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# Applying the Joint Client Privilege to Related Corporate Entities

## Litigation and Dispute Resolution





In-house lawyers frequently advise related corporate entities. Given that companies within the same corporate family share similar goals and business strategies, the use of centralized in-house counsel can be both efficient and economical. To preserve the attorney-client privilege in the representation of related corporate entities, counsel should carefully consider the intricacies of the joint client privilege.

## What is the joint client privilege?

The joint client privilege, also referred to as the co-client privilege, is an exception to the rule that the attorney-client privilege is waived when privileged information is shared with a third party. The joint client privilege, if properly applied, can protect against disclosure of communications between employees of affiliated companies and a centralized in-house legal team.

In *In re Teleglobe*, the US Third Circuit provided the most comprehensive analysis of the joint client privilege in the corporate context. Recognizing that that "parent companies often centralize the provision of legal services to the entire corporate group in one in-house legal department," the court explained that when a company's in-house legal department represents both the parent and a subsidiary or subsidiaries on a matter of common interest, the corporate entities are in a joint client relationship with the legal department. Therefore, privileged communications between employees of corporate affiliates and centralized in-house counsel regarding a legal matter of common interest should generally be protected from disclosure.

## What the joint client privilege is not

It is important to recognize that the joint client privilege is distinct from other information sharing privileges — the common interest privilege and the joint defense privilege. The privileged information sharing doctrines are often confused, as they are similar, yet have certain distinct characteristics.

The common interest privilege allows separate attorneys representing different clients with common legal interests to share information between the attorneys while preserving the privilege. The privilege does not apply to communications between the separate clients. As observed in *In re Teleglobe*, the common interest privilege "only applies when clients are represented by separate counsel. Thus, it is largely inapplicable to disputes that revolve around corporate family members' use of common attorneys (namely, centralized in-house counsel).

The joint defense privilege "protects communications between parties who share a common interest in litigation." The joint defense privilege is narrower than the common interest privilege as it only applies to actual litigation, but many courts use the terms "common interest" and "joint defense" interchangeably.

## How does the joint client privilege work?

For the joint client privilege to apply to members of the corporate family, the party seeking to assert the privilege must show that the communication: (1) is covered by the attorney-client privilege, and that (2) the clients share or shared a common legal interest.

**Attorney-client communication**
For a communication to be protected by the attorney-client privilege it must be (1) a communication, (2) made between an attorney and client, (3) in confidence, and (4) for the purpose of obtaining or providing legal assistance for the client. Because the application of the attorney-client privilege withholds relevant information from the fact finder, the privilege is narrowly construed. In order for the attorney-client privilege to apply, the communication must be primarily or predominately of a legal character. When the communication pertains to business, commercial, or personal advice, the communication will not be privileged.

**Common legal interest**
The clients must share a common legal interest. As there is no bright-line rule defining what constitutes a "common legal interest," this issue is frequently contested in discovery disputes.

Common ownership or control between the clients can be used to demonstrate a common legal interest. The greater the level of control or ownership between the parties, the more likely that a common legal interest will be established. However, parties cannot simply "rely blindly and boldly on the 'affiliation of the various entities'" in asserting a common interest. Disputes over the existence of a common interest may require the disclosure of organizational charts and corporate formation documents.

When the entity providing the legal advice is not wholly owned by the entity receiving the legal advice, courts may demand that the parties share an identical and not merely similar legal interest with respect to the subject matter of the communication.

Courts have found that a common legal interest exists in situations where joint clients were working together to complete a transaction, to avoid litigation and/or to defend against lawsuits. Specific examples include:

- Communications between sister subsidiaries of a single parent corporation regarding issues that were raised in a lawsuit against one of the sister subsidiaries had identical common interest in defense of a product liability suit.
- Communications regarding disclosures for a transaction made from a wholly owned subsidiary's vice president to the general counsel of the parent constituted communications related to a common legal interest.
- Documents and communications related to intellectual property issues or disputes with third parties between an employee of a subsidiary and counsel for the parent company sufficiently demonstrated a common legal interest and were protected from disclosure.
- Communications from in-house counsel of foreign subsidiary of the defendant to in-house attorneys and employees of entities within the corporate family concerning the allegations in the complaint were protected by the joint client privilege.

While the above examples are helpful guides, each distinct lawsuit or transaction involving multiple corporate family members should be evaluated to determine how to best protect privileged documents from disclosure.

## Limitations of the joint client privilege

- The scope of the joint client relationship is limited by the extent of the legal matter of common interest. The joint client relationship terminates when the clients' legal interests have diverged. If the clients' legal interests diverge, the entities should retain separate counsel.
- While otherwise privileged communications are privileged from disclosure to a third party, the communications are not privileged in a controversy between the co-clients.
- Courts may apply heightened scrutiny to communications to and from in-house counsel on the grounds that in-house counsel regularly communicate on business rather than legal matters. Some courts have applied a presumption that when in-house counsel is involved in a communication, the in-house attorneys' input is business in nature.
- The privilege will be waived if the communication is shared with a person or entity outside the joint client attorney relationship. Waiving the joint client privilege typically requires the consent of all joint clients.

- Recently, in *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, New York's highest court, examining the common interest (but not the joint client privilege), held that the common interest privilege did not apply to a transaction and only applies to pending or anticipated litigation. While there does not appear to be a litigation limitation on the joint client privilege, parties may attempt to stretch Ambac's holding to the application of the joint client privilege.

### Considerations for applying the joint client privilege

- Consider the choice of law issues. Some jurisdictions may apply the privilege law of the state in which the action is pending. However, other jurisdictions may apply the law of the state that has the most significant relationship to the communication, which may not always be the forum state. Additionally, with cross-border communications among related corporate entities, be mindful of international law issues concerning the privileged nature of in-house counsel communications.
- Consider whether a common or identical legal interest exists between the corporate family members throughout the course of communications. Because work associated with various projects and deals may be fluid, take steps to consider if legal interests continue to be aligned.
- Avoid situations where common in-house counsel are on the same side of the transaction. Use separate counsel to represent the different sides of the transaction.
- Always be mindful of the attorney-client privilege and its narrow scope.

## References


See, e.g., In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 341 (4th Cir. 2005).

See Restatement (Third) of the Law Governing Lawyers § 75(1) (2000) ("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….").

493 F.3d 345 (3d Cir. 2007).

Id. at 365; see also Restatement (Third) of the Law Governing Lawyers § 76(1) (2000).

In re Grand Jury Subpoena: Under Seal, 415 F.3d at 341.

In re Teleglobe Commc'n Corp., 493 F.3d at 359.

Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 37 (N.Y. 2016).

See, e.g., Rossi v. Blue Cross & Blue Shield of Greater New York, 540 N.E.2d 703, 706 (N.Y. 1989).

Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055, 1061 (N.Y. 1991).

Compare La. Mun. Police Empl. Ret. Sys. v. Sealed Air, 253 F.R.D. 300, 309-10 (D.N.J. 2008) (finding that substantially similar legal interests are sufficient); with Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974) (requiring identical interests).

In re Grand Jury Subpoena #£06-1, 274 F. App'x 306, 311 (4th Cir. 2008) ("Indeed, a number of courts have held that close corporate affiliation, including that shared by a parent and a subsidiary, suffices to render those entities "joint clients" or "co-clients," such that they may assert joint privilege in communications with an attorney pertaining to matters of common interest.").

See Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Tr. No. 1B, 230 F.R.D. 398, 415 (D. Md. 2005) (finding that where the joint clients had a business relationship, but not a controlling financial relationship or legal relationship, there was no common legal interest.)

Id. at 418.

Roberts v. Carrier Corp., 107 F.R.D. 678, 678-88 (N.D. Ind. 1985).

Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49-50 (S.D.N.Y. 1989).

SCR-Tech LLC v. Evonik Energy Servs. LLC, No. 08 CVS 16632, 2013 WL 4134602, at *5 (N.C. Super. Aug. 13, 2013).

Margulis v. Hertz Corp., No. CV 14-1209 (JMV), 2017 WL 772336, at *6-9 (D.N.J. Feb. 28, 2017)

In re Teleglobe Commc'ns Corp., 493 F.3d at 362.

Restatement (Third) of the Law Governing Lawyers § 75 (2000).

See, e.g., Neuberger, 230 F.R.D. at 411 n.20; Kincaid v. Wells Fargo Sec., LLC, No. 10-CV-808-JHP-PJC, 2012 WL 712111, at *2 (N.D. Okla. Mar. 1, 2012).

In re Teleglobe Commc'ns Corp., 493 F.3d at 363.

Ambac, 57 N.E.3d at 629.

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