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Who Should Take the Lead in a Crisis?

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Which management discipline should play the lead role when a crisis threatens reputation? This question sometimes exercises the minds of lawyers and communicators.

The rise of social media has increased the danger of getting it wrong and the costly consequences for reputation. Yet the argument continues about who should take the lead in a crisis.

Some have argued the chief legal officer is "uniquely positioned within the organization to lead this effort," which is a position which should not go unchallenged.

A lawyer's viewpoint is well suited for reputational risk arising in legal cases. But most reputational crises are not necessarily about legal cases and require an understanding of broad stakeholder expectations, which is indisputably the realm of public relations or corporate communicators.

The type of risk

While reputation can be an important factor in litigation, it's a mistake to think that litigation is the primary platform for reputation risk.

Think no further than the survey by Yahoo Finance in December, which declared Meta (formerly Facebook) as the worst company of 2021. It is noteworthy that this unwelcome title was not primarily the result of legal or regulatory breaches but for perceived failures in the fields of management and ethics.

It is a common misapprehension in many companies that reputation risk is mainly about financial and regulatory compliance. This is often indicated by a narrow scope of risk identified in the corporate risk register, which is generally managed within the finance department.

Corporate compliance is an obvious risk area where accountants, auditors, and lawyers play a crucial role — or even take the lead. But headlines around the world make it clear that reputation risk beyond just financial and regulatory compliance, potentially leading to crisis, is just as great — if not considerably greater.

Who takes the fall

Consider the recent reputational debacle suffered by online lender Better.com, when Founder and CEO Vishal Garg thought it was a good idea to fire 900 people via Zoom. During the call, Garg bluntly told soon-to-be-fired team members that "if you're on this call, you are part of the unlucky group that is being laid off...Your employment here is terminated effective immediately."

Was it legal? Probably, though the company's legal and governance advisors appear not to have reacted publicly.

By contrast, Better.com's Head of Marketing Melanie Hahn, Head of Public Relations Tanya Hayre Gillogley, and Vice President of Communications Patrick Lenihan, all promptly resigned, and the incident made headlines around the world.

As usual in most corporate crises, we don't know what legal advice was sought or provided, but it seems a fair assumption that the likelihood of reputation-sapping decisions by the CEO would not have been on Better.com's formal risk-register — if they had one.

The required skillset

While it is generally true that CLOs are credible and authoritative voices in communicating with boards, risk committees, and management, it doesn't mean they have the specific skills or experience to take the lead in a crisis. In fact, many respected experts argue to the contrary.

For example, Professor Daniel Diermeier, formerly of the Kellogg School of Business at Northwestern University, has written:

> *"Good crisis management teams have a strong, opinionated General Counsel, while poor crisis management teams are run by the General Counsel."*

Washington DC-based attorney and crisis expert Richard Levick has put it even more succinctly:

> *"Lawyers don't drive the bus. They're only sitting near the front."*

Such opinions are common and are often prefaced by the observation: You can win in the court of law yet lose disastrously in the court of public opinion.

Highlighting this well-known dichotomy, California lawyer Adam Treiger had some witty advice for his legal colleagues.

> "When your client has a crisis that could put it out of business, call the crisis manager first, think about legal issues later. If you do it the other way around, your client might not survive to

> utilise your keen legal analysis."

Put another way, if you eventually appear in court because of the crisis, those legal proceedings will likely be years in the future. Meanwhile, the court of public opinion is already in session and the public "jury" is already deciding the fate of your reputation.

The first crucial point here is this situation is not a reflection on the leadership capability of lawyers but on their role and training.

One of the world's leading authorities on risk communication, Peter Sandman, has written extensively on the relative roles of the client, the corporate counsel, and the crisis communicator. In a much-cited essay in 2002, he said:

> "Even if the risk is low, and even if there are counterbalancing reputational benefits, managing the client's reputation is not the attorney's main job. Managing the client's liability, penalty, and punishment is. No lawyer is going to get into trouble by adopting a narrowly legal approach to the client's problems, even if that approach leaves the client legally victorious but widely hated."

Of course, no lawyer deliberately sets out to make the client "widely hated," and Sandman was writing before the advent of social media made online hate a popular new currency of communication. But it remains true that managing the client's reputation is not the attorney's main job.

Common ground

The second crucial point is this is not primarily about professional capability creep or petty turf wars. Lawyers and communicators are in the same business — communication — but they do it for different reasons and are typically communicating to different audiences or stakeholders. Moreover, they both believe they are acting in the best interests of the client.

It has never been true or helpful to regard lawyers and communicators as "natural enemies" or, as one commentator recently described it, "Cats sleeping with dogs." However, lawyers and communicators do genuinely have areas of conflict that need to be managed, and this challenge is detailed in my book *Crisis Counsel: Navigating Legal and Communication Conflict*. Such conflict is never more evident than when things go wrong and in the vexed question of how and when to issue an apology to defuse a crisis and protect reputation.

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Some organizations seemingly will do anything to avoid making a genuine apology and, unfortunately, it's sometimes legal advice that lies behind this reluctance.

While it's clear that lawyers have a responsibility to protect the client against legal liability, there are accepted ways to apologize without increasing liability, and an apology can even reduce the risk of being sued, especially in civil cases.

The professional conflict here most often arises because the lawyer will tend to prioritize the legal risk of making an apology, while the communicator will be more concerned about the reputational risk of not apologizing. Or the risk of an over-legalistic apology, which may be more damaging than no apology at all.

Which brings us back to the question of who should lead in a crisis. An apology may be written by the lawyer and/or the communicator, but it is usually the CEO or another senior executive who delivers it or has their name on it. Moreover, it can affect the reputation of both the organization and the individual.

For that reason, lawyers and communicators need to do a better job of listening to each other, and the client needs to do a better job of listening to them both. Because neither the communicator nor the lawyer should be trying to “take the lead” when a crisis threatens reputation.

They should be working together to support the CEO or another top executive to make the right decisions and be the face of the organization. That’s where the leadership role should lie.

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As a recognized expert in issue and crisis management, Dr. Tony Jaques has worked for more than 20 years as a crisis manager for a major US multinational. He is now managing director of Melbourne-based Issue Outcomes P/L, which specializes in developing and evaluating corporate response systems. Jaques lectures and writes widely in the field and his latest book is *Crisis Counsel: Navigating Legal and Communication Conflict*.