

A20-1344
State of Minnesota
In Supreme Court

FILED

September 9, 2021

**OFFICE OF
APPELLATE COURTS**

Energy Policy Advocates,

Respondent,
vs.

Keith Ellison, in his official capacity as Attorney General
and Office of the Attorney General,

Appellants.

**JOINT BRIEF OF AMICI CURIAE MINNESOTA ASSOCIATION FOR
JUSTICE, MINNESOTA DEFENSE LAWYERS ASSOCIATION, MINNESOTA
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INTRODUCTION

Amici curiae are a coalition of legal organizations that collectively represent thousands of Minnesota lawyers engaged in the full spectrum of legal practice in Minnesota. Although our attorney members are often opposed to each other, this unique coalition has come together to address a shared interest—namely, that Minnesota continue to recognize the “common interest doctrine” as an exception to the general rule that attorney-client privilege is waived when privileged information is disclosed to a third party.¹

The court of appeals’ statement that Minnesota does not recognize the doctrine is legally wrong. This Court recognized the common-interest doctrine roughly 80 years ago, by applying it in *Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942), *overruled in part on other grounds by Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 308 N.W.2d 305 (Minn. 1981).

The decision was also bad policy. It upset settled expectations. It dropped a bombshell of surprise and uncertainty into the Minnesota legal community. Many lawyers routinely—sometimes, by court order—collaborate with lawyers representing other clients who share a common legal interest. This is commonplace, good for clients and courts, and should be encouraged by this Court continuing to recognize the common-interest doctrine.

¹ This brief is filed in support of neither party. The undersigned, pursuant to Minn. R. Civ. App. P. 129.03, certify that counsel for no party authored this brief, and that it was authored entirely by the undersigned. The undersigned further certify that no person other than the undersigned or their members or counsel made any monetary contribution to the preparation or submission of this brief.

Notably, none of the parties appear to oppose the doctrine's recognition in Minnesota. Rather, they only disagree about the doctrine's application here. A legion of amici also urges the doctrine's recognition.²

In addition to erring in its holding, the court of appeals' decision has also cast a spotlight on the lack of authoritative guidance on the scope and application of the common-interest doctrine in Minnesota. Amici strongly believe that Minnesota lawyers need clarity in this area because "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

As such, Amici request that the Court (1) affirm that the common-interest doctrine is recognized in Minnesota, and (2) articulate a general rule which will provide some additional guidance to Minnesota attorneys seeking to rely on the common-interest doctrine to advance client interests. Amici respectfully suggest a formulation of the common-interest doctrine based largely on the rule recognized by the Massachusetts Supreme Court, which is discussed *infra* in Section II.A.

JOINT INTEREST OF AMICI

The attorney constituents of Amici Minnesota Association for Justice ("MAJ") and Minnesota Defense Lawyers Association ("MDLA") routinely represent opposing sides in litigation. The members of Amicus Minnesota State Bar Association ("MSBA") are

² Only two amici have intervened in support of respondent's position: Public Record Media and the Minnesota Coalition on Government Information. They do not appear to oppose the doctrine's existence, but rather its application to this case's facts.

lawyers across the state in all types of legal practice. The members of Amicus Minnesota Firm Counsel Group (“MFCG”) regularly advise their clients and law firm attorneys on the topic of the common-interest doctrine, and heretofore that advice has been informed by established Minnesota law that the doctrine exists.

Despite their diverse membership, Amici collectively share a strong public interest in the law governing attorney-client privilege and work-product doctrine, when the privilege and doctrine apply, and what waives them. The decision of the court of appeals stating that Minnesota law does not recognize the common-interest exception to the waiver of privilege was a huge surprise to Amici and their members and of deep and immediate concern.

Common-interest agreements are used regularly in Minnesota to serve client interests in a wide array of contexts. Clients benefit from the efficiencies of pooled resources and the collaboration amongst counsel with a sufficiently common legal interest who seek to further that interest. Lawyers provide better representation because of that collaboration. Just as the absence of the attorney-client privilege would chill attorney-client communications, the absence of the common-interest doctrine would chill this valuable collaboration.

When it formally adopted the doctrine in 2007, the Massachusetts Supreme Court recognized that “there is no doubt that attorneys and their clients have relied on [the common-interest doctrine’s] implicit existence.” *Hanover Ins. v. Rapo & Jepsen Ins. Services*, 870 N.E.2d 1105, 1111 (Mass. 2007). Similarly, in Minnesota, the common-interest doctrine is critically important to the day-to-day legal practice of Amici’s diverse

attorney members, and the absence of the doctrine from Minnesota law could result in certain disclosures being deemed waived when in law and fairness the privilege should remain intact.

ANALYSIS

The common-interest doctrine, first recognized by this Court in *Schmitt*, is a logical extension of attorney-client privilege. Recognizing the common-interest doctrine as an exception to the general rule that disclosure to third parties of privileged communications waives the privilege advances the same policy objectives that underpin the attorney-client privilege. Both the privilege and the common-interest doctrine encourage full and frank client-attorney communication and thereby enable attorneys to supply their clients with the best possible representation. See, e.g., *Kobluk v. University of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998) (recognizing that the purposes of the attorney-client privilege “is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client”); *Hanover*, 870 N.E.2d at 1110 (recognizing that the common-interest privilege serves the same interest). These doctrines “promote broader public interests in the observance of law and administration of justice.” *Upjohn*, 449 U.S. at 389.

Despite the wide variety of practices and clientele served by Amici’s members, Amici share a conviction that the common-interest doctrine is critical to modern legal practice and should be recognized in Minnesota. This joint brief therefore sets forth the legal and policy reasons that support continued recognition of the common-interest

doctrine in Minnesota, as well as a proposed general rule that would provide some welcome clarity on the scope of the doctrine to Minnesota lawyers.

I. THE COMMON-INTEREST DOCTRINE SHOULD BE AFFIRMED IN MINNESOTA.

A. The Common-Interest Doctrine Is Well-Recognized, Including in Minnesota.

The common-interest doctrine is not a separate privilege. Rather, it serves as “an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.” *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (quotation omitted). The rationale behind the doctrine “is entirely familiar and commonplace.” *Hanover*, 870 N.E.2d at 1110. Courts generally “reason that such extensions fulfill the purpose of the attorney-client privilege to promote the free flow of communication and to enhance the effectiveness of legal advice.” Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 60-61 & n.37, n.56 (2005) (collecting cases).

Approximately 90% of jurisdictions in the United States recognize the common-interest doctrine. Nell Neary, *Last Man Standing: Kansas’s Failure to Recognize the Common Interest Doctrine*, 65 U. Kan. L. Rev. 795, at 796 & n.2 (2017)(collecting authorities). At least 40 states recognize the doctrine. *Id.* Three of Minnesota’s border-neighbor states have included the doctrine in their rules: North Dakota (N.D. R. Evid. 502(3)), South Dakota (S.D. Codified Laws § 19-19-502(3)), and Wisconsin (Wis. Stat. § 905.03(3)). In addition, “[e]ach federal circuit recognizes some form of the common

interest doctrine.” Neary, *Last Man Standing*, 65 U. Kan. L. Rev. at 811 & n.125 (collecting cases). At the federal level, Congress declined to enact the common-interest doctrine in the Federal Rules of Evidence, but not because it opposed to the doctrine. *Trammel v. United States*, 445 U.S. 40, 47 (1980) (internal citations omitted). Rather, “Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to ‘provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,’ and to leave the door open to change.” *Id.* (internal citations omitted).

Much of Minnesota’s law on application of waiver to the attorney-client privilege has developed in common law, including the recognition that parties with a common legal interest could share privileged information without waiving its protections. In *Schmitt v. Emery*, this Court considered arguments that co-defendants to a motor-vehicle-accident case who were separately represented waived privilege when they shared information. 2 N.W.2d at 416-17. The Court found that a statement by the driver of a bus involved in the accident, which was taken by a representative of the bus company “after consultation with and by direction of the company’s attorneys” was privileged. *Id.* at 415-416. Counsel for the bus company and bus driver later furnished a copy of a written statement by the driver to separately represented co-defendants, who shared a common interest in excluding the statement. *Id.* at 417. The Court was then faced with the question of whether that disclosure waived the privilege. *Id.*

The Court concluded that the bus company did not waive the privilege “[b]y its counsel’s furnishing a copy of the statement to counsel for [two separately represented co-

defendants] for use in preparing their argument.” *Id.* Counsel for the company furnished the copy “solely to accommodate them and thereby to enable them to make their effort and aid more effective in the common cause of excluding the statement.” *Id.* The Court further explained:

Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation, without an express understanding that the recipient shall not communicate the contents thereof to others, the communication is made not for the purpose of allowing unlimited publication and use, but in confidence, for the limited and restricted purpose to assist in asserting their common claims. The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents.

Schmitt, 2 N.W.2d at 417.

In short, the Court in *Schmitt* recognized the common-interest doctrine. *Schmitt* is “clear-cut authority in Minnesota” addressing “confidential communication[s] divulged to a third person by an attorney who . . . has a concert of interest with him.” *See Sprader v. Mueller*, 121 N.W.2d 176, 180 & n.4 (Minn. 1963). This Court should therefore affirm that the common-interest doctrine is recognized in Minnesota as an exception to the common law principles of waiver of attorney-client privilege.

B. Continuing to Recognize the Common-Interest Doctrine Maintains the Status Quo and Eliminates the Surprise and Uncertainty Created by the Court of Appeals’ Decision.

The court of appeals’ erroneous statement that the common-interest doctrine is not recognized in Minnesota came as a shock to the Minnesota legal community. State and

federal courts have long treated the common-interest doctrine as applying to Minnesota attorney-client-privilege law. *See Dougherty Funding LLC v. Ivy Tower Minneapolis, LLC*, No. 27-CV-09-20482, 2011 WL 3565198 (Minn. Dist. Ct. Mar. 07, 2011); *Opus Corp. v. Int’l Bus. Machines Corp.*, 956 F. Supp. 1503, 1506 & n.4 (D. Minn. 1996); *see also State v. Cash Call, Inc.*, No. 27-CV-13-12740, 2016 WL 11737539, at *7 n.3 (Minn. Dist. Ct. July 29, 2016) (“[T]he Minnesota appellate courts would find the common interest doctrine applicable under these circumstances.”).

Minnesota attorneys have relied on the doctrine’s existence, the loss of which threatens to upend both currently shared confidences and well-established practices that serve their clients. Although the common-interest doctrine “developed as an extension to the joint defense doctrine,” Neary, *Last Man Standing*, 65 U. Kan. L. Rev. at 798, it has long been applied to all attorneys in the civil and criminal context.¹ Among Amici’s

¹ “The doctrine traces its origins to *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871), a case that applied the attorney-client privilege to disclosure of confidential client information among attorneys representing co-defendants in a criminal case.” *Hanover*, 870 N.E.2d at 1109. “[T]he joint defense privilege universally gained easy and early acceptance in the criminal context.” Schaffzin, *An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 59 & n.33 (collecting cases). Courts, like this Court in *Schmitt*, have extended it to the civil joint-defense context (*see, supra*). It likewise “applies to protect privileged communications shared by counsel for coplaintiffs.” *Hanover*, 870 N.E.2d at 1110 (*citing Sedlacek v. Morgan Whitney Trading Grp., Inc.*, 795 F. Supp. 329, 331 (C.D. Cal. 1992)).

The reasoning behind the extension of the privilege enjoyed by counsel to co-defendants is that the basic principles underlying the attorney-client privilege—to foster open communication between an attorney and his or her client to provide effective representation—are no less relevant when discussing co-plaintiffs in a civil case or even non-parties.

Schaffzin, *An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 64.

members, the doctrine may be relied on broadly by parties that share a common legal interest, even though they are separately represented. In such circumstances, the doctrine gives attorneys the freedom to collaborate when doing so is in the interest of their clients.

While Amici's members can fill volumes with specific examples of how they rely on the common-interest doctrine in their varied day-to-day practices, the following is intended to provide a few concrete examples of areas in which the doctrine routinely arises:

- Coordination on Investigation and Fact Discovery. In multiparty litigation, counsel on both sides can benefit from the collaborative opportunities for investigation and discovery provided by the common interest doctrine. For example, plaintiffs' attorneys may represent clients who seek to recover for injuries or harms caused by a similar cause, but which are not amenable to class action. Communication between counsel may facilitate their ability to identify the cause of a client's injuries and better identify possible avenues of recourse.

Likewise, co-defendants in both civil and criminal contexts often have separate attorney relationships, or even potential conflicts that require separate counsel, but share mutual interests in disproving the allegations against them. For example, civil and criminal government investigations commonly target both corporate executives and the companies' they run. Due to potential conflicts of interest, separate counsel is required. The common-interest privilege allows counsel to communicate about the case honestly without waiving privilege. This can be critical to helping the attorneys provide their clients accurate assessments of potential risk and exposure, in addition to serving their advocacy and promoting efficiency. Civil defendants commonly benefit from common-interest protected communications for the same reason.

In large cases, the common-interest doctrine also facilitates the task of reviewing many thousands of pages of documentary evidence, because the work can be divided among counsel, who can then share the result and strategies for its effective use. Such efforts can meaningfully help mitigate both the time and expense associated with complex cases. In short, the communications allowed by a common-interest doctrine can allow more frank communication of information, develop and sharpen counsel's understanding of the case, reduce cost, and result in better advocacy for the client.

- Coordinating Expert Work. Parties sometimes have a shared interest in developing similar expert testimony. The common-interest doctrine allows the parties to coordinate on strategy, hiring, and work with experts. For example, plaintiffs who sought to recover for injuries in connection with the 35W Bridge collapse combined resources and efforts with other similarly situated victims of the disaster, many of whom could not individually have afforded to prosecute claims against the state, a sizeable corporate entity or one of the largest multinational corporations in the world. Under a joint prosecution agreement, funds were raised to undertake the expense of a failure analysis by world-renowned engineers, as well as to share the task of voluminous document review. Likewise, co-defendants often may have overlapping interests that can be served by the same experts—whether an expert in a criminal case that opposes government scientific evidence, a physician who challenges the scope of a plaintiff’s alleged medical damages, or an engineer that refutes a product or construction defect. Absent a common-interest doctrine, parties would not be able to share this work-product without waiving their protections.

- Shared Litigation Strategies and Coordination of Briefs. In multiparty litigation, parties may seek to share analysis of various legal arguments and strategies, including draft briefs. Co-plaintiffs and co-defendants are often able to assist each other in identifying strengths and weaknesses in their shared legal theories. Such communications also may reveal potential unknown facts or unexpected issues that may arise. This type of coordination can sharpen attorney arguments and improve client outcomes. It also allows parties to coordinate on the presentation of arguments to the court—creating efficiencies by streamlining the number of briefs, issues, or arguments a court may need to address. Given the sensitivity of attorney mental impressions and client confidences, however, this coordination would be near-impossible without a common-interest doctrine to protect them from discovery.

- Settlement Efforts. Parties also rely on the common-interest doctrine to assess cases and coordinate mediation and/or settlement. Forthright, confidential communications between counsel for co-plaintiffs or co-defendants about their clients’ willingness and ability to settle can be important to identifying feasible resolution opportunities. Given the sensitive nature of this type of information, the threat that such communications would become discoverable would have a noticeable chilling effect.

- Coordination on Risk Evaluation. The common interest doctrine is also relied on when parties have a shared reason to evaluate the risk of particular claim or issues. This can allow attorneys to work together to research a joint issue. It also arises in transactional settings. For example, in sales of entities or large stock option purchases, the buyer often wants to know the seller-attorneys’ opinions about the merits of claims or potential claims against the seller. While this can arise in many circumstances, a classic example arises when intellectual property is sold, and a buyer is worried about patent

invalidity or infringement, for example. Currently, the seller-attorney shares opinions with the buyer-attorney under a common interest agreement.

In addition to the benefits the common-interest doctrine provides to litigants, courts also benefit from the collaboration the doctrine promotes. Courts at all levels encourage coordination between parties that share legal interests. District courts appreciate coordinated efforts by co-plaintiffs and co-defendants, which often reduces the volume of discovery, motion papers, and arguments in the case. Indeed, district courts sometimes expressly request such efforts in multi-party litigation. The following provision is a verbatim excerpt from one such order:

2. **Coordination.** The parties shall undertake best efforts to minimize the extent of duplicative discovery and motion practice across the Actions subject to this Order, in order to foster the efficient and prompt management of the Actions. While this Order governs only the Actions subject to this Order, the parties shall, to the extent possible, seek to coordinate their efforts across similar actions being prosecuted by Plaintiffs and assigned to other District Judges and Magistrate Judges in the District of Minnesota.

Residential Funding Company, LLC v. The Mortgage Outlet, et al., No. 0:13-cv-03451-SRN-HB, ECF Doc. 88 at p. 4 (D. Minn. Dec. 18, 2014).

This Court also implicitly encourages similar coordination efforts. As it did in this case, this Court asks parties and amici to avoid filing briefs filled with duplicative arguments. Coordination between amici and parties, which typically occurs prior to the filing of public briefs, often relies on an understanding that the common-interest doctrine will protect their communications, especially in cases which may be remanded for additional district court proceedings. Similarly, the Court also strongly urges that counsel for litigants not divide oral argument, which similarly requires the sharing of privileged

litigation strategies. Absent a common-interest doctrine, this too would likely result in a waiver of attorney-client and/or work-product privilege.

In each of these circumstances and many others, the loss of privilege if the common-interest doctrine is not recognized in Minnesota would hamper effective administration of justice on behalf of clients, chill communication, hamper the discovery of pertinent facts, and drive-up litigation costs.

II. THE COURT SHOULD ARTICULATE A STANDARD FOR THE COMMON INTEREST DOCTRINE IN MINNESOTA.

In upending what was believed to be an adopted doctrine in Minnesota, the court of appeals' decision has demonstrated that the Minnesota legal community would be well-served by a clearer articulation of the common-interest doctrine in Minnesota.

Additional clarity on the doctrine would be welcomed by Minnesota attorneys because “an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Upjohn*, 449 U.S. at 393. “Until parties can rely on a consistent, uniformly applied common interest doctrine, the goals of the attorney-client privilege will remain unfulfilled.” Schaffzin, *An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 54. The “lack of the common interest doctrine's uniform application frustrates the purpose of attorney-client privilege by creating uncertainty about what communications will remain privileged.” Neary, *Last Man Standing*, 65 U. Kan. L. Rev. at 806.

Amici provide the following general principles which they believe should frame the common-interest doctrine in Minnesota.

A. A General Rule on the Common-Interest Doctrine.

There is some variety in how different jurisdictions and authorities have articulated and applied the common-interest doctrine; many questions related to its scope can also arise. *See* Neary, *Last Man Standing*, 65 U. Kan. L. Rev. at 810; Schaffzin, *An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 51; Restatement (Third) of the Law Governing Lawyers § 76(1) (2000); 56 F.R.D. 183, 236 (Proposed Federal Rule of Evidence 503). Indeed, as the diversity of amici in this appeal confirm—there are numerous permutations of fact patterns in which one party or another might want the doctrine to apply.

Understanding the limited scope of the case before the Court, however, Amici propose that the following formulation accurately articulates the universally-accepted elements of the common-interest doctrine:

The common interest doctrine extends the attorney-client privilege to any privileged communication shared with another represented party’s counsel in a confidential manner for the purpose of furthering a common legal interest. The shared common interest must be legal, rather than commercial.

This proposed rule largely follows the formulation of the common interest doctrine articulated by the Massachusetts Supreme Court in 2007. *See Hanover*, 870 N.E.2d at 1109 (quoting Schaffzin, *An Uncertain Privilege*, B.U. Pub. Int. L.J. at 86). Amici’s proposed rule also includes the clarification that the shared common interest must be a legal, rather than commercial, interest. *See Shukh*, 872 F. Supp. 2d at 855; *see also generally* Schaffzin, *An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 73, 77 (“A uniform common interest doctrine must also require that the common interest be *legal*, not purely *commercial* . . . because such a purpose would not be protected under the attorney-client privilege.”).

Amici believe this proposed rule would provide Minnesota lawyers clarity that the universally-embraced elements of the common interest doctrine is recognized in Minnesota without asking the Court to exceed the bounds of the case currently pending before it.

Amici's proposed rule is also similar in spirit to the articulation of the common-interest doctrine recognized in the Restatement (Third) of the Law Governing Lawyers:

If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Restatement (Third) of the Law Governing Lawyers § 76(1) (2000); *see also, e.g., Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 130 (Minn. 2003) (citing the Restatement (Third) of the Law Governing Lawyers approvingly); *Prior Lake American v. Mader*, 642 N.W.2d 729, 737-738 (Minn. 2002) (same).

The primary substantive distinction between Amici's proposed rule and the Restatement is that the Restatement includes a determination that the common-interest doctrine applies to "nonlitigated matter[s]." Whether the doctrine may apply absent pending or anticipated litigation is a disputed issue amongst courts. *E.g., Schaffzin, An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 74-75 (noting that because the attorney-client privilege applies to matters absent pending and anticipated litigation, some courts rely merely on the requirement that common interest "is *legal*, rather than *commercial*," while others exclude non-litigated matters.) Because that issue does not appear to be squarely

presented by the facts of this case and has not been universally treated by courts, Amici’s proposed rule does not attempt to resolve it.

Amici’s proposed rule is also consistent with the not-enacted, but often-cited, Proposed Federal Rule of Evidence 503.² Although Proposed Rule 503 was not enacted, “it is frequently cited as a guiding framework for interpreting the attorney-client privilege and the common interest doctrine.” *United States v. Gaston*, No. CR 19-211 (JRT/BRT), 2021 WL 1320479, at *2 n.1 (D. Minn. Apr. 8, 2021) (collecting cases). This Proposed Rule is “‘a useful starting place’ for an examination of the federal common law of attorney-client privilege.” *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (quoting *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994)). It “‘should be referred to by the Courts.’” *Bieter*, 16 F.3d at 935 (quoting 2 J. Weinstein, *Evidence* ¶ 503[02] at 503–17 (1975)). However, because Proposed Rule 503 does not require that the at-issue information be intended to advance a mutually-shared legal interest held by all parties to a communication, Amici have some concern that its precise articulation of the common-interest doctrine would risk giving it too broad an application. See Schaffzin, *An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 89 (explaining that the proposed rule “would protect [the] sharing of . . . information” in which one of the two parties had only a commercial

² Proposed Fed. R. Evid. 503(b) states:

General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (3) by him or his lawyer to a lawyer representing another in a matter of common interest

interest and not a legal interest, “despite the fact that the application exceeds the boundaries of the attorney-client privilege and impedes the search for truth”).³

B. The Common-Interest Doctrine Also Applies to Work-Product.

Contrary to the conclusion of the Minnesota Court of Appeals (Op. at 27), the common-interest doctrine also extends to the sharing of information subject to work-product protection. The common-interest doctrine “can only exist where there is an applicable underlying privilege.” *Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co.*, 142 F.R.D. 471, 478 (D. Colo. 1992). The work-product doctrine is a privilege that covers “an attorney’s mental impressions, trial strategy, and legal theories in preparing a case for trial.” *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). While disclosure of work product to third parties can waive the protection, it does not waive when the disclosure is made in furtherance of a common legal interest to third parties who share that interest. *See W. Fuels Ass’n, Inc. v. Burlington N. R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984) (collecting cases, joint-defense context); *cf. Armenta v. Superior Ct.*, 101 Cal. App.

³ Notably, none of these formulations require that a common-interest agreement be committed to writing. Courts have generally concluded that such a writing is not essential because “a confidentiality agreement in itself cannot create a privilege where such privilege does not already exist.” *See, e.g., Schaffzin, An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. at 81-82.

Nonetheless, written agreements are often recommended as good practice and it is “not unusual for parties exchanging attorney-client privileged information to enter into confidentiality agreements prior to exchanging information.” *Id.* at 81. “Such agreements generally manifest the parties’ intent that the information exchanged remain confidential as to any outside parties.” *Id.* at 81; *see also Minebea Co. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (quoting 2 Stephen A. Saltzburg, et al., Federal Rules of Evidence Manual at 501-35-36 (8th ed. 2002)).

4th 525, 533, 124 Cal. Rptr. 2d 273, 278-79 (2002) (plaintiffs, joint-prosecution agreement).

In short, “[t]he common-interest doctrine is an exception to work-product waiver . . . that applies when the protected material is disclosed to individuals who share a ‘common interest.’” *Walmart Inc. v. Anoka Cnty.*, No. A19-1926, 2020 WL 5507884, at *2 (Minn. App. Sept. 14, 2020), *review denied* (Minn. Nov. 25, 2020) (quoting Restatement (Third) of the Law Governing Lawyers § 91 cmt. b (2000)); *see In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe* 89-129, 902 F.2d 244, 249 (4th Cir. 1990) (“[T]he rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine.”).

CONCLUSION

Amici represent a diverse set of Minnesota attorneys who share an unusual mutual consensus—namely, without the common-interest doctrine, modern litigation may be significantly more impracticable. The quality of client representations would suffer, and courts would be needlessly burdened by duplicative briefing and argument on common legal issues to which multiple separately represented parties agree. Amici respectfully request the Court affirm the existence of the common-interest doctrine and clarify the standard for its application in Minnesota. Amici respectfully suggest their proposed formulation of the common-interest doctrine—discussed *supra* in Section II.A.—is a reasonable articulation of the doctrine for this Court to consider adopting.

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Dated: September 9, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(c). This brief was prepared using Microsoft Word Version 10 in 13-pt. font, which reports that the brief contains 4,989 words.

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