Hang Together or Hang Separately: The Common-Interest Privilege

by Michael Morin and Samantha Weil

There is an old adage among criminal defense attorneys that, if their clients “don’t hang together, they’ll hang separately.” Even for those of us who have only dabbled in criminal defense work on a pro bono basis, it is easy to understand why this adage holds true. If two defendants present inconsistent theories of the case or different versions of the facts, they are likely to end up behind bars.

It is therefore not surprising that the “common-interest privilege” originated in the context of criminal law, more than a century ago. But the need for multiple defendants to coordinate cases is by no means unique to criminal proceedings. For example, those of us involved in patent litigation have grown accustomed to multidefendant cases, in which coordination among defendants is often critical. After all, just as a sharp prosecutor can capitalize on inconsistent theories in a homicide case, an able plaintiff’s lawyer can capitalize on differences in the defendants’ theories, whether at the Markman stage, during summary judgment proceedings, or at trial. This not only is true in patent cases, but applies equally in other areas of civil litigation, be it a products-liability suit, a personal-injury litigation, or an antitrust action.

Fortunately, the law provides an avenue for defendants to coordinate their defenses. The common-interest privilege allows multiple defendants to share information while maintaining underlying protections such as the attorney-client privilege and the work-product doctrine. This

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2 This expression originated from Benjamin Franklin’s words when he signed the Declaration of Independence: “We must all hang together, or assuredly we shall all hang separately.”
article summarizes the current law on the common-interest privilege, focusing on codefendants who maintain separate counsel during litigation. It also describes other applications of the common-interest privilege, such as the protection of communications made during joint conferences. In Part I, this article provides some background on the common-interest agreement. Part II explains the contours of a common interest, including what counts as a common interest and when the privilege attaches. Part III describes whose communications the privilege protects, parsing through complications that joint conferences can create, and considers the required level of confidentiality to create and retain the privilege. Part IV explains the waiver requirements and highlights what defendants should look for to avoid waiving the privilege. Finally, Part V explains how the common-interest privilege affects subsequent adverse litigation between the joint defendants.

Throughout the paper, we try to identify some practical implications that can be gathered from the caselaw and provide suggestions on how to address them. But the authors must stress that, as will be seen below, the law on this subject is highly circuit- and circumstance-specific, so the reader should take these comments only as a starting point, and thoroughly investigate their own circumstances and the applicable law before communicating any privileged information to any third party.

I. Background

Courts initially created the joint-defense privilege to allow attorneys of criminal codefendants to form a joint strategy while maintaining the privileged nature of all communications within the group. *Chahoon v. Commonwealth*, 21 Gratt. 822, 62 Va. 822 (Va.), 1871 WL 4931, at *12 (Va. 1871); *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-
Over time, the joint-defense privilege expanded to cover a wider variety of scenarios, giving rise to the broader common-interest privilege, or community-of-interest privilege. See *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007). While often called the “joint-defense privilege,” the phrase “common-interest privilege” applies to both criminal and civil defendants and plaintiffs, as well as nonlitigating parties sharing a legal common interest, and is therefore considered the more appropriate term. *Id.* at 364 n.20.

Although the caselaw often confuses the two, the common-interest privilege should be distinguished from the coclient privilege, which applies when multiple defendants hire the *same* attorney. *Id.* at 363 n.18. The common-interest privilege applies only to parties retaining *separate* counsel. It encourages joint-defense groups to form by allowing attorneys to communicate freely with each other without waiving their clients’ ability to prevent disclosure to third parties.

Courts differ on the underpinnings of the common-interest privilege, although most agree that it is closely associated with the attorney-client privilege. One view describes the common-interest privilege as an *exception* to the general rule that disclosure to third parties constitutes a waiver of the attorney-client privilege. *See, e.g., United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007); *John Doe*, 902 F.2d at 248. In opinions applying this view, the attorney-client privilege attaches to communications made between an attorney/client pair, but disclosure to another attorney in the group or within a joint conference does not waive the privilege. As explained by the Eighth Circuit, the common-interest doctrine expands the

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3 In patent cases, the law of the regional circuit (rather than the Federal Circuit) would apply, since the common-interest privilege is not an issue unique to patent law. *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996).
coverage of the attorney-client privilege by “softening” its confidentiality requirement. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997). Consequently, many cases refer to the “attorney-client privilege” as the doctrine protecting shared communications among groups, because the attorney-client privilege must initially attach before a court can find that sharing information with codefendants did not waive the privilege for lack of confidentiality.

A second view regards the common-interest privilege as an *extension or clarification* of the attorney-client privilege. If members and attorneys of a joint-defense group communicate in confidence to advance legal representation, the attorney-client privilege is sustained, providing protection for the group disclosures. *See, e.g., Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974* (“Matter Dated November”), 406 F. Supp. 381, 386 (S.D.N.Y. 1975); *In re Grand Jury Subpoena: Under Seal* (“Under Seal”), 415 F.3d 333, 341 (4th Cir. 2005). The two analyses are nuanced in their difference and generally result in the same conclusion.

**II. Establishing a Common-Interest Privilege**

**A. The Common-Interest Requirement**

As its name would suggest, parties must share a common interest to establish a common-interest privilege. Courts differ in their views of precisely what constitutes a common interest, but several have held that it must be legal in nature. *See, e.g., Teleglobe*, 493 F.3d at 364; *Under Seal*, 415 F.3d at 341; *BDO Seidman*, 492 F.3d at 816. The *Teleglobe* decision discusses the various views among courts on the strictness of the “congruence-of-legal-interests” requirement. 493 F.3d at 365. According to one case, the “key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.” *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974). One leading commentator, Professor Paul Rice, recognizes this characterization as the majority approach but criticizes its extremeness, noting that several courts do not require legal interests to align precisely.
Teleglobe, 493 F.3d at 365. The Third Circuit in Teleglobe decided not to fully resolve whether the legal interests of parties must be identical, but stated that “it is sufficient to recognize that members of the community of interest must share at least a substantially similar legal interest.” Id. The substantially-similar-legal-interest requirement comports with the Third Circuit’s earlier decision in Eisenberg v. Gagnon, 766 F.2d 770, 787-88 (3d Cir. 1985), which held that the common-interest privilege applied to communications directed to an attorney in a joint-defense group even though the attorney represented a client with some adverse interests. This standard permits codefendants having some adverse interests (e.g., competitors) to work together under the protection of the common-interest privilege.

While a written JDA is certainly advisable, a common-interest privilege can exist when parties undertake a joint effort in either the prosecution or defense of a claim, even without an explicit JDA. John Doe, 902 F.2d at 246-47. In John Doe, a case involving an administrative claim against the Army, a parent company appealed from a decision denying privilege protection to its subsidiary’s claim-related documents. The district court found that in the absence of a JDA between the parent and its subsidiary, there was no joint privilege. Id. at 247. The Fourth Circuit vacated and remanded, however, finding that the parent and subsidiary made a “joint effort” to prosecute a claim against the government and to defend the government’s counterclaim. Id. 247, 250. Specifically, the parent and subsidiary cooperated to pursue the claim and further agreed to a division of any monetary reward. Id. at 247. This, according to the Fourth Circuit, was sufficient to establish a joint defense, even though neither the claim nor the government’s counterclaim named the subsidiary as a party. Id. at 249. As further support for the court’s decision, the parent and subsidiary had signed a letter agreement stipulating division of proceeds, governing finalization of any proposed settlement, and allocating the burden of
costs and expenses. *Id.* at 246. Although the letter did not actually surface until after the district court had already held that there was no common-interest privilege, the Fourth Circuit held that the agreement would have been evidence of a joint prosecution by the parent and subsidiary. *Id.* Moreover, while the parties had not signed a formal JDA, the court nevertheless found a common-interest privilege stemming from the cooperation of the parties and their agreement to share potential proceeds. *Id.* at 246-47, 250; cf. *Under Seal*, 415 F.3d at 341 (holding an employee’s mere cooperation in an internal investigation, without evidence of a joint strategy, does not establish a common interest).

To determine whether parties established either an explicit or an implied JDA, courts may examine meeting notes, the purpose of the communications, and other relevant evidence. *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999). In *Weissman*, the Permanent Subcommittee on Investigations (PSI) investigated Empire Blue Cross/Blue Shield (Empire). Weissman, the company’s chief financial officer (CFO), cooperated with Empire and helped it present information to PSI. But in early June, evidence emerged of wrongdoing by Weissman, and the investigation shifted to him. At a June 16th meeting with Empire’s attorneys, Weissman admitted to the improper conduct. The Second Circuit found that a JDA between Empire and Weissman did not exist during the June 16th meeting, but was established the following day, on June 17. With respect to the June 16th meeting, the two parties disagreed about whether they had discussed or established a JDA. *Id.* at 98. The district court examined the available meeting notes, taken by Empire’s attorneys, and concluded that the parties did not establish an explicit JDA. *Id.* at 99. Furthermore, the court did not find an implied JDA resulting from the cooperation of the parties before the meeting. Although the two parties had cooperated to respond to the investigation, Empire had not yet known about Weissman’s wrongdoing. *Id.* at
99-100. The communications, therefore, did not advance a common enterprise or indicate a true joint strategy between the parties. *Id.* With respect to the June 17th meeting, involving mostly the same parties, an explicit reference to a JDA in a memorandum prepared by Empire’s attorneys created a JDA. *Id.* at 99. The court of appeals affirmed the district court’s decision. *Id.* at 100.

In some jurisdictions, disclosures between parties sharing nonlegal interests may be sufficient to qualify for the protection of a common-interest privilege. The Restatement, for example, recognizes a common-interest privilege when the parties assert a legal, factual, or strategic common interest, and at least one circuit follows this broad construction. Restatement (Third) of the Law Governing Law. § 76 cmt. e (2000); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-23 (8th Cir. 1997). This standard—though it allows codefendants to assert a broader array of common interests—is not limitless. The Eighth Circuit, in a case about the Whitewater investigation of President and Mrs. Clinton, held that the common-interest privilege did not protect documents created at meetings involving Mrs. Clinton, her personal attorneys, and White House attorneys. *Grand Jury Subpoena*, 112 F.3d at 913, 922. In *Grand Jury Subpoena*, both the White House and Mrs. Clinton argued that the common-interest privilege protected their shared communications. The alleged common interests included, among others, fully understanding the facts of the OIC’s investigation and its legal consequences, minimizing distortion and public misunderstanding of the events in question, allocating responsibility between personal and public attorneys, and determining whether White House policies required altering. Despite these interests, the court held that an investigation of Mrs. Clinton’s actions could have “no legal, factual, or even strategic effect on the White House as an institution.” *Id.* at 923. The effects of the investigation on the White House did not place
the institution “in the same canoe” as Mrs. Clinton, mainly because its interests did not coincide with her personal interests of avoiding prosecution or minimizing potential consequences. Id. at 922-23. Thus, the White House and Mrs. Clinton could not invoke the common-interest privilege. Id. at 923.

Implications

While a JDA is not an absolute prerequisite, wherever possible all codefendants should sign a written JDA at the outset of their relationship. The JDA should clearly state that the parties share a common legal interest and should preferably include the subject matter or proceedings that create the common interest. Because disclosed information must further an ongoing common enterprise, the agreement should specify that all shared information will serve this purpose. By affirming that shared communications relate to previously agreed-upon common interests, written JDAs may prevent the uncertainty involved when defendants must prove the existence of an oral JDA.

B. Attachment of the Common-Interest Privilege

It is important for parties wishing to participate in a joint-defense group to determine when the privilege attaches. At least six circuits recognize the possibility of a common-interest privilege even before any threat of litigation. BDO Seidman, 492 F.3d at 816 n.6 (citing supporting cases from First, Federal, Fourth, Second, and Ninth Circuits). In contrast, the Fifth Circuit requires a “palpable” threat of litigation for communications to fall under the common-interest privilege. United States v. Newell, 315 F.3d 510, 525 (5th Cir. 2002).

The Ninth Circuit broadly recognizes common-interest protection of disclosures at any stage of a client’s dealings with counsel. Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964). In Continental Oil, which involved a motion to quash subpoenas ducis tecum, the Ninth Circuit held that the attorney-client privilege protected memoranda exchanged by
attorneys who represented two different companies and the companies’ respective employees. *Id.* at 348. The attorneys each interviewed their employee-clients both before and after the employees testified before a grand jury. *Id.* After the witness interviews, the attorneys prepared and exchanged memoranda relating to the clients’ grand-jury testimony. *Id.* The government unsuccessfully argued that, even if the attorney-client privilege initially protected the memoranda, the attorneys waived the privilege by exchanging them. *Id.* at 349. Further, the government contended, because there was not yet an indictment by the grand jury, the parties were not joint defendants and the common-interest privilege could not apply. *Id.* at 350. Rejecting this argument, the Ninth Circuit held that the privilege protected the memoranda, despite the lack of any indictments, because the privilege applies to communications made both in preparing for and participating in litigation. *Id.* Communications exchanged between attorneys of clients who are subject to potential indictment for the same transactions “should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.” *Hunydee v. United States*, 355 F.2d 183, 185 (discussing *Continental*, 330 F.2d at 350).

On the other hand, the common-interest privilege does not protect communications occurring before the creation of a joint effort, even if they relate to the subject of a subsequently created agreement. *Under Seal*, 415 F.3d at 341. In *Under Seal*, the employer, AOL, interviewed employees during an internal investigation into AOL’s relationship with another company. *Id.* at 335-36. Later that year, the Securities and Exchange Commission (SEC) began an investigation into the same matter, and soon after AOL and one of its employees, Wakeford, entered into a common-interest agreement. *Id.* at 336. The Fourth Circuit found that the common-interest privilege did not apply to interviews of Wakeford conducted by AOL attorneys
during the internal investigation, as the interviews were not “for the purpose of formulating a joint defense.” *Id.* at 341.

**Implications**

Parties should try to execute a JDA as early as possible in their relationship and should not count on their communications being protected until events have progressed to the point that a privilege will be recognized under applicable circuit law.

**III. Scope of the Common-Interest Doctrine**

The common-interest privilege protects only communications intended to further an ongoing common enterprise. *BDO Seidman*, 492 F.3d at 816; *Schwimmer*, 892 F.2d at 243. The protection generally encompasses communications subject to an underlying attorney-client or work-product doctrine and relating to the joint effort of the parties regarding a common legal interest. *John Doe*, 902 F.2d at 249. Despite differing analyses of the common-interest doctrine, most decisions recognize a privilege protecting communications intended to further a common legal interest. The burden of proving the existence of a JDA falls on the party claiming the privilege. *Weissman*, 195 F.3d at 99.

**A. Protected Disclosures**

Whether the common-interest privilege protects disclosures may depend on which parties were present at the time of the communication and whom the communication was directed towards. A “useful starting place” for determining whether communications are protected by the attorney-client privilege under federal common law is Proposed Federal Rule of Evidence 503(b)(3), also called the Supreme Court Standard 503. *Grand Jury Subpoena*, 112 F.3d at 915; *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994). Supreme Court Standard 503 states that a “client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional
legal services to the client, . . . (3) by him or his lawyer to a lawyer representing another in a matter of common interest.” Proposed Fed. R. Evid. 503(b)(3), reprinted in 56 F.R.D. 183, 236 (1972) (emphasis added). The Third Circuit abides by the Supreme Court’s guidance and holds that for the common-interest privilege to apply, a codefendant or an attorney must direct communications to a group member’s attorney. *Teleglobe*, 493 F.3d at 364; *see also* Del. R. Evid. 502(b)(3). Consequently, direct disclosure to a member may destroy the privilege. *Teleglobe*, 493 F.3d at 364. The rationale for this requirement stems from the origins of the common-interest privilege as a doctrine allowing attorneys to strategize about their clients’ criminal-defense strategies. *Id.* at 364-65. Not all courts may require communications to be disclosed directly to an attorney, however, as *Teleglobe* acknowledges that leading authorities on the common-interest privilege do not emphasize this requirement. *Id.* at 364 n.21. A bright-line rule also seems inapplicable in more complicated contexts regarding joint conferences, as participants may not always clearly direct communications to one person.

Joint conferences present an interesting situation when one analyzes whether the common-interest privilege applies. In the Ninth Circuit, when actual or prospective codefendants with a common interest confer with their respective attorneys to facilitate representation, the privilege applies to statements made at the joint conference. *Hunydee*, 355 F.2d at 184-85. In *Hunydee*, Mr. and Mrs. Hunydee were charged, respectively, with attempts to evade payment of income taxes and with aiding the preparation of false income-tax returns. *Id.* at 184. After a private meeting with his attorney, Mr. Hunydee met with Mrs. Hunydee and her separate attorney. *Id.* During this joint conference, Mr. Hunyee stated that he would plead guilty and take the blame. *Id.* The court of appeals determined that the district court erred in admitting testimony of Mrs. Hunydee regarding this conversation. *Id.* at 185. The communications
remained protected by the attorney-client privilege despite disclosure in the joint conference because they concerned a common interest of the codefendants—Mr. Hunydee’s willingness to plead guilty—and influenced the course of the representation. *Id.* at 185; *see also United States v. McPartlin*, 595 F.2d 1321, 1336 n.15 (7th Cir. 1979) (discussing *Hunydee* for the proposition that the common-interest privilege applies even when the positions of the parties are not compatible in all respects).

The Ninth Circuit in *Hunydee* applied its previously articulated rule in *Continental Oil*, 330 F.2d 347, that confidential statements made to attorneys would remain privileged, despite later “exchange between attorneys,” as long as the communications concerned common issues and were intended to facilitate representation. *Hunydee*, 355 F.2d at 185. As noted by the court in *Matter Dated November*, *Hunydee* differed from *Continental Oil* because the client in *Hunydee* directly made disclosures to an attorney in a joint conference, whereas *Continental Oil* concerned private attorney/client communications that attorneys later exchanged. *Matter Dated November*, 406 F. Supp. at 387-88. The *Hunydee* court, therefore, interpreted “exchange between attorneys” to encompass direct communications by the client to an attorney in a joint conference. *Matter Dated November*, 406 F. Supp. at 388.

In *Matter Dated November*, the Government tried to distinguish *Continental*, arguing that *Continental* involved a known attorney-client privilege that disclosure did not waive, whereas its case involved whether a privilege initially protected communications at a joint conference. *Id.* at 387. Rejecting the government’s distinction, the court clarified that the only difference between its case and *Continental* was factual—between disclosures made indirectly (attorney to attorney) and those made directly (client to attorney in a joint conference). *Id.* at 387-88.
An interpretation of the common-interest privilege as an exception to the attorney-client privilege disclosure rule presents difficulties in the context of joint conferences. In these conferences, private communications between client and attorney creating an attorney-client privilege may not exist in the first place. An initial privilege is required to determine the next question of whether disclosure in a joint-defense group prevented waiver of the privilege. Beginning with the premise that the common-interest doctrine extends or clarifies the attorney-client privilege, however, the codefendants and their respective attorneys constitute a group within which the requisite confidentiality is present, giving force to a later claim to privilege. See Matter Dated November, 406 F. Supp. at 386-88.

The common-interest privilege may extend to members outside the group of clients and their attorneys if the communications assist attorneys who have undertaken a joint strategy. Schwimmer, 892 F.2d at 244. The Second Circuit in Schwimmer described the common-interest rule as “arising out of” the attorney-client relationship and therefore meant to protect communications that the client reasonably believed were given in confidence. Id. The defendants in Schwimmer—who were ultimately charged with racketeering conspiracy, illegal pension- and welfare-fund payments, kickbacks to union officers, embezzlement, obstruction of justice, and tax evasion—each retained separate counsel after the government began its investigation. Id. at 241. One defendant, Schwimmer, made the communications at issue to an accountant his codefendant’s attorney hired to analyze the defendants’ financial transactions. Id. at 241. Schwimmer’s attorney, Fink, had directed Schwimmer to speak openly with the accountant and assured Schwimmer that the privilege would protect the communications. The court held that the common-interest rule was applicable to communications between Schwimmer
and the accountant, including those outside of Fink’s presence, because the communications were made in confidence to assist a joint strategy of representation. Id. at 244.

Although the common-interest privilege can apply even when clients attend meetings, their presence raises a number of issues. First, courts that require communications to be disclosed to an attorney, such as the Third Circuit, may not find that joint-conference communications satisfy this requirement. Because client-to-client communications waive the attorney-client privilege outside the context of a joint-defense, courts may find that client-to-client communications also waive the common-interest privilege.

Second, client presence at a joint conference may cause confusion on which client or clients each attorney represents. At least some circuits hold that a joint-defense agreement establishes an implied attorney-client relationship between attorneys and their clients’ codefendants, if only for the limited purpose of the joint defense. See, e.g., McPartlin, 595 F.2d at 1337; Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977); United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000). Implied relationships may cause conflict and disqualification problems for attorneys in later litigations.

Implications

To reduce the chances that a court will find implied attorney-client relationships, the written JDA should state clearly that the agreement and/or the sharing of information does not create any new attorney-client relationships, does not impose fiduciary duties on the attorneys, does not limit any attorney’s defense of his own client, and cannot be used as a basis by any party to disqualify any other party’s counsel in any other litigations. This is particularly important, for example, in the patent context, where two parties will often be both friends and foes, suing each other in other cases over their own patents, but jointly defending charges of
infringement by a third party (often a nonpracticing entity), who may be suing most or all players in a given industry.

**B. Required Level of Confidentiality**

The common-interest privilege protects only those communications that are otherwise subject to another valid privilege, such as the attorney-client privilege or the work-product doctrine. *John Doe*, 902 F.2d at 249. Communications must therefore meet the requisite level of confidentiality under the attorney-client privilege before receiving the protection of common-interest privilege. Whether a court views the common-interest privilege as an extension of the attorney-client privilege or an exception to the disclosure rule, the communications must remain confidential with respect to third parties outside the joint-defense group. Otherwise, the privilege may be lost.

To determine whether disclosures to a third party meet the requisite level of confidentiality, courts assess whether the defendants and their counsel had a “reasonable expectation of confidentiality.” *United States v. Melvin*, 650 F.2d 641, 646 (5th Cir. 1981). A “reasonable expectation” does not exist if the defendants and their counsel knew or should have known that the third party would not maintain the confidentiality of the information. *Id.* In *Melvin*, several people were charged with conspiracy to import marijuana. *Id.* at 642. One of the alleged conspirators, cooperating with the government, attended the appellees’ meetings with their counsel after appellees persistently requested his presence. *Id.* at 642. The Fifth Circuit found that there is no confidentiality when the third party is not yet part of the defense team and codefendants cannot reasonably expect the third party to keep communications confidential, even when, as in this case, the third party is a potential codefendant. *Id.* at 646. One important factor weighing in the reasonable-expectation analysis includes the joint-defense group’s perception about the third party’s loyalty to the group. *Id.*
The presence of a neutral or adverse party during communications between a client and his counsel will waive any underlying attorney-client privilege due to lack of confidentiality and thus refute that party’s claim to a common-interest privilege. Matter Dated November, 406 F. Supp. at 392-93. This rule applies even if the “neutral” party is a former lawyer of one of the defendants, if the defendant cannot show that the attorney was its counsel at the time of the communication. Id. Defendants must show that at the time of the communication at issue, the third party was an “interested party with respect to the joint defense purpose.” Id. at 393. Otherwise, courts may find the communication lacking in the requisite “measured and guarded confidentiality.” Id.

The common-interest privilege will not protect information exchanged by attorneys unless the initial communication was confidential and protected by the attorney-client privilege. See In re Grand Jury Testimony of Attorney X, 621 F. Supp. 590, 592-93 (E.D.N.Y. 1985). In one case, a grand jury sought to compel Attorney X to testify about conversations with a third-party attorney of another subject of the grand-jury investigation. Id. at 591-92. Attorney X had relayed the conversations with the third-party attorney, which concerned the grand-jury investigation, to his client. Id. at 591. Attorney X’s client intervened, claiming the joint-defense privilege protected the communications. Id. The court held, however, that the privilege did not apply because there was no evidence that the third-party attorney obtained the information from his client or that it was confidential. Id. at 592-93. The “addition of another attorney to the chain of communicators” will not protect communications that are not confidential to begin with. Id. at 593. This is not surprising, for the same rule applies with respect to the attorney-client privilege generally, even outside the context of the common-interest privilege.
Implications

The cases on confidentiality in the joint-defense context illustrate that members of joint-defense groups should use caution about whom they invite to meetings. Although a potential codefendant may seem like a trustworthy addition to the group, his presence may waive the underlying attorney-client privilege protecting the disclosed communications. In the multiparty context, defendants and their attorneys may have to prove in court that a communication was “intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential.” Melvin, 650 F.2d at 645. The safest option for codefendants is to exclude from meetings anyone who has not signed a JDA requiring confidentiality.

IV. Waiver

Waiver of the common-interest privilege requires the consent of all privileged parties. John Doe, 902 F.2d at 248. Furthermore, any waiver must be knowing. Eisenberg, 766 F.2d at 788. This rule allows an attorney-client pair to exchange information comfortably without worrying about another codefendant waiving the pair’s own attorney-client privilege. A fear of unilateral waiver by a codefendant, whether purposefully or inadvertently, would greatly inhibit the formation of joint-defense groups by requiring members of those groups to place an excessive amount of trust in their fellow defendants. It would render JDAs essentially worthless.

A document may inadvertently wind up in the opposing party’s possession without waiving the privilege, as long as not all codefendants have consented to waiver. Eisenberg, 766 F.2d at 788 (defendant’s discussion of correspondence at a sidebar conference with the expectation it was sealed did not waive privilege, even though discussion ended up in plaintiff’s hands); John Morrell & Co. v. Local Union 304A of United Food Workers, 913 F.2d 544, 556 (8th Cir. 1990). Even a party’s voluntary disclosure of a privileged document in response to a
subpoena may not waive a fellow group member’s claim to privilege. *BDO Seidman*, 492 F.3d at 817 (disclosure of a memorandum by one party in response to an IRS subpoena does not waive the other party’s claim to a common-interest privilege).

*John Morrell* involved a unique set of facts illustrating a complex waiver issue in the joint-defense context. In an earlier case against International Union, John Morrell & Co. (Morrell) entered into a joint-defense agreement with its employees. *Id.* at 555. In this earlier case, the employees’ expert witness turned over a privileged memorandum, also at issue in the present case, to International Union. The district court held that the document remained privileged and was inadmissible, despite possession by the opposing party. In *John Morrell*, the several Unions involved in the appeal, including International Union, tried to introduce the memorandum into evidence, but the Eighth Circuit held that there was no evidence that Morrell itself waived the common-interest privilege, even though the Unions possessed the document. *Id.* at 556. The rule requiring consent by all parties to effect a waiver of the common-interest privilege is consistent among the majority of courts. *See Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F. Supp. 1393, 1400-01 (D. Del. 1994).

**Implications**

To prevent waiver of the common-interest privilege, the JDA should expressly provide that no party can waive the privilege on any communications that are not solely its own without the express written consent of the other parties. The JDA should also make clear that all joint-defense communications are protected by the common-interest doctrine, and that disclosures under the agreement will not waive any underlying privileges protecting the information, including the attorney-client privilege and the work-product doctrine. And, as a practical matter, wherever possible, emails, memoranda, draft briefs, and the like should be clearly marked
“Confidential and Privileged Pursuant to Joint Defense Agreement” (or the like) in order to make clear the parties’ intentions were for the document to remain privileged from the outset. This will also facilitate the privilege screening process in any later document production.

V. Later Adverse Litigation

If the codefendants find themselves in later adverse litigation, absent a clear agreement to the contrary, the common-interest privilege will not prevent full disclosure of the communications made during an earlier joint conference between the now-adverse parties. Matter Dated November, 406 F. Supp. at 386. The inapplicability of the privilege in later litigation is worrisome to codefendants who are likely to litigate against each other sometime in the future. The government argued in Matter Dated November that the common-interest privilege did not protect certain documents because one codefendant, ICC, had grounds for a private action against the other, Vesco, and thus their interests were adverse. 406 F. Supp. at 391-92. The court held that even a foreseeable private action does not preclude codefendants from sharing confidential information for the purpose of joint defense against the immediate action. Id. at 392. Referencing the possibility of “peril” for the accused defendant in the event a codefendant later instigated a private action, the court remarked, “[t]hat a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or the viability of the joint defense.” Id.

If codefendants later litigate against each other, the attorney-client privilege still protects documents in third-party proceedings against the codefendants. Id. at 394. For example, in Matter Dated November, ICC eventually brought a private action against Vesco. The government argued that ICC’s pending civil actions brought it into controversy with Vesco, waiving the privilege with respect to the documents involved in the SEC proceeding against both defendants. The court, however, found a distinction between disclosure during later litigation
between the former codefendants and disclosure for use in a third-party proceeding. *Id.* The waiver in later adverse litigation is necessary to allow one party to use information the other already disclosed to it. *Id.* As applied to third parties, allowing disclosure of information because former codefendants have later diverged would defeat the purpose of the common-interest privilege, as each member of the joint-defense group would fear that “one of the others might trade resultant disclosures to third parties as the price of his own exoneration or for the satisfaction of a personal animus.” *Id.* Consequently, one codefendant cannot destroy the privilege of the other “where the two have merely had a ‘falling out’ in the sense of ill-feeling or divergence of interests.” *Id.*

**Implications**

If parties wish to retain the privilege against each other in later-arising litigation, they may want to include a provision stating their intent in a JDA. Please note, however, that according to the Restatement (Third) of the Law Governing Law. § 76(2) cmt. f (2000), no authority had been found addressing the enforceability of agreements to maintain the privilege in litigation between former codefendants.

**VI. Conclusion**

For many of us, operating under joint-defense agreements is a daily fact of life. Absent coordination with co-defense counsel, parties may end up with inconsistent (or at least incongruent) theories of the case, which ultimately benefits only the plaintiff. As two heads are better than one, parties can often develop better positions together than on their own, gain access to additional helpful evidence and witnesses, and divide the workload, potentially increasing efficiencies and reducing costs. As long as the correct steps are taken, the common-interest privilege should allow them to do just that, without fear that their confidential communications
will someday be used against them. Hopefully, by hanging together, your clients will avoid hanging separately.