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I Hear You Knocking, But You Can't Come In

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A Primer on Crisis Communications

By the time you hear the media knocking on your door, it is too late to develop a crisis communication plan. Keeping the door closed is not an option. What is your plan for addressing media and other inquiries resulting from a catastrophic accident or other event? Media attention to your company and your response to it can shape the impressions potential jurors have of your company and its key employees.

In our hypothetical scenario, a massive explosion occurs in the Millennials First building, leading to a fire, five deaths, ten catastrophic survivor injuries, and property and business interruption losses. For purposes of this paper, it is presumed that in the immediate aftermath of the fire and explosion, certain facts quickly become known to the media, leading to a deluge of inquiries to No Leaks, Inc. from all manner of media outlets, as well as from various regulatory agencies, including the Occupational Health and Safety Administration ("OSHA"), the Consumer Product Safety Commission ("CPSC"), and others. Those facts include:

- Lax cybersecurity at No Leaks, Inc. possibly leading to defect in the valve product
- Questionable controls over design and design reviews
- Questionable quality control processes at No Leaks, Inc., Cast in the Sand, and Gigantor, Inc.

- Failure to notify regulatory agencies immediately upon discovery of the alleged defect
- Issues relating to the adequacy of recall campaign conducted by No Leaks, Inc., upon discovery of the defect, including questions related to No Leaks, Inc.'s tracking of legacy product and the like

No Leaks, Inc. and its parent and sister companies are facing the veritable "60 Minutes Moment" in real time. How they respond will be critical to their ability to weather the storm and, indeed, to their survival.

The focus of this paper will be to outline a rudimentary crisis communication plan for a product manufacturing concern such as the hypothetical No Leaks, Inc. The authors will attempt to provide a framework for such a plan, and also to highlight some of the legal issues to bear in mind when preparing and executing the plan.

FUNDAMENTALS OF CRISIS COMMUNICATION

The Crisis Communication Team

The prudent company will have devoted time to the assembly of a crisis communication team in order to address any significant event that brings with it the threat of litigation, media attention, or both. Careful consideration should be given to who will comprise the members of the team. Almost certainly, senior management should be represented in the person of the CEO. The heads of the major departments or divisions of the company should also be included. For the

manufacturing concern, that would include those in charge of engineering, design, and manufacturing. The company's chief legal officer is a must, as is the company's chief financial officer. Finally, the marketing department should also be represented on the team.

It is important to clearly define the purpose and objectives of the team. This is not a group assembled for the purpose of making legal decisions relative to the crisis at hand, such as whether or not to recall a product or make reports to appropriate regulatory agencies. The purpose of the Crisis Communication Team is just that: Communication, both to the outside world and to the company's own workforce. While there may be overlap between members of the Crisis Communication Team and the team that will be guiding the company's legal response and defense of any ensuing claims, the actions of the Crisis Communication Team will be discoverable in any future litigation. Among the goals of the CCT is to provide clear, truthful communication about an issue of importance. While the chief legal officer may offer counsel on how to offer that communication without prejudicing the company's legal position in any future litigation or the like, the company does not want to be open to criticism in any future litigation that liability concerns drove the CCT.

Identify Company Spokespersons

In a crisis situation, it is important that the company speak with one voice. That individual should be carefully selected with a view to identifying a spokesperson who is knowledgeable, articulate, presentable and a good representative of the company. In addition, at least one (1) backup spokesperson should be selected in the event that the principal spokesperson is unavailable when the crisis arises, or the crisis results

in a prolonged communications scenario where it makes sense to relieve the principal spokesperson from duty from time-to-time.

Train Them!

Your company spokespersons need to be trained as communicators. Nothing plays worse in the media than the proverbial deer in the headlights. This is particularly important if you have no public relations professionals within the company. Remember, this is the person your company will be counting on to interact with reporters, media, and the general public.

For this purpose, consider retaining a professional media trainer and having your spokespersons trained in public speaking, media relations and so on. This may come in the form of a public relations professional or former television reporter or newsperson. This trainer will assist your spokespersons in not only how to present the company's views in various forms of media but also in how to recognize and respond to various interview techniques, "trap" questions, and so on. Comprehensive media training should include mock interview sessions conducted in various scenarios (i.e., friendly versus hostile interviewer, disgruntled customer group, public meeting or hearing, etc.) and videoed so that the spokesperson can see how he or she performs on camera.

Establish Formal Internal Communication Networks

Today, media and instantaneous communication are ubiquitous. There is no excuse for not being capable of being in nearly instant communication with the key people within your organization and outside your organization. Whether it be a group e-mail link, group text, automated telephonic notification, or some combination of some or all of

the above, the ability to have immediate communication between and among all members of the CCT is imperative.[1]

There should also be a similar method of immediate communication with everyone within the organization. Remember, Crisis Communication is not limited to communication with the world outside your organization. In a time of crisis, no matter the size of the company, your employees are also stakeholders who will have legitimate questions and concerns in a time of crisis, those concerns may run as deep, because their livelihoods may be threatened. It is important that the CCT also be prepared to communicate to everyone within the organization as well in order to address those questions and concerns.

Identify and Know Your Audience

The CCT is of little use unless you have identified and know the audience for the message you want communicated. Customers, suppliers, and employees are obvious stakeholders, but consideration must be given to the broader audience. If your product is regulated by some government agency or agencies, they are listening to your message. Does the crisis have criminal implications such as in the case of a large scale food borne illness crisis? Government prosecutors will be paying attention to your company's public statements. Likewise, never underestimate the importance of your employees as the audience. Whatever they hear from the CCT will be repeated by them to innumerable people outside the company.

[1] Understanding, of course, that these written communications may become "admissions" in later legal proceedings.

"No Comment" is Bad Comment: Immediate Response Statements

Depending on the nature of the crisis, the CCT may be called on to respond to media inquiries before it has a full grasp of just what the crisis is. Many times, this will result in the dreaded "No Comment" statement from the company or, worse, a reporter telling his or her audience that the company did not respond to requests for comment or information. No matter how the "No Comment" is phrased, it comes across as though the company is hiding something.

The better course is to have a statement or statements prepared for immediate use that are essentially neutral so as not to be contradicted by information learned later. Some examples might include the following:

- *The company is saddened to learn of this incident, and is initiating an immediate investigation in order to gather all of the facts. Our customers' safety is always foremost in our consideration, and we will issue further statements as more information is learned.*
- *We are aware of the lawsuit and are of course troubled by the allegations. However, as the matter is in suit, it would not be fair to either side to offer further comment until all the facts have been gathered.*
- *We have only just learned of this incident. We have launched an internal investigation, and will issue further statements as we gather the facts. We will also be posting updates to our website. Meanwhile, our thoughts are with everyone impacted by this incident.*

These types of statements can be adjusted to suit the specific circumstance being confronted. They should also be reviewed on a regular basis. Once invoked in response to a particular crisis, they should not be repeated in the context of the same event. Further statements, if any, must always contain some new or updated information.

The flip side of this coin is the BP Oil Spill scenario. Do not be Tony Hayward! Any public comment from the company must be expressed with a tone of concern for anyone outside the company potentially impacted by the crisis. Comments related to the impact of the crisis on the company, its employees, and its bottom line are to be avoided.

Anticipate Crises

Hopefully, you will never have to activate your CCT. However, practice makes perfect. The CCT should meet on a regular, formal basis in order to anticipate crises so as to be ready to respond. In the nature of a Risk Assessment or Failure Modes Effects Analysis, the CCT should brainstorm the various crisis scenarios that may arise through the use of the company's products. In the case of No Leaks, some of the possibilities are obvious: catastrophic gas fires and explosions, or gas leaks leading to building residents being overcome by fumes are just two examples. The CCT should regularly test its readiness to respond to crisis scenarios. Communications systems and protocols should be regularly tested. Contact information for CCT members and stakeholders must be regularly updated and kept current. Designated spokespersons should undergo periodic refresher media training to practice their skills.

Avoid the Ready, Fire, Aim Approach!

Unfortunately, even the best run organizations occasionally face a crisis situation that requires implementation of the CCT. However, before doing anything more than responding to an immediate inquiry, if any, with an Immediate Response Statement, the CCT needs to step back and fully assess the crisis with all known facts. This means looking at the crisis from all angles, including anticipating litigation, addressing such regulatory issues as may exist, gathering all known facts, and getting a handle on the scope of the crisis and affected population. The immediate response statement will give the CCT some time to investigate and assess the crisis so as to tailor the continuing response as needed.

Finalize and Adapt Key Messages

Much like your defense lawyer will develop one or more theories of the case for your defense in litigation, the final step in assessing the crisis should be to identify the two or three key themes to the company's response, and then assure that all future comment from the company include and emphasize some or all of those themes. For example, if the assessment reveals unquestionably that the company has released a defective consumer product into the marketplace that is subject to recall, such themes might include that the company's utmost concern is that no one become injured by it, that the company is fully cooperating and working with the appropriate government agencies, and that the company is making every effort to identify and retrieve all units of the product that have been released.

Once the CCT has assessed the crisis and is prepared to issue further comment beyond the immediate response message, additional public comment or updates should

include emphasis on one or all of those themes. The key here is that, through your well-prepared CCT, you want to assure that your company controls the message heard by the public.

Conduct a Post-Mortem

Hopefully, the post-mortem will not be an actual autopsy of your company! If you have prepared a trained CCT and anticipated potential crises, it will not be. However, in the event your company is required to activate its CCT in response to a crisis, real or perceived, there will be benefit to a post-mortem to examine how well the plan functioned, how to avoid repeating any mistakes as may have occurred, and how to improve your processes.

FUNDAMENTALS OF *POOR* CRISIS COMMUNICATION

Having examined a framework for being well-prepared to address any crisis, it is beneficial to look at the flip side of the coin and examine some things to avoid in any crisis situation.

Ignoring the Crisis

There is nothing to be gained by ignoring a brewing crisis in hopes that it will go unnoticed or simply go away. In the absence of positive, candid communication from your trained CCT, your company will fall victim to rumor mongering and the vagaries of the internet and social media. Likewise, and as expressed above, never assume that you will have time to work out a communications plan if and when the crisis hits. Trying to formulate a plan “on the fly” will result in missteps, ill-prepared corporate spokespersons, and ultimately will lead to someone other than you controlling the message.

Waiting for the Crisis Before Planning for Crisis Communications

If you wait for the crisis to become public knowledge to start planning on how to respond to it, you are so far behind the curve that you will never recover. As stated above, preparedness and anticipation are key. The company that is prepared to immediately address a crisis situation with credible statements and information will control the message and will also develop goodwill with both the media and the general public.

Positive relationships with media outlets are crucial to success in crisis communications. If you take a hostile, uncooperative position with the media, it will be motivated to present the message that it wants the public to hear, i.e., the message that will increase ratings, as opposed to the facts that your company wants the public to hear. Employing a former media member and including him or her in the CCT team can be a valuable investment in this regard.

Assuming the Best

History is filled with examples of companies that chose to ignore a crisis or remain mute in the face of one, assuming that its stellar reputation will carry the day, only to be indicted and convicted in the court of public opinion before all the facts are known. Johnson & Johnson, the manufacturer of Tylenol, is an example of a company that was proactive in its communications in the wake of a crisis: the deaths of several Chicago-area consumers caused by cyanide-tainted Tylenol tablets in the early 1980s. In the immediate aftermath of the deadly poisonings, the company's quick response and actions quite literally allowed it to survive an event which garnered immediate international media attention.

Rather than ignore the crisis or otherwise deny culpability or responsibility, the company worked cooperatively with investigators, regulators, and the media, all while constantly reinforcing two or three central message themes: that the company was likewise horrified by what amounted to random murders, was committed to solving those murders, and was, above-all, committed to protecting the consuming public. Among other things, the company immediately traced the lot numbers of the contaminated product, posted a substantial reward for information leading to the identity of the person or persons who tampered with the product on store shelves, shut down production, recalled all product from store shelves, and embarked on a campaign of media appearances in which spokespersons assured the public that the company would not return product to stores until development and implementation of tamper-resistant packaging of the type that is commonplace today. It also offered all consumers with Tylenol capsules in their homes free replacement with Tylenol tablets, which were not impacted in the poisonings. The end result? Tylenol remains one of the best-selling over the counter pain relievers in the world.

Making the Media Your Enemy

Lately, our news in the United States is rife with stories of a certain chief executive of a certain North American country who is fond of pillorying the media as “fake news” mongers and otherwise unscrupulous characters. Rarely, if ever, has this strategy worked for a company trying to manage the message of a corporate crisis. As noted, above, maintaining friendly, professional relationships with media members built on credibility and honesty will serve a company well in handling any crisis that garners media attention.

Reacting to the Crisis Instead of Controlling the Message

If your company is not fully prepared to manage a crisis and the resultant crisis communications, it will be stuck merely reacting to messages instead of controlling them. In react mode, the company will inevitably deliver mixed messages, which will be parsed by the media to the extent that the company will be made to look as if it is hiding something. That will soon translate into guilt in the court of public opinion.

Trying to Prove How Smart You Are

Part of controlling the message is conveying it in terms that ordinary people can understand. Filling communications with technical language, complicated responses to simple questions, and so on will leave the public confused and likely angry. The attorney portrayed by Denzel Washington in the movie *Philadelphia* often confronted witnesses who used complex scientific jargon by asking them to "Explain it to me like I'm a two year old." Never speak down to your audience, but always remember to communicate the message in clear, understandable terms, avoiding complex technical or industry language.

Don't Forget Your Audience

Remember at all times the audience you are trying to reach most. That may be your customers, the consumers of your product, or it may be government regulators. Whoever the audience is, keep them and your best perception of their needs and interests relative to your crisis in mind as you craft and deliver your message. Seek their feedback on the crisis and the message you are delivering, and make adjustments as needed.

Do Not Be Pollyanna

This goes hand in hand with “Assuming the Best.” You may feel that the facts and science are on your side of the crisis, and thereby discount the value of solid crisis communication. Do not. In any crisis, there will be individuals who will assume the worst of your company, immediately come to judgment, and condemn you to everyone they know. What counts as “reliable” media today is a moving target amounting to anyone with a cell phone and internet access. The prudent company in crisis mode will be out in front of the crisis with factual information conveyed by credible corporate spokespersons who have been trained to deliver and reinforce the message that your company wants delivered and reinforced.

IMPORTANT LEGAL CONSIDERATIONS

In forming your CCT and training your spokespersons, it is important to bear in mind that this very action may become discoverable in later litigation resulting from the crisis. Think of this issue as analogous to a party seeking discovery of pre-suit investigation materials. An examination of the law of just a few states reveals that items like pre-suit investigations and the like are in some circumstances discoverable. It is no stretch to see that discoverability extended to the formation, makeup, and training of a CCT.

For example, on the issue of discoverability of pre-suit investigation materials, Illinois favors the policy of disclosure rather than concealment. *Monier v. Chamberlain*, 66 Ill. App. 2d 472, 484 (3d Dist. 1966). However, the production of pretrial investigation

materials may be exempt from discovery if the materials are privileged against disclosure under Ill. S. Ct. R. 201(b)(2), which states:

> All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.

Ill. S. Ct. R. 201(b)(2). The burden of showing facts to assert such privilege lies with the party claiming the exemption. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 119 (1982).

The Attorney-Client Privilege could be invoked should a company involve its counsel in the development and implementation of a CCT. To successfully invoke the privilege, the claimant must prove that the communication originated in confidence that it would not be disclosed, that the communication was made to an attorney acting in his legal capacity for the purpose of securing legal services or advice, and that the communication remained confidential. *Consolidation Coal*, 89 Ill. 2d at 119. Core or opinion work product consists of materials generated in preparation for litigation which reveal the opinions, mental impressions, or trial strategy of an attorney. *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 196 (1991). Such work product is subject to discovery upon showing impossibility of securing similar information from other sources. *Id*.

Generally in-house or general counsel offers the same attorney client privilege as any other attorney would. For the attorney client privilege to apply the communication must be made for the purpose of seeking, obtaining, or providing legal assistance.

Restatement, The Law Governing Lawyers § 118. “For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice.” *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 743 (2009).

Documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice.” *Pacamor Bearings Inc. v. Minebea Co.*, 918 F. Supp. 491, 511 (D.N.H. 1996). **Therefore, a “corporation cannot be permitted to insulate its files from discovery simply by sending a ‘cc’ to in-house counsel.”** *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163 (E.D.N.Y. 1994). **Similarly, “the mere fact that an attorney attended a meeting does not render everything said or done at that meeting privileged.”** *Miner v. Kendall*, 1997 WL 695587 (D. Kan. 1997).

The attorney client privilege and work product doctrine apply to keep confidential communications made within a tripartite insured-insurer-counsel relationship. Although the attorney client privilege is typically waived upon disclosure to a third party, insured and insurers can be protected by the “joint defense” or “common interest” doctrines for protection. *See U.S. v. Schwimmer*, 892 F.2d 237, (2nd Cir. 1989)(“The joint defense privilege, more properly identified as the ‘common interest rule’….serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. Only those communications made in the course of an ongoing common enterprise and intended to further enterprise are protected….[It is] unnecessary that there be actual litigation in progress for the common interest rule of the

attorney-client privilege to apply….Neither is it necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney"). citing *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir.1989); *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.), *cert. denied*, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985); *Matter of Bevill, Bresler & Schulman Asset Management Corp*., 805 F.2d 120 (3d Cir.1986); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir.1987), *vacated in part on other grounds*, 842 F.2d 1135 (9th Cir.1988) (en banc), *aff'd in part and vacated in part on other grounds*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989); *Matter of Grand Jury Subpoena*, 406 F.Supp. 381 (S.D.N.Y.1975); cf. *Hunydee v. United States*, 355 F.2d 183 (9th Cir.1965).

In the corporate context, when there are a large number of employees, the scope of attorney-client privilege may be so great as to interfere with the general duty to disclose. *Consolidation Coal*, 89 Ill. 2d at 118. Illinois courts have therefore followed the control-group test to balance promoting discovery of relevant factual material with protecting client interactions with counsel throughout the investigation of incidents. *Id*. at 118-19. An employee is in a control group and therefore a "client" for the purposes of attorney-client privilege if the top management would not make decisions without his advice or opinion, and if his opinion in fact forms the basis of any final decision by those with authority within the corporation. *Id*.

On some occasions, the Rule 201(b)(2) privilege exemption attaches to communications between a client and someone who is not an attorney. *Exline v. Exline*, 277 Ill. App. 3d 10, 12 (2d Dist. 1995). Consulting experts' investigation materials are privileged from disclosure to the extent that such materials reveal the experts' thought

processes. *Neuswanger v. Ikegai Am. Corp*., 221 Ill. App. 3d 280, 286 (3d Dist. 1991). However, all other portions of the investigation materials that do not reveal such thought processes are discoverable and not exempt from discovery. *Id*.

Further, the communication between an insured and an insurer is privileged communication, as Illinois law has established that, when the insurer is under an obligation to defend the insured, the communication is protected. *Exline*, 277 Ill. App. 3d at 12. To exercise this privilege, one must establish "(1) the insured's identity, (2) the insurance carrier's identity, (3) the insurance carrier's duty to defend the insured, and (4) that a communication was made between the insured and an agent of the insurance carrier." *Id*. If such communication occurs during the investigation of an incident, discovery of the communication is prohibited. *Id.* Indeed, statements made from an insured to the investigator for the insurer are privileged and not discoverable at the pretrial stage of litigation. *People v. Ryan*, 30 Ill. 2d 456, 461 (1964); *Claxton v. Thackston*, 201 Ill. App. 3d 232, 234-36 (1st Dist. 1990). Along these lines, Illinois courts do not distinguish between the statements made by a party to his insurance company and statements made by a non-party or disinterested witness to the insurance company, as long as the four requirements to exercise the privilege are established. *Jost v. Hill*, 51 Ill. App. 2d 430, 439 (5th Dist. 1964). However, said non-parties or disinterested witnesses could still be questioned about the facts underlying the incident. *Claxton*, 201 Ill. App. 3d at 237-38.

Just three state – Illinois, Indiana, and Missouri – recognize an insurer-insured privilege protecting the confidentiality of pre-suit investigations. *People v. Ryan*, 30 Ill.2d 456, 197 N.E.2d 15 (Ill. 1964)(privilege applies where insurer is defending or participating

in the defense of the insured); *Richey v. Chappell*, 594 N.E.2d 443, 447 (Ind. 1992); *State ex rel. Cain v. Barker*, 540 S.W.2d 50 (Mo. 1976) (privilege applies where the insured has a contractual obligation to promptly report incidents and the insurer is obligated to defend).

No federal court recognizes an insurer-insured privilege. *See Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000) ("Federal courts have never recognized an insured-insurer privilege as such.") (quoting *Linde Thomson Langworthy Kohn & VanDyke*, *P.C. v. Resolution Trust Corp*., 5 F.3d 1508 (D.C. Cir. 1993) (internal quotations omitted)).

"So long as the interests of the insurer and the insured coincide, they are both the clients of the defense attorney and the defense attorney's fiduciary duty runs to both the insurer and the insured." *Nat'l Union Fire Ins. Co. v. Stites Prof'l Law Corp*., 235 Cal. App. 3d 1718, 1727 (Cal. Ct. App. 1991). See also *N. River Ins. v. Phila. Reinsurance Corp*., 797 F. Supp. 363, 366 (D.N.J. 1992) ("The [joint defense] doctrine has been recognized in the insured/insurer context when counsel has been retained or paid for by the insurer, and allows either party to obtain attorney-client communications related to the underlying facts giving rise to the claims, because the interests of the insured and insurer in defeating the third-party claim against the insured are so close that 'no reasonable expectation of confidentiality is said to exist.'") (citations omitted)); 81 Am. Jur. 2d Witnesses § 434 (2004) ("When an insurer, as required by its contract of insurance, employs counsel to defend its insured, any communication with the lawyer concerning the handling of the claim against the insured is necessarily a matter of common interest to both the insured and the insurer, and the attorney-client privilege is inapplicable.").

To ensure that the joint defense and common interest rule doctrines apply, insurers and insureds should ensure that they are acting as partners in a single, unified litigation strategy. Reimbursement for litigation costs, in some states, is not enough to protection communications between insurers and insureds. *See In re Pfizer Inc. Sec. Litig*., 90 CIV. 1260 (SS), 1993 WL 561125, at 8 (S.D.N.Y. Dec. 23, 1993).

If written or recorded statements were taken during the investigation of an incident, and the person attempting to prevent pretrial discovery of any such statements can prove that the statements are privileged as attorney-client or insurer-insured communication, discovery of the statement is prohibited. *Exline*, 277 Ill. App. 3d at 12 (wherein the recorded statement given by the insured plaintiff to the insurer's employee during the investigation of a claim was a privileged communication protected from discovery under Ill. S. Ct. R. 201(b)(2)); *Koch v. Miller*, 49 Ill. App. 2d 251, 257 (5th Dist. 1964) (the court held that a written statement signed by the insured on the back of an accident report regarding an auto collision was privileged against discovery because the report and statements were given to the insurance adjuster as an agent to be made available to an attorney that may have been selected to defend any action brought against the insured); *Ryan*, 30 Ill. 2d at 461 (the Illinois Supreme Court held that the written statement made by an insured to the investigator of the insurance company, which was later placed in the insurance file and given to an attorney who was defending the insured on criminal charges, retained its privilege); *Claxton*, 201 Ill. App. 3d at 237-38 (the written statement made by the director of the employer to the employer's insurer was not privileged against discovery because the director was not part of the corporate control group; however, had the director been a member of the control group, he would not have had to disclose

the statements otherwise covered by attorney-client privilege simply because he actually witnessed the incident at issue). Otherwise, such statements are generally discoverable.

Federal Rule 26 governs discovery in federal courts and states that written or recorded statements taken during investigation are only discoverable if a party can show a "substantial need" and lack of the ability to obtain "substantial equivalent[s] by other means". F.R.C.P.26(b)(3). Most state courts have a parallel procedural rule. *See, e.g.,* Iowa R. Civ. P. 1.503(3). However, some states allow broader discovery of witness statements. *See Coito v. Superior Court*, 54 Cal. 4th 480 (2012).

The point here is that the creation and implementation of a CCT may itself be discoverable. As such, care should be taken to assure that nothing in the planning or training documentation be written that could be construed as an effort to communicate false or misleading information, to save the company's image, or to do anything other than have in place a plan to offer factual, truthful information and communications in the event of some unforeseen crisis involving the company or its products.

CONCLUSION

The company that devotes time and resources to developing and training a crisis communications plan will be well prepared to confront and respond to any crisis that may arise, and to provide factual, credible information to the its customers, government regulators, and the public at large. That preparedness will be invaluable to the company surviving and overcoming the crisis.

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