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## **Crisis Management Planning for Small Air Carriers, Aircraft Parts Manufacturers, Installers or Maintainers, and Other Aviation Industry Participants**

David T. Norton

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# CRISIS MANAGEMENT PLANNING FOR SMALL AIR CARRIERS, AIRCRAFT PARTS MANUFACTURERS, INSTALLERS OR MAINTAINERS, AND OTHER AVIATION INDUSTRY PARTICIPANTS

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## I. INTRODUCTION

**T**HIS ARTICLE provides guidance to senior management and general counsel ("Counsel") of aviation companies, such as small air carriers, and aircraft and aircraft parts manufacturers, installers, or maintainers (the "Company" or "Companies") on shepherding their Companies through an aviation disaster crisis management planning process. Detailed texts that address general crisis management planning abound.<sup>1</sup> But three things make the planning material in this article unique.

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<sup>1</sup> In fact, I relied on many different crisis-management books in compiling information for these materials. Here are a number of the books I used, listed in reverse chronological order: JEFFREY R. CAPONIGRO, *THE CRISIS COUNSELOR, A STEP-BY-STEP GUIDE TO MANAGING A BUSINESS CRISIS* (2000); W. TIMOTHY COOMBS, *ONGOING CRISIS COMMUNICATION: PLANNING, MANAGING, AND RESPONDING* (Robert L. Heath & Gabriel M. Vesquez eds., 1999); MICHEL OGRIZEK & JEAN-MICHEL GUILLERY, *COMMUNICATING IN CRISIS* (Helen Kimball-Brooke & Robert Z. Brooke trans., 1997); DOUGLAS M. HENDERSON, *IS YOUR BUSINESS READY FOR THE NEXT DISASTER?* (1996); CRISIS RESPONSE, *INSIDE STORIES ON MANAGING IMAGE UNDER SIEGE* (Jack A. Gottschalk ed., 1993); LAURENCE BARTON, *CRISIS IN ORGANIZATIONS: MANAGING AND COMMUNICATING IN THE HEAT OF CHAOS* (Jeanne R. Busemeyer ed., 1993); DIEUDONNEE TEN BERGE, *THE FIRST 24 HOURS* (1988); and MARION K. PINSORF, *COMMUNICATING WHEN YOUR COMPANY IS UNDER SIEGE, SURVIVING PUBLIC CRISIS* (1987).

Much of the material below incorporates many basic concepts that appear in most, if not all of these texts. I do not cite to all of them when discussing such concepts, but instead provide references to specific books where otherwise appro-

First, this material was created with Counsel in mind. Many texts address crisis management planning from a generic level that rarely provides much, if any, information on topics such as the attorney-client privilege. Second, this material was formulated with the Company's aviation business in mind. It includes a discussion on potential aviation regulatory, civil, and criminal liabilities that typically do not appear in the general texts. Third, this material is an amalgam of these detailed texts. This article is designed to serve as a "single-source" document that provides a comprehensive outline for a workable crisis management planning process without going into too much background detail, while also providing extensive references to supporting materials if a Company wants to investigate certain issues in detail.<sup>2</sup>

Some Companies view a crisis management plan merely as a series of checklists or prepared statements to follow in the event of a crisis. But the real value of such a plan lies not in the finished product; rather, it lies in the process of creating that product. Considering various options and responsibilities raised by a crisis in a pressure-free, pre-crisis environment is much easier and more beneficial than considering those issues for the first time immediately after a crisis occurs, even if the Company has generic checklists and prepared statements in place.

This material is therefore divided into two parts. The main part is the main body of this article, which contains preparation material that provides a vehicle to conduct the organization and creation of a crisis management plan well before the need for such a plan arises. The second part is a series of appendixes that contains templates of the final work product itself—checklists and prepared statements—that, through the work of the appropriate people within the Company, may become the actual crisis management plan.

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priate. I also cite throughout the text a number of law review articles, treatises, and other such materials that I relied on in putting this manual together.

<sup>2</sup> But a note of caution is warranted. As one businessperson and crisis management commentator observed, there can be no basic or formulaic approach to effective crisis management planning: "[T]he right response to a crisis for one organization may be the exact opposite of the right response for another in what seem to be similar circumstances." CRISIS RESPONSE, *supra* note 1, at ix-x (from forward by Kurt P. Stocker, chief corporate relations officer for Continental Bank Corporation). Thus, the focus of these materials is an outline of the *planning process*, not a plan itself.

## II. GENERAL DISCUSSION

### A. GENERAL CRISIS MANAGEMENT PRINCIPLES AND PROCESSES

#### 1. *What is a Crisis?*

A crisis can be defined as any event that may or does bring a Company under attack by regulators, prosecutors, the press, analysts, or its investors. It is any event that could negatively affect the credibility or reputation of that Company. These events may come from a variety of sources. One source could be "bad behavior," such as sexual harassment by employees or self-dealing by board members. Another source could be antitrust violations. A third could be large-scale tax violations. Finally, another crisis source might be a catastrophic event involving, or even caused by, a product that was manufactured, installed, or maintained by the Company.<sup>3</sup> Moreover, a crisis in one area often leads to a "vicious circle" of crises in the other areas.<sup>4</sup>

#### 2. *What are the Possible (Extreme) Harms Resulting From a Crisis?*

Generally speaking, a crisis can create two types of significant damage. The first may be significant damage to the Company itself, even potentially threatening the Company's very existence. The second may be significant career or reputation damage to individual members of the Company's senior management or board of directors.

There are a range of events arising from a crisis that would have an immediate impact on the Company, its management, and its board. These could include, but are not limited to:

- (1) Regulatory investigations and related enforcement actions with the possibility of significant civil penalties or future increased regulatory oversight.
- (2) Civil lawsuits commenced by a regulatory body or by private citizens seeking enforcement of the applicable regulations.
- (3) Personal injury lawsuits, or other lawsuits sounding in tort, brought by individuals or class actions seeking significant monetary damages.

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<sup>3</sup> See CAPONIGRO, *supra* note 1, at 5-9; see also Gary G. Lynch, *Ten Commandments of Corporate Crisis Control*, 1053 PRAC. LAW INST., CORP. 239, 242-43 (May 1998).

<sup>4</sup> See OGRIZEK & GUILLERY, *supra* note 1, at 12-13.

- (4) Criminal investigations and resulting indictments by local, state, and federal authorities against the Company itself and its officers and employees.

Some, all, or none of these events could occur, other events could occur, and they all could happen sequentially or simultaneously.<sup>5</sup>

### 3. *What is Success in Dealing with a Crisis?*

Success in dealing with a crisis can be defined as navigating through the crisis as quickly and efficiently as possible while limiting damage to the Company.<sup>6</sup> But the Company needs to be realistic. Seldom is a crisis a positive experience for a Company or the individuals involved, and it is highly unlikely that the Company will somehow be able to turn a crisis into a corporate achievement.<sup>7</sup> With proper planning and implementation, however, both the short- and long-term effects of a crisis can be significantly mitigated.

### 4. *A Process Overview: How Does a Company Prepare for a Crisis?*

First and foremost, a Company successfully prepares for a crisis by initiating and fully supporting formalized crisis management planning at the highest levels of the organization and with the active involvement of the Counsel.<sup>8</sup> This is basic. Without taking the initial step of beginning a formalized planning effort, high-level support of this effort, and attention to privilege and

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<sup>5</sup> See, e.g., CAPONIGRO, *supra* note 1, at 11-16.

<sup>6</sup> See Lynch, *supra* note 3, at 244.

<sup>7</sup> See *id.* But consider Jeffery R. Caponigro, who takes a somewhat different view: "Believe me, I'm not saying a business should want a crisis to occur. But there are times when a crisis can be beneficial to a business." CAPONIGRO, *supra* note 1, at 24. The author then goes on to list a number of "benefits" that a business can experience during and after a crisis, such as increased visibility and name recognition, an opportunity to show competency and leadership, improved relationships, and the ability to make necessary changes. See *id.* at 24-26. But many of these benefits can accrue through the crisis planning process without the crisis ever occurring, which is arguably the best result of all. Thus, I think the best approach is to plan vigorously for a crisis, assuming, for extra incentive, that an actual crisis would *not* be a positive experience, and then to capitalize on the benefits that the planning process itself affords.

<sup>8</sup> See, e.g., Fredric S. Newman, *Coordinating Legal, PR Aspects of a Product Liability Crisis*, 15 No. 3 PROD. LIAB. L. & STRAT. 1, 3 ("It is imperative that any planning and training effort be mandated by a company's chief executive officer, who should establish an operational, executive, crisis management group."); see also CAPONIGRO, *supra* note 1, at 99, 103-04.



other legal issues, the Company cannot and will not be adequately prepared for a crisis.<sup>9</sup>

Second, it stands to reason that the best way to prepare for a crisis is to work aggressively to stop one from happening in the first place. If a significant crisis can threaten the very existence of a Company, then the time and resources spent forestalling preventable crises may well save the Company in the long term.<sup>10</sup>

That being said, the Company needs to realize that not all crises are preventable and that at least one is likely to happen during the life of the Company. Thus, a Company should follow two very basic steps in order to prepare for and deal with a crisis:

- (1) Create a Crisis Management Team (the "Team"); and
- (2) Use the Team to:
  - (a) Aggressively search out and address "preventable" crises, and
  - (b) Create contingency plans—the Crisis Management Plan or "Plan"—to deal with the non-preventable crises.<sup>11</sup>

In turning to the details, however, there appear to be as many ways to conduct this crisis management planning as there are crisis management planning commentators. But keeping in mind the goals described above—the creation of a planning outline with an eye to Counsel's role in an aviation-industry environment—this article teases out a path that is logical, inclusive, and flexible.

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<sup>9</sup> As one author notes, one critical step in crisis planning is to make it clear which executive is responsible. "It won't get done unless someone is clearly named as the person responsible for making it happen." CAPONIGRO, *supra* note 1, at 100.

<sup>10</sup> See CAPONIGRO, *supra* note 1, at 78 (in many cases crises can be prevented or at least mitigated); COOMBS, *supra* note 1, at 17 ("The best way to manage a crisis is to prevent it"); see also Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 1149 PRAC. L. INST., CORP. 307, 316 (1999) (stating that a legal crises arising out of corporate crises may well "threaten the very existence of the corporations they beleaguer").

<sup>11</sup> The commentators are of one mind on the importance of forming some type of crisis management team as a first step in preparing to respond to a crisis, and to the extent they go beyond merely addressing crises that have already occurred, they recognize the value in working to prevent crises as another early step in crisis management. See, e.g., CAPONIGRO, *supra* note 1, at 100; COOMBS, *supra* note 1, at 17; OGRIZEK & GUILLERY, *supra* note 1, at 86 (calling the team a "crisis unit"); Newman, *supra* note 8, at 3; Pitt & Groskaufmanis, *supra* note 10, at 317.

First, the Team, in conjunction with senior management and Counsel, can conduct a “master planning process” that lays the groundwork for the overall Plan. This includes creating privilege guidelines, identifying and minimizing—if not eliminating—crisis sources, identifying key stakeholders, and so forth. Then, if and where appropriate, the Team can break down into specifically tailored subgroups to conduct “subplanning” that is more focused on particular issues. For example, this subplanning could include (1) notification and implementation planning, (2) public affairs planning, and (3) legal response and internal investigation planning.

And once the Team, as a whole or in its subgroups, has created these plans, it must then be prepared to implement them. This typically involves dissemination of guidelines to the appropriate employees, practice drills of the plans followed by appropriate plan revisions, and the occasional review and update of the plans as time passes. Finally, the Team will be responsible for post-Crisis critique if and when one becomes appropriate.<sup>12</sup>

## B. ISSUES SPECIFIC TO AVIATION COMPANIES

### 1. *Focus Here: Potential Aviation Disasters*

As previously noted, a Company crisis may come in many forms. The focus here will be on a crisis resulting from an aircraft disaster that involves the Company’s aviation business.

### 2. *Unique Issues*

#### a. Who is the Customer?

The Company must clearly understand who its customers are. If the Company is a private operator of aircraft or is a small air carrier, then the customer is either the aircraft owner and its passengers or the flying public. If the Company is in the business of manufacturing, installing or maintaining parts on those

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<sup>12</sup> All of the commentators I have cited so far recognize most, if not all, of these elements, although not necessarily in this order. My proposed process does, however, mirror that put forward by Jeffrey R. Copanigro, who created a never-ending or circular process that includes: (1) identifying and assessing the Company’s vulnerabilities; (2) preventing crises from occurring that can be prevented; (3) planning for the crises that cannot be prevented; (4) recognizing that a crisis has occurred; (5) communicating during and after the crisis; and (6) monitoring, evaluating and making adjustments to the plans as necessary. See CAPONIGRO, *supra* note 1, at 17-18 (identifying each basic step; the remainder of book then expands on each element listed).

aircraft, then the Company's direct customers are the air carriers that use those parts rather than the general public. That is, it is the aircraft operators that make the decision of whether to install and keep one of the Company's products on its aircraft. That being said, in such a case the general public's view of the safety of the Company's products could arguably have a significant impact on the aircraft operators' decisions to install or maintain those parts on their aircraft in the first place.

b. Who Bears Most of the Burdens?

Because aircraft operators such as in-house flight departments or small air carriers are the Companies that directly conduct either private or common carriage (and thus operate or carry a non-aircraft-operator Company's devices), those Companies will be on the front line of crisis response should an aviation disaster occur. Thus, the aircraft operators will have the most direct regulatory burdens, most notably the burden of initially notifying and dealing with the appropriate federal aviation regulatory agencies in the aftermath of an aircraft accident or incident. But note that this may also place the non-aircraft-operator Company in the position of potentially becoming a "scapegoat." If such a Company does not immediately become actively involved in the post-disaster process as much as it can, it could find itself in the unhappy position of being directly or indirectly blamed for the disaster, regardless of the actual facts.

c. Whose Law Will Apply?

Another important factor in a Company's crisis management planning process, for aircraft operators and non-operators alike, is that it may face legal action in a multitude of jurisdictions. Because a Company's aircraft, or its products that are installed or maintained on the aircraft, may be operated literally anywhere, a disaster implicating the Company could happen anywhere. This in turn means that a lawsuit might be filed against the Company anywhere. While the aircraft disaster's location by itself would not necessarily have a significant impact on any resulting federal actions,<sup>13</sup> it could have a significant impact on

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<sup>13</sup> For example, Federal Aviation Administration regulatory enforcement actions will be governed by the same statute—the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 40101, *et seq.*, (1994)—and its related enforcement regulations—generally found at 14 C.F.R. pt. 13 (2000)—regardless of where the aircraft disaster occurs.

any state or local litigation because of the variance in state and local personal-injury and criminal laws.<sup>14</sup>

### 3. Definitions and Acronyms

This article will use the following definitions and acronyms throughout the discussion of the crisis management planning process, with the goal of using terminology that is commonly used in the aviation industry:

*Air Carrier or Carrier:* Any person or corporate entity—here a Company—who undertakes to engage in intrastate, interstate, overseas, or foreign air transportation, or transportation of mail by aircraft, i.e., the intrastate, interstate, overseas, or foreign carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft in commerce.<sup>15</sup> Note that all Aircraft Operators (defined below) generally will be referred to in the remainder of this article as “Air Carriers,” recognizing that there is a substantial body of such operators who provide flight services that are not for compensation or hire, such as in-house flight departments that conduct 14 C.F.R. Part 91 aircraft operations for their corporate aircraft owners pursuant to Subpart F of Part 91, because the principles discussed below generally apply to both classes of operators equally.

*Aircraft:* Any aircraft operated by an Air Carrier that has installed on it one of the Company’s Devices (as defined below).<sup>16</sup>

*Aircraft Accident:* Any “occurrence associated with the operation [(as defined below)] of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the air-

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<sup>14</sup> As one aviation-law practitioner’s guide notes:

Jurisdiction, venue and choice of law issues are often paramount in aviation cases. Often the victim or decedent is from one state, the aircraft may have been owned, maintained or hangared in another state, the flight originated in a third state, the crash occurred in a fourth state, and the aircraft, engine or component at issue was designed in a fifth state and manufactured, sold rebuilt or shipped from a sixth or seventh state. It can be a maze, and you, the attorney, are in its midst.

David I. Katzman & John D. McClune, *Preparation for a General Aviation Product Liability Action: A Plaintiff’s Perspective*, in LITIGATING THE AVIATION CASE 9, 14 (A.B.A. Tort & Ins. Prac. Sec., Desmond T. Barry, Jr. ed., 2d ed. 1998).

<sup>15</sup> See 14 C.F.R. § 1.1 (2000).

<sup>16</sup> See *id.*

craft receives substantial damage.”<sup>17</sup> An example of an Aircraft Accident could be an in-flight Aircraft cabin fire that leads to substantial damage to the Aircraft, or that seriously or fatally injures any of the passengers or crewmembers on board the Aircraft.

*Aircraft Incident:* Any “occurrence other than an [aircraft] accident, associated with the operation of an aircraft, which affects or could affect the safety of operations.”<sup>18</sup> An example of an Aircraft Incident would be an Aircraft cabin fire occurring while the Aircraft is on the ground and undergoing maintenance that either (1) indicates that such a fire could also occur while the Aircraft is being used for flight operations, or that (2) causes substantial damage to the Aircraft or serious or fatal injuries to a person working on the Aircraft.<sup>19</sup>

*Aircraft Operator or Operator:* “[A]ny person [or corporate entity] who causes or authorizes[, with or without the right of legal control,] the operation of an aircraft, such as the owner, lessee, or bailee of an aircraft.”<sup>20</sup>

*Aircraft Operation(s) or Operation(s):* The use, or to cause the use, of the “aircraft for the purpose . . . of air navigation including the piloting of [the] aircraft, with or without the right of legal control (as owner, lessee, or otherwise).”<sup>21</sup>

*Aviation Disaster:* Any Aircraft Accident or Aircraft Incident, occurring on an Aircraft in which the Company has installed or maintains any Device, that has the potential to lead to a Crisis.

*Counsel:* The General Counsel’s office for the Company.

*Crisis:* Any Aviation Disaster that has the potential to impact the Company’s image or operations significantly, or to pose significant economic or legal liability on the Company.

*Crisis Management Plan, Plan, or CMP:* A set of procedures, generally composed of several subplans, tables, and guidelines ad-

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<sup>17</sup> 49 C.F.R. § 830.2 (1999).

<sup>18</sup> *Id.*

<sup>19</sup> This example does not technically constitute an Aircraft Incident because maintenance conducted on the Aircraft while it parked and not being used for “air navigation” does not fit within a narrow reading of the definition of “aircraft operation.” However, such a scenario will be treated here as constituting an Aircraft Incident both because it presents a more conservative approach for the task at hand, and because any incident that could indicate that a safety issue exists with the eventual operation of the aircraft will tend to draw regulatory review by either the Federal Aviation Administration or the National Transportation Safety Board, whether or not it fits the NTSB’s strict definition of an Aircraft Incident.

<sup>20</sup> 49 C.F.R. § 830.2; *see also* 14 C.F.R. § 1.1.

<sup>21</sup> 14 C.F.R. § 1.1.

addressing specific areas of expertise, to be implemented by the Company in the event of a Crisis.

*Crisis Management Team, Team, or CMT:* The group of specifically identified Company employees that will create and implement the CMP in the event of a Crisis.

*Device:* Any product manufactured or sold by a Company that is not an Air Carrier and that the Company installs or maintains on an Aircraft.

*Company:* A company that either operates Aircraft, or manufacturers, installs, or maintains Devices for those Aircraft or the Aircraft itself.

*DOT:* The United States Department of Transportation.

*Fatal Injury:* “[A]ny injury which results in death within 30 days of the [aircraft] accident.”<sup>22</sup>

*FAA:* The United States Federal Aviation Administration.

*NTSB:* The United States National Transportation Safety Board.

*Serious Injury:* “[A]ny injury which: (1) requires hospitalization for more than 48 hours, commencing within 7 days from the date the injury was received; (2) results in a fracture of any bone (except simple fractures of fingers, toes, or nose); (3) causes severe hemorrhages, nerve, muscle, or tendon damage; (4) involves any internal organ; or (5) involves second- or third-degree burns, or any burns affecting more than 5 percent of the body surface.”<sup>23</sup>

*Substantial Damage:* “[Any] damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowlings, dented skin, small puncture holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not considered “substantial damage” for the purposes of [49 C.F.R. part 380].”<sup>24</sup>

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<sup>22</sup> 49 C.F.R. § 830.2.

<sup>23</sup> 49 C.F.R. § 830.2.

<sup>24</sup> *Id.*

### III. THE MASTER PLANNING PROCESS

This subpart provides a detailed discussion of the planning process that Counsel and the Company may wish to follow in order to develop a CMP.

#### A. COUNSEL'S ROLE

One of the primary purposes of any crisis management planning is the mitigation, if not elimination, of potential legal crises that can face the Company in the aftermath of a Crisis.<sup>25</sup> Therefore, Counsel should organize and conduct, to the appropriate extent, the CMP planning process once it has been initiated by the highest level of management.

One of the major benefits of this approach is that it may allow for the attachment of the attorney-client privilege—and post-Crisis, the work product doctrine—to much of the CMP planning process and implementation.<sup>26</sup> But these can be dangerous waters to tread.

##### 1. *Privilege Issues*

Privilege issues will arise should regulatory investigations commence, or civil or criminal lawsuits appear after an aviation disaster occurs. Should state-law-based personal injury or criminal

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<sup>25</sup> See, e.g., Lynch, *supra* note 3, at 247; Pitt & Groskaufmanis, *supra* note 10, at 316-17. For a detailed discussion on the changing nature of general counsel's role in assisting a Company in reducing its potential legal liabilities, see Richard S. Gruner, *General Counsel in an Era of Compliance Programs*, 46 Emory L.J. 1113 (1997). This article does not discuss crisis management planning per se, but the parallels to the material discussed above—especially as to preventative steps taken as part of the planning process—are significant:

The activities of general counsel in corporate organizations are changing in response to increasing demands for corporate law compliance and expanding knowledge about how to effectively manage law compliance in organizational settings. These changes are altering the work of general counsel in two key respects. First, the efforts of many general counsel are shifting from incident-specific activities—such as shaping the legal aspects of major corporate transactions or responding to legal claims against corporate clients—towards greater efforts to identify and reduce the legal risks raised by ongoing corporate actions. Second, in tandem with this new focus upon ongoing legal risks, corporate general counsel is becoming increasingly sophisticated in recommending the use of organizational management techniques for preventing or minimizing legal liability of corporate organizations.

*Id.* at 1113-14.

<sup>26</sup> See Gruner, *supra* note 25, at 1177-78 ("Evaluations of corporate compliance and liability prepared by or under the direction of corporate counsel may be shielded from outside scrutiny under the attorney-client privilege.").

lawsuits arise, the attorney-client privilege most likely will be defined by the state in which the suits are filed. But, as noted above, an aviation disaster can occur in any state, so it is difficult to specify the particular privileges that the Company could face.<sup>27</sup> There is arguably enough similarity in most states' approaches to the attorney-client privilege, however, that some basic principles can be defined. Furthermore, these general principles often track the federal law on privilege.<sup>28</sup>

#### a. The Attorney-Client Privilege

In short, the federal common law attorney-client privilege belongs to the client, generally lasts as long as the client asserts it (absent waiver or an exception), and protects confidential communications between an attorney and a client for the purpose of enabling the lawyer to render legal advice.<sup>29</sup> Broken down by its elements, in order for a corporation to invoke the attorney-client privilege under federal common law there must be:

*A client.* Under the first requirement that there be a client, a corporation—just as an individual client—can assert the privilege.<sup>30</sup>

*An attorney engaged to render legal advice or assistance.* The purpose of the communication must be the rendering of legal advice or assistance, and it must be a lawyer that is ultimately giving that advice.<sup>31</sup> The lawyer may be either inside counsel or outside counsel, but for internal counsel the client must take great care to separate that lawyer's legal functions from his or her other functions, particularly those of an administrative, business, or other non-legal nature. Courts do not necessarily automatically uphold the privilege simply because an attorney is conducting or supervising a particular task. Rather, they tend to

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<sup>27</sup> See the discussion on choice of law issues in aviation accidents, *supra* note 14 and accompanying text.

<sup>28</sup> For a detailed discussion of the attorney-client privilege as it applies to corporations, see JOHN WILLIAM GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* (2d ed. 1990 & Supp. 1999). Another good source of information on a variety of attorney-client privilege issues is *ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION, PROTECTING AND DEFENDING CONFIDENTIALITY* (A.B.A. Tort and Ins. Prac. Sect., Vincent S. Walkowiak ed., 2d ed. 1997).

<sup>29</sup> See, e.g., *United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982); 6 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 26.49[1] (3d ed. 1999). See also Gruner, *supra* note 25, at 1178.

<sup>30</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); GERGACZ, *supra* note 28, ¶ 2.01 at 2-3; see also Gruner, *supra* note 25, at 1177-78.

<sup>31</sup> See, e.g., *In re Bieter Co.*, 16 F.3d 929, 936 (8th Cir. 1994).



scrutinize assertions of privilege relating to communications from in-house lawyers to management, particularly when the lawyer is also an executive. Thus, the Company needs to (1) document clearly that the endeavor has a primarily legal purpose, and (2) distinguish between the legal and purely business objective of that endeavor.<sup>32</sup>

*A communication.* The privilege only attaches to communications between the attorney and the client, or among their representatives.<sup>33</sup> Thus, it does *not* protect from disclosure any underlying or preexisting facts or information not related to the confidential issue at hand.<sup>34</sup>

The possible pairings of persons whose communications may be privileged include: (1) the client or his representative and the attorney or the attorney's representative; (2) the attorney and the attorney's representative; (3) the client or his attorney with an attorney representing the client on another matter of common interest; and (4) the client and the client's representa-

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<sup>32</sup> GERGACZ, *supra* note 28, ¶ 3.02[2][a] at 3-14 to 3-15.

Gruner stresses this point in his article, noting that:

Establishing corporate attorney-client privilege concerning compliance program communications may involve several problems. At minimum, counsel must have substantial involvement in compliance efforts before the attorney-client privilege is even arguably applicable. If counsel neither directs nor conducts a compliance evaluation, then the evaluation findings are unlikely to qualify for the privilege.

Similarly, if counsel is involved in a compliance review but acts only as a fact finder or source of business advice, there is little chance that the privilege will apply. In order for the privilege to attach, the objective of a compliance investigation or evaluation must be the rendering of legal advice, including assessments of:

- (1) anticipated litigation, grounds for corporate liability and the probable scope of such liability;
- (2) the need for public disclosures concerning detected misconduct and the appropriate contents of such disclosures;
- (3) the appropriate handling of whistleblower reports and internal sanctions against wrongdoers; and
- (4) steps to prevent a recurrence of illegal conduct.

Gruner, *supra* note 25, at 1178. Note that Gruner's article focuses on compliance reviews, which is roughly analogous to the first part of the crisis management process of locating and eliminating potential crisis sources. His article does not focus on the second part, planning to respond to crises that cannot be eliminated. Thus, to this extent his arguments do not necessarily provide guidance on how the privilege may apply to this second step.

<sup>33</sup> *Bieler*, 16 F.3d at 936.

<sup>34</sup> See GERGACZ, *supra* note 28, ¶ 3.02[2][b]-[c], 3-32 to 3-48.

tive.<sup>35</sup> Where the client is an individual person it is usually easy to determine if such a pairing exists. But when the client is a corporation, the question becomes *who* at that corporation qualifies as the “client” for the purposes of attaching the attorney-client privilege?

In 1981 the United States Supreme Court rejected the commonly used answer to this question—the “control group” test—in *Upjohn Co. v. United States*.<sup>36</sup> There the Court instead found that, on the facts in that particular case, communications by certain individuals were privileged because, in general terms: (1) supervisory personnel directed those corporate employees to make the communications to corporate counsel, (2) the communications concerned matters within the scope of the employee’s duties, and (3) the employees were aware that the information was being sought in order to secure legal advice.<sup>37</sup> The Supreme Court did not adopt these elements as a new test to replace the control group test, specifically leaving the scope of this issue to be developed on a case-by-case basis.<sup>38</sup> But the federal courts have effectively adopted this version of a “subject matter test” for deciding who in the corporation qualifies as the client for the purposes of analyzing whether the privilege exists.

*Intent that the communication be confidential.* The communication itself must be confidential. The Company must intend that the communication be confidential when made and then must treat it accordingly, or the privilege may be inadvertently waived.<sup>39</sup> In order to avoid waiver, the Company should take steps such as the following:

- Documents created in the planning process should be clearly marked “Privileged & Confidential: Do Not Reproduce.”
- Counsel should advise all document recipients of the planning process’s confidential nature and the consequences of inadvertent production. Counsel should also keep in mind that the more widespread the dissemination of the confidential material, the greater the risk of waiver.
- Copies of all documents that the Company decides to keep confidential should be numbered so that they can be

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<sup>35</sup> See *Bieter*, 16 F.3d at 935.

<sup>36</sup> 449 U.S. 383, 389 (1981).

<sup>37</sup> See *id.* at 390-91.

<sup>38</sup> See *id.* at 396-97.

<sup>39</sup> See GERGACZ, *supra* note 28, ¶ 3.02[2][d], at 3-48 to 3-53.

tracked, and employees should be instructed to not make additional copies of those documents.

- Documents generated by employees should state that they have been produced at the direction of counsel and have been designed for use by lawyers to assist them in rendering legal advice to the Company.
- If and when the documents must be given to a third party, the corporation should consider obtaining a confidentiality agreement ensuring, among other things, that the materials are not forwarded to other parties.
- Counsel should brief employees to be sensitive to the possibility that otherwise privileged conversations may be taped or overheard without the speaker's knowledge. For example, employees should be careful of conversations involving speakerphones, because they may be overheard by third parties of whom the employees are not aware.
- Employees should also recognize that communications by voicemail or electronic mail must often be produced in discovery.<sup>40</sup>

*Summary—attorney-client privilege.* All of the elements and issues discussed above can be condensed into what the commentators have recognized are important factors for determining whether a particular document or communication is protected by the attorney-client privilege. These can include:

- Were the communications made by corporate employees to corporate counsel or outside counsel upon order of superiors in order to secure legal advice from counsel?
- Was the information needed by corporate or outside counsel to formulate legal advice not available to or known by upper level management?
- Was the information communicated concerning matters within the scope of the employee's corporate duties?
- Were the employees aware that the reason for the communication with counsel was so that the corporation could obtain legal advice?
- Were the communications ordered to be kept confidential, and were they in fact kept confidential?

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<sup>40</sup> See *id.* Also note Gruner's admonition that in some cases "privilege protections may be waived by disclosures of compliance reports to public agencies." Gruner, *supra* note 25, at 1179.

- What are the identity and resources of the party seeking disclosure of the privileged material?<sup>41</sup>

b. The Work Product Doctrine

Counsel should also review the potential applicability of the work product doctrine. The federal doctrine is a qualified immunity belonging to *both* the client and the attorney that protects from discovery documents and tangible things prepared in anticipation of litigation by a party or its representatives.<sup>42</sup> The doctrine was originally a common-law immunity created to protect trial preparation materials that could reveal an attorney's evaluations and strategy about the case.<sup>43</sup> It is now codified in Federal Rule of Civil Procedure 26(b)(3).

Rule 26(b)(3) provides that, other than for materials prepared by a testifying expert, a party can *only* discover documents or tangible things that a second party, or the second party's representative, created in anticipation of litigation or for trial upon the first party's showing that it has a substantial need for the materials in the preparation of its own case and that it is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Furthermore, if the court does order the discovery of such materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the second party concerning the litigation.<sup>44</sup>

*Anticipation of litigation; duration of the immunity.* Generally a party can rely on the doctrine for documents created before the lawsuit was actually filed, but in that case the documents had to have been created in anticipation of some litigation and would

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<sup>41</sup> GERGACZ, *supra* note 28, ¶ 3.02[3][b][iii], at 3-74 to 3-76. By way of comparison of these "factors-to-consider" under the federal privilege to a state-defined form of the privilege, in Texas the test is that a representative of the client, for the purposes of the attorney-client privilege for a corporation, can be either: (1) A person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the corporate client, or (2) Any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting within the scope of employment of the corporate client. Tex. R. Evid. 503 (2000).

<sup>42</sup> See, e.g., *Admiral Ins. Co. v. United States Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989).

<sup>43</sup> See *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); GERGACZ, *supra* note 28, ¶ 7.01, at 7-4.

<sup>44</sup> See FED. R. CIV. P. 26(b)(3) (2000); see also GERGACZ, *supra* note 28, ¶ 7.02[1], at 7-12 to 7-35.

not have been created but for that possibility.<sup>45</sup> And once it has attached, the immunity generally extends beyond the original litigation, including to any subsequent litigation. There is a split in the federal circuits, however, as to whether material prepared for one case may be protected under the doctrine in a subsequent *unrelated* case.<sup>46</sup>

Note also that materials created in the ordinary course of business, pursuant to regulatory requirements, or for other non-litigation reasons are not prepared in anticipation of litigation.<sup>47</sup>

*Opinion vs. ordinary work product.* The rule accords special treatment to "opinion" work product. Opinion work product consists of the attorney's mental impressions, conclusions, opinions, or legal theories.<sup>48</sup> Examples of opinion work product include: (1) the attorney's notes, including purely factual notes;<sup>49</sup> (2) documents reflecting case strategies and evaluations;<sup>50</sup> (3) compilations of documents where acknowledging the compilation would disclose the attorney's mental impressions and thought processes;<sup>51</sup> and (4) the attorney's litigation file, including the organization of that file.<sup>52</sup> The federal circuit courts' general consensus appears to be that opinion work product enjoys very strong protection from disclosure.<sup>53</sup>

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<sup>45</sup> See *United States v. Adlman*, 134 F.3d 1194, 1195, 1203-04 (2d Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997).

<sup>46</sup> See, e.g., *Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 703 (10th Cir. 1998); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974) (holding that doctrine immunity protects opinion work product even after suit for which it was prepared has ended); *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994) (noting split but declining to decide one way or the other).

<sup>47</sup> See 1979 Notes of Adv. Comm. To Fed. R. Civ. P. 26(b)(3); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260-61 (3d Cir. 1993).

<sup>48</sup> FED. R. CIV. P. 26(b)(3).

<sup>49</sup> See, e.g., *Upjohn*, 449 U.S. at 399-400; *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

<sup>50</sup> See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988).

<sup>51</sup> See, e.g., *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1328-29 (8th Cir. 1986); *Sporck v. Peil*, 759 F.2d 312, 316-17 (3d Cir. 1985).

<sup>52</sup> See, e.g., *In re San Juan*, 859 F.2d at 1015.

<sup>53</sup> See, e.g., *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422, as modified, 30 F.3d 1347 (11th Cir. 1994) (holding that crime-fraud exception is one of the "rare and extraordinary circumstances" in which opinion work product is discoverable); *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (not absolute when representative's impressions and opinions are placed at issue in the case and a compelling need for the material exists).

Ordinary work product includes other trial preparation materials that do not disclose impressions or opinions. Examples of ordinary work product include: (1) nonparty witness statements;<sup>54</sup> (2) individual pieces of evidence that reflect an attorney's selection of only certain information;<sup>55</sup> and (3) the premature creation or production of exhibit lists.<sup>56</sup> Ordinary work product is entitled to only qualified protection. Another party may discover it if the party can show a substantial need for the materials and an inability to otherwise obtain it without undue hardship.<sup>57</sup> Finally, note that collections of evidence that do not evince any creative or analytic input from a party's attorney do not qualify as work product, either opinion or ordinary, and therefore are not immune from disclosure under the work product doctrine.<sup>58</sup>

*Ownership, waiver and the crime-fraud exception.* It is generally accepted that, unlike the attorney-client privilege, the work product doctrine immunity belongs to both the client and the attorney, and either may therefore assert it. Furthermore, the client's waiver of the immunity therefore does not necessarily waive the attorney's immunity, and vice versa.<sup>59</sup>

Work product doctrine immunity can be waived. Waiver occurs if the attorney fails to timely assert the immunity, or if the covered material is intentionally disclosed to a third party.<sup>60</sup> This being said, because the immunity serves the purpose of protecting the material from disclosure to an adversary, disclosure to a non-adversarial third party will only result in waiver if

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<sup>54</sup> See, e.g., *Hickman*, 329 U.S. at 509-12. Note that even though a witness statement will usually be protected as ordinary work product, a witness may obtain a copy of any statement he/she made without having to show a substantial need or undue hardship. See FED. R. CIV. P. 26(b)(3).

<sup>55</sup> See, e.g., *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988) (computer tape reflecting counsel's selection of certain information considered ordinary work product).

<sup>56</sup> See, e.g., *In re San Juan*, 859 F.2d at 1018-19.

<sup>57</sup> See FED. R. CIV. P. 26(b)(3).

<sup>58</sup> See, e.g., FED. R. CIV. P. 26(b)(3); *Riddell Sports, Inc. v. Brooks*, 158 F.R.D. 555, 559 (S.D.N.Y. 1994).

<sup>59</sup> See, e.g., *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994); *In re Sealed Case*, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982). But see *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 866 (3d Cir. 1994) (the immunity belongs to the attorney, not the client).

<sup>60</sup> See, e.g., *Norton v. Caremark, Inc.*, 20 F.3d 330, 339 (8th Cir. 1994).

that disclosure enables an adversary to subsequently gain access to it.<sup>61</sup>

One exception to the work product doctrine is the “crime-fraud” exception; the immunity does not apply to material related to the commission of a crime or fraud.<sup>62</sup> But this exception may not apply to materials created after the client’s alleged wrongdoing has ended.<sup>63</sup>

c. Summary: Counsel Should Conduct an Attorney-Client Privilege and Work Product Doctrine Review

One of Counsel’s first duties as part of the CMP planning process will be to use the attorney-client privilege factors listed above, and the work product doctrine to the extent it may apply to post-Crisis legal activity, to determine the scope of privilege that the Company may potentially seek to apply as a result of the planning process. This will then allow Counsel to provide guidelines for the CMT, and the Company’s employees as a whole, to follow during Crisis planning and response.

In crafting privilege and work-product guidelines for the CMT, arguably the best position to take is to seek to apply the privileges as widely as possible—although not so widely as to clearly violate or lose *all* privilege—but also to anticipate that some or all of the privileged materials will be waived or inadvertently produced at some point. In other words, Counsel should plan for invoking the privilege, but also instruct the Company’s employees that everything they write down may, and potentially will, be seen by a jury at some point.

2. *Aviation Industry Legal Issues*

A central element to the attachment of the attorney-client privilege is that the communication must be made for the purposes of rendering legal advice. Counsel should therefore conduct the CMP planning process with an eye toward the various legal liabilities the Company could face in the aftermath of a Crisis. Below is an outline of three general categories of legal liabilities a Company in the aviation industry may face as a con-

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<sup>61</sup> See, e.g., *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991); *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

<sup>62</sup> See, e.g., *In re Burlington N., Inc.*, 822 F.2d 518, 524-25 (5th Cir. 1987).

<sup>63</sup> See, e.g., *In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997).

sequence of an aviation disaster: (1) regulatory liabilities, (2) civil litigation liabilities, and (3) criminal liabilities.

a. Regulatory Liabilities

The Company may face regulatory investigations and potential regulatory enforcement actions in the aftermath of a Crisis. Although some states have administrative regulations that could apply, this arena has been largely preempted by the federal government, so the federal law is the focus of this review.

**Sources of Authority.**

The statute that primarily governs the aviation industry in the United States is the Federal Aviation Act of 1958, as amended (the "Act"). The Act is currently codified at 49 U.S.C. §§ 40101, *et seq.* (1994). The Act provides regulatory promulgation authority for two of the agencies that most directly impact the aviation industry: (1) the Department of Transportation; the DOT's aviation-related regulations, the Aviation Economic Regulations or "AERs," are primarily found at 14 C.F.R. Parts 200-400 (1999); and (2) the Federal Aviation Administration; the FAA's regulations, the Federal Aviation Regulations or "FARs," are primarily found at 14 C.F.R. Parts 1-199 (1999). A third agency that has significant impact on the aviation industry is the National Transportation Safety Board, which exists under the authority of 49 U.S.C. §§ 1101, *et seq.* (1994), and whose aviation-related regulations are primarily found at 49 C.F.R. Parts 830, 831, and 845 (1999).

All of these regulations create a broad range of compliance duties for any person or Company whose actions touch upon the aviation industry.<sup>64</sup>

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<sup>64</sup> For example, but without limitation, any Company manufacturing aircraft products and parts must comply with the applicable FARs in 14 C.F.R. Part 21; any Company conducting maintenance, preventative maintenance, rebuilding or alteration operations on aircraft parts or equipment must comply with the applicable FARs in 14 C.F.R. Part 43; any individual seeking certification as an airman or mechanic must comply with the applicable FARs in 14 C.F.R. Parts 61, 63, 65, or 67; all U.S. aircraft must be registered pursuant to the FARs in 14 C.F.R. Part 47; all aircraft operations must be operated under one, if not more, of the applicable FARs' operational Parts, typically either Part 91, 121 or 135; all air carriers must receive economic authority, or operate under an exemption from the need for such authority, from DOT and comply with the applicable AERs such as Parts 201, 206, 296, 298 or 380; if a Company's certificated operation involves the operation of aircraft by a foreign air carrier then DOT's AERs in 14 C.F.R. Part 375 are invoked; if an Aircraft Accident or Incident occurs, then the NTSB's regulations in 49 C.F.R. Part 831 are invoked; and so forth. And persons or companies



## Types of Action.

### (a) Investigations

#### (i) DOT and FAA Responsibilities

The DOT and FAA have broad investigative powers under their various regulations. For example, 14 C.F.R. Part 13 provides that the FAA has the authority to “conduct investigations, hold hearings, issue subpoenas, require the production of relevant documents, records and property, and take evidence and depositions.”<sup>65</sup> Likewise, 14 C.F.R. Parts 302 and 305 outline the DOT’s extensive investigative authority pertaining to any potential violations of their regulations.

#### (ii) NTSB Responsibilities

The NTSB’s primary aviation function is to conduct investigations and make determinations of facts, conditions, circumstances, and the cause or probable cause of all accidents involving civil aircraft.<sup>66</sup> It is the NTSB that is charged with the sole responsibility and authority of determining the “probable cause” of Aircraft Accidents in the United States, even if the FAA is conducting a concurrent investigation or assisting in the NTSB’s investigation.<sup>67</sup>

The NTSB’s investigator-in-charge has the authority to designate parties to the investigation, but the parties must be limited to “those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation.”<sup>68</sup> Furthermore, no party “shall be represented in any aspect of the NTSB investigation by any person who also represents claimants or insurers. No party representative may occupy a legal position . . . .”<sup>69</sup>

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doing all of these things simultaneously must comply with all of the applicable regulations simultaneously, plus any other FAA, DOT or NTSB rules that might apply to the particular activity. In short, aviation regulatory oversight is extensive.

<sup>65</sup> 14 C.F.R. § 13.3 (2000).

<sup>66</sup> See 49 C.F.R. § 800.3(a) (2000).

<sup>67</sup> See *id.* § 831.2.

<sup>68</sup> *Id.* § 831.11(a)(1).

<sup>69</sup> *Id.* § 831.11(a)(3).

### (iii) Reporting Requirements

The Aircraft Operator is the party having the regulatory burden to report an Aircraft Accident or Incident.<sup>70</sup> Thus, although a particular aircraft part may be the cause of the Accident or Incident, it is the Aircraft Operator—not the part's manufacturer or maintainer—that has the duty to report such an occurrence to the NTSB. The report may then trigger the NTSB investigation noted above.

All persons, however, have a general duty to report any known violation of the Act or the FAR's promulgated under the Act to the FAA.<sup>71</sup> Such a report could in turn trigger an investigation by the FAA or DOT.

### (b) Enforcement

In conjunction with DOT's and FAA's broad investigatory powers, both agencies enjoy broad enforcement powers. DOT's powers are primarily outlined in 14 C.F.R. Parts 302 and 305, while the FAA's powers are largely defined in 14 C.F.R. Part 13, subpart C—Legal Enforcement Actions.

The NTSB does not have any enforcement authority per se; rather, it is primarily limited to conducting aircraft accident investigations and then making recommendations to the appropriate agencies, such as the FAA and DOT.<sup>72</sup>

## Potential Outcomes.

### (a) Civil Fines and Penalties

The Act and the applicable enforcing agency regulations give DOT and FAA substantial authority to seek a broad range of civil fines and penalties, which could easily climb into the tens of thousands of dollars depending on the type and number of regulatory violations that occurred.<sup>73</sup>

**Certificate Actions:** In addition to civil fines and penalties, the FAA has the authority to suspend or revoke any certificates it has issued, such as airmen, aircraft operator, mechanics, or repair station certificates.<sup>74</sup> This could have a significant economic im-

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<sup>70</sup> See *id.* § 830.5.

<sup>71</sup> See 14 C.F.R. § 13.1(a).

<sup>72</sup> See 49 C.F.R. § 800.3.

<sup>73</sup> See 49 U.S.C. ch. 463 (Enforcement and Penalties); 14 C.F.R. pt. 302 (DOT regulations on enforcement and civil penalties); 14 C.F.R. pt. 13 (FAA regulations on enforcement and civil penalties).

<sup>74</sup> See, e.g., 14 C.F.R. pt. 13, Subpart C.

pact on any Company that requires its FAA certification in order to continue its business.

**NTSB Probable Cause Findings:** Although the NTSB does not have enforcement authority, it does have the authority to make factual determinations and to issue the cause or probable cause for any Aircraft Accident or Incident.<sup>75</sup> More importantly, although later administrative or civil tribunals are not allowed to use these cause or probable cause findings to establish liability against a party,<sup>76</sup> this quite often effectively happens, perhaps due to the great weight accorded to these findings.<sup>77</sup>

#### b. Civil Litigation Liabilities

In addition to regulatory actions, the Company could also face civil litigation liabilities, largely in the form of personal injury lawsuits.

##### **Sources of Authority.**

Generally, there are no federal statutes that provide private causes of action for Aircraft Accidents or Incidents. Such actions are typically based on state statutory and common law provisions. Thus, which laws apply will largely depend on the particular jurisdiction in which the Accident or Incident occurs.<sup>78</sup> This being said, there are three common types of causes of action.

##### **Types of Action.**

**Breach of contract:** Depending on the nature of the Aircraft Accident or Incident, an aviation Company that provides services to Air Carriers, such as the installation and maintenance of electronic equipment, may find that it faces potential allegations that it has breached certain contractual provisions on the quality of that equipment, etc.

**General negligence:** Aircraft Accidents or Incidents that lead to the personal injury of employees or third parties may lead to personal injury lawsuits alleging negligence against all parties related to the Aircraft Operation, running from the Air Carrier to the manufacturer of sub-components used by the Air Carrier on its Aircraft.<sup>79</sup> However, in the case of components manufactur-

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<sup>75</sup> See 49 C.F.R. § 800.3(a).

<sup>76</sup> See 49 U.S.C. § 1154(b) (1994).

<sup>77</sup> See, e.g., 8A AM. JUR. 2D *Aviation* § 200 (1997).

<sup>78</sup> For a discussion on choice of law issues in aviation accidents, see *supra* notes 13-14 and accompanying text.

<sup>79</sup> See, e.g., 8A AM. JUR. 2D *Aviation* § 108 (1997).

ers, indemnity clauses often exist in the contracts between those manufactures and the Air Carriers that may shield the manufacturers from negligence-based lawsuits.<sup>80</sup>

**Products strict liability:** Aircraft Accidents or Incidents that result in personal injuries may trigger actions brought under a state's products liability laws, and in fact these types of actions are more common than those based on general negligence.<sup>81</sup> With respect to Companies that are not Air Carriers, while the courts were initially less likely to apply indemnification and warranty limitations to manufacturers under strict products liability as they were under general negligence, it appears that these limitations are becoming more enforceable.<sup>82</sup>

### **Potential Outcomes.**

**Various contractual relief:** If a court finds that a manufacturer has breached a contract related to an Aircraft Accident or Incident, then that manufacturer will face damages or other relief that may be allowed under the contract or the laws of that jurisdiction.

**Significant personal injury damages:** As with breached contracts, a finding of liability under general negligence or strict products liability will lead to damages or other relief. The significant difference is that personal injury damages typically far outpace contract damages, and may lead to millions of dollars, if not more, in damages.

### **c. Criminal Litigation Liabilities**

Although once considered rare, if not unheard of, "[i]t is becoming increasingly common for federal and state prosecutors to seek criminal penalties against both companies and their managers for violations of statutes and rules regulating conduct of businesses."<sup>83</sup> Quite often those executives and managers are

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<sup>80</sup> See Frank A. Silane & Geneva A. Collins, *Apportionment of Liability Between Users and Manufacturers of Commercial Aircraft*, in *LITIGATING THE AVIATION CASE 25*, 25 (A.B.A. Tort & Ins. Prac. Sec., Desmond T. Barry, Jr. ed., 2d ed. 1998).

<sup>81</sup> See, e.g., 8A AM. JUR. 2D *Aviation* §§ 175-185 (1997); see also Silane & Collins, *supra* note 80, at 26.

<sup>82</sup> See, e.g., 8A AM. JUR. 2D *Aviation* §§ 184 (1997); Silane & Collins, *supra* note 80, at 26.

<sup>83</sup> Margaret Graham Tebo, *Guilty By Reason of Title*, A.B.A. J., May 2000, at 44, 44.

shocked to learn that they could spend time in prison for violations their companies commit while they are at the helm.<sup>84</sup>

### Sources of Authority.

Various state and local laws: Any of the jurisdictions in which a Company works on or operates aircraft may, and probably will, have a range of criminal statutes that could apply to the aftermath of an Aircraft Accident or Incident. Note that this could conceivably include charges of manslaughter or analogous crimes in some jurisdictions.<sup>85</sup>

Federal statutes: A number of federal criminal statutes have been, or arguably could be, used against a Company involved Aircraft Accidents or Incidents. These may include:

- General Criminal Law Statutes:
  - The False Statement Statute, 18 U.S.C. § 1001. This statute prohibits a person or corporation from making, directly or indirectly, false statements regarding any matter within the jurisdiction of a federal agency, such as the FAA, DOT, or NTSB.
  - Mail and Wire Fraud Statutes, 18 U.S.C. §§ 1341, 1343. These sections prohibit participation in schemes to defraud by use of the mail or wires.
  - Conspiracy Statute; 18 U.S.C. § 371. This statute prohibits agreements to commit an unlawful act.
- Transportation-Related Laws:
  - Criminal Sanctions for Regulatory Failures:

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<sup>84</sup> See *id.* For a detailed treatment on corporate criminal liability and efforts to mitigate that liability, see Richard S. Gruner, *Reducing Corporate Criminal Liability Through Post-Offense Responses*, C800 A.L.I.-A.B.A. 159, 166 (1992) (published as part of the ALI-ABA Course of Study entitled *Organizing for Corporate Compliance: Avoid Corporate Lawbreaking Through Preventive Lawyering*) [hereinafter Gruner II].

<sup>85</sup> See Tebo, *supra* note 83, at 44. The first three paragraphs of this article are instructive, and eye-opening, for any aircraft parts manufacturer or service provider:

When ValuJet Flight 592 crashed in the Florida Everglades on May 11, 1996, killing everyone on board, Daniel Gonzalez wasn't there.

And when the oxygen canisters that caused the crash were mislabeled and loaded into the plane's cargo hold in Miami, he wasn't there, either.

Nevertheless, Gonzalez—who at the time of the crash was vice president of SabreTech, Inc., an Orlando-based airline maintenance firm—was charged with 110 counts of manslaughter. He was charged also with unlawful transportation of hazardous waste, conspiracy and falsifying records, and faced up to 55 years in prison and fines of more than \$2.7 million if convicted.

- 49 U.S.C. § 46505—Reporting and record keeping violations; it is a crime to intentionally fail to make or keep a required report, alter a report, or file a false report.
- 49 U.S.C. § 46312—Transporting hazardous material (“HAZMAT”); it is a crime to “willfully” improperly transport HAZMAT.
- 49 U.S.C. § 46316—“catch all” criminal penalties; provides sanctions for the intentional and knowing violations of any FAA safety regulations, where such violations are not already prohibited by another statute.
- Destruction of Aircraft Provisions: 18 U.S.C. § 32—Destruction of aircraft or aircraft facilities.

### **Types of Action.**

Criminal indictments: As noted above, violations of these statutes could lead to criminal penalties against the Company as a business entity and criminal indictments against executive and managers who are leading the Company.<sup>86</sup>

### **Potential Outcomes.**

Significant fines, incarceration, or both: Many of the statutes listed above call for imprisonment of up to five years, fines, or both for each violation of that statute. And, as noted above, charges such as manslaughter brought under state statutes could result in significantly longer periods of imprisonment and greater fines.<sup>87</sup> Finally, also note once again that these penalties could apply with equal force to a Company executive or manager who was not even directly involved in the Aircraft Accident or the events leading up to that Accident.

## **B. CREATION OF THE CRISIS MANAGEMENT TEAM (CMT)**

### **1. Pre-Crisis Creation, Planning and Implementation**

#### **a. Pre-Crisis Creation**

Once crisis management planning has been initiated by senior management and preliminarily organized through Counsel’s office, the next step is the creation of the initial Crisis Management Team. The Team needs to be composed of persons with adequate rank and expertise, which typically includes:

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<sup>86</sup> *Id.* at 44-45.

<sup>87</sup> See discussion *supra* notes 83-85 and accompanying text.

legal expertise to address the legal strategies entwined in crisis management; managerial experience necessary to handle employee issues; the engineering, scientific, and financial expertise required to address the substance of the crisis; and a workable system for dealing with relationships between the Company and its customers and other "key stakeholders." Thus, at a minimum, the team will typically include (to the extent each category exists):

- (1) The Company's senior officers or management representatives. This should involve the highest level of management personnel possible;
- (2) The General Counsel and the General Counsel's staff;
- (3) Senior financial representatives;
- (4) Senior operations representatives;
- (5) Senior public affairs representatives;
- (6) Senior risk management personnel;
- (7) Government and investor relations personnel;
- (8) Internal quality and safety investigators; and
- (9) Where appropriate, the Company's outside litigation counsel.<sup>88</sup>

b. Pre-Crisis Activity: Planning and Implementation

The CMT will have multiple functions, which may be broken down into two general categories: Pre-Crisis planning and implementation and Post-Crisis implementation. Pre-Crisis planning and implementation may include:

- (1) Gathering the necessary information;
- (2) Formulating the appropriate plans or subplanning processes;
- (3) Implementing those portions of the plans that can be put into place before a crisis occurs (for example, Incident notification policies, safety directives from senior management, and so forth);
- (4) Periodically creating practice scenarios to test the implementation of the plans and then revising them as necessary.<sup>89</sup>

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<sup>88</sup> See, e.g., CAPONIGRO, *supra* note 1, at 102-24, 127-29, 135-36, 145; COOMBS, *supra* note 1, at 63-70; OGRIZEK & GUILLERY, *supra* note 1, at 73-78.

<sup>89</sup> See, e.g., CAPONIGRO, *supra* note 1, at 102-24, 127-29, 135-36, 145; COOMBS, *supra* note 1, at 63-70; OGRIZEK & GUILLERY, *supra* note 1, at 73-78.

## 2. *Post-Crisis Implementation*

The primary function of the CMT during Post-Crisis implementation is initially to review the Crisis and then direct the actual implementation of the plans as appropriate. Thus, as soon as any personnel become aware of an event that may become a Crisis for the Company, steps must be in place to make sure that some member of the CMT is notified. Steps must be in place to then:

- (1) Initiate notification of the entire Team;
- (2) Assess the need for additional team members;
- (3) Initiate implementation of the appropriate plan(s);
- (4) Manage the ongoing implementation of those plans for the duration of the Crisis; and
- (5) Eventually conduct a Post-Crisis critique.<sup>90</sup>

## 3. *CMT Staff Support*

One additional factor that cannot be ignored in the crisis management planning process and the Post-Crisis implementation process is adequate support of the CMT. Senior level management must designate sufficient staffing and support resources, from the very beginning of the planning process, who will be dedicated to both supporting the CMT in its planning process and, more importantly, assisting the CMT in the implementation of the plans after a Crisis has occurred. This will typically involve adequate secretarial support and personnel assistance from each of the team members' Companies or subgroups. As the planning process progresses, the CMT can assess this requirement and senior management can then assign personnel accordingly.<sup>91</sup>

### C. THE MASTER PLANNING PROCESS

Once formed, the new CMT should follow a logical planning process that will allow it to gather systematically and consider all of the pertinent information necessary to create a balanced, well-thought-out, and useful crisis management plan. The CMT may therefore undertake tasks such as these:

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<sup>90</sup> See, e.g., CAPONIGRO, *supra* note 1, at 102-24, 127-29, 135-36, 145; COOMBS, *supra* note 1, at 63-70; OGRIZEK & GUILLERY, *supra* note 1, at 73-78.

<sup>91</sup> See, e.g., CAPONIGRO, *supra* note 1, at 102-24, 127-29, 135-36, 145; COOMBS, *supra* note 1, at 63-70; OGRIZEK & GUILLERY, *supra* note 1, at 73-78. I provide detailed lists in Part II of these materials for the supplies, etc., that the Company should stockpile in anticipation of a Crisis.



### 1. *First Task: Identify Potential Crises*

The first task of the newly formed CMT is to identify all of the potential Crises that could arise from the Company's business operations.<sup>92</sup> As noted above, the focus here will be on a potential aviation disaster that triggers a Crisis for the Company.

Generally, there are at least two general types of aviation disasters or "events" that could lead to a Crisis for the Company. The first is some type of event leading to the damage of an Aircraft or injury to the Company's direct or contract personnel while the Aircraft is not being used for revenue or flight Operations. This could be an event such as a cabin fire that occurs while the Aircraft is hangared and undergoing maintenance. This type of event would arguably not tend to draw a great deal of general public notice, but it could draw significant unwanted attention from federal regulators or from state or local officials.

A second type of event could be an Aviation Accident or Incident that occurs while the Aircraft is being used for revenue Operations. This aviation disaster could be calamitous for the Company if the Company's Aircraft Operations, or one of the Company's products, was linked to or allegedly the cause of the Disaster. An example might be either negligent Aircraft Operation procedures, or maybe an Aircraft component failure caused or exacerbated by a Device that occurs in flight, leading to the injury or death of passengers on board the Aircraft. This type of disaster would certainly draw attention from the general public; attention from federal regulators; and, in the current climate, attention from criminal prosecutors.

In either case, the CMT should consider a broad range of possibilities, conferring with the appropriate operations and in-house safety personnel to determine what types of events are most likely to occur and trigger a Crisis for the Company.<sup>93</sup>

### 2. *Second Task: Find and Eliminate Crisis Sources*

#### a. Find Potential Crisis Sources

The next task for the CMT, which can be accomplished in conjunction with the first task, is to search for the potential sources of the types of Crises it has just defined.<sup>94</sup> For example, if the CMT decides that one potential Crisis might be a cabin

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<sup>92</sup> See, e.g., CAPONIGRO, *supra* note 1, at 42-56; COOMBS, *supra* note 1, at 17.

<sup>93</sup> See, e.g., CAPONIGRO, *supra* note 1, at 42-56; COOMBS, *supra* note 1, at 17-32.

<sup>94</sup> See, e.g., CAPONIGRO, *supra* note 1, at 63-74.

fire that occurs while Devices are being installed on an Aircraft, the CMT should direct the appropriate operational personnel to review the installation process to make sure that there is not some obvious practice or factor that could lead to such a cabin fire.

b. Create Processes to Eliminate Crisis Sources

As part of the process of finding potential Crisis sources, the CMT should also coordinate with senior management to take steps to eliminate them (if such systems are not already in place).<sup>95</sup> Once again, there appear to be as many ways to do this as there are crisis management planning commentators. But all of these commentaries can arguably be boiled down to a three-step process:

First, the Company should develop, implement, and document a meaningful corporate code of conduct.<sup>96</sup>

Second, the Company should designate an office to which employees and consumer concerns may be brought. This office or officer should be a person senior enough and with enough influence within the Company to ensure that each concern is properly addressed and its resolution is documented.<sup>97</sup>

Third, the Company should create reporting guidelines for all employees, listing the types of events that should be reported and to whom they should be reported. These could range from

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<sup>95</sup> See, e.g., CAPONIGRO, *supra* note 1, at 78-92; OGRIZEK & GUILLERY, *supra* note 1, at 88 ("It is essential for a [C]ompany to know how to manage a crisis should one arise, but it is preferable to know how to avoid one.").

<sup>96</sup> See, e.g., Pitt & Groskaufmanis, *supra* note 10, at 319.

At a time when the acts of a handful of employees can precipitate a legal crisis affecting an entire organization, a company must make its operating precepts clear to all employees. A corporate code of conduct, in a variety of forms, represents the means by which a company articulates the rules applicable to its industry and creates the methodology to enforce those rules. These codes are developed with the aim of avoiding corporate crises.

*Id.* (citation omitted).

<sup>97</sup> See *id.* at 320.

Many corporate crises do not come as a surprise. Often, they stem from an organizational problem that was allowed to fester without resolution. Therefore, every [C]ompany should identify one or more high-level officers to whom an employee or any member of the public can direct any legal concern regarding the [C]ompany's operations, with assurances—at least in the case of employees—of anonymity and freedom from retribution.

*Id.*

an employee observing another employee's or supervisor's failure to comply with regulatory requirements, to an incident involving the personal injury of a contract employee who is working on the installation of a Device at an Air Carrier's facility, to an employee seeing a news report that a commercial aircraft, either one of the Air Carrier's or one potentially carrying one of the Company's Devices, has been involved in a catastrophic accident.<sup>98</sup>

These three steps combined will hopefully lead to two results. First, they will put into place a mechanism that will quickly provide critical information concerning potential Crisis sources to officials who have the authority to do something about them. Second, this in turn will allow the Company to eliminate these Crisis sources, or—if the source cannot be eliminated—at least bring them to the CMT's attention early enough so that the Team may be able to mitigate the Crisis' most serious effects.<sup>99</sup> And as an aside, not only are taking these steps the right thing to do, but they could significantly reduce corporate penalties under federal sentencing guidelines as well as potentially mitigate civil penalties or damages in regulatory investigations or personal injury lawsuits.<sup>100</sup>

### 3. *Third Task: Identify "Key Stakeholders"*

The next initial task of the CMT will be to identify the Company's "key stakeholders." There are several broad reasons for this exercise. For example, by identifying each stakeholder and its particular needs and concerns early on, the CMT can craft a CMP that is responsive to these needs and concerns from the start. This in turn may allow the CMT to "proactively" influence the Crisis as it unfolds, rather than merely reacting after-the-fact to each new piece of bad news.<sup>101</sup> Furthermore, it will be much

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<sup>98</sup> See, e.g., CAPONIGRO, *supra* note 1, at 78-92.

<sup>99</sup> See *id.*

<sup>100</sup> See, e.g., Gruner II, *supra* note 84, at 173-179, 169; Pitt & Groskaufmanis, *supra* note 10, at 320.

<sup>101</sup> See, e.g., Pitt & Groskaufmanis, *supra* note 10, at 324-325.

Perhaps the most overused, and least understood, word of the 1980s was the term 'proactive.' But, in the context of crisis management, proactive approaches are clearly the key to minimizing the adverse consequences of any crisis . . . . Rather than waiting for constituencies to define the issues, companies should take sensible steps to anticipate what issues should be of interest to the constituencies, and what responses will satisfy them that a crisis is being managed carefully and with their interests in mind.

*Id.*

easier for the CMT to gather Post-Crisis stakeholder notification information during the calm of the planning process than during the hectic hours or days immediately following the disaster that created the Crisis.

These key stakeholders may include:<sup>102</sup>

- (1) The Company's "direct" customers, i.e., for Air Carriers, members of the general public, or the business people or executives that those Operators routinely carry, and for Companies that are not Air Carriers, the Air Carriers that have installed the Devices manufactured or maintained by those Companies.
- (2) The Company's "indirect" customers, i.e., for non-Air Carrier Companies the general public. As noted above, although the general public in such situations does not have a say as to whether the Aircraft they are flying on contains Devices, their desires and concerns as to whether to have them available is transmitted through the Carriers and thus will have a direct impact on the Carriers' decisions to install and use them.
- (3) Employees. It is critical to analyze the employees' impact on the crisis management planning process. Without the employees' full support and cooperation, the crisis management planning process and the implementation of the CMP will be impossible.
- (4) Subcontractors and contract employees. The need to identify these entities is the same as with the Company's own employees. Without the subcontractors' and contract employees' support, any crisis management planning conducted by the Company is likely to fail.
- (5) Appropriate federal officials. Should an Aircraft Accident or Incident occur involving an Aircraft, individuals from the FAA, NTSB, and possibly federal district attorneys and criminal investigative personnel will likely quickly become involved in related investigations.
- (6) State and local officials for each area in which operations are conducted. This may be a difficult task because, as

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<sup>102</sup> Once again, there seem to be as many thoughts on identifying "key stakeholders" as there are disaster-preparation commentators. But the general concept appears to be fairly uniform, and the specific stakeholders listed below reflect the general commentary as applied to an aviation-industry setting. See, e.g., COOMBS, *supra* note 1, at 44-58; Pitt & Groskaufmanis, *supra* note 10, at 324-25.

noted above, the Aircraft are operated literally everywhere by the Carriers. However, the Company can analyze, at a minimum, the areas or jurisdictions where it conducts installation and maintenance of the Devices on the Carrier's Aircraft.

- (7) Senior management. As has been repeatedly stressed, it is absolutely critical that senior management initiate and support the crisis management planning process. In many ways they may have the most to lose if an appropriate process is not designed and implemented, and without their full support the effort will surely fail.
- (8) The board of directors or equivalent officers. As with the senior management and the Company's other employees, without the support of the board of directors, or the equivalent officers, any crisis management planning efforts are likely to fail.

Once all of the key stakeholders have been identified and their points of view and possible concerns during the time of a Crisis have been analyzed and considered as part of the planning process, this information, as appropriate, should be maintained and routinely updated in a Key-Stakeholder Directory that will become part of the CMP checklists and appendices.

#### 4. *Fourth Task: Select Appropriate Subplans & Assign Appropriate Planning Subgroups*<sup>103</sup>

Once the CMT has completed the first three tasks described above, it should decide how it wants to continue with the overall planning process. It may choose to continue with the Team working on the process *en masse*.

But a more efficient way may be to identify pertinent "subplanning processes." Once these are identified, the Team could then break down into appropriate subgroups that could individually work on their assigned tasks, with the different subteams working on the different subtasks simultaneously.

Under this approach, the overall planning process could be broken down into any number of subplanning processes. Three such processes will be identified and discussed in greater detail

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<sup>103</sup> Once again, there seems to be an almost infinite number of ways to conduct the nuts-and-bolts of crisis management planning. Thus, I did not rely on any one source for this particular task. Rather, I considered all of the various sources in light of the particular needs of members of the aviation community generally, and the Company specifically, and devised this proposed step.

below. The first will be a notification and implementation planning process, primarily for activating and implementing the CMP and initiating communications with various key stakeholders. The second will be a public affairs planning process, primarily for dealing with the media and the general public. A third will be a legal response and internal investigation planning process, primarily for ensuring that appropriate legally-related steps are taken to deal with the investigations and lawsuits that may arise in the wake of a Crisis.

Once each major subplanning process and its end goals are identified and the appropriate subgroups created and assigned, the CMT would break into those subgroups with an appropriate amount of time allowed for each to draft its applicable subplan. At the end of that time, the CMT would reconvene to review the product created by each subgroup. Once reviewed, the plans would be approved and those portions of the plans that could be implemented pre-Crisis would, in fact, be implemented. At the end of this process, the Company would have in place the first iteration of its Crisis Management Plan.

5. *Fifth Task: Practice Scenarios, Periodic Revision & Post-Crisis Critique*

Finally, after all of the above steps have been taken and the Company has completed its CMP, it should institute the ongoing process of simulating or practicing, reviewing, and revising the Plan.<sup>104</sup> For example, a practice scenario should be created involving a potential crisis, such as an Aircraft Accident involving a Device manufactured by the Company. Support “players”—Company employees—can be drafted to play the parts of various key stakeholders, such as Air Carrier representatives, contract maintenance representatives; federal or local investigators or officials; and, finally, members of the press. A member of the CMT can then be notified that such an “Aircraft Accident” has occurred, and the Notification and Implementation Plan then invoked with the eventual full implementation of the CMP. The scenario can be designed and time compressed over a one or two day period so that every aspect of the Plan can be tested under “real world” conditions.<sup>105</sup>

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<sup>104</sup> See, e.g., CAPONIGRO, *supra* note 1, at 109-119; OGRIZEK & GUILLERY, *supra* note 1, at 87.

<sup>105</sup> See, e.g., CAPONIGRO, *supra* note 1, at 109-119; OGRIZEK & GUILLERY, *supra* note 1, at 87.

If the CMT has done a good job of drafting the CMP, the process should be relatively self-sustaining once it has started. But no matter how much time and effort the CMT has put into the Plan, running the first practice scenario will likely expose significant issues that had not been addressed in the initial planning process—which is exactly why it is so important to conduct such a session. Thus, after the first practice session has been run, the CMT can revise the CMP as appropriate.<sup>106</sup>

The Company should then take at least two steps to ensure the ongoing viability of the CMP. First, it should identify the data in the CMP—such as the names, titles, and contact information for CMT team members—that change over time, and put into place a process periodically to update this information in the CMP. Second, the CMP should schedule periodic (e.g., annual or semiannual) practice sessions as a means to review and revise the CMP, and to familiarize new members of the CMT with the overall process.<sup>107</sup> With such steps in place, the Company will have created a “living document” that will give it the tools to successfully deal with an Aviation Crisis, should one ever arise.<sup>108</sup>

#### IV. THE SUBPLANNING PROCESS

As noted above, the CMT may wish to break down the overall planning process into several subprocesses. This subpart provides more detailed guidance on three such subprocesses. These include: (1) a notification and implementation planning process, (2) a public affairs planning process, and (3) a legal response and internal investigation planning process.

The CMT may discover as it conducts the initial master planning process that it does not need all of these plans, or that it needs different or additional plans. Furthermore, there may be overlap between the subplans. The CMT should therefore keep the planning process flexible so that as the subplans develop, additional plans can be identified and various tasks can be assigned or reassigned to different subgroups or individuals in order to create the most efficient planning and implementation process.

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<sup>106</sup> See, e.g., CAPONIGRO, *supra* note 1, at 109-119; OGRIZEK & GUILLERY, *supra* note 1, at 87.

<sup>107</sup> See, e.g., CAPONIGRO, *supra* note 1, at 109-119; OGRIZEK & GUILLERY, *supra* note 1, at 87.

<sup>108</sup> See, e.g., CAPONIGRO, *supra* note 1, at 109-119; OGRIZEK & GUILLERY, *supra* note 1, at 87.

## A. NOTIFICATION AND IMPLEMENTATION PLANNING

1. *General Purpose and Appropriate Subgroup*<sup>109</sup>

## a. General Purposes

Notification and implementation planning serves several functions, including building processes to:

- Notify and gather the entire CMT in light of a potential Crisis;
- Conduct an initial assessment of the situation to determine whether it, in fact, constitutes a Crisis;
- Make the determination of whether the CMT needs to be augmented in light of the actual Crisis that has occurred;
- Establish contact with various key stakeholders' points of contact, as appropriate;
- Implement other subplans as appropriate; and
- Monitor and modify as necessary the overall CMP implementation process through the resolution of the Crisis.

## b. Appropriate Subgroup

In light of these various functions, personnel conducting the notification and subplanning function should include at a minimum representatives from senior management, the general counsel's office, operations, public affairs, and whomever else the CMT deems appropriate.

2. *Pre-Crisis Planning and Implementation*

## a. Gather Required Information

In order to meet the general goals described above, the first task under the notification subplanning process will be the collection of the information necessary to implement the plan. For example, the subgroup will need to gather information such as:

*Operational or Product information.* The subgroup should compile a table that lists all of the Air-Carrier Company's Aircraft, or for non-Air-Carrier Companies, the Devices and the Air Carriers that use these Devices. If possible, the table should tie specific Devices to specific Air Carrier Aircraft, so that if, for example, a CMT member hears of an aircraft accident in the news, the

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<sup>109</sup> Much of this discussion is simply an expansion of the concepts already introduced above, offered with the Company's specific aviation-related business operations in mind.



CMT could quickly determine if the crash involves an Aircraft carrying a Device.

*Operational locations and subcontractor information.* Along the same lines as the operational and product information, the subgroup should compile a table that lists the various locations where Aircraft are Operated or where installation and maintenance of the Devices occurs, and subcontractor information on who is doing this installation or maintenance. Thus, if an incident occurs at one of these locations the CMT will be able to determine quickly whether it could possibly involve the Company, and who to attempt to contact at that location.

*CMT member contact information.* The subgroup should also compile a table that lists contact information for each member of the CMT so that if and when an incident occurs, the entire Team can be quickly mobilized to assess the situation.

*Key stakeholder contact information.* As discussed above, identification of the key stakeholders is one of the preliminary steps necessary to create the overall CMP. Using the overall key stakeholder information collected, the subgroup should then determine which key stakeholders the Company will likely wish to contact in light of a Crisis—namely representatives at or with the Air Carriers; Subcontractors; senior management and directors/officers; and possibly federal, state, and local officials.<sup>110</sup> Finally, once all of this information is gathered, it should be maintained and routinely updated in appropriate tables and appendices to the CMP.<sup>111</sup>

#### b. Establish Relationships with Key Stakeholders

Once certain key stakeholders and their points of contact are identified, the Company should consider taking steps to establish ongoing relationships with the stakeholders as appropriate. For example, for non-Air-Carrier Companies, such Companies should consider establishing a relationship with their Air Carriers for several reasons. Namely, it will allow for pre-coordination of disaster response plans, give substantial notice to those Air Carriers that the Company is concerned and “proactive” about safety and crisis management issues, tend to mitigate the possibility that the Company may quickly become a “scapegoat”

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<sup>110</sup> See Part II, Subpart II: Table Templates, for examples of these tables.

<sup>111</sup> See, for example, CAPONIGRO, *supra* note 1, at 110-112, for a process outline touching on all of these concepts. See also OGRIZEK & GUILLERY, *supra* note 1, at 78-80.

in the aftermath of a Crisis, and potentially allow the Company access to the post-Accident investigation process that it might not otherwise obtain.<sup>112</sup>

Likewise, for either type of Company, establishing an ongoing relationship with local FAA officials that emphasizes the Company's interest in safety and crisis management may also go a long way to gaining for the Company an initial "benefit of the doubt" in the immediate aftermath of a Crisis. Furthermore, FAA regulatory enforcement materials are replete with an emphasis on the importance the FAA places on an aviation business's compliance and safety-minded attitude. Establishing this attitude up front could arguably put the Company in a much better position should it become the target of a regulatory investigation.<sup>113</sup>

c. Create a "Notification Tree"

After gathering the necessary information, the next step in this planning subprocess should be the creation of a notification tree for the rapid notification of all CMT members, should any one member receive notice that an event has occurred that may constitute a Crisis. The notification tree should include or take the form of a "self-executing" checklist that will ensure that each member of the CMT is quickly notified and joined together, either in person or through conference call, etc., so that the CMT can begin the CMP response process. The notification tree needs to include contact information for each CMT member, with sufficient and constantly updated information to allow the immediate contact of each member 24 hours a day, 365 days a year.<sup>114</sup>

d. Create a Notification Implementation Checklist

Once the CMT has been notified and gathered, it will need a checklist it can follow to ensure that it will adequately evaluate and address the overall situation. In other words, the checklist should guide the CMT through the process of (1) initially evaluating the situation; (2) augmenting the CMT as necessary; (3) implementing the other subplans as appropriate; (4) contacting key stakeholders as appropriate; and so forth.<sup>115</sup>

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<sup>112</sup> See discussion *supra* Part II(B)(2)(b); see also COOMBS, *supra* note 1, at 44-58.

<sup>113</sup> See *id.*

<sup>114</sup> See, e.g., CAPONIGRO, *supra* note 1, at 107-08.

<sup>115</sup> See *id.*

e. Implement Portions of the Plan as Appropriate

Once the CMT has conducted all of the Pre-Crisis planning that it can through this subgroup, those portions of the plan that can be implemented should be. For example, sufficient copies of the notification tree, contact directories, and so forth should be made and distributed to the proper individuals—keeping in mind the privilege concerns discussed above—to ensure that the Post-Crisis plans can be quickly implemented, that relationships with the targeted key stakeholders are established, and so forth.<sup>116</sup>

3. *Post-Crisis Planning and Implementation*

Once all the steps above have been addressed, and the CMT learns of a potential Crisis, the notification tree checklist should be implemented. It will then convene to determine whether the event that has been reported actually constitutes a Crisis. If not, the CMT should monitor the situation to ensure that it does not develop into a Crisis. If the event constitutes a Crisis, the team should continue with running the remainder of the appropriate checklists as required.<sup>117</sup>

B. PUBLIC AFFAIRS PLANNING

1. *General Purpose and Appropriate Subgroup*<sup>118</sup>

a. General Purposes

The public affairs planning process may be the most critical activity to the Post-Crisis survival of any Company, for the overall goal of the subplan is to maintain good public relations—and thus the Company's good will—in the aftermath of an event that calls the safety of that Company's Operations or Devices into question.<sup>119</sup> A secondary or supporting goal of the subplan for

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<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 230-33.

<sup>118</sup> This is arguably the area of crisis management planning that has historically drawn the most attention by the commentators, so numerous excellent texts exist to help with the process. Once again, I have drawn on many of them, going beyond what I have cited to in this article. But where I adopted a specific sentiment from one of these commentators, I have included a cite to that material.

<sup>119</sup> See, e.g., CAPONIGRO, *supra* note 1, at 142-43; see also Newman, *supra* note 8, at 1. Note that, at first blush, this section may not appear to apply to Aircraft Operators that are not Air Carriers, such as in-house flight department Operators that do not fly passengers in common carriage. But the general provisions discussed here may well apply if an accident involving such Operators calls into

non-Air-Carrier Companies—Companies responding to crises in which the first-line regulatory and investigative response will belong to the Air Carriers rather than those Companies themselves—is to establish another reason to create a relationship with those Air Carriers that will facilitate such Company's participation in the investigative process where necessary in order to protect the Company's interests.

b. Appropriate Subgroup

This planning subgroup should therefore be composed, at a minimum, of senior public relations personnel, senior management personnel, Counsel and operations personnel, and whom-ever else the CMT deems appropriate.

2. *Pre-Crisis Planning*

Pre-Crisis planning by this subgroup will generally involve two processes: (1) An analysis of potential situations in which the Company may want to conduct or participate in press conferences or issue press releases, and (2) overall guidelines on public statements made by the Company in the aftermath of a Crisis.

a. Analyze Possible Actions, Including Participation with Air Carriers

One significant task that the subgroup will face is analyzing whether and when the Company may want to issue public statements or hold press conferences after a Crisis occurs. This task really includes deciding on the answers to several questions, such as: should the Company speak at all? If it does, how much should it say (i.e., should it release everything it knows)? And for non-Air-Carrier Companies, should it act on its own or in concert with the involved Air Carrier?

Generally speaking, the answers to the first two questions are: although in some instances it may be appropriate to remain silent (most notably, when there is no verifiable information available), it is usually better to say something. On the other hand, while it is usually better to say something than nothing at all, this does not necessarily mean the Company should release all it knows; releasing everything could well be worse than remaining silent.<sup>120</sup>

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question, for example, the parent company's dedication to protecting its own employees and executives.

<sup>120</sup> See, e.g., CAPONIGRO, *supra* note 1, at 144; Newman, *supra* note 8, at 2.

The ultimate answers to these first two questions will depend on many issues. These may include answers to questions such as: (1) What are the possible Crisis scenarios? (2) What are the possible reactions of the Company's key stakeholders to those Crisis scenarios? (3) What are the various positive or negative ramifications of communicating to the key stakeholders in light of these scenarios? All of these issues should already have been raised, if not addressed, in the master planning process described above.<sup>121</sup>

Furthermore, the answers to the questions of whether to speak and how much to say will also rest to some extent on more generic considerations, such as general corporate communications practices and legal liability concerns, which are discussed in more depth below.<sup>122</sup>

The answer to the third question—whether a non-Air Carrier Company should act in concert with the Air Carrier—will probably be the most situational of all. Questions the subgroup may want to consider as part of this analysis could include: (1) What is the likelihood that the particular Air Carrier may attempt to blame the Company for the Aircraft Accident? (2) What is the likelihood that the public may identify the Air Carrier with the Company, or vice versa? (3) What would be the short- and long-term ramifications of such perceptions by the Company's key stakeholders?

Once again, some if not all of this information should have already been gathered, if not analyzed, in the master planning process described above. This being said, it will be difficult, if not impossible, to decide whether the Company should seek to participate with the Air Carriers until a particular Crisis, attendant with all of its unique facts, actually arises. However, in light of the fact that it may be advantageous in some situations to seek to participate with the Carriers, the subgroup may wish to establish a relationship with, at least, the public affairs personnel for each Carrier. Then, if the Company feels in the wake of a Crisis that close cooperation is warranted, points of contact and familiarity with the particular Carrier will already be established, hopefully facilitating Post-Crisis cooperation.

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<sup>121</sup> See *supra* notes 92-108 and accompanying text.

<sup>122</sup> See *infra* notes 123-30 and accompanying text.

b. Create Guidelines for Dealing with the Public

The subgroup's second task should be to create a checklist or set of guidelines that the Company can follow Post-Crisis, whether the Company is cooperating with a particular Carrier, issuing statements, or holding press conferences on its own. These guidelines should be based both on the specific key stakeholder information addressed above, and on various general corporate communications and legal-liability concerns, such as:

*Why talk?* The first question that typically arises in a crisis is: "Why talk?" The most innocuous comment can assume a life of its own once litigation begins in the aftermath of a crisis. Thus, the automatic response of most litigation counsel is to think that all that matters is protecting the "bad" facts from disclosure.<sup>123</sup>

This tendency to withhold information in the aftermath of a crisis overlooks the crucial fact that the preservation of a Company's credibility in the marketplace and at the courthouse will likely turn on whether the Company is seen to be telling the truth and acting responsibly. Doing that may mean compromising on some of the traditional litigation "absolutes." Winning the case while losing the Company does not constitute successful crisis resolution.<sup>124</sup>

Furthermore, stonewalling techniques generally do not impress the public.<sup>125</sup> For example, the Watergate break-in did not lead to Richard Nixon's resignation from the presidency; rather, the ensuing cover-up did. The refusal to comment may well be perceived as evasive and irresponsible, if not utterly uncaring. The tendency to make "no comment" sounds like "taking the Fifth." In the court of public opinion, taking the Fifth Amendment is tantamount to an admission of guilt.<sup>126</sup>

A Company will not be able to avoid the issues forever. And if the press senses that the Company has assumed a "bunker mentality," their interest and attention will only increase. The unavoidable fact is that the media is going to tell a story, and it will probably be much better for the Company if it has some

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<sup>123</sup> See, e.g., Newman, *supra* note 8, at 1.

<sup>124</sup> See *id.*; see also PINSdorf, *supra* note 1, at 38-41.

<sup>125</sup> See, e.g., CAPONIGRO, *supra* note 1, at 141, 209-210.

<sup>126</sup> See, e.g., BARTON, *supra* note 1, at v; CAPONIGRO, *supra* note 1, at 209-210; PINSdorf, *supra* note 1, at 56.

hand in writing that story.<sup>127</sup> Thus, the question becomes *what* to say and *when* to say it.

*When to talk and what to say?* First, a Company should keep in mind that although early disclosure tends to show it is forthright and trustworthy, and that most public relations professionals agree that a proactive policy with the public provides more long-term benefits than pitfalls, the Company must tread very carefully if it does not have complete information. For example, if a Company is seen to misrepresent or withhold damaging information early on, its later statements will be less credible. Thus, the short answer to the question of when to talk and what to say is that the Company should begin to talk as soon as it has something constructive, concrete, and verifiable to say.<sup>128</sup>

*Who Will Be the Spokesperson?* Generally speaking, there should be two pre-conditions to the Company's choice of its spokesperson: (1) He or she should be as highly placed in the organization as possible, and (2) he or she should be able to act as spokesperson for the duration of the Crisis. Then, other significant factors to consider are the potential spokesperson's perceived credibility: the ability to quickly learn information and then express that knowledge effectively; the ability to listen carefully; the ability to express compassion and warmth; a willingness to accept critique; the ability to remain calm under pressure; and the stamina to work long, pressure-filled hours.

Finding a person who fills all of these characteristics may accomplish a number of things. For example, it can convey to the general public, and to the various regulatory and investigative agencies listening along with the general public, the seriousness with which a Company is taking the crisis. It hopefully will also allow a relationship of trust to develop between the Company and that audience. By doing these things, that Company may help to mitigate either the chances that personal injury lawsuits are filed or the pressure on the various agencies to investigate the Company with zeal.<sup>129</sup>

*"Do's and Don'ts."* In light of all of these and many other factors and issues not necessarily identified above, here is a practical list of "do's and don'ts" for public announcements by a

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<sup>127</sup> See, e.g., PINSORF, *supra* note 1, at 15-36 (discussing the need for corporations to interact appropriate with the media during a crisis).

<sup>128</sup> See, e.g., CAPONIGRO, *supra* note 1, chs. 9 & 10 (providing detailed treatment on dealing with the media and other key stakeholders during a crisis).

<sup>129</sup> See *id.* at 201-07.

Company during a crisis, realizing that every crisis is unique, public relations advisors should be consulted, and an alternate approach may be optimal.<sup>130</sup>

*"DO's":*

*Do* stay "on message." Identify the Company's legal and business goals. Formulate the message or theme and stick to it.

*Do* tell the truth. Never lie. If the CMT does not have all of the facts and it is necessary to speak to the media (which it almost always is), find respectful ways of not commenting until a later point in time. For example: "Here's what we know; here's what we can tell you; here's what we're doing to investigate it; and here's how we're limiting the harm and correcting the situation. We will let you know when we know more."

*Do* watch your demeanor. Choose the attitude that best suits the Company's message and do not get distracted. Word choice and demeanor are key. How a person says something is as important, or perhaps more important, than the substantive content. Proper language and tone can convey the impression that events are under control and that the Company is doing everything it can to respond effectively to the crisis. People will probably remember the impression the spokesperson makes much longer than what he or she actually says.

*Do* pick a proper backdrop. The street in front of the crisis location with emergency vehicles streaming by and dazed workers stumbling around is probably not the visual image a Company wishes to project. If at all possible, pick a backdrop that helps the spokesperson tell the Company's story, or at least one that is neutral and not distracting.

*Do* be accessible. If the media cannot reach someone from the Company for comment, they will likely say that Company representatives would not return telephone calls, which may sound like the Company is guilty or giving them the dodge.

*Do* be prepared with current information. Do not let the media surprise the spokesperson with new, "just in" information. Break the news to the press before they break it to you. The longer a Company waits to make its announcement, the more time the rumor mill has to grind.

*Do* prepare a written statement. Front-end load the Company's key points, and try to write in sound bites of twenty words

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<sup>130</sup> These practice tips are collected from all of the sources cited *supra* notes 118-29.



or less. Put the bad news up front in the announcement, even if it feels like the message is too abrupt or the Company fears it will be misunderstood because it has not given the big picture. Otherwise, people simply will not pay attention until the announcement "lets the other shoe drop." The announcement should state the bad news in plain English, and then, when it has the readers' attention, put that news in its proper context.

*Do* anticipate likely questions with other members of the CMT, and go over the spokesperson's remarks quickly before meeting with the press.

*Do* have information monitored by counsel for legal implications. Make sure that comments made in public are consistent with the in-house documents and are consistent with the litigation goals. It goes without saying that statements to the public need to be checked for their impact on the various privileges as well.

*Do* pay attention to the needs and concerns of the Company's employees. If the incident has caused the serious injury or death of Company employees, then have a senior representative of the Company meet with the injured or remaining family members before they are discussed in the news or publicly by the spokesperson. Make sure that all of the employees are kept well informed and know that the Company is concerned about their welfare, both as to their personal safety and as to the continuing viability of their jobs.

*Do* pay attention to the needs and concerns of members of the general public who may have been injured or killed. Without admitting liability, make sure that the injureds' or survivors' immediate needs are being met. Not only is this the right thing to do, but a little bit of goodwill by the Company early in the crisis may forestall a great deal of ill-will later on.

*"DON'Ts":*

*Don't* speculate about the cause, consequences, or liability.

*Don't* estimate costs of damage, cleanup, containment, penalties, and so forth.

*Don't* answer hypothetical questions. For example: "Isn't it true, Mr. Companyman, that if the widget had been properly installed then the thingamabob wouldn't have ignited the fire?" Answer: "At this point, we are still in the process of investigating things. We'll get back to you when we have more information." If the press follows up, insisting that the spokesperson answer the "what if" question, he or she should note that the Company

currently does not know that to be true, so it really is too early to draw any conclusions.

*Don't talk off the record.* Assume anything anyone identified with the Company says will be printed or broadcast. Pay attention to the fact that parabolic microphones can pick up any witty, gallows humor jokes made among colleagues from quite a distance. As several politicians are painfully aware, it is too late after the speaker has said it to ask "is this thing on?"

*Don't try to be funny.* The last thing a Company and its spokesperson needs is to be painted as insensitive or as not taking the situation seriously.

*Don't try to spread the blame.* Complaints about any employee, equipment, or contractor, or statements about the effectiveness of any government response, are almost sure to backfire. The old adage that when you point at someone else you have four fingers pointing back at you applies.

*Don't minimize.* The message a Company wants to convey is that it understands the gravity of the situation and is doing everything it can to take care of it. "We are concerned, and we are taking the steps to contain damage and fix the problem."

*Don't "spin."* Stick to what is unquestionably true, and do not try to sugarcoat it. For example, when there has been a loss of life or significant injury, the only comment that is appropriate in the immediate aftermath is, "Our thoughts and prayers are with the families tonight, and we are committed to finding out what went wrong." Now is not the time to talk about your immaculate safety record.

*Don't take the blame.* Do not admit fault. Take responsibility for the situation and seek to address it. This is a Company's chance to get, as far as possible, on the side of the angels. The attitude it wants to project is that it is not the Company's fault, but that it sees it as its problem, and it is committed to finding and implementing the solution.

When dealing with subsequent litigation, taking responsibility, but not taking the blame, helps a Company because by the time the case gets to court on the liability issue, it has the argument that it did its best to end the crisis, it did its best to mitigate damages, and it has already given restitution. Rightly or wrongly, fairly or unfairly, jury research, interviews with jurors after trial, and public opinion polls demonstrate that the public, and juries believe that corporations bear special and heightened responsibilities for public welfare. Companies who do not make efforts to live up to these heightened expectations do so at their

peril, particularly in the context of litigation of punitive damages claims arising from a corporate crisis.

*Don't talk the Company out of its privileges.* As discussed above, some courts have held that a public statement by a corporate official can demonstrate that an internal investigation conducted by counsel was conducted for "business" purposes and, therefore, is not entitled to work product protection.

Although the restoration of public confidence is obviously very important to any Company, the Company needs to minimize the risk that a court will subsequently strike down privileges or protections of materials generated in the investigation of the crisis. In accordance with the detailed discussion above on the attorney-client privilege and the work product doctrine, if the spokesperson talks about the investigation to the public at all, he or she should make it plain that the primary reason for the investigation is to render legal advice to the Company.

*Don't talk the Company out of insurance coverage.* Communications with the government or media can be used against a Company as a basis for denial of insurance coverage. Since most policies exclude coverage for acts expected or intended from the standpoint of the insured, care should be taken to avoid statements that could reflect on this issue.

### 3. *Post-Crisis Implementation*

Quite simply, the Post-Crisis implementation of the public affairs plan is to, as quickly as possible, assess the particular facts of the catastrophe and then apply the principles that have been discussed above. Once this is done, the Company should be prepared either to convene a press conference or to make appropriate press releases. The CMT should then continue to monitor the status of the Crisis and hold timely press conferences or issue press releases as required.

#### C. LEGAL RESPONSE & INTERNAL INVESTIGATION PLANNING

##### 1. *General Purpose and Appropriate Subgroup*

###### a. General Purpose

The general purpose of the legal response and internal investigation planning process is to prepare the Company for the legal ramifications of a Crisis. Specifically, this subgroup may want to:

- Conduct pre-Crisis planning by reviewing and preparing for various legal issues that could have a significant impact on the Company's potential Post-Crisis liabilities.
- Design and distribute various applicable guidelines to all employees.
- Establish checklists for Counsel's immediate Post-Crisis response and the subsequent implementation of an internal investigation.

b. Appropriate Subgroup

This subgroup should include, at a minimum, appropriate members from the Counsel's office, senior management, operations, risk management, and whomever else the CMT deems appropriate (keeping in mind the attorney-client issues discussed at length above).

2. *Pre-Crisis Planning*

a. Overlapping Tasks

It is appropriate to address this subplanning process last. By first attacking all of the various issues that have been discussed above, Counsel and this subgroup will have already completed a substantial portion of this subplanning process. For example:

- By coordinating with senior management to implement and conduct crisis management planning, Counsel will have assisted in taking the first critical step in mitigating, if not eliminating, potential legal crises facing the Company.<sup>131</sup>
- By conducting a privilege review, as described above, and coordinating the overall crisis management planning process accordingly, Counsel will have taken steps to ensure that the attorney-client privilege and the work product doctrine will apply to this effort as much as is possible and appropriate.<sup>132</sup>
- By conducting a review of the various aviation-related duties and potential liabilities as outlined above, and by participating in the process of identifying the key stakeholders that minister to those duties and potential liabilities, Counsel will have laid the groundwork for properly responding to those duties and liabilities if and when they arise.<sup>133</sup>

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<sup>131</sup> See *supra* text accompanying notes 8-9.

<sup>132</sup> See *supra* text accompanying notes 25-63.

<sup>133</sup> See *supra* text accompanying notes 64-87, 101-02.

- By participating in the second step of the master planning process—identifying and eliminating potential crisis sources—counsel will have taken substantial steps toward implementing a legal compliance program.<sup>134</sup>
- By assisting in the notification and implementation subprocess, Counsel will have been able to put into place procedures for collecting important evidence as to when the Company first became aware of the disaster that underlies the Crisis.<sup>135</sup>
- By assisting in the public affairs planning subprocess, Counsel will have been able to put into place balanced and appropriate procedures for communicating with the public, while not placing the Company in the unfavorable position of inappropriately acknowledging liability or destroying insurance coverage.<sup>136</sup>

b. Additional Task: Employee Communications

In addition to the tasks discussed above, Counsel and this subgroup should also conduct planning that goes beyond these steps. Specifically, there are at least three other areas they may consider addressing. The first area deals with communicating with one of the Company's most important key stakeholders—its employees.

The Company's employees will be key to both uncovering potential disaster sources and dealing with the effects of the Crisis once it has occurred; those employees could easily become either the Company's best allies or one of its biggest problems.<sup>137</sup> It is therefore imperative that the subgroup establish clear communication channels and guidelines with and for its employees before a Crisis occurs. There should be two specific goals in doing this.

The first goal is to control the potential release of damaging statements to regulators, law enforcement, and the media in the aftermath of an Aircraft Incident or Accident that could turn into a Crisis. For example, the subgroup should draft guidelines for employees along the lines that should any incident occur that could lead to a Crisis for the Company, employees are to

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<sup>134</sup> See *supra* text accompanying notes 92-100; see also Gruner, *supra* note 25, *passim* (discussing the importance of implementing legal compliance programs).

<sup>135</sup> See *supra* text accompanying notes 109-17.

<sup>136</sup> See *supra* text accompanying notes 118-30.

<sup>137</sup> See, e.g., CAPONIGRO, *supra* note 1, at 158-61.

(1) decline answering any questions from anyone concerning the incident, (2) refer all questions to the Counsel's office, (3) inform Counsel that they have been questioned by someone outside of the Company, and (4) not discuss in casual conversation any aspects of the incident until follow-on guidelines have been issued by the Counsel's office.

The second goal is to establish a positive rapport with the employees. Doing so will help (1) garner their support for the Company's position both before and after the Crisis, (2) avoid spreading damaging rumors about the Crisis, (3) establish their belief that the Company's senior management and the CMT are managing the Crisis as effectively as possible, (4) reinforce the Company's core messages to all of the key stakeholders during the Crisis, (5) maintain their focus on their day-to-day responsibilities during the Crisis, and (6) maintain a positive attitude with customers, suppliers, other employees, and so forth.<sup>138</sup>

The subgroup should keep a number of principles in mind while drafting these guidelines. For example, the Company should:

- Work hard to establish a positive rapport with its employees *before* a Crisis occurs;
- Communicate openly and honestly with employees during a Crisis;
- Specifically ask for assistance from its employees, not simply expect it;
- Choose the best vehicle to deliver the message (if the message is simply "informational," then a simple memo may be appropriate, but if the message will have a major impact on the employees' lives—e.g., the Crisis will cause layoffs, etc.—then a more personal vehicle such as a live or video-taped message from a senior officer may be more appropriate);
- Communicate with and to the employees as quickly as possible after the Crisis has occurred;
- Clearly state the Company's core messages and then periodically reinforce them;
- Maintain a regular level of communication;
- Tell them as much as is appropriate to communicate, keeping in mind privilege issues;

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<sup>138</sup> *Id.* at 163-64.

- If the Company cannot disseminate some piece of information that the employees would like to hear because of confidentiality or privilege concerns, then let the employees know why it cannot be discussed at that particular time;
- Convey basic factors leading to the Company's key decisions;
- Convey difficult decisions such as employee layoffs in a fair and compassionate manner;
- Provide multiple opportunities for employees to ask questions, provide feedback, make suggestions, and express concerns;
- Treat employees the way Counsel and senior management would want to be treated;
- Disseminate information such that all of the employees receive the information at roughly the same time;
- Consider using a different spokesperson than the media spokesperson, if appropriate under the specific facts of the Crisis;
- Let the employees know that the Company will update them on a regular basis, and then follow through; and
- Give them a specific "call to action" they can focus on, e.g., helping to spread the Company's core message about the Crisis, remaining focused on their jobs, maintaining confidence in the Company, and refraining from spreading rumors.<sup>139</sup>

Finally, the subgroup, and specifically Counsel, *must* craft and review all of these principles and the resulting guidelines with the issues of attorney-client privilege and work product doctrine in mind.

c. Additional Task: Document Retention

In addition to drafting guidelines for Pre- and Post-Crisis employee communications, the subgroup should also devise an appropriate document retention policy, if one does not already exist.<sup>140</sup> For aviation industry companies such as the Company, factors that would impact this policy will come from sources such as the three typical areas of legal liabilities addressed above,<sup>141</sup> plus whatever other non-aviation regulatory burdens the Company may face (e.g., potential document retention poli-

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<sup>139</sup> *Id.* at 160-67.

<sup>140</sup> *See, e.g.,* Pitt & Groskaufmanis, *supra* note 10, at 325-26.

<sup>141</sup> *See supra* text accompanying notes 64-87.

cies dictated by the other state or federal agencies that may have jurisdiction over the Company).

The subgroup and Counsel should keep a number of principles in mind while drafting these policies. First, the policies should emphasize to senior management, and to all employees, that the documents they create could well end up in a zealous regulator's hands or on the first page of the local newspaper; they should therefore be very careful both with what they write and with what they keep in their files. Second, if they create documents that are intended for Counsel, then they should be clearly marked as privileged and kept confidential, as discussed at length above. Third, the subgroup should ensure that specific guidelines are put into place for maintaining, and eventually destroying, regulatory required documents.<sup>142</sup> Finally, the guidelines should make clear that as soon as an incident occurs that could trigger a Crisis for the Company, *all* destruction of documents must cease, lest an agency or court later determine that the Company was attempting to destroy relevant evidence.<sup>143</sup>

#### d. Additional Task: Internal Investigation Plan

Finally, the last set of guidelines the subgroup and Counsel may consider creating deal with the Company's own internal investigation of the Aircraft Accident or Incident that gave rise to the pending Crisis. The goals of these guidelines should be two-fold. First, the guidelines should ensure that the Company takes all required legal steps immediately after the Crisis arises. For example, the subgroup should determine whether any insurance notification is required, or if any regulatory notification may be necessary.

Second, the guidelines should assist Counsel in quickly determining exactly what happened, and in preserving "fresh" evi-

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<sup>142</sup> For example, Appendix B to Part 43 of the FAR's generally requires that any business making major repairs or alterations to aircraft pursuant to authority granted under Part 43 must maintain the applicable records for those repairs for a minimum of two years. This being said, because the burden of establishing a regulatory violation against such a business rests with the FAA, the value of keeping records that could assist the FAA in meeting this burden longer than is required by the regulations should be assessed. The Company should therefore review all of the FARs applicable to the different types of work it is doing on the Aircraft, with a specific eye to other document-retention requirements under those FARs, and craft its document retention and destruction guidelines accordingly.

<sup>143</sup> See, e.g., Pitt & Groskaufmanis, *supra* note 10, at 326.



dence along the way. As has been discussed at length above, a Crisis will likely trigger regulatory, civil, or criminal proceedings, if not all three. Counsel will be in a much better position to deal with these potential legal actions if it has a good grasp on the underlying facts before they begin. Furthermore, by starting the investigation process as quickly as possible, Counsel increases the opportunity to find and preserve as complete a record as possible before the evidence begins to slip away.<sup>144</sup>

Therefore, the subgroup and Counsel should draft guidelines that call for (1) conducting interviews with employees who may have personal knowledge of facts underlying the incident that gave rise to the Crisis, and (2) collecting documents, records or other tangible evidence that may be germane to later external investigations. At least three major warnings come to mind regarding these efforts, however.

First, Counsel must keep in mind that if an attorney representing the Company is speaking to an employee who the Company later determines was acting outside the scope of his or her employment, for example, then the ethical rules that apply in that particular jurisdiction may require the attorney to give fair notice to the employee that an attorney-client relationship with that individual employee may not exist. In such a situation, information divulged by the employee could thus potentially be used by the Company or by regulators against that employee at a later date.<sup>145</sup>

Second, in gathering evidence in the immediate aftermath of the Crisis, the Company must take great care to not interfere with any investigations being conducted by the NTSB or the applicable local criminal authority or to take any steps that could be misconstrued as interfering with or misleading those investigators.

Finally, it cannot be overemphasized enough that all of these steps must be taken with privilege issues kept firmly in mind in order to avoid inadvertently waiving the protection of statements and documents that the privileges afford.<sup>146</sup>

## V. CONCLUSION

As noted in the introduction above, the overall goal in presenting these materials is to provide a guide to an effective

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<sup>144</sup> See, e.g., Gruner, *supra* note 25 at 1173-75.

<sup>145</sup> See *id.* at 1181-85.

<sup>146</sup> See, e.g., Gruner, *supra* note 25, at 1177-81.

and efficient crisis management planning process. Hopefully this manual will assist the Company in conducting a meaningful CMP planning process and will allow the Company to reap all the benefits of having its CMP firmly in place.

**APPENDIX I:  
DRAFT CRISIS MANAGEMENT PLAN  
CHECKLISTS AND TEMPLATES**

**APPENDIX I(A): CHECKLISTS**

## MASTER PLANNING PROCESS CHECKLIST

- ☐ Senior Management commits to and initiates crisis management planning.
- ☐ General counsel's office makes initial review of planning materials for purposes of assessing potential implementation or attachment of attorney-client privilege and work product doctrine.
  - ☐ Review appropriate privilege materials.
  - ☐ Review appropriate potential liability materials.
  - ☐ Draft guidelines for what material the Company will seek to protect.
  - ☐ Draft guidelines for creation and use of designated material, including instructions on labeling and limited dissemination.
- ☐ Senior management and general counsel create crisis management team ("CMT").
- ☐ CMT identifies and seeks to eliminate sources of potential crises.
  - ☐ Conduct internal safety audit of operations.
  - ☐ Create corporate code of conduct.
  - ☐ Create or designate corporate safety concern response officer.
  - ☐ Create safety concern/occurrence reporting guidelines.
  - ☐ Eliminate potential crisis sources where possible.
- ☐ CMT identifies key stakeholders.
  - ☐ Create contact sheets for each subgroup of stakeholders as appropriate.

- ☐ Identify unique issues or concerns for each group of key stakeholders.
- ☐ CMT identifies which subplans should be created.
- ☐ CMT designates appropriate subgroups to draft each applicable subplan.
- ☐ Subgroups draft subplans.
- ☐ CMT reconvenes to review and approve subplans created by the subgroups: CMP created.
- ☐ CMT conducts practice scenarios revising CMP as required.
- ☐ CMT conducts post-crisis review and revisions as appropriate.

**END.**

### **PRE-CRISIS NOTIFICATION & IMPLEMENTATION PLAN CHECKLIST**

- ☐ **Gather required information on all CMT members.**
- ☐ **Create notification tree for CMT.**
- ☐ **Create products table detailing devices carried by air carriers.**
- ☐ **Create contact tables for key stakeholders.**
- ☐ **Establish CMT response relationships with air carriers and other key stakeholders as appropriate.**
- ☐ **Create implementation plan for contact with key stakeholders in the event of a crisis.**

**END.**

## **POST-CRISIS NOTIFICATION & IMPLEMENTATION PLAN CHECKLIST**

- ☐ **Activate notification tree – notify entire CMT.**
- ☐ **CMT conducts initial assessment of situation.**
- ☐ **CMT makes determination as to whether situation constitutes a crisis.**
  - ☐ **If no, CMT continues to monitor situation as appropriate.**
  - ☐ **If yes, CMT continues this checklist.**
- ☐ **CMT augments itself as necessary.**
- ☐ **CMT implements each subplan as appropriate.**
- ☐ **CMT contacts key stakeholders, such as air carrier points of contact, as appropriate.**

**END.**



## **PRE-CRISIS PUBLIC AFFAIRS PLAN CHECKLIST**

- ☐ **Subgroup creates general strategies and guidelines for various possible crisis scenarios.**
- ☐ **Create contact and pre-coordination plan with appropriate key stakeholder points of contact, such as air carrier, media relations, or senior management personnel.**
- ☐ **Create and pre-coordinate appropriate relationships with subcontractor point of contact.**
- ☐ **Draft and disseminate, in conjunction with general counsel, guidelines for employees with respect to giving statements to the public or press.**

**END.**

## **POST-CRISIS PUBLIC AFFAIRS PLAN CHECKLIST**

- ☐ **CMT assesses initial situation or crisis.**
- ☐ **CMT designates spokesperson (if not already designated).**
- ☐ **CMT coordinates with air carrier and subcontractor points of contact regarding the air carrier's or subcontractor's public affairs plans (where applicable).**
- ☐ **Spokesperson makes press statements, if appropriate.**
- ☐ **Spokesperson conducts follow-up or continuing conferences as appropriate.**

**END.**

## **PRE-CRISIS LEGAL RESPONSE & INTERNAL INVESTIGATION CHECKLIST**

- ☐ **Conduct ongoing assessment with respect to privilege issues.**
- ☐ **Lay groundwork for later potential legal activity.**
  - ☐ **Review regulatory environment.**
  - ☐ **Review torts or civil action environment.**
  - ☐ **Review criminal indictment environment.**
- ☐ **Create template for internal investigation plan.**
- ☐ **Coordinate with risk management personnel to ensure that appropriate insurance is in place in light of operations audit.**
- ☐ **Draft and disseminate preliminary guidelines for employee activity.**
  - ☐ **Document retention policies.**
  - ☐ **Statements to press or regulators in general.**
- ☐ **Coordinate with air carrier or device manufacturer or maintainer legal counsel regarding potential responses to legal investigations.**

**END.**

## **POST-CRISIS LEGAL RESPONSE & INTERNAL INVESTIGATION CHECKLIST**

- ☐ **Reassess privilege issues.**
- ☐ **Update and disseminate guidelines to employees regarding specific investigations as appropriate.**
  - ☐ **Direct that all document destruction ceases.**
- ☐ **Issue guidelines with respect to interviews by regulators or press.**
- ☐ **Commence internal investigation plan.**
- ☐ **Contact insurance carriers to provide notice of loss or potential loss as appropriate.**
- ☐ **Contact air carrier or device manufacturer or maintainer points of contact as appropriate and ensure that Company becomes part of the NTSB/FAA investigatory process as appropriate.**

**END.**

**APPENDIX I(B): TABLE TEMPLATES**

**CONTACT INFORMATION  
(CRISIS MANAGEMENT TEAM)**

NAME / TITLE / CORP. ADDRESS	CONTACT NUMBERS / E-MAIL	HOME ADDRESS
JANE DOE CEO 9999 Company Rd. Businesstown, USA 11111 Asst: Anna Smith	Work: (111) 555-6789 Mobile: (111) 123-4567 Home: (111) 555-1234 Pager: (111) 456-7890 E-mail: <a href="mailto:janedoe@Company.com">janedoe@Company.com</a>	1234 Any Street Anytown, USA 012345
JOHN DOE General Counsel 9999 Company Rd. Businesstown, USA 11111 Asst: Steve Jones	Work: Mobile: Home: Pager: E-mail:	
	Work: Mobile: Home: Pager: E-mail:	

## STAKEHOLDER INFORMATION (CRISIS MANAGEMENT TEAM)

COMPANY NAME	CONTACT PERSON	CONTACT INFO	STAKEHOLDERS' PRIMARY ISSUES OR CONCERNS
<b>AIR CARRIERS or DEVICE MANUFACTURERS OR MAINTAINERS:</b>			
ABC Airlines	Jane Doe	9999 Company Rd. Businesstown, USA 11111 Work: (111) 555-6789 Fax: (111) 555-1234 <a href="mailto:janedoe@Company.com">janedoe@Company.com</a> Asst: Joe Smith	<ul style="list-style-type: none"> <li>◆ Device safety</li> <li>◆ Aviation Disaster induced liabilities</li> <li>◆ Etc.</li> </ul>
DEFAircraft Repair	John Doe	1234 Business Lane Companytown, USA 99999 Work: Fax: <a href="mailto: johndoe@Company.com">johndoe@Company.com</a> Asst:	
<b>SENIOR MANAGEMENT:</b>			
<b>EMPLOYEES:</b>	N/A	N/A	<ul style="list-style-type: none"> <li>◆ Work safety</li> <li>◆ Continued employment</li> <li>◆ Etc.</li> </ul>
<b>CONTRACTORS:</b>			
<b>BOARD MEMBERS:</b>			
<b>GENERAL PUBLIC:</b>	N/A	N/A	
<b>REGULATORY AGENCIES (Federal, State &amp; Local):</b>			

**AIRCRAFT OR DEVICE INFORMATION  
(CRISIS MANAGEMENT TEAM)**

AIR CARRIERS, DEVICE MANUFACTURERS OR MAINTAINERS	TAIL #	AIRCRAFT OR DEVICE TYPE
ABC Air Taxi	N1234	Lear 45
	N9876	Gulfstream III
	N5678	Hawker 800
DEF Aircraft Repairs	N1000	Lear 60
	N2000	Cessna Citation III
GHI Air Device Manufacturing	N8000	Device model A
	N9000	Device model B



## EMERGENCY NEWS RELEASE FORM (CRISIS MANAGEMENT TEAM)

INFO NEEDED	DESCRIPTION
Date	
Time	
Telephone #	
What happened	
Where	
When	
Products involved	
Products used for	
Current situation as verified by <u>facts</u>	
Number injured/killed (no names given until next of kin notified)	
Effect on local work force	
Status of investigation	
Who is investigating	
Governmental agencies involved	
Additional information	

**APPENDIX I(C): CRISIS MANAGEMENT  
PLAN TEMPLATE<sup>1</sup>**

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<sup>1</sup> These templates were culled from a number of sources. *See, e.g.*, BARTON, *supra* note 1, at 198; COOMBS, *supra* note 1, at 27-84; Gottschalk, *supra* note 1, at 409-427.

# **CRISIS MANAGEMENT PLAN ("CMP")**

**FOR**

**[E.G., ABC AIR CARRIER, OR BUSINESS  
OPERATOR OF AIRCRAFT, OR AIRCRAFT  
DEVICE MANUFACTURER]**

**COPY \_\_\_\_\_ OF \_\_\_\_\_ COPIES**

**ISSUED TO: \_\_\_\_\_**

**DATE: \_\_\_\_\_**

***THIS DOCUMENT IS PRIVILEGED AND CONFIDENTIAL  
DO NOT DISCLOSE OR COPY THIS MATERIAL***

## **Introduction by (Appropriate Senior Management Official)**

The information contained in this Crisis Management Plan ("CMP") is designed to assist Crisis Management Team ("CMT" or "Team") members in the event of a Crisis. Incorporated in these materials are checklists, to guide Team members in taking the appropriate Pre- and Post-Crisis steps; information tables, which will provide each Team member with crucial contact, stakeholder and product information; and an outline . . . . It is absolutely critical that the Company gives the utmost attention to this crisis management planning process . . . .

### **Mission Statement:**

**[E.G., ABC AIR CARRIER, OR BUSINESS OPERATOR OF  
AIRCRAFT, OR AIRCRAFT DEVICE MANUFACTURER]**

The mission of [the Company] is . . .

## **Crisis Management Plan**

**\*\* Below is an example of how your CMP Table of Contents may look \*\***

- I. Introduction by (Appropriate Senior Management Official)
- II. Mission Statement
- III. Definitions and Acronyms
- IV. Attorney-Client Privilege Guidelines
- V. Work Product Doctrine Guidelines
- VI. Notification Tree
- VII. Checklists
  - 1. Master Planning Process
  - 2. Pre-Crisis Notification & Implementation Plan
  - 3. Post-Crisis Notification & Implementation Plan
  - 4. Pre-Crisis Public Affairs
  - 5. Post-Crisis Public Affairs
  - 6. Pre-Crisis Legal Response & Internal Investigation
  - 7. Post-Crisis Legal Response & Internal Investigation
- VIII. Tables
  - 1. Contact Information
  - 2. Stakeholder Information
  - 3. Products Information
  - 4. Emergency News Release Form

## **CMT “WAR ROOM” SUPPLIES LIST**

- ◆ sufficient electrical outlets
- ◆ computers with modems that access Company files and online systems; laser printer
- ◆ portable computers with modems
- ◆ fax machine, blast fax, fax cover sheets
- ◆ preprogrammed telephones with a separate line for each member of the crisis team, voice mail, and call interrupt
- ◆ cellular phone with listed numbers and voice mail and call interrupt connections
- ◆ telephone directories for all organizational sites
- ◆ organization chart
- ◆ diagram of a “phone tree” for calling
- ◆ media directories, governmental directories, business and professional directories
- ◆ televisions with cable to receive CNN, C-SPAN, and multiple networks
- ◆ radios, including short wave
- ◆ photocopier
- ◆ VCR and audio tape playback and copying ability
- ◆ risk area maps in hard copy or software
- ◆ body bags in the event of crisis-related deaths
- ◆ legal pads, pens, pencils, paper clips, staplers/staples
- ◆ corporation stationary, envelopes (some pre-labeled with employee or other names)
- ◆ extra stick-on labels for mailing to stakeholders
- ◆ Federal Express or other rapid delivery materials
- ◆ tables and chairs
- ◆ trash receptacles
- ◆ clocks
- ◆ restrooms/shower facilities nearby
- ◆ refreshments

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