The Rights of Parties and Civil Litigants in an NTSB Investigation

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† This Article is written in the authors' personal capacity.
I. INTRODUCTION

THE NATIONAL Transportation Safety Board (NTSB) excludes lawyers from the investigation process. Through an independent investigation, the NTSB uncovers facts related to the accident, determines probable cause, and makes safety recommendations. The practitioner must have more than a general understanding of the NTSB investigation process to effectively manage an aviation crash case and to properly advise the client. The typical defendant/client—for example, the air carrier, the manufacturer, or the maintenance provider—must be advised about being responsive to, and cooperative with, the NTSB, and must understand the importance of maintaining separation between litigation activities and accident investigation. From the plaintiff/victim perspective, counsel must advise about the perceived limitations in the process, the inability to actively participate or influence the course, scope, or outcome of the investigation, and the implications on the cost of developing the case through independent investigations.

This paper discusses the NTSB investigation process and explains the use of NTSB investigatory materials, reports, and testimony in subsequent civil litigation. Counsel from both sides must be familiar with the rules regarding the admissibility of reports, the regulations related to obtaining evidence from the investigation, as well as those related to protecting proprietary information and obtaining deposition testimony from NTSB employees.

II. THE NTSB

A. Brief History

The origins of the federal government’s official involvement in civil air accident investigations and air safety can be traced to
the Air Commerce Act of 1926. The Air Commerce Act gave the Secretary of Air Commerce the duty "to investigate, record, and make public the causes of accidents in civil air navigation in the United States." By 1934, Congress specified that the Secretary's powers included the authority to hold hearings, conduct official investigations, subpoena witnesses, and compel cooperation. In 1937, the first true accident panel was formed with the same basic structure that the NTSB has today. In 1938, Congress created the Civil Aeronautics Authority and the Air Safety Board. In 1940, the investigatory powers were transferred to the new Civil Aeronautics Board (CAB). The CAB came under the newly created Federal Aviation Administration (FAA) in 1958. Then, in 1966, the CAB became the NTSB under the Department of Transportation Act. The NTSB "opened its doors on April 1, 1967."

The NTSB was technically independent, although there existed the possibility of influence because of the Board's reliance on the U.S. Department of Transportation for funding and administrative support. To enhance the perception of true independence, Congress passed the Independent Safety Board Act of 1974. This Act removed the NTSB from the control of the Department of Transportation and gave it structural auton-

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2 Littleton, supra note 1, at 257 (citing Air Commerce Act of 1926, 44 Stat. 569 (1926)).

3 Id.

4 Id. The panel had five members. Three members were from the Department of Commerce and two were chosen for their expertise. Id.

5 Clemen & Long, supra note 1, at 973 (citing Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973 (1938)).

6 Littleton, supra note 1, at 257; Clemen & Long, supra note 1, at 973.


10 Clemen & Long, supra note 1, at 974; NTSB History, supra note 9.

11 Littleton, supra note 1, at 258; Clemen & Long, supra note 1, at 975; NTSB History, supra note 9.
The NTSB has largely retained this organizational structure since 1974.13

B. OVERVIEW OF THE INVESTIGATION PROCESS

The stated purpose of an NTSB investigation is to “determine facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof.”14 The Board does not adjudicate civil claims.15 Investigations “are not conducted for the purpose of determining the rights or liabilities of any person,” and the Board does not attempt to allocate responsibility to various parties as may happen in a civil lawsuit.16 In contrast to civil lawsuits, the Board is allowed to consider evidence that might otherwise be excluded under traditional rules of evidence.17

In the context of a large commercial aircraft loss, the central component of an NTSB investigation is the “Go Team.”18 The Go Team represents the NTSB’s quick response capability; it allows for the immediate, organized collection of facts after an accident. The Go Team’s purpose is to “[b]egin the investigation of a major accident at the accident scene, as quickly as possible, assembling the broad spectrum of technical expertise that is needed to solve complex transportation safety problems.”19 The chief of the Go Team is the Investigator in Charge (IIC),20 and he or she is dispatched from the agency’s office in Washington, D.C.21

Each of the NTSB investigators, working under the IIC, heads up an investigative group or a “working group.”22 There can be

12 Littleton, supra note 1, at 258; Clemen & Long, supra note 1, at 975; NTSB History, supra note 9.
13 Littleton, supra note 1, at 258.
15 Graham v. Teledyne-Continental Motors, 805 F.2d 1386, 1389 (9th Cir. 1986).
17 Kolczynski, supra note 16.
19 Id.
20 49 C.F.R. § 831.8 (2002).
21 Cynthia C. Lebow & Liam P. Sarsfield, Safety in the Skies 14 (RAND 1999); NTSB Investigative Process, supra note 18.
22 Lebow & Sarsfield, supra note 21, at 14; NTSB Investigative Process, supra note 18.
as many as ten investigative groups. In an aviation investigation the specialties are typically: (1) Operations; (2) Structures; (3) Power Plants; (4) Systems; (5) Air Traffic Control; (6) Weather; (7) Human Performance; (8) Survival Factors; (9) Aircraft Performance; (10) Maintenance Records; and (11) Eyewitness groups formed at the scene. There are also Flight Data Recorder and Cockpit Voice Recorder teams, which form at the NTSB headquarters.

To aid in the expertise of the investigation, and to lower the operating costs of the NTSB, representatives of “parties” to the investigation staff the above listed working groups. The NTSB has discretion to determine party status: “The investigator-in-charge designates parties to participate in the investigation.” Only those organizations or corporations that can provide the Board with needed technical or specialized expertise are permitted to serve on the investigation. The NTSB website gives some typical examples of parties: the FAA (which is the only entity that has a right to “party” status), the air carrier, the pilots’ and flight attendants’ unions, and the airframe and engine manufacturer.

Generally, an NTSB investigation takes priority over all other investigations by federal agencies. The only exception to the NTSB’s priority is the circumstance where the Attorney General, in consultation with the Chairman of the NTSB, determines that the circumstances surrounding the incident reasonably indicate that an intentional criminal act may be involved. If there is a criminal investigation, the Board relinquishes its investigative priority to the FBI. The Board does, however, retain authority to continue its investigation. Other federal agencies may conduct investigations, but may only do so on a non-interference basis.

23 Lebow & Sarsfield, supra note 21, at 14.
24 NTSB Investigative Process, supra note 18.
25 Id.
28 NTSB Investigative Process, supra note 18; see also 49 C.F.R. § 831.11.
29 NTSB Investigative Process, supra note 18.
32 Id.
33 49 C.F.R. § 831.5.
C. Powers of NTSB Investigators

NTSB investigators have broad powers, which give them an unfettered opportunity to develop the facts: "Any employee of the Board, upon presenting appropriate credentials, is authorized to enter any property where an accident/incident subject to the Board's jurisdiction has occurred, or wreckage from any such accident/incident is located, and do all things considered necessary for proper investigation." 34 Investigators from the NTSB have broad powers regarding evidence and objects related to the investigation:

Upon demand of an authorized representative of the Board and presentation of credentials, any Government agency, or person having possession or control of any transportation vehicle or component thereof, any facility, equipment, process or controls relevant to the investigation, or any pertinent records or memora\randa, including all files, hospital records, and correspondence then and thereafter existing, and kept or required to be kept, shall forthwith permit inspection, photographing, or copying thereof . . . . 35

Furthermore, the NTSB can issue subpoenas for testimony or other evidence, which are enforceable in federal district courts. 36 Board representatives "may question any person having knowledge relevant to an accident/incident, study, or special investigation." 37 Representatives of the Board also have exclusive authority "to decide the way in which any testing will be conducted, including decisions on the person that will conduct the test, the type of test that will be conducted, and any individual who will witness the test." 38

An employee of the Board "is authorized to examine and test . . . any civil or public aircraft . . . aircraft engine, propeller, appliance, or property aboard such aircraft involved in an accident." 39 The Board is authorized to receive, at no cost, a copy of

34 49 C.F.R. § 831.9(a) (2002) (emphasis added); see also 49 C.F.R. § 1134(a)(1) (2002) (stating that an officer or employee of the National Transportation Safety Board, "on display of appropriate credentials and written notice of inspection authority, may enter property where a transportation accident has occurred or wreckage is located and do anything necessary to conduct an investigation.").
35 49 C.F.R. § 831.9(a); 49 C.F.R. § 1134(a)(2) (2002).
36 49 C.F.R. § 831.9(a).
37 Id.
38 Id.; see also 49 C.F.R. § 1134(d) (2002).
39 49 C.F.R. § 831.9(b) (2002).
any related autopsy reports performed by a state or local official and may order an autopsy or other tests. The NTSB’s accident investigation personnel have exclusive access to wreckage, records, mail, or cargo in its custody. When the Board has no further use for these objects, it shall release them.

The NTSB is given authority to sanction non-complying parties or even bring civil suit in federal district court to enforce certain rights. "Participants in the investigation . . . shall be responsive to the direction of Board representatives and may lose party status if they do not comply with their assigned duties . . . or if they conduct themselves in a manner prejudicial to the investigation." Failure to timely sign the Statement of Party Representation to NTSB Investigation, discussed below, "may result in sanctions, including loss of status as a party."

The Board may bring a civil action in a district court of the United States against a person ‘to enforce section 1132, 1134(b) or (f)(1)(related to an aircraft accident), 1136(g)(2), or 1155(a) of this title or a regulation prescribed or order issued under any of those sections.’

III. THE RIGHTS AND LIMITATIONS OF PARTIES

A. Party Status

The IIC has limited discretion to appoint parties to its investigation. No one has a right to be a party to an investigation, except the FAA in aviation cases, and the Secretary of Transportation “when participation is necessary to carry out the duties and powers of the secretary.” The Secretary of Transportation cannot play a role in establishing probable cause, and additionally, the FAA is not permitted to use any information it acquired in an NTSB investigation for FAA enforcement
purposes. The only entities or persons that may be parties to an NTSB investigation are those who were “involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation.” Accordingly, a victim or deceased passenger’s representative will not likely be given party status.

In Graham v. Teledyne-Continental Motors, the Ninth Circuit held that the NTSB did not abuse its discretion by denying party status to the estate representative of a pilot that died in a plane crash. The “use of the [engine manufacturer’s] facilities and expertise in disassembling its own engines could be indispensable in enabling the NTSB to carry out its mission. By contrast, there is nothing unique [that the deceased pilot’s] expert could add to the investigation.” Similarly, a court did not abuse its discretion when it denied party status to the employer of a victim. On the other hand, a trial court did abuse its discretion when it refused to allow the representative of an aircraft owner to observe the inspection and disassembly of the engine, even though the regulations did not grant the owner any right to participation.

There can be no party appointment out of good will or sympathy. NTSB investigations function to rationally collect facts without any deference to sympathies or outside influence. The Board’s investigation is removed from, and unaffected by, preparations for civil litigation. Therefore, the victim’s representatives or families have no right to party status. As one court bluntly put it: “The only one connected to the [deceased pilot] who might have had unique insight into what happened was James Graham, the pilot, who is dead.” As a consequence,

51 Kolczynski, supra note 16, at 1.
52 49 C.F.R. § 831.11(a)(1) (emphasis added).
53 Graham, 805 F.2d at 1389.
54 Id.
56 Miller v. Rich, 845 F.2d 190, 192-93 (9th Cir. 1988). A crash occurred shortly after takeoff in Van Nuys, California. The owner of the aircraft sought to enjoin inspection and disassembly of the engine until his representative was authorized to observe the process. The Ninth Circuit held that the NTSB had discretion, but that it was not “unbridled.” Id. Since the NTSB did not prove any rational justification for the exclusion, the court held that the actions constituted an abuse of discretion and reversed the district court’s denial of the owner’s injunction. Id.
57 Graham v. Teledyne-Continental Motors, 805 F.2d 1386, 1389-90 (9th Cir. 1986).
while air carriers and manufacturers are often granted party status in a major air disaster, the victims and the victims' representatives will typically not be designated as parties.

To avoid the perception of unfairness in the system, the NTSB places limitations on the party members to try to insulate them from litigation preparations. Party representatives must be employees of the party.\textsuperscript{58} No party to the investigation can be a lawyer, a lawyer's representative, or a representative of an insurance company.\textsuperscript{59} "Parties shall be represented by suitable qualified technical employees or members who do not occupy legal positions."\textsuperscript{60} Party representatives may not relay information back to corporate headquarters, or anyone in the public, except for purposes of accident prevention or remedial action, and not without the consent of the IIC:

All information concerning the accident or incident obtained by any person or organization participating in the investigation shall be passed to the IIC through appropriate channels before being provided to any individual outside the investigation. Parties to the investigation may relay to their respective organizations information necessary for purposes of prevention or remedial action. However no information concerning the accident or incident may be released to any person not a party representative to the investigation (including non-party representative employees of the party organization) before initial release by the Safety Board without prior consultation and approval of the IIC.\textsuperscript{61}

B. SIGNED STATEMENT OF PARTY REPRESENTATIVES

Furthermore, party representatives must sign an oath called a "Statement of Party Representatives to NTSB Investigation," which requires that the party and representative abide by NTSB rules.\textsuperscript{62} The oath discusses the parties' duties and includes lan-

\textsuperscript{58} 49 C.F.R. § 845.13(a) (2002); Lebow & Sarsfield, supra note 21, at 15.
\textsuperscript{59} 49 C.F.R. § 831.11(a)(3); 49 C.F.R. § 845.13(a).
\textsuperscript{60} 49 C.F.R. § 845.13(a).
\textsuperscript{61} 49 C.F.R. § 831.13(b) (2002).
\textsuperscript{62} 49 C.F.R. § 831.11(b) (2002). The full text of a statement that parties signed to join one investigation was:

It is understood that a party representative to an investigation may not be a person who also represents claimants or insurers. The placement of a signature hereon constitutes a representation that participation in this investigation is not on behalf of either claimants or insurers and that, while any information obtained may ultimately be used in litigation, participation is not for the purposes of litigation.
guage that the parties are waiving their right to assert a privilege in litigation with respect to information or documents obtained during NTSB investigations. The statement reads in part: "By placing their signatures hereon all participants agree that they will neither assert nor permit to be asserted on their behalf, any privilege in litigation, with respect to information or documents obtained during the course of and as a result of participation in the NTSB investigation."

This waiver is an evidentiary or discovery waiver through which the parties give up potential discovery privileges in future litigation. The Fifth Circuit held that the waiver does not include substantive immunities like the immunity from tort liability under Texas law for statements made during judicial or quasi-judicial proceedings. Anyone acting counter to these rules can be sanctioned or lose party status, or both. The parties may in advance, however, identify documents that should be protected as proprietary or trade secret information.

IV. THE PUBLIC HEARINGS

The NTSB may conduct hearings as a part of its accident investigation. The stated purpose of a hearing is 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

By placing their signatures hereon all participants agree that they will neither assert nor permit to be asserted on their behalf, any privilege in litigation, with respect to information or documents obtained during the course of and as a result of participation in the NTSB investigation as described above. It is understood, however, that this form is not intended to prevent the undersigned from participating in litigation arising out of the accident referred to above or to require disclosure of the undersigned's communication with counsel.

Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 637 n.3 (10th Cir. 1990) (quoting Party Statement).


Shanks, 169 F.3d at 996. (citing Thomas Brooks, 920 F.2d at 647).

Id. (Id.; 49 C.F.R. § 831.11(a)(2)-(3); 49 C.F.R. § 845.13(b).

accidents and promote transportation safety.” The hearings are further described as “fact finding proceedings with no formal issues and no adverse parties.” The hearings are public unless they are determined to be classified or in situations where national security related evidence is received. A stenographic transcript of the hearings is taken, and a board of inquiry is established, which contains a member of the NTSB who is appointed by the NTSB and who acts as the chairman. The chairman of the board of inquiry designates parties to the hearing, which are persons or entities whose “participation in the hearing is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence.” These parties often include “the Federal Aviation Administration, operator, airframe manufacturer, engine manufacturer, pilots union, and any other organization that can assist the Safety Board in completing its record of the investigation.” There is no right to party status by anyone except the FAA. The parties should appoint a single spokesperson for the hearing. The NTSB website states, “News media, family members, lawyers, and insurance personnel are not parties to the investigation and are not permitted to participate in the public hearings.”

Employees that do not occupy legal positions or represent claimants or insurers can represent parties to the hearing. The chairman has judge-like powers to determine the admissibility of evidence and to regulate the course of the hearing. Any person that testifies at the hearing has the right to be represented by counsel and the right to be paid travel and attendance fees if subpoenaed. The board of inquiry first examines a witness and then parties to the hearing may examine the witness.

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70 Id.
71 49 C.F.R. § 845.3 (2002).
72 49 C.F.R. § 845.28 (2002).
74 49 C.F.R. § 845.13(a).
76 Id.
77 Id.
78 Id.
79 49 C.F.R. § 845.13(b).
80 49 C.F.R. § 845.13(c).
82 49 C.F.R. § 845.25(a) (2002).
A public hearing is not a mandatory part of the investigation. Consequently, except in very large commercial air disasters, the NTSB may not hold a public hearing. If a hearing is held, counsel for parties must familiarize themselves and their clients with the procedural rules related to the public hearing and the potential impact on subsequent or ongoing litigation.

V. THE "SUNSHINE MEETING" AND THE FINAL REPORT

The investigation concludes with the issuance of a final report. Before issuance of the final report, however, each NTSB group chair completes a factual report that is placed in the public docket. The Board staff prepares a draft final report without the participation of the parties. Parties may submit proposed findings of cause and safety recommendations to the Board for inclusion in the final report. The Board is not required to follow the proposed findings of the parties, but the proposals become part of the public record.

The Board then conducts a public meeting in Washington, D.C. called the "Sunshine Meeting," where the Board deliberates over the report. Non-NTSB personnel, such as parties, are not permitted to interact with the Board at the Sunshine Meeting. The Board may vote to adopt the draft of the final report at this meeting, or may instead require further investigation or revision, or adopt the report with changes discussed at the meeting. In the end, two reports are issued: a factual accident report, which should consist of only factual findings, and a Board

84 49 C.F.R. § 845.40(a).
85 Lebow & Sarsfield, supra note 21, at 15; see discussion infra Part IV.
86 NTSB Investigative Process, supra note 18; Lebow & Sarsfield, supra note 21, at 15.
87 49 C.F.R. § 831.14(a) (2002); NTSB Investigative Process, supra note 18.
89 NTSB Investigative Process, supra note 18; Lebow & Sarsfield, supra note 21, at 16.
90 NTSB Investigative Process, supra note 18.
91 Id.; Lebow & Sarsfield, supra note 21, at 16.
92 Lebow & Sarsfield, supra note 21, at 16.
accident or "blue cover" report, which contains the probable cause determinations and recommendations, if any.  

VI. REVIEW OR MODIFICATION OF NTSB REPORTS

Investigations are never officially closed; new and pertinent evidence may be submitted by any interested person. Parties or persons with a direct interest in the accident investigation may petition the Board to reconsider and modify findings and probable cause determinations in light of error or new evidence. Although the regulations provide that persons with a direct interest may petition the board, a recent RAND study of the NTSB stated flatly that in reality "[p]etitions from non-parties will not be considered." NTSB decisions are not, however, subject to review under the Administrative Procedure Act. Courts, depending on the jurisdiction, review decisions by the NTSB under an abuse of discretion standard or the more expansive standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

In short, it is unlikely that an NTSB report can be revised once published. For that reason, the parties must carefully and effectively draft proposed findings and safety recommendations well in advance of the release of the final report.

VII. NTSB REPORTS AND INVESTIGATORY MATERIALS IN CIVIL TRIALS

Both practitioners and courts recognize that NTSB reports contain valuable evidence. However, as an investigatory body, the NTSB cannot be the final arbiter of civil liability. Legislative and regulatory roadblocks protect the integrity of the investigation process and preserve the autonomy of the trier of fact in related civil litigation. Courts have struggled with the question of admitting only the factual portions of NTSB reports and segregating the probable cause or opinions.

93 49 C.F.R. § 835.4 (2002); Kolczynski, supra note 16.
96 Id.; Lebow & Sarsfield, supra note 21, at 16.
97 National Transportation Safety Board Rule, 49 C.F.R. § 831.4 (2002).
98 Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 643 (10th Cir. 1990); Graham v. Teledyne-Continental Motors, 805 F.2d 1386, 1387-88 (9th Cir. 1986).
A. Preserving the Trier of Fact's Role

Federal and state law have long sought to preserve the role of the trier of fact, particularly in the context of admitting NTSB reports. Notwithstanding, and in the face of legislation and regulation prohibiting the admissibility of any part of an NTSB report, U.S. courts have found ways to admit all or part of NTSB reports.99

Courts have been little constrained by what appears to be clear legislation prohibiting the admissibility of such reports. Section 701(e) of the Federal Aviation Act (and 701(e) of the Civil Aeronautics Act) prohibited the use of investigation reports in civil trials.100 The statute is recodified and can now be found at 49 U.S.C. § 1154 (the "exclusionary rule"),101 which provides: "No part of a report of the Board, 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."102 This language unequivocally applies on its face, to any "part of a report of the Board."103 Courts have not, however, uniformly interpreted this language. The result is three distinct applications of the rule: the majority view, the minority view, and a new view based on the Chiron opinion and a 1999 modification to the NTSB regulations.

Prior to 1975, the NTSB rules did not make a clear distinction between the purely factual report, and the final report on probable cause. In practice, therefore, some reports blended both detailed factual findings with opinion and probable cause determinations. The NTSB clarified by regulation in 1975 that there is to be a distinction between the factual reports and the accident report with probable cause findings prepared by the Board. The NTSB further clarified the distinction in 1999 when it made clear that the factual accident reports are freely admissible in civil trials, while accident reports prepared by the Board

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99 See Curry v. Chevron, USA, 779 F.2d 272, 274 (5th Cir. 1985) (stating that courts put a "judicial gloss on § 701(e) [referred to as the exclusionary rule], while allowing factual portions of the report to be admitted"); In re Cleveland Tankers, Inc., 821 F. Supp. 463, 464 (E.D. Mich. 1992) (citing Curry, 779 F.2d at 272).
103 Id.
are not. The practitioner is cautioned when citing to cases that pre-date both the 1975 and the 1999 regulation clarifications because those cases were decided in a circumstance where the distinction between a factual and a Board report was not clearly delineated by regulation. Accordingly, courts often found ways to interpret the regulations in such a way as to make admissible critical facts set forth in Board reports, as well as those found in Board accident reports.

1. Majority rule

Courts recognize that NTSB reports contain valuable evidence. Most courts, therefore, refused to give full weight to the federal exclusionary rule. In 1951, a D.C. Circuit Court of Appeals opinion began the assault against the exclusionary rule.\(^{105}\) *Universal Airline* dealt not with the accident report directly, but with the more general and troubling distinction between fact and opinion. At issue was the admissibility of testimony by an investigator: the court held that where the "investigator is the sole source of evidence reasonably available to the parties, with regard to the precise position and condition of the aircraft after a disaster, we deem it to be incumbent upon the Civil Aeronautics Authority to make his testimony available by deposition or in person."\(^{106}\) The court drew a distinction between the evidentiary facts culled from an investigator's testimony and the "conclusions or opinions" of the investigator and declared that the exclusionary rule applied only to the latter.\(^{107}\)

A few months after *Universal Airline*, the Second Circuit Court of Appeals applied the fact-versus-conclusion distinction to the reports themselves. In *Lobel v. American Airlines, Inc.*, the Second Circuit acknowledged the section 701(e) rule, which called for exclusion of the entire report, but pointed out that the written report at issue "consisted wholly of the investigator's personal observations about the condition of the plane."\(^{108}\) The report was simply a collection of facts and did not have opinions, con-

\(^{104}\) 49 C.F.R. § 835.2.

\(^{105}\) See *Universal Airline, Inc. v. F. Air Lines, Inc.*, 188 F.2d 993, 999-1000 (D.C. Cir. 1951).

\(^{106}\) Id.

\(^{107}\) Id. at 1000. The court also stated that the reports raise a hearsay question. Id. However, that hurdle was later largely eliminated by the public documents exception of Fed. R. Evid. 803(8).

clusions, or findings. Unlike opinions or conclusions, the facts in the NTSB report did not usurp the duty or function of courts or juries and thus, the report was admissible.

The majority rule sprung out of this reasoning. Most courts have since held that, notwithstanding the express language of section 701(e), the factual portions of NTSB reports are admissible.

In practice, however, the majority rule is not itself uniform. There are at least two different schools of thought on the application of the majority rule: one calls for broad application, the other, narrow. Both schools allow factual portions of the NTSB report to be admitted into evidence. The distinction lies in what is excluded.

Courts use the terms "opinion," "conclusion," "probable cause," and "evaluation" loosely (sometimes referring to the entire category as "opinion") and often uphold the total prohibition against the admissibility of the entire category.

Other courts reject this rule as too expansive and narrowly exclude only opinion evidence that goes to the probable cause of the accident. The courts in the second category have criticized the view that everything except "pure fact" should be excluded,

109 Id.
110 Id.
112 "A more workable and better rule is entirely to exclude all evaluation, opinion, and conclusion evidence." Fidelity & Cas. Co. v. Frank, 227 F. Supp. 948, 949 (D. Conn. 1964). See also Berguido, 317 F.2d at 631 ("[T]he primary thrust of the provision is to exclude CAB reports which express agency views as to the probable cause of the accident. Of necessity, the opinion testimony of the CAB's investigators would also come within this rule.").
113 Mullan, 797 F.2d at 848; Keen, 569 F.2d at 549-51; Am. Airlines, 418 F.2d at 196; Kline, 345 F. Supp. at 32 ("Despite the statement in Berguido . . . that 'of necessity, the opinion testimony of the CAB's investigators would also come within this rule,' the statute does not go that far. Even if it does, however, it is only the ultimate issue, the probable cause of the accident, that is prohibited.").
factual evaluation is too difficult to apply. "Because of the uncertainty which
[a rule that would exclude all evaluations, opinions and conclusions] would introduce in sorting fact from opinion, it would be
better to exclude opinion testimony only when it embraces the
probable cause of the accident or the negligence of the
defendant."114

Both judges and lawyers struggle with the practical application of the fact-versus-opinion distinction. Along the continuum
between the two, there is no bright-line rule or conceptual demarcation between admissible factual findings and inadmissible
causal findings or opinions. The United States Supreme Court
stated, "It has frequently been remarked that the distinction be-
tween statements of fact and opinion is, at best, one of de-
gree."115 The Supreme Court also cited with approval this
language: "All statements in language are statements of opinion,
i.e., statements of mental processes or perceptions. So-called
'statements of fact' are only more specific statements of opin-
ion."116 Thus, it is not surprising to find that courts provide lit-
tle guidance on how to draw the necessary fine-line distinction
between fact and opinion.

Murphy v. Colorado Aviation, Inc. demonstrates the difficulty
that arises when distinguishing between fact and opinion for
purposes of determining admissibility of testimony.117 The testi-
mony at issue was that of a former NTSB employee who was the
supervisor and coordinator of the NTSB team that investigated
the accident.118 The court held that the former NTSB employee
could testify as to factual evidence, but not to his "own or the
Board's ultimate conclusions concerning the probable cause of
the accident or the negligence of the defendant."119 However,
in attempting to separate facts from conclusions, the court al-
lowed the employee to testify as to everything that did not cause

114 Am. Airlines, 418 F.2d at 196.
116 Id. (citing W. King & D. Pillinger, Opinion Evidence in Illinois 4 (1942)
(footnote omitted) (quoted in 3 J. Weinstein & M. Berger, Weinstein's Evi-
dence ¶ 701[01], p. 701-06 (1988)). The Court also cited with approval the lan-
guage, "There is no conceivable statement however specific, detailed, and
'factual,' that is not in some measure the product of inference and reflection as
well as observation and memory." Id. (citing E. Cleary, McCormick on Evidence
27 (3d ed. 1984)).
118 Id. at 882.
119 Id.
the accident and left only the pilot's negligence as the sole plausi-
ble cause of the accident. The court's ruling supports the con-
clusion that an NTSB investigator may testify as to any opinion other than his or her opinion as to the specific probable cause of the accident. The Murphy court reasoned that an inves-
tigator may testify negatively as to what did not cause the acci-
dent, but may not testify positively as to what actually did cause the accident. This case is an example of how a lawyer can make the probable cause quite clear to a layperson without violating the rule that excludes probable cause evidence.

The Murphy reasoning has not been accepted by all courts, however, and the Court of Appeals of Oregon, facing a similar question, concluded that the testimony from an NTSB accident investigator who testified that he noted no pilot error or mis-
operation of the aircraft was properly excluded because it called for an opinion on the cause of the crash.

The Tenth Circuit Court of Appeals also considered the difficult problem of distinguishing between fact and probable cause findings in Keen v. Detroit Diesel Alison, where the plaintiff alleged an engine defect caused the crash. The court held that there was no error in admitting testimony of an NTSB investigator who said that the plane was functioning normally at high power at the time of its crash. The court reasoned that this was merely factual testimony, even though as between pilot negligence and aircraft defect, it left only pilot negligence as the probable cause of the accident.

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120 Id. The court stated, "His testimony, however, while leading to such conclusion, did not state that this accident was caused by the negligence of the pilot."

121 Id. The employee was allowed to explain:

[N]avigational aids, the factual circumstances surrounding the acci-
dent, the difference between visual (VFR) and instrument flight rat-
ings (IFR), interpreted weather documents, indicated that weather information had been transmitted to the pilot from the Roanoke airport, stated that there was no evidence of any pre-impact mal-
function of the aircraft, opined that only an IFR pilot should fly in clouds, that there was a safe alternate route for VFR pilots, and that under the prevailing weather conditions in the area at the time of the crash, only an IFR pilot could have been flying properly at the altitude at which the crash occurred.

122 Id.


124 Id. at 547-51.

125 Id.
On the other hand, another court, dealing with the inference that can be drawn from evidence of what did not cause the accident, excluded a page of a factual report because the NTSB investigation put the word "none" next to the entry "Part Failure/ Malfunction." The court reasoned that this comment was, in form, more like opinion testimony, even though it was only evidence about what did not cause the failure. Plainly, counsel’s success in eliciting testimony about what did not cause the accident will be unpredictable and largely dependent on the proclivities of the particular trial court.

Courts have also dealt with the related question of whether expert opinions based in part on an NTSB report should be fully admissible. The Tenth Circuit, in Mullan v. Quickie Aircraft Corp., dealt with the issue in circumstances where one party argued that the opposing expert relied too heavily on the NTSB report when forming his opinion. The evidence revealed that the expert based his opinion, in part, on the report. The court rejected the inference that because the conclusions of the expert were similar to the conclusions of the NTSB, the expert impermissibly relied too heavily on the report.

2. Minority rule

The fact-versus-opinion distinction has proven difficult to apply, and therefore, some courts have entirely rejected any attempt to invoke the distinction. A small minority of courts have refused to admit any part of an NTSB report, fact or opinion, in light of the clear language of the former section 701(e) (current 49 U.S.C. § 1154). Over the last decade, the Northern District of Illinois has unequivocally held several times that no part of an NTSB report is admissible in civil trials. "The unequivocal language of 1441(e) and 1903(c) appears to leave no room for creative interpretation. The language, on its face, states an abso-

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127 Mullan v. Quickie Aircraft Corp., 797 F.2d 845 (10th Cir. 1986).
128 Id.
129 Id.
lute bar to the use of NTSB reports in the present action." The Ninth Circuit also held that no part of an NTSB report would be admissible.

3. Chiron and a New NTSB Regulation

In 1999, the D.C. Circuit Court of Appeals established a third interpretation of the section 1154 exclusionary rule by strictly construing the 1999 revision to 49 C.F.R. § 835.2. This regulation drew a new line and redefined the NTSB report as consisting of two parts. The revision to section 835.2 provided that there were "Board accident reports" and "factual accident reports." The regulation further stated "no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports." Although the regulation's language before 1999 recognized that there was a separate factual accident report, it gave no guidance as to the admissibility of the factual reports, except by implication.

The 1999 revision to section 835.2 adds that the factual accident report is freely admissible. The new language now states: "Factual accident report means the report containing the results of the investigator's investigation of the accident. The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports.

The first court to adopt the new distinction was the D.C. Circuit Court of Appeals in Chiron Corp. v. NTSB. The court stated that in light of the new language in section 835.2, parties

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131 Sioux City, 780 F. Supp. at 1208-09.
132 Gibson v. NTSB, 118 F.3d 1312, 1314 (9th Cir. 1997); Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379, 1384-85 (9th Cir. 1985); Benna v. Reeder Flying Serv., Inc., 578 F.2d 269, 271 (9th Cir. 1978); see also Stapleton Int'l Airport, 720 F. Supp. at 1496 (stating that "[h]ad these cases been tried in Idaho, the Ninth Circuit rule would be strong precedent controlling the presentation of evidence. The N'TSB report would have been inadmissible in its entirety under Protectus."). But see Davis v. Cessna Aircraft Corp., 893 P.2d 26, 34 (Ariz. Ct. App. 1995) (stating that Stapleton was an incorrect interpretation of Protectus, and that even though the court in Protectus upheld the exclusion of the entire report, it only intended to make inadmissible the probable cause and conclusions while allowing factual findings to be admitted).
133 See 49 C.F.R. § 835.2 (2002).
134 Id.
135 Id. This part of the regulation's language has remained largely unchanged.
136 Id.
137 Id.
138 Chiron Corp. v. NTSB, 198 F.3d 935 (D.C. Cir. 1999).
(and victims) "have access to necessary factual information. Therefore, courts no longer need to employ an ‘exception’ to the statute to protect parties in litigation." The court further explained that before the revision, when section 1154 and part 835.2 were "interpreted broadly to include investigators’ reports, there may have been a public policy justification for admitting factual information. However, once the statute was interpreted more narrowly, no justification remained for any exception to § 1154(b)."

Thus, the Chiron rule would admit into evidence any part of the factual accident report and would strictly prohibit admissibility of the entire Board accident report (even in circumstances where all but a few pages of the Board accident report consist of factual summary). The chairman of each group prepares the factual reports in major air crashes. These reports lack the full authority of the NTSB and are prepared before the Board formalizes its probable cause findings. As the D.C. Circuit pointed out, in light of unfettered access to the factual findings, there is no longer a public policy reason to invade the protections of the Board accident report. Since Chiron, other courts and treatises have restated the holding or have similarly interpreted 49 C.F.R. § 835.2. However, it is not clear whether the

139 Id. at 941.
140 Id.
141 49 C.F.R. § 835.2.
142 Hickson Corp. v. Norfolk S. Ry. Co., 227 F. Supp. 2d 903, 908-09 (E.D. Tenn. 2002) (stating that a Board accident report is not admissible, but a factual accident report was admissible, and holding that it may have been error for the court to admit portions of the Board accident report—although, because it was invited error, it was not reversible); Coffey v. Cherokee Aviation, Inc., No. E1999-01037-COA-R3-C, 2000 WL 991657, at *3 (Tenn. Ct. App. July 19, 2000) (citing 49 C.F.R. § 835.2 and reasoning that the Board accident report is not admissible, but a factual accident report is admissible); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.8 n.28 (5th ed. Supp. 2003); William R. Dorsey, III, Marine Casualty Investigations by the United States Coast Guard and the National Transportation Safety Board, 75 TUL. L. REV. 1387, 1414-15 (2001); Jason A. Lyons, et al., Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Administrative Law, 69 GEO. WASH. L. REV. 477, 480 (2001). Compare, however, Starling v. Union Pac. Ry. Co., 203 F.R.D. 468, 485 (D. Kan. 2001), which also considered the 1999 revisions to 49 C.F.R. § 835.2. In Starling, plaintiff sought to exclude twenty-five documents that the parties had received from the NTSB, which included transcript testimony and exhibits used by the NTSB, but which were not incorporated into the Board accident report. Id. The court cited the majority rule cases and the new section 835.2 language to hold that the "[p]laintiff has not cited any authority to support the proposition that anything beyond the actual written NTSB report might be barred from being used as evidence in court." Id. However, the court remained reluctant to an-
reasoning in Chiron will evolve into the new standard. Arguably, the Chiron standard is conceptually more efficient and is supported by the plain language of 49 C.F.R. § 835.2. It represents a compromise that allows a trier of fact to use the high quality information gathered by the NTSB without the confusion and pitfalls related to trying to distinguish between opinion or conclusion and fact. The Chiron rule further allows courts to gain the benefit of the majority rule without resorting to judicial gloss.

The Chiron rule will be readily applied in practice in those circumstances where the factual report contains only facts, and no opinions or conclusions. In light of the precedential strength of the majority rule, litigants may challenge the admissibility of statements made in the factual reports if the report contains conclusory or opinion statements. Admitting such opinion statements found in the factual report would, under the Chiron rule, lead to an invasion of the province of the trier of fact, and could then lead to a return to the same fact-versus-opinion confusion that exists when applying the current majority rule. On the other hand, any opinion statements contained in a factual report would be authored only by an investigator and arguably would lack the authority and overwhelming influence of the full Board.

B. DEPOSITION AND TESTIMONY AS A MEANS TO INTRODUCE PORTIONS OF THE NTSB REPORT

In jurisdictions or courts that tend to limit the admissibility of NTSB reports, testimony of NTSB investigators, either by written interrogatory or by deposition, is a more universally accepted means to introduce the factual findings of the NTSB investigation. The minority rule jurisdiction of the Northern District of Illinois held that the NTSB maintains "a clear and unequivocal distinction between evidentiary use of NTSB reports and investigator testimony."143 Federal regulations place limitations on the

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143 In re Air Crash Disaster at Sioux City, Iowa, 780 F. Supp. 1207, 1209 (N.D. Ill. 1991). The court, applying the minority rule, pointed out that it interpreted the regulations as creating an absolute bar to evidentiary use of the NTSB report, but allowing factual portions of the NTSB report to be admitted in the form of deposition testimony. Id.
testimony of NTSB investigators. These limitations are similar to the limitations on admissibility of NTSB reports under the majority rule. In fact, the majority rule regarding the admissibility of the factual portions of NTSB reports may have sprung from the more lenient doctrine then applicable to NTSB investigator testimony.\textsuperscript{144}

In many early opinions, courts considering the admissibility of NTSB reports looked to the regulations and case law related to the admissibility of NTSB investigator testimony and vice versa.\textsuperscript{145} Some minority rule decisions, in their strict reading of the statutes, hold that the entire Board report can be excluded because Congress intended NTSB investigator testimony, not NTSB reports, to act as the means to introduce the factual results of investigations in civil litigations.\textsuperscript{146} "Congress plainly chose to serve its purpose of preventing NTSB data from 'usurp[ing] the function of the jury' by absolutely barring admission of NTSB reports, while permitting limited testimony from NTSB employees."\textsuperscript{147} Therefore, even in the minority rule jurisdictions that uphold a complete bar to any part of the NTSB report, the excluded factual information can be entered into evidence by trial or deposition testimony of an NTSB investigator.

The NTSB regulation allows for the admissibility of an NTSB employee's factual testimony.\textsuperscript{148} NTSB employees may testify "as to the factual information they obtained during the course of an investigation, including factual evaluations embodied in their factual accident report."\textsuperscript{149} The purpose of this regulation 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

\textsuperscript{144} It could be fairly said that the majority rule sprung out of \textit{Lobel}. However, the Second Circuit was borrowing from a D.C. Circuit case that allowed factual, but not conclusion or opinion, testimony. \textit{See} Universal Airline, Inc. v. E. Air Lines, Inc., 188 F.2d 993, 999-1000 (D.C. Cir. 1951).


\textsuperscript{146} \textit{Sioux City}, 780 F. Supp. at 1210.

\textsuperscript{147} \textit{Id.} (citing \textit{Universal Airline}, 188 F.2d at 1000).

\textsuperscript{148} 49 C.F.R. § 835.3(a)-(b) (2002).

\textsuperscript{149} \textit{Id.}
funds for non-Board purposes, to preserve the impartiality of the Board, and to prohibit the discovery of opinion testimony.  

A Board employee may testify by deposition or written interrogatories, but not by live court testimony. NTSB employee testimony is only allowed if the employee has unique, firsthand information. Furthermore, while “Board employees may testify about the firsthand information they obtained during an investigation that is not reasonably available elsewhere, ... [they] are not authorized to testify regarding other employee’s reports, or other types of Board documents.” Therefore, the fact that information is contained in a factual accident report does not necessarily make it the proper subject of deposition testimony. Counsel will likely be restricted from pursuing a line of questioning related to certain portions of the factual accident report that contain information that is not of the deponent’s firsthand knowledge and that relates to any prohibited conclusions or information.

NTSB employee testimony must receive advance approval by the General Counsel. While testifying, an NTSB employee may bring and use copies of the factual accident report that he or she prepared to refresh his or her recollection. However, no part of the Board’s accident report may be used for any purpose during a Board employee’s testimony.

Board employees may only be deposed once, the deposition must take place at the Board’s office where the employee is assigned, and must occur at a time “arranged with the employee reasonably fixed to avoid substantial interference with the performance of his duties.” Typically, the General Counsel of the NTSB will not approve a deposition for a civil trial until the combined factual accident report is issued. However, if it is a major accident investigation, the General Counsel may approve....

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151 In re Air Crash Disaster at Sioux City, Iowa, 780 F. Supp. 1207, 1209 (N.D. Ill. 1991) (“The current regulations further prohibit investigators from testifying in court, and instead limit NTSB employee testimony to deposition form.”); 49 C.F.R. § 835.5(a).

152 Id.

153 49 C.F.R. § 835.3(c) (2002).

154 49 C.F.R. § 835.3(e) (2002).

155 49 C.F.R. § 835.3(f) (2002).

156 49 C.F.R. § 835.4(a) (2002).

157 49 C.F.R. § 835.4(b) (2002).

158 49 C.F.R. § 835.5(b) (2002).
the deposition once the groups complete their factual reports.\textsuperscript{159} Any Board employee who receives a subpoena will not be given permission to give a deposition until the subpoena has been withdrawn.\textsuperscript{160}

Former NTSB employees may testify at a trial and do not need Board approval before testifying.\textsuperscript{161} However, the former employee is not permitted to testify about probable cause or Board conclusions.\textsuperscript{162} Notwithstanding these prohibitions, the Fifth Circuit Court of Appeals and the California Court of Appeals have held that a former employee of the NTSB that was not actively involved in the investigation could testify as to his personal opinion of the probable cause of the accident, because it was not the NTSB's conclusion as to probable cause.\textsuperscript{163} The regulations only ban testimony as to the NTSB's probable cause conclusions.\textsuperscript{164} In \textit{Loftleidir}, the court reasoned that the employee's opinions were derived after he left the NTSB and differed with the NTSB's conclusions and therefore, did not reflect the NTSB's views.\textsuperscript{165}

VIII. OTHER LIMITATIONS ON DISCLOSURE OF INFORMATION

A. COCKPIT OR SURFACE VEHICLE RECORDINGS AND TRANSCRIPTS

Respect for the dignity and privacy of pilots, as well as concerns regarding the "safety" function of recording devices, has lead to the development of procedures that limit the public disclosure of cockpit voice recorders. In light of such concerns, and tempered by the obvious need for such information to aid

\textsuperscript{159} 49 C.F.R. § 835.6(b) (2002).
\textsuperscript{160} 49 C.F.R. § 835.9(a) (2002).
\textsuperscript{161} 49 C.F.R. § 835.7 (2002).
\textsuperscript{162} Id.
\textsuperscript{164} Loftleidir, 204 Cal. Rptr. at 363 (citing 49 C.F.R. 835.7; 49 C.F.R. 835.3). However, this is not a universal reading of the regulations. \textit{See} Carlson v. Piper Aircraft Corp., 646 P.2d 43, 48 (Or. Ct. App. 1982) ("[49 U.S.C. § 1141(e) (2001)] and 49 C.F.R. § 835.3 . . . have been interpreted by federal and state courts, which have held that federal investigators may relate factual evidence and give opinions so long as they do not testify to their own or to NTSB's 'ultimate conclusions' concerning the cause of the accident or the negligence of the tortfeasor.") (emphasis added).
\textsuperscript{165} Loftleidir, 204 Cal. Rptr. at 363.
investigations, Congress passed legislation that allows the Board to release a "relevant" transcript, but not a recording unless there is sufficient safety-related reasons to require public disclosure. The statute states:

The Board may not disclose publicly any part of a cockpit voice or video recorder or transcript of oral communications by and between flight crew members and ground stations related to an accident or incident investigated by the Board. However, the Board shall make public any part of a transcript or any written depiction of visual information the Board decides is relevant to the accident or incident.166

The public safety exception states: "This subsection does not prevent the Board from referring at any time to cockpit voice or video recorder information in making safety recommendations."167 The same language is restated in the context of surface vehicle recordings.168

Cockpit voice recordings and full transcripts may not be discovered unless the court, after an in camera review, decides: (1) that the part of the transcript made public does not provide the party with adequate information to provide for a fair trial; and (2) discovery of other parts of the transcript is necessary to provide a fair trial.169 Furthermore, there can only be discovery of the transcript if the recording itself is not available.170 When the court allows discovery of a transcript or recording, the court must put the material under seal and issue a protective order that limits the use of the material to that particular judicial proceeding, and prohibits dissemination of the material to any person that does not need access to it for the judicial proceeding.171 The Board may make cockpit voice recordings and transcripts available to the public in the form of a reference in a safety recommendation.172

B. FOREIGN INVESTIGATIONS

The Board will not release information that it has received from foreign aircraft investigations unless the foreign country has released the report or two years have passed since the

accident, whichever comes first. The Board may also release such information when the country doing the investigation authorizes it to do so, or if the Board is making safety recommendations.

C. INFORMATION PROTECTED FROM DISCLOSURE UNDER THE ADMINISTRATIVE PROCEDURE ACT

Legislation provides that the NTSB is not required to release any information that is protected from disclosure under section 552 of the Administrative Procedure Act (APA). This includes: (1) information kept secret by Executive order in the interest of national defense or foreign policy; (2) information related solely to internal personnel rules and practices of an agency; (3) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency; (4) personnel, medical, and other files whose disclosure would constitute a clearly unwarranted invasion of personal property; and (5) law enforcement records in certain circumstances. Under some circumstances, in particular in the context of a mishap involving military aircraft, counsel must be cognizant of the APA limitations on the release of information.

IX. CONCLUSION

The NTSB investigation process is largely controlled by legislation and regulation. This paper touches on some of the critical statutes and regulations that affect the investigation, in particular those that are pertinent to on-going or subsequent litigation.

An understanding of the NTSB investigation process is crucial to effective representation of clients in air crash litigation. With a thorough understanding of the process and an appreciation for the public policy that does not allow the litigation process to intrude on the investigation process, counsel can take active measures during the course of the investigation to develop the case independently, to anticipate evidentiary hurdles, and to formulate a strategy for securing the best evidence outside the NTSB investigation process.

Once the investigation is complete, all attorneys involved in subsequent litigation will have to deal with the question of admissibility of the NTSB reports. The evolving rule seems to allow for admission of the entire factual report. Difficulty will undoubtedly arise in those circumstances where the NTSB factual reports include some opinions or conclusions, or where the Board accident report contains mostly facts, with a short statement on probable cause.