

Master the Disaster

MANAGING LEGAL ISSUES IN A CRISIS – AN OVERVIEW

James A. Vroman

**Co-Chair Environmental, Energy
& Natural Resources Practice**

J E N N E R & B L O C K

THE LAWYER BRINGS TO CRISIS MANAGEMENT

- ▶ Liability Assessment Skills
- ▶ Identification Of Mitigation Measures
- ▶ Investigation/Damage Assessment
- ▶ THE ATTORNEY CLIENT PRIVILEGE/THE WORK PRODUCT DOCTRINE

THE ATTORNEY CLIENT PRIVILEGE

- ▶ Legal Advice Of Any Kind Sought
- ▶ From Professional Legal Advisor (Lawyer Or Lawyer's Agent)
- ▶ The Communication Relates To That Purpose
- ▶ Made In Confidence
- ▶ By The "Client"

IF PRECONDITIONS ARE MET:

- ▶ Communication Is Protected From Disclosure-
Absolute
- ▶ But Privilege Can Be Waived By Client
- ▶ Privilege Can Be Lost By Presence Of Third Party
- ▶ However, If Third Party Is Present To Assist Counsel,
Privilege Is Preserved

ISSUES TO CONSIDER

- ▶ Does Attorney Have To Hire/Retain Consultant?
- ▶ At Minimum, Explicit Directive In Scope Of Retention
- ▶ Attorney Cannot Be Mere Business Advisor-Must Be Involved For Legal Advice

WORK PRODUCT DOCTRINE

- ▶ Applies To Work Product Of Lawyer
- ▶ Work Performed In Anticipation Of Litigation
- ▶ Qualified Privilege-One Seeking Disclosure Must Show Necessity
- ▶ Only Applies To Legal Theories/Conclusions—
Interpreted Broadly

THE BENEFITS OF THE A-C PRIVILEGE

- ▶ Promotes Creative Thinking And Uninhibited Discussion
- ▶ Management Has A Duty To Exercise And Apply Reasoned/Best Judgment
- ▶ If Litigation Likely, Key People May Be Concerned Disclosing Thoughts, Concerns, Creative Ideas
- ▶ Perspective: Foster Free, Open Thinking

WORD OF CAUTION TO ATTORNEYS

- ▶ Must Remember Client Runs Business/Agency
- ▶ Not Engaged In Legal Exercise
- ▶ Mindful Of: Employee Safety/Health, Customers Service/Relationships, Suppliers, Community Relations
- ▶ Need Prompt Decisions/Response

ASSESS LIABILITIES/RISKS IDENTIFY MITIGATION STEPS

- ▶ First Step: Learn The Client And Its Operations
- ▶ Interviews Of Key/Knowledgeable People
- ▶ Annual Reports, Promotional Materials
- ▶ Desktop Procedures/Operational Manuals
- ▶ Customer/Supplier Lists

REVIEW OF OPERATIONAL DOCUMENTS

- ▶ Will Want To Review Employee Contracts/Union contracts
- ▶ Customer Contracts-Force Majeure Clauses
- ▶ Supplier Agreements-Similar Analysis
- ▶ Distribution Agreements
- ▶ Leases, Financial Agreements

REVIEW INSURANCE POLICIES

- ▶ Identify Relevant Policies (CGL, Workers' Comp., Property, Business Interruption, Environmental Liability, Automobile, ect.)
- ▶ Provide Prompt Notice To Insurers
- ▶ Mitigate Damages
- ▶ Comply With Other Policy Requirements

ADVANCE PLANNING IS CRUCIAL

- ▶ Do You Have Appropriate Coverage
- ▶ Has Your Insurer Removed Certain Events From Coverage On Renewal
- ▶ Is Insurance Information Readily Accessible

CONDUCT INVESTIGATION

- ▶ Simultaneous With Liability Assessment/Identification Of Mitigation Measures
- ▶ May Retain Experts/Consultants, e.g., Investigators, Environmental Engineers, Health/Toxicology Experts
- ▶ Documents To Be Reviewed: Employee Files, Visitor Logs, Engineering Schematics/As Builts, Hazardous Chemical Inventory/MSDs, ect.

CONDUCT INVESTIGATION

- ▶ Interviews To Be Performed
- ▶ Employees, Neighbors, Witnesses
- ▶ Note: May Be Resistance, No Attorney-Client Privilege, No Work Product For Facts
- ▶ Communications With Governmental Agencies-Strike Balance Cooperation And Rights/Interests Of Client (Bill Forcade)

CONDUCT INVESTIGATION

- ▶ Remember Primary Interest Is Business/Agency To Run
- ▶ Employee And Community Relations (Jennifer): Must Make Effort To Keep Informed And Share Info That Can Be Shared (Tribune Article)
- ▶ Continued Relations With Agencies

ADVANCE PLANNING!

