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| **NDI** Executive Exchange

Crisis Management

November 10, 2016

Panelists

- **Patricia Diaz Dennis**
Board Member, U.S. Steel and Entravision
- **Chris Hodges**
CEO and Founder, Alpha IR Group
- **Jim Snyder**
President, Global Mobile, LLC
- **Rebecca Wing**
COO and General Counsel/Corporate Secretary, LW Lands, Inc.
- **Moderators:** Beth Boland, David Sanders, Foley & Lardner, LLP

Pre-Crisis Preparation

- What preparation should be done *before* a crisis hits?

Stakeholders

- Who are the stakeholders that need to be contacted and involved when a crisis hits?
- What are their respective roles and responsibilities?

Stakeholders, cont.

- Employees
 - Pre-selected crisis management team
 - Which employees will be involved in helping develop/communicate the message?
 - What are the special issues/sensitivities involved with developing an internal message?
- Investment community
- Media (trade and financial)
- Customers

Stakeholders, cont.

- Suppliers
- Partners
- Regulators
- Governments

Impact of Social Media

- How is crisis management different in the age of social media?

Role of Outside Advisors

- Which outside advisors need to be involved and when?
- When hire an IR firm versus a PR firm?
- When should litigators be involved?

Communications with Outside Advisors

- Importance of maintaining privilege
 - Litigation perspective
 - PR perspective
- Confidential communications with outside counsel for the purpose of soliciting or providing legal advice are generally privileged
 - Including a lawyer on a non-legal communication does not automatically create privilege
 - Including a third party on otherwise privileged communications can waive privilege

Communications with Outside Advisors, Cont.

- Courts Are Split on Whether Communications with Outside PR Consultants Are Privileged.
 - There is no “PR privilege” and courts have required the production of confidential communications with PR consultants.
 - The inclusion of a PR consultant on an otherwise privileged attorney-client communication can even waive privilege.
 - The key question in recent cases analyzing this issue is whether the PR consultant is providing advice for the purpose of helping the lawyers provide legal advice.
 - For example, the Southern District of New York recently rejected an argument that such communications are privileged: “If . . . legal counsel[] involved the public relations firms not as part of his effort to provide legal advice to the University, but as part of an effort to craft announcements which would be more palatable to the media or the public, he was not using the consultants in order to help him as a lawyer, but to help the University as a public institution anticipating a public relations campaign. Under that scenario, sharing otherwise privileged documents with the consultant is a waiver of the attorney-client privilege, and communications directly with the consultant are not privileged at all.” *Waters v. Drake*, 2015 U.S. Dist. LEXIS 164179, at *6-7 (S.D.N.Y. 2015).

Communications with Outside Advisors, Cont.

- Communications with outside PR consultants, cont.
 - Best practices to protect privilege:
 - Outside counsel should retain PR consultants directly
 - Engagement letter should specify that PR consultants are retained to assist in the provision of legal advice
 - Ideally for privilege purposes, the company should retain a different PR consultant than the PR consultant it uses for matters unrelated to the litigation/crisis
 - May be cost-prohibitive or otherwise impractical
 - Communications with PR consultant should go through attorney, and be framed in a way that makes clear that the relevant tasks are material to the actual or anticipated litigation.
 - Bottom line:
 - Follow best practices to bolster case for protection.
 - Assume that communications with PR consultants may be discoverable.

When Litigation Hits...

- What should the company do when litigation hits?
 - Desire to “go dark” may be outweighed by reputational impact from lack of transparency and appearance of secretiveness
- If confronted with potential CEO/C-suite wrongdoing, Board should resist temptation to immediately circle wagons:
 - E.g., “We’ve been confident in the path we’ve taken in the past. But we are taking a careful, hard look at [this new information], and will determine whether that path should change.”

Lessons Learned

- What are the lessons learned from the experience of having lived through corporate crises?
 - Address the court of public opinion
 - Develop and project a “Tone at the Top” of transparency and trust
 - Write down, practice, and update your crisis management plan
 - Have a succession plan for crises that sideline current leadership
 - Identify in advance the internal and external crisis-management team

Lessons Learned, Cont.

- Institute social media controls and strategy
- Limit internal distribution of sensitive materials and information
- Consider the perspectives of all stakeholders—and decide which ones should be invited to join the process
- Don't jump to “circle the wagon” conclusions. Credibility is paramount

Conclusion

- Questions?