



December 2012

HANDLING MARINE CASUALTY INVESTIGATIONS AND CRIMINAL INVESTIGATIONS CONDUCTED BY THE UNITED STATES COAST GUARD

Recognizing Trouble

If your company is involved in a marine casualty, which results in a spill or a death, it is possible that your company and its employees may become the subject of a criminal investigation. The following fact situation is from an actual case involving a marine incident which caused the death of a dockside worker.¹ The U.S. Coast Guard (the "USCG") conducted an immediate marine casualty investigation which turned into a criminal investigation and criminal charges being brought against the master of the vessel. Many of these circumstances start out as routine marine investigations, and end up as criminal investigations and prosecutions. While the vessel involved in this situation was a deep water container ship, this fact situation can be applied to any type of vessel, including mobile offshore drilling units.

Case Study

A vessel allides with a dockside crane resulting in the death of a worker in the crane. That day, the operators of the vessel hire an attorney to conduct an independent investigation. The attorney concludes that there was a problem with the vessel's thruster while the vessel was maneuvering and that it was an accident. The attorney believes from his investigation that no criminal liability was involved.

Also on the date of the incident, USCG marine safety investigators board the vessel and take a statement from the master. The day after the incident, one of the marine safety investigators returns to the vessel with a special agent of the Coast Guard Investigative Service ("CGIS") to assist in the investigation. The company's attorney is also present and asks the USCG investigator if they were conducting a criminal investigation. The attorney later testifies that the response was, "no." According to the CGIS agent and the USCG investigator, the CGIS special agent responded, "not yet." The CGIS special agent and the USCG investigator later testifies that, at that point, there was not a criminal investigation, but purely a marine casualty investigation. The investigators proceeded to interview the master again and other members of the crew. The attorney later testifies that it was his understanding that he was not allowed to be present during the interviews, although he neither asked to be present nor was directly told that he could not be present.

A month later, two CGIS special agents arrive at the vessel requesting additional interviews. The master calls the company's attorney and the CGIS special agents wait for him to arrive before proceeding. The attorney again asks if this was a criminal investigation, and, according to the attorney, one of the CGIS special agents responds that it was not a criminal investigation and that they were gathering additional information. The CGIS

¹ *United States v. Wolfgang Schroder*, No. 06-0088-CG, 2006 WL 3717896, 2006 AMC 2545 (S.D. Ala July 6, 2006).



December 2012

special agent later testifies that he said they had expanded the investigation, but they were still in a fact-finding mode. He testifies that he was uncomfortable saying whether or not there was a criminal investigation because they were still gathering facts and did not know whether a criminal indictment would be sought. The other agent later testifies that the CGIS agent's response was simply that they were there to gather more facts.

The CGIS special agents proceed to question the master, as well as other members of the crew. The company attorney is not present for the questioning because he still thought he was not allowed to participate. During his later testimony, one of the CGIS agents acknowledges that he was engaged in a criminal investigation of the incident at the time of the second interview, but maintains that it was not a criminal investigation of the master at that time. The company attorney testifies that if the investigation was criminal in nature then there was a potential conflict in his representation of the company and the master. The company attorney stated that if the investigators had said the investigation was criminal, he would not have allowed the investigators to proceed until separate counsel could be obtained for the master. The testimony of the CGIS special agents indicated that, although the primary mission of the CGIS is to conduct criminal investigations for the USCG, they also participate in protective service operations, collect intelligence, and assist the Captain of the Port in major pollution cases or major marine casualty cases.

The U.S. Attorney's Office had opened up a file on the incident sometime between the first interviews and the interviews that occurred a month later. One of the CGIS special agents had also consulted with a criminal Assistant U.S. Attorney on several occasions between those two dates, and specifically consulted about the second interview. Also, prior to the second interview but after the first interview, the CGIS received a letter of predication, which is a formal request for investigative assistance from a command. A letter of predication to the CGIS does not mean that the decision has been made to seek a criminal indictment, but that the USCG is to investigate whether criminal acts occurred.

The letter of predication was issued two weeks after the incident and included the following:

Subj: REQUEST FOR CGIS LEAD ON A CASE AGAINST _____, MASTER OF
THE M/V _____

1. Enclosed is information relating to negligence. In the above referenced case, there is evidence to support possible criminal charges relating to this allegation.
2. The Master's actions may have contributed to the destruction of a loading crane, damage to the M/V _____ and the death of Mr. _____.

A criminal indictment was later returned against the master charging a one count violation of the Seaman's Manslaughter Statute, 18 USC § 1115. The master filed a pretrial motion to suppress his statements given to the USCG investigators so that they could not be used as evidence at his criminal trial. The master contended that his statement should be suppressed because he gave his consent to be interviewed relying on the misrepresentations of the USCG investigators that there was no criminal investigation.



December 2012

The Court found that the CGIS special agent materially misled the master about the nature of the investigation at the time of the second interview.² The Court determined that the letter of predication directed the CGIS to conduct a criminal investigation targeting the master and that the responses of the agents to the direct questions of the attorney were evasive and incomplete. However, the first statements taken from the master were not suppressed since they were taken before the letter of predication at a time when the investigation was purely administrative, and there was no reason to believe there was any criminal conduct.

This scenario calls into question the following issues:

What is the difference between a USCG casualty investigation and a criminal liability investigation?

A USCG casualty investigation is a purely administrative matter to determine the cause of the accident and whether any laws were violated so that action should be taken against any licenses.

In this regard, 46 USC § 6301 provides that:

The Secretary shall prescribe regulations for the immediate investigation of marine casualties under this part to decide, as closely as possible—

- (1) the cause of the casualty, including the cause of any death;
- (2) whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any individual licensed, certificated, or documented under part E of this subtitle has contributed to the cause of the casualty, or to a death involved in the casualty, so that appropriate remedial action under chapter 77 of this title may be taken;
- (3) whether an act of misconduct, incompetence, negligence, unskillfulness, or willful violation of law committed by any person, including an officer, employee, or member of the Coast Guard, contributed to the cause of the casualty, or to a death involved in the casualty;
- (4) whether there is evidence that an act subjecting the offender to a civil penalty under the laws of the United States has been committed, so that appropriate action may be undertaken to collect the penalty;

² *Id.*



December 2012

(5) whether there is evidence that a criminal act under the laws of the United States has been committed, so that the matter may be referred to appropriate authorities for prosecution;

(6) whether there is need for new laws or regulations, or amendment or repeal of existing laws or regulations, to prevent the recurrence of the casualty.

By statute, USCG marine casualty investigations are not intended to fix civil or criminal responsibility. 46 C.F.R. 4.07-1 provides:

(a) The Commandant or District Commander upon receipt of information of a marine casualty or accident, will immediately cause such investigation as may be necessary in accordance with the regulations in this part.

(b) The investigations of marine casualties and accidents and the determinations made are for the purpose of taking appropriate measures for promoting safety of life and property at sea, and are not intended to fix civil or criminal responsibility.

(c) The investigation will determine as closely as possible:

(1) the cause of the accident;

(2) whether there is evidence that any failure of material (either physical or design) was involved or contributed to the casualty, so that proper recommendations for the prevention of the recurrence of similar casualties may be made;

(3) whether there is evidence that any act of misconduct, inattention to duty, negligence or willful violation of the law on the part of any person holding a Coast Guard credential contributed to the casualty, so that appropriate proceedings against the credential of such person may be recommended and taken under 46 USC § 6301; . . .

If the USCG marine investigator discovers evidence of criminal conduct, he/she will turn that evidence over to the CGIS. The CGIS is the arm of the USCG which conducts criminal investigations and will interact with the United States Attorney's Office on any criminal investigation.

Under 46 USC § 6301(5), the investigator is charged to determine whether there is evidence that a criminal act occurred, in order that the matter may be referred to appropriate authorities for prosecution.



December 2012

If a special agent of the CGIS shows up at the scene of a casualty or at your office, you should assume that the matter has turned into a criminal investigation.

Actions of U.S. Attorney

Under the federal criminal justice system, the U.S. Attorney has wide latitude in determining whether, when, whom, and how to prosecute alleged violations of Federal criminal law. The *United States Attorneys' Manual* (the "Manual") is the official guide promulgated by the U.S. Department of Justice to all U.S. Attorneys in conducting investigations and prosecutions. On the subject of initiation of a prosecution that Manual provides:

Initiating and Declining Prosecution—Probable Cause Requirement

If the attorney for the government has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction, he/she should consider whether to:

Request or conduct further investigation; Commence or recommend prosecution; Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction; Decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or Decline prosecution without taking other action.³

This provision sets forth the alternatives when U.S. Attorney has probable cause to believe that a person has committed a federal crime. The probable cause standard for initiating an investigation is the same standard as required for an arrest warrant or for the return of an indictment by a grand jury. However, even if this requirement is met, it does not automatically mean that a prosecution will be initiated. Further investigation may be required since the standard of proof in a criminal case is proof beyond a reasonable doubt. Prosecutors generally do not seek indictments unless they possess proof beyond a reasonable doubt, which is a much higher standard than probable cause. However, if probable cause does not exist, a criminal prosecution cannot be initiated.

When is the appropriate time to talk or not to talk?

As discussed below, there are various statutory requirements that spills and discharges of hazardous material be immediately reported to government agencies and, to the extent a person provides such information, he/she is protected by immunity under statute.

At the scene of the incident, you can refuse to talk to investigators if you believe you have exposure to being

³ USAM9-27.200



December 2012

charged criminally when they ask you questions. If you believe you have criminal exposure, you should decline to be interviewed and immediately consult a criminal attorney who can assist you in dealing with the on scene investigators. You can assist in the clean-up effort only, and you should not discuss the circumstances leading up to the spill or the cause of the spill since that information may implicate you in a crime.

Without a subpoena to testify at a USCG hearing or federal grand jury, you cannot be compelled to talk to the government. If you get a subpoena, you can assert the Fifth Amendment privilege to the extent that a question might tend to incriminate you in a crime. Moreover, the U.S. Supreme Court has interpreted the Fifth Amendment privilege against self-incrimination to include the act of producing business records of an individual or sole proprietorship.⁴ The act of producing records concedes the existence and possession of the records called for by the subpoena as well as the respondent's belief that such records are those described in the subpoena. You need the advice of a criminal attorney to deal with these issues.

Reporting Requirements

If your company is involved in a marine casualty, which results in a spill of oil or other hazardous material into the water, there are reporting requirements to both the federal and state governments. Failure to adhere to these reporting requirements carries criminal penalties. Therefore, the company and its employees are required to determine whether a report to the government is mandated. If no report is made when one is required, they could face criminal charges for failing to make the report, in addition to any other criminal violations which may arise out of the incident. As discussed later, the information disclosed in the report cannot be used against the person who makes the report in any subsequent criminal proceeding.

The Clean Water Act ("CWA") requires a responsible party to immediately notify the National Response Center ("NRC") on a toll-free number⁵ as soon as the party has "knowledge of an oil spill from a vessel or facility," which was operating in U.S. navigable waters, on the outer continental shelf, or at a deep water port. The following information is to be reported to NRC: (1) name and address of the reporting party and the name and address of the responsible party; (2) the type and quantity of material which was spilled or released; (3) the location of the spill or release; (4) the time of the spill or release and/or when it was discovered; and (5) the cause of the discharge. Other types of discharges must be reported to the NRC under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").⁶ In this regard, 40 C.F.R. 302.6(a) states:

Sec. 302.6 Notification requirements.

(a) Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he or she has knowledge of any release (other than a federally permitted

⁴ *United States v. Doe*, 465 U.S. 605 (1984).

⁵ (800) 424-8802.

⁶ CERCLA § 103(a), 42 USC § 9603(a), CERCLA § 101(22), 42 USC § 9601, 40 C.F.R. § 302.6(a);



December 2012

release or application of a pesticide) of a hazardous substance from such vessel or facility in a quantity equal to or exceeding the reportable quantity determined by this part in any 24-hour period, immediately notify the National Response Center ((800) 424-8802; in Washington, DC (202) 426-2675 or (202) 267-2675; the facsimile number is (202) 267-2165; and the telex number is 892427).

As with a CWA report, the NRC Duty Officer will ask the caller a set of standardized questions to obtain the maximum amount of available information concerning the incident.

There is also the requirement under 46 C.F.R. 4.05-1 to notify the USCG of certain types of marine casualties: 46 C.F.R. 4.05-1 provides:

- (a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—
- (1) an unintended grounding, or an unintended strike of (allision with) a bridge;
 - (2) an intended grounding, or an intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of paragraphs (a) (3) through (8);
 - (3) a loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel;
 - (4) an occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems;
 - (5) a loss of life;
 - (6) an injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties;



December 2012

(7) an occurrence causing property-damage in excess of \$25,000, this damage including the cost of labor and material to restore the property to its condition before the occurrence, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage;

(8) an occurrence involving significant harm to the environment as defined in §4.03–65.

(b) Notice given as required by 33 C.F.R. 160.215 satisfies the requirement of this section if the marine casualty involves a hazardous condition as defined by 33 C.F.R. 160.203.

(c) Except as otherwise required under this subpart, if the marine casualty exclusively involves an occurrence or occurrences described by paragraph (a)(8) of this section, a report made pursuant to 33 C.F.R. 153.203, 40 C.F.R. 117.21, or 40 C.F.R. 302.6 satisfies the immediate notification requirement of this section.

46 C.F.R. 4.05-10 requires that the vessel owner, agent, master, operator, or person in charge deliver a written report utilizing Form CG-2692 (Report of Marine Accident, Injury or Death), Form CG-2692A (Barge Addendum), and CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident) to a USCG Sector Office or Marine Inspection Office within five days of the incident.

Failure to Report

33 USC § 1321(b) (5) makes it a federal crime for failing to carry out reporting requirements of federal law:

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. The Federal agency shall immediately notify the appropriate State agency of any State which is, or may reasonably be expected to be, affected by the discharge of oil or a hazardous substance. Any such person

(A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection;

(B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge;



December 2012

(C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined in accordance with title 18, or imprisoned for not more than 5 years, or both. Notification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement.

The ending sentence of 33 USC § 1321(b)(5) is critical to the reporting person for it provides information provided pursuant to the statute "shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement." Thus, the person making the report has "use immunity" for the information he/she provides; however, the company for which he/she works has no such protection. It is important to note that this does not give the reporting individual "transactional immunity" for any underlying criminal offence with which he/she may have been involved.

Failure to Report a Hazardous Condition: Ports and Waterways Safety Act

Under 33 C.F.R. 160.215, whenever a hazardous condition exists aboard a vessel or is caused by a vessel or its operation, the owner, agent, master, operator, or person in charge shall immediately notify the nearest USCG Sector Office or Group Office of such condition. A "hazardous condition" is defined under 33 C.F.R. 160.204 as:

any condition that may adversely affect the safety of any vessel, bridge, structure, or shore area or the environmental quality of any port, harbor, or navigable waterway of the United States. It may, but need not, involve collision, allision, fire, explosion, grounding, leaking, damage, injury or illness of a person aboard, or manning-shortage.

It is a federal felony to fail to willfully and knowingly fail to immediately make this report.⁷

If your company is involved in a marine casualty which results in a spill or a death, to be on the safe side, you should consult with a criminal attorney who will assist you in making a determination of whether to submit to an interview or otherwise speak with USCG investigators, whether they be USCG marine safety investigators or CGIS special agents. If a CGIS special agent shows up, you should always consult a criminal attorney, since the primary mission of the CGIS is to conduct criminal investigations for the USCG.

Any statement given by any company employee to any investigator can be later used against the company or the employee at a subsequent criminal proceeding. Under the Fifth Amendment of the U.S. Constitution, a person may refuse to answer a question of a government agent if the response could provide self-incriminating

⁷ 33 USC § 1232, ("Any person who willfully and knowingly violates this chapter or any regulation issued hereunder commits a class D felony").



December 2012

evidence of criminal conduct. The Fifth Amendment protects an individual from being forced to incriminate himself. If you have any concern that you have involvement in causing a spill or death, you should decline to answer any questions of the USCG investigator and say that you would first like to consult an attorney before talking with the agent. You should get the name and number of the agent so that your attorney can contact him later and arrange for an interview, if appropriate.

When should the USCG tell or warn you which one it is ?

Nothing requires that the USCG investigator announce to you that he is conducting a criminal investigation. However, if the investigator is asked whether he/she is conducting a criminal investigation and decides to give an answer, the investigator cannot misrepresent that there is not a criminal investigation if, in fact, there is one. If the investigator decides to answer, a truthful answer must be given, otherwise the investigator risks having the statement declared inadmissible as occurred in *United States v. Wolfgang Schroder, supra*. The investigator cannot lie if a criminal investigation is under way, but they have to be asked. Therefore, you need to ask them to trigger this responsibility.

U.S. Coast Guard Marine Safety Manual

With regard to joint civil and criminal investigations, the *U.S. Coast Guard Marine Safety Manual*⁸ (the "Marine Safety Manual") states:

Generally speaking, marine casualty investigations that uncover criminal activity do not change the process by which marine investigations are conducted. The same findings of fact are collected and evidence is gathered.⁹

With regard to the taking of witness statements, the Marine Safety Manual provides that the investigator cannot mislead a witness that there is no criminal investigation or make a promise of immunity:

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 IO "cut a deal" with crewmembers or their attorneys to gain assistance. Similarly, Coast Guard personnel must not make any representation as to a

⁸ See Addendum 1, Excerpt from *USCG MARINE SAFETY MANUAL*, Volume V, INVESTIGATIONS AND ENFORCEMENT A3-3 (April 2008).

⁹ *Id.*



December 2012

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.¹⁰

The Marine Safety Manual states that the investigating officer ("IO") should cite the specific authority that he/she is acting under (sometimes several) when asked for the purpose of the investigation.¹¹ If the IO is asked whether the investigation is civil or criminal the Marine Safety Manual states:

IOs should cite the specific authority that 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 IO 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."¹²

Obviously, this is a purposefully equivocal response designed to give no clear information. The Marine Safety Manual then 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.¹³ The Marine Safety Manual states that, notwithstanding this dilemma, the IO should proceed with the investigation. If a crewman requests an attorney, the IO should contact his/her supervisor and advise the witness that he/she is free to consult his/her own attorney on matters prior to giving testimony. However, the Marine Safety Manual states that when such a situation occurs on-scene:

this does not mean the Coast Guard must stop asking reluctant crewmembers for assistance or stop asking questions. IOs may continue asking questions of reluctant crewmembers just as they would a cooperative crewmember. However, IOs should not single out, harass or badger reluctant crewmembers. Further, any attempt to encourage a reluctant crewmember to participate in a response or investigation should not be in the form of a threat of subsequent prosecution or other action.¹⁴

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *supra* at A3-4

¹⁴ *Id.*



December 2012

This is questionable advice to field investigators. Pursuit of questioning a witness who has requested assistance of an attorney creates a risk of a violation of a witness' right to consult an attorney and may cause the suppression of any statement at any subsequent criminal case.

The Marine Safety Manual states that an attorney should not be excluded from any interview of his/her client.¹⁵ The Marine Safety Manual then encourages IOs to tell attorneys not to interfere with response or investigative efforts in accordance with federal obstruction of justice and witness tampering statutes but that attorneys cannot be prevented from advising their clients.¹⁶ This type of advice will more than likely increase the tension on-scene rather than dissipate any tension.

If a person is placed in custody, such as by arrest or in a situation where the person reasonably believes that he/she is not free to leave, the investigator must advise the person of his Miranda rights before questioning him/her, or risk having the statement suppressed. However, the Manual states that Miranda warnings are not "normally" required during a marine casualty investigation and need not be given during "routine Coast Guard boardings."¹⁷

What are the possible criminal exposures to the company or crewmember that can result from a typical casualty investigation?

In view of the federal and state criminal statutes that make mere simple negligent conduct criminal or make it a crime to fail to report when certain events occur, it is important to have a general overview of the relevant statutes, so that you can determine whether you or your company or its employees have possible criminal exposure and whether a criminal attorney should be consulted. The following are the typical criminal exposures of company or crewmembers when there is a spill of oil, release of a hazardous substance, a hazardous condition on a vessel which is not reported, or death of a person:

(1) *Clean Water Act*: A negligent discharge of any pollutant by any person into navigable waters of the United States is a misdemeanor under 33 USC § 1319 C 1 (A).

(2) *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 USC § 411.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at A3-5



December 2012

(3) *Federal Criminal Statute—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 USC § 1321(b)(5).

(4) *Migratory Bird Treaty Act*: The taking or killing of a migratory bird by any means or in any manner is a misdemeanor under 16 USC §§ 703 and 707.

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 C.F.R. 160.215 and 33 USC § 1232.

(6) *Seaman's Manslaughter Statute*: The simple negligence of a vessel's employee which causes a death is a felony under 18 USC § 1115.

(7) *Federal Criminal Code—False Statement To Government Agency And Obstruction Of Justice*: The willful falsification, concealing, or covering up of a material fact to any government agency and the falsification of any document with the intent to impede, obstruct, or influence any government investigation are felonies under 18 USC §§ 1001 and 1519.

When is the time to plead the Fifth Amendment?

As discussed above, you cannot be compelled to talk to the government unless you are served with a subpoena to testify at a USCG hearing or federal grand jury. If you are subpoenaed, you can assert the Fifth Amendment privilege against self-incrimination to the extent that a question might tend to incriminate you in a crime. Moreover, the U.S. Supreme Court has interpreted the Fifth Amendment privilege to include the act of producing business records of an individual or sole proprietorship. The act of producing records concedes the existence and possession of the records called for by the subpoena, as well as the respondent's belief that such records are those described in the subpoena. If you feel you are exposed to criminal liability, you should refuse to answer any questions until you have consulted an attorney.

What is the method or time in an investigation for a company or a crewmember to refuse to cooperate in a USCG investigation for fear of criminal prosecution?

As discussed above, you can refuse to talk to investigators if you believe you have exposure to being charged criminally. If you believe you have criminal exposure, you should immediately consult a criminal attorney. You can assist in the clean-up effort only, but you should not discuss the circumstances leading up to the spill or the cause of the spill since that information may implicate you in a crime.



December 2012

Is there a point where the company or crewmember's attorney challenges the actions of the USCG and, if so, when and how is it done?

If a member has asserted his Fifth Amendment rights or has requested an attorney, the attorney should step in and advise the investigator that he/she should not talk to his client, but should contact the attorney if there are any questions.

There are means to have an investigator removed from an investigation, but it is very rare and difficult to be successful. Motions can be filed to seek recusal of the investigator

Conclusion

Understanding the implications and consequences of a USCG marine casualty investigation is essential to anyone involved in the marine industry, whether you are the owner of a marine company or an employee, lawyer, or adjuster. Quick decisions and actions are required when an incident involving a death or discharge of hazardous cargo has occurred and a USCG investigator shows up. Just because you or your company did not intend to commit a crime does not mean you cannot be charged and convicted.

— [James E. Wright, III](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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