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Crisis and Response: You Have Nothing to Fear but the Fear of Responding

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06-18-2008

Imagine you're the CEO of what you consider to be a reputable computer software company looking to expand your company headquarters by buying several surrounding properties. No sweat, right?

A few outspoken local residents, however, get wind of your plans and organize an opposition that, to your horror, spins quickly out of control. Community forums and unknown bloggers, posting confidential details of your plans, rip the company for its supposed insensitivity to the local residents and attack the company's honesty and forthrightness. A lawsuit is filed to stop the expansion, and zoning battles over the company's expansion loom. Even your competitors get into the act, issuing public statements that exploit the situation and impugn the company's products. You are getting calls from reporters salivating to cover the burgeoning controversy.

Sound far-fetched? Hardly. This sort of public relations nightmare happens so frequently that it's surprising how many companies and institutions fail to prepare for it. In fact, if you start thinking about it when the crisis arises, you're already late to the game. Every company or institution concerned about its business and reputation must assume the worst and develop a game plan before a crisis happens.

Here are some of the legal and public relations advice and ground rules that can help you prepare for, and respond to, a crisis.

Before A Crisis Erupts

Risk Audit: A risk audit determines and assesses the risks that a company or institution faces on a daily basis. How could things go wrong? Is sensitive information about the company or its employees kept confidential and disseminated only on a need-to-know basis? What are others currently saying about the organization? Who is speaking with the press on behalf of the organization? What controls are placed on those within the organization who have the capacity to make statements to the outside world?

Without this sort of risk audit, a company or institution will quickly bungle the first crisis that comes along.

Policies/Procedures: In our hypothetical, it was clear that a company employee was leaking confidential information. Every company and institution needs policies that govern what employees can say and give them notice that their communications on their employers' systems are not private. Years ago, employee e-mail created concern. Now, the bigger risk is what employees say on the Internet, especially on blogs, regardless of whether they are run by the employee or the company.

With blogs, there are numerous risks. Employees can inadvertently (or deliberately) reveal confidential business information/ trade secrets and harm the company's business dealings. They can defame others or disparate competitors' products and services. And they can cause friction among employees and subject the company to harassment/discrimination lawsuits.

Such policies are not one-size-fits-all. Some companies (such as Sun Microsystems, whose CEO has his own blog) welcome employee engagement in the blogosphere, while others don't want anything of the sort. Each company's policy must reflect its own culture, values and goals. But most companies and institutions will want a policy that requires the following: prior approval before any posting on a company blog; a prohibition on employees blogging at work and/or using company resources; compliance with the company's non-harassment policy; and discipline for violations of the policy.

Crisis management plans: Our hypothetical CEO would have been in a much better position had he taken the time to develop a well-thought out crisis management plan that takes the most likely disaster or crisis scenarios and maps out potential responses to them. When the crisis occurs, and it usually does, the company must follow the plan.

All too often, the best-laid plans are wrecked by heat-of-the-moment improvisational thinking that seems right at the time but turns out disastrously. Take the time now, before a crisis, to make informed decisions about how you will respond to a variety of scenarios. Set up policies that encourage cooperation among your lawyers, your communications team, and your operations staff. Determine who will speak, and consider possible responses. But do it now, so that you're not acting in the heat of the moment.

Once A Crisis Erupts

Our CEO is torn by two conflicting impulses. On one hand, the CEO wants to counterattack, talking personally with the media, harshly criticizing the community activists and taking a scorched earth approach. On the other hand, the CEO wants to shut up, afraid that anything she says will prompt additional lawsuits.

In most situations, neither approach is the right approach. Saying nothing means that the company will lose the battle of public opinion, while saying and doing everything will get the company into more trouble. As in most things, striking the right balance is the key.

Dealing with the Media: There's really only one cardinal rule in dealing with the press: Don't take any of

it personally. Reporters and editors have jobs to do, just like you, and they have feelings, just like all of us. So if calls come in, they need to be answered - and answered promptly and credibly. Without hostility, too. It may feel like an attack, but it's usually just an attempt to get information. Be a participant, and get involved in the story that will impact your company or organization. News, like silence, abhors a vacuum, which is a fancy way of saying that if you don't speak up for yourself, someone else likely will do so for you. And no one understands your story better than you.

So our advice: Work with the media, not against them. Answer their questions, but have a strategy that contemplates ahead of time what those responses, and your message, are going to be. If you don't know the answer, say so. Except in unusual situations, you should avoid saying "no comment," which readers often construe as equivalent to a Fifth Amendment assertion. Don't fake it, and don't ever lie. Reporters are human. If you give them a reason to doubt your candor, their reporting will likely reflect that. If you want to speak with them off the record or on a not-for-attribution basis, make the terms of that agreement explicitly clear. While reporters strongly prefer on-the-record comments, they sometimes grant confidentiality and will honor that promise.

On the other hand, you should never speak with reporters cavalierly. Your comments must be well prepared and consistent with an overall message that you want the public to hear. Flippant, offhand remarks can become the centerpiece of a story. Not everyone has the skills and personal qualities to speak with the media, so take care to designate the right person or hire a public relations professional. And in a crisis, designate only one such person to speak. It's critically important in a crisis to speak with one voice and maintain a clear and credible message. That's infinitely easier to achieve if there's only one person doing the talking instead of several.

The truth is, in some scenarios you may not even need to hire an outside communications firm, if you have taken advantage of the opportunity to plan ahead so that you are prepared. But the scope of the crisis may overwhelm your internal communications staff; or it may be the first time your organization has faced a major crisis and it is straying from the message and methods set in your crisis plan; or you may decide that it may be beneficial to have an outside consultant to serve as a "barrier" or "buffer." In such situations, it may be a good idea to hire outside help.

Working with a PR firm: If you make a determination to hire outside PR counsel, here's what generally happens: You and the firm's leaders meet to discuss the problem and map a course of action that includes a variety of responses. These could include drafting written responses for publication in the newspapers; orchestrating responses from responsible (credible) third parties in support of your position; holding a news conference to explain your position and respond to damaging allegations; or even developing a coordinated response that includes all of the foregoing responses as well as creating newsworthy public events that speak to the important issues.

The key in this regard is finding ways to work together to ensure that your message is newsworthy - in other words, that newspapers, radio and TV reporters and editors want to actually cover what you have to say. Getting this right is critical, and not at all coincidental. It means committing to a credible message and then aggressively conveying that message through the news media to your "target audience" and the public at large.

Vetting Statements: In sensitive situations, it is important that you obtain legal review of press releases and statements to ensure that the risks of libel, slander and invasion of privacy are minimized. The job of your attorney is not to tell you that you can't say what you want to say. The attorney's job is to help you say what you want with less risk. There is no way to eliminate risk, but knowledgeable attorneys can make it more likely that what you want to say falls outside the boundaries of actionable defamation.

For example, only statements of fact are actionable under the laws of defamation; thus the use of words that give an opinion but neither state nor imply false facts entails less risk. Likewise, defamation requires statements that ruin one's reputation and are not simply embarrassing or annoying; tailor your statements to avoid crossing that line. There are a variety of privileges. The fair report privilege, for instance, protects fair and accurate statements of governmental reports and proceedings, including what is filed in court. Relying on those reports and proceedings adds protection.

Filing Lawsuits: Filing lawsuits may make you feel better, but it isn't always the answer. They are time consuming and distracting. If not taken on contingency, they can cost a lot of money. They take years to resolve, long after your anger has subsided. Suing the media means attacking someone who will continue to report on you, not usually a good idea. And, especially for defamation and invasion of privacy lawsuits, the focus of the case is often more on the plaintiff than any defendant.

If you're alleging your reputation was ruined, the defendant can take discovery on your reputation before and after the alleged defamation; a libel plaintiff's pre-existing reputation is rarely pure and easily punctured. If you're alleging financial damage, the defendant gets your financial records, tax returns and dealings with customers, clients and others. Such discovery can be very revealing and painful for libel plaintiffs.

Filing lawsuits should be considered only if you have suffered real damage from a truly defamatory statement, or if you believe that you'll suffer even worse damage from statements by someone who won't be deterred unless sued. Short of that, it is usually better to work via methods short of litigation.

Companies and institutions are increasingly realizing this. Rather than sue activists and bloggers, they are engaging them, posting responses that correct the record and trying to persuade them to think differently. You won't persuade everyone, but you will probably convert a number of them. And you won't foster a heavy-handed, David-versus-Goliath image, which is a bad public relations move.

Unmasking anonymous bloggers: Depending on your viewpoint, anonymous bloggers are a mainstay of our democracy and deserving of the fullest First Amendment protections, or they are the scourge of the Internet, ruining reputations or disclosing private information at a keystroke without any concern or accountability. Whatever your view, there's no question that anonymous bloggers are causing companies and institutions to pull their hair out with frustration.

Suing bloggers is one alternative, but getting a court to permit the unmasking of an anonymous blogger won't be easy. The trend in the law is that court will "out" anonymous bloggers only if the plaintiff can show that their lawsuit is viable and non-frivolous. This means persuading the court that the complaint would survive a motion to dismiss or summary judgment. It may be a lot of trouble to sue someone who likely does not have a deep pocket, but if an employer believes that an anonymous blogger spewing

defamation or leaking secrets is one of its own employees, such a course is often well worth the time.

There is nothing to fear when speaking to the press. It's an important part of maintaining the company or organizational image, and it is critically important to ensure that accurate information about your organization is being conveyed to the public. Don't avoid it, but instead prepare for it - with a communications plan that is developed ahead of any crisis, and by thoughtful and effective responses that are the product of a solid partnership among you, your communications team and your lawyers. **ROBERT C. CLOTHIER** is a partner in Fox Rothschild's Philadelphia office and chairs the firm's media, defamation and privacy law practice group. He can be contacted by e-mailing RClothier@foxrothschild.com.

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