



IRF Reputation in collaboration with Advestra
Communications and Legal in Crisis Situations

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For companies and involved individuals “under fire”, close cooperation between PR and legal is key

Be it a leak in the middle of a M&A deal, a legal battle between two companies that is also fought in public, or a surprising CEO change announced on short notice – in such a crisis situation, both the communication and legal teams enter the playing field to support the company or individual that is “under fire” for its announcement.

Experience shows that it is key for a successful crisis management that PR and legal work closely together. How a company handles a crisis can make the crisis stronger or weaker in the end. Professional communication alone cannot make a problem disappear, but it hopefully leads to a much faster de-escalation. And professional legal advice can minimize or even avoid juridical risks and potential litigation – but being right from a legal point of view is not always identical with being right from a moral perspective.

Know the facts

The first days or even hours are decisive for handling the crisis successfully. We recommend the legal department, together with external counsel, should quickly collect and secure as many facts and figures about the case as possible, including preliminary internal findings. This is only possible in close cooperation with the client facing the crisis and therefore the company affected should outline these facts transparently. In addition, this requires general crisis manuals and processes established, tested and trained in normal times. When collaborating with external lawyers, the client will benefit from the so called “client-attorney privilege” principle.

In parallel, communication searches for similar cases by doing a media analysis and/or by approaching individuals and organizations that have been dealing with a similar situation in the past. Such examples (and learnings) from the past can provide valuable inputs for successfully handling the current crisis.

Furthermore, we recommend you evaluate your allies and opponents. Which board members or investors must be involved (or might be affected by the crisis)? Are there some country heads to be informed? Which customers and business partners might face consequences? Are there competitors that want to join the game on the sideline? And when it comes to authorities: Which local, regional and national (or even global) organizations might be act as advocates of the case, which will be against it?

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Define the defence strategy

Once the frame has been prepared, it is time to outline the strategy how to minimize damage. The key questions to do so are:

- Should we as a company or individual quickly publish a first statement that is based only on initial facts (to minimize the reputational risk), or should we stay quiet as long as possible (in order to minimize the risk of liability claims)?
- Should the communication be pro-active, or should a statement only be published in the case of a leak, a sound rumour, accusations on social media or if journalists start calling?
- Is the crisis so critical for the economic or financial survival of the client that under no circumstances can something be disclosed internally or externally?
- Is it appropriate to apologise or could this be seen as an admittance of guilt? And how should we phrase such a potential apology?

Example 1: An accident with injuries or even fatalities

In the case of a train accident or an airline crash where passengers got injured or even lost their lives, it is important that the company operating the train, or the airline is providing a speedy initial reaction. Top management should confirm the event and express empathy for all victims and their families as well as its own employees. In addition, a contact point for all people affected must be established. The company should also ensure the full cooperation with the authorities and announce by when next insights might be available (as this should also help to reduce the number and intensity of rumours circulating). Experience shows, for example, that it quickly becomes clear whether the failure was human or technical.

Conclusion: With this strategy, the justified interest of the relatives and the public can be served quickly without pre-empting the legal investigations.

Example 2: Misappropriation of funds by an employee

An investigation by a media outlet concludes that a staff member of a company has embezzled donations to an NGO. After an internal investigation, the company confirms the facts and dismisses the employee with immediate effect. At the same time, it apologises for this misconduct and indicates what steps will be taken to ensure that such a situation will not occur again in the future. These steps could include, for instance, a stricter control and compliance system and the systematic use of a 4-eyes principle. Further accompanying and longer-term measures, tailored to the specific case, should ensure that customers do not lose their trust.

Conclusion: With this strategy, it is quickly and clearly shown that misconduct by one's own employees will not be tolerated. If internal processes have made this misconduct possible in the first place, it must be shown how these processes will be improved in the future. It is important that the NGO or the company does not make any accusations against the employee that could not later withstand a possible legal case before a competent court.

Example 3: Missing authorizations

A listed company has been producing at several locations in Switzerland for many years. Suddenly, a competent cantonal administration of one of these sites discovers that the company does not actually have a permit for a certain production step. Emission in the form of a dark

smoke could theoretically escape during this production step, which therefore requires a license from the competent authority. The company immediately declares that it will cooperate with the competent authorities. External lawyers examine the internal processes and discover that the company disclosed all relevant facts to the relevant authorities but did not request the license required for this production step and the authorities did not notice the missing authorization request either. The authorities and the company agreed that the company will file a request for the required license within a month. If the request satisfies the legal requirements, the authorities will not impose a production halt or a fine. As a listed company, an immediate (ad hoc) or later (e.g. in the annual report) disclosure of this situation might be required.

Conclusion: Thanks to this strategy of cooperation, the company was able to prevent a temporary production stop. All communication with the authorities is handled exclusively by legal and all other communication is handled by PR in close cooperation with legal. Because this situation is extremely critical for the persistence of the company, it is important that any communication is only release once cleared by legal.

Example 4: Accusation of production issues

Accusations are being made on social media that broken glass was found in Birchermüsli packets. Photos and a short video are posted as proof in newspapers and social media. However, the company quickly realises that this is not technically possible. Moreover, these packages with broken glass only appeared at two retailers in the same city. As a first step, the company releases a statement that it takes note of the accusations, but it is technically not possible that the broken glass was added during the production of the Birchermüsli. For this purpose, it shows the production facility and the packaging machines, via video or a guided tour for journalists, which it also posts on social media. In the second step, the company contacts the retailers concerned; surveillance videos from there finally show that the glass shards were put into the packages by a customer in these sales outlets. Additionally, the few customers affected were compensated by the retailers and the safety of the packaging was re-evaluated. As soon as these facts were revealed, the company publishes a second press release disclosing the outcome.

Conclusion: In this strategy, transparency and active communication with the media and consumers were key to responding appropriately to the crisis. The company confidently showed that the cause of the incident was product tampering and not its own fault.

Example 5: Issue with supplier not following local laws and code of conduct

Media reports show that an important local supplier of a large Swiss industrial company is not following the safety and environmental laws of the country where he is operating. From a Swiss perspective, this issue is critical as those local safety and environmental laws are far lower compared to the similar rules and regulations applicable in Switzerland. The articles are providing proof of this wrongdoing; in the corresponding comment, the editor is arguing that the large Swiss industrial company is able to enhance its profitability by causing harm to the local population in the third world country affected. Although the company required the local supplier to comply with its code of conduct which provides best industry practices, the supplier did neither comply with the company's code of conduct nor with the local laws and regulations.

If possible, the company immediately should cease to purchase products from this supplier until it complies not only with local rules and regulations, but also with the company's code of conduct. The company should evaluate whether it may switch to an alternative supplier. As conditions to working with the supplier again, the supplier should be required to higher disclosure and reporting standards, to show which measures it has implemented to comply with local rules and regulations as well as the company's code of conduct and required to compensate the affected employees. Further, the supplier will have to show that it cooperates with the local authorities.

Conclusion: In this situation, the company has to react to two issues. First, there is the problem that his supplier is not following compulsory local rules and regulations. The second issue is the perceived injustice that the local rules in the respective country are less strict than the corresponding rules in Switzerland. Here, the Swiss company can make a contribution by requiring its supplier to apply best industry standards which have a higher standard than local rules. It should be noted that the indirect counter-proposal to the corporate responsibility initiative will impose additional duties to certain Swiss companies in the future. In addition, the Swiss company and its supplier can also engage in charitable activities locally, either through own initiatives or by cooperating with local governmental or NGO organizations to show their commitment vis-à-vis the local community.

Example 6: Misbehaviour of Chairman or CEO

The chairperson of the board or the CEO of a company is accused of private misconduct in a media report. This could be, for example, saving taxes via offshore accounts, driving too fast on the highway, or problems in his private life.

Conclusions:

- Finding the right strategy for this crisis is a balancing act. Saving taxes via offshore accounts may be perfectly legal, but the public tends to view such behaviour negatively. Even a fine for speeding has nothing to do with the performance of the president or CEO in question from a legal point of view. But they do pose a reputational risk to the company they head. This reputational risk occurs even more when professional and private lives are mixed. For example, if a private overnight stay or trip is charged to the company or confidential company documents are passed on in private.
- It should be noted that, today, the public often does not tolerate such behaviour anymore. And such incidents always provide an opportunity for polemical media reports or heated discussions on social media. Accordingly, resignations of executives due to "minor" offences are more common today than in the past, even if there was no misconduct at all in the professional life and regarding the duties of the manager.
- In extreme cases, resignations may constitute an important step to prevent (reputational) damage to the respective company and should not be considered at all an admission of guilt in a legal sense. Ideally, the relevant person resigns voluntarily.
- In the event of minor misconduct, an appropriate way would be that the accused person suspends his or her function until all accusations have been clarified. However, this is easier in the case of a non-executive function than if the accused person is an executive manager.

Specific requirements for stock-listed companies

An often-occurring discussion between legal and communication is around disclosure: What to say? How much to say? Who to say it to? And what to keep back? A second such likely area of conflict is balancing speed and accuracy. Or, in other words: When to say it?

- In this context, it is vital to follow the specific disclosure obligations stock-listed companies have also in a crisis. As a publicly listed corporation at the SIX Swiss Exchange (SIX), you have to follow the Listing Rules and its Directive on Ad hoc Publicity at any time, also in a case of an emergency (so-called "Ad hoc publicity"). This directive details the information on the obligation of issuers to disclose price-sensitive facts. The purpose of Ad hoc publicity is to ensure that issuers provide the public with true, clear and complete information on significant events arising during their business activities in a timely manner. The rules were recently updated, and it is important to have implemented the new requirements to be ready for an ad hoc notification.
- A price-sensitive fact must be disclosed by the issuer by means of an ad hoc announcement as soon as the issuer has knowledge of the main points. Hence, some people involved prefer following only the legal regulation, others are in favour for interpreting the law less rigidly. A good example how to jointly handle a leak during a transaction or an M&A discussion is the following scenario: The leak statement should officially disclose only as little as necessary, but background information is provided to investors, analysts and journalists so that they still get the broader picture and weight the facts correctly. In media and analyst reports, those facts are then referred to as "sources close to the discussions say that...", "industry experts believe that...", or similar.
- In addition, the Listing Rules of the SIX provides the possibility of postponing the disclosure of such a price-sensitive fact, if the fact is based on a plan or decision from the issuer and if its dissemination might prejudice the legitimate interests of the issuer. However, confidentiality for the entire time that disclosure is postponed is key. And in the event of a leak, the market must be informed about the fact immediately.

Resume

In (serious) crises, communication is a matter for the bosses – supported by a first-class, small leadership centre with clearly defined roles. Please note that a crisis team should be assembled already during "normal times" and enhanced specifically based on the type and character of the occurring crisis. One of the key goals should be "back to normal business as quickly as possible".

The legal team must ensure an organization in a crisis faces no legal harm that could lead to negative financial or business implications.

- It is responsible for minimising or even avoiding legal risks and potential litigation.
- Therefore, lawyers might remain defensive and strongly recommend not to admit any legal liability, if applicable.

The communication team, on the other hand, must establish and ensure trust between the organization and its stakeholders.

- PR therefore argues that you should not think solely about legal aspects, but also about reputational arguments.
- And that making the public liking a company makes this company later more likeable in court.

As described above, close cooperation between PR and legal is crucial to be able to manage a crisis in the best possible way from both a reputational and a legal perspective. Therefore, it is also important that the experts from communication and law are aware of some differences between their respective fields:

- Lawyers prefer to communicate in the way that legal trials and negotiations in courts will not happen. Still, they cannot be avoided at all times. There are defined procedures and deadlines to which all parties must adhere. Access to the discussion is also regulated; as a plaintiff, you must be admitted by the court. And until the conclusion of a trial, the presumption of innocence applies.
- In media communication, everything happens quickly and in a jumble. Unlike court cases, scandals do not follow a predefined procedure. This makes the course of scandals often unpredictable. And after a critical (polemical) media report, the presumption of innocence is already de facto suspended.
- In addition, journalists are prosecutors and judges at the same time. They stage scandals like court cases, pass judgement in the form of commentaries and call for legal consequences. But since courts are not enforcers of public morality, they do not follow the logic of scandalisation, which is why their judgements can also fall into the scandalisation maelstrom.

Ingredients for a successful crisis communication

Obviously, there are many tools, processes and principles that can be used and applied by both communication and legal teams to successfully cope with a crisis situation. Hence, there are some ingredients that apply more to one team or the other:

Communication	Legal
Clear core messages for each stakeholder group that are easy to understand and reflect the truth	Clear messages that are easy to understand and reflect the truth; choose a way to communicate in order to avoid legal processes / trials in courts
Trained spokespeople that interact calm with stakeholders (and in front of the cameras), following a stringent one voice policy	Prepare a script and train the client what to say and what he/she should not say
Treat all media equally, but maintain close contact with journalistic opinion leaders	Treat all investors equally
In case of accidents or mistakes, show empathy towards all parties affected	Immediately start internal and external root cause investigation
Apologize (if reasonable and approved by Legal)	When apologizing, do not acknowledge any wrongdoing from a legal perspective
Don't lie	Likewise: Don't lie
Align communication activities with Legal	Align legal activities with Communication

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