New Jersey Supreme Court Recognizes the Common Interest Doctrine: Part I

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In his September 3, 2014 “Privilege Points” release, Tom Spahn discusses the common interest exception to waiver of privilege:

Most federal courts recognize the common interest doctrine, which can avoid a waiver when separately represented clients who are in or anticipate litigation share communications protected by the attorney-client privilege. The New Jersey Supreme Court finally recognized the doctrine in *O'Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014).

The court acknowledged that "[o]utside of New Jersey, . . . courts vary in their analyses of the common interest rule, resulting in less certainty concerning its application." *Id.* at 314. Among other things, the court pointed to federal and states courts' disagreement about the following issues: (1) the required level of "anticipation" of litigation; (2) the required similarity of interest among the participants; and (3) the doctrine's applicability to communications that do not involve all participants' lawyers. The court ultimately adopted a common interest doctrine that (1) applies in connection with "actual or anticipated litigation"; (2) can protect communications among participants who share a "common purpose" (because "the common interest need not be identical"); and (3) can protect communications between "counsel for one party and a representative of another party." *Id.* at 317.

The New Jersey Supreme Court's recognition of the common interest doctrine comes as good news. However, the court's catalogue of variations among other courts' application of the doctrine highlights its uncertainty. Next week's Privilege Point discusses two other aspects of the New Jersey Supreme Court's decision — one of which is unique to New Jersey, and one of which is not.