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Teamwork Can Sometimes Make the Dream Work: How to Properly Maintain the Protections of Common Interest Doctrine in North Carolina

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Parties to a lawsuit often find themselves on the 'same side of the courtroom' as other entities or individuals. In these instances, where a party is one of multiple (or many) co-plaintiffs or co-defendants, it is often advantageous to work collaboratively while navigating the legal battleground presented by litigation.

When done correctly, the principles of common interest doctrine protect the confidentiality of information and communications exchanged in a collaborative effort. However, to maintain this protection, lawyers for each party must proceed with extra caution. This article will review the landscape of common interest doctrine in North Carolina and provide practice tips to help keep lawyers and their clients within the bounds of its guardrails.

Common Interest Doctrine in North Carolina

The doctrine of common interest allows parties with a shared legal interest to preserve confidentiality while collaborating in pursuit of their joint interest. The doctrine is most frequently utilized in lawsuits with multiple defendants. Typically, the defendants will enter into an agreement that is intended to facilitate the joint or collective exchange of documents, to communicate about strategy, and to otherwise coordinate on litigation activities such as discovery. Common interest doctrine is an exception to the waiver of attorney-client privilege that, without the agreement, very probably results when such information or communications exchanged between an attorney and client are disclosed to a person who is a stranger to the relationship. When applicable and properly used, the common interest doctrine effectively extends the attorney-client privilege to the parties to the agreement. *SCR-Tech, LLC v. Evonik Energy Servs. LLC*, 2013 WL 4134602, *6 (N.C.B.C. 2013) ("the common-interest doctrine extends the protection of the attorney-client privilege only to communications between parties sharing a common interest about a legal matter."); *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 247 N.C. App. 641, 648, 788 S.E.2d 170, 177 (2016) ("common interest doctrine does not recognize an independent privilege, but is 'an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information [to] a third party.'") (citing *United*

States v. Schwimmer, 892 F.2d 237, 243-46 (2d Cir. 1989).

A party seeking to avail itself of the benefit of the common interest doctrine must: "(1) share a common [legal] interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential." *Friday Invs.*, 247 N.C. App. at 648, 788 S.E.2d at 177. North Carolina courts make a distinction between parties who share a common *legal* interest and those who share a common *business* interest. *Id.* 247 N.C. App. at 649, 788 S.E.2d at 177; *see also, SCR-Tech*, 2013 WL 4134602 at *6 ("A party seeking to rely on the common interest doctrine must demonstrate that the specific communications at issue were designed to facilitate a common *legal* interest; a business or commercial interest will not suffice."); *and In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005) ("For the privilege to apply, the proponent must establish that the parties had 'some common interest about a legal matter.'").

In *SCR-Tech*, the North Carolina Business Court held that the parties shared a common legal interest when they were both defendants in the same lawsuit. *SCR- Tech*, 2013 WL 4134602 at *7. However, the parties shared merely a common *business* interest when one party, SCR-Tech, became the plaintiff in a secondary lawsuit where the other party, Ebinger, was not a litigant and had no discernable or real legal interest. *Id.* ("communications intended solely to facilitate SCR–Tech's pursuit of its claims in the present lawsuit may relate to a common business interest, but do not rise to a level of shared legal interest adequate to support a common interest privilege.").

There is no bright-line rule in North Carolina for determining whether common interest will apply. Courts engage in a fact-specific analysis when the doctrine is asserted. *Friday Invs.*, 247 N.C. App. at 648, 788 S.E.2d at 176. Corporate affiliation between the parties asserting common interest privilege is not required but may be considered as a factor by the court. *SCR-Tech,* 2013 WL 4134602 at *4 ("The common interest doctrine depends more on common legal interests between the separate entities, although the fact of corporate affiliation between them can factor into the analysis of that common legal interest."). What is important—indeed essential—is a shared legal interest in what is at issue.

Key Practice Tips

To ensure that a court recognizes a common interest arrangement with another person or entity, lawyers should carefully adhere to the guidelines set forth in precedential opinions concerning the doctrine. Here are four main takeaways from North Carolina's jurisprudence on this topic:

First, although not technically required, parties will be well served to memorialize their agreement in writing. *Friday Invs.*, 247 N.C. App. at 648, 788 S.E.2d at 177 ("Although prudent counsel would always put a representation agreement in writing, there is no requirement that the agreement be in writing."). Establishing the existence of a commitment to collaborate on a matter of shared legal interest may be very difficult without a clear written agreement spelling this out concisely.

Second, lawyers should mark all information exchanged and communication amongst each other as "Common Interest Privilege: Joint Interest Communication" (or with some similar declarative admonition). This will make clear the intent to apply the doctrine, exercise the privilege, and help ensure that confidential information and communications exchanged are not inadvertently produced or, if they are, are not reviewed without resolution by the court of the assertion of applicability of the doctrine and exercise of the privilege.

Third, to the extent possible, lawyers should make sure that attorneys are involved in all exchanges of information and communications. Further, people and entities who are not parties to the agreement should not be involved. For example, although Lawyer A may need some factual information from Client B, it is best

for Lawyer A to request that information directly from Lawyer B. Alternatively, Lawyer A should at least copy (or otherwise include) Lawyer B in his or her communications with Client B. Parties who are not included in the common interest relationship should not be involved in the exchange of information or communications.

Finally, lawyers must preserve the privilege created by the doctrine by objecting to discovery requests when warranted. Since the doctrine is just an exception to the general rules governing the waiver of attorney-client privilege, the related privilege can still be easily waived if not properly asserted and protected. When required, information exchanged, and communications that are subject to the doctrine and privilege properly should be included on a privilege log.

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 For further information regarding the issues described above, please contact Payton R. Collier or Donalt J. Eglinton.