

9-19-2016

Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit

Jared S. Sunshine

Follow this and additional works at: <https://scholarship.law.edu/lawreview>



Part of the [Legal Profession Commons](#), and the [Other Law Commons](#)

Recommended Citation

Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 Cath. U. L. Rev. 833 (2016).

Available at: <https://scholarship.law.edu/lawreview/vol65/iss4/10>

This Essay is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit

Cover Page Footnote

J.D., *cum laude*, Fordham University School of Law, 2008; B.A., Columbia College of Columbia University in the City of New York, 2004. The views expressed in this Article are the author's alone, and do not represent those of the abovesaid entities or any other.

SEEKING COMMON SENSE FOR THE COMMON LAW OF COMMON INTEREST IN THE D.C. CIRCUIT

Jared S. Sunshine⁺

“Suffice to say, it is impossible to conclude that the common law, as interpreted in this and other jurisdictions, provides a clear explanation of what a common interest is.”¹

The attorney-client privilege is the most ancient and revered of the evidentiary protections cognizable at common law.² At base, it provides that communications between attorney and client are undiscoverable so long as their purpose is legal and the exchange remains confidential.³ Its *nouveau riche* kinsman, the work product privilege,⁴ may be later to the scene, but has rapidly established itself as a central aegis of the American adversarial system.⁵ Rather than focusing on communications with counsel, it shields any documents prepared in preparation for litigation.⁶ Yet both are often frustrated

⁺ J.D., *cum laude*, Fordham University School of Law, 2008; B.A., Columbia College of Columbia University in the City of New York, 2004. The views expressed in this Article are the author’s alone, and do not represent those of the abovesaid entities or any other.

1. *Miller v. Holzmann*, 240 F.R.D. 20, 22 (D.D.C. 2007).

2. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (*citing* 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”); 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 1:1-2 (2d ed. 1999). *See generally* Geoffrey Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

3. *Upjohn*, 449 U.S. at 389–90 (1981); *see also* *Fisher v. United States*, 425 U.S. 391, 403 (1976); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 866–67 (1998) (observing that clients can waive the attorney-client privilege by “voluntarily disclosing a communication to third parties, [or] failing to take reasonable precautions to preserve the confidentiality [of information].”).

4. Although many sources use the terminology “protection” rather than “privilege” in regard to work product, this Article adopts the latter in view of the usual outcome that material protected under the work product doctrine is in fact privileged from discovery. *See generally* Sherman L. Cohn, *The Work Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 917, 923 (1982). *See also, e.g.*, *Haines v. Liggett Group Inc.*, 975 F.2d 81, 94 (3d Cir. 1992) (referring to both attorney-client and work product as privileges); *cf. infra* note 34 and accompanying text (discussing terminology in regard of other evidentiary privileges).

5. *See Hickman v. Taylor*, 329 U.S. 495, 511–12 (1947); *Union Carbide Corp. v. Dow Chemical Co.*, 619 F. Supp. 1036, 1050 (D. Del. 1985) (“When compared to the seasoned existence of the attorney-client privilege, the work product doctrine stands as a virtual newcomer to federal jurisprudence.”).

6. *Upjohn*, 449 U.S. at 397–98; *United States v. Nobles*, 422 U.S. 225, 236–40 (1975); *Hickman*, 329 U.S. at 511; *see also* Fed. R. Civ. P. 26(b)(3).

by the modern complexity of legal actions.⁷ Where once the attorney served as confidante to a single client, contemporary corporate counsel regularly find themselves advising sprawling multipartite enterprises working in tandem with others to achieve their goals.⁸ As the Supreme Court has explained, given “the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law’ . . . particularly since compliance with the law in this area is hardly an instinctive matter.”⁹

Adapting venerable common law to such changing times has not proven easy. In particular, the attorney-client privilege has long been said to require strict confidentiality, lest its protections be waived.¹⁰ Commentators have often noted that waiver may be a misnomer, since clients normally do not willingly forgo the privilege, but rather forfeit it involuntarily or inadvertently through actions inconsistent with secrecy.¹¹ Any sort of third party—even advisors relevant to rendering legal advice—endangers the inviolability of the protected conversation.¹² The risk is almost greater for the fact that forfeiture

7. See Rice, *supra* note 3, at 863–65; Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 77–78 (2005).

8. See, e.g., Rice, *supra* note 3, at 863–65.

9. *Upjohn*, 449 U.S. at 392 (quoting Bryson B. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW 901, 913 (1969)); see also *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417 (N.D. Ill. 2006); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976).

10. Rice, *supra* note 3, at 853–57 (“In all formal definitions of the attorney-client privilege, whether employed in state or federal courts, the client or the attorney must communicate with the other *in confidence*, and subsequently that confidentiality must have been maintained.”); see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (“But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney.”); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (“Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.”).

11. See EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 390 (5th ed. 2007); cf. *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (“Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’”)); *United States v. Wesley*, 422 F.3d 509, 520 (7th Cir. 2005) (“A forfeiture is basically an oversight; a waiver is a deliberate decision”). *But cf.* *Eisenberg v. Gagnon*, 766 F.2d 770, 788 (3d Cir. 1985) (quoting *In re Grand Jury Empanelled October 18, 1979 (Appeal of Malfitano)*, 633 F.2d 276, 280 (3d Cir. 1980)) (“No matter what standard of waiver [of privilege] is applied, the waiver must be knowing.”).

12. 8 JOHN HENRY WIGMORE, *EVIDENCE* § 2311 (McNaughton rev. 1961) (“One of the circumstances by which it is commonly apparent that the communication is not confidential is the *presence of a third person*”); e.g., *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 141 (D. Del. 1982) (“The presence of nonessential third parties not needed for the transmittal of the information will negate the privilege.”).

can be unpredictable.¹³ Such severe strictures hearken back to the origins of the privilege with barristers as tradesmen-*cum*-gentlemen, leading to the corollary that the attorney-client privilege was a sort of trade secret attendant to their gentlemanly calling.¹⁴ Behavior inconsistent with secrecy negated the privilege,¹⁵ and such a privilege was by definition confined to the litigation on which the barrister was instructed.¹⁶

As time passed, however, these traditional contours of privilege law increasingly fell short of serving their desired objectives.¹⁷ Attorney-client privilege expanded from barristers engaged in a case at bar to encompass any legal matter.¹⁸ Indeed, the very purpose of the privilege was reconceived as not an adjunct to the gentleman esquire, but a right vested in the client to confide in his chosen counselor.¹⁹ From a public policy perspective, the

13. Compare, e.g., *In re G-I Holdings*, 218 F.R.D. 428, 434–35 (D.N.J. 2003) (accountant present to explain client’s proposed tax structure to counsel negated privilege), and *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54–55 (S.D.N.Y. 2000) (privilege negated in communications with public relations firm), with *FTC v. GlaxoSmithKline*, 294 F.3d 141, 147–48 (D.C. Cir. 2002) (privilege upheld in communications with public relations firm), *United States v. Judson*, 322 F.2d 460, 462–63 (9th Cir. 1963) (privilege upheld through intermediary), and *Miller v. Haulmark Transp. Sys.*, 104 F.R.D. 442, 445 (E.D. Pa. 1984) (privilege also upheld through intermediary).

14. See Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 487 (1928) (“Since some lawyers were gentlemen almost *virtute officii*, the common obligation of gentlemen not to betray a confidence reposed in them constituted, as Dean Wigmore has shown, the original basis of the protection accorded to communications between barrister and those who instructed him.”); Hazard, *supra* note 2, at 1070 (observing that “some of the early cases express the idea that the privilege was that of the lawyer (a gentlemen does not give away matters confided to him)”); *id.* at 1071 (explaining that “at one time the privilege was thought to belong to the lawyer rather than the client [because] [a] barrister was considered not merely an ‘officer’ of the court but a member of it, who could no more properly be asked to reveal a client’s confidences than a modern judge could be asked to disclose matters heard *in camera*”).

15. See, e.g., *Blackburn*, 128 U.S. at 470.

16. See Radin, *supra* note 14, at 487; see also Hazard, *supra* note 2, at 1090–91 (“As one can see, ‘tradition,’ both English and American, thus clearly sustained a privilege confined to those communications that are related directly to pending or anticipated litigation.”).

17. See Radin, *supra* note 14, at 487–91; compare Hazard, *supra* note 2, at 1070–73, with *id.* at 1075–85.

18. See generally Hazard, *supra* note 2, at 1073–85; see also WIGMORE, *supra* note 12, §§ 2294–95 at 558–62, 565; *Spectrum Sys. Int’l. Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1061 (N.Y. 1991) (stating “the attorney-client privilege is not tied to the contemplation of litigation”).

19. See Hazard, *supra* note 2, at 1070 (“as the rule developed the privilege became that of the client to have his secrets protected”); RICE, *supra* note 2, § 1:3 at 8–9. By contrast, the work product privilege is held jointly by both attorney and client, and can be asserted by either. See *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994) (“Accordingly, the work product privilege was adequately asserted below by both the Lawyer and the appellant.”); see also *In re Sealed Case*, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982) (finding that the “work product privilege belongs to the lawyer as well as the client”).

privilege now sought to encourage clients to consult early and often with learned counsel, both to avoid litigation *ab initio*, and to preserve counsel's ability to elicit the full facts necessary to discharge their professional responsibilities without compromising their clients.²⁰ Nonetheless, the primeval necessity of strictest secrecy has persisted,²¹ notwithstanding cogent arguments from respected scholars that it should be relaxed in light of modern circumstances.²²

This Article explores the contours of confidentiality amongst multiple parties, specifically with reference to communications between competitors and combining companies, and the D.C. Circuit whose precedent is so important in such antitrust matters. Part I sets forth the related joint defense and common interest doctrines that define privilege where more than one client is involved, seeking to slice through the lack of clarity about their parameters to identify how they overlap and differ. In particular, this Part focuses on the so-called litigation requirement, which would problematically deny privilege to multiple parties that are not actively confronting a lawsuit. Part II examines precedent on these issues in the D.C. Circuit, identifying how certain misconceptions have flourished and how they might be resolved. Finally, Part III looks to the rationales behind the best reconciliation of the D.C. Circuit Court of Appeals' precedent with many of its sister circuits and public policy considerations.

As with many issues at law, the commentariat is sharply split as to the proper metes and bounds of privilege.²³ Some have forcefully argued that common interest privilege is an incoherent or ill-conceived excrescence of traditionally narrow privilege law.²⁴ Others have defended common interest as

20. See *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 407 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389, 398 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976); Radin, *supra* note 14, at 490; see also *United States v. BDO Seidelman LLP*, 492 F.3d 806, 816 (7th Cir. 2007) (finding advance consultation with attorneys "serves the public interest by advancing compliance with the law"); *Spectrum*, 581 N.E.2d at 1061 ("Legal advice is often sought, and rendered, precisely to avoid litigation").

21. See RICE, *supra* note 2, at 853–57.

22. See generally *id.* at 888–91, 893–98 (hypothesizing what a more relaxed approach to the attorney-client privilege would be like if the requirement of confidentiality was lost and what it would mean for attorney-client communications).

23. See generally Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQUETTE L. REV. 475 (2012) (proposing limitations on the attorney-client privilege, including removing the privilege in the "allied lawyer setting"); Edward J. Imwinkelried, *Symposium on Criminal Discovery, The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L. Q. 19 (1990) (questioning the practice of applying the attorney-client privilege to non-testifying expert witnesses).

24. See Geisel, *supra* note 23, at 475, 480–87. Extending attorney-client privilege in common interest situations has been criticized for "not encourag[ing] frank attorney-client

supported by the same rationale as the underlying privilege, with little cost to the search for truth.²⁵ And well-heeled scholars have more generally decried the strictures of confidentiality and called for a still-broader conception of privilege.²⁶ Looking to the Supreme Court's holdings, this author would tend to side more with a broader privilege, recognizing its invaluable role in the development of the modern legal profession and representation.²⁷ Nonetheless, clarification of the common interest doctrine, notably in the D.C. Circuit, is imperative to ensure that parties may depend on the application of whatever view ultimately prevails.²⁸

I. THE COMMON LAW OF COMMON INTEREST

Nowhere is secrecy more problematic than where companies collaborate towards a common legal end, as happens frequently in an age of global interdependency.²⁹ If they seek to retain common counsel in a lawsuit, or their respective counsel cooperate on issues of mutual importance, they might once have been thought to forfeit their privilege.³⁰ The judicial response was the development of two closely related doctrines generally known as joint defense (or, on the other side of the aisle, joint prosecution) and common interest.³¹ Under these analyses, materials disclosed between parties allied in a lawsuit or sharing a common legal interest remain privileged from discovery, notwithstanding the presence of a nominal third party.³² These doctrines are not freestanding privileges, but exceptions or exemptions preventing forfeiture of the underlying attorney-client or work product privilege.³³ Nonetheless, it

communications that can improve legal representation, which is the heart of the privilege's purpose." *Id.* at 482. In addition, "[o]ther proposed justifying rationales—such as increased efficiency of representation, increased efficiency of the judicial system, or increased effectiveness of representation—cannot survive cost-benefit analysis." *Id.*

25. See generally Schaffzin, *supra* note 7; see also James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 634 (1997).

26. See generally Rice, *supra* note 3, at 856–60; cf. Douglas R. Richmond, *The Case Against Selective Waiver of the Attorney-Client Privilege and Work Product Immunity*, 30 AM. J. TRIAL ADVOC. 253 (2006) (illustrating some of the difficulties that arise from strict confidentiality requirements, including those arising from selective waivers of confidentiality).

27. Rice, *supra* note 3, at 856–60.

28. See generally *supra* notes 25–27 and accompanying text.

29. See *Am. Auto. Ins. Co. v. J.P. Noonan Transp., Inc.*, No. 970325, 2000 WL 33171004, at *7 (Mass. Super. Ct. Nov. 16, 2000); Schaffzin, *supra* note 7, at 77–78 (discussing and quoting at length).

30. See *supra* notes 7–22 and accompanying text.

31. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 75–76 (AM. LAW INST. 2000).

32. See *id.* § 76 cmt. c.

33. See, e.g., *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 94 (3d Cir. 1992) (common interest or joint defense allows parties “to exchange privileged communications and attorney work

will be expedient to refer to them as evidentiary privileges rather than mere doctrines, as the result of their application is that otherwise discoverable documents remain privileged.³⁴ The vast majority of the states,³⁵ and every circuit court of appeals,³⁶ have adopted some form of the joint defense or common interest privilege.

A. The Menagerie: Co-Clients, Joint Defense, and Common Interest

An initial question is whether joint defense and common interest are distinct, or only different names for the same doctrine. Further complicating matters, there is a third animal in this terminological menagerie, co-client privilege.³⁷ The Third Restatement of the Law Governing Lawyers draws a line between this distinct co-client privilege, where multiple clients are represented by the same attorney; and common interest, where clients are represented by separate counsel as to a shared issue.³⁸ The Restatement then unhelpfully, if candidly, points out that “[t]erms such as ‘joint defense’—less frequently, ‘common defense’—are sometimes applied to” common interest.³⁹ In fairness, Justice Antonin Scalia rightly observed that the rules propounded in modern Restatements are often “aspirational” rather than descriptive of judicial

product in order to adequately prepare a defense without waiving either privilege”); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987).

34. *E.g.*, *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989) (defining “joint defense privilege”); *Waller*, 828 F.2d at 583 n.7 (same); *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (same); *Lieberman v. Gelstein*, 80 N.Y.2d 429, 437 (N.Y. 1992) (defining “‘common interest’ privilege”); *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002) (defining joint defense and common interest privilege). *But see also Oxy Res. Cal. LLC v. Sup. Ct. of Solano Cty.*, 9 Cal. Rptr. 3d 621, 634–35 (Cal. Ct. App. 2004) (“The ‘joint defense privilege’ and the ‘common interest privilege’ have not been recognized by statute in California. For this reason, we will refer to the joint defense or common interest doctrine, rather than the joint defense or common interest privilege, to avoid suggesting that communications between parties with common interests are protected from disclosure by virtue of a privilege separate from the attorney-client privilege, the work product doctrine, or any other statutorily recognized evidentiary privilege.”) (citations omitted). By way of comparison, *see supra* note 4 (discussing terminology anent work product).

35. *See* Greg A. Drumright & W. Rick Griffin, *Chapter 3: The Joint Defense Doctrine—Cohesion Among Traditional Adversaries* in EVIDENTIARY PRIVILEGES FOR CORPORATE COUNSEL 35, 42–43 (Defense Research Institute 2008) (chart showing adoption by state); *see also* Schaffzin, *supra* note 7, at 52–53 n.7.

36. *See* Drumright & Griffin, *supra* note 35, at 41 (chart showing adoption by circuit); *see also* Schaffzin, *supra* note 7, at 52–53 n.7.

37. *See infra* note 38 and accompanying text.

38. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (AM. LAW INST. 2000) (co-client privilege), *with id.* § 76 (common interest privilege).

39. *See id.* § 76 (reporters note).

consensus.⁴⁰ Still, many authorities have echoed the Restatement's fundamental division based on singular or multiple counsel.⁴¹

The Restatement is quite correct, in any event, that courts and commentators alike have conflated joint defense and common interest doctrines at times.⁴² Some expressly make no distinction at all, implicitly finding the difference to be mere nomenclature.⁴³ Others, getting closer to the reality, describe the earlier development of joint defense theory and its eventual development into modern common interest doctrine.⁴⁴ Many fail to clearly distinguish co-client representations at all, viewing them simply as joint defense or common interest arrangements with shared rather than separate counsel⁴⁵—despite nigh-unanimous admonitions by commentators against conflating co-client with joint defense or common interest relationships.⁴⁶ At least a few courts,

40. See *Kansas v. Nebraska*, 574 U.S. 1045, 1064 (2015) (Scalia, J., dissenting) (“I write separately to note that modern Restatements . . . are of questionable value, and must be used with caution And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.”); see also Jeffrey P. Schomig, *The Ability of Trade Associations to Receive Advice on Antitrust and Other Legal Risks: Are These Communications Protected from Discovery?*, BLOOMBERG LAW REPORTS: ANTITRUST & TRADE, Vol. 4, No. 6 (2011) (noting that the Restatement of Law is “a guide that carries no independent authority”).

41. See generally, e.g., Giesel, *supra* note 23, at 521–23, 533–34.

42. See Jason M. Rosenthal, *Joint Defense Agreements and the Common Interest Privilege* in A YOUNG LAWYER'S GUIDE TO DEFENSE PRACTICE 147, 148 (2008) (“The courts frequently use the terms ‘joint defense privilege’ and ‘common defense (or common interest) privilege’ interchangeably.”); EPSTEIN, *supra* note 11, at 275 (“Federal courts have use the term ‘joint defense privilege’ to refer to both the joint client privilege and the ‘common interest’ privilege.”).

43. See, e.g., *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) (“The joint defense privilege [is] also known as the common interest rule[.]”); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (opining the “joint defense privilege” should be called the “common interest rule”); Drumright & Griffin, *supra* note 35, at 38 (“While the doctrine is occasionally referred to by courts and legal scholars as the joint defense privilege or the joint defense doctrine, the more appropriate name . . . is the common interest doctrine.”).

44. E.g., *In re Grand Jury Subpoenas*, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990). See also Schaffzin, *supra* note 7, at 61–63.

45. *In re Teleglobe Comm'n Corp.*, 493 F.3d 345, 363 n.18 (3d Cir. 2007) (“[M]uch of the caselaw confuses the community-of-interest privilege (which is the same as the ‘common-interest privilege’ . . .) with the co-client privilege.”) (citation omitted); see, e.g., Michael Pavento, Daniel H. Marti, Tracie Siddiqui & Patrick Eagan, *Applicability of the Common Interest Doctrine for Preservation of Attorney-Client Privileged Materials Disclosed During Intellectual Property Due Diligence Investigations* in INTELLECTUAL PROPERTY DESK REFERENCE 353, 353 (2009) (describing joint litigant privilege as a subset of common interest in which the clients are “represented by the same attorney or different attorneys”).

46. See e.g., Drumright & Griffin, *supra* note 35, at 37 (“The terms joint defense doctrine and joint defense privilege should not be confused with the term ‘joint client doctrine.’ The joint client doctrine protects confidential communications between co-parties and their common, as opposed to separate, counsel.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 cmt. c (AM. LAW INST. 2000) (“Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person with allied interests

however, have managed to penetrate the doctrinal disarray to clearly identify the three basic species of multi-party privilege: “joint client” (*i.e.*, what the Restatement calls co-client), “joint litigant” (*i.e.*, what most courts call joint defense or joint prosecution privilege), and “common interest.”⁴⁷ For the sake of consistency and of adhering to the most frequently used terms, this Article will follow the Restatement in denominating these three species: co-client, joint defense, and common interest privilege.⁴⁸

The threesome are best seen as various overlapping stages in the protracted evolution of multi-party privilege. Codefendants have long had the right to coordinate a common front and defense by retaining joint counsel, without chancing that their strategizing be disclosed.⁴⁹ Such co-client representations were regular occurrences in the early United States, and although they had their origin in criminal prosecutions,⁵⁰ there has never been any bar to clients jointly seeking a lawyer’s advice on a civil matter,⁵¹ or in matters unconnected to litigation at all.⁵² Corporate persons may avail themselves of co-client arrangements no less than natural persons.⁵³ However, the approach and

cooperates with the client and the client’s lawyer (see § 76.”); *see also* Giesel, *supra* note 23, at 478–80 (advocating for distinguishing joint defense and common interest from co-client postures); Fischer, *supra* note 25, at 634–35 (advocating for distinguishing between the often “mangled” use of co-client and co-litigant concepts).

47. *E.g.*, *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 347–48 (N.D. Ohio 1999); *see* Rosenthal, *supra* note 42, at 148 (discussing *Libbey Glass*); *see also* Fischer, *supra* note 25, at 634–35 (distinguishing the three species).

48. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 75–76 (AM. LAW INST. 2000). Despite its use in the foundational common interest decision *Duplan Corp. v. Deering Milliken, Inc.*, this Article rejects the major competitor to the “common interest” terminology, “community of interest,” as adding prolixity but not clarity. 397 F. Supp. 1146, 1159 (D.S.C. 1974). The two are tantamount at law, however. *See In re Teleglobe*, 493 F.3d at 363 n.18 (“[T]he community-of-interest privilege . . . is the same as the ‘common-interest privilege[.]’”).

49. *See* Giesel, *supra* note 23, at 522–23 (“[H]istorically the attorney-client privilege has protected communications in joint client settings. Early cases in the United States do not treat this application of the privilege as controversial. Rather, it is treated as an accepted and indisputable point of law—an inherent side-effect of clients being clients as a group.”).

50. *See id.*; *see also, e.g.*, Craig S. Lerner, *Conspirators’ Privilege and Innocents’ Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1481 (2002) (indicating that early joint-defense agreements were often in criminal matters).

51. *See* Giesel, *supra* note 23, at 512 n.176; *see also* *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 937 (D.C. Cir. 1984).

52. *See, e.g., In re Mirant Corp.*, 326 B.R. 646, 648 (Bankr. N.D. Tex. 2005) (in which co-clients were involved in corporate divestiture); *see also In re Santa Fe Trail Transp. Co.*, 121 B.R. 794, 796 (Bankr. N.D. Ill. 1990) (same).

53. *See* RICE, *supra* note 2, § 4:23; *see also e.g., Mirant*, 326 B.R. at 648 (in which parent and subsidiary corporation were co-clients); *Santa Fe*, 121 B.R. at 796 (same).

positions taken by the co-clients must be strictly the same;⁵⁴ a single lawyer could not ethically pursue divergent tactics simultaneously for each of multiple co-clients.⁵⁵ This requirement follows naturally from the very definition of co-client arrangements: singular counsel representing plural clients.⁵⁶

The more generalized joint defense doctrine, allowing for separate counsel, arose in criminal suits against natural persons only in the nineteenth century.⁵⁷ Like the co-client setting, joint defense has since been applied to companies targeted by criminal and civil cases with regularity under the same rationale.⁵⁸

54. See RICE, *supra* note 2, § 4:30 at 195 (“When the same attorney simultaneously represents two or more clients on the same matter, the individuals being represented are considered joint clients.”); *e.g.*, FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) (“[T]he joint client exception presupposes that communications have been ‘made in the course of the attorney’s joint representation of a ‘common interest’ of the two parties.’ The term ‘common interest’ typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest.” (citations omitted)); Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850, 854–55 (7th Cir. 1974); Hillerich & Bradsby Co. v. MacKay, 26 F. Supp. 2d 124, 127 (D.D.C. 1998) (“The court concludes from these factors that the MacKays also shared the same common legal interest as H & B and Jack MacKay. Accordingly, the court rules the MacKays had a joint attorney-client relationship with Mr. Jacobson.”); see also Rudow v. Cohen, No. 85 Civ. 9323, 1988 WL 13746, at *4 (S.D.N.Y. Feb. 18, 1988) (finding that the shared privilege only extends to the specific subject matter of the joint representation, not other matters). *But see* sources cited *infra* note 84 (cataloguing authorities holding that very similar interests can suffice).

55. See RICE, *supra* note 2, § 4:30 at 198 (“Such joint representation is permissible from the attorney’s perspective as long as it does not create a conflict of interest that will require a division of the attorney’s loyalties.”); Giesel, *supra* note 23, at 481, 519–22; *e.g.*, Rosman v. Shapiro, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (holding that when co-clients’ interests “‘diverge and become antagonistic, their lawyer must be absolutely impartial between them, which usually means that he may represent none of them.’ To hold otherwise would undermine the loyalty and trust upon which the attorney-client relationship is based.”) (quoting HENRY S. DRINKER, LEGAL ETHICS 112 (1953)); see also E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 396–97 (S.D. Tex. 1969); *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1189 (N.D. Cal. 1993) (finding that the corporate counsel in a derivative securities suit must be different from that for the company and directors). *But see, e.g.*, Eureka Investment Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 937 (D.C. Cir. 1984) (finding the parties were co-clients even whilst the shared lawyer secretly colluded with one co-client against the other on a different matter, notwithstanding the patent ethical issues); *infra* note 90 and accompanying text.

56. See, *e.g.*, *Ogden*, 202 F.3d at 461.

57. See *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 841–42 (Va. 1871); Patricia Welles, Comment, *Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321, 324–25 (1981) (“Since *Chahoon v. The Commonwealth* in 1871, United States courts have recognized the attorney-client privilege in a joint defense. The general rule for joint defense situations can be stated simply. If individually retained attorneys for codefendants communicate in the furtherance of a joint defense, that communication is privileged.”); see also Giesel, *supra* note 23, at 504–08, 531, 536; Schaffzin, *supra* note 7, at 58–59.

58. See EPSTEIN, *supra* note 11, at 287 (“The concept of a joint or common defense has long since been extended to the civil context.”); RICE, *supra* note 2, § 4:35 at 254 nn.22–23 (“The protection is available in both criminal and civil contexts.”); Schaffzin, *supra* note 7, at 59–60 (“In the 1942 case *Schmitt v. Emery*, the Supreme Court of Minnesota became the first court to extend this joint defense privilege beyond the criminal context into the civil arena[.]”); Giesel,

By its nature, joint defense focuses on the alignment of the parties for a specific litigation, whether overtly threatened or pending.⁵⁹ This can be seen vividly in the emergence of the mirror-image, joint prosecution privilege to protect communications and work product exchanged by coplaintiffs.⁶⁰ The privilege extends to any statements in furtherance of defense strategy and positioning, even if the individual approach actually taken differs between defendants to the point of adversity.⁶¹ Although some loosely labeled “joint defense” arrangements involve co-clients represented by the same counsel,⁶² joint defense as a distinct privilege implies separate counsel acting in concert.⁶³ This distinction is crucial:⁶⁴ unlike the co-client posture, there is no ethical or practical bar to separate counsel coordinating strategy but ultimately making different choices that are best for their respective clients.⁶⁵ As the Fourth Circuit summed up:

supra note 23, at 531 (“First applied in *Chahoon v. Commonwealth* as a privilege applicable only in allied lawyer settings involving criminal matters in reference to a joint defense, courts now apply the privilege in both criminal and civil settings.” (citations omitted)); *see also* *W. Fuels Ass’n, Inc. v. Burlington N.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984).

59. *See* *Drumright & Griffin*, *supra* note 35, at 38 (The privilege “affords protection to confidential communications among jointly aligned co-parties and their separate counsel”); *Welles*, *supra* note 57, at 324–25; *see also*, *Hunydee v. United States*, 355 F.2d 183, 184–85 (9th Cir. 1965) (in which the husband and wife were both prosecuted for income tax infractions).

60. *See* *Schaffzin*, *supra* note 7, at 63–65; *Drumright & Griffin*, *supra* note 35, at 38; *In re Grand Jury Subpoenas*, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249–50 (4th Cir. 1990); *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685–86 (S.D. Cal. 1996) (citing *Grand Jury Subpoenas*, 902 F.2d at 249); *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 247 (C.D. Cal. 1993); *Sedlacek v. Morgan Whitney Trading Group, Inc.*, 795 F. Supp. 329, 331 (C.D. Cal. 1992).

61. *See Welles*, *supra* note 57, at 328–30 (citing cases for the “reality of joint defense—namely, that defendants’ interests often coincide only on certain issues”); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL § 18.03 (1982) (discussing the Supreme Court Standard 503, lawyer-client privilege); *Eisenberg v. Gagnon*, 766 F.2d 770, 787–88 (3d Cir. 1985) (“We agree with the district court’s ruling that the correspondence was privileged, since it is best viewed as part of an ongoing and joint effort to set up a common defense strategy between a defendant and an attorney who was responsible for coordinating a common defense position. Communications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests.”) (citing *United States v. McPartlin*, 595 F.2d 1321, 1336–37 (7th Cir. 1979)); *Hunydee*, 355 F.2d at 184–85 (describing criminal codefendants contemplating whether each should testify against the other); *see also* *Cont’l Oil Co. v. United States*, 330 F.2d 347, 349–50 (9th Cir. 1964).

62. *See, e.g.*, *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 965 (N.D. Ill. 2010) (describing the “‘joint-defense privilege,’ where two or more co-defendants are frequently represented by a single attorney”); *Pavento, Marti, Siddiqui & Eagan*, *supra* note 45, at 353.

63. *See, e.g.*, *Hunydee*, 355 F.2d at 184–85; *Grand Jury Subpoenas*, 902 F.2d at 249.

64. *See* sources cited *supra* notes 45–46; *see also, e.g.*, *Hunydee*, 355 F.2d at 184 (in which separate counsel was obtained “[b]ecause of a possible conflict of interest” between husband and wife).

65. *See* JEROME G. SNIDER, HOWARD A. ELLINS & MICHAEL S. FLYNN, CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 4.06 (2006) (“In the joint defense context, each

Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.⁶⁶

What then is common interest? By comparison to the previous two privileges, the common interest doctrine reaches further, protecting materials communicated amongst cooperating parties and their separate counsel on any matter in which they share a common legal interest.⁶⁷ Such an interest would not necessarily depend upon alignment in adversarial proceedings (as in joint defense),⁶⁸ nor upon the retention of common counsel (as for co-clients).⁶⁹

individual party has his or her own attorney and attorney-client relationship, there may be clear conflicts of interest among the parties, and communications among the parties may be guarded. In the multiple client context, there is only one lawyer for all the parties, the parties have either no conflicts of interest or have agreed to take the risks involved in such a situation, and generally speak freely when communicating with the common lawyer.”); *see also In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 366 (3d Cir. 2007) (“In particular, because co-clients agree to share all information related to the matter of common interest with each other and to employ the same attorney, their legal interests must be identical (or nearly so) in order that an attorney can represent them all with the candor, vigor, and loyalty that our ethics require In the community-of-interest context, on the other hand, because the clients have separate attorneys, courts can afford to relax the degree to which clients’ interests must converge without worrying that their attorneys’ ability to represent them zealously and single-mindedly will suffer.” (internal citations omitted)).

66. *In re Grand Jury Subpoenas*, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990).

67. *See* EPSTEIN, *supra* note 11, at 290 (“Unlike the joint defense privilege, the common interest does not require or imply that an actual suit is or ever will be pending. It does require, however, that a definable common interest exist.”); RICE, *supra* note 2, § 4:35 at 244–45 (“The ‘community of interest’ rule is distinguished from the ‘joint defense’ rule by the fact that the collaboration between the parties need not be related to a pending legal action.”); Fischer, *supra* note 25, at 632–34.

68. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW INST. 2000); RICE, *supra* note 2, § 4:35 at 244–45; EPSTEIN, *supra* note 11, at 275 (“For instance, one can have a common interest which will allow the sharing of privileged communications without waiver without having a ‘joint defense’ to any pending or prospective litigation at all, either actual at the time that the privilege is shared or prospective.”); *id.* at 290; *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 965 n.5 (N.D. Ill. 2010) (“The privilege does not require that the interest be in litigation or that litigation be actual or imminent for communications to be privileged. So, the fact that Ms. Salela is not a defendant in this case—which plaintiff suggests scotches the common interest doctrine—does not matter.” (internal citations omitted)).

69. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. a (AM. LAW INST. 2000) (“This Section states the common-interest attorney-client privilege. The rule differs from the co-client rule of § 75 in that the clients are represented by separate lawyers.”); *id.* cmt. b (“Clients thus can elect separate representation while maintaining the privilege in cooperating on

Parties may wish to cooperate in literally innumerable legal situations outside of litigation: for example, ensuring that mutually beneficial advertising is not misleading,⁷⁰ applying for patents,⁷¹ conducting due diligence,⁷² or avoiding any liability in the first place to prevent a lawsuit.⁷³ Courts have regularly recognized that the common interest privilege serves the same purpose as the underlying privilege: “the free flow of communication to enhance the quality of legal advice.”⁷⁴

The common interest privilege is the most evolved of these doctrines discussed because it allows for separate counsel, like joint defense, whilst looking beyond litigation to allow collaboration in any legal matter, as with co-client privilege.⁷⁵ It is not a surprise that a Delaware court recently concluded, perhaps a bit strongly, that “[a]lthough the common interest doctrine has its origin in the joint defense privilege, it has completely replaced that privilege for information sharing among clients with different attorneys.”⁷⁶ There remains a place for joint defense where parties to a case want to coordinate strategies without necessarily proceeding in the lockstep demanded by a common interest.⁷⁷ In practice, however, common interest should apply to the substantial majority of valid multi-party privilege postures.⁷⁸

To be sure, some courts and state codes demand that, like joint defense, common interest can arise only where litigation is impending or pending.⁷⁹

common elements of interest”); *see also Pampered Chef*, 737 F. Supp. 2d at 965 n.5 (finding retention of a single attorney unnecessary to common interest).

70. *E.g.*, *LG Elecs. v. Whirlpool Corp.*, No. 08 C 242, 2009 WL 3294800, at *5 (N.D. Ill. Aug. 24, 2009).

71. *E.g.*, *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389–90 (Fed. Cir. 1996).

72. *See generally* Pavento, Marti, Siddiqui & Eagan, *supra* note 45.

73. *E.g.*, *United States v. BDO Seidman LLP*, 492 F.3d 806, 815–16 (7th Cir. 2007) (“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’ . . . this planning serves the public interest by advancing compliance with the law”); *Regents*, 101 F.3d at 1390–91; *see also SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976) (“Corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it.”).

74. *See* Schaffzin, *supra* note 7, at 62 & n.41.

75. *See id.* at 57–62.

76. *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr. Del. 2010).

77. *See, e.g.*, *Hunydee v. United States*, 355 F.2d 183, 184–85 (9th Cir. 1965).

78. *See* Fischer, *supra* note 25, at 652 (implying a broad application of the common interest privilege, limited by the qualifying principle that “information shared must be for the purpose of furthering the legal interests of the members of the arrangement”). *Cf. In re Sealed Case*, 146 F.3d 881, 886–87 (D.C. Cir. 1998).

79. *E.g.*, *ARK. R. EVID. 502(b)(3)* (“A client has a privilege to refuse to disclose . . . confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party *in a pending action*”).

Such an approach mirrors that of the model Uniform Rules of Evidence.⁸⁰ A litigation requirement would dramatically restrict the scope of the common interest privilege, or at least incite parties to contrive attenuated *post hoc* theories of having anticipated some litigation that eventually ensued.⁸¹ The intertwining of the common interest privilege with litigation may have its roots in the earlier joint defense privilege; similarly, some courts' misconception that common interest can apply only to co-clients confuses the modern privilege with a predecessor.⁸² Surreptitiously importing inapposite requirements from earlier privileges makes little sense and only serves to blur lines that should be clear.

The better and more prevalent argument, both amongst commentators and in the courts, is that parties should be permitted to privily consult counsel together whenever they have an identity of interest.⁸³ (Indeed, some courts would allow very similar but not identical interests to suffice, despite the fact that the parties may later be adverse.⁸⁴) This approach has been adopted by

and concerning a matter of common interest *therein . . .*”) (emphasis added); HAW. R. EVID. 503(b)(3); ME. R. EVID. 502(b)(3); MISS. R. EVID. 502(b)(3); N.H. R. EVID. 502(b)(3); N.D. R. EVID. 502(b)(3); TEX. R. EVID. 503(b)(1)(C); VT. R. EVID. 502(b)(3); *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 714 (5th Cir. 2001); *see* Schaffzin, *supra* note 7, at 74–75.

80. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF EVIDENCE ACT 32-34 (amended 2005); *see also* Drumright & Griffin, *supra* note 35, at 41 (“Other states have adopted a statutory form of the joint defense doctrine based on Uniform Rule of Evidence 502(b), which requires pending litigation for the doctrine to apply.”).

81. *See, e.g., Santa Fe*, 272 F.3d at 715–16.

82. *See Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 965 (N.D. Ill. 2010); Schaffzin, *supra* note 7, at 58–62; EPSTEIN, *supra* note 11, at 276 (“The ‘common interest exception’ arose in the criminal context where separate counsel for multiple defendants aligned possible defenses or at least discussed their litigations strategy.”).

83. *E.g., Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D.S.C. 1974); *see also* Fischer, *supra* note 25, at 634 (“This Article will examine the common interest arrangement and whether preserving the confidentiality of information-sharing arrangements should be restricted to matters in litigation. I believe that no valid reasons exist for such a limitation as long as our legal system continues to recognize the underlying privilege itself.”); Schaffzin, *supra* note 7, at 76–78 (explaining why “jurisdictions should uniformly reject the limitation of the common interest doctrine to pending or anticipated litigation”); EPSTEIN, *supra* note 11, at 275 (“There is no need for parties to be allied in a given litigation although it often is the case that they are. What is essential is that their legal interests be fully aligned.”).

84. *See, e.g., United States v. McPartlin*, 595 F.2d 1321, 1336–37 (7th Cir. 1979); *In re Leslie Controls, Inc.*, 437 B.R. 493, 497 (Bankr. Del. 2010) (“The privilege applies where the interests of the parties are not identical, and it applies even where the parties’ interests are adverse in substantial respects. The privilege applies even where a lawsuit is foreseeable in the future between the co-defendants.”); *GUS Consulting GMBH v. Chadbourne & Parke LLP*, 20 Misc.3d 539, 541–42 (N.Y. Sup. Ct. 2008) (“Although some federal courts have held that the doctrine applies only where the nature of the parties’ common interest is ‘identical, not similar’. . . other courts, ‘[i]n recognizing the exigencies of the joint-defense privilege . . . have not required a total identity of interest among the participants. The privilege applies when a limited common purpose necessitates disclosure to certain parties. Thus, even where a later lawsuit is foreseeable between

statute in Delaware, the nation's bellwether of corporate law.⁸⁵ It has been endorsed in the Third Restatement.⁸⁶ And it has been recommended by the Supreme Court.⁸⁷ The Federal Rules of Evidence Manual recognizes its role in upholding privilege's basic purpose: "In many cases, it is necessary for clients to pool information in order to obtain effective representation. So, to encourage information pooling, the common interest rule treats all involved attorneys and clients as a single attorney-client unit, at least insofar as a common interest is pursued."⁸⁸ Free of a litigation requirement, parties may properly maintain privilege on one discrete matter while pursuing divergent strategies elsewhere.⁸⁹ In extraordinary cases, privilege may apply even as companies secretly and separately prepare claims against one another.⁹⁰

This is not to say that the presence or absence of litigation has no bearing on the question of common interest. Mutual business and commercial interests, regardless of similarity, cannot suffice for the common interest privilege,⁹¹ just

the co-defendants[,] that does not prevent them from sharing confidential information for the purpose of a common interest."') (citations omitted); Schaffzin, *supra* note 7, at 70–71 ("Thus, sharing parties may overcome even significant adversities between them if the interests for which the parties shared the information are identical and they can demonstrate that they exchanged the communications with the reasonable expectation that the communications would remain confidential."').

85. See DEL. UNIFORM R. EVID. 502(b)(3).

86. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (AM. LAW. INST. 2000) ("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 under sections 68–72 that relates to the matter is privileged as against third persons.'). *But see* sources cited *supra* note 40 and accompanying text.

87. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 361–62 (1971).

88. 2 STEPHEN A. SALTZBERG, FEDERAL RULES OF EVIDENCE MANUAL 599 (6th ed. 1994); see Schaffzin, *supra* note 7, at 51.

89. *Leslie*, 437 B.R. at 497; *e.g.*, *Eisenberg v. Gagnon*, 766 F.2d 770, 787–88 (3d Cir. 1985); *United States v. United Tech. Corp.*, 979 F. Supp. 108, 111–12 (D. Conn. 1997); 330 *Acquisition Co. v. Regency Sav. Bank*, F.S.B., 783 N.Y.S.2d 805, 805–06 (N.Y. App. Div. 2004).

90. See, *e.g.*, *Eureka Investment Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 937 (D.C. Cir. 1984) ("Eureka assuredly was concealing from CTI its consideration of legal action against the latter Wigmore's first principle presupposes that the communication at issue was made in the course of the attorney's joint representation of a 'common interest' of the two parties. Here, although Fried, Frank was representing Eureka and CTI in a matter of common interest at the time the communications at issue were made, those communications were not made in the course of its representation on that matter; indeed, they were made in the course of representation distinctly not in the interest of CTI."').

91. *E.g.*, *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) ("The development of defenses to allegations against Aramony simply is not a legal matter concerning UWA. Although these defenses could help preserve UWA's reputation, the preservation of one's reputation is not a legal matter. If the allegations concerning Aramony could have subjected

as they cannot suffice for the attorney-client or work product privileges.⁹² The pendency of a lawsuit surely helps to segregate the legal from the lay.⁹³ However, the ease of administration cannot abridge the privilege itself,⁹⁴ and there is far more to the legal profession than litigation.⁹⁵ Indeed, some subjects may present both business and legal questions, and the existence or overlap of commercial concerns does not and should not foreclose privilege as to the legal aspects.⁹⁶ And from a normative perspective, the law should not dissuade

UWA to civil or criminal liability, Aramony's claim would be stronger."); *John Doe Corp. v. United States*, 675 F.2d 482, 489 (2d Cir. 1982); *Rayman v. Am. Charter Fed. Sav. & Loan Ass'n*, 148 F.R.D. 647, 654 (D. Neb. 1993); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1167 (D.S.C. 1974); see Schaffzin, *supra* note 7, at 72 ("Courts also require that the common interest shared by the parties be a legal, rather than a purely commercial, interest."); see also *Mineaba Co. v. Pabst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (citing *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995)); *Pavento, Marti, Siddiqui & Eagan*, *supra* note 45, at 353–54 (considering the question of legal interest in due diligence).

92. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 72 cmt. c (AM. LAW. INST. 2000) (extending privilege to communication for the purpose of legal advice and "not predominantly for another purpose."); see, e.g., *W. Trails, Inc. v. Camp Coast to Coast, Inc.*, 139 F.R.D. 4, 8 (D.D.C. 1991) ("Attorney-client communications concerning business matters are not within the attorney-client privilege.").

93. See *Tr. of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 14 (D.D.C. 2010) ("There is no clearer example of when the privilege is protected than in this case, where the transferor and transferee are engaged in related litigation against a common adversary on the same issue or issues."); *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) (looking to whether litigation was anticipated in assessing whether asserted common interest was business or legal); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976) ("The timing and setting of the communications are important indicators of the measure of common interest; the shared interest necessary to justify extending the privilege to encompass intercorporate communications appears most clearly in cases of co-defendants and impending litigations but is not necessarily limited to those situations."); see also *Fischer*, *supra* note 25, at 642; *Schaffzin*, *supra* note 7, at 74 (discussing common interest in the context of the litigation requirement).

94. Cf. *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) ("While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege.").

95. See *SCM Corp.*, 70 F.R.D. at 513 ("The [common interest] privilege need not be limited to legal consultations between corporations in litigation situations, however.").

96. E.g., *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 & n.9 (Bankr. Del. 2010) ("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."); accord *Strougo v. BEA Assocs.*, 199 F.R.D. 515, 520–21 (S.D.N.Y. 2001); *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 73 (S.D.N.Y. 2009) ("While the lenders' business interests may coincide or overlap with their legal interests, the obligations they seek to enforce are grounded in contract and, by definition, involve the pursuit of legal rights and remedies."); *Cheeves v. S. Clays, Inc.*, 128 F.R.D. 128, 130 (M.D. Ga. 1989); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1975). *Contra*, e.g., *Bank Brussels Lambert*, 160 F.R.D. at 447 ("[T]he

clients—whether singular or multiple—from soliciting legal advice that encourages adherence to rule of law and preserves judicial resources by avoiding lawsuits entirely.⁹⁷

The co-client, joint defense, and common interest privileges are thus best seen as forming an incompletely overlapping Venn diagram.⁹⁸ The following table summarizes the best view of each of the doctrines hitherto discussed:

Table 1: Comparison of Multiple-Party Privileges

	CO-CLIENT	JOINT DEFENSE	COMMON INTEREST
NO. OF CLIENTS	multiple	multiple	multiple
SHARED COUNSEL?	shared	separate	separate
LITIGATION REQUIREMENT?	no	yes	no
IDENTICAL INTEREST? ⁹⁹	yes	no	yes

As can be seen, the common interest relationship is a complement to co-client privilege, allowing clients to choose between mutual (co-client) and separate (common interest) representation in any matter in which they have identical interests.¹⁰⁰ By contrast, joint defense is somewhat different, in that it requires an underlying litigation against which to jointly defend, but allows greater leeway in variance of tactics once that fundamental alignment of interests is established.¹⁰¹ The community of interest in joint defense is

common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation.”)

97. See *United States v. BDO Seidelman, LLP*, 492 F.3d 806, 815–16 (7th Cir. 2007).

98. See *United States v. McPartlin*, 595 F.2d 1321, 1336–37 (7th Cir. 1979); *In re Leslie Controls, Inc.*, 437 B.R. 493, 497 (Bankr. Del. 2010); see also *supra* Section I.A.

99. As mentioned above, some courts would find very similar but not identical interests sufficient. See *supra* note 84. For the purposes of these distinctions, “identical” will be used to encompass both standards.

100. See *Fischer*, *supra* note 25, at 638–39 (“The common interest arrangement represents an interpretation of the attorney-client privilege that avoids forcing defendants to elect between either common counsel, with the associated ‘conflicts of interests’ such representation presents, or separate counsel, with its cost of forfeiting the confidentiality of the shared information.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. a (AM. LAW. INST. 2000) (“This Section states the common-interest attorney-client privilege. The rule differs from the co-client rule of § 75 in that the clients are represented by separate lawyers.”).

101. See *GUS Consulting GmbH v. Chadbourne & Parke LLP*, 20 Misc.3d 539, 541–42 (Sup. Ct. N.Y. Co. 2008) (“[I]n recognizing the exigencies of the joint-defense privilege, [courts] have not required a total identity of interest among the participants.”); accord *In re Megan-Racine Assocs., Inc.*, 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL § 18.03 (1982) (discussing the Supreme Court

circumscribed by the litigation; in common interest, it is bounded by the identical stratagem pursued.¹⁰² The burdens imposed on the privilege's proponent also differ sharply.¹⁰³ Co-clients are established based on traditional principles of legal retention;¹⁰⁴ codefendants might present a docket sheet as predicate for joint defense;¹⁰⁵ but putative parties in common interest must show their strategies actually coincide.¹⁰⁶ Though intimately related, each has a place in the protection of both professional representation and the broader adversarial system, the central concerns of the attorney-client, and work product privileges respectively.¹⁰⁷

Standard 503, lawyer-client privilege); *Eisenberg v. Gagnon*, 766 F.2d 770, 787–88 (3d Cir. 1985) (citing *United States v. McPartlin*, 595 F.2d 1321, 1336–37 (7th Cir. 1979)); *Hunydee v. United States*, 355 F.2d 183, 184–85 (9th Cir. 1965); see also *Cont'l Oil Co. v. United States*, 330 F.2d 347, 349–50 (9th Cir. 1964). As previously mentioned, one can speak imprecisely of a “joint-defense” relationship in which clients share the same counsel, but the requirements of such arrangements reduce to that of co-client, owing to the ethical and practical impossibility of representing adverse clients. Compare *supra* text supported by note 62, with text supported by note 63.

102. See generally *supra* Section I.A.

103. Cf. *United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002) (stating in the common interest context that “a party asserting a privilege exemption . . . bears the burden of demonstrating its applicability.”) (quoting *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001)); *Schaffzin*, *supra* note 7, at 63 n.43 (“As with all evidentiary privileges, the burden of proof is on the party seeking to apply the common interest doctrine.”).

104. See *Giesel*, *supra* note 23, at 528 (“In the joint client representation scenario, a heightened requirement of common interest is not necessary. The common interest is inherent in the nature of the representation. As long as the communication is in the context of the joint representation and as long as it satisfies the other elements of the attorney-client privilege, then the communication should enjoy the privilege.”); e.g., *Eureka Investment Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 936–37 (D.C. Cir. 1984); *In re Colocotronis Tanker Sec. Litig.*, 449 F. Supp. 828, 830–31 (S.D.N.Y. 1978). Compare *Sky Valley Lts. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 652–53 (N.D. Cal. 1993) (citing eleven factors for determining co-client status) with EPSTEIN, *supra* note 11, at 281 (citing six factors).

105. See generally Stephen A. Messer and Scott J. Seagle, *Combining Forces: A Primer on the Joint Defense Agreement in Civil Litigation*, 30 TRIAL ADVOC. Q. 7, 7–8 (2011) (explaining that courts have often afforded the joint defense privilege to codefendants by virtue of their participation in a common defense); see also RICE, *supra* note 2, § 4:35 at 260 & n.37 (“[S]ome courts have assumed this intention [of furthering a joint defense] when the parties are codefendants or prospective codefendants.”) (citing cases).

106. See *FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (“Thus, the proponent of the exception must establish cooperation in fact toward the achievement of a common objective.”); *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr. Del. 2010); see also *United States v. Moss*, 9 F.3d 543, 550 (6th Cir. 1993).

107. *Ogden*, 202 F.3d at 461.

B. Privilege Amongst Competitors and Combinations

The antitrust and merger contexts present special challenges for corporate common interest.¹⁰⁸ Market rivals clearly cannot be allowed to conceal anticompetitive collusion behind a fig leaf of putative common interest, which would impermissibly co-opt the shield of privilege for violations of the law.¹⁰⁹ Competitors who claim their interests coincide inherently raise a certain quantum of suspicion.¹¹⁰ To use a recurring example, claims of mutual privilege propped by competing members conferring under the umbrella of a trade association have yielded a diversity of holdings: some older decisions favored viewing members as co-clients of the association's lawyers, but more modern courts typically reject that presumption as unwieldy and unwarranted, and demand a specific showing that the competitors mutually sought legal counsel in the matter under dispute.¹¹¹ Whether this then places the various members in a common interest privilege stance, or merely confirms their status as co-agents or co-clients, remains largely unclear from the cases.¹¹²

108. See Anne King, Comment, *The Common Interest Doctrine and Disclosures during Negotiations for Substantial Transactions*, 74 U. CHI. L. REV. 1411, 1412–13 (2007) (stating that “most courts conclude that disclosures made during transaction negotiations work a waiver of the attorney-client privilege, and thus courts decline to allow common interest protection. But a few courts hold that disclosures during negotiations for a substantial transaction may be protected under the common interest doctrine. Hence, with respect to substantial transactions, courts are split as to whether common interest protection applies to disclosures made during negotiations.”). See generally Schomig, *supra* note 40.

109. See Gregory B. Mauldin, *Invoking the Common Interest Privilege in Collaborative Business Ventures*, 56 FED. LAW 54, 58 (2009); *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003) (voicing concern over extending privilege to antitrust matters due to the likelihood of abuse, and inadequate regulatory measures); EPSTEIN, *supra* note 11, at 277 (“The greatest push to expand the common interest privilege comes from corporate attorneys representing multiple clients often in an antitrust context. It is precisely in such a context that the potential for abuse is the greatest. The ‘common interest’ privilege may be nothing but a cover for an antitrust conspiracy.”); *cf.* *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (“[T]he attorney-client privilege cannot at once be used as a shield and a sword.”).

110. See, e.g., *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514 (D. Conn. 1976) (directing proponent of privilege as to common interest in antitrust consultations with competitor to submit affidavit of the content of the discussions to the court for *in camera* inspection, noting that the “individual postures relevant to the antitrust discussions in point are undefined”). See *supra* note 109 and accompanying text.

111. Compare Schomig, *supra* note 40, at 10 (“Several older trial court opinions have, with little analysis, held that all members of a trade association enjoy an attorney-client relationship with the association’s legal counsel.”), with *id.* at 10–11 (“Some more recent court decisions have analyzed the privilege status of attorney-client communications made between trade association members and the association’s attorney in a manner that takes into account many factors governing both the general nature of the attorney-member relationship and the circumstances surrounding the particular communications at issue.”).

112. Schomig, *supra* note 40, at 10–11.

Antitrust concerns were discussed at length in the Fifth Circuit's decision to deny common interest privilege to competitors in *In re Santa Fe Int'l Corp.*,¹¹³ in which privilege was sought on a memorandum on labor law circulated amongst several offshore drilling companies.¹¹⁴ In demurring, the court expressed serious fears about according privilege to market rivals who might well be engaging in price fixing or other antitrust violations.¹¹⁵ To be sure, under the crime-fraud doctrine, no privilege could apply to exchanges constituting antitrust (or any other) legal infractions.¹¹⁶ The panel majority's holding is troubling, however, insofar as it prescribes an especially severe litigation requirement:

In the present case, Santa Fe admits in the motion for reconsideration it filed in the district court that the communications it claims are protected by the privilege were not made in anticipation of future litigation. Instead, the documents were "circulated for the purpose of ensuring compliance with the antitrust laws and minimizing any potential risk associated with the exchange of wage and benefit information." In sharing the communications, therefore, they sought to avoid conduct that might lead to litigation. They were not preparing for future litigation.¹¹⁷

Given the opinion's stated concerns, such reasoning seems perverse, penalizing companies whose recourse to counsel was to *avoid* violation of antitrust laws. Yet the majority was nonchalant as to any policy concerns stemming from providing disincentives for companies to mutually ensure their behavior is legal.¹¹⁸ It was left to the dissent to forcefully, if futilely, expound the better

113. 272 F.3d 705 (5th Cir. 2001).

114. *Id.* at 709.

115. *Id.* at 714 ("[T]he record in this case is neither clear nor indisputable with respect to Santa Fe's motive for sending its inhouse counsel's memorandum to its horizontal offshore drilling competitors. It is possible that the disclosures were made to facilitate future price fixing in violation of the antitrust laws, as the plaintiffs contend."); *see also id.* at 711 (holding "there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day [*sic*] result in litigation, before communications between one possible future co-defendant and another, such as the ones here made between one horizontal competitor and another, could qualify for protection").

116. *See id.* at 714 n.9 ("If so, they would fall outside the scope of any attorney-client privilege as communications made for criminal or fraudulent purposes."); *Duplan Corp v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1196-97 (D.S.C. 1974) (finding that a "prima facie showing of an antitrust violation establishes the tort exception to the attorney-client privilege, requiring production of all confidential communications that show the opinions of the associates' attorneys"); *see also United States v. Zolin*, 491 U.S. 554, 563-64 (1989) (providing an explanation of the crime-fraud exception); *Clark v. United States*, 289 U.S. 1, 15 (1933).

117. *Santa Fe*, 272 F.3d at 713.

118. *Id.* at 714 ("There is no justification within the reasonable bounds of the attorney-client privilege for horizontal competitors to exchange legal information, which allegedly contains confidences, in the absence of an actual, or imminent, or at least directly foreseeable, lawsuit. . . .

holding: “the parties claiming protection under the rule only need share ‘a common legal interest’ about a matter, and there need be no actual litigation in progress.”¹¹⁹

In any event, the Fifth Circuit’s approach to common interest is distinctly ungenerous compared to its sister circuits.¹²⁰ Other courts have had little doubt that competitors “shared a common legal interest regarding compliance with antitrust and other laws.”¹²¹ Society’s interest in promoting lawful behavior is paramount, and “manifestly does not require that there be actual or contemplated litigation. Indeed, in response to the explosion of regulations from federal and state agencies, business entities routinely seek the advice of lawyers precisely so that they may avoid litigation by planning for the future.”¹²² Such concerns are at their zenith in the antitrust setting, given that attorneys are the primary actors ensuring corporate compliance.¹²³ Without competent counsel capable of consulting confidentially with their counterparts, companies cannot be expected to discern the delicate bounds that define antitrust law.¹²⁴ And, vexingly, the continued “undifferentiated use” of the terms “joint defense” and “common interest” to describe legal arrangements involving separate counsel has only exacerbated the uncertainty of whether privilege attaches in these situations.¹²⁵

[If] the disclosures were perhaps made in the sole interest of preventing future antitrust violations, as the defendants argue in their motion for reconsideration, . . . they hardly could be seen as the commencement of an allied litigation effort.”)

119. *Id.* at 719 (Smith, J., dissenting) (citing *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985), *United States v. Fortna*, 796 F.2d 724, 730 (5th Cir.1986), and *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989)).

120. *See Pavento, Marti, Siddiqui & Eagan, supra* note 45, at 357 (“In the Fifth Circuit, the two types of communications protected under the common interest doctrine are: (1) communications between co-defendants in actual litigation and their counsel, and (2) communications between potential co-defendants and their counsel. These oft-cited categories of protected communications are quite narrow when compared to the limits established in other circuits, and thus district courts in this circuit may arguably be reluctant to extend the common interest doctrine any further.”); *see also Santa Fe*, 272 F.3d at 719–20.

121. *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417 (N.D. Ill. 2006).

122. *Id.* at 416; *cf. supra* text supported by note 9.

123. *Duplan Corp v. Deering Milliken, Inc*, 397 F. Supp. 1146, 1164 (D.S.C. 1974) (“This court recognizes that it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients. Unless corporate personnel on a fairly low level can speak to attorneys in confidence, the enforcement of the federal antitrust laws is likely to be adversely affected.”).

124. *See id.*; *see also In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998) (“It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur. For instance, lawyers routinely . . . consider whether business decisions might result in antitrust or securities lawsuits.”); *supra* text supported by note 9.

125. *In re Sulfuric Acid*, 235 F.R.D. at 417.

A New York appellate court recently sorted through some of these considerations thoughtfully in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*¹²⁶ That New York was the venue reflects it being the domiciliary state of many corporations, as well as its high court's thoughtful parsing of common law.¹²⁷ The factual setting was the archetypal corporate collaboration: materials shared between companies undertaking a merger and its attendant legal complexities.¹²⁸ At issue were hundreds of documents shared during pre-merger discussions that the trial court had ordered produced, finding that "that the common-interest rule, an exception to the attorney-client privilege, does not apply unless the parties share a common legal interest that impacts potential litigation involving all parties, and that to hold otherwise would be inconsistent with the narrow scope of the attorney-client privilege."¹²⁹ After reviewing contrary authority, the appellate panel disagreed:

We find, however, that this line of cases does not adequately address the specific situation presented here: two business entities, having signed a merger agreement without contemplating litigation, and having signed a confidentiality agreement, required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction. As BAC aptly asserts, imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel. This outcome would make poor legal as well as poor business policy.¹³⁰

Accordingly, the court rejected the litigation requirement and instead adopted the better rule that privilege is not forfeited so long as the parties to the attorney-client communication share a common legal interest.¹³¹

The New York Court of Appeals, however, reversed in a fractured 4-2 decision.¹³² The majority ruled against a backdrop of twenty years during

126. 998 N.Y.S.2d 329 (N.Y. App. Div. 2014), *rev'd*, No. 80, 2016 N.Y. LEXIS 1649 (N.Y. June 9, 2016).

127. See David E. Bland & Scott G. Johnson, *Applying the Attorney-Client Privilege to Investigations Involving Attorneys: What Is Fair Game in Discovery?*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 32-33 (2d ed. 1997).

128. *Ambac*, 998 N.Y.S.2d at 331-32.

129. *Id.* at 332.

130. *Id.* at 336-37.

131. *Id.* at 337.

132. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 80, 2016 N.Y. LEXIS 1649 (N.Y. June 9, 2016).

which New York courts had “restricted the common interest doctrine to pending or anticipated litigation,” declining the invitation to expand the privilege further in light of modern developments.¹³³ In particular, the majority fretted that untethering common interest privilege from litigation would render it unadministrable and prone to abuse,¹³⁴ and opined that its litigation requirement had occasioned no “corporate crisis” in merger practice during those twenty years.¹³⁵ The dissent, by contrast, adopted much of the appellate panel’s reasoning, emphasizing that the attorney-client privilege has no litigation requirement itself, promoting the free flow of information between client and counsel,¹³⁶ and that encouraging privilege in the merger context could only support companies’ compliance with the law.¹³⁷ It rejected as speculative any potential for abuse, noting robust protections deriving from the crime-fraud doctrine and requirement of legal rather than commercial commonality.¹³⁸ And it noted that eschewing a litigation requirement would have brought New York into synchrony with many other state and federal jurisdictions.¹³⁹

Indeed, the appellate panel in *Ambac* had observed that its rule has been widely adopted in the federal courts, calling it the “federal approach,”¹⁴⁰ echoing other courts that have noted that “federal case law makes clear that the common interest doctrine applies even where there is no litigation in progress.”¹⁴¹ This is no exaggeration: the First, Second, Third, Fourth, Seventh, Eighth, Ninth, and Federal Circuits have all rejected a strict litigation requirement,¹⁴² while only the Fifth has embraced it.¹⁴³ As mentioned earlier,

133. *Id.* at *18.

134. *Id.* at *18–19.

135. *Id.* at *18.

136. *Id.* at *25–26 (Rivera, J., dissenting).

137. *Id.* at *38–40.

138. *Id.* at *39–40.

139. *Id.* at *10 & n.1.

140. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 998 N.Y.S.2d 329, 334–35 (N.Y. App. Div. 2014), *rev’d*, No. 80, 2016 N.Y. LEXIS 1649 (N.Y. June 9, 2016). (“Neither this Court nor the Court of Appeals has yet considered the propriety of a litigation requirement for the common-interest privilege. However, the federal courts that have addressed the issue have overwhelmingly rejected that requirement.”).

141. *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 71 n.9 (S.D.N.Y. 2009).

142. *Cavallaro v. United States*, 153 F.Supp.2d 52, 60 (D. Mass. 2001) (quoting the Restatement that common interest applies to both “a litigated or unlitigated matter”); *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001); *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989) (It is “unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply.”); *In re Teleglobe Comm’ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (“[C]ommunity-of-interest privilege . . . applies in civil and criminal litigation, and even in purely transactional contexts.”); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996) (“But it is unnecessary that there be actual litigation in progress

the Supreme Court itself has proposed a federal rule of common interest without any such requirement.¹⁴⁴ One court of appeals even upheld common interest between parties to a merger that eventually collapsed, leaving them adversaries in the ensuing legal action.¹⁴⁵ Such jurisprudential concord is vital to companies contemplating combinations,¹⁴⁶ where mutual discussions with antitrust counsel are often undertaken.¹⁴⁷ Imposing a litigation requirement inefficiently exposes merging companies to potentially protracted discovery rather than encouraging them to forestall a lawsuit entirely.¹⁴⁸ The irony that *Ambac* points to is that a litigation requirement for common interest would increase the risk of those very suits.¹⁴⁹

On the other hand, more latitude may be afforded by work product privilege. Some courts have recognized the assessment of potential antitrust litigation occasioned by a merger as sufficiently concrete to qualify as being prepared

for this privilege to apply.”); *United States 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.”); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (quoting the Restatement that common interest applies to both “a litigated or nonlitigated matter”); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964) (Common interest applies “irrespective of litigation begun or contemplated.”); *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1390–91 (Fed. Cir. 1996) (Common interest “is not limited to actions taken and advice obtained in the shadow of litigation.”).

143. *In re Santa Fe Int’l Corp.*, 272 F.3d 705, 714–16 (5th Cir. 2001).

144. *See supra* note 87. However, Congress declined to codify the privilege and instead directed federal courts to apply traditional common law. *See* FED. R. EVID. 501.

145. *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

146. *See, e.g.*, *In re JP Morgan Chase & Co. Securities Litig.*, No. 06-CV-4674, 2007 WL 2363311, at *3 (N.D. Ill. Aug. 13, 2007) (“[A]fter the parties to the merger signed the merger agreement, they shared a common interest in ensuring that the newly agreed merger met any regulatory conditions and achieved shareholder approval.”); *Cohen v. Berkshire Hathaway, Inc.*, No. CL 81833, 2002 WL 34217931 (la. Dist. Ct. April 15, 2002) (“The Purchaser and Director Defendants’ common interest began with the execution of the merger agreement. From this point forward, . . . they had a common interest - legal strategies for seeking regulatory approval and discussions relating to the joint defense of this lawsuit - in effectuating the merger agreement. . . . communications prepared in reference to regulatory approval after the merger agreement was executed are protected.”).

147. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 998 N.Y.S.2d 329, 336–37 (N.Y. App. Div. 2014), *rev’d*, No. 80, 2016 N.Y. LEXIS 1649 (N.Y. June 9, 2016); *see also* Kathryn M. Fenton, *Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships*, ANTITRUST SOURCE 1 (Dec. 2009) (“It is common for companies under investigation for possible cartel activities to enter into a JDA [joint defense agreement] to facilitate fact gathering and development of a coordinated strategy. Similar interests might motivate formation of common interest groups in merger reviews or civil antitrust lawsuits.”).

148. *See Gulf Oil*, 760 F.2d at 296. *But see* Rosenthal, *supra* note 42, at 149 (“Parties co-operating in conjunction with a business transaction, such as a merger or business deal, are not necessarily pursuing a common or joint defense.”).

149. *Ambac*, 998 N.Y.S.2d at 337.

“because of” litigation, and thus within the work product privilege.¹⁵⁰ Their reasoning is straightforward: to permit discovery of such an assessment would flout the very concerns central to the Supreme Court’s recognition of the work product privilege in *Hickman v. Taylor*: “asked by a client to evaluate the antitrust implications of a proposed merger and advised that no specific claim had yet surfaced, a lawyer knowing that work product is unprotected would not likely risk preparing an internal legal memorandum assessing the merger’s weaknesses.”¹⁵¹ Even when competitors are collaborating towards a common end, claims of common interest in work product may find a more sympathetic ear because of the work product privilege’s built-in nexus to litigation.¹⁵²

II. SOME COMMON MISSTEPS ANENT COMMON INTEREST IN THE D.C. CIRCUIT

Yet for all its ubiquity elsewhere, the federal approach—that is, rejection of the litigation requirement in the attorney-client common interest context—has enjoyed unsettled application in a vital jurisdiction for merging companies, the D.C. Circuit, where antitrust actions are often filed and precedent is made.¹⁵³ No circuit has been immune from some degree of confusion about common interest.¹⁵⁴ But the district courts in the D.C. Circuit have generated a notably disjointed corpus of precedent,¹⁵⁵ with some imposing a litigation requirement and others not. Broadly speaking, the lack of cohesion has two wellsprings. The first and more fundamental flows from gauzy treatment of the divergent rationales for common interest in maintaining work product privilege on the one hand, and the attorney-client privilege on the other.¹⁵⁶ The second arises from conflation of modern common interest doctrine with its conceptual forebears in the joint defense or even co-client privilege.¹⁵⁷ Where these currents of confusion have intersected, the law of common interest has become

150. See e.g., *In re Sealed Case*, 146 F.3d 881, 886–87 (D.C. Cir. 1998).

151. *Id.* at 886 (proceeding to explain how such a situation would defy *Hickman v. Taylor*, 329 U.S. 495, 511 (1947): “Discouraging lawyers from engaging in the writing, note-taking, and communications so critical to effective legal thinking would, in *Hickman*’s words, ‘demoraliz[e]’ the legal profession, and ‘the interests of the clients and the cause of justice would be poorly served.’”).

152. See Schomig, *supra* note 40, at 12–13.

153. See Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 741, 741 (2006) (“In this brief comment, I will use the debate over the enduring meaning of *Microsoft* to argue that the D.C. Circuit has surpassed the United States Supreme Court as the most important and articulate antitrust court and has outshone the highest court in the land in crafting honest and true antitrust doctrine consistent with history, precedent, and policy.”).

154. See generally Pavento, Marti, Siddiqui & Eagan, *supra* note 45 (discussing common interest concerns in each circuit).

155. Take, for example, the despondent sentiment expressed in the epigram to this Article by one of those district courts in *Miller v. Holzmann*, 240 F.R.D. 20, 22 (D.D.C. 2007).

156. See *infra* Section II.A.

157. See *infra* Section II.B.

a hazardous morass for companies seeking surety for their secrecy.¹⁵⁸ Such confusion is all the more perplexing—and readily resolvable—given the D.C. Circuit Court of Appeals decisions that point to consistent answers.¹⁵⁹

A. *Work-Product Versus Attorney-Client Privilege*

Some of the entanglement originates from the oft-cited decision of the D.C. Circuit in *United States v. AT&T*.¹⁶⁰ MCI, a litigant in a separate antitrust suit against AT&T, had disclosed documents subject to work product privilege to the United States, and attempted to intervene in the government's case to defend its privilege, but the district court denied both intervention and work product protection.¹⁶¹ The court of appeals then reversed, finding MCI's intervention mandatory,¹⁶² and upholding MCI's work product claims despite the disclosure to the government, citing the common interest doctrine:

We do not endorse a reading of the *GAF Corp.* standard so broad as to allow confidential disclosure to any person without waiver of the work product privilege. The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts.¹⁶³

By its terms, the *AT&T* court's holding on common interest was therefore cabined to the work product privilege, which presupposes adversarial litigation.¹⁶⁴ Indeed, the court grounded its holding in the starkly contrasting purposes of attorney-client and work product privileges, observing that the "purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation."¹⁶⁵ Common interest in the work product context is inherently and unobjectionably tethered

158. See, e.g., *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 312–13 (D.D.C. 2009) (engaging in both misapprehensions).

159. See, e.g., *In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998); *In re Sealed Case*, 29 F.3d 715, 716 (D.C. Cir. 1994); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

160. *Am. Tel. & Tel.*, 642 F.2d at 1299–1300.

161. *Id.* at 1288.

162. *Id.* at 1295.

163. *Id.* at 1299.

164. *Id.*

165. *Id.*

to the lawsuit that animates the work product privilege itself.¹⁶⁶ Work product applies only to documents created “because of” litigation.¹⁶⁷ To be sure, the D.C. Circuit has recognized that work product privilege may attach in advance of the lawsuit being filed, or based on work to avoid legal action on a particular claim.¹⁶⁸ The requisite “eye toward litigation” may be attenuated, but there must still be a nexus.¹⁶⁹ Modern attorney-client privilege, by contrast, undeniably has no litigation requirement whatsoever.¹⁷⁰

The problem arose when lower courts later mistakenly cited to *AT&T* for common interest reasoning in the wholly different posture of the attorney-client privilege, even though the court of appeals had distinguished it sharply.¹⁷¹ The first such case, *Holland v. Island Creek Corp.*,¹⁷² cited *AT&T* alone for the proposition that “[u]nder the common interest rule, individuals may share information without waiving the attorney-client privilege if: (1) the disclosure is made due to actual or anticipated litigation”¹⁷³ Others courts in the D.C. Circuit followed apace.¹⁷⁴ Some selectively quoted *AT&T* as to the litigation requirement whilst trimming away the holding’s limitation to the work product privilege.¹⁷⁵ Inexorably, district courts came to be citing their

166. See *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994) (“The work product privilege protects any material obtained or prepared by a lawyer ‘in the course of his legal duties, provided that the work was done with an eye toward litigation.’”) (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)); see also *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980).

167. *United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010) (stating that most circuits apply the “because of” standard to work product).

168. See *In re Sealed Case*, 146 F.3d 881, 886–87 (D.C. Cir. 1998).

169. *In re Sealed Case*, 29 F.3d at 718 (quoting *In re Sealed Case*, 676 F.2d at 809).

170. See *Welles*, *supra* note 57, at 325–26 (“The attorney-client privilege currently extends to any communication made in order to facilitate the rendition of legal services to a client, ‘irrespective of litigation begun or contemplated’”) (quoting *WIGMORE*, *supra* note 12, §§ 2294–95); see also *Spectrum Sys. Int’l. Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1061 (N.Y. 1991) (“The prospect of litigation may be relevant to the subject of work product and trial preparation materials, but the attorney-client privilege is not tied to the contemplation of litigation.”).

171. See *supra* text accompanying notes 164–65; see also *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

172. 885 F. Supp. 4 (D.D.C. 1995).

173. *Id.* at 6.

174. See, e.g., *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. Civ.99-329, 2004 WL 2009413, at *4 (D.D.C. Aug. 12, 2004) (“Parties may successfully operate under the common interest privilege if the communication: 1) is prompted by actual or anticipated litigation . . .”).

175. See, e.g., *United States ex rel. Landis v. Tailwind Sports Corp.*, 303 F.R.D. 419, 427 (D.D.C. 2014) (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299–1300 (D.C. Cir. 1980)) (“A common interest privilege can exist ‘so long as [the] transferor and transferee anticipate litigation against a common adversary on the same issue or issues.’”); see also *Miller v. Holzmann*, 240 F.R.D. 20, 22 (D.D.C. 2007).

own colleagues' holdings,¹⁷⁶ creating a false impression of consensus about common interest based on a single mistaken predicate.

Perhaps, this is partly the result of the passage of time since the *AT&T* decision; the earliest of these misconstructions was issued in 1995, fifteen years after the original holding.¹⁷⁷ One district court even recognized that *AT&T* spoke only to common interest in the work product privilege, but nonetheless assumed "that the common interest rule is equally applicable" to attorney-client privilege, whilst noting "it is possible that the precise scope of the common interest rule will vary as applied to each privilege because of the differing purposes of the privileges."¹⁷⁸ Another also conceded *AT&T*'s basis in work product theory, yet still found the holding supports the requirement of pending litigation even for the attorney-client privilege.¹⁷⁹ The latter court's frustration shows through in the opinion, as when it pronounces, with certain hint of resignation, "Suffice to say, it is impossible to conclude that the common law, as interpreted in this and other jurisdictions, provides a clear explanation of what a common interest is"¹⁸⁰ Such a sentiment is hardly original, as many courts and commentators have offered similar laments.¹⁸¹

Such pessimism, however, discounts the many trial courts and appellate panels in the D.C. Circuit that have gotten *AT&T* right. Only two years later, the court of appeals followed *AT&T* faithfully in distinguishing the purposes of the attorney-client and work product privileges, and quoted its holding on common interest only for the latter.¹⁸² Subsequent court of appeals decisions followed suit.¹⁸³ And numerous district court decisions have similarly read

176. See, e.g., *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 312 (D.D.C. 2009) (citing *Holland*, 885 F. Supp. at 6), *vacated*, 786 F. Supp. 2d 123 (D.D.C. 2011).

177. *Holland*, 885 F. Supp. at 6.

178. *In re United Mine Workers of Am. Emp. Benefit Plans Litig.*, 159 F.R.D. 307, 313 n.4 (D.D.C. 1994).

179. See *Miller*, 240 F.R.D. at 22 (quoting *United States v. Amer. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)) ("More to the point, in this Circuit, the court of appeals has indicated that the work product privilege is not lost even if it is shared by entities that are not co-parties in litigation so long as 'transferor and transferee anticipate litigation against a common adversary on the same issue or issues.' While the court was speaking of the work-product privilege, the decision at least points away from any greater requirement than a common interest in litigation against a common adversary.").

180. *Id.*

181. See, e.g., Giesel, *supra* note 23, at 551–53; Schaffzin, *supra* note 7, at 51–54.

182. See *In re Sealed Case*, 676 F.2d 793, 817–18 (D.C. Cir. 1982) ("We have held that a party waives its work product protection in civil litigation if it discloses the privileged material to anyone without 'common interests in developing legal theories and analyses of documents.'").

183. E.g., *United States v. Deloitte LLP*, 610 F.3d 129, 139–40 (D.C. Cir. 2010) ("As we explained in *AT&T*, the attorney-client privilege and the work-product doctrine serve different purposes: the former protects the attorney-client relationship by safeguarding confidential communications, whereas the latter promotes the adversary process by insulating an attorney's litigation preparation from discovery."); *United States v. Williams*, 562 F.3d 387, 394 (D.C. Cir.

AT&T as speaking only to the work product privilege's requirement of litigation, and clearly differentiated the rationales for assertion and waiver of attorney-client privilege.¹⁸⁴

In fairness, *AT&T* might be read as questioning whether common interest is available at all in the attorney-client context, given its emphasis on confidentiality.¹⁸⁵ At least one district court has thought as much.¹⁸⁶ But in 1994, the court of appeals explained in *In re Sealed Case*¹⁸⁷ that "common interest privilege protects communications between a lawyer and two or more clients regarding a matter of common interest," without expressing any reservation about litigation.¹⁸⁸ (It is inconvenient but unavoidable, given the secrecy of the grand jury context in which matters of privilege often arise, that the appellate court has decided so many cases anent privilege under the caption *In re Sealed Case*.¹⁸⁹)

2009); *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371-72 (D.C. Cir. 1984); see *Tr. of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 14 (D.D.C. 2010) ("AT&T was followed in *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, where the claim was made that the Department of Justice had forfeited its work-product privilege when it disclosed its work-product in rebutting claims made against it in a Congressional committee report. The court of appeals rejected the forfeiture, invoking the *AT&T* case for the principle that the work-product privilege is forfeited only when the disclosure is inconsistent with maintaining the secrecy of the work-product from the disclosing party's adversary." (citations omitted)).

184. *E.g.*, *Harris v. Koenig*, 271 F.R.D. 356, 370 (D.D.C. 2010) ("The attorney-client and work-product privileges serve different societal interests.") (quoting *Tr. of Elec. Workers*, 266 F.R.D. at 13); *In re Apollo Grp. Sec. Litig.*, 251 F.R.D. 12, 23 (D.D.C. 2008); *Nishnic v. Dep't of Justice*, 671 F. Supp. 771, 775 (D.D.C. 1987); see also *Latin Inv. Corp. v. L & L Constr. Assoc., Inc.*, 160 B.R. 262, 263-64 (Bankr. D.C. 1993).

185. *In re United Mine Workers Of Am. Emp. Benefit Plans Litig.*, 159 F.R.D. 307, 312, 313 n.4 (D.D.C. 1994) (observing without holding that "it is possible to read some language in the *American Tel. and Tel.* case (especially in light of *In re Sealed Case*) to suggest that the common interest rule is inapplicable to situations where information protected by the attorney-client privilege is disclosed to a third party because any such disclosure (even to an individual or entity with a common interest) would be inconsistent with the confidentiality inherent in the attorney-client relationship."); see also *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.D.C. 1980) ("We do not consider the strict standard of waiver in the attorney-client privilege context, as reflected in *D'Ippolito*, to be appropriate for work product cases. The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.").

186. *E.g.*, *United Mine Workers*, 159 F.R.D. at 313 n.4.

187. 29 F.3d 715 (D.C. Cir. 1994).

188. *Id.* at 719. Technically, what *Sealed Case* described was co-client privilege, but the court did not distinguish clearly between separate or mutual counsel in the common interest context.

189. See generally *In re Sealed Case*, 146 F.3d 881, 882 (D.C. Cir. 1998); *In re Sealed Case*, 29 F.3d 715, 716 (D.C. Cir. 1994); *In re Sealed Case*, 877 F.2d 976, 977 (D.C. Cir. 1989); *In re*

The *Holland* court's failure the very next year in 1995 to follow the guideposts in *Sealed Case*, and its choice to instead transplant *AT&T*'s logic regarding work product, is perplexing.¹⁹⁰ Nor did the court of appeals view *AT&T* itself as pointing in a different direction; three years after *Holland*, it read *AT&T* and *Sealed Case* together as establishing that common interest applied not only to work product but also to attorney-client privilege, and again omitted any litigation requirement for the latter: "as a usual rule, disclosure of attorney-client or work product confidences to third parties waives the protection of the relevant privileges; however, when the third party is a lawyer whose client shares an overlapping 'common interest' with the primary client, the privileges may remain intact."¹⁹¹ Several district courts have found common interest may attach in the attorney-client context.¹⁹² Whatever the source of confusion in other district courts between work product and attorney-client privilege, the court of appeals has made its own reasoning passably clear.

B. Joint Defense (and Co-Client) Versus Common Interest Privilege

Just as district courts in the D.C. Circuit have often confused common interest principles in the work product and attorney-client contexts, they have also conflated the common interest privilege itself with its predecessor in the joint defense privilege.¹⁹³ And once again, such confusion is puzzling because the court of appeals has spoken directly to the issue.¹⁹⁴ In *Sealed Case*, the panel clearly recognized and distinguished between discrete joint interest and common interest privileges, holding that appellant had properly raised each before the lower court and thereby preserved both claims.¹⁹⁵ The court described joint defense privilege as follows:

Sealed Case, 676 F.2d 793, 797 (D.C. Cir. 1982). To avoid confusion, references to *Sealed Case* in the main text will be limited to the seminal 1994 decision.

190. See *Holland v. Island Creek Corp.*, 885, F. Supp. 4, 6 (D.D.C. 1995).

191. *In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998).

192. See *Chesapeake Bay Foundation, Inc. v. U.S. Army Corps of Eng'rs*, 722 F. Supp. 2d 66, 74 (D.D.C. 2010) ("The attorney-client common interest privilege 'protects communications between a lawyer and two or more clients regarding a matter of common interest.' It applies to both 'communications subject to the attorney-client privilege' and 'communications protected by the work-product doctrine.'" (citations omitted)).

193. See, e.g., *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 15–16 (D.D.C. 2007); see also *United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C. 2000).

194. *In re Sealed Case*, 29 F.3d 715, 718–19 (D.C. Cir. 1994).

195. *Id.* ("The appellant also argues that the common interest privilege bars disclosure of his communications with the Lawyer. Specifically, he contends that he, Z and the foreign company share an attorney-client privilege regarding their consultations with the Lawyer. Therefore, he argues, any waiver of the privilege that he made was ineffective because a jointly held privilege can be waived only by all of its holders. In response, the Government claims that the appellant waived his common interest privilege argument by failing to raise it below. We disagree.

The joint defense privilege protects communications between two or more parties and their respective counsel if they are engaged in a joint defense effort. The party asserting the privilege must show: “(1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived.” The district court rejected the joint defense privilege because there was no “actual or potential litigation” or strong possibility thereof at the time the appellant consulted the Lawyer.¹⁹⁶

As with work product, the joint defense privilege by its very terms requires an actual or potential litigation against which to jointly defend.¹⁹⁷ Not so with the distinct common interest privilege, which looks only to sharing a “matter of common interest.”¹⁹⁸ Indeed, *AT&T* had only a few years before expressly rejected cramped restrictions even in the work product context, finding that “‘common interests’ should not be construed as narrowly limited to co-parties.”¹⁹⁹

Despite this critical difference, district courts in the D.C. Circuit have regularly conflated the two and thereby imported the joint defense litigation requirement into the common interest privilege.²⁰⁰ The first such case, *United States v. Hsia*,²⁰¹ enigmatically cites directly to *Sealed Case* for the proposition that the “joint defense privilege, often referred to as the common interest rule, is an extension of the attorney-client privilege that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement.”²⁰² Such an equation of the two privileges cannot be found in *Sealed Case*, yet *Hsia*’s gloss has proven influential. It was quoted wholesale in *United States v. Phillip Morris*²⁰³ and *Intex Recreation Corp. v. Team Worldwide Corp.*,²⁰⁴ the latter of which was in turn cited in *NLRB v. Jackson Hospital Corp.*²⁰⁵ for the

Although the Government is correct in noting that the appellant concentrated his argument on the joint defense privilege in district court, he also asserted the common interest privilege.”)

196. *Id.* at 719 n.5 (citations omitted).

197. *See id.*; *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002).

198. *See In re Sealed Case*, 29 F.3d at 719; *cf. Holland v. Island Creek Corp.*, 885 F. Supp. 4 (D.D.C. 1995).

199. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Work product still requires litigation, but as discussed above, the putative parties in joint defense were litigants in separate but related litigations. *Id.* at 1288–90.

200. *E.g.*, *United States v. Hsia*, 81 F. Supp. 2d 7, 16–17 (D.D.C. 2000); *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 15 (D.D.C. 2005).

201. 81 F. Supp. 2d 7, 7 (D.D.C. 2000).

202. *Id.* at 16 (referencing *In re Sealed Case*, 29 F.3d 715, 719 n.5 (D.C. Cir. 1994)).

203. No. Civ. A. 99-2496(GK), 2004 WL 5355972, at *6 (D.D.C. Feb. 23, 2004).

204. 471 F. Supp. 2d 11, 15–16 (D.D.C. 2007).

205. 257 F.R.D. 302, 302 (D.D.C. 2009), *vacated*, 786 F. Supp. 2d 123 (D.D.C. 2011).

observation that the “common interest doctrine is also sometimes referred to as the joint defense privilege when applied to codefendants.”²⁰⁶ Resting on this tottering tower of authority, these later courts denied common interest privilege for lack of a mutual adversary.²⁰⁷

They also relied on another district court case,²⁰⁸ *Mineaba Co. v. Pabst*,²⁰⁹ which warrants slightly more elaboration. Like the others, *Mineaba* began by excerpting *Hsia* at length.²¹⁰ But it then highlighted the difficulties resulting from joint defense and common interest being shoehorned into a single doctrine, declaring that protected documents “must be disclosed pursuant to a common legal interest and pursuant to an agreement to pursue a joint defense.”²¹¹ Similarly, *Mineaba* directly juxtaposes one out-of-circuit authority that “the party seeking to claim privilege still must demonstrate that the specific communications at issue were designed to facilitate a common legal interest; a business or commercial interest will not suffice”²¹² with another finding the privilege “arises out of the need for a common defense, as opposed merely to a common problem.”²¹³ The result is no more handsome than Dr. Frankenstein’s work,²¹⁴ demanding that parties simultaneous meet the requirements for both the joint defense and common interest doctrines does service to neither.

Finally, courts in the D.C. Circuit²¹⁵ have occasionally collapsed the historical and doctrinal gaps between co-client and common interest privileges.²¹⁶ In *Chesapeake Bay Found., Inc. v. U.S. Army Corps of*

206. *Id.* at 312.

207. *See Intex*, 471 F. Supp. 2d at 16 (“A party which relies on the joint defense privilege or common interest doctrine must establish that ‘the parties had agreed to pursue a joint defense strategy.’”); *NLRB*, 257 F.R.D. at 312 (holding that “the definition of ‘common interest’ is not entirely settled, but in any event the parties must have a common interest in the prosecution of a common defendant”).

208. *See Intex*, 471 F. Supp. 2d at 16; *NLRB*, 257 F.R.D. at 312.

209. 228 F.R.D. 13 (D.D.C. 2005).

210. *Id.* at 15–16.

211. *Id.* at 16.

212. *Id.* (referencing *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995)).

213. *Id.* (quoting *Medcom Holding Co. v. Baxter Travenol Labs.*, 689 F. Supp. 841, 845 (N.D. Ill. 1988)) (alteration removed).

214. *See generally* MARY SHELLEY, FRANKENSTEIN; OR, THE MODERN PROMETHEUS (LACKINGTON, HUGHES, HARDING, MAVOR & JONES 1818).

215. *E.g.*, *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng’rs*, 722 F. Supp. 2d 66, 74 (D.D.C. 2010); *see also* *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. Civ.99-3292004, 2004 WL 2009413, at *4 (D.D.C. Aug. 12, 2004).

216. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. a (AM. LAW INST. 2000) (“This Section states the common-interest attorney-client privilege. The rule differs from the co-client rule of § 75 in that the clients are represented by separate lawyers.”).

Eng'rs,²¹⁷ the district court looked to *Sealed Case* for precedent on attorney-client common interest privilege.²¹⁸ It properly made no mention of a litigation requirement, yet then went on to conclude that “the privilege applies only where the same attorney represents each of the clients.”²¹⁹ In fairness, the “common interest” posture in *Sealed Case* itself described a single attorney representing multiple clients—properly, co-client privilege—but the court hardly limited its reasoning on common interest to that factual posture.²²⁰ If nothing else, *Chesapeake Bay* vividly illustrates the confusion occasioned by describing doctrine for common interest and co-client privilege in one breath.²²¹ Nonetheless, only two years earlier, the court of appeals had more clearly defined common interest as applying amongst multiple attorneys.²²² Prior appellate decisions had found that common interest attached in situations beyond the co-client context.²²³ Ambivalent terminology aside, *Chesapeake Bay* simply cannot be reconciled with such controlling precedents. (And in any event, there is no litigation requirement in the co-client context in the D.C. Circuit.)²²⁴

Lest the muddle be thought impenetrable, other D.C. Circuit district courts have had little trouble distinguishing between joint defense and common interest. For example, *Pogue v. Diabetes Treatment Ctrs.*²²⁵ treated each of the two individually, and enumerated the distinct factors required for each.²²⁶ Meanwhile, after setting forth distinctions between the attorney-client and

217. 722 F. Supp. 2d 66 (D.D.C. 2010).

218. *Id.* at 74.

219. *Id.*

220. See *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994) (“The appellant also argues that the common interest privilege bars disclosure of his communications with the Lawyer. Specifically, he contends that he, Z and the foreign company share an attorney-client privilege regarding their consultations with the Lawyer.”). Indeed, the court made clear separately that the “joint defense privilege protects communications between two or more parties and their respective counsel if they are engaged in a joint defense effort.” *Id.* at 719 n.5.

221. See sources cited *supra* notes 45–46 and accompanying text.

222. *In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998).

223. See, e.g., *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

224. See, e.g., *Hillerich & Bradsby Co. v. MacKay*, 26 F. Supp. 2d 124, 127 (D.D.C. 1998) (“This conduct shows that both [co-clients] Jack MacKay and H & B had a common legal interest in the development of the aluminum bat patent application.”).

225. No. Civ. 99-3298, 2004 WL 2009413 (D.D.C. Aug. 12, 2004).

226. Compare *id.* at *3 (“The joint prosecution privilege protects disclosures between two or more parties and their respective counsel if their communications are conducted under a joint prosecution agreement.”), with *id.* at *4 (“The common interest privilege protects disclosures between a lawyer and two or more clients regarding a matter of common interest or common interests.”). Then again, *Pogue* mistakenly imported the litigation requirement from the work product context, and it arguably shared *Chesapeake Bay*’s misconception of common interest as applying only to co-clients, so it is hardly a model of clarity. *Id.*

work product privileges, *Purcell v. MWI Corp.*²²⁷ discussed *Sealed Case* at length and explained the differing definitions and purposes for the related but distinct joint defense and common interest privileges.²²⁸ In short, as was manifest in *Sealed Case*, D.C. Circuit courts “recognize both a joint-defense privilege and a common-interest privilege.”²²⁹ Having completed this comprehensive tour of evidentiary protections, the *Purcell* court concluded that the “overarching principle that governs these privileges remains the same—protecting attorney-client correspondence on matters of common interest and ‘protecting attorneys’ preparations for trial and encouraging the fullest preparation without fear of access by adversaries.”²³⁰ But like goals do not make for identical privileges, and delicate discrimination is necessary to navigate the jurisprudential jungle of multi-party privilege.

III. COMMON SENSE AND COMMON INTEREST: A WAY FORWARD

The D.C. Circuit has often treated claims of privilege parsimoniously as compared to other jurisdictions.²³¹ As this author has written elsewhere, some of its jurisprudence demands disclosure of seemingly privileged material, to the point that the Department of Justice has advised that such precedents are no longer good law in light of contrary Supreme Court rulings.²³² Its court of appeals has been particularly severe with regard to waiver of the attorney-client privilege due to disclosure to a third party: until 2008, “any disclosure automatically constitute[d] waiver, even in the case of inadvertent disclosure,”²³³ and that draconian rule was only displaced by the Supreme Court’s promulgating Federal Rule of Evidence 502(b).²³⁴ The court of appeals has historically demanded absolute secrecy as the “traditional price” of

227. 209 F.R.D. 21 (D.D.C. 2002).

228. *See id.* at 25.

229. *See id.*

230. *See id.* (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980)).

231. *See Amobi v. D.C. Dep’t of Corr’ns*, 262 F.R.D. 45, 51 (D.D.C. 2009).

232. *See Jared S. Sunshine, The Part & Parcel Principle: Applying the Attorney-Client Privilege to Email Attachments*, 8 J. MARSHALL L.J. 47, 72–73 & n.100 (2015); compare *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977) (non-confidential facts embodied in privileged communications are subject to discovery), with *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981) (facts embodied in privileged communications are protected).

233. *See Amobi*, 262 F.R.D. 45, 52 (D.D.C. 2009) (“Just over a year ago, parties in defendants’ position in this Circuit would have no argument to protect against waiver; they would simply be dead in the water with an inadvertent disclosure. The District of Columbia Circuit found that any disclosure automatically constitutes waiver, even in the case of inadvertent disclosure. [] Rule 502(b), enacted on September 19, 2008, overrides the longstanding strict construction of waiver in this Circuit.” (citation omitted)).

234. *Id.*

the privilege.²³⁵ It is therefore not entirely surprising that the D.C. Circuit has been unhurried in clearly setting out the exact circumstances under which multiple parties may share in the attorney-client privilege through the application of common interest.

There can be no doubt, however, that circuit law recognizes the common interest privilege, however cautiously. True, this has largely been in the context of the work product rather than the attorney-client privilege,²³⁶ but several opinions have addressed the latter, albeit more *en passant* than *vis-à-vis*.²³⁷ Most of the heavy lifting is already done: the court of appeals distinguished early and often between common interest in the work product and attorney-client contexts,²³⁸ and between modern common interest and joint defense standards.²³⁹ What is lacking is a definitive statement on the subject from the court of appeals, repudiating the litigation requirement and reaffirming the sacrosanctity of privilege even when multiple parties confer on legal matters, even before any particularized claim by or against others is contemplated.²⁴⁰

Speaking to the work product context, the court of appeals has already articulated the right rationale persuasively, writing that

a contrary ruling would undermine lawyer effectiveness at a particularly critical stage of a legal representation. It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur. For instance, lawyers routinely . . . consider whether business decisions might result in antitrust or

235. See *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984) (quoting *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981)).

236. See *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010); see also *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598 (D.C. Cir. 2001); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980).

237. See, e.g., *In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998); *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994); see also *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002).

238. See *Deloitte LLP*, 610 F.3d at 139–40; *United States v. Williams*, 562 F.3d 387, 394 (D.C. Cir. 2009); *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371–72 (D.C. Cir. 1984); see also *Tr. of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 14 (D.D.C. 2010); *Harris v. Koenig*, 271 F.R.D. 356, 370 (D.D.C. 2010); *In re Apollo Grp. Sec. Litig.*, 251 F.R.D. 12, 23 (D.D.C. 2008); *Nishnic v. Dep't of Justice*, 671 F. Supp. 771, 775 (D.D.C. 1987); *Latin Investment Corp. v. L & L Construction Assoc., Inc.*, 160 B.R. 262, 263–64 (Bankr. D.C. 1993).

239. See *In re Sealed Case*, 29 F.3d at 719; see also *Purcell*, 209 F.R.D. at 25; *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. Civ. 99-3298, 2004 WL 2009413, at *3–4 (D.D.C. Aug. 12, 2004).

240. See *supra* text supported by notes 236–39 (showing that the breadth of cases on this topic do not provide a definitive statement on this aspect of privileges).

securities lawsuits [A]sked by a client to evaluate the antitrust implications of a proposed merger and advised that no specific claim had yet surfaced, a lawyer knowing that work product is unprotected would not likely risk preparing an internal legal memorandum assessing the merger's weaknesses, jotting down on a yellow legal pad possible areas of vulnerability, or sending a note to a partner—"After reviewing the proposed merger, I think it's O.K., although I'm a little worried about What are your views?" Nor would the partner respond in writing, "I disagree. This merger is vulnerable because" Discouraging lawyers from engaging in the writing, note-taking, and communications so critical to effective legal thinking would, in *Hickman's* words, "demoraliz[e]" the legal profession, and "the interests of the clients and the cause of justice would be poorly served."²⁴¹

Indeed, the court anticipated *Ambac's* logic in concluding that "[w]eakening the ability of lawyers to represent clients at the pre-claim stage of anticipated litigation would inevitably reduce voluntary compliance with the law, produce more litigation, and increase the workload of government law-enforcement agencies."²⁴²

The D.C. Circuit should apply the same reasoning when it comes to common interest.²⁴³ Particularly in the antitrust and merger setting, *Ambac's* commonsensical rebuke to the litigation requirement serves both equity and economy by facilitating companies' sidestepping any illegality *ab initio*.²⁴⁴ Eight circuits have already agreed in principle, whilst the courts of appeals for four circuits—including the D.C. Circuit—have not yet made a clear pronouncement.²⁴⁵ Only the Fifth Circuit stands in open rebellion,²⁴⁶ and given that it has stood by its precedent,²⁴⁷ and that two of the three states over

241. *In re Sealed Case*, 146 F.3d 881, 886–87 (D.C. Cir. 1998) (second modification original).

242. *Id.* at 887; *cf. Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 998 N.Y.S.2d 329, 336–37 (N.Y. App. Div. 2014), *rev'd*, — N.E.2d — (N.Y. 2016).

243. *Martin v. Lauer*, 686 F.2d 24, 32–33 (D.C. Cir. 1982) ("The government's argument ignores appellants' legitimate interest in an early assessment of their legal rights. 'The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.' Maintaining the confidentiality of attorney-client communications facilitates this process by encouraging the client to supply his attorney with relevant information." (citations omitted) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390–91 (1981)).

244. *See Ambac*, 998 N.Y.S.2d at 336–37.

245. *See supra* text supported by notes 142–43.

246. *See In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001); *see also supra* text supported by notes 113–22.

247. *See, e.g., Unites States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002) (following *Santa Fe*, 272 F.3d 705).

which it has geographical jurisdiction have codified litigation requirements,²⁴⁸ it seems likely to remain so. Unlike the other three circuits that apparently remain undecided,²⁴⁹ the D.C. Circuit has evaluated common interest with some regularity, and wants only for a decisive formulation.²⁵⁰ Its court of appeals therefore has a felicitous opportunity to resolve this thorny and recurring issue once and for all.

The Supreme Court often repeats by rote the conflicting mandates tugging at privilege law: protecting the attorney client relationship and adversarial process more broadly, at the cost of a less comprehensive truth-finding mission.²⁵¹ Certainly the D.C. Circuit has mouthed that “familiar platitude.”²⁵² Yet the Supreme Court has also sharply criticized whittling away at the margins of “one of the oldest recognized privileges in the law,” and concluded that what evidence exists indicates that a robust privilege serves vital ends.²⁵³ The D.C. Circuit has at times agreed, writing that “[l]imitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused.”²⁵⁴ And the Supreme Court admonished, in an oft-quoted passage from *Upjohn*, that an “uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”²⁵⁵ The present confusion in the D.C. Circuit as to the litigation requirement for the common interest privilege spurns *Upjohn*’s admonition, and in the absence of a definitive statement on common interest by the court of appeals (or the Supreme Court), the disarray is likely to persist.

248. See TEX. R. EVID. 503(b)(1)(C); MISS. R. EVID. 502(b)(3). Louisiana is the outlier, providing that a “client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication . . . by the client or his lawyer, or a representative of either, to a lawyer, or representative of a lawyer, who represents another party concerning a matter of common interest.” LA. CODE EVID. art. 506(b)(3).

249. See Pavento, Marti, Siddiqui & Eagan, *supra* note 45, at 358 (discussing the Sixth Circuit); *id.* at 363 (discussing the Tenth Circuit); *id.* at 364 (discussing the Eleventh Circuit).

250. See *supra* text supported by notes 236–40.

251. *E.g.*, *Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990); *Trammel v. United States*, 445 U.S. 40, 50 (1980); *United States v. Nixon*, 418 U.S. 683, 709–10 (1974); see also Schaffzin, *supra* note 7, at 56–58 (discussing the attorney-client privilege), 58–59 (discussing the joint defense privilege), 67–68 (discussing the common interest privilege).

252. *Cavallaro v. United States*, 153 F. Supp. 2d 52, 59 (D. Mass. 2001) (“The familiar platitude is that the privilege is narrowly confined because it hinders the courts in the search for truth.”); *e.g.*, *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998); *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982) (“Each of the recognized privileges protects a substantial individual interest or a relationship in which society has an interest, at the expense of the public interest in the search for truth.”).

253. *Swidler & Berlin v. United States*, 524 U.S. 399, 409–10 n.4 (1998).

254. *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982).

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

In any event, the D.C. Circuit's joining the emerging consensus against a litigation requirement will not heal all the woes of common interest doctrine for merging companies. *Ambac* addressed the situation in which the companies had already executed merger and non-disclosure agreements, lending substance to their claims of commonality.²⁵⁶ Where does that leave parties contemplating the antitrust implications (or any other legalities) of a merger prior to signing an agreement? An Illinois court professedly could not understand how market participants could share a common interest antedating a signed agreement: "Prior to the merger, these organizations stood on opposite sides of a business transaction. From a business standpoint and from a legal standpoint, the merger parties' interests stood opposed to each other. They had no common interest, and indeed, their interests were in conflict."²⁵⁷ This is probably the more broadly-held view: "of the cases addressing a party's disclosure of confidential information during negotiations, almost all have held that such disclosure waives the privilege."²⁵⁸ Some, however, have been more open to finding common interest even whilst deals are still being negotiated, claiming the weight of case law points to privilege.²⁵⁹ Such reasoning seems particularly persuasive in the antitrust context, where even prior to an agreement, both parties have the same legal interest in assessing the defensibility of the ensuing combination.

And what of intermediate stages, for example, where the parties have signed non-disclosure but not merger agreements? Courts do look to non-disclosure agreements as evidence of confidentiality supporting common interest.²⁶⁰ But the prudent practitioner should at least reduce any understandings between

256. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 998 N.Y.S.2d 329, 336–37 (N.Y. App. Div. 2014), *rev'd*, No. 80, 2016 N.Y. LEXIS 1649 (N.Y. June 9, 2016); *accord* *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

257. *In re JP Morgan Chase & Co. Sec. Litig.*, No. 06 C 4674, 2007 WL 2363311, at *5 (N.D. Ill. Aug. 13, 2007); *see, e.g.*, *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004); *Cheeves v. S. Clays, Inc.*, 128 F.R.D. 128, 131 (M.D. Ga. 1989), *aff'd*, 39 F.3d 326 (11th Cir. 1994).

258. *Oak Indus. v. Zenith Indus.*, No. 86-C-4302, 1988 WL 79614, at *4 (N.D. Ill. July 27, 1988).

259. *Cavallaro v. United States*, 153 F. Supp. 2d 52, 62 (D. Mass. 2001) ("The weight of the case law suggests that, as a general matter, privileged information disclosed during a merger between two unaffiliated businesses would fall within the common-interest doctrine.") (citing, *inter alia*, *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 311 (N.D. Cal. 1987) and *Rayman v. Am. Charter Fed. Sav. & Loan Ass'n*, 148 F.R.D. 647, 655 (D. Neb. 1993)). *But see* *Oak Indus.*, 1988 WL 79614, at *4 (explaining why the court declined to follow *Hewlett-Packard*).

260. *See, e.g.*, *Tenneco Packaging Specialty & Consumer Prods. v. S.C. Johnson & Son*, No. 98 C 2679, 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999); *MobileMedia Ideas LLC v. Apple, Inc.*, 890 F. Supp.2d 508, 518 (D. Del. 2012).

potential merger participants to a written common interest agreement.²⁶¹ In any common interest arrangement, and particularly in exploratory merger discussions, the parties may ultimately fail to come to terms, and litigation may ensue.²⁶² The parties may be pursuing other interests that are divergent or even adversarial.²⁶³ Counsel for both sides must therefore weigh the advantages of sharing information against the disadvantages;²⁶⁴ a written agreement can set forth the parties' obligations in the event of the common legal interest's cessation or the parties' divergence.²⁶⁵

Common interest presents knotty issues of law, which are made none the easier by ostensible doctrinal disarray. But the confusion is not as intractable as some commentators would have it. One complained that courts are widely split as to whether a written agreement is necessary, whether there is a litigation requirement, and whether the common interest need be identical.²⁶⁶ But in fact there is general consensus that an oral agreement may suffice for the privilege just as it would for any other contract,²⁶⁷ and that a litigation requirement is counterproductive, at least in federal courts.²⁶⁸ In fairness, there is much variation as to the necessary degree of similarity of interests.²⁶⁹ All in all, however, much of the confusion with common interest is more semantic

261. See Drumright & Griffin, *supra* note 35, at 44 (quoting *In re Beville*, Bresler & Schulman Asset Mgt. Corp., 805 F.2d 120, 126 (3d Cir. 1986)); Schaffzin, *supra* note 7, at 81–83; Fischer, *supra* note 25, at 649–50; Rosenthal, *supra* note 42, at 151–52. Common interest does not require a writing, but memorializing any agreement is undoubtedly prudent both to avoid misunderstandings and provide evidence to any court. See Schaffzin, *supra* note 7, at 81–82; Fischer, *supra* note 25, at 649–50; e.g., *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 72–73 n.12 (S.D.N.Y. 2009) (“[W]hile Nordbank and the non-party lenders wisely chose to reduce their common agreement to writing, their decision to do so does not mean that there was no prior agreement. To the contrary, Nordbank has made a persuasive showing that the parties shared a common interest . . .”); *Denney v. Jenkins & Gilchrist*, 362 F. Supp. 2d 407, 415 (S.D.N.Y. 2004); *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003).

262. See, e.g., *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985); see also *Hewlett-Packard*, 115 F.R.D. at 309–10.

263. See generally *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979); *Eureka Investment Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 937 (D.C. Cir. 1984); *Eisenberg v. Gagnon*, 766 F.2d 770, 787–88 (3d Cir. 1985); *United States v. United Tech. Corp.*, 979 F. Supp. 108, 111–12 (D. Conn. 1997); *In re Leslie Controls, Inc.*, 437 B.R. 493 (Bankr. Del. 2010); 330 *Acquisition Co. v. Regency Sav. Bank, F.S.B.*, 783 N.Y.S.2d. 805, 805–06 (N.Y. App. Div. 2004); *GUS Consulting GMBH v. Chadbourne & Parke LLP*, 20 Misc.3d 539 (N.Y. Sup. Ct. 2008).

264. See Pavento, Marti, Siddiqui & Eagan, *supra* note 45, at 354, 365–66; Rosenthal, *supra* note 42, at 150–51; e.g., *Ageloff v. Noranda, Inc.*, 936 F. Supp. 72, 77 (D.R.I. 1996).

265. Rosenthal, *supra* note 42, at 151; Pavento, Marti, Siddiqui & Eagan, *supra* note 45, at 365–66.

266. See Giesel, *supra* note 23.

267. See RICE, *supra* note 2, § 4:35 at 246 n.10; *supra* note 261.

268. See *supra* Section I.B.

269. See, e.g., *supra* text supported by note 84.

than substantive, and resolvable largely by more careful selection of language in arguments and opinions.²⁷⁰ Common interest serves a vital role in increasingly entangled legal representations, and a clarified understanding of its posture vis-à-vis joint defense and co-client privilege is essential to fully realizing its value.

270. See *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417 (N.D. Ill. 2006) (criticizing the “undifferentiated use” of “joint defense” and “common interest”); Giesel, *supra* note 23, at 478 n.5 (“cataloguing the mishmash of terms”); George S. Mahaffey Jr., *Taking Aim at the Hydra: Why the “Allied-Party Doctrine” Should Not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 REV. LITIG. 629, 631–33 (2004).

