

TOO LITTLE IN COMMON: ADDRESSING THE INCONSISTENCY OF THE COMMON INTEREST PRIVILEGE

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INTRODUCTION

Plaintiff sues Defendants A, B, and C, alleging the same claims against all three Defendants. Upon receiving notice of the lawsuit, each of the three Defendants retain separate attorneys to represent them (Attorneys A, B, and C). After reviewing the allegations in Plaintiff's complaint, Attorney A decides it would be in the best interest of her client for the three Defendants to develop a joint strategy in defense of the lawsuit. With Defendant A's approval, Attorney A contacts Attorneys B and C to discuss this approach with their respective clients. Once Defendants B and C approve, Attorneys A, B, and C share confidential information protected by the attorney-client privilege obtained from their respective clients. During the discovery process, Plaintiff moves to compel the Defendants to disclose the shared confidential information. How should the court rule on Plaintiff's motion?

The common interest privilege is an extension of the attorney-client privilege which allows parties with a "common interest" to share confidential information without waiving the

attorney-client privilege.¹ However, there are many variations of the doctrine with little-to-no consistency across jurisdictions, and it even goes by a number of different names.² This inconsistency discourages clients from invoking the common interest privilege, which in turn, undermines the purposes of attorney-client privilege.³ As the United States Supreme Court stated in *Upjohn Co. v. United States*:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.⁴

Part I of this Article will provide background information on the common interest privilege, including a general overview of the privilege, its historical development, and a brief description of other problems associated with it. Part II will shift focus to the primary problem surrounding the common interest privilege: how the privilege varies across the United States regarding seven different issues. Part III will discuss three prior attempts to create a model version of the common interest privilege to address this lack of uniformity: (1) Proposed Rule 503(b)(3) to the Federal Rules of Evidence; (2) Rule 502(b)(3) of the Uniform Rules of Evidence; and (3) Section 76 of the Restatement (Third) of the Law Governing Lawyers. Finally, Part IV of this Article will fashion a new model version of the common interest privilege that all state and federal jurisdictions should adopt.

¹ *In re Grand Jury Subpoenas*, 902 F.2d 244, 248-49 (4th Cir. 1990).

² To name a few examples, the doctrine is also commonly referred to as the “joint defense doctrine,” the “community of interest doctrine,” and the “allied litigant doctrine.” See discussion *infra* Section I.C. For the sake of clarity, this Article will refer to the doctrine only as the “common interest privilege.”

³ Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 65 (2005).

⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

I. BACKGROUND

A. *General Overview of the Common Interest Privilege*

The common interest privilege is “an extension of the attorney client privilege.”⁵ The attorney-client privilege applies to “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”⁶ The purposes of the attorney-client privilege are: (1) “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”;⁷ and (2) for the client “to obtain fully informed legal

⁵ *Waller v. Fin. Corp. of America*, 828 F.2d 579, 583 n.7 (9th Cir. 1987). A small number of courts have considered the common interest privilege as an extension of the work product doctrine as well. *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1298-1302 (D.C. Cir. 1980); *AT&T Corp. v. Microsoft Corp.*, No. 02-0164 MHP (JL), 2003 WL 21212614, at *8 (N.D. Cal. Apr. 18, 2003); *Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572, 578 (S.D.N.Y. 1960). Furthermore, Professor Bartel has argued that the common interest privilege should be reconceptualized as its own privilege, separate and distinct from either the attorney-client privilege or the work product doctrine. *See* Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 *FORDHAM L. REV.* 871, 918-25 (1996). For the purposes of this Article, the common interest privilege shall be considered exclusively as an extension of the attorney-client privilege.

⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000). Like the common interest privilege, there is no uniform version of the attorney-client privilege, but there are several commonly accepted iterations in addition to the Restatement formulation. *See also* 5 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2292 (2d ed. 1923) (“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (“The [attorney-client] privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.”). For the sake of clarity and consistency, this Article will use the Restatement formulation of the attorney-client privilege.

⁷ *Upjohn Co.*, 449 U.S. at 389.

advice.”⁸ However, the attorney-client privilege also has the potential effect of impeding the administration of justice by excluding pertinent evidence from the court.⁹

The attorney-client privilege may be waived under a number of circumstances.¹⁰ The primary purpose for waiving attorney-client privilege “is rooted in notions of fundamental fairness . . . to protect against the unfairness that would result from a privilege holder selectively disclosing privileged communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable.”¹¹ For this reason, the disclosure of confidential communications, such as those covered by the attorney-client privilege, to a third party generally waives any claim of privilege to those communications.¹²

However, the common interest privilege operates as an exception to the traditional rule of waiver by disclosure and extends the attorney-client privilege to confidential information shared among clients who have a common interest.¹³ Since the common interest privilege is an extension of the attorney-client privilege, the purposes of the common interest privilege and the attorney client privilege are the same: (1) to encourage the free flow of communication; and (2) to obtain fully informed legal advice.¹⁴ Like the attorney-client privilege, the common interest

⁸ *Fisher v. United States*, 425 U.S. 391, 403 (1976).

⁹ *Id.* (“[S]ince the [attorney-client] privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.”). *See also United Shoe Mach. Corp.*, 89 F. Supp. at 358 (“The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.”).

¹⁰ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 78-80 (AM. LAW INST. 2000).

¹¹ *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996).

¹² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 (AM. LAW INST. 2000). *Accord Genentech, Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997).

¹³ 1 PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35, Westlaw (database updated Dec. 2020).

¹⁴ *Schaffzin*, *supra* note 3, at 62. *See also United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (“The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.”) (citation omitted).

privilege is also burdened by the potential for impeding “the truth-seeking process of the fact-finder.”¹⁵

B. Historical Development of the Common Interest Privilege

The common interest privilege has its origins in the joint defense privilege, a common law doctrine developed for communications made in the context of criminal litigation.¹⁶ Virginia is widely credited with being the first state to recognize the joint defense privilege through the state supreme court’s 1871 opinion in *Chahoon v. Commonwealth*.¹⁷ In *Chahoon*, three co-defendants and their respective attorneys (except for Chahoon’s attorney) met to discuss their defense strategies for the upcoming trials.¹⁸ During Chahoon’s trial, the Commonwealth called one of the other co-conspirators, Sanxay, as a witness to testify about statements made between them at this meeting.¹⁹ In order to discredit Sanxay’s harmful testimony, Chahoon called Sanxay’s attorney as a witness to testify about those same statements, but Sanxay’s attorney refused to testify, claiming that all of the statements made at that joint conference were privileged.²⁰ After Chahoon was convicted, he appealed to the Virginia Supreme Court for consideration of whether the trial court erred in excluding the testimony of Sanxay’s attorney.²¹

The Virginia Supreme Court found that under the circumstances of the case, “it was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel,

¹⁵ Schaffzin, *supra* note 3, at 62.

¹⁶ As discussed *infra* Section I.C, some jurisdictions still refer to the modern common interest privilege as the “joint defense privilege,” even though it is no longer restricted to the criminal litigation context.

¹⁷ William T. Barker, *The Attorney-Client Privilege, Common-Interest Arrangements, and Networks of Parties with Preexisting Obligations*, 53 TORT TRIAL & INS. PRAC. L.J. 1, 18 (2017); Schaffzin, *supra* note 3, at 58; Bartel, *supra* note 5, at 885-86; Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321, 324-25 (1981).

¹⁸ *Chahoon v. Commonwealth*, 62 Va. 822, 835-836 (1871). The three co-defendants were jointly indicted for conspiring to defraud the estate of a decedent and separately indicted for forgery. *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 836.

²¹ *Id.* at 824, 834.

communicate to the latter all that might be deemed proper for them to know, and to make all necessary arrangements for the defence.”²² The Court, then, reasoned that the co-conspirators might have hired one attorney to represent all of them since they were charged with the same crimes, in which case, their communications would have been privileged by the joint-client doctrine.²³ Thus, the Court held:

They had the same defence to make . . . , and the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client. They had a right, all the accused and their counsel, to consult together about the case and the defence, and it follows as a necessary consequence, that all the information, derived by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them.²⁴

As a result, the Court affirmed the trial court’s exclusion of the testimony of Sanxay’s attorney.²⁵

In *Schmitt v. Emery*, the Minnesota Supreme Court extended the joint defense privilege beyond the realm of criminal litigation to co-defendants in civil litigation.²⁶ In *Schmitt*, two drivers were sued by a third driver for personal injuries arising out of a traffic accident, and during the co-defendants’ joint effort to exclude a written statement from evidence, one co-defendant’s attorney

²² *Id.* at 839. The Court began its analysis of this issue with a thorough discussion of the nature, history, and purposes of the attorney-client privilege. *See id.* at 836-839.

²³ *Id.* at 841. The Advisory Committee’s Note to Proposed Rule 503 of the Federal Rules of Evidence, *see* discussion *infra* Section III.A, questioned the Virginia Supreme Court’s logic here. *See* Rules of Evidence for U.S. Courts and Magistrates, 56 F.R.D. 183, 239 (U.S. 1972) (“The [court’s reasoning] seems to be incorrect in overlooking a frequent reason for retaining different attorneys by the various clients, namely actually or potentially conflicting interests in addition to the common interest which brings them together.”).

²⁴ *Chahoon*, 62 Va. at 841-42.

²⁵ *Id.* at 843. The court noted that Sanxay’s testimony did not operate as a waiver of the privilege because he did not expressly waive the privilege and the record did not indicate that he was a voluntary witness. *Id.* at 842-43.

²⁶ *Barker*, *supra* note 17, at 19.

shared the statement with the other co-defendant's attorney.²⁷ On appeal, the Minnesota Supreme Court declared:

Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation, without an express understanding that the recipient shall not communicate the contents thereof to others, the communication is made not for the purpose of allowing unlimited publication and use, but in confidence, for the limited and restricted purpose to assist in asserting their common claims. The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents.²⁸

Therefore, the Court upheld the trial court's exclusion of the written statement from evidence.²⁹

More than twenty years after *Schmitt*, the Ninth Circuit became the first federal circuit court to recognize the common interest privilege in the criminal litigation context in *Continental Oil Co. v. United States*³⁰ and *Hunydee v. United States*.³¹ Following *Continental Oil Co.* and *Hunydee*, state and federal courts across the country began to recognize the modern common interest privilege in some form or another.³² While some states have codified the common interest privilege,³³ it has largely developed through the common law, which helps to explain the wide variation of the privilege across United States jurisdictions.

²⁷ *Schmitt v. Emery*, 2 N.W.2d 413, 414-15 (Minn. 1942), *overruled by* *Leer v. Chi., Milwaukee, St. Paul & Pac. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981).

²⁸ *Id.* at 417.

²⁹ *Id.*

³⁰ *Cont'l Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964).

³¹ *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965).

³² Bartel, *supra* note 5, at 885-86; *see also* Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475, 511 (2011) (characterizing the modern development of the common interest privilege as an "explosion of cases").

³³ *See infra* notes 129, 135 and accompanying text.

C. Other Problems with the Common Interest Privilege

In addition to the confusion created by the number of ways in which the doctrine varies across jurisdictions,³⁴ there are other problems associated with the common interest privilege. One problem is that the common interest privilege is sometimes confused with the “co-client” privilege.³⁵ While the common interest privilege extends the attorney-client privilege to communications between two clients who retain separate attorneys, the co-client privilege extends the attorney-client privilege to communications between two clients who share the same attorney.³⁶ While the common interest privilege and the co-client privilege are similar, they are separate and distinct from one another. However, courts and legal scholars alike are guilty of confusing the two privileges.³⁷

The confusion surrounding the common interest privilege is further exacerbated by the fact that it also goes by a variety of different names. Stemming from the common interest privilege’s early confinement to the criminal litigation context,³⁸ some jurisdictions still refer to the common interest privilege as the “joint defense” privilege.³⁹ Another frequently cited term for the common interest privilege is the “community of interest” privilege.⁴⁰ Other names for the common interest privilege include

³⁴ See discussion *infra* Section II.

³⁵ See Nicole Garsombke, Note, *A Tragedy of the Common: The Common Interest Rule, Its Common Misuses, and an Uncommon Solution*, 40 GA. L. REV. 615, 624-27 (2006).

³⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (AM. LAW INST. 2000).

³⁷ See, e.g., *Hanson v. U.S. Agency for Int’l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004) (“[T]he common interest [privilege] applies when two or more parties consult or retain *an attorney* concerning a legal matter in which they share a common interest.”) (emphasis added); 81 AM. JUR. 2D *Witnesses* § 352, Westlaw (database updated Aug. 2020) (“The [common interest privilege] is typically understood to apply when two or more clients consult or retain *an attorney* on particular matters of common interest, and in such a situation, the communications between each of them and *the attorney* are privileged against third parties.”) (emphasis added).

³⁸ See discussion *supra* Section I.B.

³⁹ See, e.g., *Niagara Mohawk Power Corp. v. Megan-Racine Assocs. (In re Megan-Racine Assocs.)*, 189 B.R. 562, 571-73 (Bankr. N.D.N.Y. 1995); *In re Grand Jury Subpoenas*, 902 F.2d 244, 248-50 (4th Cir. 1990).

⁴⁰ See, e.g., *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 363-66 (3d Cir. 2007); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172-85 (D.S.C. 1974).

the “joint litigant” privilege, the “pooled information” privilege, the “allied lawyers” privilege, and the “allied litigant” privilege.⁴¹ Without a uniform term for the common interest privilege, attorneys and courts are susceptible to thinking each of these terms refers to separate privileges rather than the same one.

II. THE BIG PROBLEM—THE INCONSISTENCY ACROSS THE UNITED STATES

The primary problem with the common interest privilege is that state and federal jurisdictions have taken vastly different approaches in defining the privilege. There are seven key issues that must be addressed in defining the common interest privilege: (1) how to define a “common interest” among clients; (2) which actors are allowed to share privileged information and which actors are allowed to receive it; (3) whether each of the clients’ attorneys must be present when privileged information is shared; (4) what is required to demonstrate that the clients have agreed to enter into a common interest arrangement; (5) whether the common interest privilege can apply only in the context of pending litigation, in the context of anticipated litigation, or outside the context of litigation entirely; (6) whether, within the context of pending litigation, the clients must be in the same pending case or can be in separate pending cases; and (7) how can the privilege be subsequently waived. No jurisdiction has addressed all of these issues, and many have only addressed one or two. Furthermore, state and federal jurisdictions have addressed each of these issues in a variety of ways. The following subsections will discuss each of the seven issues in turn and the common approaches taken by state and federal jurisdictions in addressing each issue.

A. *What Is a “Common Interest” Among Clients?*

The first issue that all state and federal jurisdictions which recognize the common interest privilege must address is how to define what a “common interest” is. To address this overarching issue, jurisdictions must address two sub-issues: (1) How closely

⁴¹ *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 35 n.1 (N.Y. 2016).

must the clients' interests be aligned to be "common?" (2) What interests are covered by the common interest privilege?

1. Congruity of the Clients' Interests

State and federal jurisdictions take different approaches in the congruity of the clients' interests that is required to invoke the common interest privilege. Some jurisdictions hold that the clients' interests must be identical. For instance, in *United States ex. rel. (Redacted) v. (Redacted)*, the United States District Court for the District of Utah held that a common interest "exists where different persons or entities 'have an *identical* legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice.'"⁴² In this case, the defendants filed a motion to compel the plaintiff relators to answer deposition questions regarding their discussions with their fellow plaintiff, the United States.⁴³ The court held that the parties' interests were sufficiently aligned to satisfy the common interest privilege because they were "allied in their interest in this litigation in identifying [] false claims, proving them, obtaining statutory redress in the form of damages, and distributing the proceeds of this suit."⁴⁴

Similarly, in *Duplan Corp. v. Deering Milliken, Inc.*, the United States District Court for the District of South Carolina stated, "[t]he key consideration is that the nature of the interest be *identical, not similar*."⁴⁵ *Duplan Corp.* was a "consolidated, multi-district patent-antitrust" lawsuit involving twenty-two parties and more than one-million documents produced during a five-year discovery process.⁴⁶ The plaintiffs, which included the owner of the patents and its associates that held licenses under the patents, refused to produce approximately 4,500 documents,

⁴² *United States ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 479 (D. Utah 2001) (emphasis added) (citation omitted).

⁴³ *Id.* at 477.

⁴⁴ *Id.* at 479 (citation omitted). The court noted, however, that the common interest privilege would dissolve during the course of the litigation if the parties' interests diverged, specifically if the parties dispute the relator's share of the proceeds. *Id.* at 479 n.3.

⁴⁵ *Duplan Corp.*, 397 F. Supp. at 1172 (emphasis added).

⁴⁶ *Id.* at 1156.

asserting, among other claims, the common-interest privilege.⁴⁷ Ruling on the defendants' motion for production of the documents,⁴⁸ the district court held that there was "sufficient [common] interest [among the plaintiffs in the present litigation] so that there is no waiver of the attorney-client privilege of communications made between the parties."⁴⁹ The district court further extended the common interest privilege to communications shared with a non-party because it had "a duty to act . . . as legal patent advisor to [two of the plaintiffs]."⁵⁰ However, the court declined to extend the privilege to communications shared with a non-party that was a former licensee of the patents.⁵¹

Conversely, some jurisdictions do not require the clients to have identical interests to invoke the common interest privilege. In *O'Boyle v. Borough of Longport*, the New Jersey Supreme Court held that the parties' interests "need not be identical; a common purpose will suffice."⁵² The court explained that a "common purpose" includes the "sharing of trial preparation efforts between attorneys against a common adversary."⁵³ However, the court further explained that the common purpose "should be broad enough to encompass the situation in which certain disclosures of privileged material are made to another attorney who shares a common purpose, for the limited purpose of considering whether he and his client should participate in a common interest arrangement."⁵⁴ The court held that a common purpose existed where communications were shared between three clients who were defendants in civil actions against the same plaintiff and a

⁴⁷ *Id.* at 1156 & n.1.

⁴⁸ *Id.* at 1156.

⁴⁹ *Id.* at 1175. The district court made numerous other rulings on the common interest privilege's application to communications shared in other litigated and non-litigated matters that were either pending or already completed at the time, but these other rulings have been omitted for clarity. *See id.* at 1176-85.

⁵⁰ *Id.* at 1175.

⁵¹ *Id.* at 1156 n.1, 1175. However, the court held that the communications shared with this non-party were protected by the work product doctrine. *Id.* at 1175.

⁵² *O'Boyle v. Borough of Longport*, 94 A.3d 299, 317 (N.J. 2014).

⁵³ *Id.* Here, the court seemed to be clarifying that while a common purpose certainly exists where the parties have identical interests, the finding of a common purpose is not limited to this situation.

⁵⁴ *Id.*

fourth client that, although not party to a lawsuit at the time, had previously been a defendant in multiple lawsuits brought by the plaintiff and anticipated more litigation from that plaintiff in the future.⁵⁵ The court did not take issue with the fact that the fourth client was not actually defending a lawsuit at the time; the court's only timing concern was whether the common purpose existed at the time the communications were shared, which the court found that it did.⁵⁶

While other approaches certainly exist,⁵⁷ the "identical" interests requirement and the "common purpose" requirement seem to represent the two most common approaches to addressing the issue of congruity in the clients' interests. For better or worse, the "identical" interests requirement narrows the application of the common interest privilege to a greater extent than the "common purpose" requirement.⁵⁸ The "identical" interests requirement is also a more subjective approach because judges will have different views on what constitutes "identical" interests compared to the more objective approach that asks whether or not the clients share a "common purpose."

2. Nature of the Clients' Interests

State and federal jurisdictions must also address the sub-issue of the types of client interests protected by the common interest privilege. In 2003, the Court of Appeals of Arizona adopted the Restatement's articulation of the common interest privilege,⁵⁹ including its requirement that the clients' common interest be "legal, factual, or strategic in character," as long as the shared information "further[s] the *legal* interests of each client."⁶⁰

⁵⁵ *Id.* at 317-18.

⁵⁶ *Id.*

⁵⁷ *See, e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007) (noting, in dicta, that clients must have at least "substantially similar" interests). *See also* Nell Neary, Comment, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. KAN. L. REV. 795, 828 (2017) (proposing a balancing test requiring the parties' "common interests" to outweigh their "adverse interests").

⁵⁸ *See Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1113 (Mass. 2007) ("Clients rarely will have identical interests.").

⁵⁹ *See* discussion *infra* Section III.C.

⁶⁰ *See* *Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1100 (Ariz. Ct. App. 2003) (emphasis added) (citations omitted).

In 2011, the Court of Appeals of Arizona applied this requirement in reviewing the appeal of several attorneys who were sanctioned by a trial judge for, among other things, refusing to identify who agreed to the issuance of a subpoena at a meeting of parties involved in a common interest arrangement.⁶¹ In reversing the trial court's sanctions, the court of appeals held that if the attorneys had disclosed the identities of those who assented to or opposed the issuance of the subpoena, they "would have revealed communications and advice between client and attorney about active litigation, and [would have] reflected strategic decisions individual to each client."⁶²

Another issue that state and federal jurisdictions need to consider regarding the nature of the clients' common interest is whether the common interest privilege should still apply if the clients share other common interests in addition to their common legal interests. Returning to *Duplan Corp.*, the United States District Court for the District of South Carolina stated that the common interest must be "legal, not solely commercial."⁶³ In regard to the "present litigation," the court found no common legal interest where a non-party had only a commercial interest in the litigation.⁶⁴ In regard to the "current litigation in Great Britain," the court found that communications between parties who shared a common interest "from both a commercial and legal standpoint" were protected by the common interest privilege.⁶⁵ Similarly, in *In re Grand Jury Subpoena Duces Tecum*, the Eighth Circuit rejected the application of the common interest privilege to communications between then-First Lady Hillary Clinton and White House officials because the White House's interests in the

⁶¹ Lund v. Donahoe, 261 P.3d 456, 460-62 (Ariz. Ct. App. 2011).

⁶² *Id.* at 465.

⁶³ *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974). *Accord* Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court, 280 P.3d 240, 247 (Mont. 2012) ("[F]or the common interest [privilege] to apply, the parties must share a common legal interest, rather than a commercial or a financial interest.") (citation omitted); *Niagara Mohawk Power Corp. v. Megan-Racine Assocs. (In re Megan-Racine Assocs.)*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) ("[T]he parties asserting the [common interest] privilege must have a common *legal* interest.").

⁶⁴ *Duplan Corp.*, 397 F. Supp. at 1175.

⁶⁵ *Id.* at 1176.

Office of Independent Counsel investigation were political, not legal.⁶⁶

B. Who Can Make and Receive Confidential Communications?

State and federal jurisdictions differ widely in the actors that can share confidential information and those that can receive it for the confidential information to be covered by the common interest privilege. The Restatement formulation represents the broadest approach to addressing this issue. In *Arizona Independent Redistricting Commission v. Fields*, the Arizona Court of Appeals adopted the Restatement approach which allows “communications [to] be made between any member of a ‘client set’ and a member of a similar client set.”⁶⁷ “A ‘client set’ consists of a client (including a prospective client), the client’s agent for communication, the client’s lawyer, and the lawyer’s agent.”⁶⁸ In a more succinct articulation of the Restatement’s approach, the Idaho Rules of Evidence extend the common interest privilege to communications made “among clients, their representatives, their lawyers, or their lawyers’ representatives, in any combination.”⁶⁹ On the opposite end of the spectrum, some jurisdictions only allow the clients’ attorneys to make and receive communications in order to be covered by the common interest privilege.⁷⁰ These jurisdictions rationalize this strict approach as preventing clients from claiming the privilege as a “*post hoc* justification for a client’s impermissible disclosures.”⁷¹

Between these two extremes exist any number of potential combinations of which actors can share confidential information and which actors can receive it. For instance, Texas allows the common interest privilege to apply to “communications made between a client, or the client’s lawyer, to another party’s lawyer,

⁶⁶ *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921-23 (8th Cir. 1997).

⁶⁷ *Ariz. Indep. Redistricting Comm’n v. Fields*, 75 P.3d 1088, 1100 (Ariz. Ct. App. 2003) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (AM. LAW INST. 2000)).

⁶⁸ *Fields*, 75 P.3d at 1100 n.12.

⁶⁹ IDAHO R. EVID. 502(b)(3).

⁷⁰ *See, e.g., Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 146 (D. Del. 2009) (“[T]o qualify for and to maintain continued protection, the communication must be shared between counsel.”).

⁷¹ *Id.*

not to the other party itself.”⁷² In *Niagara Mohawk Power Corp. v. Megan-Racine Associates, Inc.*, the United States Bankruptcy Court for the Northern District of New York broadened Texas’ approach slightly to include confidential information shared to “an agent of the [receiving client’s] attorney.”⁷³ The Uniform Rules of Evidence further extend the privilege to confidential information shared “by the client or a representative of the client or the client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party.”⁷⁴

C. *Must the Clients’ Attorneys Be Present?*

Among those state and federal jurisdictions that extend the common interest privilege to confidential information shared or received by actors other than the clients’ attorneys, these jurisdictions must address whether the clients’ attorneys must be present when the confidential information is shared with the other members of the common interest arrangement. Some jurisdictions have held that the common interest privilege will fail if the client’s attorneys are absent. In *United States v. Gotti*, the United States District Court for the Eastern District of New York considered the defendants’ motion to suppress audio surveillance collected by the FBI.⁷⁵ The defendants’ accompanying brief asserted that the common interest privilege required the court to suppress the recorded conversations despite the fact that no attorneys were present when the conversations took place.⁷⁶ The court flatly rejected the defendants’ argument and stated, “[s]uch an extension [of the common interest privilege] is supported neither in law nor in logic.”⁷⁷

However, other jurisdictions have held that direct client-to-client communications without the presence of attorneys remain

⁷² *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52-53 (Tex. 2012).

⁷³ *Niagara Mohawk Power Corp. v. Megan-Racine Assocs.* (*In re Megan-Racine Assocs.*), 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995).

⁷⁴ UNIF. R. EVID. 502(b)(3).

⁷⁵ *United States v. Gotti*, 771 F. Supp. 535, 538 (E.D.N.Y. 1991).

⁷⁶ *Id.* at 545.

⁷⁷ *Id. Accord In re Teleglobe Commc’ns Corp.*, 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.”) (citation and footnote omitted).

protected by the common interest privilege. In *Hunydee v. United States*, the Ninth Circuit articulated the common interest privilege as follows:

[W]here two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.⁷⁸

Ten years later, the United States District Court for the Southern District of New York asserted in dictum that the Ninth Circuit's articulation of the rule "confirmed that the 'exchange between attorneys' . . . might equally be effected through the clients' direct communication."⁷⁹ Similarly, the Second Circuit stated, it is not "necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney."⁸⁰

D. How Can Clients Prove the Existence of a Common Interest Agreement?

Clients with a common interest necessarily must agree that confidential information will remain as such before they exchange any information.⁸¹ While state and federal jurisdictions generally do not require the prior execution of a formal written agreement to demonstrate the existence of a common interest arrangement,⁸²

⁷⁸ *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

⁷⁹ *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 16, 1974, 406 F. Supp. 381, 388 (S.D.N.Y. 1975).

⁸⁰ *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989).

⁸¹ However, the Supreme Judicial Court of Massachusetts has held that the clients' attorneys may enter a common interest arrangement with only the implied consent of their respective clients. *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1112 (Mass. 2007) ("While it is certainly preferable to secure the client's consent before sharing a privileged communication in the event a joint defense agreement is found not to exist, we do not think a client's knowledge or express consent essential to create such an agreement. . . . [T]he attorney may disclose client information 'impliedly authorized in order to carry out the representation.'" (citations omitted).

⁸² *See, e.g., id.* at 1113 ("[B]ecause the attorney-client privilege does not depend on a writing, the common interest doctrine does not require a writing."); *Power Mosfet*

they do not apply the same standard in determining whether such an agreement exists. In *Niagara Mohawk Power Corp. v. Megan-Racine Associates*, a bankruptcy court ordered the litigants in an adversary proceeding to make a good faith effort to resolve their discovery disputes and, if necessary, submit any documents that remain in dispute to the court with an accompanying explanation as to why the document is privileged in light of the court's opinion.⁸³ Regarding an assertion of the common interest privilege, the bankruptcy court required the accompanying explanation to demonstrate "that there was an agreement, made prior to the communication, between the parties to keep the communication confidential."⁸⁴ The bankruptcy court clarified, however, that "[t]he requisite agreement . . . [may be] inferable from the circumstances."⁸⁵

In *In re Pacific Pictures Corp.*, the Ninth Circuit held that the communications must be made "in accordance with some form of agreement—whether written or unwritten" to be protected by the common interest privilege.⁸⁶ Similarly, in *Minebea Co. v. Papst*, the United States District Court for the District of Columbia stated:

It is incumbent on a party claiming the joint defense privilege, therefore, to establish that "the parties had agreed to pursue a joint defense strategy." "Some form of joint strategy is necessary to establish a [common interest arrangement] rather than merely the impression of one side." Obviously, a written agreement is the most effective method of establishing the existence of a joint defense agreement, although an oral agreement whose existence, terms and scope

Techs. v. Siemens AG, 206 F.R.D. 422, 425 (E.D. Tex. 2000) ("While there is no doubt that a fully executed, well drafted joint defense agreement makes it simple to determine if parties have intended to participate in a joint defense, it is not a necessary document.") (footnote omitted), *objections sustained on other grounds by*, No. 2:99-CV-168, 2001 WL 35986948 (E.D. Tex. July 30, 2001).

⁸³ *Niagara Mohawk Power Corp. v. Megan-Racine Assocs.* (*In re Megan-Racine Assocs.*), 189 B.R. 562, 575-76 (Bankr. N.D.N.Y. 1995).

⁸⁴ *Id.* at 575.

⁸⁵ *Id.* at 571-72.

⁸⁶ *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012).

are proved by the party asserting it, may be enforceable as well.⁸⁷

Applying this rule, the district court held that a common interest arrangement clearly existed between the parties that executed a written “Joint Defense Agreement.”⁸⁸ The court also found a common interest arrangement existed between the plaintiff and three non-parties prior to the execution of the Joint Defense Agreement because the plaintiff presented extrinsic evidence to demonstrate that a common interest arrangement already existed.⁸⁹ The court did not find a common interest arrangement for the plaintiff’s communications with two other non-parties because the plaintiff submitted no evidence that the non-parties had signed the Joint Defense Agreement.⁹⁰

E. In What Contexts Does the Privilege Apply?

Another key issue that state and federal jurisdictions must address is in which contexts the common interest privilege can apply. The Uniform Rules of Evidence restrict the common interest privilege exclusively to the context of a “pending action.”⁹¹ A number of states have either adopted the rule articulated in the Uniform Rules of Evidence or otherwise adopted the requirement that the common interest privilege only applies in the context of pending litigation.⁹² In *In re XL Specialty Insurance Co.*, the Supreme Court of Texas applied this pending litigation requirement to communications between the attorney for an insurance company that was a party to an administrative claim for worker’s compensation and its insured that was not a party.⁹³ The court held that the common interest privilege did not protect

⁸⁷ *Minebea Co. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005).

⁸⁸ *Id.* at 17-20.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ UNIF. R. EVID. 502(b)(3).

⁹² *See, e.g.*, HAW. REV. STAT. ANN. § 626-1 (West, Westlaw through 2020 Reg. Sess.); ME. R. EVID. 502(b)(3); MISS. R. EVID. 502(b)(3); N.H. R. EVID. 502(b)(3); OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West, Westlaw through 2d Reg. Sess. of 58th Leg.); S.D. CODIFIED LAWS § 19-19-502(b)(3) (Westlaw through 2021 Reg. Sess.); TEX. R. EVID. 503(b)(1)(C).

⁹³ *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 48 (Tex. 2012).

those communications because the insured “was not a party to the litigation or any other related pending action.”⁹⁴

Other jurisdictions are more lenient and extend the common interest privilege to situations outside of the context of pending litigation if litigation is “reasonably anticipated.” In *Niagara Mohawk Power Corp. v. Megan-Racine Associates*, the Bankruptcy Court for the Northern District of New York stated that the common interest privilege applies “where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation.”⁹⁵ In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, New York’s highest state court considered extending the common interest privilege beyond the context of “pending or reasonably anticipated litigation” but ultimately reaffirmed its commitment to this requirement.⁹⁶ As a result, the Court of Appeals reversed the Appellate Division’s ruling that the common interest privilege protected confidential communications shared between parties during the pre-closing phase of a merger.⁹⁷

In *SCM Corp. v. Xerox Corp.*, the United States District Court for the District of Connecticut rejected the requirement that communications must be made in the context of either pending or anticipated litigation:

Corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it. The timing and setting of the communications are important indicators of the measure of common interest; the shared interest necessary to justify extending the privilege to encompass intercorporate communications appears most

⁹⁴ *Id.* at 53-54.

⁹⁵ *Niagara Mohawk Power Corp. v. Megan-Racine Assocs. (In re Megan-Racine Assocs.)*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995).

⁹⁶ *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 37 (N.Y. 2016).

⁹⁷ *Id.* at 32-33, 40. The Fifth Circuit similarly extends the common interest privilege to communications “between co-defendants in actual litigation and their counsel” and “communications between *potential* co-defendants and their counsel.” *In re Santa Fe Int’l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001). However, the Fifth Circuit clarified that the word “potential” must be “construed narrowly.” *Id.*

clearly in cases of co-defendants and impending litigations but is not necessarily limited to those situations.⁹⁸

Therefore, the district court held that the common interest privilege protected communications between parties regarding the development of a patent program.⁹⁹ Similarly, in adopting the Restatement's articulation of the common interest privilege which extends the privilege to "litigated or nonlitigated matter[s],"¹⁰⁰ the Supreme Judicial Court of Massachusetts stated, "[c]onfidentiality of consultations between parties to business transactions with their respective attorneys is no less essential or less common than in the litigation context."¹⁰¹

F. In Pending Litigation, Must the Clients Be in the Same Case?

Similarly, state and federal jurisdictions should address whether, in the context of litigation, the clients must be co-parties in the same pending case. In *O'Boyle v. Borough of Longport*, the New Jersey Supreme Court stated that in the context of litigation, "[clients and their] attorneys need not be involved in the same litigated matter or anticipated matter."¹⁰² Similarly, in *Travelers Casualty & Surety Co. v. Excess Insurance Co.*, the United States District Court for the Southern District of Ohio rejected the plaintiff's argument that the common interest privilege did not apply to communications between the defendant and a non-party because they were not and "unlikely ever to be parties to the same lawsuit."¹⁰³ Finally, in *United States v. American Telephone & Telegraph Co.*, the D.C. Circuit held that the common interest

⁹⁸ *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976).

⁹⁹ *Id.* at 514.

¹⁰⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (AM. LAW INST. 2000).

¹⁰¹ *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1112 (Mass. 2007).

¹⁰² *O'Boyle v. Borough of Longport*, 94 A.3d 299, 317 (N.J. 2014).

¹⁰³ *Travelers Cas. & Sur. Co. v. Excess Ins. Co.*, 197 F.R.D. 601, 607 (S.D. Ohio 2000).

privilege “should not be construed as narrowly limited to co-parties.”¹⁰⁴

1. Case Study: Mississippi State Law

Interestingly, both the Mississippi Supreme Court and the federal district courts in Mississippi have considered this issue regarding Mississippi state law and have reached opposite conclusions. In *Hewes v. Langston*, the Mississippi Supreme Court reviewed a trial court’s determination that certain materials were not privileged and, thus, discoverable by the plaintiff.¹⁰⁵ Among those materials were “[v]arious correspondence and attachments, including draft affidavits circulated among [defense counsel in another case] and Alan Perry,” Hewes’s original attorney in the case on appeal.¹⁰⁶ The Court held that the materials were “protected by . . . the ‘common interest’ prong of the attorney-client privilege”¹⁰⁷

Just three years later, when interpreting Mississippi state law, the United States District Court for the Northern District of Mississippi held that certain documents withheld by the defendants were not protected by the common interest privilege because “the party asserting the [common interest] privilege must have been, at the time of the communication, a co-party to pending litigation with the party to whom it bears a relationship of common interest.”¹⁰⁸ The Northern District asserted that this so-called “same-action, pending-litigation requirement” stemmed from Rule 502(b)(3) to the Mississippi Rules of Evidence and its accompanying Comment.¹⁰⁹ The Northern District did not address

¹⁰⁴ *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (recognizing the common interest privilege as an extension of the work product doctrine).

¹⁰⁵ *Hewes v. Langston*, 853 So. 2d 1237, 1239 (Miss. 2003).

¹⁰⁶ *Id.* at 1239, 1249.

¹⁰⁷ *Id.* at 1249. The Court also held that the communications were protected by the work product doctrine. *Id.*

¹⁰⁸ *United Inv’rs Life Ins. Co. v. Nationwide Life Ins. Co.*, 233 F.R.D. 483, 487-88 (N.D. Miss. 2006).

¹⁰⁹ *See id.* At the time, the Comment to Rule 502 stated that the common interest privilege extended to “statements made in multiple party cases in which different lawyers represent clients who have common interests.” *Id.* at 487 (citation omitted). While Rule 502 still contains this language, *see* MISS. R. EVID. 502 advisory committee’s note, the Mississippi Supreme Court has since restyled the Mississippi Rules of

the *Hewes* opinion in regard to its holding on the common interest privilege even though it had previously cited the *Hewes* opinion just two paragraphs prior in regard to the attorney-client privilege.¹¹⁰ As of the writing of this Article, the Mississippi Supreme Court has yet to resolve this disagreement between Mississippi's state and federal courts on the issue of whether, in the context of pending litigation, the common interest privilege can only apply to co-parties to the same pending case.

G. How Can the Privilege Be Subsequently Waived?

State and federal jurisdictions also differ in how the common interest privilege may be waived. When the Virginia Supreme Court first established the joint defense privilege, which preceded the common interest privilege,¹¹¹ it stated that the privilege “belongs to each and all of the clients, and cannot be released without the consent of all of them.”¹¹² As applied to the modern-day common interest privilege, the Fourth Circuit held that the privilege “cannot be waived without the consent of all parties who share the privilege.”¹¹³ Relying on this rule, the Fourth Circuit held that the common interest privilege protected confidential communications between a parent company and its subsidiary which, at the time the communications were made, were jointly pursuing a claim against the United States Army despite the fact that the subsidiary subsequently waived all rights to the privilege.¹¹⁴ The Fourth Circuit stated that the subsidiary “may not waive [the privilege] unilaterally.”¹¹⁵

In *Niagara Mohawk Power Corp. v. Megan-Racine Associates, Inc.*, the Bankruptcy Court for the Northern District of New York

Evidence's “Official Comments of the Court” as “Advisory Committee Notes” and declared that the Advisory Committee Notes are no longer “‘authoritative guides’ for interpreting the Mississippi Rules of Evidence.” Order Substituting Advisory Committee Notes for Comments, MISS. R. EVID. (Miss. June 16, 2016), <https://courts.ms.gov/research/rules/msrulesofcourt/Restyled%20Rules%20of%20EvidenEv.pdf> [<https://perma.cc/HH3Y-G4CG>].

¹¹⁰ *United Inv'rs*, 233 F.R.D. at 487-88.

¹¹¹ See discussion *supra* Section I.B.

¹¹² *Chahoon v. Commonwealth*, 62 Va. 822, 842 (1871).

¹¹³ *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990).

¹¹⁴ *Id.* at 250.

¹¹⁵ *Id.*

largely agreed with the Fourth Circuit's holding that the common interest privilege's rule that all parties must consent to waive the privilege unless "the parties become adverse litigants."¹¹⁶ Likewise, in *United States v. Anthem, Inc.*, the government sought production of communications between two corporations where the counsel of each corporation supposedly accused the other corporation of violating terms of a merger agreement between the corporations.¹¹⁷ In dictum discussing why the common interest privilege should not apply if the two parties subsequently entered into litigation over the breach of contract allegations, the court stated, "[i]f the breach of contract allegations do proceed to litigation, it is inconceivable that counsel would coordinate their legal efforts in any way. Such action would be inconsistent with the adversarial process."¹¹⁸

A small number of federal jurisdictions disagree with the requirement that all members of the common interest arrangement must consent to waiving the common interest privilege. The First Circuit has stated, "the existence of a [common interest] agreement does not increase the number of parties whose consent is needed to waive the attorney-client privilege; it merely prevents disclosure of a communication made in the course of [a common interest arrangement] by the third party to whom it was made."¹¹⁹ Similarly, in *United States v. Balsiger*, the United States District Court for the Eastern District of Wisconsin held, "[A] party is entitled to waive protection for its or his own communications even if made in a [common interest] context, but cannot waive any privilege as to communications of another member of the [common interest arrangement]."¹²⁰

¹¹⁶ *Niagara Mohawk Power Corp. v. Megan-Racine Assocs.* (*In re Megan-Racine Assocs.*), 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995).

¹¹⁷ *United States v. Anthem, Inc.*, No. 1:16-cv-1493 (ABJ), 2016 WL 8461264, at *1 (D.D.C. Oct. 6, 2016).

¹¹⁸ *Id.* at *10.

¹¹⁹ *In re Grand Jury Subpoena*, 274 F.3d 563, 572-73 (1st Cir. 2001).

¹²⁰ *United States v. Balsiger*, No. 07-CR-57, 2013 WL 3490873, at *11 (E.D. Wis. July 10, 2013). See also *United States v. Agnello*, 135 F. Supp. 2d 380, 382-83 (E.D.N.Y. 2001).

III. PREVIOUSLY PROPOSED MODEL VERSIONS OF THE COMMON INTEREST PRIVILEGE

In formulating a model version of the common interest privilege, it is instructive to review three prior attempts at doing so: (1) Proposed Rule 503(b)(3) to the Federal Rules of Evidence; (2) Rule 502(b)(3) of the Uniform Rules of Evidence; and (3) Section 76 of the Restatement (Third) of the Law Governing Lawyers.

A. *Proposed Rule 503(b)(3) to the Federal Rules of Evidence*

One of the previously proposed model versions of the common interest privilege is found in Proposed Rule 503 to the Federal Rules of Evidence (“Proposed Rule 503(b)(3)”). Proposed Rule 503(b)(3) stated:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . by him or his lawyer to a lawyer representing another in a matter of common interest.¹²¹

Proposed Rule 503(b)(3) limited the common interest privilege to common *legal* interests because the confidential information must be “for the purpose of facilitating the rendition of professional legal services.”¹²² It also clearly stated that the client and the client’s lawyer may share the confidential information and a client’s lawyer may receive it.¹²³ Furthermore, the Advisory Committee’s Note to Proposed Rule 503(b)(3) indicated that a client can subsequently waive the privilege in regard to his or her own communications.¹²⁴

The Advisory Committee’s Notes stated that the common interest privilege would not apply “where there is no common

¹²¹ Rules of Evidence for U.S. Courts and Magistrates, 56 F.R.D. 183, 236 (1972).

¹²² *Id.* This is consistent with the current law in all state and federal jurisdictions that recognize the common interest privilege. *See* discussion *supra* Section II.A.2.

¹²³ Rules of Evidence for U.S. Courts and Magistrates, *supra* note 121, at 236.

¹²⁴ *Id.* at 239 (“[I]f for reasons of his own, a client wishes to disclose his own statements made at the joint conference, he should be permitted to do so, and the rule is to that effect.”).

interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis.”¹²⁵ However, neither Proposed Rule 503(b)(3) nor the accompanying Advisory Committee’s Notes clarified how congruent the clients’ interests must be for them to share a “common interest.” Furthermore, although Proposed Rule 503(b)(3) required the attorney for the client receiving confidential information to be present, it failed to clarify whether the sharing client’s attorney must also be present for the shared information to remain privileged. Proposed Rule 503(b)(3) also did not address what is required for clients to demonstrate the existence of a common interest agreement, in what contexts the common interest privilege can apply, or whether, in the context of pending litigation, the clients must be co-parties to the same pending case.

For better or worse, this model version of the common interest privilege in Proposed Rule 503(b)(3) never came to fruition. When the Supreme Court first promulgated the Federal Rules of Evidence in 1972, Congress rejected the original version of Article V, governing privileges, entirely.¹²⁶ Congress’s rejection of Article V was based on the rationale that privileges should “continue to be developed by the courts of the United States.”¹²⁷ While Congress has since added Rule 502, concerning the attorney-client privilege and the work product doctrine, to the Federal Rules of Evidence, it makes no mention of the common interest privilege.¹²⁸ However, some states have adopted the common interest privilege as articulated in Proposed Rule 503(b)(3).¹²⁹

¹²⁵ *Id.*

¹²⁶ Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 87-88 (2002).

¹²⁷ H.R. REP. NO. 93-650 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7082. Ironically, Congress declared that the requirement of amended Rule 501 mandating federal courts to apply “the principles of the common law . . . in the light of reason and experience” would ensure that common law privileges will develop “under a uniform standard.” *Id.*

¹²⁸ *See* FED. R. EVID. 502.

¹²⁹ *See, e.g.*, NEB. REV. STAT. ANN. § 27-503(2)(c) (West, Westlaw through 2d Reg. Sess. of 106th Leg.); NEV. REV. STAT. ANN. § 49.095(3) (West, Westlaw through 32d Spec. Sess.); N.M. R. EVID. 11-503(B)(3); OR. REV. STAT. ANN. § 40.225(2)(c) (West, Westlaw through 2d Spec. Sess. of 80th Leg.); WIS. STAT. ANN. § 905.03(2) (West, Westlaw through 2019 Act 186).

B. Uniform Rules of Evidence 502(b)(3)

Another previously proposed model version of the common interest privilege is found in the Uniform Rules of Evidence Act drafted by the National Conference of Commissioners on Uniform State Laws.¹³⁰ Rule 502(b)(3) of the Uniform Rules of Evidence (“U.R.E. 502(b)(3)”) states:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client . . . by the client or a representative of the client or the client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.¹³¹

Like Proposed Rule 503(b)(3), U.R.E. 502(b)(3) requires the clients to have common *legal* interests because the confidential information must be “for the purpose of facilitating the rendition of professional legal services.”¹³² U.R.E. 502(b)(3) also clearly states that confidential information may be shared by a client, the client’s representative, the client’s lawyer, or a representative of the client’s lawyer and may be received by another client’s lawyer or a representative of that lawyer.¹³³ Finally, U.R.E. 502(b)(3) clarifies that the common interest privilege may only be invoked in the context of pending litigation.¹³⁴

Even though U.R.E. 502(b)(3) makes clear the context in which the common interest privilege may apply, it fails to clarify whether the clients must be co-parties in the same pending case or if they can be in separate pending cases. Although U.R.E. 502(b)(3) defines the nature of the clients’ “common interest,” it

¹³⁰ UNIF. R. EVID. 502(b)(3). The National Conference of Commissioners on Uniform State Laws is now called the Uniform Law Commission. See *About ULC: Overview*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/DJ8A-QLHX>] (last visited Dec. 17, 2020).

¹³¹ UNIF. R. EVID. 502(b)(3).

¹³² UNIF. R. EVID. 502(b).

¹³³ UNIF. R. EVID. 502(b)(3). In this sense, the common interest privilege under U.R.E. 502(b)(3) is broader than the articulation of the privilege in Proposed Rule 503(b)(3). See discussion *supra* Section III.A.

¹³⁴ UNIF. R. EVID. 502(b)(3) (requiring a “pending action”).

does not articulate what level of congruity is required among the clients' interests to invoke the common interest privilege. Furthermore, since U.R.E. 502(b)(3) allows non-attorneys to share confidential information and to receive it, it is unclear whether the clients' attorneys must be present for the communications between the clients to be privileged. It is equally unclear what is required to demonstrate the existence of a common interest agreement and under what circumstances the privileged may subsequently be waived.

Although many states have enacted U.R.E. 502(b)(3),¹³⁵ it has failed to achieve its namesake goal of creating a uniform version of the common interest privilege. While the continuing lack of uniformity is certainly attributable to states refusing to adopt the Uniform Rules of Evidence Act, this is not the only reason. It is also a result of the failure of U.R.E. 502(b)(3) to address many of the key issues surrounding the common interest privilege. Therefore, even in jurisdictions where U.R.E. 502(b)(3) has been adopted, state courts, like their federal counterparts, must further develop the common interest privilege through the common law. This naturally leads to a wider variation of the common interest privilege across state jurisdictions.

*C. Restatement (Third) of the Law Governing Lawyers Section
76*

A final previously proposed model version of the common interest privilege is found in the Restatement (Third) of the Law Governing Lawyers Section 76 ("Restatement Section 76"), which states:

- (1) 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 as against third persons. Any such client may

¹³⁵ See, e.g., ARK. R. EVID. 502(b)(3); KY. R. EVID. 503(b)(3); N.D. R. EVID. 502(b)(3); OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West, Westlaw through 1st Reg. Sess. of 58th Leg.); S.D. CODIFIED LAWS § 19-19-502(b)(3) (Westlaw through 2021 Reg. Sess.).

invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.¹³⁶

Regarding the nature of the clients' common interest, the Restatement also allows the clients' common interest to be "either legal, factual, or strategic in character"¹³⁷ as long as the communications are made "for the purpose of obtaining or providing legal assistance for the client."¹³⁸ The Comment to Restatement Section 76 also makes clear that the confidential information may be both shared and received by "any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent."¹³⁹ From the text and the Comment of Restatement Section 76, it is clear that some form of agreement among the clients is required¹⁴⁰ and that a formal written agreement is sufficient but not necessary for demonstrating that such an agreement exists.¹⁴¹ It is equally clear that Restatement Section 76 does not require the communications to be made in the context of either pending or anticipated litigation.¹⁴² In regard to the subsequent waiver of the common interest privilege, the Comment to Restatement Section 76 indicates that the client who shares the privileged information is allowed to subsequently waive the privilege, but does not have the authority to waive the privilege for information shared by any

¹³⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (AM. LAW INST. 2000).

¹³⁷ *Id.* at § 76 cmt. e.

¹³⁸ *Id.* at § 68(4). Comment a of Restatement Section 76 clarifies that the conditions of the attorney-client privilege listed under Section 68 must be met for the common interest privilege to apply. *Id.* at § 76 cmt. a.

¹³⁹ *Id.* at § 76 cmt. d.

¹⁴⁰ *Id.* at § 76(1) (requiring the clients to "agree to exchange information concerning the [common interest]").

¹⁴¹ *Id.* at § 76 cmt. c ("[The common interest agreement] may be predicated on an express agreement, but formality is not required.").

¹⁴² *Id.* at § 76(1) (The clients must have "a common interest in a litigated or nonlitigated matter.") (emphasis added).

other member of the common interest arrangement.¹⁴³ The common interest privilege is also automatically waived in a “subsequent adverse proceeding” between the clients.¹⁴⁴

While the Comment to Restatement Section 76 states that the clients’ interests “need not be entirely congruent,”¹⁴⁵ this does not clarify what level of congruity is required for a common interest to exist between the clients. Also, since “any member of a client set” may share confidential information, neither the text nor the Comment of Restatement Section 76 clarify whether the clients’ attorneys must be present when the information is shared.¹⁴⁶ It is also unclear if the clients must be co-parties in the same pending case when the communications are made in the context of pending litigation.¹⁴⁷

At least two state jurisdictions have adopted Restatement Section 76 outright,¹⁴⁸ and a number of state and federal jurisdictions have otherwise been influenced by its articulation of

¹⁴³ *Id.* at § 76 cmt. g (“In the absence of an agreement to the contrary, any member may waive the privilege with respect to that person’s own communications. Correlatively, a member is not authorized to waive the privilege for another member’s communication.”).

¹⁴⁴ *Id.* at § 76(2).

¹⁴⁵ *Id.* at § 76 cmt. e.

¹⁴⁶ Comment d states, “a communication directly among the clients is not privileged unless made for the purpose of communicating with a privileged person.” *Id.* at § 76 cmt. d (emphasis added). The Restatement defines “privileged persons” as “the client (including a prospective client), the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.” *Id.* at § 70. Therefore, while Restatement Section 76 seemingly disallows direct communications between clients without the presence of their attorneys under most circumstances, the exception for communications “made for the purpose of communicating with a privileged person” is arguably broad enough to allow the common interest privilege to apply to almost all direct communications between clients.

¹⁴⁷ Since the common interest privilege extends to communications made entirely outside the context of litigation, it would make little sense for Restatement Section 76 to require the clients to be co-parties in the same pending case solely because their common interest exists in the context of pending litigation. However, the text of Restatement Section 76, which extends the privilege to situations where the clients share “a common interest in a litigated . . . matter,” arguably adds this requirement. *Id.* at § 76(1) (emphasis added).

¹⁴⁸ See *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1112 (Mass. 2007); *Ariz. Indep. Redistricting Comm’n v. Fields*, 75 P.3d 1088, 1099-100 (Ariz. Ct. App. 2003).

the common interest privilege.¹⁴⁹ However, like the other two previously proposed model versions of the common interest privilege, Restatement Section 76 has not solved the problem of the privilege's inconsistency across state and federal jurisdictions. This may be partially due to the fact that, although it addresses many of the key issues raised by the common interest privilege, it does not address all of them. More likely, the failure of Restatement Section 76 to address this inconsistency is a direct result of the Restatement's intended purpose as a common law tool.¹⁵⁰ Because Restatement Section 76 was always meant to be a reference tool for courts, it was unlikely that it would ever bring uniformity to the common interest privilege.

IV. A NEW MODEL VERSION OF THE COMMON INTEREST PRIVILEGE

A. *Three Criteria for the New Model Version*

Combining the current approaches taken by state and federal jurisdictions and the lessons learned from previously proposed model versions, a new model version of the common interest privilege must satisfy three requirements. First, the new model version must clarify how it addresses each of the seven key issues raised by the common interest privilege. Many articulations of the common interest privilege address some of these possible variations, but none address all of them.¹⁵¹ Second, since the common interest privilege stems from the attorney-client privilege, the new model version must be consistent with the attorney-client privilege's dual purposes of encouraging the free flow of communication and obtaining fully informed legal

¹⁴⁹ See, e.g., *Selby v. O'Dea*, 90 N.E.3d 1144, 1151-52, 1160, 1163-65 (Ill. App. Ct. 2017) (leaving the decision to adopt the Restatement approach to the Illinois Supreme Court); *O'Boyle v. Borough of Longport*, 94 A.3d 299, 313-16 (N.J. 2014); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997).

¹⁵⁰ See *Publications: Frequently Asked Questions*, AM. LAW. INST., <https://www.ali.org/publications/frequently-asked-questions/#differ> [<https://perma.cc/3TVG-E377>] (last visited Dec. 18, 2020).

¹⁵¹ Even Restatement Section 76, which is comparatively thorough in its formulation of the common interest privilege, only addresses five out of the seven key issues. See discussion *supra* Section III.C.

advice.¹⁵² Third, since the common interest privilege extends the attorney-client privilege beyond its normal bounds, the new model version must mindfully balance the attorney-client privilege's dual purposes with its possible consequence of impeding the administration of justice by "withholding relevant information from the fact-finder."¹⁵³

B. How the New Model Version Addresses the Seven Key Issues

The new model version of the common interest privilege must address all seven of the key issues raised by the privilege: (1) how to define a "common interest" among clients; (2) which actors are allowed to share privileged information and which actors are allowed to receive it; (3) whether each of the clients' attorneys must be present when privileged information is shared; (4) what is required to demonstrate that the clients have agreed to enter into a common interest arrangement; (5) whether the common interest privilege can apply only in the context of pending litigation, in the context of anticipated litigation, or outside the context of litigation entirely; (6) whether, within the context of pending litigation, the clients must be in the same pending case or can be in separate pending cases; and (7) how can the privilege be subsequently waived.

Regarding the congruence of the clients' common legal interests, the new model version of the common interest privilege adopts the approach taken by the New Jersey Supreme Court in *O'Boyle v. Borough of Longport*. New Jersey rejects the high bar required in some jurisdictions that the clients' interests must be "identical."¹⁵⁴ Professor Rice argued that the requirement of "identical" interests is "unnecessarily narrow" and that no court has "offer[ed] a convincing reason for imposing such a strict standard."¹⁵⁵ Professor Schaffzin has also argued that the "very high" level of congruity required to satisfy the "identical" interests requirement creates "uncertainty surrounding the [privilege's] application" and, in practice, limits the common interest privilege

¹⁵² Schaffzin, *supra* note 3, at 62.

¹⁵³ Fisher v. United States, 425 U.S. 391, 403 (1976).

¹⁵⁴ O'Boyle v. Borough of Longport, 94 A.3d 299, 317 (N.J. 2014).

¹⁵⁵ RICE ET AL., *supra* note 13, at § 4:36.

to clients who are “parties allied on the same side in pending litigation.”¹⁵⁶ This places an unnecessary restriction on the common interest privilege because the attorney-client privilege, from which the common interest privilege derives, is not restricted to clients who are in pending litigation.¹⁵⁷ In lieu of the “identical” interests requirement, New Jersey requires only a common purpose between the clients.¹⁵⁸ This approach avoids the uncertainty created by the “identical” interests requirement because allied clients and their attorneys do not have to be concerned that a court will find their interests are not sufficiently aligned to be “identical.” As long as the clients share a common purpose and the shared communications are made in furtherance of this common purpose, the common interest privilege should protect those communications.

Regarding the nature of the clients’ common interest, the new model version of the common interest privilege adopts the approach taken by the Arizona Court of Appeals in *Arizona Independent Redistricting Commission v. Fields*, allowing the clients’ common interest to be “either legal, factual, or strategic in character” as long as it “further[s] the legal interests of each client.”¹⁵⁹ Therefore, the common interest privilege should not protect communications made in furtherance of the clients’ purely commercial interests. As Professor Schaffzin argued, limiting the common interest privilege’s application to common *legal* interests is consistent with the attorney-client privilege’s purpose of obtaining *legal* advice.¹⁶⁰ However, as the court in *Duplan Corp.* held, courts should not disallow the application of the common

¹⁵⁶ Schaffzin, *supra* note 3, at 70-73. *Cf.* *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1113 (Mass. 2007) (“Clients rarely will have identical interests.”).

¹⁵⁷ Schaffzin, *supra* note 3, at 76. Proponents of the “identical” interests requirement may correctly point out that the court in *Duplan Corp.* required clients to have “identical” interests, yet it extended the common interest privilege to a non-party to the litigation. *See Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172, 1175 (D.S.C. 1974). However, since the non-party had a duty to act as the legal patent advisor to plaintiffs in a patent-antitrust lawsuit, *Id.* at 1156, 1175, this exception proves the rule.

¹⁵⁸ *O’Boyle*, 94 A.3d at 317.

¹⁵⁹ *Ariz. Indep. Redistricting Comm’n v. Fields*, 75 P.3d 1088, 1100 (Ariz. Ct. App. 2003).

¹⁶⁰ Schaffzin, *supra* note 3, at 72-74.

interest privilege where the clients' common legal interest could also be considered a commercial interest.¹⁶¹ As *Duplan Corp.* demonstrates,¹⁶² clients' legal interests often have commercial implications, so requiring a common interest to be purely legal would severely restrict the privilege's application similar to the "identical" interests requirement.

Regarding who can make and who can receive confidential information protected by the common interest privilege, the new model version adopts Idaho's approach and extends the common interest privilege to information shared or received "among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination."¹⁶³ This approach is consistent with the attorney-client privilege, which also protects communications made between clients, the client's representatives, the client's lawyer, and the lawyer's representatives.¹⁶⁴ By mirroring the approach taken by the attorney-client privilege, the model approach avoids the confusion created by some of the current state statutes, which often allow one combination of these four potential actors to share the privileged information and another combination to receive them.¹⁶⁵ Furthermore, under the approach taken by other states that applies the common interest privilege only to information shared between the clients' attorneys,¹⁶⁶ allied clients may inadvertently waive the privilege entirely if the privileged information is shared by anyone other than the clients' respective attorneys. The approach taken by the new model version avoids this unnecessarily harsh consequence.

Although the clients' attorneys are not the only parties that can share or receive confidential information, the new model

¹⁶¹ *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974).

¹⁶² See discussion *supra* Section II.A.2.

¹⁶³ IDAHO R. EVID. 502(b)(3). *Accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. d (AM. LAW INST. 2000).

¹⁶⁴ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68, 70 (AM. LAW INST. 2000). In fact, the Restatement defines a "client set" for the purposes of the common interest privilege by simply incorporating the definition of "privileged persons" provided by § 70 regarding the attorney-client privilege. *Id.* at § 76 cmt. d.

¹⁶⁵ See *supra* notes 72-74 and accompanying text.

¹⁶⁶ See, e.g., *Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 146 (D. Del. 2009).

version of the common interest privilege does require the clients' attorneys to be present at the time that the confidential information is shared. Regarding Delaware's strict requirement that communications can only be shared among clients' attorneys,¹⁶⁷ the United States District Court for the District of Delaware rationalized that it "prevents abuse, such as, *post hoc* justification for a client's impermissible disclosures."¹⁶⁸ This concern for abuse is a legitimate one, but the same goal is accomplished by requiring the clients' attorneys to be present at the time the communications are shared rather than only allowing the client's attorney to receive privileged communications. Additionally, requiring the presence of the clients' attorneys furthers the attorney-client privilege's purpose of enhancing legal advice.¹⁶⁹

While executing a formal written agreement prior to sharing privileged information may certainly be a good practice,¹⁷⁰ the new model version of the common interest privilege does not require clients to do so to invoke the privilege. While proponents of a formal written agreement requirement may argue that it would prevent the abuse articulated in *Robert Bosch LLC v. Pylon Manufacturing Corp.* that clients may use the common interest privilege as a "*post hoc* justification" for an inadvertent

¹⁶⁷ DEL. R. EVID. 502(b)(3).

¹⁶⁸ *Robert Bosch LLC*, 263 F.R.D. at 146.

¹⁶⁹ Schaffzin, *supra* note 3, at 78-81 ("[B]ecause the attorney-client privilege protects only communications between an attorney and his or her client made for the purpose of obtaining legal advice, and because the purpose of that privilege is to increase the effectiveness of legal counsel, the privilege cannot extend through the common interest doctrine to communications made outside the presence of counsel. Parties cannot reasonably expect that such communications would result in legal advice.").

¹⁷⁰ 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 501.02[5][e][ii], LexisNexis (database updated June 2020) ("[I]t is certainly prudent (and common) practice to execute a written agreement before significant communications are exchanged. This would reduce any doubt about whether the parties to the discussion were pursuing a common goal with respect to the matters communicated. Without a written agreement, the party's burden of proving that a statement was made in the common interest will undoubtedly be more difficult.") (footnotes omitted). *See also* Power Mosfet Techs. v. Siemens AG, 206 F.R.D. 422, 425 (E.D. Tex. 2000) ("[P]arties relying on an oral agreement run the risk that the Court can not [sic] determine when or if an agreement was reached.") (footnote omitted), *objections sustained on other grounds by*, No. 2:99-CV-168, 2001 WL 35986948 (E.D. Tex. July 30, 2001).

disclosure,¹⁷¹ the other requirements of the new model common interest privilege, including that the clients share a common legal interest and that the clients' attorneys be present, already combat this potential abuse. Furthermore, while jurisdictions have varying standards for demonstrating that an agreement to share privileged information existed,¹⁷² many jurisdictions do not require a formal written agreement to invoke the common interest privilege.¹⁷³ Allied clients should be allowed to claim the common interest privilege as long as they can demonstrate that they were in agreement to share privileged information at the time the information was shared and that the other requirements of common interest privilege are satisfied.¹⁷⁴

Regarding the context in which the communications are made, the new model version of the common interest privilege rejects both the strict requirement that communications can only be made in the context of pending litigation and the somewhat less strict requirement that extends the privilege to communications made in the context of anticipated litigation. Professor Schaffzin argues that these requirements are inconsistent with the attorney-client privilege because there is no pending or anticipated litigation requirement for the attorney-client privilege.¹⁷⁵ Furthermore, the pending or anticipated litigation requirement is "redundant" because its purpose is to ensure that the common interest privilege will only apply to a common *legal* interest, which is already a prerequisite of the privilege.¹⁷⁶ Since courts can easily determine whether the common interest shared by allied clients is legal in nature, the pending or anticipated litigation requirement is unnecessary.

¹⁷¹ *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007).

¹⁷² See discussion *supra* Section II.D.

¹⁷³ See RICE ET AL., *supra* note 13, at § 4:35 n.13.

¹⁷⁴ See Schaffzin, *supra* note 3, at 82-83 ("[N]o confidentiality agreement should be necessary to protect a communication from disclosure, as long as the party asserting the privilege can sufficiently prove the elements of the privilege absent such an agreement.").

¹⁷⁵ Schaffzin, *supra* note 3, at 74-78.

¹⁷⁶ *Id.* See also Neary, *supra* note 57, at 829-30, taking particular issue with the "anticipated litigation" requirement ("Moreover, the idea of 'anticipated litigation' is ambiguous and vague, requiring additional judicial interpretation. Arguably, parties engaged in high risk industries could be anticipating litigation at any time.") (footnote omitted).

Instead, the new model version of the common interest privilege extends the privilege to communications made outside the context of litigation entirely. This approach not only brings the common interest privilege into alignment with the attorney-client privilege, but also furthers the attorney-client privilege's dual purposes of encouraging the free flow of communication and obtaining fully informed legal advice. As the district court in *SCM Corp. v. Xerox Corp.* put it, "[Clients] should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it."¹⁷⁷

When the communications are made in the context of pending litigation, the new model version of the common interest privilege allows the common interest privilege to apply when the clients are in separate pending cases. If the common interest privilege can apply outside the context of litigation entirely, requiring allied clients to be in the same pending case in context of litigation is illogical. Furthermore, plaintiffs are not required to sue defendants in the same action unless the elements of Rule 19 of the Federal Rules of Civil Procedure are met,¹⁷⁸ and defendants sued in separate actions may not be allowed to consolidate their cases for jurisdictional reasons. Therefore, if jurisdictions require allied clients to be sued in the same pending action, a cunning plaintiff could simply bring separate lawsuits with similar claims against clients to prevent them from invoking the common interest privilege. Allowing allied clients to be in separate pending cases in the context of litigation would prevent this kind of abuse.

Rather than requiring unanimous agreement by all members of the common interest arrangement to waive the common interest privilege, the new model version of the privilege allows only the client who shared the privileged information to subsequently waive the privilege. As Professor Schaffzin argues, even though the privileged information is disclosed to the other clients in the common interest arrangement, the attorney-client privilege belongs to each individual client, so requiring unanimous consent to effect a waiver of the common interest privilege undermines the attorney-client privilege in regard to each client's privileged

¹⁷⁷ *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976).

¹⁷⁸ See FED. R. CIV. P. 19 and its state equivalents.

information.¹⁷⁹ The “unanimous consent” requirement not only disrupts the consistency between the common interest privilege and the attorney-client privilege, but also discourages clients from disclosing privileged information with the other members of the common interest arrangement because doing so would relinquish that client’s control as to whether or not the information should remain privileged.¹⁸⁰ Therefore, a client who shares privileged information with the other clients should retain the right to waive the privilege.

Professor Rice disfavors this approach, claiming that “it may lead to an unfair infringement of the confidentiality of the other participants in the joint defense arrangement.”¹⁸¹ However, as Professor Schaffzin clarifies, the right to waive the privilege in regard to any privileged information that originates within the context of the common interest arrangement, such as communications made in a joint conference among the allied clients, would be held by each member of common interest arrangement.¹⁸² In such a case, the unanimous consent of all members of the common interest arrangement is required to waive the privilege without undermining the attorney-client privilege or resulting in the “unfair infringement” of each client’s confidentiality.

Furthermore, the common interest privilege should be automatically waived if the allied clients become adverse parties in a subsequent proceeding. The United States District Court for the Southern District of New York explained the reasoning for this automatic waiver in the following way: “[W]hen [formerly allied clients] face one another in litigation, neither can reasonably be allowed to deny to the other the use of information which he already has by virtue of the former’s own disclosure.”¹⁸³ The only exception to this rule would be if, during the course of the common interest arrangement, the allied clients had specifically agreed

¹⁷⁹ Schaffzin, *supra* note 3, at 83-85.

¹⁸⁰ *Id.*

¹⁸¹ RICE ET AL., *supra* note 13, at § 4:35.

¹⁸² Schaffzin, *supra* note 3, at 83-85.

¹⁸³ *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975).

that the information protected by the common interest privilege will remain privileged in the event they became adversaries.¹⁸⁴

C. Putting It All Together: The New Common Interest Privilege

Rule 502(b)(3) of Idaho Rules of Evidence serves as the model statute of the common interest privilege, which reads as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made . . . among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication.¹⁸⁵

Additionally, the following proposed commentary would accompany the statutory text of the common interest privilege:

For purposes of the common interest privilege, clients share a "common interest" if they share a common legal purpose and the shared communications are made in furtherance of this common legal purpose. Additionally, the clients' common interest may be either legal, factual, or strategic in character as long as it furthers the clients' legal interests. Furthermore, the common interest privilege shall not be terminated where clients share other interests, such as common commercial interests, in addition to their common legal interests.

Prior to sharing confidential information, the clients must be in agreement that the shared information will be protected by the common interest privilege. Although the execution of a formal written agreement is sufficient to demonstrate the existence of this agreement, such formality is not required. The common interest privilege shall apply as long as the clients can demonstrate the existence of a prior agreement to share

¹⁸⁴ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. f (AM. LAW INST. 2000).

¹⁸⁵ IDAHO R. EVID. 502(b)(3).

confidential information and the other requirements of the common interest privilege are satisfied.

While the common interest privilege certainly applies in the context of pending or anticipated litigation, the privilege applies outside these contexts as well. Within the context of pending litigation, clients may be involved in the same pending case or in separate pending cases.

Each client retains the right to waive the common interest privilege in regard to the client's own confidential information even though it has been shared with the other members of the common interest arrangement. However, the unanimous consent of all members of the common interest arrangement is required to waive the privilege in regard to confidential communications that originate among the members of the common interest arrangement. In the event that clients in a common interest arrangement become adversaries in a subsequent proceeding, the common interest privilege shall be automatically waived unless the clients had previously agreed that the privilege would remain in effect in such event.

CONCLUSION

The common interest privilege allows clients with a "common interest" to share confidential information without waiving the attorney-client privilege.¹⁸⁶ Beyond this broad, generic definition of the common interest privilege, there is very little congruity among the state and federal jurisdictions throughout the United States in articulating what the common interest privilege is. The common interest privilege raises seven key issues: (1) how to define a "common interest" among clients; (2) which actors are allowed to share privileged information and which actors are allowed to receive it; (3) whether each of the clients' attorneys must be present when privileged information is shared; (4) what is required to demonstrate that the clients have agreed to enter into a common interest arrangement; (5) whether the common interest privilege can apply only in the context of pending litigation, in the context of anticipated litigation, or outside the context of litigation entirely; (6) whether, within the context of pending litigation, the

¹⁸⁶ *In re* Grand Jury Subpoenas, 902 F.2d 244, 248-49 (4th Cir. 1990).

clients must be in the same pending case or can be in separate pending cases; and (7) how can the privilege be subsequently waived. Unfortunately, no state or federal jurisdiction has addressed all of these issues, and among those that have addressed some of these key issues, they have not done so in a consistent manner.

Congress and the state legislatures should pass a uniform version of the common interest privilege to resolve this inconsistency. Under this model version of the common interest privilege, a “common interest” will exist where clients share a common purpose regarding their legal interests. The model version also allows the clients, their attorneys, and their respective representatives to share and receive confidential information as long as the clients’ attorneys are present. Furthermore, no formality is required to demonstrate the clients’ agreement to share confidential information protected by the common interest privilege. Additionally, the model version allows the common interest privilege to apply outside the context of litigation entirely, and in the context of pending litigation, clients may be in separate pending cases. Each client may also subsequently waive the common interest privilege in regard to the client’s own confidential information unless the confidential information originated in communications between the members of the common interest arrangement. Finally, the common interest privilege is automatically waived if the clients become adversaries unless they have specifically agreed otherwise.

The model version of the common interest privilege proposed by this Article aims to address all seven of the key issues raised by the privilege in a way that combines the “reason and experience”¹⁸⁷ of state and federal courts, the lessons learned from previously proposed model versions of the privilege, and the expertise of legal academia. Furthermore, it best effectuates the dual purposes of the attorney-client privilege, encouraging the free flow of communication and allowing clients to obtain fully informed legal advice, while remaining mindful of the privilege’s effect of “withholding relevant information from the fact-finder.”¹⁸⁸

¹⁸⁷ FED. R. EVID. 501.

¹⁸⁸ Fisher v. United States, 425 U.S. 391, 403 (1976).

Since “an uncertain privilege . . . is little better than no privilege at all,”¹⁸⁹ Congress and the state legislatures should eagerly jump at the opportunity to bring commonality to the common interest privilege.

¹⁸⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).