



What Keeps Directors Up at Night?

Brad Vynalek, Partner

June 20, 2018



Quarles & Brady LLP

Reputational Damage - #1



- No "undo" or "pause" button
- Headlines/PR/inability for control of the narrative
- Have diversity, cultural and unconscious bias trainings
- Have procedures in place to avoid incidents
- Take accountability and respond appropriately



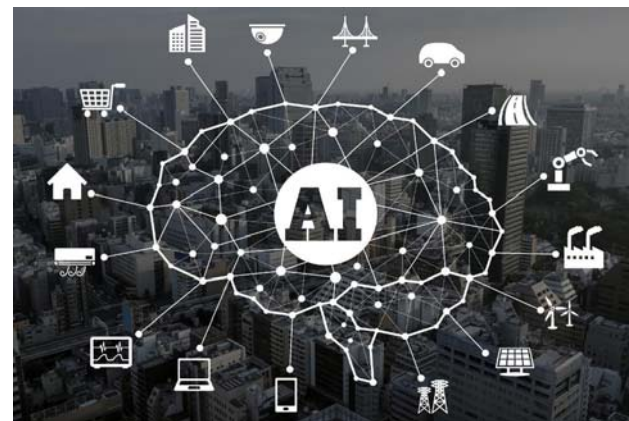
Tension Between Innovation and Regulation

- How to balance the interaction between innovation and regulation
 - Too much: Is innovation stifled? Or does it help innovation?
 - Not enough: What are the consequences?
 - Legal consequences – uncharted territory
 - Public Policy Initiative: Defense and Offense



The Brave New World - Artificial Intelligence

- Artificial intelligence will impact all aspects of society, including: economic, political, mobility, healthcare, security and defense, and the environment.
 - AI is projected to increase profitability of multiple industries by 2035. AI in healthcare can help cure diseases and increase life expectancy, and help fight climate change.
- Areas of Concern:
 - Software accessibility, safety, accountability, liability, and ethics
 - Potential for hackers to use AI for malicious purposes
 - liability in causes of accidents
 - labor disruption
 - regulation
 - business risk



The Big Data Conundrum and the Holy Trinity

- Data Selling
- Data Breaches
- Compliance



The Profit Challenge – Data Selling



- If another entity has access to private data, you need to know what it is doing with that data.
- Have a system in place to communicate with the third party entity to ensure that it is not misusing private data.

The Inevitability Paradigm – Data Breaches



- **Encryption:** prevent unauthorized access if it gets into the wrong hands
- **Access Control:** control who has access to sensitive information
- **Tracking:** know who is accessing information and investigate unauthorized users
- **Internal Threats as Challenging as External**



Quarles & Brady LLP

The Great Hope/Challenge - Compliance

- States have laws that require companies to notify customers when their information has been compromised
- EU: General Data Protection Regulations (GDPR)
 - Data collection must be transparent and fair
 - Must be collected for specified legitimate purposes
 - Limit the amount of data you collect and retain
 - Keep data up to date
 - Only keep what you need
 - Safeguard data—encryption and privacy by design are required
- Confers new rights on consumers
- Audit Committees
- Don't forget about insurance



The HR Department - Harassment

- Thoroughly vet potential employees: is that person worth the trouble they might cause?
- Set company standards and apply them equally.
- Training that applies to everyone.
- Board of Directors wants to be informed early and often.



Impact of Taking a Stance on Social Issues

- More frequently, national companies have been taking stances on salient social issues.
- For example, Dick's Sporting Goods and Wal-Mart both altered their gun selling policies recently, leading to an increase in consumer's favorable perception of the brand.
- But, Delta cancelled a discount for NRA members, costing the company a \$40 million tax break.
- Challenges on both sides from a business standpoint.
- Assessing any legal risk is critical.



Shareholder Activism

- An increasing trend where a person, or group of people, who buys shares in hopes of changing something at the company.
- Over the past decade an unprecedented amount of capital deployed.



Social Media

- Social Media is a great way to market, but it cuts both ways.
 - Company social media often target of hackers.
 - A tasteless post, inappropriate response, or an incorrect statement can damage the brand and have legal consequences.
- Double check posts before sending them; make sure cyber security is up to date; be careful getting involved in politics; and admit mistakes quickly if they are made.



Litigation Trends

- Litigation as a whole is trending down relative to commercial disputes
- Most litigation that is pursued is high profile
- Early Resolution (parties and judges)
- Patent Trolls – not as prolific
- But, the headlines are BAD!
- Costs can still get out of control

Procedural Rule Changes

- Arizona Mandatory Initial Discovery Pilot Project (MIDPP)
 - District of Arizona study evaluating whether requiring parties in civil cases to respond to a series of discovery requests prior to other discovery will reduce the cost and delay of litigation



Arbitration

- The U.S. Supreme Court recently ruled that arbitration agreements for individualized proceedings must be enforced under the Federal Arbitration Act, making arbitration agreements more heavily enforced. *See Epic Systems Corp. v. Lewis* (Decided May 21, 2018)

Legal Operations – Are We Efficient Enough?



- 31% of law departments have a knowledge management program (KMP)
- 61% of law department's KMPs are sponsored by the general counsel
- 24% of respondents believe their KMP content is shared openly across the legal department
- 1 in 10 law departments offer incentives to drive KMP participation*

*Statistics taken from CLOC April 2018 Knowledge Management Survey

Crisis Management/Crisis Preparedness

- Identify Key Decision Makers and Assign Responsibilities
- Consider Need to Bring in Outside Help
- First Things First in a Crisis
- Quickly Find Out What Happened in a Disciplined Way
- Focus on Key Audiences/Relationships and Coordinate Appropriate Messages/Responses to Each
- Promptly Resolve and Prioritize Conflicting Objectives of Internal/External Audiences/Constituencies
- Litigation/PR Objectives and Concerns
- Identify Messengers/Vehicle/Timing of Internal and External Communications
- Normal Decision Making Processes and Timelines Won't Work
- Mistakes Will Be Made, But Action Critical

What Can You Do To Partner With Business To Stay Away From the Directors' Table?

- Budget litigation by phases
- Table talk exercises
- Partner with communication and PR teams
- Candid dialogue with outside counsel
- Create best practices
- Proactive
- Follow headlines and assess how you would respond
- Educate
- Follow legal ops trends



CRISIS COMMUNICATIONS Getting Your Message, Getting It Straight, and Getting It Out

Dan Conley | Quarles & Brady LLP | daniel.conley@quarles.com | (414) 277-5609
Brad Vynalek | Quarles & Brady LLP | brad.vynalek@quarles.com | (602) 229-5261

1. Identify/Gather Key Decision-Makers (or Their Proxies); Confirm or Assign Responsibilities.

2. Consider Need to Bring in Outside Expertise or Depth.

- /// Accounting experts
- /// Environmental experts
- /// Legal experts
- /// Public relations experts
- /// Computer/web security experts
- /// Insurance recovery specialists
- /// Forensic engineers
- /// Other outside technical expertise
- /// Objectivity
- /// Issue spotting
- /// Privilege/Expert/Evidentiary Implications

3. First Things First in a Crisis.

- /// First fix the problem/stop the bleeding.
- /// Focus on the people involved and most affected by the problem.
- /// These are often individual personal tragedies and doing the right thing is important.
- /// These are often business problems needing business solutions.

4. Quickly Find Out What Happened in a Disciplined Way.

- /// Protect work product/attorney-client privilege if possible.
- /// Balance importance of limiting early information on a need to know basis against importance of promptly providing accurate information to target audiences.
- /// Be sensitive to attorney-client and work product privilege; conflicts of interest; organization as client; fairness to opposing party; truthfulness in statements to others; communications with people represented by counsel; dealing with unrepresented person; respect for rights of third persons.
- /// Remind organization about press/e-mail/privilege policies.

5. Focus on Key Audiences/Relationships and Coordinate Appropriate Messages/Responses to Each.

- | | | |
|--|---|--|
| A. Victims/families. | G. The press (most unpredictable and uneven) | M. Potential jurors |
| B. Employees/recruits | H. Competitors | N. Advocacy groups |
| C. Regulators (e.g., D.A., SEC, OSHA, DNR, EPA, etc.) | I. Suppliers | O. Potential plaintiffs and plaintiffs' attorneys |
| D. Customers | J. Investors | P. Insurers |
| E. Police | K. Distributors | Q. Opponent(s) |
| F. Politicians | L. Trade groups | R. Social Media |

6. Promptly Resolving and Prioritizing Conflicting Objectives of Internal/External Audiences/Constituencies: What's The Tail and What's The Dog?

7. Litigation/PR Objectives and Concerns.

- // Typical attorney concern: Don't volunteer anything; first do no harm; attorney-client privilege; ethical uncertainty; uncertain judicial reaction; defamation; admissions; inexperience with press or too eager for spotlight.
- // PR concerns: Get in front of story; never look like you're hiding anything; protect the company brand and image; no comment never an option.
- // Best communication strategies often consistent with PR and litigation objectives in and out of court.
- // A failure to have a communications strategy simply lets someone else set the agenda/coverage and leads to misinformation, gossip and unnecessary negativity, both within and without an organization.

8. Identify Messengers/Vehicle/Timing of Internal and External Communications.

- // Ethical rules at play: Trial publicity, impartiality and decorum of the tribunal, truthfulness in statements to others, confidentiality of information, role as independent and candid advisor, fairness to opposing parties and counsel, respect for the rights of third persons.
- // Important for speaker to have credibility with audience (whomever it is) and also to understand or work with someone who understands the "rules" (i.e., confidentiality, off-the-record, privilege, etc.).
- // Be mindful that facts and key messages change over time; early press can set story (positively and negatively).
- // Be very careful if there is the potential for the company or for individual employees, officers or directors to face criminal liability—standards for culpability may not be what you think.
- // Privilege/discovery component of press communications.

9. Normal Decision-Making Processes/Timelines Will Not Work.

- // Pressures of time.
- // Limitations of single individual to make all decisions.
- // Requirement of acting on imperfect information.
- // Requirement to act.
- // Some people aren't available or good in a crisis.
- // Not a good time for decision-makers to "learn the ropes" about litigation or dealing with the press.

10. Mistakes Will Be Made.

11. Most Important Takeaways.

- // Ethical traps that can catch you in even more slow paced scenarios arise and pass quickly in crisis context.
- // You cannot act quickly enough in terms of getting additional help and in immediately responding to a crisis.
- // Although the information you provide must be accurate, a failure to promptly get involved in a larger communication strategy can allow a situation to spin out of control.
- // Advance planning can make a difference.
 - Risk management audit
 - Advanced media training
 - Crisis response plan and team

Dan Conley | Quarles & Brady LLP | daniel.conley@quarles.com | (414) 277.5609
Brad Vynalek | Quarles & Brady LLP | brad.vynalek@quarles.com | (602) 229-5261



Questions?

© 2018 Quarles & Brady LLP -
This document provides
information of a general nature.
None of the information
contained herein is intended as
legal advice or opinion relative
to specific matters, facts,
situations or issues. Additional
facts and information or future
developments may affect the
subjects addressed in this
document. You should consult
with a lawyer about your
particular circumstances before
acting on any of this
information because it may not
be applicable to you or your
situation.

Quarles & Brady LLP

THANK YOU



Bradley Vynalek
Partner
(602) 229-5261
brad.vynalek@quarles.com