

# Joint Defense Agreements: A Primer on the Potential Risks and Benefits

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## I. THE COMMON INTEREST PRIVILEGE: LEGAL FOUNDATION FOR THE JOINT DEFENSE AGREEMENT

No good discussion about JDAs begins without first discussing the common interest doctrine; a concept breathing life into all JDAs. The common interest doctrine (sometimes referred to as the joint defense privilege) is an extension of the attorney-client privilege. It allows parties sharing a common interest in defeating a mutual legal opponent to freely share information with each other without worry of waiving the attorney-client privilege as to their communications.

In Oregon, for civil cases, the doctrine is conveniently codified under ORS 40.255, OEC Rule 503(2)(c)—extending the attorney-client privilege to communications "by the client or the lawyer to a lawyer representing another person in a matter of common interest."

In federal courts, the Federal Rules of Evidence (FRE) require application of common law attorney-client and common interest privileges in federal criminal cases. See FRE 501. Thus, in the Ninth Circuit the common interest doctrine applies where (1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege is not waived. See *Hunydee v. United States*, 355 F2d 183, 185 (9th Cir 1965).

Key to fully understanding the scope of the common interest doctrine, is grasping how courts interpret the term "common interest." For example, in Oregon, to establish that a common interest exists, parties only need to show that their aligned interests are shared or similar; as opposed to identical.<sup>[1]</sup>

Even with such guidance, however, it can still be difficult to ascertain what each parties' respective interest is and, even more importantly, whether a common interest exists. To ensure there is not mistake, cooperating parties in the throes of litigation, or anticipating it, often enter into JDAs.

### **II. CONCERNS AND RISKS OF JOINT DEFENSE AGREEMENTS: JDA HORROR STORIES**

Besides clearly delineating the parties' common interest, JDAs provide a host of other benefits and cures—often utilized to facilitate efficient, coordinated, and cost-effective case preparation. It should be understood, however, such agreements are not without complication and risk. To support that point, the following case summaries have been compiled to illustrate just how easy it is to mishandle a JDA.

#### **A. Preparing for the Defector Co-Defendant**

A common issue associated with JDAs is the risk of a co-defendant deciding to cooperate with the government. According to the US Sentencing Commission, in 2017, approximately 97% of federal criminal cases ended in a guilty plea.<sup>[2]</sup> And around 11% of those total cases also saw a downward departure for substantial cooperation.<sup>[3]</sup> Most notably, for the typical white collar case, substantial cooperation often resulted in significantly less time than that suggested by the Guideline minimum.<sup>[4]</sup> Thus, it is not a question of, whether a co-defendant will cooperate with the government, but rather, when they will cooperate. For that reason, vigilant counsel should always be prepared for the inevitable co-defendant schism because failure to do so can be ruinous.

Consider *United States v. Henke*. In *Henke*, Silicon Valley executives were charged with conspiracy and financial fraud.<sup>[5]</sup> Initially, the executives, as co-defendants, worked together under a JDA. After some time, however, one of the executives began cooperating with the government. In exchange for a lesser charge, the executive agreed to testify against his co-conspirator.

The executive's trial testimony contradicted statements he'd made while a participant to the JDA. Defense counsel, however, refused to explore those contradictions through cross-examination for fear of violating the JDA. His client was convicted.

On appeal, however, the conviction was set aside and a new trial ordered. The Ninth Circuit noted that the conflict of interest impaired the defendant's constitutional right to cross-examine a witness who testified against him.

#### **B. Accepting the Court's Redline**

Dealing with a similar dilemma to that in *Henke*, the court in *United States v. Stepney*<sup>[6]</sup> attempted to sidestep all potential conflict of interest issues arising from JDAs among numerous defendants. By doing so, *Stepney* highlighted another risk associated with JDAs—particularly, the risk of the court dictating the terms of a JDA before its execution.

In *Stepney*, multiple defendants had been charged with violation of several federal drug and weapons laws. In an effort to prepare coherent defenses efficiently, defense counsel sought to enter into a JDA. This concerned the court. Specifically, the court was concerned with the large number of defendants, their lack of familiarity with each other, and the numerous and varied criminal charges involved in the case. The court also was rightly disturbed by the fact that one defendant had been murdered.

Out of concern for proper court proceedings, defendant safety, and defendants' constitutional rights, the court—*sua sponte*—ordered defense counsel to submit their proposed JDA to the court for *in camera* review. The court noted that pursuant to its supervisory powers, it had substantial authority to oversee its own affairs to make sure justice was served. In support of that point, the court stated:

When a party to a joint defense agreement decides to cooperate with the government, the potential for disclosure of confidential information also threatens other defendants Sixth Amendment rights. (citations omitted). Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Courts also have an independent interest in protecting a fairly-rendered verdict from trial tactics that may be designed to generate issues on appeal. Given the high potential for mischief, courts are well justified in inquiring into joint defense agreements before problems arise.<sup>[7]</sup>

Following its review of the JDA, the court ordered the following:

All JDAs had to be in writing, signed by defendants and their attorneys, and submitted to the court for review prior to going into effect.

Each JDA submitted had to explicitly state that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. Additionally, no JDA could purport to create a duty of loyalty.

Each JDA had to contain provisions conditionally waiving confidentiality by providing that a signatory attorney cross-examining any defendant who testifies at any proceeding whether under a grant of immunity or otherwise, may use any material or other information contributed by such client during the joint defense.

Each JDA had to explicitly allow withdrawal upon notice to the other defendants.

*Stepney* is a cautionary tale of the lengths the court, on its own accord, may go to in order to ensure court proceedings and defendants' rights are upheld and protected. When considering entering into a JDA, counsel should be aware of how the relationship between co-defendants and the factual circumstances of a particular case could prompt a court to exercise its ability to review and edit a proposed JDA.

### **C. Unprotected Hallway Discussions**

Counsel should also consider the degree to which certain communications by parties under a JDA are protected. For example, JDAs cannot protect communications that aren't, in the first place, covered by the attorney-client privilege.

Defendants learned that the hard way in *United States v. Krug*.<sup>[8]</sup> In *Krug*, a written JDA was entered into by co-defendants and their lawyers. After executing the agreement, co-defendants engaged in a hallway discussion about topics related to their case. The court ruled that the hallway discussions were not protected by the JDA and could be used as evidence against them during trial.

According to the court, the hallway communications did not serve the interests that justify the privilege. For example, the communications occurred outside the presence of any lawyer (even though, as the court notes, the lawyers were standing nearby) and were not made for the purpose of obtaining legal advice. The court characterized the communications as merely a "hallway discussion [consisting] of one member of the JDA conveying his independent, non-legal research to another member of the JDA while noting he had sent the same research to his attorney."<sup>[9]</sup> Moreover, the court noted that "the mere fact that the communications were among co-defendants who had joined in a joint defense agreement was, without more, insufficient to protect the statements from disclosure."

And relating the discussion back to Oregon, it is worth mentioning that a court applying Oregon law to the factual circumstances of *Krug* would likely have come to the same conclusion as the court in *Krug*. As mentioned above, OEC 503 does not extend attorney-client privilege to communications between co-defendants themselves. For communications to be protected under the rule they must be:

By the client or the client's lawyer to a lawyer representing another in a matter of common interest; and

Be made for the purpose of effectuating legal representation for the client.

### **D. The Oral JDA: Taking Co-Counsel's Word for It**

There is no rule that requires parties to a JDA to memorialize their agreement in writing; indeed, many JDAs are oral. Participants who insist on oral agreements, however, should appreciate the risk involved. Namely, the risk that the court may decide a JDA does not exist.

This happened in *United States v. Weissman*.<sup>[10]</sup> In *Weissman*, both the named defendant and his corporation were being investigated for securities fraud. Prior to trial, Weissman, his counsel, and counsel for the corporation met to discuss their legal strategy. During that meeting, Weissman made incriminating statements and damaging admissions, many of which were notated in memorandum format by the corporation's counsel. Later, those meeting notes were provided to the government.

Weissman invoked the joint defense privilege to ensure his own admissions would not be used against him. To prove his right to the privilege, Weissman's lawyer testified that, at the beginning of the meeting, he asked corporate counsel to agree that the meeting would take place pursuant to a JDA. According to Weissman's lawyer, corporate counsel agreed. Corporate counsel, however, had a different recollection of the meeting, and stated that no JDA was ever discussed.

The court sided with corporate counsel, concluding that there was no agreement and denied relief—Weissman's incriminating statements were not privileged and could be used against him at trial.

### **E. When "All for One" is not "One for All"**

There will be instances when a co-defendant attempts to monopolize the direction of legal strategy under a JDA solely to benefit themselves. Collaborating defense counsel should be weary of those situations, as a court may find that there is no JDA under such circumstances.

This happened in *United States v. Napout*.<sup>[11]</sup> There, Napout, former president of the South American Football Confederation ("CONMEBOL"), and CONMEBOL were being investigated by the government for fraud associated with the International Federation of Association Football (or "FIFA"). Around the same time, Napout, in his personal capacity, was under criminal proceedings, which included claims alleging he had harmed CONMEBOL.

Napout hired separate counsel for himself and CONMEBOL. He did this so that nothing occurring in his criminal case would be affected by the FIFA investigation. To ensure no complications would arise, counsel for Napout and CONMEBOL entered into a JDA during a telephone discussion. The discussion was memorialized in an email exchange the next day, with CONMEBOL's counsel writing:

The purpose of this email is to memorialize our discussions yesterday concerning our clients' common interests in the FIFA-related issues. We will cooperate pursuant to a common interest agreement. I understand it will have terms similar to the last one we had, and we can work out whether to have it in writing, specific details, etc. when you land. It is effective starting yesterday.<sup>[12]</sup>

During the course of the FIFA investigation, the government acquired certain records and communications between Napout and CONMEBOL's counsel. The government sought to use the information against Napout in his criminal case. This prompted Napout to assert his privilege over the documents.

The court concluded there was no JDA, or common interest privilege, protecting the information. Significant to the court's determination was the obvious conflict of interest between Napout and CONMEBOL. As the court explained, it had a difficult time reconciling "Napout's interest as a target of the government's investigation with CONMEBOL's opposing interest as a purported victim of the crimes alleged in [Napout's] indictment."<sup>[13]</sup> With no privilege identified, the government was free to use the information against Napout.

### III. CONCLUSION

Based on the foregoing, overly cautious counsel may conclude that a JDA is simply never worth the hassle. Instead, the hope is that by becoming more familiar with stories of JDAs gone awry, all counsel will be able to appreciate the very real risks, complexities, and concerns associated with JDAs. That way the choice to enter into one, or forgo the opportunity, will be informed and deliberate, and most of all with the best interest of the client in mind.

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[1] See *Port of Portland v. Oregon Ctr. for Env'tl. Health*, 238 Or App 404, 414, 243 P3d 102, 109 (2010), *rev den*, 350 Or 230 (2011) ("OEC 503(2)(c) suggests that the interest between parties must be shared, but not necessarily identical.").

[2] US Sentencing Commission ("USSC"), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureC.pdf>

[3] USSC, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/TableN.pdf>

[4] USSC, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table30.pdf> (noting white collar crimes such as larceny, fraud, embezzlement, forgery/counterfeiting, bribery, tax, and money laundering had a median percent decrease from Guideline Minimum of greater than 50%).

[5] 222 F3d 633 (9th Cir 2000).

[6] 246 F Supp 2d 1069 (ND Cal 2003).

[7] *Id.* at 1077–78.

[8] 868 F3d 82 (2d Cir 2017).

[9] *Id.* at 87.

[10] S1 94 CR. 760 CSH, 1996 WL 737042 (SDNY Dec 26, 1996).

[11] 15CR252S1PKCRML, 2017 WL 980323 (EDNY Mar 10, 2017).

[12] *Id.* at 2.

[13] *Id.* at 4.