



**2016 CLM Annual Conference  
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**BUILD YOUR OWN A-TEAM! THE WORST HAS HAPPENED: FIGHT BACK BY  
GATHERING THE RIGHT PEOPLE WITH THE RIGHT SKILLS, TO COMBAT  
EVEN THE MOST CATASTROPHIC CLAIMS**

**HOW WOULD YOU REACT? VS. HOW YOU SHOULD REACT!**

On January 19, 2000, a fire killed three students and injured 58 others in a Seton Hall University dormitory.

On January 13, 2012, the Italian cruise ship Costa Concordia capsized and sank after striking an underwater rock obstruction off Tuscany, with the loss of 32 lives.

**Initial Response To Your Crisis**

Si vis pacem, para bellum is a Latin adage translated as, "If you want peace, prepare for war." This is the mentality you need to successfully combat any catastrophic claim.

You get that call, the unexpected has happened, what do you do? Your body reacts, but so does your mind. Your stomach drops, but your head is clear, because you have prepared for this moment. You have your team, you have your plan, now you just need to execute it.

Crises can come at any time and in any form. A crisis, is a relative and subjective term, especially in the legal world, where uncertainty can lie at every turn. When a crisis occurs, it can impact every aspect of your business, negatively impacting investor and customer relations and brand loyalty, in addition to possibly depleting your coffers. When a company faces a crisis situation, the calculated decisions and actions made in the days following the incident will dictate the road to recovery. Preparing a versatile crisis response team, your A-Team, with a variety of expertise will give you peace of mind during even the most drastic crisis. Your A-Team can dramatically shorten the response time in the days immediately following a crisis and help the company manage, and in many instances, avoid long-term negative repercussions to your business and reputation.

Admittedly, it is impossible to perfectly plan for or anticipate every crisis scenario. This is not intended to be an exhaustive outline. Rather this outline is meant to help establish a template for your crisis plan, one that can be adapted to your needs.

### **Prepare Before You Need To, Start Yesterday!**

Before a crisis occurs, work to develop proactive strategies for the unthinkable. Your A-Team should be comprised of members that can provide cross-disciplinary legal advice, are accustomed to formulating rapid response teams, can bring together the professionals needed to defuse controversies quickly, address public perception, and mitigate the damage to property, community standing, and brand credibility.

### **Hit the Ground Running!**

Combating your crisis cannot be executed from behind a desk. To provide effective legal counsel and support as a crisis evolves, your A-Team needs to be proactive in addition to reactive. They should visit the site, talk with investigators, and meet with affected employees, customers, and local authorities. An inside and personal view and understanding of the circumstances surrounding a crisis should influence how a matter is managed and ultimately litigated.

The first 24-48 hours and the actions that you allow to occur during that time will create an evidentiary trail that will either enable you to successfully defend and recuperate from the crisis or guarantee costly and possibly dire consequences. During that time, people might be maimed, dead or dying, millions of dollars might be at stake, and because of that, the initial visceral reaction might be to panic. That's why it is crucial to have your A-Team ready to go at a moment's notice.

### **Identify Your Leader Before Your Crisis Occurs**

Plan on the unexpected and also plan on knowing who to call when the unexpected does occur. You will need a leader, someone who can solely focus on managing and mitigating your crisis. Although your leader does not need to be an attorney, that person should understand and appreciate the legal ramifications for certain actions and certain inactions. The person will be juggling multiple tasks and, from a future liability perspective, creating an evidentiary trail that will either allow for a potential defense or a legal catastrophe. That individual needs to recognize who needs to be designated, who he or she needs to delegate to, and when he or she needs to take charge.

Identifying your Leader before the catastrophe occurs will enable you to hit the ground running. When every minute counts, you cannot afford to waste time choosing a leader and then assemble a team.

However, you will need to find YOUR leader. Depending on what type of business you operate, you will need someone who understands your individual needs and the potential exposures, you and your company will face. That individual must know who to retain and who to bring into your

inner circle. As the leader they serve many functions, including clarifying what communications will likely be afforded attorney-client privilege protection.

The attorney-client privilege only protects the essence of the “communications” conveyed by the client and lawyer and only extends to information given for the purpose of obtaining legal representation. This information will not be protected and is discoverable if it is available from other sources. Therefore, attempting to conceal discoverable information by merely conveying it to your attorney will not be successful. Fortunately, the ethical duty of client-lawyer confidentiality is quite extensive in terms of what communications are protected. This privilege relates to all communications conveyed, in confidence by the client to the attorney and also all information concerning the related litigation, whether or not this information came directly from the client. This privilege is not absolute, but the essence is to allow for an open and free discourse between client and attorney. Without these protections, clients and attorneys would have no incentive to communicate, thereby stifling and undermining the client-attorney relationship.

Regarding this privilege, states are divided in two distinct schools of thought, utilizing either the control group test or the subject matter test. Someone on your A-Team, whether it is your Leader, in house counsel, or locally retained counsel, must know the extent of the privilege and what communications can and cannot be conveyed in the jurisdiction of your crisis. The most beautifully crafted legal arguments won’t be worth the paper they are printed on, if it does not conform to the local and possibly idiosyncratic rules of the jurisdiction. With that being said, if your outside counsel is appointed your Leader, he or she should direct the investigation and maximize the information and communication that is protected by the attorney-client privilege.

Armed with that information, it is now time to create your A-Team. These individuals will need to be trusted and discreet and possess skills that further your goals. Furthermore, they must appreciate that their actions are a reflection upon the entire company.

### **Show Your Best Face and Develop a Media Contact Plan**

Never let “no comment” or unavailable for comment linger in the media after a crisis. Your company should pro-actively respond to the media inquests. The best defense here is a good offense, ensuring that your position on the matter makes it into the media’s narrative. Silence, even justifiable silence, can and will be construed negatively. However, this doesn’t mean representatives of your company can say anything they want. A carefully tailored and crafted statement is the goal. That statement will show your human side, your appreciation for the circumstances, and your assurances that this crisis will be dealt with in a swift and thorough manner. If possible avoid delving into fault or blame. Furthermore, only state that which you know is true. It is crucial that the picture you paint is accurate and not subsequently undone by a loquacious former employee or a leaked email or text. An unintentional contradiction, in the eyes of the unforgiving public, can be as bad as an outright lie. Expect that everything you say, everything you do, everything you text or email will be seen and used against you.

Again, know who is on your team, who has access to pertinent and potentially hazardous information, and be careful with who can disseminate sensitive or potentially eruptive information. In this day and age, technology enables us to access any and all information instantly. It also enables us to be exposed instantly. All information should pass through your Leader and any other designated personnel. They are your guardians, assuring loose lips do not sink your ship.

For some, hopefully no one on your A-Team, the first reaction is to shoot off a text or an email, without appreciating its potential repercussions. Accordingly, immediately after a crisis, impose this simple rule: DON'T WRITE ANYTHING DOWN. If you need to communicate, communicate in person or call. However do not leave a voicemail. Avoid, as much as possible, leaving a footprint and discoverable information. This is not to say that you should hide or attempt to hide information. Your goal is to ensure that something that would privileged and confidential does not become discoverable information because of some inadvertent, but blundering, action.

Many jurisdictions impose a duty to disclose such electronic communications. Accordingly, remember another adage: speech is silver, silence is golden. Shooting off a text or email is bad enough and can leak crucial information. However, even worse, once that email or text is created, you may be responsible to assure that it does not get destroyed. Again, many jurisdictions will impose a negative inference against parties who discard or destroy discoverable information. Again, to protect against local spoliation rules, which might be foreign to your company and your jurisdiction, plan on retaining and utilizing the expertise of local counsel. Your crisis will be time consuming enough, there is no need to compound issues by failing to recognize that different jurisdictions employ different rules.

### **Boots on the Ground: Pennies Today are Dollars Tomorrow**

Unfortunately, if and when your crisis occurs, it will not occur at a convenient place or time. However, critical information, evidence, and even witnesses can disappear within seconds, minutes, and hours of your crisis. Victims, who ultimately become Plaintiffs have, unfortunately, experienced the crisis firsthand. They will retain counsel. Depending on when that counsel is retained, their counsel will have the luxury of possibly 2 or more years to prepare for their case. During that time they will gather evidence and strategize how to pursue their cause of action. If you are not prepared to fight back, if you do not plan ahead, you will be at a major disadvantage.

Your Leader must have already made contact and arranged with local investigators and experts. These members of your A-Team must be ready to arrive at the crisis location at a moment's notice. This may seem extreme and aggressive, but the money you spend guaranteeing a quick response will ultimately save your company money down the road, pennies today are dollars tomorrow. Having engineers, accident reconstruction experts, and investigators, among others, will give you piece of mind and enable you to immediately respond to any accident. Again, these

professionals should be trusted and understand the need for discretion. When collecting physical evidence after an accident, make sure that a chain of custody log is created to prevent a suggestion that evidence was misplaced or altered due to poor record-keeping procedures.

### **No More Crocodile Tears**

Finally, remember the Human Touch, especially in cases of human tragedy. Do not come across as callous or a deep pocketed faceless corporation. Showing that your company is comprised of concerned individuals will help mitigate damages inside and outside court and will soothe any bad publicity or public perception.

As outlined above, the focus of your A-Team should be protecting the client and mitigating or negating their exposures. However, do not overlook the fact that people, besides your company have been affected by this crisis. As much as you must look inward, you must also look outward and pursue the possibility of gaining the trust of a potential Plaintiff, a scorned victim is much more likely to seek recourse through legal action. As such, a member of the company, preferably a person of prominence within the hierarchy, should reach out to the victims and their families to show that you understand and appreciate the circumstances. However, again, these interactions must be tailored so as to not convey disingenuous emotions or an avoidance of guilt. This will need to a collaborative effort between your legal team and your public relations team.

Remember, it is very difficult, if not impossible to prevent a crisis. No amount of planning or precaution will ever be able to combat the human element. Mistakes will be made and there is nothing you can do to prevent that. However, that does not mean you can't make the best of a bad situation. Prepare today!