

# CRISIS MANAGEMENT

## The Anatomy of an NTSB Accident Investigation

A Guide for "Parties-to-the-Investigation"  
& Their Lawyers

April 2013



David Tochen, General Counsel

Thomas W. Tobin, Partner



 **WILSON ELSE**  
WILSON ELSE MOSKOWITZ EDELMAN & DICKER LLP

# CONTENTS

- 
- An aerial photograph of an airport runway. The runway is paved with asphalt and has white dashed lines and numbers. The number '17' is visible on the runway. To the right of the runway, there is a grassy area. A small aircraft is parked on the grass. The background shows a clear sky and some distant structures.
- 1** Abstract
  - 1** The NTSB
  - 2** Initiation and Nature of NTSB Investigations
  - 3** On-Scene Organization
  - 3** NTSB Investigation Groups
  - 4** Parties to the Investigation
  - 5** NTSB Witness Interviews
  - 6** NTSB Public Investigative Hearings
  - 7** Four Party Opportunities in NTSB Investigations
  - 8** NTSB Safety Recommendations
  - 8** Top Ten Ways for a Party-to-the-Investigation to Assist
  - 10** What Issues May Arise for Counsel to a Party to an NTSB Investigation?
  - 11** NTSB Involvement in Litigation



# CRISIS MANAGEMENT

## THE ANATOMY OF AN NTSB ACCIDENT INVESTIGATION

### A Guide for "Parties-to-the Investigation" & their Lawyers

Thomas W. Tobin & David Tochen<sup>1</sup>  
April 2013

#### ABSTRACT

The National Transportation Safety Board (NTSB) has a broad mission but no regulatory authority. It is small - only about 400 employees. But yet it issues over 200 safety recommendations each year with an acceptance rate of over 80%. How do they do it? Who are these folks?

This paper will describe the NTSB's mission and investigative authority, and then walk the reader through the NTSB investigation process from beginning to end. Along the way, the authors will share their "top ten tips" for how a company or "party to an NTSB investigation" can best assist with the process. We also make note of common issues for counsel assisting clients with the process and provide an outline of the NTSB's limited involvement with post-investigation litigation.

#### THE NTSB

The NTSB is comprised of five presidentially-appointed, Senate-confirmed "Board Members"<sup>2</sup> with a staff of around 400 employees, about 100 of whom are located in nine regional offices.

The NTSB's mission is transportation safety as risk-free as reasonably possible - in the air, on land and on the water:

**Air:** "The [NTSB] is responsible for the organization, conduct, and control of all accident and incident investigations within the United States, its territories and possessions, where the accident or incident involves any civil aircraft or certain public aircraft .... " 49 C.F.R. § 831.2(a).

**Surface:** "The National Transportation Safety Board shall investigate ... and establish the facts, circumstances, and cause or probable cause of:

- "a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State."
- "a railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train."
- "a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment."
- "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 .... "
- "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 [the goals of] this chapter." 49 U.S.C. § 1131(a)(1)(A - F).

<sup>1</sup> Thomas W. Tobin is a partner in the Wilson Elser Law Firm and has assisted many clients with the NTSB investigation process. David Tochen is the General Counsel of the NTSB. This paper reflects the personal views of the authors and was not approved by the NTSB.

<sup>2</sup> No more of three of whom can be of the same political party.

# CRISIS MANAGEMENT

## INITIATION & NATURE OF NTSB INVESTIGATIONS

The NTSB harvests news and information concerning transportation accidents and incidents from publically available reports, state and local authorities and required notifications by various transportation providers. The NTSB's "Modal Office Directors," together with the Chairman, Managing Director, and others, make the decision as to whether to launch an investigation. If a decision is made to launch an NTSB "Go Team," that team is "wheels up" in an FAA jet or on commercial transportation in one to two hours.

Once a decision is made to launch, the Chairman or another senior member of the NTSB routinely telephones senior officials of "involved parties" to advise them of the investigation, explain the process, clarify expectations and answer questions.

The NTSB's on-site field investigatory efforts are organized by discipline-specific "groups" with participation by "parties to the investigation." This investigation team then embarks upon several months of fact gathering and analysis, sometimes including a public hearing, culminating in the issuance of "Factual Reports" by each investigatory group. Several months later, the NTSB investigators prepare a draft Final Report that includes proposed findings as to probable cause, as well as safety recommendations, for consideration by the NTSB Board. These investigative procedures are very similar regardless of whether the accident or incident relates to transportation in by air or on land or water.

■ "Accident and incident investigations are conducted by the Board to determine the facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof. These results are then used to ascertain measures that would best tend to prevent similar accidents or incidents in the future." 49 C.F.R § 831.4.

- "Accident/incident investigations are fact-finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedure Act (5 U.S.C. § 504 et seq.), and are not conducted for the purpose of determining the rights or liabilities of any person." 49 C.F.R. § 831.4.
- "Subject to the requirements of this paragraph, an investigation by the Board ... has priority over any investigation by another department, agency, or instrumentality of the United States Government." 49 U.S.C. § 1131(a)(2)(A).
- "If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation. The relinquishment of investigative priority by the Board shall not otherwise affect the authority of the Board to continue its investigation under this section." 49 U.S.C. § 1131(a)(2)(B).
- "The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities in the investigation. However, those departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident." 49 U.S.C. § 1131(a)(2)(A).
- Local law enforcement agencies may work in parallel with NTSB where local law enforcement has an interest.



# CRISIS MANAGEMENT

## ON-SCENE ORGANIZATION

The NTSB's "Investigator in Charge" or "IIC" is in control of the scene.

- He or she "organizes, conducts, controls, and manages the field phase of the investigation, regardless of whether a Board Member is also on-scene at the accident or incident site." 49 C.F.R. § 831.8.
- "The IIC continues to have considerable organizational and management responsibilities throughout later phases of the investigation, up to and including Board consideration and adoption of a report or brief of probable cause(s)." 49 C.F.R. § 831.8.

NTSB Go Teams typically include a Board Member. Also included are "Group Chairmen" from various specialties, a Transportation Disaster Assistance Specialist and, occasionally, an NTSB attorney

Upon arrival on-scene, the NTSB Go Team generally surveys the accident site, establishes a command post, arranges communications, confirms security and biohazard precautions and begins work with first responders and the parties to the investigation. This effort is quickly followed by an Organizational Meeting, the goals of which are:

- Establish order;
- Designate Parties & Party Coordinators;
- Establish & organize Investigation Groups;
- Review applicable Rules of Conduct and confirm with signatures on "Statements of Party Representatives;" and
- Review on-site safety precautions.

The Board Member or the IIC are the official spokespersons for the NTSB at the scene. They will conduct press briefings and be the only source of information from the investigation about the accident or incident. Parties are actually prohibited from speaking with media regarding the specifics of the accident or the investigation.

## NTSB INVESTIGATION GROUPS

NTSB investigation efforts are broken down into logical groups. Historically these may have included groups such as:

- Operations
- Control Systems
- Mechanical
- Human Performance
- Survival Factors
- Event Recorders
- Crashworthiness
- Hazardous Materials
- Fire/Explosion
- Metallurgical

More recently, NTSB investigation groups have reflected the organization's broader mission of preventing future transportation accidents:

- Corporate Policies & Governance
- Organizational "Safety Culture"
- Industry Practices
- Regulatory Oversight

NTSB Safety Recommendations are rarely focused upon a single probable cause of an individual accident. The opportunity is frequently taken to offer broader recommendations to transportation operators, manufacturers, industry associations, labor associations, regulators, and others as to how related future transportation accidents might be avoided.

# CRISIS MANAGEMENT

## PARTIES TO THE INVESTIGATION

The NTSB is assisted on-scene and throughout the factual phase of its investigation by “parties to the investigation” designated by the IIC.

Party status is limited to “... those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation.” 49 C.F.R. § 831.11(a)(1).

It is generally agreed that the “party system” is critical to the NTSB’s methodology and success. There is no other way such a small agency could investigate so many accidents. Also, the cooperation demanded, and almost universally received, from the parties provides broad, up-to-date technical assistance that would be very difficult to duplicate regardless of agency size or budget.<sup>3</sup>

The Federal Aviation Administration is the only “party of right” to NTSB accident Investigations (49 U.S.C. § 1132(c)), but it is the consistent practice of the NTSB to offer party status to the Federal Railroad Administration, Federal Transit Administration, Federal Motor Carrier Safety Administration, U.S. Coast Guard and other agencies. As noted above, typical additional parties include organizations such as:

- Transportation Operators;
- Labor organizations;
- State regulatory inspectors;
- Police, fire, emergency responders; and
- Manufacturers.

Parties are represented in the investigation by a Party Coordinator and Party Specialists.

Party Coordinators are expected to supervise any members of their organization assigned to NTSB Investigation Groups. They work directly to support the IIC and are expected to be available on-scene to the IIC and his or her Command Center at all times. They must be able to speak for their organizations and be senior enough to obtain documents and information quickly. Perhaps most importantly, they are responsible for ensuring that NTSB rules are followed by those participating on behalf of their organization in the investigation, as well as by the organization itself outside the context of the on-scene and follow-up work. They will be expected to sign, for themselves and on behalf of their organization, a related “Certification of Party Representative.”<sup>4</sup> This certification confirms, among other things, that their participation will be solely to assist the NTSB safety investigation and “not for the purposes of preparing for litigation.”

Party Specialists are proposed by organizations to assist in the Group Investigation effort. They must possess technical expertise needed by the Group. They should be full-time employees of the organization and will work under the direct supervision of NTSB Group Chairmen. They are required to abide by the NTSB rules and procedures and will also be required to sign a “Certification of Party Representative.” Among the rules and procedures that Party Representatives must follow is an obligation to share with the NTSB any information in the possession of or developed by a party that may be relevant to investigation. At the same time, Party Coordinators and Party Specialists must agree not to share information developed by the NTSB investigatory effort with their employer, or anyone else, without permission of IIC.

The NTSB prohibits parties to the investigation from being represented in any aspect of an NTSB investigation by any person occupying a legal position or who represents potential claimants or insurers.<sup>5</sup>

<sup>3</sup> NTSB staff recognizes that there may be tensions, or differing and conflicting organizational objectives, among the parties. Investigators are trained to be vigilant for this, manage the issues, and consider this in weighing inputs from the parties. At the same time, those injured in accidents, and representatives of the estates of those killed, have on occasion been critical of the absence of any participation specifically on their behalf. There has been recent congressional interest in this issue.

<sup>4</sup> [http://www.nts.gov/doclib/forms/ntsb\\_investigation\\_party\\_form.pdf](http://www.nts.gov/doclib/forms/ntsb_investigation_party_form.pdf)

<sup>5</sup> See 49 C.F.R. § 845.13 & 49 C.F.R. § 831.11 (a)(3)



# CRISIS MANAGEMENT

NTSB staff expects party representatives to focus on transportation safety as the primary concern during the fact-finding investigation. They expect:

- Candor and truthfulness;
- Responsive, cooperative, technically accurate interactions; and
- Relevant information discovered by party, before or after the accident, to be *volunteered*.

Should a party or its representatives violate the party rules, it may lose party status.<sup>6</sup> Such conduct includes but is not limited to:

- Disreputable conduct within the investigation;
- Spoliation, destruction or loss of evidence;
- Compromise or disclosure of the NTSB's investigative activity or focus;
- Public statements purporting to address the findings, cause, probable cause, or contributing factors of a pending investigation (this includes statements by headquarters, officers, or designated spokespersons); and
- Any other violation of the agreed upon "Certification of Party Representative" to NTSB investigations and the associated "Information and Guidance for Parties to NTSB Accident and Incident Investigations."

## NTSB WITNESS INTERVIEWS

An important part of the NTSB investigatory effort is witness interviews. These interviews are conducted under oath and are recorded by a stenographer or other means. The transcribed interviews typically become part of the NTSB Public Docket. Questioning is typically done by NTSB investigators, but it is not unusual for investigation group members to attend and suggest lines of questioning. Should a witness refuse to participate, the NTSB has subpoena power to compel participation. There is a right of "representation" at such interviews.<sup>7</sup> The right, however, belongs to the witness and not his or her employer. A labor union member, for instance, may choose to be represented by a fellow union member. When a witness requests representation from his or her employer, the employer and their counsel should be alert to any potential conflicts between the organization and the individual employee. Witnesses should be cautioned about the False Statements Accountability Act, as well as their right against self-incrimination.<sup>8</sup> They should also be aware that NTSB Investigators can not assure confidentiality or grant immunity from prosecution.



<sup>6</sup> "Participants in the investigation (i.e., party representatives, party coordinators, and/or the larger party organization) shall be responsive to the direction of Board representatives and may lose party status if they do not comply with their assigned duties and activity proscriptions or instructions, or if they conduct themselves in a manner prejudicial to the investigation." 49 C.F.R. § 831.11 (a)(2).

<sup>7</sup> 49 C.F.R. § 831.7

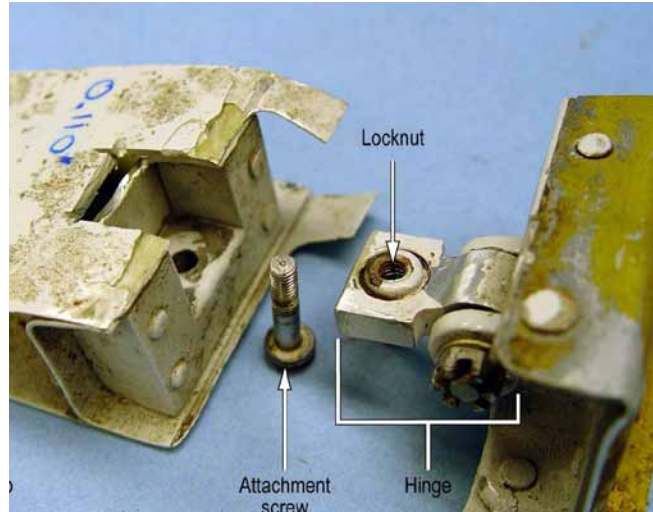
<sup>8</sup> See "Federal Prosecutions Launched against Platinum Jet Staff," at [http://www.tlghtglobal.com/articles/2009/021\\_10/32233\\_8/federal-prosecutionslaunched-against-platinum-jet-management.html](http://www.tlghtglobal.com/articles/2009/021_10/32233_8/federal-prosecutionslaunched-against-platinum-jet-management.html).

# CRISIS MANAGEMENT

## NTSB PUBLIC INVESTIGATIVE HEARINGS

As noted above, the NTSB occasionally convenes a public investigative hearing with sworn testimony from witnesses<sup>9</sup> as part of its fact-finding mission. These are major events, often heavily covered by the media and web-cast live. Questioning is conducted by an NTSB technical panel, party representatives and the Board itself.

- “Transportation accident hearings are convened to assist the Board in determining cause or probable cause of an accident, in reporting the facts, conditions, and circumstances of the accident, and in ascertaining measures which will tend to prevent accidents and promote transportation safety.” 49 C.F.R. § 845.2.
  - “Such hearings are fact-finding proceedings with no formal issues and no adverse parties and are not subject to the provisions of the Administrative Procedure Act.” 49 C.F.R. § 845.2.
  - “The chairman of the board of inquiry [normally the Chairman or an assigned Board Member] shall designate as parties to the hearing those persons, agencies, companies, and associations whose participation in the hearing is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence.” 49 C.F.R. § 845.13 (a).
  - Parties to the investigation may decline to participate as parties to the hearing, but may still be compelled to provide witnesses or records via subpoena or otherwise. 49 U.S.C. § 1113(a).
  - “Parties shall be represented by suitable qualified technical employees or members who do not occupy legal positions.” 49 C.F.R. § 845.13 (a).
  - Usually the week prior to the hearing there is a “... prehearing conference [at which] the parties shall be advised of the witnesses to be called at the hearing, the areas in which they will be examined, and the exhibits which will be offered in evidence.” 49 C.F.R. § 845.23(a).
- Witnesses are sworn in by the Hearing Officer. 49 C.F.R. § 845.21.
  - Sequence of questioning: Technical Panel (49 C.F.R. § 845.22-NTSB staff); Parties; and then Board of Inquiry. Chairman of the board of inquiry may give either group multiple rounds, but second round expected to be short. 49C.F.R. § 845.25.
  - “Materiality, relevancy, and competency of witness testimony, exhibits, or physical evidence shall not be the subject of objections in the legal sense by a party to the hearing or any other person.... Such matters shall be controlled by rulings of the chairman of the board of inquiry on his own motion.” 49 C.F.R. § 845.25(b).
  - “[The chairman] may exclude any testimony or exhibits which are not pertinent to the investigation or are merely cumulative.” 49 C.F.R. § 845.26.



<sup>9</sup> Witnesses are entitled to “representatives,” who may be attorneys, but no objections are allowed. 49 C.F.R. § 845.24



# CRISIS MANAGEMENT

## FOUR PARTY OPPORTUNITIES IN NTSB INVESTIGATIONS

There are at least four major opportunities for a party to an NTSB investigation to make formal contributions.

### 1. Field Notes

The Investigation Groups prepare field notes while on-scene. They routinely ask group members to sign off on the accuracy of those notes. Party representatives should review these notes very carefully for errors of any sort. This may also be an opportunity to comment upon such things as characterizations of what was seen; on any limitations, for whatever reason, in the on-scene work; and on what may have been expected but was not seen.

### 2. Group Factual Reports

Following the on-scene work, the Investigation Groups continue their work for several months. This work includes information gathering of all sorts,<sup>10</sup> sometimes including testing and the use of outside consultants. Eventually each Investigation Group prepares and circulates a draft Factual Report to its group members. The members are requested to either sign off on the accuracy of the report or provide an explanation as to any aspects of the report about which they disagree. Such disagreements may be substantive or may relate to some characterization of the evidence. Either way, it is an opportunity to place into the record any disagreement that a party may have as to factual findings that may later be the foundation for findings as to causation. Group Chairmen actually welcome any constructive changes at this point. It may also be that even if a suggested change is not adopted, it will be included in a footnote that a particular party disagrees with a factual finding or the manner in which that finding was characterized. Conversely, a failure to suggest corrections at this point may call into question any effort by a party to suggest later on that a factual finding was

incorrect. Weighing in on the accuracy of NTSB Group Factual Reports is particularly important because these reports are generally admissible in civil litigation.

### 3. Party Participation in a Public Investigative Hearing

It is critically important that any party representatives and party witnesses participating in an NTSB public investigative hearing be well prepared. These proceedings are videotaped, transcribed and web cast live. While testimony from these hearings may not be used affirmatively in civil litigation, it may possibly be used for impeachment purposes.

### 4. Party Submission of Proposed Analysis & Findings

After the NTSB releases its public docket containing the Group Factual Reports, there is typically a 60 day window for parties to submit Proposed Analysis & Findings.<sup>11</sup> Parties may also request the opportunity to meet with the IIC to present these proposed analyses and findings. Parties generally format this document to be consistent with the NTSB style for its own analysis and findings. This opportunity is important because once the fact-finding phase of the investigation is completed, party representatives are released and do not participate in the preparation of the NTSB's final report concerning the accident, probable cause or safety recommendations. Submission of Proposed Analysis and Findings is a party's only opportunity to weigh in on these matters.



<sup>10</sup> Typical requests include those for copies of records, e-mails, computer files and databases, medical records, computer hard drives, cell phone numbers of employees killed or involved in the accident, copies of written policies and procedures, employee interviews, maintenance records/logs, system schematics, equipment design drawings, employee disciplinary records, etc.

<sup>11</sup> 49 C.F.R. § 831.14, and also 49 C.F.R. § 845.27

# CRISIS MANAGEMENT

## NTSB SAFETY RECOMMENDATIONS

The NTSB routinely makes 200 or more Safety Recommendations each year. Since the formation of the Safety Board in 1967, almost 14,000 safety recommendations have been made. These include recommendations specific to the systems, hardware or operations involved with accidents and incidents at issue, but frequently include broader policies and regulatory issues. NTSB Safety Recommendations have been made to more than 2,500 entities. These frequently include:

- DOT or a DOT modal operating administration (FAA, FRA, FMCSA, FTA, etc.);
- United States Coast Guard, Department of Homeland Security, etc.;
- Transportation Operators;
- Trade associations;
- Labor Unions;
- Manufacturers; and
- State & Local Governments.

Despite the NTSB's complete lack of regulatory authority, more than 80% of the NTSB's Safety Recommendations have been accepted by those to whom they have been recommended. More than 90% have been at least partially accepted and closed in a manner deemed "acceptable" to the NTSB.



The NTSB's current "Most Wanted" Safety Improvement Lists <sup>12</sup> are in the areas of:

- General Aviation Safety
- Airport Surface Operation
- Eliminating Transportation Distractions
- Bus Safety
- Fire Safety
- Transportation Infrastructure
- Pipeline Safety
- Positive Train Control
- Substance-Impaired Driving
- Collision Avoidance

## TOP TEN WAYS FOR A PARTY-TO-THE- INVESTIGATION TO ASSIST

There are many ways in which parties to an investigation can maximize their assistance and value to the process. Most are in the nature of understanding the NTSB and its investigation process and adopting a win/win approach toward the use of the process to prevent future accidents. With this in mind, here are ten useful things for any party to keep in mind as it navigates its way through an NTSB investigation:

### 1. Understand the responsibilities of IIC & Group Chairmen

Once these responsibilities are understood, it is easier to accept, and explain to others, the sometimes intrusive and short deadlines associated with the investigation's urgent need for documents and information.

### 2. Keep copies of the documents provided (also a list!)

In the frenzy of a serious calamity, documents and information are often provided to NTSB investigators without any copies or even a list of what was provided. Without copies and such a list, a party may have no way of knowing whether the correct and complete documents were provided.

<sup>12</sup> <http://www.nts.gov/safety/mwl.html>

# CRISIS MANAGEMENT



### 3. Respond swiftly, and make sure of accuracy (Q&A Book)

Even in the litigation world, it is rare that there ever needs to be immediate compliance with any request for documents or information. That is not so in an NTSB investigation. The IIC and his or her team are focused upon learning how and why an accident or incident took place in an effort to save lives by preventing the next occurrence. The information requested may well give rise to follow-up requests to you or others. The IIC and his or her team are understandably impatient and have difficulty allowing a party's normal day-to-day business needs to take priority over their pending investigation. When you, as a party or through any of your party specialists, respond to requests for information, the requests and responses should be kept together in one place. This is the only way to put the requests and responses into context as the investigation unfolds.

### 4. Assume all communications with the NTSB will be public

This is important and needs to be understood by everyone interacting on your behalf in any way with the NTSB. A key guiding principle for the NTSB is transparency. Once again, keep copies.

### 5. Choose your Party Coordinator & Specialists carefully

The NTSB requires your Party Coordinator to have sufficient stature within your organization to obtain early requests for documents and information quickly, but he or she may not simultaneously be a Party Specialist. There is a temptation to appoint someone very senior as your Party Coordinator. Before you do so, you need to realize the scope of the commitment. The NTSB frowns on any substitutions of Party Coordinators or Specialists. Whoever you choose will need to have the time and personality to manage your team of Specialists. The Specialists, by definition, must possess technical capabilities in the area they will be assigned. This may limit your choices. Be particularly aware, however, that the Specialist will be an important spokesperson for your organization and will need to know to reach out for help, or at least confirmation of what they only suspect

may be true or untrue, or what they simply do not know. This may require a level of experience or sophistication over and above a more junior person who may be aware basic technical concepts, but may not be aware of the bigger picture technical issues within your organization.

### 6. Work closely with your Coordinator & Specialists

Your Party Coordinator and Party Specialists will have responsibilities to keep confidential that which they learn from the investigation. But that does not mean that they should be cut loose and not supported by your organization. There will be times when they will not know the answers to questions posed or they may think they know but are not sure. They need to know that in their role as organizational representatives they must constantly be on guard to make sure that the organizational information which they provide or are relying upon is correct. Ideally, they will "know when they don't know" and they will reach out within the organization to obtain whatever they need. One way to encourage this is to stay in close touch with them.

### 7. Be open to opportunities for interim remedial action

It may be that swift action you can take now will prevent accidents long before the NTSB issues any formal recommendations. You should be sure that your Party Coordinator and Party Specialists are alert to this. The NTSB encourages such action even if it means that early investigation information must be released in order to accomplish such remedial action. Party Coordinators and Party Specialists should be encouraged to propose any such early release of information for the purpose of remedial actions to the IIC.

### 8. Vet the draft Field Notes & Group Factual Reports carefully

Parties to the investigation have an excellent opportunity to correct any errors, omissions or potentially misleading language in Field Notes and Group Factual Reports. You must take these opportunities very seriously and strictly respect any associated time deadlines.



# CRISIS MANAGEMENT

## 9. Prepare extensively for any Public Investigative Hearing

The unpredictable nature of Public Investigative Hearings, along with the fact that they are very public, requires extensive preparation. Make sure that your witnesses fully understand the format and are prepared to respond to any likely questions. Make similarly sure that your representative is prepared with appropriate lines of inquiry for witnesses from other parties and possible clarifying follow-up inquiries for your own witnesses.

## 10. Submit Proposed Findings & Recommendations

The NTSB welcomes proposed finding and recommendations. These can validate or call question to conclusions independently generated. Both are extremely important.

### WHAT ISSUES MAY ARISE FOR COUNSEL TO A PARTY TO AN NTSB INVESTIGATION?

- Who or what to represent. Every witness in NTSB investigation entitled to “representation.” 49 C.F.R. § 831.7. But if you, as counsel to a party, represent an individual company witness or witnesses, you may have a conflict in simultaneously representing the company
- Proprietary Documents & Information. Proprietary information submitted to the NTSB must be appropriately marked on each and every page of such document. 49 C.F.R. § 831.6(a)(2). While the NTSB has authority to publicly disclose proprietary information, it must generally engage in consultation process with the submitter prior to doing so. An exception is when delay in disclosure would be detrimental to public health and safety.

- Attorney involvement in the NTSB investigative process is a sensitive subject. In order to preserve their independence and reduce any appearance of bias, the NTSB prohibits attorneys for injured parties, estates, potential defendants or anyone else from participation in any aspect of the NTSB on-scene investigative process. Investigation information is shared with representatives of parties to the investigation, but solely to assist the NTSB safety investigation and “not for the purposes of preparing for litigation.” With these prohibitions in mind, there have been suggestions that law firms supporting Party Coordinators or Party Representatives during the fact-finding portion of an NTSB investigation may need to set up a legal “fire wall” to separate their involvement from that of litigation defense counsel. Such an arrangement may make it easier for Party Representatives to have access to counsel during fact-finding without the risk of violating their party agreement with premature disclosures of investigative information to litigation counsel.
- While mounting a parallel investigation to that of the NTSB is strictly prohibited, parties are encouraged to conduct a safety review in order to quickly take any remedial actions that may be warranted by the accident or incident under investigation.



# CRISIS MANAGEMENT



## NTSB INVOLVEMENT IN LITIGATION

The mission of the NTSB is to avoid future accidents rather than to determine legal fault for accidents in the past. Consistent with this mission, Congress has put in place multiple safeguards to protect the NTSB staff and investigators from most involvement in civil or criminal litigation.<sup>13</sup>

### ***NTSB Final Reports are Not Admissible***

49 U.S.C. § 1154(b) precludes the use or admission into evidence of Board accident reports in any suit or action for damages arising from accidents. These sections reflect Congress' 'strong ... desire to keep the Board free of the entanglement of such suits'. Rep. No. 93-1192, 93d Cong., 2d Sess., 44 (1974), and serve to ensure that the Board does not exert undue influence on litigation." 49 C.F.R. § 835.3(a).

### ***NTSB Fact Reports are Generally Admissible***

"... Board employees may use copies of the *factual* accident report they prepared, and may refer to and cite from that report during testimony." (emphasis added) 49 C.F.R. § 835.4(a).

### ***Testimony of NTSB Staff & Investigators***

If there is no other way to obtain the requested factual information, NTSB investigators and other employees may only testify in civil or criminal proceedings by way of deposition or answers to interrogatories. Even then, they may do so only in extremely limited circumstances.

Board employees may only testify by deposition or interrogatories as to unique, first-hand factual information they obtained during the course of an investigation, including factual evaluations embodied in their factual accident reports.<sup>14</sup> Board employees may not offer opinion testimony.<sup>15</sup> They may testify only once in connection with any investigation they have made of an accident.<sup>16</sup> This testimony may not take place until after the factual report concerning the matter has been issued and after any public hearing has taken place.

### ***Production of NTSB Records for use in Legal Proceedings***

Litigants can easily download copies of the NTSB's official public docket as to any recent matter from the NTSB web site. Certified copies of a docket, or copies of NTSB databases, may be obtained from the NTSB Public Inquiries Branch.<sup>17</sup>

Any demand for investigation materials not in the public docket must include an affidavit by the party seeking the material setting forth its relevance to an on-going proceeding and a certification, with support, that the information is not available from other sources.<sup>18</sup>

## PLEASE REMEMBER ...

The prevention of accidents benefits everyone. It is indeed a privilege to be part of the process.

### ***Travel safely***

<sup>13</sup> "[I]n lawsuits or actions for damages and criminal proceedings arising out of transportation accidents when such testimony is in an official capacity and arises out of or is related to accident investigation, the presumption is against testimony by Board employees, unless there is no other way for litigating parties to obtain factual information.... The purpose of this part is to ensure that the time of Board employees is used only for official purposes, to avoid embroiling the Board in controversial issues that are not related to its duties, to avoid spending public funds for non-Board purposes, to preserve the impartiality of the Board, and to prohibit the discovery of opinion testimony." 49 C.F.R. § 835.1.

<sup>14</sup> 49 C.F.R. § 835.3(b) & § 835.5(a)

<sup>15</sup> "The purposes of these sanctions would be defeated if expert opinion testimony of Board employees, which may be reflected in the views of the Board expressed in its reports, were admitted in evidence or used in litigation arising out of an accident. . . . [T]he use of Board employees as experts to give opinion testimony would impose a significant administrative burden on the Board's investigative staff. Litigants must obtain their expert witnesses from other sources." 49 C.F.R. § 835.3(a)

<sup>16</sup> "Consequently, when more than one civil lawsuit arises as a result of an accident, it shall be the duty of counsel seeking the employee's deposition to ascertain the identity of all parties to the multiple lawsuits and their counsel, and to advise them of the fact that a deposition has been granted, so that all interested parties may be afforded the opportunity to participate therein." 49 C.F.R. § 835.5(c)

<sup>17</sup> 49 C.F.R. § 837.3(a)

<sup>18</sup> 49 C.F.R. § 837.4(b)(2)







---

**David Tochen, Esq.**

General Counsel  
National Trans. Safety Board  
490 L'Enfant Plaza, SW  
Washington, D.C. 02594  
david.tochen@ntsb.gov  
Office: 202-314-6616  
Mobile: 202-579-8638

**Thomas W. Tobin, Esq.**

Partner  
Wilson Elser Law Firm  
150 East 42nd Street  
New York City, NY 10017  
thomas.tobin@wilsonelser.com  
Office: 914-872-7246  
Mobile: 914-262-2891

---



---

Wilson Elser, a full-service and leading defense litigation law firm ([www.wilsonelser.com](http://www.wilsonelser.com)), serves its clients with nearly 800 attorneys in 24 offices in the United States and one in London, and through a network of affiliates in key regions globally. Founded in 1978, it ranks among the top 200 law firms identified by *The American Lawyer* and is included in the top 50 of *The National Law Journal's* survey of the nation's largest law firms. Wilson Elser serves a growing, loyal base of clients with innovative thinking and an in-depth understanding of their respective businesses..