# RESPONDING TO A SERIOUS MARINE INCIDENT

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The steps that a vessel owner or operator takes during its initial response to a serious marine incident can have a profound impact on the value of the claim. The following is a discussion of the steps that should be taken and mistakes that should be avoided.

**WHAT DO WE MEAN BY A SERIOUS MARINE INCIDENT?**

A serious marine incident occurs when a vessel is in commercial service and is involved in an incident that results in: (1) One or more deaths; (2) An injury to a crew member, passenger, or other person that requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties; (3) Damage to property in excess of $200,000; (4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. § 3301; (5) Actual or constructive loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. § 3301, of 100 gross tons or more; (6) A discharge of oil of 10,000 gallons or more into the navigable waters of the United States as defined in 33 U.S.C. § 1321; (7) A discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States; (8) A release of a reportable quantity of a hazardous substance into the environment of the United States. 46 CFR §§ 4.03-2, 4.03-1, and 4.05-1.

**WHAT REPORTING REQUIREMENTS ARE TRIGGERED BY A SERIOUS MARINE ACCIDENT?**

46 CFR § 4.03-2 and 4.05-1 require that a serious marine incident be called into the Coast Guard immediately after addressing any resulting safety concerns.

Drug and alcohol tests must be performed on individuals directly involved in the incident not later than 32 hours and 2 hours, respectively, after the incident has occurred. The term "individual directly involved in a serious marine incident" means an individual whose order, action, or failure to act is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing the incident. 46 CFR § 4.06-1.

Frequently, an injured employee involved in a serious marine incident is admitted to the hospital before the employer can test him or her for drugs or alcohol. Make sure that you either have the test performed by the hospital or, if they are unwilling, then by a vendor that has been retained in advance.

Complete Coast Guard form 2692 and 2692(b) within five days of the incident. If barges in tow were involved in the incident, form CG2692(a) will also be required. If the serious marine incident involved personal injuries, death, or missing persons, form CG2692(c) will also have to be completed.

When completing form CG2692, special attention should be paid to box 25b which asks the vessel owner/operator to provide a description of the casualty (casualty events and the conditions and actions that were believed to be causal factors, as well as any hazards created as a result of the casualty). In most, if not all, serious marine incidents, it takes longer than five days to have an accurate and comprehensive understanding of what happened and to identify all of the causal factors. Furthermore, the CG2692 will almost certainly be requested by claimants in discovery, or through a FOIA request to the Coast Guard. Consequently, the utmost caution should be exercised in completing this portion of the report. For example, if it turns out that there was third party involvement (e.g., a passing vessel that impacted your vessel's route, etc.), and you do not mention that third party in the CG2692, that can be used against you in litigation. Please make sure your form 2692 is carefully reviewed by your risk management team and attorney prior to submission.

If you are unsure whether to submit a CG2692, err on the side of caution and send it in. If you fail to submit a CG2692 when it is required, you will likely hear from the Coast Guard and perhaps receive a notice of violation or worse. Furthermore, the failure to submit a CG2692 when it is required can be used with great effect by claimant's counsel in litigation.

**YOUR INVESTIGATION OF THE INCIDENT**

### Crew Interviews and Statements

**1. Who Should You Interview?**

At a minimum, you should interview everyone who was on watch at the time of the incident, and preferably the entire crew.

**2. Who Should You Take a Statement From?**

With regard to crew members who have no knowledge of the incident and/or who received no injury, you should obtain a signed statement from them to that effect. This will help you cut down on the list of witnesses who will be deposed in litigation and lower the risk of questionable personal injury claims arising out of the incident.

With regard to crew members who do have knowledge of the incident, you may want to obtain a signed statement from individuals who have not been with the company very long or where there is otherwise a risk that they may not be with the company much longer, and they have significant/helpful information relating to the incident.

**3. Are Statements Discoverable?**

In federal court, statements taken by the vessel owner/operator in the normal

privileged. Heath v. F/V ZOLOTOI, 221 F.R.D. 545, 550-551 (W.D. Wa. 2004). Similarly, statements taken by an insurance investigator or claims agent are generally not privileged because they are taken in the ordinary course of the insurance company's business. Id. at 550. Statements taken by attorneys in anticipation of litigation are generally considered to be work product and, therefore, not subject to discovery. Sandra T.E. v. South Berwyn School Dist. 100, 600 F.3d 612, 612-623 (7th Cir. 2010).

In Illinois, crew member statements are typically discoverable regardless of whether they were taken by the vessel owner/operator or its attorney. ILCS S. Ct. Rule 201(b)(1); Monier v. Chamberlain, 221 N.E.2d 410, 416 (Ill. 1966); Consol. Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257-258 (Ill. 1982).

In Missouri, crew member statements taken by the vessel owner/operator in the normal course of business are discoverable. 56.01(b), R.S.Mo.; State ex rel Pitts v. Roberts, 857 S.W.2d 200, 202 (Mo. App. 1993). Crew member statements taken by an attorney generally are not discoverable unless a claimant can show that he or she has a substantial need for the document and cannot obtain the information contained therein from another source. 56.01(b)(3), R.S.Mo.; State ex rel. Tillman v. Copeland, 271 S.W.3d 42, 45-46 (Mo. App. 2008).

## Photographs

Photographs taken will be discoverable unless it can be demonstrated that they were taken in anticipation of litigation. State ex rel. Missouri Pacific R. Co. v. Koehr, 853 S.W.2d 925, 925-927 (Mo. 1993). But even then, photographs taken shortly after the incident are likely to be discoverable, even if taken by or at the request of an attorney, because the claimant will be able to argue that they have a substantial need for the information and cannot otherwise obtain it. Id. at 926.

## Conflicts of Interest

As discussed below, the Coast Guard or OSHA may want to interview an employee after a serious marine incident, and the question arises as to whether the company's attorney can or should represent the employee during the interview. The answer to that question turns on whether the employee's interests and the company's interests are aligned.

For example, if there is a serious marine incident involving a fatality, it may be in the interest of the company for the pilot to admit that the sole cause of the incident was pilot error which would support the company's attempt to limit its liability under the Limitation of Liability Act. But doing so would expose the pilot to criminal liability under the Seaman's Manslaughter Statute (18 U.S.C.A. § 1115) which criminalizes a negligently caused homicide. In such a circumstance, the pilot may need separate counsel.

Another example would be where a serious marine incident involves pollution, and a crew member has criminal liability exposure under the Clean Water Act (33 U.S.C.A. § 1319(c)(1)) which criminalizes negligent conduct that causes pollution.

Other statutes creating potential criminal exposure for a company or crewmembers when there is a spill of oil, release of a hazardous substance, a hazardous condition that is not reported, or a fatality include the following. This is by no means a complete list of all potentially relevant criminal statutes.

- THE RIVERS AND HARBORS ACT – REFUSE ACT – Any discharge of refuse of any kind from a vessel into navigable waters of the United States is a misdemeanor under 33 U.S.C. § 411.

- FAILURE TO REPORT AND IMMUNITY FOR REPORTING – Any person in charge of a vessel who, as soon as he has knowledge, fails to report a hazardous discharge to the appropriate federal agency shall be guilty of a felony under 33 U.S.C. § 1321(b)(5).

- PORTS AND WATERWAYS SAFETY ACT – The failure to report a hazardous condition either aboard a vessel or caused by a vessel or its operation is a felony under 33 CFR 160.215 and 33 U.S.C. § 1232.

- FALSE STATEMENT TO GOVERNMENT AGENCY AND OBSTRUCTION OF JUSTICE – The willful falsification, concealing or covering up of a material fact to any governmental agency and the falsification of any document with the intent to impede, obstruct or influence any government investigation are felonies under 18 U.S.C. §§ 1001 and 1519.

The foregoing is not an exhaustive list of the circumstances under which conflicts may arise, but whenever a serious marine incident involves a fatality or pollution, careful consideration should be given to whether one or more crew members need their own attorney.

## Preservation of Evidence

### 1. When Do You Have a Duty to Preserve Evidence?

Generally, a vessel owner/operator is legally required to preserve data potentially relevant to ongoing or reasonably anticipated litigation. See, e.g., Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D. N.Y. 2003); see also, Trask-Morton v. Motel 6 Operating, L.P., 534 F. 3d 672, 682 (7th Cir. 2008) ("The proper inquiry is not when a lawsuit was filed, much less when discovery was properly served under the Federal Rules of Civil Procedure, but when a party had "reason to anticipate litigation."). The standard applied to determine if litigation is reasonably anticipated is objective. See, e.g., Micron Tech., Inc. v. Rambus, Inc., 645 F.3d 1311, 1320 (Fed. Cir. 2011) ("This is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a

reasonable party in the same factual circumstances would have reasonably foreseen litigation."). If a vessel owner/operator initiates a lawsuit, for example a limitation action, that will always trigger its duty to preserve evidence. However, initiation of the action is not dispositive of when the duty arose. The duty to preserve may very well have arisen earlier. See, e.g., Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.").

The Sedona Conference has provided guidance on the meaning of "reasonable anticipation" suggesting, "[a] reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." Sedona Conference Commenting on Legal Holds: The Trigger & The Process, 11 Sedona Conf. J. 265, 271 (Fall 2010).

**2. What Evidence Should You Preserve?**

Once your duty to preserve evidence arises, you must preserve evidence that is reasonably likely to be relevant to claims arising out of the incident. See, e.g., Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 748-749 (8th Cir. 2004). This will, of course, depend on the facts and circumstances of each particular incident as noted by the Advisory Committee Notes to the 2015 amendment of Federal Rule of Civil Procedure 37(e) which provides "[a] variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain." That said, based upon experience, the following non-exclusive list is a good start:

- Vessel logs
- Engine room logs
- Physical evidence such as broken wires
- Electronically stored information such as electronic chart data (location, direction, speed, track, GPS coordinates); engine data; and e-mails
- Video from cameras on the boat.

**3. Litigation Holds**

Once the vessel owner/operator's duty to preserve evidence arises, a litigation hold must be issued. See, e.g., Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 431 (S.D. N.Y. 2004) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.").

**(a) How Quickly Should you Issue a Litigation Hold?**

As noted above, a litigation hold must be issued when the duty to preserve arises. In practice, this is typically within a reasonable period of time after the incident takes place. Typically, within a week of an incident, the investigation is at a point where at least some relevant evidence and custodians can be identified. After the legal hold has been issued, it should be periodically reviewed and refined as the investigation and litigation progress.

**(b) Who Should the Litigation Hold be Sent To?**

The litigation hold should be issued to appropriate stakeholders, including relevant operations personnel, IT, Records Information Management, and other administrative personnel so routine deletion practices are suspended and employee accounts can be preserved in the event of an employee's separation from employment. It should also be sent to any employee having custody of relevant evidence – note, those with custody of the relevant evidence is usually a more expansive group that simply those involved in the incident.

**(c) What Should the Litigation Hold Say?**

litigation hold should identify the likely custodians of relevant ESI; relevant non-custodial data sources; and other relevant physical evidence with instructions to preserve same. The litigation hold should identify with specificity, known custodians, sources and categories of potentially responsive information and relevant time periods, if known. The litigation hold should also provide a point of contact for questions – this should be someone who is working at counsel's direction. It should also require an acknowledgement of receipt from the recipient.

**4. What are the Consequences if You Fail to Preserve Relevant Evidence?**

Federal Rule of Civil Procedure 37(e) states:

Failure to Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was

unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Courts have found "intent to deprive" for purposes of deciding whether to impose severe sanctions under Rule 37(e)(2) under the following circumstances: intentional deletion of information [Ottoson v. SMBC Leasing & Fin., Inc., 2017 WL 2992726 (S.D. N.Y. 2017), GM Netcom, Inc. v. Plantronics, Inc., 2016 WL 3792833 (D. Del. 2016)]; failure to take reasonable steps to preserve information [Bankdirect Capital Fin., LLC v. Capital Premium Fin., Inc., 2018 WL 1616725 (N.D. Ill. 2018); Ottoson v. SMBC Leasing & Fin., Inc., 2017 WL 2992726 (S.D. N.Y. 2017), Internmatch, Inc. v. Nxt Big Thing, LLC, 2016 WL 491483 (N.D. Cal. 2016)]; circumstantial evidence that a party deleted evidence after the duty to preserve arose [Ala. Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730 (N.D. Ala. 2017)].

**INTERACTING WITH THE COAST GUARD**

**Crew Member Interviews by the Coast Guard**

**1. Do You Allow This?**

Typically, it is in the vessel owner's/ operator's best interest to cooperate with the Coast Guard during its investigation of a serious marine incident. If you refuse to allow a crew member to be interviewed by the Coast Guard, this will, of course, put you on a poor footing with the Coast Guard at the very beginning of the investigation process, and the Coast Guard can serve a subpoena on the crew member compelling their testimony which will result in a transcript of sworn testimony. Given these considerations, it is typically recommended that you allow your crew members to be interviewed by the Coast Guard.

**2. Can/Should Your Attorney be Present**

The vessel owner/operator should absolutely try to have its attorney present for any Coast Guard interviews of crew members. Typically, the Coast Guard will not object to this, but, occasionally, they will. The Coast Guard investigating officer may take the position that the company attorney cannot be present for the Coast Guard interview because he does not represent the crew member and it would be a conflict of interest for him to do so. Whether a conflict of interest exists may or may not be true depending on the circumstances of the incident (*see* Section IV.C. above), but it is up to the attorney and the crew member, not the Coast Guard, to decide whether a conflict of interest exists.

**How Do You Know Whether the Coast Guard is Performing a Marine Casualty Investigation or a Criminal Investigation?**

**1. Do They Have To Tell You?**

A Coast Guard investigator is not required to tell you that he is conducting a criminal investigation. But if you ask the investigator if he is conducting a criminal investigation and he decides to give you an answer, he cannot tell you that there is not a criminal investigation if, in fact, there is one. Consequently, you should always ask the investigator if he is conducting a criminal investigation.

It is, however, unlikely that a Coast Guard investigating officer will directly answer your question. The United States Coast Guard Marine Safety Manual states:

Investigating officers should cite the specific authority they are acting under (sometimes several) when asked as to the purposes of an investigation. If asked about the possibility of criminal liability by a witness before or during an interview, the investigating officer should respond with words to the effect that "the Coast Guard is free to choose civil, criminal, or administrative enforcement when an apparent violation is detected, and any decision to take one type of action does not preclude another type of action."

USCG Marine Safety Manual, Vol. 5, Investigations and Enforcement A3-3 (April 2008) (the "Manual").

The Manual also states:

D.2. STATEMENTS TO WITNESSES. Various industry representatives and lawyers have alleged that the Coast Guard attempts to lull mariners and other maritime personnel into a false sense of security with words to the effect of "this is not a criminal inquiry," or "this is just an investigation for cause." Such statements are misleading and shall be avoided. Under no circumstances should an investigating officer "cut a deal" with crew members or their attorneys to gain assistance. Similarly, Coast Guard personnel must not make any representation as to a possible grant of immunity. Only certain Department of Justice (DOJ) personnel can grant immunity. Only the District Commander can decide whether to refer a case for criminal prosecution.

Id.

The Manual recognizes the dilemma that crewmen face during an investigation regarding cooperating on one hand and exposing themselves to self incrimination, or not cooperating and exposing their employer to potential civil penalties, or loss of defenses or limits of liability in civil cases, but the Manual nevertheless states that the investigating officer should proceed with the investigation, and that if a crewman requests an attorney, the investigating officer should contact his supervisor and advise the witness that he is free to consult with his own attorney on matters prior to giving testimony. Id. at A3-4.

The Coast Guard Investigative Service (CGIS) is the criminal investigative component of the Coast Guard. 46 CFR 4.07-1(c)(3). See also 46 U.S.C. § 6301(5). Agents from the CGIS have the same investigative authority as the FBI and are authorized to carry a weapon. So if you see Coast Guard representatives on site and they are carrying weapons, this is a red flag that it is a criminal investigation.

**INTERACTING WITH OSHA**

**Now That We Have a Subchapter M, are There Any Circumstances When OSHA Would Investigate a Serious Marine Incident?**

Due to the advent of Subchapter M, it is unlikely that OSHA will be involved in investigating the conditions on a towboat in connection with a serious marine incident. Thomas v. Hercules Offshore Servs., LLC, 713 Fed.Appx. 382, 384 (5th Cir. 2018).

With regard to barges, we typically only see OSHA involvement with construction barges, particularly crane barges.

**If OSHA Wants to Inspect Your Crane Barge and/or the Crane, What Do You Do?**

We recommend that you have your safety professional, or your attorney, shadow the OSHA investigator during their inspection. Photograph what they photograph, measure what they measure.

We also recommend that, if possible, you clear the area of employees so that you can avoid random questioning by the OSHA investigator. As discussed below, OSHA has the right to interview your employees, but it is best to try to limit their interviews to those employees that they specifically identify in advance.

**Employee Interviews/Statements**

1. **Can the Company's Attorney Sit in on OSHA Employee Interviews?**

The employer has the right to have its attorney present for OSHA interviews of management level employees.

With regard to non-management employees, OSHA investigators will sometimes allow the employer's attorney to sit in on the interview, but frequently they will not. A possible workaround to this situation occurs when the employee consents to being represented by the company attorney for purposes of his or her OSHA interview. OSHA investigators may still refuse to allow attendance by the company attorney under these circumstances, and the law is unclear on the issue.

**INTERNAL INCIDENT REPORTS/ ROOT CAUSE ANALYSIS**

Many vessel owners/operators have written policies regarding the preparation of incident reports. Because this type of incident report is prepared in the normal course of business, and typically not in anticipation of litigation, they are discoverable. Great care should be taken in filling out these reports particularly in the context of serious marine incidents. We recommend that they be reviewed by your risk management team and your attorney.

This is particularly true where the company's incident reports include a "root cause analysis" identifying the specific causes of the incident, and what the company did incorrectly. Although some jurisdictions recognize a "self-critical analysis privilege," which may protect documents like this from disclosure in litigation, many jurisdictions do not. Consequently, you have to assume that any such documents will be discoverable, and they should be prepared with that in mind, and reviewed by your risk management team and your attorney prior to being finalized.

**CONCLUSION**

It is the author's hope that this article will serve as a useful outline of some of the more significant and common issues that arise in responding to a serious marine incident, but every case turns on its own facts which should be evaluated by your risk management team and attorney.