

Cassels

Quarterbacking a Crisis

Jeremy Martin

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With Super Bowl LII looming this weekend, it seemed an apt time to reflect on the role of external counsel 'quarterbacking' a crisis response in the product liability realm.

In some cases, manufacturers with a deep, veteran legal department can (and do!) manage their own crisis response with the benefit of specialized teams and integrated corporate resources like insurance personnel, a PR department and employee relations staff. External counsel, to the extent they are required at all, can provide some of the heavy lifting of client-directed regulatory response and, if necessary, litigation.

In other cases, though, external counsel are relied upon to provide guidance not only in staffing the client's needs, but in *identifying* them. Among many other things, external counsel are relied upon for our network of contacts and our knowledge of the multifaceted procedure a manufacturer is required to follow in as short a time as 48 hours after the report of a product failure.

There are a number of support teams external counsel are typically asked to muster for a client in the midst of a potential advisory or recall situation:

- **Regulatory counsel.** In most cases, product liability litigators work hand-in-glove with pure regulatory counsel to rapidly determine the applicable standards and industry regulators that require a response; the information they most urgently require; and, perhaps most importantly, the response timeline to expect from a regulator that may not perceive the incident to be quite as urgent as the client does.
- **PR professionals.** While lawyers tend to consider themselves masters of the mot juste, any product liability lawyer worth her salt will have a shortlist of recommended PR teams to respond to a potential product advisory or recall. These teams are crucial, not only in terms of seamlessly crafting a compelling message alongside counsel, but for tangible services lawyers cannot – or do not think to – provide.
- **Insurance coverage counsel.** At a time when the client has many more questions than answers, there are almost always tricky questions of product- or general-liability coverage at stake. These questions need to be answered quickly, and those answers sometimes deviate from the plain language of a policy. Expert assistance at the outset can be invaluable.
- **Cross-border counsel.** It is a given now that our clients will generally market their products beyond North America and Europe. External counsel's battle-forged relationships with their counterparts on every continent can be an excellent shortcut to an extended RFP process that can jeopardize the timeliness of an overseas regulatory response.

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- **Independent expert analysis.** As a product liability matter matures, the need for an independent assessment of the incident(s) grows. Independent experts can provide a useful outsider perspective, and – if retained by counsel – their work can be litigation-privileged, provided they undertake not to testify.

Every case is different, but these pieces are generally set into motion right from the snap, in the early days of a product liability file. Particularly since counsel can provide the benefit of privileged communications with these team members, it is often worthwhile to make inquiries of counsel at the outset as to just how broad their crisis response capabilities might be.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.