1. Disasters are unpredictable and can come in a variety of flavors.

   A. PR crises (reps and spokespersons moral failings; government investigations, gripe sites, etc.)
   B. Natural Disasters (earthquake, hurricanes, hantavirus, etc.)
   C. Man-made Disasters (fire, explosion, flooding, etc.)
   D. Terrorism and Active-Shooter events.
   E. Technology Disasters (OMG! no internet!)

2. You can plan for a predictable crisis, but you’re better of planning for ANY type of crisis – Have a Written Plan.

   A. Have a Written Plan and make sure it is “backed up” to the “cloud”
      Imagine how they will do it in the dark, with no power, with no internet, with no smart phones, etc.
   B. Pre-Planning Planning (imagine the worst case scenario, consider how that will affect business, then plan around that).
   C. THE PLAN may include:
      1. Office evacuation plans (think fire-drills from high school)
      2. Keep an active list of employees (who is in, who is out, etc.)
      3. Assign a chain of command for the disaster (this is not your org chart)
      4. Contact information for management and employees
         This could include down to social media contact info, which has proven to be useful in crises
      5. Keep a list of critical suppliers and vendors.
      6. Communication Plan
         a. Employees – procedures, number to call, etc.,
         b. Communicate to suppliers/vendors, etc.
         c. Review contracts to make sure you have options in a “force majeure” event.
         d. Put out PR messages
         e. Communicate with regulators
      7. Where will you go tomorrow (back up HQ)
8. Legal Issues

_Are you liable if you FAIL to properly plan?_

3. Rehearse the Plan (the time to discover holes in your plan is NOT when real world events force your plan into action).
   a. Implement the Plan
   b. Training Tips (new hires, existing employees, management, etc.)
   c. Keeping the Plan Up-to-Date

4. Review Insurance Coverage
   Where coverage might be available:
   1. Notify carrier immediately of any potential claims.
   2. Notify insurance coverage counsel immediately.
   3. Do not trust claims adjusters (their goals are not your goals)

   Make sure documents are properly secured, copied and archived in more than just HQ’s metal file cabinet).

5. Address the Corporate Culture
   A. Trust
   B. Communications
   C. Constructive Criticism
   D. Accountability
WHEN THE LEVEE BREAKS – CRISIS MANAGEMENT WITH NO PLAN IN PLACE AND NO RESOURCES

WHAT TO EXPECT WHEN IT’S NOT EXPECTED

YOU SHOULD HAVE A PLAN

- YOU SHOULD REHEARSE THE PLAN – IT’S NO GOOD IF IT’S JUST ON THE SHELF
- REHEARSAL ALSO NEEDS TO INCLUDE POST-MORTEM REVIEW OF CHECKLIST AND TWEAKING

EVEN WITH A PLAN...

AND EVEN WITH A REHEARSED PLAN...

NO AMOUNT OF PLANNING WILL EVER HAVE YOU FULLY PREPARED FOR THE ACTUAL EVENT – YOU CAN’T FULLY ANTICIPATE IT, AS THERE ARE DIFFERENT TYPES OF “EVENTS”, SUCH AS:

- GOVERNMENT INVESTIGATION
- NATURAL DISASTER
- FACILITIES DISASTER (FIRE, EXPLOSION, ETC)
- TERRORIST OR OTHER VIOLENCE

RISK MITIGATION/CRISEIS PREVENTION IS AS IMPORTANT AS A PLAN (AN OUNCE OF PREVENTION)

- ENGAGE AN OUTSIDE FIRM TO CONDUCT RISK ASSESSMENT
- DEVELOP A PLAN TO MITIGATE RISKS IN DESCENDING ORDER, BIGGEST RISKS FIRST
- IMPLEMENT THE PLAN

WHAT I LEARNED FROM “MY EVENT”:

FOCUS ON THE PROCESS – HOW WILL THE EVENT BE MANAGED:
HOW WILL DECISIONS BE MADE
COMMUNICATIONS PLAN
RETAIN PR FIRM/MEDIA CONSULTING FIRM
ALL EXPERTS/CONSULTANTS/PR SHOULD BE HIRED BY OUTSIDE LAW FIRM
(PRIVILEGE IS EASIER TO ASSERT)
MAKE SURE YOU HAVE OUTSIDE INSURANCE COVERAGE COUNSEL ANNUALLY
REVIEW YOUR POLICY TO ADVISE YOU OF WEAKNESSES IN COVERAGE, “GAPS” AND
“GOTCHAS”
FIGURE OUT WHO THE LIKELY PLAYERS WILL BE, E.G., CEO, CFO, GC, HR, ETC,
AND WHAT THEIR LIKELY ROLES WILL BE
DEVELOP A CHECKLIST, INCLUDING, FOR EXAMPLE:
NOTIFYING PR/MEDIA CONSULTING FIRM YOU HAVE ON RETAINER
LITIGATION HOLD
INSURANCE CARRIER NOTIFICATION

IF THE EVENT INVOLVES A POTENTIALLY BIG FINANCIAL LOSS AND POTENTIAL
CATASTROPHICALLY LARGE INSURANCE CLAIM, BE PREPARED:

- NOTIFY YOUR CARRIERS IMMEDIATELY
- NOTIFY INSURANCE COVERAGE COUNSEL IMMEDIATELY
- YOUR CLAIMS ADJUSTER IS NOT THERE TO HELP YOU – YOUR INTERESTS ARE
  NOT ALIGNED
  THEIR GOAL IS TO DELAY PAYMENT
  OR EVEN BETTER, TO DENY COVERAGE AND PAY NOTHING
- OBTAIN VOLUNTARY PAYMENTS WAIVER ON EMERGENCY EXPENSES OR IF
  IMPRACTICABLE, NOTIFY CARRIERS ASAP OF EMERGENCY CIRCUMSTANCES
  REQUIRING EXPENDITURES.
- DOCUMENT EVERYTHING.
- BEING ORGANIZED: IT IS NOT ENOUGH TO HAVE EVERYTHING DOCUMENTED.
  IF YOU CAN’T RETRIEVE/ACCESS IT QUICKLY AND EASILY, YOU WON’T BE ABLE TO
  RESPOND TO RAPIDLY DEVELOPING EVENTS
When the Levee Breaks: Crisis Management with No Plan in Place and No Resources

Session 510 – Thursday October 30, 2014 (9:00 AM-10:30AM)

The title of this Program is “When the Levee Breaks: Crisis Management with No Plan in Place and No Resources,” and that title makes me think of a few of my favorite quotes:

“You can hire the smartest, most diligent and highly motivated people on the planet, put them in a bad system, and the system will win every time.” Unknown.

“Be Prepared” – The Boy Scouts of America’s official motto; and,

“The man who coined the phrase ‘Money can’t buy happiness,’ never bought himself a good fly rod” Reg Baird.

In the summer of 2010, I was the General Counsel of Advance America, Cash Advance Centers, Inc., then a publicly traded consumer finance company in the payday lending space. We were the target of choice for all sorts of regulatory investigations, political debates, and press-room headlines. One such investigation was particularly challenging.

One fine summer morning, my CEO walked into my office with a grim look on his face, placed a certified mail envelope on my desk and said, “I received this from the SEC last night.” I looked inside the opened envelop and felt the autonomous “fight or flight” physical changes course through my body. He had received a Wells Notice from the SEC informing him that the agency believed that he had engaged in insider trading. His question to me, “what do I do.” For the first 30 seconds, a lifetime then and now, my response was a blank stare. I was a first-time public company GC and Corporate secretary, and in spite of the warning signs, I had no plan, and I had no idea what to do... “Let me make some calls and I'll get back to you in an hour.”

That very awkward conversation with my CEO wasn't really the way I wanted to start the process, but the truth of the matter is that I was so focused on all of the other regulatory challenges of the business that I had completely overlooked one of the most basic, fundamental rules of in-house practice: always be prepared for the unexpected challenge.

I think of the first two quotes because they remind me of two things I took away from managing that crisis. The first, I've already alluded to, and that is, YOU MUST HAVE A PLAN. Some document, even a simple checklist to help you navigate the challenges of an investigation or regulatory incident is critical to not only your ability to provide guidance to your company and the Board, but it is essential to your sanity. Regardless of what type of crisis you face, the issues will be challenging and events will transpire quickly. If you've been the leader that you need to be, you will have something in place to help you get your arms around the issues and respond to evolving circumstances quickly.
The second, which I just mentioned, is that YOU MUST BE A LEADER of your organization regardless of where you report within the organization. Being a leader within your organization or department could be its own program, and since this program is focused on what to do when you encounter a crises, I will not spend a lot of time on leadership, but these materials do include my thoughts on being a corporate leader from wherever your particular vantage point sits within the organization. In essence, being a leader means being a proponent of a healthy culture. It’s not something you can just talk about, it’s literally something that oozes from your pores… you have to walk the walk, as they say, and it isn’t always easy.

Both of these observations may seem like common sense, but given the fact that you are all here, I’m guessing that you are now just as prepared, or unprepared, as I was when the SEC came knocking on my client’s door. Why wasn’t I as prepared as I needed to be? Good question. Had I been the leader that I needed to be at that time, I would have been.

With that in mind, I’ve prepared a practical checklist that I hope you will find helpful if you find yourself in the throws of an SEC or FINRA securities investigation. The check-list is based on my experience and laced with what I hope are helpful practice tips. Also, toward the end of these materials, I’ve shared with you my thoughts on leadership and how you can model your behavior and that of those around you to help your management team build a sustainable a leadership culture.

Dealing with a Regulatory Investigation – Simple Practice Checklist

1) Know your internal policies

a. Review and revise (as appropriate) your internal policies often. In my example, for instance, knowing that your Insider Trading Policy is up to the task is a big deal… while your CEO will be looking to you to protect him, your only concern at this point is protecting the company and its shareholders… don’t ever forget that.

b. Make sure that your corporate records are also up to snuff. When was the last time you read your bi-laws? It’s been even longer since they were updated. In my example, knowing what they say about trading and about directors and officers indemnity will become very important.

2) Understand the investigation. Start day one. Don’t assume you know or understand what happened. Talk to the investigators and understand learn everything they are willing to tell you.

a. Is it a formal or informal investigation;

b. Is it criminal or civil in nature and who are the targets? The suspects? The witnesses?

c. What are the specific allegations?
d. How long will the investigation last?

e. **Deal with information requests.** *I can’t stress this enough, take some time to think about where applicable records and communications might reside and make sure, you’ve issued a litigation hold to everyone who might have those records.*

   i. What information is being requested, how should you cooperate?

   ii. Remember, no subpoena power for informal investigations, but cooperation could mean credit. How you cooperate and the extent of your cooperation will become important factors in the future should the company become a subject of the investigation.

   iii. **Always try to provide the facts in light most favorable.** *Just because you should cooperate doesn’t mean you can’t persuade investigators to view facts and circumstances in the light most favorable to your company.*


   v. **Should you request confidential treatment?** *It may be important to protect the innocent or preserve the integrity of the investigation… both sides may see it the same way, so don’t hesitate to ask for confidential treatment if you see something that should remain confidential.*

   vi. Make sure your submission has been reviewed by competent counsel;

   vii. **Who’s running the investigation?** *Understand their take on the investigation. You’ll be able to tell quickly if they suspect broader implications; and never miss an opportunity to persuade the investigator to view facts and circumstances as you would have them perceived.*

3) **Issue a litigation hold in conformance with your document retention policy.** *Pay a lot of attention to this… this is a day one action item.*

4) **Appoint a Special Committee.** *Choose wisely. These are the people whom you’re going to rely on to make recommendations to the Board. Know them well. Inform them fully, and make sure they have all the facts and understand the applicable issues.*

   a. Special Counsel;

5) **Consider public company disclosure requirements;**

   a. Required disclosure?
b. Voluntary disclosure?

6) **Start your own investigation.** Remember to protect the privilege. **Hire a firm to conduct the investigation, but stay involved. You do not want to be seen as “washing your hands” of the investigation process... it will be perceived poorly by your organization. Make sure everyone knows the reason why the firm is involved... the company’s protection.**

a. **Interview targets and witnesses.** *Don’t forget to give “Upjohn” warnings;***

   i. Not all employees are alike, consider their emotional state and determine where you might need to spend more time;

   ii. Remember your company’s culture and work within it... now’s not the time to expect employees to “trust,” or “communicate,” if those cultural attributes don’t already exist.

b. Protect investigation by using outside counsel;

c. Written conclusions v. withheld conclusions;

d. Do you self-report anything you learned during your investigation?

7) **Review applicable indemnity agreements;**

a. Lawyer them up – pay attention to your indemnity agreements... SEC may make you treat fees as compensation or claw-back;

b. Consider multiple counsel;

c. Lawyers for witnesses/preparing witnesses;

8) **Your Wells Notice submission – do you make one?***

a. Discovery considerations;

b. Facts and consequences;

9) **Remember your place in the world**

a. **You represent the company. You do not represent individual directors, nor do you represent individual officers, nor do you represent individual shareholders. You represent the company and the company alone. Beware the pitfalls of those “quiet” conversations that you might have with your CEO, CFO, COO or Directors. Explain your position. Make it clear that they do not have privilege.**
The Importance of Culture

Regardless of whether you’re a one-man show, running a small or large law department, or just an associate in-house counsel, you need to remember that you, as much as anyone else on your management team or working in your department, drive your organization’s culture. Culture might be based on certain ideals, like “core values,” but building a culture isn’t done by expressing an ideal, it’s a behavior, and you, as a leader must recognize how to model your own behavior to be a leader and advance your company’s culture. That’s not always easy, especially in settings where there’s always a regulatory challenge just around the corner, because people would rather be led by someone than to lead for another.

But, our job is to drive good results, and driving results means leading and the first step of leading is knowing where to start, so I’ll share with you what has worked for me, and helped me build and sustain a culture of leadership within the organizations that I’ve represented over the years.

One of the most difficult aspects of leading is overcoming your “followers” propensity to be led. To do this, you have to somehow make leaders out of your followers, and to manage that process, you need to have a strong sense of how to build or influence your organizations corporate culture. For me, this meant understanding how to build teams that trusted each other, communicated openly and clearly with one another, gave constructive rather than destructive criticism (they understood the power of the word “no” and used it to find better answers), held one another accountable to their word and their tasks, and generally paid attention to the results that their actions created for the larger organization.

Trust – This is the foundation of any strong corporate culture. It isn’t the “I love you man,” trust that you might think of when you’re thinking of your spouse or watching a bad romantic comedy… this is the kind of trust that is felt when everyone knows that it’s OK to speak their mind and make mistakes. The “I got your back,” or “I’m pulling on the same oar,” even though I disagree with you kind of trust.

Communication – Sounds simple, but how many times have you heard your CEO say, “damned legal ease…” Remember, translating statutes and regulations into a business practice isn’t easy. Pay attention to the words you use, and ask your colleagues for thoughts on how to best communicate the issues. Bight your tongue in exploratory or development meetings… your first impression is most likely almost always wrong. Jot it down, white-board it, research it, and return to the group with a well-developed thought.

Constructive Criticism -- Make your criticisms constructive. Sometimes, that might mean that you wait to give it. We’ve all been in settings where we know what we are supposed to say (“Yes”), but that often conflicts with what we need to say. Don’t react too quickly. Jot down notes, whiteboard the issue, make sure it’s not a red herring. You’ll thank yourself over and over and over again.
Accountability – This is really only achievable if your team has the three former concepts down pat, otherwise, human propensity is to point fingers at others rather than take accountability for our own shortcomings. Don’t hesitate to accept responsibility. I’ve never met a mistake that could not be fixed, and most are easily fixable.

Attention to Results – This is where the magic happens. If your team doesn’t learn to take accountability, they will never pay attention to results. However, once folks are holding themselves accountable, they will take time to evaluate the results of their efforts and adjust them light of their observations.

When you walk into the office and govern your behavior in accordance with these five behaviors, and strive to manage your team or your daily undertakings toward these five simple principles, you’ll find that regardless of whether you’re leading an administrative assistant, an internal legal department, or outside litigation counsel, the results you seek will be easier to obtain because your team will model their behavior after yours and lead themselves to the results you and your organization desire.
When the Levee Breaks: Crisis Management with No Plan in Place and No Resources

Description: What is the small law department’s role when a natural or man-made disaster impacts your operations or those of a key business partner? What if the company doesn’t have a plan in place and you have to provide immediate advice? Emerge from this session better equipped to respond when disaster strikes, with the rudiments of a plan in mind and with the desire to fully develop that plan while things are calm!

According to the National Science and Technology Council, a disaster is a “serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses which exceed the ability of the affected community or society to cope using its own resources”. Disaster are community based, while crises are organization-based. Clearly, disaster can lead to crisis. And depending on your industry, your response to a disaster will help or hurt the short and long term image of your company.

Crisis can come in many different forms:
- Natural Disaster (e.g., Katrina)
- Man Made Disaster (e.g., arson)
- Terrorist Acts (e.g., 9/11) or Active Shooter Scenarios (e.g., Isla Vista)
- Technology Disaster (“OMG! The internet is down!”)
- Government Investigations (Feds raiding business and seizing evidence)
- Customer/Media Attacks (social media gripe sites)

Having a Crisis Management Plan in place can help your legal department and your client survive a disaster.

Elements of a Crisis Management Plan

To write or not to write?
I prefer having a physical manual that each critical employee can hold, read and flip through the pages. I assume “the big one” (meaning the San Andreas Fault in Los Angeles that will soon be sending half of the city into the Pacific) will result in a complete failure of internet, which will lead to power outages, which will lead to riots and looting…and eventually the zombie apocalypse. To access a document online, you will need the following…and in a disaster, any or all of them are likely to be unavailable): (a) Hardware (computer, tablet, smart phone), (b) Electricity and (c) internet connection. Of course, you can also maintain a digital or cloud-based version for easy reference and updating. When changes are made, update the physical manual.

Pre-planning Planning:
1. Make sure you backup and “save” whatever you need. That includes employee files as well as client files and business documents. Assume your office building burns down. Can you recreate hard-copy files? Assume your computer system is hit by a nasty virus. Can you recreate your digital files? If you’re using a cloud service, do you know how your information is stored, protected and accessible in the event of a disaster?

What to Plan:
1. Office Evacuation Plan (think fire-drills from high school)
   a. Make sure everyone knows the meeting place upon exit of the building. Have an alternate meeting spot in case your first location is dangerous or unavailable.
      i. Always assess the area to make sure it’s safe. If the primary site is unsafe for any reason, go to the backup location for a headcount.
   b. Keep a list of active employees, so you don’t inadvertently miss anyone.
      i. When you evacuate, someone needs to take inventory of the employees that should have evacuated. How will you know who was at work today, versus who called in sick, was on vacation or stepped out for lunch?
   c. Assign someone to be in charge, with a second (and maybe a third) in command.
      i. It’s particularly important for the designated leaders to be aware of their responsibilities and able to fulfill them (that means everyone’s favorite: role-play!).
   d. Make sure employees know how to get in touch with management and other executives. Not just by email (what if the internet is down) or by mobile phone (what if cellular service is not working).
      i. Don’t forget… social media can be an excellent communication tool, so if you haven’t jumped in yet, do it now…and share your info with others so they can use it.
      ii. Unlike traditional media (which is one way), social media can be a tool for two way communication.
   e. Keep a list of each employee’s contact information, including name, mobile phone, home phone (if anyone has such a thing anymore), home address, email address, social media handles (Facebook, Twitter, Instagram and other tools), and the employee’s emergency contact person (again, name, address, email and phone numbers).
      i. Designate which employees. If mobile phone service remains active in a disaster, texting can be a very efficient way to communicating.
   f. Have a list of critical suppliers, vendors and others in the food chain that might need to be contacted along with multiple contact options.
2. Communication
   a. Do you have a crisis communication plan?
   b. First things first! What about the employees?
      i. There is the immediate need to communicate with employees.
      ii. Do you know how to communicate with employees during a crisis?
         1. Communication may be in-person, telephone (land line or mobile), company bulletin boards, online resources and social media, etc.
c. Employees may need to communicate with family and friends.
d. You may want to communicate with suppliers, vendors, resellers and others in the food chain to stop the flow of products or services.
   i. (As a side note, consider your contract templates...do you have a force majeure clause that gives you an easy avenue to terminate or suspect agreements, payment obligations, etc.?)
e. Your clients and customers (whether B2B or B2C) might want to know what’s going on (will their goods or services be interrupted, if so for how long, what are their options, etc.).
f. The press may need to be alerted to help spread necessary messages.
   i. Be careful how you approach certain disasters. The public generally will be sympathetic to natural disasters and may be forgiving of accidents, but intentional or preventable disasters (such as the recent financial meltdown) will not be easily forgiven, overlooked or forgotten.
   ii. Do you have a designated employee to talk to the press? If not, consider designating someone who can be trained how to talk to the media.
   iii. How will you protect the credibility of the company?
g. If you’re a regulated industry, do you need to communicate with government agencies or regulators? Do you and your staff know who to call?

3. Where do you go Tomorrow?
   a. Thank about alternative or temporary work sites. If your building is blown up, burned down, blown away, flooded or becomes a crime scene, where will you and the rest of the company’s employees go to work?

4. The LEGAL issues:
   a. Negligence.
      i. If you (or more specifically, you client) doesn’t do adequate disaster planning, is the company liable when things go wrong?
      ii. See, for example, the Run, Hide, Fight video from the City of Houston. In light of the seemingly rising number of active shooter scenarios, is this type of training a good idea (if not a duty)?
   b. Consider the possibility of disaster with each contract and build in appropriate outs or remedies.
   c. Review insurance coverage for adequate coverage for a variety of possibilities, including physical loss, data breach, loss of employees, etc.
   d. Other legal issues.

5. OTHER TIPS:
   a. Practice disaster preparedness. If you don’t practice, people will panic and chaos will prevail.
   b. Bug-out bags (keep a small supply of emergency survival supplies with you either in your car or in your desk).
      i. Include medications, personal hygiene, water, power bars and a basic first aid kit.
Enduring an unexpected Senate Investigation.

Top three lessons learned:

1. Play politics before you need to ask for help (i.e., be prepared)

2. Documents, emails and conversations always should be made assuming they will be turned over or leaked (i.e., be prepared)

3. Have a PR plan in writing to mitigate bad press (or even to capitalize on potentially bad press) (i.e., be prepared).

When Budget Van Lines was subject to a Senate Investigation, we were surprised but we organized ourselves in a way that allowed us to take the spotlight as “the only moving broker to fully cooperate and find solutions”. We were able to put a positive spin on our efforts, which also ended up helping us raise our BBB grade from an “F” to an “A+”.
Introduction/Overview

What do you do when your high-profile celebrity “spokesbody” Anna Nicole Smith suddenly dies under sudden and mysterious circumstances?

How does a company manage a key product brand and its relationship to a popular former spokesperson while dealing with:

- The fallout from an FTC Agreement and resulting FTC Consent Order concerning allegedly misleading advertising that featured the deceased celebrity?
- A pending class-action lawsuit covering similar allegations of false and misleading marketing claims as encompassed by the FTC Agreement and resulting Consent Order?
- Odd revelations that the celebrity may have been cheating on the company by using a competitor’s product - Photos of Smith’s refrigerator obtained by TMZ.com showed and a Medical Examiner Report discussing the hotel room where Smith died mentioned cans of Slim Fast shakes – a Unilever product.
- Extraordinary and intense media coverage of the passing of Anna Nicole Smith, including speculation that her use of your company’s product caused or contributed to her sudden death.

Annotated Timeline (The deconstruction of a brand and the company behind it)

1.04.2007 FTC announces settlement with GTC – maker of Trimspa.

**COMMENT**: Although the settlement terms between the FTC and GTC were finalized months earlier, the FTC waited until January 4, 2007 to collectively announce settlements with GTC, Bayer Corporation and several other companies. As FTC Chairman Deborah Platt Majoras stated in her press conference: “It is resolution time again, isn’t it? We’re implementing our resolution to fight back against companies that use deceptive advertising claims.” Simultaneously, the FTC issued a press release with the first line stating: “FTC Recovers $25 Million to Settle Allegations of Deceptive Marketing for … Trimspa ….” Numerous news outlets used that sentence to create their story headline (e.g., The Washington Post, January 4, 2007, “FTC Fines Weight Loss Pill Firms $25M.” In actuality, GTC agreed to pay a $1.5 million relating to a handful of discontinued ads from 2003-2004. Bayer, the other prominent company subject to the FTC announcement, agreed to pay a $3.2 million relating to its marketing of One-A-Day WeightSmart multivitamins. The remaining $20+ million “recovery” concerned the estimated value of assets to be surrendered by two bankrupt companies and their former principals.

**LESSON NO. 1**: Be Prepared (Part 1) - Regulators have their own agenda and deadline pressed media will take what is offered.

As part of settlement negotiations, GTC sought FTC assurances that the company would get a “heads – up” before any public announcement was issued. While the FTC staff indicated it would “try”, GTC did not expect any advance warning and none was provided. Clearly, with the New Year timing of its
announcement, the aggregation of 4 separate settlements and its highlighting of Trimspa/Anna Nicole advertisements in its press conference – the FTC wanted to make a splash with consumers, marketers, and the media. And it did not want to be preempted.

GTC issued a press release that same day as the FTC announcement. The press release stated the company decided to amicably resolve the matter and move forward. [NOTE: The FTC CID (Civil Investigative Demand), which included an extremely broad document request and preservation directive, was served on GTC in September 2004. Earlier in 2004, a lawsuit alleged deceptive Trimspa advertising was filed against GTC in Los Angeles state court on behalf of a class of California consumers.] While expressing its disagreement with the FTC position regarding insufficient substantiation at the time the [advertisements] were made”, in the press release GTC emphasized that the FTC complaint addressed only a handful of advertisements that ran in 2003 and early 2004 (i.e., 3 to 4 years ago), and applauded the agency’s efforts to clean-up the industry. [NOTE: In creating press releases and crafting other public responses, remember that FTC actions are subject to a minimum 30 day comment period. An announced settlement is not final until expiration of the comment period and formal acceptance by a majority of FTC Commissioners. Further, in GTC’s case, class action lawyers were lurking so any public responses also needed to account for pending and potential litigation.]

2.05.2007 The first of several new putative class action lawsuits is filed against GTC. The allegations of all these lawsuits track verbatim the allegations of the FTC’s January 2007 complaint. In addition to the entities and individuals named in the pending FTC Consent Order, one new lawsuit includes Anna Nicole Smith as a defendant.

2.08.2007 Anna Nicole Smith, 39, is found unconscious in a Florida hotel room and pronounced dead after being taken to a hospital. Authorities state the cause of death is under investigation and an autopsy will be performed. Given Smith’s sudden and mysterious death and her constant weight fluctuations, almost immediately speculation begins regarding whether her dieting – including the safety and efficacy of Trimspa – caused or contributed to Smith’s death.

GTC, through its CEO, posts a message of its website which stated in part: “Anna Nicole Smith’s grief stricken and tumultuous personal life came to an end. Anna came to our company as a customer, but she departs it as a friend…We pray that she is granted the peace that eluded her more recent days on earth…..” The website further noted that comments were no longer being accepted.

COMMENT: As discussed later regarding media preparation and crafting media statements, the short, poignant website message addressing the tragic passing of Smith was well received.

2.12.2007 Questions raised about the future of Trimspa. See, e.g., “Trimspa’s future?”, The Tan Sheet, February 12, 2007 (Brand consultant Robert Passikoff, Ph.D. notes that TrimSpa’s legal trouble in conjunction with Smith’s death does not bode well for the future of the brand and the combination of circumstances may be “too big a hit” for Trimspa to recover.)

COMMENT: Company used website, press releases, messages boards etc. and communications with retailers to try and shift the story and rebrand Trimspa: central theme was that Smith was one of many Trimspa success stories and that the product had helped many, albeit less famous, people in all walks of life. Prior testimonials/regular people stories republished to reinforce “rebranding” theme.
Simultaneously, company pulled products with Smith image on packaging/containers from retail distribution and killed print and TV advertising that featured “Anna Nicole 2.0” (i.e., lost baby weight with the help of Trimspa). [NOTE: Insurance, such as product recall or event cancellation insurance, was not applicable in this situation. Nonetheless, as part of crisis planning and management, companies should consider potential insurance coverage options and strategies for triggering coverage (e.g., timing and content of notice, frequency and content of status communications, settlement offers/voluntary payments etc.)

2.16.2007 Media coverage of Anna Nicole Smith’s death was so extensive in the days and weeks following her death that stories were being written about the “feeding frenzy for the national media.” See, e.g., “Anna Nicole Coverage Sweetens the Ratings Pot,” The Washington Post, February 15, 2007 (Noting that NBC’s Nightly News devoted 14 seconds to the Iraq war compared to over 3 minutes for Anna Nicole; CNN referenced Anna Nicole 522% more frequently than it did Iraq and MSNBC had 708% more references to Anna Nicole than Iraq.); “Chronicle of a death foretold,” The Guardian, May 12, 2007 (In death, Anna Nicole Smith received the same volume of press coverage as Princess Diana and noting that “the intensity of the US coverage was extraordinary. …Internet sites continually crashed. She was on the front pages of every tabloid for weeks.”)

3.27.2007 Detailed autopsy report released regarding Smith’s death. Symbolic of the extensive interest in Smith’s death, the Medical Examiner’s (“ME”) report was accompanied by a news release and a PowerPoint presentation.

COMMENT: While the ME concluded that Smith’s death was accidental, due to an overdose of a lethal combination of sleeping medication and numerous other prescription drugs, the comprehensive report contained several items with the potential to add further insult to the Trimspa brand and Smith’s highly publicized weight loss attributed to her use of the product. First, the report noted that Smith had a nasty infection caused by injection of vitamin B-12 and growth hormone, injections often used for weight loss. Second, the report also described Smith’s hotel room as containing, among other things, SlimFast – another over the counter weight loss product.

The safety of Trimspa was not implicated by the ME report. [NOTE: during this time, the safety of dietary supplements remained a high profile issue following the FDA’s 2004 ban of the highly popular and effective weight loss dietary supplement ephedra as unsafe; the December 2006 enactment of the Dietary Supplement and Nonprescription Drug Consumer Protection Act mandating reporting to the FDA of serious adverse events for dietary supplements and non-prescription drugs marketed without an approved application; and continued litigation challenging the FDA ephedra ban. It was not until May 14, 2007 (months after Smith’s death) when the U.S. Supreme Court denied a writ of certiorari petition by a Utah manufacturer that legal challenges to the FDA’s ephedra ban subsided.]

However, the ME report rekindled speculation and varied opinions across the internet about the efficacy of Trimspa and the veracity of Smith’s endorsement of the product – often negative publicity that did not help the brand’s reputation.

LESSON NO. 2: Be Prepared (Part 2) – Expect the Unexpected (No way to be fool proof, but there is a way to be prepared.)
Advance preparation is essential to successfully navigating a crisis. Every company can have a crisis. But the company cannot know when a crisis may arise or how the company may be impacted in the short and long-term. Studies indicate that the public remembers how an organization managed a crisis more than the details of the crisis/incident itself. [Source: Virgil Scudder, “Asiana Crash Underscores Need for Crisis Preparation,” The Public Relations Strategist, Fall 2013.] Compare company handling of J&J – Tylenol Crisis with Malaysia Airlines Flight MH370 Disappearance.

Build a Plan

- Identify the most likely crisis situations (e.g., airline – fatal crash, oil company – major spill, consumer goods company – tainted/unsafe product or ingredient) and create a thorough response plan.

- Consider that a crisis situation can also arise from an attack on a company’s integrity and reputation (e.g., activist driven protests and/or call for boycott call, “hactivist” or other malicious/intentional action, actual/perceived immoral, unethical or questionable conduct by senior executive (e.g., sexual harassment allegations) or voicing of unpopular opinion on (same sex marriage, domestic abuse) - coupled with negative publicity or continued publicity.


- NOTE: A commonly cited shortcoming of crisis management plans is that there are no requirements for reporting a problem or a potential problem. The plan should define a reportable crisis as any event that can negatively impact the company’s revenue or reputation. Over inclusiveness is preferable.

Advance Preparation Steps and Considerations

- Assemble a crisis management team in advance based of their subject matter expertise, knowledge of particular business etc. May be able to identify which team members will be involved in managing particular crisis types.

- When a crisis is identified, the appropriate spokesperson can be selected from this pool based on the crisis level, circumstances and his/her experience speaking in high stress. Companies with international operations should consider having a spokesperson or some PR presence in significant international jurisdictions.

EXAMPLE: Asiana crash at San Francisco Airport July 6, 2013 (airline had no spokesperson outside Korea so there were no representatives in the United States to handle the media. This spokesperson void manifested into various mistakes. Early investigation into crash focused on pilot error. A local TV station was given fake, racially insensitive pilot names which names were aired. Asiana publicly threatened to sue the TV station, which repeatedly apologized for the report. Although the lawsuit threat was withdrawn, the media criticized Asiana for its focus “at a time like this.” [Source: Virgil
Scudder, “Asiana Crash Underscores Need for Crisis Preparation,” The Public Relations Strategist, Fall 2013.]

- Smaller companies face additional obstacles because they may not have the same internal personnel as larger companies, although threats from crises may be larger. Consider retaining outside assistance or rely on internal personnel to fulfil multiple roles.

**NOTE**: Take care to clearly define roles. Without established crisis management team roles, crisis response typically ad–hoc and prone to mistakes in the heat of the moment. One Public Relations/Crisis Communications consultant, Geraud Braud, advocates that all companies create 3 types of crisis plans with corresponding defined roles: 1) crisis management plan/team; 2) emergency response or incident command plan/team; and 3) continuity of business plan/team. Braud recommends that the leader of each of these teams should be a member of the crisis management team and consider limiting your core crisis management team (or inner circle) to 4 or 5 leaders. Each leader should have other internal managers and experts they can consult as needed. See Gerard Braud, “Crisis Communications Plans Built to Fail: 3 Warning Signs and How to Avoid Them, “The Public Relations Strategist, July 15, 2014.

- Prepare corporate spokesperson(s), including practice drills for various possible crisis scenarios. With most companies, some risks are obvious. But less obvious risks should also be addressed (e.g., hacking threats, consumer boycotts, bad behavior resulting in negative publicity).

- Select a crisis manager. Can crisis manager fully delegate normal duties during crisis? Does crisis manager have ability/authority to make difficult decisions, i.e. choose between competing interests? Crisis manager should have authority to “go over the head” of officers/senior management to report to whatever level necessary to address an issue. This may include opposing legal advice. See, e.g., “Should PR pros oppose the advice of general counsel during a crisis?” PR Week, August 1, 2014 (While acknowledging that opinions differ and this conflict is not “a zero sum game,” article quoted one communications CEO stating, “We live in a fast-changing era. Crises become causes … and they get widespread coverage in the media. The truth gets lost in the shuffle. Waiting for lawyers while watching a troll army gin up embarrassing GIFs about your brand is too much to endure.”).

- Consider seeking outside PR counsel. Outside PR consultants 1) can have greater experience/expertise vs. inside team; 2) perspective not clouded/impeded by emotional or internal considerations; 3) allow top management to focus on day-to-day business.

- Should crisis manager or lead spokesperson be the CEO or another high-ranking executive? Some companies have been heavily criticized by media for not having top executives issue media statements. But if a crisis is not severe or is related to false allegations, designating the CEO as spokesperson could lead media and public to believe the crisis is bigger/more serious than it really is.

**NOTE**: If CEO makes a public blunder, will damage to company’s business and reputation be exacerbated. **EXAMPLE**: Infamous quote from now former BP CEO Tony Hayward who publicly said during the BP Deepwater Horizon Oil Spill, “I want my life back.”
LESSON NO. 3: Be Prepared (Part 3) - the media is pervasive.

The news is constant from TV, newspaper, radio, and the web. The impact of social media is tremendous, with millions of posts on blogs, forums, social media sites, corporate websites, and watchdog sites. The timing is immediate and companies must be prepared to make quick responses (e.g., 1-2 hours). Media and online chatter must constantly be monitored.

- Advance preparation for the media response should be mandatory.
- Include media considerations in your crisis management plan. Utilize company website and create online newsroom as central communications headquarters for all press materials. According to 2014 Business Wire Media Survey Results, over 60% of 300 participating North American journalists were receptive to brand written articles on company sites. Further, nearly 90% of journalists indicated that press releases were the most desired content especially for breaking news items and media relations contact information.
- Include media/PR personnel on crisis management team.
- Cultivate media relationships.
- Identify media outlets to monitor and appoint monitors.
- Participate in media crisis “drills”.
- Educate employees re: identification of authorized spokespersons and policies on crisis communication and disclosure.

QUESTION: Does your company require executives to participate in media training?


News focuses on blame and fault (“hashtag means hashtag”). Themes take prominence and the opinions created have staying power. Consider that the audience includes legislators, regulators, potential plaintiffs, plaintiffs’ attorneys, shareholders, consumers and business customers.

- Legal considerations: Admissions, privilege/work product protection preservation/waiver, false statement liability (all statements should be truthful and current; speculation which could be subsequently deemed erroneous) should be avoided even if requested), duty of preservation. There may be pending litigation or claims/litigation can be “reasonably anticipated.” In some crises, an investigation may need to be conducted by the company.

NOTE: Given the pending FTC matter and class action lawsuits, GTC was already operating under a document preservation notice. For practical “How-to” advice on preservation, see “How to Implement a Document Preservation Notice While Under Government Investigation: Ten Practical Steps,” Ober Kaler Podcast Transcript 2014.
• Consider voluntary disclosure of problems (to government, public, media) or other corrective actions (e.g., product recall, offers to help victims/pay for medical care etc.)

- Such measures may help create good will and credibility.
- Except where public health and safety, need to evaluate whether cons (e.g., admission of fault, ammunition for plaintiffs and plaintiffs’ attorneys vs. benefits of good will and long term best interests of company.

NOTE: Getting Bang for your “I’m Sorry” Buck” – Think through all issues/logistics and consider developing “victims relations” guidelines. As a general rule, it is reasonable to assume that a victim who feels he or she has been fairly treated is more likely to settle with the company than sue the company.

EXAMPLE No. 1: Data Breach – company made a mistake or has been victim of a crime. Customer data is on the open market and people are upset and looking for remediation. Who answers the phones and responds to their emails? Do you offer credit monitoring and/or identity protection? For how long? Answers to these questions (and how company executes the remediation plan) can mean the difference between customers happy to return and customers no longer.

EXAMPLE No. 2: Asiana Crash – company offered crash survivors $10,000 claiming cash was a settlement offer, but that the families could use the money. It was subsequently reported by a Korean New Agency that in order to receive the payment, families had to agree to eight conditions that airline refused to disclose citing potential impact on future lawsuits. Whatever “good will” or positive impression Asiana created with cash offers was lost in a chorus of cynics once existence of further conditions revealed.

• Internal and External Electronic Communications - Some Guidelines/Best Practices

- Electronic messages are never deleted and are not informal.
- Understand that any/every message may be discoverable or distorted/taken out of context to make you or your company look bad (it won’t seem funny in court).
- Establish a team communications system.
- Limit recipients, avoid “reply all” unless necessary (e.g., may want to avoid sharing certain confidential information with outside public relations consultants which could waive any privilege protections.)
- Pause before sending, consider using the phone especially if have any doubt about content (but be cautious about voicemail messages).
- Avoid discussing legal strategy or ongoing litigation.
- Leave nothing implicit even if obvious (e.g., say you are asking for legal advice or are providing information requested by counsel to assist him/her in advising the company.)
• Special Comments re: Press Releases/Media Statements

- Poignant statement can diffuse a negative story;
- Useful tool especially when not ready to answers questions “on air” or submit to a full blown interview or when deem that nothing to gain from interview;
- Helps ensure that media gets some balance/company perspective, especially when responding to a negative incident;
- Helps ensure a consistent organizational message – make sure Legal on board;

**NOTE:** Leave the legal language for pleadings, not for the media and communications to non-lawyers].

- Keep it short, positive and to the point (in a crisis, less is more); short statement sent before reporter’s deadline more likely to be used by media; and
- Say something substantive; otherwise the media and public will likely view a nothing statement as … nothing.

**NOTE:** The perils of “no comment.” No comment can create an impression of guilt. It is advisable for most employees to decline comment and direct media to an appropriate company spokesperson. BUT an organization that refuses all comment risks being viewed/treated with suspicion AND it is very likely the media will run the story without the company’s cooperation.

**LESSON NO. 5: Prepare (Part 5) to Litigate or Settle Civil Claims, Criminal Charges, and Shareholder Suits.**

Bad incidents or events and crisis situations (e.g., environmental disaster, data breach, product recall) inevitably seem to generate legal actions. Therefore, early on, attorneys and the crisis management team needs to start assessing the company’s potential liability and form a litigation strategy. Since predictability is difficult in the early stages of a crisis, several litigation strategies may need to be created (e.g., early settlement with victims or protracted litigation). Further, different strategies may be needed to address different types of claimants and different types of claims (e.g., wrongful death actions by decedent’s family, breach of fiduciary duty against management, officers and directors by shareholders, statutory violations and/or criminal allegations by government).

**NOTE:** Settlement with the government may be contingent on the company’s disclosure of all information, including confidential and privileged documents. Disclosure of privileged documents will likely waive privilege as to other parties. See In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (joining the First, Second, Third, Fourth, Sixth, Seventh, Tenth, D.C.
and Federal Circuits in rejecting the doctrine of selective waiver). Therefore, early settlement with civil claimants may be a preferable strategy if the company faces criminal litigation.

If litigation ensues, be mindful that judges may exercise control over the information dissemination process. Not every judge relishes the opportunity to regularly appear on Court TV or the local news. Understand the relevant court rules and the breath of any rulings regarding publicity. It is never a good idea to anger a judge. But neither is missing a strategic opportunity to tell your side of the story in response to comments that are already a matter of public record.

**LESSON NO. 6: Crisis Management Includes Rebuilding Confidence and Market Share**

Effective crisis management is not over when the immediate problem is resolved. Effective crisis management should include long-term management to rebuild confidence at all levels (consumers, employees, investors, government and general public).

- Review company’s crisis reaction and performance. For example, can the company convey a message that it is a good corporate citizen, concerned about public health and safety? Did the company accept responsibility (vs. pointing fingers) and undertake immediate corrective measures?
- Where long-term corrective measures implemented? Or where corrective measures improved as result of the crisis? Is likelihood of another occurrence minimized?
- If the crisis involves a product or service sold by the company, the crisis management team (probably with additional assistance from internal/external marketing personnel) should formulate a plan to restore consumer and retailer confidence in the product.

**NOTE:** Sometimes even the right moves damage undermine a company’s long term prospects.

**EXAMPLE:** Perrier’s voluntary recall of some of its water due to traces of benzene resulted in a sharp decrease in its market share. Perrier never recaptured its dominant market position, not because consumers were afraid of benzene but because the recall opened the door to competitors. Unquestionably, the recall was the correct decision, but the damaged France based Perrier ultimately lost its independence to Swiss giant Nestle.

**NOTE:** Sometimes the “perfect storm” hits and the brand never recovers.

**EXAMPLE:** GTC

7.09.2007 California court preliminarily approves GTC nationwide class action settlement regarding that alleged deceptive labeling and advertising statements of Trimspa from April 2003 to October 2006 (“class period”). Settlement gives claimants a free bottle of GTC vitamins, a $5.00 discount coupon for any GTC product and $1.00 for every bottle of Trimspa claimant purchased during class period. Subject
to court approval, plaintiff’s counsel eligible for an award of attorney’s fees and expenses not to exceed $3.4 million.

**COMMENT:** Nationwide settlement in 2004 lawsuit mooted FTC “copycat” lawsuits filed in 2007 and lead to their voluntary dismissal. Thus, by end of 2007 and for a fraction of sales revenue generated by sales of Trimspa, GTC able to resolve litigation hanging over the Trimspa brand. However, Trimspa sales and market share suffered considerably and never recovered.

**5.21.2008** GTC and several related companies file for bankruptcy reorganization under Chapter 11 of the Bankruptcy Code.

**COMMENT:** Continuing poor sales numbers, the inability to raise sufficient capital on acceptable terms and the inability to restructure certain existing debt combined to create a “liquidity crisis” precipitating the bankruptcy filing.

In the broader context 2008 saw an increase in retail sector bankruptcy filings (e.g., Boscov’s, Circuit City, Fortunoff, Sharper Image and Linen n’ Things) and several of the largest bankruptcy proceeding in history (i.e., Lehman Brothers, Bear Sterns, IndyMac and Washington Mutual). Lehman’s collapse triggered a widespread crisis in the global banking system – further tightening already difficult credit markets.

**9.07.2008** GTC Chapter 11 reorganization proceeding converted to a Chapter 7 liquidation and Trustee appointed.

**10.28.2008** Auction held to sell various assets to raise money for creditors.

**COMMENT:** The GTC related company owning the intellectual property rights to Trimspa (e.g., trademarks) was strategically not included in the GTC bankruptcy filing. The U.S. Trustee unsuccessfully tried to claim the Trimspa intellectual property rights as part of the assets to be liquidated.
ACC 2014 Annual Meeting Presentation
When the Levee Breaks: Crisis Management with No Plan in Place and No Resources
Session 510 – Thursday October 30, 2014 (9:00 AM-10:30AM)

Resources for Crisis Management Planning and Response

• “Employers before the Court of Public Opinion: Facing High Profile, Controversial Situations,”

• Crisis Communications Preparedness Checklist, excerpted from: “When Disaster strikes: The Legal department’s new Imperative, “ (originally presented at ACC’s 2001 Annual Meeting)

• Crisis Management: The Economy, Security and Coping with the Unexpected, “A Practical Guide to Preparing for and Responding to a Crisis,” Jenner & Block, LLC (originally prepared for Georgetown University Law Center Continuing Legal Education on March 14, 2002)

• “Responding to Media Inquiries in a Crisis: In-house Counsel as Spokesperson,” ACC Docket July 2003, 40-56

• Crisis Management, Planning and Execution, by Edward S. Devlin (published December 26, 2006 by Auerbach Publications)

• Crisis Management: Responding When Disaster Strikes (presented at ACC’s 2008 Annual Meeting) (materials include “Crisis Communications Desktop Reference” from Levick Strategic Communications and Jackson Walker L.L.P. article “ How to Protect Privilege With Respect To Communications With Litigation –Related Public-Relations Consultants”)

• Best Practices for Electronic Communications,

• Crisis Management in Litigation and Investigations: Parallel Proceedings, Competing Stakeholders and Multiple Venues in a Global Environment, prepared by Skadden, Arps, Slate, Meagher & Flom LLP (ACC InfoPak July 2011)
• Preparing For A Crisis: The Roles of In-House and Outside Counsel, PowerPoint Presentation by Greenburg Traurig, LLP at New Jersey Corporate Counsel Association Annual Dinner November 17, 2011 (available at acc.com)


• “Managing the Court of Public Opinion During a Media Crisis,” ACC Docket July 2013, 56-65