Managing a Corporate Crisis
Hosted by The Litigation and Dispute Resolution Affinity Group

Speakers
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Brandy Bergman ’92, Founding Partner & Chief Executive Officer, Reevemark
Brooke Cucinella ’06, Partner, Simpson Thacher

Moderator
Amanda Kramer ’03, Assistant United States Attorney in the United States Attorney’s Office for the Southern District of New York

Monday, May 6, 2019
6 - 7 p.m. | Discussion
7 - 8 p.m. | Networking Reception
Mayer Brown
1221 Avenue of the Americas
New York, NY 10020
CLE Materials
(1) Non-transitional, ethics, credit hour.

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Agenda

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Michelle J. Annunziata '03 is counsel in Mayer Brown’s New York Office whose practice focuses on complex commercial and financial services litigation. She has represented national and multinational corporations in federal and state courts since joining Mayer Brown’s New York office in 2003.

Michelle’s experience includes cross-border internal and government investigations, including DOJ, CFTC, SEC and IRS investigations. She has also worked on numerous contract disputes, lender liability matters, federal securities litigations and international arbitrations. In 2014 Michelle was named a 2014 ”New York Metro Rising Star” in Business Litigation by Super Lawyers.

While at Fordham Law School, Michelle was a member of the Fordham Moot Court Board. She also was a member of the Urban Law Journal.
Brandy Bergman ’92 is Founding Partner and Chief Executive Officer of Reevemark LLC. Brandy has spent 20 years advising public corporations, private companies, high-profile individuals, professional services firms, and non-profit and educational organizations on a wide range of strategic communications issues including litigation, reputation management, M&A, defense planning and proxy fights, executive transitions, and corporate positioning. Brandy also has advised clients on media and investor relations surrounding special situations such as cyber-attacks, FCPA and other regulatory investigations, earnings warnings, and product recalls.

Prior to co-founding Reevemark, Brandy was a Managing Director at Sard Verbinnen, where she led the firm’s Employee Development program. Before joining Sard Verbinnen in 1997, Brandy, an attorney, was a senior assistant district attorney in the Kings County District Attorney’s Office. During her five years as a prosecutor, Brandy was responsible for investigating and prosecuting crimes ranging from insurance fraud and embezzlement to homicide.

While at Fordham Law School, Brandy was a member of the Fordham Moot Court Board.
Brooke E. Cucinella ’06 is a Partner at Simpson Thacher & Bartlett LLP. Brooke, a former federal securities fraud prosecutor and experienced trial lawyer, focuses on government and internal investigations and high-profile disputes.

Prior to joining the Firm, Brooke served in the Department of Justice as an Assistant United States Attorney in the U.S. Attorney’s Office for the Southern District of New York, where she was a senior member of the Securities and Commodities Fraud Task Force. As a federal prosecutor, she tried multiple significant cases and oversaw numerous investigations involving federal and state law enforcement and regulatory agencies, including the U.S. Securities and Exchange Commission. Brooke was responsible for investigating and prosecuting a wide range of complex financial crimes, including accounting fraud, insider trading, market manipulation, wire fraud, bank fraud, tax fraud and money laundering. She also has significant experience coordinating cross-border investigations and arguing appeals.
Amanda Kramer ’03 has been an Assistant United States Attorney in the United States Attorney’s Office for the Southern District of New York since 2008, where she serves as Senior Litigation Counsel in the Securities and Commodities Fraud Task Force. She has conducted 12 criminal trials and argued 5 appeals before the Court of Appeals for the Second Circuit. From 2011 until April 2017, Amanda was the Office’s Human Trafficking Coordinator, and has also served as the Office’s Project Safe Childhood Coordinator. In those roles, in addition to maintaining her own active docket of cases involving organized crime and fraud, she conducted trainings, coordinated with law enforcement partners and NGOs, and helped supervise the Office’s investigations and prosecutions involving human trafficking and child exploitation. Before joining the U.S. Attorney’s Office, Ms. Kramer was a litigator at Patterson Belknap Webb & Tyler and Weil Gotshal. From 2004 through 2005, Ms. Kramer served as a law clerk to the Honorable Loretta A. Preska, United States District Judge for the Southern District of New York. She is a 2003 graduate of the Fordham University School of Law, where she has served as an Adjunct Professor teaching Trial Advocacy since 2014. In 2014, Ms. Kramer was recognized as one of New York’s New Abolitionists by Sanctuary for Families and the New York State Anti-Trafficking Coalition. In May 2015, Ms. Kramer was named Top Prosecutor by the organization Women in Federal Law Enforcement for her work on human trafficking. In 2016, Ms. Kramer was named Prosecutor of the Year by the Society of Asian Federal Officers.
Managing a Corporate Crisis:
Strategies for Containing a Crisis and Controlling the Public Narrative While Meeting Ethical Obligations and Maintaining Privilege

May 6, 2019
Panelists: Michelle Annunziata * Brandy Bergman * Brooke Cucinella
Moderated by: Amanda Kramer
Crises Can Take Many Forms

- **Business**
  - Operational Errors
  - Service failures resulting from natural and manmade causes
  - Whistleblower
  - Labor issues
  - Environmental issues

- **Executive**
  - Departure/termination
  - Malfeasance, personal issues
  - Misstatements
  - Illness/death

- **Workplace Violence**
  - Employees hurt

- **Product Issue**
  - Product recall
  - Supply chain disruption

- **Financial/Investor Community**
  - Earnings miss or restatements
  - Lowering guidance
  - Shareholder activists
  - Unsolicited offers
  - Liquidity issues
  - Covenant breach

- **Data Breach**
  - Loss of personal/customer information

- **Legal**
  - Regulatory actions (DOJ, SEC, NHTSA, FDA, CFTC, CFPB)
  - Employee litigation (Title VII, ADEA, ADA, FLSA)
  - Plaintiffs’ bar litigation
  - Commercial litigation
Initial Response to a Corporate Crisis

- Whistleblower complaints are increasingly common
  - In FY18, the SEC received 5,282 whistleblower tips compared to 4,484 in FY17 and 4,218 in FY16
  - Since the inception of the Dodd-Frank Whistleblower Program, the SEC has received over 28,000 tips

- Federal and state laws provide protections for whistleblowers
  - Dodd Frank Section 922
Initial Response to a Corporate Crisis

- **Identifying the response team:**
  - An organization should identify the core of its response team before a crisis begins – Contingency/Crisis Planning

- **Once Crisis/Issue Identified:**
  - Internal Teams
  - External Teams
  - Internal Communications/Messaging
  - External Communications/Messaging
  - Investigation Strategy
  - Anticipated Work Product
Engaging Outside Professionals

- Outside counsel
- Other professionals
  - Courts routinely find that communications with outside professionals, including public relations firms, fall within the privilege

“This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions—such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication—would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. . . . In consequence, this Court holds that (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege.” *In re Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003).
Engaging Outside Professionals

That said, not every communication with a public relations firm or other outside consulting professional is privileged.

- Communications with outside professionals that are not “necessary to implementing [the attorney’s] legal advice” may not be privileged. *Guiffre v. Maxwell*, 15 Civ. 7433 (RWS), 2016 WL 1756918, at *9 (S.D.N.Y. May 2, 2016).

- See also *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 352 F. Supp. 3d 207, 211 (2019) (holding that communications are not privileged if they are not at the behest of the target’s lawyers or directed at helping lawyers formulate strategy).
Taking Control of the Public Narrative

- Corporate entities must maintain privilege while abiding by the fundamentals of crisis communication.
  - **Response to a crisis can be more defining than the crisis itself**
    - How you handle a crisis defines perceptions of the organization
  - **Remember the public’s interest**
    - Prepare to present information from public interest viewpoint, not just what serves the Company’s interests
  - **Third parties can help**
    - Seek third-party support (outside experts, industry leaders) to help explain the Company’s position to various audiences
  - **Preserving credibility is key**
    - Must be factual, consistent and responsive; demonstrate empathy where appropriate
Taking Control of the Public Narrative

- Corporate entities must maintain privilege while abiding by the fundamentals of crisis communication. (con’t)
  - **Know the role of public relations**
    - No amount of PR “spin” can make the crisis go away, but a well-managed response can minimize duration/impact and speculation
    - It’s easy to make a bad situation worse, even with the best intentions
  - **Rally behind a strong leader**
    - Vital to quickly bring together right team under one strong leader
    - Position team to move quickly and collaboratively
    - Break down organizational silos quickly – hear all key voices and move decisively
  - **Collect facts in real time and be forthright**
    - Be absolutely clear on the facts and focus on understanding and resolving inconsistencies
    - Provide frequent updates to avoid information gap being filled by rumor and speculation
    - Do not speculate – avoid temptation to provide too much, too soon
# MeToo as Corporate Crisis: Changed Landscape, Evolving Rules

- Executive conduct that offends current social or cultural standards can cause greater, swifter reputational harm to a company than conduct related to financial issues or the performance of the business
  - BUT - It’s not just #MeToo, conduct involving race and other sensitive touchpoints can be equally inflammatory (e.g., Papa Johns, Paramount, Netflix, Governor Northam, Meghan Kelly)

- Boards of Directors’ natural deliberative process often in direct conflict with “shoot first, ask questions later” media practice

- With 24/7 news cycle and social media, judgement can be rendered in an instant; reputation cemented quickly and difficult to change

- Boards perceived as slow to react face increased scrutiny
  - Boards under pressure to show action being taken: can be deliberative, but must commence quickly
  - Increase in shareholder derivative suits alleging breach of fiduciary duty for failing to respond to misconduct or consciously allowing it to continue (e.g. 20th Century Fox, Google, CBS)
  - Exposure to activist attacks and regulatory inquiries
  - CEO misconduct at founder-led companies creates additional challenges where exec is seen as critical to growth and mission (e.g., Uber, Tesla, Wynn)

- Walking the walk, not just talking the talk
  - A diverse and refreshed Board and robust policies and practices that are consistently reviewed and reinforced in the workplace can help keep issue isolated
  - Employees can be a company’s most effective supporter or harmful attacker – their view on culture is critical and should be cultivated before crisis arises
#MeToo as Corporate Crisis: Changed Landscape, Evolving Rules

Shades of Gray:

- The decision to take action against or terminate a senior executive is difficult under any circumstances; it becomes even more so when #MeToo allegations are involved. Unfortunately, the environment in which these often difficult decisions are made do not leave much room for error.

- #MeToo issues are polarizing. Some believe consequences following an accusation should be swift and severe. Others are concerned that due process considerations are being ignored in a rush to avoid the potential negative publicity of a public accusation.

- Currently, #MeToo movement is more vocal than those who advocate for due process protections; passionate minority drives agenda.

- While some #MeToo situations are clear cut, many are not and often require Boards of Directors to make decisions based upon limited information or disputed facts.

- Boards must weigh not only what action to take, but also how to disclose/describe it to constituencies.

- Whether a Board decides to take no action, force a resignation, or terminate with or without cause, how and when it communicates its decision can have a significant reputational impact.

- Depending on details, accusations can generate unfavorable and steady media interest, emotional and viral reaction on social media, boycotts/protests, and calls for and management or Board accountability and change.

Key Considerations:

- Nature of allegations (seriousness, corroboration, number of accusers etc.)
- Role/importance of executive at company; ability to effectively replace executive
- Impact of decision on key constituencies
- Likelihood of accuser going public with accusations (if not yet public)
- Likelihood of additional accusers emerging
- Level of media/public interest in company
- Corporate culture and company history around such issues
- Existence of robust policies and practices related to sexual harassment etc.
- Board of Directors independence, make up and oversight
- Terms of executive employment contract
- Disclosure requirements
- Risk of Litigation
#MeToo as Corporate Crisis: Changed Landscape, Evolving Rules

Options and How They Play Out IRL

Case Studies:

- Option 1: No Immediate Action (CBS)
- Option 2: Resignation & Generous Severance (Google)
- Option 3: Termination & No Severance (Barnes & Noble)
Internal Investigations

- Internal investigations originated in the 1960’s and 1970’s as a means to settle SEC enforcement actions. Now they are a standard technique used to respond to a wide variety of regulatory and legal concerns.

- Internal investigations allow the company to get ahead of a government investigation by allowing management to identify and correct questionable practices, discipline responsible employees, and adopt controls to prevent reoccurrence of the conduct.

- Following an internal investigation, if a company discloses wrongdoing and adopts subsequent remedial measures, the company may curtail or entirely avoid civil and criminal sanctions that could be imposed as a result of a government enforcement action.
Commencing an Internal Investigation

- Corporation as client

  - **Model Rule 1.13 (Organization as Client):** “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. . . . If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer **shall** proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer **shall** refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.”
Commencing an Internal Investigation

- Corporation as client (con’t)
  
  - Model Rule 1.13 (Organization as Client) (Comment 2):
    
    “When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer.”
Commencing an Internal Investigation

- Impact of FCPA Guidance and Yates Memo on determining when a conflict between employer and employee might arise
  
  - Yates Memo (2015): limited the ability of DOJ lawyers to offer *any* cooperation credit in civil or criminal matters to corporations unless they provided “all relevant facts” regarding *all* of the individuals involved in the corporate misconduct.
    - Yates Memo put emphasis on enforcement actions against individuals in both civil and criminal matters and states that investigations should focus on individuals from their inception.
  
  - Rosenstein Revisions To Yates Memo Requirements (2018)
    - To receive cooperation credit, a company need only provide all relevant facts related to individuals “substantially involved in or responsible for” the alleged wrongdoing.
    - DOJ attorneys now have discretion to award partial cooperation credit if a company provides “meaningful and honest assistance” to the DOJ’s investigation.
  
  - FCPA Pilot Program considers disclosure of facts regarding individual wrongdoing in determining whether to give credit for self-reporting, cooperation and remediation efforts.
Commencing an Internal Investigation

- Conducting witness interviews

  - *Upjohn* warnings

Commencing an Internal Investigation

- Determining whether interests of the corporation and individuals diverge

  - **Model Rule 1.7 (Conflicts of Interest: Current Clients):**
    
    - “(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
      
      - (1) the representation of one client will be **directly adverse to another client**; or
      
      - (2) there is a **significant risk** that the representation of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”
Commencing an Internal Investigation

- Determining whether interests of the corporation and individuals diverge (con’t)

  - Model Rule 1.7 (Conflicts of Interest: Current Clients) (con’t):
    - “(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
      - (1) the lawyer **reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client**;
      - (2) the representation is not prohibited by law;
      - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
      - (4) each affected client gives informed consent, confirmed in writing.”
Commencing an Internal Investigation

- Determining whether interests of the corporation and individuals diverge (con’t)
  
  • Model Rule 4.3 (Dealing with Unrepresented People):
    - “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”
Commencing an Internal Investigation

- Collecting documents and information
  - Model Rule 4.4 (Respect for Rights of Third Persons):
    - “(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
    - (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”
Reporting to the Government

- Maintaining privilege while disclosing sufficient information to obtain cooperation credit
    - “The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. . . The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.”

“For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative.”
Reporting to the Government

- A robust compliance program in place at the time of a crisis may help an organization with the government.

- Recent guidance (April 30!) from DOJ identifies key topics and questions that prosecutors consider when evaluating a compliance program.

- Relevant topics to consider:
  - Analysis and Remediation of Underlying Misconduct
  - Reaction of Senior and Middle Management
  - Autonomy and Resources of Compliance Function
  - Existing and Modified Policies and Procedures
  - Risk Assessment Capabilities
Reporting to the Government

- Relevant topics to consider (con’t):
  - Training and Communications
  - Confidential Reporting and Investigation
  - Incentives and Disciplinary Measures
  - Continuous Improvement, Periodic Testing and Review
  - Management of Third-Parties
  - Due Diligence in Connection with Mergers and Acquisitions
Summary of Handouts

- **New York Rules of Professional Conduct**
  - Rule 1.6 – Confidentiality of Information
  - Rule 1.7 – Conflict of Interest: Current Clients
  - Rule 1.13 – Organization as Client
  - Rule 4.3 – Communicating with Unrepresented Persons
  - Rule 4.4 – Respect for Rights of Third Persons
  - Rule 5.3 – Lawyer’s Responsibility for Conduct of Nonlawyers

- **ABA Model Rules of Professional Conduct**
  - Rule 1.6 – Confidentiality of Client Information
  - Rule 1.7 – Conflict of Interest: Current Clients
  - Rule 1.13 – Organization as Client
  - Rule 4.3 – Dealing with an Unrepresented Person
  - Rule 4.4 – Respect for Rights of Third Persons
  - Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistance
Reputational Risk in the #MeToo Era

MAY 6, 2019
Overview
CHANGED LANDSCAPE, EVOLVING RULES

• Executive conduct that offends current social or cultural standards can cause greater, swifter reputational harm to a company than conduct related to financial issues or the performance of the business
  • It’s not just #MeToo, conduct involving race and other sensitive touchpoints can be equally inflammatory (e.g. Papa Johns, Paramount, Netflix, Governor Northam, Meghan Kelly)

• Boards of Directors’ natural deliberative process often in direct conflict with “shoot first, ask questions later” media practice
  • With 24/7 news cycle and social media, judgement can be rendered in an instant; reputation cemented quickly and difficult to change

• Boards perceived as slow to react face increased scrutiny
  • Boards under pressure to show action being taken: can be deliberative, but must commence quickly
  • Increase in shareholder derivative suits alleging breach of fiduciary duty for failing to respond to misconduct or consciously allowing it to continue (e.g. 20th Century Fox, Google, CBS)
  • Exposure to activist attacks and regulatory inquiries

• CEO misconduct at founder-led companies creates additional challenges where exec is seen as critical to growth and mission (e.g. Uber, Tesla, Wynn)

• Walking the walk, not just talking the talk
  • A diverse and refreshed Board and robust policies and practices that are consistently reviewed and reinforced in the workplace can help keep issue isolated
  • Employees can be a company’s most effective supporter or harmful attacker – their view on culture is critical and should be cultivated before problems arise
SHADES OF GRAY

• The decision to take action against or terminate a senior executive is difficult under any circumstances; it becomes even more so when #MeToo allegations are involved. Unfortunately, the environment in which these often difficult decisions are made do not leave much room for error.

• #MeToo issues are polarizing. Some believe consequences following an accusation should be swift and severe. Others are concerned that due process considerations are being ignored in a rush to avoid the potential negative publicity of a public accusation.

• Currently, #MeToo movement is more vocal than those who advocate for due process protections; passionate minority drives agenda.

• While some #MeToo situations are clear cut, many are not and often require Boards of Directors to make decisions based upon limited information or disputed facts.

• Boards must weigh not only what action to take, but also how to disclose/describe it to constituencies.

• Whether a Board decides to take no action, force a resignation, or terminate with or without cause, how and when it communicates its decision can have a significant reputational impact.

• Depending on details, accusations can generate unfavorable and steady media interest, emotional and viral reaction on social media, boycotts/protests, and calls for and management or Board accountability and change.
KEY CONSIDERATIONS

- Nature of allegations (seriousness, corroboration, number of accusers etc.)
- Role/importance of executive at company; ability to effectively replace executive
- Impact of decision on key constituencies
- Likelihood of accuser going public with accusations (if not yet public)
- Likelihood of additional accusers emerging
- Level of media/public interest in company
- Corporate culture and company history around such issues
- Existence of robust policies and practices related to sexual harassment etc.
- Board of Directors independence, make up and oversight
- Terms of executive employment contract
- Disclosure requirements
- Risk of litigation

Assume All Bad Facts Will Become Public
#MeToo FACT PATTERN

- General Counsel of Company X received an email from a woman who claims that the Company’s current CEO sexually assaulted her on a date fifteen years ago, ten years prior to the CEO joining Company X.
- Company X has investigated the allegations and has thoroughly interviewed the accuser and the CEO.
- Company investigators find the accuser to be sympathetic and generally credible, although she never reported it before, her account cannot be corroborated and investigators can’t determine with information available whether the account is accurate.
- The CEO acknowledges the date but denies the incident occurred as described.
- There have never been any complaints lodged against the CEO during his five years at the Company.
- The accuser did not make any specific demands on Company X, apart from asking questions about the Company’s process and timeline for dealing with matters of this kind.
- In consultation with outside legal counsel, Company X is considering what action, if any, to take in relation to the CEO.
- Company X asked Reevemark to assess the reputational risk that could ensue from one of three courses of action under consideration.
POTENTIAL RESPONSES

Scenario 1
• Take No Action

Scenario 2
• Resignation + Generous Severance

Scenario 3
• Termination + Minimal/No Severance
SCENARIO 1: TAKE NO ACTION

RISKS

• Accuser goes public with allegation
• Media picks up story and publishes unflattering article(s) about Company
• #MeToo movement engages; goes viral
• Additional accusers come forward with similar claims about CEO or others at Company, forcing Company to change course and take action
• Employees make claims about culture; feel threatened by continued presence of CEO at Company
• Shareholders question Board decision/stewardship

ANALYSIS

Risk of Becoming Public:

Potential Reputational Risk, If Public:
SCENARIO 2: RESIGNATION + GENEROUS SEVERANCE

RISKS

• Accuser goes public with allegation, claiming she drove his departure

• Accuser could repeat allegation to CEO’s next employer and/or the media with added ammunition that Company knew about bad conduct and was content to sweep under rug

• Generous severance could be construed as improper pay-out to bad actor

• If not properly disclosed, CEO’s departure could raise questions internally and externally and Company may be forced to recharacterize as new facts emerge

ANALYSIS

Risk of Becoming Public:

MODERATE

Potential Reputational Risk, If Public:

LOW TO MODERATE
SCENARIO 3: TERMINATION + MINIMAL SEVERANCE

RISKS

• Accuser goes public as driver of change, touting successful outcome as vindication

• CEO feels unfairly maligned and sues Company for wrongful termination

• CEO shares story as example of #MeToo movement run amok

• Backlash from internal and external constituencies who perceive termination as hasty and unfair given circumstances

• Shareholders question Board decision/stewardship

ANALYSIS

Risk of Becoming Public:
MODERATE

Potential Reputational Risk, If Public:
LOW
Case Studies*

*Case studies based on publicly available information
CASE STUDY: NO IMMEDIATE ACTION

• January 2018: Board members become aware of allegations against Chairman & CEO Les Moonves and that journalists may be working on story about allegations

• July 27, 2018: The New Yorker publishes expose entitled “Moonves and CBS Face Allegations of Sexual Misconduct” which details allegations by multiple accusers

• August 1, 2018: CBS Board announces it has hired two law firms to conduct investigation into allegations and formed special committee to oversee it; no action is taken against Moonves (other than to emphasize that he would have no role in investigation)

• August 2018: new accusations emerge, including one that was reported to the police in 2017; stories shift to CBS culture and what Board knew about allegations and when, fueling a controversy that would continue through end of year

• September 9, 2018: CBS announces appointment of new CEO and immediate departure of Moonves; says that decision on severance will be made upon conclusion of independent investigation

• December 17, 2018: CBS terminates Moonves for cause, announcing formally that it will not pay him $120 million severance

CBS is currently responding to regulatory and investigative inquires from the Manhattan District Attorney, NYC Human Rights Commission and NYAG; a putative class action has been filed against the Company, and certain executives and board members; and Les Moonves has filed for arbitration (2/15/19 annual report).

See Appendix for supporting press releases
CASE STUDY: RESIGNATION + GENEROUS SEVERANCE

- October 2014: Android creator Andy Rubin leaves Google to start a tech incubator
- November 29, 2017: Rubin takes leave of absence from his start-up after tech blog *The Information* publishes report that he was involved in an inappropriate relationship with a female subordinate while at Google
- October 25, 2018: *The New York Times* publishes story, "How Google Protected Andy Rubin, the 'Father of Android'" which names Rubin as one of three executives Google protected after they were accused of sexual misconduct and details allegations made against him and the $90 million severance he was given when he was left; story generates significant follow-on coverage and employee backlash
- November 1, 2018: more than 20,000 Google employees stage a walk out to protest the Company's handling of sexual misconduct issues
- November 8, 2018: Google announces it will overhaul its sexual misconduct policy
- January 10, 2019: Shareholders sue Alphabet Board, alleging “The directors’ wrongful conduct allowed the illegal conduct to proliferate and continue. As such, members of Alphabet’s board were knowing and direct enablers of the sexual harassment and discrimination.”

See Appendix for supporting press releases
CASE STUDY: TERMINATION + NO SEVERANCE

• July 3, 2018: Barnes & Noble announces that the Board has fired CEO Demos Parneros for unspecified violations of the Company’s policies. The release makes clear that the termination is unrelated to the Company’s financial reporting and that Parneros will not be receiving severance.

• August 28, 2018: Parneros sues Barnes & Noble for wrongful termination and defamation; complaint alleges that the reason given for his firing – violation of the Company’s sexual harassment policy – was pretextual; complaint contains embarrassing and unflattering attacks on the Company founder, Len Riggio, and other senior executives, and discloses a previously unknown failed bid for the Company.

• August 28, 2018: Barnes & Noble issues statement in response to lawsuit which states that Parneros was “terminated for sexual harassment, bullying behavior and other violations of company policies.”

• October 30, 2018: Barnes & Noble countersues Parneros, claiming he breached his duties of loyalty and good faith by sexually harassing a female employee, bullying subordinates, and attempting to “sabotage” a potential sale of the business.

See Appendix for supporting press releases
STATEMENT FROM CBS BOARD OF DIRECTORS (8/1/18)

At its meeting this afternoon, the CBS Board of Directors unanimously approved the retention of Covington & Burling and Debevoise & Plimpton to conduct a full investigation of the allegations in recent press reports about Chairman and CEO Leslie Moonves, CBS News and cultural issues at all levels of CBS. At Covington & Burling the investigation will be led by Nancy Kestenbaum, and at Debevoise & Plimpton it will be led by Mary Jo White.

To help facilitate the investigation, a Special Committee of Board members has been formed comprised of Bruce S. Gordon, Linda Griego and Robert N. Klieger. Mr. Moonves will have no role in the investigation and is entirely recused from it. The Board took no further action at this meeting pending discussion with counsel as to appropriate next steps.

The Board noted that it takes these allegations seriously and is committed to acting in the best interest of the Company and all of its shareholders, and is confident that the employees of CBS will continue to perform at a high level as this process unfolds.

In addition, the Board took action today to appoint Bruce S. Gordon to serve as Lead Independent Director of the Board of Directors.

Neither the Board nor the Company expects to comment further on this matter at this time.
CBS CORPORATION AND NATIONAL AMUSEMENTS ANNOUNCE RESOLUTION OF GOVERNANCE DISPUTES AND TRANSITION TO NEW LEADERSHIP (9/9/18)

• Leslie Moonves Departs as Chairman and CEO; Joseph Ianniello, COO, Appointed President and Acting CEO
• Six New Independent Directors Elected to the Board; Five Independent Directors and One NAI-Affiliated Director Step Down
• Settlement with National Amusements Enhances Opportunity to Create Value for CBS Shareholders

CBS Corporation (NYSE: CBS.A and CBS) (“CBS” or “the Company”) today announced a settlement agreement with National Amusements, Inc. ("NAI"), members of the CBS Board of Directors, and related parties. Under the terms of the settlement, which have been approved by the Boards of Directors of CBS and NAI, the parties agreed to dismiss their pending litigation in Delaware. The full Board of CBS (following the unanimous recommendation of the Special Committee of the Board) has unanimously rescinded the previously announced Class A share dividend, and NAI has amended the Bylaws to undo the previous amendments that it adopted following filing of the Delaware litigation.

Concurrently with the settlement, Leslie Moonves will depart as Chairman, President and Chief Executive Officer effective immediately. Chief Operating Officer Joseph Ianniello will serve as President and Acting CEO while the Board conducts a search for a permanent successor. Mr. Ianniello, who joined the Company in 2005, has been COO of CBS since June 2013. The Chairman position will remain open pending the appointment of a permanent CEO.

Moonves and CBS will donate $20 million to one or more organizations that support the #MeToo movement and equality for women in the workplace. The donation, which will be made immediately, has been deducted from any severance benefits that may be due Moonves following the Board’s ongoing independent investigation led by Covington & Burling and Debevoise & Plimpton. Moonves will not receive any severance benefits at this time (other than certain fully accrued and vested compensation and benefits); any payments to be made in the future will depend upon the results of the independent investigation and subsequent Board evaluation.

In keeping with CBS’ and NAI’s commitment to Board independence, five current independent directors and one NAI-affiliated director have stepped down from the Board, and six new independent directors have been elected to the Board. The ongoing members of the Nominating and Governance Committee have endorsed the new independent directors. The new Board will be comprised of 11 independent directors and 2 NAI-affiliated directors.

In addition, NAI confirmed that it has no plans to propose a merger of CBS and Viacom and has agreed that it will make no such proposal for at least two years after the date of the settlement. NAI reaffirmed that it will give good faith consideration to any business combination transaction or other strategic alternative that the independent directors believe are in the best interests of the Company and its stockholders.

Vice Chair Shari Redstone said, “CBS is an organization of talented and dedicated people who have created one of the most successful media companies in the world. Today’s resolution will benefit all shareholders, allowing us to focus on the business of running CBS – and transforming it for the future. We are confident in Joe’s ability to serve as acting CEO and delighted to welcome our new directors, who bring valuable and diverse expertise and a strong commitment to corporate governance.”
Lead Independent Director Bruce Gordon said, “We thank Les for his 24 years of service. Among his achievements, he established a strong management team, giving us great confidence as we accelerate our succession plans and provide continuity of leadership. This agreement maintains an independent Board that is charged with determining the best course for the future of CBS on behalf of all shareholders.”

Gordon thanked the outgoing directors for their service: “They have devoted many valuable hours looking out for the best interests of this company, which has achieved industry-leading performance during their tenure. I welcome the new directors, who bring superb expertise, competence and diversity of perspective.”

The six new independent Board members are: Candace Beinecke, Barbara Byrne, Brian Goldner, Richard D. Parsons, Susan Schuman and Strauss Zelnick. The following independent directors will remain on the board in addition to Gordon: William Cohen, Gary Countryman, Linda Griego and Martha Minow. On behalf of NAI, in addition to Redstone, Robert Klieger remains on the board.

Additional details about the settlement agreement and the agreement with Moonves will be included in a CBS Corporation 8-K filing. The Board will schedule the Company’s Annual Meeting of Shareholders for no later than Nov. 30, 2018.

Joe Ianniello Bio

Joseph Ianniello will now serve as President and Acting CEO of CBS Corporation. In this role, he will oversee all operations of the Company, including the CBS Television Network, Showtime Networks, The CW (a joint venture between CBS Corporation and Warner Bros. Entertainment), CBS Television Studios, CBS Studios International, CBS Television Distribution, CBS Interactive, CBS Films, CBS Television Stations and Simon & Schuster.

Previously, since 2013, Ianniello served as the Chief Operating Officer, where he was responsible for establishing and executing strategy across all of the Corporation’s businesses. In addition, he oversaw the monetization of the Company’s content across platforms, including retransmission consent fees and reverse compensation from affiliates, as well as the licensing of CBS content for digital streaming and broadband services. Ianniello has helped lead CBS to be the #1 media stock among its peers for three of the last five years. Recently, he led the Company’s acquisition of Network Ten in Australia and the split-off CBS Radio through a transaction with Entercom. In addition, he led the conversion of CBS Outdoor into a real-estate investment trust, marking a first for an outdoor advertising business and ultimately leading to the split-off of CBS Outdoor from CBS in 2014.

Prior to being named Chief Operating Officer, Ianniello served as Chief Financial Officer (2009-2013) where he was responsible for the Company’s financial strategy across all of its operations. Before that, he held a number of key financial positions in the Company. He joined CBS in 1997. In 2013 and 2014, Ianniello was ranked the #1 chief financial officer by sell-side analysts in Institutional Investor’s annual All-America Executive Team survey. Ianniello serves on the Board of Directors of New Alternatives for Children, Inc.

Ianniello earned a Bachelor of Business Administration at Pace University, where he serves today on its Board of Trustees, and a Master of Business Administration at Columbia University. He is married and has two children.
STATEMENT FROM CBS BOARD OF DIRECTORS (12/17/18)

The Board of Directors of CBS has completed its investigation of former Chairman and CEO Leslie Moonves, CBS News, and cultural issues at CBS.

With regard to Mr. Moonves, we have determined that there are grounds to terminate for cause, including his willful and material misfeasance, violation of Company policies and breach of his employment contract, as well as his willful failure to cooperate fully with the Company’s investigation. Mr. Moonves will not receive any severance payment from the Company.

As a result of their work, the investigators also concluded that harassment and retaliation are not pervasive at CBS. However, the investigators learned of past incidents of improper and unprofessional conduct, and concluded that the Company’s historical policies, practices and structures have not reflected a high institutional priority on preventing harassment and retaliation. The investigation determined that the resources devoted to the Company’s Human Resources function, to training and development, and to diversity and inclusion initiatives have been inadequate, given the size and complexity of CBS’ businesses. Employees also cited past incidents in which HR and the Company did not hold high performers accountable for their conduct and protect employees from retaliation.

The Board, which includes six new members, and the Company’s new management have already begun to take robust steps to improve the working environment for all employees. Among other things, the Company appointed a new Chief People Officer, is actively engaged in ways to enhance and reimagine the Human Resources function, and has retained outside expert advisors to develop other initiatives for promoting a workplace culture of dignity, transparency, respect and inclusion. These efforts will continue to be a high priority for the Board and the Company’s management, and we will continue to work together to communicate with our workforce in that regard.

We would like to thank everyone who cooperated with the investigation and applaud CBS’ employees for remaining focused on their jobs during this very difficult time. We look forward to the people of CBS returning their full attention to the outstanding work that they do every single day.
It’s clear that to live up to the high bar we set for Google, we need to make some changes. Going forward, we will provide more transparency into how you raise concerns and how we handle them.

We will provide better care and support to people who raise concerns. And we will double down on our commitment to be a representative, equitable, and respectful workplace.

Today, we’re announcing a number of actions to achieve these things.

**Transparency**

*We are committed to handling all concerns with more transparency.*

Arbitration: We will make arbitration optional for individual sexual harassment and sexual assault claims. Google has never required confidentiality in the arbitration process and it still may be the best path for a number of reasons (e.g. personal privacy), but, we recognize that the choice should be up to you.

Investigations Report: We will create a new section in our Investigations Report focused on sexual harassment to show the number of substantiated or partially substantiated concerns over time, by function. It will also discuss trends, disciplinary actions taken, and substantiation percentages. We’ll also summarize, in this annual report, the types of behavior we do and do not terminate employees for.

Publicly visible workplace policies and processes: We will publicly share our policy on Harassment, Discrimination, Retaliation, Standards of Conduct & Workplace Concerns, as well as our processes, and channels for raising and investigating concerns.

Investigations Practice Guide: We’ll commit to implementing & publishing internally an Investigations Practice Guide, outlining expectations for how concerns are handled within Google. This Guide will clearly outline what Googlers can expect during the investigation process and/or how their concerns will be handled. We’ll seek input from Googlers who have participated in the investigations process before finalizing the Guide. We’ll commit to reviewing the Guide annually and updating it as required.
Care

We will provide better care and support to people who raise concerns.

Extra care: We will create better care services around investigations to support those who have raised concerns. These opt-in care services will include extended counselling and EAP support, check-ins, support for accommodations and leaves, etc.

Bring a colleague: We’ll establish a global process that will allow Googlers to be accompanied by a companion during an HR investigation, or when raising/reporting any harassment or discrimination concerns to HR. We’ll start with a Q4 pilot of sexual harassment concerns to learn from, and scale this to all types of harassment and discrimination concerns in Q1.

Specialty team: We will create a specialty team of advisors on the Employee Relations team to look into all sexual harassment and discrimination concerns.

Revamping the process: We’ll commit to taking a fresh look at each of our channels for reporting concerns, and the processes for looking into them, to ensure claims are handled with empathy and care, and that individuals bringing concerns forward are heard. We’ll launch this in Q1 2019.

T-V-Cs: T-V-Cs are an important part of our extended community. We investigate all matters in which a complaint is made by a T-V-C against an employee, and require that suppliers do the same for complaints against T-V-Cs and report back to us on any complaints. In addition, we recently broadened the reach of our Supplier Code of Conduct and require Google suppliers to “demonstrate a commitment to identify, measure, and improve a culture of diversity and inclusion through all aspects of workplace management.” This contractual agreement also holds suppliers accountable for maintaining “a program that provides workers with a means to report grievances anonymously and without fear of retaliation, unless prohibited by law”. We’ll continue routinely reviewing our suppliers for adherence with these provisions. For those suppliers that employ Google’s TVCs, we’ll consider the findings from these reviews in evaluating whether to continue our supplier relationships.
Workplace

We will accelerate our commitment to a representative, equitable, and respectful workplace.

Company OKR: We will recommit to our company-wide OKR around diversity, equity and inclusion again in 2019, focused on improving representation—through hiring, progression and retention—and creating a more inclusive culture for everyone.

Diverse candidate slate: For new or vacated positions at the Director level or above, we’ll commit to having a diverse slate of candidates on the interview short list. Note, there may be some limited exceptions (e.g., highly specialized roles or unique skills) that can be approved only at the joint discretion of the VP-level hiring manager and the VP of Staffing and Operations.

Chief Diversity Officer (CDO) Google’s Chief Diversity Officer will continue to lead monthly discussions with Google Leads and the CEO on topics of diversity, equity and inclusion as well as workplace health. In addition, the CDO provides recommendations directly to the Board of Directors through the Leadership Development and Compensation Committee on diversity, equity, inclusion and culture matters.

Excessive alcohol: Harassment is never acceptable and alcohol is never an excuse. But one of the most common factors among the harassment complaints made today at Google is that the perpetrator had been drinking (~20% of cases). Our policy is clear: Excessive consumption of alcohol is not permitted when you are at work, performing Google business, or attending a Google-related event, whether onsite or offsite. Going forward, all leaders at the company - Directors, VPs and SVPs - will be expected to create teams, events, offsites and environments in which excessive alcohol consumption is strongly discouraged. For example, many teams have already put two-drink limits in place for events. Others use drink ticket systems. The onus will be on leaders to take appropriate steps to restrict any excessive consumption among their teams, and we will impose more onerous actions if problems persist.

Real consequences for not doing training: Starting next year, all employees will complete mandatory sexual harassment training annually (currently required every two years). Employees out of compliance with any required training will be docked one rating in the year end Perf cycle (e.g., Exceeds Expectations will be moved to Consistently Meets Expectations). This applies to all Googlers including our senior leaders.

Noogler training: We’ll enhance our Noogler training to specifically focus on educating Nooglers on our Harassment, Discrimination and Workplace Conduct policies, and share more about our processes for reporting concerns, and resources available to support employees, setting a strong expectation from Day 1. We’ll also incorporate this information into our Google TVC Onboarding program, providing a uniform opportunity for our TVCs to understand policies, processes, and resources available to them.
BARNES & NOBLE ANNOUNCES CEO TERMINATION (7/3/18)

The Board of Directors of Barnes & Noble, Inc. (NYSE: BKS) today announced the termination of its Chief Executive Officer, Demos Parneros, for violations of the Company's policies. This action was taken by the Company's Board of Directors who were advised by the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mr. Parneros' termination is not due to any disagreement with the Company regarding its financial reporting, policies or practices or any potential fraud relating thereto. Mr. Parneros will not receive any severance payment and he is no longer a member of the Company's Board of Directors.

In order to ensure continuity going forward, the Company has appointed a leadership group to share the duties of the office of the CEO until a new leader is named. Those appointed include: Allen Lindstrom, Chief Financial Officer; Tim Mantel, Chief Merchandising Officer and Carl Hauch, Vice President, Stores. Leonard Riggio remains Executive Chairman of the Company and will be involved in its management.

The Company said it will begin an executive search for a new CEO and that no changes in its goals or objectives are planned. Additionally, the Company affirms its previously announced EBITDA guidance of $175 million to $200 million for fiscal 2019.

A reconciliation of the Company's EBITDA guidance to operating income is included in the press release issued by the Company on June 21, 2018. EBITDA means earnings before interest, tax, depreciation and amortization.
BARNES & NOBLE ISSUES STATEMENT IN RESPONSE TO LAWSUIT BY TERMINATED CEO (8/28/18)

Barnes & Noble, Inc. (NYSE:BKS) today commented on the lawsuit filed by former CEO Demos Parneros. As announced on July 3, 2018, Mr. Parneros was terminated for cause following multiple violations of the Company’s policies.

The Board of Directors of Barnes & Noble issued the following statement:

The lawsuit filed by Demos Parneros is nothing but an attempt to extort money from the Company by a CEO who was terminated for sexual harassment, bullying behavior and other violations of company policies after being in the role for approximately one year. The allegations contained in the complaint about Len Riggio are replete with lies and mischaracterizations. They are an example of someone who, instead of accepting responsibility for blatantly inappropriate behavior, is lashing out against a former employer. The Board, advised by legal counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP, unanimously terminated Mr. Parneros’ employment following a thorough investigation that revealed multiple examples of significant misconduct. Mr. Parneros not only violated his employment agreement, but also compromised the trust and respect that we strive to foster throughout our organization.

For more than 50 years, since founding Barnes & Noble, Mr. Riggio is widely known amongst his business associates, colleagues and employees for his impeccable reputation and as an individual and leader that upholds the highest standards of integrity and decency.

Mr. Parneros’ actions were unacceptable and not representative of the high standards by which Barnes & Noble operates. At Barnes & Noble, we are committed to providing an inclusive, welcoming, respectful and safe workplace.

Paul, Weiss, Rifkind, Wharton & Garrison LLP is serving as legal counsel to Barnes & Noble in connection with this matter.