

**Investigating the Maritime Incident
Applicable Privileges and Considerations**

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INVESTIGATING THE MARITIME INCIDENT APPLICABLE PRIVILEGES AND CONSIDERATIONS

I. INTRODUCTION.

A well planned and properly conducted investigation is critical to the successful evaluation and defense of a case. Such an investigation is the basis for an early evaluation of exposures and the formulation of a reasoned strategy going forward. This paper will discuss the privileges applicable to the maritime incident investigation, and then provide some practical advice regarding the common issues that arise in performing an investigation.

II. PRIVILEGES.

A. The Attorney/Client Privilege.

1. The General Rule.

Generally, the attorney client privilege protects from disclosure communications among clients, counsel and their representatives made for the purpose of obtaining legal advice, provided the communications were intended to be confidential. The rationale behind the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.¹ The privilege may be defined by State or Federal law, depending on the nature of the claim and the court where suit is pending. So, the first question in determining the applicable privilege is, “what law applies?”

2. What law applies? State or Federal?

¹ *Upjohn Company v. United States*, 449 U.S. 383, 389 (1980).

Some maritime claims may be brought in State or Federal Court. Others must be brought only in Federal Court. The following chart shows what law applies to some of the more common maritime claims:

<u>Maritime Claims in State Court</u>	<u>Substantive Law Governed By:</u>	<u>Attorney Client Privilege Governed By:</u>
Jones Act	Federal Maritime Law	State Attorney Client Privilege
Death on the High Seas Act	Federal Maritime Law	State Attorney Client Privilege
OCSLA	State Law	State Attorney Client Privilege
General Maritime Law	Federal Maritime Law with State law filling gaps as Federal law	State Attorney Client Privilege
State Law Claim	State Law	State Attorney Client Privilege

<u>Maritime Claims in Federal Court</u>	<u>Substantive Law Governed By:</u>	<u>Attorney Client Privilege Governed By:</u>
Jones Act	Federal Maritime Law	Federal Attorney Client Privilege
Death on the High Seas Act	Federal Maritime Law	Federal Attorney Client Privilege
OCSLA	State Law	State Attorney Client Privilege
General Maritime Law	Federal Maritime Law with State law filling gaps as federal law	Federal Attorney Client Privilege
Limitation of Liability Claim ²	Federal Maritime Law	Federal Attorney Client Privilege
Pure State law claim based on Diversity Jurisdiction	State Law	State Attorney Client Privilege
General Maritime Claim based upon Diversity Jurisdiction	State Law	Federal Attorney Client Privilege

² A limitation of liability claim may not be brought in State Court.

a) Why is what law applies important?

As indicated in the chart, a federal claim brought in state court will be subject to the state's privilege law. If removed to federal court, the federal common law will apply. This can be important.

The scope of the attorney client privilege in Texas, Louisiana and the Federal Courts is practically identical, but this may not always be so. Each follows the subject matter test in determining the class of persons considered to be the client. Under the control group test, a "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.³ Courts applying this test generally only protect statements made by the upper echelon of corporate management.⁴ Under the control group test, a corporation could have virtually no attorney-client privilege in communicating with some managerial and all non managerial employees. On the other hand, under the subject matter test, an employee's statement is deemed to be that of the corporation if the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. This is an important distinction. Under the control group test, notes of interviews and advice to noncontrol group employees could be subject to disclosure, and both attorneys and noncontrol

³ *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993) (Texas Supreme Court articulating the "control group" test while still the law in Texas).

⁴ *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993) (Texas Supreme Court articulating the "control group" test while still the law in Texas).

group employees could be required to testify about their conversations with each other.⁵ If you are in a State using the control group test, this important distinction should be kept in mind.

Texas, Louisiana and the Federal rule all provide for protection from disclosure of communications between attorneys, their clients and consultants. Louisiana's attorney-client privilege rule expressly provides protection for communications between representatives of the client's lawyer (i.e. communications between two of a lawyer's consultants or experts). The Texas and the Federal Courts do not expressly provide protection for these communications, but such communications would appear to be contemplated by the rule.

3. Who owns the Privilege?

The attorney client privilege is owned by the client.⁶ Accordingly, it is the client's decision to waive or maintain the privilege.

4. What is Protected by the Privilege?

The attorney client privilege protects communications for the purpose of obtaining legal advice between:

- a. the attorney and the client;
- b. a representative of the attorney and a representatives of the client;
- c. the attorney and the attorney's representatives;
- d. the client and a representative of the client;
- e. representatives of the client;
- f. attorneys and their representatives for the same client;

⁵ Cullen M. Godfrey, The Revised Attorney-Client Privilege for Corporations in Texas, Texas Journal of Business Law, Winter, 2000.

⁶ *United States v. Juarez*, 573 F.2d 267, 276 (5th Cir.), cert. denied, 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978); *West v. Solito*, 563 S.W.2d 240, 244 (Tex. 1978); *Smith v. Kavanaugh, Pierson & Talley*, 513 So.2d 1138, 1143 (La.,1987).

- g. the attorney, the client, or their representative to an attorney or his representative on a subject matter of common interest in pending litigation.

The communications may be:

- a. letters
- b. emails
- c. memorandums
- d. notes
- e. oral discussions

Generally, it will apply when the lawyer is performing any of the following functions:

- a. evaluating whether employee conduct has bound or will bound a company.
- b. assessing the legal consequences of employee conduct.
- c. formulating appropriate legal responses to actions that have been or may be taken by others regarding employee conduct.⁷

5. What is not protected by the attorney client privilege?

There are limits to the protection afforded by the attorney client privilege. The privilege protects the attorney and the client from disclosure of matters discussed in the context of giving and receiving confidential legal advice. It does not, however, protect the basic *facts* from disclosure.⁸

It does not protect non legal business information shared between the attorney and the client.⁹ Merely copying an attorney on a communication does not make it privileged. The mere

⁷ *Upjohn Company v. United States*, 449 U.S. 383, 403 (1980).

⁸ *Upjohn Company v. United States*, 449 U.S. 383, 402 (1980).

⁹ *See e.g., Simon v G. D. Searle & Co.*, 816 F.2d 397, 402-04 (8th Cir. 1987).

fact that a communication comes from an attorney does not make it privileged. The communication must be for the purpose of facilitating the rendition of legal advice. If an in-house attorney communicates a business decision to a business unit, or is performing another task in a non legal role, the communication may not be privileged.

It does not protect materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation.¹⁰

6. Waiver - how you lose the privilege.

The privilege is lost if a communication is made to someone other than the client or in a manner that reflects it was not intended to be confidential. As a result, statements made by an attorney to third parties (persons not defined as the client under the applicable test) or communications which are made in such a way that they can be overheard by persons outside the attorney client relationship are not privileged. This can be particularly complex in matters involving joint ventures, limited liability companies or partnerships, and other situations where an attorney is hired by the managing entity and is asked questions or discusses a matter with someone outside of the entity which retained the attorney.

7. The use of outside counsel to preserve the privilege.

If outside counsel is employed to perform an investigation and is the person retaining the consultants and experts to assist in the investigation, it is easier to prove the work is protected by the attorney client privilege. The lawyer's role is to give legal advice. The role of the persons retained by the lawyer is to facilitate the rendition of that advice. Of course, if those consultants or experts later testify or their work is relied upon by a testifying experts, all of the communications between the attorney and the experts will be discoverable.

¹⁰ *United States v. El Paso*, 682 F.3d 530, 542 (5th Cir. 1982).

The problem with in house counsel conducting investigations and retaining consultants is that it is often difficult for an outsider to distinguish between the lawyer acting in his capacity as a lawyer and when the in house counsel is acting in a business capacity. Often, the in house counsel wears both hats. In some instances, he or she may be an investigator and in that same context be giving legal advice. The investigative role may not be privileged, depending on many considerations, including company policies and the role of the lawyer. By taking on responsibility for an investigation, the in house lawyer's work has a greater risk of disclosure than the work of an outside lawyer who is retained for the sole purpose of rendering legal advice.

Similarly, if the in house counsel selects consultants to perform testing, analysis, or investigation, and the in house counsel is found not to have been wearing the "lawyer hat," the work of those consultants may not be privileged.

B. The Work Product Privilege.

1. The General Rule.

Generally, the work product privilege applies to materials prepared in anticipation of litigation or for trial by or for an attorney, consultant, surety, indemnitor, insurer, or agent. This material is divided into two categories - (1) core work product and (2) other work product. Even though other work product may be prepared in anticipation of litigation, the trial court has the discretion to order the production if the party seeking the discovery has substantial need of the materials in the preparation of the party's case and that party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

a) Core vs. non core work product.

i. Core work product - - the attorney's mental impressions - - is protected.

Core work product is generally not discoverable. It includes the mental impressions, opinions, conclusions and legal theories of the attorney and the attorney's representative. It may include such things as a memo analyzing the law, a deposition summary, a case plan or legal strategy, a proof outline, or evaluation of the strengths and weaknesses of the case.

ii. Non Core work product - - - everything else - - is discoverable based on substantial need and undue hardship.

The work product privilege provides only a qualified protection for non core work product. To overcome the qualified protection, the party seeking the information must show (1) a substantial need for the materials and (2) inability to obtain the substantial equivalent of the information without undue hardship.¹¹ If this is shown, the Court may order the materials produced.

b) The material must be prepared in anticipation of litigation.

i. What is Anticipation of Litigation in Louisiana?

In Louisiana, the courts look to the content, nature, and purpose of that document to determine if the document was created in anticipation of litigation or for trial. Even if a document is prepared after a claim is made or suit is brought, it may be found not to have been prepared in anticipation of litigation.¹² Louisiana's rule is patterned after Rule 26(b)(3) of the Federal Rules of Civil Procedure, so federal decisions construing the rule are persuasive authority.¹³

ii. What is Anticipation of Litigation in Texas?

¹¹ See e.g., Rule 26(b)(3) Fed. R. Civ. P.; La.C.C.P. art. 1424; and Rule 192.5 Tex. R. Civ. P.

¹² *Hodges v. Southern Farm Bureau Casualty Ins. Co.*, 433 So.2d 125, 130-35 (La. 1983). *McHugh v. Chastant*, 503 So.2d 791, 793 (La.App. 3 Cir. 1987); *Sonier v. Louisiana Power & Light Co.*, 272 So.2d 32 (La.App. 1 Cir.1973).

¹³ See *Hodges v. Southern Farm Bureau Casualty Ins. Co.*, 433 So.2d at 131.

In Texas, the work product privilege can be invoked if there is good cause to believe that suit would be filed at the time the item is created or after the suit is filed. Good cause is determined by a two-prong test set forth by the Texas Supreme Court in *Flores v. Fourth Court of Appeals*.¹⁴ The first prong of the *Flores* test is objective. The court is required to determine whether a reasonable person, based on the totality of the circumstances existing at the time of the investigation, would have anticipated litigation. The second prong of the test is subjective. The party invoking the privilege must show they believed in good faith that there was a substantial chance that litigation would ensue. As with the objective prong, the court must examine the totality of the circumstances to determine whether the subjective prong is satisfied.

iii. What is Anticipation of Litigation in the Federal Courts of the Fifth Circuit?

In the federal courts of the Fifth Circuit, the work product privilege may be invoked if the primary motivating purpose behind something's creation was to aid in possible future litigation.¹⁵

c) What is Protected?

i. What is protected in Louisiana?

In Louisiana, the work product privilege is set forth in La.C.C.P. art. 1424 and protects only "writings."

In *Landis v. Moreau*,¹⁶ the Louisiana Supreme Court held writings does *not* include tangible things such as videotapes, films or photographs. The Court was asked to determine

¹⁴ *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 40-41 (Tex.1989).

¹⁵ *United States v. Davis*, 636 F.2d 1028, 1039 (5th Cir. 1981).

¹⁶ *Landis v. Moreau*, 779 So.2d 691, 697 (Lou. 2001).

whether audiotapes containing the mental impressions, conclusions, opinions, or theories of an investigator were protected by the work product privilege. The Court held that because the audiotapes were “tangible things” and not a writing, the work product privilege did not protect the tapes from disclosure.

Article 1424 specifically excludes protection for the statement of a party or a witness (if the witness requests his own statement).

ii. What is protected in Texas?

The Texas work product privilege is set forth in Rule 192.5 of the Texas Rules of Civil Procedure and protects “material,” “mental impressions,” and “communications” made in anticipation of litigation or for trial.

The rule specifically excludes protection for witness statements, trial exhibits, the name, address, and telephone number of any potential party or person with knowledge of relevant facts, any photograph or electronic image of underlying facts (e.g. a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence, and any work product that would fall within an exception to the attorney client privilege.

iii. What is protected in Federal Court?

The Federal work product privilege is set forth in Rule 26(b)(3) of the Federal Rule of Civil Procedure and protects “documents and tangible things” prepared in anticipation of litigation or for trial.

The rule specifically excludes protection for the statement of a party or a witness (if the witness requests his own statement). Additionally, the Fifth Circuit has held that statements taken of witnesses shortly after an accident constitute unique catalysts in the search for truth in

that they provide an immediate impression of the facts that cannot be recreated or duplicated by a deposition that relies upon memory.¹⁷ In *Lanham*, the Court noted that “[M]any courts have held that the mere lapse of time [between and accident and the depositions of witnesses] in itself is enough to justify production of [earlier] statements.”¹⁸

iv. Practical examples of protected and non protected materials.

Examples of the types of materials which do and do not receive protection under the work product privilege is shown below:

Material sought to be Protected	Louisiana Work Product Privilege:	Texas Work Product Privilege:	Federal Work Product Privilege:
Attorney notes and impressions of witness interview	Protected as core work product	Protected as core work product	Protected as core work product
Attorney Dictaphone tape of mental impressions on accident	Not Protected	Protected as core work product	Protected as core work product
Photographs taken by the attorney of the accident scene	Not Protected	Not Protected	Protected as non core work product (may be discoverable by showing substantial need and undue hardship)
Investigation reports	Mental impressions of attorney protected. Recitation of facts or witness statements may be discoverable by showing substantial need and undue hardship	Mental impressions of attorney protected. Recitation of facts or witness statements may be discoverable by showing substantial need and undue hardship	Mental impressions of attorney protected. Recitation of facts or witness statements may be discoverable by showing substantial need and undue hardship

¹⁷ *S. Ry. Co. v. Lanham*, 403 F.2d 119, 128 (5th Cir. 1969).

¹⁸ *Lanham*, 403 F.2d @ 128.

Legal research and memos	Protected as core work product	Protected as core work product	Protected as core work product
Letters from the attorney to the client	Protected as core work product	Protected as core work product	Protected as core work product
Video recording by attorney prepared in anticipation of litigation	Not Protected	Not protected if intended to be offered into evidence	Protected as non core work product (may be discoverable by showing substantial need and undue hardship)

Generally, there is no work product immunity for documents prepared in the ordinary course of business prior to the commencement of litigation.¹⁹

If a company has a written policy requiring the investigation of accidents, this may be used as a basis for seeking the results of any such investigation. For example, in *S. Ry. Co. v. Lanham*,²⁰ an investigation report was prepared as part of the ordinary course of business. Nevertheless, the Court did not require production because “disclosure of the opinions and recommendations contained in these reports could prove disadvantageous to a [company], and the fear of discovery might deter it from seeking full and candid evaluations of the cause of accidents and the proper disposition of claims, ” and portions of the investigative report that reflect the mental processes are discoverable only upon a showing of necessity, justification, hardship, or injustice.”²¹

2. What law applies? State or Federal?

¹⁹ See e.g., *Occidental Chemical Corp. v. OHM Remediation Services Corp.*, 175 F.R.D. 431, 435 (W.D.N.Y. 1997) (noting “even though these documents were prepared with an eye toward litigation, it is indisputable that the documents also contain information which plaintiff would be expected to obtain or compile in the ordinary course of its business of overseeing the performance of environmental remediation work under its contract with defendant.”)

²⁰ *S. Ry. Co. v. Lanham*, 403 F.2d 119, 131 (5th Cir. 1969).

²¹ *Lanham*, 403 F.2d @ 131.

Like the attorney-client privilege, the work product privilege may be governed by the federal or state law, depending on where the case is filed. A state court will apply a state work product rule and a federal court will apply a federal work product rule. This is because the work product rule is considered to be a procedural rule governed by the law of the forum.²²

a) Why is what law applies important?

Different jurisdictions have different rules regarding what receives protection and what constitutes “anticipation of litigation.” Because the work product privilege only applies to specific types of things and then only if prepared in anticipation of litigation, these can be critical distinctions.

3. Who owns it?

In contrast to the attorney-client privilege, the work product privilege belongs to both the client and the attorney, either one of whom may assert it.²³

4. Waiver - how do you lose the protection?

The same rules apply to the work product privilege as the attorney client privilege. Disclosure to “third parties” waives the privilege.

C. The New Kid on the Block? The Self-Critical Analysis Privilege.

²² 1 Wigmore Ev. 3rd ed., 1940, §5.

²³ *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994).

This is new privilege emerging in the federal common law which potentially protects a company's internal investigations from discovery. It is also known as the "self critical evaluation" and "self evaluative" privilege.

The self-critical analysis privilege has been stated to apply to any critique by a person or entity of its own operations, policies, or processes.²⁴ It is grounded in the basic notion that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law.²⁵ Without the privilege, the argument goes, companies would be caught in the predicament of doing self-analysis and risking a subsequent costly disclosure, or not doing self-analysis and risking subsequent costly violations of the law.²⁶ The privilege has not been widely accepted, but its future is undetermined.²⁷ So, it may be a basis for protecting internal analysis in the future.

III. THE INCIDENT INVESTIGATION. "IT" HAPPENED. NOW WHAT?

Everything appears to be going smoothly and then the phone rings. Someone has been hurt, a vessel has collided with another vessel, someone is alleging sexual harassment. What should you do?

A. Initial Questions that should be considered.

²⁴ *Cloud v. Superior Court of Los Angeles*, 50 Cal. App. 4th 1552 (1996).

²⁵ Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law* Albany Law Review (1996).

²⁶ Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law* Albany Law Review (1996).

²⁷ See e.g., *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir., 1992) (minutes of meeting of the vessel's safety committee not protected); *In re: Kaiser Aluminum and Chemical Co.*, 214 F.3d 586 (5th Cir. 2000)(Documents of Overpressure Protection Committee not protected; the Fifth Circuit did not recognize the privilege but stated, "[w]e need not decide whether a self-evaluation privilege should ever be recognized"); *FTC v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (Courts have uniformly refused application of the privilege, particularly when documents are sought by a government agency).

1. What happened?

In order to make an informed decision, you should find out the basics of what happened: who, what, when, where, why or how? Is anyone seriously injured? Is the location safe?

2. Who needs to know of the allegation or event?

Depending on the nature of the accident, you will want to determine who should receive notice. This may include others within the company, various local, state or federal governmental agencies, and third parties.

a) Who in the Company needs to know?

Following an incident, company policy should be followed on the notification process. Often, this depends on the severity and nature of the incident and may include legal, public relations, risk management, and environmental health safety and security.

b) Does legal need to be involved?

Any time there is an incident, the legal department or outside counsel who serves as an advisor regarding incidents should be advised. Lawyers just look at things differently. Based on experience, they are always asking the big picture questions; how can this be used against me? Do we really need to say this? Once legal is contacted, a judgment can then be made about the appropriate actions given the circumstances. For the lawyer, it is always appreciated when the call comes before a decision or action has been taken, rather than after the fact. More often than not, the lawyer will be in the best position to see how actions or statements may be taken out of

context or used against a company and suggest ways to accomplish the goals of the company without saying more than has to be said.

c) Does the government need to be contacted?

Depending on the nature of the accident, various local, state and federal agencies may require notice of the incident. Risk management or the appropriate person inside or outside the company should be consulted.

d) Do any third parties need notice?

The first third party that comes to mind as needing notice is the company's insurer. Generally, notice must be provided as soon as practical. In many instances, the insurers will be the ones who decide on what consultants are retained to evaluate damages to a vessel or facility. Early notice enhances the likelihood that the consultant of choice can be retained and review the scene before it changes.

Most contracts require notice to the client or customer.

If equipment is going to be moved or the scene changed, it is important that anyone interested in the incident have notice of what is going to be done. This could include the representatives of an injured worker, an equipment manufacturer or vendor, or an independent contractor involved in the work. So, potential third parties who may need notice of an incident include:

- i) Client or Customer.
- ii) Equipment or vessel Manufacturer.
- iii) Equipment or vessel Vendor or Seller.
- iv) Insurers.

v) Plaintiff's attorney.

3. Is there any immediate action necessary (to prevent injury or hazard)?

a. What needs to be done to preserve and secure evidence?

i. The object at issue.

This is the piece of equipment or item involved in the incident. It could be a ladder, a gangway, a swing rope, a man lift, a pump, a piece of pipe. Whatever was directly involved in the incident. Often, this item is a functioning part of the vessel or operation, and can not practically be removed. In that case, it is important that the item be preserved as is until decisions can be made about how to document its condition, e.g. by photographs, operation, or testing.

ii. The scene.

This is the general area where the incident occurred. When an incident occurs, it is often difficult to predict all the information that may be important later. At this point, the goal is to secure the area so further injury does not occur and a reasoned decision can be made about what to do. This may also include securing the gangway to be sure that access is limited to those you want to have access. Generally, you do not want adverse investigators, surveyors or adjusters talking to your employees without a company representative present.

4. What kind of investigation is needed?

How many resources are devoted to an incident depends on the circumstances. The principle reasons for doing investigations are to understand what happened and to prevent a reoccurrence. A minor housekeeping issue that causes a no lost time injury may require no more

than the preparation of an accident report and a review of the circumstances by a supervisor. On the other hand, the 5th housekeeping issue in a week may suggest there are more deep routed systemic issues that need to be addressed and investigated as a whole. An explosion and fire may require a full investigation team with a great deal more formality. How much should be done is a matter of common sense and good judgment.

5. Who is going to do the investigation?

a) Outside counsel.

It won't surprise you that we recommend the investigation of any serious incident be conducted under the direction of outside counsel. The principal reasons for this are to 1) maximize the chance that the investigation will be confidential and not subject to discovery, or subject only to limited discovery, 2) assure that policies are followed and appropriate notifications are given, 3) to advise on the legal implications of any actions considered, including contractual obligations that may exist.

b) In house counsel.

Unless you have had a bad experience in having in house counsel perform an investigation, it may not be apparent why that can be risky. Most in house lawyers give both legal and business advice. This makes it difficult to determine what role the attorney may be playing at the time of the investigation. As a result, communications thought to be privileged may turn out to be discoverable. There is no similar risk if outside counsel is used, since outside counsel's sole role is the rendering of legal advice.

c) A non lawyer root cause team.

A root cause analysis looks at the immediate and systemic causes of an incident and are typically conducted by root cause specialists. The methodology provides a host of reasons the analyst may select as causing an incident. Rarely does such an analysis find an absence of fault on anyone involved. If an owner employs an independent contractor and the contract says that the owner shall not control the manner and method of the work, a root cause analysis may still find that an incident could have been avoided had the owner exercised control over the contractor's work. Additionally, a contractor representative often sits on the root cause investigation committee, which makes it difficult to sustain a privilege claim. While most persons conducting these investigations do not like to consult with a lawyer over the report that is generated, the best practice is to have an outside lawyer involved in the process. Sometimes, the lawyers role is just to make something complex more simple and understandable. Sometimes it is to point out the contractual limitations on the right of control. On balance, the downside of having a lawyer participate is much less than the downside of unnecessarily saying something that could be very problematic for the company in subsequent litigation.

d) An adjuster.

The principal issue here is not whether an adjuster should be involved, but the role of the adjuster. Should he or she direct the investigation? The principle reason for having outside counsel direct the investigation is the preservation of the attorney client and work product privileges to the maximum extent permitted by law. If an adjuster directs the investigation, questions may be posed about whether the investigation was done in the ordinary course of business as opposed to in anticipation of litigation or to facilitate the rendering of legal advice. The best strategy is to have the adjuster to work under the direction of the attorney. This will

allow for both the attorney-client privilege and the work product privilege to potentially shield the adjuster's work.

6. What are people in the company going to be told?

When an incident involving loss of life or injury occurs, it is natural for people in the company to talk about it. Friends and coworkers want to know that people are all right and that the company is concerned about their well being. Thought should be given to when, how and what people will be told, always keeping in mind that it is likely to be repeated in court. The main thing to avoid is premature statements about the cause of an event or the condition of the people involved. Sometimes all that needs to be said is that an incident occurred at "X" facility, the known condition of persons involved, and that an investigation is being conducted.

7. What is the expected timing and schedule?

How fast an investigation has to be undertaken will be determined to a large part by the magnitude of the incident. Big or small, an incident should be investigated quickly. People should be questioned as soon as possible, while their memories are fresh. Whoever is directing the investigation should have a clear understanding of when the investigation is expected to be complete.

8. Who is the decision maker? Removing that person from the investigation.

Do not have on the investigation team a person who is potentially responsible for the event or someone who will have to make a decision about what will be done following an investigation. A person who may be responsible for the event has a potential conflict of interest because that persons own interests may cloud the direction and scope of the investigation. The

decision maker should be separated from the investigation to assure not only the independence of the investigation but also the decision which is made based upon the investigation.

B. Make a plan.

1. Identify the law, policies, procedures at issue.

To be sure the right questions are asked, the investigation must take into account the applicable legal principles. Similarly, any safety rules, policies, or procedures must be obtained and an evaluation made of whether the conduct at issue complied with those standards. This analysis will identify the broad subjects that must be covered and the questions that must be asked.

2. Identify the people who may have knowledge of the facts and key documents.

The best way to identify the people who may have key documents and information is by obtaining an organizational chart, crew list, IADC report, and other document listing the people. Be sure to get the names of people involved before, during, and after the events at issue, since all may have relevant information. When meeting with these people, they should be asked if they made any notes or have any documents related to the issues.

With the amendments to the Federal Rules of Civil Procedure and the specific requirements in State rules of procedure for the identification and preservation of electronic data, including emails, someone needs to be assigned the responsibility for 1) placing the relevant group of people on notice that emails and other electronic data should not be destroyed, 2) taking

appropriate steps to assure that any automatic deletion of electronic data is suspended pending further notice, and 3) the responsibility for retrieving the data.

3. Determine where the interview or investigation will take place.

An incident scene is always a location that should be viewed and studied. But where should people be interviewed? This will depend on the circumstances. Sometimes the only choice is the vessel. Other times it may be a nearby hotel, the corporate office, or the lawyer's office. If it is important for the witnesses to view the scene, the scene is the best place. The witnesses will naturally be nervous so, other times, it may be worth considering if there is a venue that will place the witnesses more at ease.

4. Determine who will do the interviewing.

a) Outside counsel.

Not surprisingly, we recommend the witnesses be interviewed by outside counsel. 1) There is no better way for the lawyer who may be involved any following lawsuit to get to know the people and to learn the facts. 2) Lawyers are skilled in the art of asking questions. The same approach does not work with every witness. Sometimes silence draws out information. Sometimes a witness needs some gentle or not so gentle coaxing. 3) The lawyer is in the best position to know the issues that are raised by the applicable law. 4) The notes of an outside lawyer regarding an interview of a witness will be privileged unless there is a waiver.

b) In house counsel.

The risk of using in house counsel is the possibility that a court could find the lawyer was not acting as a lawyer, but in some non legal capacity which would not have the protections of

the attorney client and work product privileges. If the investigation is directed by outside counsel and in house counsel is associated for purposes of conducting the interviews, the risk of this kind of finding is less than if the in house counsel is directing and conducting the investigation. It may also be difficult for the in house lawyer, who may find himself or herself in the dual role of trying to find out what happened at the same time as being asked to give legal advice to the witness.

c) A non lawyer root cause team.

If the root cause team conducts the interviews, it increases the likelihood that the interview notes will not be privileged 1) since the interview is not conducted by an attorney, and 2) the purpose of the interviews may be more to determine what happened and to make recommendations for avoiding similar occurrences in the future, as opposed to primarily being performed in anticipation of litigation. Having a lawyer associated with the investigation team may help in an argument over privilege, but would not assure it. Generally, root cause investigations are directed by root cause specialists, not by the lawyers for the company. As a result, it is more difficult to establish the privilege.

d) An adjuster.

Most experienced adjusters have taken many statements. Most lawyers who then have those statements later, find there are subjects they wish were covered or covered differently. For the lawyer who will handle the matter, there is no substitute for meeting the witnesses personally and learning the facts first hand. Finally, there is always greater risk that the investigation will not be protected from disclosure if conducted by a non lawyer.

5. Determine who should be interviewed and in what order.

The initial assessment of the facts will give an initial assessment of who should be interviewed. Then, a decision needs to be made about the order of the questioning. As a general rule, it is helpful to get the big picture from the captain or supervisor. If you know someone will be friendly, they should be next. The more information the investigator has when interviewing the people involved in the key events, the better. To this end, when investigating a complaint related to work place safety or retaliation, it is important to speak with the complainant before speaking to the persons accused, so that each of the allegations can be fully addressed. Don't be reticent to reinterview, to follow up on what is learned and to test what is being said. Be comprehensive. Sometimes the absence of knowledge by a witness can be as important as being a witness to the actual events at issue.

If it is necessary to speak with persons employed by another company, care should be taken to obtain permission from the company or its counsel to speak to the witnesses.

6. Identify any issues related to interviewing the witness, e.g. right to have union steward.

In some instances, a witness may have a right to have a person of their choice sit in on an interview. This is particularly true in the union environment. Consideration should be given to such issues in scheduling interviews.

7. Identify the documents or evidence that will be shared with what witness.

As documents are gathered, certain documents will emerge as more important than others. For instance, a policy or procedure at issue. These should be identified early in the

investigation process. Additionally, it is always helpful to organize documents by witness or subject. By putting together all documents mentioning an individual, it is easier to get a view of what that witness may know.

C. Conduct the investigation.

The goal of the investigation is to find out what happened: the good, the bad and the ugly. The company may then determine what may be done to prevent a future occurrence. In doing an investigation, it is important that it be conducted in such a way that the process can not be criticized as slanted or partial. If an investigation is conducted improperly, it can have significant consequences, including the inadvertent waiver of privileges, loss of the right to offer evidence or a presumption that documents or evidence was harmful if destroyed, and the portrayal of the company unnecessarily in a negative light.

1. Secure the scene and the objects at issue.

If the scene or the object at issue has not been secured already, this should be done. Extreme care should be taken to photograph, mark, tag and retain custody of the items and to maintain a record of the chain of custody so that no one can ever claim they were disadvantaged by the way the investigation was conducted. If anything is going to be discarded, someone should always ask if there is any way an opponent could claim that its absence prejudiced their ability to reconstruct what occurred.

2. Interview the witnesses.

a) Taking notes.

The notes of an outside attorney are generally privileged. For this reason, it is best to have the notes taken by a lawyer. In some cases, it makes sense to have a lawyer who is not doing the questioning take the notes. This allows the questioner to focus on the witness and the information being developed, and to engage in a conversation with the witness without the interruption and distraction of taking notes.

Whoever is the note taker should be complete and consistent, note the date and time of the interview and who was present, write down the substance of the discussion and if something is really important, place in quotations, capture any introductory cautions or closing comments, and note any credibility issues like body language, a refusal to answer questions, crying, anger, and defensiveness. If a person is identified by physical characteristics, those characteristics should be recorded, e.g. blue FRC clothing with the name, Bob, and the company name, "X", height, weight, hair color, build, hard hat, etc.

b) Should statements be taken before a court reporter or recorded?

This has advantages and disadvantages. The advantage is that there is no question about what was said. It also frees the questioner to ask the questions without taking notes. The potential disadvantages include the recording of everything said, even if harmful to the entity conducting the investigation, the cost of having a reporter, and the dampening effect it may have on a witnesses willingness to talk openly. As a general rule, interviews should be stenographically or tape recorded when it is likely to be helpful. Another instance when recording may be considered is where an appearance of transparency is important due to some likely government investigation. If not, then the better practice would be to conduct the interview and then decide if written statements should be taken.

c) How about written statements?

Written statements serve a very important purpose. They record a person's recollection of events at a time when the events are the most fresh in their memory. They tie a witness down to a story or a lack of knowledge.

i. What goes in the statement?

If taken, the statement should be signed by the witness, who should acknowledge that the statement has been freely given and the witness has been given the opportunity to change it in any way he or she saw fit. The challenge for the person taking a statement is always what to put in it. If there is bad and good, can the statement contain only the good? If the bad is omitted, how damaging is the possible later assertions by the witness that something important was said and not included? As a practical matter, it is likely that the witness will want the statement to be substantially correct. So, if bad is included, thought should be given to how it may be minimized.

d) Ask, "What am I missing?"

No matter how experienced a person is as an investigator, it is important to ask a witness, " "what am I missing?" "Anything you think I should know that we have not talked about?" "You thinking, Gee, I figured you would ask me about something, but I didn't do it?" An investigator should ask these kinds of questions about documents, people to interview, and questions or facts he or she should know.

e) Explain what happens or may happen next.

What happens next may be a deposition, an interview by a government investigator, or returning to work with the likelihood that nothing else will happen. The witness will appreciate knowing what to expect, which may help build a rapport which could be important later.

f) Discuss contact by a third party.

Always tell witnesses that they may be contacted by someone represented by another party. If they are contacted, they should let the company know and advise the person contacting them that the witness would prefer to have someone from the company present in any interview. In this way, there won't be any mistake or misunderstanding about what is said.

3. Gather Documents.

Key documents must be identified and gathered as part of the investigative process in order to tell the story and to avoid a claim that key documents were not preserved in order to avoid their disclosure.

In learning the story from the witnesses, documents can play a key role. To the extent they recorded the events as they occurred, they are the background against which further facts are developed. To the extent they set forth the applicable standard of conduct, they are the guide to determining whether the conduct failed to comply with the standard in any material way. They may establish who knew what and when and the contractual obligations of the parties.

a) What if key evidence is not preserved? The spoliation doctrine.

If documents are not preserved, the consequences can be disastrous. Under the spoliation doctrine, a jury or judge might draw an inference that a document was destroyed because it was harmful. Pleadings may be stricken. The court may preclude the offering of proof. This may not only affect the specific issue, but taint the entire view of the case. Usually, the documents at issue would not be as harmful as the inference which can be drawn from their destruction. In order to avoid the document retention issue taking on a life of its own and becoming a central issue reflecting on the character of the company, care must be taken to identify and preserve relevant documents.

b) Remember, all documents gathered are likely to be disclosed in a court case.

A document gathered in the course of an investigation is not likely to be privileged unless it was privileged at the time it was collected. Merely placing in an investigation file will not cloak with a privilege. If it is not created as part of the investigation, it will likely be produced in a subsequent legal proceeding.

c) Finding documents.

The person doing the investigation needs to make his or her own judgment about what documents exist and should be reviewed. Often, clients make judgments about what they believe is needed, and this may not cover all of the documents that should be considered. The first step is identifying the existence of the documents. This is done by asking managers about people who may have relevant documents, asking witnesses what documents they maintain or know about, asking that electronic documents be preserved and addressing how electronic documents will be searched and retrieved, and learning how records are kept in the organization, formally

and informally, in such places as the corporate records, working files, calendars, personal files, supervisor files, and personnel files. Then, the best practice is to go to where the documents are kept and look for yourself.

d) Maintain the documents you receive.

Once documents are obtained, their integrity must be maintained. Some key rules to follow are:

- A. Do not alter originals.
- B. Note the source.
- C. Make working copies for interviews and other files.
- D. Designate a person to keep the originals.
- E. Create a list of documents retrieved.
- F. Consider summarizing key document so that key points are more readily available.

4. Document the investigation (Who did what, when, how, etc.).

If an investigation is documented, it allows someone else to pick up the file and understand what was done. An investigation file should include:

- 1. Any written investigation plan.
- 2. A document with the names and contact information for the investigators and persons interviewed.
- 3. A record of the document preserving and gathering process, including the notice sent to preserve documents and any response.

4. One place for documents gathered, with a record of when documents were received, the name of the person(s) who provided the documents, the location found, and the date.
5. A chronology of events.
6. All interview notes in one place.
7. Any final report or memo with all references or attachments.

The result of the investigation, i.e. the facts found, should always be documented. The more complex question is how. Generally, this will be by a formal report or memo to the file.

a. A memo to the file or a report?

If a priority is protecting the results from disclosure in subsequent litigation, an oral report to the company with a memo to the lawyer's file by the outside lawyer may be best. The company will have the benefit of the findings, with the highest likelihood of preserving the privilege, and the lawyer will have the benefit of the memo as the case progresses.

If a report is written, the writer and the company should have a clear understanding of what is expected in the report. Is it the job of the investigator to report the facts, to determine causation, or to make recommendations regarding future corrective actions?

b. What a report may cover.

Some companies and insurers have specific formats for reports. Topics which may be covered include:

- i) The steps taken (people interviewed and documents reviewed).
- ii) Facts found.
- iii) Analysis of the evidence.
- iv) Opinions of consultants.
- v) Other incidents of a similar nature.
- vi) Recommendations for corrective actions.
- vii) Opinions or conclusions of counsel.

IV. CONCLUSION.

One of my favorite sayings is, “There is no risk in being prepared.” When an incident occurs, the investigation needs to be well planned. By good planning, with the applicable privileges in mind, a company can maximize the potential for protecting what the law allows to be protected, and minimize the possibility that the conduct of the investigation, rather than the event itself, will be the focus of any subsequent lawsuit or proceeding.