When Are "Joint Defense" or "Common Interest" Meetings among Corporations Privileged?

Your company is one of a group of companies in an industry that see themselves as likely targets for civil litigation from a group of rich plaintiffs' lawyers who are running low on tobacco and asbestos cases. General counsel and their outside litigators decide to meet and plan a joint strategy for the defense of the entire industry. No suits are pending yet, but you hear that the plaintiffs' bar is hiring experts and looking for good cases. If the lawyers meet, can your companies protect the fruits of these joint discussions? The answer is maybe.

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It is not unusual for meetings to be held among in-house counsel and their respective outside counsel for several corporations to devise a joint defense strategy against a common litigation threat. Despite the fact that these communications were shown to others beyond the corporate client, they have been deemed protected under the attorney-client privilege[1] and the work-product doctrine.[2] Sometimes referred to as the "joint defense privilege" or the "common legal interest" rule,[3] these arrangements are an exception to the general rule that disclosures other than those between a client and the client's lawyer waive the privilege.[4] Unfortunately, the boundaries of the joint defense privilege or common legal interest rule are hazy, and the consequences of stepping out of bounds can be severe: disclosure of highly privileged information to one's adversaries.

Where are the chalk lines? Although there is general agreement that the actual commencement of litigation is not a prerequisite to satisfy the rule,[5] there is disagreement over the critical question of the degree to which litigation must be threatened in order to invoke this rule.[6] For example, when can one who has not yet been sued reasonably "anticipate" that he or it will be sued? When a problem is discovered? When a dispute arises? When litigators are retained? Compounding that problem, when can two or more companies reasonably anticipate that they will face a common foe? Or stated differently, when does a person or entity become a "potential" defendant? As reflected in *In re Santa Fe International Corporation*,[7] the Fifth Circuit has recently limited application of this privilege by adopting a narrow construction of these terms in cases in which (1) the joint defense meetings were themselves alleged as improper and (2) the actual litigation was instituted many years after the meetings. Although the unhappy procedural posture of the case and the unique circumstances of the discussions limit the precedential effects of the decision, it should raise red flags for in-house counsel.

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Santa Fe involved a class action brought by offshore drilling workers against several offshore drilling corporations, alleging that the defendants had violated the antitrust laws by secretly meeting for a period of 10 years for the purpose of setting, stabilizing, maintaining, or limiting the wages and benefits paid to offshore drilling workers.[8] The litigation was filed in 2000 and, significantly, alleged

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that the secret "joint defense" meetings were themselves in furtherance of the antitrust claim. During the course of discovery, plaintiffs sought discovery of certain documents that had been prepared by in-house counsel for several defendants, and shared with the other defendants, that concerned certain legal issues relating to defendants' exchange of wage and benefit information. One such document was a 1991 memorandum written by defendant Santa Fe's in-house counsel. Following an adverse ruling by the trial court, Santa Fe, together with two of the other defendants, filed a motion for reconsideration,[9] claiming the protection of the common legal interest privilege. Upon denial of this motion, Santa Fe petitioned the Fifth Circuit for a writ of mandamus directing the district court to vacate its order rejecting the defendant's claim of privilege.[10]

In reviewing Santa Fe's claim in light of circuit precedent, the court reaffirmed that communications may be protected under the common legal interest privilege, not only in cases in which the communications involve codefendants in actual litigation and their counsel, but also in cases in which the communications involve potential codefendants and their counsel.[11] Because of the lack of a clear definition for the term "potential" and in light of the deference to be accorded to the truth-seeking process, however, the court held that it was required to review the issue and then construed the term narrowly.[12] The court concluded, in a two-to-one decision, that the threat of litigation must constitute a "palpable" threat at the time of the communication and not "a mere awareness that one's questionable conduct might some day result in litigation."[13] In view of the vintage of the communication (1991) in relation to the timing of the litigation (2000) and because of the absence of any evidence of a common defense agreement,[14] the court held that the trial court had not clearly erred in finding that the common legal interest privilege was inapplicable:

> Here, the lack of any temporal connection to actual or threatened litigation is striking . . . . [W]hen the threat of litigation is merely a thought rather than a palpable reality, the joint discussion is more properly characterized as a common business undertaking, which is unprivileged, and certainly not a common legal interest. There is no justification within the reasonable bounds of the attorney-client privilege for horizontal competitors to exchange legal information, which allegedly contains confidences, in the absence of an actual, or imminent, or at least directly foreseeable, lawsuit.[15]

Although not a focus of the analysis, the fact that the "joint defense" discussions themselves were alleged to be a part of the antitrust agreement no doubt also affected the court's view. This case thus differs from the typical joint defense arrangement in which potential defendants meet to discuss their proposed litigation response to a separate and prior loss-causing event. Perhaps the most damning analysis was the court's rejection of Santa Fe's characterization of the purpose of the documents:

> In the present case, Santa Fe admits . . . that the communications it claims are protected were not made in anticipation of future litigation. Instead, those documents were "circulated for the purpose of ensuring compliance with antitrust laws and minimizing any potential risk associated with the exchange of wage and

benefit information." . . . In sharing the communications, therefore, they sought to avoid conduct that might lead to litigation. They were not preparing for future litigation . . . .[16]

Santa Fe is one of a number of decisions that have articulated a wide spectrum of standards. Courts have required a "strong possibility"[17] or a "reasonable foreseeability" of future litigation.[18] In other jurisdictions, however, impending litigation is not determinative of whether certain communications are protected by the privilege.[19] Instead, the focus in those jurisdictions centers on the "actual or potential identity of interest which the parties share."[20] Under this view, legal advice that is shared among those having a common legal interest[21] in the advice constitutes protected information, whether the parties contemplate litigation or are attempting to avoid litigation.[22] More importantly, however, the modern corporation can now be sued literally anywhere in America, so there is no way even to predict which circuit's rule will be applicable.

This fact counsels a prudent lawyer to be prepared to meet the most stringent standard or to face the risk of a devastating disclosure. For this reason, before engaging in intercorporate meetings for the purpose of devising a common defense strategy, counsel should take certain precautions:

- Review the standards on joint defense or common interest protection in the jurisdictions in which litigation is most likely to occur and make certain to satisfy those standards.
- Enter into a written joint defense or common interest agreement that recites certain specific litigation or threat of litigation as anticipated. Check with securities counsel before doing so, however, because disclosure issues may arise from overzealous descriptions of the imminence or nature of potential litigation.
- Keep the group of potential defendants as small as possible, and never include any party that has a reasonable likelihood of being adverse in litigation.
- Assume that the protection will fail and that any document exchanged (and possibly any on the topic) will lose its privilege protection. Draft documents with the assumption that the protections will not work. Minimizing all written exchanges and prohibiting the participants from retaining notes or making memoranda of the oral discussions are ideal, but lawyers may not be able to control their memo-writing and note-taking urges.

NOTES

1. *See* Travelers Cas. and Sur. Co. v. Excess Ins. Co., Ltd., 197 F.R.D. 601, 606 (S.D. Ohio 2000) (noting how "numerous courts throughout the United States" have recognized this application of the attorney-client privilege).
2. *See* Western Fuels Ass'n, Inc. v. Burlington Northern R.R. Co., 102 F.R.D. 201, 203 (D. Wy. 1984) (expanding application of attorney-client and work-product privileges to communications arising during course of joint defense efforts).
3. *See* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:35 (2d ed. 1999). In order to qualify for this privilege, the party seeking its benefit must establish that the communications were made in the course of a joint defense effort or enterprise and were designed to further that effort and that the privilege has not been waived. Matter of Bevill, Bresler & Schulman, 805 F.2d 120, 125 (3d Cir. 1986).
4. Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995).
5. *See United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) (where a joint defense strategy has been undertaken, communications made in furtherance of this strategy are privileged regardless of whether litigation has been commenced against the parties or not); Griffith v. Davis, 161 F.R.D. at 692; *see also* In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990) (stating that "whether the 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").
6. Travelers Cas. and Sur. Co. v. Excess Ins. Co., Ltd., 197 F.R.D. at 606.
7. 272 F.3d 705 (5th Cir. 2001).
8. *Id*. at 706–707.
9. The trial court's initial ruling was made at a discovery hearing requested by one of the other defendants for the purpose of scheduling certain depositions. Counsel for defendant Santa Fe was not present. No motion to compel production had been filed by plaintiffs before the hearing, and no notice had been given that plaintiffs would request or that the court would rule on this issue. Even though Santa Fe's counsel was not present, the Fifth Circuit noted that counsel's absence did not preclude the trial court from making its ruling because counsel for the other defendant was "evidently speaking for all of the defendants." *Id*. at 707–708.
10. Only Santa Fe's claim of privilege with respect to its 1991 memorandum was before the court. *Id*. at 706.
11. *Id*. at 710.
12. *Id*.
13. *Id*. at 711.
14. *See id*. at 709, note 5. The court notes that in its motion for reconsideration, Santa Fe admitted that the document was not made in anticipation of future litigation, but instead was circulated to ensure compliance with the antitrust laws and to minimize any potential risk posed by the exchange of wage and benefit information—that is, defendant intended "to avoid conduct that might lead to litigation." *Id.* at 713. As discussed *infra*, some courts recognize that joint efforts to avoid litigation may fall within the privilege.

15. *Id*. at 714 (quoting from the district court's response to defendants' motion for reconsideration). As noted in note 9, *supra*, and as pointed out in the dissent, the absence of evidence in support of the privilege can be explained by the fact that plaintiffs raised the issue of the document's production at a hearing called for another purpose without notice to defendants of their intent to do so and that Santa Fe was not represented by its counsel at the hearing.
16. *Id*. at 713 (internal references removed).
17. *See, e.g.*, Travelers Cas. and Sur. Co. v. Excess Ins. Co., Ltd., 197 F.R.D. at 606 (joint defense privilege requires the existence of a strong possibility of litigation at the time of consultation).
18. *See* Royal Surplus Lines Ins. v. Sofamor Danek Group, 190 F.R.D. 463, 472; *see also* Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841, 845 (N.D. Ill. 1988) ("[t]he privilege arises out of a need for a common defense, as opposed merely to a common problem"). In Travelers Cas. and Sur. Co. v. Excess Ins. Co., Ltd., the court recognized that there was not an "absolute congruence in litigation" involving the members of a reinsurance group formed to discuss and exchange legal advice about reinsurance claims related to certain pollution claims, but found that the joint defense or common interest privilege was applicable because the members "reasonably anticipated involvement in litigation" in which those common issues would arise. 197 F.R.D. at 607.
19. *See* Baxter Travenol Labs., Inc. v. Abbott Labs., 1987 WL 12919 (N.D. Ill. 1987); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn.), *app. dism'd*, 534 F.2d 1031 (2d Cir. 1976).
20. Royal Surplus Lines Ins. v. Sofamor Danek Group, 190 F.R.D. at 472.
21. Where the imminence of litigation is not the focus, the legal interest shared by the parties seeking protection of the communications must be identical. SCM Corp. v. Xerox Corp., 70 F.R.D. at 514.
22. *Id*. at 513 (noting that "corporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it").