PROTECTING ATTORNEY CLIENT PRIVILEGE WHEN THE THREAT OF LITIGATION ARISES

By: Brendan Collins

One of the primary purposes of trade associations is for member entities to share information about common issues and problems that confront the industry or profession. Often the problems and issues raise legal concerns. These may include litigation involving individual members, which could affect the industry or profession as a whole. The types of legal problems may be diverse, ranging from labor disputes to regulatory obligations.

Thorny issues often arise, however, as to when information that is shared among association members is entitled to protection from disclosure on attorney-client privilege grounds. The extent to which such communications may be protected is uncertain because courts have reached starkly different conclusions as to the scope of the privilege. While some courts afford protection from disclosure of communications any time that parties sharing confidential information have a common interest in a legal question, other courts have limited the privilege to instances when there is a palpable threat of litigation at the time of the communication. Even under the more relaxed standards, courts will be more likely to apply the privilege if the party to whom the disclosure is made faces identifiable risks associated with the legal issue presented.

Regardless of which standard is applied, if a decision is made to share otherwise privileged information, association members should execute a joint defense agreement before making such disclosures. The need for this is pronounced for trade associations because, as a general rule, a lawyer who represents a trade association is deemed to represent the association and not its members or constituents. Thus, in the absence of a written joint defense agreement, a member's confidential communications may be disclosed if the association decides to waive the attorney-client privilege. In order for a member to protect against such a disclosure, a joint defense agreement should articulate the nature of the communications being protected and the fact that they are being shared so as to protect a common legal interest.

Joint Defense Privilege

The joint defense privilege, often referred to as the common interest rule, is an extension of the attorney-client privilege which protects against forced disclosure communications between two or more parties if they are participating in a joint defense agreement.[i] The rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work product doctrine.[ii]

Traditionally, in order for the joint defense or common interest privilege to apply, it must not only satisfy the requisites for attorney-client communications or work product, it must also be disclosed pursuant to a common legal interest and be pursuant to an agreement to pursue a joint defense.[iii] Although an oral agreement whose existence,

terms and scope are proved by the party asserting it is enforceable, a written agreement is the most effective method of establishing the existence of a joint defense agreement.[iv]

A party seeking to claim the joint defense or common interest privilege not only must prove the existence and the scope of the agreement, it also must demonstrate that the specific communications at issue were designed to facilitate a common legal interest; a business or commercial interest will not suffice.[v] The joint defense privilege thus requires evidence of a "coordinated legal strategy" between two or more parties.[vi]

In construing whether the joint agreement protects specific communications, courts have frequently addressed the question of whether litigation must be in existence or pending in order for the joint defense or common interest privilege to apply. While courts almost uniformly have held that there need not be actual litigation in progress for the common interest rule to apply, they have sharply diverged on the question of whether litigation must be pending or foreseeable in order for the privilege to govern. On one side of the divide is the Fifth Circuit's decision in *In re Santa Fe International Corp.*, 272 F.3d 705, 711 (5th Cir. 2001), where the court noted that because the attorney-client privilege is an "obstacle to truth seeking," it must be construed narrowly. Accordingly, the *Santa Fe* court held that there must be a "palpable threat of litigation at the time of the communication rather than a mere awareness that one's questionable conduct might some day result in litigation, before communications between one possible future co-defendant and another . . . could qualify for protection." *Id*. at 711.[vii]

In sharp contrast to those decisions, the Seventh Circuit in *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007), noted that the weight of authority supported its holding that communications need not be made in anticipation of litigation to fall within the common interest privilege. Thus, enforcing the attorney-client privilege encourages parties with a shared legal interest to seek legal assistance and to plan accordingly. Likewise, in *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996), the Fourth Circuit recognized that it was not necessary for litigation to be in progress for the common interest privilege to apply. The court, nonetheless, refused to apply the privilege because there was no evidence that the party to whom the confidential disclosure had been made had a sufficient legal interest in the matter to warrant application of the privilege. *Id*. at 1392.

Conclusion

Courts have expressed widely divergent views as to whether there must be an imminent risk of litigation before a joint defense or common interest privilege will apply. The trend appears to be in favor of recognizing the privilege even absent a risk of litigation, but that holding is far from uniform. Even those courts taking a more liberal approach may require a showing that the party to whom the disclosure is made has a sufficient, concrete, legal interest in the legal issue presented to justify protection of otherwise discoverable information. Thus, association members may want to limit their sharing of otherwise privileged information to instances in which the "common interest" of the membership is strong and there is a likelihood that the party to whom the

disclosure is made could face legal consequences related to the subject matter of the disclosure.

In the event that a decision is made to share otherwise privileged information among association members, the members should execute a joint defense agreement before doing so. Such agreements should spell out the nature of the communications being protected and the fact that they are being shared to protect a common legal interest.

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i *United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C. 2000).

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

iii *Minebea Co. Ltd., v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005).

iv *United States v. Hsia*, 81 F. Supp 2d at 17.

v *Bank Brussels Lambert, v. Credit Lyonnais (Suisse), S.A.*, 160 F.R.D. 437, 447 (S.D. N.Y. 1995).

vi *Shamis v. Ambassador Factors Corp*., 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999).

vii *See also Aetna Cas. and Surety Co. v. Certain Underwriters at Lloyd's London*, 176 Misc. 2d 605, 612 (Sup. Ct. N.Y. 1998), *aff'd* 263 A.D.2d 367 (1st Dep't 1999); *Bank of America v. Terra Nova Lines, Co.*, 211 F. Supp. 2d 493, 497-98 (S.D.N.Y. 2002); *In re Megan-Racine Associates, Inc*., 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995).