

Conferences

Planning, Coordination, Consistency Urged In Talks Geared to Business and Its Counsel

A holistic approach to risk management, integrating legal and business concerns, works best for companies throughout the life cycle of their products, speakers said at a March 19 symposium in Washington, D.C.

Coordination among business decisionmakers, engineers, communications specialists, and lawyers helps to avoid product crises and to handle them effectively when they occur, speakers agreed.

The daylong seminar, “Staying Afloat When Your Brand Is Under Pressure: How to Avoid, Mitigate, and Manage Product Crises,” was hosted by the law firm Crowell & Moring LLP. The firm’s risk management group grew out of its tort practice and has taken an integrated approach, Christopher Cole, the co-chair of the group, said in opening remarks.

Ray Dempsey, an executive with BP America and a member of the Deepwater Horizon response team, stressed the importance of a company’s reputation.

Addressing whether action or communication is best in a crisis, Dempsey said, “It’s both.” He discussed a number of measures BP undertook following the Gulf of Mexico oil spill, including waiving a liability cap, establishing a trust fund, conducting cleanup, communicating with government and the media, and advertising.

BP’s response to the crisis “restored confidence” in the company, allowing it to acquire more acreage throughout the world, Dempsey said.

During a time when it was receiving many legal opinions, BP “made choices based on [its] corporate values,” Dempsey said. Outside counsel can help a company understand the risks and consequences of possible actions, “but they need to understand business decisions,” he added.

Minimizing Risk Through Design. Engineer Dr. Jason L. Hertzberg of Exponent Inc., addressing a panel on product design, outlined the ways in which engineers try to minimize risk, from “designing the risk out” of the product, through installing guards and providing warnings and training. If risk still remains, the company can accept it or reject the product, he said.

Another panel member, Cheryl A. Falvey, former general counsel at the Consumer Product Safety Com-

mission and now an attorney at Crowell & Moring, said a company’s elimination of a problem in the design phase looks good to a regulating agency. “CPSC looked at whether a company was proactive; did it have a culture of safety?” she said.

Anthony M. Cooke, assistant general counsel for product and regulatory matters at Volkswagen Group of America, and former chief counsel to the National Highway Traffic Safety Administration, said automakers need to get “robust feedback” from users about the durability and safety of their products. The documents involved in this process may set off alarm bells for attorneys—but if attorneys ran businesses, nothing would happen, he said.

Safety features of a product, such as guards, address foreseeable use and misuse, Hertzberg said. The question of where foreseeable misuse crosses into abuse is a matter of scientific, legal, and regulatory judgment, he said.

Focus groups can help identify foreseeable misuse, Falvey said, but she added that some problems, like television tip-overs, won’t come out in focus groups.

Falvey said CPSC’s administrative cases against magnet-set makers and the manufacturer of an infant recliner, now pending in an administrative court, are both misuse cases. “The Commission is not accepting warnings as good enough” in those cases, she said. “It’s a real wake-up call for manufacturers.”

As for warnings and instructions, Cooke said technical people may not understand the legal duty involved in drafting an adequate warning. “Lawyers need to have access to the technical people,” he said.

The Voice of Buckyballs. Andrew Frank of Karv Communications delivered a talk on crisis communications. He stressed the importance of planning; good crisis management; and tailoring messages to different stakeholders, but being consistent.

Frank discussed a marketing campaign by one of his clients, Maxfield & Oberton LLC, a magnet-set maker that resisted CPSC pressure to recall its product, Buckyballs. Maxfield & Oberton became a target of one of CPSC’s administrative complaints, and is now out of business.

The company’s “Save Our Balls” campaign was important to the company’s financial viability, Frank said. It was “aggressive,” he said, but “we didn’t feel we had many tools.” Magnets were the company’s only product, and with retailers backing out, the sets were “no longer an impulse buy.” The result was a humorous

web video that argued Buckyballs' position that the warnings were adequate and CPSC was overreaching, and offered direct sales of the product.

The Art of Discretion in Communications. Panelists on a communications panel offered insight and tips on interacting with the media, Congress, attorneys, and others in a product crisis. Public statements should not come back and hurt a company in litigation, Kathleen Taylor Sooy, chair of Crowell & Moring's class action practice, said. She emphasized a coordinated approach that includes litigation and business concerns.

Kate Childress, a marketing communications manager at DuPont, said her company has a team dedicated to crises and similar issues. It aims for "no media surprises," she said.

"Communications people are concerned about the company's long-term reputation" and seek to incorporate company values and the right tone, consistently, in all their communications, she said. This sometimes produces tension with the company's lawyers, she said. When the lawyers "get it," working together is easier, she said.

Josh Tzucker, of Crowell & Moring's public policy practice, told attendees public messaging should be consistent.

Tzucker also said a company's cooperation with congressional investigations can produce benefits, such as limiting the scope of an inquiry or maintaining attorney-client privilege.

Scott Wolfson, director of CPSC's office of communications, recommended that businesses work with the

agency and make sure information about risks and remedies is available before making public statements.

Fighting With Agencies. In a panel on litigation, particularly litigation with an agency, panelists commented on the different missions, culture, and approaches of different agencies.

When contesting an action by the Food and Drug Administration or the Environmental Protection Agency, it is very important to get the science right, Keith Harrison, head of the trial practice team at Crowell & Moring, said.

With the Occupational Safety and Health Administration, which has the authority to show up unannounced and look for violations, working cooperatively matters—but if you credibly challenge its actions, OSHA takes the move seriously, Kevin Mayer, a partner at Crowell & Moring, said.

Companies should not use general litigators before an agency when that agency is a "gateway" for the company, Crowell & Moring's John Fuson, a former associate chief counsel at FDA, said.

Mayer also suggested attorneys advise clients about potential risks from internal emails. "They're going to come out" and be seen by the agency, the media, and juries, he said. "Limit potential damage," he urged.

Other panels focused on advertising, global regulatory coordination, handling a mass tort claims process, and managing a recall crisis.

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