Minn.'s New Common Interest Doctrine: A Primer

By **George Singer** (October 12, 2022)

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The right of confidentiality is usually lost when communications between an attorney and client take place in the presence of a third party, or when work product is shared with others.

However, legal counsel often argue that these communications and materials remain protected due to the application of the common interest doctrine — also referred to as the joint defense privilege. Some states do not recognize the doctrine — and courts that do disagree about many of its requirements.

The Minnesota Supreme Court recently adopted the common interest doctrine in Minnesota. Last month, in Energy Policy Advocates v. Ellison,[1] the court reversed the Minnesota Court of Appeals, which found that the doctrine was inapplicable since it was not recognized by law in Minnesota.

The decision leaves open issues, but is certainly a welcome result for lawyers in Minnesota. Even the parties to the proceeding did not seriously dispute that the doctrine should be recognized.[2]

Attorney-Client Privilege and Work-Product Doctrine

The concept of privilege is a fundamental cornerstone of the U.S. legal system. Certain confidential communications between a client and his or her attorney are sacrosanct and protected from disclosure.[3]

Indeed, the attorney-client privilege is one of the oldest and most venerable of all privileges, and is codified by statute and protected by rule of court.[4] And a party's documents and notes — including those of the parties' representatives and attorneys made primarily in anticipation of litigation — are similarly protected under the work product doctrine.[5]

In order to protect information from discovery and retain its character as privileged, the information must be delivered to or by legal counsel for the purpose of giving or receiving legal assistance, and be confidential — i.e., not divulged to a third party who is not counsel or client.[6]

A voluntary disclosure of information and documents to a third party typically waives privilege. The result of waiver is that the information becomes subject to discovery by adversaries and potentially admissible at trial.

This being the case, great care should be used to ensure that thoughtful consideration is given before sharing sensitive communications and information with third parties. The challenge often becomes how best to provide the client the most effective and fullest representation, and yet keep possibly game-changing materials out of an adversary's reach through discovery.

The law has created a number of exceptions to the rule that the sharing of otherwise privileged communications destroys privilege. Courts have recognized that there is often a

need for an attorney to include outside parties in discussions with the client and share documents as part of an effective overall representation.

Nomenclature varies from one jurisdiction to another, but the objective remains the same: avoiding the risk of waiver, and precluding a common adversary from discovering those shared communications and materials.

Common Interest Doctrine

The commonplace and practical need for lawyers to be able to collaborate with other clients who share a common legal interest cannot be understated. A joint defense privilege has developed in most jurisdictions to allow one group of clients and their counsel to communicate with another group of clients and their separate counsel.[7]

The common interest doctrine is not a separate privilege, but rather, a notable exception to the general rule that disclosure or communications with or in the presence of third parties destroys any attendant privilege. It can, however, be practically viewed as an extension of the attorney-client privilege, and is often referred to as a joint defense privilege.

The doctrine allows separately represented parties with common legal interests to share information with each other and their attorneys without having to disclose it to third parties.[8]

Facts of Ellison

Energy Policy Advocates, a nonprofit national advocacy organization, submitted document requests related to climate change litigation to the Office of the Attorney General. The attorney general determined that the request produced no responsive nonprivileged public data.

Energy Policy Advocates disputed the assertion of privilege, and commenced a lawsuit in Ramsey County District Court under the Minnesota Data Practices Act, seeking to compel the production of records that were retained. Specifically, Energy Policy Advocates sought documents relating to the relationship between the Minnesota attorney general and an outside group that was alleged to fund special attorneys general in order to advance climate change positions.

The attorney general refused to produce documents requested. The parties' arguments centered on the existence and scope of the common interest doctrine, as well as the applicability of the attorney-client privilege to internal communications among attorneys in public law agencies.[9]

The parties agreed to resolve the dispute through motion practice and a process for categorizing documents, preparing a privilege log and identifying the attorney general's justification for refusing to release requested documents. Certain documents were also submitted for in camera review. The district court granted the attorney general's motion and dismissed the case, triggering subsequent appeals.

Court of Appeals Finds Doctrine Inapplicable

The Minnesota Court of Appeals concluded that the district court erred in two fundamental respects.[10]

First, the district court erred by applying the common interest doctrine to sanction the records retention by the attorney general, because that exception to disclosure was not recognized in Minnesota.[11] The court opined that it is solely within the purview of the Supreme Court or the Legislature to undertake the task of extending existing law.[12]

Second, the Minnesota Court of Appeals found that the district court erred by finding the attorney-client privilege to be applicable to internal communications among attorneys in government agencies.[13]

The Court of Appeals decision was fundamentally based on the lack of recognition by Minnesota law — statute, rule or precedent — of the applicability of the common interest doctrine, a material distinction from the authority that exists in the state concerning the applicability of the attorney-client privilege.

The decision prompted dozens of amici curiae to submit briefs urging for the adoption of the common interest doctrine in Minnesota. According to an amicus brief submitted jointly by the Minnesota Association for Justice, the Minnesota Defense Lawyers Association, the Minnesota State Bar Association and the Minnesota Firm Counsel Group, the importance of the issue to the legal profession and the uncertainty created by the Court of Appeals decision created "deep and immediate concern."[14]

The attorney general petitioned the Minnesota Supreme Court for further review.

Supreme Court Recognizes Doctrine

The Minnesota Supreme Court reversed the decision of the Minnesota Court of Appeals. The high court opined that the attorney-client privilege may apply to internal communications among attorneys in public law agencies. The Supreme Court also ruled that Minnesota should join the authority of nearly every state court and federal circuit court and formally recognize the common interest doctrine.[15]

The court pronounced that the common interest doctrine applies in Minnesota, both to attorney-client and work product-protected communications:

> [W]hen (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy.[16]

The formulation articulated by the Supreme Court was intended to generally align the requirements for the doctrine's applicability under Minnesota state and federal law.[17] The desire to provide clarity to the legal community with respect to the contours of the doctrine's applicability was evident from the court's opinion.

As articulated in the amicus brief quoted above, "'[a]n 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.'"[18] Public policy and the administration of justice are furthered by guidance in the law that can be predictably relied upon, and thereby furthers the purposes of the attorney-client privilege.[19]

The Minnesota Supreme Court articulated basic parameters for the application of the common interest doctrine. Importantly, the mere existence of a common interest — or common adversary — does not satisfy the common interest doctrine.

The following general principles set forth in the court's decision frame the common interest doctrine in Minnesota, and should be carefully considered before any disclosure to third parties is made.[20]

Doctrine Requires Parties to Be Separately Represented

The common interest doctrine only applies where parties are represented by separate lawyers. There can be no protection when an unrepresented party is part of the communication.

However, the rule formulated by the Minnesota Supreme Court does not, by its express terms, necessarily require the other attorney — or any attorneys, for that matter — be actually party to the communication.

But there would be a serious risk of waiver by proceeding in a fashion where, for example, clients directly communicate with one another without involving their counsel in those communications. This would be particularly true if those communications did not implicate the attorney's legal advice, work product or mental impressions.[21]

Doctrine Requires Sufficiently Common Interest

Courts disagree about the precise meaning of "common interest." Some cases indicate that a common interest means an identical interest. Other cases permit something less than identical interests to suffice for purposes of triggering common interest doctrine.

Some courts have even recognized that the doctrine may even be properly invoked notwithstanding the fact that the parties have in some respects adverse interests.[22] This is the better view, as privileged information shared between parties to mergers and other business transactions should as a matter of policy be able to qualify for protection in appropriate circumstances.[23]

The common interest doctrine generally does not apply where the participants merely have common problems, or share a desire to succeed in a particular matter. There must be sufficient commonality of legal interests.

The possibility of future discord between the parties should be irrelevant to the alignment of their interests. As long as a common interest is shared at the time the agreement was made, it is enough for the common interest doctrine to apply.

Parties should evaluate whether there are — or may in the future likely be — any issues on which their legal interests diverge, prior to deciding to engage in otherwise protected communications. The analysis should be made on an issue-by-issue basis to determine the extent of the common legal interest and protections afforded.

Doctrine Limited to Legal Interests

The Minnesota Supreme Court made clear that the appropriate scope of the doctrine is limited to only common legal interests. That limitation encompasses both common litigated and nonlitigated legal interests.[24]

In other words, the common interest requirement in Minnesota recognizes the applicability of the doctrine even in the absence of pending or anticipated litigation.[25] While the

validity of an assertion of protection might not be challenged until litigation arises, Minnesota's formulation can protect communications that occur long before any litigation begins — or is even expected.

The standard articulated by the Minnesota Supreme Court excludes purely commercial interests, political interests or policy interests from the scope of protection by the common interest doctrine. However, that is not to say that legal interests must be the only interest the parties hold for the doctrine to apply.

Business or personal interests may be implicated. However, the legal nature of the communications typically must predominate over other interests.

Doctrine Extends to Attorney Work Product

In recognizing the common interest doctrine in Minnesota, the court concluded that it also extends to attorney work product.[26] Work product of counsel, in other words, need not be disclosed if otherwise privileged and shared with those who are similarly aligned on a matter of common interest.

Doctrine Does Not Require Written Agreement

The pronouncement by the Minnesota Supreme Court requires only that the parties agree to exchange information with respect to the matter in which they have a common legal interest. That agreement must exist before any disclosure is made to a third party. The rule does not require the agreement to be memorialized in a written document.

Just as it is always sound practice to have a written engagement agreement to establish and clarify any attorney-client relationship, a written agreement among the client groups and their counsel is advisable, and aids in proving that there is a shared legal interest. Importantly, the mere existence of an agreement — even one memorialized in writing — does not alone assure protection for disclosed information and allow for unrestrained sharing.

Doctrine Requires Coordinated Legal Strategy

A common interest alone does not ensure that the common interest doctrine will apply. The specific communications at issue must be designed to further the formulation of a joint legal strategy in order to be protected by Minnesota's articulation of the common interest doctrine.

Doctrine Requires Communication Be in Furtherance of Interest

The communications must be made in furtherance of a joint legal strategy for the common interest doctrine to apply. The common interest participants must actually be engaged in a joint legal strategy and effort to further their common legal interests.

Doctrine Requires an Otherwise Privileged Communication

A threshold issue for determining the applicability of the common interest doctrine is whether there exists an otherwise applicable and underlying attorney-client privileged communication for the common interest doctrine to apply.[27]

The communication must in the first instance be intrinsically privileged to warrant

protection. A review of who specifically is included in the communication can often be fatal, as the standard is appropriately high for communications that do not include counsel.

The "otherwise privileged" requirement for the application of the doctrine ensures that there is a minimal infringement on the administration of justice. Since the underlying communication is protected due to privilege, it would not be discoverable in the first instance.

Doctrine Requires Asserting Party to Bear Burden of Proof

The party asserting the applicability of the attorney-client privilege or common interest doctrine bears the burden of proving its applicability.[28] That party must be able to clearly articulate the precise legal ties connecting the parties in order to successfully invoke protection and the satisfaction of all required elements.

Courts will necessarily evaluate the sufficiency of any common interest claim on a case-by-case, issue-by-issue basis to determine whether the parties were allied in a common legal cause at the time the communications were made.

Implications of Supreme Court Decision

The adoption by the Minnesota Supreme Court of a general rule on the common interest doctrine, and the guidance provided with respect to some of its boundaries, further the public interest in the law governing the attorney-client privilege in Minnesota.

The state protects legal advice and other privileged communications shared to advance a common legal interest without risking waiver of privilege. But the precise contours of the common interest doctrine are not fully defined or settled, notwithstanding Ellison. Case-specific issues and concerns not addressed in the decision will arise in varying situations.

A successful use of the common interest doctrine requires care, preparation and attention to detail. Lawyers need to focus on the essential elements of the doctrine in order maximize the benefits of the attorney-client privilege.

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[1] Energy Policy Advocates v. Ellison, No. A20-1344, 2022 Minn. LEXIS 402 (Minn. Sept. 28, 2022).

[2] In addition, nearly 100 amici curia (including 38 states and territories) participated in the submission of briefs in connection with the appeal urging the Supreme Court to adopt the common interest doctrine. One brief was submitted by two associations that collectively represent thousands of Minnesota lawyers engaged in the full spectrum of legal practice, and that often represent opposing parties in litigation. Id. at 10 and n.1.

[3] The Minnesota Supreme Court has previously recognized the following articulation of the attorney-client privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Kobluck v. University of Minn., 574 N.W.2d 436, 440 (Minn. 1998). The purpose of the attorney-client privilege "is to encourage the client to confide openly and fully in his attorney without the fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client." Id.

[4] See Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). See also Fed. R. Evid. 502; Fed. R. Civ. P. 26(b)(3); Minn. Stat. § 595.02 subd. 1(b); Minn. R. Civ. P. 26.02(d). Lawyers are also duty-bound to protect the confidences of their clients. See Minnesota Rules of Professional Conduct, Rule 1.6.

[5] The attorney-client privilege focuses on confidential communications between the attorney and the client, while the work product doctrine focuses on tangible documents that contain the thoughts, opinions, conclusions, strategies and mental impressions of counsel. See Dennie v. Metro. Med. Ctr., 387 N.W.2d 401, 406 (Minn. 1986).

[6] See Restatement (Third) of the Law Governing Lawyers § 68 (Am Law. Inst. 2000).

[7] The common interest doctrine advances the same policies that underpin the attorney-client privilege — namely, to encourage full and frank communication and to enable attorneys to provide the most effective representation of a client.

[8] See Shukh v. Seagate Tech. LLC, 872 F. Supp. 2d 851, 855 (D. Minn. 2012).

[9] The Minnesota Data Practices Act provides that the disclosure of government data is governed by the statutes, professional standards and rules concerning discovery, evidence and professional responsibility generally. Minn. Stat. § 13.393.

[10] Energy Policy Advocates v. Ellison, 963 N.W.2d 485 (Minn. Ct. App. 2021), rev'd, No. A20-1344, 2022 Minn. LEXIS 402 (Minn. Sept. 28, 2022).

[11] Id. at 501-02. The Court of Appeals further found that if Minnesota did recognize the common interest doctrine, it would not extend to attorney work product. Id. at 502.

[12] Id. at 501.

[13] Id. at 500.

[14] See infra note 18, at 3.

[15] Ellison, 2022 Minn. LEXIS 402, at *10 (Minn. Sept. 28, 2022). The U.S. Court of Appeals for the Eighth Circuit, which has appellate jurisdiction over federal district courts in Minnesota, has applied the doctrine. See In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997) (reviewing the contours of the common interest doctrine).

[16] Ellison, 2022 Minn. LEXIS 402, at *11 (Minn. Sept. 28, 2022).

[17] Id. Accord Restatement (Third) of the Law Governing Lawyers §§ 76, 91 cmt. b.

[18] Joint Brief of Amici Curaie Minnesota Association for Justice, Minnesota Defense Lawyers Association, Minnesota State Bar Association and Minnesota Firm Counsel Group, at 12 (quoting Upjohn Co. v. U.S., 449 U.S. 383, 393 (1981)).

[19] The policy considerations supporting the common interest doctrine may differ depending on the context in which it arises. In the context of litigation, the promotion of the adversarial system supports a no-waiver rule, where co-parties with a common legal interest share information. The policy considerations in the transactional context include the beneficial economic and societal effects that result from transactions generally, and efficiencies (including cost efficiencies) that can arise if the parties are able to share confidential information.

[20] While the fundamentals of the attorney-client privilege are relatively uniform among jurisdictions, the precise contours of the common interest doctrine are not fully settled across the country. It is therefore important for counsel to take care to review the requirements of jurisdictions that may be pertinent to a matter.

[21] See Reginald Marin Agency Inc. v. Conseco Med. Ins. Co., 460 F. Supp. 915, 920 (S.D. Ind. 2006).

[22] The application of the common interest doctrine should be available even if, like in the case of a merger, there may be interests in conflict — as in virtually every business transaction, each party wants to obtain the best deal, and negotiates at arm's length to obtain it. And, to the extent successful in that goal, the other party suffers.

[23] See John C. Riech and Sangki Park, Common Interest Doctrine in IP Transactions, Cybaris: Vol. 11: Iss. 2, Article 1 (2020) (noting the weight of authority recognizing the applicability of the common interest privilege in the transactional context). "The weight of the case law suggests that, as a general matter, privileged information exchanged during a merger between two unaffiliated business[es] would fall within the common-interest doctrine." La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 310 (D.N.J. 2008). Shielding communications between prospective buyers and sellers from discovery encourages open communications about the transaction and diminishes the risk of subsequent litigation. See Hewlett-Packard Co. v. Bausch & Lomb Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987) (opining that courts should not erect barriers to business deals by increasing the risk that prospective buyers will not have access to important information — this would set the stage for more lawsuits, rather than create an environment in which business can more freely share information relevant to their transactions).

[24] Ellison, 2022 Minn. LEXIS 402, at *11-12 (Minn. Sept. 28, 2022).

[25] Id. Accord In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997) (the common interest privilege applies "not only if litigation is current or imminent but ... whenever the communication was made in order to facilitate the rendition of legal services to each of the clients involved in the conference").

[26] Ellison, 2022 Minn. LEXIS 402, at *12 (Minn. Sept. 28, 2022). See Restatement (Third) of the Law Governing Lawyers § 91 cmt. b (providing that work product may generally be disclosed to parties similarly aligned on matters of common interest).

[27] Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992).

[28] Ellison, 2022 Minn. LEXIS 402, at *11 (Minn. Sept. 28, 2022) (citing In re: Comm'r of Pub. Safety, 735 N.W.2d 706, 711 (Minn. 2007)). The application of the burden to the party asserting protection of the common interest doctrine is consistent with the general rules for discovery. Id.