Are You Joined at the Hip?

Application of the Attorney–Client Privilege in Joint Representations

By Gregory R. Farkas

The joint representation of multiple clients by a single attorney or law firm usually starts off on a positive note. The clients, whether they are investors looking to start a business, or family members looking to purchase real estate, are getting along well enough to agree to be represented by the same counsel. Before accepting such a representation, the attorney must determine that there are no conflicts between the clients. Things look good.

But occasionally, the good times do not last. Conflicts between formerly joint clients can create any number of thorny issues. One such issue that may arise is the application of the attorney–client privilege to the former joint clients.

The basics are simple. Communications between the joint clients and counsel are afforded the same protection as communications between a single client and counsel. Assuming that the general elements of the attorney–client privilege are satisfied, such communications cannot be discovered by a third party. All of the joint clients must agree to waive the privilege to disclose communications to a third party. However, the joint clients cannot assert the privilege against each other. When their interests become adverse, the otherwise privileged communications become fair game in a dispute between them. *See, e.g., Squire, Sanders and Dempsey, L.L.P.*, 127 Ohio St.3d 161, 937 N.E.2d 533, 2010-Ohio-4469, ¶ 32; *Emley v. Selepchak*, 76 Ohio App. 257, 262 63 N.E. 919 (9th Dist. 1945); Restatement (Third) of the Law Governing Lawyers §75.

While the general rule is simple, as with many simple things, its application can be complex. One such complexity is determining whether a joint client relationship exists. An Ohio appellate court recently addressed this situation in *Hinerman v. The Grill on Twenty First St. LLC,* 5th Dist. Licking No. 17-CA-82, 2018-Ohio-1927. The dispute involved two members of an LLC who had a falling out over the business. The plaintiff sought to depose the attorney who formed the LLC, which is a classic joint representation scenario. The complication in this case was that the defendant disputed that the attorney had represented the other member of the LLC. There apparently was no representation letter outlining the parties to the representation. Nor does it appear that the plaintiff paid the attorney. The attorney testified in support of the privilege objection that his client in drafting the operating agreement for the LLC was the defendant. *Id.* at ¶ 16. However, his deposition testimony prior to the privilege objection was far more equivocal. *Id.*

The court noted that the creation of an attorney–client relationship involves the subjective belief of the client. *Id.* at ¶ 12. The plaintiff testified that he had personally employed the attorney in the past and was never told that the attorney was only representing the defendant in forming the LLC. *Id.* at ¶ 15. Based on this testimony, the appellate court concluded that the trial court did not abuse its discretion in finding that there was a joint representation.

Hinerman illustrates the importance of clearly documenting the parties and scope of representation in any *potential* joint representation scenario. The perception of the "clients" matters, and who is paying the bills is not determinative. *Id.* at ¶ 12.

As noted above, the general rule for applying the attorney–client privilege when joint clients become adverse to one another is relatively well established. But what happens when one client becomes adverse to the joint attorney? After all, a client can waive the privilege to pursue a malpractice claim against its counsel, and an exception to the attorney–client privilege exists to allow the attorney to defend against such a claim. *See, e.g., Squire, Sanders and Dempsey,* 2010-Ohio-4469 at ¶ 34-53.

An Ohio court addressed this situation in *Galati v. Pettorini*, 8th Dist. Cuyahoga No. 101712, 2015-Ohio-1305. The plaintiff was one of 11 joint plaintiffs who filed suit against an insurance company. He later filed a malpractice claim against the attorney and sought discovery of communications with other plaintiffs concerning the handling of the original case. The attorney objected on the basis of the attorney–client privilege. The trial court ordered the documents produced. The

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court of appeals agreed with the attorney and reversed, holding that the plaintiff "could not and cannot unilaterally waive the privilege of the other… clients." *Id.* at ¶ 40.

The court in *Galati* did not cite any authority directly on point on this specific issue. A California appellate court reached the opposite result in *Anten v. Superior Court of Los Angeles Cty.*, 183 Cal. Rptr.3d 422 (2d Dist. 2015). The plaintiff had jointly retained the defendant law firm with another party. The plaintiff later sued for malpractice and the other party did not. In the malpractice litigation, the plaintiff sought discovery of communications between the law firm and the other party. The law firm objected, based on the attorney–client privilege.

The California appellate court rejected the privilege claim. It held that because there was a joint representation, there was no expectation of confidentiality between the clients. *Id.* at 426. Therefore, no privilege could apply. The court also concluded that "fundamental fairness" prevented application of the privilege. The court explained that applying the privilege in such situations created a "substantial risk" of collusion between the attorney and the non-suing client. *Id.*

As illustrated above, the application of the attorney–client privilege in the context of malpractice claims involving joint clients is unsettled. When a malpractice claim is based on allegations that a case involving multiple plaintiffs was improperly settled, courts have generally allowed discovery of communications with the non-suing clients about the settlement. *See, e.g.*, *Williamson v. Edwards*, 880 So. 2d 310 (Miss. 2004); *Scrivner v. Hobson*, 854 S.W. 2d 148 (Tex. Ct. App. 1993). To the extent that a majority rule exists, under differing fact patterns, it appears that most courts do *not* apply the privilege in the context of malpractice claims by one of the joint clients and allow discovery of communications between counsel and the non-suing joint clients related to the joint representation. *See, e.g., Newsome v. Lawson*, 286 F. Supp. 3d 657 (D. Conn. 2017); *Bolton v. Weil, Gotshal & Manges LLP*, 836 N.Y.S.2d 483 (N.Y. Sup. 2005); *Farnsworth v. Van Cott, Bagley, Cornwall & McCarthy*, 141 F.R.D. 310 (D. Colo. 1992); *Tunick v. Day, Berry & Howard*, 486 A.2d 1147 (Conn. Super. 1984).

So what is the takeaway? Both attorneys and clients need to be aware that the attorney–client privilege is not as absolute, and potentially it can be lost in a variety of ways, in joint client representations. As G.I. Joe taught us: "Knowing is half the battle." FD