

ETHIC PANEL: CRISIS MANAGEMENT FOR IN-HOUSE COUNSEL

Moderator: Scott O'Connell
Nixon Peabody

Brand Protection in High Exposure Litigation: Winning In the Court of Public Opinion

W. Scott O'Connell
Nixon Peabody LLP
Boston, MA and Manchester, NH

Consumer facing companies understand that brand protection is mission critical activity. The traction of a brand reflects, among other things, consumer perceptions of a company together with the quality, value, and safety its products and services. Diluting or undermining these important perceptions is high risk behavior. Brands do not simply materialize. Rather, they are created over time through constant stewardship, protection, and reinforcement. Every consumer interaction is a potential brand-building or brand diluting opportunity. Strong brands often have associated strong consumer loyalty, good will and secondary meaning to in the market which has substantial, if not calculable, value. Products and services may come and go, but the brand, with proper management, may live on and prosper.

C-level executives live this reality. Much of their professional attention is devoted to brand building activities. While there are no shortcuts to building a strong brand, there are quick ways for a brand to suffer irreparable damage. Catastrophic events, product safety issues, or corporate integrity matters are all potential assaults to a carefully cultivated brand. Indeed, instantaneous transmission through any number of social media to a seemingly limitless virtual audience gives frightening new meaning to the old saw “bad news travels fast.” Negative information about a company or its products can “go viral” before decision makers know of a problem. Once this information is in the blogosphere, it takes on virtual life of its own. This virtual free market of information has no rules of evidence, no master editorial board, and no fact checker. Accurate and factual information can reside next to complete fantasy often with no filter but the commonsense and wisdom of the reader. The court of public opinion can render its “verdict” on this negative information—whether it is true or false-- with immediate lost sales and associated financial consequences. All of this will occur years before a judge or jury hears any real evidence of the company’s liability. The demise of Arthur Andersen teaches a powerful lesson: winning in a court of law can be far less important than winning in the court of public opinion. Indeed, by the time Andersen was vindicated on federal charges, there was no company left to save.

Some problems are simply too significant, too exigent, too sensitive or too harmful to await resolution in a court of law. Taking on adverse events and correcting negative information is often time sensitive and critical corporate behavior for the survival of a brand. A survey of recent headlines provides potent examples of bad things that can happen to an array of companies: a catastrophic oil spill into the Gulf of Mexico; the discovery of lead paint in toys

imported from China; salmonella and e coli contamination of food products; mechanical problems with car accelerators are all current issues in some stage of active management by the affected companies. In some circumstances, health, safety, brand preservation and goodwill requires immediate, decisive, and responsive action. Often, such actions are required long before meaningful litigation risk analysis can occur. Immediate reputational harm eclipses many other considerations. The company's immediate responses to these exigent circumstances can have a powerful influence in the court of public opinion. These early actions in the heat of the moment can chart a course for brand preservation or brand destruction.

How do you assess the readiness of your team to manage through a situation like this? Do you have crisis management plan? Do you have an identified team with specific responsibilities? Do you have media and new media communication strategy that sheds "no comment" in favor of substantive communications with your affected consumers and the interested public? Is your trial team and strategy in sync with your crisis response? If the answer to any of these questions is no, you are probably not ready. Time to get busy!

Detailed below are some practical considerations for dealing with the three phases of a crisis response: (1) planning for the crisis; (2) active management of the exigent events; and (3) managing the litigation, regulatory or other fact finding processes.

Phase One: "Fix the Roof While the Sun is Shining" ***Things To Prepare in Advance***

The middle of a catastrophic event is not the time to invent a response protocol. Advance preparation with the professionals on whom you will call is critical for an effective response. Appropriate planning should include the following.

1. Identify, educate and train your crisis response team

Multiple constituencies and disciplines are often necessary for an effective response. Specific circumstances will dictate ultimately who should be part of this team. Core members should include senior management with operational command and control authority, chief legal counsel, regulatory compliance and corporate communications. This core group should drive the process which helps all functional areas develop a coordinated plan for their specific area of responsibility. For example, functional leaders of technology, human resources, sales and fulfillment or other areas will need to tailor plans for their specific areas of responsibility, but they all need central coordination so that the plans can be implemented in an integrated way. All members of the core team as well as functional leaders should obtain crisis response training to establish uniform expectations, set priorities and align all participants. As with any other responsibilities, plans need to be reviewed, updated and assessed for gaps. This behavior required behavior should be cyclical on the corporate calendar and enforced by senior management.

2. Cause your response team to work together in advance of an event

Because the response team necessarily needs to be high functioning under highly stressful and exigent circumstances, it is critical that they form a working relationship in advance of an exigent situation. A natural area for tension in these working groups exists between public relations professionals and members of the legal team, because each is accustomed to doing very different things. Lawyers by training and orientation are issue spotters and risk minimizers. Public relations professionals are by training and orientation focused on getting meaningful, timely messages to the public on the company. Some lawyers see nothing but risk in every message issued before the implications of the events can be fully analyzed and considered. For the reasons referenced above, saying nothing or issuing vacuous statements about the unfolding issues is largely unacceptable and will be savaged in the ethernet. Thus, from the very start of the crisis management, the response team may have constituencies with competing orientations, with differing goals and objectives. This is a dynamic that needs management before the crisis. Quickly reconciling public messaging recommended by the PR team with appropriate counsel from the legal team is very important. Senior management must set the expectations of how these professionals will collaborate in order provide effective and timely communication even with associated risk. Getting these critical players to work well together on this critical issue takes practice and training. Work in this area prior to an exigent event will pay significant dividends in the effectiveness of your response.

3. Prepare your internal and external media strategy

In a crisis situation, established, functional trusted relationship with the established main stream or industry specific media can be very helpful. Such relationships are cultivated overtime through providing accurate, timely and responsive information to journalists in the regular press of business. During the press of a crisis, you will want specific and laser focused messaging to cut through the cacophony of chatter. In those circumstances, solid relationships with the media make a difference.

Cyberspace presents a different challenge. The limitless dissemination of negative information in the virtual world necessitates makes advance work challenging. If the company is actively engaged in social media, it is a possible tool for providing factual information. Additionally, some companies, industries, or issues are followed by influential bloggers and internet-based media. Developing a trusted relationship with these specialty media outlets may prove useful in the midst of an exigent situation. Indeed, bloggers who closely followed the criminal cases involving the Duke lacrosse players improperly charged with rape are credited by the defense counsel involved with debunking inaccurate representations made in the mainstream media. The lesson is this new media has power that if harnessed can be potent. How to engage it to assist with an exigent situation is worth some consideration and planning.

4. Identify the communications protocol

Demonstrating the company's grasp of the issues, recognition of the harm caused, empathy for those effected and a commitment to deliver a resolution are necessary to stop the hemorrhage of public trust often caused by an exigent circumstance. Delivering these messages in a meaningful and effective way requires many things. Depending on the gravity of the circumstance, the CEO or someone from senior leadership should be prepared to be the face of

the company through the exigent circumstances underscoring these important messages. The company needs to provide timely, accurate and consistent information as it becomes available. The company needs to avoid any dissonance in its messaging. It should not overstate what it knows. If some things are not known, then it should say so. To accomplish these goals, the company prepare a protocol as to how and by whom the information will be delivered. These people should be provided media training so that they are comfortable being the face of the company in a crisis situation. The appropriate infrastructure should be assembled in order to rapidly disseminate information as it becomes available. The core response team and functional heads need to know how they can provide relevant information for possible dissemination. Again, this is not something you want to invent in the middle of crisis situation.

5. Identify the important brand attributes that you want underscored by your responsive actions

Planning for a crisis response begins with what attributes of your brand, mission, corporate culture or values that you want to preserve through the ensuing events. All of the decisions that will be made should be informed by these important identity issues. Clarity on these points will help the company navigate through the rough waters with actions that help to re-affirm the brand.

***Phase 2: “Houston, We Have a Problem”
Things to Do During the Crisis***

Knowing that you are in the midst of a potential crisis situation is not always evident. Sometimes there is an event—like an exploding oil platform—that provides clarity on the issue. Sometimes, however, events unfold incrementally over a period of time until a tipping point occurs. Knowing when, for example, stuck accelerators reached a crisis point for Toyota could be a point of reasoned debate (and another article). Nevertheless, once a crisis has occurred—after the planning activities referenced above—the following are important considerations.

1. Communicate regularly with affected constituencies

Reestablishing trust and confidence starts with demonstrating knowledge, control and response to the situation. Regular communication on these points is helpful. Internal and external communications are very important. Regulated entities will likely need to develop specific communications for their regulator.

2. Be honest, accurate and don't overstate the circumstances

Reestablishing credibility demand this. One of the fundamental missteps that must be avoided is being dismissed as an unreliable source. This breeds suspicion and compounds your problems rather than simplifying them. Also, it is important that your messaging not be dismissed as “sales puffery.” This is a time when the company needs to demonstrate grounded self-awareness of the problem and its consequences.

3. Take corrective action as soon as possible

There is little to add to this point. Actions speak louder than words. There are few substitutes for delivering a fix to any resulting problem.

4. Focus on solutions not blame

During active crisis management, discussion about blame is a corrosive distraction from the important messages you need to make. Blame is a self-interested defensive issue that takes needed energy away from what the court of public opinion demands—a solution. Discussion about blame needs to be deferred until the exigent circumstance is under control.

5. Admit mistakes

This is an issue which gives all defense counsel heartburn. Admitting mistakes. The concern is that the company is admitting liability for something which is not fully known. This may be true. But, as described above, some circumstances simply cannot wait for a legal process to unfold and determine liability. In some circumstances, the credibility of the company to deliver a solution requires candid acknowledgement of the problem. This needs to be considered. Also, in the event a company goes the route of admitting mistakes, it should avoid temptations to engage in a “no admission” admission. Efforts to condition the admission of the mistake may eviscerate the effect it will have in the court of public opinion.

Phase 3: “What Now?”

Things to Do After the Active Crisis Management Passes

1. Follow through on any action items promised

Rebuilding trust in the brand requires careful follow through. Promises made must be fulfilled.

2. Investigate the facts and continue efforts to correct misinformation

Knowing what happened and why is an important part of re-building trust with affected constituencies. An appropriate investigation-- directed by legal counsel—should be undertaken as soon as possible. The facts that are developed in this process will be necessary not only in dealing with any resulting legal claims but also to educate the affected constituencies about actions undertaken to prevent a similar event. This is another trust building activity which underscores the messages developed during the active management of the crisis.

3. Defend legal actions

Just as night follows day, lawsuits will follow a crisis. The actions described above are intended to prevent catastrophic consequences to a brand prior to getting to court. Some of these actions necessarily limit the options that a company may otherwise have in a non-catastrophic circumstance. The company may have been forced to take actions which constrains its ability to

defend on certain liability issues. Remember, in the type of case at issue here, the viability of the brand is at risk. As a result, a calculated decision is made early on to stop the harm through active intervention. This is the exceptional case with an exceptional approach.

Despite constraints on liability, absent unusual circumstances, the company should be free to defend against overreaching damages or to pursue third party liability. In doing so, it is important that the litigation strategy not work at cross purposes to the activities referenced above. The brand re-building activities referenced above can be undermined if the litigation employs arguments or defenses that are inconsistent with the activities of phase 2. In these circumstances, it is important that the trial team fully understand the activities undertaken in Phase 2 and outline the limits of its defense. Failure to appreciate this circumstance may undermine any progress made through the Phase 2 activities.



NIXON PEABODY

Scott O'Connell

Partner

Boston, MA • Manchester, NH

soconnell@nixonpeabody.com

617-345-1150 (Tel) • 866-947-1393 (Fax)

Scott O'Connell is the leader of the firm's Class Action & Aggregate Litigation practice. He represents integrated financial service companies—including banks, securities firms, insurance companies, and regulated subsidiaries of nonfinancial parents—in federal and state court litigation and before regulatory agencies.

Scott has extensive experience defending financial institutions in class actions concerning lender liability, breach of contract, breach of fiduciary duty, breach of good faith, unfair and deceptive trade practices, fraud, misrepresentation, fair debt collection practices, and civil RICO. He has particular trial experience litigating complex financial relationships between parties, unfair and deceptive trade practices claims, corporate control issues including corporate freeze-out, lender liability, and civil RICO.

While at law school, Scott served as an editor of the Cornell Law Review and as chancellor of the Moot Court Board. He was also an instructor in the Cornell undergraduate government course, "Law: Its Nature and Function."

Scott is vice chair of the Nixon Peabody Litigation Department. He has been recognized for exceptional standing in the legal community in Chambers USA: America's Leading Lawyers for Business 2010 for litigation work. He has also been recognized by Chambers USA in previous years. In addition, he has been recognized as a "New England Super Lawyer" in Securities Litigation based on a peer-review survey by Boston Magazine (2007 to present) and has been included in The Best Lawyers in America 2010 and 2011 in Commercial Litigation (Copyright 2009 by Woodward/White, Inc., of Aiken, SC). Scott has earned an AV peer rating from Martindale-Hubbell.

Admissions

Scott is admitted to practice in all federal and state courts in New Hampshire, Massachusetts, Vermont, Maine, New York, and the District of Columbia, and before the U.S. courts of appeals for the First, Second, Ninth, and Tenth circuits.

Affiliations

Scott is currently a member of the Federal Court Advisory Committee for the District of New Hampshire. In January 2003, he was selected by New Hampshire state-wide paper, The Union Leader—as one of the state's "Forty under 40." Scott is a former vice chairman of the Farnum Center, a statewide alcohol and drug in-patient recovery program; former member of the Board of Directors of the New Hampshire Food Bank (a program of Catholic Charities); past president of the New Hampshire Task Force to Prevent Child Abuse; former captain, Heritage United Way Community Investment Process; founding director of the St. Lawrence University Alumni Lawyers Association; and New Hampshire coordinator of the Cornell Law School Alumni Association. Mr. O'Connell is a graduate of Leadership New Hampshire.

