

# Marine

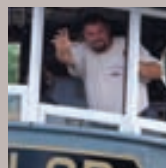
## News

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## Texting Could Create Liability for Vessel Owners



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Over the course of my legal career, I have had the opportunity to witness first-hand the methods various industries employ in the prevention and investigation of accidents and the management of claims and litigation. Without a doubt, the maritime industry is the leader of the pack. Maritime employers effectively train their employees to avoid accidents, quickly and efficiently investigate incidents and claims and, when faced with a suspicious claim, maritime employers do not shy away from defending a lawsuit.

If you are reading this article, you undoubtedly understand the importance of hiring diligent employees and of training those employees to operate your vessels with safety as their primary concern. Even the best employee, however, can make a mistake; and, as we all know, offshore accidents are inevitable. The investigation that usually follows an offshore accident sets the maritime industry apart from many others. When a non-maritime company experiences an incident, it often turns the claim over to its workers' compensation insurer and forgets about it. Maritime companies, on the other hand, tend to conduct a thorough investigation into the circumstances surrounding the incident. Thankfully, these investigations lead to the implementation of safer policies and procedures and have made our industry much safer than it was just a few years ago.

In response to this investigation, virtually all companies prepare a basic accident report that is traditionally produced to the claimant once litigation is filed. Many companies also prepare more detailed documents with titles such as Root Cause Analysis or Subsequent Remedial Measure Report. These detailed reports provide all of the information that is used to make the operation safer in the future. They also provided a double edged sword because the conclusions found in these reports are often critical of

the company and could be used by a claimant to impute liability if they are ultimately produced through the discovery process.

Many of the documents prepared during the investigation of an accident do fall within the definition of an "accident report" and are required to be produced to the claimant's attorney if requested. Some companies have worked with their legal teams to develop a protocol to properly investigate, prepare, route and use the results of the investigation in a manner that makes it privileged as work product prepared in anticipation of litigation. Usually, in these situations, the only discoverable documents produced to the claimant consist of a generic accident report or USCG 2692 and the more detailed analysis is withheld as privileged.

Advances in technology and communication have necessitated some changes in the rules of discovery. Examples of new technologies that do not quite fit within the carefully managed script of accident investigation and documentation include e-mail messages, cell phone calls, text messages and other instant messaging tools.

For example, if an anchor-handling vessel is performing an anchor handling operation, the crew could accidentally hit a pipeline and cause the pipeline to rupture. A captain following the standard reporting/investigation protocol will not put anything into writing that admits that he is responsible for the accident. Advanced technology, however, now allows the captain, as well as the rest of the crew, to communicate with a much larger pool of people. The captain may follow the documentation/investigation protocol to the "T" while sending his wife, or another employee, text or email messages that discuss what happened, often providing details that may be incorrect and better left for the formal process of investigating the incident. A quick text to a co-worker stating "We may have been out of position and dropped the anchor on a

pipeline,” may prove to be incorrect and particularly damaging to the company. Even if the subsequent investigation determines that the pipeline was out of position or not buried properly, the jury may only remember the immediate statement provided by the captain.

As such, it is important for vessel operators to stay up to date with the technology available to its vessel crews and the rules of discovery. Operators must implement policies to mitigate the damage that can be caused by these quick messages that are often exchanged without giving them any significant thought.

The rules of discovery are slowly adapting to these new technologies. In December 2006, the Federal Rules of Civil Procedure were changed to address electronic discovery issues. The rules provide that emails and other forms of electronically stored information are discoverable just like any other document.

Federal Rule 34(A)(1)(a) states that a party can request “any designated documents or electronically stored information- including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations- stored in any medium from which information can be obtain either directly or, if necessary, after translation by the responding party into a reasonably usable form.”

Most states are following suit and amending their procedural rules to specifically address the treatment of electronically stored information. For

example, discovery in La. now includes an obligation to preserve all documents in one’s possession, including documents that exist only in electronic form, in the event of initiated or threatened litigation.

As e-mails have become prevalent, most operators and their employees understand that e-mails are permanent and may be read by others. Most employees have started putting some thought into what they say in an email. However, text messages sent between cell phones and pocket PCs are going to provide operators the latest twist in the wave of producing electronic evidence. Because cell phone devices are mobile, users instinctively feel that their messages are less permanent. As a result, they are often less careful about what they send. While most people now understand that desktop emails are not easily erased, many don’t realize that text messages can also live on after users delete them, both in the device and on the cell phone provider’s server.

As such, it is imperative that vessel operators educate their employees in the use of these alternate methods of communicating and have them understand that any message sent via any of these alternate means of communication may be discoverable and may create significant liability issues for the company.

Although most claimants’ attorneys have not yet standardized discovery requests seeking to obtain cell phone logs, text messages or instant messages to their list of commonly requested items, that day is coming.



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