

## How to Manage a Crisis

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**Ben Rand:** Hello everyone and welcome to this episode of the Harris Beach Podcast. In this episode we're going to be discussing crisis planning and management. It's a very timely issue given the coronavirus pandemic. With me today are partners Rajat Shah and Terry Flynn, both of whom have extensive experience in counseling organizations through difficult situations. Rajat, Terry, thanks for being here. It's an unusual time for employers and their counsel alike and it's a pretty extraordinary crisis so I wanted to start with a question related to the coronavirus. Is the pandemic and its unfolding aftermath something any organization could legitimately prepare for? And what should organizations be considering now most of all as this situation unfolds? Rajat, we'll start with you.

**Rajat Shah:** So, I think one of the key takeaways that we're learning from this pandemic, which in any crisis is evident, is how critical communication is. In addressing any crisis, no matter how big or small, I always say remember the three c's: communication, control, is critical. And there are different tranches of communication and different audiences when you think about communication. External and internal communication. So, that is both your employees which are the life blood of any organization. So, during a crisis and after a crisis. Your shareholders as well. Traditional media and social media. Government and regulatory agencies. Look, unfortunately in the times that we live in today, in any crisis there is always the concern of litigation, so part of any crisis communication strategy is making sure that we are managing to mitigate any potential plan of litigation arising from any crisis.

**Ben Rand:** Great, that makes sense. So, Terry, what would you say, are you hearing from clients at this particular time that we should be looking at?

**Terry Flynn:** I think the key issues right now as we are not surprised by are first labor and then cyber related. With respect to labor related area, the attorneys that I work with are being inundated with phone calls and requests for legal information. So as you're getting that information you're making decisions that under the law are important. Both federal and state and maybe even county. In those situations, when you get the advice, you're going to want to properly manage it and record it. What I mean is maintain the emails for any communications you have as you're moving forward because that advice you give will not only be important to the human resources division, but as Rajat mentioned, the fourth quadrant that you may be dealing with is litigation down the line. So

whatever decisions you're going to be making with respect to your staff and your employees may or may not end up in litigation. You want to be able to demonstrate that you followed the law as given to you by the lawyers and you communicated and executed in the proper fashion. So, you want to make sure that not only are you recording that information in a legal context but you're also delegating to your management first and foremost if there are certain people that will be managing it. Not everyone should be communicating in any manner or commenting regarding labor issues. Like in any matters that we deal with in a crisis, it's very important that you define from the very beginning who is in charge. Who are the people, as Rajat said, who will be communicating both internally and externally. So, if we take the internal part, which we're talking, obviously flowing out of litigation, you should identify who are the stakeholders in the company that will be spokesman or woman, it may be that of human resources, it may be the CEO, it may be the general counsel, but either way you need to define who that person is and share with the management and obviously in your emails to the employee base that communications will be coming by specific people on issues regarding labor and certain communications will be coming by specific on issues regarding cyber and computers and so forth. You depend on your business model but you need to be organized to define how communications are going to be expressed internally and most importantly who will be the person. The reason why I say that is not only to contain the database of information that is being disseminated and that it's being done in a professional and legally compliant way but it also sets the tone within the internal aspects of the business. Just presume that everything you say and everything you do will make its way beyond the company out into the overall larger environment. It's setting a tone from the beginning that we are communicating by certain people under a certain channel of information and a certain fashion. That way you are clearly defining what the message is and doing it appropriately but you're also now limiting the ability of other people to interject themselves into an area that is not within their purview. So it'll make it clear to the other employment base and the staff and everyone at different levels, including other parts of management, that there are certain people that will be communicating on those issues. As a result, not only will you limit any inadvertent comments being made that may be interpreted improperly, but most importantly, down the line, when you do possibly have litigation and the plaintiff lawyers or whoever are involved, there will be a very small amount of data that's there. We do not want, and we've all seen this in many fashions and we'll talk about examples, Rajat and I have businesses that we have counseled, that sometimes in the first days people communicate and everyone's making comments that in hindsight appear insensitive or appear inappropriate. If you define it very correctly who is speaking and you define it very correctly the channel of how that information is disseminated, then when they later ask for all of the ESI, or the electronic media and the litigation there will be a small corpus of information by a small group of people and it will look professional, it will look appropriate and it will look defensive, instead of having multiple people

across the board commenting. As we all know, those emails can sometimes cause problems with litigation or with the government, if the government is looking at it.

**Rajat Shah:**

Ben, Terry is absolutely spot on. The importance of minimizing written communication is critical in any crisis. So, I'll give you an example. When I was general counsel for an international company, we had a health crisis at one of our properties that we were managing where a number of people became critically ill. I got involved maybe six months after the crisis, more oncoming cleaning up and managing the aftermath of the initial impact. As Terry said, controlling the communication is critical and minimize anything that is in writing a limit who puts things in writing because emails live forever. Internal emails within your company are usually not privileged, and as we all know, people often write things in email that they would never say out loud. In any crisis you need to prepare for litigation and in crisis, my number one rule for a crisis is don't forget the compassion for your employees and your customers. The written emails that are found that may not be the business philosophy or the intent of the owners and senior leadership but if you have people in the field that are more focused on when are operations are going be restarted and what's the economic impact to their field site or to their jobs, those will play and will look terrible when discovered in litigation context. So it is extremely important, as Terry said, to minimize written communication and particularly email. Make sure as general counsels you are at the forefront at this and mandating that any discussions are done verbally and that critical emails are viewed by outside counsel. As state cases are evolving, internal emails within your company, even if it includes a general counsel, the level of privilege is dissipating. So, maintaining privilege is critical, getting counsel involved early and appropriate to make sure that privilege maintained. It's important to minimize any negative economic impact out of the crisis.

**Terry Flynn:**

Ben, if I could add to what Rajat said, and he's totally correct. When he's talking about minimizing it as well as the crises at hand and what happens when you have the issue of attorney client privilege. I'll give you another example. We represented years ago a gas utility company that was involved in an explosion that unfortunately resulted in a fatality of a young child as well as significant injuries to other members of the family. At that time we were retained immediately that morning. We already were their counsel, but we were contacted immediately that morning by their general counsel and we went to the scene of the incident. As you can imagine, in many scenarios of crisis, there's a theme. There's a crime scene, there's an accident scene, there's some area where the company's exposure's at. That morning obviously the exposure was at the scene where the explosion was because in that case you obviously had a criminal investigation as well as obviously potential personal injury litigation that would flow. First and foremost, in all these cases you can guess, is the safety and welfare of the people on the scene and once that's done, often you will have law enforcement, or government, could be an ocean matter or any department of education or whoever, who's going to be on the

scene and who's going to want to interview people and is going to find out what happened, and is going to want the electric media, that's going to want the paper media. How we made decisions is very important as you plan that you be prepared for these. So, the general counsel in that case was prepared. He had a background in crisis management, so did we, so we worked hand in hand together. We made sure that the communications were being made by us as the outside counsel so we immediately developed a privilege. We made sure that any communications that were for the first 48 hours to the general public, because the media was interested, came from the outside counsel. That was done because we needed 48 hours to fully contain and understand what was going on. They wanted the benefit of having an outside attorney with a law enforcement background to speak on their behalf. We also preserve not bringing the company situation and the business engaged in that investigation in that first 48 hours because it's important to get an understanding what happened and therefore it's better for outside counsel who had that background to be the person speaking to the media, working with law enforcement, and most importantly preserving the theme. When you do that, you now have at least given yourself some time, and think about it when you plan, you're going to have different moments of the crisis, there's the first 24/48 hours and then it progresses. You want to determine who will be there first so you maintain the privilege so you can identify what's going on. Then at some juncture, once the scene was preserved and the privilege is now in play that the attorneys are accumulating the information, under the privilege that they could then turn over to law enforcement properly. Then at some juncture, 48 hours, the determination was made that the company itself, which was a family owned company, will come out in the forefront. There were various things they wanted to say to the public and to the family and to their customer base, both verbally, both through written communications, through media, through the website and through the customer base directly. But it gave us some time to allow us to develop the privilege, identify the crisis at hand, be able to have time to think and plan and even though you may say gee I didn't plan ahead of time. Okay, no one can be fully prepared but you can do your best to prepare. When it happens, you can continue to plan. As Rajat said, he was brought in several months after. There was still planning going on at that point as he was brought in to assess it. So, you should develop ways that you can pause and think. So, in this case, the first 24/48 hours outside counsel involved, privilege maintained, working with law enforcement, then at some point the company can step in because they have the business acumen to make decisions. So, planning can come in stages and you can develop it as you go but you do want to plan it ahead a time and think what is most important. What is most important is to obviously preserve material, learn what's happening, support whatever the government needs and then go from there. You usually want to do that under the privilege because that gives you the ability to think and make decisions knowing full well you will be protected as you do it.

**Ben Rand:** It sounds like it's planning, planning and planning. So, Rajat, perhaps you could talk a little bit about how to go about advanced planning, particularly involving management and the board of directors?

**Rajat Shah:** Ben, thank you. I agree, and Terry's right, planning is critical. Every company is going to face a crisis at some point, and may face multiple crises. But as Terry said, one of the best ways to mitigate any crisis is by advanced planning. It's the only way that leadership can begin to predict what may come around the corner and do their fiduciary duty to manage the risk. So all companies, whether large or small, should do an annual risk assessment with their senior team and then with their board to ascertain what are the most likely crises or risks that the company faces. If you have the correct risk matrix that's updated, it is the best way to plan and face a risk that the company may face around the corner. So, typical risks that all companies will face or are likely to face. One is health and safety, which every company now in the U.S. is facing with this global coronavirus pandemic. Even without coronavirus in every industry there are probably specific health and safety issues that your industry faces that you can plan for in advance. Cybersecurity breaches: it's only a matter of when and how severe that your company is going to face a cybersecurity breach. With the increased elevation of addressing sexual harassment, that's something that every company with their HR team should be planning for. Whether it's a sexual harassment claim against a CEO, or a member of the senior management team, or a pervasive cultural trend in the organization, it's a risk assessment and crisis planning that is foreseeable. Financial statements: particularly for public companies and for companies that are either doing business overseas or are even getting products from overseas, planning for a foreign corrupt practices violation is a risk that we can do advanced planning on. Once a company puts together a risk matrix, what's really helpful and it's something that I did with my leadership team when I was a general counsel for a large hospitality company that had operations across the world, were table topics or simulations, where we would bring either outside law firm or an outside consultant and have to simulate a crisis to see how well the senior team actually implemented the plan. Even if you don't have the resources to bring out an outside consultant, any advanced thinking that the senior team can do subsequently with their board, better helps your prepare for a crisis around the corner. The other thing that we did, was we made sure that since communication is so critically important in any crisis, we made sure that we had a crisis PR Firm in advance that we worked with in order to prepare for any communication related to a crisis.

**Ben Rand:** I see, very interesting. It sounds like it's a lot of work. Terry, perhaps you could talk about some of the things that Rajat has mentioned. I guess that you've had some other instances where you've had to work with companies. Do you have some examples?

**Terry Flynn:** Sure, and separate from, I gave you the example of the utility gas industry incident. In a different situation we dealt with a large international retailing

company that's a client of ours. And we were brought in obviously to deal with a crisis after it occurred and again in that case like the other one, it dealt with a fatality that occurred on the scene but as you went forward in this case we knew that for at least three years this company was going to have to deal with this crisis in the sense that not only litigation but they agreed under discussions with the government that going forward they would modify the way that they handled the business. So, they were under what we call a monitorship and that happens a lot. In some fashion you're under a formal scenario where someone from the government is monitoring some aspect of your business, or you're being monitored by the media, or you're being monitored by the plaintiff attorneys, or in reality monitored by your employment base and customers that are looking at going forward what are you doing to deal with this crisis. Did you demonstrate that you are a good steward of your customers and therefore moving forward you're protecting them? So in that, crises, sometimes crises occur right in the beginning and they're over, sometimes crises go on for years because you're in the retail industry, or you're in the food industry, and you have customer base so they'll be watching it. So, what you do in the months to go forward will be important. So in those cases we worked with the company, not only did they define where the PR would but we worked with how we communicated with the government and how we communicated with the employment base because in those years to come we were changing the way in which the business was being done. We were doing it under a government oversight so the employees were seeing it and customers might even see it. So what you did in those situations was work directly with the company to constantly communicate properly with the government as to what you were doing. You may do it face to face, you may do it in writing, you may do in both but clearly delineate it in a positive way what you were doing and what you were learning from it and engaging them. So, it's very important in a crisis, especially when you're going forward, not only in the moment it happens, that you continue to develop and maintain the relationships you have with your colleagues and other aspects of the business. So, what I mean is, communicating with law enforcement, state, federal, local, which means, town, village and county. If you have friendships in those areas, reengage with those people and maintain the lists of those people because when these crises occur either on the day of it or the weeks, or months, or years thereafter. You're going to need the help and support of law enforcement, or help and support of government experts, or regulators. You need them to believe you're going to handle the crisis in an appropriate way. So, maintaining and developing the relationships is important, but most importantly, knowing who they are. So you sit down, as Rajat said, and you do these tabletop exercises to plan. You're going to need to have in front of you the list and the names of the people that you know in different aspects in government or in your supplier's chain, or whatever it is, the issue, the entities beyond you that are going to be important as you move forward. So make sure you've kept up to date, the names and the addresses and where they are, and you've been familiar with those people because they

will be very important to you when you later need their help. So, very important in planning not only to plan for the crisis per se but plan for the expectation that you will be dealing with people beyond the boundaries of your company or the beyond the boundaries of your business. That means not just private companies or publicly traded companies. I mean school districts, I even mean city hall or government. Sometimes governments have a crisis and need to deal with other aspects of government. Knowing those people, knowing those relationships, keeping them up to date and maintaining those relationships will be very important to you. You will find out they will be of great benefit to you and they will also demonstrate to your employees, to your customers and to the general public that you are trusted and they believe that you're a good partner and together you will move forward through it. So, relationships are just as important as planning. They are interrelated, so I really behoove all of you as you listen to this podcast to start to think of who do you have relationships with in all those sectors which may be important to you. And who are all of those connected people. And update it and have it available to you when the crisis occurs that would be a great help to you in the days and weeks and hours moving forward.

**Ben Rand:** Very interesting. I take it that applies to smaller businesses as well right, you do mean everybody?

**Terry Flynn:** Everybody, no exceptions. Government, non-government, publicly traded, small companies, big companies, public companies, like a school district. All of them.

**Ben Rand:** Understood. Now, one of the things that I know is really important in crisis management is to look at how you performed, an after action review if you will, to figure out what you've learned and how you can strengthen your planning in response. Can you talk a little bit Rajat about what goes into that review and what questions people should be asking post event?

**Rajat Shah:** Yeah Ben, absolutely. As important as preparing for a crisis, once you get through it, and we'll all get through this current crisis and any future crises, we may have us doing what I call us post mortem. After the crisis passes, doing a self-assessment with your crisis management team, and you use it as a tool to better prepare for the next one. The questions that I would ask our crisis management team after we weathered through a crisis were: how well did we anticipate and prepare for the crisis that we just went through? Was it part of our annual risk assessment? Did we do a table topic on it? If it wasn't on our annual risk assessment, obviously it's going to on your next one but also provide for an opportunity to discuss what else you may have missed on your annual risk assessment. Second question is: how quickly did we as a team diagnose the crisis? As Terry said, throughout a crisis, there is planning, and it's important to have a system and tools in place so that you diagnose a crisis early rather than later. Once you realize there was a crisis how well did you communicate the crisis and then the last piece is how well did you manage

or resolve the crisis. It's not only just the communication and the planning but actually the third pillar of any crisis management plan is the process. Did you follow the process to efficiently resolve a crisis? Did everyone know what their responsibility was? Did everyone do what they were supposed to do? Did the key leaders stay calm and stay within their swim lanes? So those are kind of critical self-assessment questions, and it's a great tool to get the team to reflect on a crisis that just happened but even more importantly to be better prepared to mitigate the next one.

**Ben Rand:** Terry, what kinds of questions do you want your clients asking after an event?

**Terry Flynn:** Well there's a very well-known company, an international company, that we work for, very large, and they always approach it this way. They always say after a crisis or an incident occurs, what are our opportunities? It's always the word opportunity. And it's an appropriate way to approach it. It's a very smart way and you need to learn from the situation. So what opportunity arises by the way you did it. And the second thing they always say is could we have done it better? So, (a) the opportunity moving forward to learn from it and to develop from it. It may even create business opportunities or better relations with customer's opportunities but second, could we have done it better as Rajat kind of described, and you go through that process. When you approach it in a positive manner there will always be critical elements to it, but that is not the moment to be criticizing people, you've all gone through a crises that like it or not was not completely expected, didn't know it was going to happen that moment, more than likely, so everybody is exhausted, everybody is raw, and therefore it's important that if you approach the meetings that you have after and you reassess it and you go through it, as Rajat described, you approach it as what opportunities arise from this situation, for all of us, our colleagues, our stakeholders, our customers and our employees, and second, how could we have done it better? When you do that, you engage the people within your team, and as a result you demonstrate to the general public, and to your customer base, and your stakeholders, and therefore that you're using in a proactive way and that will move forward and will deal with it better the next time. It'll be a different crisis of a different fashion but you've now built the confidence because people realize there's an opportunity here, we learn from it, we made mistakes or we didn't make mistakes, but we can do it better. That's the way to approach it and every client that I've seen that have survived crises and ended up doing better, and not all of them do, are the ones that always look at it in a very healthy way and look for opportunities and look for the ability to assess and think how could we have done it better. Those are the ones, who moving forward, will be better for the experience that they had.

**Ben Rand:** Sounds like very wise advice. Rajat, any last pieces of advice?

**Rajat Shah:** Crises never come up at a good time but regardless of when they come up, you have to remember to keep the emotions out of the decision analysis because often during a crisis, common sense goes out the window and that's

why, as Terry said, the planning is so critical. If you follow the plan and follow your process you're going to be in the best position to mitigate and get through any crisis that you're in. Again, as a general counsel, I'd say you're most important task in any crisis is to stay calm, be cheerful and guide your team that you guys have developed

**Ben Rand:** Rajat, Terry, thanks for being here today. And thanks' to everybody for listening. If you have additional questions or want more information please visit [www.HarrisBeach.com](http://www.HarrisBeach.com)

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