

THE JUSTICE DEPARTMENT ON LINE ONE, THE TIMES ON LINE TWO: CRISIS PUBLIC RELATIONS FOR THE IN-HOUSE COUNSEL

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I. INTRODUCTION: THE KNOCK ON THE DOOR, FOLLOWED CLOSELY BY THE RING OF THE PHONE

It is, unfortunately, a familiar story, albeit varied in its manifestations. The FBI agents appear, laden with search warrants and computer technicians. The Department of Justice intervenes in the multi-million-dollar False Claims Act case, heretofore blissfully sealed. The SEC announces an investigation into stock option backdating or files a broad enforcement action alleging accounting fraud. A Congressional committee wants to know why the nonprofit CEO makes a million dollars a year. A key executive is revealed to have defrauded the company out of millions of dollars through dummy contracts and kickbacks. In whatever manner, at whatever inconvenient time, the knock at the door comes, and the in-house lawyer must answer. It is the moment that he or she has feared, that has caused anxiety dreams on too many nights, but it is one that the lawyer has, in some measure, likely thought about and prepared for.

What the organization, and the in-house lawyer, may not be prepared for, though, is the ring of the phone that follows. “Clark Kent here, *Daily Planet*. We’re running a story on this grand jury subpoena, and we wanted to give you an opportunity to make a comment. We’re on a 5:00 deadline.”

It is, of course, 4:37.

The range of corporate and institutional crises that can befall a business organization, public or private, for-profit or nonprofit, grows broader all the time. With the increased scrutiny that business enterprises of all kinds face, combined with growing regulatory complexity in many industries, ever-evolving financial reporting standards, and the ubiquitous interest in corporate governance, the risk that an organization of any material size or public interest will face some type of high-profile bad event at some point in its existence is very good. With any luck, the organization will have in place a team of inside professionals and outside advisors and counsel that can assist it in responding to the substantive legal, financial or regulatory crisis.

However, one variable for which the organization may not be completely ready is the media attention that accompanies a crisis. There are lots of media outlets out there, and the 24/7 appetite for news content is enormous. Even where an event seems purely local in nature – a particularly bad patient outcome at a standalone hospital, for example, or a large environmental issue at a single location – the organization will be faced with persistent attention from local print and broadcast media and perhaps the trade press. Where the crisis involves a broader scope – an investigation of a large public company, a Congressional inquiry directed at an industry segment, allegations by federal or state authorities of systemic violations by a major player, etc., etc. – scrutiny may come from many other fronts as well: the national news and financial press, broadcast networks, wire services like Bloomberg, Dow Jones and Reuters and Internet-based media (including the Internet news services associated with traditional print and broadcast outlets), as well as the local and trade media. Further, the Internet means that even local stories have a broad and long-lived distribution. A story written by the local AP stringer in Wichita can appear on the websites of publications stretching from Fargo to Pascagoula, and can live forever, or at least for a long time, in the world of Google-land.¹ At the same time the organization’s management is trying to deal with this, it will likely also be faced with questions from concerned employees, inquiries from nervous joint venture partners, vendors or customers, and entreaties from irate board members. Such demands can well overwhelm the normal public relations facilities of the affected enterprise.

“But wait,” you may say. “Why is this a concern for the in-house lawyer? The lawyer’s job is to deal with the substantive crisis. It’s up to management and the PR people to deal with the media.”

This view, however, may prove shortsighted. At the simplest level, most crises that draw media attention in business organizations have a substantial legal component. The alleged financial fraud or corporate malfeasance may lead to government enforcement actions and private lawsuits by stockholders, bondholders or other aggrieved constituencies. The bad event purportedly arising from egregious negligence will undoubtedly be accompanied by a tort lawsuit, and may give rise to actions by federal or state regulators as well. Reported issues that call into question the integrity or financial viability of the organization may lead to adverse actions by vendors, joint venture partners or others having contractual relationships with the enterprise. What is said – or not said – to the media may have significant implications for the organization’s substantive and practical legal positions in these types of actions and investigations. Further, it is not at all uncommon to encounter the situation where the CEO calls in the in-house counsel and says, “Return the call from this reporter. Don’t say anything that will get us in trouble.” In-house counsel tend to make their stock in trade the notion that

¹ And that is not even to speak of the twilight world of blogs and Internet message boards, both of which can be expected to deal in great detail with significant corporate scandals and to do so with a rather pronounced point of view.

they are capable of handling anything. Sometimes, in a media relations crisis, their superiors take them up on that notion.

In any crisis with legal implications – and few crises do not have them – in-house counsel for a business organization have a role to play in the organization’s public response, and it is frequently one for which neither training nor experience have particularly equipped them. The purpose of this paper is to suggest some steps that in-house counsel should consider in helping their organizations deal with crisis media relations (and other crisis communications), and to provide some information that may help in-house counsel be a more productive player on the crisis communications team.

II. “CRISIS? WHAT CRISIS?”: FIRST STEPS IN THE COMMUNICATIONS STRATEGY

A. Assembling the Team

When a crisis with media implications breaks, the initial response time is likely to be short, and the tasks many. First and foremost, of course, the crisis response team must gather and assess as much information as possible about the relevant facts and whatever immediate substantive steps can or will be taken. However, that observation begs the question: who is the crisis response team?

Ignoring, for a moment, the question of outside advisors, the initial crisis response team should include

- Senior executive-level management: the chief executive, or someone with broad authority to act on his or her behalf
- Senior internal media relations/public relations/investor relations personnel, as applicable and available
- Some combination of the general counsel, senior internal litigation counsel, senior internal compliance and/or senior internal securities counsel, again as applicable and available²
- If not included in the foregoing, a senior-level person responsible for employee communications

² The nature of counsel’s involvement will, of course, depend on the organization of the entity’s internal legal function. For example, in some organizations, there may be a deputy general counsel who effectively acts as the senior lawyer on most matters, or there may be divisional general counsel or specialized counsel who are the most relevant lawyers for the particular matter. Similarly, the nature of the underlying crisis may dictate who should be involved: if it is an allegation of financial fraud in an entity that has publicly traded securities, for example, the senior lawyer responsible for securities disclosure should be part of the team; if what is involved is an allegation of Medicare fraud directed at a healthcare provider, it may be appropriate to have the senior lawyer who handles compliance or reimbursement matters on board.

It is vital that the team include senior, policy-making leadership, because the communications strategy requires both (a) as much comprehensive knowledge of all aspects of the situation as possible and (b) the ability to make and execute decisions with minimal need for approvals beyond the team, because time will be at a premium. In some circumstances, depending on the nature of the crisis, it may be advisable to include senior management of the relevant operating division or unit, the chief financial officer, or other senior personnel who are likely to play a significant role in staying on top of the facts and determining the message. In the grand spirit of “don’t give him anything good to hit, but don’t walk him”³, the team should be large enough to make sure that all relevant areas of expertise and decision-making authority are represented, but not so large that it will have difficulty in gathering quickly and arriving at agreed strategies.

For reasons that will be elaborated on below, it is critical that the general counsel or other appropriate, senior-level legal personnel be involved as an integral part of the team. Executive management and media/public/investor relations staff may not immediately think of this, and may actually discourage it, but the lawyer must find a way to insist on this. From both a risk management standpoint and, with any luck, a positive benefit standpoint, the lawyer must be involved in the early stages of a crisis communications and response strategy.

B. Assessing the Resources and Bringing in More Troops

Another early decision that must be made is whether the internal team is capable of responding adequately and appropriately to the media and communications demands, or whether it is advisable to enlist outside media relations advisors.⁴ Some organizations may have large communications staffs, with considerable expertise in dealing with the myriad constituencies who will take an interest in the crisis. Others may have a single individual with a dot-matrix printer, whose experience with the press consists of sending out the occasional press release announcing the opening of a new site or the festivities for Customer Appreciation Day. In any event, however, the day-to-day routines of the internal public relations group, whether large or small, may not provide adequate preparation for the torrent of attention that follows a highly public crisis.

Accordingly, one early decision that must be made is whether to bring in an outside advisor (or, if the organization has an existing relationship with an outside media

³ What the pitching coach says to the pitcher when the bases are loaded and the big hitter is at the plate, for those unfamiliar with baseball clichés.

⁴ The communications strategy may actually need to involve various types of “relations”: media relations, i.e., dealing with the print, broadcast and possibly Web-based media; governmental relations, i.e., dealing with public and political bodies that may have an interest in the matter; other public relations, i.e., dealing with the impact of the crisis on communications that are not specifically “news”-related, such as overall marketing efforts, positioning with strategic partners, “corporate image”-directed activities, etc.; and investor relations, i.e., communications with stockholders, bondholders and other constituencies in the capital markets, if applicable. For the sake of simplicity, and because it is the primary focus of this paper, from this point on most references will be to “media relations”, unless the context otherwise dictates. The general principles espoused should be understood to apply, *mutatis mutandis*, to other “relations” as well.

relations firm, whether its resources are up to the task or whether more specialized assistance will be necessary). The organization must quickly determine whether its internal staff – who will also have the other demands placed on them by their routine, pre-crisis tasks – can go it alone or not, because early action can be critical in crisis response. If outside advisors are to be brought in, that step should be taken as quickly as it prudently can.⁵

A key component of the decision to bring in outside help is the nature of the expected media attention (and related communications needs). One of the most vital attributes of those filling a media relations function, whether internal staff or outside advisors, is the quality of the contacts and credibility they have with the relevant reporters. If the nature of the crisis is primarily local, then, it is important to have on board those who have a track record with local media outlets. If, on the other hand, the crisis is likely to attract attention from the national press, it may be more advantageous to enlist the assistance of those who are experienced in that arena. To the extent feasible, it is obviously a good idea to seek out advisors who have a background and reputation in any specific area relevant to the particular crisis situation – a history with clients in the same industry, if the matter involves industry-specific troubles, or a background in financial fraud cases if that is the problem at hand. Whatever the circumstance, it is desirable to look for advisors with experience in working with situations involving significant potential legal liability. Public relations advisors and lawyers are frequently at odds with each other; finding an advisor who is used to interacting with lawyers can avoid various frictions and pitfalls (and suggestions for lawyers on interacting with public relations advisors will arise herein).

Further, any outside advisor must be a good fit with the culture of the team. While time is of the essence, it is important to do as much research as possible on the advisor’s historical approach to communications and to determine, as well as circumstances allow, how it fits into the strategy the organization expects to implement. Where, for example, the crisis involves a criminal or regulatory investigation as to which the entity is going into “full cooperation” mode, it is unlikely to be happy with an advisor whose approach to life is provocative and confrontational.

C. Where the Inside Lawyer Fits In

Coming back to the original thesis, internal counsel on the crisis response team must establish what his or her role will be and figure out how to be a productive, yet prudent, factor in the organization’s media relations effort. Most lawyers are conservative by nature, and in-house counsel are likely to be even more so. The lawyer’s instinctive response to word of almost any press inquiry is usually, “Tell ‘em we’ve got

⁵ See, e.g., Michael Bobelian, *When the News Is Bad: A Company in Legal Trouble Looks to PR Experts*, N.Y.L.J. (Apr. 16, 2004), at 5 (“Public relations experts recommend that lawyers act as early as possible [to help the client determine whether to bring in a crisis public relations team], so that they can keep a crisis from gaining momentum as unaddressed press reports accumulate.”).

no comment.” The conventional wisdom is that what you do not say will not be used against you.

However, in a serious crisis, the “no comment” strategy will probably not be viable for at least a couple of reasons, both of which will be elaborated on in succeeding sections:

- There will likely be a series of external events (new lawsuits, new indictments, discovery of prior similar incidents, involvement by additional regulators, etc.) which will give rise to rippling waves of stories. “We’re evaluating the situation” may work in the early days; as new stories emerge over time, it will look like stonewalling.
- In all probability, management, with or without prodding by media advisors, will feel an increasing need to “get our side of the story out”. In an isolated incident with a short half-life, the lawyer may succeed in arguing that it is best to let the publicity die a natural death. In the protracted, continuing-new-developments type of crisis that has become so familiar, the lawyer is unlikely to keep winning that argument.

Assuming it to be the case that the organization will determine at some point that it needs to start making substantive responses to inquiries and/or to make affirmative efforts to get its own message out, the lawyer needs to find a way to be a key player in that process. The primary reason for this is simple, and was alluded to Section I above: most corporate crises are going to involve litigation of some sort – with private litigants, with government regulators, or with both – and may well also involve other types of interactions with government regulators and, more frequently than ever, with Congressional committees or other elected officials. What the organization says in its media strategy must be coordinated with what is happening on these other fronts, some or all of which presumably fall in internal counsel’s bailiwick. If internal counsel can be involved on the front end as part of the media strategy team, it is simply less likely that statements will be made to the media that compromise key positions in lawsuit defense or regulatory strategy.

Beyond that defensive concept, there are positive contributions that can be made using the resources that internal counsel bring, with any luck, to their more regular work. Lawyers are supposed to be good at marshaling facts and analyzing the implications of those facts and how they fit together. When faced with insistent questions from a reporter on deadline, it is a natural thing for the organization’s spokesperson to want to say whatever seems at the time likely to show the organization in the most favorable (or least negative) light. However, that sort of under-pressure response may prove to be an erroneous one, or one that opens the door to further, more damaging inquiries because the spokesperson simply has not thought through the implications to which the statement logically leads. If the lawyer is involved on the team, he or she can help anticipate the sorts of questions that are likely to arise and remind management and the media relations squad of relevant facts that they may have overlooked or logical inferences that might be drawn from a hasty or incomplete statement, which inferences could lead to adverse

results later. Oversimplifying, by training and usually by inclination, lawyers tend to think before they talk. While that may frequently be perceived as an annoying habit, it can be of great assistance in planning a media response.

Further, the nature of the work of a general counsel or other senior internal lawyer is likely to encompass myriad disparate parts of the organization. Thus, the lawyer may be in a better position than many of the other folks on the team to have a command of the range of information that may prove to be relevant in developing a strategic response to media inquiries, or at least to know where such information is likely to be found.

Finally, there may sometimes be circumstances where the lawyer makes the best spokesperson for the organization. Some thoughts on those circumstances are put forth below.

III. “ONE DAY AT A TIME”: MOVING FORWARD WITH THE STRATEGY

A. Understanding the Dynamic, and Building a Routine

One of the most predictable aspects of a crisis is, of course, its unpredictability. From the standpoint of media relations, it is usually safe to start from the proposition that new and unexpected inquiries will arise as frequently as every day or so in the early stages, and will continue to pop up throughout the process. Adverse litigants and their counsel will seek out reporters and ply them with purported facts designed to show the organization in an unfavorable light. Disgruntled ex-employees will likely be located, if they do not come forward themselves. Documents provided to regulators or prosecutors will show up in public court files or will otherwise find their way into circulation.⁶ If the matter draws sufficiently broad attention, pundits and experts will be available for inflammatory quotes, which may or may not be based on any familiarity with the underlying facts. For any number of reasons, the organization should expect to get calls, frequently on short deadlines, seeking comments, responses or explanations with respect to matters about which the organization may have little or no advance notice.

For this reason, one important component of the media relations effort should be regular and frequent – perhaps as many as two or three times a day, in the early going – meetings of the crisis response team to pool knowledge as to what is going on and to attempt to assess, to the extent possible, what the likely areas of media interest will be. These meetings provide an opportunity to make sure that everyone is on the same page, and to share information that may prevent untoward or ill-informed statements. Over

⁶ It is perhaps appropriate to note that this statement is expressly not intended to suggest any inference of improper disclosure of information by official sources. While that may happen in some cases, that is not the point sought to be made. That point is simply that, one way or another, a lot of information that the organization may have assumed was practically inaccessible may well turn up in a setting where it will be available to diligent reporters.

time, they will also provide a forum for moving out of reaction-response mode and into a more positive strategy.

B. Developing Themes

As early as possible in the process, the organization needs to assess what affirmative messages it wants to try to bring out. The “committee meeting” structure provides an opportunity to do that.

For example, if the crisis involves potential government action that could cripple or kill the organization – a corporate indictment, an exclusion from participation in key federal payment programs, the loss of required licensure or other regulatory approvals – the organization will (assuming that it is true) want to take every opportunity to reinforce the point that it is cooperating fully with prosecutors, investigators or regulators. Some effort should be made to get that concept into every response or statement where it is plausibly appropriate, and it should be bolstered where possible with meaningful supporting information (“We are meeting with the regulators on a regular basis to respond to their questions”; “We have terminated the employees who violated our safety procedures and initiated intensive supplemental training for all employees”; “We have provided over 10,000 documents responsive to the government’s subpoena”).

Similarly, if the crisis involves facts that call into question the continuing financial or operational viability of the enterprise – an accounting restatement, a bond default, a substantial change in governmental reimbursement policy, an exorbitant damages award – the organization will want to come up with consistent, accurate messages about what it is doing to preserve that viability and about any offsetting positive factors that can be identified (“We have negotiated an emergency line of credit sufficient to meet our immediate liquidity needs”; “We have seen continued growth in our XYZ division, which has offset to some extent the loss of the ABC contract in our PDQ division”; “We have been able to establish payment terms with our key suppliers that will give us time to implement the cost-saving measures we have identified”).

Obviously, the themes that can be developed will be dependent on the specific facts, and care should be taken not to over-accentuate the positive beyond what is reasonably ascertainable. However, it is important to begin as soon as possible trying to come up with consistent, accurate messages that can be worked into as many media interactions as appropriate. The goal is not to “spin” reporters with overly optimistic information; rather, it is to try to build up whatever momentum can be built that plausibly and supportably counterbalances the bad news, and to maintain those positive messages wherever possible in all media interactions.⁷

C. Designating a Spokesperson/Contact; Creating Accessibility

It is crucial to channel media inquiries through designated individuals who (a) are thoroughly in the loop on the overall communications strategy and “party line”, (b) have

⁷ See, e.g., RICHARD S. LEVICK & LARRY SMITH, STOP THE PRESSES: THE LITIGATION PR DESK REFERENCE (2004) at 37 – 41.

access to relevant members of senior management and the legal team, and (c) will be perceived as having credibility with reporters.⁸ This is essential because the strategy will not be effective if calls are directed to random individuals who may or may not be readily accessible, who may or may not have access to up-to-date information and who may or may not be focused on the team message. In general, these individuals should not be members of the senior management team, for the simple reasons that (i) senior management's time and resources will be diffused if they are responsible for first-line handling of inquiries, and (ii) senior management will be less likely to have the luxury of being able to credibly say, "Let me check on that and get back to you."

It is desirable to set up a designated phone number (and possibly email address) for media inquiries. This will ensure that time-sensitive media questions do not get caught up in a morass of unopened voicemail, and will also allow greater certainty as to which calls are coming in from the media so that they can be appropriately handled.⁹ Where the designated media contact is not invariably based in the organization's corporate office, it is useful to make the designated number a mobile number, which also allows the "call duty" to be shifted by simply handing off the phone to a backup spokesperson.

Note that the use of designated spokespersons does not mean that members of management, counsel or other appropriate persons will not give interviews, provide statements or respond to questions in specific circumstances. That will be a decision that management will make in coordination with the media response team. What is important is that there be a small group of designated individuals who are going to handle the day-to-day communications flow and who will be the principal points of contact for the media.

D. Coordinating with the Legal Team(s)

Depending on the nature of the crisis, there may be a variety of inside and outside lawyers involved in the substantive response: litigators, securities lawyers, regulatory specialists, white-collar types, governmental relations gurus, or what have you. In addition, there may be separate counsel for the organization's board of directors, audit committee, etc., who are involved in some aspects of the response. To the extent possible, the general counsel or another senior member of the internal legal department should usually be responsible for coordinating with other members of the legal team on communications strategy matters as to which their involvement is crucial. Where multiple legal functions are involved, and particularly where there are multiple law firms

⁸ In general, this paper will refer to such an individual as a "spokesperson". Note that this does not necessarily mean that the individual's only function is providing quotes, statements, etc. Rather, the term is generally intended to refer to the primary media contact, whose functions will include interacting with the media, coordinating interview requests, handling press releases, chasing down information and performing similar functions, as well as serving as the day-to-day "on the record" voice of the organization.

⁹ Interesting trivia: if Caller ID shows nothing but a series of "1"s (111-111-1111), it's the New York Times, or at least it was in the days when the author was on the receiving end of such calls.

(as well as internal counsel) handling those functions, there is always a risk that there will be competing communications priorities for the different facets of the team (and sometimes, attendant jockeying for position), and it will be difficult to manage these priorities unless there is one lawyer responsible for assimilating them and refereeing among them.

While it is not necessary (and would undoubtedly be expensive!) to involve all of the outside lawyers in the regular meetings of the media response team, it would certainly be advisable to include relevant ones (by phone or in person, as circumstances dictate) in any meetings at which particular topics involving their spheres of responsibility are going to be discussed – e.g., if the team is planning a response to a litigation development that is expected to be publicized, having one of the litigators on the line is a good idea. In any event, it is prudent to ensure that all press releases or major statements regarding matters for which outside counsel have major responsibility are vetted by such counsel in advance.

One decision that should be made early on is whether, and to what extent, outside counsel will be permitted to respond directly to media inquiries. As a general rule, this should probably be discouraged in favor of coordination and pre-approval by the organization (which may, of course, determine that it is desirable to have outside counsel speak directly on the record in particular circumstances). There is simply too much risk of inconsistent messages if outside counsel not involved in the day-to-day communications strategy are allowed to respond unilaterally to random calls from reporters. If the organization determines that outside counsel are not to make press statements or respond to questions on their own initiative, that should be clearly communicated to them at an early stage, and they should be advised how to direct any inquiries that come their way.¹⁰

Finally, it should be recognized that coordination of communications with the legal team is particularly important where the situation involves actual or potential criminal charges against the organization. In any circumstance where there is high-level criminal wrongdoing alleged, there is the risk of a corporate indictment. While there are exceptions, a corporate indictment can shut an organization down almost overnight, as demonstrated by the Arthur Andersen experience. If the organization has determined to cooperate with a criminal investigation in hopes of avoiding an indictment, the corporation's public attitude toward the investigation, and toward any individuals that are

¹⁰ In that regard, it should be borne in mind that some outside counsel, especially in the white-collar/governmental relations areas, have become fairly high-profile media figures in their own right. If the organization happens to have hired one of those, the chances are fairly high that the lawyer will get direct calls from the media, and may well have developed the habit of responding to those calls. There are circumstances where this type of lawyer can be very useful, especially if the lawyer is one who has developed a high reputation for credibility with the media. However, if the organization has such a lawyer on its team, the general counsel, bolstered as necessary by other senior management, should reach a clear, up-front understanding as to how the lawyer is going to handle calls from the press, and the lawyer should be held to that understanding. Using a celebrity lawyer tends to have both costs and benefits, and both parties will likely be happier if the balance between those is clearly addressed up front.

charged in connection with it, will be a critical aspect of cooperation. Thus, in such a situation, it is important to ensure that counsel responsible for the organization's defense/cooperation effort are actively consulted on all public statements bearing in any way on the investigation, any individual indictments or pleas, or any underlying facts.

E. Managing the Management

As a crisis develops, one of the most difficult tasks, and one where the internal lawyer can be of great utility, is dealing with the concerns, and the natural inclinations, of the organization's senior management. Senior management types normally want to put the crisis behind them as quickly as (they think it ought to be) possible, and frequently have some difficulty accepting that, depending on the particular nature of the crisis, there are some aspects of the schedule that are simply not susceptible of being sped up. For example, if the crisis involves a lawsuit of some sort, it is unlikely, despite management's fervent wishes, that counsel can make it go away by simply calling the other side up and explaining to them that they have no case.

What implications does this have for the media response effort? Unfortunately, it frequently means that senior management will want the media response to take positions or make predictions that are imprudent, potentially inflammatory, or simply not supported by the facts at hand or the natural course of events: "We expect the court to throw this case out"; "These claims are totally baseless"; "We are confident the matter will be wrapped up within 60 days, probably less". This is normally not because of any inclination on the part of management to be deceitful or misleading; more commonly, it is simply because of a belief that it is essential to convey a positive message and put pressure on the troops to make the problem go away.

The problem with this approach, of course, is that such statements, if inaccurate or inappropriately timed, can both destroy crucial credibility with the media and create issues with opposing parties, regulators or judges. In order to forestall such problems, it is essential for the responsible internal lawyer and the senior media relations advisor, whether internal or external, to work together to anticipate these problems and be prepared to coach management toward a more measured response. The lawyer should discuss with the media advisor, and be prepared to discuss with management, issues that are likely to arise in response to whatever particular aspect of the problem is at hand – explaining what the schedule of a court proceeding is, clarifying what the process of a regulatory appeal will be, interpreting the significance of a particular ruling or motion – and the lawyer and the media advisor should work together to figure out what the most effective supportable statements would be and try to steer relevant management personnel in that direction.

IV. SOME RULES OF THE ROAD

While the specifics of crisis media response will vary with the organization's infrastructure and media team, the nature and duration of the crisis, the nature of the media interest (e.g., local press vs. national press vs. trade press vs. financial press) and

the goals sought to be accomplished, there are some common tools and themes that will run across most response strategies, and some factors that in-house counsel should be mindful of in advising the employer/client on the response. In no particular order, the following subsections set forth some of these concepts.

A. Reporters Are Professionals

In the midst of a crisis, it is easy to demonize individual reporters, or the media in general. The fire is raging, and they are shipping in gasoline to throw on it. However, no useful purpose is served (usually, at least) by treating them as the enemy. Reporters have a job to do, just as corporate executives, media relations professionals and lawyers do, and it is productive to keep in mind what their purposes are and what goals they are trying to meet. It is also worth remembering that an experienced reporter has probably heard the full conventional range of threats, promises, evasions and wheedling before. Treating reporters as if they were professionals doing a job, and responding to them in a professional way, will go a lot further toward ensuring fair coverage than assuming that they are either villains or simpletons.

What does this entail? It entails dealing with media inquiries in a way that is as fair and open as the circumstances prudently allow. There are generally some questions that can be answered, and declining to answer them (at least without a good reason) will (a) be unlikely to derail the story, whatever it is, (b) make it more likely that erroneous or speculative information will be reported, perhaps out of proportion to its importance, and (c) irritate the reporter who is trying to do his or her job. While there are always times when “no comment” is the most appropriate response for a variety of reasons, a general policy of not responding to reasonable questions without undertaking some sort of cost/benefit analysis of what is to be gained or lost by responding/not responding does not contribute to a productive relationship with reporters.

(Of course, this is not to suggest that the default position should always be to answer any given question. Particularly where the securities laws are implicated, there is a real danger in selectively providing information if by doing so an incomplete or misleading picture would be presented. Beyond that, there may be other strategic or practical reasons why it may be prudent to decline answers or comments – impairing litigation positions, jeopardizing relationships with regulators, lack of confidence in the state of the organization’s own information, etc.¹¹ The point is simply that there should be no rote responses to media calls. Each should be evaluated on its own merits, and there are benefits to be gained from answering that which can be answered.)

Beyond that, recognizing the professional nature of a reporter’s task also entails trying to accommodate any known factors that affect the reporter’s ability to do his or her job. If the reporter has advised that he or she is writing for a 5:00 p.m. deadline, it is simple professional courtesy, as well as good practical strategy, to respond, even with a

¹¹ Where feasible, and where there is reason to have confidence in the trustworthiness of the reporter, it may be desirable to explain why the organization is not in a position to respond to questions, assuming the explanation is not likely to give rise to a story in and of itself.

“no comment”, in time to allow the reporter to assimilate the response before the deadline. If the subject matter is something about which the organization is willing to talk, but as to which some known intervening event – a board meeting, perhaps, or an impending press release – is likely to affect the substance of the story, it is similarly courteous to discuss, at whatever level of detail is prudent, why the reporter might want to try to delay the deadline or push the story to the next day, week or whatever. The nature of a crisis-besieged organization’s relationship with the media is unavoidably adversarial to some extent; there is no point in making it unnecessarily so.

B. Reporters Are People

On a related point, the organization should bear in mind that reporters, notwithstanding their professionalism, are also subject to the same personal motivations as most other folks. While a competent reporter will not knowingly slant or bias a story because of such motivations, it is simply a fact of ordinary human experience that, other things being equal, people are nicer to people who are nice to them. It would, perhaps, impugn journalistic integrity to suggest that the presentation of news items is affected by a reporter’s visceral reaction to the manner in which a press spokesperson deals with the reporter. It would, however, be simple observed fact to note that human emotion affects most human interactions. In establishing a tone for dealing with the press, that observed fact is worth bearing in mind.

C. Know the Code

One of the most common traps for the unwary in dealing with the media is a failure to understand, before an interview or other media interaction begins, what the “speaking terms” are: i.e., the extent to which information provided to a reporter can be quoted, attributed or used.¹² The default position is that all discussions are “*on the record*”: any statements made or matters discussed may be used by the reporter, quoted in a story and attributed by name to the person making the statement, without review or further approval by that person. Absent an advance agreement to the contrary between the spokesperson and the reporter, all information communicated should be understood to be on the record.

After that, the lines can become blurry. In general, information communicated “*on background*” or “*not for attribution*” may be quoted or otherwise used, but may not be attributed specifically to the source. “Persons close to the negotiations” and “senior company officials” speak on background. Information provided “*on deep background*” may be used but without any attribution to specific sources, however vague (“It has been learned that . . .”; “It is rumored that . . .”). Information communicated “*off the record*” may not be used at all in the story; it is provided solely for the information of the reporter, presumably to help provide context or other background that, the spokesperson hopes, will help clarify the reporter’s thinking on a particular matter. However, these

¹² See, e.g., LANNY J. DAVIS, TRUTH TO TELL (The Free Press, 1999), at 44 – 50 (describing embarrassing reporting resulting from author’s failure to understand difference between “on background” and “off the record” in speaking for the White House).

terms may not be consistently understood or honored by all media outlets, or even by all reporters employed by a particular media outlet.¹³

Anyone dealing with the media must bear in mind three important points concerning these terms:

- If the spokesperson intends to speak other than on the record, that intent must be expressed to the reporter, and agreed to by the reporter, *before* the statement is made. A spokesperson who makes an incautious statement and follows it up with “By the way, that was all off the record” is likely to be an unemployed spokesperson.
- Where communications are other than on the record, the spokesperson and the reporter should clarify and agree, up front, to the specifics of the arrangements. Where a spokesperson speaks “on background”, he or she should endeavor to reach an agreement with the reporter as to how any references to the spokesperson will be couched (“a source close to the situation” versus “a senior member of the Legal Department”, for example).¹⁴ When a spokesperson speaks “off the record”, he or she should clarify whether the reporter understands that to mean that the reporter can use the information if it can be developed from another, attributable source.¹⁵
- Without suggesting any breaches of journalistic ethics, information, once communicated, has a tendency to make it on the record sooner or later. Accordingly, an organization’s spokesperson should be extremely cautious in communicating anything on any basis if the organization is not prepared to see it in the paper in some form eventually.

¹³ See generally, e.g., *The Associated Press Statement of News Values and Principles* (Feb. 16, 2005), available at www.ap.org/newsvalues/index.html (under caption “Standards and Practices Anonymous Sources”) (“AP Statement of News Values”); American Society of Newspaper Editors, *Compendium of news organizations’ policies on anonymous sources* (last updated June 20, 2003), available at www.asne.org/index.cfm?id=4694.

¹⁴ Thankfully, the term “double super secret background”, used in an account by Time reporter Matthew Cooper of a discussion he had with Karl Rove that came to light in the prosecution of I. Lewis “Scooter” Libby, does not seem, as they say in journalism, to have legs. See Howard Kurtz, *Reporter: Rove Told Him of Plame’s CIA Tie*, WASHINGTON POST, July 18, 2005, p. A2.

¹⁵ For example, the Washington Post defines “off the record” to mean not only that the information may not be used in a story, but that it may not be used in further reporting. See *For the Record, What It All Means*, WASHINGTON POST, Mar. 7, 2004, p. B5; *The Washington Post’s Policies on Sources, Quotations, Attribution, and Datelines*, available at www.poynter.org/column.asp?id=53&aid=61244 (under caption “Ground Rules”). But cf. Timothy Noah, *For the Record, What “Off the Record” Means* (June 22, 1999), available at www.slate.com/id/1003063/ (describing differing interpretations placed on speaking terms by five different Washington Post reporters). Other media outlets may interpret the term to mean that the information may not be used directly, but that it can be used as a basis for seeking to find an on-the-record source for the same information. See, e.g., Celeste Mitchell, *Ask mb: On and Off the Record* (Aug. 1, 2003), available at www.mediabistro.com/articles/cache/a617.asp; *AP Statement of News Values*, supra n. 14.

D. Don't Blow Smoke

Credibility is absolutely critical in dealing with the media. Thus, one of the most serious mistakes an organization can make in a crisis situation is to provide information that is (a) known to the organization to be incomplete (unless that is made clear) or erroneous, (b) intentionally misleading or (c) exaggerated in substance or tone. Obviously, lying to the media is inadvisable; aside from the moral imperatives, reporters will be talking to multiple sources, some of whom will not have the organization's best interests at heart, and any out-and-out lie or obvious distortion is likely to be embarrassingly discovered, and perhaps given exaggerated importance.¹⁶

More difficult is the situation where the organization's management is simply insistent on getting a response on the record, even where the state of its information means that such response may prove to be highly erroneous. "We've got to tell them something," the cry goes out, "otherwise the press will kill us." The spokesperson is then pressured to put out a blanket statement – "We're confident that we have no liability here"; "We have determined that the malfeasance was limited to a small group of rogue employees", or what have you – which may soon have to be withdrawn or modified. Aside from making the organization look inept when later stories reveal the inadequacy – if not the outright inaccuracy – of the initial response, these types of knee-jerk reactions, if they prove to be erroneous, will cause reporters to distrust any similar subsequent statements, and will make it that much harder to develop a professional relationship with the press.

Far better, when events are developing rapidly and information is subject to material change, to make that clear to the reporter. Where possible (and true), the spokesperson can say things such as "We are moving forward with our investigation and will have a full statement to make at the appropriate time" or "We are reviewing the matter with our counsel and will respond accordingly". Of course, these types of statements will not defuse a negative story; indeed, there is not that much that will defuse a negative story, at least in the early stages of a crisis. On the other hand, they will indicate that the organization is diligently pursuing a cautious course, and they will not lose credibility points the way a demonstrably erroneous statement will. Most crises go on for awhile, with peaks and valleys.¹⁷ The media strategy has to be focused on the long haul, and not just on responding to the provocative question of the moment.

¹⁶ See Bobelian, *supra* n. 4 (describing growing press hostility toward Microsoft during its antitrust trial, as the company's lawyers "regularly [appeared] before reporters after bad days for the company in court and speaking as if Microsoft had scored a victory"). See also Larry Bodine, *AmLaw Editor's 9 Rules for Working Effectively with the Media* (Nov. 18, 2003), available at www.lawmarketing.com/pages/articles.asp?Action=Article&ArticleID=195 ("If you decide to lie, please decide in advance how easily this lie can be found out. . . . If a couple of phone calls will make it clear what's really going on, don't do it") (quoting Aric Press, Editor in Chief, THE AMERICAN LAWYER).

¹⁷ See, e.g., Gwyneth Howell & Rohan Miller, *How the relationship between the crisis life cycle and mass media content can better inform crisis communications*, PRISM vol. 4, no. 1, (2006), available at http://praxis.massey.ac.nz/fileadmin/Praxis/Files/Journal_Files/2006_general/Howell_Miller.pdf (a rather technical Australian study).

E. Use Time Wisely

One problem common to all crises is the struggle to get out of a reactive mode. When questions are coming in fast and furious, there is a tendency to respond to whatever is on the plate in a disorganized manner. Where possible, the organization should try to impose some order on the process.

First, when questioned by a reporter, the spokesperson should endeavor to find out (if the reporter does not volunteer it) the schedule on which the reporter is writing. Sometimes the story is a breaking-news item on a short deadline; on other occasions, it may be an investigative/analytical piece with a longer fuse, or simply a piece for a weekly or monthly publication that has more scheduling flexibility. Ask the reporter what his or her reporting schedule is. If the reporter is working on a longer deadline, the organization should, if possible, try to use that time to provide more complete information and to give the reporter the opportunity for appropriate follow-up.

Where time allows, the spokesperson should be sure to circle up with all relevant players in the organization to ensure that he or she has information that is as complete as possible, even if all that information is not going to be provided to the reporter. Memories are notoriously unreliable, especially in the throes of a crisis; where it is possible to use available time to confirm information internally, through documents or simply through cross-checking internal sources, that will minimize the risk of an embarrassing or incomplete response.

There will, of course, be times when the organization wants to put out its own information in an affirmative manner, through a press release or news conference. If that is the case, the organization will want to be sensitive to news cycles in order to ensure that its statements get maximum coverage. Except for an isolated few major newspapers, weekend readership is significantly lower than daily readership. Thus, in most cases the organization seeking to get a positive message out will not want to put a press release out on Friday afternoon absent a compelling reason to do so.¹⁸ Similarly, if the organization finds it advantageous to be sensitive to the needs of a particular publication – for example, a local morning newspaper – the organization will want to try to put out its press releases at a time that allows for that publication to pick them up before they are stale news.¹⁹ If the organization plans a news conference, it should notify the relevant

¹⁸ In fact, when an organization intentionally puts out news just before a weekend, it is sometimes subject to suspicion that it wanted the announcement to fall between the cracks.

¹⁹ In some cases, where the organization wants to accommodate differing deadlines and ensure that particular information is provided to certain key media outlets in ample time for them to work up a story that they might otherwise be beaten on, the organization may provide information to such outlets on an “embargoed” basis – an agreement that the information cannot be published or used until a specified deadline has passed. This is a sometimes useful but potentially dangerous technique; if the information leaks out from another outlet prematurely, the embargoed outlet may suspect that manipulation or duplicity was involved. Similar concerns arise when a key outlet is promised an exclusive story in exchange for honoring the organization’s preferred timing. Embargoes and exclusivity should be used sparingly, and with professional advice.

media in ample time to ensure that they have an opportunity to cover it. The goal of affirmative announcements is to have them picked up and fairly reported by the press; the organization should do whatever it can do to make the media's job easier in such circumstances.

F. Don't Waste Time

On a correlative point, it is easy to get bogged down on matters that simply distract from prudent uses of the organization's time and resources. To take a simplistic example, when a reporter calls 15 minutes before deadline with a when-did-you-stop-beating-your-spouse question, it is fairly unlikely that the organization is going to have an answer that will "turn the story around". In such a case, unless there is a clear mistake of fact that can be rectified in a convincing manner, it is unlikely that any comment or response is going to be worthwhile.

More subtly, reporters develop a track record, just as spokespersons do. If a reporter has demonstrated a consistently negative perspective and has been unwilling to give any credence to information provided by the organization, there is likely to be little point in wasting extra effort on that reporter. This is a matter of some judgment, and there is no purpose to be served by announcing to the reporter that he or she is "in the penalty box" or the like, but the organization should be mindful of spending its time to the extent possible on reporters who have shown that they are disposed to give the organization a fair hearing.

Finally, there are some stories, regardless of reporter, that simply will not benefit from comment. If an adverse story is factually accurate and the organization does not have any positive message to add, it is probably better just to let the story be written without making any special effort to influence it.

G. All Questions Don't Have to be Answered

Of course, one of the difficulties associated with abandoning a total "no comment" strategy is that responding to questions tends to breed more questions. Eventually, the organization may well find that it is facing questions that it is not advantageous to answer: perhaps because the answers might compromise positions in litigation; perhaps because the answers require more research than is justified by the expected benefit; perhaps because the answers will lead to still more disadvantageous questions. Accordingly, the response team needs to be prepared at appropriate points to say, "We're just not inclined to answer that."

This can frequently be a point of friction between the organization's media relations people and its lawyers. Media relations types trade on their interactions with the press, and having developed a rhythm of responding, sometimes they do not want to break the flow. The lawyer should be in a position to articulate reasons why a particular line of inquiry should be cut off, and should not be shy about challenging the media relations spokespersons on that.

Further, it is not unheard of for reporters to ask questions based on speculative or unsupported information in hopes of eliciting a confirming answer. The organization should be wary of questions that take the form “We’ve heard that . . .”, followed by vague allusions to a particularly damaging piece of information. Sometimes, this is a mere fishing expedition by the reporter, hoping to get the organization to go on the record about something that has not yet reached a confirmed, reportable level. Of course, sometimes it isn’t, and determining which situation obtains in the particular case requires some educated judgment. At this point, it is important to pool the knowledge of the team to assess what might underlie the question, and to form a judgment on how damaging the story might be if the reporter is not simply fishing and the organization has passed up the opportunity to provide ameliorative information. The organization may or may not win the bet in any given case. However, it is important to recognize that this phenomenon exists, and to avoid simply responding reflexively.

H. All Inaccuracies Don’t Have to be Corrected

Newsgathering is an imperfect science, and sources can have faulty memories and impure motives. Accordingly, many news stories may contain information that the organization believes to be inaccurate. This in turn frequently leads the organization’s management to insist on demands for retraction or corrective press releases.

Absent a clear and rebuttable error of fact, demands for retraction are usually a waste of time. Retractions are rarely made, and when made they are usually buried. As a strategy, this is usually just not worth the effort. More troublesome is management’s insistence on putting out a corrective press release. There are circumstances where information in a story is so egregiously wrong that the organization needs to do whatever it can to clear up the record. However, this strategy should be used judiciously, or it can backfire.

First, the error being corrected should be one that is significant, and the correction should meaningfully rebut the error. If the story says that ten executives have been subpoenaed by the SEC, it is probably not going to be of much benefit to point out that it was really just eight.

Second, public correction of one particular error in a story may be read to imply agreement with the other statements that are not corrected.²⁰ If there are one or two inaccurate statements in a lengthy, fact-laden story, the organization must carefully consider whether it is worth making a special effort to correct those inaccuracies in view of the fact that it will likely be perceived that the organization does not dispute anything

²⁰ This is a matter of particular significance if the organization is subject to the securities laws, since the selective decision to comment on particular inaccuracies or rumors can be deemed to give rise to an obligation to speak on other matters going forward, where that obligation would not otherwise necessarily exist. *See generally, e.g.,* William W. Horton & Monty G. Humble, *The Disclosure Dilemma: How, When, and What to Tell Stockholders and Stakeholders About Your Qui Tam Suit or Investigation*, in Linda A. Baumann (ed.), *HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES* (American Bar Ass’n Health Law Section/BNA Books, Supp. 2006), at 409 – 412.

else in the story. In many circumstances, it may be better to try to work the accurate information out into the media in other contexts, such as follow-up stories or interviews.

Finally, of course, there is the universal truth that most efforts to dispute stories serve to keep those stories alive and draw more attention to them. For all the agitation that accompanies them, most news stories have a fairly short half-life, especially in a situation where new developments are occurring all the time. As unpleasant as it may be to see facts distorted or statements misquoted, cooler heads in the organization – a group that hopefully includes its lawyers – should point out that it is sometimes better just to let a story die than to keep it alive by engaging in combat over it.

I. Coach the Spokespersons

In most crises, there will come a time when the organization’s senior management will take the stage – in scheduled interviews, in news conferences, in meetings with investors, employees or other constituencies. While these types of appearances can be critical to managing the crisis, they are also fraught with danger. Most members of senior management tend to have a fairly high view of their ability to explain things and handle difficult situations.

Unfortunately, while this view may, in the event, be accurate, it sometimes leads to overconfidence in highly sensitive situations where statements and answers must address the demands of many different constituencies. Further, in any circumstance, keeping leaders “on message” may sometimes be challenging, and that challenge is exacerbated in a crisis situation, where questioners may be looking for the opportunity to elicit a damaging admission or imperfectly thought-out response.

Accordingly, before any appearance by senior management, one of the key jobs of the crisis response team is to reinforce the key points that the organization wants to be sure to get across – the steps that are being taking to address the source of the crisis, the achievements that have been attained, the milestones that are still to come. Beyond that, if the appearance is in a setting where there will be an opportunity for questions – an interview, a press conference, a public hearing – there should be ample opportunity for “dress rehearsals”, in which the crisis response team poses every potentially damaging or inflammatory question they can think of and works with the spokesperson to refine the answers. The goal is not to create an impression that appears slick or over-rehearsed, but rather to ensure that, to the extent possible, the spokesperson is prepared to deal appropriately (or, just as important, not to deal inappropriately) with any reasonably foreseeable turn that the conversation is likely to take.

It will normally be important that a member of the legal team be involved in this process, because that person will be in the best position to consider the potential impact of particular statements or responses on the ongoing legal strategy. For example, if the organization has been the subject of an adverse ruling in a legal proceeding relating to the crisis, it may be emotionally satisfying, and perhaps inspirational to the troops, to declare loudly that the judge is a tool of the plaintiffs’ lawyers – heck, it may even be true – but such a statement is unlikely to help the litigation position, and the lawyer is in a better

position to point that out than other members of the team may be. More mundanely, the lawyer may be in a position to advise that a particular response is based on incomplete information or is subject to variously potentially countervailing arguments, and that giving such a response may back the organization into a corner from which it may later have difficulty gracefully escaping. The point is that lawyers, by trade, are supposed to be good at thinking through the implications of words in various contexts. This talent can be of great value in helping prepare organizational spokespersons, especially high-level ones, for the inherently somewhat adversarial nature of interviews and Q-and-A sessions in a crisis situation.

J. The Lawyer Should Never Be the Spokesperson . . . Except When the Lawyer Should Be the Spokesperson

Well, then, if lawyers are so good with words and their implications, should the lawyer be the organization's primary spokesperson? In general, there are at least two reasons why this strategy is not ideal in most situations:

- The lawyer is likely to *know too much* about the situation.
- The lawyer is likely to *see too little* about the situation.

In reality, these two points are, to some extent, mirror images. A major goal of a crisis communications strategy is to get out a clear, straightforward message in terms as definitive as the situation allows: "We're cooperating with the investigation"; "We have identified the source of the error and are taking immediate steps to rectify it"; "We believe that we will be able to resolve the matter with minimal impact on our ongoing operations". Lawyers tend to be more conscious of the possible contingencies that may make the clear, straightforward message prove to be inaccurate depending on how those contingencies resolve themselves ("Well, there will be minimal impact on our ongoing operations unless the Medicare authorities decide to exercise their permissive exclusion authority . . ."), and thus may tend to introduce an ambiguous or defensive tone into the message that does not serve the organization's purpose.

Similarly, lawyers tend to analyze situations as if the only relevant factors were those that affect the organization's legal position.²¹ Thus, a lawyer's statement may be hyper-technical ("We don't believe that the government will be able to establish the requisite scienter needed to support liability under the theories alleged . . .") or may simply focus on legal concerns without taking into account the practical business

²¹ See, e.g., Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 15 CARDOZO L. REV. 951, 967 (1994) ("When crises strike, more is at stake than mere legal principles. However, the first instinct of most lawyers, particularly litigators, is to treat the matter as if *only* (or primarily) legal principles are involved. There is a tendency to worry that anything the company . . . says or does will impact pending or anticipated litigation. . . . The litigators' syndrome overlooks the crucial fact that the preservation of a company's credibility – and perhaps even its survival in the marketplace – often will turn on the company's capacity to tell the truth, admit fault, and make amends – actions which do not fit the mold of our adversarial system." [Emphasis in original.]")

implications of a particular statement (contrast “Under the terms of our joint venture agreements, we do not believe that our partners will be able to treat this as an event of dissolution” with “We are committed to working with our joint venture partners to ensure that they understand that their concerns will be addressed”). The lawyer’s statement may be unassailably accurate, and may even be more informative than another spokesperson’s would be. Nonetheless, in many circumstances, it may not set the right tone, and it may create the impression that the organization is “hiding behind the lawyers”.²²

There are, however, some circumstances where the lawyer is the most appropriate and useful spokesperson, or should at least be part of the “speaking team”. The first, and most obvious, situation is where there is a need to have someone who speaks with technical authority address a particular legal matter: the (substantive) defenses to a complaint;²³ the procedural status of a case (“Of course, we understand that the allegations in this matter are serious, but we will have the opportunity to present the facts at the hearing on the 15th”); the implications of a particular ruling; etc. Many of these sorts of things may also be addressed by a properly informed non-lawyer spokesperson as well, but the organization may conclude that the lawyer’s involvement may provide greater credibility, or at least gravitas of a sort.

Another such situation may arise where the organization wishes to decline comment on a matter that has obvious legal implications. The temptation for an executive spokesperson to be goaded into commenting in a “no comment” situation can be fairly strong: “The lawyers don’t like it when I say this, but we’re confident they have no case.” Lawyers become constitutionally inured to giving answers that other people do not necessarily like, so they are, with any luck, less prone to such temptations. Beyond that, most reporters are unlikely to press a lawyer-spokesperson very hard when the lawyer says, “I’m sorry, Lois, but we’re just not in a position to talk about that now.” The reporter may not be happy with the response, but a lawyer who recognizes the professionalism of a reporter is likely to have his or her own professionalism recognized in return.²⁴

²² Note, however, that some organizations have actually seen fit to combine the internal legal and public relations capacities. See, e.g., Richmond Eustis, *The Dual Power of Attorney: Company Speaks with One Voice when GC is PR Chief*, GC SOUTH (Apr. 2004) at 22 (describing two companies in which the general counsel also serves as head of public relations and/or public affairs, and alluding to others).

²³ Note that, as a general rule, the organization probably will not find it desirable to focus on technical or procedural defenses to a complaint, indictment or investigation in its public statements. In the first place, the organization’s recovery effort will usually not particularly benefit from a perception that it is hiding behind loopholes. In the second place, technical or procedural defenses are frequently subject to cure, and there is no special point in giving the adversary advance notice of deficiencies.

²⁴ By the same token, of course, a lawyer who believes that he or she becomes a “spin doctor” when a reporter is on the other end of the phone is likely to be perceived as an amateur, and to be played like a violin. With occasional exceptions, lawyers gain credibility with reporters by being perceived as honest brokers, not as sources of news-at-11 soundbites.

Of course, some types of crises draw attention from the legal trade press and/or the specialized legal/regulatory publications (like those of BNA, Aspen and similar publishers) that are aimed largely at lawyers and other professionals. For those media outlets, it may also make sense to use a lawyer/spokesperson, who is presumably more familiar than others might be with the target audience and the usual style/detail level of such publications. Of course, if the lawyer is used as the spokesperson for such publications, the lawyer should be no less well-educated on the corporation's overall communications strategy and message goals than any other spokesperson would be. It does not do to have the CEO providing one message to the mass media while the lawyer provides a different one to the legal press – yet another reason to ensure that the lawyer is an integral part of the media response team.

K. Remember Multiple Audiences

The organization and its spokespersons must always bear in mind that what is said in response to media inquiries speaks to many audiences beyond the target audience of the particular media outlet. Obviously, the organization should always assume that opposing lawyers, regulators, prosecutors and other interested parties will see, and in some manner respond to or be influenced by, what the organization says to the media.²⁵ Beyond that, the organization must remember that media statements will also be attentively reviewed by employees, business partners, vendors, customers, creditors and others having relationships with the organization, and it must be sensitive to what the impact on those constituencies of particular statements may be. To give perhaps the simplest sort of example, if the organization's spokesperson is quoted as saying "We're going to eliminate 200 positions in order to reduce costs while we deal with our liquidity crisis", the larger employee base is going to lose a lot of productive time in speculating over just which positions those 200 will be.

Thus, the organization may want to ensure that specially-targeted communications are directed to particular constituencies who are likely to be sensitive to, and perhaps agitated by, news coverage of the crisis and the organization's media statements. Obviously, these statements should be carefully coordinated to ensure that they are not inconsistent with, and generally do not go beyond, what the organization is saying more generally.

²⁵ A graphic illustration of this arose in the SEC's settlement of an enforcement action against Lucent Technologies in 2004. In that case, the SEC imposed a \$25 million penalty on Lucent for lack of cooperation with the SEC's investigation. As one of the indicia of non-cooperation, the SEC pointed to an interview given by Lucent's chief executive officer and its outside counsel after Lucent had agreed in principle to settle the matter without admitting or denying liability. In that interview, according to the SEC, outside counsel "characterized Lucent's fraudulent booking of [a \$125 million 'software pool agreement'] between Lucent and another company as a 'failure of communication'[,] thus denying that an accounting fraud had occurred". The SEC determined that this statement "undermined both the spirit and letter of its agreement in principle with the [SEC Enforcement] staff". See SEC Press Release 2004-67, *Lucent Settles SEC Enforcement Action Charging the Company with \$1.1 Billion Accounting Fraud* (May 17, 2004), available at www.sec.gov/news/press/2004-67.htm.

The in-house lawyer can be of key assistance in bringing these types of concerns to the attention of the media response team, precisely because the in-house lawyer is, one hopes, accustomed to thinking through patterns of how things fit together and of what ripple effects are likely to result from a particular course of action. As described above, this should put the lawyer in a good position to advise the team on what the legal implications of particular statements may be. The same skills also give the lawyer utility in advising on what the practical consequences of those statements may be on other, perhaps less obvious, constituencies.

V. CONCLUSION

The in-house lawyer who has not been caught in the midst of a corporate crisis with significant media relations is likely to become an increasingly rare breed, if it is not indeed one already on the brink of extinction. In the current scandal-hungry, media-rich environment, the opportunities for in-house counsel to enjoy, or at least be around, the media spotlight are more and more frequent.

For many counsel, the temptation may well be to stay away from the fray, to leave media relations to those who are more accustomed to dealing with them. Yet, in a crisis situation, the analytical skills required of, and knowledge of the organization possessed by, the internal counsel can be essential to effective handling of the situation. In particular, the lawyer can play a crucial role in ensuring that the media response does not get ahead of, or crossways with, the intricate legal issues that are likely to be tightly bound up with the facts of the crisis.

When the actual crisis arises, there will be little time for the lawyer to figure out where he or she fits in to the media response. Accordingly, one productive role for internal counsel is to begin, in advance, sensitizing the organization's management and public relations/media relations/investor relations personnel to the need to have a plan in place to deal with the knock on the door when it comes, as it will probably do one day. The lawyer who does this, bearing in mind some of the strategies and factors for consideration outlined above, will go a long way toward ensuring that he or she has an appropriate seat at the table when the time comes.