# *Common-Interest or Joint-Defense Agreements: Legal Requirements, Potential Pitfalls, and Best Practices*

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## Introduction

Parties that share a common legal interest may find it advantageous to coordinate their efforts and share information, including attorney-client privileged communications. For example, co-plaintiffs or co-defendants in a lawsuit may want to work collaboratively to conduct factual investigations, perform legal research, and develop legal strategies. Parties considering a merger may want to share analyses regarding pending or future litigation. A potential purchaser of intellectual property may request that the seller furnish a copy of a privileged intellectual-property opinion. However, each of these scenarios presents a significant risk: the possibility that the disclosure of privileged communications will result in the waiver of the attorney-client privilege.[1] Further, the waiver likely extends not only to the communications disclosed, but to all privileged communications on the same subject matter.[2]

Under the right circumstances, the common-interest privilege provides an exception to the waiver rule. When privileged communications are disclosed to a party sharing a common legal interest, and the disclosure is in furtherance of the common interest, the common-interest privilege generally preserves the right to assert the *underlying* privilege against other parties. Unfortunately, common-interest privilege law is "complicated and contradictory."[3] As a threshold matter, while there is little question that co-defendants may invoke the common-interest privilege upon satisfying its requirements, the status of the privilege is far less certain outside of actual or imminent litigation. Beyond this, nuances in the law and differences across jurisdictions raise the risk that a party's reliance on the common-interest privilege will result in a waiver.

To mitigate the risk of a waiver, parties that intend to invoke the common-interest privilege often enter into a "joint defense" or "common interest" agreement.[4] If done well, a common-interest agreement establishes the foundational facts to assert the common-interest privilege and protects a party against waiver. Done poorly, the agreement can lead not only to waiver of the underlying attorney-client privilege, but also to unintended attorney-client relationships, conflicts of interest, expanded malpractice exposure, and the inability to extricate yourself or remove an uncooperative party from a group, among other things.

In this article, we discuss the requirements for invoking the common-interest privilege, pitfalls and potential problems, and provisions that counsel should consider including in a common-interest agreement.

## Ordinary Common-Interest Scenario

An ordinary common-interest scenario arises when parties that are each represented by their own counsel wish to share privileged communications, as depicted in Figure A.

**Figure A**

| Lawyer A | Lawyer B | Lawyer C |
|---|---|---|
| \| | \| | \| |
| Client A | Client B | Client C |

In this scenario, can Lawyer A disclose privileged communications between Lawyer A and Client A to Lawyer B without waiving the privilege? Ordinarily, such disclosure would result in a waiver, destroying Client A's ability to assert the privilege against other parties. But if the common-interest privilege applies, it provides an exception to the general waiver rule.

## The Distinct Co-Client Scenario

Some of the confusion regarding the scope and applicability of the common-interest privilege is due to the failure to distinguish it from the co-client privilege.[5] The co-client privilege applies where one lawyer represents multiple clients, as depicted in Figure B.

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**Figure B**


The co-client privilege generally protects communications between the Lawyer and Client A that are disclosed to Client B or Client C.[6] The focus of this article is scenarios where each client has its own counsel. The potentially applicable privilege in those scenarios is the common-interest privilege.

## What is a Common-Interest Agreement?

A common-interest agreement is essentially an agreement to assert and preserve the common-interest privilege. Generally, it is:

1. an agreement amongst persons sharing a common legal interest that;
2. information protected by the attorney-client privilege or work-product doctrine;
3. that is communicated in the presence of, or shared amongst them;
4. will not result in a waiver of those protections.

## Common-Interest Privilege Requirements

Generally speaking, a party invoking the common-interest privilege has the burden of showing:

1. an underlying privilege such as the attorney-client privilege protects the communication;
2. the parties disclosed the communication at a time when they shared a common interest;
3. the parties shared the communication in furtherance of the common interest; and
4. the parties have not waived the privilege.[7]

A significant problem for parties that intend to rely on the common-interest privilege, however, is that there is a lack of uniform law.

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Because the law varies greatly across jurisdictions, it is extremely important that practitioners research the specific law of the jurisdiction that governs any potential assertion of the common-interest privilege. Below, we summarize three Michigan cases that apply the common-interest privilege—one applying Michigan law, the other two applying federal common law.[10] Following these case summaries, we discuss common issues that arise when determining the scope of the common-interest privilege.

## Michigan Courts' Application of the Common-Interest Privilege

There appear to be no publically available Michigan state-court opinions addressing the availability of the common-interest privilege under Michigan law.[11] When presented with this issue, the federal district court for the Eastern District of Michigan held that the Michigan Supreme Court would adopt a narrow version of the common-interest privilege.[12] This court has also recognized the common-interest privilege when applying federal common law in federal-question cases.[13]

### State Farm v Hawkins—*Common-Interest Privilege Under Michigan Law*

In *State Farm Mut Auto Ins Co v Hawkins*, the federal district court for the Eastern District of Michigan held that the Michigan Supreme Court would likely adopt a narrow version of the common-interest privilege. In *Hawkins*, the plaintiff sued the defendant for fraudulently claiming reimbursement for healthcare services that she never provided.[14] The plaintiff issued subpoenas to the defendant's former law firm and to an attorney within that law firm.[15] Among the documents requested were communications between the attorney and the defendant's new attorney.[16] The attorney asserted a common-interest "arrangement" between the defendant's former law firm and the defendant, and refused to produce the documents.[17] The attorney argued that the firm and the defendant shared a common interest because the plaintiff had suggested that the firm may have played a role in the defendant's fraud.[18]

The court's first task was to determine whether Michigan law recognized the common-interest privilege.[19] The court held that "[t]he wide acceptance of [the] common interest exception, and the absence of its rejection, suggests that the Michigan Supreme Court would recognize it."[20] But given "Michigan's clear directive to construe the attorney-client privilege narrowly," the court held that "the Michigan Supreme Court would likely adopt

the narrow version of the common interest privilege as described in the Restatement."[21]

> The court cited Restatement § 76:
>
> 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 §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.[22]

"Under the Restatement," the court held:

> [P]rivileged communications between an attorney and client are not waived when they are revealed to an allied lawyer, provided that the person asserting the privilege shows that the attorney-client privilege applied to the underlying attorney-client communication…. [The] other requirements must [also] be met, e.g., the communication must be related to a common litigation interest.[23]

The court also held that, under the Restatement, the common-interest privilege applies to both actual and potential litigants.[24]

Applying this standard, the court held that the firm (represented by the attorney within the firm who had received the subpoena) and the defendant (represented by her new counsel) could participate in a common-interest arrangement.[25] The attorney for the firm communicated with the attorney for the defendant in an effort to address the firm's potential liability to the plaintiff with regard to defendant's fraudulent acts.[26] Thus, the court held that "the attorneys were representing clients with a common litigation interest."[27] But the court also held that the common-interest privilege "may only be claimed if the communications are being shared between the clients' attorneys."[28] Therefore, the court ordered the production of an updated privilege log and held that only communications made by the firm's attorneys or agents of the firm's attorneys to the defendant's new counsel could be withheld under the common-interest privilege.[29]

**Dura Global v Magna—*Common-Interest Privilege Under Federal Common Law***

In *Dura Global, Techs, Inc v Magna Donnelly Corp*, the Eastern District of Michigan, applying federal common law, held that an auto supplier had properly invoked the common-interest privilege and had not waived the attorney-client privilege when it disclosed patent opinion letters to its OEM customer.[30] Magna's patent counsel had disclosed two opinion letters to Toyota's intellectual property counsel.[31] The opinion letters related to two patents held by Dura and a window that Magna had proposed for Toyota.[32] Magna later agreed to indemnify Toyota for claims by Dura related to Toyota's use of Magna's window.[33]

Dura subsequently sued Magna for patent infringement and misappropriation of trade secrets. Dura issued a subpoena to nonparty Toyota, and Toyota produced the opinion letters to Dura, allegedly without notifying Magna.[34] Dura argued that Magna, by disclosing the opinion letters to Toyota, waived the attorney-client privilege as to the subject matter of communications between Magna and Toyota.[35] The court disagreed.

The court, unable to find controlling Sixth Circuit authority, decided the issues as it believed the Sixth Circuit would.[36] The court recited a statement of the common-interest privilege to which it stated the "parties agree."

> The parties agree that the common interest privilege permits the disclosure of privileged communication without waiving the privilege, provided that the parties have "'an identical legal interest with respect to the subject matter of the communication.'"[37]

The court noted that, if the privilege survived disclosure to Toyota, "the later unauthorized disclosure by Toyota to [Dura] did not waive that privilege."[38] The "privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties."[39]

The court rejected Dura's argument that Magna and Toyota were negotiating a business strategy, not formulating a common legal strategy.[40] First, the court noted the steps Magna took to ensure the confidentiality of the opinion letters. Magna had (1) marked the opinion letters and a cover letter "confidential and privileged," (2) asked for confidentiality concurrently with the disclosure, (3) stated in the cover letter that sharing of the opinion was "strictly on the basis of a joint defense privilege," and (4) requested in the cover letter that Toyota contact Magna if the need arises for Toyota to disclose the

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opinion to a third party.[41] Additionally, the communications were between intellectual property lawyers, not non-attorney employees.[42] The court held that Magna's counsel could reasonably expect Toyota's counsel to maintain the confidentiality of the opinion letters.[43] The court held that these steps, even if Magna could have taken more, were sufficient to prevent waiver of the privilege.[44]

Second, the court found that the disclosures were made in connection with a common legal strategy, not merely a "joint commercial venture."[45] The court distinguished *Libbey Glass*,[46] a case where disclosure was made by and to non-attorney employees who "had concerns" about legal issues, but did not understand the significance of maintaining the confidentiality of legal opinions. In contrast, the communications between counsel for Magna and Toyota dealt exclusively with legal issues relating to Toyota's purchase of windows, not business matters.[47] Additionally, the parties' correspondence about the indemnification agreement, the court held, showed that the disclosure of the opinion letters was due to a common legal interest: avoiding any liability for Magna's window infringing upon Dura's patents.[48] The court concluded that, although there was some overlap between the legal issues and the larger business venture between the parties, that overlap did not "negate the effect of the legal interest in establishing a community of interest."[49] Finally, the court stated that "[t]he weight of authority holds that litigation need not be actual or imminent for communications to be within the common-interest doctrine."[50] Accordingly, the court upheld Magna's claim of the common-interest privilege.

The court stated that, "[i]n order to be considered a 'common interest' within the meaning of the common interest doctrine, the interest must be 'identical' and it must be a 'legal' interest as perhaps contrasted to a mere business interest."

**Cozzens v City of Lincoln Park — *Common-Interest Privilege Under Federal Common Law***

In *Cozzens v City of Lincoln Park*, the court, citing federal law, rejected a nonparty's reliance on the common-interest privilege after he had disclosed privileged communications to another nonparty who had only a pecuniary interest in the outcome of a different lawsuit.

*Cozzens* began as a constitutional challenge to a city ordinance.[51] After the defendants were awarded summary judgment, they moved for sanctions against certain of the plaintiffs and nonparties and their respective attorneys.[52] In response to a subpoena issued by the plaintiffs, nonparty Bednarski invoked the attorney-client and common-interest privileges for documents that had previously been disclosed to nonparty Seagraves.[53] The communications largely consisted of communications between Bednarski and his counsel, on which Seagraves was copied, and some communications from Bednarski's counsel to Seagraves.[54] Bednarski and his counsel argued that the "common interest" linking Bednarski and Seagraves to the communications with Bednarski's counsel was a state-court lawsuit to which Bednarski was a party and for which Seagraves was paying Bednarski's legal fees.[55] But Seagraves' only interest in the state-court lawsuit was that the lawsuit represented a potential source of funds that Bednarski could use to pay a loan Seagraves had made to Bednarski.[56]

The court held that there was "too much of a disparity in the nature of the interests in the state court litigation" between Bednarski and Seagraves.[57] The court stated that, "[i]n order to be considered a 'common interest' within the meaning of the common interest doctrine, the interest must be 'identical' and it must be a 'legal' interest as perhaps contrasted to a mere business interest."[58] The court cited *Reed v Baxter*, in which the Sixth Circuit held that the common-interest doctrine did not apply when a city attorney met with two city employees to discuss a promotion decision, and two city councilmen attended the meeting.[59] Because only the city employees were involved in the underlying litigation, the Sixth Circuit held there was a disparity of interest between the employees and councilmen and therefore the common-interest doctrine did not apply.[60] Similarly, the *Cozzens* court concluded that Bednarski's disclosure to Seagraves resulted in a waiver of the attorney-client privilege.[61]

## Common Issues When Determining the Scope of the Common-Interest Privilege

Several key issues emerge when attempting to determine the circumstances under which a party may invoke the common-interest privilege. Below, we generally discuss five of these issues.[62]

***How Common Must the Interest Be?***

Courts across jurisdictions generally require a common interest that is legal and not solely commercial.[63] Beyond this, courts vary on a spectrum of requiring (1) mere commonality of interests, (2) substantially similar legal

interests, (3) nearly identical legal interests, or (4) identical legal interests. In some jurisdictions, courts have recognized the common-interest privilege in business transactions.[64] But other courts have refused to find a common legal interest in business transactions sufficient to invoke the common-interest privilege.[65]

What is required under Michigan law is not clear. Although whether the parties shared a common interest was not at issue in *Hawkins*, the court adopted the privilege as described in the Restatement.[66] Notably, the Restatement provides that the "common interest…may be either legal, factual, or strategic in character" and that the interests "need not be entirely congruent."[67] But the *Hawkins* court also expressly stated that the communication must be related to a "common litigation interest."[68] Further, the court said it was adopting a narrow version of the common-interest privilege given the "narrow scope" of the attorney-client privilege under Michigan law.[69] Therefore, *Hawkins* does not shed much light on this question.

In both *Cozzens* and *Dura Global*, the court, applying federal common law, held that the common interest must be identical and legal as contrasted to a mere business interest.[70] In *Dura Global*, the court upheld the common-interest privilege because it found that the disclosure was made in connection with a common legal strategy, as opposed to a "joint commercial venture."[71]

***Must Litigation Be Actual or Imminent?***

Some jurisdictions require anticipated or actual litigation to assert the common-interest privilege. For example, the Fifth Circuit requires a "palpable" threat of litigation.[72] Many jurisdictions, however, recognize the possibility of a common-interest privilege before any threat of litigation.[73]

In *Hawkins*, the court, applying Michigan law, looked to the Restatement and applied the common-interest privilege to "potential litigants in a case as well as actual litigants."[74] Likewise, in *Dura Global*, the court, applying federal common law, recognized that the majority rule is that litigation need not be actual or imminent to invoke the common-interest privilege.[75]

***Which Communications Are Protected?***

It is important to know that even in the context of a valid common-interest arrangement there is uncertainty regarding which communications qualify for protection. Referring to Figure A above, it is clear that communications between the lawyers of separate clients (for example, between Lawyer A and Lawyer B) are protected.[76]

It is less clear whether communications from Client A to Lawyer B would be protected. Under the Restatement approach, which *Hawkins* held the Michigan Supreme Court would adopt, they would be covered. Indeed, the Restatement's comments provide that "any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent (*see* § 70)—can exchange communications with members of a similar client set. However, a communication directly among the clients is not privileged unless made for the purpose of communicating with a privileged person as defined in § 70."[77] Nevertheless, *Hawkins* states that the common-interest privilege "may only be claimed if the communications are being shared between the clients' attorneys."[78]

Some of the courts that hold that communications from Client A to Lawyer B are protected[79] do so based on finding an implied attorney-client relationship. Note that such a finding could cause conflict issues for the lawyer. In other courts, the answer is unclear, but it may be that such communications are not protected.[80] Under proposed Federal Rule of Evidence 503(b)(3)—which has been incorporated in several states, but not Michigan—the client's privilege extends to communications "by him or his lawyer to a lawyer representing another in a matter of common interest."[81] Thus, a communication from Client A to Lawyer B would be protected, but a communication from Lawyer B to Client A would not. Some courts have suggested, without reference to Proposed Federal Rule of Evidence 503(6)(3), that communications from Lawyer B to Client A might not be protected.[82]

It is not clear whether communications between clients that include their counsel are protected. Under proposed Federal Rule of Evidence 503(b)(3) and many court opinions, such communications would not be protected. But it would seem that the context of such communications may make a difference, including if the communication can be classified as one involving or between the clients' counsel.[83] In comparison, it is noteworthy that communications between clients without counsel present are probably not protected.[84] As a threshold matter, there may be no

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basis for asserting an underlying privilege. Notably, the *Hawkins* court observed that under the Restatement an unrepresented person who is not a lawyer cannot participate in a common-interest arrangement.[85] But again, for most of these scenarios the law is simply not clear.

***Who Can Waive the Privilege?***

If an underlying privilege is preserved in a valid common-interest arrangement, who can thereafter waive the privilege? Generally, the privilege is preserved unless all parties agree to waive the privilege.[86] Unauthorized waiver is generally a waiver only as to the party committing the unauthorized disclosure.[87] Under the Restatement, participants to a common-interest arrangement may unilaterally waive the privilege for their own communications.[88] If there is subsequent litigation between former parties to a common-interest agreement, the general rule is that, absent agreement to the contrary, the common-interest privilege will not prevent the parties from using disclosed communications against each other, but the privilege will still apply as to third parties.[89] In *Dura Global*, the court, applying federal common law, held that the common-interest privilege cannot be waived without the consent of all parties.[90]

Courts generally do not require a writing to assert the common-interest privilege, but it is normally recommended.

***Is a Writing Required?***

Courts generally do not require a writing to assert the common-interest privilege,[91] but it is ordinarily recommended. A writing will help the parties meet their burden of proving that an agreement exists, and memorializes the parties to, terms of, and date of the agreement. Done properly, a writing will make it clear that all communications were made in confidence and between only those who are evidenced as parties to the agreement. The federal district court for the Western District of Michigan has said that "[i]n determining whether the particular facts of a case establish the existence of an attorney-client relationship in a joint defense situation, the federal courts rely heavily on the provisions of any written joint defense agreement establishing the rights and duties of the parties and their counsel."[92]

## Potential Pitfalls and Problems

Notwithstanding the potential benefits, entering into a common-interest arrangement is not without potential pitfalls and problems. Below are some of the issues that counsel should consider before entering into a common-interest arrangement.

- **Waiver—** The obvious risk of disclosing privileged materials in reliance on a common-interest agreement is the possibility of waiving the privilege. If, for some reason, the common-interest privilege does not apply, the underlying attorney-client privilege likely has been waived.
- **Unintended attorney-client relationships—** Absent adequate safeguards, a common-interest agreement could lead to a finding of unintended attorney-client, implied attorney-client, fiduciary, or third-party beneficiary relationships between counsel for one party to the agreement and the other parties, which counsel did not intend to represent.[93]
- **Current, future, and potential conflicts—** The attorney's receipt of confidential information from non-client parties could result in a conflict that would preclude the attorney and the attorney's firm from being adverse to the non-client party.
- **Discoverability—** In some jurisdictions, the agreement itself is not considered privileged. Further, courts generally require the identification of group members.[94]
- **Reduced freedom to control your defense—** In addition to losing some control, the parties in a litigation scenario may need to spend time resolving strategic differences. This is especially problematic if one party's best strategy (for example, introducing certain evidence or witnesses) is detrimental to other parties to the agreement.
- **A co-party may settle without you.**
- **A co-party may sue you.**
- **Malpractice exposure—** If an attorney for one party to the common-interest agreement makes a mistake (for example, failing to timely file a dispositive motion on behalf of the group), all of the parties to the common-interest agreement might pursue a claim, arguing that the attorney owed each of them a duty under the common-interest agreement.

## Provisions to Consider Including in a Common-Interest Agreement

Below are some of the provisions that counsel should *consider* including in a writing memorializing a common-interest agreement:

- A detailed description of the parties' common legal interest(s).
- When the common-interest privilege arose.
- The agreement applies to all information, whether written or oral, shared pursuant to the agreement.
- The parties intend for the common-interest privilege to apply to communications predating the written agreement. (This, of course, does not excuse the parties from showing that the privilege otherwise applies.)
- Each party agrees to assert the common-interest doctrine and all other applicable privileges when responding to any discovery request.
- Information shared will not be disclosed to a third party without the consent of the party who provided the information absent court order.
- Parties will use information exchanged only for the purposes of furthering the parties' common interest.
- Confidentiality must be maintained after the lawsuit has ended.
- Materials disclosed pursuant to the agreement may not be used by one party against another in a legal proceeding.
- Waiver of the common-interest privilege cannot occur without the consent of all parties.
- A party is not prohibited from disclosing or otherwise using in any way information that originated from that party.
- Sharing of information shall not be the basis for a later attempt to disqualify another party's lawyer in a subsequent matter unless the subject matter is nearly identical.
- A process for the return of inadvertently produced privileged information, including a statement that inadvertent production does not waive the privilege.
- A definition of the scope and limits of the parties' relationship.
- A broad advance waiver, providing that the parties agree that nothing in the agreement, nor compliance with the terms of the agreement by any party, shall be used as a basis to seek to disqualify the respective counsel of such party in any future litigation.[95]
- A clear delineation of each lawyer's responsibilities and duties to avoid, as much as possible, creating implied attorney-client relationships. State that:
  - Each party is represented exclusively by its own attorney, and no attorney-client relationship is intended or created (either express or implied) between any party and counsel for another party.
  - Actions taken under the agreement are intended solely to benefit the attorney's individual client.
  - Nothing in the agreement is intended to interfere with each attorney's obligations to the attorney's client.
  - The agreement is not intended to make any party the agent of any other party for any purpose.
  - Each attorney has performed thorough conflict checks.
  - Each attorney has explained the agreement to his or her client and that client has agreed to be bound by the agreement's terms.
  - The parties and their counsel are not obligated under any duty to share information or materials.
- A process for removing uncooperative co-parties that includes a way to protect all disclosed confidences.
- Each party retains the right to independently settle, and must provide prompt notice of any settlement to the other parties.
- Any party may withdraw with notice to all parties, and upon doing so must return all confidential information it received.
- All modifications must be made in a signed writing.
- A merger clause specifying that all

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agreements are contained in the document.[96]

- Specific performance or injunctive relief are appropriate remedies to compel performance of the agreement.
- The writing should be signed by each attorney and each party.

## Conclusion

Although common-interest agreements may result in lower litigation costs and other benefits through information sharing, these benefits do not come without risks. First, lawyers must understand the common-interest privilege law in their jurisdiction so that they do not unduly expose their clients to the risk of waiving the underlying attorney-client privilege. Second, lawyers must evaluate the other parties and counsel with whom the common interest is shared. A lack of trust amongst the group members ought to be a red flag. Additionally, lawyers should carefully consider current and potential future conflicts of interest. Third, in most circumstances, lawyers should insist on a written common-interest agreement with appropriate provisions to protect the lawyer and the lawyer's client. Finally, lawyers should carefully explain to clients both the benefits and risks of common-interest agreements.

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**NOTES**

1. *See Leibel v GMC*, 250 Mich App 229, 242, 646 NW2d 179, 186-187 (2002) ("Once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears."). Note, however, that "waiver of the attorney-client privilege will not necessarily constitute a waiver of work-product protection." Niehoff, Malone, Proctor, and Taylor, *The Attorney-Client Privilege and the Work-Product Doctrine in Michigan*, § 29, p 34. Generally, federal courts find a waiver if work product is disclosed to an adversary. *See id.*, § 30, p. 35.

2. Niehoff, Malone, Proctor, and Taylor, *The Attorney-Client Privilege and the Work-Product Doctrine in Michigan*, § 11, p 14 (2003) ("Although there is very little Michigan authority on point, most courts have recognized that, when the privilege is waived, that waiver extends to all communications on the same subject matter.").

3. *State Farm Mut Auto Ins Co v Hawkins*, No 08-10367, 2010 US Dist LEXIS 55260, at *6 (ED Mich June 4, 2010) (Cleland, J) (subsequent proceedings not included).

4. We submit that "common interest" agreement is more appropriate because it reflects the underlying common-interest privilege and the breadth of scenarios to which the privilege may apply. The common-interest privilege is also referred to as the joint-defense privilege, community-of-interest rule, and the allied lawyer doctrine, among other things. But it appears that "common interest" privilege is the most widely accepted.

5. *See Teleglobe Communications Corp v BCE, Inc (In re Teleglobe Communications Corp)*, 493 F3d 345, 365 (3rd Cir 2007).

6. Restatement (Third) of Law Governing Lawyers § 75.

7. Katherine 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, 63 (Fall 2005) (hereinafter "An Uncertain Privilege").

8. *Id.* at 65.

9. *State Farm Mut Auto Ins Co v Hawkins*, No 08-10367, 2010 US Dist LEXIS 55260, at *6.

10. *Hawkins* is the only Michigan case we found that deals with the common-interest privilege under Michigan law. The other Michigan federal district court cases that we cite all expressly state that they are applying, or appear to be applying, federal common law.

11. *See Hawkins*, 2010 US Dist LEXIS 55260 at *7.

12. *Hawkins*, 2010 US Dist LEXIS 55260.

13. *See*, *e.g.*, *Dura Global, Techs, Inc v Magna Donnelly Corp*, No. 07-10945, 2008 US Dist LEXIS 41432 (ED Mich May 27, 2008) (Majzoub, Mag J) *adopted by* No. 07-10945, 2008 US Dist LEXIS 51095 (ED Mich July 2, 2008) (Cox, J) (subsequent proceedings not included); *In re Smirman*, 267 FRD 221 (ED Mich May 12, 2010) (Zatkoff, J).

14. *Hawkins*, 2010 US Dist LEXIS 55260, at *1.

15. *Id.*

16. *Id.* at *2.

17. *Id.* at *8.

18. *Id.*

19. *Id.* at *7. Because plaintiff's complaint alleged state-law claims, the court, under Federal Rule of Evidence 501, applied state privilege law.

20. *Id.*

21. *Id.*

22. *Id.* *7 (citing Restatement (Third) of the Law Governing Lawyers § 76).

23. *Id.*

24. *Id.* at *8.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Dura Global,* 2008 US Dist LEXIS 41432.

31. *Id.* at *1.

32. *Id.*

33. *Id.* at *2.

34. *Id.*, n.2.

35. *Id.* at *1.

36. *Id.*

37. *Id.* (quoting *MPT, Inc v Marathon Labels, Inc*, No 1:04 CV 2357, 2006 US Dist LEXIS 4998slip copy at *6 (ND Ohio Feb 9, 2006) (quoting *Libbey Glass, Inc v Oneida, Ltd*, 197 FRD 342, 347 (ND Ohio 1999)).

38. *Id.* at *2.

39. *Id.* (quoting, *United States v BDO Seidman, LLP*, 492 F3d 806, 817 (7th Cir 2007)).

40. *Id.* at *3.

41. *Id.* at *1, *3.

42. *Id.* at *3.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (citing 197 FRD at 347).

47. *Id.* at *3.

48. *Id.*

49. *Id.* (quoting *In re Regents of the Univ of California*, 101 F3d 1386, 1390 (Fed Cir 1996)).

50. *Id.* (quoting *United States v BDO Seidman, LLP*, 492 F3d 806, 816 n 6 (7th Cir 2007)).

51. *Id.* at *1.

52. *Id.* at *2.

53. *Id.*

54. *Id.*

55. *Id.* at *4.

56. *Id.*

57. *Id.*

58. *Cozzens v City of Lincoln Park*, No 08-11778, 2009 US Dist LEXIS 64112, at *4 (ED Mich July 24, 2009) (Hluchaniuk, Mag J) (subsequent history not included).

59. *Id.* at *4 (citing *Reed v Baxter*, 134 F3d 351, 357 (6th Cir 1998)).

60. *Id.*

61. *Id.* at *4.

62. These issues are based on the five questions for any jurisdiction striving to effectively apply the common-interest privilege identified by Professor Schaffzin. *See*, An Uncertain Privilege, at 69.

63. *See, e.g., Strougo v BEA Assocs*, 199 FRD 515, 520 (SDNY 2001); *In re Pittsburgh Corning Corp*, 308 BR 716, 728 (Bankr WD Pa 2004).

64. *See, e.g., Hewlett-Packard Co v Bausch & Lomb, Inc*, 115 FRD 308 (ND Cal 1987) (applying common-interest rule to protect disclosure of patent opinion letter to potential purchaser of patent); *In re Teleglobe Communications Corp*, 493 F3d 345, 364 (3d Cir 2007) (noting that the common-interest doctrine applies in civil and criminal litigation, and even in purely transactional contexts).

65. *See Walsh v Northrop Grumman Corp*, 165 FRD 16, 19 (EDNY 1996) (holding that the common-interest privilege did not apply, because developing a business strategy did not transform the parties' common interest into a legal interest, even though there was a concern about litigation); *SCM Corp v Xerox Corp*, 70 FRD 508, 512 (D Conn 1976) (holding that the parties did not share a common interest but were only negotiating at "arm's length" a business transaction between themselves).

66. *Hawkins*, 2010 US Dist LEXIS 55260 at *7.

67. Restatement (Third) of the Law Governing Lawyers § 76 cmt e (2000).

68. *Hawkins*, 2010 US Dist LEXIS 55260 at *7.

69. *Id.*

70. *Cozzens v City of Lincoln Park*, No. 08-11778, 2009 US Dist LEXIS 64112, at *4 (ED Mich July 24, 2009) (Hluchaniuk, Mag J) adopted by No 08-11778, 2009 US Dist LEXIS 94463 (ED Mich Oct 9, 2009) (O'Meara, J); *Dura Global*, 2008 US Dist LEXIS 41432 at *3.

71. *Dura Global*, 2008 US Dist LEXIS 41432 at *3.

72. *See United States v Newell*, 315 F3d 510, 525 (5th Cir 2002) (recognizing that "[c]ommunications between potential co-defendants and their counsel are only protected if there is 'a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might someday result in litigation'").

73. *See e.g. United States v BDO Seidman, LLP*, 492 F3d 806, 814-18 (7th Cir 2007) (holding that the common-interest doctrine applied to support the claim of attorney-client privilege regarding the voluntary disclosure of a legal memorandum despite the absence of a threat of litigation).

74. *Hawkins*, 2010 US Dist LEXIS 55260 at *8.

75. *Dura Global*, 2008 US Dist LEXIS 41432 at *3.

76. *Id.* at 3; *Hawkins* at *8.

77. Restatement (Third) of the Law Governing Lawyers § 76 cmt d (2000).

78. *Hawkins*, at *8.

79. *See United States v McPartlin*, 595 F2d 1321 (7th Cir 1979) (citing the Supreme Court's approval of proposed Federal Rule of Evidence 503(b)(3), which extends the privilege to communications by a client to a lawyer representing another in a matter of common interest).

80. *See United States v Bay State Ambulance & Hosp Rental Serv, Inc*, 874 F2d 20, 29 (1st Cir 1989) (denying assertion of joint-defense privilege when communications from client to another client's attorney were made without the client first consulting his own attorney).

81. Proposed Fed R Evid 503(b)(3).

82. *See In re Teleglobe Communications Corp*, 493 F3d 345 (3rd Cir 2007) (requiring that information be shared with an attorney for the common-interest privilege to apply).

83. In *In re Smirman*, the court upheld the common-interest privilege for a nonparty that had disclosed its attorney's patent opinion to its customer, which was subsequently sued for patent infringement. No. 09-51223, 267 FRD 221 (May 12, 2010) (Zatkoff, J). But in *Smirman*, the party seeking discovery did not challenge the common-interest agreement, but instead asserted that it was entitled to the documents at issue because the customer that received the documents was now relying on an advice-of-counsel defense.

84. *See United Sates v Gotti*, 771 F Supp 535, 545 (EDNY 1991) (stating that extending the privilege to communications between clients, even in the absence of counsel, is not supported in law or logic and is therefore rejected).

85. *Hawkins*, 2010 US Dist LEXIS 55260 at *7.

86. *Dura Global*, 2008 US Dist LEXIS 41432, at *2.

87. *An Uncertain Privilege,* at 83.

88. Restatement (Third) of The Law Governing Lawyers § 76 cmt g.

89. *See e.g., Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F Supp 381, 386 (SD NY 1975); *see also* Restatement (Third) of The Law Governing Lawyers § 76(2), cmt. f.

90. *Dura Global*, 2008 US Dist LEXIS 41432, at *2; *see also*, *In re Smirman*, 267 FRD at 221, 223 (same).

91. *See* Restatement (Third) of The Law Governing Lawyers § 76 cmt c ("Exchanging communications may be predicated on an express agreement, but formality is not required.").

92. *City of Kalamazoo v Michigan Disposal Serv Corp*, 125 F Supp 2d 219, at 232.

93. The "general rule [is] that there is no attorney-client relationship between counsel for co-defendants in a joint defense situation." *City of Kalamazoo v Michigan Disposal Serv Corp*, 125 F Supp 2d 219, 234 (WD Mich 2000). "This general rule is unexceptional, but it does not erect an impregnable barrier against finding an attorney-client relationship in all cases. Numerous authorities recognize that, even where counsel are acting in a joint defense situation on behalf of their own clients, the circumstances of that representation may create an implied attorney-client relationship with co-defendants." *Id.* (citing *United States v Henke*, 222 F3d 633, 637 (9th Cir 2000) ("A joint defense agreement establishes an implied attorney-client relationship with the co-defendant ...")).

94. *See*, *e.g., Trading Techs Int'l, Inc v eSpeed Int'l, Ltd*, No 04 C 5312, 2007 US Dist LEXIS 36797 (ND Ill May 17, 2007) (requiring the identification of group members in lieu of producing agreement, which did not exist), *later proceeding*, 507 F Supp 2d 854, *aff'd*, 595 F3d 1340 (Fed Cir 2010).

95. *See In re Shared Memory Graphics LLC*, 659 F3d 1336, 1340-41 (Fed Cir 2011) (upholding broad waiver where there was a non-attorney-client relationship involving sophisticated parties).

96. *See ABC Barrel & Drum Sites v Detrex Corp*, No 220784, 2002 Mich App LEXIS 234 (Fed 19, 2002) (holding that merger clause in joint-defense agreement precluded claim based on alleged promises made to induce entry into agreement, including that litigation would be aggressively defended and party's share of expenses would not exceed certain sum).

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