

Maintaining Healthy Relationships With Co-Counsel In Complex Tort Litigation

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You really can foster love among porcupines.

IT HAS BEEN SAID that the propagation of the porcupine species is complicated and difficult, but very necessary. Litigators in complex toxic tort suits must be equally judicious when courting and consummating relationships in joint defense arrangements. It is very appropriate to seek arrangements with co-defendants and their counsel and memorialize them in

writing—just in case the romance dies. Coordination, cooperation, and compromise are key. But inartfully drafted or non-existent agreements that fail to anticipate issues that may arise later could result in nasty, bitter squabbling and a lot of unnecessary heartache, both for you and your clients, as well as a potential field day for your opponents.

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Coordination among defendants in complex tort actions is necessary and holds the potential for real advantages. But it can be fraught with thorny issues as well. Divergent interests among co-defendants, possible contribution or indemnity claims, arguably differing levels of culpability, different strategies, different quantities of products produced, different factual predicates, and different defenses generally make cooperation among co-defendants challenging at best. Throw in high stakes, high pressure, hubris, and a lot of thorny spikes, and you will need a rather large bottle of Love Potion Number Nine to make any kind of magic happen. As any good marriage counselor will tell you, communication and compromise are key. As any good divorce lawyer will tell you, get it all in writing before jumping in.

THE JOYS OF LOVE: THE ADVANTAGE OF PLAYING NICELY WITH OTHERS •

The effective conduct of multiple party litigation requires the exchange of information among counsel for the parties on a single side of the case. In the civil litigation context, for defense lawyers, a joint defense agreement or a joint counsel arrangement protects communications under the attorney-client privilege when such information is exchanged pursuant to a common defense scheme. It enables both lawyers and clients facing a common opponent(s) to exchange protected information to best prepare a defense.

Joint defense arrangements have many important advantages. They allow lawyers to share knowledge, resources, experts, and strategy, and can be of great benefit to clients by significantly lowering costs. Such agreements promote efficiency by allowing co-defendants to retain expert witnesses jointly, rather than each defendant hiring his or her own. Counsel can apportion tasks and share resources, data, research, and consultants. By allowing coopera-

tion among co-defendants, litigation becomes more efficient, and the costs of litigation can thus 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 can also help parties avoid logistical defense problems such as exclusion of duplicative expert testimony. It can make scheduling depositions among multiple co-defendants and parties easier. It can also allow for better usage of limited trial or argument time. Inconsistent defenses which may confuse the jury can also be avoided. *See id.* Perhaps the greatest advantage is open communication among lawyers, who can share work product and discuss case strategy. A joint defense agreement can also minimize unpleasant barbs in your relationships with co-counsel and minimize and defer satellite litigation. Joint counsel arrangements, in which multiple clients share one counsel or law firm, offer similar advantages. Hastily rushing in to any relationship, however, can be a big mistake.

FINDING ROMANCE: THE JOINT DEFENSE PRIVILEGE AT LAW •

A joint *defense* agreement, ostensibly, is a contract between two or more clients and their lawyers that permits the sharing of otherwise attorney-client privileged or work product protected information without waiving the privileges. This type of relationship differs from joint *counsel* arrangements, in which one lawyer represents several different clients in the same action, but the application of privileges in both situations appears to be the same.

Application To Material That Falls Within Attorney-Client And Work Product Protections

The “joint defense” doctrine is sometimes erroneously called the “common interest” doctrine. It applies to “communications between an individual and an attorney for another when the communications are ‘part of an on-going and joint effort to set up a common defense strategy.’” See *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986). In other words, the joint defense privilege protects communications between various co-defendants and their attorneys to the extent that the communications concern common issues and are intended to facilitate 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 protection and the attorney-client privilege. “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). Thus, joint defense protections only apply if a party can establish their materials fall within either the work product or attorney-client protections.

A technical distinction does exist between “joint defense” and “common interest” privileges. The joint defense privilege is really something also called the “allied lawyer doctrine,” which applies when parties have separate lawyers who consult together when the lawyers are working toward a common defense. See *In re*

Sealed Case, 29 F.3d. 715, 719 (D.C. Cir. 1994). The “common interest doctrine” technically applies to representations between a lawyer or law firm and multiple clients concerning matters of common interest. Representation of joint or multiple clients is generally permissible so long as the lawyers’ ethical duties to their clients will not be compromised and the clients are not asserting claims against one another. Each client should give “informed consent” in writing to the multiple representation. See ABA Model Rules of Prof’l Conduct R. 1.7 (2002), which governs conflicts of interests. Such agreements are not uncommon in complex multi-party toxic tort matters. Under the common interest doctrine, when one attorney represents multiple persons, “communications made to the shared attorney to establish a defense strategy remain privileged as to the rest of the world.” See *GuideOne Specialty Mut. Ins. Co. v. Congregation Bais Yisroel*, 381 F. Supp. 2d 267, 280 (S.D. N.Y. 2005) (citation omitted).

In application, however, courts seem to treat these two distinct concepts as one and the same. See 824 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* §5493 n.91 (Thomson West Supp. 2006) (“Federal courts continue to confuse the allied lawyer doctrine, which applies when parties with separate lawyers consult together, and the joint client doctrine, which applies when two clients share the same lawyer, by using the phrase ‘joint defense privilege’ to mangle the...concepts”); *id.* (citations omitted). Adding to the doctrinal confusion is the fact that often one lawyer can represent multiple parties in an overall joint defense that includes other defendants represented by other lawyers. A lawyer in such circumstances will necessarily need two different agreements—one from each client agreeing to the representation of other co-defendants, as well as one agreeing with his or her clients and other defendants to participation in a joint defense scheme.

THE DATING GAME: JUGGLING PORCUPINES IN JOINT COUNSEL ARRANGEMENTS • Joint counsel arrangements hold many of the same advantages as joint defense arrangements in terms of economy and efficiency. Moreover, it is also often advantageous for clients in a similar position to hire that attorney or law firm who is most familiar with the subject matter. William E. Wright, Jr., *Ethical Considerations In Representing Multiple Parties In Litigation*, 79 Tul. L. Rev. 1523 (June, 2005).

Although the analysis of privileges by courts under either joint defense arrangements or joint counsel arrangements appears to be the same, in practice these are different relationships with different issues. A joint counsel arrangement in which several individual clients share one lawyer poses distinct ethical and strategic questions. Model Rule of Professional Conduct 1.7(a)(2) states that a lawyer shall not represent a client if the representation of that client may be "materially limited by the lawyer's responsibilities to another client...or a third person..." The newest version of Rule 1.7 requires "informed consent, confirmed in writing." Thus, attorneys must consult with and explain all potential aspects of joint representation with all of their clients. The rule places the burden on the attorney to bring potential problems with joint representation to the clients' attention.

Potential Conflicts In Joint Counsel Arrangements

Joint counsel arrangements require that lawyers communicate with all clients and coordinate their clients' positions. In a complex tort case, there are many potential conflicts to be considered. The most obvious is a limitation of defenses. For example, a distributor could easily contend that a manufacturer provided a defective product or did not pass on all relevant toxicological information on a product. At the same time, the manufacturer might argue that

the distributor failed to pass on its warning literature to end users. The best defense, however, could simply be one that is in common, for example, that no defect existed and that the product is non-toxic. In the interest of asserting the most effective defense to complex claims, clients should consider being willing to sacrifice individual defenses to prevail in the litigation. As in any marriage, compromise is key to the success of a joint counsel arrangement. The concept of multiple-client representation necessarily requires that the parties consider sacrifice of at least some individual defenses to promote common goals.

Unexpected Developments

New factual developments can also arise that materially limit an attorney's representation. When such conflicts appear, they must be addressed. If after "informed consent" the parties do not wish to proceed with joint representation, their counsel must withdraw from the joint representation, and perhaps from the representation of all parties. See Debra Lyn Bassett, *Three's A Crowd: A Proposal to Abolish Joint Representation*, 32 Rutgers L.J. 387, 430 (2001). Joint counsel agreements are often written in a manner which seeks to limit this eventuality, for example, the party wishing to head off in a different direction must leave the group and not seek to disqualify the firm from continuing to represent the remaining clients. But such language is not a guarantee that irreconcilable differences will not arise.

Potential Conflicts In Settlement

Settlement may also pose challenges to joint counsel arrangements. A recent ABA Ethics opinion (Formal Opinion 06-438 (2006), ABA Standing Committee on Ethics and Professional Responsibility, *Interpreting Model of Professional Conduct 1.8(g)*, which governs the representation of multiple clients) indicates that

when a lawyer representing multiple clients negotiates a settlement, each client participating in the settlement must be advised of the total settlement amount, each client's participation in the agreement, including the amount the fees and costs and how such are to be apportioned among the clients, and any other terms. The rule and opinion seem only to apply to "aggregate settlements" of more than one client (i.e., not settlements by individual defendants), and only to those clients who are participating in the settlement (i.e., not to non-settling clients). Obviously, however, the need for harmony within the group and any client's sense of what it is owed by its counsel could well transcend these limitations. Prudence would dictate a full discussion and consensus among all the clients about how any settlement should work, before finalizing the joint counsel agreement.

Define The Scope Of The Arrangement

Entering into a joint counsel arrangement necessarily includes risks of conflict. Attorneys can attempt to minimize the risks associated with joint representation through careful crafting of joint counsel retention agreements. As an initial matter, a lawyer must make full disclosure to all potential clients at the beginning of the representation. It is important that joint counsel agreement participants be made aware of the possible use of their confidential statements against them in subsequent adverse litigation. A retention letter should state that the attorney has undertaken a conflict analysis and at present, none appear to be a bar to the representation. Counsel must also convey in writing any potential future adverse interests or drawbacks, and clients must sign the disclosure. Of utmost importance is that the retention letter provide sufficient information to permit a client to undertake an educated, informed decision about the joint counsel arrangement and its drawbacks. The agree-

ment should confirm a client's decision to undertake joint representation notwithstanding these disclosed potential conflicts.

The representation letter should specifically decline any matters relevant to potential cross-actions or indemnity claims, and the clients should expressly state that they are not seeking representation on these matters. At the same time, such claims as between the clients can be expressly preserved. The potential agreement should specifically reserve the right to represent other clients in the joint counsel arrangement and contain a waiver of the right to seek disqualification in the event that one party elects to withdraw (with the caveats above). It should also emphasize that information within the joint representation will be shared, and explain that in the event of unforeseen and irreconcilable conflicts, the attorney may need to withdraw, potentially from all representation. In some actions, the parties may undertake a joint representation knowing full well that the clients' interests may diverge at a future point. For example, the parties may elect to challenge causation jointly, with full knowledge that should causation be found, their defenses will then become adverse. In such circumstances, it may be possible to preserve the right for an attorney to remain as counsel for one or a group of the parties through a carefully crafted waiver.

A RECIPE FOR LOVE POTION NUMBER NINE: ELEMENTS 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, coun-

sel 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 arrangements. See Tex. R. Civ. Evid. 503(b).

The Case Management Order

If possible, it is often useful at the outset to ask the court to recognize the existence of a joint defense agreement in a case management order. In this manner, questions about the existence of a joint defense arrangement can hopefully 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.) Unlike joint counsel arrangements, there is technically no requirement of a writing for the joint defense privilege to apply. (At least one court, however, has held that all joint defense agree-

ments must be in writing and submitted to the court for an in camera review before going into effect. *United States v. Stepney*, 246 F. Supp. 2d 1069 (N.D. Cal., 2003).) Best practices dictate that a joint defense agreement should be in writing and reviewed with and endorsed by the client. A fully executed, well-drafted joint defense agreement simply makes 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. It is also important to keep in mind that the joint defense agreement itself is at least potentially subject to discovery. 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). Joint defense agreements should never contain strategy or 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).

The Communications Must Be Made In The Course Of Joint Defense Efforts

Communications not made for the purpose of attaining legal services will usually not be protected by the privilege. As in all claims of privilege arising out of the attorney-client relationship, a claim resting on the common interest rule requires a showing that the communication in question was given in confidence and that the client reasonably understood it to be so given. See *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985), cert. denied, 476 U.S. 1183 (1986); *Keolik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984). Privileges may apply to protect communications concerning joint defense efforts, even when individuals or entities are not ultimately made part of a joint defense agreement. See *In re Auclair*, 961 F.2d 65 (5th Cir. 1992) (holding privilege covered initial communications with lawyers regarding joint defense efforts even where representation was ultimately declined).

Communications between co-defendants, however, that continue after joint defense negotiations fail will most likely not be privileged. See *Power Mosfet Tech. v. Siemens AG*, supra, 206 F.R.D. at 425. Courts that have addressed the issue of preliminary communications seem to recognize that there is a period of negotiation before reaching a formal joint defense agreement, and that in some cases, the parties will be unable to come to an agreement. See *id.* citing *Sig Swiss Indus. Co. v. Fres-Co Sys. USA, Inc.*, No. Civ. A. 91-0699, 1993 WL 82286, 1993 U.S. Dist LEXIS 3576 (E.D. Pa. Mar. 17, 1993) (finding a joint defense arising from an indemnification agreement); *Eisenberg v. Gagnon*, supra, 766 F.2d 770 at 787-88 (finding that communications in an effort to establish a joint defense are protected); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 310 (N.D. Cal. 1987). A person need not be a litigant to be a party to a joint agreement. See *Russell v. Gen. Elec.*, 149 F.R.D. 578 (N.D. Ill.

1993) (noting that the joint defense privilege applies to parties or potential parties sharing a common interest in the outcome of a particular claim). The joint defense privilege can extend to pre-litigation communications, but parties must have at least a verbal understanding of a joint defense arrangement. See *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 02C734, 2003 WL 21920244 (N.D. Ill. Aug. 12, 2003) (ordering production of communication prior to the execution of the joint defense agreement absent a showing of intent to form a joint defense). See also *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 555 (N.D. Ill. 1964) (“communications made with an eye towards possible litigation...fall within this protection”).

At least one court, however, compelled disclosure of attorney-client communications shared between potential defendants because of the absence of any threat of litigation. In *EEOC v. The Peoples Gas, Light and Coke Co.*, 92 Lab. Cas. (CCH) ¶34, 070 (N.D. Ill., 1981), the court held that discussions between an employer and a union, both non-parties in an action, and their counsel concerning their potential liability under the equal pay provisions of an antidiscrimination statute, were not protected because they were not made “under the onus of litigation” and also because the non-parties were not potential co-defendants. *Id.* at 34, 077.

The Statements Must Be In Furtherance Of Joint Defense Efforts

Courts have found no policy reason to protect disclosures that were unrelated to common issues. See, e.g., Susan K. Rushing, Note, *Separating the Joint Defense Doctrine from the Attorney-Client Privilege*, 68 Texas L. Rev. 1273, 1285 (1990). Privileges arise out of need for a common defense. See *Metro Wastewater Reclamation Dist. v. Continental Cas. Co.*, 142 F.R.D. 471, 476 (D. Colo. 1992). Thus, the timing of the state-

ments could be an issue. If no litigation is pending or threatened, the statements may not be held to be privileged. The joint defense privilege arises only when the common interest of the parties relates to the joint defense of existing or impending litigation. See *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 49 (S.D.N.Y.1989). In that case, the privilege accompanying attorney-client privileged notes taken by an officer of a subsidiary corporation, recounting the substance of telephone conversations with a parent corporation's general counsel concerning sale of the subsidiary, were found to be held jointly by the parent corporation and the corporation that purchased the subsidiary. *Id.* Thus, the privilege could be waived by the purchasing corporation and the subsidiary's new management at their discretion. *Id.* at 51. The former parent corporation was not protected by privilege in an action brought by the purchaser for allegedly providing misleading financial data in connection with the sale. *Id.*

Most, but not all, courts require that the common interest must be legal in nature for the privilege to apply to any information shared among the parties. See *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir.1996), *cert. denied*, 520 U.S. 1239 (1997) ("To be entitled to the protection of this privilege, the parties must first share a common interest about a legal matter"); *Sheet Metal Workers v. Sweeney*, 29 F.3d 120, 124 (4th Cir. 1994); *Bank Brussels Lambert v. Credit Lyonnais Int'l Ass'n*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995). A commercial interest will normally not trigger the common interest doctrine. See *Power Mosfet Technologies v. Siemens AG*, supra, 206 F.R.D. at 424. Communications that concern business matters only are not subject to privilege and, thus, are not protected. For example, in *OXY Resources California LLC v. Superior Court*, 9 Cal. Rptr. 3d 621, 634-35 (Cal. Ct. App. 2004), a joint defense agreement between parties to a property transaction could not be relied

upon to shield otherwise non-privileged communications and contract negotiations from disclosure.

The Privileges Of All Cannot Be Waived By One

In general, under the Federal Rules of Evidence, only a party may waive privilege. When a privilege is held by more than one party, the consent of all parties is necessary to waive it. See *In re Auclair*, supra, 961 F.2d 658-71 (5th Cir. 1992). The consent of all members of a joint defense is usually necessary to waive privilege. *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) (citing *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980) ("It is fundamental that 'the joint defense privilege cannot be waived without the consent of all parties to the defense'"); *Metro Wastewater Reclamation Dist. v. Continental Cas. Co.*, supra, 142 F.R.D. at 476. Although privileges are typically waived when protected information is revealed to third parties, the joint defense privilege seems to provide some heightened level of protection. The majority of courts hold that although a party may waive privilege as to itself through disclosure to outside parties, it may not waive privilege for all parties. See *Western Fuels Ass'n v. Burlington Northern R.R. Co.*, 102 F.R.D. 201 (D. Wyo. 1984) (holding disclosure of work product to friendly litigants in related cases or to others with friendly interests is not beyond the scope of such privilege and will not constitute a waiver of the same in a land dispute involving multiple railroads). In *Western*, conferences between several railroads pertaining to a series of quiet title actions between the railroads and a pipeline company were found to be privileged even when they pertained to different matters. See also *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, supra, 90 F.R.D. at 32 (observing this limitation

is necessary to assure joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privileges of all participants).

Document Production Waives Some Privileges

Production of documents by a party to an opponent, even pursuant to a confidentiality agreement, will destroy claims of privileges. In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 296 (6th Cir. 2002), *cert. dismissed*, 539 U.S. 977 (2003), a court held that disclosure of documents in cooperation with the government even under a confidentiality agreement waived the privileges as to all opponents. The court observed, a “client cannot be permitted to pick and choose among his opponents, waiving the privilege as to some and resurrecting the claim of confidentiality as to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.” *See id.*

Waiver Standards May Differ

Another consideration is that the standards for waiver are often different for work product protection than they are for privileged information. Unlike the attorney-client privilege, the protections afforded work product are not waived merely because material is disclosed to a third party, since there may be legitimate reasons to disclose attorney work product to persons outside the attorney-client relationship. *See Bank of Am., N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 169 (S.D. N.Y. 2002); *United States v. Adlman*, 134 F.3d 1194, 1200 n.4 (2d Cir. 1998) (holding work product may be shown to others “simply because there [is] some good reason to show it” without waiving the protection). For example, there may be a common interest with the person to whom the material is disclosed. *See, e.g.,*

AT&T, *supra*, 642 F.2d at 1285. “The rationale for this is that “the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent.” *Id.* Thus, while a mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it generally will not suffice in itself for waiver of the work product privilege. *Id.* at 1298-99.

Who Has The Privilege?

In a corporate context, privileges belong to the corporation rather than individual employees, officers, or directors. *See In re Bevill, Breslyer and Shulman Asset Mgmt. Co.*, *supra*, 805 F.2d at 125; *Polycast Technology Corp. v. Uniroyal, Inc.* 125 F.R.D. 47 (S.D. N.Y. 1989). In *In re Bevill*, a court found that corporate officers could not assert joint defense privileges absent evidence that the corporation and officers agreed to pursue a joint defense strategy. It noted that a corporate official “may not prevent a corporation from waiving its privilege” arising from discussions with corporate counsel about corporate matters.” *See id.* at 49.

Also as in normal litigation settings, the attorney-client privilege will generally be waived if the client asserts a claim or defense that puts an attorney’s advice at issue; for example, the joint designation of an attorney as a witness by the group will waive the privilege. *See Leybold-Hereaeus Technologies, Inc. v. Midwest Instrument Co.*, 118 F.R.D. 609 (E.D. Wis. 1987).

LOOKING FOR LOVE IN ALL THE WRONG PLACES: ARE THESE CO-DEFENDANTS RIGHT FOR ONE ANOTHER? •

To be part of a joint defense arrangement, the interests of the co-defendants must be significantly aligned. This generally does not mean that

the defenses asserted by the parties need be compatible in all respects to apply the joint defense privilege. See *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979). Some courts have held that the privilege can apply among co-defendants even when their "liability may arise from different acts or omissions, or who may assert cross-claims against each other." See *In re LTV Sec. Litig.*, *supra*, 89 F.R.D. at 6054.

Agreements Limited To Common Interests

Joint defense groups can also be formed and limited to those areas in which all defendants have common interests, even if, on other issues, there are conflicts among those same defendants. See, e.g., *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965) (applying the joint defense doctrine to statements of common concern even though co-defendants had significant conflicts of interest); *United States v. McPartlin*, *supra*, 595 F.2d at 1336-37 (observing that statements for which protection is sought must involve a common purpose related to both defendants' defense, even though the defendants' interests were not compatible in all respects). When the interests of the defendants are too divergent, joint defense privileges will not apply. It is possible, however, to enter into joint defense agreements solely for specific portions of litigation, for example, as in the expert or causation case in a mass tort action.

Adversarial Relationships In Subsequent Litigation

Joint defense privileges may not protect communications if and when two or more parties subject to the defense become involved as adversaries in subsequent litigation. In the cases of *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, *supra*, and *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 90 F.R.D. 45 (N.D. Ill. 1981), one court considered the scope of protec-

tion for both attorney-client and work product joint defense information in subsequent litigation between former joint defense participants. In the first case, the court examined whether a participant seeking to use joint defense attorney-client communications was entitled only to those joint defense communications in which only the two now-adverse parties participated, or also those communications in which other joint defendants not involved in the subsequent litigation participated. The court held that all communications made as part of the joint defense effort (*i.e.* all communications disclosed to other joint defendants or their attorneys), were usable by former participants in subsequent adverse litigation. The court based its ruling on the ground that to do otherwise "would vitiate the subsequent litigation exception in those instances where there are a number of parties participating in a joint defense." *Ohio-Sealy v. Kaplan*, *supra*, 90 F.R.D. at 32. Thus, a lawyer must carefully evaluate her client's potential claims against prospective mates. Cross-claims in existing litigation could also be problematic to a finding of sufficient alliance in some jurisdictions. A lawyer must carefully evaluate potential indemnification and contribution claims before entering into a joint defense agreement. Failure to do so could result in later waiver of the privileges. To the extent possible, the joint defense agreement should always contain provisions that reserve such claims for later litigation or arbitration. In most jurisdictions moreover, contribution and indemnification claims do not accrue until a judgment is entered.

Essential Requirements For The Relationship

As with any successful relationship, communication and trust are the keys to getting along. The basic requirements for 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 one party to the joint defense agreement to anyone else 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.

It Pays To Ask Questions

Another important factor to consider before embarking on your new relationship is the group dynamic itself. Some questions to ponder:

- Who represents the other co-defendants?
- Do you trust the other lawyers?
- Do you trust them to do good work? To do their fair share of the work? It is often common in joint defense groups for co-defendants to rely on the work of others;
- If your client is the central focus of a large prosecution or litigation, is it necessarily in their interest to allow other lawyers and de minimis co-defendants to influence their defense strategy? Conversely, if your client is a marginal player, is it in their ultimate interest to agree to and help pay for the strategy devised by the target defendants, or otherwise to be closely associated with those defendants?
- What experts can or should you share? Who will do the work to prepare them and their testimony? What happens to the expert if one member withdraws? These questions are difficult, and there are no pat answers. In the tort context, sharing physicians, economists, or statisticians likely will pose few problems as all defendants are usually aligned on these issues. But what about industrial hygienists or corporate historians? What if your experts disagree about the “state of the art”? What if a “warnings” expert says one member’s warnings were adequate but another’s were not?

Double Trouble: Torn Between Two Lovers?

A potential drawback to joint defense arrangements is that your client might become connected with the conduct of others. This can be inferred at trial or more dangerously, arise through direct allegations of conspiracy or continuing conspiracy due to the joint defense agreement itself. Agreements should necessarily include provisions stating the purpose of the venture and reaffirm the obligations of all members and their counsel to comply with the law. If the Case Management Order provides that the joint defense is necessary and appropriate and should not be the subject of comment at trial, all the better.

One advantage to joint defense agreements is that when all expectations are in writing, it becomes less likely that conflicts will arise among members and their counsel. For example, if withdrawing from the arrangements means you lose your best experts, you may be more likely to work things out.

Spats About The Finances

Like most couples, members of joint defense groups fight about money. After all, if other defendants are not helping to reduce your client’s costs, you are not deriving a huge benefit. In larger cases, it is worth retaining an independent accountant to maintain and keep track of joint defense expenses in a separate fund. Joint defense agreements should contain provisions governing the disbursement of payments to that fund. The arrangement can lay out the timing of each assessment and a date for payment. Because it is often the case that different co-defendants are better than others at paying their fare share, joint defense agreements should contain provisions that allow for the expulsion of defendants who do not contribute in a timely manner or who become delinquent, and/or lesser penalties and incentives. All funds due to the joint defense should become due in the

event of an expulsion or withdrawal. The agreement should also provide for an accounting at the conclusion of the arrangement or upon the withdrawal of one party when all outstanding fees become due.

'TIL DEATH DO US PART: CONFLICTS OF INTEREST AND VICARIOUS DISQUALIFICATION

• Joint defense agreements can multiply a party's risk of unanticipated conflicts and vicarious disqualification issues. See Arnold Rochvarg, *Joint Defense Agreements and Disqualification of Co-Defendant's Counsel*, 22 Am. J. Trial Advoc. 311 (1998) for a full discussion of disqualification issues. See also, Todd M. Sahner, *Running the Ethical Obstacle Course: Joint Defense Agreements*, 28 Stetson L. Rev. 339 (Fall 1998). Because of this possibility, it is important to obtain representations from all participating firms that they have carefully and accurately checked potential conflicts and either:

- Concluded that there are none; or
- Have obtained the appropriate waivers.

Id. at 343. For example, conflicts can arise if a law firm that is a party to a joint-defense agreement hires a new attorney who formerly represented a party adverse to a member of the joint-defense group. See *Frazier v. Superior Court*, 118 Cal. Rptr. 2d 129, 133 (Cal. Ct. App. 2002).

Disqualifications On Other Cases

Matters involving joint defense agreements may potentially result in a disqualifying conflict on other cases. "Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against the co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of

information took place between the various co-defendants in preparation of a joint defense." See, e.g., *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977). The joint defense privilege can act as an ethical doctrine that imposes on counsel a limited duty of confidentiality toward their client's co-defendants regarding information obtained in furtherance of a common defense. See ABA Model Rules of Prof'l. Conduct R. 1.9; *United States v. Stepney*, *supra*.

Serving The Co-defendant And The Risk It Entails

One theory of the joint defense doctrine itself is that when an attorney agrees to serve his client's co-defendant for a limited purpose, he becomes that co-defendant's attorney for that purpose. See, e.g., *Gov't of Virgin Islands v. Joseph*, 685 F.2d 857, 862, (3d Cir. 1982) ("The basic rationale of the common purpose theory is that, when two co-defendants decide to join in a common effort, 'the attorney for each represented both for purposes of that joint effort'") quoting *United States v. McPartlin*, *supra*, 595 F.2d 1321 at 1337 (7th Cir. 1979) ("The attorney who ...undertakes to serve his client's co-defendant for a limited purpose becomes the co-defendant's attorney for that purpose").

In *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000), the Ninth Circuit held that a defendant's joint defense agreement with a co-defendant establishes an implied attorney-client relationship with the co-defendant. In that criminal case, the government's use of a former co-defendant, with whom defendants' attorneys had an attorney-client relationship arising from a joint defense agreement, as a key witness at trial, created a conflict of interest that impaired defense counsel's ability to cross-examine the former co-defendant, requiring disqualification, when former co-defendant's testimony allegedly conflicted with statements he made in confi-

dence during a pretrial joint defense meeting, and his attorneys “threatened [defense counsel] with legal action if they failed to protect [his] confidences.” See *id.* at 637-38. Thus, the joint defense privilege can create a disqualifying conflict when information gained in confidence by an attorney becomes an issue. *Id.* at 637. Because a defense attorney breaches a fiduciary duty if he or she uses information obtained in a joint defense meeting, when such information becomes important to his client’s defense, he or she may be disqualified. See also *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978), *cert denied*, 439 U.S. 955 (1978). Lastly, under contract principles, a lawyer in a joint defense may also owe contractual duties to the other lawyers and their clients. Howard M. Erichson, *Informal Aggregation: Procedural And Ethical Implications Of Coordination Among Counsel In Related Lawsuits*, 50 Duke L.J. 381 (2000).

Let’s imagine that well into the litigation you learn that one of your co-defendant’s law firms had a substantial representation adverse to your client in a related matter. If information obtained pursuant to that representation was shared, the joint defense arrangement may be subject to mandatory disqualification. Conflicts as a result of a joint defense agreement may arise through no fault of the conflicted attorney or law firm. Even screens may be insufficient to prevent disqualifications in such scenarios. Thus, when contemplating a relationship with any one, make sure you know them well.

In one decision, a court found that an implied attorney-client relationship was created between all of the attorney members of the joint-defense group and all of the clients. See *Essex Chem. Corp. v. Hartford Accident & Indemnity Co.*, 975 F. Supp. 650 (D.N.J. 1997). Luckily, the decision was later reversed in *Essex Chemical Corp. v. Hartford Accident & Indemnity Co.*, 993 F. Supp. 241 (D.N.J. 1998). Thus, po-

tentially handling matters adverse to members of a joint defense group can result in vicarious disqualification. In particular, courts recognize that an attorney may be disqualified if his or her client’s interests require that he or she cross-examine (or oppose in a subsequent action) another member of a joint defense agreement about whom he or she has learned confidential information. See generally, Rochvarg, *supra*.

In *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977), co-defendants of an attorney’s former client sought to disqualify the attorney from proceeding against them in a subsequent related action on the grounds that he had participated in a joint defense in the first action. The Fifth Circuit held that “in a joint defense...the counsel of each defendant is, in effect the counsel of all....[A]n attorney should...not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.” *Id.* at 253.

However, the court distinguished a joint defense situation from the typical attorney disqualification case in which, because of “the presumption that confidences potentially damaging to the client have been disclosed to the attorney during the former period of representation,” a former client “need only to show that the matters embraced within the pending suit are substantially related” to the previous case, and no inquiry into whether such disclosures actually occurred is permitted. *Id.* at 252. In the joint defense context, the court recognized that “there is no presumption that confidential information was exchanged....[The attorney] should not be disqualified unless...[he] was actually privy to confidential information.” *Id.* at 253.

In a criminal context, in a prosecution for conspiracy and violations of federal drug and weapons laws, one court has recently limited this expansion of duty to all members of a joint defense arrangement. In *United States v. Stepney*, supra, 246 F. Supp.2d at 1076, the court held “[w]hile a joint defense agreement does impose a duty of confidentiality, that duty is limited in that the showing required to establish a conflict of interest arising from prior participation in a joint defense agreement is significantly higher than that required to make out a conflict based on former representation of a client.” *Id.* The court reasoned “[c]o-defendants may eliminate inconsistent defenses without the same degree of disclosure that would be required for an attorney to adequately represent her client.” *Id.* at 1086.

Although some courts have declared that attorneys operating under a joint defense agreement owe defendants other than their clients a limited duty of confidentiality, the ABA Committee on Ethics & Professional Responsibility has opined that the Model Rules of Professional Conduct do not impose such duties on an attorney. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 395 (1995). The Committee, nonetheless, noted that some courts recognized an attorney’s “fiduciary obligation” to other members of a joint defense agreement that could create a disqualifying conflict of interest. *Id.*

Say The Right Things AND Watch Your Step

In addition to crafting careful characterizations and disclaimers of joint defense arrangements, counsel should avoid taking actions that can be construed as creating an attorney-client relationship with other members of the joint defense. Even seemingly innocuous conduct might give rise to an implied attorney-client relationship. For example, joint-defense

members may attend hearings on other members’ behalf. A joint defense agreement should, thus, expressly and in black and white, repudiate the existence of an attorney-client relationship with others.

CONCLUSION • OK, let’s face it: Love is the greatest thing on earth, but sometimes love—and joint defense arrangements—can be battlefields. Both can be great; neither is without its risks. A lot of the dangers of joint defense agreements can be avoided through careful drafting of the agreements (it’s not clear if the same can be said of love). Joint defense agreements can be very complicated or very simple. Many advantages can be gained by including prophylactic terms which anticipate later issues. Some other steps can also be taken to shore up the protections of the joint defense outside of the agreement. For example, to limit unnecessary circulation of information and the chances of its misuse or inadvertent disclosure, client communications should take place separately, outside the presence of other participants, and it may be appropriate to exclude clients from joint defense counsel meetings, or parts of them. In any event, careful drafting of joint defense and joint counsel agreements will go a long way toward keeping the romance alive.

Picking a fellow porcupine to enter into a joint defense agreement with should be done carefully; the benefits, such as efficiency and information sharing, must be weighed against the risks of disqualification and waivers of privilege. Joint defense agreements and joint counsel arrangements require conscientious drafting to make your relationships with co-counsel fruitful and rewarding and to help you realize your client’s goals.

PRACTICE CHECKLIST FOR
Maintaining Healthy Relationships With Co-Counsel In Complex Tort Litigation

- Suggested terms for joint defense arrangements (multiple lawyers and multiple parties) include:
 - ___ 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 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 and 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;
 - ___ An acknowledgement of the parties' obligations under the law to respond truthfully and fully to proper discovery requests and to proper questions at deposition, hearing, and trial. Such language could prevent the imputation of the improper conduct of one defendant to another and help combat any later or existing allegations of conspiracy;
 - ___ A reservation of the right by parties to adduce their own affirmative defenses as long as such defenses do not blame other co-defendants;
 - ___ 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;
 - ___ A provision not to notice or conduct the depositions of any personnel of another party, or to ask any questions of the personnel of the other party at depositions noticed by others;
 - ___ 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 stating a specific period in which later claims can be made following the conclusion of the joint defense arrangement or defer them to arbitration;

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- 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 not to introduce or seek to introduce joint privilege materials in any subsequent legal proceeding;
 - 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 waiver of any claim that any counsel to any other party is disqualified from representing such party in the litigation or other matters by virtue of the joint defense arrangement;
 - 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;
 - A designation of certain counsel as “expert handlers” and draft provisions that prevent departing parties from taking experts with them should they elect to withdraw;
 - 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;
 - A provision that the agreement should contain enforcement provisions and remain in effect even after the resolution of the litigation;
 - A provision that other parties might be added to the agreement due to the addition of parties to litigation or changes in counsel.
- Additional provisions for joint counsel arrangements (one lawyer, multiple clients) include:
 - An explanation that the matter entails a joint representation;

- A detailed description of potential conflicts of interest and a statement that the clients have had an opportunity to consult with independent counsel before entering into the joint counsel agreement;
- A statement that the client understands and agrees that in the case of a joint representation full ethical and fiduciary duties are owed to each client, and counsel cannot favor any client so long as counsel is providing services to the group;
- A statement that the joint representation will be directed toward vindicating common rights and interests, and that the client has been counseled on these matters and made an informed decision to participate in a joint counsel arrangement;
- A statement that the representation will not include cross-claims, indemnity claims, or intra-party disputes, and an express statement that the attorney is not providing advice on such claims;
- A statement that all information acquired during the joint representation will be fully available to other clients regardless of future conflicts;
- Provisions setting out how settlement issues are to be dealt with, including a statement that participation in the joint counsel arrangement might result in disclosure of the substantive details of any settlement to other members of the joint counsel arrangement, and a statement that participation in the joint counsel arrangement could limit certain of a party's settlement options. For example, an offer could be contingent upon all members of the joint counsel agreement accepting;
- A statement that a court may permit the introduction of such information into evidence in connection with any later disputes between the parties and that this includes potentially confidential attorney-client information communicated during the joint representation;
- A procedure for handling future conflicts;
- The agreement should include a waiver of the right to seek disqualification of counsel as a result of the joint representation;
- A statement that some conflicts could develop that would require the lawyer to withdraw from the representation of one or all members of the joint counsel group;
- A statement that in the event of withdrawal by a party, the lawyer will continue to represent the other parties;
- A provision outlining the procedures for withdrawal;
- A statement that the retention letter completely outlines the terms of the agreement, and there are no other agreements, promises, or understandings not set forth fully therein;
- A provision that the client must sign and return a copy of the retention letter agreeing to all the provisions.