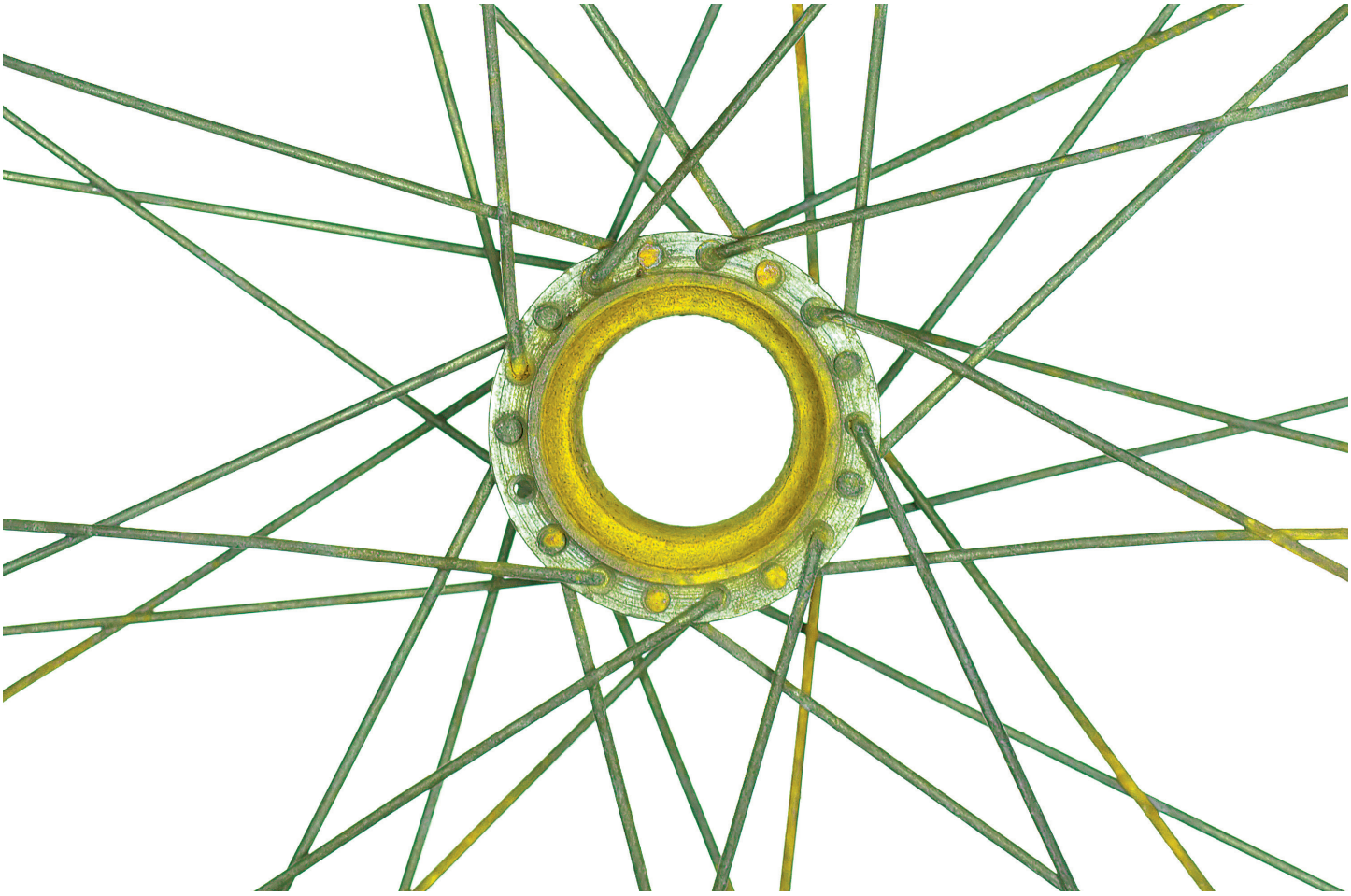
The Hub and Spokes

By Jim Wedeking

In-House Counsel at the Center of Environmental Crises



Much has been written on the immediate reaction to environmental crises, such as an explosion or catastrophic release of pollutants. Although managing the first few days of a crisis is extremely important, the impacts of environmental crises entangle a company for years afterwards. Long after the crisis response team returns to a normal schedule, the crisis will evolve. Grand jury subpoenas can be followed by civil enforcement suits; federal and state agencies often begin separate investigations; if publicly traded, the Securities & Exchange Commission (SEC) may investigate the company's disclosures on the incident; the U.S. Environmental Protection Agency and state agencies press for cleanup costs and natural resource damages; plaintiffs' lawyers and environmental groups begin filing civil suits. Shareholder suits and claims on the company's insurance policies, with the potential for additional litigation, can follow. Even state or federal legislators may get involved, calling for company officials to testify under oath and circulating new bills related to the incident. Finally, if the company, after months of presentations to the government, begins negotiations on a plea agreement, then it must open discus-

■ Jim Wedeking is an environmental litigator in the Washington, DC, offices of Sidley Austin LLP,

where he represents large companies and industry trade associations in the oil and gas, electric power, chemical manufacturing, and agricultural industries in both trial and appellate courts, as well as before administrative agencies. His experience includes the defense of criminal and civil enforcement actions, toxic torts, permit appeals, rulemaking challenges, and complex civil litigation. Mr. Wedeking is an active member of the DRI Toxic Torts and Environmental Law Committee.

sions with a separate set of officials on suspension and debarment issues.

At the center of all these developments, like a hub at the terminus of many spokes, often sits one in-house counsel—responsible for understanding all of the different satellite matters and how they affect each other. He or she must rely on a small army of business unit staff, outside lawyers, communications and public relations specialists, discovery contractors, technical consultants, and expert witnesses. This paper is intended to provide some advice to in-house counsel for managing such complex affairs and how outside counsel can make their lives easier.

Managing the Menagerie

Managing multiple law firms and consultants is one of the most difficult things an in-house lawyer can do. The sheer number of lawyers and other professionals involved in an environmental crisis is daunting. On the legal side alone, in-house counsel will often retain a white collar lawyer, a jury trial specialist, a federal environmental lawyer, a separate attorney for state environmental law, local counsel, and several others with specific expertise. They need to work with the company's corporate communications team (who may be assisted by outside public relations consultants), government affairs professionals at both the federal and state level, and consultants in fields ranging from toxicology to metallurgy to economics. Each professional will have a support staff dutifully working (and billing) behind the scenes. In-house counsel will likely find it difficult to remember the *names* of all these people, much less their roles and particular assignments.

In such a situation, there are a few key actions in-house counsel can take to keep control over what may be dozens of in-house and outside professionals: (1) regular coordinating calls, (2) expressly assigned roles, and (3) keeping a tight handle on access to documents.

Coordinating Calls

Managing such an ensemble cast is unwieldy, to say the least. While modern communications technology offers an array of innovations from videoconferencing to instant messaging, the only realistic option for coordinating such a large group is the old-fashioned conference call. Of course, like any other tool, a conference call's effect depends on the skill of the person using it. With organization and discipline, conference calls can keep key members of the team properly informed, productive, and well supervised by in-house counsel. Without skill, they can voraciously consume time and money. These are some guidelines to make sure that conference calls actually serve their purpose.

Like any other tool, a conference call's effect depends on the skill of the person using it. With organization and discipline, conference calls can keep key members of the team properly informed, productive, and well supervised by in-house counsel.

- Calls should be consistent and regular, taking place weekly at the same day and time with the same call-in number. This forces both in-house counsel and outside personnel to stop and organize themselves with respect to the immediate past assignments and upcoming activities on a consistent basis. Even where a temporary lull leaves little on the agenda, consistent calls are worth maintaining to keep management from degenerating into a more *ad hoc*, disorganized affair.
- Each firm should designate a front-line lead to participate on weekly calls. Absent special projects or circumstances, he or she should be the only participant from his or her firm, and in-house counsel should verify from invoices that multiple people are not billing simply for listening in on calls. It is significantly less expensive for the principal participants to relate information subsequently to their colleagues as necessary.
- Each call should have a definitive time to end and in-house counsel should stick by that time. This presses the participants to be organized and to raise necessary issues and resolve significant decisions quickly. The participants' collective hourly rates mean that a single conference call costs thousands of dollars per hour. In-house counsel must ensure that such expensive calls do not meander on unnecessarily. Take discrete topics off line with individual participants so you do not waste the group's collective time on minor issues.
- Use the final five minutes or so to summarize the decisions and assignments made. This avoids confusion regarding each firm's responsibilities, inadvertent duplication of work, or recriminations that someone else was responsible for a specific assignment. The summary also prevents participants from hanging up wondering whether key decisions were ever resolved, and if so, what those decisions were.

Although discipline is necessary for calls to be productive, presiding with an iron fist inhibits the free flow of information and ideas. All participants should have the liberty to make suggestions on issues outside of their specialty. For instance, an insurance lawyer could have a good idea on media strategy, while the tort lawyer may raise an important point on negotiating with the suspension and debarment office. At the end of the call, however, in-house counsel must make it clear that the specialists are charged with taking the lead on the key tasks within their purview.

Everyone Has Their Place

It is incumbent on in-house counsel to know, not just the reputation of the law firms working on the various matters, but strengths and experiences of the individual lawyers. Companies can reap tremendous benefits from a carefully assembled team of specialists, however, throwing dozens of

ambitious and eager professionals, some of whom may come from competing firms, into a collaborative project involves complications. Many outside lawyers believe that they are not only the best at what they do, but capable of much more than fulfilling a narrow specialist role. Large law firms especially are subject to "assignment creep," where they (consciously or not) muscle themselves into tasks more appropriate for others. Even where each firm understands its role clearly, the everyday work of interrelated complex litigation matters can still carry the potential for "assignment creep" or duplication. This can be especially true given that each outside firm has an independent ethical duty to the client, making trust in other firms difficult. Therefore, in-house counsel must, at the very outset of the case, clearly assign roles and actively manage individuals to ensure that each is staying within his or her own sphere, both on the front-end, such as during weekly conference calls, and on the back-end by carefully reviewing billing records.

In-house counsel can exert significant influence over team cohesion through cross-staffing. By picking and choosing individuals with special expertise from the roster of firms and assigning them different roles, in-house counsel can effectively create their own virtual law firm. For instance, to handle depositions in a toxic tort suit, in-house counsel may select a veteran trial specialist from one firm to work with a subject-matter specialist from another with a third, less expensive, firm providing support with document review and production. Although this team includes lawyers from three different firms, this helps establish a trust amongst the various firms. In such cases, senior outside lawyers will have to become comfortable with their colleagues or junior lawyers having significant independence while working with co-counsel. An inability for these firms to establish trust amongst themselves through cross-staffing or other means of cooperation could see their roles significantly diminished.

Reading from the Same Pages

To ensure that multiple firms are working from the same set of documents, there needs to be a single, centralized document database with internet access. For security purposes, this database should be maintained by an outside vendor, not the company itself. An outside vendor has specialized tools and experience to manage documents for litigation, helping to protect the company and its outside law firms. These vendors should work with outside counsel possessing significant experience in e-discovery issues, which have quickly grown beyond the ken of the average litigation partner, much less in-house counsel. No company can afford distractions created by a poor understanding of legal obligations to gather, preserve, and review potentially relevant materials ranging from ancient paper files to text messages on an employee's personal device. While the particulars of environmental litigation can be dense and difficult to grasp, everyone understands a newspaper headline declaring "Company Destroys Key Records." The same outside counsel should also handle privilege reviews with especially sensitive questions, getting input from relevant members of the legal team.

Even where each firm understands its role clearly, the everyday work of interrelated complex litigation matters can still carry the potential for "assignment creep" or duplication.

Of course, having an expertly managed database full of important documents means little if some members of the team are unaware of key records. This can be further complicated where multiple investigations or cases are underway. Some documents will not be relevant to litigation, and therefore, left out of the database, but can still be important to an internal investigation or other matters. Few things are more frustrating than having Firm A learn that key documents were in the hands of Firm B without knowing about them, or even worse, seeing documents withheld from a grand jury subpoena mistakenly produced to opposing counsel in a tort suit.

Simply declaring that the various firms must "coordinate" with each other is easier said than done. As the one person who reigns over *all* the moving pieces, in-house counsel needs to understand the types of documents being gathered and how they might apply for each aspect of an environmental crisis. Start with having outside counsel or an in-house paralegal use spreadsheets or a separate database to track the types of materials that have been collected, from whom they were collected and when, and what issues those collections cover. It is also important to document the person who collected the records, allowing for others to inquire later whether other types of records were also found in a particular place or with a particular person. To avoid inadvertent disclosures, privileged and "hot" documents should be immediately identifiable in a database with the ability to produce those documents limited to only one law firm.

Life on the Inside

Every outside counsel works for a company, yet law firms do not operate in the same manner as a Fortune 500 corporation. The difference between outside counsel, who work for other lawyers, and in-house counsel, who work for a wide array of business unit leaders and corporate executives, always hangs over the relationship. Unlike with many discreet lawsuits, environmental crises tend to spark multiple, sprawling legal matters that make understanding the company's operations, long-term business, and the board of directors more important. Further, the publicity that frequently results from environmental crises puts outside counsel in the position of protecting the company's reputation and employee morale.

Getting Down to Business

Never let outside counsel forget that the company, and its personnel, are charged with running a business. This means that, during every day of litigation, company managers continue to contemplate new business initiatives and acquisitions, brief

market analysts on earnings and profits, hire and fire employees, and keep their eyes on the stock price. No matter how serious an environmental crisis may be, it is only one facet of running and operating a large business enterprise. This means that the company's outside lawyers will, at times, have to yield to the interests that pay the company's bills, not theirs.

For instance, many major environmental matters will center on a relatively small group of employees, such as environmental engineers, operators, or plant managers. Too often, through miscommunication or mismanagement, these employees can be subject to a half dozen interviews over the course of a few months (not counting interviews with their own personal counsel or pool counsel, if retained). In-house counsel needs to act as a gatekeeper to these employees, learning who outside counsel requires for interviews and on what subjects. Outside counsel working on separate aspects of the various cases should work together to create a "master interview" that encompasses as many of the key inquiries as possible during a single session. This may require cross-staffing an interview with lawyers from different firms or requiring multiple firm to rely on the interview notes of another. Such restraints can prevent interviewees from feeling like professional witnesses, which can be a great source of stress. Of course, as new facts or twists to the various cases arise, some employees will require follow-up interviews, but requiring outside counsel to coordinate and minimize their interviews can free up company employees to spend more time doing their actual jobs.

More generally, discussing the broader business view with outside counsel early on in the case can reduce some of the friction involved in constraining their innate desire for unlimited access to resources, including employees and documents. Outside counsel often forget the importance to a company of minimizing bad publicity, maximizing its stock price, and how those are often intertwined. Meetings with outside counsel that include key business personal can be helpful in communicating the company's long-term goals related to the environmental crisis. For instance, if a chemical plant suffered a catastrophic release, it is important for outside counsel to learn that the company was exploring the sale of its chemical division or planning to shut down that particular plant. These types of broader business issues help inform outside counsel of the overall value of the case and what may be offered in a settlement.

Meetings with outside counsel that include key business personal can be helpful in communicating the company's long-term goals related to the environmental crisis.

Getting the company's name out of the newspapers may be important enough to resolve even criminal matters quickly, despite the potential either to win the case outright or settle it for a lower amount. Bad publicity can create significant complications, not just with stock prices and shareholders, but with other business or regulatory dealings that specialized outside counsel rarely consider, such as an ongoing antitrust review or regulatory review of a new product. Every outside counsel approaches a case with the goal of serving the company's broader interests, and it is a sincerely held aspiration. But as outsiders, they cannot truly understand them unless in-house counsel explains what those broader interests are.

Meet the Press

Managing the press can be a significant frustration for both in-house and outside counsel. For most outside counsel, no comment from the company can be better than "no comment." Outside counsel will almost always prefer that the company say little or nothing regarding an environmental crisis lest it inadvertently make some damning admission or inaccurate statement. For public companies facing media criticism, however, in-house counsel understands that freezing out the press is simply unrealistic for several reasons:

- If a publicly traded company is facing the prospect of significant environmental or related tort liabilities, SEC rules require the company to disclose that possibility publicly. Therefore, a public disclosure is required no matter how much outside counsel may disapprove.
- If a company looks like it is facing significant legal liabilities, its stock price may suffer to some degree. The board of directors does not want large institutional shareholders getting anxious as the value of their investments in the company declines. Frequent press statements discussing how the company is handling the response to an environmental crisis shows shareholders that the issue is being timely addressed and competently managed.
- The press will cover an environmental crisis no matter how tight-lipped the company may be. Hostile politicians, plaintiffs' lawyers, and environmental groups relish making their case in the press and all of their statements, no matter how bombastic, exaggerated, or inaccurate, will be read by the general public, shareholders, legislators, regulators, and the potential jury pool. If the company refuses to defend itself in the press, then these will be the only statements the public will read.
- Many companies will choose to make presentations to community leaders, ranging from members of a county counsel to hostile environmental activists to the local Rotary Club. Regulations may also require public meetings on issues related to the environmental crisis where company representatives will be expected to speak. Under either type of presentation, it will be important for the company to build relationships with local and state stakeholders, maintain the company's public image, and frame the company's message to both the public and any press in attendance.
- Employee morale, as discussed more below, can falter after an environmental crisis. Employees want to see the company defend itself, and want to defend the company in their own interactions

with friends and family. In the case of a large company, however, only a tiny portion of the workforce will have any understanding of what actually happened and must rely on the press for an explanation just as much as an outsider. Making a public defense of the company's actions gives employees reassurance and bucks up morale.

Some subset of outside counsel and in-house counsel must work together with the company's corporate communications team. This means keeping the corporate communications team briefed on the progress of an investigation, providing them with court filings in advance, and summaries of what the company can expect in the near future. Outside counsel should also be involved in the formulation of public statements. The core of the company's public statements on an environmental crisis should be the SEC disclosure, if required. SEC disclosures are subject to numerous rules on form and substance that should be managed by attorneys specializing in securities regulation. Although the disclosures frequently take significant time and effort to finalize, once they are completed, they should serve as the basis for statements to the press.

As the case develops, however, the original SEC disclosure will change and the company will have to prepare new press statements—sometimes with little lead time in reaction to new developments and short reporter deadlines. Outside counsel's role is to anticipate how government attorneys, regulators, and plaintiffs' lawyers could view potential statements. In this way, they screen out inadvertent admissions or statements that appear to commit the company to some course of action. Above all, outside counsel's familiarity with the case's details make sure that company statements are truthful or safely ambiguous in certain respects where facts are still being developed. Most of the questions that outside counsel will field in these meetings will begin with "Can we say ….?" This is part of the natural give-and-take between the corporate communications team's desire to simplify information into small, mentally digestible messages and outside counsel's view that all of the information is complex and fluid. It will fall to in-house counsel to referee the competing approaches.

Outside counsel should never forget that the communications team *is* a team and that outside lawyers have no more business making public statements on their own than communications staff have in providing legal advice. No matter how well outside counsel believes they understand the facts, the legal issues, and the company's goals, they should never be in a position to make extemporaneous public statements. Anticipate situations where outside counsel might be exposed to the press, such as public meetings, regulatory hearings, or court appearances. Plan in advance what questions may be asked and what those responses will be. Statements by outside counsel—if they are to be made at all—require just as much planning and consultation as a corporate press release. If this is not possible, such as during a "courthouse steps" interview immediately after a hearing that did not go as anticipated, refer the press to what they heard in the courtroom, to a transcript of the proceeding, or to corporate communications staff. Every outside lawyer should have the name and contact information of corporate communications staff with them at all times—in public or sitting next to their office phones. This avoids the sin of speaking extemporaneously while being unprepared.

Some subset of outside counsel and in-house counsel must work together with the company's corporate communications team. This means keeping the corporate communications team briefed on the progress of an investigation, providing them with court filings in advance, and summaries of what the company can expect in the near future.

The Board of Directors

In some companies, significant decisions to resolve litigation, such as plea agreements or civil settlements involving amounts higher than what the general counsel can authorize, must be made by the board of directors. Interacting with the board of directors is fundamentally different than dealing with other lawyers or judges. Outside counsel must lean heavily on in-house counsel in preparing for any presentation to the board. It also helps to keep a few things in mind.

- The board will have few or no lawyers, and even where a Board member has a law degree, they are firmly entrenched in the business side of company affairs. This means that all information presented to the board should be crisp, presented at a high level, and free of legal jargon. Clarity and efficiency are key attributes of any presentation. Clearly identify what decisions need to be made and when, and work with in-house counsel well in advance of the meeting to hone the presentation.
- No board decision should ever be viewed as a formality. Any outside counsel that entertains a stereotype of board members as pliant or captive to top executives will be in for a difficult day. Be prepared to identify the downsides of your proposal, defend your recommendation before a skeptical audience, and allow for flexibility to accommodate their concerns. Board members put a premium on their independence and diligence in decision-making. Thus, if the board elects to perform additional, independent inquiries into your recommendation, that decision will only slow the process and introduce potential complications.
- Remember that the board takes a broad view of the company's affairs and all of the matters before them are important.

Legal issues, no matter how urgent in your mind, are a small part of what the board must manage. Your presentation to the board must share time with discussions on acquisitions, candidates for high-level executive positions, or preparation for the annual meeting. In other words, their approval for a plea agreement or nine-figure settlement simply might not be the most important thing on the board's agenda.

- Any decision required of the board—from agreeing to a settlement to shutting down a business practice that involves significant legal liability—is based on a risk-benefit determination. Outside counsel tend to be very good at gauging risks, but largely uninformed on the benefit side of the equation, which requires hard business information available only to the board and company executives. As a result, outside counsel tend to overvalue the elimination of risk—an approach that, if unchecked by in-house counsel, can engender resistance from the board. In-house counsel can guide outside lawyers through the types of other, non-legal information that will be important to the board in making these types of decisions and allow for a more useful presentation.

Company Morale Matters

Outside counsel may forget that the company is an organization, not unlike a law firm, designed to do something specific, such as manufacturing goods, developing intellectual property, or marketing products. Harming the environment, or people, is simply not part of the company's design. Even the employees most closely involved in the environmental crisis generally did not intend to hurt anyone or anything. Thus, the consequences of environmental crises take a toll on employees, including those far removed from the incident itself. Rank-and-file employees typically feel proud of what they do and live in the community most impacted by an incident, so when the papers or television news begin excerpting pleadings from lawsuits—using words like "reckless," "manipulated," "dangerous," or "concealed"—it can take a significant toll on company morale. It is not unusual for employees to be confronted by members of their family, neighbors, or even strangers if they drive a company truck or wear a shirt with the company's logo, about the incident.

Employee confrontations are another reason why outside counsel simply cannot advise the company to keep quiet. Even if in-house counsel and senior managers can be persuaded to withhold press statements or issue the ubiquitous "no comment," there are hundreds or thousands of employees who want to know what they should say. "No comment" does not work with their next door neighbor or the stranger at the grocery store. Outside counsel should work with the corporate communications team to create messages intended for company employees, as well as the SEC and the press. These messages should abide with common sense, avoid legalese, and give employees some peace of mind without minimizing the seriousness of the situation.

Even if in-house counsel and senior managers can be persuaded to withhold press statements or issue the ubiquitous "no comment," there are hundreds or thousands of employees who want to know what they should say. "No comment" does not work with their next door neighbor or the stranger at the grocery store.

It may be assumed by outside counsel that the so-called "Yates Memo," a U.S. Department of Justice memorandum demanding that corporations offer up culpable employees for individual prosecution, could severely damage employee morale. *See generally*, Memorandum from Sally Quillian Yates, Deputy Attorney General, to the Assistant Attorney General, Antitrust Division, *et al.*, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015). Dealing with potentially culpable employees, however, is far more complicated. For the employees close to the crisis, many are fearful that the company is looking for a scapegoat or that they have done something wrong without knowing it. The Yates Memo, to the extent that employees know of it or learn about it, could only exacerbate the feeling that the company is now adverse to them. This can not only decimate morale among those closest to the crisis, but stifle cooperation and negatively impact one's ability to continue doing their day-to-day job.

For the hundreds or thousands of company employees who only know what they read in the newspaper, morale can be far more fickle. During an investigation, outside counsel typically advises the company to keep potentially culpable employees close so they may be interviewed and to manage their interactions with prosecutors. This often means putting them on some type of administrative leave. But this can have unintended impacts on employee morale. To those who know and worked with the potentially culpable employee, they see someone who made a catastrophic error getting paid to do nothing and giving the appearance that the company is going to extremes to protect an inept employee who should have been fired. Holding employees accountable for their actions can serve to reinforce a company's compliance culture. It shows that the company will not put itself at risk to shield culpable employees. Outside counsel should be sensitive to these tensions.

Take a Number

Last, but not least, all in-house counsel are similar to the board of directors: your matter is only one thing on the agenda. In-house lawyers may be managing dozens, if not hundreds, of diverse litigation and non-litigation matters simultaneously and must routinely deal with emergency situations. While each matter has a varying degree of importance, all of the work needs to get

Environmental Crisis › page 80

Environmental Crisis ❮ page 69
done. Thus, outside counsel should not take offense if their multi-million dollar, high-profile environmental crisis is not always the first priority.

Outside counsel should work to understand the priorities of in-house counsel and how much they want to be involved in the details of the case. Some find it necessary to be present at major employee interviews or depositions, while others are limited by their other responsibilities to a less involved role. Understanding this dynamic, however, requires time, experience with the in-house counsel themselves, and intangible inter-personal skills.

Regardless of in-house counsel's ability to participate in more detailed aspects of the case, outside counsel should always understand the value placed on information. Routine conference calls keep in-house counsel apprised of a matter's long-term management, but cases sometimes take unexpected turns at inopportune times. For important developments, keep in-house counsel promptly informed, even if that means a call to their mobile phones on nights and weekends. Despite the inconvenience, in-house counsel should never be surprised to learn of new developments through news reporting, company executives, or the board of directors. In-house counsel should always hear it from outside counsel first.

Conclusion

Whenever an environmental crisis occurs, in-house counsel can find themselves in the middle of a maelstrom—one that can last for years. Where one incident sparks multiple cases, investigations, or regulatory or legislative developments, effectively managing the cadre of lawyers and other professionals is key to avoiding confusion and errors. Maintaining regular lines of communication, assigning clear roles, and asserting a tight control over documents can keep all of the moving pieces coordinated. For outside counsel, discounting priorities like long-term business goals, the importance of the company's public image, or employee morale can cause a significant rift with the client. Instead, having in-house counsel educate outside counsel and other professionals as to where an environmental crisis fits into the overall business of a company facilitates a more effective representation, and builds a stronger working relationship that, in turn, help achieve the company's larger goals.

This article was originally prepared to accompany a panel presentation, moderated by Jim Wedeking, during the 2017 DRI Toxic Torts and Environmental Law Seminar. Panelists included Richard E. Byrne, general counsel for ExxonMobil Pipeline Company; Thomas Campbell, vice president and deputy general Counsel of The ServiceMaster Company; and Michelle S. Spak, associate general counsel for Duke Energy Corporation.