

Joint-Defense and Common-Interest Agreements in Government Investigations: Best Practices for In-House Counsel to Retain Privilege and Develop Legal Strategies

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Introduction Your company is under investigation by the government. As part of the investigation, the government subpoenaed an employee for testimony. The employee retained a lawyer (separate from your company's outside counsel) and decided to talk to the government under the terms of a proffer agreement. To prepare for the interview, the employee and her counsel contact your outside legal counsel and ask them to provide the government's current theories of liability, key documents prioritized by the government, potential defenses, and the main areas of liability identified by the company. It is often advantageous when counsel for the company and counsel for employees coordinate their efforts and share information, including attorney-client privileged communications, during government investigations. However, this coordination and information sharing presents a significant risk — the possible waiver of the attorney-client privilege and work product protection. Any such waiver could extend not only to the communications disclosed but also to all privileged communications on the same subject matter. The common-interest doctrine provides an exception to the waiver rule. To mitigate the risk of a waiver, parties intending to invoke the common-interest doctrine often enter into a written "joint defense" or "common interest" agreement. **The Common-Interest Doctrine** The common-interest doctrine is an extension of the attorney-client privilege and work product doctrine. It is not a separate privilege and does not create an independent protection for documents or information not otherwise protected. Typically, the doctrine allows a defendant to assert the attorney-client privilege to protect statements made in confidence not only to his own

lawyer but also to an attorney for a co-defendant for a common purpose related to the defense of both. The doctrine protects only those communications made in the course of an ongoing common interest and intended to further that interest. To maintain the privilege, the common interest must relate to a specific litigation, anticipated litigation, or a legal interest, rather than a business, commercial, or financial interest. Although the common-interest doctrine initially protected only communications between co-defendants in criminal cases, it now covers additional scenarios involving multiple parties with a common defense or claim. Courts have broadly construed the term “co-defendants,” extending the doctrine to civil co-defendants, companies representatives summoned before a grand jury, potential co-parties to anticipated litigation, and civil defendants sued in separate actions. **Joint-Defense or Common-Interest Agreements** Given the broadened construction of the doctrine, courts refuse to recognize a common-interest agreement unless the parties objectively agree to pursue a joint legal strategy. One party’s mere impression that other parties have, should, or will join forces does not support the inference that the parties have entered a common-interest agreement. Although a common-interest agreement can be oral, reducing any such agreement to writing is often best practice. A written agreement provides strong evidence that the parties operated jointly and communicated in the course of a common legal effort. It can include provisions outlining the process for adding and removing parties, as well as provide for the return of privileged materials and for the continuation of the parties’ obligation to keep any information received confidential after the conclusion of the litigation or other common legal interest. **Privilege Waiver by Common-Interest Members** The obvious risk of disclosing privileged materials through a common-interest agreement is the possibility of waiving the privilege. If the common-interest doctrine does not apply, the parties likely waived the underlying attorney-client privilege of shared communications. If the common-interest doctrine applies, however, courts in the Eleventh Circuit agree that one member of a common-interest group cannot waive another member’s privilege without the consent of that member. By agreeing to be a part of a joint defense, members agree not to disclose anything learned from the other members through that joint arrangement. In some jurisdictions, the common-interest agreement itself is not considered privileged. Courts in the Eleventh Circuit, however, have denied motions to compel the production of joint-defense and common-interest agreements, finding that the agreement was prepared in anticipation of litigation and protected as work product. *See, e.g., ADP, LLC v. Ultimate Software Grp., Inc.*, 2017 WL 7794226, at *2 (S.D. Fla. Dec. 15, 2017). **Practice Pointers** Best practices for entering and maintaining common-interest agreements include:

- Carefully consider the commonality of the parties’ legal interests, or lack thereof, before sharing information. Although members’ interests need not be identical, they should align with a common legal strategy. In the government investigation context, the likelihood that a party may have divergent legal interests — such as cooperating with the government against another party — should be thoroughly analyzed before entering an agreement.

- Establish a common-interest agreement before sharing information. Both sides must agree that they are entering into a common-interest relationship. For the greatest protection, the agreement should eventually be reduced to writing.
- Document that the information shared is pursuant to a common-interest agreement and include the parties' expectation that their communications or other shared materials are confidential and privileged.
- When claiming that the doctrine applies to prevent testimony or production of documents, ensure that an underlying privilege — such as the attorney-client privilege or work product protection — applies to the requested testimony or documents.

Conclusion Returning to the above example, would you allow your outside counsel to share information with counsel for the employee? Would your decision change if the government subpoenaed *documents* from the employee rather than *testimony* pursuant to the terms of a proffer agreement? Would your decision depend on the subject matter of the investigation? Before entering into a common-interest agreement and disclosing confidential information to other members, carefully analyze all pending theories of liability, as well as the available defenses, and determine whether divergent interests exist or are likely to develop over the course of the investigation. If the likelihood of divergent interests is high, refrain from entering into the agreement or narrow the agreement's scope to ensure that it only applies to aligned interests. If you enter into an agreement, remain vigilant about protecting privileged communications and protected work product by marking it as such and requesting confidential treatment of it. In the example above, the prospect of employee testimony under a proffer agreement that could afford the employee credit for cooperating against the company, or immunity for the same, should be carefully weighed. The interests of the two parties may not sufficiently align to exchange privileged or protected information without a heightened waiver risk.

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