

Products, General Liability and Consumer Law

RELATIONSHIPS WITH CO-COUNSEL: THE JOINT DEFENSE PRIVILEGE

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Coordination among counsel in complex tort actions is necessary and presents strategic advantages to the parties. But, divergent interests among co-defendants, potential contribution or indemnity claims, arguably different percentages of fault, different factual predicates, and different defenses make cooperation among co-defendants challenging at best. Good communication and willingness to compromise are critical.

The Advantage Of Cooperation

The effective conduct of multiple party litigation requires the exchange of information among counsel for parties on the same side of the case. In civil litigation, a joint defense agreement generally protects communications between defense counsel based on the attorney work-product doctrine when such information is exchanged pursuant to a common defense strategy. It enables both lawyers and clients facing a common opponent to exchange protected information to facilitate the best result for all defendants.

Joint defense arrangements have many advantages: they allow lawyers to pool their knowledge, resources, and materials, and can be of great benefit to clients by significantly lowering costs. Such agreements promote efficiency by allowing co-defendants to retain and prepare expert witnesses jointly, rather than each defendant hiring his or her own. Counsel can prepare and file joint motions and share data, research, and

consultants. By allowing cooperation among co-defendants, litigation becomes more efficient, and the costs of litigation can be greatly reduced. *See, e.g.,* The Corporate Counsel Section of the New York State Bar Ass'n, *Report on Cost-effective Management of Corporate Litigation*, 59, Albany L. Rev. 263, 308-12 (1995); Richard A. Horder, *Case Management of Mass Tort Litigation from the Perspective of Inside Counsel: What Clients Want in Preparation and Trial of a Toxic Tort Case* (PLI Litig. & Administrative Practice Course Handbook Series, Nov. 1, 1988).

A joint defense arrangement also can help parties avoid logistical problems such as the exclusion of duplicative expert testimony. It can make scheduling depositions among multiple parties easier. It can also allow for better usage of limited trial or argument time.

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... bringing together plaintiffs' attorneys, defense attorneys and insurance and corporate counsel for the exchange of information and ideas.

antidepressant caused the suicide death of her father and that the defendant manufacturer failed to adequately warn of the risk of suicide. *Id.* at *1. The court based its finding of no preemption on the federal regulation which requires manufacturers to revise their labeling without first obtaining approval by the FDA whenever there is “reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved.” *Id.* at *6 (citing 21 C.F.R. § 201.57(e) recodified as 21 C.F.R. § 201.80(e)).

In finding the FDA regulations represented merely a floor, the court explained that the Preamble’s Final Authority language is in tension with the regulation allowing unilateral label modifications. *Id.* Given the FDA’s final authority over all labeling revisions, strict application of the Preamble would prevent manufacturers, fearing possible enforcement actions, from revising their warnings after coming into possession of

“reasonable evidence” of a serious health hazard. The *McNellis* court, therefore, specifically rejected the FDA’s position that its regulations constituted a ceiling. *Id.* at *7. “An agency’s interpretation of its own regulations which would nullify those regulations is not entitled to controlling weight.” *Id.*

Conclusion

It was inevitable that the FDA’s statement would trigger a battle over the FDA’s preemptive authority. The FDA’s broad statement about the effect of its regulations and broad categories of preempted claims has generated significant scrutiny in the last year. Because the debate over the Preamble involves complex legal issues and because convincing and reasoned arguments can be made for and against preemption, guidance from the higher courts is needed. 

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It can reduce the chance of presenting inconsistent theories which may confuse the jury. *See id.*

The Joint Defense Privilege

A joint defense agreement is a contract between the defendants to extend the attorney-client privilege and the work-product doctrine to confidential communications between outside counsel (and the parties) to facilitate the exchange of information for the mutual benefit of the participants. However, outside counsel must be aware that entering into a joint defense agreement may increase the risk of a conflict of interest and the potential for disqualification. It may be necessary to obtain waivers from other clients and/or from the other participants in the joint defense. Joint defense agreements also can create disqualifying conflicts in subsequent actions. E.g., *see In re Gabapentin Patent Litigation*, 407 F.Supp.2d 607 (D.N.J. 2005).

The Communications Must Fall Within The Attorney-Client Or Work-Product Protections

The “joint defense” doctrine is sometimes called the “common interest” doctrine.² It applies to “communications between an individual and an attorney for another when the communications are ‘part of an ongoing and joint effort to set up a common defense strategy.’” *See In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986). In other words, the joint defense privilege protects

communications between various parties on the same side, and their attorneys, to the extent the communications concern common issues and are intended to facilitate their representation and positions in litigation. *See In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981). This protection extends to communications between different persons or separate corporations when they are part of an “ongoing and joint effort to set up a common defense strategy.” *See Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985), *cert. denied*, 474 U.S. 946 (1985). Joint defense agreements do not create independent privileges, but rather, are intended to prevent waiver of otherwise applicable privileges – most notably the attorney work-product doctrine and the attorney-client privilege.

The name “joint defense privilege” or “common interest” doctrine is a misnomer. “Despite its name, the common interest privilege is neither common nor a privilege. Instead, it is an extension of the attorney-client privilege and of the work-product doctrine.” *See Ferko v. NASCAR, Inc.*, 219 F.R.D. 396, 401 (E.D. Tex. 2003). *See also OXY Resources California LLC v. Superior Court* (Calpine Natural Gas LP, Real Parts in Interest) 115 Cal.App. 4th 874 (2004). In *OXY Resources*, the court held that a joint defense agreement evidences an expectation of confidentiality necessary to avoid waiver by disclosure to a third party, but does not protect documents from disclosure unless they contain or reflect attorney-client communications or attorney work-product. *Id.* at 893894. Thus, joint defense protection only applies if a party can establish the

² The common interest doctrine also can apply to communications between plaintiffs and their counsel in a multiple-plaintiff case and can protect their collaborative work-product under a Joint Prosecution Agreement. *See Armenta v. Superior Court* (James Jones Company, Real Party in Interest) 101 Cal.App. 4th 525 (2002).

communications fall within either the work-product or attorney-client protections.

Recognition Of The Joint Defense Privilege

The joint defense and common interest privileges are widely recognized by a number of courts. Indeed, all 50 states recognize the joint defense or common interest privileges in some form. *See, e.g.,* Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 Notre Dame L. Rev. 1449, 1491 (2002). Before lawyers and clients enter into a joint defense agreement or attempt to solicit one, counsel should be certain they understand how the courts in their particular jurisdiction view them. Federal Rule of Evidence 501, for example, governs privileges. It states that in civil litigation in which the state law applies, privileges are to be determined in accordance with state law. Fed. R. Evid. 501. When a federal question exists, federal common law applies. *Id.* Counsel must work out the choice of law issues before attempting to establish a joint defense group. Texas, for instance, has a specific provision governing joint defense agreements. *See* Tex. R. Civ. Evid. 503(b).

The Role Of A Case Management Order

Counsel may ask the court to recognize the existence of a joint defense agreement in a case management order. If included in the case management order, questions about the existence of a joint defense arrangement will be avoided or minimized when privileges are asserted later. As a general rule, privileges will be strictly construed. *See Univ. of Penna. v. EEOC*, 493 U.S. 182 (1990). As a policy matter, courts balance the need for full discovery and free communications among parties facing a common opponent.

Simply put, joint defense agreements are contracts, in which the parties agree to exchange confidential information for their mutual benefit, and protect from disclosure the fact of the exchange and preserve privileges already attached to such information. Charles W. Blau, American Law Institute – American Bar Association Continuing Professional Education, *Communication and Privilege in a Criminal Environmental Case*, SG014 ALI-ABA 301, (ALI-ABA Course of Study, *Criminal Enforcement of Environmental Laws*, November 8-9, 2001.)

Best practices dictate that a joint defense agreement should be in writing and must be reviewed with and endorsed by the client. A fully executed,

well-drafted joint defense agreement will make it easier for courts to find that the parties intended to participate in a joint defense. *See Power Mosfet Technologies v. Siemens AG*, 206 F.R.D. 422, 424 (E.D. Tex., 2000); *United States v. Stepney*, *supra*, 246 F. Supp. 2d at 1080. The joint defense agreement may be discoverable. *See Power Mosfet Technologies v. Siemens AG*, *supra*, at 426 n.12. The party asserting a joint defense privilege holds the burden of establishing it, and thus, counsel should draft and operate as if all terms will be subject to discovery. *See United States v. Weissman*, 195 F.3d 96, 98-99 (2d Cir. 1999). Accordingly, joint defense agreements should never contain strategy, information or language that the parties do not want to be revealed.

Establishing The Joint Defense Privilege

In general, to establish the existence of the joint defense privilege, several elements must be satisfied:

- The communications must be made in the course of a joint defense effort;
- The statements must be designed to further the joint defense effort; and
- Otherwise existing privileges must not be waived.

See, e.g., United States v. Am. Tel. and Tel. Co., 642 F.2d 1285, 1298-99 (D.C. Cir. 1980) (“AT&T”); *In re Sealed Case*, *supra*, 29 F.3d at 718-19; *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 27-28 (1st Cir. 1989); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992).

Essential Elements Of A Joint Defense Agreement

The basic elements of a joint defense include:

- Consent among all members to the agreement;
- A clear understanding that communications with co-defendants are covered by the joint defense privilege; and
- An understanding that no privileged information can be disclosed by a party to the joint defense agreement to anyone outside the agreement without the consent of all members.

See Gary A. Bezet, *Putting On A Joint Defense In A Complex Case* (2002), available at 2002 WL 32345665.

ABA Annual Meeting

CHECKLIST FOR JOINT DEFENSE AGREEMENTS IN COMPLEX TORT LITIGATION

- ___ A representation that each of the parties has had full opportunity to consult with privately retained separate counsel and is fully informed of potential conflicts;
- ___ A clear identification of the parties and the actions or litigation contemplated, as well as a statement of intention about scope, if further litigation is contemplated;
- ___ A statement and some recitation of common interests in connection with the actions, either threatened or potential, to trigger the application of privileges;
- ___ A statement that each party consents to the agreement and acknowledges that lawyer “A,” representing client “A,” is not becoming client “B’s” counsel by virtue of the agreement, a situation which could create the potential for a conflict of interest in a subsequent action;
- ___ A statement of intent to cooperate with one another in the defense of litigation, and to avoid wasting the time of the court and all of the parties with duplication of time and expenses, and to share use of expert witnesses and efforts as part of a joint and united defense. This serves to provide justification for the effort as well as evidence of proper motive;
- ___ A warranty that the individuals signing the agreement in a representative capacity hold the authority to do so on behalf of each entity they represent;
- ___ A provision specifically allowing the sharing of confidential information about the litigation and regarding the development of defenses, including information pertaining to product identification, factual information regarding the plaintiffs or their claims, scientific and any other information of potential use to the development of defenses;
- ___ A provision that the parties will defer disputes among themselves and refrain from discovery, presentation of evidence, and motions related to intra-party disputes until the conclusion of the joint defense arrangement;
- ___ An express statement that cross-claims or claims for indemnification or contribution will be deferred until after resolution of the plaintiffs’ claims in any litigation covered by the joint defense agreement;
- ___ A provision that information and materials transmitted among the parties or their counsel may contain confidential and privileged communications designated as subject to the attorney-client privilege, the attorney work-product doctrine, or other applicable privileges or protections and that it is the intention and understanding of the parties that the exchange will not waive any applicable privilege or protection from disclosure or compromise the confidentiality of such materials;
- ___ An agreement that neither the parties nor their counsel will produce or disclose any joint privilege materials received, or the contents thereof, to any other person, unless ordered by a court, and then only after providing co-defendants with an opportunity to challenge production orders;
- ___ An express agreement to maintain the confidentiality of the identity of fact and expert witnesses retained pursuant to the joint defense arrangement as well as to maintain the confidentiality of the opinions of the jointly retained experts until, and except to the extent that such opinions are disclosed at trial, in expert reports or as otherwise required by the applicable rules of civil procedure or court order;
- ___ Explicit funding details and information including provisions that allow for the retention of an outside accounting firm or the establishment of a joint fund for common expenses;
- ___ A termination provision that allows withdrawal of members upon timely notice to joint defense members;
- ___ A requirement that the parties give timely notice of all settlements to the joint defense and are required to return all joint defense materials in the event of settlement;
- ___ A provision that the agreement should be binding upon the successors and assigns of the parties; and
- ___ A provision that the agreement should contain enforcement provisions and remain in effect even after the resolution of the litigation.

