

## Dual Challenge

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**A** look at some key issues involving the intersection of NTSB investigations and civil, criminal, and FAA enforcement proceedings.

# Flight and the Real World of NTSB Investigations

Most attorneys have heard of the National Transportation Safety Board (NTSB), and some even have a rough idea of what this Board does. Relatively few attorneys, however, have actually seen the NTSB in action, let alone participated

in NTSB proceedings. While the movie *Flight*, starring Denzel Washington, provides an inside peek at the NTSB, it was not entirely accurate.

*Flight* tells the fictional story of a commercial airline pilot, Whip Whitaker, who pilots a commercial flight while under the influence of alcohol and illegal drugs. The plane crashes, resulting in multiple fatalities. (For those who have not seen the movie, this is your spoiler alert.) The pilots' union hires an attorney to represent Whitaker, who will likely face criminal charges for drug use and manslaughter. Together, the union representative and the attorney conspire to conceal Whitaker's alcohol and drug abuse from the NTSB, even buying drugs for Whitaker to overcome his binge-induced hangover so that he can testify at an NTSB hearing. Part of that involves quashing a toxicology report, which this article does not comment on as attorneys can have valid bases for quashing a toxicology report.

While this scenario makes for good drama, had this occurred outside of Hol-

lywood, Whitaker, his attorney, and the union representative could have faced criminal charges. In the real world, it is illegal to provide false information to the NTSB, and any person or entity responding to the NTSB during an accident or incident investigation is required to provide truthful information, even if the information provided may influence subsequent criminal, civil, or Federal Aviation Administration (FAA) proceedings. Federal regulations define an "accident" as an occurrence associated with the operation of an aircraft where a person suffers death or serious injury or in which the aircraft receives substantial damage. An incident is any occurrence other than an accident associated with the operation of an aircraft which affects or could affect the safety of operations. 49 C.F.R. §830.1.

Understanding the NTSB investigation process is critical for any company or individual that becomes involved in an investigation. In particular, knowing how to manage the dual challenge of responding to an NTSB investigation properly while



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also preparing for potential subsequent litigation or administrative actions is crucial.

Lest you rely on Hollywood as your resource for approaching legal matters involving the NTSB, we will endeavor to provide you with more reliable information. This article will address key issues involving the intersection of NTSB investigations and civil, criminal, and FAA enforcement proceedings.

### First, Some Background About NTSB Investigations

The NTSB is an independent U.S. government investigative agency charged with identifying the causes of transportation incidents and accidents and making safety recommendations to prevent similar mishaps. 49 C.F.R. §831.4. The NTSB does not have regulatory or enforcement powers, nor does it adjudicate civil claims or determine the rights or liabilities of any party. *Id.*

The NTSB investigates approximately 2,000 aviation accidents and incidents a year and about 500 accidents in other modes of transportation including rail, highway, and marine. *The Investigative Process at NTSB*, Nat'l Transp. Safety Bd., <http://www.ntsb.gov/investigations/process.html> (last visited June 24, 2013). The NTSB normally takes the lead in investigating transportation accidents. However, the Board may delegate investigations of smaller accidents to the FAA while retaining oversight authority. The NTSB will also relinquish the lead to other organizations, including the U.S. Department of Justice and the Federal Bureau of Investigation (FBI), if the U.S. attorney general declares that an intentional criminal act generated an incident. For example, the U.S. Department of Justice led the 9/11 investigation. In such instances, the NTSB will assist by providing technical support. *Id.*

Because the NTSB has only approximately 400 employees, it accomplishes its job by leveraging resources. It does this by designating other organizations or companies as a "parties" to an investigation. *Id.* By law the FAA is automatically a designated party. *Id.* Only those organizations involved in an accident or incident that can provide expertise to the investigation can serve as parties to it, but within those parameters, the NTSB has broad discretion. 49 C.F.R. §831.11(a)(1); *The Investigative Process*, Nat'l Transp. Safety Bd.,

*supra*. Party examples include air carriers, airframe and engine manufacturers, and pilots' and flight attendants' unions. The parties and the investigators form working groups that examine defined segments of an investigation including operations, power plants, weather, human performance, air traffic control, and others. The groups function as subcommittees of an investigation. *The Investigative Process*, Nat'l Transp. Safety Bd., *supra*.

Eventually, each working group chairman prepares a factual report that is placed in the public docket. Further fact finding may take place during a public hearing if the NTSB deems one necessary. A public hearing has several purposes: assisting the NTSB to determine the probable cause of an accident through sworn testimony from subpoenaed witnesses; ascertaining measures that will prevent accidents and promote transportation safety; and allowing the public to observe the investigation in progress. 49 C.F.R. §845.2; *The Investigative Process*, Nat'l Transp. Safety Bd., *supra*. After collecting all the evidence, the NTSB issues an accident report containing an official determination, including the probable cause of an accident. 49 C.F.R. §835.2. Often, the NTSB will also issue detailed recommendations to improve safety.

### The Obligations and Rights of Parties to an Investigation

Parties to an investigation assist with the fact-finding process even though they may have a stake in the results. The findings could affect them negatively in potential subsequent civil or criminal trials. The FAA may also use the reports in administrative or enforcement actions if the FAA believes, due to its own investigation, that a Federal Aviation Regulation (FAR) has been violated. In FAA administrative actions, the FAA may issue a warning letter or a letter of correction requiring an individual or company holding an FAA license or certificate, including airmen, mechanics, and aviation businesses, to remedy an identified problem. Such letters can remain in a certificate holder's record for years. In enforcement actions, the FAA may revoke or suspend the certificate of any FAA certificate holder. It can also impose monetary penalties. The results of administrative or enforcement actions can terminate or gravely affect an

individual's aviation career or a company's ability to conduct business.

While the ultimate findings of the NTSB are, to some extent, excluded from litigation, the underlying facts may be used in subsequent proceedings. As a result, parties to an NTSB investigation may find themselves trying to balance the dual

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objectives of providing the technical expertise expected of them with preparing for future litigation, regulatory actions, and potential damage to their reputations.

The NTSB rules recognize the dual and potentially conflicting roles of the parties to an investigation. To collect factual information and to determine probable cause impartially, the NTSB has limited party investigation designees. The limits seek to prevent a party from directing the fact finding in a self-serving manner. Federal regulations expressly exclude lawyers from becoming parties to investigations, and the regulations exclude claimants and their representatives and insurers as well. 49 C.F.R. §831.11(a)(3); 49 C.F.R. §845.13(a). *See also Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1389 (9th Cir. 1986) (holding that the NTSB did not abuse discretion by denying party status to the estate representative of a pilot that died in a plane crash). The failure to comply with these regulations may result in sanctions, including loss of status as a party.

### Right to Be Represented By Counsel

While lawyers may not be “parties” to investigations, lawyers can invaluablely guide individuals and companies through the investigative process to help them fulfill their roles as witnesses or parties to investigations while also protecting their clients’ vulnerability to litigation or enforcement actions. A lawyer can quarterback a client’s partic-

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ipation in an investigation while advising a client on how the information provided may affect the client in other forums such as civil and criminal courts or before the FAA.

The regulations provide that any witness questioned by the NTSB has the right to be represented by counsel in all phases of an investigation. 49 C.F.R. §831.7. But the NTSB is not required to inform a witness of this right because this is a safety investigation and not a criminal proceeding. Attorneys can prepare witnesses to give statements or testimony, assist with the flow of documents to and from the NTSB, including evaluating which documents are protected from disclosure, among other things. They can also counsel clients on whether it is beneficial to seek “party” status in investigations. The NTSB expects a party representative to channel information to and from the NTSB. 49 C.F.R. §831.13(b). Because all statements given and documents produced may become publicly available, having experienced aviation counsel from the beginning of an investigation will provide maximum benefit.

### Broad NTSB Investigation Powers and Disclosure of Information

The NTSB has broad investigatory powers to fulfill its mission. The information that the NTSB obtains may become part of the public docket or released through Freedom of Information Act (FOIA) requests, regardless of how damning it may be. Civil litigation concepts such as relevance objections do not apply to NTSB investigations. Under the federal regulations, “any employee of the Board, upon presenting appropriate credentials, is authorized to enter any property where an accident/incident subject to the NTSB’s jurisdiction has occurred, or wreckage from any such accident/incident is located, and do all things considered necessary for proper investigation.” 49 C.F.R. §831.9(a); 49 U.S.C. §1134(a)(1). NTSB investigators may interview witnesses on demand, including crew members, passengers, and maintenance workers. They may inspect files, enter facilities, inspect the computer data of any party involved in an air crash, and conduct testing. *Id.* They can issue subpoenas for testimony or other evidence. 49 C.F.R. §831.9(a). They have exclusive access to all wreckage, records, mail, or cargo in its custody. 49 C.F.R. §831.12.

Statements made to the NTSB are not privileged and may be used against the witness or company in subsequent proceedings. 18 U.S.C. §6004. The information obtained through an NTSB investigation may be shared with other investigative bodies, including the FAA and the FBI, and as mentioned above can potentially be used in subsequent FAA enforcement actions, criminal proceedings, or civil litigation.

### Limits on Disclosure of Information

Despite the broad reach of an NTSB investigation, witnesses may invoke some limits. Witnesses still have the right to avoid incriminating themselves based upon the Fifth Amendment. However, the Fifth Amendment only applies to compelled testimony of an individual. A corporation cannot plead the Fifth. *Braswell v. United States*, 487 U.S. 99, 105, 108 S. Ct. 2284 (1988) (holding that a corporation does not have a Fifth Amendment privilege against self-incrimination); *Bellis v. United States*, 417 U.S. 85, 89–90, 94 S. Ct. 2179, 2184 (1974) (holding that the Fifth Amendment privilege is “limited to

its historical function of protecting only the natural individual from compulsory incrimination.”). Additionally, the Fifth Amendment does not apply to compelled record production. *U.S. v. Rinehart*, 539 F. Supp. 2d 1334 (W.D. Okla. 2008) (holding that the contents of corporate records are not privileged under the Fifth Amendment). A witness must comply with a subpoena to produce documents even though they may incriminate his or her employer. Additionally, witnesses that hold an FAA license or certificate are required to turn over certain documents such as log books, even without a subpoena, because they are required to maintain these documents as a condition of having an FAA license or certificate. Phillip J. Kolczynski, *Criminal Liability in Aviation*, AVweb (Dec. 28, 1999), at <http://www.avweb.com/news/avlaw/181901-1.html> (last visited June 24, 2013).

Federal law places limitations on public disclosure of information concerning “trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” 18 U.S.C. §1905. It also specifically limits NTSB disclosure of trade secrets. 49 U.S.C. §1114 (b). An experienced attorney can help determine which documents are not appropriate for disclosure and or which documents can be provided but kept confidential.

### Criminal Penalties for Falsely Responding to the NTSB

Regardless of how potentially harmful certain information may be to a person or company, not responding fully or truthfully to the NTSB has severe criminal consequences. Whip Whitaker, his attorney, and his union representative could have been subject to criminal penalties for engaging in a cover up that provided false information to the NTSB.

It is a crime for anyone to provide false information or false testimony to the NTSB regardless of whether there were any fatalities or injuries involved in an accident or incident. Federal criminal law criminalizes engaging in false record keeping, providing a false statement to the government, and intentionally and knowingly violating any of the Federal Aviation Safety Regulations.

State law can differ on the finer points, but the consequences are similarly severe. 49 U.S.C. §46310; 49 U.S.C. §46316.

The federal government has prosecuted companies and individuals for providing false information in connection with an NTSB investigation. Some examples include the 2005 accident of a Platinum Jet aircraft at Teterboro Airport in New Jersey. Federal prosecutors charged managers of Platinum Jet with providing false statements to NTSB investigators to hide certain FAR violations. The charges included submitting false information about weight and balance computations and documents for the flight. Gary Halbert, *United States: The NTSB and Parallel Law Enforcement Investigations* (Oct. 4, 2011), available at <http://www.mondaq.com/unitedstates/x/147624/Aviation/The+NTSB+and+Parallel+Law> (last visited June 24, 2013).

In 1999, the Florida State Attorney's Office brought criminal charges against SabreTech, Inc., related to the 1996 ValuJet DC-9 Disaster. The charges stemmed from SabreTech's mishandling of hazardous materials, conspiracy, and false statements, among other things, and included 110 counts of third-degree murder and manslaughter charges under Florida law. The U.S. Attorney's Office then issued a federal indictment including 24 criminal counts against SabreTech and three of its maintenance workers. Kolczynski, *supra*.

These cases highlight the real consequences for aircraft owners, operators, and manufactures, including criminal prosecution related to their involvement in NTSB post-accident investigations. It is critical that anyone in a company that is involved in an NTSB investigation or is responding to an investigative body receive proper training on how to respond.

### Use of Evidence from NTSB Investigations in Subsequent Proceedings

To keep the NTSB independent and solely focused on improving transportation safety, the NTSB's analysis of factual information and its probable cause finding generally are not admissible as evidence in civil or criminal proceedings. The law provides that "no part of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in

a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C. §1154. While this language seems unequivocal, judicial application has not been uniform. The majority of courts find that a final report of the NTSB is excluded from evidence but the factual portions of an NTSB report is admissible. The factual reports are prepared by the chairman of each working group and are prepared before the NTSB formalizes its conclusions and probable cause findings. 49 C.F.R. §835.2. In 1999, the NTSB revised the regulations to make it clear that the portion of a Board report that contains the NTSB's determination may not be admitted into evidence. *Id.* However, the revisions did not bar admitting factual accident reports as evidence. *Id.* The first court to adopt the new distinction was the D.C. Circuit in *Chiron Corp. v. NTSB. Chiron Corp. v. NTSB*, 198 F.3d 935 (D.C. Cir. 1999). This case has paved the way for arguing that an entire factual report is admissible in a court of law. However, in practice litigants still may use this clear rule in ways that weaken it. For instance, a litigant may seek to introduce factual observations to a jury as if they are conclusions of the NTSB or cloaked with NTSB authority when they are not. Some of this can be remedied with carefully drafted motions *in limine*.

The prohibition on using the NTSB reports as evidence stems from public policy objectives. The prohibition is intended to promote cooperation and openness in the investigations. However, the NTSB is not bound to follow any particular evidentiary rules, and this certainly affects the evidentiary value of its findings.

### Conclusion

Individuals and companies involved in NTSB investigations must truthfully and fully respond to an NTSB investigation and provide the technical expertise requested. However, this obligation may conflict with the private interests of an individual or a company seeking to avoid litigation or an FAA enforcement action because the individual or company making a statement or producing a document to the NTSB or any other federal agency may not know at the time whether it will be used against it in the future.

Understanding the NTSB investigation process and its intersection with other

potential legal proceedings is crucial to representing clients in NTSB investigations effectively. An experienced lawyer should meet with a witness or a party at the earliest stages of an NTSB investigation to help guide the client through the process in a way that fulfills the client's obligations while protecting the client's other interests.

Whip Whitaker ultimately confessed

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in *Flight*, and thus, the NTSB was not deprived of the information that it sought. However, had the cover up been discovered, the consequences for all involved would have been severe. The scene of Whitaker in jail reveals that he was criminally charged as a result of his actions. What we didn't see was how the case would have played out in the civil courts and before the FAA, which probably would have imposed significant civil liability against the air carrier, and perhaps other parties. Without a doubt the FAA would have revoked Whitaker's certificate, barring him from flying.

Hopefully, this article has not spoiled the experience of simply enjoying a movie for its dramatic content. But we suppose that it is the role of every good lawyer to examine situations from all sides, which includes making sure that a good movie is not mistaken for a short course on aviation law.

