

## [Joint Defense Groups in Complex Litigation](#)

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**Maintained**

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This practice note addresses key considerations in forming and managing joint defense groups (JDGs), and it explains the legal framework underlying the joint defense and common interest doctrines, outlines how to form a JDG—including in pre-litigation settings—and provides practical guidance on structuring and operating JDGs with respect to governance, membership, cost-sharing, and communications. It also discusses challenging issues that frequently arise, such as who may join, what information can be shared, how to handle diverging interests, and the ethical and practical pitfalls counsel should anticipate and avoid.

Complex litigation rarely unfolds as a two-party dispute. In mass tort actions and multidistrict litigations, multiple defendants may confront common claims, overlapping facts, and intertwined legal questions—often making solo defense efforts inefficient and potentially riskier. Without coordination, parties may duplicate work, take inconsistent positions, and accidentally waive protections.

JDGs offer a practical solution: a structured way for aligned parties to collaborate, share costs, and develop defenses while preserving privilege and work product protections through the joint defense/common interest doctrine. When done properly, JDGs can accelerate fact development, strengthen expert strategy, and reduce motion practice. But if not executed properly, they may invite privilege concerns, strategic missteps, and cost-sharing disputes.

For a related template, see [Joint Defense and Confidentiality Agreement \(Federal\)](#).

### **Legal Framework**

JDGs exist because aligned parties can share privileged information to further a common legal objective without waiving protection. Sometimes referred to as the "common interest doctrine" or the "joint defense privilege," this is not a stand-alone privilege; it is a narrow exception to the general rule that disclosure to a third-party defeats privilege.

This doctrine first emerged in criminal cases but was later extended to civil cases because "[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter." In *re Grand Jury Subpoenas*, 89-3 & 89-4, John Doe 89-129, [902 F.2d 244, 248–49 \(4th Cir. 1990\)](#) (quoting [United States v. Schwimmer](#), 892 F.2d 237, 243–44 (2d Cir. 1989)) (citations omitted).

"In effect, the common interest doctrine extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances. For that reason, the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise." [United States v. BDO Seidman, LLP](#), [492 F.3d 806, 815–16 \(7th Cir. 2007\)](#).

Key features courts generally (though not uniformly) require include:

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- **A genuinely legal, not merely commercial, common interest.** Business objectives alone do not qualify. See, e.g., [In re Teleglobe Commc'ns Corp.](#), 493 F.3d 345, 365 (3d Cir. 2007) ("[t]he key consideration is that the nature of the interest ... be legal, not solely commercial") (citation omitted).
- **Counsel communications.** Courts are more skeptical of client-to-client exchanges without lawyer involvement. See, e.g., [Teleglobe Commc'ns Corp.](#), 493 F.3d at 364 ("to be eligible for continued protection, the communication must be shared with the attorney of the member of the community of interest") (emphasis in original).
- **Litigation Posture.** Some courts require pending or reasonably anticipated litigation; others extend protection to non-litigation settings when the purpose is legal advice on a shared legal concern. Compare [Ambac Assur. Corp. v. Countrywide Home Loans, Inc.](#), 27 N.Y.3d 616, 616 (2016) (requiring that "the communication relate to litigation, either pending or anticipated, for the exception to apply"); with [BDO Seidman, LLP](#), 492 F.3d at 816 ("communications need not be made in anticipation of litigation to fall within the common interest doctrine").
- **Communications in furtherance of the shared legal objective.** The communications must generally advance the joint legal strategy in confidence, not merely share nonlegal information. See, e.g., [BDO Seidman, LLP](#), 492 F.3d at 816 ("the doctrine is limited strictly to those communications made to further an ongoing enterprise"); [Schwimmer](#), 892 F.2d at 243 ("Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.") (citation omitted).

The takeaway is both flexible and cautionary: JDGs are most effective when anchored in a clearly defined legal objective, with lawyers at the center, and structured to satisfy the most restrictive plausible standard that could govern later privilege disputes.

### Formation of JDGs

Start with alignment. Form a JDG only if participants genuinely share a common legal interest that justifies collaboration. That interest might be defeating liability on overlapping claims, coordinating and harmonizing defenses on causation and damages, or aligning discovery protocols and protective orders. A JDG is not joint representation: each client retains separate counsel, conflicts must be cleared, and any participation is with informed client consent. The group is a collaboration, not a merger of attorney-client relationships.

**Put it in writing.** A formal joint defense agreement (JDA) may not be strictly required to invoke common interest protection, but in practice, it is essential. A thoughtful JDA memorializes intent, anchors the collaboration in a legal objective, sets guardrails courts can assess if privilege is challenged, and prevents mismatched expectations.

**Plan for change.** Litigation is dynamic—new defendants appear, theories shift, and interests can diverge. Build flexibility into your agreement, including by providing for the admission of new members, defining withdrawal mechanics, and describing what happens to shared material upon exit. Critically, agreements should also include a continuing confidentiality obligation that survives termination. Finally, the agreement should choose governing law and a forum for disputes under the JDA—ideally a jurisdiction whose common interest doctrine is well-developed and favorable.

**Don't wait for a complaint.** JDGs can be valuable in pre-litigation and regulatory settings to the extent the relevant jurisdiction recognizes common interest privilege in such settings. Regulatory agencies frequently issue requests for information, civil investigative demands, or subpoenas aimed at multiple stakeholders. A JDG may help harmonize privilege positions, align search parameters, standardize response formats, and ensure consistency on legal theories—all while preserving the independence each company needs for its unique facts and risks.

**Putting it all together.** While each circumstance leading to the formation of a successful JDG and governing JDA will be factually distinct, a successful JDA will, at a minimum, cover the following:

- Parties and covered affiliates

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- The defined common legal interest and subject-matter scope
- A clear provision confirming that sharing among the group is for the purpose of litigation preparation and preserves privilege/work product
- Counsel-centric communications, emphasizing substantive exchanges
- Separate representation and no fiduciary duties among members; no authority to bind other parties absent express agreement
- Onboarding and offboarding mechanics, including criteria to admit new members, withdrawal procedures, return/destruction of shared materials, and a continuing confidentiality obligation that survives exit, withdrawal, or termination of the JDG –and–
- Choice of governing law and forum for JDA disputes, preferably a jurisdiction with a well-developed, favorable common interest doctrine

For a sample agreement, see [Joint Defense and Confidentiality Agreement \(Federal\)](#).

### Best Practices for Structuring JDGs

Once a JDG is formed, success depends less on the ink in the JDA and more on operational discipline. The practicalities of who does what, how communications flow, and how information is safeguarded can preserve the promised protections or potentially undermine them.

Counsel should clearly outline roles and responsibilities to provide for a well-functioning JDG. Workstreams within the JDG can often mirror the litigation itself. For example, there may be specific subgroups and roles responsible for fact discovery, expert strategy, motion practice, and settlement or mediation. Assigning leads to each stream (and anticipating divergence) encourages accountability and minimizes duplication. It can also create discrete channels for sensitive topics.

Communication protocols are the first line of defense against privilege issues and should therefore be counsel-led and purpose-driven. Practitioners should ensure that substantive exchanges include counsel, are framed as requests for or provision of legal advice, and be labeled accordingly (recognizing that labels alone may help, but do not create privilege). Counsel should check that distribution lists exclude business personnel who are not necessary for the legal work and are audited as personnel change. Finally, counsel should ensure that secure collaboration platforms with encryption and access controls are utilized to limit downloads, revoke access, and certify destruction at the end of the matter.

### JDGs in Practice

Expert strategy is one area where JDGs can pay particularly strong dividends. Early in the case, the group should decide whether to retain joint consulting experts on foundational issues (e.g., causation, damages, and methodology). Consulting experts can drive efficiency, harmonize the defense narrative, and stress test divergent theories typically without the disclosure obligations attached to testifying experts. If consensus emerges, the group can later jointly designate testifying experts, mindful that Federal Rule of Civil Procedure 26 protects draft reports and most attorney-expert communications, but requires disclosure of facts and data considered, assumptions relied upon, and compensation. The more the group shares with a testifying expert, the more that may be discoverable. Best practices include keeping sensitive modeling and scenario analyses with only consulting, and not testifying, experts unless and until the group decides to put them forward. If interests diverge, the JDG should be prepared to manage subgroups with their own experts and to limit cross-sharing.

Case workups also benefit from standardized tools. A shared chronology, cast of characters, and issue modules, among other things, can align efforts across defendants and reduce costs. Joint interviews of certain third-party witnesses may be appropriate where interests truly align, while interviews of key internal custodians should remain

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within each party's control. Participants of a JDG could also share summaries in a manner and at a level of generality that preserves privilege. For depositions, agreeing in advance on which counsel will take lead on common topics, exhibit handling, time allocations, and objection protocols can prevent misalignment. Joint briefs, to the extent they present common legal issues, present a unified voice and can earn favor with courts by conserving pages, while separate briefs reserve space for unique facts and defenses. Coordination is again paramount to avoid inconsistent arguments and positions; where divergence of interests is unavoidable, coordination is key to having advanced knowledge of such divergence and preserving party-specific positions. Finally, in settlement and mediation, JDGs can leverage process efficiencies like mediator selection, logistics, and common-issue statements without disclosing bottom lines or business information that could spur harmful competitive behavior.

### Common Pitfalls and How to Avoid Them

Privilege waiver is the dominant JDG risk and it often happens in ways that are avoidable. One error is allowing client-to-client exchanges without counsel. Another pitfall is conflating legal and business discussions. The more a message reads like business advice, the more challenging the privilege claim. Instead, use counsel-led channels, clearly frame communications as legal advice, and segregate business discussions. Sharing with third parties can also defeat privilege unless those parties are necessary to the legal advice and are appropriately engaged.

Despite best efforts, inadvertent productions of privileged materials can happen, particularly in large-scale discovery. Without a clear directive in the JDA and follow-through by the relevant parties, however, inadvertent production of privileged material can metastasize into subject-matter waiver in some jurisdictions. Conflicts of interest within the group are another source of fragility. JDGs are attractive precisely because they avoid joint representation, but that does not eliminate conflict concerns.

JDGs also sit within broader business relationships. For example, manufacturers, distributors, and retailers can find themselves aligned legally but entangled commercially. Those ties can make candid collaboration difficult. The JDG should anticipate these pressures and anticipate divergence. It can create topic-specific subgroups to sequester especially sensitive areas, insist on neutral formulations in joint filings that avoid placing blame, and allow opt-outs on positions that materially prejudice a particular member's unique defenses. When divergence becomes likely, the group should consider tolling agreements among members to pause limitations periods for crossclaims while the common defense continues. At the same time, the group should be prepared to narrow collaboration, sequester information flows, and, if necessary, facilitate orderly withdrawal with destruction or return of shared materials and reaffirmed confidentiality obligations.

When alignment shifts, speed and clarity matter. The JDA should require prompt notice if a member is considering regulatory cooperation, contemplating a settlement that may adopt facts adverse to others, or otherwise anticipating a shift in position. Upon such notice, the group should swiftly evaluate whether to narrow access for that member, create subgroups, pause certain shared workstreams, and document the rationale and steps taken to preserve privilege. The JDG should also weigh soft factors such as reputational interests, cohesion, and resource asymmetries within the group. Sometimes excluding or downgrading access for a wavering member safeguards the JDG's credibility with a court; other times, tighter guardrails keep a smaller participant inside the tent without undue risk. There is no one-size-fits-all answer; the key is to ground decisions in the JDG's legal purpose and to document the steps taken to preserve privilege.

### Ethical Considerations

JDGs implicate both privilege doctrines and professional responsibility rules. Counsel must navigate both with care. Model Rule of Professional Conduct 1.6 requires lawyers to protect client information. Sharing within a JDG must be reasonably necessary to represent the client's interests and consistent with the JDA's limits. Similarly, Rules 1.7 on current clients and 1.9 on former clients regarding conflicts demand continuous vigilance. A JDG is no safe harbor from conflicts; if the JDG contains a member who was a former client, counsel must be mindful of the obligations to both that JDG member as a former client, but also to counsel's current client within the JDG. Rule

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4.2's no-contact principle also remains in force in JDG contexts. Communications with represented parties should go through counsel, and JDGs exist to facilitate counsel-to-counsel collaboration, not to open direct lines between clients.

**Conclusion**

JDGs reflect a simple truth about modern litigation: aligned parties can mount a stronger and more coherent defense, but only within clear legal and ethical guardrails. The common interest doctrine enables protected sharing for a shared legal purpose. But the doctrine is neither self-executing nor uniform. Successful JDGs are intentional from the start: they define a concrete legal objective and reduce their arrangement to writing in a JDA that defines scope, privilege, governance, conflict management, and exit. Used wisely and armed with the guideposts covered in this article, JDGs can conserve resources, avoid inconsistent positions, and present a unified defense without sacrificing privilege.

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