

CRISIS MANAGEMENT
NATIONAL LAW JOURNAL SEMINAR

The National Law Journal organized a day-long seminar on crisis response. The number and severity of crises increase due to climate change, technology, interdependence, government regulation and new media. Examples of crises discussed include hurricanes, oil spills, plant explosions, terrorist attacks, insider trading, product recalls, bribery, sex abuse, and institutional cover-ups. Not all of the following points apply to all types of crises. Each type has its own dynamics and players.

KEY POINTS

- Have a plan. The plan should include a check list with variations for different types of crises, a generic form of press release, a likely spokesperson, a crisis management group with variations, expert sources, and means of contacting federal, state and local government officials, customers, suppliers, employees, shareholders, news organizations and non-traditional media.
- During the crisis, members of the crisis management group should be in the same room, close to the crisis. Don't try to handle the crisis long distance.
- Include a lawyer in the group, but don't let the lawyer dictate the response. You will be sued anyway. Possible litigation is only part of the problem and too cautious or technical an approach may alienate the public. Mistakes will always be made.
- Strive for "rough justice" - likely to be accepted by the public. Maintain the long term credibility of the organization.
- Try to make disclosures factual and complete, including both good and bad information. But try to put bad information in a positive context by collecting other information. If possible, delay the disclosure until you have collected that information.
- No plan is permanent. Keep revisiting and updating your plan. If you have a plan and a policy, follow it. Worse than not having a plan is having one and not following it.
- Know that you cannot control all sources of information. Your employees may be faced by cameras and journalists. They will have more credibility than you do.
- Government crises (dealing with taxpayer money) are different from business crises.
- Develop and maintain local contacts – government, press, community. Be a good citizen and member of the community.

DETAILS

Pre-Crisis Planning –

Set up an internal investigation team structure, to be implemented quickly. At the same time, consider who should conduct a later, independent investigation if needed.

Set up a "dark site" on the internet, with essential PR information applicable to all types of crises. Be prepared to "load" it with information specific to the particular event. Be prepared to activate it and get your story out.

When the Crisis Hits -

First, determine the type of crisis you are facing and who your audience is, how it is likely to react.

Do your best to stop the problem from continuing or getting worse. For example, stop distributing the defective product.

Use simple language in dealing with the public. Tell a simple story. There are many ways of telling one's story, using various forms of media and telling the story oneself or to another to tell it for you.

Keep a time line so you can show the public that you were dealing with the problem behind the scenes, not covering up the problem. Assume that everything you say and do will become public.

The public will be inclined to think you are lying. Establishing and maintaining your credibility is very important.

An example of putting bad facts in context: If, the President "sells" nights in the White House Lincoln bedroom, don't admit that fact until you have determined how frequently the prior President did it. Or if the President asked 50 big campaign donors for money in the White House, find out how many others he invited without soliciting them. Do not tell only the good facts, leaving your critics to bring out the bad ones.

Spokesperson –

Who is the face for the company? The best person is normally the one who can say "I am in charge; I am responsible." This is usually the CEO but he or she may not be best suited to the task. Anyone under consideration for the role should be put on camera in advance, to have some experience as to how he or she looks to others. The person should have some basic training, not simply in public speaking.

Going on camera and saying "everything is under control; there is no problem" may be worse than saying nothing at all if the statement turns out to be false. Then the company has lost its credibility.

Employees may also be interviewed. They can be most credible but do damage if they say the wrong thing, including by saying "I have been told not to say anything to the press."

Apologies can be dangerous if given or not given. The best middle ground is to acknowledge that an accident has happened and state that a full investigation has begun.

Lawyers -

Lawyers are necessary but very dangerous in crisis situations. They can monopolize the decision-making by reason of the risk of litigation. But there are factors other than litigation to consider and litigation is likely to arise anyway. (Some of the presenters disagreed with this position.)

In dealing with lawyers and crises in the United States, the concept of "attorney-client privilege" is important. The plaintiffs in subsequent litigation cannot force you to disclose what was said in meetings with your lawyer. However if a 3rd party, not a lawyer, was present, then there is no such protection.

Lawsuits are seldom filed in the midst of the crisis. For one thing, the lawyers have to find a plaintiff.

Rough Justice –

If the public is involved in the crisis, basic fairness or “rough justice” is essential to success. Only two of three key factors are possible at a time: speed, cost and quality. Since speed is essential to dealing with a crisis, quality always suffers and the cost is always greater. Sophistication and precision are too dependent on individual facts and situations. The process of achieving the goal must be transparent. The actual settlements can be confidential.

To achieve rough justice, some sort of payment to victims early on is essential, irrespective of the ultimate amount of the claim. The amount can be determined by a formula, combining several factors, such as number of members of the family and its proximity to the source of the problem. Direct causation has to be presumed, not proven. In the Gulf oil spill, British Petroleum set up three geographic groups. The first geographic area benefited from a presumption of damage. The second area enjoyed no presumption but proof could be accomplished by simplified, independent evidence such as before and after financial statements. In the remaining geographic area, recovery was still possible, but there was a presumption of no causality.

Providing basic fairness is made more difficult if injured parties may get remedies from multiple sources: for example special government funding, Social Security, private gifts and insurance.

If the total size of the funding pot is unknown but likely not to cover all claims fully, it is best allocated by a system of points awarded to each claimant. Once the size of the pot is known, the points all have a value. If the fund of money is likely to be sufficient, the point system is not needed. Reaching an administrative settlement (such as funds for a mass tort) is made more difficult if the claimant has an alternative forum, such as a class action or individual suit.

Note that prior victims of other disasters may feel mistreated if it did not receive equivalent benefits. Some victims of the Oklahoma bombing resented the 9-11 victims.

The public reacts differently depending on whether the funds are insurance funds or government (taxpayers') funds. The public is much more critical of payments with taxes.

Media -

Websites and social media can be very important in influencing public attitudes. Do not limit yourself to traditional media. But do not manipulate non-traditional means; the results will be negative. Know who the journalists are who might cover the story.

Government Aspects -

Litigation is another form of policy making, outside Congress and the executive branch of government. The results of litigation will affect future crisis reactions, governmental and private. Catastrophes lend themselves to litigation because mistakes are always made.

In the US, disasters are politicized - seen through a political lens - supporting one view of government or another. (We also saw this in Germany, in Gerhard Schroeder's first (Oder flood) *and* second election (Katrina and George Bush's failed response)).

In dealing with government investigations, it is important to figure out who is leading it. Often many agencies are involved without any one leader. Once Congress begins to investigate, no one has control.

The government can only coordinate, call out the National Guard and write checks. In the US, the government does not own the public utilities. So it cannot force the electricity to be restored.

The person most clearly responsible is the one closest to the problem, often the mayor or the governor. Citizens expect more and more problem solving from the government. The Federal Emergency Management Agency (FEMA) can operate without much concern for litigation. It is very difficult to sue the government successfully, so its dynamics are different. FEMA officials need to gather information and try to make sense of what is going on. It has to make decisions quickly, without enough information. It has to anticipate; local officials always ask for help too late. Sometimes the government reaction can just be token, but that may be enough if it sends the message that the government is reacting.

Technology -

Technology magnifies crises. Fukushima would have been a disaster by reason of the tsunami alone, but that combined with nuclear power created a whole new magnitude. We also face new, internet-based disasters. Internet and computer security is a constantly moving target.

Visiting business or foreign government partners may visit your premises and expect to use your computers, including for "making presentations." The host company or government must have hardware and protocols in place to accommodate the visitor without giving it access to its network but also without showing distrust. Ask in advance of a meeting if hardware is needed. But be prepared to provide it, whatever the answer.

Business Aspects –

One of the costs of a crisis is the time it takes away from the normal management of the business. Senior management must take control and be involved, if only for public and political reasons, but it must not be so involved that the business suffers unduly.

For publicly held companies, the crisis may tend to prove that prior public statements – such as in securities filings - were inadequate or misleading.

Fraud -

For a government response to be accepted there must be an anti-fraud component. There will always be fraudulent claims and the plan has to be in place to combat them. The US has the NCDF - "National Center for Disaster Fraud." It coordinates with local officials - state and local, including other agencies,

such as fish and wildlife. The coordination gives it access to local information and enables it to spot fraud more easily.

Some neighbors and co-workers of claimants will be motivated by resentment to report abusers. Others will try to cash in. After Hurricane Katrina, one McDonald's manager complained that his employees had all quit because of the government payments they had gotten, although none had suffered any loss. Another person filmed his neighbor banging on his own car in hopes of getting a government payment. Informal cell phone pictures and video may intentionally or unintentionally disclose fraud. Satellite photos have disproven claims for roof damage.

Proof of loss may be more difficult if the claimants did not file tax returns. In Louisiana, a black market developed for blank W-2's (official income statements).

Miscellaneous -

Delay – often seen as a cover up – usually makes matters worse. Some institutions try to protect themselves by dealing with a problem internally. This strategy seldom works. The problem usually comes out and looks worse, despite honest efforts.

Commercial losses are emotional but less emotional than physical ones.

If a company (like BP) makes payments, it needs to have a vision of where it wants to end up. It is not enough to simply react to demands. All members of the response team need to have that same vision.

Before making a sensitive call to a possible opponent, have someone trusted by both sides pre-clear the call, to be sure it won't be misinterpreted or used against you. Possibly that person should monitor the follow up call between the two sides.

Insurance – NOTE – This section, although general, is more detailed than the others and pertains mainly to US insurance law.

In the United States, insurance policies fall into general groups, but within each group there are many details which can make the difference between recovery and no recovery. The two basic groups are "all risk" and "named peril". But the "all risk" policies, despite the name, have a long list of exclusions. If the policy is "named peril" the insured has to prove the incident was included in the coverage. If "all risk", then the insurer has that burden.

The extent of coverage may be affected by the number of occurrences. The coverage may be greater if the insured can show that there was more than one occurrence, or alternatively the insured may have to pay two deductibles and receive a reduced net amount. Did the occurrences occur in rapid succession or in multiple locations? Policies may treat a series of similar causes as one event. The relevant factors are time, spatial proximity and the interrelationship of causes. The insured should look at the policies and develop a strategy how to maximize its recovery. Special risks may have lower limits than the general coverage limit. These limitations will be strictly construed by the courts.

The great 1906 San Francisco earthquake and ensuing fire continue to affect US insurance policies. Policies then did not cover earthquakes but did cover fires. The California state court ruled that the fire was a “concurrent cause,” so full recovery was permitted. As a reaction, insurance policies added so called “ACC” or “anti-concurrent cause” clause, to override this ruling. The ACC provisions vary and must be read carefully. However, as another result of the San Francisco events, states passed the “ensuing loss provision” which prevents excluding loss by a fire which follows some other, excluded event. This provision will be very important in determining losses caused by super storm Sandy, which hit New York, New Jersey and Connecticut.

If damage by one cause is covered but not by another and they were simultaneous, the question arises whether the insured gets full recovery, partial recovery or none at all?

The calculation of damages also depends on the policy. “Actual cash value” deducts for depreciation whereas replacement value does not. Some policies will require actual rebuilding to receive the full cash value. If the property is only partially damaged, the insured may have a problem if he decides not to repair. Furthermore, whether the insured rebuilds what was destroyed or something else may affect the award.

In any event, the insured should increase his coverage as its property value increases.

To collect on business interruption insurance, the insured must have suffered physical loss to its own property and have had to stop operations. The period allowed for restoration is a reasonable standard, not the period actually taken. Government orders to evacuate may trigger insurance coverage. The proximity of the evacuation to the business site may vary from policy to policy. Evacuation in anticipation of an event such as a hurricane may not be covered. The language of the order itself is important. When access to the business is permitted again, is it full or partial? What does the order permit and what is physically possible? If access is permitted, are the necessary services (electricity, water, gas) available?

In Hurricane Katrina, some claims were initially denied due to causation by “storm surge” which was not covered. One claimant proved that damage was caused by wind (which *was* covered) by finding a nurse who filmed the storm (including noting the precise time) from a hospital a few miles from the damaged buildings. So such informal evidence may be extremely valuable. Finding personal videos may be difficult, but the Boston marathon experience may make gathering these videos more common.

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