

Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 26

Crisis Communication: Managing Perception & Mitigating Reputational Damage

Featuring Matt Adams of Fox Rothschild LLP and Karen Kessler of Kessler PR Group

Adams: Hi everyone, and welcome to "The Presumption of Innocence." I'm your host Matt Adams, one of the co-chairs of the White-Collar Criminal Defense & Regulatory Compliance Practice at Fox Rothschild.

Today we have a great guest, Karen J. Kessler, who heads up the Kessler PR Group, a public relations and crisis management firm located in Monmouth County, New Jersey, and really doing work nationally. Karen and I have worked together before on some high-profile cases, and I think she's just exceptional. But I wanna dig a little bit deeper today into exactly what it is that you do, Karen, and then we're gonna try to bring it full circle and talk about the specific ways that you help the white-collar criminal defense team. So, welcome to "The Presumption of Innocence."

And why don't you just start by telling our audience what exactly a PR firm like yours and a PR crisis management professional like you does every day.

Kessler: Well, first of all, I have to say thank you for the word exceptional, so that's a great way to start. I am yours now forever.

Adams: That's all it takes.

Kessler: That's all it takes.

We are a crisis communications firm. That is our sweet spot. That's what we've been doing for 30 years. Which means, generally, we are the interface between people that do what you do, Matt -- and some of your listeners -- and the media and internal communications, meaning inter employees, stakeholders, anyone that you have to communicate with when times get difficult.

Adams: And obviously, communication is key, particularly in crisis scenarios, which often arise in situations like a criminal indictment or investigation. So, let's talk a little about and unpack some of the various ways that you help.

So, let's focus a little bit on something that's not as intuitive. The external communication piece of this, when a crisis like a criminal investigation hits, is kind of intuitive. Let's talk about the internal communication piece for a moment, because I would imagine that it sometimes is as important -- or even potentially more important -- the way a company or an organization communicates with its people when things hit the fan, so to speak, as it is when they communicate with the media, for example.

Kessler: So, one of the first ways that you can lose all credibility and lose all friends is by letting people find out from external sources what's going on. Because if I work for you in my company and

I've been giving you my loyalty, I expect that in return, and I don't expect to find out from third parties what's going on. So, internal communications is key. It is often forgotten, to your point, and it matters the most. Because to the media, if they need a comment and you choose not to make one, someone who maybe just answers a phone or maybe cleans up after hours or someone who maybe serves food will be as valuable a spokesperson because they are available and they can say they work inside. So yes, indeed, internal communications are key. And also included in internal communications are friends and family. Because that's another big constituency that people often overlook, and they can really do a big number on your reputation.

Adams: So, what's the special sauce, Karen? What are the ingredients of an effective internal communication plan -- before we segue into that external variable.

Kessler: So, we always say, "You've gotta be honest. But it's not a deposition." And what we mean by that is, you can't make up a story and you can't tell a separate set of facts, especially not a separate set of facts than people like you are responsible for dealing with, Matt. But at the same time, it's not a deposition. You don't have to answer everybody's questions. You don't have to tell every chapter and verse. You have to tell what you want them to know, enough to get them relaxed enough to feel like you're in good hands, and then stop talking.

Adams: Yeah, stop talking is sometimes the advice that I frequently give.

Now, let's transition for a moment into the external-facing communication, because in a lot of respects, when I first started practicing law, some of the advice that the more senior lawyers would give in a high-profile or potentially embarrassing or public relations-type crisis scenario -- the "no comment," ignore the inquiry kind of approach -- was frequently the MO.

I think media has become more ubiquitous because anybody these days is a reporter, with social media. Everyone walks around with a smartphone that has video and audio recording capabilities. So sometimes, I have started to abandon that approach of the "no comment" being the best policy because oftentimes, controlling the narrative and getting out in front is actually even more important than some of the legal strategy that goes into things. Particularly, when you start to think through the potential issues with a jury pool and the idea that the recipients of today's communication could quite possibly be the people tomorrow who are sitting in the box and deciding your fate.

So, when it comes to these external communications, who generally makes the determination whether or not there's actually going to be communication at all, or we're gonna stick to that thing that I learned earlier in my career, which was sometimes "no comment" is the best comment.

Kessler: So, I would say media-savvy attorneys have a special place in our heart. And a good attorney will consider us a good partner. We understand that our needs come second to legal strategy, but they support legal strategy, to your point.

So, we like to think this is a conversation between our firm and counsel and client about what the possibilities are, what the potential drawbacks are, the potential benefits are, to commenting, and what kinds of comments we can say without jeopardizing any kind of legal action.

On the other hand, we do believe that there must be a lot of law schools that still teach the "do not say anything, no comment" is your best friend, hang up on the media, don't answer their phone calls, because we get a lot of that with a lot of the attorneys we deal with. And I will tell you it is rarely ever a successful strategy for them or for their clients. On the other hand, we sometimes get attorneys who say, "Make sure my name is in that story. Make sure that you spell my name and put

in my firm's name in that story." And that's a different kind of need -- not always also in their client's best interest -- but we serve many executives when we do our job.

Adams: And I'm thinking through some of the cases I've had, right? And in the criminal defense world, I think it doesn't come as a shock to anyone that sometimes allegations can be salacious, scandalous, embarrassing and very personally emotional for the individuals associated with it.

And I can recall specific examples in my career where comment that I have given is perhaps not what a reporter wanted. Some factual dissertation about the allegations that exist in a charging document or something like that. But I've simply said, instead of no comment, this person is entitled to the presumption of innocence. This person is entitled to a full grant of due process and what comes with trial and discovery. And that means that right now, they're innocent. And until proven guilty, that fact is going to remain. Is that sometimes where you find yourself, helping to craft that process-driven message less than the focus on the substantive allegations? Even though the media might wanna salivate over those?

Kessler: Well, we probably wouldn't say it that way. And we try to stay away from legal type talk because we talk in "regular people talk" 'cause that's who we're talking to. But I think one of the things we do, and I think you know this, is because we have a very good relationship with many, many reporters, we have an opportunity to say things when we know that they're going down a rabbit hole that's not right and say, "If you write that, you may end up having to retract that. I do not think that's a good way for you to go on this one, and I'm just telling you that, us to you." No reporter wants to get it wrong. So, sometimes that can be effective.

But if it's really salacious and it's really gonna be click bait -- that's how MANY reporters get paid these days, you know. A percentage of all of their salary is actually how many clicks they get on their stories. So, you always have to bear that in mind when you have one of these cases. Sometimes it has to do with how complaints are written. If you write it sexy, they're gonna print it sexy. If you can tone down the sexy, they're gonna find it less interesting.

And then the last piece is, you know, the legal press is obviously different than the general interest press. And that's speaking to a different kind of audience. That's speaking to judges, not necessarily to jurors. That's speaking to fellow attorneys. So, all of them have to have a little bit of a nuanced message.

Adams: I think a precise example of how you can help the defense team ... because whereas I might be focusing on that legal, your job is to put it in to real people speak, into the vernacular that readers and consumers of the press are able to say, "Okay, I understand that." The gobbledygook he just said about the presumption of innocence, while maybe constitutionally accurate -- and I'll submit it -- was, is not what the ordinary consumer wants to hear. How would you take what I was trying to convey and put it into common vernacular such that it's consumable by a broader audience than just people who might read legal media?

Kessler: I think what you would need to say is, "This case is complicated. There's a lot that's yet to come out, and we would suggest you hold judgment because you are going to hear more things than you are aware of now." Something along those lines. That would be my first take.

Adams: Therein lies the value add of the PR consultant.

Now, what does the modern media teach us about how you go about your job? How has the proliferation of online media as sort of the main source of news for many, what has that done to

reshape the way you do your job? Or is it still the same as it was when the newspaper got printed every morning and you got your one shot to get a headline?

Kessler: It's not even the same as it was two months ago. On one hand, social media has been a great boon for the bottom line of firms like ours because people are petrified and they wanna make sure that they're not roasted forever, since if you are roasted on the internet, it is forever. Even though we can play around the edges, it's tough to get stories removed.

On the other hand, it makes it very difficult, because there's no such thing anymore as editors. There's no such thing anymore as deadlines. You know, it used to be six months ago or eight months ago, if a comment went up on Twitter that was wrong or defamatory, we could get it taken down. Now no one answers the phone if you call half these social media sites. And if it does, they're not taking it down because it's already working for them, because they're getting traction and clicks. So, it's very challenging. It means you have to be very careful. It means you have to be really thought out before things happen. And it means you have to be very responsive.

And our team here, despite all the tools we have, I mean, they work around the clock monitoring these things when things get really challenging and there's a really big ugly case. Because if a story runs at 2:00 a.m., you cannot afford to not respond to it till eight o'clock in the morning.

Adams: Yeah. And that kind of builds on where I want it to go next. What happens when you just ignore a story? When you give that standard answer, no comment, or worse off yet, you get an email and you just delete it from a reporter, or a phone call that goes unreturned. What happens in your experience with the media stir that's beginning, that resulted in that kind of outreach to the legal team? And then it just, goes unanswered. Does that just end the inquiry or what in your experience happens next?

Kessler: It, I mean, obviously clearly depends on what the matter is, what the case is, what the social media chatter is. But mostly it depends on the client, too.

We have clients that are panicky when there's one story in one very poorly read site. And they are panicked what this is gonna mean for their kids' college education, for their neighbors, for their church, for their schools.

And then we have clients that say, "I don't give a anything about how they write about me. I have a job to do and I'm gonna do it here and you know, head down and I'm not paying attention." So, we have to be responsive to all of that. Sometimes we call ourselves therapists in this office because some of these clients will call us and just, for one time after another, after another, keep saying, "Don't you think everyone is reading that site? Don't you think they're looking at me? I can't walk outta my house, I can't walk my dog." And we wanna say "No, no, no, no. You don't have a perspective on this."

On the other hand, to your point, if you don't answer it, you can come across as an arrogant piece of work and that can just get the press even more anxious to dig in deep.

Adams: Let's talk about some specific examples, right? I think it would not surprise you that many people who find themselves in the crosshairs of criminal authorities -- in particular in the white-collar case -- the case at the beginning looks like one set of facts. It looks like this massive issue. And oftentimes, the defense lawyers, like myself, we can pare it down into something more manageable, and then it's resolved. We can oftentimes take a large set of allegations and sort of narrow the funnel. How do you work through that process from a PR perspective? If the initial set of allegations

is doomsday, and then maybe at the end, the disposition is doomsday, you know, minus a few orders of magnitude?

Kessler: You know, it's very hard in these situations when the first-out-of-the-box, kind of, press is so big and so ugly. And then in the end, if a case gets settled, you know, that's the old famous, where do I go to get my reputation back? Nobody likes to write a story saying, by the way, remember what we wrote six months ago? Well, they settled it and it's outta court. Or you know, they got five of the charges dismissed or whatever is involved, to that extent. That's really more of an internal kind of messaging situation. So again, it is really important when these allegations first come out that the kinds of comments that come out of the attorney's mouth -- because it is always the attorney that we want to speak, not the client in those cases -- has to really frame for the press what could happen going forward, even if it's not what's happening now, so that some of the press thinks before they write. Or so that they at least write what the possibilities could be, not just what they're seeing in a charge that comes out of a federal authority.

Adams: So, let's stick with sort of some of these specific examples, and let's move to the apology, the mea culpa. What makes a good one?

Kessler: That's our favorite topic is writing apologies and fighting with lawyers about the ability to be able to deliver them.

Adams: I get the sense that maybe it's not a fight, but there is a healthy intellectual debate that goes on between --

Kessler: Ah, we arm wrestle a fair amount. There are apologies that go on before a case settles and apologies that go on post-settlement. Most challenging are the ones before case settles. It's important to show that whoever this is that's in trouble, whether it's a company or an individual, has some sense of compassion for what people are going through. Even if you are not admitting responsibility, you can admit concern for those people and for the pain that they're suffering in whatever form that comes. It is important that it not have too many prepositions in it, if you were damaged, but, however. Those kinds of words immediately, whether it's in a legal case or frankly in your personal life, they are just like, say, ignore what I'm saying and just know that I really don't believe it. And if I tell you, Matt, how many times people say, "If I hurt you by my actions." Well you, you know, we wanna say "Well, you wouldn't be apologizing if you hadn't hurt them, so why are you even doing that?"

But that is how most people like to say something. And then they followed up with the second line, which is, and it wasn't my intention. It doesn't really matter if it was your intention, if the damage is done, the damage is done. So, it has to be written in a way that is authentic, that shows some sense of compassion, that shows some sense of learning, and that shows that you are really recognizing you have a responsibility and whatever this is.

After a case is over, that's where, oftentimes, these are litigated, actually, and part of settlement discussions is what's the apology gonna say? How much, how far are you willing to go? And that's again, always a negotiation. But at that point, generally, if you're willing to go a little bit further, that goes far with the general public.

Adams: I made a joke a few minutes ago about the ongoing back and forth that takes place between lawyers and PR people, because, in a way, some of what you do obviously helps the legal process. But some of it is antithetical to it, especially when we have things like the Fifth Amendment right to remain silent, where I might be telling people, "Everybody's shutting up. We're not saying a

word to anybody. We're just going into bunker mentality." Your perspective might say, but we have to say something.

Talk to us a little bit about that back and forth and what --

Kessler: I'll say this --

Adams: that looks like?

Kessler: You would be surprised at how often we do say you do not have to say something. So, I would agree with you. There are many times that saying something just exacerbates and keeps the story alive a lot longer than its natural life. So that's one.

But there certainly are times when we feel like there is something that has to be said. Because we are focused on your reputation, and your reputation has to be intact whenever this chapter that you're going through is over. And it's not just about, you know, a lawyer can walk away at the end of this case. But the individual has to be able to hold their head up high and continue to do what they're doing and still have the same kind of social and other kinds of relationships, business relationships. So, we are focused on all of that.

A lot of that was really problematic -- and is problematic -- when we do a lot of the Me Too work. Because even if those cases go away, there's a big group of people that, you know, look at you with very sort of squeezed eyes and turned up noses and say, "You know, yeah, you might have gotten out of that, but I know, you're really probably a creep in your personal life." That's a big one.

Adams: Right, I can imagine. The status of the particular client, celebrities, religious leaders, corporate executives, politicians, your average Joe the plumber. How do you shape the PR strategy, based on their station in life?

Kessler: So, the sad fact of life, and I do think it's somewhat sad, is that if you are an athlete -- a professional athlete in particular -- and if you are an entertainer, you have the shortest road back to being accepted in the world, as long as you can continue to do what you were doing before. So if you can get another hit record, if you can, you know, throw a ball just as far, people are gonna be willing to accept you back faster.

If you are a religious leader who has fallen from grace because of something you've done, or you are a politician, or you are a teacher, it's gonna be a very long road for you. In part because there's always other people willing to take your place that, to the outside world, are just as good or just as not good as you were. But it's a tough one. And so the celebrities and the athletes tend to think because they are who they are -- and their whole life, they've been catered to as being sort of superhuman -- that they don't have to go through the same kind of apology. They don't have to go through the same sort of admission. They don't have to go through the same sort of community service, whatever's gonna be involved. That's where a lot of the challenge is. But they bounce back pretty darn fast, most of them.

Adams: Yeah, I can think of some high-profile examples of that.

Kessler: Absolutely.

Adams: Yeah. In our lifetime.

Kessler: I would mention them, but then somebody would sue me and then you'd have to defend me, and then that would be a whole other issue.

Adams: Yeah. We won't go down that path.

Kessler: Okay.

Adams: But certainly, there's a couple that come to mind.

Let's shift for a second. Let's go into, sort of, the proactive. Before the problem hits. Before the headline. Before the media inquiry about a potential issue that forces our hand. How can organizations prepare themselves for the possibility that one of these issues creeps up down the road and requires them to make some of these difficult decisions about what the public face of their narrative?

Kessler: That's a great question. We spend a lot of time with big organizations writing what's called a crisis communications plan -- which can be anywhere from a small one of 25 pages to sometimes they can be hundreds of pages -- where we actually say, "Let's come up with what we think are the 20, the 50, the 100 most likely scenarios that you're gonna face. And let's come up with sample statements of what we can say. Let's come up with the list of stakeholders you're gonna have to reach."

I mean, what happens when stuff hits the fan is that usually you don't know who to find. You don't know where to find the right person. You don't have their phone number at hand. So, we try to put together these documents. And I have to say, there's a lot of very prominent organizations that have us do these and do them and update them on a fairly regular basis where we put those together.

And then once they are done, we say, "Keep a hard copy. Because one day when the Internet's out and you need to contact people, you're not gonna know where it is." Keep a hard copy. Keep an online copy. Make sure everyone who needs it has one. Update it every six months because your head of HR won't be there the next time you do it and there'll be a different set of phone numbers. And make sure you know how to reach people when they're not in the office. And is there someone else? And really take it through every kind of possible scenario that you're gonna deal with. Every kind of possible person you're gonna have to find. Do you know how to reach the chief of police if they're not in the office? Those kinds of things.

And then, make sure that it's a living document. Because most times for organizations that have them, when something does hit -- you always have to play around the edges, no doubt --but this really forms the basis and really saves a huge amount of time and a huge amount of cost.

Adams: And what types of things would you provision for, just out of curiosity? What goes into that plan?

And let's take a hypothetical company. Let's take a financial services firm. What possibly could a financial services firm have to think about ahead of the game to make sure that they have a cohesive communication strategy from the PR perspective?

Kessler: So, it could be everything from cyber attacks, it could be physical attacks, it could be executives doing bad stuff within their job. It could be board members doing bad stuff outside of their job. It could be anything along those kinds of lines. That's what you don't really know, and that's why

we had to get ready. It could be civil. It could be criminal. It could be anything along that. And we all know that. And those things happen all the time.

And we had two companies last week call us that both found employees who were arrested for child pornography. And how did they find out? Someone within the company saw it online. So by the time an employee found it online and shared it with most of their department, and more so, the company then had to quickly figure out how they were gonna respond internally and if they had to respond externally.

You know it's really hard for most of these companies to think about all the things that they might have to deal with, but that is what we do every day.

Adams: And to add complexity to that, there's obviously privilege issues that start to creep in when you're starting to talk about working with outside and inside counsel, between the PR groups. And most courts that have looked at this issue have refused to extend protections of privilege to outside PR firms, so that could probably be a whole other day of learning between you and I, Karen, where we could talk about some of the case law that's come out around this issue.

Kessler: It's definitely thorny, Matt. We insist on being hired through outside counsel. We think whatever protection it affords us is more than there would be if we did not have that.

We are very lucky that in 30 years of doing this, we've not been deposed. I have sat in court and watched other PR people be deposed that did not get hired through counsel. No, it is not foolproof. But, with a little bit of luck and some carefully written agreements, life has been good.

Adams: I think that's a good place to end. That's all the time we have.

Kessler: You got it.

Adams: ... for today on "The Presumption of Innocence." But Karen, it's been a great pleasure talking through some of these issues about your work as a public relations and crisis management consultant.

Until next time, I'm Matt Adams. We'll see you on "The Presumption of Innocence." See you again.