APL-2015-00061
New York County Clerk's Index No. 651612/10

COURT OF APPEALS
STATE OF NEW YORK

AMBAC ASSURANCE CORPORATION and THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

Plaintiffs-Appellants,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP.,

Defendant,

and

BANK OF AMERICA CORP.,

Defendant-Respondent.

BRIEF OF *AMICUS CURIAE* NEW YORK STATE ACADEMY OF TRIAL LAWYERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*

The New York State Academy of Trial Lawyers ("Academy") is a statewide organization of attorneys. Its membership consists of plaintiff and defense

attorneys, state and local government attorneys, and law professors. Presently, it has 2,100 members.

The Academy, as stated in its Mission Statement, maintains a strong commitment to protect, preserve and enhance the civil justice system, while working to rebuild and improve the image of our profession. The Academy's members embrace the core values of our legal system, and with its diverse membership base the Academy with its members advocate on a wide array of matters that affect our civil justice system. These matters include evidentiary developments that may hamper the truth-finding process of civil and criminal litigation, and which may lead to results that are contrary to the purposes of a fair civil justice system.

The decision of the First Department below in *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.* (124 A.D.3d 129 [2014]) ("*Ambac*") is of concern to the Academy because it creates an evidentiary rule, greatly expanding the reach of the attorney-client privilege, which has the potential to immunize from discovery highly relevant information and block the truth-seeking process in litigation, both civil and criminal. While the Academy endorses the attorney-client privilege, the rule created by the First Department is inconsistent with the strong public policy that underlies the privilege as no tangible benefit is derived from the rule it created. Hence, the Academy appears as an *amicus curiae* in support of

plaintiffs and advocates herein for the rejection of the rule created by the First Department.

ARGUMENT

POINT I

NEW YORK'S ATTORNEY-CLIENT PRIVILEGE JURISPRUDENCE RECOGNIZES AS A GENERAL PROPOSITION THAT THE VOLUNTARY DISCLOSURE OF OTHERWISE PRIVILEGED COMMUNICATIONS TO NON-PRIVILEGED PERSONS RESULTS IN THE LOSS OF PRIVILEGE PROTECTION

A. Attorney-Client Privilege

1. CPLR 4503

(a) Statute

New York's attorney-client privilege is codified in CPLR 4503. As pertinent here, it provides:

> (a) 1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the court of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclosure such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

(CPLR 4503, subd. [a][1]).

This statute, as observed by this Court, is a "'mere re-enactment of the common law' reliance [upon which] continues to this day." (*Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 [1991] [citation omitted]). The essence of this privilege as codified is that "evidence of a confidential communication made between the attorney or his [or her] employee and the client in the course of professional employment" shall not be disclosed without the client's permission, unless its protection is waived. (CPLR 4503, sud. [a]).

(b) Underlying Rationale and Policy

Although the underlying rationale for the privilege has been the subject of debate over the years among state and federal courts and commentators (Wigmore, Evidence §2290 [McNaughton ed. 1962]; Park *et al*, Evidence [3d ed] §12.03, at p. 441-442), this Court has long viewed the privilege as premised on the rationale that "one seeking legal advice will be able to confide fully and freely in his [her] attorney, secure in the knowledge that his [her] confidences will not later be exposed to view to his [her] embarrassment or legal detriment." (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68 [1980]). Such disclosure enables the attorney to act more effectively and expeditiously, thereby "ultimately promoting the administration of justice." (*Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 592 [1989]; *see also*, *Upjohn v. United States*, 449 U.S. 383, 389 [1981] [privilege "promotes broader public interest in the observance of law

and administration of justice"]; *People ex rel. Vogelstein v. Wardens of County Jail of County of N.Y.*, 150 Misc. 714, 717 [Sup. Ct. N.Y. Co. 1934] [Sheintag, J.]).

However, the privilege is not without its costs, namely an obstacle to the truth-finding process. (*See, Matter of Jacqueline F.*, 47 N.Y.2d 219 [1979]). As stated by Judge Sheintag: "[T]he exercise of the privilege may at times result in concealing the truth and in allowing the guilty to escape. That is an evil which . . . is considered to be outweighed by the benefit which results to the administration of justice generally." (*People ex rel. Vogelstein*, 150 Misc. at 717, *supra*).

Thus, the New York courts take a carefully constrained approach to the privilege, emphasizing that because it "constitutes an obstacle to the truth-finding process . . . the protection claimed must be narrowly construed." (*Sieger v. Zak*, 60 A.D.3d 661, 662 [2d Dep't 2009] [quoting *Matter of Priest*, 51 N.Y.2d at 68, *supra*; *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 378, *supra*] [internal quotation marks omitted]). This approach is necessary to ensure that the "application [of the privilege] is consistent with its purpose." (*Matter of Jacqueline F.*, 47 N.Y.2d at 219, *supra*). Accordingly, the applicability of the privilege is to be limited to circumstances that are necessary to achieve its purpose. (*See, Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 378, *supra*; *see also, Fisher v. United States*, 425 U.S. 391, 403 [1976] ["[S]ince the privilege has the effect of withholding relevant

information from the factfinder, it applies only where necessary to achieve its purpose."]).

B. Confidentiality Requirement For The Creation And Maintenance Of The Privilege

Confidentiality of the communication is the pillar of the attorney-client privilege. (*See, United States v. Teller*, 255 F.2d 441, 447 [2d Cir. 1958] ["It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential."]; Rice, Attorney-Client Privilege in the United States [2011] §6:1, p. 7; Barker and Alexander, Evidence in New York State and Federal Courts [2d ed] §5:7, p. 293). This key element of the privilege requires that at of the time the communication between the client and the attorney, it was made in confidence and with the intent and reasonable expectation that the communication would not be disclosed to persons outside the attorney-client relationship, including their privileged agents. (*See, People v. Osorio*, 75 N.Y.2d 80, 84 [1989]; *Baumann v. Steingester*, 213 N.Y. 328, 331-333 [1915]). The element also requires that confidentiality be maintained. (*See, People v. Osorio*, 75 N.Y.2d at 84, *supra; Willis v. Willis*, 79 A.D.3d 1029, 1030-1031 [2d Dep't 2011]; *Parnes v. Parnes*, 80 A.D.3d 948, 950-951 [3d Dep't 2011]).

C. Loss Of Confidentiality, And With It The Privilege, By Voluntary Disclosure Of The Privileged Communication

While disclosure of the confidential communication to so-called privileged persons, which include agents of the client and attorneys who are assisting in the legal representation involved, does not defeat the privilege (*see, People v. Osorio*, 75 N.Y.2d at 84, *supra*; Barker & Alexander, *supra*, §5.10, at pp. 302-303), the courts in New York, and other jurisdictions as well, have uniformly held that a disclosure of the otherwise privileged communication to third persons outside of that group will result in the loss of the privilege. (*See, People v. Patrick*, 182 N.Y. 131, 175 [1905]; *In re Von Bulow*, 828 F.2d 94, 102 [2d Cir. 1987]). This rule, commonly referred to as a rule of waiver, has emerged in order to ensure that the privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle" (8 Wigmore on Evidence, *supra*, §2291, at p. 554), and as well in recognition of fairness in that "when [the privilege holder's conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not." (8 Wigmore on Evidence, *supra*, §2327, at p. 636; *see also* Martin, Capra and Rossi, New York Evidence [2d ed] §5.1.5, at p. 295 ["it is unfair to allow the holder to claim or not claim confidentiality depending on which is advantageous at the time."]). As this Court stated over a century ago, the continuation of the privilege where disclosure has been made

"would be to stretch the [privilege] beyond the demands of public policy." (*People v. Patrick*, 182 N.Y. at 175, *supra*).

POINT II

NEW YORK LAW HAS HISTORICALLY RECOGNIZED A COMMON INTEREST EXCEPTION TO THE WAIVER RULE WHICH IS LIMITED TO THE "JOINT CLIENT" AND "ALLIED LITIGANT" SITUATIONS

A. The Common Interest Exception Rule

Persons and entities may find in certain circumstances that it is in their own best separate interests to retain the same attorney concerning a matter and to share information between each other and with the jointly retained attorney. Likewise, persons and entities may find in the litigation context that it is in their own best separate interests to retain separate attorneys and to share information with each other and their respective attorneys. However, they may very well be dissuaded from entering into such arrangements if the cost of doing so will be the inability to protect as privileged information shared during their existence.

This Court has responded to this problem by recognizing a rule which permits persons or entities with a common interest to share information with each other and their respective attorneys without causing the loss or potential loss of privileged status that has attached or might otherwise attach to the information. (*See*, Martin, Capra and Rossi, *supra*, §5.2.3 at pp. 318-319; 1 Rice, Attorney-Client Privilege: State of New York [2015] §§9:68-9:70). Most jurisdictions have

embraced such a common interest rule, as well, albeit formulated differently. (*See*, Broun, McCormick on Evidence [7th ed] §91:1).

This common law rule, it must be noted, is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third-party. (*See, In re Auclair*, 961 F.2d 65, 69 [5th Cir. 1992]; *In re Grand Jury Subpoenas*, 89-3 and 89-4, 902 F.2d 244, 249 [4th Cir. 1990]). As a result, it is in essence a mere extension of the attorney-client privilege which allows clients and attorneys with common interests to communicate among each other without losing the expectation of confidentiality. (*See, Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n. 7 [9th Cir. 1987]).

B. Two Distinct Situations Encompassed By the Common Interest Rule

1. Generally

The common interest rule as recognized by this Court subsumes two distinct situations, which have separate requirements. The first situation involves the "joint client" which arises when two or more persons or entities with a legal issue of common interest retain the same attorney. Closely related is the "joint litigant" rule, frequently referred to as the "joint defense" rule, which arises when two or more persons or entities with separate attorneys participate in joint attorney-client

discussions for the purpose of preparing a common position in litigation. These situations, including their evolution, are separately discussed.

2. Joint Client Situation

Historically, the New York courts have long recognized that the attorney-client privilege protects otherwise privileged communications in a joint-client setting. (*See, The Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 595 [Ct. of Chancery 1848]). Such recognition has not been controversial in New York over the years (*See, Whiting v. Barney*, 38 Barb. 393 [NY Gen. Term 1862] ["Unquestionably, the communication in this case was so far privileged as that the attorney would not be required or permitted to disclose it as a witness in favor of a third person, against both this clients without their consent"]; *Hurlburt v. Hurlburt*, 128 N.Y. 420, 424 [1891]; *Doheny v. Lacy*, 168 N.Y. 213, 224 [1901]; *Finn v. Morgan*, 46 A.D.2d 229, 235 [4th Dep't 1974] [Simons, J.]; *Mason v. Village of Ravena*, 114 Misc.2d 487 [Sup. Ct. Albany Co. 1982] [Cholakis, J.]); or in the United States where all jurisdictions uniformly follow this rule. (*See*, Anno., 4 A.L.R. 4th 765 §3 [collecting cases]). Of course, professional responsibility requirements regarding concurrent conflicts of interest largely inform whether such joint representation is ethically permissible and may preclude such representation.

The sharing of an interest inherent in the representation is all that is required for this joint client rule to apply. (*See, Root v. Wright*, 84 N.Y. 72, 76 [1881]). As explained by a commentator:

> The sharing of interest inherent in the ethical joint client representation should be all that is required for the privilege to apply. A lawyer cannot represent more than one client on the same matter if there is an impermissible conflict of interest - - the clients' interests must align significantly. The stated requirement of a common interest is simply a statement of this reality of joint representation. In the context of applying the attorney-client privilege to joint clients, the joint representation defines the requisite common interest. There need be no independent analysis of common interest other than a determination that the communication is in furtherance of the joint representation - that is, intended to be a part of the joint client representation. If the parties' interests are aligned such that joint representation is desirable and ethical, the interests are sufficiently common.

(Giesel, "End The Experiment: The Attorney-Client Privilege Should Not Protect Communications In The Allied Lawyer Setting", 95 Marq. L. Rev. 475, 525 [2011]).

The disclosures permitted by the joint-client rule without resulting in the loss of the privilege are justified by sound public policy. As stated by this Court:

> Where parties, having diverse or hostile interests or claims which are the subject of controversy, unite in submitting the matter to a common attorney for his advice, they exhibit, in the strongest manner, their confidence in the attorney consulted. The law should encourage, and not discourage, such efforts for an amicable arrangement of difference, and public policy and the interests of justice are subserved by placing such communications under the seal of professional confidence to the extent at least of protecting them against disclosure by the attorney at the instance of third parties.

(*Root*, 84 N.Y. at 76, *supra*). These benefits outweigh any loss of evidence in the limited circumstances involved.

In sum, joint clients need protection against disclosure for the information they convey to their attorney on matters of common interest for the same reasons that a single client does when communicating with his/her attorney. Viewed as such, the joint client rule as established by this Court furthers the public interest and represents sound public policy.

3. Allied Litigation Situation

The other situation encompassed by New York's common interest rule goes a step beyond the joint client situation, and involves the situation where two or more persons or entities, each represented by their own attorney, meet to discuss a matter of common interest, sharing information, in a litigation context. As to this situation, the courts have used a variety of terms for this type of sharing arrangement, including "joint defense" rule, "Common defense privilege" and even "common interest privilege." *Amicus Curiae* will utilize here the term "joint litigant" since we submit it more accurately describes the rule established by this Court and the lower courts prior to the First Department's decision below.

While the joint litigant rule can trace its roots back to 1871 (*see, Chahoon v. Commonwealth*, 62 Va. 822 [1871]; *Giesel*, *supra*, 95 Marq. L. Rev. at 531), this Court first recognized it in 1989 in *People v. Osorio* (75 N.Y.2d 80, *supra*).

Osorio was decided in the context of a pending criminal prosecution. There, the defendant had communicated with his attorney in the presence of a separately represented co-defendant. The co-defendant was at the time acting as an interpreter between the defendant and his attorney. This Court rejected the privilege claim holding that the communications could not be deemed confidential in the circumstances. (*Id.* at 85). However, the Court also observed that "[i]f the co-defendants [were] mounting a common defense their statements are privileged but unless the exchange is for that purpose the presence of a co-defendant will destroy any expectation of confidentiality between a defendant and his [her] attorney." (*Id*.). This Court held that the common defense rule did not apply because defendant at the time of the communications was "not planning a common defense." (*Id*.).

Notably, this Court cited for this common defense point two federal court decisions which applied the "joint defense" rule as developed by the federal courts. These two decisions are *United States v. McPartlin* (595 F.2d 1321, 1336-1337 [7th Cir. 1979]), which held that joint defense communications were privileged because they "were made in confidence to an attorney for a co-defendant for a common purpose related to both defenses" and "serve[d] to expedite the trial or . . . the trial preparation"; and *Hunydee v. United States* (355 F.2d 183, 185 [9th Cir. 1965]), which affirmed privilege claims over communications between attorneys of "two

or more persons who are subject to possible indictment . . . to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings."

Thus, as clearly recognized by this Court, the rule is predicated upon a showing that the communications among the clients and their attorneys were made during litigation in the course of "mounting a common defense." (*Ibid*.). This requisite showing has been consistently applied by the courts in this State. (*See, People v. Borcsok*, 107 A.D.2d 42, 44 [2d Dep't 1985] ["in the furtherance of common defense"]; *People v. Pennachio*, 167 Misc.2d 114, 115 [Sup. Ct. Kings Co. 1995] ["ongoing common enterprise," "joint defense effort or strategy"]; *People v. Calandra*, 120 Misc.2d 1059, 1061 [Sup. Ct. N.Y. Co. 1983] ["common goal or interest"]).

Furthermore, consistent with *Osorio* and its predicate common interest in litigation, the lower New York courts have as well applied this joint litigation rule in civil actions, whether the clients are defendants or plaintiffs.[1] (*See, Hyatt v. State of Cal. Franchise Tax Bd*., 105 A.D.3d 186, 205 [2d Dep't 2013]; *Hudson Val. Mar., Inc. v. Town of Cortlandt*, 30 A.D.3d 377, 378 [2d Dep't 2006]; *Yemini v. Goldberg*, 12 Misc.3d 1141, 1143-1144 [Sup. Ct. Nassau Co. 2006]; *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's, London*, 176 Misc.2d 605, 612-613

[1] Hence, *Amicus Curiae's* use of the term "joint litigant" as better describing this rule.

[Sup. Ct. N.Y. Co. 1998], *affd*., 263 A.D.2d 367 [1st Dep't 1999], *lv. dism*. 94 N.Y.2d 875 [2000]).[2]

From these decisions, in order for the joint litigant rule to be applicable to shared communications there must be a showing that: (1) the clients have a common interest in a litigated matter or or a matter that is reasonably anticipated to be litigated; (2) the clients agree to exchange information concerning the matter; (3) the communication involved otherwise qualified as privileged; and (4) the information relates to the litigated matter. Once these requirements are established the joint communications remain privileged with respect to the rest of the world, and either client can assert the privilege as against a third person. (*See*, Barker & Alexander, *supra*, §5:7 at pp. 295-296 with n. 7, collecting cases).

Although the New York courts applying this rule have not expressly articulated its underlying rationale and policy objective, it is readily apparent, as can be gleaned from the substantial federal and state case law that has adopted and applied the rule prior to New York's adoption thereof. Like the joint client situation, the joint litigant rule by allowing the sharing of information without fear of a loss of privilege promotes the efficiency and effectiveness of legal representation in litigation. (*See*, Bartel "Reconceptualizing the Joint Defense Doctrine", 65 Ford. L. Rev. 871, 880-893 [1996]). And at a minimum the rule

[2] These decisions while adhering to the litigation requirement define it as encompassing pending or "reasonably anticipated" litigation

promotes efficiency since it "makes savings in expense and effort likely." (*In re LTV Sec. Litig*., 89 F.R.D. 595, 604 [ND Tex. 1981]).

As aptly summarized by the Fourth Circuit Court of Appeals:

> 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 defense their claims.

(*In re Grand Jury Subpoenas*, 89-3 and 89-4, 902 F.2d 244, 249 [4th Cir. 1990]). These social benefits are, as noted by the Fourth Circuit, confined to the litigation process, and outweigh any inability to adversaries in accessing the shared information.

In sum, it follows that New York's common interest rule encompasses joint litigants since as with joint clients, this other common interest situation furthers the public interest and represents sound public policy.

C. Rejection Of Further Expansion Of The Common Interest Rule

As further discussed *infra* at p. 28, several, but not a majority of, jurisdictions, either through their common law or by legislative action, have expanded the common interest rule to encompass a third situation, namely a properly named "allied attorney" situation which involves the sharing of information among clients and their separate attorneys regarding a matter in which

they have a common legal interest and where there is no expectation of litigation. In essence, it would go a step beyond, and a big step at that, the joint litigation situation as it would expand the common interest rule to encompass purely transactional matters involving separate attorneys for separate clients.

Prior to the First Department's decision below, the New York courts have consistently rejected efforts to expand New York's common interest rule to encompass this allied attorney situation. (*See, e.g., Hyatt*, 105 A.D.3d at 205-206, *supra; Aetna Cas. & Sur. Co.*, 176 Misc.2d at 612, *supra* ["The attorney-client privilege, even as expanded by the "common interest" exception, may not be used to protect communications that are business related…."). Instead the courts remained steadfast in their application of the joint litigant rule. (*See*, cases collected in opening Brief of Pltf.-App. ["PA Brief"], p. 26).

POINT III

THE EXPANSION OF THE COMMON INTEREST RULE TO ENCOMPASS THE SHARING OF COMMUNICATIONS AMONG CLIENTS AND THEIR SEPARATE ATTORNEYS OUTSIDE THE CONTEXT OF LITIGATION, AS NOW PERMITTED BY *AMBAC,* DOES NOT COMPORT AND IS INCONSISTENT WITH SOUND PUBLIC POLICY

A. The *Ambac* Decision

1. Its Created Rule

The First Department in *Ambac* diverged from 20 years of New York precedent and created a new rule, in essence a third situation that would be

encompassed within New York's common interest rule. It provides that the common interest rule includes a situation where persons and entities working together with separate counsel share information for the purpose of furthering a common legal interest shared by them, even without the "looming spectre of litigation." (*Ambac*, 124 A.D.3d at 130-131, *supra*). To avoid using the term employed by the *Ambac* court, *i.e.*, the "common interest privilege"[3] - and for lack of a better term, *Amicus Curiae* here will utilize the term "allied attorney" for the rule adopted by the First Department in *Ambac*. This term is utilized by commentators, who lament the wide variety of terms used by the courts to describe the various common interest situations. (*See*, 2 Mueller and Kirkpatrick, Federal Evidence [4th ed] §5:20 [caption]; Graham, 24 Fed. Prac. & Pro.: Evidence §5493 [caption]; Lerner, "Conspirators' Privilege and Innocent's Refuge: A New Approach to Tort Defense Agreements," 77 Notre Dame L. Rev. 1449, 1492 [2002]).

The new rule announced by the First Department in *Ambac* is problematic in view of its expansive nature and scope, the lack of firm contours delineating its boundaries, and the ambiguity inherent in its application. In this regard, it is notable that *Ambac* leaves unanswered the critical issue of what constitutes a sufficient legal interest which implicates the newly created rule; and the related

[3] As noted *supra*, it is misleading to refer to this rule as a privilege.

issue of how to distinguish a common legal interest from a common commercial or business interest, which, apparently, does not fall within the new rule recognized. Expressed differently, while it is relatively easy to determine when the joint litigant rule is applies - *i.e*., in the presence or absence of litigation - no true guidance is given as to when this new allied attorney rule will be implicated.

Viewed as such its creation is especially problematic because of its potential to prevent disclosure of a large number of highly relevant communications, the sharing of which is motivated by nothing more than business purposes and may very well involve communications that are predominately of a commercial rather than a legal nature. Of course, the attorney-client privilege was not recognized to protect against disclosure of such communications. Indeed, such communications would in all likelihood be exchanged in order to consummate the transaction regardless of the application of any privilege.

This Court, *Amicus Curiae* submits, must reject this further extension of the common interest rule as it does not reflect sound policy in view of the vast, if not unlimited, amount of communications that can be shielded from discovery without any sufficient reciprocal benefit. *Amicus Curiae's* argument in support of this position follows.

2. Limited Precedent and Support in Other Jurisdictions for Its Creation

As noted *supra* at p. 17, no New York court prior to the First Department's decision had ever held that the common interest rule could encompass a situation involving an exchange of information among separate attorneys and their clients where they have a "common legal interest" in a matter that is bereft of any litigation overtones. Thus, it is worthwhile to consider the extant precedent for it, and how it developed and fared in other jurisdictions.

(a) Controversial Origin

Notably, this allied attorney rule is a rule of recent vintage which "emerged suddenly and developed with little attention to first principles or the costs of the privilege." (Lerner, *supra*, 77 Notre Dame L. Rev. at 1494).

The initial recognition of this rule came with the publication of Rule 503(b)(3) in the "Revised Draft of the Proposed Rules of Evidence from the United States Courts and Magistrates" (51 F.R.D. 315, 361-362 [1971] ["Proposed Rule"]).[4] This Proposed Rule, acknowledged as a new rule, provides that a disclosure by the client or his/her attorney to "an attorney representing another in a matter of common interest" does not result in the loss of the privilege. The presence of litigation is clearly not required. Notably, at that time "[n]o American case ha[d] allowed a privilege for a joint conference in a situation totally unrelated

[4] For the convenience of the court a copy of this Rule is included in the Addendum to this Brief.

to litigation." (Comment, "The Attorney-Client Privilege in Multiple Party Situations," 8 Col. J. of Law and Soc. Prob. 179, 187 [1972]). Furthermore, the Advisory Committee in support of the proposed rule made no argument, much less a convincing argument, that extending the privilege to cover disclosures to third-parties who have a "common interest" in the absence of litigation produces a benefit to the legal system that outweighs the cost of the loss of evidence to the courts. (Proposed Rules, *supra*, at 51 F.R.D. at 364).

Why then was this rule proposed with no litigation element? As candidly admitted by the Proposed Rules' Advisory committee Reporter, the inclusion of this common interest rule was inserted "to help out antitrust lawyers." (*See*, Cleary, "Article V: Privilege", 33 Fed. Bar J. 62, 66 [1974]; *see also* Graham, *supra*, §5493, at p. 461 [noting corporate lawyers as well favored this special protection for their communications]). Ultimately, this proposed rule, and the other proposed privileges, was rejected by Congress.

With this controversial origin of the allied attorneys rule, it is notable that Rule 502(b) of the Uniform Rules of Evidence, as promulgated by the Uniform Law Commission in 1974, rejected the proposed Federal Rule 503(b)(3). Instead, the Uniform Rule provides that a disclosure of a confidential communication by the client or the client's attorney to an attorney representing another client will remain confidential provided that it is made "in a pending action and concerning a

matter of common interest therein." (FRE 503[b][3] [1974]).[5] The Commission's most recent version of the Uniform Rules of Evidence (1999) continues the common interest in a pending action requirement. (URE 502[b][3]). In short, URE 502(b)(3) expressly adopts the view that the privilege applies under the common interest rule only if litigation has already begun, rejecting the contemporaneously proposed FRE 503(b)(3).

(b) The Rejection and Adoption of the "Allied Attorney" Rule in Other Jurisdictions

Analysis of the case law by various commentators reveals that there is substantial disagreement among the state and federal courts as to whether the common interest doctrine should recognize the allied attorney position - *i.e.*, only a common interest - or whether a litigation requirement is necessary - *i.e.*, the joint litigant position. (*See,* Broun, *supra*, §91.1 , at pp. 563-564 ["It is commonly said that the doctrine applies only where the parties are involved in litigation, but some courts have applied it in other instances."]; Giesel, *supra,* 95 Marq. L. Rev. at 531 ["While some courts require that litigation be on the horizon, others apply the privilege even in transactional contexts."]).

Legislative enactments likewise show disagreement. Thus, while Alaska, Delaware, Idaho, Nebraska, Nevada, New Mexico, Oregon and Wisconsin have adopted the proposed but rejected FRE 503(b)(3), Arkansas, Hawaii, Maine,

[5] For the convenience of the Court, a copy of this rule is included in the Addendum to this Brief.

Mississippi, New Hampshire, Oklahoma, South Dakota, Texas and Vermont have adopted the more stringent URE 502(b)(3). (*See*, Lerner, *supra*, 77 Notre Dame L.Rev. at 1492-1493; *see also*, Imwinkelreid, *supra*, Appendix D to his Treatise collecting the state enactments]).

Lastly, §76 of the Restatement (Third) of the Law Governing Lawyers must be mentioned. This provision provides in pertinent part that "[if] two or more clients with a common interest in a litigated or non-litigated 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 . . . that relates to the matter is otherwise privileged as against third persons."[6] As it frequently does with respect to the privilege - *i.e.*, extending the reach of the privilege, - the Restatement takes a broad view of the common interest rule protection, aligning itself with the proposed but rejected FRE 503(b)(3). Notably, the Restatement cites no significant or compelling authority for this broad position that it takes. Its rationale is simply that it makes it possible for clients with separate attorneys to cooperate in the development of common positions. (Restatement [Third] of the Law Governing Lawyers §76, Comment b).

Suffice it to say, there is no basis to state with any level of certainty that the allied attorney approach has achieved wide acceptance in the courts or legislatures.

[6] For the convenience of the Court, a copy of this rule is included in the Addendum to this Brief.

This is especially true when one considers that the "overwhelming majority of courts" have yet to consider this allied attorneys situation. (*See*, Schaftzin, "An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It," 15 B.U. Pub. Intl. L. J. 49, 65-66 [2005]).

B. With Its Open-Ended Common Legal Interest Basis For Sharing Communications, The First Department's Ruling In *Ambac* Is Contrary To The Public Policy Underlying The Attorney-Client Privilege And The Common Interest Rule As Established By This Court

For centuries, the common law has considered the "social good derived from the proper performance of the functions of lawyers acting for their clients . . . to outweigh the harm that may come from the suppression of [relevant] evidence." (*United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357-358 [D. Mass. 1950] [Wyzanski, J.]). Thus, in order to expand New York's up to now limited common interest rule to cover communications that previously were not protected by the privilege or had lost their privileged status there needs to be a strong policy justification - more than simply meeting the desires of corporations and their attorneys. Suffice it to say, defendants here have not made such a showing. Indeed, the record here tends to show that it is not sound policy to so expand the doctrine as done in *Ambac*.

Amicus Curiae endorses the sound public policy reasons advanced by plaintiffs for adhering to the joint client rule as established in *Osorio* and opposes

the First Department's *Ambac* extension. (Pltf.-App. Br., pp. 27-49). Nonetheless, further comment is warranted.

Initially, while it might be arguable that expansion of the common interest rule would be justified if it created a benefit that outweighed the harm from keeping information from the trier of fact, which is the basic policy premise of the privilege, as noted *supra* at pp. 4-5, no such benefit is apparent here. In that regard, defendants have made no showing that the purported desire for legal compliance with various regulatory schemes readily depends upon a "widened circle of communication-sharing." (Barker, *supra*, at 2015-2016 Pocket Part, §5:7, p. 25). In fact, in light of the potential financial gains resulting from the communication and the transaction itself, here a merger, it is likely that the sharing would have occurred anyway even if the parties knew the privilege would not be applicable. Thus, any claim that the rule is necessary to encourage attorneys to share information lacks support.

To the extent it may be possible to show that disclosure would not occur in the absence of privilege protection, a doubtful proposition, no showing has been made by defendant here, or even the proponents of the proposed rules, that any benefit to the legal system so achieved outweighs the cost of the loss of evidence to the trier of fact. (*See*, Graham, *supra*, §5493; Lerner, *supra*, 77 Notre Dame L. Rev. at 1514-1518).

Moreover, the costs to the justice system may be considerable, especially in the criminal context. For example, after the parties' merger here is finalized, a grand jury investigation concerning the parties' conduct before or during the merger might arise. Under the First Department's *Ambac* rule, thousands of documents would be immune from a grand jury subpoena leading to a frustration of valid law enforcement efforts.

While it has been argued that the rule is justifiable because it creates efficiencies in representation, any suggestion of such a "systemic benefit" is weak, if not non-existent. (*See*, Giesel, *supra*, 95 Marg. L. Rev. at 548). As noted: "It is also very possible that recognition of the privilege in this setting does not decrease systemic costs in any way. Parties working together are not likely to present inconsistent positions and therefore judicial proceedings may be less lengthy, but such is not a foregone conclusion. The same amount of judicial resources may be used in a joint endeavor situation with separate lawyers." (*Id*.).

The potential for misuse of the rule as recognized must also be considered. As observed by one commentator: "The greatest push to expand the common interest privilege comes from corporate attorneys representing multiple clients, often in an antitrust context. It is precisely in such a context that the potential for abuse is greatest. The 'common interest' privilege may be nothing but a cover for

an antitrust conspiracy." (Epstein, The Attorney-Client Privilege and the Work-Product Doctrine [5th ed], p. 277).

Lastly, in considering the above points made against adoption of the rule that the First Department endorsed in *Ambac* it is important to consider a likelihood that the loss of relevant evidence may very well be exacerbated by reason of the failure of the *Ambac* court to adopt a principled basis for distinguishing between those common interests that are legal in nature, and thus within the rule, and those which are commercial or business in nature. Historically, communications that are made for purposes of obtaining business advice fall outside the privilege. (*See, Matter of Grand Jury Subpoena* [Bekins Record Stor. Co.], 62 N.Y.2d 324, 329 [1984]; *see also, United States v. Ricky,* 632 F.2d 559 [9th Cir. 2011] [preparation of evaluation report for submission to the IRS]; *Christman v. Brauvin,* 185 F.R.D. 251 [ND Ill. 1999] [drafts of and comments to such draft involving proxy statements]). However, under the First Department's *Ambac* ruling with its seemingly open-ended common legal interest basis for sharing information, such communications may well be found to be privileged, a point cogently made by plaintiffs-appellants. (*See,* Pltf.-App. Br., pp. 52-58). This would be a perverse result. Such an unlimited privilege rule, needless to say, is contrary to notions of what constitutes sound public policy.

In sum, it is not sound policy to allow the exchange of information among clients and their separate attorneys to enjoy or retain privileged status when they are not made in a litigation context. Unlike the joint client and allied litigant situations where the benefits are readily apparent and the possibility of abuse of the privileged status minimal due to its confined nature, communication in the allied attorney situation under the *Ambac* decision have not been shown to be deserving of privilege protection.

C. *Ambac's* Advanced Rationale For Its Enunciated Rule Is Not Compelling And Hardly Justifies Its Adoption

The First Department in *Ambac* based its decisions on several factors. None of them are convincing or sufficient to warrant the rule it adopted.

Initially, the Court cited in support to Restatement [Third] of the Law Governing Attorneys §76 and the "overwhelming[ly]" adoption of the non-litigation rule by the federal courts. (*Ambac*, 124 A.D.3d at 133-134, *supra*). However, as noted *supra* at pp. 21-24, the Restatement provision is not supportable itself.

Moreover, as to the claimed "overwhelming" federal case law, review of the federal case law hardly shows "overwhelming" adoption by those courts of this non-litigation rule. There is instead substantial rejection of it by the federal courts. (*See, Hernton & Williams*, 590 F.3d 272, 284-286 [4th Cir. 2010]; *United States v. Duke Energy Corp*., 2012 WL 1565228, *13-16 [MD N.C.]; *Atlantis Consultants*

Ltd. Corp. v. Terradyne Armored Vehicles, 2015 WL 9239808, *4 [ED Va.]; *In re Santa Fe Intl. Corp*., 272 F.3d 705, 710 [5th Cir. 2001]; *United States v. Newell*, 315 F.3d 510, 575 [5th Cir. 2002]; *Schaahar v. Amer. Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-192 [ND Ill. 1985]; *In re Fresh and Process Potatoes Antitrust Litigation*, 2014 WL 2435581, *6-7 [D. Idaho]). Likewise, there has been rejection of the rule by many state courts, which rejection the First Department failed to consider. (*See,e.g., O'Boyle v. Borough of Longport*, 218 N.J. 168, 197-199 [2014] [also noting the "considerable debate among the various jurisdictions, state and federal, regarding adoption of the rule]; *In re XL Specialty Ins. Co*., 373 S.W.2d 46, 51-52 [Texas 2012]).

Second, the First Department expressed the view that as the common interest rule it enhanced descends from the attorney-client privilege, which is not tied to litigation, imposition of a litigation requirement here would be inconsistent with the policy underlying the privilege. (*Id*. at 135-136). However, there is no "contradiction" as stated by the Court. The issue here is not the attorney-client privilege but "how far access to privileged communications fairly should extend." (Barber, *supra*, 2015-2016 Supp. §5:7, p. 25). In that regard, the position of plaintiffs and *Amicus Curiae* will not result in the loss of any privilege that has attached to communications before they were shared. Furthermore, the Court's observation fails to take into account that the interests served by the common

interest rule are distinct from those served by the privilege, as noted *supra* at pp. ____. (*See also*, Bartel, *supra*, 65 Ford. L. Rev. at pp. 913-915).

The Court's further claim that the better policy is to eliminate a litigation requirement (*Id*. at 135) is unavailing as discussed *supra* at pp. 8-16. Notable in this regard is the Court's failure to consider the loss of relevant information and whether the purported benefit of the rule outweighed such loss. (*See, Lamitie v. Emerson Elec. Co.-White Rodgers Div.*, 142 A.D.2d 293, 299 [3d Dep't 1988] [Levine, J.], *lv. dism*. 74 N.Y.2d 650 [1989]).

Likewise, the Court's argument that imposition of a litigation requirement would make "poor business policy" is unavailing. In that regard, the concern is whether the rule enhances legal representation and not businesses in their commercial affairs.

Lastly, the Court was swayed by the fact that the Delaware legislature - not the Delaware courts - rejected a litigation requirement. (*Id*. at 137). However, a single state legislative decision should not dictate what rule New York courts should follow, an observation that is especially true where the Delaware statute is nothing more than an adoption of the much criticized proposed FRE 503(2)(b).

In sum, the rationale employed by the First Department is not persuasive, and does not at all provide a sound basis for its newly created rule.

D. Conclusion

Accordingly, the expansion of the common interest rule to encompass the sharing of communications among clients and their separate attorneys outside the context of litigation, as now permitted by the First Department's decision in *Ambac*, does not comport and is inconsistent with sound public policy.

POINT IV

THE EXPANSION OF THE COMMON INTEREST RULE AS EFFECTED BY THE FIRST DEPARTMENT IN *AMBAC* IS A MATTER NOT FOR THE COURTS BUT FOR THE LEGISLATURE

The New York courts have consistently deferred to the Legislature as to the expansion of privilege protection, except in the rarest of situations. (*See, Lamitie v. Emerson Elec. Co. - White Rogers Div.*, 142 A.D.2d at 298-299, *supra*). In that regard, the New York courts have observed that where there has not been a "strong showing that the harm to the public interest from disclosure outweighs the interest of the litigant seeking disclosure"; and such expansion would "favor . . . an additional class," which if it is to be done, "it should be done by the Legislature." (*People ex. rel. Mooney v. Sheriff of N.Y. County* (259 N.Y. 291, 295 [1936]). No such showing has been made here.

The First Department has granted through its so-called "common interest privilege" broad protection against disclosure to communications made among

corporate attorneys and their clients, which protection had not been previously available. If such protection is desirable and thus effected, surely that is a task best left to the Legislature, as *Mooney* and *Lamitie* instruct.

CONCLUSION

It is a fundamental principle that the "public is entitled to every person's evidence." (*Brangburg v. Hayes*, 408 U.S. 665, 688 [1972]). Thus, it is the "policy of the law . . . to require the disclosure of all information by witnesses in order that justice may prevail. (*People ex rel. Mooney*, 269 N.Y. at 295, *supra*). As the First Department decision is inconsistent with those principles, as *Amicus Curiae* submits it has demonstrated, this Court should reject its holding.

Accordingly, the order of the First Department should be reversed and the certified question answered in the negative.

Dated: March 16, 2016

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ADDENDUM

Rule 503

Lawyer-Client Privilege

(Not enacted.)

(a) **Definitions**. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) 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, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

UNIFORM RULES OF EVIDENCE (1974)
WITH 1986 AND 1988 AMENDMENTS

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIFTH YEAR
IN BOSTON, MASSACHUSETTS
AUGUST 1 – 8, 1986

WITH PREFATORY NOTE AND COMMENTS

ARTICLE V
PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED. Except as otherwise provided by constitution or statute or by these or other rules promulgated by [the Supreme Court of this State], no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

RULE 502. LAWYER-CLIENT PRIVILEGE.

(a) Definitions. As used in this rule:

(1) ~~A "client" is~~ "Client" means a person, including a public officer, ~~or~~ corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from ~~him~~ the lawyer.

(2) ~~A representative~~ "Representative of the client" ~~is one~~ means (i) a person having authority to obtain professional legal services, or to act on advice thereby rendered ~~pursuant thereto~~, on behalf of the client or (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) ~~A "lawyer" is~~ "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) ~~A "representative~~ "Representative of the lawyer" ~~is one~~ means a person employed by the lawyer to assist the lawyer in ~~the rendition of~~ rendering professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential ~~communications~~ communication made for the purpose of facilitating the rendition of professional legal services to the client ~~(1)~~ (i) between ~~himself~~ the client or ~~his~~ a representative of the client and ~~his~~ the client's lawyer or ~~his lawyer's~~ a representative of the lawyer, ~~(2)~~ (ii) between ~~his~~ the lawyer and ~~the lawyer's~~ a representative of the lawyer, ~~(3)~~ (iii) by ~~him~~ the client or ~~his~~ a representative of the client or ~~his~~ the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, ~~(4)~~ (iv) between representatives of the client or between the client and a representative of the client, or ~~(5)~~ (v) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, ~~his~~ the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud~~;~~.

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by ~~inter vivos~~ transaction~~;~~ inter vivos.

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by ~~the~~ a lawyer to ~~his~~ the client or by ~~the~~ a client to ~~his~~ the lawyer~~;~~.

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness~~;~~.

(5) Joint Clients. As to a communication relevant to a matter of common interest between or among ~~2~~ two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients ~~or~~.

(6) Public Officer or Agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Comment

The previous rule adopted the so-called "control group" test with regard to the scope of the attorney-client privilege among corporate officers and employees. The U.S. Supreme Court rejected this rule in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). There have not been any cases subsequent to *Upjohn* that have attempted to formulate a new rule. *Upjohn* itself is most notable for not giving much guidance. However, it would appear from the basic rationale of the case – that of furthering the efficacious rendition of legal services – that it probably should be read very broadly. The proposed rule does just that.

RULE 503. PHYSICIAN AND PSYCHOTHERAPIST-PATIENT PRIVILEGE.

(a) Definitions. As used in this rule:

(1) A "patient" is a person who consults or is examined or interviewed by a [physician or] psychotherapist.

[(2) A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.]

(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the

UNIFORM RULES OF EVIDENCE ACT
(Last Revised or Amended in 2005)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
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ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTH YEAR
IN DENVER, COLORADO
JULY 23 – 30, 1999

WITH PREFATORY NOTE AND COMMENTS

March 8, 2005

ARTICLE V

PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED.

Except as otherwise provided by constitution or statute or by these or other rules promulgated by [the Supreme Court of this State], no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or record; or

(4) prevent another from being a witness or disclosing any matter or producing any object or record.

Comment

The word "record" has been substituted for the word "writing." See the Comment to Rule 101.

RULE 502. LAWYER-CLIENT PRIVILEGE.

(a) Definitions. In this rule:

(1) "Client" means a person for whom a lawyer renders professional legal services or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in

furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any State or country.

(4) "Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(5) "Representative of the lawyer" means a person employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in rendering professional legal services.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(2) between the lawyer and a representative of the lawyer;

(3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer

representing another party in a pending action and concerning a matter of common interest therein;

(4) between representatives of the client or between the client and a representative of the client; or

(5) among lawyers and their representatives representing the same client.

(c) Who may claim privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud;

(2) as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos;

(3) as to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) as to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;

(5) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) as to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or

(7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Restatement (Third) of the Law Governing Lawyers § 76 (2000)

Chapter 5. Confidential Client Information

Topic 2. The Attorney–Client Privilege

Title B. The Attorney–Client Privilege for Organizational and Multiple Clients

§ 76 The Privilege in Common-Interest Arrangements

- **(1) 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.**
- **(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.**