

**PROTECTING THE FRUITS OF COLLABORATION
THE COMMON INTEREST PRIVILEGE**



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COMMON INTEREST PRIVILEGE

- AKA
 - The Community of Interest Rule
 - The Allied Lawyer Doctrine
 - The Joint Defense Privilege



COMMON INTEREST PRIVILEGE

- History
 - *Chahoon v. The Commonwealth*, 21 Gratt. 822 (Vir. 1871)
 - Now applied to criminal cases, civil cases and maybe transactional matters



COMMON INTEREST PRIVILEGE

- Not a privilege at all
 - Exception to the general rule
 - Construed narrowly



RESTATEMENT § 76

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...that relates to the matter is privileged against third persons. Any such client may invoke the privilege unless it has been waived by the client who made the communication.





ELEMENTS

- A party invoking privilege must show:
 - An underlying privilege
 - Disclosed when common interest shared;
 - In furtherance of common interest;
 - Privilege not waived.





BURDEN

- Party invoking the common interest privilege must show...
 - Burden on the party invoking





ELEMENT 1

- Underlying privilege protects the communication
 - Generally, attorney-client or work product
 - Who is permitted to share?



ELEMENT 2

- Disclosed when common interest shared
 - The “common interest” is thorny
 - Legal? Factual? Strategic? Commercial?
 - Degree of interest?
 - Must there be litigation?



ELEMENT 3

- Communication was shared in the furtherance of the common interest



ELEMENT 4

- Parties have not waived the privilege
 - Disclosure to third party
 - Client to client?
 - Consent of all parties?
 - When common interests become adverse in litigation?



LATER ADVERSITY

- Discoverability to common interest participants
- Discoverability to third parties
- Insurance coverage litigation



ETHICAL CONCERNS

- Model Rules of Professional Conduct
 - 1.6: Duty of Confidentiality
 - 1.9: Duties to Former Clients
 - 1.10: Imputation of Conflicts of Interest



ETHICAL DANGERS

- Implied attorney-client relationship
- Fiduciary duty of confidentiality
- Potential malpractice
- Disqualification



JOINT DEFENSE AGREEMENTS

- Considerations
 - Are your interests aligned?
 - Is there trust?
 - Likelihood of later adverse proceedings



JOINT DEFENSE AGREEMENTS

- Pros
 - Shared information
 - Shared expertise/experience
 - Division of costs (experts, documents, etc.)



JOINT DEFENSE AGREEMENTS

- Pros, cont.
 - Division of labor (research, briefing, argument)
 - Overcome discovery limitations
 - United front



JOINT DEFENSE AGREEMENTS

- Cons
 - Too many cooks in the kitchen
 - Must resolve differences
 - Difficulties in arriving at agreement
 - Contractual issues (e.g., breach, ambiguity)



JOINT DEFENSE AGREEMENTS

- Cons, cont.
 - Ethical landmines
 - Who's your partner?
 - Assume jury will hear about it



JOINT DEFENSE AGREEMENTS

- Writing or oral?
 - Writing not required
 - Avoid production?
 - Like blurry contours?
 - Certainty as to rights and obligations
 - Resolve ethical issues/conflicts at the outset
 - Easier to prove a writing



JOINT DEFENSE AGREEMENTS

- Discoverable?
 - Existence? Terms?
 - Court may review in camera
 - Terms are likely not relevant (*Biovail Laboratories*(S.D.Fla. 2010))



JOINT DEFENSE AGREEMENTS

- Discoverable?, cont.
 - But, the fact of the JDA may be discoverable
 - May be admissible to show bias (*Island Intellectual Prop.* (S.D.N.Y. 2010))



JOINT DEFENSE AGREEMENTS

- Terms to Consider
 - Parties
 - Recitation of elements and purpose
 - Dates
 - Description of materials and work/cost sharing
 - Opportunity to object



JOINT DEFENSE AGREEMENTS

- Terms to Consider, cont.
 - Required to assert privilege
 - Settlement
 - Indemnification/contribution rights
 - Ethical issues
 - Termination/withdrawal
 - Confidentiality of agreement



