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Common Interest Is Broader Than You May Think

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by Allen Levine and Darren Goldman

Generally speaking, private conversations between an attorney and client are privileged and their contents cannot be discovered. The same is true with respect to an attorney's work product and his mental thoughts and impressions. These privileges are so engrained in the law that Florida has codified them at Florida Statute Section 90.502 (attorney-client privilege) and Florida Rule of Civil Procedure 1.280(b)(4) (work product).

Also engrained in the minds of most practitioners is the idea that these privileges are destroyed if an otherwise-privileged communication or work product is disclosed to a third party. While this is generally true, there is an important exception: common interest.

Though often referred to as a separate privilege, common interest (sometimes also called joint defense or pooled information) is really just an offshoot of the attorney-client privilege and work product doctrine. It is an exception to the rule that protection is lost if the contents of the otherwise privileged conversation or work product is disclosed to third parties.

Under the exception, protection is not lost when discussed among those with a "common litigation interest." See *Visual Scene v. Pilkington Brothers*, 508 So.2d 437 (Fla. 3d DCA 1987). The rationale behind the exception is two-fold: persons with a common interest should be able to speak freely to promote observance of the law and the administration of justice and persons with a common interest are likely to have an equally strong interest in keeping the information confidential.

Courtesy photos

Allen Levine, left, and Darren Goldman, right, of Becker & Poliakoff.

Importantly, because common interest is not a separate privilege, it does not provide an independent basis to withhold information. For common interest to apply, the shared material must already be protected by the attorney-client privilege or work product doctrine.

What constitutes a "common interest" is broadly defined. Courts throughout the country and in Florida have recognized the exception in the case of criminal co-defendants, of civil co-defendants, of co-parties to potential litigation, of members of a class of plaintiffs pursuing separate litigation in state and federal courts, of defendants being sued in separate actions, and of companies individually summoned before a grand jury.

In fact, the common interest can even extend to parties who are on opposing sides of the "v," i.e., to a plaintiff and a defendant in a multi-party case. So long as parties have some interest in common and are not completely adverse, communications between themselves and their attorneys are privileged with respect to the common issues.

Notably, parties' common interest may not be static throughout a litigation, and just because parties have a common interest at one

point does not mean the common interest exists at all times. In other words, the parties may have a common interest at the beginning of the litigation, and then as the litigation progresses, their respective interests may diverge.

Conversely, the parties may start off with adverse interests and then realize after discovery that their interests are actually aligned. To further complicate matters, parties may start off aligned, then have their interests diverge, only to then have them converge back into alignment.

Understanding the alignment of the parties—and the timing accompanying that alignment—is important because the privilege exists only during the time of the common interest. If parties begin a case adverse to each other and then later realize they have a common interest, the privilege only extends to communications after the parties began working in furtherance of the common interest. The same is true when the parties' interests diverge.

The privilege only attaches to communications that occur while the parties' interests are aligned, so once the interests are no longer aligned, communications are no longer privileged. And if parties begin aligned, then diverge, and then converge into alignment again?: privileged conversations are sandwiched around nonprivileged communications, and an opposing party would be entitled to the conversations that occurred in the middle of the dispute, even though earlier and later conversations between those same parties would be non-discoverable.

Because alignments are not always cut-and-dry and often in flux, the main issues facing litigants asserting common interest are establishing what is the common interest and when it was in place. This is an inherently fact-based determination, and like any privilege issue, the burden of establishing the applicability of the common interest rests with the party invoking it.

While it is not necessary for a common interest to be in writing, it is generally good practice for the parties to enter into a common interest agreement prior to exchanging privileged or confidential information. Any common interest agreement should therefore include the following information:

- The date of the agreement, or if the common interest pre-dates the agreement, the date the common interest began;
- The areas in which the parties believe there is a common interest;
- The scope of the common interest;
- Acknowledgement that communications among the parties and their respective attorneys regarding the areas of common interest are privileged; and
- Acknowledgement that even if the common interest no longer exists and the parties become adverse, the communications made pursuant to the common interest agreement remain privileged.

By including this information in a written common interest agreement, parties can protect themselves from challenges to privilege assertions. These agreements are especially useful in cases where parties are not entirely aligned, because those are the cases where a common interest privilege claim is most likely to be challenged.

Finally, it is worth remembering that even with a common interest, there are still risks to sharing privileged communications and work product with others. First, common interest protection only extends to conversations and work product in furtherance of that common interest. Conversations and work product regarding matters not directly related to the common interest are not covered, so sharing them with third parties—even those with whom a party has a common interest with respect to other issues—would waive any privilege that would otherwise exist.

Second, nothing prevents other parties to the common interest from disclosing the information to third parties. This would destroy the privilege for everyone, not just the disclosing party.

Third, common interest only applies to keeping privileged communications shielded from third parties. The exception does not prevent a party from disclosing the privileged communication against another member of the common interest in a subsequent dispute between the parties. Accordingly, even though common interest is a useful privilege which should appropriately be used in a number of circumstances, it is also one that should be exercised with caution.

Allen Levine *is chair of Becker & Poliakoff's business litigation practice in Fort Lauderdale. He can be reached at alevine@beckerlawyers.com.* ***Darren Goldman*** *is a senior attorney in the firm's business litigation practice and can be reached at dgoldman@beckerlawyers.com.*

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