

Drafting the Joint Defense Agreement

(with Sample Provisions)

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Joint defense agreements have some obvious advantages, but some not-so-obvious disadvantages.

If you plan to enter into one, be sure that it addresses the potential for conflicts.

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JOINT DEFENSE AGREEMENTS sound like a great idea. And, in many circumstances, they are: joint defense agreements allow defendants (and plaintiffs) to share information and strategies in confidence. But joint defense agreements are also fraught with peril. Today's friend may be tomorrow's antagonist. Indeed, separate counsel are generally retained, at least in part, in recognition that parties may have adverse interests. Thus, when entering into joint defense agreements, counsel must consider what will happen when those adverse interests collide, and make certain that their clients (and they themselves) are protected in that eventuality.

PRESERVATION OF PRIVILEGES • It is generally assumed that a party supplying privileged information pursuant to a joint defense agreement retains the right to prevent disclosure of such information by the other participants even after a joint defense agreement is terminated. *See, e.g., In re Grand Jury Subpoena*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975) ("How well could a joint defense proceed in the light of each co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration or for the satisfaction of a personal animus?"). As a result, the joint defense privilege ordinarily will protect communications between parties unless and until the parties to the communication become actual adversaries in litigation. *Id.* at 392; see also *IBJ Whitehall Bank and Trust Co. v. Corey & Associates, Inc.*, 1999 WL 617842, at *3 (M.D. Ill. Aug. 12, 1999) (joint defense privilege cannot be waived without the consent of all parties to the defense, except when one of the joint defendants becomes an adverse party in the litigation). Because cooperating with the government, and even testifying against a former joint defense member, is generally not deemed "actually adverse" to the interests of other joint defense members, it does not trigger a waiver of the privilege. Instead, even when one defendant agrees to cooperate with the government and testify against his co-defendants, the assumption is that joint defense information will remain privileged, and will not be useable against the producing party.

THE HENKE DECISION • In *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000), the Ninth Circuit reached somewhat startling conclusions about the consequences of a joint defense agreement when one member of the joint defense group agrees to testify for the government. The *Henke* case arose from the prosecution of California Micro Devices CEO Chan Desaigoudar, CFO Steven Henke, and President

Surendra Gupta for securities fraud and related matters. The three defendants had entered into an oral joint defense agreement pursuant to which they exchanged confidential information. During one discussion, Gupta allegedly told the others that DesaiGoudar was not present at a key meeting in which revenue reporting had been discussed. Thereafter, Gupta entered into a plea agreement and agreed to testify against his co-defendants.

On the third day of trial, after learning that Gupta would be called as a witness, DesaiGoudar's lawyer moved for a mistrial and asked to withdraw as counsel, arguing that the joint defense privilege prohibited him from cross-examining Gupta using information obtained during joint defense meetings, and that his ability to represent his client effectively was thereby impaired. Henke's lawyer joined the motion. The district court granted the mistrial but denied the motion to withdraw, reasoning that since any privileged information learned by the lawyers would not be known to new counsel, the defendants would no worse off with their existing attorneys. The defense lawyers refused to cross-examine Gupta at the second trial, and both defendants were convicted.

The Danger: Disqualifying Conflict

The Ninth Circuit reversed the convictions, concluding that a joint defense agreement “establishes an implied attorney-client relationship with the co-defendants” and that it can also “create a disqualifying [conflict of interest] where information gained in confidence becomes an issue.” *Id.* at 637. The court determined that, as a result, the defense lawyers were “in a difficult position” because “[h]ad they pursued the material discrepancy in some other way, a discrepancy they learned about in confidence, they could have been charged with using it against their one-time client Gupta.” *Id.*

COPING WITH HENKE • Courts (and litigants) are struggling with the implications of *Henke*. In *United States v. Allen*, No. CR98-40167 (DLJ), one court in the Northern District of California granted a motion to withdraw under circumstances similar to those in *Henke*. The *Allen* court also noted, however, that the implications of *Henke* for new counsel are far from clear. A lawyer possessing confidential information pursuant to a joint defense communication may have passed that information along to his or her client, and indeed may even have had an obligation to do so. What is to prevent the client from passing that same confidential information to his or her new attorney? And once that is done, is the new attorney also deemed to be a lawyer to the former member of the joint defense group because of the receipt of confidential information? Does the new lawyer face the same conflict? The district court in *Allen* ultimately allowed the defendant to disclose joint defense information to his new attorney, predicated upon the condition that the defendant waive any potential conflict of interest claim resulting from that disclosure, but did not resolve whether the new attorney would be able to use the joint defense information in cross-examining the former joint defense member.

Pretrial Orders

The *Henke* decision gives rise to the potential for great mischief on the eve of, or even during, trial. As a result, some judges are trying to resolve *Henke* issues early in a case, rather than waiting for conflicts to arise. A state court judge in California in *People v. Avant!*, a prosecution for theft of trade secrets, required all the defendants to waive any conflicts prospectively and to submit copies of any joint defense agreement to the court, under seal, even though there was no indication that any defendants

were considering cooperation. The *Avant!* court ordered the defendants to submit declarations stating, among other things, whether the clients had consulted with independent counsel in determining the client's legal position with respect to conflicts of interest and the name of that attorney, and a statement that the independent counsel or his current counsel had explained the conflicts in detail.

CONCLUSION • *Henke* is remarkable for being loathed with almost equal fervor by prosecutors and defense counsel alike. It gives prosecutors a powerful weapon: The government can enter into a cooperation agreement in order to gain a tactical advantage by disqualifying members of the defense team. On the other hand, the government faces a huge hurdle if it seeks to enter into a last-minute cooperation agreement, because doing so would almost inevitably delay the start of trial. The possibility of conflicts of interest in general, and the *Henke* decision in particular, have implications for whether to enter into a joint defense agreement, and how to draft the agreement.

APPENDIX

Suggested Provisions for Joint Defense Agreements

The following are some suggestions for provisions to include in joint defense agreements. These provisions were drafted in the context of a criminal case, but are readily adaptable to civil cases, which may present similar issues. The desirability of any particular provision will, of course, depend upon the facts of the particular case. Moreover, some of these provisions have not been tested in court, and thus their efficacy as drafted is not guaranteed.

1. Non-Disclosure of Confidential Information

The government frequently requires that a cooperating defendant make full disclosure of all facts regarding the subject of the investigation. Plea agreements frequently require the waiver of all applicable privileges, including the attorney-client privilege, and make no provision for joint defense privileged information. As a result, a joint defense agreement generally includes a provision prohibiting all parties from disclosing joint defense privileged statements even after the termination of the Agreement:

Each Signatory and each Attorney agrees not to disclose to any other person or entity privileged information received after the date of this agreement from another party or counsel unless the Client or Attorney wishing to disclose the information first obtains the consent of counsel for all other parties who may be entitled to claim any privilege or protection with respect to such information, except to the extent explicitly permitted pursuant to a different section of this Agreement.

2. Disclosure of Joint Defense Agreement

In light of the pressures on individual witnesses to cooperate, it may be necessary to go one step further, and to require joint defense members entering into cooperation agreements to make certain specific

representations to the government. Although the express disclosure of the existence of a joint defense agreement may run counter to conventional wisdom, this disclosure puts the government on

notice of the existence of the agreement and requires the government not to take any steps to obtain privileged information:

In the event any Signatory to this Agreement enters into a debriefing, plea, or other cooperative agreement with the government, that Signatory agrees to disclose in any and all agreements that he is bound by a joint defense agreement and that he is prohibited from disclosing information obtained pursuant to that Agreement. All written agreements entered into between the government and that Signatory shall contain the following: "Nothing in this agreement is intended to abrogate any joint defense relationship or privilege that may exist between defendant and any other individual."

Note that such a provision may be viewed with disfavor by some defendants, because it may complicate cooperation with the government.

3. Disclaimer of Attorney-Client Relationship

In the wake of *Henke*, joint defense agreements should make clear that each attorney represents only his or her own client, and does not enter into an attorney-client relationship with the other participants in the joint defense agreement:

Nothing in this Agreement shall be construed to create an attorney-client relationship. Each Client represents and acknowledges that he or she is represented exclusively by his or her own Attorney as identified in Paragraph __. Each Attorney participating in the Joint Defense Group is obligated to maintain the confidentiality of information as specified in the Agreement, but each Attorney does not act on behalf of any person other than his or her own Client.

4. Withdrawal from Joint Defense Group

A joint defense agreement needs to address what will happen if one participant withdraws from the joint defense group. A standard approach is to specify that the parties waive any conflicts that might arise from the sharing of information, including the right to seek to disqualify counsel:

Each Signatory specifically acknowledges that any Client may become a witness, whether voluntarily or otherwise, in connection with or as a result of the investigation. In the event that any Client becomes a witness, nothing in this Agreement shall create a conflict of interest so as to require the disqualification of any Attorney from the representation of his or her Client, based on the existence of this agreement or any sharing of defense materials. By entering into this Agreement, each Client and each Attorney knowingly and intelligently waives any conflict of interest or other objection that might otherwise be available based upon the sharing of information pursuant to this Agreement.

The parties may also wish to include a broader waiver that is triggered when a former joint defense participant agrees to testify against his former joint defense members:

Any Client who enters into a cooperation agreement with the government or who testifies in any civil, administrative, or criminal proceeding arising from this matter hereby consents to any other Signatory using for defense purposes any information or material contributed by the Client or his Attorney, and waives any conflict of interest related thereto. This Agreement specifically permits the use of contributed

information or material in cross-examining the former joint defense participant and permits the presentation of the material or information by the defense at any point in the proceeding. Each Client further represents that he has consulted with his or her own Attorney regarding this provision and its implications and waives any conflicts of interest that might be created thereby.

This provision is intended to eliminate any issue regarding disqualification of counsel. However, joint defense participants may refuse to agree to this provision for fear that confidential information later could be used against them. Moreover, the government is likely to look with particular disfavor upon such a provision, because it permits government witnesses to be impeached with joint defense material, but does not allow the government access to that same information.

5. Notification of Intent To Withdraw or Cooperate

A joint defense agreement should require not only notification of an intent to withdraw from the Agreement, but should also require notification of an intent to cooperate with the government. This provision may also be particularly unpopular with the government because it requires early notification to the joint defense participants if one member is considering cooperation. Nonetheless, this provision has many advantages for the defense. For example, it can help safeguard joint defense information by ensuring that such information is not shared with defendants who are actively pursuing cooperation with the government:

Each Signatory agrees immediately to notify in writing all other Signatories when any Client or Attorney engages in discussions concerning possible cooperation with the government or when a Client decides to cooperate with the government, grant an interview, or make any form of proffer to the government either directly or through counsel.

6. Return of Privileged Documents

Finally, a joint defense agreement should also require that all documents provided under the joint defense agreement be returned when any party withdraws from the agreement, or at its conclusion:

All materials that are exchanged pursuant to this Agreement shall be marked and identified as being provided with the following language: "Confidential and privileged communication produced pursuant to joint defense agreement." Any signatory withdrawing from the Agreement for any reason, or upon its termination, shall immediately return all copies of such materials to the producing party.