Considerations For Joint Or Common Defense Agreements

BY ARNOLD R. ROSENFELD

In previous columns I have discussed "Confidentiality And Attorney-Client Privi-
lege" (Feb. 19, 2001) and "Inadvertent Disclo-
sure Of Confidential Or Privileged Data" (Nov. 10, 2003). In essence, as most attorneys
are aware, the attorney-client privilege pro-
pects communications between a lawyer and
and client in instances when a client is seeking
legal advice to comply with the law.

However, there are an increasing number
of situations where courts have held the privi-
lege does not apply because the communi-
faction fell within the crime-fraud exception;
and it had been waived by partial disclosure, se-
lected disclosures to third persons, and/or
inadvertent disclosures, or by creating an "at
issue" waiver.

When lawyers are involved in multi-party
litigation, there are particular concerns about protecting attorney-client privilege
and work product information.

One area where the courts generally have
upheld the privilege and work product pro-
tections, even where there have been third-
party disclosures, is when there is a joint or
common defense agreement in place. United
States v. Bay State Ambulance, 874 F.2d 20
(1st Cir. 1989).

Common defense agreements are utilized
when there are clients who have some in-
terests in common in a matter, and where the
communications and sharing of privileged
communications and/or work product are part
of an effort to set up a common strategy. U.S.
v. Schoettiner, 802 F.2d 207 (2d Cir. 1989).

The justification for the joint defense privi-
lege is the belief that persons who share a
common interest in litigation should be able
to communicate with each other to more ef-
ficiently prosecute or defend claims in either
criminal or civil cases.

The joint defense privilege, therefore, is
an extension of the attorney-client privile-
ges and protects attorney-client privilege
and work product information even though the privileged communications are
disclosed to third parties.

In order for the common defense privilege
to apply, the proponent must demonstrate
that the privileged communication or the
work product was made or prepared in the
course of a joint defense effort in defending
or prosecuting an actual or threatened lit-
igation, the exchange of information was de-
signed to further the joint effort, and that
the privilege was not waived.

A general-purpose meeting to discuss
matters of common interest, that is not
intended to further the common purpose
of an enterprise, does not necessarily lead
to the inference that there is a joint de-

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There are some key elements that make it more likely than not that a
common interest agreement, and the protection of attorney-client
privilege and work product, will be recognized by the courts.

by or the scope of the agreement;
(3) Written agreements usually set out
clearly the duties of the parties when a par-
ty either withdraws or joins the agreement.
See, e.g. In re Grand Jury Subpoena,
supra, where the 1st Circuit rejected the
claimed oral joint defense agreement un-
supported by any evidence other than a
lawyer's affidavit. 274 F.3d at 569 (1st Cir.
2001).

There are some key elements that make it
more likely than not that a common interest
agreement, and the protection of attorney-
client privilege and work product, will be rec-
ognized by the courts. These are:
(1) a common in-
terest among the parties on which the agree-
ment is based,
(2) communications or materials that fall within the attorney-client privi-
lege or work product doctrine can be dis-
closed or revealed only to members or appro-
ved non-members (such as consul-
tants or experts) of the agreement;
(3) waiver can be only by consent of all the
parties;
(4) a reasonable expectation of confiden-
tiability, and the agreement itself must be con-

fense agreement.
U.S. v. Weissman, 195 F.3d 96 (2d Cir.
1999); see, also, In re Grand Jury Sub-
poena, 274 F.3d 563 (1st Cir. 2001),
where the 1st Cir-
cuit held that a
joint defense agree-
ment may only be
formed with respect
to the subject of po-
tential or actual lit-
igation and that the
privilege already
had been waived by
the corporation.

While it is not a re-
quirement that a com-
mon defense agree-
ment be in writing, it
is a better policy to do so. There are several rea-
sons for this:
(1) When a court examines whether there
was a joint defense agreement in effect, a
written document is strong evidence in favor
of a positive finding;
(2) A written joint defense agreement sets
out specific terms that bind the parties so
that there is no dispute on what is covered
with regard to conflict of interest, at least
one court has held that when the interests of
one member of the agreement become con-
flicted with other members, such as when
one member becomes a government witness
and has disclosed confidential information
as part of the joint defense agreement, the
lawyers for the other parties may not cross-
examine the turncoat witness and continue
to represent co-defendants without violating
ethical duties to the government witness.
U.S. v. Henke, 222 F.3d 633 (9th Cir. 2000).

In addition, courts also have held that a
common defense agreement can create a
fiduciary duty to parties who are not their
clients if, for example, a party utilizes the in-
formation learned through the agreement to
the advantage of one party over another.

There are cases where lawyers have been
disqualified from their representation and
other cases where the courts have not
 waived a lawyer who is part of a com-
mon defense agreement, depending whether
there was confidential information disclosed
to the lawyer from the aggrieved party.

When entering into a common defense
agreement, lawyers frequently request that each
counsel signify that he or she has no conflicts in the matter.

Finally, since one of the principal pur-
poses of a common defense agreement is the pro-
tection of attorney-client privilege and work
product, the parties must be careful not to
waive the privilege by some other means not
covered in the agreement. American Bar As-
sociation Formal Opinion 95-395 discusses
some of the issues in more depth.

There clearly are advantages and dis-
advantages to entering into a common de-
ense agreement. When there are multi-
ple defendants in a civil or criminal case,
there often is pressure to join a common
defense agreement.

On the positive side, it allows information
to be shared while protecting privileged in-
formation, reduces costs, and enables legal
strategies to be developed based upon com-
munity intelligence.

On the other hand, entering into an agree-
ment with a party who is not trustworthy or
who has different motives than your client
can create significant problems.

Since a common defense agreement can
have both benefits and negatives, these ele-
ments must be carefully weighed in deciding
whether entering into such an agreement is
in the best interest of your client.