

Why lawyers and communicators

New research has reopened the age-old debate about the interaction between lawyers and communicators in a crisis, and shows that conflict between legal and communication advice is still a very real problem, according to **Tony Jaques**

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Crisis managers everywhere know you can win in the court of law and still lose disastrously in the court of public opinion. Yet regular news reports expose organisations that follow an overly legalistic strategy and end up in reputational hell.

New research suggests such outcomes are at least partly down to a persistent lack of trust between lawyers and communicators, and also because they don't fully understand or respect each other's role in a crisis. The result is often conflicting advice to management, who may then struggle to make the right decisions when a crisis strikes.

This finding is one of many to come out of a recent project that included interviewing experienced crisis lawyers in the UK, US, Canada, Australia and New Zealand. The lawyers were asked about their own role in a crisis and what they think about the role of communicators.

This first-of-a-kind survey – in partnership with SenateSHJ and its PROI international network – reopens the age-old debate about the interaction between lawyers and communicators in a crisis, and shows that conflict between legal and communication advice is still a very real problem.

The lawyer survey is included in my new book *Crisis Counsel: Navigating Legal and Communication Conflict*.

Lack of legal awareness

While the lawyers interviewed said that their relationship with communicators is improving, one of the key areas of conflict relates to disclosure – how much to say, how much to keep back, when to say it, and who to say it to. They think that communicators' desire to inform openly and transparently means they risk disclosing information that may lead to liability or future litigation. The lawyers are also concerned about a lack of legal awareness among communicators.

Another perceived area of potential conflict is balancing speed and accuracy; almost every lawyer emphasised the need for certainty before communicating in a crisis. This response appeared to show little appreciation of how it is very common that decisions must be made quickly based on what is known at the time, which is typically incomplete in a real crisis.

Other areas the lawyers nominated as particularly challenging are communicating during litigation; issues of business ethics and professional privilege; and the often vexed question of how and when to apologise.

It's hardly a surprise that lawyers and communicators may disagree on some areas of crisis advice. More

must work better together

important is why they disagree and how crisis managers and senior executives can navigate through conflicting advice in a crisis and arrive at decisions in the overall best interests of the organisation and its stakeholders.

The book identifies five areas most prone to disagreement:

- **The clash between liability and responsibility:** When the organisation needs to step forward, even when it might not be clear who was responsible for the crisis;
- **Why and how to apologise:** To admit fault sincerely and avoid legalistic non-apologies, which may be worse than no apology at all;
- **Product crises:** Balancing public risk from a faulty product against the cost of a recall;
- **Defending patents and trademarks:** When over-zealous litigation might look like bullying; and
- **Marathon legal proceedings:** When prolonged pursuit of some legal principle puts reputation at risk.

In each of these areas, conflicting legal and communication advice can exacerbate a crisis or even trigger a new crisis situation.

There are scores of examples where executives have taken a principled stand in the face of legal advice, for example, when the CEO of BP America commented after the notorious Huntington Beach oil spill: "Our lawyers tell us it's not our fault, but we feel like it's our fault and we are going to act like it's our fault."

Another example is provided by the owners of the Alton Towers Theme Park in England following a devastating rollercoaster accident: "Our immediate response and subsequent actions were driven by a desire to do what we believed was the right thing by all those affected by the accident. We didn't try to hide behind lawyers."

A third example is when the newly appointed CEO of Thomas Cook travel apologised after the company had spent nine years denying responsibility for the death of two young children who were killed by toxic gas from a faulty hotel heater on a Thomas Cook holiday in Corfu: "Even though I was new to the job, I somehow got stuck in this legacy. I got caught in this corporate behaviour. I listened too much to lawyers."

Sadly, there are so many cases where management and their legal advisors seemed to get it wrong, for example, when lawyers for Mountain Dew unhelpfully defended a claim of a mouse in a can by arguing the drink was so acidic it would turn the little rodent into jelly.

Or when global pharmaceutical companies got locked in a high-profile dispute with the government of South Africa over the legal status of desperately needed AIDS medication. Or when Johnson and Johnson sued the American Red Cross over the use of the red cross symbol.

All were cases where someone needed to ask: "Is this the right thing to do?"

Such clashes often become public when organisations pursue legal strategies that must have seemed almost certain to generate brand damage. A case in point was when KFC demanded that the Tan Hill Inn in England's Yorkshire Dales stop using the slogan 'Family Feast' to promote the traditional Christmas dinner served on just one day a year. As landlady Tracy Daley commented after the legal letter was withdrawn: "Common sense has prevailed."

Or consider when McDonald's invested an extraordinary eight years of legal action against a Kuala Lumpur restaurant called McCurry, claiming that use of the 'Mc' prefix infringed its copyright. The fast food giant eventually suffered a humiliating trademark defeat and faced the inevitable David and Goliath headlines around the world.

And let's not forget the notorious case when Mohamed Al-Fayed, former owner of Harrods of Kensington, London, launched legal action against Henry Harrod, the

long-time owner of Harrods Family Restaurant in the New Zealand provincial city of Palmerston North.

Coming out in support, the tiny dairy town of Otorohanga temporarily renamed itself Harrodsville and 72 of the 74 local business adopted new signage, such as Harrods bakery, Harrods dry cleaners and Harrods fish and chip shop.

In the face of merciless media reporting around the world, Al-Fayed eventually gave up and ordered his lawyers to back off.

As in just about every crisis, we don't know what advice was or wasn't given, whether good advice was provided and ignored, or if bad advice was accepted. But we do need to ask why the legal and communication departments were seemingly not working together to avoid predictable reputational damage.

While it may seem obvious, the best way for lawyers and communicators to work better together to avoid or respond to a crisis and to help manage conflicting advice, is to establish a healthy working relationship before any crisis strikes.

The key is to understand and respect each other's roles, and to recognise that they are both working towards the same goal.

At the same time, senior management needs to listen better and make the right decisions that are in the best interests of the organisation as a whole.

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