

“DEFENDANTS, CAN’T WE ALL JUST GET ALONG?”

**STRATEGIES FOR A PEACEFUL CO-EXISTENCE WITH
DEFENDANTS IN COMPLEX MULTIPARTY LITIGATION:
BEYOND JOINT DEFENSE AGREEMENTS**

**Lori E. Iwan
James K. Horstman
Iwan Cray Huber Horstman & VanAusdal LLC
29 North Wacker Drive Suite 500
Chicago, Illinois 60606**

Lori Iwan is a principal in the firm of Iwan Cray Huber Horstman & VanAusdal LLC, a Chicago-based law firm with a national civil trial practice. She is a member of the Law Institute of the Defense Research Institute, is the Assistant Dean of the Litigation Management College of the FICC, and serves as the Chair of the Products Liability Section of the FICC.

James Horstman is the managing partner of Iwan Cray Huber Horstman & VanAusdal LLC. He specializes in appeals and insurance coverage litigation in federal and state courts. Mr. Horstman is a member of the DRI, the Appellate Lawyers Association and the Federation of Insurance and Corporate Counsel.

I. Introduction

The only thing worse than having to fight off a plaintiff's attorney at trial is to have to watch your back from co-defendant's counsel in complex multi-party litigation. Any time the plaintiff interjects into a lawsuit the competing interests of manufacturers, designers, upstream suppliers, downstream distributors, middlemen, retailers, installers and users of product, the possibility of conflicting positions among the defendants arises with the potential for disaster at trial. One need only do a quick survey of any jurisdiction to identify cases where defendants fought and plaintiffs profited. Savvy plaintiffs' attorneys encourage finger-pointing and infighting among defendants to lighten the plaintiff's burden and drive-up the verdict. This article suggests strategies to enable defendants to peacefully co-exist in multi-party cases and avoid financial disasters at trial. While the focus of this article is on product liability litigation, the principles apply equally well to other types of litigation, such as medical liability, employment and commercial contract disputes.

II. What's the Problem?

Generally speaking, the problem in multi-party commercial cases is that co-defendants, who at one time were all working toward a common end, have, for various reasons, determined that their explanation of the events is at cross-purposes with the co-defendants in litigation. For example, a medical device sales representative sells a new orthopedic rod for the internal fixation of a femur fracture and proceeds to assist the orthopedic surgeon on his first use of the rod in the operating room. The rod later fails. The manufacturer claims an installation error and points at the doctor, while the doctor points back claiming the product failed due to metal fatigue and manufacturing defects. Having failed to reconcile the views of what went wrong in the case, the defendants point the finger at each other while the plaintiff sits back and waits for a large verdict.

In a second example, a multi-vehicle accident results in claims against the drivers, the vehicle manufacturer, and the child car seat manufacturer, after a child is seriously injured. At trial, rather than reconcile the evidence into one cohesive defense, the defendants point fingers at each other claiming defective design and negligence by the co-defendants proximately caused the injuries to the minor child. Again, plaintiff profits.

Conflicts among defendants can insidiously creep into a case when you least expect it. Hence, it behooves defense counsel to be aware of the possible situations that can give rise to a conflict among defendants and to address these situations early in the litigation.

A. Voir Dire

Although counsel may not recognize the impact that some innocently posed questions may have during voir dire, certain types of issues do set the defendants against each other. For example, asking questions about a manufacturer compared to a retailer can create a distinction in the jurors minds that prejudices them into believing that there is a different degree of culpability on one or the other parties.

B. Expert Disclosures

In an abundance of caution, defendants oftentimes name experts in specialties that overlap with the co-defendants' specialties "just in case" the defendants turn on them and begin to criticize defense counsel's client at deposition or trial. This cautious, preventive practice sends a signal to co-

defendants that the defendants may be at odds with each other in the litigation, immediately heightening the level of awareness and intensity of attack on co-defendants.

C. Opening Statement/Closing Argument

Plaintiff's counsel conveniently mentions during the opening statements or closing arguments that "something must have gone wrong in the case" because the defendants cannot agree on the facts or who was the culpable party. The only place this type of ammunition comes from is if a defendant has testified against a co-defendant. The preparation of the defendant for deposition is a critical element of any defense case and the need to protect a co-defendant's position as part of the overall case strategy should not be overlooked.

D. Discovery

Oftentimes, rather than informally obtain information necessary for one defendant's case, defense counsel sends formal written discovery to a co-defendant, or worse yet, engages in an aggressive line of questioning at the co-defendant's deposition. This type of conduct sends the wrong message to the co-defendant and raises a red flag regarding where defendant's loyalties lay.

E. Experience of Counsel or the Claims Handler

Inexperienced counsel or claims handlers may mistakenly believe that in order to save their own client they need to point the finger at a co-defendant. This is rarely the case. Creative thinking can generate a position that reconciles all facts without blaming a defendant in all but the rare malpractice case.

F. Reporting Requirements

The filing of a report pursuant to statutory reporting requirements regarding injuries related to a product could cause the product manufacturer to think that the defendant is taking an inconsistent position than that which is likely to be advanced on behalf of the manufacturer. For example, if the malpractice involves the use of a medical device, a Medical Device Report may need to be filed with the FDA. (See 21 CFR 803.3) An event which must be reported has occurred when the treatment facility becomes "aware of information that reasonably suggests that a device has or may have caused or contributed to a death or serious injury". 21 CFR 803.3 (q)(1). Events involving pharmaceutical products may trigger a requirement to notify the FDA or the manufacturer of the

event. Similarly, the Consumer Product Safety Commission accepts voluntary reports regarding consumer reports. Absent a statutory requirement, a defendant seeking to alert a manufacturer or governmental agency of a potential problem with a product, may send the wrong message regarding that defendant's position in litigation by having aired its concerns about a product publicly.

G. Pleadings

Some states require that counterclaims be filed by defendants during the pendency of the main action in order to preserve contribution rights or allocations of fault. The filing of these claims can often be misinterpreted as a defendant's assault on a co-defendant.

H. Particular Case Issues

A number of case issues create the potential for finger-pointing at trial. These issues include the following:

1. Miscommunication. When one party believes that information was adequately communicated to another, and the other disagrees, a potential conflict can result.
2. Competence v. supervision. In cases where the competence of the product designer, installer, maintainer or user is at issue and other defendants are involved in the supervision or training of those personnel, conflicts can develop.
3. Technique v. defect. Any time a product must be installed or maintained, the technique of the service person could be at odds with the product designer or manufacturer's recommended practice.
4. Learned intermediary cases. When a product manufacturer raises the defense of the learned intermediary, it calls into question the competence of the intermediary who may be a co-defendant in the case.
5. Instructions and labels. In cases involving the adequacy of instructions and labels, co-defendant product users could be at odds with the product manufacturer.

6. Off label use. A manufacturer's awareness of a common use of a product and subsequent failure to address the use in product warnings or instructions could put the manufacturer at odds with co-defendants. For example, when a medical device manufacturer is aware of off label use of its product, and the medical personnel are defending against allegations that the prescribed use of the drug or medical device is not within the confines of the FDA approval, the defendants can potentially be at odds.

7. Cost v. safety. The potential for a conflict in defenses exists if a co-defendant buys into the time-worn argument that pure profit motive drove the defendant manufacturer/designers decisions in making the product. To the extent the co-defendant opted not to buy or use an optional safety feature, a conflict in the defense could develop.

There are a number of permutations of the issues that can set the co-defendants potentially apart during the discovery and trial of a complex commercial case. An awareness of the potential for conflict is the first step in avoiding friction at trial.

III. Strategies for a Cooperative Defense

A. Joint Defense Agreements

The joint defense privilege (also identified as the "common interest rule"), has been described as an extension of the attorney-client privilege. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). "The joint defense privilege serves to protect confidentiality of communications passing from one party to the attorney for another party where the joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected." *Schwimmer*, 892 F.2d at 243-44. To establish the joint defense privilege, defendants must show that (1) the communications were exchanged during a joint defense effort; (2) the communications were designed to further the effort; and (3) the privilege was not waived. *In Re Bevill Bresler and Schulman Asset Management*, 805 F.2d 120, 126 (3d Cir. 1986).

Joint defense agreements have been used in a variety of contexts where

defendants have a common interest: criminal investigations, product liability (tobacco, medical devices), insurance coverage litigation (environmental), and commercial litigation. The agreements can be in writing but this is not required by all courts. The agreement cannot be imposed retroactively. To create a joint defense agreement one needs (1) the consent of all members to the agreement, (2) a clear understanding that communications with co-defendants are covered by a joint privilege, and (3) an understanding that no privileged information can be disclosed by one party to a joint defense agreement without the consent of all members. Joint defense agreements have been used effectively to assist in the common defense by "reducing costs through document management, notification, investigation as to damages, coordination of discovery, legal research and the pooling of damages experts." *In Re San Juan DuPont Plaza Hotel Fire Litigation Master File MDL 721*, 1993 U.S. Dist. LEXIS 14191 (1993).

One solution to easing the potential friction among defendants in multi-party litigation is to enter into a joint defense agreement. However, these agreements are not without problems. If the agreement attempts to compromise a defendant's ability to enter into settlement, the court may find it is contrary to public policy. See *In Re San Juan DuPont Plaza Hotel Fire Litigation Master File MDL 721*, 1993 U.S. Dist. LEXIS 14191 (1993). If confidential information has been exchanged among the signatories to the agreement, and it is later determined that one of the attorneys to the agreement has a conflict of interest, all attorneys may be disqualified from the further representation of their own clients as a result of the existence of the joint defense agreement. See *Essex Chemical v. Hartford*, 993 F.Supp. 241 (D.N.J. 1998) (Magistrate Judge disqualified all attorneys to joint defense agreement based on conflict of interest of one party to the agreement; reversed by the district court and remanded to the magistrate judge for a determination of the extent to which defense counsel acquired confidential information and the precise nature of the relationship among defense counsel.)

Joint defense agreements have had problems with enforcement in a variety of contexts. In *Waller v. Financial Corporation of America*, 828 F.2d 579 (9th Cir. 1987), defendant Anderson argued that defendant FCA's proposed settlement agreement violated the joint defense agreement in which defendants who were dismissed or settlement would continue to protect the confidentiality of joint defense information. The settlement required FCA to cooperate with the plaintiff classes. The court held that defendant Anderson's fear of a potential disclosure of a confidence was not a sufficient basis to object to a settlement.

The enforcement of joint defense agreements can be problematic in that the underlying malpractice litigation spawns new litigation arising out of disputes

over the terms of the joint defense agreement. For example, issues of whether one party is in a conflict of interest, or whether one party can settle, whether one party has violated the agreement by disclosing certain information, all generate ancillary proceedings which can eclipse the time and attention given to the defense of the underlying matter.

Similarly, the issue of whether the joint defense agreement is admissible before the jury can consume significant time and effort before the court. There is no clear cut rule on whether joint defense agreements are admissible. In certain litigation, it may be argued that a joint defense agreement is evidence of a conspiracy among the defendants to conceal unfavorable evidence. In the face of this type of allegation, it is likely that the court would order the disclosure of the joint defense agreement to the plaintiff and her counsel and quite possibly to the jury as well.

A variety of "sloppy" practices with respect to joint defense agreements have been noted by the courts and have resulted in the unenforceability of the agreements. In some instances, joint defense agreements only exist among certain co-defendants but conversations which were intended to be covered by the agreement were held in the presence of the non-signatory defendants. The courts have held this is a waiver of any privilege. The courts also apply standards ranging from liberal to conservative concerning what constitutes a waiver of the privilege created by a joint defense agreement. The joint defense privilege is designed to protect communications shared when individuals with separate attorneys consult together on issues of common legal interest. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 84 (3d Cir. 1992). Courts have recognized a fiduciary obligation or implied professional relationship between co-defendants and their legal counsel. *Ageloff v. Noranda, Inc.*, 936 F.Supp. 72, 76 (D.R.I. 1996). However, where a party to a joint defense agreement discloses any portion of a privileged matter, the courts are likely to rule that the entire privilege on that subject matter has been waived. Inadvertence or sloppiness on the part of co-counsel can doom the entire defense team as information which was intended to be kept confidential becomes revealed by another parties' representative. Finally, attempting to retroactively assert that a joint defense agreement was in place is likely to meet with failure in the courts. Parties must be careful to characterize the terms of the agreement and prospectively enforce it if they hope to have the courts enforce the provisions of the agreement.

B. Other Options

Given the potential problems with formal joint defense agreements, it

seems that an appropriate strategy for coordinating the defense in complex multi-party litigation with co-defendants is to build trust with co-counsel through communication. As diverse as this country seems to be, we still practice in a small legal community where the saying is often heard "what goes around, comes around". Yet at the same time, the legal profession is large enough that attorneys have lost their willingness to trust attorneys with whom they do not have a close business relationship or past history. Hence, there is a need to build trust among defense counsel in order to reassure co-counsel that one attorney is not going to ambush co-counsel at trial and that everyone is working towards a common objective, namely the defensibility of the case and the minimization of damages. While there are no magic solutions for handling these difficult situations, some techniques can be used to achieve a cooperative defense among co-defendants.

- Understand that the ability to communicate is key to developing a relationship built on trust. Face-to-face meetings diffuse tension, allow for expressing and venting frustration, exploring strategic options and getting to know one's co-counsel. Communication is probably the most significant factor in building the trust that will be necessary to get the parties through the tense times that await them during discovery and trial. Counsel should schedule regular meetings with the co-defendants to discuss the status of the case, strategy, concerns, experts and other issues where counsel may suspect that someone is "lying in the weeds" waiting to ambush them from the defense side.
- Identify and demonstrate a case solution that reconciles the facts and allows a consistent defense to be presented to the jury. Absent egregious misconduct, in most instances the facts do follow a cohesive pattern and the defense should take advantage of that cohesive story. While it may be easy to point the finger and blame someone else for dropping the ball, when counsel keeps in mind that this same tactic can be used against her own client, its appeal diminishes.
- Deal with any credibility problems including those involving your client. If you are representing a party who filed a product defect report against the co-defendant manufacturer, the manufacturer has good reason to be concerned about your client's testimony. Address these credibility problems early on as you communicate with co-counsel. For example, reassure the manufacturer that your defendant will agree that based on the information available to it at the time the product was used, the defendant had no reason to believe of a product defect, and that if the manufacturer had the same information available to it, the defendant will not be critical

of the manufacturer at trial.

- Anticipate the concerns, assumptions and objectives of co-counsel and be able to deal with each in turn in a non-threatening and non-judgmental way. Whether co-counsel is inexperienced or concerned because of the financial exposure potentially facing his client, these situations can be dealt with in a non-threatening and non-judgmental way and should be handled in such a manner. By expressing reasonable solutions that will work to everyone's mutual benefit and regularly discussing the risks of alternative options, reasons should gradually wear away at opinions based on fear.
- Watch for mixed messages. Recognize that mixed messages can undermine the trust that you are trying to build. Keep the promises you have made and don't allow co-counsel to find out that you have changed your direction in the case by learning it from plaintiff's counsel. Obtain the informed consent of all members of the defense team about proceeding in a cooperative manner at the outset of the relationship. This includes the individual defendant, the insurer, the manufacturer and any other interested entity. Obtain written agreements at the outset of the cooperative relationship from the interested parties so that a change in corporate ownership, claims handler or some other personnel change does not disrupt the trust and strategy which you are trying to build during the years of preparation of the lawsuit.
- Consider side agreements for pleadings and discovery. If it is necessary to file a counterclaim to preserve an apportionment claim, enter into a tolling agreement, an arbitration agreement, or a side agreement to allocate percentages of fault on some pre-determined basis, in an effort to avoid airing these claims before the jury. If it is necessary to obtain discovery from the co-defendant, outline the needed information and send an informal request to co-counsel. Ask for co-counsel's cooperation in obtaining the information and answers necessary for you to defend your own client, and reciprocate on informal discovery requests you may receive.
- Identify areas of mutual interest to control costs and demonstrate through your actions in preparing the defense of those issues that you are willing to work cooperatively. Issues such as damages, causation, investigations, surveillance and the sharing of experts can be jointly

arranged.

IV. Conclusion

In the long run, fighting with co-defendants will not get a defendant to the finish line first nor guarantee that the defendant will avoid a significant verdict. Instead, defense counsel fighting with co-defendants will quickly get the reputation that counsel cannot be trusted and, in turn, when defending the difficult case, will find no friends among the co-defendants. It behooves defense counsel to meet early and discuss joint strategy options for the mutual benefit of all defendants. Based on the premise that the individual defendants were not operating at cross-purposes when they were working cooperatively in business while selling, servicing and using the product, there seems little reason why defense counsel should be operating at cross-purposes at the time of trial. While communication and building a trust relationship may take more time than the preparation of the ordinary case, in the long run it may be the single most significant activity undertaken on behalf of the client.