Joint Representations and the Attorney-Client Privilege

DOUGLAS R. RICHMOND*

I. INTRODUCTION

Lawyers routinely represent more than one client in a matter of common interest.[1] In litigation, for example, a lawyer may represent a corporation and one of its employees who have been sued as defendants in the same case.[2] A business lawyer may represent multiple clients in

* Managing Director, Aon Professional Services, Olathe, KS. J.D., University of Kansas. Opinions expressed here are solely those of the author.

1. "The term 'common interest' typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest." FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000).

2. *See also* Supreme Forest Prods. v. Kennedy, No. 3:16-cv-0054, 2017 WL 120644, at *2 (D. Conn. Jan. 12, 2017) (finding a joint representation where a lawyer represented two clients as plaintiffs in separate lawsuits asserting "highly similar

forming a corporation, joint venture, limited liability company, or partnership. For the clients, representation by a single lawyer in a matter offers efficiency and, ideally, lower legal fees. For the lawyer, representing multiple clients in a matter may cement, expand, or launch relationships with those clients, afford the lawyer a larger role in the litigation or transaction, streamline the defense or prosecution of the litigation, or ease the negotiation or closing of the transaction.

Most joint representations are uneventful. Normally, the joint clients' interests are aligned throughout the representation and the matter proceeds as anticipated.[3] The joint clients achieve their goals and the lawyer's services are never at issue. Sometimes, however, the joint clients' interests or relationships diverge or erode, and they eventually develop into adversaries. To use a common example, the joint clients' collaborative business venture that seemed so promising initially instead fails or spawns serious managerial or financial challenges that subsequently pit the joint clients against each other in arbitration or litigation.[4] To use another example, one of the joint clients may believe that the lawyer was professionally negligent or breached a fiduciary duty in their joint representation and opt to separately sue the lawyer.[5] In these circumstances, one of the issues likely to surface is the effect of the joint clients' opposing interests on their attorney-client privilege with their lawyer.[6]

Foundationally, the attorney-client privilege applies to "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client."[7] "Privileged persons" include the client, the lawyer, agents of the client and the lawyer who further communications between them,

employment claims" against their common employer and explaining that joint representation does not necessarily require joint litigation).

3. "[J]oint clients are two or more persons who have retained one attorney on a matter of common interest to all of them. . . ." Roush v. Seagate Tech., LLC, 58 Cal. Rptr. 3d 275, 284 (Ct. App. 2007). This Article uses the terms "co-client" and "joint client" interchangeably.

4. *See, e.g.*, Hinerman v. Grill on Twenty First, LLC, 112 N.E.3d 1273 (Ohio Ct. App. 2018).

5. *See, e.g.*, Anten v. Superior Ct., 183 Cal. Rptr. 3d 422 (Ct. App. 2015).

6. *Anten*, 183 Cal. Rptr. 3d at 425–27; *Hinerman*, 112 N.E.3d at 1275–77.

7. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000).

and agents of the lawyer who assist in the client's representation.[8] Where a lawyer jointly represents multiple clients in a case or deal, any otherwise privileged communication by any of the clients with the lawyer that "relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication."[9]

In brief, communications between the joint clients and the lawyer enjoy the same protection against discovery by outsiders as communications between a single client and a lawyer.[10] The privilege remains intact even where a conflict of interest develops between the clients.[11] Any joint client can waive the attorney-client privilege with respect to her individual communications with the lawyer so long as the communications concern only her interests.[12] At the same time, one joint client cannot "unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients."[13] Where joint communications with

8. *Id.* § 70.

9. *Id.* § 75(1).

10. Gregory R. Farkas, *Application of the Attorney-Client Privilege in Joint Representations*, FOR THE DEF., Aug. 2018, at 82, 82; *see* Iafrate v. Warner, LLP, 335 F.R.D. 378, 382 (E.D. Mich. 2020) ("The attorney-client privilege protects joint client communications from discovery by third parties."); McCullough v. Fraternal Ord. of Police, 304 F.R.D. 232, 238 (N.D. Ill. 2014) (referring to the "joint lawyer doctrine").

11. Cantu Servs., Inc. v. Worley, No. CIV-12-129-R, 2021 WL 2323721, at *5 (W.D. Okla. June 7, 2021) (citing Eureka Inv. Corp. v. Chi. Title Ins. Co., 743 F.2d 932, 937–38 (D.C. Cir. 1984)). This position is consistent with the general rule that there is no conflict of interest exception to the attorney-client privilege. *See* New Phoenix Sunrise Corp. v. Comm'r of Internal Revenue, 408 F. App'x 908, 919 (6th Cir. 2010) ("[T]he fact that an *attorney* has a conflict of interest does not mean that the *client* forfeits the benefit of the attorney-client privilege."); *Eureka*, 743 F.2d at 938 ("[C]ounsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable."); State v. Fodor, 880 P.2d 662, 669 (Ariz. Ct. App. 1994) ("[A] lawyer's potential ethical conflict has nothing to do with whether a client communication with a lawyer is protected by the attorney-client privilege.").

12. *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 363 (3d Cir. 2007).

13. *Id.*; *see, e.g.*, *In re* Lawrence, 954 N.W.2d 597, 602–03 (Minn. Ct. App. 2020) (rejecting the trial court's conclusion that one joint client could waive the privilege on behalf of itself and other joint clients); U.S. Bank Nat'l Ass'n v. Lightstone

the lawyer are at issue, all the joint clients must agree to waive the privilege.[14]

Unless joint clients agree otherwise, however, their communications with their shared lawyer about a matter of common interest are not privileged as between them in a subsequent adverse proceeding between them.[15] The lawyer may not withhold such communications from one joint client even if the other joint client refuses to consent to the disclosure.[16] Courts describe this principle as the joint client or joint representation exception to the attorney-client privilege.[17] It is not necessary for both joint clients to have consulted with the lawyer for the

Holdings, LLC, 152 N.Y.S.3d 441, 444 (App. Div. 2021) (stating that one client could not unilaterally waive the privilege on behalf of other clients).

14. Southampton, Ltd. v. Salalati, No. CIV-14-852-M, 2016 WL 6693562, at *2 (W.D. Okla. Nov. 14, 2016); Magnetar Techs. Corp. v. Six Flags Theme Park, Inc., 886 F. Supp. 2d 466, 479 (D. Del. 2012); *see, e.g.*, ZVI Constr. Co. v. Levy, 60 N.E.3d 368, 378–79 (Mass. App. Ct. 2016) (concluding that two joint clients' waiver of the privilege was irrelevant where the third joint client did not also waive the privilege).

15. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 75(2) (AM. L. INST. 2000); *see* Feighan v. Feighan, 118 N.Y.S.3d 674, 676 (App. Div. 2020) (describing the operation of the joint representation exception to the attorney-client privilege); *In re* JDN Real Estate-McKinney, LP, 211 S.W.3d 907, 922 (Tex. App. 2006) (explaining in basic terms the attorney-client privilege in joint representations); *see also* Energy Creates Energy, LLC v. Brinks Gilson Lione, P.C., No. 4:18-cv-00913, 2020 WL 12702546, at *1 (W.D. Mo. Aug. 26, 2020) (stating that for the joint representation exception to apply, the subject communications must fall within the scope of the joint representation). Relatedly, joint clients' communications with their shared lawyer about a matter of common interest are not privileged as between them during the pendency of that matter (that is, prior to any adverse proceeding between them). *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 30 (AM. BAR ASS'N 2021) (expressing "the prevailing rule" in joint representations).

16. Newsome v. Lawson, 286 F. Supp. 3d 657, 664 (D. Del. 2017).

17. *See, e.g.*, Orgill, Inc. v. Distrib. Ctrs. Am., LLC, No. 3:16-CV-158, 2017 WL 8777459, at *5 (N.D. W. Va. Oct. 31, 2017) (stating that "the joint-representation exception to the attorney-client privilege" is widely-recognized); Williamson v. Edmonds, 880 So. 2d 310, 320 (Miss. 2004) (using "joint client exception"); Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533, 540 (Ohio 2010) (discussing the "common-law joint-representation exception to the attorney-client privilege"); *In re* DISH Network, LLC, 528 S.W.3d 177, 185 (Tex. App. 2017) (referring to the "joint client exception" to the attorney-client privilege embodied in TEX. R. EVID. 503(d)(5)).

exception to apply.[18] If only one of the joint clients communicated with the lawyer about a matter of common interest and a dispute later erupts between the joint clients, the lawyer must reveal her communications with the first client to the second client even though the lawyer and the second client never spoke.[19] This rule holds true even where the second client was unaware of the communication between the first client and the lawyer at the time it occurred.[20]

This Article examines the joint representation exception to the attorney-client privilege in practical fashion. As should be clear here but is important to remember more generally, "joint representation" describes a situation in which two or more people ("joint clients" or, synonymously, "co-clients") retain a single lawyer to represent them on a matter of common interest.[21] The attorney-client privilege in joint representations is a distinct concept from the common interest doctrine and joint defense doctrine that may effectively extend the privilege in matters where multiple parties with mutual interests employ separate lawyers.[22] With that line drawn, Part II of the Article discusses the creation of attorney-client relationships. Obviously, for two or more people to be joint clients for purposes of the joint representation exception to the privilege, they must first be *clients* of the lawyer involved. In particular, the creation of implied attorney-client relationships is often a fundamental question in joint representation exception cases. Part III analyzes (a) parties' status as joint clients as compared to being concurrent but separate clients of the same lawyer; and (b) the related requirement

18. Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004); *see In re* Fundamental Long Term Care, Inc., 489 B.R. 451, 463 (Bankr. M.D. Fla. 2013) ("The co-client exception applies regardless of whether both parties are present when the communication is made." (footnote omitted)); Ashcraft & Gerel v. Shaw, 728 A.2d 798, 812 (Md. Ct. Spec. App. 1999) (stating that the attorney-client privilege does not apply between joint clients, regardless of whether both or all clients were present during the communication).

19. *Brandon*, 681 N.W.2d at 639.

20. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 75 cmt. d (AM. L. INST. 2000).

21. Montgomery v. eTreppid Techs., LLC, 548 F. Supp. 2d 1175, 1183 (D. Nev. 2008); Roush v. Seagate Tech., LLC, 58 Cal. Rptr. 3d 275, 284 (Ct. App. 2007).

22. *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 50–51 (Tex. 2012); *see* Am. Mun. Power, Inc. v. Voith Hydro, Inc., No. 2:17-cv-708, 2021 WL 4891307, at *7–8 (S.D. Ohio Oct. 20, 2021) (distinguishing joint representations from common interest arrangements).

that the parties share a common interest in a matter to be considered joint clients. Finally, Part IV examines the application of the joint representation exception where a joint client sues the lawyer who represented the joint clients rather than suing another joint client.

II. CREATING AN ATTORNEY-CLIENT RELATIONSHIP

For the joint representation exception to the attorney-client privilege to come into play, the parties to the dispute each must have been a client of the lawyer in the matter in question.[23] Ordinarily, there is no confusion on this point. The lawyer and the clients have an express agreement that the lawyer memorializes in an engagement letter to the clients.[24] But not always.[25] For instance, the lawyer may believe that she represented only one of the parties claiming joint client status and there is no clarifying engagement agreement or letter. Or, approaching affairs from a slightly different angle, one of the parties may subjectively believe that she shared an attorney-client relationship with the

23. *See* Bare v. Cruz, No. 10-4546, 2012 WL 1138591, at *3 (E.D. Pa. Apr. 2, 2012) ("First and foremost, the attorney-client privilege applies only if an attorney-client relationship exists." (footnote omitted)); Roehrs v. Minn. Life Ins. Co., 228 F.R.D. 642, 646 (D. Ariz. 2005) ("Of course, there must be an attorney-client relationship before the privilege exists."); Grassmueck v. Ogden Murphy Wallace, P.L.L.C., 213 F.R.D. 567, 571 (W.D. Wash. 2003) ("[T]here can be no assertion of attorney-client privilege if there is no attorney-client relationship."); *In re* Paul Abbott Co., 767 N.W.2d 14, 18 (Minn. 2009) ("An attorney-client relationship must exist before communications can be considered privileged.").

24. In some states, an engagement letter or written engagement agreement may sometimes be required. *See, e.g.*, CAL. BUS. & PROF. CODE § 6148(a) (Deering, Lexis through 2022 Sess.) (specifying when a written contract for legal services is required); N.Y. COMP. CODES R. & REGS. tit. 22, § 1215.1 (2022) (requiring a written engagement letter where a lawyer "enters into an arrangement for, charges or collects any fee from a client" and specifying the timing of the engagement letter and certain matters that must be addressed in the engagement letter).

25. *See, e.g.*, United States v. Holmes, No. 18-cr-00258-EJD-1, 2021 WL 2309980, at *1 (N.D. Cal. June 3, 2021) (rejecting the defendant's attorney-client privilege argument based on a claimed joint representation where the defendant and the law firm "did not sign an engagement letter or establish any formal guidelines describing the scope of [the law firm's] legal representation"); Cohen v. Jaffe, Raitt, Heuer & Weiss, P.C., No. 16-CV-11484, 2017 WL 2833535, at *4–5 (E.D. Mich. June 30, 2017) (noting that the law firm did not send new clients engagement letters at the relevant time, so the court had to examine the facts to determine whether an attorney-client relationship existed).

lawyer, but the lawyer denies the claim and thus calls into question the objective reasonableness of the party's belief.

A. Attorney-Client Relationship Essentials

Certainly, an attorney-client relationship may arise in the absence of an express agreement between the lawyer and the client.[26] An attorney-client relationship may be implied or inferred from the parties' conduct.[27] In the absence of an express agreement, an implied attorney-client relationship may be formed when (1) a person seeks the lawyer's advice or assistance; (2) the requested advice or assistance relates to matters within the lawyer's professional competence; and (3) the lawyer expressly or impliedly agrees to provide or actually furnishes the desired advice or assistance.[28] In some cases, the third element may be established by proof of detrimental reliance, meaning that the person seeking legal services reasonably relied on the lawyer to provide those services, and the lawyer, who recognized the person's reliance, did not dispel it.[29]

26. Bistline v. Parker, 918 F.3d 849, 864 (10th Cir. 2019) (applying Utah law); Att'y Grievance Comm'n v. Shoup, 979 A.2d 120, 136 (Md. 2009); Ripa v. Petrosyants, 164 N.Y.S.3d 168, 170 (App. Div. 2022).

27. Estate of Nixon v. Barber, 796 S.E.2d 489, 492 (Ga. Ct. App. 2017); *In re* Hodge, 407 P.3d 613, 648 (Kan. 2017); Patel v. Martin, 111 N.E.3d 1082, 1093 (Mass. 2018); State *ex rel.* Couns. for Discipline of the Neb. Sup. Ct. v. Chvala, 935 N.W.2d 446, 471 (Neb. 2019).

28. *Chvala*, 935 N.W.2d at 471–72; *see also* Chem-Age Indus. v. Glover, 652 N.W.2d 756, 768 (S.D. 2002).

29. Cesso v. Todd, 82 N.E.3d 1074, 1078–79 (Mass. App. Ct. 2017) (quoting DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983)); *Chvala*, 935 N.W.2d at 472. For example, in *Rice v. Forestier*, 415 S.W.2d 711 (Tex. App. 1967), the client, Forestier, delivered suit papers to the lawyer who was currently handling another matter for him and who had previously represented him in two other matters, Rice, with the expectation that Rice would answer the suit. Rice never filed an answer—apparently because he believed it to be unnecessary under the circumstances—nor did he tell Forestier that he did not intend to represent him in the matter. *Id.* at 713. Consequently, Forestier suffered a default judgment. *Id.* at 712. If Rice did not intend to represent Forestier in the new matter, he should have so informed him, as the court explained:

> In view of the fact that Rice was handling other matters for Forestier at this time, Forestier was justified in leaving the citations with

When deciding whether an implied attorney-client relationship exists, courts focus on the putative client's expectations.[30] As important as a would-be client's perspective may be, however, a person's unilateral belief that an attorney-client relationship exists does not make it so.[31] Rather, a putative client's subjective belief that an attorney-client relationship has been formed must be accompanied by facts indicating that the person's belief is objectively reasonable.[32] At bottom, then, the existence of an attorney-client relationship is governed by an objective standard.[33]

> Rice or his secretary. Rice admits he saw at least one of the citations and petitions and is thereby charged with knowledge of the contents of same. Rice certainly had the right to decline to represent Forestier in this matter if he chose to do so. In such event, however, he would have been obligated to inform Forestier of this decision.

Id. at 713. The jury that heard Forestier's legal malpractice case against Rice decided that Rice negligently failed to inform Forestier that he declined to handle the suit, thereby depriving Forestier of the ability to timely retain another lawyer. *Id.* at 712, 713. The *Rice* court affirmed the trial court judgment for Forestier. *Id.* at 714.

30. *See, e.g.*, People v. Bennett, 810 P.2d 661, 664 (Colo. 1991) ("The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed."); Rubin & Norris, LLC v. Panzarella, 51 N.E.3d 879, 891 (Ill. App. Ct. 2016) (stating that the analysis of whether an attorney-client relationship exists focuses on the client's viewpoint rather than the lawyer's); Barkerding v. Whittaker, 263 So. 3d 1170, 1181 (La. Ct. App. 2018) ("[T]he existence of an attorney-client relationship turns largely on the client's subjective belief that such a relationship exists.").

31. Belliveau v. Barco, Inc., 987 F.3d 122, 133 (5th Cir. 2021) (applying Texas law); *In re* Grand Jury Subpoena: Under Seal v. United States, 415 F.3d 333, 339 (4th Cir. 2005); *In re* Robbins, 192 A.3d 558, 563 (D.C. 2018); Moran v. Hurst, 822 N.Y.S.2d 564, 566 (App. Div. 2006).

32. Kemp Invs. N. v. Englert, 314 So. 3d 734, 738 (Fla. Dist. Ct. App. 2021); Murphy v. MKS Plastics, L.L.C., 314 So. 3d 65, 71 (La. Ct. App. 2020); Hinerman v. Grill on Twenty First, LLC, 112 N.E.3d 1273, 1275–76 (Ohio Ct. App. 2018); O'Kain v. Landress, 450 P.3d 508, 516 (Or. Ct. App. 2019).

33. *Barkerding*, 263 So. 3d at 1182; Flores v. Branscomb, PC, No. 13-18-00411-CV, 2021 WL 2371517, at *4 (Tex. App. June 10, 2021).

B. Illustrative Implied Attorney-Client Relationship Cases Involving Alleged Joint Representations

The existence of an implied attorney-client relationship between one or more of the parties and the lawyer involved in the underlying matter is a recurring issue in joint representation exception cases.[34] *Hinerman v. Grill on Twenty First, LLC*[35] is such a case.

In *Hinerman*, Anthony Mason and Stuart Hinerman went into the restaurant business together.[36] In laying the groundwork for their affiliation, Mason was represented by Adam Vernau of the law firm of Morrow, Gordon & Byrd.[37] Mason asked Vernau to prepare the operating agreements for the two limited liability companies (LLCs) that he and Hinerman wanted to form: The Grill on Twenty First, LLC to operate the restaurant and Twenty First Street Properties, LLC to own and manage the property on which the restaurant stood.[38] Hinerman, who was already a client of another Morrow, Gordon lawyer, agreed to Vernau's preparation of the documents.[39]

Several years later, Hinerman sued Mason and the two LLCs for breach of contract and breach of fiduciary duty, and for an accounting.[40] The defendants counterclaimed for breach of contract.[41] When Hinerman took Vernau's deposition, Mason objected to some questions on the basis that his communications with Vernau regarding the preparation of the LLCs' operating agreements were shielded from discovery by the attorney-client privilege.[42] After an evidentiary hearing and the submission of supplemental affidavits by Hinerman and Vernau, the trial court held that the joint representation exception to the

34. *See, e.g.*, Oppliger v. United States, Nos. 8:06CV750, 8:08CV530, 2010 WL 503042, at *4 (D. Neb. Feb. 28, 2010) (finding an attorney-client relationship); Sky Valley P'ship v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 652 (N.D. Cal. 1993) (listing factors that courts should consider when deciding whether an implied attorney-client relationship exists for purposes of the joint client exception to the attorney-client privilege).

35. 112 N.E.3d at 1273.

36. *Id.* at 1274.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

attorney-client privilege applied and ordered Vernau to answer questions as to whether Hinerman or Mason gave him special instructions regarding the contractual allocation of losses from the restaurant, and to testify as to whether he prepared any of the contracts that undergirded the men's dispute.[43] The defendants appealed the trial court's decision to the Ohio Court of Appeals.[44]

After observing that Ohio courts recognize a joint representation exception to the attorney-client privilege, the *Hinerman* court explained that "[t]he test for determining the existence of an attorney-client relationship is both subjective and objective; it is a question of both what the putative client believed and whether or not that belief was reasonable based on the surrounding circumstances."[45] Here, the trial court found that Hinerman reasonably believed that Vernau represented both he and Mason.[46] The trial court further determined that Hinerman and Mason shared a common interest when hiring Vernau.[47] The *Hinerman* court reviewed the trial court's judgment for an abuse of discretion.[48]

In his trial court affidavit, Hinerman stated that (1) he was a Morrow, Gordon, & Byrd client before going into business with Mason; (2) Mason reported that he had found Vernau "to draft our operating agreements for both of us"; (3) he agreed to Vernau's representation because he was already a Morrow, Gordon client; (4) Vernau prepared the LLC operating agreements; (5) Vernau never told him that he was representing Mason exclusively, nor did he advise him to consult his own lawyer; (6) he thought that Vernau was representing he and Mason jointly; and (7) he and Mason "shared a common interest in having our operating agreements drawn up to reflect the terms that [they] had agreed upon."[49] In contrast, Vernau's trial court testimony was at best confused. In his affidavit, he swore that in creating the LLCs and preparing the operating agreements, Mason was his sole client.[50] In his deposition testimony that spawned Mason's initial privilege

43. *Id.*
44. *Id.* at 1275.
45. *Id.* at 1275–76.
46. *Id.* at 1276.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

objection, however, Vernau testified that his clients "would have been the LLCs, and the members," meaning that he guessed that he jointly represented Mason, Hinerman, and the two LLCs.[51] Finally, he testified in his deposition that he thought he represented Hinerman as a matter of law but that his dealings with him were limited.[52]

On that record, the *Hinerman* court easily concluded that Hinerman and Mason were joint clients of Vernau on a matter of common interest.[53] Accordingly, the court held that the trial court did not err in finding the joint representation exception to the attorney-client privilege applied to Vernau's testimony.[54]

In comparison, the court in *In re DISH Network, LLC*[55] found no attorney-client relationship between a corporate employee and the law firm involved, and consequently (1) no joint attorney-client relationship and (2) no basis to apply the joint representation exception to the privilege.[56]

Yvette Delgado served as Human Resources (HR) Manager for DISH Network, LLC and Echosphere, LLC (collectively DISH) from December 2007 until she was fired in August 2015.[57] As HR Manager, she communicated with DISH's outside counsel, Hagan Noll & Boyle (HNB), about discrimination and harassment lawsuits and unemployment compensation claims against DISH.[58] Delgado was never named as a defendant in any of those matters.[59] Basically, she assisted HNB lawyers in responding to discovery requests, arranging meetings with fact witnesses, investigating claims, and coordinating witnesses' attendance at depositions, hearings, trials, and arbitrations.[60] She was deposed as a fact witness in one arbitration, *Barrera v. Echostar*, in which HNB defended DISH.[61] She never testified as a witness or served as a

51. *Id.*
52. *Id.*
53. *Id.* at 1276–77.
54. *Id.* at 1277.
55. 528 S.W.3d 177 (Tex. App. 2017).
56. *Id.* at 185–87.
57. *Id.* at 179.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

corporate representative in any trial or arbitration proceeding in which HNB represented DISH.[62]

Delgado sued DISH for discrimination and retaliation soon after DISH fired her.[63] DISH hired HNB to defend the lawsuit.[64] When HNB reminded Delgado's lawyer that Delgado had signed an arbitration agreement when she joined DISH, Delgado's lawyer accused HNB of a conflict of interest by virtue of the firm's history with Delgado.[65] DISH disagreed and moved to compel arbitration.[66] Delgado then served DISH with the following requests for production of documents:

> 1. Any and all documents . . . that relate to any pleadings filed by Defendants' counsel in any case where Plaintiff was identified as a witness, a corporate representative, employee or otherwise provided any statements or testimony, including but not limited to any depositions, statements, affidavits, correspondence, emails or other documents that involve Plaintiff.
>
> 2. Any and all documents . . . exchanged between Plaintiff and David Noll, Stephanie Waller or any other lawyers affiliated with [HNB], employed by the same law firm or associated with Mr. Noll or [HNB], including but not limited to any email correspondence, messages, pleadings or other documents.[67]

The trial court delayed ruling on DISH's motion to compel arbitration pending the completion of discovery on Delgado's claim that HNB should be disqualified from representing DISH in her case.[68] DISH objected to Delgado's requests for production of documents based on attorney-client privilege, work product doctrine, and confidentiality agreements, and sought a related protective order.[69] Following a hearing, the trial court granted Delgado's motion and ordered

62. *Id.*
63. *Id.*
64. *See id.* (identifying HNB as DISH's counsel in Delgado's case).
65. *Id.*
66. *Id.* at 180.
67. *Id.*
68. *Id.*
69. *Id.*

DISH to produce documents that it claimed were privileged and immune from discovery as work product.[70] DISH promptly petitioned the Texas Court of Appeals for a writ of mandamus.[71]

In the appellate court, Delgado contended that she was entitled to the disputed documents "under the joint client exception established by Texas Rule of Evidence 503(d)(5)," which states that the privilege does not apply to a communication that "(A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients."[72] To reach the exception, of course, Delgado first had to show that she and DISH were joint clients of HNB.[73] There was no evidence that HNB ever agreed to represent her in any case in which DISH was sued, thus leaving Delgado to rest her argument on the alleged existence of an implied attorney-client relationship with HNB.[74] She accordingly submitted an affidavit in which she stated:

> I was previously employed by Dish Network/Ecosphere [sic]. During that time, there were a number of legal proceedings involving the company, including lawsuits and unemployment benefit claims.
>
> When I was a witness in those suits, I would meet with the attorneys from the Hagan Noll & Boyle law firm, including David Noll and Stephanie Waller, to prepare to testify. They gave me advice and instruction, including telling me how to testify and how to answer specific questions. I understood that they were

70. *Id.* The *In re DISH Network* court referred to the "work product privilege[ ]" in permitting Delgado's discovery. *Id.* But the work product doctrine is correctly understood to be a form of qualified immunity. ACLU v. U.S. Dep't of Just., 880 F.3d 473, 484 n.8 (9th Cir. 2018); *In re* Naranjo, 768 F.3d 332, 345 n.16 (4th Cir. 2014); Wachovia Bank, N.A. v. Clean River Corp., 631 S.E.2d 879, 884 (N.C. Ct. App. 2006) (quoting Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 551 S.E.2d 873, 876 (N.C. Ct. App. 2001)).

71. *In re DISH Network*, 528 S.W.3d at 179.

72. *Id.* at 185 (quoting TEX. R. EVID. 503(d)(5)).

73. *Id.*

74. *Id.*

> providing these legal services to me, not just to my employer.
>
> At all times, it was my understanding that the lawyers represented me personally, not just the company I worked for. They never advised me that they were not my attorneys or that they did not represent me. They never advised me that they would later represent my employer against me if a dispute arose between us. I considered them my lawyers, not just the lawyers for my employer.
>
> When they were my lawyers, I discussed Dish Network/Ecosphere's [sic] employment policies and employment decisions with the lawyers in the Hagan Noll & Boyle law firm.[75]

In considering Delgado's affidavit, the court applied Texas law, which holds that the existence of an implied attorney-client relationship is objectively measured and requires a court to examine the parties' words and actions rather than their subjective beliefs.[76] Delgado's assertions that "she 'understood' or had an 'understanding' that the HNB lawyers represented her personally," which merely reflected her subjective belief, were therefore unpersuasive.[77]

Delgado's argument that an implied attorney-client relationship arose out of advice that HNB lawyers gave her regarding her testimony as a fact witness in cases against DISH fared no better.[78] She could identify no cases in which she testified as a witness, while, in contrast, DISH offered evidence that she never testified as a witness at trial or in an arbitration and was deposed in connection with a lone arbitration.[79] In the one case in which she was deposed, Waller gave her the same advice she gave all DISH employees who were deposed, which was to listen carefully to the other lawyer's questions and to answer

75. *Id.* at 185–86.

76. *Id.* at 185. As outlined earlier, the existence of an implied attorney-client relationship is governed by an objective standard. *See supra* note 33 and accompanying text.

77. *In re Dish Network*, 528 S.W.3d at 186.

78. *Id.*

79. *Id.*

truthfully.[80] Delgado was never a party in any case against DISH.[81] When HNB lawyers communicated with her, they did so exclusively in her capacity as DISH's human resources manager.[82] Distilled, Delgado's ambiguous claim that HNB lawyers advised and instructed her about testifying as a DISH representative did not support an implied attorney-client relationship.[83]

Hanging on by her fingernails, Delgado argued with sketchy factual support that she further shared an implied attorney-client relationship with the HNB lawyers because she discussed DISH's employment policies and actions with them.[84] But beyond the general factual infirmity of this argument, Delgado never discussed her personal job situation with the HNB lawyers; all her conversations with them occurred in her role as DISH's HR Manager.[85] As a result, these conversations did not demonstrate the existence of an implied attorney-client relationship.[86]

Finally, Delgado seized on an admission by one of the HNB lawyers that the lawyer had represented her in the sole deposition in which she testified as a fact witness.[87] The court was unmoved, however, because Delgado was neither a party nor a potential party in that case, and she testified solely in her capacity as a DISH employee.[88] In short, the lawyer's statement did not support a finding that HNB and Delgado shared an implied attorney-client relationship.[89]

The *In re DISH Network* court concluded that Delgado did not establish that she had an attorney-client relationship with HNB, such that she necessarily failed to establish that the joint client exception to the attorney-client privilege applied.[90] The trial court therefore abused its discretion by granting Delgado's motion to compel discovery.[91] The

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 186–87.
91. *Id.* at 187.

In re DISH Network court remanded the case to the trial court to decide DISH's motion to compel arbitration.[92]

C. Comparing the Outcomes in Hinerman *and* In re DISH Network

The disparate results in *Hinerman* and *In re DISH Network* are easily understood. In *Hinerman*, Hinerman's belief that he shared an attorney-client relationship with Vernau was reasonable when viewed from the perspective of a disinterested observer. After all, Hinerman and Mason were going into business together and needed a lawyer to form their LLCs and draft their operating agreements; it made sense to engage a single lawyer for those purposes as a matter of both efficiency and economy; their interests at the time were aligned; Hinerman was already a client of Vernau's law firm; and Vernau never told Hinerman that he represented Mason alone.[93] In contrast, in *In re DISH Network*, Delgado and DISH were not co-equals; Delgado had no financial interest in the outcome of any case against DISH; Delgado was not a party to any litigation against DISH; she had no hand in selecting HNB as DISH's regular outside counsel; and she never sought personal legal advice from HNB lawyers.[94] There was simply no objective basis to conclude that HNB ever represented her.

Generally, when deciding whether an implied attorney-client relationship exists, courts may consider (1) the circumstances that brought the party and the lawyer together; (2) the party's and lawyer's conduct; (3) the subject and nature of the party's and lawyer's communications; (4) "whether (with respect to matters on which the party and the lawyer communicated) the party played a decision-making role comparable to the role that the law empowers clients to play"; (5) whether the party was free to ignore the lawyer's advice or instead had to follow the lawyer's instructions; (6) "the relative sophistication of the party and the magnitude or significance of the interests of the party that were implicated in the matters covered by the alleged attorney-client relationship (the more sophisticated the party, and the more significant the interests affected, the more skeptically courts should view arguments that it was reasonable to rely on an implied attorney-client

92. *Id.*

93. Hinerman v. Grill on Twenty First, LLC, 112 N.E.3d 1273, 1276–77 (Ohio Ct. App. 2018).

94. *In re DISH Network*, 528 S.W.3d at 182–86.

contract)"; and (7) "whether and to what extent the party also consulted or had access to any other lawyers" at relevant times and with respect to the subject of the implied attorney-client relationship.[95] A court may also consider whether the party paid the lawyer for legal services or owed the lawyer payment,[96] although the payment of fees does not alone determine the existence of an attorney-client relationship.[97]

Applying those factors, the first five support the existence of an implied attorney-client relationship in *Hinerman* and weigh against such a finding in *In re DISH Network*. Further, while it is not clear whether Hinerman was responsible for paying any portion of Vernau's fees, it seems obvious that DISH and not Delgado paid HNB's fees.

III. FINDING A JOINT ATTORNEY-CLIENT RELATIONSHIP

Assuming the parties claiming to be clients of a common lawyer are, in fact, clients of that lawyer, two additional factors will determine whether the joint representation exception to the attorney-client privilege will apply should they later become adversaries. First, they must have been jointly represented by the lawyer in the underlying matter rather than having "merely entered concurrent but separate representations" with the lawyer.[98] Whether a joint representation exists as compared to concurrent separate representations is a question of fact that will pivot on the understanding of the parties and the lawyer.[99] Second, the foundational matter must involve the parties' common interests.[100]

95. Sky Valley P'ship v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 652 (N.D. Cal. 1993).

96. *Id.*

97. Edward Wildman Palmer, LLP v. Superior Ct., 180 Cal. Rptr. 3d 620, 628 (Ct. App. 2014); Rubin & Norris, LLC v. Panzarella, 51 N.E.3d 879, 891 (Ill. App. Ct. 2016); State *ex rel.* Stovall v. Meneley, 22 P.3d 124, 140 (Kan. 2001); Att'y Grievance Comm'n v. Brooke, 821 A.2d 414, 424 (Md. 2003); Fuller v. Partee, 540 S.W.3d 864, 869 (Mo. Ct. App. 2018) (quoting Fox v. White, 215 S.W.3d 257, 261 (Mo. Ct. App. 2007)); *In re* Disciplinary Action Against Ward, 881 N.W.2d 226, 230 (N.D. 2016).

98. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 75 cmt. c (AM. L. INST. 2000).

99. *Id.*

100. *Id.*

A. Joint versus Separate Concurrent Representations

In determining whether parties were joint clients of a lawyer as compared to being represented by the lawyer concurrently but separately, courts may weigh various factors, including:

> (1) the conduct of the two parties toward one another, (2) the terms of any contractual relationship (express or implied) that the two parties may have had, (3) any fiduciary or other special obligations that existed between them, (4) the communications between the two parties (directly or indirectly), (5) whether, to what extent, and with respect to which matters there was separate, private communication between either of them and the lawyer as to whom a "joint" relationship allegedly existed, (6) if there was any such separate, private communication between either party and the alleged joint counsel, whether the other party knew about it, and, if so, whether that party objected or sought to learn the content of the private communication, (7) the nature and legitimacy of each party's expectations about its ability to access communications between the other party and the allegedly joint counsel, (8) whether, to what extent, and with respect to which matters either or both of the alleged joint clients communicated privately with *other* lawyers, (9) the extent and character of any interests the two alleged joint parties may have had in common, and the relationship between common interests and communications with the alleged joint counsel, (10) actual and potential conflicts of interest between the two parties, especially as they might relate to matters with respect to which there appeared to be some commonality of interest between the parties, and (11) if disputes arose with third parties that related to matters the two parties had in common, whether the alleged joint counsel represented both parties with

> respect to those disputes or whether the two parties were separately represented.[101]

Hall CA-NV, LLC v. Ladera Development, LLC[102] is a rare case in which the nature of the parties' attorney-client relationships with their common law firm was at issue. The facts and procedural history of the case are excruciatingly complex, however, and thus require detailed explanation.

The case arose out of the failed re-development of resort property that straddled the California and Nevada borders around Lake Tahoe.[103] New Cal-Neva Lodge, LLC (Cal-Neva) was the developer of the property and Penta Building Group, LLC (Penta) was the general contractor.[104] Hall CA-NV, LLC (Hall) and Ladera Development, LLC (Ladera) financed the project: Hall agreed to loan Cal-Neva $29 million, while Ladera agreed to loan Cal-Neva $6 million.[105] Hall and Ladera purchased title insurance from Old Republic National Title Insurance (Old Republic) to protect "their respective loan priorities."[106] They also entered into an "Intercreditor Agreement," which deemed Hall's loan senior to Ladera's, and established their corresponding obligations, rights, and roles regarding the Cal-Neva project.[107] Hall and Ladera then recorded their deeds of trust in the appropriate Nevada and California counties.[108]

As the Cal-Neva project cratered, Hall declared a default on its loan and election to sell its interest in the project, and Penta filed mechanic's lien actions against Hall in Nevada and California claiming

101. Sky Valley P'ship v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 652–53 (N.D. Cal. 1993); *see also* F.D.I.C. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("In determining whether parties are 'joint clients,' courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like.").

102. No. 3:18-cv-00124-RCJ-WGC, 2019 WL 5448458 (D. Nev. Oct. 24, 2019).

103. *Id.* at *2.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

that its lien was superior to Hall's deed of trust.[109] Ladera was not a party to those actions.[110] Cal-Neva filed for bankruptcy protection in July 2016.[111] Penta's lawsuits against Hall were ultimately transferred to the U.S. Bankruptcy Court for the District of Nevada, where they became known collectively as the Hall Adversary proceedings and were part of Cal-Neva's bankruptcy case.[112]

In late January 2017, Old Republic hired the law firm of Kolesar & Leatham (K&L) to represent Hall in the Hall Adversary proceedings.[113] In February 2017, Penta sued Ladera in an action described as the Ladera Adversary, alleging that its mechanics lien was superior to Ladera's deed of trust.[114] On March 8, 2017, Old Republic retained K&L to represent Ladera in the Ladera Adversary.[115]

The same day that it was retained by Old Republic to represent Ladera, K&L sent a conflict waiver letter to Ladera.[116] The letter stated that K&L was hired by Old Republic to represent Hall in the Hall Adversary proceedings and was also engaged to represent Ladera in the Ladera Adversary, and that the letter's purpose was "'to describe the proposed joint representation of [Hall] and [Ladera], to define the scope of said representation, and to secure the consent of those concerned to the representation as described'" thereafter.[117] K&L explained that it could represent both Hall and Ladera because they would be taking the same position with respect to Penta's lien claims.[118] Hall and Ladera consented to any conflicts of interest.[119]

In April 2017, the parties stipulated to the consolidation of the Hall Adversary proceedings and the Ladera Adversary.[120] In August 2017, Hall sued Ladera in a Nevada state court for allegedly violating

109. *Id.* at *3.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* (alterations in the original) (quoting the letter).

118. *Hall*, 2019 WL 5448458, at *3.

119. *See id.* at *4 (reciting the contents of a second letter confirming Hall's and Ladera's consent to any conflicts in response to the March 8, 2017 letter).

120. *Id.*

the Intercreditor Agreement.[121] As a result, K&L sent a second conflict waiver letter to Hall and Ladera.[122] Specifically:

> The letter stated that it was to supplement "the March 8, 2017 acknowledgement of joint representation" and to confirm and memorialize waivers of the actual and potential conflicts of interest described and consent to continued representation. It reiterated that K&L had first been retained to represent Hall in the Hall Adversary proceedings, and was then asked to represent Ladera in the Ladera Adversary. It recounted that Hall and Ladera "consented to joint representation by K&L" in the Hall Adversary proceedings and the Ladera Adversary by letter dated March 8, 2017. . . .
>
> The letter requested confirmation of "joint representation of [Hall] and [Ladera], to define the scope of said representation, and to secure the consent of those concerned to the continued representation as described herein." . . .
>
> The letter then said that notwithstanding the action Hall filed against Ladera . . . , K&L believed it could still represent both Hall and Ladera in the consolidated adversary . . . because Hall and Ladera continued to take the same position regarding the claims and counterclaims asserted in the Consolidated Adversary.[123]

K&L asked Hall and Ladera to sign and return the letter as consent to the firm's continued representation of them.[124] Hall and Ladera both complied.[125]

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

In October 2017, Ladera retained separate coverage counsel to advise it with respect to its rights under its Old Republic title insurance policy.[126] Hall did likewise.[127]

In late 2017, Hall settled with Penta and Cal-Neva.[128] Hall had a separate law firm—not K&L—handle the settlement.[129] Old Republic hired independent counsel for Ladera in connection with the settlement.[130] The court approved the settlement over Ladera's objection.[131] The court then dismissed Cal-Neva's bankruptcy and all the adversary proceedings.[132]

In March 2018, Hall sued Ladera in federal court in Nevada for allegedly breaching the Intercreditor Agreement by objecting to Hall's settlement with Penta and Cal-Neva.[133] Ladera counterclaimed for fraud and negligent misrepresentation, claiming that Hall allegedly knew all along that Penta had a lien right that would be superior to Hall's and Ladera's deeds of trust.[134]

In August 2018, Ladera served a subpoena duces tecum on K&L.[135] The subpoena "requested the files maintained in the Penta lien litigation in California and Nevada State courts, in the bankruptcy and adversary proceedings, and . . . all correspondence, including that between K&L and Hall and/or Ladera."[136] The subpoena asserted that because K&L jointly represented Hall and Ladera, the materials sought were not shielded from discovery by the attorney-client privilege.[137]

K&L moved to quash the subpoena on the basis that the joint representation exception to the privilege did not apply.[138] As K&L lawyer Aaron Maurice explained at a related hearing:

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at *5.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at *6.
137. *Id.*
138. *Id.* at *8.

> [A]fter Hall tendered to Old Republic, K&L was retained to represent Hall in the Hall Adversary proceedings, to which Ladera was not a party. The purpose of the representation was to establish Hall's first priority in the Hall Adversary proceedings. . . . Then, Ladera subsequently submitted a claim to Old Republic under its own title insurance policy, and Old Republic retained K&L to represent Ladera in the Ladera Adversary to establish that the Ladera deeds of trust were in second priority. . . . Hall was not a party to the Ladera Adversary. . . . K&L obtained a conflict waiver from the parties because K&L knew there was an Intercreditor Agreement and it was clear that somewhere down the line these parties would be fighting against each other. . . . [W]hile the adversary proceedings were ultimately consolidated for discovery and trial, they were still separate cases and K&L did not represent Ladera in the Hall adversaries and vice-versa.[139]

Hall also resisted the subpoena.[140] Hall argued that Ladera was not entitled to discover communications between Hall's general counsel, K&L lawyers, and Hall's outside counsel in which Ladera's lawyers did not participate.[141] Hall further contended that Ladera should not be able to discover any communications after K&L sent its August 2017 conflict waiver letter because that letter redefined the scope of K&L's representation in light of Hall's state court action against Ladera for allegedly breaching the Intercreditor Agreement.[142] Finally, Hall contended discovery was inappropriate because K&L had reportedly kept Hall's and Ladera's documents and communications separate the entire time that the firm represented them.[143]

The *Hall CA-NV* court applied Nevada law in analyzing the parties' positions.[144] A Nevada statute codifying the joint representation exception to the privilege provided that there is no privilege "'[a]s to a

139. *Id.* at *7.
140. *Id.* at *8.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.'"[145] To determine whether Ladera could invoke the joint representation exception here, the court had to decide "if K&L was retained or consulted in common by Hall and Ladera."[146] There was ample evidence that it was not.[147]

K&L represented Hall alone in the Penta state court lien cases to which Ladera was not a party.[148] K&L did not represent Hall or Ladera in the Cal-Neva bankruptcy case; each company had separate bankruptcy counsel.[149] That left Hall's, Ladera's, and K&L's communications between and among each other in the adversary proceedings.[150]

K&L began representing Ladera on March 8, 2017, when Old Republic engaged the firm to represent Ladera in the Ladera Adversary.[151] So, any of Hall's communications with K&L prior to that date were outside the scope of the joint representation exception to the privilege.[152] The question thus became whether the joint representation exception applied "to communications between Hall and K&L or Hall, K&L and Ladera after K&L began to represent Ladera on March 8, 2017, and the termination of its representation of Ladera in December of 2017."[153]

The *Hall CA-NV* court considered the totality of the circumstances in deciding whether the joint representation exception applied to the parties' communications during the months in question.[154] In the process, the court notably had to address K&L's characterization of its representations of Hall and Ladera as a joint representation in its two

145. *Id.* at *9 (quoting NEV. REV. STAT. § 49.115(5) (2021)).

146. *Id.* at *10.

147. *Id.* at *10–13.

148. *Id.* at *10.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See id.* at *11 (quoting *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 363 (3d Cir. 2007)).

conflict waiver letters.[155] This was indeed one factor that indicated that K&L jointly represented Hall and Ladera, but when viewing the situation broadly, it appeared to the court "that this was an unfortunate use of that phrase, and did not accurately reflect the scope of the representation being provided."[156] As Ladera conceded:

> K&L was separately retained by Old Republic to represent Hall in proceedings to which Ladera was not a party, and then subsequently was retained to represent Ladera, in a proceeding to which Hall was not a party; Hall and Ladera never consulted K&L in common; there were no group meetings, telephone conferences, strategy sessions or emails between them; K&L maintained separate files for Hall and Ladera; Hall and Ladera each had separate private counsel in their respective adversary proceedings; K&L directed questions regarding the insurance policies or Intercreditor Agreement to the parties' separate counsel; Hall and Ladera each had separate coverage counsel; K&L did not communicate to either Hall or Ladera on behalf of the other; [and] K&L made it clear that the scope of representation of each was to establish the priority of their respective deeds of trust.[157]

Ladera's position was further undermined by its own discovery responses in the litigation in which it had designated its communications with K&L as confidential and privileged.[158] As the court observed, if Ladera thought that it and Hall were co-clients of K&L, it would have recognized that their status as such would have also entitled Hall to discover its otherwise privileged communications with K&L.[159]

Long story short, although K&L's aims in representing Hall and Ladera might have been the same—that is, prioritizing their deeds of trust over Penta's mechanic's liens—the firm's representations of Hall

155. *Id.* at *11–12.
156. *Id.* at *12.
157. *Id.*
158. *Id.* at *13.
159. *Id.*

and Ladera were "concurrent but separate."[160] Consequently, K&L had no obligation under the joint representation exception to the privilege to divulge its confidential communications with Hall to Ladera.[161]

B. A Matter of Common Interest

For parties to be joint clients of a lawyer, and thus for the joint representation exception to the attorney-client privilege to apply, the lawyer must represent them on a matter of common interest.[162] "The term 'common interest' typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest."[163] The party advocating for the exception therefore "must establish cooperation in fact toward the achievement of a common objective."[164] *Lewis v. Fulkerson*[165] is a representative common interest case.

160. *Id.*

161. *Id.*

162. Bartholomew v. Aviation Cap. Grp., Inc., 278 F.R.D. 441, 449 (D. Minn. 2011); Neuberger Berman Real Est. Income Fund, Inc. v. Lola Brown Tr. No. 1B, 230 F.R.D. 398, 417 (D. Md. 2005).

163. F.D.I.C. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000). As the court explained in *In re Teleglobe Communications Corp.*, 493 F.3d 345, 365–66 (3d Cir. 2007), when differentiating joint representations from common interest doctrine and joint defense doctrine that may come into play where multiple parties with mutual interests employ separate lawyers:

> [B]ecause co-clients agree to share all information related to the matter of common interest with each other and to employ the same attorney, their legal interests must be identical (or nearly so) in order that an attorney can represent them all with the candor, vigor, and loyalty that our ethics require. . . . In the community-of-interest context, on the other hand, because the clients have separate attorneys, courts can afford to relax the degree to which clients' interests must converge without worrying that their attorneys' ability to represent them zealously and single-mindedly will suffer.

Id. at 366 (citation omitted). *But see* Supreme Forest Prods., Inc. v. Kennedy, No. 3:16-cv-0054, 2017 WL 120644, at *2 (D. Conn. Jan. 12, 2017) ("For the co-client privilege, it suffices for the clients to have a common interest, not necessarily interests that are identical in all respects.").

164. *Ogden Corp.*, 202 F.3d at 461.

165. Lewis v. Fulkerson, 555 S.W.3d 432, 432 (Ky. Ct. App. 2017).

Lewis arose out of Laura Fulkerson's divorce from Wade Lewis.[166] Fulkerson was a successful veterinarian and Lewis was a prosperous entrepreneur.[167] Much of Lewis's wealth came from the sale of one of his businesses, Maximum ASP, to a company called Cbeyond Communications.[168] Anyway, while Lewis and Fulkerson were married, they created two payable on death trusts for themselves.[169] The corpus of Fulkerson's trust, which the court referred in shorthand fashion to as the LRF Trust, was a focal point in the litigation.[170]

The parties created the LRF Trust in 2011.[171] They funded it with $1.7 million from Lewis's and Fulkerson's joint bank account.[172] It was undisputed that the funds drawn from the bank account were proceeds from Lewis's sale of Maximum ASP to Cbeyond Communications.[173] The parties' intent in establishing the LRF Trust, however, was hotly disputed.[174] Fulkerson contended "that the trust was a gift given to her to control exclusively," and that Lewis repeatedly told her "that she could spend the money in the trust any way she wanted and that they would each control the contents of their own trusts."[175] Not so, said Lewis.[176] He insisted that the LRF Trust was established solely for tax avoidance purposes as part of the couple's estate plan, and swore that he never told Fulkerson she could spend the entrusted funds as she pleased.[177]

Fulkerson subpoenaed Ed Lowry, the lawyer who drafted the LRF Trust, to appear for a deposition.[178] Lowry objected to the subpoena and later moved to quash it.[179] He resisted being deposed on the

166. *Id.* at 435.
167. *Id.*
168. *Id.*
169. *Id.* at 436.
170. *Id.* at 435.
171. *Id.* at 436.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

basis that he had an attorney-client privilege with each of the parties.[180] The family court held that Lowry could not be deposed or called to testify in a planned final hearing unless both parties waived their attorney-client privileges.[181] Fulkerson declined to do so.[182]

Because of an unfavorable evidentiary ruling, Lewis moved to amend his witness list for the final hearing to add Lowry, but only to testify about Lewis's separate trust.[183] The family court denied Lewis's motion based on "the 'perversion to public policy that would result if an attorney were forced to testify about matters related to privileged communications.'"[184] The family court repeated its earlier position that if Fulkerson waived her attorney-client privilege with Lowry, as Lewis effectively had through his motion to supplement his witness list, Lowry could testify at the hearing.[185] Fulkerson again refused the invitation and Lowry was therefore precluded from testifying at the final hearing.[186]

Lewis and Fulkerson were equally dissatisfied with the family court's rulings at the final hearing and they both appealed to the Kentucky Court of Appeals.[187] A central issue in Lewis's appeal was the family court's refusal to allow Lowry to testify regarding Lewis's donative intent concerning the LRF Trust.[188] Lewis argued that the family court erred in excluding Lowry's testimony because the joint client exception to the attorney-client privilege applied to any trust-related communications between he, Fulkerson, and Lowry.[189] As the *Lewis* court noted, Kentucky Rule of Evidence 503(d)(5) provided that "there are no privileged attorney-client communications 'relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted

180. *Id.*
181. *Id.*
182. *Id.* n.7.
183. *Id.* at 437.
184. *Id.* (quoting the family court).
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 439.
189. *Id.*

in common, when offered in an action between or among any of the clients.'"[190]

In this case, the matter of common interest to the parties was Lewis's intent when he funded his trust and the LRF Trust.[191] Lowry drafted the LRF Trust documents and prepared numerous other estate planning documents for Lewis and Fulkerson, and he had multiple communications with them in the process.[192] After the LRF Trust was formed, Lewis deposited $1.7 million in an investment account opened in the trust's name.[193] On those facts and applying the plain language of Rule 503(d)(5), the *Lewis* court reasoned that the family court abused its discretion in not applying the joint client exception to the privilege and thus allowing Lowry to testify.[194] The court therefore reversed the family court's judgment on this point and remanded the case for further proceedings.[195]

IV. THE PRIVILEGE IN CONNECTION WITH PROFESSIONAL LIABILITY CLAIMS AGAINST JOINT CLIENTS' COMMON LAWYER

We have so far explored the contours of the joint representation exception in cases where joint clients become adverse to one another. But just as joint clients may become adverse to one another, so, too, may one joint client become adverse to the lawyer who handled the joint representation. If one joint client sues the lawyer for professional negligence or breach of fiduciary duty, for example, how does the joint representation exception to the privilege operate in such a case? Does the exception even apply?

Courts that have considered the issue have tended to hold that the joint client suing the lawyer is entitled to discover the non-suing joint clients' communications with the lawyer even if the non-suing clients do not consent to disclosure.[196] As a Delaware federal court explained:

190. *Id.* at 440 (quoting KY. R. EVID. 503(d)(5)).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 441.

196. *See, e.g.*, Newsome v. Lawson, 286 F. Supp. 3d 657, 664 (D. Del. 2017) ("The only people joint clients can reasonably expect to withhold privileged

> The only people joint clients can reasonably expect to withhold privileged communications from are third parties or strangers to the joint representation. . . . Neither a joint client nor a joint attorney is a stranger or a third party to the joint representation. . . . Indeed, the joint attorney provided the joint representation. . . .
>
> As a result, a joint attorney may not withhold from one joint client privileged communications from the joint representation, even if the other (non-party) joint client refuses to consent to the disclosure.[197]

Anten v. Superior Court[198] leads this line of authority. There, Lewis Anten and Arnold and Lillian Rubin jointly retained lawyers Marvin Gelfand and Allan Kirios of the Weintraub law firm (Weintraub) to represent them in connection with a tax audit occasioned by their tax lawyers' incorrect advice around the sale of their business.[199] Gelfand and Kirios advised Anten and the Rubins that the tax lawyers' error irreversibly precluded the favorable tax treatment they thought the sale would receive.[200] Based on the Weintraub lawyers' advice,

communications from are third parties or strangers to the joint representation. . . . Neither a joint client nor a joint attorney is a stranger or a third party to the joint representation.") (citation omitted); Farnsworth v. Van Cott, Bagley, Cornwall & McCarthy, 141 F.R.D. 310, 313 (D. Colo. 1992) (applying Utah law); Anten v. Superior Ct., 183 Cal. Rptr. 3d 422, 425–26 (Ct. App. 2015) (applying a California statute and discussing the policy reasons for this approach); Tunick v. Day, Berry & Howard, 486 A.2d 1147, 1149 (Conn. Super. Ct. 1984) (recognizing a waiver despite the joint clients' refusal to waive the privilege); Williamson v. Edmonds, 880 So. 2d 310, 319–20 (Miss. 2004) (involving an aggregate settlement); Bolton v. Weil, Gotshal & Manges LLP, No. 602341/03, 2005 WL 5118189, at *6 (N.Y. Sup. Ct. Sept. 16, 2005) ("[L]ike cases involving disputes between former co-clients, . . . [the parties] as co-clients represented by defendants, would have no reasonable expectation of confidentiality with respect [to] . . . communications which were relevant to their common interest as joint clients."); Scrivner v. Hobson, 854 S.W.2d 148, 151–52 (Tex. App. 1993) (involving an aggregate settlement).

197. *Newsome*, 286 F. Supp. 3d at 664 (citations omitted).

198. 183 Cal. Rptr. 3d at 422.

199. *Id.* at 424.

200. *Id.*

Anten and the Rubins settled with the Internal Revenue Service for more than $1 million.[201]

The Weintraub lawyers also urged Anten and the Rubins to sue the tax lawyers for legal malpractice.[202] Anten favored negotiation over litigation, so Weintraub dumped him as a client and sued the tax lawyers on behalf of the Rubins.[203] Anten subsequently overcame his aversion to litigation and sued both the tax lawyers and Weintraub.[204]

Anten moved to compel Weintraub to respond to certain written discovery.[205] Weintraub opposed the motion on the basis that it could not provide the requested responses without violating the Rubins' attorney-client privilege, which they refused to waive.[206] The trial court denied Anten's motion based on Weintraub's assertion of the Rubins' attorney-client privilege.[207] Anten then petitioned the California Court of Appeal for a writ of mandamus.[208]

The appellate court agreed with Anten that the trial court abused its discretion in upholding Weintraub's assertion of the Rubins' attorney-client privilege.[209] Section 958 of the California Evidence Code provides that the privilege does not apply "to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."[210] The *Anten* court acknowledged that "there [was] no case law addressing the scenario presented in the instant case, in which one *joint client* charge[d] the attorney with a breach of duty, but other joint clients [did] not," but nonetheless concluded that the case fell "squarely within the literal terms of section 958."[211] The communications Anten sought from Weintraub were not protected against discovery by the Rubins' attorney-client privilege.[212]

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 425.
210. CAL. EVID. CODE § 958 (2021).
211. *Anten*, 183 Cal. Rptr. 3d at 425.
212. *Id.*

In addition to the statute's plain language, the *Anten* court reasoned that policy considerations led to the same conclusion.[213] "First, because Anten and the Rubins were joint clients of Weintraub, the Rubins' communications with Weintraub were not confidential as to Anten."[214] In short, this case represented a straightforward application of the joint representation exception to the attorney-client privilege.[215] Second, principles of "fundamental fairness" strongly supported the application of § 958 in this situation.[216] Third, a different outcome would risk encouraging collusion between joint clients or between one joint client and the lawyer, depending on the situation.[217] The *Anten* court outlined its fairness and collusion concerns as follows:

> For example, if one of two joint clients breached an attorney fee agreement but the other joint client did not, and the attorney sued the breaching client, then it would be unjust to allow the nonbreaching client to thwart the attorney's suit by invoking the privilege to prevent introduction of the fee agreement itself. Moreover, the risk of collusion between the joint clients would be substantial. Similarly, if an attorney breached a duty to one of two joint clients but breached no duties to the other, and the wronged client sued the attorney, then it would be unjust to allow the nonsuing client to thwart the other client's suit by invoking the privilege to prevent introduction of relevant attorney-client communications made in the course of the joint representation. Again, the risk of collusion between the attorney and the nonsuing client would be substantial—indeed, the risk would be particularly significant if the alleged breach were that the attorney had favored the interests of the nonsuing client over those of the suing client.[218]

213. *Id.*

214. *Id.* at 425–26 (footnote omitted).

215. *Anten*, 183 Cal. Rptr. 3d at 426 (quoting and citing multiple California cases).

216. *Id.*

217. *Id.*

218. *Id.*

In conclusion, the *Anten* court held that the Rubins (and Weintraub on their behalf) could not invoke the attorney-client privilege to prevent Anten from discovering relevant communications between them and the Weintraub lawyers during the parties' joint representation.[219] The court therefore mandated that the trial court grant Anten's motion to compel discovery.[220]

Anten is consistent with the general rule that joint clients' communications with their shared lawyer about a matter of common interest are not privileged as between them in a subsequent adverse proceeding between them even if one of them objects to disclosure.[221] The *Anten* court simply imported the joint representation exception to the privilege from a dispute between two joint clients (treating the Rubins as a single client) into a dispute between one of the joint clients and the lawyer.

In *Galati v. Pettorini*,[222] on the other hand, the court took a different approach. In that case, Anthony Galati sued Timothy Pettorini for alleged malpractice in prosecuting a lawsuit against American Family Insurance Co. (American Family).[223] Galati was one of eleven American Family agents who were joint plaintiffs in a lawsuit against the company known as *Charms*.[224] "The 11 joint plaintiffs asserted identical causes of action against American Family in a single complaint, but each plaintiff's claims were bifurcated for purposes of trial. Galati's trial was set first."[225] Galati settled with American Family during trial.[226] Pettorini continued to represent the remaining *Charms* plaintiffs.[227]

Roughly one year after he settled, Galati sued Pettorini for his alleged negligence in the *Charms* litigation.[228] Galati alleged that

219. *Id.* at 426–27.
220. *Id.* at 427.
221. *See supra* notes 15–20 and accompanying text.
222. No. 101712, 2015 WL 1510914 (Ohio Ct. App. Apr. 2, 2015).
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at *2.

Pettorini failed to assert numerous causes of action against American Family and had bungled his case in various other respects.[229]

In discovery, Galati "sought numerous communications and documents from Pettorini, some of which involved the other *Charms* plaintiffs."[230] Pettorini objected to Galati's discovery because the remaining ten *Charms* plaintiffs were his current or former clients and his communications with them were privileged.[231] The other *Charms* plaintiffs had neither waived the attorney-client privilege nor otherwise agreed to the disclosure or production of the communications or documents that Galati targeted.[232]

The trial court ordered Pettorini to deliver the disputed documents for *in camera* review "'even if they also touched upon matters relating to other *Charms* plaintiffs' but denied production of documents that related solely to Pettorini's representation of the other *Charms* plaintiffs."[233] Ultimately, the trial court ordered Pettorini to produce certain documents, and Pettorini appealed.[234] On appeal, Pettorini asserted that the trial court erred by ordering the disclosure of privileged information because Galati was not authorized to waive the privilege as to the other ten joint clients' communications with him.[235]

After a jumbled discussion of the joint representation exception to the privilege as compared to the attorney-client privilege in joint representations, the *Galati* court observed that while one joint client "may unilaterally waive the privilege as to its own communications with a joint attorney, . . . it may not . . . unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients."[236] Here, each of the joint *Charms* clients' communications with Pettorini were protected from compelled disclosure to third parties by the attorney-client privilege.[237]

229. *Id.* ("Pettorini failed to retain an expert, file necessary motions, complete discovery, and prepare witnesses for trial.").

230. *Id.*

231. *Id.*

232. *Id.* n.1.

233. *Id.* at *2.

234. *Id.* at *3.

235. *Id.*

236. *Id.* at *7 (quoting *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 363 (3d Cir. 2007)).

237. *Id.*

"Even though Galati was part of the joint representation, he could not . . . unilaterally waive the privilege of the other *Charms* clients."[238] Having failed to obtain the other joint clients' consent to disclosure of the disputed documents, those documents remained privileged and were off-limits in his lawsuit against Pettorini.[239] The trial court therefore erred in ordering Pettorini to produce the documents.[240]

In sum, the *Galati* court enforced the other *Charms* plaintiffs' attorney-client privileges as commonly applied in joint representations because Galati's lawsuit was not a dispute between joint clients.[241] Rather, it was a lawsuit by one joint client against a third party—Pettorini. The joint representation exception to the privilege simply did not apply on the facts.[242] Indeed, courts generally hold that the joint representation exception applies only in adverse proceedings between joint clients.[243] Unlike the *Anten* court, the *Galati* court apparently did not consider the threat of collusion in deciding whether to lift the other *Charms* plaintiffs' privileges and for good reason: there is no "collusion exception" to the attorney-client privilege. There is a crime-fraud exception to the privilege, and courts generally do not permit parties to selectively enforce or waive the privilege,[244] but neither of those concerns was present in *Galati*.

V. CONCLUSION

Lawyers frequently represent more than one client in a matter of common interest to the clients. Clients often favor joint representations. Where the attorney-client privilege is concerned, the general rule is that as between co-clients, the privilege does not attach to communications

238. *Id.*

239. *Id.*

240. *Id.* at *8.

241. *Id.* at *6.

242. *Id.*

243. *See, e.g.*, Spence v. Hamm, 487 S.E.2d 9, 11 (Ga. Ct. App. 1997) (explaining that the joint representation exception applies only during subsequent litigation between the joint clients and thus did not apply in this case where the joint clients were not parties).

244. *See generally* Douglas R. Richmond, *Understanding the Crime-Fraud Exception to the Attorney-Client Privilege and Work Product Immunity*, 70 S.C. L. REV. 1 (2018); Douglas R. Richmond, *The Case Against Selective Waiver of the Attorney-Client Privilege and Work Product Immunity*, 30 AM. J. TRIAL ADVOC. 253 (2006).

with their shared lawyer about matters of common interest.[245] That remains the general rule where the co-clients later are pitted against one another as adversaries in arbitration or litigation. It is important for co-clients to understand how the attorney-client privilege operates in joint representations and it is up to the lawyer to explain at the outset the privilege's application to the co-clients' matter and the joint representation exception. Fortunately, the application of the attorney-client privilege in joint representations is conceptually straightforward; unfortunately, it can sometimes be confusing in practice. The privilege's application is especially uncertain in cases where one joint client becomes adverse to the lawyer who conducted the joint representation rather than to another joint client. In the end, joint representations are but one more situation in which lawyers and clients alike must be attentive to limits on, and exceptions to, the important attorney-client privilege.

245. Max-Planck-Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Wolf Greenfield & Sacks, PC, 736 F. Supp. 2d 353, 362 (D. Mass. 2010); Scrivner v. Hobson, 854 S.W.2d 148, 151 (Tex. App. 1993); Fla. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 95-4 (1997); *see* Pinnacle Sur. Servs., Inc. v. Manion Stigger, LLP, 370 F. Supp. 3d 745, 751 (W.D. Ky. 2019) ("The attorney-client privilege does not shield communications between one client and counsel from other joint clients.").