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Maintaining Attorney-Client Privilege Even Without an Attorney: Recent Application of the Common Interest Doctrine

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Many parties to pending or potential litigation likely have been admonished to always copy their lawyer or risk disclosure of communications that could otherwise be subject to attorney-client privilege. Although such advice remains prudent, a recent decision from the Commercial Division of the Supreme Court, New York County highlights the potential importance of—and protection offered by—the sometimes overlooked sibling of attorney-client privilege: the common interest doctrine.

It is hornbook New York law that the attorney-client privilege protects confidential communications between a lawyer and client made for the purpose of seeking and receiving legal advice.

See West 87 v. Paul Hastings, 192 N.Y.S.3d 921 (Table), 2023 N.Y. Slip Op. 50821(U), at *2 (Sup. Ct., N.Y Cnty. Aug. 4, 2023); *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995). The privilege encourages clients to make full and frank disclosures to their attorneys to better enable effective advice and representation. *Spectrum Systems International v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991); *People v. Edney*, 39 N.Y.2d 620, 626 (1976). For the privilege to apply, the communications must be between a client and its lawyer and must stay confidential;

subsequent disclosure to third parties means those communications generally lose any such protection. *See Spectrum*, 78 N.Y.2d at 378; *Ambac Assurance v. Countrywide Home Loans,* 27 N.Y.3d 616, 624 (2016).

In specific circumstances, however, the protections of attorney-client privilege may extend to third parties. The common interest doctrine operates as an "exception to the 'traditional rule that the presence of a third party, not an agent or employee of counsel, at a communication between counsel and client is sufficient to deprive the communication of the confidentiality which is one of the pillars of the privilege.'" *Yemini v. Goldberg*, 12 Misc. 3d 1141, 1143 (Sup. Ct., Nassau Cnty. 2006) (citation omitted). Pursuant to the common interest doctrine, attorney-client communications disclosed to a third-party may remain privileged *if* they are shared with parties who have a common legal interest in pending or anticipated litigation. *See Ambac*, 27 N.Y.3d at 620.

The common interest doctrine frequently applies in the event of "dual representation" by multiple law firms or "where there is a joint defense or strategy, but separate representation." 4 Bender's New York Evidence §160.02 (2023). Typically, those communications occur between lawyers rather than directly between parties themselves. *See* Kenneth Duvall, *The Common Interest Privilege: What Exactly Is It, and When Does It Apply?*, American Bar Association (Aug. 25, 2021) ("[I]t is also a best practice to ensure that the attorneys in a common interest group handle all communications. The parties themselves should not directly communicate with each other[.]").

Indeed, certain courts in certain jurisdictions, including the U.S. Court of Appeals for the Third Circuit, have limited the common interest doctrine in this way—as applicable only to *attorney* communications. *In re Teleglobe Communications*, 493 F.3d 345, 364 (3d Cir. 2007) ("[T]he communication must be shared with the *attorney* of the member of the community of interest…. Sharing the communication directly with a member of the community may destroy the privilege.").

Of note for New York practitioners, district courts within the Second Circuit have found that the common interest doctrine can protect communications where counsel was not included. *See, e.g.*, *In re Bank of New York Mellon Corp. Forex Transactions Litigation*, 66 F. Supp. 3d 406, 408-09 (S.D.N.Y. 2014) (finding that memorandum prepared for defendant bank and forwarded to third-party investment managers associated with bank's pension plan was protected by common interest doctrine); *Millennium Health v. Gerlach,* No. 15-CV-7235 (WHP) (JLC), 2015 WL 9257444, at *2 (S.D.N.Y. Dec. 18, 2015) ("The joint defense privilege may apply as between two individuals within a joint defense effort, regardless of the presence of an attorney."); *Doctor's Associates v. QIP Holder*, No. 3:06-CV-01710 (VLB), 2009 WL 1683628, at *3 (D. Conn. Feb. 26, 2009) ("An attorney does not need to be directly involved in the communication if the clients are sharing information that would be privilege[d]."); *Kelly v. Handy & Hartman*, No. 08-CV-0163 (KMK)(GAY), 2009 WL 2222712, at *2 (S.D.N.Y. July 23, 2009) ("[T]he privilege is not forfeited even though no attorney either creates or receives that communication.").

In *West 87*, Justice Robert R. Reed applied the common interest doctrine to communications sent and received by non-lawyers. During the course of discovery, the plaintiffs moved for a protective order to shield certain communications with their owner, a non-party to the litigation. Acknowledging that the majority of the challenged documents did not include legal counsel as senders or recipients, the plaintiffs nonetheless sought to protect communications with their owner-entity purportedly conveying information provided by outside legal counsel and communications reflecting discussions regarding prior and anticipated legal advice.

The plaintiffs sought to protect these documents pursuant to the attorney-client privilege, the attorney work product privilege, and the litigation privilege. *West 87*, 2023 N.Y. Slip Op. 50821(U), at *2. Notably, the plaintiffs did not affirmatively raise the common interest doctrine as a basis to protect these communications. Based on his in-camera review, however, Justice Reed sua sponte determined that the common interest doctrine applied because the entities participating in the communications were interrelated and had a common legal interest.

Relying on the New York Court of Appeal's decision in *Ambac*, the court determined that attorney-client communications disclosed to a third party remain privileged if they are shared with parties of common legal interest in pending or anticipated litigation. As the Court of Appeals explained in *Ambac*, "when two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. While in that situation, the common interest doctrine promotes candor that may otherwise have been inhibited[.]" *Ambac*, 27 N.Y.3d at 616.

The Commercial Division's sua sponte application of the common interest doctrine in *West 87* is a good reminder that, under certain circumstances, the common interest doctrine may apply even when lawyers are not included in the communications. Indeed, this application of the common interest doctrine reflects the practical reality that a party to litigation may share ownership interests with separate, non-party entities that may have a legitimate need to stay informed of and be involved in pending or anticipated litigation.

In assessing whether communications with such parties remain privileged, counsel would be well advised to consider both the jurisdiction they are litigating in and whether the common interest doctrine may offer enhanced protection, even if the parties fail to include their lawyer.

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