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

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In his September 10, 2014 “Privilege Points” release, Tom Spahn discusses the common interest doctrine:


First, the court reiterated an attorney-client privilege principle unique to New Jersey. In that state, unlike any other state, "[t]he privilege must yield . . . in furtherance of 'overriding public policy concerns,' . . . or other important societal concerns." *Id.* at 309 (citation omitted). Second, the New Jersey court followed a few other courts in analyzing the common interest doctrine in a setting where it may not even have been relevant. The case involved a private lawyer and a municipal lawyer cooperating in their responses to a resident's lawsuits and Open Public Records Act requests. Most of the shared documents would seem to deserve work product protection. Because courts agree that disclosing work product to friendly third parties does not waive that robust protection, most courts do not even address the common interest doctrine in the work product context. Instead, courts insist that participants meet the demanding common interest doctrine standard only when seeking to avoid a waiver of the much more fragile attorney-client privilege protection. The *O'Boyle* decision recognized that "[t]here are circumstances when disclosure of work product to a third party . . . does not waive the protection afforded to it." *Id.* at 312. The court also acknowledged that "[d]isclosure consistent with the common interest rule is one of those circumstances," but its decision may mistakenly cause some to think that they must meet the exacting common interest doctrine standard to avoid waiving work product protection. *Id.* (emphasis added).

One of the great ironies of the common interest doctrine is that just when it becomes available in most courts (when the participants are in or anticipate litigation), it is not needed. Participants in that context usually can share their work product without risking a waiver — even without a common interest agreement.