

## Crisis Management – Lessons from the Law, Aviation and Real Life

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Crises are often self-inflicted, such as the Boeing 737 Max crisis in which Boeing's executives apparently ignored the very people inside Boeing who knew of the Max's problems – the pilots. "After the crash, Boeing issued a bulletin disclosing that this line of planes, known as the 737 Max 8, was equipped with a new type of software as part of the plane's automated functions. Some pilots were furious that they were not told about the new software when the plane was unveiled."<sup>[1]</sup> "Boeing Pilot Complained of 'Egregious' Issue With 737 Max in 2016" was a headline in the New York Times.<sup>[2]</sup> Too often a crisis in the cockpit is so urgent that time does not allow for taking out the paper or electronic flight manual to help analyze and solve the problem.

Student pilots are taught the "4 C's" -- when faced with difficulty, "Climb, Communicate, Confess and Comply with instructions."<sup>[3]</sup> In addition to learning what's in the flight manual for the aircraft being flown, the 4 C's are part of every pilot's proficiency check ride. "A pilot goes through four stages of proficiency when learning a new airplane, a new set of skills, or working in a new environment. Those stages are Cautious, Compliant (or Current), Confident and Complacent. The last of these can kill you."<sup>[4]</sup>

Boeing as an institution seems to have gotten "complacent" when it came to Max's safety because, it appears, those in the C-suite knew better than the pilots in the trenches. Once a self-inflicted crisis due to whatever cause, such as complacency, escalates, the 4 C's come into play – Climb to safety, Communicate the problem, Confess what you did and what the problem is, and Comply with instructions from the higher authority of air traffic control.

Boeing did what the Iranians did in the crash of a Ukrainian Boeing 737-800 (not a Max). The Iranians denied there was a problem and blamed someone else. Boeing blamed pilot error and the Iranians blamed mechanical failure. The two Boeing Max crashes occurred when foreign pilots were in control of new Boeing Max jets maintained and operated by foreign airlines.

The Iranians did what some say they do best – invoke the big lie. The Iranians had no access to the black box or to cockpit information; there was no distress call; and in lying the Iranians were effectively faulting Ukraine's pilots, mechanics, and pilot training even though Ukraine has one of the best safety records in terms of aircraft maintenance and pilot training. Only days later did the Iranians admit their military "unintentionally" shot down the Ukrainian airliner.<sup>[5]</sup> Even when "confessing," the Iranians continued to lie – the missile was fired intentionally at an ascending aircraft, not at a descending incoming anything, and the Iranian's Russian missile homed in on the airliner's transponder which is what those missiles are supposed to do to hit their targets. The "unintentional" word was intended to excuse the incompetence and stupidity of the Iranian missile defense personnel.

Bill Clinton in the Monica Lewinsky affair invoked only part of the 4 C's -- he Climbed by telling America he had to get back to work as President of the United States, and he certainly Communicated that position. He also did the big lie when he denied he had had "sex with that woman." In telling America, "It depends on what the meaning of 'is' is,"[6] President Clinton made every American parent of a daughter cringe.

Boeing, Iran and President Clinton created these crises, and all mismanaged them. While it would seem axiomatic that a self-inflicted crisis can be managed more easily than an unexpected crisis, that unfortunately appears not to be the case.

In unexpected crises, these rules of aviation also apply. The obituary of one of America's foremost crisis management experts, Harold Burson, said: "Mr. Burson advised corporate C.E.O.s to *get bad news out quickly and fully, making it a one-day story rather than letting it drag out. He urged them to be candid, and refused to take clients who could not be.* He held staff seminars to promote Burson-Marsteller's 'vision and values.' He was less interested in hiring reporters with contacts than he was in finding good writers who could capture the essence of a client. As business and financial news reporting improved in the 1970s and '80s, he sought writers adept at detailed analysis, not the old puffery about chief executives and companies." [7] [Emphasis added] Boeing, Iran and President Clinton could have used and heeded this advice which looks similar to the 4 C's

As a lawyer for over 50 years, I have had the privilege of having clients trust my judgment when a crisis occurs. Sometimes those have been "bet-the-company" crises. Boeing's Max crisis was potentially a "bet-the-company" crisis. The Iranian shoot-down of a passenger plane and killing all 176 aboard was nothing more than a seeming "public relations" crisis to the Iranian regime.[8] And the Clinton crisis was a "Bet-the-Presidency" crisis that turned on a 50-50 Senate vote.

"Over the years, I learned that the traditional advice of a lawyer to avoid public comment during a legal crisis had become outdated, especially with the impact of the Internet at the turn of the twenty-first century. . . . It was no longer viable for a lawyer to tell a client, 'We'll win it in the courtroom—we won't litigate this in the media.' There were too many ways for the judge and the jury to be influenced by public opinion, consciously or unconsciously; too many ways for prosecutors and regulators to be persuaded by adverse media coverage to launch an investigation or to bring a case, as broadcast news, once a day, became 24/7 cable, and then within just a few years, the Internet led to websites and then some blogs and then the blogosphere and then Google, Twitter, YouTube, WiFi, and social networks. *Everything that follows ineffective crisis management – developing a simple message, rapid response to correct misinformation that could hurt a client's reputation, share values or outcome in the courtroom – and, in the long-term, repairing the damage begins with the need to get the facts, all the facts, good and bad – not just those that attorneys are ready to tell a non-attorney crisis manager or public relations, consultant. And that means getting access to all the facts, first with the protection of attorney-client privilege.*"[9]

While the author of that advice was one of President Clinton's advisers in the Paula Jones and Monica Lewinsky matters, his words of today, which may be ironic given what happened some 25 years ago, are valuable: "The first rule of Crisis Management is to get all the facts." [10] Some law firms have created crisis management practices, sometimes within their government investigations practices. One firm "advocates a multifront approach to crisis management. Whether the situation stems from internal problems or external events, we enable our clients to maintain focus on their business objectives while managing a crisis to its best outcome." [11] In aviation terms, this law firm is telling clients to continue to fly the airplane – continue to run their businesses, which is the "Climb" mandate of the 4 C's, and the lawyers will gather the facts and engage other professionals such as public relations or crisis management firms, under the umbrella of the attorney-client privilege, and then advise the client on potential courses of action.

An Above-the-Law article explains the critical importance of learning the facts: A hospital manager's lost laptop with protected patient information on it meant the focus had to be not first on what the potential damage for a HIPAA violation could be, but first on making sure the "fact" the laptop was lost was accurate. "[T]he only 'wise' decision I made that day was to turn over the reins of our response to my colleague who suggested we first ask the manager to retrace her steps over the previous day. And as luck would have it, her laptop turned up in a rarely used conference room a few minutes later. Safe and sound, and most importantly, no violation of HIPAA or our patients' information." [12] There is no substitute for learning the facts as quickly and as accurately as possible.

Another aviation crisis management lesson taught to all student pilots and repeated at all phases of pilot training is to "Aviate,

Navigate, Communicate.”[13] The “Aviate and Navigate” part of this mandate is the “Climb” part of the 4 C’s. The “Communicate” element is shorthand for the “Communicate, Confess and Comply with instructions” part of the 4 C’s. The client must always Aviate and Climb – run the business. The Confess part is usually where things get dicey in terms of whether the client will come clean with the lawyers. Boeing apparently did not. The global media were the lawyers in the case of the Iranian shoot-down of the Ukrainian aircraft. And we do not know whether President Clinton Confessed to his advisers at the time all of the facts regarding Paula Jones, Monica Lewinsky and other women accusers.

I chose the aviation analogy to crisis management for business because as a licensed pilot for more than 40 years and having owned my own single engine aircraft for more than 38 years, I have had my share of difficult situations just as every pilot does. Having a landing light blow out on approach to an unfamiliar non-tower controlled airport after a multi-hour night cross country to work on an acquisition in Maine; having a very large Seagull dive towards my windscreen and hit my right wing over the New Jersey Turnpike at 500 feet on approach to my home airport; and getting lost when encountering an unexpected snow squall in Western Pennsylvania, many occurring in my aircraft’s pre-GPS days, were all manageable because of my recurrent pilot training to prepare for those potential crises.

While the possible crises in aviation are seemingly endless, especially the more complicated the aircraft, training and more training proves the adage that “practice makes perfect.” There are some crises that cannot be practiced in an aircraft and need to be practiced in a simulator, especially when flying more complicated aircraft. An airplane is a machine with parts, systems, passengers and crew that can malfunction. What we do as student pilots and then as pilots is train for contingencies. Training for a crisis in business is not as easy as training for a crisis in aviation because training for crises is usually not part of a business’s agenda. Contingency planning can be urged by insurers, and some companies’ management will have risk managers who do engage in contingency planning. Unenlightened management will often view costly contingency planning as an expense without a quantifiable immediate benefit.

How often do we roll our eyes at fire drills in high rise office buildings? This is contingency planning and practice, or recurrent training, no different from what we do as pilots. “If you see fire or smoke, follow the four ACES of high rise building fire safety: 1. ACTIVATE the fire alarm immediately by pulling the nearest Fire Alarm Box . . . . If you cannot pull the Fire Alarm, call 911. 2. COMMUNICATE with the Fire Warden Team and other colleagues on your floor. 3. EVACUATE by using the stairs . . . . DO NOT USE THE ELEVATORS. Members of the Fire Warden team will lead the evacuation down two or more floors for re-entry (or if there is the need to evacuate the building completely . . .). 4. SELF-ESCAPE Stay calm, don’t panic. Stay low in smoke conditions, and close doors to confine fire and smoke. Feel doors before opening them; if they’re hot, don’t open!”[14] Isn’t this really a tenant’s variant on “Climb, Communicate, Confess and Comply with instructions?”

“I have written before about the necessity of contingency plans, but what if there is simply no time to pull out the book and turn to page 63? You are in a state of emergency, your stomach is in a knot, and the CEO is asking you some very difficult questions. Grab the canoe. Take a breath and do your best.”[15] The canoe is the business or the aviate and navigate/fly the plane part of dealing with an aviation crisis. “First, you must ‘grab the canoe’ and get back to floating; only then can you assess what else might be wrong (missing possessions, food, wet socks, etc.). Things are going to go screwy during your tenure as an attorney — they just will. *You cannot possibly plan for everything, but you can remember the mantra of ‘grab the canoe.’* The canoe is a metaphor for the stasis that usually surrounds your job. You are first and foremost representing an entity. . . . The entity is what keeps you and the other employees afloat. *During a crisis, all of the happenings within the entity are to be worried about after first taking care to right your primary client, the business.* Some things that occur in an emergency, or a quickly moving negotiation, can be left behind, such as obsolete contractual language. Other issues are absolutely necessary in a publicly-traded company — reporting requirements, for instance. *And in the time it takes to read this column, some of these issues can overturn your company’s sense of balance, and leave you drifting.*”[16] “Of course we are not saving lives, or curing dread disease. We practice law. The key is in the word “practice.” As you practice, answers become ingrained, and your expertise begins to grow. After years of “practice,” you enable yourself to right tipped canoes, and assist stressed CEOs quickly, efficiently, and appropriately. But in the recesses of your mind, you must always be aware of the possibilities for crisis. Remember that in the moment you will rely on what you know and keep the primary focus on staying afloat. You can allow yourself to let the what-ifs creep in once you are past the crisis and are happily ensconced at the third seat at the bar, with a martini safely in hand.”[17]

Crises can be big or small. And they can sometimes involve saving lives. It is not often we as lawyers are called upon to help clients deal with “Bet-the-Company” or life-and-death crises. Our “practice” for these crisis events usually comes on the job and our performance often turns on the judgment we have developed from experience, from observing more experienced lawyers, from reading as much as we can about as much as possible, and most of all from thinking and analyzing what we read, see and hear and all the what-if’s that never cease in our daily law practices.

In my law practice, I have had a few “Bet-the-Company” crises to help clients through. Fortunately, all turned out fine. One involved consumer product tampering and the other involved a brother-in-law’s attempt to misappropriate my client’s business.

*The Product Tampering Crisis:* The CEO of my branded consumer product client called in a panic, telling me a supermarket executive notified the client and FBI that one of its stores had received a call from someone claiming to have put poison in a container of the client’s product. The client asked whether he should issue a product recall. I have used this example in interviewing job applicants.

I ascertained the facts by speaking with the client’s CEO, COO and plant manager and by liaising with the FBI. I learned that wiretaps had been placed on the supermarket’s telephone lines and that the FBI agent’s experience was more often than not these were hoaxes. My advice to the client was to wait, not rush to issue a product recall, and instead to withdraw the product just from the stores in the local area, to test the withdrawn product, and to replace the product with new product produced at a different plant. That was done and testing proved negative. We waited.

This was in the days before computer real-time inventory could tell us how much product had been purchased at each location. If no poisoned product was out there and the client issued a recall, the company and its brand would have been severely and possibly irreparably damaged. If a poisoned container was already out there in commerce to an unsuspecting consumer, the company would be severely damaged, and a recall would necessarily follow. The FBI agent and I thought the odds of a just-purchased container being consumed and harming or killing someone were fairly low.

The supermarket received a second call from the same caller a few hours later. The FBI wiretap led to an arrest that day of a disgruntled teenage supermarket employee who confessed to the hoax. A public product recall was avoided, and no one was hurt.

*The Brother-In-Law Crisis:* A prospective client was referred to me to discuss estate planning and his desire to leave his hotel business to his adult child who had joined the business and opened an on-premises restaurant. The client believed this hotel was “his,” as the client ran this hotel and his brother-in-law ran two other hotels that all four in-laws owned. I needed to know what the client owned, not what the client told me he owned. After reading the relevant documents, I learned that the client did not own or control the business he thought he did, and he would not be able to leave the business to his heir. The client owned 26% of a limited partnership that owned the business, and he was one of two general partners, the other being his brother-in-law, a very controlling and domineering person. The brother-in-law conditioned his okay for the client’s adult child to open the restaurant on the restaurant providing, at its expense, free breakfasts to the hotel’s guests.

The client’s then-lawyer and then-accountant were among the dozen or so family and friends limited partners. The partnership’s term was contractually scheduled to expire some years earlier, but the brother-in-law, attorney and accountant had advised the client to extend the partnership’s term because if the business was sold, they would all have to pay taxes. It was not a coincidence that each limited partner’s original investment was yielding an annual 700% cash return, all while the assets of the business had appreciated significantly.

Because the client was the nicest person I had ever met and was the kind of man one would choose as your father if that was a matter of choice, the client was not confrontational and did not want to sue despite what I thought were good claims against some of the actors here. I devised a non-litigation strategy that included the partnership not distributing cash to its partners so the partnership could use its cash for acquisitions and other business matters. That resulted in the partners having taxable income without cash being distributed to them. The client offered to buy out the limited partners who rejected the offer, commenced arbitration, and sued for an injunction to compel cash distributions. Although the client would not sue, he would defend himself quite vigorously.

The injunction was denied. The case proceeded to pre-arbitration mediation. Relying on their own "expertise," the former lawyer and former accountant chose not to obtain an appraisal and agreed on behalf of the limited partners to a buy-out at a particular partnership valuation. I arranged for a bank client to make a loan to the partnership in an amount greater than the buy-out value of the limited partners' 48%. The bank's appraised value of the business turned out to be about 50% greater than the buy-out value. After some intra-family transactions, this crisis was resolved with my client owning 100% of his business and having the ability to leave his very valuable asset to his heir. The client said that the decision to make me his attorney was the most significant business decision of his life.

It is critical to ascertain the facts in any crisis situation, both for the lawyer and the client, and the lawyer must be able to communicate those facts clearly to the client and ultimately to others involved in the crisis. "'We are advocates,' Mr. Burson told The New York Times in 1984. 'We are being paid to tell our clients' side of the story. We are in the business of changing and molding attitudes, and we aren't successful unless we move the needle, get people to do something. But we are also a client's conscience, and we have to do what is in the public interest.'"<sup>[18]</sup> While we are advocates to the world outside the client, we need to be truth-tellers to and questioners of the client.

"When cyanide-laced capsules of Tylenol, the pain medication, killed seven people in the Chicago area in 1982, its manufacturer, Johnson & Johnson, made the best of a bad situation. After consulting Mr. Burson, the company's chief, James E. Burke, announced a recall, ordered new tamper-resistant caplets and packaging seals, and mounted a campaign that acknowledged the facts, stressed safety measures and eventually restored his company's credibility. 'Basically, I served to help him think through problems and reinforce his own instincts,' Mr. Burson said of Mr. Burke. It was not modesty. P.R. people have always tried to keep their hands invisible, allowing clients to take credit and blame, and the Tylenol case is often cited as a textbook model of corporate responsibility in a crisis. No one was ever prosecuted for the tampering, or for an isolated 1986 recurrence."<sup>[19]</sup> (Coincidentally, I advised a pharmaceutical packaging company client at that time that repackaged Tylenol in tamper-evident packaging following that crisis.)

Sometimes, identifying and articulating the facts suggests a solution. In my examples, each business needed to continue to be operated while these crisis situations played out and resolved. "Climb, Communicate, Confess and Comply with instructions" is the client's job in a crisis. Our role as lawyers is to focus the client on running the business and ascertaining the facts as rapidly and as accurately as possible, evaluate options with the client, and then together arrive at the solution that makes the most sense for the client and the client's constituencies. "Never let a good crisis go to waste" has been attributed to Winston Churchill<sup>[20]</sup> and to others.<sup>[21]</sup> No matter the outcome of a crisis, there is always a lesson to be learned.

[1] [https://www.washingtonpost.com/business/economy/new-software-in-boeing-737-max-planes-under-scrutiny-after-second-crash/2019/03/13/06716fda-45c7-11e9-90f0-0ccfeec87a61\\_story.html](https://www.washingtonpost.com/business/economy/new-software-in-boeing-737-max-planes-under-scrutiny-after-second-crash/2019/03/13/06716fda-45c7-11e9-90f0-0ccfeec87a61_story.html)<sup>[2]</sup>  
<https://www.nytimes.com/2019/10/18/business/boeing-flight-simulator-text-message.html>

[3] <https://airfactsjournal.com/2018/09/the-other-4-cs-of-aviation/>

[4] <https://airfactsjournal.com/2018/09/the-other-4-cs-of-aviation/>

[5] <https://www.nbcnews.com/news/world/iranian-military-says-it-unintentionally-shot-down-ukrainian-plane-n1113996>

[6] [https://en.wikipedia.org/wiki/Impeachment\\_of\\_Bill\\_Clinton](https://en.wikipedia.org/wiki/Impeachment_of_Bill_Clinton)

[7] Harold Burson, a Giant in Public Relations, Dies at 98 <https://www.nytimes.com/2020/01/10/business/media/harold-burson-dead.html>

[8] [https://en.wikipedia.org/wiki/Ukraine\\_International\\_Airlines\\_Flight\\_752](https://en.wikipedia.org/wiki/Ukraine_International_Airlines_Flight_752)

[9] Lanny J. Davis, Why Lawyers Are Best At Crisis Management <http://www.lannyjdavis.com/why-lawyers-are-best-at-crisis->

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[10] <http://www.lannyjdavis.com/why-lawyers-are-best-at-crisis-management/>

[11] <https://www.steptoelaw.com/en/services/practices/criminal-defense-investigations/crisis-management.html>

[12] <https://abovethelaw.com/2017/05/counseling-through-an-in-house-crisis/>

[13] For much more on this topic, see <https://idea.library.drexel.edu/idea:6094/datastream/OBJ/download>).

[14] <https://finance.columbia.edu/content/building-evacuation-procedures>

[15] <https://abovethelaw.com/2013/07/grabbing-the-canoe-or-reflections-on-crisis-management/>

[16] <https://abovethelaw.com/2013/07/grabbing-the-canoe-or-reflections-on-crisis-management/?rf=1>

[17] <https://abovethelaw.com/2013/07/grabbing-the-canoe-or-reflections-on-crisis-management/?rf=1>

[18] <https://www.nytimes.com/2020/01/10/business/media/harold-burson-dead.html>

[19] <https://www.nytimes.com/2020/01/10/business/media/harold-burson-dead.html>

[20] <https://realbusiness.co.uk/as-said-by-winston-churchill-never-waste-a-good-crisis/>

[21] <http://freakonomics.com/2009/08/13/quotes-uncovered-who-said-no-crisis-should-go-to-waste/>