

Lessons In Crisis Lawyering 20 Years After 9/11

By **Dianne Phillips** (September 9, 2021)

Most lawyers of a certain age remember where they were when they learned of the terrorist attacks on Sept. 11, 2001.

For me, I was only a couple of months into a new job working for Distrigas of Massachusetts LLC, and its then-parent company, Tractebel LNG, operators of the nation's oldest, continuously operating liquefied natural gas, or LNG, import terminal, located in Everett, Massachusetts, on the edge of Boston Harbor.

I joined the in-house team after 13 years in private practice, seeking a quality-of-life change when my son was starting elementary school.



Dianne Phillips

As will become clear from my story, I found in-house lawyering to be just as stressful and demanding, perhaps even more so, than being a partner in a BigLaw firm.

So, I went back to my firm after two years and have been there ever since — but that is a story for another day.

Twenty years later, the lessons I learned about lawyering in a crisis continue to apply.

Maybe it is the pandemic, or maybe it is the result of the 24/7 business cycle, and the role of social media and information overload, but it seems the profession is confronted with triage lawyering on a daily basis across many different industries.

This can be especially challenging for in-house counsel.

While lawyers are trained to handle many events that clients consider crises, these are often routine legal services.

But being confronted with unprecedented, novel situations can challenge even the most seasoned lawyer, in part because these situations take lawyers outside their comfort zones and force them to deal with difficult conditions for practicing law.

Specifically, these include extreme time pressures, high stakes that often involve serious threats to safety, uncertain or unsettled legal principles, and disruptive events directly affecting the lawyer or her organization.

Often the situation requires balancing risks and involves quick decision-making that can have huge ripple effects with no way of knowing what cascading events may occur.

For lawyers used to dealing with precedent, being faced with unprecedented events can be really challenging.

While my experience occurred long before crisis lawyering became the subject of a 2021 book by Ray Brescia and Eric K. Stern,[1] it is clear that it is a growing trend, and that lawyers, especially in-house lawyers, need to be as prepared as possible.

Like many in the Northeast, I had friends, family and colleagues affected by Sept. 11, 2001.

While we all scrambled to verify the whereabouts of our loved ones, legal work that day was paused across many organizations.

It seemed our whole world stopped, but for those of us in-house lawyers with businesses immediately affected, the pause was momentary.

Contingency plans were activated, facilities were secured and personnel was gathered, some returning from business trips or called back from vacation.

During the days and weeks that followed, we were confronted with the immediate consequences for our business, including novel legal questions.

Operationally, we were tasked with ensuring safe and secure facilities, including safe passage for ships delivering LNG to the port.

What additional resources would be needed in terms of security? What plans and studies did we need to demonstrate the ships, their mariners and the shoreside facilities were safe?

Political leaders and regulators from federal, state and municipal agencies all wanted to be part of the decision-making process, whether they had formal jurisdiction or not.

We were immediately confronted with determining which of these regulators controlled the ships' transit. Was it the U.S. Coast Guard, which patrolled the federal navigational channel, or the city of Boston, which claimed Boston Harbor as part of its sovereign territory?

All of these questions had to be answered before resuming operations.

In addition, despite the mild weather, customers were anxious about supplies for the coming winter, and about literally keeping the lights and heat on throughout the region.

Upstream suppliers, with whom we had contracted for firm supply, wanted to know where the LNG would go if it were not delivered to Everett.

All of these questions required legal analysis, as well as business and technical considerations. We worked for weeks to address them all, from negotiating contract revisions to responding to governmental inquiries.

The U.S. Department of Transportation's Pipeline and Hazardous Materials Administration chose this period for an unannounced inspection of the facility, seeking, among other things, copies of the initial training records for operational personnel who had been employed for decades.

Needless to say, locating decades-old records to satisfy regulators was a challenge during this time — but in the end, we prevailed.

My colleagues were regularly called to briefings before political leaders.

While not quite the same as preparing witnesses for trial, the consequences seemed just as important to me. If we were unable to open the port to ship transits, the impact on our business would have been catastrophic.

We were prepared to demonstrate to the captain of the port that our contingency plans

would allow the safe passage of ships to resume.

But the city of Boston sought a temporary restraining order prohibiting LNG carriers from entering the harbor, which it claimed to control.

This motion was presented to Judge Reginald C. Lindsay of the U.S. District Court for the District of Massachusetts in *City of Boston v. Tractebel LNG* just days before our ship, which was already underway, was scheduled to arrive.

Rushing to federal court on that Friday afternoon in October 2001 was one of the most memorable events in my career.

After weeks of preparation, I knew that both the law of physics and the supremacy clause were on our side, especially because I had the Coast Guard captain of the port seated with me at defendants' table.

Simply stated, multiple studies confirmed the safe design of the double-hulled ships, and that the ship's transit from international waters through Boston Harbor to its berth in Everett on the Mystic River was a matter governed by federal law, which the city could not block.

After several hours of argument, where Judge Lindsay questioned all parties about the safety and security of the ship transits — which, ironically, he had watched pass the federal courthouse from his chambers for years — we were instructed to work over the weekend to finalize a plan for the ship's arrival on Monday.

Thereafter, our business returned, more or less, to normal, but my several weeks of crisis lawyering taught me some critical lessons.

The lessons I learned in the aftermath of 9/11 include the following.

Don't forget that your legal education and training has prepared you for novel situations, so don't panic.

I was only familiar with force majeure as a concept from contracts class before I was confronted with its immediate application.

I was thankful for my broad legal education and varied experience as we confronted emergency procedures that essentially shut down our operations in the Port of Boston with virtually no notice.

Embrace lifelong learning, as you never know when something you once studied will come in handy.

Don't forget your friends in the legal industry who can provide advice and assistance.

I had been in my job for only a few months when I was confronted with unprecedented needs beyond the capacity of our two-person legal department.

I called upon lawyers I had known my entire career, because I knew they would have my back and do whatever they could to help me manage the crisis.

Relationships matter. Be sure to build some throughout your career.

Every decision you make, and every piece of advice you give, will be viewed with 20/20 hindsight in the weeks and months that follow a crisis.

While the tendency is to focus on the immediate need, don't lose sight of the long game, especially since it might affect your reputation, or that of your organization.

I came up with a saying that I would use to remind myself of the importance of this principle: "Stupidity will look like fraud with 20/20 hindsight."

I still use it today in my regulatory compliance practice.

You will be called upon to answer questions well outside your area of expertise, and most of your internal clients will not take "no," or "I don't know," for an answer.

This was one of the most challenging things for me, and I suspect something that would be hard for any lawyer forced to provide advice in these circumstances.

I would remind myself that the no-action alternative, borrowed from my project development background, was itself a choice, and rarely a beneficial one.

Your internal clients are almost always better off having your less-than-perfect advice than being left to their own devices in their decision-making.

You will be forced to make decisions with very limited information and very little time to reflect on the consequences.

Don't be tempted to take shortcuts on the thinking part of the practice of law.

My business colleagues at the time were mostly engineers and technical specialists, so when pressed to act quickly I would say, "You cannot make up in detailed design the lack of forethought in front-end engineering." This was a concept they could easily relate to.

Even a lawful plan of action, if viewed as putting profits before health and safety, is doomed.

Remember, as a lawyer you are in a unique position to set the tone.

Although it is not always apparent, our legal education has prepared us not only to chart the right legal course, but the moral one as well.

Having given my valedictory address in 1988 on the appearance of impropriety, I was well aware of the importance of how something might appear, especially to laypeople, as cautioned by Canon 9 of the American Bar Association's 1969 Model Code of Professional Conduct.

Although the model code has been replaced by the Model Rules of Professional Conduct, avoiding even the appearance of impropriety has been a hallmark that has served me, and many other lawyers, well.

Conclusion

A careful reader of my list of lessons will quickly spot some of the internal inconsistencies, for it may be impossible to adhere to each lesson at the same time.

And that is the biggest challenge in crisis lawyering: knowing when to apply each of the lessons.

There is no magic answer in my view, but I have found that integrity and careful forethought, coupled with trusted advisers on speed dial, usually work!

Twenty years later, I continue to apply these lessons to my everyday practice, and am grateful for having had the experience, despite how challenging it was at the time.

Dianne R. Phillips is a partner at Holland & Knight LLP.

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[1] Brescia, Ray, and Eric K. Stern. *Crisis Lawyering: Effective Legal Advocacy in Emergency Situations*. New York University Press, 2021.