

Due to increasing government prosecution of corporate executives, a solid knowledge of law, particularly criminal litigation, has become mandatory for those who advise senior management. Many governments, at many levels, are either beginning to focus on and emphasize criminal prosecution of statutes and laws, or are criminalizing laws, rules, and regulations that in the past involved only civil penalties. This trend of toughened enforcement continues and, despite much public policy rhetoric to the contrary, the public's increasing demand for punishment will strengthen the government's use and enhancement of punitive measures that serve to satisfy the public's expectations.

Case Study: A Sexual Harassment Lawsuit

Abusive, coercive, bullying behavior needs to be dealt with conclusively, constructively, and very quickly. The more promptly the company acts with directness, compassion, and common sense, the more manageable this problem will become. Sexual harassment involves serial predator behavior. The perpetrator benefits because almost every victim remains silent and suffers alone – and there are always multiple victims. The higher these behaviors occur in an organization, the more witnesses there actually are – most if not all generally remaining silent, thus becoming complicit with the perpetrator.

The Company

Dependable Insurance is a 140,000-employee company with offices throughout the US and Canada and in many foreign countries, selling a full line of business and private insurance products. It has advertising and public relations budgets exceeding \$10 million per year.

The Crisis

Dependable's legal department was notified that Karen, a former employee, was to file a sexual harassment complaint against Mark, the current CEO, within the next 48 hours. Karen alleged that she had been forced to travel and cohabit with Mark in order to keep her job. While Mark's interest in Karen and overt inappropriate behavior toward her in the presence of others was far from a secret, senior management banter was, "She must like it if she keeps going along with it."

The Complexities

According to a draft complaint of the civil suit, Karen was seeking restitution and damages. The graphic illustrations and allegations of her humiliation in the workplace promised adverse publicity in many company cities and in the trade press. Considering that the insurance industry already has dozens of watchdog organizations, critics, and ongoing commentators, this had the potential to develop into a very explosive situation.

The Approach:

To respond, the company had essentially three options.

Option one: Do nothing other than prepare for the litigation. In response to outside inquiries, the communication approach would be to deny all charges with little comment.

- ▶ “We believe these charges to be groundless and the emotions of a disgruntled former employee. We will prevail at trial.”
- ▶ “We don’t know what she’s talking about; we cannot comment further because the matter is in litigation.”

Option two: Prepare for trial and its attendant publicity, work to discover the facts, avoid making any statements, and suppress information through pretrial motions. Prepare to discredit the plaintiff if need be, but especially for the trial.

Option three: Immediately split the legal team in two task groups: litigation and settlement. Have the settlement team approach the plaintiff, if possible, before filing occurs. Attempt to achieve a negotiated settlement at the earliest possible time. Courts generally support any serious efforts at settlement at any time during the litigation process.

The Culmination

The company sought my advice too late, already having chosen option two, an aggressive anti-victim strategy to discredit Karen. Once a lawyer was chosen as a spokesperson, the company said very little. Company litigators argued vigorously against any settlement, claiming it would make Mark look weak. When I disagreed, I was excluded from company litigation strategy meetings. I advised that Mark be terminated, but he was kept on as CEO, finally suspended at the last minute, just before the trial began.

The trial went badly for Dependable Insurance. Karen was a credible, empathetic witness. Badgering by defense attorneys only made things worse. Throughout, Mark maintained his innocence, supported by his peers and colleagues. He was ultimately separated from the company with a significant payout, eventually taking a job with a startup company in Silicon Valley.

As for Karen, she had been assaulted repeatedly by Mark, who abused his position of power to take advantage of an employee, while his buddies stood around and watched. I doubt that even a good day in court will help Karen heal, but it may be a start.

Lessons Learned

Dependable Insurance appears to have learned little from the experience, and the corporate culture of insensitivity to women has continued. Lawsuits and accusations of wrongdoing are treated as one of the costs of doing business.

The Conclusions

While the insurance company appears to have learned little, this scenario offers powerful lessons to learn for companies that choose to heed them:

- ▶ Except in the rarest of circumstances, an effort to settle should be initiated immediately. My philosophy of settlement is the check you write today is the smallest check you'll ever write.
- ▶ Individuals accused of these behaviors, at whatever level, need to be suspended from their jobs, preferably terminated. Termination sends an extraordinarily powerful signal to the victim, other employees, and the public that you are serious about preventing such abuse. The argument against is that it will lead to wrongful termination litigation. However, it pays to remember that a litigation stemming from this termination will fully discuss and explore why the termination occurred, and most perpetrators will shy away from that.

9.4 Creating the Management Structure to Prepare for Litigation

The law department model of operational behavior is an excellent model for the corporate communications operation to follow.

Build your knowledge of the organization's legal environment and then identify specific legal, paralegal, and non-legal resources that can be marshaled on a moment's notice for specific areas of potential threat. In other words, the law department model of operational behavior is an excellent model for the corporate communications operation to follow.

The recommended model for applying legal knowledge and identifying areas of required preparation is based on proactive steps and approaches that build management confidence. The model effectively contributes to resolving issues beyond simple legal questions and involves seven active areas:

1. **Pay attention.** To become more legally sensitive, the current issue monitoring, identification, and analysis process must be augmented with some additional tasks related to potential legal exposure. Typically in the issue identification process, any given issue is broken down into a predictable group of categories such as a description, the current status, company impact, the stakeholders,

advocacy opportunities, current company position, unresolved questions, recommendations, related issues, and the potential unintended consequences of key actions. From a litigation perspective, a new series of evaluative standards should be applied to the legal questions at issue and the victims/stakeholders affected. Specific areas for evaluation include:

- ▶ The nature of the effect on each;
- ▶ Settlement options;
- ▶ Inclination to settle;
- ▶ Likely opposing issues;
- ▶ Anticipatable repercussions beyond the litigation;
- ▶ Adverse consequences of settling; and
- ▶ Adverse consequences of litigating.

Victory in decision-making often goes to the individual who can be brief, pragmatic, and positive, both verbally and in writing.

2. **Have some specific approaches ready.** Fortunately, most approaches to corporate communications issues have useful direct application to the litigation process. They do tend to go beyond where the lawyer might go in developing information. In practice, because litigation requires the review of so many documents and discussion with so many people, you will need to be more succinct, more direct, and more pragmatic than in most other circumstances. A direct, five-step, problem-solving format is useful and effective for introducing your corporate perspectives into the mix of recommendations and decisions that need to be made:
 - ▶ **Step #1 - Situation Analysis:** Briefly describe the nature of the issue, problem, or situation.
 - ▶ **Step #2 - Situation Interpretation:** Briefly describe what the situation means, what its implications are, and how it threatens the organization.
 - ▶ **Step #3 - Options Available:** Develop at least three response options for the situation presented. You can suggest more, but three is an optimal number for management consideration.
 - ▶ **Step #4 - Most Recommended Option:** Select the option you would choose if you were in the boss' shoes. Provide an explanation of why you selected it.
 - ▶ **Step #5 - Unintended Consequences Forecast:** Explain those events or problems that could arise due to the options you suggested, or that could arise from doing nothing.

Chapter 9 – Questions for Study and Discussion

1. What is the advantage of bringing in an outside lawyer rather than relying on corporate counsel?
2. Name three ways that lawyers think differently from corporate management and staff. What is the advantage?
3. Explain the chief differences between civil law and criminal law.
4. What is the most important factor to keep in mind when you are setting up a Litigation Communication Strategy?
5. Name and explain three mistakes you or the lawyer can make dealing with the media – how do these become worse when a “victim” is involved?
6. Why do “ethics” and “compliance” become important after a legal case involving the company has been concluded?
7. Consider crisis situations you have observed in the workplace or seen in the news. Now that you have read this chapter, how do you see that management could have handled the situation differently? On the other hand, in what ways did they handle it well? If you had been in charge of crisis communication, what would have been your first actions?

References, Chapter 9

Blanchard, K. & McBride, M. (2003). *The one minute apology*. New York: Harper Collins.

Federal sentencing guidelines manual (2010), chapter 8, part B.

Fitzpatrick, K. R. & Rubin, M.R. (1995). PR vs. legal strategies in organizational crisis decisions. *PR Review*. 21 (1), 21 – 33.

Hickson, G., Clayton, E.W., Githens, P.B., & Sloan, F.A. (1992). Factors that prompted families to file medical malpractice claims following perinatal injuries. *JAMA*, (267), 1359-63.