



Considerations for Joint Defense Agreement

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1. WHAT IS A JDA?

- A Joint Defense Agreement (“JDA”) is an agreement entered into by two or more defendants regarding a common defense.
- JDAs are not contracts in the traditional sense. Instead, they act as a “written notice of defendants’ invocation of privileges set forth in common law.” *United States v. Stepney*, 246 F. Supp. 2d 1069, 1079 (N.D. Cal. 2003). Those common-law privileges refer to the so-called “common interest privilege” discussed below.
- The point of a JDA is for multiple defendants to work together in a common defense while protecting the confidentiality and privilege of shared information. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). This necessarily includes an agreement to protect information disclosed among members as privileged—i.e., the “common interest privilege.”

2. COMMON INTEREST PRIVILEGE PROTECTIONS?

- Entering a JDA offers strong protections. But it can also hamper a client’s ability to cooperate with the government in the future.
 - Specifically, a JDA member cannot waive and reveal any information from a co-defendant that would ordinarily be protected by attorney-client privilege learned through the JDA.¹
- Note too that a JDA will follow the client and the client will remain bound by JDA for any communications normally protected by the attorney-client privilege.
 - An individual member of a JDA, of course, remains free to waive his or her own privileged information. But a member cannot waive the privilege for protected information shared by another member. *See MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 606 (S.D. Fla. 2013) (“A member of a joint defense group can waive his privilege, of course, as to his own prior statements, but other clients of the joint defense group can keep him from directly or indirectly revealing the privileged communications of the other clients.”).
 - The privilege, however, does not apply to “subsequent adverse proceedings” between common-interest members. Restatement (Third) of Law Governing Lawyers § 76 cmt. f. But even this exception can be limited

¹ See Restatement (Third) of Law Governing Lawyers § 76 (“[A] member is not authorized to waive the privilege for another member’s communication.”); *see also Schwimmer*, 892 F.2d at 243 (explaining that a JDA “serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel”).

by specific terms in the JDA stating the information will remain privileged even in adverse proceedings between members. *Id.*

3. HOW STRONG IS A JDA?

- Defendants remain bound by JDAs, even if they retain new representation. If the client was represented by different counsel, this will not matter for the purposes of the JDA's protecting previously shared information—the JDA follows the client.
 - The client will be subject to honoring the privilege protected by the JDA's terms—assuming that privilege was not waived or otherwise limited.
 - So strong is the protection of a JDA, that some courts have even held oral JDAs to be valid. See *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012); *United States v. LeCroy*, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004). If a JDA is discussed and agreed to, then a binding JDA can form. See *United States v. Weissman*, 195 F.3d 96, 99-100 (2d Cir. 1999).
- While courts vigorously enforce JDAs, their “[p]rivileges should be narrowly construed and expansions cautiously extended.” *Weissman*, 195 F.3d at 100.
- The burden of proof for enforcing a JDA rests with the person claiming privilege under the JDA. *Id.* at 96.
- JDAs are not unassailable. Remember that they are not contracts. Courts can utilize their “inherent supervisory powers” to both inquire into the JDA and insist that certain “procedural requirements” be met when a defendant’s Sixth Amendment rights are at stake. *Stepney*, 246 F. Supp. 2d at 1077.
 - This can include requiring that the JDA be put in writing. *Id.* at 1076.
 - The Sixth Amendment also mandates that courts “inquire into potential conflicts” that become apparent during the representation—given what is at stake in a criminal prosecution. *Id.* at 1077.
- JDAs, of course, can create serious conflicts of interest. *Id.* They impose ethical duties both to the other parties as well as to the individual client. *Id.* And a withdrawal from the JDA—especially at a later stage—can create prejudice. *Id.* Thus, courts are free to inquire into the “high potential for mischief” that a JDA in a criminal case can present. *Id.*
- Further, the usual crime-fraud exception to privilege also applies to JDAs. Thus, if a defendant (or defendant’s counsel) learns that another defendant is perpetrating a fraud, then the fraudulent actions may be disclosed. See, e.g., *In re Grand Jury*, 475 F.3d 1299, 1302 (D.C. Cir. 2007) (holding that counsel properly disclosed an admission by another defendant’s counsel that a key document had been forged).
- A JDA also will not preclude the use of damaging evidence that a defendant obtained from an independent source. In other words, the fact that one defendant disclosed some information through the JDA does not shield other members from utilizing that information provided it was learned from an independent source.
 - As is true of privilege generally, privilege claims can be overcome by showing that the information was obtained “from a legitimate, independent source.” *Schwimmer*, 892 F.2d at 446.²

² See *Fireman’s Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 139 (S.D.N.Y. 2012) (“The doctrine ‘is not an independent source of privilege or confidentiality’ so that ‘[i]f a communication is not protected by the attorney-client privilege or the attorney work-product doctrine, the common interest doctrine does not apply.’” (alterations in original)); *Schanfield v. Sojitz Corp. of Am.*, 258 F.R.D. 211, 215 (S.D.N.Y. 2009) (“The common interest doctrine does not provide an independent source of protection from disclosure; it is inapplicable to documents not otherwise protected by the attorney-client privilege or work product doctrine.”); *United States v. Agnello*, 135 F. Supp. 2d 380, 381 (E.D.N.Y. 2001) (“The joint defense privilege ‘is not an independent basis for privilege but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.’”)

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4. IMPORTANT CONSIDERATIONS:

- Before assuming representation of a client, inquire whether that client is a member of a JDA. Chances are the client will continue to be bound by the JDA.
- If preparing a JDA, it is best to be detailed—particularly if you are looking to protect something specific. Remember that courts will narrowly construe and cautiously extend the JDA’s protections. *Weissman*, 195 F.3d at 100.
- Before advising a client to enter a JDA, consider the adverse interests of the client versus those of other defendants.
 - If a client’s best option may be to proffer evidence against co-defendants and accept a plea deal, then a JDA may not be advisable.
 - On the other hand, if independent sources of evidence against other co-defendants exist, perhaps entering a JDA would be beneficial. In the event that the client’s best play becomes striking a deal with the prosecution, evidence can still be tendered.
 - Be sure to also think about the potential of squabbling over whether the information was truly obtained from an independent source. Even if it was, be sure that the situation can be made clear to the court—lest the court conclude that the information was obtained via the JDA and find it privileged.
 - Conversely, consider independent sources of evidence against the client. If codefendants can squeal on the client, perhaps the best option is to beat them to prosecutor’s office rather than trying to pull together a tenuous defense team.
- Likewise, consider the client’s future interests and how those interests may be impacted by a JDA.
 - Specifically, if there is a likelihood that the client will bring a civil action against a co-defendant, be sure that a JDA does not include language extending its reach to future adversarial proceedings.

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