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Mine Safety and Health Administration Special Investigations - A Primer

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MINE SAFETY AND HEALTH ADMINISTRATION SPECIAL INVESTIGATIONS—A PRIMER

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INTRODUCTION

This article is designed to provide attorneys representing mining companies and contractors doing work on mine property with a primer for dealing with Mine Safety and Health Administration ("MSHA")[1] special investigations. MSHA special investigations pose particularly complex and sensitive problems for company counsel. Such an investigation may give rise not only to increased civil, or even criminal, liability for the company, but also civil and criminal liability for individual managers.

It is also important to note that, although not addressed separately in this article, the concepts addressed herein are, in large measure, equally applicable to accident investigations. MSHA regulations provide that certain events occurring on mine property including, among other events, the death of an individual or the injury to an individual "which has a reasonable potential to cause death" are to be immediately reported to MSHA.[2] As one can appreciate, an accident with serious injuries, or a fatality, is a situation where potential liability is great and these circumstances almost always lead to serious citations and a later special investigation.[3]

Special investigations are a "preliminary" which may lead to greater corporate liability, individual managers' civil liability, and, in extreme circumstances of conscious misconduct, criminal liability for both the

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1. The Mine Safety and Health Administration is a part of the United States Department of Labor and is charged with enforcement of the Federal Mine Safety and Health Act of 1977. Federal Mine Safety and Health Act of 1977, Pub.L. No. 95-164 § 302, 91 Stat. 1290 (codified at 29 U.S.C. § 557(a) (1977)).

2. *See generally* 30 C.F.R. Part 50 (2000). An "accident" is to be immediately reported to MSHA by telephone. 30 C.F.R. § 50.10. It is then at MSHA's discretion whether or not to conduct an immediate on-site investigation. Particularly where a fatality or a serious, potentially disabling, injury has occurred, MSHA virtually always conducts an immediate on-site investigation. The accident investigation will usually begin the next or second working day after the accident, depending upon the proximity of MSHA offices to the mine site. 30 C.F.R. § 50.2 (h)(1-12) defines "accident" as one of twelve discrete events, including ten which do not necessarily involve any personal injury.

3. It is certainly prudent whenever an incident is immediately reported that company counsel be involved in assisting mine personnel in dealing with MSHA's accident investigation.

company and individuals. It is thus essential that mine operators proceed with great care as to any citation, or accident, which may lead to a special investigation.

I. MINE ACT LIABILITY

Liability for violations of the Federal Mine Safety and Health Act of 1977 ("the Mine Act")[4] can be significant. The Mine Act provides that each violation of an applicable regulation, or the Mine Act itself, may lead to a civil penalty against the mine operator.[5] The maximum for that civil penalty is currently $55,000.[6] While most citations have proposed penalties of a few hundred dollars and, on occasion, only $55.00,[7] those citations arising from a fatality, serious injury, or which are found to be caused by a high degree of negligence or an "unwarrantable failure" will often be assessed much closer to the maximum allowable penalty.

In addition to mine operator civil liability, the Mine Act also provides for corporate criminal liability[8] and, of particular significance here, civil and criminal liability for individual directors, officers, or agents of a corporate mine operator.[9] That liability allows for the same level of penalties against an individual as a corporate operator would face.

For civil liability to attach, a director, officer, or agent of a corporate mine operator must have "knowingly authorized, ordered, or carried out" an action or failure to act which would subject the corporate mine operator to a civil penalty.[10] This liability may arise for either a violation of a mandatory health or safety standard or any other provision of the Mine Act itself.[11]

In evaluating whether some action has been taken "knowingly," MSHA takes the position that it does not have to show "bad faith or evil

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4. Mineral Lands and Mining Act, 30 U.S.C. § 801 *et seq* (2000). For an overview of the Mine Act, *see, e.g.*, Stephan A. Bokat & Horace A. Thompson III, eds., OCCUPATIONAL SAFETY & HEALTH LAW, Chapter 26, "The Federal Mine Safety and Health Act of 1977" (The Bureau of National Affairs, Inc. and American Bar Association 1988).

5. 30 U.S.C. § 820(a) (2000).

6. *Id.* The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 535, 104 Stat. 890 (1990), *amended by,* Pub. L. No. 104-134, Title III § 31001(s)(1), 110 Stat. 1321-373 (1996) *and* Pub. L. No.105-362, Title XIII, § 1301(a), 112 Stat. 3293 (1998) (allowing for automatic periodic increases in civil penalties with inflation). Thus, the maximum civil penalty is presently set at $55,000. *See* 30 C.F.R. § 100.3(a) (2000).

7. MSHA Civil Penalty Regulations at 30 C.F.R. Part 100 (2000). *See also* 30 C.F.R. § 100.4(a) (allowing for a single penalty assessment of $55.00 for minor violations).

8. 30 U.S.C. § 820(d) and (f). It should be noted that by operation of 18 U.S.C. §§ 3571 and 3581, the maximum criminal fines may be as high as $500,000 for a corporation and $250,000 for an individual, depending upon the nature of violation involved.

9. 30 U.S.C. § 820(c).

10. *Id.*

11. *Id.*

purpose or criminal intent."[12] MSHA's position is that the term "knowingly" is to be defined as in contract law "where it means knowing or having reason to know [and that a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence."[13] Nevertheless, cases have consistently included the concept that before individual civil penalties can be issued, there must be some showing that the action of a director, officer, or agent of a corporation "involve[d] aggravated conduct, not ordinary negligence."[14] Under these cases, "knowing" conduct must involve more than a lapse in judgment or a loss in concentration.[15] Nevertheless, because the standard for individual civil liability encompasses not only what the individual knew but also what the individual reasonably should have known, caution dictates that whenever a violation of the Mine Act has been alleged by MSHA and a special investigation follows, the matter must be treated with the utmost care and seriousness.

The Mine Act also provides for criminal liability for the operator of a mine and any director, officer, or agent of a corporate operator where the mine operator, director, officer, or agent "willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply" with certain orders issued under the Mine Act.[16] Criminal liability may arise where action occurs which involves "intentional disobedience" or "reckless disregard" of a mandatory health or safety standard or applicable provisions of the Mine Act.[17] Reckless disregard has been defined as "closing of the eyes to or deliberate indifference toward" requirements which the defendant "should have known and had reason to know" about at the time of the violation.[18]

Whether evaluating the risks of civil or criminal liability, issues of intent and knowledge are central. Issues of intent usually, and necessarily, involve subjective evaluations. Whenever MSHA seeks to undertake

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12. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, MSHA HANDBOOK #PH97-I-3 4-xxxvi (1997). This Handbook is available on MSHA's website *at* http://www.msha.gov/.

13. *Id.*

14. *E.g.* MSHA v. Wyoming Fuel Co., 16 F.M.S.H.R.C. 1618, 1630 (1994)(*citing* MSHA v. Bethenergy Mines, Inc., 14 F.M.S.H.R.C. 1232, 1245 (1992)). *Accord* Freeman United Coal Mining Co. v. Federal Mine Safety and Health Review Comm'n, 108 F.3d 358, 363-364 (D.C. Cir. 1997).

15. *Id.*

16. 30 U.S.C. § 820(d). A violation of a standard is "willful" if done:

> [E]ither in intentional disobedience of the standard or in reckless disregard of its requirements. Reckless disregard means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation. The term willfully requires an affirmative act either of commission or omission, not merely the careless omission of a duty.

U.S. v. Jones, 735 F.2d 785, 789 n.6 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984). *See also* U.S. v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).

17. *See Jones*, 735 F.2d at 789.

18. *Id.*

a special investigation, it is essential that in-house, or outside, counsel be involved in evaluating how to proceed. Even though mine management may feel it acted properly and in good faith, that will not be the end of the matter. The issue in a special investigation ultimately boils down to the conclusion reached by a special investigator and the investigator's superiors in the MSHA internal review chain as to whether any "knowing" or "willful" misconduct has occurred. In such circumstances, it is valuable, if not critical, that counsel be involved in assisting both the company and individual managers in the investigation. The investigation is essentially an adversarial proceeding, or certainly should be treated as such. Failure to take advantage of assistance of counsel may lead to an incomplete or misdirected defense of the company and/or an individual's position.

II. MSHA CRITERIA FOR A SPECIAL INVESTIGATION

MSHA's Special Investigations Procedures Handbook describes criteria for undertaking a special investigation.[19] The "special investigation" is the mechanism MSHA uses to evaluate whether to propose extraordinary penalties. It is important to note that the Mine Act does not reference "special investigations," and it contains no criteria for evaluating whether a special investigation is appropriate. MSHA will make an initial evaluation as to whether there is some basis for concluding a "knowing" or "willful" violation may have occurred. If that conclusion is "yes" or "maybe," a special investigation will follow.

Where there has been a mine accident, a complaint of possible advance notice of an inspection,[20] false reporting of information,[21] or misrepresentation regarding equipment's compliance with Mine Act requirements,[22] the circumstances will be evaluated to determine whether a special investigation is appropriate.[23]

Additionally, other citations issued to a mine operator, independent of these circumstances, will be evaluated. Particularly those citations issued along with an imminent danger closure order,[24] citations desig-

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19. *Supra* note 12, at 4-xxxvii.

20. Giving advance notice of an inspection may also lead to criminal sanctions. 30 U.S.C. § 820(e). Presumably that sanction would only apply to a government agent, not a mining company or one of its agents.

21. False statements, representations, or certifications may lead to criminal penalties. 30 U.S.C. § 820(f). This may apply to records required to be kept pursuant to MSHA regulations or to statements made in special investigations, among other things.

22. 30 U.S.C. § 820(h).

23. *Supra* note 12, at 4-xxxvii.

24. Imminent dangers may lead to an immediate, self-executing closure of the affected area of the mine. 30 U.S.C. § 817(a) (2000). Only persons needed to correct the danger may enter affected area. 30 U.S.C. § 817(a), as provided in 30 U.S.C. § 814(c) (2000). "Imminent danger" is defined at 30 U.S.C. § 802(j) (2000).

nated by an unwarrantable failure,[25] or citations which involve working in violation of an order of withdrawal[26] will draw specific focus in determining whether a special investigation should occur. While not all of these citations will lead to a special investigation, increasingly, in recent years, the norm is for these matters to lead to a special investigation.[27]

It should also be highlighted that MSHA is not precluded from conducting a special investigation into other alleged violations that fall outside these parameters. Moreover, it is not required to conduct a special investigation of every alleged violation of a mandatory health or safety standard or other provision of the Mine Act that meets these criteria. MSHA has a great deal of administrative discretion in determining which matters it will pursue to a special investigation.

III. THE SPECIAL INVESTIGATION

A. *Early Company Investigation*

Where an accident has occurred, and an attorney has participated in the accident investigation, a thorough factual investigation will be undertaken at the same time as MSHA's initial accident investigation. However, where the attorney has not participated in the accident investigation or, non-accident events have occurred which may give rise to a special investigation under MSHA's criteria, it is prudent to undertake an early factual investigation of the situation. Failure to do so may significantly limit the ability to mount a successful defense.

Depending upon the circumstances surrounding the citation and the availability of mine personnel, this early investigation may be conducted either through an on-site investigation by the attorney or by telephone in coordination with safety personnel and mine management. Particularly,

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25. The legal standard for an unwarrantable finding has long been set. The Senate Report to the Mine Act specifically approved a prior decision finding an unwarrantable failure under the predecessor of the Mine Act, the Coal Mine Safety and Health Act of 1969. *See* S. Rep. No. 181, at 32, *reprinted in* 1977 U.S.C.C.A.N. 3432, which cited with approval under Zeigler Coal Co., 84 I. D. 127, 135 (1977), 1 MSHC 1518, 1524 (IBMA No. 74-37, 1977) which stated:

> [T]hat an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care. The inspector's judgment in this regard must be based upon a thorough investigation and must be reasonable.

Decisions as to an unwarrantable failure necessarily involve multiple fact questions as to the judgment of supervisory personnel.

26. The Mine Act provides that withdrawal orders may be issued for failure to timely abate a citation, 30 U.S.C. § 814(b), repetitive, unwarrantable failure violations, 30 U.S.C. § 814(d), citations following a pattern of violation notice, 30 U.S.C. § 814(e), and for imminent danger situations, 30 U.S.C. § 817(a). Additionally, untrained miners are to be withdrawn from work until their training is completed. 30 U.S.C. § 814(g).

27. *See* MSHA Special Investigation Procedures, *supra* note 12, at 4-xxxvii-4-xxxix.

should cost be an issue, or if there are significant uncertainties as to whether a special investigation might occur, much can be done by telephone. Document collection can readily be coordinated and interviews can often be conducted by telephone, depending upon the nature of the situation.

Early investigation and evaluation is important, not only to begin making judgments as to approaches, but also to ensure information is not lost. MSHA's internal guidelines allow for at least thirty days for processing and evaluation as to whether a matter should be pursued for special investigation.[28] MSHA's Manual does not specify how soon an investigation should commence. In recent years, in view of the significant increase in the number of special investigations, it has been rare, at least in the western United States, for special investigations (especially in non-accident situations) to occur less than six months after a citation is issued. Nine to twelve months is probably a more common time period between issuance of a citation and MSHA's beginning special investigation interviews of managers. MSHA inspectors will have always made notes of their evaluation of a situation leading them to issue a citation. While some managers and safety representatives take notes during the course of inspections, many do not. Often the notes taken may not necessarily be very detailed. Even if the inspector noted concern about the situation at the time it was observed, the seriousness of the potential citation may not have been disclosed until the end of the inspection day, or perhaps even later. Even a week or two after a citation is issued, memories will have begun to fade. If fact gathering does not begin for several months, much information may be lost. Company personnel should have at least the broad outlines of their defense prepared before MSHA begins contacting the company or individual managers for interviews, which may not occur until months after the citation was issued.[29]

B. *Ethical Issues*

Since a special investigation necessarily involves not only determinations as to more serious corporate liability, but also decisions as to managers, ethical issues as to representation will often arise for counsel. The Code of Professional Responsibility mandates that lawyers not represent a client if the representation of that client is directly adverse to another client.[30] Moreover, since a corporate mine operator can only act

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28. *Supra* note 12, at 4-xxxviii.

29. MSHA regulations allow for a conference on citations to discuss the citation and the company's reasons for reducing the severity of the citations. Federal Mine Safety & Health Act 30 C.F.R. § 100.6(c) (2000). The conference must be requested within 10 days after the citation is issued. 30 C.F.R. § 100.6(b). Where a conference has occurred, added information will presumably have been collected. However, that may not necessarily have been done from the perspective of litigation defense.

30. Colorado Rules of Prof'l Conduct R. 1.7(a) (2000).

through its directors, officers, and agents a lawyer representing the corporation must carefully evaluate whether s/he can represent not only the corporation but also individuals.

Generally, counsel will begin this process representing a corporate client. A lawyer representing a corporate entity is obligated to proceed "as is reasonably necessary in the best interest" of the corporation in a situation where an officer, director, or agent is engaged in action that may give rise to a violation of law that might be attributable to the corporation.[31] Dual representation of directors, officers, or employees/agents is allowable depending upon the circumstances.[32] Assuming the situation is one in which counsel initially becomes involved on behalf of a corporate entity, it is ethically mandated that a judgment be made, and reevaluated on a ongoing basis, as to whether the lawyer can represent not only the corporate entity, but also individuals associated with the corporation.[33]

Determining whether multiple representation of both the corporation and one or more corporate agents can occur involves a fact intensive evaluation of a number of issues. Most prominent among these are judgments as to the potential culpability of the corporation, potential culpability of individual managers, corporate requirements, and allowable approaches as to indemnification of corporate agents. Additionally, judgments need to be made as to the potential for civil versus criminal liability, since it is doubtful that joint representation would ever be undertaken where it was thought there was a serious risk of criminal liability.

Other than noting the necessity for this evaluation and the broad requirements of the canons of ethics, no clear guideline can be provided. Counsel must review the applicable canons of ethics, company policies and practices, the facts of the particular citation(s), and make a judgment as to the appropriate approach for handling the particular representation. Certainly, if the circumstances are such that the corporation is considering discipline, if not discharge, of a manager involved in the events leading to the citation(s), joint representation will likely be inappropriate. In that situation, the corporation will likely be considering, if not pursuing, an argument that corporate negligence should be reduced, and thus the penalty lessened because of supervisory misconduct.[34] Also, an indi-

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31. Colorado Rules of Prof'l Conduct R. 1.13(b).

32. Colorado Rules of Prof'l Conduct R. 1.13(e).

33. Colorado Rules of Prof'l Conduct R. 1.13(a).

34. The efficacy of such an argument will be highly dependent on the facts of the particular situation. The Federal Mine Safety & Health Review Commission has ruled that where a mine operation is (a) prudent in selecting and training a foreman [or other manager], who had in the past exercised good judgment, and (b) has an adequate overall safety program, then a foreman's acting "aberrantly" and engaging in "wholly unforeseeable misconduct" will give rise to a defense which, if proved, can reduce the level of negligence attributable to the mine operator, and, thereby, reduce the civil penalty. MSHA v. Nacco Mining Co., 3 F.M.S.H.R.C. 848, 850 (1981). Recently, the Commission noted this defense "has been applied sparingly" and it refused to apply *Nacco* to reduce

vidual may for his/her personal reasons prefer separate representation and, depending upon the circumstances and corporate indemnification policies, the Company may be obligated to finance such a request.

I would also add a personal word regarding multiple representations based upon my own experience. If an initial decision in favor of joint representation later proves to be an error, the only "penalty" is that the lawyer will be obligated to withdraw, both from representing individuals and from representing the corporation on the particular matter at hand. There is no loss of privilege to communications occurring prior to the withdrawal from representation. Where corporate indemnification policies provide protection for the individual and there is no reason to expect the corporation may either wish to discipline a manager for actions taken or omitted or argue that the conduct of an individual officer, director, or agent was improper and cannot, or should not, be attributed to the corporation, my preference is to err on the side of joint representation. I say this even though this approach may later give rise to a necessary withdraw from all representation on the particular matter.

The reason for this approach is that, even at larger mines, the workforce tends to be close knit and first line supervisors often identify closely with their more senior managers and the mining company itself. If mine supervisors have separate representation from the corporation, it may ensure that a particular lawyer represents the company throughout the dispute to its resolution, but it will not necessarily serve the overall interests of the corporation in having an effective management team. If good managers have to find their own independent counsel, even if they are assisted in that by corporate counsel, it will necessarily foster some degree of "we" and "they" mentality which will not be productive, long-term, for the mine. Obviously, where it is known early in an investigation that a particular manager has engaged in plainly inappropriate conduct, not only will corporate counsel be unable to represent that individual, the attorney may also be involved in advising the corporation as to whether misconduct engaged in by the manager warrants demotion or even termination from employment. Where, however, as is most often the case, the worst that may be said about a manager is that a lapse in judgment or attention led to the circumstance now being specially investigated by MSHA, the overall interests of the corporation may best be served by "hanging together" rather than "hanging separately". In assessing the interests at play and applicable ethical standards, the potential advantages to the corporate client and its managers in a joint representation should be carefully evaluated, even if it leads to the lawyer's accepting some risk that if facts dramatically change, withdrawal from all representation in the matter at a later date might be required.

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the negligence of a mine operator and, thereby, vacate an unwarrantable failure finding. MSHA v. Capitol Cement Corp., 21 FMSHRC 883, 893-95 (1999).

Necessarily, judgments as to joint representation should only be considered by outside counsel. In-house attorneys actively involved in handling special investigations are in a different posture. Rarely, if ever, would in-house counsel be in a position where s/he would want to undertake representing not only the corporation but also individual officers, directors, or agents.

C. *A Special Investigation Checklist*

In preparing for a special investigation, counsel should evaluate a number of factors both before and during the investigation.

1. Issues of Representation

As described above, ethical issues must be addressed at the outset and as the matter progresses, in connection with any special investigation. A continuing evaluation of whether counsel can represent not only the mining company, but also individual supervisors must occur. It is also important to determine what representation role counsel will provide with respect to particular company witnesses. That, of course, will bear upon issues as to the applicability of attorney-client privilege to communications that occur in the interview process.

2. Witnesses

Information must be gathered as to the potential witnesses to the alleged violation. This may include both management and non-management employees. Depending upon the issues raised by the citation(s), it may be appropriate not only to interview personnel accompanying the inspector but also personnel working in the area during the shift when the citation was issued and personnel who may have worked in the area on one or more prior shifts. Additionally, where issues of equipment condition or maintenance are involved, it is likely that the maintenance personnel last involved with the equipment will have pertinent information to supplement the information equipment operators may have.

As a list of witnesses is developed, interviews should be conducted to determine what information each witness may have related to the circumstances surrounding the citation(s) at issue. As a part of this interview process, counsel should also be evaluating whether it will be appropriate to undertake representation of one or more individuals. Independent of representation issues, counsel should advise those witnesses of their rights vis-à-vis an MSHA special investigator in an interview.[35]

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35. Witnesses are not required to participate in an interview with a special investigator. If a witness does participate in an interview, it is certainly in the witness' interests to have the assistance of counsel. Without the assistance of someone familiar with the investigation process, and the litigation that may follow, the witness may not make a complete or clear defense of the situation.

It should also be added in regard to witnesses that when an MSHA special investigator contacts mine management about a special investigation, the investigator may be willing to disclose the names of those managers the investigator wishes to interview. The investigator will not disclose non-management interviewees. Moreover, some investigators will only disclose names of management witnesses after the investigator has first attempted to contact the company manager to determine whether the manager is willing to talk to the investigator without the assistance of counsel, or assistance of some other company representative.

3. Document Gathering

The range of potential documents will obviously depend upon the nature of the underlying citation. Categories which may be pursued, however, include (a) notes made by company personnel during the inspection leading to the citation, (b) notes made by the manager(s) working in the area where the citation was issued during the shift when the citation was issued and, often, prior shifts, (c) pre-shift and on-shift inspection records which may have been completed for the area where the citation arose or equipment in question was located, and (d) maintenance records for any equipment that may be involved in the citation.

It is critical that once documents are collected, they be retained. Independent of what decisions may be made with regard to personal interviews, company records may be subpoenaed if not voluntarily provided.[36]

4. Should the Individual Managers Submit to an Interview?

As information is gathered, a decision must be made about whether to advise a manager to be interviewed. The approach here will depend both upon the comfort level of the manager and the circumstances. Individual managers are not obligated to participate in an interview nor, for that matter, are hourly employees. A range of factors, including the apparent direction of the investigation, information that the witness may have, the witness' comfort level with the process, and the anticipated reaction of MSHA to a refusal to be interviewed, should be considered in addressing this issue. While not articulated by MSHA, my sense of the investigation process is that if an individual refuses to participate in an interview, MSHA will draw a negative inference from that refusal which may increase the risk of a penalty being proposed. That alone, however,

36. While no survey has been conducted, anecdotal information from discussing these issues with other practitioners would suggest to the author that most commonly, counsel representing mining companies, and managers, during special investigations provide the investigator with company records as requested by the investigator. Different issues as to access may arise in a situation in which an individual supervisor is asked to produce any notes which he may have made. Those issues should be addressed on a case by case basis.

should not lead a person to participate in an interview. Finally, it should be added that generally, though not always, if an individual is unwilling to be interviewed, that should lead to closer consideration of whether separate representation may be appropriate for that individual.

Before the witness actually meets with the MSHA investigator, the lawyer should also spend time preparing the witness for the interview. This will, in large measure, be comparable to preparing a witness for a deposition or trial testimony. Although this process is in many respects less formal than deposition or trial testimony, advance preparation of a witness is just as important before a meeting with a special investigator.

5. Should a Witness Agree to Provide a Written Statement or to be Tape Recorded?

I always counsel against witnesses agreeing to be tape-recorded. I have, over my 27 years of practice, heard too many witnesses unintentionally misspeak, whether they misunderstood a question, misheard a question, or simply misspoke. Where a tape recording is made, unless counsel knows at the time that a misstatement has been made, no correction can be made, as a practical matter, and later efforts to make a correction may be of only marginal utility. If someone misspeaks in the nervousness of the interview, he should not have a tape recording held against him.

While the conclusion will vary depending upon the circumstances, my own view is that if a witness is submitting to an interview, it will generally also be best to agree to give a written statement. Again, it is critical to evaluate the particular circumstances before agreeing to give a written statement. If an interview is conducted, however, utilization of a written statement ensures the opportunity to correct any errors that may have been made in the investigator's preparation of the statement and also insures obtaining a copy of what has been provided to the special investigator. Absent that, the special investigator may be unwilling to provide a copy of interview notes or any interview memorandum generated during the course of the interview.

6. Lawyer Conduct in the Interview

MSHA special investigators expect to conduct the interview themselves. Should a circumstance arise in which the witness wishes to confer with counsel or should the interview be taking an inappropriate direction, counsel can and should intervene, confer with the witness, and determine what steps to take. Absent that, the primary role of counsel is to protect the witness from overreaching, provide clarifying information as appropriate, and review the statement with the witness before it is finalized to assist with clarifications and corrections.

7. Post-Investigation Statement of Position

Whenever counsel has participated in a special investigation, it is important to do a post-investigation statement of position to the special investigator. This will provide both factual and legal argument, together with other available information mitigating the issuance of any individual penalties. The letter should request that it be included in the file. It will provide a statement of position for evaluation by more senior managers of MSHA as MSHA evaluates the file to determine what actions, if any, to take.

CONCLUSION

Special investigations create especially sensitive problems for mining companies and their managers and counsel. While this article provides thoughts about the process and steps to evaluate, each special investigation must be evaluated on its own merits. Careful attention to the facts of the situation, the presentation of those facts, and the individuals involved (both from the company and MSHA) is necessary and will invariably lead to tailoring the particular approach. "Rules" suggested herein may often find exception in the unique circumstances of a particular investigation. Nevertheless, these broad guidelines should provide counsel with a start to the process.