

Are Pennsylvania state courts committed to the common interest privilege?

By Carolyn O. Boucek, Esq., Eckert Seamans Cherin & Mellott LLC

MARCH 7, 2023

While the common interest privilege exists in Pennsylvania,¹ there is a dearth of authority from the Pennsylvania Supreme Court. The most fulsome analysis of the doctrine by the Pennsylvania Supreme Court came in its 2019 decision, *Pittsburgh History & Landmarks Found. v. Zeigler*.²

But the Court's analysis focused on privilege in the setting of a derivative action and did little more than note the difference between the common interest privilege with the co-client privilege.

Accordingly, several federal courts and lower state courts in Pennsylvania have applied the common interest privilege anticipating how the Supreme Court of Pennsylvania would apply it.³ In some instances, the lack of authoritative case law has even led Pennsylvania lower courts to cite federal cases exclusively for the standard of Pennsylvania law.⁴

The common interest privilege is an exception to the waiver of attorney-client privilege for communications between parties who have different attorneys and whose interests in the litigation are substantially the same.⁵

For example, it can arise when separate litigants retain different counsel to avoid conflicts of interest over subsidiary issues that could arise in the case.⁶

Generally, the common interest privilege "extends the confidentiality of the attorney-client communications to information shared with third parties having common interests and may arise in the context of civil or criminal proceedings."⁷ Broader than the similar joint defense privilege, the common interest privilege does not necessarily require that the parties are on the same side of the "v" with respect to any particular action or proceeding.

Rather, the common interest privilege would apply where the proponent of the privilege shows: "(1) the parties' agreement to the same; (2) a common legal interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement; and (4) the continued confidentiality of the communications, i.e., the communications were not disclosed to other third parties such that the privileges were waived."⁸

Notably, the "common interest" of the second prong must be a legal interest — a solely commercial interest is insufficient.⁹

But parties hoping to meet those prerequisites face an uphill battle. As a threshold matter, the proponent of the common interest privilege must first establish that the attorney-client privilege applies to the disclosed information; only then can the proponent assert the four bases for the common interest privilege.¹⁰

And while entering an agreement might be easy, establishing that the parties have a sufficient common interest is a challenge, due almost entirely to the lack of authority on that standard. Federal courts in Pennsylvania and otherwise within the Third Circuit have interpreted the requirement to mean that the parties' interests "must be closer to 'legally identical' than 'legally similar.'"¹¹

The common interest privilege does not necessarily require that the parties are on the same side of the "v" with respect to any particular action or proceeding.

But, the exact boundary is murky, and the Third Circuit has suggested that because the common interest privilege only applies where parties have separate attorneys, "courts can afford to relax the degree to which clients' interest must converge without worrying that their attorneys' ability to represent them zealously and single-mindedly will suffer."¹²

Federal courts in the Commonwealth have held that the common interest privilege can apply to potential parties as well as existing parties, and the parties can apply the common interest privilege to particular claims as opposed to the litigation in its entirety.¹³

However, the Pennsylvania Supreme Court has not clearly defined a sufficient common interest, leaving litigants in Pennsylvania with doubts as to the extent of the doctrine's protections in state court proceedings.

Furthermore, some courts have held that the common interest doctrine does not apply to communications that occur between litigants but outside the presence of their respective lawyers under the logic that the privilege protects communications between a lawyer representing another client, but not client-to-client

communications; “To be protected, the communication must be shared with the *attorney* of the member of the community of interest as sharing the communication directly with a member of the community may destroy the privilege.”¹⁴

Pennsylvania’s relative lack of robust case law applying and defining the contours of the common interest privilege, especially given that several federal courts have discussed it in more detail, leaves litigants wondering about the strength of the protection, and Pennsylvania’s commitment to it in future cases.

The Pennsylvania Supreme Court has not clearly defined a sufficient common interest.

Until the Pennsylvania Supreme Court clearly defines the contours of the common interest doctrine in the Commonwealth, parties and prospective litigants seeking to avail themselves of the common interest privilege should take care to avoid disclosing sensitive information under the common interest privilege unless necessary and do so only in the presence of their respective attorneys, under the advice of their respective attorneys as to the sufficiency of their common interest, and with a written common interest agreement in place.

And, until more the Supreme Court issues additional authority, attorneys should follow best practices to protect their clients’ privileged information.

Such practices include:

- (1) advising clients seeking to utilize the common interest privilege regarding the risks associated with doing so in writing;
- (2) drafting a clear and concise common interest agreement that clearly sets out the legal interest(s) in common; and

- (3) adopting a practice and procedure to annotate every communication disseminated subject to the common interest privilege as disclosed pursuant to that privilege; and
- (4) taking care to share only documents that are subject to the attorney–client privilege under the applicable common interest privilege.

Notes

¹ *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750 (Pa. 2018).
² 200 A.3d 58 (Pa. 2019).
³ *E.g.*, *Gelman v. W2 Ltd.*, Civil Action No. 14-6548, 2016 WL 8716248 (E.D. Pa. Feb. 5, 2016); *Rosser Int’l, Inc. v. Walter P. Moore & Assocs.*, Civil Action No. 2:11-cv-1028, 2013 U.S. Dist. LEXIS 108561, at *42 (W.D. Pa. Aug. 2, 2013) (applying Pennsylvania law); *Pa. Public Utility Comm’n v. Sunrise Energy, LLC*, 177 A.3d 438, 445 (Pa. Commw. Ct. 2018); 5 West Pa. Prac., *Discovery* § 2:3 (August 2022 update) (citing *Est. of Kofsky*, 409 A.2d 1358, 1362 (Pa. 1979)).
⁴ *E.g.*, *Metamorphic Surgical Devices v. V.*, No. GD-12-003014, 2015 Pa. Dist. & Cnty. LEXIS 23141, at *7–8 (Pa. C.P. Allegheny July 16, 2015).
⁵ See *e.g. Audi of Am. Inc. v. Bronsberg & Hughes Pontiac, Inc.*, 255 F.Supp.3d 561, 566 (M.D. Pa. 2017) (applying Pennsylvania law).
⁶ *Serrano v. Chesapeake Appalachia, LLC*, 298 F.R.D 271, 184 (W.D. Pa. 2014).
⁷ Standard Pa. Pract. 2d § 54:73 (November 2022).
⁸ *Sunrise Energy*, at 446 (quoting *Rosser Int’l*, 2013 WL 3989437, at *19); See 5 West Pa. Prac., *Discovery* § 2:3 n.4 (August 2022 update).
⁹ *Serrano v. Chesapeake Appalachia, LLC*, 298 F.R.D 271, 184 (W.D. Pa. 2014).
¹⁰ *In re Generic Pharms. Pricing Antitrust Litig.*, 432 F.Supp.3d 490, 494 (E.D. Pa. 2020).
¹¹ *In re Generic Pharms. Pricing Antitrust Litig.*, 432 F.Supp.3d 490, 494 (E.D. Pa. 2020); see also, *10x Genomics, Inc. v. Celsee, Inc.*, 505 F.Supp.3d 334, 337 (D. Del. 2020).
¹² *Teleglobe Commc’ns. Corp. v. BCE, Inc.*, 493 F.3d 345 (3d Cir. 2007) (applying Delaware law).
¹³ *Serrano v. Chesapeake Appalachia, LLC*, 298 F.R.D 271, 184 (W.D. Pa. 2014) (citing *Russell v. Gen. Elec.*, 149 F.R.D. 578 (N.D. Ill. 1993)).
¹⁴ *In re Generic Pharms. Pricing Antitrust Litig.*, 432 F.Supp.3d 490, 494 (E.D. Pa. 2020) (quoting *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (emphasis in original); *United States v. Gott*, 771 F.Supp. 535, 545 (E.D.N.Y. 1991).

About the author



Carolyn O. Boucek is a commercial and employment litigator based in **Eckert Seamans Cherin & Mellott LLC’s** Pittsburgh office. She assists businesses with developing and implementing strategies to succeed in litigation surrounding employment discrimination, supply-chain integrity, vendor disputes, corporate governance and contract breakdown, among other matters. She can be reached at cboucek@eckertseamans.com.

This article was first published on Westlaw Today on March 7, 2023.