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Top Ten Steps in Managing a Company Crisis



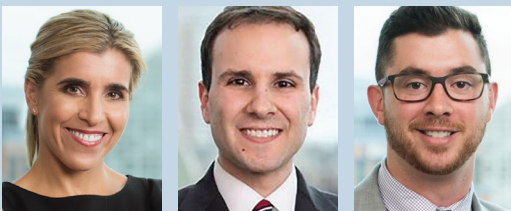
This article was inspired by a real-life occurrence that was unlike any contentious cross-examination, closing argument, or “bet the company” litigation ever handled by the authors. Now imagine being a newbie general counsel for a company that

you previously defended and represented as corporate and defense counsel, answerable to many, many company leaders, who finds herself facing a very public regulatory inquiry that jeopardizes an entire product division, with the potential to affect other product lines, then throw in the mix trolling plaintiffs’ lawyers attempting to stir up class action litigation. True story... and one that we hope that you and your clients never have to face. That experience

spawned this crisis management primer, and we hope that our timeline and article, as well as the accompanying diagram, assist you should you find yourself at such a crossroads with your client. The good news... the company navigated the inquiry successfully and is stronger than ever.

As lawyers, a/k/a problem solvers, we all must be able to handle a crisis situation. No one wakes up and plans on handling a crisis situation, but it only takes one crisis to

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cripple a company, and being unprepared or caught flat-footed can lead to client dissatisfaction or worse. So, the purpose of this article is to serve as a go-to resource if and when that day comes.

Obviously, crises come in different sizes and forms, but this practical article should help you spot the issues and provide a road map/decision tree of other experts and when to contact them during a crisis. Most importantly, do not forget the colleagues who you have met through your private firm practices and your professional organizations such as DRI, Maryland Defense Counsel, and others. They can provide countless resources from publicity and media handlers to specialty counsel.

When it comes to preparing for an emergency, such as when a regulatory agency comes knocking and threatens to shut down a lucrative product line of your client or your company, the response must be multidisciplinary, swift, and focused. It is in a company's best interest to have a crisis management plan in place so that the company's personnel do not become overwhelmed and the company's day-to-day operations are not jeopardized. A crisis will generate publicity, and a company will need mass internal and external communications to manage levels of staff, customers, and end-users; to keep board members informed; to steady international markets; to respond to the media; and to handle lawyers hoping to gain information on the extent of the crisis. When developing a crisis management plan, a company should establish specific guidelines with detailed steps to take throughout the crisis. These guidelines should not only lay out what a company needs to do on the day that the crisis hits, but also the steps to take until the crisis is harnessed and ultimately concluded. The flowchart that we have provided depicts the crisis management plan in summary. See Figure 1.

Step 1 (Before the Crisis): Determine What Activates the Crisis Management Plan

Before a crisis even occurs, a company needs to decide how the crisis management plan becomes activated. It is important to identify the different crisis levels, since this will guide the steps that a com-

pany will take, and when, throughout the crisis. For example, we created three different crisis levels:

- A limited crisis is a *level-one* crisis and can be activated by an incident that will not seriously affect the overall functional capacity of a company, such as a shareholder dispute, but which still requires some semblance of action internally.
- An issue-driven crisis is a *level-two* crisis, which we defined as a slowly developing situation that negatively and seriously affects a company, such as a lawsuit.
- Finally, a major crisis is a *level-three* crisis, which is an incident that poses a major risk to a company. For example, any litigation brought against a company by the government, such as the US Food and Drug Administration; an "it has come to our attention," untitled, or warning letter; or a class action lawsuit.

Once a company determines how its crisis management plan becomes activated, it will be able to navigate crisis situations properly.

Step 2 (Day 1): Form a "SWAT" Team

When a crisis strikes, a company must first establish a crisis management team, which we call the "SWAT" team, to evaluate the situation. This idea may seem trivial, but establishing and identifying key players and their roles during a high-pressure situation is vital. The SWAT team should consist of C-suite-level employees (chief executive officer, chief financial officer, chief operating officer, and chief information officer); compliance or regulatory affairs; public relations, in-house or outside counsel, or all three; and importantly, a crisis manager or "quarterback" who drives the agenda for meetings and runs herd on the various SWAT team members to assure that deliverables are made by the assigned deadline.

The crisis manager will organize and coordinate management of the crisis, schedule weekly conference calls, keep an agenda and running list of assignments to be fulfilled during the crisis, and overall manage the team. The crisis manager is an essential part of the crisis management plan, since he or she confirms that the crisis is being properly handled, that dead-

lines are kept, and that the plan and the team are on track.

It also is important to identify each player's role during the crisis. For example, it is essential to identify the individuals who will do the following:

- Communicate with the regulatory agency at issue.
- Be responsible for communicating the message to the media.
- Address any imminent marketing changes and/or necessary product recalls.
- Explain the situation to employees, shareholders, and board members.

The SWAT team may then focus on and direct its aim toward the severity of the crisis. Identifying the severity is very important from a cost-projection standpoint especially. Companies need to brace for cash flow management because legal and other types of expenditures will spike at this time. Once the key players are identified and their roles are clearly established, the SWAT team should perform a risk assessment of the crisis.

Step 3 (Day 1): Assess the Crisis

Assessing the crisis is probably the most important step in a company's crisis management plan, and it requires the company to ask what, why, when, and who. During this step, a company needs to research what prompted the crisis and where the crisis originated and get intelligence from the field or industry to determine if there were any signs of a potential crisis of which the company should have been aware.

Specifically, a company should determine the following:

- short-term and long-term financial effect on the company
- short-term and long-term changes to be made in the supply chain and sales pipeline
- how the company's reactions to the crisis will affect the long-term outcome of the crisis
- the optics of the situation and how they will affect other product lines not currently at issue in the crisis
- given the force of social media, if there will need to be monitors on media and the internet at large to determine any negative coverage or trolling plaintiffs' lawyers trying to drum up lawsuits

- whether any deadlines have been placed by any regulatory or law enforcement agency

Once the company has determined what caused the crisis and the pertinent deadlines, it needs to decide whether the crisis requires additional experts, from media consultants to outside legal specialists. Depending on the specialized nature of the crisis, it may be necessary for a company to hire outside counsel to help navigate the crisis. And this can take some effort and time. For example, in a crisis that we previously encountered, our client interviewed at least six different law firms to help the client through the crisis before

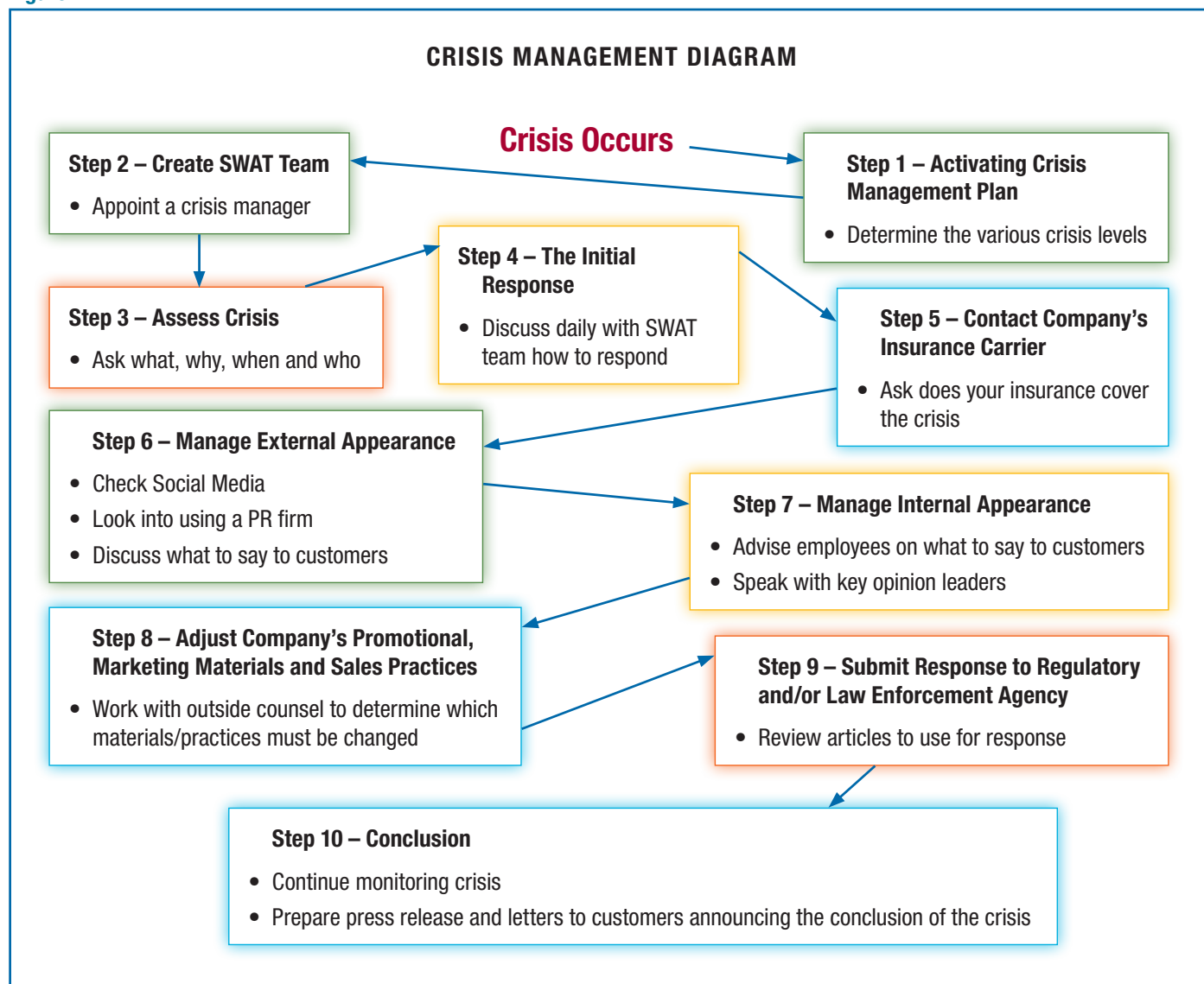
we were asked to join the team. It is very important to pair a company with competent, well-respected representation during high-pressure situations, which may take, as mentioned, more than one try.

The SWAT team also should evaluate and research the extent of the crisis. Are other industry members involved? Has the regulatory or law enforcement agency brought similar charges or allegations against a competitor? How do the charges differ among companies? How can the company distinguish its conduct from the conduct of its competitors to find an exit strategy from the crisis? These are questions that need to be answered, and

answered quickly. A member of the SWAT team should be designated to research the prosecution practices of the relevant regulatory or law enforcement agency or agencies, and specifically whether competitors have been identified in the same or a similar crisis. This process may identify important clues regarding the overall risk to the company. Any chance at viewing the proverbial hand that the company has been dealt could save thousands of dollars in unnecessary resources and expenditures.

In addition, it is important to remember that while the risk-assessment process is under way, there should be no public com-

Figure 1



munications on the matter to the media, other counsel, customers, or company personnel, other than from the SWAT team. Once the company has performed all the necessary research, it can begin drafting its initial response to the crisis. This will take a collaborative approach and will likely require compiling historical data, studies, and other sources. It is imperative to remember that when responding to anything during a crisis, everyone on the crisis management team must be on board, and no swift or ill-informed decisions should be made; input from all the team members is valuable. Once a company has assessed the crisis situation, discussions can begin on how to respond to the crisis.

Step 4 (Day 1–2): The Initial Response

To respond properly to a crisis, a SWAT team should hold a conference and discuss how it should proceed. After the conference ends, the SWAT team must adjourn immediately and get to work ensuring that everyone is on the same page and that no swift action is taken without the agreement of all necessary parties. Teleconferences will occur at least daily at first, and then over time, they will transition to happen every other day. During these teleconferences, daily updates will be provided on how the company is responding, next steps, changes in marketing and operations, and whether the company will require outside counsel. In addition, before the company responds, the SWAT team should figure out where this crisis originated, and see if there were any red flags that were missed.

Further, before responding to a crisis, a company should consider its position compared to other competitors facing the same crisis. This can be done by comparing and contrasting letters received by each company; determining how each company advertises; looking at each company's clearances; figuring out which companies had adverse events; and deciding whether any company received a warning letter, past or present. Moreover, on the second day of the crisis, the SWAT team should coordinate teleconferences with the company's sales team and with central opinion leaders to answer any initial questions about the crisis. The SWAT team also should coordi-

nate another conference call with central opinion leaders one month later to discuss whether the company needs to release another response.

Step 5 (Day 3): Insurance

After the initial assessment, a company must contact its insurance carrier to provide notice of potential claims, and if possible, seek coverage. When communicating with the insurance carrier, it is important to ask these questions:

- Does the company's insurance policy specifically cover the area of interest?
- What are the limitations and deductibles regarding such coverage?
- Are there any additional notice requirements?

It also is necessary for the company to review the policy language to ensure that adequate coverage exists and identify the steps to take to appeal in the event of a denial. Further, the company should review the insurance company's website for helpful materials and contacts that may serve as resources for the specific crisis.

Step 6 (First Week): Manage the External Appearance: Public Relations, Media, and Customers

Within the first week after a crisis occurs, it is imperative for the crisis management team to conduct daily news sweeps and sweeps for trolling plaintiffs' lawyers who inevitably will post notices looking for claimants. Sweeps are done by reviewing aggregator sites and setting up alerts; monitoring social media websites; monitoring statements on websites and media outlets; and reviewing posted statements by experts or key opinion leaders in the field of interest. This review should be conducted daily and charted until the crisis has been resolved to help with damage control and to provide information to third parties that may want to post their own statements in response to negative coverage.

Also, if a crisis becomes public and is covered by the media, a company must formulate a public relations strategy and determine whether a press release is necessary. A company can consult or hire a public relations firm, handle the public relations side of the crisis internally, or simply confer with in-house or outside legal counsel. If a company decides to send out a press

release, the communication may be placed on the company's website to notify existing and prospective customers of the situation. In addition, before disseminating *any* information, the entire SWAT team should review and agree on the content of the document, as well as review and compare any responses by third-party competitors that may be dealing with the same or a similar crisis, to make sure that all bases have been covered in the press release.

Amid a crisis, it is very likely that customers and "internet trolls" will express concerns and disparage the product and a company as a whole to attempt to spawn claims, or worse yet, to spur class actions. It is vital that the company and its employees consult with the SWAT team before responding to any unfavorable communication in person or on the internet: these communications may be used by regulatory or enforcement agencies during potential future litigation.

Step 7 (First Week): Manage the Internal Appearance—Advising Employees and Communicating with Key Opinion Leaders

After the crisis occurs, a company will need to manage the situation not only externally but also internally. As soon as a crisis arises, most of a company's personnel will face questions, especially sales representatives working in the field. No matter what type of crisis occurs, the company employees must refrain from responding to questions or concerns until they receive approval from the crisis management team. This includes questions posted to company and personal social media accounts, which also should be internally monitored by the SWAT team.

In addition, once a crisis occurs, it is important to understand which experts and key opinion leaders will be most helpful to the company, and to discuss with them directly their thoughts on the situation. The crisis management team should communicate with these individuals over the first several days of the crisis and compile a complete file of those experts and key opinion leaders willing to speak publicly on behalf of the company about the crisis. Further, the crisis management team should maintain a spreadsheet recording each key opinion leader's or expert's position on the crisis

and compiling their statements, both positive and negative.

Step 8 (First Week): Adjust the Company's Promotional and Marketing Materials and Sales Practices

During the first week of a crisis, it may be important to adjust a company's marketing tactics, effective immediately. The crisis management team should work with outside counsel, if the company has brought a firm on board, to determine which practices must be changed regarding materials—physical and electronic.

Once that plan has been determined, a conference call should take place to advise everyone who needs to know of the changes and their immediate implementation, and the crisis management team, top marketing and sales personnel, and potentially, outside counsel should participate. Also, depending on the type of crisis, it may be necessary for a company to suspend all marketing and promotional material use for 60 to 90 days, or until the company learns more about the crisis. This includes all slide presentations, material provided by sales representatives, brochures, and certain content on the company's website and social media accounts. Such a drastic decision must be made by unanimous consensus of the SWAT team.

Step 9 (First Month): Submitting a Response to the Regulatory or Law Enforcement Agency

Once a company implements proactive steps to preempt a repeat of the crisis, it should begin crafting a response to the regulatory or law enforcement agency with which the situation originated. In general, the goal for a company during a crisis is to weather the storm, and to do so without breaking the bank. This requires drafting a well-designed, strategic response to the regulatory or law enforcement agency.

Before a company drafts its response, it should find out how much time it has to respond to the crisis and exactly what the regulatory body will consider, who will review the submission, the background of the reviewers, and the leadership and the focus of the agency under such leadership.

The response drafters should also identify the company's previous interactions with the agency, industrywide responses to the current crisis, whether competitors have been targeted by the agency inquiry, and the company leaders and lawyers with the best relationship with the agency. The crisis management team should review any pertinent internal documents and relevant articles, research, and data on the issue that can be used to support its response. This includes social media and other online resources. The agency will be doing the same things. The crisis management team should create a chart summarizing all the important posts, documents, data, and articles that can help the inquiry to use as a quick resource and to consider as rebuttal material for the submission. In some instances, company customers become a rallying force and can assist in defusing media coverage.

After the company submits its response to the crisis, the crisis management team should participate in a status call to discuss any questions that have arisen since its response was released and how best to address any follow-up meetings with the agency. This includes the approach to take with the agency. For example, should the company wait for the agency to respond, or be proactive with its follow-up on the submission, and how will that choice affect the inquiry closure timeline. The company also should begin preparing internal and external communications to employees and customers that generally address the crisis, the company's stance on the situation, and the steps being taken to rectify the situation.

Step 10 (One Month Post-Submission): Concluding the Plan

After responding to a crisis, it is important for a company to continue monitoring the situation over the next several months. This includes monitoring competitor marketing and product lines, reviewing the regulatory or law enforcement agency's website for communications on the crisis, and continuing to conduct one teleconference per week to ensure that the company as a whole continues to watch the situation and that employees comply with any new company policies and procedures. Further,

after the crisis has been resolved, the company may prepare a press release and letters to customers announcing the outcome. To the extent that a press release is necessary, it should be sent out no later than one week after the crisis has been resolved, and it should explain the crisis outcome and describe the action taken by the company. This response must be truthful and honest to avoid any future action by the regulatory or law enforcement agency.

Closure

And that is really all there is to it! Trust us that closure to such an inquiry feels every bit as good as a defense verdict when that day comes. Don't wait for a crisis to hit before you start a crisis management plan. Preparation is vital to your client's or a company's ability to weather the storm successfully. This article can assist you in the planning process. 