

Deepwater Horizon Oil Spill 10 Years Later: Trends Still Shaping the Legal Industry Today

By James J. Neath | 2020-Apr-29



I awoke the morning of Wednesday, April 21, 2010, to another beautiful sunny day in Houston — until I turned on the TV news and saw a drilling rig in the Gulf of Mexico engulfed in fire. My heart sank moments later when I was told that the rig was working for BP, my employer.

As BP's associate general counsel in charge of global litigation, I had lived through a number of significant legal crises: the largest oil spill ever on Alaska's North Slope, a multiple fatality refinery explosion, the near sinking of one of the world's largest oil rigs, a commodity trading scandal, among others. I knew as I watched the rig burn that the *Deepwater Horizon* incident would generate many years of litigation. In the years following BP's merger with Amoco, many observers doubted that any single legal matter could threaten the financial health of the group. That was about to change.

That Wednesday, I was asked to lead BP's litigation response to the event, which would draw heavily on my prior crisis management experience. I did not know then how the tragic loss of 11 lives aboard the *Deepwater Horizon* rig would be emotionally portrayed in a Mark Wahlberg movie of the same name six years later. Sadness returned Thursday, April 22, 2010, when the burning rig sank to the bottom of the Gulf of Mexico. Root cause investigations will commence, litigation claims now will be filed, I thought. Here we go. But the worst was yet to come.

I did not learn until several days later that the incident involved much more than a terrible deadly explosion. It turned out that the sunken rig was still leaking oil. In 5,100 feet of water 41 miles offshore, the uncontrolled breach would discharge more than 200 million gallons of crude oil over 87 days. I did not need news anchor Anderson Cooper to tell me that this would become the worst environmental disaster in US history. A rolling, summer-long economic and ecological crisis unfolded for the US Gulf Coast region until the well could be plugged. As we now search frantically for a cure to COVID-19, I think back to our 2010 search for a technology to close this high-pressure leak at the bottom of the sea.

Remembering the 10th anniversary of the *Deepwater Horizon* oil spill

In recognition of the 10th anniversary of the devastating event, it is worth remembering the human and environmental tragedy that it was. We felt it across the globe, and we must continue to re-learn its lessons.

As members of the legal industry, we can learn our own lessons from the legal drama that was *Deepwater Horizon*. For me, the legal response was a life-changing event. Our large internal and external legal team worked on the crisis response literally 16 hours a day, seven days a week, for a year and a half. The data management effort alone was a monumental, spare no expense evidence gathering, retention, and analytics challenge. One entire workstream was devoted to identifying, preserving, and "live-streaming" video footage of the ongoing leak! The following are some of the more noteworthy observations from the legal response.

The crisis spawned an enormous array of overlapping and often conflicting accident investigations. No fewer than 10 investigations began almost simultaneously. The US Coast Guard and a Presidential Commission conducted root cause investigations alongside BP's own extensive inquiry. Beginning immediately following the blowout, the US Congress and the public media began an unrelenting quest for "what happened" and "who was responsible."

These intense inquiries influenced early legal, shareholder, and public relations strategy. They point to a critical crisis management imperative: the importance of speed in fact gathering and analysis. Law enforcement and regulatory investigations proliferated: US Department of Justice (DOJ) Civil and Criminal components of the Justice Environment and Natural Resources Division (ENRD); US Securities and Exchange Commission (SEC); US Interior Department; and more.

Each of these investigations had its own timing implications, legal impact, reputation effect, and evidence-handling requirements. Also, most observers did not fully appreciate the international aspects of the event. These included the global evidence-gathering challenge and the international character of claims activity, ranging from class actions in Mexico to UK pension fund securities claims to litigation in the Ecuadorian Constitutional Court.

Another noteworthy facet of the *Deepwater Horizon* legal drama was the role of government inter-agency politics. Today, it is not uncommon to see politically driven competition among public officials. The *Deepwater Horizon* oil spill activated almost every public and government entity imaginable, each one seeking to carve out a special value for its own constituency, whether a form of corrective action, environmental resource restoration, and/or public compensation.

These public actors included every level of government, from multiple branches and agencies of the federal government down to individual municipalities competing for a share of institutional credit. This “politicization” of the legal process resulted in conflicts between federal and state attorneys general (AGs), between State AGs and individual counties/parishes, among federal and state environmental regulatory agencies, between Congress and the Executive branches, and among energy industry participants themselves.

Some of these *Deepwater Horizon* observations have faded into the pages of a unique event in US and world history. Others — with the benefit of hindsight — appear to be living on within larger trends now reshaping the legal industry. In this article, I share my thoughts on what these trends are and what we can and should learn from them. (These views do not represent those of BP, either during the crisis or now.)

A decade since *Deepwater*

In the decade since the *Deepwater Horizon* crisis, much has changed in the way legal services are delivered. Some of these changes have resulted from global political and economic forces. Other changes reflect an evolution of the legal services market itself. And, of course, technology advances have begun to alter the practice of law fundamentally. Many commentators have offered views on these subjects. When I reflect on how the legal services market has changed since *Deepwater*, I see four important trends that first began to appear in the aftermath of that legal, human, and environmental crisis.

1. Conflict between globalization and nationalism complicates legal solutions

No one would dispute that since 2010 the practice of law has continued its rapid globalization. Just as the *Deepwater* explosion in the international waters of the Gulf of Mexico led to claims in other distant legal jurisdictions, complex legal problems are now often litigated in multiple international venues simultaneously (e.g., Volkswagen emissions scandal, forex manipulation, climate change litigation).

The global coronavirus pandemic could lead to the same. Victims outside the United States commonly seek access to the US justice system for compensation. Lawyers representing victims are increasingly collaborating across borders (e.g., plaintiffs’ counsel who represented international victims of BP’s Algerian terrorist hostage crisis in 2013). And, just as the world is becoming a smaller place in which to practice law, pertinent data (evidence) can no longer easily be protected from discovery across borders based on jurisdictional considerations or corporate formalities. Cross-border cooperation among international government regulators is now even more common than among private plaintiffs’ counsel.

While these trends have accelerated, what’s new is the tension created by growing nationalism and the patchwork of data regulation that is complicating the speedy flow of data internationally. Brexit

and the growing use of tariffs have made international borders more important than ever. Today, the issue is less about the power of regulators to compel international data transfer, than it is about understanding where and how your data is stored, so that stringent electronic data privacy and security interests can be protected. Managing the tension between legal globalization and data protectionism requires both an international legal strategy as well as a considered data strategy.

2. Fragmentation and politicization of government regulation

It comes as no surprise that political polarization has increased around the globe. Accompanying this political divisiveness has been the fragmentation and politicization of government regulators and law enforcers. US states, counties, and municipalities have become more independent.

Local relationships matter more than ever before. It is now common for social ills to be litigated independently at all levels of government. Good examples of this are the climate change, opioid addiction, and other public nuisance claims being pursued by municipalities, and the growing antitrust assertiveness of state attorneys general (e.g., T-Mobile/Sprint merger challenge).

The affected US Gulf Coast states and counties (parishes) were strong, independent actors that influenced the outcome of *Deepwater* Horizon claims activity, and they were not easily influenced by the DOJ. This was less about political leanings than it was about tensions arising from experience with Hurricane Katrina. But since *Deepwater*, these lessons are now part of lawyer playbooks: managing government regulatory relationships in crisis requires a multi-faceted strategy.

3. Emergence of independent corporate investigations functions

It has become painfully obvious that a company's brand reputation and indeed its very license to operate often depends heavily on how, when, and by whom it investigates suspected corporate wrongdoing. Corporate "root cause" investigations can unfold with breathtaking speed and beyond the company's control. The US Congress and the US Coast Guard began public hearings into the *Deepwater* Horizon accident only three weeks after the explosion. BP completed its own internal investigation of the incident four months later.

In the years since *Deepwater*, it has become common for corporations to establish centralized internal business functions dedicated to investigating affairs affecting business safety and integrity. The importance of professionalism, speed, and independence motivate these changes. These units or functions are typically staffed by former government investigators trained in investigative techniques and who often bring subject matter expertise involving the business operations involved.

These functions are established to be independent of the affected business, free from any profit-making influence, and sometimes sitting outside the legal department. Legal crisis response must take account of these developments. Internal investigation units often reflect a purposeful policy to elevate transparency over legal privilege and reputation protection over short term legal exposure. Armed with artificial intelligence (AI) tools and sophisticated data management practices, these investigation functions can reap the benefits of greater data aggregation using advanced analytics to begin predictive modeling of compliance behaviors.

4. Role of technology and professional legal operations

BP's "no holds barred" approach to evidence preservation and data management during the *Deepwater* crisis was impressive to say the least, occupying hundreds of non-law firm technology

contractors (today commonly referred to as “alternative legal service providers” or ALSPs) to find, lock down, and analyze data and devices across the globe.

But since *Deepwater*, many of these bespoke approaches have become embedded within corporate business process. Just as professionalism and expertise have driven improvements to the internal investigation process, so too has it transformed the use of technology to assist legal practitioners. Most large corporations now host a cadre of business professionals (e.g., legal operations) devoted to transforming in-house lawyering using technology, most notably AI tools.

In the 10 years since *Deepwater*, these trends have become crucial business initiatives for many legal departments, which speaks to the imperative of speed and the role of advanced data analysis. Today’s most forward-thinking GCs consider the core value of litigation law firms to be trial advocacy, and this irreplaceable value must be paired with expert data technologists (whether sourced inside the corporate client or from external service providers).

What can we learn from these developments?

These reflections on the practice of law in the decade since the *Deepwater Horizon* tragedy point to the pace of change in the legal services industry. Thought-provoking though they may be, what do they really mean for senior leaders? What should general counsel, chief compliance officers, and law firm managing partners be doing differently to improve outcomes and overall effectiveness? I offer the following thoughts.

Today’s complex legal problems require a data management plan, just as they have long required a legal plan. Likewise, the data management plan needs to be strategic, proactive, and professionally managed. I submit that a chief data strategist needs to be at the table alongside the GC and the lead outside counsel when a response plan is being developed and executed. The data management role cannot and should not be delegated to an external law firm. Legal crisis response requires a dream team with true experts in all key areas. At BP, we called this a virtual legal team.

Additionally, any data management plan must have a combination of global reach, consistent process discipline in each region, and the flexibility necessary to accommodate country-specific requirements. The chief data strategist must bring a resource capability that enables the company to think globally while acting locally. It is critical to have a seamless cross-border data transfer plan.

Third, I have emphasized the growing importance of investigations — both internal corporate inquiries but also proactive responses to anticipated regulatory inquiries. Here, speed and agility are crucial. Though human witnesses always will be important, the greatest challenge is data. Skillful application of advanced data analytics is imperative in responding timely to diverse government investigations, while navigating balkanized data privacy (and sometimes in-country national security) requirements. The speed, agility, and cost-effectiveness of the cloud is a consideration that no data strategist can afford to ignore anymore.

Finally, even though I have emphasized the importance of professional data expertise separate from core legal expertise, the data strategist must work closely alongside the GC and the lead law firm partner. Data experts, however, often speak a different language, and this can be frustrating to legal practitioners. Consequently, the data management team should have seasoned professionals with strong law practice backgrounds in order for the “dream team” partnership to work effectively. This is an attribute often overlooked.

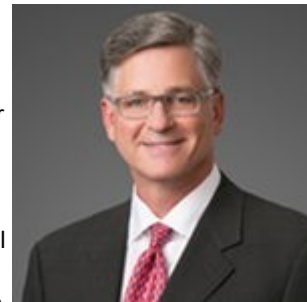
The *Deepwater Horizon* crisis was a life-changing event for me personally and a landmark event in US legal history. The scientific challenges we now face in stopping the unfolding virus remind me of the summer of 2010. Even 10 years on, there's much we can still learn from *Deepwater Horizon*.

For more of James J. Neath's insights on mitigating and handling legal crises, register for ACC's [Litigation Readiness in Times of Crisis](#) webcast, which is eligible for one CLE/CPD credit.

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About the Author

James J. Neath is president of strategic solutions at [Morae Global Corporation](#), a leading provider of transformative legal and compliance solutions for corporations and law firms. In his role, Neath is responsible for assisting corporate legal departments and law firms with strategic planning for litigation readiness, investigations, and related discovery processes for responding to complex matters such as multi-party high-stakes lawsuits. Previously, he served as associate general counsel in charge of BP's global litigation group where he led BP's response to the *Deepwater Horizon* Gulf Oil Spill, during which he coordinated the work of hundreds of lawyers, managed a legal budget exceeding US\$1 billion, and successfully negotiated one of the largest class action settlements in US history. Neath also helped transform the BP legal department into a true business function. He designed and built an internal eDiscovery specialist group, implemented a state-of-the-art e-billing system, and created a law firm sourcing and management program that saved more than US\$70 million in law firm and discovery expense. The innovative strategic and technology improvements that Jim implemented at BP are the very solutions and capabilities that he now helps corporations to design and implement in his role as an executive at Morae.



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