

For the Common Good?

By Thomas J. D'Amato
and Tanis J. Leuthold

Sufficient foresight and a proper drafting can help defense attorneys limit risks to themselves and their clients while still reaping the many benefits of a joint-defense agreement.

Avoiding Potential Pitfalls in Joint-Defense Agreements

Many defense attorneys do not think much about entering into joint-defense agreements. And why should they? A joint-defense agreement has so much to offer—it allows a defense attorney to share information with other defense

attorneys and to develop a unified defense strategy, not to mention it conserves resources by allowing codefendants to work together and limit unnecessary, duplicative work. With all they have to gain, it's not hard to understand why attorneys sometimes overlook the potential pitfalls of joint-defense agreements.

A joint-defense agreement has implications well beyond the four corners of the agreement. It is not simply an agreement to share privileged information with codefendants. A joint-defense agreement may create an implied attorney-client relationship, a fiduciary relationship, and a third-party beneficiary relationship between counsel for one defendant and the other defendants. Moreover, a client risks waiving or losing protection of privileged communications shared with other members of the joint defense agreement.

What Is the Joint-Defense Privilege?

Joint-defense agreements and joint-defense

consortiums are not new. Since as early as 1871, multiple defendants have joined forces to create a united, common defense. See *Chahoon v. Commonwealth*, 62 Va. (21 Grat.) 822 (1871); George S. Mahaffery, Jr., *All for One and One for All? Legal Malpractice Arising From Joint Defense Consortiums and Agreements, The Final Frontier in Professional Liability*, 35 Ariz. St. L.J. 21, 27 (2003). Today, joint-defense arrangements are common in complex, multiparty, civil litigation as well as criminal cases involving multiple defendants. Mahaffery, *supra* at 28 (citing Scott M. Seaman & Rebecca Levy Sachs, *The Good, the Bad and the Ugly about Joint Defense*, The Brief, Fall 1998, at 12, 13).

A joint-defense agreement is grounded in the joint-defense privilege, also referred to as the common-interest doctrine, and is defined as “[t]he rule that a defendant can assert the attorney-client privilege to protect a confidential communication made to a codefendant lawyer if the communication was related to the defense of both



■ Thomas J. D'Amato and Tanis J. Leuthold are attorneys with the San Francisco law firm of Murphy, Pearson, Bradley and Feeney. Mr. D'Amato's litigation and trial practice focuses in the areas of professional liability, business, intellectual property, real estate, employment and personal injury. Ms. Leuthold represents individuals and businesses in all phases of litigation and counsels clients on corporate matters. Her practice is focused on professional liability defense as well as business litigation.

defendants.” *Black’s Law Dictionary* 1236 (8th ed. 2004). The joint-defense privilege is waived, however, when one of the joint defendants becomes an adverse party. Some courts have held that participants in a joint-defense agreement can unilaterally waive the privilege protection for their own communications. See *In re Sunrise Secs. Litig.*, 130 F.R.D. 560, 573 (E.D. Pa. 1989); *Medcrom Holding Co. v. Baxter Travenol Labs., Inc.*, 689 F. Supp. 841, 844 (N.D. Ill. 1988); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980); *Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975).

Federal Courts and State Courts Treat the Joint-Defense Privilege Differently

Nearly all state and federal courts recognize some form of the joint-defense or common-interest privilege. However, state and federal courts often differ in how they treat the joint-defense privilege.

For example, California has not created a distinct common-interest or joint-defense privilege. Unlike federal courts, California has developed a common-interest doctrine, also referred to as the joint-defense doctrine, that operates as an exception to the general rule that a privilege is waived upon voluntary disclosure to a third party. *OXY Resources Calif. LLC v. Sup. Ct. (Calpine Natural Gas LP)*, 115 Cal. App. 4th 874, 889, 890 (Cal. Ct. App. 2004) (common-interest doctrine is a non-waiver doctrine, analyzed under standard waiver principles applicable to attorney-client privilege and attorney work product protection); *Roush v. Seagate Technology, LLC*, 150 Cal. App. 4th 210, 224 (Cal. Ct. App. 2007); see also *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 973 (Cal. Ct. App. 2009) (California recognizes “common-interest doctrine”); The Rutter Group, Cal. Prac. Guide Prof. Resp. Ch 7-C. Under California’s common-interest doctrine, a party does not waive an existing privilege when the following three requirements are satisfied: (1) the information shared with a coparty would otherwise have protection from disclosure; (2) the parties had a reasonable expectation that the information disclosed would remain confidential; and (3) the disclosure was reasonably necessary to advance the party’s shared interest in securing legal

advice on a common matter. *Oxy Resources California, LLC v. Superior Court*, 115 Cal. App. 4th 874 (Cal. Ct. App. 2004); California Civil Courtroom Handbook & Desktop Reference §21:22 (2010 ed.).

California’s approach differs from that of federal courts in that federal courts recognize a distinct joint-defense privilege. The federal joint-defense privilege extends the attorney-client privilege to disclosures made in the presence of two or more clients who share a common interest in a legal matter. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995). The federal joint-defense privilege will protect communications that were made in the course of a common defense effort so long as the statements were designed to further the effort and the privilege has not otherwise been waived. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922–23 (8th Cir. 1997); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685 (S.D. Cal. 1996).

The distinction between the federal approach and the California approach is important. California has not created a new privilege but rather has carved out an exception to the general waiver rules for existing attorney-client and attorney work product privileges. Federal law, on the other hand, created a new and distinct privilege for joint-defense communications.

Potential Liability for Attorneys

By entering into a joint-defense consortium or joint-defense agreement with other defendants on behalf of a client, an attorney opens the door to potential liability for professional negligence under implied attorney-client, fiduciary, and third-party beneficiary relationships with the other defendants.

Some state courts have recognized that despite the general privity of contract rule an attorney’s liability for professional negligence may expand to a non-client if that party was the intended beneficiary of the attorney’s services or the foreseeability of harm to that party due to the attorney’s professional negligence outweighs other policy considerations. *St. Paul Title Co. v.*

Meier, 181 Cal. App. 3d 948, 950 (1986). For this reason, it is imperative that attorneys exercise caution when filing joint motions or otherwise furthering the common interests of a joint-defense consortium.

Unintended Attorney-Client Relationship

Even in early cases involving joint-defense efforts, courts recognized that in a joint-

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defense arrangement “the counsel of each was in effect the counsel of all.” *Chahoon v. Commonwealth*, 62 Va. (21 Grat.) 822, 841–42 (1871). Many courts have held that a joint-defense agreement does in fact create an implied attorney-client relationship between counsel for one defendant and the other defendants participating in a joint-defense consortium. See *U.S. v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000); *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979); *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977). Whether an attorney-client relationship exists is a question determined by a court based on substantive law and the individual facts of a case. Courts will typically consider written agreements, intent of the parties, and other indicia of an attorney-client relationship in determining whether an implied attorney-client relationship exists. *Ageloff v. Noranda, Inc.*, 936 F. Supp. 72, 76, (D.R.I. 1996).

If a court determines that a joint-defense agreement did in fact create an implied attorney-client relationship, what professional responsibilities and ethical obligations accompany that implied attorney-client relationship? Courts tend to agree that an attorney will owe some duty to the members of the joint-defense

group upon receiving confidential information; however, courts have not agreed on the scope of that duty or whether the attorney owes professional ethical duties as well. *City of Kalamazoo v. Michigan Disposal Service*, 151 F. Supp. 2d 913, 914 (holding that the attorney had a direct attorney-client relationship with a member of the joint-defense group under the terms

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of the joint-defense agreement signed by each member so that he could be disqualified as counsel due to the risk of disclosing confidential information); *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977) (agreeing that counsel for one becomes counsel for all codefendants in a joint-defense context, but holding that in that situation counsel owes fiduciary duties to codefendants and thus cannot proceed against them in a subsequent substantially related matter if he received confidential information in preparing a joint defense).

The ABA Standing Committee on Ethics and Professional Responsibility found that an attorney representing one defendant participating in a joint-defense consortium would not owe ethical obligations to other members of the joint-defense consortium because the Model Rules do not impose such an obligation. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-395, at 4 (July 24, 1995). However, the same opinion recognized that an attorney would almost surely have a fiduciary obligation to the other members of the consortium, which might well lead to his or her disqualification from a representation.

It is not clear exactly what obligations an attorney owes under an "implied" attorney-client relationship, but many courts agree that in such circumstances an attorney owes

the other joint-defense agreement defendants a duty of confidentiality and a duty to avoid conflicts of interest such that the attorney could be disqualified from representing the other joint-defense agreement members in pending or subsequent litigation in certain circumstances. However, other courts have been reluctant to impose on attorneys a duty of loyalty to their client's co-defendants. *U.S. v. Stepney*, 246 F. Supp. 2d 1069, 1082-83 (N.D. Cal. 2003).

United States v. Henke, 222 F.3d 633 (9th Cir. 2000), demonstrates the risks associated with establishing an implied attorney-client relationship through a joint-defense agreement. In *Henke*, three criminal defendants entered into a joint-defense agreement whereby they shared privileged information with each other. One of the defendants, Suren Gupta, accepted a plea deal with the government and was then called as a witness in a trial against the other codefendants, Chan Desaigouadar and Steven Henke. While on the stand, the former codefendant Gupta's testimony conflicted with statements that he made in confidence during a pretrial, joint-defense meeting. Neither Desaigouadar's nor Henke's attorney could cross-examine the witness, Gupta, without revealing information that they received in confidence under the joint-defense agreement, and the witness's attorneys threatened the other defense attorneys with legal action if they failed to protect the witness's confidences. Desaigouadar and Henke appealed their convictions on the grounds that a conflict of interest prevented their attorneys from cross-examining a key government witness, Gupta. The court recognized that both Desaigouadar's and Henke's attorney had an implied attorney-client relationship with the witness, Gupta, through the joint-defense agreement and that the government's use of the former codefendant, Gupta, as a witness during the trial created a conflict of interest that impaired Desaigouadar's and Henke's attorneys' ability to cross-examine Gupta. *Id.* at 635. The court held that the circumstances warranted disqualifying Desaigouadar's and Henke's attorneys from representing them, as well as a new trial. *Id.*

Courts have also held that an attorney can be disqualified from proceeding against the former codefendant of a former client just as he or she could not

proceed against a former client if confidential exchanges of information took place between the various codefendants in preparation for their joint defense. *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977).

Some courts, on the other hand, have not imposed on attorneys a duty of loyalty to their clients' codefendants as it would create a minefield of potential conflicts. *U.S. v. Stepney*, 246 F. Supp. 2d 1069, 1082-83 (N.D. Cal. 2003) (refusing to extend per se rule of disqualification simply because a duty of loyalty existed to a cooperating former codefendant).

Fiduciary Relationship

Attorneys representing one defendant in a joint-defense agreement generally owe certain fiduciary duties to the other defendants. This fiduciary duty arises by sharing and receiving confidential information. The Seventh Circuit held that a defense attorney breaches his or her fiduciary duty if he or she uses information obtained in a joint-defense meeting against the codefendant. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978). In such a situation, a defense attorney can be disqualified from a representation based on his or her fiduciary duty and the conflict of interest it presents.

Third-Party Beneficiary Relationship

An attorney can also be held liable to his or her client's codefendant under a third-party beneficiary theory. Assume that under a joint-defense agreement, attorney for defendant 1 and attorney for codefendant jointly prepare and sign a motion for summary judgment. Attorney for defendant 1 then offers to file and serve it, but does not file it in time. As it turns out, the court would have granted the motion for summary judgment but for its tardiness. Codefendant then incurs substantial expenses in preparing for and trying the case. Attorney for defendant 1 could be found liable to codefendant under a third-party beneficiary theory.

Contractual Liability

An attorney who is party to a joint-defense agreement may also face contractual liability for breaching the terms of the agreement. An attorney in a joint-defense

agreement typically agrees to keep certain information received from codefendants confidential while at the same time the attorney owes his or her client a duty of utmost loyalty. When an attorney is forced to either breach the duty of loyalty to his or her client or the obligation to keep the codefendant's information confidential, the attorney will have a conflict of interest that may render him or her disqualified to represent his or her client or a subsequent client.

Risks to Clients

Joint-defense agreements are not only risky because of the increased liability exposure for attorneys. Defendants should also be wary because the joint-defense privilege is not as strong as the attorney-client privilege or attorney work product privilege. The joint-defense privilege is more easily lost or waived.

For example, if codefendants do not agree to assert the common-interest doctrine and underlying applicable privilege when responding to discovery requests or other compelled disclosures of materials or information covered by the joint-defense agreement, a client may lose certain privileges and an attorney may face liability for breaching his or her fiduciary duties to the other signatories to the joint-defense agreement. *OXY Resources Calif. LLC v. Sup.Ct. (Calpine Natural Gas LP)*, 115 Cal. App. 4th 874, 901–02 (ordering disclosure of some documents covered by a joint-defense agreement because the party producing and transmitting them to the other party did not assert privilege or oppose a motion to compel production).

As mentioned above, the joint-defense privilege is waived as soon as one of the joint defendants becomes an adverse party. See *In re Sunrise Secs. Litig.*, 130 F.R.D. 560, 573 (E.D. Pa. 1989); *Medcrom Holding Co. v. Baxter Travenol Labs., Inc.*, 689 F. Supp. 841, 844 (N.D. Ill. 1988) (“confidential communications between codefendants... are privileged against third parties except where the codefendants later become adversaries in litigation.”)

Some courts have even held that participants in a joint-defense agreement can unilaterally waive the privilege protection for their own communications. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980); *Matter of Grand Jury Sub-*

poena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975).

Limiting the Risks

There are many ways that attorneys and defendants can limit their exposure and risk when entering into joint-defense agreements. Before entering into a joint-defense agreement, defense counsel should develop a thorough understanding of the case and the theories of liability alleged against each defendant. When there is a reasonable likelihood that defendants could later become adversaries in the same litigation, defense counsel should refrain from sharing information that the client wants to keep confidential. The less likely it is that defendants could become adversaries, the more defendants can feel confident that the information that they share will remain privileged.

In cases in which defendants do not have the same or substantially similar legal interests, defense counsel should be extremely judicious in sharing privileged information or decline participating in a joint-defense consortium altogether. If a court finds that the shared communication did not further the common defense, the underlying attorney-client or attorney work product privilege would be waived upon voluntary disclosure to a third party.

If after reasonable consideration of the specific facts of a case, defense counsel concludes that entering into a joint-defense agreement will benefit their client, counsel should fully inform their client of the risks and benefits of entering into a joint-defense agreement. It is advisable and often necessary to secure a client's informed, written consent before entering into a joint-defense agreement on a client's behalf.

Before sharing any privileged information with other defendants, an attorney needs to ensure that a carefully drafted joint-defense agreement is in place and that it has been signed by each attorney and defendant involved in the joint-defense group. The provisions outlined below are not exhaustive and merely address some of the points that attorneys should consider including in a joint-defense agreement. See Paul W. Burke & Brian T. Moore, *The More the Merrier: The Challenges of the Joint Defense*, A.B.A. The Brief, Fall 2007, at 12 (including two examples of joint-defense agreements).

A defense attorney can minimize the risks associated with creating an implied attorney-client relationship and fiduciary duty by carefully drafting a joint-defense agreement. A joint-defense agreement should contain, at a minimum, the following provisions:

- No attorney-client relationship is intended nor created (either express or implied) between the codefendants and their respective counsel.
- Each party is represented exclusively by its own attorney.
- The agreement is not intended to interfere with the attorney's obligation to ethically and zealously advocate for his or her individual client.
- Each client waives any conflict of interest claim or right to disqualify from representation any attorney who receives confidential information pursuant to the agreement either now or in the future.
- Each client has had its individual counsel explain the agreement to it and each client understands it and each agree to abide by its terms.

To limit additional liability, the agreement should make the following points clear:

- The parties and their counsel are not obliged or under any duty to share information or materials.
- The agreement is not intended to make any party the agent of any other party for any purpose whatsoever.
- Any actions taken under the agreement are intended solely to benefit the attorney's individual client and not the other members of the joint defense agreement.

To limit an unintentional waiver of a privilege, the agreement must include the following provisions:

- The information shared will remain confidential and will not be disclosed to outside parties both during and after withdrawal from the joint-defense agreement without prior written consent of the party who made the information available, or without court order.
- Each party agrees to assert the common-interest doctrine and underlying applicable privilege when responding to any discovery request or other compelled disclosure of materials or information covered by the joint-defense agreement.
- No confidential communications and **Joint Defense**, continued on page 78

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derivative information obtained by virtue of the agreement shall be admissible in evidence in any proceeding arising from a claim made by one party to the agreement against the other party.

Conclusion

The use of joint-defense agreements is a

long-established, common practice among members of the defense bar. Such agreements, however, are not without peril. Defense attorneys should thoroughly screen a case at inception to determine if a joint-defense agreement is appropriate, and a change in circumstances among the defendants may require reevaluation down the line. If a joint-defense agreement is

appropriate, defense counsel should obtain the informed consent of the client and use precaution when disclosing privileged information. With sufficient foresight and a properly drafted joint-defense agreement, defense attorneys can limit risks to themselves and to their clients while still reaping the many benefits of a joint-defense agreement. 