

MANAGING LEGAL AND REPUTATION RISK: A VIEW FROM THE FIELD

As companies find themselves increasingly balancing legal and reputation risk in times of crisis, the relationship between lawyers and communicators has been transformed.

Despite decidedly different approaches, general counsels (GCs) and chief communications officers (CCOs) are now finding themselves participating in the same reputation management strategy meetings, conference calls and contingency planning sessions. GCs, external legal advisors and CCOs now have no choice but to trust and understand each other. As a well-established thought leader in the area of reputation and crisis management, Weber Shandwick initiated research to explore how legal and communications executives manage reputation risk today when faced with a threat to their company's reputation and when the stakes are higher than ever.

The insights outlined in this report represent lessons learned from 19 in-depth telephone interviews conducted with corporate general counsels, chief communications officers and senior attorneys at law firms in July through September 2011. A variety of industries were represented — ranging from financial services and energy production to consumer products, airlines and mining. Similarly, an array of crisis scenarios were explored, including product recalls, problems arising from the financial meltdown of 2008, CEO illness and succession, advertising blunders and power plant security breaches (for a full list of crises explored, please see box).

"While the specific incidents, composition of response teams and reputation-sustaining strategies revealed in these interviews varied, what is clear is that assaults on a company's reputation are considered paramount in sustaining business health today," said Micho Spring, chair of Weber Shandwick's global corporate practice. "Crisis preparedness and response now require legal and communication advisors to understand each other and work more closely than ever before. Everyone must be on the same page."

Examples of Crises Explored in Research:

1. Credit/mortgage financial meltdown and government bailout issues
2. Security breach at nuclear power plant and/or malfunction in power service
3. Litigation over unfair pricing allegations
4. CEO illness and succession
5. Product safety/recalls
6. Backlash from potential competitors to new product launch
7. Political entanglements
8. Extortion by foreign entities leading to federal fine
9. Financial fraud leading to shareholder lawsuits
10. Airline crash
11. Hostile takeover bid
12. Customer data security breach
13. Strike leading to negative Facebook activity
14. Product innovation leading to false consumer claims of harm
15. Setting up legal protocols for innovative social media marketing plan
16. Shutdown of a healthcare facility that ignited regulatory issues

KEY INSIGHTS & BEST PRACTICES

1) YOU CAN'T PREPARE ENOUGH

Crisis veteran and law firm partner:

"Most companies aren't prepared, partly because of how they are structured, and partly because of human nature where people tend to say... 'what happened to the other guy won't happen to me.'"

Many of the reputation challenges described by interviewees contained some element of surprise, adding complexity to an already stressful situation. And while most organizations have at least some level of crisis preparation, executives still find the nature or intensity of the situations they've managed to be unfamiliar or unanticipated on some level.

To prepare for crises, creating a *culture of anticipation* is critical. Preparation planning might include the following:

- Crisis plans that **identify which executives to involve** and assign clear definition of their roles and responsibilities rather than focusing on steps and procedures. Without knowing whom to call, one CCO said:

"You're playing with fire if you're not partnering with the right people...it is critical to work with those who have the answers when you don't, and who can make decisions very quickly."
- A **thorough readiness** on a variety of potential crisis scenarios. One mining concern which was the focus of a hostile takeover bid had prepared for such a scenario, fully briefing each response member on the issues that could be involved, the most relevant stakeholders to consider and how best to communicate quickly. A financial services firm developed protocols for specific scenarios, working with a crisis communications firm to play out potential responses.
- "Designing out" potential problems by **using a Devil's Advocate Panel**. As described by the CCO of a global consumer products company, this approach is especially helpful in new product introductions. Experts from different parts of the company are convened to consider the implications of a new product launch and to come up with solutions to challenges uncovered throughout the exercise.
- Helping business units **surface issues faster** is necessary in preparing for reputation assaults. One way companies do this is by the CEO assigning top priority to reputation protection, at the highest levels of subsidiary or division leadership. Executives who know they are directly responsible for uncovering problems and personally initiating solutions or engaging appropriate corporate support tend to more readily root out problems and take charge of situations before they erupt.

General Counsel, food products company:

"You have to be able to adjust your panic meter. You just have to be calm. Figure out what you can influence, identify steps you can take, and realize you can't change what has happened."

2) CEOs ARE IN CHARGE... TO A DEGREE

General Counsel, financial services company:

“Someone has to...convene a response group and this should emanate from the CEO, but CEOs don’t always have experience with reputation issues, so they are really looking for advice.”

It is widely understood that CEOs get all the credit when things go right and all the blame when they go wrong. While most attribute ultimate authority in a crisis to the CEO, the GCs and CCOs interviewed believe that the day-to-day **tactical execution of crisis resolution takes place further down the corporate hierarchy**. Many describe their CEO as one who is informed when crises arise, has oversight over the strategy that is presented, settles disputes if necessary, and works with the corporate board to secure their confidence in the company’s response.

Many legal and communications executives interviewed felt CEOs should not be responsible for managing the crisis team, given that the leader would be “in the line of fire” and pulled in many directions. A few exceptions include mid-sized companies, where the chief executive shares crisis response with a GC or small team.

When asked what a CEO should focus on in times of crisis, respondents suggested:

- Set convening power in place (insuring the right executives are in place on crisis response teams) and clearly define overall roles
- Underscore that reputation is paramount and must be part of the C-Suite measurement dashboard
- Set the tone for doing the right thing and abiding by the company’s values
- Give the team attention and access
- Be available to step forward as the spokesperson (internally and externally)
- Maintain confidence and calm at all times
- Share all and any available information with the response team
- Make resources available so the company can act swiftly

3) LEGAL RADAR EXTENDS BEYOND LIABILITY

Chief Communications Officer, business products company:

“Think horizontally, considering the best interests of the entire enterprise.”

Former GC and law firm partner:

“Your voice is not the only voice. You must share the responsibility for your company’s response to an issue...Legal issues are clearly important, but not the ones that necessarily should rule the day...The legal implications of an action must be considered and weighed equally with business decisions.”

Both in-house and third-party lawyers interviewed have a keen **appreciation for numerous stakeholder audiences**. When asked to rate the importance of various stakeholders that a company under reputation threat might have, many cited groups beyond regulators and potential plaintiffs. Some discussed the importance of employee perceptions — especially critical in moving business forward effectively, but also in preserving positive information flow. They recognized that employees are often a company’s best frontline advocates. Financial analysts, shareholders, customers, vendors and the general public rounded out the legal radar.

When it comes to the media, **both traditional and social media were mentioned as important**. Some attorneys describe closely reviewing media coverage when working on reputational issues and note that it is especially important when managing the opposing party’s perception of whether they’re “winning the media war.” And while all recognize that communications executives play the lead role with the media as strategists and spokespeople, attorneys consider the media critical in shaping a company’s reputation and review all press releases and messages supporting those efforts.

Importantly, the more seasoned GCs express **willingness to balance liability concerns** in some situations when the interests of the business supersede legal priorities. One interviewee

suggests that “short-term pain for long-term gain” can sometimes be the best antidote. It can help a company move quickly beyond a negative episode by admitting wrongdoing or settling a case rather than letting litigation run its course and exposing the company to protracted negative attention.

4) REPUTATION DEFENSE INVOLVES MORE, NOT LESS

Reputation defense is everyone’s job. It is not limited to one department or advisor. It can often change according to circumstance. The following describes the specific roles that respondents articulated for the executives most often involved in reputation issues and crises:

CHIEF COMMUNICATIONS OFFICERS AND PR AGENCIES:

Chief Communications Officer, financial services company:

“Having a message probably transcends all in terms of importance. You have to get out of the avalanche and out of the defensive position and move forward proactively, doing it with confidence and a clear message reinforced through repetition.”

Most communications executives describe their role as one of **communications strategy development**. They ensure these strategies are followed and executed swiftly. Outside communications agencies are often brought in to affirm or critique a strategic response due to their wide exposure to multiple and diverse corporate crises. The ability to walk through various scenarios and strategize how best to approach them are reasons why many say they hire outside agencies for their crisis management acumen. As with outside law firms, the presence of experienced third-party communications counselors offers in-house executives perspective and a sense of calm during the fairly emotional and stress-laden situations that crises evoke. Additionally, rapid response execution, expertise in specific disciplines (such as investor relations) and access to specific media outlets are other benefits mentioned when hiring outside communications counsel.

GENERAL COUNSELS:

General Counsel, food products company:

“Lawyers are conservative. They feel that everything you say will be played back to you in the context of litigation. Everything you say must be scrupulously accurate; you can’t talk in generalizations.”

Many GCs talk about the importance of fact gathering at the start of the crisis and then working with their communications counterparts (or larger “triage” teams including HR and/or financial colleagues) to devise response plans for all relevant audiences. Since anything in the public record can be used against a company in potential litigation, one of the first steps for GCs after fact gathering and before communicating externally is uncovering why a crisis occurred and who will be impacted. Understanding the company’s legal exposure is ultimately the GC’s main concern.

Still, **most GCs understand the broader, non-legal implications** of the crises they recounted. Trained as “issue spotters and problem solvers,” attorneys feel they bring a unique set of skills to crisis management that help get teams to consider all the nuances unfolding in a scenario, facilitate constructive discussion and accelerate consensus.

LAW FIRMS:

Partner in an international law firm:

“The hardest challenge is getting the company to face the reality of what the crisis is. There are various stages of denial, anger and excuses and then finally facing what needs to get done to get past [the crisis].”

The third-party attorneys interviewed talked about their role in reviewing the laws or rules applicable to their clients as they relate to a crisis and ensuring that the company’s reaction (to disclose or not) is **legal and compliant**. Working with in-house and/or third-party communications professionals to refine the client’s message is considered a secondary but important role in crisis management. Limiting financial exposure and ultimate payout is a prime concern of third-party legal counselors.

Attorneys advise their clients that it is critical to **preserve all documents** relating to a crisis. They strongly advise on sending communications to all employees and board members that no documents should be destroyed. Lawyers say they always assume that a crisis will end up in litigation and that the first thing that the government or opposing parties will investigate is whether there has been a cover-up.

When asked whether responsibility for reputation management on the part of legal or communications advisors has changed over the past five years, many describe an increasingly complex environment punctuated by regulatory (Sarbanes Oxley) and corporate governance pressures. According to those interviewed, companies are less willing to take risks and thus increasingly seek more legal and communications counsel.

THE BOARD:

The executives interviewed agreed that **corporate boards play critical roles** during reputation crises. They often contain subcommittees **responsible for risk planning** and crisis preparedness. Boards are always informed of important reputational threats and sometimes offer advice and contacts such as law or crisis firms who can counsel senior management. Situation resolution and best practice presentations to risk committees or even entire boards often round out the denouement of a crisis situation.

Many of those interviewed caution crisis managers that **board relations can be tricky**. Some board members may not have the same interests as senior management in times of crisis. Board members may be concerned about their own reputations or liability (a cause for hiring their own third-party counsel). In other cases, board members may be reached by the media for their opinions or comment, and unknowingly harm the threatened company by speaking off-the-record. Therefore, early and continual communications with the board are key strategies in containing board members and solidifying their confidence in the company's approach to a reputation threat.

The other senior members of crisis triage teams, according to respondents, tend to represent

HR, Finance/Shareholder Relations, Regulatory Compliance (if not under the GC) and business unit leaders. The degree to which these executives are involved often depends on the nature of the crisis but their participation is usually a given.

5) TENSION EXISTS, BUT EASILY RESOLVED

Chief Communications Officer, global food products company:

"Our job is to tell a story and push the envelope to ensure everything gets across. The GC's job is to make sure we keep ourselves out of trouble. You have to respect and acknowledge that and adhere to those roles."

Former Chief Communications Officer, consumer products company:

"Sometimes we treat legal as an obstacle, but I've seen many cases where they are terrific advocates and partners in creative solutions. They also have a lot of contacts, so they can reach out to influencers and help shape the discussion."

Most of the executives interviewed admitted to experiencing or observing some tension between legal and communications when managing reputation issues. The tension usually arises from **differing mindsets**. Communications advisors often want to be transparent in proactively explaining a crisis situation — either admitting to a problem or even wrongdoing or outlining how the company will ameliorate the crisis and prevent it from occurring again. Attorneys, on the other hand, often prefer a more conservative approach — waiting until all the facts are known and limiting external discussion to ensure accuracy and to avoid generalizations in the hopes of minimizing downstream liability.

Other tensions between CCOs and GCs or outside counsel arise from the nature of each discipline. As one attorney explained, communications executives are trained to simplify information and develop concise and digestible messaging, whereas legal issues and litigation are often highly complex and ill-suited for simplification.

However, all interviewees recounted ways to resolve these differing approaches to crisis communications. For many, **building strong relationships** with their in-house legal or communications counterparts allow for a foundation where disagreements can be comfortably reduced. Being open to one another's challenges and a willingness to be informed of mutual priorities are important steps to finding solutions. *"He got my world, and I got his"* was often articulated. *"Ultimately, the middle of a crisis is not the time to make friends; you have to have lots of interaction before a crisis hits and then you'll have a partnership based on mutual understanding of what counts and who is influential in each world."* (CCO, global consumer products company)

Chief Communications Officer, food products company:

"A partnership with the General Counsel will only enhance the experience and the process. In many crisis situations, we are the ying to the legal yang. We'll push each other; we'll probe, and they'll let us know what they feel comfortable with."

In all cases, the interviewees discussed their desire to offer sound, strategic direction to help resolve crises. The focus for most was recognizing they were all on the same team and responsible for offering constructive input. As one GC describes the role of her department,

"We strive to be problem solvers rather than inspectors — we contribute to the fix, not the impediment."

6) WHO LEADS? EVERYONE AND NO ONE

Veteran communications executive:

"A good candidate to lead [a crisis team] has to be good at forming a protocol, getting discussion going and helping people come to a consensus."

When asked who took the lead role on reputation crisis teams, both in-house counsel and communications executives tended to claim responsibility. In a few cases, there were specific reasons cited for a changeable leadership structure. For some companies, certain crises are specifically anticipated. In the case of power plant safety, the legal issues are clearly defined and communications takes the lead in gathering information and developing a response strategy. In the case of pricing irregularities, legal takes the lead because of the nature of the institutional contracts under question that require an attorney's oversight.

However, in a number of the other cases explored, the interviewee felt they took a leadership role out of necessity — either because it wasn't clear who should lead or because others didn't follow expected protocol. When grappling with business-sustaining issues resulting from 2008's financial meltdown, one large financial institution's crisis managers experienced such intense pressure that the CCO emerged as the response team leader and pragmatist. In another case, where a CEO was incapacitated due to a sudden illness, the C-Suite and board were hesitant to follow the company's established interim succession strategy. In this case, the CCO took an advocacy role for the plan.

It is clear, however, that the same crisis response leader may not always be appropriate for every situation. A reputation threat arising from a class action lawsuit may best be led by the GC, while a response to a potential strike or inadvertent consumer backlash may necessitate the head of communications, HR or marketing to act. Much depends on the specific source of risk to the impairment of value at the company and which stakeholders are closest to that risk. However, for

clarity of leadership and direction, interviewees agree that a **company should anoint a point person in times of crisis** to lead the working group and coordinate its efforts.

7) SOCIAL MEDIA IS NOW AN INTEGRAL PART OF EVERY REPUTATION STRATEGY

Chief communications officer, food products company:

"It's a world where misinformation gets many times more presence than correct information and it happens at the speed of light."

Companies have adapted to the 24/7, mobilizing power that social media has introduced to reputation management. Whereas a few years ago, companies felt some control of their messages when managing traditional media, companies today can find their story hijacked by previously unknown online activists or bloggers.

All of the communications executives interviewed agree that it is **just as critical to deal with online audiences as it is with traditional media**. The strategies they draw upon are similar to those employed with non-digital media. Communications staffers are assigned bloggers with whom they cultivate relationships and monitoring tools are engaged to keep track of digital coverage to determine response opportunities. Many of the CCOs in this study have also enhanced the social media education of their staff or hired professionals with expertise in the medium.

Chief Communications Officer: consumer products company:

"Your customers and other media care about what bloggers say, so you can't deny or ignore them."

Among legal interviewees, most view social media as another stakeholder group which companies under fire must manage. Some have reluctantly embraced digital media to a greater extent than others. At one firm, the CCO described the initial trepidation of the GC to offering social tools to employees on the corporate website. However, these concerns were eventually allayed with social media guidelines and policies developed jointly by the legal and communications staff. And some GCs have embraced social media marketing. In one case, an innovative use of Twitter was planned by the marketing department which would have required each tweet to be reviewed by legal. This GC circumvented any complications and work overload anticipated by her legal staff by developing a set of principles to be used by all marketers tweeting on this brand-focused page.

In the challenging environment in which companies operate today, business has come to realize that defending reputation is a complex matter requiring greater collaboration, speed and dexterity. As a result, the right internal and external advisors need to be involved. While each player brings a unique perspective and expertise, it is clear that neutralizing threats and recovering reputation must be a collective effort that draws on disparate points of view to restore a company's good name as quickly as possible. To be effective, the crisis response team requires flexibility, mutual respect, resourcefulness and, importantly, the leadership and trust of the company's chief executive and board of directors. How a company responds to crisis is fast becoming a vital measure of building and maintaining reputation today.

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