

White Collar Corner: Reducing risks associated with joint defense agreements

■ ALAN J. BOZER AND MARIO FADI AYOUB SPECIAL TO THE DAILY RECORD

JOINT DEFENSE AGREEMENTS (“JDA”) are an attractive option where multiple defendants face the same allegations. But what happens when one party to a JDA abandons the agreement and cooperates with the government? While the risk is always present, thoughtful drafting can turn a JDA into an efficient and enforceable defense tool that benefits all parties. A

recent case shows that a JDA offers powerful protections even when one member breaks the agreement.

Background and History

Litigation often involves multiple defendants with separate counsel. Codefendants, possibly with differing interests, often face the same claims and assert the same counterclaims and defenses. There are obvious advantages to coordinating efforts. A JDA allows defendants to pool resources and knowledge in order to develop common strategies and arguments pursuant to the common interest privilege. This privilege “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.” *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

The common interest privilege was first recognized by the Supreme Court of Virginia in 1871, where the Court held that three co-conspirators in a criminal fraud case “had a right ... to consult together about the case and the defence, and ... that all the information, derived by any of the counsel from such consultation, [was] privileged, and the privilege belong[ed] to each and all of the clients, and [could not] be released without the consent of all of them.” *Chahoon v. Commonwealth*, 62 Va. 822, 842 (1871). The privilege was first applied in the civil context by the Supreme Court of Minnesota in 1942, see *Schmitt v. Emery*, 211 Minn. 547, 555 (1942), and first recognized in federal court by the Ninth Circuit Court of Appeals in 1967. See *Hunydee v. United States*, 355 F.2d 183, 184 (9th Cir. 1965).

Trust is a key element of a JDA, but sometimes when the stakes are high, codefendants may decide to cooperate with the government and enter plea negotiations. In 2018, more than 97% of federal criminal convictions were the result of plea bargains.[1] Thus, codefendants should exercise caution when deciding whether to enter into such an agreement.

JDA Enforceability

U.S.A. v. Pisoni, a recent criminal fraud case out of the Southern District of Florida, demonstrates the risks posed and the broad protections afforded by JDAs. No. 15-CR-20339 (S.D. Fla. filed

May 7, 2015). In July 2021, a federal district judge said he would order a new trial for three men convicted after trial because he was persuaded that federal prosecutors “deliberately misled” him and knowingly used confidential information obtained unlawfully from the defendants’ JDA meetings.[2]

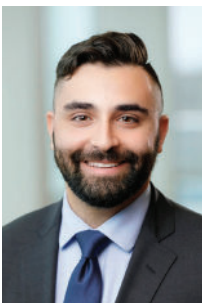
Four men had been charged in Pisoni with mailing falsified notices to individuals stating that they had won a substantial prize. The defendants instructed the “winners” to pay them a fee ranging from \$20 to \$50 to collect the winnings. The defendants were able to collect payments from over 100,000 recipients.

The four defendants entered into a JDA. They and their counsel met frequently to share information and to coordinate strategy. About one year later, in April 2016, it was learned that a superseding indictment had been filed against one of the defendants — Leon. It was then revealed that Leon had signed a plea agreement in February 2016 and had begun to cooperate with the government. Leon, however, had been attending JDA meetings regularly since signing the plea agreement and had been sharing confidential information with prosecutors.

The three other defendants moved to dismiss the indictment, arguing that the government had invaded the defense camp. The court agreed, but then declined to dismiss the indictment on the basis of the government’s assurances that it had acted in good faith and had no knowledge that Leon was relaying privileged JDA information to prosecutors.



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In January 2018, one year after Leon's three codefendants were convicted, the government filed a notice to correct the record. The notice resulted from an Office of Professional Responsibility (OPR) investigation into the government's dealings with Leon. The OPR investigation determined that the prosecutors in the case had misled the court. It was established that the prosecutors had been aware of the JDA, knew that Leon continued to attend JDA meetings after signing the plea deal, obtained extensive strategy notes from Leon, and obtained information about witnesses and documents the defendants planned to use at trial. Worst of all, prosecutors lied when they told the court that Leon had not provided them with privileged documents obtained through the JDA.

In ordering a new trial, the federal judge noted that there "was no way the defense could have truly known the extent of the misconduct" and that a new trial was required to "uphold the integrity of these proceedings and ... to protect the defendants' constitutional rights.[3]" At the time of this writing, the court has yet to issue a written order for a new trial. Once issued, the government can appeal.

While Pisoni serves as a cautionary tale for those looking to enter into a JDA, this case also reveals how the courts will uphold the common interest privilege. The defendants will have a new trial based on the breach of the JDA and this time around prosecutors will need to try the case without the privileged details provided by Leon.

Lessons Learned:

Drafting a Strong JDA

Breaches of contracts are a staple of American jurisprudence. A defendant, like any other party to an agreement, cannot fully eliminate the risk that another party to a JDA may breach and "spill the beans," but defendants can keep their eyes open.

Suggestions:

- **Counsel should identify and discuss risks with the client before entering into a JDA.** At the onset of a criminal case, where the same or similar charges have been filed against codefendants, it may be tempting to assume that all codefendants' interests are perfectly aligned and that a JDA will be the most efficient way to proceed with a unified defense. As the government develops its case and new facts are uncovered, however, the codefendants' relationships may dramatically change. Common risks include participant withdrawal, confusion regarding what materials are protected by privilege, and strategic coordination issues where the parties' interests may conflict. It is good practice for counsel to discuss possible future conflicts and identify risks to sharing information prior to entering into a JDA.
- **Clearly define the scope of the agreement and rights afforded to the parties.** If the benefits of entering into a JDA outweigh the risks, the next step is to carefully define the scope of the agreement. The agreement should clearly identify the parties and establish

what claims, events or other aspects of the litigation are subject to the agreement. Establishing the scope early will prevent confusion later regarding which communications are covered under the JDA and which are not. Further, the JDA should clearly identify the rights of the parties: when disclosure is permitted, how to respond to requests for information, who has access to defense materials, and restrictions on negotiating with adverse parties.

- **Establish requirements for withdrawal and termination.** Counsel should include specific requirements for withdrawing from or terminating the agreement and clearly define what information will remain subject to confidentiality restrictions. This will prevent confusion about what information remains subject to the JDA after a party withdraws or the joint defense is otherwise terminated. Further, the JDA should also contemplate whether a party can be forced to withdraw due to a breach of the agreement's terms.

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[1] U.S. Sentencing Comm'n, Table 11, Guilty Pleas and Trials in Each Circuit and District, Fiscal Year 2018, 2018 Annual Report and Sourcebook of Federal Sentencing Statistics 56 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf>.

[2] Hailey Konnath, Judge Orders New Trial After AUSAs 'Deliberately Misled' Him, Law360 (July 16, 2021), <https://www.law360.com/articles/1404097/judge-orders-new-trial-after-ausas-deliberately-misled-him>.

[3] Konnath, *supra* note 2.