Monday, October 20
11:00 am-12:30 pm

103 Crisis Management: Responding When Disaster Strikes

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Partner
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General Counsel, Contracts, Litigation and Risk
BearingPoint, Inc.

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Chief Executive Officer and President
Levick Strategic Communications

Faculty Biographies

Charles L. Babcock

Charles L. "Chip" Babcock is a partner at Jackson Walker LLP where he has developed a national litigation practice.

Previously, Mr. Babcock spent the two years with Judge Porter in the United States District Court for the Northern District of Texas before joining Jackson Walker. He has represented Fortune 500 clients on a regular basis both as plaintiffs and defendants and has tried over 100 cases to a jury.

Mr. Babcock is long-term a member of the Texas Supreme Court Advisory and has served as its chair. The advisory committee studies and reports to the court on all manner of rules and issues affecting litigation practice in the state courts. He was recently appointed by the court to chair a committee charged with rewriting the Texas Code of Judicial Conduct and chaired a separate committee which considered the effect of the United States Supreme Court decision in Republican Party of Minnesota v. White dealing with judicial speech. Mr. Babcock frequently comments on trial issues and matters affecting First Amendment freedoms and last year was quoted in *The New York Times*, NPR, and the *Washington Post*, among others. Mr. Babcock has received the Meritorious Pro Bono Service Award and the Distinguished Pro Bono Service Award.

Mr. Babcock graduated from Brown University and attended Boston University School of Law.

John DeGroote

John DeGroote currently serves as general counsel/contracts, litigation, and risk at BearingPoint, Inc., a global management and technology-consulting firm with approximately 17,000 employees doing business worldwide. Mr. DeGroote leads a legal department of over 40 lawyers in 12 countries, with responsibility for the company's contracts, intellectual property, employment matters, and insurance. He has served as the company's chief litigation counsel, with responsibility for the company's global litigation docket and litigation prevention strategies.

Mr. DeGroote practiced previously with McKool Smith, P.C., and in the Dallas office of Jackson Walker, LLP.

Mr. DeGroote received his JD from the Duke University School of Law and his BA from Mississippi State University.

Richard S. Levick

Richard S. Levick, Esq., the president and CEO of Levick Strategic Communications, is a pioneer in crisis and litigation communications. Under his leadership, the firm has set new standards in global communications and brand protection for countries, corporations, and major institutions. He regularly addresses corporate boards as well as industry and government leaders around the world on their most pressing communications and reputation management challenges.

Mr. Levick was named Public Relations Professional of the Year for US Agencies and inducted into the PR News Hall of Fame for lifetime achievement, joining a select rank of communications professionals who have permanently changed their industry. To foster the development of future industry leaders, Mr. Levick sponsors numerous educational programs and resources, including scholarship programs at two universities. A past director of American University's School of Public Affairs Leadership Program, Mr. Levick currently teaches a graduate course in crisis communications at Georgetown University in Washington, DC.

Mr. Levick holds a BA from the University of Maryland, a MS from the University of Michigan, and a JD from American University's Washington College of Law.


ACC Association of Corporate Counsel
Plaintiffs Bar Keywords
Transportation
Pharma
Medical Devices/Hospitals
Product Liability
Toxic Chemicals
Food
Children and Toys
Financial/Business
Personal Injury


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Plaintiffs Bar Keywords
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Product Liability
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Food
Children and Toys
Financial/Business
Personal Injury
Avandia Lawsuit
Celebrex Lawsuit
Effexor Suicide Lawyer
Fen Phen Lawyer
Zelnorm Heart Attack & Stroke
Zyprexa Lawsuit
Mirapex Lawyer
Ortho Evra Birth Control Patch
Paroxetine Lawyer
Paxil Recall
Trasylol Litigation
Accutane Lawsuit


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Plaintiffs Bar Keywords
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Medical Devices/Hospitals
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Financial/Business
Personal Injury
Accident Injury Questions
Accident Lawyer
Airline Lawyer
Car Accident Attorney
Defective Car Attorney
Ford Explorer Rollover Lawsuit
Lemon Law Claim
Lemon Law Help
Lemon Law Lawyer
SUV Rollover Lawyer
Truck Accident


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Food
Children and Toys
Financial/Business
Personal Injury
Guidant Defective Settlement
Hospital Malpractice
Medical Device Defects
Medical Malpractice Dental
Medical Malpractice Lawyer
Medical Malpractice Surgery
Medtronic Consultation
Taxus Stent Injury


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Plaintiffs Bar Keywords
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Stand N Seal Injury
Product Liability Lawyer


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Castleberry Chili Food Poisoning
Food Poisoning Blog
Food Poisoning Lawyer
Dole Spinach Recall Lawyer
Topps Meat E Coli Diagnosis
Pot Pies Food Poisoning
Shigella Lawsuit


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Benzene Exposure
Mesothelioma Lawsuit
Silicosis Litigation


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Transportation
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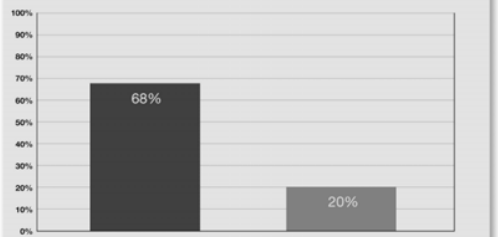
Product Liability
Toxic Chemicals
Food
Children and Toys
Financial/Business
Personal Injury
Defective Carseat
Aqua Dots Recall Attorney
Evenflo Defective Car Seat Recall
Graco Attorney

Plaintiffs Bar Keywords

Transportation	*Investment Fraud Attorney*
Pharma	*Recover Stock Losses*
Medical Devices/Hospitals	*Stockbroker Fraud*
Product Liability	*Tax Fraud Attorney*
Toxic Chemicals	*Worker Injury Lawyer*
Food	*Workplace Retaliation*
Children and Toys	
Financial/Business	
Personal Injury	

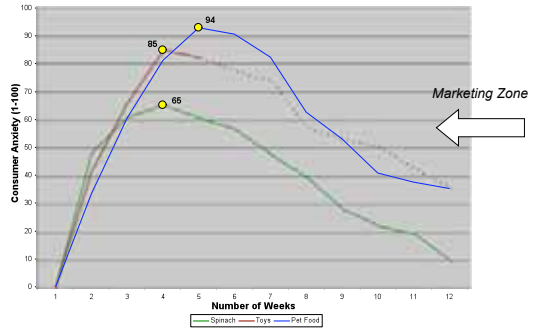
Are Corporations Generally Guilty or Innocent?



Plaintiffs Bar Keywords

Transportation	*FMLA Discrimination Lawyer*
Pharma	*Injury Law Firm*
Medical Devices/Hospitals	*Injury Lawyers*
Product Liability	*Nursing Home Abuse Attorney*
Toxic Chemicals	*Personal Injury*
Food	*Police Brutality Lawyer*
Children and Toys	*Sexual Harassment Lawyer*
Financial/Business	*Wrongful Death*
Personal Injury	

Consumer Anxiety Over Time



FALL 2008
For Corporate Boards,
Executives, and Counsel

Crisis Communications

Desktop Reference

Regulation
Litigation
Recalls
Disasters

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Chapter 1 - Board Responsibilities and Liabilities

Although it's not a board's mission or responsibility to manage a company, the strategic oversight that independent directors can provide is increasingly important across a range of issues – and nowhere more tangibly than in times of crisis.

Not surprisingly, the Sarbanes-Oxley Act of 2002 increased the burden on directors because it mandated that only independent directors with no affiliation to the companies they serve could sit on certain board committees. This measure not only gave boards more independence, but more responsibility – and liability – as well.

For example, in a banner class-action lawsuit against WorldCom led by the New York State Common Retirement Fund, the telecommunications giant's independent directors were ruled negligent and *personally* liable for a portion of the company's losses. This outcome reinforced the serious nature and potential consequences of their duties and catalyzed new awareness of the greater crisis management roles that they would now have to play.

Today board members have three overriding concerns about how companies handle crisis communications.

First, is the company telling the truth?

Second, has it complied with all SEC disclosure requirements?

Third, are company managers and directors telling shareholders what they would want to know if *they* were shareholders?

Board members should press for formal crisis preparedness but take company size and resources into consideration. Larger companies can have a fully trained PR staff as well as outside agencies ready to step in. For small cap companies, the board and management need ongoing relationships with outside communications firms familiar with the industry and able to step in quickly during a crisis.

Today there is critical need for directors to at least be able to identify where internal resources are deficient and must be supplemented by outside expertise across a broad variety of issues. It's not just smaller companies that suffer deficiencies. When Jerry Levin became CEO of what was then Sunbeam Corp. in the late 1990s, he was surprised at how little the board knew about the very accounting problem that was then roiling the corporate waters. There was likewise a dearth of bankruptcy expertise among HealthSouth Corp. directors in the post-Richard Scrushy period that protracted the discussion of whether or not to even seek Chapter 11 protection.

Such cases call for outside directors who can cover all bases and anticipate multifaceted contingencies. In turn, directors should be given the training they need in order to perform these augmented roles.

Private Blunders, Public Missteps: Lessons from HP's Two-Front Disaster

By Lawrence P. English and Richard S. Levick
From *Directors Monthly*, March 1, 2007

In January 2005, a series of articles appeared in the Wall Street Journal revealing that the Hewlett Packard (HP) board of directors was considering a reorganization aimed at reducing then-CEO Carly Fiorina's responsibilities. The articles were based on information which originated at a confidential board discussion, and which was apparently revealed to reporters by a dissident director. Unilaterally, secretly, and selectively revealing confidential board matters is highly unethical and potentially illegal. While the perpetrator of this act has never been punished, the chain of events triggered by that action has caused the company and its shareholders immeasurable damage, destroyed the formerly impeccable reputations of several people employed by or associated with the company, and led to the criminal indictment of the former board chair.

The story of what happened has already been analyzed in depth, but what still bears analysis is why it happened, and how the corporation compounded its mistakes in the court of public opinion-both during and after the Wall Street Journal got on the case. This two front debacle has posed many questions about what HP's management and board could have done differently from the outset, and how they might have handled public communications more effectively once the story broke.

The Long Downward Spiral

Dissension at the highest levels of HP was apparent as early as 2001 when, after HP and Compaq directors unanimously approved a merger of the two companies, HP's founding families waged a bitter battle to block the deal. The merger was effective in May 2002, but the dispute put enormous pressure on Fiorina and her board to fully integrate the two companies and deliver the promised benefits.

Two years later, investors were still waiting for results. The third-quarter 2004 earnings target was missed, and the share price had stagnated. In late 2004 and early 2005, the HP board's independent directors, in the proper execution of their role in evaluating the CEO's performance, met privately and discussed a number of options, including the possibility of reorganizing the top management. A group of directors met with Fiorina and shared their concerns and suggestions with her. These concerns and organizational suggestions were further discussed at a board meeting in January 2005.

First Mistake: The Board Tried to Do Management's Job. According to Fiorina's account, the board was clearly dysfunctional by late 2004, and she resented their usurpation of her responsibilities as CEO. A properly functioning board would have discussed the CEO's performance, and if the majority had lost confidence, they would have taken steps to replace her. However, instead of devising an orderly succession plan, the HP board began doing Fiorina's job for her by developing organization changes and executive assignments. This usurpation was indicative of a serious lack of decision-making on the part of the board.

Second Mistake: Play Me or Trade Me. By her own admission, Fiorina was too docile in her response to the HP board. A more resolute CEO would have thanked board members for their suggestions, but reminded them that organizational decisions and executive assignments were up to her. She should have told them to let her do her job or to let her go-after all, she was protected by a lucrative severance arrangement and was a much sought-after executive.

Third Mistake: Breaching the Duty of Confidentiality. Board-proposed organization issues were further discussed at a meeting in January 2005, but according to Fiorina, a final decision on these proposals wasn't reached. Although it's unclear exactly what transpired at this meeting, one thing is clear: someone relayed what the board discussed to the Wall Street Journal, violating the duty of confidentiality that directors of a public company are required to uphold.

Fourth Mistake: Creating a Lame Duck CEO. A fundamental principal of good governance dictates that, until a CEO is removed, that person deserves full public support from the company's board. By discussing organization matters with Fiorina's subordinates, HP's board weakened her position and raised questions about her authority. Leaking the substance of these discussions to the media drastically undermined her position with employees, customers, and investors-an egregious breach of fiduciary responsibility. Not surprisingly, Fiorina was soon removed as CEO, Patricia Dunn was appointed board chairman, and the search that led to the eventual appointment of Mark Hurd as CEO began.

Fifth Mistake: Letting the Breach of Confidentiality Fester. With Dunn's appointment as chairman, events could have taken a very different turn. However poorly the Fiorina matter had been handled, she was gone, and the search for a new CEO was underway. Now was the time to create board unity.

When an internal investigation made it clear that no one would admit culpability for the breach of confidentiality, a stronger board might have locked itself in a room until the matter was resolved in a way that would preclude future leaks. The board's failure to do so was a dereliction of duty.

Sixth Mistake: Launching a Second Investigation. Late in the summer of 2005, the investigation launched by Dunn still had not determined the leaker's identity. Hurd had become CEO, the company seemed back on track, and the board had another opportunity to reconvene and restore trust. But that opportunity came and went. In January 2006, additional leaks surfaced, and a second investigation began.

Instead of contemplating why another investigation was necessary-especially in light of the fact that Fiorina was long gone, HP's business was going better, and the new leaks were inconsequential-Dunn and Hurd decided to look backward. It's unclear whether Dunn and Hurd really thought it was in the best interest of shareholders to know the identity of the new leaker, or whether personal anger, distrust, and animosity kept them from making a sound business decision. If the former, they were grievously mistaken. If the latter, they were as blameworthy as the leaker.

Seventh Mistake: Assuming It's Right Because It's Legal. Over the course of the second investigation, Dunn sought extensive legal advice from internal counsel and counsel for the third-party investigators-a fact that suggests the undertaking was dubious at best. More importantly, the question of technical legality doesn't take into account ethical and moral considerations and whether those actions are consistent with company values. History is rife with examples of

executives who hid behind the opinion of advisors, only to find that the advice was a woefully thin shield in the marketplace.

Eighth Mistake: Public Hanging. The situation utterly deteriorated when Dunn insisted on revealing the results of her investigation at an open board meeting. She humiliated one director and caused another to resign in anger, triggering the extremely public revelation of just how dysfunctional this board was, and just how far this company had strayed from its values, traditions, and history. Common sense should have dictated that with the revelation of the investigation, there was a significant risk of a PR nightmare far worse than what any errant board member might have caused.

Ninth Mistake: Failure to Anticipate the Impending PR Disaster. According to the Wall Street Journal, the May 18, 2006 HP board meeting was chaotic. Dunn had the results of the investigation presented to the board. Director George Keyworth was identified as the source of the 2006 leaks. He was asked to resign and refused. Another director, Thomas Perkins, resigned in anger and left the meeting.

Anyone who has served on a public board knows that this amount of dissention is not going to blow over. Yet the only public statement made by HP was a routine May 22 announcement of Perkins' resignation. Nothing more was said until August, when Perkins forced the company to make further disclosures that led to the press feeding frenzy in the fourth quarter of 2006.

Best Practices for Worst-Case Scenarios

Let's take a closer look at the communications missteps that compounded the governance fiasco, and the lessons public companies must take away from those missteps.

First, Prepare a Strategy before You Need One. The gaping deficiency in HP's level of preparedness for the September 2006 press debacle was obvious when there didn't seem to be any sort of a company spokesperson once the Wall Street Journal broke the story and the crisis unfolded. Crisis planning means identifying and training one or more executives before a crisis happens. Once a crisis happens, the process of prepping that spokesperson with specific message points can take place quickly and smoothly.

Second, Assign a Team before You Need One. A corporate crisis team should be ready to deploy as needed, and it should include people who know each other's strengths, who trust each other's counsel, who have met regularly in the past, and who have the resources to gather information on a 24/7 basis.

Reporters loved covering the HP story because the company was in such disarray. Journalists had numerous sources and, as one confided to us, pitting one against the other was like "shooting fish in a tank."

Third, Have Internal Policies on What to Do if a Journalist Calls. There's probably no way to guarantee a leak-proof ship, but something set down in writing does have influence simply because it is set down in writing. The document should direct all media queries to an in-house corporate communications professional who can either deal with the matter or direct it to a pre-assigned spokesperson.

CRISIS COMMUNICATIONS DESKTOP REFERENCE FALL 2008

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Identifying high-authority bloggers so that you can monitor what these "influentials" are saying about you;

Landing pages laden with the keyword-rich language that attracts web browsers to your site; and

Dark pages populated with placeholder content – derived from anticipating your most likely crisis scenarios – that can go live the moment they are needed.

While it may seem daunting – as indeed it can with more than a quarter of a billion files of social media content online – the ferocity with which Americans continue to read, post, respond, and form opinions based upon digital media content makes clear the critical necessity for accurate and timely engagement.

A Whole New Ballgame:
How Blogs Have Taken Crisis Communications To the Next and Unprecedented Level

By Richard S. Levick and Larry Smith
From *Stop the Presses: The Crisis and Litigation PR Desk Reference*

"The outlook for newspapers is not great."
-- Warren Buffet

"Stop the Presses." That's easy enough for us to say, but the truth is that you can never stop all the presses when everybody's got one. Today's new media pack doesn't need to buy ink by the barrel every week. They pay Internet fees instead and enlist (without qualifying degrees) in the army of opinion-shapers and world movers universally known as bloggers. An underground fourth estate now breaks stories, cremates reputations, provides authoritative data, challenges brands, defends brands, and reaches much larger audience than most daily newspapers.

So everything you've ever learned about crisis communications…well, thanks to blogs and the blogosphere, you can now underscore those lessons a thousand-fold. Ratchet up the sense of urgency. Exponentially increase the levels of preparedness should your company face a public challenge or be hit with a high-profile lawsuit. Be ready, as you've never been ready before, to have answers to all the tough questions that may confront you.

In case you don't know, a blog (or weblog) is a regularly updated online "journal" where people write about things they find interesting. Blogs get posted on every subject imaginable. Some bloggers are simply cranks but that won't stop them from firing salvos at the corporate hull. Your important audiences may even use these cranks as sources of information. Meanwhile, there are "high-authority" bloggers whose opinions are sanctified by the full faith and credulity of the surfing public.

You know a high-authority blog when you see one. Is it being quoted by major industry trades? Are Harvard business professors posting there? On January 12, 2005, in *U.S. v Booker*, the Supreme Court cited the *Sentencing Law and Policy Blog,* the creation of Ohio State University Professor Douglas Berman. Now *that's* a high-authority blog!

It was an important moment, not just in American legal history, but in American history, period. The blogosphere has entered the mainstream at the highest possible level. Meanwhile, there is also a growing number of state and federal courts that reference blogs as if they were law review articles. The boundary between sanctified texts and online resources has definitely blurred.

"Our blog is read by professors from around the world, as well as antitrust enforcers and practitioners in the field," says D. Daniel Sokol, Visiting Associate Professor at the University of Missouri-Columbia School of Law and one of the authors of *Antitrust & Policy Competition*, a top-ranked blog focused on antitrust issues. "On a regular basis, reporters call about any number of antitrust-related issues. Savvy companies and their media relations professionals play a critical role in our blog by alerting us to important antitrust developments around the world."

You must also know the high-authority bloggers relevant to your industry. You need to treat them as if they directly feed the *Wall Street Journal* because, in fact, many of them do. Industry analysts track blogs too, and it would be surprising if the regulators who oversee drugs and food

and telecommunications resist the temptation. As John Mack points out, the impact of high-authority blogs like his own reaches the inner recesses of your own organization as well.

"A substantial portion – over 40% -- of readers of my blog are employees of pharmaceutical companies," says Mack, Editor and Publisher of *Pharma Marketing News* and the *Pharma Marketing Blog*. "The vast majority of readers -- 65% -- are somewhat or very supportive of the industry. Many of these people would like the industry to have a better public image and believe, as I do, that the first step in that direction is for the industry to better regulate itself.

"The opinions and revelations I make on my blog resonate with these people and suggest that the drug industry can lose support from its core -- their own employees!"

The Drudge Factor

Journalists are often "scooped" by bloggers and follow their lead rather than vice versa. The media has had to adapt to bloggers and, since it could not beat them, it has joined them. Blogging has provided a dynamic platform where journalists, the public, and industry people can interact and discuss issues. The *Wall Street Journal,* for example, now has fifteen blogs of its own, covering areas like health, law, the economy, and even auto shows.

Bloggers are the on-the-ground journalists of the new media. They get press credentials to cover political conventions. They have readerships in the millions. They break news (think Mark Foley) and they keep stories alive (think Monica Lewinsky). Bloggers' and new media stories may not arrive on your doorstep like the morning paper, but technologies such as RSS (Really Simple Syndication) and bookmarks provide readers with online subscriptions that are just as reliable.

Savvy bloggers and readers won't stand for corporate rhetoric or tactical obfuscation. "Most bloggers don't respond well to marketing pitches, but we do appreciate real information," says Bruce Schneier, security technologist and author of the *Schneier on Security* blog.

Developing and implementing a substantive blogging strategy in advance of a crisis is therefore critical. A blog gives businesses a way to stay ahead of the news cycle by presenting, testing, and refining the company's message, to distinguish facts from fiction, and to correct any misinformation that may be circulating and propagating through the blogosphere.

The operative word is "substantive." As Schneier says, "the more you spin, the less we listen."

From Rank-and-File to the A-List

Blogs first surfaced as online journals, posting random streams of consciousness that were published as online diaries. The blogosphere is still abundant with diaries as about 37% fall into this category. But in its maturation, the online blog community is now crowded with citizen journalists, editors, and experts passionately advocating a cause, curse, or career.

Fabulous Fisherman Fred blogs side by side with CEOs from Fortune 100 companies. You'll find Fred's blogroll friends (the folks who post commentary to the blog) talking tackle and even trading bass lures. Google the Fortune 100 CEO and you'll also find the latest company successes as well as what the disgruntled IT guru is saying about the company's software migration.

The blogosphere may or may not include the voice of your legal counsel, but you can surely expect the plaintiff's bar to troll for clients through marketing blogs. You'll find the good, the bad, and the very, very ugly. You'll often find flame sites about your company products, exposés of "customer no-service" or allegations of dubious hiring policies, along with the latest inside information delivered in cyber-time by your competition. There are bloggers from MIT, Microsoft, and the *New York Times* among the tens of millions who generate and propagate content through the blogosphere.

But the MITs and Microsofts or mainstream media brands don't necessary dominate the popularity-driven Blogosphere A-list. Internet storytellers rank particularly high. Most of these storytellers don't consider themselves journalists. Ask Fabulous Fisherman Fred. He might say he hates the media even if he doesn't realize that his buzz on the latest lure and its defects has trumped every other carefully placed product review. Fred can ignite media attention and shift the communications focus from product launch to the crisis scramble necessitated by product recall. *Are the lure manufacturers ready? Have they thought ahead to that eventuality?*

Bloggers like Fred and his millions of counterparts have tremendous impact by influencing the media and public opinion through what's often an anonymous no-holds-barred online debate. Blog search engine Technorati measures the global blog at about 70 million and counting, while the number of blogs doubles every six months with 1.2 million blog posts daily. Amid such numbers, what are the odds of your evading unwanted coverage should you face any sort of organizational crisis?

Different Game, Different Rules

It is specifically because of the differences between blogs and traditional media that companies must adapt their crisis communications plan to incorporate a solid online component that takes the blogosphere as seriously as it deserves to be taken.

"The number one thing to know is not to ignore bloggers," says John Mack. "A story may live for a short time in the media, but never dies within the interconnected blogosphere. If PR people do not engage bloggers, their voices are not heard in this sphere, which is having greater and greater impact on the public."

As Mack says, unlike traditional editorial content, blogs have a shelf life that far surpasses media coverage, not to mention the messages originating from your own official company web site. In fact, information on blogs lives indefinitely, giving last year's blog attack a weight equal to today's positive media spin and the recent press release added to your online newsroom. You simply have to scroll down to find it. By contrast, yesterday's newspaper is now wrapped around the remains of last night's dinner. Traditional editorial content lasts only as long as the newspaper sits on the table or the six o'clock news program is on the air.

Meanwhile, blog archival content arises in search results over and over again via "permalink" technology and can be reposted and redistributed again and again. Blog content remains relevant long after information has moved from the home page of the blog, and long after yesterday's headlines are replaced with today's online news.

"The Internet speeds up the dissemination of not only information but also misinformation," says Jeff Jarvis, who heads the interactive journalism program at the CUNY Graduate School of

Journalism and blogs on journalism and media at *Buzzmachine.com*. “So what are we to do about this? Regulate? Legislate? Complain? Ignore? Or respond?

"We need to recognize that the Internet alters how media operate,” adds Jarvis. “Blogs – whether written by professionals or amateurs – tend to publish first and edit later, which can work because the audience will edit you. In this medium, stories are never done; rather than turning into fish-wrap, they can grow and become more factual and gather new perspectives, thanks to the power of the link and, yes, the correction."

Blogs have other legs-up as well. Affiliation is easy to mask and bloggers can be completely anonymous. Unlike editorial content in the mainstream media, the citizen journalist may be unknown. There’s a good chance that, if a blogging activist is badmouthing your company, you may never know that person’s true identity.

In addition, while mainstream journalists meet midnight deadlines and move on, bloggers remain vigilant in the background and delve beyond the surface scoop. They're not limited by the competitive platform of media as a business or the 24-hour news cycle. Bloggers talk. They're connected. They match wits, offer references, trade information, and share sources and resources.

They pursue doggedly and they pursue endlessly. Their identity (or lack thereof) is not in their names but resides in, and is validated by, the hyperlinks that justify their analysis and opinion. Who they are pales in comparison to the credibility of the information they unearth and deliver, which often becomes a bona fide transparent media source.

Many bloggers police their counterparts and other media; they’re adept in surfacing and connecting information that the press corps has missed. Despite amateur status or anonymity, these investigators and their networks can quickly shift yesterday's ground-zero headlines into a frenzied media groundswell.

A Nimble Adversary

There are few barriers to entry when it comes to blogging. Low-cost or no-cost blogging software is widely available, making it extremely easy for people to publish, regardless of technological skill. Bloggers make the most of this “think it, write it, publish it” technology, reacting to breaking news and current events with judgment calls, personal opinions, and links to additional sources offered in real time. After all, bloggers have no legal department, corporate communications bureaucracy, copy desk, or executive chain of command. There's nothing to slow them down; the “approval process” starts with the blog post – be it rant, rave, ramble, or vent -- and the real-time buzz is measured by audience response, reaction, and viral circulation.

Blogs may not seem as official as the 30-second sound byte or as memorializing as the primetime news spot that encapsulated your take on Katrina or food contamination, a fatal train derailment, or the potential consequences of a hazardous waste spill. Perhaps you had the last word or potentially will. And, you might think, blog buzz could never come close to the dividends your company expects from the upcoming *BusinessWeek* interview. Well, consider what *BusinessWeek* itself had to say (May 2, 2005):

> “Go ahead and bellyache about blogs. But you cannot afford to close your eyes to them, because they're simply the most explosive outbreak in the information world since the Internet itself. And they're going to shake up just about every business — including yours. It doesn't matter whether you're shipping paper clips, pork bellies, or videos of Britney in a bikini, blogs are a phenomenon that you cannot ignore, postpone, or delegate. Given the changes barreling down upon us, blogs are not a business elective. They're a prerequisite. (And yes, that goes for us, too.)”

If media relations are a two-way street, then blogs suggest four-way intersections. While editorial and traditional media present information, blogs toss it in the sandbox as fact or fiction and invite everyone to play. The information will live or die in these lively interactive forums of discussion and idea exchange. Traditional media, along with traditional concepts of damage control, do not compass these whirligigs of content and perception-sharing. Barriers and boundaries between what’s public and what’s private have dissolved in a ubiquitous medium that challenges the traditional information gatekeepers and those formerly quoted as industry experts.

How Traditional Media Use Blogs

It's no wonder that mainstream media have joined the blogosphere. After ignoring its power of persuasion, the media itself now blogs because of revenue, influence – and because mainstream and emerging audiences go online for news and almost everything else. Perhaps the growing number of media blogs is evidence of the media's desire to be part of this larger conversation.

This morning’s blog post may be the catalyst for tomorrow’s front-page headline. As information, news, opinions, speculation, misinformation, and propaganda move through the blogosphere at the speed of light, reporters are looking to blogs for alternative angles and tracking their hyperlinked research into news-making stories. Consider:

- Blogs played a catalytic role in the 2006 Mark Foley sex scandal, revealing the first IM messages.
- Blogs were credited with helping interest mainstream news in the racially insensitive remarks by Senator Trent Lott that led to his resignation as Senate majority leader.
- Bloggers first sent up the alarm about the forged Bush/National Guard memos reported as authentic by Dan Rather, a debacle for CBS and *60 Minutes*.
- During the Virginia Tech tragedy, blogs and social media offered real-time interviews and images and these accounts were integrated as part of CNN reports. While *Roanoke Times* journalists used blog formats online for their coverage, other mainstream media scoured blogs and forums for eyewitness sources.
- The real truth behind Starbucks' earnings shortfall was a few forecasts short, revealed popular *StarbucksGossip.com*. The company told Wall Street the story, but the blog told them the rest of the story. It linked the news to predictions from the blogger’s own Main Street audience of store managers. Those store managers said they had forecast losses and shared their concerns with company chiefs eight months earlier.

But not all media rank-and-file are believers. Joseph Rago, an assistant editorial features editor at the *Wall Street Journal,* wrote an editorial (December 20, 2006) in which he opined that blogs are "written by fools to be read by imbeciles." Bloggers had a field day. One response was offered the very next day by a blogger who calls his blog *Texas Hold 'Em*:

> "…Rago’s words bring to mind the old saw about media elitism: 'Here’s the news and here’s what to think about it…' This condescending attitude is precisely what led to the

> rise of alternative media, such as cable news, talk radio, the Internet and blogs…Blogs here in Wisconsin and across the nation have influenced local, state and even national stories. Quick: how was the chairman of the Racine County Democratic Party forced to resign in light of sexual harassment? A blog – *RealDebate Wisconsin.* The traditional media – *Racine Journal Times* and *Milwaukee Journal* – arrived at the party late…How did Senior McGee eventually have to face disciplinary action for telling racist jokes on the airwaves? How did news of Junior McGee saying Leon Todd should be [hanged] break? It wasn't the *Milwaukee Journal* but rather *Badger Blogger* in both cases…"

This rejoinder certainly supports the more scientific finding of a Columbia University study that shows 51% of journalists use blogs regularly. The number is rapidly growing, in large part because, for all the abuses and misinformation, they provide real value. "In many ways, blogs keep the media honest," says Bruce Schneier. "Far too often, the established media presents stories in easy-to-digest hard-to-offend nuggets. Bloggers look beyond those nuggets to the real story.

"Yes, there's an echo chamber where certain views get magnified and others get ignored," adds Schneier. "But the established media does that too, to an even more extreme degree. Think of blogs as the final democratization step of the media revolution begun with the invention of the printing press. Embrace the fact that you can't control the story, and let the facts speak for themselves.

"Sure, it's not what you want but it's way better than you'll get otherwise," says Schneier.

A Corporate Resource

During a recent PR Newswire forum on blogs, David Whelan, a staff writer at *Forbes* and a blog fan, commented that blogs "give you an idea of what opinions are out there before you pick up the phone." He noted that companies that have blogs are going to be noticed more because lots of story ideas "bubble up" from blogs to the mainstream media.

The ideal proactive campaign begins with a blog that is already in place. It is a transparent extension of your company's brand and communications, a way to develop and grow customer and audience relationships. It is clear, real, and authentic because it really is a conversation, and a transparent one at that. The blog voices talk in plain language, dispensing with the stiff formality often found in press releases (which are intended for the media but often stumbled on by customers searching online).

Blogs give companies a place to talk and listen as well as a lively, alternative platform to post insights, articles, news, and comments on industry happenings. The blog can easily cement your position as an industry thought leader. You'll know because your insights will circulate rampantly as permalinks in the blogging global arena. At the same time, the ideal blog is more than an alternative forum to roll out the latest news brief, extol the internal mechanisms of your company, or tout support for its business objectives. It is also about its people – their concerns and connections to the world inside and outside the company.

Because the blog already exists, it will presumably have a ready audience that will turn to it if the company becomes a topic of public conversation, especially negative conversation. They will naturally want to know what you have to say in reply to whatever it is that Badget Blogger said about you. And, it should be optimized to attract the greatest number of additional web users.

Used proactively, blogs give companies a way to test, manage, and actually "experience" the messages in front of their audiences – and with their audiences -- and this experience includes both the messages the company intends and those "outside" messages the audience will certainly hear. In that sense, a blog can be a tool for a company to go on the offensive: to disseminate its messages before those messages are needed in response to an allegation or criticism. It is a way for the company to define the debate in the blogosphere before it even begins.

Beyond that, you will need to be constantly monitoring the blogosphere to assess how your proactive measures are being received and, certainly, to identify areas where you are being attacked and don't yet know it.

Which takes us to the crucial nuts and bolts of what corporations really must deliver in this brave and frequently capricious new world.

The Brass Tacks

It's often observed that a person who has a good experience tells one other person; a person who has a bad experience tells five. The blogosphere underscores this truism, whether the telling originates as a competitor's flame attack, as comment from a dissatisfied customer, or as the personal blog opinion of an unhappy employee blasting a management initiative. You'll be hard-pressed to prevent the spread of misinformation. From a practical standpoint, much of it won't justify a response. Nevertheless, your blog is a way to tap the pulse of the blogosphere and, when warranted, respond appropriately to inaccuracies or damaging messages before they land on a high-authority blog and then proliferate uncontrollably.

If you've got a computer or gaming system in your house, you probably have at least one or two Electronic Arts (EA) video games. But as savvy as the company is in game design, they didn't quite realize the technological power of the blogosphere. They learned the hard lessons of online buzz when a blogger called *EA Spouse* posted about the working conditions at EA. She wasn't complimentary.

What started out as a single post on a relatively insignificant blog rapidly gained momentum and, in short order, media attention. When mainstream media asked EA for comment on the online allegations, EA's response was the one we've all been trained to give: "We can't discuss employee issues." Alas, the *EA Spouse* blog is, to this day, highly ranked in Google, while EA recently settled a $15 million overtime suit brought against it by employees.

The good news is that a blog threat isn't necessarily just one or two opinions posted online. Instead, these opinions, however nasty, are actually corporate assets, the early alerts needed to address (as was true in EA's case) crucial internal issues *before* external issues arise that pose more significant threats. Choose your buzz: A company blog? Or the buzz of media and public opinion that follow an employee uprising and crisis headlines?

The first step must therefore be a dedicated daily monitoring program – in fact, twice a day. From there a strategy evolves. Among the key elements of that strategy…

- Know what people are saying about your company. Perhaps they're commenting on a new initiative or reacting to a recent advertising campaign. Maybe they think your recent

YouTube video is absolute genius. Or maybe Sue crowed about her raise in her online diary and Bill down the hall is furious. He's uploaded a litigious memo to his blog….

- Connect the dots. Gather information and links from a variety of company sources. Keep the information current and spread "information packages" with blog excerpts and supportive hyperlinks. The goal is that, when other bloggers descend on your blog, you want them to discover at least one part of a story that satisfies their quest to create a broader whole. The more parts you provide, the better.
- Use your blog to influence other blogs. With your own blog firmly in place, you'll have more credibility in the blogosphere. Your value is more than being one among many; it's in being a dynamic member of a proud community. That value and credibility extend to your links. Bloggers link – it's what they do. So give them plenty to link to.
- Reach out to bloggers and develop an authentic, transparent relationship with them in much the same way your corporate communications team cultivates and interacts with any influential reporter who covers your industry. Promote your relationships and connections with a "blogroll," the community of online friends and supporters.
- If and when a genuine crisis develops, you respond quickly through your blog, offering conversational information that's also embodied in the company's talking points, position statement, and official press release. If you're credible, embedded context links and your own blog post permalink will carry more weight and propagate more quickly than all other methods combined. Your blog news will also hang around far longer, especially if your crisis strategy deploys a commentary or link campaign.
- Keep your friends close and your enemies closer, as Sun-Tzu, the Chinese philosopher and military strategist, advised. A blog monitor will help your business identify blogging adversaries and allies, before a crisis calls you to the war room, so that you can respond accordingly and, if needed, proactively. Being aware of adversity is important. Equally crucial is early knowledge of loyalty and support. You may need to mobilize allied forces to broadcast your message. Messages have greater weight when third parties deliver them.
- You'll also want to identify bloggers who are likely to start or circulate rumors or jump on a cause about your overall industry as well as those bloggers who are neutral or objective.

A monitor that analyzes allies and enemies, and the early-warning systems and neutral camps on the periphery, can rapidly scale to an incredibly persuasive blog campaign when a crisis demands high-speed and high-stakes deployment.

A Crisis Communications Tool

As noted, a blog that is already in place provides an immediate source for people to see how your company is reacting to rumor or news. It's faster than a press release, more conspicuous than a website update, much quicker than getting an op-ed piece in the *New York Times,* and more credible than a full-page ad in the *Washington Post.*

Online crisis communications draws on the best practices of both proactive and reactive strategies. For example:

- Say something. Even a minimized response of "we're looking into it" can be a reassuring message of acknowledgement without any confession of liability. Meanwhile, you've

bought time to assess online impact, rally legal counsel, explore blog strategy, and strategize with the entire crisis communications team.

- Pre-plan. Since at least 51% of media use blogs, contribute to theirs and invite them to use yours *before* a crisis occurs. Include real-time media updates via blog RSS feeds and encapsulated friendly versions of the company press room. When time is of the essence, key media are already trained to check your blog and rely on it as a source for official information. They also have an existing relationship with you. As in all crisis management, relationships are crucial.
- Preempt. The goal is to get a smear campaign that starts in the blogosphere to end in the blogosphere. Your clarification, and the conversations surrounding it, may be all journalists need to fact-check for the more accurate story or disregard it altogether (as a veiled flame attack from a disgruntled competitor, for example). The journalist may move on to the next rumor or discover a bigger and better story. Reporters do research rumors, but they're also looking to blogs for new angles and nuggets that can make positive company headlines too.
- Humanize. Blogs help put a human face on the organization. Personable voices enrich the corporate profile. Solid customer connections go a long way toward building loyalty when headlines are good, and empathy when the news play is crisis.

Uncommon Common Sense

A great deal of blogosphere management requires what seems to be common sense. But, as with crisis and media management in general, such common sense is rooted in instincts. The reputation disasters that have befallen corporate America in recent years prove that those instincts are by no means universal or easily acquired.

For example, some corporations find it very difficult to sound credible when they're trying to sound human. They should study the example of Bryan Zmijewski, founder and main blogger at microstock photo site *LuckyOliver.com*, who says he's used his company's blog to share good news as well as apologize for technical snafus.

"We've heard from our customers that one of the things they really love about our business is that they can tell from our blog and our website that we're real human beings and that we care and feel real passion for what we're doing," says Zmijewski. "It's gotten to the point that, if someone is questioning our company or putting LuckyOliver in a less than positive light on another blog or in a forum, our customers actually speak out on our behalf without any prompting by us. Our blogging has played a huge role in how they feel about us."

A blog cannot sound as if it is written by a robot, a computer, or a corporation's legal department (even if it has to go through legal before it is posted). Blogs need to have the tone and personality of the people who are writing them. Think about a presentation one might give at an industry conference. It's like a formal paper, but the conversation that takes place in the hallways between sessions is like a blog post. A blog post should have a conversational tone and – this cannot be emphasized too strongly – corporations need to give their blog writers a certain leeway that they would not usually give in other corporate formats. If your bloggers want to use the word "damn," let them.

Honesty is another form of uncommon common sense that the blogosphere demands. So be transparent. If your PR firm is writing the blog on your behalf, say so. If you are posting a complimentary piece on a company that just happens to be a partner or affiliate, disclose the

relationship. Scheme to be anything but completely upfront, and it's only a matter of time before the bloggers will delight in "outing" you or disclosing the relationship you failed to leverage yourself.

Maybe that's the best news coming out of the blogosphere. As bizarre as this environment may be, your success in it depends on your humanity, your honesty, and your willingness to communicate. Those are prime qualities to feature under any circumstances.

So Don't Forget…

The blogosphere is a shoot-from-the-hip medium into which corporations are often thrust by crisis. Under daunting circumstances, it's naturally harder to identify and implement the tactical best practices. Here are a few basic ones…

- Monitor all mentions of your company in the blogosphere. Even if you don't respond, the repository of public and even internal opinion is invaluable. Information is power.
- Update the blog at least weekly and more often if possible. The denizens of the blogosphere expect you to take their medium as seriously as they do.
- Diversify your communicators. CEO blogs are great but, for journalists, valuable communications also come from the rank-and-file and lower-level managers.
- Set boundaries. Predetermine what's acceptable, especially where there's legal exposure. Talk to your lawyer but make sure your blog doesn't read like you just talked to your lawyer.
- Allow comments. One-way blogs are decisively less credible. You can restrict comments until you've reviewed them but think about publishing negative ones as well. It will show that your blog is a true public resource. It will also allow you to publicly respond to negative opinions that are probably circulating anyway.

Chapter 3 - Corporate Social Responsibility: You Can't Just Buy It

Corporate Social Responsibility (CSR) is a business term in search of an ironclad definition. It means different things to different people inside and outside of corporations.

To some people, corporate social responsibility is the humane duty of companies to improve or regulate labor practices – shutting down sweatshops in developing countries and the industrial centers of Group 8 nations, feeding the hungry, volunteering in schools, building homes for the homeless, fending for migrant farmers, or creating goodwill in the community.

To others, Corporate Social Responsibility must be closely linked to sustainable development and business decisions driven by ethical considerations and environmental consequences. The World Business Counsel for Sustainable Development says, "Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."

In either case, CSR is the idea that corporations should assume responsibilities that go beyond profits and beyond charity. Now, with the enforcement of tougher business mandates like Sarbanes-Oxley, Corporate Social Responsibility no longer occupies the fringe areas of business life but is, perforce, a subject for discussion in the boardroom.

Corporations often set themselves up for failure when they take a "bag of money" approach to CSR, throwing cash at public problems and hoping to enjoy public goodwill as a result. Today's consumers are not easily convinced that philanthropy equals responsibility. In fact, companies that spend billions advertising drug donations or cures for smoking (as overseas production quadruples) can accomplish the very opposite of what they set out to do.

They are perceived as trying to buy their way out of CSR, not fulfill it.

They fail in part because they only advertise what they do. There is no strategic communications. With advertising, companies purchase media time to talk about themselves. With strategic communications, among other approaches, respected and disinterested outsiders speak on their behalf.

Too often, the missing component in CSR campaigns is the right messenger. In fact, that messenger is often more important than the message itself.

Sponsoring the Beijing Olympics:
An Interview with Dick Schultz

From *High Stakes*, May 2008

As Chairman and CEO of International Partnerships, LLC, Dick Schultz guides business relationships between China and the U.S.

Mr. Schultz was formerly the Executive Director of both the U.S. Olympic Committee and the NCAA. Here's what he had to say about the complex issues shadowing this year's games:

Given all of the negative attention the Beijing Games are receiving, why sponsor them at all?

Dick Schultz: It comes back to branding. The Olympic brand is one of the most highly recognized brands in the world. Being able to put that Olympic logo next to your brand has a terrific impact. Anybody that has ever seen those five rings knows that.

Even though professionals have crept into the Olympics over the last ten years, the worldwide public views the Olympics as one of the purest forms of athletics. Olympic athletes are a special brand of person, and they're not getting paid to represent their nations. Overall, the Olympics are held in very high regard and I imagine that these sponsors view the power of that brand as an asset that trumps the potential problems.

And don't forget; most of these companies have been sponsoring the games for a long time. They know that each event has plusses and minuses. The Olympics are something that they can market all year long – and in off years as well.

What should Olympic corporate sponsors be saying to keep their constituents happy, both inside and outside of China?

Dick Schultz: They need to focus on the athletes and the Olympics themselves and not the Chinese government. That's the only way to do it.

The U.S. companies, which make up the vast majority of sponsors, need to be saying: 'We're standing behind our athletes. We're making these games possible. These folks and their families have sacrificed for years to prepare for the games. While we don't condone what the Chinese government is doing, we want to be there to support our athletes.'

It's all about distancing themselves from what the government is doing while letting the world know they're there for the athletes.

What are the risks for a sponsor that withdraws its sponsorship for social or political reasons?

Dick Schultz: If it was a problem that had a big enough international impact, I don't think it would have a negative effect on the sponsors' brands. It might even have a positive impact.

That said, I'd remind sponsors considering such a move of the backlash that Jimmy Carter suffered when he pulled the U.S. out of the Moscow games in 1980. All of those positive messages about supporting the athletes and their families…they'll come back and haunt you if you renege on that promise in any way or for any reason.

I'm a $100 million company, a company that makes in a year what most Olympic sponsors shell out in advertising alone. I'll never sponsor the Olympics. What can I learn from all of this?

Dick Schultz: I think the big thing is – whatever you're going to spend in marketing and advertising – make sure you pick your target well. Again, that's the real value of the Olympics. If everything else screws up, you've got the athletes to fall back on.

So ensure that whatever you put your brand on has strong visibility and that, if something should go wrong, there's a fallback position you can use.

Chapter 4 - Corporate Campaigns: A Ready Offense

Angst among consumers and business leaders will continue to grow as the economy spirals downward, global credit markets slump, and foreign investors acquire marquee U.S. assets. In this environment, corporations will be even more subject to attacks than in the few years since Enron.

Potential antagonists such as activist shareholders, public interest groups, non-government organizations, regulators, legislators, consumers, and the media will likely exploit this period of vulnerability to advance their own agendas.

In response, companies can mount a two-part campaign…

First, articulate vision and values. This prong of the campaign accentuates the positive. It is all about reputation management and brand-protection communications that, in essence, build up goodwill equity deposits – a trust bank, as it were, for corporations to draw on if they are specifically targeted in the months ahead.

The corporation and its ostensibly disinterested third-party surrogates should be the first to articulate the vision and values of their enterprise. The goodwill deposits will pay high-interest dividends if they're made before a specific crisis occurs. Amid multi-media attacks, the instinct of consumers, business partners, analysts, investors, and even journalists will then be: "Wait a minute, that's not the company I know!"

The "equity bank" strategy worked like a charm during the 2007 Jet Blue crisis when severe weather gutted airline operations. Along with the many things Jet Blue did right during the crisis, the airline had also nurtured a pool of trust and loyalty before the crisis, shielding its brand during that troubled winter.

Second, have an offense ready to deploy. Understand how activist groups think and react in order to anticipate how they'll come at you; then, lay the groundwork for an effective response. These antagonistic organizations have become particularly adept with technology, leveraging viral digital communications to create a global climate of inimical opinion.

But they don't have to dominate the Internet. There are effective corporate counter-strategies based on proactive outreach, web optimization, and a constant monitoring of the significant "high-authority" blogs that focus on your industry.

There is also an area of vulnerability where NGOs and other adversaries may be particularly unprepared, online and off. They may not expect or be able to withstand attacks on their own independence and objectivity. They are so accustomed to being on the offense that their own defensive lines might be porous – especially if, as forensic investigations commissioned by corporations often disclose, they have a pecuniary or otherwise compromising stake in the outcome of their own "public service" initiatives.

An offense-based strategy should never be triggered automatically. There must instead be sober analysis of whether such a strategy will actually serve the corporate brand or ratchet up the battle to a point where everybody loses. At the very least, however, the attack plan should be ready, the weapons primed, and the war games played.

Prepare for Communications Hostilities Ahead

By Richard S. Levick
From *For the Defense*, August 2005

A dozen people residing adjacent to a new XYZ Corp. construction project have developed respiratory symptoms. As it is a polluted part of the slate, the symptoms could be attributed to many causes. But an NGO has posted a blog blaming XYZ. A front-page article in the local newspaper use the blog as a source and—when the NGO intensifies its attacks to include past accusations of Clean Air Act violations—the coverage only gets worse.

The GC advises the CEO to contact the NGO and ask to post a strong Statement affirming that there is absolutely no evidence of responsibility on XYZ's part. In return, XYZ will, as a gesture of good faith, sponsor chest x-rays for anyone living or working within five miles of the site.

Very, very bad advice! The NGO accepts the offer—with surprising alacrity—and a lawsuit is filed two months later. The plaintiffs soon assert that the chest x-rays tire tantamount to an admission of liability. As a legal argument, that may not prevail, but the damage to the XYZ brand is potentially serious us the media starts asking: Is XYZ the kind of company that tries to buy its way out of responsibility?

The GC's biggest mistake was his naiveté about his adversaries. He assumed them to be isolated do-gooders, and that their primary concern was actually the health and safety of area residents. Even though he performed basic due diligence, he did not discover a strong paper trail linking the NGO to the richest plaintiffs' law firm in the region. In fact, had he moved beyond traditional research, he most likely would have uncovered monetary contributions to the NGO by the taw Arm.

With the right resources, including sources within the NGO. he may even have uncovered an extensive confidential strategic plan co-ventured by the NGO and the law firm. The plan specifically targets XYZ among other companies.

Hardly any GCs have the resources to mount such due diligence. Yet such resources are often precisely what are needed to protect corporate brands against the adversary's covert resources.

A new breed of corporate investigators is now on the scene to provide just such resources. Their job is to tell you what you need to know about organizations, individuals, and other businesses that, for whatever reason, are out to harm you.

To understand the value of these professional investigations, understand their scope. The basics include:

- Is an attack on a corporation secretly funded by a competing corporation (or by a plaintiff's firm as in our fictionalized example)?
- Does an attacker have a hidden personal animus against the company unrelated to die product or business practice under attack?
- Who is behind affiliated groups or sub-groups? Are they just shells contrived to make the adversary look stronger than is actually the case?

- Who are the principal players? Were they with an animal rights group yesterday and an environmental group today? If so, the same methods used in past campaigns against a laboratory may be used against your chemical company today.

Follow the linkages. You may discover enemies you never knew you had.

A Legitimate Enterprise

In our communications campaigns on behalf of businesses, we often see immediate need for uniquely trained professionals who protect brands by taking due diligence to the next level. At the very least, they are necessary to identify where the next attack will come from and how intense it's likely to be.

It is wise practice to include such professionals on the crisis team alongside the CEO, the GC, outside counsel, the internal communications chief, and outside media/crisis counselors.

While there are covert dimensions to their work, the cloak-and-dagger component should not be overstated. The covert component is important, of course. It uncovers information that is not publicly available. And, it's important simply because you don't want your adversaries to know that you're collecting information.

But the confidential nature of these investigations does not make them any less legitimate a mechanism to protect business interests than legal strategies, insurance coverage, public relations, and lobbying campaigns.

It is especially important for general counsel to realize that this burgeoning cottage industry falls altogether on the safe side of the taw. It's respectable work as well. Decades ago, when General Motors sent spies to dig up dirt on Ralph Nader, it cast a lasting pall on legitimate investigatory work. Bui there is no similarity between that debacle and the services that today's qualified investigators provide.

The Nader example is particularly instructive, as good investigations do not focus on the prurient details of a subject's life. In many cases, such stuff actually betrays a real laziness on the part of the investigator who cannot uncover anything more substantive.

Team Member

Like any relationship, the corporate use of Investigators should be guided by a number of best practices, including:

- Even if these people advertise in the newspapers—although the better ones never do—it's wise to hire them strictly on a referral basis. The industry is relatively unregulated and quality varies widely, from lone wolf gumshoes to sophisticated corporate intelligence firms. It is best to rely on validation by a trusted third party.
- The investigator will be an integral part of the crisis team. To ensure a harmonious collaboration, it's best that your law firm or media firm, or both, have an existing relationship with the investigator.

- Establish in no uncertain terms what the investigators are supposed to achieve and how, in terms of techniques and resources, they will achieve it. Sometimes, their primary service is only consultative: to simply advise clients on the best ways to obtain information with the lowest amount of risk.
- It is often essential to establish from the get-go how the information will be used. In some venues, a confidential source is legally useless. But if it's a media play, as would seem the case with our XYZ scenario, the barrier for entry is much lower and an array of off-the-record tips can be very useful.
- Don't write a blank check. Even with the corporate brand at risk, there are reasonable budgetary controls and timelines that ought to be put in place.

Do not use investigators for matters that—like pre-transaction due diligence—can still be handled cost-effectively by the corporate staff. That said, some transactional matters are large and complex enough to require outside professionals.

In one real-life instance syndicating bank affirmed that due diligence had been conducted, An outside investigation found nothing more than a balance sheet based financial assessment Additionally compromising information was then uncovered, and the client was able to exit the deal without penalty because of the substantial misrepresentation.

Indeed, today's investigators, in addition to protecting brands in the court of public opinion, are significant adjuncts to the legal team. For example, they provide powerful discovery weapons uncovering crucial data on their clients' witnesses as well as opposing counsel's. One need look no further than the Scrushy trial when powerful cross examinations, based on behind-the-scenes information-gathering, discredited the prosecution's case with witness after witness.

Information is Power

With some of this information, the action points are obvious. Where sources are directly impugned, off-the-record tips to reporters can kill the story. If reporters feel leally tolled, alerting them to a tell-tale funding source or a personal vendetta can turn the tables as your adversary becomes the subject of subsequent exposes.

It gets trickier when the adversarial web is elaborate or when on ideological attack is subtly couched amid charges against specific products. Your strategy here can be two-pronged:

First, alert other industry representatives that a bread attack threatens their own interests. Create an industry-wide response that maximizes third-party support and paves the way for concerted action by, typically, a trade association

Second, develop a story about the attacker—its sophistication, its funding, its methodology—that neither mentions nor defends your own products or business practices. In other words, go on the offense with a totally fresh topic.

Corporate adversaries will continue to develop increasingly sophisticated strategies. Each new corporate scandal only further encourages the assault. The first absolutely essential objective of professional investigations is to find out who the enemy really is. Only then can a corporation know what it really has to do.

Chapter 5 - Product Liability: The Mother of All Brand Threat

Product liability crystallizes the challenge of crisis management at its most acute. Public safety is at play. Corporate reputation and corporate responsibility are at play. Missteps and obfuscation can be fatal to the brand, stock price, and reputation.

The ideal nominee for best practices in handling product liability is any company that, as part of its crisis response initiative, shoulders the burden of responsibility and does so honestly, yet without exposing itself to unacceptable liability.

The classic success story involving product liability is, of course, Johnson & Johnson, which earned widespread public approbation with its handling of the Tylenol tampering. What might have destroyed a product built instead a 20-year legacy of company-wide trust. Johnson & Johnson sacrificed one quarter of Tylenol profits but achieved 80 successive quarters of company growth and global distinction. The crisis was transformed into a positive marketing opportunity that actually strengthened the corporate brand. More than any other pharmaceutical company, Johnson & Johnson then had a trust bank to draw from for future product liability situations.

Product liability can thus present an opportunity to reverse the public cycle, from "the sky is falling" to "you're in good hands with…" – fill in your company's name. But, like Johnson & Johnson, companies must offer assurances at the earliest possible point, even before a cause or solution has been identified. When companies make decisions on how to handle product liability, the key to being perceived as part of the solution is taking control of the situation before anyone else does. Be seen and heard…

Controlling the narrative. A product liability crisis is a story. More often than not, tales told in the first person paint the storyteller in a positive light because the listener identifies with the narrator. Take control of the narrative by being the *first to tell it* – even if a solution has yet to present itself. Johnson & Johnson did not immediately know the cause of its problem, yet was the first to articulate and undertake a course of action that restored order.

Controlling the picture. When an E. coli scare all but crippled the spinach industry, the first pictures of the crisis – of unskilled migrant workers working the fields and spinach being pulled from shelves – did not paint the industry in a positive light. But the industry responded, disseminating visual pictures of modern safety treatment facilities peopled by skilled technicians busily at work on measures to prevent contamination. Weeks later, the E. coli scare was old news and the industry was back on its feet.

Articulating next steps. Even if all the pertinent information has yet to emerge, find ways to keep your messages coming until the information is uncovered. For example, during the 2007 pet food crisis, the President of the Pet Food Institute was called by Congress to testify before the contaminant had been identified. But he took that occasion to announce the establishment of a National Pet Food Commission that would study the crisis and make recommendations on how a similar situation could be averted in the future. The fundamental message: "We don't yet have an answer but we'll never stop looking for ways to find one."

Lessons from the Mattel Crisis

By Richard S. Levick
From, *Corporate Responsibility Officer*, March 5, 2008

Regardless of what business you're in, the toy industry's recent ordeals concern you directly. The patterns and public challenges are broadly relevant, and the lessons to be derived are universally applicable to diverse professional and industrial pursuits.

First, a little background.

When Mattel recalled 18.2 million toys with potentially harmful tiny magnets, it was likely just the tip of the iceberg for the toy industry, and that should not be too surprising, if we remember that 80 percent of the world's toys are manufactured in China. The world's best-known toy makers outsource to some 10,500 toy contractors in China. Mattel alone uses 3,000 to 5,000 Chinese contractors, and 65 percent of Mattel's toys are pieced together there.

Mattel issued 31 recalls from 1998 to 2007, according to the Consumer Product Safety Commission (CPSC). Yet "if we don't see an [even further] increase of recalls in this industry, then it's a case of denial," a leading analyst said.

Dangerous toys are sold by companies noted for the toughest safety standards. Contractors have been known to put safety-tested batches in front of inspectors and, under pressure to contain costs, ship batches made with cheaper or illegal parts. Meanwhile, there are simply not enough inspectors to go around. The CPSC is under-funded, and Chinese inspectors are overwhelmed by the flood of exports.

No wonder the toy story has legs. While Mattel recalled more than one million Fisher-Price-brand toys because lead levels violated international law, Illinois-based RC2 recalled 1.5 million Chinese-produced toy railroad sets, also due to impermissible lead paint levels.

The stakes couldn't be higher for the $22 billion toy industry. With the latest news reports from China, companies are under intense pressure to prevent a sea change in consumer perception of toy safety. Reputations can suffer, share prices fall, and potential investors get cold feet.

Chinese courts won't likely compel Chinese companies to compensate American victims. The only recourse is to sue the U.S. companies that placed the toy order. Those companies are liable for upstream problems regardless of how far downstream they may be.

The toy industry is not, however, navigating totally uncharted waters, as there is solid crisis management precedent – both good and bad. When, for example, Mega Brands' Magnetix toy killed a Seattle toddler in 2005 and injured 27 others, the company reacted quickly to guarantee safety by redesigning the product.

Mega Brands, however, failed to change the packaging and, as a result, the company did not drive home the message that it had indeed resolved its safety issues. Customers could not readily distinguish the new and improved version of the toy from the older one still on retail shelves.

The lessons to be learned from such past experience, and from the current crisis, are all about, first, ensuring safety and, second, credibly communicating that you have done so. And you must do so for multiple audiences, including retailers and regulators, as well as consumers and parents.

The lessons pertain equally to accounting firms and insurance companies, to auto manufacturers and pharmaceutical firms – to anyone who relies on public trust to stay in business. Consider:

- Companies must build trust by exceeding acceptable oversight levels. Just as toy manufacturers are increasing the frequency of inspections and devising new safety assurance measures, so too can other corporations go "beyond compliance." One healthcare company accused of fudging the numbers on its success reports retained—not one—but three independent auditors to confirm that its systemic data problems had been resolved. Another company was required by law to report a data breach in California; it reported the breach in all 50 states instead.
- Establish direct personal links to the end users. If the CEO of a toy company has small children, he or she should say so. If food executives are overseeing a recall—perhaps for spinach or pet food—they can remind the world that they too eat spinach or that they have beloved pets of their own. Don't be the "other." Be "one of us" in every way you can.
- Initiate corrective actions voluntarily. If it's a recall, don't wait for regulators to pull your products; act early to remove them from homes and stores. Emphasize that top-line consequences are irrelevant. Your credo should be: safety first and profits second. If shareholders holler, launch a separate investor relations initiative to address their concerns, but don't back down on the safety promise.
- Keep customers informed. In any crisis, and especially one involving public safety, fully disclose—and, importantly, if there is information you are still seeking, tell the world that you are still seeking it and that you will disclose it as soon as you have it. The vegetable growers' trade associations did a particularly good job with this sort of outreach during the spinach crisis.
- Keep the online wires humming. Set up a special website page to post updates. Always have "dark sites" in reserve with templates already set up, so you can fill in the blanks with specific content and quickly deploy once a crisis occurs. Some industries—like pharmaceuticals or, for that matter, any manufacturer dependent on foreign suppliers—are in permanent crisis mode. Take advantage of the breathing room between crises to fully prepare an Internet strategy for the next predictable bad event.
- Don't pass the buck. In the case of the toy recalls, it is true that corruption runs rampant in China. (Some 1,800 Chinese officials confessed to corruption in June 2007 alone.) But spreading liability, not to mention culpability, will only exacerbate consumer tensions and disserve your own interests in the long term.
- Be careful about calling problems "minor." Americans expect perfection and, if one Tylenol bottle is poisoned or one rogue employee has stolen private customer data, the dam is still leaking and wet is wet. In 2007, China itself made the mistake of saying that 99 percent of its exports were safe. But that 1 percent is a killer. With 2006 exports valued at $974 billion, China had therefore exported $10 billion in potentially dangerous goods.
- Never assume safety questions will disappear after a product has been redesigned or remanufactured. Never assume that investor confidence can be 100 percent after an accounting restatement or insider trading scandal. Your brand is your promise. Break it once and even your most faithful followers keep wary eyes open for future problems.

Years after the aforementioned Mega Brands redesign, a newspaper featured pieces of the toy configured like a skull-and-crossbones, breathing new life into old safety doubts. JetBlue did an expert job recapturing its brand equity after the February 2007 breakdown, but it must be prepared to prevent renewed disillusionment if a similar event happens in the future.

- Enlist supportive third parties to praise your performance. Sometimes those allies come from unexpected quarters. In 1997, for example, Mattel gave S. Prakesh Sethi, a fierce industry critic, free reign to make unannounced onsite inspections. His subsequent endorsement was all the more credible with the media.

Every day, these fundamental best practices get tested in a global marketplace where no one can promise absolute control. In the simplest marketplace, crisis communications are always more art than science, requiring experienced judgment as well as shrewd action. In a global environment, the complexities naturally proliferate.

In such a marketplace, corporate communicators need strategies and messages broad enough to resonate with just about everyone. But they also need to zero in on the specific concerns of specific audiences including consumers and journalists, shareholders and analysts. Respond respectfully and carefully to each new set of expectations.

Chapter 6 - Lessons from the Year of the Recall

In 2007 – when pet food tainted with melamine, toy parts containing dangerous levels of lead paint, and spinach infected with E.coli dominated headlines – consumer fears and public scrutiny of product safety reached fever pitch.

According to data released by Thomson West in December 2007, 61% of Americans are worried or very worried about product safety; 55% are more worried about product safety than they were a year ago; and 73% said that they have owned a recalled product.

Themselves targets for criticism, the Consumer Product Safety Commission, the Food and Drug Administration, the Department of Agriculture, and other government agencies are, perforce, likely to be more aggressive in the immediate future than at other times in recent memory.

Most important, perhaps, recalls obviously attract unrelenting media attention, as do the manufacturers, retailers, or wholesalers forced to issue one. From there, the bad news is magnified and transmitted to the consumer.

Recalls aren't new and corporations have long had sound management and communications tools to minimize their impact. However, the current level of frequency and severity *is* new. So are the global factors that exacerbate public anxiety, especially since the Chinese are involved.

Yesterday's best practices must be expanded and refined to accommodate this unprecedented public urgency. Particularly important…

Preparation. Have a recall plan ready and train your key people to implement it. Assemble a team on a regular basis in order to build the trust that fast action may one day demand. Anticipate the likeliest recall scenarios and provide action points for each one. Build relationships with third-parties who can echo or validate your messages in the media. Be ready to saturate the Internet with your own recall messages before hostile voices tell the story for you.

Messenger. The messenger is often as important as the message itself. During last year's pet food recall, a Pet Food Institute was created as a credible industry voice and resource. Its President was equally trained for media inquiries and congressional hearings. Supportive third parties, like respected veterinarian Jim Humphries, were enlisted. Importantly, messengers were recruited and kept informed well before they were asked to speak publicly.

Responsibility. Apologize for what has happened and take full responsibility for rectifying the situation. But be careful: your language must be sufficiently nuanced to convey empathy without conceding liability.

Action. During the 2007 toy recalls, Hasbro instituted a "Total Safety Program" that helped calm a nervous marketplace and satisfy wary regulators. Significantly, Hasbro itself was never at the center of the crisis. But the company understood a cardinal rule of recall management: treat your competitor's recall as if it were your own. By so doing, you prepare for your own possible public scrutiny as well as help protect an industry in which you have an obviously vital interest.

Like all crises, product recalls allow proactive companies to seize a leadership position and, by so doing, transform crisis into opportunity.

The Year of the Recall Response

By Gene Grabowski
From *Food Safety Magazine,* March 2008

It was the day before Halloween, 2007. House Speaker Nancy Pelosi and Consumers Union Senior Director of Product Safety Planning Don Mays teamed up to deliver an ominous—and, to some industry insiders, downright frightening— message about the future of consumer product safety efforts in the United States. At a Capitol Hill news conference in which they dubbed 2007 "The Year of the Recall," the Speaker called for the embattled head of the Consumer Product Safety Commission (CPSC), Nancy Nord, to step down. Don Mays demanded stricter measures to keep dangerous products off the shelves. And those sentiments were echoed lawmaker after lawmaker trooped to the lectern to chastise industry leaders and regulatory officials after a record-setting year in which 472 consumer products had been recalled to date.

It seems as if the politicians have a hot issue on their hands. And recent data reported by legal services information provider Thomson West only reinforces the fact that it's going to get hotter in the coming months. According to the study, which was released in mid-December, 61 percent of Americans are worried or very worried about product safety; 55 percent are more worried about product safety than they were a year ago; and 73 percent responded that they have owned a recalled product. Simply put, 2008 is shaping up to be a very scary year—with increased scrutiny of product safety and intensified efforts to keep hazardous products off the shelves—not just at the CPSC, but at the U.S. Food and Drug Administration (FDA), the U.S. Department of Agriculture (USDA), the U.S. Environmental Protection Agency (EPA), and any other government agency that has oversight authority.

Perhaps most important, recalls are attracting ever more media attention on any manufacturer, retailer or wholesaler that issues a recall. Of the 73 percent of respondents who reported they owned a recalled product in the Thomson West survey, only those owning recalled automobiles outranked those who had purchased a recalled food product. And with words like E. coli, melamine, and Salmonella still permeating newspapers, magazines, the airwaves and the Internet, one can safely assume that every food brand logo potentially looks like a bull's-eye to lawmakers, regulators or media outlets eager to make headlines. With the deck so heavily stacked against the food industry in 2008, what can those caught in the recall crosshairs do to avoid losing hundreds of millions of dollars in litigation, and even more in brand credibility and trust? The answer is simple: Take a lesson from those who have been there before—for 2007 could just as easily be have been dubbed "The Year of the Recall Response."

Pet Food: Taking Decisive Action

The public has very little patience for companies or industries that are perceived to have caused harm to vulnerable populations—and, other than children, there is no more vulnerable population than pets. FDA officials have reported that the number of inquiries they received with regard to the 2007 pet food crisis dwarfed the number they received for any food-related recall in recent history. In cases such as these, emotions run high and the potential for disaster increases exponentially, making an effective communications response absolutely imperative for companies, or entire industries, that must protect their brands and calm a nervous consumer base. What can we learn from the pet food industry's crisis response?

1. **Think like your consumers.** While every recall response is different, there is one piece of advice that applies across the board: Think like your consumers. What is their mindset? What do they need to hear? From whom do they need to hear it? These factors will ultimately decide whether a company's brand credibility and trust are going to survive. In the pet food recalls, it wasn't hard to approach the situation from the consumers' point of view. Pet-owners were worried and extremely upset. They wanted to know that every precaution was being taken to keep their pets safe. And, above all, they wanted to believe the person telling them that everything was going to be okay. These early determinations guided every aspect of the recall response and greatly contributed to the success of the measures outlined below.

2. **Take action.** As the old adage dictates, actions always speak louder than words. But, in this regard, the pet food industry faced a unique challenge in that, at the outset of the campaign, there were no answers available as to the source of the pet food adulteration. Because of the situational analysis described above, the industry knew that fast action was necessary. So, rather than go into period of "radio darkness" until answers could be provided, they established the National Pet Food Commission, a group of industry, regulatory and scientific leaders charged with getting to the bottom of the crisis. This move shifted the pet food industry from a perception that they were part of the problem, to a perception that they were part of the solution— and it bought valuable time for the industry to identify the root cause of the crisis.

3. **Let your allies speak for you.** In crisis communications, the messenger is often more important than the message itself. And because the credibility of those telling the public that the vast majority of pet food products (99 percent by some accounts) still on the shelves was of critical importance, the pet food industry wisely let trusted and disinterested voices do the talking. In an example of crisis preparedness that is all too rare today, the industry had cultivated relationships with veterinarians long before the crisis hit and was able to — with the help of outside crisis communications counselors—get them placed for television and print interviews and assist them in posting to the high-authority blogs covering the recall. Letting third-party advocates deliver the key messages greatly enhanced their believability and made it that much harder for the industry's detractors to make their case. A Synovate E-Nation survey conducted just weeks after the first pet food recall led one researcher to say, "For the most part, people feel their pets were unaffected by the recall." Industry leaders credit third-party advocates with much of that success.

Spinach: Targeting the Media

The spinach recall of 2006-2007 was, in many respects, a classic food recall case. But, an examination of the recall response that followed the E. coli outbreak that nearly crippled the spinach producers of California demonstrates the power of communications tactics that are often overlooked by those embroiled in a recall crisis. What can we learn from their efforts?

1. **Control the picture of the crisis.** To quote yet another clichéd adage, a picture speaks a thousand words—but in an age when communications battles are fought in thirty-second TV and Internet clips, pictures can be worth a lot more than that. At the outset of the spinach crisis, the only pictures of the crisis available for public consumption were of spinach being pulled from shelves and questionable farming and handling industry practices. Soon thereafter, however, farmers in California opened their doors to visual media outlets in order to show rather than tell the public all that was being done to safeguard spinach crops. Pictures of modern processing facilities that took great care in protecting crops from contamination

were beamed all across the country and helped the public come to the conclusion that the crisis was temporary and not the fault of responsible spinach growers.

2. **Identify which media outlets the media is listening to.** Whenever a big story breaks, there are always particular media outlets, depending on geography, subject matter or other considerations, that jump out in front and control the story from start to finish—and from whom other media outlets take their cues. The spinach recall was no different. By focusing greater attention on California's local TV stations, the Los Angeles Times and the regional California Associated Press bureaus—the spinach outbreak's media outlet leaders—the spinach growers were able to influence every subsequent story about the recall, no matter where in the world it was being reported. The grower's made these media outlets' inquiries a top priority and proactively offered them information as it became available. As this case demonstrates, knowing to whom the media is listening is imperative to managing their coverage and ensuring that they're telling your side of the story.

3. **Identify the tipping point.** In every crisis situation there is a tipping point, a moment when the crisis has been contained and the public is ready to move forward. This is not the time to breathe a sigh a relief, but rather an opportunity to begin branding again and redefine a company or industry as a leader in preventing a similar crisis from recurring. Once the spinach recall was in the rearview mirror, the industry didn't rest. It continued pushing stories about enhanced safety measures, reinforcing the fact that the spinach industry was committed to safety first.

Toys: Taking Responsibility

An examination of the toy industry's response to the lead paint recalls provides keen insights for any company – in any industry – facing a recall. In the discussion of the pet food recalls above, we saw how little tolerance the public has for companies that are perceived to have harmed vulnerable consumer populations.

And to get a sense of the anxiety surrounding the lead paint recalls, just take the public reaction to the pet food recall and multiply it tenfold. In cases such as these, there is no spin, no dodging tough questions and absolutely no room for error. Put in a tough spot—right around the holiday season, no less—toy companies offered a shining example of how to not only protect, but enhance, brand reputation in a crisis situation. What can we learn from their experience?

1. **Take responsibility.** The sin/repentance/redemption model is one of the oldest in the communications industry. Taking responsibility for a recall, and for rectifying the situation as soon as possible, is the most effective technique for turning a two-week feature story into a one-day news item that might very well be buried on the back pages, so when stuck between a rock and hard place, don't be afraid to step up and face the music. When the toy industry announced early on that their own questionable manufacturing processes in China were to blame for the lead paint recalls, and that they were taking immediate measures to recall affected products and ensure the safety of those currently on the shelves, it gave the public precisely what it was demanding: Answers, reassurances and action.

2. **Speak directly to your consumers.** In the most sensitive recall situations, when the timely release of information makes third-party validation impractical, don't rely on the media to deliver your message for you. Rather, speak to consumers directly via means that cannot filter the information you wish to share. Throughout the lead paint recalls, the toy industry took out

full page advertisements in major print and online publications that walked consumers through the problem, the response and the measures being taken to prevent such a crisis from ever occurring again. And in so doing, they took back control of the message, and thus, the overarching story.

3. **Don't forget about your retailers.** In a recall situation, retailers are the first line of defense. If they turn against you, your customers are sure to follow. So, be sure to communicate with those who control your brand reputation and trust in its most crucial moment—the point of sale. During the lead paint recalls, manufacturers armed retailers with answers to any question that a consumer might pose. And sharing this vital information not only better enabled retailers to protect their own business interests, but also made them de facto partners in defusing the crisis. Including special content for retailers on the corporate website, distributing question-and-answer sheets and message points via e-mail, and engaging C-Suite retail executives in one-to-one conversations are all advisable courses of action in a recall situation.

What Can We Expect in 2008?

The "Year of the Recall" not only provided valuable lessons for companies and industries that will undoubtedly face similar challenges in 2008; it also offered insights into how recall responses will have to evolve if they are to remain effective. Here are two tips to remember about the coming year.

1. **New media aren't so new anymore.** Having an Internet component to a recall response strategy used to be viewed as novel. Now it is an absolute necessity. Today, bloggers often serve as the gatekeepers to the mainstream media and consumers turn to the Web for information with increasing frequency, so ensure that you have a presence in cyberspace. Post CEO or Board of Directors recall statements to your website; identify the high-authority bloggers and monitor what they're saying; consider creating your own blog or posting your own messages to existing ones; start a pay-per-click campaign; and optimize your website to ensure that your messages cut through the clutter.

2. **A competitor's recall must be treated as your own.** It used to be that a competitor's recall was good news. Today that's no longer the case. When another company in your industry issues a recall, prepare for the media spotlight to shine on you next. At the very least, take the opportunity to differentiate your brand from those that are falling short and define yourself as a leader in safety efforts.

Chapter 7 - Class Action in the Information Age: Bridging the Credibility Gap

The plaintiffs bar is an Internet generation ahead of the companies it targets when it comes to class action litigation.

While defendants languish in the graveyard that is traditional media – or worse yet, go dark for the duration of a class action – plaintiff lawyers utilize pay-per-click campaigns to troll for clients. They maintain frequently updated blogs to saturate the media, consumers, and potential judges and jurors with their messages. And, most important, they dominate the search engines to ensure that they tell their story before companies under fire can tell theirs.

To catch up, companies caught in the class action crosshairs must first realize that they have these same tools at their disposal, make a real commitment to using them, and master the tactics that can level the online playing field.

Boards, as well as in-house and outside counselors, can take a particular leadership position by demanding greater Internet awareness as it relates to litigation, and by being aware themselves of the most crucial digital action points, taken the plaintiffs bar's own playbook. Among the top-priority considerations:

Don't let the plaintiffs bar own your "terms." Through an increasingly familiar process called Search Engine Optimization (SEO), companies ensure that their messages compete with those of the plaintiffs bar when Google and other search engines rank their websites based on embedded keywords and phrases. So, to show up in the top ten rather than the top thousand…

- Create a list of all the keyword terms relevant to the impending litigation.
- Use these terms liberally in your site's URL and text.
- Regularly update your site and identify ways to link to and from other high-authority and frequently visited sites.

Beat the plaintiffs bar to the punch. Creating "dark sites" – or unpublished websites with placeholder content that can go live the moment they are needed – will allow you to match the speed with which the plaintiffs bar spins every significant development in the case. Anticipate the likely scenarios and prepare content for each so that your messages are there waiting when the time comes to go live.

Consider your own blog. *A blog isn't a short-term fix; it's a long-term investment* – one that ensures that when class action litigation does occur, you'll be able to quickly and effectively start shaping the story, and thus, public perceptions.

Don't Be an 'Entity:'
Media Strategies for Class Actions

By Richard S. Levick and Larry Smith
From *Stop the Presses: The Crisis and Litigation PR Desk Reference*

Class actions exponentially raise the ante in the high-stakes poker game. Class actions are, after all, quintessentially public lawsuits beginning, as they do, with sweeps of the general population by plaintiffs' firms trolling for class members. It's hard to keep something like that secret.

Plaintiffs' lawyers have an additional advantage in class actions. Because their clients are a *mass* group of ostensible victims, it's harder to discredit the alleged suffering. In an individual lawsuit, the defendant may counter plaintiff's claim to the sympathies of jurors and the public. You can show contributory negligence. You may even be able to raise doubts about the character of the "victim."

But what if there are 10,000 claimants? Have they all contributed to their own injuries? Are they all of dubious character? Class actions generate widespread perception of a whole human population suffering at the hands of an indifferent entity. That entity is your company – and your exculpatory options are diminished 10,000-fold. Merck might have had good legal reasons to fight the Vioxx wars on a case-by-case basis, but the company gained some advantage on the communications front as well, simply because it's been able to target individual plaintiffs and vitiate their individual claims. (Merck later announced that it was prepared to pay $4.85 billion to settle almost 50,000 Vioxx lawsuits. By making this offer, Merck apparently abandoned its case-by-case strategy as a way to settle the entire controversy once and for all. As of this writing, 85% of qualified plaintiffs must still agree to the deal.)

By contrast, in class actions, companies require a more complex strategy. At the very least, it becomes all the more important for the defendants to affirm positive messages about themselves. From the inception of a class action, the first order of business is to *stop being an entity and become something more human*. If the company cannot minimize the sympathy for the other side, it can at least create sympathy for itself. Toward that end:

- Show off your people – your employees and customers. Merck is relevant in this context as well. In 2006, the company ran television commercials showcasing the *human* benefits of the work that its *human* employees were doing. The content was not directly related to any litigation nor was the word "Vioxx" ever uttered. Yet these "image ads" exasperated the plaintiffs during one trial when a gag order precluded public discussion of the case. Only the defendant could speak to the public (and jury pool) because its communications were not case-related. The plaintiffs had no such institutional message of good tidings to convey. Such a strategy, used there for a single case, is pointedly effective for class actions as well.
- Attack the messenger – in other word, the plaintiffs' lawyers, if appropriate, rather than the plaintiffs themselves. It's the opposite strategy from the typical approach in individual cases. In individual cases, the defendant doesn't attack plaintiff's counsel (barring some specific reason to do so). Even if the plaintiff's lawyer can be legitimately attacked, it won't necessarily diminish sympathy for his or her client. In class actions, on the other hand, there are tried-and-true ways to target opposing counsel. For example, the fact that plaintiffs' counsel stand to make millions while class members may see only a few dollars at day's end creates opportunity to seize on the public's perennial distrust of lawyers. In securities class actions, this strategy is all the more promising because the injuries are complex, the fact patterns difficult to understand, and the suffering less visual than, say, in product liability cases.
- Talk about the future – what the company is doing to remedy the very problems that prompted the class action. The goal is to establish leadership by jumping on the other side of the issue as a problem solver. Partnerships with public interest groups are naturally helpful here as they impart a palpable sense that the company isn't just talking about making things better, but establishing the kind of relationships that turn talk into action.

The best practices that govern, not just the content but the process of public communications during litigation, are likewise all the more exigent during class actions. For example:

- Don't speak though a "legal mouthpiece," but select and train spokespersons who show the company's human face. Supportive third parties who can talk about the issues driving the case are likewise invaluable.
- Use every milestone in the case – every motion, every ruling – as a possible pretext to reinforce your position. At the very least, expect plaintiffs' counsel to reach out to the media at such times and carefully monitor that outreach. It's how they keep the story alive. The newswires are particularly important at these junctures since they tend to run "process stories" (e.g., "The jury was selected today in the case of…."). The wires also feed national and local newspapers everywhere.
- Blogs are especially powerful during class actions, both as opinion forums and as repositories of information. Expect plaintiffs to post their own blogs and recruit third-party supporters to post others. Monitor them carefully and, where appropriate, match them blog for blog.
- Daunting as they are from a communications standpoint, class actions do allow defendants one strategic advantage – time. Plaintiffs' firms must recruit before they can file. While their solicitations unfortunately ensure widespread public visibility, the public notices also mean that you can begin planning a public response well in advance. An ad in the newspaper soliciting your customers or clients, or those of other companies in your industry, is an obvious cue to set up a team and start coming up with a plan.

Chapter 8 - Public Communications during Trial: A Brand Protection Art

Litigation in the 21st Century is all about information and how that information is dispersed in multiple venues. At no time during litigation is the informational imperative greater than during an actual trial. It is a public event, after all. The most responsible bloggers on the Web may be there. The Internet's most irresponsible reporters may be there as well.

If litigation poses a threat to the corporate brand, then it is the courtroom event that maximizes the threat. Too often, the defense never begins to formulate a litigation communications strategy until journalists seek comment. Even then, they may retreat into "no-comments," fail to establish allies in the media, and cede the playing field to their opponents – which means that, by the time they do get to trial, the defense is at an insurmountable disadvantage in terms of what they need to say and to whom to say it.

During the pre-trial phase, the defense hides. During trial, there is no place to hide.

Litigation strategies formulated early on include measures for each phase of the case, including the trial itself. Once the trial begins, a number of specific dynamics occur…

- A no-comment during trial, especially if it concerns testimony, can be disastrous. Anyone guiding or advising a company during a trial must understand that *low comment* can be a viable alternative. It is the art of providing influential information in such a way that neither jeopardizes the case nor sounds like the kind of stonewalling that alienates the public and confirms their worst suspicions.
- Once the trial begins, internal communications become exponentially more important if it's a high-profile case of any sort. Everyone back at the home office is glued to the media reports. In many cases, the staff has already been apprised of what the company's messages are, and what its position is. Communicating with them regularly during trial shows that you meant what you said and are fighting to prove it's true.
- Stock values can rise and fall in the same day depending on how things go in a courtroom, especially if it's a financially-related law suit pertaining to, say, a merger. Constant communication from the courtroom to analysts as well as financial reporters maximizes the likelihood of price stability.
- The trial itself requires an on-site communications professional who can respond to reporters and, ideally, insulate the lawyers so they can focus on winning the case. The communications pro can at least structure the media interface, setting specific times and places for the lawyers (or, as appropriate, the defendant) to brief reporters. In turn, that allows those spokespersons extra time to think through what they're going to say.

During the dispute over *Rosie Magazine*, Rosie O'Donnell's communications advisors were in court every day. When the judge castigated Rosie's opponents for their "ill-advised" lawsuit against her, the TV tickers reported that he'd blasted both sides. Rosie's lawyers were hurried over to CNN at once, and the ticker was corrected within an hour. No less than Exxon or General Motors, Rosie O'Donnell had a brand to protect.

The courthouse is the Super Bowl stadium of brand protection. Don't wait until ten minutes before game time to start drawing up pass patterns.

Humanize the Defendant, Humanize the Spokesperson

By Richard S. Levick and Larry Smith
From *Stop the Presses: The Crisis and Litigation PR Desk Reference*

It would seem that any product defense starts off at a disadvantage on the PR front. At best, the company is in the unenviable position of having to show the world that a product essential to its business does not cause grievous injury or death. At worst, there is a widespread if baseless presumption of guilt.

"Anyone defending a corporation these days is starting off at a disadvantage, in any kind of case," comments Anne Kimball, a litigator at Wildman Harrold with decades of experience defending high-risk industries. There's always been bias against powerful "impersonal" business interests. Post-Enron, the bias is proportionately harder and faster.

The strategic response is a veritable best practice for all product liability crises – humanize the corporation! That means…

- For court appearances, pick corporate representatives the jurors can relate to. Show that, if you deal unjustly with the company, you unjustly penalize the good person sitting before you in the witness box or at the defendant's table. Remember that the ear defers to the eye, so pick folks who look sympathetic as well. The more avuncular, the better.

- For media appearances, likewise pick spokespersons who sound human when they talk, and who don't sound as if they've memorized formal corporate statements. For TV appearances, sympathetic-looking spokespersons are, again, worth their weight in gold.

- For both court and media appearances, humanize the company by humanizing its legal counsel. "I'm a mother of four, stepmother of two, and grandmother of five, and I don't mind using that fact to help my client," says Kimball.
"I was born in Brooklyn and I grew up on the South Side of Chicago. I know more than most people what the terror of violence is all about."

For complex product cases, Kimball has also found a way to make sure she's communicating with the world in a way the world can understand: She rehearses arguments for her family and friends. If they can understand her, chances are that jurors and reporters will too. With reporters, she speaks slowly and often repeats herself to make sure her points get across. "I don't worry if I don't stay on the reporter's point," she says. "It's not the reporter's question that will help the case. It's my answer."

Chapter 9 - Major Accidents Threaten Any Brand

From oil spills, to train derailments, to chemical plant explosions, to plane crashes, accidents test corporate mettle like nothing else. Companies must communicate calmly, coolly, and collectedly when conditions are anything but. They must be able to provide credible information when concrete answers have often yet to be found. They must convey empathy without seeming culpable. And, most important, they must come across as responsible stewards of the public welfare in spite of mounting evidence to the contrary.

It's a tall order to say the least. But if companies fall short at this most crucial moment, a brand once associated with quality and trust can irrevocably conjure images of disaster. Nearly two decades after the Valdez spill, what is the first thing that comes to mind when you hear the word "Exxon?" The answer provides insight to precisely what's at stake.

While accidents come in all shapes and sizes – much like the types of companies that can experience them – disaster response best practices remain largely unchanged whether the calamity results in lost lives, or mere inconvenience. In January 2007, a CSX train derailed in Bullitt County, Kentucky. No one was seriously injured, but the local population endured considerable hassles due to highway detours that forced commuters onto alternate, traffic-clogged routes. In response, CSX took a straightforward and conspicuous step. It gave $100 or more to anyone with valid ID who could simply explain how they were inconvenienced.

This strategy is called "running to the crisis," and its effect is often to minimize lawsuits and maximize public understanding. CSX showed – rather than just talked about – its concern and desire to make amends, and the local media responded warmly. The *Courier-Journal* in Louisville even quoted University of Denver marketing professor John Burnett, who agreed "the reimbursements could make CSX's reputation in the community stronger in years to come."

Granted, this accident turned out to be small potatoes compared to what other companies have experienced in the past. But, CSX's actions do highlight an element of crisis response – offering restitution to affected communities – that boards and corporate counselors should bear in mind when the companies they advise respond to disaster. The CSX response was admirable on numerous fronts:

Preparedness. While entirely unpredictable, accidents can be anticipated. Know your likely scenarios, the most effective responses, and the key players who will be called upon to implement them long before the plan must be put into action.

Responsiveness. A well-prepared and practiced disaster communications plan should make it possible for the company to take stock of the situation and meet the media pit bulls as soon as they arrive on the scene. Being first to tell the story will allow for greater control as it develops and demonstrate that the company cares about those affected, takes responsibility for setting things right, cooperates fully with authorities, and is ready to pass along vital information when it's available.

Opportunity. Just as disasters shine light on past failures, they pave the way for future successes as well. Publicize enhanced safety efforts born of the crisis as soon as they are identified. Doing so establishes the perception that you're driving a larger solution to the problems at the root of the accident and preventing future ones.

When Bad Things Happen to Good Companies

By Richard S. Levick and Gary A. Pudles
Originally published by Direct Marketing Association

An airliner skids off the runway and catches fire, but all passengers and crew are safely evacuated.

A software manufacturer releases a new version of a product, and then finds out about serious programming errors that cause it to malfunction.

A prestigious college discovers that hackers have broken into its computer system and obtained access to the names, dates of birth, and Social Security numbers of thousands of current and former students.

Bad things do happen to good organizations. Every enterprise or institution has or will make mistakes. Many have had an employee(s) commit an illegal, unwise, or dangerous act, or been victimized by an unfortunate incident.

How then do you reduce the risks of, and damage from, these events?

An ounce of prevention

Detecting problems before they happen, *when this is possible*, is always the best strategy. This method saves money, sustains productivity, and maintains image and reputation.

Companies audit their employee manuals and their patent portfolios. Shouldn't they take similar preventative measures in identifying areas of potential public exposure?

For firms that are in high-risk areas, such as pharmaceutical, automotive, and HMOs, the need is obvious. Their best strategy is to not wait for the next class action before defending themselves in the 'Court of Public Opinion.' These outfits should take future controversy as a given.

Consider:

- Pooling the names and contact information for the key people – C-Suites, inside and outside legal counsel, inside and outside media/communications advisors – who will need to swing into action as a team the moment a crisis occurs
- Media-training the team member(s) who will likely be the spokesperson(s) during the crisis
- Establishing and building relationships with key reporters *now*, before you need them to be your friends

An enterprise, no less than a piece of machinery, has points of failure. At those 'locations' where something can go wrong, there needs to be mechanisms that can detect, correct, and report potential problems.

- Are you monitoring all media mention of anything in your organization that might be of concern? – for example, coverage of a product that might face an uphill approval process by regulators?
- Do you have competent managers who have earned the trust of your employees? In well-run outfits, staffs are conscientious and loyal, report problems, and go the extra mile in a crisis. When an organization is poorly managed, workers look the other way and, when issues arise, they are more likely to go to the media and/or to regulators than to you.
- Do you also have third-party-provided corporate hotlines? Sarbanes-Oxley, for example, requires publicly-held firms to have whistleblower hotlines to catch potential securities law violations.

To spot potential crises before they develop, the best eyes and ears are your people. Yet because they work with or under those who may actually be causing the problems, a third-party-operated corporate hotline service adds a most powerful element of disinterestedness. Your staff will feel confident that they can report critical matters without facing repercussions.

Taking action

Even the best preventative measures will not stop all incidents. When these occur, here's what you should consider doing:

- Post a blog that clearly states (not defends) your position – how and why the company behaved responsibly, or what it is doing to correct mistakes. Optimize the blog (a simple technical process) to maximize traffic.
- Enlist third parties to speak on the company's behalf. The more disinterested they seem, the better.
- Identify and promulgate a powerful alternative story. If the company has trouble in area X, highlight some success or good works in area Y that will be of equal and eventually greater interest to the public. That story, aggressively developed and disseminated, represents a choice opportunity to convert adversity into a positive marketing opportunity.
- Know who your real adversaries are and monitor their public initiatives. Consider a little forensic investigation; you may come up with something that's a lot more interesting to the media than anything that reporters might be writing about you.
- Create methods for stakeholders (employees, customers and/or the public) to communicate with you and for you to communicate with them. Consider mobilizing call centers with enough capacity to handle what may be a flood of calls for both basic emergencies and for major disasters. Often times you can hire an outsourced call center to handle these communications so that your employees who deal directly with your customers can continue to operate your business

Many companies set up disaster response and emergency call centers in advance so they have a defined process in the event of an emergency. You can pre-arrange a standard but easily modifiable script, toll-free numbers, and an activation program that will allow you to handle any emergency with decisiveness. Such resources ensure the capacity and technology you need to deal with emergencies in the most efficient and cost-effective way. Remember that when these strategies fail, life will probably still go on. Sometimes you just have to swallow a day or two of bad press coverage. The key is to control the damage, or, at best, launch a long-term initiative that will yield benefits well after your initial problems are resolved and forgotten.

Chapter 10 - Insider Trading: Lessons Unlearned

While the high-profile downfalls of Boesky, Milken, and a host of other so-called "Masters of the Universe" still conjure powerful – if not deterring – images of just what's at stake when nonpublic information is used to net windfall profits, it seems a new breed of white collar offenders has emerged to write yet another chapter in one of Wall Street's oldest stories – the saga of insider trading.

According to *Financial Times*, suspicious trading in advance of significant company mergers is up 400% over the last six years, with spikes in trading activity preceding 60% of the largest deals announced in North America in 2007. Last year, a senior SEC official characterized insider trading as "rampant" among Wall Street professionals.

While violations vary in severity, the media makes no such distinctions. Martha Stewart's infringement seemed miniscule compared to the $6.7 million that former Goldman Sachs trader Eugene Plotkin and his co-conspirators allegedly siphoned off the market – but once the media got hold of the story, Stewart found herself cast in the role of Leona Helmsley's heir apparent.

In this climate of intense media scrutiny, the harm inflicted by an SEC investigation can cut much deeper than just a temporary "correction" in share price. Brand credibility and trust can be savaged as investors start looking for safer bets. To minimize the damage:

Cooperate fully with regulator requests. If the SEC comes knocking, demonstrate that you have nothing to hide by driving an agenda of full disclosure. Rest assured; the details will come out eventually – so you might as well reveal them yourself and make the most of an early opportunity to shape the story.

Create a zero tolerance environment. As a matter of effective governance and brand protection, companies must effectively communicate that insider trading will not be tolerated. If your company is a hedge fund, demonstrate your commitment to lawful business practices, *even in the absence of stringent regulatory controls.*

Define the crime as an "isolated incident." In crisis communications, defining the problem is often as effective as putting forth a solution. Take swift action to hold responsible parties accountable, thereby defining the crisis as one of human failure, not corporate irresponsibility.

Publicize measures aimed at curbing insider trading. Articulate the measures your company takes to discourage wrongdoing and educate its workforce as to the consequences of illegal trading. If no such measures exist, implement them ASAP and illustrate how the company transformed an unfortunate incident into a valuable learning experience for every employee.

Ban the "rush for riches." A significant aspect of the internal communications effort should be geared toward junior professionals – informing them that there are no shortcuts, and that illegal activity will prematurely end a promising financial services career.

Be prepared for the worst. Be ready to communicate quickly when a scandal hits by creating placeholder content for your website (press releases, FAQs, open letters to shareholders, updates, etc.) that will only go live in the event of an insider trading crisis. Maintaining these "dark pages" will allow you to get your side of the story out before the first reporter calls.

Chapter 11 - Whistleblowers: Consider Them an Early Warning System

Whistleblowers challenge a company at every level. To external audiences, whistleblowers spell wrongdoing even where there is no wrongdoing – depriving employers of due process in the Court of Public Opinion.

Internally, whistleblowers can shake confidence and destroy morale. The accuser has emerged from the employees' own ranks. At worst, their accusations achieve all the more credibility as a result. At best, whistleblowers are a long-term distraction that threatens productivity and jeopardizes the organizational trust that all companies depend upon for survival.

In every whistleblower situation, there are two immediate communications imperatives, and boards must be especially vigilant that the companies they serve are absolutely responsive on both fronts.

First, companies must unequivocally reassure their customers and shareholders, regulators and reporters, and their own internal audiences that no recriminations against the whistleblowers will ever be made.

Second, they must vigorously state that whatever problems the whistleblower's accusation may reveal will be dealt with responsibly, effectively, and in a timely matter.

Some especially prescient companies achieve giant head starts in dealing with the public ramifications of whistleblowers. They publicly encourage their employees to speak up if they think they see a serious ethical or legal problem in the company's business practices. By encouraging whistleblowers, they pre-cast future crises with themselves in the role of the whistleblowers' ally and protector.

In such cases, the questionable actions of a few bad actors don't sully the company's good name. In fact, the "early warning system" put in place actually provides a basis from which to begin branding again.

Recognizing the Early Warning Signs of a Media Crisis

By Richard S. Levick and Larry Smith
From *Chief Legal Executive*, November 2004

Corporate scandals have stripped companies in every industry of their media-exempt status, putting more pressure than ever on in-house counsel. GCs need to assemble a media team and pay particular attention to:

- Signs that your company may become entangled in an industry wide trend
- The new media savvy of agencies like the SEC
- Environmental factors that could lead to increased scrutiny.

The corporate scandals of 2002 cost a lot of companies their media exemption status. Before Enron, there were industries the press simply did not associate with scandal and malfeasance. There were Fortune 50 companies with longstanding "clean Gene" reputations. Barring unforeseeable circumstances or whistleblowers popping out of the woodwork, they just weren't on the radar screens of investigative reporters.

Today, there are no exemptions: the breadth and depth of the betrayals were too great. Not that some reporter is necessarily snooping through your proxies right now, but in-house counsel must realize that the scandals have widened the strike zone. They must be more vigilant in helping their clients navigate the minefields of high-profile cases—which means developing the skills to work with media professionals once the case goes public.

But that's only half the battle. More so than outside counsel, in-house counsel are in the business of preventive law. In terms of crisis, that means a new burden on corporate counsel to spot the early warning signs that may, if events spin in the wrong direction, stimulate media interest damaging to the corporate brand, no matter how thoroughly the corporation may ultimately be vindicated in and out of the courtroom.

The problem may go away quietly, assuming a responsible corporate initiative. But don't assume it will, and prepare as if it won't.

While they need not learn to be brilliant media strategists (although they can certainly become just that, to the benefit of their careers), in-house counsel must know when to assemble a crisis team, including legal and PR experts, and consider alternative courses of action. A media-savvy team knows how to handle increasingly media-savvy agencies—including the Department of Justice and the Securities and Exchange Commission—and how to keep the juiciest stories off the front page. Your plan should include, with room for as much specificity as possible, a template to determine:

- A sense of the cost of doing nothing
- A tracking of developments and evaluation of new factors
- Who the spokesperson(s) is to be
- Articulation of the message
- Informational resources, including Web sites, that can be marshaled
- Third-party supporters who can be recruited
- A schedule for regular meetings and seamless companywide communications

Remember, there may be no more powerful spokesperson than in-house counsel. A CEO cannot necessarily monitor all the liabilities of public disclosure when he or she speaks to the press. The chief legal executive is better positioned to do that, while at the same time providing the corporation's human face.

What, then, are the early warning signs of a media crisis, and where do you look for them? Here are some likely scenarios:

Industry environment. Other cases of a crisis nature in your industry are being covered in the media. A reporter from an industry trade publication has started to ask about facts related to what now looks to be a trend story. Certain industries are more vulnerable to trend stories. Is the industry bleeding, like telecom? Is it rife with new public offerings, with capital sources either so abundant or so at a premium that entrepreneurs are perceived to be cutting corners? Is it such a repository of public trust that one betrayal of that trust—by, say, a firm with the type of reputation that Arthur Andersen once maintained—guarantees media interest in firms in that industry?

Regulatory environment. An agency like the DOJ or the SEC or a member of Congress has indicated they want to watch an issue more closely, or political pressure is building to find a whipping boy. Monitor the attorneys general in states where your firm has a major presence. AGs are political animals, and your back may be a good step-ladder to power.

Stock performance. For two consecutive quarters, your numbers are down. Coverage of the corporate stock decline is painful enough, but reporters will jump at any suggestion that shareholder pressures are forcing inappropriate or illegal responses. At the very least, they will be inspired by the numbers to sniff around for other negatives. Since you need to prepare a media response that includes positive messages about the stock declines, include some discussion of what those other negatives might be and how you should respond.

Stockholder actions. Any action by shareholders legitimizes media interest in every aspect of the company. Remember, too, lawsuits that name directors and officers often lead to personal interest in the directors and officers themselves. The media plan must anticipate full background checks by reporters. Read their D&O résumés very carefully, and be prepared to defend them as if they were suspects in a crime.

Dangerous practices. Enron got into a lot of trouble with off-balance sheet assets. In fact, off-balance-sheet assets, as well as other practices, can be perfectly legitimate. But if Enron misused its instruments, you can expect to be called by a suspicious reporter and asked to explain what you're up to.

NGOs. You don't need to be the target of a nonprofit organization to go on full alert. Simply being in the industry—as a NAFTA trade partner, an international lender—may make you the next target. Monitor the NGO Web sites and press appearances, and consider that if they're targeting the firm or industry next door, the media might look at you too.

Hot-button issues. Listen closely for public rumblings that might suggest incipient adversarial interest in your product. For example, many people don't like SUVs, and there has already been ample suggestion that SUVs aren't safe—and we all know where those kinds of suggestions lead.

Past escapes. The Catholic Church incited keen media interest a decade ago with sexual misconduct charges that soon departed the front page, after a leading Church official was exonerated. But what could possibly have led to the conclusion that the issue would not someday resurface? Corporations, with less painful liabilities, should never forget a single past brush with scandal or fail to prepare for the media's unwanted return to an unpleasant subject.

Qui Tam. What internal dynamics might lead to a public crisis? Have there been widespread lay-offs? Does employee dissatisfaction hang palpably like a shroud in the home office? Such an environment can foster whistleblowers who will talk to the press—as well as to the government.

Faulty products. Pintos do explode. Asbestos does kill. Any genuine product liability that crosses the desk of in-house counsel should be treated as if lawsuits have already been filed and reporter inquiries phoned in. The problem may go away quietly, assuming a responsible corporate initiative. But don't assume it will, and prepare as if it won't.

Chapter 12 - Managing Data Loss and Theft

Today, many companies reserve a special fear for the nightmare scenario of the loss or theft of their data. Indeed, the damage to U.S. companies and consumers from data loss and theft – in all its forms – is equal to the GDP of an oil-rich Middle Eastern Nation: $56.6 billion in 2005 and growing. More than one in four Americans had personal digital data exposed to theft in 2005-2006. Furthermore, more than 75% of companies in a recent survey reported they had been exposed to security breaches engineered by high-tech fraudsters, up from almost 25% a year earlier.

And the epidemic spread in 2007. The Identity Theft Resource Center estimates that, as of December 18, 2007, more than 79 million personal records had been compromised, an almost 400% increase from the nearly 20 million personal records lost in 2006.

The good news is that forward thinking organizations, from government agencies to banks and from universities to multinational corporations, are doing the right thing now – proceeding as if a data breach *will* happen. Wisely, they are planning ahead to protect brand credibility and preserve customer trust. They are evolving new and fundamental best crisis management and communications practices that emphasize:

Transparency. Disclose what you can about the incident as quickly as you can, including timelines and immediate actions to remedy the situation and hold those responsible accountable. Do so at the soonest possible opportunity. If you don't tell the story, someone else will. You won't like their version and the world will wonder why you are silent.

Concern, commitment, and action. Immediately apologize to all who have been affected even as you depict yourself as likewise a victim of the wrongdoing. The messaging needs to be fairly nuanced in order to capture both positional advantages: regret that people have suffered or been inconvenienced on your watch, and disappointment that your standards have been violated, especially if that violation results from the actions of a rogue employee.

Concrete steps to protect consumers. Provide affected stakeholders with a no-cost means to monitor their credit after a breach. It is a cost of doing business in the Internet Age. If the law requires you to pay in any event, you should still publicly highlight that you are doing so most willingly. Exceed disclosure requirements whenever possible; if the law only requires disclosure in the states where affected consumers live, consider disclosing nationally to confirm your total commitment to safety.

Cooperate with authorities. The relationship with law enforcement and regulatory agencies is naturally critical. If possible, coordinate every press release with those agencies. If possible, enlist the investigators as allies so your organization becomes part of the investigation and, therefore, part of the solution.

With enough resolute proactive effort, organizations that have been through the eye of the data breach storm are in a unique position to brand themselves as leaders in protecting personal privacy. They can talk about enhanced hiring procedures, amended privacy policies, and corrected IT loopholes.

Generally, the public not only supports those who've learned their lesson, but looks to them for leadership as well.

Covering the People in Data Exposure

By Richard S. Levick and Gary A. Pudles

Data exposure incidents have too often been treated as primarily IT matters. Yet if prevention and response strategies are to be effective, they must involve people: employees and customers.

People cause data exposure. Risk sources include unscrupulous employees who have direct access to data and IT personnel who are motivated by their ability to crack data and network security. Other sources are staff members that lose, or fail to secure, devices that often contain vital data including cell phones, laptops and PDAs.

Here are several steps to lower your risk:

- Drill personnel on the importance of safeguarding data-carrying equipment and important files.
- Hire supervisors who can manage effectively. They will inspire loyalty and trust from employees who will then report suspicious behavior.
- Step up monitoring and implement password protection for specific files.
- Arrange for whistleblower hotlines answered by trusted third parties so you can find out about data exposure before your customers or regulators do.

The best preventative measures will not completely eliminate data exposure incidents. Your organization must be ready to respond to them, and to the resulting negative publicity that could damage your reputation.

Customers feel threatened when these disasters occur. Was my information warehoused with that marketing firm? Could they have my Social Security number? Here's how to respond:

- Use your Web site to inform customers of their rights and opportunities ahead of a crisis. They will then be more likely to grant you permission to make mistakes.
- Act with speed and decisiveness when a crisis occurs. It is more important to show leadership than to have all the answers.
- Plan a media strategy through your site and blogs. Anticipate the data exposure problems you are likely to have and create the site now. Do not wait for the crisis to occur. Identify those in the blogging, academic, legal, nongovernmental organization and government communities who are likely to be sympathetic and helpful. These steps will allow you to quickly unveil a site and have accurate blogs and supportive third-party spokespersons.
- Train or outsource a data exposure hotline team. Outsourcing provides quickly adjustable capacity to meet call volumes and make large numbers of calls without major investments.
- Consider self-reporting and even apologizing to the public. It will show that you are a good actor, thus dramatically lessening how long a story stays in the news.
- Seek support now from the professional and trade associations to which you belong. It will show that your company is actually part of the solution, not the problem.

By applying effective solutions to minimize people risks and maximize response, your organization will lower the odds of data exposure events happening, and increase the chances of surviving these disasters if they occur.

Chapter 13 - Going Green While Maintaining the Brand

In a recent article published by the *Harvard Business Review*, environmentalist Steven Bishop offers his opinion as to why so many companies run into trouble when marketing green products. The problem, according to Bishop, is that companies often think they must focus on the green consumer when they should be highlighting green behaviors that directly benefit all consumers.

"The majority of consumers seek to satisfy their personal needs before considering those of the planet," says Bishop. "Green-for-green's-sake products often don't meet the basic needs that most people require from their products." With those needs in mind, companies can build green credentials without a total overhaul of the products that consumers have come to trust over the years. A salient alternative to such massive re-branding is to enhance the environmental benefits of existing products and focus messaging on those benefits.

For cleaning supplies, it isn't changing the chemical formula, it's evolving from aerosol spray to pump-action mist. For vacuum cleaners, it isn't reducing the electricity needed to run the device, it's a far simpler modification like switching to a bag-less design. For products with built-in environmental benefits such as bicycles, it isn't changing production methods, it's communicating how riding to work reduces the consumer's carbon footprint.

As the marketplace begins to green, don't be afraid to jump on the bandwagon. But don't sacrifice your brand – the greatest resource your company has – in the process.

Meanwhile, a different sort of challenge confronts businesses historically perceived as serial polluters. Far from having to duck the green revolution, energy and chemical companies have a number of strategic options to create a credible place for themselves in the green universe and reap the multiple benefits that the public's approval will provide…

It's your planet too, so say so. From the board on down, everyone associated with your company must breathe the same air, drink the same water, and inhabit the same natural environment as everybody else on the planet. Build credibility by highlighting the human motives that gave rise to your green efforts.

Be greener that you have to be. As the likelihood of more stringent climate change regulation continues to grow, find ways to go above and beyond the letter of the law and publicize those efforts at every opportunity. Steps that go further than mere compliance demonstrate a real commitment, dispelling perceptions that you're becoming more environmentally conscious only because you have no choice.

Employ all-natural visuals. The green movement presents powerful opportunities for companies to market themselves in visual media. Companies can utilize television or more cost-efficient viral video to get their green messages out via verdant imagery and pastoral scenes. Visuals speak directly to how we feel – and how we feel, more than how we think, determine the decisions we make.

Engage environmentalists. Transforming critics into partners is a time-tested crisis communications tactic. Mollify detractors and further demonstrate your commitment by offering environmentalists a seat at the planning table. Publicize the fact that former adversaries are working together for our environmental security.

Carbon Emissions: A Green Litmus Test

By Larry Smith

As more and more companies claim bragging rights for protecting the climate, the public is growing wise to spurious claims of carbon neutrality, creating a special communications problem in the process. Particularly affected are firms that purchase carbon offsets, paying others to curtail air pollution instead of taking steps to cut their own carbon dioxide emissions.

Even companies thought of as environmentally enlightened face an inconvenient truth about their own carbon emission claims – including, ironically, bottled water companies that rely on images of snowy peaks or sparkling mountain lakes to sell their products. In fact, that $11 billion industry is in hot water as consumers realize these companies use more than 8 million tons of plastic in the U.S. alone. Manufacturing and shipping their product contributes as much to global warming each year as emissions from 2.2 million automobiles.

Firms worldwide want to be perceived as doing their share to save the planet – which is why carbon emissions trading markets are on the rise. In 2007, U.S. companies will pump an estimated $100 million into America's booming market for carbon offsets. As CEOs seek to reposition their firms as keen on green, lowered CO2 emissions and carbon neutrality are fast becoming yardsticks for success. For example, Lord John Browne, former chief executive of British Petroleum, pledged to move BP "Beyond Petroleum," as the logo says, and take a leadership role in emission reduction.

Meanwhile, food companies in Britain have begun printing "carbon labels" on packages, stipulating the amount of gas released during manufacturing, packaging, and distribution. To encourage corporate activism, the European Union developed the Emissions Trading Scheme (ETS). It is the world's most advanced carbon cap-and-trade scheme, putting limits on total emissions and penalizing companies that exceed their caps by compelling them to buy "credits" from companies that pollute less than their allowances.

While carbon trading schemes hold tremendous profit potential, companies must beware not to send mixed messages about "going green." Carbon offsets, for example, are coming under scrutiny in part because they're essentially transactions that pass the environmental buck.

In 2005, for instance, Seattle City Light claimed it had made up for every ton of greenhouse gases it emitted by paying other organizations to cut *their* emissions. Seattle mayor Greg Nichols said, "We can power our city without toasting our planet." But the power company still spews 200,000 tons of greenhouse gases each year and the environmentally conscious folks of the Pacific Northwest know it.

While such examples underscore the communications conundrums facing companies, some measures point toward solutions:

- Draft and distribute a statement that illustrates your company's commitment to cutting carbon emissions. For this statement to be credible, highlight the specific policies empowering that commitment. If appropriate, specify how you arrived at carbon neutrality and describe how measurements are taken.

- Specifically identify your organization's successful carbon reduction efforts. Strategically target your media outlets and consider offering interviews about your program with either employees or board members or both.
- Don't rely on checkbook environmentalism. Companies claiming to be entirely carbon-neutral are being accused of propagating feel-good hype by making symbolic offset deals without achieving real inroads to reduce their own emissions.
- Provide details about your carbon deals. If you purchase carbon-neutral certification or RECs (renewable energy certificates) from a paid consultant, be sure the sellers can verify how the transaction reduces emissions, if they're asked. Secretiveness breeds skepticism.
- Don't treat emissions trading as a quick fix solution. Increasingly, companies are forced to admit that they haven't done all they can to counterbalance the effects of their own greenhouse gas emissions. The last thing you want is public perception that reducing emissions is a bother or burden to you.

Captains of industry are turning to crisis playbooks geared specifically toward influencing environmentally conscious publics, including state and federal officials who are meeting to decide what to do about carbon emissions. These CEOs well know the old Washington maxim…

If you're not at the table, you're on the menu.

Chapter 14 - Navigating the Foreign Corrupt Practices Act

Before the era of what we now call "globalization," the Foreign Corrupt Practices Act (FCPA) was like a lightening strike – an established threat that very few people understood and even fewer ever encountered. Today, as barriers to global commerce have all but disappeared, FCPA strictures are required readings for anyone doing business overseas. The scope of the law is broad, its reach is substantial, and its enforcement has become top-priority at the Department of Justice, the Department of the Treasury, and the Securities and Exchange Commission.

Simply put, the FCPA prohibits U.S. companies, their subsidiaries abroad, and foreign companies that do business domestically or are listed on American stock exchanges from bribing foreign officials to get a leg up in acquiring or maintaining business. It also provides the SEC with the power to levy penalties if compliance systems are deemed inadequate or records are not properly kept.

While foreign officials are free from prosecution unless a criminal act takes place on U.S. soil, American executives who violate the law face consequences that range from significant fines to considerable jail time.

In 2007, the number of enforcement actions under the FCPA doubled from the previous year as cases in Asia, the Middle East, and Africa made, and continue to make, undesirable headlines for companies like Lucent Technologies, Halliburton, and oil-giant Baker Hughes – which incurred a record $44 million in civil and criminal penalties as a result of illegal payments made to officials in Nigeria, Russia, and Kazakhstan, among other countries.

In the face of this regulatory sea change, companies must take steps now to ensure that they are limiting their liability by conforming to reporting and compliance standards. At the same time, companies under fire for FCPA violations must take concrete steps to both protect their brands and reduce the potential penalties. In that context:

Make compliance a priority. Compliance with the FCPA isn't as easy as it may seem, especially for companies with foreign subsidiaries whose executives view the exchange of gifts between business partners as a time-honored tradition. To overcome the institutional hurdles involved, initiate aggressive internal training aimed at ensuring that your employees understand the law and the consequences of breaking it. Doing so will demonstrate to regulators a commitment to transparency and accountability.

Cooperate fully. Historically, the Department of Justice has been far more lenient with companies that cooperate fully with federal investigators or that actually blow the whistle on themselves before an alleged violation is disclosed. If a violation comes to your attention before the feds find out about it, seriously consider turning yourself in. Doing so can put the issue to bed before it gains traction, maybe provide some positive press for your honesty, and make the prospect of a deferred prosecution agreement a likelihood rather than a prayer.

Articulate the need to be competitive. Corporations under fire for FCPA violations have a case to make that stringent guidelines put them at a distinct disadvantage when competing with foreign companies for foreign business. While this argument won't do much good getting a company out of legal difficulties, it does have potential to light a fire under legislators who have the power to take some steps toward leveling the playing field.

The Challenge of Western Media for Chinese Companies and Their Legal Counselors

By Richard S. Levick

Consider the recent experience of two Chinese companies with the Western media.

Both experiences were bad. Both threatened essential business objectives.

Both underscore the impact of the U.S. media on how U.S. regulators – and, by extension, U.S. judges and juries – reach decisions. Both underscore how necessary it is for Chinese companies to understand the importance of media and plan accordingly.

And, both suggest an essential role for lawyers on company teams formulating and implementing media strategies in the U.S. In-house lawyers are particularly burdened with such larger public perception issues. As company executives, not just legal technicians, they have an obligation to look beyond the "letter of the law."

In today's business environment, in-house lawyers now confront two paradoxical facts of life.

On the one hand, public communications can affect the actual outcome of a specific legal matter. Lawyers who ignore the press may find their best professional efforts jeopardized in court or before a regulatory agency because of something that appeared, uncontested, in an Associated Press story or on CNN.

On the other hand, the importance of public communications, and its effect on corporate reputation, can exceed the importance of any single legal outcome. Win in court, but alienate the public, and you sacrifice hard earned institutional trust and market share. Win a vote of confidence from the Securities and Exchange Commission, but generate distrust in the financial press, and no one may buy your stock.

Scenario One: Banks at Loggerheads

When the Chinese media reported that China Construction Bank was being reorganized in early June 2004, the announcement was crisp, to the point, and direct. Unfortunately, the Western media, conditioned by decades of aggressive negativism, reported the story in a way that, from the Chinese perspective, communicated exactly the wrong message.

Consider the *Wall Street Journal* coverage:

"In a sign that China is pressing ahead with plans to list its giant state banks despite fears of economic overheating…the move gives China Construction a lead over Bank of China in preparation for stock market listings that Beijing hopes will help transform its debt-laden state banks into commercially driven operations in tune with risk, before the market is fully opened to foreign competition in 2007."

In just a few words, the journalist – who, it should be noted, was based in Hong Kong – used three common Western media devices to make this particular story more interesting, and to give it

relevance in the context of the *Journal's* broader coverage of China's growing role in the global economy.

First, the story immediately focused on the potential downside of undertaking the reorganization at this time – i.e., the Chinese economy may be too hot.

Second, the reporter pitted one bank against the other, saying, in effect, that, if one bank wins, the other has to lose.

Third, the story makes it clear that this reorganization is, after all, just what the central government wants.

The *Journal* also put the story right next to one headlined: "Calpers Says Disney, 3 Others In Need of Governance Reforms." The spatial context thus reinforced the China Construction story as a less than positive development.

Yet the worst news is that – thanks to an online database industry uniquely sensitive to the needs of news reporter – every editor and journalist who wants to write about Chinese banks will, for years to come, have this story as a reference point.

Scenario Two: A Poster Boy

As we discuss below, there are a number of best practices that foreign companies are well advised to follow when dealing with both regulators and journalists in the U.S. One company that did not appear to follow a single one of these best practices is the China Life Insurance Co. As a result, it found itself at the center of a very unpleasant, very American experience. After an extraordinarily successful initial public offering on the New York Stock Exchange, the company wound up facing multiple investigations by regulators.

Even worse from a long-term reputational perspective, China Life became the poster child for Chinese companies that are not yet ready to fully participate in U.S. and Western capital markets.

From failing to alert potential investors to a wide-ranging accounting investigation by two powerful Chinese government agencies, to self-serving hyperbole that would have made an American advertising agency blush, China Life was ill-prepared for a confrontation with the American media. But confrontation is just what it got.

In its lead story on May 17, 2004, the *Wall Street Journal* said of China Life that "companies dressed up for an overseas stock-market listing often have yet to grasp Western standards of disclosure. And the listed companies typically retain hard-to-understand ties to unlisted state-owned parents."

Translation: companies that do not provide all the information that shareholders, regulators, and others *want* – and it is important to note the difference between what the law dictates must be disclosed and what powerful constituencies demand to know in any event – will be held accountable by the media. In this, as in all similar cases, the results were not surprising. A protracted public study of corporate wrongdoing was recorded to the detriment of China Life. Predictably, its stock price fell.

Unfortunately, there's another dog that rears its ugly head in all such public imbroglios – xenophobia. Especially when economies are down and trade deficits are up, journalists take a cue from their readers and start targeting foreign interests. When, for example, BP Petroleum closed offices in Cleveland, Ohio, even local radio commercials featured foppish British caricatures as a way to appeal to local consumers.

China, by dint of its size and immense productive capacity, threatens many Americans. Regulators know that. So do reporters. Tar a few Chinese companies and you sell a few more newspapers. A company like China Life therefore has to be even more careful than its American counterparts in dotting every i and crossing every t.

New Skills

What, specifically, are Chinese companies to do, and how can legal counselors help them do it?

First, Chinese companies and their executives need to recognize that, in the hothouse of today's global business arena, they have to learn new skills. The Japanese spent many painful decades accustoming themselves to the fact that litigation is an inevitable cost of doing business in the U.S. Litigation is not in the Japanese DNA and many Japanese businesspeople have still not quite adapted to this odd American sport.

For their part, Chinese companies must accept a deregulated and sometimes abusive Western media as an irreducible fact of life. In stark terms, this means that, rather than go away, small problems will become much larger later on, when the media gets involved.

To build a better reputation, or counter a negative one that has already taken hold, Chinese companies should solidly combine five guiding rules of Western corporate communications strategy.

1. Media Relationships – As the authority and power of individual reporters covering the Chinese corporate sector increases over time, it is imperative to develop relationships with each one who currently reports on the company. The days of waiting for journalists to call for information, and being confident that they will publish a verbatim version of what you recite, are long gone. Only through strong media relationships involving the company's communications professionals *and* its executives can fair treatment be expected.
2. Telling the Truth – As professionals, journalists know when a source or corporate executive is misleading them. It is often wise to let a journalist know that a specific question cannot be answered, but it is critical to provide a reason (e.g., the judge in a court case has issued a gag order, or a new product is not ready for launch). Deliberately misleading a journalist will squander all of the goodwill built up over time and may likely focus investigative reporters on the company as a future target.
3. Third Parties – Journalists do not work in a vacuum. They rely on ostensibly disinterested sources. As such, to succeed with the media over the long term, companies should recruit third-party allies to tell the company's story. From industry leaders to market analysts to academics, these sources are key conduits for information about the company. Reporters need to hear that companies are doing good work and not cutting corners.
4. Hot Buttons – Savvy communications professionals always know the half-dozen or so hot- button issues that can spell trouble for their company at any given time. In the U.S., for example, there is today no issue more potentially vexatious than executive compensation. The rule is to be ready ahead of time with "message points," including facts and figures about how the company compares to others like it. Third-party commentators should be waiting in the wings to declare, for example, that the CEO is worth a big bonus because he guided the company to record profits last year.
5. Laws and Regulations – The scars left by the corporate scandals of 2000-2003 are still raw. As a result, the media views compliance with the law as just the first step toward good corporate citizenship. In other words, companies get no credit in the media for doing what they are supposed to do. Only those companies that go the extra mile, and provide the details of what they achieve as a result, will be rewarded in the media.

Chinese companies have everything to gain in the global marketplace. Their potential as suppliers of consumer goods and services staggers the imagination. But without time-tested, Western-style corporate communications and public relations strategies, their growth may stall for precious years.

The Lawyer's Role

Time was, media skills were highly desirable assets that in-house counsel might or might not bring to the table. In some situations, companies determined, quite shrewdly, that their own inside legal team actually offered ideal spokespersons during crises and lawsuits.

When, for example, the Bhopal disaster occurred, Union Carbide chose Joseph Geoghan, its chief legal officer, as spokesperson. Geoghan provided the best of two worlds. On the one hand, as a lawyer, he could self-monitor his public statements for hidden minefields and potential liabilities. On the other hand, he wasn't just a legal "mouthpiece," but a key member of corporate management.

Union Carbide could thus protect itself in its public position while simultaneously demonstrating the kind of personalized concern and commitment credible only with the direct involvement of its own executives. With this chief legal officer out front, the company was being extra careful but it was not hiding.

Such a pronounced media role for in-house counsel speaks to the very definition of in-house practice. In post-Enron America, every legal entanglement is a potential media disaster threatening corporate reputation and product or service brands. What ultimately defines the responsibility of corporate counsel if not reputation and brand protection?

Ergo, media skills – or at least the respect for the practitioners of those skills with an equal seat at the table -- are potentially as important for an in-house legal manager as legal skills.

Skill Sets

For lawyers, it's a tough admixture. Media and legal skills tend to be very different. The key to media skills is controlled disclosure. But the instincts of lawyers is to guard all words uttered, to utter them only if necessary, and to parse them so carefully that, from a media standpoint, their statements often wind up bowdlerized beyond any possible interest to readers or viewers.

The specific skills now required of in-house counsel involve both planning and delivery. As much as any public relations professional, lawyers should be intimately involved at every stage of the campaign. For example:

- Make sure a crisis planning team is in place at all times, long before a crisis occurs, populated with in-house legal staff, communications professionals, and C-Suite executives.
- Have a template that identifies the media outlets, both print and broadcast, that are likely to be important to the matter at hand.
- Articulate possible substantive messages – brief and coherent – to deliver to those outlets. They can be refined or added to as circumstances dictate.
- Develop relationships with key reporters before a crisis occurs. Such relationships can stand you and your company in good stead when journalists make judgment calls that can go either for you or against you.
- Coordinate with outside counsel for their advice on media strategy and their possible participation as spokespersons. Some in-house lawyers – notably Steven Hantler, Assistant General Counsel for Government and Regulation at DaimlerChrysler – now insist that outside litigators do more than pay lip service to media management, but have demonstrable skills in that area.
- Learn the ground rules of media engagement – what, for instance, does "off the record" really mean?
- Not just print media, in-house counsel should be trained to survive the electronic media as well, especially TV, and familiarize themselves with all the tricks of that challenging trade.

Chinese companies doing business in the West – and, increasingly, in Asia too – need expert counsel on what the law *doesn't* require. They need to take key steps that will prepare them for a very different kind of tribunal: public opinion. And, they must have counselors wise enough to balance the equally crucial perspectives of law and public relations.

The Crisis Response Plan: If You Fail to Plan, You Plan to Fail

There is no reason why in-house counsel cannot assume responsibility for ensuring that a Crisis Response Plan is in place. While such plans cannot predict the specifics of a future crisis, they do at least create a framework for media relations during a crisis. They systematically organize the tasks at hand and provide a platform for responding to a variety of potential problems ahead.

While Crisis Response Plans naturally vary from company to company, there are key elements common to most. Here's a checklist:

- Identifies crisis management team members, including representatives from top management, line management, public affairs, investor relations, legal, PR, and finance. Identifies the team leader. Designates alternates.
- Identifies person to whom press inquiries should be initially directed.
- Identifies the actual spokesperson(s) for the company or establishes a procedure to select one.
- Delegates responsibility for drafting and approving press releases and other formal statements.

- Provides, or underscores the need to develop three to four brief message points that provide a clear, concise statement of your company's position – and, if possible, innocence. These message points should usually enumerate concrete steps the company is taking to protect consumers, stockholders, and employees.
- Establishes a communications plan for keeping the board of directors and key managers abreast of developments.
- Describes fact-finding mechanisms to be used during the investigation and litigation (if any) stages of the crisis. Designates certain kinds of information confidential.
- Establishes a physical "command center," often a particular office in a particular city.
- Considers a special hotline to handle inquiries from investors, consumers, employees, and other concerned parties.
- Provides for website updating of all crisis-related information.
- Ensures that all employees, especially the receptionists, understand that the company has a structure in place to handle the crisis. Includes instructions for all employees on how media calls should be forwarded.
- Creates a contact system so that all members of the crisis management team can reach each other day or night. Ensures that the spokesperson(s) can be contacted at a moment's notice for prompt replies to media inquiries.
- Incorporates relevant portions of the company's document retention policy.

Particularly for anyone new to dealing with the Western media, the plan should also provide for media-training. Here, the spokesperson(s) refine their message points and they rehearse delivering them during mock interviews. Videotaping the role-plays will maximize their benefits.

Chapter 15 - CEO Resumes: Trust, but Verify

Daniel Edmondson seemed to have it all. At 46, he had risen through the corporate ranks at Radio Shack, becoming President and CEO of the electronics giant in May of 2005, after just 11 years with the company. But, as Radio Shack's Board of Directors and investors learned the hard way, people – especially candidates for high-powered positions – are not always what they seem.

After learning that Edmondson had been arrested three times on suspicion of drunk driving, the *Fort Worth Star-Telegram* probed deeper into the new CEO's background and uncovered inaccuracies in his academic record. Less than a year after taking the helm, Edmondson was out and Radio Shack was left to clean up the mess.

The Edmondson fiasco is not unique. Bausch and Lomb CEO Ronald Zarrella falsely noted earning an MBA from New York University; Kenneth Loncher, former CFO of Veritas Software, fibbed about earning a Stanford MBA; and Former Lotus CEO Jeffrey Papows exaggerated his military record, doctored his educational background, and falsely claimed he'd been an orphan.

Data from ADP Screening and Selection Services – an HR screening firm that performed 2.6 million background checks in 2001 – shows 44% of applicants lying about their work histories, 41% lying about their education, and 23% falsifying credentials or licenses. In early 2007, *Forbes* went even further, opining that, "Almost everyone lies on their resume. That includes everyone from CEOs to security guards."

While resume-padding may be rampant at all levels in corporate America, C-Suite fibbers create special difficulties. When Edmondson lies, Radio Shack is tarnished. In other words, it's a matter of brand preservation. So what should the Radio Shacks of the world do about it?

Trust, but verify. Never take a CEO candidate's word for granted. A background check is a most judicious investment. Upon Lonchar's disclosure, Veritas stock lost $1.14 billion. When MSG Capital Chairman and CEO Brian Mitchell's Syracuse degree was proven to be fabricated, the company stock dropped 37% and hit a 52-week low.

Make honesty the only policy. Draft and distribute a statement that formalizes your company's commitment to truthful credentialing and ensures that applicants know the consequences of deceit. The language should convey zero tolerance, with a simple "don't even think about it" message.

If a problem occurs, run to the crisis. Transparency is fundamental to brand credibility. Get out in front of any emerging story by broadly communicating that an investigation is ongoing. In many such situations, the best approach for maximum credibility is to employ a disinterested third party to conduct the investigation.

In today's world, executive leaders are under immense pressure to tell the truth about their companies' business practices at every level. It will all be for naught if they don't begin by telling the truth about themselves.

The CEO Quits: Strategies to Reassure the Team

By Richard S. Levick
From the *Washington Business Journal*, August 10, 2007

The founder of your company is retiring. Your CFO pens his two weeks' notice in a terse letter reiterating his concerns about the company's fiscal management. There are rumors within the company that the vice president of your international sales division may be leaving to run sales for a competitor's business.

No matter what the particulars of the situation, a key employee leaving the company can make employees, customers and investors extremely uneasy. When that sense of unease arises, your stakeholders will turn to you for reassurance. The way that you handle this communication -- both publicly and privately -- will be key in determining whether the situation is a minor bump that goes by with little notice or a major issue that may even gain media attention and potentially affect your stock price.

When determining how to communicate an important employee's departure to your customers, employees and shareholders, there are a few things you will want to keep in mind so the transition goes as smoothly as possible:

Tell your employees first. Consider how your employees will feel and react to the situation. If you tell them after the news is already out, you're at risk of having to explain (or even deny) what they heard at the water cooler or read on an industry blog. The message that you convey to them -- one that shows cordiality toward the departing employee and resolutely affirms that business will go on as usual -- will have a powerful impact on how they will then communicate with customers and clients.

Understand that the public may see it differently. Whether it's a board member, a senior executive or even someone lower on the chain of command, the departure may be perceived as putting you at a competitive disadvantage, especially if the person heads to another firm. The best defense is a clear plan to maintain continuity while moving forward. Announce the departed person's successor or indicate that you are in the process of deciding on a successor. Assure the public that the departure is one of many commonplace situations all businesses have to face.

Keep things positive. Except in extreme cases (like the litigation discussed below), you should always take the high road. Regardless of the reason for their departure, publicly wish departed employees well and thank them for their service. And that's it. It is neither the time nor the place to air grievances you may have had with the quality or quantity of the employee's work. Doing so reflects more poorly on your company than it ever will on the person who left.

Don't over-explain. People may be curious, but it is up to the departing employee to answer questions like, "Why did you leave?" Only the employee really knows for sure, anyway, no matter what the individual might have told you. Keep your comments cordial, factual and quick -- and then be quiet.

Deliver the news to important clients in person. In many industries, particularly those that are service-related (law firms, ad agencies, accounting firms, etc.), it's realistic to believe that some clients will follow the departing employees to their new firm.

Reach out to the clients that the employee managed, contacting them individually and setting up a time to meet. Reiterate how much you value their business and let them know the specific steps you are taking to ensure that there is no disruption in the quality or level of service you'll still provide. Don't give in to the temptation to just call or send an e-mail. There's a much better chance of keeping the account if you invest the face time.

If the situation gets ugly...

So far we've been talking about an employee who departs amicably. But what if the employee is leaving because of a situation that allegedly occurred, like corporate misconduct, sexual harassment or discrimination? What if the person is talking -- loud and often -- to the media or is in the process of filing (or has already filed) a lawsuit against your company?

In these circumstances, the rules shift. Obviously, you'll need to be a lot less friendly (if at all), but you will also want to avoid being pulled into a public debate over the issue. Let's say a reporter calls and asks, "How do you feel about John Doe's allegations of fiscal mishandling occurring at your business?" Here are a few things to keep in mind:

Less is more. Generally speaking, the more litigation there is, the less you say about it. Let the media and other stakeholders know that the suit is without merit and you're confident your company will be completely vindicated when all the facts come to light.

Right now, however, the goal is not to prove you're right: That will only be proved if and when a court rules in your favor. Your immediate goal is to be transparent about the actions your company is taking with regard to any investigation and to remain resolute in your belief that your company will emerge victorious.

Chapter 16 - Executive Compensation: It's All About Performance

As the economy edges toward recession, companies and their leaders are increasingly vulnerable to public attacks over the issue of executive compensation – and, specifically, what many see as an uneven and unfair pay differential. With U.S. CEOs making, on average, 369 times more than a typical worker, there's little doubt that perceptions about excessive compensation fuel vitriolic attacks, especially when rewards don't align with returns.

From ambitious politicians and customers, to shareholders and employees, to regulators and other interest groups - all of them have the potential and motivation to use the current economic uncertainty to make life far more difficult in the Court of Public Opinion for the companies they target.

The need to link pay to performance – and to be seen doing it – is indeed greater than ever before.

Consider the tale of investment bank Friedman, Billings, Ramsey. During the ten years that FBR has been selling shares to the public, customers and investors have lost money, constant restructurings have taken place, and a trading scandal forced one of the founders to resign. Those setbacks didn't stop top executives, who were already earning as much as $10 million a year, from "accepting" bonus packages that totaled $30 million in the same year (2007) that the company lost $740 million.

The marketplace made its displeasure known. In April 2008, FBR's stock traded well below $2 per share, down from a high of $28 just four years ago. While a portfolio loaded with subprime assets may explain some reasons behind the drop, there's ample reason to believe that corporate governance issues – with executive pay policy at the top of the grievance list – have also had a significant role to play in the company's fall.

Sky-rocketing executive compensation makes it too easy to damage the reputations of much healthier companies. For these companies, the solutions include:

Link executive compensation to company performance. Nobody cares that CEOs work hard. At the same time, corporate pioneers such as Bill Gates and Steve Jobs have rarely been criticized for their own wealth, precisely because their good fortune was everyone's good fortune. Results-oriented figures change the entire dynamic for the better.

Identify the metrics that best define performance. Too often, the only performance indicator that gets any attention is a company's stock price. In fact, the best corporate managers actively seek the opportunity to be measured against an array of criteria. For example, have they provided excellent returns on invested capital? Have they strengthened the company's ability to acquire other companies? Have they created jobs? By articulating those broader achievements, you paint a fairer, more accurate picture that, in turn, justifies generous compensation.

Avoid jargon. Investors, regulators, reporters, and consumers appreciate straightforward information, so give it to them. Attempting to mask pay practices in a cloud of legalese and statistics will heighten suspicion and jeopardize the trust of those the company depends on to survive.

Follow the rules – and stay under the radar. The best way to stay out of the news on executive compensation issues is to meet and fully satisfy compliance and reporting deadlines. Simply put: the less said by others, the better.

A Say on Pay

Resolutions calling for advisory shareholder votes on executive compensation (also known as "say on pay") began showing up in proxy statements in significant numbers for the first time in the spring of 2008. More than 100 companies are currently grappling with the issue and many more soon will be – leaving boards of directors with a most difficult choice.

They can:

- Agree to investors' demands and commit to taking the result of say on pay votes into account when making executive pay decisions. However, in doing so, they risk setting a dangerous precedent that will encourage shareholders to seek ever greater leverage in corporate governance;
- Agree to the votes with the strong caveat that the results are strictly informative. However, in doing so, they risk the perception that they're only paying lip service to their shareholders; or
- Stand fast and hope that say on pay is just a passing fad. However, in doing so, they risk becoming a symbol of corporate greed run amok and the perception of being out of touch with shareholder sentiment.

No matter what course of action a company chooses, there are specific communications strategies for minimizing the respective liabilities.

- Companies that embrace say on pay votes and are willing to be bound by the results should ***emphasize that the decision is meant to serve the cause of openness and transparency***. At the same time, their language must be sufficiently specific to discourage unwonted expansion of shareholder prerogatives.
- Companies that choose to embrace say on pay in a strictly advisory fashion ***must make it clear that, while the board remains the ultimate arbiter*** of executive pay, shareholder input is always invaluable.
- Companies that choose to resist must do so by relying on sound business principles arguments. ***They must emphasize the need to be competitive*** in attracting top talent while highlighting any policy safeguards against excessive executive compensation that may already be in place.

Communicating Executive Pay Decisions:
An Interview with Jeffrey Cunningham

From *High Stakes*, May 2008

Jeffrey Cunningham is Chairman and CEO of NewsMarkets, LLC, publishers of *Directorship Magazine. He* advises boards of directors on executive compensation policy and has written extensively on the subject. Here are his tips for better communicating executive pay policy.

Of all the constituencies that a company must address with regard to executive compensation (investors, analysts, consumers, media, etc.), which is the toughest to deal with?

Jeffrey Cunningham: A CEO who's under siege for compensation has to deal with that problem directly. And if they are, in fact, overcompensated, they need to be able to win the battle of justification with every constituency.

There's no tolerance for overpayment of a public company's CEO – and I say that regretfully because the one incentive people had for becoming a CEO was that you could make a pot full of money. That's just not the case anymore. You can still make a pot full of money, but you have to be able to justify it and relate it to performance.

That being said, I'd posit that activist shareholders are a constituency with a whole lot of ammunition on their side. They've got direct access to the media and, in many cases, they also represent the pension fund holders. With both media attention and shareholder backing, they represent a very tough customer – and they don't play softball. When they come at a company, they are very well researched, they understand how the game is played, and they know the corporate governance rules inside-out.

What is the biggest mistake that companies make with regard to executive compensation policy and how can it be corrected?

Jeffrey Cunningham: I think we're entering an era of demarcation with the new regulation in that the days of trying to put compensation into so many buckets that it couldn't be aggregated are likely over. Typical things like corporate apartments and personal use of the corporate plane – while not major in terms of the dollars they represented – became very annoying to shareholders who thought that people making tens of millions of dollars should be spending tens of thousands of dollars of their own for these types of services.

That era is going to vanish and disappear. I think we're going to see a coming together of private equity compensation and public equity compensation where there's a reduction in cash and an increase in long-term equity with very few tax gains and very few parlor games like the ones I mentioned. It won't necessarily be less compensation for the CEO, but [it will mean] disclosure upfront so that, with large compensation, there won't be surprises. There will still be complaining, but there won't be a sense that somebody tried to get away with anything. I think that's better for us all.

What are the most effective responses to criticisms of executive compensation policy?

Jeff Cunningham: The tendency used to be to hunker down. CEOs being attacked for their compensation weren't able to come back and say anything. Now CEOs have to build into their

compensation plans the willingness to defend them and the willingness to go out publicly and say, dollar for dollar, here is why I earned it and here is why it's good for shareholders.

A proper compensation plan should provide all the answers you need and make criticisms melt away.

Chapter 17 - Shareholder Litigation Case Study: Striking First to Stifle a Strike Suit

The company you invested in was valued at $2 billion at the close of trading on a Friday afternoon. The following Monday, the company was sold for ten cents on the dollar. Most likely, phrases like "material misrepresentation" and "cooking the books" are dancing on your tongue as you scroll the rolodex for the most ferocious trial lawyer in town.

This scenario is, of course, not unlike what thousands of Bear Stearns shareholders experienced on Monday, March 17, 2008, after an unprecedented stock drop roiled global financial markets. The only difference is that those investors didn't need to go looking for trial lawyers. Almost instantaneously, the plaintiffs bar took to The Street announcing "independent investigations" that were really just disguises for class action client trolling, replete with attempts to foster perceptions that executive wrongdoing was to blame.

Enter JP Morgan Chase. With an initial announcement that it was setting aside $6 billion to cover potential shareholder litigation brought by Bear Stearns investors, JP Morgan managed to limit its liability, assuage Wall Street's jitters, and outflank the plaintiff's bar by simply announcing that it was planning for the inevitable.

Equally important, in a move that demonstrates how sound business decisions and prescient communications strategies are one and the same, JP Morgan struck first, providing practicable insights for all boards that will be confronted by disgruntled shareholders as the economy continues its downward turn. Among the lessons learned:

Act fast. Because it assessed all the likely vulnerabilities ahead, JP Morgan was able to get its $6 billion message to The Street quickly, actually matching the speed and zeal with which the plaintiffs bar took to the marketplace. Those who tell their story first force adversaries to swim upstream against the established conventional wisdom that you yourselves have defined. Being first is all about being prepared, and being prepared requires an honest appraisal of your most significant liabilities.

Set the ceiling. By coming out with the $6 billion figure up front, JP Morgan effectively put a cap on the relief the plaintiffs bar could seek without entering into extended litigation that might not prove successful. The company sent a powerful message to trial lawyers and investors alike about the scope of the compensation available and the absolute limits beyond which it would not go without a fight.

Set the floor. The announcement of the $6 billion figure also demonstrated to Wall Street that there was, in fact, a bottom to the crisis. Investors needed to see the light at the end of the tunnel, so JP Morgan showed them one. Shareholders and potential investors now had a figure to work with rather than rumor and speculation, thus significantly limiting the impact of the impending strike suit in terms of real dollars.

Disarm the plaintiffs bar. The anticipation was that the plaintiffs bar would paint JP Morgan as a cold entity that feeds on economic uncertainty. By announcing that it was taking responsibility for rectifying a situation it really had no role in creating, JP Morgan neutralized the attack before it could even be made. The Wall Street giant donned its human face as judges and jury pools looked on.

A View from the Boardroom:
Obligation plus Liability Equals Involvement

By Richard S. Levick and Larry Smith
From *Stop the Presses: The Crisis and Litigation PR Desk Reference*

Although it's not a board's mission or responsibility to manage a company, the strategic oversight that independent directors can provide is increasingly important across a range of issues – and nowhere more tangibly than in times of crisis.

Not surprisingly, the Sarbanes-Oxley Act of 2002 increased the burden on directors because it mandated that only independent directors with no affiliation to the companies they serve could sit on certain board committees. This measure not only gave boards more independence, but more responsibility – and liability – as well.

For example, in a banner class-action lawsuit against WorldCom led by the New York State Common Retirement Fund, the telecommunications giant's independent directors were ruled negligent and *personally* liable for a portion of the company's losses. This outcome reinforced the serious nature and potential consequences of their duties and catalyzed new awareness of the greater crisis management roles that they would now have to play.

Today board members have three overriding concerns about how companies handle crisis communications, according to Lawrence P. English**,** Chairman of Lawrence P. English & Associates, a crisis and turnaround management firm based in Sarasota, Florida.

First, is the company telling the truth?

Second, has it complied with all SEC disclosure requirements? As an example of material information that falls through the cracks for one reason or another, English points to the May, 2007 announcement by the SEC that Hewlett-Packard Co. erred by failing to disclose why one of its directors, Thomas Perkins, resigned last year during the company's boardroom leak investigation. Although the SEC did not fine H-P, it was – after all the controversy beleaguering the company – a significant omission as Perkins' concerns were related to the company's corporate governance and policies and, by law, therefore needed to be disclosed.

Third, English articulates a very specific and practicable testing mechanism: Are company managers and directors telling shareholders what they would want to know if *they* were shareholders?

Best boardroom practices vary depending on size, says English who in the last four decades has served a broad variety of companies. He held several senior management positions at CIGNA Corporation and served as Chairman and CEO of Quadramed Corporation. He was also a director of three public companies and three private companies.

Board members should, for example, press for formal crisis preparedness but take company size and resources into careful consideration. "At CIGNA, we had a fully trained PR staff as well as outside agencies ready to step in when a crisis arose. On the other hand, at QuadraMed and other small cap companies, the Board and management need ongoing relationships with outside firms that are generally familiar with the business and skilled in crisis management, and that can be called on quickly in a crisis. These need to be real partnerships."

At one company English served as an independent director, stock prices declined after the CEO was terminated. Just weeks before, however, the Chairman of the Board had sold a large number of shares at the higher price. The fact that the Chairman had been a short seller in a previous life only threatened to fuel the incipient fire.

It was, to be sure, the kind of crisis scenario to which many small public companies are susceptible – and, says English, precisely why outside communications counsel can be as important for smaller companies as outside legal counsel. In the example English cites, the company's "partnership" with a communications firm spared it litigation and regulatory action.

Such cases underscore a critical need for directors to at least be able to identify where internal resources are deficient and must be supplemented by outside expertise. It's not just smaller companies that suffer deficiencies. When Jerry Levin became CEO of what was then Sunbeam Corp. in the late 1990s, he was surprised at how little the board knew about the very accounting problem that was then roiling the corporate waters. There was likewise a dearth of bankruptcy expertise among HealthSouth Corp. directors in the post-Richard Scrushy period that protracted the discussion of whether or not to even seek bankruptcy protection.

Such cases signal a need to elect outside directors in the same way as companies assign crisis teams – with abiding intent to cover all bases and anticipate multifaceted contingencies. In turn, directors should be given the training they need in order to perform their augmented roles.

Chapter 18 - Guiding the Legislative Process

Lawmakers in the United States have always sought to strike the delicate balance between regulation and commercial autonomy that an effective capitalist system and prosperous international trade demand.

Today, however, they are all influenced by an increasingly large number of constituencies, often with directly conflicting interests. Sometimes it's ideological. Sometimes it's simply two companies talking to the same congressman – one that needs a price support to be extended and another that needs it lifted.

Amid such clutter, lawmakers will choose the aspirant who speaks loudest and longest. To cut through the clutter:

Know the key legislative players. Real knowledge goes beyond just identifying the committee of jurisdiction or the sponsors of a particular bill. Are there legislators that routinely control blocks of votes? Are there champions of the issue at hand? Are there members of the leadership who will likely come forward as outspoken opponents or supporters? Identify the power players and target your efforts toward swaying them.

Know what matters most to the key players. Is one of your legislative targets facing a tough re-election fight? If so, you may want to gain support for your cause by speaking directly to the voters. To that end, the global Internet is effective; so too is the local community newspaper. Even if you don't sway those voters, the fact that you've aggressively targeted them won't be lost on the representative you seek to influence. At the same time, how can you help the lawmaker with his or her constituents in a way that seems non-partisan and disinterested? Is there a charity initiative you can sponsor that he or she can spearhead?

Engage the grassroots – and the grasstops. Public support that can be demonstrated through polling or other quantitative indicators always scores big points – but don't forget about the special interest constituencies that sway legislative prerogatives as well. Powerful donors, party leaders, and media editorial boards all fall into the "grasstops" category – audiences that exert pressure from the top down, rather than from the bottom up.

Engage the staff. Whether they work on politics or policy, the legislative staff is often the ultimate arbiter. Get to know them by name. Make it as easy as possible for them to advocate for you if only by directly providing them with your best arguments and most supportive resources.

Influencing Legislators: A Game of Public Relations Catch-Up

By Richard S. Levick
From* Mealey's Emerging Toxic Torts *June 1, 2005

Consider this real-life fact pattern. It's a tough one . . .

After much hand-wringing, a group of well-heeled citizens agreed on an alliance to block an offshore wind power development project targeted to cover a gorgeous tract of sea and sound and provide energy to two toney island communities as well as a populous, diverse mainland shore region. The alliance was fretting over environmental damage similar to problems purportedly caused by windmills in Europe, including damage to fish beds and interference with bird migratory patterns.

There was potential danger to sea and air navigation as well. To be sure, the anti-development forces were also anticipating an aesthetic diminution that would mar their own view of the water, and likewise threaten the area's lucrative tourist trade.

Unfortunately, the developer had apparent political clout, having simply strolled through the Army Corps of Engineers approval process. Worse, he had early on articulated powerful "message points" about the virtues of wind power and enjoyed a significant head start in terms of garnering and leveraging good press. He was indeed a powerful presence in the local media, and no environmental or commercial self-interest group had countered any of his messages. Absent an effective public response, their cause was bound to be a losing one.

It is a scenario that anyone who's been involved in a dispute with an important environmental component may recognize as pointedly relevant. In such disputes, there is often a PR disparity between the contending parties. Like the wind energy entrepreneur, developers can plan media campaigns before their opponents even know the development is underway. Or, in litigation, corporate defendants are often constrained in what they can say publicly, which, of course, gives plaintiffs and Non-government Organizations (NGOs) a fast start out of the media gate.

The question then becomes, how do you catch up?

The wind power story offers an important related lesson for media combatants. Environmental controversies are now much more complex communications and management challenges than in the past because the opposing sides are less well defined socio-culturally. Wind power is a politically correct energy alternative, but fish beds and avian migratory patterns are also shibboleths. It's hard these days to say whose side anyone will likely be on. Disputants cannot glibly audition for the role of good guy, not these days when environmental policy is making such strange bedfellows.

Corporate defendants are likewise deprived of easy buttons to push in the culture wars. They cannot simply attack the other side as starry-eyed tree-huggers, not when it's mainly working class Republicans who earn their livelihoods by fishing in Prince William Sound. Or used to.

In the wind power case, the developer actually had the best button to push because he could accuse the wealthy, environmentally liberal corporate retirees in the region of a "not-in-my-back-yard" (NIMBY) hypocrisy. He could suggest, directly or indirectly, that they were traditionally

all supporters of alternative energy — but someplace else, please, where they weren't trying to dock their yachts.

The NIMBY factor thus made the problem of media catch-up exponentially harder to solve. The fact that the president of the alliance was formerly CEO of a large conglomerate sued in the past for high-profile environmental violations made the media position of the anti-development people almost ludicrously unfavorable. Could there be a solution at all?

Actually, there were five solutions, all of abiding relevance to most species of environmental contestation.

Solution No. 1: Overwhelm with Fact. Presumably, your side of the controversy has substantive merit. With many types of litigation, exculpation is merely a single fact or two: the accused was in Pittsburgh at the time of the murder, or the plaintiff was warned about the health risk of the baldness cure but chose to ignore that warning. With environmental matters, however, merit or blame is usually determined by a panoply of facts and ancillary data.

Play this multitude of available facts to your advantage. Even when the other side has a head start, the facts are still the facts. Often, reporters want to extend the life of a story by presenting an opposing position. Thus does the news cycle turn. Pick knowledgeable, fair press contacts who actually care about facts. The sheer massiveness of what you present, a veritable marshalling of evidence, will make the new news cycle possible and beneficial to both the reporter and yourself.

Solution No. 2: Expand the Audience. In the wind power case, an aggressive effort by the anti-development faction did finally result in a more balanced presentation in the local press, mainly because the issue was so important to their readers that community newspapers kept it alive for months. As a best practice, though, it is especially important that the story be revived in media venues that have not already been tainted by a plethora of one-sided stories.

The wind power case naturally leant itself to broader national coverage. The *New York Times* and the major television networks presented opportunities for the anti-development people to gain the same head start on the developer in the national media at the developer had enjoyed in the local and regional media. In turn, the national press coverage had a salutary effect on the perceptions of local reporters, subtly influencing their coverage closer to the other side.

In the wind energy matter, national coverage naturally included comparisons to how the environmental elements of the story played out elsewhere in the U.S. and abroad. The wider the geographic scope of each story, the less relevant the NIMBY component became.

Solution No. 3: Play to Journalists' Best Professional Instincts. Reporters covering environmental matters may tend to be anti-corporate but, in the wind power case, the NIMBY angle was too good to resist. It appealed to their deep instinct for bringing down the mighty and uplifting the meek.

But reporters also want to be fair. To advance most reasonable positions in an environmental controversy, your approach to reporters is crucial. Never be contentious. Don't even suggest that the reporter is culpable for his or her own apparent bias. Instead, blame circumstance. In the wind power case, reporters were called and told, "Look, we know you must be getting a lot of pressure

from your editor to play up this NIMBY thing. But let us talk to you about something that we think is more relevant . . ."

It was important to bring the "NIMBY thing" out into the open, and to honestly acknowledge this potent sub-text of the debate. By doing so, reporters were politely challenged to handle the NIMBY theme as fairly as possible, and to balance it against other themes equally or more relevant to the debate. You may not win reporters to your side, but you don't necessarily have to. The object of the game is to push them toward the middle.

Solution No. 4: Enlist third-party supporters. Celebrities and well-known experts present obvious benefits. Such star power is certainly one way to play media catch-up fast. You may not erase the weeks of adverse media focus, but you can certainly overshadow it.

The danger of recruiting certain celebrities is that they may already be lightning rods. Charlton Heston has done well by the National Rifle Association, but, in an environmental case, using someone like that may erode a crucially moderate and undecided population segment. Likewise, predictably liberal Hollywood-types *(e.g.*, Ed Asner) may contribute nothing to an anti-development or pro-plaintiff matter simply because they are, from a media point of view, so predictable.

In the wind energy dispute, the alliance totally outgunned the developer on the celebrity front. Two charismatic politicians and one highly trusted network TV journalist spoke out against the windmills. Most important, though, a famed naturalist with no direct ties to the community was probably the most effective spokesperson. No NIMBY there!

Solution No. 5: Target Influential Readers. Once you begin to get your message through in the media, pick media venues that reach Very Important Persons, especially lawmakers. Toward that end, the anti-wind energy alliance added a number of publications to its media hit list only because they were published in the home states of congressmen closely involved with key regulators. To be sure, the alliance likewise included media in every region of the U.S. that was facing wind energy development.

The wind energy fracas is certainly an instructive example for all environmentally-sensitive cases — if only because this was a case that seemed so hopeless at the get-go. With limited funds, the alliance was able to overcome a giant head start by the opposition and to defuse a potentially devastating caricature of themselves as self-interested hypocrites.

With unlimited funds, and similar wisdom, imagine what the Fortune 100 can accomplish!

Chapter 19 - Congressional Investigations: A Direct Public Conduit

When the Mitchell Report on the use of performance-enhancing drugs in Major League Baseball was presented to Congress in September 2007, Andy Pettite and Roger Clemens – two of the biggest stars named in the report – opted for two very different paths in restoring their reputations.

Pettite promptly admitted his use of a human growth hormone to overcome an elbow injury in 2002 and cooperated fully with Congressional investigators – or at least successfully cemented that perception among legislators and the media. Clemens, on the other hand, went into seclusion for several weeks before professing his innocence, displaying his indignation, and expressing his surprise at being linked to the scandal.

His closed-door interviews with Members and their staff seemed to create more questions than they answered. In the wake of his public testimony, journalists had dug deeper into the allegations, which now included an extramarital affair.

The crisis that might have threatened Pettite's reputation and his career is now in the rear-view mirror. Roger Clemens may never throw another Major League pitch as he faces possible perjury charges.

The contrasting cases support the repentance/redemption model of crisis communications and provide a template for handling Congressional investigations. Significantly, in instances where criminal indictments are not necessarily in the offing, the same best practices can apply to Congressional inquiries as to crisis communications in general.

Congress more often than not directly reflects public opinion – and the public forgives mistakes if the trespasses are owned up to and a commitment to righting wrongs is made. Cover-ups, obfuscation, and outright lies will not be forgiven. Thus, make the following points central elements of your strategic response:

Be transparent. If you have nothing to hide, prove it by ensuring that legislators and their staff have full access to any materials or people they deem significant to the investigation.

Seek a partnership. Partner with Congress on any practical steps that can be taken to solve the problem, and talk about such possible collaboration during the committee hearing, when the whole world is listening.

Transform the ordeal into an opportunity. If the company has a good enough story to tell, an appearance before Congress could reinforce its brand or provide a forum to more broadly disseminate its messages.

Never let the media see you sweat. During the impromptu news conferences that take place in the halls of Congress, be cordial to the reporters and as supportive of the committee members as possible.

In other words, this experience needn't be about avoiding punishment. It could be all about showing leadership.

Chapter 20 - Regulatory Investigations: The Fundamental Decision

Crisis management often hinges on a single strategic decision – do we or do we not fight back and, if so, how aggressively?

It's a decision that's particularly germane when companies grapple with the public dimension of regulatory entanglements. On one hand, the company must protect its reputation. On the other, every press release, media interview, and blog post in the company's self-defense can alienate regulators at a point in time when it might still be possible to minimize the fallout from their investigations.

An offense communicates strength and confidence in your position. It may even convince regulators that their own political and personal goals will be disserved by pursuing an inquiry that the public perceives to be unfair, bureaucratic, and arbitrary. That public influences the legislators who, in turn, oversee and fund the regulators.

But the risks of going on offense are considerable. Not only might you infuriate the regulators and intensify their zeal, an offense can generate unwanted public attention that would not otherwise have been aroused.

A defense buys time, allowing you to cooperate with regulators and perhaps earn their trust. The risk is that you cede control of the story to your potential adversary. You may, by your docility, encourage the public's assumption that you are indeed at fault to one degree or another.

That said, the abiding benefit of a defensive strategy is that it need not be permanent. If the situation deteriorates to a point where regulators seem uncompromisingly hostile, you can launch an offense at that point. By contrast, the decision to go on offense is usually irreversible. It's awfully hard to mend fences once you question the agency's decisions in public.

What factors should drive such a choice?

First, a crisis team must do risk/benefit analyses at every juncture, all the more because the decision to stay on defense or go on offense determines every subsequent tactical action. Should you talk to the newswires? You will reach the broadest possible audience, but you won't be able to control what they write. Should you limit your offense to your own blog and thereby maintain control? You will, indeed, stay in control, but you may be perceived as proportionately less credible for doing so.

Second, it's not just a question of the fact patterns underlying your particular situation. To make the decision for defense or for offense, you also need to understand who the regulators are and what they really want to accomplish. Understand that the professionals who staff these agencies are as talented as anyone in the private sector. As lawyers, they're probably equal to your own legal counselors. The regulators also believe in what they're doing. They believe they are helping the public, which can make them all the more resolute.

To that end, regulators often choose targets that allow them to send a deterring message – but they can only do that if the message is publicized. As such, media savvy is part to the regulators' job description. Whether you opt for defense or offense, you will need to counter their media skills with savvy of your own.

A Delicate Balance:
High-Stakes Communications During Regulatory and Enforcement Actions

By Richard S. Levick
From *Mealey's Emerging Toxic Torts*, February 2, 2007

One way or another, it's a landmine.

By now it's obvious that just about any publicly traded company, and certainly any company doing business in a regulated industry, can be targeted by one or more of the diverse regulatory entities that oversee the U.S. business community. Equally possible, companies may be investigated by enforcement agencies at the federal or local level in any number of unwelcome scenarios. Individual managers, unbeknownst to other executives, commit malfeasance or non-feasance. Sometimes it's merely because the company does business with another company that's fallen afoul of the law, and the government wants to know more about its friends.

The legal quicksand is dangerous enough. The drain on money, resources, and time is as onerous as it is unavoidable. Yet effective public communications may be the most daunting challenge whenever regulators or enforcers announce their interest in a company. On the one hand, the company must do what it has to do to protect its reputation and preserve its brand equity in the marketplace.

On the other hand, every press release, every media interview, every blog posted in the company's self-defense runs the risk of alienating the very regulators and enforcement officials who are investigating the company, no less so than a statement on the courthouse steps might infuriate the judge who will be ruling on the defendant's future.

From a communications standpoint, the company is, in a sense, being forced to run a race while having to continually look right and left and behind. Under the best circumstances, the regulators and enforcers will be supportive, especially if the company is able to fully disclose its specific communication strategy and thereby ensure the government's comfort level. If the government has something to gain from the company's public outreach, so much the better.

Under the worst circumstances, however, the regulator or enforcer is, for whatever reason, an avowed antagonist. In these circumstances, the company may need to be more aggressive, especially when inaction could even be more disastrous than a full-fledged offense.

Let's take a look at both circumstances: first, some best practices to protect the company's reputation while minimizing negative fallout from the regulators and enforcers, and second, a practicable strategy to fight City Hall and live to tell the tale.

Threading the Needle

To navigate the cross-currents of public communications amid regulatory or enforcement initiatives, companies must first understand what makes the regulators and enforcers tick. They are not petty bureaucrats who could not otherwise survive off the civil service rolls. Quite to the contrary, they are usually brilliant and aggressive professionals, mostly lawyers who could hold their own at any law firm. Respect them as co-equals. Remember they often have ambitions

beyond their current roles, and they typically believe that what they're doing is right, which makes them even stronger.

Understand to the "market" in which they operate, and that, in this market, their communications strategies are necessarily as purposeful as any that a target company might launch on its own behalf. On the one hand, they choose cases that promote public deterrence. They have a point to make, and the only way to make it is publicly. Assume, therefore, maximum media acuity on their end.

Often they launch sweeps, industry-wide dragnets that are tailor-made for media visibility. Here their audiences are not just potential malefactors, but also include members of Congress who reward them for being conspicuously aggressive, as well as their own rank-and-file staffers for whom an ongoing bloodbath is a real morale-booster.

Against such odds, companies under investigation or facing regulatory inquiries must implement PR counter-strategies. However, if a satisfactory arrangement with the government is still in the offing, they must do so in full awareness that, whatever is said to the press, or posted online, is tantamount to *a direct communication with the regulators or prosecutors themselves.* In such a situation, the best tactics include:

- The full participation of the company lawyers as members of the *media team* is absolutely essential. The media strategy must be fully in synch with the legal strategy. The company cannot be saying one thing to the regulators and enforcers via the media while the lawyers are directly telling them something altogether different.
- Companies should identify ways to defend themselves in a way that makes the regulators and enforcers *look good too*. Perhaps the government official can be quoted in company press releases or online. One professional firm, where a partner was being investigated for theft, quoted a Department of Justice spokesperson, thus underscoring that only one partner, and not the organization itself, was under fire.
- Joint communiqués or press releases with the authorities may also be possible if the company is not a direct target of an investigation or inquiry. If nothing else, the joint release will remind the public that the company is, in fact, not actually under suspicion. At the very least, asking the government to pre-approve all related press releases will show an elevated level of cooperativeness.
- If there are third-party supporters who are also respected by the regulators or prosecutors, the potential positive impact is obvious. Some of these supporters could even be influential on Capitol Hill, which, as we have noted, is a highly valued audience for all regulatory agencies.
- Stay positive in tone and content. Any resentment or outrage will be interpreted by the government as a sign of guilt. Counter-attacks are usually ill-advised. Even if the regulators and enforcers back off now, they'll be loaded for bear the next time — and the odds of there being a next time go up as well.

Casus Belli

The above best practices presuppose a situation in which a productive agreement can be reached with regulators or enforcers. It is all about protecting company reputation in a way that will not only be acceptable to the government, but may even be a welcome initiative from their point of view.

In situations where the government has crossed a line in the sand, where the battle lines are drawn, where nothing less than total regulatory or prosecutorial victory will satisfy them — in those situations, forget all we've suggested. They cannot be conciliated with pre-approved press releases, and it's probably too late for third-party supporters unless it's the president or the governor or a congressman with assigned power over the agency. At this stage of the game, a counter-attack may be the only affirmative defense at the company's disposal.

The first question then becomes, how do we define the point at which further cooperative efforts are hopeless? In most instances, the legal fact patterns will define it. In some instances, there may still be opportunity if, for example, only one or two executives have been indicted. Legal counsel is then the crucial source for determining if their offenses can be sufficiently isolated and that no further liability for the company as a whole is likely to develop.

At that point, the company can still protect itself, both legally and in the Court of Public Opinion, by *making the requisite sacrifice.* For the media, for shareholders and analysts, for internal audiences, the message is that a terrible problem has been solved and that the company aggressively cooperated in the solution. The result — which will be plain for all to see — is that a new day has dawned.

The second question is, how to avoid a Pyrrhic victory in which the public counter-offensive ultimately cripples the company's ability to do business in the United States on anything like a long-term basis?

The following fictionalized case — involving a company that clearly was beyond any hope of negotiating with the government — will provide some clues to what an effective strategy looks like under these circumstances.

In 2000, a Paris-based pharmaceutical manufacturer launches U.S.-based production and distribution of an ulcer medicine.

In 2003, there are reports of severe depression among some users. Under FDA pressure, the French parent company agrees to affix product warnings and conduct research.

In 2004, the company discovers a product manager, based in the U.S., simply destroyed test evidence that the drug is potentially dangerous. The U.S. Attorney indicts the manager and the company. The company fires the product manager and agrees to a deal with the government, whereby it will pay a huge fine and cease distribution in return for full immunity for all prior related acts. The agreement is effective Jan. 1, 2005.

In 2006, the fired product manager reveals that, in 2002, the COO was likely aware of possible problems and had guardedly advised him to "do what I had to do to make it right." Interpreting this communication as sufficient evidence of further company-wide malfeasance, the government rescinds its plea agreement, arguing that the company has violated the agreement by not fully disclosing prior bad acts, even though those prior bad acts pre-dated the terms of the agreement (and there is actually no real evidence of bad acts prior to the agreement becoming effective other than the say-so of an indicted participant).

The two sides are irremediably at odds, and rough justice is the best the company can hope for. Legal counsel advises that the government's action is indefensible, in part because the original

plea agreement was badly drafted and porous. Now the question is, how can the French parent company counter with an exculpatory public communications campaign that doesn't result in a war of attrition that it cannot possibly win?

To win, it must win now — and it must do so with campaign themes that speak to the abiding interests of multiple audiences. In most shooting wars with powerful public sector entities, effective strategies use the specific facts of the case in order to make powerful arguments and underscore powerful themes that go *beyond* the case.

The government's game is to use companies as poster children for larger iniquitous trends. The best response is for those companies to beat the government at that game by pointing to the even larger, even more iniquitous trends inherent in its actions.

The French parent company has two immediate strategic messages:

- The U.S. government greatly overstepped its authority by refusing to honor an agreement. By doing so, it is undermining basic American (read: "American," not "French") values.
- The government's betrayal of its own agreement is one more example of the ill effects of Enron and the other corporate scandals - not just corporate malfeasance, but a permanent imbalance of power as the government uses the scandals to justify nearly everything. It's called the Law of Unintended Consequences and it's more threatening to America (read "America," not "France") than anything Kenneth Lay or Jeffrey Skilling might have done.

Note that here the French company is arguing broader principles, not facts. Such argument is essential if companies battling the regulators and enforcers are ever to gain the crucial third-party allies, such as think tanks, academics, corporate NGOs, and politicians, who can sway public opinion and perhaps eventually change or moderate government action.

Crucially, however, the French company's strategy is not *just* about principle. The larger themes must also speak to interest — the collective interest of businesses and even of the government itself. In particular:

- If the U.S. breaks this agreement, why would other companies ever want to enter into a similar covenant? Allowing this aggression to stand could undermine regulators and enforcers everywhere.
- If one French company can be so betrayed, why would any other French company - or British company or Chinese company or Nigerian company - take a chance of doing business in the U.S.? We're on a slippery slope here, and American jobs are at risk.
- If the American government can ignore its promises to a foreign company, why can't foreign governments ignore their promises to U.S. companies? The slope just got more slippery as the growth plans of U.S.-based multinationals are now just a little less confident.

To win long-term in a public struggle with regulatory or enforcement agencies, the key is to therefore *isolate* the adversary. By basing campaigns on both principle and interest, the defending company garners support in the business community, because of the fear of other companies that

they too will be unfairly targeted and because of the likely economic consequences whenever government agencies act in bad faith.

Yet the campaign isolates the adversary from its own public sector compeers as well - regulators and enforcers at every level, who are being reminded that this action can only make their own lives more difficult.

In a sense, both our scenarios have at least one thing in common. To pursue a brand-protecting public campaign with the approval or even the blessings of regulators and enforcers, know where their interests lie. To fight them and win a pitched battle in public, the same knowledge is equally critical

Chapter 21 - Attorney General Investigations: A Political Battleground

Of all the authorities with the power to publicly scrutinize corporations, a state Attorney General is one of the toughest customers. Their investigations have the potential to combine the brand-threatening grandstanding of a Congressional inquiry with the legal liability presented by a regulatory inquiry or criminal trial. Former New York State Attorney General Eliot Spitzer set a new standard that survives his disgrace.

We often know that AG really does stand for "Aspiring Governor" from the first press release announcing an investigation to the leaks that give the story legs. Monetary penalties are so often significant for the simple reason that anything less is unlikely to generate the press that AGs covet. Conversely, if your company is only tangentially involved, the AG may opt for a small penalty today – only to use it later to show how they got you to acknowledge culpability.

For companies with a national customer base, 49 other state AGs may jump on the bandwagon after the first investigation – lending credibility to the government's case in the eyes of key stakeholders, putting the company on the defensive from the outset, and multiplying the potential losses. The need for coordination between legal and communications professionals is nowhere so critical than in determining a response.

The first order of business is to define the company's strategic objectives. In short, decide on what the "win" is – and then plan from there. Circumstances may change that objective, but begin with some notion of whether success will mean full vindication or a deal. Consider the consequences of further inflaming a resolute adversary by counter-attacking. You may choose to take the gloves off if you decide to fight by questioning the AG's political and personal motives.

Others have done so and lived to tell the tale. Some have come out ahead by refusing to be bullied. When Ken Langone – a Home Depot co-founder and former head of the New York Stock Exchange Compensation Committee – was targeted by former New York Attorney General Eliot Spitzer for allegedly misleading board members as to the scope of NYSE CEO Richard Grasso's pay package, he highlighted the political aspirations of his nemesis, which played well with important financial market audiences, who knew exactly what Langone was talking about.

As of this writing, four of the six claims in the AG's suit have been dismissed and, even though Langone still faces prosecution on the other two, his reputation remains largely intact. He has won a great deal of third-party support from groups such as the Center for Individual Freedom. As that group publicly stated, "Spitzer's move against Grasso and Langone was more about self-promotion than the public interest."

For companies that choose to cooperate, they must do so with an eye toward reputation benefits and losses. When current New York Attorney General Andrew Cuomo brought charges against Facebook for allegedly failing to protect minors online, the result was a partnership between the AG's office and the embattled social networking site that resulted in what has been called a "new model" to protect children online.

To be sure, you need to weigh the personal agendas and proclivities of each state AG before deciding if and how a Cuomo handshake might differ from a Spitzer handshake. In this case, Facebook set an industry gold standard, which would not have come about but for the AG's actions and the company's temperate response.

Public Investigations and Beyond:
Protecting Privilege When Working with Communications Professionals

By Michael N. Levy, Esq. and Richard S. Levick
From *Corporate Officers & Directors Liability Reporter*

Protecting the work of communications advisers from discovery is a narrow legal issue with extremely broad relevance to any corporation or corporate officer involved in litigation or facing the possibility of future litigation. The specific points of law involved in this question of privilege powerfully underscore the new reality of what businesses and business leaders now must do to preserve their reputations. In today's world, almost every legal crisis is also a business and reputation crisis, and attorneys and communications professionals must learn to work together effectively to further not only the client's legal interests, but the client's business and reputation interests as well.

In the last few years lawyers have sought, under the doctrine of the attorney-client privilege, to protect from discovery the work of the communications professionals who advise them during high-profile investigations and litigation. It is not a new discussion at all, as the underlying legal issues were first adjudicated nearly a half-century ago. Most of the cases from that era dealt with accounting consultants. The fact that today such cases mainly involve public relations firms is testament to the growing and, in many instances, indispensable role of the communications counselor in such crucial legal proceedings.

One need but reflect on what is often at stake to explain the rise of the litigation communications professional. Companies involved in high-stakes cases often face not just the penalties imposed after a loss in court, but also the possible long-term depletion of their brand equity in the court of public opinion. The personal reputations of directors and officers likewise may be at risk.

Litigants therefore often must wage war on both fronts and, to do so most effectively, the communications professionals need to have a seat at the table.

Once they take that seat, however, they may become privy to the innermost legal vulnerabilities of their clients. All lawyers will grasp readily that, if that happens, it is critically important to protect this shared information from disclosure to opposing counsel or prosecutors.

To best understand just how important the privilege issue is - and why it is one of the cutting-edge topics in litigation today - it is necessary to discuss what communications professionals actually do in high-profile matters.

All-Pervasive Strategies

As clients began to appreciate the substantial business and reputational risks inherent in most high-stakes litigation, they increasingly began encouraging their lawyers to include public communications as an integral component of their case strategies. Some clients, with customers, business partners, shareholders and their own employees on their minds, even began making a "litigation communication" strategy a prerequisite term of engagement when they sat down to decide which law firms to hire.

Once engaged, the communications professionals can be, and often should be, involved at the most fundamental strategic level. The mundane deliverables are assumed. For example, they

write and advise on "talking points." They identify key reporters. They negotiate story angles and content with editors. Beyond that, however, effective communications professionals will create multifaceted campaigns that inform, enrich and refine the legal strategy on all fronts, from the morning paper to the latest blog, by using the tools of their trade. These tools range from Web optimization (and thus "findability" by reporters) to introducing alternative stories.

Litigation communications can be understood as a three-pronged imperative: assess, control and treat.

Assess the Situation

For litigation and crises that potentially affect the defendant's long-term reputation, the intelligence-gathering process must encompass all objective facts needed to frame the communications strategy going forward. With any communications initiative, the initial assessment must incorporate but also go beyond the fact patterns likely to play out in court to identify the audiences - each with its own subjective and emotional dynamics - that may have impact both inside and outside the courtroom.

Nothing is more crucial than determining the audience. The formal assessment carried out by the communications advisers forces the whole litigation team to identify not only the prospective jury pool, but also the equity analysts, the newspaper editors and the public officials who may be critical observers of the litigation - and not just these generic categories, but specific individuals within each group.

During the assessment stage, the subjective factors that will affect perceptions should also be reviewed. Is one side liable to generate sympathy as an underdog? Are there conspicuous personalities who may attract or repel support? Will employees feel threatened by the lawsuit? Litigation involves people, not just facts, and the long-term effect of a lawsuit on the company depends on how people feel as well as think.

Control Communications

To control an evolving crisis, the communications professionals develop basic campaign themes based on the factors defined during the assessment and the internal and external stakes that have been identified. These themes should guide all communications going forward. They are predicated on the overall fact patterns but tailored in each instance for each audience identified and re-crafted as fact patterns change.

For analysts and shareholders, the messages may speak to the effect of the litigation on stock or other equity value. An abiding concern of these audiences is almost always closure. These audiences want to know what is being done to settle or win sooner so they can get a clear and uninterrupted prognosis of the economic picture ahead. Internal audiences may need messages about job security. "Business as usual" is a frequent theme here. Consumers may need to hear about the effects of a lawsuit on product or service availability as well as cost.

Selection of spokespeople is key to the control phase. Not just their expertise, but also their credibility and likeability, are decisive factors. In situations where the litigation will directly affect the future of the company, CEOs are naturally the leading candidates as spokespeople. On the other hand, CEOs are the wrong candidates in situations where their involvement will elevate matters that should be perceived as much less important.

Treat the Fever

To treat the emergent crisis, deliver messages both reactively and proactively. A well-reasoned, respectful exchange among the lawyers, the communications professionals and the client is essential here as the client must understand that proactive public communications often can increase legal exposure significantly. The decision to go proactive or reactive is also based on how the fact patterns of the case evolve on a day-to-day basis and what final public position the company chooses to take.

One treatment route is for the communications professionals to work behind the scenes with reporters and editors to dissuade or minimize coverage, sometimes by calling into question the credibility of the source, sometimes by offering the reporters a different and better angle or even an altogether different and better story.

In implementing an all-pervasive strategy, the lawyers will not be able to do their jobs unless they provide counsel to the client on what to say in public and how to say it. And, to provide that counsel, they must share a multifaceted range of information with the non-lawyer litigation communications advisers.

If a communications strategy is indeed part of the core of any litigation strategy, privilege is therefore the fulcrum on which the ultimate success or failure of a case - and the future of a corporate reputation - may be decided.

The Crux of the Matter

What complicates the question of privilege is that the courts have not really presented a uniform body of rulings on this matter. Fortunately, the confusion is not so much about whether non-lawyers can be protected - there's enough case law suggesting that they indeed can be protected - but the torturous question is under what circumstances.

The solution, in other words, lies in process: the terms and conditions under which the communications professionals are retained and subsequently utilized. Adhere to those terms and conditions, and privilege applies. Stray from those best practices, and the company's most guarded strategies and secrets could be discovered.

It should be emphasized that this crucial process, so necessary to ensure effective communication when it is needed most, is not merely something for the lawyer to worry about. To ensure privilege, all parties - lawyer, litigation communications adviser and client - must know the rules of the game, and they must all stay on the same proverbial page.

To fully understand the process, let's back up and take a brief (hopefully painless) look at a few of the cases that define the issue as it stands today. The seminal case is *United States v. Kove*l, 296 F.2d 918 (2d Cir. 1961), which, in a matter involving services provided by an accountant, defined the standard for privileged communications with non-attorney members of the legal team. For non-lawyers to be protected, their services must be sought "in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service, or if the advice sought is the accountant's rather than the lawyer's, no privilege exists."

Interestingly, the court in *Kovel* compared the accountant to a "translator" in that "[a]ccounting

concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases." Those "translations" are necessary for lawyers to do their job. Their job is covered by the privilege, so the translations are privileged as well.

Other rulings subsequently rejected specific claims of privilege yet are extremely useful because they tell us what not to do. For instance, *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995), rejected a claim of privilege for an accounting firm because the services provided were not sufficiently distinguishable from the standard, non-litigation work the accounting firm had done for the client. The court even noted that the accountant's invoices mixed the litigation-related work with other work the firm had performed.

Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000), held that a public relations firm's work was not privileged because the firm had not performed any work for the lawyer beyond what it might have done if hired directly by the client. The fact that the work was related to a lawsuit was irrelevant.

Enter Martha Stewart

In *In re Grand Jury Subpoenas,* 265 F. Supp. 2d 321 (S.D.N.Y. 2003), the court concluded that Martha Stewart's criminal defense lawyer would be "undermined seriously" if he could not guide her through the frenzy of media attention attendant to her case. Because, as suggested above, the lawyer would need the services of a PR professional to provide that critical guidance, communications with that non-attorney professional were held to be privileged.

Thus, what we are left with is a general principle and a number of specific practical steps that can be gleaned from the myriad rulings both granting and denying privilege in connection with non-attorney communications professionals. The general principle still stands from *Kovel*: Privileged communications are those that are made in confidence for the purpose of obtaining legal advice from lawyers.

Lessons from Past Cases

The practical steps may vary from case to case, but based on past rulings:

* Hire the communications firm to work exclusively on the litigation. It should not be simultaneously handling business-as-usual PR chores;

* Hire a communications firm that specializes in litigation communications so as to make clear your intent vis-à-vis privilege;

* Hire the litigation communications firm early in the legal process and make it part of the legal team. Waiting until near the end of the legal matter is not only debilitating and often fatal to the communications strategy, but it also undercuts the argument that the PR firm is a necessary part of the lawyer's provision of legal advice;

* Hire the lawyer first. Then have the lawyer hire the litigation communications firm;

* If the PR firm has worked on other client matters in the past or may do so in the future, draw up a separate engagement agreement - with the law firm, not the client - that unmistakably separates the litigation task from all others;

* The engagement agreement should clearly describe the litigation communications firm's role as that of "facilitator." Doing so gets you closer to the language of Kovel describing the non-lawyer as a "translator." Invoices should likewise include such descriptions;

* Clients should not talk with the litigation communications firm without the lawyer present - at least not at first. Any subsequent communications between the client and the litigation communications firm must be either with the lawyer present or expressly directed, controlled and authorized by the lawyer; and

* Lawyers and clients must communicate forthrightly about any key information (e.g., particularly devastating information to be used on crossexamination) where the risk of losing the tactical element of surprise at trial is so great that the information should not be shared with the communications professionals or anyone else outside the core trial team. If the client agrees with this evaluation, the lawyer must respect the role of the communications professional and be sure that the closely held information in no way undercuts the statements the communications professionals are making publicly. In turn, the communications professional must respect the roles of the lawyer and the client in assessing whether this information simply should not be shared.

Conclusion

The objective for any company or officer embroiled in or anticipating litigation is to take all steps necessary to ensure that its communications advisers can deliver maximum public support without sacrificing the privilege. When the corporate brand is at risk, nothing less than the fullest and most open dialogue possible among all advisers should suffice.

There may be a more fundamental lesson to take away as well, which is to understand the abiding importance of what you are trying to protect. The communications strategy outlined above, with its assessment of risks, its identification of multiple audiences and its emphasis on long-term business reputation, is not an add-on to a litigation strategy. Beyond the present crisis, it is a blueprint for the future.

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Chapter 22 - Investigative Reporters: Prepare for Ambush

There was quite a surprise awaiting the founder of a controversial government contracting firm. As the gentleman left his suburban home one morning, a camera crew from a national television network was waiting for him, eager to discuss a lawsuit charging that his company was culpable for, literally, murder.

It's called an "ambush interview" and it's a favorite tool of investigative reporters seeking to catch their targets off guard. The gentleman's response was not atypical: He refused to talk and jumped in his SUV. As the cameras kept rolling, the CEO looked very much like a man in hiding.

The CEO's most significant mistake was failing to prepare for an entirely foreseeable threat. At the moment the lawsuit first appeared on the company's radar screen, the most aggressive sort of media inquiries should have been anticipated and responses crafted. Imagine the following alternative to what actually happened:

Reporter: "What do you have to say to the families whose loved ones were killed?"

CEO: "First and foremost, we offer our sympathies and total support to the families of those who lost their lives in this tragic matter. That said; we are confident that any investigation will show that we behaved in a totally responsible and moral way. While I'm not at liberty to discuss details of an ongoing case, I'd be happy to answer further questions at the appropriate time and place."

Three simple sentences would have thus provided a measure of control so conspicuously absent when the camera started rolling. Nor are all ambush interviews non-negotiable as investigative reporters may agree to postpone to a specific time and place. If not, there are skills that can still be mastered and applied at the critical moment:

- Look directly at the camera or the interviewer. If you don't, you'll look guilty no matter what you say, especially when the audience knows you were caught by surprise. One darkish downward glance can become the dominant image on television, online, or in print.
- Speak in sound bytes. The less explanation, the better. The less verbiage, the better. Don't give the editor a lot of choice about what to cut and what to broadcast.
- In any interview, it's always important to not repeat a negative; but at no time is it more important than during an ambush interview. You don't want the entire broadcast to be nothing more than your assertion that "we didn't do it."

Remember, a phone interview can also be an ambush, and print media reporters have their own myriad ways to spring a trap. In some cases, the "ambush" question may have nothing to do with the ostensible subject of the interview and is only asked after a series of blander questions. Yet it's the only real reason for the call.

Low Comment:
An Eye toward Strategy

By Gene Grabowski
From *LawCrossing*

For the better part of a century, conventional wisdom among attorneys held that you were best off declaring "no comment" when news reporters asked for information about pending litigation. The relationship between lawyers and reporters was guarded at best and sometimes downright adversarial. After all, why would attorneys or their clients risk saying anything in public that could come back to haunt to them in the courtroom or jeopardize ongoing legal negotiations?

This admonishment amounted to a blanket muzzle on lawyers and their clients that served the defense well in the days before mass media became a centerpiece of American culture. But, in the last 15 to 20 years – as the plaintiffs' bar has effectively demonstrated that jury pools, and even judges is some cases, can be conditioned and influenced by public communications campaigns – this strategy has proven to be a losing one. And not just in the courtroom.

At a time when the millions of dollars at stake in litigation are often dwarfed by the billions in brand credibility and trust that high-profile defendants stand to lose in the court of public opinion, "no comment" is tantamount to uttering: "My client is guilty." That's why, with increasing frequency, smart attorneys are working to identify the most effective strategies for evolving from "no comment" to what I call *low comment* – the strategy of strengthening their legal case while protecting their clients' reputations in the marketplace.

And just what is low comment? It's the art – and it is an art – of providing influential information to the media in such a way that doesn't jeopardize a case. It's deflecting what adversaries are doing publicly to strengthen their position with key audiences. It's evoking sympathy from potential jurors, judges and the general public. And it's a tested tactic for securing a settlement – which is the underlying, if unspoken, goal of almost every high-profile defendant facing litigation today.

Indeed, the fact that most high-profile cases end in settlement has provided an even greater rationale for lawyers and their clients to open up – for if there is no trial, there is usually less risk. Today, legal battles are fought on the front pages, over the airwaves, and online before, and after, they're in a courtroom. And the outcome of these public engagements often determines who wins and who loses.

For these reasons, every major legal case in America today employs a communications strategy. The news media are no longer enemies to be stonewalled, but rather allies to be cultivated. A sound communications strategy is imperative for shaping perceptions and controlling the story – whether it's being told to a jury during summation, or a media pool that has gathered on the courthouse steps. And because most lawyers recognize that they possess neither experience nor the expertise to effectively master the media, they are teaming up with communications professionals who know how to navigate the news cycle and deal with reporters well-versed in piercing even the thickest public relations armor.

The footprint of this newly-forged partnership between legal and public relations professionals is evident every time an attorney, defendant, or potential defendant is quoted on camera, in print, or – increasingly today – online.

Modern crisis statements made for public consumption are carefully tailored to convey empathy, but not culpability – as was the case when Mattel's Chief Executive, Robert Eckert, employed the following example of legally permissible speech when his company was embroiled in a lead-paint toy recall earlier this year: "Nothing is more important than the safety of our children… Our long record of safety at Mattel is why we're one of the most trusted names with parents… I am confident that the actions we are taking now will maintain that trust."

Today, statements made by media-savvy attorneys show the hallmarks of public relations strategy in their direct, to-the-point, colorful, and quotable nature – as was the case when Johnny Cochran (one of the first lawyers to truly understand the power of the media to sway a case) uttered perhaps the most famous litigation-related words in history: "If it does not fit, you must acquit."

Perhaps the greatest influence that communications professionals wield in the legal process is demonstrated when litigants correct a losing communications strategy. When S&M NuTech's leading pet dental treat, Greenies, came under fire for allegedly creating esophageal blockages in dogs, the first response of the company's founders was to declare to the media "our products are perfectly safe." But the problem was that those words could undermine their case when projected on a PowerPoint slide in a courtroom after numerous veterinarians' affidavits to the contrary were entered into evidence.

After the manufacturer's lawyers consulted with crisis communications professionals, that message was altered to "when used properly according to the directions on our packaging, our products are perfectly safe." Ten well-placed words protected S&M NuTech against further liability. And when they empowered disinterested third-party veterinarians to deliver that same message in the media, S&M NuTech effectively defended its brand in the realm of consumer relations.

And of course, the most credible voices speaking on behalf of clients in the court of public opinion aren't the clients or the attorneys at all. Instead, allied spokespeople who are considered experts are identified recruited and deployed to make an effective public case. For Greenies, it was veterinarians who advised how to use the product safely on network morning news programs. For toymakers, it was safety experts and parents blogging online and speaking with news reporters. For clients like the detainees in Guantanamo or the governments of Dubai, it's policy experts at U.S. Think Tanks and universities authoring newspaper opinion pieces.

In this brave new legal world, the only thing worse than no public relations strategy is one that is driven by a lawyer who is blind to the subtle nuances and techniques of public communication. While lawyers are among the most brilliant professionals working today, most simply don't have the media experience required in crisis situations. And while public relations professionals are pretty smart in their own right, most don't possess the legal knowledge to know where the line between solid communications strategy and increased liability lies.

That's fundamentally why we're increasingly witnessing the application of the complementary skills of attorneys and communications professionals in nearly every major piece of litigation in the public eye.

Today, applying the *low comment* strategy with the news media the way to win both in the courtroom and in front of the cameras – and it takes lawyers and communications professionals working together to effectively manage it.

Chapter 23 - Blog Attacks: All Bets Are Off

There was a time when the blogosphere was widely perceived to be the realm of kooks and conspiracy theorists – a corner of cyberspace where any self-proclaimed crusader with an Internet connection could excoriate corporations (or anyone else) without regard for fact or fairness.

Today, the line between bloggers and traditional journalists is gone, and so is any perceived credibility gap between these comparably powerful media voices. In fact, bloggers break and shape news stories before they reach the mainstream press. They demand and increasingly get media credentials for news conferences. They call public affairs offices for quotes.

And, they generate "viral" coverage and commentary that shows up everywhere. In a recent study by the Center for Media Research, 71% of reporters said they check a blog list on a regular basis, 20% said they spend more than an hour a day checking blogs, and 57% said they read blogs two or three times a week.

For companies that find themselves subject to this worrisome worldwide spotlight, a first step is to assess the attack's potential credibility. Bloggers may be more credible than they were ten years ago but not all bloggers are due equal attention and respect. Identify the "high-authority" bloggers covering your industry. They are, and deserve to be, the online resources taken most seriously.

Second, research who is responsible for the blog. Unfortunately, this task is often difficult as attribution is the sole prerogative of the author. The blogger could be a well-funded NGO with a long-term agenda. It could be a front for a plaintiffs' coalition enlisting members in a class action. It could be an employee venting about a recent policy decision.

Third, if the adversary is a serious one, try to learn if the posting is but one piece of a well-integrated campaign to pressure a policy change or force a lawsuit settlement, or if it's simply a generalized attack on the company's reputation.

Strategic and tactical determinations can only be made if there are systems in place to monitor all mentions of the company in the blogosphere. Such monitoring is now an information age necessity. Proverbially, forewarned is forearmed.

In cases where a response is deemed appropriate, it may be advisable for companies to respond in kind with optimized blogs of their own. If so:

- Update the blog regularly to demonstrate to the blogging community that the company takes the medium very seriously;
- As appropriate, diversify the communicators to offer not just official C-Suite positions, but the rank-and-file perspective that journalists value as well; and
- Accept some safe degree of controversy in the responses that get posted.

Finally, link to other blogs that are likely to support the corporate position. In this critical online culture, such online resources represent the best kind of third-party endorsement.

Social Media – A Brave New Online World

An interview with Shel Israel

From *High Stakes*, March 2008

Shel Israel and Robert Scoble literally wrote the book on business blogging, *Naked Conversations*. In this conversation, Shel talks about what every communicator needs to know before engaging stakeholders at the crossroads of technology and social interaction – a brave new online world that is also known as "social media."

With all of the different social media venues out there, how is an organization to know which one is right for them?

Shel: When we wrote the book, blogging was social media. But now, if you're a business, or an institution, or an individual, you can blog, you can create video, you can Twitter, or you can do combinations of them all. You need to identify and utilize the tools that are right for you.

But, what's important isn't the tools. What's important is the ability to have two-way conversations with your customers rather than sit around and devise marketing methods filled with adjectives and legal disclaimers and shovel them into the foreheads of people who just don't want them.

We don't like being marketed to. I just gave a talk at Intel and asked the audience, "Do you like to see other people's messages?" Three hands went up and I think they were lying. Why do companies keep doing things their customers don't like? Survey after survey shows that ads don't influence us nearly as much as they used to. What influences us is our friends. What influences us to see a movie isn't the big ad on TV; it's our friend telling us that he went to see it and it was great. That's what social media is all about.

We're ending an era in which messages were sent out all over the world through mass communications and markets were "made" by those broadcast messages. Tell me, do you enjoy going to a Website for important news and seeing some little bug jumping up and down trying to sell you something?

My point is that social media and blogging are better, more efficient, more effective ways to have conversations with your customers than little cartoon ditties on television – and that conversations have a far greater impact that just talking at an audience. The control is going from centralized organizations to their communities.

Of course, the communities were in control all along, but nobody realized that.
This decentralization is the real challenge for traditional enterprises, because they're used to mass communications and now have to convert to some sort of massive micro communications.

The question isn't whether successful companies will make the change. The question is whether companies will start soon enough for the long transition required to change from thinking that they are the ones in control to realizing that the real commands and controls are in the hands of their customers. They don't need to necessarily start a blog, but they do need to understand what is being said about them and try to participate in the conversation.

So, if time is of the essence, what should organizations be doing to get started right now?

Shel: Probably, the best way is to hire someone right out of college who's been living with this stuff since they were 12 years old. Get educated by that person and see what options would work best for you.

And if that person doesn't have the pull necessary to incite action?

Shel: No matter how dark a company is, there's a social media champion who says, 'People say we're so bad, but we're not and we need to tell them that. We have these customers that are angry and, if we listen to them, they might not be so angry.' In those companies there's an old and potbellied CEO who says, 'Not here, brother. Not while I'm in charge.' The good news is that this guy is going to leave and will be replaced by someone who grew up with the Worldwide Web, doesn't read newspapers, and respects social media. The companies that do not do this will persevere for a while, but eventually will be replaced by companies that use this technology. So be patient; change will come.

All revolutions start in the hills and get to the cities. Personal computers came in through the back door of enterprise 25 years ago. It always starts with somebody not doing what the keepers of the gate were telling them to do. The state of social media now is that it's at the stage where normalcy is just the beginning. The thought of someone arguing about why we should be ready to use social media five years from now makes about as much sense to me as arguing about why we should have fax machines. These are false issues.

I guess what I'd tell the CEO is this: 'Don't listen to me; go listen to your kids. Picture what the world will look like when their buttocks replace yours in that chair and their feet and wallets replace our feet and wallets in the marketplace.'

To switch gears a bit, how should organizations handle the bloggers who sometimes write about them? Do they deserve the same respect as mainstream journalists?

Shel: There are reporters at the New York Post right now who are interviewing aliens about kidnapping women from New Jersey – and they call that journalism. There are a good number of bloggers who are not journalists, who do not dig into the facts, and do not get it correct – but there are many who do.

The definition of who is a journalist is changed. While bloggers are steps on a press tour, most of us – including me – are not media hits. We're part of the conversation. When we report, we'll say something like, 'I liked him' or 'he's full of it' or something very candid that a traditional journalist would not be able to say. This is really a tough turn. You need to do more to find who's credible and who is not…you also need to decide what's getting more influential and what's getting less so.

Don't make this decision based on whether they're a blogger – base the decision on individual journalistic merits.

Chapter 24 - NGO and Activist Attacks

Total victory for corporations in their eternal struggle with NGOs and other resolute activists seldom comes from proving the adversary wrong. By undermining their attacks, you pursue an essentially defensive strategy that can lead to ongoing and important partial victories, but partial victories only.

Total victory, by contrast, is achieved by making an adversary's legitimate issue your own. Run to the controversy. Run to the adversary. It is more than cooptation of the opponent. It is taking the leadership role on the issue away from the opponent, and, to do so credibly, at the earliest possible opportunity.

Consider clothing giant The Gap, Inc. The multinational corporation has endured more than a decade of on-and-off protest against what activists say are its overseas "sweatshops," "immoral exploitation" of children, and "shoddy" environmental record. In recent years, sales fell in several fiscal quarters – some say in part because of well-coordinated protests and boycotts in the store's home state of California, and extending across the United States as well as into Europe and Asia.

But to its credit, Gap business and communications strategists have responded efficaciously to foster fair and humane working conditions in its factories, thereby countering labor-abuse claims with real solutions. As part of its "Social Responsibility Study," the company established one of the most comprehensive factory-monitoring and labor-standards programs in the apparel industry.

A stellar strategic move, the program earned praise even from adversarial NGOs. Yet activists still target the company and others like it for a variety of alleged offenses – a persistence that only underscores the extent to which other businesses are perennially subject to guerilla attacks, at one level of escalation or another, by NGOs and special interest groups.

The Gap playbook thus offers a prototype of the strategic response we've described. The protesters had a legitimate point, but The Gap took a leadership position by acknowledging the problem and working toward a similar advocacy program. The Gap thus went from villain to hero, and a very special sort of hero at that.

If the crisis progresses to a point where protestors and camera teams will inevitably show up at your corporate headquarters – or other company locales – boards and corporate counselors must advise precise steps to limit and even eliminate the public relations damage:

- Distribute instructions to employees and security, clearly describing how they should react – and not react – to end or avoid confrontation.
- Assume the activists have alerted reporters and provide talking points for one spokesperson at each office or locale where the protestors are likely to show.
- Stipulate in no uncertain terms that all employees must direct media questions to the communications team.
- Ensure that the police will be on the scene to prevent violence and property damage.
- Videotape the protest for protection in the event of litigation and to counter irresponsible or inaccurate media coverage.

When activists are involved, crisis communications demand both strategic forethought and tactical preparation. Rest assured, if you're not armed on both fronts, they will be.

Anti-corporate Terrorism: A Daily Occurrence

By Richard S. Levick and Larry Smith
From *Stop the Presses: The Crisis and Litigation PR Desk Reference*

Non-Government Organizations (NGOs) have decisive advantages in their sorties against global corporate capitalism. Passionate, agenda-driven warriors, they don't expect to win by simply arguing their cases in the media. The really radical ones know how to fight hard on many fronts. They know how to spot the soft underbelly. And they will utilize every weapon at their disposal to pierce it.

Consider one instance that shows just how formidable an NGO can be, and how a counter-offensive media strategy is both possible and sometimes necessary.

Huntingdon Life Sciences is a UK-based biosciences company with offices and investors throughout the United States. It does chemical testing on behalf of large companies and, since it uses animals in these tests, the company fell perilously afoul of an NGO called Stop Huntingdon Animal Cruelty (SHAC).

SHAC's tactic was to intimidate the employees, not of the company itself, but of its suppliers, actually going to people's homes and demanding that they pressure their employers to stop doing business with Huntingdon.

SHAC struck pay dirt with Marsh & McLennan, a major insurance company selling to Huntingdon. The insurer bowed to the pressure rather than invest a considerable sum in fighting back simply to support one small and, by its lights, insignificant customer.

The British government stepped in and eventually provided Huntingdon with insurance. But SHAC had sent a potent message to other NGOs: *This is how you can fight and win! This is how you should fight and win!* Meanwhile, as a parallel strategy, SHAC put so much pressure on investment firms Merrill Lynch and Charles Schwab that both companies eventually announced that they would no longer trade Huntingdon stock for investors. Other firms followed suit.

What might an anti-SHAC offense look like? Exposing SHAC's methods is certainly a beginning but the strategic fulcrum is that SHAC's methods raise serious legal issues as well. *It is therefore as viable to make people afraid to associate with the organization as to make insurers and investment firms afraid to associate with Huntingdon.*

Sometimes the best counter-attack is a mirror image of the adversary's own strategy

HOW TO PROTECT PRIVILEGE WITH RESPECT TO COMMUNICATIONS WITH LITIGATION-RELATED PUBLIC-RELATIONS CONSULTANTS

by Charles L. "Chip" Babcock* and Crystal J. Parker**

Litigation specialists generally agree that many cases are decided not only in courts, but also in the court of public opinion. This is especially true when high-profile clients or salacious subject matters are involved. A New York court has noted that the media, prosecutors, and law enforcement may engage in activities that color public opinion to the detriment of the subject's reputation and even to the detriment of the subject's ability to obtain a fair trial, such that advocacy in the public forum is necessary.[1] Not only can media coverage lead to a biased jury, but it can create such negative publicity that affected companies have a financial incentive to settle cases to avoid further reputational damage even where they are confident in the merits of their case. Companies often fear that by the time the case is concluded, the press will no longer be interested in the story, and the negative publicity will have already taken its toll.

Several courts have recognized that efforts to control media messages are part of an attorney's duties. Justice Kennedy (writing for himself and Justices Marshall, Blackmun and Stevens) in *Gentile v. State Bar of Nevada* stated that:

> "An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."[2]

Some courts have even awarded attorneys' fees for public-relations efforts.[3]

Even the American Bar Association has recognized the lawyer's role in the media; in 1994 the ABA changed an ethical rule to allow an attorney to correct false publicity.

Given the importance of dealing with the media and most attorneys' lack of experience or education in dealing with the media, many companies turn to public-relations consultants to

[1] *See In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp.2d 321, 330 (S.D. N.Y. 2003).
[2] 501 U.S. 1030, 1043 (1991).
[3] *See, e.g. Gilbrook v. City of Westminster*, 177 F.3d 839, 877 (9th Cir. 1999) (affirming an attorneys' fee award for media and public relations work in a civil rights action); *Child v. Spillane*, 866 F.2d 691, 698 (4th Cir. 1989) (stating that attorneys should be compensated for public relations in cases involving issues of vital public concern).

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guide their media strategies. But as necessary as such consultants are, there is an inherent conflict between public-relations consultants, whose goal is often to create credibility by avoiding the appearance that the company is trying to hide something, and attorneys, who often find the need to protect information or disclose it in a way that is consistent with legal strategy. This conflict often results in animated debate between the public-relations consultant and corporate counsel about confidential information and how it should be used. And because attorneys are often most familiar with the factual aspects of litigation or a business crisis, it is only natural that attorneys and media consultants would communicate about issues such as the facts of the case, some of which may be confidential, and how to enmesh the litigation and media strategies.

Although intuition might indicate that these communications regarding strategy would be privileged, case law has indicated that some communications with public-relations consultants are not privileged. Some cases in the early 2000s spurred articles claiming that companies and public-relations firms need only follow a few steps to ensure their communications are privileged. There is no fail-safe way to protect your communications, but there are steps corporate counsel and public-relations consultants can take to make it more likely that a court will find that the communications are privileged. This article sets forth those steps, then provides a summary of case law in the past nine years that addresses whether communications with public-relations consultants are protected under the attorney-client and work-product doctrines.

TIPS TO PROTECT COMMUNICATIONS WITH PUBLIC-RELATIONS CONSULTANTS

- **Outside counsel should hire the public-relations consultant**. A New York case held that communications would not have been privileged if the company had hired the consultant directly.[4]

- **Invoices for the public-relations consultants' services should be billed through the law firm, not through the company.**[5]

- **Hire a public-relations firm that specializes in media relations related to litigation.** A New York Court has noted that this was a factor in holding that the communications with the public-relations firm were privileged.[6]

- **Make sure the engagement letter with the public-relations firm states the legal purpose for hiring the firm.**[7] A New York Court has recognized the following as valid legal purposes: advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, seeking to avoid or narrow charges brought against the client, zealously seeking acquittal or vindication, and how possible statements to the press would be reported in order to advise a client as to whether the making of particular statement would be in the client's best interest legally.[8]

- **All communications with the public-relations consultant should involve an attorney if possible.** Although having an attorney present is not determinative in some jurisdictions, it is generally considered a factor supporting protection of the communication.

- **Public-relations consultants should be hired for particular projects.** If the consultants are hired to deal with the company's media image generally, some courts are more likely to find that consultants were not hired for a legal purpose even when working on a particular piece of litigation.

- **Make sure the communications with public-relations consultants show on the face of the communication how it is related to the litigation.** For example, an email from the public-relations consultant to an attorney shouldn't just say, "Please review the attached press release and let me know your thoughts." It should say, "Please review the attached press release so we can discuss whether it is consistent with your legal strategy and any legal implications the press release may have."

- **Instructions to the public-relations consultant should be requested in writing by an attorney.** Make sure to follow up any verbal request with a written request.

- **Access to work performed by the public-relations consultant at the request of the attorney should be limited to the legal team and those within the company that are involved in the litigation.** These documents should be password protected and should be stored in an area with limited access.

- **Discuss the legal implications of public-relations issues in the documents**. For example, if the documents contain drafts of a press release and the attorney's edits, make sure the comments show that the attorney was considering the legal impact of alternative expressions rather than just providing editorial comments. Although this seems like a subtle distinction, many courts have held that communications were not privileged because it appeared on the face of the document that the attorney was providing editorial rather than legal advice. Sometimes the legal implications of what appears to be editorial advice can be stated in comments to the document. Courts are much more likely to credit these comments when they are provided at the time the edits are made rather than after the fact.

- **Don't disclose them!** Many of the cases dealing with this subject involve an inadvertent disclosure of the documents at issue. While inadvertent disclosure generally will not waive privilege if the proper procedural rules are followed, opposing attorneys are much more likely to spend the time and attention trying to get the documents into evidence if they know that the documents contain helpful information for their case. Moreover, if they are inadvertently disclosed, the opposing party will likely file them with the court for review, possibly prejudicing the judge. Many cases also indicate that the court will be

[4] *See In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp. 2d 321, 331 (S.D. N.Y. 2003).

[5] *See id.*

[6] *See In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 219 (S.D. N.Y. 2001).

[7] *See id.*

[8] *In re Grand Jury*, 265 F.Supp.2d at 331.

more likely to hold the communications are not privileged if the court finds information in the documents that does not support the party's factual assertions in the case.

- **Make sure the documents are listed on a privilege log.** A Texas court has held that documents that were not included on a privilege log but were later discovered by the opposing party in a deposition were not privileged because the party asserting the privilege had not included the documents on its privilege log and the documents were not prepared in anticipation of litigation.[9]

- **Use of the communications or materials may result in their waiver.** A Tennessee court has held that an otherwise privileged report lost its privilege after the party asserting it stated that the report existed and supported the party's position in a public-relations offensive.[10] Courts generally hold that the privilege cannot act as both a sword and a shield.

- **Keep in mind that work product may be discoverable.** Under federal law, an opposing party may overcome the work-product doctrine if it can show "substantial need" for the materials and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." The exception to this rule is when the documents contain the "mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation."[11]

SUMMARY OF RELEVANT CASE LAW

In reviewing these cases, keep in mind that in many situations, it is impossible to determine what law will apply at the time of the communications. The communications may arise before litigation, in which case it will be unclear where litigation will occur. Even in cases where the company is already involved in litigation and therefore knows the applicable jurisdiction at the time of the communication, communications in one case or prior to litigation may become relevant in subsequent cases in different jurisdictions. Therefore, it is important to be aware of case law in different jurisdictions. Moreover, because case law in some jurisdictions is limited, courts in such jurisdictions are likely to look to other jurisdictions' treatment of similar communications for guidance.

Several cases have recognized that communications between a company or its attorneys and public-relations consultants are privileged. New York courts have been the leader in jurisprudence in this area. In one of the first cases to address the issue, *In re Copper Market Antitrust Litigation*, a New York court held that communications with a public-relations firm hired by a Tokyo company were privileged.[12] In that case, the Tokyo company hired the public-relations firm to act as its agent and spokesperson with respect to the Western media regarding an investigation and subsequent litigation concerning an alleged conspiracy to manipulate global copper prices. The court held that although the consultants provided only public-relations services, the communications were privileged because the legal ramifications and potential liabilities stemming from the communications were material factors in their creation and because the public-relations consultant was privy to confidential information.[13] The court noted that the public-relations firm specializes in litigation-related crisis management and that it was clear that the company retained the public-relations firm "to make sure its statements would not result in further exposure in the litigation which grew out of the copper scandal."[14]

The court held that the public-relations firm was the functional equivalent of an in-house public-relations department and should be treated no differently than the company's employees. The court noted that communications are privileged if they are made by employees acting at the direction of their corporate superiors to supply information needed for legal advice where the communication concerns matters within the scope of the employees' corporate duties and the employees are aware that the communications are for the purpose of rendering legal advice.[15] The court held that under the facts of the case, the public-relations firm was the "functional equivalent" of an employee, and thus the communications were privileged.[16]

The court also held that the communications and materials prepared by the public-relations consultant were protected by the work-product doctrine.[17] The court held that because the materials were prepared in collaboration with the company's attorneys in the context of litigation, they were "documents prepared by or for a representative of a party, including his or her agent."[18]

Just two years later, a New York court again ruled that communications with public-relations consultants were privileged in *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*.[19] In that case, Judge Kaplan of the Southern District of New York held that confidential communications between lawyers and public-relations consultants hired by the lawyers to assist them in dealing with the media are privileged as long as the communications are made for the purpose of giving or receiving advice directed at handling the client's legal problems.[20]

In *In re Grand Jury*, there was intense media coverage of a high profile client (Martha Stewart) being investigated by prosecutors and regulators.[21] A public-relations firm was hired to communicate with the media in a way that would bring balance and accuracy to the media coverage so that prosecutors and regulators could make their decisions without undue influence from the negative press coverage.[22]

In holding that the communications between the legal team, client and public-relations firm were privileged, the court noted that the attorney-client privilege protects not only

[9] *See In re Anderson*, 163 S.W.3d 136, 141 (Tex. App.—San Antonio 2005, no pet.).
[10] *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 788 (Tenn. Ct. App. 2000) (stating that "a party may not use a work product to publicly further its cause offensively as a sword, and then assert the benefit of privilege as a shield.")
[11] Fed. R. Civ. P. 26(b)(3).
[12] 200 F.R.D. 213, 215 (S.D. N.Y. 2001).
[13] *Id.* at 219.
[14] *Id.* at 221.
[15] *Id.* at 218.
[16] *Id.* at 220.
[17] *Id.* at 221.
[18] *Id.*
[19] 265 F.Supp.2d 321 (S.D. N.Y. 2003).
[20] *Id.* at 323-24.
[21] *Id.*
[22] *Id.* at 323.

communications by the client to the lawyer, but also communications by the lawyer to the client.[23] The Court also noted that the privilege protects those assisting the lawyer in the rendition of legal services, such as secretaries and law clerks, and has been applied even more broadly to encompass communications with an accountant to enable the attorney to understand the client's situation in order to provide legal services, citing *United States v. Kovel*,[24] which had held that communications between an accountant and an attorney were privileged because the accountant served a legal role as an "interpreter" of the client's complicated tax story.[25] In determining whether the public-relations firm at issue was involved in providing a legal service, the court noted that the role of lawyers has expanded to include, in some instances, advocating for the client in the court of public opinion.[26]

The court laid out several situations in which a lawyer may need to consult a public-relations consultant regarding legal issues: "advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions," "seeking to avoid or narrow charges brought against the client," "zealously seeking acquittal or vindication," and how possible statements to the press would be reported in order to advise a client as to whether the making of a particular statement would be in the client's best interest legally.[27] The court held that whether the communications took place in the presence of the attorney was not important so long as the communication was for legal purposes.[28] With respect to the communications in that case, the court held that all but two conversations with the public-relations firm were privileged.[29] One unprivileged conversation was simply the public-relations firm asking the client's opinion of the media coverage on a particular day and the other concerned a problem with a wire story.[30] In both cases, the court held that the communications were not for the purpose of obtaining legal services and therefore did not fall within the attorney-client privilege.[31]

The court also held that the documents were also protected by the work-product doctrine.

The Court stated that communications between a client and a public-relations firm would not be privileged if the client had hired the firm directly, even if the firm was hired only with respect to a legal situation.[32]

That same year, in *Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, however, a New York court ruled that communications with a public-relations consultant were not privileged.[33] In that case, a company hired a public-relations consultant who was also an attorney to help deal with media attention he suspected would result when his client filed a lawsuit.[34] The public-relations consultant entered into an agreement with the company that explicitly stated that the relationship was for the purpose of rendering legal advice and that communications between the parties would be confidential and privileged.[35] The consultant stated in an affidavit that she reviewed materials received from the client not only from the standpoint of public relations, but more important for the impact on the litigation strategy.[36] She advised the company regarding handling media communications, including issuing a press release.[37] Upon reviewing the communications, the court found that there were no requests for legal advice.[38] The court found that the communications were for standard public relations and therefore the documents were not shielded from discovery by the attorney-client privilege.[39] The court distinguished the case from *In re Grand Jury Subpoenas* because the lawyer had not identified any nexus between the consultant's work and the attorney's role in preparing the complaint or the case for trial.[40] The court stated that "[a] media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice.[41]

However, the court held that public-relations consultants are a representative of the company for purposes of the work-product privilege and determined that the work-product privilege applies to documents created "because of" litigation, even where the document is not created "primarily" or "exclusively" for litigation.[42] The court held that all communications with the public-relations consultant were protected under the work-product doctrine.[43]

A D.C. Circuit Court has held that the attorney-client privilege extends to communications between a client and its public relations and government-affairs consultants based on an affidavit stating that the attorneys worked with the consultants in the same manner as they did with full-time employees and that they were integral members of the team that dealt with issues intertwined with the litigation and legal strategies.[44] Citing *In re Copper Market Antitrust Litigation*, the Court held that under the circumstances, there was no reason to distinguish between employees and hired consultants so long as they possess information needed by attorneys in rendering legal advice.[45] The court did not address whether the communications were for the purpose of providing legal advice.

However, beware of some cases that have held that communications with public-relations consultants were not protected by the attorney-client or work-product doctrines. In *de Espana v.*

[23] *Id.* at 324.
[24] 296 F.2d 918, 922 (2d Cir.1961)
[25] *In re Grand Jury*, 265 F.Supp.2d at 325.
[26] *Id.* at 327-28.
[27] *Id.* at 331.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 331 (S.D. N.Y. 2003).
[33] No. 02 CIV 7955, 2003 WL 21998674 (S.D. N.Y. Aug. 25, 2003).
[34] *Id.* at *1-2
[35] *Id.* at *1.
[36] *Id.* at * 1-2.
[37] *Id.* at *2.
[38] *Id*.
[39] *Id.* at *3.
[40] *Id*.
[41] *Id*.
[42] *Id.* at *4 (citing *United States v. Adlman*, 134 F.3d 1194, 1195 (2nd Cir. 1998).
[43] *Id.* at *5.
[44] *Federal Trade Comm'n. v. Glaxosmithkline*, 294 F.3d 141, 148 (D.C. 2002).
[45] *Id.*

American Bureau of Shipping, a New York court ordered the production of notes from phone conferences and communications with a public-relations firm, holding that they were not protected by the attorney-client or work-product privileges.[46] The court dispensed with the argument that the attorney-client privilege applied by merely stating that press and public-relations strategies are non-legal issues and therefore not protected. With respect to the work-product privilege, the court held that "ABS would have created notes concerning press and public-relations strategies in the normal course of business without the threat of litigation," and therefore the work-product doctrine did not apply.

Similarly, in *New York Times v. United States Dept. of Defense*, a New York court held that a "draft editorial," "talking points" and related notes and comments drafted for public-relations purposes were not work product because they were not created "because of actual impending litigation."[47] In *NXIVM Corp. v. O'Hara*, a New York court broadly ruled that "if he was advising NXIVM on anything and everything other than legal services, whether business, media, public relations, or lobbying, there is no attorney-client privilege."[48] The court went on to distinguish the case from *In re Grand Jury Subpoenas* by noting that an attorney was not involved in the communications at issue and the public-relations firm did not receive any instructions or seek any guidance from the public-relations firm to help the lawyers advise the client.[49] The court noted that the privilege was intended to protect strategy about the litigation itself, not about the effects of the litigation on the client's public image.[50]

Other courts have also appeared more reluctant to protect communications with public-relations consultants. A Louisiana court has rejected the idea of a blanket privilege for communications due to extensive regulation.[51] In that case, Merck argued that, because the drug industry is so extensively regulated by the FDA, virtually all communications within the industry are privileged because they carry a potential legal issue.[52] The court rejected this argument and instead reviewed each communication at issue to determine the applicability of the privilege. The court noted that it had a particular problem with arguments that grammatical, editorial and word-choice comments on non-legal documents such as scientific reports, articles and study proposals were privileged, stating "[w]e could not see the legal significance of these comments and changes…"[53]

The court also rejected Merck's argument that the documents were privileged because they were a "collaborative effort" to accomplish a legally sufficient draft. *Id.* at 807. The court held that communications concerning public relations were not privileged unless they were primarily related to legal assistance, but the court did not define what it considered to be legal assistance as opposed to public relations.[54]

[46] 2005 WL 3455782 (S.D. N.Y. Dec. 14, 2005).

[47] No. 03 CIV 3573 LTSRLE, 499 F. Supp.2d 501, 517 (S.D. N.Y. 2007).

[48] 241 F.R.D. 109, 130 (N.D. N.Y. 2007).

[49] *Id.* at 142.

[50] *Id.* at 142.

[51] *See In re Vioxx Prods. Liab. Litig.*, 501 F. Supp.2d 789, 800 (E.D. La. 2007).

[52] *Id.*

[53] *Id.* at 802.

[54] *See id.*

An Illinois court has also held that public-relations advice is not privileged because it is not legal advice.[55] In that case, an attorney was asked to provide advice about how to present a pardon decision to the media. The court held that the advice was not privileged merely because it came from an attorney and that the advice was not legal. The court also held that an email to the attorney, which was to be used for "background purposes," along with the attorney's revisions, were not privileged because the client was not seeking legal advice, and the attorney's revisions did not reflect client confidences or convey legal advice. However, another Illinois court took a much more lenient approach, stating that if the public-relations firm would merely provide an affidavit stating that the communications between the firm and the attorney concerned legal advice, the court would not order their production.[56]

A Kansas court held in *Burton v. R.J. Reynolds Tobacco Co.* that documents prepared by a company's outside and inside attorneys concerning public relations were not privileged.[57] For example, one of the documents at issue was a draft position paper concerning carbon monoxide and cigarette smoking. The paper was prepared to respond to criticisms resulting from FTC test results showing carbon monoxide levels in commercial cigarettes. The court noted that the position paper and other communications could have been prepared by a non-lawyer and cited to non-legal literature. The court held that the documents were not privileged because they were intended for public-relations purposes rather than legal purposes and did not communicate any legal advice.[58]

Many state courts, relying on state rather than federal privilege law, have also been reluctant to find such communications privileged. A New Jersey court has held that an opposing party is entitled to depose a public-relations consultant regarding public statements and her activities in gathering information to use in such statements.[59] In that case, a public-relations consultant was hired to advise the company after a massive explosion at the company's gas plant.[60] The court held that privilege does not extend to "advocacy in the court of public opinion."[61]

A Delaware court has held that a public-relations firm was not the agent of the client, and therefore communications between the company's attorney and the public-relations firm were not privileged.[62] The court noted that although an affidavit filed by the public-relations company stated that it communicated with the attorney and had access to confidential communications "relating to legal advice," "[h]e does not assert that such communications actually concerned legal advice."[63] The court acknowledged that in some situations, confidential communications

[55] *Evans v. City of* Chicago, 231 F.R.D. 302, 314 (N.D. Ill. 2005).

[56] *Ludwig v. Pilkington N. Am., Inc.*, No. 03 C 1086, 2004 WL 1898238 at *3 (N.D. Ill. Aug. 13, 2004).

[57] 200 F.R.D. 661, 669 (D. Kan. 2001).

[58] *Id.*

[59] *See In re Long Branch Manufactured Gas Plant*, 907 A.2d 438, 449 (N.J. Super. Ct. Law Div. 2005).

[60] *Id.* at 447.

[61] *Id.* at 448 (citations omitted).

[62] *American Legacy Found. v. Lorillard Tobacco Co.*, No. 4 19406, 2004 WL 5388054 at *4-5 (Del. Ch. Nov. 3, 2004).

[63] *Id.*

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with a public-relations firm may be protected by the attorney-client privilege but did not provide guidance regarding what those situations might be.[64]

CONCLUSION

Overall, the case law concerning whether communications with a public-relations consultant are privileged indicates that there are many steps corporate counsel can take to increase the chances that a communication with public-relations consultants will be privileged, but there are no guarantees that those steps will protect all communications with public-relations consultants.

[64] *Id.* at *5.