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NTSB Investigations: Admissible or Not?

From the Experts

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With 24/7 news coverage of catastrophic accidents, National Transportation Safety Board (NTSB) investigations have become widely recognized and understood as a key element of many accident inquiries involving aviation and our railroads, highways, waterways and pipelines. What is not understood is the role the NTSB plays in the courtroom. Which NTSB reports and testimony are admissible as evidence and which are not? Who can review draft NTSB factual reports to ensure that they are truly factual and devoid of opinion, and who cannot? These are just a few of the many important issues that in-house counsel need to understand. This article will provide the many companies that may be impacted by an NTSB investigation with the necessary information to make informed decisions and to issue an appropriate response.

The Role of the NTSB

The NTSB is an independent federal agency responsible for investigating all civil aviation accidents in the United States and significant accidents in other modes of transportation—via railroad, highway, marine and pipeline. NTSB final accident reports, with findings as to probable cause and recommendations intended to prevent future accidents, are statutorily prohibited from coming into evidence at trial; however, NTSB *factual* reports *are* generally admissible at trial.

NTSB investigations typically last for a year or longer. During that time, evidence collected at the scene is analyzed and data related to training, policies, procedures, practices, design, development, prior incidents and more is gathered. Testing



may be done and numerous witnesses may be interviewed. Although there is a focus on the accident or incident that triggered the investigation, the NTSB's goal is the prevention of future accidents. With that in mind, NTSB investigations often delve into soft issues such as the safety culture of involved organizations, regulatory issues and other things that arguably may not have played a direct causal role in the incident but may be critically important in preventing future accidents.

Parties to the Process

Transportation providers, manufacturers and entities with technical expertise related to accidents are often invited by the NTSB to assist with the factual phase of its investigations as part of the NTSB "party investigation process." Such parties

have the unique opportunity to vet draft factual reports prepared by the NTSB's several investigation disciplines before they are finalized. These reports may involve operations, control systems, mechanical issues, crashworthiness, human factors, survival factors, first responders, corporate polices and governance, organizational safety culture, industry practices, regulatory oversight and more.

About six months into the investigation, the NTSB Investigation Groups often convene a technical review of draft factual reports with the parties to the investigation, or simply provide draft factual reports to them. Either event is critical to any party's active participation in the NTSB investigation process. Prior to that time, parties will have provided technical materials and assistance and

possibly been involved in confidential discussions concerning the status of the investigation. The draft reports (one for each investigation discipline) are typically the first time the parties will see the NTSB's overall factual effort in one place. The draft reports are circulated or provided to the parties for technical review in an effort by the NTSB to make sure that any eventual findings and recommendations are based on a factual record that is as accurate as reasonably possible. These factual reports will be the foundation for the NTSB's eventual findings as to probable cause and related safety recommendations. They also will likely be admissible at trial. For both reasons, a party's opportunity to review the draft reports is likely the most important party activity in any NTSB investigation.

The window for a party to review draft NTSB factual reports may be as small as 10 days. Each party member to an NTSB Investigation Group should be alerted to the absolute need to assist the NTSB with careful and timely scrutiny of the draft factual report. Appropriate scrutiny may require input from others in the party organization more familiar with the subject matter at issue than the individual party member working on the Investigation Group. Put another way, no matter how knowledgeable any party Investigation Group member is, he or she cannot be expected to be absolutely certain about every party-specific fact that is contained in an NTSB factual report.

Given that NTSB factual reports are generally admissible at trial, parties may also want legal counsel to participate in or coordinate the draft review process. Such coordination is important to make sure that the multiple draft reports are consistent with one another factually, and that statements that may appear innocuous in different reports do not, when read together, become misleading factually or morph into inappropriate statements of opinion. The involvement of counsel and party employees beyond those directly involved in the NTSB Investigation Groups may require the approval of the NTSB investigator-in-charge (IIC) or general counsel.

Vetting the NTSB Factual Report

If a party thinks something is factually incorrect or misleading in a draft report, the NTSB investigation group chairman should be advised in writing and provided with the correct information and supporting documentation. If the draft report is incorrect or misleading because of the absence of factual information, the chairman ought to be similarly advised.

If there is a characterization or nuance in the draft factual report that a party thinks is inappropriate, this is the time to say so. If something is characterized as a glass half empty when in all fairness the glass should be described as half full, the party should say so in writing and explain why.

If a draft factual report highlights a measurement of some sort but makes no mention that the measurement exceeds or is well within an applicable standard, a party may want to suggest that the values required by the standard be referenced. A party may alternatively want to include a notation if a measurement falls outside those allowed by an applicable standard.

NTSB factual reports are, of course, intended to be factual. If opinions have somehow found their way into a draft factual report, that should be called to the attention of the investigation group chairman. One example of such an opinion is the statement "All fractures and cracks noted in any of the [structural] members were consistent with overstress forces." While at first glance this real-life example from a draft NTSB factual report may seem like a factual recitation of what was or was not noted or seen, it was, in the context of the investigation, filled with innuendo and opinion (it suggested that fatigue was not the cause of any cracks). After this was called to the attention of the investigation group chairman, the comment was removed.

Objections and Concerns

While reasonable minds may differ, if a group chairman is not inclined to accept what a party considers to be an important factual correction, the party may want to ask a higher authority to weigh in, such as the IIC or even the director of the involved NTSB

investigation discipline (Office of Highway Safety; Marine Safety; Aviation Safety; or Railroad, Pipeline and Hazardous Materials). Another avenue is to involve the Office of the NTSB general counsel. Any such high-level communications should include (1) a carefully crafted written explanation of why the party believes the statement at issue is factually wrong or for some other reason inappropriate; (2) supporting documentation; and (3) clear emphasis that the concern is not merely academic – it should be understood that a jury will almost certainly think that everything in the NTSB factual report at issue has been vetted and approved as factual, fair and accurate by the NTSB.

Should these efforts be unsuccessful, a party might ask that its objection or concerns be noted by way of a footnote in the factual report. Absent that, the party may request that a letter setting forth its objection or concerns be made part of the public docket. Such a footnote or public-docket letter will be useful should the party move to preclude that portion of the factual report at the time of trial.

Organizations should welcome an invitation from the NTSB to become a party to an investigation. The primary reason, of course, is to be a good corporate citizen and assist the NTSB in preventing future accidents. Part of that responsibility is to work actively with the NTSB to help ensure that the *factual reports* on which they will base their findings and recommendations are indeed *factual*.

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