Transparency and the legal process in the Deepwater Horizon NRDA: It's all about balance

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What's the rub?

What happens when a client is in (or is facing) litigation and the disclosure of information, even for the purpose of being open and transparent to the public, could affect the case? This conflict arises when the client's communication specialist is charged with disseminating information to the public while legal counsel must protect that same information from disclosure. That is the rub. Communication specialists and attorneys come from two different perspectives—some might argue from two different planets.

The communicator's perspective

From a communicator's perspective, facilitating the public's understanding of and involvement in plans and actions that impact their lives is a good thing. The communicator's job is to supply easily understood information throughout a project and carefully consider the public's input. A true communicator lives for holding listening sessions and workshops, facilitating roundtable discussions, and supporting the notion that all ideas should be duly heard and considered. They are taught that making all information available can only strengthen collaboration and help the public provide meaningful comment. Communicators want to put all their cards on the table. According to communication specialists, attorneys, while absolutely necessary, tend to hinder transparency efforts.

The attorney's perspective

Attorneys, on the other hand, often seem horrified by public outreach practices when a case is highly publicized and involves copious amounts of confidential information and data, particularly in the environmental law arena. They keep their cards close. Attorneys, as trained, scrutinize every paragraph, sentence, word, and even punctuation marks with a narrowly focused lens. Attorneys seem to have an internal alarm that begins to sound relentlessly when an article, a news statement, a tweet—any release of information—is suggested. That's with good reason because attorneys must protect the case and the client.

Attorneys crave consistency, such as the use of talking points. They urge others to stick to the script and answer only what is asked or, better yet, say nothing at all. In some cases, court orders may prohibit disclosure of information that would otherwise not be protected. In other cases, it may simply be that the

release of certain information runs counter to the overall litigation strategy. Of course, information should never be released without the client's approval. Constant vigilance is part of the attorney's duty to preserve attorney–client privilege and to prevent disclosure of attorney work product. Keeping a client's case sound while providing public information is a high-wire act. It's all about balance.

Case in point: *Deepwater Horizon* NRDA

The *Deepwater Horizon* oil spill Natural Resource Damage Assessment (NRDA) and Early Restoration process is an example of a case in which maintaining the balance between public engagement and protecting confidential case information is vitally important. The NRDA of the nation's largest off-shore oil spill is currently underway. A NRDA is the process used by natural resource trustees to develop the public's claim for natural resource damages against the party or parties responsible for the spill. Natural resource trustees are persons and agencies entrusted under the Oil Pollution Act and other applicable statutes and regulations to restore injured natural resources and lost services resulting from an incident involving a discharge or substantial threat of a discharge of oil. The Deepwater Horizon NRDA trustees include representatives from Florida, Alabama, Mississippi, Louisiana, Texas, NOAA, DOI, USDA, EPA, and DOD (to the extent of DOD-owned lands).

In April 2011, one year after the spill occurred, the Deepwater Horizon NRDA trustees entered into an agreement with BP for the provision of $1 billion to begin restoration of natural resources and the public uses they provide through the implementation of early restoration projects. Early restoration takes place before the completion of the NRDA, which, due to the potential for litigation over natural resource damages, requires certain confidential information and communications to be protected and maintained. The agreement between the NRDA trustees and BP specifies that the public shall be engaged in the development of early restoration plans through public review and comment. Such review is also required by the Oil Pollution Act, NRDA regulations, and, where applicable, the National Environmental Policy Act (NEPA).

Because public comment is required on proposed early restoration projects before the NRDA is complete, a balancing of the competing interests of confidentiality and public disclosure and involvement is necessary. Answering questions raised by the public (such as in responses to comments resulting from public notices) requires close collaboration and cooperation between communicators and attorneys.

Striking a balance

Communication and legal experts agree there must be a balance between the dissemination of information and the protection of confidential information. Constant collaboration is the key. While every case is different, here are a few of the more common best practices that can assist both communicators and attorneys in finding that balance:

- Work as a team by sharing information and directives regularly.
- Jointly develop talking points, communication strategies, and public statements.
- Identify and prepare answers for anticipated questions from the media.
- Help communicators understand legal boundaries before information is released.

- Help attorneys understand that short, simply worded statements are best for the media.
- Review, review, review.
- And, by all means, keep your client informed and get approval for final products.

Although communicators and attorneys seem to be from two different planets, they can form a powerful team for the good of the case and the client. It's all about coordination and balance.