Common Interest Agreements

By Larry J. Saylor

The attorney-client privilege and work product doctrine, which protect communications between attorneys and clients for the purpose of seeking or providing legal advice, are among the oldest privileges recognized by the courts.[1] Ordinarily, however, the protection is waived if a privileged communication is disclosed to a third party. The common interest doctrine is an important and useful exception to this general rule. By entering into a common interest agreement—also known as a joint prosecution or joint defense agreement—attorneys for parties that are separately represented but share a common interest in prosecuting or defending a claim can freely communicate without waiving the attorney-client privilege or work product protection.[2]

Two recent published Court of Appeals decisions reinforce and clarify the common interest doctrine in Michigan, holding that it can apply even if litigation is not imminent, and even when one of the parties to the communication is not a party to pending litigation. The decisions, which adopt the prevailing federal common law, resolve some uncertainty in earlier decisions by Michigan's federal courts.[3] Parties intending to seek the protection of the common interest doctrine must make sure they in fact share a common legal interest and should enter into a common interest agreement. Although such an agreement need not be in writing, a written agreement can avoid some common problems, including unrecognized conflicts of interest that can lead to disqualification of counsel.

The common interest doctrine and the attorney-client privilege

In *Estate of Nash v City of Grand Haven*,[4] the plaintiff's decedent was killed in a sledding accident at Duncan Park in Grand Haven. The plaintiff sued the Duncan Park Commission, the Duncan Park trustees, and a groundskeeper, Robert DeHare. The plaintiff then served the city, a nonparty to the tort suit, with a request for documents and information relating to the accident under the Freedom of Information Act (FOIA).[5] The city denied the request in part, relying on the attorney-client privilege, and the plaintiff subsequently sued the city under FOIA.[6] The trial court held that certain documents the plaintiff sought were exempt from disclosure because they were covered by the attorney-client privilege, and the Court of Appeals affirmed.[7]

The Court of Appeals began its analysis by noting, "The attorney-client privilege attaches to communications made by a client to an attorney acting as a legal adviser and made for the purpose of obtaining legal advice."[8] The Court, like the trial court, then looked to a federal decision, *United States v BDO Seidman*, for guidance in applying the common interest doctrine.[9] In *BDO Seidman*, the Seventh Circuit relied on proposed Federal Rule of Evidence 503, which was put forward in 1972 but never adopted. The proposed rule stated:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) *by him or his lawyer to a lawyer representing another in a matter of common interest*, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.[10] (Emphasis added.)

In *BDO Seidman*, an accounting firm was involved in litigation with the IRS about potentially abusive tax shelters, and a lawyer for the accounting firm asked the firm's outside tax counsel for legal advice on pending IRS regulations.[11] The resulting memo was shared not only with the lawyer who requested it, but also with an attorney at a different law firm who did not represent the

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accounting firm but "serviced the same clients as the accounting firm 'on the same or related matters.'"[12] The Seventh Circuit supported the district court's conclusion that the memo was within the scope of the common interest doctrine because the accounting firm and the law firm "shared a common legal interest in ensuring compliance with the new regulation issued by the IRS, and in making sure that they could defend their [work] product against potential IRS enforcement actions."[13]

Applying this reasoning, the Court of Appeals in *Nash* held that although the city was not a defendant in the underlying tort litigation, it had a common interest with the defendants because one of the issues in the litigation was whether the city owned the park, the city's insurance covered the Park Commission through a license agreement, and the city had provided counsel for the groundskeeper.[14] In sum, "the tort defendants were involved in a joint effort to prevent or limit liability from attaching to the parties involved in the operation of Duncan Park."[15] The Court further held that communications between the city and the Michigan Attorney General's Office regarding the accident were within the scope of the common interest doctrine because the attorney general was a necessary party to a proceeding to reform the park's charitable trust.[16]

Common interest and the attorney work product doctrine

The *Nash* Court relied on the Court of Appeals' 2014 decision applying federal common interest caselaw to the work product doctrine. In *D'Alessandro Contracting Group, LLC v Wright*, the Court of Appeals considered whether an investigative report prepared for the defendants by an independent engineering firm constituted work product, and whether the protection was waived when the defendant shared the report with its indemnitor, AECOM.[17] The Court began by noting that "[t]he touchstone of the work-product doctrine is whether notes, working papers, memoranda or similar materials were prepared in anticipation of litigation."[18] The Court held that the report was at least in part work product because it was prepared in anticipation of litigation.[19]

Applying federal caselaw, the *D'Alessandro* Court then held that "the work-product doctrine protects an attorney's work from falling into the hands of an adversary"[20] so that "disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor (defendants) and the recipient (AECOM)."[21] Since the defendant and AECOM had a common interest in defending against potential litigation, the Court concluded, the defendant's disclosure of the report to AECOM did not waive work product protection.[22] Nor did the fact that AECOM was a potential adversary result in a waiver: "[T]he possibility of a future dispute between [the receiving party] and [the disclosing party] does not render [the receiving party] a potential adversary for the present purpose."[23] The Court remanded, however, for an *in camera* review to determine whether the report was work product in its entirety and a decision on whether the protection was waived when the defendant disclosed the report to the plaintiff's surety, Safeco.[24]

Parameters of the common interest doctrine

As the courts in *Nash* and *BDO Seidman* noted, "[a]lthough occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person."[25] Thus, the common interest doctrine applies only to communications that would otherwise be protected by the attorney-client privilege or work product doctrine. The *Nash* Court observed, "[t]he scope of the privilege is narrow: it attaches only to confidential communications by the client to its advisor that are made for the purpose of obtaining legal advice."[26] Thus, "the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing legal enterprise."[27] Nevertheless, in Michigan and many other jurisdictions, "communications need not be made in anticipation of litigation to fall within the common interest doctrine."[28] Because some other courts disagree,[29] counsel should research the law in each jurisdiction where common interest protection is desired.

In general, the common interest doctrine applies only to communications between counsel, communications where counsel are present, or communications between representatives of the same client. Communications between separately represented clients made outside the presence of counsel are not protected.[30]

Any participant in a common interest agreement can invoke the privilege against third parties, even if the particular communication was not made by or to that party.[31] While Michigan courts have not considered the issue, the general rule is that each party to a common interest agreement can waive the privilege only as it applies to that party's own communications.[32] Communications covered by a common interest agreement are normally not privileged in a later adverse proceeding between the parties.[33]

Should you have a written common interest agreement?

The Court in *Nash* did not require a written common interest agreement, and other courts agree that the common interest doctrine does not require any writing. As one

federal court has noted, "[t]he common interest doctrine requires a meeting of the minds, but it does not require that the agreement be reduced to writing…."[34] Nevertheless, many authors recommend that common interest agreements be in writing.[35] A written common interest agreement can clearly identify the parties' common interest, define which communications are privileged, establish the parties' obligation of cooperation and confidentiality, and prescribe standards and procedures for membership and withdrawal—helpful provisions if the validity or applicability of the agreement is challenged.

Perhaps most importantly, a written agreement can confirm that each party is represented only by its own counsel and expressly waive any conflicts of interest that may result from attorneys' receipt of other parties' confidential information. As the Western District of Michigan held in granting a motion to disqualify counsel, while the "general rule [is] that there is no attorney-client relationship between counsel for co-defendants in a joint defense situation,…[n]umerous authorities recognize that, even where counsel are acting in a joint defense situation on behalf of their own clients, the circumstances of that representation may create an implied attorney-client relationship with co-defendants."[36]

Is there a downside to a written common interest agreement? Apart from the effort of drafting and signing, a written agreement might be discoverable and could assist an opponent in arguing that a communication was outside the scope of the privilege.[37] A common interest agreement has also been offered in evidence as proof of witness bias.[38]

Conclusion

The common interest doctrine is a valuable tool that allows attorneys representing separate parties to share information and strategies without waiving the attorney-client privilege or work product protection. Parties wanting to take advantage of the doctrine in Michigan should make sure they share a common legal interest, understand the other boundaries of the doctrine, and enter into a common interest agreement. While an agreement need not be in writing, a written common interest agreement can help to defeat a challenge and avoid conflicts of interest. ■

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ENDNOTES

1. *Upjohn Co v United States*, 449 US 383, 390; 101 S Ct 677; 66 L Ed 2d 584 (1981) and *United States v Nobles*, 422 US 225, 237; 95 S Ct 2160; 45 L Ed 2d 141 (1975).
2. *In re Teleglobe Communications Corp*, 493 F3d 345, 364 (CA 3, 2007).
3. Earlier caselaw is discussed in Linna & Warren, *Common-Interest or Joint-Defense Agreements: Legal Requirements, Potential Pitfalls, and Best Practices*, 32 Mich Bus L J 1, 11–20 (Spring 2012) <https://www.honigman.com/media/site_files/554_linna_warren.pdf> (accessed March 20, 2018).
4. *Estate of Nash v City of Grand Haven*, 321 Mich App 587; ___ NW2d ___ (2017).
5. *Estate of Nash*, 321 Mich App at 590.
6. *Id.* MCL 15.243(1)(g) provides that "A public body may exempt from disclosure as a public record under this act…[i]nformation or records subject to the attorney-client privilege."
7. *Estate of Nash*, 321 Mich App at 591.
8. *Estate of Nash*, 321 Mich App at 593, quoting *Herald Co v Ann Arbor Pub Schs*, 224 Mich App 266, 279; 568 NW2d 411 (1997).
9. *Estate of Nash*, 321 Mich App at 594.
10. *United States v BDO Seidman*, 492 F3d 806, 815 (CA 7, 2007). See also Restatement of the Law Governing Lawyers, 3d, § 76(1) ("If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged… that relates to the matter is privileged as against third persons.").
11. *BDO Seidman*, 492 F3d at 809.
12. *BDO Seidman*, 492 F3d at 813.
13. *BDO Seidman*, 492 F3d at 816 (quotation marks and citation omitted).
14. *Estate of Nash*, 321 Mich App at 598–600.
15. *Estate of Nash*, 321 Mich App at 600.
16. *Estate of Nash*, 321 Mich App at 601.
17. *D'Alessandro Contracting Group, LLC v Wright*, 308 Mich App 71, 74–75; 862 NW2d 466 (2014).
18. *D'Alessandro Contracting*, 308 Mich App at 77 (quotation marks and citation omitted).
19. *D'Alessandro Contracting*, 308 Mich App at 79.
20. *D'Alessandro Contracting*, 308 Mich at 83, quoting *In re Chevron Corp*, 633 F3d 153, 165 (CA 3, 2011).
21. *D'Alessandro Contracting*, 308 Mich App at 82–83 (citation omitted).
22. *D'Alessandro Contracting*, 308 Mich App at 85.
23. *D'Alessandro Contracting*, 308 Mich App at 85–86, quoting *United States v Deloitte*, 610 F3d 129, 140 (CA DC, 2010).
24. *D'Alessandro Contracting*, 308 Mich App at 88.
25. *BDO Seidman*, 492 F3d at 815, quoted in *Estate of Nash*, 321 Mich App at 596.
26. *Estate of Nash*, 321 Mich App at 593, quoting *Herald Co*, 224 Mich App at 279.
27. *Estate of Nash*, 321 Mich App at 596, quoting *BDO Seidman*, 492 F3d at 815–816.
28. *Id.*
29. See, e.g., *In re Santa Fe Int'l Corp*, 272 F3d 705, 711 (CA 5, 2001) (common interest privilege applies only where there is a "palpable threat of litigation" at the time of the communications).
30. *Estate of Nash*, 321 Mich App at 595 (quoting proposed FRE 503); *In re Teleglobe Communications Corp*, 493 F3d 345, 364–365 (CA 3, 2007).
31. See Restatement of the Law Governing Lawyers, 3d, § 76(1).
32. See *In re Teleglobe Communications Corp*, 493 F3d at 364 ("a client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients." The same principles should apply in a common interest situation).
33. See Restatement of the Law Governing Lawyers, 3d, § 76(2) ("Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them").
34. *Hunton & Williams v Dept of Justice*, 590 F3d 272, 287 (CA 4, 2010).
35. See, e.g., Carlson, *The Joint Defense Privilege: An Illusion or a Magic Wand?*, in The Attorney-Client Privilege in Civil Litigation, pp 595, 601–603 (Walkowiak, ed, ABA, 2008).
36. *City of Kalamazoo v Michigan Disposal Serv Corp*, 125 F Supp 2d 219, 234 (WD Mich 2000).
37. See, e.g., *Hunton & Williams*, 590 F3d at 285–286; *Lureen v Holl*, unpublished opinion of the United States District Court for the Southern Division of South Dakota, issued August 31, 2017 (Case No. 4:17-CV-04016-LLP); *Beyond Systems, Inc v Kraft Foods, Inc*, unpublished opinion of the United States District Court for the District of Maryland, issued April 23, 2010 (Case No. PJM-08-409).
38. *Harris Corp v Federal Express Corp*, unpublished opinion of the United States District Court for the Middle District of Florida, issued July 19, 2010 (Case No. 6:07-CV-1819-Orl-28KRS) (denying motion in limine to exclude evidence of joint defense agreement between nonparties).