JOINT DEFENSE GROUPS: SEVEN LESSONS LEARNED FROM THE COURTS IN THE PAST DECADE

Lana K. Varney
Benjamin A. Torres

King & Spalding LLP
500 W. 2nd Street Suite 1800
Austin, Texas 78701
lvarney@kslaw.com
btorres@kslaw.com

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INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

Session Title: *In a Relationship? It's Complicated: Achieving Harmony and Avoiding the Frustrations and Ethical Pitfalls of the National/Local Counsel Relationship*

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Presented by:
Lana K. Varney of King & Spalding, LLP
Lisa M. Floro of Coloplast Corp.
Trent Spurlock of Dinsmore & Shohl LLP
Wendy West Feinstein of Morgan Lewis

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I. Introduction

After the Covid-19 pandemic, inter-firm defense collaboration became easier than ever with global implementation of Zoom, Microsoft Teams and the like. But seemingly benign efforts of coordination can have big consequences down the road. If you are collaborating with other defense counsel, you just might be in a "joint defense group."

At its most basic level, the joint defense group is a consortium of defendants who work together to cooperatively respond to claims. Joint defense groups are often formally acknowledged in a writing called a joint defense agreement. But they can be oral. And they can be created by the facts.

The "alternative to a joint defense is sometimes destructive anarchy, with each defendant presenting a different theory of the case while blaming each other." Howard M. Erichson, *Information Aggregation: Procedural and Ethical Implications of Coordination Among Counsel In Related Lawsuits*, 50(2) DUKE L.J. 381, 405 (2000). "Frequently, the only litigant who benefits from a fractionalized 'every-man-for-himself' defense is the plaintiff." *Id.* at 405.

Participants in a joint defense group might coordinate in fact investigation, legal research, defense theories, or strive to mount a unified message in the face of the plaintiff's allegations. Moreover, privileges and protections can arise between the defendants participating in a joint defense group.

But these shields can quickly turn into swords. Just as there are benefits, there are risks, and indeed duties as well. Risks of collaboration, often involving an unforeseen adversity materializing between the co-defendants, come from the exchange of confidential information between members during the group's existence. As such, you might be in an implied attorney-client relationship with a former co-defendant, and not even know it.

In light of the high stakes, there is no shortage of scholarly writing on joint defense groups. *See*, *e.g.*, Scott M. Seaman & Rebecca Levy Sachs, *The Good The Bad and the Ugly About Joint Defense*, 28 FALL BR. 13 (Am. Bar Assoc. 1998); Bradley C. Narhrstadt & W. Brandon Rogers, *In Unity There is Strength: The Advantages (and Disadvantages) of Joint Defense Groups*, 80 DEF. COUNS. J. 29 (2013); Carrie A. Daniel, *An Unintended Consequence: Disqualification from Adverse Representation*, 47 (1) DRI FOR DEF. 31 (Jan. 2005); Joseph J. Ortego & David J. Vendler, *Avoiding Pitfalls of Joint Defense Groups*, 45 JUN FED. L. 30 (Fed. Bar Assoc. June 1998). The purpose of this paper is therefore not to rehash the law of joint defense groups. It is, rather, to propose practical solutions to real world problems that have arisen in litigation over the past decade.

In deciding whether to enter a joint defense group, the defense attorney should always be thinking about how relevant ethics rules might affect the representation. Common ethical pitfalls can stem from Model Rule 1.6 (Confidentiality of Information), Rule 1.7 (Conflict of Interest: Current Clients), Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules), Rule 1.9 (Duties for Former Clients), and Rule 1.10 (Imputation of Conflicts of Interest).

First, to calibrate the reader, this paper briefly summarizes broader benefits and disadvantages of joint defense group participation. We then look at lessons learned from seven decisions handed down in various jurisdictions over the last decade.

II. Why Participate in a Joint Defense Group?

a. Pros of Participating in a Joint Defense Group

There are multiple strategic and cost advantages to forming a joint defense group. Most obviously, the price tag of defending a lawsuit can be lowered for its participants. Defendants are able to distribute the expenses for legal research, fact investigation, preparing for and taking/defending depositions, expert discovery, processing and storing documents, motion drafting, court and court reporter fees, and anything else.

Not to mention the savings in time management. Splitting litigation tasks can free up your firm's time so that it can contribute to the case's development in other ways, perhaps even specializing in one area (*e.g.*, focusing on developing a life care planning expert, researching the plaintiff, reviewing medical records, preparing legal theories and defenses). Specialization in a joint defense group allows for greater depth of analysis at a lower cost.

In preparing defense strategies, the age-old adage that two heads are better than one rings true. And three heads are better than two, and so on and so on. That is because collaboration across multiple defense firms accumulates expertise, skill, and the collective knowledge of the respective counsel. Coordination between defendants also means presenting a unified front against plaintiff tactics to divide and conquer. *See* Bradley C. Nahrstadt & W. Brandon Rogers, *In Unity There is Strength: The Advantages (and Disadvantages) of Joint Defense Groups*, 80 DEF. COUNS. J. 29, 30 (2013) ("A joint defense group enables the defendants to speak with one voice, thereby staying on message and avoiding (or reducing) conflict on their side of the case.").

Moreover, depending on the law in your jurisdiction, it is possible that communications made between counsel are protected from disclosure to the plaintiff by virtue of privileges and the work product doctrine.

But be cautious. As explored below, *see* § III, caselaw concerning the protection of these communications varies wildly. Protections can turn on the nature of the information communicated, whether there was active litigation at the

time of the communication, and whether the defense interests were identical or only similar. *See*, *e.g.*, *O'Boyle v. Borough of Longport*, 94 A.3d 299, 316 (N.J. 2014) ("[T]here is considerable debate among the various jurisdictions, state and federal, regarding whether the common interest rule should be adopted, and, if so, on what terms."). You'll have to do your homework to find out how to best protect joint defense group communications in your relevant jurisdiction.

b. Cons of Participating in a Joint Defense Group

Of course, joint defense groups are not without their risks. Many of the cons to participating in a joint defense group arise from the imposition of duties and relationships with joint defendants, including the duty of confidentiality and an implied attorney-client relationship.

For one, conflicts of interest may arise between current and/or former participants. It is not always obvious at the outset of a case whether the interests of the joint defendants will remain consistent. What do you do when you have participated in a joint defense group, shared confidential information and attorney work product with co-defendants, and now your client is directly adverse to the parties you've shared critical information with? As explored below, you may be out of luck.

Confidentiality problems can also arise ***after*** the joint defense group has terminated. The confidential information shared in joint defense meetings might become relevant in a subsequent dispute between the former joint defendants. This situation might require disqualification from future representation of your client in that matter.

Additionally, when decision making authority is decentralized, a "too many cooks" conundrum can develop in the group. In that case, even the most minor of decisions can become a bureaucratic nightmare depending on the personalities involved and the interests of the clients. On the other hand, when power is centralized, the captain might prefer to direct the ship for the main benefit of her own client, to the irk of other group members. When the pressure is too great, sometimes the ship can sink. In those cases, the withdrawal of a member might create concurrent ethical conflicts between the former group members.

III. Seven Lessons From Courts Over the Past Decade

Although joint defense groups are commonplace nationwide, their duties and privileges vary widely. The seven cases below illustrate a few lessons on joint defense groups handed down by the courts over the past decade.

- Lesson 1 –

Without a Writing, the Existence and Scope of a Joint Defense Group is a Question of Fact

Although it is preferable to formally acknowledge your joint defense group in a writing, in the absence of one the court might find that an oral joint defense agreement existed as a matter of fact.

One Ninth Circuit case, which pitted husband against wife, illustrates this principle. *United States v. Gonzales*, 669 F.3d 974 (9th Cir. 2012). In an uninspired attempt, a married couple tried their hand at insurance fraud by intentionally setting the wife's car ablaze. After the indictment, the couple's cases were severed, and both spouses were convicted in their respective trials. The wife filed a § 2255 *habeas* motion to set aside her conviction for ineffective assistance of counsel. Specifically, she argued that her attorney improperly failed to call her husband as an exculpatory witness.

In response, the government sought to depose the ***wife's attorney*** concerning communications made with the ***husband's attorney***.

Realizing his predicament, the husband intervened and filed an emergency motion to quash the government's subpoena on the basis of the joint defense privilege. The husband's attorney executed a declaration stating that he and the wife's attorney had "met and discussed confidential information related to trial preparation." *Id.* at 976. He further declared: "although there was no written joint defense agreement ('JDA'), these communications were 'for the purpose of preparing a joint defense strategy' and the 'clear understanding was that such communications were privileged.'" *Id.* at 976-77. The wife's attorney agreed. There was an "implied agreement" that their conversations were confidential and made to support a joint defense. *Id.* at 977.

The district court effected a compromise. Although the government could depose the husband's attorney, counsel for the husband could attend and object. *Id.* at 977. At the deposition, counsel for both the husband and the wife made objections on the basis of privilege.

The government was not satisfied with the testimony. After further briefing, it convinced the district court to reverse course and outright deny the husband's motion to quash. The deposition of the husband's attorney would continue with no objections on the basis of privilege. The court reasoned that, even if a joint defense agreement had existed—*which it did not decide*—an intervenor's joint defense privilege must yield to the discovery needs of the wife's § 2255 claim. *Id.*

On the husband's interlocutory appeal to the Ninth Circuit, the government argued that the record did not establish the existence of a joint

defense agreement to begin with. There was no writing. There was only self-serving declaration and testimony. But the Ninth Circuit disagreed. There was sufficient evidentiary support for a joint defense agreement, "***at least to a point***." *Id.* at 979. Although there was no written agreement, ***an oral agreement was evidenced by the husband's attorney's declaration and deposition testimony that he believed there was an implied agreement***. *Id.* at 979.

Thus, an oral joint defense agreement existed. The question was the scope of the agreement and when it ended. As the Ninth Circuit noted, *"**the existence of a JDA is not necessarily an all-or-nothing proposition, and may be created (and ended) by conduct as well as express agreement***." *Id.* at 981.

The government argued that, even if there was a joint defense group, the wife's filing of a § 2255 motion ***waived*** the privilege. But the Ninth Circuit noted ***that one party to a joint defense agreement cannot unilaterally waive the privilege for others***. *Id.* at 982 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76, cmt. g. (2000) ("Any member may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication.")). Here, the husband was an unwilling third-party participant to the wife's *habeas* petition. He had not waived any privilege.

Finally, the government contended that the interests of the husband and wife diverged when their trials were severed. After the divergence, there could be no continued joint defense group. There was merit to this argument. The husband's defense evolved to completely blame his wife while asserting his own innocence. It was her car, after all.

The Ninth Circuit agreed that it was possible the joint defense group had ended. Ultimately, it remanded the case to the trial court to decide when the joint defense agreement ended. If communications occurred during the existence of a joint defense agreement, they would be protected. But if communications were made after the joint defense ended, they would not remain privileged—although statements made during the enterprise would still be protected. *Id.* at 981.

- Lesson 2 -

Even if There is No Joint Defense Group, the Common Interest Doctrine May Protect Joint Defense Communications

Even if you do not enter into a joint defense group, the common interest doctrine might protect certain co-defense communications. But use this principal with caution. Due to the uneven application of the common interest doctrine, it is wiser to execute a joint defense agreement, if a joint defense strategy is to be used.

In a New Jersey case, a zealous townsperson filed multiple lawsuits against his municipality and two former city officials. *O'Boyle v. Borough of*

Longport, 94 A.3d 299 (N.J. 2014). The private attorney who represented the officials contacted the municipal attorney, and he suggested they cooperate in their defenses. *Id.* at 304. The private attorney then sent a joint strategy memorandum and several documents to the municipal attorney. The attorneys never executed a written joint defense agreement.

The plaintiff townsperson submitted an open records request to the municipality seeking documents exchanged between the private and municipal attorneys. *Id.* The town withheld documents on the basis of the joint defense privilege. The townsperson filed a complaint in superior court to obtain them. The court dismissed the case, determining that the requested documents were not "public records" subject to any production under New Jersey law. *Id.*

On appeal, the court assumed that the withheld documents *were* public records subject to production, but it invoked ***the common interest rule***. *Id.* at 305. Because the documents were shared pursuant to a common defense interest, they were protected by the work-product doctrine and attorney-client privilege. *Id.*

On appeal to the Supreme Court of New Jersey, the townsperson argued that the private attorney had waived his clients' privileges by voluntarily sharing documents related to their defenses with the municipal attorney. This was a contentious point. Several *amici* filed briefs—including DRI—asserting that the privileges were not waived under the majority interpretation of the common interest doctrine. *Id.* at 307-08.

The Supreme Court of New Jersey acknowledged the principle of law that if "the ***third party*** is a person to whom disclosure of confidential attorney-client communications is ***necessary*** to advance the representation, disclosure will not waive the privilege." *Id.* at 309 (emphasis added). Indeed, the Third Restatement "recognizes that the exchange of confidential information between or among two or more clients with a common interest in a litigated or non-litigated matter, who are represented by ***different attorneys***, preserves the privilege against ***third parties***." *Id.* at 310 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (2000)) (emphasis added).

The court further noted that, in New Jersey, it is not necessary that every party share ***identical interests*** for the common interest doctrine to apply. *Id.* at 314. It is further not necessary that ***actual litigation*** has commended. *Id.*

At the same time, the court cautioned that states vary in their analysis of the common interest rule. Some jurisdictions require identical interests, some do not; some require that litigation actually be anticipated or commenced, while others do not. ***These differences can result in low certainty concerning the rule's application.*** *See*, *e.g.*, *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn.) ("That . . . both parties' interests converged does not lessen the significance of their divergent interests. Their interests regarding antitrust

considerations were not sufficiently common to justify extending the protection of the attorney-client privilege to their discussion."); *Niagara Mohawk Power Corp. v. Megan–Racine Assocs., Inc.*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) ("A common legal interest exists where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation."); *United States ex rel. [Redacted] v. [Redacted]*, 209 F.R.D. 475, 479 (D. Utah 2001) ("A community of interest exists where different persons or entities have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice."); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) ("The key consideration is that the nature of the interest be identical, not similar."). Courts also disagree as to whether the doctrine can protect client-client communications.

The court concluded that in New Jersey: "The common interest exception to waiver of confidential attorney-client communications or work product . . . applies to communications between attorneys for different parties if the disclosure is made ***due to actual or anticipated litigation for the purpose of furthering a common interest***, and the disclosure is made in a manner to ***preserve the confidentiality of the disclosed material and to prevent disclosure to adverse parties***." *O'Boyle*, 94 A.3d at 317.

Here, the criteria was met. Although there was no written joint defense agreement, the common interest doctrine protected the documents that were shared between the municipality and the former officials' attorneys.

- Lesson 3 -

Contract Principles Apply to Your Written Joint Defense Agreement

Should your written joint defense agreement be subject to judicial scrutiny, the court will "review its terms according to principles of contract interpretation." *Price v. Charles Brown Charitable Remainder Unitrust Trust*, 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015).

In an Indiana case, the U.S. Department of Justice had filed a criminal case against the principal and trustee of a trust, claiming the pair conspired to defraud the IRS and engaged in improper self-dealing. *Id.* at 1170.

The principal and trustee executed a written joint defense agreement "to bolster their defenses against the criminal charges by sharing 'information which is privileged and/or confidential in nature' 'without waiver of any applicable privilege or other protection against disclosure.'" *Id.* at 1171. The joint defense agreement included two provisions that provided:

> The joint defense privilege described above and recognized by this Agreement shall not be destroyed or impaired as to any Joint Defense Materials

> exchanged pursuant to this Agreement if any adversary positions shall subsequently arise between some or all of the Parties and regardless of whether the joint defense privilege becomes inapplicable after the emergence of adversary positions among Parties or this Agreement is terminated for any reason.
>
> . . . .
>
> The exchange of Joint Defense Materials pursuant to this Agreement shall not preclude any of the Parties from pursuing subject matters reflected in [the Materials] (even as against other Parties), so long as all applicable privileges or protections are preserved.

Id. at 1174. In accordance with the agreement, attorneys for the principal and trustee cooperated in joint defense strategy sessions and exchanged documents and information. *Id.* at 1172.

After information was already exchanged, the principal had a change of heart. The principal removed the trustee and filed a civil lawsuit against him for breaches of trust and of fiduciary duties.

In the civil case, the (former) trustee moved for summary judgment, arguing that the above-cited provisions of the joint defense agreement required termination of the civil suit. The agreement provided that "[t]he joint defense privilege . . . shall not be destroyed or impaired . . . if any adversary positions shall subsequently arise between some or all of the Parties." The trial court denied the motion, and the Indiana Court of Appeals granted the trustee's motion for interlocutory review.

Preliminarily, the court of appeals noted that "the common interest privilege extends the attorney-client privilege to otherwise nonconfidential communications between parties represented by separate attorneys." *Id.* at 1173. But "[t]he privilege is limited to those communications made to further an ongoing joint enterprise with respect to a common legal interest." *Id.*

At its base, the joint defense agreement was a contract. The appellate court therefore invoked the basic principles of contract interpretation that: (1) if the contract language is clear and unambiguous, it must be given its plain and ordinary meaning, and (2) the contract must be construed as a whole, considering all of the provisions, and not just individual words, phrases, or paragraphs. *Id.* at 1173-74.

Here, the plain and ordinary terms of the joint defense agreement did not bar ***civil litigation*** between the signatories. Rather, the principal and trustee could

not use materials shared pursuant to the joint defense agreement against each other.

The trustee argued that protecting the privileged communications as required by the agreement would be unworkable in the civil suit. But, although privileged communications were protected, the relevant underlying facts were not. Accordingly, summary judgment was not available to the trustee on the basis of the joint defense agreement alone. Specific claims of privilege would need to be dealt with and resolved as they were encountered throughout discovery and trial.

This case also reminds us that "[c]laims of privilege cannot be used as a general bar to all inquiry or proof." *Id.* at 1175. Rather, "the party seeking to assert a privilege has the burden to allege and prove the applicability of the privilege as to each question asked or document sought." *Id.*

- Lesson 4 -

The Plaintiff May be Entitled to Your Joint Defense Agreement

Beware: if facts related to your joint defense agreement become at issue in the case, the plaintiff may become entitled to it. This situation can arise in instances where the plaintiff seeks discovery specifically related to the joint defendant's invocation of privileges.

In one Louisiana case, a passenger was killed in a car accident and the estate sued several insurers (the "insurance defendants"). *Blackmon v. Bracken Const. Co., Inc.*, 338 F.R.D. 91 (M.D. La. 2021). Throughout discovery, the insurance defendants withheld numerous documents on the grounds of the joint defense and common interest privileges. The withheld documents dated as far back as July 2016, two years before the accident.

The plaintiff moved to compel information related to insurance defendants' joint defense privileges, including seeking production of the joint defense agreement itself. The plaintiff was particularly irked by the insurance defendants' hesitancy to say whether a joint defense agreement existed at all. The plaintiff argued that details of the joint defense agreement—whether oral or written—were necessary because the insurance defendants relied on the privilege to withhold documents as early as 2016. *Id.* at 94. ***Thus, the existence and timing of the agreement was relevant to assess claims of privilege.***

The insurance defendants argued that the existence of a written joint defense agreement was irrelevant, because the court should presume that a joint defense group existed due to their interests being aligned. *Id.* at 94. They further argued that any written agreement's contents would be privileged from disclosure if it did exist. *Id.*

First, the court noted that, "while a written agreement is not a prerequisite for invoking the common interest doctrine, parties seeking to invoke the exception

must establish that they agreed to engage in a joint effort and to keep the shared information confidential from outsiders." *Id.* at 94.

There will be instances when the terms of a joint defense agreement will not be discoverable because they are not relevant to any party's claims or defense. *Id.* at 94. But there are times where the existence of the agreement, or its terms, become relevant to a party's claim or defense. In other words, ***whether a joint defense agreement is discoverable by the plaintiff is a question dependent on the legal theories espoused by the parties and the facts of the case***.

Here, the circumstances of the joint defense agreement were at issue because nearly every withheld document predated both the complaint and the written joint defense agreement. *Id.* at 95. The court ordered the insurance defendants to file any joint defense agreement under seal for *in camera* review, so that it could make an independent determination regarding the nature of the agreement. The defendants revealed there was a written joint defense agreement, which they filed under seal.

After reviewing the agreement, the court determined that the plaintiff was entitled to information concerning the claimed joint defense privilege. *Id.* at 96. Specifically, the plaintiff was entitled to the date of the agreement, the identity of the parties, and the scope of the agreement. *Id.* Although the agreement was generally protected by the attorney client privilege and the work product doctrine, because the plaintiff met his burden to demonstrate a substantial need for the information, portions of the joint defense agreement were to be produced to the plaintiff. *Id.* at 96-97.

- Lesson 5 -

Beware of the Threat of Disqualification

One complicated Arizona case involving three separate joint defense groups artfully demonstrates how a motion for disqualification might play out.

In *Roosevelt Irrigation District*, a political subdivision of the state called the Roosevelt Irrigation District (the "Irrigation District") sought to recuperate costs of responding to the contamination of its wells against several entities under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *Roosevelt Irrigation Dist. v. Salt River Project Agricultural Improvement and Power Dist.*, 810 F. Supp. 2d 929 (D. Ariz. 2011).

The general background is complicated but important. In October 2008, the Irrigation District had hired a law firm called Gallagher & Kennedy to assist with legal issues associated with the contamination of its wells. *Id.* at 937. In 2010, the Irrigation District filed its CERCLA complaint in the District of Arizona against dozens of defendants. *Id.* at 938.

Numerous sets of defendants filed motions to disqualify Gallagher & Kennedy as counsel for the Irrigation District, including five defendants—Univar, SRP, Dolphin, Arvin, and Cooper—who had participated in prior joint defense groups. *Id.* The defendants reasoned that various current and former attorneys at Gallagher & Kennedy had obtained privileged and confidential information relevant to their cases by participating in three distinct joint defense groups: (1) the West Van Buren Group; (2) the M-52 Group; and (3) the Adobe-Air/Arvin-Cooper Group. *Id.* at 940.

The court required all three joint defense groups to submit: (1) a copy of their joint defense agreement; (2) a list of the participating parties and attorneys; (3) information on the frequency of meetings, the regularity with which the attorneys in question attended, and the duration of the groups; and (4) a detailed description of the topics discussed and the information exchanged in connection with the groups. *Id.* at 943.

Specific facts pertaining to each of the three joint defense groups are discussed further below. Before assessing the court's analysis with respect to the joint defense groups, this section will look at the court's review of the law of joint defense groups.

The court first noted that a "joint defense agreement establishes an implied attorney-client relationship with the co-defendant." *Id.* at 962. Counsel participating in a joint defense agreement may owe duties of confidentiality and fiduciary obligations to former co-defendants. *Id.* "To determine whether such a duty exists, a court must consider whether there was an actual exchange of confidential information . . . ." *Id.*

If confidential information was exchanged, the receiving attorney must maintain its confidentiality. *Id.* at 962. "As a result, an attorney may be disqualified from a proceeding if the attorney is both in actual possession of confidential information, and by virtue of having this information, is either incapable of adequately representing the new client or will breach the duty of confidentiality owed to the former co-defendant." *Id.*

Interestingly, the court concluded that the legal source of the privileges and protections associated with joint defense groups do not arise from the ethics rules. *Id.* at 965. Rather, protections stem from caselaw surrounding joint defense groups. *Id.*

By reviewing caselaw, the court determined that ***joint defense agreements give rise to an implied attorney-client relationship***. Such a relationship might include a ***duty of confidentiality***.

Thus, a ***disqualifying conflict of interest will arise "where information gained in confidence by an attorney 'becomes an issue'—specifically when the former representation was 'the same or substantially related' to the current***

litigation and when the current client's interests are 'materially adverse' to the interests of the party asserting the conflict of interest." *Id.* at 966. Ethical rules can apply to impute such a disqualifying conflict to an entire law firm. *Id.*

To disqualify counsel, the moving party must show: (1) the actual exchange of relevant confidential information; (2) the former representation was "the same or substantially related" to the current litigation; and (3) the current client's interests are "materially adverse" to interests of the party claiming to be protected by the joint defense agreement. *Id.* at 970.

With this understanding of the law, the court analyzed the three joint defense groups separately:

- *The West Van Buren Group*

In 1992, the Arizona government had notified Univar and Dolphin that they may be liable for groundwater contamination at a well. *Id.* at 940. In turn, Univar, Dolphin, and a third entity named Reynolds formed the West Van Buren defense group to negotiate a consent decree with the state for conducting an environmental study of the site. *Id.* at 941.

The joint defense group met regularly for four years. *Id.* at 941. During the joint meetings, members openly discussed their legal defenses, the scope and nature of possible liabilities, frank assessments of the strengths and weaknesses of various defenses, settlement strategies, and they shared documents. *Id.* at 969.

During the West Van Buren group's existence, the third entity—Reynolds—had been represented by Gallagher & Kennedy attorneys. *Id.* at 941.

In the instant CERCLA case, therefore, Univar and Dolphin filed motions to disqualify Gallagher & Kennedy, asserting that its attorneys' participation in the West Van Buren defense group created an implied attorney-client relationship between Gallagher & Kennedy, Univar, and Dolphin. *Id.*

First, the court easily found that the Irrigation District's interests were materially adverse to Univar and Dolphin, given the Irrigation District was on the opposite side of the "v". *Id.* at 970. Second, the subject matter of the instant CERCLA action and the former West Van Buren Group were substantially related because the issues in both cases were the defendants' liability for groundwater contamination of a specific well. *Id.* In other words, "[t]he underlying nucleus of facts that give rise to the former matter and the instant matter are therefore nearly identical." *Id.*

Finally, the record demonstrated that confidential information that materially advanced the Irrigation District's position was in fact exchanged in the group. *Id.* at 971. Indeed, Univar and Dolphin had provided attorneys at Gallagher & Kennedy frank assessments of their possible liabilities and confidential documents. *Id.*

Because the three elements were met, the court ordered that the Gallagher & Kennedy attorneys who participated in the West Van Buren joint defense group owed a duty of confidentiality to Univar and Dolphin. *Id.* at 971. That duty was imputed to the entire firm. *Id.* at 971-72. Accordingly, Gallagher & Kennedy was disqualified from representing the Irrigation District in the matter. *Id.* at 972.

- *The M-52 Group*

In 2003, the EPA had notified SRP that it was a potentially responsible party for contaminating a well. *Id.* at 941. SRP and two other entities—called Honeywell and APS—formed the M-52 joint defense group and executed a joint defense agreement. *Id.* During joint meetings, counsel openly discussed potential contamination sources, allocations of liability, and feasibility and costs of different cleanup plans. *Id.* at 972.

Of note, Honeywell was represented by an attorney who had then worked for a third-party law firm, but who later transferred to Gallagher & Kennedy. *Id.* The attorney assured he did not bring files from the joint defense group to Gallagher & Kennedy, and that he was screened from the Irrigation District matter shortly after joining.

In the CERCLA action, SRP filed a motion to disqualify Gallagher & Kennedy from representing the Irrigation District. *Id.* at 942. SRP argued that the former Honeywell attorney's participation in the M-52 Group created an impermissible conflict of interest between Gallagher & Kennedy and SRP. *Id.*

The court handily determined that a material adversity between the Irrigation District and SRP's interests existed. *Id.* at 973. The record also demonstrated that confidential information which materially advanced the Irrigation District's position was exchanged between the Gallagher & Kennedy attorney and SRP's attorneys. *Id.* at 974. Finally, the M-52 Group's discussions related directly to the CERCLA litigation—potential liabilities were discussed between the group members "and the same strategies that the M–52 Group discussed for avoiding liability could be at play here as well." *Id.*

The court concluded that the Gallagher & Kennedy attorney who participated in the M-52 joint defense group owed a duty of confidence to SRP. *Id.* at 974. The duty of confidence was imputed to the entire firm. *Id.*

- *The AdobeAir-Arvin and Arvin-Cooper Groups*

In 1987, the EPA placed a facility—which was successively owned by Arvin and by Cooper—on a federal database that contained sites nominated for federal investigation. *Id.* at 942.

In 2002, Arvin and a third entity that had also been a successive owner of the facility—called AdobeAir—entered a joint defense agreement related to the database listing. *Id.* Arvin and Cooper then entered a second, discrete joint

defense agreement also related to the facility that same year. *Id.* In 2004, representatives from both joint defense groups signed a consent administrative order with the EPA, which order had been jointly negotiated by all of the entities. *Id.*

In 2009, an in-house attorney for AdobeAir transferred to Gallagher & Kennedy. *Id.* at 942. Prior to starting at Gallagher & Kennedy, the attorney was screened from the Irrigation District's CERCLA case. *Id.* at 975. Moreover, the attorney did not bring any of AdobeAir's files with him to Gallagher & Kennedy. *Id.* at 942. Defendants Arvin and Cooper filed a motion to disqualify Gallagher & Kennedy as counsel for the Irrigation District due to an irreconcilable conflict of interest. *Id.*

In their motion to disqualify, Arvin and Cooper advanced four preliminary arguments that were separate from their joint defense group arguments. First, they argued there was a concurrent conflict of interest that required disqualification. *Id.* at 976. The court was not convinced. The court reasoned that, even if Arvin and Cooper had been in an express attorney-client relationship with the Gallagher & Kennedy attorney by virtue of the joint defense agreements (they were not), the relationship ended when the attorney withdrew from representing AdobeAir. *Id.* Arvin and Cooper were not the attorney's current clients. Moreover, the attorney did not represent the Irrigation District because he was screened from the case. *Id.*

Second, Arvin and Cooper argued that an ethical rule protecting current clients from material limitations in their representation due to their lawyer's responsibilities to a former client required disqualification. *Id.* at 976. But because Arvin and Cooper were not current clients, the rule did not apply. *Id.*

Third, Arvin and Cooper argued that they were former clients owed duties of confidentiality under Ethics Rule 1.9. *Id.* at 976. But the court noted that "joint defense agreements do not create a traditional attorney-client relationship such that Ethical Rule 1.9 is applicable." *Id.* Also, the attorney never had a traditional attorney-client relationship with Arvin or Cooper to begin with. *Id.* He only had an actual attorney-client relationship with AdobeAir. *Id.* at 977. This argument, too, failed.

Fourth, Arvin and Cooper argued that Gallagher & Kennedy's representation of the Irrigation District created an impermissible appearance of impropriety. *Id.* at 977. But the Arizona Supreme Court had noted that the appearance of impropriety is "simply too slender a reed on which to rest a disqualification order except in the rarest of cases." *Id.* Here, any conflict of interest was too remote to require disqualification. *Id.*

Arvin and Cooper also argued that Gallagher & Kennedy should be disqualified because the firm owed them a duty of confidentiality created by the various joint defense agreements. *Id.* at 977.

According to the court, the joint defense agreements and the documents shared did ***not demonstrate that there was an actual exchange of relevant confidential information in connection with the first matter***. *Id.* at 978. And Gallagher & Kennedy timely and appropriately screened the attorney from the CERCLA matter. *Id.*

Even assuming the former AdobeAir attorney had a disqualifying conflict stemming from his participation in the joint defense group with Arvin and Cooper, he was properly screened, in accordance with the appliable ethical rules. *Id.* at 981. So, this motion to disqualify was denied.

In the end, the court ordered that no confidential information of any kind regarding Univar, SRP, and Dolphin could be shared between Gallagher & Kennedy and the new counsel for the Irrigation District. *Id.* at 986. But information concerning Arvin and Cooper could be shared.

- Lesson 6 -

Your Joint Defense Agreement Can Waive
Future Disqualifications Arising from Future Conflicts

Take waiver provisions in your joint defense agreements seriously. In one case, a company called Shared Memory Graphics filed a patent infringement lawsuit against Nintendo, Apple, Samsung, and Sony related to a multi-component computer memory chip called "the Hollywood chip". *In re Shared Memory Graphics LLC*, 659 F.3d 1336 (Fed. Cir. 2011).

Years before, a separate company called Lonestar had too sued Nintendo, and yet another company called Advanced Micro Devices ("AMD"), for patent infringement related to another component of the same Hollywood chip. *Id.* at 1338. In the first case, defendants Nintendo and AMD entered a joint defense agreement. *Id.* The purpose of the agreement was to exchange information concerning litigation tactics, settlement strategies, drafts of briefs, and other confidential information. *Id.*

Paragraph 6 of the joint defense agreement provided:

> Nothing contained in this Agreement has the effect of transforming outside or inside counsel for either party into counsel for the other party, or of creating any fiduciary or other express or implied duties between a party or its respective counsel and the other party or its respective counsel, other than the obligation to comply with the express terms of this Agreement, or of interfering with each lawyer's obligation to ethically and properly represent his or her own client. ***The parties expressly acknowledge***

> ***and agree that nothing in this Agreement, nor compliance with the terms of this Agreement by either party, shall be used as a basis to seek to disqualify the respective counsel of such party in any future litigation.***

Id. at 1338-39 (emphasis added).

The Director of Patents and Licensing and in-house counsel at AMD later transferred to Floyd & Buss—the firm that represented plaintiff Shared Memory Graphics in this second Hollywood chip lawsuit. *Id.* at 1339. Of note, there was a dispute as to whether the attorney had received confidential information from Nintendo as a participant of the joint defense group. Admittedly, the attorney was not screened when he transferred to Floyd & Buss. *Id.*

In this second case, Nintendo moved to disqualify Floyd & Buss from representing Shared Memory Graphics due to the conflict. *Id.* at 1339. Shared Memory Graphics argued that Nintendo had waived future conflicts of interest arising from the former joint defense agreement. But the district court applied a narrow interpretation to the phrase "respective counsel" of the parties, holding that the provision did not waive conflicts arising from attorneys who later moved to another company or firm. *Id.*

Instead, the district court viewed the waiver as only preventing conflicts between attorneys who ***currently*** represented AMD or Nintendo. *Id.* Thus, the waiver provision did not preclude Nintendo's motion to disqualify Floyd & Buss from representing Shared Memory Graphic because Floyd and Buss did not then represent either AMD or Nintendo. *Id.*

The court further presumed that the attorney had accessed Nintendo's confidential information. Accordingly, it held that Floyd & Buss was disqualified from representing Shared Memory Graphics due to the conflict. *Id.* Shared Memory Graphics filed a writ of mandamus to the United States Court of Appeals for the Federal Circuit. *Id.* at 1339.

The Federal Circuit, citing comment 22 of the Rule 1.7 of the Model Rules of Professional Conduct, noted that waiver-of-conflict provisions can be enforceable in a non-attorney-client relationship that involved sophisticated parties. *Id.* at 1340-41. Even in a true attorney-client relationship, the rules of professional conduct recognize that parties may consent to a waiver of future conflicts. *Id.* at 1341 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. D).

Under California law, the enforceability of an advanced waiver of potential future conflicts may be proper even if the waiver did not state the exact nature of the specific conflict. *Id.* at 1341.

Looking to the agreement, the court held that its terms "clearly point away from the district court's conclusion that [the attorney] was not covered by the waiver provision." *Id.* at 1341. It reasoned that a waiver of conflicts ***only*** arising during the pendency of the first lawsuit would produce an illogical result: "former counsel such as Cooper would have ***no ongoing obligation of confidentiality***." *Id.* In other words, limiting the phrase "respective counsel" to mean only current counsel for AMD or Nintendo would mean that the joint defense agreement imposed no ongoing obligation of confidentiality with respect to former counsel. *Id.*

The court found that Nintendo had waived this potential conflict. *Id.* at 1342. Nintendo could not seek disqualification of Shared Memory Graphic's counsel. So, this is a situation where the Director of Patents and Licensing and in-house counsel to AMD entered an agreement to exchange confidential information with Nintendo; exchanged confidential information; transferred to Floyd & Buss which represented a party adverse to Nintendo; his new law firm did not screen him from the case; and his law firm was permitted to continue its representation.

- Lesson 7 -

Make Sure the Protective Order
Does Not Conflict with Your Expectations

Sometimes it is the court's protective order—not the joint defense agreement—which requires interpretation. In *Static Media*, a patent-holder named Static Media LLC ("Static") sued Leader Accessories LLC ("Leader") alleging patent infringement in the Western District of Wisconsin. *Static Media LLC v. Leader Accessories LLC*, 38 F.4th 1042 (Fed. Cir. 2022). Relevant to this dispute was the court's protective order. *Id.* at 1043.

The protective order restricted the parties' ability to disclose confidential material only to those who were retained by a party "***consulting, technical or expert services.***" *Id.* at 1044 (emphasis added). The order further required recipients of confidential information to sign an acknowledgment agreeing not to "***use*** such information or documents ***except for the purposes of this action***." *Id.* (emphasis added).

Thereafter, Static sued a second entity—called OJ Commerce—alleging that it infringed the same patent. *Id.* at 1045. This second action was in the Southern District of Florida. *Id.* Attorneys for Leader and OJ Commerce connected and entered a joint defense agreement to jointly work up the defenses for their separate cases. *Id.* at 1044.

Pursuant to the joint defense agreement, counsel for Leader shared confidential material from the Wisconsin action with OJ Commerce, including Static's licensing and royalty agreements and sales and revenue information. *Id.*

at 1045. Counsel for OJ Commerce then "improperly used" Static's royalty agreements to assess a settlement proposal in its separate case in Florida. *Id.*

In the Wisconsin case, Static moved for sanctions against Leader as well as an order holding it in contempt for its improper disclosure of confidential documents to OJ Commerce.

The District Court of Wisconsin granted the motion, reasoning, *inter alia*, that the disclosure "itself constituted an impermissible use of the confidential information ***not 'solely'*** for the purpose of the Wisconsin action." *Id.* at 1047. It further reasoned that the joint defense agreement—a private contract—could not supersede or modify the protective order in the Wisconsin case. The court ordered Leader to pay Static's attorney's fees as well as sanctions. *Id.* at 1045.

On appeal, Leader argued that its disclosure was permitted by the protective order because OJ Commerce's attorneys were ***contractual consulting attorneys*** hired to discuss various aspects of the defenses. Static countered that Leader's disclosure was not "solely" for purpose of the Wisconsin action. Rather, the disclosed information was used in OJ Commerce's Florida action as well.

The Federal Circuit Court of Appeals concluded that there was enough doubt as to whether the protective order barred Leader's disclosure. The dissent disagreed. It reasoned that Leader had improperly disclosed Static's confidential financial information, which was used outside the Wisconsin litigation by a nonparty to that case.

Ultimately, the majority reasoned that because "the protective order exists to prevent injury, damage, or competitive disadvantages resulting from ***public disclosure*** of the information suggests that a '***use'*** entirely internal to protective order signatories—developing a joint defense strategy—would not violate its terms, **e*ven though the information would be used to develop a strategy beneficial to both the Wisconsin action and the Florida action***." *Id.* at 1048.

The Federal Circuit reversed the trial court's award of sanctions and attorney's fees.

IV. Conclusion

There are many reasons to join or form a joint defense group. Staying aligned with other defendants in litigation on key defenses, witnesses and strategy can thwart plaintiffs' attempts to divide and conquer. The benefits to you and your client can be many. But there are, as always, some potential risks and downsides that need to be carefully evaluated and discussed with your colleagues and clients before making the decision to participate in a joint defense group. All should be considered in the context of the legal and ethical obligations created by joint defense coordination. Some key takeaways from the recent case law in this area include: (1) If you don't have a written joint defense agreement, you might be able to demonstrate the existence of an agreement with appropriate facts; (2)

the common interest doctrine might protect joint defense communications even in the absence of a formal joint defense group (but don't count on it); (3) contract principles apply to the interpretation of your joint defense agreement; (4) depending on the claims and defenses, the plaintiff may be entitled to production of the joint defense agreement; (5) you might be disqualified from future representation if you gained relevant information that is materially adverse to a former co-defendant; (6) courts take waiver provisions seriously, even in light of the privilege of attorney-client confidentiality; and (7) protective orders might have discrete disclosure limitations on information gained in a joint defense meeting.