

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p><b>AE 359 (GOV)</b></p> <p><b>Government Motion</b></p> <p>For the Commission To Inquire into the Circumstances of Representation and Impose Procedural Requirements on Joint Defense Agreements To Further Safeguard the Accused’s Right to Conflict-Free Counsel</p> <p>12 May 2015</p>
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**1. Timeliness**

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.c.

**2. Relief Sought**

The Prosecution respectfully requests that the Military Commission order the Accused and their counsel to commit any joint-defense agreements to writing, to sign those joint-defense agreements, and to provide the joint-defense agreements to the Commission *ex parte* for its *in camera* review.

**3. Overview**

“Courts have routinely intervened—prior to any controversy arising—where the circumstances of a criminal defendant’s representation raises the potential for conflict of interest during the course of the proceedings, even before intervention is required by statutory or constitutional rule.” *United States v. Stepney*, 246 F. Supp. 2d 1069, 1077 (N.D. Cal. 2003) (citing *Bucuvalas v. United States*, 98 F.3d 652, 655 (1st Cir. 1996); *Henderson v. Smith*, 903 F.2d 534, 537 (8th Cir.), *cert. denied*, 498 U.S. 989 (1990); *Ford v. United States*, 379 F.2d 123, 125-26 (D.C. Cir. 1967)). Joint-defense agreements impose an ethical duty of confidentiality on

participating attorneys, “presenting the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal.” *Id.* at 1077.

Counsel for certain Accused have indicated that they have entered into a joint-defense agreement in a case the Commission has described as “a complicated international terrorism case with a joint trial of five accused under a new statutory scheme with an unprecedented amount of classified evidence.” AE 343C at 8. Under these circumstances and exercising its inherent supervisory authority, the Commission should inquire into the Accused’s representation and impose procedural requirements on joint-defense agreements to protect fairly rendered verdicts on appeal; to ensure the Accused receive conflict-free counsel; that fair legal proceedings are conducted within ethical standards; and, that the Accused are informed of their rights under the joint-defense privilege.

#### **4. Burden of Proof**

The Prosecution bears the burden of proving, by a preponderance of evidence, factual issues the resolution of which is necessary to decide the Motion. R.M.C. 905(c)(1)-(2). It also bears the burden of persuading the Commission that the requested relief is warranted. *See id.*

#### **5. Facts**

Counsel for Ramzi Binalshibh, Khalid Shaikh Mohammad, and Walid Muhammad Salih Mubarak Bin ‘Attash have indicated that, for at least nearly one year, these Accused have entered into a joint-defense agreement with other co-Accused. *See* Unofficial/Unauthenticated Transcript (“Tr.”) at 7888, 7897, 7921-22. On 16 June 2014, during argument regarding the Appellate Exhibit 292 series of pleadings, counsel for Mr. Binalshibh stated,

It means that not only did somebody purportedly from my team, is what we’re told, share information with the FBI, but he shared information with Mr. Gilhool, which is also a violation of the attorney-client privilege. Now, there’s a response to that that says you have a joint defense agreement, and the sharing of information within a joint defense agreement is permissible, and we acknowledge that.

The problem is there's still a restriction in the joint defense agreement on somebody from another team disclosing what our team tells them. The privilege just gets to a bigger group. It doesn't go to the outside.

Tr. at 7888. The same day, counsel for Mr. Mohammad stated, “[b]ut we don’t know, in either case, what information was revealed, and we are within a joint defense agreement. We—so—it’s entirely possible that the questioning of the Binalshibh DSO goes toward representations that may have come originally from my team.” *Id.* at 7897. Later that day, counsel for Mr. Bin ‘Attash “want[ed] to talk a little bit about what the joint defense agreement means.” *Id.* at 7921. She said, “It means that we share information and we share resources.” *Id.*

From the record, it is clear that at least one joint-defense agreement exists. But it is not clear how many exist, whether all three of these Accused have collectively entered into a joint-defense agreement with each other or with only certain of the Accused, or whether Ali Abdul Aziz Ali and Mustafa Ahmed Adam Al Hawsawi have entered into any joint-defense agreements. It is also unclear from the record whether the agreements are written or have been signed by any of the Accused, or whether the Accused are aware of their rights and obligations under the joint-defense agreement.

## **6. Law and Argument**

### **I. Joint-Defense Agreements Impose an Ethical Duty of Confidentiality on Participating Attorneys, Presenting the Potential for Conflicts of Interest**

The joint-defense privilege is an extension of the attorney-client privilege and the work-product doctrine against court-ordered disclosure of confidential communications.<sup>1</sup> *See In re Sealed Case*, 29 F.3d 715, 719 n.5 (D.C. Cir. 1994); *see also United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989). It protects attorney-client and work-product confidences passing from one party to the attorney for another party if: the parties entered into a joint-defense agreement; the confidences were passed in the course of and for the purpose of

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<sup>1</sup> The attorney-client privilege protects “confidential disclosures by a client to an attorney made in order to obtain legal assistance.” *Fisher v. United States*, 425 U.S. 391, 403 (1976). The work-product doctrine protects not only communications, but also material “obtained or prepared by an adversary’s counsel” in the course of its legal duties, provided that the work was done “with an eye toward litigation.” *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

furthering the joint-defense effort; and, the parties did not waive the privilege. *In re Sealed Case*, 29 F.3d at 719 n.5; *In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998) (“As a usual rule, disclosure of attorney-client or work product confidences to third parties waives the protection of the relevant privileges; however, when the third party is a lawyer whose client shares an overlapping ‘common interest’ with the primary client, the privileges may remain in tact.”). For the attorney-client and work-product privileges to remain intact when passing confidences to the attorney for another party, the parties must have entered into a joint-defense agreement. *See In re Sealed Case*, 29 F.3d at 719 n.5; *In re Lindsey*, 158 F.3d at 1282.

Under a joint-defense agreement, the confidences may remain privileged even though they were passed to the co-defendant’s counsel because “[a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant” for the limited purpose of invoking the attorney-client privilege to shield shared confidences. *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000); *accord Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (explaining that, in a joint-defense arrangement, each defendant’s counsel “is, in effect the counsel for all for the purposes of invoking the attorney-client privilege in order to shield mutually shared confidences”). For this reason, passing client confidences to the co-defendant’s counsel does not waive the privilege, but instead, the confidences remain confidential. *In re Lindsey*, 158 F.3d at 1282. The joint-defense privilege thus operates not just as an evidentiary rule binding “courts from compelling disclosure of certain evidence”; it also operates as an ethical rule designed to safeguard the confidentiality of communications between counsel and client. *Stepney*, 246 F. Supp. 2d at 1075.

As an ethical rule establishing an implied attorney-client relationship with the co-defendant, it imposes “on counsel a limited duty of confidentiality toward their client’s co-defendants regarding information obtained in furtherance of a common defense.” *Id.* Recognizing this limited duty of confidentiality, courts have disqualified attorneys where their obligation to maintain confidences learned through the joint-defense effort conflicted with their client’s present interests. *Id.* Courts “have ruled that an attorney may be disqualified if her

client's interests require that she cross-examine (or oppose in a subsequent action) another member of a joint defense agreement about whom she has learned confidential information.” *Id.* (citing *Abraham Constr.*, 559 F.2d at 253). (Attorneys can be so disqualified if they actually obtained confidences during the joint representation. *Id.* (citing cases).) Because joint-defense agreements impose an ethical duty of confidentiality on participating attorneys, they “present[] the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal.” *Id.* at 1077 (citing *Henke*, 222 F.3d at 643).

**II. To Guard Against a Conflict of Interest that Might Lead to Withdrawal or Disqualification of Counsel, the Commission Should Require the Accused and Their Counsel To Commit Their Joint-Defense Agreements to Writing, Sign Them, and Submit Them to the Commission *Ex Parte* for Its *In Camera* Review**

To guard against such a potential conflict of interest arising from a joint-defense agreement, the Commission should require the parties to commit their joint-defense agreements to writing, to sign them, and submit them to the Commission *ex parte* for its *in camera* review. In *Stepney*, the United States District Court for the Northern District of California ruled that “[a]ny joint defense agreement entered into by defendants must be committed to writing, signed by defendants and their attorneys, and submitted *in camera* to the court for review prior to going into effect.” 246 F. Supp. 2d at 1086. The court also ruled that “[e]ach joint defense agreement submitted must explicitly state that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney.” *Id.* The court did so over defense objections that the court lacked authority to require the defendants to disclose their joint-defense agreements before any controversy arose that would necessitate such an “advance disclosure”; the enforceability of the joint-defense agreements did not depend on the defendants reducing an agreement to writing; and disclosing who among the defendants had signed a joint-defense agreement “might give the government insight into the trial strategies of various defendants.” *Id.* at 1076-78.

The court reasoned that a court's "inherent supervisory powers permit inquiry into the circumstances of representation and imposition of procedural requirements on joint defense agreements in order to safeguard defendants' Sixth Amendment rights to conflict-free counsel." *Id.* at 1076-77. The court explained that "[a] court may exercise its supervisory powers to implement a remedy for the violation of a recognized statutory or constitutional right, or may take preemptive steps to avoid such violations by imposing procedural rules not specifically required by the Constitution or Congress." *Id.* at 1077 (citing *United States v. Hasting*, 461 U.S. 499, 505 (1983), and *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)). According to the court, "[t]hese supervisory powers unquestionably allow courts to require disclosure of the precise nature of a criminal defendant's representation to ensure that no conflict of interest exists that would deprive a defendant of his Sixth Amendment right to effective assistance of counsel." *Id.*

The court noted that "[c]ourts have routinely intervened—prior to any controversy arising—where the circumstances of a criminal defendant's representation raises the potential for conflict of interest during the course of the proceedings, even before intervention is required by statutory or constitutional rule." *Id.* (citing *Bucuvalas*, 98 F.3d at 655; *Henderson*, 903 F.2d at 537; *Ford*, 379 F.2d at 125-26). The court added that such circumstances exist in the context of joint-defense agreements. This is because joint-defense agreements "impose an ethical duty of confidentiality on participating attorneys, presenting the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal." *Id.* (citing *Henke*, 222 F.3d at 643 (reversing defendants' convictions where the trial court improperly denied defense counsel's motion to withdraw on the eve of trial)).

The court concluded that such circumstances warranted its inquiry because "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession that legal proceedings appear fair to all who observe them." *Id.* at 1078 (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)). Further it added that the



court also has “an independent interest in protecting a fairly-rendered verdict from trial tactics that may be designed to generate issues on appeal.” *Id.* (quoting *United States v. Moscony*, 927 F.2d 742, 749 (3d Cir.), *cert. denied*, 501 U.S. 1211 (1991)). The court reasoned that, “[g]iven the high potential for mischief, courts are well justified in inquiring into joint defense agreements before problems arise.” *Id.* With this justification in mind, and seeking to mitigate the threat that joint-defense agreements might pose to defendants’ rights and “the integrity of the proceedings,” the court imposed certain procedural requirements on the joint-defense agreements: among them, requiring the defendants to commit the agreements to writing; requiring the defendants and their counsel to sign them; requiring counsel to submit the agreements *in camera* to the court for its review before going into effect; requiring each agreement to state “that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney”; prohibiting any provision that would purport to create a duty of loyalty; and, requiring a provision that allows “withdrawal upon notice to the other defendants.” *Id.* at 1078, 1086.

As in *Stepney*, the Commission should inquire into the Accused’s joint-defense agreements by requiring the Accused and their counsel to commit any joint-defense agreements to writing, sign the joint-defense agreements, and submit them to the Commission *ex parte* for its *in camera* review. Such an inquiry is necessary because counsel for certain Accused have indicated that they have entered into joint-defense agreements (Tr. 7888, 7897, 7921-22), presenting the potential for conflicts of interest that might lead to their withdrawal or disqualification late in the proceedings or the reversal of a conviction on appeal if the provisions of the agreement are not clearly set forth and understood by the parties. *See Stepney*, 246 F. Supp. 2d at 1077. The inquiry is particularly necessary here, where the case, as described by the Commission, “is a complicated international terrorism case” in which the Prosecution seeks to try five Accused in a joint trial, and, which inquiring into the circumstances of representation will ensure clarity and prevent a potential appellate issue. AE 343C at 8. The Commission has the authority to conduct such an inquiry under its supervisory power to ensure the trial is

conducted within ethical standards; to safeguard the Accused's right to conflict-free counsel; to ensure the Accused are informed of their rights under the joint-defense privilege; and, to protect a fairly rendered verdict in this complex case. *See Stepney*, 246 F. Supp. 2d at 1076-79.

Furthermore, by inquiring into the Accused's joint-defense agreements *ex parte* and *in camera* as the *Stepney* court did, the Commission may "avoid offering the prosecution any hint of defense strategies." *Id.* at 1078 (inquiring into joint-defense agreements over defense concerns that disclosing which defendants have signed joint-defense agreements "might give the government insight into" their trial strategies).

The Commission should also require written joint-defense agreements because although oral agreements may be enforceable, "a written agreement is the most effective method of establishing the existence of a joint defense agreement" and "the best evidence that a joint defense agreement exists." *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 16-17 (D.D.C. 2005) (quoting 2 Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* 501-35-36 (8th ed. 2002) (explaining that written agreements "would eliminate any doubt about whether the parties to the discussion were pursuing a common goal with respect to the matters communicated"))). It also is the most prudent method, given that "[t]oo often the vagaries of an oral agreement cloud and pollute the true intent of the parties, especially when the parties claiming the privilege must establish that there was in fact an agreement and that the specific communication was protected thereunder." *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003); *see Hunton & Williams v. DOJ*, 590 F.3d 272, 285 (4th Cir. 2010) (noting that "mere 'indicia' of joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed"); *Stepney*, 246 F. Supp. 2d at 1079 n.5 ("A written joint defense agreement also protects against misunderstandings and varying accounts of what was agreed to by the attorneys and their clients."). Also, written joint-defense agreements "allow[] each defendant the opportunity to fully understand his rights prior to entering into the agreement." *United States v. Almeida*, 341 F.3d 1318, 1327 n.21 (11th Cir. 2003).



For all these reasons, the Commission should grant the Prosecution's Motion and require the Defense teams to reduce any joint-defense agreements to writing for an *ex parte, in camera* review by the Military Judge to ensure that the agreement is within ethical standards and that the Accused enjoy conflict-free counsel as well as are informed of their rights under the joint-defense agreement.

## **7. Conclusion**

Because at least some of the Accused have entered into a joint-defense agreement and because joint-defense agreements present the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal if the provisions of the agreement are not clearly set forth and understood by the parties, the Commission should order the Accused and their counsel to commit their joint-defense agreements to writing, sign them, and submit them to the Commission *ex parte* for its *in camera* review. It should do so to protect fairly rendered verdicts on appeal; to ensure the Accused receive conflict-free counsel; to ensure fair legal proceedings are conducted within ethical standards; and, that the Accused are informed of their rights under the joint-defense agreement.

## **8. Oral Argument**

The Prosecution does not feel oral argument is necessary for this motion, but if argument is requested by, and granted to, the Defense, the Prosecution would like an opportunity to respond.

## **9. Witnesses and Evidence**

At this time, the Prosecution does not offer any witnesses or evidence to support the Motion.

**10. Certificate of Conference**

On 12 May 2015, the Prosecution consulted with the Defense on the instant motion. Counsel for Mr. Mohammad, Mr. Bin 'Attash, Mr. Ali, Mr. Binalshibh and Mr. Hawsawi stated their objection to the requested relief.

**11. Additional Information**

At this time, the Prosecution does not offer additional information.

**12. Attachments**

A. Certificate of Service, dated 12 May 2015.

Respectfully submitted,

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Clay Trivett  
Managing Deputy Trial Counsel

Danielle Tarin  
Assistant Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 12th day of May 2015, I filed AE 359 (GOV) the **Government Motion** For the Commission To Inquire into the Circumstances of Representation and Impose Procedural Requirements on Joint Defense Agreements To Further Safeguard the Accused's Right to Conflict-Free Counsel with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Clay Trivett  
Managing Deputy Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions