Transactions, Litigation and business disputes often involve multiple clients with aligned interests but with different attorneys. Many times, clients and their counsel want to communicate with other clients and counsel without risking a waiver of any applicable privileges or immunities. Clients and counsel can benefit from the options developed by courts, including by sharing a joint defense or common interest privilege.

The prerequisites, scope and boundaries of the joint defense or common interest privilege can differ significantly, depending on the jurisdiction. State and federal jurisdictions vary over whether they even recognize a joint defense or common interest privilege, as well as to what extent such a privilege applies.

Nonetheless, sufficient common ground exists such that attorneys can maximize the chances that any individual court will recognize and give effect to claimed joint defense and common interest privileges and immunities. This usually occurs by means of a formal written agreement.

As a starting point, many courts distinguish between the joint defense and common interest privilege, determining that the former is narrow and arises from actual litigation, while the common interest privilege is broader and does not require litigation to be pending. Many other courts use the terms almost interchangeably, with no meaningful distinction between the two.

The safer course is to recognize the commonly accepted distinctions between the two and to take steps to create enforceable protections for the communications that will be subject to the privilege, which will inevitably extend beyond those between the individual clients and their attorneys.

### Joint Defense Privilege

In litigation, co-defendants often share a common interest in defeating the plaintiff’s claims. Particularly in situations where the co-defendants are not seeking to shift blame to each other, courts have recognized that the defendants might engage in a joint defense, sharing confidences and secrets (as well as expenses). In that context, although communications among the defendants would not be protected in subsequent disputes between them, the communications would be protected from discovery by the plaintiffs.

Joint defense relationships can be between co-plaintiffs or co-defendants and in the civil or criminal context. A joint defense can even extend to nonparties such as insurers of defendants.

As a strictly legal matter, the joint defense privilege is a misnomer because it is not actually an affirmative privilege; rather, it is an exception to the rule on waiver. Generally, sharing privileged and confidential information with a third party constitutes a waiver of the privilege. However, those protected by a joint defense agreement can avoid a waiver...
and preserve the privilege notwithstanding the sharing of confidential information with third parties.

To maintain the privilege in sharing communications with others, a party must typically show three things: that the communications were made pursuant to a joint defense, that the communications were made to further the goals of that joint defense, and that the privilege was not otherwise waived (i.e., that the joint defenders are not sharing the communications beyond their limited group).

Although most jurisdictions do not require a formal written agreement to recognize a joint defense privilege, the best practice is to actually document the scope, duration, boundaries and parties to the joint defense privilege.

Confirm the Joint Nature of the Defense

Here are some tips for increasing the likelihood that the joint defense will protect the privilege.

A joint defense agreement that simply says that parties are co-defendants and want to share information may not be enough to protect the privilege. Some courts are skeptical of efforts to hide behind a privilege that has been waived and are reluctant to extend the privilege to third parties absent evidence that such extension is supported.

In reviewing the validity of a joint defense agreement, courts generally focus on whether the interests of the co-parties are truly aligned. For example, in World Trade Center litigation after 9/11, the District Court for the Southern District of New York refused to recognize the common interest privilege asserted by holders of leases on the WTC and the employees of the insurance broker that obtained coverage for the WTC.

The dispositive facts were that the interests shared by the leaseholders and the broker were similar but not identical and that the common interest was largely commercial, not legal. The court concluded that simply sharing a desire to be successful in litigation is not a sufficient “common interest.”

Other courts have interpreted a common interest more broadly, but the risk remains that courts can find the co-parties’ interests are not sufficiently “joint” or “common” to recognize a joint defense agreement. The best practice is to articulate the common legal interests, including positions, defenses and potential liabilities.

Address Potential Conflicts of Interest and Duties

The very need for separate counsel for different defendants in the same litigation illustrates one of the risks of a joint defense. The interests among parties with different attorneys are rarely entirely identical. When those differing interests evolve into actual differences in approach, strategy or resolution, the very predicate of the joint defense is called into question.

If unaddressed, such differences can jeopardize all parties to the joint defense agreement. Thus, one important provision in every joint defense agreement is to address exactly what happens if one party decides to terminate it or abandon it.

For the attorneys, this includes addressing risks such as duties to nonclients who are parties to the joint defense agreement. It is recommended that any joint defense agreement include provisions that it shall not serve as a basis to try to disqualify another counsel.

Because an implied attorney-client relationship is typically determined based on the reasonable perspective of the potential client, a well-drafted joint defense agreement can confirm that the parties agree there was no intended attorney-client relationship with co-parties for any purpose.
Common Interest Agreements

Of course, not every matter in which clients and their attorneys want to exchange information with others and their attorneys involves litigation. To address this possibility, many courts have extended the principles of the joint defense privilege to the nonlitigation context.

The concepts and predicates for an enforceable common interest agreement are substantially similar to those of the joint defense agreement. They include actual common interests sufficient to warrant an exception to the waiver rules for the attorney-client privilege.

Because the existence of common interests is not as obvious as in the litigation context, it is especially important that clients and attorneys document the inception, duration, scope, boundaries and termination of any common interest agreement. The inception is important so that in the event of subsequent disputes, the parties can precisely determine when the common interest began.

The termination is important so that the parties fully understand when the common interest privilege ends and what happens when it does. Provisions confirming the attorneys’ duties, or lack thereof, are again necessary to avoid needless disputes including costly motions to disqualify.

Joint defense and common interest agreements can be effective tools to advance the interests of clients and reduce expense. The key is to get them right so that they do not themselves become the basis of litigation.

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