

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

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN ‘ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI; MUSTAFA
AHMED ADAM AL HAWSAWI**

AE 359C (GOV)

Government Reply

To Defense Response to 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

2 June 2015

1. Timeliness

This Reply is timely under Military Commissions Trial Judiciary Rule of Court 3.7.e.(2).

2. Law and Argument

Mr. Bin ‘Attash devotes much of his Response to opposing arguments the Prosecution does not make. His opposition to these alleged arguments—that defendants must put their joint-defense agreements in writing to be able to assert the joint-defense privilege, that joint-defense agreements create a duty of confidentiality and an implied attorney client-relationship that are unlimited in scope, that joint-defense agreements create a duty of loyalty, and that a joint trial will compromise the Accused’s right to conflict-free counsel—fails to join issue. The question is whether the Commission should examine the Accused’s joint-defense agreements under this case’s circumstances given that such agreements, by imposing a limited duty of confidentiality, present the potential for conflicts of interest that could lead to withdrawal or disqualification of counsel late in the proceedings or reversal of conviction on appeal. Mr. Bin ‘Attash’s remaining arguments evince that the answer is yes because they betray his fundamental misunderstanding of the privilege. To ensure at least that the Accused properly understand their rights and obligations under the joint-defense agreements, the Commission should grant the Motion.

I. Mr. Bin ‘Attash’s Fundamental Misunderstanding of the Joint-Defense Privilege Compels the Commission’s Inquiry**A. An Inquiry Is Necessary To Guard Against the Potential for a Conflict of Interest that Could Lead to Disqualification or Withdrawal Late in the Proceedings or Reversal of a Conviction on Appeal***1. Members to a Joint-Defense Agreement Owe Each Other a Limited Duty of Confidentiality*

Mr. Bin ‘Attash’s first fundamental misunderstanding of the joint-defense privilege is his belief that the privilege does not impose a duty of confidentiality on the members to a joint-defense agreement. *See* AE 359A (WBA) at 12. This misunderstanding defeats the very purpose of the privilege: as an extension of the attorney-client privilege and the work-product doctrine, the joint-defense privilege fosters the free flow of information by protecting the confidentiality of information passed from one party to the attorney for another party in furthering the joint-defense effort. *In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998). A defendant thus may invoke the privilege to preclude a co-defendant from disclosing confidential information learned as a consequence of the joint defense. *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000). This is how the privilege imposes on the co-defendant a limited duty of confidentiality. *See United States v. Stepney*, 246 F. Supp. 2d 1069, 1075-77 (N.D. Cal. 2003). Without it, joint-defense members would not likely reveal their confidences to each other for fear that they would lose the privilege’s protection, its essential benefit. *See Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003) (“The essential benefit of such joint collaboration however is that a member of the common legal enterprise cannot reveal the contents of the shared communications without the consent of all the parties.”). In resisting this duty, Mr. Bin ‘Attash suggests he is under no obligation to keep confidences learned through the joint-defense effort confidential. AE 359A (WBA) at 12. This fundamental misunderstanding alone compels the Commission’s inquiry.

2. The Limited Nature of an Implied-Attorney Client Relationship Does Not Remove the Potential for a Conflict of Interest

A related fundamental misunderstanding is Mr. Bin ‘Attash’s belief that any implied attorney-client relationship created by the privilege cannot present the potential for a conflict of

interest because the relationship is a limited one. First, contrary to Mr. Bin ‘Attash’s claim (at 10-11), the Prosecution does not treat a defendant’s participation in a joint-defense agreement as identical to the formal representation of a client. (And the Commission should require the Accused to include a provision in their joint-defense agreements that explicitly disclaims any attempt to create a formal attorney-client relationship to ensure the Accused understand that none of his co-Accused’s counsel represents him. *See Stepney*, 246 F. Supp. 2d at 1084 (noting that many defense attorneys include such a provision in their joint-defense agreements).) The Prosecution has consistently maintained that any attorney-client relationship created by the privilege is an *implied* one and that an implied attorney-client relationship, with its attendant duty of confidentiality, is *limited*. As it explains in its Motion, “[u]nder 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.” AE 359 (GOV) at 4 (quoting *Henke*, 222 F.3d at 637 (citing *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977))) (emphasis added); *accord* AE 359B (GOV) at 2, 3, 4, 5 (noting that the attorney-client relationship and the duty of confidentiality are “limited”).

Second, contrary to Mr. Bin ‘Attash’s belief (at 10), the limitation on an implied attorney-client relationship does not remove the potential for a conflict of interest. The relationship is limited in that a defendant may assert the attorney-client privilege—extended to the co-defendant through the joint-defense privilege—only to preclude the co-defendant and his counsel from disclosing confidences he shared with them. The potential for a conflict of interest persists because, regardless of this limitation, counsel could conclude that their obligation to maintain the confidences learned through the joint-defense effort conflicts with their client’s present interests. *Stepney*, 246 F. Supp. 2d at 1075. As but one example of how a potential conflict could manifest in this case, the Prosecution has noted that past statements of the Accused and their counsel indicate one or more of the Accused may decide to testify on his own behalf (*see* AE 359B (GOV)

at 2)—a fact Mr. Bin ‘Attash does not dispute. Counsel could conclude that their client’s interests require them to cross-examine another member about whom they have learned confidential information, thus presenting a potential conflict of interest. *See Stepney*, 246 F. Supp. 2d at 1075 (“In particular, 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.”); *see also Henke*, 222 F.3d at 637 (“This privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue, as it did in this case.”).

Far from disproving the duty of confidentiality, ethics opinions relied upon by Mr. Bin ‘Attash confirm that the potential for a conflict of interest persists and that it persists because of joint-defense members’ “confidentiality responsibilities” to each other:

Under [D.C. Rule of Professional Responsibility 1.7(b)(4) on conflicts involving third parties], a lawyer’s confidentiality responsibilities to a non-client member of a joint defense group may preclude the lawyer from undertaking a representation adverse to the member in a substantially related matter that implicates the confidential information. The lawyer will be personally disqualified from such a matter unless the lawyer can secure a release from the obligation.

D.C. Bar, Ethics Op. 349 (2009); *see* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-395 (1995) (concluding that, to the extent a lawyer “acquired information confidential to other members of a consortium, he might owe an [ethical] obligation to his former client not to disclose the information by reason of the former client’s obligation to the other members” and that the lawyer “would almost surely have a fiduciary [although not ethical] obligation to other members of the consortium, which might well lead to his disqualification”). Regardless of whether one characterizes members of a joint-defense agreement as being “non-client members” or as having an implied attorney-client relationship, the members owe each other a limited duty of confidentiality. Because this duty presents the potential for a conflict of interest that could lead to disqualification or withdrawal or reversal of a conviction on appeal, and to ensure the Accused understand their rights and obligations under their joint-defense agreements, the Commission should grant the Motion and examine the agreements.

Mr. Bin ‘Attash contends that such an examination is unnecessary by noting that generally joint-defense agreements “do not create a duty of loyalty.” AE 359A (WBA) at 11 (citing *Stepney*, 246 F. Supp. 2d at 1079, 1082). The Prosecution does not contend that they do. And it agrees that they should not. If anything, Mr. Bin ‘Attash’s contention raises another reason why the Commission should examine the Accused’s joint-defense agreements: to ensure that they, by their terms, do not purport to impose a duty of loyalty on their members—an examination he notes the *Stepney* court undertook. *Stepney*, 246 F. Supp. 2d at 1080-1084 (criticizing proposed joint-defense agreements for imposing a duty of loyalty). Nevertheless, as explained above and in the Motion, the potential for a conflict of interest exists because of the duty of *confidentiality*. *See id.* at 1077 (explaining that “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”). It is this duty that gives rise to the potential for a conflict of interest, warranting written joint-defense agreements and the Commission’s examination of them.

Mr. Bin ‘Attash also misses the mark when he contends that the Commission should deny the Motion because “joint defense agreements need not be reduced to writing.” AE 359A (WBA) at 15. It is true that a party to a joint-defense agreement need not commit the agreement to writing to prove an agreement exists for the purpose of invoking the joint-defense privilege and shielding protected information from compelled disclosure. *See* AE 359B (GOV) at 4. But this does not advance his argument because the issue presented in the Motion is not whether the Accused may invoke the privilege to shield protected information. The issue is whether the Commission should ensure the parties are informed of their rights and obligations under their joint-defense agreements and avoid a conflict of interest that might lead to disqualification or reversal of a conviction on appeal in this case, given that joint-defense agreements present the potential for a conflict of interest and the Accused have indicated they might testify on their own behalf. As shown in the Prosecution’s Motion and both of its Replies, the answer is yes. And the way to achieve this objective is for the Commission to require the Accused to commit their agreements to writing and

examine those agreements *ex parte* and *in camera*. Achieving this objective inures to the benefit of all parties.

B. Written Joint-Defense Agreements that Include an Explicit Waiver Provision Are Necessary To Ensure the Accused Are Properly and Fully Informed of Their Rights and Obligations Under the Agreements

To the extent Mr. Bin ‘Attash contends that a joint-defense member may waive “any privilege” and disclose confidential information to third parties simply by departing from the agreement, he is incorrect. AE 359A (WBA) at 13-14. “It is fundamental that the joint defense privilege cannot be waived without the consent of all parties to the defense.” *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO*, 913 F.2d 544, 556 (8th Cir. 1990) (internal quotation marks omitted); accord *United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012) (“Moreover, the case law is clear that one party to a JDA cannot unilaterally waive the privilege for other holders.”); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir. 2007) (“[T]he privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties.”); *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990) (“[A] joint defense privilege cannot be waived without the consent of all parties who share the privilege.”). “The essential benefit” of a joint-defense agreement “is that a member of the common legal enterprise cannot reveal the contents of the shared communications without the consent of all the parties.” *Lugosch*, 219 F.R.D. at 238. The privilege thus “continues long after a member of the agreement has departed from the legal consortium and none of the parties to the agreement may unilaterally waive the privilege.” *Id.*

There is some support for the proposition that a member may waive the privilege however as to his *own* communications, in particular where he agrees to testify on the government’s behalf. See generally *Restatement (Third) of the Law Governing Lawyers* § 76, cmt. g. (2000) (indicating that although a “member may waive the privilege with respect to that person’s own communications,” he “is not authorized to waive the privilege for another member’s communication”). So, in *United States v. Almeida*—a case Mr. Bin ‘Attash cites approvingly at

13—the United States Court of Appeals for the Eleventh Circuit considered whether a member may waive the joint-defense privilege with respect to his own communications when he has “decide[d] to testify on behalf of the government in exchange for a reduced sentence.” 341 F.3d 1318, 1326 (11th Cir. 2003). The court held that, under these circumstances, the cooperating defendant’s communications “do not get the benefit of” the privilege’s protection. *Id.*; *see also In re Grand Jury Subpoena*, 274 F.3d 563, 572-73 (1st Cir. 2001) (“Even when [the joint-defense privilege] applies, however, a party always remains free to disclose *his own* communications.” (emphasis added)).

In so holding, the court relied on *Stepney*, observing that “defense lawyers should insist that their clients enter into *written* joint defense agreements that contain a clear statement of the waiver rule enunciated in this case, thereby allowing each defendant the opportunity to fully understand his rights prior to entering into the agreement.” *Almeida*, 341 F.3d at 1326 n.21 (emphasis added). The Prosecution agrees. Joint-defense agreements present the potential for a conflict of interest where, as in Mr. Bin ‘Attash’s illustration, the attorney cross-examining a witness who is testifying for the government holds relevant confidences of the witness. *See* AE 359A (WBA) at 13; *see also Stepney*, 246 F. Supp. 2d at 1085. Although the Prosecution also agrees with Mr. Bin ‘Attash (at 12) that joint-defense agreements do not necessarily compel disqualification, they can, in this and other ways, present the potential for a conflict that could lead to disqualification or withdrawal and even reversal of a conviction on appeal. *See, e.g., Stepney*, 246 F. Supp. 2d at 1077. (The Prosecution has consistently maintained that joint-defense agreements present the *potential* for a conflict of interest. Contrary to Mr. Bin ‘Attash’s mischaracterizations, it has never contended they “*will compromise a specific trial right.*” AE 359A (WBA) at 8; *compare id., with* AE 359 (GOV) at 1-2.)

To manage the potential for a conflict in such a situation, the Commission should require the Accused to enter into written joint-defense agreements that include a clear statement of the waiver rule articulated in *Almeida*. The American Bar Association (“ABA”) provides a sample

waiver provision.¹ Although Mr. Bin ‘Attash dismisses the *Stepney* court as failing to address the waiver (AE 359A (WBA) at 13), the court actually cited the ABA’s sample waiver provision with approval and required the parties to include a similar waiver provision in written joint-defense agreements—a requirement the *Almeida* court endorsed. *Stepney*, 246 F. Supp. 2d at 1085. As required in *Stepney* and endorsed in *Almeida*, including the waiver provision here would manage the potential for a conflict because it would make clear that “all defendants have waived any duty of confidentiality [they owed to testifying defendants] for purposes of cross-examining testifying defendants.” *Id.* It would also “place[] the loss of the benefits of the joint defense agreement only on the defendant who makes the choice to testify” and provide “notice to defendants that their confidences may be used in cross-examination, so that each defendant can choose with suitable caution what to reveal to the joint defense group.” *Id.* at 1085-86. And because providing notice will give the Accused confidence in their decisions about what to reveal, notice will encourage—not chill—the joint-defense effort. *Cf.* AE 359A (WBA) at 10 (exalting joint-defense agreements as having “vital importance” while also denigrating them as “defense-chilling documentation”).

C. For the Joint-Defense Privilege to Apply, the Parties Asserting the Privilege Must Have Entered into a Joint-Defense Agreement

Another fundamental misunderstanding of the joint-defense privilege is Mr. Bin ‘Attash’s belief that a party seeking the protections of the joint-defense privilege need not enter into an agreement to share client confidences for the purpose of furthering the joint-defense effort. *See* AE 359A (WBA) at 7 (incorporating Mr. Ali’s argument that the joint-defense privilege protects co-accused’s communications even if the co-accused do not join a joint-defense agreement). Although the agreement need not be in writing for an accused to assert the privilege and thereby seek its protections, “an agreement there must be.” *Hunton & Williams v. DOJ*, 590 F.3d 272, 285 (4th Cir. 2010). Indeed, for the joint-defense privilege to apply, “there must be an agreement or a

¹ The American Bar Association’s model joint-defense agreement provides that “a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense.” Joint Defense Agreement, Am. Law Institute-ABA, *Trial Evidence in the Federal Courts: Problems and Solutions* 35 (1999).

meeting of the minds.” *Am. Mgmt. Servs., LLC v. Dep’t of the Army*, 703 F.3d 724, 733 (4th Cir. 2013); *see* AE 359B at 3-4. Courts thus require the party asserting the privilege to show it has entered into a joint-defense agreement before concluding that the privilege protects certain information from compelled disclosure. AE 359B at 4 (citing cases). To ensure the Accused are properly and fully informed of their rights and obligations under the privilege, the Commission should grant the Motion to require a written agreement so there can be no ambiguity regarding the existence and terms of the agreement. *See Almeida*, 341 F.3d at 1327 n.21 (explaining that written joint-defense agreements “allow[] each defendant the opportunity to fully understand his rights prior to entering into the agreement”).

II. The Commission Has the Authority to Inquire into Joint-Defense Agreements

Mr. Bin ‘Attash argues that the Commission lacks authority to examine the joint-defense agreements because, unlike civilian courts, its jurisdiction is circumscribed by statute. AE 359A (WBA) at 16 n.3. But the Military Commissions Act of 2009 guarantees an accused the right to effective assistance of counsel, including counsel who are free from conflict. 10 U.S.C. § 948k(e). To safeguard this recognized statutory right that is committed to the Commission’s care, the Commission has the authority to take preemptive steps to avoid a violation of that right. Rule for Military Commissions 901(d)(4)(E) acknowledges the Commission’s authority, providing that “[w]henver it *appears* that any defense counsel *may* face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused’s choice of counsel.” R.M.C. 901(d)(4)(E), Discussion (emphasis added). Mr. Bin ‘Attash provides no authority supporting the proposition that this authority extends only to actual—and not potential—conflicts of interest. *See* AE 359A (WBA) at 16. To hold otherwise would contradict the plain language of Rule 901(d)(4)(E) and deprive the Commission of its ability to prevent an actual conflict of interest from forming, despite knowing the potential exists. The Commission’s authority is not so constrained.

3. Conclusion

The Commission has the authority to inquire into the circumstances of the Accused's representation and impose specific procedural requirements on joint-defense agreements to safeguard the Accused's statutory right to conflict-free counsel. Mr. Bin 'Attash's fundamental misunderstanding of the joint-defense privilege evinces that the Commission should exercise its authority by requiring the Accused to commit their joint-defense agreements to writing, sign them, and submit them to the Commission for its *ex parte* and *in camera* review. Doing so is necessary not only to ensure the Accused are properly and fully informed of their rights and obligations under the agreements, but also to protect fairly rendered verdicts on appeal, guard against disqualification or withdrawal of defense counsel late in the proceedings, and ensure that fair legal proceedings are conducted within ethical standards. For all these reasons, the Commission should grant the Motion.

4. Witnesses and Evidence

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

5. Additional Information

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

6. Attachments

A. Certificate of Service, dated 2 June 2015.

Respectfully submitted,

//s//
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 2nd day of June 2015, I filed AE 359C (GOV) the **Government Reply To Defense Response to 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