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Are You Sure Those Conversations Are Covered by the Common Interest Privilege? Check the Record

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Imagine you are representing an individual who has been subpoenaed for testimony as part of the government's investigation of her employer. Your client has made the decision to talk to the government under the terms of a proffer agreement. Rather than go into that interview blind, you and your client would like the benefit of learning certain information from the employer and other witnesses, including the government's current theories of liability, the key documents the government has focused on so far, what defenses might exist, and what the employer and other employees think the main liabilities are. You are going to need to enter into a joint defense agreement, which relies on the common interest privilege to keep that exchange of information privileged.

The Common Interest Privilege

Parties who have a common interest in a potential civil or criminal case, but who are represented by separate attorneys, often rely on the common interest privilege to protect their communications with each other and their attorneys as they try to understand the government's strategy and prepare their defenses. The common interest privilege is "an extension of the attorney client privilege." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). "It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Id.* A claim of privilege under the common interest rule "requires a showing that the communication in question was given in confidence and that the client reasonably understood it to be so given." *Id.* at 244.

Notably, when describing the application of the common interest privilege, the Third Circuit has explained that it should not be used "as a post hoc justification for a client's impermissible disclosures." *Teleglobe Commc'ns Corp. v. BCE, Inc.,* 493 F.3d 345, 365 (3d Cir. 2007). This comment proved relevant for a recent decision in the Southern District of New York, which held that the common interest privilege did not apply to communications between an attorney for an employee and the attorneys for his company because the employee was not able to produce evidence that he and the company had agreed to a common interest or joint legal strategy at the time the communications were made.

SEC v. Rashid

In *SEC v. Rashid*, the SEC was investigating defendant Mohammed Rashid's corporate expenses while he was an employee at Apollo Management, L.P. During the investigation, Rashid was represented by an attorney from Crowell & Moring LLP, and Apollo was separately represented by attorneys from Paul, Weiss, Rifkind, Wharton & Garrison LLP. At some point during the investigation, Rashid ended his relationship with Crowell and hired new attorneys. During a pretrial deposition of his former attorney from Crowell, Rashid and his new attorneys objected when the SEC attempted to ask questions about the Crowell attorney's previous communications with Paul Weiss, arguing that those communications were protected by the common interest privilege. The SEC moved to compel.

Noting that the common interest privilege is narrowly construed and that the party invoking the privilege bears the burden of demonstrating it existed, the Southern District

of New York considered whether there was evidence that the parties had agreed to a common interest or joint legal strategy. The court ultimately determined that there was no such evidence.

The court first noted that Apollo's attorney from Paul Weiss stated that he did not recall entering into a common interest or joint defense agreement with Rashid and his attorney. Second, although Rashid's attorney testified that they had an understanding, he was not able to recall the details of any conversation with Paul Weiss attorneys about such an agreement. Indeed, although Rashid's attorney had sent an email to Paul Weiss that contained "Common Interest Privilege Document" in the subject line and noted that the document was attached "pursuant to our common interest," the court discounted this evidence. The court did so because in an email a few weeks later, a Paul Weiss attorney noted: "We would like to remind you that we are not in a position to enter into a join[t] agreement with your client. . . . The information is considered privileged, however, that privilege belongs to Apollo." The court concluded that Paul Weiss's express rejection of the common interest designation weighed against applying the privilege.

Rashid also argued that he reasonably believed the common interest privilege applied when he shared information because he had only received one *Upjohn* warning from Paul Weiss, before he hired his own counsel, and then never received it again. The court rejected this argument, noting that the administration of the *Upjohn* warning actually reinforced Paul Weiss's understanding that it did not share a common legal interest with Rashid, and the fact that Paul Weiss only administered the warning once was not evidence that the parties had a joint legal strategy. The court also rejected Rashid's argument that Apollo's decision to pay his legal fees was evidence that the parties agreed to pursue a joint legal strategy.

Overall, the court weighed the evidence and, emphasizing that both parties must agree to pursue a joint legal strategy, held that the common interest privilege did not apply in these circumstances.

Lessons and Practice Pointers

There are some key lessons to take away from this opinion, as clients and attorneys seek to share information in a joint defense context:

- Establish the common interest agreement before sharing information. The agreement does not have to be written, but *both sides* must agree that they are entering into a common interest relationship.

- Documentation helps. When possible, document that the information is being shared pursuant to a common interest agreement and that the parties expect their communications to be privileged.

- Keep attorneys in the loop. The exchange of information should occur between (or with) attorneys and not directly and exclusively between clients.

- Carefully consider the parties' unity of legal interests, or lack thereof, before sharing information.