



## Legal Aspects of Accident Investigations

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**“I would say in just about every investigation we have, there will be differences of opinion, where you have partial facts, as to what those facts mean.”**

*– Robert Mueller*

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**“Each investigation team has a lawyer attached to it and there was a lawyer attached to me and my assistant.”**

*– Tony Greig*

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**“A Lawyer will do anything to win a case, sometimes he will even tell the truth.”**

*– Patrick Murray*

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## Accident Investigation – Primary Focus

WHAT IS THE PRIMARY REASON FOR AN INVESTIGATION?

- ▶ Is it to develop documentation?
- ▶ Is it to meet legal requirements, if any?
- ▶ Is it to help defend the innocent (or the guilty)?
- ▶ Is it to help with witness recollection months/years later?
- ▶ Is it to meet the expectations of OSHA or other third parties?
- ▶ Is it for insurance-related reasons?
- ▶ Is it to meet ISO or other industry standards?

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## Accident Investigation – Primary Focus

- ▶ Many hold the view that the main point about investigations is to discover the truth behind the cause(s) of an accident. By discovering the cause(s), actions can be taken to reduce the risk of another incident.
- ▶ Sometimes, in the midst of the post-accident emotions, lawyers, litigation concerns, etc., that main point can get lost.

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## Accident Investigation – Primary Focus

- ▶ If an investigation is going to occur, it needs to reach a truthful and informed conclusion.
- ▶ There is no sense in conducting an investigation unless that goal is the expected end result.
- ▶ That does not mean that all investigations involve complete agreement among all parties/investigators!

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## What About Those Differing Opinions?

- ▶ Different perspectives ought to be encouraged.
- ▶ Often, the truth comes as a result of the insight/input from all participants in the investigation.
- ▶ Sometimes, the “majority” view of an issue is not necessarily the correct one.

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## What About Those Differing Opinions?

- ▶ Dinosaur Example – late 1970's/1980.
- ▶ Observable evidence and incomplete facts (110 miles).
- ▶ March, 2010 – International Panel endorsed.
- ▶ Moral of the Story -- It is not a good idea to dismiss initially “off the wall” ideas about an incident, until all of the facts are analyzed, and make sure you have all of the facts!

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## Accident Investigation Team -- Staffing

- ▶ Many accident investigation teams are comprised of three (3) general staffing elements:
  - ❑ Technical & Operations personnel (industrial hygienists; equipment experts; accident reconstructionists; chemical experts; production and maintenance personnel, etc.)
  - ❑ Administrative officials (environmental, safety & health managers, HR officials, facility leadership, etc.) – high enough in the organization to secure cooperation and responsiveness



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## Accident Investigation Team -- Staffing

- ▶ Legal counsel (if there is any thought about trying to secure attorney/client privilege and/or work product protection over any particular aspect of the investigation or a report to be issued by legal counsel. Even if there is no such thought, legal counsel may help with compliance, documentation, and other matters)



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## What About Non-Management Personnel?

- ▶ Some lawyers are prone to suggest staffing the investigation team only with management-level personnel, for a variety of reasons.
- ▶ My own view, in relation to our Primary Focus, is to include non-management personnel, if they can provide expertise that cannot be duplicated or covered by others.
- ▶ Often, non-management staff have the most applicable expertise and detailed knowledge.
- ▶ An initial assessment must be made about the personnel most likely to have information helpful to the investigation.



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## What About Non-Management Personnel?

- ▶ Sometimes, essential personnel are not discovered until an investigation is already underway.
- ▶ If so, then it may be important to add them to the team.
- ▶ However, some management and non-management personnel can simply be interviewed about an incident and background information without being a part of the actual investigation team.
- ▶ Moral of the Story – Case by case assessment needed.



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## Government Agency Investigations

- ▶ If there is a government investigation, should an employer continue its own investigation?
- ▶ Typically, yes – because not all government investigations are as comprehensive, timely and as close to the situation as an employer's own investigation.
- ▶ Do you really want the only investigation to be the one conducted by a third party?
- ▶ Cooperation is essential with the government investigation.
- ▶ There have been some notable criminal cases brought against individuals and employers who have attempted to interfere with a lawful government investigation by attempting to change documents, hide or destroy documents, etc.

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## Does Legal Counsel Have A Role In Investigations?

- ▶ First, a caveat – I have somewhat of bias here.
- ▶ I do not think that lawyers need to be part of every investigation of every incident.
- ▶ This is not a view that is shared by all lawyers!
- ▶ There are legitimate contrary views, but I maintain that there are certain situations where a lawyer is not a necessary member of an investigation team or process.



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## Does Legal Counsel Have A Role In Investigations?

- ▶ There are, however, situations where I believe that a lawyer(s) should strongly be considered to be a part of an investigation (either on the team or as a resource to support the team and its conclusions). Some examples (this is not an exhaustive list):
  - ▶ Any case in which there is a fatality;
  - ▶ Any case in which there is any other reportable OSHA/IOSHA incident (amputation/loss of an eye/hospitalization);
  - ▶ Cases in which there are multiple contractors/employers on the affected jobsite (since many of those contractors/employers may be engaging counsel);

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## Does Legal Counsel Have A Role In Investigations?

-  Cases in which there is a large scale event, even if the incident did not involve a reportable OSHA/IOSHA incident (e.g., explosion, chemical release, fire, major property damage, etc.);
-  Cases in which there is a claim of safety-related retaliation or whistleblowing;
-  Cases in which there are concerns about disclosure of trade secrets/proprietary business information;
-  Cases in which there is a potential indemnity obligation of the employer to others (e.g., in a project contract clause or rider);
-  Cases in which there are concerns over insurance coverage;
-  Cases in which a potential claimant has retained counsel;

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## Does Legal Counsel Have A Role In Investigations?

-  Any case in which a criminal investigation is being conducted;
-  Cases in which there are unclear/complex legal compliance issues presented.

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## Legal Counsel and Attorney-Client Privilege

- ▶ Can an accident investigation be conducted under attorney-client privilege and/or subject to the work product rule?
- ▶ Should an accident investigation be conducted under the attorney-client privilege and/or subject to the work product rule?
- ▶ To me this is the bigger question.
- ▶ These days, it is expected that there will some form of post-incident employer investigation.
- ▶ In fact, some laws require such a post-incident investigation (e.g., the process safety management standard under OSHA).

CONFIDENTIAL DOCUMENT  
ATTORNEY-CLIENT PRIVILEGE

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## Legal Counsel and Attorney-Client Privilege

- ▶ There are many issues that go into whether an investigation ought to be conducted under the privilege.
- ▶ Reference the types of situations we discussed previously and connect with counsel early in the process to make such determinations.



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## Witness Interviews and Legal Issues

- ▶ Typically, interviews are not privileged unless conducted by or at the request of counsel so that legal advice can be provided to the client.
- ▶ Interviews of witnesses and management officials will occur early in the process by OSHA and possibly others (insurance representatives, etc.).
- ▶ Since management officials can bind the employer with their statements, the company's lawyers are sometimes at such interviews.
- ▶ Importantly, counsel usually meet with management witnesses to explain the process, assist in securing documentation likely to be requested, reviewing such documentation, etc.

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## Witness Interviews and Legal Issues

- ▶ Witness interviews can bind the Company and they may be used to impeach subsequent testimony.
- ▶ Timing is critical as to when interviews occur in relation to where the investigation is at any moment.
- ▶ This is because it is important not to take a position on the cause(s) of an incident until after the Company's investigation has run its course and reached a conclusion.

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## Witness Interviews and Legal Issues

- ▶ Speculating and guessing about the cause of an accident is never recommended.
- ▶ Not only might such guesses be wrong, they tend to cast doubt on the accuracy/legitimacy of the conclusion of the investigation, if a different cause(s) is found by the investigation team.
- ▶ If asked about the cause of an accident before the investigation is concluded, it is generally better to advise that the cause is currently not yet determined, because the investigation is ongoing.
- ▶ OSHA or others may then request a copy of the investigation report.

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## Witness Interviews and Legal Issues

- ▶ For a variety of reasons, it is usually best to identify one senior official who will act as the contact person for all inquiries about an accident and the investigation.
- ▶ It is important to advise the witnesses to please be complete, accurate and truthful in their interview statements.
- ▶ Important issues are at stake, especially with respect to finding out what caused an incident.

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# Documentation

- ▶ Documentation.
- ▶ Various approaches.
  - ▷ Limited documentation
  - ▷ Full/detailed documentation



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## The Purpose of Documentation



1. Chronicle steps taken
2. Assess/Analyze Incident and Workplace
3. Organize thoughts
4. Reference point for improvements in safety
5. Freeze recollections/memories
  - ▶ Litigation
  - ▶ Attrition/retirement

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## Importance of Effective Documentation

- ☞ Could mean the difference in saving lives/preserving health in the future
- ☞ Could mean the difference between winning and losing litigation
- ☞ If it is not written down, perspectives and memories can change (and often do)
- ☞ Documentation does not have to be unduly time-consuming
- ☞ Documentation must be accurate and complete
- ☞ Documentation should avoid unnecessary commentary
- ☞ Emails are almost always discoverable! Investigatory emails are not much different regarding discoverability!

## Significant Incident Notes

- ▶ Must be kept confidential, to the extent possible
  - ▷ if confidentiality is not maintained, it may affect balance of investigation (e.g., one witness learning of another witness' recollection/version)
  - ▷ Cannot promise strict confidentiality
  - ▷ Notes may be/likely are discoverable (unless specifically undertaken by counsel or at counsel's directive)
- ▶ Must include
  - ▷ Date
  - ▷ Specific statements
  - ▷ Specific chronology
  - ▷ Acknowledgment



## What should I document in my log/notes and when should I start doing so?

- ▶ All relevant facts
- ▶ All recollections
- ▶ Photos, if applicable\*
- ▶ Videos, if applicable\*
- ▶ Copies of applicable policies/procedures
- ▶ Copies of applicable management directives
- ▶ Copies of applicable equipment manuals/owners handbooks
- ▶ Copies of applicable training
- ▶ Copies of applicable safety enforcement documentation



## How much detail should I include in my log/notes?



- ▶ As much as necessary to help arrive at a conclusion
  - ▶ Could someone outside the company understand the issue?
  - ▶ Could a judge/jury understand?

## Should I just keep a log on employees who I think are favorable to the Company/investigation?



▶ No

## How long should I keep my log/notes?



- ▶ Depends, but maintain as long as counsel advises
- ▶ Must have a system to easily locate and retain your notes

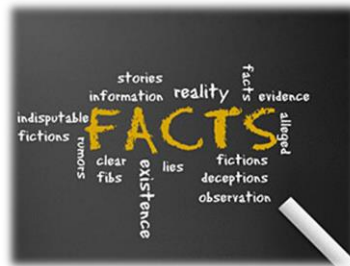


## Key Standards



- ▶ Based on facts
- ▶ Covers the entire investigatory period (may begin well before incident)
- ▶ No unsupported analysis/conclusions
- ▶ Consistent with all other investigative procedures
  - ▷ If there is a departure from prior procedures, assess reasons

## Witness Statements



- ▶ Document who, what, when and where...
- ▶ As soon as possible after the incident
- ▶ Focus on specific, observable, behaviors/facts
- ▶ Avoid speculation or assumption

## Examples



This accident occurred because Joe was an idiot who did not follow the rules and was poorly supervised.

## Possible Alternative



Review of this incident indicates that Joe did not follow the training provided on \_\_\_\_\_, 2012 and \_\_\_\_\_, 2011. While Joe passed prior safety tests/validations in this area, re-training is to be scheduled promptly. Additional supervision is also recommended for a period of \_\_\_\_ weeks.

## Examples



Equipment failure. Maintenance had been deferred. Bad idea.

## Possible Alternative



Machine No. 17 – machine guarding failed due to burned out solenoid switch. Last maintenance on No. 17 was done on January 3, 1998. Machine No. 17 placed out of service until switch is replaced – scheduled for \_\_\_\_\_, 2012. Review of maintenance schedules is recommended.

## Examples



This was a preventable death!  
Budgetary cuts have impacted  
safety at the Jobsite.

## Assessment



- Many accidents are preventable
- Budget cuts do affect safety (and quality, other things)
- Note: The prior slide may disclose a true statement, but does it tell us what specifically happened?

## Example

- ▶ An employee was observed in the excavation outside of the trench box-protected area. While the employee was only in the unprotected area for a moment, he did not follow our safety policy and prior excavation safety training (last conducted on 5-5-2012) in straying from the protection provided on the jobsite. Excavation safety re-training of the crew is recommended. (A safety disciplinary warning was provided to the employee for this infraction. He did not have any prior safety disciplinary issues).

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## Example

- ▶ A backup alarm on the [Machinery] had either come loose or was disconnected. It is also unclear as to when this occurred. If it was disconnected, we do not know if this was done when the [Machinery] was recently maintained (and the alarm simply was not re-attached) or whether it was disconnected for some other reason. It is noted that all other equipment at the jobsite had functioning backup alarms.

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## Example

- ▶ As part of our response to this matter, we have:
  - ▷ 1) retrained the crews that such alarms are not to be disconnected (except as authorized for such things as maintenance/repair) and that doing so is a dischargeable offense under our policy;
  - ▷ 2) checked and tightened all backup alarm connections on all Company equipment; and
  - ▷ 3) placed bolted tamper resistant metal shields over all backup alarm connections. Supervisors have also added backup alarm checks on all jobsite equipment as part of their daily checklist of safety items.

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## Should An Expert Be Retained?

- 👤 Sometimes, an expert can be very helpful in assessing the cause of an incident.
- 👤 Examples:
  - 👤 Equipment failure;
  - 👤 Computer controlled/electronic system failure;
  - 👤 Alleged chemical/biological/hazardous material contact;
  - 👤 PPE failure;
  - 👤 Security/safety issues;
  - 👤 Assessment of OSHA/third party investigation results

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## Should An Expert Be Retained?

- ✎ A case-by-case assessment needs to be made.
- ✎ It may be important to decide whether the expert should be retained by counsel.
- ✎ Experts can add considerable value and weight to investigatory conclusions.
- ✎ They may have even seen similar situations at other employer facilities or with respect to similar/same equipment.
- ✎ Depending upon qualifications/reputation, an expert can also add credibility to an investigatory conclusion.

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## Evidence Preservation and Spoliation

- ▶ Equipment, tooling, documentation, and other evidence must be preserved in order to allow investigation of the same;
- ▶ This may mean taking such equipment out of service for as long as necessary for examination/review;
- ▶ It should not be released back into service until it has been cleared by the governmental investigator and Company counsel;
- ▶ A failure to preserve such evidence may not compromise an investigation's ability to determine cause, it may prompt a spoliation claim by adverse counsel or the governmental agency;
- ▶ This may have significant adverse consequences to an employer and/or individuals.

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## Investigatory Conclusions And Follow-Up

- ▶ Three main conclusions about which to be concerned:
  1. Unsafe conditions that are true.
    - Require prompt correction following investigation.
  2. Alleged conditions that the investigation team agrees are safe.
    - Get written confirmation into the file.
  3. Unsafe conditions that are true & are then corrected.
    - Get investigation team (and sometimes, an outside consultant) to confirm correction/abatement in writing.



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## Investigatory Conclusions And Follow-Up

- ▶ Appoint a management level official for investigatory follow-up and communication.
- ▶ Depending upon the circumstances, the draft investigation report may be provided to counsel for the purpose of seeking legal advice.



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# Questions?

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