



2021 Annual Conference  
June 16-18, 2021  
Atlanta, GA

## **Managing a Company Crisis**

### **I. Beginning of a Crisis**

This presentation is inspired by a real-life occurrence that was unlike any contentious cross-examination, closing argument, or “bet the company” litigation ever handled by the presenters. Imagine a newbie general counsel at a company that she previously defended and represented as corporate and defense counsel, answerable to many, many company leaders, who now finds herself facing a very public regulatory inquiry that jeopardizes an entire product division with potential impact on other product lines, then throw in the mix trolling plaintiffs’ lawyers attempting to stir up class action litigation. This is a true story and one we hope that you and your clients never have to face. The good news is that the company navigated the inquiry successfully and is stronger than ever.

As lawyers, a/k/a problem solvers, we all must be able to handle a crisis situation. No one wakes up knowing the day will present a crisis situation, but it only takes one crisis to cripple a company, and being unprepared or caught flat-footed can lead to client dissatisfaction or worse.

Obviously, crises come in different sizes and forms, but this practical article should help you spot the critical decision points and provide a road map/decision tree of when to call in experts and other resources during a crisis. Most importantly, do not forget to access the colleagues you have met through your personal network, firm practice and professional organizations such as DRI, FDCC, CLM, state and local bar associations, RIMS, and others. They can provide countless resources, from publicity and media handlers to specialty counsel.

When it comes to preparing a client for an emergency situation, such as when a regulatory and/or law enforcement agency comes knocking and threatens to shut down a lucrative product line of your client, the response must be multidisciplinary, swift, and focused. It is in a company’s best interest to have a pre-established crisis management plan in place so that the company’s personnel are not overwhelmed and its day-to-day operations are not compromised. There will be publicity surrounding the inquiry and the counsel’s role will include management and supervision of large amounts of internal and external communications needed to manage various players, including staff at different levels, customers and/or end-users, board members, international markets, media, and lawyers hoping to gain information on the extent of the crisis. When developing a crisis management plan, a company should establish specific guidelines that set forth detailed steps to take in the midst of a crisis. These guidelines should not only lay out what the company will need to do on the day the crisis hits but also what steps to take until the

crisis is harnessed and ultimately concluded. The flowchart we have provided depicts the crisis management plan in summary.

### **Step 1 (Before the Crisis) Determine What Activates the Crisis Management Plan**

Before a crisis occurs, a company needs to decide how the level of risk determines which crisis management plan to activate. It is important to identify the different crisis levels, since this will guide what steps the company will take and when to take them throughout the crisis situation. For example, we can envision three different crisis levels:

- A limited crisis is considered to be a level-one crisis and can be activated by an incident that will not seriously impact the overall functional capacity of a company, but still requires some semblance of action internally, such as a shareholder dispute.
- An issue-driven crisis is a level-two crisis, which is a slowly developing situation that negatively and seriously impacts a company, such as a lawsuit.
- Finally, a major crisis is considered to be a level-three crisis, which is an incident that poses a major risk to a company. For example, any litigation brought against the company by the government, such as the FDA; a communication that begins “It Has Come to Our Attention,” or is Untitled or in the form of a Warning Letter; or a class action lawsuit.

Once a company determines how its crisis management plan becomes activated, it will be able to properly navigate the crisis situation.

### **Step 2 (Day 1) Formulate a “SWAT” Team**

When a crisis strikes, the company must first establish a crisis management team, which we would call the “SWAT” team, to evaluate the situation. This idea may seem trivial, but establishing and identifying key players and their roles going into a high-pressure situation is vital. The SWAT team should comprise c-suite level employees (chief executive officer, chief financial officer, chief operating officer, and chief information officer), compliance and/or regulatory affairs personnel, public relations consultants, in-house and/or outside counsel, and importantly, a crisis manager or “quarterback” who drives the agenda for meetings and runs herd on the various SWAT team members to assure deliverables are made by the assigned deadline.

The crisis manager will organize and coordinate management of the crisis, schedule regular weekly conference calls, keep an agenda and running list of assignments to be fulfilled during the crisis, and manage the team overall. The crisis manager is an essential piece of the crisis management plan, since he/she confirms that the crisis situation is being handled properly, that deadlines are kept, and that the plan and the team are on track.

It also is important to identify each player’s role during the crisis. For example, it is essential to identify the individuals who will:

- Communicate with the agency at issue
- Be responsible for communicating the message to the media
- Address any imminent marketing changes and/or necessary product recalls
- Explain the situation to employees, shareholders, and board members.

The SWAT team may then focus and take aim on the severity of the crisis. Identifying the severity is very important from a cost-projection standpoint especially. Companies need to brace for cash-flow management as legal and other expenditures will likely spike at this time. Once the key players are identified and their roles are clearly established, the SWAT team should perform a risk assessment of the crisis.

### **Step 3 (Day 1) Assess the Crisis**

This is probably the most important step in a company's crisis management plan, and requires the company to ask what, why, when, and who. During this step, a company needs to research what prompted the crisis and where the crisis originated and then get intelligence from the field/industry to determine if there were any signs of a potential crisis of which the company should have been aware.

Specifically, the company should determine:

- Short-term and long-term financial impact on the company
- Short-term and long-term changes to be made in the supply chain and sales pipeline
- How the company's reactions to the crisis will impact the long-term outcome of the crisis
- The optics of the situation and how they impact other product lines not currently under review
- Given the force of social media, if there will need to be monitors on media and the internet at large to determine any negative coverage or trolling plaintiffs' lawyers trying to drum up lawsuits
- Whether any deadlines have been placed by any regulatory or law enforcement agency.

Once the company has determined what caused the crisis and the pertinent deadlines, it needs to decide whether the crisis requires additional experts, from media consultants to outside legal specialists. Depending on the specialized nature of the crisis, outside counsel may be necessary to help the company navigate the crisis. For example, in a crisis situation that we encountered, our client interviewed at least six different law firms to help them through the crisis. It is very important to pair the company with competent, well-respected representation during high-pressure situations, which may take, as discussed above, more than one try.

The SWAT team also should evaluate and research the extent of the crisis. Are other industry members involved? Has the regulatory or law enforcement agency brought similar charges or allegations against a competitor? How do the charges differ between companies? How can the company distinguish its conduct from the conduct of its competitors to find an exit strategy from the crisis?

These are questions that need to be answered, and answered quickly. A member of the SWAT team should be designated to research the prosecution practices of the relevant regulatory or law enforcement agencies, and specifically whether competitors have been identified in the same or a similar crisis. This process may surface important clues regarding the overall risk to the company. Any chance at viewing the proverbial hand the company has been dealt could save thousands of dollars in unnecessary resources and expenditures.

In addition, it is important to remember that while the risk-assessment process is under way, the company may determine that there should be no public communications on the matter

to the media, other counsel, customers, or company personnel, other than from the SWAT team. Once the company has performed all the necessary research, it can begin formulating its initial response to the crisis. This will be a collaborative approach and will likely require compiling historical data, studies, and other sources. It is imperative to remember that when responding during the crisis situation, everyone on the SWAT team must be on board, and no swift or ill-informed decisions should be made; input from all the team members is valuable. Once a company has assessed the crisis situation, discussions can begin on how to respond to the crisis.

## **II. During the Crisis**

### **Step 4 (Day 1-2) The Initial Response**

To respond properly to a crisis situation, the company leadership should hold a conference with the SWAT team and discuss how it should proceed during the crisis. After the initial conference, the SWAT team must immediately get to work ensuring that everyone involved in the response is on the same page and that no swift action is taken without the agreement of all necessary parties. Expect that teleconferences may occur at least daily, and then over time will transition to every other day. During these teleconferences, daily updates should be provided as to how the company is responding, next steps, changes in marketing and operations, and whether the company will require outside counsel. The company response should be mindful of the SWAT team's findings of where this crisis originated, and if any red flags were missed.

Further, before responding to the crisis, a company should consider its position compared with competitors facing the same crisis. This can be done by comparing and contrasting regulatory letters received by each company; determining how each company advertises; looking at each company's clearances; figuring out which companies had adverse events; and deciding whether any company received a warning letter, past or present. Moreover, once the SWAT team has agreed to a response protocol, it should coordinate meetings or teleconferences with the company's sales team and with key opinion leaders to answer initial questions about the crisis. The company also should confer with key opinion leaders about one month later to discuss the sufficiency of the initial response and whether the company needs to release another response.

### **Step 5 (Day 3) Insurance**

After the initial assessment, the company must contact its insurance carrier to provide notice of circumstances and potential claims and, if applicable or possible, seek coverage. When communicating with the insurance carrier, it is important to inquire:

- If the company's insurance policy specifically covers the area of interest
- What are the limitations and deductibles regarding such coverage
- If there are any additional notice requirements.

It also is necessary for the company to review the policy language to ensure adequate coverage exists and what steps need to be taken to appeal in the event of a reservation of rights or denial. Further, the company should review the insurance company's website for helpful materials and contacts that may serve as resources for the specific crisis.

## **Step 6 (The First Week) Manage the External Appearance: Public Relations, Media, and Customers**

Within the first week after the crisis occurs, it is imperative for the SWAT team to conduct daily news sweeps and media sweeps for trolling plaintiffs' lawyers who inevitably will post notices looking for claimants. Sweeps can be done by reviewing aggregator sites and setting up alerts; monitoring social media websites; monitoring statements on websites and media outlets; and reviewing posted statements by experts or key opinion leaders in the field of interest. To help with damage control, this review should be conducted daily and charted until the crisis has been resolved. Also, information can be provided to third parties that may want to post their own statements in response to negative coverage.

In addition, if the crisis becomes public and is covered by the media, a company must determine its public relations strategy and whether a press release is necessary. A company can consult or hire a public relations firm, or handle the public relations of the crisis internally; either way it can confer with in-house or outside legal counsel. If the company decides to issue a press release, the communication may be placed on the company's website to notify existing and prospective customers of the situation. Before disseminating *any* information, the entire SWAT team should review and agree on the content of the document, as well as review and compare any responses by third-party competitors that may be dealing with the same or a similar crisis to make sure that all bases have been covered in the press release.

In the midst of the crisis, it is very likely that customers and/or "internet trolls" will express concerns and disparage the product and company as a whole in an attempt to spawn claims or, worse yet, class actions. It is vital that the company and, importantly, its employees consult with the SWAT team before responding to any unfavorable communication in person or on the internet, as these communications may be used by regulatory or enforcement agencies during potential future litigation.

## **Step 7 (The First Week) Manage the Internal Appearance: Advising Employees and Communicating with Key Opinion Leaders**

In a crisis, the company will need to manage the situation not only externally but also internally. As soon as the crisis arises, the vast majority of the company's personnel will be faced with questions, especially inquiries by sales representatives working in the field. No matter what type of crisis occurs, the company's employees must refrain from responding to questions or concerns until they receive approval from the SWAT team. This includes company and personal social media accounts, which also should be internally monitored by the SWAT team.

In addition, once a crisis occurs, it is important to understand which experts and key opinion leaders will be most helpful to the company, and to discuss their thoughts on the situation with them directly. The SWAT team should communicate with these individuals over the course of the first several days of the crisis and compile a complete file of those experts and key opinion leaders willing to speak publically on behalf of the company regarding the crisis. Further, the SWAT team should maintain a spreadsheet recording each key opinion leader's position on the matter and a compilation of their statements, both positive and negative.

## **Step 8 (The First Week) Adjust the Company's Promotional and Marketing Materials and Sales Practices**

During the first week of the crisis, it may be important to adjust and/or alter the company's marketing tactics, with changes to be effective immediately. The SWAT team should work with outside counsel to determine which practices must be changed regarding marketing materials – physical and electronic.

Once that plan has been determined, a conference call should take place with the SWAT team, senior marketing and sales personnel, and potentially outside counsel to advise of changes and their immediate implementation. Also, depending on the type of crisis, it may be necessary for the company to suspend all marketing and promotional material for 60 to 90 days or until the company learns more about the particular crisis. This can include all slide presentations, material provided by sales representatives, brochures, and certain content on the company's website and social media accounts. Such a drastic decision should be made by a consensus of the SWAT team.

### **Step 9 (The First Month) Submitting a Response to the Regulatory and/or Law Enforcement Agency**

Once the company implements proactive steps to preempt a repeat of the crisis, it should begin crafting a response to the regulatory and/or law enforcement agency with which the inquiry originated. In general, the goal for a company during a crisis is to weather the storm, and to do so without breaking the bank. This requires a well-designed, strategic response to the regulatory and/or law enforcement agency.

Before a company drafts its response, it should find out how much time it has to respond to the crisis and exactly what will be considered, who will review the submission, the background of the reviewers, the leadership and the focus of the agency under such leadership, prior interactions with the agency, industry-wide response, whether competitors have been targeted by the agency inquiry, the company leaders and lawyers with the best relationship with the agency, and so on. The SWAT team should review any pertinent internal documents, articles, research, and data on the issue that can be used in support of its response – this includes social media and other online resources. The agency will be monitoring these same factors. The SWAT team should create a chart summarizing all of the important posts, documents, data, and articles that may impact the subject of the inquiry to use as a ready resource and to consider citing as rebuttal in the submission. In some instances, customers of the company become a rallying force and can assist in defusing media coverage.

After the company submits its official response to the agency, the SWAT team should participate in a status call to discuss any questions that have arisen since its response was released and how best to address follow-up meetings with the agency. This includes determining the best approach to take with the agency; for example, should the company wait for the agency to respond or be proactive with its follow-up on the submission, how will the form of response impact the timeline on closure of the inquiry, and so on. At this time, the company also should begin preparing direct internal and external communications to employees and customers that generally address the crisis, the company's stance on the situation, and the steps being taken to rectify the situation.

### **III. After The Crisis**

#### **Step 10 (One Month Post-Submission) Concluding the Plan**

After responding to the crisis, it is important for the company to continue monitoring the situation over the next several months. This includes monitoring competitor marketing and product lines, reviewing the regulatory and/or law enforcement agencies' websites for communications on the crisis, and continuing to conduct approximately one teleconference per week to ensure the company as a whole continues to sufficiently monitor the crisis situation and that employees are complying with all new company policies and procedures. Further, after the crisis has been resolved, the company may prepare a press release and letters to customers announcing the outcome. To the extent a press release is deemed appropriate, it should be sent out no later than one week after the crisis has resolved and should include the outcome of the crisis and actions taken by the company. This response must be truthful and honest so as to avoid future action by the regulatory and/or law enforcement agency.

And, if successfully managed, that is really all there is to it! Trust us that closure to such an inquiry feels every bit as good as a defense verdict when that day comes. Don't wait for a crisis to hit before you start a crisis management plan. Preparation can be vital to a company's ability to weather the storm successfully. This article can assist you in the planning process.