Separate Parties, Common Interests

Protecting Legal Communications

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It is widely understood that a parent corporation and its subsidiary are legally separate entities. However, even if they are represented by separate lawyers, the parties may face legal issues that affect their common interests. How does that commonality of issues affect their legal representation?

For example, the two entities may be contemplating a sale of the subsidiary to another entity, or they may be involved in negotiations to enter into a joint contract. In instances such as these, where the parent and subsidiary do have separate attorneys, it may be necessary, or at least beneficial, for the two entities to share legal communications among their respective clients and counsel. However, the general rule is that sharing legal advice with a party other than a client, or the client's or lawyer's agent, waives the privilege.[1]

Is there a special rule that will permit entities or individuals that are represented by different attorneys, yet that share a common interest, to communicate regarding that common interest without waiving the attorney–client privilege? Depending on the circumstances, the answer may be yes.

The Doctrine's Genesis

The "common interest doctrine"[2] has been recognized in the United States since 1871.[3] This doctrine permits parties represented by separate attorneys to share legal advice regarding matters that affect their common interest without causing the attorney–client privilege to be waived.[4] Rationales for this rule include protection of the free flow of information between attorney and client and reduction of legal costs.[5] Essentially, the doctrine is an extension of the attorney–client privilege, which already exists to protect legal communications between clients and their attorneys.[6]

> As one court explained, the common interest doctrine: does not create a new or separate privilege, but prevents waiver of the attorney–client privilege when otherwise privileged communications are disclosed to, and shared in confidence with, an attorney for a third person having a common legal interest for the purpose of rendering legal advice to the client.[7]

The attorney–client privilege in civil actions in Arizona is governed by statute[8] and broadly protects communications between a lawyer for a corporation and its employees. The statute, A.R.S. § 12-2234, was enacted in 1994 in response to the Arizona Supreme Court decision *Samaritan Foundation v. Goldfarb*.[9] In *Samaritan*, the Supreme Court had construed the privilege to apply, in civil

cases involving corporations, "only to employee-initiated communications intended to seek legal advice or to communications concerning the employee's own conduct for the purpose of assessing legal consequences for the corporation."[10] However, § 12-2234 provides that communications between an attorney for a corporation, or other entity or employer, and an employee, agent or member, "regarding acts or omissions of or information obtained from the employee, agent, or member," is privileged if the communication is either for the purpose of:

1. providing legal advice to the entity or employer or to the employee, agent or member, or
2. obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.[11]

Accordingly, the statute has broadened protection for privileged communications in the corporate setting.[12]

The common interest doctrine is similar to the so-called joint defense privilege, which is widely recognized.[13] In both instances, protection for legal communications is extended beyond an attorney and his or her client.[14] However, unlike the joint defense privilege, the common interest doctrine is not necessarily limited to defendants, or even to communications made during or in anticipation of litigation.[15] Some courts and commentators have broadly construed the common interest doctrine to include communications that "may be legal, factual, or strategic in character."[16] Other courts, however, have required that there be pending or anticipated litigation for the doctrine to apply.[17]

There are other limitations that may apply to the common interest doctrine. For example, there must be an understanding by all parties and their lawyers that the communications will be kept privileged. Moreover, there also must be an underlying common interest that is sought to be advanced by the privileged communications.[18]

Arizona Application

The only Arizona case involving the common interest doctrine is *Arizona Independent Redistricting Commission v. Fields*.[19] In *Fields*, the commission, which had been created in 2000 to undertake voter redistricting in Arizona, challenged an order by the trial court compelling the commission to produce documents exchanged between the commission, its consultants and expert witnesses. The court granted the motion to compel.

Courts are divided on whether the "common interest" shared by the parties must be identical.

On appeal, the court of appeals decided that communications between the commission and its consultants, including documents, were protected by the legislative privilege.[20] However, the court also found that, to the extent the consultants had already been identified as testifying experts for the commission, that privilege was waived.[21]

The commission also argued, in the alternative, that communications with its consultants were privileged under the common interest doctrine. The court of appeals noted, first, that this was a case of first impression in Arizona and, because there was no Arizona law directly on point,[22] it looked to the applicable Restatement—here, the *Restatement (Third) of Law Governing Lawyers*.[23] The court determined that because the attorney–client privilege, which may be extended by the common interest doctrine, only covers "confidential communications made for the purpose of obtaining or providing legal assistance for the client … , it follows that the common interest doctrine protects only those communications made to facilitate the rendition of legal services to each of the clients involved in the conference."[24]

The court held that, because the consultants had no legal responsibility with respect to the redistricting, but only responsibility based on their consulting agreement with the commission, there were no common legal interests, and therefore the attorney–client privilege, as extended by the common interest doctrine, did not protect the communications.[25]

How Common Must "Common" Be?

Courts are divided on whether the "common interest" shared by the parties must be identical, or whether a less than identical interest is sufficient.[26]

The *Restatement* approach, which was followed in *Fields*, provides, "The interests of the separately represented clients need not be entirely congruent."[27] Thus, it appears that in Arizona, a less than identical interest may support application of the doctrine.

Does the common interest rule protect communications directly between parties that share a common interest, or only between their respective attorneys? The *Restatement* provides that a communication that is "directly among the clients is not privileged unless made for the purpose of communicating with a privileged person as defined in § 70 [of the *Restatement*]."[28] A "privileged person" is defined to include lawyers, clients, "agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation."[29] Accordingly, under this view, communications directly between clients may be privileged.[30] Moreover, a number of states have enacted statutes that provide that communications between a lawyer or client on the one hand and the legal representative of another party on the other hand are privileged.[31]

As noted, courts generally require that the common interest "be a legal, rather than a purely commercial, interest."[32] Indeed, the court in *Fields* expressly declined to find the communications at issue were privileged because the communications did not involve a shared legal interest.[33] Moreover, because the common interest privilege belongs to the group participating in communications, the privilege may be waived only by the group, unless the parties have agreed to the contrary.[34] Accordingly, a waiver by one member of the group would constitute a waiver only as to that party.[35]

Securing the Privilege

There is no requirement that an agreement to share legal communications pursuant to the common interest doctrine be set forth in writing.[36] However, as a practical matter, parties that wish to privilege their shared communications would be well served by entering into a written common interest agreement. The parties may wish to consider including the following provisions[37]:

- The agreement covers all clients, attorneys, employees and agents.
- The parties share a common legal interest in the subject of the agreement.
- The parties will protect shared information and will not disclose to outside parties without the consent of all parties.
- No party is obligated to share all information in its possession.
- Signature by counsel is a representation that the agreement has been explained to the client and the client has agreed to comply with the agreement.
- No party may use shared information in a manner adverse to a co-party.
- All amendments to the agreement must be in writing and signed by parties and their counsel.
- If a party withdraws from the common interest group, communications between that party and the other members of the group will remain protected.
- Nothing in the agreement will be deemed to interfere with each attorney's obligation to represent that attorney's client. AZ AT

endnotes

1. *State v. Hampton,* 92 P.3d 871, 873 (Ariz. 2004) (en banc); *State v. Sucherew,* 66 P.3d 59, 65 (Ariz. Ct. App. 2003).
2. The doctrine is also known by other names, including the common interest rule, the community of interest privilege and the joint defense privilege. Katherine Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 55 (Fall 2005).
3. *Chahoon v. Commonwealth,* 62 Va. (Gratt) 822 (1871); *see also* Schaffzin, *supra* note 2, at 58; Nicole Garsombke, Note, *A Tragedy of the Common: The Common Interest Rule, Its Common Misuses, and an Uncommon Solution,* 40 GA. L. REV. 615, 624 (Winter 2006). As of late in 2005, 37 states and three federal circuits had not decided whether to recognize the common interest doctrine. Schaffzin, *supra* note 2, at 61 n.39.
4. Warren Moise, *Just Between Us: The Common Interest Rule*, 16 S. CAROLINA LAWYER 11, 12 (July 2004).
5. *Id.* at 11.
6. Schaffzin, *supra* note 2, at 54.
7. *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.,* 870 N.E.2d 1105, 1110 (Mass. 2007). *See also* Garsombke, *supra* note 3, at 627 ("The common interest rule has been called both an extension of the attorney–client privilege or work-product privilege and an exception to waiver of those same privileges.").
8. A.R.S. § 12-2234.
9. 862 P.2d 870 (Ariz. 1993).
10. *Roman Catholic Diocese of Phoenix v. Superior Court,* 62 P. 3d 970, 973 (Ariz. Ct. App. 2003).
11. A.R.S. § 12-2234.
12. *See generally* Stacey A. Dowdell, *The Extent of the Attorney–Client Privilege in Arizona*, 36 ARIZ. L. REV. 725 (Fall 1994).
13. There do not appear to be any reported Arizona cases involving the joint defense privilege. The Ninth Circuit has recognized the joint defense privilege. *See, e.g., United States v. Austin,* 416 F. 3d 1016, 1021 (9th Cir. 2005).
14. Schaffzin, *supra* note 2, at 61.
15. Moise, *supra* note 4, at 11; *see also Teleglobe Commc'ns Corp. v. BCE, Inc.*, 493 F.3d 345, 364 n.20 (3d Cir. 2007) (noting that, according to the *Restatement*, "The community-of-interest privilege has completely replaced the old joint defense privilege for information sharing among clients with different attorneys."); Garsombke, *supra* note 3, at 641 (proposing that Georgia adopt the distinction made in the *Restatement* between the "coclient privilege" [joint defense privilege] and the common interest doctrine).
16. *See Arizona Independent Redistricting Comm'n v. Fields,* 75 P. 3d 1088 (Ariz. Ct. App. 2003).
17. Schaffzin, *supra* note 2, at 74.
18. *Id.* at 63.
19. *Fields,* 75 P.3d at 1088.
20. *Id.* at 1094-99.
21. *Id.* at 1101-02.
22. *Espinoza v. Schulenberg,* 129 P.3d 937, 939 (Ariz. 2006) (en banc) ("Generally, … absent law to the contrary, Arizona Courts follow the *Restatement.*").
23. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (2000).
24. *Fields*, 75 P. 3d at 1100.
25. *Id.* at 1101.
26. Schaffzin, *supra* note 2, at 69-70. *Cf. Union Carbide v. Dow Chem.*, 619 F. Supp. 1036, 1047 (D. Del. 1985) ("The key consideration is that the nature of the legal interest be identical, not similar."); *Cavallaro v. United States,* 153 F.R.D. 52, 60 (D. Mass.) ("The term 'common interest' typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest") (internal citation omitted); *Hanover Ins. Co.*, 870 N.E.2d at 1113 ("Courts should deem an interest 'common" where two or more parties share a sufficiently similar interest and attempt to promote that interest by sharing a privileged communication").
27. RESTATEMENT § 76, cmt. e.
28. *Id.* § 76, cmt. d.
29. *Id.* § 70.
30. *See also Pucket v. Hot Springs School Dist. No. 23-2,* 239 F.R.D. 572, 583 (D. S.D. 2006) (communications relayed from lawyer to client and then directly from client to separately represented party held covered by common interest doctrine).
31. Schaffzin, *supra* note 2, at 79-80.
32. *Id.* at 72.
33. *Fields,* 75 P. 3d at 1101.
34. RESTATEMENT §76, cmt. g.
35. *Id.*
36. *Hanover Ins. Co.,* 870 N.E.2d at 1113.
37. John Freeman, *The Common Interest Rule*, 6 S. CAROLINA LAWYER 12 (May/June 1995). *See also* Garsombke, *supra* note 3, at 659 (listing key objectives to be achieved in a common interest arrangement).