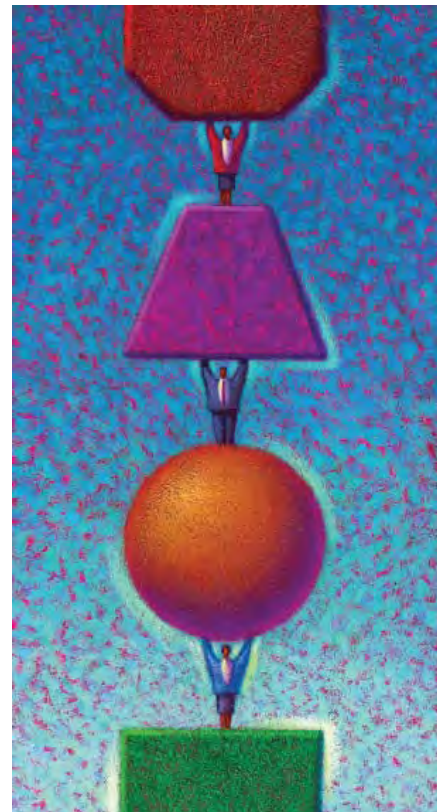


Invoking the Common Interest Privilege in Collaborative Business Ventures

Although many businesses may have vaguely heard of the "common interest privilege," they are often unfamiliar with the particulars of that privilege and hesitant to rely upon it. Fortunately, courts have recently examined and fleshed out the contours of the common interest privilege. Companies should thus now be able to engage in collaborative business ventures knowing whether or not the privilege will protect their communications from disclosure.

By Gregory B. Mauldin



It is common practice for companies to engage in collaborative business ventures with suppliers, customers, and sometimes even competitors. The law may permit these collaborations, but what is less well known is the extent to which the collaborators' communications are protected by the "common interest privilege." This article distills recent cases addressing the common interest privilege, and provides a framework for understanding when the privilege protects and does not protect communications between companies engaged in ventures with other businesses.

Before addressing the particular features of the modern-day common interest privilege, which is sometimes called the "community of interest privilege," it is first important to understand generally what the privilege covers. At its core, the common interest privilege "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." *Teleglobe USA Inc. v. BCG Inc. (In re Teleglobe Commc'ns Corp.)*, 493 F.3d 345, 364 (3d Cir. 2007). This is distinct from what is known as the "co-client" privilege, which refers to situations in which a single attorney represents multiple clients in the same matter. See *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 219 (W.D. Ky. 2006); *In re Teleglobe*, 493 F.3d at 363 n.18.

The common interest privilege is also different from the "joint defense" privilege, which typically refers to situations in which defendants *in litigation* "enter into written joint defense agreements in an effort to assure that information shared among the attorneys for each of the defendants will remain privileged despite the sharing." *Broessel*, 238 F.R.D. at 219 (citing Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 201 (4th ed. 2001)). The

common interest privilege, by contrast, is available outside of litigation, even "in purely transactional contexts" for joint venturers. *In re Teleglobe*, 493 F.3d at 364; see also *United States v. BDO Seidman LLP*, 492 F.3d 806, 816 (7th Cir. 2007), cert. denied, 128 S. Ct. 1471 (2008) ("Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication, ... [and should be protected by the common interest privilege].").

For many years, courts were not careful when distinguishing between common interest, co-client, and joint defense privileges and often cobbled them together loosely or referred to them as if they were the same privilege. But the trend in the past decade has been to separate the various privileges, so that by now there is a fairly thorough and consistent precedent assessing the aspects of the common interest and other similar privileges. The following presents an analysis of the case law concerning the common interest privilege and its applicability to business collaborations.

To Be Protected Under the Common Interest Privilege, Intercompany Communications Must First Qualify as Attorney-Client Privileged Communications

Central to understanding the common interest privilege is the initial realization that it is an extension of the attorney-client privilege. E.g., *BDO Seidman*, 492 F.3d at 815; *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). Courts permit the disclosure of confidential attorney-client communications to third parties without waiving the privilege. E.g., *La. Mun. Police Employees Retirement Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 309 (D.N.J. 2008). As such, all the requisite elements of the attorney-client privi-

lege—namely, a communication between lawyer and client that is confidential and made for the purpose of seeking or obtaining legal advice—must first be satisfied to qualify for the common interest privilege. See, e.g., *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002); *Schwimmer*, 892 F.2d at 243–44. A lengthy discussion of the attorney-client privilege is unwarranted in this article, but an analysis of how the attorney-client privilege affects the common interest privilege is helpful, because it does so in a variety of unique ways.

First, to qualify for the common interest privilege, it is essential that *each group member have his or her own legal counsel*. Numerous courts have stressed this necessity of independent and separate legal counsel. For example, in 2008, the Fourth Circuit held that no common interest existed between parties to a business collaboration, because they had “failed to establish [they] were represented by separate legal counsel engaged in a joint strategy.” See *United States v. Okun*, 281 Fed. App’x 228, 231–32 (4th Cir. 2008). Similarly, in 2007, the Third Circuit observed that the common interest “privilege only applies when clients are represented by separate counsel.” *In re Teleglobe*, 493 F.3d at 365. Several district courts have also rejected common interest privilege claims when one or more parties did not have their own legal counsel. See, e.g., *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass. 2001), aff’d, 284 F.3d 236 (1st Cir. 2002) (“Under the strict confines of the common-interest doctrine, the lack of representation for the remaining parties vitiates any claim to privilege.”); *Libbey Glass Inc. v. Oneida Ltd.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999) (refusing to extend common interest privilege when “only one participant used the services of counsel”); see also *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 18 (E.D.N.Y. 1996) (“The [common interest] doctrine is limited to situations where multiple parties are represented by separate counsel but share a common interest about a legal matter.”). Accordingly, any prospective business collaborator wishing to protect intercompany communications under the common interest privilege should first insist that *all* members of the collaborative group engage *separate* legal counsel.

Second, to be protected from disclosure *communications must be with legal counsel*. Because the common interest privilege extends from the attorney-client privilege, courts have naturally limited the protection of the common interest privilege to communications with attorneys. As the Second Circuit declared, the common interest doctrine “serves to protect the confidentiality of communications passing from one party to the attorney for another party.” *Schwimmer*, 892 F.2d at 243; see also *Walsh*, 165 F.R.D. at 18 (the common interest doctrine only “protects confidences shared by one party with the attorneys of another party”). Courts, in turn, have also refused to shield from disclosure direct communications between various group members who are not attorneys. As the Third Circuit recently observed, “to be eligible for continued protection, the 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.” *In re Teleglobe*, 493 F.3d at 364 (citation

omitted). Thus, companies should ensure that attorneys are present if they want their communications to be protected from disclosure by the common interest privilege.

Third, *the group’s common interest must be legal in nature*. Although some courts have held that a group’s common interest “may be ‘either legal, factual, or strategic in character,’” *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (citation omitted), the overwhelming weight of authority holds that the common interest privilege applies only when the members are pursuing a common legal interest, as opposed to a business interest. See *BDO Seidman*, 492 F.3d at 815–16 (“the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest”); *In re Teleglobe*, 493 F.3d at 365 (“members of the community of interest must share at least a substantially similar legal interest”). Indeed, the most frequently cited basis for refusing to apply the common interest privilege to intercompany communications is the companies’ inability to articulate a cognizable legal concern addressed by their communications. See, e.g., *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) (affirming no common interest when there was no “common interest about a legal matter”); *Nidex Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 580 (N.D. Cal. 2007) (holding that the communication was designed “to further a commercial transaction” and “did not further a common legal strategy”); *Bank of Am. N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 498 (S.D.N.Y. 2002) (“the parties’ agreement was not made to achieve some legal goal ... but rather to embark on a commercial venture”); *Libbey Glass*, 197 F.R.D. at 349 (the party “sought commercial gain, not legal advantage, through disclosure of its lawyer’s advice” to a third party); *Walsh*, 165 F.R.D. at 19 (concluding that, although “[t]here was undoubtedly a concern about litigation,” that concern did “not transform their common interest and enterprise into a legal, as opposed to commercial, matter”); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (group members presented “no evidence that they formulated a joint legal strategy”).

The decision by the Southern District of New York in *Bank of Am. N.A. v. Terra Nova Ins. Co.* at 493, 497 (S.D.N.Y. 2002), is a good representation of the problems companies run into when convincing courts that they have a viable common legal interest. In that case, Bank of America and an insurance company had entered into letter of credit agreements pursuant to which the bank extended letters of credit to the insurance company. Bank of America and the insurance company were represented by separate legal counsel in structuring and effectuating the letter of credit agreements. The bank’s legal counsel was subsequently served a subpoena duces tecum requiring the law firm to produce documents concerning the agreements. In response, Bank of America claimed that certain communications between the bank, its law firm, the insurance company, and the insurance company’s law firm were privileged under the common interest doctrine.

The Southern District of New York rejected that claim, concluding that the “structuring and effectuating” of the letter of credit agreements was designed “to achieve a

commercial goal,” not a legal goal, and that the “only apparent ‘legal’ aspect to the venture was a desire that the transaction be legally appropriate.” *Id.* at 497. The court went on to conclude that “[i]t was of no moment that the parties may have been developing a business deal that included as a component the desire to avoid litigation.” *Id.*

One might ask how any *business* transaction could be considered sufficiently *legal* to be protected by the common interest privilege. The answer is that most courts do not require the legal concern to be the exclusive basis for the communication. Instead, courts usually provide protection if the parties can show that a legal concern was the “predominate” basis for the communication. See *Allied Irish Banks PLC v. Bank of Am. N.A.*, 252 F.R.D. 163, 171 (S.D.N.Y. 2008) (“The [common] interest must be ‘primarily or predominantly legal rather than commercial.’”) (citation omitted); see also *Dura Global, Techs. Inc. v. Magna Donnelly Corp.*, No. 07-cv-10945-DT, 2008 WL 2217682, at *3 (E.D. Mich. May 27, 2008) (applying common interest privilege despite “overlap between the legal issues ... and the larger business venture” when communications were “made in connection with a common legal strategy” to deal with “intellectual property issues”). Thus, to shield a document from disclosure pursuant to the common interest doctrine, a company must be able to explain persuasively both the legal concern addressed in the communication and why that concern was the predominant purpose for the communication. Even then, parties should be wary that a skeptical court might conclude that business concerns, rather than legal ones, drove the communication.

Fourth, *companies need more than a vague fear of litigation* to meet the requisite “legal” concern requirement of the common interest doctrine. Put another way, companies should be able to articulate a specific and concrete legal concern addressed by their communications. Otherwise, a court might be apt to conclude that the group’s legal concern was merely ancillary to their business objective. See, e.g., *Bank Brussels Lambert*, 160 F.R.D. at 447 (the common interest doctrine “does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation”); *Libbey Glass*, 197 F.R.D. at 349 (“All parties apprehended that their venture involved some legal risk, but that apprehension was merely a part of their larger endeavor.”); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 525 (D. Conn. 1976) (“Unless the interests of the parties are demonstrably common ... the risk of shared exposure must at least be sufficiently substantial to have prompted the third party’s lawyer to counsel his client regarding the prospective hazard.”) (citation omitted).

On the other hand, the common interest privilege does not require companies to conjure up complicated legal concerns; group members’ common interest in complying with a particular law usually suffices. See, e.g., *BDO Seidman*, 492 F.3d at 816 (holding “[joint venturers] shared a common legal interest ‘in ensuring compliance with the new regulation issued by the IRS,’ and in making sure that they could defend their product against potential IRS enforcement actions”) (citation omitted); *In re the Regents of the Univ. of Cal.*, 101 F.3d 1386, 1391 (Fed. Cir. 1996) (applying common interest

privilege to patent prosecution context after observing that public interest is served by encouraging “compliance with law and meeting legal requirements”); *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417 (N.D. Ill. 2006) (stating that parties “shared a common legal interest regarding compliance with antitrust and other laws”). In short, the ability to point to a specific and cognizable law and/or legal concern addressed by the group’s communication greatly improves the chances that a court will protect the communication under the common interest doctrine.

Fifth, *establishing the threat of litigation is generally not necessary* to invoke the common interest privilege. Indeed, the vast majority of courts, including at least four federal courts of appeal, has ruled that communications need not be made in anticipation of litigation or that litigation need not be actual or imminent for the common interest doctrine to apply. See *Schwimmer*, 892 F.2d at 244; *BDO Siedman*, 492 F.3d at 816; *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), *aff’d in part and vacated in part on other grounds*, 491 U.S. 554 (1989); *In re Regents*, 101 F.3d at 1390–91.

There is one notable exception, however, to this trend. The Fifth Circuit has repeatedly concluded that parties must prove the threat of litigation to qualify for protection under the common interest privilege. See, e.g., *In re Santa Fe Int’l Corp.*, 272 F.3d 705, 711 (5th Cir. 2001) (“there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation”); *United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002) (“a cognizable common legal interest does not exist if a group of individuals seeks legal counsel to avoid conduct that might lead to litigation, but rather only if they request advice to ‘prepar[e] for future litigation.’”) (quoting *Santa Fe*, 272 F.3d at 713).

Moreover, multiple federal courts directly or indirectly appear to stress that anticipated litigation (or lack thereof) is helpful to demonstrate a cognizable legal concern (or lack thereof) for the communication. See *Memry Corp. v. Ky. Oil Tech. N.V.*, No. C04-03843, 2007 WL 832937, at *1 (N.D. Cal. Mar. 19, 2007); *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003); *Bank of Am.*, 211 F. Supp. 2d at 496–98; *Rayman v. Am. Charter Fed. Sav. & Loan Ass’n*, 148 F.R.D. 647, 654 (D. Neb. 1993); *SCM*, 70 F.R.D. at 513. Accordingly, although demonstration of a palpable threat of litigation may not be necessary outside of the Fifth Circuit, doing so will improve the chances that a court will protect the joint communications under the common interest privilege. (Keep in mind that the duty to preserve relevant documents may be triggered by the threat of litigation. Similarly, it is wise to check with securities counsel on any corresponding obligation to report anticipated litigation.)

There Are Multiple Other Keys to Seeking Protection Under the Common Interest Privilege

In addition to meeting all requirements related to the attorney-client privilege described above, companies must clear numerous other hurdles in an effort to shield communications from discovery pursuant to the common interest doctrine. These hurdles are more practical in nature, but they are no less important.

First, *all group members should share an identical, or nearly identical, common interest.* As its name implies, the common interest privilege mandates that group members have a “common” interest to qualify for protection. Courts have disagreed somewhat on the extent to which the group members’ interests need to align. There are three main camps. Some courts have ruled that the respective interests must be completely “identical.” See *In re JP Morgan Chase & Co. Sec. Litig.*, No. 1783, 2007 WL 2363311, at *4 (N.D. Ill. Aug. 13, 2007) (“This common interest ... must be ‘identical, not simply similar’”) (quoting *Dexia Credit Local v. Rogan*, 231 F.R.D. 287, 293 (N.D. Ill. 2005)); *Bank of Am.*, 211 F. Supp. 2d at 498 (refusing to apply the common interest privilege when “parties’ interests, while similar, were not identical with respect to th[e] venture”); *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985) (“[t]he key consideration is that the nature of the [parties’ common] interest be identical, not similar”) (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974)). Other courts have relaxed the stringent identical interest requirement but still require that the interests be substantially similar or nearly identical. See *In re Teleglobe*, 493 F.3d at 365 (requiring “substantially similar” legal interests); *In re Regents*, 101 F.3d at 1390–91 (same); *Cavallo*, 153 F. Supp. 2d at 60 (permitting common interests that are “nearly identical”). Finally, a small number of courts have been very lenient on the requirement that the interests be identical. See *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003) (noting a “complete unity of interests among the participants” is not required); *La. Mun. Police*, 253 F.R.D. at 310 (stating that an “identical” legal strategy is “beside the point” because “[a]ll of the participants interests ‘need not coincide’”) (quoting Paul Rice, *Attorney-Client Privilege in the United States* § 4:36 (2007)).

In any event, parties are well advised to assess their respective interests and to expect protection by the common interest privilege only to the extent the parties can prove that their communications are related to an identical interest. The parties must also ensure that *all* members of the group share that interest. *In re Teleglobe*, 493 F.3d at 364.

Second, companies need to keep in mind that *arm’s-length business transactions generally do not qualify for the common interest privilege.* In contrast to *collaborative* business ventures, companies engaged in arm’s-length transactions (mergers, for example) are usually deemed to be adverse to one another and *not* protected by the common interest privilege. See *Nidex*, 249 F.R.D. at 579 (concluding that common interest privilege does not “extend[] generally to disclosures made in connection with the prospective purchase of a business”); *In re JP Morgan Chase*, 2007 WL 2363311, at *5 (finding no common interest before the merger because the organizations “stood on opposite sides of a business transaction” and were thus “in conflict,” even though they may have “each desired the merger negotiations to come to fruition”); *SCM*, 70 F.R.D. at 513 (“the parties were not commonly interested, but adverse, negotiating at arm’s length a business transaction between themselves”); see also *Bank of Am.*, 211 F. Supp. 2d at 497 (“The mere fact that the parties were working together to achieve

a commercial goal cannot by itself result in an identity of interest between the parties. Here, each party had an interest in making the terms of the transaction as favorable as possible to itself.”) (Citation omitted.)

That is not to say that parties transacting at arm’s length may never qualify for protection under the common interest doctrine. In fact, a couple of courts have protected communications between transacting companies under the common interest privilege. See *La. Mun. Police*, 253 F.R.D. at 310 (holding that “privileged information exchanged during a merger between two unaffiliated business[es] would fall within the common-interest doctrine”) (quoting *Cavallo*, 153 F. Supp. 2d at 61); see also *Rayman*, 148 F.R.D. at 654; *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 311 (N.D. Cal. 1987). A review of these cases, however, shows that the parties engaged in the transaction were keenly aware of looming litigation and that sharing privileged information concerning that litigation was essential to finalizing the transaction. See, e.g., *Rayman*, 148 F.R.D. at 654 (noting that, “at the time negotiations were proceeding, it must have been apparent to both [parties] that if the merger were completed, [the purchaser] would be defending this action”). Thus, it appears that communications between parties conducting arm’s-length business transactions will usually not be shielded from discovery, except perhaps when the prospect of litigation is obvious and the sharing of privileged communications is required to complete the transaction.

Third, companies seeking protection under the common interest doctrine should *execute a written agreement evidencing their common legal interest.* This step may seem formalistic, but all groups seeking protection under the common interest privilege are well advised to have a written agreement that documents their collective decision to invoke the privilege. See generally *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999) (affirming the party’s refusal to find an implied joint defense agreement). The written agreement should have at least the following characteristics:

- The agreement should limit or omit references suggesting a solely commercial interest among the respective group members. See *Walsh*, 165 F.R.D. at 19 (stating that a written agreement made “plain” that the common interest was a “business, not a legal, enterprise”).
- The agreement should limit or omit references suggesting adverse or unaligned interests among the respective group members. See *Bergonzi*, 216 F.R.D. at 496–97 (concluding that a confidentiality agreement did not demonstrate aligned interests).
- The agreement should explicitly state that the group members intend to seek legal advice from each other’s counsel. See *Bank of Am.*, 211 F. Supp. 2d at 498 (refusing to apply common interest privilege after observing that there was no “agreement that explicitly provided that the parties would be seeking advice from each other’s counsel”).
- The agreement should express the specific legal issues and concerns sought to be addressed by the group. See *Walsh*, 165 F.R.D. at 19 (citing as a basis for rejecting the

application of common interest privilege the fact that the parties' agreement did not identify any legal concerns).

- The agreement should identify the date when the collaborative effort commenced. *See Bank of Am.*, 211 F. Supp. 2d at 498 (observing that the "Common Interest/Joint Prosecution and Defense Agreement" showed that the parties had no agreement in place until after the purported common interest started).
- The agreement should seek to prevent disclosure of only privileged communications. *See Grider v. Keystone Health Plan Cent. Inc.*, No. 2001-CV-05641, 2007 WL 2852334, at *1 n.1 (E.D. Pa. Sept. 20, 2007) (later vacated) (refusing to apply common interest privilege because the group's joint defense agreement sought to withhold nonprivileged information from discovery).
- For reasons given below, the agreement should contain provisions for protecting the confidentiality of all privileged communications.

Fourth, the group members should *take affirmative steps to protect confidentiality*. Courts have stressed that demonstrable steps taken by the group to protect the confidentiality of privileged intercompany communications will support application of the common interest privilege. *See, e.g., Hewlett-Packard*, 115 F.R.D. at 309 (applying common interest privilege after noting that a group member took "substantial steps to assure that [the other member] maintained the confidentiality of the [communication]"); *United States v. United Techs. Corp.*, 979 F. Supp. 108, 112 (D. Conn. 1997) (applying the common interest doctrine in part because the consortium proved the "documents were disclosed only to persons 'who share[d] responsibility for the subject matter underlying the consultation'" (citation omitted). Conversely, the lack of any demonstrable attempt by the group to ensure confidentiality might cause a court to not protect the communications. *See, e.g., Libbey Glass*, 197 F.R.D. at 348 ("refusing to extend the common interest privilege to situations where no efforts were taken to acknowledge and protect the privileged status of the shared communications"); *Memry*, 2007 WL 832937, at *1 (declining to apply common interest privilege because the party "ma[de] no showing that the disclosure of the [communication] was conducted under strict standards of confidentiality").

Therefore, companies seeking to protect their communications by invoking the common interest privilege should take measures to maintain the confidentiality of privileged communications. Among other things, companies should do the following:

- limit the number of copies of a written communication,
- limit the recipients of any communication,
- instruct recipients to not copy or forward a written communication, and
- require that all written communications be returned to the company's legal counsel.

Fifth, companies should be aware that group members cannot unilaterally waive the common interest privilege. Indeed, courts encourage reliance on the common interest

privilege by holding that waiver of the privilege requires the consent of all group members. *See BDO Seidman*, 492 F.3d at 817 ("[T]he privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties. ..."). Accordingly, members of a group that share a common interest have some protection if any individual member attempts to use the privileged information in subsequent litigation.

Finally, companies contemplating the protection of the common interest privilege should know that *certain contexts cut in favor and others against application of the common interest privilege*. For example, courts seem to apply the common interest privilege in intellectual property cases more readily. *See, e.g., In re Regents*, 101 F.3d at 1390-91; *Hewlett-Packard*, 115 F.R.D. at 311; *see also* 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 275 (5th ed. 2007) (observing that courts generally find a common interest in the area of patent law). On the other hand, courts and commentators have suggested that application of the common interest privilege is less warranted—or even not warranted—in antitrust cases. *See* 1 Epstein, *supra* at 277 (stating that "corporate attorneys representing multiple clients ... in an antitrust context" is "precisely" the context where "the potential for abuse is greatest"); *In re Santa Fe*, 272 F.3d at 711 (refusing to apply common interest privilege "between one horizontal competitor and another" in an antitrust conspiracy case); *Duke Energy*, 214 F.R.D. at 388 (stating that "no one has ever made a convincing argument that strategy sessions among [antitrust] co-defendants produce a benefit to the legal system that outweighs the cost of the loss of evidence to the courts") (quoting 24 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5493 (1986 Supp. & 2003)); *SCM*, 70 F.R.D. at 513 (declining to apply common interest to "the possibility of shared exposure to antitrust liability"). *But see In re Sulfuric Acid*, 235 F.R.D. at 417 (finding common interest in "compliance with antitrust" laws).

In short, counsel should assess the types of lawsuits and claims that might arise with respect to the assertion of the common interest privilege. The results of that research may counsel for or against the decision to rely upon the privilege.

Conclusion

Although the parameters of the common interest privilege are somewhat unresolved and vary by court (and sometimes within courts), an array of recent cases generally shows that courts are embracing the common interest privilege and increasingly construing it in similar fashion. The foregoing article hopes to have shed some light on those cases and thereby assisted lawyers and clients in deciding whether to seek protection provided by the privilege and how to do so. **TFL**

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