

The Business of Preventive Law

Recognizing the early warning signs of a media crisis can help keep you off the front page.

BY RICHARD S. LEVICK AND LARRY SMITH

The corporate scandals of 2002 cost a lot of companies their media-exemption status. Before Enron, there were industries the press simply did not associate with scandal and malfeasance. There were Fortune 50 companies with longstanding “clean Gene” reputations. Barring unforeseeable circumstances or whistle-blowers popping out of the woodwork, they just weren’t on the radar screens of investigative reporters. Today, there are no exemptions: the breadth and depth of the betrayals were too great. Not

[IN BRIEF]

Corporate scandals have stripped companies in every industry of their media-exempt status, putting more pressure than ever on in-house counsel. GCs need to assemble a media team and pay particular attention to:

- Signs that your company may become entangled in an industrywide trend
- The new media savvy of agencies like the SEC
- Environmental factors that could lead to increased scrutiny

that some reporter is necessarily snooping through your proxies right now, but in-house counsel must realize that the scandals have widened the strike zone. They must be more vigilant in helping their clients navigate the minefields of high-profile cases—which means developing the skills to work with media professionals once the case goes public.

But that’s only half the battle. More so than outside counsel, in-house counsel are in the business of preventive law. In terms

of crisis, that means a new burden on corporate counsel to spot the early warning signs that may, if events spin in the wrong direction, stimulate media interest damaging to the corporate brand, no matter how thoroughly the corporation may ultimately be vindicated in and

out of the courtroom.

While they need not learn to be brilliant media strategists (although they can certainly become just that, to the benefit of their careers), in-house counsel must know when to assemble a crisis team, including legal and PR experts, and consider alternative courses of action. A media-savvy team knows how to handle increasingly media-savvy agencies—including the Department of Justice and the Securities and Exchange Commission—and how to keep the juiciest stories off the front page.

Your plan should include, with room for as much specificity as possible, a template to determine:

- A sense of the cost of doing nothing
- A tracking of developments and evaluation of new factors
- Who the spokesperson(s) is to be
- Articulation of the message
- Informational resources, including Web sites, that can be marshaled
- Third-party supporters who can be recruited
- A schedule for regular meetings and seamless companywide communications

Remember, there may be no more powerful spokesperson than in-house counsel. A CEO cannot necessarily monitor all the liabilities of public disclosure when he or she speaks to the press. The chief legal executive is better positioned to do that, while at the same time providing the corporation's human face.

What, then, are the early warning signs of a media crisis, and where do you look for them? Here are some likely scenarios:

Industry environment. Other cases of a crisis nature in your industry are being covered in the media. A reporter from an industry trade publication has started to ask about facts related to what now looks to be a trend story. Certain industries are more vulnerable to trend stories. Is the industry bleeding, like telecom? Is it rife with new public offerings, with capital sources either so abundant or so at a premium that entrepreneurs are perceived to be cutting corners? Is it such a repository of public trust that one betrayal of that trust—by, say, a firm with the type of reputation that Arthur Andersen once maintained—guarantees media interest in firms in that industry?

Regulatory environment. An agency like the DOJ or the SEC or a member of Congress has indicated they want to watch an issue more closely, or political pressure is building to find a whipping boy. Monitor the attorneys general in states where your firm has a major presence. AGs are political animals, and your back may be a good step-ladder to power.

Stock performance. For two consecutive quarters, your numbers are down. Coverage of the corporate stock decline is painful enough, but reporters will jump at any suggestion that shareholder pressures are forcing inappropriate or illegal responses. At the very least, they will be inspired by the numbers to sniff around for other negatives. Since you need to prepare a media response that includes positive messages about the stock declines, include

some discussion of what those other negatives might be and how you should respond.

Stockholder actions. Any action by shareholders legitimizes media interest in every aspect of the company. Remember, too, lawsuits that name directors and officers often lead to personal interest in the directors and officers themselves. The media plan must anticipate full background checks by reporters. Read their D&O résumés very carefully, and be prepared to defend them as if they were suspects in a crime.

Dangerous practices. Enron got into a lot of trouble with off-balance-sheet assets. In fact, off-balance-sheet assets, as well as other practices, can be perfectly legitimate. But if Enron misused its instruments, you can expect to be called by a suspicious reporter and asked to explain what you're up to.

NGOs. You don't need to be the target of a nonprofit organization to go on full alert. Simply being in the industry—as a NAFTA trade partner, an international lender—may make you the next target. Monitor the NGO Web sites and press appearances, and consider that if they're targeting the firm or industry next door, the media might look at you too.

Hot-button issues. Listen closely for public rumblings that might suggest incipient adversarial interest in your product. For example, many people don't like SUVs, and there has already been ample suggestion that SUVs aren't safe—and we all



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know where those kinds of suggestions lead.

Past escapes. The Catholic Church incited keen media interest a decade ago with sexual misconduct charges that soon departed the front page, after a leading Church official was exonerated. But what could possibly have led to the conclusion that the issue would not someday resurface? Corporations, with less painful liabilities, should never forget a single past brush with scandal or fail to prepare for the media's unwanted return to an unpleasant subject.

Qui Tam. What internal dynamics might lead to a public crisis? Have there been widespread layoffs? Does employee dissatisfaction hang palpably like a shroud in the home office? Such an environment can foster whistleblowers who will talk to the press—as well as to the government.

Faulty products. Pintos do explode. Asbestos does kill. Any genuine product liability that crosses the desk of in-house counsel should be treated as if lawsuits have already been filed and reporter inquiries phoned in. The problem may go away quietly, assuming a responsible corporate initiative. But don't assume it will, and prepare as if it won't. •

Richard S. Levick is president of Levick Strategic Communications. Levick's latest book, Stop the Presses: The Litigation PR Desk Reference, is available to readers for free by e-mailing stopthepresses@levick.com. Larry Smith, Levick's director of strategy, contributed to this article.