This article analyzes the current status of the common interest doctrine within the U.S. Court of Appeals for the Fourth Circuit. Generally, courts within the Fourth Circuit hold that for the common interest doctrine to apply, the parties must have a nearly identical interest that is legal in nature, though the interest may also have a commercial component. However, there is an implication that an adverse party is required, which means that at least contemplated litigation is a prerequisite. Clients having a common legal interest with another party would be well advised not to share information with that party outside the presence of counsel, and preferably should only do so after executing a written common interest agreement. We provide at the end of this paper a common interest doctrine checklist to aid in determining whether a contemplated situation would meet the requirements for application of the common interest doctrine.

Definition and Requirements
The common interest doctrine is “an extension of the attorney-client privilege”¹ or the work-product doctrine,² and “applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest.”³ Accordingly, the common interest doctrine requires an underlying privilege — either the attorney-client privilege or the work-product doctrine.⁴ And “applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest.”³

In the Fourth Circuit, the requirements of the underlying privileges are similar to those in other circuits. First, the attorney-client privilege applies only if the asserted holder of the privilege is or sought to become a client; the person to whom the communication was made is a member of the bar of a court or his subordinate and is acting as a lawyer in connection with this communication; the communication relates to a fact of which the attorney was informed by his client without the presence of strangers, for the primary purpose of securing either an opinion on law or legal services or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and the privilege has been claimed and not waived by the client.⁵ In short, the attorney-client privilege applies “only to confidential disclosures by a client to an attorney made in order to obtain legal assistance.”⁶

Second, the work product doctrine “protects an attorney’s work done in preparation for litigation” and therefore requires pending or anticipated litigation.⁷ A party asserting work product privilege must show “as to each document, that the work product in question was prepared by, or under the direction of, an attorney and, was prepared in anticipation of litigation.”⁸ The purpose of the work product doctrine is to prevent a party from benefitting unfairly from the opposing party’s counsel’s time in gathering facts relevant to litigation when those facts were ascertainable by both parties. The doctrine also safeguards the mental impressions and opinions of an attorney to ensure that the lawyer is “free to advise clients and prepare their cases for trial without undue interference.”⁹

Courts generally require that the parties show the existence of an underlying privilege for

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the common interest doctrine and disclose the communication at a time when they shared a common interest,\textsuperscript{10} shared the communication in furtherance of that common interest,\textsuperscript{11} and have not waived the privilege.\textsuperscript{12} The burden of showing compliance with these requirements is on the party seeking to apply the common interest doctrine.\textsuperscript{13} These requirements are generally required by all courts that apply the common interest doctrine. What follows are certain particularities of the common interest doctrine within the Fourth Circuit.

**“Common Interest” within the Fourth Circuit**

The seminal case \textit{DuPlan Corp. v. Deering Milliken Inc.} dealt at length with the common interest doctrine and is widely cited within and outside of the Fourth Circuit. \textit{DuPlan} required that the “common interest” between the parties be identical and pertain to a legal interest.\textsuperscript{14} Since \textit{DuPlan}, courts have not consistently required that the interest be identical, but often merely state that the interest be common, consistent with the current name of the doctrine. For example, in 2005 in \textit{In re Grand Jury Subpoena}, the Fourth Circuit did not require that the interest be identical, but stated that “[f]or the privilege to apply, the proponent must establish that the parties had some common interest about a legal matter” and that “some form of joint strategy is necessary.”\textsuperscript{15} Similarly, in 1990 the Fourth Circuit stated “persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.”\textsuperscript{16}

Although courts have not consistently required an identical interest, courts have required that the interest be legal in nature: “the common interest doctrine applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest”;\textsuperscript{17} “[t]o be entitled to the protection of this privilege the parties must first share a common interest about a legal matter”;\textsuperscript{18} “[t]he common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims.”\textsuperscript{19}

The doctrine’s requirement that the parties’ interest be legal in nature is understandable given that the attorney-client privilege — the very privilege from which the doctrine extends — requires the privileged communication to involve legal subject matter.\textsuperscript{20}

Nevertheless, despite the explicit requirement that the common interest be legal in nature, the Fourth Circuit recognizes that the parties’ common interest may be both legal and commercial, and the commercial nature of the interest does not negate application of the doctrine. “The fact that there may be an overlap of a commercial and legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest.”\textsuperscript{21}

**Who Can Have a Common Interest?**

Previously, only criminal codefendants in pending litigation could have a common interest under what was termed the “joint defense privilege.” In fact, the Supreme Court of Virginia was the first court to recognize the joint defense privilege, and it did so by extending the attorney-client privilege to communications between criminal codefendants made in the presence of counsel.\textsuperscript{22} The rationale was that the codefendants could have hired the same attorney, so to encourage the free flow of information to produce the most effective legal advice, communications between the codefendants and their corresponding counsel should also be protected by the attorney-client privilege.\textsuperscript{23} Thus, it is clear that although courts frequently state that the common interest doctrine applies only “when two or more parties consult or retain an attorney”;\textsuperscript{24} each party may retain its own attorney, because “the counsel of each [is] in effect the counsel of all.”\textsuperscript{25} Therefore, the privilege

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extends to multiple parties, each having its own counsel, rather than just multiple parties having joint counsel.

The “joint defense privilege” was not extended to civil codefendants until 1942, when
the Supreme Court of Minnesota in *Schmitt v. Emery* extended the privilege. The name “joint defense privilege” was eventually changed to the “common interest doctrine” because the privilege was extended to coplaintiffs as well as parties not in pending litigation. The Fourth Circuit explicitly recognized the expansion of the joint defense privilege to the common interest doctrine in 1990:

> Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.27

Thus, a common interest may be found among defendants or plaintiffs regardless of whether they are in civil or criminal litigation.

With regard to the requisite type of interest the parties must have, the *DuPlan* court explained that the key consideration in determining whether a sufficient common interest exists between two or more parties is “the nature of the common interest as it relates to the action of the attorney.”28 In *DuPlan*, although the patent holder and the exclusive licensee engaged in a transaction “which necessitated the services of an attorney who represented the interests of both parties to the transaction,” the common interest of the patent holder who was a party to the pending litigation and a nonparty exclusive licensee was not sufficiently legal in nature.29 The court reasoned that the exclusive licensee would only benefit financially from the patent holder’s legal success and, therefore, there was no common legal interest between the patent holder and the exclusive licensee. Therefore, the communications that occurred during the licensing transaction were not entitled to the exception of waiver under the common interest doctrine.30 As explained below, if the parties had an identifiable adverse party, the court would have been more likely to find a common legal interest.

**Is an Adverse Party Required?**

Until 1996, the implication was that litigation needed to be pending for a common interest to exist. However, in *Aramony* the Fourth Circuit adopted the Second Circuit’s reasoning in *United States v. Schwimmer*,31 and stated “it is unnecessary that there be actual litigation in progress for this privilege to apply.”32 Since *Aramony*, courts in the Fourth Circuit have not required litigation to be in progress.33 The District Court for the District of Maryland explained this principle by stating that the litigation “may be actual, pending or contemplated against a common adversary.”34 Thus, while actual litigation need not be in progress, there is an implication that litigation must at least be contemplated against (or threatened by) an adverse party for there to be a sufficient common interest among the parties.

The Fourth Circuit has declined to address whether an adverse party is a prerequisite for invoking the common interest doctrine. In *Hunton & Williams v. United States Dept. of Justice*, Hunton & Williams relied on a Third Circuit case (*Haines v. Liggett Group Inc.*35) to argue that the common interest doctrine only applies when there is an adverse party.36 The Fourth Circuit stated, “[w]e need not address the issue here” because there was “ample evidence to support the district court’s conclusion” that there was an adverse party.37 While *Haines* from the Third Circuit involved the joint defense privilege and therefore required an adverse party (that is, a plaintiff adverse to multiple defendants), the fact that the Fourth Circuit skirted the issue in *Hunton & Williams* leaves a faint implication that at least a potential identifiable adverse party is required for the common interest doctrine to apply. Courts within the Fourth Circuit have yet to apply the common interest doctrine in the absence of contemplated, threatened, or pending litigation.

Requiring litigation (contemplated or otherwise) for the common interest doctrine to apply,

The Fourth Circuit has declined to address whether an adverse party is a prerequisite for invoking the common interest doctrine.
however, is unfounded. The common interest doctrine “applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine.”38 While the work-product doctrine requires litigation (because it protects an attorney’s work done in preparation for litigation), the attorney-client privilege does not require litigation, or even contemplated litigation.39 Therefore, it does not follow that litigation (pending or contemplated) is required for a court to find that a common legal interest between two parties exists. Nevertheless, because of this unpredictability, one would be well advised not to share information with a third party in the absence of at least contemplated or threatened litigation against an identifiable adverse party.

Waiver of Attorney-Client Privilege
The common interest doctrine does not apply if the parties have waived the underlying privilege,40 and the underlying privilege may be waived if at least one attorney is not present. As recognized by the U.S. District Court for the Eastern District of Virginia, “the Fourth Circuit has implied that an attorney must be on either end of the communication.”41 But who may be on the other side of the communication without waiving the privilege? If one of the parties is a corporation, for example, to whom may an attorney communicate? When determining who the attorney-client privilege extends to, courts often apply, first, the control group test and, second, the subject matter test.42 Under the control group test, “the main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decision-making process concerning a problem on which legal advice is sought.”43 Therefore, in the corporate setting the control group test should not be viewed as limiting communications between the attorney and the group that controls the corporation, but merely as limiting communications between the attorney and the individuals that control the information necessary for the attorney to render legal advice. For example, in a patent case a patent attorney may need to speak to “the corporate technical personnel down in the ranks” rather than the chair of the board who “probably could not explain the problem well enough” for the attorney to be able to render legal patent advice.44

After satisfying the control group test, the subject matter test is simply satisfied if the communication is “incident to a request for, or the rendition of, legal advice.”45 Accordingly, the attorney-client privilege and the common interest doctrine protect communications that are between an attorney and people that control the information necessary for the attorney to render legal advice if those communications are for the purpose of requesting or giving legal advice. In sum, clients (joint or otherwise) that have a common interest would be well advised to avoid direct client-to-client communications made outside the presence of counsel because those communications will not be protected under the attorney-client privilege, and the common interest doctrine, therefore, would not apply to those communications.

Does the Doctrine Require a Written Agreement?
The Fourth Circuit does not require a written confidentiality or common interest agreement.46 However, “[w]hile [the] agreement need not assume a particular form, an agreement there must be.”47 Agreements are best manifested by a writing, and a written agreement helps the parties meet their burden of proof that the shared information was made in confidence and that they do indeed have a common interest.48 Accordingly, it is best to have a written agreement, whether it be named a confidentiality agreement, a joint defense agreement, a joint prosecution agreement, or a common interest agreement, and should preferably include a statement that the purpose of the information exchange is to further a common legal interest between the parties.49

Who Can Waive the Common Interest Doctrine?
As recognized in the seminal Chahoon case, which established the joint defense privilege, “the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them.”50 Courts within the Fourth Circuit uphold the principle that the privilege must be waived by each party unless the original parties are now opposed in litigation.51
Common Interest Doctrine Checklist

The following checklist may be used to determine whether courts within the Fourth Circuit would apply the common interest doctrine to a communication:

- Does the communication, before being shared with a third party, satisfy either the attorney-client privilege or the work product doctrine?
- Do the parties seeking to enter a common interest agreement share a common interest?
- Is the common interest legal in nature with respect to the actions of the attorney(s)? In other words, is the purpose of the communication that is to be shared with a third party to secure primarily either an opinion on law or legal services or assistance in a legal proceeding?
- Is litigation at least contemplated against a potential identifiable adverse party?
- Is an attorney on at least one side of the communication?
- Is there an express agreement between the parties that a common interest exists between them?
- Is the communication made after there is an express agreement between the parties and in furtherance of the common interest?
- Is the communication made in confidence?
- Have the parties collectively waived the privilege?

The common interest doctrine has evolved over the years and will continue to evolve. What remains true, however, is that the more identical and the more legal the common interest is between the parties, the more likely courts are to find that the common interest doctrine applies and, therefore, find nonwaiver of communications shared between those parties. Nevertheless, because courts within the Fourth Circuit have yet to hold that litigation — pending or contemplated — is not required, clients would be well advised not to share information with a third party in the absence of at least contemplated litigation against an identifiable adverse party.

Endnotes:
2. In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990).
10. Hunton & Williams, 590 F.3d at 285 (“Documents exchanged before a common interest agreement is established are not protected from disclosure.”).
11. In re Grand Jury Subpoena, 415 F.3d at 341 (“Purpose of the privilege is to allow persons with a common interest to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims”) (quotations omitted).
12. Id. at 339.
13. Id.
14. See DuPlan Corp. v. Deering Milliken Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1974) (“The key consideration is that the nature of the interest be identical, not similar, and be legal, not commercial.”).
15. In re Grand Jury Subpoena, 415 F.3d at 341 (employee’s cooperation in an internal investigation alone not deemed sufficient to establish a common interest) (citing United States v. Weisman, 195 F.3d 96, 100 (2d Cir. 1999).
17. Sheet Metal Workers Int’l Ass’n, 29 F.3d at 124.
19. Hunton & Williams, 590 F.3d at 277.
20. In re Grand Jury Subpoena, 415 F.3d at FN3 (to be privileged, communication must be for the purpose of securing primarily either an opinion on law, or legal services, or assistance in some legal proceeding).
business strategy which happens to include . . . a concern about litigation”).


23 The Supreme Court of Virginia stated: “The parties . . . might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communications. They had the same defense to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all . . . . They had a right, all the accused and their counsel, to consult together about the case and the defense, and it follows as a necessary consequence, that all the information, derived by any and all of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them.” Chahoon, 62 Va. (21 Gratt.) at 841–42.

24 Sheet Metal Workers Int’l Ass’n, 29 F.3d at 124.

25 Chahoon, 62 Va. at 841. See also In re Grand Jury Subpoena, 415 F.3d at 341 (“The purpose of the privilege is to allow persons with a common interest to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.”).

26 2 N.W.2d 413 (Minn. 1942).

27 In re Grand Jury Subpoenas, 902 F.2d at 249 (reversing the district court’s ruling which was based on the notion that the joint defense privilege is limited to codefendants).


29 DuPlan Corp., 397 F. Supp. at 1175.

30 Id.

31 892 F.2d 237, 243 (2d Cir. 1989).

32 Aramony, 88 F.3d at 1392.

33 See, e.g., Hanson v. United States Agency for Int’l Development, 372 F.3d 286, 292 (4th Cir. 2004) (“communications between each of the clients and the attorney are privileged against third parties, and it is unnecessary that there be actual litigation in progress for this privilege to apply”) (citing Aramony, 88 F.3d at 1392).


35 975 F.2d 81, 90 (3d Cir. 1992).

36 Hunton & Williams, 590 F.3d at 283.

37 Id.


39 See In re The Regents of the University of California, 101 F.3d 1386, 1390 (Fed. Cir. 1996) (“It is well established that the attorney client privilege is not limited to actions taken and advice obtained in the shadow of litigation.”); see also Paul R. Rice, Attorney-Client Privilege in the United States § 1:13 (1993) (the attorney-client privilege in the United States is free of the “pending or in anticipation of litigation” limitation).

40 In re Grand Jury Subpoenas, 415 F.3d at 339.

41 In re Outsidewall Tire Litigation, 2010 U.S. Dist. LEXIS 67578, at *8 (E.D.Va. July 6, 2010) (noting that the Second and Third Circuits have stated that the common interest doctrine applies to communications between an attorney for one party and the common interest party).


44 Id.

45 Id.

46 See Beyond Systems Inc., No. PJM—08-409, 2010 U.S. Dist. LEXIS 40423, at *4 (noting that “[w]hile not required, there has never been a written record of a common interest agreement over the eight years of intense litigation”).

47 Hunton & Williams, 590 F.3d at 287.

48 See id. at 286 (noting that the parties failed to create a written common interest agreement until November 2005, and that neither party made any kind of “common interest” notation on their written communications until October 2005).


50 Chahoon, 62 Va. (21 Gratt.) at 841.

51 In re Grand Jury Subpoenas, 902 F.2d at 248 (“An exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege, a joint defense privilege cannot be waived without the consent of all parties who share the privilege.”); see also Beyond Systems, Inc., No. PJM-08-409, at *8, 2010 U.S. Dist. LEXIS 40423 (“As the privilege is shared by more than one entity, each entity sharing in the common interest must waive its protection.”).