

# Properly Joining in a Co-Party's Brief or Motion to Avoid Waiver Issues

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*United States v. Ramirez-Rivera*, 800 F.3d 1 (1st Cir. 2015)

Joining in a co-party's brief or motion can be cost effective and aid the court in streamlining legal issues. But the careful litigator should make sure to explain to the court how the other party's arguments apply to your client. Failure to do so may result in waiver, as a recent First Circuit decision makes clear. See *United States v. Ramirez-Rivera*, 800 F.3d 1 (1st Cir. 2015).

In *Ramirez-Rivera*, three defendants were convicted of numerous federal drug and gun crimes, and each appealed. Two of the defendants filed a joint brief, and the other defendant filed a separate brief. Each tried to join in the other's brief, but failed to explain how the arguments in the other brief applied. Instead, they simply included language such as "to the extent they are applicable," they join in the arguments raised in the other brief.

The First Circuit took the opportunity to explain how this was insufficient under the rule governing briefs in cases involving multiple appellants/appellees, Federal Rule of Appellate Procedure 28(i). In quoting a prior decision on the subject, the Court explained that "[a]doption by reference cannot occur in a vacuum and the arguments must actually be transferable from the proponent's to the adopter's case.' Therefore, where, as here, an appellant 'offer[s] no explanation as to why [his co-appellant's] arguments pertained to him,' such 'textbook perfunctory' treatment waives the appellant's attempts to adopt-by-reference his co-appellant's arguments." 800 F.3d at 12 n.1 (internal citation omitted). In another recent case, the D.C. Circuit explained the rule to mean that "adoption by reference is permitted only to the extent we can readily apply the proponent's arguments to the adopter's case." *United States v. Straker*, 800 F.3d 570, 594 n.5 (D.C. Cir. 2015).

Although *Ramirez-Rivera* and *Straker* are criminal appellate cases, the courts' admonitions apply across the board. The defendants in *Ramirez-Rivera* wanted to take advantage of every argument that was presented, but they failed altogether to explain to the court how those arguments would apply to their particular facts and circumstances.

Adopting another party's arguments in a brief—or a motion for summary judgment, motion to dismiss, etc.—can be effective, but you had better be sure that the court understands how those arguments apply to your client. Err on the side of providing specificity, and make sure the court has all the facts it needs to apply the adopted argument to your client.

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