

Common Interest Doctrine

Introduction

The common interest doctrine permits adversaries to share confidential information without waiving the attorney-client privilege or the work product doctrine. Whether plaintiffs or defendants, counsel and parties who oppose one another on some issues may nonetheless share confidential information on subjects of common interest privately.

Attorney Client Privilege

“‘[C]onfidential communication between client and lawyer’ means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.”¹

“Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure. A disclosure that is itself privileged is not a waiver of any privilege. A disclosure in confidence of a communication that is protected by a privilege when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted, is not a waiver of the privilege.”²

Work Product Doctrine

“It is the policy of the state to [p]reserve the rights of attorneys to prepare cases [in] privacy [and] [p]revent attorneys from taking undue advantage of their adversary’s industry and efforts. A writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.”³

Common Interest Doctrine

“The ‘joint defense privilege’ and the ‘common interest privilege’ have not been recognized by statute in California.”⁴ The common interest doctrine protects against “disclosure by relying on the principle that parties who possess common legal interests may share privileged information without losing the protection afforded by the privilege. This principle operates as an exception to the general rule that a privilege is waived upon voluntary disclosure of the privileged information to a third party, and has been variously referred to as the ‘joint defense’ doctrine, the ‘common interest’ doctrine, and the ‘pooled information’ doctrine, among other

¹ Evid. Code § 952 (ellipses omitted).

² Evid. Code § 912 (ellipses omitted).

³ Cd. Civ. Proc. § 2018 (ellipses omitted).

⁴ *OXY Resources Calif. LLC v. Superior Court (Calpine Natural Gas LP)* (2004) 9 Cal.Rptr 3d 621, 634 (*OXY*).

terms.”⁵ “[T]he common interest doctrine is more appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine.”⁶ “[T]here is no waiver by mutual disclosure of work.”⁷

Waiver by Disclosure

1. Attorney Client Privilege

“[T]he right of any person to claim lawyer-client privilege is waived if any holder of the privilege has disclosed a significant part of the communication.”⁸ “In California, the presence of third parties does not destroy confidentiality if the disclosure was reasonably necessary to accomplish the client’s purpose in consulting counsel. The statutory language is to the same effect.”⁹

2. Work Product Doctrine

“There is no statutory provision governing waiver of work product protection.”¹⁰ “[T]he work product privilege is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney’s work product and trial preparation. Normally, disclosure to a litigation adversary would be inconsistent with those policies.”¹¹

3. Common Interest Doctrine

California law of waiver of a privilege under the common interest doctrine adopts the rules of waiver applicable to the attorney-client privilege and the work product doctrine. “[W]hen disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted, [there is no] waiver of the privilege. While involvement of an unnecessary third person in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication.”¹²

In Camera Review

“Subject to certain exceptions not relevant here, subdivision (a) of Evidence Code section 915 provides that a court may not require disclosure of information claimed to be privileged in order to rule on a claim of privilege. The rule against in camera review, however, is not absolute. [C]ourts have recognized, if necessary to determine whether an exception to the privilege applies,

⁵ *Id.* at 633.

⁶ *Id.* at 635.

⁷ *Raytheon Co. v. Superior Court (Renault & Handley Employees Invest. Co.)* (1989) 208 Cal.App.3d 683, 687 (*Raytheon*).

⁸ Evid. Code § 912 (ellipses omitted); See, *Attorney-Client Privilege Waiver - MoL*.

⁹ *Raytheon, supra*, 208 Cal.App.3d at 688 (ellipses omitted); Evid. Code § 912(d).

¹⁰ *OXY, supra*, 9 Cal.Rptr.3d at 634; *Raytheon, supra*, 208 Cal.App.3d 683, 687.

¹¹ *Raytheon, supra*, 208 Cal.App.3d at 689 (ellipses omitted).

¹² *OXY, supra*, 9 Cal.Rptr.3d at 635-36 (citations, ellipses, and quotation marks omitted); *Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 765.

the court may conduct an in camera hearing notwithstanding section 915. Generally, in camera hearings should be limited to a determination whether there is an exception to, or waiver of, the privilege, and whether the exception or waiver depends on the content of the communication. Although the protection of the attorney-client privilege is absolute, the protection afforded by the common interest doctrine is qualified, because it depends on the content of the communication.”¹³

Adversaries Are Protected

Often called the joint defense doctrine, “the concept has expanded to include plaintiffs, parties in civil actions, parties who oppose one another in a case but are able to join forces on a particular issue of common interest, and parties who are not yet engaged in litigation but who coordinate efforts to avoid litigation even before litigation is foreseeable. Therefore, the more inclusive terminology of ‘common interest’ more accurately describes what was originally purely a joint defense concept.”¹⁴ “The Supreme Court has recognized that it is an ‘everyday reality that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information.’ Such sharing cannot abrogate the privilege protecting an attorney’s legal opinions.”¹⁵

Burden of Proof

“[T]he party seeking to invoke the [common interest] doctrine must first [1] establish that the communicated information would otherwise be protected from disclosure by a claim of privilege. For example, the content of the communication may comprise information shared in confidence by a client with his or her attorney, a legal opinion formed and advice given by the lawyer in the course of the attorney-client relationship, or a writing reflecting an attorney’s; [2] it is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential; [3] disclosure of the information must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted; [4] the two parties have in common an interest in securing legal advice related to the same matter; [5] the communications be made to advance their shared interest in securing legal advice on that common matter.”¹⁶

¹³ *Id.* at 640-41 (citations, ellipses, and quotation marks omitted).

¹⁴ *Id.* at 634.

¹⁵ *Fireman’s Fund Ins. Co. v. Superior Court (Front Gate Plaza, LLC)* (2011) 196 Cal.App.4th 1263, 1274, quoting *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1154.

¹⁶ *OXY, supra*, 9 Cal.Rptr.3d 621, 636-37 [numbering added] (ellipses omitted); see *First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co.* (N.D. Cal. 1995) 163 F.R.D. 574, 581; *Raytheon, supra*, 208 Cal.App.3d at pp. 688-689.