More Courts Reject Common Interest Doctrine's Applicability

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In his March 5, 2014 “Privilege Points” release, Tom Spahn discusses the common interest doctrine and preserving the privilege:

The common interest doctrine occasionally allows separately represented clients to share privileged documents without waiving their fragile attorney-client privilege protection. However, lawyers cannot automatically assure the doctrine's applicability just by entering into a common interest agreement with another participant. Courts reject the doctrine's applicability in over half of the cases.

In Ducker v. Amin, Case No. 1:12-cv-01596-SEB-DML, 2013 U.S. Dist. LEXIS 181690 (S.D. Ind. Dec. 31, 2013), the court found that the common interest doctrine did not protect direct communications among the clients without at least one of the client's lawyers' participation in the communication. Three weeks later, in Integrated Global Concepts, Inc. v. j2 Global, Inc., Case No. 5:12-cv-03434-RMW (PSG), 2014 U.S. Dist. LEXIS 7294, at *5 (N.D. Cal. Jan. 21, 2014), the court found that two companies which had entered into a merger agreement could not rely on the common interest doctrine to resist discovery of privileged documents they had later shared – finding the doctrine inapplicable because the companies faced "no impending threat of litigation" at that time. One day later, another court found that the common interest doctrine could not apply "until litigation became a palpable reality." In re Application of Tinsel Grp., S.A., Misc. A. H-13-2836, 2014 U.S. Dist. LEXIS 7882, at *10 (S.D. Tex. Jan. 22, 2014).

These and many other similar cases did not address the common interest doctrine's applicability in the abstract. All of these participants and their lawyers thought they could avoid a waiver by entering into a common interest agreement, and later learned that the doctrine did not apply – after they had already waived their privilege by sharing protected documents.