

**PACIFIC ADMIRALTY SEMINAR
San Francisco October 2024**

Responding to Marine Casualties: Ten Personal Guidelines

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Responding to Marine Casualties: Ten Personal Guidelines

To begin with, I confess that I am uncomfortable with writing “how to” articles. Even after almost forty-five years as a Barrister and U.S. maritime lawyer, I am still learning. But given that I have handled or responded to more than 35-40 marine casualties over the course of my career, I feel I should pass something along to help others. In any other context, I would be happy to regale you with sea stories, both unadorned and embellished. Alas, in this paper, I must be disciplined. So here it is: ten personal guidelines for how to respond to marine casualties.

1. Your Response Should be Immediate and Unhesitating.

The client needs you to drop everything immediately and insert yourself into a crisis you know nothing about, acting as their expert legal representative. (See Guideline 10 below regarding Stress.) Without hesitation, you need to set aside all other personal and professional responsibilities and commit yourself to this new case.

Quite often, you must first wake up, shower, pack, book your travel arrangements, and get on the road. You will usually be heading to a place unfamiliar to you, perhaps overseas, where you will be expected to meet and work closely with persons unknown. Early on, you will want to find a time and place -- be it a departure lounge or the back of an Uber -- when you can start to make a list and get a handle on what you need to do.

As all this is happening, you need to negotiate and agree upon the terms of your engagement, including a written confirmation of your rates. This means accurately identifying all the parties and, where necessary, clearing any conflicts of interest. This is time-consuming and requires patience and precision, but it is necessary ethically and needs to be accomplished without delay.

If you are fortunate, you will already know your client, and will be able to draw upon experience of similar incidents. Otherwise, you will feel as if you are launching yourself into the unknown. You must do so courageously and without hesitation.

2. Keep Detailed Notes

Do not feel self-conscious about notetaking. This habit is essential in an investigation. I learned early on that my notes must record dates and times, and, where possible, quotations from witnesses or others present to give added context. In any marine casualty response, there is too much happening for you to be able to recall every last item of evidence you need to relay to the client. You need to remember who is who, who said what, when they said it, and how you spent your days. Write it down.

Investigations are intense and disorientating, even if you are getting sleep. I remember distinctly flying home from a particularly intense weeklong investigation in a foreign country, looking over my notes and realizing that I had no idea of the date or day of the week when anything happened – I had to piece it together on the plane. After that, I adopted a practice of the most detailed note-taking possible, including the date and time of every entry.

3. Listen and Observe

It may come naturally to you to control the narrative and act as an advocate. You cannot usually do that in a marine investigation: there may be opportunities for a comment here or there, or an aside to share a theory, but this will be rare. In a marine investigation, you are not there to argue the case: your principal role is just to be the client's eyes and ears. There will be a time and place for advocacy and strategy, but, during the investigation, you must focus on listening and observing.

4. Interview Fearlessly

In an NTSB or U.S. Coast Guard investigation, you may be permitted to attend witness interviews conducted by government personnel. After following the appropriate procedure, you may be designated as the representative of a party in interest and entitled to sit in on the government investigators' witness interviews. Within certain parameters, you may be invited to ask clarifying questions. Look for those opportunities, but when you attend such interviews, be judicial about what you ask: in my experience of being present at government investigations, it is generally better to listen closely and save your questions for later, especially if you are at that point still learning the facts.

When the time comes for you to conduct the witness interviews without any other party present, switch into a different mode. If you are questioning witnesses in these circumstances, you should not hold back. You must ask all the questions necessary to learn the facts as accurately, and in as much detail, as possible. Ask simple open-ended questions, listen carefully to the answers and follow up. Be prepared for your questions that disclose unfavorable facts. Go back and forth with the witness until you have covered everything; this should be a back-and-forth conversation, not a formal question and answer. Look to confirm your understanding of the facts: consider the sort of question that begins, "So, as I understand it, you are saying that ... is that so?" This is not a deposition: it is a fact-finding mission. Be prepared to hear answers that are different from what others have told you, and ask about that, if you can do so without suggesting answers.

As far as you can, prepare your interview outline ahead. Where there are certain specific issues you need to address, such as an *Upjohn* warning, write out a script and follow it.

Keep detailed notes of what the witness said. It is generally not possible to tape interviews, so consider engaging someone to partner with you when taking interviews. Not only will your partner catch questions you should have asked or answers you should have verified, if they are not a lawyer in the case, they may themselves testify about the witness' statement during the investigation.

5. Identify and Gather Documents and Electronic Evidence

Figure out what documentation or electronic evidence exists and gather it. Experience counts, because you will know where to look. Otherwise, especially if you are dealing with an unfamiliar area of ship operations, ask about what documentation or data exists. You will be surprised, in this era of voyage data recorders, extensive onboard computer programs, and sophisticated communication between the ship and its owners and operators, how much data is generated by a commercial vessel on an almost hourly basis. Do not forget the emails and cell phones used by vessel personnel -- I recall a major casualty I investigated in Alaska where the main item of evidence was a video recorded by a crewman on a tug in a heavy storm: that video and its audio told us more about the incident than any other evidence we found. Ask about these things.

6. Preserve Evidence

There is no more important mandate for a marine investigation than to preserve all the evidence. This rule not only covers witness interviews (within reason, interview everyone and keep extensive notes) but also extends to every item of documentary or data evidence -- logs, charts, VDR, computer data, photos (take and preserve it if in doubt), emails (however inconsequential they may seem) – and also to every item that may be connected to the incident, down to a replaced pipe or oily rag. Do not destroy or lose anything. Have your client and vessel personnel check in with you over every piece of potentially material evidence; encourage them to ask before anything is thrown away or written over.

In some investigations, such as pollution incidents, you will need to maintain a chain of custody log to verify the source of the evidence and how it has been preserved. As formal as this sounds, it is always worth doing; draw up the form of log and have all custodians sign and date all transfers of possession. I learned early in my marine investigation career that a chain of custody record is essential where dealing with physical evidence, particularly samples.

7. Report to the Client Regularly

Early on in any marine casualty investigation, you must establish a protocol for regularly reporting to the client, by email, zoom, phone, or a combination of all. This may involve early mornings or late nights, but the client needs to know what is going on, what you have found out, how the evidence is developing and your impressions. When you are overseas, you will need to have a ready reference guide, like a page in your notebook, where the time differences are laid out – this will minimize the disorientation of working across timelines (and impress the client.)

At some point, you will need to generate written reports; the sooner you can start sending emails or other reports the better. In addition to the date and time, I like to number reports so that the client can follow the investigation as it progresses. Use the client reports to clarify in your own mind what is important and how you are planning to proceed. Listen to what the client considers important or wants to know and modify your reports accordingly. Your reports do not need to be dry: do not hesitate to include the “flavor” of the investigation, such as comments on personalities, quotes, and information about the site of the casualty: clients generally prefer reports that are interesting.

8. Be Calm and Confident

Be sensitive to the clients’ reactions. Your interactions with the client during the investigation must be professional. You should aim to reassure the client that, as far as possible, you are in control. Try to be calm and confident. Report what is happening accurately and disclose all bad news, but do not convey any hint that there is any aspect of the crisis that you cannot handle.

I recall once investigating a cruise ship fire in Alaska alongside U.S. Coast Guard investigators. After the cause of and response to the fire had been investigated and we were gathering documentation on board for the joint NTSB and Coast Guard hearings, we realized that the ship, which was alongside and empty of passengers, was developing such a severe list that the Captain had to order all crew, plus Coast Guard and me, to evacuate for safety reasons, in case the vessel capsized at the dock. This was very alarming and, to say the least, did not support the “command and control” narrative I was developing. I reported this to the client, of course, but calmly and without any embellishment (and thereafter, the hearings or government report never mentioned it.)

9. Be Prepared for the Facts to Emerge Over Time

Generally, the reason for an attorney for a ship owner or operator to conduct a marine investigation is to find out what happened and why (who or what was responsible.) This is not always the case: there will be different and most complicated considerations if, for instance, your client has been indicted for a crime or is the target of a criminal investigation. But in most cases of actual or potential civil liability, the party's attorney's role is to ascertain the facts, and the cause of the incident.

In this respect, the opinions of those closest to the event are a useful place to start. One of the first questions I like to ask witnesses is their opinion about what happened and why. Even if they do not know, those people who were part of or connected to the incident often have valuable insights and theories. These opinions shape how, as an investigator, I approach finding out the facts and forming my own conclusions.

Sometimes you learn the truth fairly early in the investigation and have those facts confirmed as you develop the evidence. But this does not happen always. Often there will be attempts to cover up or conceal evidence, and witnesses will not be straightforward or forthcoming. In those instances, the investigation will involve a series of adjustments as it progresses. In my experience, it is worthwhile to keep an open mind over the course of the investigation to be aware of new or different evidence.

This lesson was impressed upon me in an early casualty investigation where, upon arriving at a ship (off the coast of Central America) that had recently caught fire, all the witnesses and government investigators – and the client – told me exactly what they were sure had happened: they all explained how a particular engine had an electrical failure that caused the conflagration. They were so convinced of this that they discouraged me from conducting my investigation. I nevertheless investigated, and, as I did, the story I had been told began to make less and less sense. In the end, after two days in the Engine Room (in my embellished retelling -- without food, water, and in 120-degree heat), I concluded the cause had been simple crew negligence while the repairing the engine in question, which nobody wanted to admit. Fortunately, I was able quietly privately to confront one of the principal vessel personnel, who confessed. Not the outcome anyone was hoping for, but the investigation uncovered the truth, eventually.

10. Be Aware of the Stress

Conducting a marine casualty investigation is stressful. While there will rarely be an opportunity to unwind during an investigation, try to find ways to understand and recognize the physical and mental stress that the situation is putting you under. Reclaim some normality about your routine: have breakfast, take a bath, and engage in casual conversations. As you travel to and from the ship, when you are sitting around the mess, and other moments when you can, try to be friendly with the folks you are working with, whether they be vessel personnel, experts or government investigators -- I generally make friends on the cases I handle, sometimes lasting ones. It helps. When there is downtime during the investigation, use it to do something different.

Most of us are in this line of work because of the people in the maritime industry, because we are thrilled to be out in this wonderful world -- be it Yokohama, the Olympic Peninsula, Oslo, the Panama Canal, Liverpool, or Portage, Alaska --, and because, let's face it, we love being in and around ships. A marine investigation will not always be fun, but you should try to enjoy it where you can.

Postscript

In my early days of marine casualty response, I worked with a brilliant lawyer who had been a salvage master before going to law school. As you might imagine, his specialist experience was invaluable for marine investigations. By contrast, when I first attended on board a vessel following a disaster at sea, my only seagoing experience was as a passenger on cross-channel ferries.

In the ensuing years, I educated myself by listening and observing everything around me on board, devouring a library of maritime books from the Merchant Marine Academy, reading the American Seaman's Manual from cover to cover, and absorbing every book I could find on navigation, ship handling, engineering, cargo stowage, and other ship operations. I used the cases I handled to learn about bunkering, fuel oil and ballast systems, salvage, firefighting, naval architecture, and all kinds of equipment found on board vessels. I taught myself how to confidently explain the workings of a tank high level alarm, the oily-water separator, and a marine sanitation device. I climbed down onto the heating pipes in the deepest depths of empty (and gas-free) tanks on a parcel tanker. I examined the charred carcasses of cars burned to a crisp in a car carrier fire. I came to know the meaning of metacentric height, what "doing your dips" involves, and – one of my personal favorites – why a ship might engage in a movement termed by my Japanese friends, a "Monroe Walk."

I reached a point where I realized that I should not expect me to have the knowledge or experience of a ship's captain or engineering officer, or my wonderful friend the salvage master. And nobody expects me to have that knowledge or experience. I learned that it is entirely acceptable to ask a technical question, even if it risks revealing my ignorance – and perhaps because it does. In my practice as an investigator of marine casualties, I chose to focus on knowing the areas where the client is relying on my expertise as a lawyer -- one with experience of conducting investigations on board ship, but one who knows when and who to ask.

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San Francisco
October 2024