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THE GC'S ROLE IN PREPARING FOR THE (INEVITABLE) CRISIS

GC distils the learnings from the 2016 Lex Mundi General Counsel Summit with pragmatic solutions for in-house counsel when handling a crisis

COUNSEL AND CRISIS

'One can imagine such technology outsmarting financial markets, out-inventing human researchers, out-manipulating human leaders, and developing weapons we cannot even understand.'

Warren Buffet

Crisis management as a theme cuts across a number of different issues that are supremely important to today's general counsel – and in today's 21st century business landscape, it seems more often than not that it's a matter of when, not if, that seemingly inevitable crisis hits.

Catherine McGregor

Editor-in-chief

Email Catherine

These were some of the key ideas informing the Lex Mundi General Counsel Summit held in Amsterdam in May, which I was invited to and which was attended by a selection of leading global general counsel and partners from some of Lex Mundi's member firms.

When crises do arise, they encompass a range of the GC's skillset and mandate – the role of risk management; interaction with the c-suite; the intersection of legal and compliance. All are essential elements of what it means to be a lawyer in today's business environment; but they also represent a host of unique challenges for the GC.

But where particular difficulty arises for companies and their lawyers is that predicting a crisis is no longer as simple as sticking to the letter of the law, because today there is a gap between reputation and legality. Today's companies and their legal departments need a substantial foothold in so much more than legal to weather the storm of public opinion, which is significantly amplified by social media and the immediacy of information sharing.

That means that a loss of reputation is no longer just about a catastrophic event like cheating or mis-selling, but rather an ongoing story of reputation being built and destroyed in a space beyond simple law and regulations. The law can be on your side – but you can still have a reputational crisis where the law is lagging behind what you, as a company, have to do to meet societal expectations.

The pharmaceuticals industry, for example, has grown up with practices that are often now seen as questionable from a societal point of view – even if these are actually legal – such as marketing to doctors. Large corporates in the light of the 'Panama Papers' revelations are struggling with the fact that offshore tax structures, which in many cases are perfectly legal, are being viewed with increasing suspicion and distrust by the public, the media and some governments. Executive compensation is another fraught area where corporates feel the heat of public opinion on practices that are completely legal.

BEST PRACTICE TIPS

- The GC and their team operate as much as risk arbiters as lawyers. This demands a proactive assessment of risk in all its forms and can be incredibly pertinent to crisis management.
- To know and measure your risk, you need knowledge and transparency: know your company – not just its legal issues.
- Having a culture where transparency and whistleblowing are encouraged is key. This can be crucial for getting in front of issues before they become crises.

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IPAD AND IPHONE EDITION



- Knowledge also equals preparedness – knowing key facts and figures, even general ones, can be incredibly helpful in a crisis.

Many global companies respond by proactively trying to be the best they can. However, the risk of an active approach – one going beyond what is just legally required – is that the bar is set high, making walking the walk even more important. A key point made by one general counsel was that it also becomes a matter of announcing that message – effectively ‘talking the walk’ – so that internally and externally a culture of going beyond the letter of the law is effectively communicated. One GC defined this as having a ‘North Star’.

The bottom line is that companies and their legal teams need to take perception seriously. The incredible power, influence and impact of public opinion, which is a function of technology and social media, needs to be monitored but also carefully harnessed by companies.

THE ROLE OF THE GENERAL COUNSEL

The GC role in most multinational companies is becoming increasingly defined by its growing focus on strategic risk management. This makes the GC a crucial figure in terms of determining how well a business is prepared for a crisis, bringing that level of preparedness up to standard, as well as leading actions when a crisis hits.

The notion of the GC as independent and being able to bring more than one perspective to bear was a key insight which came up repeatedly at this meeting; someone with the ability to offer a differing or opposing point of view is pivotal.

The role of the GC themselves is fundamental to the question of reputation and risk management, but the conversation cannot be limited only to the GC, but must cascade down through their department. Part of the issue is equipping all lawyers in-house to be more than just lawyers.

Increasingly, the general counsel and their team has to balance the paradox of their proximity to business with having the independence and distance to speak up.

BEST PRACTICE TIPS

- Try to ensure you have ‘a seat at the table’ in regards to crisis preparation.
- Ensure your team can think in ways that are not defined purely by legal advice.
- Be aware of the importance of your independence and objectivity, especially in giving an opposing or challenging point of view.
- Consider the challenges of maintaining a training culture across a large and/or geographically diverse legal team.

RISK MANAGEMENT AND REPUTATION

Risk, although not solely the purview of the GC and their team, is increasingly an area where in-house counsel have the ability to add value to organisations through thinking strategically and proactively about risk in all of its forms – not merely legal risk – and imparting that knowledge throughout the organisation.

While there may be risk factors which are above and beyond the law, the proactive GC needs to take note where potential shortfalls occur and monitor how the law evolves in those areas, as today’s fast-changing regulatory environment means that today’s risk may be tomorrow’s regulation.

That knowledge is power is definitely a maxim that holds true in the world of crisis and reputation. Risk management in its broadest sense is predicated on being acutely aware of all variables in an increasingly complex business world. For GCs who have lived through a major crisis – or for some, crises – one of the biggest learnings is to know your facts. In regards to preparation, this becomes fundamental; a good GC should undoubtedly know their business well and be involved in more than just the legal aspects.

A lack of factual knowledge can be devastating. Lack of internal facts means that issues can arise that could cause red flags to be raised but not necessarily acted upon. If these are not brought to the attention of key personnel or if these are ignored, the potential for something much more cataclysmic could happen – whether through regulatory or criminal enforcement, whistleblower or media revelations, or more broadly – a hit to social reputation.

One needs to be aware that internal factors such as employee dissatisfaction and compliance violations, situations which can sometimes be dismissed as benign or isolated incidents, can evolve quickly and exponentially with devastating flow-on effects. In addition, there also needs to be a well-honed awareness for external factors, most obviously changing regulations, but also societal expectations.

FORWARD PREPAREDNESS: READYING FOR THE (INEVITABLE) HIT

It seems that perhaps the one defining characteristic of all crises is that they will strike in ways and at times you least expect – you can never predict where the next one will happen and how its impact will be felt. The other defining issue of most crises is that their risks won't sit in one place or squarely in legal – instead requiring complex stakeholder co-operation and management of 'grey areas'.

Simple procedures and manuals should be developed, which can be adapted to a variety of situations and eventualities, and can be used in an agile and time-critical fashion. One GC shared a quote from a PR consultant that 'legal is my best friend when I have time, but my worst enemy when I have to act now'.

CRISIS MANAGEMENT TOOLBOX

- Create checklists!
- Have a one-page cheat sheet of what steps will be taken when a crisis hits – this can be especially valuable for keeping senior decision makers on track and ensuring the process of fact checking and formulating responses is followed.
- Run crisis exercises so that procedures are ingrained and information is retained.
- Prepare answers to questions that you can predict in each crisis type. A full review of what you're going to need and when is imperative. Speed makes a huge difference.
- Monitor what's out on social media in other crises. When you run your crisis scenarios, include social media hits and responses.
- Wait and evaluate: much of what you hear in the first 48 hours of a crisis may not be 100% accurate, so a company should wait to publicise a message.
- If the crisis is large enough, someone appropriately senior needs to show up at the crisis site to show support. Think: what type of personality, what liabilities and credibility do they bring and what training is needed to ensure they are suitably equipped?
- It is essential to keep the company board informed proactively, so members don't react negatively to information they hear through other channels.
- Leverage the board's external relationships to influence the reputational impact of crisis.
- Be aware of issues pertaining to legal privilege in regards to communications.

The role of legal is to be involved in crisis management, but not in charge of it. The GC should not be at the centre of the crisis, but rather well informed and ready to serve in an advisory role. Having a quick sign-off team within the legal department that isn't the GC was one pragmatic tip offered, so that the GC stays out of the daily minutiae, but is able to track and be involved at key stages.

Due to the risk of regulatory proceedings, class actions and even potential criminal cases, the protocols of legal privilege need to be rigorously adhered to. This can potentially apply to external communication specialists as well. One piece of very useful practical advice was to have such specialists instructed by outside counsel – not directly by the company – so that legal privilege will apply to all communications.

It is also very helpful to have relationships with an external communications adviser in advance so that the adviser has good knowledge of your company. Ensuring that they are prepared and involved when formulating your crisis preparation protocol in advance can pay dividends in terms of mobilising and executing when the time comes. It's also worth making sure that such advisers understand the ramifications of legally privileged communication and have a good grounding in the legal frameworks as well as the PR issues.

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Sleepless Nights for GCs Caused by Regulations and Crisis Management

Jennifer Williams-Alvarez, Corporate Counsel

June 22, 2017

As general counsel take on more responsibility within their companies, there are sure to be a number of challenges that are top of mind. But what are the concerns that rank highest for today's GCs?

A report from ALM Intelligence and Morrison & Foerster, unveiled Thursday at the [17th annual SuperConference](#), a gathering for in-house counsel and other legal professionals in Chicago, aims to answer just that question. The inaugural "[General Counsel Up-at-Night](#)" report looks at responses to an online survey conducted in spring 2017 from more than 200 U.S.-based general counsel and other in-house legal decision-makers.

The results reveal that the most pressing challenges faced by respondents are: regulations and enforcement; privacy and data security; risk and crisis management; litigation; and intellectual property. Among these, the biggest concerns are regulations and enforcement, with 74 percent of respondents identifying this as a very important challenge, followed by privacy and data security with 65 percent and risk and crisis management with 63 percent.

[Bob Bostrom](#), senior vice president, general counsel and corporate secretary at Abercrombie & Fitch Co., said he's not surprised these issues ranked as top concerns for general counsel, especially reputational risk and regulatory uncertainty.

"Reputational risk is increasingly on my mind, and I think on the minds of many," he said, pointing to recent headlines where an issue has suddenly become an "existential crisis" at companies such as [Wells Fargo & Co.](#) and [Uber Technologies Inc.](#) "I think increasingly, companies now are thinking of [reputational risk] not necessarily as a byproduct of an event, but something you need to think about every day," he added.

As for regulatory issues, a big concern is monitoring changes coming out of Washington, D.C., Bostrom said, and enabling the business to react to new developments. "What kind of keeps me up at night is not knowing what's going to happen and when and what the implications are going to be for our business," he said.

[Sterling Miller](#), former general counsel to Travelocity and Sabre Corp. and now a lawyer at the firm Hilgers Graben, agreed that regulations and enforcement may be concerns becoming more important to those in the legal department. "What in-house counsel really want most of all from the government is consistency," he said. "When things get thrown up in the air and you don't know what regulations are going to be in effect ... and how are they going to be enforced, now you have a lot of gray area. I can see that weighing heavily on in-house lawyers' minds."

Some 39 percent of respondents to the survey cited regulatory uncertainty as a primary obstacle when it comes to managing regulatory and enforcement matters.

Despite identifying the most pressing challenges for GCs, however, the survey showed some disparity between the amount of time focused on these issues versus their perceived importance. Respondents were asked to rate on a scale how important an issue was to them and how much time they spent on that issue. For privacy and data security the results showed a 22 percentage point difference between importance assigned and time assigned. For risk and crisis management, there was a gap of 17 percentage points.

Where stated priorities seem most in line with time spent is with respect to regulations and enforcement and intellectual property, with each having only a 4 percentage point difference between importance and time.

Disparities between time and importance ratings may come down to balancing what has to be dealt with now, versus problems that can be dealt with later, according to Miller. "I think those things where the gap is smaller are issues that are arising daily or weekly and have to be dealt with. The other things are more theoretical: Will we have a privacy breach? Will we have a crisis we have to manage?" he said. "It's just a matter how do you best focus your limited resources on the things that need to be done and still try to find time to deal with these things that can be put off, so to speak."

And practically speaking, it makes sense that the percentages might not always match up, said Bostrom, because even if data security is a top priority, for instance, "unless you have a data breach, you can't spend [65] percent of your time on privacy and data security because nothing else would get done," he said. A general counsel will have a hand in setting up protocols, adopting policies and engaging with relevant associates in the company, Bostrom added, "but once you've done that, it's still a very high priority, but there's only so much you can do."

Other findings from the report include:

- Some 73 percent of respondents' work was handled by the legal department. Twenty-five percent of the work went to outside firms and the remaining 2 percent was allocated to alternative service providers.
- When it comes to intellectual property matters, nearly 70 percent of respondents identified enforcement of IP rights as a challenge.
- Eighty-seven percent of respondents identified hacking/phishing/malware/ransomware as a current concern with respect to privacy and data security. This was followed by 62 percent who cited employee mistakes.

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BEWARE

McKinsey's crisis response – a major crisis threatening Mysore, about the unique mechanisms from McKinsey

CRISIS MANAGEMENT



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(The Legal 500 In-house)

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What is the GC Powerlist?

How to nominate in-house counsel

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Canada

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France

Germany

Iberia

India

Ireland

Italy

Latin America

Mexico

Middle East

Nordics

Russia

Imagine that you are the CEO of a company and most operate in a global environment

injured, or worse. Your investors will be livid, and the board looking to assign blame. By the end of the first week, chances are your organisation will be facing dozens of lawsuits, some set to become class actions over time.

At this early stage, you will realise that verifiable facts are few and far between. Opinions and rumours abound. You will have little or no idea of the extent of any physical or financial damage, or to what degree the organisation was complicit in the event. You don't even know which of your top team members you can count on. Some of them may be implicated; others may be operationally inexperienced, unfamiliar with the political realities, or temperamentally unsuited to the new situation – filled with good intentions, but uncertain what role to play.

Normal rules for how the organisation operates get torn up quickly in a crisis. Informal networks founded on trust and the calling in of favours can dominate over formal organisational reporting structures. Those previously opposed to the status quo can quickly become vocal, sparking a turf war and delaying action. Managers may start executing an uncoordinated set of actions with the best of intentions, but incomplete or inaccurate information. No longer able to build consensus, they end up with unwieldy organisational structures that have dozens of decision-makers around a table, with the result that the effort becomes dispersed and disconnected.

The crisis will be manna from heaven for your organisation's natural antagonists, who will seek to take advantage of your misfortune. Competitors will try to lure customers and poach employees. Activist investors may plot a takeover. Hackers may target your systems. The media will dig up every past error the company has ever made.

Much of the anger, by the way, is directed at the executives personally. Parody Twitter accounts may appear, trashing their reputations. Their families may be targeted online. Reporters may be camping outside executives' homes at odd hours of the day and night.

In the midst of all this confusion, what exactly do you do? Do you hold a press conference? If so, what do you say when you have so few facts? Do you admit wrongdoing, or do you insist that what happened is not the fault of the company? Do you point to the cap on your legal liability, or do you promise to make everything right, no matter the cost? What do you tell regulators who are themselves under pressure and demanding explanations?

These issues are not hypothetical. They are all real experiences that organisational leaders have faced during crises in recent years. And these incidents are now far more frequent, and far more devastating, than they were in the past. The amount of money paid out in penalties by US companies grew five times between 2010 and 2015, to \$60bn. Globally, this figure is now over \$100bn.

Every crisis has its own unique character, rooted in specific organisational, regulatory, legal, and business realities. Over the years, McKinsey has delved into the chaos of corporate disasters to help around 150 companies to cope. As a result, it has developed a view that spans sectors and geographies, and which reveals some clear patterns in the most successful crisis resolutions.

PREPARATION: DEVIL IN THE DETAIL

AVAILABLE

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Turkey

United States

United Kingdom

IPAD AND IPHONE EDITION



Forewarned is forearmed, of course, but what level of detail is useful when many crises take companies by surprise? When planning in advance, the McKinsey message is to aim for a balance of preparation and real-time reaction. Too much specificity can be a waste of time, because what actually happens is unlikely to mirror the plan. Instead, identify the top three or five threats your company might potentially face in broad terms, construct scenarios to deal with them, and allow for flexibility during the execution. If you're lucky, the plan will be 60% right.

MODELLING THE CRISIS TEAM AHEAD OF TIME

A key practical step when planning is to prepare the crisis response unit and allocate roles within it. The ideal approach is a set of small, cross-functional teams, typically covering planning and intelligence gathering, stakeholder stabilisation, technical or operational resolution, recovery, investigation, and governance.

The best crisis response units are relatively small, with light approval processes, a full-time senior leader, and very high levels of funding and decision-making authority. The team should be able to make and implement decisions within hours rather than days, draw a wall of confidentiality around the people who are responding, and protect those not involved from distraction in their day-to-day activities.

Conducting a simulated crisis scenario is a good idea, to ensure that people know what they have to do, and allow for a greater level of preparedness when the real thing hits, even if the crisis in question is completely different from the simulation. Even if you don't go to the lengths of enacting a full-scale exercise, just talking through a scenario at a board meeting can alert key stakeholders to the complexity of a potential risk situation and open their minds to doing more in terms of preparation.

WISE COUNSEL

The crisis team at McKinsey contends that the right leader will usually be internal, well known and well regarded by the C-suite. They will have served within the industry, and will enjoy strong informal networks at multiple levels in the company. He or she should possess a strong set of values, have a resilient temperament, and demonstrate independence of thought, in order to gain credibility and trust both internally and externally. Could this be the general counsel?

Not usually, according to McKinsey, which instead suggests that the crisis leader is an operational expert, rather than a legal one. However, the role of the general counsel in a crisis is critical. They can add real value through their ability to influence and act as the bridge between business executives and the legal teams (external and internal). By virtue of participating in key meetings and major strategy discussions, they and their team are aware of potential crisis issues. GCs are also usually best placed to shape the organisation's negotiation and settlement strategy, based on the legal exposures.

In addition, the ability of the GC and their team to translate risk exposure into plain business terms can be of pivotal importance, as other business leaders will be typically concerned with understanding and mitigating the level of exposure. For example, in the aftermath of a crisis, businesses are often hit with liquidity issues as suppliers and business partners become nervous, and shorten payment terms. Anticipating that risk when drafting contracts can be a significant factor in avoiding further crisis escalation. If the crisis response team doesn't have an awareness of the intersection of the legal and business risk, it is hard to be effective.

CRISIS MANAGEMENT AT MCKINSEY

Mihir Mysore is one of McKinsey's leaders in crisis response, operating from the company's Houston office. He shares his thoughts on the evolving nature of corporate crises and the grounding for an effective response.

THE THREAT IS GROWING

'Globalisation and increased complexity are the main reasons that black swan events have increased so much. It's becoming harder to predict and prevent every risk. We may not have even thought of some risks, due to changes in technology or the supply chain.

Another factor can be the speed we have in product development cycles that were taken for granted a decade ago. Now there can be two new versions of a car in a year. The product cycle in oil and gas used to be ten years; now it's half that. With that speed of change it's hard to know what risks you are taking on.

The next big change is that of stakeholder expectations. We see people taking a position on social media that can shut down revenues, and shareholder activists making fundamental changes in the way a company is run. It's all part of a changing social contract around institutions and a lack of trust in those institutions.

THE RIGHT AMOUNT OF DETAIL

Many companies today get very detailed when considering what crises to prepare for. People want to go into a certain level of detail because they can model it. But most companies are finding out that it is not possible to ascertain whether every employee or contractor is truly following best practices, such as not clicking on phishing emails, or using passwords that can be broken. You can't be certain that an employee is not going

rogue and breaking the law. Or, if you think about the massive complexity of products now, whether that's in pharmacy, cars, cell phones and so on, can you truly know that your product does not contain something that can harm privacy or safety?

However, the process of going through a 'rich enough' scenario is incredibly informative. The first thing it teaches you is that there are second order effects when you have a crisis. For example, even if in the first instance your competitors sympathise with you, that doesn't mean they won't be undermining you in a month. Just knowing that second order effect in the broadest terms can change your actions.

It's not enough to think solely in legal, technical or PR terms. If you go through exercises with enough detail – but not an over abundance – you will form an intuition about the way a crisis works that is hugely effective.

THE ROLE OF THE GC

We have seen extremely competent GCs step up and become crisis response managers, but often the GC is too busy managing the legal issues. We see many GCs and their teams playing a reactive role, later. They're more front and centre once the issue becomes a crisis, not before, and we think that should change.

For every 100 potential issues facing companies and their officers, 98 will not become crises. We can't treat everything as a crisis, but we need judgement, and that risk judgement can be key for the in-house legal team to be part of.

Being involved early on can give the legal team an opportunity to understand the project and the various potential trade offs in a richer level of detail. It does mean that the lawyers have a delicate balancing act, but they can really play the role of objective observer and give feedback on previous issues such as lawsuits or challenges that have happened.

Very few crises are ever completely new; you just need a wide enough lens and a desire to dig into these issues to get a perspective, which is what lawyers are ideally placed to provide.'

PARALLEL PATHS TO RESOLUTION

In McKinsey's experience, it helps to think of a crisis in terms of 'primary' and 'secondary' threats. Primary threats are the interrelated legal, technical, operational and financial challenges that form the core of the crisis, while secondary threats are the reactions of key stakeholders to those primary threats. Ultimately, the organisation will not begin its recovery until the primary threats are addressed, but dealing with the secondary threats early on will help the organisation buy time. While all need to be tackled early, they will likely require different levels of emphasis at different stages.

STABILISE STAKEHOLDERS

In the first phase of a crisis, it's rare for technical, legal, or operational issues to be resolved. At this stage, the most pressing concern will likely be to reduce the anger and extreme reactions of some stakeholders, while buying time for the legal and technical resolution teams to complete their work.

For instance, an emergency financial package may be necessary to ease pressure from suppliers, business partners, or customers. Goodwill payments to consumers may be the only way to stop them from defecting to other brands. Business partners might require a financial injection or operational support to remain motivated or even viable. It may be necessary to respond urgently to the concerns of regulators.

It's tempting, and sometimes desirable, to make big moves, but it is tough to design interventions that yield a tangible positive outcome from either a business or a legal standpoint. What usually works is to define total exposure and milestones, stakeholder by stakeholder, then design specific interventions that reduce the exposure.

RESOLVE THE CENTRAL TECHNICAL AND OPERATIONAL CHALLENGES

Many crises (vaccines in pandemics, oil wells during blowouts, recalls in advanced industries) have a technical or operational challenge at their core. But the magnitude, scope, and facts behind these issues are rarely clear when a crisis erupts. At a time of intense pressure, the organisation will therefore enter a period of discovery that urgently needs to be completed. However, companies frequently underestimate how long the discovery process and its resolution will take.

Initial solutions simply may not work. One manufacturer had to reset several self-imposed deadlines for resolving the technical issue it faced, significantly affecting its ability to negotiate. Another company in a high-hazard environment made multiple attempts to correct a process safety issue, all of which failed very publicly and damaged its credibility.

It's best, if possible, to avoid over promising on timelines and instead allow the technical or operational team to 'slow down in order to speed up'. This means giving the team enough time and space to assess the magnitude of the problem, define potential solutions, and test them systematically.

Another frequently-seen problem is that the technical solution, mostly due to its complexity, ends up becoming a black box. To avoid this, technical and operational war rooms should have an appropriate level of peer review and a 'challenge culture' that maintains checks and balances without bureaucratic hurdles.



REPAIR THE ROOT CAUSES

The root causes of major corporate crises are seldom technical; more often, they involve people issues (culture, decision rights, and capabilities, for example), processes (risk governance, performance management and standards setting), and systems and tools (maintenance procedures). They may span the organisation, affecting hundreds or even thousands of frontline leaders, decision-makers and workers. Tackling these is not made any easier by the likely circumstances at the time: retrenchment, cost-cutting, attrition of top talent, and strategy reformulation.

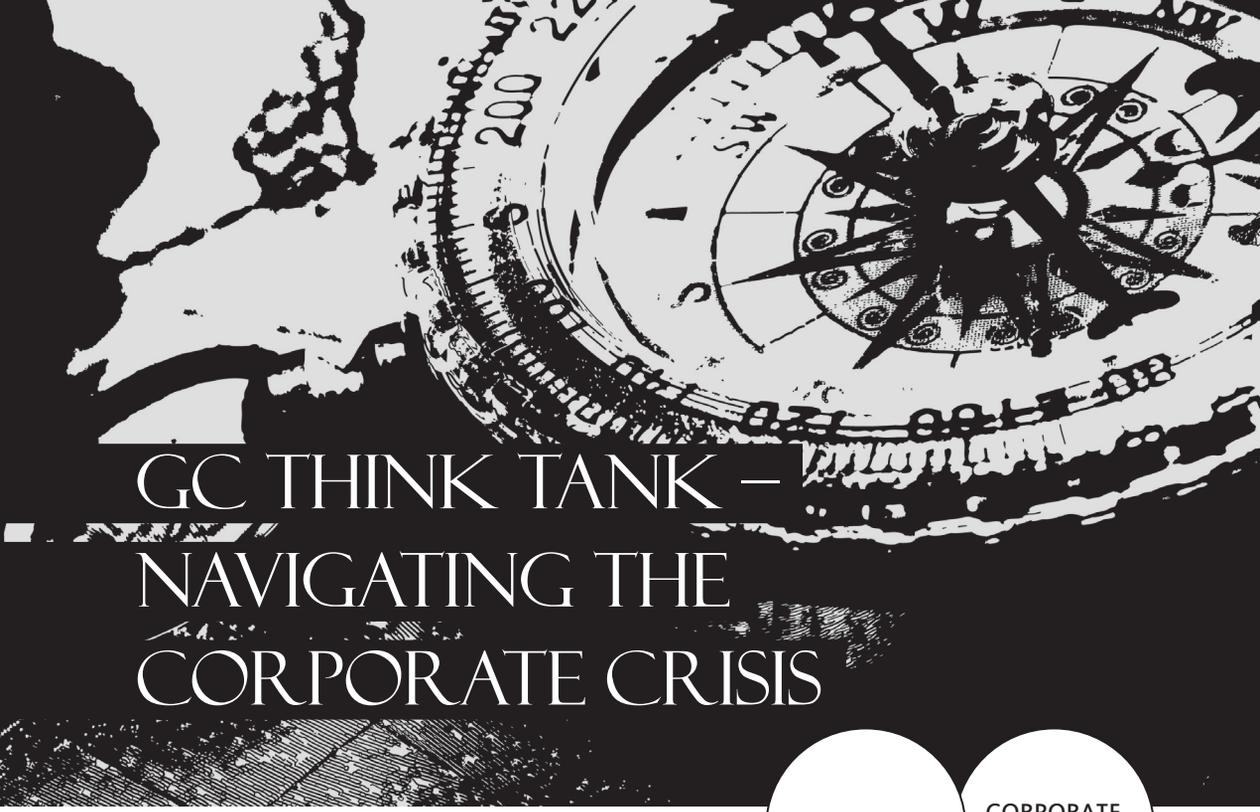
For all these reasons and more, repairing the root cause of any crisis is usually a multiyear exercise, sometimes requiring large changes to the fabric of an organisation. It's important to signal seriousness of intent early on while setting up the large-scale transformation programme that may be necessary to restore the company to full health. Hiring fresh and objective talent onto the board is one tried and tested approach. Other initiatives we've seen work include the creation of a powerful new oversight capability, the redesign of core risk processes, increased powers for the risk management function, changes to the company's ongoing organisational structures, and fostering a new culture and mindset around risk mitigation.

RESTORE THE ORGANISATION

Some companies spend years of top management time on a crisis, only to discover that when they emerge, they have lost their competitiveness. A large part of why this happens is that they wait until the dust has settled before turning their attention to the next strategic foothold and refreshing their value proposition. By this stage, it is usually too late. The seeds for a full recovery need to be sown as early as possible, even immediately after initial stabilisation.

This allows the organisation to consider and evaluate possible big moves that will enable future recovery, and to ensure it has the resources and talent to capitalise on them.

This article includes excerpts from a McKinsey Quarterly article, 'Are you prepared for a corporate crisis?' (April 2017). To see more visit www.mckinsey.com



GC THINK TANK – NAVIGATING THE CORPORATE CRISIS

SULLIVAN & CROMWELL LLP

CORPORATE
CRISIS

‘GC Think Tank – Navigating the Corporate Crisis’ gathered an elite group of US general counsel, alongside leading lawyers and external experts in the field, to discuss strategies and practical learnings for businesses in crisis. While the discussion was held strictly under the Chatham House Rule, GC has collated the most significant and pragmatic ideas from the event.

ATTENDEES

Karen Braun, **Sullivan & Cromwell**
Diane Brayton, **The New York Times Company**
Jennifer Daniels, **Colgate-Palmolive**
John Finley, **The Blackstone Group**
Robert Giuffra, **Sullivan & Cromwell**

Howard Harris, **BMW of North America**
Paul Holmes, **Finsbury**
Mihir Mysore, **McKinsey & Company**
Pilar Ramos, **MasterCard Worldwide**
Bob Rooney, **Enbridge Inc.**
Joseph Shenker, **Sullivan & Cromwell**
Catherine McGregor, **The Legal 500**

THE GC'S ROLE IN A CRISIS

What role should the general counsel play in a crisis? How central should they be?

All crises require a point person to be decisive and lead the company through uncertainty. Oftentimes, companies turn to individuals from the c-suite to serve in this role. But increasingly, general counsel are finding themselves both coordinating and leading crisis response, given that the fallout often goes hand-in-hand with legal challenges.

The general counsel needs to act quickly by:

- a) Defining the crisis.
- b) Assembling a team.
- c) Creating a flexible plan.
- d) Instilling confidence to successfully implement the plan.

A) DEFINING THE CRISIS

Crises come in all shapes and sizes. In some cases, the crisis is so huge that a company's existence is at stake. But it is equally important to identify when a matter is at the lower end of the crisis scale. It is necessary for the general counsel to classify crises against levels appropriate to a company's culture and industry.

Levels of Crisis:

- a) **Level 1:** Low – problem identified, but probably only has one day in the press cycle.
- b) **Level 2:** Medium – problem identified and seems significant, but diminishes over time.
- c) **Level 3:** High – problem is an 'existential crisis' where the brand is at risk, affecting employees, the board of directors and potentially even the public at large. For a public company, this type of crisis will often have a significant impact on the share price.

Real life tip: Some companies have situation alerts, which immediately warn the GC of an impending situation if a certain number of criteria are met. These alerts can help tease out themes. For example, are there systematic compliance failures which could be building to a major crisis? Are there problems with the chain of command in certain departments or jurisdictions?

B) ASSEMBLING A TEAM

A general counsel will typically have a substantial Rolodex of contacts in a variety of industries, who will be able to serve as trusted advisers in a crisis. Advisers will include (but aren't limited to) people in the following areas:

- Outside counsel
- Outside financial consultants

- Public relations professionals
- Government/regulatory experts
- Trade groups

Real life tip: Don't panic and 'over-lawyer'. Less can often be more, as advice may become confusing and contradictory. If a 'black swan' event hits, it might appear that immediately consulting a range of advisers is best, but often this is not the case.

When you are in surgery, you don't want five doctors, each with a scalpel, performing the operation – just one skilled surgeon being allowed to get on with the job.

C) CREATING A FLEXIBLE PLAN

Information available during a crisis, particularly in the first 24 hours, will often be imperfect. The general counsel must take steps to assess the facts and how they correspond to plans already in place, adjusting responses to the press, regulators and the public accordingly. As more information is obtained, the response plan must also take into consideration regulatory, litigation and communications issues, aligning the strategy of all three.

D) INSTILLING CONFIDENCE TO SUCCESSFULLY IMPLEMENT THE PLAN

The company's employees, particularly those in the c-suite and on the board of directors, will look to the GC to provide assurance that they are

effectively handling the process, which means that the GC needs to:

- Educate and secure the trust of executives.
- Communicate effectively, including with interested parties outside the company.

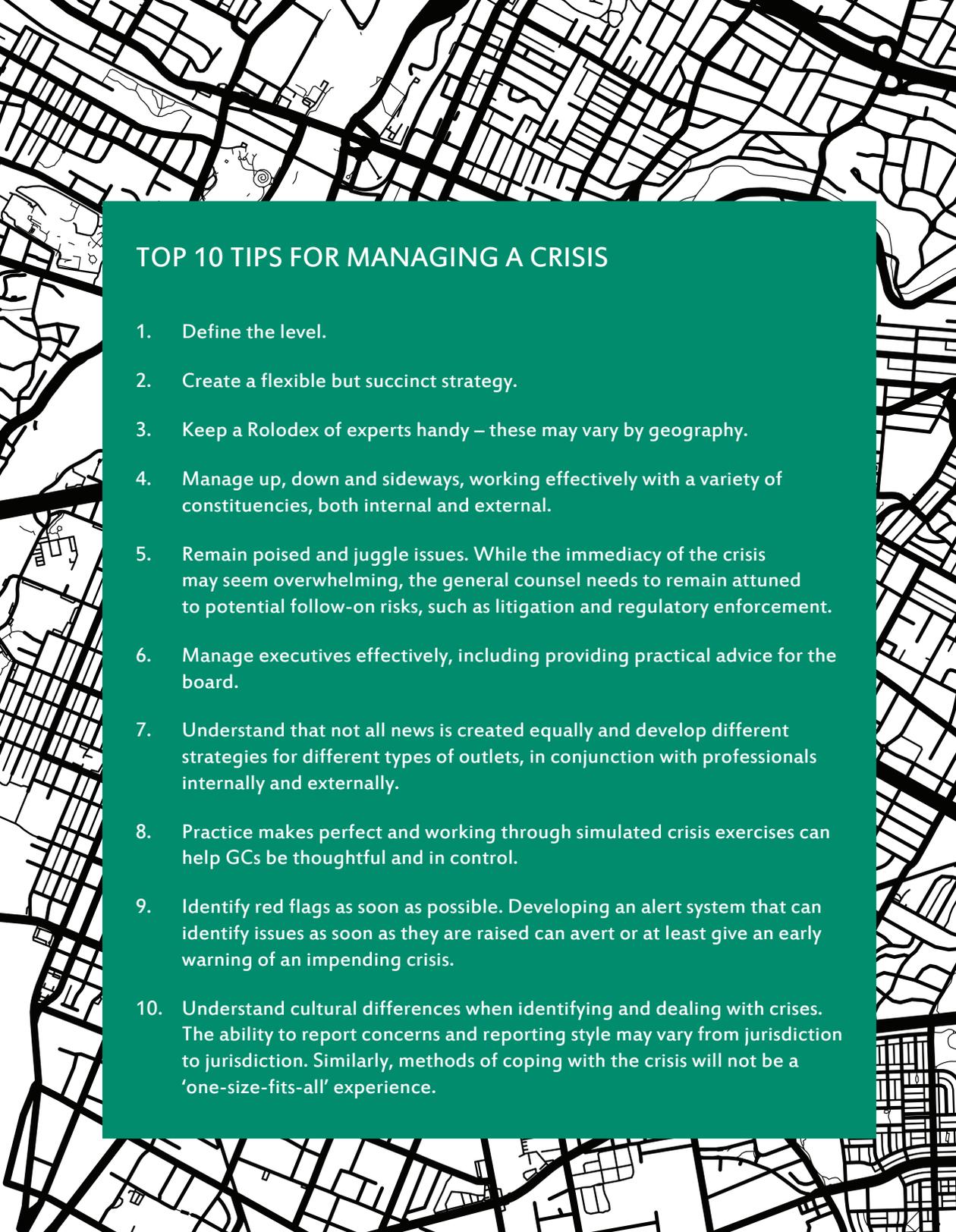
Real life tip: Understand that not all news is created equally.

Social media can descend into noise, and sound bites can become 'facts'. To avoid this happening, wait for the facts, and assess them thoroughly before making pronouncements in the media. Initial statements can address that all facts are not known, and that the company is waiting to gather these.

As with any leader, the GC needs to remain calm in a crisis in order to be effective. Therefore, the GC:

- Must not lie or cover up.
- Must not speak out of ignorance.
- Must wait to speak until they have the facts, and avoid adding to legal implications.
- Must be human, showing heart and compassion.
- Must manage a news cycle that moves in seconds.

Using these guidelines, GCs across industry sectors can develop a framework that will not only mitigate damage from a present crisis, but could also avoid future crises. 



TOP 10 TIPS FOR MANAGING A CRISIS

1. Define the level.
2. Create a flexible but succinct strategy.
3. Keep a Rolodex of experts handy – these may vary by geography.
4. Manage up, down and sideways, working effectively with a variety of constituencies, both internal and external.
5. Remain poised and juggle issues. While the immediacy of the crisis may seem overwhelming, the general counsel needs to remain attuned to potential follow-on risks, such as litigation and regulatory enforcement.
6. Manage executives effectively, including providing practical advice for the board.
7. Understand that not all news is created equally and develop different strategies for different types of outlets, in conjunction with professionals internally and externally.
8. Practice makes perfect and working through simulated crisis exercises can help GCs be thoughtful and in control.
9. Identify red flags as soon as possible. Developing an alert system that can identify issues as soon as they are raised can avert or at least give an early warning of an impending crisis.
10. Understand cultural differences when identifying and dealing with crises. The ability to report concerns and reporting style may vary from jurisdiction to jurisdiction. Similarly, methods of coping with the crisis will not be a 'one-size-fits-all' experience.