

CRIMINAL INVESTIGATIONS

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Mr Kuffler chaired the U.S. Maritime Law Association's Committee on Maritime Environmental Crimes from its formation in 1997 until May 2005. He is lead counsel for the vessel interests in the November 2004 Athos I oil spill. Drawing on the criminal law expertise within the firm, Mr Kuffler is prepared to develop and conduct the training and educational programs and protocols discussed in this article.

■ Shipboard visits from criminal investigators and criminal prosecutors intrude with increasing regularity and can provoke severe, expensive, and long lasting consequences.

These recurring and high profile prosecutions and the serious repercussions which follow strongly suggest that prudent shipowners should include as part of their contingency planning a new view of the American criminal process. Training programs should include well thought out protocols for responding to the criminal investigator who boards without warning or pays an unannounced visit to company offices.

In addition, as part of that preparation, owners should have specialist lawyers immediately available to respond at the first hint of a criminal investigation.

The Problem

With the Exxon Valdez spill in March 1989, the prosecutorial community turned its attention to the maritime industry. Ultimately, the State of Alaska convicted the master of negligently operating the Valdez.

In the mid 1990's Royal Caribbean was indicted for falsifying records, knowingly discharging oil, conspiracy, and witness tampering, and eventually pleaded guilty to a number of these charges. Holland America and its director of technical operations pleaded guilty to charges of negligently discharging oily bilge water. The Command incident in California resulted in guilty pleas to charges of knowingly discharging oil. The Command is of

particular significance because the flag state, at the request of the United States authorities, allowed U.S. investigators to board the vessel while she was in international waters. The Neptune Dorado produced a guilty plea to charges of knowingly failing to report hazardous conditions as required under the Ports and Waterways Safety Act.

The oily water separator has become the toy of choice in the modern maritime prosecutor's nursery.

Recently, Evergreen paid a USD 25,000,000 fine growing out of oil water separator issues. In the Katerina matter, her chief engineer pleaded guilty to rigging a by pass pipe around the oily water separator and was sentenced to eight months in prison. In June of this year, in a most shocking and tragic by product of these investigations, the chief engineer of the M/V Celine committed suicide after the crew was questioned about the oily water separator.

In addition, the strengthened security programs in this post 9/11 era have made the criminal investigator a common shipboard visitor whenever a breach of security or terrorism is even the subject of the slightest speculation. For example, in August 2003 three defendants in Port Everglades, Florida pleaded guilty to violations under federally mandated requirements in their employer's Terminal Security Plan. In April 2005 the US Coast Guard Sector Delaware Bay conducted a workshop in which the author participated using three actual recent local incidents as the bases for discussion. One involved radiation emissions from containers, the second a "harmful biological substance" and the third, the master's report, albeit ultimately false, that he had a bomb on board timed to explode when the vessel reached Philadelphia. Needless to say, representatives of the Department of Justice and the criminal investigative agencies attending the workshop had considerable involvement and attendance onboard in these incidents.

Crimes of concern may include not only substantive violations of law, but also "obstruction of justice" issues such as false statements

to investigators and falsification of records. The Royal Caribbean, Holland America, Command, Neptune Dorado and subsequent matters all have involved prosecution for obstruction of justice as well as for substantive violations of law.

In fact, uniformly, almost all the reported cases involve prosecutions not only for violation of a substantive criminal statute, but are also quick to raise the obstruction of justice charge. In the recent non-marine federal prosecution of Martha Stewart, the well known head of publically traded company bearing her name which specializes in home furnishings. The underlying prosecution for violation of the insider trading securities laws with respect to an unrelated company in which Ms Stewart owned shares was dropped, but Ms Stewart was convicted and served a prison term for making false statements to federal investigators.

But the maritime industry has no immunity from prosecution for conduct highlighted by the Stewart case. The Coast Guard's 1997 Instruction regarding criminal prosecutions stated in the clearest language that any suggestion that a shipowner was engaging in conduct which might be deemed obstruction of an investigation would lead to criminal prosecution. Because the Coast Guard has multiple responsibilities, criminal investigation and prosecution is not always that agency's highest priority. In this regard, owners must always bear in mind, however, that the Coast Guard and the Department of Justice may not always agree on the initiation of a criminal investigation, but at the end of the day, the Department of Justice has the final say.

By way of example of recent successful prosecutions for obstruction of justice, in September 2003 an engineer onboard the Hoegh Minerva pleaded guilty in Seattle, Washington to obstructing the Coast Guard's investigation concerning the illegal intentional dumping of waste oil. In January 2005 the Justice Department announced the sentencing in Portland, Maine, of two engineers from the Kent Navigator for illegally by passing the oily water separator and then falsifying Oil

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cast an even darker shadow

Record Book entries regarding discharge of oily water.

As can be seen from the descriptions of the foregoing cases, (1) both owners in their corporate forms and individuals are being charged and convicted, and (2) none of the cases are going to trial, but are being resolved by means of guilty pleas, that is, admissions in court and on the public record that the defendants have engaged in the criminal conduct with which they have been charged, and are prepared to endure the consequences. In the face of the possibility of even more severe sanctions than those following a guilty plea, defendants have not been willing to take these matters to trial.

The Consequences

Criminal convictions, including plea agreements, can bring with them not only substantial fines, but possible prison terms, the banning of personnel from entering the United States or serving on vessels calling at United States ports, and stringent environmental compliance programs which the United States government will supervise. Investigators will also detain the vessels for indefinite periods and crew members may be held as material witnesses long after the ship is allowed to sail. The financial implications of such detentions of ships and personnel are obvious and substantial.

Contingency Planning

In the crucial first hours after a serious casualty or security incident, investigators from the Coast Guard, the Environmental Protection Agency, Border and Customs Protection, the FBI, the federal secret service, and comparable state agencies may board the vessel and begin an investigation. Mariners must understand both their rights and their obligations, and must understand what actions will bring additional charges of obstruction of justice.

Education through contingency planning and training must prepare company personnel – both shipboard and management – for the appropriate and proper response in the event they become involved in criminal matters.

Proper contingency planning and training of personnel should include:

- Explanation of the investigative roles of the various agencies, including the Coast Guard. The Coast Guard may simultaneously be onboard conducting vessel inspections, regulatory compliance, port state control, and criminal issues;
- Identification and explanation of the rights and obligations which both personnel and the company have when confronted with a criminal investigation;
- Outline of Coast Guard policy and procedure regarding criminal investigation;
- Identification of significant maritime environmental crimes, their elements and possible sanctions;
- Implications for criminal and civil liability inherent in the mandatory reporting of an incident to the Coast Guard, the flag state, and owners;
- Establishing procedures for avoidance of falsification of evidence and obstruction of justice charges;
- Inclusion of competent criminal defense counsel as part of the ship owner's response team;
- For risk managers and senior executives, an explanation of the negative impact criminal proceedings and convictions may have on civil liabilities and insurance programs;
- Establishing and publishing guidelines covering the circumstances under which the company will provide a defense for its personnel who are facing criminal charges and development of personnel policies covering the company's obligations to its employees caught up in criminal matters;
- Consideration of circumstances where self disclosure may be appropriate and the benefits which may be gained by such early action;
- The role that whistle blowers, who are often disgruntled employees or former employees, may play and the appropriate responses to disclosures from such sources.

The looming shadow of the criminal investigator is a constant presence in the

modern maritime world. Only planning and training can assure a proper and competent defense when the criminal investigators arrive onboard, or even in the company's offices, and minimize the serious risks of early and irreversible errors in the response. ■

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not apply to this goal. Also, personnel should be clearly advised of the requirement that log and record entries are to be made contemporaneously with the event and are to be accurate.

A preferred method of accomplishing both tasks is for the company to institute a maritime compliance program. Federal law provides that, if a company has a qualifying compliance program in place and a violation occurs regardless, the company will be entitled to a major reduction in sentence. One major cruise ship company benefited from this provision when it was proven that some of its personnel had engaged in improper discharge of waste oil and falsification of the ORB. Both the Department of Justice and the Environmental Protection Agency (EPA) have written policies providing that, in appropriate cases, they will forego criminal prosecution for companies with compliance programs. The EPA has exercised such forbearance in the past, although not yet in a maritime context.

The bottom line is that, for a shipowner or operator to avoid handing the federal government a signed confession in the form of an oil record book with false entries, the owner or operator must impress upon its engineering officers that they are to properly maintain and operate the OWS and to make accurate and contemporaneous entries in the ORB. The engineering officers, particularly the chief engineer, must be given every incentive to do the right thing and no incentive to do the wrong thing. ■