Considerations for Sharing Information Between Partners

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***Privilege Alert*:** *While representing a client, you may need to communicate with third parties to facilitate the provision of legal services for your client. If your jurisdiction recognizes the common interest privilege, consider whether to document the intention to engage in common interest communications with those third parties. If you don't know whether your jurisdiction recognizes a common interest privilege or you don't know the requirements for the privilege, it is prudent to research and analyze the issue. This is a sample memo analyzing the common interest privilege in Oregon.*

MEMORANDUM

TO: File

FROM: NCVLI

RE: Common Interest Privilege in Oregon

DATE: July 2017

INTRODUCTION

The attorney-client privilege is a staple of evidentiary law in Oregon. *See* Or. Rev. Stat. Ann. § 40.225, Or. R. Rev. Rule 503 (defining attorney-client privilege); *Frease v. Glazer*, 4 P.3d 56, 60 (Or. 2000) (en banc) ("The attorney-client privilege is one of the oldest and most widely-recognized evidentiary privileges.").

Generally, the attorney-client privilege is waived when privileged communications are disclosed to a third party. However, if certain factors are met, an exception exists when otherwise privileged communications are shared among those with a common interest. *See* Or. Rev. Stat. Ann. § 40.225, Or. R. Rev. Rule 503(2)(c) (extending the privilege to communications to certain third parties if "made for the purpose of facilitating the rendition of professional legal services to the client," including communications made by the client or the client's lawyer to "a lawyer representing another in a matter of common interest"). This aspect of attorney-client privilege is often called the "common interest doctrine" or "joint defense" privilege.

The common interest doctrine has been recognized by the Oregon appellate court, but only recently, and the Oregon Supreme Court has not yet weighed in on it. *See Port or Portland v. Oregon Center for Environmental Health*, 243 P3d 102 (Or Ct. App. 2010) (review denied).

The goals of the common interest doctrine are consistent with the overarching goals of the attorney-client privilege: They are both meant to encourage the free-flow of information and enhance the quality of legal advice. Katharine Taylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49 (2005) (*citing Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

Oregon courts have found that application of the common interest doctrine hinges on three findings, which are consistent with the text of Rule 503. First, the communication must be confidential. Second, the communication must be made for the purpose of facilitating the rendition of professional legal services to the client. And third, the communication must have been made between persons or entities set forth in Or. R. Rev. 503(b), including those engaged in a common interest. *Oregon Health Science University v. Haas*, 949 P.2d 261, 266 (Or. 1997) (*citing State v. Jancsek* 730 P.2d 14, 17 (Or. 1986)); *Port of Portland*, 243 P.3d at 107 (citing 1981 Conference Committee Commentary).

These elements are discussed in turn below.

ANALYSIS

I. Factors in Recognizing the Common Interest Doctrine

A. "Confidential Communication"

A "confidential communication" is defined by statute as "a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Or. Rev. Stat. Ann. § 40.225, Or. R. Rev. Rule 503(1)(b).

1981 Conference Committee Commentary to this rule clarifies that a confidential communication is defined in terms of "intent." The default assumption is that communications are intended to be kept confidential. "Unless an intent to disclose is apparent, however, the attorney-client communication is confidential." Or. Rev. Stat. Ann. § 40.225 1981 Conference Committee Commentary, *citing Bryant v. Dukehart*, 210 P. 454 (Or. 1922).

The question of intent is a fact-specific inquiry which must be "inferred from the circumstances, e.g., taking or failing to take precautions." Or. Rev. Stat. Ann. § 40.225 1981 Conference Committee Commentary; *see also State v. Ogle*, 682 P.2d 267, 268 (Or. 1984) ("The application of the privilege hinges on both the intent of the parties to shield the communication from disclosure and the purpose for which the communication is made.").

Even if a court finds that a common interest exists, the communications made within that common interest still must meet the confidentiality test. *See generally United States v. BDO Seidman, LLP*, 492 F.3d 806, 815-16 (7th Cir. 2007) (noting that the doctrine applies to communications that would be otherwise protected by the attorney-client privilege, and for that reason "the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise"); *Common*

Interest In General, 1 Testimonial Privileges § 1:103 (3d ed.) ("These common interest extensions of the privilege do not themselves confer privileged status to any of the communications involved. Instead, they merely allow communications which are already privileged to be shared among commonly interested parties without causing waiver: the communications themselves must independently satisfy the elements of privilege.").

B. "Made for the Purpose of Facilitating the Rendition of Professional Legal Services"

Oregon statute makes clear that some disclosure to third parties beyond the attorney and client is permissible. Or. Rev. Stat. Ann. § 40.225, Or. R. Rev. Rule 503(1)(b) (attaching the privilege to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," and listing the types of individuals and entities to whom disclosures can be made).

The Oregon Supreme Court recognized that a communication is made for the purpose of facilitating the rendition of legal services if it makes it easier for an entity to make use of legal advice or legal services. *Haas*, 942 P.2d at 266-67. In this case, the court determined that a lawyer who conducted an internal investigation concerning a client's potential legal liability, provided the client with a written report on the results of that investigation, and advised the client on ways to resolve problems uncovered in the investigations had rendered professional legal services to the client. The court also concluded that a statement made by a faculty member to other employees about the report that resulted from the investigation was protected by the attorney-client privilege because it was necessary to inform some individual employees of the content of the legal advice so that the employees could aid in carrying it out. *Id.*

Litigation need not be pending in order for legal services to be deemed rendered. "[T]he rendition of legal service or advice under any circumstances suffices." Or. Rev. Stat. Ann. § 40.225 1981 Conference Committee Commentary (citing *Bryant v. Dukehart*, 210 P. 454 (1922)). This interpretation of the rendition of legal services holds true in common interest doctrine cases as well. *See Port of Portland*, 243 P.3d at 105 (finding a joint defense agreement to be protected by the attorney client privilege, although no litigation was currently underway, when future litigation was contemplated); *see also United States v. Gonzales*, 669 F.3d 974, 978 (9th Cir. 2012) (noting that the doctrine "has not been limited to criminal defense situations, or even situations in which litigation has commenced").

Additionally, the privileged information need not be legal advice. Rather, the rule requires only that the communication be made for the purpose of facilitating the rendition of professional legal services. *Port of Portland*, 243 P.3d at 108.

C. Among Parties with a Common Interest

When information is exchanged between those with a common interest, the relationship between those individuals must be cooperative. That means that the interest between parties "must be shared, but not necessarily identical." *Port of Portland*, 243 P.3d at 109.

Oregon case law has found that for the common interest doctrine to apply, parties must be working together, not on an adversarial basis. However, "even if there are some adversarial aspects to a relationship between the parties, the privilege can apply as long as there is a common interest promoted by joint consultation. Some adversity is acceptable, but the key is that the communication furthers a common interest." *Id.* (finding there to be a common interest between parties where they shared common interests and adversaries in anticipated litigation).

While the common interest doctrine is often interchangeably called the joint defense privilege, it is important to note that the doctrine is not limited to defendants or potential defendants in a case. *See United States v. Gonzalez*, 669 F.3d 974, 948 (9th Cir. 2012) ("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: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.") (citing *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)).

II. Making it More Likely Courts Will Recognize a Common Interest

There is no requirement that there be a written joint defense agreement setting forth the expectation of confidentiality in furtherance of a common interest for the privilege to be recognized. *See e.g., Gonzalez*, 669 F.3d at 979 ("[I]t is clear that no written agreement is required, and that a JDA may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation."); *Avocent Redmond Corp. v. Rose Elecs., Inc.*, 516 F. Supp. 2d 1199, 1203 (W.D. Wash. 2007) (stating that "a written agreement is not required" to invoke the joint defense privilege).

However, it is best practice, when entering into a common interest relationship, to document its existence and the intention of keeping communications confidential. *Port of Portland*, 243 P.3d at 107 (finding intent to keep information privileged was shown where agreement made clear that the group intended to keep confidential the agreement's terms and information gathered pursuant to those terms, and disclosure was limited to those necessary after receiving a separate written confidentiality agreement); *see also* Michael J. Newman and Trevor E. Gillette, *The Common Interest Doctrine: Ensuring Privileged Communications*, 52 No. 4 DRI For Def. 68 (2010) ("[W]hile the doctrine is not dependent on any written agreement, it is always best to memorialize any such situation in writing, so as to strengthen one's argument that the attorney-client privilege is still in full force.").

CONCLUSION

The common interest doctrine exists in Oregon, although its interpretation in Oregon courts is still limited. Under the doctrine, otherwise privileged communications, when communicated to third parties with a common interest, remain privileged. Although not necessary, it is best practice to memorialize a common interest with an agreement setting forth the existence of a common interest, and the intention of keeping communications confidential.