

The Enemy of My Enemy is My Friend: The Joint Defense Privilege

By Jason R. Augustine¹

Trial lawyers often find themselves defending one of several defendants in a lawsuit. Depending on the claims and defenses in the case, they may need to communicate with lawyers defending other parties to discuss defense strategy and understand the case from different perspectives. It is critically important for trial lawyers to know and understand which communications are protected from discovery.

Texas recognizes a joint defense privilege in TRE 503. It states:

(b)(1) A client has a privilege to refuse to disclose and to prevent other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

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(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.

Courts view the joint defense privilege as an exception to the rule that waives the privilege for confidential communications disclosed to third parties. Accordingly, communications between lawyers representing co-defendants are privileged as long as those communications relate to a matter of common interest between the defendants. The privilege also extends to communications between parties who are about to be in the same lawsuit when those communications are made in anticipation of litigation. *Ryals v. Canales*, 767 S.W.2d 226, 228 (Tex. App.—Dallas 1989).

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The joint defense privilege is an important privilege that can be very useful throughout the entire course of the litigation. Lawyers reviewing their clients' documents for production often encounter written communications between their clients and co-defendants. If those communications were made during or in anticipation of litigation, they are privileged. It is also quite useful in permitting the lawyers to candidly discuss trial strategy, settlement, and the facts of the case.

The joint defense privilege exists under TRE 503 regardless of whether there is a formal agreement between the parties. But parties should evaluate whether entering a written joint defense agreement is appropriate. There are certain drawbacks to a written agreement. For example, written joint defense agreements can be discoverable. They can also be expensive to prepare. A written agreement, on the other hand, can more clearly define co-defendants' duties to one another. Additionally, in the long term a coordinated joint-defense cemented in an agreement could save your client money through pooled knowledge, research, motion practice and discovery.

If trial lawyers decide that a joint defense agreement is in the best interests of their client, these are some of the issues they should consider:

- an acknowledgment by all parties that they share common interests in the litigation and that their interests will be served if their counsel can share information related to those interests;
- a disclaimer of any actual attorney-client relationship between an attorney and client other than the pre-existing client of that attorney;
- an agreement between the parties to cooperate with each other reasonably in the defense of the parties common interests, including the sharing of information protected by the attorney-client privilege to assert joint defenses to the claims in the litigation;
- an agreement between the parties that the information shared in furtherance of the agreement is protected from disclosure and shall remain privileged;

- an agreement to limit the disclosure of the shared information to parties, their employees (to the extent necessary) and counsel for the parties;
- an agreement to limit the use of the shared information to the present case;
- a waiver of the parties' rights to disqualify other parties' counsel based upon disclosure pursuant to the agreement. The waiver should include the prospect that representatives of a party to the agreement might be subject to cross-examination or some other adverse acts by counsel for another party to the agreement;
- a provision prohibiting any settling or withdrawing party from later disclosing any confidential information it learned while a party to the agreement; and
- a provision defining joint defense costs and how they will be shared

The extent to which lawyers rely on the joint defense privilege in defending a particular case depends upon the complexity and relative interests of the parties. When lawyers represent co-defendants with common interests, they should take advantage of the efficiency and information sharing permitted by the joint defense privilege, which ultimately better serves their client's interests.