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MINNESOTA FORMALLY RECOGNIZES THE COMMON INTEREST DOCTRINE

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In legal disputes between sophisticated business parties—particularly between numerous sophisticated business parties—a client and a third party may end up sharing a similar legal interest in the dispute. In situations where a single plaintiff sues multiple business entities on the same subject matter, for example, the client and the third party co-defendant may have similar interests in the litigation. As we have seen many times in our practice, those parties may, for the sake of efficiency, wish to work together in defending the case, even by sharing legal strategies.

Before sharing those documents, however, litigants must ask themselves an important question: can parties with common legal interests share communications and strategies they have received from their counsel without waiving their attorney-client privilege? In many parts of the country, the answer to that question is "yes," under what is frequently referred to as the Common Interest Doctrine. In a recent decision by the Minnesota Supreme Court, *Energy Policy Advocates v. Ellison*, ___ N.W.2d ___, 2022 WL 4488489 (Minn. Sept. 28, 2022), the Court formally recognized the doctrine in Minnesota.

It is important to understand the significance of the Common Interest Doctrine and how it relates to longstanding attorney-client privilege and work production protections enjoyed by clients. One of the oldest traditions in law is the attorney-client privilege: when a client seeks legal advice from their attorney, the attorney-client privilege protects those communications from disclosure to third parties. This bedrock of the profession has even been codified by Minnesota statute. *See* Minn. Stat. § 595.02, subd. 1(b). Similarly, the work-product doctrine prevents disclosure to third parties of documents prepared in anticipation of litigation or for trial, as well as the mental impressions, conclusions, opinions, or legal theories of attorneys concerning litigation. The communications and work produced under the attorney-client privilege or work product doctrine are, by their very nature, confidential; in most situations, they are not intended to be disclosed to third parties. Where disclosure of the communications or work product is made to a third party, however, the attorney-client privilege or work product protections are generally waived.

The Common Interest Doctrine is an exception to this rule. Under the doctrine, attorney-client and work-product protections are not waived when two or more parties with a common legal interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information. While the parties may choose to recognize their common interests through a formal agreement of some sort, a formal statement of an existing common interest is generally not required. No jurisdiction to have considered whether to recognize the Doctrine appears to have ever rejected it. Minnesota's *federal* courts have recognized the Doctrine, and now, Minnesota *state* courts have done so as well.

In *Energy Policy Advocates*, the non-profit plaintiff requested certain data from the Office of the Attorney General (the "AG") under the Minnesota Government Data Practice Act; the AG declined, citing (among other reasons) the Common Interest Doctrine. 2022 WL 4488489, at *2. The Minnesota Court of Appeals rejected the AG's application of the Doctrine, noting that the Doctrine had never been formally recognized in Minnesota, and that the responsibility to do so belonged to the Minnesota Supreme Court. *Id.* at *2–3.

On review, the Minnesota Supreme Court reversed the Court of Appeals on this issue, noting that numerous other states and federal circuits had already recognized the doctrine. *Id.* at *2-3. It was time for Minnesota to do the same. *Id.* The Court defined the contours of the doctrine as follows: "We hold that, in Minnesota, the common-interest doctrine applies when (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy. This formulation is generally consistent with the common-interest doctrine's requirements in the federal courts for Minnesota, as well as the Restatement." *Id.* at *4.

The Court noted that in addition to privileged communications, the doctrine also encompassed "attorney work product", but restricted the scope of the doctrine to cover only "common *legal* interests" not "purely commercial, political, or policy interest[s.]" *Id.* (emphasis added).

The *Energy Policy Advocates* decision is an important one for Minnesota. As the U.S. Supreme Court has observed, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn v. United States*, 449 U.S. 383, 393 (1981). By formally recognizing the Common Interest Doctrine in Minnesota—and describing its contours—the Minnesota Supreme Court has brought much needed clarity to an important issue that frequently arises in complex business disputes in this state.

Joseph T. Janochoski is a trial lawyer at the Minneapolis law firm Anthony Ostlund Louwagie Dressen & Boyland P.A. He is a fierce advocate for clients using skillful negotiation, creative litigation strategies, and compelling trial presentations. As a former federal district court and Minnesota Supreme Court law clerk, Joe understands that effective, persuasive legal advocacy stems from a thorough understanding of a client's unique situation, and an in-depth knowledge of the law. He has been awarded for his ethics and professionalism. Joe's practice includes advocating in state and federal courts, as well as in arbitrations and other forms of alternative dispute resolution on myriad and multifaceted business issues.