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Dealing with Technical Complexities in Environmental Litigation and Enforcement Actions

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Explosions! Fires! Chemical exposure! Environmental release! – Litigation and enforcement actions in the making. All of these issues are likely to require a team including both legal counsel and technical experts to address – whether on the defense or the plaintiff’s side of the case. Further, all of these types of incidents are likely to require someone with more than a narrow technical expertise. There are frequently multi-disciplinary scientific and engineering issues involved in these types of incidents and the associated litigation or enforcement action. Narrow specialists may have extensive academic credentials, but that may not be the critical need. Rene Dubos stated, “Scientists themselves react like the lay public when they function outside their areas of professional specialization.” Royden Sanders goes on to explain, “The typical scientist or engineer has, for every purpose but those of his own specialty, an average, or perhaps below average, ability to communicate.”

Multidisciplinary problems generally require multidisciplinary solutions. Even in situations where a specialist may be needed for testimony in front of a jury, a technical multidisciplinary generalist can be a significant aid in behind the scenes litigation support. Analysis of the



opposing counsel's expert reports and assistance in preparing questions for depositions of both fact and expert witnesses can be aided by someone with a multidisciplinary technical background who can see beyond the confines of a narrow specialty.

Similar circumstances can arise in enforcement cases. While a regulatory agency is going to focus on the enforcement issue and potential penalties, it is often the case that the underlying enforcement investigation is technically flawed. Careful analysis of the data that has been gathered for enforcement can often reveal these technical flaws. For this to happen someone familiar with the process, the science and the regulation is needed. Indeed, this author has prepared an expert report for this type of circumstance and converted an enforcement action of seven figures based on serious issues to paperwork violations with fine levels an order of magnitude lower.

A well-crafted expert report in a litigation case can go a long way toward creating an atmosphere conducive to a settlement in favor of the client. The key is a report that is both lucid and technically detailed enough to convince opposing counsel and opposing experts that they have a weaker case than they had originally thought. Many of the cases this author have been involved in ended at the point shortly after the author's expert report was delivered to opposing counsel and the court.

"The biggest problem with communication is the illusion that it has been accomplished," according to George Bernard Shaw. At the time of trial it may be that the technical expert who best communicates with the judge and/or jury may be the one who can make the strongest case. This may not be the narrow specialist who can be easily thrown off stride by opposing counsel during cross-examination by moving the questions slightly outside of the expert's area. A multi-disciplinary expert, such as the author, is much less likely to have this problem and may be better able to communicate the complex technical issues involved in the case in a manner that is easily understood by the judge and jury.

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