

Special Report



A MARINE INCIDENT INVESTIGATION CHECKLIST

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For admiralty defense attorneys, marine investigations can occur shortly after an incident happens or after suit has been filed. Investigations in response to incidents are somewhat different than investigations as part of suits.

Typically an incident investigation moves at a quicker pace and requires the admiralty attorney to have a checklist in place before receiving notification of an incident. The following provides some insight for developing a marine incident investigation checklist.

The typical marine incident investigation commences upon receipt of a telephone call, e-mail or fax from the

vessel's master requesting assistance. Such notification rarely occurs when a lawyer is at his desk. It is more likely to occur in the middle of the night or on a holiday.

The lawyer must gather basic information to run a conflicts check; confirm authority to board the vessel; and get a feel for what type of response investigation will be required. If the call comes in from outside a firm's established intake procedure, it is prudent to place the matter into the firm's established intake process, so conflicts do not arise.

Besides obtaining the name of the vessel, its location and the nature of the incident, the lawyer should gather preliminary information about: 1. the condition of the crew, vessel and cargo; 2. the identity of other involved parties, injured or otherwise; 3. the

itinerary of the vessel; 4. the presence of governmental authorities; and 5. contact information for the vessel owner, underwriters and vessel's agent. This information is valuable in making decisions on whether to send notices of protest or notices claims, whether to retain and dispatch a marine surveyor, and how to determine which information to collect.

The attorney, not the client, should retain and instruct the marine surveyor. This provides the foundation for establishing the attorney work-product privilege at a later date. Otherwise, opposing parties will characterize the efforts of the marine surveyor as part of the client's ordinary business practice and seek information about those efforts in discovery.

Once retained, the marine surveyor and others who board the vessel(s)

should be reminded to keep their initial reports and notes focused on factual information. They can express opinions at a later date. Those who attend an investigation — including attorneys — shortly after an incident may become fact witnesses in later litigation. The likelihood of becoming a fact witness increases as the factual information gathered becomes unique and unattainable from other sources. This is one reason for conducting joint surveys with adverse parties.

Depending on the amount of time available, the marine surveyor or the investigating attorney can perform document review. The core set of documents to gather from the vessel during any investigation include: the list of particulars, which is the specification sheet about the vessel's dimensions, ownership, etc.; the crew list; deck, gangway and engine room log book excerpts for the relevant time frame; accident report(s); relevant check/inspection lists filled out prior to the incident; notices of protest, claims or regulatory interest; and charter party agreement(s).

These documents typically identify those who may have knowledge of relevant facts, provide basic information about the incident, and pinpoint areas and topics of interest. Traditionally, reviewing the table of contents of the procedure or technical manuals provided leads to the gathering of more specific relevant information and documents from the vessel. However, these manuals are typically written in terms of operational and technical issues.

New Tools

Finding relevant information about safety procedures and the like is easier since the implementation of the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code). The ISM Code establishes safety management objectives and requires the ship owner, the manager or the bareboat charterer to establish a safety management system.

The ISM Code requires development of a safety management manual (SMM) to be used on board all vessels except the smallest vessels that engage in international trade, which

are exempted from the manual requirement. Reviewing the SMM can provide leads on relevant documents to copy and topics to investigate. Depending on the operation of the vessel, other procedural schemes, such as the quality management standards promulgated by the International Organization for Standardization (ISO9000), can further provide leads on relevant information or documents.

Another good place for document leads is the vessel's certificate binders. Most vessels keep their statutory and industry certificates in a set of binders for easy access and review by regulatory authorities. The table of contents for the certificate binders helps identify relevant documents, such as lifting gear certificates or load line certificates.

The investigating attorney should consider drafting a business record declaration for the documents collected and use the "Unsworn Declarations Under Penalty of Perjury" provisions of 28 U.S.C. §1746 to avoid the need for a notary public. Similarly, draft any crew statements with the same provisions.

However, if a person's knowledge is more than just relevant but critical to a future action, the investigating attorney should further consider the *de bene esse* deposition procedure set forth in Federal Rule of Civil Procedure 27. The party seeking such a pre-suit deposition must show that there is an immediate need to perpetuate the testimony. This is typically not a problem when asking the court for an order to take the deposition of foreign seaman who may not return to the area.

Depending on the type of incident under investigation, the attorney should also make Freedom of Information Act requests to the U.S. Coast Guard's local offices, including the offices that handle investigations, compliance and vessel traffic services.

The Coast Guard monitors and records vessel traffic movements as a result of the requirement that all commercial self-propelled vessels more than 65 feet long carry an automatic identification system (AIS), which is not unlike the transponders carried by aircraft.

The graphical representations the Coast Guard provides can be quite useful in collision, allision and wake-damage cases. The same is true for

the radio voice traffic monitored and recorded by the U.S. Coast Guard. However, the Coast Guard's retention policy on voice and AIS recordings is not perpetual. Make requests within 30 days of the incident.

Besides requesting AIS and radio traffic recordings from the Coast Guard, it is worth the effort to send requests under the Texas Open Records Act or to subpoena facilities along the Houston Ship Channel or any navigable waters in the state. As a result of the Homeland Security Act of 2002, most port facilities have installed video cameras and keep the recordings for a certain period of time.

The National Oceanic and Atmospheric Administration (NOAA) is a good source for weather and hydrographic data, such as tides, currents and certain underwater features. A good place to start is NOAA's Web site at <http://tidesandcurrents.noaa.gov/index.shtml>. Access real-time data about the weather, tides and currents for certain locations, such as Galveston Bay, at <http://tidesandcurrents.noaa.gov/ports.html>. NOAA, through the National Weather Service, provides a variety of weather-related products, which can be accessed at www.nws.noaa.gov/om/marine/home.htm.

Finally, lawyers can obtain information about other vessels from the public Web site Equasis at www.equasis.org. It requires a log in, but registration is free. The contents of the site go beyond the typical general dimensions of the vessel to provide information about owners, operations, underwriters and reported investigations by regulatory authorities, all of which can be of use in a marine investigation.

Unlike the investigation of 15 years ago, more information is readily and instantly available to the investigating admiralty attorney. 

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