Chapter Three: The Joint Defense Doctrine—Cohesion Among Traditional Adversaries

Greg A. Drumright

W. Rick Griffin

Greg A. Drumright is a partner with the law firm of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P. in Wichita, Kansas. He has experience in general civil and commercial litigation. His primary focus is on commercial and individual contract disputes, product liability, agricultural law and construction litigation. He received his Bachelor of Arts degree from Wichita State University and went on to receive his J.D. from the Washburn University School of Law.

W. Rick Griffin is a senior associate with the law firm of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P. in Wichita, Kansas. He has experience in general civil and commercial litigation. His primary focus is on commercial contract, product liability, oil and gas and bankruptcy litigation. He received his Bachelor of Arts degree from Oklahoma State University and went on to receive his J.D. from the University of Kansas School of Law.

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The Joint Defense Doctrine—Cohesion Among Traditional Adversaries

The joint defense doctrine, or joint defense privilege as it is commonly referred to, is a doctrine utilized by courts to protect the confidentiality of information exchanged between co-parties and their separate counsel. The terms joint defense doctrine and joint defense privilege should not be confused with the term "joint client doctrine." The joint client doctrine protects confidential communications between co-parties and their common, as opposed to separate, counsel. Although some of the same rules and rationale of the joint defense doctrine are equally applicable to the joint client doctrine, the joint client doctrine is not a focus of this chapter. This chapter, rather, discusses the history of the joint defense doctrine, the benefits and purpose of the doctrine, the elements necessary to establish and maintain the privilege between two aligned parties, the federal and state laws pertaining to the joint defense doctrine, the viability of joint defense agreements, and waiver issues specific to the joint defense doctrine.

I. History and Background of The Joint Defense Doctrine

The need to protect confidential communications among jointly aligned co-parties and their separately retained counsel was first recognized by an American court in the criminal context. Michael G. Jones, *Finding a Way to Get Along: Joint Defense Agreements and Other Ideas for Forging a United Defense Front Against Plaintiffs*, Kan. Def. J. at p. 7 (Fall 2007); Marvin Pickholtz, *History of Joint Defense/Plaintiffs Agreements*, 21 Sec. Crimes §3:21 (2006); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine,* 65 Ford. L. Rev. 871 (1996). The criminal case credited with first recognizing the doctrine is *Cahoon v. Commonwealth,* 62 Va. 822, 841–43, 1871 WL 4931 (1871).

In *Cahoon,* three co-defendants who each separately retained counsel were charged with conspiracy. When counsel for one of the co-defendants attempted to call one of the other attorneys as a witness to recount a conversation that took place among the co-defendants and the defense lawyers, the attorney called as a witness refused to testify on the ground that the communications were privileged. *Id.* at 839–40. The court upheld the lawyer's refusal to testify and emphasized the practical importance of protecting confidential statements made in the presence of multiple attorneys when the purpose of the communications was to advance the common legal interests of the co-defendants. *Id.* at 840–41.

Seventy years later, the rationale of *Cahoon* was extended to protect communications between co-parties and their separately retained counsel in a civil case. *See Schmitt v. Emery,* 2 N.W. 2d 413 (Minn. 1942), *overruled on other grounds*, *Leer v. Chicago*, 308 N.W.2d 305 (Minn. 1981). Then, in the 1960s, two Ninth Circuit criminal decisions established the modern version of the joint defense doctrine. The first, *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), involved a situation where separately retained counsel for two oil companies exchanged information in advance of a grand jury proceeding. *Id.* at 348. In noting the importance of protecting confidential communications at all stages of the clients' dealings with counsel, the court indicated that the communications between the two attorneys were protected "irrespective of litigation begun or contemplated. . ." *Id.* at 350. In the second landmark decision, *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965), the court upheld its prior decision and re-emphasized the importance of protecting communications between multiple parties and their attorneys when the communications concern and promote common interests. *Id.* at 185.

Since the Ninth Circuit's establishment of the modern version of the joint defense doctrine, a number of other federal circuit courts have followed suit. Jones, *supra*. Some of the circuits that have adopted the doctrine include the First, Second, Third, Fifth, Seventh, and Tenth Circuits. Pickholz, *supra,* at §3:21; Jones, *supra* (citations omitted). Indeed, no federal circuit court has denied or rejected the doctrine. *Id.*; *see also B.E. Meyers & Co. v. United States*, 41 Fed. Cl. 729, 732 n.5 (1998) (noting that the joint defense doctrine is well recognized in all of the circuits that have considered it). Additionally, most of the state courts that have addressed the issue have also generally recognized the doctrine and its basis in either statutory or common law. Joan K. Archer, *Joint Defense/Common Interest Privilege in Kansas*, 75 J. Kan. B.A. 20 (Feb.

2006); Jones, *supra*; *but see Associated Wholesale Grocers, Inc. v. Americold Corp.*, 975 P.2d 231 (Kan. 1999) (reserving the joint defense issue for "another day when the issue and policy considerations have been fully briefed and placed squarely before us").

In 1971, the United States Supreme Court proposed a rule addressing the joint defense privilege. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 361–62 (1971) (Rule 503 (b)(3)). The proposed rule provided that the client had a privilege to prevent from disclosure confidential communications "by him or his lawyer to a lawyer representing another in a matter of common interest." *Id.* Although the U.S. Congress chose not to adopt the proposed joint defense privilege, some states have since adopted the rule.

A. The Joint Defense Doctrine versus the Common Interest Doctrine

While the doctrine is occasionally referred to by courts and legal scholars as the joint defense privilege or the joint defense doctrine, the more appropriate name for the doctrine which affords protection to confidential communications among jointly aligned co-parties and their separate counsel is the common interest doctrine. *See*, *e.g.*, *Boyd v. Comdata Network, Inc.*, 88 S.W. 3d 203, 213–14 (Tenn. Ct. App. 2002); *United States v. Schwimmer,* 892 F.2d 237, 243 (2d Cir. 1989); Jerome G. Snider & Howard A. Ellins, Corporate Privileges and Confidential Information, §4.01 (2007 ed.). The common interest doctrine more appropriately and more accurately describes what it is insofar as the doctrine does not just apply to defendants or defense counsel, but instead is equally applicable to both plaintiffs and defendants alike. *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990); Archer, *supra,* at 20; Gerald Heller, *Raising the Joint Defense Privilege*, 44 Fed. Law. 46 (Jan. 1997). While the doctrine applies to both plaintiffs and defendants, it is more widely utilized by defendants and defense counsel engaged in multi-defendant litigation.

It is also important to note that the doctrine is just that; it is a doctrine as opposed to a "privilege," which is yet another reason why the term "joint defense privilege" is somewhat misleading. This distinction is important because if the common interest doctrine were construed as a separate privilege, as some courts suggest, states that no longer recognize common law privileges would require the "privilege" to be codified before applying it. While some state statutes unambiguously incorporate the common interest doctrine, codification is not required.

B. The Necessity of an Underlying Privilege

Codification of the common interest doctrine is not required because the doctrine is commonly viewed not as a separate privilege, but instead as an exception to waiver of the attorney-client privilege. *See*, *e.g.*, *United States v. Moss*, 9 F.3d 543 (6th Cir. 1993); *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989); *Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987); *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990); *Sawyer v. Southwest Airlines,* 2002 U.S. Dist. Lexis 111 (D. Kan. 2002) (stating that most courts view it not as a separate privilege, but as an exception to waiver of the attorney-client privilege); *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134 (D. Kan. 1996) (stating that disclosure of confidential information among counsel of actual or potential co-defendants does not constitute a waiver of the attorney-client privilege); *SmithKline Beecham Corp.*, 193 F.R.D. 530, 539 (N.D. Ill. 2000) (holding that the doctrine is not a privilege in and of itself); *Ariz. Indep. Redistricting Comm. v. Fields*, 75 P.3d 1088, 1100 (Ariz. Ct. App. 2003) (finding that the doctrine does not create a privilege); Snider, *supra*, at §4.02; Bartel, *supra,* at 893. In other words, the joint defense doctrine is an exception to the general rule that the disclosure of confidential information to third parties constitutes a waiver of confidentiality.

Because the doctrine is a rule of non-waiver of the attorney-client privilege or work product protection, all of the elements of the underlying privilege or protection must be satisfied before confidential communications with separate counsel will be protected from disclosure. Archer, *supra,* at 23–24; Richard M. Dunn & Alfred J. Saikali, *Using a Joint Defense Agreement in Litigation Involving Multiple Defendants*, 35 Brief 46 (Spring 2006). In other words, "[t]he joint defense privilege is not an independent basis for refusing to reveal information or produce documents." Archer, *supra*, at 23-24. A party must demonstrate that the

communications or documents shared with its jointly aligned co-parties were protected under an existing privilege or protection prior to the information being shared. *Id.*; Jones, *supra*; Heller, *supra*, at 46.

II. Benefits and Purpose of the Joint Defense Doctrine

While forging a united defense with the help of the joint defense doctrine is not practical in every situation, the joint defense doctrine undoubtedly offers a number of advantages over a solo defense. Indeed, the joint defense doctrine is a powerful tool when used properly. The widespread implications of the doctrine enhance our judicial system and provide advantages that may often be overlooked. Not only does the doctrine promote judicial and economical efficiency, it protects litigants and allows for the presentation of a more effective defense.

A. Protection of Litigants and Promotion of Fairness

The joint defense doctrine is not one-sided, but instead benefits both plaintiffs and defendants. *In re Grand Jury Subpoenas,* 902 F.2d 244 (4th Cir. 1990); Archer, *supra*, at 20; Heller, *supra*, at 46. The doctrine is invaluable and necessary for the protection of all clients at all stages of the attorney-client relationship. *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964). Not only does the doctrine benefit individual parties, it is of vital importance to the practice of law as a whole.

Every litigant is entitled to a fair trial, and the right to such a trial is inviolate. The doctrine protects and enhances our system of justice and should be utilized so as not to interfere with, but rather enhance, this fundamental right. *See*, *e.g.*, Susan K. Rushing, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege,* 68 Tex. L. Rev. 1273 (May 1990).

In order to protect and preserve the right to a fair trial and ensure that parties are receiving effective legal representation, counsel must be able to engage in the free flow of confidential information. The doctrine fulfills this goal by promoting the uninhibited exchange of confidential information among co-parties and their separate counsel. Rushing, *supra*, at 1273. The free exchange of confidential information fosters effective legal representation, which is one of the primary reasons to utilize the doctrine. Heller, *supra,* at 47; Rushing, *supra*, at 1274.

Effective communication is necessary to ensure that counsel articulate their best case and provide their clients with the highest possible level of representation. Mark A. Miller, *A Privileged Character? The President & Joint Defense*, 85 Geo. L. J. 1979 (June 1997); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (protecting collaborative efforts of co-parties encourages better case preparation). Uninhibited communications and uninhibited strategizing among co-parties with common legal interests are necessary for a fair trial. *See*, *e.g.*, *United States v. McPartlin*, 595 F.2d 1321, 1335–37 (7th Cir. 1979). The doctrine promotes and protects this exchange and is a valuable tool when utilized to its full potential.

Without the protection afforded by the doctrine, counsel would have a disincentive, and even a fear, to collaborate and confer with co-counsel. The doctrine helps alleviate the fear that confidential communications will be discoverable or used in subsequent litigation. Not only that, the doctrine gives counsel the ability to work together to present the best, most consistent, and comprehensive case. *See* Jones, *supra.*

It is well known that, in multi-party litigation, inconsistent and contradictory theories create "destructive anarchy," thereby penalizing plaintiffs and defendants alike. Robert L. Haig, Corporate Counsel's Guide 68 (1996). This divisiveness should be avoided because it will lead to inefficient trials and result in a tactical advantage to single parties. Thus, the doctrine also allows co-parties to collaborate on strategic decisions and present unified theories of their cases.

B. Promotion of Judicial Efficiency and Elimination of Unnecessary Costs

Utilization of the joint defense doctrine fosters judicial efficiency at every stage of the litigation process. In fact, it is not uncommon, and is in fact beneficial, for co-parties to begin planning and strategizing immediately upon the filing of a lawsuit, if not before. This early planning and sharing of confidential communication eliminates, among other things, duplicative pleadings, discovery, motions, and trial material. On the other hand, non-utilization of the doctrine can lead to additional cross claims, indemnity claims,

third party actions, as well as duplicative discovery, expert disclosures, depositions, motions, briefs, exhibits, and trials.

The ability to share confidential communication, pool resources, and divide labor is imperative to the efficiency of our judicial system. The joint defense doctrine promotes the sharing of information, resources, and labor. Indeed, if the doctrine were not utilized by counsel involved in multi-party litigation, nearly everything would be duplicated. For instance, multiple parties would automatically lead to multiple experts. Multiple experts, in turn, would lead to increased fees, increased time, increased expenses, increased scheduling conflicts, and increased delays.

Not only is judicial efficiency increased by the utilization of the doctrine, but the sharing of privileged information among co-parties eliminates unnecessary costs for litigants. Duplicative, ineffective, and inefficient pleadings, discovery and trials will create more work and more significant costs to clients. Utilization of the doctrine will "save money, time and effort," which will lead to more cost-efficient litigation. Rushing, *supra*, at 1280. Conversely, non-utilization of the doctrine will increase litigation expenses and make access to the judicial system even more cost-prohibitive for a number of individuals and corporations which lack unlimited financial resources.

III. Summary of Federal and State Law on the Joint Defense Doctrine

When considering a joint defense agreement, a party should examine the authority for the extension of the attorney-client privilege or work product doctrine in the particular state of interest. All fifty states have considered the joint defense doctrine and adopted the privilege extension in some form. Archer, *supra*. In approximately half of the states, state legislatures have enacted statutes providing authority for the doctrine in one form or another. *Id*. A handful of these states have adopted the doctrine based on model rules proposed by the United States Supreme Court in 1971, though the U.S. Congress ultimately did not adopt the rules. *Id*. Instead, Congress determined that the privilege decision was best left to the state legislatures. As a result, federal courts have stumbled forward with the doctrine through the creation of common law.

A. Application of the Joint Defense Doctrine in Federal Courts

In 1971, the Supreme Court proposed uniform rules of evidence specifically enumerating the attorney-client privilege and expressly prohibiting judicial adoption of privileges not enumerated in the proposal. 51 F.R.D. 315, 356, 361–63 (1971). The proposal included the joint-defense doctrine, providing that "[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. . . by him or his lawyer to a lawyer representing another in a matter of common interest." 51 F.R.D. at 361–63. Congress ultimately rejected the proposed rules, instead providing that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. Pursuant to Rule 501, every circuit of the United States Courts of Appeal has adopted the joint-defense doctrine. *See*, *e.g.*, *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998).

The following chart highlights the adoption of the joint defense doctrine by federal circuit.

B. Application of the Joint Defense Doctrine in State Courts

Included among the states which have adopted the joint defense doctrine based on the proposed rules of the United States Supreme Court set forth above are Alaska, Delaware, Idaho, Nebraska, Nevada, New Mexico, Oregon, and Wisconsin. Alaska's statute, for example, provides as follows:

> 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, (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, or (2) between the client's lawyer and the lawyer's representative, or (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, or (4)

Circuit	Doctrine Adopted?	Citation
1st Circuit	Yes	*Cavallaro v. U.S.*, 284 F.3d 236, 249 (1st Cir. 2002).
2d Circuit	Yes	*U.S. v. Schwimmer*, 892 F.2d 237, 245 (2d Cir. 1989).
3d Circuit	Yes	*In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364–65 (3d Cir. 2007).
4th Circuit	Yes	*U.S. v. Okun*, 2008 WL 2385253, at *3 (4th Cir. 2008).
5th Circuit	Yes	*In re Santa Fe Intern. Corp.*, 272 F.3d 705, 712 (5th Cir. 2001).
6th Circuit	Yes	*Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998).
7th Circuit	Yes	*U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 815–16, (7th Cir. 2007).
8th Circuit	Yes	*In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997).
9th Circuit	Yes	*U.S. v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005).
10th Circuit	Yes	*Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 705 (10th Cir. 1998).
11th Circuit	Yes	*U.S. v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003).
D.C. Circuit	Yes	*In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998).
Federal Circuit	Yes	*In re Toy*, 102 F. App'x 657, 658 (Fed. Cir. 2004).

> between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Alaska R. Evid. 503(b).

Other states have adopted a statutory form of the joint defense doctrine based on Uniform Rule of Evidence 502(b), which requires pending litigation for the doctrine to apply. For example, the Texas code provides that the joint defense doctrine extends to "[c]onfidential communications made for the purpose of facilitating the rendition of professional legal services. . .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." Tex. R. Evid. 503(b)(1)(C) (emphasis added). Other states that follow Uniform Rule of Evidence 502(b) include Arkansas, Hawaii, Maine, Mississippi, New Hampshire, North Dakota, Oklahoma, South Dakota, and Vermont.

Almost all of the remaining states rely on common law or some mixture between statutory and common law to provide at least some form of the joint defense doctrine. For instance, a majority of the Kansas district courts and the Kansas Court of Appeals have recognized and applied the joint defense doctrine to varying degrees, but the Kansas Supreme Court has yet to squarely address the issue. *See Associated Wholesale Grocers, Inc. v. Americold Corp.*, 975 P.2d 231 (Kan. 1999); *State v. Maxwell*, 691 P.2d 1316 (Kan. Ct. App. 1984); *Hahn v. ONEOK, Inc.*, No. 01 C 1819 (Order dated June 12, 2002) (Sedgwick County Dist. Ct.) (Yost, J.); *Owen v. Turner, et al.*, Case No. 85,025 (Mar. 9, 2001). *But see State of Kansas, ex rel. v. Brooke Group, LTD., et al.*, No. 97-CV-319 (Shawnee Co. Dist. Ct. Oct. 15, 1997). As a result, the application of the doctrine throughout the Kansas courts lacks uniformity. In states such as Kansas where the status of the joint defense doctrine is unresolved, the language of the state's attorney-client privilege statutes may be instructive on the potential application of the doctrine. Although attorney-client privilege statutes like that of Kansas can be read to incorporate the common interest doctrine, it is important to note that codification is not required. *Sawyer v. Southwest Airlines*, 2002 U.S. Dist. Lexis 111 (D. Kan. 2002); *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134 (D. Kan. 1996). This is because the doctrine is not a separate privilege, but instead is an exception to waiver of the attorney-client privilege or the work product protection. Thus, even if a court concludes that a particular attorney-client privilege statute does not incorporate the joint defense doctrine, such a determination is arguably not fatal.

The chart set forth on the following page identifies whether states have adopted the joint defense doctrine and, if so, whether through common law or statutory enactment.

State	Doctrine Adopted?	Citation
Alabama	Yes	ALA. R. EVID. 502(b)(3)
Alaska	Yes	ALASKA R. EVID. 503(b)(3)
Arizona	Yes	Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1099–101 (Ariz. Ct. App. 2003).
Arkansas	Yes	ARK. R. EVID. 502(b)(3)
California	Yes	Roush v. Seagate Tech., LLC, 58 Cal. Rptr. 3d 275, 285 (Cal. Ct. App. 2007).
Colorado	Yes	Black v. Sw. Water Conservation Dist., 74 P.3d 462, 469 (Colo. Ct. App. 2003).
Connecticut	Yes	Steadfast Ins. Co. v. Purdue Frederick Co., 2005 WL 2433341, at *1 (Conn. Super. Ct. 2005).
Delaware	Yes	DEL. R. EVID. 502(b)(3); see also WT Equip. Partners, L.P. v. Parrish, 1999 WL 743498, at *1 (Del. 1999).
Florida	Yes	Visual Scene, Inc. v. Pilkington Bros., PLC, 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987).
Georgia	Yes	McKesson Corp. v. Green, 597 S.E.2d 447, 452 (Ga. Ct. App. 2004).
Hawaii	Yes	HAW. REV. STAT. §626–1; HAW. R. EVID. 503(b)(3)
Idaho	Yes	IDAHO R. EVID. 502(b)(3)
Illinois	Arguably yes	Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991).
Indiana	Yes	Corll v. Edward D. Jones, 626 N.E.2d 721 (Ind. Ct. App. 1995).
Iowa	Not yet addressed	
Kansas	Arguably yes	State v. Maxwell, 691 P.2d 1316, 1319 (Kan. Ct. App. 1984).
Kentucky	Yes	KY. R. EVID. 503(b)(3)
Louisiana	Yes	LA. R. EVID. 506(b)(3)
Maine	Yes	ME. R. EVID. 502(b)(3)
Maryland	Yes	Gallagher v. Office of Attorney General, 787 A.2d 777, 785 (Md. Ct. Spec. App. 2001).
Massachusetts	Yes	Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 870 N.E.2d 1105, 1110 (Mass. 2007).
Michigan	Not yet addressed	
Minnesota	Not yet addressed	
Mississippi	Yes	MISS. R. EVID. 502(b)(3)
Missouri	Yes	Lipton Realty, Inc. v. St. Louis Hous. Auth., 705 S.W.2d 565, 570 (Mo. Ct. App. 1986).
Montana	Yes	In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806, 821 (Mont. 2000).
Nebraska	Yes	NEB. R. EVID. §27-503(2)(c)
Nevada	Yes	NEV. REV. STAT. §49.095(3)
New Hampshire	Yes	N.H. R. EVID. 502(b)(3)
New Jersey	Yes	LaPorta v. Gloucester County Bd. Of Chosen Freeholders, 774 A.2d 545, 549 (N.J. Super. Ct. App. Div. 2001).
New Mexico	Yes	N.M. R. EVID. 11–503(B)(3)

New York	Yes	U.S. Bank Nat. Ass'n v. APP Int'l Fin. Co., 33 A.D.3d 430, 823 N.Y.S.2d 361 (N.Y. App. Div. 2006).
North Carolina	Yes	Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 46–47 (N.C. Ct. App. 2005).
North Dakota	Yes	N.D. R. EVID. 502(b)(3)
Ohio	Not yet addressed	
Oklahoma	Yes	OKLA. STAT. ANN. tit. 12 §2502(B)(3)
Oregon	Yes	OR. R. EVID. 503(2)(c)
Pennsylvania	Yes	Young v. Presbyterian Homes, Inc., 2001 WL 753031, at *196–97 (Pa. Com. Pl. 2001).
Rhode Island	Not yet addressed	
South Carolina	Not yet addressed	
South Dakota	Yes	S.D. CODIFIED LAWS §19-13-3(3)
Tennessee	Yes	Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 214–15 (Tenn. Ct. App. 2002).
Texas	Yes	TEX. R. EVID. 503(b)(3); see also In re Skiles, 102 S.W.3d 323, 326–27 (Tex. Ct. App. 2003).
Utah	Yes	UTAH R. EVID. 504(b)
Vermont	Yes	VT. R. EVID. 502(b)(3)
Virginia	Yes	Hicks v. Commonwealth, 439 S.E.2d 414, 416 (Va. Ct. App. 1994).
Washington	Yes	State v. Am. Tobacco Co., Inc., 1997 WL 728262 (Wash. Super. Ct. 1997).
West Virginia	Yes	Huffman v. Am. Tobacco Co., 1999 WL 33721486 (W.Va. Cir. Ct. 1999).
Wisconsin	Yes	WIS. STAT. ANN. §905.03(2)
Wyoming	Not yet addressed	

IV. Elements of the Joint Defense Doctrine

The breadth of cases in which courts have found the existence of a common interest between co-parties sufficient to support the application of the joint defense doctrine has grown significantly since the doctrine's inception. Snider, *supra*, at §4.02[3]. The joint defense doctrine has been applied in cases involving civil co-defendants, companies summoned before a grand jury, potential co-parties to prospective litigation, plaintiffs pursuing separate actions in different cases, civil defendants sued in different actions, parties to arbitration proceedings, and parties with shared interests in defending a patent, to name a few. *Id.*

Considering the broad scope of the doctrine, one central and required theme has remained constant: the assertion of the joint defense doctrine requires that the parties have a common interest in the legal matter at issue. *Id.* A synthesis of the case law involving the doctrine has led to the following generally recognized elements:

> (1) That the otherwise privileged information was disclosed due to actual or anticipated litigation, (2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation, (3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and (4) that the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information.

Jones, *supra*; Archer, *supra,* at 25. A handful of courts, however, simply require (1) that the statements were made during the course of a joint defense; (2) that the communications were made to further that effort; and

(3) that the privilege has not been waived. *Id.*; *see*, *e.g.*, *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *In re Bevill Bresler & Shulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986).

When the elements for application of the doctrine are met, the joint defense doctrine often protects from discovery not only communications between attorneys and their own respective clients in a cooperative arrangement, but also conversations between unrepresented parties and between attorneys and outside consultants such as accountants. Pickholtz, *supra*, at §3:21; Jones, *supra*. However, keep in mind that for the joint defense doctrine to apply, a party must first establish that the subject communications are protected by the underlying attorney-client privilege or work product doctrine. *Id.*

V. Joint Defense Agreements

The first step in forming a joint defense arrangement is deciding whether to enter into a formal written joint defense agreement or forge an informal accord. In either scenario, an agreement should be reached as early as possible. While a written contract is not required, *see*, *e.g.*, *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 (Tenn. Ct. App. 2002), it is strongly preferred. Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 Penn St. L. Rev. 381, 421–22 (2005); Jones, *supra*. "Too often the vagaries of an oral agreement cloud and pollute the true intent of the parties, especially when the parties claiming the privilege must establish that there was, in fact, an agreement and that the specific communication was protected thereunder." *In Re Bevill, Bresler & Schulman Asset Mgt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (denying the privilege because party failed to show that the communication was made during the course of a joint defense agreement). Moreover, courts generally hold that a written joint defense agreement is not discoverable, and a number of courts have even held that the existence of a joint defense agreement is not discoverable. Archer, *supra,* at 28; *Boyd*, 88 S.W.3d at 217.

Parties wishing to enter into a written joint defense agreement should consider the following provisions:

1. Identification of all parties to the agreement, including all which are interested in participating in the agreement but have not yet been added as defendants.
2. Description of the common legal interest.
3. Provision providing that the documents, communications and information shared pursuant to the agreement are confidential and are intended to remain confidential.
4. Inclusion of a confidentiality provision, including an agreement regarding the discoverability of the agreement itself.
5. Indication that a party is only represented by his attorney and not by an attorney for a cooperating party and that no attorney-client relationship is created by the agreement.
6. Provision indicating that the agreement will not limit an attorney's ability to provide zealous advocacy and independent advice to his client.
7. Waiver of any conflict of interest between the parties to the agreement.
8. Waiver of any right of the parties to disqualify counsel for any of the parties to the agreement.
9. Provision barring cross-claims among the parties to the agreement.
10. Clearly outline the scope of the intended coverage—it should state whether it encompasses such individuals as employees, staff, accountants, and expert witnesses in addition to the actual parties and their counsel.
11. Identification of the type of documents, communications, and information covered.
12. Declaration that custody of documents will remain with the producing party and that entrance into the joint defense agreement does not alter ownership of the documents.
13. Identification of the precise obligations of the parties and procedures for ensuring confidentiality.
14. Declaration that documents, communications and information shared pursuant to the agreement are to be used solely for the underlying legal matter and should not be viewed as a waiver of the attorney-client privilege or work product protections.
15. Provision that disclosure to third parties of any matter subject to the agreement is prohibited without the consent of all of the parties to the agreement and that monetary relief is not an

adequate remedy for any breach of the agreement.

16. Provision addressing the procedure for handling inadvertent disclosure of information subject to the agreement.
17. Description of the obligations of a party in response to a subpoena seeking production of documents subject to the agreement.
18. Description of the restrictions and circumstances in which a party may make use of its own confidential information.
19. Identification of the prospect of receiving an adverse judgment and determination of a formula for dealing with this possibility, potentially deferring intra-defendant disputes on indemnity or contribution until a later proceeding, whether in litigation or arbitration.
20. Provision that a settlement agreement by any party does not affect obligations under the agreement.
21. Termination clause outlining the circumstances that will trigger withdrawal and to what extent parties must maintain documents' confidentiality.
22. Provision providing for the return or destruction of all documents subject to the agreement once the parties cease to share the common legal interest or the agreement is terminated.
23. Provision indicating a choice of law and/or choice of venue and identification of the applicable time period it covers.

Archer, *supra*; Snider, *supra*, at §4.02[3]; Jones, *supra*. For a sample agreement, see Richard M. Dunn & Alfred J. Saikali, *Using a Joint Defense Agreement in Litigation Involving Multiple Defendants*, 35 Brief 46, 50 (Spring 2006).

In addition to drafting a written agreement, the parties to the agreement should meet to discuss several other strategic facets of the arrangement. Jones, *supra*. For instance, proactively establishing a basic protocol for issues which arise throughout the legal matter will increase efficiency and ease constraints on cooperation under the agreement. In creating such a protocol, the parties should consider the appointment of lead or liaison counsel in order to provide a unified voice for all the participants. Jeffrey R. Parsons & David K. Williams, *Considerations Regarding Consolidated Defense Arrangements in Environmental Litigation*, 455 PLI/Lit 559 (Mar. 1993). A central meeting place is also ideal. W. Donald McSweeny & Michael L. Brody, *Defending the Multi-Party Civil Conspiracy Case*, Litig., Spring 1986, at 10 n.1. Attorneys for the parties should also decide how to allocate the work in a fair and equitable manner. *Id*. at 9.

VI. Waiver of the Joint Defense Doctrine

Once all of the necessary elements have been satisfied and the protection afforded by the joint defense doctrine has attached, it can only be waived in limited circumstances. In fact, the doctrine may only be waived by the unanimous consent of all the parties to the joint defense effort or by subsequent litigation between the parties. Snider, *supra*, at §4.02[4]; Heller, *supra*, at 48–49. This promotes the underlying purpose of the doctrine and ensures that confidential information will not be unilaterally waived, jeopardizing the privileged communications of other participants. Indeed, the very existence of the joint defense doctrine would be undermined if one participant had the power to unilaterally waive the protection. Given that all of the participants must consent to a waiver of the joint defense doctrine, parties are not precluded from participating in such joint defense efforts out of fear that a party will defect from the group. *Id.*; *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990); *Western Fuels Ass'n v. Burlington Northern Railroad Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984); *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980).

While one participant may not unilaterally waive the privilege for the group, a party may still waive the attorney-client privilege or work product protection by disclosing such otherwise privileged information to persons outside of the joint defense circle. Snider, *supra*, §4.02[4]; Heller, *supra*, at 48; *see also United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985). The divulging of confidential information to persons not engaged in the joint defense or joint prosecution demonstrates a lack of confidentiality. However, "such a waiver by one party to a joint defense relationship will not constitute a waiver by any other party." Snider, *supra*, §4.02[4].

If participants in a joint defense arrangement subsequently become adversaries, the joint defense

doctrine will not be applied to protect confidential communications between the participants. Heller, *supra*, at 48–49. As a result, parties may be reluctant to join ranks with one another if there is a possibility of future litigation among them. While this is understandable, it is shortsighted and should not be the lone deterrent to establishing a unified defense. In fact, more often than not the participants or prospective participants in a joint defense effort will be faced with the threat of future litigation. Nonetheless, parties to a joint defense agreement take "a knowing and calculated risk that they [have] more to gain than lose from their confidential sharing of information." *Agel-off v. Noranda, Inc.*, 936 F. Supp. 72, 77 (D.R.I. 1996). Because confidential information exchanged between jointly aligned co-parties may be admissible in subsequent litigation between the co-parties, any information one party does not want revealed should be kept confidential from the rest of the group. Snider, *supra*, at §4.02[4].

VII. Practice Tips

- Complete an early analysis of the common legal matter to determine whether a joint defense arrangement would be beneficial.
- Assess the law of the relevant state or federal circuit to determine the requirements for reliance on the joint defense doctrine, with close attention paid to whether pending litigation is required.
- Ascertain whether un-named parties which may be joined at a later point in the litigation should be made a party to the joint defense agreement prior to their joinder.
- Determine whether to enter into a formal, written joint defense agreement versus an oral agreement.
- Ensure that all parties understand that even the existence of the joint defense agreement may be kept confidential in many states and federal circuits.
- Institute a clear protocol for resolving issues relating to the joint defense agreement as they arise in litigation and amongst the parties.