

# CORPORATE LEGAL TIMES

## When General Counsel Become Image-Makers

### In-House Counsel Offer Advice On Keeping Companies Squeaky Clean

BY AMY I. STICKEL

THE CORPORATION and its officers have earned a starring role lately in America as the Bad Guy. It's a script in-house counsel have been forced to memorize, complete with corrupt CEOs, accounting scandals, plummeting stock prices and restated earnings. And Congress and regulators have been only too happy to put on their white hats and ride in to rescue widows, orphans and the rest of the shareholding (and voting) public.

The problems have been well-documented. And there has been quite a bit of talk about how in-house counsel can guide their company through the perils of Sarbanes-Oxley and corporate governance. But even better than cleaning up a mess is keeping one from happening in the first place. And the legal department can have a big impact in that arena.

At a recent Martindale-Hubbell Counsel To Counsel forum in Dallas, general counsel and law firm lawyers met to discuss how to keep their companies from being branded the next Enron or WorldCom. Participants at the forum, "How the Legal Function Protects Corporate Image," discussed ways to prepare for a crises, deal with them after they happen and ensure they don't happen again.

#### Good Citizens

The greatest nightmare for many in-house counsel is when smart employees do stupid things. And it's a nightmare that plagues every company, large and small, in every industry.

For Carol Jablonski, manager of national

### COUNSEL SESSIONS

litigation and IP at Electronic Data Systems Corp. (EDS) in Plano, Texas, her crisis scenario involved a corrupt subsidiary.

While conducting an internal audit several years ago, the company discovered that employees at a subsidiary in New York had been creating fake documentation and using it to fraudulently obtain significant sums of money from a number of states.

"And that was, needless to say, a horrible feeling for everybody who knew about it," she told participants. "The worst-case scenario was that the corporation could face criminal liability for the actions of its employees."

For the legal department, which had recently engaged in crisis-management training, the key was to be proactive.

"We made the decision to disclose the findings to the government as soon as possible," she said. That included full disclosure to the U.S. Attorney's office in the Southern District of New York and government officials in other states. The legal department hired a high-profile law firm and a large accounting firm to do a forensic audit.

EDS also worked with the U.S. Attorney's office to ensure the company's actions of disclosure were forthright and to communicate the company's actions in discovering and disclosing the wrongdoing. Unfortunately, when the news reported nearly a dozen EDS employees had been indicted, there wasn't a word about the company's cooperation in finding and disclosing the wrongdoing.

EDS's PR department was ready for the onslaught, and it worked with the U.S. Attorney's office to help get the word out

about the company's cooperation. For the lawyers involved, that forthrightness wasn't necessarily the easiest choice.

"Lawyers are accustomed to preserving confidences of their clients," she said. "But the fact of the matter is, if you choose not to disclose, it will only be worse when the matter becomes public later. And frankly, in the legal department and the upper levels of corporate management, we really believed that if we wanted to be an ethical corporation and a good citizen, we needed to take these actions."

#### Saving Lives

For other general counsel, the issue can actually be one of life and death. And that's a chance J.C. Penney Co. Inc. doesn't want to take.

### C2C Forum At a Glance:

#### "How The Legal Function Protects Corporate Image" • Dallas, Texas

##### Co-Chairs:

- > **Tom Sabatino**, Baxter International Inc.
- > **Carol Jablonski**, Electronic Data Systems Corp.
- > **Michael Hoffman**, VarTec Telecom Inc.

##### Law Firm Co-Hosts:

- > **Robin Hartmann**, Haynes and Boone
- > **Tom Harris**, Haynes and Boone
- > **Robert Latham**, Jackson Walker
- > **Byron Egan**, Jackson Walker
- > **Arlene Steinfeld**, Thompson & Knight
- > **James Peacock III**, Thompson & Knight

##### Facilitator:

- > **Deborah McMurray**, Deborah McMurray Associates

Eugene McGreal, deputy general counsel of Texas-based Penney, told fellow panelists he believes in the approach Johnson & Johnson took with the Tylenol–cyanide incident in 1982: If there’s an issue that impacts the safety of consumers, make it public immediately.

Since Penney doesn’t manufacture any of its own products, it has to work with its vendors when it uncovers a problem. But sometimes, the vendors are reluctant to disclose a problem to the U.S. Consumer Product Safety Commission (CPSC). In that case, Penney will consider going to the commission on its own if the circumstances warrant such action.

“The [CPSC] appreciates that, because especially with the children or babies any accident can be horrific,” he said. “You want to jump on those quickly.”

Despite its massive operations (more than 1,000 stores nationwide), Penney’s centralized customer-service unit can track troubling trends quickly.

And while children do get themselves into sometimes–deadly situations with toys and equipment, the healthcare industry sees many more life and death situations.

As vice president, legal affairs and general counsel of Seton Healthcare Network, Michael Regier often has to deal with life and death issues as part of his job. One situation at Seton—a Catholic non-profit healthcare network in Austin, Texas—involved the life of children and the death of pigeons.

Regier described how a nurse at Seton’s children’s hospital became suspicious that one of her colleagues was intentionally overdosing patients with narcotics. Officials immediately relieved the nurse of her duties, and, after quickly reviewing a week of charts and records from that nurse’s shift, realized they had a potential crisis on their hands.

Further review suggested the nurse may have overdosed 20 children in a six-month period. In addition to proactively informing all the parents of the affected children, Seton had to notify the police and file a report with the body that governs nurses—either of which could have leaked the information to the press.

“We knew that this was going to be huge news in our community and our region,” Regier said. “We also preplanned a press conference. We did communications that were scripted for all the different publics that we have: our board of trustees, the boards of trustees of our fundraising organizations and our employees internally.”



(Clockwise from top left): **Dwight Dumler**, assistant general counsel of Rent-a-Center Inc.; **Carol Jablonski**, manager, national litigation and intellectual property at EDS; **Jay Johnson**, vice president and assistant general counsel of Texas Instruments; **Steffen Horlacher**, an attorney with American Airlines Inc.; **Richard Mathews**, deputy general counsel of the Boy Scouts of America; and **Mark Weintrub**, vice president, administration and general counsel of Isotag Technology Inc.

Seton set up a 24-hour, seven-day-a-week hotline staffed with nurses and then waited for the first phone call from the media. But when it came, it wasn’t what Regier or anyone else had prepared for: Instead of questions about the nurse who was poisoning children, the media wanted to know why Seton’s grounds crew was slaughtering pigeons.

It turned out, in an attempt to solve a pigeon problem, workers had used a medicated food intended to make the birds ill so

they would settle elsewhere. Instead, the poisoned food killed them.

“We were waiting for the media to talk about a possible angel of death operating in a hospital. And here’s the animal-rescue folks who want to go and rescue the little baby pigeons who have been orphaned by the Catholic hospital,” he recalled with a laugh. And when the media did pick up on the story, Seton was able to get in front of it and proactively provide information.

Regier credited crisis-management train-

ing for helping them prepare for the situation. In fact, none of the families of the children who were overdosed ever filed a suit against the hospital.

But besides the fallout from the pigeon situation, Seton had to deal with another unexpected situation. When the Texas Department of Health launched an inspection following the situation with the nurse, it found significant problems with the way the pharmacy and nursing staff at the children's hospital were documenting the use and disposal of controlled substances—all of which could have resulted in Medicare pulling its funding.

“There was a second crisis that was created as a result of the first crisis and the proactive disclosures that we made that we had not anticipated,” he said. “We then had to manage and correct that, and we did so successfully.”

## A New Course

As Jablonski at EDS learned, doing the right thing is often most important—even if that may be difficult for lawyers who are looking to protect their clients from legal exposure.

It was a lesson echoed by Tom Sabatino, senior vice president and general counsel of Baxter International Inc.

“Don't just protect the company,” he told participants. “Do what is right. Obviously, this presumes you know what the right thing is. Sometimes the optimal course of action from a litigation perspective may be at odds with maintaining relationships with key stakeholders and preserving your reputation. You have to have lawyers that are comfortable with balancing these competing needs.”

And sometimes getting the lawyers publicly involved isn't the best course of action to protect the company image. Many people see lawyers as hired guns, willing to say or do anything. As such, lawyers don't always make the best spokespeople, many participants agreed.

Participants also agreed that learning from others' mistakes goes a long way toward heading off problems. Reading the newspapers and imagining how a similar situation could apply at your organization is a start.

“Some weeks after our pigeon fiasco, I read in the newspaper about a pigeon-kill at the new Denver airport that was attributed to the use of the medicated food we had used,” Regier said. “If management at the Denver airport had read about our experience, they might have known not to use the same pigeon feed.” ◀

## Baxter's Response To The Unexpected: Be Prepared

Baxter International Inc., a global healthcare products manufacturer, considers threats a normal part of business—not a sign of failure.

Being prepared is key to dealing with threats, and Baxter has called upon its legal department to serve as leaders in that area, said Tom Sabatino, senior vice president and general counsel of the Illinois-based company.

Baxter has 10 threat-management teams that cover each business unit and region. The teams include in-house lawyers, as well as experts from human resources, IT, communications, quality, marketing, supply chain, finance and environmental health and safety.

The legal team leader on each team has several responsibilities, including:

- > Guiding the team on legal aspects of response strategies, including collection and protection of evidence
- > Ensuring regulatory compliance during the resolution of the emergency
- > Taking appropriate actions to minimize liability
- > Maintaining and directing outside legal services
- > Working with communications team to ensure the internal and external statements don't create unintended legal risk or exposure
- > Working with government affairs to assess and develop the need for political contacts and support

Sabatino warned there also are some disadvantages to having a lawyer on the team.

“Lawyers make good threat-management leaders because of their ability to manage complex processes,” he said. “The flip side of that is they have this inherent desire to protect, and there is a natural tendency not to tell anybody anything.”



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