

WSG MEETING OF THE AMERICAS



MIAMI, FLORIDA



MOORE STEPHENS

Cifuentes, Lemus & Asociados, S.C.
RIF J-00296621-1



Professional Firm Risk Management - Professional Liability and Crisis Management

PANEL DISCUSSION

MODERATOR

José E. Quiñones, Partner, *Quiñones, Ibargüen, Luján & Mata, S.C.*

PANELISTS

Eileen Garczynski, Senior Vice President & Partner, *Ames & Gough*

Paul M. Durham, Director and General Counsel, *Durham Jones & Pinegar*

Sheila Sawyer, Partner, *Waller Lansden Dortch & Davis, LLP*

U.S. Law Firm Risk Environment

LEGAL/REGULATORY | MAY 28, 2012, 10:21 PM | 178 Comments

Dewey & LeBoeuf Files for Bankruptcy

BY PETER LATTMAN



The headquarters of Dewey & LeBoeuf in Manhattan.

Victor J. Blue/Bloomberg News

Dewey & LeBoeuf, the law firm crippled by financial miscues and partner defections, **filed for bankruptcy** on Monday night, punctuating the largest law firm collapse in United States history.

The filing, made in federal bankruptcy court in Manhattan, is the final chapter in a turbulent period for Dewey, which came apart after disappointing profits and prodigious debt forced it to slash partners' salaries. The partners, already owed millions from previous years, grew concerned over the firm's finances and their ability to get paid. A partner exodus destroyed the firm.

Dewey announced Monday that the firm planned to liquidate. It said it would ask about 90 employees to remain on staff to assist in the wind-down of its business. The firm has \$315 million in liabilities, of which \$225 million is owed to its banks, according to the court filings. Other creditors include the firm's landlords and former partners owed money.

"This is a very sad day for the legal profession," said Richard J. Holwell, a former federal judge in Manhattan now in private practice. "Dewey is a fabled firm with a lot of great lawyers and a demise of this magnitude is unprecedented."

With historical roots stretching back a century, Dewey — the product of a 2007 merger between Dewey Ballantine and LeBoeuf, Lamb, Greene & MacRae — employed at its peak more than 2,500 people, including roughly 1,400 lawyers in 26 offices across the globe.

ABA JOURNAL

Law News Now

HOME NEWS TOPICS MAGAZINE NUMB#RS

Home » News » [K&L Gates OKs settlement of \\$23.7M in LeNature's legal malpractice case](#)

BANKRUPTCY LAW

K&L Gates OKs settlement of \$23.7M in LeNature's legal malpractice case

Posted Jan 29, 2014 4:35 PM CST

By [Martha Neil](#)

A major Pittsburgh-based international law firm and one of its top attorneys have agreed to pay \$23.7 million to settle a malpractice lawsuit brought by a bankruptcy trustee winding up the affairs of a former client.

The agreement by K&L Gates and Sanford Ferguson did not involve any admission of liability in the Allegheny County case, which concerns LeNature's Inc., a now-defunct soft drink maker in western Pennsylvania, according to the [Associated Press](#) and the [Pittsburgh Tribune-Review](#).

Hired by three members of LeNature's board in 2003 to look into concerns that CEO Gregory Podlucky was involved in theft and other wrongdoing, Ferguson kept the CEO informed about the progress of the probe and three years later handled an initial public offering for LeNature's, trustee Marc Kirschner alleged in court pleadings. Podlucky is now serving federal prison time, along with six family members and business associates, for crimes connected to what officials called a \$600 million to \$900 million corporate fraud.

Kirschner contended Ferguson was not experienced in corporate fraud investigations and could have shut Podlucky down earlier if the law firm had handled the matter differently.

U.S. Law Firm Risk Environment



LAW FIRMS

Jurors Award \$34.5M to Investors in Suit Against Holland & Knight

Posted Apr 20, 2012 8:48 AM CDT

By Debra Cassens Weiss

Los Angeles jurors have awarded three real-estate investors \$34.5 million in a malpractice suit against Holland & Knight.

Jurors are scheduled to consider punitive damages today, according to the [Daily Report](#). Jurors had deliberated for six days before finding liability. The story bases the verdict information on a report by a court official.

The plaintiffs had lost money through investments with Atlanta developer Shi Shailendra, the story says. They claimed Holland & Knight protected Shailendra without looking out for their interests. The firm represented the Shailendra Group and other investment entities, and says it had no attorney-client relationship with the plaintiffs.

Lawyers for both sides told the [Daily Report](#) that the judge in the case has barred them from commenting until the punitive damages phase of the trial is complete.

Business

Chad Hemmat: \$2 million verdict against law firm in "toothless cooties" case

By Alan Prendergast Tue., Aug. 28 2012 at 12:57 PM

Categories: [Business](#), [Follow That Story](#), [News](#)

12 Comments

Like 36 Send Tweet 6 Submit Pocket 0 +1 3

A Denver jury has awarded a verdict of more than \$2 million, including \$1.5 million in punitive damages, to a former client of Anderson, Hemmat & Levine in what amounts to a [legal malpractice case](#) against the prominent personal-injury law firm. Daniell Goff claimed that the firm's lawyers pressured her to settle her car-accident case for far less than it was worth and that Chad Hemmat, one of the firm's founding partners, referred to her as a "toothless cootie" in an e-mail to another attorney.

Monday's verdict came after a week-long trial, during which Goff attorney Patric LeHouillier attempted to portray AHL as a "settlement mill" that proclaims its dedication to "Justice for Victims" in numerous commercials and billboards but devotes little attorney time to meeting the needs of its injured clients. AHL's attorneys countered that the firm worked hard on behalf of Goff and her husband, who were injured in a 2008 auto accident, and that the couple fully agreed to a negotiated settlement with the other motorist's insurance company.

Goff's share of the settlement came to \$92,000, but much of that was spent on medical bills, expenses and the law firm's one-third contingency fee. She contends that Hemmat's firm failed to uncover an umbrella policy that could have provided greater compensation and dissuaded her from taking the accident case to trial. The jury decided that her actual damages in the action against AHL amounted to \$674,000 -- and then assessed another \$1.5 million in punitive damages against the firm.

Trap # 1: Poor Client Selection or Engagement



How to Avoid?

- ✓ You should choose your clients, they shouldn't choose you.
- ✓ Make sure the client has a problem you can solve. Do you have the experience, expertise, and license to handle?
- ✓ Determine if the client has had previous problems with other counsel (Winkelvoss Twins).
- ✓ Ensure your client has the ability to pay you for your legal services. Consider credit checks and use large upfront retainer where possible and/or consider an evergreen retainer.
- ✓ Carefully Manage the engagement/non-engagement and or the disengagement.



Managing the Non-engagement

- Avoid behavior that could be interpreted as creating an attorney client relationship.
- Send a non-retention letter which asserts that (1) no representation was accepted by the firm, (2) the matter may be subject to a statute of limitations that could bar the person's claim, and (3) prospective counsel should seek another attorney or take other appropriate measures on its own behalf to protect their interests.



Managing the Engagement

If you decide to represent the client, you need to define the Scope of the attorney client engagement.

- ✓ Who is the client? Outline who you do and do not represent.
- ✓ Who speaks for the client?
- ✓ Define the scope of the agreement. What services will you provide and which services will you not provide?
- ✓ Detail the payment for services and the timing for payment.

**LPL Premium credit for Engagement & Disengagement Letters

Managing the Disengagement – Termination of the Relationship

- ✓ State rules don't always allow you to terminate an attorney client relationship easily or quickly.
- ✓ Termination Letter should clearly state the reason for the termination (imagine the letter with an exhibit sticker on it).
- ✓ Recite the action taken to date and the actions the client needs to take and recommend and encourage the client seek other counsel asap.
- ✓ Consider the disposition of client files.
- ✓ Address all outstanding legal fees and expenses & include a final bill.





Trap # 2: Conflicts



All attorneys have an affirmative duty to identify and address conflicts of interest. This responsibility exists in every phase of client representation, beginning with an initial meeting with a client and lasting beyond conclusion of the representation. This issue is best addressed on the front end by carefully screening new clients, seeking advance waivers for potential future conflicts (where appropriate) and clarifying who the client is for any given matter.

I. High Costs of Violating Conflict Rules

- Bar disciplinary complaint
- Withdrawal from both representations
- Disqualification from representation
- Disgorgement of compensation
- Malpractice Liability

II. Identifying Conflicts Can Be Challenging

- Litigation
- Corporate family
- Trade association
- Individual interests
- Lobbying
- Merger or practice group acquisition
- Lateral hiring—attorneys and staff
- Late-identified conflicts

Conflicts, Cont.

How To Avoid?

- ✓ Can't represent clients on opposite sides of the same matter (Rule 1.7(a)) (*Ex. Exxon & Greenpeace*)
- ✓ Can't be adverse to a client, even in unrelated matter (Rule 1.7(b)(1)) -- *Consider an Advance Waiver*
- ✓ Can't represent a client if duties to another client or own interest would interfere (Rule 1.7(b)(2)-(4)) (*Investing in an IPO; Sitting on a Board; Accepting a Contingent Cash Fee; Becoming an Expert Witness*)
- ✓ Can't be adverse to a former client in a matter that is closely ("substantially") related to prior representation (Rule 1.9) – *Conflict of Matter*
- ✓ Former government official may not work on a matter that s/he worked on while in government (Rule 1.11)
- ✓ Conflicts of one lawyer generally imputed to all lawyers in firm (Rule 1.10)

*****What remains consistent across model rules is that an attorney is required to maintain undivided loyalty to his or her clients in the face of a conflict -- & obtain informed consent from clients in connect with continued representation***

Advance Waivers

Rule 1.7: *A lawyer shall not advance two or more adverse positions in the same matter unless each potentially affected client provides informed consent after full disclosure of full or potential conflicts and their potential consequences.*

- ✓ Send the Waiver Contemporaneously;
- ✓ Make the language as specific as possible and use plain language. Courts often look at how sophisticated the client is in determining if you gave sufficient informed consent).
- ✓ Make sure it's signed and returned;
- ✓ Spell out consequences of a potential conflict
- ✓ Keep the document fresh (e.g. revisit n at least a yearly basis).
- ✓ Recommend Independent Counsel Review of the Waiver.

Definition of a perfect waiver? *“Such extensive disclosure in conformity with Rule 1.7 that no client in his right mind would ever sign it!” **

*Anthony Davis, partner at Hinshaw Culbertson and an adjunct professor at Columbia University on Professional Ethics.



Trap # 3: Poor Client Relations

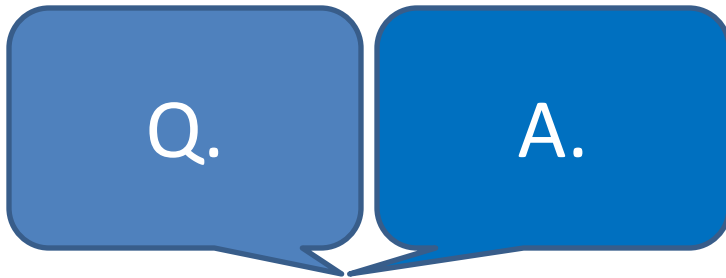
Every malpractice claim begins with a dissatisfied client! While their expectations may not be realistic, some clients require more frequent hand-holding than others.

How to Avoid?

- ✓ Listen to the client. Time should be taken at the beginning to ID the client's goals. Also call the client personally to maintain rapport throughout the life of the case.
- ✓ Clearly explain to each new client orally and IN WRITING (via Engagement Letters) the purpose for which the firm was hired; the fee arrangements; the reporting and billing procedures; and the client's obligations.
- ✓ Exercise Promptness. Return phone calls; keep appointment times; send regular case status reports; copy the client on all correspondence.
- ✓ Support staff should be courteous and professionals as they are the interface between the attorneys and the client.
- ✓ Disengagement Letters should be written at the end to outline what was accomplished.



Questions?



Eileen Garczynski, Esq.
Senior Vice President
Ames & Gough

egarczynski@amesgough.com

Most Common Risks Facing Law Firms & How to Avoid Them

DURHAM

JONES &

PINEGAR

PAUL M. DURHAM,
DURHAM JONES & PINEGAR
SALT LAKE CITY, UTAH

Trap # 4: Fee Disputes



Fee disputes are often associated with poor client relation. Typically, the attorney sues the client for unpaid fees and then is countersued for legal malpractice.

How To Avoid?

- ✓ Do not accept clients who cannot afford your legal services;
- ✓ Discuss fees and your billing process during your initial discussions with the client and then document your discussions;
- ✓ Create written fee agreements that include the scope of the and a clear explanation of the legal fees that will be charged. Be specific and itemize any out-of-pocket expenses for which the client will be responsible;
- ✓ Bill frequently and collect on a timely basis;
- ✓ Copy the client on all meaningful correspondence;
- ✓ Avoid suing former clients.

Trap # 5: Missed Deadlines



How To Avoid?

- ✓ Include redundancy, through multiple calendars -- in paper & on the computer
- ✓ Have at least one docket date for every open file to ensure that all files are reviewed regularly
- ✓ Include tracking procedures that enable the firm to identify who made any given entry
- ✓ Have the capacity to crosscheck between the master calendar and the back-up calendar to catch calendaring errors. Remember that a good calendaring system only avoids claims if it is used properly
- ✓ Make all attorney and non-attorney staff accountable (initial entries)
- ✓ This is the No. 1 cause of malpractice claims. ABA Law Practice, July/Aug 2010

Trap # 5: Missed Deadlines



ONGOING: \$4 Million Verdict in *Gilbert v. Paulson & Nace, PLLC*, 2013 WL 6911813 (Va. Cir. Ct.) (Oct. 1, 2013).

Defendant law firm failed to file, within the applicable statute of limitations, a complaint in a medical malpractice action. The jury found liability in the underlying medical malpractice action and also found the defendant law firm liable for \$4 million in damages.

The legal malpractice carrier for the law firm has filed a declaratory judgment action in federal court, contending the law firm made misrepresentations in its insurance application and asking the court to rescind coverage under the policy.

Trap # 6: Poor Lawyering



How To Avoid?

- ✓ Avoid representations outside your experience or expertise and consult experts if there is uncertainty about a point of law; Ethics Rule 1.1;
- ✓ Don't slack off strategy & planning due to "fast track" litigation rules that have you working under the gun;
- ✓ Conduct careful, methodical research & case review (e.g. don't rely on client provided statements in lieu of reviewing corroborating documents);
- ✓ Maintain adequate research resources and keep up with changes in the law -- always shepardize!;
- ✓ Enlist independent review of your work and review the work of all staff (including contract attorneys)

Trap # 6: Poor Lawyering



VERDICT: October, 2013 - \$100 million+ malpractice verdict in *Baker & McKenzie, LLP v. Evans*, 123 So.3rd 387 (Sup. Ct. Miss. Oct. 17, 2013)

Owner of oil drilling companies brought action against business partner's law firm (Baker & McKenzie) and one of its attorneys, alleging legal malpractice and breach of contract. Plaintiff believed that the law firm represented him and other parties. Plaintiff lost his companies' two largest assets (2 drilling rigs) worth more than \$50 million. The law firm had been representing multiple parties in the transactions.

The case has been remanded on the issue of proximate cause and damages.

Trap # 7: Intentional Wrongs



Any time an attorney intentionally misrepresents a fact and the other party relies on that misrepresentation to his detriment, that attorney has committed a wrong. Fraud also occurs when one intentionally omits a material fact that he should have disclosed.



**There IS NO INSURANCE COVERAGE
FOR FRAUD or any other Intentional Wrong.**

Trap # 7 Intentional Wrongs



VERDICT: \$6.4M - Angela Causo v. David Leneghan et al.

A woman won \$6.4M in a Cleveland, Ohio Court when she lost her coffee business to her attorney's father. The attorney swindled her into using his father as a financier of the business, and then she was later locked out of the business.

Trap # 8: Untimely Notice of Claims to the Insurer



How To Avoid?

Understand your firm's policy's claim reporting requirements:

“If during the policy period any claim (or Disciplinary Proceeding) for a wrongful act is first made against you (the firm), as condition precedent to your right to coverage under the policy you must give written notice of the claim as soon as practicable.”

“If during the policy period you (the firm) first becomes aware of a wrongful act that may subsequently give rise to a claim...and you give written notice to the insurer of such potential claim, then (barring any coverage issues) if a claim is subsequently made against you, then it will be treated as though it had been first made during the policy period.”

Trap # 8: Untimely Notice of Claims to the Insurer



How To Avoid?

Report circumstances in application that could lead to a claim:

Application: “Does the firm or any attorney or employee in the firm have knowledge of any incident, circumstance, act or omission, which may give rise to a claim not previously reported to us?”

Application: “You must report to us any material changes between the date of the application and the effective date of the Policy.”

Trap # 8: Untimely Notice of Claims to the Insurer



How To Avoid?

- ✓ Encourage internal discussion of possible client issues;
- ✓ Implement a clear system for the reporting of circumstances;
- ✓ Appoint a risk specialist (general counsel, risk manager or other specialist) to manage the firm's compliance and regulation;
- ✓ Survey or poll all staff immediately in advance of the application process – Most insurers require it!

Trap # 8: Untimely Notice of Claims to the Insurer



Policy Rescinded: *Koransky, Bouwer & Poracky, P.C.*, 712 F.3rd 336 (7th Cir. 2013).

Jan. 24 - Plaintiff executed a contract to purchase a Rite Aid store, and sent it to its law firm to deliver to Seller. However, the contract was misfiled and was never sent to Seller.

Feb. 22 - Seller's counsel sent notice canceling the contract for failure of delivery of the executed contract.

March 10 - The law firm filed application for malpractice insurance, but did not disclose potential claim.

March 14 - Seller filed an action to declare no contract was formed.

Held: policy rescinded because law firm did not advise the insurer of potential claim during the renewal application process.

It Could Happen to You!



In spite of all the publicity that legal malpractice claims have received in the past few years, many attorneys erroneously believe that they will never be a target of a malpractice claims.

The statistics do not support that belief.

Attorneys in private practice have between a 4 and 17 percent chance of being sued for malpractice each year depending on the jurisdiction and nature of their practice.

waller

CRISIS MANAGEMENT & THE INTERPLAY
BETWEEN PUBLIC RELATIONS AND
LEGAL COUNSEL

WHAT WE WILL COVER TODAY

Effective crisis management requires preparation and an understanding of the complex legal and communication challenges faced by companies.

- The difference between issue and crisis
- Crisis planning and preparation
- Crisis simulation models
- The need for internal and external Crisis Response Team
- Attorney/client privilege issues

ISSUE  VS. CRISIS

ISSUE VS. CRISIS

ISSUE

- Poor financial performance
- Union negotiations
- RIF
- Patient/customer death
- Leadership change
- Conflict within management team
- Vendor/supplier dispute
- High prices

CRISIS

- Widespread injury or harm to consumers
- Union strike
- Tainted/contaminated product
- Bankruptcy
- Contagion outbreak at healthcare facility
- Data breach
- Government investigation

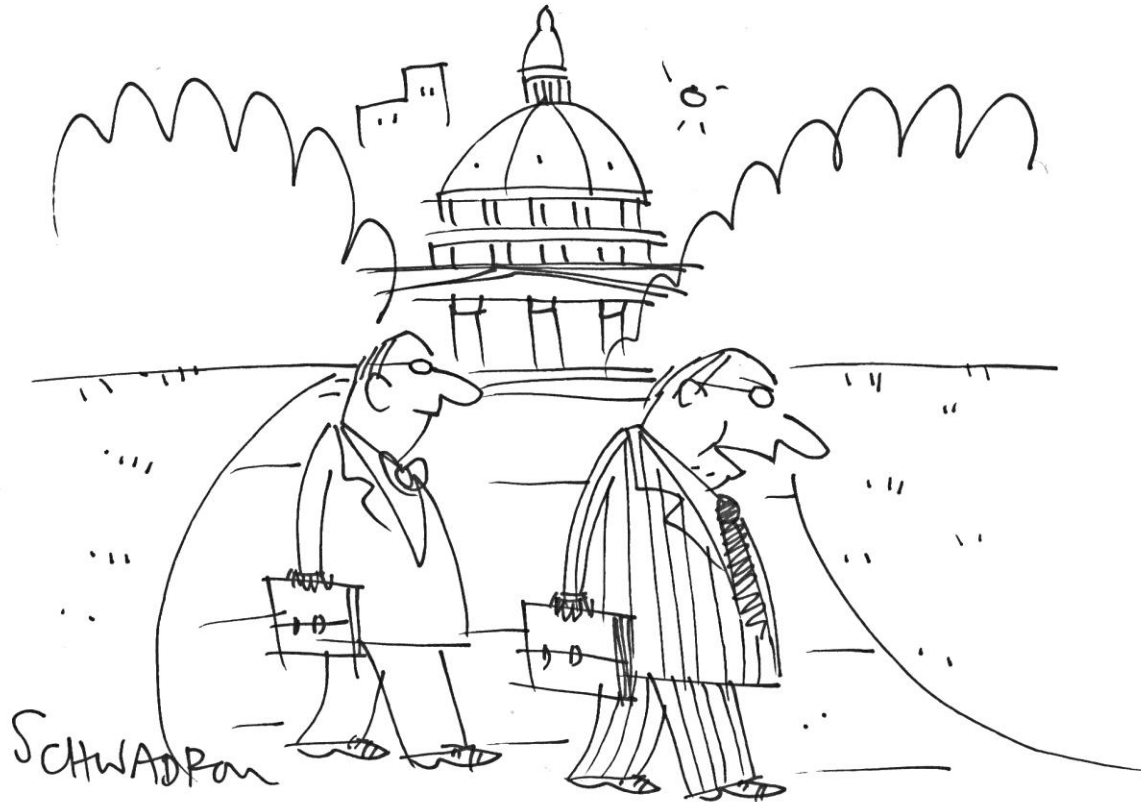
CRISIS PREVENTION, PLANNING & PREPARATION

The best crisis management is that which is never done. Effective management often prevents the issue from ever becoming a crisis.

Internal Controls

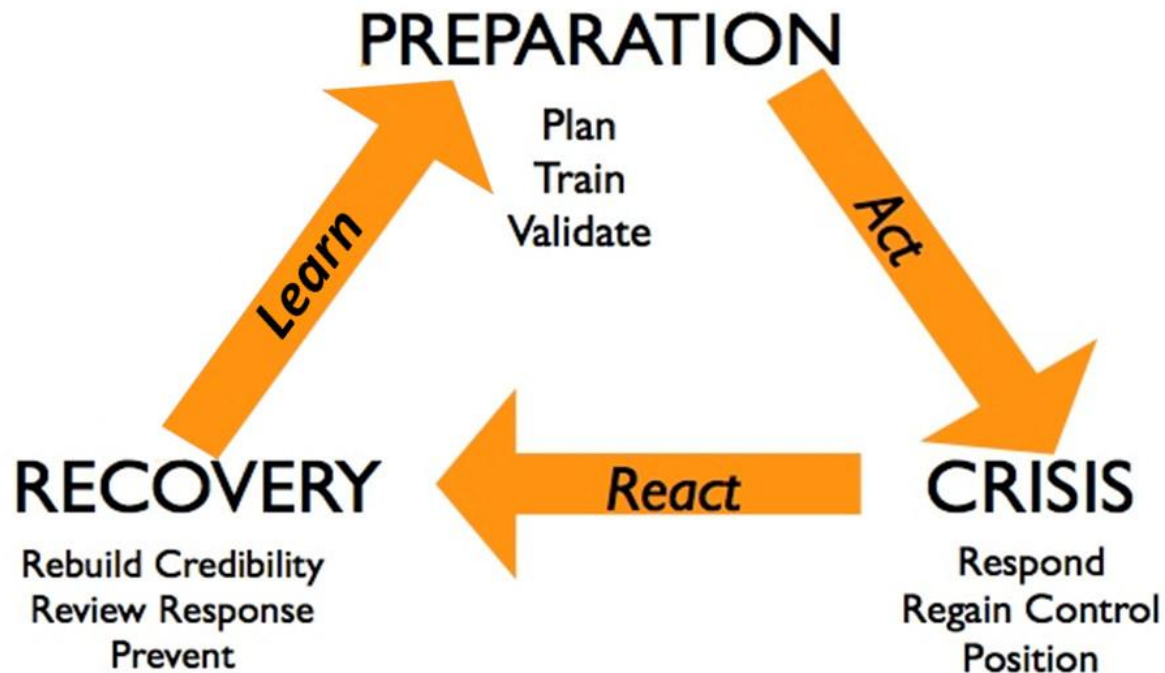
- Identify risks
- Act consistent with regulatory requirements and sound business practices
- Maintain a culture of disclosure

CRISIS PREVENTION, PLANNING & PREPARATION



"AS I SEE IT, WE HAVE THREE OPTIONS: BE PART OF THE PROBLEM, PART OF THE COVERUP, OR PART OF THE WIKILEAKERS."

CRISIS PREVENTION, PLANNING & PREPARATION



PREPARATION – PLAN:

- Identify range of possible issues
- Identify key audiences
 - Employees
 - Board members
 - Customers, clients
 - Vendors
 - Regulators
 - Community
- Anticipate reactions from internal and external audiences
- Identify members of the response team

CRISIS PREVENTION, PLANNING & PREPARATION

PREPARATION – PLAN:

- Create the crisis plan and share the protocol within the organization
- Draft standby materials and basic messaging
- Create dark microsite and webpages, purchase web addresses
- Prepare specific social media channels – Twitter, YouTube, Facebook, et al – specifically for issues and crises
- Create specific plan for online Reputation Restructuring – SEO management (e.g., Digital Whiteout)

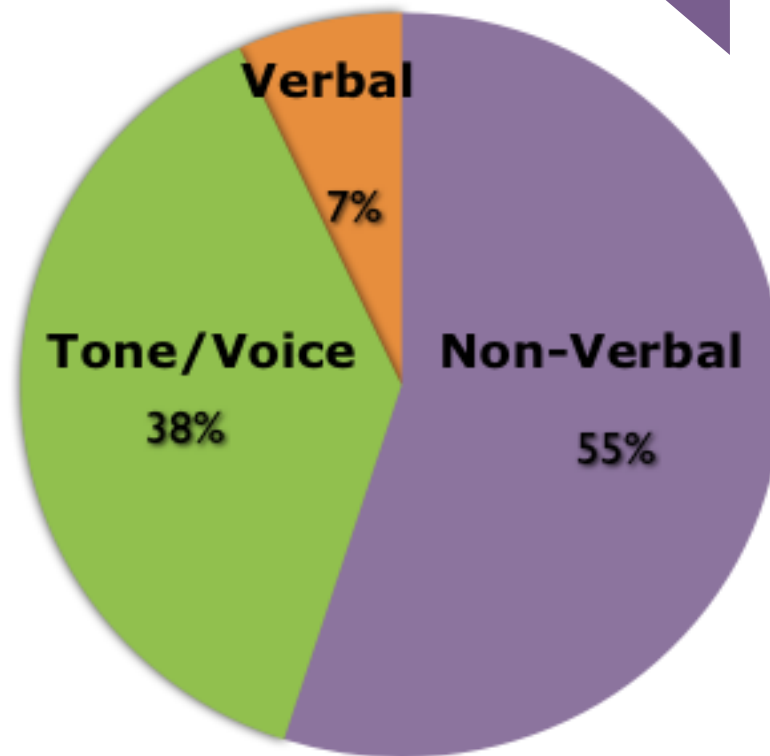
PREPARATION – TRAIN:

- Identify spokespeople and key executives who may need to speak to media
- Craft key message for certain issues, consistent language about the organization
- Conduct media/speaker training and on-camera practice sessions
- Hold periodic refresher sessions
- Stage annual crisis simulation

CRISIS PREVENTION, PLANNING & PREPARATION

“What you are speaks so loudly that I cannot hear what you say.”

- Ralph Waldo Emerson



PROSECUTOR GIVES EMOTIONAL DEFENSE IN HACKER CASE

PREPARATION – VALIDATE:

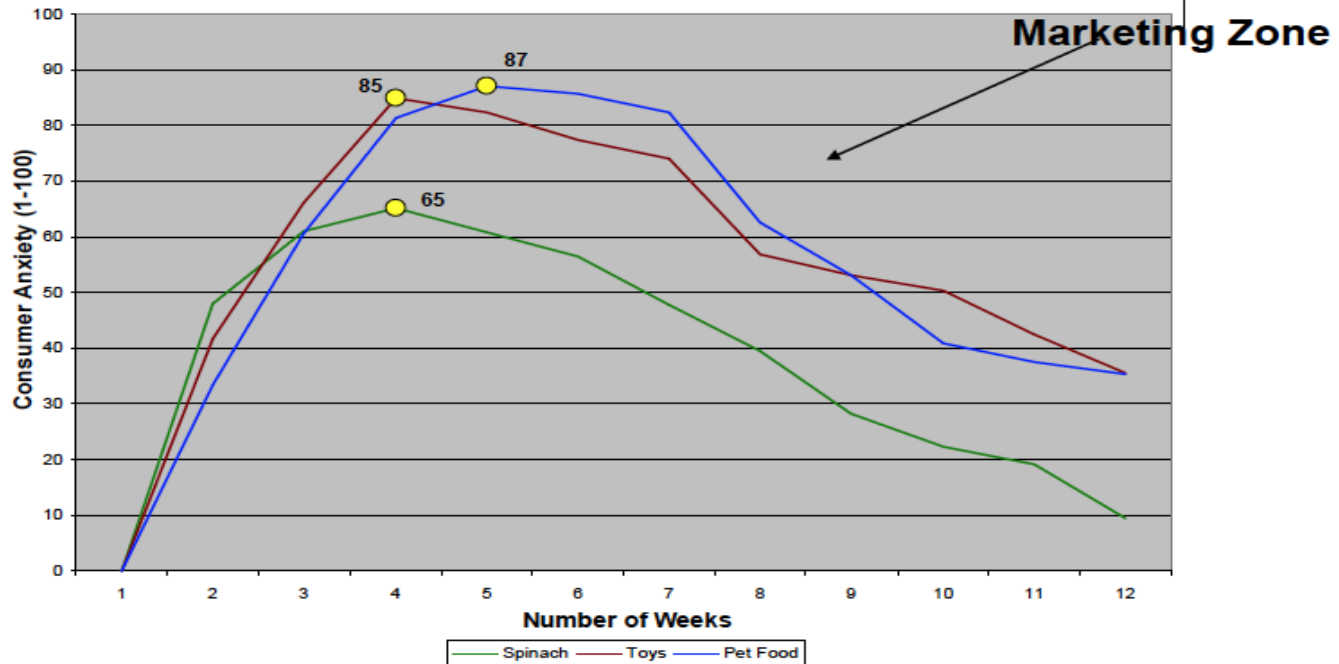
- Track media coverage
- Measure public perception and brand image
- Track and measure social media
- Measure share of voice and appearance of key messages

CRISIS PREVENTION, PLANNING & PREPARATION

PRNews



Consumer Anxiety Over Time



www.pnewsonline.com

CRISIS RECOVERY

RECOVERY – REBUILD CREDIBILITY:

- Shift from crisis management into marketing and brand rebuilding
- Execute specific crisis recovery plan to rebuild reputation
- Conduct media relations and other activities to enhance leadership credibility
- Return to your previously scheduled programming

BP's ONGOING COMMITMENT TO THE GULF

CRISIS RECOVERY

RECOVERY – REVIEW RESPONSE:

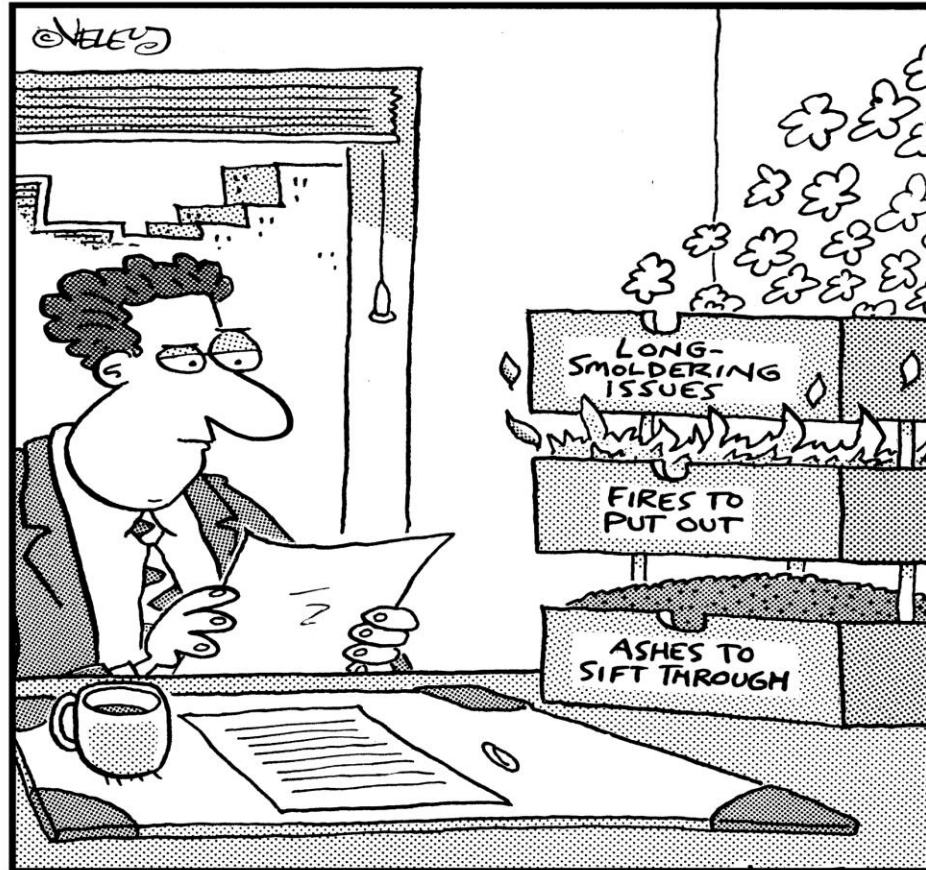
- Critically assess the crisis plan's effectiveness
 - Did we reach our audiences?
 - Were our messages effective?
 - What didn't work?
- Evaluate preparation and effectiveness of spokespeople
- Identify new communication assets to be deployed in future issues or crises
- Revise crisis management plan, messages, preparation and execution

CRISIS RECOVERY

RECOVERY – PREVENT:

- Turning from crisis to campaign
 - Reform and restitution lead to recovery
 - Return to normalcy requires intensity
 - Performance is only effective long-term cure
 - Lingering problems must be compartmentalized
- Never let a crisis go to waste
- The right reputation is “political capital” that can be used to deal with future problems

CRISIS RECOVERY – LEARNING FROM YOUR MISTAKES



TEN GREATEST CRISIS MISTAKES

1. Lying
2. Thinking the CEO is always the best spokesperson
3. Listening blindly to either the PR people or the lawyers; there must be a balance
4. Following a bias toward withholding information
5. Letting Board members talk
6. Answering every question
7. Speaking first, acting later
8. Withholding from your allies
9. Answering “no comment”
10. Forgetting about empathy and humanity

ATTORNEY CLIENT PRIVILEGE ISSUES

1. Where legal advice is sought;
2. from a professional legal advisor in his or her capacity as such;
3. the communications relate to that purpose; and
4. are made in confidence.

In appropriate circumstances, the privilege can extend to involve persons assisting the lawyer in the rendition of services.

ATTORNEY CLIENT PRIVILEGE ISSUES

In re Grand Jury Subpoena Dated March 24, 2003,
256 F. Supp. 2d 321 (S.D. N.Y. 2003)

This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions--such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges, and (c) zealously seeking vindication--would be undermined seriously if lawyers were not able to engage in ***frank discussions of facts and strategies with the lawyers' public relations consultants.*** (emphasis added)

ATTORNEY CLIENT PRIVILEGE ISSUES

In re Grand Jury Subpoena Dated March 24, 2003,

256 F. Supp. 2d 321 (S.D. N.Y. 2003)

(cont.)

[L]awyers may need skilled advice as to whether and how possible statements to the press--ranging from “no comment” to detailed factual presentations--likely would be reported in order to advise a client as to whether the making of particular statements would be in the client’s legal interest. And there is simply no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers’ defense strategies and tactics, free of the fear that the consultants could be forced to disclose those discussions.

MAXIMIZING PRIVILEGE POTENTIAL AND MINIMIZING RISK

1. Have the lawyer hire the consultant
2. Put a heading on each e-mail stating that it is for purposes of providing legal advice, is privileged and should not be forwarded
3. Make clear in the body of the communication that information is being used for purposes of providing legal advice
4. Include the lawyer in the "To" line
5. Talk more, write less
6. Avoid admissions

PLANNING AND EXECUTION IS KEY



"Once you get the hang of it, crisis management is fairly straightforward."

WSG MEETING OF THE AMERICAS



MIAMI, FLORIDA



MOORE STEPHENS

Cifuentes, Lemus & Asociados, S.C.
RIF J-00296621-1