

Litigation Communications in the Information Age:

What Every Lawyer, General Counsel, Communications Officer,
and Board Member Should Know

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Introduction

The accelerated information revolution of the last generation is giving way to the nascent Artificial Intelligence (AI) revolution in which apps are already making rudimentary arguments in [legal proceedings](#). As such, lawyers face obviously dramatic new challenges in litigation and other high-profile matters. How do we control the narrative amid ever-faster-moving media than hardly anyone can comprehend, much less command? The plaintiffs' bar, NGOs, and activist investors are among the leaders in the effective use of these new technologies, which increasingly put companies and their lawyers on the defense, often after it is largely too late to control the message.

This information revolution has changed the power dynamic. For our entire careers, information flowed from the top down through advertising, public relations, candidate funding, and lobbying. It was a republican form of communications; that is, a few groups of people served as gatekeepers to the masses. As a result, credible journalists, committee staff, and financial analyst were the purported truth-tellers. What they wrote, said, or did, controlled the narrative. Today, we exist in a democratic form of communications and the narrative comes from the other end—the grassroots.

Information works its way up into the mainstream narrative and that content determines how consumers, legislators, shareholders, jury pools, and influencers think, feel, and act.

The difference between republican and democratic forms of communications is akin to the difference between monologue and dialogue. Listening—social, critical, [risk-mapping](#)—is now essential.

In this environment, litigation, real or potential, is only one concomitant factor that C-Suites, Boards of Directors, and law departments must weigh in order to determine a best course of action. Today, those decision-makers have to manage risk in an exponentially broader context where, for example, an inopportune firing or victory in a court of law can be disastrously Pyrrhic if it ignites a social media firestorm or social activism that may lead anywhere from adverse regulatory or legislative initiatives to consumer boycotts. As such, any decision regarding high-profile litigation—e.g., to settle or not to settle—must be made with a more prescient eye to the business consequence of that decision. If technological innovation means anything, it means transparency and speed. Anything that is not sealed will almost instantly become public.

Lawyers can, amid this maelstrom, carefully limit their “proper” roles as advisors on legal liability. They can, if they want, dutifully take themselves out of the larger fray, separating themselves from functions more traditionally associated with “corporate communications,” “investor relations,” “risk management,” “government relations,” etc. Alas, those who do so will

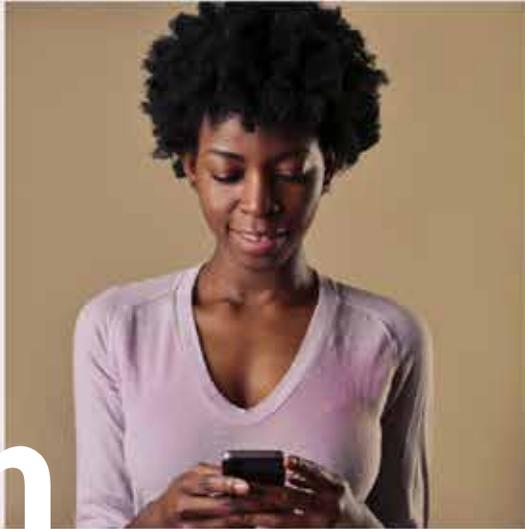
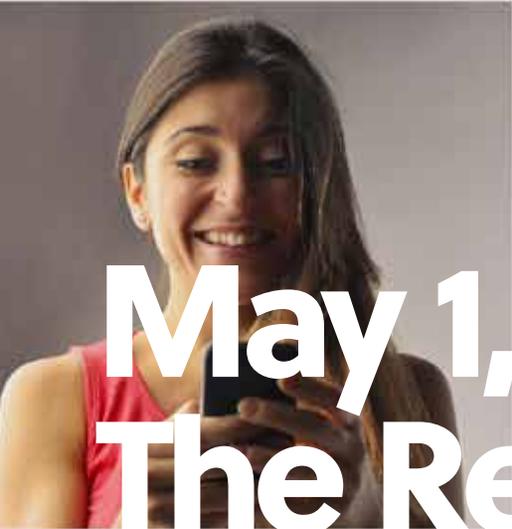
simply make themselves less relevant. As challenging as it is, wiser corporate leaders eschew silos; they are moving instead toward seamless corporate teams that bring multidisciplinary skills to bear in order to determine what’s coming next and prepare for the alternative contingencies. Of course, with this breadth comes the realization that the lawyer cannot—and should not—always control the decision, much less the internal conversation.

Recent watersheds underscore the anger as well as the unprecedented empowerment of diverse stakeholder segments. With Donald Trump’s election, in particular, a “Rule by Tweet” was ushered in. It soon became obvious that any company—large or small, public or private—is potentially implicated in a complex political dynamic and cast as hero or villain, depending on one’s point of view, with respect to a potentially infinite number of policy issues, from trade to immigration. All that is required is an accusation—any accusation—on a topic that fits a pre-existing bias held by an angry mob, especially a digital one. The days of reflection and discussion in the marketplace of ideas is over, replaced by so much shouting (sometimes all I caps).

It isn’t, of course, just the Presidential Tweet, a tactic which quickly lost its power—a power, by the way, initially considered so vast that the [Eurasia Group](#) listed it as the number one enterprise risk at the start of 2017. Since then, however, we have actually seen the stock values of companies attacked by Trump go up. In any event, fake news has supplanted real news as an essential risk index. We have gone from the inveterate “two-source” rule used by journalists to verify their facts, to the “one-source” rule that was the norm during the Clinton impeachment, to the “no source” rule that governs today. Risk is no longer about what is real, but what is perceived.

The legal issues are critical but they are part of the equation and not necessarily the sum.

Suddenly, if lawyers are to be considered a truly strategic asset during a potentially high-profile legal matter, much more is required of them than simply telling your client and team, “No comment” and “Stay off Facebook.” When liberty, market share, and regulatory fines are at stake, the brand is paramount and the strategy must be, well, strategic.



May 1, 2012: The Revolution Will Be Televised



Not just the audience, the Internet itself is also constantly changing to an extent that demands persistent attentiveness to the actual means of communication. The challenge is therefore both strategic and tactical; in other words, companies must have both a game plan and a familiarity with the ever-evolving digital tools by which that plan can be made to succeed.

It's not about the new “shiny” but rather about separating the wheat from the chaff. Of all the hundreds of new media platforms and hardware, which ones change the way in which people receive and share information? Both receiving and sharing are pivotal: receiving, for the obvious reason that democratized news choices undermine the nearly three-century-old Fourth Estate oligopolies. But sharing is equally powerful because how information is exchanged changes the equation. If a news consumer can now share their stream of information, they have the power of William Randolph Hearst (“You furnish the pictures, and I’ll furnish the war”) to develop and sway trends. Since truth is usually only what people learn first—“A **lie** can travel halfway around the world while the truth is putting on its shoes”—you concede the argument by ignoring seismic trends.

On May 1, 2012, the trend grew ever more seismic when Google changed its analytics to give optimization precedence to spoken versus written content: i.e., that content which shows up first at the top of their dominant search engine listings. (If you want to keep something a secret, the safest place is the second page of a Google search result.) Changes in analytics happen maybe 100 times a year at Google. It's always kept secret until it's implemented, so no one can game the system. But the May 1, 2012 change was historic because, for the first time, audio changed the game.

Suddenly, videos could control the narrative of a case or a controversy largely by controlling the search results.

While the defense bar still has largely not figured it out, the plaintiffs' bar and activist investors merrily control the narrative in matter after matter. It was precisely the sort of decisive “event” that should inform how lawyers and corporate communicators go about their business. At a crucial moment during a litigation, crisis, or other brand-impacting scenario, global corporations and those who advise them must know, not just what to communicate, but how to communicate it. Emotions, not facts, control the narrative and therefore jury pools.



The Three Lessons of the Information Revolution



There are three critical takeaways from this transformative shift in communications. While they may seem obvious, they are indeed so transformative as to demand separate consideration.

1. Speed: To say that the Internet has sped up our lives is to repeat the painfully obvious. Yet we usually miss the real lesson because we think it's all about doing the same thing, only faster. But that is a drastic misreading of the fact, and a sure-fire recipe for disaster.

Speed really means that we can no longer base litigation or crisis communications strategy on being reactive. We must now enter the far riskier, unfamiliar world of the proactive.

There is no longer any time to be reactive because minds are already made up by the time you have done so.

This new pro-activity doesn't necessarily mean going first and it certainly doesn't mean taking unnecessary risks. Agile pro-activity entails instead the kind of in-depth and substantive risk assessment that informs you as to what's going to happen next. All communications strategy must be built on the kind of risk intelligence that is gained from a far deeper dive than Google searches or a discussion with traditional Enterprise Risk Management professionals. We're talking instead about the resources, human and otherwise, that can spot the canary in the coal mine. For Wells Fargo, Mylan's EpiPen, fracking, the TransCanada Keystone Pipeline, Fox News litigation, offshore drilling, sugar, and thousands of other matters and entire industries, there are key patterns evident months or years ahead. You must look for them; understand who's saying what, from where, and why. Who is the first to tweet? What is the URL? Who is funding it? Are they purchasing Search Engine Marketing (SEM) advertisements? Where is the information coming from? What does relevant NGO fundraising cover? Who's behind the video? To which journalists are your adversaries pitching their sides of the story? Who's

hacking whom and what information has now become available? In all cases, intelligence informs strategy. Forewarned is proverbially forearmed and everything else is guesswork.

2. Transparency: Information leaks as hacks are veritable 100% inevitabilities. The reason for the hack may have nothing to do with the litigation or matter that you're working on but, once in the ether, the information is fair game for anyone to exploit, including your adversaries.

We all claim to be in favor of transparency until we're the one called upon to be transparent; our enthusiasm then wanes.

If you don't want it public, don't write it down. Difficult advice to follow some of the time, but a very sound practice all of the time! If you have written it down, if you're running that risk for whatever sound business or legal reason, anticipate in your contingency planning how you'll respond when the worst happens and the information is shared publicly from the least flattering point of view.

3. Anger: We've mentioned anger as a decisive component of the New Normal; let's understand what it means. People are angry in ways we have not seen since the 1968-72 period at the height of the anti-Vietnam War movement, and at times it feels like we are moving toward an 1856-1860 pre-Civil War environment. Trust is at a premium and your corporate trust bank may be overdrawn. No time on Mount Olympus is ever permanent as trust is now measured in terms of days and weeks: Yesterday, you or your client might have gotten the benefit of the doubt. "That's not the company I've come to know and trust," said your stakeholders. But now they're wavering and, in a week or two at most, you will be perceived guilty until proven innocent.

Now more than ever, you have to use your peacetime wisely and build a brand like Hershey's or Harley-Davidson's. Such companies have armies of true believers who know that problems are the exception rather than the norm. To aspire to this favored circle, you have no choice but to build your trust bank now, before the litigation or crisis tests your brand loyalty. Once the blockbuster lawsuit is filed, the lawyers need to ask the communications professionals what they are doing outside of the litigation to earn trust in an environment where trust is no longer a given.



What Separates Success and Failure in High-Profile Litigation and Crisis?

In working on hundreds if not thousands of high-profile matters around the world, we have found three consistent rules that separate success and failure:

1. Fear: Companies hire senior executives for their monetizing skills in order to grow the company. They spend precious little time during the hiring and integration stage focusing on the descendant side of the curve. How will they do in a crisis? Most people have never been in the foxhole and they are just not at their best under fire. Even in the military, when highly trained soldiers go to battle, it is assumed that 50% won't discharge their weapons when they need to.

If your teams are not tested, haven't prepared for a crisis, are not accustomed to making rapid, critical decisions with the information at hand, they will be ruled by fear.

Fear never allows for the best decisions. Only through practice and drilling do we develop the instincts that overcome the power of fear.

2. "What got you here won't get you there." Because the careers of most crisis team members are all about building the company and success, their perception is to just keep doing more of the same in a crisis; presumably, that will work as well as it did prior to the crisis. The presumption is natural but it's wildly unjustified. In a high-profile matter, all the rules change. Your audience is different because it's now comprised largely of non-customers and non-shareholders. You are no longer trusted. Prior to the high-profile event, all you needed to do to be on the side of truth was to say you are. Now, you need others to do the evangelizing and it's all subject to proof in any event. Nor is everyone within the company rowing in the same

direction. The longer a crisis goes on, the likelier it is that people will start worrying about their division, their personal liability, and, of course, their job. It's no longer the brand first, no longer command and control. You need to look at the situation differently, and act differently.

3. "Why we can't." These three simple words are the most damaging at the critical moment of a high-profile matter. A smart company gets its crisis team together and HR makes a suggestion about firing someone and legal will say "why we can't." Or legal will make a suggestion and IR will say "why we can't." It goes on and on until the moment of opportunity when a sacrifice, an apology, an act of contrition, or simply generosity would contain the cancer. But at that moment, no team member has the stomach to take the risk and recommend a sacrifice, be it a temporary dip in share value, a product recall, or the firing of a division head. So the team makes no decision at all until they can "gather all the facts." Alas, in a crisis, such moments of opportunity do not return—and failures to seize such moments are far commoner and far more damaging than most of our less-than-perfect decisions. "Why we can't" is the opposite of opportunity.



The Eight Rules of Litigation and Crisis Communications in the Information Age



To some extent, the following best practices are not new; they evolved under circumstances that were exigent at the dawn of the century during the early stages of Internet influence. That said, they are more important and more urgent now than ever before. Companies and their counselors who, at that earlier juncture, saw the need to fundamentally rethink their priorities are today reaping the benefits.

But most companies must now play catch-up, a task all the more daunting in light of the accelerated speed with which the social media are expanding even as regulators, plaintiffs' lawyers, activist investors, the media, and NGOs relentlessly up the ante. Daunting or not, 21st century businesses and their lawyers have no choice but to play the game. Here are a few essential rules of that game.

Risk Intelligence

The New ERM. It is worth repeating: intelligence informs strategy. Almost all defense lawyers and even most communications professionals operate on what they have learned over a lifetime. As valuable as that has been, it means they operate backwards in a pre-Information Revolution style. Nixon opened relations with China by taking only a dozen reporters with him—yet he was assured of communicating with all of America. You simply cannot do that today.

When truth was dominated by those with access to treasured gatekeepers (journalists, op-ed writers, think tanks, financial analysts, Hill staff, etc.) and those who had the largest advertising budgets, strategy was easy. In fact, it really wasn't strategy at all but rather a series of tactics: press conference, press release, photo, advertisements, or a liberally oiled echo chamber. You were a communications genius if you knew to focus on the morning or afternoon newspaper or with which of the three television networks to advertise. Today, though, real strategy matters. If it doesn't feel genuine, it doesn't work.

Too many companies still look at Enterprise Risk Management as if it's about studying history and extrapolating the future. While that has a place, it misses the most significant side of the Ouija Board.

In order to respond ASAP, you must know ASAP what you'll have to be responding to. To that end, the legal and/or crisis team should have regular access to risk experts who deploy the most efficient technology in order to monitor the digital and social media and to develop [risk maps](#). Effective risk-mapping identifies where trouble is likely to come from, from whom, what they're saying, and what their weaknesses are. If you understand who your adversary is and what motivates them, you can develop strategy. Without it, you are just guessing.

Once you know what you're dealing with, then and only then can you engage in strategy. In industry after industry, high-profile matter after high-profile matter, litigation after litigation, defense lawyers digest tons of information but almost nothing as to the deep background of their potential or actual adversaries. Yet there are highly sophisticated plaintiff's lawyers who know precisely with which reporters to plant leaks in a given industry in order to effect maximum pain. Or how to control search engines to dominate results. Or when to release an emotion-packed video to change perceptions about who the villain and hero are. Or how to engage state attorneys-general, thereby mounting a highly effective one-two punch of regulation and litigation.

Some activist investors are so savvy in both traditional and social media that they can clandestinely deploy NGOs in a public attack in order to advance their private agendas.

Absent an awareness of these subtle powers, targeted companies are only punching at shadows in their attempts to keep pace and influence the governing narrative. Here's the key: this level of risk intelligence is not about "big data." It is about *human intelligence* in the study of social media users, trends, and activities; it's about looking at lobbying disclosures, foreign country representations, and other public databases to see who's in bed with whom. It includes the study of foreign regulation and litigation to discern patterns and practices; it's about political donations and activities and reviewing dozens if not hundreds of other sources in order to disclose the intricate interrelationships of relevant parties. Once you understand the factors that drive your adversaries, you can develop the strategies to win.

With a robust risk monitoring and analysis system in place, decisions can then be made about the importance of any mention—which can be simply ignored, or publicly refuted, or deciphered as an early warning sign of a much larger storm that might be brewing. Certain bloggers are "high-authority" and usually justify the team's attention. Certain patterns may emerge when, for example, an outlier, earlier dismissed as a crank, now seems to be gaining attention and credibility among more traditional audiences.

Teams

Quick, who acted more quickly—Jim Burke in the famous 1982 [Tylenol crisis](#) or Tony Hayward in the 2010 BP [Deepwater Horizon oil spill](#)? We all want to say Jim Burke of Tylenol, as that remains the gold standard for crisis response to this day, some four decades later. The late Mr. Burke was a hero and his team did respond brilliantly as it put people over profits, but they did not act with literal speed. In fact, they were not allowed to do so; Johnson & Johnson was prohibited by the FBI from acting amid fears of copycat activity. Five days in, however, Burke insisted on acting and the rest, as they say, is history. Tony Hayward at BP not only acted instantly, but chose transparency as the best way to establish credibility. This comparison is not meant as criticism in any way toward either company or leadership, but instead a testament to the speed of change. The fact is emblematic: In the early 1980s you could wait five days and still claim the mantle of instantaneous response—while, three decades later, literally acting instantly, you still pay over [\\$20 billion](#) in fines, incur [\\$62 billion](#) in total costs, and get no credit for it. The difference bespeaks the exponentially accelerated speed of communications as well as the necessity to know and trust your crisis team now, long before the high-profile moment actually happens.

When the phone rings at 4 am, it's seldom good news. From the moment a company is alerted to a crisis through the moment it finally fades from view, decisions are required at the speed of the *crisis*, not at the speed of decisions based on fact-gathering or discussions of legal exposure. Yes, information is as critical as we have suggested, yet you are still going to have to make decisions about issues that the public deems critical before you've gathered all the facts.

Needless to say, you never publicly communicate what you aren't certain of, nor do you ever comment on something in a way that will limit your legal options. But that doesn't mean some comments shouldn't be made or that allies can't provide important and timely messages.

The bigger the crisis—the more time zones it impacts, the faster it moves without the benefit of any downtime—the more you need to already know and trust your response team if you want to get ahead of the game.

In an age of permanent crisis, crisis teams cannot be ad hoc; businesses must operate on the assumption that deployment isn't a matter of "if" but "when." Initial leadership begins at the top, in the C-Suite. Absent leadership from that quarter, it becomes a fiduciary duty of the Board to demand that crisis teams be selected and trained, and to ensure that the make-up of the crisis team reflects the aforesaid multidisciplinary spectrum, which also includes IT and social media expertise as well as legal, IR, HR, financial, etc. Ideally, though, the team should be a direct arm of the CEO, an elite squad of trusted managers assigned by him or her, and who, when the crisis occurs, will help maximize the CEO's impact as a leader.

In this process, in-house counsel is well-positioned to support and inform the team formation. As lawyers with presumably close involvement at multiple operational levels, they have a unique grasp of corporate liability on a day-to-day basis along with a telescopic view of the trending laws, policies, etc. that signal future liabilities or future opportunities in the making. In-house counsel is indeed better positioned than ever to play a leadership role to both support

compliance and help create safeguards against the sort of systemic breakdown that, for example, happened at United Airlines.

Formal training should begin immediately upon the formation of the team and should include tabletop exercises, role-plays, and test runs. The larger benefits are manifold as an essential trust gets built up among team members. Protocols and lines of intra-team communication are established; new trends are reviewed; new contingencies evaluated, new Internet tools assessed. In most cases, the tabletop exercises are best conducted by outside communications counsel who can bring a fresh perspective to the problems themselves, with a judicious eye as to how well the organization is actually prepared to respond.

Here are three rules to keep in mind about your team:

Go/No Go: [Gene Kranz](#), former NASA Flight Director at Mission Control, effectively used the “Go/No Go” decision making. The biggest mistake crisis teams make is failure to make a decision. Paralysis by analysis. They lose whatever advantage they have (that of acting quickly, no matter how bad the situation) and let others—adversaries, plaintiff lawyers, victims, journalists, etc.—control the narrative and thereby write the history. Fear of failure negates the power of action.

Team Size: The team should be as large as it needs to be to actively invite multiple perspectives, but small enough to act efficiently. Speed and decision-making are key.

It's the DNA: You cannot anticipate or plan for all contingencies. Don't try. What you are looking for in your team is chemistry and DNA. A team that trusts and knows each understands the right priorities. Having people comfortable in the crisis-planning process results in a well-functioning team adapted to the situation at hand. You'll know you have a team with the right DNA when they are not stressed by the need for rapid decision-making—and when they all genuflect to the corporate brand, not their own fiefdom.

Privilege

While the ultimate question of what is privileged is evolving and determined by jurisdiction, it is always wise to anticipate attempts to pierce the veil. By hiring a litigation and crisis communications firm early in the process, and integrating it as part of legal strategy development, you show credible intent to protect the privilege. It may not be a perfect defense but it helps make the argument, should it later be needed, that any pursuit of information must

be limited to a specific narrow scope. The failure to build this wall invites plaintiffs' lawyers to engage in discovery about everything that your internal corporate communications officers and agency of record may have discussed with the lawyers, even if entirely unrelated to the case. Don't make trade secrets fair game in a fishing expedition.

The agency of record must be included and protected. Their outside perspective is essential; corporations in or out of litigation and crisis must, after all, see themselves as others see them. To that end, the most successful risk management successes have typically entailed a close working relationship between law and communications firms. In most instances, the law firm thereby plays an additionally needed role with best-effort attempts to extend privilege to the communications or risk management experts with whom they partner.

Chronology, Exposure, and Gating Events

Thirteen years elapsed between the first anti-GMO site on the Web and the food industry's first pro-GMO site. Wells Fargo had five years advance notice after the Los Angeles Times published the [first story](#) on fraudulent accounts. The energy industry had nearly a decade advance notice after the Sierra Club removed official notice of its support for the low carbon-footprint fracking



extraction method from its website. The very next year HBO released the film [Gasland](#), which lambasted fracking; six months after release, the movie's website topped the Google search engine for searches of the word, “fracking.” A movie had morphed into a movement and a

40-year energy extraction method supported by environmentalists had suddenly become a target. But it really wasn't sudden at all.

Crisis moves so quickly, teams need a written and drawn chronology in order to comprehend what is happening. Once the stars in the constellation are seen in order, many things come into focus: early warnings, fact patterns, legal exposures, credible responses, allies and adversaries. Such a chronology may seem too basic a tactic to justify mention in a larger discussion of strategy, but it is a kind of strategy itself. The very fact that teams engage in this exercise ensures that every crisis team member is on the same page (literally). We all know what the facts are and when they happened. We can now anticipate what's likely to come next; just as important, we see our crisis the way our critics do, with its tsunami of information.

Don't stop with just the chronology. Map out legal risks and liabilities in order to clearly decide between taking a brand/market risk and a legal one. It's a skill that will prove crucial when the time arrives to decide on a sacrifice. Follow up by creating a calendar of gating events, mainly future public events that may impact your private crisis. What's dead ahead in the equity markets, in Congress, in the states, or anywhere else a new news cycle may arise? The answers will help you see—and plan for—the near future rather than be taken prisoner by it.

Welcoming Dissent

Strong crisis teams need to genuinely invite dissent because that's how ideas and strategies are fully vetted—and the failure to do so almost guarantees that the communications strategy will miss the mark.

Once the team understands chronology, potential legal, brand, and investor liabilities, and an approximate timeline of near-future gating events, then it becomes easier to manage the various priorities and biases. If the potential legal liability is greatest, then legal priorities lead. If, on the other hand (and I know this is anathema to many lawyers) brand vulnerabilities are the most threatening, then brand leads. If it is share value, then IR leads. The lead disciplines do not dominate at the expense of all the others but they are given priority consideration.

During the Gulf oil spill, [Tom Campbell](#), a partner with the Pillsbury law firm, who was representing the interest of a foreign company invested in the Gulf, identified the legal liabilities after the fact-gathering and chronology were complete. He then said: “We calculate the

company's potential federal and state liability to be \$2 billion. I don't see any other area—IR, HR, PR, brand, etc.—with higher liability. But if I'm wrong, *please tell me why I'm stupid.*”

Such integrity, transparency, and fairness are rare in crisis teams, especially among the lawyers on those teams, but we're talking about the organization's highest aspirational value. It says that the best, most practical strategy wins.

Winning everything isn't possible, except in the movies. Instead, successful crisis resolution is all about making the decisions that minimize the sacrifice that the client is going to have to make.

“Tell me why I'm stupid” was not just a factual question—i.e., does anyone have a better argument to make?—but an emotional one as well. Campbell was demonstrating leadership through vulnerability. It is a risky action style but it is demonstratively courageous and it allows your team to be at its best. Telling truth to power intimidates even the most senior and experienced executive. Inviting dissent requires more than asking for it. As leaders, we need to demonstrate that there is no recrimination for disagreement and that open discussion is warmly welcomed. Remember, the ultimate arbiter is not the ego in the war room, but the value of the brand, minimization of the legal liability, and responsiveness to the marketplace. Nothing else matters.

Sacrifice

When companies drill down on chronology, garner facts, measure liability, and identify adversaries and allies early in the high-profile litigation or crisis process, they enable their teams to assess the cost and value of assets, both real and goodwill. While crisis teams have a strong sense of the cost in terms of dollars and cents, their newer audiences in a high-profile matter—i.e., no longer just customers and shareholders but, now, regulators, NGOs, motivated citizens, plaintiffs' lawyers, media, and others—have their own sense of justice. Nothing makes a story fade from view faster than a meaningful sacrifice to appease that sense. By sacrifice, we

mean doing something that costs you in the short term and that this new, expanded audience will appreciate enough to no longer consider you the villain.

In 1982, Jim Burke removed *all* of Johnson & Johnson's over-the-counter products from store shelves *before* the company was required to do so by the FDA. It is still the definitive model of sacrifice because it included two critical elements:

1. J&J clearly put people before profits by doing more than the company needed to, a move so bold it became J&J's brand for nearly three decades: 'It is the company that cares.' As to the cost of that sacrifice, do the arithmetic: three decades of growth followed one quarter of acceptable loss.

2. J&J acted before it needed to, before any federal regulator required action. While it's tempting to wait and see just how ineffectual the oversight may turn out to be, you'd lose all the gains with which the public will lavish on your leadership. No parents give their kids credit for cleaning up their rooms *after* they've been told to clean up their rooms.

By contrast, BP, in the Gulf oil spill, paid one of the largest corporate fines in history, yet, as we've noted, received virtually no credit for cooperation because it all came after the White House and others had taken them to the woodshed.

The fastest way to rebuild brand credibility is by volunteering your own punishment.

If you look at 2007, the so-called "year of the recall," three industries—pet food, spinach, and toys—all had subsequent record quarters after their recalls because they made sacrifices, took responsibility, and volunteered to fix the problems.

Some sacrifice may be as simple as an apology, which is indeed a form of genuine sacrifice, from the appropriate spokesperson. While many lawyers will parse each word of an apology, the critical value is in its voluntary nature, its genuineness, and integrity. Here, lawyers must be particularly open to rethinking their instincts. An apology acknowledges culpability and

culpability equals exposure, which lawyers are trained to avoid. But if the brand is at risk, the brand comes first, even if it means a partially disadvantaged position at the settlement table.

On the other extreme, sacrifice often takes the form of a product, division, or personnel change; CEOs themselves are occasionally the sacrificial lambs. The option to discuss any sacrifice, involving anyone and anything, is something the team must feel empowered to exercise at any point during a crisis. It is here that the "telling-truth-to-power" courage gets truly tested. At the end of the day, the paramount question is, "What is in the best interest of the brand?"

Sacrifice often entails goal-switching, which is the single most difficult thing for executives. Of the three things that people fear the most—death, failure, and change—goal-switching touches two of the three hot buttons. When US Air Captain Sully Sullenberger had his [close encounter](#) with the Hudson River, he instantly understood the need to switch goals and focus on saving the 155 lives, not the \$60 million plane. At a critical moment—actually, the fateful one—saving the airplane was no longer the priority; saving the passengers was. Sullenberger's airplane was just one company asset among many; likewise, in less dramatic situations, there are often much more important considerations than a lawsuit. As straightforward and obvious as the need may seem, getting people to let go of the assets they represent will be the most difficult challenge.

Lawyers and crisis teams that understand the import and timing of sacrifice have successfully recognized this single most important factor in determining success or failure in a crisis.

Culture

Culture dictates outcomes. It has an unspoken yet outsized influence on almost all high-profile matters. The culture factor soon becomes obvious and critical during any Chinese, Japanese, or Korean crisis that plays out on Western soil, even down to how information is shared internally. It's likewise obvious when Middle East matters touch American markets.

Great leadership comes from those who understand and appreciate that the culture of the market where the crisis arises has to be the culture of the crisis team.

Asians must defer to American culture if their challenge is in the U.S. Americans must in turn defer to Korean culture if their problem occurs in Seoul. Less obvious, but no less important, are the cultural differences between Wall Street and K Street and Main Street, or between legal cultures and brand marketing cultures. Everyone comes to the crisis/litigation table with their own views based on daily experience and expertise. But high-profile matters require us to be more holistic, to consider the world—or at least the crisis—from the viewpoint of others.

Third Parties

There is an old saying on Capitol Hill—“Never kick a man while he’s up, it’s too much work.” Wait until he’s down, the wisdom goes, so you can pile on, without any cost to you. As bad as a crisis seems in the opening hours and days, it is never as bad as it can be once it spirals out of control. There is a narrative arch to high-profile matters which are dependent upon the response to the opening act. If the defendant mishandles it and extends the life of the story, the results are obvious.

There is also the Greek chorus who will determine history, or at least the short-term version. So take your own version of the Hippocratic Oath: first do no harm. But use your peacetime wisely as well; arrange for supportive thought leaders who can weigh in early and put things in context. These third parties will certainly include prominent social media voices with industry or media followers; the list is also likely to include academics, retired politicians, members of NGOs, unions, editorial writers, and others who can speak on your behalf, or on behalf of positions you want espoused. It might take enough of their courage to weigh in early so don’t make it more difficult for them by asking their help only at the urgent moment when you need it. Know them before you need them.

Pursue Corporate Social Responsibility (CSR) strategically, not just philanthropically.

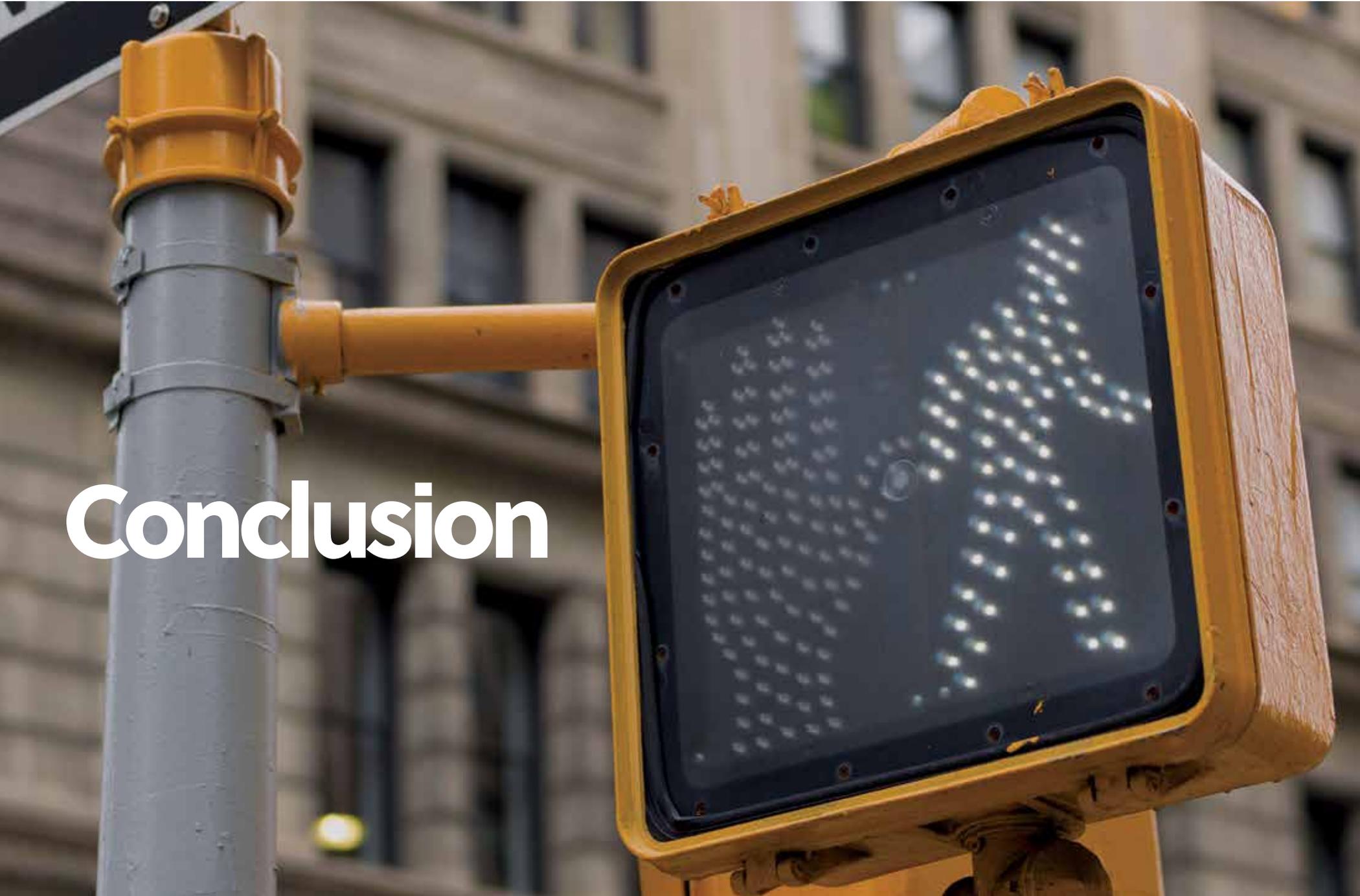
Know the NGOs that care about your causes. Develop relationships ahead of time so that, at the very least, you can have honest conversations without fear of it backfiring. Have your PR team likewise know and connect to high-authority bloggers just as they do journalists.

At the end of the day, people get too much information—3,000 to 5,000 messages a day—to do much more than categorize and stereotype. All they can numbly ask is: ‘Is this good or bad?’ So help them categorize your company and position, not by trying to educate them with the facts, but through messengers they already know and trust. All communications are tribal. Corporate communications is pleasant enough work on the way up when everyone is happy or at least content. But on the way down, in crisis and litigation, new audiences and old need more personalized non-corporate messengers to whom their tribe relates. It is less about the message than the messenger.

When public audiences see a messenger they trust, they’ll defer or will at least be less inclined to pile on. Apple has spent nearly three decades building a relationship with its audiences, elevating the name from a brand to a religion. It has millions of customers and critics who double as company evangelists. Such fervid dedication may not protect the company from every crisis but the investment has already paid dividends multiple times.



Conclusion



When was the last time you thought about the power of symbols? Seldom do high-profile litigation and crisis teams adequately focus on symbols.

Yet symbols are far more important than anything else we do: Auto executives [flying private planes](#) to TARP hearings in Washington; the Australian pictures of a far less expensive version of EpiPen; George W. Bush's fortunate bullhorn and unfortunate "Great job, Brownie" moments—symbols control our emotions, and emotions control our thinking. If you want to win the day in high-profile matters, you need to own the symbols. In all high-profile matters, perception trumps reality.

Those caught up in what should be, as opposed to what is, are roadkill in the race to the "truth."

Sticking to the facts of your matter will guarantee you miss out on opportunities to reduce the damage and make the crisis go away. A high-profile crisis is as we find it, not as we wish it to be. By seeing the world through the eyes of our new and varied audiences, lawyers become the counselors that our clients need us to be.

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LEVICK is a crisis communications and public affairs agency representing countries and companies in the highest profile matters worldwide. Comprised of attorneys, former journalists, intelligence officers, authors, and members of governments, we provide our clients with risk intelligence to anticipate forthcoming challenges; crisis remediation; rehabilitation, and reemergence.

On public affairs, we understand how ideas become movements and can inspire viral communications — or help to minimize it.

From the Gulf oil spill, AIG, and Guantanamo Bay to the World Cup, multi-jurisdictional class actions, and nation-state kidnappings and ransom, we help our clients implement the strategies and communications on the most complex matters.

For regulatory, litigation, financial, crisis, and public affairs matters, LEVICK is the firm of choice for the world's leading law firms and insurance companies.

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For more than 25 years, general counsel and other members of the in-house legal community have relied on Corporate Counsel Business Journal for leading-edge information tailored to their specific needs. We do this through a unique partnership conceived by founder Al Driver, former GC of one of the world's leading retailers.

Our model, focused on service, not profits, proved potent. It is built on the common ground shared by multiple constituencies: the world's leading corporate law departments; outside counsel from elite law firms; innovative companies with products and services designed to help corporate law departments serve their clients more efficiently and effectively; and various individuals and groups, including educators, businesspeople, bar associations, legal foundations, and civil justice reform advocates, with agendas shared by GCs and their in-house teams.

Unlike other publications catering to the in-house bar, CCBJ cuts through the noise, eschewing glitz and gossip, to deliver timely, in-depth content with a laser focus on serving the interests of its partners. That's why we continue to evolve and serve 25 years later. Yes, the role of in-house counsel has changed in many ways, big and small, but so have we in ways that assure we consistently deliver value to our readers and partners.

About [The Crisis and Litigation Communicators Alliance \(CLCA\)](#)

The Crisis and Litigation Communicators Alliance (CLCA) is an international network of independent, owner managed PR firms who specialise in Litigation and Crisis PR.

About [Marsh](#)

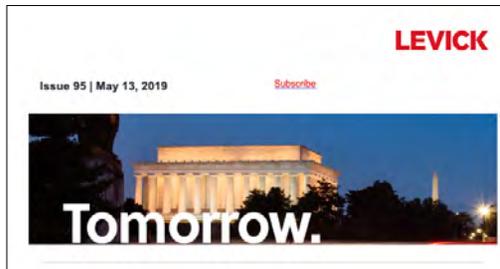
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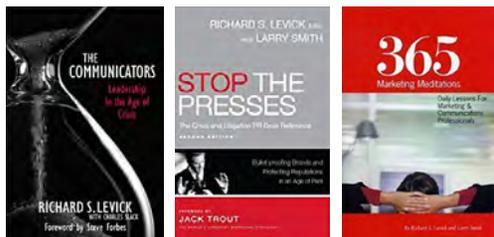
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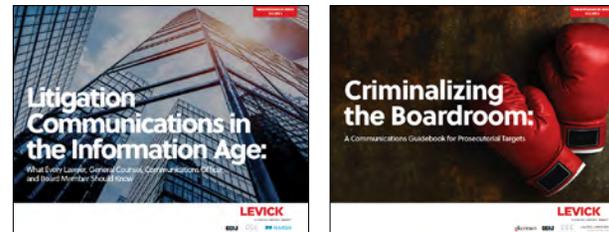
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