

Crisis Response: Why Most Lawyers' Instincts Make Things Worse

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When our clients face a crisis, our lawyer's instincts prompt us to admit nothing, deny everything, and stall for time while we figure out our best defense. Unfortunately, this time also is the only opportunity that our clients will have to be transparent and shape the narrative about what happened. To help them balance all of the goals that they have to meet, we need to recognize when our lawyer skill set helps and when it gets in the way of our client's mission.

I. Protecting Our Client's Litigation Posture is Not the Same as Protecting Our Client's Mission

- A. When we defend our client in litigation, we traditionally rely on a specific skill set that serves that defense. Our instincts are to
1. Admit nothing, deny everything until credibility demands grudging admissions
 2. Control information — e.g., privileges (work product, communications), NDAs; and
 3. Spread the blame around — e.g., assumption of risk, contributory/comparative negligence defenses
- We have to recognize that this skill set is designed to make our job of defending the lawsuit easier. We aren't focusing on the client's business as a whole, and we don't know as much as our clients about running their organizations. We have to recognize that sometimes our mission of a top-notch legal defense will conflict with our client's overall mission. For example, it does our client no good to be vindicated in court if, in the interim, the business fails because customers no longer trust them.
- B. When we focus on our client's mission, we have different goals.
1. To care for employees and clients (current, past & future)
 2. Christian ministries, nonprofits, and youth-serving organizations have added responsibilities of self-sacrifice and caring for vulnerable people.
 3. Self-sacrifice does not mean commit corporate suicide — that would violate our obligation to current staff and future clients.
 4. Meeting that mission requires transparency and accepting responsibility early. Both of those goals are hard for attorneys, particularly litigation attorneys, to recognize and pursue.
- C. Our role in crisis management is to balance those responsibilities (to potential litigation and to the client mission)
1. Some tasks will take priority at different points in time. Early transparency is not always incompatible with a vigorous defense of a later lawsuit.
 2. We may need to find creative ways of meeting both goals. For example, criminal defense attorneys often make statements to the media instead of letting their clients speak.

II. Initial Response

- A. We have to resist our lawyer training to lock down the fortress and start looking for defenses.

- B. We need to focus on a mission-oriented response
 - 1. Begin an objective investigation (discussed below)

 - 2. Help the organization minister to staff, volunteers & current clients
 - a. Client meetings asap
 - b. Employee communications asap
 - c. One point of contact for each group

 - 3. Minister to past clients
 - a. This goal is especially important for Christian and non-profit organizations
 - b. Avoid casting victims as opponents
E.g., SBC report — <https://www.sataskforce.net/updates/guidepost-solutions-report-of-the-independent-investigation>
p. 192 — “Overall, the legal advice focused on liability created a chilling effect on the ability of the EC to be compassionate towards survivors of abuse. Survivors were always viewed through the lens of potential plaintiffs threatening lawsuits, rather than as individuals who had been harmed and were in need of care.”
 - c. Ministering to victims does not require assuming truth of their allegations before the investigation is completed. We have to hear all victims, but not necessarily believe all victims.

 - 4. Transparency to clients and public
 - a. Public statement asap
 - b. Don’t set out defenses in public statement
 - c. Express concern for victims and intent to cooperate with law enforcement
 - d. “No comment” is the second-worst response a client can give
 - e. The worst response is a lawyerly defense
Ex., SBC report, p. 25 — “I am pleased to receive any questions from these ladies they would like him to answer and if I deem them appropriate, I will get him to answer them.”
 - f. Ongoing transparency also is important
 - g. Examples of bad public statements:
 - i. <https://www.law.com/international-edition/2021/04/08/sometimes-law-firms-struggle-to-manage-their-own-crises/>
 - ii. <https://www.forbes.com/sites/jackkelly/2021/12/04/bettercom-ceo-fires-employees-in-a-cold-one-way-video-announcement/?sh=258dd0f97548>
 - h. Excellent public statement:
<https://minnesota.cbslocal.com/2021/07/28/family-of-boy-thrown-from-third-floor-balcony-sues-mall-of-america/>

“From the day that this tragic event happened, our concern has been focused on Landen and his well-being. We are thankful for his ongoing and continued recovery. We can't imagine how traumatic this ordeal has been for Landen, his family, and friends.

Legal matters are not unexpected in a situation such as this. It is a process that we will continue to work through and hopefully find resolution for all parties.

Our thoughts and best wishes continue to remain with Landen and his family.”

III. Investigation

A. Models of investigation

1. Traditional internal investigation
 - a. Assumes client is right
 - b. Casts claimants as opponents, looks for flaws in their stories
 - c. Biased in favor of organization
2. Victim-oriented investigation
 - a. Assumes victim's claims are objectively true
 - b. Main search is for bad actors
 - c. More focus on restitution and restoration than traditional investigation model
3. Trauma-focused, fact-finding investigation
 - a. This is the model that we recommend, believing that it takes the best aspects of both models and avoids jumping to conclusions before investigators gather the facts.
 - b. This model strives for objectivity, tries to avoid conclusions during investigation
 - c. Trauma-focused questioning recognizes that trauma can change how victims process and remember information
 - (i) There are theories that trauma causes physical changes in the brain, but these theories do not have much supporting evidence.
 - (ii) Nevertheless, there is no doubt that trauma affects information processing and recollection.
 - d. The trauma-focused model voids questioning techniques that are combative, might blame the victim, or cause additional trauma
 - e. This model is widely-used in Title IX and law enforcement investigations
 - f. It tries to balance both goals of due process and victim protection, but it errs on the side of protecting victims.
 - g. Trauma-informed is NOT the same as “victim-centered” or “trauma-focused” models that presume truth of allegations without investigation

- (i) Beware of theories, such as “trauma-focused” that began as therapy techniques.
- (ii) Therapists always presume the truth of their clients’ stories. That presumption is required for the therapeutic bond.
- (iii) Therapy techniques do not translate to forensic evaluation and objective investigations.
- h. More information about trauma-informed techniques:
 - (i) <https://resources.whispli.com/blog/how-conduct-trauma-informed-investigation>
 - (ii) <https://www.hklaw.com/-/media/files/insights/publications/2019/07/fairequitabletraumainformed-investigationtraining.pdf?la=en>

B. Considerations for deciding between internal and independent investigations

1. Internal investigations are lawyers’ traditional model
 - a. Client keeps control of all aspects, including who can be interviewed and who is able to see final report
 - b. If managed by attorneys, traditional privileges apply
 - (i) Communications privilege — *Upjohn Co. v. United States*, 449 U.W. 383 (1981)
 - (A) Purpose clearly must be to provide legal advice
 - (B) Privilege belongs to corporation
 - (C) Need to give warnings to interviewees that corporation can waive privilege
 - (D) Practice pointer — best to get signed acknowledgement of these warnings
 - (E) Too much reliance on non-lawyer professionals can waive privilege, *U.S. v. ISS Marine Servs.*, 905 F. Supp.2d 121 (D.D.C. 2012) (privilege waived by use of internal auditor not directed by attorneys).
 - (ii) Work product privilege applies, with usual qualifications
 - (A) Limited to anticipation of litigation
 - (B) Can be overcome by showing of need
 - c. Tightly-controlled communications with Board and C-Suite, little to no communications with stakeholders (bounded by limits of privilege)
 - d. Model works well for low-profile or internal-only questions
 - e. Model lacks credibility for controversial, high-profile or high public interest issues
2. Independent investigations
 - a. More credibility and less client control
 - b. Requires clear agreement with client about who controls the investigation and who will have access to the findings.
 - c. Standards for independent investigations found in other areas of law

- (i) SEC – Seaboard Report
<https://www.sec.gov/litigation/investreport/34-44969.htm>
 - (ii) Investigations of law enforcement misdeeds
E.g., <https://harvardlawreview.org/2015/04/enhancing-accountability-and-trust-with-independent-investigations-of-police-lethal-force/>
- d. Hallmarks:
- (i) Independent investigators
 - (A) At one time, that meant no prior work for client
 - (B) Moving toward recognition that prior familiarity can aid investigation
 - (C) Key is obligation to independent standard (e.g., bar ethics rules), no pre-existing fiduciary obligations. *See, e.g., U.S. v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd on other grounds, U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (investigator owed ethical duties to chief financial officer from prior representation).
 - (ii) Unrestricted access to personnel and documents
 - (iii) Sufficient budget
 - (iv) Clear agreement about limitations of attorney work-product and communications privileges
 - (v) Clear agreement about communications with stakeholders
 - (vi) Clear agreement about how to handle investigative report
 - (A) Control of private and confidential information (e.g., identities)
 - (B) Disclosure to victims, opportunity to challenge facts?
 - (C) Timing of disclosure to Board, C-Suite
 - (D) Timing of disclosure to stakeholders or public
 - (vii) Collaborate with litigation defense when possible, but don't let them control the report

IV. Start Planning Now

- A. Research historic insurance policies
- B. Designate team
 - 1. Executive Manager — internal role, coordinates all internal and external team members
 - 2. Attorney — external role, reviews actions to help organization protect itself in the event of litigation, AND help fulfill organization's mission. Conducts internal/independent investigation if requested.
 - 3. Public Relations contact — internal or external role, manages all media interactions and drafts all public statements.
 - 4. Client/Stakeholder contact — internal role, or external member of attorney's team, manages all relationships with parents and stakeholders.
 - 5. Victim contact — can be the client/stakeholder contact, manages all contacts with victims/accusers

6. Employee/accused contact — internal role or external member of attorney’s team, manages all relationships with employees and accused employee or accused client.
 7. LEO contact — internal or external member of attorney’s team; manages all contacts with law enforcement and agency investigators.
 8. Project Manager — internal role, collects and tracks all documents, records, and employee statements.
- C. Develop Protocols
1. Document Retention
 2. Communications to media, employees, clients
 - a. Limitations on public comment
 - b. Protocols for internal communication
 - c. Preservation protocols for emails

V. Conclusion

There is no one perfect model for every investigation. We have to recognize when our traditional model and lawyer’s tool kit do not work for our client’s particular situation. For highly-contentious situations or those with the potential for significant public scrutiny, independent and objective investigations with trauma-informed interviews offer the best chance of a factual investigation that does not add more trauma. For all situations, we need to assist in our client’s overall mission, not just prepare to defend a lawsuit.