

When Disaster Strikes: The Legal Department's New Imperative

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Crisis Communications Preparedness Checklist

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| Situation | Self-examination Questions | Actions Necessary | Status |
|---|---|--|--------|
| We don't have a crisis communications plan. | Why are we taking such a massive risk? | Have vulnerability audit conducted and crisis communications plan created immediately. | |
| We have a crisis communications plan. | <p>Is it current, regularly updated based on changes in the company, as well as by periodic brainstorming sessions regarding vulnerabilities?</p> <p>Was it prepared by someone who is as qualified in his or her field as experienced specialty group attorneys are in theirs?</p> <p>Was the plan based on a comprehensive audit of your potential vulnerabilities that included input from all levels of the company, relevant consultants and key outside contacts?</p> | <p>If not, update immediately; contact lists should be updated at least twice annually, rest of plan at least annually.</p> <p>If not, have plan reviewed immediately by qualified individual. A crisis communications plan "off the shelf" or created by someone not experienced in this area is not likely to suffice and could, in fact, be dangerous to the company's welfare.</p> <p>If it was based on "the best thinking of senior management and the plan's creator" versus a vulnerability audit, consider the potential cost of what's been overlooked. Have audit conducted and revise plan</p> | |

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| | <p>Do your crisis-response messages deal with feelings, not just facts?</p> <p>Does your crisis plan consider the “ripple” effect of crises that may affect other organizations or audiences first, but then affect you as a result?</p> <p>Do you rehearse crisis response? Do you compile and review the "lessons learned" from such drills? Are lessons learned compared to existing plans and are necessary revisions made? Are revised plans regularly "exercised" in subsequent drills?</p> <p>Does your plan recognize and take into account time pressures inherent in crisis response and make the resources available to address time demands of crisis</p> | <p>accordingly.</p> <p>If not, consider that, in times of crisis, expressing reassurance and concern, first and foremost, is essential to also communicating your facts.</p> <p>It is not uncommon for otherwise very good crisis plans to omit this type of analysis, but this possibility was dramatically demonstrated on September 11, 2001. Revisit your plan in this context.</p> <p>If not, note that most people either panic or are immobilized by shock during real crises; rehearsal improves reaction speed and appropriateness. Conduct regular “mock crisis” drills to make sure the system works.</p> <p>If you can’t set aside most or all of what you do day-to-day to participate in crisis management, then establish a system, now, that will allow you to either do that or assign</p> | |
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| | <p>response.</p> | <p>the primary crisis management legal responsibilities to someone who can. This is true not only in Legal, but in every operational area.</p> | |
| <p>We try to prevent or minimize the chances of damage from future crises.</p> | <p>Are your in-house or consulting PR staff trained and/or experienced in crisis prevention and response?</p> <p>Are your crisis-savvy PR staff and/or consultants kept informed of legal threats to the company as soon as you know of them?</p> <p>Are the appropriateness of legal decisions evaluated in terms of marketing/PR impact on all audiences important to the company?</p> | <p>If not, note that having untrained personnel responsible for critical tasks results in "accidents." Get them trained.</p> <p>If not, note that damage minimization is VASTLY improved if they have a chance to consider the PR implications of legal threats well in advance of any public knowledge. Consider briefing at least one senior-level PR rep as soon as threats appear.</p> <p>If not, note that every significant legal and operational decision has a potential impact, for better or worse, on your important audiences. Consider including senior-level PR reps in your deliberations before finalizing your decision.</p> | |

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| | <p>Do your crisis-savvy PR staff and/or consultants get a chance to review legal documents regarding sensitive matters that are going into the public record?</p> <p>Does the company conduct ongoing proactive community relations and public relations to create a cushion of goodwill that will soften the impact of crises when they happen?</p> <p>Do you fully assess, and appropriately respond to, the potential for crisis inherent in loose cannons and disgruntled employees?</p> <p>Do you know, with certainty, that managers at all levels of the company are letting senior management know when there are "situations" brewing that could become crises?</p> | <p>If not, consider that a document may look perfect, legally, but you don't realize that para 2, on page 3, could easily be taken out of context and misconstrued by the media or general public. Consider involving PR reps in key document review; sometimes a few changed words can prevent a crisis without changing the legal picture at all.</p> <p>If not, consider a change in policy, because every crisis, big or small, will cause more damage if the cushion of goodwill does not exist.</p> <p>Realize that disgruntled employees and loose cannons are two of the most common sources of negative media coverage about a company.</p> <p>If you think you know, with certainty, how do you know? Has it been independently verified either by the vulnerability audit process or confidential employee surveys? If not, your vulnerability to</p> | |
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| | <p>Have managers at all levels been trained on how to spot potential crises well in advance?</p> <p>Do you have a rumor-control system?</p> <p>Do your important audiences, internally and externally, find it easy to communicate with you, to ask questions and get them answered?</p> | <p>being blindsided is high.</p> <p>While spotting certain types of crises may be inherent in the manager's routine training, spotting others may not. Review training to ensure that managers know how to spot most or all of the types of crises to which your company is vulnerable.</p> <p>Rumors cause immeasurable damage amongst all of a company's key audiences on a daily basis even when you're not in crisis. If you don't have a rumor-control system, establish one.</p> <p>If not, note that without a mechanism for easy two-way communication, your audiences will regard you as insensitive or uncaring, particularly during crises.</p> | |
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| | <p>Are you an obstacle or a facilitator? Ask yourself:</p> <p>Can press releases be approved in less than 15 minutes, if necessary?</p> <p>Can you, or your backup, be reached 24 hours a day?</p> <p>Have you researched, in advance, legal considerations pertaining to crises that can already be anticipated?</p> | <p>If not, remember that speed of response is critical to crisis communications; in the absence of communication, rumor and innuendo fill the gap.</p> <p>There should be a 24-hour contact list for all executives whose approval is essential to crisis response.</p> <p>It is possible to anticipate most, not all, crises that you may encounter and create draft responses, in advance, for each, that are appropriate from both a legal and PR perspective. Do your homework now, pre-crisis.</p> | |
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ARTICLE

Educating the Jury Pool

© 2000, 2001, Jonathan Bernstein

This article originally appeared in Arizona Attorney magazine, publication of the Arizona State Bar, and has since been slightly edited.

Which of the following statements about a jury, civil or criminal, are true?

1. *Prospective jury members never lie regarding their advance bias about a case.*
2. *Jury members are always truly "peers" of the defendant.*
3. *Jury members never talk about a case outside of jury deliberations, or read and watch TV about a case when sequestered, once directed not to do so by a judge.*

If your answer is "none of the above," you begin to appreciate the potential value of crisis/issues management for the purpose of educating a jury pool. Now, I am aware, though not an attorney, that members of the bar are not allowed to influence a jury. Ed Novak, a partner at the Phoenix-based law firm, Quarles & Brady Streich Lang, bridges the gap between influencing and educating.

"While it is unethical to attempt to influence prospective jurors, there is nothing unethical or unprofessional about having an accurate picture of your client presented to the media and other audiences," said Novak.

A jury consultant is typically not called in until there is some high certainty that a case will, in fact, go to trial. By then, if the case in question has been highly visible in the press, it may well be too late to educate a jury pool "contaminated" by the media's interpretation of events.

Any honest reporter (yes, there are honest reporters who might even acknowledge there are honest attorneys) will admit that he or she brings a natural bias and an institutional editorial perspective to a story. Journalists will do their best, in that context, to report in a "balanced manner," with the exception of columnists, who are often free to say pretty much what they please and not worry about "balance." These media representatives are a gateway through which both plaintiff/prosecutor and defendant can communicate not only to the public's thought of most often - business contacts, community VIPs, etc. - but also to potential jury members. It is the responsibility of counsel, with expert assistance as necessary, to direct media relations that can shift the balance of coverage.

"If we say something to the media, we realize we may be talking to future jury members as well, and if we don't say something, we're telling those jury members 'we don't care enough about you to keep you informed.' When we get to court, they'll remember that," said Novak.

And, he notes, his firm has realized that the same analysis done by crisis management professionals to anticipate multi-audience response to various public relations tactics also helps them anticipate jury response.

"I've had a crisis consultant sit in on practice sessions for depositions, resulting in a change in the client's choice of words," he said. In that circumstance, the crisis consultant was actually hired as a jury consultant under the law firm's umbrella of confidentiality.

What tactics can be used for this public education process? They include, but are not limited to:

- The use of spokespersons trained to deliver key messages to the media and other audiences.
- Educating employees of defendant or plaintiff's companies about what to say or not to say about the situation at hand when they're back home, out in the community which will eventually be the source of jurors.
- Advertorials -- buying print space or broadcast time in which one puts news-like stories about your client organization that are designed to help balance any misinformation which may already be in the public eye. This tactic is usually only employed if the media has consistently mis-reported the facts.

The battle for the hearts, minds and votes of jury members does not begin in the courtroom. In my experience, advance communication begins immediately after a legal situation hits the media. It can work together with legal tactics to (a) preclude a case ever going to trial (assuming that's a desired outcome for either side of the issue) or (b) affect public perception sufficiently to enhance either side's chance of a favorable outcome in court.

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ARTICLE

The Biggest Mistakes in Crisis Communications

© 2000, 2001, Jonathan Bernstein

This article originally appeared in Arizona Attorney magazine, publication of the Arizona State Bar, and has since been slightly edited.

All businesses are vulnerable to crises. You can't serve any population without being subjected to situations involving lawsuits, accusations of impropriety, sudden changes in company ownership or management, and other volatile situations on which your audiences -- and the media that serves them -- often focus.

The cheapest way to turn experience into future profits is to learn from others' mistakes. With that in mind, I hope that the following examples of inappropriate crisis communications policies, culled from real-life situations, will provide a tongue-in-cheek guide about what NOT to do when your organization is faced with a crisis.

To ensure that your crisis will flourish and grow, you should:

1. Play Ostrich

Hope that no one learns about it. Cater to whoever is advising you to say nothing, do nothing. Assume you'll have time to react when and if necessary, with little or no preparation time. And while you're playing ostrich, with your head buried firmly in the sand, don't think about the part that's still hanging out.

2. Only Start Work on a Potential Crisis Situation after It's Public

This is closely related to item 1, of course. Even if you have decided you won't play ostrich, you can still foster your developing crisis by deciding not to do any advance preparation. Before the situation becomes public, you still have some proactive options available. You could, for example, thrash out and even test some planned key messages, but that would probably mean that you will communicate promptly and credibly when the crisis breaks publicly, and you don't want to do that, do you? So, in order to allow your crisis to gain a strong foothold in the public's mind, make sure you address all issues from a defensive posture -- something much easier to do when you don't plan ahead. Shoot from the hip, and give off the cuff, unrehearsed remarks.

3. Let Your Reputation Speak for You

"Doesn't anybody know how important we think we are?" you complain. You: big business Goliath. Me: member of public who doesn't trust big business. You lose.

4. Treat the Media Like the Enemy

By all means, tell a reporter that you think he/she has done such a bad job of reporting on you that you'll never talk to him/her again. Or badmouth him/her in a public forum. Send nasty faxes or emails. Then sit back and have a good time while:

- The reporter gets angry and directs that energy into REALLY going after your organization.
- The reporter laughs at what he/she sees as validation that you're really up to no good in some way.

5. Get Stuck in Reaction Mode Versus Getting Proactive

A negative story suddenly breaks about your organization, quoting various sources. You respond with a statement. There's a follow-up story. You make another statement. Suddenly you have a public debate, a lose/lose situation. Good work! Instead of looking look at methods which could turn the situation into one where you initiate activity that precipitates news coverage, putting you in the driver's seat and letting others react to what you say, you continue to look as if you're the guilty party defending yourself.

6. Use Language Your Audience Doesn't Understand

Jargon and arcane acronyms are but two of the ways you can be sure to confuse your audiences, a surefire way to make most crises worse. Let's check out a few of these taken-from-real-situations gems:

- The rate went up 10 basis points.
- We're considering development of a SNFF or a CCRC.
- We ask that you submit exculpatory evidence to the grand jury.
- The material has less than 0.65 ppm benzene as measured by the TCLP.

To the average member of the public, and to most of the media who serve them other than specialists in a particular subject, the general reaction to such statements is "HUH?"

7. Assume That Truth Will Triumph over All

You have the facts on your side, by golly, and you know the American public will eventually come around and realize that. Disregard the proven concept that perception is as damaging as reality -- sometimes more so.

8. Address Only Issues and Ignore Feelings

- The green goo that spilled on our property is absolutely harmless to humans.
- Our development plans are all in accordance with appropriate regulations.
- The lawsuit is totally without merit.

So what if people are scared? Angry? You're a businessman, not a psychologist...right?

9. Make Only Written Statements

Face it, it's a lot easier to communicate via written statements only. No fear of looking or sounding foolish. Less chance of being misquoted. Sure, it's impersonal and some people think it means you're hiding and afraid, but you know they're wrong and that's what's important.

10. Use "Best Guess" Methods of Assessing Damage

"Oh my God, we're the front page (negative) story, we're ruined!" Congratulations -- you may have just made a mountain out of a molehill....OK, maybe you only made a small building out of a molehill. Helpful hint: you can make the situation worse by refusing to spend a little time or money quietly surveying your most important audiences to see what THEY think and if it matches the perception created by the media.

11. Do the Same Thing over and over Again Expecting Different Results

The last time you had negative news coverage you just ignored media calls, perhaps at the advice of legal counsel or simply because you felt that no matter what you said, the media would get it wrong. The result was a lot of concern amongst all of your audiences, internal and external, and the aftermath took quite a while to fade away.

So, the next time you have a crisis, you're going to do the same thing, right? Because "stuff happens" and you can't improve the situation by attempting to improve communications... can you?

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BERNSTEIN COMMUNICATIONS, INC.**Crisis Response, Issues Management & Litigation Consulting****COLLECTION OF ARTICLES WRITTEN****BY JONATHAN BERNSTEIN****FOLLOWING THE SEPTEMBER 11 TERRORIST ATTACKS****The Price of Complacency****by Jonathan Bernstein****as originally published by The PR Network, September 2001**

complacency, *n* self-satisfaction accompanied by unawareness of actual dangers or deficiencies (Webster's New Collegiate Dictionary)

When terrorists killed thousands of Americans on September 11, I have no doubt they knew that they were also causing massive "collateral damage" to American businesses and other organizations. Overseas, anti-American speakers have crowed over the complacency of rich, fat Americans who thought they were invulnerable to such inhuman acts.

As I write this, two days after the attack, the crisis communications response of organizations in this country demonstrates that some were well-prepared, and most were not. That most were, as suspected, complacent.

Few organizations would logically plan to respond to a massive terrorist attack. But all organizations can and should have crisis communications plans that allow them to deal with scenarios such as:

- Service interruptions
- Events which traumatize employees
- Deaths of key employees
- Sudden loss of key suppliers or contractors

In my opinion, the most directly affected businesses, such as the two hijacked airlines, followed all of the important tenets of crisis communications. They were prompt, expressed concern and compassion, provided honest and accurate information, and gave customers and victims means for two-way communications.

I have heard from a small number of adequately prepared online retailers and other service

providers expressing their regret that they can't ship orders as usual and what they plan to do about that. I knew that their service would be interrupted, of course, but their consideration in contacting me scored a lot of "PR points." On the other hand, there are a lot of obviously unprepared organizations from which I have not heard.

Some businesses – PR Newswire comes to mind – offered their services free to those most directly affected by the tragedy. A marvelous, humanitarian response – and damned good PR.

And finally there are the exploiters, the ones offering us 10 percent off of survival gear, American flags – or guns. They may sell more in the short run – but at what cost?

If this horror doesn't get American CEOs to pull their heads out of the sand, they might as well retire to the ostrich farm.

The Essence of Crisis Communications

by Jonathan Bernstein

as originally published in "Crisis Manager," September 15, 2001

This is a time to return to the basics, the essence, of crisis communications, to remember some fundamentals such as:

- In times of crisis, feelings are as important, and often more important, than facts. Deal with the FEELINGS of your most important audiences -- which almost always comes down to dealing with one of two fears. Fear that they'll lose something they have. Or fear that they'll not get something they need. Fear that may not come out, initially, as fear, but as anger, as depression, as anxiety.
- Your most important audiences are your INTERNAL audiences. Those employed by or close enough to you to be considered "family" from a business perspective. If they feel (there's that word again) secure, that your organization is doing "the right thing" at this moment, that you care about them, then they will communicate that sense of confidence in dealing with your external audiences.
- Two-way communication is a vital part of crisis management. All of your audiences should have had, and continue to have, a means for giving you their feedback, their comments, related to the crisis as it affects your organization. It not only provides you with useful information - - it makes them feel empowered and cared for.
- Crises have a ripple effect. It doesn't have to be YOUR organization at the focus of a crisis for you to be affected, as has been so dramatically illustrated by the grounding of all air travel for some days. Are you fully prepared, not only operationally, but also in terms of crisis

communications response, if a key supplier "goes down" for any reason? If your shippers aren't shipping? If one or more key employees die or are injured? If parts you use for your product are being produced by a supplier who's suddenly under federal investigation? We all focus on the big cases -- not only the September 11 attacks, but Bridgestone/Firestone and the like. But quietly, EVERY DAY, businesses suffer from the downstream effect of crises for which they were inadequately prepared.

- Assess the damage, now and in the months ahead. Don't assume that there has been no long-term negative impact on your organization just because everything seems to be returning to normal. Closely monitor the behavior and feedback of all your audiences, maybe even schedule special forums for discussing "how things are going" with various groups. I can envision the owners of high-rise office buildings, for example, facing some long-term nervousness by existing and prospective tenants.
- Learn from your mistakes. Were you able to respond, rapidly and effectively, to how this crisis affected your organization? If not, why not? The crisis is NOT over and even if not repeated in exactly this form, crises will happen. No organization is invulnerable.

Post-Crisis Response

Article From "Crisis Manager," 10.01.01

Editor's Note: I asked readers to submit examples of how crisis managers responded well, or not so well, after the terrorist attacks. Here are some examples that were sent in, along with others I found through my own research.

Well Done!

As Americans everywhere tried to absorb the devastation of the attacks, the San Francisco Psychoanalytic Institute's Public Information Committee began a multi-faceted campaign to help the general public handle this tragedy. SPFI's media relations consultant, Mary Tressel, of Lewis & Summers Public Relations, immediately contacted radio, television and newspaper outlets to let them know that SFPI had psychology experts available for interview. She also used an Internet service for journalists to publicize their organization's availability nationwide. The results of these efforts were multiple media interviews, print and broadcast. Also, at the suggestion of SPFI Chair Mark I. Levy, M.D., two local TV stations sponsored Grief Counseling Hotlines for viewers.

I thought this letter from Midwest Express Airlines (not surprising, given their popularity with flyers), was by far the best I received from any airline:

Dear Jonathan Bernstein:

All of us at Midwest Express Airlines have shared in the grief of our nation. We have also witnessed the tragic events give way to untold stories of heroism. We extend our sympathies to our friends and associates in the airline industry, business communities, and all those who have suffered loss.

At Midwest Express and Skyway Airlines, we are resuming service with renewed dedication. Since 1984 we have been privileged to help the people of our hometown, Milwaukee, and other communities on their journeys--to advance commerce, to visit loved ones, to enjoy a well-deserved vacation. To travel is to participate in the vitality of America.

We know that life will be different. Some flight schedules may be altered. Our customers will need to allow for more time at the airport. Safety and security is our first priority, and we are following stringent new federal security standards.

But one significant part of life at Midwest Express will definitely not change--our commitment to serving our fellow citizens as they take full advantage of the freedoms we all share.

Sincerely,

Timothy E.Hoeksema
Chairman, President and Chief Executive Officer

From Bad to Tacky

Quantum Tech, a Tennessee company that helps small firms recover computer files in the event of emergencies, issued a September 13 press release written by a new employee -- and not reviewed by the company chief executive pre-release. It said, "A lot of lives were lost in Tuesday's tragedy, and a lot of data was lost, too." Within minutes the firm received email and phone calls that ranged from angry to threatening at the perceived callousness and exploitation. The employee was fired (one wonders if his/her supervisor was fired, too) and the firm issued an immediate apology.

An anonymous tipster let me know of the following message at ATMMarketplace.com:

"In the wake of Sept. 11's deadly terrorist attacks in New York and Washington, D.C., ATM Industry Association International Director Mike Lee notes that ATMs give people the ability to control the flow of cash belonging to them, even in the aftermath of a devastating tragedy. It isn't a coincidence, Lee contends, that many countries in Central and Eastern Europe only began installing ATMs after they became democratic countries."

[Editor's Note: it got worse after that.]

GM's entire "Keep America Rolling" promotional campaign, announced only eight days after the attacks. They could have launched this legitimately good deal without a disingenuous connection to the idea of keeping people working, as in this September 19, 2001 statement by GM President for North American Operations, Ron Zarrella:

"As a company, industry and nation we have all been responding in a variety of ways to help America regain its footing, including supporting disaster relief, making blood donations and providing economic support", said Zarrella. "We know this is a difficult time to talk about an incentive program, but GM has a responsibility to help stimulate the economy by encouraging Americans to purchase vehicles, to support our dealers and suppliers, and to keep our plants operating and our employees working."

The broadcast advertisements have, even worse, included patriotic music.

###

AMERICAN CORPORATE COUNSEL ASSOCIATION

WHEN DISASTER STRIKES – THE ROLE OF GENERAL COUNSEL AND THE LAW DEPARTMENT

Security Self Due Diligence Towards Ensuring Business Continuity (A Short Checklist of the Basics)

- A. Whose job is it to ensure business continuity in the face of a disaster?
- Do you have a crisis management team with the authority and responsibility to implement a business continuity plan with firmly defined goals?
 - If so, does your team(s) have local, regional, national, and/or international responsibility?
 - If not, who will make decisions?
- B. Where do you stand right now?
- What are your present internal and external resources and capabilities for confronting a disaster? For example,
 - Do you have evacuation plans?
 - Do you have alternative set-up sites for displaced offices or businesses?
 - What are your internal plans and policies?
 - Are you aware of governing codes and regulations that affect your various sites?
 - Do an Insurance Review.
 - Do you need outside help?
- C. What assets are essential to business continuity?
- What are your critical products, services and operations? Where are they located?
 - How many employees do you have at each site?
 - Do any of your employees have special needs that may require special safety measures?
 - How secure are your computer systems?
 - Are your electronic files backed-up?
 - Where are the back-up files maintained?
 - Are you sure?
 - Where are original corporate documents stored?
 - Drawings?
 - Process documents?
 - Other trade secret materials?
 - What about sensitive corporate data, cash or high value items requiring additional protection during routine operations and emergencies?
 - Who are your primary banks and other financial institutions? What happens if one falls victim to the same disaster?
- D. What are your vulnerabilities? Risks? Threats?


- What are the potential emergencies your company faces?
 - natural
 - manmade
- What is the probability of any of any emergency event?
 - Historical data
 - Current analysis
- What is the potential human impact?
- What is the potential property impact?
- What is the potential business impact?
- Have you had independent risk, vulnerability, and threat assessments completed recently?

E. Additional Data

- Obtain copies of the building floor plans for each site.
- Obtain a list of all corporations and government agencies occupying or adjacent to your sites.
- Identify any other unusual facilities located near your sites.
 - airports
 - prisons
- Infrastructure Resources: Who provides
 - Telephone?
 - Electricity
 - Water?
 - Other communications?
- Determine whether emergency back-up electrical power is available at your sites.
- What law enforcement, fire and medical resources are available near your sites? Who are your liaisons?
- If your site is evacuated, what security measures are in place?
 - Man power
 - Security systems
 - Access control
- Are there lines of communication with employees when off site or after hours?
- What are your kidnap and ransom policies for employees traveling abroad?



F. Develop the four components of your business continuity plan:

- A report for senior executives
- An outline for office heads and other management informing them of their responsibilities during an emergency
- A policy statement comprising the procedures to be followed during an emergency of every variety
- Support documents distributed to all employees
 - Evacuation routes
 - “What to do in case of ...” manuals, posters etc.




 **Kroll**


Detecting, Deterring
and Responding in a
World of Risk




Emergency
&
Contingency Planning




Advance Planning





- Emergency
 - Planning
 - Intelligence
 - Pre-Event Preparation
 - Event
 - Response
 - Recovery
 - Reporting/Evaluation



Planning





- Contingencies for Planning include but are not limited to:
 - Terrorist Assault
 - Fire/Explosion
 - Water/Power Outages
 - Computer System/Telecommunications Failures
 - HAZMAT Incident
 - Bomb/Armed Attack
 - Civil Disorder
 - Hostage Incident
 - Severe Weather/Other Natural Occurrences
 - Flood
 - Earthquake
 - Hurricane



Emergency and Contingency Planning

- Review Emergency Preparedness Plans
 - First Responder Training
 - Emergency Supplies
 - Evacuation Routes




Pre-Event Action

- Plan Development
 - Appoint Management Coordinator
 - Identify Key Team Members
 - Establish Priorities
 - Protect Human Life
 - Prevent or Minimize Personal Injury
 - Reduce Exposure of Physical Assets
 - Restore Normal Operations ASAP




Seek Expertise

- FEMA “*Federal Emergency Management Agency*”
- Law Enforcement
 - Local
 - Federal
- Civil Experts
 - Engineers
 - Corporate Risk
 - Access Control
- Crisis Planning
 - Business Continuance
 - Terrorism/Civil Disturbance
 - Security Force Review




After the Plan is Written . . .


- Remember This is a ***Living Document*** . . .
 - Update Continuously
 - Personnel Changes
 - After Each Training Drill
 - After Every Emergency
 - Changes in Physical Design of Facilities
 - Policy/Procedures Changes
 - Training and Drills
 - Tabletop Exercises
 - Functional Drills
 - Evacuation Drills
 - Full Scale Exercises




Event Response



- **Follow the Plan . . .**
 - Establish Well-being of Employees
 - Evacuate As Directed
 - Emergency Shut-down of Equipment
 - Utilities
 - Computer Systems
 - Generators
 - Restoration
 - Restore Critical Utilities and Equipment Only



Recovery



- Damage Assessment
- Coordinate with Property Management, Local and Federal Emergency Agencies to Determine Safe Return to Premises
- Business As Usual

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**When Disaster Strikes:
The Legal Department's New Imperative**

ACCA
2001 Annual Meeting
October 16
San Diego

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Continuity of Business Operations

Definitions / Response Life Cycle
Recent Events
Role of the General Counsel
Lessons Learned
The New Continuity Setting

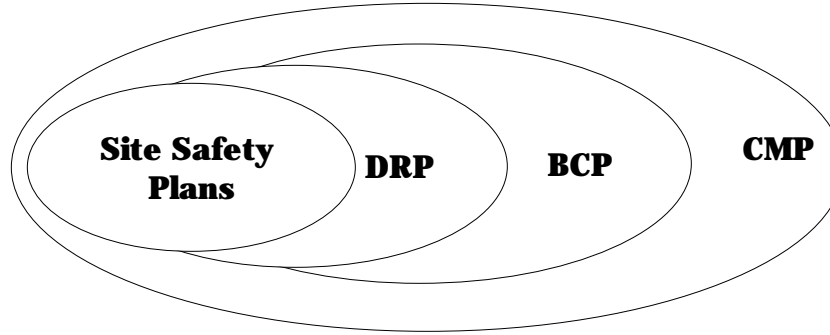
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Definitions

In a Continuity of Operations Program, there are many levels and approaches. This illustrates and helps define an overall approach to crisis management, business continuity, disaster planning and site specific site and life safety plans.

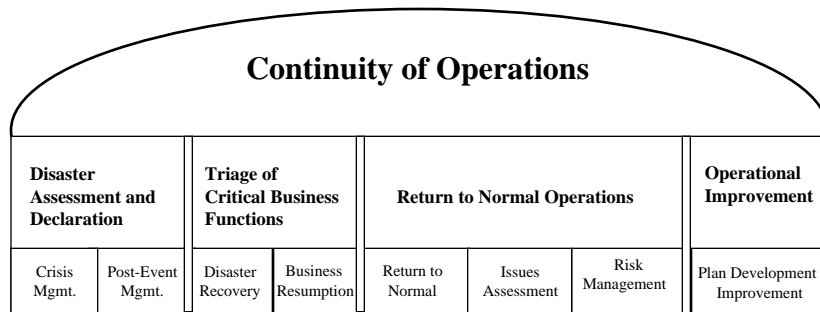
- DRP - Disaster Recovery Plan
- BCP - Business Continuity Plan
- CMP - Crisis Management Plan



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The Response Lifecycle

This shows the lifecycle of continuity from initial crisis response, business and technology recovery through process improvement



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Recent Events

- Response
 - ◆ IBM estimated that they had 1,200 customers in the immediate area of the WTC
 - ◆ Comdisco says 48 NY businesses moved into its backup facilities in Queens, NY and NJ
 - ◆ Many smaller companies were put out of business
- Recovery is not just about Information Technology
 - ◆ Space for people
 - ◆ Chain-of-command processes
 - Clear lines of communication
 - Roles and assignments
 - Relocation plans
 - ◆ Managing the supply chain and your customers
- The re-planning has already begun
 - ◆ Some companies lost their disaster recovery teams
 - ◆ The cost of maintaining plans and recovery facilities won't be questioned
 - ◆ Extreme scenarios and measures will no longer seem extreme

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Role of the General Counsel

- The GC must have two focuses for Business Continuity Planning
 - ◆ Enterprise-wide
 - Focused on critical systems to continue business operations
 - ◆ Law Department
 - Focused on critical legal processes
 - Need to understand what legal process are part of the enterprise plan

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Role of the General Counsel

Misconceptions

- Business Continuity Planning is just for IT
 - The Law Department must identify and protect its critical business processes in order to maintain an acceptable level of operations in the event of an incident.
- Business Continuity Plans are three ring binders that sit on the shelf
 - The BCP is not a one-time effort, but an on-going process
- Business Continuity Planning is a business issue, not a legal issue
 - Finance - Gramm-Leach-Bliley Act, Expedited Funds Availability Act and SAS70 audit reports require effective business continuity plans
 - Health - Health care businesses have always been required to have resources for ensuring the availability of service in case of disruption (federal and state EMS, JCAHO accreditation). Health Insurance Portability and Accountability Act of 1996 have expanded requirements.
 - Regulated Utilities
 - Telecommunications - Federal Communications Commission
 - Water and Power - EPA and State Public Utilities

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Role of the General Counsel

Preparation Steps

- The law department needs to assign someone to plan for the legal function BCP
 - Requires team of department members that represent mix of people
 - Professional service firms available to assist
 - Consultants should facilitate, not take ownership of the project
- Senior management support and participation is required
 - Identify critical systems and processes
 - Confirm what systems and processes are covered by the enterprise planning
- Evaluate Risks
 - How will legal need to respond to various events – provide for worst case
- Analyse Potential Impacts
 - Identify critical business processes and resources needed to support them
 - Assume little or no recovery capability
 - Identify vital records that need to be protected

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Role of the General Counsel

Planning Considerations / Ideas

- Facilities
 - Have agreements in place with key law firms / suppliers to provide office space and administrative support
 - Have access to mobile business tools – laptops, cell phones, pagers
 - Remote connectivity capabilities – VPN, dial-in, personal e-mail addresses
- Information
 - Consider criticality of electronic document management systems
 - Review expectations with regard to law firm retention policies for your documents
 - Consider whether matter management systems should be included with other critical systems for enterprise recovery planning
 - Require routine backups from individuals' laptops to ensure documents are captured on enterprise backup systems
- Suppliers / Customers / Stakeholders
 - Contract management systems
 - Claim processing systems
- Training / Preparation
 - Participate in enterprise preparation and drills
 - Cross-train personnel to ensure continuity
 - Communication plan / Delegation of authority

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Role of the General Counsel

Planning Considerations / Ideas

- Law Firm Issues
 - Law firms have spent significant funds upgrading infrastructure in recent years
 - Less attention given to:
 - Records retention policies
 - E-mail management policies
 - Business Continuity Planning
 - Law firms normally just focus on IT backups
 - General Counsels should confirm:
 - Law firms have evaluated risks
 - Business continuity plans in place
 - Document retention policies exist for client records
 - Compliance with programs tested

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Lessons Learned

Most Plans Assume . . .

- A worst case scenario where one or more buildings become inaccessible or destroyed.
 - Few if any would have planned for extreme scenarios.
 - **Continuity plans and strategies should embrace extended scenarios.**
- Key staff will be available.
 - Vital capabilities may be lost. Multi-site organizations have an improved chance of continuity, provided key infrastructure and records and staff remain intact.
 - **Cross train, plan for succession and transfer skills between key individuals.**
- Primary suppliers or business partners will be unaffected.
 - Many of the companies affected by an event may transact business with each other.
 - Just in Time delivery inherently means tight schedules. Any failure in any part of the supply chain will spread and cause chaos and each link in this chain is yet another potential failure point.
 - **Identify secondary sources of supply and test compatibility. Ideally, multiple sources.**

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Lessons Learned

Most Plans Assume . . .

- Recovery will be able to begin in days.
 - Recovery may not commence for weeks, if at all. This uncertainty places extreme strain on all parties and relationships may become eroded or unreliable.
 - **Suppliers, clients, employees will demand steady reassurance and positive, ongoing communication.**
- A localized exclusion zone will be enforced.
 - In this case, businesses and residents may be restricted access due to investigation and safety concerns and only allowed limited retrieval time for personal belongings or key business assets/records.
 - **Plans should include coordination with public safety agencies, including site orientation, regular briefings and possible joint disaster exercises.**
- Backups of critical data are available.
 - Some companies store backups locally, and these will be irretrievable. Even backup media stored off site may be difficult to retrieve due to loss of access codes and authorization.
 - **Review critical data storage strategy. Reassess overall IT recovery strategy and ensure alignment with overall business and IT strategy.**

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Lessons Learned

Most Plans Assume . . .

- The backups can be recovered.
 - Replacement equipment and applications may no longer be compatible with recovery data normally run on legacy systems. Procedures may not exist for effective restoration and key staff may be unavailable to facilitate restoration.
 - **Ensure legacy systems can be replaced and test-restore with second line staff.**
- Utilities will remain available.
 - Utilities may be disrupted over a wide area for an extended period. These include telecommunications, gas, electricity, water, public services, transportation, and so on.
 - **Under these circumstances, remote alternate recovery sites may be the only option. Expect Internet overload**
- Standard operating procedures for information security apply.
 - Understanding the implications for security will require a renewed appreciation on the value of information.
 - **A robust, defined information security policy that demonstrates the identification of risk across the organization - not merely in terms in networks needs to be implemented and managed. Cyber security emergency response needs to be linked to continuity of operations plans**

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Lessons Learned

Most Plans Assume . . .

- Traditional planning process still applies.
 - Recent events proved to magnify the need for "faster, smoother, smarter" processes for continuity planning. The rise of e-commerce, business outsourcing, supply integration, cost management and the like have been pushing continuity planning to move out of the 60's and into the new business environment.
 - **Continuity program must be integrated across the enterprise, aligned with business and IT strategy, and become part of the corporate culture.**

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New Continuity Setting

- Revisit the organizations' critical business processes and update recovery requirements and strategy
- Ensure that a viable Crisis Management Plan is in place to coordinate communication of information, recovery priorities and allocation of recovery resources
- Update continuity plans to include key business partners, suppliers and customers
- Update and align Business Operations Continuity Plans and Technology Disaster Recovery Plan
- Build change management controls to keep plans and processes up to date
- TEST all Plans aggressively

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ACCA MEMBERS AND GUESTS. I AM HONORED TO BE HERE AND ONLY SLIGHTLY INTIMIDATED TO BE IN A ROOM WITH THIS MANY LAWYERS.

I HAVE NOT WRITTEN OUT A COMPLETE SPEECH, OTHER THAN FOR A CLIENT, SINCE MY UNDERGRADUATE DAYS ALMOST THIRTY YEARS AGO. I LIKE TO THINK I'M PRETTY GOOD, EXTEMPERANEOUSLY, SPEAKING FROM AN OUTLINE. BUT WHAT I HAVE TO SAY TO YOU TODAY, IN TEN MINUTES OR LESS, IS TOO IMPORTANT TO ALL OF OUR FUTURES TO TRUST TO NOTES ALONE.

IF YOU REMEMBER NOTHING ELSE ABOUT CRISIS PREPAREDNESS FROM MY PRESENTATION, PLEASE REMEMBER THIS POPULAR DEFINITION OF INSANITY, OFTEN ATTRIBUTED TO ALBERT EINSTEIN:

INSANITY....IS DOING THE SAME THING OVER AND OVER AGAIN EXPECTING DIFFERENT RESULTS.

IN THAT CONTEXT, CONSIDER THAT THE VAST MAJORITY OF AMERICAN ORGANIZATIONS ENDURE CRISIS AFTER CRISIS WITH LITTLE OR NO CRISIS COMMUNICATIONS PLANNING. PLANNING THAT WOULD NOT ONLY REDUCE THE MATERIAL DAMAGE AND LEGAL COSTS OF CRISES, BUT WOULD ALSO ACTUALLY PREVENT SOME TYPES OF CRISES FROM HAPPENING.

THROUGH WHAT I'M SAYING FROM THE PODIUM, AND THROUGH THE CRISIS COMMUNICATIONS PREPAREDNESS CHECKLIST CREATED SPECIFICALLY AS A HANDOUT FOR THIS CONFERENCE, I AM ASKING YOU TO CHALLENGE YOURSELVES, TO SET ASIDE THE WAYS YOU HAVE BEEN REGARDING CRISIS-RELATED COMMUNICATIONS AND TAKE A FRESH LOOK IN THE AFTERMATH OF THE WORLDWIDE WAKEUP CALL WE ALL RECEIVED ON SEPTEMBER 11.

HOW MANY OF YOU DID NOT HAVE YOUR BUSINESS EITHER SOMEWHAT OR VERY DISRUPTED BY WHAT HAPPENED THAT DAY?

WAS IT REASONABLE THAT YOUR CRISIS COMMUNICATIONS PLAN INCLUDE TERRORIST ATTACKS AS A POSSIBILITY? FOR SOME BUSINESSES, YES, FOR MOST, PROBABLY NOT – BUT ANY ORGANIZATION IS VULNERABLE TO SERVICE INTERRUPTIONS, TEMPORARY OR PERMANENT LOSS OF KEY PERSONNEL, EVENTS THAT TRAUMATIZE EMPLOYEES AND THE SUDDEN LOSS OF KEY SUPPLIERS OR CONTRACTORS. ALL OF THOSE CRISES, AND MANY MORE, WERE CONTAINED WITHIN THE IMPACT OF THOSE HORRENDOUS ATTACKS, BUT COULD EASILY OCCUR WITH NO TERRORISM INVOLVED.

I SEE NO POINT IN READING TO YOU WHAT YOU CAN READ FOR YOURSELVES, BUT I DO WANT TO HIGHLIGHT WHAT I CONSIDER TO BE THE MOST IMPORTANT POINTS IN THE CRISIS COMMUNICATIONS PREPAREDNESS CHECKLIST:

1. IF YOU DON'T HAVE A CRISIS COMMUNICATIONS PLAN, REMEMBER EINSTEIN'S DEFINITION OF INSANITY.
2. WOULD YOU TRUST AN INTELLECTUAL PROPERTY ATTORNEY WITH LITTLE OR NO LITIGATION EXPERIENCE TO HANDLE YOUR SENSITIVE WHITE COLLAR CRIMINAL CASE? MAKE SURE THAT THE PEOPLE WHO CREATE YOUR CRISIS COMMUNICATIONS PLAN ARE QUALIFIED TO DO SO. AND IF YOU WOULDN'T BUY A LEGAL DEFENSE OFF THE SHELF, DON'T BUY A CRISIS PLAN THERE EITHER.
3. DO THE RESPONSES IN YOUR CRISIS PLAN DEAL WITH FEELINGS, NOT JUST FACTS? IMMEDIATELY AFTER A CRISIS BREAKS, PEOPLE ARE FEELING A THOUSAND VARIETIES OF FEAR AND, UNLESS YOU ADDRESS THAT ADEQUATELY, THEY'LL NEVER HEAR YOUR FACTS.
4. HAVE YOU DONE PROACTIVE PR WORK TO CREATE A CUSHION OF GOODWILL AMONGST ALL YOUR AUDIENCES, INTERNAL AND EXTERNAL, THAT WILL SOFTEN THE IMPACT OF CRISES WHEN THEY DO OCCUR?

5. HAVE YOUR MANAGERS BEEN TRAINED TO DETECT EARLY SIGNS OF WHAT IS SOMETIMES CALLED "CREEPING CRISES," ALLOWING YOU TO HEAD THEM OFF BEFORE THEY CAUSE MAJOR DAMAGE?
6. IF YOUR COMPANY IS HIT WITH A CRISIS AT 3 A.M. TODAY, WILL ALL THE RIGHT EXECUTIVES BE NOTIFIED AND BE READY TO ISSUE A PUBLIC STATEMENT BY 4 A.M.?

YOU, AS CORPORATE COUNSEL, MAY HAVE TO DEAL WITH A COURT OF LAW FROM TIME TO TIME, BUT YOU ALSO HAVE TO DEAL WITH ANOTHER COURT THAT IS ALWAYS IN SESSION: THE COURT OF PUBLIC OPINION.

YOU ARE, INVARIABLY, AN INTEGRAL PART OF ALL COMPANY ATTEMPTS TO COMMUNICATE EFFECTIVELY WITH ALL YOUR PUBLICS, INTERNAL AND EXTERNAL. YOU USUALLY HAVE VETO POWER OVER WHAT IS, OR WHAT IS NOT SAID VIA PUBLIC RELATIONS AND OTHER COMMUNICATIONS ACTIVITIES. IT'S AN AWESOME AMOUNT OF POWER TO DO HARM, OR GOOD. TO BE A FACILITATOR, OR TO BE AN OBSTACLE – BY COMMISSION, BY OMISSION, OR BY ENNUI.

I LEAVE YOU WITH A CHALLENGE TO RAISE YOURSELVES AND YOUR ORGANIZATIONS TO A NEW LEVEL OF DISASTER AND CRISIS PREPAREDNESS. TO DEMONSTRATE THE LEADERSHIP AND FORESIGHT WITHIN YOUR COMPANY THAT IS BEING CALLED FOR, BY NATIONAL LEADERS, IN THE WAR ON TERRORISM.

WHEN THEY CAME UP SHORT IN THEIR PREPAREDNESS FOR TERRORISM-RELATED CRISES, OUR LEADERS RESPONDED WITH HUMILITY, COURAGE, AND RESOLVE TO NOT BE THAT VULNERABLE, EVER AGAIN.

YOU, AND YOUR ORGANIZATION, MAY COME AWAY FROM THIS CONFERENCE FEELING THAT, SIMILARLY, YOU HAVE NOT DONE ALL YOU CAN TO MINIMIZE

VULNERABILITY. NONE OF US IS PERFECT. BUT WE CAN LEARN FROM OUR MISTAKES, WE CAN AVOID DOING THE SAME THING OVER AND OVER AGAIN EXPECTING DIFFERENT RESULTS. ALL IT TAKES IS HUMILITY, COURAGE AND RESOLVE.

THANK YOU.

Robert N. Sikellis
Decision Strategies

INTRODUCTION

There are really two key areas from a security consultant's perspective.

First, and, by far, the most important, is the *human element*. The responsibility the company has for the safety and security of its employees and guests in the event of a crisis.

Second, is the *preservation of business assets and a business continuity plan*.

For many of us in the security business, once we were able to move beyond the events of September 11th and the staggering human toll, were struck by the number of businesses that have no plan whatsoever in the event of a disaster or other crisis resulting in displacement. The vast majority of businesses do not have a disaster plan until after a crisis.

We were also struck by the number of plans in place which, in many ways, were rendered obsolete by the events of September 11th and beyond.

Vulnerabilities, Risks, Threats

As a preliminary analysis in this area, and, before getting to the two areas mentioned above, there should be a realistic and professional review of your vulnerabilities, risks and threats.

- What are the potential emergencies your company faces?
 - Natural (earthquakes, fires, etc.) or,
 - Man made
- What is the probability of emergency events? Here, we generally look to:
 - Historical data
 - Current analysis
- Recent events have taught us that risk assessment is not as clear as it once was. Much more must be taken into consideration now. For instance,
 - What is the potential human impact of an emergency event?
 - What is the potential property impact?
 - What is the potential business impact?

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Protection of Employees

In light of the recent vulnerability, where does your business stand at the present time with respect to:

- Protection of employees
- Preserving business assets
- Ability to continue with business following a disaster.

Stating the obvious, your first responsibility is to your employees in the event of a crisis/disaster. What are your present internal and external resources and capabilities for confronting a disaster?

- Do you have evacuation plans?
- Even for those that do, many are now reassessing those plans. e.g., professional firm – second level of the parking garage under the building(unless fire). First thing we changed. (Bob, this example needs to be put in a different form since this isn't a speech any more.)

Other questions you should ask:

- What law enforcement, fire and medical resources are available near your sites? Who are your liaisons?
- How many employees are at each site?
- Do any of your employees have special needs that may require special safety measures?
- Who are the people that should take the lead if an evacuation becomes necessary? Who will make the decision to evacuate? Where should employees go if evacuated? In some instances, depending on the situation, evacuating may be more dangerous than remaining inside.
- What if some hazardous material were found or sent to your company? Other than calling 911, would your employees know how to contain the hazardous material to prevent possible exposure.
- Are there emergency medical supplies available? Emergency back-up electrical power?

These are some basic considerations. A checklist for a self due diligence. Not all, of course, will apply to every business in every part of the world but many will, and some of the “answers” to those have changed over the past month or so.

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Asset Protection and Business Continuity

The second part of any good crisis management plan will also deal with the preservation of business assets and will have a business continuity plan in place.

Again, some of the basic questions to ask in this area are:

- Whose job is it to ensure business continuity in the face of a disaster?
 - Do you have a crisis management team with the authority and responsibility to implement a business continuity plan with firmly defined goals?
 - If not, who will make such decisions?
 - Are there alternative sites for displaced offices or businesses?
 - Are there lines of communication in place for employees off site or after hours?
- What assets are essential to business continuity?
 - Has someone identified your critical products, services and operations? Where are they located?
 - How secure are your computer systems?
 - If possible to do so safely, whose responsibility is it to handle the emergency shut down of the systems?
 - Are your electronic files backed up?
 - Where are the back-up files maintained? Are you sure? You'd be surprised how this may not be the case.
 - Where are the original corporate documents stored?
 - drawings
 - process documents
 - trade secret material
 - other sensitive corporate data, cash or high value items?
- Who are your primary banks and other financial institutions? What if one of them falls victim to the same disaster?

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- If your site is evacuated, what measures are in place to secure the site?
 - ❑ man power
 - ❑ security systems
 - ❑ access control
- Whose responsibility is it to make sure these measures are implemented? Bob, just a little sexist, aren't we????
 - ❑ In terms of infrastructure resources, who provides some of the key resources?
 - ❑ telephone
 - ❑ electricity
 - ❑ water
 - ❑ other communications
- Will this information be readily available to someone in the event of a disaster so the company can, at some point, move forward?

Conclusion

The foregoing is a list of some of the issues to be concerned with, especially in light of the events of September 11th and thereafter. In the final analysis, a good crisis management plan will have taken these issues, and more, into consideration

At the end of this process, a comprehensive plan should be developed which includes:

- An outline for office heads, and other management, informing them of their responsibilities during an emergency.
- A policy statement consisting of the procedures to be followed during an emergency of every variety.
- A training component for office heads, management and employees.
- Support documents distributed to all employees such as:
 - Evacuation routes
 - "What to do in case of. . ." manuals, posters, etc.
 - Finally, an understanding that any such plan, no matter how good it is and how much time and effort went into preparing it, is a work in progress which needs to be reviewed and updated as personnel and circumstances change.

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