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THE CLAIRVOYANT CORPORATION

— General Counsel as —
SUPERMEN



03 Contents

04 THE CLAIRVOYANT CORPORATION
General Counsel as Supermen

10 SMART SOCIAL MEDIA STRATEGY
with Eliot Frick

12 THE GNC “JACK3D” LAWSUIT
Retailer Liability Hangs in the Balance

15 BLOGS
Worth Following

16 LEVICK
In the News

17 SIGN UP
for LEVICK Insights

COVER IMAGE: Risk management is the identification, assessment, and prioritization of risks (defined in ISO 31000 as the effect of uncertainty on objectives, whether positive or negative) followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events or to maximize the realization of opportunities. Risks can come from uncertainty in financial markets, project failures (at any phase in design, development, production, or sustainment life-cycles), legal liabilities, credit risk, accidents, natural causes and disasters as well as deliberate attack from an adversary, or events of uncertain or unpredictable root-cause.

The Clairvoyant Corporation

General Counsel as Supermen

Richard S. Levick

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If we've learned anything in the last five years, it's that renewed business growth, which now seems imminent, must rely on broad and literate risk management, risk avoidance, and risk prediction if it is to be sustainable. We need to know where our exposures lurk, including those of our own making as well as those thrust on us by the actions of competitors, adversaries, and regulators.

Thus armed, we can take timely action to set our houses in order and plan to either contest or adjust to new legislative and regulatory initiatives on the horizon.

"A fundamental priority of all corporations must be to create a culture of risk avoidance and accountability based on nothing less than a form of corporate risk clairvoyance," observes Arvin Maskin, Co-Chair of the Mass Tort & Products Liability practice group at Weil, Gotshal & Manges, LLP.

"This clairvoyance is fundamentally different from 'crisis management,'" says Maskin, whose practice includes a broad range of domestic and international litigations and crises, and who counsels corporations on risk management. "Here we are talking about the identification, quantification, and avoidance of corporate risk before crises evolve."

Of course the question gets begged, how does one predict future risk absent the clairvoyant's proverbial crystal ball? "I believe strongly in leveraging historical experience, including use

of a systematic application of ‘lessons learned’ from prior litigation or events involving one’s own company or industry, or from other companies with relevant experience,” advises Maskin. “One might even consider a type of ‘stress test,’ not dissimilar to the ones imposed on financial institutions, to see how the company holds up,” he says.

In this context, a recent study by KPMG is extremely well-timed because it focuses on how, in general, risk can be turned to advantage, and how a new breed of leader—the corporate General Counsel—has gradually emerged as a key player in the risk management arena.

“Beyond the Law: KPMG’s Global Study of How General Counsel are Turning Risk to Advantage” is based on a survey of 320 GCs in 32 countries. It shows how in-house lawyers are no longer just overseers of outside counsel or practitioners handling mundane matters. They have now become, as KPMG puts it, “barometers” for management and boards. While their qualifications as risk-predictors are most notably recognized by their colleagues in the regu-

latory area, the impact of risk prediction is felt at every level of corporate planning, from M&A to litigation.

“We all know that litigation is costly and disruptive, and often does not take place in isolation but on multiple fronts—class actions, congressional investigations, securities claims, criminal investigations, investor relations inquiries, and so forth,” says Maskin.

“The fallout may not only be significant in financial terms, but also in the harm to brand, reputation, and goodwill—and possibly even trigger a realignment of the regulatory environment, usually for the worse,” he adds. “So there’s little wonder that general counsel feel pressure to perfect their skills at risk identification, mitigation, and management, and to do what is necessary and possible to avoid such triggering events in the first place.”

Little wonder indeed, yet it’s noteworthy how long this purported transformation of the GC’s role has taken to evolve. Ever since the 1980s (when, among other events, the influential trade association now called the Association of

Corporate Counsel was founded), the in-house sector has been struggling to gain a place in the sun as deal-makers, rather than deal-breakers; as business advisors, not just legal scribes.

It might not be too glib to suggest that the incessant corporate scandals of recent years raise serious questions as to how much this decades-long struggle really achieved. But the KPMG data may show that a turning point has indeed been reached, reflecting perhaps the recognition by C-Suites and boards that—beset on all sides by legal and reputational disasters—they can no longer afford to under-utilize this ready resource. That said, the KPMG report advises against undue optimism, especially when a full third of responding GCs say they’re still looked upon by their colleagues in management as a “necessary evil.”

There are organizational factors accounting for this resistance to the ongoing ascendancy of the GCs. Nearly 60% of KPMG’s respondents work at law departments organized along functional lines, which, on a day-to-day basis, separates them from the business units and thus retards efforts to embed GCs in the business decision-making process. “Not all companies are structurally or culturally wired to encourage the timely flow of information to the general counsel at the embryonic stage,” says Maskin.

Again, though, exigent circumstance may be forcing a sea change. For boards, the expanded role of the GC can be indispensable as risk and compliance oversight are now such prepossessing boardroom concerns. Board members

who face personal liability for oversight shortcomings have a particular interest in strong GCs who can assess risk at the earliest possible juncture. Further, in North America, with its stringent regulatory regimes and an altogether litigious environment, nearly half the KPMG respondents already sit on their companies’ boards.

The KPMG study is additionally telling because the results often show near unanimity. More than 90% of respondents cite the rising volume and complexity of regulation as the greatest organizational risk and—further indication that corporations are paying more than lip service to the idea of GCs as risk predictors—around 70% say their companies are formally training corporate counsel on legislative matters.

Apparently, government relations veterans and lobbyists now have new on-the-job partners even as, ostensibly, legal teams will work more closely with other risk-management teams throughout the organization. For GCs, outside law firms are also obvious partners. “Consider the fact that law firms naturally work with companies, institutional investors, banks, and insurance companies to routinely quantify acquisition risk,” says Maskin. (Risk prediction in M&A would seem additionally critical when corporations buy into new industries that have their own specific risk profiles outside the acquiring company’s prior experience.)

The utility of outside counsel as part of the risk assessment function varies broadly. For example, employees at all levels of the company

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need document discipline training. Enough corporations have been savaged in courts of law and the Court of Public Opinion by what Maskin describes as “seemingly insensitive or incendiary verbiage or ill-considered musings in internal emails, engineering memos, marketing reports, or even board minutes” to appreciate the need for this discipline.

Data security is another such area where a richer collaboration of law departments and law firms holds much promise. Not accidentally, 53% of KPMG’s respondents said that data security is their principle future concern. Here, their anxiety is not about future legislation or regulation, but the enforcement of existing rules as well as the overall impact of security breaches on reputation and revenue. With such issues, the GCs are emerging from the shadows as public figures concerned about, and participating in, the very survival of the corporate brand.

In our experience as communications consultants, we’ve seen significantly greater involvement among GCs or their direct reports in strategic campaigns of various sorts, to a point where they’re often team leaders. Such a public role, embracing so many non-legal considerations, would have been generally unthinkable in the 1990s or the early years of this century. (There were exceptions; e.g., during the Bhopal crisis in 1984, Union Carbide’s spokesperson was the GC.)

GCs’ oversight of corporate social media is another critical case in point, directly related to

their role as risk-predictors. Here, after all, we find a laundry list of salient risks: disclosure of confidential business information, reduced employee productivity, negative remarks by current and former employees, damaging remarks about competitors, etc. For GCs, the same professional dynamic applies with Facebook and Twitter as with the dictates of the SEC or the EU Commission that likewise demand prescience and early assessment.

In the end, it’s all about the public exposure that lies ahead and, even amid the glare of a public investigation or media frenzy, asking and answering the decisive question: What’s Next? **L**

Richard S. Levick, Esq., President and CEO of LEVICK, represents countries and companies in the highest-stakes global communications matters—from the Wall Street crisis and the Gulf oil spill to Guantanamo Bay and the Catholic Church.

SMART SOCIAL MEDIA STRATEGY

with Eliot Frick



In this LEVICK Daily video interview, we discuss the strategies that drive successful social media engagement with Eliot Frick, the Founder and CEO of bigwidesky. At a time when consumers are demanding increasingly personal interactions with brands, effective social media outreach is not merely a box to be checked. It is an ongoing conversation that transforms companies, organizations, and governments into good faith participants in the social network.

The GNC “Jack3d” Lawsuit

Retailer Liability Hangs in the Balance

Gene Grabowski

Originally Published on LEVICK Daily



The *New York Times* recently published a sprawling, six-page feature story that signals a new era in retailer liability.

The piece details the death of Army Private Michael Lee Sparling, who collapsed and suffered cardiac arrest just 10 minutes into a routine training run. According to a lawsuit filed by Private Sparling’s parents, he died because he took a recommended dose of the workout supplement Jack3d (pronounced “Jacked”) prior to exercise.

Jack3d is designed to provide its users with an energy boost while they work out—and does so partly via a stimulant known as dimethylamylamine (DMAA), which some health experts and regulators say affects the body in ways similar to amphetamines. The allegedly fatal dose was purchased from a General Nutrition Center (GNC) store located on Private Sparling’s base at Fort Bliss, Texas. As such, the leading supplement retailer now finds itself a co-defendant in the Sparling Family’s wrongful-death suit against Jack3d manufacturer USPlabs. That’s despite the fact that federal regulations place responsibility for product safety on manufacturers, not retailers who rely on manufacturers’ good faith and guarantees.

Of course, if the Sparling Family and growing chorus of industry critics have their way, that may not remain the case for much longer—at least where nutritional supplements are concerned.

In many ways, GNC makes for the perfect test case for such an expansion of product liability regulation. First, it is the face of a supplement industry long the target of activists who argue that its products contain ingredients that must be more tightly regulated than those found in traditional foods and beverages. Second, it could be said that GNC actually is the industry. It hauled in more than \$2.4 billion in revenues last year and dominates the market with more than 8,100 retail locations around the world.

Third, and perhaps most important, GNC’s status as an industry leader means it is held to a higher product safety standard. In this context, it is a victim of its own brand success. Fairly or unfairly, consumers view GNC as a stamp of approval. With so many questions swirling around supplement safety—and so many different products available online or from other relatively anonymous sources—consumers believe the retailer is a trustworthy judge of product safety. Simply put, they think that if it’s on GNC’s shelves, it must be OK.

That implicit understanding between GNC and its consumers is a pillar of the company’s brand. As such, it needs to do more than issue a statement about the lack of scientific evidence that DMAA is dangerous. That, coupled with current limits on retailer liability, likely won’t be enough to win in court, let alone in the Court of Public Opinion.

GNC needs to aggressively communicate—in the both traditional and social media—the fact

that all of its products are subject to strict reviews; that a physician board helps guide the development of new products; that it works with independent testers to certify that its products contain no ingredients banned by the World Anti-Doping Agency; and that it will continue to find ways to even further ensure that every product it sells is safe.

These messages need to serve as the centerpiece of a concerted litigation communications effort aimed containing the damage to its brand, consumer trust, and regulator relationships. Instead, they are buried on GNC's website—far deeper than conspicuous offers listing Jack3d as a “hot buy.”

their case for imposing tougher rules on supplement retailers. As The New York Times piece amply demonstrates, they won't have much difficulty finding sympathetic partners in high-profile media.

Right now, GNC's “no comment” strategy is ceding control of the conversation—and if it continues to do so, a major courtroom defeat might be in the offing. That won't only signal a new era in retailer liability; it could usher in an entirely new, and far more onerous, regulatory crackdown. **L**

Gene Grabowski is an Executive Vice President at LEVICK and a contributing author to LEVICK Daily.



BLOGS worth following



THOUGHT LEADERS

Amber Naslund

brasstackthinking.com

Amber Naslund is a coauthor of *The Now Revolution*. The book discusses the impact of the social web and how businesses need to “adapt to the new era of instantaneous business.”

Brian Halligan

hubspot.com/company/management/brian-halligan
HubSpot CEO and Founder.

Chris Brogan

chrisbrogan.com

Chris Brogan is an American author, journalist, marketing consultant, and frequent speaker about social media marketing.

David Meerman Scott

davidmeermanscott.com

David Meerman Scott is an American online marketing strategist, and author of several books on marketing, most notably *The New Rules of Marketing and PR* with over 250,000 copies in print in more than 25 languages.

Guy Kawasaki

guykawasaki.com

Guy Kawasaki is a Silicon Valley venture capitalist, bestselling author, and Apple Fellow. He was one of the Apple employees originally responsible for marketing the Macintosh in 1984.

Jay Baer

jaybaer.com

Jay Baer is coauthor of, “*The Now Revolution: 7 Shifts to Make Your Business Faster, Smarter and More Social.*”

Rachel Botsman

rachelbotsman.com

Rachel Botsman is a social innovator who writes, consults and speaks on the power of collaboration and sharing through network technologies.

Seth Godin

sethgodin.typepad.com

Seth Godin is an American entrepreneur, author and public speaker. Godin popularized the topic of permission marketing.

INDUSTRY BLOGS

Holmes Report

holmesreport.com

A source of news, knowledge, and career information for public relations professionals.

NACD Blog

blog.nacdonline.org

The National Association of Corporate Directors (NACD) blog provides insight on corporate governance and leading board practices.

PR Week

prweekus.com

PRWeek is a vital part of the PR and communications industries in the US, providing timely news, reviews, profiles, techniques, and ground-breaking research.

PR Daily News

prdaily.com

PR Daily provides public relations professionals, social media specialists and marketing communicators with a daily news feed.

BUSINESS RELATED

FastCompany

fastcompany.com

Fast Company is the world's leading progressive business media brand, with a unique editorial focus on business, design, and technology.

Forbes

forbes.com

Forbes is a leading source for reliable business news and financial information for the World's business leaders.

Mashable

mashable.com

Social Media news blog covering cool new websites and social networks.

LEVICK IN THE NEWS

ARTICLES

Christian Science Monitor | MARCH 20, 2013

Steubenville Rape Trial: Why Media Came Under Fire – and What’s at Stake

Insurance Journal’s Carrier Management | MARCH 19, 2013

Richard Levick: Tweeting CEOs, AIG & Shaping The Conversation

Insurance Journal’s Carrier Management | MARCH 19, 2013

Richard Levick on The Questions Boards of Directors Need to Ask About Social Media

Insurance Journal’s Carrier Management | MARCH 19, 2013

Richard Levick: Enhancing Your Brand

Reuters | MARCH 15, 2013

Red Bull’s Openness on Faeces Threat Could Pay Off

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