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# Crisis Planning and Management

June 29, 2022

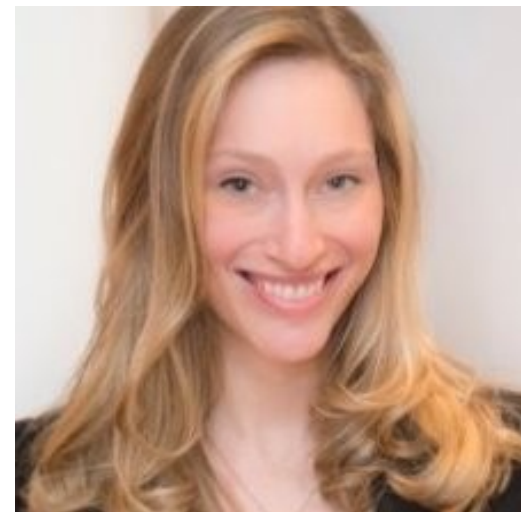
# Today's Presenters



**Steve Patterson**  
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Human Rights Campaign



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- Crisis vs. Business Issue
- Players in a Crisis and the Unique Role of In-House Counsel
- Developing an Approach for a Crisis
- Selected Legal Issues in a Crisis
- Communication Issues in a Crisis

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***“Plans are nothing;  
planning is everything”***

- U.S. President Dwight D. Eisenhower

## Inevitable

- Part of doing business
- No organization is immune

## Unpredictable

- By definition, outside the realm of normal activity
- Can be triggered by a wide range of internal or external factors

## Unique

- General principles, best practices and approved protocols apply
- No cookie-cutter solutions

## Survivable

- In most cases, organizations can manage through successfully, though must work to repair trust gap created with key stakeholders

# Examples of Crises

## Business/Financial

- Operational or product failure
- Marketing and consumer-related issues
- Significant shortfall in financial performance; strategic challenges
- Shareholder activism

## HR

- Sudden change in CEO, other senior leadership
- Sexual harassment, racial discrimination issues
- Criminal acts by or against employees
- Labor issues

## Legal

- Commercial litigation
- Regulatory issues / investigations
- Intellectual property issues
- Class-action lawsuits

## External

- Cyber attack
- Natural disasters / accidents
- Terrorist acts; active shootings
- NGO activism; political pressure

# Crisis Management as Part of the Risk Management Framework

## Risk Management

- Preventative planning / risk reduction – proactive
- Provides overarching risk structure and guidance
- Identifies organizational risk tolerance

## Crisis Management

- Planned reactive response – response to “unforeseen” adverse event
- Enables rapid response / decreases tensions that arise during a crisis
- Expedited recovery

Both are elements of a robust corporate governance structure



- Affect ability to operate or serve customers
- Result in media coverage or social media conversations
- Size/influence/sensitivity of affected universe
- Control of disclosure timeline (are external parties aware)
- Impact on internal morale
- Stakeholder notification requirements
- Materiality of impact (financial or otherwise)



# What is at Stake?



# Goals in a Crisis



Stop the harm



Protect and prioritize any victims



Manage the fallout



Minimize legal exposure



Demonstrate agility



Avoid unforced errors

- Customers
- Shareholders and financial community/lenders
- Employees
- Commercial partners (*e.g.*, suppliers and vendors)
- Elected officials
- Government regulators
- Local communities
- General public and media

## Role of Management

- C-suite
- Chief Legal Officer / General Counsel / other in-house attorneys
- Head of communications

## Role of Board of Directors

- Chair
- Independent directors

## Outside Advisors

- Legal counsel
- Communications / public relations firm
- Government relations firm
- Accountants / auditors
- Technical experts

# Developing an Approach for a Crisis

Managing a crisis  
with a plan vs.  
without a plan

A company may not be able to develop a detailed plan for every crisis, but it can have a process or approach for any crisis



# Key Elements of a Crisis Plan

Clearly defined crisis team  
(*e.g.*, key decision makers)  
and advisors (*e.g.*,  
communications firm, legal  
counsel, others)

Framework for assessing  
crisis and corresponding  
escalation

Step-by-step response  
checklist with  
responsibilities

Key questions to define the  
issue

Stakeholder and vehicle  
mapping

Scenario holding  
statements and key  
messages

# Selected Legal Issues in a Crisis

- Attorney-client privilege
- Protection of evidence (*e.g.*, document holds)
- Disclosure requirements (for public companies)
  - Mandatory vs. voluntary disclosures
- Approach for handling internal investigations
- Responding to government regulators
- Responding to congressional or criminal investigations
- Managing civil litigation
- Managing board communications
- Managing corporate governance issues
- Insurance coverage



- Elements of Attorney-Client Privilege
  - A communication
  - Made between counsel and client (including a client representative)
  - In confidence
  - For the purpose of seeking, obtaining, or providing legal assistance to the client



**Practice Tip:** Even if you believe a written communication to your client is privileged, write it thinking that someone else will see it – indeed, that someone may be a judge or jury.



**Practice Tip:** Remember the telephone – some things are better said than written.



- How Privilege Applies to the In-House Lawyer
  - Whether privilege protects an in-house lawyer's communications depends on the predominant purpose of the communication.
  - If the objective is legal advice, the communication is privileged so long as it is confidential and between lawyer and client.
  - Alternatively, if the lawyer is acting as a business negotiator or advisor, the communication is probably not privileged.
- The attorney-client privilege belongs to the client (*i.e.*, the company), not employees



**Key Question:** What is the predominant purpose of the communication — is the in-house lawyer acting as a business negotiator or a legal advisor?

- What Hat Is the In-House Lawyer Wearing?

Could the task have been readily handled by a non-lawyer?

What was the purpose of contacting the lawyer?

Did the client give any indications about the role of the lawyer?

Did the lawyer give any indications about her role in communicating with the client?

Expressly communicating in terms of requesting or providing legal advice is useful.  
Merely copying an attorney on an email does not make it privileged.

~~ATTORNEY-CLIENT PRIVILEGE~~  
~~WAIVED~~

- Privilege can be lost or waived
- Decisions about waiver of the privilege should be made by the company's management in consultation with its counsel
- Disclosure of privileged communications to employees
- Disclosure of privileged communications to third parties
  - Communications / Public Relations Firms
  - Outside Counsel
  - Accountants
  - Auditors
  - Consultants
  - Insurers
  - Counterparties



**Practice Tip:** The attorney-client privilege only extends to clients, clients' representatives, lawyers and lawyers' representatives. Caution the client not to forward your advice to anyone outside the lawyer-client relationship.

## Key Takeaways

- A communication is not privileged just because an in-house lawyer is copied on it. Be careful what you say, no matter who the audience is.
- Pick up the phone when you are uncertain. While privilege issues are certainly still in play in oral communications, using the phone instead of writing information may save you trouble down the road in litigation.
- Disclosure of privileged information to a third party waives the attorney-client privilege — and there are no exceptions for spouses, family, roommates, or neighbors. This is particularly important when discussing privileged information while working remotely.
- Do not forward emails without first considering whether they contain privileged information.
- There are limited instances in which privileged material can be disclosed to third parties without waiving the privilege, but such disclosure should never be done haphazardly. Always ask in-house or outside counsel before sharing or disclosing privileged information with a communications/public relations firm, accountant, consultant, insurer, or other third party.

- Legal obligation to preserve documents
  - Knows (or reasonably should know) that a reasonable probability of litigation or investigation exists = Duty to preserve evidence relevant to or discoverable in that potential litigation or investigation
- Preservation measures are critical part of the overall defense strategy
  - Reduces risk of loss of evidence (good or bad)
  - Preserves integrity of investigative process, particularly in the event of subsequent disclosure to government

- Vary across regulatory regimes; may be imposed by Congress, government regulators, self-regulatory bodies, stock exchanges and commercial partners.
- Considerations
  - Public vs. private company
  - Identify regulators for the specific industry (*e.g.*, SEC, FTC, FCC, CFPB, CFTC, FINRA)
  - Identify specific laws or requirements implicated in the crisis (*e.g.*, HIPAA; Gramm-Leach-Bliley Act; state data security and breach notification laws; critical infrastructure requirements; government procurement requirements)
  - Consider contractual requirements to notify third parties (*e.g.*, commercial partners)

## Securities and Exchange Commission (public companies)

- Material legal proceedings (Item 103, Regulation S-K)
- Management's Discussion and Analysis of Financial Condition and Results of Operations: current and anticipated material impacts of the crisis on the company's liquidity, financial condition or operating results (Item 303, Regulation S-K)
- Consider whether facts uncovered in managing crisis may make other statements materially false or misleading
- Update risk factors to address specific risks to the business
- Form 8-K / Press Release / Regulation FD Issues



## DOJ Guidance

- Credit for Voluntary Disclosures
  - Must be made prior to “imminent threat of disclosure or government investigation”
  - Within a reasonably prompt time of becoming aware of the misconduct
  - Must include all relevant facts including the individuals involved

*Sources: U.S.S.G. § 8C2.5(g)(1); Justice Manual, Section 9-47.120.*

- Parallel Track for Remediation
  - Remediation can begin before investigation is complete
  - Goal is to stop ongoing misconduct, reduce risk of future violations and ensure future credit from regulators if necessary

- Legal should “direct” the investigation
- Consider designating outside counsel to conduct the investigation
  - Nature of the allegations
  - Enhanced preservation of privilege
  - Potential for a future voluntary disclosure to regulator
  - In-house counsel as potential fact witness
  - Response to the issue becomes focus of the investigation
  - Potential for future privilege waiver by the company as part of cooperation process
  - Enhanced credibility of investigation process
  - Multiple entities involved requiring joint representation
- Is there a need for a truly independent investigation?
  - Typically commissioned by a board and conducted by a firm with no prior history with the client
  - May be appropriate for publicly traded company depending on nature of allegations

- Documents and other evidence gathered and reviewed
- Necessary witnesses interviewed and all facts gathered
- Prompt and thorough
- Well documented
- Results in reasonable conclusions
- Confidentiality is protected to extent possible
- Action taken that is effective to end inappropriate conduct and deter future similar conduct

## DOJ Guidance

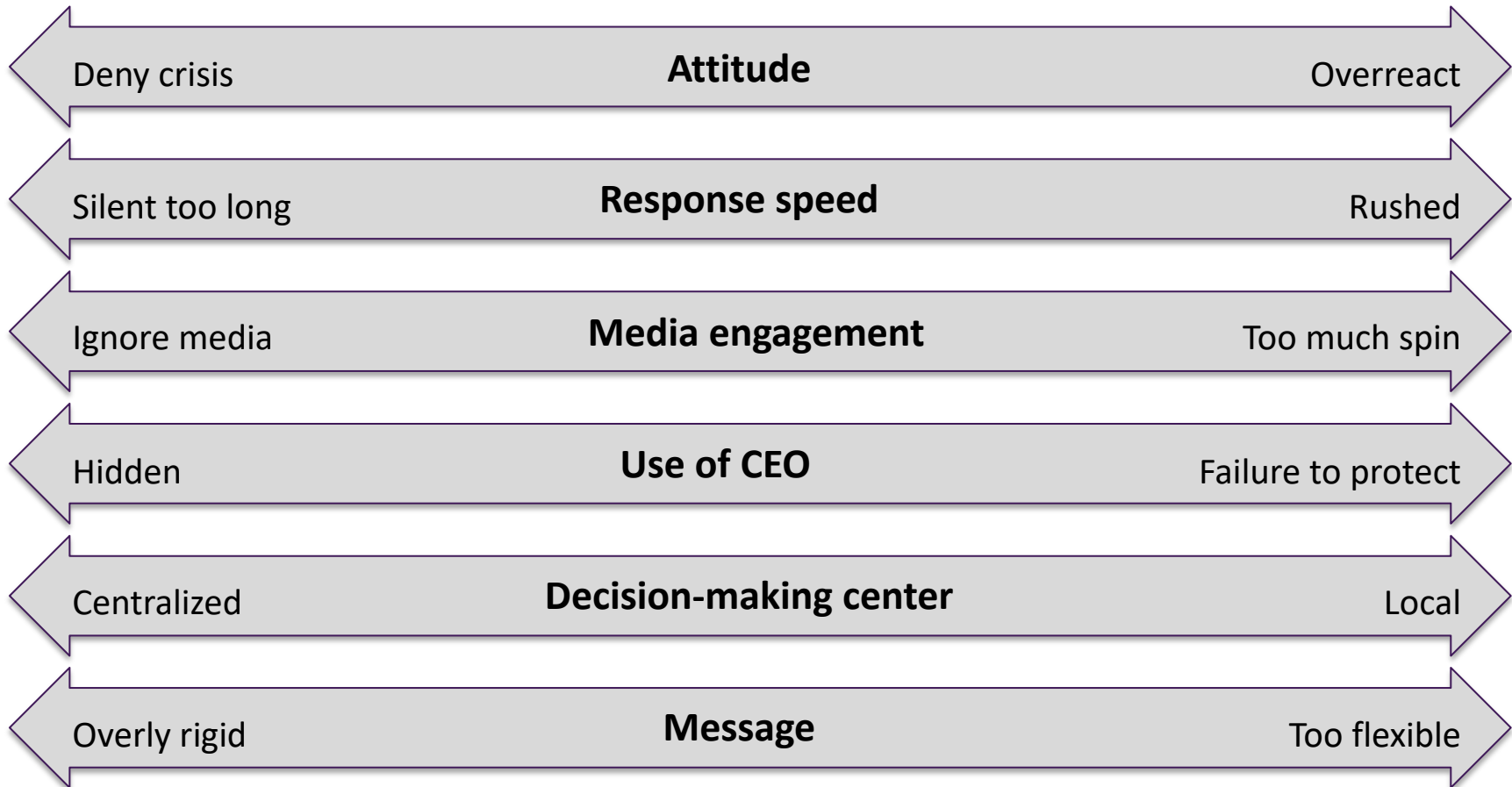
- Evaluation of Investigative Process
  - Properly scoped
  - Independent and objective
  - Properly conducted and documented
  - Root cause analysis and accountability of senior managers

*Source: DOJ's Evaluation of Corporate Compliance Program (June 2020).*

- Decision making and corporate governance
  - Unilateral decisions by CEO or Chair
  - Board meetings
  - Use of board committees
  - Competing directions from different players in a crisis

# Unprepared Companies Make Poor Decisions

Carefully calibrate response



# Response Guiding Principles

## Mobilize crisis team

- Coordinate across functions, including legal and communications
- Identify team leader
- Establish contact protocols

## Gather information

- Identify sources of information for particular event
- Quickly and honestly assess nature of crisis and available information
- Intensify monitoring, paying attention to those with an interest in keeping the crisis in the headlines and trending on social media

## Develop objectives, messaging, actions

- Define clear objectives
- Avoid overreaction, stay in control
- Be the source of accurate information
- Consider direct stakeholder-specific communication and outreach, in addition to media posture
- Use holding statements to:
  - Acknowledge event/actions taken in timely and truthful manner
  - Express empathy, if appropriate, without accepting undue responsibility before facts are known

- ✓ Select the crisis response team – and know how to reach them
- ✓ Ensure all people/functions know when to “break the glass”
- ✓ Have a response protocol in place
- ✓ Ensure all players understand GC’s role
- ✓ Understand notification and disclosure requirements
- ✓ Plan for engagement of outside advisors
- ✓ Act reasonably and fairly, and in alignment with overall objectives
- ✓ Establish a quick response approval process, which includes the GC
- ✓ Schedule crisis tabletops to test plans, protocols, and muscle memory



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