

Preparing for a Transportation Security Incident: Organizing the Legal Response Team

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Consider the premise for this discussion. A legal response to a “transportation security incident”. The uninitiated on seeing this would undoubtedly and understandably ask, what the heck is a transportation security incident? It is a phrase that comes out of Washington and remember Washington D.C. is the center for euphemisms and acronyms. A transportation security incident is a defined term under the Maritime Transportation Security Act of 2002. It is a “security incident resulting in a significant loss of life, environmental damage, transportation system or economic disruption”. I think they mean a terrorist attack.

How do we organize a legal response team for such an incident? Essentially in a way similar to how you would organize a legal response team to respond to a natural catastrophe such as a hurricane, earthquake or flood. Many in the port industry have experience with such calamities. There are of course significant differences in the events but the lessons learned by ports in reacting to natural disasters can be applied in preparing for a transportation security incident.

First let’s look at a few ways that the incidents are different and why legal input is important:

- The attack is man made, intended and directed, thus raising a question regarding foreseeability.
- Such an attack raises questions regarding insurance coverage.
- Such an attack is by definition a criminal act raising issues relating to jurisdiction, authority, investigation and control of the crime scene.
- Damage will most likely be inflicted on a site or facility controlled by the port and may not be widespread.
- Issues relating to the future financial stability of the port agency could arise.

I've had the opportunity to read a number of reports regarding drills and table top exercises that have been held and have some questions about the exercises and the composition of the teams that participated. Our experience after 9/11 was that there were a significant number of legal issues that arose almost immediately after the attack. It is critical that attorneys from the various individual agencies be part of any response team and port agencies should insist on that. If you review the various exercises or planning sessions that have been held or that a port authority participated in I would be surprised if you find many cases in which a port attorney was involved.

Recommendation:

Include attorneys in all planning exercises and response teams.

Why have they not been involved? I believe that there are a number of reasons including the culture and practice in some agencies. There is always a certain amount of institutional turf fighting within and among departments and agencies. Various departments within an agency see security and incident response as their exclusive proprietary responsibility. There is a need before any incident to change the culture and attitude and to recognize the needs of the agency and the public.

Recommendation:

Recognize the number and seriousness of the legal issues that will be encountered.

Often the after action reports for exercises focus on legal issues encountered in the law enforcement aspect of the exercise and not on the legal issues arising from the effects of the incident.

As an example, the attack on the World Trade Center on 9/11 was the largest insurance event in the history of this country. It involved between \$30 and \$59 billion. Issues relating to the financial security of the agency, status of leases, control of the site, liability, future operations at other facilities and many others had to be dealt with immediately. Following any incident involving a transportation facility legal issues relating to tenants, passengers, finances, control, and continuation of business will inevitably come to the fore. Consider one area that is most often forgotten, procurement. Who will be ordering the supplies necessary for recovery and to continue operations?

Recommendation:

Prepare your law department in advance for any emergency.

I will discuss later how to prepare your law department for a crisis. But for now I recommend that you consider planning for how you will continue an operation if a serious incident deprives you of your records or facilities. You can not organize a legal response if you have no one or anything to respond with. This is one of the most important lessons that we learned.

Recommendation:

Port authorities should be educating policy makers about their importance and stake in any transportation security incident.

It always amuses me when meetings are held among what is referred to as “stakeholders”. Who are these stakeholders, what precisely is their stake and what is their interest in any reaction to a major terrorist attack? It sometimes appears to me that in Washington the term stakeholder often relates to federal appropriations and grants rather than investment or potential loss. The focus seems to be on authority rather than responsibility.

Recommendation:

Recognize the expertise among your own staff.

I wonder how many here, or participating in the many exercises that have been held have ever met a terrorist. Or how many have been involved in an actual transportation security incident. I recognize that you don’t have to have been involved in an incident to have expertise in a particular operational area. Too often we forget that among port staff are people, particularly on the operating level, who have expertise far more relevant than that which can be borrowed from consultants.

After 9/11 there was a proliferation of terrorism experts, almost as great as the proliferation of relatives for a lottery winner. Everyone seemed to be an expert. Watch the television news coverage of any incident and you will see what I mean.

The World Trade Center was attacked in 1993 and that experience proved extremely valuable when we were attacked on 9/11. It was a heavy price to pay for that experience but proved to be invaluable. Consider that on 9/11 the main offices and records of the Port Authority were destroyed. The executive director and superintendent of police had been killed. But the professional staff remained.

The World Trade Center which had been destroyed had more office space than the City of Saint Louis and as much as the City of Baltimore. Hundreds of thousands of people were wandering the streets in Manhattan in shock and looking for a way to get home. The train service had been suspended and the Holland and Lincoln Tunnels were closed. The four major airports that the Port Authority operates were closed and thousands of passengers were stranded. Ships were being held at sea and sailings suspended.

The staff reacted in an amazing fashion, because among staff was the expertise to deal with the problems with a minimum of direction. There were no experts to call in. We realized that we were the experts.

Identify now those people on your staffs who have the expertise to react to such a calamity.

How do you prepare for a legal response to a transportation security incident? By recognizing the expertise of your staff, being able to communicate with them at all times and preparing contingency plans before an incident occurs.

I've been asked to speak on a number of occasions before professional organizations, corporate meetings and even university business schools about crisis management and dealing with the problems that arise for a law department or any other organization following a catastrophe. I was particularly surprised to learn at one talk at a well known college in New England that at that time crisis management was not included in their business school curriculum. I think that it now is.

You must prepare your own department and agency for a crisis before it happens if you expect to organize a legal team to respond after an incident occurs.

As attorneys, of course, on 9/11 we had a concern regarding the legal issues surrounding the event that destroyed the World Trade Center. But the operations and functions of the organization had to continue if the organization was to survive and that involved numerous legal issues. That is a reality that you should focus on. And of course, there is a continuing concern regarding the possibility of another event, or attack, like the one we just experienced. On 9/11 there were in fact other attacks, namely the Pentagon, so such a concern was not unrealistic. We were aware that in 1993 the Holland Tunnel was in fact a secondary target.

Here are some ideas regarding preparing your legal team that you may want to retain and apply.

First and foremost, in the wake of any great catastrophe, you have to take an inventory of and protect your most valuable asset. People. The staff, particularly, the experienced staff immediately should be the primary concern of any organization. Yet surprisingly, they can be forgotten or ignored by senior staff in the rush to focus on political, financial or media issues. We've found, however, that concern for the welfare of staff is not only the morally and ethically correct thing to do, it is good business. Without your staff, it is not likely that the other issues will be resolved.

How many executives in any organization have a list of employees, their addresses and telephone numbers, email addresses, pager numbers and cell phone numbers available at a site away from the office? I recommend it.

There are three very important things in the wake of a catastrophe. To paraphrase Harry Helmsley they are: communication, communication and communication. If you ask anyone who was in the World Trade Center at the time of the attack, what was the most important thing immediately after, almost without exception, they will say "getting to a phone to call my loved ones to say I'm all right." In our case, cell phones were useless. The cells had been knocked out with the destruction of the Trade Center. Eventually, when we got access to land lines, we were able to begin communicating. Our police radio network was also a valuable means of coordinating activities.

I recommend that an alternative site at which to conduct emergency operations be designated before a crisis arises. It can be offices at another facility, remembering that the site will not necessarily be substitute offices that will be used for a long period, only a pre-designated site to assemble at and work from temporarily. Lists of employees and communication information should be available at that site and a copy of department lists kept at home by each department manager.

An important lesson we learned was that the experienced staff was able to improvise and resolve problems with a minimum of supervision, if allowed to do so. As I mentioned, on 9/11 all aircraft in the United States were grounded and thousands of people were stranded at airports. The Port Authority operates three major commercial airports and had a difficult operational problem on its hands. One experienced supervisor thought to simply activate the emergency snow plan and treat the situation the same as if passengers were stranded by a major snowstorm. With the exception of actual snow removal, the operational problems were similar. There was a need to expand food service, coordinate ground transportation, provide information and coordinate with area hotels.

One interesting observation regarding communications is that there is a need and a desire for staff to be kept informed. This I suggest is absolutely critical for effective crisis management or effective response and should be planned for. Staff wants to know the facts, what will become of them, what happened to others, what plans were being made, are there any current threats and other things relevant and significant to them. I noticed, however, that almost unconsciously senior staff began what seemed to be a policy of information containment instead of information dissemination. There seemed a reluctance to share information, I believe for a number of reasons. The senior staff was located at a different site from the Law Department and line departments which complicated the situation. In some cases there was uncertainty or a lack of self confidence. Eventually, I insisted on daily information from the front office and held daily meetings with our Law Department division chiefs. They were then expected to pass the information on to their staffs. Insure that the law department is in the communication loop that is planned.

The need for the establishment of an operations center was evident after our experience with the 1993 bombing. Such a center was established in Jersey City and began operations immediately following the attack on 9/11. This was independent from the efforts to continue everyday operations which for the most part were being dealt with on a facility level. Remember, we had to deal with the effects of the horrendous attack while at the same time re-establishing operations. Attorneys should be part of this operation center.

One of the most difficult tasks at the Operation Center was to handle inquiries from families seeking information about family members. Handling those matters and later assisting the families of deceased employees is something few want to plan for but must be done. Attorneys were designated to respond to telephone calls, establish a point

of contact and to the best of their ability answer questions. We also maintained contact with area hospitals to try to establish the location of injured staff. Sadly, although the area hospitals were ready with catastrophe plans, few emergency rooms were crowded

One goal was to immediately simplify access to office email from home computers. Previously a concern regarding security had limited such access. This access improved communication and productivity as well as morale. Most organizations now provide for such access, but if yours doesn't, I strongly recommend that access to office email from home computers be S.O.P. as soon as possible. Access to information is vitally important during any response. We also found that the use of Blackberry's by key staff was useful.

When considering planning for emergency offices, thought should also be given as to what records should be copied and stored off site. Again, we learned a lesson in 1993 and on 9/11, were reasonably well prepared. Financial records, employee records, insurance policies and other information such as maps, drawings and facility plans should be available at more than one location in an emergency. Legal input regarding what records will be essential should be part of that decision making.

We did lose our personnel folders and medical records however. Blue prints of the World Trade Center were extremely important both in 1993 and again on 9/11. For attorneys, the importance of the availability of insurance information is obvious. In a case of luck sometimes being more important than brains, a few weeks before 9/11 the Port Authority contracted out the service of our group life insurance program. All records, including a record of named beneficiaries, had been moved from the Trade Center; otherwise they would have been lost. You will find that it is common that such records are located in the Human Resources Department.

I suggest some contingency planning be done and vital records be identified, copied and stored off site. This type of recommendation can originate in a law department as part of its preparation.

Within one week, the time it took to replace some of our computers, we were completing procurement contracts, leases and financing documents. Legal advice was being provided to all of our facilities from day one and we had attorneys assigned to the Operation Center on a 24/7 basis and a Family Assistance Center was established. The Friday after 9/11 was a payday. We were able to access our financial information and pay every employee on schedule. In the case of direct deposit, the problem was simplified. In other cases, checks were delivered by federal express. It was an eloquent statement as to the commitment of the organization to its employees.

The need to obtain necessary equipment including computers on an expedited basis became obvious very early. Any organization, particularly a government organization, has layers of authority and approvals. Procurement is often subject to

bidding procedures and subject to close scrutiny. We found that it was necessary initially to suspend the need for certain approvals although financial accountability remained tight. By being able to acquire computers quickly, we were able to continue legal operations within a week. Once we returned more to “normal” operations, the process slowed. Any reaction plan should include expedited processes and a suspension of certain oversights. The need for later accounting for insurance claims cannot be ignored however. Your legal preparations should include anticipating legal issues relating to an expedited procurement process.

Following any catastrophe, insurance is naturally a legal concern. Not just the existence of policies and the level of coverage but the terms of policies. As an example, does a policy contain a war or terrorism exclusion? Stockholders, or in the case of public authorities, bondholders, will seek information and comfort and the financial community will have many questions that could effect the financial future of the organization. A review of the coverage and the preparation of a fact sheet should begin immediately. In fact, I have recommended that an annual review be done to assure no insurance gaps exist, something that you might want to consider as part of any preparations. Any Board of Directors will typically be very concerned with coverage questions. I found that the question, “are we insured” was one very frequently asked.

After any catastrophic loss, work should begin immediately preparing an insurance claim so plan for this. This you will find is an ongoing process. We established a multi department team to work on that but the structure and size of your organization will dictate planning for this. Accounting should be kept from day one of all expenses incurred relating to the event. Overtime, computers, extra costs of delivery, the cost of alternative offices are but a few expenses that will be included in a claim. It should all be documented. Starting a system early will avoid many problems later on. A wise attorney recommends this as part of the planning.

While many questions relating to liability will inevitably arise following any catastrophic event, they are seldom issues that must be resolved within days. Usually such issues are more a media concern than a business or legal one. Liability issues, while they may be promoted by aggressive claimants lawyers often can be dealt with after the immediate crisis stage. You will find that inevitably you will have to establish a form of legal triage to decide the priority that will be assigned to various legal issues.

The need to deal with the media is necessary but it can be a dreadful distraction. It is better to leave that chore to professional media relations people and as an organization speak with one voice, that of a designated spokesman. There is a tendency for many people with various motives to want to appear on camera and be quoted. In the case of political figures, it is virtually impossible to prevent them from appearing at the scene of any catastrophe with publicity representatives and a collection of reporters and photographers. Without mentioning the politician, we once had a very ambitious one appear at the scene of an aircraft accident. Her staff wanted to set up an interview so that

the wreckage, which was still burning would be visible in the background. It didn't happen.

If all of the above hasn't convinced you that attorneys should be a part of any response team I don't know what could. A discussion of these issues with the board members of your organization will encourage the recognition by them of the need for your law department to be involved in the planning for any incident and the reaction thereto. And when your planning is completed I sincerely hope that you will never need it.