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From Chaos to Control: Best Practices for Ethically Navigating Crises



Panelists



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How do Crises Start? Events



Labor

- Talent shortage; leadership changes; high employee turnover; labor union activism; employee activism; employee strikes



Natural disasters

- Pandemics; hurricanes; wildfires; environmental crises



Personnel

- Employee or leadership involved in unethical or illegal misconduct



Financial

- Loses value in its assets; unmanageable debt



Cybersecurity

- Cybercrime and cyber security; online, social media, or digital attacks; viral negative social media conversation



Transportation

- Train derailments; plane crashes



Healthcare

- Pandemics; nursing homes

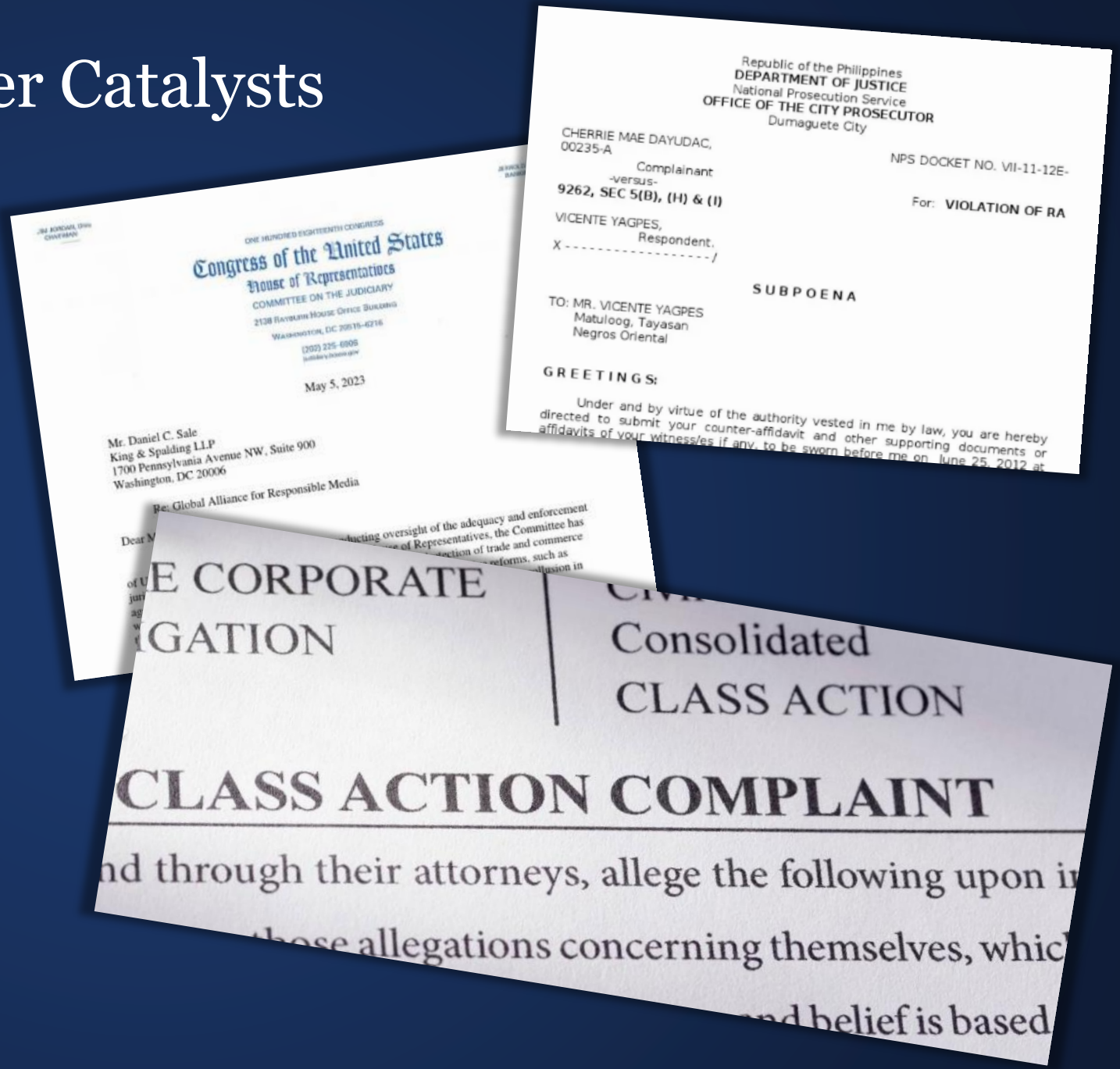


Supply chain

- Supply chain issues or disruption; product failure; quality issues

How do Crises Start? Other Catalysts

- Subpoenas
- Media inquiries
- Lawsuits
- Whistleblowers
- Congressional correspondence



Where Do They Happen?



Construction

- Environmental issues
- Employee accidents



Pharmaceutical

- Product manufacturing issues
- False advertising



Energy

- Pollution/oil spills



Transportation

- Crashes/break downs/malfunctions



Financial services

- Cybersecurity incidents



Agriculture

- Food poisoning/bacterial outbreaks



Technology

- Product malfunctions



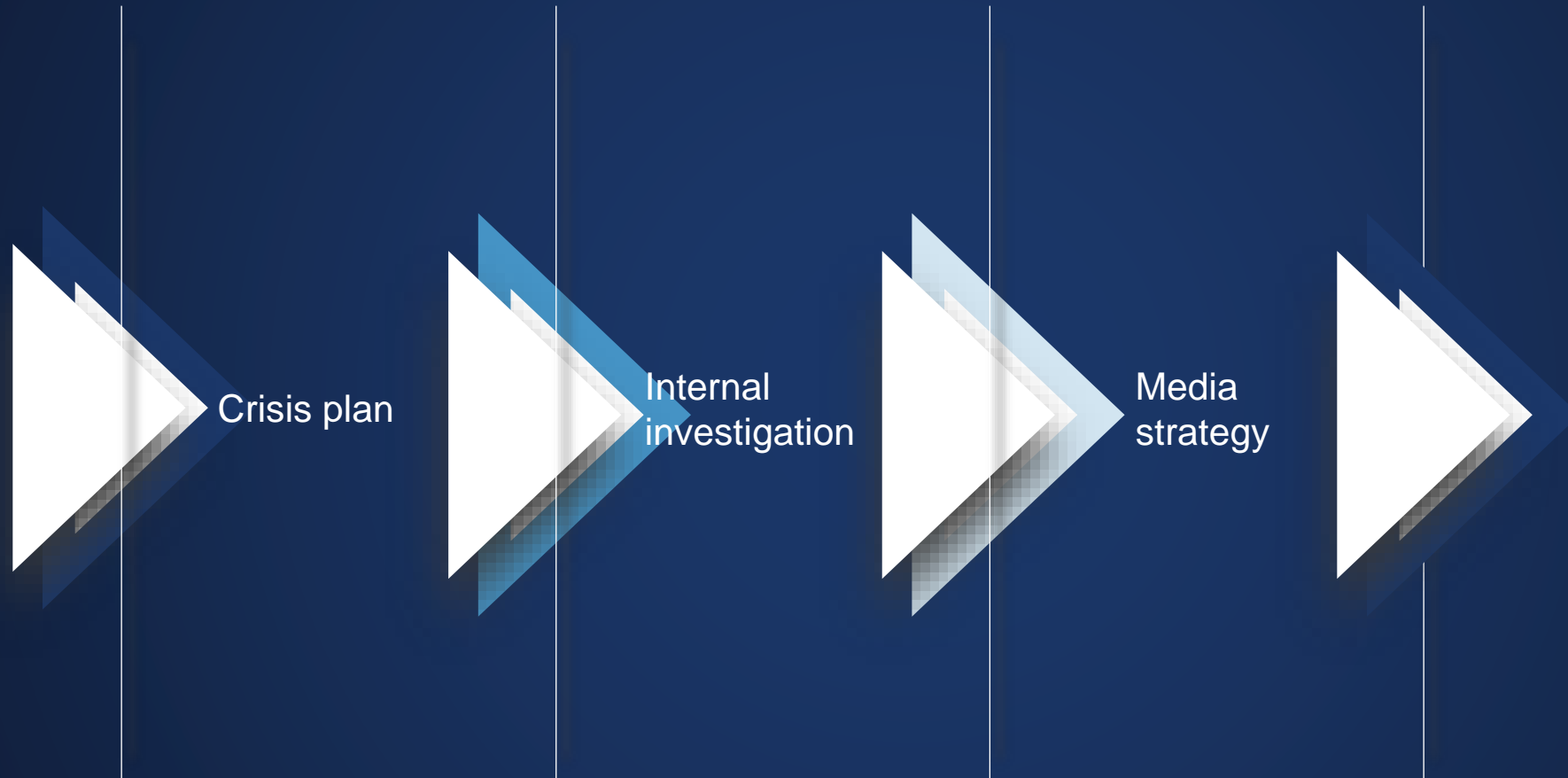
Hospitality

- Sanitation/cleanliness issues

What Are The Elements of Crises?



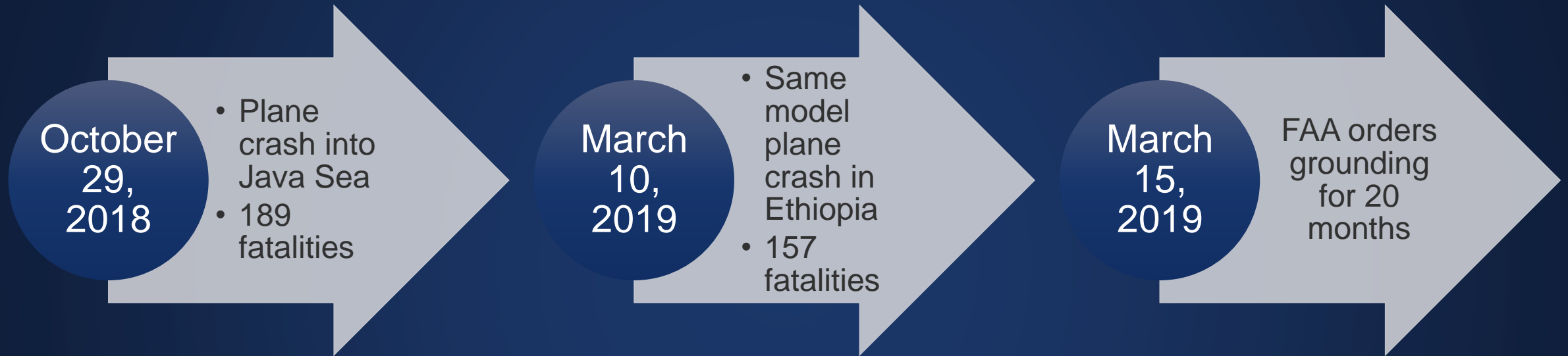
Elements of Response



Before the Crisis Begins

- Identify crisis team
- Identify potential events
- Anticipate audiences, identify stakeholders, and maintain relationships
- Create communications protocol
 - Templates
 - Holding statements
- Identify outside counsel and consultants
- Tabletop exercises
- Document retention and preservation
- Fine tune and document corporate compliance programs

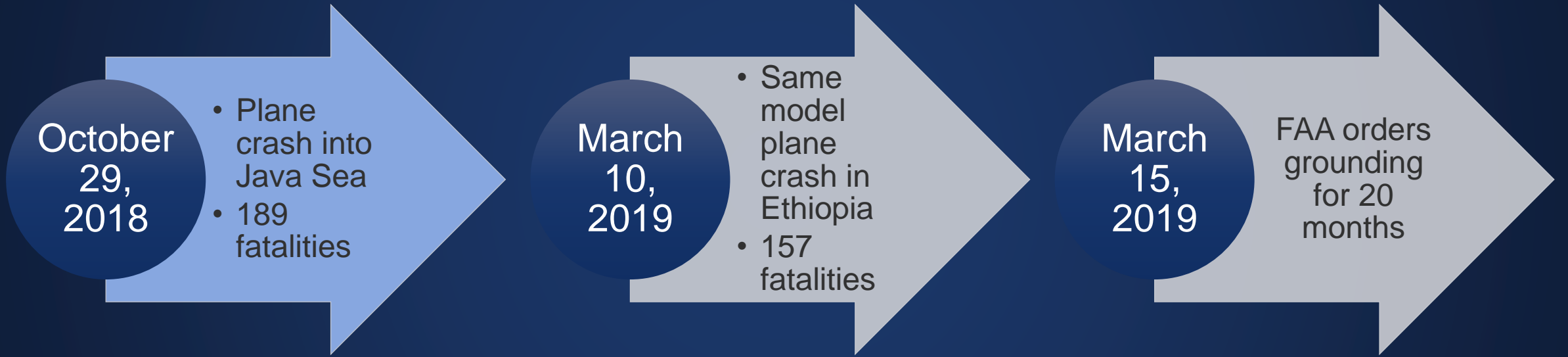
Scenario: Plane Crashes



Crisis Management Plans:

- Have a crisis management plan before the crisis
- Customize for crises likely for the company and the industry

The First 48 Hours



The First 48 Hours: Who Does What?

- Key players

- C-suite and board of directors
- In-house counsel
- Outside counsel
- Communications consultants
- Government affairs
- Investor relations

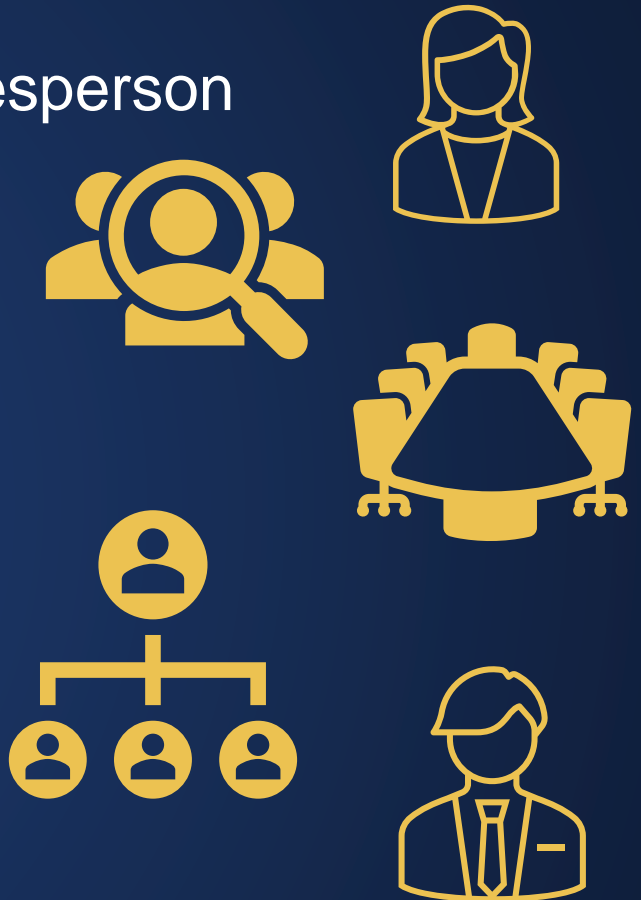
- Choosing a quarterback

- Credibility?
- Involvement in the underlying events?
- Authority?

- Choosing a spokesperson

- Outreach

- Shareholders
- Media
- Regulators
- Investigators
- Employees
- Customers



The Role of the Lawyers

Virginia Rules of Professional Conduct Rule 1.13: Organization as Client

- a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents
- b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
 - 1) Asking for reconsideration of the matter
 - 2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization
 - 3) Referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law

The Role of the Lawyers (Cont.)

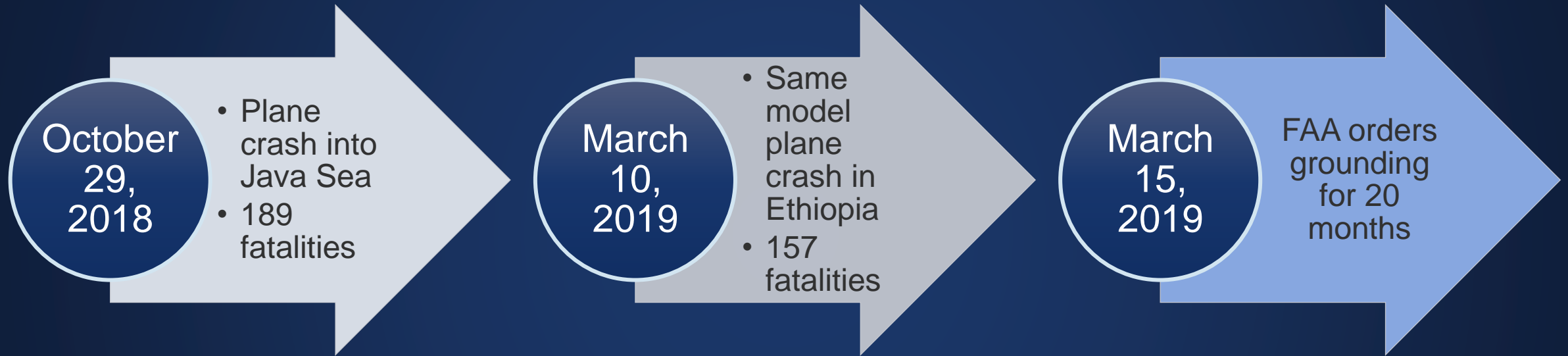
- c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.
- d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Notifying and Communicating with Insurance Carriers

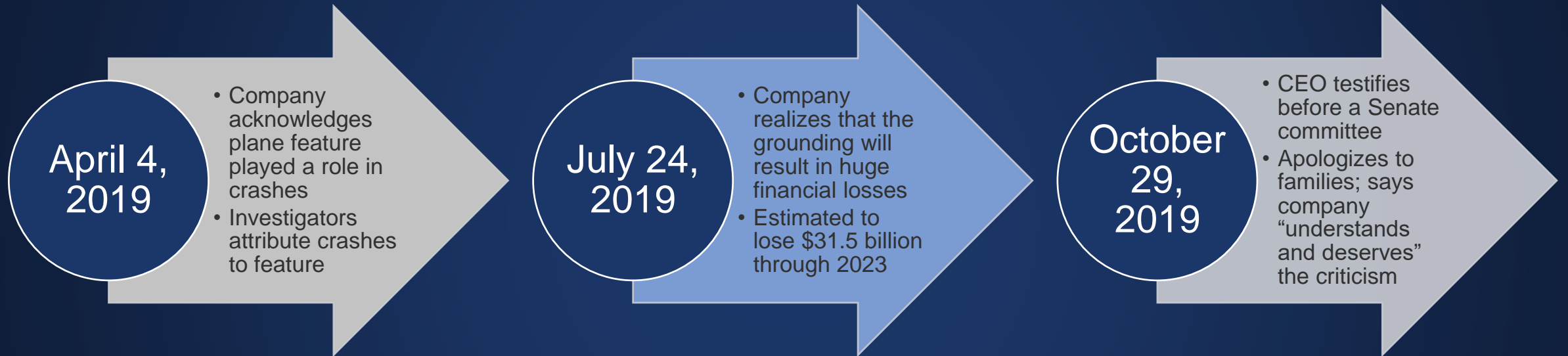
- Satisfying policy conditions
 - Prompt notice
 - Insurer consent
 - Full cooperation and candor
- Policy limits
- Categorizing and reporting losses
- Privilege issues



Handling Adverse Regulatory Outcomes

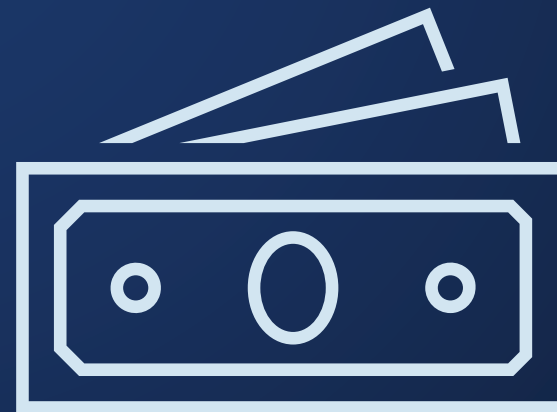


Addressing the Financial Impact



Financial Troubles

- Grounding of planes
- Cost of investigations
- Remedial measures
- Resolution of lawsuits or other claims or penalties
- Market capitalization



Finding Out What Happened and Managing Consequences



Internal Investigations

- Who is in charge?
 - Inside counsel? Outside counsel?
- Role of experts and investigators?
- Who needs lawyers?
- Who gets interviewed?
- Collecting documents?
- Memorializing interviews?
- Preserving privilege?
- Disclosures to regulators and government investigators?

Communication with Persons Represented by Counsel

Virginia Rules of Professional Conduct Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so

Dealing with Unrepresented Persons

Virginia Rules of Professional Conduct Rule 4.3

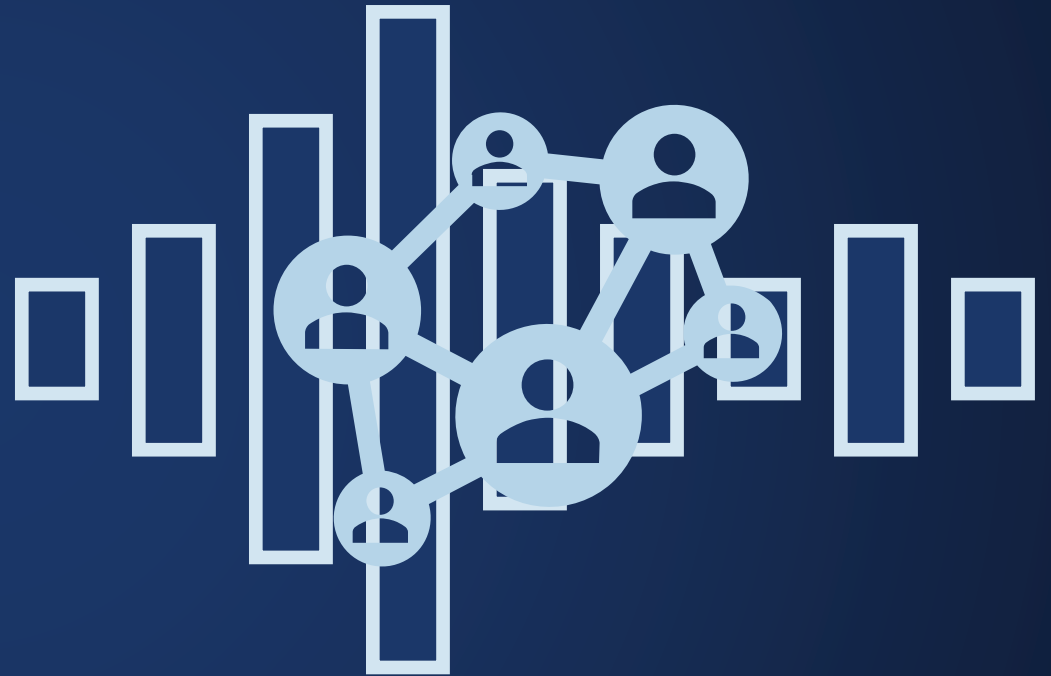
- a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding
- b) A lawyer shall not give advice to a person who is not represented by lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Apologies and Admissions



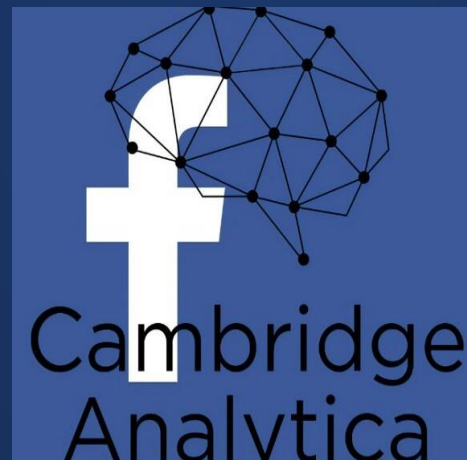
Messaging

- One message or many?
- Who has input?
- Preserving privilege?
- Traditional media? Social media?
- Who is the spokesperson?
- When to stay silent?



PR Examples

- Wells Fargo
- United Airlines
- Facebook & Cambridge Analytica
- DiGiorno Pizza
- Southwest Airlines



Disclosures to Regulators and the Government

01 Written submissions or oral proffers

02 Preserving privilege

03 Parallel civil proceedings

04 FRE 502

FRE 502

- a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
 - 1) the waiver is intentional;
 - 2) the disclosed and undisclosed communications or information concern the same subject matter; and
 - 3) they ought in fairness to be considered together.
- b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
 - 1) the disclosure is inadvertent;
 - 2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - 3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).
- c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
 - a) would not be a waiver under this rule if it had been made in a federal proceeding; or
 - b) is not a waiver under the law of the state where the disclosure occurred.
- d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
- e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
- f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
- g) Definitions. In this rule:
 - 1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
 - 2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Discovery Issues and Leaks



Confidentiality of Information

Virginia Rule of Professional Conduct Rule 1.6

- a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
- b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
 - 1) Such information to comply with law or a court order;
 - 2) Such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any processing concerning the lawyer's representation of a client;
 - 3) Such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
 - 4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
 - 5) Such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
 - 6) Information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
 - 7) Such information to prevent reasonably certain death or substantial bodily harm

Confidentiality of Information (Cont.)

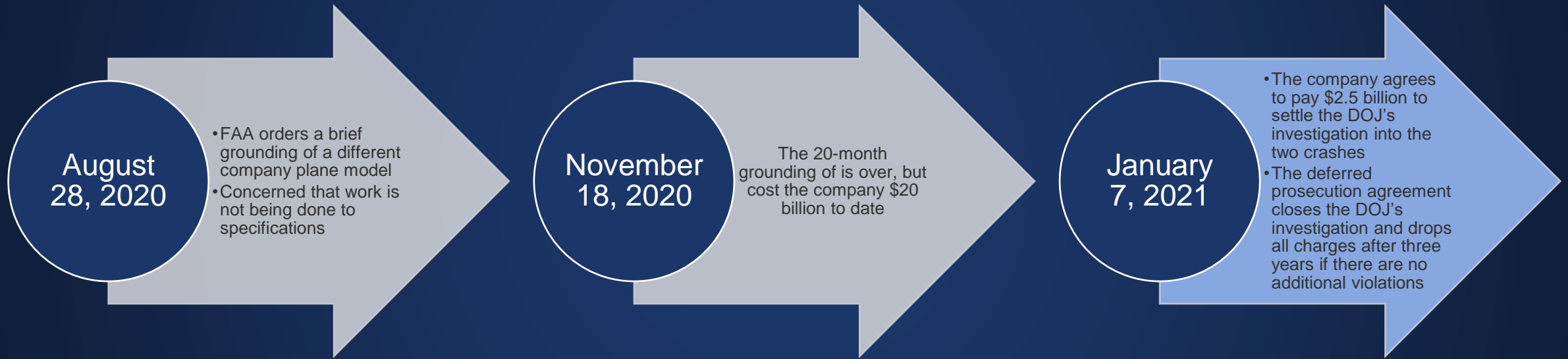
- c) A lawyer shall promptly reveal:
 - 1) The intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or
 - 2) Information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and nondisclosure to the client.
- d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Respect for Rights of Third Persons

Virginia Rules of Professional Conduct Rule 4.4

- a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.
- b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information

Investigations



DOJ Considerations: Prosecuting Corporations

- **Justice Manual 9-28.300:** Principles of Federal Prosecution of Business Organizations

CONSIDERATIONS

1	The robustness of a compliance program? <ul style="list-style-type: none">• Corporate enforcement of the program? Effectiveness of detecting and preventing employee misconduct?• Designed to detect and prevent the types of misconduct most likely to occur?
2	Is the program being executed in good faith?
3	Does it work in practice?

DOJ Examples



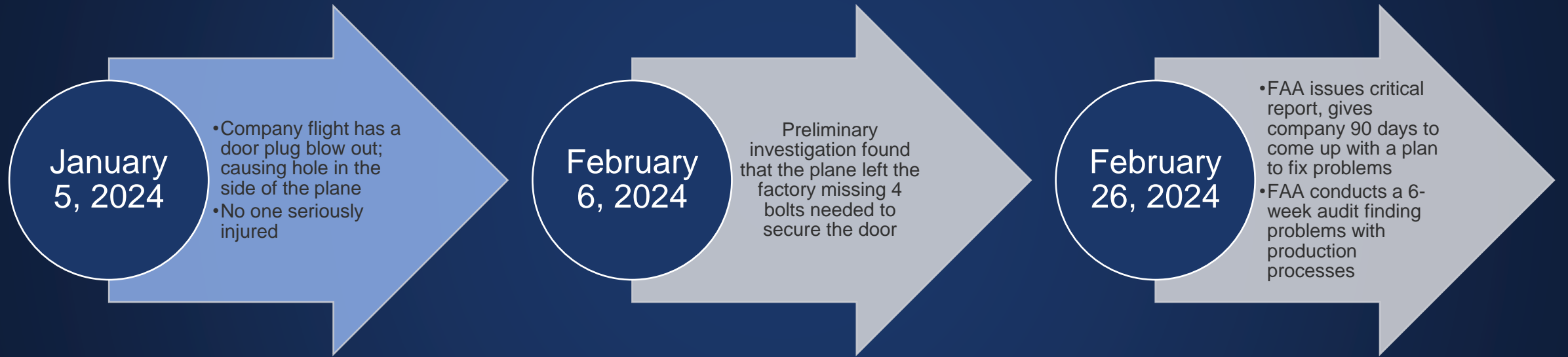
- **Declination to Prosecute:**

- Corsa Coal FCPA violations (bribery to secure coal supply contracts)
 - Disgorged \$1.2 million in profits and handed over evidence that enabled DOJ to criminally charge two former vice presidents with bribing Egyptian officials.
- DOJ stated that it declined because (1) the company voluntarily self-disclosed the misconduct, (2) the company cooperated with the government’s investigation and agreed to continue to cooperate with any ongoing investigations, (3) the nature and seriousness of the offense was low; (4) the company timely and appropriately remediated the offense; and (5) the company agreed to disgorge the amount of its ill-gotten gains

- **Full Prosecution:**

- Arthur Anderson pays \$7 million fine for its role in an accounting fraud at Waste Management
 - Were warned of severe DOJ action for future violations
- SEC requests documents for Enron audit, Anderson destroys documents
- DOJ indicts for obstruction of justice
- Firm cannot recover

Recidivism



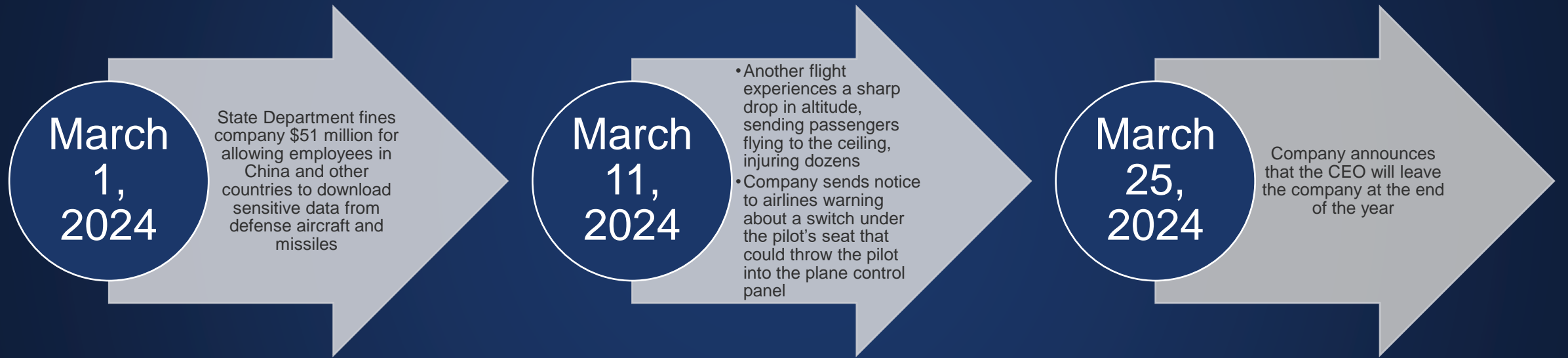
Recidivism

- How recidivism changes the approach to...
 - Internal investigations?
 - Media?
 - Private suits?
 - Cooperating with regulators and investigators?
- DOJ's more aggressive stance with recidivists
 - In a new policy that offers incentives to companies who voluntarily self-disclose misconduct, the DOJ has stated that recidivism is *an aggravating factor that may mean that the company will not receive the same goodwill the policy otherwise extends.*
- Demise of Arthur Anderson (accounting firm)
- Auditors for Enron (waste management screw up)

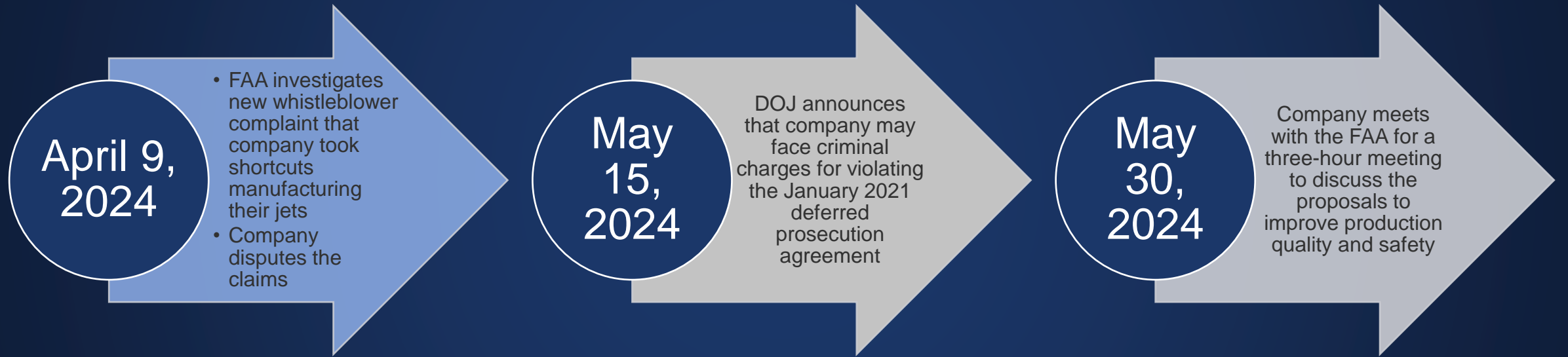
U.S.S.G. 9-28.600: The Corporation's History of Misconduct

Prosecutors should consider a corporation's history of misconduct ... in determining whether to bring criminal charges and how best to resolve cases. ... In assessing a corporation's history of misconduct, prosecutors should consider the following non-exhaustive list of factors: (1) the amount of time that has elapsed since the prior ... action or resolution concluded; (2) whether a prior action was criminal, civil, or regulatory, and whether it involved U.S. federal or state authorities or foreign authorities; (3) seriousness and pervasiveness of the conduct underlying the prior action or resolution and the role, if any, of senior management in that conduct; (4) whether the conduct underlying the prior action or resolution was similar in nature to the conduct currently under investigation; (5) the form and terms of a prior resolution; (6) whether, during the conduct that is the subject of the current investigation, the corporation was serving a term of probation or was subject to supervision; (7) whether the conduct at issue in the prior and current matters reflects broader weaknesses in the corporation's compliance culture or practices; (8) whether the prior action or resolution involved a corporate entity related to the corporation and the relationship between the related entity and the corporation; (9) whether the corporation under investigation operates in a highly regulated industry, and, if so, whether the corporation's history of regulatory actions is comparable to that of similarly situated corporations in the industry; and (10) whether the corporation voluntarily self-disclosed the conduct giving rise to the current matter or prior action(s) or resolution(s).

Handling DPA Obligations



Whistleblowers

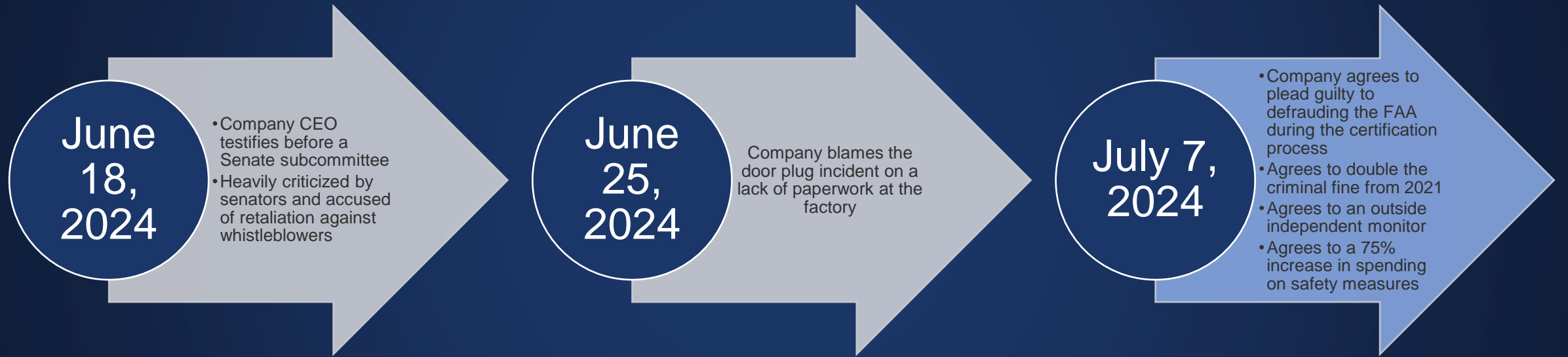


Whistleblowers

- Communications regarding whistleblowers with:
 - Suspected whistleblower
 - Other employees
 - Media
- Retaliation
- Procedures for confidential reporting of misconduct



Remediation



Remedial Actions

- ✓ The DOJ prosecution deferral
- ✓ The fund for victims' families
- ✓ Funds for the victims of the door plug incident
- ✓ Putting planes out of production
- ✓ Grounding of planes
- ✓ Handling the employees who made the mistakes
- ✓ New safety precautions
- ✓ Independent monitoring
- ✓ Further FAA involvement/regulation



Cruise Ship Hypothetical

- Negligence during the COVID-19 pandemic by a cruise line led to the death of 28 passengers
- Festival cruise ship line took off on a cruise from Australia to New Zealand on March 8, 2020; one week after a passenger on a different cruise line died of COVID-19.
- The ship returned on March 19, 2020, just before Australia's borders closed
- Of the 2,671 passengers from the cruise line, 663 contracted COVID-19 and 28 died
- At the time the cruise left port, it was several months into the pandemic, and the cruise line did not take measures to take reasonable care of the health and safety of its passengers
- In October 2023, a federal court of Australia ruled that the cruise line had been negligent
 - Particularly considering the fact that Festival cruise line previously had experienced outbreaks on other cruises in the previous months



Handling the Cruise Ship Problem

What did the cruise line do right?

What did it do wrong?

Dealing with the PR on this issue: how to talk about it with journalists?

What should it have done?

How to discuss the issue with your employees? How to handle the internal investigation?

Sexual Harassment Hypothetical

- How to handle the crisis when one employee accuses another of sexual harassment in the workplace?
 - What are the initial steps to take?
 - What sort of plan should be in place to deal with situations of workplace harassment?
- What if it comes out that supervisors either (1) were the harassers themselves; or (2) knew about the harassment and did not take proper steps to address it?



Questions or Comments?