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STRATEGIES, BENEFITS AND RISKS OF JOINT DEFENSE AGREEMENTS, INCLUDING DISCOVERABILITY, CONFLICTS OF INTEREST AND ESTABLISHING THE JOINT DEFENSE PRIVILEGE

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I. THE BACKDROP FOR CONSIDERING JOINT DEFENSE AGREEMENTS

Complex tort litigation, such as multi-party construction defect litigation, has resulted in decades of expensive litigation where a singular plaintiff makes claims against multiple defendants who then make express or implied indemnity claims against each other in order to achieve transfer of risk. As a result, what ultimately occurs is counter intuitive to what most defense attorneys agree is the overall objective in defending litigation, specifically the defeat of or substantial reduction to plaintiff's claim. In order to accomplish risk transfer, defendants become cross-complainants and take up the laboring oar in establishing fault against other defendants, all the while proving plaintiff's claims.

In certain circumstances, this counter-productive defense protocol can be avoided through the use of a properly timed and well written Joint Defense Agreement between multiple parties and their multiple lawyers or alternately a Joint Counsel Agreement, where one lawyer is retained to represent multiple parties with common interests.[1] By entering into a Joint Defense Agreement ("JDA"), defendants can share information, share work product, share experts and, in some cases, avoid counsel and experts engaging in the typical "inter-defendant finger pointing" which often results prolonged and more expensive litigation. Absent a JDA, defense expenses are often disproportionately high in relation to the overall value of the case's exposure which, in turn, causes insurers to increase their premiums and decrease their coverage – a negative consequence that all of our clients face daily.

We likely all agree that the effective defense of multi-party litigation requires the exchange of information among counsel on a single side of the case. For defense lawyers, a JDA protects communications under the attorney-client privilege where such information is exchanged pursuant to a common defense scheme. It enables both lawyers and clients facing a common opponent join forces and exchange protected information in order to best prepare a consolidated defense.

[1] The majority of this handout pertains to Joint Defense Agreements, but in some instances the handout and the panel discussions will also discuss Joint Counsel Agreements.

This handout will discuss not only the joint defense doctrine and how defendants can benefit from it, but also the utilization of JDAs to creatively defend complex multi-party litigation in a manner where the defendants work together.

II. APPLICATION OF THE JOINT DEFENSE PRIVILEGE TO PROTECT THE EXCHANGE OF CONFIDENTIAL INFORMATION BETWEEN ATTORNEYS WHOSE CLIENTS SHARE A COMMON INTEREST

Most attorneys know that the attorney-client privilege protects communications between a lawyer and a client seeking legal advice. The privilege protects only *confidential* communications, specifically, those intended to remain private. The presence of any other party during the communications between one's attorney and a client effectively waives the attorney-client privilege. An exception to the waiver is when the communication takes place among persons with a "common interest." Under the common interest privilege, the attorney-client privilege is extended to protect communications that are "part of an on-going and joint effort to set up a common defense strategy." *Weinstein v. Eisenberg*, 474 U.S. 946, 106 S. Ct. 342 (1985).

The "joint defense" privilege, also referred to as the "common interest" doctrine, 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." Over 120 years ago, the Virginia Supreme Court was the first court to recognize a "joint defense privilege" by protecting from disclosure communications among multiple defense counsel and defendants who faced conspiracy charges. (See Watson, *Ethical Implications of Joint Defense or Common Interest Agreements* (1998) 12–SUM Antitrust 59.) Arguing application of the joint defense privilege, defendants who possess common legal interests may share privileged information among counsel and experts without losing the protection afforded by the attorney-client privilege.

The joint defense or common interest privileges are widely recognized by a number of courts. Indeed, all fifty states recognize the joint defense or common interest privileges in some form. Before lawyers and clients enter into a JDA 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. Where a federal question exists, federal common law applies. *Id.* Counsel is well advised to work out the choice of law issues and their state's case law particulars before attempting to establish a joint defense group.

To trigger the protections of the joint defense doctrine, it is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential. An expectation of confidentiality, however, is not enough to avoid waiver. In addition, disclosure of the information must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted. (California *Evidence Code* § 912.)

JDAs are a way to formalize the privilege if the parties agree to maintain the confidentiality of communications between them that would, absent disclosure to the other defendants and lawyers, be protected by the attorney-client privilege or work product doctrine. *United States v. Henke* 222 F.3d 633, 637 (9th Cir. 2000). Many jurisdictions apply the common interest doctrine if (1) the disclosure relates to a common interest of the attorney's respective clients; (2) the disclosing attorney has a reasonable

expectation that the other attorney will preserve confidentiality; and (3) the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted.

III. JOINT DEFENSE AGREEMENTS

A. Generally

A JDA is simply 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. As mentioned above, the JDA relationship differs from joint counsel arrangements where one lawyer represents several different clients in the same action, but the application of privileges in both situations appears to be the same. Simple JDAs exist only to document an agreement between defense counsel to protect those documents and communications already protected from disclosure. More complex JDAs often provide for the sharing of expert expenses, the joint retention of experts, division of labor at trial and the likely dismissal of cross-complaints as between the defendants until after conclusion of the plaintiff's case in chief. This protocol then allows defense witnesses to join together in a common defense scheme to defend plaintiff's claims while reserving indemnity and allocations determinations for a later time.

More uncommon and complex are Joint Counsel Agreements ("JCAs") where several individual clients share one lawyer. JCAs pose distinct ethical and strategic questions. For example, 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 a 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 and consequences of a proposed JCA with their clients before forging ahead with one.

B. Benefits

JDAs have many advantages. They allow lawyers to share strategy, experts, and knowledge, greatly benefitting clients with significant costs savings. JDAs promote efficiency by allowing co-defendants to retain expert witnesses jointly, rather than each defendant hiring her own and JDAs enable co-defendants to divide the labor involved in trial preparation and cross-examination at trial. A JDA can also help parties avoid logistical problems such as the exclusion of duplicative expert testimony while allowing improved usage of limited trial time. Inconsistent defenses among co-defendants which may confuse the jury can also be avoided.

Perhaps the greatest advantage to a JDA is the open communication among defense lawyers who can share work product and discuss case strategy. A JDA can also minimize unpleasant barbs in the defense counsel dynamic and minimize or defer satellite litigation. JCAs offer similar advantages.

C. Elements

To be a member of a JDA, first the interests of the co-defendants must be significantly aligned but this generally does not mean that the defenses asserted by the parties need be compatible in all respects. See *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979). Some courts have held that the privilege can apply among co-defendants even where their "liability may arise from different acts or omissions, or who may assert cross-claims against each other." See *In re LTV Securities Litigation* 89 F.R.D. 595, 605 (USDC, N.D. Texas, 1981).

Joint defense groups can also be formed and limited to those areas where all defendants have common interests, even if, on other issues, there are conflicts among those same defendants. *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). In situations where the interest of the defendants are too divergent, joint defense privileges will not apply, but it is possible to enter into JDAs solely for specific portions of litigation, for example, the retention of a joint expert.

JDAs can be verbal or written, as long as the parties have agreed to preserve the confidentiality of communication. *United States v. Schwimmer*, 892 F.2D 237, 244 (2nd Cir. 1989), *cert. denied*, 502 U.S. 810 (1991) (recognizing a verbal JDA.) However, parties who anticipate asserting the privilege should always insist on a written agreement. A written agreement, at a minimum, should establish that the privileges are not waived; lay out the specific terms for the parties so that there is no dispute on what is covered by the scope of the agreement; specify the parties' duties when a party may withdraw or join and should specifically address current and potential conflicts of interests and provide for their resolution.

There are several additional elements that can be included in a JDA to help alleviate problems and increase the likelihood that the agreement will be enforced. For example, a JDA should:

- ☐ Set out the general areas of common defense or joint strategy between the parties, or, it may recite that such common interests exist.
- ☐ State that the sharing of materials and information is reasonably necessary to achieve the parties' common goal.
- ☐ Disclaim any attorney-client relationship (and should expressly disclaim any duty of confidentiality or loyalty) between an attorney and client other than the attorney's pre-existing client. The agreement may also state that no such relationship will arise by implication.
- ☐ Make it clear that communications or materials that fall within the attorney-client privilege or work product doctrine can be disclosed or revealed only to parties to the agreement or approved non-parties (such as consultants or experts) to the agreement.
- ☐ State that waiver can be only by consent of all the parties.
- ☐ Describe the parameters by which joint defense materials may be used by the parties and their counsel.
- ☐ Identify the procedures to be followed when subpoenas, court orders or other demands are made for materials.
- ☐ Describe the effect of a participant's settlement.
- ☐ Provide a method for clients and their attorneys to withdraw from the agreement, including a method for providing notice to the other parties and returning materials.
- ☐ Provide a representation by the attorneys that they have no conflicts in the matter.
- ☐ State that the agreement itself is confidential.

The agreement should be as thorough as practicable under the circumstances. It may also include a mechanism to address future contingencies that may arise between the parties. Not every JDA will have all of the above elements, but these are issues to be considered in the drafting of the agreement.

Additional elements for JCAs (One Lawyer, Multiple Clients) may also include:

- ☐ An explanation that the matter entails a joint representation.
- ☐ A detailed description of potential conflicts of interests and a statement that the clients have had an opportunity to consult with independent counsel prior to 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 towards 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.
- ☐ 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.
- ☐ An outline of a procedure for handing future conflicts.
- ☐ 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.

D. <u>Risks</u>

Unfortunately, the use of JDAs often loses support from defense attorneys who do not want to lose business volume or who think by suggesting a JDA will result in a client thinking they are unwilling or unable to zealously represent their client. There is an existing mindset that participation in a JDA is somehow not congruent with being a strong client advocate. Further, many attorneys whose clients may

be owed contractual indemnity from other parties will view the JDA concept as "pay and chase" by another name given the possibility their client's name may be the only one identified on a jury form making their client at risk for an adverse judgment and collection action. However, if these contingencies are dealt with proactively in the JDA, the overriding litigation objections of a JDA may still outweigh the risks.

Another important factor to consider before considering a JDA is the dynamic itself. Who represents the other co-defendants? Do you trust the other lawyers? Do you trust them to do good work? Do you trust them to do their fair share of the work? It is often common in joint defense groups for co-defendants ride the coattails of others. If your client is the central focus of the litigation, is it necessarily in their interest to allow other lawyers and de minimis co-defendants to influence their defense strategy? 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 easy answers. Sharing physicians, economists, or statisticians likely will pose less problems than others as all defendants are usually aligned on these issues. But what about individually hired liability experts?

Defense counsel will instinctively understand that the JDA process will not work on all types of cases given personality challenges that are too insurmountable to get past in order to work within an agreement that requires trust and cooperation. Further, there is the issue of how to resolve non-participants who fail to participate in a JDA and then argue they have achieved an unfair disadvantage by their failure to participate.

Another risk inherent in JDA is fights 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. The JDA then can 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 fair share, JDAs should contain provisions that allow for the expulsion of defendants who do not contribute in a timely manner or who become delinquent or lesser penalties and incentives. All funds due to the joint defense should become due in the event of voluntary withdrawal or expulsion. The agreement should also provide for an accounting at the JDA's conclusion or a party's withdrawal where all outstanding fees become due.

There also exists a possibility that conflicts of interest may arise between JDA members. For example, in construction defect cases, while typically the defense team represents the develop/general contractor, if insurers for the subcontractors agree to enter into a JDA (often in recognition of additional insured and express indemnity obligations) the insurers may think the lead defense counsel is overpaying to resolve plaintiff's claims. However, if a subcontractor's insurer can view the JDA as the opportunity to save defense fees and consulting costs, including the elimination of the multiple levels of payment obligations where a subcontractor's insurer is forced to pay a share of the developer's counsel, plus separate defense counsel, plus the potential retention of coverage counsel to assert coverage defenses, ultimately, there appears to be a ripe opportunity to save substantial defense and expert fees.

There also exists the potential for clients within the JDA to argue that the attorneys representing other members in the JDA owe them fiduciary responsibilities. Be sure to investigate your own state's jurisdiction understanding that some state courts have declared that attorneys operating under a JDA owe defendants other than their clients broader duties than others. However, the ABA Committee on Ethics & Professional Responsibility has opined that the Model Rules of Professional Conduct do not impose broad duties on an attorney participating in a JDA. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 395 (1995). To protect oneself from having broad ethical duties to members

other than your own client, in addition to crafting careful characterizations and disclaimers within the JDA, counsel should avoid taking actions that can be construed as creating an attorney-client relationship with other members of the joint defense group and, as noted above, the agreement itself should expressly repudiate the existence of an attorney-client relationship with others.

Finally, it is important to note that joint defense privileges may not protect communications if and when two or more parties subject to the defense become involved adverse in subsequent litigation. In *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, 90 F.R.D. 21 (N.D. Ill. 1980), the court considered 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*, 90 F.R.D. at 32. Thus, a lawyer must carefully evaluate her client's potential claims against prospective JDA members and draft the JDA in such a way as to proactively stipulate the effect of later litigation as between members.

IV. RECENT JOINT DEFENSE AGREEMENT SUCCESSES

During recent construction defect litigation in California known as *Watermill Flying Point Trust, et al. v. Ronald Arrache Construction Co., Inc. et al*., the lead defense attorney has opined that the use of a "Joint Defense Information Sharing Agreement" was the number one reason why the defendants were successful in completely defending plaintiff's claim and proving the builder's Cross-Complaint for fraud back against the homeowner resulting in plaintiff now facing a multi-million dollar judgment. The *Watermill* JDA resulted in a dismissal of each defendant's cross-complaint before trial, a division of labor in terms of focus on cross-examination of certain witnesses, while still reserving allocation of liability issues for resolution post plaintiff trial.

V. CONCLUSION

Ultimately, compromise, cooperation and coordination are key in the implementation of a JDA or JCA. Poorly drafted or non-existent agreements can result in nasty disagreements for both you and your clients – as well as a potential field day for the plaintiff. However, benefits such as efficiency, improved strategies, and information sharing often can make a Joint Defense or Joint Counsel Agreement rewarding and enable the defense to realize many overriding defense goals.