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The Role of Corporate Counsel in the Criminal Environmental Case: Advice to Quench the Fire

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THE ROLE OF CORPORATE COUNSEL IN THE CRIMINAL ENVIRONMENTAL CASE: ADVICE TO QUENCH THE FIRE

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I. INTRODUCTION

CRIMINAL law expertise, a long recognized field of endeavor, is not a badge normally worn by those of us in the traditional role of corporate counsel. By comparison, while the environmental law expert is a neophyte, having developed from scratch in the last twenty years, most corporate counsel have received initial exposure to the area in only the last decade. The confluence of these two churning fields, corporate criminal liability and environmental regulation is certain to engulf a great number of corporate counsel in the whirlpool of these unfamiliar waters. This paper offers practical comments and observations about the process of a criminal environmental investigation resulting from the author's own experience, and also provides some insight on the impact that such an investigation has on the corporation.

The author does not purport to be either a criminal or environmental law expert. As general counsel to a New York Stock

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Exchange-listed, but by that standard, only moderately sized corporation, my activities span the spectrum of legal affairs for the client, including management of a small corporate legal department. Dim memories from law school classes on criminal law mixed with a general knowledge about the impact of more recent environmental legislation and regulation of the company's business were my only tools in confronting a significant environmental criminal issue. Like many corporate counsel, my most recent exposure to criminal conduct was gained through vicarious adventures with the corporate criminals depicted in that infamous crime rag, *The Wall Street Journal*. My innocence disappeared, so to speak, abruptly one Friday morning in June, 1988.

A phone call from the manager of the company's Springfield, Missouri secondary metals plant informed me that a Special Agent from the Office of Criminal Investigations of the EPA had just served him with a court order.[1] The order authorized special agents of EPA and FBI, their authorized contractors, representatives of the Missouri Department of Natural Resources and the Springfield Fire Department to seize and search the plant site for property that constituted evidence of the commission of various criminal offenses. The company was completely unaware that a criminal investigation was even being considered, let alone being launched with such enthusiasm. The only information offered by the special agent was the phone number of the Assistant United States Attorney. I was told that his office would be expecting my call.

What followed next was a highly publicized three-day seizure and search of the company's plant site which included excavation, dye-testing of drains and sampling, followed by a grand jury investigation and six-count indictment against the company, the plant manager and assistant manager for alleged illegal disposal of hazardous waste,[2] all concluding with a two-week trial resulting

1. Under the comprehensive scheme of the Resource Conservation and Recovery Act (RCRA), the EPA is granted statutory authority to enter company premises and search for hazardous wastes. *See* 42 U.S.C.A. § 6927(a) (1988 & Supp. 1991). For an overview of the process of an EPA investigation, *see* Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 792-95 (1991) (citing EPA, Functions and General Operating Procedures for the Criminal Enforcement Program (1985)).

2. Unlawful disposal of hazardous waste constitutes a violation of RCRA. *See* 42 U.S.C. §§ 6901-91 (1988 & Supp. 1991). Criminal penalties are available under 42 U.S.C. § 6928(d), which provides for such penalties for knowing and improper transportation, treatment, generation, storage or disposal of hazardous waste and other handling or omission of material information in violation of the Act.

in acquittal or dismissal of all charges. From start to finish the episode lasted only nine months - supersonic speed for most significant legal matters and the one aspect for which all concerned were most grateful.

This experience forms the basis for the observations and comments in this Article. As stated above, the role of corporate legal counsel in dealing with a criminal environmental investigation and possible litigation encompasses much more than merely tackling the pure legal issues. Counsel must be prepared to confront not only government officials, but also the concerned client and overly-zealous media. Counsel must move quickly and purposefully in a fast-paced situation, with an eye to both the immediate and long-term effects that the experience will have on the corporation. This Article focuses on the many considerations that corporate counsel must keep in mind and also offers a type of road map or checklist to follow when facing a criminal environmental matter.

II. NOTICE AND ORIGIN OF THE INVESTIGATION

A. Detecting the Subtle Signs

The role of corporate counsel in alerting managers to the potential for a serious criminal investigation without fostering an atmosphere of undue criminal paranoia in the company cannot be underestimated. Counsel's accurate assessment of the gravity of the situation depends on prompt and reliable information being conveyed from managers and can be critical in providing a chance to either short cut an erroneously premised investigation or adequately prepare the company's response. Most managers quickly relay to counsel unusual events which come to their attention, such as a government agent's request for a home interview concerning the company's business. Notice, however, is not always so obvious and counsel should educate the client's managers to the more subtle signs of a possible investigation which they may observe but consider insignificant. Examples include:

(1) An unexpected adjournment in the midst of a thorough but unfinished civil or regulatory review or audit with no schedule to conclude the matter.

(2) A line of inquiry or document review normally not a subject of past requests such as: the identity or location of former employees, reporting relationships, capital expenditure approval or denial procedures or authority, and the in-

volvement of higher-ranking employees, headquarters personnel or corporate officers in decision-making processes, plant operations or inspections.

(3) An unanticipated visit from a regulatory agency for the purpose of obtaining responses to a line of inquiry which seems so unrelated to the company's operations, as known to the agency, so as to appear to be more of an environmental survey than responses to questions about specific conduct.

(4) Trade rumors about investigations of competitors, suppliers, customers, or industry practices. Notice of an investigation may come from outside as well as from within the company.

(5) An unexplained request for supporting documentation for sampling procedures, techniques, frequency, or related information.

(6) Any of the above occurrences at a location or project where employees have been known to leave under hostile conditions or express antagonism toward the company (without reason).

Many companies have made excellent strides in establishing effective procedures that allow employees to call to the attention of high-level managers any action which they believe constitutes illegal or unethical conduct by company employees. These systems, which may take the form of employee hotlines, business conduct questionnaires, ethics ombudsmen, or other similar procedures, can play an important role both in addressing legitimate concerns and identifying unwarranted employee hostility. Since perception rather than fact may significantly affect an employee's view of the company's environmental compliance, it is crucial that employees be provided some outlet to express their concern over these perceptions with proper assurance of an adequate and fair analysis of their complaints.

B. Does the Identity of the Source Really Matter?

One of the first questions counsel will likely confront in the unanticipated criminal environmental investigation is the identity of its origin. Sometimes the source can be quickly identified and typically will involve information from disgruntled or concerned former or current employees. Other likely candidates include the usual list of suspects that wander through the affairs of large com-

panies on a regular basis. This parade of government inspectors and auditors, investigative reporters, civil lawsuits with possible criminal misconduct allegations, allegations by environmental organizations and complaints from competitors or ambitious politicians, all may have been instrumental in triggering the investigation.

At the outset of the investigation, counsel should prepare for the inevitable expression of concern that the company has been unfairly singled out for some type of personal vendetta. Behind the popular banner demanding justice for white-collar crooks, the client may sense ulterior motives as the reason for the investigation. It is important to avoid the tendency to spend too much effort, at least at the outset, attempting to identify the source. The source and background of the investigation may, of course, be critical to the outcome, but in terms of priority there will likely be more immediate tasks to be addressed. When confronted with the unanticipated criminal environmental investigation, time management should be the first priority. There will be much to accomplish and the timeliness of counsel's response is critical.

III. THE SEIZURE AND THE SEARCH

There is nothing subtle about the unexpected arrival of an order to seize and search a plant site. My call to the Assistant United States Attorney on that Friday morning in June, 1988, found both the Assistant and the United States Attorney for the Western District of Missouri present in Springfield. They were prepared to discuss, or rather to inform me, of what was about to happen. I remember thinking, and may have told them, that I was not a criminal lawyer and could not understand the approach that was being taken. I listened almost in shock with emotions that vacillated between fear and anger.

The EPA order directing the agents to seal the site, excavate, photograph, dye-test, obtain samples, and conduct other tests, had been obtained based on an affidavit by an EPA Special Agent.[3] The affidavit contained serious allegations that the company had illegally disposed of hazardous waste at the plant site. The search was to include excavating a pit where hazardous waste was alleged to have been dumped before being covered with concrete.

I requested that company representatives be present during

3. See *supra* note 1.

the search and that split samples be obtained. The United States Attorney responded that because information in the affidavit indicated that the excavation presented possible risks of explosion, fire, and hazardous waste releases, the area around the site would be blocked off and no one would be permitted to be present without protective clothing and breathing apparatus. Samples would be split if, and when, required by law. I was informed that the search was being conducted to obtain evidence of the alleged commission of a crime on the plant premises. Depending on how the search progressed, they anticipated returning possession of the premises back to the company within 72 hours.

During this conversation, both the Assistant and the United States Attorney did ask for the company's cooperation in utilizing company equipment and mobilizing the employees to move scrap aluminum from that portion of the plant site where the excavation would take place. They also asked, in the interest of public safety, that the company disclose any information it had about specific types of hazardous waste buried at the site. The call concluded with the comment that a news conference would take place that morning, at which time a statement would be made disclosing the service of the search warrant, plans for blocking off of property near the plant during the search, and the fact that air near the plant and the City of Springfield's water supply were being monitored and were not endangered.

About two hours after the seize and search order was served, a press conference was called by the office of the United States Attorney for the Western District of Missouri. Copies of the search warrant and attachments, including the 54-page affidavit by an EPA special agent describing the investigation, were apparently made available to the media.

Local television news carried the story that evening. One station whose reporter took credit for working on the investigation carried a detailed story replete with an interview with a former employee whose identity was disguised by dark shadows and an electronically-altered voice. The Saturday morning edition of *The Springfield News-Leader* carried a front page story and photograph describing how federal, state, and local authorities swooped down on the plant in a raid following allegations by former employees that managers ordered illegal dumping of hazardous materials into a massive pit at the plant site.[4] The newspaper also attributed

4. Ron Davis, "Karchmer Searched for Illegal Dump," THE SPRINGFIELD NEWS-LEADER, June 25, 1988, at 1A.

to an EPA Region 7 spokesman the statement that no threat existed to Springfield's drinking water and that the air around the plant was clear. The United States Attorney for the Western District of Missouri was quoted as saying, "[n]ormally, we do not inform the public of the existence of a criminal investigation. We simply want to dispel any concern about the site the residents of Springfield might have."[5] The media circus had begun.

On the way down the hall to the President and CEO's office, I remember trying to organize my thoughts in an attempt to explain what was about to happen, why, and what options were available to the company. Some of the decisions made in those first few hours proved critical to the events of the next few months. What follows in the remainder of this Article are some practical considerations that corporate counsel should keep in mind in preparing to respond to a serious criminal environmental matter.

IV. A CHECKLIST FOR IMMEDIATE ACTION

From the moment that notice of an environmental investigation reaches the corporate client, counsel should assume that the government knows more than counsel about the facts or at least knows one version of the facts. In reality, this assumption is generally true and was most certainly correct in the author's case. The government may be relying on incorrect information, but will most probably have facially credible accusations in hand. By the time that counsel learns of the investigation, the government will likely be in search of collaborative evidence to support these initial accusations.

As we considered our response to the initial EPA order, it was obvious that speed was of the utmost importance. An attack on the order and search warrant in the form of a Stay of Execution or Motion to Quash was quickly dismissed as improvident. We believed it would be doomed to fail and would only put the company deeper into the public relations hole that the U.S. Attorney, in the name of public safety, was digging for the company at that very moment with the press conference. The company's manager, a man of the highest, and prior to this moment, unquestioned integrity, denied knowledge of the alleged events and company officers believed him. We also knew it was unlikely that the government would devote such effort and create what was

5. *Id.* at 8A.

sure to be a major media event in Springfield, and perhaps beyond, unless they believed that the evidence they already had was overwhelming. Could something have happened without the manager's knowledge? Could the government be so wrong? If the search found nothing in the way of collaborative evidence, could the government take no further action in view of the publicity?

The balance of the available time that first day was devoted to the following efforts which should be followed by corporate counsel in the first few hours of the crisis:

(1) **Selection of outside counsel.** Speed is the critical factor. In our situation, I believed we had to have outside counsel that our key officers and directors already knew and who had some knowledge of the company. White collar federal criminal trial experience was an obvious must. Environmental law expertise would be important, but not as important as the criminal trial experience. My successful past experience with a lawyer from Philadelphia led me to select him for the task. My judgment was that the risk of bringing in an unfamiliar face or voice over the telephone at this stage exceeded the obvious drawback of inserting long distance assistance from a Philadelphia lawyer in a developing criminal crisis in the middle of the Ozarks. I believed the right mix of local counsel could be, and in fact was, added later when separate representation for the manager and assistant manager became necessary.

My advice to corporate counsel without close ties to experienced criminal trial counsel is to constantly be on the prowl for such assistance. Counsel should interview and select at least one specific outside attorney, not firm, whom they would consult in the event that the assistance of outside counsel is needed. When the crisis arrives, there is no time for getting acquainted with the company's outside-counsel. When selecting outside counsel, ignore any particular area of criminal trial experience expertise and concentrate on the personality and demeanor of the attorney, asking how the person will interface with the client's CEO and directors. Unless the client is "IBM," forget the "big" names in the

field as they will likely be unavailable on short notice and can always be added later if necessary.

(2) **Communication with the client.** While this may sound obvious, informing key management and available outside directors of the immediate events with what little information is in hand is not only important, but will occupy more time than is usually available. The CEO may opt to undertake this task but counsel should not be surprised to get the direct calls anyway. It is important to remember that the client is the corporation and outside directors will be most interested if they are told that the matter may receive media coverage. Prepare for the "But if we haven't done anything wrong what do we need to worry about?" and "If you will just let me explain . . ." syndromes you may encounter.

(3) **Obtain relevant documents quickly.** Securing all documents relevant to the ongoing investigation is another obvious but important and time-consuming effort. In the case of an unexpected search warrant, the affidavit used in the application may be the most comprehensive public information available on the status of the government's investigation. While counsel will remember that there must be probable cause for the issuance of a search warrant,[6] what he or she may not be aware of is the manner in which the affidavit can utilize hearsay, innuendo, and sheer speculation in support of the request. A copy of the 54-page affidavit filed in our case was obtained the first day of the search, though not without some effort even though copies had apparently been made available to the media by the U.S. Attorney. The affidavit provided a valuable road map of the investigation to that date. It proved even more valuable at trial as the EPA Special Agent/affiant and other government witnesses consistently had overstated issues that were not supported by the evidence at trial. To the media, this affidavit became the lore of the case. The government's press conference discussed the pending search but, as would be expected, did not go into any details of the allegations. The press therefore adopted the information in the affidavit to fill in the blanks.

6. United States v. Harris, 403 U.S. 573, 576 (1971).

(4) **Consider the approach to the company's investigation.** Commence a company internal investigation, but first prepare a recommendation for the format of the investigation. Because no two investigations are apt to be alike, counsel should consider some basic structural questions. What is the purpose of the actions that are taken? Is there a chance to avoid the client's indictment? Should the investigation be geared toward trial preparation? Does the company want to voluntarily disclose all, regardless of where the facts may lead?

(5) **Prepare for the media blitz.** The phone will start ringing almost immediately. For this reason, the immediate question that must be asked is what position the company wishes to communicate and to whom - employees, customers, suppliers, neighbors, citizens of the community, shareholders? For the reasons suggested later, counsel will be involved in this area whether they wish to be or not.[7] Corporate counsel alone will have the best understanding of what is happening during the first few hours of an investigation. Utilization of the company's media contacts during that time can be critical and counsel must therefore devote some time to them.

(6) **Consider mandatory or voluntary disclosure requirements.** If the client is a public company, news releases and disclosure documents will need to be prepared.[8] If the client is a private company, certain groups, such as bankers or suppliers must be advised of the situation.

(7) **Employee relations issues.** Counsel should be involved in how the situation is presented to employees. There can be tremendous repercussions when employees either try to support what they may believe is the company's position or become disenchanted at the perceived treatment of the employees involved. If counsel has reason to believe that current employees are instrumental to the government's investigation, by acting as confidential informants for example, managers should be promptly advised to avoid the natural urge to confront their perceived accusers or conduct their own investigation. To this end, counsel should consider state and federal

7. See *infra* section VII "Public Relations and Media Issue."
8. See *infra* note 10.

statutes designed to protect "whistleblowers."[9] At the first notice of the investigation, especially when news of the allegations is carried on the wings of the media and not through the company's customary channels, managers should be advised to treat known or suspected informants as is customary without regard to the allegations. Dealing with employee relations issues is always difficult and more time-consuming than may have been anticipated.

8. **Miscellaneous activities.** Because the first few days of the crisis are necessarily hectic, counsel should have someone help in completely clearing their calendar. If the criminal environmental crisis is unexpected and serious, do not try to become a part-time legal crisis advisor. Delegate, delegate, and delegate until the desk is clean.

   Make sure records are being preserved. Should the initial activity escalate to litigation, it is imperative that all relevant records have been saved and all activities documented.

   Expect tough discussions with officers and managers who may feel the company has been betrayed by other employees. The finger of accusation can be bent in many directions and employees' emotions will flow.

   Find time to review attorney-client privilege considerations and be on the watch for possible obstruction-of-justice issues. Prosecutors seem to derive satisfaction from tossing threatening comments on this subject in the direction of in-house counsel.

V. THE COMPANY INVESTIGATION

As the company investigation itself is far too expansive a topic to be given complete treatment in this Article, only some of the most basic considerations will be discussed as they apply to criminal environmental enforcement. In general, the following

9. Several states have enacted whistleblower laws aimed at protecting against repercussions resulting from the employee's reporting of employer wrongdoing. For example, the Pennsylvania Whistleblower Law, 43 Pa. Stat. Ann. §§ 1421 *et seq.*, creates a private cause of action for any employee who suffers an adverse employment action "because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." 43 Pa. Stat. Ann. § 1423(a) (West 1991).

are all items that corporate counsel must consider at various stages of the government's investigation:

(1) Time aspect of investigation
(2) Impact of investigation on decision to prosecute
(3) Derivative claims
(4) Public relations issues
(5) Impact of confidentiality
(6) Type of internal investigation to best develop the facts.
(7) Anticipated litigation and other investigations
(8) Employee morale and corporate philosophy
(9) Expense

As mentioned earlier, the first question that should be asked is what counsel hopes to accomplish with the internal investigation. Will total neutrality and a truly independent investigation accomplish the objective or does counsel really want to prepare for the battle of litigation? There is nothing wrong with a partisan investigation when a hostile situation already exists. How formal an affair does counsel want this to become? Are employees in Luckenbach likely to tell all to a New York lawyer? There is nothing wrong with an informal investigation if that will best develop the facts.

Depending on the facts specific to the investigation, corporate counsel should consider whether there is any action that can be taken that will impact on the government's decision to prosecute. Is there a realistic chance to talk the prosecutor out of the apparent decision to prosecute? Will the investigation lend credibility to the company's position and help avert a more serious public relations crisis or will it be doomed as a whitewash despite the company's best efforts and intentions? Should the company be asked to endure the grief associated with independent counsel who may engage in an ego trip at the unlimited expense of the company? These are all questions to be asked depending on the stage of the government's investigation.

As the structure of the investigation is being put together, it is essential to remember that corporate counsel is looked to as the company's primary legal advisor. Be careful not to cede that responsibility, because long after the specialized expertise has hit the trail, counsel will still be around to deal with the consequences. In addition, counsel selection must be carefully controlled to utilize only those individuals that local counsel can comfortably work with during the entire process.

Remember to be on top of attorney-client privilege issues and the role of corporate counsel in the investigation. Employees will need to be advised and reminded that counsel represents the company and that there may be conditions under which the company may elect to waive the privilege and disclose information the employees reveal to them.

As a result of this relationship with the employees, questions concerning the need for separate counsel for the employees may eventually need to be discussed with the outside criminal experts and management. Relevant considerations include: (1) whether the company should encourage separate counsel or remain silent on the issue; (2) whether to suggest that separate counsel be retained; and (3) when, as well as who, should pay or advance fees and costs for separate counsel. Counsel should understand the implications of a common defense agreement and prosecutors' views about separate counsel.

In the course of the investigation, it is likely that strange, unrelated matters will turn up which will require immediate attention. Counsel should not be surprised at the amount of time that is spent in winding up matters that must be looked into but which twist off in different directions from the main objective.

Finally, do not be like the dog that chased cars until it finally caught one and then realized it didn't know what to do. Prepare for the ultimate day when the investigation is over. In the absence of mandatory disclosure requirements such as those required by the Securities and Exchange Commission,[10] corporations have no general duty to disclose wrongdoing discovered in the investigation. The issue will turn on policy questions relating to the company's view of its public image, possible termination of permits or licenses, and the ability to avoid actions such as suspension or disbarment proceedings. Counsel needs to start looking into these issues before the investigation is complete.

10. The Securities and Exchange Commission mandates that corporations disclose any material information concerning a pending legal proceeding, other than ordinary routine litigation incidental to the business, to which either the registrant or its subsidiaries is a party or of which any of their property is the subject. *See* Standard Instructions for Filing Forms Under Securities Act of 1933-Regulation S-K, 17 C.F.R. § 229.103 (1991). This regulation requires that disclosure be made regarding any action arising under federal, state, or local provisions regulating the discharge of materials into the environment: (1) if the proceeding is material to the business or financial condition of the registrant; (2) if the proceeding involves primarily a claim for certain remedies; and (3) if a governmental authority is a party to the proceeding and the proceeding involves potential monetary sanctions except under certain circumstances. *Id.* at § 229.103(5).

VI. PLEA NEGOTIATIONS, INDICTMENT, AND TRIAL

A. The Role of Corporate Counsel in the Process

After counsel is satisfied that it has a handle on the facts, consider whether some presentation should be made to the prosecutor directed at either terminating the investigation prior to indictment or, if an indictment has already been granted, bargaining for the least offensive charge. While experienced criminal counsel should be the guide, corporate counsel must be involved in the evaluation of the offers and also be in the thick of communications with officers and directors.

Plea negotiations can reward the creative. In the author's case, the government was faced with a possible statute of limitations issue and claimed to have minimal time to negotiate prior to indictment. The prosecutor sought to impress upon counsel the significance of selected samples from the elaborate soil testing conducted during the seizure. As we later learned when all government test results were furnished to the company after indictment, there were numerous, other less fruitful test results which tended to confirm the company's own less alarming test results. At trial, the difference was explained, in part, by the unusual procedure by which the government lab had first reduced a solid sample to its liquid state before testing for certain characteristics. The whole story was not known during the constructed time period the government sought a negotiated plea.

Plea negotiations may also present an opportunity to argue for the conversion of non-deductible fines into deductible expenses. Section 162(f) of the Internal Revenue Code (I.R.C.) and the regulations thereunder provide that no deduction shall be allowed as an ordinary and necessary business expense for any fine or similar penalty paid to a government for the violation of any law.[11] We were told that a Springfield fire engine had been damaged as a result of overheating while stationed at the plant site during the search as requested by EPA. The city rightfully expected EPA to do something about the damage. Had a negotiated plea been feasible, we would have tried to accommodate the city's

11. I.R.C. § 162(f) (West Supp. 1991). The Supreme Court long ago decided that such a business deduction was not permitted where the effect would be to "reduc[e] the 'sting' of a penalty imposed by law." Tank Truck Rentals, Inc. v. Comm'r, 356 U.S. 30, 36 (1958). This policy has been followed in the context of fines for violations of environmental statutes. *See* Colt Indus. v. United States, 880 F.2d 1311, 1313 (Fed. Cir. 1989) (deduction for civil penalties under Clean Air Act and Clean Water Act disallowed as ordinary business expense).

request by fashioning a tax deductible reimbursement to the city. Counsel should therefore consider the tax consequences of any payments made to resolve the case.

The indictment will bring another wave of media attention to what may have been seemingly forgotten. Corporate counsel should be aware of the anticipated timing required to meet the mandatory disclosure obligations[12] as well as other communication matters. Consideration must be given to the status of indicted employees who, from this stage through the trial, will be consumed in the preparation of their individual defenses.

Corporate counsel should insist on being a meaningful part of the trial team. There is plenty of work to be done in preparation for trial that experienced corporate counsel can and should be expected to handle more efficiently than counsel not previously involved in work for the company. In addition, communication of trial developments to key officers and assistance in responding to unanticipated needs for company personnel and records are best handled through corporate counsel during the trial.

Strategy sessions during the trial should likewise include corporate counsel. Criminal counsel and corporate counsel must work together to develop a feel for the proper time to defer and the time to voice concerns over any issue or strategy. Prepare for the roller coaster of emotional issues involved in a criminal trial. Do not be afraid to show ignorance by questioning criminal counsel as to certain procedures you do not understand.

B. Keeping the Overall Focus

Above all else, corporate counsel should try to focus on the overall picture being painted in the court without getting bogged down in the multitude of details accompanying the trial. The perspective that corporate counsel brings to the proceeding can provide valuable assistance and will be appreciated by even the most experienced criminal trial attorney.

For example, during the course of our trial, I became concerned that some jurors seemed particularly interested in statements made by several government witnesses and the prosecutor concerning labels on metal drums that had been used at the plant site to store various metal scrap. The labels described the hazardous chemicals which were, at some point in the life-cycle of the

12. See *supra* note 7.

drum, admittedly contained inside. As a secondary or scrap metal recycling facility, it was not uncommon to receive shipments of nonferrous metals such as brass and copper sorted into various grades and classifications in drums. In addition, another hotly disputed factual issue before the jury involved allegations that a supply of drums used for that very purpose was not legally empty but instead contained hazardous waste. As the argument to the judge over the proper jury charge was taking place it dawned on me that our proposed charge addressing the definition of an empty container (metal drum) did not state that it was not illegal to buy or own an empty drum that had, in a prior use, obviously contained a hazardous material by virtue of the old label still found on the drum. I became concerned that the jury would consider the mere possession of such a drum to be illegal. The result, which I drafted while listening to argument on the more complex instruction of the definition of an empty drum or barrel, was ultimately accepted by the judge and submitted as Instruction No. 26 of 40. This instruction read: "It is not a violation of the law to own or possess a barrel with a label stating or implying that the barrel contained or contains a hazardous waste."

It was a short sentence in a 50-page set of instructions, but it did nevertheless help clear the air that the defendants were clearly not on trial for possessing barrels labeled with skull and crossbones.

As a final piece of advice for the criminal trial process, corporate counsel should set aside adequate time each night to meet alone with the lead trial counsel away from the action in order to share observations from that day's proceedings.

VII. PUBLIC RELATIONS AND MEDIA ISSUES

Corporate counsel should not kid themselves into believing that they can avoid the public relations aspects of the criminal environmental crisis. While it may seem to be extralegal, outside the area of corporate practice, beneath the calling of an attorney, and not the best use of time, counsel will definitely be involved in the media circus surrounding the investigation. Counsel's participation in this area can and should be one of the most critical services provided to the client. Advising the client that they should remain silent in the face of the circumstances is worthless. Counsel must be wary of criminal lawyers who, without regard to the circumstances, advise clients not to fight the media battles but rather to save factual information only for the courtroom. My ad-

vice to counsel confronting such a lawyer is to fire him or her. Silence in the midst of the crisis may cause the client to lose the war before the battle has even begun.

Do not be afraid to recommend that the corporation retain public relations or crisis-management consultants at the outset of the investigation and continue their use throughout the indictment and trial publicity. Their suggestions may seem obvious, but they can help focus the company's position within the media in a fashion that counsel will likely not have the time to accomplish. The impact that the media can have during the investigation and trial cannot be underestimated. While the jury will not be watching the evening news, you can bet that the company's customers, bankers, stockholders, and employees will be watching. Make sure that the media experts have a reporting relationship to corporate counsel.

The corporate attorney's most important responsibility in dealing with the public relations issues is to try to be responsive and appreciate the needs of the media. A checklist to aid in this endeavor includes the following steps:

(1) Understand the baggage:
   a. What business people think of the media,
   b. What reporters think of business people,
   c. What everyone thinks of lawyers.
(2) Issue materials in a form that can be used by the media.
(3) Consistently follow the highest standards of disclosure.
(4) Establish very clear and definitive approval procedures for the public release of information.
(5) Do not assume knowledge of even the simplest business or legal terms or practices.
(6) Do not tolerate even minor mistakes by the media as they may be repeated in more important presentations. Use the correction process to educate to the extent feasible.

VIII. CONCLUSION

Increased emphasis on criminal enforcement of environmental laws has begun to enmesh corporate counsel in unique and challenging situations. Serious criminal environmental matters now send traditional corporate counsel venturing into a brave new world of issues such as: guilt without scienter, responsibility without knowledge, and incrimination without identity—all un-

folding in an emotionally charged arena of high profile media attention. Corporate environmental criminal investigations demand that legal counsel not only analyze the complex legal issues involved in such a foray, but also deal with a host of other practical considerations including the effect that such investigation will have on the corporation.

A charge of criminal environmental misconduct is a painful and expensive experience for all involved. The accusation that a person, possibly a respected manager or officer, has violated the law and may be subjected to incarceration will generate emotions not previously experienced among fellow employees or corporate counsel. The drama and personal burden this will create for counsel and those with whom counsel must work should not be underestimated. From my own experience, the Judgment of Acquittal and dismissal of all charges does not constitute adequate recompense for the lasting impact that a criminal investigation has on the corporation.