

ASSOCIATION OF CORPORATE COUNSEL

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PRESENTED BY: ACC Litigation Committee and the Washington Metropolitan Area Corporate Counsel Association

SPONSORED BY: Skadden, Arps, Slate, Meagher & Flom LLP

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MODERATOR: Monica J. Palko, Associate Corporate Counsel, BearingPoint, Inc.

Operator: Just a reminder, today's conference is being recorded. Welcome to this ACC webcast. Monica, please go ahead.

Monica Palko: Thank you. Hello everyone. Good morning or good afternoon, depending upon your time zone. And welcome to "When a Crisis Hits," which is presented by Gary DiBianco and Jen Spaziano of Skadden, Arps.

I'm Monica Palko. I'm the ACC Litigation Committee Webcast Chair, and I'll be your moderator today. We are so pleased to present this as the first joint webcast between the ACC Litigation Committee and a local chapter. In this case it's the Washington Metropolitan Area Corporate Council Association.

We've had an overwhelming response. In fact, as of yesterday morning we had over 170 registrants. And we have a group of 20 or so in the room. So we very much look forward to joint programs in the future.

Before we get started, we have a few administrative matters. The materials for today's webcast are displayed at the upper left hand side of your screen. And this includes an info pack that Jen and Gary prepared regarding crisis management, both speaker bios, and an evaluation form. We very much welcome your input.

We read every form carefully, and we encourage you to complete the evaluation form. Another benefit is if you complete the form and if we haven't gotten to a question that you'd like to ask, you can place it on the evaluation form and Jen and Gary will get back to you later.

The ACC events blog is another great resource for follow-up dialog about the webcast, and that will open on December 19.

So if you have any questions during the course of the webcast, and we very much encourage your questions – type your question into the box at the lower left hand side of your screen. And please don't forget to press send. Only today's presenters will be able to see your question. It will not be broadcast generally to everyone on the call.

Your question will also be anonymous so even the presenters won't be able to see your name or your e-mail address. Do your best to keep your questions short. It can be really tough to answer long questions during the webcast.

We would love for this to be as interactive as possible. And with that in mind, we've incorporated some polling questions. And your answers to those are also anonymous.

For those of you who want to receive CLE for your participation today, WMACCA is accustomed to doing this but this is a first for the ACC. So what we're going to do is at the end of the webcast, we will display an individual's e-mail address. And you'll need to send that individual a note that you participated and then she will send you a CLE form. This is something akin to handing it out at the end of the presentation.

So without further adieu, let's go ahead and get started. I am truly honored to introduce today's speakers. I've personally worked with Jen and Gary since I first went in-house, which I realize now was nearly 6 years ago. If you'll permit a very brief war story, I was (grousing) to my boss one day about the performance of some outside counsel. And he said, "You know what, Monica, after all, you were raised on the gold standard that is Jen and Gary."

So I have to say I could not agree more. I encourage you all to review Jen and Gary's full bios, which have been provided and they're in those materials on the left of your screen. But I just want to highlight a few data points that are especially relevant to today's presentation.

Gary DiBianco, Gary has handled simultaneous federal and state investigations and civil proceedings involving white collar defense, state and federal securities laws, accounting and anti-bribery, and consumer fraud. Gary's clients include U.S. and foreign companies, financial institutions, accounting firms, and individuals. Gary has been with Skadden's DC office since 1998, and he's relocating to London next month to provide a local presence and support to clients with international operations.

Jen Spaziano, Jen also handles multiple proceedings that stem from the same event, and she also represents a variety of clients in civil and criminal investigations and in litigation in federal and state courts. She has extensive experience in class action litigation. And the subject matter of her work includes actions brought under securities laws, the Fair Housing Act, the FCPA, Foreign Corrupt Practices Act, the False Claims Act, and RICO. Jen recently received the very prestigious top 40 under 40 award in D.C., and she's also been with Skadden's Washington, D.C., office since 1998. Jen has no plans to relocate.

So let's start out with our first polling question. In today's environment, there's certainly a – let's see, backing up, if you can just respond or click in the box next to the A, B, C, or D, we'll all be able to see a percentage response here. Great. So it looks like almost everyone on the call – let's see – about 50% have been in-house or in their current position for less than 3 years.

Now I think that's probably enough time to have experienced either a crisis yourself or a crisis at another company that impacted you. But let's talk about what we mean by a crisis because, especially if you're in litigation, nearly everything is an emergency to someone.

And you really can't go by how the crisis arose because it can arise in dramatically different ways. It can be something as public as a national disaster – or sorry, a natural disaster, or an explosion at a factory or something that comes along as quietly as a call from the government about the activities of one of your employees.

So what's the common ground? What is it that makes something a crisis that we're talking about today?

Well, they all tend to involve a lack of reliable factual information, a sense of a loss of control, extensive outside scrutiny, whether it's by the public or by the government entity and a lot of anxiety and maybe even panic. And then in addition, a crisis almost often immediately requires a company to deal with parallel proceedings, whether it's litigation and investigation or with just a variety of competing stakeholders.

So with that in mind, how many of you on the call have experienced a crisis at your company? Well, we're looking at 75% or so, so I think we can all, in fairness, say we've had to deal with this.

So this is how our webcast is put together. First, we're going to talk about what a company can do now to prepare for a potential crisis. Next we're going to talk about how handling a crisis is different from handling the single matters that we may be more accustomed to. And finally, we're going to have question and answer.

So with that, I'll turn it over to Jen.

Jen Spaziano: Thanks very much, Monica. In our InfoPAK, Gary and I dealt with the question of what to do when a crisis hits. We wanted to focus today on the question what you can do now to be prepared to deal with a crisis should one hit. And of course we all hope that one doesn't, but the numbers that we just saw suggest that the great likelihood is that one will.

A couple of things to think about. Consider creating a crisis management plan now. That will help you deal with the crisis if and when one occurs. How do you do that? Identify areas within your company that are vulnerable to a crisis. Are you working at a company that's susceptible to having to deal with a mass disaster? Are you likely to face an employee strike that could wreak havoc on your operations? Are you concerned about a financial crisis or employee problems?

If you identify the areas where you might face the crisis and anticipate the types of crises that are likely, you will be better prepared to handle a crisis when one occurs.

You may also want to establish a compliance program that's designed to identify warning signs of a pending crisis. So you identify the areas where you're likely to see a crisis and then you develop a compliance program that will alert you to the possibility or potential probability of a crisis occurring.

If the compliance program identifies issues of weakness, whether financial, physical, or human, you may have advance notice of an impending crisis and may be able to better position yourself to handle the crisis. And on a very practical level, consider distributing contact information, contact numbers among senior management to facilitate contact in the case of a crisis. And then develop a crisis manual. And we'll spend some time this afternoon – or morning, depending on where you are – discussing the type of information you may want to include in that crisis manual.

Let's move on to the next slide. In connection with the development of a crisis management plan, you will want to give some consideration to the composition of a crisis management team and the identification of a company spokesperson. The crisis management team generally should include a senior officer and senior managers of the legal, public relations, security, finance, marketing, and/or human resources departments.

You may also want to identify outsiders to the company who could serve on the crisis management team, depending on the circumstances of the crisis. And we'll talk about some of the outsiders that you may want to include in the development of this plan.

In addition to identifying the team that will manage the crisis, you will also want to identify high level individuals that could serve as a company spokesperson. It will be very important once the crisis hits for the company to speak through a single voice and for that voice to be identified as early as possible after the crisis hits.

Although it is important to consider possible teams now and to reconsider those possible teams between now and the time that a crisis hits, the actual crisis management team and the spokesperson obviously will need to reflect the nature of the crisis.

Let's move on to the next slide.

Gary DiBianco: As everyone who's been through some sort of litigation or government investigation knows, one of the key aspects of maintaining a company's position from the first event in any piece of contested litigation is making sure that relevant documents are preserved. This is one of the very few areas where a misstep at the beginning, or inaction at the beginning, can result in losing information that you'll later need or in an event happening that cannot be fixed or cannot be recovered.

Accordingly, at the beginning of a crisis and before a crisis, one very important consideration is how you can prepare for the time that you will be asked to, or decide to, preserve documents.

We all recognize the difficulties and the massive scope of electronic information that exists in today's environment. And what I think can happen now as a practical matter is that people can sit down with the different departments in the company and understand the IT systems. If you do that before the crisis hits, you'll have an understanding of where you go when it is necessary to issue a document preservation directive.

So on a very practical level, one can sit down with the IT personnel, with finance, with manufacturing operations, with international operations, and find out where your servers are stored, where your e-mail is stored, what kind of software do you use, what is your backup plan, what kinds of tapes are recycled, because when it comes time to issue a document preservation directive, the first thing you want to know is what's happening right now.

Let's go to the next slide. Similar to document preservation, an issue that always comes up, as Jen has mentioned, is how to deal with the press and with the media. And this comes up at the very outset of a crisis situation because in some circumstances, a company will find out about a potential problem or a crisis from press calls. In other instances, there will be a leak to the press and there will be inquiries from the press, and this will be one of the first things that the company needs to respond to.

What can be done now? Understand who is – who are the key people inside your company who generally are communicating with the press and communicating with the media. Understand your current policies regarding communications with the press. And make sure the people understand what their responsibilities are in terms of public statements on behalf of the company, marketing, human resources, investor relations. These are things that can be incorporated into your standard employee training and your on-boarding processes, and it will give you a leg up when something happens that involves media inquiries to the company.

Let's go to the next slide. Another thing you can do, which sounds obvious but isn't always taken into account, is know your audience. Find out in your industry, in your business, who tracks you, who is likely to call you when something happens, who are your press and media constituencies both that will come to you with questions and also who you may want to go to with a story or with a press release or with a statement to maximize the ability for the company to understand and manage what's being said out in the public regarding a crisis situation.

Monica Palko: So with that, let's go to our next polling question. Does your company have a PR firm on retainer, or perhaps your internal team specifically identified if a crisis hits? So it looks like about 1/2 of it – 1/2 of the companies do have this covered.

Jen Spaziano: Right. It does. And it also looks like some are relying on in-house PR firms, which in many cases is just fine. And our view is that it's certainly a good idea to identify a public relations firm that you can call in the event of a crisis. It's also a good idea to rely on your internal PR groups in order to deal with a crisis.

The one thing that we wanted to highlight today is an issue dealing with privilege and the idea that you also should be giving some thought to the privileged nature of communications between a PR firm and the company if a crisis hits and whether you would want those communications to be privileged.

And that's something that you would want to think about as the crisis hits and as you decide to retain a PR firm because there are some things that you can do to better protect the privileged nature of those communications. Those things are having the PR firm retained by outside counsel, having the PR firm only work on crisis litigation, not be somebody that works on other matters for the company, and then having outside counsel be present at all meetings between the PR firm and the company.

So the idea is that if there's a chance that you may want to retain a PR firm in connection with the crisis and you may want those communications to be privileged, you might want to identify somebody who is not the typical PR firm that the company goes to for routine matters and have that list available in the event a crisis hits.

Moving on to the next slide, I'm going to talk a little bit in this series of slides about other areas that you can think about now that may become useful in the event that a crisis hits. And doing a little bit of legwork today and updating that legwork over time may prove truly beneficial if something were to happen down the road.

First is insurance and the importance of maintaining a list of your company's insurance policies that could be easily accessed in the event that a crisis hits. Being aware of relevant insurers in advance of a crisis will make it easier for the crisis management team to interact appropriately with the insurers during a crisis.

Next slide.

Monica Palko: Actually, if I may interrupt for a question that's online. About retaining an outside PR firm, the question is if your outside counsel retains the PR firm, then are the communications to the PR firm privileged?

Jen Spaziano: The answer to the question is uncertain. There are some cases that hold that they can be and there are other cases that hold that they are not. So unfortunately this is one of the many areas of the law where there is no definitive answer. And some of the factors that the courts look at are those that were addressed in this slide that we've previously looked at with respect to PR firms, including whether the PR firm does any other work for the company.

So if the PR firm does work for the other company but outside counsel retains the PR firm for the particular crisis, courts are more likely to find that the communications are not privileged. If outside counsel is not present at all meetings between the company and the PR firm, it's more likely that a court is going to find that the communications are not privileged.

There was actually a pretty detailed discussion in the InfoPAK regarding the different cases on this issue and how they come out in the different factors that were at issue. And I actually think that – if I'm remembering correctly, the Martha Stewart case addressed this issue in great detail. And we talk about that a bit so that might be a source of useful information in understanding the various factors that the court's going to look at.

Moving on to the next slide, another list of contacts you may want to start maintaining, and again, updating as time goes on and you are blessed without a crisis, is a list of contacts with key federal and state regulators and also being aware of the issues that these regulators are focused on at any given time. Staying abreast of those issues will help you know how to respond to those individuals if something were to happen at your company.

Next slide. It is also important to understand the company's obligations vis a vis its employees. Toward that end, it might be useful to start the process now of reviewing employment policies and relevant employment laws and, as I mentioned, regularly updating those reviews when the policies change or the laws change so that you know what your obligations are vis a vis the employees.

You also may want to identify a law firm, or law firms, that could be retained if the company makes a decision to provide separate representation to employees or if the company decides that it needs to get special advice and counsel with respect to its obligations vis a vis employees if a crisis hits.

And again you know the concept now is if you think now and identify people you might need to call on in the future, you will have that information readily available when the pressing demands of every day might prohibit you from doing the leg work to identify those you know key firms or policies that you might want to be looking at at that point.

Next slide. And in the same vein, you'd want to identify other constituencies with which you may need to interact if a crisis were to hit. You know all of your companies have key constituencies. You've got financial institutions and lenders, you've got suppliers, you've got customers, you've got groups of people who are going to want to hear from you if a crisis hits.

And sure you know sitting here today you could probably you know rattle off you know who those companies are. But when a crisis hits and your mind is being occupied with all of the other events that are going on, it would be very useful to have all of that information in one place where you can refer to it and say, "Hey, yes, we need to remind you know X, Y, and Z, or get in contact with A, B, and C, to ensure that they know that we're keeping them in the loop."

A company's ability to keep these key entities informed when a crisis hits may be crucial during a crisis to maintain the company's relationship with these constituencies going forward when the crisis is over.

Gary DiBianco: We're going to do another polling question getting to know you. How many companies out there have global operations? And by that we just mean how many have something outside of the United States.

And it looks like a pretty high percentage, about 3/4, 75%, do have something – some sort of operations outside the United States. And that's certainly consistent with the increasingly international nature of business, whether it be supply chains, whether it be outsourced data management, whether it be customers outside the United States, whether it be purchasers or things that you're purchasing outside the United States.

And these international considerations are something that can be thought through now so that you are prepared when a crisis hits. And it's particularly important to think these issues through in advance because as anyone who has worked with overseas colleagues understands, it's simply – everything simply takes longer. There are time differences to be managed, cultural differences to be managed, language differences to be managed.

And something that would be as routine as getting a document notarized in the United States or calling a reporter or pulling an insurance policy, as we've discussed, which might take you 2 hours

here could take 2, 3 days, a week, for your colleagues in Poland or your colleagues in China or in Japan.

And so to the extent you can identify what you might need and get it compiled and understood, that will save you a lot of time.

Another important issue that arises in international investigations, international crises, and litigation, are the transfer of data. And this is something that most U.S. lawyers and business people and IT people don't think about but that people outside of the United States take very seriously, and that is that there are a number of laws in Europe and South America and in Asia that prohibit the transfer of personal information, which is very broadly defined to include names, e-mail addresses, telephone numbers, to so-called unprotected countries and jurisdictions. And the U.S. is considered generally an unprotected jurisdiction.

What this means as a practical level for many companies is that it may be permissible to routinely share information between operations that you have in France and the United States or Romania and the United States but that if that information is requested to be provided to an adversary in litigation or a government investigator that the law in France or Romania may prohibit the information being transferred to the United States.

Most U.S. lawyers, government investigators, plaintiff side litigators, are not sympathetic to the argument that they can't get this information and they will push for it. And it is something that can be handled in advance by understanding the local laws that govern your operations in your various jurisdictions and literally setting up data sharing policies and data sharing agreements among company affiliates so that both in your routine operations and in your non routine operations you can freely share the information that's needed to keep your business going.

Now pulling this all together, what are the very specific things that can be done in order to prepare for the day that you don't want to come? We've talked about a number of documents and materials that can be compiled. And think about literally putting those things into a binder, into a document, into a PDF and making that available to your senior executives and key individuals who you've identified for your crisis management team.

You can tell people if it's a binder, certain people should take it home, keep it in a safe place so that if you have to access it on a weekend or after business hours, they can do so. If you have secure Intranet, it can be posted there so that people have electronic access to it no matter where they are in the country or in the world.

And the things that you might include in this crisis management binder would be many of the things that we have discussed: Your contact numbers for senior executives; the lists of your relevant news sources, publications, blogs, reporters, and contact people; potential public relations contact information should you need to call them; insurance policies; government regulators and agency contacts; your key financial institutions; key suppliers; key customers; and list of outside advisors that could assist you if and when the time comes.

Monica Palko: OK. So let's now move on to the second part of the presentation which is how dealing with a crisis is different from dealing with the single litigation or the single investigations that we may be more accustomed to.

Gary DiBianco: We thought we'd start this portion with a hypothetical that we've tried to make relevant. Imagine that your company discovers that although it thought it was doing absolutely fine financially and had a very strong balance sheet, it turns out that there was a very large position in a security that when everyone – when it was purchased everyone thought was triple A rated but because of the severe downturn in the financial markets has lost value and was backed by collateralized debt obligations that now have very little value.

And what you thought was a nice big safe pile of cash has turned into a liquidity problem that you're not sure how you're going to solve as you go into the next year.

All of a sudden, all the things that we've talked about may be happening. We show them on the next slide. The government is coming and asking questions about what you knew and when you knew it about your suddenly dwindled cash position. Shareholders are threatening to sue because they see a drop in your stock price if you're a public company. The press is hounding you because here is a strong company that everybody thought was doing great and suddenly doesn't look so good.

As the in-house lawyers, you're getting frantic calls from your board wondering about the liability they're going to be faced with and how come nobody inside the company was looking at this and how come nobody mentioned it at the last board meeting.

And you're getting ceaseless questions from your employees, from your shareholders, from financial analysts who want an audience, and others. And this is spilling out into your commercial base and your customers and suppliers, creditors, and business partners where everyone is asking, "What are you going to do? What are they going to do? How are they going to get their piece? And how are they going to be safe?"

Monica Palko: So Gary, in-house counsel and in-house PR departments, especially at sophisticated companies and larger companies – and we've seen that we had something like a 75% were global companies here – we're actually usually pretty well equipped to handle the fallout from a single investigation or a litigation and we do a good job. What really makes the crisis different?

Gary DiBianco: When we talk about a crisis, we're talking about something that generally requires coordination among a number of different groups across the company or it affects a number of groups across the company. So in many pieces of litigation you might have a breach of contract, you might have an employee discrimination lawsuit where the locus of the facts and the locus of the decision makers resides in one group.

In a crisis, like the kind that we're discussing, you have many different constituencies inside the company, all of whom need to communicate with each other, coordinate with each other, and think through this strategy.

Another aspect of the crisis – of a crisis that makes it different than a single event is that it is frequently difficult – or almost always difficult – to see at the beginning of the crisis what all the ramifications are going to be. I think many sophisticated counsel, when they are hit with a standard complaint or a standard government investigation, they can say, "I've done 15 of these. I know you know we're going to go into discovery. There's going to – we'll have a motion to dismiss. See how we do. We'll go in – we'll go past that," or a government investigation, stuff will be turned over to the government and there'll be some follow-up inquiries and it's a fairly linear path.

The difference in a crisis is that because there are so many moving parts, it's not clear where everything is going to end up and which aspect – whether it be interaction with one of your key lenders or the board's role or shareholders or the government – not clear which one is going to require attention at a given time and which one is going to come to the forefront in terms of what you need to manage.

And what we frequently say to sort of – to try to manage that issue is to the extent you can, look out as far as you possibly can at the beginning and force yourself to say, "I know this isn't the normal situation. What are all the bad things that can happen?" And think them all through and then think about how your strategy should try to account for events unfolding on multiple fronts.

Now let's add to our hypothetical further complication which is that it turns out that your key financial officer was personally involved in the aspects of buying these securities that have now gone bad and you discover very early on that the CFO probably had knowledge of the potentially risky nature of these securities at the time that they were purchased. What does that mean?

What it means, in a broader sense, it means that a key person who would normally be involved in your decision making, normally be involved in discussions with analysts, discussions with the board, discussions with counsel, can no longer be heavily involved because that person is going to be a key fact witness and because it may turn out that personnel action needs to be taken against him or her or she'll need to leave or need to move to another position or will be the target of government investigations or will need his or her own counsel.

That's disruptive to your normal process because it means the team that you normally rely on and the communications that you are normally used to can't be followed. And frequently what happens is that in-house counsel needs to step into the liaison role to make up for the fact that a senior decision maker can no longer be involved in planning these key issues for a company. You'll have to take – you'll have to come up with a work around.

And sometimes that work around is a new designated executive from somewhere else in the company who is familiar enough with the company, senior enough to deal with the issue but not personally involved. Sometimes it means that there will be a special committee of the board of directors appointed to assist in oversight of the issue.

But whether it is a new executive taken from somewhere else or a special committee of the board, that person or that group likely will not have the lines of communication with outside advisors and with internal people that your core management team had. And so it frequently falls on the lawyer, the in-house lawyer, to step up and be the liaison between all these new groups of people who need to communicate, including potentially outside counsel, potentially outside PR advisors, including – if it's a public company – the auditors, the press, and the board and the board committee.

And so this is very disruptive but it's something that can be thought through and should be considered early on because one thing you want to make sure to preserve the company's position down the line is that to the extent that senior people are arguably or could be accused of being involved in the events underlying the crisis, they are preserved as pure fact witnesses and don't get into the company's defense of the issue.

Jen Spaziano: In the first part of our presentation here this afternoon, we talked about the various lists that you should be putting together, the contacts that you should be creating so that in the event of a crisis you would have that information readily available so that you could reach out to those people. And we're going to spend a little bit of time now talking about the difference in the interactions with those individuals or those constituencies when you're dealing with a crisis versus when you're dealing with a single litigation or a single investigation.

And the first area that we're going to talk about are media relations and public relations. And crises typically involve more significant media attention, and thus a more coordinated approach from the media relations, public relations, perspective is necessary in such situations.

Gauging the scope of a crisis at its onset, however, is often difficult or impossible. And as we were trying to tell people about the webcast that we were doing today, one individual who received an invite contacted us and gave us a situation and said that we may want to think about it in the context of our presentation.

And I think this is where it would come into play which is the idea that sometimes you might not even know that you have something that requires a coordinated effort or is something that might be the spark of a crisis. And the situation that was explained to me that I was authorized to share

with the group here you know was the idea that you may have something that you're dealing with and you may receive inquiries about it and you may not realize that there are other areas at your company that are receiving inquiries as well. And the lack of a coordinated response between what you're doing and what other areas of your company are doing could create problems down the road.

And so I highlight that as something to think about. And when you are dealing with anything, even if you think it's something small or something that can be handled by one person, to consider whether or not it has broader ramifications throughout the company.

The company should also avoid painting themselves into a corner with public statements before the crisis is fully understood. I think that the gut reaction is to want to get out with the statement to say something positive to avert misinformation or people being you know uncomfortable with respect to your company's operations.

But making definitive statements before you understand what is happening or what the extent of the crisis is could be problematic down the road when the true nature of the events unfold and you understand that statements that you made which may have been true when you made them based on your knowledge at that point in time become maybe untrue based on information that unfolds.

So that's something else that you want to consider when you're dealing with a crisis. And frankly you know that advice goes to any time you're dealing with the media and making statements.

And then in dealing with the crisis, when you do have multiple areas of a company that are involved, you want to make sure that the public statements that are made are considered for consistency and the potential connection to future litigations and investigations.

We commented early on – I think Monica referenced it in her opening remarks – that crises often develop into parallel proceedings. And you've got the government that's looking at you. You've got class action law firms that are looking at you, and you want to make sure that the statements that you make in one context are not going to come back to hurt you in other contexts.

So those are the things you want to be thinking about with respect to media relations, public relations, in the context of a crisis.

Moving on to the various constituencies that we talked about, you're going to be talking to a lot of people in the event that a crisis hits. There are a number of different groups that you're going to want to talk to, and there are some things that you should bear in mind in having those conversations or communications.

You may not have the luxury of time to craft your responses. That's one of the unfortunate circumstances of a crisis. Somebody wants you to answer a question now, and you have to answer the question now and you don't have time to think about it. You're going to have to act quickly but you're also going to have to act consistently.

You also may not have the luxury of remaining silent where in a crisis situation silence may be seen as an admission of guilt in the court of public opinion. Litigators like to say you know don't say anything. That's our gut reaction when a case has been filed and the company receives a press inquiry. I know it's my gut reaction. Don't say anything you know no comment.

But when you're dealing with a crisis, we understand, even the litigators understand, that no comment isn't necessarily an acceptable answer to all of the constituencies that a company is dealing with. And so silence may not be acceptable even if it's the easiest answer.

And as you'll notice in the two comments I've just made, I've told you, you have to act quickly, you have to act consistently, and you may not be able to remain silent, but I'm not giving you any advice as to what to say. Those are hard, hard things. And being the best we can do today without specifics is to say be aware of them and be aware that they're things that you're going to have to deal with.

A general but reassuring public statement early on may help set the tone. Public statements should be directed by the crisis management team. That's one easy answer. Make sure that you have a coordinated effort with respect to the statements. And we've mentioned several times today the importance of having a single high-level spokesperson that will ensure that consistency.

Moving on to communications with employees, your employees are going to be made aware of a crisis. I think that that is a truism that we need to accept, that if the crisis is made public your employees are going to know about it. Not necessarily the same case in an investigation or a litigation where often times the only employees that know about it are those that were involved in it. And so that's something that you need to be aware of when you're dealing with a crisis.

Employees are probably going to find their information out from speculation, water cooler talk, and the media, the blogs that we've talked about. They're going to know this information. And so you are going to want to think about communicating better information to them because the information that they have may not be accurate.

So you want to consider communicating directly with your employees, do it through the crisis management team because you don't want them to get all of their information from the media and speculation and what other people are saying about what is happening.

You also want to deal with employees because you want to tell them that they shouldn't be talking outside the company. You want to stress to them the importance that they should not be logging onto blogs and providing their feedback as to what's going on. You want to stress to them the importance that the company is communicating through a single spokesperson because if you have the spokesperson who management is looking to but the media is able to get information from a bunch of employees, you're really undermining the efforts that the company is taking to speak with one voice.

All that said, you need to assume that any information you communicate to your employees is going to make its way to the press because there is no guarantee that your employees are going to listen to the directive that they not communicate with the media directly.

Gary DiBianco: One constituency we haven't really talked about much yet is auditors of public companies. And I think Jen and I could both tell you that for some odd reason, a crisis always seems to hit within 2 weeks of the end of a reporting period.

And that adds an entirely new dynamic to what a company can and cannot do because as those of you who've worked on public filings and public disclosure obligations understand, when a company is aware of important information and you're coming upon the end of a reporting period, a couple things happen. One, you'll have to consider your internal obligations, that is, the company's obligations to disclose to the public.

And as it relates to this slide, the other thing that will happen is your public accounting firm will come to you and ask questions and will want information and reassurances that they are able to do whatever they need to do. Whether it be sign off on a year-end audit or sign off on a quarterly review.

And what that frequently means is that you have to pull together quickly a great deal of information for an outside constituent who you would prefer not to share the information with immediately, and certainly not before you fully understand all the facts. But who wields an

enormous amount of leverage because for a public company to miss a filing deadline or to delay a filing deadline because of a crisis may actually deepen the crisis maybe worse than the crisis itself.

The crisis may be something that is difficult but manageable. But the loss of confidence in the markets if you have to postpone a 10Q or a 10K could be devastating. And it may be that the only way – the only thing that stands between you and the timely 10K is a list of things that your auditor wants from you and you don't want to provide it because it's going to be burdensome, time consuming, difficult since you don't yet understand the facts. But the alternative isn't available because that information needs to be incorporated into the auditor's analysis and you need to get your financial statements done.

And there is no magic bullet solution to this. It takes hard work. It takes careful consideration. And it takes a recognition that the information that you provide to your auditors in that context likely will not be considered privileged and confidential by opposing litigants or by government investigators.

Now, there are things that you can do to maximize the possibility that you'll have information privileged and also to position yourself for later. For example, include confidentiality provisions in the communications with your auditors on these issues. Carefully vet the information that is going to be provided to the auditors in the same way that you're vetting the information that's going to the public to make sure that it's accurate, that it's consistent, that the whole team has weighed in on it, and that it doesn't go too far in saying things that may turn out not to be accurate.

And consider providing, to the extent possible, some of the briefings orally as opposed to in writing so that there are not, at least from your communications to the auditors, written record of exactly what was transmitted at a particular point in the crisis. But also recognize that auditors in their duties of performing audits and according to their audit standards will keep detailed records in their work papers of what is communicated to them by a company.

And now let's turn to another key and important issue in a crisis which is managing multiple government investigators. And here what I would say at the outset is very similar to what Jen said on the media and employees and public communications. And it's sort of captured by the doctor's Hippocratic Oath, "first do no harm."

You can do it the best you can in managing multiple government investigators, but the very first thing you should do is not make the situation worse. And we talked a little bit about document preservation and public statements. Those are areas where you, unless you're careful, can make it worse.

So be careful about what you're going to say to the public, what you're going to say to the government. And if you don't have anything good to say to the government, you may consider saying, "Well, we'd be happy to cooperate with you. We know nothing right now, and we'll get back to you as quickly as we possibly can," rather than trying to put a gloss or a spin on the situation that will maybe get you a little bit of time up front but ultimately may lead to a loss of credibility down the line.

Dealing with multiple situations in a crisis situation with government investigations is different from a one-track investigation or one-track piece of litigation because you have to manage the requests that many different investigators and potential litigants are making. And the strategy that you choose with one of those litigants or requestors may contradict the strategy that you would choose with another one.

For example, you may decide, if you are in the hypothetical that we've talked about, receive an inquiry from the Department of Justice or the Securities and Exchange Commission, you may say to yourselves, "We are a company that's highly regulated. We have a long-standing and good

relationship with our regulators. We have always been open, and we are going, therefore, to be candid and cooperative with the SEC in this inquiry.”

At the same time, you may be getting demands from plaintiff’s lawyers, and your historical position with plaintiff’s lawyers may be, “We stonewall those people. We don’t give them a single piece of paper until the judge tells us to. We maintain a firm position. We never settle, and that’s how we get them to go away.”

Well, in a crisis situation where you’re dealing with both, the SEC may say, “Thank you for agreeing to cooperate. Now you know get your team of internal investigators out doing some interviews, collecting some documents. We’d like you to put together a written report, and we’d like you to come back and report to us in 4 weeks.”

And that may be the only way to keep the SEC happy, but if you do that, you’re going to be creating a lot of internal buzz and talk about this issue in this investigation, and you’ll be creating a document that, when it’s given to the SEC, most courts will hold is probably not privileged.

You go in 6 weeks later to your initial discovery conference in class securities litigation and the judge says, “Well, what have you done? What do you all know about this? I mean, I’ll consider this on a motion to dismiss, but I want to know is there factual information out there?” And you have to be candid and accurate and the answer is, “Yes, Judge, we’ve put together a report for the SEC.” And the judge may very well say, “Well, if it’s good enough for the SEC, it’s good enough for these plaintiff’s lawyers. Turn it over,” which means that you are unable to execute on your strategy of stonewalling the plaintiff’s lawyers, even while you’ve kept the SEC happy for a time.

And again, and unfortunately there is no magic solution to this other than to think about the dilemma at the very beginning. And when you are sitting down to plan your response, predict that in a crisis situation you’ll be dealing with requests from your auditors, requests from analysts, requests from the government, and multiple governments. It could be state governments, attorneys general, could be Congress, could be federal regulators, plus litigants. And therefore you may decide at the outset that you’re going to compromise a little bit with everybody in order to try to navigate through all of these waters.

Monica Palko: Great. Let’s turn it over to Q&A. We have a number of questions on the webcast. We invite people in the room to raise any issues. Let’s start first with a couple of questions that have arisen about crisis plans or crisis manuals.

One says that when they propose creating such a manual or other types of manuals, they get push back that it will become evidence of what they have not done if they are not strictly followed. And another has asked whether the advice is to create a crisis plan for specific types of crises or just one overarching plan.

Jen Spaziano: I’ll take the second question and address that which I think the answer to the second question is that it really depends on the company. I think that you want a crisis management plan that is going to deal with any potential crises that your company might face.

Whether it makes more sense to create an overarching plan that can apply to any situation or it makes more sense to have separate crisis management plans given the potential crises if they are discrete and would involve very different people, it may very well make sense to have a couple of different plans and a couple of ways to address that or to involve only those people.

An example of that might be employee strike versus mass disaster. If you’re a company that might face either of those situations, you may want to create a plan for one and a separate plan for the other. And each of those events might involve very different people.

I will address briefly the first question and then pass the question to Gary. My initial reaction to the question is a lot of what we've talked about today is the gathering of information and the thinking about how to respond in a crisis situation and not so much you know substantively you know what it is that you should be doing in order to prevent a crisis but more what is it that the company wants to be in a position to do to respond.

And I think the gathering of this information and the staying abreast of some of these issues are things that would not create liability down the road or even arguments if you were you know say, for example, not to have updated a particular list by you know within a particular time frame because obviously the matters that we're talking about today are not going to be the most pressing matters on your agenda but they are things that you ought to be considering.

Gary, I don't know if you have any further thoughts on that?

Gary DiBianco: All I would add is that there's always a trade-off in having policies. And so this comes up in this issue, it comes up with document preservation, it comes up with due diligence. I think here you could consider, in addition to what Jen has said, how you phrase what the plan says and use open-ended words like if you are putting together a to-do list, say, "We will consider the following steps," or "The following are possible steps in the event of a crisis." And so you leave yourself some leeway that if you do one thing and you don't do the other, you can point to your business judgment in that context.

Monica Palko: What's the likelihood that the manual could actually be privileged?

Gary DiBianco: I'll tell you from at least my perspective, and I think Jen shares this, we take the – we take the pessimistic view that nothing is privileged, including an e-mail that I write to Jen inside of our law firm about a client in the context of giving advice.

And so we operate from the assumption that we will make all of the arguments to keep everything that is privileged, privileged, but at the end of the day, the privileges are dwindling and they are difficult to preserve and so that you should be careful and phrase things in a way that leaves you some room.

Monica Palko: Do you find that overseas the privilege is more substantial or less?

Gary DiBianco: Substantially less. And, I mean, there – in a number of countries, in Europe that I'm aware of, there is no concept of an attorney/client privilege with in-house counsel and that if you are defending a criminal investigation in one of those countries, you will only have a privilege between the in-house lawyer and outside counsel if items are marked as for defense purposes only.

It's another area, Monica, where you know the law you know it's something you can do now, identify the relevant law in those jurisdictions and set up your advice structures accordingly.

Monica Palko: Great. Well, you made reference to criminal proceedings, so that is a good segue into another question. The question is what about possible criminal acts by employees – actually there's a broad question. What's the exposure to the company or to senior management? And do you treat this differently than other types of crises?

Gary DiBianco: As a legal framework matter, the more senior you go in a company in terms of someone's conduct, the more likely that that conduct will be imputed to the company directly and immediately for purposes of imposing liability on the company. And so while you may have an argument that someone at the factory floor or out on a sales organization was on a frolic, you likely won't have that argument if it is a senior vice president or member of your executive management team.

And I think when we talked earlier about the idea of identifying those people early on if you can and segregating them from the team that is dealing with the crisis, that's an important step you can take and it's particularly relevant to the senior employees.

Jen Spaziano: To add to that answer, one thing that strikes me in the question given from the comments we made earlier today is the idea that you may believe that the conduct is limited to one particular individual. And that may not be the case when the investigation unfolds and you may learn through the course of the investigation that more senior people either were involved in the conduct, knew of the conduct, or turned a blind eye to the conduct.

And so to reiterate some of the points of not getting ahead of yourself and making a comment and calling the person a rogue employee or trying to distance yourself from the employee when you do not know all the facts is something that you should be cautious about.

Monica Palko: And if you're in the room and have a question, raise your hand. I don't want to keep focusing on the webcast questions. All right. Let's take another one. You referred to in-house counsel acting as liaison among different groups in a crisis. This is part of the reason this is good to have an anonymous Q&A.

At our company, some of the management thinks they outrank everyone, including the lawyers, and especially the lawyers. So do you have any tips on how to put yourself in that posture?

Gary DiBianco: I would say first of all as outside counsel we get treated the same way, if not worse. But I think to the extent that you can convey to these management people that you really are trying to help them with the company's best interest in mind, you may make headway and that no one here is trying to steal the thunder. And in fact, one thing that's important about these crises is that no one's going to win. You're only going to be managing it downside.

And so frequently the savvy executives will run for the hills and let in-house counsel and outside counsel take the blame, so that may help you. But you are trying to help and you are trying to assist. And to the extent that you can tell them that it's in – in their own best interest to let a lot of this be handled by counsel and inside counsel, that may assist in getting people to turn over the reins where they should be doing so in something like this.

Monica Palko: Great. Well, it looks like we're right at 1 o'clock, so I want to end in a timely manner. We have other questions that I see here on the webcast. As a reminder, please complete the evaluation form. And if you'd like, and your question wasn't answered or if you just want a more private forum, put your question in the evaluation form.

The ACC events blog will open on December 19. That's another chance. For those in the room, we encourage you to stay for dessert and coffee.

Ah, and this is the moment we've all been waiting for, the contact for CLE. Here it is. It's Robin Hayutin at WMACCA. And we thank Robin very much for agreeing to process these. So go ahead and send Robin an e-mail if you would like CLE, and she will go ahead and send you the form and then you'll need to submit that on your own.

So thank you again very much for participating. We appreciate your attention. And you may now disconnect.

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