

Your Incident Response Plan Is Missing Something: Your Lawyer

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When something goes wrong on a worksite, the instinct is to act fast. Secure the scene. Notify the owner. Call the insurer. Document everything. These are the right instincts, but most organizations are missing a critical first step: calling their lawyer.

That is not a small omission. In the construction industry, where incidents can trigger regulatory investigations, insurance disputes, and costly litigation, often all at once, the timing of legal involvement is the difference between a protected investigation and one that works against you.

Why Legal Privilege Matters

Legal privilege protects the communications between you and your lawyer from being shared with opposing parties, regulators, or insurers. It is one of the most powerful tools available to an organization involved in a dispute.

But privilege is not automatic. Seeing a lawyer's name copied on an email is not enough. Privilege must be established deliberately, and it starts the moment legal counsel is meaningfully involved in the investigation. If that involvement comes too late, communications and findings that could have been protected may be fully exposed. For construction organizations, the stakes are high. A single incident can involve multiple parties, including owners, general contractors, subcontractors, insurers, and regulatory bodies. Each has different interests, and none of them are aligned with yours.

The Investigation Team Reports to Counsel, Not the Other Way Around

One of the most important structural decisions you can make is who leads the investigation. The answer should be your lawyer, or at minimum, the investigation team should report to counsel. This is what keeps the work protected.

It also matters who is on that team. Conflicts of interest are common in construction. If the engineer who designed the equipment that failed is also the one investigating the failure, you have a problem, not just legally, but practically. Will they be objective about the root cause? Build your investigation team with independence in mind.

Insurance Makes It More Complicated, Not Less

When insurance is involved (and in construction, it usually is) retain separate insurance counsel. Your litigation counsel and your insurance counsel have different roles and, potentially, different obligations. Keeping those roles and obligations separate protects you and keeps the priorities clear.

If co-defendants or joint venture partners are involved, a common interest privilege agreement should be in place before the investigation begins. This allows parties with aligned interests to share information without waiving privilege.

Build the Protocol Before You Need It

The organizations that handle investigations well are not reacting. They are executing a plan. Before an incident occurs, consider establishing:

- A clear communication protocol that identifies who should be included in any messages related to an incident, and who should not
- A defined process for where files are stored and who controls access. Losing access to a shared drive in the middle of a dispute is a risk that no organization should take
- Standards for documenting evidence. Photos and videos must capture who took them, what they show, where and when; an image with no context is not evidence, it is a liability
- A witness interview process. Your witnesses may be former employees by the time a matter goes to trial; interview them early and get their contact information on file

Most importantly, create a culture where legal counsel is the first call, not the last. That is not a legal formality. That is how privilege begins.

The Bottom Line for Construction Organizations

Incidents happen in construction. That is a reality of the industry. What sets organizations apart is not whether an incident occurs. It is how prepared they are when it does.

Involving legal counsel early, structuring your investigation team correctly, separating insurance and litigation priorities, and having a documented protocol in place can protect your position, your communications, and your ability to recover losses. Done right, a well-managed investigation is not just a legal obligation. It is a strategic advantage.

Conclusion

Incidents are inevitable in construction. What is not inevitable is losing control of the investigation that follows. Organizations that involve legal counsel from the outset are better positioned to protect privilege, preserve critical evidence, manage competing stakeholder interests, and reduce litigation risk. By establishing clear investigation protocols before an incident occurs and ensuring counsel directs the response from day one, construction companies can strengthen both their legal position and their operational resilience. In the moments that matter most, your lawyer should be part of the first call list - not the last.

When an incident, investigation, or dispute arises, the most important decisions are often made in the first few days. Our [Construction Litigation](#) team works with owners, contractors, subcontractors, and insurers on these issues every day, helping clients assess risk, protect their interests, and navigate complex legal and regulatory challenges. Whether a matter is just beginning or already underway, we can help answer your questions, identify practical next steps, and work toward the best possible outcome.

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