

# BUSINESS LAW TODAY

## Training for Tomorrow:

### The Court of Public Opinion: Best Practices for Attorneys in High-Profile or Crisis Situations

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Most business lawyers are familiar with the ground rules for managing legal crises in a court of law, but the stakes can be just as high when dealing with a crisis in the court of public opinion.

When a crisis strikes a large company, the typical gut reaction we have as lawyers is to play defense and investigate the facts carefully and deliberately. Once we're armed with some information, our professional instincts usually lead us to refute the allegations in a technical or legal way, often to discredit any attackers or adversaries involved, and perhaps to deflect the criticism aimed at the company.

Unfortunately, those legal instincts that serve us well during litigation proceedings can create larger problems for the company when a high-profile problem or a crisis situation develops. As lawyers, we often give little consideration to the business concerns or emotions of the many other parties affected by the crisis – such as employees, suppliers, vendors, distributors, customers, or the stock market.

The truth is that every one of those constituencies has a tremendous impact on the way the company's brand is perceived, which is a long-term predictor of corporate success that goes far beyond any one lawsuit or legal dispute. Business lawyers ought to be able to manage a high-profile

or crisis situation affecting the company in a holistic way that includes the legal strategy, but also involves the management of other stakeholders that have an important long-term impact on the health of the company.

This article will explore the importance of a well-conceived crisis plan, the importance of early detection when navigating the non-legal issues surrounding a crisis, and the key guiding principles that will help with assessing the crisis and then activating the crisis plan.

#### The Hard Work of Preparation

There is simply no substitute for having a well-conceived crisis plan that has been developed in advance. Without a good plan ready to be deployed when the circumstances demand, you'll be playing catch-up from the outset of a crisis and will lose valuable time in the crucial early stages of a crisis while you hustle up a plan.

The first step is to assemble a crisis team that can be mobilized when a high-profile matter emerges. The team should include key internal personnel – the CEO, the general counsel, appropriate division heads, marketing/corporate communications leader, customer service leader, and representatives from the board of directors – as well as select external professionals, such as

your outside legal counsel and crisis public relations consultants. It's a good idea to vet each team member for their experience in crisis management and temperament to work as a cohesive member of the team, and to make sure there is clarity about each member's role on the team to share expertise in their individual disciplines.

Once the team is assembled and roles are defined, have them get to know each other, work together, and understand each other in the context of normal business operations. They need to know and trust each other when a crisis strikes so they can react well and in a collaborative fashion. It might even be wise to get together a few times a year in a relaxed atmosphere so comfort levels are high with each other and quick decisions will be more easily made under pressure.

Next, schedule regular crisis drills at least once per year – including all team members – so your crisis team can role play and each member can exercise the responsibilities they'll be expected to carry out when a crisis happens. As an illustration of this, consider how the City of Boston was widely lauded for handling the crisis surrounding the Boston Marathon bombings of 2013. That wasn't luck; those professionals reacted so well because they had role-played a similar incident numerous times.

As for the specific tactical ingredients of the crisis plan, here are some key best practices to consider:

- Have your top executives and designated spokespersons take media training courses. There is an art to handling media inquiries and publicly communicating information under pressure – a little bit of professional training will go a long way when the time comes for those skills to be put to the test. Avoid the “no comment” response which can be perceived as an admission of guilt in the court of public opinion.
- Make or maintain media contacts you will want to use to get your message out. There is tremendous turnover in journalism, so it’s important to keep an updated short list of key reporters and producers of importance to your company (locally and/or nationally). Cultivate these relationships, to the extent possible, and you’ll have greater trust as a source in the event a crisis hits and you need to communicate breaking news.
- Make sure you have an open line of communication with your rank and file employees and a channel in place for getting urgent news and information out to them immediately. Also, do they know whom to call and what to say when confronted by journalists or other third parties in the event of a crisis?
- Have some generic positive messaging statements available that can be rolled out in the early public hours of a crisis. This is critical during the early stage of the crisis when the company has the most control over the event and the brand.
- Prepare press release messages and key corporate talking points in advance of key events (e.g., hearings in litigation cycle) for both a good and a bad outcome in legal proceedings, investigations, legislative developments, etc. Take time to understand how your company is perceived by the public (not necessarily how you would want them to be) and work with that image in mind when crafting your media communications so they feel more authentic.

- Get all digital tactics in place in advance – perhaps a “dark” online microsite that can be activated when needed, a matrix of all keywords so you can control primary search result ads, a list of all key Twitter handles for sponsored Tweet placement, target online venues where banner ads could be placed, and mocked-up digital ads so the formatting is in place ahead of the crisis eruption.

Advance preparation work may not be the most glamorous project on your “to do” list this year, but it will pay dividends for the corporate brand and the long-term health of the company when the inevitable day comes for your crisis plan to be activated.

#### The Importance of Early Detection

A high-profile or crisis situation often includes a legal component, but it’s rare that the legal considerations and strategies can be assessed in a vacuum. For example, the Target data breach was a serious matter that had profound legal implications for the company, but it’s clear from the aftermath that the business impact from shoppers who were alarmed by the story was a major fiscal risk to the brand. Similar arguments could be made regarding the GM automobile recall or perhaps the Herbalife shareholder activism stories.

In other situations – such as the documentary aired on CNN that was critical of SeaWorld or the Under Armour uniform controversy at the 2014 Winter Olympic Games – the legal issues are truly secondary to the delicate issues in the court of public opinion.

When navigating the non-legal issues in a high-profile matter or crisis situation, early detection and prompt action is critical. There is sometimes a small window of time to try and get ahead of the problem before it becomes public and before the involved parties become more defensive. This may be the moment to have fact-finding conversations prior to any party making demands for indemnification. This is truly an art form and an opportunity for business lawyers to flex our “trusted advisor” muscles.

If your detection protocols reveal signs of trouble on the horizon, identify additional crisis team members (e.g., local and criminal counsel) who may need to be added to your team meetings.

What are some early detection methods? Consider a few reliable measures:

- Customer service calls/e-mails/complaints should be tracked and studied.
- Data from distributors/suppliers/key contractors should be aggregated and analyzed.
- Enterprise risk management – what are the risks and how are you tracking them each day?
- Internet searches and comments posted to blogs and news articles should be monitored.
- Cultivate internal flow of information – good and bad – from Yammer, the corporate intranet, or any message boards maintained by company employees (officially or unofficially). Low-level rumors should be tracked for a while and compared to what your competitors are experiencing to determine if yours are more prevalent or magnitude is higher.

#### Assessing the Crisis, Activating the Plan

Regardless of whether or not you detected the crisis early enough to initiate prompt action, once it is thrust upon you it’s crucial to assess the potential stakes as best as you can in the initial hours. Again, we’re not speaking solely to the legal risks here, but rather the overall risks to the brand and the long-term health of the company.

So, just as a legal investigation would have specific goals and parameters, it’s important to investigate fully what happened in the context of the court of public opinion. Gather all of the facts by talking to the involved “parties” directly. Intermediaries can have agendas and you may not get the full story. Also, talk to people surrounding the incident who can provide helpful context and background. You may want to consider using security personnel to help try and get the full story, depending on the nature of the crisis or high-profile matter. Given the nature of today’s 24-hour news

cycle, your investigation likely will need to be simultaneous with team members dialoguing with the media and stakeholders.

Now, knowing what you know, consider what the full range of potential consequences could be. Remember, what starts off as an embarrassing public scandal could wind up having associated criminal and contractual consequences (e.g., the Lance Armstrong scandal with the USPS cycling team). View both the financial and emotional components when assessing perceptions of your brand. Do some big picture thinking and contemplate what are the components and perceptions that make it successful, considering the views of people inside and outside of the company who have a view about the brand.

This assessment will allow you to determine what the brand can withstand. Will temporary bad publicity or loss of capital still allow us to live to fight another day? Would a messy public trial or a criminal penalty with a televised “perp” walk be a fatal blow to the company? These are the tough non-legal evaluations that sometimes must be made by business lawyers in the heat of a crisis.

Once the crisis plan is activated, focus on a few key guiding principles:

- Stay calm – trust your plan and your team
- Manage perceptions (facts are secondary)
- Engage internal/external crisis management team like you would a SWAT team
- Alert/direct other internal stakeholders
- Alert/direct external stakeholders
- Be measured but pro-active and decisive so you can move quickly in the early hours of the story

- Set realistic goals – remember that you likely won’t have complete victory on all fronts, so you need to prioritize and accept some hits will be taken to the brand

#### In Closing

Perhaps the most important suggestion we can offer for navigating the non-legal issues amid a crisis or high-profile matter is to remain focused on the long-term health of the business at all times – your most important constituencies are your customers, shareholders, distributors, and employees. Competitors, regulators, and plaintiff’s attorneys are important, but they are secondary to the long-term health of the business and are likely trying to take advantage of the company when it is vulnerable; don’t let them set the agenda. Combat them by repairing and maintaining your relationships with your most important constituencies.

The best thing you can do today to get started on the right track is to consider what things can be done now – such as adding a morals clause to an agreement, seeking insurance to support an indemnity claim, and making sure you have experienced outside counsel that has handled high-profile matters or crises before. There’s no substitute for preparation.

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#### ADDITIONAL RESOURCES

For other materials related to this topic, please refer to the following.

#### BLS Programs Material Library

The Court of Public Opinion:  
Best Practices for Attorneys in  
High Profile and Crisis Situations  
(PDF) (Audio)

2014 Spring Meeting  
Presented by Middle Market and  
Small Business, Business and Corporate  
Litigation, Intellectual Property,  
Corporate Counsel