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AN UNCERTAIN PRIVILEGE: WHY THE COMMON INTEREST DOCTRINE DOES NOT WORK AND HOW UNIFORMITY CAN FIX IT

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I. INTRODUCTION

The common interest doctrine provides an exception to the general rule that a client waives the attorney-client privilege by communicating previously privileged information to a third party.¹ The doctrine permits represented parties who share a common legal interest to exchange privileged information in a confidential manner for the purpose of obtaining legal advice without waiving the attorney-client privilege.² Consider the following illustration: Plaintiffs A and B have filed lawsuits in North Carolina and New Jersey, respectively, against a common defendant, Tobacco Company, for damages related to each plaintiff's smoking addiction. Plaintiff C, suffering similar damages, is considering filing a similar lawsuit against Tobacco Company in Colorado.³ Under this example, Plaintiffs A,

* Honorable Abraham L. Freedman Fellow and Lecturer in Law, Temple University Beasley School of Law. I would like to thank David Sonenshein, Richard Greenstein, and Daniel Schaffzin for their helpful comments on this Article and their useful insights on the ideas expressed herein. I also wish to thank Henrik Swanljung and Tricia Desmarais for their excellent research assistance.

¹ E.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990); *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.* (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

² E.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249 (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)); *Sedlacek v. Morgan Whitney Trading Group, Inc.*, 795 F. Supp. 329, 331 (C.D. Cal. 1992) (quoting *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1175 (D.S.C. 1975); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 440-41 (Fla. Dist. Ct. App. 1987); James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 632 (1997). See *infra* Part II.C. for a detailed discussion of the common interest doctrine.

³ This Article employs variations of this hypothetical example throughout the discussion. The hypothetical involves information-sharing among plaintiffs in separate actions facing a common adversary in mass tort litigation because the prosecution of

such litigation easily demonstrates this Article's focus on how the uncertain application of the common interest doctrine frustrates the goals of the attorney-client privilege.

Mass tort litigation involves numerous lawsuits brought by multiple plaintiffs against a common defendant or group of defendants for alleged widespread injury arising from a similar set of facts. Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, __ UTAH L. REV. 1 (forthcoming 2005) (manuscript at 1 n.1, on file with author) (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.1 (2004)); Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 994 (1995). Although plaintiffs' counsel may attempt to formally aggregate the cases through class certification, "courts have proved reluctant to allow mass tort litigation, especially mass products liability claims, to proceed as class actions." Lowenthal & Erichson, *supra* at 991; *accord* Stier, *supra* (manuscript at 3). According to Professor Byron Stier, courts are reluctant to certify mass torts as class actions "because they involve numerous individualized issues that require unmanageable individualized adjudication." Stier, *supra* (manuscript at 3). The result forces many independent plaintiffs to file separate lawsuits against a common defendant based on common facts.

Notwithstanding the courts' reluctance to certify classes, the modern trend among plaintiffs is to proceed through informal aggregation—where attorneys representing plaintiffs with similar legal interests proceed as though a case were formally aggregated by sharing information and pooling resources through a plaintiffs' network. Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386-87 (2000); Lowenthal & Erichson, *supra* at 998. Included in such pooling is the sharing of discovery, strategic planning, and identification and preparation of witnesses. Stier, *supra* (manuscript at 35-6); Erichson, *supra* at 388-89; Lowenthal & Erichson, *supra* at 998. These plaintiffs' networks result in decreased costs to each individual plaintiff and increased efficiency in prosecuting each claim. *See, e.g.*, Erichson, *supra* at 386-88; Lowenthal & Erichson, *supra* at 1000 (quoting *ATLA Guide to Litigation Groups*, TRIAL, July 1991, at S1, S2).

Participation in an information-sharing network while prosecuting mass tort litigation poses a significant risk to an individual plaintiff's attorney-client privilege. To the extent that information-sharing calls on one plaintiff to disclose information protected by the attorney-client privilege to another plaintiff in a separate action, the disclosure may constitute the waiver of the privilege that occurs when a party breaches the confidentiality of a privileged communication by disclosure to a third party. *See, e.g.*, *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997); *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981); *Niagara Mohawk*, 189 B.R. at 571; *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985); *In re LTV Sec.*, 89 F.R.D. at 604; *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 386 (S.D.N.Y. 1975). Such waiver may occur regardless of a written confidentiality agreement between parties attempting to preserve the attorney-client privilege. *See infra* Part III.B.4. discussing the utility of a confidentiality agreement in preventing the compelled disclosure of communications addressed by the agreement.

Even if a plaintiff engages in information-sharing in a jurisdiction where such actions

B, and C may decide to share otherwise privileged information with one another to enhance their own claims. They may also elect to pool resources such as discovery and expert reports to save money and increase the efficiency of their claims.⁴ In theory, the common interest doctrine would allow Plaintiffs A, B, and C to share, through or in the presence of counsel, privileged information related to their common legal interests against Tobacco Company, without waiving the attorney-client privilege.

The purpose of the doctrine, like that of the underlying attorney-client privilege, is two-fold—to encourage the free flow of information and to enhance the quality of legal advice.⁵ Courts reason that the privilege's positive effect on the quality of legal advice benefits society by promoting justice.⁶ Returning to the previous example, Plaintiffs A, B, and C will be more likely to share information among themselves, in the presence of counsel, if they can more accurately predict that such action will not waive the attorney-client privilege. Accordingly, the common interest doctrine promotes the free flow of communication. Moreover, access to information concerning cases substantially similar to their own aids counsel to Plaintiffs A, B, and C to become more informed about their clients' respective cases. Where counsel is more informed, he or she may provide better legal advice. Therefore, in theory, the common interest doctrine fulfills both purposes of the attorney-client privilege.

Its divergent recognition and application across jurisdictions, however, have prevented the common interest doctrine from achieving the goals it shares with the

would not constitute waiver of the attorney-client privilege, he or she is not protected from a ruling that the privilege is inapplicable in another jurisdiction, allowing the disclosure of formerly privileged documents to a party with interests adverse to plaintiff's. For example, if the common interest doctrine were clearly adopted and applied in North Carolina, but not yet recognized in New Jersey or Colorado, Plaintiff A would be discouraged from sharing information with Plaintiffs B or C, for fear that a court in New Jersey or Colorado would decline to adopt the privilege and compel Plaintiffs B or C to disclose the information privileged in North Carolina to Tobacco Company. Despite the significance of these risks, information-sharing and resource-pooling continues as a growing practice among plaintiffs in mass tort litigation.

⁴ To the extent that the pooling of resources involves the disclosure of attorney work-product, the common interest doctrine may also protect such disclosures. However, because the analysis of the common interest doctrine extending to work-product differs from that in applying the common interest doctrine to the attorney-client privilege, this Article limits the discussion to attorney-client protected communications.

⁵ See *infra* notes 23, 31, 41, and accompanying text.

⁶ See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

attorney-client privilege. Only a handful of state and federal jurisdictions have affirmatively adopted the common interest doctrine.⁷ Moreover, those jurisdictions

⁷ Courts within the following jurisdictions have either adopted the common interest doctrine or at least favorably recognized it: Arizona, *see, e.g.*, *Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1099-1101 (Ariz. Ct. App. 2003) (applying common interest doctrine to protect communications shared between counsel to plaintiff in a civil action and non-party), California, *see, e.g.*, *McKesson HBOC, Inc. v. Super. Ct.*, 9 Cal. Rptr. 3d 812, 818 (Cal. Ct. App. 2004) (dictum) ("In other words parties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege."); *Armenta v. Super. Ct.*, 124 Cal. Rptr. 2d 273, 278-79 (Cal. Ct. App. 2002) (dictum) (applying common interest doctrine to protect work product shared between counsel for co-plaintiffs in civil action), Delaware, *see, e.g.*, *WT Equip. Partners, L.P. v. Parrish*, No. Civ. A. 15616, 1999 WL 743498, at *1 (Del. Ch. Sept. 1, 1999) (applying common interest doctrine to protect communications shared between counsel for plaintiff and non-party in civil action), Florida, *see, e.g.*, *Visual Scene*, 508 So. 2d at 440-41 (applying common interest doctrine to protect communications shared between counsel to plaintiff and defendant in civil action to further parties' common interest in defeating counterclaim and cross-claim brought against them by common co-defendant), Georgia, *see, e.g.*, *McKesson Corp. v. Green*, 597 S.E.2d 447, 452 n.8 (Ga. Ct. App. 2004) (dictum) ("The 'common interest' privilege, also known as the joint defense privilege, applies where '(1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived.'") (quoting *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2005)), Massachusetts, *see, e.g.*, *Am. Auto. Ins. Co. v. J.P. Noonan Transp., Inc.*, No. 970325, 2000 WL 33171004, at *7 (Mass. Super. Ct. Nov. 16, 2000) (applying common interest doctrine to protect communications shared between counsel to co-plaintiffs in civil case), Missouri, *see, e.g.*, *Lipton Realty, Inc. v. St. Louis Hous. Auth.*, 705 S.W.2d 565, 570 (Mo. Ct. App. 1986) (applying common interest doctrine to protect communications shared between counsel to civil defendant and non-party), Montana, *see, e.g.*, *In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures*, 2 P.3d 806, 821 (Mont. 2000) (dictum) ("[W]e do not hold that the disclosure of detailed description of professional services to a third-party auditor necessarily violates any privilege that may attach to them."), New Jersey, *see, e.g.*, *LaPorta v. Gloucester County Bd. of Chosen Freeholders*, 774 A.2d 545, 549 (N.J. Super. Ct. App. Div. 2001) (dictum) (applying common interest doctrine to protect work product shared among counsel to civil defendants and non-party), New York, *see, e.g.*, *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London*, 676 N.Y.S.2d 727, 732 (N.Y. Sup. Ct. 1998) (dictum) ("The principles which warrant an extension of the privilege to co-defendants facing criminal charges apply with equal force to those parties facing common problems in pending or threatened civil litigation."), Tennessee, *see, e.g.*, *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 214-15 (Tenn. Ct. App. 2002) (applying common interest doctrine to protect communications shared between attorneys for civil defendant and non-party), Texas, *see, e.g.*, *In re Skiles*, 102 S.W.3d 323, 326-27 (Tex. Ct. App. 2003) (applying common interest doctrine to protect communications shared between counsel to civil defendant and non-party), Virginia, *see, e.g.*, *Hicks v. Commonwealth*, 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (dictum)

that have recognized the common interest doctrine have not applied it uniformly.⁸ This lack of uniformity results in uncertainty concerning the doctrine's reach and function.⁹ Such uncertainty may discourage parties from sharing information with others similarly situated for fear of waiving the attorney-client privilege.¹⁰ As the United States Supreme Court noted, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is

(declaring that common interest doctrine applies "whether the commonly interested parties are plaintiffs or defendants"), United States Court of Appeals for the Second Circuit, *see, e.g.,* *Lugosch v. Congel*, 219 F.R.D. 220, 236 (N.D.N.Y. 2003) (applying common interest doctrine approved in *Schwimmer*, 892 F.2d at 243-44, to protect communications shared among counsel to civil defendant and non-party), United States Court of Appeals for the Third Circuit, *see, e.g.,* *Constar Int'l, Inc. v. Cont'l Pet Techs., Inc.*, No. Civ. A. 99-234-JJF, 2003 WL 22769044, at *1 (D. Del. Nov. 19, 2003) (applying common interest doctrine to protect communications shared among counsel to civil plaintiff and non-parties), United States Court of Appeals for the Fourth Circuit, *see, e.g., In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249 (applying common interest doctrine to protect communications shared between attorneys for civil plaintiff and non-party), United States Court of Appeals for the Sixth Circuit, *see, e.g.,* *Libbey Glass, Inc. v. Oneida Ltd.*, 197 F.R.D. 342, 347 (D. Ohio 1999) (applying common interest doctrine to protect communications shared among counsel to civil defendant and non-parties), United States Court of Appeals for the Seventh Circuit, *see, e.g., Schachar*, 106 F.R.D. at 191-92 (applying common interest doctrine to protect communications shared between attorneys for plaintiffs in separate lawsuits), United States Court of Appeals for the Eighth Circuit, *see, e.g., In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (dictum) (adopting Proposed Federal Rule of Evidence 503(b)(3) as exception to waiver of attorney-client privilege where parties share privileged information concerning common legal interest), United States Court of Appeals for the Ninth Circuit, *see, e.g., Sedlacek*, 795 F. Supp. at 331 (applying common interest doctrine to protect communications shared between attorneys for co-plaintiffs in civil action), United States Court of Appeals for the Tenth Circuit, *see, e.g.,* *United States ex rel. [Redacted] v. [Redacted]*, 209 F.R.D. 475, 479 (D. Utah 2001) (dictum) (applying common interest doctrine to protect work product shared among counsel to co-plaintiffs in civil action), United States Court of Appeals for the Federal Circuit, *see, e.g.,* *B.E. Meyers & Co., Inc. v. United States*, 41 Fed. Cl. 729, 732 (Fed. Cl. 1998) (applying common interest doctrine to protect communications shared between counsel for plaintiff in civil action and counsel for non-party), United States Court of Appeals for the District of Columbia Circuit, *see, e.g., Minebea Co. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005) (applying common interest doctrine to protect communications shared between attorney for civil plaintiff and attorney for non-party).

⁸ See *infra* Part III.B. for a detailed discussion of the extent to which those jurisdictions recognizing the common interest doctrine apply it.

⁹ For a detailed discussion of the effects of uncertainty concerning the common interest doctrine, see *infra* Part III.

¹⁰ See *infra* Part III for a detailed discussion of the effects of uncertainty concerning the common interest doctrine.

little better than no privilege at all.”¹¹ Unless a party is certain that a shared communication will remain privileged, the risk of disclosing protected information (except that which concerns truly innocuous matters), and thereby sacrificing the attorney-client privilege, may outweigh the perceived benefits of sharing. This lack of certainty obstructs the free flow of information and limits the ability of counsel to provide the best available legal advice. Until parties can rely on a consistent, uniformly applied common interest doctrine, the goals of the attorney-client privilege will remain unfulfilled.

In this Article, I propose the adoption of a uniform common interest doctrine across jurisdictions. A well-defined doctrine would clarify current uncertainty concerning the application of the attorney-client privilege and encourage information-sharing without risking waiver of the privilege. Thus, a uniform common interest doctrine would promote the uninhibited communication of information among parties with common legal goals. This, in turn, would enhance the quality of legal advice given. Therefore, a uniformly adopted and clearly defined common interest doctrine can achieve the currently unattainable goals of the attorney-client privilege.

Part II of this Article explains the evolution of the common interest doctrine from its roots in the attorney-client privilege, through judicial recognition of the joint defense doctrine, and finally to judicial consideration of the common interest doctrine itself. Part III demonstrates that the recognition and application of the common interest doctrine is uncertain, and that this uncertainty frustrates its utility as a tool in achieving the goals of the attorney-client privilege. This Part also highlights the significant holes in the doctrine, as jurisdictions currently interpret it, which would prevent even a uniformly recognized doctrine from effectively serving its purpose. Part IV of this Article proposes the uniform adoption of a clearly defined common interest doctrine. Finally, in Part V, this Article concludes that a uniformly adopted and well-defined common interest doctrine will redress the current state of uncertainty concerning this issue, rendering the doctrine effective in achieving the goals of the attorney-client privilege.

II. THE EVOLUTION OF THE COMMON INTEREST DOCTRINE

The common interest doctrine is firmly rooted in the attorney-client privilege. Many courts characterize it as an extension of the attorney-client privilege¹² and

¹¹ *Upjohn Co.*, 449 U.S. at 393.

¹² *E.g.*, *Schwimmer*, 892 F.2d at 243; *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987) (“The joint defense privilege, which is an extension of the attorney client privilege, has been long recognized by this circuit.”); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 386 (S.D.N.Y. 1975) (“Those cases in which the privilege has been sustained in relation to communications among, or made in the presence of, two or more lay persons and one or more attorneys may be regarded as clarifications of, rather than exceptions to, the [waiver] rule set forth

many more describe it as an exception to the traditional waiver of the attorney-client privilege that occurs when a client discloses confidential communications to a third party.¹³ Courts identify it by a variety of names, such as the “common interest privilege,” the “community of interest privilege,” the “joint defense privilege,” the “joint prosecution privilege,” the “joint privilege,” and the “pooled information privilege.”¹⁴ While a few courts and commentators have debated the subtle nuances of each name,¹⁵ this Article uses the phrase “common interest doctrine” to describe the exception to the waiver rule that protects from disclosure attorney-client privileged communications that clients, either by or in the presence of counsel, exchange among represented parties who share a common legal interest.¹⁶ The common interest doctrine is so intertwined with the attorney-client privilege that it cannot apply unless the attorney-client privilege protected the

above.”).

¹³ *E.g.*, *In re Grand Jury Subpoenas*, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990) (describing joint defense privilege as “[a]n exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege”); *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.* (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995) (“The joint-defense privilege acts as an exception to these general waiver rules in order to facilitate cooperative efforts among parties who share common interests.”); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (characterizing joint defense privilege as “exception to the general rule that no privilege attaches to communications made in the presence of third parties”).

¹⁴ *See, e.g.*, *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249 (applying common interest doctrine to protect communications disclosed between civil plaintiff and its non-party subsidiary) (quoting *Schwimmer*, 892 F.2d at 243); *Sedlacek v. Morgan Whitney Trading Group, Inc.*, 795 F. Supp. 329, 331 (C.D. Cal. 1992) (renaming “joint defense privilege” as “joint prosecution privilege” when applied to co-plaintiffs); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (applying “joint privilege” to protect communications between plaintiffs in separate litigations, not yet certified as class); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1175 (D.S.C. 1975) (applying “community of interest” to protect communications exchanged between plaintiffs in civil litigation and non-parties to litigation); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 440-41 (Fla. Dist. Ct. App. 1987) (applying “common interests exception” to protect communications between civil plaintiff and defendant with common interest in defending counterclaim and cross-claim brought by common co-defendant).

¹⁵ *E.g.*, *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249 (quoting *Schwimmer*, 892 F.2d at 243); *Sedlacek*, 795 F. Supp. at 331; *Schachar*, 106 F.R.D. at 191-92; *Duplan*, 397 F. Supp. at 1175; *Visual Scene*, 508 So. 2d at 440-41; Fischer, *supra* note 2, at 632-34.

¹⁶ Although courts and commentators refer to the concept as either a privilege or a doctrine, this Article refers to a “doctrine” to underscore the fact that the common interest doctrine is tied to the attorney-client privilege and is not a privilege in its own right.

original communication prior to its disclosure.¹⁷ To understand the reasoning behind the evolution of the common interest doctrine, therefore, one must first understand the history and policies behind the attorney-client privilege.

A. The Attorney-Client Privilege

The attorney-client privilege is an evidentiary privilege that protects from disclosure the confidential communications that an attorney and his or her client exchange for the purpose of rendering legal advice.¹⁸ The privilege belongs to the client and only he or she may waive it.¹⁹ Because the nature of the communication must be confidential for the attorney-client privilege to apply,²⁰ courts have generally applied the traditional rule that disclosure of an otherwise privileged communication to a third party constitutes a waiver of the privilege by removing the "confidential" nature of the communication.²¹

Courts have developed the attorney-client privilege and its waiver through common law application of the privilege on a case-by-case basis.²² In recognizing

¹⁷ See, e.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249; *Minebea Co., Ltd. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005); *Niagara Mohawk*, 189 B.R. at 571; *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 387-88; Joel D. Heusinger, *Practical Concerns in Prosecuting Pass-Through Claims*, 25 CONSTR. LAW. 26, 28 (Spring 2005). See *infra* Part II.C. for a discussion of the requirements of the common interest doctrine.

¹⁸ E.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) (citing 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1 (1st ed. 1993)); *In re LTV Sec.*, 89 F.R.D. at 599-600; *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 27-28 (N.D. Ill. 1980); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 66, 99 (2002); see also, e.g., *Marc Rich & Co. A.G. v. United States*, 731 F.2d 1032, 1036 (2d Cir. 1984) ("The privilege attaches '(1) where legal advice of any kind is sought (2) from a professional legal advisor 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 advisor, (8) except the protection be waived . . .'" (quoting *United States v. Bein*, 728 F.2d 107, 112 (2d Cir. 1984)); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

¹⁹ See, e.g., *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 841 (1871).

²⁰ See, e.g., *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981); *Niagara Mohawk*, 189 B.R. at 571 ("It is well-established that confidentiality lies at the heart of the attorney-client privilege."); *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985); *In re LTV Sec.*, 89 F.R.D. at 604; *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 386.

²¹ See, e.g., *Genentech*, 122 F.3d at 1415; *Melvin*, 650 F.2d at 645; *Niagara Mohawk*, 189 B.R. at 571; *Union Carbide*, 619 F. Supp. at 1047; *In re LTV Sec.*, 89 F.R.D. at 604; *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 386.

²² See *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981); *Polycast Tech. Corp.*

the attorney-client privilege, courts have universally employed the rationale that the privilege encourages the free flow of information between client and attorney, accordingly enhancing the effectiveness of counsel.²³ This goal, however, conflicts with the general principle that "the public is entitled 'to every man's evidence.'"²⁴ In the 1976 case, *Fisher v. United States*, the United States Supreme Court recognized the conflict between the search for truth and the attorney-client privilege that necessarily obstructs that search, noting,

As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.²⁵

As a result, courts generally strictly construe the attorney-client privilege to protect the truth-seeking process.²⁶ Despite the courts' strict construction, the joint defense and common interest doctrines have evolved through an extension of the reasoning

v. Uniroyal, Inc., 125 F.R.D. 47, 48-9 (S.D.N.Y. 1989); *but see, e.g.*, ALA. R. EVID. 502(b)(3) (statutorily addressing attorney-client privilege); ALASKA R. EVID. 503(b)(3) (same); ARK. R. EVID. 502(b)(3) (same); CAL. EVID. CODE §§ 912 & 952 (same); DEL. R. EVID. 502(b)(3) (same); FLA. STAT. ANN. § 90.502(c) (West 1999 & Supp. 2004) (same); HAW. R. EVID. 503(b)(3) (same); IDAHO R. EVID. 502(b)(3) (same); KY. R. EVID. 503(b)(3) (same); LA. R. EVID. 506(B)(3) (same); ME. R. EVID. 502(b)(3) (same); MISS. R. EVID. 502(b)(3) (same); NEB. R. EVID. § 27-503(2)(c) (same); NEV. REV. STAT. § 49.095(3) (2002 & Supp. 2004) (same); N.H. R. EVID. 502(b)(3) (same); N.M. R. EVID. 11-503(B)(3) (same); N.D. R. EVID. 502(b)(3) (same); OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West 1993) (same); OR. R. EVID. 503(2)(c) (same); S.D. CODIFIED LAWS § 19-13-3(3) (Michie 1995) (same); TEX. R. EVID. 503(b)(1)(C) (same); UTAH R. EVID. 504(b) (same); VT. R. EVID. 502(b)(3) (same); WIS. STAT. ANN. § 905.03(2) (West 2000) (same).

²³ *See, e.g.*, *Upjohn*, 449 U.S. at 389; *Fisher*, 425 U.S. at 403; *Haines*, 975 F.2d at 89-90; *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986); *Marc Rich*, 731 F.2d at 1036; *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 322 (7th Cir. 1963).

²⁴ *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 386 (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (John T. McNaughton ed., 1961)); *accord, e.g.*, *Fisher*, 425 U.S. at 403; *Radiant Burners*, 320 F.2d at 323; *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191 (N.D. Ill. 1985); *In re LTV Sec.*, 89 F.R.D. at 600.

²⁵ 425 U.S. at 403.

²⁶ *See, e.g., id.*; *Radiant Burners*, 320 F.2d at 323; *Schachar*, 106 F.R.D. at 191; *In re LTV Sec.*, 89 F.R.D. at 600; *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 27-28 (N.D. Ill. 1980); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 386.

supporting the attorney-client privilege.

B. The Joint Defense Doctrine

In its 1871 decision, *Chahoon v. Commonwealth*, the Virginia Supreme Court of Appeals became the first court to expand the attorney-client privilege beyond its own strict confines.²⁷ In that case, the court held that a criminal defendant had not waived the attorney-client privilege by disclosing confidential information among counsel to criminal co-defendants, thereby becoming the first court to recognize what has come to be known as the joint defense privilege.²⁸ The joint defense privilege is an exception to the general rule that disclosure of attorney-client privileged communications to a third party waives the privilege. The privilege applies when a client, by or in the presence of his or her attorney, shares privileged communications among represented co-defendants for the purpose of forming a common defense strategy.²⁹

In recognizing the joint defense privilege as applied to criminal co-defendants, courts reason that co-defendants have the right to obtain the separate counsel of their choice as well as the privilege to protect communications between the defendant and his or her attorney from compelled disclosure.³⁰ Because the purpose of the

²⁷ 62 Va. (21 Gratt.) 822 (1871).

²⁸ *Id.* at 841-42. In *Chahoon v. Commonwealth*, the Commonwealth of Virginia indicted three men as co-conspirators to fraud. *Id.* at 835. The three defendants retained separate attorneys and met together to discuss a common defense strategy. *Id.* At trial, one co-defendant called counsel to another co-defendant to testify as to what his client said during that joint defense conference. *Id.* at 836. Counsel refused to answer such questions, relying on the attorney-client privilege. *Id.* The trial court denied a motion to compel counsel's testimony. *Id.*

On appeal, the Virginia Supreme Court of Appeals affirmed the decision of the trial court and refused to compel the disclosure by counsel. *Id.* at 845. The court held that the attorney-client privilege protects communications made in the presence of counsel during a conference among criminal co-defendants to discuss a joint defense strategy. *Id.* at 841-42. In this manner, the court in *Chahoon* first extended the attorney-client privilege beyond the confines of an attorney and his or her client to the context of communications shared with members of a common defense team.

²⁹ See, e.g., *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *In re LTV Sec.*, 89 F.R.D. at 604.

³⁰ See *Chahoon*, 62 Va. (21 Gratt.) at 841-42; accord, e.g., *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 388-89; Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1289 (1990) ("Several courts have worked the joint-defense requirement into the framework of the attorney-client privilege through the *Chahoon* rationale: reasoning that the attorney-client privilege extends to shared information in the first place because the parties could have hired the same lawyer.") (emphasis added).

attorney-client privilege is to encourage the free flow of information to produce the most effective legal advice, and because permitting the exchange of communications among defendants with a common defense strategy promotes this goal, these courts reason that the privilege should extend to protect such communications.³¹ As first expressed by the Virginia Supreme Court of Appeals in *Chahoon*,

The parties . . . might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication. They had the same defence [sic] to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all They had a right, all the accused and their counsel, to consult together about the case and the defence [sic], and it follows as a necessary consequence, that all the information, derived by any and all of the counsel from such consultation, is privileged³²

Based on this rationale, the joint defense privilege universally gained easy and early acceptance in the criminal context.³³

In the 1942 case *Schmitt v. Emery*, the Supreme Court of Minnesota became the first court to extend this joint defense privilege beyond the criminal context into the civil arena by applying it to protect confidential communications that civil co-defendants shared in the presence of their separately retained attorneys.³⁴ Since

³¹ *In re Grand Jury Subpoenas*, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990); see, e.g., *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979); *Chahoon*, 62 Va. (21 Gratt.) at 838-39; see also Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 511 (2003); Note, *Attorney-Client & Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697, 1708 (1995) (acknowledging free flow of information as a rationale for extension of privilege).

³² *Chahoon*, 62 Va. (21 Gratt.) at 841-42.

³³ See, e.g., *United States v. Melvin*, 650 F.2d 641, 645-46 (5th Cir. 1981) (dictum); *McPartlin*, 595 F.2d at 1336; *Hunydee v. United States*, 355 F.2d 183, 184-85 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 388-89.

³⁴ 2 N.W.2d 413 (Minn. 1942), *overruled on other grounds by* *Leer v. Chi., Milwaukee, St. Paul & Pac. Ry. Co.*, 308 N.W.2d 305, 309 (Minn. 1981). In *Schmitt v. Emery*, the Supreme Court of Minnesota considered the appeal of plaintiff from a verdict for the defendants in her personal injury action against a bus company, a bus driver, the owner of another automobile, and the driver of that automobile, for injuries sustained when a car driven by her husband collided with a bus and another car. *Id.* at 415-16. On appeal, plaintiff charged that the trial court erred in disallowing evidence of the defendant bus driver's statements to the agent of joint counsel for defendant bus company and defendant bus driver. *Id.* at 416-17. In a joint effort to keep the statement out of evidence at trial, counsel to the bus company and bus driver shared the statement with counsel to the owner and driver of the second automobile. *Id.* at 417. The trial

then, other courts that have considered this issue have similarly applied the joint defense privilege to protect attorney-client privileged communications that civil co-defendants have shared in counsel's presence for the purpose of enhancing a common defense strategy.³⁵

In *Niagara Mohawk Power Corporation v. Megan-Racine Associates, Inc.*, the United States Bankruptcy Court for the Northern District of New York stated the generally accepted rationale for extending the joint defense privilege to co-defendants in a civil matter as follows:

Although the joint defense privilege is developed within the context of criminal cases, its purpose is to encourage interparty communications such that the parties receive effective legal representation as well as to facilitate a just determination of the case. As these purposes are common to civil and criminal cases, the Court does not find it anomalous to extend New York's recognition of the joint-defense privilege to civil cases.³⁶

In all instances where a jurisdiction has extended the attorney-client privilege beyond the traditional bounds of attorney and client to protect communications between co-defendants sharing a common legal interest, courts have focused on the same justifications. They reason that such extensions fulfill the purpose of the

court did not allow the statement into evidence, eventually sustaining the argument that the attorney-client privilege protected the statement. *Id.* at 416-17.

The supreme court affirmed the trial court's decision not to admit the statement. *Id.* at 417. The court agreed that the attorney-client privilege applied to the statement and that the co-defendant asserting the privilege had not waived the privilege by disclosure to counsel for the co-defendants working towards the common legal goal of excluding the statement from evidence. *Id.* at 416-17. The court recognized that the purpose of the disclosure was "to enable them to make their effort and aid more effective in the common cause of excluding the statement." *Id.* at 417. The court held,

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 cannot be compelled, to produce or disclose its contents.

Id.

³⁵ See, e.g., *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.* (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562-571 (Bankr. N.D.N.Y. 1995); *Western Fuels Ass'n, Inc. v. Burlington N. R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

³⁶ 189 B.R. at 571 (citations omitted).

attorney-client privilege to promote the free flow of communication and to enhance the effectiveness of legal advice.³⁷

C. *The Common Interest Doctrine*

Courts first developed the common interest doctrine as they considered whether the joint defense doctrine protected privileged communications that civil co-plaintiffs or even non-parties shared in the presence of counsel to further a joint prosecution strategy.³⁸ Most courts have left the issue of whether the attorney-client privilege extends to co-plaintiffs or non-parties in a civil action largely unaddressed.³⁹ Those courts that have addressed the issue have adopted the

³⁷ *In re Grand Jury Subpoenas*, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990); see, e.g., *McPartlin*, 595 F.2d at 1336 (criminal co-defendants); *Niagara Mohawk*, 189 B.R. at 571 (civil co-defendants); *Western Fuels*, 102 F.R.D. at 203 (civil co-defendants); *Chahoon*, 62 Va. (21 Gratt.) at 838-39 (criminal co-defendants).

³⁸ During this time, courts and commentators developed various phrases to describe the concept of the joint defense privilege when applied to parties other than co-defendants. Although several courts continue to refer to the common interest doctrine as the "joint defense privilege," that title is not appropriate when extending the privilege to plaintiffs. Of those courts that have addressed the issue, many have more appropriately renamed it the "common interest privilege." See, e.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249 (applying common interest doctrine to protect communications disclosed between civil plaintiff and its non-party subsidiary); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 440-41 (Fla. Dist. Ct. App. 1987) (applying "common interest privilege" to protect communications between civil plaintiff and defendant with common interest in defending counterclaim and cross-claim brought by common co-defendant). There remain, however, a number of jurisdictions and commentators who refer to the common interest doctrine by a variety of other names, including the "joint defense privilege," the "pooled information privilege," the "joint prosecution privilege," the "joint litigant privilege," or the "community of interest privilege." See *supra* note 14. Despite the lack of uniformity in naming the concept, the courts in each of these instances considered the application of the attorney-client privilege to communications shared between plaintiffs or non-parties in the presence of counsel for the purpose of furthering a common legal interest.

³⁹ Courts in the following jurisdictions have not yet considered whether to apply the common interest doctrine to protect attorney-client privileged communications disclosed among plaintiffs or non-parties sharing a common legal interest: Alabama, Alaska, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the Fifth Circuit, and the United States Court of Appeals for the Eleventh Circuit. A number of states included in this list maintain attorney-client privilege statutes that arguably protect

doctrine, extending the attorney-client privilege to privileged communications shared by parties with a common legal interest for the purpose of furthering that common interest.⁴⁰ In recognizing the common interest doctrine, courts cite to the same two-fold purpose as that of the attorney-client privilege and the joint defense doctrine—the free flow of communication to enhance the quality of legal advice.⁴¹ To protect the truth-seeking process of the fact-finder, courts also impose the same narrow construction on the common interest doctrine as they impose on the attorney-client privilege.⁴²

communications shared among plaintiffs or non-parties, as well as among co-defendants. See, e.g., ALA. R. EVID. 502(b)(3); ALASKA R. EVID. 503(b)(3); ARK. R. EVID. 502(b)(3); IDAHO R. EVID. 502(b)(3); KY. R. EVID. 503(b)(3); LA. R. EVID. 506(B)(3); ME. R. EVID. 502(b)(3); MISS. R. EVID. 502(b)(3); NEB. R. EVID. § 27-503(2)(c); NEV. REV. STAT. § 49.095(3) (2002 & Supp. 2004); N.H. R. EVID. 502(b)(3); N.M. R. EVID. 11-503(B)(3); N.D. R. EVID. 502(b)(3); OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West 1993); OR. R. EVID. 503(2)(c); S.D. CODIFIED LAWS § 19-13-3(3) (Michie 1995); UTAH R. EVID. 504(b); VT. R. EVID. 502(b)(3); WIS. STAT. ANN. § 905.03(2) (West 2000). Those states are included in the above list, however, because the courts within those states have not yet applied those statutes to protect communications shared among plaintiffs or non-parties. For a list of those jurisdictions that have addressed the issue of the common interest doctrine, see *supra* note 7.

⁴⁰ See, e.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249 (applying doctrine to protect communications disclosed between attorneys for civil plaintiff and its non-party subsidiary) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)); *Sedlacek v. Morgan Whitney Trading Group, Inc.*, 795 F. Supp. 329, 331 (C.D. Cal. 1992) (applying doctrine to communications shared between counsel to civil co-plaintiffs); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (applying doctrine to communications exchanged between counsel to plaintiffs in separate litigations); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1175 (D.S.C. 1975) (applying doctrine to communications exchanged between counsel to plaintiffs in civil litigation and counsel to non-parties); *Visual Scene*, 508 So. 2d at 440-41 (applying doctrine to protect communications shared between attorneys for plaintiff and defendant with common interest in defending counterclaim and cross-claim brought by another defendant to civil action). For a list of those jurisdictions that have favorably recognized the common interest doctrine, see *supra* note 7.

⁴¹ See, e.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249; *Visual Scene*, 508 So. 2d at 440-41; *Rushing*, *supra* note 30, at 1274 (“The joint-defense privilege fulfills the social goal of encouraging inter-party communications by preserving their confidentiality. When several clients retain separate counsel, the litigation often requires cooperation among the clients and their respective counsel if the clients are going to receive effective legal representation.”). For a discussion of the two-fold purpose of the attorney-client privilege, see *supra* note 23 and accompanying text. See *supra* note 31 and accompanying text for a discussion of the two-fold purpose of the joint defense doctrine.

⁴² See *Schachar*, 106 F.R.D. at 191 (applying strict construction of attorney-client privilege to its application of common interest doctrine). For a detailed discussion of

Courts applying the common interest doctrine generally require that the party invoking it prove the following:⁴³ (1) that an underlying privilege such as the attorney-client privilege protects the communication;⁴⁴ (2) that the parties disclosed the communication at a time when they shared a common interest; (3) that the parties shared the communication in furtherance of that common interest; and (4) that the parties have not waived the privilege.⁴⁵ By requiring a demonstration that an underlying privilege applies, courts incorporate the burden of proof of the underlying privilege into the additional requirements of proving that the common interest doctrine applies. Thus, to prove that a client has not waived the attorney-client privilege by disclosing a confidential communication to a third party, the client must prove that the parties shared a common interest, exchanged such communication for the purpose of seeking legal advice, and had a reasonable expectation that the communication would remain confidential.⁴⁶

In *Sedlacek v. Morgan Whitney Trading Group, Inc.*, the United States District Court for the Central District of California considered extending the joint defense privilege to protect communications disclosed among counsel representing co-plaintiffs in a class action against a common defendant.⁴⁷ The court recognized that

the strict construction of the attorney-client privilege, see *supra* notes 24-26 and accompanying text.

⁴³ As with all evidentiary privileges, the burden of proof is on the party seeking to apply the common interest doctrine. See, e.g., *Schwimmer*, 892 F.2d at 244 (joint defense doctrine); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989) (joint defense doctrine); *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (joint defense doctrine); *Minebea Co., Ltd. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005) (common interest doctrine); *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.)*, 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) (joint defense doctrine); *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (joint defense doctrine).

⁴⁴ See, e.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 249 (common interest doctrine); *Minebea*, 228 F.R.D. at 15 (common interest doctrine); *Niagara Mohawk*, 189 B.R. at 571 (joint defense doctrine); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 387-88 (S.D.N.Y. 1975) (joint defense doctrine); Heusinger, *supra* note 17, at 28.

⁴⁵ See, e.g., *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992) (joint defense doctrine); *Bay State*, 874 F.2d at 28 (joint defense doctrine); *Beville*, 805 F.2d at 126 (joint defense doctrine) (citing *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. at 385); *Minebea*, 228 F.R.D. at 15 (common interest doctrine) (quoting *Beville*, 805 F.2d at 126).

⁴⁶ See *supra* note 18 and accompanying text for a detailed discussion of the requirements of the attorney-client privilege.

⁴⁷ 795 F. Supp. 329, 330 (C.D. Cal. 1992). In *Sedlacek v. Morgan Whitney Trading Group, Inc.*, the United States District Court for the Central District of California heard the appeal of plaintiff from an order of United States Magistrate Judge Stone compelling the production of documents which plaintiff's counsel had exchanged with counsel to similarly situated plaintiffs litigating similar claims against a common defendant. *Id.* After finding that the court would recognize the common interest doctrine, the court

the United States Court of Appeals for the Ninth Circuit had not yet considered whether the joint defense privilege should extend to communications shared among counsel for co-plaintiffs.⁴⁸ The court determined that, "to be consistent [with the Ninth Circuit's recognition of the joint defense doctrine,] cooperating plaintiffs must be extended that same privilege. Otherwise, cooperating defendants would be situated better than their plaintiff counterparts."⁴⁹ The court continued, reasoning that, "[i]n order to ensure that inequities in discovery are not established in cooperating defendants' favor, it is necessary to extend the common interest rule to cooperating plaintiffs."⁵⁰

The reasoning behind the extension of the privilege enjoyed by counsel to co-defendants is that the basic principles underlying the attorney-client privilege—to foster open communication between an attorney and his or her client to provide effective representation—are no less relevant when discussing co-plaintiffs in a civil case or even non-parties.⁵¹ For example, in *In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe* 89-129, the United States Court of Appeals for the Fourth Circuit considered extending the joint defense privilege to protect communications shared between counsel for a civil plaintiff and its subsidiary, which was not a party to the litigation.⁵² In that case, the unnamed movant invoked the common interest doctrine to prevent the compelled disclosure of communications that its attorney shared with the attorney for its subsidiary concerning the movant's civil action against the United States Army over a government contract, which the movant assigned to its subsidiary during the pendency of the movant's claims against the Army.⁵³ The court found that the movant and its subsidiary exchanged such

remanded the issue to the magistrate judge to apply the doctrine to the documents that defendant sought. *Id.* at 331 (referring to common interest doctrine as "joint prosecution privilege").

⁴⁸ *Id.* at 331.

⁴⁹ *Id.*; accord *Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002) (citing *Sedlacek*, 795 F. Supp. at 331).

⁵⁰ *Sedlacek*, 795 F. Supp. at 331; accord *Purcell*, 209 F.R.D. at 25 (citing *Sedlacek*, 795 F. Supp. at 331).

⁵¹ See *supra* note 41.

⁵² 902 F.2d 244. In *In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe* 89-129, United States Court of Appeals for the Fourth Circuit considered the appeal of a movant, whose name remains under seal, from an order quashing subpoenas addressed to the movant, but ordering the disclosure of communications sought by the subpoenas from the movant's unnamed subsidiary. *Id.* at 245. Prior to the issuance of the subpoenas, the movant brought suit against the United States Army concerning a dispute over a government contract, which the movant later assigned to its subsidiary. *Id.* The parties settled this dispute before the issuance of the subpoenas. *Id.* at 246. Through the subpoenas, the United States sought communications shared between counsel for the movant and counsel for the movant's subsidiary concerning the contract dispute with the Army. *Id.* The movant argued that the attorney-client privilege protected such communications. *Id.* at 245.

⁵³ *Id.* at 246.

communications in furtherance of their common legal interests in succeeding against the Army in the contract dispute, despite the fact that the subsidiary was not a party to the litigation against the Army.⁵⁴ The court recognized the common interest doctrine in order to apply the attorney-client privilege:

We have discovered no case in which the existence of a joint defense or common interest privilege turned on such distinctions. Whether an action is ongoing or completed, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.⁵⁵

Thus, courts adopting the common interest doctrine have remained true to the principles underlying the attorney-client privilege. Expansion of the privilege encourages the free flow of communication and enhances the quality of legal advice without further inhibiting the search for truth.⁵⁶

III. AN UNCERTAIN PRIVILEGE: WHY THE COMMON INTEREST DOCTRINE DOES NOT WORK

A great deal of uncertainty exists concerning the recognition of the common interest doctrine to protect communications shared among counsel to plaintiffs or non-parties because few jurisdictions have considered this issue.⁵⁷ Even when states adopt the common interest doctrine, the lack of uniformity in its application further compounds such uncertainty.⁵⁸ The increased uncertainty surrounding such protection discourages parties from disclosing attorney-client privileged information to others sharing a common legal goal. Such discouragement undermines the two-fold goal of the attorney-client privilege—to encourage the free flow of information and to enhance effective legal advice.

A. Few Jurisdictions Recognize the Common Interest Doctrine

Those courts that have considered the issue have applied the valued principles of the attorney-client privilege to recognize the common interest doctrine. The overwhelming majority of courts, however, have yet to consider recognizing the

⁵⁴ *Id.* at 248.

⁵⁵ *Id.* at 249 (referring to “joint defense rule” and “common interest privilege” interchangeably).

⁵⁶ See, e.g., *id.*; *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 440-41 (Fla. Dist. Ct. App. 1987).

⁵⁷ See *infra* Part III.A. for a discussion of the uncertainty surrounding the lack of a uniformly adopted common interest doctrine.

⁵⁸ See *infra* Part III.B. for a detailed discussion of the non-uniform application of the common interest doctrine.

doctrine to protect attorney-client privileged communications that are disclosed by or in the presence of counsel for plaintiffs or non-parties sharing a common legal interest.⁵⁹ Thus, a client and his or her attorney cannot be certain whether the courts in those jurisdictions will adopt the common interest doctrine or whether the client will waive the attorney-client privilege by disclosing privileged communications to members of a common interest group.⁶⁰

The uncertainty in the recognition of the common interest doctrine across jurisdictions frustrates the common goal of that doctrine and the attorney-client privilege.⁶¹ It discourages such communications when doubts arise about whether they will remain privileged after disclosure.⁶² In *Upjohn Company v. United States*, the United States Supreme Court lamented the uncertain application of the attorney-client privilege caused by the lack of uniformity in the privilege's common law evolution.⁶³ The Court reasoned that uncertainty surrounding whether attorney-client communications will be privileged in a given case would lead clients to limit disclosure of such communications, thus decreasing the effectiveness of the legal advice they receive.⁶⁴ The Court highlighted the deterrent effect that uncertainty in the privilege's application has on fulfilling the purpose of the

⁵⁹ See *supra* note 39.

⁶⁰ See *Rushing, supra* note 30, at 1275 ("Despite the need to share confidential information, however, parties with common interests remain reluctant to exchange information because they fear denial or waiver of the privilege once they divulge the information. Courts have followed a variety of approaches to the privileged status of multiple party exchanges of information, none of which guarantees predictable protection.").

⁶¹ See *supra* note 41 and accompanying text for a discussion of the two-fold purpose of the common interest privilege. For a discussion of the two-fold purpose of the attorney-client privilege, see *supra* note 23 and accompanying text.

⁶² E.g., *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."); see *Rushing, supra* note 30, at 1275 ("The uncertainty surrounding the application of the joint-defense privilege discourages most parties from taking advantage of it, undermining the effectiveness of legal representation.").

⁶³ 449 U.S. at 392-93; see also Glynn, *supra* note 18, at 74. In his article, *Federalizing Privilege*, Professor Timothy Glynn proposed that Congress federalize the attorney-client privilege to provide uniform application of the privilege across state and federal jurisdictions. *Id.* at 73-85. His article explained in great detail the effect of the non-uniform application of the attorney-client privilege, namely, the rise of uncertainty undermining the free flow of information that the privilege was meant to promote. *Id.* He reasoned that "the privilege cannot enhance candor or communication if the protection it affords is uncertain. Thus, for society to reap benefits from the privilege, it must afford sufficiently certain protection for attorney-client communications." *Id.* at 74.

⁶⁴ *Upjohn*, 449 U.S. at 392-93.

privilege, stating,

[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 that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.⁶⁵

Just as the uncertain recognition and application of the attorney-client privilege frustrates its underlying goals, such uncertainty also undermines the goals of the common interest doctrine because both the privilege and the doctrine share a common purpose.⁶⁶ In contrast, a universally recognized and applied common interest doctrine will enable parties to predict more accurately whether

⁶⁵ *Id.* The Court stressed that the case-by-case examination of the attorney-client privilege as required by Rule 501 of the Federal Rules of Evidence fosters the uncertainty which undermines the privilege itself. *Id.* at 396-397. The Court's expressed frustration with Rule 501 in 1981 was likely heightened by the fact that the Court had promulgated Proposed Federal Rules of Evidence in 1972 pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 (1970). See Glynn, *supra* note 18, at 87. Prior to Congress's review of the Proposed Rules, federal and state common law governed evidentiary rules, including testimonial privileges. *Id.* Article V of the Proposed Rules, as promulgated by the Supreme Court, would have codified nine testimonial privileges, including the attorney-client privilege, thus eliminating the uncertainty which case-by-case analysis of common law breeds. See COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 47-48 (1971); FED. R. EVID. 501 advisory committee's note (1974 Enactment); Glynn, *supra* note 18, at 87-88.

Dissatisfied with a number of aspects in the detailed proposed Article V, Congress rejected Article V in its entirety when adopting the Federal Rules of Evidence. FED. R. EVID. 501 advisory committee's note (1974 Enactment); Glynn, *supra* note 18, at 88. Congress deleted Article V from the Federal Rules of Evidence and replaced it with Rule 501. FED. R. EVID. 501 advisory committee's note (1974 Enactment); Glynn, *supra* note 18, at 88. Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. Thus, the Supreme Court was required to continually apply the attorney-client privilege on a case-by-case basis, fueling the dissatisfaction expressed in *Upjohn* with the uncertainty fostered by the lack of a uniform federal rule governing the privilege.

⁶⁶ See *supra* note 41.

communications shared with a common interest group in a given jurisdiction will remain privileged. The more accurately parties can calculate the risks of sharing, the more likely they are to share information where the benefits outweigh the risks. Such information-sharing promotes the free flow of information and thus enables counsel to offer better-informed legal advice, thereby serving the attorney-client privilege's purpose.

The only reasonable criticism against adopting the common interest doctrine is that it broadens the attorney-client privilege, which is generally construed narrowly when balanced against the over-arching search for truth.⁶⁷ This criticism, however, cannot apply where jurisdictions have clearly defined the common interest doctrine. Instead, the uniform adoption and application of the doctrine would ensure that courts struggling with the concept on a case-by-case basis do not corrupt or extend the attorney-client privilege. At its most basic, the common interest doctrine attaches only to communications that would have been protected by the attorney-client privilege had they not been shared with another party.⁶⁸ Accordingly, to invoke the common interest doctrine, a party must first demonstrate that he or she made the subsequently shared communication in confidence to his or her attorney for the purpose of seeking legal advice and that he or she did not waive that privilege.⁶⁹ Thus, any well-defined common interest doctrine would respect, rather than extend, the attorney-client privilege.

Moreover, the common interest doctrine infringes only minimally on the search for truth. The fact-finder loses nothing by allowing information-sharing among parties with a common interest. This is because the shared information was initially protected by the attorney-client privilege and thus was always beyond the fact-finder's grasp. For example, if Plaintiff A possesses a document protected by the attorney-client privilege, the fact-finder is unable to access that document. Neither adversaries nor the court can discover the "truth," as it were, contained in the document because it is protected by the attorney-client privilege. If, however, Plaintiff A exchanges the same document with Plaintiff B, the fact-finder's access to the document turns on the application of the common interest doctrine. Applying the common interest doctrine to protect the document puts the fact-finder in the same position he or she would have been had Plaintiff A not shared the document with Plaintiff B—without access to the document. The doctrine does not act to withhold any additional "truth" from the fact-finder than that which would be withheld had the information not been shared. Thus, the common interest doctrine burdens the search for truth no more than the attorney-client privilege.

B. Of Those Jurisdictions that Recognize the Common Interest Doctrine, Few Apply It Uniformly

Even in those jurisdictions that have adopted the common interest doctrine,

⁶⁷ See *supra* notes 24-26 and accompanying text.

⁶⁸ See *supra* note 44.

⁶⁹ See *supra* note 18.

uncertainty prevails concerning the application of the privilege.⁷⁰ This is due in part to the fact that, to properly recognize a uniform common interest doctrine, jurisdictions must uniformly define several key factors relevant to the doctrine's application. Attorneys and clients will still face the significant risk of waiving the attorney-client privilege until they have clear guidelines governing the sharing of privileged communications with others with a common legal interest.

The following discussion identifies the most significant issues any jurisdiction must address before attorneys and clients can safely assess the risks of information-sharing under the protection of the common interest doctrine. Courts applying the doctrine have discussed various combinations of the following issues, although no jurisdiction has addressed all five.⁷¹ Any jurisdiction striving to effectively apply the common interest doctrine, however, must definitively answer the following questions: (1) What is a common interest? (2) Does the attorney-client privilege extend to communications made in the absence of pending or anticipated litigation? (3) Does the attorney-client privilege extend to direct communications between parties in the absence of their attorneys? (4) Does the attorney-client privilege extend through the common interest doctrine to shared communications absent a written confidentiality agreement? and (5) To whom does the power to waive the common interest doctrine belong? Failure of any jurisdiction to resolve each of these issues will foster the uncertainty that obstructs the free sharing of information between attorney and client and hinders the effectiveness of legal counsel.

1. What is a "common interest"?

In grappling with the common interest doctrine, a number of courts have attempted to define exactly what a "common interest" is.⁷² Those courts have initially defined it as an "identical" legal interest.⁷³ Although no court has defined

⁷⁰ See Rushing, *supra* note 30, at 1275 ("Even if a communication is protected, the duration and breadth of the privilege is uncertain.").

⁷¹ See, e.g., sources cited *infra* Parts III.B.1.-5.

⁷² See, e.g., *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.* (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) ("A common legal interest exists where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation."); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1975) ("A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice.").

⁷³ See, e.g., *Niagara Mohawk*, 189 B.R. at 573; *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985) (quoting *Duplan*, 397 F. Supp. at 1172); *Duplan*, 397 F. Supp. at 1172 (requiring that "the nature of the interest be identical, not similar"); Carol J. Patterson & Kenneth F. Strong, *Joint Defense & Prosecution Agreements*, 21 CONSTR. LAW. 33, 35 (Spring 2001) ("To establish the 'common interest privilege,' the parties must demonstrate that they have identical legal interests with respect to the subject matter of communications between counsel and clients

the term "identical," the case *United States ex rel. [Redacted] v. [Redacted]* clearly demonstrates its implied meaning.⁷⁴ In that case, the United States District Court for the District of Utah applied the common interest doctrine to protect work product shared between attorneys for plaintiff relator and the United States on plaintiff's behalf.⁷⁵ The court found that the United States shared a common interest with plaintiff relator because the parties were "co-plaintiffs, 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."⁷⁶ Thus, the level of similarity needed to satisfy the requirement that parties' interests be *identical* is implicitly very high. Under such a narrow definition of "common" interest, parties should be wary of sharing information with any party other than one aligned on the same side of pending litigation.

Other courts, however, do not consistently apply the narrow requirement that parties share an identical legal interest and often permit the common interest doctrine to protect communications shared in furtherance of a less than an *identical* interest. For example, in *Visual Scene, Inc. v. Pilkington Brothers, PLC*, the Third District Court of Appeal of Florida reversed the decision of a lower court compelling the production of certain documents shared between counsel to a plaintiff in the litigation and counsel to a defendant in the same case.⁷⁷ The court held that, despite the significant adversity between the parties, the plaintiff and the defendant shared a common legal interest in defending against a cross-claim and counterclaim brought by a common co-defendant in the litigation.⁷⁸ Because the parties shared the privileged communications "for the limited purpose of assisting in their common cause," the court held the common interest doctrine to apply.⁷⁹

While the existence of an identical interest is clear where the sharing parties are co-parties to civil litigation, such as in the case of *United States ex rel. [Redacted]*, it is much less clear how parties who are not aligned on the same side of a pending lawsuit could share identical legal interests, as the court found in *Visual Scene*. Because the sharing parties in *Visual Scene* were actively engaged in litigation against one another, one cannot deem their legal interests truly *identical*, regardless of the similar interests that they shared in defeating the counterclaim and cross-claim of the common co-defendant. Thus, courts defining a "common interest"

related to legal advice.").

⁷⁴ 209 F.R.D. 475 (D. Utah 2001).

⁷⁵ *Id.* at 479. The reasoning of the court in *United States ex rel. [Redacted] v. [Redacted]* is applicable by analogy to this discussion of the common interest doctrine's application to the attorney-client privilege, despite the court's consideration of the doctrine's application to only the work-product privilege, because the determination that the parties shared an identical interest is the same under both privileges.

⁷⁶ *Id.* (internal citation omitted).

⁷⁷ 508 So. 2d 437, 439 (Fla. Dist. Ct. App. 1987).

⁷⁸ *Id.* at 441-42.

⁷⁹ *Id.* at 441 (quoting *In re LTV Sec. Litig.*, 89 F.R.D. 595, 603-04 (N.D. Tex. 1981)).

often pay only lip-service to the requirement that the parties' interests be identical. The mixed message sent to parties when courts do not enforce the strict definition of "common interest," as they have defined it, increases the uncertainty surrounding the application of the common interest doctrine.

To find interests between parties sufficiently common to support application of the common interest doctrine, courts require that the commonality of the interests not be overwhelmed by the parties' other adverse interests.⁸⁰ The requirement that parties share an *identical* interest, however, does not foreclose the applicability of the doctrine to parties who are otherwise adverse; several courts have determined that even parties with significant conflicts of interest may maintain a privilege as to information shared concerning a common legal interest.⁸¹ For example, in finding that the plaintiff and defendant shared a common legal interest in defending against a cross-claim and counterclaim brought by a common co-defendant, the court in *Visual Scene* weighed the adversity of the parties' interests and reasoned that,

[t]o extend the common interests privilege to parties aligned on opposite sides of the litigation for another purpose is not inconsistent with any policy underlying the attorney-client privilege and merely facilitates representation of the sharing parties by their respective counsel. Sharing parties on opposite sides of litigation, being uncertain bedfellows, run a greater than usual risk that one may use information against the other should subsequent litigation arise between them, . . . yet there is no sound reason not to protect from the rest of the world . . . information intended by [the sharing parties] to be kept confidential and to be used to further the common litigation interest.⁸²

Thus, sharing parties may overcome even significant adversities between them if the interests for which the parties shared the information are identical and they can demonstrate that they exchanged the communications with the reasonable expectation that the communications would remain confidential.⁸³ Such a broad interpretation of "common interest" encourages wider application of the doctrine, thus promoting the free flow of information.

⁸⁰ See, e.g., *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1050 (D. Del. 1985) (finding common interest doctrine inapplicable to communications exchanged between counsel to civil plaintiff and non-party prior to creation of any common interest at time when "the parties approached this issue at arms length, each asserting a position directly in conflict with the other"); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976) ("That . . . both parties' interests converged does not lessen the significance of their divergent interests. Their interests regarding antitrust considerations were not sufficiently common to justify extending the protection of the attorney-client privilege to their discussions.").

⁸¹ See, e.g., *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 441-42 (Fla. Dist. Ct. App. 1987).

⁸² 508 So. 2d at 441-42.

⁸³ See, e.g., *Bay State*, 874 F.2d at 28; *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981).

Courts also require that the common interest shared by the parties be a *legal*, rather than a purely *commercial*, interest.⁸⁴ For example, in *Duplan Corporation v. Deering Milliken, Inc.*, the United States District Court for the District of South Carolina declined to extend the common interest doctrine to protect communications shared between counsel for the plaintiff, the owner of a patent, and counsel for a non-party, the exclusive U.S. sales-licensee under the patent, because the interest of the non-party was purely commercial, and not legal.⁸⁵ The court found that the patent-owner's legal success would benefit the patent-licensee only financially; the licensee had no legal interest in common with the patent-owner.⁸⁶ The court reasoned,

[W]here there is no legal interest . . . , the mere interest of a non-party client in legal transactions between the prime client and an outsider is not sufficient to prevent a waiver of the attorney-client privilege. This is true no matter how commercially strong the non-party client's interest is, or how severely the non-party client may be legally effected [sic] by the outcome of the transaction between the prime client and an outsider.⁸⁷

The absence of an identical legal interest shared between parties exchanging information, therefore, may lead to waiver of the attorney-client privilege. This requirement adheres to the boundaries of the underlying attorney-client privilege, which require that the purpose of sharing communications be to obtain legal advice.

The overwhelming majority of courts have not defined the term "common interest" and those that have defined it fail to apply the definition consistently. If a party cannot predict how the courts in his or her jurisdiction will define and apply the common interest doctrine, he or she would be well-advised not to share information with any third party. Such a decrease in information-sharing obstructs the free flow of information and thereby inhibits attorneys' abilities to provide the best legal advice.

To fulfill the purpose of the common interest doctrine and the attorney-client privilege, jurisdictions should eliminate this uncertainty by embracing a uniform

⁸⁴ See, e.g., *Minebea Co., Ltd. v. Pabst*, 228 F.R.D. 13, 16 (D.D.C. 2005); *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.)*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1975) ("The key consideration is that the nature of the interest . . . be legal, not solely commercial."); *Patterson & Strong*, *supra* note 73, at 35 ("If the advice sought is purely commercial as opposed to legal, the privilege will not apply.").

⁸⁵ 397 F. Supp. at 1175.

⁸⁶ *Id.* As discussed at *supra* note 40, the same court did apply the common interest doctrine to communications shared between the same plaintiff and another non-party, a legal patent advisor to plaintiff, after finding a sufficient common legal interest. *Id.* Regarding the patent advisor, the court found that the advisor's legal duty to act on behalf of the patent owner constituted a common legal interest, although the patent advisor was not a party to the litigation. *Id.*

⁸⁷ *Id.*

definition of “common interest.” A uniform common interest doctrine should require that the parties’ shared legal interest be *common* but not necessarily *identical*. The current requirement that the parties’ interests be identical has limited application to only parties allied on the same side in pending litigation. The *identical* interest requirement stifles the free flow of communication that the attorney-client privilege is intended to promote while inconsistent application of the requirement further stifles communication. A definition of “common interest” with broader application will encourage more parties to utilize the doctrine to enhance legal advice. Moreover, when courts consider whether parties share a common legal interest, the determination should focus on the nature of the communication and the general purpose for which it is shared, rather than on the relationship of the parties. Specifically, under a uniform common interest doctrine, courts should deem an interest “common” where two or more parties share a sufficiently similar interest and attempt to promote that interest by sharing a privileged communication.

Such a definition would encompass the fact patterns considered in both *United States ex rel. [Redacted]* and *Visual Scene* without creating any uncertainty through the inconsistent application of a narrower standard. In both cases, the parties shared legal interests in defeating a common litigation opponent and exchanged privileged communications for the purpose of furthering that common interest. Further, a uniform definition of “common interest” would apply to parties in conflict who share a particular communication related not to their conflicting interests, but to their *common* interests, as in the case of *Visual Scene*.

A uniform common interest doctrine must also require that the common interest be *legal*, not purely *commercial*.⁸⁸ The attorney-client privilege protects confidential communications between an attorney and his or her client concerning legal advice.⁸⁹ Because the common interest doctrine follows the same goals and boundaries as that privilege, jurisdictions must similarly impose upon the common interest doctrine a requirement that the purpose of sharing the communication be to enhance *legal* advice. Although legal and commercial interests may overlap, it is essential that both parties share a *legal* interest pertaining to the communication in question.⁹⁰ Returning to the earlier hypothetical, for example, Plaintiffs A and B certainly both have legal interests in defeating Tobacco Company in their respective lawsuits, in addition to their commercial interests in winning monetary judgments against Tobacco Company. A uniform common interest doctrine would protect an otherwise-privileged communication shared between counsel to Plaintiffs A and B because both parties have legal interests in sharing the communication, despite the existence of accompanying commercial interests. The common interest doctrine, however, would not protect communications shared by counsel to Plaintiff A with counsel to Non-Party Z, a former employee of Tobacco Company whose stock in

⁸⁸ See *supra* notes 84-87 and accompanying text.

⁸⁹ See *supra* note 18.

⁹⁰ See *supra* notes 84-87 and accompanying text.

Competitor will increase if Plaintiff A defeats Tobacco Company. Although the quality of legal advice available to Plaintiff A would be enhanced by information-sharing with Non-Party Z, the doctrine would not apply unless both parties' interests in sharing information were *legal*. Where Non-Party Z shares the information for the purpose of increasing the value of his stock, his interest is purely commercial and a uniform common interest doctrine would not apply.

A uniform definition and application of the common interest doctrine as explained above is the first step toward eliminating the uncertainty surrounding the doctrine that often prevents parties from utilizing it. Increased certainty will result in the increased utilization of the privilege and increased information-sharing, thus fulfilling the goals of the common interest doctrine and the attorney-client privilege.

2. Can the common interest doctrine apply absent pending or anticipated litigation?

There is little consensus among the few jurisdictions that have considered whether the common interest doctrine can apply absent pending or anticipated litigation. A number of jurisdictions have determined that either pending or anticipated litigation is necessary at the time of the communication.⁹¹ These courts reason that no commonality of legal interests can exist absent the threat of actual litigation.⁹² For example, in *Niagara Mohawk Power Corp. v. Megan-Racine Associates, Inc.*, the United States Bankruptcy Court for the Northern District of New York intertwined its definition of a common legal interest with the requirement that litigation be pending or reasonably anticipated at the time parties share a confidential communication.⁹³ The court stated that "[a] common *legal*

⁹¹ See, e.g., *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.* (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) ("A common *legal* interest exists where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation."); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D.N.Y. 1989) ("Actual or potential litigation is a necessary prerequisite for application of the joint defense privilege."). In addition, some state legislatures have imposed a similar requirement. See, e.g., ARK. R. EVID. 502(b); HAW. R. EVID. 503(b); KY. R. EVID. 503(b)(3); ME. R. EVID. 502(b)(3); MISS. R. EVID. 502(b)(3); N.H. R. EVID. 502(b)(3); N.D. R. EVID. 502(b)(3); OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West 1993); S.D. CODIFIED LAWS § 19-13-3(3) (Michie 1995); TEX. R. EVID. 503(b)(1)(C); VT. R. EVID. 502(b)(3).

⁹² See, e.g., *Niagara Mohawk*, 189 B.R. at 573 (intertwining concepts of legal interest and pending or anticipated litigation); Patterson & Strong, *supra* note 73, at 35 ("If there is no action pending, there is greater risk that the underlying communication could be characterized as commercial in nature."); Fischer, *supra* note 2, at 656 ("The narrow approach to the common interest arrangement is predicated on the notion that protection should only be afforded to information exchanges when those exchanges arise out of the need for a common defense or prosecution, rather than the need to address a common problem.").

⁹³ 189 B.R. at 573.

interest exists where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation.”⁹⁴ Thus, the court rejected the possibility that parties could share a common legal interest in the absence of pending or reasonably anticipated litigation.

A number of other jurisdictions, however, have determined that no pending or anticipated litigation is necessary to protect communications under the common interest doctrine.⁹⁵ Those courts reason that modern society demands recognition that individuals may share common legal interests absent any pending or anticipated litigation.⁹⁶ As explained by the United States District Court for the District of Connecticut:

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 clearly in cases of co-defendants and impending litigations but is not necessarily limited to those situations.⁹⁷

Thus, these courts conclude, the same reasons supporting the extension of the common interest doctrine apply even absent pending or anticipated litigation.⁹⁸ The real inquiry is not whether litigation is pending or anticipated, but whether the interest that the individuals share is *legal*, rather than *commercial*.⁹⁹ Thus, these courts would eliminate the pending or anticipated litigation limitation altogether.

Many jurisdictions are silent on the issue of the litigation limitation and those that have considered it are in disagreement. As a result, an attorney and his or her

⁹⁴ *Id.*

⁹⁵ See, e.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990) (applying common interest doctrine to protect communications exchanged between attorneys for civil plaintiff and non-party absent contemplated litigation involving non-party); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) (“[I]t is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply . . .”); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976) (“The privilege need not be limited to legal consultations between corporations in litigation situations . . .”).

⁹⁶ See, e.g., *Fischer*, *supra* note 2, at 656 (“However, the need for legal advice is not limited to litigation settings, and the range of parties who are interested in the resolution of a ‘problem’ is not limited to those who may be made co-parties or who have the legal right to assume control of the defense or claim.”).

⁹⁷ *SCM*, 70 F.R.D. at 513.

⁹⁸ See, e.g., *Schwimmer*, 892 F.2d at 243-44 (“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 . . .”) (quoting Daniel J. Capra, *The Attorney-Client Privilege in Common Representations*, 20 TRIAL LAW. Q. 20, 21 (1989)).

⁹⁹ See, e.g., *Fischer*, *supra* note 2, at 634 (“The proper limitation on information-sharing arrangements is that the information shared must be for the purpose of furthering the legal interests of the members of the arrangement.”).

client cannot know with certainty whether confidential communications shared with another party's attorney in a matter of common interest will be deemed privileged from one jurisdiction to the next in the absence of pending or anticipated litigation.¹⁰⁰ Because the only certainty, assuming that a particular jurisdiction will extend the common interest doctrine, is that those communications otherwise privileged will remain so if disclosed while litigation is pending, the lack of uniformity on this issue should encourage clients to refrain from sharing information with others until litigation commences.¹⁰¹ Such cautionary limits placed on information-sharing discourage the free flow of information, and are thus contrary to the goals of the common interest doctrine and the attorney-client privilege.

To get the information flowing again, jurisdictions should uniformly reject the limitation of the common interest doctrine to pending or anticipated litigation. In the jurisdictions that require that information-sharing occur only in light of pending or anticipated litigation, many communications remain unprotected. If jurisdictions uniformly remove this limitation on the common interest doctrine, parties will have greater certainty as to the doctrine's application and will be encouraged to share information. An increase in the number of parties exchanging privileged communications will result in a greater flow of information to counsel and thereby enhance the quality of advice that counsel is able to give to his or her client.

As discussed above, the common interest doctrine is firmly rooted in the attorney-client privilege, as both share common goals, benefits, and boundaries.¹⁰² The attorney-client privilege does not place limits on the protection of communications based on whether or not they are made in anticipation of litigation. That privilege requires only that a communication be made in confidence between an attorney and his or her client for the purpose of seeking legal advice.¹⁰³ Because the common interest doctrine respects the boundaries of the attorney-client privilege, there is no valid reason to limit the doctrine if the attorney-client privilege is not so limited.¹⁰⁴

¹⁰⁰ See, e.g., Heusinger, *supra* note 17, at 28 ("[S]ome courts require that the shared information relate to *impending* litigation, whereas others state that a common legal interest, without litigation, suffices. As a result, the [parties] cannot assume consistency among states and their counsel should research the jurisdiction's law before sharing privileged information.").

¹⁰¹ See, e.g., Fischer, *supra* note 2, at 634 ("That parties may find it in their joint interests to share information, but will be dissuaded from doing so if disclosure causes the information to lose its protected status, is obvious.").

¹⁰² See *supra* Part II for a discussion of the evolution of the common interest doctrine from the attorney-client privilege.

¹⁰³ See sources cited *supra* note 18.

¹⁰⁴ See Fischer, *supra* note 2, at 634 ("I believe that no valid reasons exist for such a limitation as long as our legal system continues to recognize the underlying privilege itself.").

Moreover, the requirement that litigation be pending or anticipated before the common interest doctrine will attach is redundant of other safeguards universally built into the privilege. The courts that apply such a limit reason that it ensures that the communication is used for the purpose of giving or receiving legal advice.¹⁰⁵ These courts highlight their concern that the common interest doctrine not apply where one or all of the parties sharing information has a purely commercial purpose because such a purpose would not be protected under the attorney-client privilege.¹⁰⁶ This apprehension is legitimate because jurisdictions are necessarily concerned about reading the common interest doctrine as narrowly as they construe the attorney-client privilege.¹⁰⁷ To be sure, the pending or anticipated litigation requirement does ensure that the parties share a common legal interest. It does so, however, at the expense of failing to protect other communications that parties may wish to share to further a common legal interest outside the context of anticipated or pending litigation.

The common interest doctrine, however, already universally requires that the parties sharing information have a legal interest in common.¹⁰⁸ This renders the pending or anticipated litigation requirement superfluous to the extent that it is aimed at ensuring that the parties share a common *legal* interest. In evaluating whether a common interest between parties is a legal interest, courts necessarily balance the legal and commercial interests of the parties to determine the motivation for the communication in question.¹⁰⁹ This evaluation of the parties' legal interests serves the same purpose as requiring pending or anticipated litigation, without denying protection to communications made for a common legal interest where no pending or anticipated litigation exists. Thus, the pending or anticipated litigation requirement is redundant and unnecessarily limits the application of the common interest doctrine.

In modern society, many individuals and entities may share a common legal interest unrelated to any anticipated or pending litigation.¹¹⁰ This reality requires that the common interest doctrine extend to communications shared between

¹⁰⁵ See *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.* (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995).

¹⁰⁶ See *supra* notes 84-87 and accompanying text.

¹⁰⁷ See *supra* notes 24-26 and accompanying text.

¹⁰⁸ See *supra* note 84 and accompanying text.

¹⁰⁹ See *supra* notes 84-87 and accompanying text.

¹¹⁰ See, e.g., *Am. Auto. Ins. Co. v. J.P. Noonan Transp., Inc.*, No. 970325, 2000 WL 33171004, at *7 (Mass. Super. Ct. Nov. 16, 2000) ("At a time and in an age where transactions and the litigation they produce are increasingly complex, I am of the opinion that the joint defense or common interest components of the attorney-client privilege are necessary to ensure, as a practical matter, that clients receive the fully informed advice the attorney-client privilege is designed to produce."); Fischer, *supra* note 2, at 655-56 (proposing that courts eliminate requirement of pending or anticipated litigation from common interest doctrine in light of "economic realities and the strategic considerations that encourage parties to cooperate for mutual protection").

entities with a common legal interest, whether or not the communications are made in regard to pending or anticipated litigation.¹¹¹ As explained by the Superior Court of Massachusetts,

Individuals or entities with joint or common interests simply cannot obtain [fully informed legal] advice if their attorneys must proceed in splendid isolation and are prohibited from interacting with others for the purpose of determining whether and to what extent common measures for preservation of common interests are available, feasible and agreeable to all who may have such interests.¹¹²

The common interest doctrine should protect communications shared among parties with common legal interests without limitation to pending or anticipated litigation for the same reasons that the attorney-client privilege is needed to protect confidential attorney-client communications outside of a litigation setting.

3. Are direct client-to-client communications made without the involvement of counsel privileged?

Very few courts have addressed the issue of whether the common interest doctrine would protect direct client-to-client communications made outside the presence of counsel, if such communications were otherwise privileged.¹¹³ Many state legislatures, however, have addressed the issue in their respective evidentiary codes. Those state legislatures extend the common interest doctrine only to those communications made *by* a client or his or her legal representative *to* the legal representative of another represented party.¹¹⁴ Although rarely interpreted, such

¹¹¹ See sources cited *supra* note 110.

¹¹² *Am. Auto. Ins.*, 2000 WL 33171004, at *7.

¹¹³ See, e.g., *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.* (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) ("Courts and commentators have suggested that the *Hunydee* reasoning can be extended such that even inter-client communications in the presence of their attorneys are protected.") (emphasis added); *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected."); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381 388 (S.D.N.Y. 1975) ("Thus, the *Hunydee* opinion—specifically addressed to a joint conference situation—confirmed that the 'exchange between attorneys,' within the comprehension of the rule set forth above, might equally be effected through the clients' direct communication as well as through the attorneys' reciprocal transfer of documents recording such communication.").

¹¹⁴ See, e.g., ALA. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice "by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest"); ALASKA R. EVID. 503(b)(3) (extending attorney-client

privilege to confidential communications for purpose of rendering legal advice “by the client or the client’s lawyer to a lawyer representing another in a matter of common interest”); ARK. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by him or his representative or his 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”); DEL. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by the client or the client’s representative or the client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest”); HAW. R. EVID. 503(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by the client or the client’s representative or the 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”); KY. R. EVID. 503(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “[b]y the client or a representative of the client or the client’s lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein”); LA. R. EVID. 506(B)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “[b]y the client or his lawyer, or a representative of either, to a lawyer, or representative of a lawyer, who represents another party in a matter of common interest”); ME. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by the client or the client’s representative or the 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”); MISS. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by him or his representative or his 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”); NEB. R. EVID. § 27-503(2)(c) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by him or his lawyer to a lawyer representing another in a matter of common interest”); NEV. REV. STAT. § 49.095(3) (2002 & Supp. 2004) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by him or his lawyer to a lawyer representing another in a matter of common interest”); N.H. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by the client or the client’s representative 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”); N.M. R. EVID. 11-503(B)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by the client or the client’s lawyer to a lawyer representing another in a matter of common interest”); N.D. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by him or his representative or his 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”);

statutory language implies that courts in those jurisdictions would not extend the common interest doctrine to direct client-to-client communications made outside the presence of counsel. The reasoning for such a distinction is simple: because 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.¹¹⁵

Because so few states have interpreted statutory language governing this issue and even fewer have addressed the issue through common law, there is no certainty as to whether the common interest doctrine would protect direct client-to-client communications made outside the presence of counsel. A common interest doctrine with clearly defined parameters would provide the certainty needed to more

OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West 1993) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “[b]y the client or a representative of the client or the client’s attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein”); OR. R. EVID. 503(2)(c) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “[b]y the client or the client’s lawyer to a lawyer representing another in a matter of common interest”); S.D. CODIFIED LAWS § 19-13-3(3) (Michie 1995) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by him or his representative or his 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”); TEX. R. EVID. 503(b)(1)(C) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “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”); VT. R. EVID. 502(b)(3) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by him or his representative or his 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”); WIS. STAT. ANN. § 905.03(2) (West 2000) (extending attorney-client privilege to confidential communications for purpose of rendering legal advice “by the client or the client’s lawyer to a lawyer representing another in a matter of common interest”).

¹¹⁵ See, e.g., Patterson & Strong, *supra* note 73, at 35 (“While there is no case law on this issue, given the policy and rationale supporting the joint defense or common interest privilege, a claimed extension of that privilege to client-to-client direct exchanges where no lawyers are present is vulnerable to attack by adverse parties seeking disclosure of such communications.”); Rushing, *supra* note 30, at 1295 (“[C]lient-to-client communication clearly does not fit within any logical extension of the attorney-client privilege . . . because the communications do not lend themselves to analogy to the attorney-client privilege.”).

accurately predict how jurisdictions will apply it.

In uniformly defining the common interest doctrine, jurisdictions should limit the doctrine's application to communications shared among parties with a common legal interest and made only in the presence of counsel. Protection of direct client-to-client communications made outside the presence of an attorney does not further the attorney-client privilege's purpose of enhancing legal advice. As a result, protecting such communications would not conform to the accepted principle that the attorney-client privilege be construed narrowly.¹¹⁶ Thus, any uniform common interest doctrine should protect only communications between a client or a client's attorney and counsel for another represented party sharing a common legal interest. Excluding direct client-to-client communications from a uniform common interest doctrine will uphold the boundaries of the attorney-client privilege and further the underlying search for truth.

4. Can the common interest doctrine apply absent a written confidentiality agreement?

It is not unusual for parties exchanging attorney-client privileged information to enter into confidentiality agreements prior to exchanging information.¹¹⁷ Such agreements generally manifest the parties' intent that the information exchanged remain confidential as to any outside parties.¹¹⁸ The parties may name such an agreement a "confidentiality agreement," a "joint defense agreement," a "joint prosecution agreement," or a "common interest agreement," and will typically include a statement that the purpose of the exchange is to further a joint defense strategy, a joint prosecution strategy, or some other legal interest common to the parties.¹¹⁹ For example, under my earlier hypothetical, Plaintiffs A and B may execute an agreement entitled "Joint Prosecution Agreement," which affirmatively states that the purpose of the information exchange is the furtherance of the parties' individual claims against the common defendant, Tobacco Company. The agreement would likely include some provision precluding Plaintiffs A and B from disclosing the exchanged information to any other party.

A few courts have examined the relevance of written confidentiality agreements to the application of the common interest doctrine.¹²⁰ These courts agree that a

¹¹⁶ See *supra* notes 24-26, 42, and accompanying text. Of course, because the addition of counsel's presence to such communications opens the possibility that the parties shared the communication for the purpose of obtaining legal advice, the doctrine may apply where two represented parties communicate directly in the presence of counsel.

¹¹⁷ See generally Martin F. Murphy, *Sharing Secrets: Thinking About Joint Defense Agreements*, 46 B. B.J. 31, 31 (Sept.-Oct. 2002) (suggesting use of joint defense agreements); D. Alan Rudlin, *Case Management & Health Claims in Toxic Tort Litigation*, SJ065 A.L.I.-A.B.A. 43, 83 (2004) (same).

¹¹⁸ See, e.g., Murphy, *supra* note 117, at 31; Rudlin, *supra* note 117, at 83.

¹¹⁹ See, e.g., Murphy, *supra* note 117, at 31; Rudlin, *supra* note 117, at 83.

¹²⁰ See generally, e.g., *Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc.*

confidentiality agreement in itself cannot create a privilege where such privilege does not already exist.¹²¹ They reason that no extension of the narrow attorney-client privilege can exist in the absence of the privilege itself.¹²² If a communication is not first privileged as between a single client and his or her attorney, neither the common interest doctrine nor a confidentiality agreement can create that privilege.

Confidentiality agreements, however, are not without value in the fight to protect communications from disclosure. Such agreements, particularly when written, evidence the agreeing parties' intent that such communications remain confidential. A written confidentiality agreement helps the party seeking to apply the common interest doctrine meet the burden of proof by manifesting the parties' joint intent that shared information remain confidential.¹²³ While such an agreement may include other provisions, such as affirmative statements that the parties share a common legal interest, a confidentiality agreement has little additional legal value in establishing the privilege because courts will evaluate the existence of a common legal interest independently from the agreement.¹²⁴ Courts will not allow two entities to conspire to protect non-privileged documents from disclosure to a third party simply by entering into a confidentiality agreement.

A uniformly applied common interest doctrine should not require a written confidentiality agreement. While such an agreement can serve as evidence of the parties' reasonable intent that information exchanged between those with a shared interest remain confidential,¹²⁵ it should not be a prerequisite to the application of

(*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995); *Visual Scene, Inc. v. Pilkington Bros., PLC*, 508 So. 2d 437, 441 n.4 (Fla. Dist. Ct. App. 1987); Heusinger, *supra* note 17, at 28.

¹²¹ See, e.g., *Niagara Mohawk*, 189 B.R. at 571 ("[T]he Court finds that the joint-defense privilege is only applicable where the party asserting it can demonstrate an agreement between the parties privy to the communication that such communication will be kept confidential. . . . The requisite agreement of confidentiality, however, is inferable from the circumstances."); *Visual Scene*, 508 So. 2d at 441 n.4 ("Of course, the mere existence of an agreement between parties to keep documents confidential is not, in itself, sufficient to protect them from discovery under a claim of privilege."); Heusinger, *supra* note 17, at 28 (cautioning parties to joint prosecution agreements that "the joint prosecution agreement is only evidence of underlying facts and 'cannot create a privilege that otherwise does not already exist'") (citations omitted).

¹²² See, e.g., *In re Grand Jury Subpoenas*, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990); *Niagara Mohawk*, 189 B.R. at 571; *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 387-88 (S.D.N.Y. 1975); Heusinger, *supra* note 17, at 28.

¹²³ See, e.g., *Minebea Co., Ltd. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005); Heusinger, *supra* note 17, at 29; Rudlin, *supra* note 117, at 83.

¹²⁴ See *supra* Part III.B.1. for a detailed discussion of a court's assessment of parties' common legal interests.

¹²⁵ See *supra* note 18 and accompanying text for a detailed discussion of the requirements of the attorney-client privilege.

the common interest doctrine. Under a uniform common interest doctrine, no 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.

Moreover, the adoption of a clearly defined uniform common interest doctrine should obviate the need for confidentiality agreements because many of the protections sought by these agreements would already be in place. Attorneys working under a uniform common interest doctrine would no longer expend needless effort on confidentiality agreements that ultimately provide minimal legal protection. Rather, attorneys could predictably formalize any exchange of information in accord with the clearly defined doctrine. Although attorneys cannot manufacture the attorney-client privilege or the applicable use of the common interest doctrine through agreement, the law should be clear enough to allow them to predict the application of the doctrine where the underlying privilege already exists.

5. Who may waive the attorney-client privilege protecting communications under the common interest doctrine?

It is well-established that the attorney-client privilege belongs to the client.¹²⁶ When parties share this privilege through extension of the common interest doctrine, however, it is much less clear who owns the privilege and who may waive the privilege concerning the shared information. In these situations, multiple parties may seek to prevent the disclosure of a privileged communication.

The few courts that have addressed this issue agree that, because the privilege belongs to the group, no party may waive it absent the consent of all members of the common interest group.¹²⁷ Courts treat the unauthorized waiver of the privilege by one member of a common interest group as a waiver as to that party only.¹²⁸

¹²⁶ See *supra* note 19.

¹²⁷ See, e.g., *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 556 (8th Cir. 1990) (quoting *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980)); *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 248 (“[A] joint defense privilege cannot be waived without the consent of all parties who share the privilege.”); *Niagara Mohawk*, 189 B.R. at 572 (“The joint-defense privilege cannot be waived unless all the parties consent or where the parties become adverse litigants.”); *Metro Wastewater Reclamation Dist. v. Continental Cas. Co.*, 142 F.R.D. 471, 478 (D. Colo. 1992) (citing *John Morrell*, 913 F.2d at 556); *Ohio-Sealy*, 90 F.R.D. at 29 (“[T]he joint defense privilege cannot be waived without the consent of all parties to the defense, except in the situation where one of the joint defendants becomes an adverse party in a litigation.”); Heusinger, *supra* note 17, at 28 (“The general rule provides that the protection of the common interest doctrine can be abandoned only if all parties agree to the waiver.”); Patterson & Strong, *supra* note 73, at 35 (“[A]s a general rule a voluntary waiver of the joint defense or common interest privilege requires the unanimous consent of all participating members.”).

¹²⁸ *Western Fuels Ass’n, Inc. v. Burlington N. R.R. Co.*, 102 F.R.D. 201, 203 (D.

The non-waiving members of the group retain the privilege.¹²⁹ Courts have adopted this interpretation of voluntary waiver from the rule that co-clients of the same attorney must all consent to the waiver of attorney-client privileged communications unless the co-clients become adverse to one another.¹³⁰ Because such an interpretation follows the attorney-client privilege, it appears to satisfy the strict construction rule that limits the common interest doctrine to the confines of the attorney-client privilege. Moreover, courts applying the co-client waiver rule reason that the requirement that all parties to a shared communication consent to the waiver of the common interest doctrine which protects that communication from disclosure "is necessary to assure joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privileges of all participants."¹³¹

Nonetheless, the perception that application of the co-client waiver rule, which requires unanimous consent, to the common interest doctrine maintains a narrow interpretation of the attorney-client privilege is flawed. Rather, applying the co-client waiver rule to parties sharing a common interest actually expands the attorney-client privilege by protecting more communications than the privilege alone would protect. Returning to my earlier hypothetical example, Plaintiff A could waive the attorney-client privilege before exchanging a document with Plaintiff B. Tobacco Company could access such a document and reveal it to the fact-finder because Plaintiff A waived the privilege. Under the co-client waiver rule as applied to the common interest doctrine, if Plaintiff A attempted to waive the privilege after sharing the document with Plaintiff B, and Plaintiff B refused to waive the privilege, Tobacco Company and the fact-finder could not access the document. Thus, application of the co-client waiver rule to the common interest doctrine may deprive the fact-finder of the truth more so than the attorney-client privilege. Therefore, this interpretation actually violates the rules of strict construction governing application of the attorney-client privilege.

Of course, if the attorney-client privilege did not attach to the communication until it was shared, as in the case where Plaintiff A and Plaintiff B were engaged in a joint conference with their respective counsel and a privileged communication originated during that conference, the original privilege would belong to both parties—Plaintiffs A and B. Under such a circumstance, it would be appropriate to apply the co-client waiver rule to require the consent of all to waive the common

Wyo. 1984) ("[W]aiver of privileges relating to information shared in joint defense communications by one party to such communication will not constitute a waiver by any other party to such communication.").

¹²⁹ *Id.*

¹³⁰ See, e.g., *John Morrell*, 913 F.2d at 556 (quoting *Ohio-Sealy*, 90 F.R.D. at 29); *In re Grand Jury Subpoenas*, 89-3 & 89-4, 902 F.2d at 248; *Niagara Mohawk*, 189 B.R. at 572; *Metro Wastewater*, 142 F.R.D. at 478 (citing *John Morrell*, 913 F.2d at 556); *Ohio-Sealy*, 90 F.R.D. at 29; Heusinger, *supra* note 17, at 28; Patterson & Strong, *supra* note 73, at 35.

¹³¹ *Western Fuels*, 102 F.R.D. at 203.

interest privilege. Because the privileged communication originated within the group, it belongs to the group, and the consent of the group should be required to waive it. Under this hypothetical, the origin of the privileged communication is more similar to the co-client situation: if Plaintiffs A and B were co-clients of a joint attorney, a court would require the consent of all to waive the privilege as to communications arising from a joint conference with counsel. Where the communication originates from a joint conference of two independent plaintiffs with separate attorneys, a court would nonetheless require both Plaintiffs A and B to consent to waive the privilege.

Additionally, the application of the co-client waiver rule to the common interest doctrine actually inhibits the free flow of information, thus frustrating the goal of the attorney-client privilege. As noted above, before a party can share any privileged information with a common interest group without waiving that privilege, the attorney-client privilege must attach to such information as between a client and his or her attorney.¹³² At that time, only the client maintains the right to waive the attorney-client privilege.¹³³ Requiring the original privilege holder to relinquish control of that privilege to share information with members who stand to benefit from the disclosure discourages the original privilege holder from sharing information. Before parties agree to exchange information for a common interest, they must consider what they have to lose by revealing such information to another party with a common goal, as well as what they will gain by learning confidential information belonging to the other party. Unfortunately, because the lack of information available prior to an exchange makes the cost-benefit analysis difficult to measure accurately, a client may be discouraged from sharing information because he or she calculates the risk as too great. This risk-adversity concerning information-sharing interrupts the free flow of information.

To further the goals of the attorney-client privilege without expanding that privilege, a uniform common interest doctrine should include the requirement that only the original privilege holder may waive the privilege even after the information is shared. Allowing the original privilege holder to control the waiver of the common interest doctrine after information is shared will encourage parties to share more information.¹³⁴ If clients can temper their risk calculation with the knowledge that they will maintain the sole power to further disclose the information to any other party once they disclose privileged information to a common interest group, they are more likely to engage in information-sharing.

¹³² See *supra* note 44 and accompanying text.

¹³³ See *supra* note 19 and accompanying text.

¹³⁴ See Jonathan M. Jacobson, *Applying the Attorney-Client Privilege in Multi-Party Contexts*, 4 ANTITRUST 18, 19 (Summer 1990) ("The rationale for permitting disclosure is that a party should be able to control the disclosure of his own statement irrespective of the presence of others when the statements were made.").

IV. HOW TO FIX IT: A PROPOSED UNIFORM COMMON INTEREST DOCTRINE

The mechanism for rendering the common interest doctrine effective in fulfilling its goals—the free flow of information to enhance the quality of legal advice—is a uniform common interest doctrine. Such a doctrine should extend the attorney-client privilege to any privileged communication shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest. Jurisdictions should not limit the privilege to communications between criminal co-defendants, civil co-defendants, or even civil co-plaintiffs. The privilege should extend to all communications shared between parties or non-parties, regardless of their affiliation with any particular side of a given lawsuit, as long as the communications are privileged, shared in a confidential manner, and intended to further a common legal interest.

Specifically, restoring the free flow of communication among parties sharing a common legal interest requires a federal rule of evidence governing the attorney-client privilege that includes a clearly defined common interest doctrine. State legislatures should enact a similar rule of evidence to provide much-needed uniformity across jurisdictions.¹³⁵

Within the context of defining waiver of the attorney-client privilege, such a rule must clearly recognize and define the application of the common interest doctrine as an exception to waiver. The rule must define this exception as applicable (1) to attorney-client privileged communications (2) shared among represented parties in the presence of counsel or among counsel for such parties (3) with a common legal interest at the time the communication is shared (4) for the purpose of advancing that common legal interest (5) with the reasonable expectation that such communication will remain confidential after it is shared, (6) which confidentiality has not been otherwise breached by the original holder of the attorney-client privilege. The rule should not include any limitation related to the existence of pending or anticipated litigation or to the existence of a written confidentiality agreement. Moreover, the rule should not require that the parties' common interests be identical.

By uniformly adopting a clearly defined common interest doctrine, jurisdictions will achieve three things: respect for the search for truth, encouragement of free and open communication, and availability of enhanced legal advice. A well-defined common interest doctrine maintains the narrow construction of the attorney-client privilege. Such a narrow construction is necessary to balance the social benefits of the attorney-client privilege against the social benefits of maximizing the truth available to the fact-finder.¹³⁶ By delineating the boundaries of the common interest

¹³⁵ Many state legislatures enacted evidentiary rules modeled after Proposed Rule 503(b), which was never enacted by Congress. *See infra* note 141. Given the eagerness of state legislatures to address this issue, many states are likely to follow Congress' lead in enacting a new rule of evidence detailing the application of the common interest doctrine.

¹³⁶ *See supra* notes 24-26, 42, and accompanying text.

doctrine, courts are less likely to stray from the strict confines of the attorney-client privilege in an effort to apply the privilege on a case-by-case basis.

Moreover, a well-defined common interest doctrine provides the certainty necessary to encourage parties to share information. When parties can accurately assess whether a privileged communication will remain so after it is shared, their risk assessments become more precise and they can more freely share information without risking waiver. The free flow of information provides attorneys with access to greater information on which to base legal advice. All jurisdictions should strive to enact such a doctrine because a uniformly adopted and clearly defined common interest doctrine will enhance the quality of legal advice, which is the ultimate goal of the attorney-client privilege.

Because the common interest doctrine is an exception to the waiver of the attorney-client privilege, jurisdictions should adopt a uniform doctrine as a part of a larger statute recognizing the attorney-client privilege in an evidentiary code. Professor Timothy Glynn has suggested revisiting Proposed Rule of Evidence 503(b) and federalizing the attorney-client privilege to attain the certainty necessary for the privilege to achieve its purpose.¹³⁷ The uncertainty of the larger attorney-client privilege and the federalization of that privilege are beyond the scope of this Article. Nonetheless, any discussion of revisiting Proposed Rule 503(b) or any other uniform attorney-client privilege provides an opportunity to clearly define the common interest doctrine and its application.

Proposed Rule 503(b), as promulgated by the United States Supreme Court in 1972 pursuant to the Rules Enabling Act,¹³⁸ would have codified the attorney-client privilege and would have recognized the common interest doctrine.¹³⁹ As proposed, Rule 503(b) provided in pertinent part:

(b) General rule of privilege. 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, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client.¹⁴⁰

When adopting the Federal Rules of Evidence, Congress rejected Article V of the Court's Proposed Rules in its entirety, including Proposed Rule 503(b), because it was dissatisfied with a number of details in the Article, which recognized only nine

¹³⁷ Glynn, *supra* note 18 *passim*.

¹³⁸ 28 U.S.C. § 2072 (1970). See Glynn, *supra* note 18, at 87-88 for a detailed discussion of Proposed Rule of Evidence 503.

¹³⁹ Glynn, *supra* note 18, at 87-88.

¹⁴⁰ COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 65, at 47-48, *noted in* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1 (2d ed. 1999).

testimonial privileges.¹⁴¹

Proposed Rule 503(b) would have recognized the common interest doctrine within its larger definition of the attorney-client privilege.¹⁴² As proposed, Rule 503(b) would have uniformly applied the privilege in all federal jurisdictions, leaving the recognition of the doctrine in state courts up to each state.¹⁴³ By limiting the privilege to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," Proposed Rule 503(b) provided that the common interest doctrine applies only when the communication first meets the other requirements of the attorney-client privilege.¹⁴⁴ This requirement respects the boundaries of the attorney-client privilege necessary to protect the over-arching search for truth. Proposed Rule 503(b) also implicitly requires that both parties retain counsel and that such counsel be present when a communication is exchanged by requiring that the communication be shared "for

¹⁴¹ FED. R. EVID. 501 advisory committee's note (1974 Enactment); Glynn, *supra* note 18, at 88. Congress deleted Article V from the Federal Rules of Evidence and replaced it with Rule 501. *See, e.g.*, FED. R. EVID. 501 advisory committee's notes (1974 Enactment); Glynn, *supra* note 18, at 88. For the text of Rule 501 as adopted, see *supra* note 65.

Presumably frustrated by the uncertainty bred by case-by-case application of the attorney-client privilege, a number of jurisdictions, nevertheless, adopted rules of evidence modeled after Proposed Rule 503(b). *See, e.g.*, ALA. R. EVID. 502(b)(3); ALASKA R. EVID. 503(b)(3); ARK. R. EVID. 502(b)(3); CAL. EVID. CODE §§ 912, 952; DEL. R. EVID. 502(b)(3); FLA. STAT. ANN. § 90.502(c) (West 1999 & Supp. 2004); HAW. R. EVID. 503(b)(3); IDAHO R. EVID. 502(b)(3); KY. R. EVID. 503(b)(3); L.A. R. EVID. 506(B)(3); ME. R. EVID. 502(b)(3); MISS. R. EVID. 502(b)(3); NEB. R. EVID. § 27-503(2)(c); NEV. REV. STAT. § 49.095(3) (2002 & Supp. 2004); N.H. R. EVID. 502(b)(3); N.M. R. EVID. 11-503(B)(3); N.D. R. EVID. 502(b)(3); OKLA. STAT. ANN. tit. 12, § 2502(B)(3) (West 1993); OR. R. EVID. 503(2)(c); S.D. CODIFIED LAWS § 19-13-3(3) (Michie 1993); TEX. R. EVID. 503(b)(1)(C); UTAH R. EVID. 504(b); VT. R. EVID. 502(b)(3); WIS. STAT. ANN. § 905.03(2) (West 2000). Because each jurisdiction modified Proposed Rule 503(b) slightly before enacting it, uniformity among states, even those following Proposed Rule 503(b), does not exist. While such statutes do minimize the uncertainty regarding whether the common interest doctrine will apply in a particular jurisdiction, few courts have interpreted the text of these statutes. *See, e.g.*, McKesson HBOC, Inc. v. Super. Ct. of San Francisco, 9 Cal. Rptr. 3d 812, 820 (Cal. Ct. App. 2004) (construing CAL. EVID. CODE §§ 912 & 952); WT Equip. Partners, L.P. v. Parrish, No. 15616, 1999 WL 743498, at *1 (Del. Ch. Sept. 1, 1999) (construing DEL. R. EVID. 502(b)(3)); *In re Skiles*, 102 S.W.3d 323, 326 (Tex. Ct. App. 2003) (construing TEX. R. EVID. 503(b)(1)(C)). Moreover, such statutes fail to address each of the elements identified above, which are necessary to any clearly defined and certain common interest doctrine. Thus, uncertainty remains regarding how the common interest doctrine will apply even in those states with evidentiary codes that appear to at least recognize the doctrine.

¹⁴² *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 65, at 47-48, *noted in* 1 RICE, *supra* note 140, § 2:1.

¹⁴³ *See id.*

¹⁴⁴ *See id.*

the purpose of facilitating the rendition of professional legal services *to the client*" and that the communication be made by the client or his attorney "*to a lawyer*" for another.¹⁴⁵ By requiring the presence of both parties' attorneys, Proposed Rule 503(b) further emphasized the importance of legal advice, a central element of the attorney-client privilege, in the application of the common interest doctrine.

Had Congress enacted Rule 503(b), however, the rule would have failed to define the common interest doctrine in sufficient detail to provide the certainty that parties considering its use need. The proposed rule requires that the sharing party have a *legal* interest in disclosing the communication, as the requirement that the purpose of the communication be to render legal services to the client implies, but it includes no parallel requirement that the party receiving the communication share that *legal* interest, only that the receiver share "a matter of common interest."¹⁴⁶ Such a discrepancy overlooks the importance of requiring that the communication be shared *for the purpose of furthering a legal interest common to both parties*. Under such statutory language, the receiver could have a purely commercial interest, extending the common interest doctrine beyond the attorney-client privilege and thus obstructing the search for truth. For instance, consider the information exchange between Plaintiff A and Non-Party Z, discussed above, where Plaintiff A had a legal interest in sharing a privileged communication, while Non-Party Z had only a commercial interest in so sharing the communication.¹⁴⁷ This would satisfy the language of Proposed Rule 503(b), and the rule would protect such sharing of information, despite the fact that such an application exceeds the boundaries of the attorney-client privilege and impedes the search for truth.

The language of Proposed Rule 503(b) also left open the possibility that parties may share information, under the protection of the privilege, for some purpose other than the one they have in common where the privilege holder has breached confidentiality by sharing information with a party with adverse interests. This ambiguous position on the importance of confidentiality further hinders the search for truth. Moreover, the text of Proposed Rule 503(b) provided that the original privilege holder can prevent waiver of the privilege by another once shared, but it failed to address whether the consent of all was required to waive. A potential user of the privilege, evaluating the risks of sharing information, may hesitate to rely on the rule because of this uncertainty. Thus, the language of Proposed Rule 503(b) insufficiently addressed the common interest privilege in attempting to define the boundaries of the attorney-client privilege.

Regardless of the proposed rule's faults, its intention—to recognize the common interest doctrine through a uniform Federal Rule of Evidence—was excellent. Proposed Rule 503(b), at the very least, identified the need for the recognition and definition of the common interest doctrine to clarify the uncertainty surrounding the

¹⁴⁵ See *id.* (emphasis added).

¹⁴⁶ See *id.*

¹⁴⁷ See *supra* Part III.B.1. for a detailed hypothetical discussion of the communications shared between Plaintiff A and Non-Party Z.

larger attorney-client privilege. Because such recognition or definition has not yet been achieved, the subject of defining a common interest doctrine should be revisited with a new focus on the detailed elements described above. It is only through a clear definition that the common interest doctrine can further the purpose of the attorney-client privilege.

V. CONCLUSION

The common interest doctrine, as currently interpreted, undermines the goals of the attorney-client privilege. Because jurisdictions do not uniformly recognize or apply it, the common interest doctrine is an uncertain privilege. As such, parties will not utilize the doctrine to share information for the purpose of enhancing the quality of legal advice concerning a common legal interest. This unwillingness to take advantage of the doctrine undercuts its utility and frustrates the goal of the attorney-client privilege—to enhance the quality of legal advice by promoting uninhibited communication between attorney and client. The current common interest doctrine is thus ineffectual.

A uniformly applied common interest doctrine recognized across jurisdictions will provide the much-needed certainty that the doctrine currently lacks. Under a more certain doctrine, parties will be able to confidently share information without the risk of unknowingly waiving the attorney-client privilege. Increased disclosure among parties sharing a common interest will enable attorneys to receive better information and to provide better legal advice. Thus, a uniformly adopted and applied common interest doctrine will achieve the goals of the attorney-client privilege.