

**2014 CLM Professional Liability & eDiscovery Mini-Conference
January 24, 2014 – Orlando, Florida**

**Point One at Me and Three Point Back at You
Strategies for Defending Multi-Party Litigation**

I. The Joint Defense Agreement: Making it Work – Making it Safe

The joint defense agreement has been used for years because of the strong benefits it can provide to multiple defendants who share a common interest in litigation. These benefits include the ability to coordinate litigation strategy, the ability to combine the parties' resources, and the ability to reduce costs involved in the litigation, all of which result from the parties working together and avoiding duplicative work. However, the primary benefit of the joint defense agreement is the ability to share confidential, privileged information among the multiple defendants and maintain the existing privilege to such information.

However, the joint defense agreement can also create concerns and pitfalls which can provide risks to both the parties to the agreement and to their respective counsel. The most obvious concern is the waiver of privilege as to the information disclosed pursuant to the agreement, if it is determined that an enforceable agreement has not been entered into. But just as concerning, and not as obvious, are the problems that can arise for clients if their counsel are disqualified from representing them, or prevented from being able to fully represent them should their interests become adverse to the other parties to the agreement.

Further, there are issues that counsel may not fully appreciate regarding such risk of disqualification, both in the pending matter and future matters, as well as the potential to be held liable and responsible to the non-client parties to the joint defense agreement for the actions taken during the course of the litigation involving the joint defense agreement. As a result, care and thought must be given in the drafting of the joint defense agreement to protect the client and the attorney so that the goals of the joint defense are achieved, with a minimum of risk and exposure to all concerned.

II. Playing Well With Others: How to prevent disputes between defendants from screwing up your case.

It is critical to the success of the case to establish effective relationship with co-defendants. Oftentimes problems with co-defendants are as much or more of a challenge than with the plaintiff! This is particularly true when there are multiple insurance

policies and coverages at issue, there are disparate financial circumstances and risks between the parties (some have deep pockets and some don't). To be successful, the professionals managing the case MUST avoid making the plaintiff's case for them! Delayed agreements between co-defendants and insurance carriers result in high costs and damaging discovery.

Best practices and tips for success for working effectively with Co-Defendants & Co-Carriers include the following. Determine who the responsible claim professional is for each defendant, potential defendant and carrier. Determine all sources of coverage including limits, known coverage defenses, etc. Establish claim professional to claim professional contact early in the case. Advise desire to present a united front and coordinated approach to defending, and if indicated, resolving the claim. INSIST defense attorneys communicate with one another early in the case. Urge each party to complete their own confidential investigation and evaluation PRIOR TO extensive discovery by plaintiff. Identify and discuss areas of potential and actual conflict between the parties. Identify and confirm areas of agreement between the parties. Identify and discuss claims and litigation philosophy with Co-Defendants which may be very different. It is best to address these issues from the beginning of the case. Be willing to share evaluation of plaintiff's damages and any other mutually beneficial information. Maintain emotional and professional maturity at all times.

Additionally, there are pitfalls to avoid if your goal is to work well with the other parties in the case. Do NOT be disrespectful, condescending, patronizing or polarizing. Return phone calls and emails timely! Know the basics of your case. Remember, it is almost always better to fight the plaintiff than the Co-Defendant.

When it comes to settlement considerations always keep the end goal in mind. DON'T get hung up on percentages. The best scenario is to reach an agreement between all parties as to Who is Going To Pay What.

If the Co-Defendants and/or the co-carriers are unable to agree, it is still best to focus on resolving the case in the most advantageous manner and working out contribution issues post-resolution. Some of methods which can be effective to accomplish this goal include agreeing to settle case with the plaintiff and while preserving the ability to argue positions regarding contribution post settlement. Inter-party arbitration agreements have many benefits to the defendants that litigation doesn't.

III. Consequences of Failure to Agree

Agreeing to share in a global settlement offer may feel distasteful on those occasions wherein your analysis suggests your insured or client acted reasonably among co-defendants, but we will explore the reasons behind committing to a mutual defense that benefits the client in the end.

When the defense of your client necessitates pointing the finger at a co-defendant present at trial and represented by counsel, that target is going to have to respond to your attack as well as the attack presented by plaintiff's counsel and more often than not, the

response will include criticism of your client's actions and omissions. With the defendants pointing fingers at each other, the plaintiff will have a field day knowing the jury will most likely find someone negligent and probably more than one defendant.

Recent claims histories prove the belief that pointing fingers increases the expense and indemnity payouts of multi-party litigation and benefits no-one. As you are likely to encounter the same insurance carriers and defense counsel in future cases, the blame game has repercussions in future litigation. For these reasons, blaming others in your defense is an ineffective trial strategy that must be avoided.