Professional Perspective

Common Interest Doctrine as Litigation Tool

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Despite its advanced age, the common interest doctrine is an oft-overlooked tool in the belt of the California attorney. It is as versatile as it is old, finding its application in both criminal and civil forums, but divining its contours remains stubbornly difficult. Without a firm grasp of the common interest doctrine, practitioners on both sides of the aisle—members of the plaintiffs' and defense bar, alike—are too often prone to produce communications between counsel and third parties during discovery under the mistaken belief that such communications are rarely or never protected from disclosure.

This article spotlights this powerful but often misunderstood, or forgotten, tool by explaining what it is not—a standalone "privilege"—then illustrating how the doctrine is applied to attorney-client communications and attorney work-product in general before concluding with the doctrine's application to "affiliated" corporate entities.

Formation

Over 130 years ago, the Virginia Supreme Court was the first court to recognize a "joint defense privilege" by protecting from disclosure communications among multiple defense counsel and defendants who faced conspiracy charges. *OXY Resources California LLC v. Superior Court*, (2004) 115 Cal.App.4th 874, 888. Since that time, the concept of joint defense has expanded to include plaintiffs, parties in civil actions, parties who oppose one another in a case but are able to join forces on a particular issue of common interest, and parties who are not yet engaged in litigation but who coordinate efforts to avoid litigation even before litigation is foreseeable.

Because it no longer applies only to defendants, the more inclusive terminology of "common interest" more accurately describes what was originally purely a "joint defense" concept.

Divining the contours of the common interest doctrine is difficult, as the doctrine is a bit nebulous. See *Roush v. Seagate Technology, LLC*, (2007) 150 Cal.App.4th 210, 225 ("So far as we know, there is no talismanic method by which parties must prove that a common interest exists so as to eliminate the waiver otherwise created by a third party disclosure.") Most case law regarding the common interest "privilege" comes from federal law, because the federal courts have leeway to create and expand privileges through common law, whereas California courts are not free to create new privileges and instead must apply only those privileges which have been created by statute. *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 99.

Federal cases are not particularly helpful in understanding the application of the common interest doctrine as applied in California because there is no statute providing for a common interest "privilege" in the state. See *Oxy Resources*, 115 Cal.App.4th at 889 ("The 'joint defense privilege' and the 'common interest privilege' have not been recognized by statute in California"); see also, *Raytheon Co. v. Superior Court*, (1989) 208 Cal.App.3d 683, 689 ("There is no 'joint defense privilege' as such in California …").

Instead, over time, the California courts have evolved a "doctrine," which is similar—but not identical—to its federal cousin. For this reason, we must avoid reading too much into the federal case law regarding the common interest "privilege," because where the federal courts have created a "privilege," the California Courts have only a "doctrine." In California, therefore, we describe the principle as either the "common interest doctrine," or the "joint defense doctrine." For purposes of this article, we use "common interest doctrine."

As a 'Non-Waiver' Doctrine

There appears to be a temptation by courts and litigants alike to think of the common interest doctrine as an extension of the attorney-client privilege, or attorney work-product doctrine, when in fact it is best to think of the common interest doctrine as a "non-waiver doctrine." The common interest doctrine is not an independent privilege, but a doctrine specifying circumstances under which disclosure to a third party does not waive privileges.

It does not refer to an expanded attorney-client relationship encompassing all parties and counsel who share a common interest. *Citizens for Ceres v. Superior Court*, (2013) 217 Cal.App.4th 889, 914; see also *Oxy Resources*, 115 Cal.App.4th at

889—"The common interest doctrine is more appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine."

As Applied to Privileged Communications

The common interest doctrine allows for the disclosure between parties, without waiver of privileges, of communications that are protected by the attorney-client privilege or the work product doctrine, when the disclosure is necessary to accomplish the purpose for which the legal advice was sought. It is not enough to simply demonstrate that a confidential communication took place between parties who purportedly share a common interest.

Instead, the party seeking to invoke the doctrine must first establish that the communicated information is independently privileged and protected from disclosure. Only then can the invoking party analyze whether disclosing the information to a party outside the attorney-client relationship waived the applicable privilege. *Oxy Resources*, 115 Cal.App.4th at 890.

Consider a scenario in which a plaintiff has sued multiple affiliated entities for the violation of various employment statutes, including wrongful termination. This plaintiff has sued not only their direct employer but also the direct employer's parent company and other affiliated entities. When counsel is retained by the direct employer to defend the employer against this suit, perhaps they see that there were pre-termination communications between in-house counsel of the direct employer, and counsel for those other affiliated entities about the plaintiff and the decision to terminate their employment. Those communications are pre-litigation communications between attorneys representing different clients—are they protected from disclosure?

To answer this question, we turn to the controlling law regarding waiver of privilege by disclosure. The common interest doctrine finds its roots in *Evidence Code* sections 912 and 952. *Evidence Code* § 912(d) states that the disclosure of a privileged communication, when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted, is not a waiver of the privilege. *Evidence Code* § 952 allows for the disclosure of confidential information to those "to whom disclosure is reasonably necessary for … the accomplishment of the purpose for which the lawyer is consulted."

Decisions handed down over the past decade have consistently identified two ways the disclosure of a privileged communication to a third party may not destroy the privileged nature of the communication under sections 912(d), and 952. The first method is where the third party has no interest of their own in the matter, but a litigant must disclose a confidential communication to the third party because the third party is an agent or assistant who will help to advance the litigant's interests. See *Citizens for Ceres,* 217 Cal.App.4th at 915. This category of disclosure includes the communication of privileged information to an expert or an appraiser. See Cal. L. Revision Comm'n Reports, *Evid. Code* § 912.

The second and more relevant category of disclosure is where the third party is not in any sense an agent of the litigant or attorney but is a person with interests of their own to advance in the matter; interests that are in some way aligned with those of the litigant. See *Behunin v. Superior Court*, (2017) 9 Cal.App.5th 833, 846. For parties with common interests to protect communications, they must have in common an interest in securing legal advice related to the same matter, and the communications must be made to advance their shared interest in securing legal advice on that common matter.

See *Roush,* 150 Cal.App.4th at 223—"litigants may nevertheless disclose confidential information without waiving the attorney-client privilege when the disclosure is to 'those who are present to further the interest of the client in the consultation' or is 'reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.'"; *Citizens for Ceres,* 217 Cal.App.4th at 916—"The privilege survives disclosure to a party with a common interest only if it is necessary to accomplish the privilege holder's purpose in seeking legal advice."

In addition, it is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential. If a disclosing party does not have a reasonable expectation that a third party will preserve the confidentiality of the information, then any applicable privileges are waived. *Oxy Resources*, 115 Cal.App.4th at 891.

The communications subject to the attorney-client privilege, and thus subject to the common interest doctrine, need not be related to a "litigation." In fact, they can be pre-litigation communications, or they can be unrelated to litigation at all, such as communications during the course of a commercial transaction. See *STI Outdoor v. Superior Court*, (2001) 91 Cal.App.4th 334, 340-41—"We are not persuaded that the attorney-client privilege is limited to litigation-related-communications."

As a Burden-Shifting Device

The common interest privilege alters the usual burden of proof associated with attorney-client communications. Normally, whenever a party claims that a communication is protected by the attorney-client privilege, the communication is presumed to be so privileged, and the opponent of the claim of privilege has the burden of proof to establish that the communication was in fact not confidential. *Behunin v. Superior Court*, (2017) 9 Cal.App.5th 833, 844.

However, this normal allocation of burden is lost when the subject communication is disclosed to a third party. When a third party is present, no presumption of confidentiality is applied, and the usual allocation of burden of proof, resting with the proponent of the privilege, applies in determining whether confidentiality was preserved under Evid. Code § 952. In other words, although the protection of the attorney-client privilege is absolute, the protection afforded by the common-interest doctrine is qualified, because it depends on the content of the communication and the circumstances in which it was made. *Seahaus La Jolla Owners Ass'n v Superior Court*, (2014) 224 Cal.App.4th 754, 775.

As Applied to Attorney Work-Product

The common interest doctrine applies not only to privileged communications, but also to protected attorney work-product. See *Citizens for Ceres,* 217 Cal.App.4th at 916–"the same considerations [pertaining to waiver of privileged communications] apply to waiver or nonwaiver of the work-product doctrine."; *Oxy Resources*, 115 Cal.App.4th at 891. The attorney work-product doctrine is codified at Code Civ. Proc. § 2018.030, which provides: "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." Code of Civ. Proc. § 2018.030(a).

Like the attorney-client privilege, the attorney work-product doctrine is waived by disclosure of the confidential or privileged information to an uninterested third party. *Oxy Resources*, 115 Cal.App.4th at 891 (citing 2 Jefferson, Cal. Evidence Benchbook (3d ed. 2003) § 41.6 and *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1261). However, under the common interest doctrine, "an attorney can disclose work product to an attorney representing a separate client without waiving the attorney work product privilege if the disclosure relates to a common interest of the attorneys' respective clients; the disclosing attorney has a reasonable expectation that the other attorney will preserve confidentiality; and the disclosure is reasonably necessary for the accomplishment of the purpose for which the disclosing attorney was consulted." *Meza v. H. Muehlstein & Co., Inc.*, 176 Cal.App.4th 969, 981.

Thus, the disclosure of work product relating to multiple parties' common interests does not result in a waiver so long as there is a reasonable expectation of confidentiality and the disclosure is reasonably necessary to accomplish the means for which the attorney was consulted.

As Applied to 'Related' or 'Affiliated' Corporations

It is by now well-understood that corporations are people too, at least as far as the attorney-client privilege and attorney work-product doctrine are concerned. A corporation is considered a "person" whose confidential communications with its attorney are protected by the attorney-client privilege. Less well-understood is that absent some conflict of interest or some evidence of antagonism among separate and distinct corporate entities, disclosure of counsel's legal opinion to the officers and employees of a company affiliated with the attorney's corporate client, does not waive the attorney-client privileged. See *Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 767.

The attorney-client privilege and attorney work-product doctrine extend to communications, which are intended to be confidential, if they are made to business associates or agents of the party on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant. See *Zurich American Ins. Co. v. Superior Court*, (2007) 155 Cal.App.4th 1485, 1495-96.

For decades, the courts have considered cases involving the disclosure of confidential material to "business associates" and "agents" of client-corporations. The courts have routinely held that the disclosure of privileged communications or materials to the employees or agents of affiliated or related entities of the client-corporation, does not waive the applicable privilege, so long as the disclosure is reasonably necessary to advance the legal interests of the client-company, and so long as the interests of the affiliated or related entities are aligned.

The Bottom Line

Practitioners in all areas of the law would be wise to consider the application of the common interest doctrine to their own cases. Too often, counsel assume that their communications with parties or entities other than their own client are discoverable, particularly when the communication is between counsel for one party and counsel for another party.

In fact, where the interests of the parties align, communications between attorneys of different parties can be shielded from disclosure by the common interest doctrine, thereby adding another layer of protection to the practitioner's thoughts, strategy, frank commentary, and advice.