



The Don'ts of Accident Investigation: Mistakes to Avoid

2024 Aviation Symposium
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Fox
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NTSB Investigation – Legal Basis

- NTSB Statutory Authority and Related Sections:
 - 49 USC §1101-1155
 - 49 CFR § 831: Accident/Incident Investigation Procedures
 - 49 CFR § 845: NTSB Hearing and Report
- Other laws and applicability (HIPAA, OSHA, immunizations, hazards, etc.)
- Accidents outside the U.S. – International Civil Aviation Organization (ICAO) Annex 13
- Possible implication of treaties
 - Warsaw Convention of 1929
 - The Hague Protocol
 - The Montreal Convention

NTSB Investigations – Initial Response

- NTSB Form 6120.1 – Pilot/Operator Aircraft Accident/Incident Report
- 49 CFR §830: Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo and Records
 - General – Applicability and definitions
 - **Initial notification** of aircraft accidents, incidents and overdue aircraft
 - **Preservation** of aircraft wreckage, mail, cargo, and records
 - **Reporting** of aircraft accidents, incidents and overdue aircraft

What Can the NTSB Investigate – 49 U.S.C. § 1131

The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of--

- (A) an aircraft accident ...;
- (B) a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State;
- (C) a railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train;
- (D) a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment;
- (E) a major marine casualty (except a casualty involving only public vessels) occurring on or under the navigable waters, internal waters, or the territorial sea of the United States ...; and
- (F) any other accident related to the transportation of individuals or property when the Board decides--
 - (i) the accident is catastrophic;
 - (ii) the accident involves problems of a recurring character; or
 - (iii) the investigation of the accident would carry out this chapter.

The Accident Investigation Process

- NTSB is comprised of presidential-appointed board members
 - Five each appointed for a five-year term
 - A member is designated by the President as Chairman and Vice Chairman for two year terms. Chair requires Senate confirmation
 - Approximately 400 employees located at HDQ in DC, and regional field offices (Ashburn(VA), Denver (CO) Federal Way (WA) and Anchorage (AK)

The Accident Investigation Process

- The NTSB Party Process:
 - 49 CFR Section 831.11 defines the “parties” to an investigation
 - Party status is limited to
 - Federal, state or local government agencies (e.g. PHMSA, FAA), state (i.e., PUC), or local government agencies (e.g., emergency responders)
 - Organizations whose employees, functions, activities, or products were involved in the accident and that can provide suitable qualified technical personnel, to actively assist in the investigation
 - Investigator In Charge (“IIC”) designates party status
 - The role of a party member is to provide technical advice and assistance to the NTSB in the fact gathering phase of the investigation
 - Typically – the “operator” airline, pipeline/gas company, bus company, etc. is a party

The Accident Investigation Process

- The Party Certification - Participants must sign statement agreeing:
 - Not to share info with co-workers, management or anyone outside the investigation (but note safety exception of 49 CFR § 831.13(c)(3))
 - Not to prejudice the investigation or violate NTSB policies or instructions
 - Not to withhold pertinent information
 - He/she does not occupy a legal position
 - He/she does not represent claimants/insurers

See [Certification of Party Representative](#)

The Accident Investigation Process

- Examples of typical Parties to an aviation accident investigation
 - Aircraft manufacturer
 - Engine manufacturer
 - Airline/operator
 - Pilot and flight attendant unions
 - Avionics manufacturer
 - FAA/Air traffic control

The Accident Investigation Process

- Expectations of IIC
 - Technical expertise
 - Logistical support
 - Investigative support
 - Confidentiality
 - Loss of party status
- Interface with other governmental agencies

Lawyers role in accident investigation

- Emergency response planning
- Review applicable insurance policies
 - Review emergency response procedures
 - Establish / revise communication protocols
 - Establish / revise procedures / manuals
 - Verify information security
 - Establish appropriate "Go Teams"
 - Establish relationship with appropriate vendors
 - Establish media communication protocols

Lawyers role in accident investigation

- Train and drill on emergency response procedures and communication protocols
- Train all critical personal on NTSB Process
 - Party status
 - Confidentiality requirements imposed on working group members
 - Confidentiality of Information Provided to NTSB
 - CVR (49 USC Section 1154(a))
 - DFDR
 - Witness statements

Witness Statements

- Who is your client?
 - NTSB has the right to interview "witnesses" which include employees of the operator, the manufacturer, applicable component manufacturers, search and rescue organizations
 - Can occur at accident scene, at applicable headquarters, during a deposition or during the public hearing
- Witness Interviews
 - 49 C.F.R. Section 831.7, 845.24 provides that each witness has a right to representation during an interview: the witness "has the right to be accompanied, represented or advised by an attorney or non- attorney representative"
 - "Company counsel" does not have the right to accompany the witness

Witness Statements

- Witness determines who will accompany him/her
- Witness may request company counsel or co-employee to represent him/her and NTSB will probably acquiesce
- However ethically this "representation" is probably prohibited under the Model Rules
- Witnesses in the U.S. retain their 5th Amendment rights against self incrimination

Witness Statements

- 18 U.S.C. Section 1001 makes it a criminal offense to knowingly give false testimony or provide false records in an NTSB proceeding
- Witness Statements, including working group reports are not privileged, and in fact are public, and can be used in other proceedings, including criminal prosecution and civil litigation

Petitions for Reconsideration (PfR)

- A Party or other person having a direct interest in the investigation may submit a PfR based on the discovery of new evidence or on a showing that the Board's findings are erroneous. (See 49 CFR §845.32)
- A petition based on the discovery of new factual matters must:
 - Identify the new matter
 - Include affidavits of prospective witnesses, authenticated documents or an explanation of why such substantiation is unavailable
 - State why the new matter was not available prior to the board's adoption of its findings
- A petition based on a claim of erroneous findings must set forth in detail the grounds upon which the claim is based
- Substantive response to a PfR takes about a year
- No time limit or statute of limitations on when a petition for reconsideration or modification can be filed
- Staff who were not involved in the underlying accident investigation will be assigned to review and analyze the petition and prepare a decision for Board Members' consideration
- The NTSB's decision to reject a petition is **not subject to judicial review**
(*Joshi v. NTSB*, 731 F.3d 8 (D.C. Cir. 2015), *cert. denied*, No. 15-672, Jan. 25, 2017)

Family Assistance

- Aviation Disaster Family Assistance Act of 1996 (ADFAA)
- October 1996: US Airlines only
- Foreign Air Carrier Family Support Act of 1997: Foreign Airlines operating in the US (FACFSA)
- 1998 Task Force Recommendations
- 2000 Amendments (AIR 21)
- 2003 Amendments (Vision 100)
- 2008 Federal Family Assistance Plan for Aviation Disasters
- 2008 Rail Passenger Disaster Family Assistance (RPDFA)

Family Assistance

- July 2002 the NTSB's Office of Family Affairs became the Office of Transportation Disaster Assistance (TDA)

"The Office of Transportation Disaster Assistance coordinates public and private responsibilities in the wake of transportation disasters for all modes of transportation within the NTSB. The NTSB Transportation Disaster Assistance Team stands ready around the clock to help survivors, families of victims, communities, and commercial carriers deal with transportation disasters; services include family/victim support coordination, Family Assistance Centers, forensic services, communication with foreign governments, and inter-agency coordination."

NTSB Website June 2011

Family Assistance

- The ADFFA / FACFSA / RPDFA applies to:
 - Any US carrier having a certificate of public convenience and necessity
 - Any foreign flag carrier having a permit to operate in/to the U.S.
 - Interstate intercity rail passenger operations or interstate or intrastate high-speed rail operations
 - Accidents occurring within the U.S. (including territorial waters and possessions)
 - Involving a “major loss of life”

Family Assistance

- ADFAA / FACFSA / RPDFA requires every airline/railroad to file a plan with the NTSB providing it with adequate “assurances” that it will:
 - Publish toll-free number
 - Must have internet site as well
 - Establish a process for notifying families of passengers before media release
 - With appropriate personnel
 - As soon as passenger manifest is verified
 - To the extent practicable—in person

Family Assistance

- Provide passenger list immediately upon request – only to NTSB Family Coordinator or FBI Liaison
- Consult with families on disposition of remains and personal effects
- Return all personal effects to the families regardless of condition
- Retain unclaimed possessions for 18 months
- Consult with each family concerning a monument

Family Assistance

- Treat all families alike regardless of revenue status
- Coordinate with ARC to insure families receive continued required level of support
- Reasonably compensate ARC for services
- Provide transportation to location and physical care facility
- Commit sufficient resources to carry out the plan

Family Assistance

- **2000 Amendments (air 2000)**
 - At request of family, indicate if passenger name appeared on preliminary manifest
 - Provide adequate training to its employees and agents to meet the needs of survivors and family members
 - Collaborate with Board if the carrier voluntarily provides assistance to US citizens with respect to an accident outside of the US involving major loss of life
- **2003 Amendments (Vision 100)**
 - Communicate to owners of on-ground property damaged as a result of the accident as specified
 - Provide cable feed for public hearing

Family Assistance

- ADFAA / FACFSA / RPDFA Prohibits
 - Lawyers or their representatives from making “unsolicited” communications concerning a potential action for personal injury or wrongful death for 45 days after the accident
 - Any person from impeding the ability of the board or the ARC from carrying out its responsibilities under the act
 - Any person from impeding the ability of families/passengers from having contact with one another
 - Any person from preventing the ARC from providing mental health and counseling services

Family Assistance

- ***Failure to file a plan or commit the resources necessary to carry it out...***
 - Will cause US carriers to lose Certificate of Public Convenience & Necessity
 - Will cause foreign carriers to lose their authority to fly to the United States
 - Railroads

After the Investigation – Civil Litigation

- Attorney client and work product privileges
- Discovery of electronically stored information (ESI)
- Retention and preservation of ESI
- Document retention tips
- Federal Rule of Evidence 407 and Notes of Advisory Committee

Attorney Client & Work Product Privileges

- Attorney-client privilege
 - Communication made in confidence between a client and an attorney for the purpose of seeking or providing legal advice
- Work product privilege
 - Protects from disclosure documents and tangible things “prepared in anticipation of litigation or for trial” by or for a party or its representative
- NTSB Party Participants waive privilege over “information or records received as a result of...participation in the NTSB investigation.”
 - Competing views on scope of waiver – whether merely documents, or investigative role. *See In re Air Crash at Charlotte, N.C.*, 982 F.Supp. (D. S.C. 1995); *Caves v. Beechcraft Corp.*, Case No. 15-CV-125-CVE-PJC, 2016 WL 355491 (N.D. Okla. Jan. 29, 2016).

Electronically Stored Information (ESI)

- Discovery of electronically stored information (ESI)
 - Federal Rule of Civil Procedure 34
 - Federal Rule of Civil Procedure 26(b)(2) – Party must provide ESI that is “reasonably accessible”
- Retention and preservation of ESI
 - Document Retention Policy must address ESI to avoid claims of spoliation of evidence

10 Document Retention Tips

1. Practice competent pre-litigation planning – develop a policy and enforce it
2. Involve the technology department in decisions regarding the policy's parameters and methods for enforcement
3. Establish clear accountability for the enforcement of the policy
4. Educate all company computer users on the pitfalls of electronic communications
5. Teach employees how to manage their electronic data; advise them about legal impact

10 Document Retention Tips

6. If the policy states certain unnecessary records will be purged at regular intervals, be sure the policy is consistently followed
7. Consider segregating business and personal email applying different retention standards
8. Be prepared to suspend regular retention and destruction procedures when litigation or a legal document request is pending or imminent
9. Involve the technology department again when litigation or any form of document request is imminent
10. Periodically conduct an internal audit of the company's retention policy

Questions?

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