PRIVILEGE PRIMER FOR ATTORNEYS APPROACHING JOINT DEFENSE AGREEMENTS IN SECTION 337 LITIGATION

By Nicholas J. Boyarski *

INTRODUCTION

You represent a corporation that has been named as a respondent in a Section 337 complaint filed with the U.S. International Trade Commission ("Commission").[1] The complaint asserts patent infringement against several respondents, including your client. Counsel for one of the co-respondents approaches you regarding the formation of a joint defense. Now what? What issues should you consider, and how should you proceed to best represent the interests of your client?

This article is tailored to those approaching their first joint defense agreement, as well as those approaching their first joint defense agreement in quite some time. The goal is to remind attorneys of the issues they will likely encounter during Section 337 litigation involving a joint defense agreement. To provide a more complete picture, this article will first review the basic principles of the attorney-client privilege and the work-product doctrine. Second, the article will discuss the joint defense privilege and review recent applications of the doctrine. Third, the article will discuss the advantages and disadvantages of joint defense agreements. Finally, the article will discuss considerations when drafting and operating under a joint defense agreement.

Like many areas of law, the joint defense privilege is not crisply defined. Its interpretation varies across jurisdictions, and due to these variations, continues to both expand

---

* Summer Associate, Steptoe & Johnson LLP, Washington D.C., 2008; B.S. Mechanical Engineering, University of Wisconsin-Madison; M.S. Mechanical Engineering, University of Wisconsin-Madison; J.D. candidate, Arizona State University - Sandra Day O'Connor College of Law, 2009. The author wishes to thank Alice Kipel and Charles Schill, Partners, at Steptoe & Johnson LLP for their guidance and assistance in preparation of this article.

[1] *See* 19 U.S.C. § 1337 ("Section 337").

and contract. This article will attempt to assemble both the commonalities and disparities that currently exist in the application of this judicially created doctrine. In defining the current state of the joint defense privilege, this article looks first to Commission orders and second to federal court opinions.

DISCUSSION

A. Underpinnings of the Joint Defense Privilege

Before discussing the joint defense privilege, it is useful to briefly review the two doctrines that establish its foundation, the attorney-client privilege and the work-product doctrine. While the joint defense privilege includes aspects of both the attorney-client privilege and the work-product doctrine, it remains distinguishable from both.[2] Since discovery requests generally motivate assertions of privilege, it is appropriate to first begin with a concise review of the scope of discovery during a Commission investigation.

1. Scope of Discovery

Under the Commission's Rules, "a party may obtain discovery regarding any matter, not privileged, that is relevant to … the claim or defense of the party seeking discovery."[3] In addition, information that "appears reasonably calculated to lead to the discovery of admissible evidence" will be discoverable.[4] When responding to a discovery request, "a party resisting discovery on the ground of attorney client privilege must by affidavit show sufficient facts as to

[2] *See* Deborah S. Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 Fordham L. Rev. 871, 874 (1996).

[3] 19 C.F.R. § 210.27(b).

[4] *Id*.

bring the identified and described document within the narrow confines of privilege."[5] Thus, the withholding party bears the burden of demonstrating that a communication is entitled to at least one of the several forms of privilege discussed below.

2. Attorney-Client Privilege

The attorney-client privilege protects communications made in confidence between a client and his/her lawyer for the purpose of obtaining legal advice.[6] As stated by Judge Wyzanski and frequently cited in Commission orders:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[7]

The attorney-client privilege also extends to corporate clients, including communications between attorneys and corporate employees.[8] The justification for the attorney-client privilege rests on the notion that clients will receive the fairest representation if "full and frank communication between attorneys and their clients" is permitted.[9] However, because the

---

[5] *Certain Phenylene Sulfide Polymers and Polymer Compounds and Products Containing Same*, Inv. No. 337-TA-296, Order No. 44 at 12 (Aug. 26, 1989) (quoting *International Paper Co. v. Fiberboard Corp.*, 63 F.R.D. 88, 94 (D.Del.1974)).

[6] *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981); *Certain Combination Motor and Transmission Systems and Devices Used Therein, and Products Containing Same*, Inv. No. 337-TA-561, Order No. 11 at 2 (Sept. 12, 2006).

[7] *United States v. United Shoe Machinery Co.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *Certain L-Lysine Feed Products, Their Methods of Production and Genetic Constructs for Production*, Inv. No. 337-TA-571, Order No. 18 (Aug. 16, 2007).

[8] *Upjohn*, 449 U.S. at 389.

[9] *Id*.

attorney-client privilege can limit the pursuit of truth, courts deem it necessary to impose strict bounds on the privilege.[10] Missteps by a client, an attorney, or even a third party, can easily lead to unintentional waiver of the privilege.

To avoid waiver of the attorney-client privilege, a communication must be addressed to or from an attorney. So, when a communication is transmitted from one client to another and bypasses an attorney, privilege will not generally be recognized. However, an exception is recognized where the communication includes the advice of counsel.[11] For example, where a document discussing a corporate attorney's advice and opinion regarding alleged patent infringement is transmitted from one client to another client within a corporation, privilege will be preserved.[12]

Voluntary disclosure of confidential material to an adversary in litigation constitutes a waiver of privilege for the confidential information disclosed.[13] Also, if a party fails to exercise a "reasonable effort" to protect confidential information, privilege is likely waived.[14] For example, a reasonable effort will not be recognized where a party discloses a document to the opposing counsel on two occasions and fails to request return of the document.[15]

---

[10] *Garner v. Wolfinbarger*, 430 F.2d 1093, 1100-01 (5th Cir. 1970), *cert. denied sub nom. Garner v. First Am. Life Ins. Co*., 401 U.S. 974 (1971).

[11] *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437 (S.D.N.Y. 1995).

[12] C*ertain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof*, Inv. No. 337-TA-422, Order No. 7 (Sep. 29, 1999) [hereinafter *Two-Handle Centerset Faucets*].

[13] *Genentech v. United States International Trade Commission*, 122 F.3d 1409 (Fed. Cir. 1997) (citing *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (en banc)).

[14] Certain *EPROM, EEPROM, Flash Memory*, and Flash Microcontroller Semiconductor Devices and Products Containing Same, Inv. No. 337-TA-395, Order No. 35 (Dec. 5, 1997) [hereinafter *EPROM, EEPROM, Flash Memory*] (citing Paul R. Rice, Attorney-Client Privilege, § 9:69, at 9-229 (West Group 2d ed. 1999)).

[15] *EPROM, EEPROM, Flash Memory*, *supra* note 14.

While voluntary disclosure always results in waiver, "inadvertent" disclosure may or may not result in waiver.[16] "[T]he administrative law judge has discretion in deciding the appropriate scope of waiver…because such determinations 'depend heavily on the factual context in which the privilege is asserted'"[17] Accordingly, in the case of inadvertent production, the Administrative Law Judge ("Judge") has discretion to find that privilege has not been waived and may order the receiving party to return all privileged information.[18]

One caveat is worth mentioning, while communications between an attorney and a client are privileged and protected, the underlying facts involved in the communication are not protected.[19] Thus, despite a valid assertion of privilege over a document containing a privileged communication, a witness may still be called to testify regarding the underlying facts.

3. Work-Product Doctrine

The work-product doctrine is codified in the Federal Rules of Civil Procedure.[20] Under the work-product doctrine, information obtained or produced by or for an attorney "in preparation for litigation" may be protected from discovery.[21] In this respect, the work-product doctrine creates a zone of privacy for an attorney preparing for trial and prevents an opposing

---

[16] *See Carter*, 909 F.2d at 1451; *see also Genentech*, 122 F.3d at 1415.

[17] *EPROM, EEPROM, Flash Memory*, *supra* note 14 (quoting *In re United Mine Workers Employee Ben. Plan Lit*., 159 F.R.D. 307, 309 (D.D.C. 1994)).

[18] *EPROM, EEPROM, Flash Memory*, *supra* note 14.

[19] *See Upjohn*, 449 U.S. at 395; *see also Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, Order No. 64 at 11 (Jan. 15, 1997).

[20] *See* Fed. R. Civ. P. 26(b)(3).

[21] *Hickman v. Taylor*, 329 U.S. 495, 499 (1947).

party from "piggybacking" on its adversary's efforts.[22] Examples of documents covered by the work-product doctrine include invalidity opinions and non-infringement opinions.[23] In general, a party resisting discovery "bears the burden of establishing that the documents in question were prepared principally or exclusively to assist in anticipated or ongoing litigation."[24]

Unlike the attorney-client privilege, the work-product doctrine is a limited privilege and may be overcome by a showing of substantial need in addition to an absence of alternative means for obtaining the requested information.[25] However, a showing of substantial need will not always render materials discoverable.[26] For instance, where the communication contains "mental impressions, conclusions, opinions, or legal theories," the court shall protect against disclosure.[27] Protection may be achieved by redacting privileged information in a requested document.[28] In contrast, where a communication fails to include an attorney's "mental impressions, conclusions, opinions, or legal theories," work-product privilege will not be recognized and the court may order discovery.

B. Joint Defense Privilege

[22] *Certain Network Interface Cards and Access Points for Use in Direct Sequence Spread Spectrum Wireless Local Area Networks and Products Containing Same*, Inv. No. 337-TA-455, Order No. 60 (Nov. 21, 2001) [hereinafter *Network Interface Cards*]; *see United States v. Nobles*, 422 U.S. 225, 238 (1975).

[23] *Electro Med. Sys. S.A. v. Cooper Life Sciences Inc*., 32 USPQ2d 1017, 1023 (Fed. Cir. 1994).

[24] *Certain Encapsulated Integrated Circuit Devices and Products Containing Same*, Inv. No. 337-TA-501, Order No. 53 (May 20, 2004) (citing *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 462 (S.D.N.Y. 1996)).

[25] Fed. R. Civ. P. 26(b)(3); *Certain Wireless Communication Equipment, Articles Therein, and Products Containing the Same*, Inv. No. 337-TA-577, Order No. 35 (Apr. 3, 2007).

[26] *Certain Optical Disk Controller Chips and Chipsets and Products*, Inv. No. 337-TA-523, Order No. 56 (May 18, 2005).

[27] *See* Fed. R. Civ. P. 26(b)(3).

[28] *Network Interface Cards, supra* note 22.

The joint defense privilege establishes privilege for communications passing from one party to a third person "who has a *common legal interest* with respect to the subject matter of the communication."[29] As a result, the joint defense privilege acts as an exception to the general rule that disclosure of privileged information to third parties results in privilege waiver.[30] In addition to a common legal interest, a party seeking protection under the common interest doctrine must demonstrate that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further that effort, (3) the underlying communications are attorney-client privileged or attorney work-product, and (4) the privilege has not been waived.[31] In some instances, the "joint defense effort" prong is alternately referred to as a "joint defense strategy" or a "common defense effort."[32] Nevertheless, the three terms are interpreted similarly.

1. Establishing a Common Legal Interest

The common interest doctrine applies when "a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[33] It is required that the common interest be identical and not merely similar.[34] Also, the common interest must be legal

---

[29] *Two-Handle Centerset Faucets, supra* note 12, at 5 (quoting *Hodges, Grant & Kauffmann v. U.S. Government*, 768 F.2d 719 (5th Cir. 1985) (emphasis added)).

[30] *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990).

[31] *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing the Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, Order No. 35 (Apr. 25, 2006) [hereinafter *Baseband Processor*] (citing *Certain Hardware Logic Emulation Systems and Components Thereof*, 337-TA-383, Order No. 52 (Oct. 17, 1996) [hereinafter *Hardware Logic*]).

[32] *Baseband Processor, supra* note 31; *Hardware Logic, supra* note 31.

[33] *Two-Handle Centerset Faucets, supra* note 12, at 5 (citing *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 237, 243 (E.D.N.Y. 1996)).

[34] *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1175 (D.S.C. 1974); *In re Grand Jury Subpoenas*, 902 F.2d at 249.

and not solely commercial.[35] For example, while a common legal interest may have a commercial interest intertwined, "[a] business or commercial interest cannot form the basis of any privilege, including the joint defense privilege."[36] Thus, "the common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation."[37]

2. When Does Privilege Attach?

When parties are named as co-respondents in a Section 337 investigation, a common legal interest is automatically established between the respondents and privileged communications exchanged between them may be protected from discovery.[38] But to qualify for protection, the underlying communications must be either attorney-client privileged or attorney work-product.[39]

The Commission may protect communications that occur prior to the filing of a Section 337 complaint if the communications are shared in the course of "a coordinated legal strategy concerning potential litigation regarding [an] accused [product]."[40] For instance, litigation may be *reasonably anticipated* where two corporations work together in developing a product which

---

[35] *Hardware Logic, supra* note 31; *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y.1995).

[36] *Certain Voltage Regulators, Components Thereof and Products Containing Same*, Inv. No. 337-TA-564, Order No. 10 (Nov. 1, 2006) [hereinafter *Voltage Regulators*].

[37] *Hardware Logic, supra* note 31 (quoting *Bank Brussels,* 160 F.R.D. at 448).

[38] *Two-Handle Centerset Faucets, supra* note 12.

[39] *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989); *In re Grand Jury Subpoenas*, 902 F.2d at 249.

[40] *Two-Handle Centerset Faucets, supra* note 12.

is likely to infringe a patent held by a corporation having a strong position in the marketplace.[41] So, where parties are named as co-respondents in a complaint, their previous communications regarding an accused product may qualify for protection under the joint defense privilege.[42]

In general, the existence of related litigation will establish a common legal interest between parties. For example, where a patent infringement suit is filed in a district court before a complaint involving the same patent is filed with the Commission, a common legal interest between the parties may begin at the time of the district court filing.[43] Thus, privileged communications shared between the co-defendants during a district court proceeding are shielded from discovery in a Section 337 proceeding.[44]

The Commission also recognizes a common legal interest between a respondent and a third party customer where the common interest is legal and not solely commercial.[45] For instance, where a respondent and a non-party customer share the same interest in the outcome of a litigation proceeding, a Judge has found the existence of a common legal interest and no waiver of privilege.[46] In such cases, the common legal interest stems from the parties' common interest in "defending against a potential infringement allegation" that would disrupt business.[47] Further support for finding a common legal interest arises from the potential that a third party may

---

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Hardware Logic, supra* note 31.

[47] *Two-Handle Centerset Faucets, supra* note 12.

eventually be named as a co-respondent in the complaint, so it has an interest in assisting a respondent early in the proceedings. [48]

In contrast, a common legal interest will not be recognized between a respondent and its customers where there is no showing of a "coordinated defense effort" and no showing of an underlying privilege.[49] Since the burden of showing a coordinated defense effort falls on the parties asserting the privilege, a common legal interest between a respondent and intervenors will not be recognized where the only evidence presented is "[v]ague, self-serving statements that the [third party]…worked with [the respondent] in various ways for many months."[50] Moreover, where the third party fails to produce a privilege log, no underlying privilege will be recognized.[51]

On the other hand, the presence of an exclusive license agreement between parties is evidence of a common legal interest, because the parties share a common goal of protecting the licensed patent from infringement and from claims of invalidity and/or unenforceability.[52] Accordingly, where parties are part of an exclusive license agreement, documents relating to the prosecution and litigation of a licensed patent qualify for privilege.[53] Similarly, the existence of a joint development agreement is evidence of a common legal interest.[54] Where two parties are

---

[48] *Id.*

[49] *Baseband Processor, supra* note 31 (citing *Hardware Logic, supra* note 31, at 4).

[50] *Baseband Processor, supra* note 31.

[51] *Id.*

[52] *EPROM, EEPROM, Flash Memory*, *supra* note 14.

[53] *EPROM, EEPROM, Flash Memory*, *supra* note 14.

[54] *Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof*, Inv. No. 337-TA-503, Order No. 43 (Aug. 24, 2004).

"operating under an agreement for the joint development of certain products and the pursuit of patent rights related thereto," a common legal interest will be recognized between the parties.[55]

D. Joint Defense Agreements: Advantages and Pitfalls

A party seeking to invoke a joint defense privilege bears the burden of demonstrating privilege for communications requested in discovery.[56] In many cases, a joint defense agreement provides evidence of a joint-defense effort, thereby resulting in the recognition of privilege. In this way, a joint defense agreement provides co-respondents the ability to communicate confidential information, such as legal strategies, without waiving privilege.

A joint defense agreement may also provide evidence of a common interest between a respondent and third party.[57] As a result, information shared between a respondent and a third party customer may be privileged.[58] In many cases, the existence of a agreement can help refute a later arising question of whether a "joint defense effort" or a "common legal interest" existed at the time of disclosure.

Joint defense agreements can be particularly useful to respondents in patent infringement suits. For instance, during patent litigation, a coordinated defense effort will allow respondents to align their claim construction positions and assert common support for those positions. So, the potential that a respondent's claim construction might be undermined by a co-respondent's claim construction is eliminated. In addition to numerous strategic advantages, co-respondents may also experience economic advantages. By sharing the litigation tasks among various legal

---

[55] *Id.*

[56] *Voltage Regulators, supra* note 36; *In re Bevill, Bresler & Schulman Asset Management*, 805 F.2d 120, 126 (3d Cir. 1986).

[57] *Certain Absorbent Garments*, Inv. No. 337-TA-508, Order No. 25 (Sep. 8, 2004).

[58] *Id.*

teams and by eliminating redundancies, the cost of litigation for each participating respondent may be reduced.

Although joint defense agreements provide an opportunity to achieve consistency in the defenses asserted by the co-respondents, this consistency should not be confused with unity. For instance, a joint defense agreement does not result in parties sharing counsel. Each co-defendant retains his/her own lawyer by entering into a traditional contractual attorney-client relationship. Under a joint defense agreement, the co-defendants are free to pursue their own defenses and may also reach a settlement without the group's approval. Further, there is no assumption that a co-respondent's attorney has anyone's best interests in mind besides his/her client's.

Even with a joint defense agreement in place, respondents should always be cognizant of their co-respondent's actions and potential defense strategies. Respondents should be aware that the existence of a joint defense agreement does not necessarily imply that co-respondents are allies or even that they are being completely forthright.[59] Keep in mind that if co-respondents become adverse parties in subsequent litigation, the privilege may be waived.[60]

In some cases, business competitors may be unwilling to enter into joint defense agreements, perhaps due to prior legal disputes or perhaps due to potential future litigation. In such cases, the formation of a joint defense agreement including all respondents is simply not an option. But it may be possible to form a joint defense agreement among remaining co-respondents. Thus, while not completely unified, the parties who are willing to cooperate may still salvage some of the benefits available under a joint defense agreement.

E. Operating Under a Joint Defense Agreement

[59] *See* Bartel, *supra* note 2, at 877.

[60] *Ohio-Sealy Mattress Mfg. v. Kaplan,* 90 F.R.D. 21, 32 (N.D. Ill. 1980).

In an attempt to broaden discovery efforts, a complainant may challenge an assertion of a joint defense privilege. As previously mentioned, the burden of showing a joint defense privilege falls on the respondent, so:

> [i]f a joint defense agreement is attempted, and a court subsequently determines that the joint defense privilege is not available because of some infirmity in forming the joint defense, the court may compel members of the joint defense agreement, and even counsel present at the joint defense meetings, to testify regarding statements made at the meetings.[61]

Thus, it is critical that respondents take all necessary precautions to bolster the joint defense agreement early in the litigation process. Although not required, the first step should be to memorialize the agreement in writing.[62] As noted by Judge Harris "[a] written agreement is the most effective method of establishing the existence of a joint defense agreement," but "an oral agreement…may be enforceable as well."[63] Although the agreement need not be in writing, it is wise to pursue a written and signed agreement. Having all participants sign the agreement provides admissible evidence of a joint defense effort.[64]

The contents of a joint defense agreement is vitally important, because "the federal courts rely heavily on the provisions of any written joint defense agreement [that establishes] the rights and duties of the parties and their counsel."[65] Accordingly, when drafting an agreement, the

---

[61] ABA Section of Antitrust Law, Handbook on Antitrust Grand Jury Investigations, 218 (3d. ed. 2002) [hereinafter *Handbook on Antitrust*]; *see United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985).

[62] *Handbook on Antitrust, supra* note 61, at 232.

[63] *Voltage Regulators, supra* note 36.

[64] *See In re Grand Jury Subpoena Duces Tecum Dated November 26, 1974*, 406 F. Supp. 381, 389-91 (S.D.N.Y. 1975).

[65] *Certain Network Interface Cards and Access Points for Use in Direct Sequence Spread Spectrum Wireless Local Area Networks and Products Containing Same*, Inv. No. 337-TA-455, Order No. 101 (Feb. 27, 2003) (quoting *City of Kalamazoo v. Michigan Disposal Services Corp.*, 125 F.Supp.2d 219, 232 (W.D. Mich. 2000)).

provisions should be careful selected to preserve a joint defense privilege. As a starting point, a respondent's counsel may consider including provisions similar to the following:

- 1) A common legal interest exists among all parties who have signed the agreement regarding both the Commission investigation and any related district court proceedings.
- 2) The exchange of confidential or privileged information will further the joint defense effort.
- 3) Information exchanged between parties will continue to be subject to the attorney-client privilege, the work-product privilege, the common-interest privilege, and the joint defense privilege.
- 4) Each counsel represents his/her client only and owes no obligation to anyone other than his/her client.
- 5) The parties will maintain the contents of the joint defense agreement in confidence.
- 6) If disclosure of information is sought by a court, the party must give the other parties sufficient written notice prior to making any such disclosure.
- 7) If disclosure of information is sought by any person or entity not a party to the agreement, the party receiving the request must notify the other parties before making any such disclosure.
- 8) Each party shall take reasonable steps and make reasonable efforts to protect the confidentiality of all confidential joint defense materials.
- 9) The exchange of confidential information will not result in waiver of privilege for the information exchanged and will not result in waiver of privilege for related information that is not exchanged.
- 10) All information exchanged pursuant to the agreement will be returned or destroyed upon expiration of the agreement.

Even after a joint defense agreement is signed, great care should be taken when interacting with co-respondents. Before commencing any joint defense meeting, all participants should agree that "the meeting will be conducted in furtherance of a common defense and will be maintained in confidence."[66] In addition, counsel should always be aware of all individuals in

[66] *Handbook on Antitrust, supra* note 61, at 233.

attendance, both physically and via teleconference. Disclosure to an individual who has not signed the agreement may result in waiver of privilege, because it "may destroy counsel's ability to demonstrate that the parties intended the communications to be confidential."[67] Thus, even with a joint defense agreement in place, counsel must act diligently to preserve privilege.

CONCLUSION

Joint defense agreements are well-suited to patent infringement claims arising in Section 337 investigations where complainants often name multiple respondents. The high-stakes nature of these cases, in addition to intense statutory time constraints, makes collaboration among co-respondents both common and beneficial. However, before agreeing to a joint defense, the benefits should always be weighed against the potential risks. If a joint defense is ultimately pursued, the provisions of the agreement should be carefully selected and meetings with joint respondents should be carefully managed.

[67] *Id.*