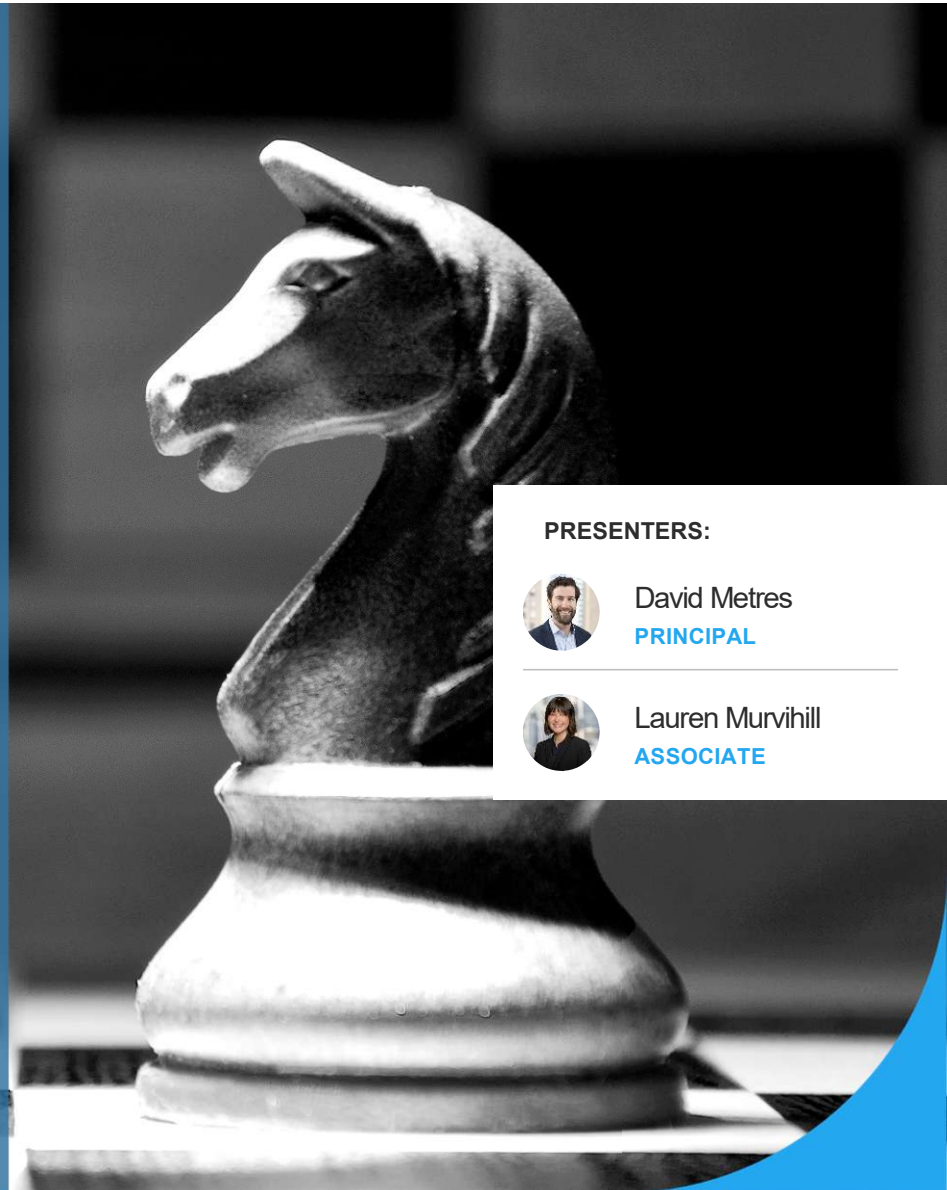




# Ethical Pitfalls and Best Practices in Superfund and Other Multi-Party Litigation

ACC-SFBA Webinar

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# Background and Overview

What is CERCLA?

What is its purpose?

How is it used?

Why is it relevant to the topics of this CLE?

CERCLA cases often involve multiple parties over varying time periods, but all parties contributed to the same issue at some point and are on the hook for it now



# CERCLA Liability and (Potential) Litigation

What is the standard of liability? How is liability found?

Liability includes retroactive liability

EPA enforcement

PRP “compensation and liability”

Multi-party involvement

Joint-and-several liability

Apportionment (divisibility) versus allocation



# Common-Interest / Joint Defense Groups: Why Consider Them?

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Enables sharing of privileged factual development, legal theories, and strategy

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Prevents waiver when exchanging attorney-client communications or work product

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Reduces duplicative discovery and inconsistent positions

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Joint-defense and common-interest arrangements are privilege-preservation tools, not loyalty commitments



# Common-Interest / Joint Defense Groups are Appropriate When...

Parties have a “shared legal interest” related to actual or anticipated litigation, enforcement, or legal exposure. *OXY Resources v. Sup. Ct.* (2004) 115 Cal. App. 4th 874

- E.g., all PRPs at a Superfund site and negotiating with EPA; all companies part of the same industry defending a class action lawsuit or a lawsuit alleging illegal coordination (e.g., tobacco cases); joint venture partners facing claims related to the venture

What is not a shared legal interest?

- Shared business, financial, or commercial interests; co-defendants (without explicit understanding).

Privileged information must be exchanged

Alignment exists now, even if it may not later



# In the CERCLA context, Common-Interest / Joint Defense Groups are appropriate when...



**Members (PRPs) have common objectives**

- Jointly evaluating third parties to add as PRPs
- Jointly negotiating orders and the scope of cleanup with regulators to limit costs
- Jointly attempting to limit or eliminate third party claims arising from chemicals in soil, groundwater or air
- Engaging common counsel and common consultants to represent and advise the Group or serve as consulting or testifying experts

# Other Contexts for Common-Interest / Joint Defense Groups



## Parallel Civil / Criminal Litigation



## Government Investigations and Enforcement Actions – DOJ, SEC, EPA, FTC, or state AG investigations



## Corporate or Real Estate Transactions with Shared Legal Risk



## Patent, IP, and Trade Secret Disputes

- Defend infringement claims
- Why consider?
  - Coordinated invalidity or non-infringement strategies
  - Shared technical analyses and expert development
  - Avoids waivers



# Other Contexts for Common-Interest / Joint Defense Groups



## Mass Tort and Product Liability

- Shared factual investigations (site history, product design)
- Joint expert strategy
- Unified legal defenses against plaintiffs or regulators



Citizen suit or other litigation against manufacturers or producers of the same products



Employment context and potential private attorney general actions

## Joint vs. Separate Counsel

When should you consider common counsel (joint counsel)?

What about joint consultants?

Managing communications among multiple represented parties



# Common-Interest and Joint Defense Groups – PRP Agreements

Timing – **BEFORE** sharing privileged information

Key provisions of joint defense or common interest agreements

- Purpose and scope of shared legal interest
- Definition of protected communications
- No creation of attorney-client relationship
- No waiver of privilege
- Termination and survival provisions
  - Triggering events
  - Survival of privilege protections
  - Use of shared materials after termination

Tolling and reservation of claims vis-à-vis other JD group members

Funding

*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874



# Practical “Red Flags” to Highlight

## In-house counsel should pause and reassess when:

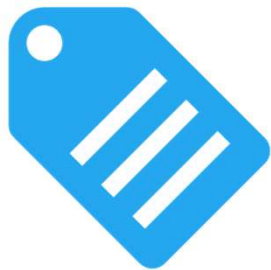
- Interests are mostly aligned but not identical
- One party may later cooperate with the government
- Business teams are driving information sharing without legal oversight
- No one has defined when or how the arrangement ends

## In-house counsel should control who is inside the “Privilege Bubble”

- Identify who may receive shared information
- Avoid
  - Open distribution list
  - Copying business teams without legal need

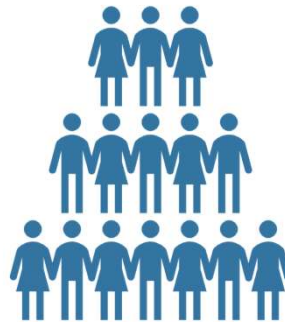
## Avoid forwarding common-interest communications internally without controls

# Best Practices for In-House Counsel



## Label Communications – But Don't Rely on Labels Alone

- Best practice – use consistent legends (**Common-Interest-Privileged Communication**)
- BUT, tie each communication to the shared legal interest
  - Labels can demonstrate intent, but substance—not form—controls privilege determinations



## Revisit Alignment Regularly

- Periodically reassess whether interests remain aligned
- Trigger reassessment internally when:
  - Settlement discussions begin
  - Cooperation with regulators is contemplated
  - Individual party's exposure change
- Alignment is dynamic



## Coordinate with Outside Counsel

- Vet the agreement
- Manage privileged exchanges
  - Serve as representative (along with client rep) to joint defense group meetings
  - Serve as gatekeepers for shared communications





Open Discussion

# Hypotheticals

**Ethical Pitfalls to Avoid While  
Considering the California Rules of  
Professional Conduct**

# Commonly Implicated Ethical Rules

CRPC 1.4: Communication with Clients.

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CRPC 1.6: Confidential Information.

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CRPC 1.7: Conflict of Interest: Current Clients.

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CRPC 1.9: Duties to Former Clients.

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CRPC 2.1: Advisor.

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CRPC 3.4: Fairness to Opposing Party and Counsel.

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CRPC 4.2: Communication with a Represented Person.

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# Will you be... in my Joint Defense Group?

SCENARIO	ISSUE(S) RAISED	CRPC?	DISCUSSION QUESTION	TEACHING POINT
<ul style="list-style-type: none"> <li>EPA issues a general notice letter under CERCLA for a collection of mine sites in Eastern Dakota to 11 PRPs.</li> <li>The general notice letter alleges that the 11 PRPs owned the mines, carried out the mining, or processed the ore, but the letter is unclear on who did what.</li> </ul>	<ul style="list-style-type: none"> <li>Is there a shared legal interest?</li> <li>What is the appropriate timing for forming a joint defense group?</li> <li>What protections will your client be afforded?</li> </ul>	<ul style="list-style-type: none"> <li>CRPC 1.6: Confidential Information of a Client</li> <li>CRPC 1.4: Communication with Clients</li> <li>CRPC 1.7: Conflict of Interest: Current Clients</li> <li>CRPC 4.2: Communication with a Represented Person</li> </ul>	<ul style="list-style-type: none"> <li>Can you form a joint defense group in this situation? What issues should you consider? What information would you want to gather to evaluate the issue?               <ul style="list-style-type: none"> <li>What information can you share with the members of the joint defense group?</li> </ul> </li> <li>Should you consider common counsel? For what purposes?               <ul style="list-style-type: none"> <li>Representation before EPA, so that the PRPs speak with a single voice; this could be served by remediation counsel.</li> <li>Litigation counsel to pursue other PRPs that have not participated.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>The need for a joint defense group can come up suddenly.</li> <li>Quick and accurate evaluation of your client's needs is essential to ensure maximum protection of interests.</li> </ul>

# When Interests Diverge

## SCENARIO

- Citizen Suit Plaintiffs (CSPs) file and serve a notice of intent to sue (NOI) under Proposition 65 alleging failure to warn California consumers of exposures to PFAS (per- and poly-fluoroalkyl substances).
- You are in-house counsel at Big Cookware, Inc. Big Cookware learns that several other cookware manufacturers, including your law-school-classmate's company Slippery Surfaces, also received NOIs from the CSPs.
- You are evaluating your outside counsel's proposal to form a joint defense group with four other manufacturers.

## ISSUE(S) RAISED

- Evaluation of shared legal interest.
- What is the scope of that shared legal interest?

## CRPC?

- CRPC 1.1: Competence
- CRPC 1.4: Communication with Clients
- CRPC 1.6: Confidential Information of a Client
- CRPC 1.7: Conflict of Interest: Current Clients
- CRPC 4.2: Communication with a Represented Person

## DISCUSSION QUESTION

- You learn that Big Cookware's products do not have intentionally-added PFAS, but Slippery Surfaces's product does have intentionally-added PFAS.
- Can the common-interest or joint defense group continue to share privileged communications?
- If the Group had retained common counsel, could common counsel continue to effectively represent the group? What issues should be considered?

## TEACHING POINT

- Shared industry interests are not necessarily shared legal interests.

# The “Common Interest” That Wasn’t

## SCENARIO

- Three competitors exchange legal analyses under a “common interest” label while lobbying against proposed regulation. No litigation is pending or threatened. Years later, the documents are sought in civil discovery.
- Can the members of the group rely on the “common interest” exception to privilege waiver?

## ISSUE(S) RAISED

- Whether a legal (vs. commercial or political) interest existed.
- Risk of privilege being rejected entirely.
- Antitrust issues.
- Whether documents prepared for actual or anticipated litigation.

## CRPC?

- CRPC 1.4: Communication with Clients
- CRPC 1.6: Confidential Information of a Client
- CRPC 1.7: Conflict of Interest: Current Clients
- CRPC 2.1: Advisor

## DISCUSSION QUESTION

- How could this arrangement have been structured differently?

## TEACHING POINT

- Courts reject common-interest claims that are primarily business or policy-driven.
- Must have a shared legal interest.



# Expert Strategy Gone Wrong

## SCENARIO

- A joint defense group collectively develops expert strategy and shares draft expert reports. One member later settles and becomes a third-party witness.
- Plaintiffs subpoena the expert drafts and joint strategy communications.
- Are these materials still protected, or did the settling party's change in status destroy privilege?

## ISSUE(S) RAISED

- Work-product protection versus common-interest sharing.
- Whether settlement changes privilege status.
- Risk of discovery into joint expert development.

## CRPC?

- CRPC 1.6: Confidential Information
- CRPC 1.7: Conflict of Interest: Current Clients
- CRPC 1.9: Duties to Former Clients
- CRPC 3.4: Fairness to Opposing Party and Counsel

## DISCUSSION QUESTION

- Should expert materials be treated differently from legal analyses?

## TEACHING POINT

- Joint development of expert strategy magnifies efficiency—and discovery risk.

## Joint-defense arrangements are not ethical safe harbors.

They require continuous compliance with California's confidentiality, conflict, and competence rules, often under rapidly changing facts.





# Questions?

## Thank you!



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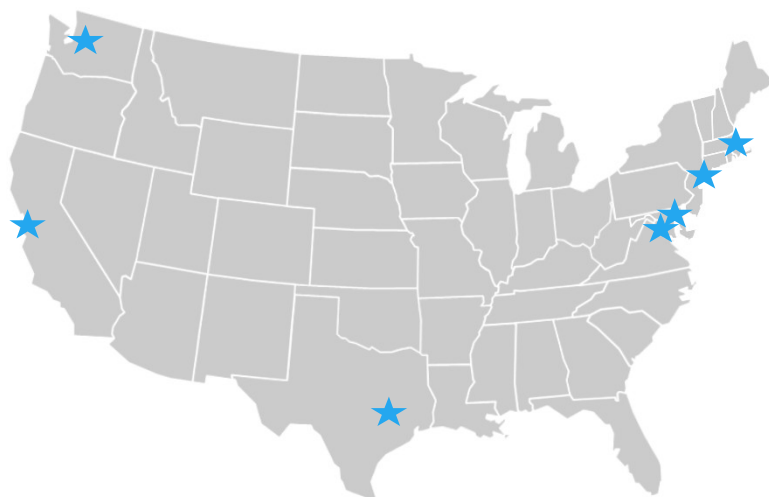
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