Defense parties have worked with joint defense agreements (JDAs) for years on a variety of cases ranging from product liability cases, to toxic tort cases, to construction defect cases. However, have JDAs worked for them? Comprehensive JDAs can work well for everyone involved with the right timing, the right case and the right counsel. When parties cooperate and work together, everyone can ultimately benefit from the parties' collaboration.

The concept behind the JDA, confidentiality of communications between co-parties, was first recognized in 1871 in the context of communications between criminal co-defendants and their respective counsel, which were found to fall under the attorney-client privilege. The joint defense privilege entered civil practice in 1942 and was recognized by federal courts in 1967 as the "Joint Defense Doctrine" or the "Common Interest Doctrine."

**Common Interests**

A JDA is created by co-parties with common interests to coordinate strategies, pool resources, exchange information, reduce costs and maintain a unified front while preserving the attorney-client and work product privileges. It is a written agreement, although in some states it does not appear to be an absolute requirement for enforcing a JDA. Many states recognize the important public policy benefits of extending the privilege among a group by allowing clients to communicate freely and in confidence when seeking legal advice. It can be the best protection against the undesirable risks such as the waiver of privileged information, finger-pointing, exorbitant costs, and excessive time.

A JDA can be narrow and among a couple of defendants or broad and among all defendants. It does not need to include all defendants to benefit everyone. For example, in a construction defect case, the parties can execute a JDA among just the subcontractors or a subset of subcontractors. Or in a construction site accident case, the JDA can be executed among all defendants other than the property owner. It depends on the issues in the case and the strategies of the defendants, their counsel and the insurer. But either way - narrow or broad - the JDA can work to facilitate discovery, present consistent defenses, and considerably cut the cost of litigation while not helping the plaintiff establish their case.
Depending on the state, there are some requirements that should be satisfied before entering into a JDA. For instance, in Florida, the parties must be "potential or actual parties" in "ongoing or contemplated" litigation, share a common defense interest and a meeting of the minds as with the formation of any contract on maintaining confidentiality and the scope of the information being protected. One real danger of entering a JDA is the risk of a conflict of interest arising after privileged information is shared and one or more of the members of the JDA has been disqualified. Counsel must remember that because the JDA gives rise to an implied attorney-client relationship with all members of the JDA, former and future representation could be affected. Therefore, it is important that a conflict check is conducted among all counsel before the JDA is executed.

It is helpful to keep several issues in mind while navigating through the case with a JDA. Timing is always an issue regarding when to execute the JDA. The JDA should be executed early on so there is enough time to coordinate efforts, divide the labor and start sharing costs. Also, the sooner the JDA is executed, the sooner JDA members can take advantage of sharing privileged information.

**Drafting a JDA**

The basic JDA should include at least the following six general terms:

- Identification of the JDA members - parties, counsel, litigation staff, experts, consultants, insurers (and anyone working on the defense side);
- Any privilege as to any communication among the JDA members or work product of defense counsel cannot be waived;
- JDA members cannot share information with anyone outside the members of the JDA;
- Any claims by and among JDA members relating to the case are specifically reserved as necessary (until after the case is over);
- JDA members will not offer any opinions, conclusion, and/or testimony adverse or otherwise critical of any other member and agree to refrain from asking any questions or soliciting any opinions, conclusions or testimony adverse or critical of any other member;
- Any withdrawal of a JDA member must be made in writing to all members.

With respect to the provision regarding holding back on claims by and among JDA members until after the case is over, if there are cross-claims among the defendants, the defense parties can save time and money by either bifurcating or dismissing these claims (with reservations to litigate or simply mediate these claims if necessary after the case is settled with the plaintiff or tried).

If the JDA includes the provision where JDA members are prohibited from offering opinions, conclusions, etc., everyone saves time because the experts and witnesses are refrained from finger-pointing, which only leads to arguments, meet and confer discussions, motions, further depositions, etc. This is a very effective tool for depositions and trial. It also makes it easier for defense witnesses because they only have to be prepared to answer questions from the plaintiff's lawyer. With fewer lawyers questioning witnesses, the trial tends to be shorter, which is appreciated by everyone, particularly judges and juries. This strategy at trial must be thoroughly discussed prior to trial and works in cases where the plaintiff has galvanized the defendants and this galvanization is part of the plaintiff's theme or theory of the case. It does not necessarily work in every case.
Money-Saver

Defense counsel should ensure they have authority from the insurers that retained them to represent the defendant-insureds before they execute a JDA. Many claims professionals want to review the JDA and strategize with counsel regarding the pros and cons. The JDA can cut down litigation fees and costs for insurers in least three ways:

- Defense counsel can divide up the tasks required to defend the defendant-insured (rather than perform all tasks);
- Insurers typically have more settlement options (they can contribute together with all defendants or a sub-set of defendants to make an offer to the plaintiff);
- Expenses for experts can be shared among insurers for jointly retained experts. In addition, since the defense parties are sharing information, they save on the time and expense they would otherwise have to spend to obtain this information from other defense parties, which can also further save costs for insurers.

A Successful JDA

To help ensure the JDA benefits everyone, defense counsel should check their egos at the proverbial door. They should also take advantage of each member's skillset and take leadership in dividing up the labor. For example, in a construction defect case, counsel who is representing the framer should take lead in deposing and examining those witnesses at trial who testify regarding the framing (rather than have all counsel prepare for these witnesses). Coordinating efforts in this way also helps to prevent the "jack of all trades, master of none" approach too often seen by counsel who do not take advantage of the skillset of their esteemed and aligned colleagues.

Defense counsel can also divide up the labor by designating certain counsel to file particular discovery or pre-trial motions (and all other parties join the motions rather than write their own). Further, experienced trial counsel should take lead to assist other counsel in preparing for trial and at trial. A JDA does not work well when counsel is inexperienced, lacks leadership, or when the defense cannot coordinate efforts to effectively divide the labor. Therefore, counsel should discuss their experience and skillsets soon after the JDA is executed and before the discovery phase begins.

Coordinated Effort

A coordinated effort by the defense from the outset of the case, through discovery, pre-trial motions, and trial, benefits everyone because the more parties involved in the JDA, the less time it takes for the defense to put on its case. Counsel can and should aggressively defend the client at the micro level while simultaneously working with the JDA members at the macro level to coordinate efforts and share costs. It defeats the purpose of the JDA for defense counsel to focus solely on their client's individual position in the case rather than working together as a team to achieve a common goal - a defense verdict. As such, the alignment of the parties can be very effective in preventing the plaintiff from proving liability or establishing damages.
The JDA can also help the defense parties with respect to mediation for at least two reasons. One, the mediator has built-in groups aligned to provide joint offers to the plaintiff and two, the more the defense is aligned, the less in-fighting among the defense. This helps the insurers for at least three reasons. First, if a subset of defendants can make joint offers together or all defendants can make a joint offer together to the plaintiff, each party's contribution toward the offer is less than if each defendant was pitted against one another making individual offers to the plaintiff. Second, if the defense parties are working to make a joint offer together, this saves the insurer fees and costs expended for their retained counsel because counsel is not focused on strategizing their own client's individual position at mediation (which can lead to the in-fighting). Third, this coordinated effort typically leads to fewer mediations because the defense is a unified group offering an amount to the plaintiff.

A JDA is not necessarily the right tool for every case, but it can be a very effective tool for any case where there are multiple defendants, an alignment of the defense on at least one issue, and involves counsel who are willing to take lead and share their experience, skillsets, and the tasks at hand to work towards the ultimate goals in the case - saving time and expenses and defeating the plaintiff's case.