Minnesota Supreme Court Recognizes Common-Interest Doctrine

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On September 28, 2022, the Minnesota Supreme Court formally recognized the common-interest doctrine for privileged communications, confirming what many attorneys in Minnesota had already believed to apply in the state. The Court's decision in *Energy Policy Advocates v. Ellison*, No. A20-1344, 2022 WL 4488489, reverses a ruling by the Court of Appeals that suggested the doctrine does not apply in Minnesota, and it provides comfort for attorneys that may need to collaborate with other lawyers and their clients or insurers concerning shared legal interests.

Common-Interest Doctrine

The Common-Interest Doctrine is not itself a substantive privilege protecting certain communications but is instead understood to be an extension of the attorney-client privilege. Confidential communications between attorneys and their clients regarding legal advice are privileged under Minnesota statute, court rules, and the common law. But that privilege can be waived when those confidential communications are disclosed to a third party. The common-interest doctrine provides a general exception to that waiver rule.

Although specifics can vary from jurisdiction to jurisdiction, the common-interest doctrine generally permits parties with a common legal interest to share documents and communications without losing the protection of the attorney-client privilege, or in some cases, work-product privilege as well. Such protections are often necessary for attorneys that hope to collaborate with other parties — whether it is in investigation and fact discovery, planning litigation strategy, coordinating between an insured and its insurer, or engaging in frank settlement discussions to resolve a dispute.

Most jurisdictions have adopted the common-interest doctrine, either formally by statute or through the development of the common law. Federal courts including the District of Minnesota and the Eighth Circuit also apply the doctrine.

Although there was little development of the doctrine in Minnesota state courts, many Minnesota attorneys took for granted that the common-interest doctrine would apply when they collaborated with lawyers representing other parties who share a common legal interest. The Minnesota Court of Appeals, however, disturbed any settled expectations about the doctrine in 2021 when it ruled that the common-interest

doctrine did not apply in *Energy Policy* because it had never been officially recognized in Minnesota.

Data Practice Act Challenge in *Energy Policy* Raises Questions About the Doctrine

The question about the common-interest doctrine in *Energy Policy* is one of several legal issues arising from a Minnesota Government Data Practice Act dispute. Energy Policy Advocates, a nonprofit advocacy group, had submitted public data document requests to the Office of the Attorney General seeking various information, including documents and correspondence related to climate-change litigation coordinated with external law firms, advocacy organizations, or other state attorneys general. The Attorney General responded that it possessed no non-privileged public data responsive to the request.

Energy Policy challenged the Attorney General's categorization of documents in Ramsey County District Court in 2019. The advocacy group argued that the Attorney General's office had improperly characterized some documents as "private data on individuals," and therefore not subject to public data requests, and that the office also improperly invoked overbroad claims of privilege over some documents.

The District Court granted the Attorney General's motion to dismiss the case, concluding, among other issues, that the Attorney General's office properly withheld documents on the grounds that they were protected by the work-product doctrine, the attorney-client privilege, or the common-interest doctrine.

Energy Policy appealed the decision. With regard to the common interest doctrine specifically, Energy Policy argued that the doctrine should not be applied to the extent that an attorney within the Attorney General's office communicated with an attorney outside the office about a matter involving the other attorney's client.

The Court of Appeals agreed, reversing the District Court on a number of grounds. The Court of Appeals concluded that the District Court had not properly reviewed documents in camera to determine if attorney-client privilege or the work product doctrine applied. As to the common-interest doctrine, however, the Court of Appeals concluded that the doctrine could not be the basis for the office to withhold documents. Although many courts have applied the doctrine in federal court or in other states, the Court of Appeals ruled that it was not codified by any Minnesota statute and had not been recognized by the Minnesota Supreme Court. Because the Court of Appeals noted that the task of extending existing law falls only to the legislature or the Supreme Court, it declined to recognize the common-interest doctrine in this case.

The Supreme Court Formally Recognizes and Defines the Doctrine in *Energy Policy*

Last month the Supreme Court reversed the decision in *Energy Policy*, addressing the issue of the common-interest doctrine in addition to other Data Practice Act issues. The Court noted that neither party disputed that Minnesota should recognize the common-interest doctrine, and indeed dozens of amici curiae (including 38 other states and territories) had submitted briefs urging the Court to adopt the doctrine.

Therefore, without delving into whether the common-interest doctrine has previously applied in the state, the Court took the opportunity to formally recognize the doctrine in Minnesota.

The Supreme Court outlined the bounds of the common-interest doctrine, holding that applies when (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy.

This standard for the common-interest doctrine clarifies two points that often vary from jurisdiction to jurisdiction. First, although the doctrine is not limited in Minnesota to pending or anticipated litigation, the parties must have a common *legal* interest rather than simply a political interest or business interest. The Court did not specify what type of interest would be sufficiently "common" to fall under the protection, but instead observed that the party asserting the doctrine would bear the burden of proving its application, consistent with other general rules of discovery. The Court's definition does require, however, that the communication itself be disclosed *in furtherance* of the common legal strategy, rather than provide a broad protection based simply on the nature of the parties' interest or relationship.

Second, the Court specifically acknowledged that the doctrine applies to attorney work product as well as attorney-client communications. Although the Court of Appeals had suggested that the doctrine's application was dependent on a pre-existing attorney-client communication, the Supreme Court's adoption of the doctrine is broader. The doctrine does require an underlying privilege, but like most other jurisdictions to recognize the doctrine, the Supreme Court agreed that it can apply equally to the disclosure of an attorney's mental impressions, trial strategy, and legal theories regardless of whether they were previously communicated to a client.

The Supreme Court did not disturb the Court of Appeals ruling that remand was necessary to review the application of particular privileges for the documents withheld by the Attorney General's office. Although the ruling in *Energy Policy* does not provide specific examples of communications that may fall within the doctrine's scope, it does identify boundaries that will likely be further developed in Minnesota courts.