



# ACC DoubleHeader®

## Saving the Franchise

March 31, 2011

WINSTON  
& STRAWN  
LLP

**ACC AMERICA**  
Association of Corporate Counsel  
Southern California Chapter (ACCA-SoCal)



# Overview

- Scouting the Risks
  - Case Studies: Recent Corporate Crises
  - New Developments that May Cause Crises
- Five Strategies to Avoid and Manage Crises
- Making the Last Shot to Win: Post-trial Rescue™ Missions
- Putting it Into Practice: A Hypothetical Crisis



# Today's Presenters



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# Today's Presenters



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# Case Studies: Recent Company Crises



# Product Recall

**Hip Implant Pain?**

You May Be Entitled to Compensation

*“Recall Issued for Defective ASR Hip Implants”*



**Hip Implant Recall Attorneys**

- Johnson & Johnson unit DePuy recalls hip implants installed in 93,000 patients
- Some doctors estimate 49% failure rate
- Most recent financial reports include a \$966 million charge for litigation costs



# Accidental Disaster/ Social Media Attack



- Tweets from “BPGlobalPR” – a fake entity – mocked BP’s oil spill response
- Twitter does not require authentication to open an account
- Account had many more followers than the real BP spill response Twitter account



# Natural Disaster

- Total losses from the Japanese earthquake and tsunami likely to exceed \$100 billion
  - Japanese and global insurance/re-insurance companies will be forced to pay a significant portion.
  - Aflac, which sells life and health insurance in Japan, had a 9.2 percent drop in its stock price the morning after the earthquake and will face significant losses for the year.
- Most factories shut down – unclear when companies can restart operations
  - Sony has been forced to halt production in its six northern factories, and both Nissan and Honda Motors have had to close plants.





# Natural Disaster (cont'd)

- **Wide-Spread Destruction of Transportation and Distribution Systems**
  - Ford has had to implement restrictions on the use of black and red paint because of limitations in supply from Japan.
- **Possible Radiation From Japan**
  - **Possible Legal Obligations Triggered**
    - OSHA obligation to provide safe workplace
    - Injury & Illness Prevention Plans
  - **Crisis Management Plan Considerations**
    - Monitor the situation
    - Have effective company-wide communications
    - Take appropriate steps to provide safe workplace





# Political Unrest



- Oil and energy companies closing down in Egypt
  - American oil and energy companies closed drilling operations
  - Several foreign energy companies began to relocate workers in February
- Oil prices rise due to Libyan unrest
  - Libyan production has fallen 60-90%
  - Trucking industry already on alert re rising oil prices and that recent freight volume increases may be affected



# Labor Unrest



- NFL
  - Players' Union de-certifies to sue Team Owners
  - Players concern regarding information on financials
- Wisconsin
  - Public-sector workers' collective bargaining rights taken away
  - Similar bills are springing up in other states

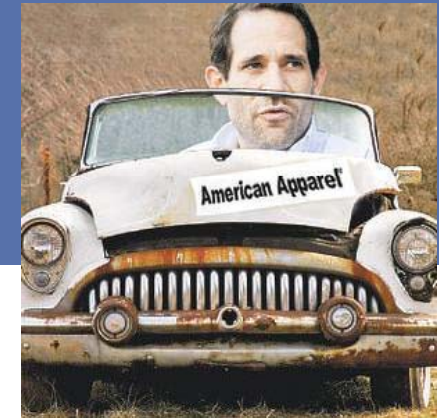
# Financial Distress



- Ford declined government bailout
- Risked competitive disadvantage
- Risk paid off
  - Positive impact on consumer perception
  - Gained market share



# Executive Misconduct



- **Mark Hurd, former HP CEO**
  - Sexual harassment claim, but HP says the company's sexual harassment policy not violated
  - Hurd did submit inaccurate expense reports that concealed his personal relationship with the Plaintiff
  - Hurd resigns and takes \$40,000,000 in severance
- **Dov Charney, American Apparel CEO**
  - Plaintiff seeks \$250,000,000 in damages for alleged sexual harassment
  - Prior claims against Charney were settled including another sexual harassment case for \$1,000,000



# Conflicts of Interest/ Oversight Failure

## Los Angeles Times



### Waste Throws Wrench into Los Angeles Community Colleges' Massive Project

Poor planning, frivolous spending and shoddy work dog the sprawling system's bond-financed construction system

Feb. 27, 2011

- *LA Times* investigation uncovers conflicts of interest among Trustees
- Construction chief fired after 8 years on the job
- PR disaster as tens of millions of tax dollars are wasted



# Executive Succession



- Steve Jobs, the visionary CEO of Apple Inc., took an indefinite medical leave of absence on January 17, 2011.
- Apple's stock price plunged 2.25% the next day.
- Since then shareholders have been clamoring for the disclosure of his medical records, and the disclosure of a succession plan.
- This raises questions about the Board of Directors' obligation to disclose such information to shareholders.



# Dissemination of Sensitive Information



- WikiLeaks is an international non-profit organization that publishes submissions of private, secret, and classified media from anonymous sources.
- WikiLeaks recently disclosed diplomatic cables about Chinese Car manufacturer and recent Warren Buffet investment, BYD Co. Ltd.
- These cables allege that BYD has a history of stealing designs from competitors and using predatory pricing to expand its market share.
- While it is too early to tell, such allegations may threaten BYD's plan to enter the automobile market in the United States.



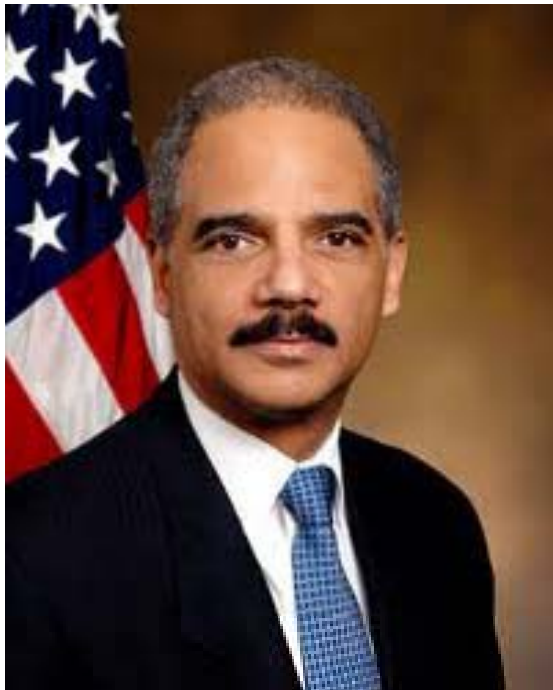
# IS Security Breaches/Hacking



- “Hacktivist” organization, Anonymous, broke into the computer system of technology security consultant HBGary Federal’s computer system.
- During this security breach, Anonymous stole 71,800 emails and posted them on the Internet along with the home address and social security number of the company’s CEO.
- Among the emails were highly sensitive, attorney- client protected, proposals to a law firm outlining a “dirty tricks campaign” against the competitors of the firm’s clients.
- Another email from an attorney implied that his client wanted content removed from a website even if that included methods that were not on the “up and up.”



# Foreign Corrupt Practices Act ("FCPA") Enforcement



- The FCPA is a potent weapon against foreign corrupt business practices.
- Approximately \$1.8 billion in FCPA-related fines, penalties, and disgorgements were collected in 2010.

# PR Gaffes



- Comedian Gilbert Gottfried, the voice of the iconic Aflac Duck, sent out a series of offensive tweets following the earthquake in Japan.
- In a separate incident, an employee of a major American auto manufacturer's social media agency used an expletive and insulted Detroit drivers on its brand's official Twitter account.
- In both cases a swift response helped to mitigate damage.





# New Developments That May Cause Crises



# Privacy Issues



- **Recent FTC Privacy Developments**

- In a recent FTC report, issued on December 1, 2010, the agency proposed sweeping changes to how it believes companies should approach consumer privacy, extending protection to all types of information.
- The report contemplates a three-pronged approach to privacy:
  - Have companies incorporate privacy protections at every stage of their business;
  - Give consumers a streamlined choice about how their information is used; and
  - Make companies give better transparency about their data practices.
- In focusing on online privacy issues, the FTC endorsed a “do-not-track” mechanism, which would give consumers more control over marketers, similar to the effect of the “do-not-call” registry.
  - Such a mechanism would significantly impact companies that engage in online advertising and companies that collect electronic information about consumers. The decrease in availability of online behavioral advertising would unquestionably increase the cost of advertising.



# Privacy Issues (cont'd)

- Collection of Personal Identification Information
  - The definition of personally identifying information is already very broad, and has recently been interpreted even more broadly by courts.
    - For example, in *Pineda v. Williams-Sonoma Stores, Inc.*, the California Supreme Court extended the definition of personal identification information under the Song-Beverly Act to include a consumer's ZIP code when requested in the course of a credit card transaction.
  - The collection of such information in the course of business may violate certain statutes, thus exposing companies to significant liability.
    - As a result of the *Pineda* decision, California retailers cannot request and record a consumer's ZIP code without facing penalties of up to \$1,000 for each transaction, and will need to adjust their business practices accordingly.
  - Court decisions expanding the definition of personal identification information may be retroactively applied.
    - The court in *Pineda* applied its decision retroactively, meaning that retailers are faced with significant potential liability based on previous transactions, even if they relied on lower court decisions explicitly finding that ZIP codes, without more, did not constitute personal identification information.



# Social Media



- Traditional media strategies do not work in social media, where it is much more difficult to control the message
  - Viral videos and Twitter accounts bypass traditional PR channels
- Companies must have a social media strategy that reflects the nature of the technology
  - Avoid overreacting or becoming combative
    - Streisand Effect/Tony La Russa
  - Be proactive in monitoring social media channels



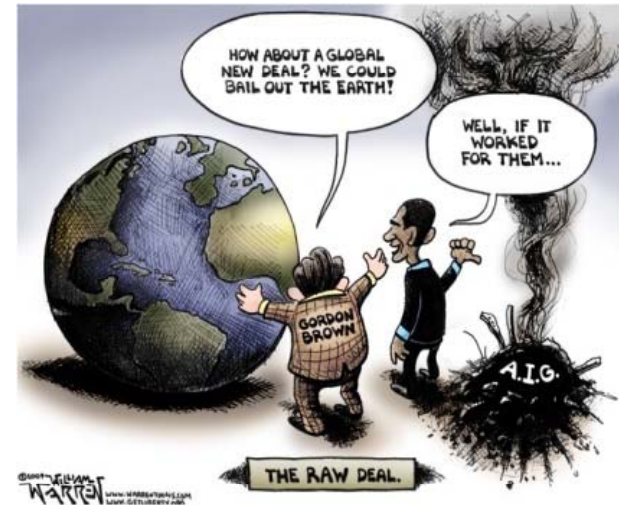
# Consumer Product Safety Commission

- The Consumer Product Safety Act (“CPSA”) requires the U.S. Consumer Product Safety Commission (“CPSC”) to establish and maintain a publicly available, searchable database on the safety of consumer products, and other products and substances regulated by the CPSC.
- This database will have the potential to become a clearinghouse of information for plaintiffs’ firms looking to generate class action litigation.



# Increased Government Regulation

- 30-year deregulation era ended in 2008
  - Era began in 1978 when President Carter signed the Airline Deregulation Act into law
  - Ended abruptly on Sept. 16, 2008 when the government took an 80% stake in AIG
  - Regulatory efforts since 2008
    - Dodd-Frank/SEC
    - Health Care Reform
    - Credit Card Reform
    - FDA (Food Safety Bill)
    - EPA (Clean Air Act Enforcement)





# Foreign Corrupt Practices Act ("FCPA")

- A potent weapon to go after foreign corrupt business practices
- The FCPA consists of two parts:
  1. Anti-Bribery Provisions
  2. Accounting Provisions
- Consequences of violating the FCPA:
  1. Anti-Bribery Provisions
    - Criminal fines, civil penalties, disgorgement of profits, collateral consequences
  2. Accounting Provisions
    - Criminal fines and civil penalties



# Foreign Corrupt Practices Act ("FCPA") (*cont'd*)

- Approximately \$1.8 billion in FCPA-related fines, penalties, and disgorgements were collected in 2010.
- Four of the top 10 costliest cases in the 30-year plus year history of the FCPA were determined in 2010:
  - \$400 million - BAE
  - \$365 million - Snamprogetti Netherlands B.V./ENI S.p.A
  - \$338 million - Technip S.A
  - \$185 million - Major European automaker

# Dodd-Frank Whistleblower Provisions



- Compensation soars under Dodd-Frank
  - Available in ALL judicial and administrative actions that lead to monetary damages of more than \$1 million
  - Awards are 10% minimum, up to 30% of the damages collected, at the discretion of the SEC



# Dodd-Frank Executive Compensation Provisions

- The Dodd-Frank Act is to the Board's Compensation Committee (and its individual members) what the Sarbanes-Oxley Act was to the Audit Committee
- Ten Separate New Requirements
  - Compensation Committee Independence
  - Corporate Governance
  - Director Elections
  - Public Reporting



# The Dodd-Frank Act: Compensation

1. Compensation Committee Member Independence
2. Independence of Compensation Consultant, Legal Counsel, and Other Advisers
3. Policy on Recovery of Erroneously Awarded Compensation
4. Disclosure of Hedging by Employees and Directors
5. Disclosure of Pay Versus Performance
6. Pay Ratio Disclosure
7. Disclosure Regarding Chairman and CEO Structures
8. Shareholder Say on Pay (*Effective Now*)
9. Shareholder Approval of Golden Parachute Compensation
10. Elimination of Discretionary Voting by Brokers on Executive Compensation Proposals (*Effective Now*)



# Wage & Hour Issues

- **Misclassification:**
  - E-Loan: \$13.6 million (\$27K per employee)
  - IBM: \$65 million (\$2K per employee)
  - Staples: \$38 million (\$22K per employee)
- **Off-the-Clock:**
  - Albertson's: \$53.3 million (\$7.6K per employee)
  - Wal-Mart: up to \$54 million (100K employees)
- **Meal and Rest Breaks (CA):**
  - UPS: \$87 million (\$3.7K per employee)
  - All Covered Inc: \$975,000 (\$4.9K per employee)
- **Other**
  - Radio Shack: \$4,500,000 (expenses)
  - Wal-Mart: \$86,000,000 (final wages, vacation)
  - Combined Ins. Of America: \$6,000,000 (expenses, final wages, wage statements)





# Increased Agency Enforcement

- “[T]here is a new sheriff in town.” – Sec. Solis
  - Stepped-up enforcement and aggressive in pushing legal interpretation and authority
  - Less emphasis on compliance assistance
  - Tilted toward organized labor demands
- DOL has been taking much narrower position on:
  - Administrative and Outside Sales Exemption
- DOL is beginning to focus on compensation issues created by advancing technology:
  - Computer log-on, Blackberries, and home email
  - Associated commuting and travel issues



# Five Strategies to Avoid & Manage Crises





# Overview

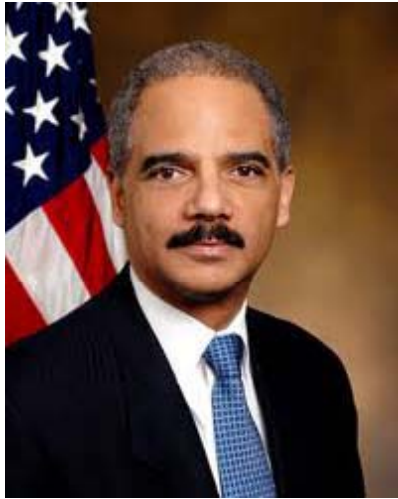
1. Tips for Preventing a Crisis
2. Monitoring for Early Signs of Trouble
3. Communicating with the Board
4. Developing a Game Plan for Crisis Management
5. The Importance of Public Relations & Proactive Media Outreach



# Tips for Preventing a Crisis



# Know Your Potential Crises!



**Hip Implant Pain?**

You May Be Entitled to Compensation

*"Recall Issued for Defective ASR Hip Implants"*

Hip Implant Recall Attorneys





# Cautionary Tale No. 1

- A mortgage banking company's CEO wrote e-mails such as these to other executives within the company:

**We are flying blind** on how these loans will perform in a stressed environment of higher unemployment, reduced values and slowing home sales. . . .

“[i]n my conversations with [executive colleague] he calls the 100% sub prime seconds as the ‘milk’ of the business. Frankly, **I consider that product line to be the poison** of ours.”

“In all my years in the business **I have never seen a more toxic product** [sic].”

- Consequence: SEC pursued the CEO for fraud and insider trading; he settled for \$67.5 million



## Cautionary Tale No. 2

- A customer of Spirit Airlines complained to the CEO and customer service personnel about a flight delay that caused them to miss a concert. The CEO of Spirit responded with an instruction to the customer service employee but used the “Reply-to-All” function:

Please respond, Pasquale, but we owe him nothing as far as I'm concerned. Let him tell the world how bad we are. He's never flown us before anyway and will be back when we save him a penny.
- Consequence: the CEO's e-mail was circulated in travel websites, numerous blogs, and several newspapers



# Cautionary Tale No. 3

- **AutoComplete** is a feature in Outlook which displays suggestions for names and e-mail addresses as you begin to type them
- A pharmaceutical company lawyer intended to e-mail a confidential memo regarding billion-dollar settlement negotiations to co-counsel named *Bradford Berenson*.
- Instead, the lawyer inadvertently sent the memo to a *New York Times* reporter named *Alex Berenson*.
- Consequence: the reporter promptly wrote a front-page story about the negotiations.



# Cautionary Tale No. 4

- A semiconductor company's GC, a patent attorney, and an engineer tried to call a rival's in-house lawyer
- No one answered, so they left a voicemail.
- After they hung up (or thought they did), they discussed the following topics:
  - Theft of the rival's trade secrets
  - Unlawful hiring away of the rival's engineers
  - Potential jail terms
- Consequence: their discussion was captured in the voicemail and is key evidence in a trade secrets trial



# BE PREPARED!!

- Attorney-Client Privilege
- Careful Communications
- Document Retention/Litigation Holds
- Regulatory and Policy Compliance
- Any Duties (e.g., Duty to Report)
- Anticipate Liquidity Issues
- SEC Disclosure Obligations



# Attorney-Client Privilege

**In order to be protected, "the communication must be made in confidence for the purpose of obtaining legal advice from the lawyer."**

- The privilege protects:
  - Legal advice, not business advice
  - Specific communications, not information generally
  - Communications with consultants retained by the lawyer
- Whenever practicable, privileged documents should be marked as follows:

***PRIVILEGED & CONFIDENTIAL***

***ATTORNEY-CLIENT COMMUNICATION***

***DO NOT FORWARD OR COPY***



# Attorney Work Product

- Qualified privilege for materials prepared by an attorney, or someone working on behalf of the attorney, acting for the client in anticipation of litigation
- May include work performed by others working on behalf of the attorney
- Purpose is to protect the mental impressions, conclusions, opinions, or legal theories of the attorney



# Maintaining Privilege: Securing

- Privileged documents should be maintained securely:
  - Secure computer storage
  - Passwords
  - Careful e-mail transmissions
  - Avoid commingling with non-privileged documents
  - Locking file cabinets and storage rooms
- Requests to the Law Department or in-house counsel should begin with: "I'm seeking your legal advice concerning . . . "
  - Communications made prior to the request may not be privileged
  - Communications which diverge from the subject of legal advice will not be privileged



# Loss of Privilege: Waiver

- Disclosure of privileged information to a non-confidential third party
- Putting privileged information at issue
- Inadvertent disclosure
- Reliance on advice of counsel
- Selective disclosure runs risk of a broader waiver
- Intentional waiver



# Careful Communications

## **Before putting it in writing, ask yourself:**

- Would I mind if this document were turned over to the regulatory authorities?
- What if this document were published in a newspaper?
- Could my boss explain this document in court?
- Would I be comfortable if this document were subpoenaed by a business rival?



# Careful Communications (*cont'd*)

## **Also ask yourself:**

- Is this statement true under all circumstances?
- Can it be taken out of context or misconstrued?
- Is my statement factual or have I exaggerated?
- What would my customers think?
- Is this document preliminary or limited in some way that I need to qualify?
- Is there any reference to liability, wrongdoing, or inappropriate or unethical behavior?



# Careful Communications: E-mail Guidelines

- Indicate up front if a message contains privileged or confidential information
- Use a descriptive subject line
- Carefully review addressees before you send
- Use bcc's judiciously
- Avoid "Reply to All"
- Recognize that e-mail is not always the best mode of communication – pick up the phone or walk down the hall
- Assume there is no privacy (misaddressed messages, hacking, monitoring)
- Store e-mails in appropriate folders



# Careful Communications: Oral Statements

- Assume there are no "off-the-record" conversations
- Keep to the specific facts you know
- Do not speculate, especially about the nature or effect of company policies or practices
- Send appropriate confirming correspondence
- Review and correct incoming confirming correspondence so that your statements have not been mischaracterized
- Be aware that voicemails can be permanent records



# Document Retention & Litigation Holds

- Once litigation is reasonably anticipated, there is a duty to suspend any document destruction, preserve relevant documents, and avoid spoliation of evidence
  - Extends to files on individual computers, network servers, databases, backup tapes, PDAs, paper files, archival storage media, etc.
- Counsel should quickly:
  - Institute and periodically reissue a "litigation hold" on deletion or destruction of files
  - Communicate directly with key players to advise them of their responsibilities
  - Secure all potential sources of relevant data
  - Involve technical experts early



# Anticipate Liquidity Issues

- How broad is the “MAC” in your credit line?
- Does the “quick-draw” artist win?
- Default on outstanding debt?
- Offering window closed? Refinancing Needed?



# SEC Disclosure

- Form 8-K
  - Item: 2.04 – Triggering Events
  - Item: 2.06 – Impairments
  - Item: 5.08 – Ethics Waiver
  - Item: 1.07 – Material Agreements
- Filed v. Furnished
- Forms 10K and 10Q
- Closing the option/sale window for insiders
- Reg FD



# Monitoring for Early Signs of Trouble



# Monitoring: Sources of Information

## Employee Hotline / Suggestion Box

- Anonymous employee tips can provide early alert

## Internal Audits

- Financial or other internal controls

## Whistleblower Notices

- Act aggressively to head off *qui tam* suits or Dodd-Frank liability for financial services companies



# Monitoring: Sources of Information *(cont'd)*

## Investigation of Business Partners

- Government action against subcontractors or vendors

## Competitor Complaints

- Unfair competition claims; antitrust

## Competitor Disclosures

- Highlighting industry practices; actions that put your industry in a bad light



# Monitoring: Sources of Information (*cont'd*)

## Social Media

- Identify brand attacks and other PR problems from Facebook, Twitter, etc.

## Press Reports

- Investigative journalism; op-eds about your industry

## Info from Prosecutor, Regulator, or Subpoenas

- This may be the first sign of a crisis that you receive



# Communicating with the Board





# Protecting & Advising the Board

- Corporate governance reforms have changed the role of General Counsel – increasing General Counsel’s responsibility to advise and protect the Board
  - Expanded role beyond providing traditional legal counsel to advising on non-legal risks
- General Counsel must monitor corporate governance trends, world developments and recent crises to help meet this responsibility
- Risk management does not mean risk elimination
  - The use of sound business judgment requires risk taking



# Duties of the Board

- Generally: Duties of Care and Loyalty receive “business judgment rule” deference
- Compliance: Duty of Oversight/Monitoring
  - Arises from Duty of Loyalty
  - “Conscious disregard” standard
  - No exculpation or indemnity



# Informing the Board

- In developing a crisis-management plan (Phase 1) the early-stage procedures are critical
- General Counsel must immediately inform the Board and non-legal Senior Management of the crisis
  - The success of any crisis-management plan will hinge on the cooperation of the Board and Senior Management



# Employee Misconduct

- If Board member or employee allegedly participated in illegal conduct, General Counsel should determine whether they need independent counsel
- General Counsel should also consider whether any employees or Board members need to be replaced
  - Replace with Independent Board
  - Replace Management
  - Use Special Committee



# Board-directed Internal Investigations

- Initiated by the Board as the result of an alleged violation of law, corporate policy, or other misconduct by an employee or agent
- Conducted under the oversight of the Board with little or no involvement by management
  - Concerns about the independence or integrity of officers of the corporation



# Status Reports to the Board

- Periodic oral reports concerning the status of the investigation to the Board are sufficient unless potential misconduct is by Senior Management or may result in “material” impact on the company’s financial statement or business
- If Board is supervising the investigation, then more frequent and detailed reports are required



# The Board & Remedial Measures

- The Board should be informed of the results of an internal investigation
- Full Board must approve recommended remedial measures
- Board is responsible for ensuring management's implementation of approved remedial measures



# Best Practices

- Serve as key gatekeeper of information to the Board for aiding its decision-making process
- Ensure company meets disclosure requirements of material non-compliance, both to management and Board
- Respond to Board requests and inquiries regarding legal, regulatory, and corporate governance matters
- Provide information far enough in advance of Board meetings that Directors have sufficient time to review the information prior to meetings



# Best Practices (*cont'd*)

- Thoroughly brief all topics and ensure each is discussed
  - Biggest Concerns
    - Executive compensation and severance
    - Mergers and acquisitions
    - Conflicts of interest
    - Related-party transactions
    - Capital raising
    - Accounting practices
- Minutes should generally cover subjects discussed at board meeting



## Best Practices (*cont'd*)

- Balance working relationship with the Board and with non-legal Senior Management
  - Board and non-legal Senior Management have different expectations of General Counsel
    - Non-legal Senior Management expect General Counsel to be an advocate for management's strategies and business plans
    - The Board expects open disclosure of potential risks and problems
  - The corporation benefits when General Counsel is "in the mix"



## Best Practices (*cont'd*)

- Use special committees in situations where Board members are not truly independent
  - Directors should have a heightened awareness of the perception of conflict and take action to demonstrate that they have considered such conflicts
  - In special committee matters, the duties of loyalty and care are most often at issue

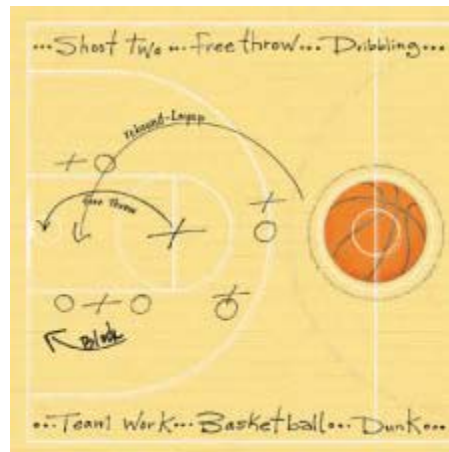


# Best Practices

- Special committees should rely on outside counsel for advice
  - Outside counsel can provide:
    - Competence and experience
    - Dedicated focus on committee interests
    - Fiduciary duty explanation
    - Potential litigation assessment
    - Expertise concerning disclosure matters
    - Attorney work product protection



# Developing a Game Plan for Crisis Management:



## Initial Game Plan



# Immediately Gather Information Regarding What Triggered Crisis

- Resist the urge to act too quickly.
- Early-stage procedures are critical.
  - Internal communications
  - Ensure communication protocols are in place
  - PR and media considerations
  - Consider retaining PR firm to counter negative publicity and level the playing field
- Employ problem-management/escalation protocols.



# Assess Scope of Crisis, Risk to Company, & Issues Presented

- Start assessment process.
  - If there is government outreach, determine its nature.
  - Pay attention to the characteristics of the issue.
- Consider the potential risks to the company.
  - Type of risks include civil, criminal and regulatory.
  - Assess the degree of exposure.



## Consider Investigation & Obstruction-of-Justice Issues

- Develop the facts.
- Consider the potential for corporate liability.
- Consider removing employees or directors.
- Override existing document retention policy to avoid destruction of any relevant documents or evidence.
  - Take measures to preserve all potentially relevant materials.
  - Distribute a document preservation notice.
  - Preserve attorney-client and work product privileges.



# Assemble Internal Investigation Team & Assign Roles

- Form an investigative plan and put it in writing.
  - Who will supervise internally?
  - Who will make strategic and operational decisions?
  - Should outside counsel be retained and with what type(s) of expertise?
  - What other experts will be needed?
- Monitor the investigation.
  - Maintain legality and ethics of the investigation.
  - Control information and deal with press inquiries.



## Set Appropriate Timeline & Protocols for Reporting

- The timeline for the response plan will be determined by the triggering event.
- Protocols for analyzing the gathered information and reporting to supervisors of the investigations include:
  - Evaluation of alleged misconduct or violation in light of applicable laws and company policies.
  - Determination, under advice of counsel, of nature, scope and content of report.



# Execute the Investigation & Response Plan

- Develop guidelines for document collection/review and interviews.
- Determine proper treatment of employees.
- Consider how a General Counsel can properly advise/protect the Board.
- Control the message to the media.
- Consider whether to cooperate with law enforcement and the government.
- Figure out how to deal with Congressional investigations.



## Address Investigation Results & Recommend Corrective Action

- Obtain Board approval of remedial actions and ensure implementation by management.
- Stop any ongoing illegal activity.
- Consider whether to upgrade internal controls and legal compliance programs.
- Meet post-investigation disclosure obligations.
- Prepare for potential future litigation.
- Reevaluate the corporate structure.
- Consider responses to various issues and constituencies.



# The Importance of Public Relations & Proactive Media Approach



# Public Relations & Media Outreach (*cont'd*)

- Four-step crisis communications strategy:
  1. Get it ***Right***
  2. Get it ***Fast***
  3. Get it ***Out***
  4. Get it ***Over***



# Public Relations & Media Outreach (*cont'd*)

- **First Response – Managing the Message**
  - Don't ignore a potential crisis situation.
  - Convene the crisis communications team.
  - Gain access to the decision maker.
  - Gather facts.



# Public Relations & Media Outreach (*cont'd*)

- First Response – Managing the Message
  - Assign tasks.
  - Consider hiring a public relations firm.
  - Know your audiences.
  - Establish communications protocols.



# Public Relations & Media Outreach (*cont'd*)

- **First Response – Managing the Message**
  - Ensure a controlled and vetted response.
  - Draft releases and responses for investor relations personnel.
  - Monitor the media including social media.
  - Notify key stakeholders. Keep employees in the loop.
  - Monitor your stakeholders.



# Public Relations & Media Outreach (*cont'd*)

- Sustained Response – Controlling Information Throughout the Crisis
  - Identify a “go-to” person for media inquiries.
    - One spokesperson.
    - Provide facts and data, but minimize detailed public announcements.
    - Only speak truthfully.
    - Demonstrate empathy.



# Public Relations & Media Outreach (*cont'd*)

- Sustained Response – Controlling Information Throughout the Crisis
  - General Counsel’s office should take an active role in shaping the message during an investigation.
  - Avoid leaks.
  - Maintain confidentiality when dealing with law enforcement.
  - Continue to monitor and evaluate the situation.
  - Plan for recovery – acknowledge mistakes and communicate steps to correct the situation, as well as avoid similar occurrences in the future.



# Making the Last Shot To Win: Successful Post-Trial Rescue™ Missions



# The Crisis

- Under the radar (pretrial)
- Jury verdict
- Jurors impassioned by mischaracterized fact(s)
- Unreasonable determination of liability
- Excessive damages
- Prejudicial errors



# Taking the Shot





# The Art of the Rescue

- S.W.A.T. frame of mind
- Open negotiations
- Buy time
  - Clock on post-trial motions (from entry of judgment)
    - California – 60 days to rule
    - Federal – 28 days to file
  - Postpone entry of judgment
  - Stip/*ex parte* app. to establish/extend time frames
- Position the shooters
- Close the deal or take the shot



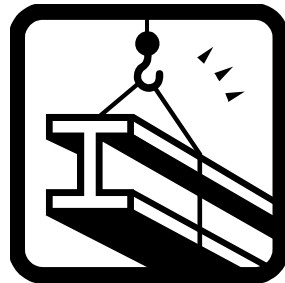
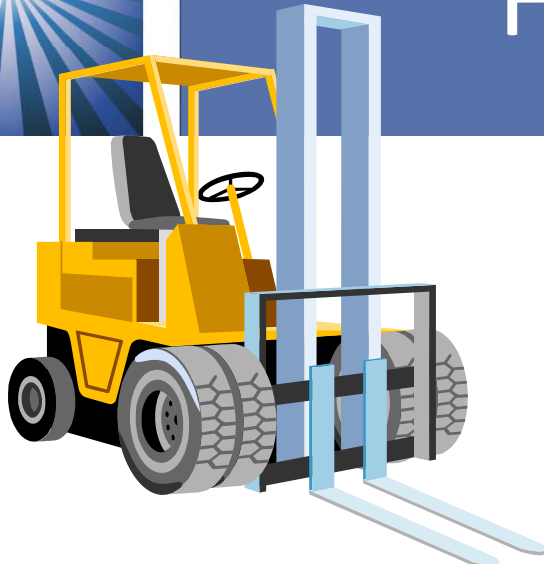
# Game Winners

- Reduced largest U.S. antitrust jury verdict by 95%
- Eliminated uninsured portion of damage award (\$10 million)
- Won damages phase (\$0) after client found liable for fraud (\$26 million)

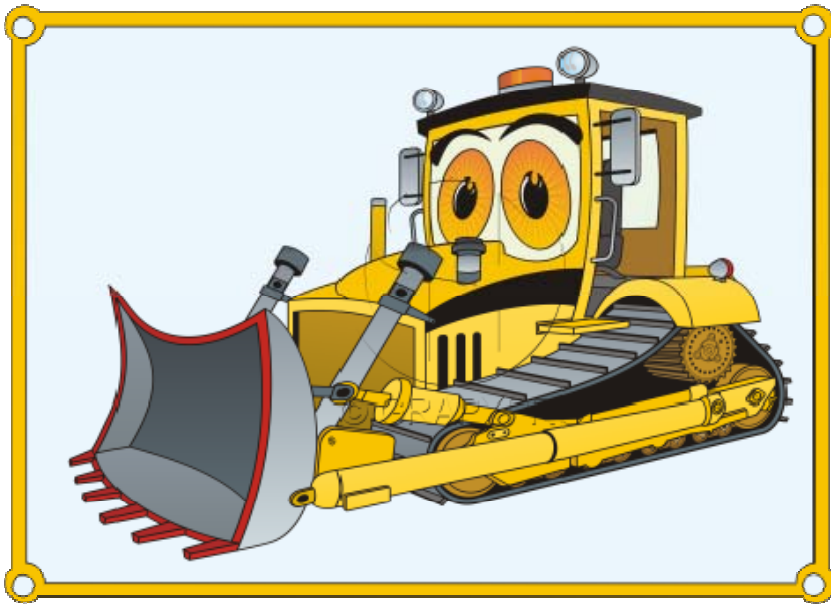


# Putting it Into Practice: A Hypothetical Crisis

# Financial Statements Due!



- General Counsel for major heavy equipment manufacturer
- Clients include construction and infrastructure development industry, and national and international governments





# Mary Walks in Thursday at 4:00 pm...

- Mary refuses to sign the Sarbanes-Oxley certification
- Who is Mary?
  - Financial officer
  - Passed over for promotion
  - Complainer
- Outside Auditors reviewed the billing practices
- Talked to salespersons, one who was angry about unpaid commissions





# Friday @ 3:00 pm

## Mary's Concerns

- Senior officers issued directives that led to customer overcharges
- \$70M in sales that won't be delivered/paid until the start of the next fiscal year

## Mary's Findings

- Emails/spreadsheets supporting her allegations
- Customer collusion
- Claims corroborative witnesses internally
- Questionable payments to foreign officials
- Past quarterly reports may have misstatements



# Public Relations

- Reporter inquires about the billing practices
- Internet message boards contain sensitive information
  - Wasn't it non-public information?
- SEC and Plaintiffs' bar will know soon!



# Time to Act – What Do You Do?



# Questions/Discussion?



# Review of Program

- Scouting the Risks
  - Case Studies: Recent Corporate Crises
  - New Developments that May Cause Crises
- Five Strategies to Avoid & Manage Crises
- Making the Last Shot to Win: Post-trial Rescue™ Missions



# Thank you!



# Disclaimer

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