

Looney & Grossman LLP

Attorneys at Law

MASSACHUSETTS RECOGNIZES VALIDITY OF “JOINT DEFENSE AGREEMENTS”

September 2007
by Charles P. Kindregan

101 Arch Street
Boston, Massachusetts
02110
Telephone (617) 951-2800
Facsimile (617) 951-2819
www.lgllp.com



Charles P. Kindregan

Looney & Grossman

Practice Groups:

Bankruptcy

Business

Litigation

Transportation

When two or more parties involved in litigation have a common interest, they sometimes share privileged information in an effort to further their common goals. Many Massachusetts lawyers have relied on “joint defense agreements” or “common interest agreements” to protect such shared communications from discovery by third parties. Until now, however, the Massachusetts Supreme Judicial Court (“SJC”) has never formally recognized the validity of such agreements.

In *Hanover Insurance Company v. Rapo & Jepson Insurance Services, Inc.*, 449Mass. 609 (2007), the SJC determined that joint defense agreements are indeed valid in Massachusetts. The Court held that such agreements may be used to prevent what would otherwise be a waiver of the attorney-client privilege. In other words, two parties with a common interest may share privileged information for their common good without waiving the privilege protecting the information.

In reaching its decision in *Hanover*, the SJC reasoned that the attorney-client privilege protects the free flow of information between a client and attorney, thereby allowing attorneys to provide the best possible legal representation. The Court found that it was consistent with the benefits of the attorney client privilege to allow parties with a common interest to share such privileged information with each other without waiving the privilege. Protecting the free flow of information furthers the goal of having attorneys provide the best available legal services to their clients. Thus, the SJC adopted the “Common Interest Doctrine.”

While the *Hanover* case involved a joint defense agreement in litigation, the SJC made it clear that the protections of the Common Interest Doctrine adopted by the Court are actually much broader in scope. The Court stated that the Doctrine applies to any parties who share a common interest in a legal matter and agree to share information with each other. The Doctrine is equally applicable to parties in a business transaction who share common interests but have different lawyers, the Court said. Moreover, the protections apply not only to attorney-client privileged material shared between the parties, but also to work product that they share with each other.

The SJC was careful to explain that an agreement between two parties under the Common Interest Doctrine cannot be used to protect otherwise discoverable information. Thus, parties cannot use such an agreement to hide otherwise discoverable material. The Doctrine will only apply to protect privileged material by preventing a waiver of the privilege when the information is shared with the other parties to the agreement.

The SJC's formal recognition of the Common Interest Doctrine should encourage more widespread use of agreements between aligned parties in legal matters. More confidently, attorneys are able to assure their clients that sharing privileged material and work product will not waive the protections afforded those materials.

In spite of the *Hanover* decision, however, counsel must still approach the use of joint defense or common interest agreements with some care. While the SJC expressly held that an agreement need not be in writing, counsel would do well to consider whether a written agreement is appropriate. Not only does a written agreement assist immensely in providing the necessary proof that there *is* an agreement, but it also gives the parties an opportunity to address with greater precision the parameters and limitations of their agreement.

A number of other issues could arise in connection with agreements under the Common Interest Doctrine that the SJC did not have occasion to address in *Hanover*. A carefully crafted written agreement gives the parties an opportunity to address such contingencies as how to terminate a joint defense agreement, what happens to shared information when a party withdraws from an agreement, what uses can be made of documents or information shared under an agreement, and how shared information will impact cross-examination of a party's co-members in a joint defense group if the case goes to trial. These, and a variety of other, issues need to be carefully considered and addressed in advance, preferably in a written joint defense agreement.

The *Hanover* decision has certainly given attorneys another tool to provide their clients with the best representation possible. At the same time, attorneys must be careful to determine whether a joint defense or common interest agreement is appropriate for their clients and must be sure that the terms of the agreement will ultimately improve the client's position in the matter.

If you need legal assistance or more information on the above case, please contact Charles Kindregan at ckindregan@lgllp.com or 617-951-2800.

Visit www.lgllp.com to read client alerts and articles, which may be beneficial to you or your business. Also view attorney profiles and descriptions of Looney & Grossman's Bankruptcy, Business, Litigation and Transportation Practice Groups.

This material may be considered advertising under the rules of the Supreme Judicial Court of Massachusetts. Do not act or rely upon this information without seeking professional legal advice.