



1 deposition testimony from depositions relied upon by both parties. The Court also has reviewed the  
2 documents submitted to the Court by ARCO for in camera inspection which the parties refer to as the  
3 “Goodman Memorandum.” Finally, the Court has considered the parties’ proposed findings of fact and  
4 conclusions of law. (document ## 920, 922)

### 5 **FACTUAL BACKGROUND**

6 Plaintiffs, a coalition of three mining companies, have been conducting an environmental cleanup of  
7 polluted groundwater in the Globe-Miami historical mining district of Gila County, Arizona. In this action,  
8 Plaintiffs are suing Defendants, mining and oil companies, to recover a portion of Plaintiffs’ environmental  
9 cleanup costs pursuant to certain provisions of the Comprehensive Environmental Response, Compensation  
10 and Liability Act of 1980 (“CERCLA”) and Arizona’s Water Quality Assurance Revolving Fund  
11 (“WQARF”). Plaintiffs allege that more than a century of copper mining and related activities have  
12 contaminated ground water in the Pinal Creek Basin, which naturally drains toward Roosevelt Lake,<sup>2/</sup> and that  
13 each Defendant’s activities has either caused or contributed to this contamination. Total cleanup costs may  
14 exceed 100 million dollars. Thus, the subject litigation, initially filed in 1991, is likely the largest and most  
15 expensive environmental cleanup litigation in Arizona history.

16 In the pending Motion to Compel, Plaintiff Inspiration seeks production of a set of documents referred  
17 to collectively as the “Goodman Memorandum.” (document # 905) Plaintiff Inspiration believes that the  
18 Goodman Memorandum contains key historical evidence relevant to Plaintiff’s allegations that ARCO’s  
19 predecessor, The Anaconda Company (“Anaconda”), jointly operated the Inspiration mine in the Globe-  
20 Miami district with Plaintiff. ARCO invokes the attorney-client privilege and the work product doctrine in  
21 refusing to produce the Goodman Memorandum. ARCO does not dispute that the Goodman Memorandum  
22 is relevant to Plaintiff Inspiration’s claims.

23 The parties agree that the Goodman Memorandum is a draft legal memorandum prepared from about  
24 1969 to 1975 by the law firm of Chadbourne, Parke, Whiteside & Wolff (“Chadbourne”) under the direction  
25 of antitrust partner Melvin Goodman.

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27 <sup>2/</sup> Roosevelt Lake, a major water supply source for the cities of the metropolitan Phoenix area, was the  
28 first water storage reservoir for the Salt River Valley, completed in 1911 and substantially modified in the late  
1980's and early 1990's.

1 In 1975, the Crane Company (“Crane”) attempted a hostile take over of Inspiration. Inspiration  
2 requested that Anaconda purchase additional shares of Inspiration’s stock to foil Crane’s takeover attempt.  
3 At a meeting attended by representatives of Anaconda and Inspiration, the Goodman Memorandum was  
4 utilized to explain Anaconda’s decision not to acquire additional Inspiration stock.

5 Inspiration now argues that it is entitled to the production of the Goodman Memorandum because  
6 Chadbourne lawyers used it during the course of a joint representation of Anaconda and Inspiration. ARCO,  
7 however, argues that the representation of Anaconda and Inspiration was merely coincident but not joint and,  
8 therefore, the Goodman Memorandum is protected by the attorney-client privilege.

9 In view of the foregoing, the issues before the Court include: (1) whether Chadbourne’s representation  
10 of Anaconda and Inspiration can be characterized as “joint representation<sup>3</sup>”, and (2) if no joint representation  
11 existed, whether Anaconda waived the attorney-client privilege and work-product immunity with respect to  
12 the entire Goodman Memorandum.

### 13 **RELEVANT FACTS**

14 The Court finds the following facts relevant to this dispute:

#### 15 **I. Relationship between Anaconda and Inspiration**

16 Anaconda and Inspiration had “an historic, close cooperative relationship.” (Davis Dep. at 89:12-17)  
17 The relationship between the two companies led to federal antitrust scrutiny on numerous occasions. Beginning  
18 in 1923, the federal government scrutinized the relationship between Anaconda and Inspiration for possible  
19 antitrust violations. (document # 905, Exhibit 3) Again in 1947, the companies’ relationship drew  
20 governmental scrutiny. (document #905, Exhibit 4) In 1960, the Department of Justice (“DOJ”) investigated  
21 Anaconda’s transfer of its Miami, Arizona smelter to Inspiration. (Deming Dep. at 65:19-66:24; 91:21-92:6;  
22 109:9-110:3) The DOJ’s investigation continued and in 1965, it issued Civil Investigative Demands (“CIDs”)  
23 to both Anaconda and Inspiration. (Deming Dep. at 48:17-50:18; 90:2-15; 121:17-22) Thereafter, the DOJ  
24 issued a memorandum stating that: “On the basis of the facts presently available to us . . . Inspiration should  
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26 <sup>3/</sup> The parties have stipulated that if the Goodman Memorandum falls within the scope of Chadbourne’s  
27 joint representation, then the attorney-client privilege and work product immunity doctrine only apply as to  
28 third parties, but would not shield the Goodman Memorandum from discovery by Inspiration. (August 29,  
2000 Stipulation)

1 be classified as a long time subsidiary of Anaconda and not as an independent company. Inspiration has  
2 appeared to operate during over a half century as an integral part of the Anaconda ‘group’ of companies.”  
3 (document # 905, Exhibit 6)

4 During the aforementioned federal antitrust inquiries, Chadbourne represented both Anaconda and  
5 Inspiration and crafted a single, unified defense to those inquiries. (document # 905, Exhibit 9) The companies  
6 cooperated completely with each other and with Chadbourne.

7 In order that the companies could respond consistently to antitrust inquiries, each client and  
8 Chadbourne & Parke freely shared information, legal research and advice. . . Neither client  
9 asked for a waiver or required that Chadbourne, Parke withhold information from the other.

10 (Davis Dep. at 155:17-25) “Chadbourne, Parke represented both Anaconda and Inspiration Copper in any  
11 antitrust matter relating to their relationship with each other until Anaconda sold its equity interest in Inspiration  
12 Copper” to Hudson Bay. (See page 8) (document # 905, Exhibit 9) Chadbourne had complete access to all  
13 of the historical files of Anaconda and Inspiration. (Deming Dep. at 84:7-16; 96:16-22; Davis Dep. at  
14 122:19-123:4)

15 Neither Inspiration nor Anaconda had antitrust counsel other than Chadbourne. (Davis Dep. at 161:1-  
16 21; 162:7-10, Deming Dep. 129:18-130:18) Chadbourne served as Inspiration’s general counsel. (Davis  
17 Dep. at 9:19-22; 33:12-19; Deming Dep. 56:13-22)

## 18 **II. The Goodman Memorandum**

19 The Goodman Memorandum is a lengthy and detailed legal analysis by Chadbourne which was begun  
20 in approximately 1969 and modified and updated until 1975. It was created during repeated rounds of federal  
21 investigation of the relationship between Anaconda and Inspiration. (Deming Dep. at 17:4-18:21) The  
22 document was authored principally by Melvin D. Goodman, an anti-trust partner at Chadbourne. At that time,  
23 Mr. Goodman was the Chadbourne attorney primarily responsible for antitrust matters for Anaconda and he  
24 performed work for both Anaconda and Inspiration on antitrust matters. (Davis Dep. at 14:8-12, 100:25-  
25 101:31) The purpose of the Goodman Memorandum was “to pull together in one place the history of  
26 Anaconda’s holdings of stock [in Inspiration], when acquired, et cetera, and to also consider the antitrust  
27 aspects of that holding and related.” (Deming Dep. at 10:21-25) Significantly, the Goodman Memorandum  
28 was used to analyze antitrust implications of Anaconda purchasing additional shares of Inspiration stock.

1 (ARCO Exhibit (“Ex.”) 1,<sup>4/</sup> (Steinmetz Declaration (“Decl.”), ¶ 8)(Davis Deposition 105:18-106:9) With  
2 Inspiration’s knowledge and cooperation, Mr. Goodman used Inspiration materials in preparing the Goodman  
3 Memorandum. (Davis Dep. at 108:3-8)

4 In late 1974 -1975, the Crane Company attempted a hostile takeover of Inspiration. (Davis Dep. at  
5 104:13-21) To fend off that attempt, Inspiration’s president, Myles Jacob, requested that Anaconda, a 28%  
6 shareholder, increase its share ownership of Inspiration. (Id.) In view of the past federal antitrust  
7 investigations, both companies were aware that such an increase raised antitrust concerns. (Davis Dep. at  
8 104:22-105:23) Anaconda rejected that request based on the Goodman Memorandum which outlined  
9 possible antitrust violations in the event that Anaconda acquired additional Inspiration stock. (ARCO Ex. 2,  
10 Deming Dep. 17:22-24; Davis Dep. 105:21-23)

### 11 **III. Direction of Legal Work Relating to Goodman Memorandum**

12 Anaconda directed the creation of the Goodman Memorandum. (ARCO Ex. 1, Steinmetz Decl. ¶  
13 8)(“... Chadbourne was asked to advise Anaconda on the antitrust implications of Anaconda purchasing  
14 additional shares of Inspiration stock . . . . Inspiration representatives had no part in requesting the information  
15 from Chadbourne, did not attend the meetings where Mr. Goodman reported to me, and did not receive  
16 copies of Mr. Goodman’s written communications to me.”). Chadbourne took no direction from Inspiration  
17 regarding the Goodman Memorandum and the related file: “Q. ...Did you ever take any direction from any  
18 Inspiration person in doing that work? A. No.” (ARCO Ex. 2, Deming Dep. at 167:20-22.) Inspiration did  
19 not attend any meetings during preparation of the Goodman Memorandum to discuss Chadbourne’s progress  
20 or direct the work. (ARCO Ex. 1, Steinmetz Decl. ¶ 8.)

### 21 **IV. Payment for the Goodman Memorandum**

22 Chadbourne billed Anaconda and Inspiration separately for legal work. (ARCO Ex. 4, Deming Decl.  
23 at ¶ 4; ARCO Ex. 2, Deming Dep. at 165:4-7.) It is unclear who paid for the Goodman Memorandum.  
24 ARCO asserts that it paid for the Goodman Memorandum in its entirety. (ARCO Ex. 2, Deming Dep. at  
25 165:4-7) (“Q. Who paid for that work? A. Anaconda Company. Q. Did Inspiration pay for any of that  
26 work? A. Did not.”). Inspiration, however, paid a monthly retainer to cover Chadbourne’s legal services

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27 <sup>4/</sup> Citations to “ARCO Ex.” are to exhibits attached to ARCO’s response to Plaintiff Inspiration’s  
28 Motion to Compel (document # 910).

1 and did not receive a detailed bill of Chadbourne’s services. (Morrison Dec. ¶ 11); (Davis Dep. at 118:12-  
2 20)(“Q. The legal analysis on whether Anaconda could acquire or increase its ownership interest in  
3 Inspiration, do you know who paid for that? A. Well, certainly the early stages of that project Mel Goodman  
4 was doing, my impression was that Anaconda was paying for it. Whether Inspiration eventually came to share  
5 in that cost, I really did not know.) The Court, however, need not decide who paid for the Goodman  
6 Memorandum because, as discussed below, that issue is not dispositive of whether joint representation existed.

## 7 **V. Access to the Goodman Memorandum**

8 Chadbourne maintained separate files for Anaconda and Inspiration. (ARCO Ex. 4, Deming Decl.  
9 ¶ 4; ARCO Ex. 6, Conwell Aff. ¶ 8; ARCO Ex. 2, Deming Dep. at 117:9-15; 158:20-25; 169:1-170:6.)  
10 Access to the separate files maintained for Anaconda and Inspiration was limited to Chadbourne lawyers and  
11 to the appropriate client. (ARCO Ex. 6, Conwell Aff. ¶¶ 6-8.) The Goodman Memorandum was kept in  
12 the Anaconda special A.U. file. The file was designated as such to “[k]eep confidential [the file] not only vis-  
13 a-vis other clients, but hopefully to insulate the files from roving eyes within the office too.” (ARCO Ex. 2 ;  
14 Deming Dep. at 166:1-167:7; ARCO Ex. 2, Deming Dep. 165:18-25 )(“Q: In any instance that you can  
15 recall, was Inspiration ever made privy to Anaconda files, its own files on antitrust matters? A. I know of no  
16 such instance. Q. Okay. And the Goodman memo, to your knowledge, was it ever in anything other than  
17 an Anaconda file? A. No, strictly an Anaconda file.”) The Goodman Memorandum was not given to  
18 Inspiration. (ARCO Ex. 1, Steinmetz Decl. ¶ 8; ARCO Ex. 2, Deming Dep. at 165:22-25; 168:18-25 )(“Q.  
19 Okay. And if the - any of the materials in the A.U. file had been physically handed to someone at Inspiration,  
20 would you expect to know that? A. Yes, I would . . . Q. Did you ever hear of such a thing? A. I did  
21 not.”); (ARCO Ex. 3, Davis Dep. at 106: 10-15 )(“Q. Do you have any knowledge, Mr. Davis, about  
22 whether that work product, this memo, in whatever—at whatever level of completion it may have had, was  
23 ever given to any of the Inspiration people? A. I don’t know.”).

## 24 **VI. The Crane Takeover Attempt**

25 As previously mentioned, in late 1974 -1975, Inspiration faced a hostile takeover attempt by the Crane  
26 Company (“Crane”). To resist Crane’s takeover attempt, Inspiration requested that its 28% shareholder,  
27 Anaconda, acquire additional Inspiration stock. (document # 910; ARCO Ex. 3, Davis Dep. at 104:8-  
28 21)(“When the Crane Company made its attempt to take-over, take control of Inspiration I believe in 1974,

1 I believe this was an issue that Myles Jacob [of Inspiration] immediately raised as a point Anaconda now trying  
2 to step up, you know, protect us by increasing its percentage. I believe in that context we had a discussion  
3 with Myles Jacob on this issue.”) Anaconda had a significant investment in Inspiration, and both Anaconda  
4 and Inspiration had a common interest in protecting their long time relationship against a threat by Crane.  
5 (document # 305, Exhibit 9, Davis Letter of May 31, 2000)(“... during most of this period Anaconda was  
6 a significant shareholder in Inspiration Copper [sic] Both companies viewed this shareholding as beneficial  
7 and desired to maintain their relationship . . .”).

8 Anaconda declined to acquire more Inspiration stock. To explain Anaconda’s decision to Inspiration,  
9 Mr. Steinmetz, as general counsel of Anaconda, directed that Mr. Goodman and Mr. Davis of Chadbourne  
10 meet with Mr. Jacob of Inspiration to “on Anaconda’s behalf explain why there were serious antitrust  
11 impediments to Anaconda taking the action that Myles Jacob wanted Anaconda to take.” (ARCO Ex. 3,  
12 Davis Dep. at 105:12-23; 128:15-129:8)(“Q. Was part of the discussion Anaconda wanted Inspiration to  
13 understand why it was going to choose not to be the white knight, was that the gist of why that discussion was  
14 taking place? A. I believe so. . .”).

15 The 1975 meeting was attended by Inspiration president Myles Jacob, Chadbourne attorneys Mel  
16 Goodman, Richard Davis, and Richard Hobbins. At that time, Mr. Hobbins was a director of Inspiration.  
17 At the death of Mr. Hobbins, Mr. Davis succeed Mr. Hobbins as director in 1975. (Davis Dep. 37:18-38:2)  
18 At the time of the 1975 meeting, Anaconda and Inspiration shared a common interest with respect to the  
19 antitrust implications of Anaconda’s ownership of Inspiration stock. (Davis Dep. at 115:11-116:7) Mr. Davis  
20 testified that Chadbourne represented both companies jointly during the 1975 meeting:

21 MR. WALLWORK: Who were you representing at the time, Mr. Davis?

22 THE WITNESS: You mean in the context of that conversation?

23 Mr. WALLWORK: Yes.

24 THE WITNESS: In that conversation we were responding to -- that is a good  
25 question, I guess. Actually, this was a meeting at the invitation of Anaconda and  
26 Inspiration to discuss that issue. So I would say we were representing, I suppose,  
both companies.

(Davis Dep. at 109:25-110:11)(Emphasis added).

27 “So our discussion with Myles Jacob was in the context of a joint  
28 Inspiration/Anaconda approach to the issue.” (Davis Dep. at 105:6-9)

1 Q: In particular you indicate that “Chadbourne, Parke simultaneously  
2 represented both Anaconda and Inspiration Copper in any antitrust matter relating  
3 to their relationship with each other until Anaconda sold its equity interest in  
Inspiration Copper to Hudson Bay.” That is the beginning sentence to the last  
paragraph (of the May 31, 2000 letter).

4 Do you see that, at least the third paragraph?

5 A: Yes. That sentence says “as a consequence of the foregoing” we did that. The  
6 foregoing to which it refers was their joint interest in maintaining Anaconda’s  
ownership interest in Inspiration. As to that  
7 matter they had a joint interest in protecting that from antitrust challenge.  
In that connection, represented both Anaconda and Inspiration.

8 (Davis Dep. at 153:16-154:10)(Emphasis added).

9 Q: Mr. Davis, just to be clear as we deal with this matter, if we need to before the  
10 court, the letter you provided me indicates that I had requested you address the issue  
of the antitrust relationship — the representation relating to antitrust matters.

11 I think we already established as a general matter the principles you indicate in your  
12 letter apply as well to the Anaconda shareholding in Inspiration?

13 A: It says and to the extent the representation was joint to the Anaconda  
Company. What I indicated in the letter with respect to the Anaconda’s  
14 ownership of equity in Inspiration Copper, because both clients wanted  
to protect that interest from an antitrust challenge, that with respect to  
15 that issue antitrust viability of that shareholder there was a joint interest.  
As a consequence, joint representation.

16 (Davis Dep. at 167:13-168:10).

17 Mr. Davis is the only participant of the 1975 meeting who is alive today and nothing in the record contradicts  
18 his testimony.

19 During the 1975 meeting, Chadbourne attorneys used the Goodman Memorandum to provide legal  
20 advice to Inspiration and Anaconda. (Davis Dep. 105:3-11; 113:25-115:2; 157:24-158:13 -159:3).

21 Mr. Davis explained, the Chadbourne lawyers “. . . were drawing on work Mel Goodman had done on this  
22 issue . . . work that was done for Anaconda. . . .” (ARCO Ex. 3, Davis Dep. at 105:3-11.) The  
23 Chadbourne lawyers discussed with Mr. Jacob the substance of the Goodman Memorandum to “explain why  
24 there were serious antitrust impediments to Anaconda taking the action that Myles Jacob wanted Anaconda  
25 to take.” *Id.* at 105:20-23. Mr. Davis described the information provided to Mr. Jacob as a “full-scale  
26 review” of the issue. (Davis Dep. at 115:22)

27 In fact, I think the discussion was a detailed discussion in terms of, you know,  
28 you have a market percentage of X, Anaconda has a market percentage of Y.

1 There were a number of - also, actually, I think we discussed some of the history  
2 of relationships between the company and posture Anaconda had taken at different times for  
3 different reasons with respect to Inspiration. Assurances that  
4 Anaconda may have given the government in different contexts. Things of that  
5 sort.

6 It was a fairly detailed comprehensive review. It was made possible by this  
7 great body of work that Mel Goodman had done.

8 (Davis Dep. at 114:6-21) Although Inspiration was not provided with the Goodman Memorandum in  
9 connection with the meeting, no limits were placed on Chadbourne's ability to use the Goodman  
10 Memorandum during the meeting. Mr. Davis testified that "there was no inhibition about sharing legal  
11 conclusions specifically." (Davis Dep. at 169:13-21, as amended in 8/27/2000 declaration) Thus, during the  
12 1975 meeting regarding the Crane takeover attempt, Anaconda and Inspiration discussed information  
13 contained in the Goodman Memorandum. The purpose of the 1975 meeting was to discuss whether  
14 Anaconda's purchasing of additional shares of Inspiration's stock would draw anti-trust scrutiny. Ultimately,  
15 Anaconda chose not to acquire more Inspiration stock. (ARCO Ex. F, Davis Dep. at 115:23-116:24)  
16 ("... Mr. Jacob realized he was being left to his own devices to beat off Mr. Evans [of Crane]."). Inspiration,  
17 as a result, located Hudson Bay as an alternative investor to resist Crane. (ARCO Ex. F, Davis Dep. at  
18 115:3-116:13.)

19 The parties agree that Anaconda and Inspiration had a common interest in whether Anaconda could  
20 buy more Inspiration stock to prevent a takeover by Crane. (Davis Deposition 167:13-168:10)("both clients  
21 wanted to protect [Anaconda's ownership of equity in Inspiration] from an antitrust challenge, that with respect  
22 to that issue antitrust viability of that shareholding there was a joint interest. As a consequence, joint  
23 representation.") (Davis Deposition 167:13-168:10) Mr. Davis characterized the interaction between  
24 Anaconda and Inspiration that occurred during the meeting regarding the Crane takeover attempt as "two  
25 clients with similar interests wishing to cooperate with each other on a legal issue . . . ." (ARCO Ex. 3, Davis,  
26 Dep. at 169:15-18.)

## 27 **VII. Use of Goodman Memorandum by Mr. Davis in 1979**

28 The relationship between Anaconda and Inspiration changed after 1975 when Hudson Bay invested  
in Inspiration rather than Anaconda. In 1979, Mr. Davis was asked to prepare an antitrust analysis for  
Inspiration and Hudson Bay. In doing that work Mr. Davis, as a Chadbourne partner, had access to

1 Chadbourne antitrust documents, including the Goodman Memorandum. (document # 905, Exhibit  
2 11)(“[T]he long memo to Steinmetz”). It was “common practice” for lawyers at Chadbourne to consult files  
3 created for other clients to take advantage of prior work on similar legal issues. (ARCO Ex. 3, Davis Dep.  
4 135:18-136:8) Although he used the Goodman Memorandum and other Chadbourne memoranda for  
5 background information, Mr. Davis never provided the Chadbourne memoranda prepared for Anaconda to  
6 Inspiration’s owners.

7 Q. Did you provide any research memoranda or other work product prepared  
8 by Chadbourne for the Anaconda Company to the new owners of Inspiration in  
connection with this 1979 work?

9 A. Did I give them copies of those memos?

10 Q. Yes.

11 A. No.

12 (ARCO Ex. 3, Davis Dep. at 133:16-24.) Mr. Davis was reluctant to give the Goodman Memorandum to  
13 Inspiration in 1979 because circumstances changed between 1975, when Anaconda and Inspiration were  
14 closely related, and 1979, when that relationship ceased. (ARCO Ex. 3, Davis Dep. at 137: 6-16)(“Q.  
15 Would you have been comfortable, Mr. Davis, in handing over the research memos done for Anaconda . . .  
16 to Hudson Bay in 1979 without the permission of Anaconda? A. I would not have done so. Q. Why not?  
17 A. It was their property. Q. In fact you didn’t do so; did you? A. No.”). Mr. Davis explained that the  
18 situation in 1979 was vastly different from 1975 and that sharing would have been expected during 1975 given  
19 the close relationship between Anaconda and Inspiration and their common interest:

20 There it was two clients with similar interests wishing to cooperate  
21 with each other on a legal issue relating to potential legal action by  
22 the United States government. Therefore, there would obviously in  
that context there was [no] inhibition about sharing legal conclusions  
specifically.

23 (Davis Dep. 169:15-21)(with correction noted in August 27, 2000 declaration.)

## 24 LEGAL ANALYSIS

25 As previously stated, in the pending motion to compel, Inspiration seeks an order compelling  
26 Defendant ARCO to produce the Goodman Memorandum.

### 27 **I. LEGAL STANDARD**

28 Federal Rule of Civil Procedure 26(b)(1), as amended effective December 1, 2000, provide

1 [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim  
2 or defense of any party. . . For good cause shown, the court may order discovery of any  
3 matter relevant to the subject matter involved in the action. Relevant information need not be  
admissible at trial if the discovery appears reasonably calculated to lead to the discovery of  
admissible evidence.

4 Id. (emphasis added). The parties do not dispute that the Goodman Memorandum is relevant to Inspiration’s  
5 claims.<sup>5/</sup> Rather, Defendant ARCO refuses to produce the Goodman Memorandum on the basis of attorney-  
6 client privilege. Inspiration counters that the joint client exception to the attorney-client privilege applies.  
7 Because this is a federal question case, federal common law governs the attorney-client privilege. McMorgan  
8 & Company v. First California Mortgage Co., 931 F. Supp. 699, 700 (N.D.Cal. 1996) (quoting Clarke v.  
9 American Commerce Nat’l. Bank, 974 F.2d 127, 129 (9<sup>th</sup> Cir. 1992)). “However, there appear to be no  
10 pertinent federal common law cases from the Ninth Circuit. In other federal circuits, the federal common law  
11 on the joint client exception is ambiguous with no single, coherent theory having been adopted.” McMorgan,  
12 931 F. Supp. at 701. Because federal privilege law is not consistent, the court should invoke state principles  
13 “to accommodate the legitimate expectations of the state’s citizens.” McMorgan, 931 F.Supp. at 701 (citing  
14 Pagano v. Oroville Hosp., 145 F.R.D. 683, 687-88 (E.D.Cal. 1993)). The Court, therefore, will look to  
15 Arizona law for guidance on the joint client exception to attorney-client privilege. Arizona law on this issue,  
16 however, is sparse but helpful. Thus, the Court will look to other jurisdictions for guidance.

17 **II. Existence of Attorney-Client Privilege**

18 A communication between a client and his or her attorney is confidential, and therefore privileged, if  
19 “the communication [was] made in the context of the attorney-client relationship and was maintained in  
20 confidence.” Alexander v. Superior Court, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (Ariz. 1984). Arizona  
21 law applies a subjective test to determine whether an attorney-client relationship exists. Id. ““An attorney-  
22 client relationship is said to exist when the party divulging confidences and secrets to an attorney believes he  
23 is approaching the attorney in a professional capacity with the intent to secure legal advice.”” Id. (quoting  
24  
25

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26 <sup>5/</sup> Discovery regarding the relationship between Anaconda and Inspiration is relevant to establishing  
27 Inspiration’s claim that ARCO is liable as a former operator of the Inspiration mine under federal and state  
28 environmental laws. See, 42 U.S.C. § 9607(a)(stating that any person may seek to recover environmental  
cleanup costs from a corporation if it “actively participated in, and exercised some control over, the operations  
of the facility” that caused the pollution.)

1 Trinity Ambulance Service, Inc. v. G & L Ambulance Services, Inc., 578 F. Supp. 1280, 1283 (D. Conn.  
2 1984)).

3 Here, the parties agree that both Anaconda and Inspiration had an attorney-client relationship with  
4 Chadbourne during the relevant period. The parties also agree that the Goodman Memorandum was a  
5 communication between clients and attorneys for the purpose of seeking legal advice, and therefore is  
6 protected, as to strangers, by the attorney client privilege.

7 The parties, however, disagree as to the nature of Chadbourne's representation of Inspiration and  
8 Anaconda as to the Goodman Memorandum. If Chadbourne represented Anaconda and Inspiration jointly,  
9 as Inspiration asserts, then the Goodman Memorandum is not privileged between Anaconda and Inspiration.  
10 However, ARCO argues that if Chadbourne represented Anaconda and Inspiration separately and prepared  
11 the Goodman Memorandum solely for Anaconda, then the attorney-client privilege applies unless waived.

### 13 **III. Joint Client Exception to Attorney-Client Privilege**

14 Inspiration asserts that Anaconda and Inspiration cooperated with respect to defending antitrust  
15 matters, including the 1975 meeting regarding Crane's hostile takeover attempt, and that cooperation resulted  
16 in a "joint representation" or "co-client" relationship, which implies that all communications with the lawyers  
17 during the relationship will be disclosed to both clients. Restatement Third, The Law Governing Lawyers  
18 (hereinafter "Restatement") § 75 comment d ("Rules governing the co-client privilege are premised on an  
19 assumption that co-clients usually understand that all information is to be disclosed to all of them."). ARCO  
20 counters that the 1975 meeting was limited cooperation in the "common interest" which does not involve either  
21 an obligation or an understanding to exchange all information relating to the matter of common interest.  
22 Restatement § 76 comment c.

23 The joint client or mutual representation exception to the attorney-client privilege provides that "when  
24 two or more clients employ the same attorney in the same business, communications made by them in relation  
25 to such business are not privileged inter sese nor are they privileged as between any one of the parties and the  
26 attorney . . . the communications are privileged solely as to strangers . . ." Nichols v. Elkins, 2 Ariz.App.  
27 272, 277, 408 P.2d 34, 39 (Ariz. Ct. App. 1966)(holding that where clients jointly employed attorney, either  
28 client can compel attorney to testify against the other regarding their negotiations.) See also, Alexander v.

1 Superior Court, 141 Ariz. 157, 163, 685 P.2d 1309, 1315 (Ariz. 1984)(stating that there is a presumption  
2 that between joint clients there is no expectation of confidentiality); Nitrini v. Feinbaum, 18 Ariz. App. 307,  
3 312, 501 P.2d 576, 582 (Ariz. Ct. App. 1972)(holding that trial court did not err in admitting testimony of  
4 attorney for partnership where attorney represented all parties in quiet title transaction.); 8 J. Wigmore,  
5 Wigmore on Evidence § 2312 at 603-04(stating that according to the joint attorney exception to the attorney-  
6 client privilege, where an attorney represents clients with common interests, communications between the  
7 parties are not privileged when sought to be discovered in subsequent action between the parties.)

8 As the party asserting the joint client exception, Plaintiff bears the burden of establishing its existence.  
9 McMorgan & Co. v. First California Mortgage Co., 931 F. Supp. 699, 701 (N.D. Cal. 1996), citing Sky  
10 Valley Ltd. Partnership v. ATX Sky Valley Ltd., 150 F.R.D. 648, 650 (N.D. Cal. 1993)(stating that “[t]he  
11 party asserting the joint client exception has the burden of establishing its existence.” ) Merely showing that  
12 two parties were clients of the same law firm at the same time or that the same law firm represented the two  
13 parties in another dispute is not sufficient to “justify the wholesale breach of the attorney-client privilege” that  
14 results from a finding of joint representation. McMorgan at 701-02. “Clients of the same lawyer who share  
15 a common interest are not necessarily co-clients.” Restatement § 75 comment c. Joint representation “must  
16 also be distinguished from situations in which a lawyer represents a single client, but another person with allied  
17 interests cooperates with the client and the client’s lawyer. . . .” Id.

18 In Sky Valley Limited Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 651 (N.D. Cal. 1993)  
19 the court explained that in considering whether parties are joint clients, the court must examine “whether it  
20 would have been *reasonable*, taking into account *all the relevant circumstances*, for the person who  
21 attempted to invoke the joint client exception to have inferred that she was in fact a ‘client’ of the lawyer.”  
22 (citations omitted.). Here, as in Sky Valley, both parties to the dispute were clients of and received legal  
23 advice from the same law firm for certain matters. Sky Valley, 150 F.R.D. at 656. The issue is whether  
24 Inspiration and Anaconda were joint clients of Chadbourne with respect to the Goodman Memorandum

25 Relevant to the Court’s analysis of whether joint representation existed is the policy of the attorney-  
26 client privilege of encouraging free and open communication between lawyer and client. Sky Valley, 150  
27 F.R.D. at 659. The Court also must consider the public policy underlying the joint representation or joint client  
28

1 exception to the attorney-client privilege – the need to discourage breaches of fiduciary duty (as between  
2 partners or insurers and insureds) and the avoidance of unfairness. Sky Valley, 150 F.R.D. at 663.

3       Because the record contains no evidence of an express contract governing the attorney-client  
4 relationships in this matter, in considering whether Chadbourne jointly represented Anaconda and Inspiration  
5 the Court applies an objective rather than subjective test. Id. at 652. Although relevant, the subjective views  
6 of the parties are not dispositive. Id. The First Circuit Court of Appeals and district courts in the Ninth  
7 Circuit have enumerated several factors which are relevant in determining whether an implied contractual  
8 relationship exists for purposes of the joint client exception. Federal Deposit Ins. Corp. v. Ogden Corp., 202  
9 F.3d 454, 461 (1st Cir. 2000); McMorgan & Co. v. First California Mortgage Co., 931 F. Supp. 699, 701  
10 (N.D.Cal. 1996); Sky Valley Ltd. Partnership v. ATX Sky Valley, 150 F.R.D. at 652-53. These factors  
11 “includ[e] but [are] not limited to matters such as payment arrangements, allocation of decision-making roles,  
12 requests for advice, attendance at meetings, frequency and content of correspondence, and the like.” Ogden,  
13 202 F.3d at 461. Sky Valley sets forth 11 similar factors to be considered in determining whether joint  
14 representation exists including “(1) the conduct of the two parties toward one another, (2) the terms of any  
15 contractual relationship (express or implied) that the two parties may have had, (3) any fiduciary or other  
16 special obligations that existed between them, (4) the communications between the two parties (directly or  
17 indirectly), (5) whether, to what extent, and with respect to which matters there was separate, private  
18 communications between either of them and the lawyer as to whom a “joint” relationship allegedly existed, (6)  
19 if there was any such separate, private communication between either party and the alleged joint counsel,  
20 whether the other party knew about it, and if so, whether that party objected or sought to learn the content  
21 of the private communication, (7) the nature and legitimacy of each party’s expectations about its ability to  
22 access communications between the other party and the allegedly joint counsel, (8) whether, to what extent,  
23 and with respect to which matters either or both of the alleged joint clients communicated privately with other  
24 lawyers, (9) the extent and character of any interests the two alleged joint parties may have had in common,  
25 and the relationship between the common interests and communications with the alleged joint counsel, (10)  
26 actual and potential conflicts of interest between the two parties. . . , and (11) if disputes arose with third parties  
27 that related to matters the two parties had in common, whether the alleged joint counsel represented both  
28

1 parties with respect to those disputes or whether the two parties were separately represented.” Sky Valley  
2 at 652-653.

3 The Court will apply the multi-factor tests discussed in Ogden, Sky Valley, and McMorgan to the  
4 evidence in this case discussing only those factors regarding which the record contains evidence. First, as early  
5 as 1923 and continuing into the 1970's the parties cooperated with one another and with Chadbourne with  
6 respect to government inquiries regarding possible antitrust violations. The parties had a common interest in  
7 continuing their long-time relationship and in avoiding anti-trust scrutiny and crafted common defenses to  
8 preserve their interest.

9 In the midst of ongoing antitrust inquiries, Chadbourne attorney Mel Goodman created the Goodman  
10 Memorandum. The memorandum was intended to create a unified history of Anaconda's stock holdings in  
11 Inspiration and to consider antitrust aspects of those holdings. It is unclear who paid for the Goodman  
12 Memorandum because Inspiration paid Chadbourne a monthly retainer and did not receive an itemized bill.  
13 In preparing the Goodman Memorandum, Chadbourne attorneys used materials from Inspiration. Inspiration,  
14 however, did not attend meetings where Mr. Goodman reported to Mr. Steinmetz of Anaconda, and  
15 Inspiration never received a copy of the Goodman Memorandum. The Goodman Memorandum was originally  
16 sent to Mr. Steinmetz of Anaconda with letters designated “personal and confidential.”

17 The Goodman Memorandum became particularly important in late 1974-1975 when Crane attempted  
18 a hostile takeover of Inspiration. It is undisputed that the parties shared a common interest in defeating  
19 Crane's 1975 takeover attempt and in continuing their past relationship. As in the past, the parties were  
20 concerned with anti-trust implications of Anaconda assisting Inspiration in fighting the takeover attempt. The  
21 Goodman Memorandum addressed that issue.

22 When disputes arose with third parties, such as when Anaconda and Inspiration came under federal  
23 anti-trust scrutiny, they turned to Chadbourne to represent them and cooperated in preparing a unified defense.  
24 Neither party had counsel other than Chadbourne to represent them in antitrust matters.

25 The thrust of the joint representation doctrine is that the issue of representation and ownership of  
26 confidential documents turns upon an analysis of “all the relevant circumstances.” Sky Valley, 150 F.R.D. at  
27 651. As discussed above, the relevant circumstances in this matter include the lengthy relationship between  
28 Anaconda and Inspiration and their cooperation in antitrust matters. Over a period of many years, Anaconda

1 and Inspiration both turned to Chadbourne for legal representation when their close relationship drew federal  
2 antitrust scrutiny. Anaconda and Inspiration worked together in these instances. The Goodman Memorandum  
3 was prepared to detail the parties' relationship over the years to assist in defending against antitrust matters.  
4 At issue here is the 1975 meeting between the parties to discuss the feasibility of Anaconda purchasing  
5 additional stock in Inspiration to fend off a hostile take over of Inspiration. As the parties had for numerous  
6 years, the parties again worked together with Chadbourne to protect their relationship and to avoid antitrust  
7 scrutiny. The fact that Anaconda specifically requested the preparation of the Goodman Memorandum and  
8 that a copy of the Goodman Memorandum was maintained only in Anaconda's files is not dispositive in view  
9 of the parties' lengthy history of cooperation and sharing of information with respect to antitrust matters.  
10 Likewise, Mr. Davis' refusal to produce the Goodman Memorandum in 1979 when the relationship between  
11 Anaconda and Inspiration had changed is not relevant to whether a joint representation existed with respect  
12 to that document. Under the circumstances, it was reasonable for Inspiration to have inferred that it and  
13 Anaconda were joint clients of Chadbourne. See, Western Gas Processors, Ltd. V. Enron Gas Processing  
14 Co., 1989 WL 20529, \* 6 (D.Colo. 1989)(finding joint client relationship where law firm represented joint  
15 venture against third parties). But see, Sky Valley, 150 F.R.D. 648, 654)(finding no joint representation where  
16 lawyers never considered ATX a client, lawyers never billed ATX for anything, parties had separate counsel  
17 in lawsuit against a third party during the same period that ATX and Sky Valley worked on project together);  
18 McMorgan, 931 F.Supp. at 701-702 (finding no joint client relationship where defendant did not pay for any  
19 legal services, plaintiff disclosed documents at issue to defendant as well as other parties, law firm asked  
20 plaintiff's permission to perform legal work for defendant, law firm refused to represent defendant when  
21 plaintiff refused it permission to do so.)

22 The Court concludes that the policy underlying the attorney-client privilege – encouraging clients to  
23 speak freely with their lawyers in order to obtain legal advice – would not be hindered by a finding of joint  
24 representation in these circumstances. In addition, the Court concludes that the policy underlying the joint  
25 representation doctrine – discouraging breaches of fiduciary duty and avoiding unfairness – would be advanced  
26 by a finding of joint representation in this matter.

27 Thus, the Court concludes that Inspiration has established the existence of a joint representation  
28 resulting in Inspiration's joint entitlement to the Goodman Memorandum. The Court, therefore, need not

1 address the issue of waiver of the attorney-client privilege or work product immunity. In view of the Court's  
2 conclusion, the Court will order ARCO to produce to Inspiration with twenty (20) days of this Order the  
3 documents collectively referred to as the Goodman Memorandum.

4 Accordingly,

5 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel (document # 905) is **GRANTED**.

6 **IT IS FURTHER ORDERED** that Defendant ARCO shall produce to Plaintiff Inspiration within  
7 twenty (20) days of this Order the documents collectively referred to as the Goodman Memorandum in its  
8 entirety.

9 DATED this 12th day of December, 2000.

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Lawrence O. Anderson  
United States Magistrate Judge