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Division II  
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No. 50718-8-II

WASHINGTON COURT OF APPEALS  
DIVISION II

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WASHINGTON COALITION FOR OPEN GOVERNMENT,  
a Washington nonprofit corporation,

*Appellant,*

v.

PIERCE COUNTY,

*Respondent.*

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REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. REPLY STATEMENT OF THE CASE.....	2
A. The trial court correctly rejected the County’s “Hobbs” argument.....	3
B. All of WCOG’s PRA claims, as set forth in WCOG’s <i>Amended Complaint</i> , are before this Court for review. ....	3
C. WCOG provided specific examples of improperly redacted records as exhibits, and cited those exhibits in its proposed findings of fact.....	4
D. WCOG reserved its injunction claim based on the County’s argument that WCOG could not seek an injunction unless and until the court found that the County had violated the PRA.....	5
III. RESPONSE TO COUNTY’S HOBBS ARGUMENT .....	5
IV. STANDARD OF REVIEW .....	8
A. <i>Adams v. Dept. of Corrections</i> , 189 Wn. App. 925, 361 P.3d 749 (2015), confirms that the County has the burden to prove that its exemption claims are valid. ....	8
B. The County cannot carry its burden of proof by making nonspecific evidentiary objections.....	9
C. WCOG identified specific examples of improperly redacted records even though, as the requestor, it had no burden to present any evidence whatsoever.....	9
V. ARGUMENT.....	10
A. The County’s common interest agreement claim has no basis in fact or law. ....	10

1.	The fact that various amicus parties filed similar briefs in <i>Nissen</i> does not prove that a common interest agreement was ever made.....	10
2.	The County’s common interest agreement claim is unsupported by admissible evidence, not credible, and directly contrary to all the documentary evidence....	11
3.	There is no legal precedent for an attorney to form a common interest agreement with himself as an adverse party.....	13
B.	The County’s exemption logs, which merely asserted that redacted records were “work product” under RCW 42.56.290, failed to provide the brief explanation required by RCW 42.56.210(3).....	17
C.	The County violated RCW 42.56.100 by failing to adopt and enforce rules for the production of electronic records. ....	20
VI.	APPENDIX.....	25

## TABLE OF AUTHORITIES

### CASES

<i>ACLU v. Blaine Sch. Dist.</i> , 88 Wn. App. 688, 937 P.2d 1176 (1997) .	22-23
<i>ACLU v. Blaine Sch. Dist.</i> , 95 Wn. App. 106, 975 P.3d 536 (1988) .....	23
<i>Adams v. Washington State Dept. of Corrections</i> , 189 Wn. App. 925 (2015) .....	8
<i>Avocent Redmond Corp. v. Rose Electronics, Inc.</i> , 516 F. Supp. 2d 1199 (W.D. Wash. 2007).....	10
<i>Cedar Grove Composting, Inc. v. City of Marysville</i> , 188 Wn. App. 695, 354 P.3d 249 (2015).....	6-7
<i>Chen v. City of Medina</i> , 179 Wn. App. 1026 (2014).....	21-22
<i>City of San Jose</i> , 225 Cal. App. 4th. 75, <i>reversed</i> , 2 Cal. 5th, 389 P.3d 848 (2017) .....	16
<i>Continental Oil Co. v. U.S.</i> , 330 F.3d 347 (1964) .....	11
<i>Denver Post Corp. v. Ritter</i> , 255 P.3d 1083 (Colo. 2011).....	16
<i>Gronquist v. Dept. of Corrections</i> , 159 Wn. App. 576, 247 P.3d 436 (2011).....	20
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978) .....	25
<i>Hobbs v. State</i> , 183 Wn. App. 925, 335 P.3d 104 (2014).....	1, 3, 5-8
<i>Hikel v. Lynnwood</i> , 197 Wn. App. 366, 389 P.3d 677 (2016) .....	22
<i>Hunydee v. United States</i> , 355 F.2d 183 (9th Cir. 1965).....	11
<i>In re Pacific Pictures Corp.</i> , 679 F.3d 1121 (9th Cir. 2012).....	11
<i>Judicial Watch v. Dep’t of Justice</i> , 432 F.3d 366 (D.C. Cir. 2005).....	11

<i>Kittitas County v. Allphin</i> , 195 Wn. App. 355, 381 P.3d 1202 (2016), review granted, 187 Wn.2d 1001 (2017) .....	10, 20
<i>Kleven v. Des Moines</i> , 111 Wn. App. 284, 44 P.3d 887 (2002) .....	20
<i>Kleven v. King County Prosecutor</i> , 112 Wn. App. 18, 53 P.3d 516 (2002).....	16
<i>Lakewood v. Koenig</i> , 182 Wn.2d 87, 343 P.3d 335 (2014) .....	1, 7, 18-20
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998) .....	16
<i>Mechling v. Monroe</i> , 152 Wn. App. 830, 222 P.3d 808 (2009) .....	25
<i>Neighborhood Alliance v. Spokane County</i> , 172 Wn. App. 702, 261 P.3d 119 (2011) .....	7
<i>Nissen v. Pierce County</i> , 183 Wn.2d 863, 357 P.3d 45 (2015) .....	<i>passim</i>
<i>Northup v. Dept. of Corrections</i> , 2015 WL 4094233 (July 6, 2015).....	5
<i>O’Neill v. City of Shoreline</i> , 145 Wn. App. 913, 187 P.3d 822 (2008) .....	16
<i>Resident Action Council v. Seattle Housing Authority</i> , 177 Wn.2d 417, 327 P.3d 600 (2013).....	7
<i>Sanders v. State</i> , 169 Wn.2d 827, 240 P.3d 120 (2010) .....	11, 19
<i>Sappenfield v. Dept. of Corrections</i> , 127 Wn. App. 83, 110 P.3d 808 (2005) .....	20
<i>Spokane Research &amp; Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	7
<i>Strang v. Collyer</i> , 710 F. Supp. 9 (D.D.C. 1989) .....	11
<i>U.S. v. Gonzalez</i> , 669 F.3d 974 (9th Cir. 2012).....	11
<i>West v. Bacon</i> , 2017 WL 6492709 (Dec. 19, 2017) .....	5
<i>West v. Port of Tacoma</i> , 2017 WL 2645665 (June 20, 2017).....	5
<i>West v. Thurston County</i> , 144 Wn. App. 573, 183 P.2d 346 (2008) .....	16

*West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016) .....15

**STATUTES**

Laws of 1973, ch. 1, § 2.....23

Laws of 2005, ch. 483, §4.....24

Laws of 2017, ch. 304, §2.....24

RCW 42.56.030 .....19

RCW 42.56.080 .....24

RCW 42.56.100 ..... 2, 7, 20, 22-23, 25

RCW 42.56.210(3)..... 7, 9, 17-29

RCW 42.56.290 ..... 17-20, 23

RCW 42.56.550 .....1, 7, 8, 9, 14, 17,23

RCW 42.56.565 .....8

RCW 43.105.250 .....24

**REGULATIONS**

WAC 44-14-05001.....24

**COURT RULES**

ER 702 .....9

## I. INTRODUCTION

This case is *not* a personal injury case, employment discrimination case, contract dispute or any other type of lawsuit in which the plaintiff has the burden of proof. This is a case under the Public Records Act, Chap. 42.56 RCW (“PRA”), in which respondent Pierce County has the burden to prove that its exemption claims are valid. RCW 42.56.550(1). The requestor, appellant Washington Coalition for Open Government (“WCOG”), has no burden to prove what did or did not happen in the underlying *Nissen* case. WCOG has no burden to prove that the records withheld by Pierce County are not exempt. WCOG has no burden to explain why Prosecutor Lindquist cannot form a valid common interest agreement with himself as Intervenor in a case where he should have appointed a special prosecutor to represent the County.

The County has failed to carry its burden to prove that the redacted records are exempt as work product pursuant to an alleged oral common interest agreement in the *Nissen* case. The County’s various attempts to shift the burden of proof to WCOG are unavailing. The County’s argument under *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 104 (2014) was correctly rejected by the trial court. The County’s exemption logs were inadequate under *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014), which both the County and the trial court have ignored. Finally,

the record demonstrates that the County failed to adopt and enforce proper PRA rules as required by RCW 42.56.100.

This Court should reverse the trial court's rulings, award WCOG its attorney fees, and remand this matter for further proceedings.

## **II. REPLY STATEMENT OF THE CASE**

Having failed to carry its burden of proof in the trial court, the County asks this Court to "scrutinize the record" to determine whether WCOG's proposed findings are properly supported. *County Br.* at 18. That is not the Court's job. In the absence of any evidence or argument from the County as to which of 137 proposed findings is allegedly unsupported, this Court should accept WCOG's proposed findings as true.

The County asserts that WCOG's PRA request seeks "voluminous" records, and that the records "obviously contain attorney work product and privileged information." *County's Br.* at 1-2. In fact, WCOG's request relates to a single lawsuit, and WCOG did *not* request any party's privileged communications with its own attorneys. CP 2645.

The County misleadingly suggests that WCOG's PRA request was not sent to the County's PRA officer, Joyce Glass, but only to Deputy Hamilton. *County's Br.* at 6. In fact, WCOG's request was mailed to Ms. Glass, but also emailed to Hamilton because the County had failed to post the email address of its public records officer on its website. CP 470.

The County asserts that the trial court “twice granted” motions for a protective order, and that WCOG’s discovery requests were designed to “harass” the County. *County Br.* at 12. In fact, the trial court granted the first motion without prejudice, crossing out the County’s absurd ‘harassment’ provisions. CP 1561. In the second order the court ruled that depositions were unnecessary, but that the court might revisit the issue. CP 1827. Because Lindquist and Hamilton never testified WCOG did not raise the issue again. *See WCOG Br.* at 29-30.

**A. The trial court correctly rejected the County’s “Hobbs” argument.**

Taking bits of the record out of context, the County asserts that the trial court partially agreed with the County’s argument under *Hobbs*, 183 Wn. App. 925. *County Br.* at 1, 11-12, 15-16. In fact, the County’s *Hobbs* motion was denied, and none of WCOG’s claims were dismissed under *Hobbs*. CP 931. When the County renewed its *Hobbs* argument at the hearing on the merits the trial court rejected the argument again, ruling that WCOG’s lawsuit was “in response to final agency action.” CP 358.

**B. All of WCOG’s PRA claims, as set forth in WCOG’s *Amended Complaint*, are before this Court for review.**

The County erroneously asserts that only two (2) installments of records, produced before December 14, 2015, are at issue in this case. *County Br.* at 1, 15-16. In fact, WCOG filed an *Amended Complaint* in

October 2016 that set forth PRA violations based on the County's first *nine (9) installments* of records (through September 15, 2016). CP 2089. Although the trial court overlooked the amended complaint in its letter ruling, the trial court's ruling on the County's exemption claims did not distinguish between particular records or installments. CP 358-359.

**C. WCOG provided specific examples of improperly redacted records as exhibits, and cited those exhibits in its proposed findings of fact.**

The County's assertion that WCOG failed to identify specific improperly redacted records is false. *See WCOG Br.* at 25-26; CP 1575-1614, 2490-2515, 2569-2577, 2917-2949. The County's assertion that WCOG did not identify specific records in its hearing brief (County Br. at 13) is intentionally misleading because those records were in WCOG's exhibits and proposed findings of fact. All but one of WCOG's examples of improperly redacted records came from the first *nine (9)* installments covered by the *Amended Complaint* (records numbered 0001 through 5288).<sup>1</sup> *WCOG Br.* at 16-17; CP 2089. WCOG's proposed findings of fact identified four subclasses of records, based on whether the records were shared with WAPA, WSAMA, employee amicus groups or Intervenor Lindquist. CP 1592, 1596-97, 1599, 1601 [FOFs 87, 97, 104,

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<sup>1</sup> WCOG submitted a single email from the County's eleventh (11th) installment, which was only one of four examples of redacted records that the County had shared with organizations of government officials or employees. CP 447, 1599, 2923-2926.

112]. WCOG’s proposed findings identified multiple specific examples of improperly redacted records in each subclass. *Id.*; *WCOG Br.* at 26.

**D. WCOG reserved its injunction claim based on the County’s argument that WCOG could not seek an injunction unless and until the court found that the County had violated the PRA.**

The County asserts that “WCOG did not brief any request for injunctive relief.” *County’s Br.* at 14. As explained in *WCOG’s Brief* at 48 n.19, WCOG reserved its injunction claim based on the County’s argument that WCOG did not have standing to seek an injunction unless and until the trial court found that the County had violated the PRA. CP 2116-2117. After WCOG filed its hearing brief the County contradicted its earlier position, arguing that WCOG had failed to brief the injunction claim. CP 1531-1532. The trial court correctly ignored the County’s argument. CP 357. WCOG’s injunction claim is *not* before this Court on appeal but may be pursued on remand.

**III. RESPONSE TO COUNTY’S *HOBBS* ARGUMENT**

*Hobbs*, 183 Wn. App. 925, holds that no PRA case may be brought until an agency takes some sort of “final action.” *Hobbs*, 183 Wn. App. at 937.<sup>2</sup> Where an agency has taken final action, *Hobbs* no longer applies.

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<sup>2</sup> The unpublished cases cited by the County do not hold otherwise. See *West v. Bacon*, 2017 WL 6492709 (Dec. 19, 2017), \*4 (no final agency action); *West v. Port of Tacoma*, 2017 WL 2645665 (June 20, 2017) \*7 (same); *Northup v. Dept. of Corrections*, 2015 WL 4094233 (July 6, 2015) \*4 (same).

*Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 715, 354 P.3d 249 (2015).

The issue under *Hobbs* and *Cedar Grove* is whether the County engaged in final agency action before WCOG brought this case. The trial court correctly held that the County had engaged in final agency action:

Pierce County has denied inspection of multiple records or portions of records and provided exemption logs. The agency takes a clear position that the exemptions are justified and the withheld documents will not be produced. This lawsuit is in response to final agency action, and it is not premature.

CP 358. This ruling, which the County fails to challenge or even mention, is correct. There is nothing in the record or the County's brief to suggest that the County is ever going to reconsider its exemption claims or produce the unredacted records. The County's *Hobbs* argument fails because the requirement of final agency action is met.

The County conflates final agency action under *Hobbs* with the irrelevant question of whether an agency has completed its response to a particular PRA request. The County's argument ignores the requirement of final action, asserting only that WCOG's case was "premature" because the County's response was not complete. *County's Br.* at 19. Similarly, the County attempts to distinguish *Cedar Grove* based on the irrelevant supposition that the agency in *Cedar Grove* was no longer producing

installments. *County's Br.* at 22. Neither *Hobbs* nor *Cedar Grove* supports the County's argument that no PRA case can be brought unless and until the agency states that its response is complete.<sup>3</sup>

Finally, the County argues, in the alternative and without any supporting authority, that the Court should limit its review to records claimed as exempt before this case was commenced in December 2015. *County's Br.* 23-24. This argument ignores the fact that WCOG filed an *Amended Complaint* in October 2016. CP 2083-2093. Furthermore, the County's request is pointless. The events that are the basis of WCOG's claims under RCW 42.56.100 occurred before the original complaint was filed in December 2015, and WCOG's legal challenges to the County's common interest claims and exemption logs do *not* depend upon whether the Court reviews the first two installments or the first nine installments.

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<sup>3</sup> The County also recycles its erroneous argument that the PRA provides only two causes of action. *County's Br.* at 19-20. In *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104-106, 117 P.3d 1117 (2005) the Supreme Court reversed the Court of Appeals' erroneous conclusion that the PRA creates a special statutory proceeding, and clarified that (i) PRA cases are ordinary civil cases, and (ii) that the PRA must be liberally construed. Contrary to the County's incorrect understanding of the PRA, the claims expressly permitted by RCW 42.56.550 are *not* the only claims that can be brought under the PRA. A requester may recover attorney fees and costs where an agency has failed to conduct a reasonable search. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 724-25, 261 P.3d 119 (2011). A requester may recover attorney fees and costs where an agency has failed to properly explain its exemptions under RCW 42.56.210(3), even if no records were improperly withheld. *City of Lakewood v. Koenig*, 182 Wn.2d 87, 99, 343 P.3d 335 (2014). An agency may be ordered to adopt proper rules to implement the PRA. *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 446-47, 327 P.3d 600 (2013). None of these claims are based on the text of RCW 42.56.550(1).

Nothing in the *County's Brief* at 33-50 suggests otherwise. This argument, like all of the County's *Hobbs* arguments, is a meritless distraction from the actual issues in this case.

#### IV. STANDARD OF REVIEW

This Court reviews the trial court *de novo*. *County Br.* at 17.

The County acknowledges that it has the burden of proof under the PRA. *County Br.* at 15, 33-34; RCW 42.56.550(1). But having failed to carry its burden of proof, the County makes several arguments intended to shift the burden of proof to WCOG.

**A. *Adams v. Dept. of Corrections*, 189 Wn. App. 925, 361 P.3d 749 (2015), confirms that the County has the burden to prove that its exemption claims are valid.**

Both the County and the trial court erroneously cited *Adams v. Dept. of Corrections*, 189 Wn. App. 925, 952, 361 P.3d 749 (2015), for the proposition that a plaintiff requestor has the burden to prove the essential elements of its claim. *County Br.* at 34; CP 358. *Adams* confirms that an agency has the burden under RCW 42.56.550(1) to prove that its exemption claims are both factually and legally supported. 189 Wn. App. at 937. The portion of *Adams* erroneously relied on by the County and the trial court, 189 Wn. App. at 952, relates to the burden of proving “bad faith” under RCW 42.56.565, a special statute relating to inmates that has nothing to do with this case.

**B. The County cannot carry its burden of proof by making nonspecific evidentiary objections.**

The County argues that much of the evidence submitted by WCOG is inadmissible. *County Br.* at 18-19. Apart from objecting to the opinions of two ethics experts under ER 702 (CP 1527) the County failed to make any specific evidentiary objections in the trial court. CP 357. On appeal, the County ignores the trial court's ruling, and again fails to make any specific evidentiary objections. *County Br.* at 18-19. The County cannot carry its burden of proof under RCW 42.56.550(1) by lobbing nonspecific evidentiary objections at the requestor who does *not* have the burden of proof.

**C. WCOG identified specific examples of improperly redacted records even though, as the requestor, it had no burden to present any evidence whatsoever.**

The County repeats its meritless assertion that WCOG failed to identify specific improperly redacted records. *County Br.* at 13-14, 33-35; *see WCOG Br.* at 25-26. First, the County's assertion that WCOG failed to identify specific records is simply false. *See* section II(C) (above). Second, the County cites no legal authority to support its argument because there is no such authority. The PRA requires agencies to identify withheld or redacted records, to explain their exemptions, and to prove their exemptions in court. RCW 42.56.210(3), -550(1). The PRA does not impose any such burdens on the requestor.

## V. REPLY ARGUMENT

### A. The County's common interest agreement claim has no basis in fact or law.

#### 1. The fact that various amicus parties filed similar briefs in *Nissen* does not prove that a common interest agreement was ever made.

Although the common interest doctrine does not require a formal written agreement, *County Br.* at 36, some sort of agreement is required. “[T]he parties must invoke the privilege: they must intend and agree to undertake a joint defense effort.” *Kittitas County v. Sky Allphin*, 195 Wn. App. 355, 368, 381 P.3d 1202 (2016), *review granted*, 187 Wn.2d 1001 (2017); *County Br.* at 40. And the parties’ agreement must be established with some sort of evidence. *See Avocent Redmond Corp. v. Rose Electronics, Inc.*, 516 F. Supp. 2d 1199, 1204 (W.D. Wash. 2007) (rejecting attorneys’ claim of joint defense agreement).

The County has no documentation to support its claim of an oral common interest agreement. CP 2837. While the County disclosed Lindquist and Hamilton as witnesses to that agreement it refused to allow those witnesses to testify. CP 1827. The County’s only supporting declarant (WSAMA’s attorney) had no personal knowledge of any common interest agreement. CP 1830. As a result, the County relies exclusively on the bare fact that the amicus briefs agreed with the County.

*County's Br.* at 38-40. That fact alone does not carry the County's burden of proof.

The County's argument ignores *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012), which holds that abstract agreement on a legal issue is *not* sufficient to establish that a common interest agreement was made. None of the authorities cited by the County hold that a common interest agreement may be implied from the bare fact that an amicus party's brief agrees with a litigant.<sup>4</sup> The section of the Rice treatise quoted by the County does not mention amicus parties at all. *County Br.* at 36-37 (citing Paul R. Rice, *Attorney-Client Privilege in the United States* § 4.36); **Appendix B.**

**2. The County's common interest agreement claim is unsupported by admissible evidence, not credible, and directly contrary to all the documentary evidence.**

WAPA and WSAMA are both organizations of attorneys who represent particular counties or cities. Any disclosure to a member of WAPA or WSAMA is a disclosure to the agency that member represents. That is why counties and cities represented by WAPA and WSAMA

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<sup>4</sup> See *Sanders v. State*, 169 Wn.2d 827, 853-54, 240 P.3d 120 (2010); *U.S. v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012); *Continental Oil Co. v. U.S.*, 330 F.3d 347 (1964); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965). The cases cited by the County for the proposition that "[a] party to an appeal can have a common interest with amicus supporters," *County Br.* at 39 n. 22, deal with *internal* agency communications and do not address the common interest doctrine at all. See *Judicial Watch v. Dep't of Justice*, 432 F.3d 366, 370 (D.C. Cir. 2005); *Strang v. Collyer*, 710 F. Supp. 9 (D.D.C. 1989).

members released their *Nissen* records to WCOG without any claim of work product or “common interest agreement.” CP 1289-1292. These disclosures contradict the alleged oral common interest agreement.

The County responds to this evidence by falsely asserting that all of the agencies that provided records to WCOG had “waived” the common interest agreement. *County Br.* at 41-42. There is no evidence that any agency “waived” a common interest agreement with the County. All the evidence in the record indicates that the County never had any common interest agreement in the first place. CP 2561, 2566.

The County’s “waiver” argument directly contradicts its common interest agreement claim. In a footnote the County asserts that it had a common interest relationship with WAPA and WSAMA as organizations, but *not* with the counties and cities that the members of WAPA and WSAMA represent. *County Br.* at 40 n. 27. But when the County attempts to explain why various counties and cities produced unredacted WAPA and WSAMA records, the County argues (without evidence) that those cities and counties elected to waive the common interest agreement. *County Br.* at 41-42. **The County’s assertion that these agencies “waived” the common interest agreement directly contradicts the County’s assertion that only WAPA and WSAMA, and *not* their client agencies, were parties to the alleged agreement in the first place.**

The County has failed to address several other holes in its common interest agreement theory. The County has not explained how, as a practical matter, it could have entered into an oral common interest agreement with dozens of attorneys from other agencies, some of whom disagreed with the County. CP 2523, 2540. The County has not explained why it listed only four attorneys as witnesses to an alleged agreement that must have included dozens of attorneys. CP 2836-37. The County has not explained why it never attempted to claw back the records WCOG obtained from other agencies, allegedly in violation of the County's common interest agreement, or why WAPA's staff attorney advised WAPA members to use the phone to avoid creating public records. CP 2561. The impracticality or impossibility of WAPA or WSAMA claiming any sort of work product protection for their amicus discussions is undoubtedly why WAPA claimed no exemptions, and warned its members to use the phone to avoid creating records. CP 2561, 2566.

**3. There is no legal precedent for an attorney to form a common interest agreement with himself as an adverse party.**

The *Nissen* case was *not* a typical PRA case in which the requestor named both an agency and a public official as defendants. The subject matter of the *Nissen* case was Prosecutor Lindquist's personal cell phone, and Nissen's complaint explicitly alleged that the requested records would

show misconduct by Lindquist himself. CP 2159. Unlike all the PRA cases cited by the County, Lindquist retained a private attorney to intervene in the *Nissen* case to assert his own privacy interests, and even sought a restraining order against his own agency. CP 2190-2214.

Because Lindquist never appointed an independent special prosecutor for the County, and remained actively involved in representing the County, Lindquist was wearing two hats. Any records shared with Lindquist in his capacity as the County's attorney were also shared with Lindquist in his capacity as the Intervenor. CP 1601. The County has the burden under RCW 42.56.550(1) to establish that an alleged common interest agreement between Lindquist as Intervenor and Lindquist as the County's attorney is valid. The County has failed to carry that burden.

The County addresses only the question of whether Lindquist had a conflict of interest in *Nissen*, arguing that there was no conflict of interest. *County Br.* at 42-47. WCOG raised the conflict issue to explain why Lindquist should not have represented the County in *Nissen*. The obvious conflict of interest created by a prosecutor suing his own client agency is undoubtedly why there appears to be no legal precedent for the County's common interest agreement claim. CP 2071. Lindquist's intervention pleadings contradict the County's assertion that the interests of Lindquist and the County were aligned. His motion to intervene stated that

“[i]ntervenor’s interests are distinct from the County’s and he is unable to assert them personally and directly unless he is a party hereto.” CP 2183. The County has no legal authority or ethics expert to support its argument that Lindquist could intervene in the *Nissen* case and seek a restraining order against his own agency without creating a conflict of interest that required a special prosecutor.<sup>5</sup> Nor does the County have any authority to allow any attorney to form a common interest agreement with himself.

The County erroneously asserts that the same attorneys represented both the City of Puyallup and a former city councilmember in *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). *County Br.* at 45 n.29. In fact, the appellants in that case were separately represented, and those parties had a written common interest agreement. CP 2962. In each of the other PRA cases cited by the County the requestor either named the public official as a defendant or sued that defendant in their official

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<sup>5</sup> The County’s collateral estoppel argument, *County Br.* at 45-47, is erroneous for several reasons. First, neither superior court actually ruled that Lindquist did *not* have a conflict of interest in *Nissen*. Judge Roof ruled on the sufficiency of recall charges against Lindquist, and his ruling does not even use the phrase ‘conflict of interest.’ CP 1109-1117. Judge Tabor held that a conflict of interest had not been established *at that time*, but declined to foreclose the issue. CP 1100-1101. Second, both rulings were made before it came to light that Lindquist had caused the County to wrongfully withhold his text message to Sommerfield. CP 2587-91. Third, none of the collateral estoppel cases cited in the *County Br.* at 46 support the argument that, by filing an amicus brief on PRA issues, WCOG was in privity with Nissen on other issues addressed on remand.

capacity.<sup>6</sup> None of these cases support the County’s argument that a prosecutor who intervenes in a PRA case to assert personal interests is permitted to continue to represent his or her agency in the same case.

The County’s response misleadingly focuses on the “attorney-client relationship between the County and Prosecutor Lindquist,” omitting the key fact that Lindquist intervened as a party in *Nissen County Br.* at 42-43; CP 2190-2214. The attorney-client relationship between the County and Prosecutor Lindquist is *not* the issue. None of the privilege cases cited by the *County Br.* at 43-44 involved prosecutors who intervened in cases against their own agencies to assert their personal interests. CP 1145. None of those cases allowed an attorney to form a common interest agreement with himself or herself as an adverse party.

In addition, the County has no response to WCOG’s argument that the alleged common interest agreement is not consistent with the purposes of the common interest doctrine, and enables an attorney to conceal unethical conduct. *WCOG Br.* at 39. Nor has the County responded to

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<sup>6</sup> See *Kleven v. King County Prosecutor*, 112 Wn. App. 18, 25, 53 P.3d 516 (2002); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998); *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011); *City of San Jose*, 225 Cal. App. 4th 75, reversed, 2 Cal. 5th, 389 P.3d 848 (2017); *O’Neill v. City of Shoreline*, 145 Wn. App. 913, 920, 187 P.3d 822 (2008). See also *West v. Thurston County*, 144 Wn. App. 573, 183 P.2d 346 (2008) (requester named the county’s law firm as defendant).

WCOG's argument that, narrowly interpreted, RCW 42.56.290 does not apply where one party is also an attorney for an adverse party. *Id.*

The County has failed to carry its burden under RCW 42.56.550(1) to establish that the County's alleged oral common interest agreement is valid. This Court should reverse the trial court, and hold that an attorney cannot form a common interest agreement with himself.

**B. The County's exemption logs, which merely asserted that redacted records were "work product" under RCW 42.56.290, failed to provide the brief explanation required by RCW 42.56.210(3).**

It is undisputed that the County's exemption logs stated that the redacted records were "work product" under RCW 42.56.290, and that the "controversy" to which these records related was the *Nissen* case. But it is also undisputed that the County's exemption logs did not explain how the common interest doctrine applied to the records. The County's logs did not explain the existence, parties or scope of the alleged oral common interest agreement.

The County argues, and the trial court agreed, that RCW 42.56.210(3) does not require the County to explain how the common interest doctrine applied to the redacted records. *County Br.* at 49; CP 360. WCOG argues that RCW 42.56.210(3) and -.290 require an explanation of why records are exempt, and that an assertion that records

are “work product” is insufficient where an exemption claim under RCW 42.56.290 depends upon the application of the common interest doctrine.

The County argues that WCOG has no supporting authority. *County Br.* at 49. On the contrary, the County ignores the most recent Supreme Court case on this issue: *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014). That case clarified that an exemption log under RCW 42.56.210(3) must provide “sufficient explanatory information for requestors to determine whether the exemptions were properly invoked.” 182 Wn.2d at 96. The information provided in the County’s logs was *not* sufficient for WCOG to determine whether the County’s exemptions were “properly invoked.” *Id.* The County does not argue otherwise. WCOG had to file a lawsuit and conduct discovery to get any information about the existence, nature, parties or scope of the alleged oral common interest agreement. The County’s exemption logs failed the *Lakewood* test and violated the PRA.

The trial court also ignored *Lakewood* and failed to apply the test from that case. CP 359-360. Instead, the trial court distinguished between “work product” and the “common interest doctrine,” and held that only the former was the “exemption relied on” for purposes of RCW 42.56.210(3). *Id.* But the text of RCW 42.56.290 does *not* recognize such an artificial

distinction between “work product” and the common interest doctrine.

The phrase “work product” is not used in the exemption, which provides:

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

RCW 42.56.290. Contrary to the trial court’s ruling, the “exemption relied on” is *not* “the work product privilege.” CP 360. The exemption in RCW 42.56.290 requires an agency to prove that the records would not be available to another party in pretrial discovery. If that exemption depends upon the application of the common interest doctrine then that doctrine is both part of the exemption under RCW 42.56.290 and part of the explanation required by RCW 42.56.210(3).

Nothing in the PRA or case law supports the trial court’s ruling, which forces requestors to sue an agency in order to determine why records have been withheld. Allowing the County to provide only a partial explanation of its work product exemption is inconsistent with RCW 42.56.210(3), *Lakewood*, and the general requirement that the PRA be interpreted liberally. RCW 42.56.030. The County’s argument is also contrary to *Sanders*, which rejected the requestor’s argument that the common interest doctrine was not applicable to RCW 42.56.290. 169 Wn.2d at 853-854. If the common interest doctrine can be part of a valid

PRA exemption claim under RCW 42.56.290 then the doctrine must also be explained under RCW 42.56.210(3) and *Lakewood*.<sup>7</sup>

The County's exemption logs failed to provide "sufficient explanatory information for requestors to determine whether the exemptions were properly invoked." *Koenig*, 182 Wn.2d 87, 97, 343 P.3d 335 (2014). The trial court's ruling must be reversed.

**C. The County violated RCW 42.56.100 by failing to adopt and enforce rules for the production of electronic records.**

RCW 42.56.100 requires each agency to adopt and enforce rules that "shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." Simple mistakes, such as mislabeling a single audiotape, are not violations of the PRA. *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97, 44 P.3d 887 (2002). However, a failure to adopt and enforce rules is a PRA violation. *Id.*<sup>8</sup>

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<sup>7</sup> The unpublished opinion in *Kittitas County v. Sky Allphin*, 195 Wn. App. 355, 368, 381 P.3d 1202 (2016), *review granted*, 187 Wn.2d 1001 (2017), is distinguishable. That case involved a common interest agreement between only two parties that were statutorily required to collaborate, and the record demonstrated that those parties had formed an agreement at the outset of the case. 195 Wn. App. at 369, ¶55. In contrast, the County's logs in this case did not even indicate who the parties to the alleged common interest agreement might be.

<sup>8</sup> *Gronquist v. Dept. of Corrections*, 159 Wn. App. 576, 247 P.3d 436 (2011), and *Sappenfield v. Dept. of Corrections*, 127 Wn. App. 83, 89, 110 P.3d 808 (2005) do not hold otherwise. Both cases simply acknowledges that different considerations apply to rules for prison inmates.

It is undisputed that the County had current electronic office technologies—including email, PDF, Acrobat redaction software and internet file transfer—and it knew how to use them. It is also undisputed that the County simply refused to use these technologies in response to WCOG’s PRA request. The County’s PRA rules, which were last updated in 2007, do not address whether the County will respond to a requestor by email or whether or how the County will produce electronic records. CP 262-266; *WCOG Br.* at 46 n. 18.<sup>9</sup>

The lack of proper rules for email and electronic documents enabled the County to be intentionally unhelpful in response to WCOG’s PRA request. The County does not argue otherwise, and makes no attempt to defend its conduct. Instead, the County makes a series of arguments that would immunize the County by weakening the PRA.

The County relies on *Chen v. City of Medina*, 179 Wn. App. 1026, ¶ 25 (2014) (unpublished), which states, without authority, that:

The PRA provides no separate cause of action for an agency’s failure to provide the fullest assistance to a requester. *Chen* raises no challenge to any City rules or regulations. Thus, the court did not need to address this allegation.

It is unclear what the *Chen* court meant by the first sentence above. To the

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<sup>9</sup> The County repeats its erroneous assertion that the County adopted rules that WCOG failed to challenge. *County Br.* at 32; CP 1532. But the County cannot point to any rules regarding email or electronic records because it has no such rules. *Id.*

extent *Chen* holds that RCW 42.56.100 is unenforceable that holding is simply wrong. However, the second sentence (above) suggests that, consistent with *Kleven*, a claim under RCW 42.56.100 must be based on an agencies failure to adopt and enforce rules. *See also, Hikel v. Lynnwood*, 197 Wn. App. 366, 377-78, 389 P.3d 677 (2016) (rejecting challenge to agency rules raised for the first time in reply brief). In this case, WCOG challenged the County's *failure* to adopt and enforce rules for email or electronic documents.

The County argues that RCW 42.56.100 may be enforced by injunctive relief, but also asserts that WCOG failed to brief its injunction claim. *County Br.* at 30-31. As explained in section II(D), WCOG's injunction claim was reserved, based on the County's argument that WCOG lacked standing to seek an injunction unless and until the trial court found a violation of the PRA. CP 2116-2117. The trial court correctly ignored the County's self-contradictory argument. CP 357.

*ACLU v. Blaine Sch. Dist.*, 86 Wn. App. 688, 937 P.2d 1176 (1997), an earlier PRA case that did not address an agency's obligation to adopt and enforce rules, held that a school district violated the PRA by refusing to mail records to a requestor. The court held that the agency's interpretation of the PRA "cannot be a proper interpretation in view of the further statutory duty of the agency to give 'fullest assistance to

inquirers.’” 86 Wn. App. at 695 (citing former RCW 42.17.290). Because the agency had effectively denied access to the records the court held the agency liable for penalties under RCW 42.56.550(1). 86 Wn. App. at 699; *ACLU v. Blaine Sch. Dist.*, 95 Wn. App. 106, 975 P.3d 536 (1988).

The County turns *ACLU* on its head, arguing that *ACLU* gives the County the right to send records by mail even if a faster and cheaper method is readily available to the agency. *County Br.* at 25-27. The County makes this argument by omitting any reference to the duty of fullest assistance to requesters, RCW 42.56.100 (former RCW 42.17.290), on which *ACLU* was based. *Id.* The County also argues, based on *ACLU*’s award of statutory penalties, that RCW 42.56.100 is not violated unless an agency’s response amounts to a denial of access to records under RCW 42.56.550(1). *County Br.* at 27, 29. Like the school district in *ACLU*, the County’s interpretation of the PRA is inconsistent with an agency’s statutory duty to provide fullest assistance to requestors.

The PRA requires agencies to adopt rules for electronic public records. The original 1972 PRA explicitly applied to electronic records, including types of data that cannot be copied onto paper. Laws of 1973, ch. 1, § 2 (“writing” includes “pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums

and other documents”). In 1996 the legislature enacted RCW 43.105.250 (now RCW 43.105.351) to encourage agencies to make public records “widely available electronically to the public.” WAC 44-14-05001. Nine years later the 2005 legislature required the Attorney General to adopt model rules for the PRA, specifically including “providing fullest assistance to requestors” and “[f]ulfilling requests for electronic records.” Laws of 2005, ch. 483, §4. WAC 44-14-05001 notes that large agencies with electronic resources (such as Pierce County) can and should provide records electronically, but that “agencies have some discretion in establishing their reasonable procedures under the [PRA].” The County ignores these statutes and dismisses the AGO model rules as “advisory.” *County Br.* at 28. It undisputed that the County’s rules, last updated in 2007, fail address electronic records. CP 262-266.

The County cites a 2017 amendment to RCW 42.56.080(2) (Laws of 2017, ch. 304, § 2) for the proposition that the PRA did not require agencies to use email until June 23, 2017. *County Br.* at 26. That amendment, which clarified that agencies are required to respond to requests “received” by email, does *not* actually require agencies to *respond* by email. Therefore, according to the County’s reasoning, agencies still have no obligation to communicate with requestors by email, and they will never have such an obligation unless the legislature amends

the PRA again. As the Supreme Court observed forty years ago, “leaving interpretation of the [PRA] to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

Finally, the County argues that agencies have no obligation to produce records in electronic format. *County Br.* at 27-28. The cases cited by the County do not allow an agency to refuse to produce existing electronic records, such as the redacted PDF files that the County created with Adobe Acrobat redaction software. On the contrary, *Mechling v. Monroe*, 152 Wn. App. 830, 850, 222 P.3d 808 (2009), held that the agency was required to produce emails in electronic format “if it is reasonable and feasible for the City to do so.” 152 Wn. App. at 850. The record shows that it was reasonable and feasible for the County to respond to WCOG by email and to produce electronic records. The County does not argue otherwise. The County’s failure to adopt and enforce proper rules as required by RCW 42.56.100 was a violation of the PRA.

The trial court’s ruling was erroneous and must be reversed. The remaining issues relating to the County’s compliance with RCW 42.56.100 should be addressed on remand.

## **VI. APPENDIX**

**Appendix** Paul R. Rice, *Attorney-Client Privilege in the U.S.* § 4.36)

RESPECTFULLY SUBMITTED this 11th day of May, 2018.

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Certificate of Service

I, the undersigned, certify that on the 11th day of May, 2018, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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## 1 Attorney-Client Privilege in the U.S. § 4:36

Attorney Client Privilege in the United States    December 2017 Update  
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Chapter 4. Client

IX. Joint Clients/Participants in Joint or Common Defense

B. Participants in Joint or Common Defense/Individuals With a Community of Interests

### § 4:36. “Community of interests”

#### References

There is no clear standard for measuring the community of interests that must exist for the privilege to apply. Although courts have spoken generally of “common issues,”<sup>2</sup> these cases, for the most part, have involved situations where the participants were actual or potential coparties in litigation. In these instances, the rule has been denoted the “joint defense” rule.<sup>3</sup> When coparties are in the midst of or preparing for litigation through a joint defense strategy, courts have virtually assumed (without focusing on the nature of each party's interests and how they might diverge) that a sufficient community of interests exists, because of the common positions in the litigation, to justify the sharing of otherwise privileged communications without that disclosure constituting a waiver of the privilege.<sup>4</sup> Sharing among participants in a joint defense, however, is not without limits. And when limits are set, lines will likely be drawn along a “community of legal interests.” In *Power Mosfet Technologies v. Siemens AG*,<sup>5</sup> for example, the defendants were charged with independent infringement of a particular patent. Despite the fact that each defendant had a common interest in declaring the patent invalid or unenforceable, the court was willing to recognize a joint defense privilege only for documents that addressed “prosecution history” of the patent, “potential prior art ... and similar issues.” It denied the privilege protection for shared communications relating to “infringement analysis against each individual defendant” because they were “competitors, and engaged in developing technologies superior to each other for obvious commercial advantage.” Because the defendants were not charged with “conspiracy to commit infringement” or engaged in “a coordinated effort to produce shared technology,” the court concluded that there was insufficient common legal interests to extend the privilege protection.<sup>6</sup>

For the joint defense rule to apply, it is necessary that litigation be the reason for the sharing of communications. For example, in *In re Santa Fe International Corporation*<sup>7</sup> information was shared among companies for the purpose of ensuring compliance with antitrust laws and minimizing any potential risk associated with the exchange of wage and

## APPENDIX

benefit information. The court held that the privilege was waived because the information was shared “to avoid conduct that might lead to litigation. They were not preparing for future litigation.”<sup>8</sup>

The protection of the privilege under the community of interest rationale, however, is not limited to joint litigation preparation efforts.<sup>9</sup> It is applicable whenever parties with common interests join forces for the purpose of obtaining more effective legal assistance.<sup>0</sup> This has been denoted the “common interest” or “community of interest” rule. The caselaw often confuses the two concepts of “joint defense” and “community of interests” and, as a consequence, imposes “joint defense” restrictions on the “community of interest” doctrine. For example, in *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*,<sup>2</sup> the court was addressing a privilege claim premised on a community-of-interests because the parties were both potential defendants in an infringement action. Only one of the parties was named as a defendant in a pending action. In discussing the community-of-interest concept, the court followed the restrictions imposed by the Third Circuit in *Haines v. Liggett Group Inc.*,<sup>3</sup> where the joint defense concept was at issue. The *King Drug* court imposed three limitations delineated in *Haines* on the availability of the community-of-interests concept.<sup>4</sup> The most restrictive was the requirement that the communications have been made “in the course of a joint defense effort.” Unless the concepts of “joint defense” and “community of interests” are synonymous, and therefore appropriately used interchangeably, requiring that a joint defense effort be the subject of the communications is inappropriate. The fact that litigation was pending against one and apparently probable for the other should not restrict the availability of the attorney-client privilege to shared communications based on the joint defense concept.<sup>5</sup> Even when courts recognize the distinction between the concepts, they often construe the rule narrowly, in line with the approach taken to privileges generally.<sup>6</sup>

Often litigation is not the focus of the collective attempts to obtain legal advice. Similarly, coparties in litigation communicate among themselves under a joint defense strategy and then share those communications with third parties who are not involved in the litigation.<sup>7</sup> In these situations, courts generally have restricted the application of the attorney-client privilege to communications that have been shared by parties shown to have had “an identical legal interest” in the subject matter of the protected communications.<sup>8</sup> This restrictive standard was coined in *Duplan Corp. v. Deering Milliken, Inc.*,<sup>9</sup> and subsequently has been widely followed.<sup>20</sup> In none of these instances, however, do courts offer a convincing reason for imposing such a strict standard.

A standard of identical legal interests is unnecessarily narrow.<sup>2</sup> As long as the proponent of the privilege satisfies the burden of proving that the communications were for the purpose of pursuing a joint defense on a matter of sufficiently common interests to be able to benefit from such a collaboration, the fact that the interests are not identical should not be dispositive. A more reasoned standard was followed in *SCM Corp. v. Xerox Corp.*:<sup>22</sup>

Of course there need not be a clear demonstration of actual liability before a third party and a client can be considered to have sufficiently common interest in legal advice. And the prospect of liability need not arise solely in the context of trial preparation. But a client's sharing of its attorney's advice with a third party is not in confidence simply because the third party's lawyer thought that there “might” be [an antitrust] challenge [to a joint venture in which they were involved], which “could” involve his client. Unless the interests of the parties are demonstrably common, as when potential defendants discuss grand jury questioning, ... or intended pleas, ... the risk of shared exposure must at least be sufficiently substantial to have prompted the third party's lawyer to counsel his client regarding the prospective hazard.<sup>23</sup>

An interesting variation of this requirement of “identical legal interests” was adopted in *Logisch v. Congel*<sup>24</sup> and *Denney v. Jenkins & Gilchrist*,<sup>25</sup> where the courts concluded that there need only be an agreement toward “an identical legal

## APPENDIX

*strategy.*” If followed, this approach would significantly expand the opportunities to cooperatively join forces for legal assistance purposes. This, of course, could result in significant cost savings for individual participants. Another court has defined “identical legal interests” as having the same ultimate legal goal, even though the reasons for that goal, or legal interests and rights possessed, are different.<sup>26</sup> This action involved common legal advice that was being sought by a hospital and a management company. Each was attempting to claim that the attorney-client relationship and privilege flowing from that relationship was theirs alone and could be asserted against the other.

The Management Companies and EMC [Edgewater Medical Center] had an identical interest in the privileged communications, albeit from different perspectives. For EMC, the legal advice was important so that EMC could make decisions on contractual engagements, litigation matters, and tax or other regulatory matters. The Management Companies had an interest in that legal advice (which they were provided through counsel that the Management Companies chose pursuant to the [Hospital Management Agreements]): namely, to insure that the Management Companies were fulfilling their fiduciary and other obligations under the [Management Agreements]. Thus, EMC and the Management Companies had the identical interest that the legal advice Tatoes gave was sound, so that each could rely upon it. The fact that EMC and the Management Companies had different business reasons for relying on the advice does not undermine that they had the identical interest in the legal advice itself. And, it is the common legal interest, not business interest, that is central to application of the common interest doctrine.<sup>27</sup>

Such decisions are coming very close to adopting a “common” legal interest theory under the pretext of “identical.”

Aside from whether the parties pursuing a joint defense effort must have interests that are legally identical or only factually common, it is clear that all of the participants' claims need not coincide.<sup>28</sup> As one court characterized it, a sufficiently similar “common interest” exists if the cooperating parties do not have an incentive to blame each other for alleged wrongful conduct.<sup>29</sup>

One court, using the theory of “common legal interests,” held that the prospective purchaser and the seller of a corporate subsidiary, had sufficiently overlapping legal interests (even though they were only potential, and that potentiality never materialized because the subsidiary was never purchased) to justify a finding that the sharing of a legal opinion did not waive the privilege protection for that opinion.<sup>30</sup>

While appearing to relax the “common interest” standard, the judge in *Libbey Glass, Inc. v. Oneida, Ltd.*,<sup>31</sup> insisted that it be demonstrated that “common legal interests” were being pursued by each person with whom the communications were shared. The judge wanted to be assured that the purposes of the privilege were being furthered through the sharing of the communications. Therefore, he required that it be shown that steps were taken to guard against further disclosures by those with whom communications were shared. Among the steps mentioned were discussions between the privilege holder and the third parties about the need for confidentiality and, perhaps, the execution of a confidentiality agreement with a reservation of privilege claims.<sup>32</sup>

The standard of “common legal interests” was also employed in a number of additional cases.<sup>33</sup> In *Bowne, Inc. v. AmBase Corp.*, privileged documents of a parent corporation were shared with a subsidiary.<sup>34</sup> The court held that this breach of confidentiality destroyed the documents' attorney-client privilege protection because the parent and subsidiary shared only a common business interest in the matters addressed in those documents, not a common or “joint legal interest.” Similarly, in *Herwig v. Marine Shale Processors, Inc.*,<sup>35</sup> where former employees of the defendant had jointly discussed breach of contract claims with an attorney, the court held that there was no jointly held privilege for the shared communications because most of the individuals either were not seeking legal representation or did not understand the

## APPENDIX

purpose of the meeting, and none of them shared “a common legal interest.” Although rejecting their claim, the court made an important point about the nature of these initial meetings with individuals who are later determined not to share a “community of interests” or “common legal interest.” Because this cannot always be known prior to the meeting, “[i]n some circumstances, the existence of a matter of common interest must be presumed in the pre-representation phase when several persons seek consultation with an attorney; and in that situation no one of the jointly interviewed clients can waive the privilege as to all participants.”<sup>36</sup>

Without discussing the type of interest or level of similarity that had to exist, the court in *American Colloid Co. v. Old Republic Insurance Co.* concluded that a “community of interest” existed between the insured and an insurance brokerage firm that attended to all of its client’s insurance business—advising about insurance coverage, placing insurance policies, forwarding premium payments to insurers, and forwarding notices of claims and lawsuits.<sup>37</sup> Therefore, when Colloid filed suit against an insurance carrier, seeking indemnification for expenses and damages from certain lawsuits, the court held that the communications between Colloid’s attorney and the employees of the brokerage firm were protected by the attorney-client privilege. “Persons acting as agents of an insured in pursuing an insurance claim have a sufficient community of interest with the insured such that communications to such agents do not waive the privilege ... Communications with [the brokerage firm’s employees] would be privileged in the same manner that communications with employees of American Colloid would be privileged.”<sup>38</sup>

In the context of litigation between insurers and insureds, the “common interest” doctrine has been employed by insurers as a justification for *gaining access* to communications between the insured and the insured’s attorney.<sup>39</sup> There appears to be a split of authority over whether this “common interest” doctrine is applicable when the insured and insurer are adversaries over the issue of indemnity. In *Vermont Gas Systems, Inc. v. United States Fidelity & Guaranty Co.*,<sup>40</sup> the court held that there was no “common interest” as between an insured and his insurer relative to the insured’s communications with his counsel when the insurer had created an adversarial relationship between the two by denying coverage. Going a step further in *North River Insurance Co. v. Philadelphia Reinsurance Corp.*, the court denied access to attorney-client communications solely because the insured and the insurer were not jointly represented—not because of any adversarial relationship that had existed.<sup>41</sup> The court noted “the common interest doctrine is completely unmoored from its moorings in traditional privilege law when it is held broadly to apply in contexts other than when there is dual representation. ... As a matter of general privilege law, there is no automatic waiver of the attorney-client privilege merely because an insured and its insurer have a ‘common interest’ in the outcome of a particular issue.”<sup>42</sup> In contrast, the court in *LaSalle National Trust, N.A. v. Schaffner* rejected the argument that the common interest doctrine should not apply after the insurer has disclaimed the duty to defend or indemnify because after the denial of coverage, “the interests of the insured and the insurers are diametrically opposed only on issues of indemnity.”<sup>43</sup> Some courts have avoided the “common interest” question by construing the insured as having waived privilege claims for communications that are relevant to the issues raised in the action for indemnification.<sup>44</sup> These courts hold that the insured places those communications “at issue” by bringing the action.

When the insurer is not contractually obligated, or otherwise fails, to retain counsel for the insured, the “common interest” doctrine (which requires an identity of legal interests), will not necessarily protect the same communications that would have been protected when they were joint clients. The reason for this is simply the fact that the legal interests of two are not identical. While that lack of identity of legal interests is the same as it would have been had joint counsel been retained, the lack of cooperation between the two compels a different result relative to a shared attorney-client privilege. While they both may wish to avoid liability on a claim, their reasons are often quite different, and in some instances conflicting. Because of contractual limitations on policy coverage, the insurer and insured may have conflicting interests in how the damage is found to have occurred, the type and level of damages, and the characterization of how the insured responded.<sup>45</sup> In the reinsurance context, the lack of “common interests” increases because unlike the insurer,

## APPENDIX

the reinsurer has no duty to defend the insured.<sup>46</sup> Therefore, as one court has admonished, “a common interest cannot be assumed merely on the basis of the status of the parties.”<sup>47</sup>

The community of interest that must exist to maintain the privilege for shared communications is the interest at the time of the sharing. The fact that the document shared was created before there was a community of interest,<sup>48</sup> or that the common interests evaporated after the sharing, is irrelevant to the application of the application of the privilege.<sup>49</sup> Once the community of interest is established, the parties need not be actively involved in the common enterprise. They need only demonstrate cooperation in formulating a common legal strategy with an understanding that the communications shared among them are provided in confidence.<sup>50</sup>

In bankruptcy proceedings, a flexible approach to “community of interests” or “common interests” has been taken. In *In re Mortgage & Realty Trust*,<sup>5</sup> for example, the court held that conversations between the debtor in possession (the corporate debtor's executive vice-president), bankruptcy counsel for the debtor, and counsel for an unofficial committee of creditors were protected by the attorney-client privilege. While the debtor's interests and the creditor's interests are not the same, the court extended the privilege because they shared “a duty to maximize the debtor's estate”:<sup>52</sup>

The committee performs many important roles in the reorganization process. It is the official organized voice of the unsecured creditors. It provides needed checks and balances in the reorganization process. Within this context, it investigates, it appears, it negotiates, it may litigate, and it is at all times intimately involved in the reorganization. ... In order to permit the committee to carry out these duties, the debtor must be able to provide information to the committee free of the risk that the committee may be forced to disgorge such information to adverse third parties. A communication in furtherance of this common legal interest with that of the debtor is entitled to the protection of the attorney-client privilege, unless its confidentiality has been waived.<sup>53</sup>

The common interest concept has been rejected when a government contractor discloses privileged documents to an audit agency, pursuant to the terms of their contract with the government, because their interests are not common:

In a rather abstract sense, MIT and the audit agency do have a ‘common interest’ in the proper performance of MIT's defense contracts and the proper auditing and payment of MIT's bills. But this is not the kind of common interest to which the cases refer in recognizing that allied lawyers and clients—who are working together in prosecuting or defending a lawsuit or in certain other legal transactions—can exchange information among themselves without loss of the privilege. To extend the notion of MIT's relationship with the audit agency, which on another level is easily characterized as adversarial, would be to dissolve the boundary almost entirely.<sup>54</sup>

Similarly, in *Hope for Families & Community Service, Inc. v. Warren*,<sup>55</sup> the court held that a regulator and the regulated company do not have sufficient parallel interests to allow confidential communications to be shared without waiving the attorney-client privilege. “The fact that they might share ... the same public policy interests ‘of the best interests of the citizens of Macon County’ does not ... could not ... merge their legal interests as the regulator and the regulated into a common interest.”<sup>56</sup>

In addition to sharing a common legal interest, for the community of interest doctrine to apply, the communication at issue must have been to further that legal effort.<sup>57</sup> For example, in *Nidec Corp. v. Victor Co. of Japan*, the court

## APPENDIX

concluded that a litigation abstract might have been helpful to facilitate the potential commercial transaction, but it did not further a common legal strategy in connection with the instant litigation:

It was not, for instance, a communication coordinating the defense in this case. Rather, Defendants provided the litigation abstract in order to facilitate the TPG fund's and other potential bidders' commercial decision whether to buy the majority share in JVC. Thus, it was designed to further not a joint defense in this litigation, but to further a commercial transaction in which the parties, if anything, have opposing interests. The litigation abstract thus would not qualify for the common interest exception.<sup>58</sup>

Beyond legal interests, other common interests may not suffice to preserve the privilege for shared communications. For example, in *In re: Grand Jury Subpoena Duces Tecum*, First Lady Hillary Rodham Clinton, with her personal attorney, had discussions with White House counsel on the subject of her billing records at the law firm where she worked before her husband was elected President.<sup>59</sup> These records had been subpoenaed by a federal grand jury but not been produced because they had been misplaced. Subsequently, they were suspiciously discovered on a desktop in the White House. The White House claimed that the First Lady and the White House had a sufficient community of interests to share communications without losing the protection of the attorney-client privilege for the following reasons:

Both [the White House and Mrs. Clinton] needed a full and accurate understanding of the facts surrounding the various incidents under investigation and of the legal consequences of those facts; both had an interest in ensuring that there was no distortion of these events by political and legal adversaries, and no misunderstanding of them by the public.<sup>60</sup>

The court went on to explain that “the need for allocation of responsibility between personal and public attorneys, and the desire to determine whether any White House policies need to be altered to prevent future difficulties, the fact that the OIC is investigating ‘official misconduct,’ and the ongoing White Water-related investigations by the RTC, FDIC and Congress” were not factors creating a sufficient common interest between them:

We have no doubt that the White House and Mrs. Clinton are concerned with understanding fully the facts involved in the OIC's investigation, nor that dividing responsibility between the personal attorneys and White House counsel can be a difficult task. And surely the multiplicity of investigating authorities only complicates the lives of these attorneys. But these justifications amount to no more than an assertion that ‘we all want to obey the law.’ We do not believe the common-interest doctrine stretches that far.<sup>6</sup>

The fact that the Office of Independent Counsel was investigating misconduct of officials in the White House did not change the court's decision because the “official misconduct” was nothing more than “misconduct of officials” who happened to be in the White House:

The OIC is actually investigating the actions of individuals, some of whom hold positions in the White House. The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution. Certainly action by the OIC may occupy the time of White House staff members, may vacate positions in the White House if any of its personnel are indicted, and may harm the President and Mrs. Clinton politically ... [W]e do not believe that any of these incidental effects on the White House are sufficient to place that governmental institution in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake.<sup>62</sup>

## APPENDIX

The same result was reached vis-à-vis different government agencies represented by the lawyers in the Justice Department. When the interests of the agencies are in conflict, it has been held by some courts that the sharing of communications by the agencies effects a waiver of attorney-client privilege protections. In *Modesto Irrigation District v. Gutierrez*,<sup>63</sup> the court would not permit the sharing of confidential communications between agencies without destroying the attorney-client privilege protection simply because the adverse agencies were both part of the Executive Branch. It did, however, find that the privilege was not waived because the agencies between which the communications were shared fell within the common interest doctrine. In *Menasha Corp. v. U.S. Department of Justice*,<sup>64</sup> the district court followed the lead of *Modesto* and held that when adverse agencies (reflected in the fact that they were represented by separate counsel on the same matter) communicate between themselves, those communications are not protected by the attorney-client privilege. On appeal, however, the court reversed the district court in *Menasha*, finding that at least in the context of the work product privilege, the two competing sections of attorneys lacked autonomy and amounted to a single representative representing a single party, the United States.<sup>65</sup> While not reaching on appeal the attorney-client privilege contentions of the Justice Department, it would appear that the same analysis would apply.

Similarly, in *Bowman v. Brush Wellman, Inc.*,<sup>66</sup> the court held that a sufficient common interest did not exist among companies who shared a desire for a favorable result at a regulatory proceeding to permit the sharing of privileged documents without waiving the protection:

Defendant claimed that it shared a common interest with the other beryllium companies in ensuring that the standards set through the regulatory proceedings were fair and accurate ... It does not appear, from a review of the submitted documents, that the parties had any other motivation than a business concern in attempting to obtain favorable results in the regulatory proceedings.”<sup>67</sup>

Simply “sharing a desire to succeed in an action does not create a ‘common interest’” sufficient to justify sharing confidential communications without waiving the attorney-client privilege.<sup>68</sup>

In *In re Tyco International, Inc. Multidistrict Litigation*, the client shared confidential communications with the SEC and the New York District Attorney for the purpose of bringing wrongdoers to justice.<sup>69</sup> The court rejected this as a sufficiently common interest to justify sharing documents without waiving privilege protections:

Tyco is not engaged in a joint action with either the SEC or the district attorney. Instead, it has merely supplied documents that both agencies require for their own investigations. Further, while Tyco may share an interest with the SEC and the district attorney is seeing that Belnick is held to account for any wrongdoing, both agencies are acting pursuant to a broader mandate to protect the public that may well put them in an adversarial relationship with Tyco at some point in the future. Finally, unlike most cases in which the common interest exception applies, the agencies to whom the documents have been produced have not agreed to maintain their privileged status ... [A]t most, the SEC and the district attorney have agreed not to claim that Tyco forfeited its privilege claims by producing the documents ... [T]his is not the kind of case that the common interest exception was intended to reach.<sup>70</sup>

In *In re Rivastigmine Patent Litigation*,<sup>71</sup> the interests held by an inventor after his patent was assigned to a company was held to be commercial, rather than legal, since he only continued to have a right to a royalty. The common interest that the inventor and assignee had in the patent being found valid apparently was not sufficient.<sup>72</sup>

## APPENDIX

Inconsistent with the above cases, the court in *Chambers v. Allstate Insurance Co.*, held that the client's voluntary disclosure of documents to both the fire marshal and the prosecuting attorney did not waive the privilege protection for those communications because they “shared common interests.”<sup>73</sup> The interest identified by the court was “determining the cause of the fire which destroyed Plaintiff's home. They were not adverse at all.”<sup>74</sup> Clearly, the interests of the public officials were not common, legally or otherwise, with those of the private party. The conclusion that their interests were not adverse was both wrong and irrelevant to the attorney-client privilege claim. Some of the confusion regarding what types of interests qualify for the exception may stem from the conflation of the concepts of joint clients and separate clients with a community of interests.<sup>75</sup>

The fact that parties subjectively believed that they had a sufficient community of interests to share communications without waiving privilege protections is an insufficient basis for a court extended it where it is otherwise is inappropriate. This is true, even if the parties entered into a joint defense agreement. As noted by the court in *J.E. Dunn Construction Co. v. Underwriters at Lloyd's London*, “even though plaintiff may believe that the correspondence is privileged by virtue of its having entered into a ‘common interest and joint defense agreement’ with Lockton, ‘a client's beliefs, subject or objective, about the law of privilege’ cannot ‘transform an otherwise unprivileged conversation into a privileged one.’”<sup>76</sup>

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#### Footnotes

1 One court has even gone so far as to classify a corporate client and the SEC as participants in a “joint enterprise” after they agreed upon a consent decree whereby the SEC agreed not to prosecute the corporation for securities violations if the corporation agreed to have an outside law firm investigate its illegal activities and share its report with the Commission. “The investigation is a joint enterprise of LTV and the SEC, not unlike the joint defense otherwise recognized by the cases. *In re LTV Securities Litigation*, 89 F.R.D. 595, 621, 8 Fed. R. Evid. Serv. 748, 31 Fed. R. Serv. 2d 1542 (N.D. Tex. 1981). Another court has held that a bank and the U.S. Attorney do not share a sufficient common interest, simply because they both are interested in the prosecution of federal banking crimes. *In re M & L Business Mach. Co., Inc.*, 161 B.R. 689, 694 (D. Colo. 1993).

2 The leading case on this issue is *Hunydee v. U.S.*, 355 F.2d 183 (9th Cir. 1965) where the court stated:

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

*Hunydee v. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965) (emphasis added). This holding has been adopted by several courts. *See, e.g., Johnson Electric North America, Inc. v. Mabuchi North America Corp.*, 1996 WL 191590, \*5 (S.D. N.Y. 1996); *In re Grand Jury Testimony of Attorney X*, 621 F. Supp. 590, 592 (E.D. N.Y. 1985); *In re LTV Securities Litigation*, 89 F.R.D. 595, 604, 8 Fed. R. Evid. Serv. 748, 31 Fed. R. Serv. 2d 1542 (N.D. Tex. 1981); *Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 387 (S.D. N.Y. 1975).

3 **Second Circuit.** *See, e.g., Polycast Technology Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D. N.Y. 1989); *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 563–64, 24 Fed. R. Serv. 2d 901 (S.D. N.Y. 1977).

**Third Circuit.** *See, e.g., Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126, 22 Fed. R. Evid. Serv. 52 (3d Cir. 1986); *Mixing Equipment Co., Inc. v. Innova Tech, Inc.*, 1988 WL 21970, \*2 (E.D. Pa. 1988).

## APPENDIX

**Fifth Circuit.** See, e.g., *U.S. v. Stotts*, 870 F.2d 288, 290, 27 Fed. R. Evid. Serv. 1337 (5th Cir. 1989).  
**Seventh Circuit.** See, e.g., *United States v. First Midwest Bank*, 1997 U.S. Dist. LEXIS 3871, \*4 (N.D. Ill. Feb. 20, 1997); *Edward Lowe Industries, Inc. v. Oil Dri Corp. of America*, 1995 WL 410979, \*2 (N.D. Ill. 1995); *Cadillac Ins. Co. v. American Nat. Bank of Schiller Park*, 1992 WL 58786, \*6 7 (N.D. Ill. 1992).

**Ninth Circuit.** See, e.g., *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 918 19, 23 Fed. R. Evid. Serv. 1257, 9 Fed. R. Serv. 3d 645 (9th Cir. 1987); *Hunydee v. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965).

**D.C. Circuit.** See, e.g., *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 6, 32 Fed. R. Serv. 3d 1122 (D.D.C. 1995) (“At that time, the trustees and the BCOA had a common interest in prohibiting nonconforming agreements and advocating that the evergreen clause required employers to contribute at the rate established in the 1984 National Bituminous Coal Wage Agreement (“NBCWA”) until a new successor agreement was established. This position was in the trustees’ interest because it ensured and improved the actuarial soundness of the funds. This position advanced the BCOA’s interest as well because it helped to ensure that BCOA members would not suffer increasing liability caused by employers who abandoned the plans ... Although there was a chance that the trustees would accept the nonconforming Massey agreements, and thus diverge from the BCOA position, this possibility was remote in light of the trustees’ November 24, 1986, resolution, which effectively resolved to reject nonconforming agreements.”).

Occasionally, a court will require that litigation be anticipated, i.e., be a strong possibility. See *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 689 F. Supp. 841, 846, 12 Fed. R. Serv. 3d 1189 (N.D. Ill. 1988). This imposes an unnecessarily restrictive definition to “common interests” sufficient to justify a pooling of legal resources.

4 **Fifth Circuit.** See *In re LTV Securities Litigation*, 89 F.R.D. 595, 604 05, 8 Fed. R. Evid. Serv. 748, 31 Fed. R. Serv. 2d 1542 (N.D. Tex. 1981) (“The Court finds little merit in the class’ contention that the joint defense privilege does not extend to civil defendants whose liability may arise from different acts or omissions, or who may assert cross claims against each other. Even should such allies later become estranged, they would arguably still be entitled jointly to invoke the attorney client privilege to protect shared confidences from disclosure at the behest of a third party ... At the least, the communications made in the presence of E&W representatives after the issuance of SEC subpoenas, if otherwise privileged when made, are not to be denied the privilege because of potential controversy between LTV and E&W.”).

**Seventh Circuit.** See *Prevue Pet Products, Inc. v. Avian Adventures, Inc.*, 200 F.R.D. 413, 417 (N.D. Ill. 2001) (“The common interest rule ‘allows a defendant to assert the attorney client privilege to protect statements made in confidence not to his lawyer, but to an attorney for a co defendant for a common purpose relating to the defense of both ... The Court disagrees with the premise that the common interest rule applies only to joint defense efforts. While typically phrased in terms of a ‘defense’ privilege, the common interest rule ‘can apply to any two parties who have a “common interest” in current or potential litigation, either as actual or potential plaintiffs or defendants. ... They all are defending against the claims by Avian and Ms. Frank that Mr. Tamez is not the holder of the copyright in the bird cages, and that Prevue, Bird City and Mr. Tamez all have therefore committed copyright infringement, unfair competition and deceptive trade practices. In the Court’s view, the interests of the those parties on these points are sufficiently aligned to bring them within the scope of the common interest rule with respect to the pre deposition meeting.”); *United States v. First Midwest Bank*, 1997 U.S. Dist. LEXIS 3871, \*4 (N.D. Ill. Feb. 20, 1997) (“The sharing parties need not be allies in all respects so long as they have some interests in common ... Stated conversely, ‘the rule does not apply to situations where there is no common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis.”); *Graco Children’s Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.*, 1995 WL 360590, \*7 (N.D. Ill. 1995) (Because it could not be shown that the joint effort was undertaken in response to a litigious assault, a sufficient community of interest could not be shown.); *Cadillac Ins. Co. v. American Nat. Bank of Schiller Park*, 1992 WL 58786, \*7 (N.D. Ill. 1992) (independent actions against separate individuals by the Commission of Insurance who alleges that each was responsible for a company’s demise).

5 *Power Mosfet Technologies v. Siemens AG*, 206 F.R.D. 422 (E.D. Tex. 2000).

## APPENDIX

6 Power Mosfet Technologies, 206 F.R.D. at 425 26.

7 *In re Santa Fe Intern. Corp.*, 272 F.3d 705, 712 13, 51 Fed. R. Serv. 3d 1407 (5th Cir. 2001). This restrictive approach to defining the limits of the joint defense/common interest or community of interest doctrine has been followed in *U.S. v. Duke Energy Corp.*, 214 F.R.D. 383, 388 89 (M.D. N.C. 2003).

8 Interestingly, the Court went on to justify the denial of the joint defense claim on the basis that the shared document had not been prepared at a time when litigation could reasonably have been anticipated. It focused on the fact that the document had not been “made for the purpose of preparing a joint defense to lawsuits based on pre 1991 antitrust law violation. If the original preparation of the document was protected by the attorney client privilege outside of a litigation context, its later distribution to third parties in such a context should not determine its privilege status. If the original document had not been privileged when it was made, it would not acquire a privileged status by being disseminated to third parties. If, however, it originally held a privileged status, sharing it in another privileged context would not destroy that privilege status.

See § 5:18, *infra*.

9 **Second Circuit.** See *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513, 2 Fed. R. Evid. Serv. 535 (D. Conn. 1976) (“The privilege need not be limited to legal consultations between corporations in litigation situations, however. 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 codefendants and impending litigations but is not necessarily limited to those situations. ); *Johnson Electric North America, Inc. v. Mabuchi North America Corp.*, 1996 WL 191590, \*5 (S.D. N.Y. 1996) (“ [T]he common interest principle does not require that both, or indeed either, of the communicants be parties to a litigation. ).

**Seventh Circuit.** See *U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007) (“ [C]ommunications need not be made in anticipation of litigation to fall within the common interest doctrine. Applying the common interest doctrine to the full range of communications otherwise protected by the attorney client privilege encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly ... This planning services the public interest by advancing compliance with the law, ‘facilitating the administration of justice and averting litigation ... Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication. ); *In re Sulfuric Acid Antitrust Litigation*, 235 F.R.D. 407, 429 (N.D. Ill. 2006), supplemented, 432 F. Supp. 2d 794 (N.D. Ill. 2006) (“ The common interest doctrine] is not limited to litigation situations, but covers situations where the parties share a common interest in a legal matter. ); *Baxter Travenol Laboratories, Inc. v. Abbott Laboratories*, 1987 WL 12919, \*16 (N.D. Ill. 1987) (“Although a community of legal interests usually arises between parties engaged in or anticipating imminent litigation, litigation or impending litigation is not a prerequisite for the existence of a community of legal interests ... ). *But see Edward Lowe Industries, Inc. v. Oil Dri Corp. of America*, 1995 WL 410979, \*2 (N.D. Ill. 1995) (“In general, the community of interest doctrine applies only when the common legal interest arises out of impending or anticipated litigation ... Accordingly, the court applies the common interest doctrine insofar as the documents defendants withheld clearly address either anticipated litigation or a joint effort to avoid litigation. ).

*But see:*

**Fourth Circuit.** *U.S. v. Duke Energy Corp.*, 214 F.R.D. 383, 388 89 (M.D. N.C. 2003) (“ The client] must show an agreement among all members of the group] to share information as a result of a common legal interest relating to on going or contemplated litigation. This expansion of the privilege] only applies to the exchange of information which falls within the agreed shared interest ... Contemplated litigation means a palpable threat of litigation. A palpable threat of litigation, in turn, would seem to be at least as stringent as the anticipated of litigation standard used for work product in Rule 26(b)(3) of the Federal Rules of Civil Procedure]. ); *Federal Election Com’n v. Christian Coalition*, 178 F.R.D. 61, 71-73 (F.D. Va. 1998), order aff’d in part, modified in part, 178 F.R.D.

## APPENDIX

456, 40 Fed. R. Serv. 3d 954 (E.D. Va. 1998) (The court insisted that all the case law in the Fourth Circuit supporting the concept of people with a “common interest” or “community of interests” sharing privilege communications involved actual, contemplated or prospective litigation. Since none of those were involved in the shared communications before the court, the “common interest” claim was denied.)

**Fifth Circuit.** *U.S. v. Newell*, 315 F.3d 510, 525-26, 60 Fed. R. Evid. Serv. 669 (5th Cir. 2002) (“C]odefendants and their counsel are only protected if there ‘is a palpable threat of litigation at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation. Thus a cognizable common legal interest does not exist if a group of individuals seeking legal counsel to avoid conduct that might lead to litigation, but rather only if they request advice to ‘prepare for future litigation. Here, Gianakos sought advice to protect herself and her employees from possible—not imminent—civil or criminal action. Gianakos is not claiming that an investigation had commenced or that there was a threat of prosecution at the time she consulted Trapp. We see no common legal interest between herself, Cooper, and the other GA employees at the time Gianakos disclosed Trapp’s advice to Cooper. It follows that Gianakos waived her personal privilege by communicating Trapp’s advice to her employees.”)

**Ninth Circuit.** *Integrated Global Concepts, Inc. v. j2 Global, Inc.*, 2014 WL 232211, \*2 (N.D. Cal. 2014) (“Here, j2 relies on the common interest doctrine to shield communications with two entities when it faced no litigation, no impending threat of litigation, and which do not provide any form of legal service as their business.”)

10

**Second Circuit.** *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514, 2 Fed. R. Evid. Serv. 535 (D. Conn. 1976) (“Chester Carlson, Battelle, and Xerox shared a business interest in the successful exploitation of certain patents. Whether the legal advice was focused on pending litigation or on developing a patent program that would afford maximum protection, the privilege should not be denied when the common interest is clear.”); *U.S. v. Salvagno*, 306 F. Supp. 2d 258, 271 (N.D. N.Y. 2004) (“The Second Circuit adheres to a strict interpretation of the common interest rule such that ‘only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.”); *Johnson Electric North America, Inc. v. Mabuchi North America Corp.*, 1996 WL 191590, \*3-4 (S.D. N.Y. 1996) (“Johnson was facing a claim for infringement of Mabuchi’s patents. At the same time its customer was being drawn into the litigation both as a presumptively unwilling witness and as a potential target of Mabuchi on the theory that it had purchased and then distributed infringing machines from Johnson. ... Inevitably, as a matter of both litigation strategy and business necessity, Johnson and Dickson were de facto allies. Both faced a threat of liability if Mabuchi prevailed on its infringement theories. Moreover, Johnson, as a supplier anxious to please its customer, had a strong economic incentive to avoid unnecessarily embroiling that customer in litigation that arose from Johnson’s activities in marketing the assertedly infringing equipment. From this confluence of interests, it is not surprising to discover that Hong Kong counsel represented both Johnson and Dickson at the deposition and the Johnson entered into an indemnification agreement with Dickson. ... This congeries of circumstances amply demonstrates that the two companies had strong common interests in the course of discovery taken by Mabuchi from Dickson. Of necessity, then, communications between their respective counsel addressing the manner in which the deposition and other discovery was conducted, as well as means of limiting such discovery and protecting Dickson’s legal rights under the law of Hong Kong, come within the common interest extension of the attorney client privilege.”)

**Third Circuit.** *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr. D. Del. 2010) (“The common interest doctrine ‘allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others. It expands the reach of the attorney client privilege and the work product doctrine by providing that, under certain circumstances, the sharing of privileged communications with third parties does not constitute a waiver of the privilege.”)

**Sixth Circuit.** *Dura Global, Technologies, Inc. v. Magna Donnelly Corp.*, 2008 WL 2217682, \*3 (E.D. Mich. 2008) (“The facts surrounding the disclosure in the present action show that the disclosures were made in connection with a common legal strategy rather than ‘a joint commercial venture. ... The indemnification agreement revealed in the correspondence between these two attorneys shows that the

## APPENDIX

disclosure of the attorney opinion letters was due to a common legal interest – avoiding any liability for Defendant's window infringing upon either the patents of Plaintiffs. The weight of authority holds that litigation need not be actual or imminent for communications to be within the common interest doctrine. Finally, although there is some overlap between the legal issues of possible infringement and the larger business venture of Defendant selling its windows to Toyota, such an overlap does not ‘negate the effect of the legal interest in establishing a community of interest. ).

**Seventh Circuit.** *Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, 1996 WL 732522, \*2 (N.D. Ill. 1996) (“A community of interest may arise between two companies jointly developing a patent because they have a common legal interest in obtaining the greatest protection and ability to profit from the patent ... The community of interest, however, covers only communications relating to the prosecution and litigation of the patents, and not communications relating to the parties rights between themselves. ); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, 1996 WL 514993, \*2 (N.D. Ill. 1996) (“The documents involved are not subject to the attorney client privilege ... unless ... there is an identical legal interest. ... This Court finds that Mitsubishi and Sumitomo share a common legal interest to deal with Harris' threats of infringement. Both parties faced the same threat of liability if Harris would prevail on its infringement theory. Although Sumitomo has not been actually sued, the community of interest rule still applies. ).

**Ninth Circuit.** *Rembrandt Patent Innovations, LLC v. Apple Inc.*, 2016 WL 427363, \*4 (N.D. Cal. 2016) (“Given their rights to royalties from the patent, and their interest as possible assignees of the patent, the named inventors shared Penn's interest in engaging in 'full and frank' discussions with Penn's counsel about legal questions involved in licensing and enforcement opportunities, perfecting title in the patent, and defending the patent's validity.”); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575 (N.D. Cal. 2007) (While the community of interest rationale is not limited to litigation preparation efforts, “that legal assistance must pertain to the matter in which the parties have a joint legal interest, and the communication must be designed to further that specific legal interest. ).

**Second Circuit.** See *Weil Ceramics & Glass, Inc. v. Work*, 110 F.R.D. 500, 503 (E.D. N.Y. 1986).

**Fourth Circuit.** See *In re Grand Jury Subpoenas*, 89 3 and 89 4, *John Doe* 89 129, 902 F.2d 244, 249, 30 Fed. R. Evid. Serv. 273, 28 A.L.R.5th 775 (4th Cir. 1990) (parties pooled resources in preparation for separate actions against the Army).

**Seventh Circuit.** See *In re Sulfuric Acid Antitrust Litigation*, 235 F.R.D. 407, 429 (N.D. Ill. 2006), supplemented, 432 F. Supp. 2d 794 (N.D. Ill. 2006) (Common interest not found where two parties who were competitors were negotiating a joint venture. The court concluded that they did “not share an interest sufficiently common to extend the attorney client privilege to their discussions. ); *U.S. v. Seidman*, 368 F. Supp. 2d 858, 861 (N.D. Ill. 2005), decision aff'd in part and vacated in part, 492 F.3d 806 (7th Cir. 2007) (“This court concludes ... that the common interest doctrine applies in this case. ‘At the time the Memorandum was allegedly faxed to Ms. Guerin, both BDO and J&G] faced the same legal issues concerning their standing before the IRS and common clients. ... Both shared the common interest in ensuring compliance with the new regulation issued by the IRS and making sure that they could properly defend against any potential IRS enforcement action. BDO was not disclosing the memorandum to an unrelated third party, but instead was disclosing the memorandum to a law firm that assisted BDO in providing tax services to its clients. If BDO did not disclose the memorandum then that could have impacted J&G's ability to provide legal advice to BDO and J&G's clients. ); *Angell Investments, L.L.C. v. Purizer Corp.*, 2002 WL 1400543, \*2 (N.D. Ill. 2002) (A letter was shared by one preferred shareholder with another preferred shareholder. This disclosure waived the attorney client privilege protection because their apparent common interest were overridden by the fact that the recipient was also the chairman of Purizer's board of directors. As a consequence, it was clear on the date of disclosure that the preferred shareholder sharing the communication and Purizer, the entity personified by the recipient, had divergent interests.); *American Colloid Co. v. Old Republic Ins. Co.*, 1993 WL 195270, \*1 (N.D. Ill. 1993).

*King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2011 1 Trade Cas. (CCH) ¶ 76531, 2011 WL 2623306 (E.D. Pa. 2011).

*Haines v. Liggett Group Inc.*, 975 F.2d 81, 94, 36 Fed. R. Evid. Serv. 782 (3d Cir. 1992), as amended, (Sept. 17, 1992). The same limitation was imposed on claimants under a common interest privilege in

## APPENDIX

[Robert Bosch LLC v. Pylon Mfg. Corp.](#), 263 F.R.D. 142, 146 (D. Del. 2009) where the court noted: “The common interest privilege protects communications between individuals and entities and counsel for another person or company when the communications are ‘part of an on going and joint effort to set up a common defense strategy.

14 “The Court ruled that in order for the community of interest privilege to apply, the party asserting the privilege must establish that: 1) the communications were made in the course of a joint defense effort; 2) the statement was designed to further the effort; and 3) the privilege has not been waived. [King Drug Co. of Florence, Inc. v. Cephalon, Inc.](#), 2011 1 Trade Cas. (CCH) ¶ 76531, 2011 WL 2623306, \*4 (E.D. Pa. 2011).

15 While the Court acknowledged that the community of interest concept can apply even where there is no litigation in progress, and cited cases to support that view, it, nevertheless, limited its application to litigation related concerns. After concluding that a recognizable community of interests could exist outside a litigation context, the court inexplicably concluded: “As to whether the joint interests of Barr and Chemagis were ‘legal or ‘financial, that question does not need to be answered because ... even if the interests were ‘legal there was never a joint, coordinated and ongoing defense strategy. As a consequence, because the third party with whom the communications in *Drug King* were shared was neither a participant in the action nor meaningfully shared defense decisionmaking responsibilities with the actual defendant, no joint defense effort was found. This conclusion was reached even though there was an agreement between the parties to share the information, and the litigation costs were being shared. If the court determined that the parties shared a sufficient legal, as opposed to merely a financial, interest in the communications being shared, it appears that the community of interest privilege should have been recognized.

16 **Second Circuit.** See, e.g., [Chevron Corp. v. Donziger](#), 296 F.R.D. 168, 203 (S.D. N.Y. 2013) (“The common interest rule, like all privileges, is narrowly construed and subject to many exceptions.”).

17 See, e.g., [Lazare Kaplan International, Inc. v. KBC Bank N.V.](#), 2016 WL 4154274, \*3 (S.D. N.Y. 2016) (“Defendants and third party banks shared a common legal interest in enforcing Antwerp Bank’s contractual rights under the documents governing Plaintiff’s credit, avoiding a bankruptcy filing by Plaintiff in order to protect themselves, and defending against Plaintiff’s allegations against Antwerp Bank.”).

18 [Duplan Corp. v. Deering Milliken, Inc.](#), 397 F. Supp. 1146, 1172 (D.S.C. 1974) (Different persons of corporations have a community of interest “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. ... The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. ).

**First Circuit.** See [Kevlik v. Goldstein](#), 724 F.2d 844, 849, 14 Fed. R. Evid. Serv. 1719 (1st Cir. 1984); [U.S. v. Bigos](#), 459 F.2d 639, 643 (1st Cir. 1972).

**Second Circuit.** See, e.g., [SCM Corp. v. Xerox Corp.](#), 70 F.R.D. 508, 514, 2 Fed. R. Evid. Serv. 535 (D. Conn. 1976) (“Chester Carlson, Battelle, and Xerox shared a business interest in the successful exploitation of certain patents. Whether the legal advice was focused on pending litigation or on developing a patent program that would afford maximum protection, the privilege should not be denied when the common interest is clear. ); [SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties LLC](#), 2003 WL 193071, \*1 (S.D. N.Y. 2003) (“In determining whether a common interest privilege applies, ‘ t]he key consideration is that the nature of the interest be identical, not similar and be legal, not solely commercial. ... In this regard, ‘ a] business strategy which happens to include a concern about litigation is not a ground for involving the common interest rule. ... T]he testimony at depositions and the conduct of various parties in this litigation lead to the conclusion that the meetings at issue involved business, rather than legal matters, and therefore communications at those meetings are not protected from discovery by the attorney client privilege. That an attorney took part in business meetings does not insulate business communications made in those meetings from disclosure. ).

**Third Circuit.** See, e.g., [U.S. v. Doe](#), 429 F.3d 450, 453, 68 Fed. R. Evid. Serv. 1070 (3d Cir. 2005) (“The common interest privilege allows for two clients to discuss their affairs with a lawyer, protected by the attorney client privilege, so long as they have an identical (or nearly identical) legal interest as opposed

## APPENDIX

to a merely similar interest. ); *Union Carbide Corp. v. Dow Chemical Co.*, 619 F. Supp. 1036, 1047 (D. Del. 1985) (quoting *Duplan*, 397 F. Supp. at 1172); *Net2Phone, Inc. v. Ebay, Inc.*, 2008 WL 8183817, \*8 (D.N.J. 2008) (“The relationship between plaintiff and IDT was that of a corporation and its controlling shareholder. Simply because in house counsel enforced the corporation’s patents, which would benefit its shareholders, does not mean that they shared a legal interest. Put differently, a legal interest cannot arise simply because a company acts in a way that advances the economic interests of its majority shareholder. A logical extension of plaintiff’s argument would expand the application of the common interest doctrine to cover all business transactions where a company acted in the interest of its majority shareholder. While shareholders and the corporation may share an interest in commercial success, this shared economic interest is not a legal interest. ). *But see Schreiber v. Kellogg*, 1992 WL 309632, \*1 2 (E.D. Pa. 1992) (The court concluded that the privilege was not lost when confidential communications were shared between parent and child because they shared a “commonality of interest” a standard that was not related to the legal interests of the two.).

**Fourth Circuit.** *See, e.g., Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 43, 19 Fed. R. Serv. 2d 533 (D. Md. 1974) (joint licensors of patents share a sufficiently common interest).

**Fifth Circuit.** *See, e.g., Hodges, Grant & Kaufmann v. U.S. Government, Dept. of the Treasury, I.R.S.*, 768 F.2d 719, 721 (5th Cir. 1985) (“The privilege is not ... waived if a privileged communication is shared with a third person who has a common *legal interest* with respect to the subject matter of the communication. ) (emphasis added).

**Sixth Circuit.** *See, e.g., Cozzens v. City of Lincoln Park*, 2009 WL 2242396, \*3 4 (E.D. Mich. 2009) (The common interest doctrine was denied because it was conceded that the third party whom disclosures were made had no interest in the lawsuit except as it represented a potential source of funds from which a loan made by the third party to the client could be paid.); *Cigna Ins. Co. v. Cooper Tires and Rubber, Inc.*, 2001 WL 640703, \*2 (N.D. Ohio 2001) (“Communications shared during a business undertaking lose their privileged status, even though such sharing helped address or ameliorate bona fide concerns about the legal implications of some aspect of the business venture. Thus ‘the common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation. ); *Abrams v. First Tenn. Bank Nat. Ass’n*, 2006 WL 842980, \*2 (E.D. Tenn. 2006) (“The common interest privilege allows for two clients to discuss their affairs with a lawyer, protected by the attorney client privilege, so long as they have an “identical (or nearly identical legal interest as opposed to a merely similar interest. ’ ... While the plaintiffs and New South both may have an interest in resolving the plaintiffs’ deficiencies on the notes, the parties are fundamentally adverse to one another and do not share identical legal interests. ... The attorney client privilege is simply not applicable in this instance. ).

**Seventh Circuit.** *See, e.g., Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (“The parties who assert a common interest as the basis for their assertion of privilege (where otherwise it would not exist due to the shared communications), must simply demonstrate ‘actual cooperation toward a common legal goal with respect to the documents they seek to withhold ... This shared interest must be identical, not simply similar. ); For *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, 2003 WL 21920244, \*1 (N.D. Ill. 2003) (“To maintain the privilege, the common interest must relate to a litigation interest, and not merely a common business interest ... Parties must demonstrate ‘actual cooperation toward a common legal goal and not merely common representation or common interests. ); *Graco Children’s Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.*, 1995 WL 360590, \*7 (N.D. Ill. 1995) (Because it could not be shown that the joint effort was undertaken in response to a litigious assault, the court held that the common interests must be “legal and “identical. ); *Russell v. General Elec. Co.*, 149 F.R.D. 578, 580 581 (N.D. Ill. 1993) (A community of interest does not exist between a party and a potential witness who share only an interest in validating the witness’ work and credibility.); *Oak Industries v. Zenith Industries*, 1988 WL 79614 (N.D. Ill. 1988) (Attorney client privilege protection for communications between employees in Zenith’s consumer electronics group and Zenith counsel was waived by their disclosure to potential buyers of the consumer electronics group); *Baxter Travenol Laboratories, Inc. v. Abbott Laboratories*, 1987 WL 12919, \*1 (N.D. Ill. 1987) (quoting *Duplan*, 397 F. Supp. at 1172).

## APPENDIX

**Ninth Circuit.** See, e.g., [Key v. U.S. Bancorp Disability Income Plan](#), 1988 WL 114929, \*2 (D. Or. 1988) (“Here, Fred S. James and U.S. Bancorp do not have identical legal interests. Although Fred S. James was the administrator of the Plan, it is a separate entity from the Plan itself. Therefore, the court denied the privilege).

**Tenth Circuit.** See, e.g., [In re M & L Business Mach. Co., Inc.](#), 161 B.R. 689, 694 (D. Colo. 1993) (“ [T]he Bank and the U.S. Attorney's purported joint interest in prosecuting federal banking crimes is too abstract to permit the Bank to benefit from the common interest exception that permits confidential communications to be shared with third parties without waiving attorney client privilege protection]. ).

**Eleventh Circuit.** See, e.g., [Cheeves v. Southern Clays, Inc.](#), 128 F.R.D. 128, 131, 15 Fed. R. Serv. 3d 1311 (M.D. Ga. 1989) (“Where there is no legal interest (duty or direct transaction between the two clients of the attorney), 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. ) (emphasis added).

**Federal Circuit.** See, e.g., [Go Medical Industries Pty., Ltd. v. C. R. Bard, Inc.](#), 1998 WL 1632525, \*3 (D. Conn. 1998), judgment rev'd in part on other grounds, vacated in part, 250 F.3d 763 (Fed. Cir. 2000) (The District Court noted that: “ [T]he parties claiming protection under the common interest rule ‘must show that they had a common legal, as opposed to commercial, interest, and that they cooperated in formulating a common legal strategy. ).

*But see:*

**Third Circuit.** [In re Tribune Co.](#), 54 Bankr. Ct. Dec. (CRR) 84, 2011 WL 386827, \*4 5 (Bankr. D. Del. 2011) (In an effort to reach a settlement that was acceptable to the presiding judge, the parties shared privilege communications. “ [T]he community of interest privilege can apply to parties whose interests are not totally in accord .... Once the DCL Plan Proponents agreed upon material terms of a settlement, it is reasonable to conclude that the parties might share privileged information in furtherance of their common interest of obtaining approval of the settlement through confirmation of the plan. ).

**D.C. Circuit.** [In re Subpoenas Duces Tecum](#), 738 F.2d 1367, 1372, 16 Fed. R. Evid. Serv. 165, 39 Fed. R. Serv. 2d 611 (D.C. Cir. 1984) (a common interest did not exist between a law firm and the SEC that would avoid a waiver from voluntary disclosures).

19

[Duplan Corp. v. Deering Milliken, Inc.](#), 397 F. Supp. 1146, 1172, (D.S.C. 1974) (“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. The third parties receiving copies of the communications and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non party to any anticipated or pending litigation. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest ... Thus, where there is no legal interest (duty or direct transaction between the two clients of the attorney), the mere interest of a nonparty 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 nonparty client may be legally effected by the outcome of the transaction between the prime client and an outsider ... As to the present litigation there is a sufficient community of interest between Rhodiaceta, Chevanoz, ARCT France, ARCT, Inc., DMRC, and DMI so that there is no waiver of the attorney client privilege of communications made between the parties. Rhodiaceta, although not a party to this litigation, has a duty to act through its patent department in DAPID as legal patent advisor to Chavanoz and ARCT France. Thus, there is no waiver of attorney client privilege because communications were made to or received from Rhodiaceta. Whitin, although not a party to this litigation, is interested in this litigation from a commercial standpoint because it was the exclusive United States sales licensee under the patents in suit. Chavanoz, as the owner of the patents in suit, had a duty to defend Whitin but his litigation does not call for an exercise of that duty. Therefore, Whitin does not have a sufficient community of interest with the parties mentioned above

## APPENDIX

so that, for any communication made among those parties and for which an attorney client privilege is claimed, there is a waiver of the privilege if the communications was sent to Whitin. Other contexts in which this “identity of legal interests” requirement was applied were discussed in the opinion).

**First Circuit.** See *Massachusetts Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.*, 167 F. Supp. 2d 128, 129 (D. Mass. 2001) (“A joint attorney client relationship may terminate when circumstances ‘readily imply’ to the joint clients that the joint clients no longer share the same, or nearly the same, legal interest. ).

**Second Circuit.** See *In re Rivastigmine Patent Litigation*, 2005 WL 2319005, \*2 (S.D. N.Y. 2005), order aff’d, 2005 WL 3159665 (S.D. N.Y. 2005) (“In order for the doctrine to apply, the shared interest must be legal rather than commercial and identical rather than merely similar ... Thus, the doctrine ‘does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation ... Furthermore, it is not sufficient for the party seeking the protection of the common interest doctrine merely to show that a unified legal interest theoretically existed. Rather, it must also demonstrate that the parties demonstrated cooperation in developing a common legal strategy. ); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 2003 WL 21983801, \*1 (S.D. N.Y. 2003) (“The common interest rule extends the attorney client privilege to communications between an attorney and persons who, though not the attorneys’ clients, share the same legal interest ... To qualify for protection, ‘(1) the party who asserts the rule must share a common legal interest with whom the information was shared and (2) the statements for which protection is sought were designed to further that interest. ); *Bank of America, N.A. v. Terra Nova Ins. Co. Ltd.*, 211 F. Supp. 2d 493, 497 (S.D. N.Y. 2002) (The Bank argued that they had a common interest with Palladium Insurance because they were “structuring and effectuating a credit agreement that was appropriately supported by reinsurance policies. Accepting the Bank’s characterization of their relationship, the court rejected their claim common interests. “First, in structuring the credit agreement, the parties’ interests were not identical; the Bank was issuing letters of credit on behalf of its debtor, Palladium. While the Bank explains that there was a ‘collaborative effort’ to structure a deal, such an effort is present in many negotiated commercial transactions. The mere fact that the parties were working together to achieve a commercial goal cannot by itself result in an identity of interest between the parties ... Second, the Bank has supplied no evidence that the letter of credit agreements constituted anything more than a business transaction—that is, a commercial endeavor. The existence of a ‘legal’ rather than a commercial venture, however, is a critical component of the common interest doctrine ... Here, the only apparent ‘legal’ aspect to the venture was a desire that the transaction be legally appropriate. ); *SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties LLC*, 2002 WL 1334821, \*4 (S.D. N.Y. 2002) (“There has been no showing that Willis and the Silverstein Parties have an identical legal interest, as required by the cases. Willis is not a party to this litigation, and its legal position will be unaffected by the outcome of this case. If it did, for any reason, anticipate litigation after September 11, it would seem that it would have been more likely to be sued by Silverstein than by the insurance companies. Thus, the communications between Wachtell firm and employees of Willis are not protected by the common interest privilege. ); *Bristol Myers Squibb Co. v. Rhone Poulenc Rorer, Inc.*, 1998 WL 158961, \*1-2 (S.D. N.Y. 1998) (sufficient community of interests between patent owner and its exclusive licensee); *Bristol Myers Squibb Co. v. Rhone Poulenc Rorer, Inc.*, 1998 WL 158961, \*5 (S.D. N.Y. 1998) (“The court is left with] the impression that RPR is seeking to gain the benefit of *Regents* without exercising its rights to an exclusive worldwide License with the attendant obligation to exploit the patent commercially, all of which casts doubt on the wisdom of this Court in finding that a community of interest exists under *Regents*. A clear implication is that RPT may never negotiate an exclusive royalty bearing license, and may never have intended to negotiate an exclusive royalty bearing license of the Ojima experiments, but merely wanted to fence in the Holton patents by covering all alternative avenues in order to reduce Bristol’s ability to improve its patented product for cancer treatment under the Holton patent processes, or may have wanted merely to reduce the opportunity for any Ojima patents to compete in cancer treatment with RPR’s product utilizing its process Patents Nos. ’227 or ’011. Under these circumstances, the holder of an option to license a patent may not have the community of interest envisaged by the Regents’ court. ); *Bristol Myers Squibb Co. v. Rhone Poulenc Rorer, Inc.*, 44 U.S.P.Q.2d 1463, 1997 WL 470115, \*3 (S.D. N.Y.

1997) (The court held that Lilly and the University of California had substantially identical interests because of the potential and ultimately exclusive nature of the Lilly UC license agreement. "Both parties had the same interest in obtaining strong and enforceable patents. The District Court erred in concluding the Lilly and UC did not have an identical legal interest in the 877 patent and in foreign counterparts because 'a patentee and a non exclusive licensee do not share identical legal interests. Lilly was more than a non exclusive licensee and shared the interest that UC would obtain valid and enforceable patents. '); [Bank Brussels Lambert v. Credit Lyonnais \(Suisse\) S.A.](#), 160 F.R.D. 437, 447 48 (S.D. N.Y. 1995) (" [T]he *Duplan* court required more than merely concurrent legal interests. Although the court found that a communication with a non party that was contractually obligated to be the party's legal patent advisor fell within the common interest doctrine, it held that disclosure to the exclusive licensee of the party's patent constituted a waiver. ... The common interest doctrine, then, has both a theoretical and a practical component. In theory, the parties among whom privileged matter is shared must have a common legal, as opposed to commercial, interest. In practice, they must have demonstrated cooperation in formulating a common legal strategy ... [T]he common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation ... BBL obtained an opinion letter from counsel concerning the viability of a potential transaction, and one of the issues addressed in that letter was possible litigation. In order to facilitate a joint business decision, BBL then disclosed that letter first to Chase and through Chase to other members of the Bank Group. In doing so, BBL waived any attorney client privilege that would otherwise attach to the letter. In the absence of some evidence of a coordinated legal strategy, the presence of such a concern about litigation does not bring a disclosure within the common interest doctrine. '); [Weil Ceramics & Glass, Inc. v. Work](#), 110 F.R.D. 500, 502 03 (E.D. N.Y. 1986) (communications between counsel for related corporations with a common parent prior to the preparation for litigation).

**Third Circuit.** See [Union Carbide Corp. v. Dow Chemical Co.](#), 619 F. Supp. 1036, 1047 (D. Del. 1985) (communications between corporate counsel and third party prior to a licensing agreement under which the corporation jointly pursued a common interest with that third party).

**Fourth Circuit.** See [North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.](#), 110 F.R.D. 511, 518 (M.D. N.C. 1986) ("To sustain a finding of confidentiality, the joint venturers must have an identical legal interest. ).

**Fifth Circuit.** See [Stavanger Prince K/S v. M/V JOSEPH PATRICK ECKSTEIN](#), 1993 WL 35174, \*3 (E.D. La. 1993) ("Because Stavanger has failed to make a sufficient showing that Stavanger and OMI shared identical legal interests concerning the subject matter of the attorney client communication at issue, the Magistrate Judge finds that the attorney client privilege was waived when the Terriberry letter was sent to OMI. ).

**Seventh Circuit.** See [Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.](#), 1996 WL 514993, \*2 (N.D. Ill. 1996) ("The documents involved are not subject to the attorney client privilege ... unless ... there is an identical legal interest ... This Court finds that Mitsubishi and Sumitomo share a common legal interest to deal with Harris' threats of infringement. Both parties faced the same threat of liability if Harris would prevail on its infringement theory. Although Sumitomo has not been actually sued, the community of interest rule still applies. '); [Graco Children's Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.](#), 1995 WL 360590, \*7 (N.D. Ill. 1995); [Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.](#), 152 F.R.D. 132, 140 (N.D. Ill. 1993) (" [I]n Illinois the common interest which exists between an insurer and its reinsurers may be commercial, not legal, in nature. As the [common interest] doctrine only applies where there is an identical legal interest, ... under Illinois law disclosure of communications to reinsurers by insurers would appear to waive the attorney client privilege. '); [Oak Industries v. Zenith Industries](#), 1988 WL 79614, \*4 (N.D. Ill. 1988) (client waived privilege by disclosing protected documents to prospective purchaser of its consumer electronics group); [Baxter Travenol Laboratories, Inc. v. Abbott Laboratories](#), 1987 WL 12919, \*1 (N.D. Ill. 1987) ("A community of legal interests may arise between parties jointly developing patents; they have a common legal interest in developing the patents to obtain greatest protection and in exploiting the patents. '); [Anderson v. Torrington Co.](#), 120 F.R.D. 82, 86, 25 Fed. R. Evid. Serv. 216, 10 Fed. R. Serv. 3d 1252 (N.D. Ind. 1987) (representative of labor union of which plaintiff was a

## APPENDIX

member held to have a sufficient community of interest with that member in suit against employer over alleged age discrimination); [Roberts v. Carrier Corp.](#), 107 F.R.D. 678, 687 (N.D. Ind. 1985) (third party with whom communications were shared was not involved in the law suit, but was a fellow corporate subsidiary of another entity and shared responsibility for the malfunctioning valve involved in the litigation); [Research Institute for Medicine and Chemistry, Inc. v. Wisconsin Alumni Research Foundation](#), 114 F.R.D. 672, 675–76, (W.D. Wis. 1987) (patent holder and licensee have insufficient “community of interests” because the licensing agreement imposed no duty on the licensee to defend or to assist or cooperate in the defense of the patent or to aid in the attack upon competing patents; sufficient common interest existed between inventors and the entity to which they assigned their patent rights).

**Eleventh Circuit.** See [Matter of Celotex Corp.](#), 196 B.R. 596, 35 Fed. R. Serv. 3d 26 (Bankr. M.D. Fla. 1996).

**Federal Circuit.** See [In re Regents of University of California](#), 101 F.3d 1386, 1389–90, 114 Ed. Law Rep. 780, 36 Fed. R. Serv. 3d 641 (Fed. Cir. 1996) (“We conclude that the legal interest between Lilly and UC was substantially identical because of the potentially and ultimately exclusive nature of the Lilly UC license agreement. Both parties had the same interest in obtaining strong and enforceable patents. The district court erred in concluding that Lilly and UC did not have an identical legal interest in the ‘877 patent and its foreign counterparts because ‘a patentee and a nonexclusive licensee do not share identical interests. Lilly was more than a non exclusive licensee, and shared the interest that UC would obtain valid and enforceable patents. ).

*But see:*

**Ninth Circuit.** [Hewlett Packard Co. v. Bausch & Lomb, Inc.](#), 115 F.R.D. 308, 311, 7 Fed. R. Serv. 3d 718 (N.D. Cal. 1987) (holding that Hewlett Packard's disclosure of its patent attorney's opinion letter during negotiations with persons interested in purchasing one of its divisions did not constitute a waiver).

**Tenth Circuit.** [High Point SARL v. Sprint Nextel Corp.](#), 2012 WL 234024, \*9 (D. Kan. 2012), on reconsideration in part, 2012 WL 1580634 (D. Kan. 2012) (following the precedent established in [Hewlett Packard Co. v. Bausch & Lomb, Inc.](#), 115 F.R.D. 308, 311, 7 Fed. R. Serv. 3d 718 (N.D. Cal. 1987), and rejecting a claim of waiver by the sharing of confidential communications by companies during business negotiations about the possible sale, transfer, or licensing of the patents in suit. Imposing only a “substantially identical legal interest” standard, the court concluded the parties had been shown to have “a substantially identical common legal interest in the validity, enforceability, and potential for infringement of the patents in suit at the time it disclosed the communications. ).

21 Subsequently, courts that have enforced the “legal interests” requirement have modified it to accept “nearly identical” or “substantially similar” legal interests. See, e.g., [In re Teleglobe Communications Corp.](#), 493 F.3d 345 (3d Cir. 2007), as amended, (Oct. 12, 2007) (adopting “a substantially similar legal interest” standard); [J.E. Dunn Const. Co. v. Underwriters at Lloyd's London](#), 2006 WL 1128777, \*1 (W.D. Mo. 2006). In *Dunn* the court held that a common interest in winning the litigation and avoiding liability was a commercial interest, not a legal interest.

22 [SCM Corp. v. Xerox Corp.](#), 70 F.R.D. 508, 2 Fed. R. Evid. Serv. 535 (D. Conn. 1976).

[Giovan v. St. Thomas Diving Club, Inc.](#), 1997 WL 360867, \*5 (V.I. Terr. Ct. 1997) (the daughter and prospective heir of the plaintiff was permitted to sit in on discussion with the father's lawyer regarding a pending lawsuit involving property in which she ultimately will have an interest).

23 [SCM Corp. v. Xerox Corp.](#), 70 F.R.D. at 524–25.

**First Circuit.** See [Crane Security Technologies, Inc. v. Rolling Optics, AB](#), 230 F. Supp. 3d 10, 20 (D. Mass. 2017) (“In short, the parties had a common legal interest that is widely recognized in the law, namely, the interest that potential licensees and patent owners have in successfully prosecuting patent applications as established in [Regents, supra](#), 101 F.3d at 1390–91. During the time in question the parties were bound by a Confidentiality Agreement and were negotiating an exclusive License Agreement. The communications themselves demonstrate both that the parties were working together to develop strong patents and an expectation that the communications would be confidential. The documents are privileged and the privilege was not waived. ).

## APPENDIX

**Second Circuit.** See [U.S. v. United Technologies Corp.](#), 979 F. Supp. 108, 112 (D. Conn. 1997) (“UTC says that all members shared a common legal interest in structuring IAE in such a way as to minimize their tax liability ... Holding that the attorney client privilege, as extended by the common interest rule, protects from disclosure all the documents at issue except for Document 14. Although, in the area of taxation, it is often difficult to determine where business ends and the law begins, the court finds that nearly all the documents pertain to the development of a common legal strategy regarding the tax structure of IAE. In formulating this strategy, the members acted not as adversaries negotiating at arms length but as collaborators, legally committed to a cooperative venture and seeking to make that venture maximally profitable. ).

**Third Circuit.** See [Andritz Sprout Bauer, Inc. v. Beazer East, Inc.](#), 174 F.R.D. 609, 634 (M.D. Pa. 1997) (Speaking about the “common interest doctrine raised by the plaintiff, the court stated that “ [t]he interests of the parties need not be identical, and may even be adverse in some respects. ).

**Fourth Circuit.** See [Baltimore Scrap Corp. v. David J. Joseph Co.](#), 2003 1 Trade Cas. (CCH) ¶ 74026, 1996 WL 720785, \*9 (D. Md. 1996) (Agreeing that the interests in common had to be legal, the court did not require that the legal interests be identical. The court insisted on a demonstration that the various parties not only faced a common problem, but also shared common legal interests in the resolution of that problem. “Other than arguing that the community groups were also threatened by BSC, defendants offer no explanation as to why the interests of DJJ and the community groups, in defending against BSC's threats, were complementary. ).

**Sixth Circuit.** See [MPT, Inc. v. Marathon Labels, Inc.](#), 2006 WL 314435, \*7 (N.D. Ohio 2006) (Rejecting the identical legal interests standard the court discussed the community of interests that existed between MPT, TKG and Michael Kennedy. Acknowledging that there must be more to a relationship than a bare nonexclusive license the court explained how that standard was met. “First, the Sixth Circuit ... has held that affiliated entities are entitled to invoke the community of interest doctrine ... Second, at the behest of Polymeric the Court has already recognized not only the MPT and TKG are closely affiliated but that the relationship between the two reaches far beyond that of a typical nonexclusive licensee. The Court granted Polymeric's motion to compel production of damage document, based in large part on Polymeric's argument and evidence that MPT and TKG do not have an arms length licensing relationship, and that the interest of the two entities in this litigation is nearly identical. Third, although TKG's license is nominally classified as nonexclusive, the Court has not seen any evidence that TKG does not enjoy the lion's share of the benefits of the patent as a result of its relationship with MPT. In sum, although this license may fall below the threshold that would allow TKG or Michael Kennedy to sue on their own behalf, the relationship far exceeds the solely financial interests of a mere nonexclusive licensee. At the time of the patent assignment, all three had an identical legal interest in successfully prosecuting the patents. In litigation, all three have an identical legal interest in the enforcement and validity of the patents. Accordingly, the community of interest doctrine applies to TKG, MPT and Michael Kennedy. ).

**Seventh Circuit.** See [Lislewood Corporation v. AT & T Corporation](#), 2015 WL 1539051, \*4 (N.D. Ill. 2015) (“AT & T and Marriott claim joint defense privilege over communications concerning the Sublease, repairs, tax payments, engineering notes, communication about landlords' requested repairs, turnover issues, and the joint defense agreement itself. ) (common legal interest created through broad indemnity clause); [Blair v. Professional Transp., Inc.](#), 2015 Wage & Hour Cas. 2d (BNA) 177793, 2015 WL 1013566, \*4 (S.D. Ind. 2015) (“Advancing their legislative positions was a common interest, but it was not their only common interest. The communications between Coburn and the CHTA's personnel indicates that they shared common legal interests, including: understanding their liabilities and obligations under proposed changes to the law ... understanding and complying with the law as it stood ... and complying with the law in forming the corporation and conducting their lobbying efforts. ) (common interest exception applied); [Ocean Atlantic Development Corp. v. Willow Tree Farm, L.L.C.](#), 2002 WL 649043, \*5 (N.D. Ill. 2002) (a sufficient interest was found from the fact that the third party had a desire to limit both his and his client's legal exposure).

**Eighth Circuit.** See [In re Grand Jury Subpoena Duces Tecum](#), 112 F.3d 910, 922, 46 Fed. R. Evid. Serv. 610, 37 Fed. R. Serv. 3d 309 (8th Cir. 1997) (This court held that the common interest may be “either legal, factual, or strategic in nature. )

## APPENDIX

- 24 [Lugosch v. Congel](#), 219 F.R.D. 220, 237 (N.D. N.Y. 2003).
- 25 [Denney v. Jenkens & Gilchrist](#), 362 F. Supp. 2d 407, 415 (S.D. N.Y. 2004).
- 26 [Dexia Credit Local v. Rogan](#), 231 F.R.D. 287 (N.D. Ill. 2005).
- 27 [Dexia Credit Local v. Rogan](#), 231 F.R.D. at 294.
- 28 **Third Circuit.** See [Eisenberg v. Gagnon](#), 766 F.2d 770, 787–88, 18 Fed. R. Evid. Serv. 783, 2 Fed. R. Serv. 3d 980 (3d Cir. 1985) (“Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests. ”).
- 29 **Seventh Circuit.** In [McNally Tunneling Corp. v. City of Evanston](#), the court explained:

The Court recognizes that just because two parties agree to cooperate in defending a particular lawsuit does not automatically mean that the common interest doctrine applies. For example, although an insurer and an insured agree to cooperate in defending a lawsuit reflecting their shared interest in lowering the total amount of damages the common interest doctrine does not apply if those parties have an incentive to blame each other for alleged wrongful conduct . . . In this case, however, because Evanston and Harza resolved their adverse interests in the settlement agreement, they do not have an incentive to blame each other for the alleged breach of contract. Once a litigant establishes that it and another party has a sufficiently strong identity of interests regarding a certain document, to claim protection of the common interest doctrine, the litigant must then show that the document contains privileged information.

- 30 [McNally Tunneling Corp. v. City of Evanston, Illinois](#), 2001 WL 1246630, \*3–4 (N.D. Ill. 2001).
- [Hewlett Packard Co. v. Bausch & Lomb, Inc.](#), 115 F.R.D. 308, 7 Fed. R. Serv. 3d 718 (N.D. Cal. 1987).
- First Circuit.** See [Cavallaro v. U.S.](#), 153 F. Supp. 2d 52, 61 (D. Mass. 2001), judgment aff’d on other grounds, 284 F.3d 236, 52 Fed. R. Serv. 3d 761 (1st Cir. 2002) (“The weight of the case law suggests that, as a general matter, privileged information exchanged during a merger between two unaffiliated business would fall within the common interest doctrine. ”).
- Second Circuit.** See [U.S. v. American Society of Composers, Authors and Publishers](#), 1996 WL 633220, \*2 (S.D. N.Y. 1996) (“Moreover, the circumstances in which the meetings were held reflect that the participants were conducting these discussions to serve a common legal and economic interest the minimization of music performance rights fees. Thus, the statements made at the meetings would presumably be covered by the so called common interest extension of the attorney client privilege. ”).
- Eighth Circuit.** See [Rayman v. American Charter Federal Sav. & Loan Ass’n](#), 148 F.R.D. 647, 655, 27 Fed. R. Serv. 3d 136 (D. Neb. 1993) (common interest doctrine applied to communications between potential merger partners).
- Ninth Circuit.** See [Louisiana Mun. Police Employees Retirement System v. Sealed Air Corp.](#), 253 F.R.D. 300 (D.N.J. 2008) (“Plaintiff’s challenge to Defendants’ assertion of common interest rests primarily on the fact that the parties were on adverse sides of a business deal. This does not compel the conclusion that the parties did not share a common legal interest. In [Hewlett Packard Co. v. Bausch & Lomb, Inc.](#), Magistrate Judge Wayne D. Brazil found that the defendant and a prospective buyer of one of the defendant’s subdivisions had sufficiently common interests to permit the defendant’s sharing of a patent opinion letter with the prospective buyer. Judge Brazil found that the privilege was properly sustained, in part, because the defendant and prospective purchaser faced the possibility of joint litigation in which they would share a common interest. This conclusion was reached despite the fact that the transaction was not ultimately consummated. The same reasoning applies here. ) (citations omitted).
- Tenth Circuit.** [High Point SARRL v. Sprint Nextel Corp.](#), 2012 WL 234024, \*9 (D. Kan. 2012), on reconsideration in part, 2012 WL 1580634 (D. Kan. 2012) (following the precedent established in [Hewlett Packard Co. v. Bausch & Lomb, Inc.](#), 115 F.R.D. 308, 311, 7 Fed. R. Serv. 3d 718 (N.D. Cal. 1987), and rejecting a claim of waiver by the sharing of confidential communications by companies

## APPENDIX

during business negotiations about the possible sale, transfer, or licensing of the patents in suit. Imposing only a "substantially identical legal interest" standard, the court concluded the parties had been shown to have "a substantially identical common legal interest in the validity, enforceability, and potential for infringement of the patents in suit at the time it disclosed the communications. ).

*But see:*

**Ninth Circuit.** *Santella v. Grizzly Indus., Inc.*, 2012 WL 5399918, \*1 (D. Or. 2012) ("Without such a close and tangible legal concern—aside from general economic interest in investing in a company that had valid intellectual property rights—the common interest doctrine threatens to create an intellectual property exception to the attorney-client privilege waiver doctrine.").

*Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342 (N.D. Ohio 1999).

The court in *Libby* stated:

Sharing of legal advice may well increase the usefulness of that advice. But that does not necessarily mean that the policy of favoring consultation with counsel has been implemented. Where, as here, only Oneida involved an attorney directly, Pasabahce can hardly have been said to have "consulted" with counsel, or obtained the benefit of advice from a lawyer responsible to it alone. Because, in this instance, only one participant used the services of counsel, the policy of gaining prior legal advice was only partially fulfilled.

In addition, no steps appear to have been taken by Oneida's lawyers and its employees, or Ullmann or Pasabahce to ensure that the privileged communications, though shared, would remain confidential. There is not indication that either Ullmann or Pasabahce (or, for that matter, Oneida's own employees) understood the need to guard attentively against further disclosure if the privilege were to be retained.

By refusing to extend the common interest privilege to situations where no efforts were taken to acknowledge and protect the privileged status of the shared communications, courts make privilege law more predictable. In an area as presently uncertain as this, disputes of the sort now before me would not arise if all parties were required either to involve their own lawyers, or to take some other deliberate and meaningful steps to protect the confidential nature of the communications. By allowing claims of common interest absent clear indication that the parties sought actively to keep the communications confidential, courts can create a benchmark for parties with common legal interests to enjoy the benefits of sharing legal advice.

Clients must understand that legal information is like other types of proprietary information. Any sharing risks waiver of the privilege, and should occur under only certain specified conditions. Those conditions ensure that the information will not be disclosed beyond its use to serve the common legal interest. A court should not base its determination of whether the common interest doctrine is applicable on whether or not such further disclosure occurred. To do so would lead to protracted litigation. The burden belongs on the party claiming privilege to have avoided uncertainty, and to have taken effective steps to ensure that all participants were aware of the need to maintain confidentiality, and to show that mechanisms were in place to accomplish that objective before the information was shared.

*Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. at 348–49. See, e.g., *Tenneco Packaging Specialty and Consumer Products, Inc. v. P. S.C. Johnson & Son, Inc.*, 1999 WL 754748, \*2 (N.D. Ill. 1999) ("SCJ

APPENDIX

has stated that DowBrands disclosed the opinion to SCJ during the course of due diligence, when the asset purchase deal was largely locked up. And DowBrands took substantial steps to ensure that the opinion would remain confidential. According to SCJ, ‘access to the opinion was controlled by specific procedures designed to prevent dissemination of its contents. : DowBrands showed the opinion to a limited number of SCJ representatives, and then only after they acknowledged that disclosure was subject to a confidentiality agreement. Thus the opinion is privileged and need not be produced. ); [High Point SARL v. Sprint Nextel Corp.](#), 2012 WL 234024, \*9 (D. Kan. 2012), on reconsideration in part, 2012 WL 1580634 (D. Kan. 2012) (“Although Avaya and the other companies had adversarial interests when they were negotiating the possible transfer of the patents, they still had a common legal interest in the validity, enforceability, and potential infringement of the patents in suit. This is sufficient to establish their common interest in the communications exchanged. Avaya therefore has not waived its attorney client privilege in the documents and materials it disclosed to affiliated entities and other potential patent transferees under the common interest doctrine. ).

See also Limited Waiver, §§ 9:92, 9:93, *infra*.

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**Second Circuit.** [TIFD III E, Inc. v. U.S.](#), 223 F.R.D. 47, 50 (D. Conn. 2004) (“The common interest rule extends the attorney client privilege to privileged communications revealed to a third party who shares a common legal goal with the party in possession of the original privilege. ... The rule does not encompass a joint business strategy that merely happens to include as one of its elements a concern about litigation. ... Here it appears that GECC and the foreign bank were involved in a business relationship. Though this relationship may have lead to concern about litigation, all the indications are that the parties worked together towards a business, and not a legal, goal. Moreover, even if the parties shared legal concerns, the communications at issue are not about those concerns. If anything, the letters in question appear to be arms length, possibly even adversarial, communications. According, the common interest rule does not apply ... . ); [Bowne of New York City, Inc. v. AmBase Corp.](#), 150 F.R.D. 465, 491 (S.D. N.Y. 1993).

**Fourth Circuit.** [U.S. v. Aramony](#), 88 F.3d 1369, 1392, 44 Fed. R. Evid. Serv. 952 (4th Cir. 1996) (“To be entitled to the protection of this privilege, the parties must first have a common interest about a legal matter. ); [Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B](#), 230 F.R.D. 398, 416 (D. Md. 2005) (Applying the common legal interest precedent in the Fourth Circuit, the court explained why the standard had not been met. “ D]ue to the defendant Trusts (undefined) ownership interest in BIA, SIA and FAS, they are financially interested in their business success, but there is neither a demonstrated controlling financial relationship nor any legal relationship. Similarly, while the LOLA Trust owns a 50% interest in BIA and FAS and thus all have similar interests in the profitability of BIA and FAS. This type of ownership interest does not establish a joint or common interest for purposes of privilege. Defendant Stewart Horejsi clearly has a personal and indirect financial interest in the funds doing well, as the Trusts have invested in them and he and his children are beneficiaries of the Trusts. Similarly, Mr. Horejsi has a business interest in the funds, as he receives remuneration as portfolio manager of BIA and SIA, which are the investment advisors to two of the funds. But these kinds of interest and relationships do not prevent waiver of attorney client privilege when documents are shared beyond the client. Or said another way, these kinds of interests or relationships have not been found to establish an entitlement to a joint defense or common interest privilege. The court went on to make the important point that “ e]mploying joint counsel may be evidence that a common interest exists, but it does not create one, as defendants would have the court believe. Although in certain instances courts have used same counsel as evidence of a common interest, it is certainly not dispositive. ‘Concurrent representation of two clients is not enough to make them joint clients for purpose of the privilege. The lawyer must be retained or consulted in common “on a matter of common interest. ).

**Fifth Circuit.** [In re Auclair](#), 961 F.2d 65, 69, 35 Fed. R. Evid. Serv. 607 (5th Cir. 1992) (“The privilege is not, however, waived if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication. ); [Herwig v. Marine Shale Processors, Inc.](#), 1993 WL 70223, \*1 (E.D. La. 1993).

**Sixth Circuit.** [Travelers Cas. and Sur. Co. v. Excess Ins. Co. Ltd.](#), 197 F.R.D. 601, 607 (S.D. Ohio 2000) (“According to plaintiff, the members of the ECRG cannot invoke the protections of the ‘joint defense

## APPENDIX

or ‘common interest’ application of the attorney client privilege because those members did not in fact share a joint defense or common interest: the treatises in which each of the members participated differed in at least some respects. Moreover, plaintiff argues, because the ECRG members participated in different reinsurance contracts, they are unlikely ever to be parties to the same lawsuit. Thus, no attorney client relationship ever arose or, if it did, the disclosure of otherwise protected information to the conference attendees breached the confidentiality in which such protected communications must be preserved. This Court disagrees and concludes that, as to those issues identified in the cross consultation agreements and reflected in the documents identified in defendant’s privilege log, the members of the ECRG share interests sufficiently common or joint to create a need for full and frank communications between and among counsel and their clients. Moreover, while there is not an absolute congruence in litigation involving those members, all those members reasonably anticipated involvement in litigation in which those common issues, and their adoption of common positions on those issues, would arise. Finally, it is clear that the ECRG members shared the expectation that their communications between themselves and their counsel would be maintained in confidence. ).

**Seventh Circuit.** *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 539 (N.D. Ill. 2000), on reconsideration in part, 194 F.R.D. 624 (N.D. Ill. 2000) (“The common interest doctrine recognizes protection of communications among clients and attorneys ‘allied in a common legal cause. ... Such a common interest ‘may arise between parties jointly developing patents; they have a common legal interest in developing the patents to obtain the greatest protection and in exploiting the patents. ... Here, the agreement between plaintiffs and the licensor was exclusive, which makes their interests essentially identical. ... The agreement gave the licensor primary responsibility for legal defense and the licensed patents, while plaintiffs were responsible for all reasonable assistance. Thus, we can conclude that there was a common legal interest between plaintiffs and Ferrosan/AS, and later between plaintiffs and Norvo Nordisk. ); *American Colloid Co. v. Old Republic Ins. Co.*, 1993 WL 195270, \*1 (N.D. Ill. 1993).

**Eighth Circuit.** *Pucket v. Hot Springs School Dist. No. 23 2*, 239 F.R.D. 572, 583 (D.S.D. 2006).

**Ninth Circuit.** *Perrey v. Televisa, S.A. DE C.V.*, 2009 WL 3876198, \*2 (C.D. Cal. 2009) (“Plaintiffs and UPIP have a common legal interest even if, at times, they may have differing strategic aims or tactics. ... UPIP holds the copyrights to the songs, while Plaintiffs have a royalty interest. If the songs are performed, UPIP is entitled to compensation for use of the copyrights, and Plaintiffs are entitled to receive royalty payments. This represents an initial common legal interest. There may be all sorts of reasons, however, why one party and not another chooses to pursue litigation, even if they share common legal interests: one party may be willing to front expenses, and another not; one party may have a different assessment from another for the likelihood of a positive result, or the extent, or enforceability of any recovery; one party, but not another, may have other business relationships with their parties which, in its judgment, counsel against pursuing litigation; one party may find settlement terms palatable, while another party does not. The fact that different considerations may animate different strategies does not gainsay that the legal interests align. ); *In re Mortgage & Realty Trust*, 212 B.R. 649, 653, 47 Fed. R. Evid. Serv. 1087, 38 Fed. R. Serv. 3d 337 (Bankr. C.D. Cal. 1997) (“A communication in furtherance of this *common legal interest* with that of the debtor is entitled to the protection of the attorney client privilege, unless its confidentiality has been waived. ) (emphasis added).

**Specialized Federal Courts.** *B.E. Meyers & Co., Inc. v. U.S.*, 41 Fed. Cl. 729, 734 (1998) (“The interests of Insight and the government are more closely aligned than the interests that were found to be common in prior case law. Because of the indemnification clause in Insight’s contract with the government, Insight’s interests are not merely aligned with the government, they are identical. Any liability that is assessed against the government would likely burden Insight. Thus despite the fact that Insight has settled plaintiffs’ claims against it, the specter of liability for a claim against the government still looms. ... Insight and the government share a sufficiently common interest in defending against plaintiffs’ claims against the United States that any communications disclosed by Insight to attorneys for the United States do not lose their privileged or protected status by such disclosure. ).

*Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 491 (S.D. N.Y. 1993).

## APPENDIX

**Ninth Circuit.** See *In re Mortgage & Realty Trust*, 212 B.R. 649, 653, 47 Fed. R. Evid. Serv. 1087, 38 Fed. R. Serv. 3d 337 (Bankr. C.D. Cal. 1997) ("A communication in furtherance of this *common legal interest* with that of the debtor is entitled to the protection of the attorney client privilege, unless its confidentiality has been waived. ) (emphasis added).

35 *Herwig v. Marine Shale Processors, Inc.*, 1993 WL 70223 (E.D. La. 1993).

36 *Herwig v. Marine Shale Processors, Inc.*, 1993 WL 70223, \*1 (E.D. La. 1993).

**Fifth Circuit.** See *In re Auclair*, 961 F.2d 65, 70, 71, 35 Fed. R. Evid. Serv. 607 (5th Cir. 1992) ("It necessarily follows that when more than one person seeks consultation with an attorney on a matter of common interest, the parties and the attorney may reasonably presume that the parties are seeking representation of a common or joint matter. ... We therefore now hold that absent a contrary expression of intention by one of the parties, the existence of a matter of common interest must be presumed in the prerepresentation phase as presented in the case at bar. To hold otherwise would present a conundrum whose only acceptable resolution would be that a lawyer may never meet with more than one potential client for fear that the attorney client would be destroyed as to all. ... We hold that the attorney client privilege extended to all matters from the scheduling of the joint conference until Burton informed Diane and Mike Sanders that he could not represent them because of a potential conflict. This holding is based on these facts: Prior to the December 13 meeting, Burton knew only that Feazell and the Sanders couple sought to meet with him to discuss possible representation on some matter. The three arrived at Burton's office as a group, they met as a group, and Feazell related a factual scenario which involved all of them. Acting on the reasonable presumption of a desire for representation in a matter of common interest, Burton acquitted his professional and ethical obligation to determine whether such representation was possible by conducting separate individual interviews. Neither by word or deed did Feazell or either Sanders evidence any intention contrary to a common interest representation or to the reasonable expectation of confidentiality in either the group or separate meetings. ... Feazell and Burton were reasonable in believing in the existence of common interests and possessed reasonable expectations of confidentiality sufficient to support the attorney client privilege. Neither the fact that the joint representation ultimately proved impracticable nor the subsequent waiver by either or both Sanders can effect a retroactive recharacterization of the attorney client relationship as it existed during the pre representation meeting so as to defeat the protection the privilege affords Feazell. ).

See generally § 2:4, *supra*.

37 *American Colloid Co. v. Old Republic Ins. Co.*, 1993 WL 195270 (N.D. Ill. 1993).

38 *American Colloid Co.*, 1993 WL 195270, \*1.

39 **Third Circuit.** *Northwood Nursing & Convalescent Home, Inc. v. Continental Ins. Co.*, 161 F.R.D. 293, 297 (E.D. Pa. 1995) ("Continental requests documents relating to the underlying action that it has agreed to defend, the Angoy action. Because Continental has agreed to defend this action, Plaintiffs have no reasonable expectation of privilege. Moreover, we find that there is a common interest, and a privity between Continental and Plaintiffs on the Angoy action, such that prevents an attorney client relationship between them. ).

40 *Vermont Gas Systems, Inc. v. U.S. Fidelity & Guar. Co.*, 151 F.R.D. 268, 276 77 (D. Vt. 1993) (While suits by an insured against an insurer for indemnification usually places "at issue the attorney client communications of the insured and his attorney, see § 9:4, *infra*, that was also rejected as a basis for discovery because in denying coverage the insurer contested neither the costs incurred nor the strategies employed. They only contested the fact that the insured had failed to properly notify the insurer as required under the policy.)

**Third Circuit.** See *NL Industries, Inc. v. Commercial Union Ins. Co.*, 144 F.R.D. 225, 231 (D.N.J. 1992) ("To permit insurers, however, unrestrained access to attorney client communications and work product where those insurers refused to take part in litigation despite notice and an opportunity to participate would distort the 'common interest doctrine ... ' C]ommon interest alone, without more, does not invoke the exception. ... This is so because when a carrier has denied coverage to its insured, the insured is put on notice that it must sue in order to obtain coverage. Any materials prepared afterwards, therefore, are done so in anticipation of litigation pertaining to coverage, and with the expectation that they will be privileged. This court then held that the insured did not

APPENDIX

place his attorney client communications “at issue” by suing the insurer for indemnification—giving unpersuasive reasons relating to the insured’s expectation of confidentiality due to the adversarial relationship that the insurer had created and the availability of other sources of information. While these facts may have been appropriate considerations in determining whether the work product immunity should have been overridden, they are not answers to the question of whether the insured, by requesting indemnification for litigation expenses, has necessarily made his communications with his counsel central to the fair resolution of his claim.); *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 70–71 (D.N.J. 1992) (“To permit insurers unrestrained access to attorney client communications and work product where those insurers refused to take part in litigation despite notice and an opportunity to participate would distort the ‘common interest’ doctrine. ... There is no actual ‘common interest’ since the situation inevitably presented is one in which the insurer claims that there is no coverage for the underlying claim. Therefore, theoretically, it is of no import or consequence to the insurer whether or how much the ‘uninsured’ has incurred in liability unless and until the insurer has been forced, through a subsequent judgment, to accept that there is an actual common interest. ... Further, the fiction that there is no reasonable expectation of privacy due to an identity of interest is contrary to the perception under which the insured would operate in the underlying litigation. Particularly in the environmental liability context, the insured often enters and acts in the underlying litigation alone, with an apprehension of not only the outcome of that litigation, but also of the foreboding litigation with its insurers. The communications between attorney and client would not reflect a community of interest with its insurers. This is so notwithstanding any duty to defend and cooperation clauses in the insurance policies. ); *Northwood Nursing & Convalescent Home, Inc. v. Continental Ins. Co.*, 161 F.R.D. 293, 297 (E.D. Pa. 1995) (“Continental requests documents with respect to the actions for which Continental has denied coverage, the English actions, as well as actions for which it has not yet made a coverage determination. We find that Continental has not demonstrated an identity of interest with respect to these actions such that would make it a common client with Plaintiffs. Continental has declined coverage of the English action; accordingly, it is reasonable that Plaintiffs have proceeded with the reasonable expectation of a privilege between it and its chosen lawyers, and not with Continental. ).

**State Law.** See *International Ins. Co. v. Newmont Min. Corp.*, 800 F. Supp. 1195, 1196 (S.D. N.Y. 1992) (applying New York law). The state law of attorney client privilege is explored in detail for every state and the District of Columbia in Rice et al., *Attorney Client Privilege: State Law* (available only on Westlaw, database ID: ACP STATE).

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*North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363 (D.N.J. 1992).

*North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F.Supp. at 367.

**Second Circuit.** See *Go Medical Industries Pty., Ltd. v. C. R. Bard, Inc.*, 1998 WL 1632525, \*3 (D. Conn. 1998), judgment rev'd in part on other grounds, vacated in part, 250 F.3d 763 (Fed. Cir. 2000). In *Travelers Cas. and Sur. Co. v. Excess Ins. Co. Ltd.*, 197 F.R.D. 601, 607 (S.D. Ohio 2000), the court explained:

According to plaintiff, the members of the ECRG cannot invoke the protections of the “joint defense” or “common interest” application of the attorney client privilege because those members did not in fact share a joint defense or common interest: the treatises in which each of the members participated differed in at least some respects. Moreover, plaintiff argues, because the ECRG members participated in different reinsurance contracts, they are unlikely ever to be parties to the same lawsuit. Thus, no attorney client relationship ever arose or, if it did, the disclosure of otherwise protected information to the conference attendees breached the confidentiality in which such protected communications must be preserved. This Court disagrees and concludes that, as to those issues identified in the cross consultation agreements and reflected in the documents identified in defendant’s privilege log, the members of the ECRG share interests sufficiently common or joint to create a

## APPENDIX

need for full and frank communications between and among counsel and their clients. Moreover, while there is not an absolute congruence in litigation involving those members, all those members reasonably anticipated involvement in litigation in which those common issues, and their adoption of common positions on those issues, would arise. Finally, it is clear that the ECRG members shared the expectation that their communications between themselves and their counsel would be maintained in confidence.

- 43 [LaSalle Nat. Trust, N.A. v. Schaffner](#), 1993 WL 105422, \*5 (N.D. Ill. 1993).  
**D.C. Circuit.** See [Carey Canada, Inc. v. Aetna Cas. & Sur. Co.](#), 118 F.R.D. 250, 251, 10 Fed. R. Serv. 3d 134 (D.D.C. 1987) (“Common interest doctrine “trumps an insured’s] claim of privilege where there is admittedly a common interest between the insurers and the insureds in minimizing exposure in the underlying ... claims, even though there is a sharp dispute regarding insurance coverage.); [Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.](#), 654 F. Supp. 1334, 1365–1366 (D.D.C. 1986), on reconsideration, 672 F. Supp. 1 (D.D.C. 1986) and order aff’d, 944 F.2d 940 (D.C. Cir. 1991).  
 44 See § 9:52, *infra*.  
 45 **Second Circuit.** See [International Ins. Co. v. Newmont Min. Corp.](#), 800 F. Supp. 1195, 1196 (S.D. N.Y. 1992).  
**Third Circuit.** [Remington Arms Co. v. Liberty Mut. Ins. Co.](#), 142 F.R.D. 408, 418 (D. Del. 1992). See also [Bituminous Cas. Corp. v. Tonka Corp.](#), 140 F.R.D. 381, 386–87 (D. Minn. 1992); [NL Industries, Inc. v. Commercial Union Ins. Co.](#), 144 F.R.D. 225, 231–32 (D.N.J. 1992).  
 46 **Third Circuit.** [North River Ins. Co. v. Philadelphia Reinsurance Corp.](#), 797 F. Supp. 363, 367 (D.N.J. 1992).  
 47 [North River Ins. Co. v. Columbia Cas. Co.](#), 1995 WL 5792, \*5 (S.D. N.Y. 1995) (“When the common interest] principles are applied to the instant case, it is apparent that North River and Columbia Casualty did not have a common interest in the ADR proceedings. Clearly they were not represented by the same counsel, and Columbia Casualty did not contribute to North River’s legal expenses nor exercise any control over its conduct of the proceedings. Nor is there any evidence that the two coordinated litigation strategy in any way. While the commercial interests coincided to some extent, their legal interests sometimes diverged, as demonstrated by the instant litigation. In short, Columbia Casualty’s only argument for finding a common interest is that the two parties stand in the relation of reinsurer to the] insurer, and that is insufficient. ).  
 48 See § 4:38, *infra*.  
 49 **D.C. Circuit.** [In re United Mine Workers of America Employee Ben. Plans Litigation](#), 159 F.R.D. 307, 313 (D.D.C. 1994) (“It is clear that the Trusts, the BCOA, and the UMWA have not always shared common interests; their interests have diverged at different times. However, the common interest rule is concerned with the relationship between the transferor and the transferee at the time that the confidential information is disclosed. The fact that the parties’ interests have diverged over the course of the litigation does not necessarily negate the applicability of the common interest rule. ).  
 50 **Second Circuit.** [Cendant Corp. v. Shelton](#), 2007 WL 2460701, \*3 (D. Conn. 2007).  
 51 [In re Mortgage & Realty Trust](#), 212 B.R. 649, 653, 47 Fed. R. Evid. Serv. 1087, 38 Fed. R. Serv. 3d 337 (Bankr. C.D. Cal. 1997).  
 52 [Mortgage & Realty Trust](#), 212 B.R. at 653.  
 53 [Mortgage & Realty Trust](#), 212 B.R. at 652.  
 54 [U.S. v. Massachusetts Institute of Technology](#), 129 F.3d 681, 686, 48 Fed. R. Evid. Serv. 66, 39 Fed. R. Serv. 3d 4 (1st Cir. 1997).  
*But see:*  
**D.C. Circuit.** [Indian Law Resource Center v. Department of Interior](#), 477 F. Supp. 144 (D.D.C. 1979) (concluding an auditor from the Dept. of Interior was a confidential agent of the Indian tribe, and the disclosure of attorney fee information did not waive the privilege protection).  
 55 [Hope For Families & Community Service, Inc. v. Warren](#), 2009 WL 174970, \*24 (M.D. Ala. 2009).  
 56 [Warren](#), 2009 WL 174970, \*24.

## APPENDIX

57 **Third Circuit.** See, e.g., *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126, 22 Fed. R. Evid. Serv. 52 (3d Cir. 1986).

**Ninth Circuit.** See, e.g., *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575 (N.D. Cal. 2007); *U.S. v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003); *Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 572 (E.D. Cal. 2002).

58 *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575 (N.D. Cal. 2007).

59 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 46 Fed. R. Evid. Serv. 610, 37 Fed. R. Serv. 3d 309 (8th Cir. 1997).

60 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 922.

61 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 922.

62 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 922.

63 *Modesto Irrigation District v. Gutierrez*, 2007 WL 763370, \*1 (E.D. Cal. 2007).

64 *Menasha Corp. v. U.S. Dept. of Justice*, 2012 WL 252196, \*5 (E.D. Wis. 2012). See generally § 4:28, *supra*.

65 *Menasha Corp. v. U.S. Dept. of Justice*, 707 F.3d 846, 852 (7th Cir. 2013) (“The only federal party was the United States, a single party represented by a single legal representative, the Justice Department. ).

66 *Bowman v. Brush Wellman, Inc.*, 2001 WL 1339003 (N.D. Ill. 2001).

**Eighth Circuit.** See *J.E. Dunn Const. Co. v. Underwriters at Lloyd’s London*, 2006 WL 1128777, \*1 (W.D. Mo. 2006) (avoiding liability was not a sufficient community of legal interests to permit the sharing of privileged communications).

67 *Bowman*, 2001 WL 1339003, \*2.

68 **Second Circuit.** *Campinas Foundation v. Simoni*, 65 Fed. R. Evid. Serv. 1103, 2004 WL 2709850, \*2 (S.D. N.Y. 2004); *Obeid v. Mack*, 2016 WL 7176653, \*8 (S.D. N.Y. 2016) (“Although plaintiff claims to have sought ‘Schmidt’s opinion of and, in some cases, personal involvement in, litigation strategy (Pl.’s Mem., at 19), he sought it because Schmidt is an ‘investor with an interest in seeing that the case is successful. ).

**Third Circuit.** *Net2Phone, Inc. v. Ebay, Inc.*, 2008 WL 8183817, \*8 (D.N.J. 2008) (“ T]he relationship between plaintiff and IDT was that of a corporation and its controlling shareholder. Simply because in house counsel enforced the corporation’s patents, which would benefit its shareholders, does not mean that they shared a legal interest. Put differently, a legal interest cannot arise simply because a company acts in a way that advances the economic interests of its majority shareholder. A logical extension of plaintiff’s argument would expand the application of the common interest doctrine to cover all business transactions where a company acted in the interest of its majority shareholder. While shareholders and the corporation may share an interest in commercial success, this shared economic interest is not a legal interest. ).

**Seventh Circuit.** *Miller UK Ltd. v. Caterpillar, Inc.*, 2014 WL 67340 (N.D. Ill. 2014) (“A shared rooting interest in the ‘successful outcome of a case and that is what Miller explicitly alleges here is not a common *legal* interest.”) (deciding that potential financier of litigation did not share common legal interest with party, as opposed to commercial or financial interest in the outcome of the litigation).

69 *In re Tyco Intern., Inc. Multidistrict Litigation (MDL 1335)*, 2004 WL 556715, 2004 DNH 53 (D.N.H. 2004).

70 *In re Tyco Intern., Inc. Multidistrict Litigation*, 2004 DNH 53, 2004 WL 556715, \*2.

71 *In re Rivastigmine Patent Litigation*, 2005 WL 2319005, \*4 (S.D. N.Y. 2005), order *aff’d*, 2005 WL 3159665 (S.D. N.Y. 2005).

72 *In re Rivastigmine Patent Litigation*, 2005 WL 2319005, \*4 (“Such economic rights, standing alone, are generally not sufficient to support application of the common interest doctrine. ).

**Second Circuit.** See *Microsoft Corp. v. Acacia Research Corp.*, 113 U.S.P.Q.2d 2029, 2014 WL 6450254, \*2 (S.D. N.Y. 2014) (rejecting common interest protection for communications shared with patent sellers by non practicing agency during due diligence process where interests were only commercial in nature (royalty payments)); *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 893 (S.D. N.Y. 1999), on reargument, 187 F.R.D. 148 (S.D. N.Y. 1999) (Even though the plaintiff and BankBoston would benefit from a judgment in favor of the plaintiff, the court held that sharing a desire to succeed in an action in and of itself does not create a common interest.). See *Johnson*

[Matthey, Inc. v. Research Corp.](#), 2002 WL 1728566, \*6 7 (S.D. N.Y. 2002) ("the shared desire to maximize royalty income is ... simply a commercial concern").

73 [Chambers v. Allstate Ins. Co.](#), 206 F.R.D. 579, 52 Fed. R. Serv. 3d 1183 (S.D. W. Va. 2002).

74 [Chambers](#), 206 F.R.D. at 589.

75 See [In re Teleglobe Communications Corp.](#), 493 F.3d 345, 365 (3d Cir. 2007), as amended, (Oct. 12, 2007) ("The Restatement takes a more flexible approach than *Duplan* toward the similarity and types of interests that qualify as 'common': 'The common interest ... may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent. Restatement (Third) of the Law Governing Lawyers § 76 cmt. e.").

76 [J.E. Dunn Const. Co. v. Underwriters at Lloyd's London](#), 2006 WL 1128777, \*2 (W.D. Mo. 2006).

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## APPENDIX

**WILLIAM JOHN CRITTENDEN**

**May 11, 2018 - 6:38 PM**

**Transmittal Information**

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