

**ARRANGING FOR THE JOINT DEFENSE**

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**CHAPTER 8**

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## ARRANGING FOR THE JOINT DEFENSE

### I. INTRODUCTION

“Joint defense agreements,” also referred to as “Common interest agreements,”<sup>1</sup> can allow parties who have common interests in ongoing litigation, regulatory proceedings, or government agency investigations to coordinate the sharing of privileged information without destroying the privileged status of those communications.

The intended effect of such agreements is twofold: (1) to increase the number of persons to whom lawyers and clients may disclose otherwise privileged communications, and (2) to obligate other parties to maintain the confidence of such communications. Depending on the jurisdiction, a separate “joint defense privilege” may be recognized, as an independent basis for shielding communications among clients and/or their lawyers. In other jurisdictions, the “joint defense privilege” that forms the basis of such agreements may not be a separate basis for cloaking otherwise non-privileged information with privilege. Rather, in such jurisdictions, the “joint defense privilege” merely allows parties to share information that is privileged – for example, attorney-client communications for the purpose of rendering legal advice or attorney work product – among a “common interest” group, without effecting a waiver of privilege. Such jurisdictions treat the “joint defense agreement” as an extension of the attorney-client communications privilege. Of course, as in the typical lawyer client situation, the disclosure of confidential information to any person outside of the group waives the privilege to which such communications would otherwise be entitled.

The second aspect of joint defense agreements involves a mixture of contract law principles and case strategy. The goal of the joint defense agreement is to provide comfort among commonly situated defendants to litigation or subject of ongoing regulatory or agency investigations that materials and information shared about a common defense strategy will not be produced or shared with others by a member of the group.

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<sup>1</sup>Though some courts have noted a technical difference between “joint defense privilege” and “common interest privilege,” in most cases this distinction has no practical effect. See *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994).

Joint defense agreements can be rather straightforward agreements by which multiple clients may work with each other in an orderly, and confidential, fashion. On the whole, that is a correct assessment. But given the tenuous nature of “agreements,” like contract law, the exact implications of such agreement can often leave the parties to them confused and disappointed when things go wrong. The following discussion, then, is a broad overview of the basics of such agreements.

### II. WHAT PRIVILEGE LAW APPLIES?

Given the broad scope of litigation in which joint defense agreements are contemplated, which commonly involve clients located throughout the country if not the world, it is important to first determine what jurisdiction’s law will likely govern the common defense arrangement. Although “joint defense” principles have much in common throughout United States jurisdictions, some jurisdictions provide only common law principles, while other jurisdictions, such as Texas, have “codified” the privilege to a certain extent. TEX. R. EVID. 503(b).

As indicated above, some jurisdictions recognize a “joint defense privilege,” that exists separate and apart from other forms of privilege. See, e.g., *In re Beville, Bresler & Schulman Asset Management*, 805 F.2d 120, 126 (3d Cir. 1986). Other jurisdictions may recognize a “joint defense privilege” only to the extent that it allows otherwise privileged material, such as attorney work product, to be shared between separately represented clients without effecting waiver of privilege. See, e.g., *United States v. Bay State Ambulance & Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989) (recognizing that “joint defense privilege” is an extension of the attorney-client privilege). As Judge Patrick Higginbotham wrote as a district judge in 1981, “Federal courts, including the Fifth Circuit Court of Appeals, have endorsed the joint defense exception to the general rule that no privilege attaches to communications made in the presence of third parties.” *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

For these reasons and others, prior to entering into a joint defense agreement, it is important to determine which law will likely govern the common defense relationship between the parties.

**A. Types of Joint Defense Agreements**

A joint defense agreement can be written or oral. However, reliance on an oral joint defense agreement can be problematic, especially when the existence of the agreement is questioned by a third party or a party to the agreement. *See In re Bevill*, 805 F.2d at 126 (claim of joint defense privilege rejected, with court noting claimant “produced no evidence the parties had agreed to pursue a joint defense strategy”).

**B. Advantages of Written Joint Defense Agreements**

For this reason, parties often find it appropriate to memorialize the common defense agreement in writing. A written joint defense agreement has the following advantages:

1. It binds the parties, commonly through their counsel, to an understanding of the common interest and the privileged nature of communications pursuant to that agreement.
2. It allows the parties to memorialize the intent of the agreement, which is (as recognized under state and federal law) an appropriate method of assisting in the defense of disputed claims.
3. It specifies the parties that are entitled to claim that they were a part of the joint defense effort.
4. It allows the parties to specify the duration of the privilege to be asserted (i.e., even after a particular piece of litigation has terminated).
5. It can avoid controversy over potential disqualification issues.
6. It can allow parties to be notified in advance of third-party requests for information subject to the joint defense agreement.
7. It can provide remedies for breach of the agreement, including potential injunctive relief.
8. It can specify that shared information will not be disclosed in any subsequent controversy between the parties.
9. It can set the scope of “confidential” information, and except from the scope a party’s use of its own information and use of information obtained through other means.
10. It can limit the scope of “joint defense” obligations, to avoid claims that a participant has not “done enough” pursuant to the agreement.

With respect to the last point, as contrasted to the relationship between clients of the same lawyer, there need not be any joint defense agreement that the parties involved must share all relevant information. Thus, confidential communications disclosed to only some members of the arrangement can remain privileged against other members as well as against the rest of the world. *See, e.g., Vermont Gas Sys., Inc. v. United States Fidelity & Guar. Co.*, 151 F.R.D. 268, 277 (D. Vt. 1993) (common interest of insured and insurer in challenging EPA claims no basis for forced disclosure of privileged communication between insured and separate lawyer regarding coverage issue).

Because of this ability to narrow the scope of joint defense agreements, they are often tailored to specific cases. Most often they are used in mass tort, multi-defendant litigation, resulting in discussions by co-defendants (or co-plaintiffs) regarding discovery, pre-trial issues, and defense strategy. Other groups limit their agreement to one specific area, for example, medical discovery. *See Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordinating Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 388-92 (2000) (discussing the Bendectin and breast implant litigation).

Attached to this article is a form of joint defense agreement, for illustration purposes only. The particulars of the joint defense agreement must match the needs of the parties and the circumstances of ongoing litigation or investigations.

**III. IMPLEMENTING THE JOINT DEFENSE AGREEMENT**

Regardless of form, however, there must be an agreement to preserve the confidentiality of communications. *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989); *In re LTV Securities Litigation*, 89 F.R.D. 595, 604 (N.D. Tex. 1981). The party asserting the privilege must establish that: (1) the communication was made in the course of a joint defense effort; (2) the communication was designed to further that effort; (3) the communication was made with an expectation of confidentiality; and (4) the privilege has not been waived. *In re Bevill*, 805 F.2d at 124-26.

**IV. JOINT DEFENSE/STRATEGY**

Typically, only those communications made in the course of an ongoing common defense or

strategy, and intended to further that goal, are protected. *Schwimmer*, 892 F.2d at 243. The arrangement must be in furtherance of a joint strategy, rather than simply cooperating for business reasons. See *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999); *In re Gibco, Inc.*, 185 F.R.D. 296, 299 (D. Colo. 1997); *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 19 (E.D.N.Y. 1996).

**V. REQUIRED "COMMON INTEREST"**

The "common interest" requirement is codified in Texas Rule of Evidence 503(b)(1)(C); *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.). Rule 503 states, in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

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(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of *common interest* therein ....

(Emphasis added.) Courts have found parties to have a "common interest" subject to joint defense privilege when, among other things:

- (a) They are parties to the same lawsuit;
- (b) They are about to be parties in the same lawsuit, "making their communications in anticipation of litigation"; or
- (c) They have common defenses against a plaintiff.

*Ryals v. Canales*, 767 S.W.2d 226, 228 (Tex. App. – Dallas 1989, orig. proc.).

Any communications falling under the protection of the joint defense agreement must relate to the common interest, which may be legal, factual, or strategic. See *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). That said, the fact that clients with common interests also have interests that conflict does not mean that communications on matters that are of common interest are non-privileged. See *Eisenberg v. Ganon*, 766 F.2d 770, 787-88 (3d Cir. \_\_\_\_\_)

(communications between lawyer for insurer of law firm, law firm, and member of law firm to develop common strategy privileged despite conflict). Indeed, information may be exchanged about parallel lawsuits or even non-litigated issues. See *AT&T*, 642 F.2d at 1299; *United States v. United Technologies Corp.*, 979 F. Supp. 108 (D. Conn. 1997).

However, as with all assertions of privilege, the party seeking to assert the privilege bears the ultimate burden of showing that a particular document was prepared as part of the joint defense. For example, in *Bay State Ambulance*, the court found that a document created by a company's consultant, at the request of company counsel, was not subject to joint defense privilege. 874 F.2d at 29. The court based its finding on the fact that the consultant did not inform his individual attorney about creation of the document until months after it was provided to the company, which "raises the inference that the information was not intended to be used for that person's defense much less a *joint* defense." *Id.*

**VI. COMMUNICATION MUST BE IN CONFIDENCE**

This requirement simply restates a condition of the attorney-client privilege. See TEX. R. EVID. 503(b)(1)(C). Thus, any communication between attorneys and clients made in the presence of third parties has the effect of waiving the privilege as to those specific communications. *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985). As with the attorney-client privilege, the presence of a person who is not shown to be part of the "privileged" group will destroy the privilege. See, e.g., *In re Grand Jury Subpoena*, 406 F. Supp. 381, 392-93 (S.D.N.Y. 1975).

As a general rule, however, courts have held that that the joint defense privilege cannot be waived with regard to all defendants without the consent of all the parties to the joint defense agreement. *Imperial Corp. of America v. Shields*, 179 F.R.D. 286 (S.D. Cal. 1998).

**A. Whose Communications Are Covered By The Privilege?**

The privilege obviously covers communications among lawyers party to a joint defense agreement. Given the complexity of the cases in which such agreements are needed, the rules have been modified to expand the types of persons and quality of communications that fall under the privilege.

For example, in *Schwimmer*, *supra*, information shared with an accountant hired by a co-defendant's attorney that was used to further the interests of the joint defendants was deemed to fall under the privilege. *Schwimmer*, 892 F.2d at 143.

In the insurer/insured situation, an exception has developed for sharing information with an insurer that has a duty to defend, has retained counsel, and has the right to control that counsel. *In re Imperial Corp. of America*, 167 F.R.D. 447, 455 (S.D. Cal. 1995).

The privilege has even been extended to potential parties, as long as there is a reasonable basis for the belief the potential person will become a party to the action. *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

**B. Standing To Assert The Privilege**

Any member of a party to the joint defense agreement may invoke the privilege against third persons, even if the communication at issue was not originally made by or addressed to the objecting party. *See, e.g., Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F. Supp. 1393, 1400-02 (D. Del. 1994) (discussing similar cases).

**VII. DISCLOSURE TO GOVERNMENT AGENCIES**

It goes without saying that joint defense agreements, at least in the form discussed here, will not be entered into by the government. However, they do appear in a different variation, often referred to as "no waiver agreements," involving the government.

By way of example, corporate clients facing a white collar criminal case often share the results of an internal investigations with a governmental agency. By doing so, they take the risk of alerting the government to facts and witnesses it had not previously discovered. The end result of such disclosures can be waiver in subsequent litigation between the agency and the client.

"No waiver agreements" generally attempt to obligate the government to maintain the confidentiality of information and not to challenge the disclosure as a waiver. Courts are split on whether such agreements control. *Compare In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, No. 00-6059, 2002 WL 1270187 (6th Cir. June 10, 2002), with *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978). In *Columbia/HCA*, an agreement between

*Columbia/HCA* and the government that the initial disclosure did not constitute waiver was without effect in subsequent civil litigation. *Columbia/HCA*, 2002 WL 1270187 at \*1.

The *Columbia/HCA* case is an interesting case worthy of extensive discussion regarding selective waiver and no waiver agreements. Such a discussion is beyond the scope of this article. Suffice it to say, however, it has important implications for anyone representing clients before government agencies.

**VIII. DISCOVERABILITY**

Joint defense agreements are considered to be a type of attorney work product. As such, courts are unlikely to order their discovery. *See, e.g., A.I. Credit Corp. v. Providence Washington Ins. Co., Inc.*, 1997 WL 231127 at \*4 (S.D.N.Y. 1997).

In Texas, Rule 193.3 of the Texas Rules of Civil Procedure seems to explicitly exempt joint defense agreements from being discovered. The rule states, in part:

(c) *Exemption.* Without complying with paragraphs (a) and (b), a party may withhold privileged communication to or from a lawyer or a lawyer's representative or a privileged document of a lawyer or a lawyer's representative—

- (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution of defense of a specific claim in the litigation in which discovery is requested; and
- (2) concerning the litigation in which the discovery is requested.

However, surprisingly few cases have addressed the issue of whether joint defense agreements and standstill agreements are discoverable and/or admissible. The courts that have addressed the issue have reached differing results. In *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384 (N.D.N.Y. Sept. 28, 1992), for example, the government brought a criminal action against several defendants and argued that if a joint defense agreement existed between the defendants, the agreement must be provided to the government. The magistrate denied the government's request for a copy of any existing joint defense agreement, stating as follows:

The defendants argue that if an agreement exists, the Government has no right to see any part of it. Additionally, defendants claim that the handing over of such an agreement to the Government would be tantamount to disclosing the type of defense that the defendants were considering, as well as whether defendants felt that they had common interests.

This court does find that the disclosure of the existence of such an agreement would be an improper intrusion into the preparation of the defendants' case. Thus, this court will deny any motion by the Government to be provided with any joint defense agreement should one exist.

*Id.* at \*6.

In *A.I. Credit Corp. v. Providence Washington Ins. Co.*, No. 96 Civ. 7955, 1997 WL 231127 (S.D.N.Y. May 7, 1997), the plaintiff moved the court to reconsider its decision to allow one attorney to represent both defendants. The plaintiff contended that the court should defer any decision until after the plaintiff obtained and reviewed the defendants' joint defense agreement. The magistrate, citing only the *Bicoastal* case, held that "it is unlikely that [plaintiff] will be provided any discovery of or about the joint defense agreement, since joint defense agreements are generally considered privileged." *Id.* at \*4.

In *United States v. Hsia*, 81 F. Supp. 2d 7 (D.D.C. 2000), however, the court, in dicta, indicated that joint defense agreements may be discoverable, stating:

The defendant and the intervenors consistently have maintained that both the existence of a joint defense agreement and its terms are privileged matters. The defendant and intervenors have cited three cases to support their assertions: *A.I. Credit Corp. v. Providence Washington Ins. Co., Inc.*; *United States v. Bicoastal Corp.*; and *In the Matter of the Two Grand Jury Subpoenas Duces Tecum Dated January 5, 1995*. As the government has pointed out, two of these cases are decisions by magistrate judges in other jurisdictions and the third is an unreported New York State Supreme Court decision, only a summary and excerpt of which have

been provided by counsel. The facts in the cited cases are very different from those here, and none of the decisions contains any analysis; indeed, the court in *A.I. Credit* merely cited *Bicoastal* without discussion. These decisions do not convince this Court that either the existence or the terms of a JDA are privileged.

*Id.* at 11 n. 3 (citations omitted).

In *Tribune Co. v. Purcigliotti*, No. 93 Civ. 7222, 1997 WL 540810 (S.D.N.Y. Sept. 3, 1997), the plaintiffs brought a RICO action against several hundred individuals alleging that they conspired to file false hearing loss claims. The defendants sought discovery of a standstill agreement (that was part of a joint defense agreement) between the plaintiffs and a law firm that had acted as their agent in settling the hearing loss claims. The defendants argued that if an agreement was reached to reserve the plaintiffs' right to sue the law firm, it may have relevance to the reasonableness of the firm's conduct in settling the claims, and therefore to whether fraud could be established against the defendants. The magistrate held as follows:

I agree that under the liberal definition of relevancy in the Federal Rules of Civil Procedure, the standstill agreement may lead to the discovery of admissible evidence, and therefore, it must be produced.

The mere assertion that the standstill agreement is part of a joint defense agreement between [the law firm] and plaintiffs fails to establish the basis of any privilege that would protect its disclosure. The standstill agreement is a discrete portion of the joint defense agreement. It has not been shown to be a confidential communication giving or seeking legal advice, or embodying work product. Whether or not [the law firm] and plaintiffs have a joint defense strategy, their position regarding potential future litigation against each other would not reveal their legal thinking or strategy with regard to their pursuit of their claims against the plaintiffs in this action. If anything, the standstill agreement relates to potential interests of [the law firm] and plaintiffs that are adverse, not common. Therefore, since no legitimate basis for any privilege has been articulated or demonstrated, the standstill agreement must be produced.