



## 006 Disaster Recovery: Preparing for the Unexpected

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## Faculty Biographies

### Susan M. Angele

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Prior to joining Hershey, she worked for Nabisco (as an independent company and after its acquisition by Kraft Foods) in a variety of roles, including chief counsel to the Kraft snacks division. Her responsibilities there included counseling with respect to product safety and security matters and crisis management.

Ms. Angele has been a member of ACC for approximately 10 years, and is a past chair of the legal committee of the Grocery Manufacturers Association, a trade association representing the food industry. She is a recipient of the New Jersey Bar Association's Distinguished Legislative Service Award. She currently serves on the board of directors of the Council of Better Business Bureaus.

Ms. Angele received her B.A. from Sarah Lawrence College and her J.D. from Columbia University.

### Christian E. Liipfert

Christian E. Liipfert is the managing attorney, HSE, crisis management, and technology, for BP America Inc. in Houston, Texas. His responsibilities include leading a team of attorneys providing environmental, health, and safety legal support to the upstream (exploration and production) and gas, power, and renewables segments of BP's business in the United States (except Alaska). He has been involved in crisis management and emergency response issues for in-house counsel for more than 15 years.

Prior to his present position, Mr. Liipfert was managing counsel for BP's North Asia operations, headquartered in Hong Kong. He also was an environmental attorney and a general chemical attorney for Amoco Corporation in Chicago, directeur juridique, Services Conseils Dowell Schlumberger in Paris, France, general counsel, Sangamo Weston, Inc., Norcross, Georgia, and an associate with Dickstein, Shapiro & Morin in Washington, DC.

Mr. Liipfert graduated with a B.A. from Bucknell University and received his J.D., summa cum laude, from the American University Washington College of Law.

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Prior to joining Marriott, Mr. Ryan engaged in private practice in Washington, DC, first with the firm of Crowell & Moring, and then with Hogan & Hartson, where he became a partner in 1989.

Mr. Ryan is a member of the District of Columbia and Maryland bars. He is also a member of the association of the bar of the city of New York, serving on the hotels and tourism committee. In a non-legal capacity, he also serves on the board of the DC Stoddert Soccer Club.

Mr. Ryan received his B.A. summa cum laude and his J.D. cum laude, both from the University of Pennsylvania.

**TIPS FOR PREPARING A DISASTER RESPONSE PLAN\***

## 1. Define the Scope of the Plan

Example:

- Product contamination or tampering
- Violent conduct (e.g. kidnapping, terrorism, etc.)
- Medical emergencies
- Natural disasters
- Other unexpected events

## 2. Define the Organizational Structure for Determining the Company's Response

- A core group should be designated, including
  - Decision Maker (CEO or another designated top executive)
  - Coordinator (This individual will coordinate the investigation, core team meetings and implementation. The coordinator may be the same person all the time or may vary depending on the type of incident e.g. Director of Security for threats of violence, Director of Quality for suspected product contamination, etc.)
  - Legal
  - Public Relations
  - Depending on the issue, Operations, Human Resources and/or Security may also need to be members of the team. A contact from each of these areas should be designated and brought in as needed.
- Members must be reachable at any time, and each member must know how to reach the other members.
  - One or more back-ups should be designated for each key role.
  - Each member should have a wallet card with all key contact information.
  - The coordinator should have immediate access to secure meeting rooms and telephone conferencing.
- The core group will assess the situation and determine the Company's response. Subsidiary teams may be needed to help gather information for the core team and/or to implement the Company's response. If the Company has numerous locations, consider establishing a local team in each location.

## 3. Develop an Early Warning System

- For product-related risks, customer service personnel should be trained to categorize consumer complaints by type and level of severity and to immediately communicate to a member of the core team any consumer contact of specified types or above a specified level of severity.
- Make sure employees in field and/or overseas locations understand when they should notify a member of the core team concerning an incident.

## 4. Clearly Define the Role of Each Team Member

Example:

- Legal Counsel:
  - Identifies locations/subject matters for which outside counsel may be needed
  - Maintains current contacts and manages the use of outside counsel in connection with an incident
  - Determines legal ramifications of the incident and the Company's proposed actions, and advises the Company on such legal implications
  - Supervises and directs the Company's dealings with governmental agencies and local law enforcement as applicable
  - Determines legal responsibilities toward, and advises with respect to communications with, individuals affected by the incident (e.g. employees, family members, residents of surrounding area, consumers, as applicable)
  - Advises on creation, maintenance and dissemination of documentation related to the incident

## 5. For Each Type of Incident, Agree Up Front On the Company's Priorities

Example:

- Product-Related Issues:
  - First Priority: Consumer health and safety
  - Second Priority: Overall reputation and image of company
  - Third Priority: Reputation and image of specific brand
  - Fourth Priority: Product liability claims
- Threat of workplace violence:
  - First Priority: Employee safety
  - Second Priority: Support of victims and their families
  - Third Priority: Support as needed to others indirectly affected, e.g. other employees, local community
  - Fourth Priority: Maintaining/restoring business continuity

\* Prepared for the Association of Corporate Counsel 2005 Annual Meeting, by Susan M. Angele, Vice President, Deputy General Counsel and Chief Governance Officer, The Hershey Company, Hershey, PA. The information in this document is based on my own opinions and experiences, and does not reflect the views of The Hershey Company. It is not intended for use as legal advice.

## 6. Define the Actions to be Taken for Each Type of Incident

Each incident has four phases: alert, investigation, decision and implementation. Each phase may be repeated as the incident evolves, e.g. new information received during implementation phase may lead to further investigation and additional decisions, etc.

Example:

- Disaster (natural disaster or terrorism) in location of frequent employee business travel
  - Identify all employees scheduled for business travel to the region and employees who regularly travel to that region, even if not scheduled
  - Determine which employees, if any, were in fact known to be or likely to be in the area at the time of the incident.
  - Attempt to contact all such employees
  - For any employees not reachable, check to confirm the employee's itinerary. Confer with employee's manager, family, company travel agent, etc. to best determine employee's precise location at the time of the disaster
  - Continue efforts to locate employee; e.g. check with local hospitals, law enforcement, etc.
  - Prepare to provide counseling and support as appropriate to employee when/if located, family, co-workers
  - Determine stance with media, i.e. whether to issue press release/hold press conference as information comes in, or simply to prepare to respond to media.
  - Determine on-going obligations, to employee, family.
  - Maintain contact with family and communicate so that family does not hear information from the media without having been advised in advance.

## 7. Establish Procedures Facilitating Business Continuity in the Event of an Incident at a Company Location

- Computer systems should have a detailed backup plan, with recovery abilities in more than one location
- Develop a plan to continue production of the Company's goods/services in the event of (a) temporary and (b) longer term unavailability of the main location
- Install backup power generators as needed
- Designate alternate production locations, and understand how people, machinery and supplies will get there
- Maintain up-to-date succession plans for key executives and Board members, to minimize disruption in event of disaster affecting these individuals

## 8. Don't Let Your Plan Gather Dust

- Keep it up to date, as contacts, company locations and potential risks change
- Refresh the training. If your company is fortunate enough to not need to refer to the plan often, make sure it will continue to be top of mind if it is needed.
- Practice. The plan should set forth a timetable for drills. Consider mock disaster response drills, mock recalls, even mock press conferences.

## 9. After the Incident, Take the Time to Reflect and Follow-up.

- Shortly after the incident, discuss as a group what worked, what didn't, what should be done differently next time
- If the Company decides on follow-up action, make sure it gets implemented
- Don't assume that any effect on individuals will be short-term. Consider whether long-term support and/or counseling services should be made available.
- Review the plan and make any adjustments needed.

## 10. Don't Forget to Recognize the Heroes.

- Whether they are protecting property, reputation or lives, individuals who go above and beyond what's expected of them during an incident should be recognized.

**AN INHOUSE COUNSEL'S GUIDE TO  
PLANNING FOR AND RESPONDING TO A CRISIS**

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**An Inhouse Counsel's Guide to Planning for and Responding to a Crisis<sup>1</sup>**

by  
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**I. Introduction**

A lot has been written about crisis management and response plans. But one needs only to watch the evening news or pick up the morning paper to see "crises" that have been poorly handled. Corporate America (Enron, Arthur Andersen, Boeing and WorldCom), the White House (Karl Rove, Sandy Berger), Capitol Hill (Tom DeLay), Hollywood (Michael Jackson), data services (ChoicePoint, LexisNexis), fashion (DSW Warehouse, Hermes) and professional sports (Kobe Bryant and Rafael Palmeiro) provide notable examples. Did they have crisis management plans in place? Did they use them effectively?

A series of events does not, however, need to be a life-or-death struggle in order to be a crisis. A plant fire or explosion, a pipeline break, or a computer virus can be a "crisis" if you are the one who has to handle it.

There are general principles and common elements that apply to all "crises," small or large. By and large, a "crisis" can be anticipated, and you can develop proposed response plans in advance. While those plans may not be perfect, they are better than no plan at all.

Our purpose here is to review the common elements of crises and emergencies, and to discuss aspects to consider. We provide a list of potential crises and emergencies for your company, and some suggestions on how to prepare for those in advance. We will also explore the issue of communication, which, in one form or another, is a critical factor in every crisis, and which generally makes or breaks a crisis response.

Does your company have a Crisis Plan? If so, are you aware of its provisions, and does the Law Department have a parallel plan?

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<sup>1</sup> Copyright 2005, Christian E. Liipfert and Ray G. Thompson

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## II. Common Elements

Based upon our experience over the past fifteen years or more, most business crises have these common elements:

- Media interest, normally accompanied by conflict, controversy and a "good visual"
- Compressed time frame for resolution
- Limited (and often contradictory) information
- Problems coordinating communication, both internally and externally
- A basic human fear or failing

Intense media coverage and scrutiny of a business crisis usually involves a good visual. This can be the image of a Tylenol bottle, a Pepsi can, a paper shredder or an oil-soaked bird. Or a recognizable face, like Martha Stewart, Michael Jackson or Kobe Bryant, or Oprah standing outside a Hermes store in Paris. The media loves it, as the picture looks good on the 6 o'clock news, or on page one above the fold.

## III. Planning

To the extent that a crisis or emergency is predictable -- and most are -- you can plan for it. This is why first graders do fire drills and why the flight attendant tells you about the oxygen mask and the two over-wing exits. There are two major tasks: first, identify the possible crises that may affect your business; and, second, prepare in advance the people and materials that you would need to respond to the most likely crises.

### A. Identify the Most Likely Crises for Your Business

To identify what crises or emergencies could affect your business, start by reading a force majeure clause in a contract to identify the types of crises that could affect any business. These include the normal litany of fire, earthquake, explosion, Acts of God, shortage of labor or material, shipwreck, bad weather, riot, war, civil unrest, and, depending on your location, volcanoes.

But those only represent one type of disaster. What about other types? What crises have struck other businesses? The criminal act of a third party, such as violence in the workplace or product tampering, is one example. An allegation that one of your employees has committed a criminal act is another. Computer viruses or hacker attacks, or the shutdown of the e-mail server? A senior executive loses his or her computer, containing confidential planning data or the social security and credit card numbers of a few hundred thousand people? A crippling result in a court case? What else might happen to businesses generally?

After you have spent some time thinking about those types of crises, concentrate on your particular business. What else could go wrong there? It could be the loss of a key customer or supplier. It could be the loss of a key permit, a change in regulation or law,

or the death or unavailability of one of your key employees or a business partner. It could be the collapse of the government in one of your key markets, or Oprah telling her TV audience about her late afternoon shopping trip to one of your stores.

Included as Attachment One is a list of some of the crises and emergencies that might befall your business. Look over that list and think about whether one of those could happen to your company. Would that be a crisis?

### B. Preparing to Respond

Having identified most of the crises or emergencies that might affect your business, now you can give some thought to what you would need to do in response.

The first step is to prepare a collection of materials, normally called the Crisis Response Manual. This manual should be available all the time -- at the office, at home, in your briefcase (and portable computer) on the road. If you use a Palm Pilot or other PDA, that is a great place to carry a copy of the core materials. A USB flash drive/memory stick is fine, too.

What should you include in your manual? At a minimum, you will need the phone numbers (office, home, and mobile) of those folks who will be involved in the initial response effort. You will also need the names and phone numbers (again, office, home, and mobile) of the other folks in the business you may need to contact: your boss, your boss's boss, Public and Governmental Affairs, outside counsel, inside counsel at other locations, your secretary, etc. You may want to add contact numbers for key personnel at your partners, key contacts at relevant government agencies, and suppliers and vendors, both your normal suppliers and vendors and those upon whom you may need to call in a crisis.

While there is a role for the Legal Department in all this, at its core a crisis is a business problem, and the business folks should drive the process. If they aren't driving, they should be. The vast majority of crises are at least 85% business, and at most 15% Legal. Legal is often the tail, not the dog, in a crisis situation.

Assuming you have folks in the business responsible for this, they should have briefing sheets on the various facilities. These are helpful when you are trying to pull together press announcements following an incident. These summaries should be readily available. In larger organizations, this type of information is often on a centralized web page or server. This makes updating a lot easier. Then all you need to worry about is not having access to the server when you need it.

It may be appropriate to prepare a "media holding statement" in advance about potential issues or subjects that could develop into a crisis. It is easier to collect key information before the news crews, cameras and bright lights arrive. Pull together the *who, what, when, where, why* and *how* of your company's preparedness for particularly predictable events.

Your lawyer's Crisis Management Manual should also include a lawyer's process checklist. A sample checklist is attached as Attachment Two. While you need to decide whether this is appropriate for your business, it gives you a place to start, and some issues to consider.

Finally, are there any issues that you can anticipate for which it would be appropriate to have a memorandum or form prepared in advance? This might include a legal analysis of the duties of indemnity to your employees under your bylaws, the legal obligations in response to an offshore oil spill, or the legal rights and obligations of a volunteer. How do you maintain a chain of custody for evidence taken from the scene? What about a proposed force majeure notice or a draft contract for a service provider? Where can you find your insurance policies? How should your plant guard react and whom should he or she call if government agents appear with a search warrant? How do you secure your computer system if that's necessary? What has happened to you or to others in your industry in the past? These are things that you can, and should, think about now.

### C. Training and Drilling

Now that you have identified the possible crises that might affect your operations, and you have prepared a plan and checklists to respond to those crises, the next step is to train your legal personnel in using the plan and checklists. Getting attorneys to focus on these issues before a crisis is a challenge, as most attorneys believe that crisis management is their day job. This applies to both in-house attorneys and external counsel.

Lawyers can also help by participating in the training of others, making them aware of the legal "language" issues and document retention obligations that arise in the context of responding to an incident. This is a good opportunity to talk to people generally about writing clearly and concisely.

It is important for the attorneys involved to recognize that crisis management training is more than a routine legal matter. By definition, a crisis involves broader issues. Training can help get this message across, even to attorneys. Drills can help send the message home that attorneys may not be as prepared for this as they think they are. It can also introduce the attorneys to the Incident Command Structure, which is the way that most government responders organize to respond to an emergency. The Incident Command Structure is not intuitively obvious, and the nomenclature is unusual, so a prior introduction is helpful.

After each drill, and after each actual crisis or emergency, prepare a list of lessons learned, and prepare those materials you wish you had had, but didn't. Add those to your manuals, and distribute them to the other lawyers who may become involved in future events. Continuous improvement is a good thing.

## IV. Response

Okay. You've planned ahead, and have a manual. What else do you need to focus on when a crisis actually happens?

The primary focus, once you recognize that a crisis is occurring, is managing the response. This is the time to turn to the checklists you have prepared in advance, because when the building's on fire, it's difficult to remember everything you should be doing. Apart from looking at your checklists, the key message is communication. At the same time, keep one eye on the future, and the issues that will need to be addressed to sustain the viability of the business after the fire trucks have returned to station and you have to return to your day job.

### A. Activation

Sometimes, the most difficult thing to recognize is that a crisis is, in fact, brewing. Normally, people don't want to think that this matter is a crisis. They hesitate to activate the crisis management plan, and call everybody together, because they don't want to disturb people unnecessarily. Instead, they have the tendency to take the most favorable or optimistic view of emerging events, without making a big deal out of what may not be a crisis.

History teaches us that this is a bad idea. It is normally better to over-activate rather than to under-activate. You can always stand down from yellow or red alert; it takes more time to gear up the initial effort if you wait until you need immediate assistance.

The lawyers, and others, need to be sensitive to this tendency. Lawyers should be alert to the signs of a creeping crisis that potentially puts a significant part of the business at risk. The lawyers can then suggest that that might be a matter on which to at least notify the people who would be involved in a crisis response, so that they can locate their manuals and stay close to their phones. Have the team ready.

Once you have activated the team, then it's time to pull out your checklists and manuals, and follow them. While they may not cover every issue, they do provide a structured framework for response. Our experience is that in an actual event, people forget about these checklists in the heat of response. Lawyers, who often have a core competence in detached objectivity, can remind folks that the checklists exist and that the team should make sure they've reviewed and are using them.

A key lesson is to consider who else in your organization might need to know about the event. Is there another project pending in the area? Might the press contact someone in a similar business in your company? Is there a partner or a government (State, Federal or local) agency who would prefer to hear from you rather than read about it in the newspaper? Is a senior executive in discussions with a government agency or prospective partner next week? Who else in Legal needs to know?

## B. Communication

Many of the "poor" responses to crises have been due to poor internal or external communications. This is predictable and, to a large extent, preventable. Handling the flow of information inside your own organization, and between your organization and the outside world, is critical.

The information that you will receive from the incident site at the early stages of an incident will normally be fragmentary, ambiguous, contradictory and wrong. The sooner you establish a reliable flow of information, to and from the site, the sooner you can begin to effectively respond to the event.

### 1. Responder Communications

A well-designed crisis management/emergency response plan will establish a clear line of communication of incident and response information. When the incident involves multiple sites, this line of communication can be a combination of telephone, fax, video and electronic communication. Key points to remember are that

- the responders at the site have to deal with the incident first, and keep management back in the home office informed second,
- not everyone who wants to know needs to know,
- multiple parties will make inconsistent or duplicative demands for information,
- early information is normally ambiguous, incomplete and incorrect,
- you will need to brief people when they first join as well as at shift changes (new people will be joining constantly), so it's good to keep a running summary of all your notes, with the most recent information on top,
- keep a list of assigned tasks, who they've been assigned to, and their present status; mark off what's been completed,
- equipment breaks, and
- someone needs to arrange for food and lodging for everyone involved at or traveling to the various sites; expecting to have the on-site responders take care of you is "unrealistic."

Against this background, and recognizing the possible need to produce this information in later litigation, the lawyers can help by teaching the clients in advance what unnecessary words to avoid. Also, you can encourage your client to put qualifiers in their written work, such as "Initial reports are that the tank ruptured," rather than the absolute statement that "The tank ruptured." If at all possible, get your clients to put dates and times on their notes, as to when they received the information, and from whom. Consider whether all documentation, both paper and electronic, needs to be preserved, either under your document retention policy or to prevent a claim of

spoliation or destruction or alteration of documents governed by 18 USC §1519 (added by Sarbanes-Oxley).

The three rules of thumb in this area are:

1. Limit your written communication to the necessary facts;
2. Keep it short, keep it simple, with appropriate qualifiers;
3. Consider what documents, both paper and electronic, need to be retained.

The five hot buttons in the client's documentation in response to an incident are:

1. Adjectives, Adverbs and Absolutes
2. Judgment words
3. Unnecessary words
4. Legal words (including causation, liability, negligence, breach, etc.)
5. Speculation, opinion and guesses

In order to keep information current, and to keep track of assigned tasks, you may want to have frequent meetings or conference calls with the various lawyers involved in the different aspects of the response, and the necessary members of legal management; they have severe information demands that you need to anticipate. These meetings can be twice a day, or more frequently. These are great times to get briefings from everybody, updates on factual developments, and check on the status of pending action items. Not everybody needs to attend these meetings.

### 2. Lawyer Communications and Coordination

Early on, you should consider whether you need to have a lawyer at the incident site. The role of that attorney would, on the surface, be to assist local responders with the legal issues as they arise. An additional role, and in the event of a remote incident perhaps the primary role, is as your objective eyes and ears at the scene. And as someone who can remind folks about the need to preserve documents and evidence.

If you have more than one lawyer involved, either at multiple sites or in supporting the response effort at a single location, it is important that they have well-established lines of communication. In an actual event, you will be astounded at the amount of legal time and effort required. One lawyer will be sitting at the table advising management, another will be communicating with on-site counsel and/or headquarters, and another will be reviewing press releases, reading contracts or drafting force majeure notices. The second shift will be home sleeping, getting prepared to replace the first team. The normal legal work of the department comes to a grinding halt.



If lawyers are going to be involved at more than one management location, one lawyer should be assigned the responsibility of coordinating the overall effort. This person would be the clearing house, and a single point of contact for information about who is working which shift, which outside counsel have been engaged and deployed, and which legal projects are pending. They need to create a task list. On the pending task list, put the legal issues identified and their status (*i.e.*, resolved, assigned to XYZ response due 12pm, open/unassigned). This is a good list to share with all the lawyers involved on a regular basis and at shift changes, to avoid unnecessary duplication of effort and to identify items that may otherwise be forgotten.

### 3. Other

While considerable attention is directed to media communications in response to a crisis, one constituency that is often forgotten is the remainder of your employees who are not involved in the response. Not only do they have a strong interest in information about the incident (it's their company, too) and the company's response, they also can be an effective vehicle for distributing credible messages. Establish a procedure for getting information to them at the same time information is distributed to the press. Provide them with copies of the press releases or statements and the facts and figures, as they become available, even if you need to "qualify" the information. They will appreciate who, internally, is involved in managing the incident, and how the company is responding. These are their friends and co-workers. Your employees can be an effective channel to distribute information, especially in the local communities. Consistent, timely messages enhance your company's credibility.

If you have company bulletin boards, post and update the information. Do you have a web site? Company-wide e-mail? Your employees can be the best, most credible way to get the right word out to the public, if you let them.

### 4. External Communication

There are two principal aspects of external communication. First, identify whom you need to inform, *i.e.*, the key constituencies who are important to the success of your company. Second, consider how you should coordinate communications with those constituencies.

Depending on the nature of your operations, and the nature of your incident, emergency, or crisis, you may need to communicate with some or all of the following:

- Management, including your boss
- Shareholders
- Employees
- Families of employees
- Neighbors in the affected community
- Mutual Aid Groups
- Fire department and other local emergency responders

- Neighbors of other company facilities
- Customers
- Vendors and suppliers
- Joint Venture partners in the affected operation
- Joint Venture partners in other operations
- Industry colleagues
- Government regulators
- Elected officials (local, State and Federal)
- Host government
- Public health authorities
- Governments in other locations where you operate
- Insurers
- Hospitals
- The press/media, generally
- The trade press
- Stock analysts
- Environmental groups
- Special interest groups (and non-government organizations)

Depending on your business, there may be others you need to advise.

#### a. Dealing with the Media

In today's globally competitive environment, organizations must work harder than ever just to maintain the status quo. This is especially true when it comes to handling a crisis.

Every incident -- in any company, in any industry -- that is handled poorly increases public skepticism. And every incident that is handled well only serves to increase public expectations. The manner in which you respond to and manage a crisis impacts your company's reputation and your ability to resume business quickly. Whether the public's net impression of your company is negative or positive depends greatly upon how effectively you manage the media process.<sup>4</sup> The judgment in the court of public opinion will largely depend on how you responded and what that says about your company's character, and less so on the fact that you had an accident.

When it comes to dealing with the media, many organizations try to avoid media contact. It is a time when a company is already under the intense glare of public scrutiny. Pressure builds – on the company and on the media. More is demanded faster of both groups. Tensions build, and the chance for error and flawed judgment in responding to the media increases.

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<sup>4</sup> Management of the media itself is oxymoronic. The media is a voracious beast; all you can do is understand the process and feed it as best you can.

In reality, a crisis -- more than any other news event -- can be a vehicle for a company to demonstrate its operational integrity, and its commitment to people, the environment, business partners, customers, regulators, employees, and the community. With preparation and practice, a company can put its best foot forward in a credible and convincing manner. But remember: the story will go on with you or without you. The best course is to actively work to shape that story.

b. Establishing Yourself as THE Information Source

In a crisis, the best person to tell the story is the company itself. If the media is not required to look elsewhere to tell your side of the story for your response to a crisis, the public's net impression will generally be more favorable.

c. Hallmarks of Effective Crisis Communications

A review of successful crisis communications techniques used in government and industry over the past two decades reveals a four-pronged message strategy that is best suited in responding to a crisis. The four-step message to accomplish this objective is deceptively simple, and can be delivered without unnecessarily increasing your legal liability:

- **Show your concern.**
- **Detail your responsible actions.**
- **Demonstrate your cooperative attitude.**
- **Show your resolve to do the right thing.**

**Show concern:** Above all else, a crisis is a human trauma. Express compassion for those who are affected by the incident. In your words and deeds demonstrate your concern for them and your commitment to help. Make it plain to the reader, listener and viewer that you have considered how this event affects others and that you are working to address their needs. You may be surprised to learn that most audiences don't want to see you defeated by the bad news you must share.

Your audience understands that bad things happen to good companies. However, they are watching closely to gauge the kind of person you are, the kind of organization to which you belong based on how you respond. They will make value judgments based on the emotional content of your message.

**Statements that show concern:**

*"We regret the inconvenience this incident has caused our neighbors and our community. We are working hard to limit the impact and to help them in any way we can. We have activated our emergency plan which includes ...."*

*"This is a terribly sad day for the friends and families of all those affected by this tragedy. On behalf of our employees and their families, you have our deepest sympathies."*

*"Our primary concern is for the safety and well-being of those who were injured. We are making sure they get proper medical attention and we are hoping for their full and speedy recovery."*

*"I have spoken with many of those directly affected by this accident. I have instructed my response team to make certain that we do everything we can to get these people back to their homes as quickly as possible."*

*"As a member of this community, I, too, am concerned. That is why we have assembled a core team of specialists to help us make sure we are doing the right thing."*

**Responsible actions:** Never assume that the media or any of your key audiences realize you have a crisis plan. Detail for them the steps you are taking to mitigate and resolve the incident or issue. Show them you are working hard to do what's right. Give them evidence and examples of the scope and scale of your response efforts, the resources you are bringing to bear on the issue, and the level of your expertise, training and preparedness. Chronicle the actions you are or will be taking. Use key supports to demonstrate your commitment to do what is right, and provide precise, detailed evidence of that commitment in action.

**Statements that detail responsible actions:**

*"We have activated our emergency plan, and we are escalating our response efforts. Experts in safety, environmental protection, operations and maintenance are on the scene now working to resolve the problem."*

*"We are committed to using every resource at our disposal to mount an aggressive and effective response to this situation. So far we have ... (activated a certain number of emergency personnel; contracted with a certain number of specialty firms; collected a number of samples; established a number of response teams; organized a briefing for a number of officials)."*

*"I am pleased to report we have made progress today in containing and resolving this incident. First, ...."*

**Cooperative attitude:** In your words and in your deeds, show how you are coordinating your response efforts with those of other organizations that may be involved, especially the governmental entities. Help your audience grasp the cooperative nature of your response. Report how you are working with local, state, regional, national or international bodies. Name names, and include titles and affiliation. These details will strengthen the confidence your audience has that you are doing

everything possible to solve the problem, and that their interests are being protected. It also shows that you have nothing to hide. Emergency response organizations -- especially those at the local level -- have a high degree of credibility with many key publics. Extend this theme of cooperation to the news media as well. Tell them you understand and respect their need for information, and show them how you are working to meet those needs.

#### Statements that demonstrate a cooperative attitude:

*"We are working hand in glove with local police and fire officials in a cooperative way. In fact, (title, name & affiliation) is a full member of our emergency response team."*

*"We are getting excellent cooperation and assistance from the city, county and state emergency response organizations, including ...."*

*"I want to express my appreciation and admiration for the efforts of the unified command team that is providing us with a great deal of help and a vast amount of resources. Working with us today are emergency response professionals from ...."*

*"We are concentrating our efforts on making sure we are doing everything we can to resolve this incident. At the same time, we appreciate the need to share information with our neighbors, the media and others who want information about what we are doing. That is why we have established a series of media briefings to ...."*

**Show resolve:** This is where one's leadership qualities must emerge. Showing resolve to overcome the crisis is as much about what you say as the way you say it. You must be able to leave concerned audiences with a sense not only of your humanity, but also of your strength, control and determination. Following the terrorist attacks on New York City on September 11, 2001, Mayor Giuliani embodied this principle by constantly referring to the city's focus on recovery.

#### Statements that demonstrate resolve:

*"We are committed to fully recovering from this tragedy and returning to doing what we do best."*

*"Although we remain focused on resolving this current situation, we are confident that we can and will overcome this incident."*

A word for the lawyers.

The lawyer's job is normally to protect the company's balance sheet, and to keep that entry under "Liabilities" as small as possible. In the first days of an incident, the lawyer hasn't had a chance to review the evidence or to evaluate the potential legal theories, either of defense or prosecution. And the lawyer knows that the information is

preliminary, fragmentary, and most likely wrong. Thus, it would seem, "no comment" avoids getting the company into any more trouble.<sup>5</sup>

The Public and Governmental Affairs<sup>6</sup> folks, on the other hand, want to go out to the press and protect the company's reputation by saying that the company will fix everything so everyone is happy.<sup>7</sup> This avoids the negative impact on the other portion of the balance sheet, that line labeled "Goodwill."

The lawyers need to realize that, if this is a significant event, the press is going to run the story, with or without the company's cooperation. The lawyers need to be aware of the longer-term consequences to the company of the most conservative legal strategy. Further, if the company establishes its position as a responsible corporate citizen as well as a credible source of information, this will be reflected in the tone of the media coverage. We can thus help create a powerful message without unnecessarily increasing the company's legal liability.

So what's the answer? It's a balance. The lawyers need to work with the Public and Governmental Affairs folks, and understand the process. The lawyers need to understand the fundamental principles of Communication in High Risk/Low Trust situations. The lawyers need to work with the Public and Governmental Affairs folks to develop a message that is consistent with minimizing the creation of unnecessary legal liability, while at the same time maximizing the protection of the brand value and the company's good name.

This is confronting the "Responsibility Paradox." How can you phrase a statement so that you are acting responsibly but not admitting to responsibility in the legal sense? How about "You've asked who's responsible for this [event/explosion/tragedy]. Legal liability is something that the courts will decide after all the evidence is in. Right now, we are more concerned with acting responsibly. Let me tell you what we are doing. We have [insert number] of responders on site, working together with their counterparts from the fire department, to contain the ...." You get the idea.

We recommend that the lawyers spend some time now with the Public and Governmental Affairs folks. Build and invest in the relationship. When the crisis hits, Legal and Public and Governmental Affairs need to work as allies. This requires an investment in advance. In any case, never let someone from your company talk to the media in a crisis situation unless they have had appropriate media training.

#### V. Conclusion

While a crisis or an emergency cannot necessarily be managed, it can be survived. It takes pre-planning, a basic understanding of the process, and a willingness to observe and study the reports of other crises affecting other companies. Learn from the history, and be ready to apply those lessons when and if crisis strikes your company.

Christian Liipfert  
Ray Thompson

<sup>5</sup> In keeping with our physician friends, first do no harm.

<sup>6</sup> Or "Public Relations," as the case may be.

<sup>7</sup> Ray and I struggled on this one. But I got the final draft.

Attachment One

Potential Crises and Emergencies

- A. Force majeure, generally
  - 1. Explosions
  - 2. Fire
  - 3. Earthquake
  - 4. Flood
  - 5. Weather
  - 6. Crashes
  - 7. Volcanoes
  - 8. Medical emergency
    - a) disease
    - b) poisoning
    - c) evacuation
  - 9. Country Collapse
  - 10. Riot and Civil Insurrection
  - 11. Martial Law
  - 12. War
  - 13. Nationalization, expropriation
  - 14. Collapse of key supplier
- B. Environmental
  - 1. Releases
  - 2. Permit revocation
  - 3. Environmental releases from neighboring facilities
- C. Third Party Criminal Acts
  - 1. Kidnap, Hostage, Extortion
  - 2. Violence in the workplace
  - 3. Product tampering
  - 4. Piracy
    - a) High seas
    - b) Intellectual property
  - 5. Terrorist acts
  - 6. Arson
- D. Operational
  - 1. Loss of permit
  - 2. Loss of major customer
  - 3. Loss of major supplier
  - 4. Loss of key employees
  - 5. Labor action
    - a) Union campaign
    - b) Strike
    - c) Whistleblower report
  - 6. Occupational safety incident
  - 7. Computer Related
- 8. Viruses
- 9. Denial of service
- 10. Hackers
- 11. Collapse of network
- 12. Misuse of system
- 13. Loss of portable with sensitive information
- 14. Wrongful destruction of documents
- 15. Equipment malfunction
- 16. Employee fidelity
- 17. Management misdeeds
- 18. Whistleblowers
- 19. Local bank collapse (Letters of Credit? Accounts?)
- 20. Industrial espionage
- 21. New legislation
  - a) making your business no longer legal
  - b) new permits that can't be granted
- 22. Lease cancellation
- 23. New taxes
- 24. Government civil investigations
- 25. Product liability/recall
- 26. Partner collapse
  - a) Bankruptcy
  - b) Takeover, merger
  - c) Change of ownership
- 27. Inconsistent obligations under local law v. other law or company policy
- E. Intellectual property
  - 1. misuse by others
  - 2. allegations of misuse by your employees
  - 3. Loss of important proprietary data
- F. Allegations of unlawful conduct
  - 1. Local law violations
    - a) Bribery
    - b) Permits
    - c) Labor
      - (1) Race, sex, religious discrimination, etc.
      - d) Environmental exposure of employees
      - e) Occupational safety regulations
      - f) Document destruction
      - g) Government relations
      - h) Slander/libel
      - i) Export/import law violations
      - j) Mistakes on government filings
      - k) Tax
      - l) Private conduct by employees
        - (1) drugs
        - (2) drunk driving
        - (3) other criminal behavior
  - 2. Response to a search warrant or subpoena
  - 3. Sarbanes-Oxley Reporting

**LEGAL DEPARTMENT EMERGENCY CHECKLIST**

**UPON NOTIFICATION OF POTENTIAL CRISIS:**

- Assess need for complete plan activation
- Locate your manual
- Notify your boss

**UPON DECISION TO ACTIVATE PLAN:**

- Report to meeting of Response Team with your manual
- Review the index of your manual
- Remind participants of need to keep documents (including e-mail) limited to the facts and to avoid opinion or speculation, and that documents will all be collected
- Remind everyone on Team to review proposed press releases and internal all-employee communications with Legal
- Designate/notify assisting attorney and alternates
- As appropriate, notify local Claims Attorney
- Arrange for someone to handle your other work

**DURING AN EMERGENCY:**

- Coordinate with other lawyers involved in response
- Consider sending attorney to site (in-house, Claims, outside attorney, etc.)
- If more than one attorney involved, designate coordinating attorney
- Confirm legally required notifications have been made.
- Consider and, as appropriate, recommend additional notifications (i.e., insurance, force majeure)
- Confirm instructions to incident site to review all press releases and similar documents with Legal Department representative before issuance
- Advise site not to destroy any documents (including e-mail) relating to the incident, even if pursuant to normal document retention guidelines
- Advise site to preserve physical evidence if possible

- Remind Response Team members and site responders to leave ALL documents and notes relating to the incident in the meeting room. At shift changes or arrival of additional people, remind participants to keep documents factual and to avoid opinions and speculation.
- Notify and, as appropriate, engage, other attorneys (in-house or outside):  
 Environmental, Health & Safety  
 Local Claims Attorney  
 Labor  
 Corporate  
 Criminal Defense  
 Business Unit  
 Attorney  
 Security  
 Others
- Work with GPA on message development and employee communications

**Consider different constituencies:**

- Employees and families
- Surrounding community
- Mutual Aid groups
- Shareholders
- Stock exchanges
- Customers
- Local and State Government
- Emergency and public health authorities
- Federal government -- elected representatives and executive agencies
- Regulatory community
- Suppliers and vendors
- Contractors
- Press/media (including trade journals)
- Hospitals
- Corporate management of parent, affiliates; other company employees
- Stock analysts
- Trade associations
- Competitors
- Begin planning for recovery after the incident

**FOLLOWING AN EMERGENCY:**

- After incident, collect all notes, documents, and e-mail notes and review. To the extent that some materials are ambiguous, attempt to clarify with author while memories are fresh.
- Prepare a summary of Lessons Learned; distribute as appropriate

## DRAFT Law Department Crisis Management Manual

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