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CONSIDER WHETHER YOUR OUTSIDE CONSULTANT/AUDITOR HAS A DUTY TO DISCLOSE ENVIRONMENTAL, HEALTH AND SAFETY ISSUES TO REGULATORS

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Environmental, health and safety professionals who function as auditors are paying increasing attention to whether they may be exposed to liability if their corporate clients do not timely or fully disclose adverse conditions. And if an auditor feels exposed to liability for a failure to disclose, how can in-house counsel be sure that they receive proper advice about what must be disclosed, or ensure that their auditors won't independently disclose adverse conditions to regulators? The most-effective way to address these issues is to establish in advance clear requirements so that the auditor will not feel exposed to liability over the manner and timing of disclosure, which is the company's right to determine.

A successful [environmental, health and safety audit](#) requires careful planning and management of the response to and disclosure of adverse conditions. Many in-house counsel set up their companies' environmental, health and safety audits with the auditors' findings and recommendations funneled through counsel, so that the dissemination of information may be managed subject to the attorney-client and work-product privileges. But protecting the auditor's findings and recommendations with applicable privileges is insufficient if the auditor has an independent duty to disclose to regulators and others.

Many auditors are professional engineers, who are subject to a [code of ethics](#), which requires that they "hold paramount the safety, health and welfare of the public." Under their code of ethics, professional engineers must "notify . . . such other authority as may be appropriate" if their engineering judgment is "overruled under circumstances that endanger life or property," and may reveal even confidential client information "as authorized or required by law or [their] Code" of ethics. Some professional engineers question whether their ethics code imposes a professional obligation to disclose conditions that may endanger worker or public health and safety, even if their clients choose not to disclose. And auditors who are not professional engineers must evaluate whether a state court may impose a common law duty to disclose, when the determination whether a duty exists is determined by the courts on a case-by-case basis as "one of fairness and policy that implicates many factors" – as at least one court phrased the inquiry.

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DUTY TO DISCLOSE (cont'd)

For in-house counsel it is important that the intended purpose of the audit is fully realized. The most-effective mechanism to manage the flow of information, and to ensure that environmental, health and safety issues are addressed and disclosed in a responsible and planned manner, is to clearly define the outside consultant's obligations and responsibilities. Two examples are illustrative. In one case (not in the context of an audit), the court concluded that an engineering firm owed a duty to report safety concerns at a construction site because the firm was contracted to monitor the progress of work and was in a position to identify unsafe work conditions. In another case, the court concluded that an engineering firm owed no duty to report that an industrial activity posed a grave risk to the surrounding community because its contract clearly limited its engagement and clearly defined to whom it should report its findings.

So, in addition to setting up the audit to ensure that environmental, health and safety findings and recommendations are protected from discovery by available privileges, in-house counsel should pay particular attention to include contractual provisions that clearly define the outside consultant's functions and reporting obligations, and may even choose to preclude disclosure to third parties. And outside consultants should welcome such clearly-stated contractual obligations and reporting requirements. It serves no one's interest to be left to wonder whether an unintended duty to disclose may exist.

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