



AAPA Port Legal Issues Workshop

February 22, 2018

Houston, Texas

**Role of the Attorney in
Emergency Preparation and Response**

By Debra Tsuchiyama Baker



Roles of Attorney In Emergency Preparation and Response

- **Before** an Emergency
- **During** an Emergency
- **After** an Emergency

Before An Emergency – Attorney’s Review of Emergency Response Plans

Attorneys are critical to making sure that the best possible crisis/emergency management plan is in place for their organization.

- Does your organization have a written plan?
- Is it usable? Implementable? Accurate?
- Do your employees know where it is?
- Is it up to date? What is the protocol for updating/refreshing?
- Has a legal review of potentially problematic language been conducted?

Before an Emergency – Attorney’s Review of Emergency Response Plans – cont’d

- How will it be used in an emergency?
- How do you know it works?
- Is it ready to be discovered in litigation?
- Does it contain “shalls” and “musts” that likely cannot be complied with in an emergency situation?
- Is it consistent with Mission Statements? Other pronouncements?

Before An Emergency – Language Examples Identified By Attorney Review:

- “Level X Incidents pose major threats to life, health or the environment”
- “Utilizing resources effectively can minimize exposure, but cost effectiveness of using resources must be considered.”
- “If handled improperly, these products can cause extremely serious health impacts and pose threats to the community.”
- “Always” and “shall.”

Before An Emergency: Attorney's Role in Testing of Crisis Management Plan – Privilege Protections

- **TEST** responsiveness in the form of a real time exercise or drill tailored and designed to test desired target areas or company-wide response as a whole.
- **EVALUATE** emergency response policies, plans and company-wide procedures.
- **REVIEW** the response and identify potential areas needing improvement and review lessons learned.
- **RETRAIN** refresh and update as a result of results.

Before An Emergency – What Legal Departments Can Do to Test Emergency Preparedness *before* an Accident Occurs

Real Time Simulations Under Legal Privilege

- Simulate significant incident in real-time situations.
- Some are planned exercises – others may be random with little warning to participants.

Before An Emergency – What Legal Departments Can Do to Test Emergency Preparedness *before* an Accident Occurs

Scenario Parameters Conducted Under Privilege

- Can design with inside input
- Can span geographically separated facilities/departments
- Exercise control team provides “inputs” through various stimuli

Before An Emergency – What Legal Departments Can Do to Test Emergency Preparedness *before* an Accident

- Timed stimuli of various media to groups (phone calls, emails, press releases, news reports, social media postings, governmental inquiries, etc.)
- Multiple stimuli and simulate real-time disaster scenario
- Simulated communications/demands
- Legal issues put into play
- Communications Modules – Unanticipated input

Before An Emergency – What Legal Departments Can Do to Test Emergency Preparedness *before* an Accident

TABLE TOP EXERCISE UNDER PRIVILEGE

- Working session or run-through of a potential scenario
- Test an aspect of a plan or response (i.e., developing press statements, responding to social media, finding/implementing company plans/procedures in real time)
- Role playing with a fact pattern to discern familiarity with plans, policies, procedures

Walk Through

- Discussion-based exercise with a potential scenario or focused module
- Series of questions and answers of team to determine whether response is appropriate in circumstance

Notification Exercise

- Check contact numbers
- Exercise to determine whether key players can be reached quickly
- If not, what is plan B to account for absence of decision makers in crisis

Before An Emergency – Attorney’s Privileged Review of Drills and Lessons Learned

- Compile data, response results and conclusions regarding findings
- Time allotted post-exercise for review and discussion of issues identified and lessons learned
- Address opportunities for improvement
- Identify issues for further consideration
- Demonstrate company’s proactive approach to negate later potential allegations of negligence or negligent management/training

Before An Emergency – Attorney’s Privileged Review of Drills and Recommendations for Next Steps

- Require Retraining as Needed
- Assist with Training Modules – Review Training Modules for Legal Issues/Language
- Bring in Outside Experts to assist with training/education
- Identify/retain experts in advance for various areas that could be implicated

Before An Emergency – Legal Coordination With Risk Management

- Review Insurance
- Assess for proper scope and coverage
- Update to include new risks identified

Before An Emergency – Attorney Development of Advance Rapport with Regulators

- Pro-active in-house counsel can foster relationships with industry regulators/responders
- Pre-existing relationship can facilitate collaboration/joint work on press releases
- Help ensure that key messages are developed in advance and reflect business core values
- Dark website at the ready

Before An Emergency – Attorney Preparation of Template Documents

- Template for Press Release
- Template for litigation hold order
- Template for regulatory notifications
- Template for statement from Leadership

Before An Emergency – Attorney’s Advice Regarding Employee Social Media

- Does the company have a social media policy and should they? What are guidelines of whether employees can access social media channels during working hours
- What is the policy on posting photographs or video on company premises or in course of employment?
- What is the policy on employees posting comments on social media sites relating to their work for the company or senior executives, supervisors or colleagues?
- Advice to company regarding dissemination of information from employees, posting information on social media and engaging in on-line discussions about an emergency event

During An Emergency – Attorney’s Role in Coordination

- Coordinate legal strategy, public relations and communications strategies
- Part of cross-functional team in crisis management
- Significant role in ensuring that communications to internal and external stakeholders is consistent with organizational policies and interests
- Review Media Statements to ensure accuracy and proper tone/coordinate with communications/public affairs to formulate accurate and timely responses to public, regulators and stakeholders

During An Emergency – Attorney’s Role in Interfacing With Other Departments/Teams

- Interface
 - Regulators
 - Government
 - Claims
 - Operating
 - Media
 - Response Team
 - Company Leadership

During An Emergency – Provision of Legal Advice and Preserving Privilege/Evidence

- Legal advice (assess legal issues and preserve privilege over investigation and response)
- Investigation/retention of outside counsel
- Evidence preservation (Preservation of Records/Hold Orders)
- Defense (TRO, injunctions)
- Interface
 - Regulators
 - Government
 - Claims
 - Operating
 - Media

During An Emergency – Provision of Legal Support from the Office

- Identify strategies to protect against potential litigation and claims
- Assist in claims handling, documentation, evaluation
- Compilation of evidence, media clippings, news stories that will be seen by potential jury pool

During An Emergency – Provision of Legal Support from the Field

- Identify witnesses/evidence
- Interaction with regulators
- Set boundaries on persons approaching company employees/contractors/responders
- Assist company employees at scene with regard to proper communications/availability to third parties
- Potential reporting to law or board outside the channels of emergency response teams
- Represent company in face of TRO/sheriff instructions regarding response actions versus preservation of evidence
- Assist with emergency contracting/authorization in field

After An Emergency – Attorney’s Role and Privilege Considerations in Post-Incident Review and Lessons Learned

- Post-incident review issues regarding evaluation of overall response to emergency
- Consideration of long-term consequences of emergency and devise strategy to address
- Attention to lessons learned and path forward
- Attention and recommendations for re-training
- Internal investigation considerations
- Reporting to the leadership team