**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF DELAWARE**

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|---|---|---|
| LEADER TECHNOLOGIES, INC., a Delaware corporation, | ) | |
| Plaintiff-Counterdefendant, | ) | Civil Action No. 08-862-JJF/LPS |
| v. | ) | |
| | ) | **PUBLIC VERSION** |
| FACEBOOK, INC., a Delaware corporation, | ) | |
| Defendant-Counterclaimant. | ) | |

**DECLARATION OF KRISTOPHER KASTENS IN SUPPORT OF PLAINTIFF LEADER TECHNOLOGIES, INC.'S BRIEF IN SUPPORT OF DETERMINING DOCUMENTS PRIVILEGED AND/OR WORK PRODUCT UNDER THE COMMON INTEREST DOCTRINE**


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Dated: March 1, 2010
Public Version: March 8, 2010

1. I am an attorney with the law firm King & Spalding LLP, counsel for Plaintiff Leader Technologies, Inc. ("Leader"). I have personal knowledge of the facts set forth in this declaration and can testify competently to those facts. I make this declaration in support of Plaintiff Leader Technologies, Inc.'s Brief in Support of Determining Documents Privileged and/or Work Product Under the Common Interest Doctrine.

2.

3.

**REDACTED**

4.

5.

6. Attached hereto as Exhibit 5 is a true and correct copy of a press release entitled "Facebook Takes That $200 Million Investment From the Russians at a $10 Billion Valuation," dated May 26, 2009, accessed from http://techcrunch.com/2009/05/26/facebook-takes-that-200-million-investment-from-the-russians-at-a-10-billion-valuation/.

7. Attached hereto as Exhibit 6 is a true and correct copy of James M. Fischer, THE ATTORNEY-CLIENT PRIVILEGE MEETS THE COMMON INTEREST ARRANGEMENT: PROTECTING CONFIDENCES WHILE EXCHANGING INFORMATION FOR MUTUAL GAIN, 16 Rev. Litig. 631, 632 (1997).

I declare under penalty of perjury under the laws of the State of California and the United States that each of the above statements is true and correct. Executed on March 1, 2010 in Redwood Shores, California.

Kristopher Kastens

# EXHIBIT 1

**THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY**

# EXHIBIT 2

**THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY**

# EXHIBIT 3

**THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY**

# EXHIBIT 4

**THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY**

# EXHIBIT 5

# Facebook Takes That $200 Million Investment From The Russians At A $10 Billion Valuation.

by **Erick Schonfeld** on May 26, 2009

**Facebook** is **taking** that **rumored $200 million investment** from Digital Sky Technologies, a Russian investment group. DST will take a 1.96 percent stake in the company, giving Facebook a $10 billion valuation. Facebook ultimately did not have to **give up a board seat** to DST in return for the cash. But DST is getting preferred shares for it's $200 million.

When **Microsoft bought preferred shares**, it valued Facebook at $15 billion. Since then the market has come way down and various valuations for Facebook have been thrown out between $4 billion to $6 billion. And recently, Facebook **turned down** an investment valuing the company at $8 billion, with the stipulation that the investor get a board seat. During a conference call today, CEO Mark Zuckerberg he confirmed that other investors had approached Facebook, saying: "It was really at our option to find someone we wanted to work with on our terms." No doubt, part of the appeal of taking the Russian money was to set the company's new valuation at something easier to stomach than what the common stock was going for in private sales.

But this investment may affect the valuation of the common stock as well. Additionally, DST has the option to buy another $100 million worth of common stock from existing employees and investors. Although, during the conference call, the suggestion was made (**update**: confirmed) that these are being treated as two different transactions with different valuations. Facebook announced a program last year to let employees sell some stock to private investors, but that program was put on hold. Facebook hopes to give some of its employees liquidity with this separate deal with DST, which it views as a long=term investor.

Despite recent public statements from COO Sheryl Sandberg saying that **Facebook does not need the money** , it can certainly use the cash to fund its **growing** operations, including bandwidth, storage, and engineering costs.

During a conference call, CEO Mark Zuckerberg says that the investment will give Facebook "a good cash cushion" and give the company more flexibility "for strategic options" (which is code fro acquisitions), although he also says the company has "no plans currently." It is not clear that $200 million is enough to buy the company it really wants to buy (**Twitter!**). Zuckerberg adds: "This investment is purely buffer for us. It is not something we needed to get to cash flow positive." He expects Facebook to be cash flow positive in 2010, and says the company has been EBITDA positive for five consecutive quarters, going on six.

And what about an IPO? "It is not something we are thinking about right now, not something we are rushing towards," claims Zuckerberg.



## Actively Discussed Posts

**Can Entrepreneurs Be Made?**
147 comments

**FriendFeed Goes Down Hard. Both Remaining Users Pissed.**
97 comments

**The Steady, Efficient Decline Of Yahoo**
87 comments

**FOR IMMEDIATE RELEASE: Please Disregard This Email**
69 comments

**The iPhone's Peephole**
65 comments

# EXHIBIT 6

C

Review of Litigation
Summer 1997

Conflict of Interest Symposium: Ethic, Law, and Remedy

# *631 THE ATTORNEY-CLIENT PRIVILEGE MEETS THE COMMON INTEREST ARRANGEMENT: PROTECTING CONFIDENCES WHILE EXCHANGING INFORMATION FOR MUTUAL GAIN

James M. Fischer [FNa1]



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## I. Introduction

On January 9, 1997, the Wall Street Journal reported that tobacco company Liggett Group, Inc., proposed to turn over its own lawyers' notes taken during three decades of meetings with lawyers from other tobacco companies regarding the industry's tobacco *632 defense. [FN1] Liggett's decision reportedly was motivated by a desire to extricate itself from the massive litigation hanging over the tobacco industry. [FN2] Not surprisingly, Liggett's decision was not well-received by the other tobacco companies. Charles Wall, deputy general counsel for Philip Morris Companies, objected to Liggett's strategy: "If Liggett's notes reflect the legal discussions at a joint meeting, Liggett has no right to turn those

over to anyone without the consent of everyone... Just because something isn't a litigation matter doesn't mean it isn't privileged." [FN3]

The legal issue raised in the Wall Street Journal article concerns what has become known as the "common interest arrangement." This arrangement, when recognized, permits parties who possess common legal interests to share and exchange attorney-client privileged information without that information losing its protected status. [FN4] The arrangement bears many similarities to what is traditionally referred to as the "joint defense" privilege. [FN5] Indeed, in some cases the two *633 terms are used interchangeably. [FN6] The two concepts, however, are distinct in that the joint defense privilege requires the information exchange to occur within the context of actual or threatened litigation. [FN7] Although the "joint defense"privilege originated as a method by which defendants could share information and maintain a common defense without sacrificing the privileged status of the materials shared, the privilege also applies to cooperating plaintiffs. [FN8] Thus, I will use the term "joint litigant" privilege to reflect the actual *634 practice. In contrast the common interest arrangement, in theory, can be applied to both litigation and nonlitigation matters. It is the broader application of the common interest arrangement to non-litigation matters that many courts have rejected as an impermissible gloss on the law of attorney-client privilege.

This Article will examine the common interest arrangement and whether preserving the confidentiality of information-sharing arrangements should be restricted to matters in litigation. I believe that no valid reasons exist for such a limitation as long as our legal system continues to recognize the underlying privilege itself. However, as the number of persons exposed to confidential information through a common interest arrangement expands, it may be more difficult to police and prevent defections from the information-sharing arrangement, leaving the continued confidentiality of the material vulnerable to a claim of waiver when the defector discloses the shared information to third parties.

## II. Terminology

That parties may find it in their joint interests to share information, but will be dissuaded from doing so if disclosure causes the information to lose its protected status, is obvious. The law of privilege has responded to this problem by recognizing both "joint client" and "joint litigant" privileges. The "joint client" and "joint litigant" concepts are distinct, although as some commentators have noted, the two concepts are occasionally "mangled." [FN9] The "joint client" privilege attaches when the clients are represented by a common lawyer. Communications among the clients and their common lawyer remain privileged as against third parties, and the joint client privilege applies to both litigated and nonlitigated matters. The joint litigant privilege, on the other hand, preserves the confidentiality of attorney-client privileged matters when they are *635 shared with co-parties, even though those parties are represented by separate counsel. This privilege permits co-parties to coordinate strategy and present a unified front to a common adversary, but the privilege protects only communications that occur in a litigation context.

The common interest arrangement takes the joint litigant concept one step further. It permits persons to share information outside of the formal structure of litigation in which the information sharers are co-parties. The Wall Street Journal article discussing Liggett's efforts to resolve its tobacco-related liability exposure illustrates the distinction. Liggett did not offer to turn over material that had been exchanged while Liggett was defending a claim as a co-defendant. Instead, Liggett proposed to disclose information gained at meetings held by a group called the Committee of Counsel, which consisted of "in-house lawyers from the leading U.S. tobacco marketers." [FN10] The committee was not formed to defend any single claim but, according to the Journal, was "formed under the aegis of the Tobacco Institute, the industry trade association." [FN11] The committee reportedly "conferred on a wide variety of issues including health research, public relations, legislation and marketing of 'safe cigarettes.' [FN12] According to the report in the

Journal, it was notes of these meetings, rather than discussions of joint defense strategies, that Liggett was planning to divulge. [FN13]

The seminal decision advancing the common interest arrangement is Duplan Corp. v. Deering Milliken, Inc. [FN14] The case involved complex litigation over the validity of certain patents. During the course of the litigation, the defendants sought access to several thousand documents claimed by the plaintiff to be privileged. A ***636** number of these documents, however, had been reviewed by others. Unless that review itself was privileged or within the scope of the existing attorney-client privilege, the review by third parties would normally be deemed to waive the privilege. [FN15]

The decision in Duplan Corp. is less important for its holding, which was largely predicated upon its invocation of the now-rejected "control group" test, [FN16] than for its articulation of the standard for the common interest arrangement. The court stated:

> A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice. The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest. [FN17]

I will address the definition of "community of interest" later in this Article. The important message for now--one that has been ***637** accepted by many but not all courts--is that the common interest arrangement can extend to nonparties to litigation. [FN18]

## III. Sword or Shield

When the common interest arrangement is recognized, the effect is to protect privileged intra-group communication from discovery by third parties but still allow members of the group to use the communications in any litigation among themselves. [FN19] In this sense the common interest arrangement acts as a shield to prevent disclosure and use of disseminated privileged materials by nonmembers of the group. Occasionally, however, the common interest arrangement is used as a sword to get access to information by a "member" of the arrangement. For example, a policyholder may assume control of the defense and instruct and direct counsel regarding the defense of the claim. May the carrier compel disclosure to it of policyholder-attorney communications on the ground that they relate to a matter, the defense of the claim, as to which the carrier and policyholder share a common legal interest--here, reducing or defeating the claim against the policyholder? Most courts that have considered the matter have refused to permit the common interest arrangement to be used as a sword to compel information sharing, offering two alternative rationales for this result. One approach rejects the "common interest" argument on the ground that the policyholder and carrier could not be co-parties. [FN20] The other approach, reaching the same ***638** result, treats the policyholder-carrier relationship as adversarial. [FN21] Nevertheless, a few courts have held to the contrary, allowing the common interest arrangement to be used as a sword to access privileged information. [FN22]

Both of the reasons commonly given for not extending the common interest arrangement beyond the confines of the joint litigant privilege--(1) the potential for the parties to become adversaries and (2) the lack of co-party status--fail to support the position taken. Co-parties often have divergent interests; indeed, the rules of procedure accommodate the interests of co-parties who may wish to assert claims against one another. The fact that parties are adverse in some respects should not preclude them from uniting around shared interests or from freely deciding that their interests in ex-

changing information outweigh their differences. As one commentator has noted:

> Potential adversity exists in virtually every joint defense cases because (1) every defendant can be tempted by the possibility of a superior settlement if it breaks ranks and cooperates with the plaintiff against the other defendants, and (2) most cases present situations where a given defendant, without settling, may attempt to obtain absolution in the fact-finder's mind, or to minimize its own liability (as when damages will be apportioned), by pointing the finger at another defendant during trial. In addition, many litigation situations present the prospect that joint defendants could have cross-claims against each other. [FN23]

The common interest arrangement represents an interpretation of the attorney-client privilege that avoids forcing defendants to elect between either common counsel, with the associated "conflicts of interests" such representation presents, or separate counsel, with its ***639** cost of forfeiting the confidentiality of the shared information. [FN24] Permitting co-parties to share information obviates this dilemma. Yet, it would be foolish to suppose that co-parties do not have divergent interests. It is the existence of divergent interests that makes co-party representation through common counsel difficult. These divergent interests are also what the common adversary seeks to exploit through divide and conquer tactics. [FN25] Finally, divergent interests also cause co-parties to band together to avoid a "race to the bottom" as competition forces each party to seek to advance its own self-identified, short-term interests. Information exchange cures the information deficit that drives this variant of the "Prisoners' Dilemma" and enables co-parties to cooperate and thereby maximize their long-term interests. When squarely presented with the issue in this form, courts have not imposed stringent requirements that the common interests dominate; rather, courts have been satisfied where the subject matter of the information was related to an interest that the parties have identified as both common and substantial. [FN26] Thus, the argument that the parties have "divergent" interests is a weak reed on which to reject recognition of common interest arrangements.

***640** The second reason given for not recognizing the common interest arrangement as a sword is the lack of co-party status. [FN27] This requirement is essentially a variation of the tendency to conflate the "joint litigant" privilege and the "common interest" arrangement. [FN28] The better view is to recognize that the invocation of the common interest arrangement does not require that all parties to the arrangement have litigation-party status. The attorney-client privilege itself ***641** has not been limited to communications made in connection with or in anticipation of litigation, but has been applied to communications when no litigation is threatened. [FN29] Persons may as easily find that their legal interests would be served by information sharing in nonlitigation contexts as in litigation contexts. There is nothing sacrosanct about litigation-related communications that suggests a greater need for protection from compelled disclosure than would be applied to attorney-client communications that preceded the litigation. [FN30] Cases that have suggested that co-party status is a prerequisite to invoking the joint litigant privilege have usually involved situations where only co-party assertions were at issue. [FN31] Since the dominant reason for recognizing the joint litigant privilege and common interest arrangement is to permit individuals to communicate confidentially with their respective attorneys and with each other to advance their shared legal interests, there is no compelling reason to limit those communications to co-parties when the parties define their common ***642** legal interests more broadly. [FN32] Of course, in a nonlitigation setting the danger is greater that the underlying communication will be for a commercial purpose rather than for securing legal advice. [FN33] It is this factor, not the presence or absence of litigation, that more properly limits the application of the privilege.

Returning to a prior example, where a policyholder communicates with a carrier, there is little reason to strip that communication of its preexisting protected status simply because of the nonparty status of the carrier when that nonparty is interested in the matter and the communication advances the interests of both. It is overly formulaic to find that the communication has lost its confidential status because it was communicated to an interested party who was represented by separate counsel, but to maintain confidentiality when both parties are represented by common counsel. The interests advanced by the communication are distinct from the nature of the parties' representation with respect to that communic-

ation. Requiring common counsel as a necessary linchpin for maintaining confidentiality requires the policyholder and carrier to use a common counsel arrangement in situations where their interests, as they define them, would be better served by separate counsel. [FN34]

Decisions such as First Pacific Networks, Inc. v. Atlantic Mutual Insurance Co. [FN35] in which the court refused to recognize the common interest arrangement, represent a distinct situation where the common interest arrangement is used strategically by a nonparty to access confidential information. This application of the common interest arrangement is substantially different from the concern here--the ability of parties to an information sharing arrangement to protect shared ***643** information from disclosure to third parties. The common interest arrangement is a device that allows parties to agree among themselves how best to use confidential information to advance their mutually agreed-upon common interests.

Efforts to use the common interest arrangement as a sword compelling disclosure, rather than as a shield against disclosure, have been consistently and properly rejected because compelled disclosure is the antithesis of the cooperation that underlies the arrangement. The more appropriate basis for distinguishing between common interest situations is to recognize the arrangement when the parties affirmatively seek to cooperate, but to reject forced cooperation as a means of accessing communication between parties who have common interests but have not agreed to share information. [FN36] This approach retains the benefits of information sharing and avoids the need to engage in a balancing or weighing of "shared" and "divergent" interests to determine whether confidentiality will be maintained or abrogated. [FN37] The parties themselves, rather than the courts, are in a better position to engage in any balancing. Therefore, ***644** the parties' decision should be respected, absent additional, separate factors suggesting that the privilege should be deemed lost.

## IV. Nature of the Common Interest Arrangement

Although the joint litigant privilege has been widely adopted and the common interest arrangement is gaining in acceptance, no consensus has developed as to the relationship of those doctrines to the attorney-client privilege. One view is that the information sharing arrangements are exceptions to waiver rules that normally apply in privilege adjudications. [FN38] Under this view the requirement of confidentiality flows from the underlying communication. If the communication is not privileged, for example, because it is related to business rather than to legal advice, [FN39] or because the communication must be disclosed to a third person, [FN40] no privilege is conferred by sharing the communication with other parties or their lawyers. Under the alternative view, the joint litigant privilege and the common interest arrangement are seen as extensions of an existing privilege. [FN41] The decisional law is somewhat undefined here. It is unclear how, if at all, this latter view would influence development of legal doctrine in this area. How the common interest arrangement represents an extension of the attorney-client privilege and how far-reaching the ***645** extension is remain open and unanswered questions. One possible, albeit unlikely, application of this view would be to transform nonprivileged individual information into privileged group information when it was shared within the group for the purpose of obtaining legal advice.

While the idea of transforming public information into confidential information runs counter to accepted thinking, it is not completely alien to principles of confidentiality that have come to surround the attorney-client relationship. For example, public information may become subject to the professional duty to maintain confidentiality simply because it is acquired by the attorney as a result of the attorney-client relationship. [FN42] Nonetheless, it is probably unwise to urge a court to recognize a new, distinct privilege for shared information. In jurisdictions where evidentiary privileges have been codified by the legislature, such as California, courts have adopted the position that new privileges should not be

created through the common law process. [FN43] In jurisdictions where the legislature has delegated privilege formulation to the courts, as in the federal system, we should expect courts to be reluctant to add to the existing edifice. [FN44] Moreover, any need to protect shared information does not exist for independent, substantive reasons, as may be the case with "self *646 critical analysis" [FN45]; rather, the need exists simply because of the waiver concept in the current law of privilege. If it is deemed desirable to permit persons to share attorney-client privileged information, and if that identified good is deemed to outweigh the interests that underlie the "waiver" principle, then common interest arrangements are justified as an exception to the rule that communication of privileged material to or in the presence of a nonclient "waives" the privilege.

Waiver, as applied to attorney-client privilege materials, rests on the idea that disclosure is inconsistent with the privilege's core concept of confidentiality. This easily coheres with cases of voluntary disclosure, but co-exists less easily with the inadvertent disclosure cases. Nonetheless, the underlying theme in both situations is that a privilege-holder must remain vigilant and consistent with respect to the protected nature of the information. Selective, albeit inadvertent, "disclosure" may introduce discontinuities that cause the privilege to expire. [FN46] Even in cases of voluntary disclosure, the fact that disclosure advances the privilege-holder's legal position does not always prevent a finding of waiver.

This approach to waiver may create problems for persons who wish to create a common interest arrangement. The decision to share information is clearly selective, even as it is intended to further the legal position of the parties to the arrangement. As such, it raises the prospect that a court would find that disclosure defeats the privilege because it is inconsistent with the confidential nature of the materials, *647 even if the receivers of the disclosed materials agree to maintain the confidentiality of the materials.

Arrayed against this argument are the numerous decisions that have identified the mutual interests of the parties to disclosure in sharing materials with each other. [FN47] Yet, most voluntary disclosures may be assumed to advance the interests of the discloser. This is particularly true the more we assume that individuals act for self-interested rather than altruistic reasons. To find a waiver only when the parties to the disclosure share an identical legal interest creates a classification scheme that is self-defining but not authenticated by any external criterion other than the definition itself. All other things being equal, how is disclosure to one sharing an identical legal interest to which the privileged materials relate, under circumstances that the discloser believes advances her interests, functionally different from a disclosure to one with a differing legal interest? Disclosure to an adversary certainly can be in the interests of the discloser where, for example, it is undertaken to facilitate settlement; nonetheless, such disclosure usually is deemed to waive the privilege. [FN48]

The argument for treating selective disclosure as a waiver is that it is unfair to allow a person to disclose only favorable information while continuing to treat harmful information as confidential. Such a form of "spin" is deemed to be contrary to the legal system's search for truth. Thus, once helpful confidential information is disclosed, the privilege-holder must release the whole of the information, "warts and all." [FN49]

Disclosures among the parties to a common interest arrangement are designed to advance the interests of the discloser and retard or *648 hinder the interests of another, albeit usually someone other than the members of the information-sharing consortium. Such disclosures aim to promote the adversary system and enhance the attorney's ability to represent the client competently. Disclosure, however, is inconsistent with a formal regard for confidentiality, while preserving confidentiality advances the values that underlie the adversary system. [FN50]

Validating information-sharing arrangements requires going beyond the core concept of confidentiality and adopting practical goals that justify continued protection of disclosed materials under the attorney-client privilege. Such argu-

ments are universally accepted, either expressly or implicitly, in the more limited exceptions, such as the protection for disclosures to interpreters or agents of the lawyer. [FN51] System-enhancing goals underlie both the joint client and joint litigant arrangements. In each of these cases, there has been a disclosure outside of the narrow attorney-client relationship without a corresponding finding that disclosure defeated confidentiality. Yet, the disclosure is itself no different from a disclosure to a third party that defeats the privilege. The true difference is not that confidentiality has been preserved, for once the "secret" has been disclosed, it is no longer a secret. Rather, confidentiality is preserved because the values associated with the disclosure to the third person outweigh the interests in treating the privilege as having been waived. Different treatment of the joint litigant privilege on the one hand and the common interest arrangement on the other rests on a formulaic ***649** approach to the problem. Rather than analyzing and weighing the interests behind the costs and benefits of information sharing, we have adopted by default a classification scheme that is based on insubstantial criteria for determining when privileged information may be shared without losing its privileged status.

Requiring that an "arrangement" precede a finding that a person can access confidential attorney-client information prevents the doctrine from eviscerating the very interests it is designed to protect. This preserves the rule that, as between participants to a common interest arrangement, there is no bar to disclosure. [FN52] For example, in Worthan & Van Liew v. Superior Court, [FN53] the court permitted one client to obtain disclosure of information that the co-client had shared with their common attorney. In that case, however, the underlying arrangement that created the coclient status put each client on notice that the representation was joint in nature, that information would be shared between the clients, and that it could be used if the parties became adversaries. Yet, acceptance of the principle that parties to an information-sharing arrangement do not have an expectation of confidentiality among themselves does not suggest that the members cannot have a reasonable expectation of confidentiality with respect to third parties. Nor does it suggest that the expectation of confidentiality will be maintained by joint agreement and enforced against defectors.

It is for this reason that commentators advise participants in a joint litigant or common interest arrangement to memorialize their understanding. [FN54] It is not required that such arrangements be in writing, [FN55] but it is unlikely that a court will read a prior agreement as ***650** providing for shared information unless that prior agreement is fairly specific, particularly when, as is normally the case, compelled disclosure is sought in an adversary setting. [FN56] Thus, as one court noted: "The common interest doctrine, then, has both a theoretical and a practical component. In theory, the parties among whom privileged matter is shared must have a common legal, as opposed to commercial, interest. In practice they must have demonstrated cooperation in formulating a common legal strategy." [FN57]

## V. What Limits Apply to Information-Sharing Arrangements?

There is an inherent tension between information sharing and confidentiality. The more parties there are who have access to information, the more difficult it is to contend that the information is confidential. It is often difficult to define the line that separates "public" from "private." I have argued here that because information-sharing arrangements facilitate the sharers' joint interests and because disclosure is limited to the members of the information-sharing consortium, the protected status of the information should be maintained. The factors that lead to the basic decision to treat the information as privileged are not substantially altered by an information-sharing arrangement. Information exists, after all, to be conveyed. The value of information lies not in its intrinsic self, but in its capacity to be communicated and used. Of course, recognition of the privilege means that information relevant to the decision-making process is not accessible by all interested individuals. Since the making of decisions with full information is generally understood to be more desirable than the contrary, the cost of realizing the ***651** benefits of privilege recognition is that the decision-making process may be less accurate than if decision-making were based on all relevant information. The critical issue then is ascertaining the desired balance between (1) respecting a need to exchange information to maximize one's position within a sys-

tem in which rights are largely defined by law and (2) resolving disputes between parties based on a truncated record because critical, relevant evidence is not admissible. As one commentator perceptively noted, "At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong." [FN58]

This tension is reflected in two maxims that are often found in privilege adjudication cases. The first maxim is that the privilege should be liberally construed in order to further full communication and discussion between attorney and client so that the client may be fully advised of his rights. [FN59] The second maxim is that the privilege should be narrowly construed because it leads to the exclusion of relevant evidence. [FN60] These antagonistic positions reflect our ambivalent commitment to the privilege. We should, of course, expect that limits will be placed on any doctrine that operates to exclude information from the decision-maker. We should insist, however, that the limits be consistent with the reasons for recognition of the privilege, rather than simply ad hoc responses to the perceived costs that privilege recognition entails.

***652** The proper limitation on information-sharing arrangements is that the information shared must be for the purpose of furthering the legal interests of the members of the arrangement. It is impractical to extend the traditional elements of privilege to an information-sharing arrangement because the reasons for information sharing are different from the reasons for client-lawyer communications. Client-lawyer communications are designed to provide the client with competent legal advice so that the client realizes his legal rights and interests. Information sharing is not done primarily for the purpose of securing legal advice, but is engaged in so that the client can maximize his legal rights and interests in settings where joint, coordinated action is preferable to individual action. In many respects, the relationship between the underlying privilege and information-sharing arrangements is functionally similar to that between privilege and work product. The objective in both cases is to use and develop information to advise the client. Attorneys will be discouraged from sharing information unless they have assurances that sharing will not waive applicable privileges. We generally recognize that sharing with certain intermediaries, such as physicians, accountants, or investigators, does not waive the privilege. Sharing information among persons with common legal interests falls logically within the same category. The focus of any effort to restrict information-sharing arrangements should be directed toward the permissible lengths to which persons may go in maximizing their legal rights and interests. [FN61] Admittedly, this approach would validate many more information-sharing arrangements than has been the case historically.

***653** As noted previously, one limitation on an expansive validation of information-sharing arrangements has been the focus on "identical legal interests." This requirement has often been applied with substantial rigor. Thus, the failure of the parties "to coordinate litigation strategy" or engage in a unified defense has been cited as demonstrating the absence of an identical legal interest even though both parties shared the common economic interest of defeating or minimizing exposure on a claim to which both were liable under a reinsurance contract. [FN62] In another case, the court held that common legal interests could exist when "the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation." [FN63] Similarly, where a nonexclusive license under a patent was held to have an interest, for business reasons and convenience, in the continued validity of the patent, the court deemed that interest to be different from that of a patent holder who has a monopoly interest in the validity of the patent; hence, no common legal interest protected information shared between a licensee and the patent holder from disclosure through discovery by third parties. [FN64]

Other courts have taken a more expansive and, in my opinion, better approach to the commonality issue. In the patents context, these courts have found that the shared interests of parties in obtaining the greatest protection for or in exploiting patents satisfy the common legal interest requirement. [FN65] Similarly, in Schachar v. American Academy of

Ophthalmology, Inc., [FN66] the information exchange involved parties and their attorneys who were suing some of the same defendants*654 for antitrust violations in separate actions in the federal district courts for the Northern District of Illinois and the Northern District of Georgia. The court emphasized that "the joint privilege is meant to recognize 'the advantages of, and even, the necessity for, an exchange or pooling of information between attorneys representing parties sharing such a common interest in litigation, actual or prospective.'" [FN67] In addressing whether the requisite community of interests existed, the court further noted:

> Defendants maintain that there is insufficient mutuality of interest between the Schachar plaintiffs and the Vest plaintiffs for a joint privilege to arise regarding work product and attorney-client confidences. The court disagrees. Vest was initially filed as a class action; Rule 23 certification was postponed while the parties explored settlement. The present plaintiffs--putative members of the Vest class--were in effect parties to that litigation and may still stand to gain if that case successfully proceeds as a class action. Moreover, the factual bases for the two cases are sufficiently similar that the attorneys should be allowed to coordinate prosecution efforts to some extent without jeopardizing the confidentiality of their work product or their shared confidences. [FN68]

In In re Celotex Corp., [FN69] the information exchange occurred between the debtor in bankruptcy and certain defendants who were considered "insiders" and stood to constitute eighty percent of the equity ownership under the debtor's proposed plan of reorganization. Celotex was in bankruptcy as a result of asbestos litigation. Bankruptcy law allows the debtor (Celotex) a period of time in which the debtor has exclusive right to propose a reorganization plan. The various creditor committees sought to end this period of exclusivity and propose competing plans. During the ensuing litigation, the plaintiffs (the creditor committees) sought discovery of information shared by the debtor and the defendants, relating to the reorganization plan proposed by the debtor in the general bankruptcy case. The court found that the defendants and the debtor shared a common legal interest in the bankruptcy case because the information shared was *655 "created postpetition in contemplation of Debtor's confirmation in which Defendants are legally and commercially engulfed." [FN70]

A last example is Durham Industries, Inc. v. North River Insurance Co., [FN71] in which a policyholder sought discovery of information shared between the carrier and the reinsurers. The information consisted of correspondence between the carrier and its attorneys regarding the policyholder's claim. The court, after quoting the "identical legal interests" test from DuPlan Corp v. Deering Milliken, Inc., [FN72] held that "where the reinsurers bear a percentage of liability . . . their interest is clearly identical to that of [the carrier]." [FN73]

This second group of decisions reflects a greater willingness to permit parties to engage in a cooperative effort to meet a threat that implicates their interests. How coextensive the parties' interests must be in relation to the threat is the point of distinction between the two groups of decisions. The more rigid and narrow approach seen in the first group reveals an unwillingness to give parties much latitude to self-define their shared interests and to act in a manner that they deem will best advance their common goals. This approach requires that the "legal" interest refer to a substantive legal interest, i.e., an exclusive right to exploit patents or a right to control the defense of a claim asserted against another for which an indemnity has been promised, in order for information exchanged to retain its protected status as privileged material. Under this view the presence of litigation is an integral component of the common interest doctrine because litigation, actual or threatened, presents the fulcrum on which the parties' common litigation position demonstrates the identical nature of their common legal interests.

Although the decisions in the second group contain some qualifying language, they exhibit a greater willingness to look at *656 economic realities and the strategic considerations that encourage parties to cooperate for mutual protection. In this regard, these cases adopt the approach, suggested by a student commentator, that a common interest exists when the information disclosed is germane to and can be reasonably expected to further an interest that is related to the parti-

cipants in the information exchange. [FN74] The common interest arrangement, when practically applied, simply acknowledges that the parties' efforts to cooperate through information exchange will not be deemed inconsistent with the parties' desires to have the information retain its confidential status as to others outside the information-sharing arrangement. These decisions give the parties the flexibility to respond to common problems for which legal advice is desirable and permit the parties to share that advice in order to increase the likelihood that their interests will be realized.

The narrow approach to the common interest arrangement is predicated on the notion that protection should only be afforded to information exchanges when those exchanges arise out of the need for a common defense or prosecution, rather than the need to address a common problem. [FN75] However, the need for legal advice is not limited to litigation settings, and the range of parties who are interested in the resolution of a "problem" is not limited to those who may be made co-parties or who have the legal right to assume control of the defense or claim. [FN76]

***657** The narrow view articulated in the first group of decisions suffers from an overly formal and dated view of litigation and the legal system. As disputes become more complex and relationships more interwoven, it becomes increasingly anachronistic to insist on using formal litigation models as guidelines to determine whether information exchanges, which are beneficial to the exchangers, will be encouraged or discouraged. None of the cases in this area identifies any unfair advantages that information exchanges achieve vis-a-vis their common adversaries. [FN77] Only a profound enthusiasm for the wooden application of law justifies an approach that discourages information sharing for mutual gain, absent a showing of harm to others.

## VI. What Consequences Follow from an Expansive Approach to Information-Sharing Agreements?

Any consortium composed of members having some divergent interests faces the risk of defection. [FN78] Indeed, the information gained through membership in an information-sharing arrangement makes the defector more valuable than a similarly situated nonmember if the defector can deliver information otherwise unavailable, or available only at greater costs than those associated with procuring the defection. As the defector's value goes up, the pressure on the defector to capture that value by defecting correspondingly increases. To ensure stability, the consortium will insist on some form of security to protect against defection. Not surprisingly, practitioners who have written on this topic have emphasized the need for a written ***658** agreement that conditions admission to information-sharing arrangements on each member's agreement to maintain the confidentiality of shared information unless relieved of the obligation by agreement of all members of the arrangement. [FN79] Left unaddressed is the enforceability of these "unanimous consent" provisions. If the provisions are enforceable against a potential defector, the arrangement functions effectively as an agreed-to compulsory association from which defection is not permitted. This is accomplished by depriving the defector, and those who would induce defection, of the benefits of defection. [FN80]

A number of courts have refused to enforce provisions that bar a member of an information-sharing arrangement from defecting to capture the value of the information. The rationale of these decisions is that a disclosure, even one in breach of an agreement, constitutes a "waiver" of confidentiality. [FN81] In effect, once the interests of the ***659** members of an information-sharing arrangement become adverse, their joint ability to enforce the confidentiality provisions inherent in the arrangement lapses.

It should be observed that analysis of the enforceability of confidentiality provisions in common interest arrangements raises two closely related issues. The first issue is the enforceability of the provision as a matter of contract law. The second issue is whether, even assuming that the provision is enforceable, waiver nonetheless occurs upon a breach of the agreement.

***660** There is some authority for the proposition that "secrecy" obligations will be enforced even outside the context of trade secrets. [FN82] Specifically, the cases dealing with common interest arrangements fall along a continuum that ranges from no enforcement of confidentiality at one end, [FN83] to limited enforcement in the middle, [FN84] to full enforcement at the other end. [FN85]

The majority approach, which denies enforcement of secrecy provisions in common interest arrangements, states the weaker view. ***661** Permitting defectors to disclose information they have obtained while a member of an information-sharing arrangement imposes substantial costs on information-sharing consortiums. It is somewhat inconsistent to recognize common interest arrangements as valuable, permissible methods by which persons may advance their common interests, and yet create incentives for members to breach their understanding and their commitment to confidentiality so that they may capture the profit in their newly acquired information. As noted previously, no consortium can withstand defection, particularly when defection is indirectly encouraged and promoted through vigorous judicial enforcement of waiver rules.

It may be argued that permitting enforcement of information exchange agreements would come perilously close to validating obstruction of justice by impeding voluntary testimony by individuals with relevant evidence. It might also be suggested that lawyers who facilitate such arrangements could also be subject to discipline. [FN86] I believe these concerns are exaggerated unless there is some concrete proof that the information-sharing arrangement is a ruse, designed to prevent the parties to the arrangement from voluntarily giving relevant information about each other, rather than to advance their mutual common interests. It is the very nature of privileges that they restrict the decision-maker's access to relevant information. Unless the arrangement is entered into for an improper purpose, the fact that it does not facilitate an adversary's access to privileged information is simply a consequence of the decision to afford protection to the information in the first place.

I recognize and do not minimize the strength of the counterargument that parties to an information-sharing arrangement cannot have any "legitimate expectation that the attorney-client privilege will prevent use of shared materials if one of the parties later becomes an adverse litigant." [FN87] However, the strength of this assertion rests ***662** solely on its premise-- that the confidentiality provision will not be respected. The suggestion or statement that parties have no reasonable expectation of confidentiality is only meaningful in the context of information-sharing arrangements where confidentiality has been expressly bargained for, but the applicable legal rules are such that the parties cannot create a cone of confidentiality around themselves. If, as I assert, confidentiality should be respected because it is more fully consistent with the reasons for allowing information-exchange arrangements in the first place, then one would anticipate the opposite result--parties would have an expectation of confidentiality because their confidences would be respected by the courts and defection would be deterred.

## VII. Conclusion

The majority approach, in effect, holds that the parties to an information-sharing arrangement assume the risk of defection and cannot count on judicial assistance to minimize the risk even after the parties have done all that they could contractually to prevent defection, or at least deprive the defector of the profits of defection. This approach substantially depreciates the value of information-exchange arrangements. However, most courts seem to recognize that such arrangements are useful to participants. It is therefore difficult to square this view with the unwillingness of courts to hold parties to information-sharing arrangements to their word and enforce the confidentiality agreements to which they have agreed.

Nevertheless, the danger that a party to an information-sharing arrangement may decide to defect cannot be minim-

ized. Indeed, as information-sharing arrangements grow in membership--and this may be the chief distinction between such arrangements and the more traditional joint client and joint litigant doctrines--the ties that bind the parties together may loosen. Absent judicial willingness to enforce promises of joint action, common interest arrangements risk disruption due to individual self-interest, i.e., the "Prisoner's Dilemma" in another form.

I appreciate that this approach favoring disclosure is neither perfect nor flawless. It acknowledges that the values that underlie the attorney-client privilege are better advanced by encouraging disclosure*663 in common interest situations than by discouraging disclosure through the threat of waiver. This approach will allow privilege-holders to share and use information while denying access to that same information to their opponents. It may also encourage retroactive claims of privilege to shield past disclosures. Nonetheless, on balance the pro-disclosure approach is superior because it furthers the fundamental reason for the attorney-client privilege: the encouragement of disclosures by clients not for their own sake, but to enable clients to realize fully their legal rights in a society dominated by legal rather than cultural privileges and constraints.

Charles Wall's comment at the beginning of this paper was that the Liggett Group could not unilaterally defect and deliver. That position may be overly optimistic. Rather than saying, "They can't do that," perhaps we should add, "can they?" One may not believe they should be able to defect and deliver, but the case law is sufficiently diverse to support the contrary conclusion. Thus, participants in information-sharing arrangements must assume some risk that while the arrangement usually will be respected as against attacks by third parties, the arrangement is subject to attack from within.

[FNa1]. Professor of Law, Southwestern University School of Law. I would like to thank Christopher Cameron and James Hogan, who graciously read and shared their comments with me regarding an earlier draft of this article. I would also like to thank Southwestern University's Summer Research Stipend Program for providing financial assistance for this article.

[FN1]. Alex M. Friedman, Another Break in Tobacco Industry's Ranks, Wall St. J., Jan. 9, 1997, at B1, available in 1997 WL-WSJ 2405010.

[FN2]. See id. The litigation has grown so pervasive that one publisher devotes a report exclusively to developments in that field. Mealey's Litigation Reports--Tobacco, available inWestlaw "Provider or Gateway" Database.

[FN3]. Friedman, supra note 1, at B1.

[FN4]. See Restatement (Third) of the Law Governing Lawyers § 126 (Proposed Final Draft No. 1, 1996).

[FN5]. One commentator describes the joint defense privilege in the following terms:

Joint defense groups are arrangements in which co-defendants who are represented by separate lawyers agree to cooperate with each other in formulating their legal position. Co-defendants may agree to cooperate because they have matters of common legal interest, believe it is in their mutual interest to coordinate legal strategy, or believe it may be mutually advantageous to share information and divide the work of litigation between the various separate lawyers.

Deborah Stavile Bartel, Reconceptualizing the Joint Defense Doctrine, 65 Fordham L. Rev. 871, 875 (1996) (footnote omitted); see also Susan K. Rushing, Note, Separating the Joint Defense Doctrine From the Attorney-Client Privilege, 68 Tex. L. Rev. 1273, 1273 (1990) (footnote omitted) ("The joint defense privilege protects exchanges of information among parties who share common interests in defending against or attacking a common opponent but who are represented by separate lawyers.").

[FN6]. See North River Ins. Co. v. Columbia Cas. Co., No. 90 civ. 2518 (mul), 1995 WL 5792, at *2 (S.D.N.Y. 1995) ("The common interest doctrine subsumes a number of principles that are sometimes characterized as separate rules and at other times conflated into a single axiom. The nomenclature is less important than a determination of the outer boundaries of the doctrine." (citations omitted)); In re Megan-Racine Assocs., Inc., 189 B.R. 562, 570 n.4 (Bankr. N.D.N.Y. 1995) ("Courts and commentators use the terms 'joints defense privielege,' 'common interest privilege' and 'pooled information situation' interchangeably. Perhaps the best term, as it is the least misleading, is 'common interest exception to waiver.'"); see also GTE Directories Serv., Corp. v. Pacific Bell Directory, 135 F.R.D. 187, 191 (N.D. Cal. 1991) (noting that "[t]he legal boundaries which define the scope of the 'common interest' rule are by no means well defined").

[FN7]. This "joint defense" privilege has its roots in criminal litigation. See Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 841-42 (1872) (holding that because joint defendants in a criminal prosecutio had a common interest in their defense against the charge, communications between their separately retained counsel did not lose their status as attorney-client privileged material).

[FN8]. See, e.g., United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 685 (S.D. Cal. 1996); see also In re Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244, 249 (4th Cir. 1990). In Grand Jury Subpoenas, the court declared:

A review of cases apply the joint defense privilege reveals no principled basis upon which to distinguish Movant's relationship with Subsidiary from similar situations in which courts have upheld the privilege. Although the government notes, as did the district court, that Movant and Subsidiary were not criminal co-defendants, and that Subsidiary was not named as a party in either the civil claim against the Army or in the Army's counter-claim, we have discovered no case in whcih the existence of a joint defense or common interest privielege turned on such distinctions. Whether an action is ongoing or contemplated, 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. The district court's ruling, apparently based on the notion that the joint defense privilege is limited to co-defendants, was in error.

Id. at 249.

[FN9]. 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5493, at 102 (Supp. 1996). Even the joint client concept has been included within the common interest arrangement. See, e.g., North River Ins. Co., 1995 WL 5792, at *2 (noting that "[t]he 'common interest' doctrine applies when multiple persons are represented by the same attorney.").

[FN10]. See Friedman, supra note 1, at B1. One individual who has reportedly viewed the privilege log has described it as a "treasure map" to the "treasure trove." Anti-Tobacco Attorneys See "Treasure Map" in Documents, Los Angeles Times Feb. 4, 1997, at D1 (describing proposed disclosure of documents by Liggett Group).

[FN11]. Id.

[FN12]. Id.

[FN13]. If the common interest arrangement is not recognized, it may be that even generic discussions of litigation strategy at these meetings may be disclosable to the extent the discussions cannot be tied to a particular case to which all the participants are involved.

[FN14]. 397 F. Supp. 1146 (D.S.C. 1974).

[FN15]. Sharing privileged information with independent third parties is generally understood to waive the privilege. See

Weil v. Investment Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981); Paul R. Rice, Attorney Client Privilege in the United States § 9.22 (1993) (discussing express and implied waivers). But see Tennebaum v. Deloitte & Touche, 77 F.3d 337, 340 (9th Cir. 1996) (holding that promise to disclose without performance did not waive privilege); AMBAC Indem. Corp. v. Banker's Trust Co., 573 N.Y.S.2d 204, 208 (Sup. Ct. 1991) (holding that disclosure of mere fact of consultation is no basis for waiver as to content of that consultation); see generally Developments in the Law--Privileged Communications, 98 Harv. L. Rev. 1450, 1629 (1985) (discussing the doctrine of implied waiver).

[FN16]. Duplan Corp., 397 F. Supp. at 1164 (adopting a modified control group test under which "[o]nly where communications are between an attorney and members of the corporate control group, as well as corporate personnel not acting at the direction of a member of the control group," will the privilege be deemed waived); cf. UpJohn Co. v. United States, 449 U.S. 383, 397 (1981) (holding that the control group test cannot govern the development of the law in this area).

[FN17]. 397 F. Supp. at 1172. The test was articulated without explanation as to the reasons for inclusion of the particular components of the test. Why, for example, must the interest be identical rather than similar? Nonetheless, the test as stated in Duplan Corp. has been reverentially recited as a mantra by later courts. I will accept the test as stated for purposes of this discussion.

[FN18]. The most common example of this is information sharing between policyholders and carriers when the carrier is providing a defense pursuant to the terms of the insurance contract. See, e.g., Pittston Co. v. Allianz Ins. Co., 143 F.R.D. 66, 69 (D.N.J. 1992); Emons Indus. Inc. v. Liberty Mut. Ins. Co., 747 F. Supp. 1079, 1082 (S.D.N.Y. 1990).

[FN19]. See Restatement (Third) of the Law Governing Lawyers § 126(2) (Proposed Final Draft No. 1, 1996).

[FN20]. See First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. 574, 581 (N.D. Cal. 1995) (holding that since the policyholder and the carrier were not joint defendants in the underlying action, and could not rationally be expected to be joint defendants, the court would not conclude that communications would be part of an "ongoing and joint effort to set up a common defense strategy" against an actual or anticipated a common litigation opponent.

[FN21]. See id. at 578 (noting that once the carrier reserved its rights and permitted the policyholder to select counsel and control the defense, the interests of the carrier and policyholder were no longer substantially aligned).

[FN22]. The most significant of these decisions is Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991), in which a carrier obtained attorney-client privileged information from its policyholder by arguing that the information was not privileged against the carrier since it was common interest information material. See also EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18, 24 (D. Conn. 1992) (holding that common interest information was not privileged under the work product rules after Waste Management); Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 142 F.R.D. 471, 476 (D. Colo. 1992) (same).

[FN23]. John T. Hundley, White Knights, Pre-Nuptial Conferences, and the Morning After: The Effect of Transaction-Related Disclosures on the Attorney-Client and Related Privileges, 5 DePaul Bus. L.J. 59, 112 n.99 (1993).

[FN24]. See People v. Pennachio, 637 N.Y.S.2d 633, 635 (Sup. Ct. 1995) (noting the dilemma as a reason for recognizing common interest arrangement).

[FN25]. As Deborah Bartel has noted, "Defection is a common event [in joint defense cases] and today's co-defendant frequently turns into tomorrow's prosecution witness." Bartel, supra note 5, at 872. Weinstein & Berger have argued that

Proposed Rule 503(b)(3) of the Federal Rules of Evidence would have created a protective zone around shared confidences, barring defectors from unilaterally disclosing or using confidential information. 2 Jack B. Weinstein et al., Weinstein's Evidence, § 503(b)[4], at 503-61 (Joseph Fogel, ed., Rel. 57 Nov. 1996) ("[I]f litigation subsequently ensues between any of the clients who had engaged in a joint consultation about a matter of common interest, subdivision (b) [of Proposed Rule 503] indicates that the privilege continues to apply."). Weinstein would extend the protective zone to all communications, including those made by the defector. Id. The Advisory Committee Note would permit the defector to disclose his own confidential information after defection. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 364 (1971).

[FN26]. Cf In re Regents of the Univ. of Cal., 101 F.3d 1386, 1390 (Fed. Cir. 1996) (noting that "in order for the communications between the University of California (UC) and the Lilly attorneys to be protected by the attorney-client privilege, Lilly and UC as clients must share a common legal interest, or have a community of interest, with respect to the subject of the communications."); for a discussion of the limits on information sharing, see infra Part V.

[FN27]. See First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co., 163 F.R.D. 574, 580-81 (N.D. Cal. 1995) (finding that the common interest doctrine does not apply where the parties are not clients of the same attorney).

[FN28]. See supra note 6 and accompanying text. Many information exchanges include attorney work product material. The sharing of work product may drive the concern that permitting parties to share information without loss of protection should not be extended beyond the litigation context. Such a restriction may be inherent when work product is concerned because of the very nature of attorney work product, but no such limitation applies to attorney-client privileged communications. See United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980). In discussing shared work product materials, the court in AT&T noted:

existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But 'common interests' should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary.

Id. at 1299. Nevertheless, commentators tend to attribute the same required nexus to litigation that would be applied to shared work product information to shared attorney-client privileged information. See Robert W. Higgason, The Attorney-Client Privilege in Joint Defense and Common Interest Cases, 34 Houston Lawyer 20, 22 (July-Aug. 1996) . Higgason writes: The timing of the subject communications is important, since actual or potential litigation is a prerequisite for the joint defense privilege. The fact that two or more clients share a common problem is not sufficient to give rise to the privilege. There must be a strong possibility of litigation. The party asserting the privilege has the burden of establishing (a) that there was either existing litigation or a strong possibility of future litigation and (b) that the communications were provided for the purpose of mounting a common defense. In Polycast Technology Corp. v. Uniroyal, Inc., for example, the defendants could not prove that communications pertaining to contractual obligations under a stock purchase agreement were made in anticipation of litigation, and the privilege did not apply.

Id. (footnote omitted).

[FN29]. The privilege attaches to the giving of legal advice. That advice may be rendered in a litigation or transactional setting. See, e.g., Hoiles v. Superior Court, 204 Cal. Rptr. 111, 113 (Cal. Ct. App. 1984) (holding that attorney-client privilege applies to matters not necessarily discussed in contemplation of litigation); cf. Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977) (finding that preparation or prosecution of patent application involves activity with attorney-client privilege).

[FN30]. The standard definition of the attorney-client privilege does not contain a litigation nexus, applying where (1) legal advice is sought, (2) from a lawyer acting in his capacity as a lawyer, (3) the communication relates to that purpose, (4) is made in confidence, and (5) by the client. See Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1492 (9th Cir. 1989).

[FN31]. See United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 685 n.2 (S.D. Cal. 1996) (citations omitted). Distinguishing the weight of prior authority, the court in DeNardi Corp. stated:

The court is aware that much of the case law that discusses the joint defense privilege and the joint prosecution privilege discuss the doctrine's applicability to co-parties to a litigation sharing confidential communications as part of [sic] joint effort to establish common prosecution or defense theories. However, those courts did not have the occasion to address the issue of whether the privilege applies exclusively to co-parties, because only co-parties' assertions of the privilege were at issue in those cases.

Id.

[FN32]. Cf. Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 310-11 (N.D. Cal. 1987) (holding that disclosure of confidential information to prospective buyer did not cause information to lose its protective status because discloser-seller and buyer had common interest in seeing that the plaintiff's suit against the seller was defeated).

[FN33]. See infra note 37.

[FN34]. See In re Regents of the Univ. of Cal., 101 F.3d 1386, 1389 (Fed. Cir. 1996) (noting that "the joint client doctrine typically has been applied to overcome what otherwise would have constituted a waiver of confidentiality because a communication had been shared between two clients.") (quoting Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995) ). The court further noted that "the protection of communications among clients and attorneys 'allied in a common legal cause' has long been recognized.

[FN35]. 163 F.R.D. 574 (N.D. Cal. 1995).

[FN36]. Cf. Niagara Mohawk PowerCorp. v. Megan-Racine Assocs., Inc.(In Re Megan-Racine Assocs., Inc.), 189 B.R. 562, 571-72 (N.D.N.Y. 1995). The court in Niagara Mohawk required an agreement between the parties, holding:

In keeping with this principle, the Court finds that the joint-defense privilege is only applicable where the party asserting it can demonstrate an agreement between the parties privy to the communication that such communication will be kept confidential. The requisite agreement of confidentiality, however, is inferable from the circumstances. Thus, it is incumbent on Debtor and FDIC to demonstrate that prior to divulging the communication to each other, each party to the communication had agreed to pursue a joint-defense strategy and had agreed that such communications would be kept confidential.

Id. (citations omitted).

[FN37]. See, e.g., Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 418 (D. Del. 1992) (holding that the common interest arrangement would not be recognized to permit the carrier to access the policyholder's privileged communications relating to the underlying action because their shared interests were outweighed by their conflicting interests). This concept is also expressed in cases that recognize the common interest arrangement when the carrier assumes the defense of the policyholder. See, e.g., Glacier Gen. Assurance Co. v. Superior Court, 157 Cal. Rptr. 435, 436-37 (Cal. Ct. App. 1979). By assuming the defense, the carrier agrees to indemnify the policyholder for the claim up to policy limits. This rule varies when the carrier defends under a reservation of rights, but none of the cases recognizing the common interest arrangement in carrier defense cases has involved a conditional defense by the carrier under a reservation of rights.

[FN38]. See Niagara Mohawk, 189 B.R. 562.

[FN39]. See, e.g., Standard Chartered Bank PLC v. Ayala Int'l Holdings, Inc., 111 F.R.D. 76, 80 (S.D.N.Y. 1986) ("[T]he privilege only applies when the lawyer is acting as a lawyer, i.e., giving legal advice. When a lawyer acts as a business or economic advisor, there is no special relationship to give rise to a privilege to protect his advice from disclosure."). While the distinction is easy to state, it is maddeningly difficult to apply because (1) the core concept of "legal advice" is not defined and (2) the line between "lawyer" and "non-lawyer" activities is difficult to find, much less police. Classification is also complicated by the additional principle that the presence of nonlegal advice does not vitiate the privilege when the advice given is predominantly legal. See Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y. 1988); 2 Jack B. Weinstein et al., Weinstein's Evidence § 503(a)(1)[01] at 503-22 (Joseph Fogel ed., Rel. 57 Nov. 96).

[FN40]. See Cloud v. Superior Court, 58 Cal. Rptr.2d 365, 369-70 (Cal. Ct. App. 1996) (holding that no reasonable expectation of confidentiality attaches to documents that are required by federal law and available for inspection by federal authorities).

[FN41]. See Waller v. Financial Corp. of Am., 828 F.2d 579, 583 n.7 (9th Cir. 1987).

[FN42]. See Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 572-73 (2d Cir. 1973) (holding that attorney's duty to maintain client confidences was not affected by fact that the client's confidences were part of the public record or otherwise disclosable from other sources of information); see also In re American Airlines, Inc., 972 F.2d 605, 620 (5th Cir. 1992) (finding that information provided by a client to an attorney is protected by virtue of the attorney-client relationship without regard to whether the disclosure is part of the public record).

[FN43]. See, e.g., Valley Bank of Nev. v. Superior Court, 542 P.2d 977, 979 (Cal. 1975) (holding that "the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy"). While California courts may not create new privileges, they may with liberty draw upon judicial precedents in construing the limits of recognized privileges. Moreover, under the "sauce for the goose, sauce for the gander" principle, California courts may not imply exceptions and limitations into the recognized privileges. See Dickerson v. Superior Court, 185 Cal. Rptr. 97, 100 (Cal. Ct. App. 1982).

[FN44]. See University of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (holding that federal courts should be "disinclined to exercise this authority expansively").

[FN45]. See Aramburu v. Boeing Co., 885 F. Supp. 1434, 1438-39 (D. Kan. 1995) (noting conflict in decisional law whether such a privilege exists). Some courts have recognized a "business strategy" privilege. See, e.g., Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 418 (M.D.N.C. 1992) (recognizing a "business strategy" privilege that "'protects from disclosure the strategic business plans ... by one contemplating engaging in, or defending against, a contest for corporate control.'").

[FN46]. I use the term "selective" as distinct from "strategic." See Developments in the Law--Privileged Communications, 98 Harv. L. Rev. 1629, 1632-48 (1985) (noting that "strategic" disclosures of privileged information involve disclosures that directly bear on the factfinding aspect of the trial process, such as by disclosure at trial of only the favorable portion of privileged information and the assertion of the privilege as to the remaining unfavorable information). The key distinction between strategic and selective disclosure is the former's use of the information in some manner as evidence without full disclosure of all the information.

[FN47]. See, e.g., United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989).

[FN48]. See In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846-7 (8th Cir. 1988); In re Crazy Eddie Sec. Litig., 131 F.R.D. 374, 378 (E.D.N.Y. 1990).

[FN49]. The way Oliver Cromwell is reported to have told his portraitist to paint his face. Attribution of the quote to Cromwell has been made in several decisions without citation to an original source. See Bidna v. Rosen, 23 Cal. Rptr.2d 251, 257 (Ct. App. 1993); Truitt v. Truitt, 583 N.E.2d 331, 335 (Ohio App. 1989); von Bulow v. von Bulow, 114 F.R.D. 71, 75 (S.D.N.Y. 1987) (quoting Alan Dershowitz, Reversal of Fortune-Inside the von Bulow Case (1986)), vacated on other grounds, 828 F.2d 94 (2d Cir. 1987). I accept the weight of authority as to the authenticity of the quote.

[FN50]. Cf. United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (finding that voluntary disclosure by MCI of information to government waived attorney-client privilege but not work product protection because while former exists to protect confidential communications--a protection inconsistent with voluntary disclosure--the work product doctrine exists to "promote the adversary system," and disclosure of work product to one party is not inconsistent with preserving its confidentiality as to another person).

[FN51]. See, e.g., United States v. Alvarez, 519 F.2d 1036, 1046-47 (3d Cir. 1975) (holding that disclosure to psychiatrist hired by defense counsel to assist in preparation for trial was protected under attorney-client privilege); H.W. Carter & Sons, Inc. v. The William Carter Co., (S.D.N.Y. 1995), 1995 WL 301351, at *3 (holding that presence of public relations consultant at meeting between lawyer and client did not waive the confidentiality because consultant participated to assist lawyer in rendering legal advice); Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 518-19 (S.D.N.Y. 1992) (same as to communication with patent agent).

[FN52]. See Restatement (Third) of the Law Governing Lawyers, § 126(2) (Proposed Final Draft No. 1, 1996).

[FN53]. 233 Cal. Rptr. 725, 727 (Cal. Ct. App. 1987).

[FN54]. See infra note 79.

[FN55]. See SIG Swiss Indus. Co. v. Fres-Co Sys., U.S.A., Inc. (E.D. Pa. 1993), 1993 U.S. Dist. Lexis 3576, at *7 (noting that a court may enforce an oral joint defense agreement). If a written agreement exists, it is problematic whether the agreement itself is protected. Compare United States v. Bicoastal Corp., (N.D.N.Y. 1992), 1992 U.S. Dist. Lexis 21445, at *18 (holding agreement itself to be confidential and not subject to disclosure) with Clark v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992) (holding that attorney-client privilege does not usually protect client identity, fee arrangement and the like unless information would reveal "motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided").

[FN56]. See Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153 (Cal. Ct. App. 1994) (holding that duties of assistance and cooperation assumed by policyholder under liability insurance contract did not obligate policyholder to disclose privileged communications relating to defense of underlying claim in coverage dispute with the carrier). But see Waste Management, Inc. v. International Lines Ins. Co., 579 N.E.2d 322, 327-28 (allowing carrier to obtain privileged information from policyholder because the material was common interest information).

[FN57]. Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y. 1995). The court, however, ultimately held that the parties' common interests were commercial, not legal. Id. at 448.

[FN58]. Richard L. Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605, 1641-42 (1986).

[FN59]. See, e.g., NL Indus., Inc. v. Commercial Union Ins. Co., 144 F.R.D. 225, 230 (D.N.J. 1992) (announcing that

since the public is well-served by complete attorney-client communications, the attorney-client privilege, where applicable, should be "'given as broad a scope as its rationale requires'" (citations omitted)).

[FN60]. See, e.g., Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423-24 (3d Cir. 1991) (noting that because attorney-client privilege obstructs access to information relevant to the factfinder's ability to ascertain the truth, the protection afforded should be limited to only that necessary to obtain informed legal advice); In re Jacqueline F., 391 N.E.2d 967, 969 (N.Y. 1979) (stating that "the attorney-client privilege constitutes an 'obstacle' to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose" (citations omitted)).

[FN61]. See Gregory J. Kopta, Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California, 36 UCLA L. Rev. 151, 196-97 (1988). In this perceptive student comment, the author observed:

The extent to which allied endeavors are protected can only be determined if courts are willing to examine conventional privileges in the light of unconventional situations, both inside and outside of litigation. This examination should not involve the creation of new privileges or new standards for applying the existing privileges. Instead, it merely requires the logical application of established standards to unfamiliar circumstances--a situation with which the law must become more comfortable if it is to keep up with society's ever-quickening pace.

Id.

[FN62]. North River Ins. Co. v. Columbia Cas. Co., No. 90 Cir. 2518, 1995 WL 5792 (S.D.N.Y.), at *5 (S.D.N.Y. Jan. 5, 1995). The reinsurer in this case sought access to the documents under the argument that the common interest doctrine negated a claim of privilege as between those sharing the common interest. The better reason for rejecting access is the absence of an agreement to share information.

[FN63]. Niagara Mohawk PowerCorp, 189 B.R. at 573.

[FN64]. Research Inst. for Med. & Chemistry, Inc. v. Wisconsin Alumni Research Found., 114 F.R.D. 672, 678 (W.D. Wis. 1987). In dicta the court inferred that a common interest would exist if the license was exclusive because then the license would have a shared monopoly interest with the patent holder. Id.

[FN65]. See, e.g., Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95 95C1303, 1995 WL 360590, at *4 (N.D. Ill. June 14, 1995); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 514 (D. Conn. 1976), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976).

[FN66]. 106 F.R.D. 187 (N.D. Ill. 1985).

[FN67]. Id. at 192 (citations omitted).

[FN68]. Id. at 192; see also Baxter Travenol Labs., Inc. v. Abbott Labs., No. 84C 5103, 1987 WL 12919, at *2 (N.D. Ill. June 19, 1987) (holding that the critical issue was whether the parties shared a common legal interest to which the communication related).

[FN69]. 196 B.R. 596 (M.D. Fla. 1996).

[FN70]. Id. at 601.

[FN71]. No. 79 Civ. 1705 (RWS), 1980 WL 112701 (S.D.N.Y.), (S.D.N.Y. Nov. 21, 1980).

[FN72]. 397 F. Supp. 1146, 1172 (D.S.C. 1974).

[FN73]. Durham Indus., 1980 WL 112701, at *2. See generally Jeffrey S. Burman, Comment, Confidential Insurer-Reinsurer Communications: Are Courts Placing the Reinsurance Relationship in Jeopardy By Ordering Disclosure? 27 Rutgers L.J. 727, 747-51 (1996) (discussing application of common interest arrangement to insurer-reinsurer information exchanges).

[FN74]. Kopta, supra note 61, at 197. The author included another element in his definition of "common interest"--that the disclosing party have a "reasonable expectation of confidentiality." Id. This requirement seems unnecessary, for it is subsumed within the decision to participate in an information-sharing arrangement. It is difficult to envision a case in which the parties to the arrangement would not expect and desire as much confidentiality as the law would allow.

[FN75]. See Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841, 845 (N.D. Ill. 1988) (holding that confidential communications between codefendants are privileged against third parties except where codefendants later become adversaries in litigation).

[FN76]. For an example in the subrogation context, see Dome Petroleum Ltd. v. Employers Mut. Liab. Ins. Co. of Wis., 131 F.R.D. 63 (D. N.J. 1990), in which the court discussed the right of the subrogee to discover information as equal to that of subrogor and held that since the attorney-client privilege could not be invoked against a subrogor-client, it could not be invoked against a nonclient subrogee. Id. at 69. Although the issue of the subrogee's assertion of the subrogor's privilege was not before the court, it would appear that the court's "stands in the shoes of" reasoning would permit use of the privilege by the nonclient subrogee.

[FN77]. See Paul R. Rice, Attorney-Client Privilege in the United States, 9.28 (1993) (noting that courts will not permit selective disclosure of confidential information that is favorable to the privilege holder and permit the holder to claim the privilege as to the unfavorable, remaining portions of the confidential materials). However, as noted previously, I would characterize such disclosure as "strategic" rather than "selective." See supra note 46 and accompanying text. Terminology aside, I agree with Rice's conclusion.

[FN78]. See John S. McGee, Ocean Freight Rate Conferences and the American Merchant Marine, 27 U. Chi. L. Rev. 191, 197 (1960) ("In cartels the first problem is that of defection...."). See generally M. Olsen, The Logic of Collective Action 40-41 (1971).

[FN79]. See, e.g., Edward Lowenberg, Consolidated Defense Experience: Working With Co-Defendants to Really Minimize Costs, 497 PLI/Lit 75, at 132-33, available in Westlaw Database PLI. Lowenberg offers a sample draft of an agreement, which provides:

19. Notwithstanding any settlement agreement, including without limitation any "Mary Carter" agreement, with any or all of the Plaintiffs, the undersigned Defendants will not, directly or indirectly, disclose to any of the Plaintiffs, their counsel, or any of them, any documents prepared by any undersigned Defendant or any communications, written or oral, including, but not limited to, informal discovery, among the undersigned Defendants pursuant to this Agreement, unless required to do so by court order.

20. There shall be no modification of this Agreement without written approval of all of the undersigned Defendants.

Id. The fact that parties have common or allied interests does not automatically cloak their exchanges with the mantle of confidentiality under the common interest arrangement. See, e.g., United States v. Sawyer, 878 F. Supp. 295, 297 (D. Mass. 1995) (holding that "parties' similar interests and [[[lawyers'] desire to pursue a 'team effort' are insufficient to show that communications were made during the course of a joint defense effort").

[FN80]. Such a regime was anticipated under Proposed Rule 503(b)(3) of the Federal Rules of Evidence. See supra note 25.

[FN81]. See In re Chrysler Motor Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846-47 (8th Cir. 1988). In this case the court stated:

[W]e agree with the district court that Chrysler waived any work product protection by voluntarily disclosing the computer tape to its adversaries, the class action plaintiffs, during the due diligence phase of the settlement negotiations. "Disclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement." The fact that Chrysler and the class action plaintiffs may have shared a common interest in settling claims arising out of the Overnight Evaluation Program does not neutralize the act of disclosure because that common interest always exists between opposing parties in any attempt at settlement. Nor does the agreement between Chrysler and co-liaison counsel for the class action plaintiffs not to disclose the computer tape to third-parties change the fact that the computer tape has not been kept confidential. "Confidentiality is the dispositive factor in deciding whether [material] is privileged." Not only did Chrysler fail to keep the computer tape confidential, Chrysler and the class action plaintiffs even contemplated that the computer tape and the analysis therefrom might be used, and thus disclosed to the public, during the fairness hearing or the settlement hearing.

Id.(citations omitted); accord Atari Corp. v. Sega of America, 161 F.R.D. 417, 420 (N.D. Cal. 1994) ("Waiver of a privilege may occur by voluntary disclosure to an adverse party during settlement negotiations, despite any agreement between the parties to keep the information confidential."); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 480 (S.D.N.Y. 1993) (holding that "even if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege."); Khandji v. Keystone Resorts Management, Inc., 140 F.R.D. 697, 700 (D. Colo. 1992) ("A waiver of the [work product] privilege occurs despite any agreement between the parties to keep the information confidential. Such an agreement does not alter the fact that the work product doctrine has been breached voluntarily." (citations omitted)). But cf. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc) (holding that disclosure of privileged documents to governmental agency for limited purpose did not constitute a waiver of the privilege). Ironically, both Chrysler Motors Corp.and Diversified Indus. are from the same circuit. The decisions have been formally reconciled on the argument that Chrysler Motors Corp. involved work product, while Diversified Indus. involved attorney-client privileged materials. See McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 243 (E.D. Mo. 1996). Why waiver doctrine should require different resolutions for voluntary disclosures of attorney-client work product rather than attorney-client privileged communications was not examined in terms of any policy justifications associated with either doctrine.

[FN82]. See Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991) (holding that First Amendment did not prohibit source from recovering damages for publisher's breach of promise of confidentiality); X Corp. v. Doe, 805 F. Supp. 1298, 1311 (E.D. Va 1992) (enjoining lawyer from disclosing client confidential information), aff'd without op., 17 F.3d 1435 (4th Cir. 1994); cf. Ruzicka v. Conde Nast Publications, Inc.,999 F.2d 1319, 1322 (8th Cir. 1992) (holding that, in a case for recovery for breach of promise of confidentiality by reporter to source, the issue of whether a promise was sufficiently definite to support recovery under theory of promissory estoppel was triable issue of fact, precluding summary judgment). The most common subject of these cases is the confidentiality provision in settlement agreements. Unfortunately, the law here is badly splintered. Some courts recognize and protect confidentiality interests. See, e.g., Hinshaw, Winkler, Draa, Marsh v. Superior Court, 58 Cal. Rptr. 2d 791, 796 (Cal. Ct. App. 1996)(finding that confidentiality provision was protected by state constitutional guarantee of privacy); Grove Fresh Distrib., Inc. v. John Labatt, Ltd., 888 F. Supp. 1427, 1441 (N.D. Ill. 1995) (observing that absent confidentiality provision, claims may not settle). Other courts have been less enthusiastic in reviewing confidentiality provisions. See, e.g., Home Ins. Co. v. Superior Court, 54 Cal. Rptr. 2d 292, 295 (Cal. Ct. App. 1996) (holding that confidentiality provision did not insulate underlying facts from discovery by non-party to agreement); Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996) (declaring that the

claim that a court file contains extremely personal, private, and confidential notes is generally insufficient to constitute a privacy interest warranting the sealing of that entire file). None of these cases involved attorney-client privileged information.

[FN83]. See supra note 82 and accompanying text.

[FN84]. See Western Fuels Ass'n v. Burlington R.R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984) (holding that defector could disclose his own client's confidential information but not information shared with him by other members of the common interest arrangement); Interfaith Housing Del., Inc. v. Town of Georgetown, 841 F. Supp. 1393, 1399-1400 (D. Del. 1994) (holding that jointly represented client had authority to waive only his own privilege, not that of other jointly represented clients).

[FN85]. See In re Grand Jury Subpoenas, 902 F.2d 244, 248-50 (4th Cir. 1990) (stating that joint defense privilege cannot be waived unilaterally and that all holders of the joint privilege must agree to waive); Hicks v. Commonwealth of Va., 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (ruling that all of the information derived by any of the counsel from such consultation is privileged and that the privilege cannot be released without the consent of all).

[FN86]. See Model Rules of Professional Conduct Rule 3.4(a),(f) (1995). See generally Center for Professional Responsibility, Annotated Model Rules of Professional Conduct 331-333 (3d ed. 1996) (collecting cases).

[FN87]. Ohio-Seely Mattress Mfg. Co. v. Seely, Inc., 90 F.R.D. 45, 48 (N.D. Ill. 1981); cf. Ageloff v. Noranda, Inc., 936 F. Supp. 72, 76-77 (D.R.I. 1996) (holding that absent special request from counsel that particular information not be disclosed, information exchanged as part of a joint defense effort can be freely disclosed to other members and their counsel).
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END OF DOCUMENT

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

**CERTIFICATE OF SERVICE**

I, Philip A. Rovner, hereby certify that on March 8, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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