

CRISIS MANAGEMENT FOR IN-HOUSE LAWYERS

A CRISIS WILL PLACE YOUR ORGANISATION OUTSIDE ITS COMFORT ZONE. IT IS THE OPPOSITE OF BUSINESS AS USUAL. BUSINESS LEADERS AND SENIOR COUNSEL WILL BE REQUIRED TO TAKE DECISIONS BASED ON PARTIAL INFORMATION.

It can take days or sometimes longer to collect enough facts to fully understand the nature of the problem. Meanwhile, stakeholders will demand definitive answers and an immediate response. Executives and lawyers, who will inevitably have to base some of their decisions on assumptions, must have the confidence, backed up by robust processes, to enable sound decision-making in a world of imperfect information.

To manage a crisis successfully, you need to apply the right tools, at the right time, using the right skills. This means you need to know, in advance, who you can call on and what experience they have (the “tools” and “skills”). You need to have a clear strategy for how to deal with a crisis. A written plan and ready access to key resources will be critical success factors. Effective implementation of the plan will depend on an experienced and well-trained team who are practised at working together and know their roles and responsibilities intimately. It is, therefore, critically important that the plan should also be rehearsed. That will help the crisis management team to work calmly and coherently to address the situation.

THE CRISIS MANAGEMENT PLAN

Crises are unavoidable but not unforeseeable. A good plan, or set of plans, will ensure an organisation can

mount an effective response to any identified key crisis threats as well as providing the foundation that will enable effective management of unforeseen events.

Preparation is perhaps the most critical success factor in effective crisis management. Its significance is often overlooked. Even if you cannot tell for sure what sort of crisis might ensue, a multitude of different trigger events can be anticipated. Obvious examples include extreme weather, earthquakes, disease, pollution / contamination, government action, war, military coup, civil unrest, flood, fire or explosion, terrorism, security incidents, kidnap, extortion, cyber-attacks, data breaches, criminal activity, corruption, fraud, regulatory investigations, product failure or press exposés.

Because crises can find their origin in many different causes, you need a plan that will give you an adaptive framework within which you can take better decisions faster. A good plan will impose some sense of order and calm. If you plan well, fast-changing events will be less likely to derail the process of managing the crisis.

Plan contents – what it is, and what it is not

It is important to understand the purpose of a plan so as to determine what it should contain and what it should not. The plan is a lightweight, decision-making framework providing a vehicle to circumvent normal business processes. The crisis management team is essentially a special projects team, such as may be established for any major, non-standard, activity.

The key distinction is that in this case it is for an unknown project type occurring with little or no notice. The plan provides structure and a means to assemble the right team and to utilise the members’

core skills as effectively as possible.

A plan specifies how issues are to be escalated, who reviews and responds to them and against what criteria and, finally, what supporting systems, processes and tools are available to help. It incorporates, or gives easy access to, the following sorts of data:

- Important corporate information.
- Contact details for the crisis management team and contact mechanics (such as how to access physical / virtual meeting facilities).
- An agenda for the crisis management team: a series of reference points to ensure you don’t miss anything critical.
- Pre-prepared public statements (in template form, not complete).

The right plan will help your organisation to exercise sound judgment, draw on relevant expertise and assess the facts. That will help you to take sensible decisions that are both emotionally intelligent and business savvy.

Technology in support of the plan

In addition to the plan, many organisations make use of technology to support their response during a crisis, utilising a variety of tools:

- Data discovery, news and social media monitoring to ensure issues are identified early.
- Expert analysis and reporting.
- Mass communication tools.
- Data visualisation, and tracking of assets and staff.
- Online crisis management tools to ensure a rapid, consistent and well documented response.

DESIGNING A GOOD PLAN

Preparedness is the key to crisis management. To be meaningful, that

preparation must be consultative, the information up-to-date and accessible, and the plan must be shared and rehearsed.

How to start

Gather a cross-section of stakeholders from strategic, operational and support functions and any relevant specialists (some of whom may be external to your organisation) and review the state of health of your organisation (see Effective planning).

Ask the following questions:

- How prepared is the organisation for a crisis?
- Is the organisation resilient? In particular, has it got the know-how, the personalities and the financial and physical assets that will allow it to withstand a serious incident and bounce back, returning swiftly to 'business as usual'?
- What areas are most vulnerable? Where would the greatest and / or most enduring impacts be felt?
- Do we already have a clear view about what sorts of events might trigger a crisis?
- Do we know what the internal response would be to any given incident and the resultant crisis?

Invite your stakeholders to speculate as to what could possibly go wrong. This process must not be restricted to matters that logically fall in the usual operating parameters of your business or industry. You need to think much more broadly and imaginatively.

Once that is done, consider what impact those triggers might have on your organisation. In order to evaluate different impacts and decide how to prioritise your response, you should adopt the 'PEARS' acronym (People, Environment, Assets, Reputation, Stakeholders). The concept was advanced in the aftermath of the explosion and intense fire that ensued on the Piper Alpha North Sea oil platform in 1988, killing 167 people. One of the lessons learned from that disaster was the importance of prioritisation in rescue and crisis

management efforts. To enable organisations to make sensible decisions under pressure, the acronym aims to remove the hesitancy or misjudgement that could otherwise take over by establishing a clear, predetermined hierarchy:

- **People.** Save lives and think about the human consequences.
- **Environment.** Care for the immediate environment and mitigate any lasting impact.
- **Assets.** Salvage physical assets and data next; together with people, these are the key resources that drive your business.
- **Reputation.** Communicate effectively with media and others to preserve goodwill; by acting on the first three items, you will find you have already taken significant strides in this direction.
- **Stakeholders.** You have a responsibility to a broader community of stakeholders; this could be local communities, employees not directly affected, shareholders or regulators.

Once you have identified causes and impacts, you can start to think about how you would respond. You should prepare a crisis management plan that will help you to respond as efficiently and effectively as possible, having regard to PEARS as your guide. PEARS reflects both what is the right thing to do from a moral standpoint and what, also, is most likely to reduce legal exposure and result in a sympathetic reaction from the outside world (which makes good long-term business sense).

As you go through this process, make sure that the plan you are creating will serve its purpose. To be useful, your crisis management plan must adhere to the four Cs – it must be:

- **Clear.** Use plain language and, so far as possible, ensure it is intelligible by non-native speakers.
- **Concise.** Use short sentences, short paragraphs, clear headings and ensure it is not too long from cover to cover.

- **Current.** Keep it up to date; if information such as phone numbers is old, it quickly becomes irrelevant.
- **Communicated.** Don't just put the plan in a drawer / e-filing system; you must share the plan with all those who may need to access it and tell them what to do with it. You must refresh the communication process periodically.

Effective planning

To be effective, planning must be:

- **Consultative.** Local teams must be involved in planning. A crisis must be managed, operationally, at the crisis location; HQ can support and guide, but it cannot 'do'.
- **Up to date.** A plan without correct information is far less effective.
- **Accessible.** Here technology can be your saviour. In fact, the deployment of appropriate technology is rapidly coming to represent best practice. Online solutions can support global access to real-time information (such as locations and status of people), allow remote communications and log-keeping for dispersed teams, and give access to current (not out of date!) prepared statements, corporate policies and data.
- **Rehearsed.** A plan won't work unless people are familiar with it – you must practice. Periodically run your board and senior management through a vivid scenario. It helps the organisation to stay ready and reinforces the importance of preparedness.

What if your organisation is at fault?

It may also be sensible at this time to think about how your response would alter depending on whether you are the 'victim' or the 'villain' in the scenario: is your organisation likely to be an innocent bystander caught up in a terrible situation or is it conceivable it might be the author of (or a contributor to) the crisis? This will greatly influence the way you handle the public communications side of the crisis. It will also affect legal liability. It may not be entirely obvious at

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the planning stage – unless you take a step back – which sorts of trigger event may end up placing you in the former or the latter category. You must be honest with yourselves about the possibility of your organisation being at fault.

WHEN SHOULD YOU PLAN?

The obvious answer is before the crisis occurs. In any crisis there are three distinct periods:

- The period before the trigger incident.
- The trigger incident itself.
- The period after the trigger incident.

Successful crisis management relies on doing the right things at the right times. It is obvious that you have more time in the pre-incident period than during, or in the immediate aftermath of, the incident itself. Make the most of that fact by planning ahead.

Although we talk about an ‘incident’ as if it were a sudden occurrence, that is just shorthand. Crises can arise suddenly or evolve gradually out of a series of connected events. The former are known as ‘big bang’ crises; the latter are termed a ‘rising tide’ crisis. Whilst a rising tide crisis will give you more room to breathe, it may be harder to spot and, therefore, catch you off-guard. Systemic fraud, bribery or corruption, which would tend to take root over months or years and reveal themselves slowly, or coordinated programmes of non-compliance (such as the VW emissions scandal) are all examples of rising tides. Both should be managed according to your plan, but the challenge with a rising tide may be in identifying it as a crisis at all so as to allow you to activate the plan in time to respond effectively.

ITEM 1



Events move very quickly during a crisis and catching up is almost always impossible. Generally, the only way to keep pace with events is if much of the work was done pre-crisis – everything to the left of the incident marker in the Crisis timeline shown below. Item 1 illustrates, in a high-level format, how you should be spending your time in the pre- and post- incident crisis management world.

The effectiveness of the organisation's response and the speed of recovery is disproportionately determined by the state of readiness and preparation pre-crisis. If your organisation waits for a crisis to manifest itself before taking steps, it will start behind the curve and likely stay there as events outpace its ability to act.

In order to mount an effective response, the crisis management apparatus should already be established and, ideally, rehearsed to a high state of readiness. Business and legal leaders need to understand the crisis dynamic and the different tools at their organisation's disposal to ensure a seamless, integrated approach to crisis management, communication, business continuity and recovery. This includes having plans in place with clear working processes, responsibilities, mandates and decision-making processes. Furthermore, it requires having teams at different levels in the organisation who have been trained and have rehearsed these plans.

This may sound like a lot of work for something that may never happen. However, consider just a few of the more obvious impacts of a crisis. Depending on the facts, the directors may bear personal criminal liability; and major litigation, regulatory sanctions and fines can all follow. Each of these is likely

to place members of the executive team under significant personal strain and will probably lead to a substantial diminution in corporate value and goodwill

TRAINING AND EXERCISING

Once a plan has been developed it needs to be implemented and practiced. This is done through a progressive programme of training and exercising. The intent of this programme is to ensure the capability and confidence of the team and to validate and improve the plan. See Item 2.

USING THE PLAN IN A LIVE SITUATION

Once a situation arises, you need to react in the right way which will involve taking certain steps in order to activate the plan.

Use **RACER** as your guide:

- **Report** the facts to those who need to know.
- **Assess** the situation.
- **Convene** the crisis management team (see *The crisis management team (CMT)*).
- **Execute** the plan.
- **Resolve** the situation.

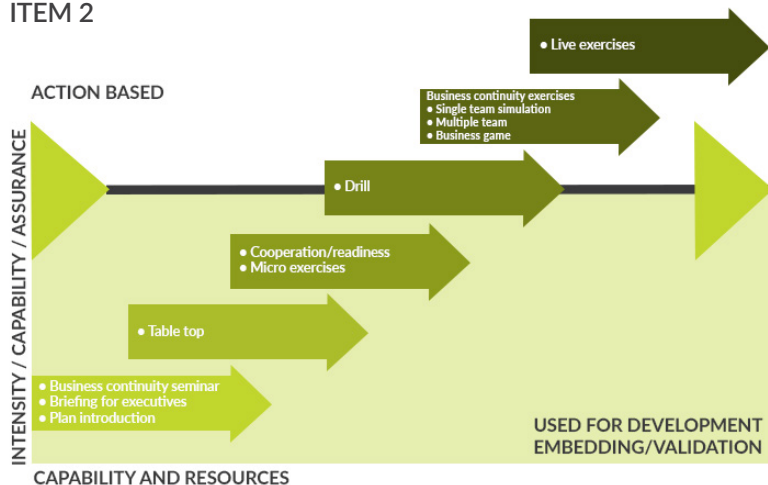
This is a widely-adopted framework within which to initiate the crisis response protocols of an organisation.

Assessing the situation and, if you have planned well, convening the CMT should take very little time. Indeed, they can happen simultaneously so that, once assembled, your CMT can be briefed and immediately start to execute the plan. The CMT may be gathered physically or virtually (see the discussion of technology to aid accessibility in Effective planning).

THE CRISIS MANAGEMENT TEAM (CMT)

You will need a local team at or near the site of the crisis, with support (such as experience, resources, money and a broader view) provided from HQ. Regardless of location, your CMT will need to comprise a number of core members. The composition can easily be pared back if some skill-sets prove

ITEM 2



superfluous. Downsizing is much easier than scaling up. As the adage goes, “it is better to have it and not need it than to need it and not have it”, so try to start with all bases covered. You should consider initial representation from:

- Business leadership (although not necessarily the CEO).
- Operations.
- Health, safety and environmental.
- Human resources.
- Finance.
- PR / communications.
- IT.
- Specialists such as environmental, medical or chemical experts or hostage negotiators (imported if you lack the skill- sets internally).
- Legal.

These members of the CMT are representative experts. Each individual will be supported by wider (internal or external) teams.

The CMT should also include a scribe, someone carefully selected for their efficient and accurate note-taking skills.

Record-keeping

You need to keep a log (see *Crisis management agenda*). Although some lawyers are instinctively wary of writing everything down, on balance the advantages of keeping a sensible written record undoubtedly outweigh the disadvantages. The most important

thing is to manage the crisis as it unfolds. To do this effectively, you must act in response to the facts. What was known? When? Where? What decisions were taken? And by whom? Without a proper log, the chances of doing this will be greatly reduced.

However, record-keeping must be done with an eye to the legal and business realities of the world in which we all now operate. Consider including on the CMT both your General Counsel, who will act in an advisory capacity, and a second experienced lawyer who can act as an intelligent scribe as well as overseer of the data that will require careful management.

When filling the role of scribe, many organisations envisage a typist. But nowadays, more than ever, we are cognisant of the huge power of electronic disclosure, encompassing everything from Word and pdf documents to emails, phone calls, text messages, WhatsApp conversations and social media posts. From a practical point of view, in addition to the central log, each involved individual needs to record their own actions. But to mitigate the risks associated with multiple, potentially divergent, narratives, each member of the CMT should be clear on what should and what should not be documented (whether in formal or informal communications and papers).

Information management is an important tool during the crisis itself. But it will be equally significant as an evidential matter long after the immediate threat has abated. All crises have some form

of reckoning, be it criminal prosecution, civil litigation, regulatory, governmental or public enquiry. Therefore, it is recommended that organisations involve an experienced legal counsel to supervise the collection and recording of data relating to the crisis, in particular (but not solely) to properly manage privilege.

The lawyer as advisor on the CMT

In the CMT, even more than in your day-to-day role as legal counsel, you must act as part of a coherent team. You cannot stand apart from your colleagues; nor can you allow yourself to be shut out from the discussion. Your role will be, in many respects, the same as it ever was: provide wise counsel, avert legal liability and help to safeguard your organisation's future. But be prepared to adjust your usual approach.

A crisis will require an organisation to evaluate each decision from distinct points of view. Those perspectives generally fall into three main categories:

- Operational / business.
- Legal.
- PR / communications.

For example, the PR and business teams may think that it makes good commercial sense to issue an apology. The legal team may disagree. Or the legal and PR teams may propose a product recall, whereas the business team may view this as undesirable.

Similarly, there are three driving forces in any crisis:

- **Commercial.** What are the likely operational and financial effects of the crisis and of each decision taken by the CMT?
- **Legal / public policy.** Where does legal responsibility and liability lie at any given moment? What are the legal implications of any given decision?
- **Moral.** What do the organisation's ethics and values require it to do?

Anyone engaged in crisis management must, therefore, contend with a series of competing priorities as events unfold, new facts come to light and priorities

shift. The success or otherwise of your organisation's management of a crisis will depend on getting the balance right. Each aspect of crisis management needs at least one representative voice. Lawyers are just one of these. You must exercise sound judgment in balancing prudent legal advice with pressing operational and public relations considerations. You must not stop being a lawyer, but you must advise in context. Your active involvement in the process – even if your point of view does not prevail – is what counts.

AGENDA FOR THE CMT

To execute the plan successfully, each person must know what they are there to do; you need good information that is up to date; and the CMT must be able to communicate clearly (both internally and with external stakeholders, including the media). That requires a clear agenda (but with built-in flexibility to create an adaptive framework) that allows you to capture the necessary inputs and outflows.

Crisis management agenda

Here are a few items for your standing agenda.

- **Roles and responsibilities.** Know, in advance, who is on the CMT. And in a live situation define their roles in relation to the present crisis.
- **Facts and assumptions.** Separate what you know from what you think you know. Assumptions are not necessarily to be ignored, but you must weigh them carefully before taking a decision based on what could be false or incomplete information.
- **Objectives.** It will not always be clear what the immediate objectives are. Long term, your goal is to return to business as usual. But over the short term you need to set specific, immediate goals. Keep in mind, these may change as events progress.
- **Priorities.** Identify priorities that promote the objectives. It is also useful to think of 'PEARS' to establish a basic order of priority:

People, Environment, Assets, Reputation, Stakeholders.

- **Scenarios.** Develop best case, worst case and most likely scenarios. Avoid misplaced optimism.
- **Response options.** Consider your options and select the best one on the facts as known at that time.
- **Stakeholders.** Identify all stakeholders (employees, families, media, public, shareholders, government and so on) and prioritise according to their interests and influence.
- **Messaging.** Establish the key messages to communicate to stakeholders.
- **Review.** Check how you are doing, regularly and frequently (initially, at least hourly).
- **Record.** You should document pertinent information in a real-time log. This will help you to manage the crisis by relating new information to what you have previously learned and will assist in relation to any future criticism of your actions by ensuring you can defend your decisions.

You need to apply non-linear thinking to these activities and, in fact, many elements of managing a crisis. Don't simply do A, then B, then C; many work streams need to progress in parallel and certain points may need to be re-visited with greater frequency than others.

RECOVERY AND LESSONS LEARNED

The assessment criteria and method for 'standing down' teams should be defined. This will also help to outline the requirements of an objective review which should be undertaken to examine the actions and events of the crisis period. Ideally this should:

- Be in the form of a workshop involving key personnel from all levels.
- Be seen as a positive process.
- Identify the aspects of the incident that were handled well and actions that proved successful.
- Consider the aspects of the incident

that were not handled well or require improvement.

Objectivity and honesty will be required to draw the full dividend from the review; those involved must assume the role of critical friends, not sit in judgment with the benefit of hindsight.

As well as any organisational changes that may be recommended, the review should generate refinements to the crisis management plan, and outline requirements for additional training and resources.

FINAL THOUGHTS

Lastly, no matter how much you plan, bear in mind the military's observation that "no plan survives first contact". That being the case, you have to remain flexible and be prepared to innovate to overcome the evolutionary challenges of a crisis.

If all else fails, remember the wise words of Anne Mulcahy, former head of Xerox, who pithily summarised the management of a crisis thus: first, get the cow out of the ditch; second, find out how the cow got into the ditch; and third, do whatever it takes to stop the cow getting into the ditch again.

FOR FURTHER INFORMATION



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