Surviving a Governmental Investigation without a Black Eye: Key Legal, Communications and Crisis Response Considerations for Nonprofits

Tuesday, May 20, 2014, 12:30 p.m. – 2:00 p.m. ET

Venable LLP, Washington, DC

Moderator:
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Upcoming Venable Nonprofit Events
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June 18, 2014 – Performance Management and Discipline in Nonprofits: Common Pitfalls, Unique Challenges, Effective Solutions

July 17, 2014 – Key Trademark and Copyright Rules for Nonprofits to Follow – and Break!
Upcoming Venable Nonprofit Events
Mark Your Calendars

August 13, 2014 – Privacy and Data Security for Your Nonprofit: Understanding Your Legal Obligations and Insuring against Risk

Agenda

- Protecting Brands in Turbulent Times
  - Crisis Characteristics and Origin
  - Crisis Management Protocol
  - Crisis Action Steps

- Trends, Platforms, and Data
  - Trends
  - Corporate Responses
  - Social Media Opportunity
  - A Social Media Crisis Framework

- Legal Considerations
  - Common Legal Issues in an Investigation
  - Planning Ahead and Risk Management
  - Protecting Your Information
  - Interacting and Negotiating with the Government
  - Internal Investigations
  - Congressional Hearings
Protecting Brands in Turbulent Times
Issue vs. Crisis

- **Crisis** – An event that immediately stops the work of the day in order to handle. It can affect the viability of a company. It is most often a reactive situation.

- **Issue** – A problem that, while important, can be contained with adequate advance planning and follow-up. If handled incorrectly, an issue can turn into a crisis.
7 Characteristics of a Crisis

1. Sudden change in circumstances
2. Insufficient information
3. Escalating flow of events
4. Beginning of loss of control
5. Intense scrutiny from outsiders and insiders
6. Beginning of the siege mentality
7. Panic
Of the 15 major crisis categories, only 3 have predominantly external triggers.
# Crisis Management Protocol

## Planning
- Identify vulnerabilities
- Identify key stakeholders for each potential crisis
- Identify crisis teams for specific situations
- Establish crisis control center and communications channels
- Identify third-party resources
- Develop preliminary messages
- Establish protocols for engaging the media and affected parties
- Establish 24/7 monitoring system

## Preparation
- Tabletop Exercises
- Test plans and protocols
- Live Exercises

## Management
- Media Engagement
- Utilization of Social Media Channels
- Direct Stakeholder Engagement

## Outcomes
- Less bureaucracy and improved response time
- Better position to shape story
- Point of view reflected in media reports
- Demonstrates that the company is on top of its affairs and alleviates confusion and speculation
- May prevent escalation to larger crisis
## Action Steps

<table>
<thead>
<tr>
<th>Preparation</th>
<th>First 3 Hours</th>
<th>First 6 Hours</th>
<th>First 24 Hours</th>
<th>Ongoing</th>
<th>Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Vulnerability assessment</td>
<td>• Validate situation</td>
<td>• Begin to implement tailored plan</td>
<td>• Communicate with key stakeholders</td>
<td>• Hold morning and afternoon meetings to review progress</td>
<td>• Voice in media reports</td>
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<tr>
<td>• Crisis planning</td>
<td>• Alert crisis team</td>
<td>• Leverage third-parties</td>
<td>• Release materials to the press</td>
<td>• Depending on intensity, institute war-room with permanent monitoring and</td>
<td>• Larger share of voice</td>
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<td>• Third-party development</td>
<td>• Convene team meeting</td>
<td>• Tailor approach for specific incident</td>
<td>• Conduct interviews</td>
<td>response, staffed by government and Ogilvy personnel</td>
<td>• Helped establish correct context and frame the situation</td>
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<tr>
<td>• Tabletop exercise</td>
<td>• Increase monitoring frequency</td>
<td>• Prioritize activities</td>
<td>• Engage with online influencers</td>
<td>• Potentially shorter duration</td>
<td>• Potentially less criticism</td>
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<tr>
<td>• Message development</td>
<td>• Institute preliminary protocol</td>
<td>• Tailor messages for specific incident</td>
<td>• Conduct outreach to offline influencers</td>
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<tr>
<td>• Materials development</td>
<td>• Identify Needs</td>
<td>• Develop additional material including statement, fact sheet, etc.</td>
<td>• Monitor for, and correct, inaccuracies</td>
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<td>• Resource and asset mapping</td>
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<td>• Social media audit</td>
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<tr>
<td>• Monitoring</td>
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Value of Planning

According to a study by the insurance firm Marsh, every $1 spent in crisis planning is worth $7 in losses averted.
Trends Work in Combination with Platforms and Data
Trend 1: Massively Parallel Processing: The Mouse That Roared
Trend 2:
I Am a Camera
Trend 3: Convening the Masses
Trend 4:
Data, Data Everywhere
Corporate Responses
Social Media Opportunity
Opportunity 1:
Crowd-Sourced Information
Opportunity 2: Hyper-communications
Opportunity 3: Compelling Narratives
Opportunity 4:
One-to-Many/One-to-One
Opportunity 5: Tracking Sentiment in Real Time
A Social Media Crisis Framework
Legal Considerations
Common Legal Issues in an Investigation

- Document production
- Internal investigation
- Witness interviews
- Congressional hearings
- Private lawsuits
- Criminal investigations
Before the Storm
Planning Ahead

- Evaluate risks
- Establish controls
- Document retention
- Crisis plan
Documents

Retention Policies

• Reduce the number of documents
• Organize the documents
Risk Management

- Board
- Senior management
- Information flow
Controls

- Theft
- Regulatory filings
- Policy development
- Public communications
A Plan

Organizational notifications
Document holds
Information gathering
Press
Retention of experts
In the Storm
Protecting Your Information

- Have the lawyer hire the experts
  - PR
  - Internal investigations
- Carefully review documents to be produced
- Congress isn’t big on the attorney-client privilege
- Consider who in the organization gets the information
Interacting with the Government

- Different strategies with different agencies
- Consider relative power/authority
- Consider negotiating position
- Develop good relationships
Document Requests/Subpoenas

- Review request/subpoena with experienced in-house counsel and/or outside counsel
- Establish a custodian of records
- Identify employees who may have responsive materials and conduct interviews
- Establish a litigation hold (including electronic documents)
- Determine scope of privileged materials
Electronic Documents

- Meet with Company I.T.
- Identify electronic media covered by subpoena
- Don’t forget all removable/portable media
- Preserve electronic documents covered by request/subpoena
- Suspend electronic document destruction procedures and policies
- Consider hiring an outside vendor
Negotiate with Government

- Negotiate the scope of the request
  - What does the Government want?
  - What does the Government need?
  - What is practical to obtain?
  - What is practical to provide?

- Format of production
  - Paper vs. electronic
  - E-mails

- Timing of production
  - Rolling vs. set date

- Confidential and/or privileged documents
Internal Investigation

Conduct Internal Investigation

- PR Tool
- Better informed
- Demonstrates organization’s commitment to compliance
- Identify source of potential illegality

No Internal Investigation

- Privilege
- Distraction
- Cost
Employee/Officer Interviews

- Be sure document collection and fact-gathering are complete before agreeing to interviews
- Conduct mock interviews to prepare employee/officer
Congressional Hearings

- Written testimony should be prepared with counsel
- Identify allies on the committee
- 18 U.S.C. § 1001
- Conduct mock Q&A
- Pleading the Fifth
- PREPARE, PREPARE, PREPARE
Questions?

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