Common Interest Privilege - A View from the Federal Circuits

Summary:

The limits of the common interest privilege across the various United States courts of appeals are not nearly as uniform as one would hope. For example, there is no consensus on whether the common interest privilege protects only communications between counsel, whether the common interest must be identical (as opposed to substantially the same), the extent to which opposing commercial interests may override common legal interests, and whether the common interest must concern litigation (actual or pending). Provided below is an overview of the current status of the common interest doctrine within the federal courts of appeals. We also present a common interest doctrine checklist to aid in determining whether a contemplated situation would meet the requirements for application of the common interest doctrine.

Overview of the Common Interest Doctrine:

The common interest doctrine is “an extension of the attorney-client privilege”\(^1\) or the work product doctrine,\(^2\) and “applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest.”\(^3\) For this reason, “[t]he common interest doctrine … is not a privilege in its own right. Merely satisfying the requirements of the common interest doctrine without also satisfying the requirements of a discovery privilege does not protect documents from disclosure.”\(^4\) In other words, the common interest doctrine requires an underlying privilege — either the attorney-client privilege or the work product doctrine.

If a party seeking to invoke the common interest doctrine can first establish that the communication meets the requirements of either the attorney-client privilege or the work product doctrine, only then will a court seek to determine whether the common interest doctrine applies to protect the communication at issue. In general, courts will apply the common interest doctrine to protect communications where the parties: (i) disclosed the communication at a time when they shared a common interest;\(^5\) (ii) shared the communication in furtherance of that common interest;\(^6\) and (iii) have not waived the privilege.\(^7\) The burden of showing compliance with these
requirements is on the party seeking to apply the common interest doctrine. This formulation of the common interest privilege is fairly standard across the federal courts of appeal.

What follows is a brief overview of how the federal courts of appeal have defined the limits of the common interest privilege.

**First Circuit:**

Following the stricter definition of what constitutes a “common” interest, the First Circuit has stated that the interest must be more than “substantially the same,” and “typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest.” However, while the First Circuit requires a common legal interest, the interest need not pertain to current or pending litigation. The First Circuit follows the formulation put forth in the Restatement (Third) of the Law Governing Lawyers, which notes that the doctrine may apply to “two or more clients with a common interest in a litigated or nonlitigated matter.” So for example, one district court noted that “privileged information disclosed during a merger between two unaffiliated businesses would fall within the common-interest doctrine.” Furthermore, the communications that are subject to the privilege must be between parties who share joint representation, or who have their own separate representation. Thus, the common interest privilege will not apply to protect communications where only one party was represented by counsel. The privilege may be invoked by any client to the common interest arrangement, unless it has been waived by the client who made the communication.

**Second Circuit:**

The Second Circuit follows the rule that the common interest privilege “protects the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” The Second Circuit is one of several that conflates the common interest privilege with the joint defense privilege. However, courts in the Second Circuit do not require that there must be actual litigation in progress in order for the common interest privilege to apply. Nevertheless, there must be evidence of a coordinated legal strategy among the parties to the common interest arrangement. While all parties involved must be represented, it is not necessary that the attorney representing the communicating party be present when the communication is made with another party’s attorney. The Second Circuit does not require a
written Joint Defense Agreement (JDA), only that “some form of joint strategy is necessary to establish a JDA, rather than merely the impression of one side.” As with most other circuits, the common interest must be a “legal, rather than commercial, interest.”

**Third Circuit:**

The Third Circuit has adopted a broader view of the common interest doctrine, which it distinguishes from the joint client privilege, namely in that the former involves parties with separate counsel, while the latter involves co-clients sharing the same attorney. This distinction allows the court to “relax the degree to which clients’ interest must converge” in the common interest context, because the court does not have to worry about “their attorneys’ ability to represent them zealously and single-mindedly.” Accordingly, the Third Circuit does not require parties asserting common interest to share an “identical” legal interest, but only a “substantially similar legal interest.” Under the Third Circuit’s formulation of the rule, the disclosure subject to the privilege must be made (1) due to actual or anticipated litigation; (2) for the purposes of furthering a common legal interest; and (3) in a manner not inconsistent with maintaining confidentiality against adverse parties. Unlike the Second Circuit, the privilege can be maintained only when “the clients’ separate attorneys share information (and not the clients themselves).” Furthermore, courts in the Third Circuit have applied the common interest privilege to protect communications in purely transactional contexts, such as where parties on adverse sides of a business deal shared privileged information based on the possibility of joint litigation.

**Fourth Circuit:**

The courts in the Fourth Circuit initially followed the view of the common interest doctrine set forth in the seminal case *DuPlan Corp. v. Deering Milliken, Inc.*, which required that the “common interest” between the parties be identical and pertain to a legal interest. Since *DuPlan*, courts in the Fourth Circuit have not consistently required that the interest be identical, but often merely state that the interest be common, consistent with the current name of the doctrine. With regard to the legal interest, “[t]he fact that there may be an overlap of a commercial and legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest.” However, with regard to the requisite type of interest the parties must have, the *DuPlan* court did explain that the key consideration in determining
whether a sufficient common interest exists between two or more parties is “the nature of the common interest as it relates to the action of the attorney.” 31 However, courts in the Fourth Circuit have not required that there be actual litigation in progress for the common legal interest to apply. 32 With regard to waiver, the common interest doctrine will not apply if the parties have waived the underlying privilege. 33 As with the attorney-client privilege, the common interest doctrine will protect communications that are between an attorney and people that control the information necessary for the attorney to render legal advice if those communications are for the purpose of requesting or giving legal advice. 34

**Fifth Circuit:**

The Fifth Circuit has recognized two types of communications protected under the common interest doctrine: (1) communications between co-defendants and their counsel in actual litigation; and (2) communications between potential co-defendants and their counsel. 35 Thus, it would be fair to say that, like the Second Circuit and others, the Fifth Circuit has blurred the lines between the common interest privilege and the related joint defense privilege. 36 Courts in the Fifth Circuit construe the doctrine narrowly because it is an “obstacle to truthseeking.” 37 The “potential” litigation prong requires a “palpable threat of litigation at the time of the communication, rather than the mere awareness that one’s questionable conduct might some day result in litigation ….” 38 An attorney may disclose privileged information directly to actual or potential co-defendants, or to their counsel, in the course of a joint defense without waiving attorney-client privilege. 39

Where the primary goal of the communications is not legal, the common interest privilege will not apply. 40 So for example, in a patent litigation case, the plaintiff asserted the common interest privilege to shield communications made with the prior owner of the patents-in-suit when the parties were negotiating the sale of the patents. 41 While the court recognized that the parties to the negotiations shared a common legal interest in the validity of the patents, “the core of the communications was not the validity of the patents but instead a negotiation for a potential adjustment to the contract price of the patent sale because [one of the patents had been invalidated]”). 42 Thus, the court noted that “any communications in which the parties’ [sic] are negotiating their rights and relationships to each other are not to be protected [by the common interest privilege], as the parties’ interests would have been adverse rather than common.” 43 It is
not clear whether courts in the Fifth Circuit would extend the common interest privilege to co-
plaintiffs.\textsuperscript{44}

\textbf{Sixth Circuit:}

While the Sixth Circuit Court of Appeals has not yet definitively weighed in on the contours of the common interest doctrine, several district courts have relied on it to protect confidential communications between parties having “an identical legal interest with respect to the subject matter of the communication.”\textsuperscript{45} At least one district court has adopted the “narrower view of the common interest doctrine,” requiring that parties have “more than merely concurrent legal interests.”\textsuperscript{46} In \textit{Libbey Glass, Inc. v. Oneida, Ltd.}, while negotiating the terms of a supplier agreement, the defendant’s legal counsel had communicated with several suppliers about similarities in appearance between glassware provided by the suppliers and glassware sold by the plaintiff. The defendant argued that the parties to the communication shared a common interest in the legal implications of the supplier agreements. The district court rejected this argument, noting that there was no evidence the parties sought to keep the communications confidential, and that even if they had, the communications were “ancillary” to the principal \textit{commercial} activity of negotiating the supplier agreement.\textsuperscript{47} The parties were unable to show the disclosures were made in furtherance of a common legal, as opposed to commercial, strategy.\textsuperscript{48}

However, subsequent courts have distinguished \textit{Libbey} by noting that “\textit{Libbey} stands only for the proposition that a joint concern about litigation in the context of a commercial transaction is not a sufficient legal interest to implicate the ‘community of interest’ doctrine.”\textsuperscript{49} A number of district courts have recognized that parties can have common legal interests “outside of the litigation context altogether.”\textsuperscript{50} So for example, district courts have shown a willingness to apply the common interest doctrine to protect communications relating to the prosecution of patents where the communications were exchanged in the context of a license or asset purchase arrangement.\textsuperscript{51}

On the issue of whether the parties must be facing at least the threat of litigation in order to claim the common interest privilege, district courts within the Sixth Circuit have not been uniform.\textsuperscript{52} In at least one case, the district court recognized a common interest legal interest between seven members of the mortgage insurance industry that “extends to legislative and regulatory matters, as well as in matters in litigation or which could lead to litigation.”\textsuperscript{53} As in
most other circuits, the courts in the Sixth Circuit have not required the parties to have a written agreement in place in order to claim the common interest privilege.\(^{54}\)

**Seventh Circuit:**

Courts in the Seventh Circuit have adopted the narrower view that parties may assert a common interest where they have “an identical—not merely similar—legal interest in the subject matter of a communication and the communication is made in the course of furthering the ongoing, common enterprise.”\(^{55}\) The Seventh Circuit follows the majority position that the common interest may be asserted even in situations where the communications are not made in anticipation of litigation.\(^{56}\) The possibility that the parties’ interests may diverge in the future is irrelevant, so long as they presently share a common legal interest.\(^{57}\) The common interest must relate to “a legal matter, (not one that is solely commercial).”\(^{58}\) No written agreement is necessary.\(^{59}\) The Seventh Circuit has not ruled on whether the common interest doctrine protects communications made between parties in the absence of counsel, as district courts have gone both ways.\(^{60}\)

**Eighth Circuit:**

Although the case law is sparse, courts in the Eight Circuit have taken a broader view of the common interest privilege. For example, the Eighth Circuit has noted that the common interest may be “either legal, factual, or strategic in character.”\(^{61}\) The common interest may be in a litigated or non-litigated matter.\(^{62}\) Furthermore, at least one district court has found that the privilege extends to cover communications with an *unrepresented* party, so long as the communicating party was represented and the parties to the communication shared a common interest.\(^{63}\) No written agreement is necessary.\(^{64}\)

**Ninth Circuit:**

While some district courts in the Ninth Circuit conflate the common interest privilege with the joint defense privilege,\(^{65}\) courts have applied the common interest privilege in the context of both “anticipated joint litigation, or a joint effort to avoid litigation.”\(^{66}\) The parties need not have a complete unity of interests, and the privilege may apply even where the parties’ interests are adverse in substantial respects.\(^{67}\)
For example, in *Nidec Corp. v. Victor Co. of Japan*, the district court refused to extend the common interest privilege to protect a litigation abstract that was shared with a third-party investment fund interested in purchasing a majority share in the defendant (JVC) because “[the investment fund] was not likely to become a joint defendant with JVC.” The court instead found that the abstract was provided “to further not a joint defense in this litigation, but to further a commercial transaction in which the parties, if anything, have opposing interests.” The defendants in *Nidec* had cited a previous case, *Hewlett-Packard v. Bausch & Lomb, Inc.*, where the court had held that a “prospective buyer of one of the defendant’s divisions had sufficiently overlapping legal interests that justified the defendant’s sharing of a patent opinion letter with the prospective buyer.” The *Nidec* court refused to read *Hewlett-Packard* as supporting the proposition that “there was a common legal interest between defendant and a third party merely because the third party was a prospective purchaser of one of defendant’s divisions.” Instead, the common interest in *Hewlett-Packard* was based on the fact that “at the time defendant and [the third party] were negotiating it seemed quite likely that [both parties] would be sued by plaintiff and that in that litigation defendant and [the third party] would be identically aligned.”

While the court’s language in *Nidec Corp.* could be viewed as an effort to rein in the reach of *Hewlett-Packard*, other district courts have applied the common interest privilege to protect communications between a potential buyer and seller of IP, even where neither party proffered any facts indicating they faced the threat of joint litigation, so long as they shared a common legal interest in avoiding or reducing litigation. Thus, decisions like *Hewlett-Packard* have been cited as endorsing a “broader view” of the common interest privilege.

**Tenth Circuit:**

The Tenth Circuit follows the Federal Circuit’s more expansive view of the common interest privilege. In *High Point SARL v. Sprint Nextel Corp.*, the district court recognized the common interest privilege exists where “two parties have in common an interest in securing legal advice relating to the same matter and that the communications be made to advance their shared legal interest in securing advice on that common matter.” And in patent cases, as an exception to the general requirement that the parties’ interests be “identical,” the court only required a showing of a “substantially identical legal interest.”

In *High Point* — a patent infringement case — the defendant (Sprint) sought discovery of communications between the plaintiff and the previous owner of the patents-in-suit (Avaya).
Avaya asserted the common interest privilege, arguing that it had a substantially identical common legal interest with prospective purchasers (including the plaintiff), and the district court agreed. Avaya had signed nondisclosure agreements with each prospective buyer; all the agreements relating to the transfer of the patents were drafted by counsel; and the parties to the negotiations had taken steps to ensure the confidentiality of the communications. The court recognized that while Avaya and the potential buyers had adversarial interests when they were negotiating the possible transfer of the patents, “they still had a common legal interest in the validity, enforceability, and potential infringement of the patents-in-suit. This is sufficient to establish their common interest in the communications exchanged.”

Eleventh Circuit:

Courts in the Eleventh Circuit tend to conflate the common interest privilege with the joint defense doctrine. Thus, at least one district court noted that “the interest must, therefore, relate to litigation for this privilege to apply.” However, “actual litigation need not be ongoing.” As in other circuits, the common interest must be “legal, not when the primary common interest is a joint business strategy that happens to include a concern about litigation.” At least one district court applied the common interest privilege to protect communications between a consultant and the attorneys for a casino operation, so long as the communications were related to the legal implications of obtaining a bingo license for the casino. The court noted that this situation “is not all that different from parties jointly developing patents.”

DC Circuit:

Like other circuits, the courts in the DC Circuit conflate the common interest rule and the joint defense privilege. For this reason, at least one district court has noted that shared or jointly created material “must be disclosed pursuant to a common legal interest and pursuant to an agreement to pursue a joint defense.” While a written joint defense agreement is preferred, “an oral agreement whose existence, terms and scope are proved by the party asserting it, may be enforceable as well.”

Thus, in Intex Recreation Corp. v. Team Worldwide Corp., the district court rejected the defendant’s argument that the execution of an exclusive distribution agreement was evidence of a common legal strategy with the distributor. Instead, the court held that the defendant — who owned the patent that was the subject of a declaratory judgment action — and the distributor
entered into a common legal strategy when they each sent near-identical demand letters to the plaintiff, demanding that the plaintiff cease manufacturing products that allegedly infringed the defendant’s patent.\textsuperscript{91} It was only at this point that the parties had established a “common defense strategy in connection with actual or prospective litigation.”\textsuperscript{92}

**Federal Circuit:**

In the case of *In re Regents of the University of California*,\textsuperscript{93} the Federal Circuit applied the common interest doctrine to protect communications between counsel of a patent licensor and licensee. The privileged communications took place between the patent holder and an exclusive licensee and involved prosecution and validity issues related to the licensed patent. The Federal Circuit held that these communications were protected by the common interest privilege because the legal interest between the licensor and licensee “was substantially identical because of the … exclusive nature of the … license agreement. Both parties had the same interest in obtaining strong and enforceable patents.”\textsuperscript{94} The fact that there was an overlapping commercial interest did not negate the effect of the common legal interest.\textsuperscript{95}

**Conclusion**

Because the contours of the common interest doctrine are not uniform across the federal courts of appeal, it is difficult to make general pronouncements about how a given court would apply the doctrine, especially when it concerns parties sharing patent documents while engaging in licensing or asset purchase negotiations. Nevertheless, the following checklist provides a good starting point of issues to consider when evaluating how the common interest doctrine could apply to a communication:

**Common Interest Doctrine Checklist**

i) Does the communication, before being shared with a third party, satisfy either the attorney-client privilege or the work product doctrine? Remember, the common interest doctrine is not a stand-alone privilege.

ii) Do the parties seeking to enter a common interest agreement share a “common” interest? And furthermore, to what extent are there competing, adverse interests?
iii) Is the “common” interest legal in nature with respect to the actions of the attorney(s)? In other words, is the communication that is to be shared with a third party, for the purpose of securing primarily an opinion on law, or legal services, or assistance in some legal proceeding? On this point, and the one before it, courts diverge. Some courts may find that the presence of adverse, commercial interests — such as in the context of a sale or licensing arrangement — overrides any common legal interest parties may share.

iv) Is litigation at least contemplated against a potential identifiable adverse party? The more likely the potential for litigation, the stronger the common interest claim will be.

v) Is an attorney on at least one side of the communication? Again, courts diverge on this point. Parties should take measures to ensure that communications are shared between the parties’ designated counsel.

vi) Is there an express agreement between the parties that a common interest exists between them? Courts generally do not require an agreement to be in writing, but an express agreement can help a court identify the existence and scope of a common legal interest.

vii) Is the communication made after there is an express agreement between the parties and in furtherance of the common interest?

viii) Is the communication made in confidence? Again, the common interest privilege can only protect confidential communications already subject to an underlying attorney-client privilege or work product protection. Parties should take steps to protect the confidentiality of any information shared pursuant to a common interest arrangement.

The common interest doctrine has evolved over the years and will continue to evolve. As with many other court-created legal doctrines, the contours of the common interest doctrine vary across the federal circuit courts of appeal. What remains true, however, is that the more identical and the more legal the “common interest” is between the parties, the more likely courts are to find that the common interest doctrine applies and, therefore, find non-waiver of communications shared between those parties.
1 United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996).
2 In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990).
3 Sheet Metal Workers Int'l Ass'n v. Sweeney, 29 F.3d 120, 124 (4th Cir. 1994).
4 Hunton & Williams v. United States Dept. of Justice, 590 F.3d 272, 280 (4th Cir. 2010). See also, Sokol v. Wveth, Inc., No. 07 Civ. 8442, 2008 WL 3166662, at *5 (S.D.N.Y. Aug. 4, 2008) (“If a communication or document is not otherwise protected by the attorney-client privilege or work product doctrine, the common interest doctrine has no application”) (quoting In re Commercial Money Ctr., Inc., Equip. Lease Litig., 248 F.R.D. 532, 536 (N.D. Ohio 2008)).
5 Hunton & Williams, 590 F.3d at 285 (“Documents exchanged before a common interest agreement is established are not protected from disclosure.”).
6 In re Grand Jury Subpoenas, 415 F.3d 333, 341 (4th Cir. 2005) (The “purpose of the privilege is to allow persons with a common interest to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims”) (internal quotations omitted).
7 Id. at 339.
8 Id. See also, U.S. v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).
9 FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000).
11 Cavallaro, 152 F.Supp.2d at 62.
12 Id. at 61 (quoting Restatement (Third) of the Law Governing Lawyers §76(1), cmt. d (“[a] person who is not represented by a lawyer and who is not himself or herself a lawyer cannot participate in a common-interest arrangement”)).
13 Id. at 63.
14 Id. at 60.
17 Schwimmer, 892 F.2d at 244.
18 See Credit Lyonnais, 160 F.R.D. at 448 (noting that “the common interest doctrine does not encompass a joint business strategy that happens to include as one of its elements a concern about litigation”).
19 Schwimmer, 892 F.2d at 244.
21 Credit Lyonnais, 160 F.R.D. at 447.
22 See In re Teleglobe Communications Corp., 493 F.3d 345, 366 (3rd Cir. 2007) (referring to the common interest privilege as the “community-of-interest” privilege).
23 Id.
24 Id. at 365.

Id. at 364 (emphasis added). But see Graco, Inc. v. PMC Global, Inc., Civ. A. 08-1304, 2011 WL 666048, at *20 (D.N.J., Feb. 14, 2011) (Noting that some courts in other jurisdictions have held that “communications need not only be among counsel for the clients as communications between counsel for a party and an individual representative of a party with a common interest are also protected”) (internal quotations omitted).


See DuPlan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1974) (“The key consideration is that the nature of the interest be identical, not similar, and be legal, not commercial.”); see also United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) (“common interest must be legal in nature”).

See, e.g., In re Grand Jury Subpoena, 902 F.2d 244, 249 (4th Cir. 1990).


Id. at 1174. In DuPlan, although the patent holder and the exclusive licensee engaged in a transaction “which necessitat[ed] the services of an attorney who represent[ed] the interests of both parties to the transaction,” the common interest of the patent holder, who was a party to the pending litigation, and a non-party exclusive licensee was not sufficiently legal in nature. Id. at 1175. The court reasoned that the exclusive licensee would only benefit financially from the patent holder’s legal success and, therefore, there was no common legal interest between the patent holder and the exclusive licensee. Therefore, the communications that occurred during the licensing transaction were not entitled to the exception of waiver under the common interest doctrine. Id.

Aramony, 88 F.3d at 1392.

In re Grand Jury Subpoenas, 415 F.3d 333, 339 (4th Cir. 2005).

DuPlan Corp., 397 F.Sup. at 1165.

In re Santa Fe Corp., 272 F.3d 705, 710 (5th Cir. 2001).

See, e.g., Aiken v. Texas Farm Bureau Mutual Insurance Co., 151 F.R.D. 621, 623 (E.D. Tex. 1993) (“The attorney client privilege is waived if the confidential communication has been disclosed to a third party, unless made to attorneys for co-parties in order to further a joint or common interest (known as the common interest rule or the joint defense privilege)”) (emphasis added).

In re Santa Fe Corp., 272 F.3d at 710.

Id. at 711. The Fifth Circuit held that where documents were circulated in order to avoid conduct that might lead to litigation, the common interest privilege did not apply. Id. at 713.


41 Id. at *3.
42 Id. at *4.
43 Id.
47 Id. at 348–49.
48 Id.
51 See, e.g., Fresenius, 2007 WL 895059, at *4 (finding parties to an asset purchase agreement had a common legal interest in obtaining strong and enforceable patents); MPT, 2006 WL 314435, at *7 (finding parties to a nonexclusive patent licensing agreement had a common legal interest in the validity of the patents).
52 Compare Travelers Cas. and Sur. Co. v. Excess Ins. Co., Ltd., 197 F.R.D. 601, 606–07 (S.D. Ohio 2000) (noting that the rule applies where parties have a common litigation opponent or when information is exchanged between friendly litigants with similar interests); with Brossel v. Triad Guar. Ins. Corp, 238 F.R.D. 215, 220 (W.D. Ky. 2006) (noting that unlike the joint defense privilege, “the common interest does not require or imply than an actual suit is or ever will be pending”).
53 Brossel, 238 F.R.D. at 220.
54 Id. at 220; see also North American Rescue Prods., Inc. v. Bound Tree Med., LLC, 2:08-cv-101, 2010 WL 1873291, *4 (S.D. Ohio, May 10, 2010) (noting that while there must be some evidence of an agreement, the form of the agreement is not important).
56 U.S. v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007).
57 Alexanian, 737 F.Supp.2d at 967.
58 Id. at 965.
59 See BDO Seildman, 492 F.3d at 817 (finding the existence of a common legal interest although no written agreement existed).
60 Compare Schachar v. Am. Academy of Ophthalmology, Inc., 106 F.R.D. 187, 193 (N.D. Ill. 1985) (holding that an attorney must be party to the communications in order for the privilege to attach) with IBJ Whitehall Bank & Trust Co. v. Cory & Associates, Inc., CIV. A. 97 C 5827, 1999 WL 617842, *6 (N.D. Ill. Aug. 12, 1999) (finding the reasoning in Schachar unpersuasive and holding that conversations between parties with a common interest may be privileged if "(1) one party is seeking confidential information from
the other on behalf of an attorney; (2) one party is relaying confidential information to the other on behalf of an attorney; and (3) the parties are communicating work product that is related to the litigation").

61 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997).

62 Id.


64 Id.


67 *Bergonzi*, 216 F.R.D. at 495.

68 *Nidec Corp.*, 249 F.R.D. at 579.

69 Id. at 580.

70 115 F.R.D. 308 (N.D. Cal. 1987).

71 *Nidec Corp.*, 249 F.R.D. at 579.

72 Id.

73 *Hewlett-Packard*, 115 F.R.D. at 310. Other district courts in the Ninth Circuit have focused on the fact that in *Hewlett-Packard*, “the prospective seller and buyer jointly anticipated litigation in which they would have a common interest, because the purchase would probably lead to the two companies both working to defend the same patent in one lawsuit.” *Memory Corp. v. Kentucky Oil Tech., N.V.*, C04-03843RMWHRL, 2007 WL 832937 (N.D. Cal. Mar. 19, 2007).


75 *See, e.g.*, *Libbey Glass*, 197 F.R.D. at 349 (commenting negatively on the “expansive, unrestricted approach of Hewlett-Packard”).


77 Id. at *7 (citing *Sawyer v. Sw. Airlines*, 2002 WL 31928442, at *3 (D. Kan. Dec. 23, 2002)).

78 Id. at *9 (emphasis added).

79 Id.

80 Id. As with courts in other circuits, there is some confusion between the common interest privilege and the joint defense privilege. Compare, *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 250 F.R.D. 575, 578 (D. Colo. 2007) (equating the common interest doctrine with the joint defense privilege); with *Metro Wastewater Reclamation Dist. v. Continental Casualty Co.*, 142 F.R.D. 471, 479 n.7 (D. Colo. 1992) (“The distinctions between the [common interest privilege and the joint defense privilege] relate to the timing of the disclosure and the ability thereafter to waive the privilege. The joint defense privilege arises only where the common interest of the parties relates to the joint defense of existing or impending

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litigation. Furthermore, if a document is subject to a joint defense privilege, a waiver of the privilege requires the consent of all parties involved in the joint defense.

82 Id.
83 Id.
85 Id. at *14.
87 Id. at 16 (emphasis added).
88 Id.
90 Id. at 16.
91 Id.
92 Id.
93 101 F.3d 1386 (Fed. Cir. 1996).
94 Id. at 1390.
95 Id. (citing DuPlan, 397 F.Supp. at 1172).