

Ethics in Marine and Energy Accident Investigation and Reporting

Slippery Decks and Slippery Slopes

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Road Map

- Mechanics of Marine Casualty Investigation
- Ethical Concerns for Attorneys and Claims Adjusters
- Best Practices for Discovery in Marine Casualty Litigation
- Selected Examples

Mechanics of Marine Casualty Investigation

- Marine casualties are complex, fast-paced, dynamic events.
 - Language barriers may arise, making fact gathering difficult.
 - Vessels may be located at remote anchorages/terminals.
 - Counsel and adjusters must therefore plan for casualties before they happen.
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Potential Investigation Participants:

- Claims Adjusters
 - Attorneys
 - Operators/Companies
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Ethical Issues for Claims Adjusters

- Model Unfair Claims Settlement Practice Act
 - Adopted by Louisiana and Texas
 - *See* LSA-R.S. 22:1674; 28 TAC § 21.203.
- NAIC Code of Ethics

Unfair Claims Settlement Practice Act (“UCSPA”)

- Prohibited conduct:
 - Material misrepresentation of relevant facts or policy provisions to claimants or insureds;
 - Failing to acknowledge with reasonable promptness claims communications;
 - Failing to adopt reasonable standards for prompt claims investigation and settlement;

Ethical Issues for Attorneys

- MRPC 3.3 – Candor to the Tribunal
- MRPC 3.4 – Fairness to Opposing Party and Counsel
- MRPC 4.1 – Truthfulness in Statement to Others

MRPC 3.3 – Candor to the Tribunal

- A lawyer shall not knowingly:
 - “ . . . make a false statement of fact or law . . . or fail to correct a statement of material fact or law made to the tribunal by the lawyer.”
 - “ . . . offer evidence that they lawyer knows to be false . . . ”
- Duty to disclose and correct false testimony, if necessary.
- Duty to disclose fraudulent or criminal conduct, if necessary.

MRPC 3.4 –Fairness to Opposing Party and Counsel

- Prohibits obstructing access to documents or materials with “potential evidentiary value”.
- Prohibits falsifying evidence, counseling or assisting a witness to testify falsely.
- Prohibits offering an inducement to a witness prohibited by law.

Rule 4.1 – Truthfulness in Statement to Others

- Counsel cannot knowingly
 - Make a false statement or material fact or law to a third person
 - Note that this expressly has been extended to mediation

Ethical Issues for Operators/Companies

- Companies and shipowners are not bound by formal ethical rules, but this does not mean they can operate with impunity.
- With respect to litigation, their conduct, as well as the conduct of attorneys and claims adjusters is governed largely by the rules of discovery.
- Companies will face punitive damages for violating ethical norms.
 - *See Exxon Valdez Co. v. Baker*, 554 U.S. 471 (2008).

Discovery in Federal Court

General Rules and Principles



FRCP 26(b)(1) – *The Scope of General Discovery*

- Relevant, non-privileged information proportional to the needs of the case “that the disclosing party may use to support its claims or defenses”
- Doesn’t have to be admissible to be discoverable.

FRCP 26(a)(1)(A) – *Initial Disclosures*

- Litigants must disclose/produce:
 - The name, address, and phone numbers of all individuals likely to have knowledge of discoverable material, as well as the subject of that information;
 - A copy/description of all documents, electronically stored information (“ESI”), or other evidence relevant to the case;
 - Insurance policies which may satisfy/indemnify all or part of a possible judgment.

FRCP 26(e) – Supplementation of Disclosures/Responses

- Party must supplement a disclosure or response
 - “In a timely manner” if the party learns that in some material respect the disclosure or response is incomplete or incorrect

FRCP 34 – *Scope of Discovery and ESI*

- Same “scope” applies to ESI as to traditional paper documents.
- Includes not only data in existence at time of request, but could also:
 - Deleted files;
 - *See Antioch Co. v. Scrapbook Borders, Inc.* 210 F.R.D. 645, 652 (D. Minn. 2002).
 - Metadata (if relevant and “necessary”).
 - *See John B. v. Goetz*, 879 F. Supp. 2d. 787 (M.D. Tenn. 2010).

The Duty to Preserve Evidence

- Attaches “when the party has notice that the evidence is relevant to the litigation.”
 - *See Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015).

Applies to ESI:

- Litigants must preserve each unique instance of ESI.
 - But not multiple or duplicative copies.

Penalties for Noncompliance with Discovery Rules

- Prohibition of use of undisclosed evidence at trial;
- Sanctions on the attorney, claims adjuster operator/company, or all the above;
- Dismissal of claims and/or case;
- Negative inference against the noncompliant party;
- Default.

Selected Examples

Ethics & Discovery in Practice



Low Hanging Fruit – *Physical Evidence and Incident Investigation*

- If physical evidence involved in accident is:
 1. Relevant;
 2. Non-privileged; and
 3. Preservation is proportional to the needs of the case;
- Then it must be preserved.
- Ethical issues typically revolve around the failure to preserve evidence.

The Missing Mat



The Briar Patch

- Draft statements
- Implausible statements/reports
- Inaccurate statements/reports

The Gordian Knot

- Computer-based reporting systems
- Draft statements, root cause analyses and incident reports

