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## PROFESSIONAL CONDUCT

### Joint Defense Privilege: Sharing Is the Law, But Do You Get to Keep the Privilege?

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*Special to the Legal*

It is no great secret that we are ardent defenders of the attorney-client privilege. In our view, the continued development of case law concerning the contours of the privilege is generally a good thing because it tends to make determining the availability of the privilege more predictable. Even when a case comes down that appears to turn the privilege on its head, or which seems to unfairly curtail the privilege in certain circumstances, in the end the proliferation of published decisions on the subject will enable us to better counsel our clients and protect our privileged communications with them from disclosure.

One of the areas where Pennsylvania privilege law is not yet mature concerns the scope and application of the “joint defense” (also called the “common interest”) privilege. If you have been in the litigation business for any length of time, you have more than likely at least heard of joint defense agreements, which are generally understood to extend the attorney-client privilege to information-sharing and developing joint litigation strategies with counsel for co-defendants. You might have a nagging question in your mind as to whether joint defense agreements can be oral, and you may not know for sure whether and to what extent co-defendants have to share a readily definable common interest before they can enter into a valid joint defense agreement.

Recently, the Commonwealth Court issued a decision in *In re Condemnation by the*



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*City of Philadelphia* affirming, on collateral appeal, a trial court order compelling the production of documents over which the city claimed protection from discovery based on the “joint defense” privilege. We took special note of the decision for several reasons.

First, the Commonwealth Court openly acknowledged a relative dearth of Pennsylvania case law concerning the “joint defense” privilege, including the absence of any Pennsylvania Supreme Court authority on the subject. As the court stated, “many issues concerning the joint defense or common interest privilege have yet to be addressed by our courts.”

Second, the court described the policy considerations supporting the protection

afforded under the “joint defense” privilege as follows, quoting *Young v. Presbyterian Homes* in the opinion: “[T]he joint defense doctrine is highly desirable because it allows for greater efficiency in the handling of litigation. Frequently, co-defendants with essentially the same interests must retain separate counsel to avoid potential conflicts over contingent or subsidiary issues in the case. To avoid duplication of efforts, such defendants should be able to pool their resources on matters of common interest. This can be done most effectively if both counsel can attend and participate in interviews with each other's clients.”

Next, the court filled in some of the gaps in the law concerning the contours of the “joint defense” privilege with standards developed in the 3rd U.S. Circuit Court of Appeals, including the following burden of proof for those claiming its protection quoting *In re Bevill, Bresler and Schulman Asset Mgmt. Corp.*: “[T]he party asserting the privilege must show that: (1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further that effort; and (3) the privilege has not been waived.” In addition, again citing local federal case law, the Commonwealth Court found that parties seeking protection under the “joint defense” privilege must share a common legal, as opposed to a mere commercial or business, interest in the matter, citing *Katz v. AT&T Corp.*

Finally, the Commonwealth Court considered the merits of the city's privilege claim — namely, that its communications with the Redevelopment Authority of Philadelphia concerning the condemnee's

redevelopment rights in connection with a certain parcel of land fell under the “joint defense” privilege. Although the city contended that it shared a common legal interest with the RDA in “determining what rights [the condemnee] had,” the court noted that the RDA was actually an adverse party to the city in the condemnation action, and that the city and the RDA were not “even defendants in similar actions.”

Furthermore, the Commonwealth Court found that the city failed to “offer[] any facts or explanation demonstrating how RDA would benefit from the City’s success in this condemnation action,” and as a result, concluded that the city failed to establish the existence of a common legal interest to support application of the “joint defense” privilege.

Also of interest is an issue that the Commonwealth Court did not reach in denying the city’s collateral appeal — namely, whether the city had to establish that it entered into a written joint defense agreement with the RDA in order for the “joint defense” privilege to apply. Based on its determination that the city failed to demonstrate a common legal interest to support application of the privilege, the court did not have to reach the issue of the absence of a written joint defense agreement with the RDA.

We look forward to further development and clarification of the contours of the “joint defense” privilege in our Pennsylvania state and federal courts. In the meantime, however, we strongly recommend that you do your due diligence and survey all of the relevant case law in your jurisdiction before deciding whether to share privileged communications with counsel for co-defendants or other parties to a litigation or other matter.

If your representation is in the 3rd Circuit or any of its districts, you should start with *In re Teleglobe Comm. Corp. v. BCE Inc.*, *Haines v. Liggett Group Inc.* and *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*

In the Pennsylvania state courts, *In re Condemnation by the City of Philadelphia*,

*Executive Risk Indemnity Inc. v. Cigna Corp.* and *Young v. Presbyterian Homes Inc.* offer useful guidance in the civil context, while *Commonwealth v. Scarfo* addresses application of the privilege to co-defendants in criminal proceedings. We also suggest that you consult the *Restatement (Third) of the Law Governing Lawyers* § 76 and other key secondary sources concerning the privilege.

Finally, we offer the following basic questions that you need to answer before sharing privileged communications with counsel for a co-defendant or other party under the auspices of a “joint defense” privilege: Is there a true common legal interest in the litigation or other matter amongst all of the

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parties with whom communications are to be shared? Are all parties clear and in agreement as to the joint legal interests involved? Have the clients been cautioned that the privilege does not extend to communications between them (as opposed to communications between and with counsel)? Do all parties and their counsel understand that the communications must be limited in scope solely to the joint legal interests identified in order to maintain the privilege? And finally, has a written joint defense agreement been prepared? If not, why not?

As to this last point, there is no question that the joint defense privilege cannot be conjured up after the fact to shield shared communications from disclosure. The joint defense privilege is, in reality, merely a defense against the general rule that the attorney-client privilege is waived when privileged communications are shared with third parties, and the courts look to the common interests, the intent and the reasonable expectations of the parties at the time of the communications to determine whether it applies. Whether the courts ultimately decide that a written joint defense agreement is required to establish the privilege, we are hard-pressed to envision a scenario where it would not be preferable to set forth the parties’ common legal interests, intentions and expectations in a written joint defense agreement.

Next month we’ll be discussing a related issue concerning application of the attorney-client privilege to communications between counsel for corporations and their constituents/employees. In the meantime, we’re always looking for new ideas, so if you come across an ethics issue or a recent case you would like to see discussed in these pages, please do not hesitate to contact us. •