

ORGANIZING AND DIRECTING MULTIPLE CLIENT CASES:
JOINT CONFIDENTIALITY AND DEFENSE AGREEMENTS

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INTRODUCTION

One of the more amusing moments in any multiple defendant criminal case is the one in which a Judge, or defense lawyer colleague, asks the group of defense counsel for a date and time on which all can agree. The answer to this question is usually punctuated by the furrowing of brows, the sizzling of portable electronic devices, the opening of scheduling books of all kinds. Within a matter of seconds, some are nodding, others shaking their heads. Minutes of negotiation follow in order to find that one time on the one day in the foreseeable future when all concerned can actually gather for a common purpose. Gathering this same group for the purpose of agreeing upon certain basic procedures that will govern the conduct of a group of defense counsel in a given case, or may even help guide a common defense approach, can be exponentially more difficult than picking a date for the next hearing.

Common sense and experience combine to tell us that there are occasions on which a group of lawyers can define a goal, and work towards it more efficiently, and in a legal sense, effectively, than can this same group when each member works alone. For example, where a group of criminal defendants are defending a case in which one or two witnesses are at the heart of the Government's case, it may be that planned joint activity by the defense will permit several lawyer/investigator teams to work in a coordinated way to obtain information for use by the defense in cross-examination. In cases in which the acquisition of information, for example in a multi-state investigation, can be accomplished through shared resources, the defense's common effort may serve the interests of all of the defendants. In order to plan a joint investigation, however, the establishment and definition of basic ground rules makes sense. In the absence of a negotiated, and stated, understanding and agreement, the lawyers in a case may have varied

interpretations of their obligations. For example, it may be that in the absence of having been admonished, instructed, or bound by an agreement, one of the lawyers may, during discussions with the Government, divulge information that has been gained through the joint effort - thereby prejudicing those defendants whose goal it is to succeed at trial, rather than to make the great deal.

Also, there are occasions on which one defense team may have access to documents, or to witnesses, that will be useful to most if not all defendants in a multiple defendant case. The sticking point may be that the one team in the position of having the critical evidence may be concerned about its use, or misuse, by others.

The purpose of this writing is to review some of the law that helps to protect common or joint communications and work product where several lawyers are representing co-defendants in a specific case. For those familiar with this legal and ethical territory, be advised that this writing does not purport to deal with a number of matters. For example, you will note very little discussion of the thorny problem that is raised in white collar crime cases where the lawyers in the criminal case are seeking to protect from disclosure material that may have been provided by corporate counsel, or lawyers handling a parallel or related civil case. This problem is accentuated where, eventually, the Government accuses the civil case lawyers obstructing justice in their handling of what could potentially be criminal case evidence.¹ There are such

¹ For those for whom this excess of jargon clouds the issue, a quick example may suffice. It is not uncommon where certain sorts of frauds have been alleged for the Office of the United States Attorney to join in a *qui tam* civil action which has been filed by a 'civilian' plaintiff against a corporate or individual defendant who also becomes a defendant in a related criminal case. See, for example, U.S. v. Talao, et al. (9th Cir., 2000) 222 F. 3d 1133, in which a construction company and two family members who were officers in it, were sued for back wages allegedly owed to workers, and were prosecuted by the Federal Government for violations of various public works wage reporting requirements. The corporation had a lawyer. Eventually, both the corporation and the individual defendants were represented by criminal defense lawyers. The question of the extent to which exchanges of documents

arcane and complex scenarios to multi-defendant or multi lawyer cases involving parallel cases that wiser minds should be entrusted to analyze those.

What follows is an introduction for California based defenders to some of the legal doctrines and practices related to: joint defense agreements; joint confidentiality agreements; the joint privilege or joint defense privilege doctrine; the common interest doctrine; and the practical application of these matters in multi-defendant cases. Some states, and the federal courts, have recognized joint defense privileges. Ironically, since this publication deals with matters pertinent to California-based lawyers, it has been noted that neither the joint defense privilege nor the common interest doctrine are defined and recognized in California evidence law. This is, first, because neither is found in the California Evidence Code. Second, while California case law has acknowledged the concepts, California courts have never specifically adopted the federal statement of these rules and doctrines as they have been recognized in federal cases.²

between the corporate lawyer and the criminal defense lawyers are protected is one of the complicated areas which, mercifully, will not be dealt with here.

² See the discussion in First Pacific Networks v. Atlantic Mutual Insurance Company (N.D. Cal., 1995) 163 F.R.D. 574, 581. The Court noted that neither the "joint defense privilege" nor the "common interest doctrines" have been recognized "statutorily in California, and case law discussion of them is sparse." *Ibid.* See also the Comment, "Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California (1988) 36 U.C.L.A. Law Review 151. There, the author noted: "It would be somewhat naive in today's world of complex, multiple-party legal endeavors to believe that participants do not share privileged information. Nor can one say with any confidence that those who share information have done nothing their opponents could challenge. Why, then, is this area so devoid of case life?" *Id.* at p. 151. Nonetheless, the author did acknowledge that there were a number of federal cases, and a few out-of-state cases, recognizing the extension of some kind of common interest or joint defense privilege in criminal cases.

So, if you were a lawyer in a multi-defendant California state case, and found out that a lawyer for a co-defendant had told the prosecutor about the trial strategy that you shared during a confidential defense planning meeting, how would you deal with it? Does the action by your colleague represent an invasion of privileged information under California law since it was disseminated in a meeting involving a number of lawyers, but no defendants? How does the evolution of the federal doctrines used to protect matters of common interest help arguments for confidentiality made by California lawyers in state proceedings?

The legal basis for thinking of defense communications involved in planning and conducting a multi-defendant defense as privileged.

Federal courts have recognized the need for protection of communications, and exchanges of information, between and among lawyers in certain classes of cases, and particularly cases involving criminal prosecutions. The specialized recognition was provided in part because: "Without the attorney-client privilege, that right [to assistance of counsel] and many other rights belonging to those accused of crime would in large part be rendered meaningless." United States v. Schwimmer.³ The Schwimmer court offers a rich and fairly elaborate discussion of the joint defense privilege as an extension of the attorney-client privilege.

The public policy behind the attorney-client privilege has been discussed in many places. As the U.S. Supreme Court put it in Upjohn Co. v. United States, the attorney-client privilege was designed to encourage full and frank communication between attorneys and their clients.⁴ The rule of confidentiality "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client."⁵ Long ago, the Court held that a lawyer's

³ (2nd Cir., 1989) 892 F. 2d 237, 243

⁴ (1981) 449 U.S. 383, 389

⁵ *Id.*

assistance can only be safely and readily provided "when free from consequences or the apprehension of disclosure." Hunt v. Blackburn⁶.

Lawyers in California are required to protect the confidences of clients not only by California Evidence Code § 955 ["When lawyer required to claim privilege"], but also under Business & Professions Code § 6068(e), which requires lawyers: "To maintain inviolate the confidence, and at every peril to himself or herself preserve the secrets, of his or her client". By definition, in California, the client is the holder of the attorney-client privilege. (See Evidence Code § 953(a).) But the issues that we are addressing here are raised in part because the attorney client privilege covers matters which are confidential because they involve one lawyer talking to one client. By definition, the one lawyer/one client confidential exchange is not shared in or with a group. Also, by definition, information provided to a lawyer in confidence, but then divulged to a third party, may no longer be deemed privileged, or protected. (Evidence Code Section 912.)

In the last thirty years, there has been an 'amplification' of the protection of privileged material which is generated by, or used in, meetings or communications between groups of lawyers defending one case, several lawyers and clients meeting in that case, and these same lawyers communicating with the non-lawyer personnel that they are using to help defend the case. It was recognized that several lawyers working in defense of the same case for separate clients, or lawyers working in various capacities for one client (for example a lawyer defending a client in a civil case, and the lawyer representing that same client in a criminal case) may have reasons to exchange privileged information. These same lawyers work with experts, investigators, paralegals and other colleagues. It was clear that to provide their services, these persons require protection when they exchange information for the purpose of providing legal services. But then the question became how broad the extension of the attorney-client and work product privileges would be. Cases then began to discuss the existence of shared or joint privileges.

⁶ (1888) 128 U.S. 464, 470

The joint defense privilege, described as more properly identified as the 'common interest rule' was defined as an extension of the attorney-client privilege which "... serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."⁷ The Schwimmer court provided a useful, common sense interpretation of the reach of the joint defense privilege. It did not consider it necessary that actual litigation be in progress for the common interest rule, or joint defense privilege, to apply. Moreover, it was not necessary that the attorney representing the communicating party be present when communication is made to another party's lawyer for the common interest rule to apply to protect all lawyers working for the common interest.⁸

Ironically, given that it is now often discussed in the context of criminal cases, the modern recognition of the joint defense privilege apparently evolved from assertions made by corporate entities of a need to maintain confidences exchanged during the course of meetings designed to develop a joint defense in civil cases.⁹ Soon after this rule or doctrine was recognized, it was viewed as applicable to cover lawyers' communications with defense experts, and other persons necessary to the provision of the legal services involved in the subject of the representation. Thus, the ruling in U.S. v. Schwimmer was to remand the case for a hearing on whether "... the Government's case was in any respect derived from a violation of the attorney-client privilege in regard to confidential communications passing from Schwimmer to Glickman [a Certified Public Accountant who was hired by a

⁷ U.S. v. Schwimmer, *supra*, at 243-244.

⁸ See, U.S. v. Zolin (9th Cir. 1987) 809 F. 2d 1411, 1417 *vacated on other grounds*, (9th Cir., 1988) 842 F. 2d 1135 (*en banc*), *aff'd in part and vacated on other grounds*, (1989) 492 U.S. 554.

⁹ See, Wilson P. Abraham Construction Corp. v. Armco Steel Corp. (5th Cir., 1977) 559 F. 2d 250-253.

lawyer involved in this white collar case to serve joint interests]."¹⁰

A number of other federal cases provide useful 'snippets' of authority to support the proposition that discussions between and among lawyers, or persons working with lawyers to establish a defense, are privileged. Moreover, as one Circuit Court put it: "Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests."¹¹

The modern reiteration of the common interest or joint defense privilege was, in a sense, also necessary because of the constitutional roots of the rules of criminal procedure. For example, any unlawful intrusion by the Government into the attorney-client relationship to obtain what would otherwise be confidential information can be deemed either a violation of the accused's Sixth Amendment right to effective assistance of counsel, or an abrogation of the right to a fair trial, and due process under the Fifth Amendment.^{12, 13}

While there are a number of compendiums that deal with the ethical issues that are raised by multiple client cases involving criminal charges. Criminal defense lawyers wishing to better understand the various applicable rules, and case law, (and looking for some 'one stop shopping' opportunities) may want to review John Wesley Hall's Professional Responsibility of the Criminal Lawyer (2d ed.,

¹⁰ 892 F. 3d 237, 244, *affirmed after remand*, (2nd Cir., 1991) 924 F. 2d 443.

¹¹ Eisenberg v. Gagnon (3rd Cir.) 766 F. 2d 770, 787-788 *cert. denied* (1985)474 U.S. 946.

¹² *See*, U.S. v. Haynes (9th Cir.) *cert. denied* (2001) 216 F. 3d 789, 796; 531 U.S. 1078; U.S. v. Aulicino (2nd Cir., 1995) 44 F. 3d 1102, 1117.

¹³ There are relatively few cases on these topics. One good source of information, and discussion on the existence of the joint defense privilege is Judge Patel's Order in U.S. v. Stepney, (N.D. Cal., 2003) 246 F. Supp. 2d 1069.

West Group). Mr. Hall, who is a very experienced criminal defense lawyer from Little Rock, Arkansas, and a prominent figure in the National Association of Criminal Defense Lawyers, provides annotated interpretations of joint privileges in his useful book. That said, Mr. Hall's book itself is good cause to sound a cautionary note. For example, his sample joint defense agreements would likely be view as controversial, and probably improper in certain particulars in the Ninth Circuit, and thus risky for use in California. The point is made because in order for lawyers to construct defensible agreements aimed at preserving confidentiality, research very specific to the jurisdiction at hand must be undertaken. This is especially true in view of the fact that some federal courts in California have taken the position that they have a duty to make inquiry into the existence, and terms, of any joint defense agreements to preserve the integrity of proceedings. These West Coast courts are not unique. Therefore, it makes sense to avoid using generic models of joint confidentiality or privilege and defense agreements in California. That said, however, Hall's work dissects, with his ample references, the world of multiple defendant cases as he discusses the attorney-client privilege in criminal cases. It is one of the sources that counsel relatively new to the matters discussed here may wish to at least review.^{14, 15}

¹⁴One of the chapters in John Hall's book that is of great interest, in part because some of the research linked to it, is Chapter 29 "Attorney-Client Privilege", which very usefully reviews the elements of the privilege, and discusses them as they apply in multiple-defendant cases. The cautionary note that is sounded here is that which is required by orders such as the Judge Pattel "Memorandum and Order Re Joint Defense Agreements" from U.S. v. Stepney, (N.D. Cal., 2003) 246 F. Supp. 2d 1069. There, finding that a trial court has a supervisory interest in the matter, Judge Pattel noted that the inherent "... supervisory powers unquestionably allow courts to require disclosure of the precise nature of a criminal defendant's representation to ensure that no conflict of interest exists ...". [Stepney at 1077.] Having made the inquiry in the Stepney case, Judge Pattel found the agreement at issue problematic in at least two respects. Indeed, it does not appear that Mr. Hall's proposed Joint Defense Agreement would likely pass muster before Judge Pattel in at least one specific area. This point is made because, as noted,

It bears repeating at this point that California state courts have not recognized a joint defense privilege or common interest doctrine. Indeed, in California, there is even a limited statutory exception to the attorney-client privilege which applies to situations where two or more clients have retained or consulted a lawyer on a matter of common interest, and later one of them seeks to claim the attorney-client privilege where the communication is offered in a civil proceeding. (See Evid. Code § 962.)¹⁶

In California, to the extent and degree that courts have actually dealt with this issue, the functional equivalent of the federal joint defense privilege, or common interest rule, is recognized as an extension of the "normal" statutory attorney-client privilege that binds one attorney representing one particular party in a case.¹⁷ As the California view has been described, it is essentially that a lawyer cannot waive the attorney-client privilege, and thus, in California, the common interest doctrine, or joint defense privilege, is loosely defined as a doctrine that recognizes that neither the attorney-client privilege nor the work-product doctrine can be waived without some affirmative act that may require something more than an exchange of information between lawyers defending the same

Mr. Hall's book is certainly a useful resource in many other respects.

¹⁵ Another recent source is the December 13, 2003, CACJ Fall Seminar Syllabus, containing materials submitted by Seattle defense lawyer Irwin Schwartz, pp. 1-59.

¹⁶ See also Rockwell International Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 1267. The other statute in California that deals with what appears to be some kind of shared privilege is Civil Code § 47(c), which provides no basis upon which, in most criminal cases, to even approach the claim that California has a statutory joint defense privilege or common interest doctrine.

¹⁷ See the truncated, somewhat pertinent, discussion in Raytheon Company v. Superior Court (1989) 208 Cal. App. 3d 683, 687-689.

case, and aimed at vindicating the right to effective assistance of counsel.¹⁸

The view that California courts should at least recognize the policy warranting the extension of the attorney-client privileges and work product doctrines to a group of lawyers, and the persons working on the defense of the criminal case, may be based on the following analysis offered by the Ninth Circuit Court of Appeal:

“The joint defense privilege, which is an extension of the attorney-client privilege, has long been recognized by this circuit. [citations omitted] Under the joint defense privilege ‘communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with co-defendants for the purposes of a common defense.’ ”¹⁹

That said, counsel should be very cautious in trying to draw parallels between the law in federal courts which are interpreting the Federal Rules of Evidence, and other doctrines found in case law in dealing with such evidentiary, and constitutional, issues. The primacy of the Evidence Code in California cannot be underestimated. While there are certain areas of substantive and procedural law in which the federal courts enjoy constitutionally required primacy, it is a matter of hornbook law that a California court’s interpretation of California Evidence Code will remain undisturbed in all but the most extreme cases raising federal constitutional issues. Citing federal precedent to California courts on the subject at issue may not, as far as the California trial court is concerned, be of anything other than general interest.

¹⁸ While it is no longer controlling authority, counsel can find a discussion of this issue in Oxy Resources California v. Superior Court (2004) 115 Cal. App. 4th 874 modified on March 4, 2004 without change in result. It is not clear that the opinion just cited will survive the further litigation.

¹⁹ Waller v. Financial Corporation of America (9th Cir., 1987) 828 F. 2d 579, fn. 7.

The value of joint confidentiality and other forms of joint defense agreements.

Because the joint defense doctrine has evolved from a fairly old principle of law, some have assumed that there would be no major problems presented by "joint defense agreements" regardless of their contents. These assumptions have proven to be erroneous.

Admittedly, the recognition of the joint defense privilege harkens back more than 130 years to 1871.²⁰ One would think that this old a concept would have produced well accepted rules everywhere. But, as the rules of criminal procedure have evolved, so have the concerns about schemes and mechanisms that undermine constitutional protections in criminal cases. Thus, there are now a number of reported cases that have analyzed the problems caused by specific types of joint defense agreements as violations of the Sixth Amendment. For example, in a decision that resulted in debate and reconsideration of some of the practices that existed at the time, a federal district court in Seattle ruled that an information sharing agreement between and among counsel that provided them with "access to confidential information from some of these potential [cooperating government] witnesses that [defense counsel] would not be able to use on cross-examination ..." created a conflict of interest warranting disqualification of the lawyers.²¹ The Court relied on the Sixth Amendment right to effective assistance of counsel to rule that a person cannot be represented by a lawyer who has contractually divided loyalties.²²

²⁰ See Chahoon v. Commonwealth (Virginia)(1871) 62 VA (21 Gratt) 822.

²¹ See U.S. v. Anderson, (W.D. Wash., 1992) 79 F. Supp. 231, 232.

²² See also Forsgren, note, "The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine (1994) 78 Minn. L. Rev. 1219. Indeed, one of the regular columnists in this publication, Gerald Uelman wrote about this subject years before the decision in Anderson. See Uelman, "The Joint Defense Privilege: Know the Risks" (1988) 14 No. 4 Lit. 35.

This attention to such types of defense agreements is not unique. Periodically, bar associations, ethics committees, and scholars have turned their attention to the problems of joint defense issues, including joint defense agreements.^{23, 24}

Indeed, the fact that joint defense agreements have been around for so long has produced an interesting, and alarming development - namely, the imposition, by some prosecutors, of a limit on the extent of discovery that can be disclosed to any lawyers working under a joint defense or confidentiality agreement in a given case. These prosecutors are likely to take the view that they have the right to make inquiries, or to have the court make inquiries, into the existence of any formal agreements between and among the lawyers in order to protect their witnesses. More diabolically, in cases in which the U.S. Government is formulating cooperation agreements with defendants, or likely defendants, the prosecutor has on occasion tendered notice that a motion for judicial inquiry into the existence of the scope of existing defense agreements would be made out of concern for the rights of the defendants. The reaction to the federal government's proactive attempted invasion of the defense camp was sufficient that the American College of Trial Lawyers commissioned an analysis of it, which was published recently in an article entitled: "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations."²⁵

In addition to the Government's professed interest in the existence of joint defense or other agreements intended to preserve confidentiality, courts have also asserted an interest in them for a variety of reasons. Some recent decisions illustrate the bases for the asserted judicial interest. In the first case, U.S. v. Henke, the Ninth

²³ For a useful, though somewhat dated, view, see, Foote, "Joint Defense Agreements in Criminal Prosecutions: Tactical and Ethical Implications."

²⁴ For a more modern view, see, 12 Georgetown Journal of Legal Ethics 377 (1999).

²⁵ 41 Duquesne L. Rev. 307 (2003)

Circuit was presented, on appeal, with a claim that the accuseds in a white collar crime case were represented by counsel who had a conflict of interest which prevented cross-examination, and thus due process and a fair trial.²⁶ The record indicated that, at the trial level, specific defense counsel had participated in joint defense meetings. Then, one of the persons whose lawyer participated in the joint meetings became a government witness. One of the non-cooperating and remaining co-defendants' lawyers later moved to withdraw on grounds that his involvement in a joint defense agreement prevented him now from cross-examining the former co-defendant, now a government witness. On appeal, the Ninth Circuit noted that it was not holding that joint defense meetings are themselves grounds for disqualification of counsel. Rather, it ruled that where defense lawyers inform a trial court that they cannot avoid reliance on information that they believe is protected from use during cross-examination because of a joint privilege, those lawyers could not uphold their ethical duties to represent their clients. They present the trial court with a conflict of constitutional dimension.

A later case arose in the same court - the Northern District of California. Henke had been decided. This later case, U.S. v. Stepney, involved nearly 30 defendants, and more than 70 substantive charges.²⁷ At the initial appearance, the court ordered that any joint defense agreements be committed to writing, and provided to the Court for *in camera* review.²⁸ Initially, no agreements were filed. But a year after this order was entered, a lawyer moved to withdraw based on his statement of concern that the joint defense agreement that he had entered into (which was apparently verbal) had created a duty of loyalty that would prevent him from cross-examining a defendant who he had learned was now cooperating with the Government. Thereafter, the defense did submit for judicial review a written Joint Defense Agreement (over the objection of defense counsel). The District Court overcame the defense's objection to its review of the defense agreement

²⁶ (9th Cir., 2000) 222 F. 3d 633

²⁷ (N.D. Cal., 2003), 246 F. Supp. 2d 1069.

²⁸ *Id.* at 1072.

by asserting that federal courts have the inherent supervisory power to implement remedies for constitutional rights. Thus, the District Court ruled that it could inquire into any defense agreements that might raise constitutional problems.²⁹

The Stepney order is of interest not only because it has since been quoted with approval by other courts, but also because, in the end, the court issuing it reiterated the view that any joint defense agreement that require defense lawyers to abandon their duty of loyalty to their individual clients and undertake to preserve the rights and confidences of all defendants will be viewed as suspect: "A duty of loyalty between parties to a joint defense agreement would create a minefield of potential conflicts. Should any defendant that signed the agreement decide to cooperate with the Government and testify in the prosecution's case-in-chief, an attorney for a non-cooperating defendant would be put in the position of cross-examining a witness to whom she owed a duty of loyalty on behalf of her client, to whom she would also owe a duty of loyalty."³⁰ The Court then found that in the context of the case, based on its review of existing case law and literature on ethics, an acceptable agreement in that case needed to state that it created no attorney-client relationship between an attorney and a defendant other than the client that the specific attorney represented. Moreover, the agreement should be clear that any defendant previously participating in the agreement, who later testified under a grant of immunity or otherwise, would be subject to cross-examination as though there were no confidentiality offered by the joint defense agreement. Finally, each defendant should have the right to withdraw from the agreement upon notice to other defendants.

One clear import of Stepney, is that it represents the judiciary's response to what some defense lawyers view as "true" joint or uniform defense agreements, as these came to be understood by some members of the defense bar. These sorts of agreements were essentially understood to bind the member defendants and their lawyers to a given, 'we all

²⁹ *Id.* at 1077 relying in part on U.S. v. Hasting (1983) 461 U.S. 499, 505.

³⁰ Stepney at 1083-1084.

rise or fall together' approach. In order to pass muster in some courts, a "joint defense" agreement today will need to contain so many exceptions to joint action that such agreements are really joint privilege or confidentiality agreements, rather than agreements that bind a group of lawyers to a joint approach. Courts have continued to approve defense agreements in so far as they are designed to preserve confidences exchanged by the defense from disclosure to the Government, or to third parties. But note that by requiring, as she did, what she called a conditional waiver of confidentiality from all defendants, the Stepney Judge placed the defense under an obligation to operate under a scheme in which a client's waiver of the joint defense privilege would be triggered when that client became, or agreed to become, a Government witness. The waiver would then allow any other defense lawyer in the case to cross examine this former defendant based on all available impeachment information, even that gained during the course of meetings and activities otherwise protected by the written joint defense agreement.

Arguably, the courts' declaration of interest in the regulation of defense activities is a form of interference with the constitutional right to present a legally available defense of choice. It is also likely to create problems where a record can be made that a defendant could have had access to necessary defense work product only through involvement in a more restrictive confidentiality agreement than permitted by the Stepney court. Ironically, in some cases the Government forces the defense to limit its use of 'protected' evidence. Just imagine, given the onerous rules imposed in current terrorism cases, how it can be said that the defense is restricted in its ability to present a defense or in cross-examination. At this point, courts seem more readily able to justify Government restriction that will compromise a defense than those self imposed by defense counsel.

It can also easily be anticipated that courts will have difficulty enforcing Stepney -like rules and procedures where agreements between corporate and individual defendants are crafted to allow the individuals access to evidence that could not otherwise be available when both the corporation and the individuals are involved in litigation.

Yes, there are complexities involved in protecting communications, and evidence, of common interest in a case. But, there is clearly value to agreements worked out between and among lawyers representing a group of defendants to permit wide-ranging discussion and defense planning, while attempting to shield defense information from the Government.

Lawyers who practice in state courts should not minimize the value of the process of reaching joint defense/confidentiality agreements, or the value of having such agreements in hand. Many lawyers dealing with complicated white collar cases, or multi-defendant cases of all types, have lamented 'handshake' agreements that resulted in regrettable prosecution invasions of the defense camp. More than once, lawyers defending gang cases have learned that a defendant in the case was being 'worked' for gang intelligence information by jail gang deputies, and that the prosecution ended up with otherwise privileged information about the common preparation of the pending case while trying to 'turn' that defendant. On one hand, it can be argued by the State that the defendant who voluntarily coughs up information by trying to curry favors with the authorities is him/herself free to waive personal privileges. On the other, the client who has been admonished, pursuant to a written and signed joint confidentiality agreement that upon a breach of that agreement, the remaining defendants will be able to seek remedy for the breach may find him/herself restricted in testimony on behalf of the state. Indeed, there are cases pending as this piece is written in which courts are being asked to impose limitations on a cooperator's testimony where the cooperator was told that the divulging of joint defense product, or joint defense information, to the government would be challenged as an invasion of the defined defense privileges.

In sum, a joint confidentiality agreement that specifies the style and manner of the extension of the attorney-client relationship and work product privilege in a group defense, and provides explicit sanctions for a participant's disclosure to the Government of material and information gained in the course of joint defense meetings and exchanges, while also requiring notice of withdrawal to the group, may place the remaining group of defendants and

their lawyers in a better position to seek remedies for a breach of a defined protocol than otherwise.³¹

Given the apparent complexities of drafting a legally permissible defense agreement, and the existence of the attorney-client and work product privileges, why bother using a written agreement to help organize the defense?

_____ It is a truism that many skilled criminal defense trial lawyers are not fond of 'the book side' of practicing law. This is not said to denigrate anyone - indeed the author is among such persons notwithstanding more than 25 years of defense work that has included both a number of appeals as well as trials. Trial lawyers are the most likely candidates to require multi-defendant case agreements. Having some familiarity with the rocky shoals of defense agreements, some lawyers may feel that it is safe to assume that the attorney-client and work product privileges will provide a sufficient shield against invasions of joint defense efforts. The extension of this logic is to deem it safe to proceed in all cases on the basis of intra-defense 'handshake' agreements without any greater formality.

³¹ One of the reasons for this informed speculation is based on the author's experience in at least one case involving a combined federal and state investigation of a well known alleged prison gang. At one point, it became evident that charged members of the group had, with the assistance of counsel, become a cooperating witness, and in cooperating had described information that could not have been learned prior to the exchange of information between and among defense lawyers pursuant to a confidentiality agreement. The existence of the written agreement was deemed to have put the cooperator on notice that neither he nor his counsel were at liberty to provide the fruit of defense investigation or discussions without penalty. Among the remedies sought were: (a) a prohibition on this former defendant's testimony against those who had signed the confidentiality agreement; and (b) an order prohibiting government agents from making inquiry into a matter which dealt at all with the defense of the case during the course of interviews on penalty of loss of cooperating witnesses - in itself a problem for the cooperators, since their "deals" were contingent in part on their testifying.

While this approach is certainly seductive in that it minimizes the need for both books and paperwork, it may be short-sighted especially in certain sorts of cases. As a number of lawyers who practice regularly before federal courts are well aware, in the absence of clearly delineated obligations, criminal defense lawyers often resort to their relatively independent and idiosyncratic practices when dealing with unexpected situations. In a room full of defense lawyers, there are likely to be varying answers to the question of what to do, for example, with a shared investigation report that a prosecutor or debriefing officer is asking about? "We know that you people talked to X's brother. What did he say?" Some lawyers may well be of the view that regardless of where the defense investigation report came from, once their client is cooperating, there is no limit to the cooperation. Others will view the situation very differently, and will object to any debriefing interview that seeks joint defense product.

An advantage to the intra-defense negotiations and discussions leading to a joint agreement is the delineation of ground rules that experienced defense counsel feel would be most useful and applicable in a given case. The process of reaching an agreement allows counsel to spell out what information sharing obligations they are willing to assume, together with a protocol for protecting the defense's confidences. This protocol, incidentally, will often require defense lawyers who begin to undertake negotiations with the Government to settle a case (particularly cooperation agreements) to notify all fellow defense lawyers that the specific cooperating lawyer is withdrawing from the information sharing process. Some recent "form" agreements require defense counsel who are negotiating cooperation agreements to return to their co-defendants those defense materials acquired pursuant to a joint defense or joint confidentiality agreement to minimize the chances of a serious breach of the common interest privilege.

Another area that can be organized and delineated through an agreement is the common use of an expert to help prepare a case, where it is clear that the expert at issue will be called at trial by a specific defendant for a purpose specific to that defendant's case. For example, both 'hard' and 'soft' scientists may have information pertinent to all defendants in a case. A relatively simple

example would be a social scientist who has been commissioned by a defendant, pursuant to an agreed upon defense procedure, to analyze a jury pool in contemplation of a jury composition challenge. Similarly, one defendant may be preparing to make a motion for change of venue that would have included public opinion polling pertinent to other defendants in the same case. For a number of reasons, it may be useful for a mechanism to be created so that the information at issue can be shared, with the understanding that the co-defendants could not use the data shared without a further agreement.

The same may be true with respect to the analysis of crime lab results by a scientist retained by one defendant in a case, or of the results of independent testing done by one of the defendants. Basic information may be shared pursuant to an agreement that makes it clear that the prerogative to call the scientist at issue will remain with only one of the defendants, with the specific further agreement that any other defendant may use appropriate material during the course of the examination of that witness, or retain another expert to analyze and present data.

Joint defense/confidentiality agreements or common interest privilege agreements, can also anticipate situations where defendants may share certain categories of information, but not others. For example, it is not unusual for defendants to guard jealously, and for good reason, mental health or family background information. It may be that one defense lawyer in a group who has otherwise shared investigation reports may announce to the others his/her intention to present a mental state defense while indicating that the foundational materials, and even the expert's report, would not be voluntarily furnished to co-defendants. Otherwise, it may be that proceeding by nods, winks, and handshakes, lawyers hoping for some level of cooperation in a case may be sorely surprised that their teamwork is met by a refusal to share information pertinent to one of the defendants.

At Least Consider A Written Agreement

Lawyers who have been through the process of negotiating, and even participating, in joint defense, common interest, joint confidentiality, or similar formal agreements will no doubt be able to offer perspectives

other than those offered here. That said, there is little doubt that the author, who has much to learn in many areas of practice, wished that he had possessed greater knowledge early in his career of the nature and scope of the joint defense agreements in multi-defendant cases. The encouragement of the negotiation and drafting of agreements of the type covered here is not meant to signal the advent of a new class of dishonorable lawyers. Rather, the formulation of such agreements permits all members of a defense group to become a 'team' (whether they will later function as a true team, or not). Researching and understanding the strengths and limitations of joint privileges; organizing and defining defense efforts in such a way that there clarity and consensus about the responsibilities of the various members of the defense—all of these are ways of avoiding that the defense does not unintentionally become part of the prosecution.