More than a Run-of-the-Mill Post-accident Investigation

The Purpose, Process, and Protection of a Post-Accident Root Cause Analysis

By Dana Hoffman and Robert Whitney

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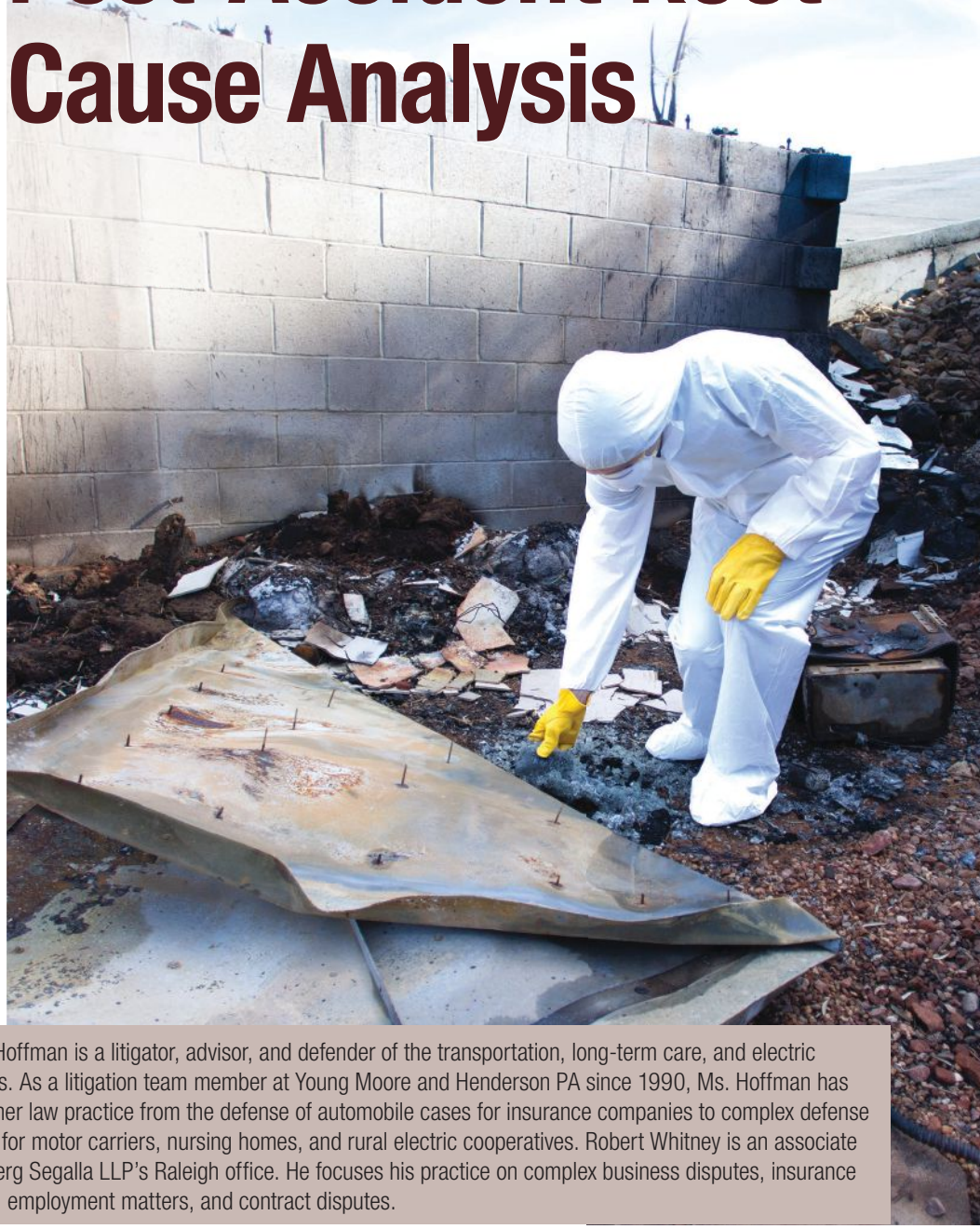

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A wild fire. A gas explosion. An emergency call regarding an electrical injury. When your company or your client's business faces a catastrophic event, the incident should trigger two investigation processes: an accident investigation initiated with the expectation of possible litigation, and a root cause analysis undertaken to prevent a similar event in the future.

Companies routinely engage in root cause analyses for different reasons, including to identify process failures, to pinpoint decline in quality, or to isolate factors leading to customer dissatisfaction. This article will focus on how to prepare and protect a root cause analysis triggered by an accident or incident.

The Purpose of a Root Cause Analysis: Finding the "Why"

In today's litigious society, almost every accident involving death, life-threatening personal injury, or significant property damage will trigger an accident investigation. How is a root cause analysis different?

Facts Versus Conclusions

An accident investigation should focus on the basics: who, what, when, where, and how. A root cause analysis evaluates the basic facts to answer, "why did the accident happen?"

Immediate Versus Eventual

An accident investigation is implemented in the immediate aftermath of an accident, while a root cause analysis should wait until after the accident investigation is complete. In addition to relying on the facts gathered during an accident investigation, it may be necessary to get additional information or data not specifically related to the accident. While a company's safety department is traditionally involved in the accident investigation, other departments such as the engineering department or operations department may play an important role in the root cause analysis process.

Reactive Versus Proactive

Accident investigators react to an accident by photographing the scene, interviewing eye witnesses, and collecting physical evidence. The event has occurred, and the evidence must be documented and preserved. A root cause analysis serves a different purpose. The principals involved in conducting the root cause analysis are interested in understanding why a protocol was not followed or why equipment failed as part of a proactive plan to prevent or minimize similar events in the future.

Best Practices for Preparing and Protecting a Root Cause Analysis When Litigation Is Anticipated

Initiating a root cause analysis to identify and fix a problem is a sound business model. However, when the analysis is triggered by a specific event that may result in litigation, the participants in the analysis should closely consider the process. Generally, most courts treat post-accident reports as a business record created in the ordinary course of business. Business records are not protected by the work-product doctrine, "nor does the [work-product] protection extend to facts known by any party." *Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (citing C. Wright & A. Miller, *Federal Practice and Procedure* §2024, at 197 (1970)). Therefore, you should expect that your accident investigation will be discoverable by the opposing party. If the accident investigation is properly limited to the facts, then the defense attorneys and defense experts have an opportunity to develop the most favorable explanation of "why" an accident happened during the litigation process.

A root cause analysis does more than recite the facts. The team responsible for generating the root cause anal-

From the Chair
Opportunities Abound with the DRI Public Utilities Task Force

By John McCoy

This is the second article produced by a member of the DRI Public Utilities Task Force. This committee is in its nascent stages. It offers an exciting opportunity to learn and network with industry members and practitioners in this legal field. Public utilities are a dynamic part of our legal landscape, and some of the most interesting, complex, and challenging legal matters occur in this space. This excellent article touches on just one aspect of public utilities. I hope it sparks an interest. If you want to know more, get involved in the task force. Team with industry members to write an article or present a webinar. Suggest a presentation that we can showcase at an upcoming DRI seminar. And join us at the next annual convention of DRI. Opportunity awaits.

ysis may cast a very broad net. In the interest of preventing future incidents, the team may aggressively identify many factors, actors, or processes that could have played a role in the accident. A standard operating procedure that operated well for many years may suddenly be called into question and ultimately lead to the realization that other companies had abandoned the procedure in favor of a different process. While such brainstorming and self-analysis is beneficial to the process of a root cause analysis, it could be significantly detrimental in the hands of the opposing party during litigation. For this reason, the root cause process should be treated differently from the run-of-the-mill post-accident investigation.

While such brainstorming and self-analysis is beneficial to the process of a root cause analysis, it could be significantly detrimental in the hands of the opposing party during litigation.

First, consider adopting a company policy that incorporates a disclaimer about the scope and purpose of the root cause analysis process. Many codes, manuals, and handbooks for public utilities incorporate disclaimers about using them in litigation. For example, the NESC (National Electric Safety Code) Handbook, published by the IEEE (the Institute of Electrical and Electronics Engineers), includes the following introductory disclaimer: "While the contributors and publisher believe that the information and guidance given in this work serve as an enhancement to users, all parties must rely upon their own skill and judgment when making use of it." Subsequent sections of the code acknowledge that not all fact patterns can be anticipated or addressed by the code, for example: "These sections attempt to address most hazards that could be present. It is recognized that it would be impractical, if not impossible, to guard against every situation involving individuals seeking to perform malicious acts to equipment or personnel or to enter the station at any cost." Additionally, implementing a company policy that tracks the language of Federal Rule of Evidence 407 regarding subsequent remedial measures may be beneficial. A policy, for instance, could state, "For any root cause analysis undertaken in direct response to an event where litigation is anticipated, the analysis is not intended to identify specific acts or causes and is intended only to identify remedial measures to all acts, causes or processes that may make the event less likely to occur in the future."

Second, consider adding an attorney to the team. The likelihood of protecting the process increases if an attorney is involved. If the company has an in-house counsel, he or she should be involved in post-accident root cause analyses only. Limiting the in-house counsel to accident-related analyses avoids the argument that his or her participation in the process is a routine business practice, and therefore, not entitled to protection.

Third, create different forms for post-accident root cause analyses. At the top of the form, state, "Prepared in Anticipation of Litigation," or use similar language. If the opposing party challenges and moves to compel production of the analysis documents, a judge may be persuaded if he or she knows that the company has a litigation form and a non-litigation form.

Fourth, weigh the benefits of limiting the process to verbal discussions with high-level executives.

Fifth, limit distribution of information and documents to the team members, attorneys, high-level executives, or a combination of these. The results and recommendations from the analysis can be shared with a broader group after litigation has ended or after the statute of limitations has expired.

Legal Trends Related to Root Cause Analyses

Several cases demonstrate real-world application of the general principles described above. For example, in *Transocean Deepwater, Inc. v. Ingersoll-Rand Co.*, Civ. Action No. 08-04448, 2010 WL 5374744 (E.D. La. Dec. 21, 2010), the court determined that under the circumstances of the case, the root cause analysis report was protected by the work-product doctrine and not subject to production. In *Transocean*, which involved a personal injury contribution action, Transocean promptly investigated an incident in which a crewman's toes were amputated. This investigation retained outside counsel to investigate the scene the day after the accident, and the counsel prepared a draft report based on his observations.

The court found the report to be protected by the work-product doctrine because the facts and circumstances showed that it was prepared in anticipation of future litigation. First, Transocean retained outside counsel to conduct the investigation on its behalf. While Transocean made it a regular business practice to prepare root cause analysis reports, it involved outside counsel only where litigation was anticipated. The court also recognized that the severity of the injury rendered litigation imminent in that case. The court found that production of the report, consisting only of a draft copy, would reveal the mental impressions of Transocean's attorneys. Transocean had represented to the court that this draft report contained no facts that had not otherwise been disclosed during the discovery process. Thus, the court in *Transocean* rejected disclosure of a root cause analysis.

Similarly, in *In re Fairway Methanol LLC*, 515 S.W.3d 480 (Tex. App. 2017), the Court of Appeals of Texas found that an investigation report prepared in the aftermath of a personal injury incident was protected under Texas law by both the attorney–client privilege and work-product doctrine. The court determined that the internal investigation documents, including the root cause analysis, were attorney–client privileged because the investigation was overseen by the in-house legal department and was conducted to evaluate potential defenses and options for predicted litigation. Further, the court found that the documents were protected by the work-product doctrine because the circumstances of the case and severity of the injuries indicated a reasonable belief that litigation was forthcoming. The court

also found the company's treatment of the incident to be relevant. While its legal department did not normally oversee such investigations, given the facts and circumstances of the case, it believed that litigation was likely and intervened to lead the investigation.

In contrast, another Louisiana court came to the opposite conclusion in *Chevron Midstream Pipelines LLC v. Settoon Towing LLC*, Civ. Action Nos. 13-2809, 13-3197, 2015 WL 65357 (E.D. La. Jan. 5, 2015). In that case, Chevron's in-house counsel convened an internal investigation team in the immediate aftermath of a pipeline leak, explosion, and fire. The court determined that because the report had been prepared in the ordinary course of business, and not principally to assist with anticipated litigation, it was not subject to work-product protection. Despite the involvement of Chevron's in-house legal department in the report's preparation and its stated purpose to assess the company's rights and defenses in litigation arising out of the incident, the court assessed company testimony, handbooks, and statements as indicating that such reports were prepared routinely after any incident involving the company.

General Lessons

Thus, the general lesson from these exemplar cases, as well as others throughout the country, is that a reviewing court will examine the specific facts and circumstances of each case in determining whether to protect a report from discovery. As shown in these cases, the involvement of counsel, whether in-house or outside, is a factor that a court will consider in determining discoverability, but it is not alone determinative. Courts will go beyond the mere involvement of a lawyer and look at company policies and behaviors in response to similar incidents.

The crucial factor differentiating the *Transocean* and *Fairway* results from *Chevron* was how the company's response in the specific situation differed from its behavior in response to other incidents. Both the *Transocean* and *Fairway* decisions specifically mentioned different procedures that bolstered each company's contention that the reports at issue were bona fide litigation materials, rather than business as usual (in *Transocean*, the retention of outside counsel to lead the investigation, and in *Fairway* the in-house legal department's oversight and leadership in the investigation). Thus, in picking from the menu of best practices outlined above, consider choosing different techniques when investigating a run-of-the-mill accident from one where significant liability is a possibility.