

University of Louisville

From the Selected Works of Grace M. Giesel

2012

End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting

Grace M. Giesel



Available at: https://works.bepress.com/grace_giesel/24/

END THE EXPERIMENT: THE ATTORNEY-CLIENT PRIVILEGE SHOULD NOT PROTECT COMMUNICATIONS IN THE ALLIED LAWYER SETTING

BY GRACE M. GIESEL*

In recent years, courts have seen an explosion of claims that communications need not be disclosed because they enjoy the protection of something often referred to as the “common interest doctrine.” These claims—claims of attorney-client privilege—occur in two situations: the joint client setting and the allied lawyer setting. In a joint client situation, an attorney represents two or more clients on a matter with all parties working together on the joint endeavor. In an allied lawyer situation, several entities or individuals work together on a matter of common interest but the parties have separate lawyers.

This Article argues, uncontroversially, that the privilege should continue to apply to communications in the joint client situation. In contrast, this Article argues, quite controversially, that communications in the allied lawyer setting should not enjoy the protection of the privilege. Applying the privilege to the joint client setting is simply applying the privilege to communications between an attorney and that attorney’s clients—clients who have engaged the attorney to represent them jointly. Applying the privilege furthers the rationale of the privilege. When the privilege is applied in the allied lawyer setting, however, the privilege protects communications that are not between an attorney and that attorney’s client. The application does not further the privilege’s rationale. In addition, the confusion surrounding the application of the privilege in this setting has eviscerated the certainty necessary for the privilege to accomplish any goal. Any possible benefit to the application is outweighed by the damage done to the truth-finding mission of the justice system. Applying the privilege in the allied lawyer setting is a practice based on a flawed precedent from 1871 and followed by courts

* James R. Merritt Professor and Distinguished University Teaching Professor, University of Louisville, Louis D. Brandeis School of Law.

only in recent decades. It is a practice that should not continue.

I. INTRODUCTION	477
II. THE ATTORNEY–CLIENT PRIVILEGE	489
A. <i>The Modern Definition</i>	489
B. <i>The Modern Rationale for the Privilege</i>	492
C. <i>Before the Modern Definition and the Modern</i> <i>Rationale</i>	494
D. <i>The Confidentiality Requirement</i>	497
E. <i>Inherent Costs of the Privilege</i>	500
F. <i>The Certainty Imperative</i>	502
III. THE ORIGINS OF RECOGNITION OF A PRIVILEGE IN THE ALLIED LAWYER SETTING	503
A. <i>In the Beginning: The Chahoon Case</i>	504
B. <i>Historical Expansion of the Privilege in the Allied</i> <i>Lawyer Situation</i>	508
1. <i>Schmitt v. Emery</i>	508
2. <i>Continental Oil Company v. United States</i>	509
3. <i>Hunydee v. United States</i>	510
4. <i>Summary</i>	511
C. <i>The Recent Explosion of Cases</i>	511
IV. THE JOINT CLIENT SETTING	512
A. <i>Joint Client Representation</i>	512
1. <i>Defining Joint Client Representation</i>	512
2. <i>Ethical Limits of Joint Representation</i>	515
B. <i>Joint Client Representation and the Attorney–Client</i> <i>Privilege</i>	519
1. <i>Generally</i>	519
2. <i>The Restatement Approach</i>	521
3. <i>Historical Acceptance of Applying the Attorney–</i> <i>Client Privilege in the Joint Client Setting</i>	521
4. <i>An Additional but Erroneous Requirement Resulting</i> <i>from the Confusion with the Allied Lawyer Setting</i>	523
5. <i>The Peculiar Confusion of Joint Clients in the Entity</i> <i>Environment</i>	529
V. THE ALLIED LAWYER SETTING AND THE ATTORNEY–CLIENT PRIVILEGE	531
A. <i>Current Application of the Privilege in the Allied Lawyer</i> <i>Setting</i>	531
B. <i>The Restatement Approach</i>	533

2011–2012] *END THE EXPERIMENT* 477

<i>C. The Representational Posture</i>	536
1. Lack of an Attorney–Client Relationship Under the Traditional Approach for Recognition of a Relationship	536
2. ABA Formal Opinion 95-395: No Attorney–Client Relationship	540
3. Disqualification Law: No Attorney–Client Relationship	542
4. Conclusion: No Attorney–Client Relationship for Purposes of Privilege	543
<i>D. An Expansion of the Privilege Contrary to Traditional Privilege Doctrine</i>	544
<i>E. Lack of Supporting Rationale</i>	546
<i>F. The Nuts and Bolts Problems in Courts’ Current Application of the Privilege in the Allied Lawyer Setting</i>	551
1. Common Interest Confusion	552
2. Confusion About the Necessity of an Agreement	553
3. Confusion About the Necessity of Litigation	555
4. Confusion About Whom the Communication Must Involve	556
VI. CONCLUSION	558

I. INTRODUCTION

In recent years courts have seen a veritable explosion of claims¹ that communications need not be disclosed because they enjoy the protection of something often referred to as the “common interest doctrine,”² the “joint defense privilege,”³ the “community of interest doctrine,”⁴ or some similar term.⁵ These claims are, in effect, claims of

1. A search in the ALLCASES portion of the Westlaw database revealed that 168 cases in the decade spanning 2000–2009 contained a reference to the Digest Key for Privileges entitled “Common interest doctrine; joint clients or joint defense.” In contrast, in the decade spanning 1970–1979, only twenty-five cases contained such a reference.

2. See, e.g., *Hunton & Williams v. U.S. Dep’t of Justice*, 590 F.3d 272, 274 (4th Cir. 2010); *Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 80 Fed. Cl. 122, 143 (2007).

3. See, e.g., *United States v. Austin*, 416 F.3d 1016, 1019 (9th Cir. 2005).

4. See, e.g., *In re United States*, 590 F.3d 1305, 1310 (Fed. Cir. 2009), *rev’d sub nom. United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

5. See, e.g., *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 359 (3d Cir. 2007) (“community-of-interest (or common-interest) privilege”); *Mass. Eye & Ear Infirmary v.*

attorney–client privilege.⁶ Parties to litigation and courts use these terms in two basic situations. This Article refers to these situations as the joint client setting⁷ and the allied lawyer setting.⁸ In a joint client representation, an attorney represents two or more clients on a matter with all parties working together on the joint endeavor. Those clients agree, expressly or implicitly, to have one attorney represent them all and render advice to all, jointly.⁹ Unlike in the joint client situation, in an allied lawyer situation several entities or individuals work together on a common matter, but the entities or individuals are separately

QLT Phototherapeutics, Inc., 412 F.3d 215, 225 (1st Cir. 2005) (“common-interest exception”); *N. Am. Rescue Prods., Inc. v. Bound Tree Med., LLC*, No. 2:08-cv-101, 2010 WL 1873291, at *4 (S.D. Ohio May 10, 2010) (“joint defense or common interest privilege”; “joint defense exception”). Some courts and commentators have noted the semantic confusion. *See, e.g.,* *Lugosch v. Congel*, 219 F.R.D. 220, 236 (N.D.N.Y. 2003) (“[The] joint defense privilege has many monikers such as the common interest doctrine, common interest arrangement doctrine, or pooled information doctrine. Unfortunately, courts, commentators, and attorneys use these terms interchangeably even when they do not serve the same purpose.”); *see also* 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) (cataloguing the mishmash of terms before choosing “allied-party doctrine”).

6. *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005) (describing the “joint defense privilege” as “an extension of the attorney–client privilege”); *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (discussing the common interest doctrine as “an exception to the general rule that the attorney–client privilege is waived following disclosure of privileged materials to a third party”). *See generally* Craig S. Lerner, *Conspirators’ Privilege and Innocents’ Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449 (2002). Some argue, however, that the privilege should be severed from the attorney–client privilege and stand alone. *See, e.g.,* Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 874 (1996) (arguing that the “joint defense doctrine” is distinct from the attorney–client privilege).

7. Section 75 of the *Restatement (Third) of the Law Governing Lawyers* refers to clients “jointly represented” by a lawyer as “co-client[s].” *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000). The ABA Model Rules of Professional Conduct refer to this sort of representation as “common representation.” *See* MODEL RULES OF PROF’L CONDUCT R. 1.7 cmts. 29–33 (2011).

8. This term, coined by Wright and Graham, seems to best define the situation and separate it from the joint client situation. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5493 (1986) (using the term “allied lawyer doctrine”).

9. An example of a joint client situation is one attorney representing two people who are both planning to invest in a business. Both people might want legal advice with regard to those investments and agree that the attorney should represent them jointly. For a discussion of joint client representation, see *infra* Part IV.A.

represented.¹⁰

This Article argues, uncontroversially, that the attorney–client privilege should continue to apply to communications in the joint client situation. Thus, the attorney–client privilege should apply if the communications involve an attorney and the attorney’s joint clients and if the communications are for the purpose of obtaining legal advice, are made in confidence, and do not further a crime or fraud.¹¹

This Article also argues, quite controversially and contrary to recent precedent, that communications in the allied lawyer setting should *not* enjoy the advantage of a privilege. In contrast to how the privilege works in the allied lawyer setting, applying the privilege to the joint client setting is simply applying the privilege to communications between an attorney and that attorney’s clients—clients who have engaged the attorney to represent them jointly. Applying the privilege in the joint client setting furthers the rationale of the privilege. When the privilege is applied in the allied lawyer setting, however, the privilege protects communications that are *not* between an attorney and that attorney’s clients. Thus, the application in the allied lawyer setting does not further the privilege’s rationale. In addition, the confusion surrounding the application of the privilege in this setting has eviscerated the certainty necessary for the privilege to accomplish any goal. Any possible benefit is outweighed by the damage done to the truth-finding mission of the justice system. Applying the privilege in the allied lawyer setting is a practice based on a flawed precedent from 1871 and followed by courts only in recent decades.¹² It is a practice that should not continue.

Historically, courts have applied the attorney–client privilege readily to communications in the joint client situation when a third party is seeking disclosure. This application has not been the subject of

10. An example of this situation from the criminal context is two defendants charged with robbery who each have an attorney and who desire to work together to present a consistent defense. An example in a civil context is a situation in which a corporation and one of its officer employees are sued individually. The corporation and the officer-employee may have separate attorneys but choose to work together on a common defense. For a discussion of the allied lawyer situation, see *infra* Part V.

11. See *infra* Part II for a discussion of the attorney–client privilege in general. See *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994), for a typical definition of the attorney–client privilege.

12. See *infra* Parts III.A, III.C.

dispute.¹³ In fact, the application of the attorney–client privilege to the joint client setting has served to define the total-sharing and no-secrets nature of a joint client representation.

Conversely, in the allied lawyer situation, members of a group who have agreed to work together on a matter have separate attorneys. The attorneys might share with each other communications each has had with his or her own client. One or all clients and one or all attorneys might meet and discuss matters. The clients themselves might discuss matters without the presence of an attorney. Unlike the communications in the joint client setting, these communications are not solely between attorney and client.¹⁴ Rather, these communications occur within the circle of clients and the attorneys who represent those persons or entities separately. Courts have faced increasing numbers of claims that such communications should be privileged under the common interest doctrine or a synonym of that doctrine.¹⁵

There is a semantic confusion of terminology in this area of attorney–client privilege jurisprudence. But this area of law is rife with a confusion of substance as well—a confusion leading to a suboptimal result in attorney–client jurisprudence.¹⁶ The remedy is to eliminate application of the privilege to the allied lawyer setting while embracing the historically accepted application of the attorney–client privilege to the joint client situation.

13. See, e.g., *Rice v. Rice*, 53 Ky. (14 B. Mon.) 335, 336 (1854); *Root v. Wright*, 84 N.Y. (39 Sickels) 72, 76 (1881).

14. Not all courts agree that the privilege applies if an attorney is not present. See, e.g., *Cooper Health Sys. v. Virtua Health, Inc.*, 259 F.R.D. 208, 214 (D.N.J. 2009) (“[T]he privilege does not extend to communications between non-attorneys who simply have a joint interest. The community of interest privilege is applicable to communications amongst attorneys”); *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (“The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected.”); see also discussion *infra* Part V.F.4.

15. Of the twenty-five cases in the decade 1970–1979 contained in the Westlaw ALLCASES database and referencing the Digest Key for Privileges entitled “Common interest doctrine; joint clients or joint defense,” only five of the cases involved allied lawyer settings. In the decade of 2000–2009, the vast majority of the 168 cases referencing that Digest Key involved allied lawyer settings. See, e.g., *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003) (exploring the allied lawyer context and “joint defense privilege”); *United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002) (discussing the allied lawyer context and “common legal interest rule”).

16. See *infra* Part IV.B.4.

The attorney–client privilege exists to encourage clients to make complete disclosure to their attorneys.¹⁷ The privilege protects communications between attorneys and clients from compelled disclosure and this protection encourages clients to make full disclosure to their counsel. Full disclosure allows lawyers to render the best and most apt legal advice. In a preventative view, clients may adapt their conduct to abide by the law in response to this superior advice. If clients, though not perfectly certain, are at least generally certain that the privilege protects their communications with counsel from disclosure in future proceedings, clients may disclose more fully.¹⁸

This rationale justifies applying the privilege to joint client situations. A communication between an attorney and one or more of the attorney’s joint clients is a communication between attorney and client. Protecting such communications from disclosure with the attorney–client privilege, theoretically, encourages full disclosure by the client group to the attorney.¹⁹ Applying the attorney–client privilege in the joint client situation thus furthers the ultimate goal of superior legal advice. Courts have accepted application of the privilege in the joint client setting throughout the life of the modern attorney–client privilege;²⁰ recognition of the privilege in this setting does not expand traditional doctrine. Indeed, the nature of joint representation and the ethical constraints on any attorney handling a joint representation make application of the privilege relatively straightforward.²¹

17. See *infra* notes 68–69, 72–75 and accompanying text.

18. See *infra* Part II for a discussion of the attorney–client privilege and its rationale.

19. See PAUL R. RICE, ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES § 4:30 (2011) (“The rationale for extending the protection of the attorney–client privilege to communications among several clients and their jointly retained attorney is no different from the basic rationale for the attorney–client privilege itself. It ensures more informed, and therefore, more effective legal advice and assistance, through the concerted efforts of individuals with common legal interests.”); see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the purpose of the attorney–client privilege is to “encourage full and frank communication between attorneys and their clients”).

20. See, e.g., *Rice v. Rice*, 53 Ky. (14 B. Mon.) 335, 336 (1854) (applying privilege to joint client situation); *Harris v. Daugherty*, 11 S.W. 921, 923 (Tex. 1889) (applying privilege to joint client situation); see also *infra* Part IV.B.3. For a recent example of courts’ acceptance of the attorney–client privilege in the joint client setting, see *Raymond v. N.C. Police Benevolent Ass’n, Inc.*, No. 230PA10, 2011 WL 1378605, at *3 (N.C. Apr. 8, 2011), in which the court stated, “This Court . . . has . . . recognized a multiparty attorney–client relationship in which an attorney represents two or more clients.” The court then applied the privilege to such a joint client representation. *Id.* at *4.

21. See *infra* Part IV.B for a discussion of joint clients and the attorney–client privilege.

In contrast, the disclosure-encouragement rationale does not justify applying the privilege to communications in the allied lawyer situation because any such privileged communication is not a communication between an attorney and that attorney's client. Applying the privilege in the allied lawyer context does not encourage frank attorney-client communications that can improve legal representation, which is the heart of the privilege's purpose.²²

Other 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. Any efficiency benefit to representation or to the judicial system as a whole is doubtful.²³ Likewise, it is not at all clear that applying the attorney-client privilege in the allied lawyer context improves the effectiveness of the representation rendered.²⁴ Even if applying the privilege creates a benefit, the cost of creating that benefit—by limiting the information reaching the truth-finder and, therefore, handicapping the truth-finding process of the judicial system—outweighs any benefit created.

The case credited as the first to apply the attorney-client privilege in the allied lawyer setting, the 1871 Virginia Supreme Court case of *Chahoon v. Commonwealth*,²⁵ reached its conclusion by analogizing the allied lawyer situation to the joint client situation.²⁶ The court decided that the allied lawyer situation was basically the same as the joint client situation and should be treated the same for purposes of attorney-client privilege.²⁷

This conclusion was in error. The joint client situation differs fundamentally from the allied lawyer situation in the nature of the relationship between the attorneys and the clients. That difference is central to the appropriateness of application of the attorney-client privilege. In a joint client representation, the privilege applies to communications within an attorney-client relationship, as the attorney-client privilege does in all other settings. In an allied lawyer situation,

22. See *infra* Part V for a discussion of the allied lawyer setting and the attorney-client privilege.

23. See *infra* Part V.E; see also Lerner, *supra* note 6, at 1528–30.

24. See *infra* Part V.C.1.

25. 62 Va. (21 Gratt.) 822 (1871).

26. *Id.* at 841.

27. See *id.* For a discussion of the *Chahoon* case, see *infra* Part III.A.

the communications are not within an attorney–client relationship. In an allied lawyer setting, contrary to the conclusion of the *Chahoon* court, a lawyer does not represent other parties who have agreed to work with the lawyer’s client simply by virtue of an agreement between the parties to work together. The lawyer does not have an attorney–client relationship with those other parties; those parties have their own separate counsel. Therefore, when a court applies the attorney–client privilege to communications in the allied lawyer setting, the privilege protects communications that are not solely between an attorney and the attorney’s client. As some courts have applied the privilege, the privileged communication may not even involve a lawyer at all.²⁸ The fact that the communication in the allied lawyer setting is not between an attorney and his or her client is a huge and fundamental difference between applying the privilege in the joint client setting and applying the privilege in the allied lawyer setting.

Courts within the first one hundred years after the *Chahoon* case may have realized the faults in that opinion. Only a few cases applied the privilege in the allied lawyer setting during that time.²⁹ In recent years, however, the use of the privilege in the allied lawyer setting has increased greatly.³⁰ This increase is a significant expansion of traditional privilege law. This expansion has occurred even though courts throughout the life of the attorney–client privilege have counseled against expansion and warned that the privilege should be construed narrowly because of its potentially deleterious effect on truth-finding.³¹

The few decades in which courts have applied the privilege in the allied lawyer setting have shown that the courts are not only deceived about the necessity of applying the privilege to the setting but also greatly flummoxed about how and when to apply the privilege in such settings.³² The federal system has no codified rule of evidence dealing with the attorney–client privilege or any related privilege,³³ so the only

28. See, e.g., *Gucci Am., Inc. v. Gucci*, No. 07 Civ. 6820(RBM)(JCF), 2008 WL 5251989, at *1 (S.D.N.Y. Dec. 15, 2008) (attorney not necessary).

29. See *infra* Part III for a discussion of those cases.

30. See *supra* note 15.

31. See *infra* Part II.E.

32. See *infra* Part V.A for a discussion about this confusion.

33. See generally Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000) (discussing the disapproval of the proposed rule).

source of guidance is court-made law. Some states have codified the attorney–client privilege. Some of those states have included at least a passing reference to the allied lawyer and joint client concepts in the codifications.³⁴ Even in such states, however, the courts shoulder much of the burden of developing the doctrine and filling in the interstices left

34. *See, e.g.*, ARK. R. EVID. 502; KY. R. EVID. 503; TEX. R. EVID. 503. These statutes obliquely acknowledge the allied lawyer setting by stating that the privilege applies, for example, to a communication involving a lawyer representing another party in a matter of common interest. *See, e.g.*, KY. R. EVID. 503(b) (limiting the allied lawyer concept to communications “[b]y the client or a representative of the client or the client’s lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest”); TEX. R. EVID. 503(b) (limiting the allied lawyer concept to communications “by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest”). State codifications indirectly acknowledge that the privilege applies to the joint client setting; the privilege no longer applies where joint clients later become adverse in an action and one former joint client seeks to have a communication from the joint representation produced and admitted. *See, e.g.*, KY. R. EVID. 503 (d)(5) (exception applies “to a communication relevant to a matter of common interest between or among two . . . or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients”); TEX. R. EVID. 503(d)(5) (applying exception “to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients”).

These states generally have followed Proposed Federal Rule of Evidence 503, which was never adopted as the federal statute. 56 F.R.D. 183. Proposed Federal Rule of Evidence 503 provides in relevant part as follows:

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

....

(d) Exceptions. There is no privilege under this rule:

....

(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

56 F.R.D at 235.

by codification.³⁵

The courts have not proved themselves able to create a workable doctrine, and the courts' opinions show a decided lack of clarity. One of the biggest problems has been defining the commonality element necessary to justify the privilege in an allied lawyer setting. In joint client representation, the nature of the representation provides the needed commonality because an attorney cannot ethically represent clients jointly unless the clients' interests dovetail significantly.³⁶ Conversely, while all courts agree that a common interest is necessary in an allied lawyer situation for a communication to be privileged, court opinions do not uniformly define or apply the common interest requirement to the facts before those courts.³⁷ Courts have tried to define the necessary common interest and have attempted to apply that definition to a vast myriad of possible fact settings.³⁸ Yet, courts have not been able to do so in a way that allows parties to predict with a degree of certainty at the time of the communication that disclosure of the communication cannot be compelled at a later time.³⁹ Certainty is vital, of course, if a privilege is to accomplish its goal.⁴⁰ Absence of certainty eviscerates the impact of the privilege.⁴¹

In addition, the courts have jumbled together claims arising in the joint client setting and those arising in the allied lawyer setting as if they were all the same to be governed by the same privilege doctrine.⁴² This

35. For example, California has codified its attorney–client privilege at CAL. EVID. CODE §§ 950–962 (West 2009). Even so, California courts are called upon to explain and clarify the reach of the privilege. *See, e.g.,* *People v. Gionis*, 892 P.2d 1199 (Cal. 1995) (attorney need not be retained for the privilege to apply); *Zurich Am. Ins. Co. v. Super. Ct.*, 66 Cal. Rptr. 3d 833 (Dist. Ct. App. 2007) (clarifying bounds of privilege regarding a corporate client).

36. *See infra* Part IV.B.4.

37. *See, e.g.,* *Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 80 Fed. Cl. 122, 143–44 (2007) (requiring a “common legal interest”); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) (requiring “an identical legal interest”); *see also In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364–65 (3d Cir. 2007) (discussing various tests).

38. *See infra* Part V.F for a discussion of attempts to define common interest and a discussion of the contexts in which courts have applied that concept.

39. *See infra* Part V.F.

40. *See infra* Part II.F for a discussion of certainty.

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

42. The Third Circuit, in *Teleglobe Communications Corp.*, lamented that “much of the caselaw confuses the community-of-interest privilege (which is the same as the ‘common-

trend has caused courts to view the common interest in the joint client setting as the same requirement as is demanded in the allied lawyer setting. In the joint client setting, however, the commonality springs from the nature of the joint representation. If there is a true joint representation, there should be no additional commonality requirement. If the communication is in furtherance of the joint representation, the privilege should apply to the communication. No such inherent commonality exists in the allied lawyer setting,⁴³ thus necessitating a definition of required commonality.

Lack of clarity exists elsewhere as well. Courts do not agree about the level of proof necessary regarding the intention to work together on a matter in the allied lawyer setting: some courts demand proof of an agreement, while other courts require less.⁴⁴ Courts disagree about whether the privilege can exist in the allied lawyer setting if no litigation is in existence or at least on the horizon.⁴⁵ Clearly, this is irrelevant in the joint client setting. If the attorney ethically represents two or more clients as joint clients, the privilege applies regardless of the threat of litigation or the existence of any agreement between the clients.

Finally, courts disagree about who must be a party to the communication in the allied lawyer setting to invoke the privilege. Some courts apply the privilege only if a communication involves an

interest privilege') with the co-client privilege." 493 F.3d at 363 n.18 (internal citations omitted).

43. The court in *Tele globe Communications Corp.* noted this distinction:

Second, while the Restatement (confusingly) uses the term "common interest" to describe the congruence of the parties' interests in both co-client and community-of-interest situations, the concepts are not the same. Compare RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(1) ("If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that . . . relates to matters of *common interest* is privileged as against third persons."), with *id.* § 76(1) ("If two or more clients with a *common interest* in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client . . . is privileged as against third persons.") 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.

493 F.3d at 365–66.

44. See *infra* Part V.F.2 for a discussion of the proof of intention confusion.

45. See *infra* Part V.F.3 for a discussion of the existence of confusion over the need for litigation.

attorney. Some courts require both the discloser and the recipient to be lawyers. Other courts appear willing to apply the privilege to any communications within the circle of parties and lawyers with a common interest.⁴⁶

The lack of a strong guiding rationale to temper the definition and application of the privilege in the allied lawyer situation is a major cause of the courts' confusion.⁴⁷ The confusion creates an uncertainty that undermines any goals the privilege is designed to achieve. The confusion also means that no client can be sure of the protection that a statement may receive. Thus, the privilege does not encourage the disclosure necessary for any possible justifying rationale. If there is no encouragement of disclosure, then there is no *raison d'être* for the privilege in the allied lawyer setting.⁴⁸

In addition, recognition of privilege in the allied lawyer situation contradicts one of the guiding principles of attorney–client privilege jurisprudence. Courts have long taken great care in their delineation of the bounds of the attorney–client privilege because of the well-grounded speculation that the privilege keeps information vital to the truth-finding process away from the truth-finder and thus hinders an ultimate goal of the entire judicial system.⁴⁹ Courts repeat the mantra that the attorney–client privilege is to be applied narrowly in light of this deleterious effect on the truth-finding process.⁵⁰ Applying a privilege to an allied lawyer situation is anything but a narrow application of the privilege.⁵¹

Also, recognition of the privilege in allied lawyer situations disparages the confidentiality requirement of the privilege. While

46. See *infra* Part V.F.4 for a discussion of the existence of confusion about parties to the communication.

47. See *infra* Part V.E.

48. See *infra* Part II.F for a discussion about the need for certainty in a communication's privilege to encourage disclosure.

49. See *infra* Part II.E.

50. See, e.g., *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1423 (3d Cir. 1991) (finding that the attorney–client privilege is narrowly construed because it “obstructs the truth-finding process”).

51. See *infra* Part V.D; see also Mahaffey, *supra* note 5, at 651 (“In light of the historically narrow approach taken to the application of privileges, it is a bit disconcerting that a number of courts have seen fit to broadly construe the attorney–client privilege and work–product doctrine of late.”).

historically not always so,⁵² the modern attorney–client privilege applies only to communications intended to be confidential.⁵³ This confidentiality requirement minimizes the privilege’s harmful effect on the truth-finding process by limiting the set of possibly privileged communications. The basis of the confidentiality requirement is the theory that a client who does not care about the confidentiality of a communication will disclose the information to his or her lawyer even without the privilege. Protection of the privilege, thus, is not needed to encourage the communication. In implementing the confidentiality requirement, modern courts generally have held that the presence of a third party for a communication indicates a lack of intent that the communication be confidential. The result is that courts find such communications not privileged.⁵⁴ Likewise, even though the communication between client and lawyer might be privileged at the

52. In fact, the opinion in *Chahoon*, where a communication in an allied lawyer situation was first found to be privileged, may have been influenced by the earlier law of privilege that required no confidentiality. An earlier view of the privilege, evidence of which is present in the *Chahoon* opinion, saw the privilege as a protector of the lawyer’s duty not to reveal client secrets that resulted from the confidential relationship. See *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 838 (1871) (“If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any court of law or equity, either as party or as witness.” (quoting the English case of *Greenough v. Gaskell*, (1833) 39 Eng. Rep. 618 (Ch.) 620; 1 My. & K. 98, 102)). Under this older view of the privilege, since abandoned in the United States, courts should not force a lawyer to breach that duty to the client and reveal the secrets even if the information came from a source other than the client. With this theory, the presence of third parties, when the communication between attorney and client occurred, was irrelevant. See Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 47; Paul R. Rice, *Attorney–Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 856 (1998) [hereinafter Rice, *Eroding Concept*]; Paul R. Rice, *A Bad Idea Dying Hard: A Reply to Professor Leslie’s Defense of the Indefensible*, 2001 WIS. L. REV. 187, 187–88 [hereinafter Rice, *Bad Idea*].

53. See *infra* Part II.D.

54. See, e.g., *Chevron Corp. v. Kohn*, Nos. 10-MC-208, 10-MC-209, 2010 WL 5173279, at *7 (E.D. Pa. Dec. 20, 2010) (no privilege applies to conversations in presence of film crew); *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 70 (S.D.N.Y. 2009) (“Although communications between client and counsel relating to legal advice are generally privileged, the privilege is waived where such communications are ‘made . . . in the known presence of a third party.’” (alteration in original) (quoting *People v. Osorio*, 549 N.E.2d 1183, 1185 (N.Y. 1989))).

time of the communication, courts have held that later sharing the communication with a third party waives the privilege because the sharing shows a lack of intent that the communication continue to be confidential.⁵⁵ Applying the attorney–client privilege in the allied lawyer situation is inconsistent with this confidentiality requirement.

Finally, abolishing privilege for the allied lawyer situation does not undo centuries of legal precedent. Rather, the application of privilege to the allied lawyer situation is a creature of recent origin.⁵⁶ Only four cases applied the privilege to the allied lawyer setting before 1965.⁵⁷ Only in the last three decades have claims of privilege in the allied lawyer situation become common and problematic.⁵⁸ By abolishing the privilege for the allied lawyer situation, courts would simply be making a correction to a recently taken jurisprudential wrong turn.

II. THE ATTORNEY–CLIENT PRIVILEGE

A. The Modern Definition

The modern attorney–client privilege is the client’s privilege; the client controls its assertion and waiver.⁵⁹ The privilege prevents compelled disclosure of confidential communications that occur between an attorney and a client if the purpose of the communication is to obtain or render legal advice⁶⁰ and if the communication is not in

55. See, e.g., *WebXchange Inc. v. Dell Inc.*, 264 F.R.D. 123, 126 (D. Del. 2010) (“[I]f a client shares an otherwise privileged communication with a third party, then the communication is no longer confidential and the client has waived the privilege.”); see also *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783 JF (PVT), 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010) (holding that the privilege was waived after client disclosed conversations with lawyer on blogs and otherwise).

56. See *infra* Part III.C.

57. See cases cited *infra* note 320.

58. See *infra* Part III.C for a discussion about the recent explosion of cases where the privilege has been claimed in the allied lawyer setting.

59. See *Sandra T.E. v. S. Berwyn Sch.* Dist. 100, 600 F.3d 612, 618 (7th Cir. 2010) (“The privilege belongs to the client, although an attorney may assert the privilege on the client’s behalf.”); *In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (“The attorney–client privilege belongs to the client, who alone may waive it.”); *Lord Say & Seal’s Case*, (1721) 88 Eng. Rep. 617, 617 (K.B.); 10 Mod. 45 (court held that privilege was not attorney’s but client’s); see also *RICE*, *supra* note 19, § 9:1.

60. *WebXchange*, 264 F.R.D. at 126 (“The attorney–client privilege protects from compelled disclosure ‘any communication that satisfies the following elements: it must be (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.’” (quoting *In re Teleglobe Commc’ns*

furtherance of a crime or fraud.⁶¹ The protection of the privilege ends if the client waives it.⁶² An often-quoted definition of the modern attorney–client privilege was stated by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*:⁶³

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.⁶⁴

Corp., 493 F.3d 345, 359 (3d Cir. 2007)); see also 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (1961).

61. See *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007) (“The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.” (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933))).

62. The privilege can be expressly or impliedly waived, and the waiver can take many forms. For example, the privilege can be waived by not taking reasonable precautions to protect the confidentiality of the communications. See, e.g., *In re Victor*, 422 F. Supp. 475, 476 (S.D.N.Y. 1976) (leaving papers in public hallway destroyed the privilege). The privilege may be waived by disclosure. See, e.g., *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685 (1st Cir. 1997). The privilege may be waived by the client making the communications a substantive issue; for example, by relying on the advice of counsel as a defense. See, e.g., *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 478–79 (3d Cir. 1995); see also RICE, *supra* note 19, § 9:23.

63. 89 F. Supp. 357 (D. Mass. 1950).

64. *Id.* at 358–59; see also *United States v. Tedder*, 801 F.2d 1437, 1442 (4th Cir. 1986) (quoting *United Shoe Mach. Corp.*, 89 F. Supp. at 358–59); *Gucci Am., Inc. v. Guess?, Inc.*, No. 09 Civ. 4373(SAS), 2011 WL 9375, at *1 (S.D.N.Y. Jan. 3, 2011) (quoting *United Shoe Mach. Corp.*, 89 F. Supp. at 358–59).

Some states have codified the privilege. For example, a New York statute states in pertinent part:

Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication,

The party claiming the protection of the privilege has the burden of proving that it applies to the particular communication.⁶⁵ Courts require the opponent to the claimant of the privilege to prove a *prima facie* case of waiver.⁶⁶ Then, the claimant of the privilege must rebut the *prima facie* case to successfully claim the privilege.⁶⁷

in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

N.Y. C.P.L.R. § 4503(a) (McKinney 1992); *see also* KY. R. EVID. § 503(b) (LexisNexis 2011) (“A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client: (1) Between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; (2) Between the lawyer and a representative of the lawyer; (3) By the client or a representative of the client or the client’s lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein; (4) Between representatives of the client or between the client and a representative of the client; or (5) Among lawyers and their representatives representing the same client.”).

65. *See* *Solidus Networks, Inc. v. Excel Innovations, Inc.*, 502 F.3d 1086, 1099 (9th Cir. 2007); *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 225–26 (1st Cir. 2005).

66. *See* *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed. Cl. 263, 267 (2003) (“The party asserting the privilege has the initial burden of establishing the elements of the privilege. Once this showing is made, the burden shifts to the party opposing the privilege to establish a *prima facie* case of waiver. . . . Next, the burden shifts back to the party asserting the privilege ‘to rebut the *prima facie* case by demonstrating that the privilege is still viable.’ Therefore, in sum, plaintiff[s] must not only establish that the privilege applied, but also that the privilege was not waived.” (footnotes omitted)).

67. Similarly, when a party claims that the privilege does not apply because the communication was in furtherance of a crime or fraud, the privilege claimant has the burden of proving that the privilege applies and then the opponent must show that the claim of crime or fraud has some basis in fact. *See* *Clark v. United States*, 289 U.S. 1, 15 (1933); *see also* *United States v. Zolin*, 491 U.S. 554, 562–63, 568 (1989). Exactly what must be shown is unclear. For example, in *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1094–95 (9th Cir. 2007), a civil matter, the Ninth Circuit Court of Appeals stated that the burden should be a preponderance of the evidence. In *In re Grand Jury Proceedings*, 867 F.2d 539, 541 (9th Cir. 1989), a criminal matter, the court required proof of “reasonable cause to believe” that the communication was in furtherance of a crime or fraud. *See, e.g.*, Cary Bricker, *Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders*, 82 TEMP. L. REV. 149, 155 (2009).

B. The Modern Rationale for the Privilege

In *Upjohn Co. v. United States*,⁶⁸ the U.S. Supreme Court discussed the purpose of the modern rationale of the attorney–client privilege:

[The] purpose [of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and [the] administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.⁶⁹

68. 449 U.S. 383 (1981).

69. *Id.* at 389; *see also* *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009) (“By assuring confidentiality, the privilege encourages clients to make ‘full and frank’ disclosures to their attorneys, who are then better able to provide candid advice and effective representation. This, in turn, serves broader public interests in the observance of law and administration of justice.” (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981))); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (“The privilege is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” (quoting *Upjohn*, 449 U.S. at 389)); *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (“Our cases make clear that an asserted privilege must also ‘serv[e] public ends.’ Thus, the purpose of the attorney–client privilege is to ‘encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.’” (quoting *Upjohn*, 449 U.S. at 389)); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (“The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”); *Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 951 (Pa. 2008) (“The attorney–client privilege, on the other hand, renders an attorney incompetent to testify as to communications made to him by his client in order to promote a free flow of information only between attorney and his or her client so that the attorney can better represent the client.”).

In an early statement of this rationale, an English court stated,

No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose every thing that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him

Annesley v. Anglesea, (1743) 17 How. St. Tr. 1139 (Exch.) 1237 (Ir.). For a discussion of this case, see Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney–Client Privilege*, 66 CALIF. L. REV. 1061, 1073–80 (1978). The *Annesley* case involved the ownership of certain

The theory is that clients need the fully-informed advice of their attorneys so that they can determine how to proceed in accordance with the law.⁷⁰ By proceeding in accordance with the law, the administration of justice, on a global measure, improves.⁷¹

As so stated, this rationale is utilitarian.⁷² It has several premises.

property. *Id.* at 1073–74. One of the claimants was the brother of a deceased earl who claimed that he inherited the earldom and the property rightfully from his childless brother. *Id.* at 1074. The other claimant claimed to be the legitimate son of the deceased earl. *Id.* He claimed that his wicked step-mother gave him away and that his uncle, knowing of his identity, sought to have him wrongfully prosecuted and hanged for a murder he did not commit. *Id.* The claimed privileged communications were communications between the uncle and his attorney in which the uncle sought the attorney's help in arranging for the prosecution. *Id.* Ultimately, the court recognized the privilege generally but did not apply it on these facts. *Id.* at 1078; see *Annesley*, 17 How. St. Tr. at 1242.

Commentators have suggested deontological justifications such as the notion that the client's privacy interest in the communication justified the privilege or the notion that respect for the client's autonomy justifies the privilege. See Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 350 (1981); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112–13 (1956).

70. See *Hunt*, 128 U.S. at 470 (1888) (finding that the privilege facilitates the "administration of justice"). In *United States v. Upjohn Co.*, the Sixth Circuit Court of Appeals refused to apply the attorney–client privilege to communications between the corporations' counsel and employees who were not in the control group of the corporation. 600 F.2d 1223, 1227–28 (1979). On review, the Supreme Court noted:

The narrow scope given the attorney–client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.

Upjohn, 383 U.S. at 392.

71. In its *Upjohn* decision, the Sixth Circuit Court of Appeals stated, "This policy of promoting full disclosure to counsel serves to implement the notion inherent in the first principle, that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests." 600 F.2d at 1226 (citing *Fisher v. United States*, 425 U.S. 391, 403 (1976)); see also *In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) ("[W]e are guided by [the attorney–client privilege's] purpose 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' The privilege also 'recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.'" (quoting *Upjohn*, 449 U.S. at 389)).

72. See 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 5:13, at 520 (3d ed. 2007 & Supp. 2011); MCCORMICK ON EVIDENCE § 87, at 387 (Kenneth S. Broun ed., 6th ed. 2006); Note, *Attorney–Client and Work Product Protection in a*

One premise is that clients will not be completely forthcoming with information when consulting an attorney unless they are certain that a court cannot compel disclosure of their communications with counsel.⁷³ Another premise of the rationale is that complete client disclosure yields superior legal advice.⁷⁴ And a third premise is that superior legal advice will lead clients to observe and obey the law.⁷⁵

C. Before the Modern Definition and the Modern Rationale

In the sixteenth century, the attorney–client privilege was not a client’s privilege as it is now. Rather, the privilege was a legal advisor’s

Utilitarian World: An Argument for Recomparison, 108 HARV. L. REV. 1697, 1703–04 (1995); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000).

73. In *Swidler & Berlin v. United States*, the Supreme Court, in deciding whether the attorney–client privilege survived the death of a client, stated, “In the case at hand, it seems quite plausible that [the client], perhaps already contemplating suicide, may not have sought legal advice from [the lawyer] if he had not been assured the conversation was privileged.” 524 U.S. at 408 (1998).

74. See *Upjohn*, 449 U.S. at 389 (“The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”).

75. Some commentators question the assumptions and the effect the privilege is thought to have. See, e.g., Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 243–44 (2002); Lloyd B. Snyder, *Is Attorney–Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 485 (2002). Empirical evidence does not shed much light on the issue. See *Swidler & Berlin*, 524 U.S. at 409 n.4, in which the Supreme Court stated:

Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication. [Vincent C.] Alexander, *The Corporate Attorney Client Privilege: A Study of the Participants*, 63 St. John’s L. Rev. 191 (1989); [Fred C.] Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 352 (1989); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962). These articles note that clients are often uninformed or mistaken about the privilege, but suggest that a substantial number of clients and attorneys think the privilege encourages candor. Two of the articles conclude that a substantial number of clients and attorneys think the privilege enhances open communication, Alexander, *supra*, at 244–46, 261, and that the absence of a privilege would be detrimental to such communication, Comment, 71 Yale L.J., *supra*, at 1236. The third article suggests instead that while the privilege is perceived as important to open communication, limited exceptions to the privilege might not discourage such communication, Zacharias, *supra*, at 382, 386.

privilege.⁷⁶ The privilege developed in reaction to the *Statute Against Perjury*, enacted in the 1560s.⁷⁷ The *Statute Against Perjury* provided that witnesses could be compelled to testify in court.⁷⁸ At that time, parties to a matter were not viewed as competent to testify.⁷⁹ The next best thing to testimony from the parties was testimony from the legal advisors of the parties about what the parties told their legal advisors. The legal advisor privilege developed to protect legal advisors from having to testify against their clients.⁸⁰

This privilege also protected the honor of the legal advisor by preventing a court from compelling the advisor to disclose the client's secrets learned in the confidential relationship of attorney and client.⁸¹ The premise of the privilege was that the legal advisor owed the client a duty of secrecy and should not be compelled to violate this duty.⁸² Interestingly, the privilege applied regardless of the confidentiality of

76. See RICE, *supra* note 19, § 1:2; see also WIGMORE, *supra* note 60, § 2290, at 544 (the privilege did not belong to the client because “[t]he pledge of secrecy had not been taken by him, and therefore the ‘point of honor’ was not his to make”). A privilege of sorts for the legal advisor may have existed in Roman times as well. For example, Professor Max Radin, writing in the 1920s, notes that when Cicero was prosecuting the Roman governor of Sicily, he commented that he could not summon the governor’s patronus (advisor). See Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928).

77. 5 Eliz. I, c.9, § 6 (1562–3) (Eng.), *cited in* RICE, *supra* note 19, § 1:2.

78. *Id.*

79. See *The King v. Inhabitants of Woburn*, (1808) 10 Eng. Rep. 825 (K.B.); 10 East 395; see also Hazard, *supra* note 69, at 1082–83.

80. See, e.g., *Hartford v. Lee*, (1603) 21 Eng. Rep. 34 (1603); Cary 63 (the court excused a solicitor from a subpoena to testify because he was a solicitor in the matter).

81. See, e.g., *Andrews v. Solomon*, 1 F. Cas. 899, 900 (C.C.D. Pa. 1816) (No. 378) (“An attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him.”); *Creed v. Trap*, (1578–1579) 21 Eng. Rep. 74 (Ch.) 74 (stating that the legal advisor “shall not be examined upon any Interrogatories which shall compel him to discover any matter which came to his knowledge as a Solicitor or as of a Counsel in this case”).

82. Professor Max Radin explained that some lawyers were gentlemen and hypothesized that “the common obligation of gentlemen not to betray a confidence reposed in them” was the original basis of the privilege. See Radin, *supra* note 76, at 487. Attorneys and solicitors were more like servants and servants also had a duty to “keep his master’s secrets.” See *id.*; see also WIGMORE, *supra* note 60, § 2291, at 553 (stating that it would be “repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent’s behest to be laid open through his own testimony,” which creates a “disagreeable inconsistency of being at the same time the solicitor and the revealer of the secrets,” which “double-minded attitude would create an unhealthy moral state in the practitioner”); RICE, *supra* note 19, §§ 1:3, 1:5.

the communication at issue.⁸³ The goal was to protect the legal advisor from being the source of disclosure of the client's secrets. A secret was information told to the lawyer in the confidential relationship regardless of whether the client shared the information with others before or after talking with the legal advisor.⁸⁴ If a client communicated to the legal advisor in the presence of a third party, the legal advisor privilege applied so that the advisor could not be compelled to disclose what the client had disclosed to the advisor.⁸⁵ The third party could testify, however,⁸⁶ so there was a disincentive to sharing information with others.

In the 1700s and 1800s, some courts embraced the view that the privilege belonged to clients,⁸⁷ not legal advisors. Some courts began considering the privilege as justified by the modern utilitarian rationale,⁸⁸ though other courts of that time continued to view the

83. See Leslie, *supra* note 52, at 48 ("Given this justification for the privilege, confidentiality was entirely irrelevant—the aim was to shelter the attorney from being forced to testify against his client and violate his trust. The presence of a third party did not make the lawyer's trust any less sacred.").

84. The privilege might apply even if the client's secret comes from a source other than the client. See *Greenough v. Gaskell*, (1833) 39 Eng. Rep. 618 (Ch.), which states,

If touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any Court of law or equity, either as party or as witness.

Id. at 620.

85. See, e.g., *Hoy v. Morris*, 79 Mass. (13 Gray) 519, 521 (1859) (stating that, though a third party overheard an attorney-client communication, the attorney could not testify because the privilege applied).

86. For example, in *Hoy*, the court stated that a third party, who overheard an attorney-client communication, could testify though the attorney could not. *Id.*; see also *Goddard v. Gardner*, 28 Conn. 172, 175 (1859) ("The rule which enjoins the attorney's silence does not extend to such a witness, and the court below erred in refusing to hear his testimony.").

87. See RICE, *supra* note 19, § 1:3. For two examples, see *Baker v. Arnold*, 1 Cai. R. 258, 266 (N.Y. Sup. Ct. 1803) (holding the privilege is the client's); and *Lord Say & Seal's Case*, (1721) 88 Eng. Rep. 617 (K.B.) (stating that "[t]he Court were of opinion . . . that an attorney's privilege was the privilege of his client").

88. See, e.g., *Annesley v. Anglesea*, (1743) 17 How. St. Tr. 1139 (Exch.) 1237 (Ir.) ("No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose every thing that is in his mind, which he

privilege as belonging to the legal advisor.⁸⁹ Eventually, the modern rule and rationale became the universally accepted rule.⁹⁰

D. The Confidentiality Requirement

Today, any definition of the modern attorney–client privilege includes a requirement that the communication be confidential at its inception.⁹¹ In addition, the communication must be kept confidential for the communication to continue to be protected by the privilege.⁹² The confidentiality mandate is not absolute,⁹³ but it does require that the

apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him . . .”). For a discussion of the case, see Hazard, *supra* note 69, at 1073 (“This case reads like a source material for a Dickens novel—indeed, its facts make *David Copperfield* seem a pale contrivance.”). Professor Melanie Leslie has noted that the two rationales “co-existed for some time, with the result that the details of the attorney–client privilege, including the existence of a confidentiality requirement, remained muddled through the nineteenth century.” See Leslie, *supra* note 52, at 49.

89. See, e.g., *Preston v. Carr*, (1826) 148 Eng. Rep. 634 (Exch.) 635. In the case, the Chief Baron stated, “I cannot accede to the proposition . . . that the privilege of an attorney is the privilege of the client.” *Id.*

90. See Imwinkelried, *supra* note 75, at 249 (the modern rule and rationale became the “dominant paradigm”).

91. See *WebXchange Inc. v. Dell Inc.*, 264 F.R.D. 123, 126 (D. Del. 2010) (“A communication is not made in confidence, and in turn is not privileged, if persons other than the client, its attorney, or their agents are present. Similarly, if a client shares an otherwise privileged communication with a third party, then the communication is no longer confidential and the client has waived the privilege.” (citation omitted) (citing *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007))).

92. See, e.g., *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (stating the privilege will only be recognized when “the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence”); see also Rice, *Eroding Concept*, *supra* note 52, at 856–57.

93. There are situations in which communications are disclosed and yet the communication does not lose the protection of the privilege. For example, an inadvertent disclosure may result in opposing counsel viewing a privileged document, yet the court may determine that the client has not waived the privilege. See, e.g., *Ergo Licensing, LLC v. Carefusion 303, Inc.*, 263 F.R.D. 40, 46–47 (D. Me. 2009) (finding no waiver in a disclosure of thirty-one privileged documents in a group of 540 documents produced in response to a discovery request and stating that “[w]hether a waiver of the attorney–client privilege is accomplished by the inadvertent disclosure of documents is evaluated by a three-element test: ‘1) the disclosure must be inadvertent; 2) the holder of the privilege or protection took reasonable steps to prevent the disclosure; and 3) the holder promptly took steps to rectify the error’” (quoting *Rhoades v. Young Women’s Christian Ass’n of Greater Pitt.*, Civil Action No. 09-261, 2009 WL 3319820, at *2 (W.D. Pa. Oct. 14, 2009))); *Nova Se. Univ., Inc. v. Jacobson*, 25 So. 3d 82, 85 (Fla. Dist. Ct. App. 2009) (applying a five-part test that considered

client reasonably and honestly believe the communication to be between the client and the attorney only.⁹⁴ Courts view the presence at

“1) the reasonableness of the precautions taken to prevent inadvertent disclosure; 2) the number of inadvertent disclosures; 3) the extent of the disclosure; 4) the delay in measures taken to rectify the inadvertent disclosures; and 5) whether overriding interests of justice will be served by relieving the party of its error” in concluding that letter found on the office fax machine was protected by the attorney–client privilege (citing *Gen. Motors Corp. v. McGee*, 837 So. 2d 1010, 1040 (Fla. Dist. Ct. App. 2002)); *Diehl v. Fred Weber, Inc.*, 309 S.W.3d 309, 324–25 (Mo. Ct. App. 2010) (a two-page email was disclosed due to clerical error after the parties had agreed to return inadvertently disclosed documents, reasonable precautions had been taken to prevent the disclosure, the disclosure was “minimal,” and the discloser acted promptly to have the document returned).

Federal Rule of Evidence 502, which became effective in 2008, states in part,

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney–client privilege or work-product protection. . . .

. . . .

(b) Inadvertent disclosure.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

FED. R. EVID. 502(b); *see also* *Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 845, 849–51 (E.D. Mich. 2010) (applying Federal Rule of Evidence 502 and finding that “the defendants took reasonable steps to prevent disclosure during the . . . document production” requiring review of “63,025 documents totaling an estimated 4.7 million pages” and that “the defendants took prompt steps to recall the documents once they realized that they had been disclosed”).

Also, the privilege applies to communications that are seized by a third party through illegal means though the seizure usually means the communications have been disclosed to third parties. *See, e.g., Sackman v. Liggett Group, Inc.*, 173 F.R.D. 358, 365 (E.D.N.Y. 1997) (expert testimony based on a stolen document was excluded); *State v. Today’s Bookstore, Inc.*, 621 N.E.2d 1283, 1288–89 (Ohio Ct. App. 1993) (leaked memorandum remained privileged); *see also Parnes v. Parnes*, 915 N.Y.S.2d 345, 348 (App. Div. 2011) (finding that, although wife accessed husband’s e-mail without authorization, the e-mail retained privilege protection).

94. *See Tractenberg v. Twp. of W. Orange*, 4 A.3d 585, 598 (N.J. Super. Ct. App. Div. 2010) (“Confidential communications are only those ‘communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.’” (quoting *State v. Schubert*, 561 A.2d 1186, 1190 (N.J. Super. Ct. App. Div. 1989))); *see also United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983) (talking loudly in a hallway does not indicate an intention that the statement be confidential).

the time of the communication of third parties who are not agents of the attorney or the client as an indication that the client had no intention that the communication be confidential.⁹⁵ Thus, the communication is not protected by the privilege. If the client later shares the communication with a third party, the courts view the sharing as an indication that confidentiality is no longer important.⁹⁶ Thus, the communication is no longer protected by the privilege even though it may have been privileged before the act of sharing.

This confidentiality requirement became a part of privilege law late in the nineteenth century.⁹⁷ It acts not as a requirement that furthers the rationale of the attorney–client privilege but rather as a necessary limit on the privilege’s scope.⁹⁸ The privilege acts to encourage a client to fully disclose information to the lawyer. The rationale of the

95. See *WebXchange*, 264 F.R.D. at 126 (“A communication is not made in confidence, and in turn is not privileged, if persons other than the client, its attorney, or their agents are present.”); *In re Condemnation City of Phila.*, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009) (“Confidentiality is key to the privilege, and the presence of a third-party during attorney–client communications will generally negate the privilege; presumably, the client does not intend communications to be confidential if they are heard by someone else.”); see also *Chevron Corp. v. Kohn*, Nos. 10-MC-208, 10-MC-209, 2010 WL 5173279, at *7 (E.D. Pa. Dec. 20, 2010) (no privilege applies because a film crew was present); *Curry v. McNeil*, No. 4:07cv351-SPM/WCS, 2008 WL 5157516, *5, *9–10 (N.D. Fla. Dec. 9, 2008) (the attorney–client privilege did not apply to a telephone conversation between attorney and client because the client’s girlfriend was also on the call).

96. See *United States v. Ary*, 518 F.3d 775, 782 (10th Cir. 2008) (“Because confidentiality is critical to the privilege, it will be ‘lost if the client discloses the substance of an otherwise privileged communication to a third party.’” (quoting *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006))); *WebXchange*, 264 F.R.D. at 126 (“Similarly, if a client shares an otherwise privileged communication with a third party, then the communication is no longer confidential and the client has waived the privilege.”); *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1265 (D. Colo. 2010) (“Only confidential information is protected by the privilege; if the information has been or is later shared with third parties, the privilege does not apply.”); see also *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783 JF (PVT), 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010) (discussing how the client disclosed conversations she had with her attorney on blogs and otherwise and finding waiver); *Bower v. Weisman*, 669 F. Supp. 602, 605–06 (S.D.N.Y. 1987) (no confidentiality where client left letter open on a table in a room in a suite where a third party was staying); *In re Victor*, 422 F. Supp. 475, 476 (S.D.N.Y. 1976) (“By placing the documents in the public hallway outside of Mr. Victor’s office, the privilege which might have theretofore existed with respect to these papers was totally destroyed.”).

97. See RICE, *supra* note 19, § 6:3. Professor Rice credits Professor Wigmore and his treatise for the general acceptance of the confidentiality requirement. See Rice, *Bad Idea*, *supra* note 52, at 188 (“The change in the concept of confidentiality was brought about by Professor Wigmore in his influential treatise.”).

98. See *infra* Part II.E for a discussion about the costs of the attorney–client privilege.

confidentiality requirement is that if a client does not care about the confidential nature of a communication, the client will readily disclose all necessary information to the lawyer without the encouragement of the privilege.⁹⁹ So, the confidentiality requirement ensures that the privilege applies only where it is needed as an encouragement.

E. Inherent Costs of the Privilege

The attorney–client privilege does not create benefit without cost. The cost of the privilege is the potential that applying the privilege in a particular situation will keep relevant evidence from the truth-finder.¹⁰⁰ As Professor Wigmore stated, “[T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth.”¹⁰¹

99. See WIGMORE, *supra* note 60, § 2311, at 599 (“The reason for prohibiting disclosure . . . ceases when the client does not appear to have been desirous of secrecy.”); see also Leslie, *supra* note 52, at 33 (“While the attorney–client privilege seeks to encourage client confidences, the confidentiality requirement exists to limit the exclusion of reliable evidence by ensuring that the privilege applies to only those statements that would not have been made absent the privilege.”). Professor Paul Rice argues that the confidentiality requirement should be abolished because it is valueless. He posits that, whether or not a communication is confidential, the client may value having the communication protected from compelled disclosure. In other words, the client may not care who knows what he told his counsel, but he would not want that information used against him in a court of law. See Rice, *Eroding Concept*, *supra* note 52, at 861 (“Confidentiality, therefore, should be abandoned as a requirement for the attorney–client privilege because compliance with it generates significant unnecessary costs in the preservation of the secrecy, the proof of that preservation, and the resolution of disputes surrounding it.”); see also Rice, *Bad Idea*, *supra* note 52, at 189.

100. See *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996) (“But the attorney–client privilege interferes with the truthseeking mission of the legal process, because it is in derogation of the public’s right to every man’s evidence. Thus, the privilege is not favored by federal courts and is to be strictly confined within the narrowest possible limits consistent with the logic of its principle.” (citations and internal quotations omitted)); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1423 (3d Cir. 1991) (the attorney–client privilege is narrowly construed because it “obstructs the truth-finding process”); *Jones v. Murphy*, 256 F.R.D. 510, 512 (D. Md. 2008) (“The privilege is ‘not favored by the federal courts’ because it interferes with the truth seeking process and contravenes the right of citizens to evidence, and should be ‘strictly confined within the narrowest possible limits consistent with the logic of its principle.’” (quoting *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984))); see also MCCORMICK, *supra* note 72, § 72, at 339 (“Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.”).

101. WIGMORE, *supra* note 60, § 2291, at 554. The courts over the years often have quoted Wigmore’s statement of the costs of the privilege. See, e.g., *NLRB v. Harvey*, 349

This cost is minimized by the fact that the privilege places communications between client and lawyer beyond the reach of compelled disclosure but does not protect the facts underlying the communications.¹⁰² Also, it is possible that no communication would exist without the privilege so there would be no communication kept from the truth-finder.¹⁰³

The courts' acceptance of the absolute protection of the privilege along with codification by some jurisdictions¹⁰⁴ indicates a collective conclusion that the privilege not only creates benefits but the benefits also exceed any cost of its application.¹⁰⁵ Yet, in applying the privilege in

F.2d 900, 907 (4th Cir. 1965) (quoting WIGMORE, *supra* note 60, § 2292); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999); *Regents of Univ. of Cal. v. Super. Ct.*, 81 Cal. Rptr. 3d 186, 191 n.5 (Cal. Dist. Ct. App. 2008) (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1162 (D.S.C. 1975)); *see also* John E. Sexton, *A Post-Upjohn Consideration of Corporate Attorney–Client Privilege*, 57 N.Y.U. L. REV. 443, 446 (1982) (“Notwithstanding the interests that the attorney–client privilege purports to serve, even its staunchest proponents concede that, whenever the privilege is invoked, otherwise relevant and admissible evidence may be suppressed. Inherently, the attorney–client privilege, like all privileges, potentially hinders the administration of justice.”).

102. The Supreme Court explained this in *Upjohn Co. v. United States*:

[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

449 U.S. 383, 395–96 (1981) (quoting *City of Phila. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)) (alteration in original); *see also* Robert Allen Sedler & Joseph J. Simeone, *The Realities of Attorney–Client Confidences*, 24 OHIO ST. L.J. 1, 9 (1963). *But see* Alexander, *supra* note 75, at 228–31.

103. In *Swidler & Berlin v. United States*, the Supreme Court stated,

In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. This is true of disclosure before and after the client’s death. Without assurance of the privilege’s posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real.

524 U.S. 399, 408 (1998) (footnotes omitted); *see also* Leslie, *supra* note 52, at 31 (“In a perfect world, then, the privilege would protect only reliable statements that would not otherwise have been made.”).

104. *See, e.g.*, ARK. R. EVID. 502; KY. R. EVID. 503; TEX. R. EVID. 503; *see also supra* note 34 and accompanying discussion.

105. *See* Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994) (“The privilege encourages the client to reveal to the lawyer confidences necessary for the

individual cases, courts continue to concern themselves with the damage to the truth-finding mission of the judicial system. Courts often repeat a refrain that the privilege must be “strictly confined within the narrowest possible limits consistent with the logic of its principle.”¹⁰⁶ Any desire to apply the privilege narrowly always must be considered in light of the counterweight of the general acceptance of the privilege. The United States District Court for the District of New Jersey recently addressed this tension in *Louisiana Municipal Police Employees Retirement System v. Sealed Air Corp.*¹⁰⁷

While it is true that the attorney–client privilege is narrowly construed because it “obstructs the truth-finding process,” the privilege is not “disfavored.” Courts should be cautious in their application of the privilege mindful that “it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.” In all instances, the facts underlying any given communication remain discoverable.¹⁰⁸

F. The Certainty Imperative

The attorney–client privilege can achieve its desired goals only if it is applied in an atmosphere of general certainty. The privilege encourages a client to be completely honest and forthcoming with his or her lawyer

lawyer to provide advice and representation. As the privilege serves the interests of justice, it is worthy of maximum legal protection.” (citations omitted)); *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 n.13 (3d Cir. 2007) (the privilege is not “disfavored”).

106. *In re Grand Jury Proceedings*, 604 F.2d 798, 802–03 (3d Cir. 1979); *see also Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (“Because the attorney–client privilege has the effect of withholding relevant information from the factfinder, it is applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney.”); *Harrisburg Auth. v. CIT Capital USA, Inc.*, 716 F. Supp. 2d 380, 387 (M.D. Pa. 2010) (“‘It is well established that evidentiary privileges . . . are generally disfavored and should be narrowly construed.’ The attorney client privilege is one such evidentiary privilege.” (quoting *Pa. Dep't of Transp. v. Taylor*, 841 A.2d 108, 118 (Pa. 2004) (Nigro, J., dissenting))); *Sieger v. Zak*, 874 N.Y.S.2d 535, 537 (App. Div. 2009) (holding that the privilege “constitutes an obstacle to the truth-finding process,” and it therefore “must be narrowly construed, and its application must be consistent with the purposes underlying the immunity” (citations and internal quotation marks omitted)).

107. 253 F.R.D. 300 (D.N.J. 2008).

108. *Id.* at 305 (quoting, in order, *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1423 (3d Cir. 1991); *Teleglobe Commc'ns Corp.*, 493 F.3d at 361 n.13; *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

2011–2012]

END THE EXPERIMENT

503

only if the client can determine before the opportunity for communication that the privilege will protect the communication from court-ordered disclosure. As the Supreme Court stated in *Upjohn*,

[I]f the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. 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.¹⁰⁹

The Supreme Court has repeatedly counseled against holdings that would injure the certainty of privilege, and the Court has heeded its own warning. For example, in *Swidler & Berlin v. United States*,¹¹⁰ the Court considered application of the attorney–client privilege after the death of the client.¹¹¹ The government argued that while the privilege might protect some information after the client’s death, the privilege should not protect communications containing extremely valuable information.¹¹² The Court stated, “Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege’s application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.”¹¹³

III. THE ORIGINS OF RECOGNITION OF A PRIVILEGE IN THE ALLIED

109. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); *see also Teleglobe Commc’ns Corp.*, 493 F.3d at 360 (“It is essential that parties be able to determine in advance with a high degree of certainty whether communications will be protected by the privilege.”); *Rhone-Poulenc Rorer*, 32 F.3d at 863 (“If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain. ‘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.’” (quoting *In re Von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987))); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 144 (D. Del. 1977) (“Only if the client is assured that the information he relays in confidence, when seeking legal advice, will be immune from discovery will he be encouraged to disclose fully all relevant information to his attorney.”).

110. 524 U.S. 399 (1998).

111. *Id.* at 403.

112. *Id.* at 406.

113. *Id.* at 409; *see also Jaffee v. Redmond*, 518 U.S. 1, 17–18 (1996).

LAWYER SETTING

A. In the Beginning: The Chahoon Case

The Virginia Supreme Court was the first court to apply a privilege to an allied lawyer situation. In *Chahoon v. Commonwealth*, the court, in a criminal matter involving indicted defendants, held that the privilege applied to communications by a defendant to or in the presence of a lawyer for one of the other defendants.¹¹⁴

In *Chahoon*, three men—Mr. Sanxay, Mr. Sands, and Mr. Chahoon—were indicted for a conspiracy to defraud the estate of Solomon Haunstein and for forging a note of Mr. Haunstein that was part of the conspiracy to defraud.¹¹⁵ All three men met after the indictment, along with Mr. Lyon, an attorney representing Mr. Sanxay, and Mr. Gregory, an attorney representing Mr. Sands.¹¹⁶ At Mr. Chahoon's trial, Mr. Sanxay testified about what Mr. Chahoon had said at the meeting.¹¹⁷ Mr. Chahoon then sought to question Mr. Lyon about what Mr. Chahoon said at the meeting.¹¹⁸ But Mr. Lyon claimed that "all that passed [at the meeting.] . . . pass[ed] under the seal of professional confidence" and that he would not answer unless his client, Mr. Sanxay, consented.¹¹⁹ The trial court refused to force the lawyer to answer.¹²⁰

The Virginia Supreme Court began its discussion of the privilege by establishing the basic rule of privilege and quoting a treatise of the era as follows: "There is no rule of law better settled than 'that a counsel, solicitor or attorney shall not be permitted to divulge any matter which has been communicated to him in professional confidence.'"¹²¹ The court then stated, "Now nothing can be more certain than that, according to all the authorities on the subject, whatever either of the counsel present heard, or saw, on the said occasion, concerning the matter of the said charge, was a privileged communication, within the

114. 62 Va. (21 Gratt.) 822, 843 (1871).

115. *Id.* at 835. See also *Sands v. Commonwealth*, 62 Va. (21 Gratt.) 871 (1872), for a related case dealing with the same facts.

116. *Chahoon*, 62 Va. (21 Gratt.) at 835.

117. *Id.* at 836.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (quoting 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS 395 (1826)).

2011–2012]

END THE EXPERIMENT

505

meaning of the rule.”¹²²

By turning to the concept of joint clients, the Virginia Supreme Court reached the conclusion that the conversation was privileged.¹²³ The court noted that the law recognizes that a lawyer could represent two clients on a matter, and the court saw no difference in the situation before it.¹²⁴ The court stated in reference to Mr. Lyon, Mr. Sanxay’s attorney,

And can it make any difference in this case, that he was employed as counsel alone by Sanxay? The parties were jointly indicted for a conspiracy to commit a particular crime, and severally indicted for forging and uttering the same paper. They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication.¹²⁵

The court reinforced its conclusion that the allied lawyer situation before it was the same for purposes of the privilege by noting, “the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client.”¹²⁶ So in this court’s view, the attorneys present for the conversation represented all three indicted individuals for purposes of the privilege.

Mr. Chahoon argued that Mr. Lyon’s client, Mr. Sanxay, waived the privilege by testifying about Mr. Chahoon’s statements in the group conversation.¹²⁷ But the court stated that, in a joint client situation, the consent of all clients must be obtained before privileged communications lose their privileged status.¹²⁸ If all of the parties had engaged Mr. Lyon as their attorney, all three parties would have to consent to disclosure for the privilege to be waived.¹²⁹ Because the court

122. *Id.* at 839–40.

123. *Id.* at 843.

124. *Id.* at 841.

125. *Id.*

126. *Id.* at 842.

127. *Id.*

128. *Id.*

129. *Id.*

viewed the situation before it as the same as a joint client situation, the same consent rule applied. Mr. Sands never consented to any disclosure, so Mr. Sanxay's actions in testifying could not waive the privilege.¹³⁰ The court then concluded that the lawyer's testimony was properly excluded, stating, "confidential communications from client to counsel, during the existence of this relationship, and about a professional matter, are privileged."¹³¹

In support of its holding, the court noted that "it was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and to make all necessary arrangements for the defence."¹³² Because the parties had a right to consult, the court concluded that the consultative communications must be privileged.¹³³ The court stated, "Otherwise what would such right of consultation be worth?"¹³⁴

As the first case to recognize that communications in an allied lawyer situation can be privileged, this opinion must be analyzed carefully. As precedent, the opinion withers under rational consideration.

First is the fact that the lower court refused to allow the lawyer, Mr. Lyon, to testify, but the court allowed Mr. Sanxay to testify about the same conversation involving the defendants and the lawyers. So, though the Virginia Supreme Court affirmed the lower court's refusal to allow Mr. Lyons to testify, Mr. Sanxay's testimony about the conversation was admitted and there was no reversal on this basis. The court noted that, even if the lower court erred in finding Mr. Lyon's probable testimony privileged, and thus even if the Virginia Supreme Court erred in affirming that finding, Mr. Chahoon was not prejudiced.¹³⁵ So the Virginia Supreme Court seemed to say that, even if its holding was

130. *Id.* The court states that even if Mr. Sanxay could waive the privilege's protection, Mr. Sanxay's testimony did not do that because it was at most a waiver by implication and an unclear implication at best. The court stated, "An intention to release the privilege ought to be expressed; or, if implied, the implication ought to be plain." *Id.* at 843.

131. *Id.* at 843.

132. *Id.* at 839.

133. *Id.* at 842.

134. *Id.*

135. *Id.* at 844. The court noted that though Mr. Chahoon was found guilty, the term of imprisonment was the least available and he was recommended to the governor for executive clemency. *Id.*

incorrect, it was of no import to the matter at hand. Unfortunately, it has had import as precedent.

Second, the court mischaracterized the law preceding its opinion. The court stated its conclusion that the privilege applied to the allied lawyer setting using the phrase, “nothing can be more certain,” and stating that all authorities agreed that the privilege applied to this situation.¹³⁶ The *Chahoon* court cited no case law and, in fact, no one has discovered any case preceding *Chahoon* in which a court held that a communication in an allied lawyer situation was privileged.

Third, the court’s analysis of the situation is flawed. The court’s underlying assumptions about application of the attorney–client privilege to the joint client situation were correct. The court’s error was its conclusion that the allied lawyer situation before it was the same as a joint client situation—that “the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client.”¹³⁷ Contrary to the *Chahoon* court’s statement, parties engage separate attorneys for reasons other than “purposes of convenience.”¹³⁸ As the discussion in Part IV illustrates, the joint client situation and the allied lawyer situation are very different in very important ways, including justifying rationale and the nature of the relationships in each situation.

Another flaw in the court’s analysis is the court’s leap from recognizing the parties’ desires to collaborate in their criminal defense to the conclusion that the system of justice must support or encourage that collaboration by recognizing a privilege for communications. Criminal defendants may have a right to consult with each other but it is quite a step to say that such defendants have a right to enjoy the protection of those consultations as privileged.

The court’s motivation in finding that the privilege applied and that the attorney could not be compelled to testify may reflect the older view that the privilege belonged to the lawyer and protected the lawyer from testifying about client information learned in the lawyer–client relationship.¹³⁹ This motivation is especially possible because the lower court allowed the testimony of Mr. Sanxay about the same conversation

136. *Id.* at 839–40.

137. *Id.* at 842.

138. *Id.*

139. See *supra* Part II.C for a discussion of the older, abandoned view of the attorney–client privilege.

involving the defendants and the attorneys.¹⁴⁰

B. Historical Expansion of the Privilege in the Allied Lawyer Situation

1. *Schmitt v. Emery*

From 1871 until 1942, no published opinion from another United States court applied the privilege in an allied lawyer situation.¹⁴¹ In 1942 in *Schmitt v. Emery*,¹⁴² the Minnesota Supreme Court enlarged application of the privilege beyond the bounds of *Chahoon* by applying it not in a criminal matter but in a civil matter, arising from an automobile collision.¹⁴³ The *Schmitt* defendants included the owner and driver of a car, the driver of a bus, and the company that owned the bus.¹⁴⁴ The plaintiff sought to have produced and admitted a document that reflected an interview between a claims employee of the bus company and the driver of the bus.¹⁴⁵ The trial court directed the parties to argue the issue of admissibility, and so the bus company shared the report with the other defendants so that they could assist in preparing an argument for inadmissibility.¹⁴⁶ The court ultimately excluded the document as privileged.¹⁴⁷ On appeal, the Minnesota Supreme Court, finding that the defendants were “maintaining substantially the same cause,” determined that disclosure of the document between counsel for

140. *Chahoon*, 62 Va. (21 Gratt.) at 835.

141. A few courts considered applying the privilege but did not. See, e.g., *Smale v. United States*, 3 F.2d 101, 101–02 (7th Cir. 1924). *Smale* involved a conversation between two criminal defendants, both of whom had been indicted for obstruction of justice, and the lawyer for one of the defendants. *Id.* at 101. At trial the question was whether the lawyer could testify about the statements of the defendant who was not the lawyer’s client, *Smale*, or whether the conversation between the three was privileged. *Id.* The court did not apply the privilege to the statements of *Smale* because *Smale* did not engage the lawyer and gave no indication that he intended to engage the lawyer and the lawyer did nothing to lead *Smale* to believe that he would “serve” *Smale*. *Id.* at 102; see also *Radio Corp. of Am. v. Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955) (no privilege); *State v. Hodgdon*, 94 A. 301, 302 (Vt. 1915) (no privilege for conversation between one defendant and that defendant’s lawyer and the lawyer for a co-defendant); Note, *Waiver of Attorney–Client Privilege on Inter-Attorney Exchange of Information*, 63 YALE L.J. 1030, 1032–33 (1954) (no cases applying the privilege from 1871 to 1942).

142. 2 N.W.2d 413 (Minn. 1942).

143. *Id.* at 414.

144. *Id.* at 414–15.

145. *Id.* at 415.

146. *Id.*

147. *Id.*

the defendants did not waive the privilege.¹⁴⁸

2. *Continental Oil Company v. United States*

The next reported case applying the privilege to the allied lawyer setting occurred in 1964. In *Continental Oil Co. v. United States*,¹⁴⁹ not only did the Ninth Circuit Court of Appeals apply the privilege in an allied lawyer situation, but it did so even though no formal legal proceedings involving the parties had begun.¹⁵⁰ In contrast, in *Chahoon*, criminal defendants had been indicted at the time of the communications at issue, and in *Schmitt*, a suit was in progress before a court. In *Continental Oil Co.*, during grand jury proceedings and before any indictment, counsel for Standard Oil Company interviewed Standard employees and counsel for Continental Oil Company interviewed Continental employees.¹⁵¹ Then the respective attorneys prepared memoranda discussing the results of the interviews and exchanged the memos.¹⁵² The Continental Oil and Standard Oil attorneys claimed that the sharing was “to make their representation of their clients in connection with the Grand Jury investigation and any resulting litigation, more effective.”¹⁵³ The plaintiff government subpoenaed the memos and claimed that when the attorneys shared the memos any attorney–client privilege was waived.¹⁵⁴ The trial court refused to quash the government’s subpoenas.¹⁵⁵ The appellate court disagreed, stating that the doctrine of *Chahoon* and *Schmitt* applied; the sharing of the memos did not act as a waiver of the privilege even though the communications occurred before an indictment or other formal proceeding.¹⁵⁶ The court explained its decision by noting the value of the attorney–client privilege in general.¹⁵⁷ The court did not address the fact that applying the attorney–client privilege in an allied

148. *Id.* at 417.

149. 330 F.2d 347 (9th Cir. 1964).

150. *Id.* at 348 (grand jury proceedings).

151. *Id.*

152. *Id.* at 348.

153. *Id.* at 348–49.

154. *Id.* at 349.

155. *Id.*

156. *Id.* at 349–50.

157. *Id.* at 350 (“The privilege asserted here is a valuable and an important right for the protection of any client at any stage of his dealings with counsel.”).

lawyer situation was not a run-of-the-mill occurrence.¹⁵⁸

3. *Hunydee v. United States*

Just one year later, in *Hunydee v. United States*,¹⁵⁹ a federal court again applied the attorney–client privilege to an allied lawyer situation and expanded the scope of such an application. In *Hunydee*, a husband was indicted for attempting to evade the payment of income tax.¹⁶⁰ The wife was indicted for aiding in the preparation of false tax returns.¹⁶¹ At a meeting involving both defendants and their separate attorneys, Mr. Hunydee stated that he intended to “plead guilty and take the blame.”¹⁶² At trial, both Mrs. Hunydee and her attorney testified about the communications that occurred at the meeting, including Mr. Hunydee’s statement.¹⁶³ On appeal, Mr. Hunydee cited the *Continental Oil* decision and argued that the court should not have permitted Mrs. Hunydee or her attorney to testify about his statements because the attorney–client privilege protected his communications made at the meeting.¹⁶⁴ The lower court had allowed the testimony because it believed that the attorney–client privilege did not apply because this was an allied lawyer situation and the communication did not involve “trial strategy or defenses.”¹⁶⁵ On appeal, the Ninth Circuit noted that the *Continental Oil* case did not involve “trial strategy or defenses” either¹⁶⁶ and yet the privilege applied there. The *Hunydee* court clarified that privileged communications do not lose their privileged status even though they are shared with another person and that person’s counsel if the statements “concern common issues and are intended to facilitate representation in possible subsequent proceedings.”¹⁶⁷ The court concluded that the privilege protected Mr. Hunydee’s statements; neither Mrs. Hunydee nor her attorney could testify about them.¹⁶⁸

158. Perhaps the court was distracted by the argument of smaller detail about whether the privilege applied before an indictment or other formal procedure.

159. 355 F.2d 183 (9th Cir. 1965).

160. *Id.* at 184.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 184–85.

166. *Id.* at 185.

167. *Id.*

168. *Id.*

2011–2012]

END THE EXPERIMENT

511

4. Summary

The early acceptance and development of the doctrine applying the attorney–client privilege to the allied lawyer setting was a bit stealthy. The initial acceptance of the application of the attorney–client privilege in the allied lawyer situation occurred in *Chahoon* in 1871, a criminal case involving post-indictment communications in which the evidence was admitted by way of another witness.¹⁶⁹ The next three cases applying the privilege in the allied lawyer situation expanded the privilege to civil settings and to pre-litigation settings.¹⁷⁰ Almost one hundred years passed between the *Chahoon* decision and the *Hunydee* decision. None of the three post-*Chahoon* courts ever returned to the basic question of the propriety of applying the privilege in the allied lawyer situation. These courts did not analyze whether applying the privilege in the allied lawyer situation furthered the goals of the attorney–client privilege. Each court accepted the conclusion of the *Chahoon* court and assumed that the privilege survived disclosure in an allied lawyer situation. Then each court dealt with smaller, subsidiary issues.

C. The Recent Explosion of Cases

Courts in the last forty years, likewise, have accepted the general notion that the attorney–client privilege protects communications arising in an allied lawyer situation. These courts have simply not looked back to analyze critically the *Chahoon* precedent. The import of the error is magnified by the fact that courts are now bombarded by many more such claims. No longer are courts dealing with one such claim now and then. In the decade spanning 1970 to 1979, only five published cases involved claims of privilege in an allied lawyer setting.¹⁷¹ In the decade spanning from 2000 to 2009, 168 published cases involved claims of attorney–client privilege based on some sort of common interest.¹⁷² The error of the *Chahoon* court in applying the attorney–

169. See *supra* Part III.A.

170. See *supra* Parts III.B.1–3.

171. See *supra* note 1.

172. See *supra* notes 1, 15. Also see, for example, *In re Teleglobe Commc'ns Corp.*, in which the appellate court noted that lower court had incorrectly treated the situation as one involving allied lawyers when in reality it was a joint client representation setting. 493 F.3d 345, 363–64 n.18 (3d Cir. 2007). The appellate court referred to the joint client setting as

client privilege to the allied lawyer setting, originally an error of little import, now has tremendous impact on the doctrine of the attorney–client privilege.

IV. THE JOINT CLIENT SETTING

In giving birth to the idea that the attorney–client privilege should protect communications in the allied lawyer setting, the Virginia Supreme Court in *Chahoon v. Commonwealth* analogized the allied lawyer situation to the joint client representation setting.¹⁷³ The *Chahoon* court concluded that the two situations were the same in that a lawyer for one defendant “in effect” represented the other defendants present at a meeting at which the communications occurred.¹⁷⁴ The *Chahoon* court then concluded that the privilege should apply to the allied lawyer situation as it would to a joint client representation situation.¹⁷⁵ The analogy upon which the application of the attorney–client privilege to the allied lawyer setting rests is a flawed analogy. In reality, the joint client representation situation and the allied lawyer situation differ in very basic respects.

A. Joint Client Representation

1. Defining Joint Client Representation

Lawyers over the years have engaged in the practice of representing multiple clients with regard to the same matter.¹⁷⁶ The clients must

appropriate for the “co-client privilege” and referred to the allied lawyer setting as appropriate for the “community-of-interest privilege.” *Id.*

173. 62 Va. (21 Gratt.) 822, 841 (1871).

174. *Id.* at 842.

175. *Id.* at 843.

176. See *Lessing v. Gibbons*, 45 P.2d 258, 261 (Cal. Dist. Ct. App. 1935) (discussing common joint representation scenarios of the time); Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 394 (2001); Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 574 (1997); see also *Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 211 (S.D.N.Y. 2009) (“Courts have long recognized the existence of the attorney–client relationship among clients and attorneys allied in a common legal cause. Typically, parties jointly developing a patent with an attorney commonly have a ‘common legal interest’ in obtaining the greatest protection and in exploiting the patents. The parties thereby develop a ‘community of interest,’ which establishes a joint attorney–client relationship among them and the attorney. In this respect, when a community of interest exists, courts have viewed those represented as ‘joint clients’ for the purpose of privilege.” (quoting *Hillerich & Bradsby v. MacKay*, 26 F. Supp. 2d 124, 126 (D.D.C. 1998))). For early examples of accepted joint client representation, see *Rice v.*

impliedly or expressly agree to be represented by the lawyer and must agree to be a part of a common representation.¹⁷⁷ The joint representation then consists only of the matters for which the clients have agreed upon for joint representation.¹⁷⁸

Often, when the question is whether there is a joint representation, the existence of representation itself is also at issue.¹⁷⁹ A party may claim that the lawyer represented the party along with another party in a joint representation. The lawyer may deny he or she represented the party at all, much less in a joint capacity. The question of the joint nature of the representation often does not receive the courts' attention because the courts often determine that there is no lawyer–client relationship of any kind.¹⁸⁰ If there is no relationship, there is no need for courts to analyze whether a representation is joint or, rather, separate.

An exception to these generalizations is *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.*¹⁸¹ In that case, the defendants claimed that a law firm had represented them in addition to the plaintiffs as joint clients on a matter.¹⁸² The court determined that the lawyers in the firm and the defendants were not in an attorney–client relationship.¹⁸³ Though the court accepted that the defendants believed that the lawyers of the firm represented them, the court found such beliefs “clearly unreasonable.”¹⁸⁴

Rice, 53 Ky. (14 B. Mon.) 335, 336 (1854); *Gulick v. Gulick*, 39 N.J. Eq. 516, 516–17 (1885); and *Whiting v. Barney*, 38 Barb. 393, 397 (N.Y. Gen. Term 1862). See generally 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES § 587, at 561 (1877) (“It is easy to conceive of cases in which two or more persons address a lawyer as their common agent.”).

177. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 cmt. c (2000) (discussing the creation of the joint client representation); *id.* § 14 (discussing the formation of the lawyer–client relationship).

178. *Id.* § 75 cmt. c (“The scope of the co-client relationship is determined by the extent of the legal matter of common interest.”); see also RICE, *supra* note 19, § 4:30.

179. See, e.g., *Fed. Deposit Ins. Corp. v. Ogden Corp.*, 202 F.3d 454, 463 (1st Cir. 2000); *Merck Eprova*, 670 F. Supp. 2d at 203.

180. See, e.g., *MacKenzie–Childs LLC v. MacKenzie–Childs*, 262 F.R.D. 241, 254–55 (W.D.N.Y. 2009) (finding no relationship); *In re Colocotronis Tanker Secs. Litig.*, 449 F. Supp. 828, 832 (S.D.N.Y. 1978) (“[T]he Court concludes that the banks were not actual clients of the firms.”).

181. 150 F.R.D. 648 (N.D. Cal. 1993).

182. *Id.* at 650. The defendants claimed that they were joint clients so they could have access to certain communications.

183. *Id.*

184. *Id.* at 654. The *Sky Valley* court stated the proper analysis for determining the existence of a relationship involved

Thus, the defendants were not clients of the lawyers of the firm.¹⁸⁵

The *Sky Valley* court had no need to analyze the possible joint nature of the relationship, but it did anyway.¹⁸⁶ The court listed the following nonexclusive factors as relevant to the determination of joint representation:

(1) the conduct of the two parties toward one another, (2) the terms of any contractual relationship (express or implied) that the two parties may have had, (3) any fiduciary or other special obligations that existed between them, (4) the communications between the two parties (directly or indirectly), (5) whether, to what extent, and with respect to which matters there was separate, private communication between either of them and the lawyer as to whom a “joint” relationship allegedly existed, (6) if there was any such separate, private communication between either party and the alleged joint counsel, whether the other party knew about it, and, if so, whether that party objected or sought to learn the content of the private communication, (7) the nature and legitimacy of each party’s expectations about its ability to access communications between the other party and

resolution of the dispute will turn on whether a contractual relationship was formed implicitly. To answer that question, courts necessarily look to circumstantial evidence, taking into account all kinds of indirect evidence and contextual considerations that appear relevant to determining whether it would have been reasonable for the person to have inferred that she was the client of the lawyer. Thus, in this setting, whether the attorney–client relationship existed is a question of law that is resolved through an objective test.

Id. at 652.

185. *Id.* at 650. In support of its finding that the defendants’ belief of representation was unreasonable, the court noted that the lawyers subjectively did not consider the defendants to be clients and never told anyone the firm represented the defendants. *Id.* at 654. At least one lawyer told several people, including a representative of the defendants, that the firm did not represent the defendants. *Id.* at 655. The defendants never paid the firm for services and the firm never billed the defendants for services. *Id.* The defendants received letters from the firm identifying the plaintiffs as clients but not identifying the defendants as clients. *Id.* Also, the defendants had separate counsel. *Id.* at 655–56. The court found that the defendants sought legal advice from the law firm and received legal advice from the law firm but only in the defendants’ contractual role as project manager, not individually. *Id.* at 657. The project contract required that the project manager consult with that law firm. *Id.* at 656–57. During the project the defendants also consulted a separate lawyer about the project. *Id.* at 657. The court concluded that “it would not advance the purposes of the privilege to hold that there was an attorney–client relationship between [the defendants] and [the law firm]” but might discourage communication by a party such as the plaintiffs. *Id.* at 659.

186. *Id.* at 661.

the allegedly joint counsel, (8) whether, to what extent, and with respect to which matters either or both of the alleged joint clients communicated privately with *other* lawyers, (9) the extent and character of any interests the two alleged joint parties may have had in common, and the relationship between common interests and communications with the alleged joint counsel, (10) actual and potential conflicts of interest between the two parties, especially as they might relate to matters with respect to which there appeared to be some commonality of interest between the parties, and (11) if disputes arose with third parties that related to matters the two parties had in common, whether the alleged joint counsel represented both parties with respect to those disputes or whether the two parties were separately represented.¹⁸⁷

2. Ethical Limits of Joint Representation

Professional responsibility principles regarding concurrent conflicts of interest greatly inform any consideration of whether a joint client situation presents an appropriate commonality of interests to justify representation. Specifically, Rule 1.7 of the *ABA Model Rules of Professional Conduct* states:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be

187. *Id.* at 652–63. The *Sky Valley* court concluded that a belief in the existence of a joint client representation would have been unreasonable as well. *Id.* at 659; *see also* Fed. Deposit Ins. Co. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) (“In determining whether parties are ‘joint clients,’ courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like.”).

able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.¹⁸⁸

The governing rule in most jurisdictions is this rule or a close approximation of it.¹⁸⁹ The rule is aimed at insuring loyalty of the lawyer to the client, which includes insuring that the lawyer exercises independent judgment on behalf of each client in joint client settings and other settings.¹⁹⁰

With regard to a joint client representation, this rule allows a lawyer ethically to represent two or more clients at the same time, jointly or otherwise, if the clients will not be “directly adverse” and no “significant risk” exists that the representation of one of the clients will be “materially limited” by the lawyer’s responsibilities to one of the other joint clients.¹⁹¹ Even if one of these two conditions exists, the rule allows for a representation if the four conditions in Rule 1.7(b) are satisfied.¹⁹²

The shared information aspect of a joint client representation makes a lawyer’s representation of “directly adverse” clients impossible.¹⁹³ Real-world clients would never consent to such and a lawyer could never “reasonably believe[]” that, in such a situation, he or she could

188. MODEL RULES OF PROF’L CONDUCT R. 1.7.

189. The ABA has online charts for many states comparing the state rule to the Model Rule Charts for nineteen states state that the state rule is identical to the Model Rule. Fifteen other state charts show that the state rule is substantially similar to the Model Rule. States with identical rules are Arkansas, Colorado, Connecticut, Delaware, Indiana, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, and Vermont. *See Charts Comparing Professional Conduct Rules*, ABA, http://www.americanbar.org/groups/profession_al_responsibility/policy/charts.html (last visited Jan. 15, 2012).

190. *See* MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 1.

191. *See id.* R. 1.7(a).

192. *See id.* R. 1.7(b).

193. *See id.* R. 1.7 cmt. 19 (“For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.”).

2011–2012]

END THE EXPERIMENT

517

“provide competent and diligent representation” to each of the joint clients. Indeed, the comments to Rule 1.7 note that “a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.”¹⁹⁴

There are many joint representation situations, however, in which there is a “significant risk” that the representation of one of the clients will be “materially limited” by the lawyer’s responsibilities to one of the other joint clients. A lawyer wishing to jointly represent clients with such a risk must then “reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client.”¹⁹⁵ In addition, the law must not prohibit the joint representation and the clients must give “informed consent, confirmed in writing.”¹⁹⁶ The comments to Rule 1.7 note that,

because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients’ interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.¹⁹⁷

The comments specifically note that “[a] particularly important factor” in deciding whether a joint representation is appropriate is the ramifications for the duty of confidentiality and the attorney–client privilege.¹⁹⁸ With regard to a lawyer obtaining consent from clients to a joint client representation and the sharing of information that such a representation necessarily entails, Comment 31 to Rule 1.7 provides:

194. *Id.* R. 1.7 cmt. 29.

195. *Id.* R. 1.7(b)(1).

196. *Id.* R. 1.7(b)(2), (b)(4). The rule also prohibits a lawyer from suing a current client on behalf of another. *See id.* R. 1.7(b)(3). This situation is a subset of the set of situations in which the clients are “directly adverse.” *Id.* R. 1.7(a)(1). As established above, no joint representation is possible in any situation of direct adversity. *Id.*

197. *Id.* R. 1.7 cmt. 29.

198. *Id.* R. 1.7 cmt. 30.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.¹⁹⁹

The lawyer must explain that his or her allegiance is to both clients; the lawyer cannot favor one joint client over another joint client.²⁰⁰ To obtain "informed consent," the lawyer must obtain the potential joint clients' agreement to the course of conduct after the lawyer explains to them "the material risks of and reasonably available alternatives to the proposed course of conduct."²⁰¹

In addition, a joint client representation cannot occur if law prohibits it. Comment 16 to Rule 1.7 notes that some states, for example, prohibit one lawyer from representing more than one defendant in a criminal matter involving the death penalty.²⁰² Some jurisdictions have disapproved of joint representations that once were thought permissible. For example, some courts consider certain types of land transfers to be improper settings for joint representation.²⁰³ Yet, the representation of a

199. *Id.* R. 1.7 cmt. 31. Comment 31 continues,

In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

Id.

200. *See id.* R. 1.7 cmt. 32.

201. *See id.* R. 1.0(e).

202. *See id.* R. 1.7 cmt. 16.

203. *See, e.g.,* *Baldassarre v. Butler*, 625 A.2d 458, 464–65 (N.J. 1993) (joint representation of buyer and seller in a complex commercial real estate transaction not allowed). *See generally* Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 814 (1977) ("Dual representation is virtually always improper in transactions such as the sale of property because of the very high probability that future conflicts of interest will develop."). Some states have disapproved of joint representation in uncontested divorce cases. *See, e.g.,* *Walden v. Hoke*, 429 S.E.2d 504, 509 (W. Va. 1993) ("The likelihood of prejudice is so great with dual representation so as to make adequate representation of both spouses impossible, even where the separation is 'friendly' and the divorce uncontested."). *See generally* Mary E.

buyer and a seller in a real estate transaction was once thought of as an acceptable and very common setting for a joint client representation.²⁰⁴

Comment 29 to Rule 1.7 addresses the failure of a joint client representation by warning that “if the common representation fails . . . the result can be additional cost, embarrassment and recrimination.”²⁰⁵ The lawyer “ordinarily” must withdraw from representation of all of the joint clients if an impermissible conflict arises.²⁰⁶ While joint representation has existed throughout the ages, it is a representation fraught with potential conflict-of-interest problems. At least one commentator has argued that the practice should be abolished entirely because the risks far outweigh any benefits.²⁰⁷

B. Joint Client Representation and the Attorney–Client Privilege

1. Generally

The evidentiary principle of the attorney–client privilege traditionally has applied to the joint client representation group—the lawyer and the joint clients that the lawyer represents on the matter of common interest.²⁰⁸ These communications are confidential

Chesser, *Joint Representation in a Friendly Divorce: Inherently Unethical?*, 27 J. LEGAL PROF. 155 (2003).

204. See *Lessing v. Gibbons*, 45 P.2d 258, 261 (Cal. Dist. Ct. App. 1935).

205. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29.

206. See *id.* But see N.Y. State Bar Ass'n. Comm. on Prof. Ethics Op. 823, at 2–3, 5 (2008) (stating that the lawyer must withdraw from representing one of the joint clients when the interests of the clients diverge but that the lawyer can continue to represent the other client if that client consents).

207. See Bassett, *supra* note 176, at 458. Bassett argues that a joint representation is a lesser representation because of the divided loyalty of the lawyer and that the client's consent is “illusory protection.” *Id.* For further discussion of the costs and benefits of joint client representation, see Chesser, *supra* note 203, at 158–61; Collett, *supra* note 176, at 574–77; and Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 251–56 (1982).

208. See *Dexia Credit Local v. Rogan*, 231 F.R.D. 287, 293 (N.D. Ill. 2005) (“[W]here two or more persons jointly consult an attorney concerning a mutual concern, their confidential communications with the attorney, although known to each other, will of course be privileged in the controversy of either or both of the clients with the outside world.” (internal quotations omitted)); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 446 (S.D.N.Y. 1995) (“At its core, ‘[t]he “common interest” doctrine applies when multiple persons are represented by the same attorney. In that situation, communications made to the shared attorney . . . remain privileged as to the rest of the world” (quoting *N. River Ins. Co. v. Phila. Reinsurance Corp.*, 797 F. Supp. 363, 366 (D.N.J. 1992))).

communications between lawyers and clients and, thus, are privileged. In effect, privilege law treats the joint clients as one client that is a group of individuals or entities. With this view, the second or other joint clients are not third parties to the representation or the communication, and so the presence of the second or other joint clients does not destroy the confidentiality necessary for the privilege to attach as would occur if a third party is present for a communication involving a lawyer and a client. Likewise, if a communication between a lawyer and a joint client is later shared with another joint client, the sharing does not waive the privilege as would occur if the communication were shared with a third party.²⁰⁹

No one joint client can waive the privilege's protection if the other joint clients do not consent.²¹⁰ A slight caveat is that one joint client can reveal his or her communications with counsel, but only to the extent that the disclosure does not reveal any of the protected communications

This rule has been true for a very long time. See *Marcuse v. Kramer*, 5 Teiss. 247, 250 (La. Ct. App. 1908) (“Two or more persons sometimes address a lawyer as a common agent. So far as concerns strangers, these communications are privileged, but not as between themselves. As they stand on the same footing as to the lawyer, either can compel him to testify against the other as to their negotiations.” (quoting EDWARD P. WEEKS, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW § 175 (2d ed. 1892))).

209. In a traditional representation, the presence of a third party destroys any presumption of confidentiality necessary for the attorney-client privilege to attach. Disclosure of an otherwise privileged communication to a third party waives the privilege. See *WebXchange Inc. v. Dell Inc.*, 264 F.R.D. 123, 126 (D. Del. 2010) (“A communication is not made in confidence, and in turn is not privileged, if persons other than the client, its attorney, or their agents are present. Similarly, if a client shares an otherwise privileged communication with a third party, then the communication is no longer confidential and the client has waived the privilege.” (citation omitted)); see also *supra* Part II.D (for a discussion of the confidentiality requirement).

210. See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) (“[W]aiving the joint-client privilege requires the consent of all joint clients.”); *Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 145 (D. Del. 2009) (“Waiver of the privilege requires the consent of all joint clients.”). For an earlier statement, see *Herman v. Schlesinger*, 90 N.W. 460, 463 (1902) (“When an attorney's services in a transaction are rendered to several persons, confidential communications to him in regard thereto, in which all such persons are interested, cannot be properly disclosed unless all join in consenting thereto. The rule in that regard has been carried so far as to preclude an attorney from divulging matters confidentially communicated to him by a firm without the individual consent of every member thereof. The reason for that is obvious. The privilege of secrecy is purely a personal right. When it affects several persons there is no way by which all can be protected in respect thereto other than by holding that all must join in lifting the veil of silence, or it must remain a secure cover for those things which it would obscure if they related to a single person only.” (citation omitted)); see also RICE, *supra* note 19, § 4:30.

2011–2012]

END THE EXPERIMENT

521

of the other joint clients.²¹¹ If the joint clients become adverse in a proceeding, however, the privilege does not protect any of the communications from the joint representation.²¹²

2. The Restatement Approach

The *Restatement (Third) of the Law Governing Lawyers* provides separate sections for the joint client representation setting and the allied lawyer setting. Section 75 deals with the joint client representation setting, providing as follows:

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68–72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.²¹³

This provision is an accurate description of how courts, in the years before the creation of the Restatement, applied the attorney–client

211. See *Teleglobe Commc'ns Corp.*, 493 F.3d at 363 (“[A] client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients’ communications or as to any of its communications that relate to other joint clients.”); *Robert Bosch*, 263 F.R.D. at 145–46 (stating that, in a joint client situation, a co-client “may unilaterally waive the privilege regarding its communications with the joint attorney, but cannot unilaterally waive the privilege for the other joint clients or any communications that related to those clients”); *Am. Mut. Liab. Ins. Co. v. Super. Ct.*, 113 Cal. Rptr. 561, 573–74 (Ct. App. 1974).

212. See *Brennan’s, Inc. v. Brennan’s Rests., Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) (“Assuming the prior representation was joint, . . . neither of the parties to th[e] suit can assert the attorney–client privilege against the other as to matters comprehended by that joint representation.”); *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992) (“[W]hen parties with a common interest retain a single attorney to represent them [and] . . . later become adverse, neither is permitted to assert the attorney–client privilege as to communications occurring during the period of common interest.”); see also MUELLER & KIRKPATRICK, *supra* note 72, § 5:19, at 568; RICE, *supra* note 19, § 4:33.

213. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000).

privilege in the joint client setting.

3. Historical Acceptance of Applying the Attorney–client Privilege in the Joint Client Setting

As the Virginia Supreme Court in *Chahoon v. Commonwealth* correctly noted in 1871, historically the attorney–client privilege has protected communications in joint client settings.²¹⁴ 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. For example, in 1854, in *Rice v. Rice*, the Court of Appeals of Kentucky dealt with the question of whether a lawyer who had previously represented two people jointly could testify as to communications that occurred in the midst of the joint representation.²¹⁵ The court stated, “As the communications were made to an attorney, who was acting at the time as the legal adviser of the parties, it is clear that he would not be permitted to disclose them in any controversy between them and a third person.”²¹⁶ And in *Whiting v. Barney*,²¹⁷ a New York court stated, “Unquestionably, the communication in this case was so far privileged as that the attorney would not be required or permitted to disclose it as a witness in favor of a *third* person, against both his clients, without their consent.”²¹⁸

Applying the attorney–client privilege to the joint client representation setting in the twenty-first century, therefore, is not an expansion of the application of the attorney–client privilege from its

214. 62 Va. (21 Gratt.) 822, 841 (1871) (“A man may be the counsel of two or more parties, concerning the same subject matter, and in all such cases confidential communications made to him by one or all of such parties, jointly or severally, in reference to such matter, are privileged.”).

215. 53 Ky. (14 B. Mon.) 335, 335–36 (1854).

216. *Id.* at 336. Because the later matter was a controversy between the two formerly joint clients, the court allowed the testimony to be admitted. *Id.*

217. 38 Barb. 393 (N.Y. Gen. Term 1862).

218. *Id.* at 397; *see also* *Gulick v. Gulick*, 39 N.J. Eq. 516, 517 (1885) (“Thus, Mr. Wharton says, vol. 1 § 587: ‘It is easy to conceive of cases in which two or more persons address a lawyer as their common agent. So far as concerns a stranger, their communication to the lawyer would be privileged. It is otherwise, however, as to themselves; as they stand on the same footing as to the lawyer, either could compel him to testify against the other as to their negotiations.’” (quoting WHARTON, *supra* note 176, § 587)); *Harris v. Daugherty*, 11 S.W. 921, 923 (Tex. 1889) (“The rule is that if the witness is the attorney of both parties in a transaction of this character, the communications made to him in course of the business are privileged, except in a controversy between the parties themselves.”).

2011–2012]

END THE EXPERIMENT

523

traditional metes and bounds of the 1800s. Communications in the joint client situation that would have the benefit of privilege protection now would have had that same protection then.

4. An Additional but Erroneous Requirement Resulting from the Confusion with the Allied Lawyer Setting

Some courts have imposed an additional but erroneous requirement for application of the privilege in a joint client setting: proof of a common interest beyond that common interest inherent in a joint client representation. For example, in *Dexia Credit Local v. Rogan*, the court evaluated a claim of privilege in a situation in which two parties were represented by the same law firm with regard to claims of fraud against common adversaries.²¹⁹ This was a joint client representation setting. The *Dexia* court began by noting

[w]here two or more persons jointly consult an attorney concerning a mutual concern, “their confidential communications with the attorney, although known to each other, will of course be privileged in the controversy of either or both of the clients with the outside world” Moreover, the joint defense privilege cannot be waived without the consent of all parties to the defense, except in the situation where one of the joint defendants becomes an adverse party in a litigation.²²⁰

This statement seems to accept the commonality of interest inherent in a joint client representation. But the court continued by requiring the parties to make an additional proof—proof of a common interest that is more than simply proof of an interest sufficient for the creation of a joint client representation. The *Dexia* court stated,

While often arising in the context of a joint defense, the common interest doctrine more generally applies to any parties who have a “common interest” in current or potential litigation, either as actual or potential plaintiffs or defendants. To maintain the privilege, the common interest must relate to a litigation

219. 231 F.R.D. 268, 272–75 (N.D. Ill. 2004).

220. *Id.* at 273 (alteration in original) (quoting *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980)).

interest, and not merely a common business interest. If there is some or even substantial overlap between the litigation and business interests, the common interest doctrine still applies so long as a “community of interest” can be established with respect to the documents. . . .

. . . [T]he parties who assert a common interest as the basis for their assertion of privilege (where otherwise it would not exist due to the shared communications), must simply demonstrate “actual cooperation toward a common legal goal” with respect to the documents they seek to withhold.²²¹

In making these statements, the court did not rely upon cases involving joint client representation settings, but rather it relied upon cases involving parties with separate counsel—that is, cases in the allied lawyer setting.²²²

Such an analysis that requires a showing beyond the presence of a joint client representation leaves open the possibility that a court would deny the privilege even when the purposes of the attorney–client privilege are otherwise present. For example, the joint client representation might arise in a setting not involving litigation or its threat. The *Dexia* court stated that “[t]o maintain the privilege, the common interest must relate to a litigation interest, and not merely a common business interest.”²²³ In such a situation the lawyer will have evaluated the positions of the clients and will have decided, in accordance with ethics concepts, that a joint representation would be ethical. The interest of the clients would be “common” enough for a joint representation by one lawyer. The clients would be seeking legal advice, just not advice regarding litigation. Such a result would cause a denial of the privilege, a notion contrary to traditional understandings of privilege law in general and traditional applications of privilege law to the context of joint client representation.

This expanded common interest requirement should not apply in the joint client representation setting. The sharing of interest inherent in the ethical joint client representation should be all that is required for

221. *Id.* (citations omitted).

222. *Id.* For example, the *Dexia* court relied on, in order, *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212 (N.D. Ill. 2001), *Strougo v. BEA Assocs.*, 199 F.R.D. 515 (S.D.N.Y. 2001), and *United States v. Evans*, 113 F.3d 1457 (7th Cir. 1997).

223. *Dexia*, 231 F.R.D. at 273.

the privilege to apply. A lawyer cannot represent more than one client on the same matter if there is an impermissible conflict of interest—the clients’ interests must align significantly.²²⁴ The stated requirement of a common interest is simply a statement of this reality of joint representation. In the context of applying the attorney–client privilege to joint clients, the joint representation defines the requisite common interest. There need be no independent analysis of common interest other than a determination that the communication is in furtherance of the joint representation—that is, intended to be a part of the joint client representation. If the parties’ interests are aligned such that joint representation is desirable and ethical, the interests are sufficiently common.

Before the explosion of allied lawyer setting privilege cases, courts applying the privilege in the joint representation setting seemed to understand this principle. These courts did not mention a common interest; the joint client representation setting was sufficient proof of shared interest.²²⁵ The learned treatises of the time did not treat the presence of a common interest as an independent requirement for the application of the privilege.²²⁶ For example, the version of Wigmore’s treatise published in 1905 stated the following:

Communications to Opponent or His Attorney or in Opponent’s Presence; Joint Attorney. There may be a relative,

224. See *supra* Part IV.A.2.

225. See, e.g., *Baldwin v. Comm’r*, 125 F.2d 812 (9th Cir. 1942) (dealing with privilege issue in a joint client representation setting with no mention of common interest); *Grand Trunk W. R.R. Co. v. H.W. Nelson Co.*, 116 F.2d 823 (6th Cir. 1941) (considering privilege issue in a joint client representation setting without mention of common interest); *Lew Moy v. United States*, 237 F. 50 (8th Cir. 1916) (considering privilege issue in a joint client representation setting with no mention of common interest); see also *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 855 (7th Cir. 1974) (stating that privilege applies when attorney represents two parties with a common interest, without discussing the common interest separately); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970) (same).

226. See, e.g., WHARTON, *supra* note 176, § 587 (“It is easy to conceive of cases in which two or more persons address a lawyer as their common agent. So far as concerns a stranger, their communications to the lawyer would be privileged. It is otherwise, however, as to themselves; and as they stand on the same footing as to the lawyer, either could compel him to testify against the other as to their negotiations.”); WEEKS, *supra* note 208, § 175 (“Two or more persons sometimes address a lawyer as a common agent. So far as concerns strangers, these communications are privileged, but not as between themselves. As they stand on the same footing as to the lawyer, either can compel him to testify against the other as to their negotiations.”).

not an absolute, confidence. The chief instance occurs when the *same attorney acts for two parties* having a common interest, and each party communicates with him. Here the communications are clearly privileged from disclosure at the instance of a third person. Yet they are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other.²²⁷

Wigmore used the phrase, “common interest,” but not to add a requirement in addition to the necessity of a joint representation. Rather, the phrase, “common interest” explains when a representation is a joint representation as opposed to a lawyer representing two or more clients separately in a related matter. A few early courts mention a shared interest, but use it in a definitional, descriptive fashion—more a method of describing the nature of a joint representation as opposed to a lawyer’s separate representation of two clients, not as an additional and separate requirement for application of the attorney–client privilege.²²⁸ If a lawyer represents one of the joint clients in a separate matter, communications relating to the separate matter would not be a part of the joint client representation and would not be treated as a communication in a joint client representation.²²⁹

Some situations accentuate the historical lack of a common interest requirement separate from the shared interest inherent in a joint client

227. 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2312, at 3235 (1905).

228. See, e.g., *Croce v. Super. Ct.*, 68 P.2d 369, 370 (Cal. Dist. Ct. App. 1937) (“[T]he communications made by parties united in a common interest to their joint or common counsel, while privileged against strangers, are not privileged as between such parties nor as between their counsel and any of them, when later they assume adverse positions.”); *Crawford v. Raible*, 221 N.W. 474, 478 (Iowa 1928) (“[T]he testimony of an attorney as to a transaction in which two parties consult him, for their mutual benefit, is not privileged in an action between such parties or their representatives involving such transaction.”); *Martin v. Slifkin*, 293 N.Y.S. 213, 214 (App. Div. 1937) (“The testimony of the attorney who handled the transaction was properly admitted on the trial, as it was not privileged under section 353 of the Civil Practice Act, for the reason that the parties on both sides consulted this witness for their mutual benefit.”).

229. See, e.g., *Rudow v. Cohen*, No. 85 Civ. 9323 (LBS), 1988 WL 13746, at *4 (S.D.N.Y. Feb. 18, 1988) (“Simply because Rudow and LOPC were jointly represented in the Alvarez matter, does not permit Rudow access to every conceivable communication generated by Litton about Rudow during that period. Clearly, in order to be discoverable under the joint client exception, the communication would have to relate to the subject matter of the joint representation.”); see also RICE, *supra* note 19, § 4:30.

representation. For example, if, after a joint client representation has begun, the interests of the joint clients diverge such that the joint representation is no longer ethically proper, courts have held that the privilege may still apply.²³⁰ At such a point of divergence, it is clear that there is insufficient shared interest even for a joint client representation much less for satisfying any additional common interest requirement. Yet, courts have applied the privilege. In *Federal Deposit Insurance Co. v. Ogden Corp.*, in an attempt to block disclosure of certain communications, the defendant claimed that though a joint client representation may have existed, the relationship dissolved when the defendant realized that its interests diverged from that of the other joint clients.²³¹ Thus, communications after that divergence should not be accessible by the other joint clients. The court stated, “A joint attorney–client relationship remains intact until it is expressly terminated or until circumstances arise that readily imply *to all the joint clients* that the relationship is over.”²³² Because the joint representation continued, any communications could not be kept from the other joint clients.²³³ Clearly, in this court’s view, the determinative fact is the clients’ reasonable belief in the joint representation and not the lack of common interest at the time of the communications. If the parties believe the joint representation has dissolved, then each can assert the privilege against the other with regard to communications after the dissolution even though the attorney may be acting unethically in continuing to represent both parties.²³⁴

Unfortunately, the *Dexia* court’s approach of requiring a heightened proof of common interest in the joint representation setting is evidence that some courts have become confused about how to apply the attorney–client privilege in a joint client representation setting. The confusion results from courts applying a common interest standard

230. See, e.g., *Eureka Inv. Corp., N.V. v. Chi. Title Ins. Co.*, 743 F.2d 932, 937–38 (D.C. Cir. 1984) (a lawyer’s improper behavior in not avoiding the conflict does not deprive the clients of the privilege); see also MUELLER & KIRKPATRICK, *supra* note 72, § 5:19, at 566.

231. 202 F.3d 454, 462 (1st Cir. 2000).

232. *Id.* at 463.

233. *Id.* at 464.

234. See *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 368 (3d Cir. 2007) (“[C]ourts are presented with a difficult problem when a joint attorney . . . continues representing both clients when their interests become adverse. In this situation, the black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer’s misconduct.” (citation omitted)).

necessarily developed in allied lawyer settings to joint client representation settings. Courts have become confused because they seem to believe that the doctrine that these courts often refer to as the common interest doctrine applies in the joint client representation scenario and in the allied lawyer scenario in exactly the same way.²³⁵ In fact, these two situations are not the same.

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,²³⁶ then the communication should enjoy the privilege. The Washington Court of Appeals in *Broyles v. Thurston County*²³⁷ more appropriately deals with the application of the privilege in a joint client representation situation, in line with the historical precedent before the allied lawyer confusion. In *Broyles*, the appellate court affirmed the trial court’s finding of privilege and quoted the trial court as follows:

It’s clear to me that all of the people went to see . . . [the] attorneys to get legal advice about their situation at work. They went as a group. An attorney/client relationship resulted from that meeting when they went to get legal advice about their situation at work. . . . That’s the consequence of going to see attorneys in a confidential situation and asking them questions.

Going as a group with a common problem, statements of all are protected. And no one individual at that meeting can waive privilege for all. And so I believe that the attorney/client privilege prevailed at that meeting and should be honored.²³⁸

This is the simple and correct approach to applying the attorney–client privilege in a joint client representation setting.

235. See, e.g., *Dexia Credit Local v. Rogan*, 231 F.R.D. 268 (N.D. Ill. 2004). See discussion of *Dexia supra* notes 219–222 and accompanying text.

236. See *supra* notes 60–64 for a breakdown of the elements needed for attorney–client privilege.

237. 195 P.3d 985 (Wash. Ct. App. 2008).

238. *Id.* at 1002.

5. The Peculiar Confusion of Joint Clients in the Entity Environment

The application of the attorney–client privilege to the joint client representation setting also has suffered a bit of confusion as a result of some courts’ skepticism of claims arising in entity representation. Entity employees sometimes claim that attorneys representing the entity also represent the individual employees, separately or jointly.²³⁹ Because the test of representation is the honest and reasonable belief of the person in the position of client,²⁴⁰ it is certainly possible that an employee might honestly and reasonably believe that he or she is represented by the entity attorney depending on what the attorney says when dealing with the individual, what the individual communicates to the attorney, and other circumstances of the situation.²⁴¹ If the individual has this honest and reasonable belief, the attorney–client privilege may apply to communications within that attorney–client relationship, provided the other elements required to protect the privilege also are present (i.e., the communications are for the purpose of obtaining legal advice and are confidential and not in furtherance of a crime or fraud).

Some courts have not applied the honest and reasonable belief

239. See, e.g., *In re Grand Jury Subpoena*, 274 F.3d 563, 571–72 (1st Cir. 2001); *In re Grand Jury Subpoenas*, 144 F.3d 653, 658–59 (10th Cir. 1998); *United States v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 119 F.3d 210, 215 (2d Cir. 1997); *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123–26 (3d Cir. 1986); *Tuttle v. Combined Ins. Co.*, 222 F.R.D. 424, 428–30 (E.D. Cal. 2004); *Grassmuck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567, 571–72 (W.D. Wash. 2003).

240. See *Boston Scientific Corp. v. Johnson & Johnson Inc.*, 647 F. Supp. 2d 369, 373 (D. Del. 2009) (“Under Delaware law, where there is no express contract or formal retainer agreement evidencing an attorney–client relationship, ‘courts look at the contacts between the potential clients and its potential lawyers to determine whether it would have been *reasonable for the “client” to believe* that the attorney was acting on its behalf as counsel.’” (quoting *Benchmark Capital Partners IV, L.P. v. Vague*, No. C.A. 19719-NC, 2002 WL 31057462, at *3 (Del. Ch. Sept. 3, 2002))); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 312 (D.D.C. 2009) (“[I]t is well settled that ‘the relationship between attorney and client hinges on the client’s intention to seek legal advice and his belief that he is consulting an attorney.’ Thus, to determine whether there is an attorney–client relationship here, I must determine whether the Union ‘believed [it] was seeking advice and whether [the Union’s] belief about the confidentiality of the conversation was reasonable.’” (alteration in original) (quoting *Jones v. United States*, 828 A.2d 169, 176 (D.C. 2003))); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000) (discussing the requirements for the formation of an attorney–client relationship).

241. See *Sky Valley Ltd. P’ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 651 (N.D. Cal. 1993) (“[T]he courts have focused on whether it would have been *reasonable*, taking into account *all the relevant circumstances*, for the person who attempted to invoke the joint client exception to have inferred that she was in fact a ‘client’ of the lawyer.”).

standard, however. They require that the individual, to succeed on a claim of privilege, make proofs beyond those in other attorney–client privilege settings.²⁴² These courts value the rights of the corporation with regard to the attorney–client privilege over the rights of the individual. Yet, no valid policy justifies derogation of the rights of the individual for the benefit of the entity. In addition, such a position is in contravention of ethics principles governing attorney conduct.²⁴³ Such a stance is misguided.²⁴⁴

If the circumstances of the situation show that the attorney, the entity, and the individual are involved in a joint representation, then the attorney–client privilege should apply to communications within that relationship if the required elements of the attorney–client privilege are satisfied. The individual must prove, however, the joint nature of the representation. There is no valid policy justification for applying a different rule to the entity situation.

242. See, e.g., *Bevill*, 805 F.2d at 123 (for the recognition of individual attorney–client privilege, the individual must prove that the individual “approached [counsel] for the purpose of seeking legal advice,” that the individual was clear with counsel that he or she sought legal advice in his or her individual capacity, that the lawyer communicated with the individual in his or her individual capacity even with the possibility of a conflict of interest on the horizon, that the communications were confidential, and that the communications “did not concern matters within the company or the general affairs of the company” (quoting *In re Grand Jury Investigation*, 575 F. Supp. 777 (N.D. Ga. 1983))); *Int’l Bhd. of Teamsters*, 119 F.3d at 215 (rejecting honest and reasonable belief standard and discussing *Bevill* approvingly); *In re Grand Jury Subpoena*, 274 F.3d at 572 (applied *Bevill* factors but noted that an individual privilege could be claimed even when a consultation involved the “general affairs” of the corporation if the focus of the consultation was with regard to the “individual officer’s personal rights and liabilities”) (quoting *In re Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1041 (10th Cir. 1998))).

243. See MODEL RULES OF PROF’L CONDUCT R. 1.13(f) (“In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”); see also *id.* R. 4.3 (directing a lawyer, in the course of a representation who is dealing with unrepresented parties, not to imply disinterestedness and to correct misunderstandings about the lawyer’s role).

244. See Grace M. Giesel, Upjohn Warnings, the Attorney–Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony, 65 U. MIAMI L. REV. 109 (2010) (discussing the possibility of the existence of an attorney–client relationship and application of the attorney–client privilege in such an entity setting).

V. THE ALLIED LAWYER SETTING AND THE ATTORNEY–CLIENT PRIVILEGE

In contrast to communications that occur in the joint client representation situation, communications in the allied lawyer setting should not have the benefit of the privilege.

A. Current Application of the Privilege in the Allied Lawyer Setting

First applied in *Chahoon v. Commonwealth*²⁴⁵ as a privilege applicable only in allied lawyer settings involving criminal matters in reference to a joint defense,²⁴⁶ courts now apply the privilege in both criminal and civil settings.²⁴⁷ While some courts require that litigation be on the horizon,²⁴⁸ others apply the privilege even in transactional

245. 62 Va. (21 Gratt.) 822 (1871).

246. *Chahoon* involved jointly indicted defendants in a criminal matter. See *id.* at 835; *supra* discussion Part III.A.

247. See, e.g., *United States v. Weissman*, 195 F.3d 96, 99–100 (2d Cir. 1999) (stating that, in a criminal matter, the privilege could have applied if the interests of the parties were aligned and they had agreed to work together); *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526, 530 (S.C. 2010) (privilege may apply to communications between South Carolina Attorney General and the National Association of Attorneys General about issues following from implementation of national tobacco litigation settlement agreement). For a discussion of the application of the privilege in the allied lawyer setting and in the criminal context, see Lerner, *supra* note 6. For a discussion of the parameters of the privilege as applied to the allied lawyer setting, see Nicole Garsombke, Note, *A Tragedy of the Common: The Common Interest Rule, Its Common Misuses, and an Uncommon Solution*, 40 GA. L. REV. 615 (2006). See generally Bartel, *supra* note 6; 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 (2005) [hereinafter Schaffzin, *Common Interest*]; Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney–Client Privilege*, 68 TEX. L. REV. 1273 (1990). For a discussion of ethical and malpractice issues surrounding the privilege, see George S. Mahaffey, Jr., *All for One and One for All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, The Final Frontier in Professional Liability*, 35 ARIZ. ST. L.J. 21 (2003); Todd M. Sahner, *Running the Ethical Obstacle Course: Joint Defense Agreements*, 28 STETSON L. REV. 339 (1998); Katharine Traylor Schaffzin, *Eyes Wide Shut: How Ignorance of the Common Interest Doctrine Can Compromise Informed Consent*, 42 U. MICH. J.L. REFORM 71 (2008); Amy Foote, Note, *Joint Defense Agreements in Criminal Prosecutions: Tactical and Ethical Implications*, 12 GEO. J. LEGAL ETHICS 377 (1999); Matthew D. Forsgren, Note, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219 (1994).

248. See, e.g., *United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002) (finding the threat of litigation necessary); *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 711 (5th Cir. 2001) (“palpable threat of litigation” required); *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003) (requiring an agreement to “share information as a result of a common legal interest relating to ongoing or contemplated litigation”). See generally MUELLER & KIRKPATRICK, *supra* note 72, § 5:20, at n.7.

contexts.²⁴⁹ The claimers of the privilege need not be defendants, as the claimers were in *Chahoon*.²⁵⁰ They can be plaintiffs.²⁵¹ Although the privilege appears to be an especially popular claim in patent and trademark matters,²⁵² it is claimed in all sorts of contexts.²⁵³

Some courts may require both parties to the communication to be attorneys.²⁵⁴ Other courts seem to require that at least one attorney be involved for the communication to be privileged.²⁵⁵ In contrast, some courts do not require the presence of an attorney for the privilege to apply to communications in the allied lawyer context.²⁵⁶

All courts require the parties claiming the privilege in the allied lawyer setting to prove the existence of a common interest that the

249. See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) ("It applies in civil and criminal litigation, and even in purely transactional contexts.").

250. 62 Va. (21 Gratt.) 822 (1871); see also *supra* discussion Part III.A.

251. See, e.g., *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002) ("[W]hether the *jointly interested persons are defendants or plaintiffs* . . . the rationale for the joint defense rule remains unchanged." (quoting *In re Grand Jury Subpoenas*, 902 F.2d at 249)); *Sedlacek v. Morgan Whitney Trading Group, Inc.*, 795 F. Supp. 329, 331 (C.D. Cal. 1992) ("In order to ensure that inequities in discovery are not established in cooperating defendants' favor, it is necessary to extend the common interest rule to cooperating plaintiffs.").

252. See, e.g., *B.E. Meyers & Co., Inc. v. United States*, 41 Fed. Cl. 729, 734–35 (1998) (privilege applied, in a patent infringement action against the government, to communications involving a contractor who was not a defendant); *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (privilege claimed in dispute between patentee and a litigation financing company but court did not find a common interest); *In re Smirman*, 267 F.R.D. 221, 222–23 (E.D. Mich. 2010) (privilege applied in a patent infringement action).

253. See, e.g., *Fojtasek v. NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 652, 656 (S.D. Fla. 2009) (action claiming cruise line negligence caused the death of a passenger); *Duke Energy*, 214 F.R.D. at 384 (action to enforce the Clean Air Act).

254. See, e.g., *Teleglobe Commc'ns Corp.*, 493 F.3d at 365 ("The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.").

255. See, e.g., *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected."); *Harper-Wyman Co. v. Conn. Gen. Life Ins. Co.*, No. 86 C 9595, 1991 WL 62510, at *6 (N.D. Ill. Apr. 17, 1991) ("This is problematical, as communications between joint plaintiffs or joint defendants outside of counsel's presence are not protected under the joint defense theory.").

256. See, e.g., *Gucci Am., Inc. v. Gucci*, No. 07 Civ 6820(RMB)(JCF), 2008 WL 5251989, at *1 (S.D.N.Y. Dec. 15, 2008) ("If information that is otherwise privileged is shared between parties that have a common legal interest, the privilege is not forfeited even though no attorney either creates or receives that communication."); see also discussion *infra* Part V.F.4.

2011–2012]

END THE EXPERIMENT

533

communication furthers.²⁵⁷ Though an acceptable common interest is a more limited level of interest than in the joint client representation setting,²⁵⁸ there is no agreement as to the appropriate level of common interest required.²⁵⁹

Courts also disagree about the required level of intention to cooperate. Some courts require proof of an intention to cooperate²⁶⁰ while other courts seem to assume an intention to cooperate simply by the fact of the communication.²⁶¹

If a court determines that the attorney–client privilege applies in an allied lawyer setting, courts agree that the privilege cannot be waived without the consent of all parties in the allied lawyer shared interest group.²⁶² If the parties become embroiled in a matter in an adversarial posture, courts do not apply the privilege between the formerly cooperating parties.²⁶³

B. The Restatement Approach

The *Restatement (Third) of the Law Governing Lawyers*, in section 76, entitled “The Privilege In Common–Interest Arrangements,” provides a definition of the situation in which the privilege applies.²⁶⁴

257. See *Telelobe Commc’ns Corp.*, 493 F.3d at 364; see also RICE, *supra* note 19, § 4:35.

258. See *supra* Part IV.A for a discussion of the common interest inherent in a joint client representation. With regard to the allied lawyer setting, Mueller and Kirkpatrick state, “[E]ach client has her own lawyer, and it is understood that their common interest is limited and they are already (or potentially) adversaries on other related matters, in a situation in which a single lawyer could *not* properly represent both.” MUELLER & KIRKPATRICK, *supra* note 72, § 5:20, at 571.

259. See discussion *infra* Part V.G.1; see also RICE, *supra* note 19, § 4:36 (“There is no clear standard for measuring the community of interests that must exist for the privilege to apply.”).

260. See, e.g., *Hunton & Williams v. U.S. Dep’t of Justice*, 590 F.3d 272, 285 (4th Cir. 2010) (stating, in referring to an agreement to collaborate, “While agreement need not assume a particular form, an agreement there must be”).

261. See, e.g., *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) (no mention of any agreement); see also discussion *infra* Part V.F.2.

262. See RICE, *supra* note 19, § 4:35 (stating “individual participants in the joint defense arrangement generally cannot unilaterally waive the privilege protection”); see also *Wagar v. Gamache*, No.1:06-MC-127(LEK/RFT), 2006 WL 3699544, at *12 (N.D.N.Y. Dec. 13, 2006) (stating “the essential benefit of such joint collaboration is that a member of the common legal enterprise cannot reveal the contents of the shared communications without the consent of all the parties” (citation omitted)).

263. See *In re Telelobe Commc’ns Corp.*, 493 F.3d 345, 366 (3d Cir. 2007); see also RICE, *supra* note 19, § 4:35.

264. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000).

Section 76 states,

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged 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.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.²⁶⁵

One of the great benefits of this section of the *Restatement* is that, in combination with section 75 (which deals with the joint client representation setting),²⁶⁶ it attempts to separate the allied lawyer and joint client representation situations. This is an improvement on the present state of affairs in the courts since many courts do not distinguish the two settings and attempt to treat the two situations identically.²⁶⁷

Section 76 treats the allied lawyer situation very similarly to the joint client representation setting, however. The privilege applies if the parties agree to exchange information,²⁶⁸ if the parties have a “common interest,” and if all parties agree to a waiver for disclosure to occur. A party can waive the privilege protection with regard to his or her own statements but only to the extent that communication does not reveal

265. *Id.*

266. See *supra* notes 177–178 and accompanying text.

267. In discussing the confusion of the joint client representation setting and the allied lawyer setting, the Third Circuit Court of Appeals, in *In re Teleglobe Commc'ns Corp.*, noted that the matter before it involved parties with a common attorney and so the trial court had erred in ruling that the parties were “in a ‘community of interest.’” 493 F.3d at 363 n.18. The court continued, “Indeed, much of the caselaw confuses the community-of-interest privilege (which is the same as the ‘common interest privilege’) with the co-client privilege.” *Id.* (citation omitted); see also discussion *supra* Part IV.B.4.

268. Comment c to section 76 of the *Restatement* clarifies that a formal agreement is not required. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. c.

protected communications of others.²⁶⁹ As with the situation of joint clients, there is no privilege between these parties in later adversarial matters with regard to communications involving the matter of common interest.²⁷⁰ In disagreement with some courts, the *Restatement* requires that the communication involve a lawyer; a communication between clients without a lawyer present cannot be privileged.²⁷¹

In an attempt to define what is a “common interest” in the allied lawyer setting, the *Restatement* explains, “The communication must relate to the common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent.”²⁷² Thus, the *Restatement* definition of common interest is broad, which is in contrast to the view of some courts.²⁷³

Unfortunately, the *Restatement* uses the phrase “common interest” to describe the interest in a joint client representation setting and also to describe the interest that parties must share in an allied lawyer situation.²⁷⁴ One might, therefore, assume that the same level of “common interest” is required in both settings. Yet, the reality is that the shared interest necessary for a joint client representation to occur is more aligned than is true in many, if not all, allied lawyer situations. The common interest present with joint clients must be close to identical because otherwise the attorney cannot ethically handle a joint representation.²⁷⁵ This certainly cannot be said regarding the allied

269. See *id.* § 76 cmt. g (“[A]ny member may waive the privilege with respect to that person’s own communications. . . . If a document or other recording embodies communications from two or more members, a waiver is effective only if concurred in by all members whose communications are involved, unless an objecting member’s communication can be redacted.”).

270. See *id.* §§ 76(2), 76 cmt. f.

271. See *id.* § 76 cmt. d.

272. *Id.* § 76 cmt. e.

273. See discussion *infra* Part V.F.1.

274. Compare RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(1) (“If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that . . . relates to matters of *common interest* is privileged as against third persons.”) (emphasis added), with *id.* § 76(1) (“If two or more clients with a *common interest* in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68–72 that relates to the matter is privileged as against third persons.” (emphasis added)).

275. See discussion *supra* Part IV.A.2; see also *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 366 (3d Cir. 2007) (stating that “common interest” in the joint representation

lawyer context. As the Third Circuit Court of Appeals stated in *In re Teleglobe Communications Corp.* regarding the allied lawyer context, “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.”²⁷⁶

C. The Representational Posture

1. Lack of an Attorney–Client Relationship Under the Traditional Approach for Recognition of a Relationship

Applying the privilege to communications in the allied lawyer setting greatly increases the wingspan of privilege protection in a way that does not occur in the joint client representation setting. In a joint client setting, all privileged communications are between an attorney and his or her clients. This is *not* true in the allied lawyer setting.

The Virginia Supreme Court in *Chahoon v. Commonwealth*²⁷⁷ viewed each attorney present for the key communications with the defendants as representing all three defendants even though each defendant had engaged a separate attorney.²⁷⁸ In fact, the attorney engaged by the defendant whose communications were at issue was not present. The court stated that “the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client.”²⁷⁹

The *Chahoon* court erred in such a conclusion. A lawyer in an allied lawyer setting represents and therefore has an attorney–client relationship with only those persons who honestly and reasonably believe they are represented by that lawyer.²⁸⁰ The traditional test used

scenario means “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”); *Fed. Deposit Ins. Co. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (“The term ‘common interest’ typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest.”).

276. 493 F.3d at 366.

277. 62 Va. (21 Gratt.) 822 (1871).

278. *Id.* at 842.

279. *Id.*

280. See *Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 210 (S.D.N.Y. 2009) (“The formation of an attorney–client relationship hinges upon the client’s [reasonable] belief that he is consulting a lawyer in that capacity and his manifested intention to seek

by courts in all sorts of settings for the determination of the existence of an attorney–client relationship has long been the honest and reasonable belief of the person in the position of client.²⁸¹ This is supported by the *Restatement (Third) of the Law Governing Lawyers*, which states in Section 14 that

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either
 - (a) the lawyer manifests to the person consent to do so; or
 - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
- (2) a tribunal with power to do so appoints the lawyer to provide the services.²⁸²

While courts generally do not require an express agreement,²⁸³ courts are very likely to find an attorney–client relationship if such an

professional legal advice.” (alteration in original) (quoting *Diversified Grp., Inc. v. Daugerdas*, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001))).

281. See *Boston Scientific Corp. v. Johnson & Johnson Inc.*, 647 F. Supp. 2d 369, 373 (D. Del. 2009) (“Under Delaware law, where there is no express contract or formal retainer agreement evidencing an attorney–client relationship, ‘courts look at the contacts between the potential clients and its potential lawyers to determine whether it would have been reasonable for the “client” to believe that the attorney was acting on its behalf as counsel.’” (quoting *Benchmark Capital Partners IV, L.P. v. Vague*, No. C.A. 19719-NC, 2002 WL 31057462, at *3 (Del. Ch. Sept. 3, 2002))); *Attorney Grievance Comm’n v. Kremer*, 946 A.2d 500, 521 (Md. 2008) (“Rather, ‘[t]he relationship may arise by implication from a client’s reasonable expectation of legal representation and the attorney’s failure to dispel those expectations.’” (quoting *Attorney Grievance Comm’n v. Brooke*, 821 A.2d 414, 425 (Md. 2003))); *John V. Heutsche Co. L.P.A. v. McNea*, 905 N.E.2d 1303, 1306 (Ohio Mun. Ct. 2008) (“Whether or not an attorney–client relationship was created ‘turns largely on the reasonable belief of the prospective client.’” (quoting *Cuyahoga County Bar Ass’n v. Hardiman*, 798 N.E.2d 369, 373 (Ohio 2003))). See generally Ingrid A. Minott, Note, *The Attorney–Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269 (2009).

282. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

283. See, e.g., *Tinn v. EMM Labs, Inc.*, 556 F. Supp. 2d 1191, 1192 (D. Or. 2008) (recognizing that no express written or oral contract is necessary); *Smith v. State*, 905 A.2d 315, 325–26 (Md. 2006) (noting that no express agreement is necessary).

agreement exists.²⁸⁴ In contrast, in the allied lawyer setting there may be an express agreement that no lawyer in the arrangement represents any client other than the one he or she represents separately.²⁸⁵ If there is such an agreement, the members of the joint effort cannot argue successfully that they honestly and reasonably believe that they are represented not only by their individually selected separate attorneys but also the attorneys separately engaged by other members of the joint effort.

Other circumstances, such as statements by a lawyer that he or she represents members of the group other than his or her separate client, could create an honest and reasonable belief on the part of those members of the group that the attorney represents the other members of the group. Likewise, the fact that a lawyer renders individual legal

284. See, e.g., *Avocent Redmond Corp. v. Rose Elecs.*, 491 F. Supp. 2d 1000, 1004–06 (W.D. Wash. 2007) (noting that engagement agreement said law firm represented a corporation “and its affiliates” and so the affiliate’s claim of representation was reasonable); see also *Johnson v. Schultz*, 671 S.E.2d 559, 569 (N.C. Ct. App. 2009), *aff’d*, 691 S.E.2d 701 (N.C. 2010) (“[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract.” (quoting *N.C. State Bar v. Sheffield*, 326 S.E.2d 320, 325 (N.C. Ct. App. 1985))).

285. For example, ABA Formal Opinion 95-395 notes that the joint defense consortium agreement being considered there stated that the lawyers for the separate members of the consortium did not represent any other members of the consortium. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-395 (1995). Alan Kornberg provided a sample published provision of such an agreement:

Nothing contained herein shall be deemed to create an attorney–client relationship between Law Firm 1 (counsel to Creditor 1) and Creditor 2, or between Law Firm 2 (counsel to Creditor 2) and Creditor 1, or to affect the separate and independent representation of each Party by its respective counsel according to what such counsel believes to be in his or her client’s best interest. After full opportunity to advise and confer with their respective counsel, each of the Parties represent that each waives any right to seek disqualification of the other Party’s counsel in any matter now pending or hereinafter commenced, based on such counsel’s receipt or disclosure of Confidential Information pursuant to this Agreement, nor shall any counsel to a Party be disqualified from examining or cross-examining any other Party who testifies in any proceeding (now pending or hereinafter commenced) because of such Party’s participation in this Agreement or because such counsel may subsequently execute an amendment to this Agreement in accordance with Section 12.

Alan W. Kornberg, *Sample Common Interest and Confidentiality Agreement*, in RECENT DEVELOPMENTS IN DISTRESSED DEBT, RESTRUCTURINGS AND WORKOUTS—FALLOUT FROM THE CREDIT CRUNCH 2008, at 81, 86–87 (Joseph Samet, chair); see also 1 JOEL M. ANDROPHY, WHITE COLLAR CRIME § 3:60 (2d ed. 2011) (sample joint defense agreement containing a provision denying the existence of an attorney–client relationship).

advice to a member of the group other than his or her separate client could create in that member an honest and reasonable belief in representation and thus in the existence of an attorney–client relationship and all its burdens and benefits.²⁸⁶ In the typical allied lawyer situation, an attorney for one member of the group does not make statements or behave in a manner that would cause other members of the group to have an honest and reasonable belief that the attorney represents not only his or her separate client, but also other members of the group. This is especially true if the group members have an agreement which states that each lawyer involved represents only that lawyer’s separate client.

In contrast, conflicts of interest of various sorts and degrees are common in allied lawyer settings.²⁸⁷ Frequently, the conflicts are such that no one attorney could ethically represent more than one member of the joint effort—hence the use of separate lawyers. Such conflicts, if sufficiently obvious, are an indication that no person in the joint effort can have an honest and reasonable belief of an attorney–client relationship with an attorney separately representing another party in the joint effort.²⁸⁸

The result of the proper application of this law regarding the formation of the attorney–client relationship is that a lawyer does not represent all parties in a cooperative group simply by virtue of their

286. A person paying a lawyer for his or her services has a stronger argument that he or she honestly and reasonably believed that the attorney represented the person and thus that they were in an attorney–client relationship. An attorney–client relationship can be formed and recognized, however, without payment. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir. 1978) (a professional relationship does not depend on the payment of fees); *Tinn*, 556 F. Supp. 2d at 1192 (same); *Attorney Grievance Comm’n v. Shoup*, 979 A.2d 120, 136 (Md. 2009) (“Our cases make clear that an explicit agreement or payment arrangement is not a prerequisite to the formation of an attorney–client relationship.”).

287. See *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 250 F.R.D. 575, 579 (D. Colo. 2007) (“Even if there is adversity between some of the parties to the common interest agreement, they still may invoke the joint defense privilege to protect communications from disclosure to third parties.”); see also JEROME G. SNIDER ET AL., *CORPORATE PRIVILEGES & CONFIDENTIAL INFORMATION* § 4.02(3)(a) (2010) (discussing the probability of adverse interests in the allied lawyer setting).

288. The court in *Harry A. v. Duncan* stated, “Where appropriate, due consideration should be given to the unreasonableness of a claimed expectation of entering a [sic] into a co-client status when a significant and readily apparent conflict of interest exists between the organization or other client and the associated person or entity claimed to be a co-client.” 330 F. Supp. 2d 1133, 1141 (D. Mont. 2004) (quoting *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 14 cmt. f (2000)).

membership in the cooperative group. A lawyer does not have, by virtue of the cooperation, an attorney–client relationship with parties in a cooperative group. A lawyer involved in an allied lawyer setting may owe other, nonclient parties in the group fiduciary duties that may flow from the joint effort and sharing of information, but the attorney does not have a true attorney–client relationship with those parties absent other conduct creating an honest and reasonable belief of an attorney–client relationship.²⁸⁹

At all times in the allied lawyer situation, such an attorney focuses on maximizing the ultimate outcome for his or her separate client. One can say that the attorney is acting in the best interest of all members of the joint effort, but such an attorney, at any particular point in the joint effort, is always evaluating the situation to determine whether the joint effort is in the best interest of his or her own client. When the better course is for the individual member to exit the joint effort, the lawyer will so counsel his or her client. So even in the midst of the joint effort, a lawyer for any one member of the joint effort has one eye clearly focused on the individual interests of the attorney’s separate client.

2. ABA Formal Opinion 95-395: No Attorney–Client Relationship

In ABA Formal Opinion 95-395,²⁹⁰ the American Bar Association’s Standing Committee on Ethics and Professional Responsibility considered the nature of the relationship of an attorney and members of a joint defense consortium, an allied lawyer setting.²⁹¹ While speculating that an attorney in an allied lawyer situation may owe members of the group fiduciary duties, the Opinion does not view the other members of the group as clients of the lawyer.²⁹² Consistent with recognizing the absence of an attorney–client relationship, the Opinion clearly states that the lawyer owes no ethical duties to the members of the group other than the lawyer’s separate client.²⁹³

The Opinion discusses these matters while focusing on the question

289. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-395, at 1 (1995); see also *United States v. Stepney*, 246 F. Supp. 2d 1069, 1083 (N.D. Cal. 2003) (stating a search of cases did not recognize that joint defense agreement created “a true attorney–client relationship or a general duty of loyalty”).

290. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-395.

291. See *id.* at 1.

292. See *id.* at 5.

293. See *id.*

of possible conflicts of interest created by the joint consortium with regard to a lawyer who no longer represents any member of the group.²⁹⁴ First, the Opinion addresses obligations the lawyer might have as a result of his duties to his former separate client.²⁹⁵ The Opinion states that a lawyer who has confidential information from members of the consortium other than his separate client “might owe an obligation to his former client not to disclose the information by reason of the former client’s obligation to the other members.”²⁹⁶ If the former client consented to disclosure, the “[l]awyer would almost surely have a *fiduciary* obligation to the other members of the consortium, which might well lead to his disqualification.”²⁹⁷ The lawyer’s fiduciary obligation, in the view of the ABA Committee, arises from the law of agency.²⁹⁸ The lawyer’s client might be viewed as an agent of the other members of the consortium and the lawyer, when he came upon the information, was a “sub-agent” of the lawyer’s client.²⁹⁹ The lawyer’s obligation to protect the information of the nonclient consortium member thus would be derivative of the client’s obligation to that member.³⁰⁰ The ABA Opinion clarifies, however, that the lawyer “would not, however, owe an *ethical* obligation” to the other members

294. *See id.* at 2.

295. *See id.*

296. *Id.* at 4.

297. *Id.* at 5. The Opinion cites *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977), in which co-defendants of an attorney’s client in a prior matter sought to have the attorney disqualified. *Id.* at 251. The co-defendants were all accused of criminal conspiracy in an antitrust context. *Id.* at 252. The court stated, “In such a situation, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants.” *Id.* at 253. The court did not have enough information about what had been shared with the attorney to make a disqualification determination. *Id.*

298. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-395, at 5 n.3.

299. *Id.* The Opinion cites an early draft of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. g(ii) (2000), which, in final form, states,

A lawyer who learns confidential information from a person represented by another lawyer pursuant to a common-interest sharing arrangement (see § 76) is precluded from a later representation adverse to the former sharing person when information actually shared by that person with the lawyer or the lawyer’s client is material and relevant to the later matter (see Illustration 8, above). Such a threatened use of shared information is inconsistent with the undertaking of confidentiality that is part of such an arrangement.

Id. § 132 cmt. g(ii).

300. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-395, at 5.

of the consortium “for there is simply no provision of the Model Rules imposing such an obligation.”³⁰¹

3. Disqualification Law: No Attorney–Client Relationship

Courts dealing with questions of disqualification resulting from allied lawyer situations agree that an attorney in an allied lawyer situation does not have an attorney–client relationship with the members of the group. For example, in *United States v. Stepney*,³⁰² the District Court for the Northern District of California, when dealing with a disqualification issue arising from an allied lawyer setting, clarified that an attorney in such a situation does not represent members of the group other than the lawyer’s separate client.³⁰³ In discussing *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*,³⁰⁴ another case addressing disqualification arising from an allied lawyer situation, the *Stepney* court stated,

Despite the analogy to attorney–client relationships, the *Abraham Construction* court did not treat the attorney’s participation in a joint defense agreement as identical to formal representation of a client. Had plaintiff’s attorney actually represented [the group member], he would have been disqualified automatically on the irrebuttable presumption that he had gained confidences during the prior representation on a related matter. Finding that there had been “no direct attorney–client relationship,” the court refused to presume that plaintiff’s attorney had obtained confidential information in the course of the joint defense. The court instead placed the burden on the party moving for disqualification to prove that the plaintiff’s attorney had actually been privy to confidential information. . . . While a joint defense agreement does impose a duty of confidentiality, that duty is limited in that the showing required to establish a conflict of interest arising from prior participation in a joint defense agreement is significantly higher than that required to make out a conflict based on former representation of a

301. *Id.*

302. 246 F. Supp. 2d 1069 (N.D. Cal. 2003).

303. *Id.* at 1076.

304. 559 F.2d 250 (5th Cir. 1977).

2011–2012]

END THE EXPERIMENT

543

client.³⁰⁵

Thus, the *Stepney* and *Abraham Construction* courts, for purposes of conflict-of-interest disqualification, applied a different analysis to the allied lawyer setting than to a situation in which a lawyer once represented the party in question. Clearly, these courts did not view an attorney in an allied lawyer setting as having an attorney–client relationship with the members of the group other than the attorney’s separate client.

When facing disqualification issues, other courts similarly have not viewed an attorney in an allied lawyer situation as having an attorney–client relationship with the members of the group other than the member separately represented by the lawyer. These courts’ disqualification analyses proceed by focusing on the information actually obtained by the lawyer, not on the basis of presumptions of information flow that would arise if an attorney–client relationship existed between the lawyer and the members of the group in an allied lawyer setting.³⁰⁶

4. Conclusion: No Attorney–Client Relationship for Purposes of Privilege

The law regarding the recognition of the existence of an attorney–client relationship makes clear that an attorney in an allied lawyer situation does not have an attorney–client relationship with the other members of the group simply as a result of the joint effort. ABA Opinion 95-395 expresses the view that such a lawyer does not have an attorney–client relationship with members of the group even though the lawyer may owe the nonclient members of the joint effort a derivative fiduciary duty to keep information confidential.³⁰⁷ Also, the courts, in dealing with disqualification questions, have required a higher level of proof when the claimed disqualification arises from an allied lawyer

305. *Stepney*, 246 F. Supp. 2d at 1076 (quoting *Wilson P. Abraham Constr. Corp.*, 559 F.2d at 253 (citations omitted)).

306. Subsequent courts have followed suit in requiring a showing that the attorney actually obtained confidences before disqualifying counsel. *See, e.g.*, *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977); *Essex Chem. Corp. v. Hartford Accident & Indem. Co.*, 993 F. Supp. 241, 251–52 (D.N.J. 1998); *GTE N., Inc. v. Apache Prods. Co.*, 914 F. Supp. 1575, 1580 (N.D. Ill. 1996). *See generally* Arnold Rochvarg, *Joint Defense Agreements and Disqualification of Co-Defendant’s Counsel*, 22 AM. J. TRIAL ADVOC. 311 (1998).

307. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-395 (1995).

setting.³⁰⁸ These courts have not presumed that a lawyer was privy to confidential information of the group's members as such a court would presume if the court believed that the lawyer represented the party and thus had an attorney-client relationship with the party.³⁰⁹

Likewise, attorney-client privilege law should not treat an attorney in an allied lawyer setting as having an attorney-client relationship with all members of the group. As these other areas of law make clear, the *Chahoon* court was not correct in concluding that a lawyer in an allied lawyer setting represents the members of the group.³¹⁰ Absent the attorney-client relationship, there is no basis for applying the privilege in the allied lawyer setting.

D. An Expansion of the Privilege Contrary to Traditional Privilege Doctrine

In the allied lawyer setting, many communications that are not between an attorney and client enjoy the protection of the privilege and thus are not subject to compelled disclosure. This is a broad expansion of the character of communications not presentable to the truth-finder and a substantial increase in the quantity of communications not subject to disclosure and not available to the truth-finder.

This expansion of the reach of the attorney-client privilege contradicts the long held and much repeated mantra that courts should apply the privilege narrowly.³¹¹ In *University of Pennsylvania v.*

308. See *supra* Part V.C.3.

309. See *supra* Part V.C.3.

310. The *Chahoon* court stated, "[T]he counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client." 62 Va. (21 Gratt.) 822, 842 (1871). Having established the relationship, the court found communications in the allied lawyer setting to be privileged, stating "confidential communications from client to counsel, during the existence of this relationship, and about a professional matter, are privileged." *Id.* at 843.

311. See, e.g., *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) ("Because the attorney-client privilege has the effect of withholding relevant information from the factfinder, it is applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney."); *Harrisburg Auth. v. CIT Capital USA, Inc.*, 716 F. Supp. 2d 380, 387 (M.D. Pa. 2010) ("It is well established that evidentiary privileges . . . are generally disfavored and should be narrowly construed. The attorney client privilege is one such evidentiary privilege." (quoting Pa. Dep't. of Transp. v. Taylor, 841 A.2d 108, 118 (Pa. 2004))); *Sieger v. Zak*, 874 N.Y.S.2d 535, 537 (App. Div. 2009) ("Since the attorney-client privilege constitutes an obstacle to the truth-finding process, however, the protection claimed must be narrowly construed, and its application must be

2011–2012]

END THE EXPERIMENT

545

EEOC,³¹² the United States Supreme Court contemplated whether to recognize a privilege for peer review. The Court acknowledged that, in light of the fact that recognition of a privilege keeps evidence from the truth-finder, “[w]e do not create and apply an evidentiary privilege unless it ‘promotes sufficiently important interests to outweigh the need for probative evidence.’”³¹³ The Court noted that because privileges block evidence, any such privilege must “‘be strictly construed.’”³¹⁴ In *Virmani v. Novant Health Inc.*,³¹⁵ the Court of Appeals for the Fourth Circuit cautioned:

When considering whether to recognize a privilege, a court must begin with “the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”³¹⁶

Recognizing the application of the attorney–client privilege in the allied lawyer setting does not “‘promote[] sufficiently important interests to outweigh the need for probative evidence.’”³¹⁷

Not only is this an expansion of attorney–client privilege law, but recognizing the privilege in the allied lawyer setting has no basis in the common law.³¹⁸ As explained above, applying the privilege to the allied lawyer setting is a relatively recent occurrence.³¹⁹ Only four cases before 1966 did so.³²⁰ Such an application of the privilege is not so engrained in our judicial firmament such that a rejection of it would wreak havoc on the judicial system.

consistent with the purposes underlying the immunity.” (citation and internal quotation marks omitted)).

312. 493 U.S. 182 (1990).

313. *Id.* at 189 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

314. *Id.* (quoting *Trammel*, 445 U.S. at 50).

315. 259 F.3d 284 (4th Cir. 2001).

316. *Id.* at 287 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996)).

317. *Univ. of Pa.*, 493 U.S. at 189 (quoting *Trammel*, 445 U.S. at 51).

318. See Lerner, *supra* note 6, at 1514 (“[I]t is plainly a departure from the traditional privilege rules.”).

319. See *supra* Part III.C.

320. The four cases are *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871); *Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942); *Continental Oil Co. v. United States*, 330 F.2d 347, 349 (9th Cir. 1964); and *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965). For an in-depth discussion of these cases, see *supra* Part III.B.

E. Lack of Supporting Rationale

Perhaps the expansion of the privilege could be justified if the expansion captured a significant benefit. For example, if applying the privilege in the allied lawyer setting furthered the rationale of the privilege itself, then the expansion might be justified. But it does not. The rationale of the privilege is to create an environment of superior legal advice by encouraging client disclosure to the client's attorney. In the allied lawyer setting, the clients are not disclosing anything new to their own attorneys. Applying the privilege in the allied lawyer setting does not, therefore, further attorney-client communications.³²¹

Even so, the expansion of the privilege might be justified if it created a benefit that outweighed the harm from keeping information from the truth-finder. There is no such rationale.

Rationales that have been suggested revolve around claims of effectiveness³²² and efficiency.³²³ For example, the *Restatement (Third) of the Law Governing Lawyers* presents its rationale for applying the

321. See *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003) (“When a defendant conveys information to the lawyer of his co-defendant, as opposed to his own lawyer, the justification for protecting the confidentiality of the information is weak. The policy of fostering frank communication with an attorney is already facilitated by privileging those communications made to the defendant’s own attorney; little can be gained by extending the privilege to those communications made to attorneys that do not represent the defendant.”); see also *Lerner*, *supra* note 6, at 1480 (“[S]haring of client confidences with another attorney does not accord with the attorney-client privilege because it in no sense furthers a client’s ability to confide in his attorney.”).

322. See, e.g., *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (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’ accordingly. This planning serves the public interest by advancing compliance with the law, ‘facilitating the administration of justice’ and averting litigation. Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication.” (quoting *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1391 (Fed. Cir. 1996))); *Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003) (stating that “joint defense agreements present a pooling of resources, a healthy exchange of vital information, a united front against a common litigious foe, and the marshaling of legal talent and advice”); see also *Lerner*, *supra* note 6, at 1479 (stating that the privilege allows “more effective legal representation than would be possible without the disclosures”); *Rushing*, *supra* note 247, at 1274 (noting that cooperation is often required for effective legal representation); *Schaffzin*, *Common Interest*, *supra* note 247, at 60 (noting court opinions that find the privilege encourages communication between parties so that the parties receive effective representation).

323. See, e.g., *Mahaffey*, *supra* note 247, at 28–29 (allows for a more efficient representation).

2011–2012]

END THE EXPERIMENT

547

privilege in the allied lawyer setting thusly:

The rule . . . permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers. For example, where conflict of interest disqualifies a lawyer from representing two co-defendants in a criminal case . . . , the separate lawyers representing them may exchange confidential communications to prepare their defense without loss of the privilege. Clients thus can elect separate representation while maintaining the privilege in cooperating on common elements of interest.³²⁴

Ultimately, both clients and the “system . . . benefit[] . . . since enabling cooperation is likely to save court time as common strategies are put into play.”³²⁵ The argument is that “collaborative communications . . . will not likely happen at all if there is no privilege.”³²⁶

Most courts do not mention a rationale for applying the privilege in the allied lawyer setting, though a few do. For example, in *Continental Oil Co. v. United States*, the Ninth Circuit Court of Appeals recognized application of the privilege after the claimants of the privilege had argued that the communications were intended “to make their representation of their clients . . . more effective.”³²⁷ And, in *Hunydee v. United States*, the Ninth Circuit Court of Appeals stated that the privilege applied when the communications “are intended to facilitate representation.”³²⁸

324. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. b (2000); see also MUELLER & KIRKPATRICK, *supra* note 72, § 5:20, at 571 (“The reason to apply the privilege in this setting is to make it possible for clients with separate lawyers to cooperate in the development of common positions.”).

325. MUELLER & KIRKPATRICK, *supra* note 72, § 5:20, at 571.

326. *Id.*

327. 330 F.2d 347, 348–49 (9th Cir. 1964).

328. 355 F.2d 183, 185 (9th Cir. 1965). See also *In re Condemnation City of Phila.*, where the court stated,

As a policy matter, the joint defense doctrine is highly desirable because it allows for greater efficiency in the handling of litigation. Frequently, co-defendants with essentially the same interests must retain separate counsel to avoid potential conflicts over contingent or subsidiary issues in the case. To avoid duplication of efforts, such defendants should be able to pool their

While it is possible that applying the privilege to the allied lawyer setting creates efficiencies in representation, it is also very possible that recognition of the privilege in this setting does no such thing. When parties join together in a common effort but with separate lawyers, it is true that the attorneys can divide up the needed work on the matter; not every client must pay to have its separate attorney complete every step. But work on a legal matter is not finite. More lawyers may mean that more work is done. The lawyers may not divide the work. Even if work is divided, each lawyer must remain wary and cautious, and must take on a monitoring function regarding the work done by lawyers for the other members of the joint endeavor. One cannot say that each client pays less or that each lawyer bills fewer hours in an allied lawyer context than when parties and counsel act separately.³²⁹

It is possible that applying the privilege to the allied lawyer setting creates efficiencies with regard to the justice system as a whole. It is also very possible that recognition of the privilege in this setting does not decrease systemic costs in any way. Parties working together are not likely to present inconsistent positions and therefore judicial proceedings may be less lengthy, but such is not a foregone conclusion. The same amount of judicial resources may be used in a joint endeavor situation with separate lawyers. The opposition may simply require more judicial resources to develop its position as a result of the united front of the parties working jointly.³³⁰ And certainly this efficiency argument fails when the parties elect to dissolve the joint endeavor. When the parties are not involved in a litigation matter, any suggestion of systemic benefit is even weaker.

At least one commentator has argued that recognition of the privilege in the allied lawyer setting involving a criminal matter is a

resources on matters of common interest. This can be done most effectively if both counsel can attend and participate in interviews with each other's clients. With multi-party cases becoming so frequent, and with litigation costs spiraling upwards—some would say out of control, the courts should not deny defendants the ability to pool their resources and coordinate their efforts on issues of common interest.

981 A.2d 391, 397 (Pa. Commw. Ct. 2009) (alteration in original) (quoting *Young v. Presbyterian Homes Inc.*, 50 Pa. D. & C. 4th 190, 198 (Pa. Ct. Com. Pl. 2001)).

329. See Lerner, *supra* note 6, at 1528–30 (joint effort allows for multiplying of work by lawyers).

330. See *id.* at 1530 (positing that in the criminal context additional prosecutorial resources may be required as prosecutors have to access other evidence because cooperation with the prosecutors may decrease as the result of a joint endeavor by the defendants).

2011–2012]

END THE EXPERIMENT

549

constitutionally required benefit.³³¹ The argument is that the privilege is necessary to protect defendants' Sixth Amendment right to counsel because a fair trial is only possible if defendants have an "unpenalized opportunity to coordinate the defense."³³² No federal court has so held.³³³ But a Pennsylvania court has recognized that prosecutorial intrusion into an allied lawyer setting could be a violation of the Sixth Amendment. In *Commonwealth v. Scarfo*, the court stated,

The possibility that intrusions may occur heightens when multiple parties are the subject of a group defense. In such a case it would be reasonable for a defendant to assume that the other defendants are allied with him or her and that the confidentiality of statements made for the benefit of group preparation would stay confidential within the group until the appropriate time for disclosure, perhaps at trial. "Defendants have both the right to prepare a group defense and the right to communicate privately with counsel; constitutional principles forbid requiring a defendant to waive one of these rights in order to exercise the other."³³⁴

Even so, this statement is not a recognition of a constitutional right

331. See, e.g., Bartel, *supra* note 6, at 872–73; see also *Cont'l Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964) (noting that the joint defense doctrine is a "vital and important part of the client's right to representation by counsel").

332. See Bartel, *supra* note 6, at 871–73.

333. In *United States v. Jones*, 44 F.3d 860, 873 (10th Cir. 1995), the court evaluated a claim by a defendant that he had been denied effective assistance of counsel by not being able to confer with counsel of other defendants. The court found no merit in the argument because the defendant had the opportunity to confer. *Id.* The court did not address whether such a denial would in fact be an affront to the Sixth Amendment because the factual basis for the claim was lacking. *Id.*

334. 611 A.2d 242, 266 (Pa. Super. Ct. 1992) (quoting Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1147 (1984)); see also *In re Condemnation by City of Phila.*, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009). The *City of Philadelphia* court, in a civil context, stated, "In *Scarfo*, our superior court held that defendants have both the right to prepare a group defense and the right to communicate privately with counsel. Constitutional principles forbid requiring a party to waive one of these rights in order to exercise the other." *Id.* at 397. Ultimately, the court did not apply the privilege because the parties did not share a proper common interest. *Id.* at 398–99. In *United States v. Almeida*, the Eleventh Circuit stated that "in light of the vast resources of the government" in a prosecution, perhaps allowing privileged collaboration leveled the playing field. 341 F.3d 1318, 1324 (11th Cir. 2003).

to application of the attorney–client privilege to the allied lawyer scenario when prosecutorial intrusion is not an issue. There is, of course, no constitutional right argument in the civil context.

Perhaps the strongest argument of a benefit gained from applying the attorney–client privilege to the allied lawyer setting is that recognition of the privilege creates an environment that encourages parties to share information, thereby assisting their lawyers to provide more effective representation.³³⁵ This rationale differs from the traditional attorney–client privilege rationale in that the attorney–client privilege is intended to encourage attorney–client communication. That communication is believed to lead to improved representation. The rationale for applying the privilege to the allied lawyer setting is that recognition of the privilege in the allied lawyer setting will allow for cooperation between parties and increased communication such that the representation of the client by the client’s separate lawyer will be superior. It is possible that the increased communication between and among the parties and their counsel creates a benefit in some cases (that being more effective representation). But the connection between the disclosure encouraged by the privilege and the improved representation seems much weaker than is true in the regular attorney–client privilege setting.

Even if applying the attorney–client privilege in the allied lawyer situation creates some benefit, the damage inflicted to the truth-finding mission of the justice system greatly outweighs that benefit.³³⁶ Applying

335. See, e.g., *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (“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.”); *Fojtasek v. NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 656 (S.D. Fla. 2009) (quoting *In re Grand Jury Subpoenas*, 902 F.2d at 249).

336. See James M. Fischer, *The Attorney–Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 650–51 (1997) (“Of course, recognition of the privilege means that information relevant to the decision-making process is not accessible by all interested individuals. Since the making of decisions with full information is generally understood to be more desirable than the contrary, the cost of realizing the benefits of privilege recognition is that the decision-making process may be less accurate than if decision-making were based on all relevant information.”); see also Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1641–42 (1986) (“At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain

the privilege in the allied lawyer setting means many communications are protected from disclosure that would not be protected otherwise. Some of those communications may not have occurred absent the promise of privilege protection, but some of those communications undoubtedly would have occurred.³³⁷

Charles Alan Wright and Kenneth W. Graham were correct in stating, “[N]o one has ever made a convincing argument that strategy sessions among co-defendants produce a benefit to the legal system that outweighs the cost of the loss of evidence to the courts.”³³⁸ As eloquently stated by Professor Craig Lerner, “[N]ot everything that improves legal representation is covered by the attorney–client privilege.”³³⁹

F. The Nuts and Bolts Problems in Courts’ Current Application of the Privilege in the Allied Lawyer Setting

Even if the application of the privilege in the allied lawyer situation could be justified, the current state of the law in applying the privilege is impossibly confused³⁴⁰ and calls into question whether the privilege *can* apply. This confusion undermines the certainty so necessary for any privilege to accomplish its goals. If there is no certainty of application, the privilege has no value because no one can know that a communication is privileged when that communication occurs.³⁴¹

the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong.”).

337. See WRIGHT & GRAHAM, *supra* note 8, § 5493 (noting that expansion of the attorney–client privilege to allied lawyers “also reduces the flow of information to the court”).

338. *Id.*; see also Mahaffey, *supra* note 5, at 684 (“Under a utilitarian approach, an allied-party doctrine or common-interest rule (at least as between the government and relator in a *qui tam* case) would be so expansive that the costs to the judicial process would outweigh any societal benefit.”); Note, *supra* note 141, at 1034 (writing when only a few courts had recognized application of the privilege in the allied lawyer setting, the student author surmised, “the tactical advantage in an exchange of information among independently hired attorneys might be deemed of insufficient social importance to justify an extension of the privilege”).

339. Lerner, *supra* note 6, at 1480.

340. It would be hard to improve on Professor Lerner’s eloquent statement when discussing the doctrine in the criminal context: “The joint defense privilege is characterized today by a core certainty as to the existence of a privilege of some sort and a confounding uncertainty as to the precise details.” *Id.* at 1490.

341. See Daniel J. Capra, *The Attorney–Client Privilege in Common Representations*, TRIAL LAW. Q., Summer 1989, at 20, 21 (noting that confusion is costly because “it is crucial for the attorney and client to know at the outset whether proposed communications are

1. Common Interest Confusion

One source of this confusion is the requirement that the communications involve parties who share a common interest if the privilege is to apply. This interest is not easily defined and is impossible to apply in a predictable way in such a vast array of scenarios. All courts agree that parties in an allied lawyer setting who claim privilege protection must prove the existence of a common interest.³⁴² Though an acceptable common interest almost always involves a more limited level of interest than in the joint representation setting,³⁴³ there is no agreement as to the appropriate level of common interest required.³⁴⁴

In fact, developing a definition of common interest that can be applied across the panoply of fact situations seems a daunting task. For example, a widely-quoted test of common interest is that of *Duplan Corp. v. Deering Milliken, Inc.*³⁴⁵ The *Duplan* court stated,

A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice.... The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.³⁴⁶

within the privilege"); Garsombke, *supra* note 247, at 620–21 (nothing that reliance is impossible because application so confused); Schaffzin, *Common Interest*, *supra* note 247, at 65 (noting that there is a great deal of uncertainty so parties are discouraged from disclosure); see also Gregory J. Kopta, Comment, *Applying the Attorney–Client Privilege and Work Product Privileges to Allied Party Exchange of Information in California*, 36 UCLA L. REV. 151, 153 (1988) ("Continuing uncertainty exacts a high price. Fear of waiver in general is very expensive to both the participants and the legal system itself.").

342. See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (discussing the requirement); see also RICE, *supra* note 19, § 4:35.

343. See MUELLER & KIRKPATRICK, *supra* note 72, § 5:20, at 571 ("[E]ach client has her own lawyer, and it is understood that their common interest is limited and they are already (or potentially) adversaries on other related matters, in a situation in which a single lawyer could not properly represent both."); see also discussion *supra* Part IV.B.4.

344. See RICE, *supra* note 19, § 4:36 ("There is no clear standard for measuring the community of interests that must exist for the privilege to apply.").

345. 397 F. Supp. 1146 (D.S.C. 1974).

346. *Id.* at 1172. *Duplan* is still the majority rule. See RICE, *supra* note 19, § 4:36. The Restatement definition is broader. It states: "[T]he common interest . . . may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. e (2000).

Another typical treatment is found in *SCM Corp. v. Xerox Corp.*³⁴⁷ There, the court stated that the legal interests must be “demonstrably common” or the clients must have “substantial” risk of shared exposure.³⁴⁸ In *Fox News Network, LLC v. U.S. Department of the Treasury*,³⁴⁹ the court stated that “[t]he interest must be a common legal interest, not merely a common commercial interest.”³⁵⁰ The court continued that “[s]uch a common interest exists where ‘the parties have been, or may potentially become, co-parties to a litigation . . . or have formed a coordinated legal strategy.’”³⁵¹

Common interest might be a simple concept easily applied if the context is cooperation of two criminal defendants. But courts today apply a privilege in all sorts of allied lawyer civil settings. Sometimes the parties who have joined together are plaintiffs rather than defendants.³⁵² Sometimes the parties working together are not involved in any current or potential litigation.³⁵³ Defining and analyzing the existence of a common interest in such a variety of contexts is beyond the reach of most mortals.

The task of interpreting these definitions of common interest and applying these statements is largely one left to the judgment of the reviewing court long after the communication has occurred and the privilege has been claimed. The common interest requirement is simply too malleable on a case by case basis to provide any certainty with regard to its application.

2. Confusion About the Necessity of an Agreement

There are other areas of confusion that make application of the

347. 70 F.R.D. 508 (D. Conn. 1976).

348. *Id.* at 524–25; *see also* *Square D Co. v. E.I. Elecs., Inc.*, 264 F.R.D. 385, 391 (N.D. Ill. 2009) (requiring a “common legal interest . . . as opposed to a common commercial interest”).

349. 739 F. Supp. 2d 515 (S.D.N.Y. 2010).

350. *Id.* at 563.

351. *Id.* at 563 (quoting *In re Subpoena Duces Tecum Served on N.Y. Marine & Gen. Ins. Co.*, No. M 8-85 (MHD), 1997 WL 599399, at *4 (S.D.N.Y. Sept. 26, 1997)); *see also* Schaffzin, *Common Interest*, *supra* note 247, at 69–74 (discussing definitions and applications of the common interest standard).

352. *See, e.g., In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990).

353. *See In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (“It applies in civil and criminal litigation, and even in purely transactional contexts.”); *see also* RICE, *supra* note 19, § 4:35.

privilege to the allied lawyer setting problematic. For example, courts disagree about whether an agreement to work together jointly is necessary. This is a manifestation of disagreement about the extent to which there must be proof of joint intent. In *Hunton & Williams v. U.S. Department of Justice*,³⁵⁴ the court rejected the notion that “mere ‘indicia’ of joint strategy” provides the required intent to collaborate.³⁵⁵ The court stated, “While agreement need not assume a particular form, an agreement there must be.”³⁵⁶ In *HSH Nordbank AG New York Branch v. Swerdlow*,³⁵⁷ the court stated, “Courts in this circuit have acknowledged that although the common interest doctrine applies only where a party has demonstrated the existence of an agreement to pursue a common legal strategy, the agreement need not be in writing.”³⁵⁸ And in *Avocent Redmond Corp. v. Rose Electronics, Inc.*,³⁵⁹ the court stated, “A written agreement is not required, but the parties must invoke the privilege: they must intend and agree to undertake a joint defense effort.”³⁶⁰

In *Hunydee v. United States*, however, the court made no mention of the existence of an agreement in a matter in which it seemed there was no agreement.³⁶¹ There is a danger that recognizing a common interest of some sort may be taken as sufficient proof of intent to proceed jointly.

If there is a joint defense or prosecution agreement (or some other agreement to jointly proceed in an allied lawyer setting), and if that agreement, as it usually does, commits the parties to maintaining the

354. 590 F.3d 272 (4th Cir. 2010).

355. *Id.* at 284–85.

356. *Id.* at 285; *see also* *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999) (finding no joint privilege because no joint defense agreement existed at the time of the communication); *Post v. Killington, Ltd.*, 262 F.R.D. 393, 397 (D. Vt. 2009) (“[T]he critical questions are whether those making and receiving the challenged communications (1) actually had a common interest with respect to the investor passes, and (2) had reached a joint strategy agreement at the time the communications were made.”); *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003) (“In order . . . for documents and communications shared amongst these litigants to be considered confidential, there must exist an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy.”).

357. 259 F.R.D. 64 (S.D.N.Y. 2009).

358. *Id.* at 72 n.12.

359. 516 F. Supp. 2d 1199 (W.D. Wash. 2007).

360. *Id.* at 1203.

361. 355 F.2d 183 (9th Cir. 1965); *see also* discussion of the *Hunydee* case *supra* Part III.B.3.

confidentiality of information revealed in the context of the joint endeavor, then the parties to the agreement are contractually bound to not reveal the information to third parties. Such an agreement is evidence of a joint endeavor for purposes of a court applying the attorney–client privilege and is evidence of the intent of the parties to maintain confidentiality. The agreement should not, however, control the application of the privilege; a communication should not be privileged because the parties agree that it is. Only the courts should be the arbiters of whether the privilege applies to communications.³⁶²

3. Confusion About the Necessity of Litigation

A third source of confusion about the application of the privilege to the allied lawyer setting is that courts do not agree about whether litigation must exist for the privilege to apply. Some courts apply the privilege in allied lawyer settings not involving litigation.³⁶³ For example, in *United States v. United Technologies Corp.*,³⁶⁴ the court applied the privilege to a situation in which members of a joint endeavor shared legal advice in an effort to minimize tax liabilities. The communications at issue “pertain[ed] to the development of a common legal strategy” and “the members acted not as adversaries negotiating at arms length but as collaborators.”³⁶⁵ Justifying this stance, the court in

362. See *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 441 n.4 (Fla. Dist. Ct. App. 1987) (“Of course, the mere existence of an agreement between parties to keep documents confidential is not, in itself, sufficient to protect them from discovery under a claim of privilege.”); see also Schaffzin, *Common Interest*, *supra* note 247, at 81–83 (explaining that the agreement cannot create the privilege).

363. In *Fox News Network, LLC v. U.S. Dep’t of the Treasury*, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010), the court stated, “Although the doctrine is most frequently applied in the context of litigation, it also has been successfully invoked with respect to joint legal strategies in non-litigation settings.”

364. 979 F. Supp. 108 (D. Conn. 1997).

365. *Id.* at 112; see also *Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 80 Fed. Cl. 122, 144 (2007) (noting that “communications are privileged as against third parties, whether or not there is actual litigation in progress” (citing *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996))); *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 965 (N.D. Ill. 2009) (“The fact that Whirlpool’s communications with its outside agencies were not in the context of litigation is of no moment because communications ‘need not be made in anticipation of litigation to fall within the common interest doctrine.’” (quoting *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007))); *HSN Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 71 (S.D.N.Y. 2009) (“The doctrine ‘precludes a waiver of the underlying privilege concerning confidential communications between the parties made in the course of an ongoing common enterprise and intended to further the

United States v. BDO Seidman, LLP, stated that “[r]eason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication.”³⁶⁶

In contrast, other courts require litigation to be on the horizon. In *United States v. Newell*,³⁶⁷ the court stated that only two types of communications are privileged in the allied lawyer setting: “communications between co-defendants in actual litigation and their counsel . . . [and] communications between *potential* co-defendants and their counsel . . . if there is ‘a palpable threat of litigation at the time of the communication.’”³⁶⁸ The *Newell* court continued, “a cognizable common legal interest does not exist if a group of individuals seeks legal counsel to avoid conduct that might lead to litigation, but rather only if they request advice to ‘prepar[e] for future litigation.’”³⁶⁹

4. Confusion About Whom the Communication Must Involve

Another source of confusion about the application of the privilege to the allied lawyer setting is that courts do not agree about who must be involved in a communication for the privilege to apply to that communication. There is *some* agreement. Courts agree that the privilege can apply when two lawyers, each representing a separate member of a group working together, share otherwise privileged information.³⁷⁰ The attorneys are sharing information gleaned from

enterprise, irrespective of whether an actual litigation is in progress.” (quoting *Sokol v. Wyeth, Inc.*, No. 07 Civ. 8442(SHS)(KNF), 2008 WL 3166662, at *5 (S.D.N.Y. Aug. 4, 2008)).

366. 492 F.3d at 816.

367. 315 F.3d 510 (5th Cir. 2002).

368. *Id.* at 525 (quoting *In re Santa Fe Int’l Corp.*, 272 F.3d 705, 710, 711 (5th Cir. 2001)).

369. *Id.* (alteration in original) (quoting *Santa Fe Int’l Corp.*, 272 F.3d at 713).

370. *See, e.g.*, *Cooper Health Sys. v. Virtua Health, Inc.*, 259 F.R.D. 208, 214 (D.N.J. 2009) (“Further, the privilege does not extend to communications between non-attorneys who simply have a joint interest. The community of interest privilege is applicable to communications amongst attorneys, ‘to be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest.’” (quoting *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007))); *see also* *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 29 (1st Cir. 1989) (“When a person provides information to another without first consulting his own attorney, it is difficult to see how the information was given as part of a joint defense, even when the recipient may be viewed as a party with similar interests. The difficulty grows when the person furnishing the information fails to inform his attorney of what he has done for several months. This raises the inference that the information was not intended to be used for

confidential conversations with their respective clients. The purpose of the original communications was obtaining legal advice and not in furtherance of a crime or fraud. As the Third Circuit in *In re Teleglobe Communications Corp.* stated with regard to requiring the communication to involve attorneys, “The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.”³⁷¹

Some courts may not require both parties to the communication to be attorneys but may require the presence of at least one attorney.³⁷² Some courts are even less demanding. For example, in *Gucci America, Inc. v. Gucci*, the District Court for the Southern District of New York explicitly rejected the notion that an attorney was necessary for the communication to be privileged.³⁷³ The court stated, “If information that is otherwise privileged is shared between parties that have a common legal interest, the privilege is not forfeited even though no attorney either creates or receives the communication.”³⁷⁴ Other courts agree.³⁷⁵

that person’s defense much less a *joint* defense. Under these circumstances, the joint defense privilege is not available.” (emphasis in original)).

371. *Id.* at 365.

372. *See* *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) (“The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected.”); *see also* *Square D Co. v. E.I. Elecs., Inc.*, 264 F.R.D. 385, 391 (N.D. Ill. 2009) (denying the privilege and stating, “EI has not even demonstrated that the subject communications were made to or by an attorney”); *Post v. Killington, Ltd.*, 262 F.R.D. 393, 397 (D. Vt. 2009) (holding there is no privilege in absence of attorneys); *Harper-Wyman Co. v. Conn. Gen. Life Ins. Co.*, No. 86 C 9595, 1991 WL 62510, at *6 (N.D. Ill. Apr. 17, 1991) (“This is problematical, as communications between joint plaintiffs or joint defendants outside of counsel’s presence are not protected under the joint defense theory.”).

373. No. 07 Civ. 6820, 2008 WL 5251989, at *1 (S.D.N.Y. Dec. 15, 2008).

374. *Id.*

375. *See, e.g.,* *Zitzka v. Vill. of Westmont*, No. 07 C 0949, 2009 WL 1346256, at *2 (N.D. Ill. May 13, 2009) (“Importantly for our purposes here, the common interest doctrine may apply in certain circumstances to communications between two non lawyers who are both covered by the common interest.”); *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 71 (S.D.N.Y. 2009) (responding to party’s argument that the privilege did not apply to sharing of a communication with a third party and argument that the privilege applied only to sharing with the third party’s lawyer, and finding the argument “meritless”); *Reginald Martin Agency, Inc. v. Conesco Med. Ins. Co.*, 460 F. Supp. 2d 915, 918 (S.D. Ind. 2006) (“Defendants urge this Court to adopt those cases that appear to stand for the proposition that the common interest doctrine does not extend attorney–client privilege to

With so much confusion surrounding the application of the attorney–client privilege in the allied lawyer setting, clients and lawyers cannot predict with any degree of certainty whether a communication will enjoy the protection of the privilege. If clients and lawyers cannot predict that communications will be protected from disclosure, these clients and lawyers cannot be encouraged to speak freely. Thus, any of the goals sought to be accomplished by applying the privilege in the allied lawyer setting are not achieved.

VI. CONCLUSION

The attorney–client privilege, throughout history, has applied to the joint client representation setting. Courts and commentators have never directly questioned this application, nor should they question it. The attorney–client privilege is as inherent a part of a joint representation as it is in any attorney–client relationship. Applying the privilege in the joint client representation setting is consistent with the privilege’s underlying rationale. Unfortunately, some courts may have become a bit confused about the privilege’s application to the joint client setting; this confusion is an unfortunate result of courts struggling with the privilege in the allied lawyer setting.

In contrast and contrary to the practice of modern courts, courts should not apply the privilege to the allied lawyer setting. Applying the privilege in this setting does not further the rationale of the attorney–client privilege and such application contradicts the traditional approach of applying the privilege narrowly. In addition, the precedential basis

communications between parties made outside the presence of counsel. While such a conclusion is tempting on first blush, closer scrutiny suggests otherwise.”).

In *Pucket v. Hot Springs School District No. 23-2*, the court stated,

In *IBJ Whitehall Bank & Trust Co.*, the third-party defendant sought discovery of several communications between two parties who had a common interest. The third-party defendant argued that the common interest doctrine did not apply because the communications occurred outside the presence of the parties’ attorneys. . . .

This court finds the district court’s reasoning in *IBJ Whitehall Bank & Trust Co.*, . . . persuasive. The court thus adopts it here. As a result, the court finds that Spitzer’s communication of confidential, privileged legal advice from the Becket Fund attorneys to the Puckets is protected by the common interest doctrine, even if these communications occurred outside the presence of the Becket Fund attorneys. 239 F.R.D. 572, 583–84 (D.S.D. 2006) (discussing *IBJ Whitehall Bank & Trust Co. v. Cory & Assocs.*, No. CIV. A. 97 C 5827, 1999 WL 617842 (N.D. Ill. Aug. 12, 1999)).

for applying the privilege in the allied lawyer setting is that the allied lawyer setting and the joint client representation setting are identical. They are not. Communications in the joint client situation are communications between attorney and clients of that attorney. Such is not the case in the allied lawyer setting.

The United States Supreme Court in *University of Pennsylvania v. EEOC*, a case involving the question of creating a privilege for peer-review communications, noted that because a privilege keeps evidence from the truth-finder, “[w]e do not create and apply an evidentiary privilege unless it ‘promotes sufficiently important interests to outweigh the need for probative evidence.’”³⁷⁶ If courts today were writing on a blank slate such that no precedent existed that recognized the attorney–client privilege in the allied lawyer setting, those courts would not create such a doctrine.

Courts looking at the matter anew would note that recognition of a privilege would be an expansion of the privilege. The expansion would contradict the historical guiding principle that courts must apply the privilege narrowly because it inhibits the truth-finding mission of the justice system. Courts would conclude that recognizing the attorney–client privilege in the allied lawyer situation would not further the rationale of the privilege—encouraging client disclosure to the client’s attorney for the ultimate goal of superior legal service. Courts would conclude that no possible rationale justifies an expansion of the privilege to the allied lawyer setting given the accompanying harm such an expansion does to the truth-finding mission of the judicial system. Finally, these courts would understand that the allied lawyer setting is fundamentally different from the joint client representation setting. The nature of the relationship between attorneys and clients is different. In the joint client representation setting, the attorney–client privilege protects communications involving an attorney and that attorney’s clients. The same cannot be said when the privilege is applied in the allied lawyer setting. In the allied lawyer setting, communications not involving a lawyer and the lawyer’s client may be privileged.

Because courts today are *not* writing on a blank slate but have the benefit of recent precedent, it is clear that applying the privilege to the allied lawyer setting has resulted in a level of confusion of application that undermines any possible value created. There is confusion about

376. 493 U.S. 182, 189 (1990) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

the kind of commonality necessary between the parties in the allied lawyer setting.³⁷⁷ There is confusion about whether the parties must reach an agreement to work together and the form such an agreement should take.³⁷⁸ There is confusion about whether the matter must involve litigation.³⁷⁹ There is confusion about who can be a part of the communication.³⁸⁰ All of these defects of clarity destroy the certainty of application necessary for the privilege to achieve its goals. As an added collateral effect, some of this confusion with regard to the allied lawyer setting also has created confusion with courts when they are dealing with the joint client representation situation—a setting, historically, that has been a model of clarity.

In recent years courts have applied the attorney–client privilege in the allied lawyer setting without evaluating the basic normative question of whether the privilege should apply at all. The courts have focused on the trees, not the forest. The courts have assumed that *Chahoon v. Commonwealth*, the case that first applied the privilege to the allied lawyer setting, is theoretically sound.³⁸¹ In fact, the analysis of the *Chahoon* court is flawed in concluding that the allied lawyer setting and the joint client setting should be treated alike for purposes of the attorney–client privilege.

Now is the time to evaluate the application of the attorney–client privilege to the allied lawyer setting. The vast majority of cases applying the privilege to the allied lawyer setting have been in the last few decades. Now is the time to acknowledge the error and correct it.

With respect to privileges in the federal system, the Third Circuit Court of Appeals stated in *Pearson v. Miller*,³⁸² “[F]ederal courts are to assess the appropriateness of new privileges as they arise in particular cases, but they are to conduct that assessment with a recognition that only the most compelling candidates will overcome the law’s weighty dependence on the availability of relevant evidence.”³⁸³

Courts should cast fresh eyes on the application of the attorney–

377. See *supra* Part V.F.

378. See *supra* Part V.F.1.

379. See *supra* Part V.F.3.

380. See *supra* Part V.F.4.

381. See *supra* Parts III.B–C.

382. 211 F.3d 57 (3d Cir. 2000).

383. *Id.* at 67.

2011–2012]

END THE EXPERIMENT

561

client privilege in the allied lawyer setting and “assess the appropriateness”³⁸⁴ of such an application. As a result of such analysis, courts should conclude that the allied lawyer setting is not such a “compelling candidate”³⁸⁵ for application of the attorney–client privilege.

384. *Id.*

385. *Id.*