JENNER & BLOCK

Practice Series

EXPECTING THE UNEXPECTED:

A Practical Guide to Preparing for and Responding to a Crisis

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INTRODUCTION

If asked to name the top five news stories of the early 21st Century, three events likely would make the list of nearly every respondent: (1) the September 11 terrorist attacks; (2) the Enron collapse, followed by other corporate accounting scandals and the conviction (ultimately reversed) of Arthur Anderson; and (3) Hurricanes Katrina and Rita. For weeks, those events -- each of which has been appropriately described as a crisis situation -- dominated the headlines of every newspaper, magazine cover and news program.

The pictures of devastation caused by September 11 and Hurricanes Katrina and Rita are forever etched in the general public's mind. However, history shows that those crisis events and others like them will leave a legacy long after the crisis situation is extinguished that goes beyond pictures of tragedy and sorrow. Whether a crisis takes the form of a natural disaster, corporate collapse or terrorist activities, the players in that crisis will be evaluated at every turn on how the handled the crisis. For example, Johnson and Johnson is still praised for how it handled its 1982 crisis involving the tampering and cyanide poisoning of Tylenol capsules. Meanwhile, despite making good technical decisions, Exxon's public relations decisions during the Exxon Valdez oil spill are still cited as examples of what not to do in a crisis situation.

In corporate crisis situations, a company must make the right decisions and must make them under extremely difficult pressures, including constraints on both the time and resources to develop a crisis response. A crisis situation also may require the company to choose between competing corporate interests. Many crisis situations bring the threat of civil or criminal litigation, and the company may naturally want to minimize potential liability, as well as protect confidential information. However, in certain crises, the company may be better served by disclosing confidential information, particularly when the crisis response involves investigations by governmental agencies or the crisis threatens public health and safety.

Today, more companies understand the importance of having a crisis management team and are, therefore, better prepared to handle crisis situations. Still, many companies are unprepared either because they have not planned at all for a crisis or because they have not taken the necessary steps to prepare for a crisis.

The need for effective crisis management is not limited to large corporations. Crises are non-discriminating and can strike small companies or sole proprietorships just as easily as Fortune 500 corporations. For example, in 1989, after a 5-year-old boy drowned in the swimming pool at a small West Los Angeles, California day camp, the owners called for help in the form of a crisis management company. The company helped manage the crisis by communicating with the boy's parents, the parents of other campers, the community, and the press.

Unfortunately, there is not a "model" that a company can use to prepare for and handle a crisis. Crises come in many forms and different degrees of severity. Moreover, the types of potential crises depend greatly on the nature of a company's business. For example, environmental hazards or products liability claims are not crisis situations for which all companies must prepare. Still, a review of past corporate crises shows that some generalizations can be made as to practical steps to follow and pitfalls to avoid when preparing for and handling crisis situations.

The starting point is understanding exactly what a crisis is. For purposes of this guide, a crisis is considered to be an unexpected and negative development with the potential for highly undesirable consequences, including public health and safety dangers, criminal liability, significant civil liability, and/or loss of significant company value, regardless of how well the crisis is managed. In most instances, a crisis is also characterized by an element of suddenness that requires prompt attention at the highest levels of the organization.

As a general proposition, effective crisis management has two principal goals. An initial goal is to identify and reduce or eliminate risks that could potentially trigger a crisis. A secondary goal is to be prepared to handle a crisis efficiently and properly, thereby reducing the scope of potential damage to the corporation caused by some or all of the following:

- **Public Health & Safety:** In crisis situations that create public health and safety dangers, the company's first priority must always be to take any measures necessary to alleviate that risk. The consequences of failing to do so are disastrous.

- **Loss of Consumer Confidence:** The Tylenol cyanide poisoning could have resulted in a loss of consumer confidence. However, Johnson and Johnson effectively managed the crisis, and today, Tylenol is still a leading product in pain medication.

- **Loss of Distributor or Retailer Confidence:** Distributors and retailers do not want to be identified with defective products, even if the distributor or retailer played no part in manufacturing the product or where the safety allegations are false.

- **Loss of Investor Confidence:** Depending on the severity of the crisis, the company may see a loss of investor confidence. In most cases, the company should rebound. In severe cases, however, investor confidence may dip low enough to render the company insolvent or make the company the target of a hostile takeover.

- **Loss of Regulatory Agency Confidence:** Companies in highly regulated industries often depend on good will with government regulatory agencies and work hard to promote it. A crisis event could affect the good will the company has worked to establish.

- **Civil and Criminal Litigation:** Most crises trigger some form of litigation, such as products liability suits, wrongful death actions, negligence lawsuits, shareholder derivative suits or criminal litigation.

Some crisis situations present multiple threats, and strategies for addressing these threats may be at odds with each other. For example, nearly all crisis situations pose a threat of civil or criminal litigation. As a result, a company's initial response to a crisis situation might focus on avoiding liability and protecting privileged and confidential information. However, some crises present other, and often more long-term, severe threats than litigation. Specifically, in responding to a crisis, often nothing is more important than maintaining public, government and/or investor credibility. The ability to maintain credibility with the these groups may depend on the disclosure of confidential information. While disclosing confidential information could change the landscape of how the company handles pending litigation, the company may be better served by maintaining its credibility. For example, cooperating with a regulatory agency may be valuable in convincing the government either to not bring criminal charges or to enter into a favorable settlement agreement with the company.

Similarly, the corporation must consider its long-term interests. Short-sighted measures that seem to help the corporation's immediate issues may damage the corporation in the long run. For example, the corporation may resist instituting a product recall because of the extraordinary costs and resources that are associated with such measures and because of fear that the public will interpret the recall as an admission of fault. While this is a valid concern, the company may be better served by instituting a voluntary recall, which could increase the company's good will with the government and public by providing credible evidence that the company places public health and safety ahead of profits.

Finally, there is one common thread to managing all types of crises — the importance of gaining a prompt and thorough understanding of the facts. Accurate knowledge enables the company to correct the problem, maintain credibility with the government and public, handle victim relations, address media questions and concerns, and prepare for litigation. On the other hand, ignorance of the facts compounds the crisis situation. If it does not know the facts, the company cannot effectively address the situation and may appear to be inept or to be engaged in a "cover-up."

I. "BE PREPARED": PLANNING FOR A CRISIS

A prerequisite to successful crisis management is advance preparation. A crisis, by its nature, requires a quick and coordinated response by multiple individuals, with significant dangers resulting from mistakes. Without a plan in place for dealing with such an event, the company significantly increases the likelihood that the crisis will be mishandled.

- **STEP 1: Assemble a Crisis Management Team**

The first step in crisis preparedness is formation of a crisis management team. A company should not rely solely on its officers and management to manage a crisis. Crisis management has become a specialized discipline that depends more on specialized areas of expertise than on business expertise. The size of the team will vary depending on the particular needs of the company. The company should coordinate various areas of expertise within and outside the corporation, including:

1. Legal Counsel: Legal counsel will have multiple roles on the team, including preparing for and handling litigation, identifying potential areas of civil and criminal liability and identifying legal obligations. In addition to in-house counsel, the company should identify and consider including outside counsel with specialized expertise in relevant areas of the law, such as products liability or environmental law.

2. Investigators: Investigators are often important members of a crisis management team. Many crisis events require the company to conduct a prompt and thorough internal investigation. The internal investigation will be a key component of the crisis management plan as it will help the company determine the facts, identify potential legal liability, and develop appropriate responses. For the reasons discussed below, the company should consider having outside counsel conduct and lead the investigation.

3. Public Relations Personnel: The company should consider including both in-house and outside public relations personnel on the team. The public relations personnel will be involved in preparing public relations guidelines and issuing company statements in response to crisis events. Public relations personnel can also assist in preparing mock crisis situations to help identify areas that the crisis management team needs to strengthen.

4. In-house Investor Relations Personnel: Including investor relations personnel can help address two dangers. First, a crisis can cause investors to sell stock, affecting the company's stock price. Second, regardless of how well the crisis is managed, investors may pursue shareholder derivative suits, claiming that directors, officers and/or senior management breached their fiduciary duties either by allowing the crisis to happen or by not managing the crisis appropriately. Therefore, the company should consider including investor relations personnel that can assist in identifying ways to reassure investors during and after the crisis.

5. Government relations personnel: Some crisis events trigger either a duty by the company to report the incident or an investigation by a government agency such as the FAA, FDA or SEC. In these situations, the crisis management team may need government relations personnel to help facilitate a cooperative effort between the company and the agency.

6. The Risk Manager/Insurance Personnel: A crisis could also trigger multiple insurance claims, requiring personnel experienced in making and handling insurance claims and other insurance related issues. Furthermore, if the crisis triggers shareholder derivative suits, the company will need to take steps to preserve its ability to seek coverage under potentially applicable insurance policies. Insurance personnel also will be important in making sure that there is adequate coverage to respond to crisis situations.

7. Finance personnel: Finance personnel will not only help create an appropriate budget for managing the crisis, but will help identify and manage post-crisis financial issues presented by possible losses of profits or assets.

8. <u>Marketing personnel</u>: Marketing personnel can assist the crisis management team in maintaining or reestablishing the company's market share and good will with consumers.

9. <u>Employee relations personnel</u>: The company may need to keep employees informed and to reassure employees that the company is protecting them. A crisis may also directly involve employees (e.g., a strike), or employees could compound a crisis by filing union grievances.

10. <u>Technical personnel</u>: Very few of the above personnel will have substantial technical expertise in the company's day-to-day operations. Therefore, the team should include enough technical personnel, such as a plant superintendent or quality control engineer, to educate the other team members on technical issues prior to and during the crisis.

In choosing the particular individuals who will serve on the crisis management team, several considerations apply. For example, crisis management often means that there is little time for delay. Therefore, the crisis management team must be composed of members to whom the company is comfortable giving complete trust and discretion to act without officer and director approval. The importance of selecting strong team members who can identify the company's options and make quick decisions under pressure was demonstrated by one Fortune 500 company's response to Hurricane Katrina. When the levees broke in New Orleans, the company was missing 35 employees; that number, however, was steadily reduced to zero employees missing. After the fact, the company's Chief Executive Officer credited the success to the member of the response team who helped formulate the plan — a former Army Special Forces colonel. Although every company may not have the luxury of having an employee with extensive military training, most companies have achieved success by relying on sound decision makers to steer the company in the right direction. In this respect, effective crisis management follows the same rule for achieving results in the market — put the right people in charge.

Furthermore, the crisis management team should appreciate the fact that a crisis may erupt at the most inopportune time. They should be willing to attend emergency meetings in the middle of the night. The team members should also understand that a crisis could interrupt a vacation or other personal plans. While some may find this requirement elementary and obvious, the seriousness of the requirement was illustrated by how some executives responded to an airplane crash several years ago. Only days after the accident, the press vilified some of the company's senior management who were unavailable to respond because they were attending a going-away party for the company's marketing chief.

The crisis management team may also serve as the company's conscience. Crisis management team members should be prepared and able to confront unpopular issues, ask difficult questions, make unpopular or costly changes and must be credible and have the confidence of top management. In difficult situations, the crisis management team may have the responsibility of persuading executives that action must be taken.

In assembling a crisis management team, the company may want to consider designating several people from each of the above categories as prospective candidates for the team, and then, provide a crisis manager with the power, once a crisis strikes, to select participants from the pool of candidates. For example, most crises will require specialized legal advice from counsel. However, the company may not know in advance what type of legal advice it will need. One way to handle this issue may be to identify attorneys in advance with specialized legal expertise and then call on one or more of the attorneys once the need arises. The same may be true for technical personnel. The company may also need to consider providing the crisis manager with a contingency plan to seamlessly add necessary team members who were not previously included.

Assembling a crisis management team for a smaller company may have additional obstacles. Specifically, a smaller company may not have the same personnel resources as larger companies, even though the threats posed by crises may be as large or larger. A smaller company may need to look outside the corporation for additional assistance or rely on more members fulfilling multiple roles.

- **STEP 2: Select a Crisis Manager**

After the crisis management team is assembled, the team should select a crisis manager. As with most areas of crisis management, there are differing views as to who should be the crisis manager. Some authors believe that the CEO should be the crisis manager. Others believe that it should be the chief in-house counsel. There is no right or wrong answer, but the team should consider a few guidelines.

  - The crisis manager should be well respected by the officers and directors, have their complete trust and be able to persuade them to take a recommended course of action.
  - The crisis manager will often have the difficult task of choosing between competing interests, so the candidate should have the ability to make these types of decisions.
  - Most crisis situations require the crisis manager's complete attention. Therefore, the crisis manager should be able to delegate his or her normal duties for the duration of the crisis.
  - As the head of the team, the crisis manager should have a high degree of familiarity with all areas of the company's business that are susceptible to crisis risks.
  - The crisis manager should have the authority to report to whatever level necessary to address a particular issue, even if it means "going over the head" of the officers or senior management.

- **STEP 3: Identify Possible Crisis Risks**

Once the crisis management team is formed and the crisis manager is selected, the team should identify all potential crisis risks. With most companies, there are obvious risks, such as mass transportation accidents, environmental hazards, securities violations, and products liability lawsuits. In order to ensure that the company is adequately prepared for all crisis events, the crisis management team should also concentrate on identifying and planning for less obvious crisis risks. The following examples demonstrate the variety of crises a company may face.

- On February 14, 1986, Gerber Foods received a complaint from a woman claiming to have found glass in a jar of Gerber strained peaches. The next day, a story in a local newspaper raised a second complaint, involving glass in strained peas. The story appeared in the national news, and a broadcast on CNN produced a third complaint from a woman in Georgia. All three complaints were eventually proven to be false.

- Hurricane Andrew presented Home Depot with a unique crisis situation. In the wake of the storm, profiteers began purchasing items in bulk and selling them on the black market. In response, Home Depot prohibited bulk sales to consumers, sold plywood and lumber at below cost prices, and pressured other retailers to take similar measures, despite the fact that Home Depot lost several stores in the storm.

- For nearly 20 years, Proctor and Gamble has dealt with false allegations that the company devotes its profits to Satanic worshipers. These rumors began with allegations that the company's stars-and-moon logo was a Satanic symbol. Despite the wildness of these allegations, the company suffered financial losses attributed to the allegations.

- In 1994, an 11-hour Teamster strike not only affected UPS's major clients such as Lands End and AT&T, but also caused the company to lose an estimated $5 million.

- While a single employment discrimination in unlikely to result in negative press, multiple employment discrimination claims may. Similarly, multiple sexual harassment suits could result in a negative public image, regardless of whether the company ultimately prevails against those claims.

- A company may also want to consider planning for less foreseeable events, such as computer hacking threats, workplace security and safety threats, and consumer boycotts.

In identifying crisis risks, the crisis management team may want to focus on crisis events that may not affect the company directly. For example, a company based in the Midwest may not have any direct risks to a hurricane. However, the company may have distributors or suppliers that are based along the Atlantic or Gulf Coast shorelines, or it may have employees who have family in those areas. Alternatively, it may have resources that could be used to help the government or charitable organizations respond to the crisis. Under either scenario, a fast response from the company could create invaluable good will for the company.

- **STEP 4: Create a Crisis Evaluation Program**

The crisis events discussed above present differing crisis threats and varying degrees of severity. One way to ensure that the crisis management team is prepared to handle a crisis is to create an evaluation program that will help the team identify how severe the crisis is or potentially will be and what type of resources will be necessary to manage the crisis. By forming a list of the questions that need to be asked before a crisis event, the team increases the likelihood that all areas of the crisis will be addressed immediately.

For example, both the Food and Drug Administration (FDA) and the Food Safety Inspection Service (FSIS) have published guidelines addressing the nature and scope of product recalls.[1] Both agencies use these guidelines to determine whether there is a need for a product recall and how the recall is to be carried out.

An effective evaluation program can serve two purposes. First, the evaluation program may help identify which corporate resources are necessary to manage the crisis. Second, the evaluation program can help identify the scope of potential injury both to people and the corporation. The following list presents examples of the questions that an evaluation system may consider in helping the company identify the scope of its response.

1. Identify the potential dangers presented by the crisis;
2. Determine whether the crisis poses a threat to the health and safety of employees, consumers or the general public;
3. Determine the number of people who will be affected by the crisis;
4. Determine the extent and severity of existing or future personal injuries;
5. Evaluate the likelihood of foreseeable and unforeseeable future injuries;
6. Determine whether the crisis is likely to escalate;
7. Determine the extent to which remedial measures are necessary;
8. Identify the company resources that will be needed to manage the crisis;
9. Determine whether the company may be subject to criminal liability;
10. Determine whether the company may be subject to civil liability;
11. Determine how the crisis will likely affect the company's profits; and
12. Determine whether the crisis is likely to be discovered by the media, and if so the likely extent of media exposure.

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[1] See http://www.fsis.usda.gov/FOIA/dir/8080.htm; 21 C.F.R. §§ 7.40 - 7.59 (2001).

- **STEP 5: Create a Crisis Management Plan**

The crisis management team should formulate separate plans for the various types of potential crises it identifies. While crises produce unexpected results that no plan can anticipate, the plans should at least establish the following basic components. To the extent that more specific details can be planned, however, the crisis management team should also prepare plans for addressing those issues. For example, the team could prepare detailed evacuation and reunification plans for appropriate crisis situations.

- Establish a Notification System

The first step is to create a notification system allowing the crisis management team and the necessary personnel to learn of potential crisis events. In small, centrally located companies, an employee may be able to call the crisis manager directly. In larger companies, it may be difficult to ensure that all employees know who the crisis manager is or even that a crisis manager exists. The following five-step notification system should work well, regardless of the size of a company.

1. Employees to company managers: Typically, company employees are the first people to know about the accident or other event. Company employees should be instructed to report any negative development to their shift manager.

2. Shift managers to the crisis manager: Once a shift manager learns of any negative crisis event, the manager must inform the crisis manager. All shift managers should be educated about two aspects of the notification system.

   First, the shift manager should know who the crisis manager is and how to contact the crisis manager at any given time. The crisis manager's contact information, including work extension, home phone number, cellular phone number and beeper number, should be published in a company directory or another publication provided to shift managers.

   Second, the shift managers should be instructed to forward all information about any negative event to the crisis manager. Simply put, this means that company managers must understand that it is not their duty to decide whether a crisis exists or not. This must be the exclusive province of the crisis management team.

3. Crisis manager to the CEO and Board of Directors: Once the crisis manager determines that a crisis exists, he or she should contact the CEO and the board of directors. Depending on the severity of the crisis, the crisis manager should determine when to contact the CEO and directors. In any event, the crisis manager should not delay contacting the CEO and board until more information is known. Instead, the crisis manager should explain the circumstances and promise that he or she will follow up as more information becomes available. In severe crisis situations, the crisis

manager may recommend calling an emergency meeting of officers or directors.

4. Crisis manager to team members: The crisis manger should also contact the team members who will be involved in managing the crisis and inform them of the nature of the crisis. The crisis manager should also call for a team conference and, if necessary, give the authority to the other team members to begin contacting outside personnel, such as investigators, legal counsel, and public relations personnel. If the crisis management team is larger than 8 members, the team may consider using a phone tree, allowing for quicker notification and faster response.

5. Crisis management team to outside contacts: Depending on the severity of the situation, the crisis management team members may need to contact outside investigators, lawyers, government liaison, or public relations personnel immediately.

■ Identify Team Roles and Responsibilities Based on Areas of Expertise

The crisis management plans should also apportion foreseeable responsibilities to team members. For the most part, roles and responsibilities can be apportioned based on areas of expertise. Other less obvious responsibilities will need to be assigned. Among the assignments, the team should consider the following:

1. At least one member should be responsible for determining the underlying facts, including initiating and supervising an internal investigation where necessary. As described above, a prompt understanding of the relevant facts is essential.

2. One member should be responsible for identifying company employees with technical expertise that is necessary to manage the crisis.

3. If applicable, one member should handle distributor and retailer relations.

4. If applicable, one member should be assigned to victim relations.

5. One member should handle employee relations and concerns.

6. In environmental hazards, one or more members should be assigned to supervising disaster control. This will not only involve cleaning up the hazard, but could also involve restricting the public's access to the disaster site or preventing the hazard from spreading through ground water contamination.

■ Establish a Team Communication System

The crisis management plan or plans should also set forth a team communication system. The communication system should take into consideration the following issues.

1. The individual plans should identify which members will be involved in managing the particular type of crisis.

2. While team members may take measures to protect privileged information, they may also need to prepare for the fact that privileged information might be voluntarily or involuntarily disclosed. Therefore, the team should take measures to restrict dissemination of any information it wants to keep confidential, and may want to avoid committing certain information to writing. For instance, the company may not wish to share confidential information with certain members of the team such as outside public relations consultants which would waive the privilege.

3. Similarly, the team should account for the risks inherent in relying on electronic forms of communications, such as e-mail, which may be less secure and which may be difficult to destroy or erase.

■ Establish Guidelines for Gathering Information and Internal Investigation[2]

In some crises, the company may need to conduct an internal investigation. In some instances, a company may even be required to do an internal investigation.[3] Even where an investigation is not required by law, the crisis management team should be prepared to initiate an investigation.

An internal investigation allows the crisis management team to determine the facts, potential liability and available defenses. For this reason, is often desirable to have an attorney conduct the investigation. An attorney, by looking ahead to potential legal implications, is often more likely to identify the relevant facts and to gather them in the most effective and defensible manner. Selecting an attorney also maximizes confidentiality through the availability of the attorney-client privilege and work-product doctrine. Depending on the circumstances, in-house counsel may conduct the investigation. In areas requiring specialized expertise or where

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[2] For more information on conducting an internal investigation, *see* Anton R. Valukas and Robert R. Stauffer, *Preventing, Investigating and Addressing Criminal Conduct in the Corporate Environment*, Jenner & Block, LLC (1998).

[3] For example, Sections 15(b)(4)(E) and 15(b)(6) of the Exchange Act, 15 U.S.C. §§78(b)(4)(E), 78(b)(6), require broker-dealers and individuals associated with broker-dealers to supervise persons subject to their supervision with a view to preventing violations of the securities laws. *See also Monieson v. CFTC*, 996 F.2d 852, 860-61 (7th Cir. 1993) (chairman of the board of futures commission merchant liable as control person where he failed to inquire adequately upon receiving reports of improper trading by employees). "Controlling persons cannot deliberately or recklessly avoid obtaining knowledge about potential wrongdoing." *Id.*

Similarly, management's fiduciary duties to the corporation may include the duty to initiate an investigation when there are indications of misconduct, and failure to investigate could thus subject management to civil liability. *See generally* Knepper & Bailey, Liability of Corporate Officers and Directors (1988).

senior management is implicated, it is generally advisable for the investigation to be conducted by outside counsel.

In order to conduct an effective internal investigation, the company and its employees must have no fear of the truth. Determining the facts should have priority over other considerations. In preparing internal investigation guidelines, the crisis management team should implement policies that promote the fact-finding process.

In formulating internal investigation guidelines, the team may want to:

1. Identify who has the authority to initiate an investigation;

2. Identify who will determine the scope of the investigation;

3. Identify, in advance, an attorney or investigator that is qualified to head the investigation;

4. Formulate a preliminary list of employees and management with knowledge about particular crisis risks;

5. Formulate guidelines that establish an initial schedule for the investigation and identify what information will be needed; and

6. Determine which team member or members will be responsible for evaluating the results of the investigation and determining what use to make of them.

- <u>Establish Document Retention Policies</u>

Another important component of a crisis management plan is creation of a document retention policy. Most companies have an existing document retention policy. However, the team may need to consider changing the existing policy in crisis situations. The plan should also ensure that company employees understand that in some circumstances, they may be criminally liable if they disregard the policy.

The best plans are only as effective as the people carrying them out. Therefore, telling company employees that the company will not tolerate document destruction may not be enough, and the crisis management team should not rely on a general memorandum to convey the importance of this subject. For example, the team may consider telling company employees about the policy during an in-house, educational seminar, or with the assistance of counsel, members of the crisis management team could consider collecting relevant documents from individual employees. The team may also consider keeping certain documents in a secure location to prevent destruction or other tampering.

The crisis management team should focus on both paper documents and electronic documents, including drafts and e-mail. Several companies provide electronic data maintenance and restoration services, such as copying computer hard drives, and the team may want to identify and provide contact information for one or more of these companies in the plan.

- <u>Establish Public Relations Guidelines</u>

In some situations, public relations is the single most important element of the crisis response. In some cases, the damage to good will, brand name, public confidence or investor confidence can far exceed civil judgments, administrative penalties or remedial measures. In these cases, effective crisis management is determined by the ability to control how information is disseminated through the media. A good media relations plan will ensure that the company's essential message is disseminated, reflect that the company is taking the crisis seriously and demonstrate that the company is cooperating with the media and, in appropriate situations, government investigators. Conversely, an ineffective media relations plan is likely to exacerbate the problems presented by the crisis.

As with most areas of crisis management, the specific strategies of the plan cannot be decided until the events unfold; however, there are certain general elements that can be established prior to the crisis. For example, the team could formulate a list of simple instructions or guidelines to follow in providing media statements, such as the following:

1. The plan may identify both a primary spokesperson and a backup, in case the primary spokesperson is immediately unavailable. The primary and backup spokesperson should be capable of dealing with tough questions and probing reporters.

2. The spokesperson should be an appropriate member of the company, and the severity of the crisis should dictate who that person is. The choice of spokesperson should reflect that the company is taking the matter seriously. Several companies have been criticized by the press for not having senior level management make statements to the press.

3. Media relations personnel should review the statement to make sure that each sentence will stand alone if extracted for a quote in a publication or news program.

4. Attorneys on the crisis management team should review the statement or proposed answer to protect against such things as privilege waivers and potential admissions that can be used in litigation.

5. A member of the crisis management team who is familiar with factual details should review the statement for accuracy.

6. After a statement or press conference is given, media relations personnel should evaluate the truthfulness and accuracy of the information provided, whether the company's message was adequately conveyed, and whether there are any unresolved questions or issues. If necessary, the media relations personnel should take corrective measures.

7. The company should remind employees to whom press inquiries should be directed.

The team can also formulate a set of guiding principles for the content of press releases. For example:

1. The company will be factually accurate in providing information to the media. For example, in 1993, a state attorney general announced that his office caught a major retailer in the act of making and charging for automobile repairs that never existed. In response, the company's attorney called the state's announcement a "shameful crusade" to divert attention from the Department of Consumer Affairs' own troubles. Days later, the company's chairman stated, "Mistakes may have occurred." Almost a week later, the chairman was forced to admit that the company's policy of paying commissions to auto technicians and imposing quotas on them was flawed and encouraged wrongful repairs. This finger-pointing campaign hurt the retailer because it struck at the heart of its business — trust — and exacerbated the public's worst fears.

2. The company will reassure the public that the company is taking the matter seriously and has commenced its own investigation into the events. After a major crash, one transportation company was criticized for not showing compassion. A crisis management consultant told the Los Angeles Times, "What I'm not seeing is the chairman of the board of [the company] on the Larry King show or the network news expressing deep sympathy and saying, 'We'll do anything to get to the bottom of this.'"

3. The company will not engage in speculation. Instead, the spokesperson should respond by stating that an answer is not yet available, but will be made available as soon as the company knows the answer. The public relations personnel should take reasonable efforts to identify an answer as quickly as possible. If an answer is not available that day, the public relations personnel should call the reporter, explain that the answer is still not available, and promise to follow up with the reporter.

4. The company will avoid using the words "no comment." These words give the appearance that the company is hiding from something, even if it is not.

5. The company will return all calls from the media within an established time period.

- <u>Identify Options For Dealing With Each Crisis</u>

The final step in preparing a crisis management plan is to identify options for responding to potential crisis events. An effective crisis management plan will identify the options that are available to the company once the crisis strikes rather than attempt to identify an absolute "solution." When it comes to responding to a crisis, the "right" decision under one set of facts and circumstances may be the "wrong" decision under a different set. For this reason, the crisis management team may be better served by identifying options that can be selected according to the facts and circumstances of crisis rather than identifying a solution that is formulated under a certain set of assumptions that may not be present once the crisis strikes. By identifying the available options in advance, the team also can debate the strengths of weaknesses of each option before the crisis strikes, thereby minimizing the chance that the crisis manager is paralyzed by a debate between two or more of the members of his or her team.

- **STEP 6: Test the Plans**

Where possible, the team should also consider testing its plans before a crisis event by performing mock crisis exercises. Depending on the company's size, it may devote significant resources to testing its plan, including requesting that a public relations firm formulate a mock crisis situation and assist in evaluating various techniques. Even where a company does not have significant resources to devote to crisis management, however, the company should consider more practical ways of testing the plans. For example, the company could test the notification system by having the crisis manager initiate the notification system through an announcement that a crisis is occurring and the team needs to meet immediately. The crisis manager can then measure the team's response time and determine whether changes need to be made. The company could also consider giving the team mock crisis situations during a weekend retreat, asking individual members to prepare plans on the spot addressing how they would proceed under the proposed crisis. Subsequent trial runs should provide new circumstances and re-test areas that presented problems for the team in previous tests.

Once the mock crisis has been completed the crisis management team should evaluate the response. Depending on the nature of the exercise, the team may consider the following questions:

1. How effective was the crisis reporting system?
2. Do company employees know that they are not to give statements to the press?
3. Does the crisis manager have the authority, as well as the budget, to immediately implement crisis management measures and directives, including retaining outside counsel, investigators and public relations personnel?
4. Does the crisis manager have the authority to draw immediately on corporate resources and personnel to provide expertise in managing the crisis?
5. Were lawyers and public relations personnel available to monitor press statements and other interactions within and outside the company?
6. Did employees feel protected by the corporation?
7. Were outside members willing to assist in the crisis management process?
8. Do the members of the crisis management team work well together?

- **Other Steps to Take**

    ■ Follow the News

One of the best ways to prepare for a crisis is to learn from others who encountered similar crisis events. During the early stages of forming the crisis management team and crisis management plan, the team should research previous actions taken by companies and crisis management teams with an eye towards which decisions "worked" and which decisions "backfired." The team may use this research to help shape its own crisis management plan. The team may want to keep files on what worked in the past and what has not. These materials may be of assistance in explaining to shareholders why the company took a particular course of action.

The team also can examine and discuss current crisis events affecting other companies as they unfold. The team should not only evaluate how another crisis management team handles the crisis, but incorporate new ideas into its own plans.

    ■ Identify Legal Issues

Once a crisis erupts, the crisis management team's primary concern is containing the crisis. While the company and the crisis management team will be concerned with criminal and civil liability, there will likely be very little time to examine legal options. Therefore, the team may want to ask counsel to identify legal issues prior to the crisis event.

For example, the crisis management team should be in a position to know as soon as the crisis erupts whether the crisis triggers a duty to report the event or the results of its internal investigation to a federal investigator or other regulatory body.[4]

Similarly, depending on the nature of the company, the crisis management team may want counsel to identify whether the company's potential liability differs in various states. For example, in the area of products liability law, some states impose a post-sale duty to warn on manufacturers, while others do not.[5] Similarly, a few states impose post-sale duties to recall or

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[4] For example, the environmental laws contain specific disclosure requirements. *See, e.g.,* Toxic Substances Control Act, 15 U.S.C. § 2607(e); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1362 (a)(2); Clean Water Act, 33 U.S.C. § 1321(b)(3),(5); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9603; Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11004.

Some types of violations, including "material" criminal conduct, must be disclosed in securities filings. *See generally* Roiter, *Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws*, 50 Fordham L. Rev. 781 (Apr. 1982). *But see U.S. v. Matthews*, 787 F.2d 38, 47-48 (2d Cir. 1986) (securities laws did not require disclosure of uncharged criminal conduct).

[5] *See Comstock v. General Motors*, 99 N.W.2d 627 (Mich. 1959) (imposing a post-sale duty to warn of defects learned shortly after the time of sale); *Modelski v. Navistar Int'l Trans. Corp.*, 707 N.E.2d 239 (Ill. App. 1999) (rejecting a post-sale duty to warn).

retrofit defective products. Even where a state does not impose such a duty, however, taking corrective measures may be a good idea. For example, in a lawsuit involving milk products contaminated with salmonella poisoning,[6] Jewel Companies successfully defeated a claim for punitive damages, in part by showing that the company instituted a voluntary recall.[7]

Finally, where counsel identifies different treatment of issues in different jurisdictions, the crisis management team may want to ask counsel to prepare and evaluate choice of law arguments.

II. THE INITIAL RESPONSE: CRISIS MANAGEMENT DURING THE FIRST FEW HOURS AND DAYS

Of course, assembling a crisis management team is only the first step to successfully managing a crisis situation. Once the crisis erupts, the crisis management team must make the appropriate decisions. While most of the crisis management team's decisions will be based on the particular events as they unfold, there are a few general rules that the crisis management team should follow which will help the crisis management team handle the crisis.

In general there are two goals that the crisis management team may want to keep in mind to help it avoid long-term pitfalls. The first goal is to learn the facts as quickly as possible. This may require the company to devote significant financial and manpower resources to discovering the underlying facts. Second, the team should resist the urge to focus only on the immediate issues raised by the crisis and, instead, should take a big picture approach by focusing on how the company will be better served in the long run and how the company can best maintain its credibility.

- **Begin a Factual Investigation**

Ignorance of the facts will not only paralyze the crisis management team, but could also force the company into making inaccurate denials. In some instances, the facts surrounding the crisis may be readily ascertainable and may not require an "internal investigation." In more complicated crises, however, the crisis management team will need to conduct an extensive factual investigation and should begin this investigation as quickly as possible. The factual investigation may lead to a more detailed, internal investigation if there is the possibility that the corporation or its employees engaged in any wrongdoing that may have caused the crisis in the first place.

A 1988 oil spill involving Ashland Oil, Inc. underscores both the importance of beginning a factual investigation immediately and the importance of conducting the investigation prudently.

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[6] *In re Salmonella Litigation*, 556 N.E.2d 593 (Ill. App. 1990).

[7] The case involving Jewel shows how a company can be successful in managing a crisis from a litigation strategy while struggling with the crisis from a public relations standpoint. *See* Sally Saville Hodge, *Jewel Drops the Ball in Salmonella Incident*, CHI. TRIB., Apr. 15, 1985, 1985 WL 2506598.

On Sunday, Ashland's chief executive officer was informed by the company's president that one million gallons of diesel fuel spilled into the Monogahella River. The CEO spent much of the day trying to determine how serious the accident was and came to the conclusion that while the accident qualified as a disaster, he thought it could be controlled. As a result, he decided against going to the disaster site. The company's vice president and media chief explained the decision as, "He didn't want to make an official appearance until he could provide some answers."

On Monday, the CEO decided against devoting his customary meeting with executives entirely to the oil spill, believing that the crisis was being handled well. By the middle of the day, several troublesome discrepancies emerged about the spill. Apparently, the company spokesperson spoke too soon, telling reporters that the storage tank involved was new and the company had a permit to construct it. In fact, the tank was reconstructed from 40-year old steel and without a written permit. In addition, the CEO learned that testing on the tank was less complete than usual.

The crisis soon turned from bad to worse. River currents were unusually fast, and containment crews could not trap all of the spill. As a result, 750,000 Pennsylvania residents were left without water, transforming the crisis from an environmental accident to a public health-and-safety concern. The CEO finally issued a statement, an action that was against the advice of his lawyer, but probably served the company's best interests.

When later asked what the CEO would have done differently, the company's media chief answered, "He would have wanted more accurate information faster."

This example provides several important lessons. First, it shows that the initial information the company receives may be inaccurate. Even when it appears that the crisis is being contained, the company may need to start a factual investigation to confirm the information it is receiving from the field. Second, this example illustrates the importance of knowing the facts before giving the press a specific statement. To some, the company's original statement that the tank was new and that the company had a permit could give the appearance that the company was trying to "cover up" the facts, when in fact the statement was apparently made in good faith but based on inaccurate information. Finally, this example shows how a crisis can escalate when a company delays in conducting a factual investigation.

Once the company knows the facts it may need to conduct an internal investigation to determine potential legal liability and develop appropriate responses. In commencing an internal investigation, the crisis management team may also consider formulating specific guidelines that address the procedures and scope of an investigation. These guidelines may help the corporation avoid allegations that it proceeded on an inconsistent or capricious basis. Some guidelines that the team may consider are:

1. Will the purpose of the investigation be limited to providing the company with legal advice?

2. What information about the investigation are investigators allowed to provide to employees?

3. What type of guidelines are necessary with respect to the time and place of interviews?

4. What steps should be taken to maximize confidentiality?

5. Who will be responsible for keeping and maintaining the files produced during the investigation?

- **Keep the Board of Directors Informed**

The crisis management team should keep the board of directors informed and provide it with regularly updated information. The crisis management team can safely assume that board members will not be happy if their source of bad news is the morning newspapers.

- **Establish a Command Post**

As discussed above, one of the most important elements of crisis management is establishing a communication system. Establishing a "command post" or "war room" will help ensure that team members and other necessary personnel have a standard contact point and that information can be easily shared. Files should be well organized and well marked. If certain files contain confidential or privileged information that should not be shared with everyone, these files should be segregated and identified as being confidential or privileged.

- **Consider Voluntary Disclosure of Problems to Government Regulators, Product Recalls and Other Corrective Actions**

During the first few hours of the crisis, the crisis management team needs to make a decision as to whether it will voluntarily disclose problems to government regulators, issue public warnings or institute product recalls. Many companies are reluctant to take these measures, fearing either the expense of implementing such measures or that the company will be seen as admitting fault. The health and safety of the public, however, must be paramount. Additionally, these measures may go a long way in creating good will with the government, the media and the general public, and may be in the company's best interests in the long run.

For example, in the wake of the 1981 Tylenol cyanide poisoning crisis, Johnson & Johnson's chairman decided to institute a voluntary nationwide recall. This decision was met with opposition from the FBI, the FDA and others within the company. The chairman's decision paid off, saving many lives — 75 of the nearly 8 million recalled capsules tested positive for cyanide — and Tylenol's reputation in the market place.

In 1995, Philip Morris received favorable press treatment for voluntarily instituting a recall. Once the company learned of traces of toxic chemicals in some cigarette filters, Philip Morris voluntarily recalled 8 billion cigarettes, even though the effects of the contamination were thought to be limited to bad taste, odor and possible dizziness. Many analysts claimed that Philip Morris' handling of the problem was a textbook example of crisis management, giving the company the appearance of being concerned about quality and customer satisfaction.

Voluntarily disclosing incidents to government agencies may also help establish good will with the government. This good will may influence the government's decision whether to bring claims or charges and may reduce any ultimate sanction or sentence which is imposed. For example, under the False Claims Act, damages exposure may be reduced from triple to double damages if the corporation gives the government the relevant information within 30 days of discovering violations and fully cooperates with any government investigation.[8] Similarly, if the company discloses the conclusions of an internal investigation or otherwise demonstrates good faith in cooperating with the government, the government may be persuaded not to seek disclosure of the entire investigation report or of the underlying materials.

Conversely, failing to disclose a violation creates potential dangers that may far outweigh the corporation's short-term interest in protecting confidentiality. For example, the company will certainly lose the benefits of cooperation and instead may face allegations of engaging in a "cover-up." Failing to disclose an incident could also create an environment in which employees do not take their own legal obligations seriously, increasing the chance of future misconduct. Finally, subsequent violations will be more damaging than they otherwise would be, and the corporation will be less able to convince the government or a court that it has an effective compliance program.

- **Victim Relations**

Victim relations presents a difficult issue for the crisis management team. On one hand, the company does not want to admit fault. On the other hand, the company will want to treat victims and their families in a way that demonstrates compassion, generates public good will and reduces the chances of litigation.

As a general rule, the crisis management team can assume that a victim who feels that he or she is being treated fairly is more likely to settle with the company rather than sue. Therefore, in creating victim relations guidelines, the crisis management team should consider establishing policies that promote settlement by making victims believe they do not have to sue the company to be adequately compensated. For example, the crisis management team could consider a policy that prohibits the company from using statements made by victims or their families during and immediately after a crisis in subsequent litigation.

There are other victims relations guidelines that the team may want to consider implementing, including the following:

1. Victims and their families should be contacted immediately, and if at all possible, before the press has an opportunity to contact them. For example, after one airplane crash, the airline company took more than 20 hours to contact victims and release a list of passengers who were on board, leaving relatives and friends of victims frustrated.

[8] 31 U.S.C. § 3729.

2. Without admitting fault, the team member should reassure the victim that the company is taking the matter seriously and investigating the cause of the crisis event.

3. The team member should tell victims that he or she will keep in regular contact and also give victims his or her own contact information.

4. Calls from victims should be returned as soon as possible and always within the same day.

- **Media Relations**

During crisis situations, some companies treat the media as one of the "enemies." As a result, the company may evade, criticize or even lie to the press. These types of actions typically produce negative results, usually with the press portraying the company as a guilty party rather than a victim of the crisis.

Examples of rules that the team may want to institute in order to ensure a proactive relationship with the media include the following:

- The crisis management team may want to issue an immediate company statement. Even if the team does not know the cause of the crisis, it should issue a statement saying that the company is taking the matter seriously and has begun its own investigation. If government regulators are involved, the team may consider including a statement that indicates that the company is giving the government the company's full cooperation in investigating and resolving the issue.

- The crisis management team may want to provide regular press conferences — more than once a day if necessary. Approximately ten years ago, a company could hold a daily press conference and know that its side of the story would be given to the public on the evening news and in the morning newspapers. That luxury may no longer exist, however. With the widespread availability of the internet and cable news programs, the public has around the clock access to new information. Indeed, the power of the media and the importance of being heard was fully demonstrated in the aftermath of Hurricane Katrina. In many cases, the press was the first to gain access to areas where victims were still waiting for relief efforts, and often times, a press member was the first — and only — person making a statement to the general public. Preferably, the company will "break" each development in the crisis before anyone else does, even if the news is bad and make sure that a company spokesperson is available multiple locations in crisis situations that affect either a large geographic area or several geographic areas.

- The team may want to have a high-ranking executive make statements. The media has crucified several companies for not having the their top executives issue media statements. On the other hand, if the crisis is not severe or is related to false allegations, sending out the chief executive could lead the press or the public to believe that the crisis is more severe than it really is. In these situations, the crisis management team should consider having a lower-level executive or public relations employee issue the statement.

- All statements should provide truthful, accurate and up-to-date information. Conversely, the statements should not include any speculation, even when requested. In making speculation, the company risks the chance that the public will view the company as engaging in deception if the speculation turns out to be erroneous.

- In appropriate situations, the team may consider including victims' hotline information. Similarly, the statement may provide contact information for media inquiries.

Baxter's handling of the crisis involving dialysis filters in the fall of 2001 demonstrates how working with the media can help a company manage a crisis. According to press reports, after learning on August 15 of deaths in Spain that were possibly related to its dialysis filters, Baxter flew a team of experts to Spain to investigate the potential crisis. After arriving and without admitting fault, the team recalled dialysis filters in Spain and halted production at the plant that made them. Two months later, when Croatia reported 21 deaths, Baxter flew in a higher level team and issued a global order to stop using the dialysis filters. Three days later, when Baxter learned of two deaths in Texas, the company issued a worldwide recall of the filters, while still not admitting fault. Instead, Baxter stated that the cause of the deaths was still a mystery, there was no evidence that its filters actually caused the deaths, and that the recall was instituted for precautionary reasons. This statement was consistent with reports from all three governments.

Almost three months later and after finding substantial evidence that its filters caused the deaths, Baxter admitted that a chemical used to manufacture the filters may have played a role in the deaths. Despite the length of time between the accidents and the admission, the press did not criticize Baxter. Instead, Baxter was praised by the press for keeping the public informed on the status of its investigation and admitting fault once it was clear that the company's filters caused the deaths. One journalist stated:

> In that kind of fix, most big companies run for cover.
>
> . . .
>
> We waited for Baxter to announce there was no proof its dialyzers were responsible. Or we waited for Baxter to blame one of its suppliers for a death toll that may top 50 people in seven countries as far apart as Taiwan, Columbia, Croatia, and the U.S.

We waited. But the blame-dodging announcement never came.[9]

- **Formulate a Litigation Strategy**

The attorneys on the crisis management team may need to start assessing the company's potential liability and form a litigation strategy. During the early stages of the crisis, it may be difficult to predict whether the company will be able to settle with victims or whether the company will be involved in protracted litigation. Therefore, the attorneys may need to plan for both scenarios and modify the strategy as more information is produced through investigations.

The attorneys may also need to determine whether the company may be subject to both criminal and civil liability. A settlement offer by the government may be contingent on the company turning over all information, including confidential and privileged documents. Moreover, disclosure of privileged information to the government will likely waive the privilege with respect to other parties.[10] For this reason, the company may want to consider settling with civil opponents early if the company may also be subject to criminal litigation. The team may also consider taking steps to minimize punitive damages.

- **Establish Deadlines for Both Short-Term and Long-Term Projects**

Many team members will have multiple responsibilities, some of which will depend on the completion of other projects. During the early hours of the crisis, the crisis management team should meet to discuss their responsibilities and how those responsibilities affect each other. The team should then set deadlines for both short-term and long-term projects.

- **Communicate with Employees**

During the early hours of the crisis, one or more members may need to communicate with the company's employees about issues such as those listed below. When possible, the team may want to have a member personally meet with the employees. When this is not possible, however, the company should consider contacting the employees via e-mail, memorandum or video conference. Examples of issues the company may want to address with employees include:

1. Updating employees on any personal safety or financial issues, and assuring them that it will continue to do so.

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[9] David Greising, *Baxter Gets Grip on Crisis, Responsibility*, CHI. TRIB., Nov. 7, 2001, 2001 WL 4133154.

[10] *See, e.g., Permian Corp. v. United States*, 665 F.2d 1214, 1219-20 (D.C. Cir. 1981) (holding that the privilege was not designed to allow parties "to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others."). *But see SEC v. Amster & Co.*, 126 F.R.D. 28, 30 (S.D.N.Y. 1989) (recognizing selective waiver where the party holding the privilege and the government have entered into a binding agreement protecting the privilege).

2. Making clear that the company will not tolerate document destruction or other actions intended to conceal evidence.

3. Informing employees that they must cooperate with both internal investigators and federal investigators if they are contacted.

4. Advising employees in appropriate situations that the corporate attorneys are only attorneys for the corporation and not for individuals. If the employee feels that it is necessary, he or she should retain his or her own attorney.

The crisis management team should also consider that the company's employees themselves, their family members or their friends may be the victim of a crisis event even if the company itself is not a victim. The individual and corporate relief efforts in the wake of September 11 and Hurricane Katrina demonstrated that the world is filled with people who want to help. By organizing relief efforts or donations to relief efforts, the company not only helps those in need, but also empowers its employees to help the victims of a crisis situation. For example, employees of one Fortune 500 company transferred more than 11,000 hours of paid time off to employees who were affected by Hurricane Katrina. Other companies matched employees' donations to relief effort organizations. In preparing for similar crisis events, the company should consider setting up a website to coordinate relief efforts and letting employees know in advance where to go for information in a crisis. In addition to helping people in their time of need, such actions likely will promote good will for the company with the crisis victims, the company's employees and the public in general.

III. LONG-TERM CRISIS MANAGEMENT: REBUILDING CONFIDENCE

Effective crisis management does not end once the immediate problem is resolved. Instead, the team will need to begin its long-term crisis management. The primary goal of long-term crisis management is to rebuild confidence at all levels, including consumers, investors, the government, employees, and the general public. Long-term crisis management also includes long-term corrective measures and an evaluation of how the company performed during the crisis.

In many respects, long-term crisis management builds upon the company's initial reaction to the crisis. For example, if the company accepted responsibility and took immediate corrective measures, the company may want to emphasize this to convey that the company is concerned about public safety.

- **Rebuild Market Share**

If the crisis involves a product or service sold by the company, the crisis management team, with the assistance of in-house and possibly outside marketing personnel, will need to formulate a marketing plan to restore consumer, distributor and retailer confidence in the product.

In 1990, after finding traces of benzene, a suspected carcinogen, in some of its bottles, Perrier instituted a voluntary recall. Unquestionably, Perrier made the right decision in recalling its product. However, Perrier saw its market share decrease dramatically — not because purchasers were afraid of benzene, but rather, because Perrier's recall opened the door for its competitors. Perrier never recaptured its dominance in the bottled water market and eventually lost its independence when it was purchased by Nestle SA.

Conversely, after a 1996 crash in Florida, many experts predicted that ValueJet was finished. After doing a little "house-cleaning" and changing its name to AirTran, the company again became a major player in the discount air market.

- **Restore Investor Confidence**

A crisis situation often results in a loss of investor confidence. If the crisis is severe, the company may see its stock fall to a level where the company becomes the target of a hostile takeover, bringing on a new crisis. Therefore, restoring investor confidence must be one of the first long-term crisis management issues addressed by the team.

- **Comply with SEC Disclosure Rules**

With the assistance of counsel, the crisis management team should determine whether the crisis event requires an SEC disclosure. The SEC requires that every public company must "make full and prompt announcements of material facts regarding the company's financial condition."[11]

- **Prepare to Litigate or Settle Civil Claims**

With the assistance of counsel, the crisis management team should continue preparing strategies for settling and litigating civil claims, such as products liability or wrongful death actions.

- **Prepare to Litigate or Settle Criminal Charges**

With the assistance of counsel, the crisis management team should continue developing litigation strategies, defenses and settlement proposals for criminal charges.

- **Prepare to Litigate Shareholder Derivative Suits**

A crisis could result in shareholder derivative suits alleging that the company's officers, directors and management breached their fiduciary duty of care. With the assistance of counsel, the crisis management team should prepare arguments in favor of a finding that the company's actions fall within the scope of and are protected by the business judgment rule.

- **Take Long-Term Corrective Actions**

The company may also need to take long-term corrective measures. For example, one manufacturer that successfully handled a crisis involving one of its products was still caught

[11] Securities Act Release No. 5092.

off guard by a second series of similar incidents. Once the crisis has been controlled, the crisis management team should formulate plans for reducing the likelihood of a second occurrence.

- **Evaluation**

Once the crisis has been controlled, the team should meet to evaluate how the team performed during the crisis. Despite the company's best efforts to be prepared for a crisis, there is nothing like the real thing to identify points of strength and weakness. Therefore, the team should consider holding an evaluation meeting after the crisis has been controlled. At this time, the team may indicate areas that need improvement. The team may also discuss particular unforeseen problems that the plans did not account for. Finally, the team should consider discussing ways that the company's overall crisis management plan can be improved, even if the crisis was handled well.

For example, Home Depot learned from previous hurricanes to become more experienced and prepared. After Hurricane Katrina hit, Home Depot was ready to quickly dispatch the first phase of the response with products like insecticides, water and diapers. However, even after a successful response, Home Depot is not resting on its laurels. As its Chief Executive Officer explained: "But we have new lessons to learn. In some cases, I couldn't get gasoline for my associates to drive to the stores, so some had to stay in their cars overnight. Now, for the next hurricane, we'll know to have portable gas."In this respect, the company should consider its crisis management plans as fluid and constantly evolving. The company should review its plans regularly and modify its plans where necessary. As discussed above, a critical review of the company's crisis management plan should not be limited to an evaluation of its own plan but also should consider and implement strategies used by other companies.

IV. PROTECTING CONFIDENTIAL INFORMATION

Should the crisis result in either civil or criminal litigation, many of the actions taken by the crisis management team could be the subject of discovery. Therefore, the team may want to take efforts to maximize protections provided by legally recognized privileges, including the attorney-client privilege, work-product immunity doctrine, and the self-evaluative privilege. However, the team should also understand that because privileges act as an obstruction to the search for the truth, they are often construed narrowly.[12] Moreover, the crisis management team must understand that privilege rules are treated differently by different courts, and as discussed below, there are several limitations to these rules.

While the company can take steps to maximize the chances that information will remain confidential, there is a substantial likelihood that confidential information will lose its protected status — either purposefully or inadvertently. The team should realize this possibility and plan accordingly.

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[12] *See, e.g., Haines v. Liggett Group, Inc.*, 975 F.2d 81, 84 (3d Cir. 1992) ("[S]ince the [attorney-client] privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purposes.").

- **The Attorney-Client Privilege**

In general, the attorney-client privilege protects confidential communications between an attorney and a client for the purpose of obtaining or providing legal assistance.[13] The privilege extends to verbal statements, documents and tangible objects conveyed in confidence for the purpose of legal advice.[14] To the extent communications with the company's in-house and outside lawyers during the course of managing a crisis are for the purpose of obtaining or providing legal advice, such as discussions concerning ways to minimize liability, they will generally be covered by the attorney-client privilege.

- **The Work-Product Immunity Doctrine**

In *Hickman v. Taylor*, the United States Supreme Court held that written statements, private memoranda and personal recollections prepared by attorneys in anticipation of litigation "fall[] outside the arena of discovery.[15] The rule established by the Supreme Court in *Hickman* is codified by Federal Rule of Civil Procedure 26(b)(3). This rule provides that materials prepared in anticipation of litigation or for trial are discoverable only upon a showing that "the party seeking discovery has a substantial need of the materials in the preparation of the party's case" and the party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." However, the rule provides that "in ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" and are never discoverable. Finally, without making a showing, a party or a non-party may obtain a previous statement concerning the action or its subject matter made by that person.

As with the attorney-client privilege, the work-product doctrine is a potential shield to valuable information. Materials generated by the company in the course of resolving the crisis may be subject to the work-product doctrine, if the company anticipated litigation at that time.

- **The Self-Evaluative Privilege**

Some courts have recognized a self-evaluative privilege to protect the confidentiality of internal interviews and investigations.[16] The rationale behind this privilege is

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[13] *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

[14] *Haines*, 975 F.2d at 90; 8 J. WIGMORE, EVIDENCE § 2292 (J. McNaughton rev. 1961); Rest. 3d § 119.

[15] *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

[16] *See, e.g., Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970) (minutes of hospital meeting evaluating the death of a patient were privileged and not subject to discovery).

that corporations will cease to conduct self-evaluations if courts do not protect these reports.[17] However, the scope of this privilege is still in question, and many courts of appeals are reluctant to find that the requirements for the privilege are met on the facts of a given case.

Courts that have adopted the privilege have identified several elements and restrictions. For example, in *Dowling v. American Hawaii Cruises, Inc.*,[18] the Ninth Circuit held that three criteria must be met to qualify for a self-evaluative privilege: (1) the requested information resulted from a critical-analysis; (2) a public interest exists in preserving the free flow of this type of information which would be furthered by recognizing a privilege; and (3) the report or document was intended to be, and in fact was, kept confidential. Some courts have imposed additional requirements and limitations, such as limiting the privilege to circumstances where the materials are sought by private parties rather than a government agency. Although the privilege can be helpful if it applies, there is enough uncertainty about its existence and scope that no company should assume that it will apply in a given case.

- **Limitations on Privileges**

As discussed above, the company should consider the substantial likelihood that confidential information will be disclosed. There are many circumstances where the privileges will not apply. Some courts use strict tests in determining whether material is privileged in the first place, and a court that wants to find a rationale for requiring disclosure of information usually can do so. The following is a sampling of privilege issues that the company should keep in mind:

- The attorney-client privilege does not protect underlying facts. The privilege only protects communications themselves.[19] Similarly, the work-product doctrine only protects an attorney's interpretations of the underlying facts, not the underlying facts themselves.[20]

- Most courts distinguish between in-house counsel's role in providing business advice and providing legal advice.[21] It is often difficult to separate the two and what the company considers legal advice may be considered business advice by the court.

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17 *See Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507, 509 (E.D. Pa. 1987).

18 *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992).

19 *In re Six Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992).

20 *Hickman*, 329 U.S. at 511-13.

21 *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (requiring a clear showing that communications with in-house counsel were in a professional legal capacity).

- The attorney-client privilege does not always apply to lower-echelon employees of the corporation. In 1981, the United States Supreme Court provided the following factors to determine whether communications between legal counsel and lower-echelon corporate employees are protected by the attorney-client privilege: (1) the information was necessary to supply the basis for legal advice to the corporation or was ordered to be communicated by superior officers; (2) the information was not available from "control group" management; (3) the communication concerned matters within the scope of the employee's duties; (4) the employee was aware that she was being questioned in order for the corporation to secure legal advice; and (5) the communication was considered confidential when made and kept confidential.[22] State courts have adopted a variety of approaches on this issue.

- Ordinary work-product, which includes witness statements, factual eyewitness information, and other documents containing relevant and non-privileged facts, is discoverable if the opposing party shows "substantial need" and "undue hardship."[23]

- Courts vary in the extent to which they require "anticipation of litigation" to be a factor for communications to be covered by the work-product doctrine. Some courts hold that a document "does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation."[24] Other courts hold that documents must have been "prepared principally or exclusively to assist in anticipated or ongoing litigation."[25]

- Rule 26(b)(3) provides work-product protection when a party seeks discovery of materials prepared "by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." This language seems to make clear that the materials need not have been prepared by, or under the direction of, counsel in order to constitute work-product.[26] Still, some

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[22] *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981).

[23] FRCP 26(b)(3); *see also Hickman*, 329 U.S. at 511-12.

[24] *See, e.g., U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

[25] *See, e.g., U.S. v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) *cert. denied*, 519 U.S. 927 (1996).

[26] *See, e.g., APL Corp. v. Aetna Casualty & Surety Co.*, 91 F.R.D. 10 (D. Md. 1980).

courts have nonetheless limited the doctrine to materials prepared by or at the direction of counsel. [27]

- Some courts do not protect services rendered by other professional firms, such as public relations firms, under the work-product doctrine even if the firm was retained prior to the lawsuit to help the law firm understand issues presented by the lawsuit, help provide legal advice to the client, and handle the ensuing media crisis.[28] Similarly, disclosure of confidential information to outside firms such as public relations consultants may waive the privileges.

- The government increasingly requires a company to turn over all confidential material as part of the terms of a settlement. Turning over confidential information to the government generally results in a waiver of the privilege in subsequent civil litigation.[29]

- Similarly, disclosure to an opponent pursuant to discovery in civil litigation generally waives the privilege in other cases.[30] This is true even if the information is disclosed in the initial litigation pursuant to a confidentiality agreement.[31]

- Disclosing the results of an internal investigation to the client's accountants may waive the privilege.[32] In 1988, Congress established a limited accountant-client privilege governing tax advice, applicable only in noncriminal proceedings. Additionally, some states recognize an accountant-client privilege. However, for practical purposes, the company may want assume that the privilege will not apply and that disclosures will waive the privilege.

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[27] *See, e.g., United States v. Doe*, 979 F.2d 939 (2d Cir. 1992).

[28] *See, e.g., In re Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000).

[29] *Permian Corp.*, 665 F.2d at 1219-20.

[30] *See, e.g., Chubb Integrated Systems Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 67 (D.D.C. 1984).

[31] *See, e.g., Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993).

[32] *See, e.g., In re John Doe Corp.*, 675 F.2d 482, 488-89 (2d Cir. 1982) (requiring disclosure of business ethics reviews prepared on basis of information developed by in-house counsel); *In re Subpoena Duces Tecum Served on Wilkie Farr & Gallagher*, 1997 WL 118369 (disclosure of investigation results to auditors in order to obtain unqualified audit opinion waived the privilege).

- The crime-fraud exception may defeat the privilege where there has been a prima facie showing that legal advice was obtained in furtherance of an illegal or fraudulent act.[33] If a court believes that there is a sufficient showing that the company was engaged in a fraud or cover-up, legal advice relating to the crime may become discoverable.

- **Recommendations**

During the early stages of the crisis, the crisis management team must make a decision on whether to try to maintain privileges. While maintaining privileges protects confidential information, waiving the privileges may produce other, more important advantages. This tension is often most apparent in crisis situations involving public health and safety. As is discussed throughout these materials, one of the most important ways to measure the successfulness of crisis management is whether the company still has credibility with the public and government. Therefore, the crisis management team will need to make an immediate decision as to whether disclosing confidential information will enhance the company's credibility.

For example, the crisis management team may choose to waive the privileges and share confidential information with the government during its investigation. This cooperation could help convince the government to either abandon criminal charges against the corporation or enter into a more favorable settlement with the company. The crisis management team may also decide to waive confidential information where that information would be instrumental in maintaining public confidence, defeating liability claims or responding to false allegations.

Even if the crisis management team decides to maintain the privileges, it must recognize the substantial possibility that everything will eventually be disclosed. This will affect the manner in which the company proceeds, in a variety of ways. For instance, team members may decide not to commit certain communications to writing or they may want their writings to avoid any unnecessary speculation that could be damaging to the individuals involved.

Finally, there are several practical steps that the crisis management team can follow to maximize confidentiality.

1. Mark all privileged communications accordingly. The marking should stand out by using a larger font, bold face, or italics.

2. Limit the number of people who are provided with privileged information.

3. Educate the members of the crisis management team about the importance and methods of maintaining confidentiality.

4. Rely on counsel, preferably outside counsel, to do most of the crisis management team's investigative work to maximize protection under the attorney-client privilege and work-product doctrine.

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[33] *See, e.g., In re John Doe Corp.*, 675 F.2d 482, 489-92 (2d Cir. 1982).

5. Segregate attorney-client privileged and work-product materials and keep them in a secure location.

6. Generate and copy privileged documents on colored paper. This allows others to know that the contents are privileged, without reading the document's contents.

7. Distinguish between in-house counsel's role as an attorney and role as a business executive. Communications with in-house counsel concerning legal advice should be made separately from business advice communications and should be clearly designated as such.

8. Memorialize in writing that communications such as employee interviews are for the purpose of providing legal advice.

CONCLUSION

While the examples cited in these materials present real issues that companies confronted in the past, these materials are by no means an exhaustive list of how a company can prepare for and handle a crisis. Instead, these materials are intended to provide suggestions for helping companies anticipate what they need to be prepared for when a crisis strikes.

Moreover, there are very few "mandatory" steps that a company must take either in preparing for or in responding to a crisis. There are exceptions to every rule. Indeed, very few crises will present the specific issues that other companies faced in the past. Each crisis presents a new "twist." Therefore, the team will need to be flexible and retain the ability to modify its plans if necessary.

Still, following three basic principles should help the company and the crisis management team navigate through any crisis:

- **Be Prepared.** Given the number of decisions that must be made during a crisis, the speed at which they must be made, and the competing interests that may be at stake, a company that is not prepared will almost certainly not handle the crisis adequately.

- **Knowledge Is Power.** Only when armed with the facts can a company expect to navigate the dangers it will face. Insufficient knowledge can often paralyze the company and lead to negative results, often making the company look inept or like it is engaging in a "cover-up."

- **Focus on Long-Term Interests:** "Knee-jerk" reactions that focus on short-term damage control can often be counterproductive. Although the nature of a crisis means that perhaps no situation will be handled perfectly, a proper approach to crisis management may make the difference between a temporary set-back and a struggle for corporate survival.