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The Joint Defense Privilege: Know the Risks

by Gerald F. Uelmen

One of the biggest frustrations of being a litigator is that decent, honest virtues—friendship and cooperativeness, for example—can get you in trouble.

Suppose your client has been charged in a federal indictment with conspiring to bribe a public official. You get a telephone call from the lawyer representing a codefendant, James Turner. She invites you to bring your client to a meeting in her office.

Unlike most meetings, this one is a festival of good spirit and time well spent. You get to interview Turner at length. Returning the favor, you let Turner's lawyer interview your client. You give Turner's lawyer copies of memoranda, records of some witness interviews, and an outline of your research on tactical options. You receive similar material from Turner's lawyer. You also jointly hire an expert to analyze numerous government tape recordings of wiretaps and bugs.

Two weeks later, you get another call from Turner's lawyer, and your good spirits begin to burn away like the morning mist. Turner has accepted an offer he could not refuse. He has flipped. Done a deal with the prosecutor. And, by the way, he will be the chief witness against your client at the upcoming trial.

You Ask Questions

Things had been going so well that you absently mumble "thank you" when you hang up. Then, your steel-trap mind snaps into action. You become increasingly uneasy and, like any good lawyer, you begin to ask questions:

- Can you stop Turner from revealing your client's statements, either in his trial testimony or in pretrial meetings with the prosecutor?
- Can you stop the prosecutor from using your memoranda of witness interviews?
- Can you preserve the confidentiality of your consultation with the tape-analysis expert?
- Can you use Turner's statements to cross-examine him

or use his lawyer's memoranda to develop additional evidence to discredit him?

- If the answer to many, or any, of these questions is "No," should you contact your malpractice carrier and start looking for another line of work?

Like most lawyers with doubts about their arguments or conduct, you hope that a little research will improve your outlook. Surely, in that vast and ever-growing mountain of words, *somebody* must have said *something* that will help. What looks now like a major blunder can be retroactively repaired by a comforting pat on the head by some judge or professor.

After less study than you feared, you discover the soothing words you wanted. Something called the "joint defense privilege" looks like it can change you from a credulous big mouth into a crack litigator who knew all along there was nothing to fear.

Joint defense privilege cases show that you are not alone. Amiable lawyers have been stumbling into this fix for years. More than 100 years ago, for example, in *Chahoon v. Commonwealth*, 62 Va. 822 (1872), three defendants, under indictment for conspiracy to defraud, held a joint defense strategy meeting with their individual lawyers. Later, one of the three pled guilty.

At trial the prosecution called the attorney for the defendant who pled guilty and asked him to testify about what one of the remaining defendants said at the joint meeting. This is a worse fix than you ever imagined. You are pleased to learn that the Virginia Supreme Court upheld a claim of attorney-client privilege, concluding that the testimony was properly excluded at the trial.

Citing an 1872 decision, however, is not a sure-fire prescription for success. You are, therefore, pleased to discover after further research that the joint defense privilege did not flare up more than 100 years ago only to sputter out shortly thereafter.

More recently, the Ninth Circuit also recognized the joint defense doctrine. *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), involved a grand jury investigation of two oil companies. Attorneys for both targets interviewed

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company employees summoned to testify, both before and after their grand jury appearances. The lawyers exchanged memoranda summarizing the interviews. The government then subpoenaed both companies and their attorneys to produce the memoranda.

Reversing the district court, the Ninth Circuit concluded that the subpoenas violated the attorney-client privilege. It found that the interviewing attorneys were functioning as attorneys for the witnesses as well as for the company, and relied on *Chahoon* for the proposition that the exchange of material did not constitute a waiver of the attorney-client privilege.

Having found *Chahoon* and *Continental Oil*, you begin to relax. The joint defense privilege is a venerable, but still vital doctrine. You were right all along.

But soon you have new doubts. Privileges are fragile, tricky things, easily waived and subject to many qualifications. What is the scope of the joint defense privilege? What are its requirements? Who can exercise or waive it? And, will it protect your client against Turner's proposed testimony?

Back to the books. You quickly learn that life is never simple. Different jurisdictions have developed different rules regarding the application and scope of the joint defense privilege. What is more, the law has developed in the criminal area, and its application to the civil side is mostly by analogy.

You begin to wish that you had done this research *before* meeting with Turner and his lawyer. You would be sleeping better now if you had known this and had clearly spelled out the terms of your cooperative exchange before it began.

Here are some examples of what you should have thought about. First, the *purpose* of the joint activity. Some courts strictly insist that the purpose of a joint conference or exchange of privileged information be the pursuit of a mutual,

"common" interest. If one party just wants to extract information from another, there can be real trouble.

In *Vance v. State*, 190 Tenn. 521, 230 S.W. 2d 987, *cert. denied*, 339 U.S. 988 (1950), for example, the defendant made certain statements at a joint conference where a codefendant and both attorneys were present. The court held that such statements were *not* privileged, since the conference was simply for the benefit of the first defendant, and the codefendant was not collaborating in a joint defense.

This means that a wholesale distribution of privileged material among all defendants and their lawyers in some state proceedings can be extremely dangerous. Distribution should be limited to those who are actively involved in discussion of strategy.

The Scope of the Privilege

Fortunately for you and your client's problems with Turner, federal courts are not as strict as the *Vance* court. They have extended the privilege to virtually *any* exchange of information among clients and lawyers on the same side of a case. See, for example, *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965).

Despite the federal approach, attorneys contemplating joint defense meetings in *any* proceeding must carefully evaluate the relative positions of various defendants. This is especially true when an exchange of privileged information is proposed. Some defendants are more likely candidates for plea bargains than others. Their reasons for participating may be different from yours. You need to be skeptical about who they may talk to and how much joint information they will pass along.

The inherent unreliability of criminal codefendants means that, before any joint exchange, everyone must agree, as a condition of the exchange, that all overtures by the prosecutor will be promptly disclosed to cooperating co-counsel. In addition, be sure to ask co-counsel if any plea discussions have already taken place and what the prospects are for such discussions in the future. The news that a codefendant has "turned" should rarely be a total surprise.

With more research, you learn more details. Apart from the purpose of the exchange and the motives—present or future—of your coparticipants, the *timing* of a meeting or exchange can be critical. The key question is whether protected joint defense efforts can occur *before* the actual institution of litigation. In *Continental Oil*, for example, the court rejected an attempt to limit *Chahoon* to postindictment exchanges of information. It held the privilege applied even though the clients were not yet codefendants when the exchange occurred. The court essentially extended the joint defense privilege to any situation where joint consultation would be mutually beneficial.

There was a time when it seemed the Federal Rules of Evidence would adopt *Continental Oil*. As recommended by the Supreme Court, Rule 503(b) extended the lawyer-client privilege to 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. . . ."

Congress, however, eliminated all of the rules relating to privilege from the final version of the rules adopted in 1974. Nevertheless, the proposed rule, though discarded, has had a broad impact. Its text was adopted in Alaska, Florida, Nebraska, Nevada, New Mexico, Oregon, and Wisconsin.



Weinstein's Evidence, § 503(03). Federal courts also have cited the proposed rule in determining the scope of the joint defense privilege. See, for example, *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979). But see *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985).

Such a broad construction of the joint defense privilege—extending it to cases involving actual or even contemplated litigation—is not uniform. Many jurisdictions do not go so far. For example, although the Uniform Rules of Evidence largely mirror the Federal Rules, Uniform Rule 502, which defines the lawyer-client privilege, does not. Section (b)(3) of that rule limits the privilege to communications:

made for the purpose of facilitating the rendition of professional legal services to the client . . . by him or his representative or his 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. (Emphasis added.)

This rule has been adopted in the evidence codes of Arkansas, Delaware, Hawaii, Maine, North Dakota, South Dakota, and Oklahoma. *Weinstein's Evidence*, § 503(03). As a result, especially before an indictment or a lawsuit is filed, you must know what the local law is before you engage in joint defense efforts.

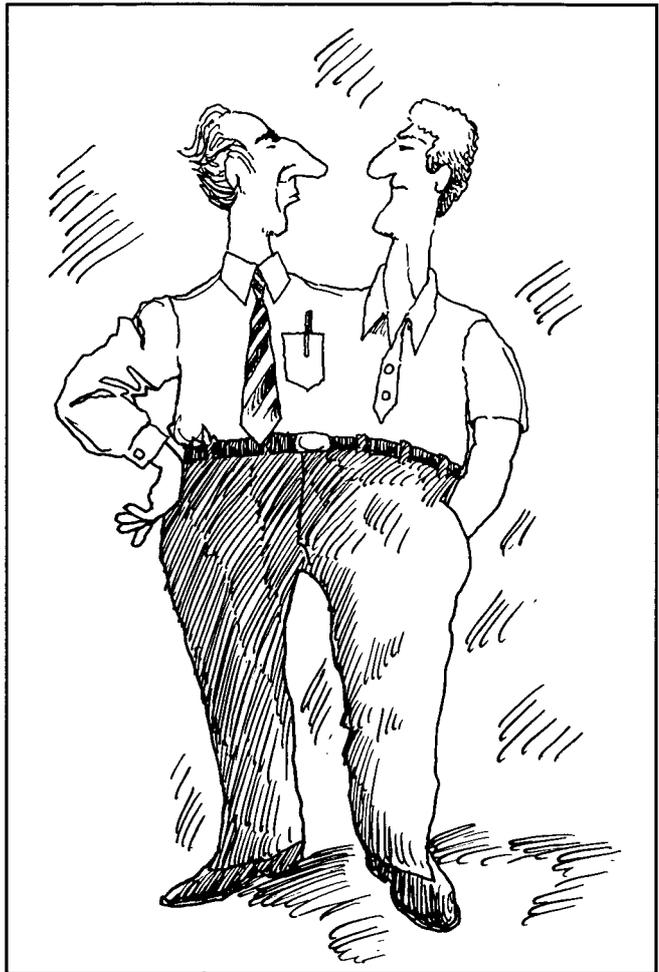
But even in a liberal, "prelawsuit privilege" jurisdiction, you must be careful. Where preindictment and precomplaint exchanges of privileged information are proposed, you should often just say no. The risk is great that privileged information will be leaked in the ordinary course of an investigation.

An even bigger problem looms. You could find yourself the target of a disqualification motion. When your client and the newly-flipped prosecution witness were codefendants, you may have received privileged communications or materials from the former defendant. The prosecution might argue successfully that you cannot stand in an adversarial relationship with a witness who has provided you with privileged information in confidence.

The risk of disqualification is not unique to criminal matters. It is present in civil cases, where cooperative exchanges are proposed before litigation has begun. Just as joint representation of parties prior to litigation may preclude representation of either party in a later trial, the exchange of privileged information between counsel for parties whose interests later conflict may later disqualify both counsel. See Taskier and Casper, *Vicarious Disqualification of Co-Counsel Because of "Taint,"* 1 *Geo. J. L. Ethic* 155 (1987). So beware, even if there is a joint defense privilege before litigation.

By now, your research has given you some comfort. You can probably prevent Turner from testifying about your joint discussions. But what about the bigger risk? Can you stop Turner from feeding the prosecution privileged information before trial? That is much harder to do.

Virtually every reported case discussing the joint defense privilege has addressed only the admission of privileged information as evidence at trial. One of the few cases to discuss pretrial breach of the joint defense privilege shows how hard it is to stop. In *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981), a codefendant participated in joint meetings with the defendants and lawyers after he agreed to cooperate and become an informant for the government. He



delivered privileged information to the prosecution. He recorded strategy sessions among defense attorneys and their clients. The district court found a violation of the Sixth Amendment and dismissed the indictment.

The court of appeals reversed. It held that the defendants were not entitled to any remedy absent a showing of "prejudice." The court also said that even if prejudice were shown, the trial judge should tailor a remedy short of dismissal, such as suppression of the evidence obtained by breach of the privilege.

Unfortunately, suppression is a poor remedy. It imposes no penalty and affords no relief for harm done by pretrial breach of the privilege. Even for what it is worth, suppression is a feeble option, because it is full of procedural obstacles and pitfalls. You cannot be sure that you will be able to show that particular information was secured through breach of a privilege and not some other, nonprivileged source.

Such limited judicial protection means that attorneys must be creative in looking for ways to prevent, limit, or highlight breach of the joint defense privilege. If you want to be protected, you need to do your homework before you get to court. If a codefendant turns and becomes a government witness, it is important to flag the issue immediately. Seek a court order impounding any privileged material in the possession of the codefendant or his attorney. Consider quick action to define the extent of the taint caused by the breach. One possibility is to seek a hearing on how any privileged information was, or may be, used in any subsequent proceeding. See *Alderman v. United States*, 394 U.S. 165 (1969).

Finally, you should consider moving to disqualify opposing counsel if he or she has obtained *really* sensitive information from your client. Before you do this, however, remember that disqualification can be a two-way street. Because *you* may have privileged information from your former confederate and new adversary, *you* also may be subject to disqualification.

There is another protective device, suggested not long ago by Steven Wilson, now a federal judge in Los Angeles. He believes that no privileged material should be exchanged until a written agreement has been executed. This would add contract remedies to the resources that could be used to protect privileged material. Judge Wilson suggests the agreement should, at a minimum, have the following provisions:

- 1) the information transmitted contains confidential attorney-client communications that are privileged;
- 2) it is being transmitted only to counsel for other subjects of the pending investigation;
- 3) the exchange is made to facilitate presentation of common defenses . . .
- 4) that the document must not be furnished to any other person by way of production of a copy or disclosure of its contents; and
- 5) each of the parties agrees to voluntarily waive any civil actions that he (or it) may now or in the future be able to prosecute against any or all of the signatories to the agreement.

Wilson, *Using the Joint Defense Privilege*, Nat'l. L. J., March 4, 1983.

This kind of agreement can be very helpful, but you may not be able to get it. Few lawyers would agree to a broad waiver of "any civil actions" against other signatories. Ultimately, how much you seek in a written agreement depends on how much you trust or mistrust your prospective allies.

What about work product? Can you stop Turner from turning over your witness interview memoranda? The joint defense privilege explicitly protects only client confidences. It does not extend to interviews of nonparty witnesses, memoranda discussing tactics and strategy, legal research, or other similar information. Such material is protected by a limited work product privilege in the hands of the lawyer who produced it, but there is a serious question whether that protection is waived if the material is shared with another party's lawyer.

If logic prevails, you should be safe. There is no more reason to find a waiver of the work product privilege in the sharing of such materials with co-counsel than there is with the sharing of lawyer-client confidences protected by the joint defense privilege. This is especially true for consultation with experts, particularly when counsel has not yet decided whether to call the expert as a witness.

Aside from general considerations of confidentiality, public policy should encourage litigants to share the expense of consulting experts. This would help ensure wider availability of an often small pool of experts and would help reduce the cost of litigation. It also might reduce the number of witnesses who have to testify.

Despite the logical force of these observations, there are few cases on either side of the issue. You just cannot be sure. This, and basic prudence, means that a written agreement, once again, is essential. The agreement should spell out not only how the expenses for joint expert consultation will be

shared, but also how access to the information will be protected, even if one party to the joint consultation later drops out. This should be clearly explained to the expert as well. Thinking about this kind of agreement is critical. The absence of precedent means it may be the only protection you have.

By now, you are getting discouraged. You probably should have had a joint defense agreement before dealing with Turner, but you did not. You should at least have thought about the situation, but you didn't do much of that either. What can you do to strike back? Can you cross-examine Turner with something he said during joint defense consultation? If he can breach the privilege you thought existed, why can't you?

Here again, the cases offer a little guidance. What you have in mind would be precluded if you had represented your client and Turner jointly. An attorney who previously represented someone cannot use information obtained in that representation to discredit his former client. Under such circumstances, the attorney might even be precluded from representing the remaining client due to conflict of interest. Rule 1.9, A.B.A. Model Rules of Professional Conduct; *Cf. People v. Lepe*, 211 Cal. Rptr. 432 (1985); *Dill v. Superior Court*, 205 Cal. Rptr. 671 (1984).

One of the few cases to extend this concept to a joint defense arrangement is *State v. Maxwell*, 691 P.2d 1316 (Kan. Ct. App. 1984). There, a single lawyer had three clients, including the eventual defendant and two key witnesses against him. By the time of trial, the lawyer was not representing any defendant, and the new defense counsel called the former lawyer to impeach the testimony of his past clients with prior inconsistencies.

The Kansas Court of Appeals said no. Besides pointing to

Before you move to disqualify counsel, remember that disqualification can be a two-way street.

basic attorney-client privilege, it relied broadly on the joint defense privilege. It suggested that the result would have been the same even if the statement had been shared among co-counsel for separately represented clients:

The assurance of confidentiality is as important and appropriate in a joint defense of defendants whose attorneys are separately retained as it is where co-defendants have engaged common counsel. 691 P.2d at 1321.

Thus, the court implied that the attorney could be precluded from testifying and presumably from cross-examining the witness about information received in a joint defense cooperative effort.

Barring use of privileged statements for impeachment is a proper solution. The joint defense privilege should give the same protection as the attorney-client privilege. A person who has relied on the joint confidence of a group of attorneys
(please turn to page 60)

Judge Medina's mind was not sufficient to disqualify. In those days, disqualifying bias in federal court required a personal bias involving a party, rather than a closed mind regarding a statute or an economic theory that "might reasonably be questioned." See 28 U.S.C. § 455 at 263. In charging bias, we allowed our pique, not to say outrage, to dominate our tactics. It also should be said that the government's case on conspiracy, while by no means totally without support, was weak.

Two final points. First, my friends at the corporate bar tell me that the investment banking business has completely changed since the trial 35 years ago and that it is now far more competitive. Second, if I have given you the impression that the judge was an ogre, I have failed grievously. He was charming much of the time and delightful some of the time. He was extremely intelligent and learned in the law. Indeed, I learned a great deal about trial conduct from him.

I conclude by revealing that Judge Medina still lives. Indeed, he is 100 years old.

So ends the story of a remarkable judge and a remarkable trial. □

Joint Defense

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should not have his privileged statements used against him by former co-counsel simply because he testifies for the other side. A contrary rule would strongly discourage the sharing of information, lessen joint defense efforts, and make codefendants even more skittish than they already are.

Disqualifying an attorney because of his access to joint defense information, however, is a drastic remedy and presents significant problems. The prosecution could eliminate a whole squadron of lawyers simply by turning one codefendant. (In the context of civil cases, it has been suggested that the strong incentive of co-counsel aligned against a common opponent to share privileged information should give rise to a rebuttable presumption of

co-counsel taint. Thus, if one lawyer is disqualified, co-counsel could be disqualified to the same extent as if they were members of the same firm. Taskier and Casper, *Vicarious Disqualification of Co-Counsel Because of "Taint,"* 1 Geo. J. L. Ethic 155 (1987).

Though disqualification is problematical, it can happen. Not all courts will stop with barring impeachment using confidential statements. This again highlights the need for a written joint defense agreement. Such an agreement should specify what information will be shared and should define how it can be used. This can be crucially important if counsel disqualification becomes an issue. Again, the cautious lawyer might well shy away from joint defense participation if disqualification were likely.

In the end, parties on different sides of a joint defense relationship have an apparent but illusory symmetry: You likely can prevent Turner from testifying to privileged statements; he likely can stop you from using such statements to impeach. In extreme cases, you may be able to disqualify his lawyer, and she may be able to disqualify you.

Such apparently equal treatment is, however, misleading. Though in theory former codefendants may be able to prevent one another from breaching a former joint defense privilege even before trial, that is a hard right to enforce. You simply cannot monitor Turner every minute. You may not be able to show that any given piece of prosecution knowledge came from a breach by Turner.

More than that—and here is where the symmetry really fails—only Turner has a motive to breach the privilege before trial. You have no reason to hurt him through pretrial revelation of his privileged statements. Put it this way: The core, inherent problem with joint defense arrangements is that the hardest breach to police is the one that renegade codefendants alone have a reason to commit.

All this means that, although a joint defense privilege has achieved general recognition—especially in the federal courts—there are plenty of unanswered questions. Great caution is essential in the sharing of privileged information. Always consider the possibility in criminal cases that some prospective

defendants may decide to cooperate with the government. An attorney in such a situation might do well to approach joint defense efforts as he would the negotiation of an arms control agreement. Recognize the potential benefits of cooperation, and try to achieve them, but be wary. Realize that each codefendant has his own agenda and motives. Everyone is holding something back. Everyone is in it for himself.

To implement this approach, rely on little unless it is in writing. Insist on a written agreement, be sure everyone understands it, and police it. Mark privileged material clearly and, at meetings, state your reliance on the privilege. Act quickly to control the damage if a codefendant flips.

None of this is fun. None of it is easy. None of it will win you friends. But remember how you felt when Turner's lawyer called to announce her client's transformation. Caution and suspicion are far better than that sinking, sour feeling of being played for a fool. □

Bad Faith

(continued from page 42)

the starting gate on an all-too-familiar technicality.

Keep detailed time records, even if you are in contingency. Some jurisdictions treat bad faith claims as an exception to the American Rule and permit Insured to recover his attorneys' fees. Generally, courts limit the award to fees expended in pursuit of the benefits promised in the insurance contract; fees spent to obtain punitive or other extra-contractual damages are not included. Time sheets should reflect this distinction. You also may want to tailor your fee arrangement accordingly, billing the benefits portion of your work on an hourly basis while keeping the extra-contractual aspect on contingency.

Even as you are reciting Insured's injuries to the jury, the focus should remain on Carrier, its conduct, and its method of doing business. Especially if Insured's out-of-pocket loss is small, you will need to persuade the jury to