

Presenting a live 90-minute webinar with interactive Q&A

Drafting Joint Defense Agreements: Protecting the Privilege, Sharing Work Product, Avoiding Disqualification

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Joint Defense Agreements

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Introduction – Joint Defense / Common Interest Agreements

- Program Overview
 - Recurring questions on enforceability, discoverability, and application outside of the litigation context
 - Privilege considerations
 - Jurisdictional differences
 - JDAs in the criminal context
 - Ethical considerations
 - Recent developments in case law

Introduction – Joint Defense / Common Interest Agreements

- A joint defense agreement is an agreement between two or more parties with a common interest that want to preserve the attorney-client privilege.
- The joint defense privilege is an extension of the attorney-client privilege that allows for communications between members of a joint defense without waiving the privilege.
- Joint defense agreements/ common interest agreements can greatly benefit your clients.
 - Consistency, resources, uniformity, coordination.
- Entering into a JDA/Common Interest agreement is not without risks
 - Motivations of parties entering into JDA (competition)
 - Diverging perspectives (companies and individuals)
 - Settlement
 - Conflicts and disqualifications

Developments in Enforceability

- Commonality
 - *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012)
 - *Patagonia, Inc. v. Anheuser Busch, LLC*, 2020 WL 6260020, (C.D. Cal. June 12, 2020)
- Business Interests
 - *Am. Bottling Co. v. Repole*, 2020 WL 2394906 (Del. Super. Ct. May 12, 2020)
 - *Heartland Consumer Prod. LLC v. DineEquity, Inc.*, 2018 WL 3574737 (S.D. Ind. July 25, 2018)
 - *Crane Sec. Techs., Inc. v. Rolling Optics, AB*, 230 F. Supp. 3d 10, 20 (D. Mass. 2017)
- Use of Written Agreements
 - *SEC v. Rashid*, 17-cv-8223 (PKC) (S.D.N.Y. Dec. 13, 2018)

Discoverability of Joint Defense/Common Interest Agreements

- Whether Joint Defense Agreements are considered privileged or work product depends on the jurisdiction.
- An agreement may be protected from disclosure if it contains sensitive information.
 - *Steuben Foods, Inc. v. GEA Process Eng'g , Inc.*, 2016 WL 1238785 (W.D.N.Y. Mar. 30, 2016)
- Courts will review agreements *in camera* on a motion to compel production to make a determination.
- Include provisions in the joint defense agreement to help safeguard against disclosure:
 - Confidentiality and nondisclosure provisions
 - Agreement on confidentiality designations for materials exchanged between the parties subject to the agreement. For example “PRIVILEGED AND CONFIDENTIAL: JOINT DEFENSE/COMMON INTEREST MATERIALS”

Privilege Considerations

- The joint defense privilege is limited and does not always protect communications between parties to joint defense agreements.
 - Must understand the limits of the protection from disclosure.
 - *United States v. Anthem, Inc.*, 1:16-cv-01493 (ABJ), 2016 WL 8461264 (D.D.C. Oct. 6, 2016)
- In general, communications between parties to a joint defense agreement are protected if the communications relate to:
 - (i) Topics about which the parties have a common interest;
 - (ii) an actual or anticipated litigation;
 - (iii) the parties' common interest; and
 - (iv) are made in furtherance of that common interest.
- **Practice Pointers:**
 - At a minimum, include an express provision that communications between parties subject to the JDA/common interest agreement does not waive privilege
 - State that waiver can only be by consent of all the parties.

Privilege Considerations – Scope of Privilege

- What may not be covered under a joint defense agreement?
 - Communications between clients without the presence of either party's counsel;
 - *United States v. Krug*, 868 F.3d 82 (2nd Cir. 2017)
 - *Patagonia, Inc. v. Anheuser Busch, LLC*, No. CV1902702VAPJEMX, 2020 WL 6260020 (C.D. Cal. June 12, 2020)
- What should be covered under a joint defense agreement?
 - Communications with third parties, such as outside consultants and experts engaged by Counsel or Client in connection with the litigation
 - *United States v. Schwimmer*, 892 F.2d 237 (2nd Cir. 1989)
- **Practice Pointers**
 - Include a provision in the JDA expressly identifying the scope of those covered under the agreement, such as accountants, investigators, in-house counsel employees.
 - Expressly state that communications falling 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.
 - Discuss with clients what types of conversations are covered under a JDA/common interest agreement.

Joint Defense/Common Interest Agreements: Jurisdictional Considerations

- Across jurisdictions, there is a lack of uniformity in recognition and application of the joint defense/common interest doctrine.
 - Common Interest
 - Identical vs. Aligned?
 - Legal or Commercial?
 - Absence of Pending or Anticipated Litigation
 - In most jurisdictions, parties do not need to “reasonably anticipate” litigation, *see Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015)
 - New York requires pending or anticipated litigation, *see Ambac Assur. Corp. v. Countrywide Home Loans, Inc. Inc.*
 - Discoverability of JDAs/Common Interest Agreements
 - Not Discoverable: *Metro. Prop. & Cas. Ins. Co. v. Savin Hill Fam. Chiropractic, Inc.*, No. CV 15-12939-LTS, 2018 WL 11424180, at *3 (D. Mass. Sept. 7, 2018)

Joint Defense Agreements in Criminal Cases

- In a criminal investigation or prosecution, a JDA functions similarly to a joint defense or common interest agreement in the civil context, with some added considerations.
 - Cooperation with government
- Practical considerations for drafting a JDA in a criminal context
 - Define “cooperation”
 - Proffers to the government enough to require withdraw?
 - Informal negotiations?
 - Clearly identify what the withdrawing party must return and/or destroy.
 - Prohibit communications with the government about information obtained during the JDA by the withdrawing party.

Joint Defense Agreements in Criminal Cases

The DOJ's Official Policy on JDAs Has Changed Over Time

- **Holder Memo:** Under the Holder Memo (1999), a company's decision to form a JDA was to be considered by the government when deciding whether to bring charges against the company itself.
- **Justice Manual § 9 28.700:** "Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit."
- **DOJ Awarded Cooperation Credit:** Until September 2015, the DOJ awarded cooperation credit to corporations on a spectrum based on the corporation's degree of cooperation.
- **Yates Memo:** Under new guidelines, issued in a memo by then Deputy Attorney General Sally Yates, the DOJ will no longer give any cooperation credit to corporations seeking leniency unless they divulge all facts about individual employee misconduct.

Joint Defense Agreements After the Yates Memo

- Companies must now balance the benefits of JDAs against the potential loss of cooperation credit if the government decides a company has not sufficiently implicated individual employee wrongdoers.
- The Yates Memo may chill the entering into and the sharing of facts pursuant to JDAs by leaving JDAs vulnerable to attack based on arguments that the parties lack a “common interest.”
 - Limits a company’s ability to conduct thorough internal investigation
 - Limits an individual’s ability to defend itself in a government investigation

Practice Pointers

- A written agreement setting forth the specific grounds for finding commonality of interests and the terms of post-withdrawal sharing of information may be preferable.
- **Client is a Company**
 - Seek feedback from the government on its view of whether particular individuals have common interests with the company and whether it's concerned about a JDA's application in the civil litigation context.
 - When retaining separate representation for current employees, company counsel should consider the potential impact on the joint defense privilege.
- **Client is an Individual**
 - Exercise care in what information it shares with company counsel and the manner in which that information is shared.

Ethical Considerations

- Creation of Attorney-Client Relationship
 - *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000)
 - ABA Opinion 95 395
- Risk of Disqualification
 - *Diva Limousine Ltd. v. Uber Technologies Inc.*, No. 18-cv-05546-EMC, 2019 BL 8013 (N.D. Cal. Jan. 9, 2019)
 - *In re Gabapentin Pat. Litig.*, 407 F. Supp. 2d 607, 610 (D.N.J. 2005)
- Advance Waiver of Potential Conflicts
 - *Patel v. United States*, 2022 WL 17850147, at *15 (D.N.J. Dec. 22, 2022)
 - *United States v. Lacey*, 2018 WL 4953275, at *4 (D. Ariz. Oct. 12, 2018)

Practice Pointers for Avoiding Ethical Pitfalls

- Always include language in the JDA that disclaims creation of attorney-client privilege and all rights to seek disqualification of attorneys in joint defense groups.
- Include specific waivers in JDA:
 - Cross-examination and possible impeachment of any defecting JDA member
 - Seeking disqualifications based on lawyers' moves to new firms
 - Express permission of other lawyers representing clients in matters adverse to other joint defense members.
- Have lawyers sign the JDA in individual capacity, not on behalf of the firm.

Joint Defense Agreements

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Joint Defense/Common Interest Agreements

- If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68- 72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
- Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.
- Restatement (Third) of the Law Governing Lawyers § 76 (2000)

Joint Defense/Common Interest Agreements

- Must both parties be represented by counsel when they share privileged information for the common interest doctrine to apply?
- Were accountants necessary agents of an attorney such that communications with those accountants were entitled to protection as attorney-client communications?
- Brauner v. Valley, 101 Mass. App. Ct. 61, 72, 187 N.E.3d 439, 450, review denied, 490 Mass. 1105, 195 N.E.3d 898 (2022)

Joint Defense/Common Interest Agreements

- Is an interest shared between parties merely a business interest?
- What is the significance of “threatened” lawsuits?
- How much time can pass without parties entering into a JDA and still have protection?
- Must parties act in concert? Or is a “common interest” sufficient?
- In re: NORTHWEST SENIOR HOUSING CORPORATION Debtor.
NORTHWEST SENIOR HOUSING CORPORATION, Plaintiff, v.
INTERCITY INVESTMENT PROPERTIES, INC. AND KONG
CAPITAL, LLC, Defendants., No. 22-30659, 2023 WL 1804625,
at *6 (Bankr. N.D. Tex. Feb. 6, 2023)

Joint Defense/Common Interest Agreements

- When can a third party be a functional equivalent of an employee such that disclosure to the third party is not a waiver of the common interest privilege?
- When does the functional equivalent doctrine apply?
- Spectrum Dynamics Med. Ltd. v. Gen. Elec. Co., No. 18CV11386VSBKHP, 2021 WL 4131650, at *3 (S.D.N.Y. Sept. 9, 2021)

Joint Defense/Common Interest Agreements

- Are defendants in separate litigation who share an outside vendor entitled to the protection of their JDA?
- RJ v. Cigna Health & Life Ins. Co., No. 20CV02255EJDVKD, 2023 WL 187565, at *1 (N.D. Cal. Jan. 13, 2023)
- Must the shared legal interest be identical?
- Or is a similar legal interest sufficient?
- Can the common interest privilege apply at certain times and not others during an ongoing relationship?
- Norris v. City & Cnty. of Denver, No. 120CV01226DDDSKC, 2022 WL 17340403, at *3 (D. Colo. Nov. 30, 2022)

Joint Defense/Common Interest Agreements

- Does information exchanged during a joint defense lead to later attorney disqualification?
- Is there an implied attorney-client relationship or other duty of confidentiality arising under a JDA?
- Kragel v. Virgin Islands Water & Power Auth., No. CV 2021-78, 2022 WL 17847083, at *6 (D.V.I. Dec. 22, 2022), objections overruled sub nom. Kragel v. Water, No. CV 21-78, 2023 WL 346208 (D.V.I. Jan. 19, 2023)

Joint Defense/Common Interest Agreements

- Whether it is an ethical violation for an attorney who formerly represented a client under a joint defense agreement to subsequently bring a case involving that client's financial interests.
- SinglePoint Direct Solar, LLC v. Curiel, No. CV 21-00989-PHX-JAT, 2022 WL 17418428, at *3 (D. Ariz. Dec. 5, 2022)

Joint Defense/Common Interest Agreements

- Whether Minnesota recognizes the common interest doctrine.
- Energy Pol'y Advocs. v. Ellison, 980 N.W.2d 146, 152–53 (Minn. 2022)

Joint Defense/Common Interest Agreements

- Whether the Fifth Circuit has declined to extend the common interest privilege beyond co-defendants or potential co-defendants.
- Whether a JDA must be in place in order for the common interest privilege to apply in the Fifth Circuit.
- Luckenbach Texas, Inc. v. Engel, No. 1:19-CV-00567-DH, 2022 WL 9530041, at *4 (W.D. Tex. Oct. 14, 2022)

Joint Defense/Common Interest Agreements

- Whether a plaintiff and a defendant may have a commonality of interest against a different defendant in the same action.
- Buchman v. Kitts Island, LLC, No. FSTCV205023358S, 2022 WL 1059504, at *2-3 (Conn. Super. Ct. Mar. 24, 2022)

Joint Defense/Common Interest Agreements

- Is a common interest among defendants in obtaining a global resolution of the parties' disputes sufficient for the common interest doctrine to apply?
- GRANT KAISER & JOHN FURNISH, Plaintiffs, v. WILLIAM DEAN KIRCHICK, CAROL RUDNICK KIRCHICK, Individually & as Tr. of the 41 SEAVIEW TERRACE REAL ESTATE TRUST, & RONALD STEVEN RUDNICK, Defendants., No. CV 21-10590-MBB, 2022 WL 182375, at *6 (D. Mass. Jan. 20, 2022)

Joint Defense/Common Interest Agreements

- Whether the claimed common interest must be legal and not commercial only.
- Am. Mun. Power, Inc. v. Voith Hydro, Inc., No. 2:17-CV-708, 2021 WL 4891307, at *9 (S.D. Ohio Oct. 20, 2021)

Joint Defense/Common Interest Agreements

- Whether a plaintiff had waived the work product, attorney-client, and common interest privilege or protection by placing the internal investigation “at issue” in the litigation.
- Moore Freight Servs., Inc. v. Mize, No. E202100590COAR9CV, 2022 WL 325595, at *12 (Tenn. Ct. App. Feb. 3, 2022)

Joint Defense/Common Interest Agreements

- Whether beneficiaries of an estate share a common interest.
- Rodriguez v. Seabreeze Jetlev LLC, No. 420CV07073YGR, 2022 WL 3327925, at *8 (N.D. Cal. Aug. 11, 2022)

Joint Defense/Common Interest Agreements

- Whether each party to a JDA must be represented by counsel.
- Rodriguez v. Seabreeze Jetlev LLC, No. 420CV07073YGR, 2022 WL 3327925, at *8 (N.D. Cal. Aug. 11, 2022)
- Brauner v. Valley, 101 Mass. App. Ct. 61, 72, 187 N.E.3d 439, 450, review denied, 490 Mass. 1105, 195 N.E.3d 898 (2022)
- Buchman v. Kitts Island, LLC, No. FSTCV205023358S, 2022 WL 1059504, at *1 (Conn. Super. Ct. Mar. 24, 2022)
- Sandoz Inc. v. Lannett Co., Inc., 570 F. Supp. 3d 258, 270 (E.D. Pa. 2021)

Joint Defense/Common Interest Agreements

- Whether there must be an agreement for the common interest privilege to apply.
- ContiTech USA, Inc. v. McLaughlin Freight Servs., Inc., No. 320CV00075SMRSBJ, 2021 WL 6618846, at *6 (S.D. Iowa Nov. 24, 2021)
- 3rd Eye Surveillance, LLC v. United States, 155 Fed. Cl. 355, 360 (2021)

Joint Defense/Common Interest Agreements

- Whether the parties to a JDA must expressly indicate that they intend to pursue a particular defense together.
- Am. Mun. Power, Inc. v. Voith Hydro, Inc., No. 2:17-CV-708, 2021 WL 4891307, at *9 (S.D. Ohio Oct. 20, 2021)

Joint Defense/Common Interest Agreements

- What law controls in the absence of definitive guidance from state courts.
- Sandoz Inc. v. Lannett Co., Inc., 570 F. Supp. 3d 258, 268 (E.D. Pa. 2021)

Joint Defense/Common Interest Agreements

- How trial courts assess privilege logs in disputes over the common interest privilege.
- Am. Mun. Power, Inc. v. Voith Hydro, Inc., No. 2:17-CV-708, 2021 WL 4891307, at *11 (S.D. Ohio Oct. 20, 2021)
- 3rd Eye Surveillance, LLC v. United States, 155 Fed. Cl. 355, 361 (2021)