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Joint Defense Agreements: A Primer

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The carefully worded joint defense agreement (JDA) can be a necessary tool for attorneys involved in multi-defendant civil proceedings. A JDA is bolstered by the so-called “joint defense privilege,” which has evolved from the oldest privilege for confidential communications, the attorney-client privilege. Despite its deep roots, practitioners may still question whether a JDA is enforceable and, if so, how a written agreement between co-defendants can shield otherwise unprivileged communications.

This article will examine the history of this privilege along with the underlying justification for its acceptance in the Commonwealth. Moreover, this article will suggest some practice pointers to make effective use of the JDA in the civil context.

EVOLUTION

The “joint defense” or “common interest” privilege is essentially an extension of the attorney-client privilege, which is intended to foster a trusting, open attorney-client dialogue. In Pennsylvania, the attorney-client privilege has been codified by 42 Pa.C.S. sections 5916 and 5928 and applies in both criminal and civil matters to confidential communications made between a client and his or her



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attorney in connection with legal services, according to *Slusaw v. Hoffman*.

At the core of the attorney-client privilege is confidentiality. Accordingly, the presence of a third party during such attorney-client communications generally will waive the privilege. Likewise, the attorney-client privilege is lost if the client discloses an otherwise privileged communication to a third party, according to *Executive Risk Indem. Inc. v. Cigna Corp.*

This general rule does not apply, however, and the privilege is not waived, when the third party is counsel for a co-defendant participating jointly in the defense of a case pursuant to a JDA.

In *Commonwealth v. Scarfo*, the Superior Court stated that criminal defendants have the right to prepare a group defense and the right to communicate privately with counsel. It stated, “Constitutional principles forbid requiring a party to waive one of these rights in order to exercise the

other,” in *In re Condemnation by City of Philadelphia*, citing *Scarfo*. These principles have since been extended in Pennsylvania to civil cases, as per *Young v. Presbyterian Homes*.

In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that the communications were made in the course of a joint defense effort; the statements were designed to further that effort; and the privilege has not been waived, according to *In re Beville, Bresler and Schulman Asset Management Corp.* Importantly, the joint defense privilege will apply only to co-defendants with common interests in defending a pending or threatened civil or criminal proceeding.

THE THEORY BEHIND ENFORCING JDAS

In most circumstances, the attorney-client privilege may be lost where statements are made to counsel in the presence of a third party. This theory derives from the presumption that a client has no intention of maintaining confidentiality if a third party is present. On the other hand, it is logical to assume that conversations shared with mutual defendants battling a common adversary would also remain confidential.

Based on similar principles, it has been held in *Young v. Presbyterian Homes Inc.* that communications made by a client to investigators, paralegals, sec-

retaries or other employees of the client's attorney for the purpose of assisting in the representation of a client are considered confidential, privileged communications. Likewise, the attorney-client privilege is not waived where the third party shares a common interest in developing a legal strategy against identical claims, according to *Executive Risk*.

The opinion in *Young* states, "Where the third party is assisting in the defense of the litigation, either as an agent or employee of the client's attorney or as counsel for a co-defendant under a joint defense agreement, the only reasonable presumption is that the client intends the communication to be confidential."

Although there should be no question that a JDA is enforceable in Pennsylvania, there may be room to debate whether the joint-defense privilege promotes justice. Those opposed to the privilege may believe that it provides defendants with an unfair advantage by permitting them to "gang up" on a plaintiff, or lead to concerted efforts to increase plaintiff's counsel's fees, or otherwise improperly bully a lone, defenseless plaintiff.

To some plaintiffs, a JDA is inherently suspicious, conjuring images of defense attorneys meeting in hideouts and conspiring to thwart discovery. Moreover, opponents of the joint defense privilege may point out that the privilege conflicts with the core principles of the attorney-client privilege, i.e. confidential communications between an attorney and his or her client.

HOW AND WHEN TO UTILIZE A JDA

Generally, the defense bar should be aware of the availability of JDAs pursuant to the joint defense privilege whenever the following fact pattern emerg-

es: a multi-defendant litigation in which each defendant has retained separate counsel and the defendants maintain a common interest in defending against the plaintiff's claims.

In this context, so long as a JDA is in place, all communications between the defendants and their counsel, which would otherwise be protected by the attorney-client privilege but for the presence of the third party, will remain

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confidential. Pooling resources and developing joint strategy, particularly during the discovery phase, may streamline and economize the process for the defendants.

IS A WRITING NECESSARY?

Although it is not necessary to enter into a written JDA, it is good practice to do so. A written JDA provides counsel with the opportunity to add or subtract additional parties to the agreement during the course of the proceedings. Moreover, a written JDA increases clarity and reduces the risk of potential conflict of interest issues.

While a JDA may take many forms, the following recitations may promote its goals while reducing the likelihood of some potential pitfalls:

- The defendants have agreed to implement common defenses;

- The defendants seek to protect and preserve the confidentiality of communication and documents between and among them and their counsel;

- The defendants wish to preserve all other applicable privileges;

- The JDA shall not create an attorney-client relationship between the defendants' respective attorneys and the other defendants;

- The JDA will in no way affect or limit the right of any defendant to enter into a settlement agreement;

- The JDA shall not be the basis to attempt later to disqualify counsel by virtue of a perceived conflict of interest;

- The JDA does not create any cost-sharing responsibility; and,

- The JDA does not create any agency relationship between or among the defendants.

Hopefully this article has explained the structure, function and utility of the JDA and will assist practitioners in reaching desired results in multi-defendant litigation. •