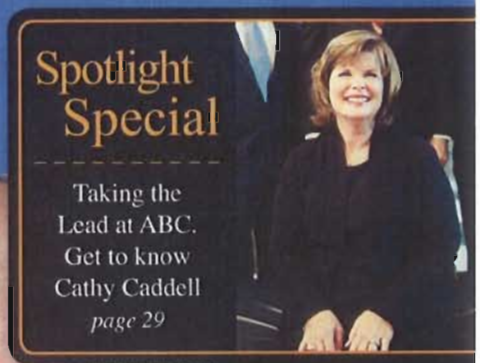
ALABAMA

CONSTRUCTION NEWS



Spotlight Special

Taking the Lead at ABC. Get to know Cathy Caddell

page 29

THE DRIVE *for* DIVERSITY

A Mentoring Initiative Helps Businesses.

The Truth About Ta

Separating Fact from Fictio

What You Need To Know About Accident Investigations

JOE DUNCAN OF HUIE, FERNAMBUCQ & STEWART SHARES IMPORTANT INFORMATION ABOUT MAINTAINING PRIVILEGE AND CONFIDENTIALITY IN ACCIDENT INVESTIGATIONS.


Joe Duncan

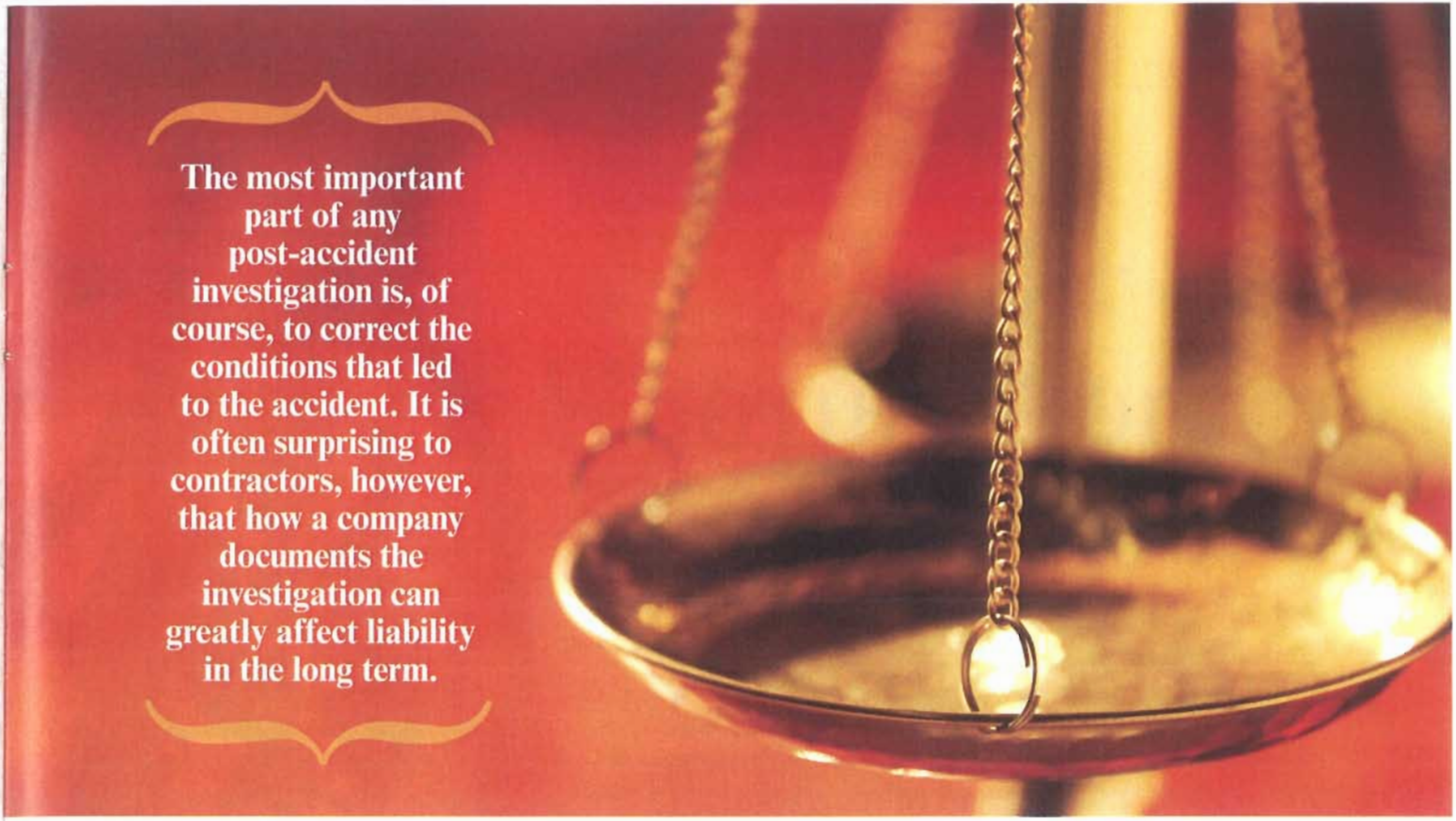
In defending contractors in litigation, I am often asked whether there are common liability issues that repeatedly arise in lawsuits. Outside of safety-related issues that lead up to the accident, the most common liability concerns frequently pertain to how a contractor documents and investigates an accident.

The most important part of any post-accident investigation is, of course, to correct the conditions that led to the accident. It is often surprising to contractors, however, that how a company documents the investigation can greatly affect liability in the long term. Many contractors expect that their internal investigation and reports are confidential, but that is rarely the case unless some additional steps are taken.

It is standard practice for contractors to prepare incident reports following an accident. State and federal laws, as well as business practice, require these reports, ranging from first report of injury to OSHA logs, be prepared. What should be remembered, however, is that most of this information can be discovered by the opposing counsel and may be used as evidence. The practical meaning of this is that a plaintiff's lawyer will be allowed to ask your employee in deposition or at trial about every word he or she used to describe an incident. These forms should be used for gathering of objective facts and identifying information from witnesses rather than requiring judgments from the employee assigned to complete the form.

A potential pitfall is that many incident forms require that the individual gathering information provide the cause of the accident and how the accident could be prevented. While some minor accidents may have straightforward answers to these questions, most companies would not want a crew foreman making judgments as to what caused a jobsite fatality or serious injury in the minutes or hours after an incident occurred. This is especially true when those opinions could implicate his company through its general oversight of job-site safety.

As an example, a foreman may believe a worker's 30-foot fall through an uncovered skylight occurred because a subcontractor's employee failed to use adequate fall protection and tie-offs. By listing this as the cause, however, the general contractor may have to defend its own safety practices from the question of why its subcontractors were allowed to operate without following OSHA safety require-



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ments. More concerning, however, is that the general contractor may have agreed, by contract, to be responsible for covering roof openings prior to beginning the project, a fact that the foreman may not know. It is common sense that the worker fell because there was no fall protection, but a company's position on ultimate liability and cause of the accident could be set forever, at least in the eyes of a jury, once the crew foreman makes a judgment about the accident.

Following serious accidents, contractors need the ability to have thoughtful, frank, and honest discussions at the management level about the cause of the accident and whether business practices need to be changed to prevent future injury. If this information can be discovered in a lawsuit, however, there may be a chilling effect on how honest companies are in their investigation. It is for these reasons that Alabama case law and the rules of evidence allow for portions of this process to be privileged and confidential.

When a serious incident or fatality has occurred, it is best for contractors to involve an attorney as soon as possible. This is because any communications with an attorney are protected by the attorney-client privilege under Rule of Evidence 502 (b). In addition, all investigation efforts carried out at the direction or request of the attorney are privileged. In short, absent a handful of rare exceptions, the practical point of this rule is that the contractor and his employees do not have to divulge, at any time, the conversations or investigation that was directed by an attorney.

In addition to the attorney/client privilege, defendants do not have to produce materials that were prepared "in anticipation of litigation." This means that, even if an attorney is not involved, materials may be confidential if they were gathered with an expectation that litigation may arise in the future. Whether such information qualifies for the privilege depends on several factors such as the severity of the injury, whether an attorney was consulted, type of claim, and venue.

Even though some of these requirements may be met when preparing general incident reports, they often do not receive the privilege. Courts are generally unwilling to treat basic incident investigation as privileged since it is carried out in regard to all accidents, and some have gone so far as to say an attorney must be consulted for items to be prepared "in anticipation of litigation." Given the gray areas and arguments that are involved, from a practical standpoint, it is easier to maintain confidentiality for such items when they are directed by an attorney. ■

Joe Duncan is a partner with Huie, Fernambucq & Stewart, in Birmingham. His litigation practice includes liability issues associated with all phases of construction at both the trial and appellate court levels. Joe is regularly called on by contractors, insurers and trade groups to help clients to control potential areas for exposure and liability before claims arise. He holds a B.A. degree from Auburn University and a J.D. degree from the University of Alabama.