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Attorney-Client Privilege: Minnesota Recognizes the Common-Interest Doctrine

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ARTICLE

ATTORNEY-CLIENT PRIVILEGE: MINNESOTA RECOGNIZES THE COMMON-INTEREST DOCTRINE

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The right of confidentiality is usually lost when communications between an attorney and client take place in the presence of a third party, or when work product is shared with others not affiliated with the legal representation. However, legal counsel often argue that these communications and materials remain protected due to the application of the "common-interest" doctrine—also referred to as the joint-defense privilege. The common-interest doctrine serves as a limited exception to the general rule that the attorney-client privilege is waived by disclosure of the previously protected information to a third party. The doctrine permits represented parties who share a common legal interest to share privileged information in a confidential manner without waiving the attorney-client privilege when the information is exchanged for the purpose of obtaining or furthering the legal representation.

Some states do not recognize the common-interest doctrine as a component of the attorney-client privilege and, even within the category of those that do, there is a lack of uniformity with respect to many of its requirements. A refusal to recognize the doctrine or uncertainty about its application frustrates the goals of the attorney-client privilege, which include the protection of communications and information exchanged between the attorney and client necessary to the rendition of sound legal advice which, in turn, contributes to the administration of justice.

The Minnesota Supreme Court recently adopted the common-interest doctrine in Minnesota. The court in *Energy Policy Advocates v. Ellison* reversed the Minnesota Court of Appeals, which found that the doctrine was inapplicable since it was not previously recognized by statute, decision, or

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rule in Minnesota.[1] The decision adds to the growing consensus in state and federal courts recognizing the need for attorneys to share privileged or protected information in limited circumstances without risk of waiver. Such protections are often necessary for attorneys to collaborate with other parties, whether it is in investigation, planning and coordinating litigation strategy, or pursuing settlement discussions in resolution of a dispute. There remain open issues after *Ellison*, but the decision is certainly a welcome result for lawyers in this state—even the parties to the proceeding did not really dispute that the doctrine *should* be recognized.[2]

I. Attorney-Client Privilege and Work-Product Doctrine

A. Foundation for Privilege

The concept of "privilege" is a fundamental cornerstone of the United States legal system. Certain confidential communications between a client and his or her attorney are sacrosanct and protected from disclosure.[3] Indeed, the attorney-client privilege is one of the oldest and most venerable of all privileges and is codified by statute and protected by rule of court.[4] Similarly, a party's documents and notes, including those of the party's representatives and attorneys made primarily in anticipation of litigation, are likewise protected under the work-product doctrine.[5] In order to protect information from discovery and retain its character as privileged, the information must be delivered to or by legal counsel for the purpose of giving or

1. *See* 980 N.W.2d 146, 150, 152 (Minn. 2022).

2. *Id.* at 152. In addition, nearly 100 amici curiae (including thirty-eight states and territories) participated in the submission of briefs in connection with the appeal urging the Minnesota Supreme Court to adopt the common-interest doctrine. One brief was submitted by two associations that collectively represent thousands of Minnesota lawyers engaged in the full spectrum of legal practice and that often represent opposing parties in litigation. *Id.* at 152 n.1.

3. The Minnesota Supreme Court has previously recognized the following articulation of the attorney-client privilege: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." Kobluck v. Univ. of Minn., 574 N.W.2d 436, 440 (Minn. 1998) (citing 8 John Henry Wigmore, Evidence § 2292, at 554 (John T. McNaughton rev. ed., 1961)). The purpose of the attorney-client privilege "is to encourage the client to confide openly and fully in his attorney without the fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client." *Id.* (quoting Nat'l Texture Corp. v. Hymes, 282 N.W.2d 890, 896 (Minn. 1979)).

4. *See* Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). *See also* Fed. R. Evid. 502; Fed. R. Civ. P. 26(b)(3); Minn. Stat. § 595.02 subd. 1(b) (2022); Minn. R. Civ. P. 26.02(d). Lawyers are also duty bound to protect the confidences of their clients. *See* Minn. Rules of Pro. Conduct r. 1.6.

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

receiving legal assistance, and it must be confidential—not divulged to a third party (someone not counsel or client).[6]

B. Waiver of Privilege

A voluntary disclosure of information and documents to a third party typically waives privilege. The result of waiver is that the information becomes subject to discovery by adversaries and is potentially admissible at trial. As such, great care should be used to ensure that thoughtful consideration is given before sharing sensitive communications and information with third parties. The challenge often becomes how best to provide the client the most effective and fullest representation while keeping possibly game-changing materials out of an adversary's reach through discovery.

C. Exception to Waiver

The law has created a number of exceptions to the rule that the sharing of otherwise privileged communications destroys privilege. Courts have recognized a "co-client" or "joint client" privilege in the context of a multi-party representation by legal counsel, which extends the attorney-client privilege to include third parties without the risk of waiver.[7] A logical extension of the co-client privilege was to add not only multiple clients to the representation but also to include more attorneys. Courts have recognized that there is often a need for an attorney to include outside parties in discussions with clients and to share documents with outside third parties as part of an effective overall representation. Nomenclature varies from one jurisdiction to another, but the objective remains the same—avoiding the risk of waiver and precluding a common adversary from discovering those shared communications and materials.

II. Common-Interest Doctrine

The commonplace and practical need for lawyers to be able to collaborate with other clients who share a common legal interest cannot be understated. A "joint-defense" privilege has developed in most jurisdictions to allow one group of clients and their counsel to communicate confidentially with another group of clients and their separate counsel.[8]

The common-interest doctrine is not a separate, stand-alone privilege. Rather, it is a line of case law (and some statutes) that apply traditional privilege and waiver principles to recognize a notable exception to the general rule that disclosure or communications with or in the presence of third

6. *See* Restatement (Third) of the L. Governing Laws. § 68 (Am. L. Inst. 2000).

7. *See, e.g.*, *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 365–66 (3d Cir. 2007).

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

parties destroys any attendant privilege. It can, however, be practically viewed as an extension of the attorney-client privilege and is often referred to as a joint-defense privilege. The doctrine allows separately represented parties with common legal interests to share information with each other and their attorneys without having to disclose it to third parties.[9]

A. *Facts of* Ellison

The *Ellison* case involved a request for state government data under Minnesota's analog to the federal Freedom of Information Act. Energy Policy Advocates, a nonprofit national advocacy organization, sought documents from the Minnesota Attorney General's Office that related to various legal matters concerning the climate and the environment.[10] The requests included communications with other state attorneys general regarding potential litigation.

The Attorney General determined that there were no nonprivileged, public data responsive to the production request.[11] Accordingly, the Minnesota Attorney General refused to produce the documents requested. Energy Policy Advocates disputed the State's assertion of privilege and commenced a lawsuit in Ramsey County District Court under the Minnesota Data Practices Act seeking to compel the production of records that the State retained. Specifically, Energy Policy Advocates sought documents relating to the relationship between the Minnesota Attorney General and an outside group that was alleged to fund special attorneys general in order to advance climate change positions.[12]

The parties' arguments before and during the course of litigation centered on the existence and scope of the common-interest doctrine, as well as the applicability of the attorney-client privilege to internal communications among attorneys in public law agencies.[13] The parties agreed to resolve the dispute through motion practice, a process for categorizing documents, preparing a privilege log, and identifying the Minnesota Attorney General's justification for refusing to release requested documents.[14] Certain documents were also submitted to the court for *in-camera* review. The district court determined that the requested data contained privileged and work-product communications of attorneys in the Minnesota Attorney General's Office.[15] The court held that the common-interest doctrine protected those

9. *See* Shukh v. Seagate Tech., L.L.C., 872 F. Supp. 2d 851, 855 (D. Minn. 2012).

10. *See* Energy Pol'y Advocs. v. Ellison, 980 N.W.2d 146, 150 (Minn. 2022).

11. *See id.*

12. *See id.*

13. The Minnesota Data Practices Act provides that the disclosure of government data is governed by the statutes, professional standards, and rules concerning discovery, evidence, and professional responsibility generally. *See* MINN. STAT. § 13.393 (2022).

14. *Energy Pol'y Advocs.*, 980 N.W.2d at 151.

15. *Id.*

communications from being subject to waiver and production.[16] The district court granted the Minnesota Attorney General's motion and dismissed the case, triggering subsequent appeals.[17]

B. Minnesota Court of Appeals Finds Doctrine Inapplicable

The Minnesota Court of Appeals concluded that the district court erred in two fundamental respects.[18] First, the district court erred by applying the common-interest doctrine to sanction the privilege asserted by the Minnesota Attorney General with respect to the records retained. The appellate panel found that lower courts could not apply the common-interest doctrine because it was not recognized in Minnesota.[19] The court opined that it is solely within the purview of the Minnesota Supreme Court or the legislature to undertake the task of extending existing law.[20] Second, the Minnesota Court of Appeals found that the district court erred by finding the attorney-client privilege to be applicable to internal communications among attorneys in government agencies.[21]

The Court of Appeals' decision was fundamentally based on the lack of recognition by Minnesota law—by statute, rule, or precedent—of the applicability of the common-interest doctrine.[22] As a result, the appellate panel found that the Attorney General could not rely on the common-interest doctrine to maintain attorney-client privilege or work-product protection over documents shared with other agencies or states attorneys general.[23] The Minnesota Attorney General petitioned the Minnesota Supreme Court for further review. The importance of the issue to the legal profession and the uncertainty created by the Court of Appeals decision created "deep and immediate concern."[24] The decision in fact prompted dozens of amici curiae representing an array of interests to submit briefs urging for the adoption of the common-interest doctrine in Minnesota.[25]

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16. *Id.*

17. *Id.*

18. Energy Pol'y Advocs. v. Ellison, 963 N.W.2d 485, 501–02 (Minn. Ct. App. 2021), *rev'd*, 980 N.W.2d 146 (Minn. 2022).

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

20. *Id.* at 501.

21. *Id.* at 500.

22. *Id*. at 501–02.

23. *Id.*

24. *See* Brief for Minnesota Association for Justice, Minnesota Defense Lawyers Association, et. al. as Amici Curiae at 3, Energy Pol'y Advocs. v. Ellison, 980 N.W.2d 146 (Minn. 2022) (No. A20-1344).

25. The Attorney General for the District of Columbia submitted a brief on behalf of the district and a collation of thirty-eight states supporting the need for the recognition of the common-interest doctrine for attorneys general. *See generally* Brief for District of Columbia et. al. as Amici Curiae Supporting Petitioners, *Energy Pol'y Advocs.*, 980 N.W.2d 146 (No. A20-1344). State agencies from the State of Minnesota filed a separate brief advocating for the need for the doctrine to ensure efficient intergovernmental coordination. *See generally* Brief for Governor Tim

C. Minnesota Supreme Court Recognizes Doctrine

The Minnesota Supreme Court reversed the decision of the Minnesota Court of Appeals. The court opined that the attorney-client privilege may apply to internal communications among attorneys in public law agencies.[26] The supreme court also ruled that Minnesota should join the authority of nearly every state court and federal circuit court and "formally recognize" the common-interest doctrine.[27]

The Minnesota Supreme Court pronounced that the common-interest doctrine applies in Minnesota (to attorney-client and work-product protected communications) to prevent waiver of privilege:

> When (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy.[28]

The formulation articulated by the Minnesota Supreme Court was intended to generally align the requirements for the doctrine's applicability under Minnesota state and federal law.[29]

The Minnesota Supreme Court also clarified other requirements for the application of the doctrine. First, "[t]he party asserting the protection of the common-interest doctrine has the burden of proving its application."[30] The doctrine should not be used "as a post hoc justification for a client's impermissible disclosures."[31] Second, the common-interest doctrine applies to both attorney-client privileged matters, as well as the sharing of attorney work product.[32] Finally, the court recognized the applicability of the doc-

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Walz and 23 Cabinet Agencies as Amici Curiae, *Energy Pol'y Advocs.*, 980 N.W.2d 146 (No. A20-1344). Minnesota's criminal prosecutors and defense attorneys joined to express support for the doctrine to allow them to effectively represent their clients. *See generally* Brief for Minnesota Association for Justice, Minnesota Defense Lawyers Association, et. al. as Amici Curiae, *Energy Pol'y Advocs.*, 980 N.W.2d 146 (No. A20-1344).

26. *Energy Pol'y Advocs.*, 980 N.W.2d at 150.

27. *Id.* at 150, 153. The Eighth Circuit Court of Appeals, which has appellate jurisdiction over federal district courts in Minnesota, has applied the doctrine. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997) (reviewing the contours of the common-interest doctrine).

28. *Energy Pol'y Advocs.*, 980 N.W.2d at 153. The Minnesota Supreme Court noted that the elements it articulated as comprising the elements necessary for the applicability of the common-interest doctrine were "generally consistent" with the formulation in sections 76 and 91 of the *Restatement (Third) of the Law Governing Lawyers*, as well as most federal courts. *Id. See generally* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. §§ 76, 91 cmt. b (AM. L. INST. 2000).

29. *Energy Pol'y Advocs.*, 980 N.W.2d at 153.

30. *Id.*

31. *In re* Teleglobe Commc'n Corp., 493 F.3d 345, 365 (3d Cir. 2007).

32. *Id.*; *see infra* Part III.D.

trine for public attorneys, rejecting a heightened standard for the government.[33]

The desire to provide clarity to the legal community with respect to the contours of the doctrine's applicability was evident from the court's opinion. As articulated in an amicus brief, "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."[34] Public policy and the administration of justice are furthered by guidance in the law that can be predictably relied upon and thereby further the purposes of the attorney-client privilege.[35]

The Minnesota Supreme Court articulated basic parameters for the application of the common-interest doctrine. Importantly, the mere existence of a common interest (or common adversary) does not satisfy the common-interest doctrine.[36] The following general principles set forth in the court's decision frame the common-interest doctrine in Minnesota and should be carefully considered before any disclosure to third parties is made.[37]

III. Requirements of Common-Interest Doctrine in Minnesota

A. Doctrine Requires Parties to Be Separately Represented

The common-interest doctrine only applies where parties are represented by "separate lawyers."[38] There can be no protection when an unrepresented party is part of the communication. The presence of an unrepresented party therefore destroys privilege and creates waiver.[39]

The rule formulated by the Minnesota Supreme Court does not, by its express terms, however, necessarily require the other attorney (or any attor-

33. *Energy Pol'y Advocs.*, 980 N.W.2d at 155, 156. While the Minnesota Supreme Court's decision did not specify when the attorney-client privilege may attach to communications between governmental agencies, it rejected the requirement that an outside "client" was necessary for the privilege to attach.

34. Brief for Minnesota Association for Justice, Minnesota Defense Lawyers Association, et. al. as Amici Curiae at 12, *Energy Pol'y Advocs*., 980 N.W.2d 146 (No. A20-1344) (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

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

36. *Energy Pol'y Advocs.*, 980 N.W.2d at 153.

37. While the fundamentals of the attorney-client privilege are relatively uniform among jurisdictions, the precise contours of the common-interest doctrine are not fully settled across the country. *Id.* at 152. It is therefore important for counsel to take care to review the requirements of jurisdictions that may be pertinent to a matter.

38. *Id.* at 153.

39. *See, e.g.*, Cavallaro v. United States, 153 F. Supp. 2d 52, 61 (D. Mass. 2001), *aff'd*, 284 F.3d 236 (1st Cir. 2002) (rejecting common-interest privilege because one party was not represented).

neys for that matter) actually be party to the communication. But, there would be a serious risk of waiver by proceeding in a fashion where, for example, clients directly communicate with one another without involving their counsel in those communications. This would be particularly true if those communications did not implicate the attorney's legal advice, work product, or mental impressions.[40]

B. Doctrine Requires Sufficiently "Common" Interest

Courts disagree about the precise meaning of "common" interest. Some courts have indicated that a common interest means an identical interest.[41] Other courts permit something less than identical interests to suffice for purposes of triggering common-interest doctrine.[42] Further, some courts have even recognized that the doctrine may be properly invoked notwithstanding the fact that the parties have, in some respects, adverse interests.[43] This is the better view, as privileged information shared between parties to mergers and other business transactions should, as a matter of policy, be able to qualify for protection in appropriate circumstances.[44]

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

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40. *See* Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co., 460 F. Supp. 2d 915, 920 (S.D. Ind. 2006).

41. *See, e.g.*, *In re* JP Morgan Chase & Co. Sec. Litig., No. 06-cv-04674, 2007 WL 2363311, at *4 (N.D. Ill. Aug. 13, 2007) (finding that companies seeking to merge didn't have identical interests; therefore, premerger discussions were not privileged); Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1046 (D. Del. 1985) (quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974)) ("identical, not similar" interests required in patent litigation).

42. *See, e.g., In re* Grand Jury Subpoena, 415 F.3d 333, 341 (4th Cir. 2005) (not requiring that the interest be identical but "[f]or the privilege to apply, the proponent must establish that the parties had 'some common interest about a legal matter' " and that " 'some form of joint strategy is necessary' " (quoting United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999)).

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

44. *See* John C. Riech & Sangki Park, *Common Interest Doctrine in IP Transactions*, 11 CYBARIS 1, 3–23 (2020) (noting the weight of authority recognizing the applicability of the common-interest privilege in the transactional context); La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 310 (D.N.J. 2008) ("The weight of the case law suggests that, as a general matter, privileged information exchanged during a merger between two unaffiliated business[es] would fall within the common-interest doctrine.") (quoting *Cavallaro*, 153 F. Supp. 2d at 61). Shielding communications between prospective buyers and sellers from discovery encourages open communications about the transaction and diminishes the risk of subsequent litigation. Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987) (opining that courts should not "erect barriers to business deals . . ." by "increas[ing] the risk that prospective buyers will not have access to important information"—this would "set . . . the stage for more lawsuits" rather than "create an environment in which businesses can share more freely information . . . relevant to their transactions").

The possibility of future discord between the parties should be irrelevant to the alignment of their interests. As long as a common interest is shared at the time the agreement is made, it is enough for the common-interest doctrine to apply, provided that the communication itself is disclosed *in furtherance of* the common legal strategy or interest. Parties should evaluate whether there are, or may in the future likely be, any issues on which their legal interests diverge prior to deciding to engage in otherwise protected communications. The analysis should be made on an issue-by-issue basis to determine the extent of the common legal interest and protections afforded.

C. Doctrine Limited to "Legal" Interests

The Minnesota Supreme Court made clear that the appropriate scope of the doctrine is limited to only common *legal* interests. That limitation encompasses both common litigated and non-litigated legal interests.[45] In other words, the common-interest requirement in Minnesota recognizes the applicability of the doctrine even in the absence of pending or anticipated litigation.[46] While the validity of an assertion of protection might not be challenged until litigation arises, Minnesota's formulation can protect communications that occur long before any litigation begins or is even expected.

The standard articulated by the Minnesota Supreme Court excludes "purely commercial, political, or policy interest[s]" from the scope of protection by the common-interest doctrine.[47] However, that is not to say that legal interests must be the only interest the parties hold for the doctrine to apply. Business or personal interests may be implicated. The legal nature of the communications typically must, however, predominate over other interests.[48]

D. Doctrine Extends to Attorney Work Product

In recognizing the common-interest doctrine in Minnesota, the Minnesota Supreme Court concluded that protection extends to attorney work product, as well as attorney-client communications.[49] Work product of counsel, in other words, need not be disclosed if otherwise privileged and

45. *See* Energy Pol'y Advocs. v. Ellison, 980 N.W.2d 146, 153 (Minn. 2022).

46. *Id.*; *accord In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 939 (8th Cir. 1997) (quoting JACK B. WEINSTEIN & MARGARET A. BERGER, 2 WEINSTEIN'S EVIDENCE 503–99) (the common interest privilege applies "not only if litigation is current or imminent but . . . whenever the communication was made in order to facilitate the rendition of legal services to each of the clients involved in the conference").

47. *Energy Pol'y Advocs.*, 980 N.W.2d at 153.

48. Communications are often not necessarily either purely legal or not legal in nature. Both legal and commercial interests are often intertwined. Courts are therefore required to determine whether the legal nature of the communication is important enough to deserve protection.

49. *Energy Pol'y Advocs.*, 980 N.W.2d at 153.

shared with those who are similarly aligned on a matter of common interest. As articulated by the Minnesota Supreme Court, documents or communications containing "an attorney's opinions, conclusions, mental impressions, trial strategy, and legal theories in materials prepared in anticipation of litigation" do not become discoverable if the doctrine's six criteria are met.[50]

E. Doctrine Does Not Require "Written" Agreement

The pronouncement by the Minnesota Supreme Court requires only that the parties "agree to exchange information" with respect to the matter in which they have a common legal interest.[51] That agreement must exist *before* any disclosure is made to a third party.[52] The rule does not *require* the agreement to be memorialized in a written document.[53]

Just as it is always sound practice to have a written engagement agreement to establish and clarify any attorney-client relationship, a written agreement among the client groups and their counsel is advisable and aids in proving that there is a shared legal interest.[54] Importantly, the mere existence of an agreement (even one memorialized in writing) does not alone assure protection for disclosed information and allow for unrestrained sharing.

F. Doctrine Requires Coordinated Legal Strategy

A common interest alone does not ensure that the common-interest doctrine will apply. The specific communications at issue must be designed to further the formulation of a "joint legal strategy" in order to be protected by Minnesota's articulation of the common-interest doctrine.[55]

G. Doctrine Requires Communication Be "in Furtherance of" Interest

The communications must be made "in furtherance" of a "joint legal strategy" for the common-interest doctrine to apply.[56] The common interest participants must actually be engaged in a joint legal strategy and effort to further their common legal interests.[57]

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50. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 91 cmt. b (AM. L. INST. 2000) (providing that "work product . . . may generally be disclosed" to parties "similarly aligned on . . . matter[s] of common interest").

51. *Energy Pol'y Advocs.*, 980 N.W.2d at 153.

52. *See id.*

53. *See id.*

54. *See infra* Section IV below.

55. *Energy Pol'y Advocs.*, 980 N.W.2d at 153.

56. *Id.*

57. *Id.*

H. Doctrine Requires an "Otherwise Privileged" Communication

A threshold issue for determining the applicability of the common-interest doctrine is whether there exists an otherwise applicable and underlying attorney-client privileged communication for the common-interest doctrine to apply.[58] The communication must, in the first instance, be intrinsically privileged to warrant protection.[59] A review of whom specifically is included in the communication can often be fatal, as the standard is appropriately high for communications that do not include counsel.[60]

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

I. Doctrine Requires Asserting Party to Bear Burden of Proof

The party asserting the applicability of the attorney-client privilege or common-interest doctrine bears the burden of proving its applicability.[61] That party must be able to clearly articulate the precise legal ties connecting the parties in order to successfully invoke protection and the satisfaction of all required elements. Courts will necessarily evaluate the sufficiency of any common interest claim on a case-by-case, issue-by-issue basis to determine whether the parties were allied in a common legal cause at the time the communications were made.

IV. Practical Considerations

There is often a need for lawyers to collaborate and include outside parties for the purpose of providing the client the best representation possible. The preservation of privilege to communications and work product in those circumstances can often be critical. There are a number of things that lawyers can do in an attempt to increase the likelihood that a court will uphold a claim of the common-interest privilege with respect to certain information and documents, including the following:

- Memorialize agreement between or among client groups and their legal counsel that identifies the common legal interests and sets forth their joint expectations with respect to matters such as privilege and confidentiality.

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58. *See* Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992).

59. *See id.*; *see also Energy Pol'y Advocs.*, 980 N.W.2d at 153.

60. *Energy Pol'y Advocs.*, 980 N.W.2d at 153.

61. *Id.* (citing *In re* Comm'r of Pub. Safety, 735 N.W.2d 706, 711 (Minn. 2007)). The application of the burden to the party asserting protection of the common-interest doctrine is consistent with the general rules for discovery. *Id.*

- Ensure that the attorneys in the common interest group handle all communications and take steps to avoid direct communications by clients.
- Mark documents and communications confidential or subject to the attorney-client privilege.
- Understand the requirements for the preservation of the privilege and the common-interest doctrine in the precedent-controlling jurisdiction before engaging in communications and exchanging documents in order to ensure that a full appreciation of the requirements of applicable law are taken into account.[62]

V. Implications of Minnesota Supreme Court Decision

The common-interest doctrine permits coordination of efforts by separate parties and their legal counsel, including in certain instances disclosures of communications otherwise protected due to the attorney-client privilege. The adoption by the Minnesota Supreme Court of a general rule on the common-interest doctrine and the guidance provided with respect to some of its boundaries further the public interest in the law governing the attorney-client privilege in this state. Minnesota protects legal advice and other privileged communications shared to advance a common legal interest without risking waiver of privilege.

The precise contours of the common-interest doctrine are not fully defined or settled, notwithstanding *Ellison*. Case specific issues and concerns not addressed in the decision will arise as the situations vary. A successful utilization of the common-interest doctrine requires care, preparation, and attention to detail. Lawyers need to focus on the essential elements of the doctrine in order to maximize the benefits of the attorney-client privilege.

62. The attorney-client privilege is generally a creation of state law. *See* Fed. R. Evid. 501. The requirements for the applicability of the common-interest doctrine as an extension of the privilege in various jurisdictions vary. Notably, New York requires that the communication be related to "pending or reasonably anticipated litigation" in order to be protected. *See* Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 57 N.E.3d 30, 33 (N.Y. 2016).