

Insights: Alerts

Herding Cats: Making The Most Out Of A Joint Defense Group

August 8, 2017

Written by

Litigation today often involves multiple defendants facing a common adversary — whether it is patent litigation against the same patent holder or tort litigation against the same plaintiff. Multidefendant litigation can afford the defendants with efficiencies that result from common effort, but having too many varied interests and perspectives can also cause a multidefendant case to become less efficient and more complicated. After having represented many clients in multidefendant litigation, I have discovered four strategies that enable multidefendant litigation to become more efficient and streamlined. These strategies include thoughtful consideration of the formation of a common interest group at the beginning of litigation; careful planning and collaboration among the defendants during litigation; and effective communication with your client about their desires for the cost and management of the group. Employing these strategies will help ensure that a multidefendant matter gains the benefit of group efficiency and avoids the potential problems associated with fighting and power struggles that can lead to inefficiency in the group.

Forming a Common Interest Group

Although often labeled as a “joint defense” privilege, the “common interest” doctrine allows parties with *similar* legal interests to share information without having to disclose it to others. It is an extension of the attorney-client privilege and work product doctrine, and it protects communications among parties with a common interest and their counsel as if those communications had not been disclosed beyond the attorney-client relationship. In *re* *Tele globe Communications Corp.*, 493 F.3d 345, 364-65 (3d Cir. 2007). Moreover, the common interest does not have to arise from actual litigation; “*contemplated [litigation] against a common adversary*” is sufficient. *Beyond Systems Inc. v. Kraft Foods Inc.*, No. PJM-08-409 (D. Md. Apr. 23, 2010) (emphasis supplied). For example, the receipt of a demand letter asserting claims or requesting a license for intellectual property rights can be enough to allow the recipient to contemplate that litigation may arise such that the common interest doctrine is implicated.

Importantly, though, the interests of the parties seeking to invoke the privilege must be aligned. *United States v. Weissman*, 193 F.3d 96, 99 (2d Cir. 1999); *Ferko v. National Association for Stock Car Auto Racing*, 219 F.R.D. 403, 406-07 (E.D. Tex. 2003). To invoke the privilege, two elements must be met: (1) the communication must be shared with an *attorney* of the member of the community of interest and (2) all members of the community must *share a common legal interest* in the shared communication.

See *In re Teleglobe Communications Corp.*, 493 F.3d at 364; accord *Neuberger Berman Real Estate Income Fund Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 415-17 (D. Md. 2005). Moreover, the privilege in the underlying communication or material that is being shared with the group must not have lost its privileged status. For example, if a party waives the attorney-client privilege as to a particular communication, that communication does not later become protected simply because it is shared in a joint defense group.

Thus, it is important that parties in a multidefendant litigation evaluate the alignment of their interests early in the case to assess whether a common interest exists. If it does, then forming a common interest or joint defense group could make sense to help manage the litigation and increase efficiency. Although the privilege does not depend on the existence of a written agreement between the parties, a written agreement is often used to document when the parties came to an agreement as to their common interest and to confirm the parties' obligations vis-à-vis each other as members of the group. The written agreement can also be drafted so as to protect information discussed between the parties before the execution of that written agreement, for example by including language such as:

Prior to the execution of this Agreement, some or all of the Parties and Counsel, after agreeing that there was a commonality of interest among them relating to Plaintiff's Claims and that their communications would be privileged, may have shared information and materials with one another that would be governed by this Agreement. The Parties agree and acknowledge that such Information is subject to (a) the same legal privileges and protections as though it had been shared after the execution of this Agreement and (b) all terms and conditions of this Agreement.

Importantly, even the joint defense agreement itself is protected from disclosure as work product under the common interest privilege. See *Generac Power Systems Inc. v. Kohler Co.*, 2:11-CV-1120, at *2 (E.D. Wis. Nov. 8, 2012). Such agreements typically provide that they remain privileged even after the litigation is resolved, and parties leaving the joint defense arrangement (by virtue of settlement or other resolution of the plaintiff's claims against them) have an obligation to maintain the secrecy of the information (including the agreement itself) shared during the term of the agreement. Moreover, these agreements typically provide that once a party believes its interests are no longer aligned with the group (because it has settled its claims, for example), it must promptly withdraw from the group so that its presence does not destroy the protections afforded by the common interest doctrine.

Dealing with Competitors

Often, a joint defense group is comprised of companies in the same or similar industry, all of whom are being accused of similar, if not identical, conduct. As a result, competitors often find themselves aligned with each other for purposes of opposing a plaintiff's action. Joint defense agreements and protective orders need to address this reality and at times carve out certain competitively sensitive information from general dissemination to all parties in a case.

As outside counsel, it is particularly important to raise these issues with your client so that the client can advise on which companies in a joint defense group may be especially concerning from a competitive standpoint. And, some companies that may seem to be competitors with each other may actually have business relationships that make their interests aligned in certain fields. Understanding the competitive landscape among the

defendants at the outset of the litigation will ensure that you can effectively represent your client without oversharing or putting your client's confidential, competitively sensitive information in the hands of its arch rival.

Creating Subgroups

In addition to facing competitors in a joint defense situation, some cases may involve so many defendants such that there are subsets of them whose interests are more closely aligned than the interests of the full joint defense group. For example, in a patent infringement case asserting allegations against a component part manufacturer and the companies who incorporate the component part in their systems, there could be smaller groups of defendants who use the component part in systems that function more similarly and those defendants may want to create a small, joint defense subset group for purposes of strategy development and interest alignment.

The creation of a smaller subset of the joint defense group can enable those parties whose interests are more similarly aligned to act as an alliance in the broader group and to unify in decision making. Moreover, the subset group could even work together to file a dispositive motion based on their common activity that the broader group could not file. And, certain companies have industry groups within which they already work, and creating these sub-alliances can be easily accomplished through those pre-existing relationships. Thus, just as important as understanding who may be your client's competitors in a joint defense group is developing a sense of which companies may be so similarly situated in the litigation that they should consider forming a subset of the joint defense group to discuss the issues that most impact them.

Managing the Group: To Lead or Follow?

Another important consideration when representing a client in a joint defense group is whether to lead the group or let another party lead. It can be more expensive to lead the group, which could favor sitting back and allowing another party to take the lead. Alternatively, a party may have more at stake from a damages perspective such that it makes sense for that party to take a larger role in running the group. Moreover, certain clients may have the philosophy that they want to be viewed as a leader, regardless of the extent of the potential exposure against them, such that they insist on leading.

A corollary to this consideration is how to deal with multiple parties who are trying to lead the group, particularly when the self-appointed leaders may not necessarily agree on strategy or approach. One company's philosophy may be much more aggressive, leading to a fight on almost every issue, whereas another company's philosophy may be much less confrontational and more collaborative. Navigating these political issues in a joint defense group is important, particularly to ensure that your client's desires and strategic thoughts are conveyed to the group. Ultimately, regardless of whether your client is a leader or a follower, membership in a joint defense group can come with personality and philosophical differences that need to be addressed and understood so that the group can run effectively.

A final consideration regarding management and leadership in a joint defense group is that often the group has a variety of tasks facing the parties in litigation — for example, retaining and working with experts on common issues; dealing with the plaintiff on common discovery and plaintiff's discovery responses; developing strategy for dispositive motions; and taking third-party discovery. Even if a party has no desire to lead the entire group's efforts, there may be discrete tasks that relate more specifically to one party or a subset of parties such that it makes more sense for those parties to take the lead on a specific task. Allowing different parties to lead certain

efforts also has the benefit of spreading the costs associated with defending against the plaintiff's allegations and allows for the creative thinking that results from a collaborative effort. Having a joint defense arrangement in place allows the parties to focus their efforts on defending against plaintiff's claims and to align their individual strategies to benefit the collective group where possible.

Conclusion

Common interest arrangements can increase efficiency throughout the litigation when a joint defense group is managed properly and working well together. Having a specific plan as a member of the common interest group in the beginning as to whether to lead or follow, what issues or aspects of the case are most concerning to your client, and whether a subset of the parties may have more aligned interests that would justify the formation of a subset group of the joint defendants is critical to ensuring that the efficiencies of a joint defense arrangement are recognized. The common interest doctrine allows parties to work together to defend themselves against the same adversary, and its benefits outweigh the challenges of working with a group when these four considerations are thoughtfully considered at the beginning of the common interest arrangement. Doing this will ensure that the joint defense group does not devolve into a frenetic, leaderless group, not dissimilar from a group of independently minded cats running aimlessly to escape a common threat.