What's Uncommon About the "Common Interest" Doctrine

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Two or more clients represented by the same attorney can typically communicate with one another and their counsel about a matter without waiving the attorney-client privilege. Restatement (Third) The Law Governing Lawyers §75 – the "joint client" privilege. If the same clients are represented by separate lawyers and agree to exchange information, their communications may also be privileged if they concern a matter of common interest. Rest. 3d §76 – the "common interest" doctrine.2

The common interest doctrine is not a separate privilege but rather an exception to the general rule that the attorney-client privilege does not apply to confidential communications that are communicated to or in the presence of third parties. The information exchanged in a common interest arrangement must still satisfy the four requirements to be a privileged communication.3 The common interest doctrine has the effect of relaxing the requirement of confidentiality by enlarging the circle of persons to whom the clients may disclose privileged information. Rest. 3d §76, comment c.4

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2 The common interest privilege is also referred to as the "joint defense" or "joint prosecution" privilege. However, the term "common interest" is more accurate since the doctrine applies whether or not the matter involved litigation. Rest. 3d §76, comment b.

3 Where legal advice is sought from a lawyer in his professional capacity, communications relating to that purpose, made in confidence by the client, are protected from disclosure by the client or the lawyer, unless waived. In re Grand Jury Investigation, 974 F.2d 1068, 1072, n. 2 (9th Cir. 1992)

4 In California, where the attorney-client privilege is a matter of statute and not common law, the "common interest" doctrine is a non-waiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and attorney work (footnote continued)
The policy precluding a waiver of the privilege in a common interest arrangement is the same as in the case of joint clients – to allow attorneys to have complete information in rendering legal services and advice. Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* (ABA 5th Ed. 2007) 286. It makes sense to allow separately represented clients to be able to exchange information and communicate among themselves, and with their respective attorneys, on matters of common interest. One form of common interest that has been held sufficient to preclude waiver of the attorney-client privilege is where parties share a "common defense" but are represented by separate counsel. The joint defense concept appears to have originated in the criminal litigation context; however, the common interest doctrine has been extended to civil cases and to transactional matters. See, e.g., *Morvil Technology, LLC v. Ablation Frontiers, Inc.*, 2012 WL 760603 (S.D. CA 2012) – two companies that shared attorney-client privileged documents during negotiations for the acquisition of one of the companies by the other did not waive either company's privilege because they shared a common interest in avoiding litigation and assessing the validity and enforceability of patents to be acquired in the transaction.

### Establishing the Privilege under the Common Interest Doctrine

The party asserting the attorney-client privilege in a common interest arrangement must show that the communication at issue was made in the course of a joint defense or common enterprise, that the communication was designed to further the shared interests, that the communication is otherwise privileged and that the privilege has not been waived. See *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d. 120, 126 (3d. Cir. 1986). This means that the party asserting the privilege under the common interest doctrine has the burden of establishing an agreement to pursue a joint defense or common interest. *In re Megan-Racine Assocs. Inc.*, 189 B.R. 562, 571-572 (Bkrtcy. N.D.N.Y. 1995). Any member of a joint defense agreement can invoke the privilege against third persons, even if the communication at issue was not made to or by the member.5

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5 Restatement (Third) of the Law Governing Lawyers § 76(1) states:

If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is (footnote continued)
Some courts presume that communications are intended to be in furtherance of a joint defense agreement where the parties are codefendants or prospective codefendants. E.g., *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) - where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent they concern common issues and are intended to facilitate representation in subsequent proceedings. Other courts require proof that the parties actually agreed to pursue a joint defense strategy. See, e.g., *U.S. v. Weissman*, 195 F.3d 96 (2d Cir. 1999) – refusing to infer the existence of a joint defense without proof of an explicit agreement or demonstrated cooperation in formulating a common defense strategy.

The court in *U.S. v. Duke Energy Corp.*, 214 F.R.D. 383, 388-389 (M.D. N.C. 2003) required that three elements be satisfied before a client could share confidential documents with third parties and avoid waiving the attorney-client privilege: an agreement among all members of the group to share information, the desire to share information must be the result of a common legal interest, and the common legal interest must relate to on-going or contemplated litigation. The court further held that the joint defense privilege only protected information that fell within the scope of the parties' shared or common interest.

Some courts have held that litigation need not be threatened or anticipated for the common interest doctrine to apply. The parties need only "undertake a joint effort with respect to a common legal interest." *United States v. BDO Seidman, LLP*, 492 F.3d. 806, 816 n.6 (7th Cir. 2007). See also *In re the Regents of the University of California*, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996) - the attorney-client privilege is not limited to actions taken and advice obtained in the shadow of litigation; people seek legal advice and assistance to meet legal requirements, plan their conduct, facilitate the administration of justice, and ultimately avoid litigation. Other courts require a "palpable threat of litigation" at the time of the communications in order for the joint defense or common interest privilege to apply. *In re Santa Fe Int'l Corp.*, 272 F.3d. 705, 711 (5th Cir. 2001); see also *Allied Irish Banks, P.L.C. v. Bank of America, N.A.*, 252 F.R.D. 163, 171 (S.D.N.Y. 2008) - requiring common interest as to "pending or reasonably anticipated litigation".

While it is best to have a written agreement to pursue a joint defense or common interest, the existence of a written agreement is not a prerequisite to asserting the privilege. See *Katz v. American Tel. & Tel. Corp.*, 191 F.R.D. 433, 437 - "the common interest doctrine protects privileged and work-product materials even if there is no 'final' agreement or if the parties do not ultimately unite in a common

privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.
enterprise"; United States v. Gonzalez, 669 F.3d 974 (9th Cir. 2012) – no written agreement is required and a joint defense agreement may be implied from conduct, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in criminal litigation. Other courts have been reluctant to apply the joint defense privilege in the absence of a written agreement acknowledging the parties' shared interests and their intent to maintain the confidentiality of the exchanged information. See, e.g., Weissman, supra, 195 F.3d at 99-100 (2d Cir. 1999).

**Communications that are Protect**

The common interest doctrine protects communications that are relevant to or advance the interests of clients possessing the common interest. The parties to the communication can be actual or potential codefendants or interested third parties who have a community of interests in the subject matter of the communications. Under a common interest arrangement, any member, including the client, the client's agent for communication, the client's lawyer and the lawyer's agents can exchange communications with other members and their agents. Rest. 3d §76, comment d.

The privilege applies to communications made in the course of seeking legal advice. Consultations with attorneys to the arrangement for business or other non-legal purposes are not protected by the common interest doctrine. See In re Grand Jury Proceedings, 156 F.3d. 1038, 1042-43 (10th Cir. 1998); see also United States v. Aramony, 88 F.3d. 1369, 1392 (4th Cir. 1996).

Communications between separately represented clients, made outside the presence of their respective lawyers, may not receive the same level of protection as those where a lawyer is present. Courts frequently require that communications sought to be protected be made in the presence of counsel in applying the common interest doctrine. This requirement is said to ensure that the doctrine only protects disclosure when attorneys, not clients, decide to share information in order to coordinate their respective legal strategies. In re Teleglobe Communications Corp. 493 F.3d. 345, 365 (3d Cir. 2007).

**Commonality of Legal Interest**

The joint defense privilege will apply when two or more parties have a community of interest and share legal advice with regard to that common interest. Most cases limit the doctrine to common shared legal interest rather than only a common shared economic, financial or commercial interest. Epstein, The Attorney Client Privilege and Work Product Doctrine, supra, at page 289. In Duplan Corp. v. Deering Milliken, 397 F.Supp. 1146, 1164 (D.S.C. 1974), the court emphasized that a community of interest between separately represented persons permits the exchanging of privileged communications without waiving the privilege, provided that the clients have "an identical legal interest with respect to the subject matter of the communication." See also North River Ins. Co. v. Columbia Cas. Co., 1995 WL 5792
at 4 - "what is important is not whether the parties theoretically share a similar interest but rather whether they demonstrate actual cooperation toward a common legal goal"; *Bank Brussels Lambert v. Credit Lyonnais (Suisse)* S.A., 160 F.R.D. 437, 447 (S.D.N.Y. 1995) – confidential communications can be shared without waiver only if both parties have more than merely concurrent interests. The parties must have a common legal, as opposed to commercial, interest. Not all courts agree: see *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 310 (N.D. CA 1987) – sharing of confidential communications protected even if the interest is primarily commercial or financial.

The interests of the separately represented clients do not have to be entirely compatible for their shared communications to be privileged. Rest. 3d §76, comment e. Clients with common interests may also have interests that are in conflict. "When clients have adverse as well as common interests, the question of whether a particular communication is privileged depends on whether it relates to the common or the adverse interests." Epstein, *The Attorney Client Privilege and The Work Product Doctrine, supra*, at page 307. In *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965), defendant and his wife were under investigation for tax evasion. At a pre-indictment meeting with both spouses and separate counsel present, defendant agreed to take the blame and clear his wife. It was error for defendant's wife and her counsel to testify about this admission at defendant's trial because defendant's statement apprised the respective attorneys of defendant's position at a time when both clients were concerned with common issues and had agreed to exchange confidential communications to facilitate the representation of each client in subsequent proceedings.

**Waiver of the Privilege**

Disclosure of privileged information to members of a common interest arrangement waives the privilege as against other members of the group in a later adverse proceeding between them unless they have agreed otherwise. Rest. 3d. §76(2); and see *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 172 (C.A La., 1979). Each client may waive the privilege as to the use of that client's own communications. However, one member of the joint defense agreement cannot unilaterally waive the privilege for the other members. See *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007); *In re Auclair*, 961 F.2d 65 (5th Cir. 1992).

**Recent Cases**

In *U.S. v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012), a husband and wife were convicted in separate trials for fraud arising from an insurance scam. Their car was found burned in a field with a gas can in the backseat shortly after they learned that the car needed several thousand dollars in repairs. Although both confessed to the fraud, the wife claimed she had no idea fire would be used to destroy the car. Shortly before his own trial, the husband indicated that he would claim at trial that he had
nothing to do with the crime but had lied about his involvement in order to protect his 
wife. The husband was convicted of three counts of fraud, but acquitted of the count 
for use of fire, and sentenced to ninety-six months in prison.

The wife's attorney decided not to call the husband as a witness at his wife's trial. The 
wife was convicted on all counts and sentenced to one-hundred-and-twenty-one 
months in prison. The wife later moved to set aside the conviction claiming her 
attorney had rendered ineffective assistance of counsel by not calling the husband as a 
witness. The government subpoenaed the wife's counsel for deposition concerning 
communications counsel had with the husband and his counsel about the husband's 
potential testimony at the wife's trial. The husband intervened and sought to quash 
the subpoena on the grounds that the husband had met with the wife's attorney and 
discussed confidential information related to the trial, and such communications were 
therefore protected by the joint defense privilege.

Although there was not a written joint defense agreement, there was nonetheless 
an implied agreement arising from the course of conduct that took place between the 
parties. Gonzalez, supra, 669 F.3d at 979. The case was remanded to determine if 
the joint defense agreement ended at some point, and if so, at what point did the 
communication to the wife's attorney occur.

In another recent case, Morvil Technology, LLC v. Ablation Frontiers, Inc., 2012 
WL 760603 (S.D. CA. 2012), two companies exchanged privileged documents 
related to one company's acquisition of the other. In subsequent litigation against the 
two companies, a third party plaintiff sought to compel production of the documents, 
claiming that each company had waived the privilege by sharing the documents with 
the other. Plaintiff also argued that the documents were not privileged in the first 
instance because they pertained to business related advice, rather than legal advice. 
The court held that the companies shared a common legal interest and that the joint 
defense privilege applied because they had worked together to ensure successful 
completion of the business transaction and had a joint effort to avoid litigation, 
especially with regard to patent infringement. Although the documents exchanged 
between the two companies served primarily to facilitate a business transaction and 
there was some overlap of commercial and legal interests, there was still a sufficient 
community of interest that supported the common interest privilege.