

Preserving Privilege in Third-Party Liability Claims

What captive groups, insurers, insureds, and defense counsel need to know before strategy communications become discovery exhibits.

Based on "[Preserving the Attorney-Client Privilege in Third-Party Liability Claims: What Captive Groups Need to Know](#)," republished on February 24, 2026, in *Westlaw Today* (January 2026)



Myles H. Sonnier

Associate

New Orleans

504.566.8673

msonnier@bakerdonelson.com



The Practical Problem Behind the Rule

Captives increasingly sit close to claims strategy because the dollars, data, and incentives.

Captive value

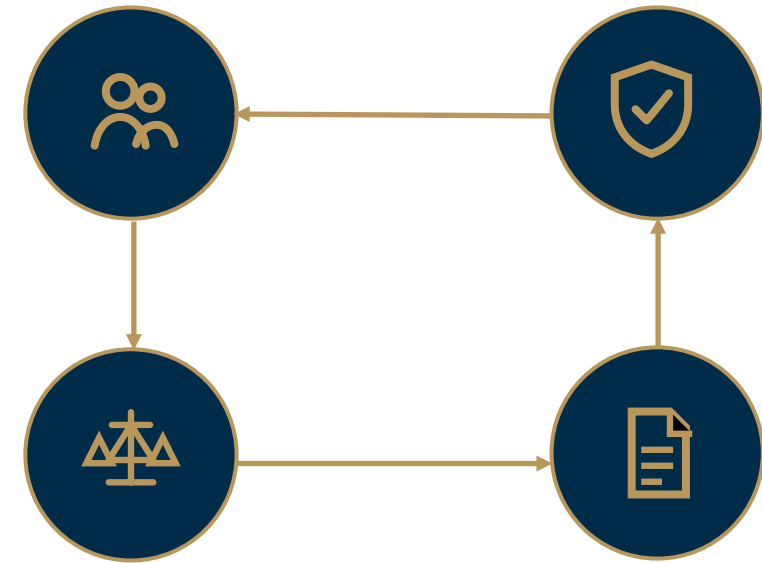
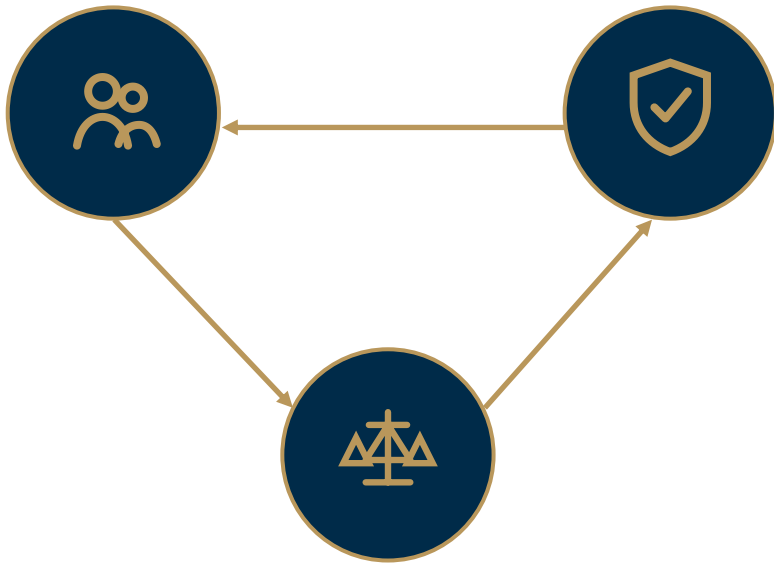
Financial alignment, loss control data, and sophisticated claim governance can materially improve litigation outcomes.

Privilege exposure

The same participation can invite waiver arguments if communications are not channeled through counsel and tied to legal strategy.

Protocol solution

Design a defensible communication architecture before the first serious strategy meeting.



The Foundation

Texas Rule of Evidence 503(b)(1)(A)

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client...between the client or the client’s representative and the client’s lawyer or the lawyer’s representative[.]”

Attorney–Client Privilege: The Baseline Rule

Core elements

- ✓ Communication
- ✓ Between lawyer/client
- ✓ Made to facilitate legal services
- ✓ Confidential when made

Common Pitfalls

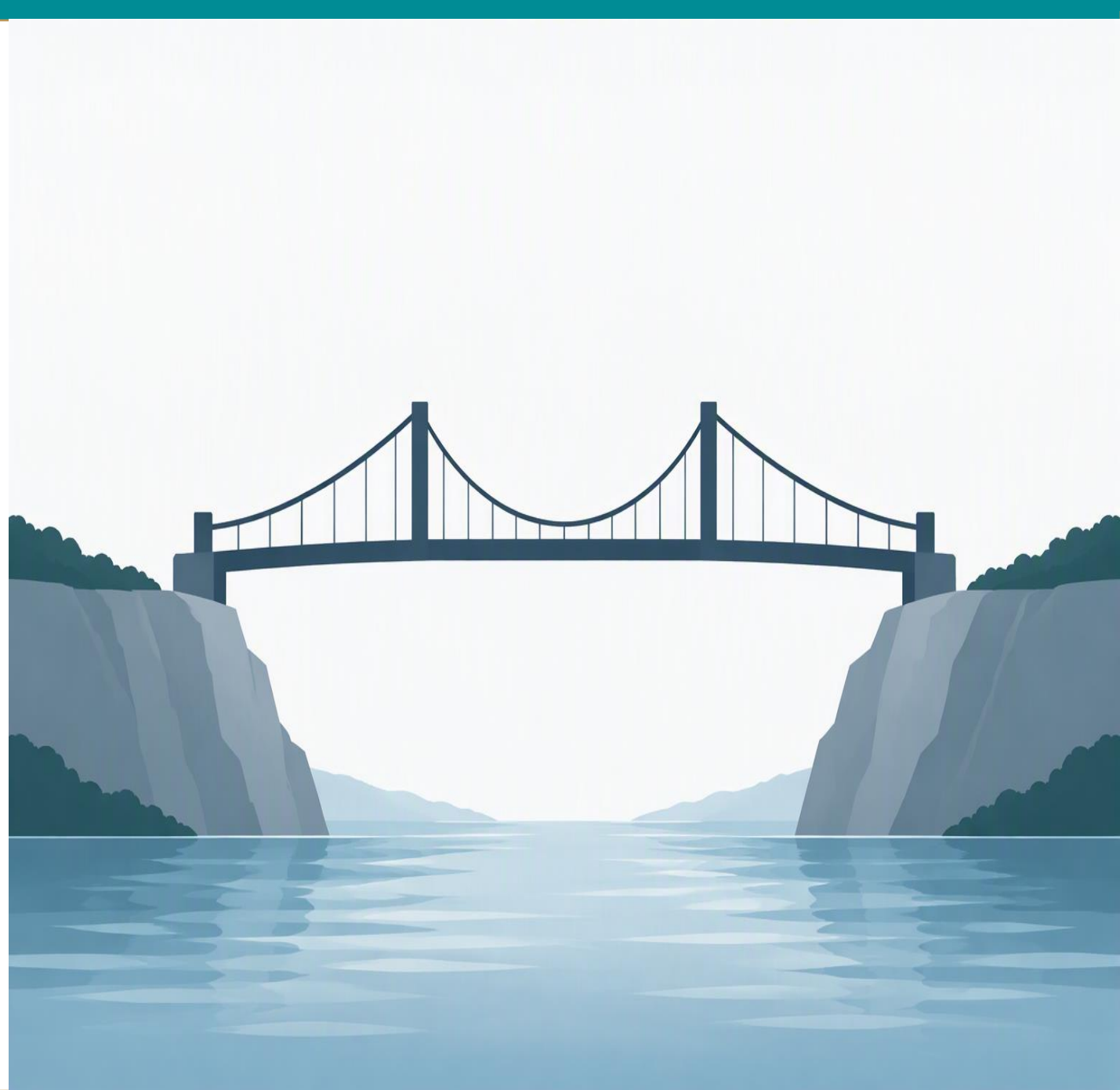
- ✓ Third-party recipients
- ✓ Forwarding communications
- ✓ Unclear client identity
- ✓ Business advice framed as legal



Common Interest Doctrine

Texas Rule of Evidence 503(b)(1)(C)

“...by the client, the client’s representative, **the client’s lawyer**, or the lawyer’s representative to a **lawyer representing another party** in a **pending action** or that lawyer’s representative, if the **communications** concern a matter of **common interest** in the **pending action**[.]”



Common Interest Doctrine

Common-interest text

- ✓ Reaches communications to a lawyer for another party in a pending action if the communications concern a matter of common interest.

Caveats

- ✓ For Texas state-law privilege, “pending action” and lawyer-to-lawyer channels are central.
- ✓ Client to client communications protected?

A Bridge Between



Steps to Preserve Protections

Fast action with poor channels can create permanent problems.

Step 1

Create legal strategy channel and business reporting channel.

Step 2

Identify counsel, claim owner, captive contact, and preservation needs.

Step 3

Draft common-interest and confidentiality agreement; confirm roles.

Step 4

Hold counsel-led strategy meeting; document attendees and purpose.

Claim File Architecture: Separate the Lanes

A litigation file can be discoverable in pieces even when some parts are protected.

Business/operational

Reserves, payments, routine status, non-legal claim handling.

Legal strategy

Counsel advice, liability analysis, strategy, expert strategy, mediation positioning.

Governance

Board or committee materials with separate legal annexes and privilege labeling.

Common Interest Agreement: Anatomy of a Durable Record

Parties and counsel

- ✓ Identify insured, insurer, captive, defense counsel, coverage counsel, captive counsel.

Common legal interest

- ✓ Identify the claim, claimants, DOL, defense, liability theory, indemnity, and settlement issues.

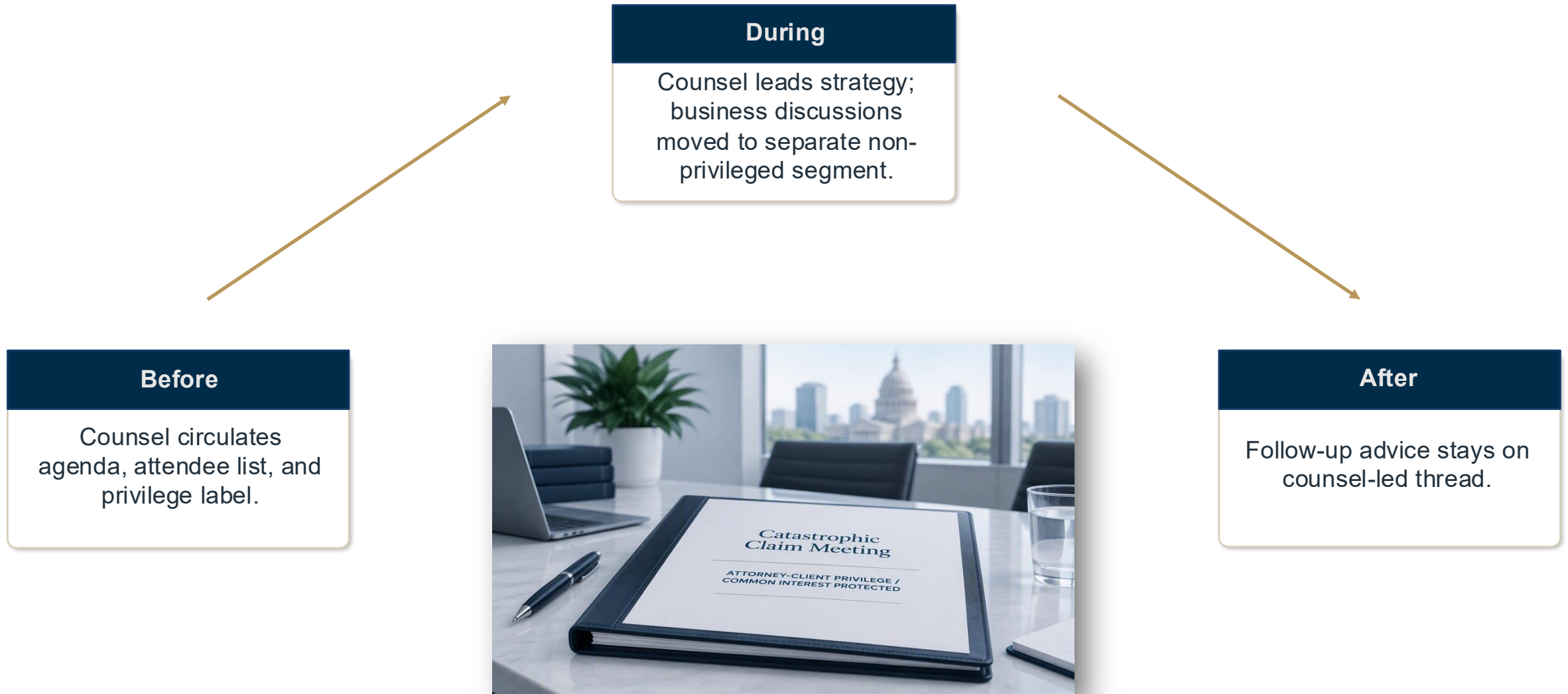
Purpose and limits

- ✓ Recite the purpose is for legal advice and strategy only.

No waiver intent

- ✓ State communications are intended to preserve privileges and protections, secure storage, no outside forwarding

Meeting Protocols: Privilege by Design



Settlement & Trial Valuations

Protected lane

- ✓ Counsel analysis of liability, damages, jury and appeals, litigation strategy, and negotiation strategy.

Business lane

- ✓ Funding, reserves, risk appetite, member communications, and accounting treatments.

Protocol

- ✓ Keep legal valuation and business authority separate; combine only through counsel when needed.



The Highest-Value Target

Texas Waiver: Rule 511 & Voluntary Disclosure

General rule

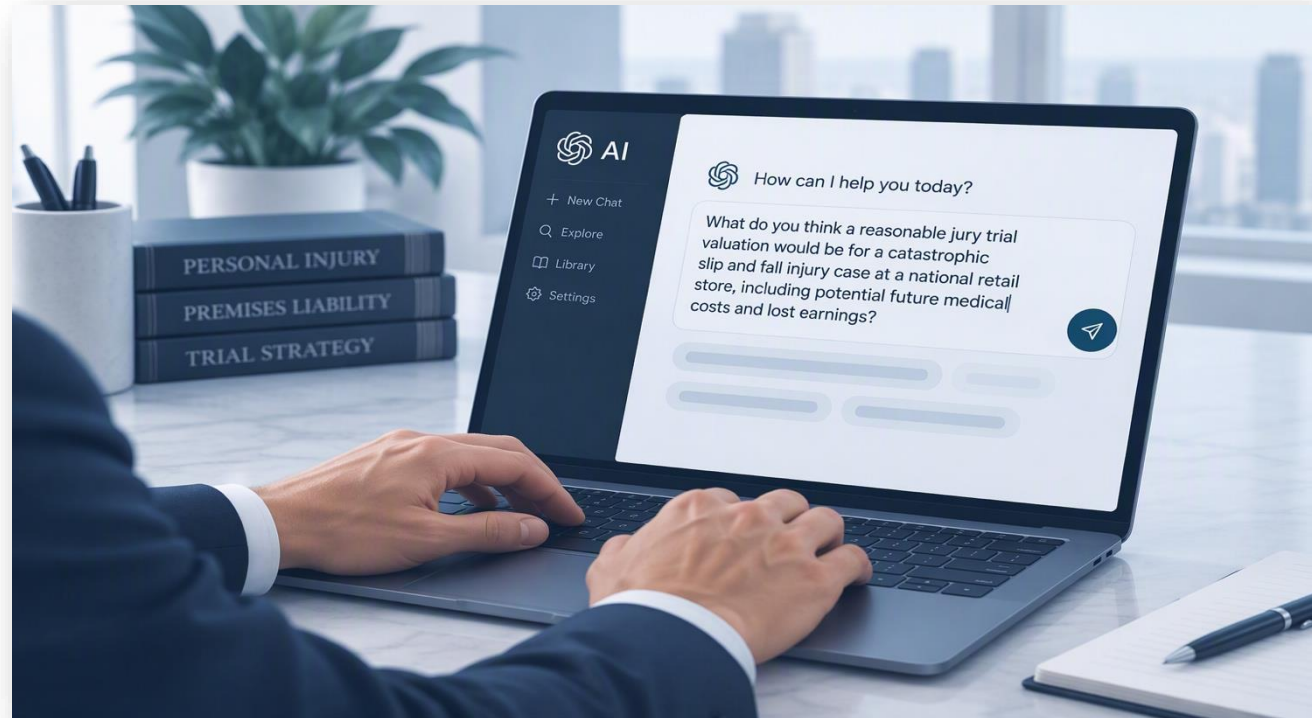
Privilege is waived if the holder voluntarily discloses or consents to disclosure of a significant part of the privileged matter, unless the disclosure itself is privileged.

Subject-matter scope

For lawyer-client privilege and work product, certain subject-matter waiver rules apply when fairness requires related undisclosed material to be considered together.

Inadvertent disclosure

In Texas, inadvertent disclosure may avoid waiver if the holder follows Texas Rule of Civil Procedure 193.3(d) procedures.



Key Takeaways: Privilege preservation is a process, not a label.

1

The captive's economic stake does not automatically create privilege.

2

Common interest preserves existing privilege; it does not create privilege.

3

Rule 503 makes counsel-led, pending-action-aware protocols important.

4

Separate legal strategy from business reporting.

5

Document roles, purpose, common interest, and distribution limits.

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Questions?



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