

When Crisis Strikes Law Firms

What to Do, What to Say

Law firms, relying as they do on public trust and the confidence of clients, have every incentive to act when a crisis threatens to damage their reputation and relationships. Advance planning makes sense: an appropriate response in one instance may be disastrous in another.

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In 2007, at a prestigious East Coast law firm, a secretary reports to firm management that a partner has written himself checks from an elderly client's account. The partner explains that he did not steal the money, but that it was earned money that should be shared among the partners. Firm management accepts the explanation, an apology, and repayment of \$77,500 to the firm. The secretary, now resigned, threatens to sue the law firm. The firm brings in outside auditors, who discover the partner has stolen hundreds of thousands of dollars from the firm and clients. He's disbarred and goes to jail. The local newspaper reports the story and now the legal community is "reeling." Crisis over?

Nope. We're just getting started.

Next, three partners resign, one publicly saying he resigned because of the internal handling and investigation of the embezzlement matter. The managing partner steps down, but remains with the firm. The local daily newspaper runs another story, focusing largely on the actions of the former managing partner, "who had a reputation as one of the most trustworthy and dependable lawyers" in the state. Ultimately, the secretary files an ethics complaint against six partners at the firm alleging violations of ethics rules. An investigation ensues and lasts for two years. More news stories. Then the ethics hearing, and then, in 2010, the state supreme court's 35-page order: the six partners violated no ethics rules.

Now it's over.

Bad things happen to good law firms. When an adverse event becomes public, how is the law firm to respond? While few are ever fully prepared to deal with a crisis, more often than not crises are preceded by warning signs or a pattern of activity that suggests something is amiss. Often, however, the red flags are disregarded as anomalies, perfectly explainable, or easily ignored until after the brief is filed, the trial is over, or the deal has closed.

Some may prefer the Cross-That-Bridge-When-We-Come-To-It approach, and certainly that's one option. Even modest amounts of thought and planning in advance of a crisis, though, can be quite useful.

What's on the Line

Lawyers and law firms are expected to be savvy, sophisticated professionals, advocates, and advisors of the highest order. Lawyers counsel their clients through personal and business crises every day and are particularly skilled at doing so. But when lawyers and their law firms find themselves facing their own crises, they are in a particularly awkward position:

if they are the experts, how did this crisis happen?

Law firm crises undermine the most valued asset of the lawyer or law firm—reputation. When reputation is threatened, questioned, or damaged the firm stands to lose clients, employees, and the respect of the bench, bar, and broader community. In short, the continued success of the law firm is on the line.

Crises call into question the fundamental traits that are the hallmark of a lawyer's and law firm's good reputation—competence and trustworthiness.

Take competence: most law firms proudly feature the accomplishments, education, accolades, and victories of their lawyers. After all, the firm is selling the education, experience, and judgment of its attorneys. Indeed, the first rule governing lawyers' professional conduct imposes a duty of competence.¹

The second quality—trustworthiness—is the foundation on which the relationship between lawyer and client (and others) rests. A few bad apples have unfortunately spoiled the barrel for everyone, and so lawyers are stereotyped and often disparaged by the media and the blogosphere-consuming public. We are all too familiar with “lawyer jokes” that question the honesty and integrity of the legal profession.

In determining how best to manage a crisis, the most critical considerations will boil down to this: How are clients and others to be assured that the firm remains competent and trustworthy despite this crisis? Law firms sell the services of the professionals that work there; if their people are perceived to be incompetent or untrustworthy, it is a hard sell indeed.

Responding to Crisis

Firms in crisis often focus on what will be *said*. The answer to that question depends on what is being *done*. When you do the right thing, you can say the right thing.

Investigations

The single greatest mistake of the East Coast law firm mentioned above may have been its failure to undertake a more thorough internal review of the secretary's initial report to firm management.² Failure to engage in a thorough and exhaustive review of the matter made the law firm appear naïve or even complicit. Even the court, though finding no ethics rules violation, observed that management was “too trusting.”³

How much investigation is warranted depends on the nature of the problem and who or what it affects. While law firms may encounter problems that can be thoroughly investigated and managed

internally, some situations require the capabilities of outside experts. The important question for a law firm then is “Who do we need to help us with this problem?”

Thomas Shroyer, CEO of Moss & Barnett, has provided counsel to law firms and accounting firms on variety of matters, including their own internal crises. He says firms need to stand behind their investigations: “The investigation needs to be done authoritatively by an independent expert, so that it is not the firm doing the investigation and thereby at risk for potential blow back that it was not independent.” He adds that investigations should be conducted as quickly as possible so the firm can “get ahead of the curve to take remedial steps that mitigate or eliminate further exposure or risk. Firm management has to be strong and clear, and be prepared to put the full resources of the firm behind the investigation, particularly if the issue involves a partner or owner of the firm who has a lot of clout.”

Gathering accurate facts when time is of the essence can be especially challenging, which is why law firms often seek outside assistance. William Wernz, director of the Office of Professional Responsibility from 1985-1992, points out that when a specific attorney's actions are in question, that attorney is often an unreliable information source. “People will understate facts because they want to protect themselves or they do not believe their actions are a problem. Or, they will overstate the problem because they feel like the worst person in the world for having potentially done something wrong. In either case, distance and objectivity are so important to getting the story straight.” Wernz adds: “All the benefits of the firm doing the right thing—being candid, and making a clean breast of the problem—are lost when it cannot get accurate facts. The firm comes out with information it thinks is correct, only to have to change the story later when the true facts become known.”

Swift, authoritative and responsible action following a thorough investigation not only is the most prudent and effective way to manage the crisis but also allows a law firm to show that it is actively managing the situation. Decisive action timely communicated by a firm can help shift focus away from the crisis and allow the law firm to communicate what it has done to investigate, remedy, and prevent the problem from happening again.

A case of attorney misconduct at Winston & Strawn exemplifies how the right actions allow for the right words. In 1994, Winston & Strawn responded quickly when it learned one of its most

prominent attorneys, Gary Fairchild, was stealing money from the firm. According to the *New York Times*, within an hour of learning of the abuses, the firm had demanded and received the partner's resignation. The firm said that no clients were affected by Fairchild's misdeeds and Fairchild would repay the firm the stolen money. “We got ripped off, and we're getting our money back,” said James Thompson, the managing partner. “[Fairchild's] reputation was that of a model of probity and frugality; that's why we were all stunned. But the money is not the point. When we found he had abused the trust of his partners, he was gone.”⁴

Reporting Obligations

In Minnesota, a law firm in the midst of crisis must consider what, if any, ethical obligations the crisis may trigger for attorneys in the firm. If an attorney has knowledge⁵ that a lawyer's conduct “raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects,” the attorney must report the violation to the Lawyer's Professional Responsibility Board.⁶ Failure to report can subject the attorney to disciplinary action.⁷

While the potential consequences are serious, disciplinary actions against attorneys in Minnesota for failing to report another's misconduct are few, observes Michael Unger, a trial lawyer who is currently vice chair of the Lawyer's Board.⁸ “Under most circumstances,” says Unger, “attorneys are hesitant to report another attorney without that personal, first-hand knowledge of misconduct.” Given the damage that a complaint and investigation can wreak on a lawyer's reputation, “most people really don't like making these reports with anything less than personal knowledge.”

Learning of the attorney's misconduct through the news media will not typically constitute first-hand knowledge of a rule violation triggering the reporting requirement.⁹ When the Office of Lawyers Professional Responsibility learns of misconduct through the media, it has the authority to initiate its own investigation, even in absence of a complaint being filed against the attorney.¹⁰

Protecting Others

A law firm will be judged by professional colleagues, clients and the public based on what was done to protect others from harm or mitigate the damage a crisis causes. If an internal investigation into an adverse event reveals that acts of an employee of the firm or one of its lawyers adversely affected certain persons, the law firm may need to notify these victims.

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If the matter wasn't public before, it could become public as information is disclosed to potential or real victims who then may share the information with others, including the media.

How well the law firm acted to protect others or limit the amount of damage done will impact how the public views the firm and how readily the public will accept and forgive the firm. Here's how one firm described its notice to clients in a statement to the media:

The actions of [the partner] violated all of the values this firm and its employees hold dear. It was the firm that first reported the [situation] by writing to clients before there was any publicity Every client harmed by [this attorney] has been made whole. ...¹¹

Candid communications about impact of the misconduct are received much better than attempts to deny, admit in part, or quasi-apologize. "Many clients are organizations, and being organizations they no doubt themselves have had problems with employees, who, being human beings, sometimes do the wrong the thing," says Wernz. "When attorneys act so beyond the bounds of the law, people understand that it was the individual attorney acting, and not the firm. People just want candor—they don't need all the details, but they do expect candor."

Even if there is no self-disclosure, the attorney's misconduct may become a public matter if there are disciplinary proceedings. While information concerning an ethics complaint or investigation by the Lawyers Board typically remains confidential,¹² and while most discipline cases are private, public disciplinary proceedings and a variety of other circumstances in which the rules allow or require disclosure will bring the matter to light.¹³

Finally, the firm will benefit by informing the public when an attorney's misconduct caused no harm to others outside the firm. In Buffalo, New York, a law firm issued a statement concerning the embezzlement by its bookkeeper, stressing that none of its clients were

ever at risk. The law firm contained the crisis by reassuring its stakeholders that no one but the law firm was harmed.¹⁴

Ensuring Business Continuity

A key consideration in crisis response is business continuity. Most crises cause some disruption to the law firm business but may last for a short period of time or affect a small group of people at the firm. Other crises can be all-consuming and cut to the very heart of the business, such as the dissolution of the firm itself; in such cases, managing the situation becomes the firm's business. While there may be audiences (such as a state bar association) who are interested in information about the crisis, clients and employees are the most critical stakeholders to be addressed to preserve the firm's business continuity.

A law firm's key stakeholders want to understand how a problem may impact them and their relationship with the firm. The objective here is to retain current clients and keep prospective clients feeling positive about the firm. Clients must be assured that business continues as usual and exceptional client service continues to be the most important priority at the firm.

Communications with clients can be in writing where appropriate, or one-on-one and in-person when necessary. Without violating attorney-client privilege and where appropriate, the firm should share with clients what it knows about the situation, what the firm is doing to ensure that client service remains focused and uninterrupted, and what the firm is doing to prevent recurrence of the problem. In the East Coast law firm example, while the law firm was likely not in a position to provide much information, its statement was focused on clients: "We look forward to continuing to serve our clients as economic conditions improve, and to a time when we can discuss the issues surrounding the [] matter publicly."¹⁵

Business continuity likewise depends critically on maintaining productivity of lawyers and other staff during a crisis. The challenge will be to keep employees focused and productive. When employees learn of a crisis from an internal announcement or the media, they natu-

rally need time to process that information—it is their crisis too. The law firm should allow employees to take time to understand the situation and work through the range of emotions that may arise as a result.

Remind employees of the need to continue serving clients during this time, and assure them that as soon as additional information is available, they will be informed. Assure them that business continues as usual, and that their continued performance and dedication at this time is especially important. One large, prestigious law firm sent an email to its employees and all lawyers on the morning of the 9/11 attacks after the Twin Towers had collapsed: "You may go home at this time, but you are expected at your desk tomorrow morning." While the firm might have sent a more nuanced message and adopted a more sensitive tone, given the enormity of the crisis that day, in typical circumstances a message conveying the expectation for continued work would be appropriate.

Involvement of law enforcement in the crisis may limit what may be said or done, in which case law firm communications will likewise be restricted. The firm can still be responsive to its stakeholders by issuing a "Holding Statement," a brief statement of concern and already public facts, even though unable to disclose much substance. Such a statement may also be helpful immediately after a crisis becomes public when the law firm has not yet had time to fully understand the problem, evaluate the impact, and determine its response.

Here is a classic holding statement issued by Allen & Overy after one of its partners was arrested, charged with downloading and distributing child pornography over the Internet:

Everyone has been shocked and appalled by the news that a lawyer in our New York office, Edward De Sear, has been criminally charged by federal prosecutors in Newark, New Jersey, after being arrested at his home. He has resigned from the firm. This is now subject to a federal investigation so we cannot make any further comment.¹⁶

Mistakes to Avoid

Decisions made with best intentions can backfire and cause significant damage to even the most reputable organizations. Paradoxically, what may be appropriate in one situation can be disastrous in another. Each scenario requires its own individual analysis to determine the most appropriate strategy.

■ **Disclosing too much information.** While transparency is an important value, disclosures should be made on a need-to-know basis based on strategic considerations. If the information is not necessary to satisfy regulatory requirements, protect the public, or otherwise achieve communications objectives, don't share it.

■ **Withholding too much information.** In an effort to protect itself, an organization may err in being too tight lipped, which then makes it look evasive, or worse, guilty of something. If the information will inevitably come out anyway, and the stakeholders will feel slighted if they were not the first informed, then disclose it.

■ **Offering "No comment."** Lawyers tend to be somewhat media averse. Offering "no comment," however, can create the appearance of guilt or liability. The damage an unrebutted bad news story can cause to a law firm's reputation is very difficult to repair. Consider any media inquiry an opportunity to shape the story and provide accurate information helpful to the law firm.

■ **Responding to every media call.** Some feel compelled to respond to every media inquiry. There may be, however, a sound, strategic reason to respond to one call and not another. Some media organizations are more credible than others and/or the firm's stakeholders may not be consumers of the particular media organization. Consider the risks and rewards of responding or not.

■ **Not being proactive in responding.** If the firm waits too long after the issue becomes public before communicating to its stakeholders—clients, employees, peers—the prolonged silence becomes deafening, suspicion sets in, or worse, adversaries fill the gap with their own narrative. Swift communication is necessary in a crisis. Even if not all facts have been gathered or can be revealed, a "Holding Statement" can help keep control of the message. A proactive media relations strategy allows a law firm to present its story to the reporter first and select the information to release. But contacting media too soon may break a story that otherwise never would have been published or broadcast.

■ **Being too proactive in responding.** Sometimes the mistake is made of disclosing unfavorable information before its publication is inevitable and despite the absence of any public safety or regulatory disclosure rule requiring public announcement. Being first may be advantageous, but not if the story can be avoided entirely. Communications that explain the crisis and include too little information about what the organization is doing to fix the problem or prevent it recurring are equally problematic. If the firm has not had ample time to work through it, sharing the problem without offering solutions is ineffective and may be harmful.

■ **Ignoring published inaccuracies.** Seeking corrections in a story has never been more important, particularly given digital media and the blogosphere, where inaccuracies may be republished repeatedly. Every Google search of the firm will produce the information that is available and inaccuracies will be repeated by reporters writing subsequent reports. Editors and website administrators may strongly resist a demand for correction once a story has spread. The best chance to correct an erroneous story is when it's first published.

■ **Seeking correction when the inaccuracy is better left alone.** A request for correction can pique reporters' interest in new or additional facts, reviving the story and heading it into a second news cycle. Consider how significant the error is and whether the record can be set straight effectively by a client letter, email to employees, web posting, or other, less public means.

Conclusion

Law firms, like any business, are not immune to crisis. When a law firm is faced with an adverse event, its reputation for trust and competence is jeopardized. Decisive, thorough, and ethically driven decision making can significantly mitigate the damage a crisis causes. While missteps in crisis response are not unusual, there are many opportunities to manage the situation thoughtfully and strategically. ▲

Notes

¹ MRPC 1.1.

² This analysis is based on a series of newspaper articles about this law firm that appeared in the *Portland Herald Press* and the Maine Supreme Judicial Court's 35-page opinion. We readily acknowledge that there may be facts not publicly known that may have significantly impacted the law firm's initial response and investigation.

³ *Board of Overseers of the Bar v. David E. Warren et al.*, No. Bar-10-11 (Me. 12/29/10).

⁴ "A theft scandal ravages a career at a leading American law firm," *New York Times* (05/13/1994).

⁵ See MRPC 1.0 (knowledge is "actual knowledge of the fact in question," which may be "inferred from circumstances").

⁶ See MRPC 8.3 (reporting is mandated only when a lawyer "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects ...").

⁷ Mary L. Galvin, "A Lawyer's Duty to Report Misconduct Under Rule 8.3," *Minnesota Lawyer* (12/03/2001); cf. Wernz, William J., *Minnesota Legal Ethics* (MN State Bar Ass'n., 2010), online at <http://minnesotalawyring.com/> (questioning the strength of the reporting requirement in MRPC Rule 8.3).

⁸ See also "A Lawyer's Duty to Report Misconduct Under Rule 8.3," *supra* at n.5; Edward J. Cleary, "The Obligation to Report and Retaliatory Ethics Complaints," *Bench & Bar of Minn.* 65:4 (Apr. 1998), at 21 ("Seldom will this office seek discipline of an attorney for failing to report another.").

⁹ Craig D. Klausung, "Reporting the Conduct of Others," *Minnesota Lawyer* (03/02/2009).

¹⁰ *Id.* The director must seek the prior approval of the Executive Committee prior to commencing an investigation. See RLPR 8(a).

¹¹ "In law firm inquiry, key questions remain," *The Portland Press Herald* (02/26/2010).

¹² RLPR 20(a).

¹³ See generally RLPR 20.

¹⁴ "Two admit embezzling nearly \$1 million," *BuffaloNews.com* (03/03/2010).

¹⁵ "In law firm inquiry, key questions remain," *The Portland Press Herald* (02/26/2010).

¹⁶ "A&O partner faces child porn charges in the U.S.," *Legalweek.com* (07/15/2011).