

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

**REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE,
COMMERCIAL LAW & UNIFORM STATE LAWS COMMITTEE ,
CORPORATION LAW COMMITTEE,
COUNCIL ON JUDICIAL ADMINISTRATION, AND
MERGERS, ACQUISITIONS & CORPORATE CONTROL COMMITTEE**

**PROPOSED AMENDMENTS TO NEW YORK CIVIL PRACTICE LAWS AND RULES
4503(a)(1) REGARDING COMMUNICATIONS OF COMMON INTEREST**

The Professional Responsibility Committee, Commercial and Uniform State Laws Committee, Corporation Law Committee and Mergers, Acquisitions and Corporate Control Committee of the New York City Bar Association propose revisions to New York’s statute on the attorney-client privilege in order to protect the sharing of privileged communications between parties with a common legal interest without regard to whether litigation is pending or reasonably anticipated. This change in the law will encourage candid collaboration between such parties and, in turn, facilitate compliance with the law. A copy of the proposed amendment is appended to this report.

I. BACKGROUND

The New York Court of Appeals recently ruled in *Ambac Assurance Corporation v. Countrywide Home Loans*, 27 N.Y.3d 616 (2016) that the common interest doctrine extends only to communications related to pending or anticipated litigation, and not those relating to transactional matters. The Court notes that the common interest doctrine – which it refers to as the “common interest exception” – is actually an exception to the general rule that disclosure of attorney-client communications to third parties waives the privilege.¹ That exception applies when two parties with a common legal interest share attorney-client information (either attorney-client privileged communications or attorney work product) to assist in a joint strategy, and extends the privilege to attorneys and clients working “to maintain a common claim or defense.”² While noting that applying the common interest doctrine between parties to criminal and civil litigation has long been a feature of New York law³ Faced with a conflict between the First and Second Departments on this issue, the Court followed the Second Department approach and

¹ *Ambac Assurance Corporation v. Countrywide Home Loans*, 27 N.Y.3d 616 (2016) at 624-25.

² *Id.* at 625.

³ *Id.* at 625, citing, *inter alia*, *People v. Osorio*, 75 N.Y.2d 80, 84-85 (1989)], the Court stated that, until the First Department had ruled in this case [*see*, 124 A.D.3d 129 (1st Dep’t 2014)], “New York courts [had] uniformly rejected efforts to expand the common interest doctrine to communications that do not concern pending or reasonably anticipated litigation.” *Id.* at 627, citing, *e.g.*, *Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186 (2d Dep’t 2013) and *Hudson Val. Mar. Inc. v. Town of Cortlandt*, 30 A.D.3d 377 (2d Dep’t 2006).

limited the common interest privilege to situations involving actual or reasonably anticipated litigation.

The Court in *Ambac* gave several reasons for its decision. It ruled, first, that actual or anticipated litigation is the situation “where the benefit and the necessity of shared communications are at their highest,” given the need to plan joint strategies and the parties’ concern about sharing communication in the face of potential later discovery requests.⁴ According to the Court, the need for protection is not as great in the transactional context, since the absence of a common interest privilege in that context has not prevented New York lawyers from consummating complex commercial transactions or complying with the law.⁵ Second, the Court deemed the “potential for misuse” of the joint privilege “minimal” in the litigation setting, while greater in the transactional setting because of the supposed “difficulty” of defining a common legal interest in that setting, and the risk that corporate clients will use an expanded privilege to conceal shared commercial (as opposed to legal) communications.⁶ Put succinctly, “the potential for abuse is sufficiently great, and the accompanying benefits so few, that expansion is not warranted.”⁷ Third, it found that the common interest exception, though it extended the protections of the attorney-client privilege, did not need to be coextensive with that privilege, and thus did not need to include transactional settings.⁸ Fourth, the fact that joint clients represented by the same lawyer will have greater protection than clients with aligned interests represented by different lawyers is of no moment because “in the joint client or co-client setting, . . . , the clients indisputably share a complete alignment of interests in order for the attorney, ethically, to represent both parties.”⁹

Judge Rivera’s dissent addressed each of these arguments in compelling fashion. The Committees find her reasoning, as well as several additional considerations noted by commentators and our members, to be persuasive. The majority noted, in a footnote, that “the Legislature is free to consider the alternative arguments articulated by the dissent and to expand the common interest exception as other state legislatures have done (see e.g., D.R.E. 502[b]).”¹⁰ We are asking the Legislature to do just that, for the detailed reasons set forth below.

II. REASONS FOR SUPPORT

a. The Need for a Common Interest Privilege is Not Lesser in the Transactional than the Litigation Context

We disagree that the need for a common interest privilege is somehow lesser in the transactional than the litigation context. As Judge Rivera said, “The privilege should apply

⁴ *Ambac*, 27 N.Y.3d at 628.

⁵ *Id.* at 628-29.

⁶ *Id.* at 629-30.

⁷ *Id.* at 630.

⁸ *Id.*

⁹ *Id.* at 631.

¹⁰ *Id.* at 632 n.6.

where disclosure of client communications facilitates the provision of legal services to advance a joint strategy developed to ensure compliance with regulatory or other legal mandates for the production of [transactional] documents, and the framing of legal positions, necessitated by regulatory and legal obligations.”¹¹ This collaborative process, she noted, “may further compliance with legal mandates” in a “highly-regulated financial business environment.”¹² As commentators have noted:

Due to the rapidly evolving regulatory landscape, corporations and financial institutions executing transactions in the midst of complex compliance regimes will invariably encounter challenges and, as a result, would benefit from the protection that prudent information sharing without risk of discovery would afford. As the preeminent business center in the world, it is in New York's interest to have laws in place that make New York a desirable venue for sound business practices.

Consistent with what the court in *Upjohn v. United States* recognized and appreciated, "the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter." Further, as the Appellate Division, First Department in *Ambac* understood, "imposing a litigation requirement ... discourages parties with a shared legal interest, such as [a] signed merger agreement ... from seeking and sharing [] advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel. This outcome would make poor legal as well as poor business policy."¹³

b. Common Interest Privilege Should Not Have a Transactional Exception

The majority's premise that there is no need for the privilege to encourage inter-party communications in the transactional context because “parties to a business deal already have an incentive to share information that will close the transaction” is misguided.¹⁴ Judge Rivera notes, correctly, that “the majority fails to identify any distinction [in this regard] between co-parties or persons who reasonably anticipate litigation, and parties committed to the completion

¹¹ *Id.* at 636-37 (Rivera, J. dissenting).

¹² *Id.* at 636.

¹³ Stewart D. Aaron, Joshua Berick and Christian D. Cheslak, Preserving Attorney-Client Privilege in M&A Transactions, N.Y.L.J., August 8, 2016, available at <http://www.newyorklawjournal.com/id=1202764328761/Preserving-AttorneyClient-Privilege-in-MA-Transactions?slreturn=20161001183043> (all websites last visited June 20, 2017).

¹⁴ *Ambac*, 27 N.Y.3d at 638 (Rivera, J. dissenting).

of a merger. Both are incentivized to cooperate in order to secure a mutually beneficial outcome. . . . No rational basis exists to recognize the expectations for maintaining confidences in the former but not the latter.”¹⁵ While not all Circuits agree, in federal courts the common interest doctrine is applied to many other non-litigation settings, such as the sharing of legal analysis memoranda with a company’s auditors or the sharing of tax accrual work papers.¹⁶ Moreover, we suspect, based on our own experience, that many corporate lawyers are unaware of the handful of intermediate-level New York appellate decisions on this subject, and operate under the assumption that a common interest privilege covers their interactions with other lawyers in efforts to establish common legal goals. The *Ambac* decision threatens to change a dynamic culture that has helped make New York the commercial capital of the world.

Nor is there a rational theoretical basis for distinguishing the transactional context from the litigation context. While the majority views the common interest privilege as an “exception to an exception” – *i.e.*, as an exception to the rule that disclosure to a third party waives the privilege – and thus subject to whatever limitations a court wishes to put on it, we agree with Judge Rivera that, putting aside disputes as to the doctrinal basis of the common interest privilege, the focus of any analysis of whether a document falls under it must include whether “the communication . . . satisf[ies] the requirements of the attorney-client privilege.”¹⁷ And that privilege “has never been limited to client communications involving pending or anticipated litigation.”¹⁸ We find no theoretical basis for engrafting any special limitation on the common interest privilege other than the most basic one: that the communication between the parties must involve a “common *legal* interest.”¹⁹ If a dispute arises on that point, a court can determine whether this requirement is met, just as courts determine privilege disputes every day.²⁰ But if the attorney-client privilege itself has no transactional exception, neither should the common interest privilege.

c. Applying the Common Interest Privilege in the Transactional Context Will Not Cause a Loss of Evidence or an Increase in Abuse

We address the *Ambac* majority’s fears of “the substantial loss of relevant evidence” and the “potential for abuse” because of the difficulty of defining “common interest” in the corporate context compared to the litigation context.²¹ As to the first, the loss of evidence is always a defining feature of any privilege, a concern that we believe is superseded by the benefits the

¹⁵ *Id.*

¹⁶ See Robert J. Malione and Adam J. Goldberg, IRS Litigations Deepen the Circuit Split on Work Product Protection, 4 Bloomberg Law Reports-Corporate Law 24 (2011), available at <https://www.lw.com/thoughtLeadership/irs-litigations-deepen-circuit-split-over-work-product>; David M. Brodsky and Robert J. Malione, Trends in Work Product Waivers: Disclosures to Auditors, N.Y.L.J., February 23, 2007, available at <https://www.lw.com/thoughtLeadership/trends-work-product-waivers-disclosures-to-auditors>.

¹⁷ *Ambac*, 27 N.Y.3d at 639-40 (Rivera, J. dissenting).

¹⁸ *Id.* at 642 (Rivera, J. dissenting).

¹⁹ *Id.* at 629-30 (emphasis added).

²⁰ *Id.* at 639 (Rivera, J. dissenting).

²¹ *Id.* at 7.

privilege provides in this context. A primary benefit here, as noted by Judge Rivera's dissent, is encouraging parties to consult counsel and thereby comply with the law by minimizing the possibility that such consultations will be made public. As to the second, we do not believe that the potential for abuse of the common interest exception is significantly different in the transactional context than it is in litigation. Nor do we believe that the challenge of defining a common interest privilege is significantly different in the two contexts.

In the transactional context, the common interest doctrine has been applied, for example, to mergers,²² as well as where various constituencies in a potential bankruptcy share information in the interest of having an agreed restructuring plan approved.²³ Straightforward examples of where the exception should apply include where two companies both desire to ensure that their antitrust filings are accepted in order to permit an acquisition, or if both companies want to ensure that the expected tax treatment which makes the transaction mutually desirable is correct. As noted by Judge Rivera, "the legal demands of a highly-regulated financial business environment affect the management of information shared between client and attorney where separately represented parties work collaboratively towards a mutual goal of transforming existing business entities and relationships. Confidences shared with attorneys under an appropriate common law privilege may further compliance with legal mandates."²⁴

While we do not think a bright-line rule is advisable as to what constitutes a "common legal interest" in the transactional context, any more than it is in the litigation context, at least one state which has adopted the common interest privilege in the transactional context has noted that it arises when "both parties are committed to the transaction and [are] working towards its successful completion."²⁵

While definitional problems may exist, the same problem also exists in the litigation context. For example, does the truck driver who had a traffic accident because of lack of sleep have a common interest with her co-defendant supervisor, who may or may not have known of her exhaustion? Does the driver have a common interest with other drivers who may have witnessed her interactions with the supervisor?²⁶ Also, if the "common interest" exception may

²² See, e.g., *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985),

²³ See, e.g., *In re Tribune Co.*, 2011 WL 386827, *4-*5 (Bankr. D. Del. Feb. 3, 2011).

²⁴ *Ambac*, 27 N.Y.3d at 636.

²⁵ *Morvil Technology LLC v. Ablation Frontiers, Inc.*, Civil No. 10-CV-2088 (BEN), 2012 WL 760603 at *3 (S.D. Cal. 2012) (finding common legal interests where both parties wanted to ensure patents being sold did not violate any third party's intellectual property); see, e.g., *Citizens for Ceres v. Superior Court*, 217 Cal. App. 4th 889, 920 (Cal. App. 5th Dist. 2013) (exchange of information *before* environmental review completed not protected by common interest privilege, but information exchanged afterwards, when both municipality and successful applicant are engaged in a "subsequent joint endeavor to defend the EIR" is protected), citing *California Oak Foundation v. County of Tehama*, 174 Cal. App. 4th 1217, 1222-23 (Cal. App. 2009); *STI Outdoor LLC v. The Superior Court of Los Angeles Co.*, 91 Cal. App. 4th 334, 341 (Cal. App. 2nd Dist. 2001) (after bid for public contract accepted, parties exchanged information needed to create "binding, detailed license agreement").

²⁶ See also R. Minkoff, N. Hyland and L. Gong, *New York Court of Appeals Narrowly Interprets the Common Interest Privilege*, New York Legal Ethics Reporter (September 2016) (hereafter, "Minkoff/Hyland/Gong"), found at <http://www.newyorklegaethics.com/n-y-court-of-appeals-narrowly-interprets-common-interest-exception-to-attorney-client-privilege/>.

apply not just to pending litigation, but also to “reasonably anticipated litigation,” when exactly does the privilege kick in? When a threat of litigation is made? Before? After? It seems safe to assume that the greatest immediate impact of the *Ambac* decision is likely to be an increase in litigation to obtain documents legitimately shared in the interest of consummating a transaction after it has reached a phase (e.g., after a bid is accepted or a letter of intent has been reached) where the parties can be said to have common legal interests in consummating the deal.

In short, imposing a litigation limitation on the common interest exception does not help courts avoid tough questions. Courts regularly determine what is privileged and what is not, and assertions of the common interest exception should be handled in the same manner.²⁷ As Judge Rivera notes: “the majority fails to explain why a party’s attempted abuse of the privilege” – whether in a litigation or transactional setting – “cannot be addressed through our legal system’s existing methods of preventing and sanctioning obstruction of proper discovery.”²⁸ We believe a case by case analysis in determining the presence of a “common interest” is practical as well as within the capability of the New York State courts to implement.

d. “A Lawyer for One is the Lawyer for All” Assumption is Misplaced

The examples cited above illustrate why the majority’s assumption that in the litigation context “a lawyer for one is the lawyer for all” – and thus that the common interest situation may be treated differently than where the same lawyer represents joint clients -- is misplaced.²⁹ The truck driver or HSR filing examples above could as easily be handled with separate counsel as a single counsel representing multiple parties. Either way, the interests of the parties are common to the same extent, and should be treated the same way for privilege purposes. In other words, the fact that parties decide to retain their own counsel in a matter should not create an inference that their interests diverge.

e. The Majority’s Approach Puts New York State Courts at Odds With That of New York Federal Courts

The majority’s approach puts New York state courts at odds with that of New York federal courts.³⁰ It is also at odds with the view of the Restatement (Third) of the Law Governing Lawyers,³¹ as well as numerous other federal Circuits and several states, all of which have declined to impose a litigation requirement for the application on the common interest privilege.³²

²⁷ *Id.*

²⁸ *Ambac*, 27 N.Y.3d at 639 (Rivera, J. dissenting).

²⁹ *See id.* at 631.

³⁰ *See Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015) (no litigation limitation on common interest privilege).

³¹ *See id.* § 76 (2000).

³² *See, e.g., Teleglobe*, 493 F.3d at 364; *U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007); *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996); *U.S. v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987); *Hanover Ins. Co. v. Rapo & Japsen Ins. Servs, Inc.*, 449 Mass. 609, 616 (2007); *Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 143 N.M. 215, 222 (2007); *STI Outdoor LLC v. Superior Court*, 91 Cal. App. 4th 334 (2001).

The disconnect between New York federal and state courts, and the lack of uniformity generally, is reason enough to be concerned about the *Ambac* holding. “Given that participants in a transaction usually do not know whether an eventual litigation related to the transaction will wind up in state or federal court, there will be uncertainty as to whether the common interest privilege will apply, leading cautious parties, perhaps unnecessarily, to adopt a less forthcoming approach in light of *Ambac*.”³³ There will also be unfairness, as the application of the common interest privilege may depend on the fortuity of where a third party ultimately chooses to litigate.³⁴ As the U.S. Supreme Court said in *Upjohn v. U.S.*, “[a]n uncertain privilege, or one which purports to be certain but results in varying application by the courts, is little better than no privilege at all.” 449 U.S. 383, 393 (1981).

III. CONCLUSION

For all these reasons, we recommend that CPLR 4503 be revised to include the language set forth above, which will ensure that the common interest privilege will include communications between lawyers and clients sharing a common legal interest in a transactional setting.

Professional Responsibility Committee
Meredith S. Heller, Chair

Commercial Law and Uniform State Laws Committee
Victor Y. Chiu, Chair

Corporation Law Committee
David Michael Silk, Chair

Council on Judicial Administration
Hon. (Ret.) Carolyn E. Demarest

Mergers, Acquisitions and Corporate Control Committee
Alexandra D. Korry, Chair

June 2017

³³ See Minkoff/Hyland/Gong, n. 24, *supra*.

³⁴ *Id.*

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

APPENDIX

STATE OF NEW YORK

2017-2018 Regular Sessions

AN ACT to amend the civil practice law and rules regarding communications of common interest

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Paragraph 1 of subdivision (a) of section 4503 of the civil practice law and
2 rules is amended to read as follows:

3 (a) 1. Confidential communication privileged. Unless the client waives the
4 privilege, an attorney or his or her employee, or any person who obtains without the
5 knowledge of the client evidence of a confidential communication made between the
6 attorney or his or her employee and the client in the course of professional employment,
7 shall not disclose, or be allowed to disclose such communication, nor shall the client be
8 compelled to disclose such communication, in any action, disciplinary trial or hearing, or
9 administrative action, proceeding or hearing conducted by or on behalf of any state,
10 municipal or local governmental agency or by the legislature or any committee or body
11 thereof. Evidence of any such communication obtained by any such person, and evidence
12 resulting therefrom, shall not be disclosed by any state, municipal or local governmental
13 agency or by the legislature or any committee or body thereof. The common interest
14 doctrine as otherwise defined by New York common law shall determine whether the
15 privilege is waived when such communication is shared in a matter of common legal
16 interest, except that the common interest doctrine shall apply regardless of whether the
17 matter of common legal interest arises from or relates to pending or reasonably
18 anticipated litigation. The relationship of an attorney and client shall exist between a
19 professional service corporation organized under article fifteen of the business

APPENDIX
DRAFT LEGISLATION

- 1 corporation law to practice as an attorney and counselor-at-law and the clients to whom it
- 2 renders legal services.
- 3 § 2. This act shall take effect immediately.