

BE CERTAIN YOUR COMMUNICATIONS REMAIN CONFIDENTIAL: INVOKING THE COMMON INTEREST PRIVILEGE

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Confidential information that you share only with your attorney in connection with legal services is protected by the attorney-client privilege. Your attorney may not reveal the privileged information, nor can a court compel the attorney to disclose this information.

When you find yourself in complex litigation, involving a combination of parties with variously aligned interests, an early concern is knowing with whom you can share information and maintain the privileged nature of the communication. Disclosing information to the wrong person can destroy your right to keep that information out of court. Under limited circumstances, sharing information among parties in civil suits with similar interests is permitted. You take precautions, however, before sharing communications.

In 1992, the Pennsylvania Superior Court, for the first time, extended the attorney-client privilege to include communications among multiple criminal defendants and their separate attorneys as part of a joint defense. The same reasoning has since been applied in civil cases allowing parties (whether plaintiffs or defendants) with similar interests to share information between themselves and their respective counsel without waiving the privilege that protects the information from discovery. This has been referred to as "the common interest privilege."

It was not until July 2009, however, that any Pennsylvania appellate court addressed the applicability of the joint defense/common interest privilege in a civil case. In *In Re: Condemnation by the City of Philadelphia*, 981 A.2d 391, 398 (Pa. Commw. 2009), the Pennsylvania Commonwealth Court held that a common financial interest among parties in the outcome of a legal proceeding is insufficient to establish a common legal interest for purposes of the common interest privilege. In the proceeding, the City of Philadelphia attempted to invoke the common interest privilege to protect its communications with the Philadelphia Redevelopment Authority ("RDA"). The City and the RDA were actually adverse parties to one another in the case. However, the entities shared a desire to reduce the financial obligation each owed to another party, a commercial developer. To facilitate this outcome, the City and the RDA had orally agreed to share otherwise privileged information. The RDA was also in the midst of a related action by the commercial developer for breaching a purchase agreement for the parcel at issue.

The Commonwealth Court held that no common interest privilege existed between the City and the RDA. The Court was not convinced that the mutual desire of the City and the RDA to reduce each entity's respective financial obligation to the commercial developer was a common legal interest for purposes of the common interest privilege. The Court emphasized that the application of the common interest privilege requires a common legal interest in the outcome of the legal proceedings in which the privilege is being invoked, not just a desire for some mutually beneficial outcome to result.

The Court also mentioned, but did not decide, two related issues. The trial court had ruled that the common interest privilege requires the parties' interests not only to be legal in nature, but also to be identical and to be memorialized in a written agreement. On appeal, the Commonwealth Court determined it need not review whether the asserted interest must be identical or the agreement confirmed in writing because it found no interest existed in the first place. Thus, it remains

unclear in Pennsylvania whether parties must have identical interests to invoke the privilege or whether a written agreement is necessary to confirm the decision to share information.

How can you protect your communication with parties with similar interests in litigation? First, never share information with other parties without first scrutinizing the nature of your relationship or without considering whether a written common interest agreement is appropriate. Second, you must closely evaluate the particular nature of the interest you share with the other party. A mere common business or financial interest in the outcome of a proceeding is insufficient to invoke the privilege. Finally, if you feel you do share a common legal interest with another party, you should strongly consider a written agreement to confirm your understanding with the other party.

If you have any questions regarding the common interest privilege, the Litigation attorneys at McNees Wallace & Nurick are here to assist you.

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