Crisis preparedness and response

LEAD DIRECTOR NETWORK

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King & Spalding

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Natural disasters, product and service failures, cyber attacks, revelations of corporate malfeasance, the sudden loss of a CEO: public companies face no shortage of potential crises. If poorly handled, a crisis can lead to significant destruction of value in the form of direct expenses, lost revenue, declining market value, and a tarnished corporate reputation. The direct personal impact on executives and boards can be severe as well; as a result of recent crises at Target, Wells Fargo, and Equifax, among others, CEOs and other executives lost their jobs, and investors and, in some cases, regulators have called for board members to lose their seats as well.

Members of the Lead Director Network (LDN) and their general counsel (GC) guests met on October 24, 2017 in Washington to discuss the roles of the board and the GC in detecting, avoiding, and responding to a crisis. This *ViewPoints* synthesizes that discussion. A companion *ViewPoints* synthesizes another discussion at the meeting related to shareholder activism. *For further information about the LDN, see page 6. For a list of participants, see the appendix on pages 7-8.*

Avoiding a crisis: look for warning signs

While participants recognized that some crisis situations are genuinely unavoidable, several pointed out that management and boards can often identify internal and externa warning signs to prevent troubling issues from developing into crises. As one member put it, there are a number of ways to *"take the organization's temperature."* Another participant explained, *"It is important to look for cultural health indicators—through cross-functional cultural teams, the audit and enterprise risk management roles, and other leaders in the company, not just the most senior. It's about monitoring all the data to be able to gather it and get a constant feedback loop … Historically, only compliance and enterprise risk management looked at that data—it was siloed; now, we are trying to get a broader view."*

Participants also noted the need to monitor the external environment for signs of trouble, in terms of public perceptions, policy and regulation, and investor relations. One GC said, *"It's important to look at external pressure points, such as social media and policy developments. External forces will have a real impact on how you are regulated by society."*

During the conversation, meeting participants identified a number of ways that boards and senior management could identify the warning signs of an impending crisis:

- **Know your people.** If a particular organization or facility within the business shows high rates of attrition, it could be an indicator of trouble. King & Spalding's Dixie Johnson said, *"I advise companies to look backward to find early indicators. One is the change in attrition or tenure in the finance department or in a particular organization. When you see people leaving, it can be an indication that something is up."* Another member found unexpected value from employee engagement surveys: *"I initially thought, What's the value? But as you survey the workforce and hear what they are telling you, it is interesting the insights you gather on their sense of worth, empowerment, and feelings about working for the company."*
- **Look for patterns and trends.** Some crises arise from a multitude of small issues whose significance is only obvious when viewed together. The challenge for a company's leadership is to foster structures and policies that surface those patterns. As one member put it, *"How do management and the systems in place support the ability to see trends and identify patterns that are happening that would otherwise be seen as one-offs? The data and systems are a key way to see if the company is heading for a crisis."* Meeting participants found it particularly important to look for trends in employee hotline responses that might seem insignificant when viewed in isolation.
- **Monitor social media.** Participants recognized that social media is an increasingly important source of insight into public perceptions of their companies, and several said their companies have stepped up their monitoring of social media. One GC said, *"We have listening centers for social media around the world."* Another participant noted that one of his firm's subsidiaries *"has a social-media center that monitors and communicates with customers; it has transformed our customer interactions."*

Building an organization that can detect and respond effectively to a crisis situation

Despite the best efforts of a firm's leadership to identify trouble spots and prevent them from developing into a crisis, participants recognized the need to prepare their organizations to respond in a crisis situation. During the discussion, several aspects of governance and management emerged that are particularly important in a crisis.

Ensure that the right crisis-response team is in place

Participants emphasized the need to find leaders who can remain steady during a crisis, including the CEO, the GC, and the lead director. One participant noted, *"Sometimes the lead director underestimates their role in a crisis. My experience is that it is really important to be the steady rock, to keep the calm among cats being herded. Everyone reacts differently—even on a board. It is important for the lead director to have a sense of whom they need to talk with, including directors, to get them through the crisis."*

Another participant pointed out the need to make crisis response an important part of the evaluation of CEO candidates: *"As a lead director, you will experience several successions of the*

CEO or other senior officers. Look hard at the crises or challenges they have faced personally and professionally. Dig into that—plenty of people can run things when things are good; it's not the same skill set when things are really bad … There will come a time of crisis; will the CEO and subordinates rise to the challenge? You need to determine what the candidate has done that gives the board comfort that he or she can handle a crisis."

Empower employees to use their judgment when the rules do not fit the situation

Several participants noted that a compliance-based culture could contribute to the development of a crisis. One participant explained, *"An effective compliance program can be so rigid that you are going through a process and not getting additional feedback, because the same people are doing it. It's too much of a check-the-box. How do you emphasize that people need to be ready to react? It's not enough to give people tools and training. What are the personalities and soft skills they need to bring to bear? They need to stay calm and own the message."*

Referring to an example of a passenger forcibly removed from a flight, one director suggested that it was likely that airline staff felt the need to adhere to company policy and did not feel empowered to use judgment as they saw the situation unfold. One member said, *"Many companies today operate by a set of rules and guidelines, and employees are not empowered. I would imagine that those staff did not have authority to offer greater compensation that might have avoided removing the passenger. I wonder how we can empower employees to make good decisions when they are the only ones who can keep the company out of these types of crises."* Acknowledging the need to empower local response, one GC added, *"If it has to make it to the corporate center to have a response, it's too late."*

Foster a culture of openness and seek perspectives to help overcome organizational blind spots

One director said, *"Every human being has blind spots, so you have to drive an open, challenging, collaborative culture throughout the organization to avoid missing things … Cultural aspects are as important as risk management, reporting, monitoring, and the rest."*

This need for speaking and hearing unpleasant truths extends to the relationship between the lead director and the CEO: *"Lead directors' relationships with CEOs have to have an edge. They cannot be best buddies. Lead directors need to be willing to discuss issues that the board has described in executive session—they need to communicate to the CEO what has to be communicated."*

One GC noted that board members who bring an outside perspective can help management identify practices that might be misguided: *"Boards can help you, especially members that come from outside the industry. There are policies and practices that make you gasp if you come from outside."*

Further, a member noted the importance of *"having a resource that can judge the potential impact of an issue through the lens of society today, which is not necessarily represented on the* *board."* The member went on to describe an issue that the board and senior management believed would never cause a problem and could safely be ignored, adding, *"Fortunately, we were dissuaded from this point of view before it reached a head. We were just not aware of how volatile things can be on social media and how companies are supposed to handle themselves."*

Develop a healthy relationship between the board and the GC

Members and GCs agreed on the need for a strong and trusting relationship between the GC and the board, and especially the lead director. Several participants noted that their firms' CEOs were supportive of an independent relationship between the GC and board members. More than one member said that it would be a matter of concern if the CEO expressed any hesitation about the GC having direct access to board members or objected to the GC meeting with board members without prior approval.

The lead director's relationship with the GC, always crucial, becomes especially so during a CEO succession crisis. One GC explained, *"With an unexpected CEO transition, the relationship between the GC and the lead director is critical. That's how you communicate and implement the board's solution."*

Responding to a crisis: internal and external communication

Participants agreed that the quality of internal and external communication is critical to navigating a crisis situation and preserving a company's reputation. One GC said, *"You will always be judged by the first thing you say. You need to know what you know and what you don't know. The moment a crisis hits, reputation through communication is the biggest risk, not legal liability. I've got three years to deal with legal liability, but three days to deal with reputation—or three minutes. Reputation risk has to be front and center."*

Meeting participants identified three key elements for successful crisis communication: quickly elevating information to the top of the organization, speaking with a unified organizational voice, and paying close attention to the timing and pace of disclosure.

The CEO and board need to be sure they are getting the full picture

Participants noted the need to rapidly elevate information about a crisis to the top of the organization. One director said, *"One thing is to get it to the right level, get all key officers involved immediately. Don't wait. Get it to the CEO so it's not held somewhere in the organization."* Getting the right information to the CEO and the board can be a challenge, since these leaders can be insulated from the true picture. *"In those moments where things are breaking down, information is filtered by the time it gets to the CEO and the board,"* one participant said. *"So get out of the bunker—step outside and find out if what you are hearing is consistent with the information you're getting from subordinates."*

Most members agreed that information about a crisis should be quickly elevated to the board, though some did express caution about exposing the board to added liability: *"To give the board the facts and get them to give feedback is helpful—unless you are concerned about liability* *issues or putting the board at risk."* Ms. Johnson pointed out, however, that *"the earlier you let the board know about information, the earlier and the more they can do things—as opposed to not doing things, which is what increases liability."*

The organization needs to speak with a unified voice

Participants emphasized that a company should speak with one voice during a crisis. This can mean limiting board members' direct involvement with the media, unless the CEO is somehow compromised. One participant's company *"never lets the board or board members communicate directly with the public."* Another participant said, *"The last thing management needs is to be worrying about the board and whether the board is communicating to the media."* Another agreed: *"Clearly, when the CEO is involved, it goes to the board. Otherwise, the board is stepping back. The last thing you want is multiple messages getting out."*

Timing and pace of disclosure are critical

Participants noted that one of the most difficult aspects of responding to a crisis is the timing of disclosures, both internally and externally. In the words of Bobby Burchfield of King & Spalding: "*In a rapidly evolving situation, how do you handle your disclosure obligations? Organizations do wait too long sometimes, which creates issues with regulators. And you can disclose too early and then have to retract and step back."*

Some members favored immediate transparency, while others expressed reservations and pointed out countervailing pressures. One director insisted, *"Every board has to commit to a policy of transparency the instant you see a threat of a problem. The longer things get worked on by counsel, and every second we have that data without disclosing, we create a problem. There is a tendency to want to hide things."* Another director, however, asked, *"Whom do you disclose to first? Social media puts pressure on disclosing to the public and shareholders, but sometimes the government—the FBI or the Secret Service—doesn't want you to disclose as fast as the public might want. A couple of times, the government didn't want us to disclose, and it kind of put us in a box."* Another participant pointed to the need to build relationships with relevant regulators before a crisis erupts in order to have a clearer picture of their expectations regarding disclosure.

Viewing the crisis through a human lens

Attendees discussed ways that viewing a crisis from a less technical perspective could transform a company's response to a crisis.

As an example, one participant recalled how his board and company learned from prior experience with natural disasters to guide planning for an impending hurricane. The board made a decision that no employee of the company would spend a night in a shelter. Not only did they reserve rental cars and hotel rooms, but company representatives physically secured the keys ahead of time, having learned from prior experience that hotel clerks or rental car representatives could be bribed to give away reserved rooms or cars. The board also authorized cash grants to affected employees, secured long-term housing through the company's relocation arm, and authorized no-interest loans to help people rebuild despite the lack of adequate flood insurance coverage. In addition, the company brought in employees from the rest of the country so that workers in the affected area could be with their families and tend to the recovery. The member said it was an *"incredible atmosphere, the reaction of the company and the employee base—the energy was higher … It was in some ways a great experience."*

Prompted by this account, one member suggested, *"A company in almost any crisis would be well served if there was a discipline for asking, What is the human lens on this, who has entrusted us, and where will that trust be felt to be betrayed? Policy explanations will never work. If that discipline could be the guide, you have created a through-line that may give you a guide for how you act."* The member added, *"I think things like empathy and authenticity have to be on display—that gives you the benefit of the doubt and builds trust with regulators. But you can't make it up or fake it; it has to be part of your makeup."*

Appendix: meeting participants

The following general counsel participated in the meeting:

Audrey Andrews, Senior Vice President and General Counsel, Tenet Healthcare

Brian Berube, Senior Vice President and General Counsel, Cabot

Michelle Bryan, Executive Vice President, General Counsel, and Chief Administrative Officer, Intelsat

Greg Butler, Executive Vice President and General Counsel, Eversource Energy

Sheila Cheston, Corporate Vice President and General Counsel, Northrop Grumman

Rhonda Ferguson, Executive Vice President and Chief Legal Officer, Union Pacific

John Finneran, Executive Vice President, General Counsel, and Corporate Secretary, Capital One Financial Corporation

Bernhard Goepelt, Senior Vice President and General Counsel, The Coca-Cola Company

Jim Kerr, Executive Vice President, General Counsel, and Chief Compliance Officer, Southern Company

Suzette Long, General Counsel and Corporate Secretary, Caterpillar

Nicole Maddrey, Senior Vice President, General Counsel, and Secretary, Graham Holdings

Monique Mercier, Executive Vice President, Corporate Affairs, and Chief Legal and Governance Officer, TELUS

Tom Moriarty, Executive Vice President, Chief Policy and External Affairs Officer, and General Counsel, CVS Health

Kellye Walker, Executive Vice President and General Counsel, Huntington Ingalls Industries

Barbara Wall, Senior Vice President and Chief Legal Officer, Gannett

The following Lead Director Network members participated in the meeting:

Dick Auchinleck, Lead Director, ConocoPhillips; Non-Executive Chair, TELUS

Bobby Burchfield, Partner, King & Spalding

Dave Calhoun, Independent Chair, Caterpillar

Sandy Cloud, Lead Trustee, Eversource Energy

Don Felsinger, Lead Director, Archer Daniels Midland and Northrop Grumman

Ann Hackett, Lead Director, Capital One Financial Corporation

Dixie Johnson, Partner, King & Spalding

Doug Johnson, Lead Director, Aflac

Mike McCarthy, Lead Director, Cabela's and Union Pacific

Jack O'Brien, Lead Director, TJX; Non-Executive Chair, Cabot

Cal Smith, Partner, King & Spalding

Doug Steenland, Non-Executive Chair, AIG and Performance Food Group

Dick Walker, Partner, King & Spalding

Jim Woolery, Partner, King & Spalding