



# In-House Counsel Committee Newsletter

Vol. 9, No. 1

September 2005

---

## COMMENTS FROM THE CHAIR

---

**Jim Moore**  
*Chair, In-House Counsel Committee*

It is again with pleasure that we release the latest edition of the newsletter for the In-House Counsel Committee of the ABA Section of Environment, Energy, and Resources.

### Welcome to New Members

We extend a warm welcome to those of you receiving this Newsletter for the first time. We encourage you to learn more about, and to become involved in, our activities. What is most important, if this committee is going to bring value to you, is either your active participation in committee activities or your communicating to us those issues of most interest to you so that we can tailor our efforts appropriately in this newsletter and programs.

### Public Service

One of the strengths of this Committee is its Earth Force public service program, which provides students in our public schools with hands-on environmental experience through stream sampling and a series of follow-up discussions on the issues presented by the sampling results. Our Public Service vice chair, Raissa Kirk, has worked hard this year to obtain additional funding for the program. As a result, and with the help of the Section, we currently have a professional fund-

raiser seeking funding that, along with hoped for contributions from law firms and companies, will allow the program to flourish in venues across the country. A more-detailed description of the program is included in this newsletter.

### Committee-Sponsored Programs

The committee is currently sponsoring or cosponsoring two panels for the 13th Section Fall Meeting in to be held in Nashville, Sept. 21-25, 2005:

“Weighing the Choices and Finding a Balance: Deciding Whether Work is Handled In-House or by Outside Firms,” a program focused on the evolving market for outside environmental/natural resource counsel services and how corporations determine when and whether to hire outside counsel. We believe the program will be of interest to many of you.

“Digital Dangers: The Brave New (Ethical) World of Identification, Preservation, and Collection of Electronic and Other Evidence,” a program focused on both ethical and practical issues raised by our relatively new digital business environment.

We sincerely hope that you will be able to attend the 13th Section Fall Meeting and, in particular, take in these two panels.

**In-House Counsel  
Committee Newsletter  
Vol. 9, No. 1, September 2005  
David F. Zoll, Editor**

***In this issue:***

Comments from the Chair  
*Jim Moore* ..... 1

Public Service Update  
*Raissa Kirk* ..... 3

In-House Counsel Committee  
Membership Benefits  
*Tamar Jergensen Cerafici* ..... 4

Why Contest OSHA Citations?  
Avoiding Later “Repeat” Citations is  
One Good Reason  
*Shell J. Bleiweiss* ..... 5

The Role of Company Lawyers  
*Jim Moore* ..... 6

© 2005. American Bar Association. All rights reserved. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly should not be construed as representing the policy of the ABA.

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



**Issues of Particular Interest to In-House Counsel Committee Members**

Each year our committee officers put their heads together to discern, as best we can, the most important issues for members of the committee. Out of that effort comes a list of issues on which we focus our efforts in developing articles for future editions of this newsletter and in identifying programs that the committee or Section can sponsor (either the Annual Conference on Environmental Law in the spring or the Section Fall Meeting or in Quick Teleconferences). We would like to hear whether our draft list makes sense to you or, if not, how it should be modified.

- Self-reporting violations
  - Is self-reporting the way to go and where are the logical limits?
  - Should the requirement imposed by DOJ that cooperating self-reporting companies must/may have to waive privilege as a condition of cooperation be eliminated?
  
- Cost-effective use of outside counsel
  - How can outside counsel be used most effectively?
  - Given the regulatory issues faced today, as well as the maturity of many regulatory programs, what is the best use of outside counsel for most companies?
  
- What special ethical and practical legal issues are raised by use of wireless communications, e-mail and other modern forms of communication and data storage?
  
- Sustainability
  - How has it evolved as it relates to corporations’ and public entities’ activities and programs?
  - What are the developing expectations for achieving “sustainability”?
  
- Transactions
  - How best to handle contamination/remediation issues in transactions.

**Raissa Kirk**

- Sarbanes-Oxley issues important to in-house environmental counsel
  - Adequacy of internal controls to identify environmental issues needing to be reported
  - Reporting contingent liability matters
- New amendments to the Sentencing Guidelines for Organizations
  - Effective ways of satisfying the requirements.
- Public Service opportunities

Please let one of us know if you have comments on the proposed list or wish to add to it.

**Committee Officers**

Finally, we are blessed with a group of experienced and dedicated officers who wish to provide the highest quality service to committee members. A list of committee officers and their contact information follows. Please do not hesitate to call or e-mail any of us if you would like to see the committee address a particular issue or would like to participate in a committee activity such as the Earth Force public service program cosponsored by the committee and Earth Force.

***Chair:***

Jim Moore (jim\_moore@huntsman.com; 801/584-5828)

***Vice Chairs:***

*Vice Chair:* Alexandra Dunn  
(adunn@amsa-cleanwater.org; 202/533-1803)

*Vice Chair Newsletter:* David Zoll  
(DZollMeD8@earthlink.net; 410/337-2873)

*Vice Chair Public Service:* Raissa Kirk  
(rkirk@crowncentral.com; 410/659-4835)

*Vice Chair Programs:* Peter Wright  
(pcwright@dow.com; 989/636-6148)

*Vice Chair Membership:* to be appointed.

*Vice Chair Technology:* Jim Arnold  
(JArnold102@aol.com; 415/439-8831)

As we have reported previously, the In-House Counsel Committee has initiated a novel partnership between the ABA and national environmental education group, Earth Force to implement a watershed assessment / environmental civics curriculum in certain underserved city schools, utilizing lawyer mentors. The In-House Counsel Committee and ABA mentors are working at a number of sites across the country to bring Earth Force's Project GREEN – The Global Rivers Environmental Education Network – to local schools. To date, we have established local mentoring programs in several public elementary and middle schools in Indianapolis and Baltimore together with local environmental group partners, such as Hoosier River Watch. An important focus for the In House Counsel Committee this past year has been continuing our pilot project with Earth Force in Indianapolis, Indiana, and exploring potential projects in West Palm Beach, Florida; Houston, Texas; and Denver, Colorado. In May 2005, several attorneys mentors attended an Earth Force Youth Summit at the Denver Zoo to explore mentoring possibilities for the upcoming school year. In order to expand this program, we have worked with the Section's outside funding specialist. He is currently seeking \$123,500 in outside funding. We plan on initiating an aggressive co-funding effort through law firms and companies to try to match or exceed that amount. Our objective is to expand the Earth Force program to a series of school venues throughout the United States. If you are interested in getting involved either as a mentor or otherwise providing support to this project, please contact Raissa Kirk at 410/659-4835 or rkirk@crowncentral.com.

## IN-HOUSE COUNSEL COMMITTEE MEMBERSHIP BENEFITS

---

### Tamar Jergensen Cerafici

Ever wondered why you should become a member of the In-House Counsel Committee? Here are a few reasons:

- It's free: That's right – once you're a member of the Section, you can join up to five committees at no additional cost! If you're an attorney serving the environmental needs of a corporation, or if you work for a law firm that provides environmental advice to corporate clients, *you need to join this committee!*
- Instant access to your colleagues in the Section: The Section has a list serve set up for each committee, giving you instant access to dialogue and problem-solving with in-house counsel throughout the Section.
- Early-bird notification of informative brown-bags: From time to time, the In-House Counsel Committee notifies members of innovations and brown-bags discussions that aren't always sponsored by the Section. For example, In-House Committee members got early notification of an important corporate transparency tool developed by the Global Environmental Management Initiative (GEMI) and a special invitation from GEMI to join in the roll-out teleconference.
- Newsletters: At least three times per year, the committee produces a newsletter which is posted on the committee's Web site. Committee members receive notification of a newly published newsletter via the committee's list serve as soon as the newsletter becomes available. The newsletter has important information about developing trends, legislation, and case law that may have an effect on your company and clients. Recent newsletters discussed homeland security requirements, disclosure under Sarbanes-

Oxley and corporate sustainable development initiatives. You can also review archived newsletters and find tips on how to manage your practice more effectively.

- Public Service: You get a chance to join with other committee members in an innovative partnership with Earth Force, a program that teaches environmental science to elementary and secondary school kids in areas throughout the country. We are currently working out the 2005 program and support strategy.
- Becoming a member is EASY: Once you join the Section, go to [www.abanet.org/environ/committees/signup.html](http://www.abanet.org/environ/committees/signup.html) and select "In-House Counsel."

We hope you see what committee members know already – committee membership adds tangible value to your Section membership. If you'd like more information about us, check out our Web site: [www.abanet.org/environ/committees/counsel/home.html](http://www.abanet.org/environ/committees/counsel/home.html).

*Tamar Cerafici is an environmental consultant and attorney at CH2M HILL in New England. You can reach her at [Tamar.Cerafici@ch2m.com](mailto:Tamar.Cerafici@ch2m.com).*

### IN-HOUSE COUNSEL COMMITTEE LIST SERVE

Communicate with your colleagues on the In-House Counsel Committee by using the committee list serve:

*[environ-inhsecounsel@mail.abanet.org](mailto:environ-inhsecounsel@mail.abanet.org)*

## WHY CONTEST OSHA CITATIONS? AVOIDING LATER “REPEAT” CITATIONS IS ONE GOOD REASON

---

**Shell J. Bleiweiss**

In June 2001, this newsletter featured my article entitled “Dealing With OSHA – The Most Common Mistake Companies Make,” which discussed how to handle an OSHA inspection at your facility. This article addresses the next step in the process: what to do if you receive citations from OSHA following an inspection.

Within six months following the initiation of an OSHA inspection, OSHA will decide whether to issue citations to your company. If OSHA citations are issued, they will usually be sent to your company by certified mail. You will have 15 business days from receipt of the citation(s) to formally contest the citation(s). **No extension of this time is available for any reason.** Citations will have three components: the OSHA standard allegedly violated; the penalty; and, the required abatement date. Any or all components can be contested. If not contested, the citations will become final on your company’s record, just as if a judge had found your company “guilty” of the violations.

The penalty amounts OSHA is allowed to seek are set by law, but vary widely. Occasionally we hear of some Fortune 500 company being hit with a multimillion dollar penalty by OSHA. These penalties make the news and grab a lot of attention. From OSHA’s perspective, there is great fright value, or as OSHA calls it, “deterrent value,” in such news. In other words, if the regulated community sees General Motors, or Proctor & Gambel or whomever, receiving a seven figure penalty for non-compliance with OSHA rules, OSHA hopes that other companies will work harder to comply.

However, the vast majority of OSHA penalties are typically in the \$1,000-\$30,000 range. In these cases, the question invariably comes up: why spend the money to pay lawyers to contest the citations, when it may cost as much in legal fees as the penalty? On this

basis, many companies do not contest and simply pay OSHA. This economic reasoning may be short-sighted. Here’s why.

OSHA calculates its penalty amounts based on several factors, one of which is severity of the violations. The most common levels of citations are called: “Other Than Serious,” “Serious,” and “Repeat.” (There are also “Willful” and “Criminal” levels. They are used infrequently and are beyond the scope of this article.) “Other Than Serious” citations typically carry no monetary penalty. In OSHA’s view, however, if the violation has the potential to cause serious injury or death, the level cited is at least “Serious.” By law, Serious citations carry a maximum of \$7,000 per citation. So, for example, if a company is cited for three “Other Than Serious” violations and four “Serious” violations, the most they will be penalized is \$28,000.

However, penalties for citations deemed by OSHA to be “Repeat” carry maximum penalties of ten times as much, or \$70,000 each. So merely by being cited as Repeat instead of Serious, the \$28,000 example above could become \$280,000, or if all seven violations are at the Repeat level, \$490,000. As is readily apparent, the penalty costs go up significantly when OSHA can cite your company for Repeat violations.

An employer can be charged with a “Repeat” violation when that employer has been previously cited for a substantially similar condition, and the citation has become a final order of the Occupational Safety and Health Review Commission. As a matter of policy, OSHA looks to the most recent three-year period in determining whether to cite at the Repeat level.

If your company did not contest a citation a couple of years ago because it was cheaper to pay OSHA than to hire an OSHA lawyer to contest, and now you are being cited for violations of the same or similar OSHA standards (*e.g.*, you were cited for fall protection before and now you are being cited for fall protection again), OSHA could choose to cite you for “Repeat” rather than “Serious” violations. As discussed above, it gets expensive fast when you are cited at the “Repeat” level.

While there is no guarantee that by contesting citations you will win or settle them away, it is important to consider, with the input of a knowledgeable OSHA attorney, just what the prospects of prevailing are. If there is a reasonable chance to eliminate some or all of the citations, it is worth the effort, if for no other reason than to minimize your company's exposure to "Repeat" citations later. At the very least, during the period of the pending matter, the citations will not be available to OSHA as the basis for a Repeat citation.

*Shell J. Bleiweiss is an attorney specializing in environmental and OSHA law in Chicago, Illinois. He practiced for 16 years with three of the largest law firms in the U.S. before opening his own practice in 1998. Mr. Bleiweiss is a past chair of the ABA Section of Environment, Energy, and Resources' Alternative Dispute Resolution Committee. He can be contacted at sbleiweiss@shell-bleiweiss.com.*

## THE ROLE OF COMPANY LAWYERS

**Jim Moore**

***Chair, In-House Counsel Committee***

Those of us who labor as in-house environmental, natural resource or energy counsel at medium-sized and large corporations often struggle with what our role should be. Should we provide legal advice only or should we provide policy advice, too? When we give legal advice, should it be as protective as possible from a strictly legal perspective or should we attempt to assess the full suite of risks faced by the company and provide our view as how best to minimize the risks as a whole including, but not limited to, legal risks?

In my view, it is often risky for counsel to venture outside of the legal realm and provide advice to the client on broader issues without being invited. I learned that more than 20 years ago when I became the manager of an EPA legal office. Certain of the EPA lawyers had, for years, offered advice to agency client personnel on policy and administrative issues (*i.e.*, told the program personnel how to do their jobs) without being invited; the result was that several client offices in the agency were not coming to the legal office when they needed legal advice. When we discovered what was happening, we, as an office, after some substantial self-analysis, announced to our clients that, from then on, we would not provide *anything* but legal advice unless asked. This was a recognition that by telling or suggesting how program personnel should do their jobs, we were venturing out of our area of responsibility into theirs. Our announcement was simply another version of "good fences make good neighbors": we will stay on our side of the fence and respect your right to carry out your business on your side unless you invite us across. By following through on this promise, a much healthier relationship between the legal and client program offices was developed. Our clients came to trust us, and the upshot was that they not only regularly came to us for legal advice, but often sought our views on collateral non-legal matters as well. We became much more effective lawyers within the agency.

The fact that it is risky for lawyers in an organization to venture outside of the legal realm without being invited,





**In-House Counsel  
Committee Newsletter**

We hope you enjoy this issue of the In-House Counsel Committee Newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues for the newsletter, please contact the editor David Zoll at (410) 337-2873 or dzollmed8@earthlink.com.

Back issues of the newsletter can be found at [www.abanet.org/environ/committees/counsel/newsletter/home.html](http://www.abanet.org/environ/committees/counsel/newsletter/home.html).

does not mean that lawyers have little to offer beyond the law. It just means that organizational lawyers are more effective in dealing with their in-house clients if the lawyers are respectful of the capabilities and responsibilities of others.

In a recent article from the Financial Times of July 14, 2005, a copy of which was obtained through the Web site of the World Business Council for Sustainable Development, it was reported that lawyers are more likely these days to get a seat at the table at senior manager meetings focused on broad extra-legal issues such as corporate responsibility. The reasons for this are various, including the following: (1) laws like Sarbanes-Oxley not only establish a broad set of rules relating to corporate responsibility, but put lawyers in a position of overseeing and even enforcing compliance; (2) there is an understanding among many senior executives as well as general counsel, that the tort and regulatory liability potential of many companies is influenced by the way the company is viewed externally; and (3) according to Elliot Schrage, formerly senior vice president of global affairs at Gap who is quoted in the Financial Times article, “Legal training can force rigorous thinking and analysis that has not historically been the hallmark of corporate responsibility and sustainability initiatives.”

The article notes, however, that “. . . it is the risk-averse approach of legal departments that [sometimes] hamper corporate efforts to tackle social and environmental impacts” Aron Cramer, the head of Business for Social Responsibility, is quoted in the article, as follows: “There is a sense among American lawyers that aspirational principles create binding legal obligations . . . that can lead to substantial liability.” Mr. Cramer argues that this risk-averse approach “. . . does not take into account broader risks present in a world where legislators, consumers, campaigners, and local communities are scrutinising corporate behavior.”

Provision of legal advice in a context where there are many risks to the corporate client in addition to legal liability, some of which could be as or more significant than the legal risks, should be carefully qualified to acknowledge the non-legal risks. Lawyers may not have the expertise to assess those other risks, but they

should be able to advise the client that it needs to consider those other risks in making an ultimate decision despite how important the lawyer may think the legal risks are. Risk-averse legal counseling, which gives priority only to legal risks, may do a serious injustice to the corporate client. In a sense, such narrow-focused legal counseling is just as much a mistake for the in-house lawyer as voluntarily going beyond the legal realm and giving policy advice where it is not invited.

## **THE YEAR IN REVIEW 2004 AND NR&E NOW AVAILABLE ONLINE!**

Section members are able to view *The Year in Review 2004* and *Natural Resources & Environment* in the Section Members Only area of the Section Web site ([www.abanet.org/environ](http://www.abanet.org/environ)) after logging onto the Web site with your ABA Member ID number and password.

The online version of *The Year in Review 2004* contains all chapters found in the paper copy, each in .pdf format.

*Natural Resources & Environment* online contains all articles found in the paper copy, created in .pdf format. Past issues dating back to 2002 can be found in the archives page.



**AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES**

***Calendar of Section Events***

**13th Section Fall Meeting**

Sept. 21-25, 2005  
Nashville, Tennessee

**Energy Litigation Conference**

Oct. 19, 2005  
Houston, Texas  
(Cosponsored with the Center for American and International Law. For more information, see [www.cailaw.org](http://www.cailaw.org).)

**Petroleum Refining and Marketing Law Roundtable**

Oct. 21, 2005  
Chicago, Illinois

**Brownfields 2005**

Nov. 2-4, 2005  
Denver, Colorado  
(Cosponsored with the International City/County Management Association (ICMA) and U.S. EPA. For more information, see [www.brownfields2005.org](http://www.brownfields2005.org).)

**24th Annual Water Law Conference**

Feb. 23-24, 2006  
San Diego, California

**35th Annual Conference on Environmental Law**

March 9-12, 2006  
Keystone, Colorado

***For more information, see the Section Web site at [www.abanet.org/environ](http://www.abanet.org/environ) or contact the Section at 312/988-5724.***

