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AVIATION CRISIS MANAGEMENT:

ARE YOU REALLY READY?

Are you prepared to respond to an aviation accident or crisis involving your company? Is your in-house accident team primed and well versed on the issues that will arise in the first few hours following an accident? Do you even *have* an in-house accident team? Have you identified potential litigation issues and pitfalls your company might step into while attempting to do the right things? If not, read on.

While the aviation industry is enjoying its strongest safety record in years, any segment of the industry could be called upon at any moment to deal with a crisis, emergency, or accident situation. Whether in aviation or any other industry, corporate management should work with its various departments, outside counsel, communications specialists, and insurers well in advance to develop a workable emergency plan. The time and preparedness that are required to deal with today's vastly complicated crisis situations should not be underestimated. Indeed, how a company handles a crisis in the first few hours, days, and weeks following a crash or other catastrophe often affects the public's perception of the company and may strike at the bottom line. Even with the best intentions, mishandling a crisis can haunt a company for months and even years.

We have gathered some "lessons learned" from various incidents over the years. These points, as outlined here, are intended to serve as a primer for company executives and in-house counsel in advance of a crisis. The discussion is not meant to be exhaustive. And while this article addresses aviation accidents in particular, the concepts we discuss are applicable, in most instances, to any industry or company crisis.¹

DEVELOP A WRITTEN EMERGENCY PLAN OR MANUAL

One very basic step that companies often overlook is a written emergency plan or manual. A well-written company manual that outlines an emergency action plan can be a very valuable starting point and training tool.

An emergency plan can take several forms. It can be limited to the initial steps the company will follow in the immediate hours and days following an aviation accident, or it can be more comprehensive in scope, expanding well beyond the accident itself. Regardless of scope, however, any emergency plan should be detailed and identify the roles and responsibilities of each department and the department leaders in a crisis. When possible, the manual should include examples of other incidents or recent events from the industry that any user can draw on for direction. A well-written manual is often the cumulative result of lessons learned and constant input from employees at all levels.

To keep your plan up to date, consider scheduling periodic feedback sessions to review and assess the contents of the plan. Revisit and update your plan annually, for example. This

is a wise investment of time and will ensure that the company is ready to engage in best industry practices when catastrophe strikes.

ASSEMBLE SPECIAL CRISIS TEAMS

Identifying key individuals with defined roles for accident response is also an important pre-crisis task. A good starting point for crisis management is to assemble a "headquarters" or executive team, who will be charged with high-level decision making.

In addition to the "headquarters team," smaller "ground" or "go" teams should be considered. These teams should comprise individuals charged with traveling to the accident site and addressing the immediate factual investigation, as well as the media and emotional issues at the scene. Specific individuals should be assigned, for example, to interface on site with law enforcement, families, the media, and personnel from the National Transportation Safety Board ("NTSB") and/or the Federal Aviation Administration ("FAA"), particularly in the event that "party status" is allowed. These individuals should be properly trained and experienced with the applicable NTSB rules and regulations, with the design and manufacture of any potentially relevant product, and with any other issue that may arise at the site.

The ground team could also include one or two individuals who are responsible for closely monitoring developments in any accident investigation. For example, a member of the team could be responsible for attending briefings or gathering information from FAA, law-enforcement, or medical personnel at the scene and reporting these developments back to headquarters.

All team members who are dispatched to an accident site should be briefed or trained on how to interact with the personnel they will encounter. Team members should avoid impromptu interviews or expressing opinions or conclusions about the accident or the company's products or position on the crisis. Rather, they should report the facts and identify the people they observe in the field, as well as those authorities on whom they rely for information.

To maximize communication between the team on site and the team at headquarters, there should be a clear reporting structure and instructions on when to inform management

and whether to do so in written or oral form. All members should carry out their individual charges consistently.

Regardless of the specific roles assigned to individual members of a ground or go team, however, all team members should be well versed on policies regarding photographs and videotapes of the events following a catastrophe and on taking notes on what they observe at the scene.

If team members come into possession of wreckage or other evidence following an accident, the wreckage should not be disturbed or moved. There should be a protocol for documenting the wreckage and any inspections that take place. If a team member creates field notes, they should be neutral in content and without opinions or conclusions. Emails should be created carefully and should also be neutral in tone. Assume that all documents created in the wake of an accident will be produced in subsequent litigation.

Document retention and e-discovery issues similarly should not be overlooked. Team members should gather and secure all documents that may be immediately relevant; those documents relating generally to the flight, the aircraft, and any component parts your company might have on the aircraft should be gathered and preserved first. Aircraft maintenance records, operations and maintenance manuals, and training records should also be assembled. Preservation of electronic media should be discussed and coordinated by technical and legal personnel versed in the relevant issues. Longer term, documents relating to the design, manufacture, and sale of component parts should be gathered and analyzed. Involving counsel in this process will be beneficial.

Also, consider holding mock drills for your teams in order to assess the preparedness of assigned personnel and the effectiveness of the plan. Evaluate and reevaluate assigned personnel annually, even if no emergency occurs in the interim. And make sure the roster of assigned personnel is current, to avoid any holes inadvertently created by attrition.

PROMPT AND EFFECTIVE FACT GATHERING AND PUBLIC COMMUNICATIONS

Careful, deliberate, and prompt fact gathering is crucial. Often, facts are acquired in small bites over time, and jumping to conclusions can lead to misinformation. To avoid this pitfall, set up a chain of command for assembling and

reporting information from various on-site personnel and first responders. There should be a responsible balance between fact confirmation and disclosure to the public. Conference calls and updates should be held at regular intervals to discuss progress and share information. Protocols for confirming information and releasing facts to the media and the public should also be considered.

Posting messages to the company's web site about the crisis and the steps that are being taken proactively to address the issues can be perilous when fact gathering is incomplete. While toll-free numbers may give customers and family members an opportunity to express needs and concerns that they have, the personnel manning those lines must be knowledgeable and updated constantly and consistently. They, in turn, must pass along that information in a like manner.

In a crisis, the goals of the in-house communications department and any public relations campaign should be consistent. Special care must be used in developing any public message, because factual information in the early stages will be incomplete and may be unintentionally misleading. To avoid this problem, consider retaining a crisis management firm to work with the in-house communications department to develop a communications plan *before* a crisis situation arises.

Another factor to consider is whether to have a designated company spokesperson for emergency situations. If your company values a spokesperson, identify one or two individuals who can consistently put forth an appropriate face and presence on behalf of the company. Whoever is chosen must be able to adequately explain (and defend) the company's position or the status of an investigation.

The spokesperson must also understand the potential legal implications of any interviews that are given. When law-enforcement or other government officials request interviews of company witnesses, outside counsel should help prepare the individuals for their interviews. If possible, counsel should attend the interviews to make sure they proceed fairly. Understand in advance the ground rules for recording and videotaping the interviews. Review any statements closely before electing to have the individuals or spokesperson sign them. Assume that every word articulated by the company spokesperson will be used (and mischaracterized) by

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an adversary in open court as a purported admission by the company in subsequent litigation.

The role of the company spokesperson should not be assigned lightly or assumed without appropriate guidance, consultation, and training. In the rare circumstance where a lawyer is chosen as the spokesperson, make sure privilege-waiver issues are analyzed and any potential consequences understood.

NOTIFY INSURANCE BROKERS AND INSURERS

Insurance-related issues are a critical part of crisis management. Insurance issues should be identified early and quickly. All applicable insurance policies should be gathered and made easily accessible to the headquarters team for review. Contact information for the appropriate brokers should be available.

It is critical to understand policy terms that provide coverage for all or part of expenses, potential liability, and costs of defense. Assign a particular individual or department head to review and analyze relevant policies for applicable notice requirements. Discuss these and other relevant insurance issues with outside counsel and underwriters (if appropriate) early on to help protect the company from inadvertently waiving its rights, and be sure to identify the steps and missteps that could jeopardize coverage.

One particular issue that should be addressed well in advance of an accident is whether the company has control over the selection of outside counsel. Retaining outside counsel during the initial stages of an emergency has many benefits. For example, having outside counsel in place can free up the in-house legal team to address sensitive and immediate business, public disclosure, media, and family-related issues. Outside counsel can also assist with document and information gathering, research and analysis of legal issues, and conducting witness interviews.

Companies can, and should, have preferred outside counsel for different situations. Particularly when facing a catastrophe, executives and company officers often have preferred or go-to counsel whom they trust and rely upon to identify

relevant issues, provide guidance, and assess risks in bet-the-company incidents.

In addition, many routine aviation accidents are now being “criminalized” by local law-enforcement officials. These officials are quick to open investigations, demand production of files, and subpoena interviews of company personnel located “on the ground” where an accident occurs—a trend that is becoming increasingly prevalent in European and Asian countries. Having control over the choice of even local counsel can be critical, especially when you need effective representation for corporate officials who may be faced with varied and immediate requests from local law-enforcement officers following an accident. Uncertainty as to whether you have control over the choice of outside counsel at such a crucial time will increase cost and cause delay. Negotiate this benefit into your policy well before an accident strikes. It will be a wise investment.

COMMUNICATIONS WITH SUPPLIERS AND BUSINESS PARTNERS

Insurers are not the only parties to whom notice might be necessary. In-house counsel should also review, earlier rather than later, relevant supply or business contracts to determine whether notice should be given of any intent to seek indemnification for loss due to or during the crisis. In addition, it is good business practice to communicate with and provide updates to suppliers and other relevant business partners who might have a stake in the accident. This will enable such business partners to engage in adequate response plans and strategies on behalf of their own companies. When appropriate, product audits should be scheduled.

SEC AND DISCLOSURE ISSUES

In addition to the litigation and regulatory issues associated with a crisis, publicly traded companies are likely to have to address disclosure and other securities-law issues in a compressed time frame. When a crisis strikes, it is important to engage internal investor-relations leaders to begin appropriate steps for disclosure. Outside securities counsel should similarly be engaged and notified at an early stage to determine whether special disclosures are required or prudent.

CONCLUSION

The importance of advance and thorough preparation for addressing an aviation crisis cannot be overstated, as it will help a company deal with adversity if and when the real event occurs. Corporate executives and their in-house teams should not face such an extraordinarily stressful event alone or unprepared; there are many resources available to help put together an effective crisis management plan. Thought and deliberate action must be taken in implementing it, however, since good intentions alone will not suffice. Don't be caught unprepared. ■

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