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Work Session I: Crisis Communications and Reputation Management for Attorneys and Their Clients

By:

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Essential Elements of a Crisis Communications Plan

Crisis communication plans vary in complexity, but here are the essential elements every organization should compile in order to be prepared for a crisis.

- List of members of the Crisis Communication Team and complete contact information (including after-hours)
- A clear delegation of responsibilities for each member of the Team (including backups)
- Clear protocols and procedures for activating the Crisis Communication Team and approving communications
- Guidelines for working with the media during a crisis, including a clearly defined media policy and designated spokesperson(s) and support
- Lists of critical stakeholders and databases with their contact information and guidelines for outreach
- Pre-established notification system(s) and instructions for activation
- Policies and procedures for the front office staff on how to handle media calls & visits
- Pre-approved messages for crisis scenarios and templates for letters, statements to the media and other communication tools for each scenario
- Guidelines for the use of social media during a crisis, including company policies, authorized responders, preferred sites, accounts and general guidelines for participation, monitoring and responding
- Background information for the media and/or a dark website containing executive bios, fact sheets, maps/directions to facilities, high-resolution photos and logos, Material Safety Data Sheets, etc.
- After-hours contact information for local media. (Crises rarely happen during business hours, and the local media will continue to cover your organization long after CNN leaves.)
- Other useful information, including instructions and passwords for social media platforms and 24/7 contact information for outside resources

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Make sure YOU have the knowledge, usernames and passwords to gain emergency access to your website (as well as your Facebook and Twitter accounts)
Downloadable Press Kit
Complete PR Contact info (be sure it's 24/7/365)
Searchable archives
Company history, timeline, mergers, acquisitions, names changes, new plants, etc.
High-resolution, color media-trade photos of company/building/products

- Usually 5x7 at 300 dpi (though some newspapers & magazines like 8x10 at 300 dpi)
- Using a JPEG compressed in "very high quality" mode is usually acceptable
- Offer suggested captions

Executive bios (AKA obituaries), headshots & team photos
Video (both high and low-bandwidth footage)
Video News Releases (VNR) & B-Roll
Diagrams, illustrations and graphics, including company logos (offer in low-rez, perhaps keeping hi-rez password-protected)
Press releases (current w/ release dates and archived); categorize by section or product
Corporate backgrounders
Case studies
Product overviews
Searchable database of experts on-staff
Opt-in for news distribution
Links to related articles
Consider adding a blog to provide insight by expert employees & monitor opinion
Events calendar (executive appearances, press conferences, trade shows, products releases)
Hidden content for crisis comm, including media statements for crisis scenarios (in text format, not PDF)
Post a FAQ, Terms of Use & Privacy Policy

Helpful Tips
Ensure website has an easy to navigate design

- A mobile version is absolutely essential
- Simple and functional is best
- Avoid fancy graphics, Flash animation, etc.
- Keep use of PDF's to a minimum – reporters in the field are likely using smartphones

Whenever possible, do not password-protect your online pressroom – reporters may not have time for lengthy registrations and they may not like feeling they are going to be "tracked"

- That said, you still may wish to consider using a combination of open and password-protected areas within the online newsroom, allowing you to keep control over more sensitive information
  - Pros: allows you to collect data and monitor how the site is being used; password-protected sites will also keep those pages from being "spidered" and, therefore, unavailable through a Google or Yahoo search

Absolutely, positively make certain that your online newsroom is current and up to date

- Learn how to post news releases and update info without being dependent upon your IT Department

Add Really Simple Syndication (RSS) to the site

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Bruce M. Hennes



Bruce M. Hennes is the Managing Partner of Hennes Communications, one of the few firms in the U.S. focused exclusively on crisis communications and reputation management.

Hennes has more than 30 years' experience working in politics, having managed or served as a campaign consultant for a wide variety of political campaigns. Hennes also served three years as Executive Director for The Temple on the Heights in Pepper Pike, Ohio, and three years doing government and public relations in the automotive industry. He opened his own communications firm in 1989.

As one of Ohio's best-known crisis communication specialists and media trainers, Hennes is an in-demand speaker before bar and trade associations on the subject of crisis communications and "how the media manipulate the news." He frequently speaks to mayors, police, fire, education and health officials about how to handle mass casualty incidents and other "extreme" situations involving threats to life & limb, often sponsored by county Emergency Management Agencies.

Hennes Communications now counts among its current and former clients such companies as ThyssenKrupp, Carpenter Technology, Cleveland Metroparks, The MetroHealth System, Evonik, Interlake Steamship Company, Kent State University, Lubrizol, NASA, Northeast Ohio Medical University, Oswald Companies, Riverside Companies, SeaStreak and Westfield Insurance (Ohio Farmers Insurance), as well as scores of law firms, hospitals, educational institutions, nonprofits and government agencies.

Hennes is past chairman of the Greater Cleveland Partnership's Public Affairs Committee. He was one of the founding board members of the FBI Citizens Academy Foundation of Cleveland. He is also an adjunct professor at the Levin College of Urban Affairs at Cleveland State University and a frequent guest lecturer at John Carroll University, Kent State University and Case Western Reserve University. Hennes serves on the boards of The Judicial Candidates Rating Coalition (Judge4Yourself.com) and the Cleveland Leadership Center. He is also a longtime member of the executive committee of The Cleveland Metropolitan Bar Association, which awarded him its first-ever President's Award. Hennes is president of the Leadership Cleveland Class of 2008 and recipient of the President's Special Award for Extraordinary Service from the Cuyahoga County Bar Association and two Vega awards from The American Red Cross. In 2010, Hennes was inducted into the Plain Local Schools Hall of Distinction (Canton, Ohio); in 2011, he received the Communicator of the Year award from the International Association of Business Communicators- Cleveland; and in 2013, he received a Gold "Rocks" award and "Best of Show" award from the Public Relations Society of America-Greater Cleveland Chapter for his crisis communications work related to a ferry boat crash in New York City's Financial District. He has a degree in political science from York University in Toronto, Canada. Hennes received certification in Effective Communications from the U.S. Department of Homeland Security and The Federal Emergency Management Agency.

About Hennes Communications

Hennes Communications is a crisis communications and reputation management consulting firm based in Cleveland. Serving corporations, government agencies and nonprofits that are "on trial" in the Court of Public Opinion, Hennes Communications also offers crisis management, litigation communication support, media training, pre-crisis preparation and crisis drills to clients. In 2009, Hennes Communications won the coveted "Best of Show" award from the Cleveland Chapter of the Public Relations Society of America for its work with another agency on the national peanut butter recall. Hennes Communications also won Gold "Rocks" awards in 2010 and 2011 for its work on behalf of The MetroHealth System and Saint Joseph Academy. In 2012, the firm won another Gold "Rocks" award for its Crisis Comm & Media Relations E-Newsletter. In 2013, the firm won PRSA's Gold "Rock" award and the "Best of Show" award for its work on a ferry boat crash. In 2014, the firm won its 6th Gold "Rocks" award for a program it created and carried out for a forestry client in Australia. For more information, please go to **www.crisiscommunications.com**.

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On Trial in the Courts of Law and Public Opinion: The Tension Between Legal and Public Relations Advice

by Mark Herrmann and Kim Kumiega

Regardless of industry or size, companies today are more vulnerable than ever. A government action such as a product recall of a children's toy, or a media event such as an investigative exposé of fraudulent business practices on *20/20* can place almost any corporation on trial simultaneously in the courts of law and public opinion. The corporation will rely on lawyers to defend against liability in court and on public relations professionals to protect its reputation in the media. These judicial and media battlefields, however, present very different threats. With every media inquiry, the litigator may see risk where the public relations consultant sees opportunity. The corporation may thus receive conflicting advice on a variety of subjects.

The battles to avoid liability and to protect the brand must both be won. Management will not be praised for winning the litigation at the expense of the company's reputation, or for protecting the brand at the cost of punitive damage awards that drive the company into bankruptcy. The company must thus intelligently balance the advice proffered by legal and public relations advisors.

Some media inquiries portend both litigation and public relations risks. A telephone call in which the executive producer of *60 Minutes* explains that Mike Wallace intends to criticize the safety of your product puts you on notice that the corporation is about to be attacked on two fronts. The situation would be quite different, however, if the same producer called and seemed to be honing in on one isolated incident. For example, a company that sells its products exclusively door-to-door might receive media attention about the number of assaults committed by door-to-door sales representatives. If only one such assault was committed by your company's sales force, and the incident was resolved or is now barred by the statute of limitations, the television exposé threatens little litigation risk. It is unlikely that a substantial number of assaults by sales representatives went unreported and that a televised exposé would now prompt the filing of many complaints.

A corporation should be able to decide relatively quickly whether it is confronting potential liability, a potential stain on its public image, or both. If the threat is purely one of public relations, there is less need for close coordination between legal and public relations advisors. If the threatened risk involves both potential liability and potential harm to the corporate brand, however, then lawyers and public relations consultants must work together in the company's defense.

They may disagree immediately on a threshold issue: Should the public relations advisor attend critical meetings with counsel? The lawyer's advice on this subject will be cautious. Meetings between lawyer and client are protected by the attorney-client privilege, and a client ordinarily waives that privilege by disclosing information to a person who is outside the attorney-client relationship. Some courts have suggested that a public relations advisor is a stranger to the attorney-client relationship, so disclosing privileged information to her may under certain circumstances waive the privilege. *Compare In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001) (finding no waiver), *with Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000) (finding waiver). A cautious lawyer will want to avoid any risk of waiving the attorney-client privilege and thus will typically advise a client to exclude the public relations advisor from strategy sessions between client and counsel.

The public relations advisor is likely to have exactly the opposite view: How is she to advise the corporation on how to protect its reputation without being fully informed of all key events, which often include legal decisions and strategy? She will want full access to that information and may suggest

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the client is best served by having both teams share strategic insight to develop an integrated plan to protect the company's divergent interests.

A possible compromise solution in this situation is to designate a lawyer to serve as the liaison to the public relations staff. After the lawyer attends key meetings with management, she can advise the public relations staff about decisions that were reached without disclosing privileged thought processes. For example, the liaison might tell the public relations advisor that the corporation decided to pursue a particular theme, without disclosing the deliberations that led to the choice of that theme. Although this approach insulates public relations consultants from certain information, it generally keeps them in the loop without risk to the attorney-client privilege.

Like most compromises, however, this solution is not perfect and requires delicate balance. The liaison to the public relations team must be a senior attorney with the ability to assess various scenarios from a strategic standpoint and answer critical questions posed by the team. For example, will the strategy of "vigorously defend" preclude settlement talks? Have plaintiffs' attorneys reviewed in discovery damaging internal documents that could surface or leak before trial? Answers to these questions and others might substantially affect the tactics employed and messages developed by public relations professionals. The public relations counselor could not be expected to deliver a comprehensive strategy without access to all pertinent information. What one liaison determines to be critical information, worthy of sharing, another might not. The liaison must be sensitive to ensuring that the public relations counselor is armed with all critical information to guide her strategy.

Traditionally lawyers advised clients not to comment in the press about pending litigation. The rules of ethics discouraged talking to the press. *See* Model Code of Professional Responsibility DR 7-107; Model Rule of Professional Conduct 3.6. Thus, many lawyers would "not acquiesce in allowing what used to be condemned as 'trying cases in the press.'" 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law Of Lawyering* § 32.8 at 32-14 (3d ed. 2001). Apart from ethics, lawyers saw no advantage to foreshadowing one's case in the media. Even today, certain lawyers continue to advise clients to decline to comment to the media.

Public relations consultants, on the other hand, are typically eager to speak to the press. "When the media call, you can't hide behind a 'no comment' response. The press will report the story with or without you. The sooner you present the facts clearly to the public, the sooner the issue will be resolved." Sandi Sonnenfeld, "Media Policy—What Media Policy?," *Harvard Business Review* 18, 28 (July-Aug. 1994). Public relations consultants will thus routinely advise corporations to take advantage of, or even to try to generate, media opportunities.

On this subject, times have changed, and so must legal advice. In particular situations, litigation risk may be paramount. In other situations, the public relations risk might be paramount. If a controversy threatens the destruction of a company's reputation, then lawyers can no longer advise their clients to ignore the press and accept the consequences.

Moreover, public opinion is irrelevant to many, but not all, lawsuits. In high-profile cases, massive publicity may so poison the minds of potential jurors that a trial is lost before a jury is chosen. Depending on the circumstances, the corporation will have to develop an appropriate response to media inquiries.

Sometimes the situation will force a company's hand; other times the situation will leave many options open. For example, the media may be poised to criticize an entire industry rather than one company's particular product. If your client is a small player in that industry, the client might choose not to speak to the press about the issue, leaving the titans in the marketplace to fend for the industry at large. If, on the other hand, your client is a market leader, it may find itself compelled to speak for the industry. The appropriate media response may vary with the circumstances, but companies should rarely, if ever, adopt blanket policies of providing only a "no comment" in response to pending litigation.

This does not mean, however, that the spokesperson will discuss details of pending litigation with the media. It is perfectly acceptable for an executive to refuse to comment on litigation while agreeing to respond to the issues in general. For example, in cases involving the EEOC or quality-control allegations, the spokesperson can defend the company's record and discuss corporate guidelines and policies without discussing details of the case. Communications strategy will likely encourage you to tell your side of the story whenever possible. With or without the details of litigation, the company likely has a track record, a corporate mission and philosophy, and an overarching reaction to the litigation that it can share.

When a high-profile controversy does arise, someone must speak for the company. Legal and public relations professionals agree that spokespersons should be presentable, articulate, and fully able to defend the company's position.

In addition, the spokesperson should receive both media training and a legal briefing. Media training can help the spokesperson ensure that the company's position is, in fact, aired. Legal training will emphasize that every word spoken during an interview might later be deemed an admission by a party opponent and thus be admissible at trial. *See* Federal Rules of Evidence 802(d)(2). Similarly, the spokesperson must understand the underlying substantive law governing lawsuits to "help avoid comments or phraseology that have an apparently innocuous ring to a layperson but fit uncomfortably snugly into the language of later jury instructions." Kevin F. Brady, Mark Herrmann & Katherine Bryan Jenks,

"What to Do When Mike Wallace Knocks on Your Door," *Corporate Legal Times* 84 (Dec. 1999). The challenge here is in melding the styles. All comments must be safe from a legal perspective, but the difference between an appropriate answer in a deposition (the most concise truthful answer) and an engaging sound bite (authoritative, direct comments that show control and understanding of the situation) diverge widely and must be considered when framing answers and counseling clients.

Lawyers will generally advise that a member of senior corporate management should *not* act as spokesperson. Chief executives and other senior officers are important to running a business and should not be distracted from their jobs by being forced repeatedly to give testimony in lawsuits. A senior corporate officer who does not act as a spokesperson typically can be protected from being deposed by offering alternative witnesses who have more personal knowledge of the relevant facts and by explaining that senior managers should be witnesses of last resort. *See, e.g., Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985) (quashing deposition notice served on Chrysler Corporation's then chairman Lee Iacocca); *Liberty Mutual Insurance Co. v. Superior Court*, 10 Cal. App. 4th 1282, 1287, 13 Cal. Rptr. 2d 363, 366 (1992) (depositions of senior-level officials "raise a tremendous potential for discovery abuse and harassment").

If a senior officer serves as spokesperson, the corporation may be less able to protect that officer from later being forced to give testimony. The information that the spokesperson discloses to the media, the positions that the corporation takes, or the mere fact of the interview itself may be discoverable events. In a situation where hundreds or thousands of lawsuits are filed, the corporate officer who acts as spokesperson may be deposed repeatedly. Lawyers thus recommend choosing a less valuable employee to serve as spokesperson.

Public relations consultants, however, typically advise corporations to have the key executive managing a problem or able to change corporate policy to prevent a similar problem in the future serve as the media spokesperson. The issue here is one of accountability. The CEO or other top executive is not chosen simply because she has a high profile but also because messages are more effective when delivered by someone who is responsible for the part of the business that is on trial in both the media and courts.

A corporation under siege in the media is defenseless until it offers its own explanation of the crisis.

For high-profile matters of public safety, the communication strategist will likely urge that the CEO become involved. *See* Kathleen A. Martinelli & William Briggs, "Integrating Public Relations and Legal Response During a Crisis: The Case of Odwalla, Inc.," *Public Relations Review* 443, 458 (Winter 1998) ("The public demonstrates understanding of corporate problems when the corporation—through its top leadership, not just the Director of Communications—quickly comes forward to make (in-person) public statements disclosing as much information as is available"); Rose Marshall, "No Comment and Other Admissions of Guilt," *Briefly* 1, 21 (Feb. 2000). By selecting such a spokesperson, the corporation tells the world that it is taking the problem seriously and a responsible officer is on the scene. This spokesperson projects both the appropriate corporate image and appropriate concern.

Involving the CEO

In the last few years, the soft drink industry has provided two examples of when and how to involve the CEO. The first example is a case study in effective crisis management; the other illustrates the pitfalls of an inappropriate response.

In 1993, PepsiCo was faced with a contamination issue when a syringe was discovered in one of its cans. Within 24 hours the CEO made appearances on all major national media, sharing the company's plan of action and underscoring the importance of public safety above all else. When the case turned out to be a hoax that had been escalated by copycat claims in more than 20 states, the company was applauded for its responsiveness, even though Pepsi had not been at fault. *See* Julie Androshick,"Kaboom!,"*Forbes* 18 (Nov. 18, 1996).

The Coca-Cola Company, on the other hand, seemed to be late in its response and concern when, in June 1999, 100 people in Belgium, including 40 school children, reported becoming ill after consuming soft drinks. Multiple spokespersons were used during the first 10 days of investigation; only later did then CEO Douglas Ivester become involved by traveling overseas to investigate personally this high-profile focus of international attention. Many cited his lack of responsiveness as one reason for his departure as chairman and chief executive officer only six months later. *See* Betsy Morris & Patricia Sellers, "What Really Happened at Coke," *Fortune* 114, 116 (Jan. 10, 2000).

Ultimately, the corporation will be forced to choose between protecting senior management from repeated depositions and projecting the right image on the public relations front. That tension is sometimes unavoidable; in other situations, it can be resolved by using a second-tier corporate officer or a regional employee as the media spokesperson.

Once the company selects a suitable spokesperson, management must determine what that person should say. Most lawyers believe two things deeply: First, because the universe of known facts changes over time, the results of an initial investigation will almost inevitably be revised as more information comes to light. Second, people who make statements based on preliminary information can be embarrassed at trial for having said things that later turned out not to be true. Lawyers have thus historically tended to give conservative legal advice in a crisis: "Tell 'em nothin' and tell 'em slow." Norman R. Augustine, "Managing the Crisis You Tried to Prevent," *Harvard Business Review* 147, 155 (Nov.-Dec. 1995).

Public relations professionals, on the other hand, believe that a corporation under siege in the media is defenseless until it offers its own explanation of the crisis. The public relations advice is thus to make a spokesperson available and to provide as much detail as possible.

Although advisors may disagree over the level of detail a company should provide, they should share one cardinal rule: Tell the truth. From both legal and public relations perspectives, honesty is both the right policy and the best policy.

According to Daniel J. Edelman, founder and chairman of Edelman Public Relations Worldwide, "We emphasize the truth in communicating to the public—telling the truth and telling it immediately and saying what you're going to do about it if it's a problem." Dan G. Tripps. *The Heart of Success—Conversations With Notable Achievers* 221 (2001).

Given the scope of permissible discovery in litigation and the insatiable curiosity of investigative reporters, the real story will eventually be told. Public relations strategy is often to be the first to tell the truth, which allows the company to benefit from positioning its side of the story from its own perspective early on in the coverage.

Getting Out in Front

Many lawyers' instincts will be conservative. There is no legal benefit to setting in stone the facts as they are understood early in litigation, because early statements may require revision and could prompt assertions that the client made misstatements to the public. Moreover, adopting a position prematurely reveals to opposing counsel the target being attacked, thus giving them more opportunity to prepare. Being proactive offers no legal advantages and several potential disadvantages; restraint is the safer course.

Not so, says the public relations advisor: Be proactive. "[S]et up a media blitz of your own, a truth squad to carry your messages to reporters. ... Create Fact Sheets or White Papers to leave behind with the media." Robert L. Dilenschneider, "Getting Your Message Across While Under Attack," *Public Relations Quarterly* 9, 10 (Summer 2000). The importance of this is multiplied in light of modern communication tools. With approximately 407 million people using the Internet worldwide, both news and misinformation spread across the globe at lightning speed. "Crisis managers need to move faster and use communications vehicles that may be unfamiliar, such as Web sites and chat rooms, to reach consumers in real time. And those consumers are more cynical and demanding, thanks to the proliferation of investigative news shows and class-action lawsuits." Dana James, "When Your Company Goes Code Blue: How Crisis Management Has Changed," *Marketing News* 1, 1 (Nov. 6, 2000). If a company is not in front of the story, its message is often left behind, leaving the company in a reactive and weakened position.

The difference between the legal and public relations advice in this area may be less than it seems. So long as the facts are true and verifiable—which should be important to advisors of every type—lawyers should rarely object to sharing basic, accurate facts with the media when disclosure is needed to protect the corporate image. Nor should lawyers object to the public relations effort to frame that information appropriately and in a timely manner. Public relations professionals urge getting the company's message out before the opposition has a chance to frame the story. The difference between responding on the first day of a crisis and the second can set the tone for every activity that follows.

The case of Odwalla is instructive. Immediately after the company learned that some of its juices might be infected with *E. coli* bacteria, Odwalla recalled the products and set up an Internet site to provide customers with up-to-date information about the recall. The company also set up two 800 numbers, one for consumers and one for retail outlets and suppliers. The Web site received 1,400 hits in less than 24 hours. Odwalla chairman and co-founder Greg Steltenpohl served as spokesperson, repeatedly offering to pay medical bills of all those affected and promising the company would not make apple juice products until it could ensure they were bacteria-free. A team of food and safety experts was assembled and determined that the contamination was not an isolated incident at one company but posed a threat to the entire fresh-juice market. Complete, proactive disclosure and total transparency led to full reintroduction of Odwalla juices on grocery store shelves, while competitors dealt with issues reverberating through the industry. *See* Martinelli & Briggs, *supra*, at 443, 450-51.

If a corporation is accused of conduct that injured or killed people, another tension may arise between the legal and public relations advice. A lawyer will typically advise a client not to apologize or accept responsibility for having caused harm when possible alternative explanations exist. An apology, like any other statement by a responsible corporate officer, could later find its way into evidence at trial as an admission by a party opponent and be used as evidence against the defendant. *See* Peter H. Rehm & Denise R. Beatty, "Legal Consequences of Apologizing," *Journal of Dispute Resolution* 115, 119-22 (1996). Additionally, insurance policies sometimes forbid the insured from assuming liability without the insurance company's consent. Counsel may be concerned that, were the client to apologize, it could be deemed an admission of fault that voided insurance coverage. *See* Annotation, "Validity, Construction, and Effect of 'No-Consent-to-Settlement' Exclusion Clauses in Automobile Insurance Policy," 18 *A.L.R.* 4th 249 (1982). Counsel thus routinely advise clients not to apologize.

From the public relations perspective, however, it is important for a corporation to accept responsibility for any wrong it may have done. Only by accepting responsibility, displaying appropriate empathy, and promising to make necessary changes in the future can a company restore public trust. "[I]f there is *any* truth whatsoever to the charges, then I *unequivocally* advise the individual or organization to admit their culpability, put the crisis behind them, and get on with business." Ian I. Mitroff & Gus Anagnos, *Managing Crises Before They Happen* 95 (AMACOM 2001) (emphasis in original). Studies with focus groups have shown that more than anything else, including paying monetary damages, consumers and audiences expect companies to apologize and take responsibility for their conduct when appropriate. From a public relations perspective, an apology may be precisely what is needed to save the brand.

This tension between the legal and public relations viewpoints could lead to a compromise—a partial apology. The corporation might, for example,

> express sympathy for the injured party's condition, but not admit fault or express regret for the defendant's actions. Following a car accident, the offender might visit the injured party in the hospital and state simply 'I am very sorry that your leg is broken, and I hope that you feel better soon.'

Jonathan R. Cohen, "Advising Clients to Apologize," 72 *Southern California Law Review* 1009, 1030 (May 1999).

To use a higher profile example, the United States recently offered a partial apology to obtain the release of the crew of an EP-3 spy plane that made an emergency landing in China after a midair incident involving a Chinese plane. After several days of negotiations, escalating ill will between the two nations, and increasingly negative headlines, U.S. Ambas-

sador Joseph W. Prueher and the Chinese minister of foreign affairs agreed to the terms of a partial apology from the United States. The ambassador asked Minister Tang Jiaxuan to "convey to the Chinese people and to the family of pilot Wang Wei [who was killed in the incident] that we are very sorry for their loss." Ambassador Prueher was also "very sorry the entering of China's air space and the landing did not have verbal clearance." *See* www.usembassy-china.org.cn/english (May 31, 2001). The ambassador did not, however, go so far as to apologize for having violated Chinese airspace or for having spied on China. Nor did the United States agree not to spy on China again in the future. The United States thus expressed regret without accepting blame or making commitments. To Cole Porter, this might have been the difference between *tomato* and *toh-mah-toh*, but in international affairs, it was the key to obtaining the safe release of 24 members of the American flight crew.

From a public relations standpoint, the main criticism of the EP-3 affair is that 10 days of negative media coverage could have been avoided if the carefully framed apology had been made early on in the crisis. From a legal standpoint, however, similar creative ambiguity might be used to show regret to protect the brand in a way that could not be construed to admit liability or void insurance coverage. The show of humanity that is critical to the public relations strategy can be structured to do no harm to the litigation strategy.

A wide range of audiences other than courts and the media may be curious about a corporate crisis. Shareholders may flood the corporation's investor relations department with inquiries. Employees will naturally be curious about what they read in the press and the implications of the crisis for their futures. Corporate suppliers and distributors may have legitimate interests of their own. All the while, the company's competitors may be fanning the flames, and the sales force may be providing a different answer to each customer.

Lawyers have traditionally tended to advise limited sharing of information. Loose lips sink the attorney-client privilege. Talkative employees may have their depositions prolonged by hours of questions about past conversations. Information, lawyers may advise, should be shared sparingly.

Public relations consultants, in contrast, may view employees and other corporate constituencies as some of their most important audiences. If questions posed to employees, vendors, and stockholders are not answered, these constituencies are left to speculate. This, in turn, feeds the rumor mill and again places the company in a reactive and defensive position. If you don't tell people what's going on, they generally assume the worst. And, unfortunately, "the worst" can become tomorrow's headlines. *See* Alison Paddock, "When Lightning Strikes," *Grocery Headquarters* 16, 19 (Dec. 2000).

Deciding what information to share with various corporate constituencies requires a true compromise between the legal and public relations advisors. After a corporation selects the main themes it will press in the media, it can share these themes with its employees, suppliers, and distributors. Basic factual information that is unlikely to be subject to dispute can also be shared safely.

The corporation should, however, avoid disclosing too much detail when speaking to these various constituencies. Superfluous details clutter the message (offending the public relations consultant) and may also later turn out not to be true (the lawyer's concern). An intelligent compromise between the need to speak and the need to avoid over-speaking is probably the appropriate middle ground. Statements made to corporate constituencies should of course be vetted carefully by both lawyers and public relations consultants.

In some circumstances, a corporation may need third-party experts to come to its defense in a crisis. Lawyers will typically advise corporations to keep their powder dry: Save the best available experts to serve as expert witnesses at trial. Delaying the disclosure of these experts serves many legal purposes. First, an expert who acts as a media contact may become a fact witness susceptible to deposition and may be deposed repeatedly or prematurely, before the necessary analysis has been completed. Second, an expert who speaks to the media may be tempted to opine on a wider range of subjects than will actually be in dispute in a later trial. The expert may thus inadvertently expand the range of topics on which he can be cross-examined before a jury. Third, an expert who defends the company in the media might be painted at trial as an advocate rather than a neutral expert.

Public relations advisors, on the other hand, are likely to encourage deploying the best available experts at the earliest possible time. Public relations consultants view a threat to the brand as immediate, and a prompt response could stop the image crisis in its tracks. The best defense of the brand is to deploy the corporation's finest outside experts to help balance the story. The public will listen and likely give the company the benefit of the doubt sooner if a trusted figure stands by the company's side.

The case of Pepsi and the syringe again provides an example of using the right resources at the right time. During the syringe crisis, the then commissioner of the Food and Drug Administration, who was also a pediatrician, appeared on many national news programs alongside Pepsi's CEO. Because the syringe issue focused on trust, the FDA commis-

sioner gave credibility to Pepsi as the story unfolded.

The tension between the legal and public relations advice on when to deploy experts peaks when relatively few experts are available to speak for the company. If a wide assortment of experts is available, some can be used for public relations purposes, and others can be kept under wraps as litigation consultants. If, however, only one or two experts are available to speak for the company, hard choices are inevitable. Corporate management considering whether to disclose expert witnesses at an early date will have to weigh the benefit to the corporate brand against the potential harm to the litigation defense.

In certain crises, a corporation may ultimately decide that a particular employee, or a small number of employees, was responsible for the problem. If the chief financial officer intentionally cooked the corporate books, then the CFO is culpable, and she must be fired. In other situations, however, culpability may be more ambiguous. It might be possible to assign blame, for example, to certain members of a product development team, but it may not be clear that those employees acted maliciously. In that situation, the legal and public relations consultants may offer conflicting advice.

A lawyer might advise a corporation not to fire an employee who is likely to become a key witness in coming months or years. Firing the employee could create animosity, which could make it more difficult to work with the employee to prepare for upcoming depositions and trial. Moreover, firing the employee could also have implications for the attorney-client privilege. If the employee will be fired, the lawyer might advise, this can be done after the last lawsuit is tried.

The public relations consultant, on the other hand, may prefer fixing the blame and firing the responsible people. By acting quickly to assign blame and punish the culprits, the corporation shows that it is in command and has acted decisively. Prompt action can help turn the tide in the media blitz, so long as that action affects the truly responsible parties, not simply scapegoats who may come back to haunt the company.

Like many of the other areas of disagreement, there is no easy way to resolve this tension. The corporation can do no more than evaluate the individual circumstances, weigh the costs and benefits of the competing approaches, and try to reach a sensitive and intelligent solution.

Although there will be tensions between legal and public relations viewpoints on many aspects of crisis management, there are other areas in which these outside professionals will see eye to eye. In these areas, corporate management would be wise to follow the joint advice.

It is axiomatic among crisis managers that companies must plan in advance for corporate crises. *See generally* Mitroff & Anagnos, *supra*. Lawyers and public relations professionals alike understand that, in a crisis, time and information are precious commodities. With appropriate advance preparation, a corporation may have stored reserves of time and information that can be used in a crisis.

For example, today's large corporations often face high-profile race discrimination lawsuits. A well-advised corporation will plan for that possibility in advance, preparing packets of material describing the company's diversity efforts, its successes in the field, and its future plans. The corporation may also prepare lists of key personnel and contact information to be used if a race discrimination crisis arises. When the crisis erupts, everyone on the crisis management team will save time and have ready access to basic information if these materials were prepared, reviewed, and shared in advance.

Every company should take a hard look at its most likely industry exposures and be ready to respond. For instance, food companies should have a rigorous plan in place to respond to and manage recalls based on product contamination. According to the American Dietetic Association, millions of Americans are sickened, 325,000 are hospitalized, and 5,000 die each year from food poisoning. Not surprisingly, the Food Marketing Institute reported in a 1999 consumer survey that between 60 percent and 75 percent of Americans rated product safety as very important in food shopping. Even though the issue of liability for these illnesses is a separate matter, the need to address the issue is unquestionable. A food company that is not responsive will suffer the public's wrath, which can result in plummeting product sales in the short term and a long-term hit in corporate and brand trust that could take years to repair.

A conscientious lawyer should add one caveat to the sound advice that corporations prepare in advance for crises. Advance-planning crisis-management documents may or may not, depending on the circumstances, be protected by the attorney-client privilege or work product doctrine. If not carefully crafted, a fact sheet about the subject of race discrimination could later be introduced as exhibit one of a plaintiff's case: The corporation was so keenly aware of its discriminatory conduct, plaintiff's counsel could argue, that the company actually planned in advance how to defend against anticipated lawsuits. The plaintiff could suggest that the advance planning documents are themselves evidence of discriminatory intent. Thus, although advance planning is necessary, it must be undertaken carefully.

Food companies should have a rigorous plan in place to manage recalls.

Lawyers and public relations consultants alike should agree that fact investigation is best left to lawyers. This is true for two primary reasons. First, the work of lawyers is more likely to be protected by the attorney-client privilege than the work of public relations consultants. There is thus less chance of public disclosure of preliminary investigative work if the investigation is conducted by lawyers.

Second, litigators spend much of their lives developing factual records; public relations consultants devote more of their efforts to casting known facts in an attractive and newsworthy light. By having lawyers conduct the investigation and public relations consultants develop themes, both sides work in concert to share information and develop strategies, and all are put to their highest and best uses.

Legal and public relations advisors should also agree that their efforts must be coordinated. This is sometimes harder to achieve than it first appears. Some old-school lawyers continue to believe that it is their job solely to protect the client in the courtroom and that only a publicity hound with a thin

sense of ethics would try a case in the press. Moreover, lawyers' egos may interfere with efforts to coordinate. Some lawyers "say they don't believe a public relations consultant can tell a story or deliver a message as well as a lawyer." Marshall, *supra*, at 21-22.

Certain public relations professionals, on the other hand, view lawyers as conservative advisors with no sense of the reality of modern life. Public relations consultants may also fear that stodgy lawyers will, like the scholastic monks of old, spend days quibbling about the meaning of words, thus delaying urgent press releases. When statements are finally made, the news angle may be lost in a maze of legal jargon and seemingly irrelevant procedural explanations.

Getting Along

If a corporation retains lawyers and public relations professionals with some sensitivity to each others' tasks, then these advisors should be able to work together civilly. A lawyer should realize that a media consultant can help develop catchy themes that later prove useful at trial. And a public relations consultant will come to learn that taking time to scrub the facts can pay long-term dividends. At a minimum, lawyers and public relations consultants must understand the need to be accessible to each other and to return each other's phone calls promptly.

A failure to coordinate legal and public relations efforts can have devastating consequences. For example, in early 1993, an automotive manufacturer defended the wrongful death case of a 17-year-old boy who died in a fiery truck crash. The jury found in favor of plaintiffs during the first phase of the trial. Defense counsel then gave his argument during the punitive damages phase. The lawyer told the jury that its verdict was "a crushing blow" to the manufacturer. He continued, "You sent a message. We have got the message. We have got the message." While the lawyer

> was giving [the company's] *mea culpa* to the jury inside the courtroom, outside in the corridor a [corporate spokesman] was distributing a defiant press release rejecting the jurors' determination that the pickup truck was defective and accusing them of being swayed by emotion. When [plaintiffs' counsel] stepped forward to make his case on punitives, he had the press release in his hand.

Terence Moran, "Defendant Burns Itself," *American Lawyer* 68, 81-82 (Apr. 1993).

Plaintiffs' counsel explained that the defense lawyer was saying, "We respect the jury system." But the company "has already issued a press release about this case. Why don't they give you the press release and see if that tells you that they respect your decision?" The court later admitted the press release into evidence, and the jury chose to award punitive damages of $101 million.

In today's world, even small missteps can have large consequences. In high-profile litigation, the mere scheduling of depositions can have public relations implications. Will the deposition of the CEO be taken at the office of plaintiffs' counsel? If so, will a team of reporters be waiting in counsel's lobby for pre- and post-deposition interviews? Or should the corporation have the deposition taken at a conference room in a local hotel that has a back door for easy (and low-profile) entrance and egress? For depositions and hearings that involve lower level employees, who will advise the company's witnesses to walk confidently through the cameras and not to pull their coats over their heads like criminal suspects often do on television?

Public relations consultants may also want to obtain expedited (or real-time) deposition transcripts to share with the press promptly. But a lawyer may have to review the transcripts to designate as confidential those exhibits and testimony that would disclose corporate trade secrets and proprietary information. Close coordination is essential to avoid missteps in the mundane tasks that can inadvertently add fuel to a media fire.

Coordination is also needed for less mundane tasks. Defense counsel are often pessimists. They are retained only after the catastrophe has occurred and spend their lives trying to reconstruct the wreckage. A defense lawyer may occasionally be "guardedly optimistic" about the result of a motion or trial; true enthusiasm only rarely enters the lawyer's emotional repertoire.

Public relations consultants may be exactly the opposite. Any procedural success is a victory worth trumpeting. The discovery of helpful evidence means that the litigation is almost over. A constant drumbeat of good news may influence media coverage, and corporate management may be pleased to report news that helps relieve pressure on the company's stock price.

Due regard for securities law, however, must occasionally dampen this enthusiasm. "Often the gravest danger is presented by a perceived need to remain continuously upbeat with the Wall Street community." "High Profile Litigation," *Successful Partnering Between Inside and Outside Counsel* § 67:6 (Robert L. Haig ed., 2000). If a corporation makes an optimistic but materially misleading statement that affects the price of a security, a securities fraud complaint may compound the company's legal woes. Statements about the litigation process, or the crisis in general, should thus be reviewed by a securities lawyer to ensure legal compliance.

Developing Themes

Another reason to coordinate the legal and public relations efforts is to ensure the corporation uses its best themes in both the courts of law and public opinion. A "theme of the case" that will be used as the introduction to an opening statement or closing argument at trial is likely also to be a sound bite suitable for use in a television interview. Indeed, the television interview may influence public opinion in a way that later helps to shape jurors' attitudes. The corporation should have legal and public relations staffs work together to develop themes of the case that can be used from the first television interview through the last closing argument.

Repetition and the constant drumbeat of messages will benefit the company in the long run. In public relations, as in writing briefs and trying cases, "Tell 'em what you're gonna tell 'em. Tell 'em. Tell 'em what you told 'em." Peter Jacobi, *Writing With Style: The News Story and the Feature* 93 (1982).

Finally, a corporation that finds itself on trial simultaneously in courts of law and public opinion probably should retain outside help. A high-profile crisis is, fortunately, a relatively rare event. Most corporations choose not to employ full-time staff capable of managing crises that arise only rarely. Instead of having that capacity available in house, most corporations will need to bring in extra help when this type of crisis erupts. That temporary help—crisis managers and defense counsel—can be key to corporate survival.

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