The Common Interest Doctrine: Key Practices for Maintaining Confidentiality

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While confidentiality is usually destroyed when communications between an attorney and client take place in the presence of a third party or when work product is shared with others, those communications can remain protected if the common interest doctrine applies. This article explains the doctrine and then outlines key practices to consider when dealing with common interest doctrine issues which may arise in many different fact patterns.

Key elements of the doctrine are (1) the parties share a common interest; (2) the disclosing party had a reasonable expectation of confidentiality; and (3) the disclosure is reasonably necessary.[1]

The common interest doctrine originated in the criminal law when multiple defendants with separate counsel shared information to pursue a united defense. It was later extended to civil matters.[2] The doctrine does not create a protection; it prevents a protection from being waived. It applies not only to the attorney-client privilege and to the work-product doctrine. The purpose of the doctrine is to permit the parties in a joint defense to coordinate a joint legal strategy.[3] It also allows lawyers representing different clients with similar legal interests to share information without having to disclose it to other parties who do not share those interests.[4]

A common scenario for application of the doctrine is multiple defendants with separate counsel agreeing to share information and agreeing that the shared information will fall within the attorney-client privilege.[5] In the subrogation context the doctrine might apply when a lawyer hired by an insurance carrier to pursue a subrogation claim communicates with the insured about the loss as part of the effort to recover from the responsible tortfeasor. It is important to know whether those communications are discoverable.

Before the doctrine should be analyzed, first evaluate whether there is an otherwise valid privilege. Without an otherwise valid privilege, the doctrine, which is only an exception to waiver of

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[1] See Continental Cas. Co. v. St. Paul Surplus Lines Ins. Co., 265 F.R.D. 510, 528-529 (E.D. Cal. 2010).

[2] Mainstreet Collection, Inc. v. Kirkland's, Inc., 270 F.R.D. 238, 242-243 (E.D.N.C. 2010).

[3] Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 214 (Tenn.Ct.App. 2002).

[4] In re Teleglobe Communications Corp., 493 F.3d 345, 364 (C.A.3 (Del.) 2007).

[5] People v. Shrier, 118 Cal.Rptr.3d 233, 244 (Cal. App. 2 Dist. 2010).

such a privilege, cannot apply.[6] The doctrine may not be necessary if the additional person who is part of the communications is a joint client of the same lawyer.[7]

Following is a list of things to consider when dealing with the common interest doctrine.[8]

A LAWYER HIRED BY A SUBROGATING CARRIER SHOULD CONSIDER WHETHER TO ENTER INTO A FORMAL ATTORNEY-CLIENT RELATIONSHIP WITH THE INSURED IN ORDER TO APPLY THE DOCTRINE TO AVOID WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE.

The majority in Brandon v. West Bend[9] presumed that an attorney-client relationship existed between the insured and the lawyer hired by the carrier because the lawyer used the insured's name when he filed an action against the tortfeasor. However, a dissenting justice held that filing a subrogation claim does not create an attorney-client relationship, even if the carrier has the right to use the insured's name as the plaintiff. The dissenting justice would have required that the client accept the services.

IT IS GENERALLY NOT NECESSARY FOR THE PARTIES PURSUING APPLICATION OF THE COMMON INTEREST DOCTRINE TO HAVE AN AGREEMENT IN WRITING.

The doctrine applies as long as the parties clearly and specifically agree.[10] One court observed that written agreements limiting the scope of a joint representation may be preferable, but that nothing required such an agreement as long as the parties understand the limitations of the relationship.[11] The party asserting the doctrine must be able to prove the oral agreement's existence, terms and scope.[12]

No writing is required, in part, because the attorney-client privilege, from which the common interest doctrine was derived, does not depend on a writing.[13] Also, a written agreement would not give rise to a privilege, which comes from the common law and the rules of professional conduct.

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[6] See Mainstreet, 270 F.R.D. at 242 -243.

[7] "... joint clients are two or more persons who have retained one attorney on a matter of common interest to all of them, such as where the attorney represents both an insurer and its insureds." See Roush v. Seagate Technology, LLC, 150 Cal.App.4th 210, 223, 58 Cal.Rptr.3d 275, 284 (Cal.App. 6 Dist. 2007).

[8] Because each jurisdiction has different rules about underlying privileges and immunities and about application of the common interest doctrine to them, the law of each jurisdiction should be considered. While privileges have strong common law foundations, be sure to check rules of procedure and state-specific statutes for any codification of an applicable privilege.

[9] See Brandon v. West Bend Mut. Ins. Co., 681 N.W.2d 633, 640 (Iowa 2004).

[10] See Cooey v. Strickland, 269 F.R.D. 643, 652 (S.D. Ohio 2010).

[11] See In re Teleglobe Communications Corp., 493 F.3d 345, 363 (C.A.3 (Del.) 2007).

[12] See Minebea Co., Ltd. v. Papst, 228 F.R.D. 13, 16 (D.D.C. 2005).

[13] See Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc., 449 Mass. 609, 618, 870 N.E.2d 1105, 1113 (Mass. 2007).

PREPARING AND SIGNING A WRITTEN COMMON INTEREST AGREEMENT (OFTEN CALLED A "JOINT DEFENSE AGREEMENT") CAN BE HELPFUL.

(A) A well written agreement will demonstrate the parties' intentions and may avoid court inquiries into that issue. Such an inquiry was discussed in the Teleglobe case. The court discussed the many circumstances relevant to determining whether two or more parties intended to create a joint defense arrangement, including how the parties would interact with the joint attorneys and with each other. A very broad scope of joint representation may give the parties more control over each other's ability to waive the privilege than they intended, and it subjects them to losing it in litigation with one another."[14]

(B) A written agreement is the best method of establishing the existence of a joint defense agreement.[15]

(C) If the parties waive a conflict of interest, the written agreement should expressly waive the conflict in order for that waiver to be effective.[16]

(D) Parties who do not sign a written joint defense agreement might argue joint representation by implication. However, in Neighborhood v. Murphy, the court dismissed such an argument, finding that correspondence clearly indicated that there was no express joint representation and that the parties' arguments of implied joint representation were "unpersuasive."[17]

(E) Consider having the agreement address the work product doctrine specifically in order to broaden the agreement's coverage.

CONSIDER REASONS NOT TO PURSUE THE COMMON INTEREST PRIVILEGE, INCLUDING THE POSSIBILITY THAT ITS EXISTENCE MAY BE USED BY AN OPPOSING PARTY TO SUPPORT A BIAS ARGUMENT AND THAT ITS TERMS MIGHT BE SOUGHT IN DISCOVERY.

In Ford v. Edgewood, the court noted that the existence of a joint defense agreement and the identity of the parties to it was relevant.[18] The court reviewed the agreement and concluded that there were no trial strategies in the agreement. It noted that such strategies would constitute opinion work product, which were absolutely protected in that circuit. The Court ordered disclosure only of the identity of the parties to the agreement.

COMMON REPRESENTATION HAS BEEN CALLED THE BEST EVIDENCE OF A COMMON PURPOSE.

The clearest proof of common interest is dual representation, that is, representation of two or more parties by one lawyer. Common interest can also exist when there is a joint defense or strategy, but

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[14] See In re Teleglobe Communications Corp., 493 F.3d 345, 363 (C.A.3 (Del.) 2007).

[15] See Minebea, 228 F.R.D. at 16.

[16] See In re Pittsburgh Corning Corp., 308 B.R. 716, 729 (Bkrtcy.W.D.Pa. 2004).

[17] Neighborhood Development Collaborative v. Murphy, 233 F.R.D. 436, 441 (D.Md. 2005).

[18] Ford Motor Co. v. Edgewood Properties, Inc., 257 F.R.D. 418, 428-429 (D.N.J. 2009).

separate representation.[19] If various co-defendants share information with each other, the purpose of that exchange should be presumed to be to assist in their common cause.[20]

A COMMON LEGAL INTEREST, POSSIBLY INCLUDING A "COORDINATED LEGAL STRATEGY", MAY BE NECESSARY.

A common interest agreement in and of itself does not ensure that the doctrine will apply.[21] The specific communications at issue must still be designed to further a common legal interest; a business or commercial interest is not enough. There should be a "coordinated legal strategy" between the parties. The legal interest might not need to be actual litigation.[22]

PENDING OR REASONABLY ANTICIPATED LITIGATION MAY BE REQUIRED.

In Allied v. Bank of America, a New York court wrote that communications about business matters did not qualify for protection from discovery under the common interest rule unless the communications arose from pending or reasonably anticipated litigation. The mere existence of a common problem which led parties to transmit information that was business-oriented was not enough to invoke the privilege.[23]

SOME COURTS EVEN REQUIRE ACTUAL LITIGATION.

In the United v. Nationwide matter, the court limited the application of the doctrine to pending litigation in which the co-parties bear a relationship of common interest.[24] The court noted that this "same-action, pending-litigation" requirement was very different from federal common interest privilege law.

INCLUSION OF A PARTY THAT IS NOT ULTIMATELY SUED WILL NOT NECESSARILY PREVENT APPLICATION OF THE DOCTRINE.

In Fojtasek v. NCL, a party named as a defendant in the action, NCL, had previously shared information with Tabyana, a company that was not ultimately named in the action.[25] The court applied the common interest doctrine because NCL and Tabyana shared a common interest at the time they shared information.

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[19] See American Re-Insurance Co. v. U.S. Fidelity & Guar. Co., 40 A.D.3d 486, 491, 837 N.Y.S.2d 616, 621 (N.Y.A.D. 1 Dept. 2007).

[20] See People, 118 Cal.Rptr.3d at 244.

[21] See Intex Recreation Corp. v. Team Worldwide Corp., 471 F.Supp.2d 11, 16 (D.D.C. 2007) .

[22] See Pampered Chef v. Alexanian, 2010 WL 3602376, 5 (N.D.Ill. 2010).

[23] See Allied Irish Banks, P.L.C. v. Bank of America, N.A., 252 F.R.D. 163, 171 (S.D.N.Y. 2008).

[24] United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 487-488 (N.D.Miss. 2006).

[25] Fojtasek v. NCL (Bahamas) Ltd., 262 F.R.D. 650, 656-657 (S.D.Fla. 2009).

The court observed that a plaintiff could prevent a joint defense by either dismissing one party from the case or by not naming each possible defendant. Also, a bar on naming Tabyana as a party based on the statute of limitations elapsing should not lift the work product protection veil from the report. There was no evidence that Tabyana knew at the time that it prepared the report in question that it would be spared from being sued.

CASE LAW VARIES WITH RESPECT TO WHETHER THE SHARED INTERESTS MUST BE IDENTICAL OR JUST SIMILAR.

The Leader v. Facebook court held that for a communication to be protected, the interests must be identical, not just similar.[26] Other courts have not required a total identity of interest.[27]

INVOLVEMENT OF ONE OR MORE LAWYERS IN THE COMMUNICATIONS MAKES IT MORE LIKELY THAT THE PRIVILEGE WILL APPLY.

According to the Cooey v. Strickland court, communications between parties without attorneys being present probably are not tied to the parties' common legal interest.[28] However, communications not involving a lawyer might still be protected if those communications implicate counsel's legal advice or mental impressions. [29]

WAIT UNTIL A FIRM AGREEMENT IS REACHED BEFORE SHARING INFORMATION.

Communications made before an agreement is reached are not privileged.[30] The privilege does not begin until the date on which the agreement is reached. However, facts and circumstances other than a writing may prove a firm understanding that certain kinds of shared information were to be treated as privileged.[31]

WAIVER OF AGREEMENT GENERALLY REQUIRES CONSENT OF ALL PARTIES; OBJECT IF ANOTHER PARTY TO A JOINT DEFENSE AGREEMENT SHARES CONFIDENCES WITH A THIRD PARTY.

The common interest privilege generally cannot be waived unless all the parties consent or where the parties become adverse litigants.[32] However, even though a waiver by one party to an agreement does

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[26] Leader Technologies, Inc. v. Facebook, Inc., 719 F.Supp.2d 373, 376 (D.Del. 2010); see also GUS Consulting GMBH v. Chadbourne & Parke LLP, 20 Misc.3d 539, 541-542, 858 N.Y.S.2d 591, 593 (N.Y.Sup. 2008).

[27] See GUS, 20 Misc.3d at 541-542.

[28] Cooey, 269 F.R.D. at 653.

[29] See Reginald Martin Agency, Inc. v. Conseco Medical Ins. Co., 460 F.Supp.2d 915, 920 (S.D.Ind. 2006).

[30] Cooey, 269 F.R.D. at 652.

[31] Intex, 471 F.Supp.2d at 17.

[32] See In re Commercial Money Center, Inc., Equipment Lease Litigation, 248 F.R.D. 532, 536-537 (N.D.Ohio 2008).

not automatically operate as a waiver by another, knowledge about, awareness of, or consent to unwarranted disclosure to a third party may waive the attorney-client privilege.[33]

SHARING DOCUMENTS WITH A TESTIFYING EXPERT WILL PROBABLY WAIVE THE PRIVILEGE AS TO THOSE SHARED DOCUMENTS.

Rule 26 mandates disclosure of all documents provided to testifying experts. The source of those documents is not relevant to the need to enable the opposing party to challenge the expert's opinions at trial.[34]

CONSIDER AVOIDING DISCLOSING INFORMATION TO EVEN ONE POTENTIAL ADVERSARY, EVEN IF YOU ARE NOT ADVERSE ON ALL ISSUES, OR TO A NON-DEFENDING INSURER.

It has been held that disclosure of work product to one adversary waives work product protection as to all other adversaries.[35] Such a disclosure is inconsistent with the adversary system and with the confidential nature of the work product privilege.

In the Continental v. St. Paul case, because St. Paul did not share a protected tripartite relationship with Crown and Stephan and because the interests of St. Paul and Crown had also been adverse in many significant respects, the court found that St. Paul was a third party and also a potential adversary, and that Crown and Stephan's disclosure of any work product to St. Paul waived any work product protection. [The court in this case considered a specific statute's authorization to share some otherwise privileged communications with one carrier but not with another.] Because St. Paul was a non-defending insurer, no disclosure of work product to St. Paul was necessary for Crown's defense.

THE POTENTIAL FOR FUTURE ADVERSITY AMONG THE PARTIES TO A COMMON INTEREST AGREEMENT DOES NOT ALWAYS PREVENT APPLICATION OF THE COMMON INTEREST RULE.

It has been held also that the possibility of future discord is irrelevant to the current alignment of their interests. Sharing a common interest at the time the agreement was made was enough for the doctrine to apply.[36]

IF THE THIRD PARTY TO WHOM INFORMATION IS DISCLOSED IS CONSIDERED AN AGENT OF A PARTY, THEN THE DOCTRINE MAY NOT BE NEEDED.

When the third party in whose presence such communications take place is an agent of the client, the confidentiality is not destroyed.[37]

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[33] See Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 146 (D.Del. 2009).

[34] Id.

[35] Continental, 265 F.R.D. at 528-529.

[36] See Pampered, 2010 WL at 7.

[37] See Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

In the Royal v. Sofamor case, the attorney-client privilege was extended to communications between the insurer and the insurance broker's senior VP. Because the VP was the main conduit of information between the insurer and the broker during a complex transaction, the VP was deemed an "insider" with respect to certain communications.[38]

AN OFFICER OF A COMPANY MIGHT NOT BE CONSIDERED AN AGENT FOR PRIVILEGE PURPOSES IF THEY NEED SEPARATE COUNSEL.

In Kennedy v. Gulf, the absence of any evidence indicating that a memo prepared for a company was intended also to benefit the company's officers led the court to conclude that the company alone held the attorney-client privilege applicable to the memo.[39]

EVEN IF THE COMMON INTEREST DOCTRINE MAY NOT APPLY, OTHER ARGUMENTS AGAINST WAIVER MIGHT.

For example, consider arguing that the work product privilege was not forfeited by the communication that allegedly waived it.

Even if a disclosure vitiates the attorney-client privilege, it might not waive the work-product privilege.[40] Disclosure by one party sharing a common adversary with another party of work product to that other party may be perfectly consistent with maintaining the secrecy of the work product from their common adversary. The work product privilege is forfeited only when the disclosure is inconsistent with maintaining the confidentiality of the work product from an adversary of the disclosing party.

CONCLUSION

The common interest doctrine can be a powerful tool for allowing parties to communicate with each other confidentially and therefore more openly and fully. Hopefully, this discussion will help the reader utilize the doctrine effectively.

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[38] Royal Surplus Lines Ins. v. Sofamor Danek Group, 1999, 190 F.R.D. 463.

[39] Kennedy v. Gulf Coast Cancer & Diagnostic Center at Southeast, Inc., 326 S.W.3d 352, 358 (Tex.App.-Houston [1 Dist.] 2010).

[40] Harris v. Koenig, 2010 WL 3909507, 12 (D.D.C. 2010).