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JOINT DEFENSE AGREEMENTS AND RELATED ETHICAL ISSUES

I. WHAT'S A JOINT DEFENSE AGREEMENT (JDA), AND WHY?

A. Function
The joint defense privilege applies where two or more parties, having a sufficient common interest, retain separate counsel and then share information and strategies to design a consistent and collaborative position. The JDA is the oral or written understanding which includes the parties’ commitments to one another to assure confidentiality of the information exchanged.

B. Benefit
A JDA is an effective and efficient tool to share resources, to minimize redundancy and cost, to control information flow, and to present a coordinated (and usually united) defense or prosecution.

Protection is extended to attorney-client privileged communications and also to work-product-protected information.

Example:
In a lawsuit with millions of documents, the review and culling of documents involves great time and careful judgment. The indexing and summaries and identification of key documents – clearly work product, though not attorney-client communications – have great strategic advantage and consume great resources.

If there were no protection such as a joint defense privilege, the sharing of that privileged information with a co-party would be a waiver of traditional requirements of confidentiality, and would cause the information to be discoverable by an opponent.

II. WHAT'S THE RIGHT NAME FOR A JOINT DEFENSE PRIVILEGE?

A. Plaintiffs, too
“Defense” is a misnomer. The privilege is also available to plaintiffs. E.g., Sedlacek v. Morgan Whitney Trading Group, Inc., 795 F.Supp. 329, 331 (C.D.Cal. 1992). Texas Rule of Evidence 503 uses the term “another party” – not “another defendant.” It is a privilege available to parties with sufficient common interests.

B. “Common-interest Privilege” - Some Ambiguity
This phrase is a better description of the privilege. But the same phrase is used in defamation cases to describe a privilege against suit when a defamatory communication has been made to a person who shares a common interest with the speaker – as when one manager of a business makes a derogatory statement about an employee to another manager of the business.

C. “The Privilege in Common-interest Arrangements”
This is the wordy phrase used by the Restatement of the Law Governing Lawyers (2000) (“Restatement”). Section 76 identifies the privilege.

D. Is it a Privilege or a Defense?
1. Is it a defense against claims of waiver of privileged information?
Analytically, the “joint defense privilege” is principally a defense against an opponent’s claim that privileged information lost its confidentiality due to its disclosure outside of the traditionally protected circle of client, attorney, client’s representatives and attorney’s representatives. Ordinarily, the attorney-client privilege is waived by voluntary disclosure to a third-party even if the third-party agrees not to disclose it to anyone else. Westinghouse v. Republic of the Philippines, 951 F.2d 1414, 1427 (3rd Cir. 1991). The joint-defense privilege is an exception to the ordinary rule of waiver.

That is, it may be perceived as a loosening of the requirement concerning confidentiality, allowing attorney-client communications and work-product information to be shared with others and yet retain protection against coerced disclosure.

2. Is it an application of the attorney-client privilege?
Some courts say that the joint defense privilege is merely an application of the attorney-client privilege and the work-product privilege, and only applies if the other conditions of those privileges are satisfied. E.g., Griffith v. Davis, 161 F.R.D. 687, 691 (C.D.Cal. 1995).

But consider the difference between the joint defense privilege and the protection of communications where a single lawyer has 2 or more clients in common (“joint clients”). If Attorney X represents Defendant A and Defendant B in a lawsuit, the sharing of work product and the communications for the purpose of giving, receiving or acting on legal advice all relate to traditional notions of allowing confidentiality in order to encourage a client to be forthcoming and candid with the
client’s attorney, who (in turn) has ethical duties that prevent disclosure to others.

By contrast, the joint defense privilege protects communications to attorneys who (at least at first blush) have no ethical duty to a co-party. If Attorney X represents Defendant A, and Attorney Y represents Defendant B, communications between A and Y are protected even though Attorney Y has no relationship to Defendant A aside from the joint defense endeavor.

To treat JDA communications as traditional attorney-client communications, the model would need to treat respective counsel as “representatives” of one another. That is, under traditional notions, communications between Attorney Y and either Attorney X or Defendant A would be privileged only if Attorney Y were (i) a lawyer representing Defendant A, (ii) a representative of Defendant A, or (iii) a representative of Attorney X. That model would immediately introduce agency and fiduciary principles. For Y to be a “representative” of A or X would immediately suggest agency duties to A or X – such as duties of disclosure, of undivided loyalty, of diligence, of care, of competence, of obedience and of confidentiality.

Instead, the protection of communications between Attorney X and Attorney Y, or between Attorney Y and non-client Defendant A, serves different legal interests and extends beyond attorney-client relationships.

3. The joint defense privilege is also a protection of additional communications.

These communications are protected under the joint defense privilege, but probably not protected by other doctrines: (i) a communication between Defendant A and Attorney Y; (ii) a communication between Attorney X and Attorney Y; (iii) a communication between Defendant A’s representative and Attorney Y; (iv) a communication between Defendant A and Attorney Y’s representative; (v) a communication between Defendant A’s representative and Attorney Y’s representative.

Example: Defendant A talks with the accountant hired by the lawyer for Defendant B. The communication is eligible for the joint defense privilege. United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989).

E. “Joint Defense Privilege” Is the Easiest Phrase. We’ll Keep Using It.

III. TEXAS RULE OF EVIDENCE 503(B)(1)(C):

“(b)(1) General rule of privilege. 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:

“...”

“(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.”

Elements of the text of the rule:

a. is it confidential?
b. was it for the purpose of facilitating the rendition of professional legal services?
c. was it between qualifying persons?
d. was there “a pending action”?
e. did it concern “a matter of common interest therein”?

IV. UNCERTAINTY AND RISK: OPEN ISSUES UNDER TEXT OF TEXAS RULE

A. “A Pending Action”

1. What about a threatened action?

A pending action clearly excludes a non-pending, but threatened, action.

Most jurisdictions give protection to threatened actions, even though Rule 503 appears to exclude them. Restatement §76. The Fifth Circuit gives such protection. In re Santa Fe Int’l Corp., 272 F.3d 705, 710-11 (5th Cir. 2001) (communications between potential defendants and their respective counsel are protected, but only if there is “a palpable threat of litigation at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation”).

Without discussing the variance, one Texas court of appeals (i) quoted Rule 503, with its limitation to “a pending action,” (ii) relied upon Federal case law establishing the applicability of the joint defense privilege also as to “parties who are about to be in the same lawsuit, making their communications in anticipation of litigation,” and (iii) observed that the communications at issue may have included times in anticipation of one party’s “entry into the proceedings.” Ryals v. Canales, 767 S.W.2d 226, 228-29 (Tex. App. - Dallas 1989, no writ).
A Supreme Court decision enforcing rights under a JDA implicitly found the JDA to be effective in preserving confidences even though one participant was not a party to any proceeding. The issue is not discussed in the opinion. In National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996), a Mr. Cronen was the subject of a criminal investigation but was never indicted. Thus, he never was a party to “a pending action.” Even so, the participation by Cronen and his lawyer in a JDA with indicted parties was given the same effect as if enforceable confidential and privileged communications had occurred.

No contrary Texas case is found. Perhaps Texas courts will continue to apply a “common law” privilege somewhat broader than Rule 503, to include pre-lawsuit communications. However, due to the restrictive language in Rule 503, parties and their lawyers are at risk in relying upon protection for communications prior to the filing of a lawsuit.

2. What about a parallel proceeding?

Suppose Plaintiff P sues Defendant X and Y in Lawsuit #1, and Plaintiff P, with substantially the same allegations, sues Defendant Z in Lawsuit #2 – perhaps for venue or jurisdictional reasons. Or suppose, due to arbitrability reasons, Plaintiff P sues X and Y in Lawsuit #1 and sues Z (with substantially the same allegations) in Arbitration #2.

The same policy reasons apply as in the case of a single action. No policy reason counsels a different result. The privilege to coordinate similar defenses should not turn on a plaintiff’s choice concerning multiplicity of lawsuits. Rule 503’s reference to “another party in a pending action” is ambiguous. On the one hand, it does not say “another party in the same [or a single] action,” and thus the text is consistent with a joint defense privilege where parties are in different lawsuits but share a common interest. On the other hand, Rule 503’s use of the adjective “another” could suggest that each party must be in the same proceeding.

Non-Texas law has applied the joint defense privilege where there are separate, parallel lawsuits brought by the same plaintiff. E.g., Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 579 (S.D.N.Y. 1960) (defendants in two patent infringement suits, brought by the same plaintiff, pooled information).

In all likelihood, a JDA will be effective even where parties sharing a common interest are in different proceedings; but there is risk of a contrary result.

3. What about a subsequent action?

Suppose Plaintiff P sued Defendant X in Lawsuit #1 and settled; and thereafter sues Defendant Z in Lawsuit #2 with substantially the same allegations. Are communications protected if Z’s lawyer communicates with X’s lawyer?

No case is found. The policy reasons, however, are not as persuasive for supporting any privilege. Although Z’s defense in Lawsuit #2 will perhaps be less expensive if Z’s lawyer can rely upon X’s work product from Lawsuit #1, there is no coordination of strategies, no sharing of responsibilities and perhaps no “common interest” – since X has already made peace with Plaintiff.

B. What about Non-Litigated Matters?

Restatement §76 gives protection if there is “a common interest in a litigated or nonlitigated matter.” To support this proposition, the Reporter’s Note to Comment d cites Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (dicta). The dictum is obscure; Schachar involved a pending lawsuit, and the cases cited in Schachar involved either pending or prospective litigation. If “non-litigated” means a threatened lawsuit, there is much support for protection; but if it means matters that are unrelated to pending or imminent proceedings, you should rely on the dictum at your peril.

Where communications between companies were allegedly made to promote antitrust compliance, but not in anticipation of future litigation, the Fifth Circuit found that no joint-defense privilege could be applicable. In re Santa Fe Int’l Corp., 272 F.3d 705, 713 (5th Cir. 2001).

C. Co-party to Co-party Communications?

Notably absent in Rule 503(b)(1)(C) is any protection for communications directly between the parties. Similarly, no protection is given for communications between [non-lawyer] representatives of two parties. The protections in the text are given to communications that involve a lawyer or a lawyer’s representative.

Some courts have squarely held that the joint defense privilege does not apply to communications directly between two separately-represented parties. E.g., United States v. Gotti, 771 F.Supp. 535, 545 (E.D.N.Y. 1991). The rationale is that the privilege is intended to promote cooperative strategies, but not to sanction undiscoverable continuing conspiracies between defendants.

When this question was available to determine in a Texas case, however, the Court did not identify the direct
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client-to-client communication as a frailty. Ryals v. Canales, 767 S.W.2d 226, 228-29 (Tex.App. - Dallas 1989, no writ) (remanding to apply the joint defense privilege, apparently as to communications directly between the two parties).

Prudent trial preparation under a JDA will rely on communications in which at least one lawyer (or lawyer’s representative) is a participant. There is no certainty that direct client-to-client communications will be protected.

D. Whose Right to Waive? Whose Power to Waive?

Rule 503(c) and Rule 511 discuss who owns, and who has power to waive, privileges. The “holder” of the privilege waives the privilege if there is a voluntary disclosure (Rule 511); and “the client” may claim the privilege [and therefore is presumably the “holder”], according to Rule 503(c). The rules are not clear, however, when there are several clients.

1. The client who made the communication?

It is commonly expected that “[a] client who is part of a joint defense arrangement is entitled to waive the privilege for his own statements, and his co-defendants cannot preclude him from doing so.” E.g., United States v. Agnello, 135 F.Supp.2d 380, 383 (E.D.N.Y. 2001), aff’d, 2001 WL 792192 (2nd Cir. 2001).

Correspondingly, it is likely that – in the absence of an agreement to the contrary – no other person has the right to waive privilege as to one party’s communication, except that party. See Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1191 (D.S.C. 1974).

The Restatement suggests that this rule can be varied by contract, so that other participants can prevent one JDA participant from waiving privilege as to her/his own privileged statement: “[I]n the absence of an agreement to the contrary, 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.” Restatement § 76, cmt. g.

2. If no client made a communication?

If the protected information is an attorney’s communication, perhaps the same rule should apply: in the absence of an agreement to the contrary, if a communication was on behalf of a particular client, only that client has the power to waive confidentiality.

But if the protected information is the collaborative work-product reflecting input by lawyers for several parties, is the privilege waivable by any single one of the various parties? ... or only by the unanimous decision of all? An enforceable choice can probably be addressed in either fashion by the JDA. The default rule may be the following: “If a document or other recording embodies communications from two or more members, a waiver is effective only if concurred in by all members whose communications are involved, unless an objecting member’s communication can be redacted.” Restatement § 76, cmt. g.

3. What intra-party litigation is enough to deem a waiver?

Most authorities assume that a subsequent lawsuit between the participants to a JDA will result in waiver of the privilege. Restatement §76(2) (“Unless the clients have agreed otherwise, [a JDA communication] is not privileged ... in a subsequent adverse proceeding between [the former JDA participants]”); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 26-29 (N.D.Ill. 1980).

Restatement § 76, comment f, however, makes clear that the parties should be able by their JDA to prevent such a result: “There is no waiver between the members exchanging communication if they have agreed that it will remain privileged as against each other in subsequent adverse proceedings.”

Would that include the trial in the very same action, in which the parties seek contribution from one another or present competing evidence in their respective efforts to minimize their respective comparative responsibility?

No one yet knows how Texas courts will decide.

E. What’s a “Common Interest”? How Much Is Needed?

The text of Rule 503 (“concerning a matter of common interest therein [i.e., in the pending action]”) is consistent with the cases that say the participants need not have identical interests. No bright line, however, defines when the interests are not sufficiently common.

In Gulf Oil Corp. v. Fuller, 695 S.W.2d 769 (Tex.App. - El Paso 1985, no writ), the court held that no joint-defense privilege applied to documents exchanged at “Technical Committee” meetings. The Technical Committee was a group of representatives of oil companies who were suing, or being sued, concerning royalty claims in several pending lawsuits. The court found insufficient common interest: “[T]here is obviously an overlap of both legal and commercial interest among the Technical Committee participants. Their relationship is, however, more adversary than cooperative, and the mutuality falls more in the area of commercial impact than legal.” Id. at 774. After reviewing the parties’
positions in the various lawsuits, the court concluded: “In the overall context of the suit, the adversary relationship between the working interest owners is far more significant than the joint defense against the Plaintiffs.” Id. Implicitly, the court appeared to hold that a communication is not privileged if adversarial interests outweigh common interests.

In In re LTV Securities Litigation, 89 F.R.D. 595, 604-05 (N.D.Tex. 1981), the court noted that the privilege extends to defendants whose liability may arise from different acts or omissions, or who may assert cross-claims against each other.

A criminal case emphasized the burden of proof of establishing the privilege. In Strong v. State, 773 S.W.2d 543 (Tex. Crim. App. 1989), one capital-murder defendant wrote a co-defendant’s lawyer urging that the co-defendant not turn State’s evidence. The court declined to say that the co-defendants were pure adversaries, but acknowledged the difficulty of finding any case-law guidance as to the parameters of “common interest.” Id. at 550. The court said that a claim of “common interest” cannot be supported by mere conclusory assertions. Id. at 552. The court found that the course of action urged by defendant Strong was not in the best interests of defendant Sweeney, and that Sweeney had already – by the time of the letter – made one voluntary statement implicating Strong. Id. The absence of a bright-line test is troubling and is demonstrated by this holding. Where a similar letter had been written by the defendant’s lawyer, rather than by the defendant, the Fifth Circuit found the communication to be privileged. United States v. Stotts, 870 F.2d 288 (5th Cir.), cert. denied, 493 U.S. 861 (1989).

One court was particularly skeptical of a claim that a common interest existed. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 117 S.Ct. 2482 (1997). The court wrote:

“[T]here is lacking in this situation the requisite common interest between the clients, who are Mrs. Clinton in her personal capacity and the White House. Mrs. Clinton's interest in the OIC's investigation is, naturally, avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her. One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest. The common interest may be 'either legal, factual, or strategic in character,' id. cmt. e, but no legitimate interest offered by the White House meets even this loose standard.” Id. at 922.

Because there is no bright line, a JDA will be most effective when there are no adverse relationships. If there is a mixture of common and adverse interests, the JDA should be drafted to emphasize the commonality and the exchange of communications should be carefully limited to matters of common interest.

F. What Happens When Interests Are No Longer Sufficiently “Common”?

At least as to information exchanged from that point forward, a court should not sanction any continued confidentiality, regardless of the agreement between the exchanging parties. This is because a party’s voluntary sharing of its confidential information with an adverse party constitutes a waiver of confidentiality.

V. UNCERTAINTY AND RISK: WHAT LAW APPLIES?

A. Federal Rule 501

Federal Rule of Evidence 501 states that Federal common law will determine privileges, unless State law supplies the rule of decision for an element of a claim or defense. If the latter, then State law applies to the determination of privilege.

B. Federal Common Law

A common statement of the privilege in Federal courts is this:

To establish the existence of a joint defense exception to the requirement of confidentiality otherwise required by the attorney-client privilege, the party asserting the privilege must show that : (1) the communication was made in the course of a joint defense effort; (2) the statement was designed to further that effort; and (3) the privilege has not been waived.

C. What’s the Law in the Other State?

1. Variations

There appears to be nearly uniform protection of the exchange of privileged information among co-parties with common interests.

California, however, may have restrictions that are significant. In California, Evidence Code § 912 states that a disclosure in confidence of a privileged communication is not a waiver of the privilege “when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer
was consulted.” See Raytheon Co. v. Superior Court, 208 Cal.App.3d 683, 687 (1989). That court stated that California does not recognize a “joint-defense-privilege as such,” but no waiver of confidentiality would occur by appropriate sharing of privileged attorney-client communication with counsel for a co-party if there is “reasonable need for the disclosure.” One implication of that analysis is this: that the sharing of previous communications, which are privileged, would not lose their protection; but perhaps California would give no protection to new communications among respective lawyers for co-parties, or between a lawyer and a nonclient co-party, since those communications are not within California’s attorney-client privilege statute.

Different states have differing text of their analogous evidence rules. By way of example, Nebraska’s Revised Statute § 27-503(2)(c) does not contain the limiting requirement that the communications be in “a pending action,” which appears in the Texas rule; but it is narrower than the Texas rule in not protecting communications between one client’s lawyer and a representative of the other client’s lawyer. A collection of varying rules appears in Note, Separating the Joint-Defense Doctrine from the Attorney-Client Privilege, 68 Tex. L. Rev. 1273, 1276 n.22 (1990).

2. Generally protected

The privilege has been recognized at least since Chahoon v. Commonwealth, 62 Va. 822, 823 (1871). There, three criminal defendants were represented by three lawyers. One defense attorney was called as a witness to testify about a joint meeting in which the three clients and three lawyers had discussed a joint defense against the conspiracy charges. Held: the attorney could not be compelled to testify about the discussions.

Virtually all States have some form of protection for joint-defense communications, but “[t]he privilege remains in a confused state.” Note, supra, 68 Tex. L. Rev. 1273, 1276 (1990).

3. The Restatement of Law Governing Lawyers § 76:

“(1) 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 [all of which relate to the attorney-client privilege] 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.

“(2) 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.”

At this date, Section 76 (or its predecessor § 126 in earlier drafts of the Restatement) has only been cited by Federal courts on eight occasions and by State courts on two occasions (Arizona and Tennessee). Texas courts have not yet cited § 76.

VI. WHAT’S YOUR RELATIONSHIP WITH CO-PARTIES?

A. Do You Have Ethical Duties to Them, under an Implied Attorney-client Relationship?

Some courts appear to say “yes.” In Wilson P. Abraham Construction Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977), the defendants sought to disqualify Steve Susman as attorney for plaintiff because of his prior role in a JDA. In a prior lawsuit he had represented Whitlow Steel Company. In the prior lawsuit, Whitlow had entered into a JDA with Armco and other steel companies, who were now defendants in the new lawsuit brought by Susman’s new client. Whitlow was not a party to the new lawsuit. The Fifth Circuit adopted the defendants’ reasoning that Susman was effectively a lawyer for all participants in the prior JDA:

“The defendants persuasively argue that in a joint defense of a conspiracy charge, the counsel of each defendant is, in effect, the counsel of all for the purposes of invoking the attorney-client privilege in order to shield mutually shared confidences. We agree, and hold that when information is exchanged between various co-defendants and their attorneys that this exchange is not made for the purpose of allowing unlimited publication and use, but rather, the exchange is made for the limited purpose of assisting in their common cause. In such a situation, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants.” Id. at 253.
The Ninth Circuit reversed a criminal conviction, based on the conclusion that a JDA resulted in creation of an attorney-client relationship where there otherwise had been none. United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000). Three defendants had three lawyers. They discussed confidential information. Defendant Gupta then entered into a plea agreement and testified for the Government. The lawyers for the other two defendants sought leave to withdraw (which the trial court denied), because they said that their promises of confidentiality to Gupta prevented their cross-examination of him. The Ninth Circuit reversed. In the decision, the court characterized the two lawyers as having “an attorney-client relationship arising from a joint defense agreement.” Id. at 637. Therefore, the court ruled, the trial court abused its discretion in refusing to allow the two lawyers to withdraw.

Chief Judge Patel has urged that Henke not be read to impose a duty of loyalty by lawyers in favor of non-clients, merely because they all participated in a JDA. United States v. Stepney, 246 F. Supp.2d 1069 (N.D.Cal. 2003). She ordered that criminal defendants explicitly state in writing in JDAs that the agreement “does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. No joint defense agreement may purport to create a duty of loyalty.”

ABA Formal Opinion 95-395 (1995) (“Obligations of a Lawyer Who Formerly Represented a Client in Connection with a Joint Defense Consortium”) states a contrary view. It states that the lawyer does not have any ethical duties to the non-clients, merely because they all participated in a JDA. United States v. Stepney, 246 F. Supp.2d 1069 (N.D.Cal. 2003). She ordered that criminal defendants explicitly state in writing in JDAs that the agreement “does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. No joint defense agreement may purport to create a duty of loyalty.”

B. Do You Have Merely Contractual Duties to JDA Co-parties?

The simplest analysis is that an attorney participating in a JDA simply has contractual duties, rather than any effective attorney-client relationship to non-clients and rather than any fiduciary duty to non-clients. The Texas Supreme Court, however, as discussed below, has concluded that the duties are fiduciary.

C. Do You Have Fiduciary Duties to Them?

Yes. Texas law has become clear on this point. In National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996), the Court relied heavily on Wilson P. Abraham Construction Corp. v. Armco Steel Corp., above. Although making clear that the JDA did not create any quasi-attorney-client relationship, the Court held that the JDA created a fiduciary relationship on the part of each participating attorney to hold the confidential information in continuing confidence. Id. at 130-33. Godbey dealt with an effort by NME to disqualify Baker Botts due to the prior participation of a lawyer with non-client NME and others in a JDA in prior litigation. Lawyer Tomko (then with Doke & Riley) represented a Mr. Cronen in 1992 and participated in joint defense meetings with NME. Tomko never represented NME. Later, Tomko joined Baker Botts. In 1994, Baker Botts (though not Tomko) sued NME in a new lawsuit. Baker Botts did not sue Tomko’s former client Cronen. Tomko took pains to prevent any Baker Botts lawyer from obtaining any information he had obtained while representing Cronen. NME filed its motion to disqualify Baker Botts. The Texas Supreme Court held that Baker Botts should be disqualified. The Court held:

a. Tomko agreed under the JDA to preserve confidences obtained from other participants (including NME), except with the consent of the attorney who disclosed the information, id. at 129;

b. the relationship between Tomko and non-client NME was not an attorney-client relationship, id. at 130, but instead is based on Tomko’s duty to preserve confidences, id. at 131; and the duty is “in the role of a fiduciary, the same as toward a client,” id. at 132;

c. it is irrefutably presumed that every Baker Botts lawyer has access to all confidential information that Tomko had acquired. Id. at 131-32.

Importantly, the Texas Supreme Court included this statement: “[The duty to preserve the nonclient’s confidences] did not preclude an attorney and client from acting in their own best interests, even to the point of using information disclosed by others in ways that conflicted with the others’ interests. For example, the parties recognized that situations could arise in which it would become necessary for them to cross-examine each other in court. But Tomko and the other parties strictly promised not to disclose information shared in the
joint defense with third parties under any circumstances.”

Id. at 129 (emphasis added). That is, the fiduciary duty to a nonclient to safeguard confidential information received in confidence does not trump the lawyer’s fiduciary and ethical duties to the client.

_Godbey_ was followed, with resulting disqualification of a law firm, in _In re Skiles_, 102 S.W.3d 323 (Tex.App. - Beaumont 2003, no pet.).

VII. PRACTICAL AND FIDUCIARY PROBLEMS

A. What If a Statute or Other Duty Requires Your Client (Or You) to Disclose Information Obtained from Another Participant under the JDA?

1. SEC
2. Consumer Product Safety
3. Attorney’s duty to third-persons? to the Court? to opponent?

Example: A corporation’s indemnity of an officer is not available upon proof of fraud. If the corporation learns confidential information from an officer under a JDA, probative of the officer’s fraud, does the corporation have a fiduciary duty to its shareholders to use the confidential information to recoup defense costs that had been paid to the officer?

B. The Problem of the Turncoat Participant

What if a JDA participant shares confidential information with an opponent?

1. It’s hard to identify a breach.

2. A remedy may require proof of prejudice.
   According to the Fifth Circuit, relief is available against a turncoat only if there is a showing of both a breach of the JDA and also actual prejudice from a disclosure. _United States v. Melvin_, 650 F.2d 641, 644 (5th Cir. 1981).

   Corollary: Never share any information that is so secret that damage would be irreversible and fatal if disclosed.

3. Possible danger for opponent – disqualification by receiving confidential information?
   If an opponent knowingly receives confidential information that had been protected under a JDA, analogous principles from other fact patterns would suggest that a motion to disqualify the opponent may be successful. See _In re Meador_, 968 S.W.2d 346 (Tex. 1998) (listing factors to consider in disqualifying an attorney who, through no wrongdoing, reviews privileged documents of an opponent). The factors include:

   a. “whether the attorney knew or should have known that the material was privileged;
   b. “the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
   c. “the extent to which the attorney reviews and digests the privileged information;
   d. “the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant’s claim or defense, and the extent to which return of the documents will mitigate that prejudice;
   e. “the extent to which movant may be at fault for the unauthorized disclosure;
   f. “the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.” _Id._ at 351-52.

C. Your Client’s Desire to Maximize Benefits in a Plea Bargain or Settlement

Has your client’s (and your) participation in a JDA cut short possibilities to plea or to settle? Would your client have had greater latitude to plea or settle in exchange for sharing information in the absence of a JDA?

D. Can You Cross-Examine a Participant?

1. A continuing participant?
   If the Ninth Circuit is accurate in _United States v. Henke_, above, then a lawyer participating in a JDA has ethical duties that preclude cross-examination of other parties who participated in the JDA. But this is not likely the result most courts will determine, particularly in civil litigation.

   The Texas Supreme Court in _National Medical Enterprises, Inc. v. Godbey_, 924 S.W.2d 123 (Tex. 1996), expressly acknowledged that cross-examination was anticipated under the JDA at issue there and appears to have approved that possibility: “For example, the parties recognized that situations could arise in which it would become necessary for them to cross-examine each other in court.” _Id._ at 129.

   Unless the JDA provides otherwise, however, a cross-examination cannot reveal any confidential information obtained under the JDA.
2. A former participant?
The same result should apply.

E. Can a Former Participant Cause You to Be Disqualified from the Present Litigation?
One might hastily conclude that the Texas Supreme Court implicitly answered this “yes” in *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).

Godbey, however, dealt with the question of whether a law firm could be disqualified from representing a new client in a subsequent lawsuit, rather than representing the same client in the same or a subsequent lawsuit.

The result in Godbey was expressly distinguished in a case where the effort was to disqualify a lawyer from representing the same client. *Great Am. Ins. Co v. Christopher*, No. 3:02-CV-2112-P, 2003 WL 21414676 (N.D.Tex. June 13, 2003). In connection with shareholder lawsuits, Kalitta, represented by Lawyer X, sought D&O indemnity from Great American, represented by Lawyer Rosenfeld. At the insistence of the insurer, Kalitta and Great American and respective counsel met and discussed information pertinent to the cooperation clause. Great American promised that the information would not be disclosed to third parties. Later, Great American sued to rescind the policy. Kalitta sought to disqualify Rosenfeld from representing Great American, because Rosenfeld had received confidential information from Kalitta during the earlier litigation. The court denied the motion to disqualify, even though disqualification would seem to be indicated under the principles in Godbey (i.e., that a fiduciary duty attaches when, in the course of a joint defense, an attorney undertakes a duty to preserve the confidences of a nonclient). The court emphasized that Rosenfeld was not seeking to represent a new client, but was continuing to represent the same client, Great American. The court emphasized that Rosenfeld’s ethical and fiduciary duties to his ongoing client were well-known to Kalitta at the time of the disclosures, and that Kalitta knew that the disclosures would be shared with Rosenfeld’s client, Great American (which was indeed present by its representative during the meeting in which disclosures occurred). The duty not to disclose Kalitta’s confidences to third-parties did not warrant a disqualification of Rosenfeld from continuing to represent his same client.

F. Can a Former Participant Cause You to Be Disqualified from a Subsequent Litigation?
No doubt about it – at least as to your representation of a new client in matters adverse to a JDA participant. National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996). Can the JDA be drafted to change this result?

Open issue: in order to disqualify, is it enough to show that a substantial relationship exists between the former and the new lawsuits; or must the movant prove the actual possession of confidential information, obtained in the prior lawsuit and relevant to the new lawsuit?

The rule, of course, for a former client’s disqualification of a lawyer is whether a “substantial relationship” exists between the former and the current matter. *NCNB Texas Nat’l Bank v. Coker*, 765 S.W.2d 398, 399-400 (Tex. 1989). If so, an irrebuttable presumption exists that former confidences were obtained and that they would be used in the subsequent matter. Id.

However, some courts have held that a former JDA participant (as contrasted with a former client) does not enjoy an irrebuttable presumption. Instead, to disqualify a lawyer, the former JDA participant must show (i) that the challenged lawyer actually obtained confidential information during the prior lawsuit and (ii) that subject matters of the prior and current lawsuits are substantially related. *Rio Hondo Implement Co. v. Euresti*, 903 S.W.2d 128, 132 (Tex.App. - Corpus Christi 1995, no writ); *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *Turner v. Firestone Tire & Rubber Co.*, 896 F.Supp. 651 (E.D.Tex. 1995).

Restatement § 132, comment g(ii), states a similar rule:

“A lawyer who learns confidential information from a person represented by another lawyer pursuant to a common-interest sharing arrangement (see § 76) is precluded from a later representation adverse to the former sharing person when information actually shared with the lawyer or the lawyer’s client is material and relevant to the later matter.... Such a threatened use of shared information is inconsistent with the understanding of confidentiality that is part of such an arrangement.”

In *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996), the Texas Supreme Court applied an irrebuttable presumption, but in a slightly different context. There, it was undisputed that the former lawyer actually obtained confidential information that was relevant to the new lawsuit. Therefore, that case does not address whether an irrebuttable
presumption exists that confidential information was obtained if the subject matters are substantially related. However, the undisputedly acquired-and-relevant confidential information was attributed to all other members of the law firm because of an irrefutable presumption that one lawyer’s information was available to all in the firm.

It is not clear whether the Rio Hondo test – requiring an actual showing that confidential information was obtained, rather than an irrefutable presumption under the “substantially related” test – survives Godbey.

G. Can a Former Participant Cause Your Firm to Be Disqualified from a Present or Subsequent Litigation?

No doubt about it. National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996). Can the JDA be drafted to change this result?

H. Does Your New Lateral Hire Carry along Attribution from All JDAs of the Past?

No doubt about it. National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996). Can the JDA be drafted to change this result?

I. Does a Former Participant Have a Cause of Action Against You for Malpractice? ... for Negligent Misrepresentation?

See Mahaffey, All for One and One for All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, The Final Frontier in Professional Liability, 35 Ariz. L.J. 21 (2003). The author looks at the Fifth Circuit decision in Wilson P. Abraham Construction Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) and at decisions from other jurisdictions and asks: Has a lawyer participating in a JDA unintendedly assumed duties to non-client participants – other than the obvious intended duty to preserve confidences – so that a non-client participant can sue?

Example: A lawyer agrees to share a draft motion to dismiss, but omits a theory that would have been beneficial to the various co-defendants. Might a non-client JDA-participant have a cause of action for (i) negligence/malpractice, despite the absence of customarily required privity between the non-client and the lawyer, or (ii) negligent misrepresentation? Mahaffey’s article predicts “yes.” Perhaps adequate drafting of a JDA can minimize this risk.

VIII. SHOULD YOU ENTER INTO A JDA?

A. Can You Represent Your Client as Well Without Participation?

If so, do the risks and uncertainties of entering into and relying upon a JDA outweigh any benefits your client might enjoy under a JDA?

B. Does a Sufficient Level of Trust Exist with Co-parties and Their Attorneys?

If not, why would you trust your important confidences with someone when (i) the co-party’s breach may be hard to detect and (ii) the damage from a disclosure to the common opponent may be substantial and irreversible?

C. What Is the Motivation of the Other Participants for Wanting to See Your Confidential Information?

If other participants desire to ride your coattails, but do not have benefits to offer your client under a JDA, why accept any risks and uncertainty?

IX. CAN DRAFTING HELP REDUCE UNCERTAINTY AND RISKS?

A. Is a Written Agreement Required?

No. In re Skiles, 102 S.W.3d 323, 326 (Tex.App. - Beaumont 2003, no pet.). But it clearly is vastly preferable. A written agreement:

1. proves the date that the joint defense arrangement was created,
2. proves who the intended participants are,
3. proves the intent to maintain confidentiality notwithstanding the exchange of information,
4. identifies the common interest,
5. negates potential implied duties, and
6. requires all participants to focus on the agreed-upon limitations and covenants.

B. A Sample JDA Is Attached. It Is Intentionally Unusual (And of Probable but Not Certain Effectiveness), Because it Contemplates Sharing of Confidential Information by Some Parties Who Are Defendants in Plaintiff's Lawsuit and Another Party Who Is a Defendant in Plaintiff's Parallel Arbitration.

C. Explain the Common Interest
D. Explain Your Reliance on the Enforceability of the JDA and on the Co-parties’ Promise of Confidentiality

E. Don’t Promise to Give Information. Reserve the Right to Share Information with Some Participants and Not Others. See Restatement § 76, Cmt. E. If You Choose to Share, Make Clear That You Are Not Promising its Accuracy. As Examples, You May Want to Have Separate Consulting Experts and Witness Interviews, Unshared with Other Co-parties.

F. Don’t Promise to Do Anything, Except to Safeguard Confidentiality

G. Define Who Can Waive Confidentiality: (I) Only upon Unanimous Consent? (ii) the Party on Whose Behalf a Communication Was Made, If Made Only on Behalf of One Party; and (iii) All Parties on Whose Behalf a Communication or Work-product Was Created If More than One or If Collaborative.

H. Address the Right to Cross-examine and to Be Adverse, Stating Clearly That Nothing Limits a Lawyer’s Ability to Zealously Represent Her/his Client.

I. Make Clear the Absence of Any Duty of Loyalty or Similar Relationship with Co-parties

J. Consider a Definition Concerning Adequate “Fire Walls” Within Firms, to Limit Attribution, and Express the Consent by Each Participant That Such Screening Will Prevent Any Later Claim of Attribution.

K. Consider Stating the Consent by Each Participant That No Disqualification Will Be Sought of Any Other Party’s Lawyer in the Existing Litigation or in Any Subsequent Litigation (Even If Substantially Related), Notwithstanding the Lawyer’s Receipt of Confidential Information.


M. Should You Promise to Give Notice of Settlement/plea Overtures?

N. How Can You Withdraw from the JDA?

O. Do You Want Your Confidential Information Returned? If So, Include a Covenant for the Return of All Documents (Including Electronic and Copies) Within a Specified Time Following Demand.
APPENDIX A

[SAMPLE] JOINT DEFENSE AGREEMENT

This Joint Defense Agreement ("Agreement") is entered into this ___ day of ____________, 200_, by and among ___________________ ("A"), _______________________ ("B"), ___________________ ("C") and __________________________ ("D") (collectively, "the Parties"), joined herein by their respective attorneys as set forth below (collectively referred to as "Counsel"). The Parties and Counsel, along with their representatives as defined in Texas Rule of Evidence 503(a)(2) and (4), are hereafter referred to collectively as the “Joint Defense Group.”

WHEREAS, there is a pending civil action brought by _________________ ("Plaintiff") filed in Cause No. ________________ in the District Court of ________________ County, Texas, in which Plaintiff alleges that various of A, B and C, among others, participated “in a wrongful scheme to ___________________” ("the Litigation"); and

WHEREAS, there is an arbitration pending between Plaintiff and D, Commercial Arbitration No. ________________, with the American Arbitration Association, _______ Division ("the Arbitration") in which Plaintiff has raised similar claims and issues as in the Litigation; and

WHEREAS, the Parties (i) believe that they have a mutuality of interest in connection with defending against the claims asserted by Plaintiff in the Litigation and/or the Arbitration and (ii) wish to memorialize their mutual understanding concerning their joint defense interests that commenced pursuant to oral agreement with the initial communications and exchanges of information in connection with the Litigation and/or the Arbitration; and

WHEREAS, the Parties have concluded that their mutual interests will be best served, and the provision of legal advice to each Party by its respective attorneys will be facilitated, by sharing among them or their respective counsel certain materials and information (both written and oral) which might otherwise be confidential and privileged; all of which shared confidential and privileged materials and information will hereinafter be referred to as “Shared Materials”; and

WHEREAS, in the absence of such sharing, these Shared Materials may be privileged from disclosure to adverse or other parties as a result of the attorney-client privilege, the attorney work product privilege and other applicable privileges;
WHEREAS, the Parties desire to invoke the benefit of established judicial principles that encourage cooperative and coordinated efforts and that assure continued confidential and privileged status and protection to such information when shared with parties, or their representatives, who have a common interest in a controversy;

WHEREAS, but for the mutual promises of confidentiality in this Agreement and but for the protection given by established judicial principles to the joint-defense privilege, the sharing contemplated under this Agreement would not occur; and

WHEREAS, any exchanges and disclosures of Shared Materials as provided herein or among members of the Joint Defense Group do not diminish in any way the confidentiality of the Shared Materials and do not constitute a waiver of any privilege otherwise available because of disclosure as provided herein;

IT IS THEREFORE AGREED:

VII. Shared Materials provided to or obtained by any of the Parties shall be deemed and kept confidential and shall be protected from disclosure to any third party except as provided herein. The Parties agree to exercise the same degree of care and diligence to maintain confidentiality of the Shared Materials as they would use for their own privileged information.

VIII. Any Shared Materials shall be used solely in connection with the Litigation and/or the Arbitration and any proceedings related thereto.

IX. The Parties shall not disclose Shared Materials, or the contents thereof, to any third party (i.e., a person not a Party to this Agreement, or part of the Joint Defense Group) without first obtaining the written consent of all Parties to this Agreement who may be entitled to claim any privilege with respect to such Shared Materials, unless disclosure is ordered by a court of competent jurisdiction.

X. All persons permitted access to Shared Materials shall be specifically advised that the Shared Materials are confidential and, as applicable, privileged and subject to the terms of this Agreement. If, however, any non-party requests or demands, by subpoena or otherwise, the production of any Shared Materials from any of the Parties, that Party will immediately notify all other Parties and each of the Parties so notified or to whom such request or demand has been made will take all steps necessary to permit the assertion of all applicable rights and privileges with respect to
said Shared Materials and shall cooperate fully with all Parties in any judicial proceeding relating to the disclosure of
Shared Materials.

XI. The Parties mutually understand and agree that, should any Party testify in any proceeding involving another Party, Counsel for the other Party will not be disqualified from cross-examining the testifying Party for any reason arising out of the existence of this Agreement but that such cross-examination and testimony shall be subject to the confidentiality provisions of this Agreement. The Parties also understand and agree that nothing in this agreement precludes any Party from taking positions adverse to other Parties in the Litigation or the Arbitration, subject to the confidentiality provisions of this Agreement.

XII. In the event any Party determines that it no longer has, or no longer will have, mutuality of interest with the other Parties, said Party will provide ten (10) days written notice to the other Parties that it is withdrawing from the Joint Defense Group, and the agreement will thereupon be terminated as to that Party and its counsel, to the extent he/she/it is acting as legal counsel to the terminating Party; provided, however, that no such termination shall affect or impair the obligations set forth herein regarding the confidentiality of Shared Materials previously furnished pursuant to this Agreement.

XIII. The Parties mutually understand and agree that specific performance and/or injunctive relief is an appropriate remedy to compel compliance with the provisions of this Agreement.

XIV. This Agreement may only be modified by a written agreement signed by all members of the Joint Defense Group that have not then withdrawn from the Agreement.

XV. Each Party, by signing this Agreement, verifies that it/he/she understands and acknowledges that it/he/she is represented exclusively by it/his/her own Counsel in this matter and that while counsel representing other Parties to this Agreement have a duty to preserve the confidences disclosed to them pursuant to this Agreement, each Counsel will not be acting as counsel for any other Party and will owe a duty of loyalty only to its/his/her own respective Party-Client. In other words, each Party and its/his/her Counsel understands and agrees that this Agreement itself does not and will not (i) create any attorney-client relationship with Counsel for any other Party for purposes of the determination of conflicts of interest, or (ii) create any duty by Counsel for any other Party, other than contractual duties set out in this document, to act with any degree of care to such Party or to furnish any information with care or at all.
Each Party (i) takes the risk that information contained in the Shared Materials may contain inaccuracies and (ii) acknowledges that no warranty is given as to the accuracy of same. Each Counsel further verifies that its/his/her Party-Client(s), and each Party further verifies that it/he/she, understands and acknowledges that in the event that any Party may have or may in the future develop an interest that is adverse to any or all other Parties’ collective or individual interest(s), a real, apparent or possible conflict of interest may arise. Defenses might be available to one Party that are not available to other Parties; conflicts may arise with respect to particular decisions that one Party may feel must be made, such as the decision to testify at a proceeding or to cooperate with adverse parties. Neither the existence of this Agreement, nor its terms, nor Shared Materials obtained hereunder, shall be asserted by any Party as grounds for a motion to disqualify any Counsel in any proceeding relating to this Matter or in any future proceeding unrelated to this Matter.

XVI. The Parties recognize that if Plaintiff’s claims against the Parties in the Litigation and/or the Arbitration are not defeated, the Parties may have grounds to assert cross-claims against one another. The Parties hereby reserve their right to assert claims against one another, and do not waive that right by entering into this Agreement.

XVII. This Agreement may be signed in counterparts, each of which when executed shall be deemed to be an original and all of which together shall constitute a single instrument binding upon the Parties hereto.

IN WITNESS WHEREOF, the Parties have caused this Joint Defense Agreement to be executed by their respective Counsel.

A
By________________________
Its Attorney

C
By________________________
Its Attorney

B
By________________________
Its Attorney

D
By________________________
Its Attorney