

Represent Multiple Clients? Not So Fast

BY AARON J. SCHECHTER

Attorneys representing multiple clients in one matter can find themselves in trouble if they fail to assess the risks of multiple-client representation before sharing their communications among these multiple clients. This article introduces two doctrines that can extend the attorney-client privilege – the common-interest doctrine and the joint-client privilege, and then explains why an attorney representing multiple clients in connection with one matter cannot necessarily rely on the benefits of the attorney-client privilege to facilitate communication among the clients. Indeed, if an attorney proceeds under the mistaken assumption that communications among multiple clients are shielded by the attorney-client privilege, he may face the reality that a court will compel the clients to reveal them.

In New York, the attorney-client privilege is triggered either (1) when communications are made by the client “for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose,” or (2) when communications are made from attorney to client “for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.” *Rossi v. Blue Cross & Blue Shield of Greater New York*, 73 NY2d 588, 510-11 (1989). When such communications involve multiple lawyers and/or multiple clients, the attorney-client privilege may be extended under two distinct – and frequently misunderstood – doctrines.

First, the “common-interest doctrine” (sometimes referred to as the “allied lawyer privilege”) can extend the attorney-client privilege when multiple parties represented by different lawyers are mounting a joint defense or engaged in a common legal enterprise. *See, e.g., People v. Osorio*, 75 N.Y.2d 80, 84-85 (1989). Second, the “joint-client privilege” can extend the attorney-client privilege “when the same attorney acts for two parties having a common interest.” *See, e.g., Wallace v. Wallace*, 216 N.Y. 28 (1915).

The common-interest doctrine requires a common interest among parties by its very name, but the joint-client privilege similarly presupposes the existence of a common interest between joint clients of the same lawyer. *E.g., Wallace*, (“[W]hen the same attorney acts for two parties having a common interest, and each party communicates with him[,] the communications are clearly privileged.”); *Rudow v. Cohen*, 1988 WL 13746, at *3 (S.D.N.Y. Feb. 18, 1988) (holding that the attorney-client privilege shields communications that are made in the course of the attorney’s joint representation of a common interest between the two parties). Thus, to invoke either the common-interest doctrine or the joint-client privilege, the parties must have “an identical legal interest with respect to the subject matter of a communication.” *Durham Indus., Inc. v. North River Ins. Co.*, 1980 WL 112701, at *2 (S.D.N.Y. Nov. 21, 1980).

Because the joint-client privilege is triggered only when an attorney’s multiple clients share a common legal interest, an attorney representing multiple clients in one matter should carefully assess the circumstances of the representation before sharing either client’s communications with the other, or communicating at the same time with more than one such client. By way of example – most attorneys will easily recognize that when they represent A and B on entirely different matters, their attorney-client

communications with A cannot be shared with B (and vice versa), nor can there be a joint meeting among the lawyer and A and B. But the same result can occur even when he represents A and B in the same matter, because the simultaneous representation of two separate clients in the same matter does not automatically give rise to the joint-client privilege. Before sharing communications between A and B, or conducting a joint meeting with A and B, the attorney must determine that A and B share a common legal interest with regard to the representation.

The lawyer's inquiry becomes particularly acute when he represents a party to a lawsuit and also undertakes to represent a "friendly" witness in the same matter. In these circumstances, New York law makes clear that a witness who "is not a party to [the] litigation, and [whose] legal position will be unaffected by the outcome of th[e] case" cannot have a "common interest" with the litigant. See *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 2002 WL 1334821, at *4 (S.D.N.Y. June 19, 2002); see also *Bass Public Ltd. v. Promus Cos.*, 868 F. Supp. 615, 621 (S.D.N.Y. 1994), which found no joint attorney-client privilege between two clients of a law firm because the clients "were never co-defendants in [the] action and there [was] no evidence that any of the parties anticipated that they would become co-defendants in subsequent litigation").

"...[s]haring a desire to succeed in an action does not create a 'common interest.'" *SR Int'l Bus. Ins. Co.*, 2002 WL 1334821, at *4 (quoting *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999)); see also *Yemini v. Goldberg*, 821 N.Y.S.2d 384, 387 (Sup. Ct. 2006) (holding that a non-party fact witness did not have a "common legal interest" with the litigant because his "interest in the outcome . . . can only be viewed as personal or business oriented").

In a recent decision addressing these principles, a federal judge ruled that the joint-client privilege did not apply to a witness preparation meeting attended by (1) a New York State Trooper who was the sole defendant in a Section 1983 case, (2) the Assistant Attorney general representing the defendant, and (3) four current or former New York State Troopers who were non-party witnesses and received representation from the same Assistant Attorney general in connection with their testimony. *Smith v. Anthony*, Civ. no. 95-8374, D.i. 77 (S.D.N.Y. Feb. 21, 2008) (Batts, J.). (Kirkland & Ellis represents Plaintiff Steven Smith in this action.)

The meeting in *Smith* occurred shortly before the depositions of the four non-party witnesses. At their depositions, these witnesses followed counsel's instructions not to testify about the meeting on the grounds of attorney-client privilege. *Id.* The plaintiff challenged the privilege, and the Assistant Attorney general submitted that the meeting was privileged because the witnesses were "non-adverse witnesses employed at the time of the incident by the New York State Police." *Id.* In response, the plaintiff argued that the joint-client privilege did not arise simply because there was a lack of adversity between the defendant and the witnesses, but required the showing of a common legal interest between them. Indeed, the non-party trooper witnesses had never been parties to the action, had no chance of being held liable for the incident that led to the action, and would have been wholly unaffected by the outcome of the action. *Id.*

The Court concluded that the circumstances did not provide any basis for a privilege assertion, thereby overruling the Assistant Attorney general's privilege instruction and requiring the non-party witnesses to sit for continued depositions concerning communications during what was intended to be a privileged meeting. *Id.* As this decision illustrates, an attorney for a litigant who also chooses to represent a witness

for his client must be particularly careful when speaking jointly to his multiple clients, and should never assume that the joint-client privilege is automatically triggered because they are all his clients.

It is important to note that these privilege issues regarding witness representation give rise to different complexities when an attorney represents business entities rather than individuals. In the corporate representation context, the client is the corporate entity itself, and the attorney-client privilege is sometimes extended all the way down to the attorney's "communications with low- and mid-level employees." *See, e.g., Niesig v. Team I*, 76 N.Y.2d 363, 371 (1990). Moreover, the corporate entity's attorney-client privilege may cover former employees with respect to attorney-client communications that took place during the time of employment. *See, e.g., Radovic v. City of New York*, 642 N.Y.S.2d 1015 (Sup. Ct. 1996). Given these principles, an attorney who normally represents corporate entities — and is used to facilitating privileged communications between and among many individuals — must be particularly mindful of the joint-client privilege's common-interest requirement when representing individual clients.

In light of the willingness of some courts to invalidate assertions of the joint-client privilege, an attorney seeking to facilitate communications between clients should first ascertain the nature and scope of the common interest (if any) between those clients. If in doubt as to whether a joint client privilege can exist, the attorney should err on the side of separately communicating with each client and not sharing one client's privileged communications with the other client. The fact that New York's Disciplinary Rule 5-105 allows simultaneous representation of multiple clients does not provide the attorney with automatic license to share the privileged communication of one client with other clients.

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