Delaware Federal Court Addresses the Common Interest Doctrine

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In his November 14, 2012 “Privilege Points” release, Tom Spahn discusses the “common interest” doctrine as applied by a federal court in Delaware:

As discussed in a number of previous Privilege Points, the common interest doctrine can allow separately represented corporations to avoid waiving the privilege when they share protected communications with each other -- but only under very narrow circumstances.

In MobileMedia Ideas LLC v. Apple Inc., C.A. No. 10-258-SLR-MPT, 2012 U.S. Dist. LEXIS 128440 (D. Del. Sept. 10, 2012), the court ultimately found that Nokia and Sony could rely on the doctrine, and thus did not waive their respective attorney-client privilege protections by sharing privileged communications in connection with forming a separate company to hold and defend the companies' potential patents. The good news is that the court rejected the adversary's argument that the common interest doctrine protection failed because "Sony and Nokia waited six months to execute a common interest agreement" – noting that "when the exchanges [of privileged communications] occurred, non-disclosure agreements had been executed." Id. at *16. However, there also was bad news. The court reiterated the majority view that "to qualify for and to maintain the privilege, the communications must be shared between counsel, and not just between the clients." Id. at *16. Perhaps more importantly, the court explained that the common interest doctrine could apply only if the participants are in or "anticipated" litigation. Id. at *17. Of course, courts use that standard when judging the availability of work product protection.

Although it is unclear whether the same "anticipation" element applies in the common interest context as in the work product context, companies should keep in mind that courts differ on what type of "anticipation" makes work product protection available. This increases the uncertainty of common interest protection absent actual litigation.