Lessons from the BP Oil Spill

Keith B. Hall

1. Joint Operating Agreements

   (a) JOAs often exempt operators from liability to working interest owners (except for the operator’s own proportional share of liability based on its fractional working interest), except in the event of gross negligence.

   (b) Is this language acceptable to non-operator working interest owners?

   (c) Is the absence of this language acceptable to an operator?

   (d) Note that, if the JOA contains such language, it might apply both to tort and contract liabilities. See, e.g., Reeder v. Wood County Energy, LLC, _ S.W. 3d _, 2012 WL 3800231 (Tex).

   (e) Avoid investing as a working interest owner in your individual capacity. Use LLC or corporation.

2. Crisis communications

   Inaccurate information can be a public relations disaster (e.g., early estimates by BP of the rate at which oil was flowing from the well).

3. Many environmental statutes have criminal penalties and/or significant civil penalties.

   It is important to get things right in order to protect lives, property, and the environment. Further, the liability when things are not done right may go beyond civil damages. BP and others face civil penalties under the Clean Water Act and Oil Pollution Act, and there has been speculation about the possibility of criminal charges.

4. Communications with press

   (a) Ask employees to refer press inquiries to a designated person or persons.

   (b) Employees have their own duties and do not need to be distracted by press inquiries.

   (c) Busy employees will not always be aware of the very latest developments during a crisis because they are doing their own job.

   (d) In subsequent litigation, our-of-court statements by employees might be admissible. Ohio R.Evid. 801(d)(2); La. Code Evid. Art. 801(D)(3)(a); Fed R. Evid. 801(d)(2).
(e) Employees might not be prepared to stress the company’s theme or “message” during a crisis.

5. Internal communications

Urge employees not to speculate, even in internal e-mails. E-mails generally are discoverable in litigation.

6. Preservation of evidence

(a) Company may have a duty to preserve evidence relating to some event that likely will lead to litigation.

(b) Company may face adverse inferences or other sanctions for spoliation if it does not preserve evidence. *Adkins v. Wolever*, 554 F.3d 650, 652-3 (6th Cir. 2009).

(c) Company may even be subject to liability for a spoliation cause of action. *Smith v. Howard Johnson Co., Inc.*, 615 N.E. 2d 1037 (Ohio 1993).

(d) Company may have a duty to preserve e-mails.

(e) Destruction of evidence can constitute obstruction of justice and can lead to criminal charges.

7. Investigations

(a) If a major accident leads to litigation, adverse parties likely will seek results of any internal investigation a company conducts.

(b) To the extent that interviews are conducted by attorneys for the company, written summaries of the interviews may be protected by the work product doctrine. See *Hickman v. Taylor*, 329 U.S. 495 (1947); Fed. R. Civ. Proc. 26(b)(3); La. Code Civ. Proc. art. 1424(A); Ohio R. Civ. Proc. 26(B)(5).

8. Attorney-client privilege

(a) Attorney-client privilege protects the confidentiality of the communications themselves, but does not protect the underlying information from disclosure.

(b) The attorney-client privilege can apply with respect to in-house counsel.
(c) A court might conclude that the attorney-client privilege does not apply to communications involving an attorney if the attorney is acting in a business or management role, rather than in the role of a lawyer.

9. Off-site computer backup is important.

10. Communications with employees

   (a) Obtain alternate contact information for employees, including e-mail addresses, cell phone numbers, and perhaps a relative’s contact information.

   (b) Notify employees of ways they can obtain information during emergencies

Disclosure: Before he left private practice, Keith B. Hall was counsel of record for Cameron International (manufacturer of blowout preventer) in the multi-district litigation that arose from the BP oil spill.

Notice: All opinions stated by the author are his alone and do not represent the views of his former law firm or of Cameron International.

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