

Lawsuit Outcome vs. the Company's Reputation

A Lawyer's Guide to Crisis Management

by James L. Pattillo

Every lawyer knows that litigation poses a threat to a company. However, the impact of a crisis leading to litigation can be a lot heavier than any settlement or judgment. Just as important as the outcome of the lawsuit is the impact on the image and reputation of the company. Accusations of misconduct or liability will affect how stakeholders view the company.

Who are the stakeholders? They are virtually limitless: stockholders, employees, customers, suppliers, legislators, regulatory officials, competitors, and yes, the plaintiffs' bar! All of these groups will hold some view of the company, and their view will directly affect how they act and relate to it. The stakeholders' views will affect crucial factors like market share, stock price, sales revenue, employee and industry relationships, and ultimately, the long-term performance of the business. They will have an opinion, and it will matter.

The lawyer plays a key role in how these stakeholders view the company in the midst of a crisis. This article will define the lawyer's role in the crisis management process and ex-

plain how a company, embroiled in a crisis, effectively manages its reputation while minimizing the impact of litigation. For another perspective on crisis management, focusing on media relations, see the article on page 46 of this magazine.

What Constitutes a Crisis?

A business crisis has been defined as "a significant business disruption which stimulates extensive news media coverage. The resulting public scrutiny will affect the organization's normal operations and also could have a political, legal, financial and governmental impact on its business." *Institute for Crisis Management* <http://www.crisisexperts.com/crisisdefinitions.htm>. *Webster's New Collegiate Dictionary* defines a crisis as "an unstable or crucial time or state of affairs whose outcome will make a decisive difference for better or worse." The Institute for Crisis Management reports that class action lawsuits account for a leading 20 percent of all crisis events. See <http://www.crisisexperts.com/pub.htm>.

A crisis poses a threat to a company's hard-earned reputation, and can ultimately affect the long-term viability of the business. Companies "have come a long way in understanding what a crisis is, how to handle it, and what the ultimate penalty is—that is, the damages to the brand or the company which far out-

weigh the cost and fear of the courts." Stocker, "A Strategic Approach to Crisis Management," chapter 12 in *The Handbook of Strategic Public Relations and Integrated Communications*, 189, 190 (McGraw-Hill 1997).

How a crisis is handled (or not handled) can have a tremendous effect on how the company is viewed by the stakeholders. A 1993 survey by a public relations agency (Porter-Novelli) revealed, among other things, that how a company behaves in the face of a crisis is crucial to determining the public reaction. "When a company refused responsibility, or put out inaccurate information, the public was angry. When the company seemed to put profits above public interest, or was not quick to rectify a problem, the public got angry." Stocker, *supra*, at 195. A crisis is always a threat, but it can also be a turning point and an opportunity, if handled correctly. One thing is certain: stakeholders will be watching for a response to the crisis and will be quick to judge that response.

In the modern age of corporate accountability, the public is very sensitive to any hint of misconduct within the company. The media are also looking for headlines that will grab the public's attention. Therefore, a company that succeeds in the courtroom only runs the risk of damaging a reputation that often has taken years to build. Understanding the impact of the crisis beyond the courthouse steps is crucial. While aware of the financial impact of protracted litigation, lawyers should be sensitive to the overall impact of decreased public confidence in the corporation. They can, and often do, play a key role in the outcome of a crisis on an organization's public image.

A study at Northwestern University's Integrated Marketing Communications program, reported in Stocker, *supra*, assessed the cost impact of an organizational crisis. The study showed that "the potential for legal costs tends to determine how companies respond to a crisis and, in almost every case, ends up being a minor segment of the ultimate costs. The largest single segment of costs is market costs—the cost of lost sales, either through damaged products or damaged reputation. The ultimate effect is on market share, ability to grow, and margins."

The Crisis Plan

A crucial factor in the quality of the organization's response to crisis is its degree of preparedness. It is too late to plan once a crisis occurs. In fact, the outcome of the crisis ulti-



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mately is a direct function of the preparation in anticipating such an event.

The most important step in preparing for a crisis is to develop a crisis response plan. A crisis plan is a document that outlines a coordinated approach to a variety of specifically identified potential crises. A crisis plan should achieve three goals: 1) identify possible crisis situations and take proactive steps to prevent them; 2) modify the negative effect of a crisis on the company and its product or service; and 3) provide a platform for the company's future. The plan should allow the company to respond to any type of crisis quickly, decisively, and in a way that influences the tone of the crisis as details unfold. The plan should also be adaptable to a different range of crises.

A key component of any crisis plan is the organization of an internal crisis team. This team should include all of the company's key decision makers—the chief executive officer, chief financial officer, general counsel, security director, operations director, risk manager, and representatives from the communications, public/press relations, human resources, and investor relations departments. The crisis response plan should precisely detail the responsibilities of all team members. The company will also benefit from the input of outside counsel, who is familiar with the organization and has an understanding of crisis management.

The crisis response plan should name a central operating location from which the crisis team will manage the organization's initial response. The team should identify key messages early on that are easily understandable; these messages should be drafted with some care, so they will not be impeachable in the courtroom or in the news media.

The plan should identify a single primary spokesperson to deal with the press, so that all external communications are as consistent as possible. This person should not necessarily be the CEO or other top officer. This would be an appropriate role for the PR director, or other person most capable of competently presenting the company's message in a favorable light.

The plan should allow for an honest and quick assessment of the situation that is reported to the interested stakeholders. A strike-first approach is favored. A quick response will have a favorable effect on the image of the company before the crisis is fully developed. The crisis team should quickly but thoroughly assess the situation and develop key facts and points of emphasis; this initial report should then be

sent to the interested stakeholders. The attorneys on the team will rightly sense the need to temper this first message so that it doesn't contain any hint of an admission of liability. That is one reason why legal counsel should be a part of the initial crisis response team.

The company should speak in a coordinated and consistent manner; inconsistent messages will jeopardize its credibility. In October 2003, the former CEO of a major health care provider appeared on *60 Minutes* and vehemently denied any wrongdoing. Only days later, sound bites of him invoking the Fifth Amendment

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before a Congressional committee dominated the evening news. The inconsistency of his behavior spoke volumes about his believability; it permanently impaired his ability to salvage his company's already damaged reputation.

One way to avoid sending mixed messages is to get the company's attorneys (both in-house and outside counsel) involved in the initial stages of crisis planning. However, companies often wait too long before calling in the lawyers. They do not examine the legal implications from the outset, and instead address them only once the immediate fires are put out. Although they are somewhat constrained by ethical rules when it comes to acting as a spokesperson (discussed below), lawyers can help form the initial response in a way that will minimize the impact of the evidence of such response in the courtroom. Lawyers need to be in contact with the crisis team as the litigation evolves so that the litigation goals are in line with the overall organizational and crisis management goals.

The Lawyer's Role in Managing the Crisis

- A surgeon mistakenly performs an unnecessary mastectomy.

- The SEC launches an investigation into improper accounting practices.
- A hospital orderly is accused of molesting anesthetized patients.
- An employee is caught divulging crucial trade secrets.
- Civil allegations against a corporation turn into a criminal grand jury investigation.
- The FDA pulls a new drug off the market because of unexpected adverse effects.

In each of these situations, the lawyer can play a significant role in shaping the response to the crisis, when it first arises, and later as potential litigation develops, and eventually in the courtroom. A lawyer's job, simply put, is to obtain the best result possible for the client. The attorney who is focused only on success in the courtroom is narrow-minded and not serving the client's needs.

To represent the business client in the best possible manner, the attorney must fully understand, appreciate, and support the client's goals. The attorney should ask what the client is more concerned about: the immediate outcome of the litigation, or the long-term reputation and viability of the company in the marketplace? Both of these goals can often be achieved with the same litigation strategy. However a favorable legal result does not necessarily mean that the damage to reputation with customers, competitors, and other constituencies is minimized.

The traditional role of the attorney does not change when litigation garners the attention of the public and the media. That role is to identify all the potential liability and damage issues and prepare arguments that are calculated to address those issues to the advantage of the client. However, when a company's reputation is at stake, it becomes essential for the attorney to coordinate the legal strategy with the message that is being sent by the company to the public. The need for attorneys and corporate officers to coordinate their messages to the public during a crisis should be clear; such cooperation is essential to victory in the courtroom and in the public arena.

When evaluating a case that might draw the attention of the general public, the attorney should broaden the legal strategy to encompass the larger goals of the company. A thorough examination of the following questions at the outset is crucial:

- How will this litigation affect customers' view of the company?
- How will media coverage affect the jury pool in the event of a trial?

- How will the allegations affect the public's confidence in the ability of the company to deliver quality products or services?
- Will media coverage of this litigation encourage future litigation?
- What will be the impact of lengthy litigation on stock price?
- How will litigation affect market share and the company's positioning in relation to competitors?
- What is the impact on sales revenue and how long will the impact last?

Analyzing these issues will require the lawyer to think outside the litigation box. Regardless of how the lawyer's role is defined in the crisis response plan, he or she will need to be prepared to address all of these issues. In addition, the lawyer will need to understand the roles of everyone else on the crisis response team and even be prepared to step in and fill some of those roles. In general, the smaller the organization, the more roles the lawyer needs to be able to fill in a crisis situation.

The Role of Corporate/In-House Counsel

Attorneys employed full-time by the company in its legal department are usually in the best position to manage the dual goals of success in the courtroom and protecting the reputation of the company. First, in-house counsel is more familiar with the internal functioning of the company, including policies, employees, and operations. If the organization is large enough to employ media and communications personnel, the in-house attorney, often in the same building, will have convenient access to those departments.

In-house corporate counsel is also in the best position to coordinate the early investigation of the crisis. This investigation should identify all witnesses as soon as possible. Initial witness interviews and evidence gathering should be conducted to find out exactly what happened. In addition to helping develop litigation strategy, the involvement of the company's lawyers in this process will broaden the protection of the attorney-client privilege and protect the non-factual part of the investigation from disclosure.

The flow of information around the crisis must be carefully monitored. In-house counsel, along with the communications or press relations officer, should review every bit of information that flows from inside the organization to the outside to be sure it is consistent with both the litigation goals and public rela-

tions goals of the crisis. It is the lawyer's responsibility to be sure that the inflow and outflow of information does not compromise the company's legal position in this crisis or in future litigation.

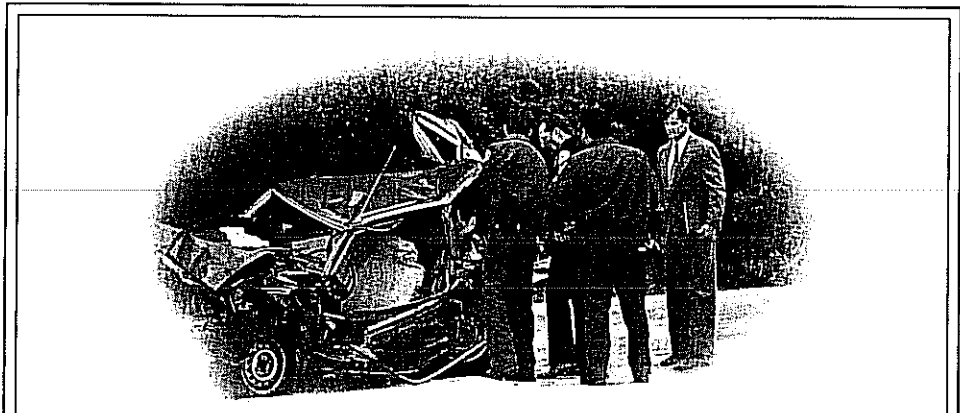
All public statements should be prepared and carefully reviewed by both communications personnel and the lawyer. Such statements should leave room for further factual development as the investigation and corporate response continues. In-house counsel should ensure that employees receive proper instruction regarding the legal status and impact of any statements or written communications (including e-mail) that could be discoverable.

Once the initial crisis response has been issued and the preliminary investigation is complete, it is time for the company to develop its litigation strategy. Generally, one of the jobs of corporate counsel is to select a local law firm to represent the company. "Going outside" usually makes sense, because often the company's legal department will not be familiar with local prosecutors, judges, and investigators. Depend-

ing on the local culture, company lawyers also may not have a feel for the effect of the crisis on public perception, as would savvy outside counsel. In selecting a lawyer(s), the company should look for someone who is familiar with the local bar, has experience in the type of litigation that is produced by the crisis, and has a familiarity with the company and the industry. Most importantly, the outside lawyer should be sensitive to the crisis management and public relations goals of the company client.

The Role of Outside/Local Counsel

An outside law firm representing a company in litigation can be a great asset in a crisis situation. First, it can play an important role in pre-crisis planning. Insight on how a company and a particular industry is viewed in the local economy and populace may help identify potential crisis areas. The local defense firm will have the best feel for the plaintiffs' bar's "suit du jour" and whether there are potential litigation issues for the company. Regular contact with local counsel outside the context of specific



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litigation may help the company get a head start on handling a crisis when it erupts.

Outside counsel should also be involved if any consultants need to be hired to assist with the crisis. The presence of a lawyer in any discussion with consultants will allow the attorney-client privilege to be invoked. This will allow everyone to speak freely about the crisis without the fear that their statements or documents will end up in the press or, even worse, in front of a jury. Generally, the privilege protects communications for the purpose of rendering legal advice. The rule on the privilege is theoretically the same for in-house counsel and outside counsel. However, because communications with in-house counsel may not always be for legal advice, it is easier to assert the privilege when outside counsel is involved.

It is likely that the local lawyers the company hires will be approached by the press. Both the attorneys and the company, including the communications and press relations departments, should anticipate this situation and develop a strategy for how local counsel should respond. In order for the outside attorneys to be proactive in preaching the company's message, they must be prepared. This means becoming familiar with the company, its product or service, operations, personnel, and most importantly, the communications strategy to address the crisis issues.

The lawyer may find himself responding to questions about the crisis from the media or other stakeholders before he has a chance to learn about it himself. Under no circumstances should his reply be "no comment" or some other non-responsive answer. At minimum, he should let the inquiring parties know that an investigation will be conducted and a statement will be prepared. If appropriate, he should offer to contact a reporter when the company is ready to comment, but only if the offer is genuine. Local counsel should also be prepared to report to the client on any press coverage, particularly in local or regional media.

A sure way to shift blame to the company is for the lawyer to take a defensive posture in an interview with the press. The interview should be viewed as an opportunity, not something to be feared. The goal is to prevail in the journalist's mind—not merely to survive, but to preach the company's message in a way that restores and maintains public confidence. In *The Simple Truth*, media consultant Bob Aronson writes: "It is human nature that when confronted, people become defensive. My experience in

working with hundreds of clients is that usually they have nothing to defend and in most cases could point with pride to their accomplishments and service to any targeted audience. In most cases, interviewees could show great pride, but because they feel intimidated by a reporter, they become defensive. Think about it, do you want to be a defender or an advocate? Do you want to survive or prevail?"

Tips for Managing the Crisis

Many times aggrieved parties just want you to

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say that you are sorry it happened; not that you are guilty or responsible, but just that you regret the event. When a company refuses to express regret, the public turns on it. The company looks guilty, even if it isn't. For example, when a major fast-food chain was accused of food poisoning, its first response was to blame suppliers and inspectors. Even though the company may not have been at fault, customers walked away from their restaurants.

When used in the right context, an apology can go a long way. This may be difficult for some lawyers to conceptualize, since an apology could easily be misconstrued as a public admission of liability. However, there is a difference between telling someone "we are sorry the event happened" and telling them "we're sorry we did this to you." It is the lawyer who, in many cases, will have the most personal contact with the aggrieved person(s). He or she needs to be aware of the ability of an apology (not an admission) to soothe relations between the plaintiff and the company.

Stakeholders want to hear that the company has plans to resolve the issue that led to the crisis. Communicate to them the steps you will take to do this—install childproof locks, improve security measures, recall and repair potential

defects, improve testing and research, etc. Or, if the company truly is not at fault, say so.

Depending on the jurisdiction, subsequent remedial measures usually cannot be introduced in court as evidence of fault. However, outside of the courthouse, in the street or shopping malls, they can be seen as evidence of fault by the public. Be willing to fix it if it is broken, but be careful how and when it is fixed.

If there is a solid defense to liability, tell the stakeholders about it. Also, take time to assure that the incident will not happen again. Although the lawyer is not necessarily responsible for any recurrence, he or she can still communicate this message.

This means more than a judgment in a court of law. A lawyer sensitive to the desires of an organization's customers and other stakeholders can be creative in negotiating a potential settlement. Find out what it will take to restore the confidence of the stakeholders and do it.

Ethical Considerations

Lawyers must at all times be aware of the ethical ramifications of how they represent the client. Ethics rules specifically dictate what an attorney can and cannot do when he or she begins talking to the press or mass media about the client's case. The rules attempt to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. A company certainly has the right to protect its reputation from irreparable damage caused by the effects of a crisis. However, when does it cross the line such that the publicity affects the right to a fair trial?

The American Bar Association's Model Rules of Professional Conduct, adopted by most states in their codes of professional ethics, deals with trial publicity in its Rule 3.6. The rule states:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

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of punitive awards is to punish the defendant for its conduct—and yet conduct is not a factor to be considered in a strict liability analysis. Plaintiffs reap the benefit of strict liability by having only to prove that the product was defective when it left the control of the manufacturer or seller, and that the defect caused some injury to the plaintiff. The plaintiff need not prove that the manufacturer or designer even knew that the defect existed—only that a reasonable, alternative design existed. Since conduct is immaterial to the strict products liability action, punitive damages should have no place in such an action. Punitive awards are, by nature, designed to punish someone for conduct that society wishes to prevent.

It cannot be stressed enough that early attacks on punitive claims should be made, and they should continue until the claim is either dismissed or rendered ineffective. In fact, punitive awards are not only rare, but are routinely reduced or abandoned on post-trial motion or appeal. Still, no client, whether a self-insured corporate entity or an insurance company, wants to deal with punitive damages. In a climate where corporations are often viewed as aggressors, the average citizen (and potential juror) is far more likely to read about huge punitive awards (such as the \$2.7 million award to a McDonald's coffee drinker) than the reduction of the same award post-trial (to \$480,000, before a \$600,000 settlement). Indeed, a study from the University of Puget Sound determined that while the initial award in the McDonald's

case was reported widely in nearly every newspaper surveyed, the post-trial remittitur was carried in fewer than half. Halton, *Reporting on the Courts: How Mass Media Cover Judicial Actions* (Nelson-Hall, 1998).

Communicating with the Client

A good trial lawyer must be aware of all the different perspectives of those involved in assessing the merits of a lawsuit, especially a major action against a corporation. Your client, perhaps a large company with a self-insured retention, may have its own legal department, including risk managers and lawyers. In addition, it may have multiple layers of insurance, and each layer may have its own adjuster. Each of these persons may have a different view of the case, and they may each carry different motives that form that view. As the outside lawyer, however, your only concern must be an objective evaluation of the risk to your client. You must communicate all of the positive and negative aspects of the lawsuit to the client.

A recommendation to settle just before trial should never come as a surprise to the client or insurance company. Continuing communication with your client and adjusters throughout the discovery phase is essential to maintaining a good relationship; they do not want to be surprised. In-house lawyers and adjusters will be annoyed and upset when the outside lawyer appears to be afraid to try a case, or appears willing to settle only after the file is squeezed for all of its potential billing. If your analysis

and recommendations change as discovery progresses, that change should be communicated promptly, and not held back until the eve of trial.

Conclusion

The art of defending a product liability case requires you to think about what is best for your client in all circumstances. This may include, for example, the filing of an immediate dispositive motion in lieu of filing an answer, or accepting another party's tender of defenses and indemnification in the absence of a contractual requirement. Thus, you should be mindful of the fact that just because something can be done does not mean that it should be done in every case, or more importantly, in yours.

Proper preparation, an understanding of the issues, and diligent inquiry and follow-up are essential to the proper defense of any case, especially one sounding in product liability. Whether you are fresh out of law school or on the partnership track, your clients count on you to guide them through the potential perils of product liability litigation. They will look to you to identify the issues, how they should be handled, and how the case should ultimately be resolved. Your ability and willingness to learn the different aspects of such litigation will guide you as the cases you encounter involve more difficult issues and more significant injuries. Early recognition of the issues will permit you to build a strong defense on behalf of your client. **FD**

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(c) Notwithstanding paragraph (a) a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Paragraph (c) of Rule 3.6 essentially takes away the lawyer's ability to participate in the strike-first approach to disseminating the company's response to the crisis. However, this Rule operates on the lawyer and not the client. It does not take away the company's ability to be proactive in responding to the stakeholders; it only limits the lawyer's role as spokes-

person to situations where he or she is responding to publicity initiated by someone other than the lawyer or the client.

Conclusion

It is becoming evermore apparent that a crisis can have profound effects on a company beyond the immediate impact of the litigation. How the crisis is handled from the outset will dictate the company's success in building or retaining market share, the price of its stock, employee and union relations, sales relationships, its public image, the possibility of increased governmental regulation, and ultimately the long-term viability of the business. If a lawyer is to provide a valuable service to the client, he or she must be aware of these effects and coordinate the litigation strategy with the overall goals of the company. **FD**

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