

FEATURE ARTICLE

Planning for University Crisis Management

The Seven-Step Approach

by Daniel I. Prywes and Scott Sobel

Good planning will allow good execution in crisis management.

INTRODUCTION

SOONER OR LATER, a public relations (PR) crisis will hit your university. A reputation for integrity, scholarship, and civic-mindedness nurtured over decades can be sundered overnight. Almost always, a crisis will be accompanied by legal risks, sometimes involving large potential liabilities in today's litigious society. To best weather the storm, legal guidance and PR advice—which may be at cross-purposes—will have to be harmonized.

Most often, the nature of the crisis will be unpredictable. It could arise from sexual assaults, shootings or other crimes, controversial speech, misbehaving athletes, academic fraud, medical practices at a university hospital, financial difficulties, or any of the numerous other facets of today's universities, many of which are effectively small cities.

A recent survey of businesses showed that many feel unprepared to manage various types of crises and recognize that they have gaps in their crisis communications and decision-making capabilities (Deloitte 2015). The same is surely true of many universities. But while the exact nature of a crisis may not be foreseeable, preparation is still possible and necessary. Indeed, it is unforgivable in current times not to have a crisis management plan in place. The plan should involve key campus administrators and be practical, easy to activate, and flexible. Regular training is also invaluable.

In this article, we discuss seven basic steps that should be part of most universities' crisis management plan. Of course, there is great diversity among institutions of higher education, so our suggestions may require adaptation to particular circumstances.

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SEVEN-STEP APPROACH TO CRISIS MANAGEMENT

STEP 1: DEVELOP HEALTHY RELATIONSHIPS WITH JOURNALISTS AND FIRST RESPONDERS IN ADVANCE OF ANY CRISIS

As a matter of routine—before any crisis strikes—a university should develop relationships with journalists (local and beyond) who cover the university and who can be expected to cover the inevitable crisis when it hits. Journalists are people, and they will be more receptive to hearing and even accepting the university's viewpoint if they have previously developed a relationship of trust, or at least professional respect, with the university's leadership.

In many cases, a university crisis will also involve local public safety officials—police, fire, ambulance, and other first responders. In the event of a crisis, those officials will have an important role in informing the public. University communications staff should get acquainted with their

counterparts at public safety organizations. Even more importantly, universities should ensure that their security and facility managers have good operational relationships with their first-responder counterparts. The best time to get acquainted and learn coordination is not in the middle of a tornado. Take advantage of calm times to foster the relationships that will be essential in tougher days.

STEP 2: FORM THE CORE CRISIS MANAGEMENT TEAM

Before a crisis strikes, a university should form a crisis management team that includes the core set of campus leaders whose input will likely be needed. At larger universities, this team might include the university president, chief operations officer, general counsel, compliance director, communications officer, dean of students, campus police chief, manager responsible for rape and mental health counseling, athletic director, and risk management officer. Smaller institutions without all these managers should form a smaller team of those with equivalent functional responsibilities.

Every university should arrange in advance for external PR advisors and legal counsel to be on standby if a crisis metastasizes quickly. Such advisors can provide objective perspectives that can be crucial to overcome internal politics and career considerations that can color crisis responses; they can also provide specialized advice depending on the nature of the crisis. It is better to identify and vet potential advisors when that can be done with due deliberation rather than on the fly during a crisis.

Universities should determine the scope of crisis management functions to be placed under the general counsel because legal advice provided by the general counsel based on his or her investigation will often be shielded from disclosure under the attorney-client privilege. In particular, it is important to determine whether PR advisors will report to the general counsel or others because it will sometimes be possible to treat their advice as privileged and confidential—even in

later legal proceedings—if they report to the general counsel and provide advice on the PR implications of various legal strategies.¹ This issue should be investigated before a crisis strikes because the privilege issues relating to attorney communications with PR advisors may be treated differently in different states.

Universities should also identify the physical office space to be used as the “command center” in the event of a crisis and ensure in advance that it has ample connectivity for telecommunications and Internet.

STEP 3: TRAIN THE CORE TEAM AND OTHERS IN CRISIS MANAGEMENT SKILLS

There are PR skills that will be necessary in managing any crisis, and any university action or communication could also have legal ramifications. Training is therefore invaluable. Some institutions even engage in training simulations, so-called “tabletop simulations,” where a mock “crisis” is managed over a period of time.

Here are a few basic training tips:

- » Anyone who will be interacting with journalists or key constituencies should be trained in basic PR skills. Most importantly, university leaders should avoid the temptation early in a crisis to cast blame or assert excuses based on incomplete information, rumors, or speculation. At the same time a university should move as quickly as possible to investigate the facts and disclose those it is confident are accurate. Otherwise, all public statements should be qualified as based on “the facts currently known” in order to preserve credibility if those facts prove wrong. Spokespersons should avoid “no comment” responses or their equivalent and

1 See Beardslee 2009; *Hadjih v. Evenflo Co.*, Civ. No. 10-cv-02435-RBJ-KMT, 2012 U.S. Dist. LEXIS 76100, at *14 (D. Colo. May 31, 2012); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001) (recognizing privilege for communications between PR advisor and in-house and outside counsel that helped counsel provide legal services); Murphy 2005.

instead should reinforce the message that the university is investigating the facts and is determined to act appropriately upon its findings. Comments on criminal matters are best left to law enforcement authorities.

- » While everyone in a university will have an opinion on any crisis, internal discipline from campus managers is vital to ensure that the university as an institution speaks with one voice. Administrators, deans, department chairs, and lower-level managers should be trained to refrain from public comment on controversies and to refer media to the designated university spokespersons.
- » Journalists will try in a variety of ways to extract confidential information about a campus crisis. A university needs to train its managers on how to professionally rebuff media attempts to obtain leaks.
- » The core team should also receive training on basic legal issues likely to be of concern in managing a crisis. Managers need to understand the type of statements that could lead to claims of defamation, the privacy rights of persons involved in a crisis, and the standards of liability for negligence. Some basic training may avert careless comments that can jeopardize a university's legal defenses or lead to defamation or negligence claims. Additional areas of training are discussed below.

STEP 4: IDENTIFY ONE OR MORE MANAGERS TO SERVE AS THE UNIVERSITY'S SPOKESPERSON IN TIMES OF CRISIS AND TRAIN THOSE MANAGERS IN COMMUNICATIONS SKILLS

It is vital for journalists and the public to know who is authorized to speak for the university in any crisis. Inconsistent information can suggest either incompetence or a cover-up. A university should appoint more than one spokesperson because some crises extend over lengthy periods and can exhaust a single individual.

From a PR perspective, the best university spokesperson is one with both clout and a deep knowledge of the relevant facts. That could be a university president or provost whose prominent role can help assure the public that the university takes the controversy seriously. From the legal perspective, however, it is often best to avoid using a high-level administrator as a spokesperson. Even an inadvertent factual error in a statement made by a high-level leader can lead to a harsh public reaction and be harder to disavow in legal proceedings. It could be prudent in some circumstances to bifurcate the PR spokesperson duties between one person who addresses discrete factual issues with legal implications and an upper-echelon administrator who offers more inspirational messages regarding university values and processes.

When a crisis poses significant legal issues, a university may seek to appoint the general counsel as the university spokesperson because of his or her awareness of the legal environment and any potential pitfalls. While such a selection makes sense in many circumstances, universities should understand that attorney spokespersons are subject to ethical rules that limit public, out-of-court statements that could harm the fairness of a judicial proceeding.

The Model Rules of Professional Conduct (American Bar Association 2013) state that a “lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter” (American Bar Association 2013, Model Rule 3.6(a)).

However, some types of attorney statements are clearly permitted. The ethical rules permit an attorney to state to the media “information contained in the public record” and report that “an investigation of a matter is in progress” (American Bar Association 2013, Model Rule 3.6(b)(2, 3)). An

attorney can also provide a “warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest” (American Bar Association 2013, Model Rule 3.6(b)(6)).

In a criminal case, an attorney may also state the identity, residence, and family status of the accused; information necessary to aid in the apprehension of a person; the fact of an arrest; the identity of the investigating or arresting officers or agencies; and the length of the investigation (American Bar Association 2013, Model Rule 3.6(b)(7)).

Significantly, an attorney may also make public statements to rebut misinformation provided by others. The ethical rules provide that “a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client” if the statement is “limited to such information as is necessary to mitigate the recent adverse publicity” (American Bar Association 2013, Model Rule 3.6(c)).

Attorneys should take these ethical rules seriously. In the notorious Duke lacrosse case, the local district attorney was eventually disbarred for misconduct, which included his inflammatory remarks about three indicted lacrosse players.²

STEP 5: TRAIN THE CRISIS MANAGEMENT TEAM TO UNDERSTAND THE TYPES OF INFORMATION THAT CANNOT BE DISCLOSED WITHOUT INFRINGING ON LEGALLY PROTECTED PRIVACY INTERESTS

In many crises, privacy laws may interfere with the ability of universities to exonerate themselves in the court of public opinion. The crisis management team should understand what disclosures these laws allow and disallow.

The information that can be disclosed about students is limited by the federal Family Educational Rights and Privacy Act (FERPA).³ Without parent or student authorization, universities generally may only disclose to the public a student’s “directory information,” which includes only basic information such as the student’s name, address, photograph, date and place of birth, major field of study, dates of attendance, and degrees and awards received. However, under FERPA information about students can be disclosed in certain circumstances:

- » When a student or parent sues a university, the university may disclose a student’s education records “to the court,” but only to the extent that such records are relevant to the university’s defense (34 CFR § 99.31(a)(9)(iii)(B)). Similarly, when a university sues a parent or student, it may disclose to the court those student education records “that are relevant for the [university] to proceed with the legal action as plaintiff” (34 CFR § 99.31(a)(9)(iii)(A)).
- » When campus police prepare records of student arrests or receive complaints of criminal activity, that information may be publicly disclosed (20 U.S.C. § 1232g(a)(4)(B)(ii); 34 CFR § 99.8(d)).
- » FERPA permits a university to disclose the final results of a disciplinary proceeding that determines that a student committed any crime of violence (including forcible sex offenses) or a nonforcible sex offense (such as statutory rape or incest) in violation of the university’s policies (20 U.S.C. § 1232g(b)(6)(B)).
- » FERPA permits a university to disclose education records in connection with a health or safety emergency if the recipient’s knowledge of the information is necessary to protect the health or safety of the student or other individuals (34 CFR § 99.31(a)(10), § 99.36). The U.S. Department of Education has announced that its policy is to “not substitute its judgment” for that of the

² *North Carolina State Bar v. Nifong*, N.C. St. B. Disc. Hearing Comm’n, No. 06 DHC 35, 23 Law. Man. Prof. Conduct 330 (June 16, 2007).

³ Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, 34 C.F.R. Part 99.

university if the university had a rational basis for its determination based on the information available at the time (34 CFR § 99.36(c)). (See Tribbensee 2008.)

Universities often have their own institutional privacy and confidentiality policies, such as those involving faculty, staff, or student discipline. Those policies may also impede a university's ability to exonerate itself publicly. Legal counsel should be prepared to advise the university on whether the protected party has waived confidentiality by making public statements,⁴ whether the university can comment on the controversy on the basis of information gained from other sources (outside the disciplinary process), or whether a university may find other ways to reconcile privacy interests with PR objectives.

STEP 6: TRAIN THE CRISIS MANAGEMENT TEAM TO UNDERSTAND THE TYPES OF INFORMATION THAT MUST BE DISCLOSED UNDER APPLICABLE LAWS

Universities do not have as much freedom as others to control the flow of information, especially about campus crime. It is vital for the crisis management team to understand how required disclosures must be taken into account when responding to a crisis.

The federal Clery Act⁵ requires universities to publicly disclose certain information about crimes on or near campus. In a crisis environment, several of the Act's other requirements are important.

Under the Act, universities must report publicly certain types of crimes (ranging from homicide to liquor law violations) considered to be a threat to students and employees in a manner that is "timely . . . and that will aid in the prevention of similar occurrences" (20 U.S.C. § 1092(f)(3)). Universities

are also required to follow their emergency notification procedures and provide a warning to the university community if there is an immediate threat to the health or safety of students or employees (34 CFR § 668.46(e, g)).

Campus police are required to keep a daily log listing details about each reported crime and the outcome of any complaint (20 U.S.C. § 1092(f)(4)(A); 34 CFR § 668.46(f)(1)). Generally, the log entries must be open to public inspection within two business days.

However, disclosure can be withheld in several circumstances, such as (a) where disclosure would jeopardize the confidentiality of the victim; (b) where there is clear and convincing evidence that disclosure would jeopardize an ongoing criminal investigation or an individual's safety, cause a suspect to flee or evade detection, or result in the destruction of evidence; or (c) the disclosure is prohibited by law (20 U.S.C. § 1092(f)(4)(B)(i, iii); 34 CFR § 668.46(f)(2); 34 CFR § 668.46(f)(3)(i)).

Many public universities must also comply with state "open records" laws, which entitle the public and media to have access to many types of government records. These laws may even apply to campus police departments operated by private universities when campus police are licensed by state authorities.

There is wide variation among the states' open records laws, including different approaches to the interplay between those laws and the student privacy restrictions in FERPA.⁶ University counsel should become familiar with these issues before a crisis strikes.

4 The U.S. Department of Education used an "implied student waiver" rationale when issuing its regulation that permitted universities to disclose education records when sued by a student in court. See 65 Fed. Reg. 41852, 41858 (July 6, 2000); 34 C.F.R. § 99.31(a)(9)(iii)(B).

5 The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f), 34 C.F.R. 668.46.

6 See Kaplin and Lee 2013, 1057–64; McGee-Tubb 2012; Nowadzky 1996 ("there is substantial variance in how each state classified confidential personnel information;" "[i]n most states, these types of records are not open to inspection when disclosure would constitute a violation of the subject's right to privacy").

STEP 7: PLAN YOUR SOCIAL MEDIA STRATEGY

A social media strategy is essential to any crisis management plan. Universities must be prepared to monitor and respond to social media rumors and allegations. They must also be prepared to disseminate their own messages proactively through social media channels. Planning is vital:

- » Before any crisis strikes, every university should identify and catalog the social media sites through which students and other constituencies communicate about issues of concern. These may include websites or blogs of campus organizations, student newspapers, staff organizations, alumni groups, and local community groups.
- » Universities should ensure that communications managers on the crisis management team are savvy in social media and that a social media “rapid response” team is prepared to mobilize when a crisis strikes.
- » Universities should establish their own authorized social media channels and publicize them as such. In the event of a crisis, the campus community and others will recognize that statements on those particular social media channels (whether a website, Facebook page, Twitter feed, etc.) truly speak for the university administration.

The crisis management team should also be trained as to the types of social media activities that are *not* allowed or that involve legal risk. For example, universities should be cautious about accessing a person’s personal social media account (even if it can technically be accessed through a university-run network) without that person’s consent as that may violate federal law⁷ as well as state common-law privacy rights. Many states have enacted laws that limit employers from requesting that their employees provide access to

7 The federal Stored Communications Act, 18 U.S.C. §§ 2701–2712, generally prohibits anyone from obtaining unauthorized access to a person’s private social media account.

their personal social media accounts, and other states are considering such legislation (see National Conference of State Legislatures 2015; Prywes and Valdetero 2013). Some states (such as Arkansas, Illinois, Louisiana, New Hampshire, Oregon, Rhode Island, and Wisconsin) also restrict educational institutions from seeking students’ passwords or access to their social media accounts, and others are considering such legislation.⁸ Public universities must also ensure that any unauthorized review of student or employee records comports with Fourth Amendment protections against warrantless searches.

CONCLUSION

Good planning will allow good execution in crisis management. Without such planning, the race for the hearts and minds of the public may be over before a university leaves the starting block. With the seven steps outlined above, universities should be well prepared to meet the challenge.

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8 See Ark. Code Ann. § 6-60-104 (Social Media Accounts of Current and Prospective Students or Employees); 105 Ill. Comp. Stat. 75/10 (Right to Privacy in the School Setting Act: Prohibited Inquiry); La. Rev. Stat. Ann. § 1954 (Educational Institutions; Prohibited Activities; Exceptions); Or. Rev. Stat. § 326.551(1) (Prohibited Actions Related to Access to Personal Social Media Accounts); R.I. Gen. Laws § 16-103-3 (Social Media Access Requests Prohibited); Wis. Stat. § 995.55(3)(a)(1) (Restrictions on Educational Institution Access to Personal Internet Accounts).

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