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Managing Corporate Crisis and Litigation While Everybody is Watching
The Expanding Role of the General Counsel

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I. THE SCALES OF JUSTICE HAVE BEEN RECALIBRATED

Managing crisis and litigation is a very public process for Fortune 150 companies. Imbedded in our constitutional democracy are two predicate rights that have evolved into the notion of a "Court of Public Opinion." They are: (1) a free press and (2) the fundamental rights of all Americans to pursue their legal grievances in a court of law. The coalescence of these bedrock principals now expresses itself in a 24/7 news cycle in which opinion and news are often indistinguishable and a plaintiffs' bar that wields more influence than ever before. This combustive combination emboldens public opinion to an unprecedented degree.

Like never before, corporate crisis and litigation lure the attention of a variety of critical corporate stakeholders including: shareholders, industry analysts, customers, employees, regulators, joint venture partners, Wall Street, and board rooms. The enabler for all of this is largely the media. Clearly, the most explosive recent examples revolve around criminal prosecutions of symbols of corporate misconduct. But there also are vivid illustrations of civil litigation that *the Wall Street Journal*, *the New York Times*, *Fox News*, *Court TV*, *60 Minutes*, and the rest have found totally engaging including, for example: tobacco litigation, 911 tort litigation, and obesity litigation.

A. **Game On**

The general counsel is a critical component of the communications team that must develop and implement the strategies that will help protect the image equity that resides in the corporate brand. The general counsel must help calibrate the strategic communications imperatives that will help protect reputation, market capitalization,

standing with regulators, and business opportunity with the immediate legal exigencies. The better prepared the general counsel is and the comfortable she is with role and function of strategic communications the more likely it is that she will be successful. While planning makes perfect, there are a number of legal and ethical principals that must first be factored into the mix.

II. **KNOW WHERE THE RULES ARE HIDDEN**

According to a 2002 Hill & Knowlton/Opinion Research Corporation Survey, the public, in surprising numbers (over 80%) is willing to suspend judgment in the context of allegations of corporate wrongdoing if the company provides a timely and comprehensive explanation of its position on the issue(s). Accordingly, the battle to win the hearts and minds of the American public, sometimes considered the "extra juror," must be waged by participating aggressively in the court of public opinion during crisis and litigation. While this is great news for the VP of corporate communications and the public relations firm, it presents a minefield, albeit navigable, for corporate counsel.

A. **Restrictions On Lawyer Commentary**

There are very significant restrictions on a lawyer's freedom to deal with the public using the press as a conduit. A brief sampling includes:

- There ethical constraints on what can be said about a pending lawsuit. *See ABA Model Rules of Conduct, R. 3.6.*[1]

[1] RULE 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- Local court rules may restrict the freedom to comment
- The judge may strongly disapprove of lawyers commenting on pending litigation and issue a gag order
- Public revelations or disclosures of privileged communications could constitute a waiver of the attorney-client privilege or work product doctrine protections on the entire subject of the litigation.

B. **Balancing Ethical Constraints with Reputational Imperatives**

Historically, ethics codes strictly prohibited lawyers from commenting on pending or threatened litigation except in "extreme circumstances." *See* Canon 20 of the Canons of Professional Ethics (1908). The profound role of the media and public opinion in litigation in the United States resulted in Rule 3.6 of the ABA Model Rules of Professional Conduct, adopted by the ABA in 1983 and amended in 1991 in

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(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that and investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6);
    i. the identity, residence, occupation and family status of the accused;
    ii. if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    iii. the fact, time and place arrest; and
    iv. the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

response to the U.S. Supreme Court's ruling in Gentile v. State Bar of Arizona, 501 U.S. 1030 (1991). In Gentile, the Supreme Court held that a state supreme court rule that read much as Model Rule 3.6(a) currently reads satisfied the First Amendment, but that as construed by the State Supreme Court the rule (without clarifying examples) was void for vagueness. Justice Kennedy's concurring opinion clearly recognized that at times advocacy in the court of public opinion is appropriate:

> "An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation …. **including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."** (Emphasis added).

501 U.S. at 1043.

Rule 3.6 is particularly salient in the strategic communications context because it highlights the utility and legal contours of developing both proof points for the court of pubic opinion. There is a nascent trend for litigation communications specialists to work closely with corporate counsel and outside counsel to carefully craft pleadings, briefs, and motion papers so that interested third parties including the media, non-party regulators, and shareholder activists are presented with a clear, compelling, and timely articulation of the company's position. Strategically, this can form the basis of a "public record" that can be cited later in the proceedings because the "public filing" doctrine under Rule 3.6 allows it. This is a vital building block for assembling the case to be made to the public.

III. **LITIGATION COMMUNICATIONS DESTINY= THREE Ps**

It is manifest that planning, planning, and planning are the cornerstone of any successful litigation or crisis communications strategy. The strategic margins that are available to corporations and all litigants for that matter are broadest before a lawsuit is filed. The plaintiffs' bar keenly recognizes this and in the context of class action litigation has created an environment in which evidence is almost optional because public opinion can be leveraged so effectively.

A. **Find It Before They Do**

The best opportunity for corporate litigants to be an active participant in their reputational destiny is developed and refined before a complaint is filed or a legal issue is mature. H&K's experience demonstrates repeatedly that companies that engage actively in scenario planning and proactive analysis of legal exposure and the putative impacts on critical stakeholders routinely settle quicker, shape stakeholder opinion, and protect corporate reputation. Experts say the proof of the foregoing proposition lies in the Tylenol recall over a decade ago. To this day, Johnson & Johnson is credited with strengthening its reputation through its adept handling of a terrible crisis. The planning that J&J had in place for crisis and threatened litigation clearly enabled the response. Despite very public litigation, a recent Harris Interactive Survey ranked Microsoft as the second most reputable company in the country. Microsoft ultimately understood that the public was a *de facto* juror.

In the wake of shocking revelations of corporate misconduct and new governance standards, it appears that corporate counsel must now embrace a broader managerial and custodial function as it relates to crisis avoidance and litigation management. Rule 1.6 of

the ABA Model Rules of Professional Conduct was recently amended to include financial wrongdoing as an exception to the confidentiality of information provided to counsel. The provision reads as follows:

> (b) A lawyer may reveal information relating to the representation of a client to the extent a lawyer reasonably believes necessary:
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and furtherance of which the client has used the lawyer's services…

Coupled with the evolving "noisy withdrawal" provisions for outside counsel in connection with financial disclosures, Rule 1.6 in essence allocates an internal (and unenviable) whistleblower function to outside counsel. It is axiomatic that a corporation's ability to guard against crisis and litigation is linked to its ability to anticipate its vulnerabilities and engage in an analysis which yields a blueprint for managing various litigation and crisis scenarios. Corporate Counsel's centrality to this process is critical in light of the legal interests that are at stake.

Given the climactic change of the last couple of years, corporations are saddled, to a significant degree, with challenges that historically were relegated to the imagination. The meaning of "notice" and "standards of care" are changing as is accountability to shareholders, regulators, and other interested parties on the litigation and crisis management front. In some cases, the Department of Justice expects corporations to conduct exhaustive internal investigations and then turn over their findings to prosecutorial authorities and waive privilege at the same time.[2] All of this makes for great head-lines and ready made cases.

[2] U.S. Department of Justice Memorandum to Heads of Department Components United States Attorneys from Larry D. Thompson, Deputy Attorney General, on the Principles of Federal Prosecution of Business Organizations. (January 20, 2003)

In growing numbers, companies are now actively engaged in detailed risk assessment campaigns bolstering crisis and litigation management protocols. While critical communications planning is a companion mandate in this effort, vulnerability assessments and the development of management plans are a first step. Because the exercise has palpable legal import, the collaborative process should be driven by corporate counsel. A representative template can include the following considerations:

(1) *Crisis Management and Communications Plan*: Recent events have documented the fundamental need for a comprehensive crisis management plan that accounts prospectively for a variety of contingencies but is nimble in its design and execution. While crisis response is key, crisis communication is critical to link action and perception. A crisis management team should be put in place with authority from the C-Suite to engage corporate personnel at all levels and demand accountability. Once in place, the crisis management plan is rehearsed through crisis simulation drills addressing both remediation and communication issues.
(2) *Thorough Risk Assessments:* Risk assessment and audits have been routine for most companies but typically the involvement of counsel is limited. The new standards for risk assessment require an in depth analysis of production, sales, physical security, intellectual capital security, and wide range of subjects that demand both legal and crisis/security expertise. This assessment must be initiated by counsel because exposure issues can be substantial.
(3) *Sufficient Utilization of Insurance and Other Tools*: New risks almost always translate into new products. The insurance industry immediately kicked into gear in the aftermath of 9/11 and is already offering a variety of products that are designed to insure against those risks. The risk/reward calculus for these products is essential and requires modeling that must be conducted under the auspices of an attorney with appropriate consultation. Similarly, risk consulting service providers have a variety of new services to offer. Not all new products are warranted or appropriate but they must be considered in the context of protecting the fundamental interests of the corporation.
(4) *Cyber-Terrorism:* Yesterday's hackers may become tomorrow's cyber-terrorists. It is now clear that a lone individual can shut down the operations of a company or hold companies' hostage by infiltrating critical information sources. Corporate counsel must be aware that companies can now be liable to shareholders if they fail to take adequate precautions to guard against cyber-terrorists. Utilizing appropriate security experts can mitigate this risk substantially. In addition, back-up systems equip a client to shift immediately to an alternate structure, making them less vulnerable.
(5) *Employee Screening:* The role of employees in contributing to and guarding against risk and crisis is central to any risk management plan. Clearly, employees have

unique access to corporate assets and information and must be trusted to protect those interests. Employee screening is a sensitive proposition that requires discrete procedures informed by legal obligations and security necessities.

(6) *Corporate restructuring:* In some cases, the findings of a comprehensive risk assessment or crisis vulnerabilities audit will warrant the consideration of corporate restructuring to guard against certain risk categories. Corporate Counsel must recognize that integrating legal expertise and risk assessment protocols is essential. Only lawyers have the transactional capability to engage in this process and decipher the legal mandates of a risk audit.

(7) *Broader use of intelligence:* Senior management and Directors must have at their disposal business intelligence that enables them to consider risk more thoroughly. Corporate acquisitions, layoffs, new product offerings, and other initiatives all have compelling business motives but they also carry with them enhanced possibilities of security breaches and crisis potential that must be evaluated carefully. The collection and analysis of this data is sensitive and should be coordinated by outside counsel with appropriate consultants.

The utility of risk assessment and prospective crisis management should be clear. But it is apparent that the more extensive the process and the more robust the analysis, the more likely it is that information will be discovered that should not see sunlight for obvious and legitimate legal reasons. In addition, a comprehensive crisis management audit will include recommendations, not all of which will be immediately implemented by the corporation. The nightmare scenario is that a crisis erupts and plaintiffs use the discovery process to obtain risk assessment documentation not yet implemented, all of which is used by plaintiff's counsel in an attempt to crucify the defendant. For this reason, many companies have adopted the "ignorance is bliss" standard for risk assessment. In this era of heightened corporate accountability such a defense, albeit well crafted and legally politic, is likely to fail, underscoring the expanded role for counsel as a gatekeeper and project coordinator of the preemptive work that must be done.

B. **Don't Be Afraid to be Transparent**

Critical to building public trust and earning the image equity that protects corporate reputation during high profile litigation or crisis, is defining very clearly and specifically the standards and positions of the company on the most difficult and controversial issues the company faces a going concern. Ideally, this should be an outgrowth of the risk assessment and crisis management protocols discussed above.

Corporate counsel must work very closely with corporate communications in the aftermath of the process just discussed to develop crisis and litigation communications plans that project the corporate brand with resonance and through the compelling depth and clarity of its position in anticipated or potential litigation.

The essential planning predicates include: a multi-disciplinary approach, audience specific analysis, and broad tactics that work both through and over the media to initiate and shape opinion of key stakeholders. To develop an effective litigation or crisis communications strategy, it is important to start early. An early start enables counsel and corporate communications to understand each other's needs and develop an effective working relationship. It provides the time needed for effective public relations planning in coordination with the business and legal strategies, which is absolutely essential. A communications plan should account for the following:

Situation Assessment – An assessment of the situation should be conducted, analyzing strengths and vulnerabilities from the business and public relations perspectives as well as the legal. The analysis should include stakeholders and their likely needs, concerns and impacts.

Scenario Analysis – Scenarios should be developed to identify the situation's potential options and outcomes, including their likelihood of occurring and potential consequences if they do. Such a risk assessment can be invaluable in determining the most likely scenarios, as well as the ones with the highest impact. Both the situation assessment and

scenario analysis should be updated periodically at key points of the case to determine whether changes in strategy are required.

Milestones – Timing of litigation milestones should be established, to ensure coordination with public relations communications and outreach to various audiences and to prepare for potential strategies by opponents.

Audience Identification – Target audiences can be identified, which nearly always go beyond media and the general public. Most important to a corporate client are generally customers and employees. If a company can hold onto them throughout litigation or crisis, almost everything else is survivable.

Research – Opinion research can provide invaluable information on public attitudes to drive communications strategies and identify the most effective messages. This process also builds an empirical platform upon which to base the communications plan.

Key Messages – Key messages must be developed and incorporated in communications across the target audiences. Effective key messages must support and be consistent with legal messages, while being written in lay language for audiences outside the legal process. Each outside audience – employees, customers, investors, vendors, regulatory officials, and others – will have different issues. While overarching key messages must be consistent, key messages for each group must address the group's specific issue to be fully effective. Messages also provide an opportunity to test potential legal arguments on outside audiences and to convey the strength of the case, potentially driving the opposing party to a favorable settlement.

Communications Strategies – Public relations strategies and tactics identify the methods and timing for communications to the different target audiences. Many communications strategies can be employed to reach different audiences. However, the most important ones for all audiences are the key messages and question-and-answer sheets, for use within the litigation and crisis communications team. These ensure messages are delivered accurately and potential questions are foreseen before they are asked. In some high-profile cases, a party will develop a web site specifically for communications related to the litigation.

Media Training & Spokesperson Selection – Media and message training must be provided to spokespersons, using simulated interviews to ensure messages are tested against likely difficult questions and spokespersons are prepared to communicate effectively. In high-profile litigation, it is often most effective to use a single spokesperson. Frequently, this will be an individual from corporate communications but in every event this decision should be calibrated carefully to account for the particular circumstance. In increasing measure, media often prefer access to counsel because the attorney is the one with the greatest knowledge of the legal issues and often the facts of the case. In this instance, the attorney should be thoroughly media-trained to ensure messages are delivered accurately. While the public relations consultant may be the spokesperson in some situations, it is usually the least desirable of the three choices. While the consultant will be experienced in media techniques, reporters would prefer to

talk with either the client's in-house communicator or the attorney, who are likely to be knowledgeable about the facts.

Third-Party Allies – A third-party advocacy program should be established. Such a program can be of substantial assistance to a corporate litigant. Just as expert witnesses can aid in a courtroom, third-party allies can provide credibility on critical legal issues to outside audiences. The Hill & Knowlton litigation survey cited earlier also found that 45 percent of respondents said third parties were the most credible source of information, more than the 34 percent who favored media. These third parties included government and regulatory officials, legal professionals, activists, and academics. Such third parties can provide a more objective, credible source for a company or individual accused of wrongdoing in litigation or other legal proceeding.

Coalition Building – In areas of threatened crisis or litigation in which the issue does or will likely affect a number of companies, forming coalitions around the issue can be very effective and can rally public opinion. The coordinating function for these efforts can and should join corporate counsel, government relations, and corporate communications. Frequently, an outside party including chambers of commerce, trade organizations, or foreign policy groups can serve as the umbrella under which the coalition is organized. The power of the coalition can be expressed in sponsorship of legislation, gorilla media tactics, and a variety of other initiatives that serve business, legal, and reputational interests.

V. TRY IT IN THE COURTROOM OR TRY IT ON TV: YOU DECIDE

More than ever, companies must engage in strategic communications planning when stakes litigation or crisis looms. A communications strategy that articulately lays out company's legal position to non-legal audiences is crucial to the preservation of corporate reputation and business goals. Given that America's Fortune 1000 spends on average almost $12 million annually on legal costs – most of which are litigation driven – reducing the reputational and financial impact of litigation and crisis through savvy and sophisticated planning is imperative. With a coordinated strategic plan, a company will inevitably be prepared to respond effectively without appearing to cover up its actions or seem reactive.

VI. **CONCLUSION**

The impact of the media and public opinion on big business litigation and crisis communications is animated more vividly than ever before. The market for news on business litigation seems to be unslakable thirst, with news radio, business magazines, 24-hour cable TV news networks, Court TV, local TV stations, and the Internet. Today high-profile litigation almost inevitably brings attorneys and public relations professionals together. It is, therefore, essential that corporate counsel and strategic communications professionals understand the critical role that each plays. The combination of the actors here is far greater than the sum of the parts.

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