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**ORANGE COUNTY BAR ASSOCIATION**

**CORPORATE COUNSEL  
SECTION WEBINAR**

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Crisis Management in 2020: Looking to the Future While  
Learning from the Past... and from the Present



Tuesday, August 11, 2020

# Crisis Management in 2020:

## Looking to the Future While Learning from the Past . . . and from the Present

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# What a Difference A Year Makes

Revisiting some of the things we discussed in 2019.

# What is a Crisis?

“Any global, regional or local natural or human-caused event or business interruption that runs the risk of escalating in intensity; adversely impacting the company’s financial position; causing harm to people or damage to property; falling under close media or government scrutiny; interfering with normal operations and consuming significant management and/or financial resources; adversely affecting employee morale; or jeopardizing the company’s reputation, products, or people, and therefore negatively impacting its future.”



- a time of intense difficulty, trouble, or danger;
- a time when difficult or important decisions must be made.

# What is Crisis Management?

“The intervention and coordination of individuals or teams before, during, and after an event to resolve a crisis, minimize loss, and otherwise protect the company and its stakeholders.”



- prevent a crisis from becoming a catastrophe

# The Four Stages of Crisis Management

- ▶ Stage One: Preparation of a Crisis Response Plan and identification of a Crisis Management Team.
- ▶ Stage Two (Hours – Days): Immediate response to the event, focused on gathering information and communicating effectively with key stakeholders and government authorities (as appropriate).
- ▶ Stage Three (Weeks – Months – Years): Intermediate response to event, focused on halting harm caused by the event and initiating remedial measures, collecting evidence about what happened, communicating and cooperating with stakeholders and government authorities, and addressing legal fallout (e.g., litigation).
- ▶ Stage Four: Conduct post mortem, absorb lessons learned, and improve preparation for future events.
- ▶ The life cycle of a crisis will depend on the nature of the problem and the effectiveness of the response.

# What Can Precipitate a Crisis?

- ▶ Non-Company Specific Causes
  - Natural disasters (earthquakes, hurricanes, etc.) [22%]
  - Terrorist events.
  - Wars and international political disputes.
  - Financial market panics.
- ▶ Company-Specific Causes
  - Data breaches. [13%]
  - #MeToo events.
  - Activist investor attacks.
  - Whistleblower complaints/government investigations. [10%]
  - Product recalls.
  - Financial restatements.
  - Failure of new products/failure to obtain new product approvals.

## Prepared for 2020 and Feeling Good





And . . . Thwack



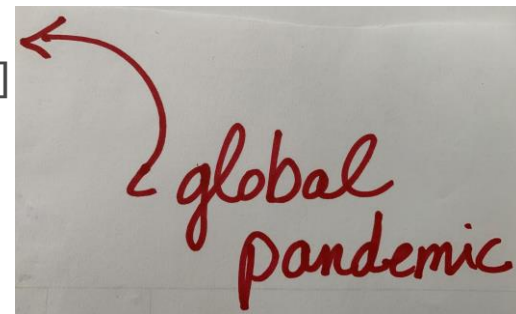
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# What is Corporate Counsel's Role in a Crisis?

- ▶ Every crisis will be unique, so corporate counsel's specific role may differ in any given circumstance, and may change depending on the stage of the response.
- ▶ The skills and everyday responsibilities of corporate counsel make corporate counsel a natural choice to be one of the leaders of a crisis management team.
- ▶ Examples: coordinate with HR and management on employment and safety issues; coordinate with business team on contractual matters in supply chain and with customers; guide company in responding to governmental directives; evaluate and pursue insurance coverage; assist with internal and external messaging.
- ▶ Corporate counsel regularly interacts with the board and upper management as well as with outside counsel, operations, sales, etc. Because protecting privilege may be an important consideration in the response to a crisis, corporate counsel is a natural node of crisis communications.

# Stage Two

The Immediate Response to the Event.

# Immediate Steps in Responding to a Crisis

- ▶ Trigger Crisis Response Plan.
- ▶ Assemble Crisis Management Team.
- ▶ Gather information about what is happening.
- ▶ Organize emergency response to event as appropriate.
- ▶ Direct inquiries to designated spokesperson – both internal and external.
- ▶ Implement documents retention practices where appropriate.

# Gathering Information to Aid in Decision-making

- ▶ For an intra-corporate matter, this may entail initiation of an internal investigation.
  - ▶ Should be conducted by counsel (more on this later).
  - ▶ Pandemic has accentuated need for experienced investigators who can operate effectively within social distancing constraints.
- ▶ For a more widespread occurrence originating outside the organization, such as a pandemic, corporate counsel can and should play a key role in gathering important information.
  - ▶ This will be an ongoing issue as the crisis evolves.
  - ▶ Utilize professional networks and outside counsel to help gather information and to collect insights on best practices for how to respond. Example: <https://covid19.troutman.com/>
  - ▶ Monitor governmental sources and directives.

# Considerations Regarding Communications

- ▶ Identify key stakeholders and government authorities which will have a material interest in what is going on.
  - ▶ Board, management, employees, investors, customers, government authorities (police, FBI, SEC, FDA, EPA, etc.), lenders, insurers.
  - ▶ Don't forget about who else is watching and listening – media, competitors, plaintiffs' lawyers, elected officials, etc.
- ▶ Craft and deliver coordinated and consistent statements for key constituencies.
- ▶ Take great care in making statements before facts are known.
- ▶ Counsel should be involved in preparing and vetting communications.
- ▶ Consider use of public relations professionals – hired to assist counsel.

# Considerations Regarding Communications

Some components of successful messaging:

- ▶ Offer reassurance that you're not only aware of the problem, but that you're working to take appropriate measures to address the situation.
- ▶ As soon as reasonably possible, provide clear guidance on what you are doing to prevent the situation from getting worse and then on what you plan to do to resolve it.
- ▶ Explain how the actions being taken are aimed at seeing the organization through the crisis – focus on achievable intermediate goals.
- ▶ It is OK to project optimism about the future but avoid promises of success not rooted in known reality.



# Considerations For Communications About Intra-Organization Crises

- ▶ If the public and media is already alerted to the crisis, “No comment” can be a disaster. Initial message might include:
  - “This is what we know so far.”
  - “We are cooperating with authorities.”
  - “It is too early to determine the cause, but we are investigating and devoting all necessary resources to it.”
  - “We have already taken steps X, Y and Z and believe that any threat of continuing harm has been eliminated/minimized.”
- ▶ Spokesperson should be prepped and should use qualifier terms and avoid using or responding to legally-tinged terms:
  - Yes: “Based on the best information available now . . .”
  - No: “Responsibility” – “Liable”

# Stage Three

The Intermediate Response to the Event.

# Responding to the Evolution of the Crisis

The effects of a crisis may impact your organization differently at different points during the life of the crisis. For example, with COVID we have been shifting from how to work remotely to how to get back to the office.

But some key principles remain constant throughout:

- ▶ Continue to communicate with your constituencies.
- ▶ Protect your business reputation – e.g., avoid being seen as profiting at others' expense (“rich” companies taking PPP funds; price gouging).
- ▶ Keep assessing risks as the crisis evolves and plan how to respond.
- ▶ Where possible, build in flexibility – if something goes wrong, have a “Plan B.”
- ▶ Maintain good recordkeeping.
- ▶ Consider designating a group to investigate and plan the endgame – post-crisis next steps and how to return to normalcy.

## Maintain a Record of Issues that Arise and Decisions that are Made

- ▶ Appoint one crisis team member to capture lessons learned during the response and recovery phase.
- ▶ Keep an actions and decisions log, noting the problems that have been encountered, and noting the interim solutions.
- ▶ Post-crisis, having this information will help the organization understand what went well and what needs to be improved.
- ▶ Such an overview will also help demonstrate the rationale behind certain decisions and the information available when decisions were made. This can prove essential during legal disputes and/or regulatory investigations.

# One Crisis May Lead to Another, or Multiple Crises May Occur Simultaneously

For some companies, COVID has been accompanied by other “mini” crises.

- ▶ Cybersecurity issues.
- ▶ #MeToo issues.
- ▶ Government investigations.
- ▶ Social unrest.
- ▶ Ethical misconduct, e.g., insider trading.

# Fraud is on the Rise During the COVID Pandemic

In June 2020, the Association of Certified Fraud Examiners (“ACFE”) published the results of a survey of thousands of members across the globe, covering all industries and organizations of all sizes.

**As of May 2020, 68% of survey respondents had already experienced or observed an increase in fraud levels, with one-quarter saying the observed increase has been significant.** The forms of fraud reported include:

- ▶ Cyberfraud.
- ▶ Fraud by vendors and sellers (overcharging/underperforming).
- ▶ Payment fraud.
- ▶ Bribery and corruption.
- ▶ Employee embezzlement.
- ▶ Financial statement fraud.

# Conducting Internal Investigations

- ▶ The investigation should be directed by counsel.
  - Outside counsel should take the lead, in coordination with inside counsel.
  - When is “independent” counsel appropriate?
- ▶ Who at the company supervises the investigation?
- ▶ Consideration of employee rights and obligations.
  - *Upjohn* warnings.
  - Separate counsel? Who pays?
- ▶ Should there be a report? In what form?
- ▶ Preserving privileges.
- ▶ “Cooperation” with government regulators.

# Litigation Oversight

- ▶ Class actions.
  - Consumers/state consumer protection.
  - Securities holders/securities laws and disclosure obligations.
  - Multi-forum actions.
- ▶ Business partner disputes, both offensive and defensive.
- ▶ Derivative suits.
  - Shareholder demands.
  - “Books & records” requests.
- ▶ Government regulatory actions and prosecutions.
- ▶ International reach.
- ▶ Managing multiple counsel.
- ▶ **Alternate Dispute Resolution.**



# Stage Four

The Post-Mortem.

# Learning From the Past to Prepare for a Better Future

A post-crisis review should cover both the cause of an event and the effectiveness of the organization's response.

When conducting a post-crisis review, the following questions are key:

- ▶ Why and how did the crisis happen?
- ▶ What were the operational and strategic impacts on the organization's people, assets, reputation, and stakeholders?
- ▶ How effective was the organization's response and what can the organization do to prevent similar scenarios?
- ▶ How can the organization improve a future response?
- ▶ How can lessons learned enhance overall organizational resilience?

# Post-Crisis Review Means More Than Updating the Crisis Response Plan

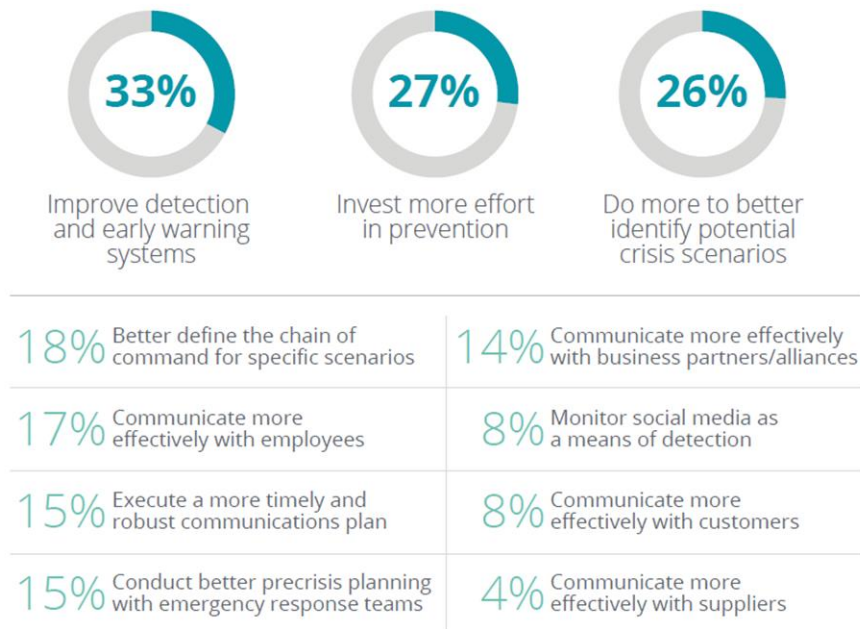
As COVID is teaching us, a crisis can uncover aspects of the company's business that can be weaknesses in a crisis. It can also reveal new strengths and opportunities. Using COVID as an illustration:

- ▶ How did tech systems perform when employees were forced to work remotely?
- ▶ How did leaders and employees perform in the face of the crisis?
- ▶ Did the crisis reveal potentially problematic dependencies in the supply chain?
- ▶ Did the crisis teach anything about the resilience and needs of the company's customer base?
- ▶ Can the company's business contracts be improved for the future, e.g., improved force majeure clauses?
- ▶ Were there gaps in the company's insurance coverage?
- ▶ Overall, are there new or improved business continuity strategies that can mitigate the disruptions experienced during this event?

# Pre-COVID Observations About Lessons Learned From a Crisis

Figure 2. Lessons learned from having experienced a crisis

[Thinking about a crisis you experienced within the past two years], what, if anything, are the lessons that your organization learned or that you would do differently?



Base: All respondents who experienced a crisis in the past two years (n=421)

Source: Deloitte 2018 global crisis management survey.

Deloitte Insights | [deloitte.com/insights](https://deloitte.com/insights)

# And . . . Back to Stage One

Updating the Crisis Management Plan.

# Going Back To Basics

- ▶ Identify crisis team members and leaders based on skills and decision-making roles – what did COVID teach us about who needs to be on the team and how they should be organized?
  - CEO, CFO, GC, HR, IR, Compliance, Sales, Operations, IT.
  - Create a contact list and crisis org chart.
  - Clearly identify roles, responsibility and authority.
- ▶ Identify outside resources: law firms, PR firm, IT forensics, insurers, government agencies.
  - Know who to call and how to reach them quickly.
- ▶ Develop coordinated communication plan, and clearly identify appropriate spokesperson(s) and those who will craft message.

## Going Back To Basics

- ▶ Develop an agreed-upon crisis response philosophy in conjunction with senior management.
- ▶ The plan should be written and kept in both electronic and hard copy.
- ▶ The plan should be readily accessible for those who need it.
- ▶ Consider use of modules to address common elements of different risks.
- ▶ Utilize checklists and flowcharts where possible.
- ▶ Run practice drills.
- ▶ Continue to regularly update plan and consider new/changed threats.

## Using Recent Experience as a Guide, Things to Cover in the Plan

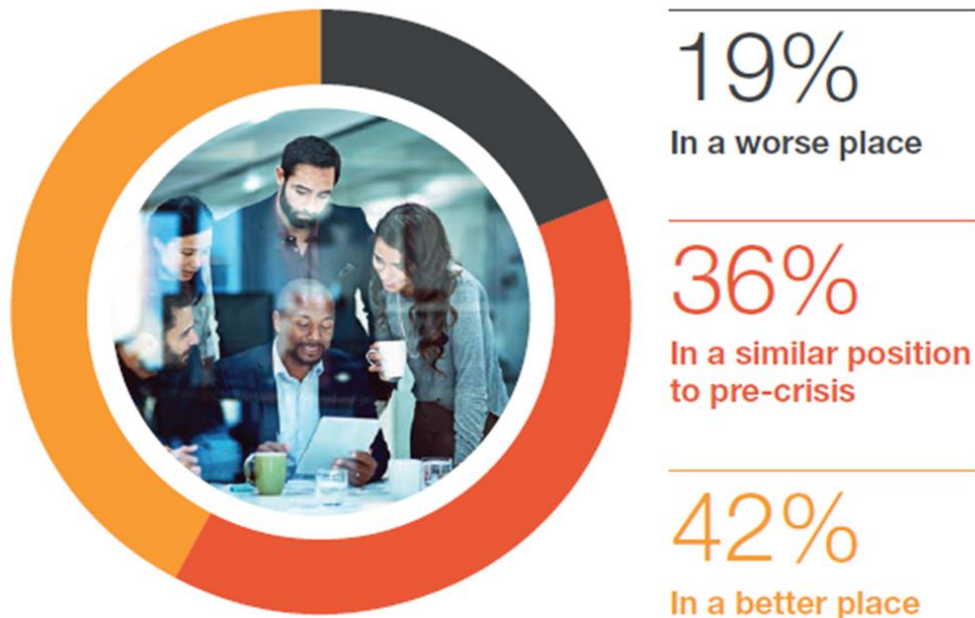
Ernst & Young recently published a list of mostly financial and operational issues to consider when preparing a crisis management plan, including:

- ▶ How to protect the well-being of your people and the safety of your productive assets in the event of a crisis.
- ▶ How to ensure technology, data and communication continuity.
- ▶ How to address demand disruption.
- ▶ How to ensure sustainable financing and stable cash reserves.
- ▶ How to adapt your business model to reduce costs, both in the short and medium term.
- ▶ How to overcome supply chain and production risks.
- ▶ Include the impact of a crisis in regular budgeting and business planning processes.



# Looking Forward to Better Times

Figure 6: Crisis Impact



Source: PwC Global Crisis Survey of 2084 respondents

## Questions?

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