

Brand Protection in High Exposure Litigation



Consumer-facing companies understand that brand protection is mission critical activity. The traction of a brand reflects, among other things, consumer perceptions of a company together with the quality, value, and safety of its products and services. By “consumer-facing companies,” I mean companies that interact directly with consumers. Diluting or undermining those important consumer per-

ceptions is high-risk behavior. Brands do not simply materialize. Rather, they are created over time through constant stewardship, protection, and reinforcement. Every consumer interaction is a potential brand-building or brand-diluting opportunity. Strong brands often have associated strong consumer loyalty, goodwill, and secondary meaning in the market, which has substantial, if not calculable, value. Products and services may come and go, but the brand, with proper management, may live on and prosper.

C-level executives live this reality. Much of their professional attention is devoted to

brand-building activities. While there are no shortcuts to building a strong brand, there are quick ways for a brand to suffer irreparable damage. Catastrophic events, product safety issues, or corporate integrity matters all potentially can assault a carefully cultivated brand. Indeed, instantaneous transmission through any number of social media to a seemingly limitless virtual audience gives frightening new meaning to the old saw “bad news travels fast.” Negative information about a company or its products can “go viral” before decision makers know of a problem. Once this information is in the blogosphere, it takes on virtual life of its own. This virtual free market of information has no rules of evidence, no master editorial board, and no fact checker. Accurate and factual information can reside next to complete fantasy often with no filter but the commonsense and wisdom of the reader. The court of public opinion can render its “verdict” on this negative information—whether it is true or false—with immediate lost sales and associated financial consequences. All of this will occur years before a judge or jury hears any real evidence of a company’s liability. The demise of Arthur Andersen teaches a powerful lesson: winning in a court of law can be far less important than winning in the court of public opinion. Indeed, by the time Andersen was vindicated on federal charges, there was no company left to save.

Some problems are simply too significant, too exigent, too sensitive, or too harmful to await resolution in a court of law. Taking on adverse events and correcting negative information is often time-sensitive and critical corporate behavior for the survival of a brand. A survey of recent headlines provides potent examples of bad things that can happen to an array of companies. A catastrophic oil spill



■ W. Scott O'Connell is a partner of Nixon Peabody LLP in the firm's Boston, Massachusetts, and Manchester, New Hampshire, offices. He is the Vice Chair of the Litigation Department and leader of the firm's Class Action and Aggregate Litigation practice. Mr. O'Connell represents integrated financial service companies—including banks, securities firms, insurance companies, and regulated subsidiaries of nonfinancial parents—in federal and state court litigation and before regulatory agencies. He is a member of DRI and its Government Enforcement and Corporate Compliance, Trial Tactics, and Commercial Litigation Committees.

into the Gulf of Mexico, the discovery of lead paint in toys imported from China, salmonella and E. coli contamination of food products, and mechanical problems with car accelerators are all current issues in some stage of active management by the affected companies. In some circumstances, health, safety, brand preservation, and goodwill require immediate, decisive, and responsive action. Often, such actions are required long before meaningful litigation risk analysis can occur. Immediate reputational harm eclipses many other considerations. A company's immediate responses to exigent circumstances can have a powerful influence in the court of public opinion. These early actions in the heat of the moment can chart a course for brand preservation or brand destruction.

How do you assess the readiness of your team to manage a situation like this? Do you have a crisis management plan? Do you have an identified team with specific responsibilities? Do you have media and new media communication strategy that sheds "no comment" in favor of substantive communications with your affected consumers and the interested public? Is your trial team and strategy in sync with your crisis response? If the answer to any of these questions is no, you are probably not ready. Time to get busy!

Detailed below are some practical considerations for dealing with the three phases of a crisis response: (1) planning for the crisis; (2) active management of the exigent events; and (3) managing the litigation, regulatory, or other fact-finding processes.

Phase One: "Fix the Roof While the Sun Is Shining"—Things to Prepare in Advance

The middle of a catastrophic event is not the time to invent a response protocol. Advance preparation with the professionals on whom you will call is critical for an effective response. Appropriate planning should include the following:

- Identifying, educating, and training your crisis response team
- Causing your response team to work together in advance of an event
- Preparing your internal and external media strategy
- Identifying the communications protocol

- Identifying the important brand attributes that you want underscored by your responsive actions

Identify, Educate, and Train Your Crisis Response Team

Multiple constituencies and disciplines are often necessary for an effective response.

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Quickly reconciling public messaging recommended by the public relations team with appropriate counsel from the legal team is very important.

Specific circumstances will dictate ultimately who should be part of this team. Core members should include senior managers with operational command and control authority, chief legal counsel, regulatory compliance, and corporate communications. This core group should drive the process that helps all functional areas develop a coordinated plan for their specific area of responsibility. For example, functional leaders of technology, human resources, sales and fulfillment, or other areas will need to tailor plans for their specific areas of responsibility, but they all need central coordination so that the plans can be implemented in an integrated way. All members of the core team as well as functional leaders should obtain crisis response training to establish uniform expectations, set priorities, and align all participants. As with any other responsibilities, plans need to be reviewed, updated, and assessed for gaps. This required behavior should be cyclical on the corporate calendar and enforced by senior management.

Cause Your Response Team to Work Together in Advance of an Event

Because a response team necessarily needs to be exceedingly functional under highly stressful and exigent circumstances, it is critical that the members form a work-

ing relationship in advance of an exigent situation. A natural area for tension in these working groups exists between public relations professionals and members of the legal team because each is accustomed to doing very different things. Lawyers by training and orientation are issue spotters and risk minimizers. Public relations professionals are by training and orientation focused on getting meaningful, timely messages to the public about a company. Some lawyers see nothing but risk in every message issued before the implications of events can be fully analyzed and considered. For the reasons referenced above, saying nothing or issuing vacuous statements about the unfolding issues is largely unacceptable and will be savaged across the net. Thus, from the very start of managing a crisis, a response team may have constituencies with competing orientations, and with differing goals and objectives. This is a dynamic that needs management before the crisis. Quickly reconciling public messaging recommended by the public relations team with appropriate counsel from the legal team is very important. Senior managers must set the expectations of how these professionals will collaborate to provide effective and timely communication even with associated risk. Getting these critical players to work well together on this critical issue takes practice and training. Work in this area prior to an exigent event will pay significant dividends in the effectiveness of your response.

Prepare Your Internal and External Media Strategy

In a crisis situation, an established, functional trusted relationship with the established mainstream or industry specific media can be very helpful. Such relationships are cultivated over time through providing accurate, timely, and responsive information to journalists in the regular press of business. During the press of a crisis, you will want specific and laser-focused messaging to cut through the cacophony of chatter. In those circumstances, solid relationships with the media make a difference.

Cyberspace presents a different challenge. The limitless dissemination of negative information in the virtual world makes advance work challenging. If your com-

pany is actively engaged in social media, it is a possible tool for providing factual information. Additionally, some companies, industries, or issues are followed by influential bloggers and Internet-based media. Developing trustable relationships with these specialty media outlets may prove useful in the midst of an exigent situation. Indeed, bloggers who closely followed the criminal cases involving the Duke lacrosse players improperly charged with rape are credited by the defense counsel involved with debunking inaccurate representations made in the mainstream media. The lesson is that this new media has power that if harnessed can be potent. How to engage it to assist with an exigent situation is worth some consideration and planning.

Identify the Communications Protocol

Demonstrating a company's grasp of the issues, recognition of the harm caused, empathy for those effected, and a commitment to deliver a resolution are necessary to stop the hemorrhage of public trust often caused by an exigent circumstance. Delivering these messages in a meaningful and effective way requires many things. Depending on the gravity of the circumstance, your CEO or some other senior leader should be prepared to be the face of your company throughout the exigent circumstances underscoring these important messages. A company needs to provide timely, accurate, and consistent information as it becomes available. A company needs to avoid dissonant messaging completely. It should not overstate what it knows. If some things are unknown, then it should say so. To accomplish these goals, a company must prepare a protocol detailing how and by whom information will be delivered. The people delivering information should undergo media training so that they are comfortable serving as the face of your company in a crisis situation. A company should assemble an infrastructure appropriate to rapidly disseminating information as it becomes available. The core response team and functional heads need to know how they can provide relevant information for possible dissemination. Again, this is not something that you want to invent in the middle of a crisis situation.

Identify the Important Brand Attributes That You Want Underscored by Your Responsive Actions

Planning for crisis response begins with the attributes of your brand, mission, corporate culture, or values that you want to preserve throughout the ensuing events. These important identity issues should

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inform all of the decisions that your company will make during a crisis. Clarity on these points will help a company navigate the rough waters with actions that help to re-affirm the company's brand.

Phase Two: "Houston, We Have a Problem"—Things to Do During a Crisis

Knowing that you are in the midst of a potential crisis situation is not always evident. Sometimes there is an event—such as an exploding oil platform—that provides clarity on the issue. Sometimes, however, events unfold incrementally over a period of time until a tipping point occurs. Knowing when, for example, stuck accelerators reached a crisis point for Toyota could be reasonably debated, and would require another article. Nevertheless, once a crisis has occurred—after the planning activities referenced above—it is important to communicate regularly with affected constituencies; be honest and accurate and don't overstate the circumstances; quickly take corrective action; focus on solutions, not blame; and admit mistakes.

Communicate Regularly with Affected Constituencies

Reestablishing trust and confidence starts with demonstrating knowledge, control,

and response to the situation. Regularly communicating on these points is helpful. Internal and external communications are very important. Regulated entities will likely need to develop specific communications for their regulator.

Be Honest and Accurate and Don't Overstate the Circumstances

Reestablishing credibility demands this. One of the fundamental missteps that a company must avoid is being dismissed as an unreliable source, because it breeds suspicion and compounds your problems rather than simplifies them. Also, it is important to make sure that your messaging is not dismissed as "sales puffery." This is a time when your company needs to demonstrate grounded self-awareness of the problem and its consequences.

Take Corrective Action as Soon as Possible

There is little to add to this point. Actions speak louder than words. There are few substitutes for delivering a fix to any resulting problem.

Focus on Solutions, Not Blame

During active crisis management, discussing blame corrosively distracts from the important messages that you need to make. Blame is a self-interested defensive issue that takes needed energy away from what the court of public opinion demands—a solution. Defer discussing blame until the exigent circumstance is under control.

Admit Mistakes

Admitting mistakes is a topic that gives all defense counsel heartburn. Their concern is that a company is admitting liability for something when not all the facts are fully known. This may be true. But, as described above, some circumstances simply cannot wait for a legal process to unfold to determine liability. In some circumstances, the credibility of a company to deliver a solution requires candid acknowledgement of the problem. This needs to be considered. Also, in the event that a company takes the route of admitting mistakes, it should avoid the temptation to engage in a "no admission" admission. Efforts to condition an

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admission of the mistake may eviscerate the effect it will have in the court of public opinion.

**Phase Three: “What Now?”—
Things to Do After the Active
Crisis Management Passes**

After the crisis has passed, your company should follow through on promises, investigate the facts and continue to correct misinformation, and, as necessary, defend legal actions.

**Follow Through on Any
Action Items Promised**

Rebuilding trust in a company’s brand requires careful follow-through. Promises made must be fulfilled.

**Investigate the Facts and Continue
Efforts to Correct Misinformation**

Knowing what happened and why is an important part of rebuilding trust with affected constituencies. A company should undertake an appropriate investigation—

directed by legal counsel—as soon as possible. The facts that are developed in this process will be necessary not only to dealing with any resulting legal claims but also to educating the affected constituencies about actions undertaken to prevent a similar event in the future. This is another trust-building activity that underscores the messages developed during the active management of the crisis.

Defend Legal Actions

Just as night follows day, lawsuits will follow a crisis. The actions described above are intended to prevent catastrophic consequences to a brand before a company arrives in a court. Some of these actions necessarily limit the options that a company may otherwise have had if the circumstances had not been catastrophic. With catastrophic circumstances a company may have been forced to take actions that would constrain its ability to defend against certain liability claims. Remember, in the type of case at issue here, the viability of a company’s brand is at risk. As

a result, a company will have made a calculated decision early on to stop the harm through active intervention in an exceptional case with an exceptional approach.

Despite constraints on liability, absent unusual circumstances, a company should be free to defend against overreaching damages or to pursue third-party liability. In doing so, it is important that a litigation strategy not work at cross purposes to the activities designed to insulate, to the extent possible, and rebuild a company’s brand, discussed above. It can undermine the brand rebuilding activities if a litigation strategy employs arguments or defenses that are inconsistent with the phase two activities. So it is important that the trial team fully understand the activities undertaken in phase two and outline the limits of its defense. Failing to appreciate that some defense may undermine attempts to rebuild a company’s brand may undermine the progress that a company has made by undertaking phase two activities. 