A CASE STUDY:

WHY YOU SHOULD CHOOSE YOUR PROFESSIONAL ADVISORS WISELY

The vessel was a 39' sportfisherman, about 12 years old. Built by a well-known manufacturer, it was equipped with twin 502 V8 gasoline engines.

In late spring, after a claim to the vessel's underwriters by the owner, the insurance company's underwriters requested that the engines be surveyed. The engines were found to have suffered from saltwater corrosion and were deemed to be due for a major overhaul. The surveyor noted that the inboard exhaust manifold on the port engine had a rather large salt deposit partially blocking the dry exhaust side of the manifold.

The engines were removed by the marina and shipped to an engine rebuilder for further evaluation. After the engines were dismantled, the surveyor determined that the failure was due to wear and tear of the engine exhaust manifold, riser, riser extensions, and gaskets. The underwriter denied coverage, as "wear and tear" was specifically excluded from the vessel's policy of insurance.

The owner did not want to repower with new engines, choosing instead to rebuild them. Over the advice of the rebuilder, the owner reused some of the original parts rather than replacing all of them. The engines were rebuilt, sent back to the marina which reinstalled them, and the vessel was returned to the owner in September.

Soon thereafter, the owner heard noises coming from the starboard engine and the marina found a bent connecting rod caused by the pushrod guide plate. The condition was corrected and the vessel returned to service.

In June of the following year, the engines again began to malfunction. The marina personnel examined the engines and noted that the engines appeared to have suffered from saltwater ingestion and required significant repairs. In response the owner, via his attorney, gave written notice that marina personnel were not only precluded from performing any work, but from even setting foot on board without the express written permission of the owner or his attorney.

Rumors that the vessel owner was in the process of arranging for the vessel to be towed to another facility and then sue the marina got back to the vice president and general manager of the marina. What would you do? How would you protect yourself? Do you contact your insurance agent when there is no claim yet? Let's assume you tried to call and even wrote to the owner but he refuses to communicate with you. You then talked with the rebuilder, going over his notes and worksheets with him. You know there is nothing he or you did wrong. In fact, all you did, except for repairing the bent connecting rod, was to remove and reinstall the engines. Yet you know a law suit is coming, so what do you do?

By Eugene McDonald, J.D.

David Mandell's article, *A Flawed Relationship with Professional Advice*, (*Marine Business Journal*, April 2005), is right on point and was the impetus for this article. Smart, savvy, and successful businessmen know the value of professional advisers and maintain a good relationship with them. That is one reason why they are successful.

After almost 30 years as an attorney specializing in maritime law, I can tell you that most people exercise poor judgment in choosing an attorney. In the above story the marina's vice president and general manager called me. I am not just an attorney who specializes in maritime law – I am also a trial attorney. The distinction is important. I know excellent maritime attorneys around the world who have never seen the inside of a courtroom. They are excellent in their respective fields, such as maritime finance, representing clients before the U.S. Maritime Commission, and the like.

When I was in law school it was

imbedded in my brain by my professors that lawyers should analyze facts and present a case. Lawyers are not engine rebuilders, marina operators, or marine engineers. Therefore, to successfully prosecute a case, a lawyer must seek out all knowledge and facts regarding the particular field. I like the field of law that I practice in and I like boats, so here is lesson number one: Find an attorney who is not only smart but is savvy, likes what he does, and is not afraid to admit that he does not know everything (but seeks to find the answers wherever those answers may lead).

In this case, I was concerned that the primary evidence that would exonerate my client would float away and be lost forever. In the legal business, we call it "Spoliation of Evidence."

If my client, the marina, did not have the opportunity to further inspect the engines and they were subsequently replaced and the originals later destroyed, the "best evidence" – the engines themselves – would be lost. Consequently, there would be no other provable facts to dispute the owner's subsequent claim, which was coming. I knew that the claim would not be coming from the owner but rather the owner's insurance company as the engines would be replaced and this time they would be "covered." The owner's insurance company would subsequently file a subrogation suit in the name of the owner, against the marina to recoup what it had paid out based upon negligent repairs. The marina would be forced to name the engine rebuilder as an additional third-party defendant and possibly the vessel's manufacturer. This would not be an easy task and would only result in mountainous legal expenses for the marina. I might add that most business owners are not insured for negligent repairs as such coverage requires an additional rider and premium sometimes referred to as completed operations.

It was of no consequence that the owner was directly involved with the rebuilder or that he, over the advice of the rebuilder, chose to reuse some of the original parts. The owner's claim would be paid by his underwriter after which the file would be sent off to the subrogation unit. Once this happened, the marina would lose complete control of the situation as the claims person handling the subrogation claim would be concerned with only one proposition: the engines had to be replaced, the marina's repairs were negligent, the insurance company paid out and wanted to be reimbursed for costs plus interest.

I needed to have those engines inspected before the boat moved. I advised my client to have the vessel arrested. Fortunately, the owner had an outstanding bill with the marina which gave rise to a maritime lien enforceable by having the vessel arrested. A judge signed the order of arrest and the engines were inspected, after which the vessel was released.

I also put the marina's underwriters on notice of a possible subrogation claim. They were glad to get on board and pick up the tab, not only for me but for the filing fees and the appointment of our expert who was a graduate naval architect and marine engineer, as well as a licensed engineer. Most business owners don't know that they have the right not only to request, but also to choose the attorney appointed by the underwriters so long as that attorney is competent in the field for which he will prosecute the case. In this case, the marina's underwriters were more than glad to try to stop a problem before it became one. This is another reason why it is so important to pick the right attorney.

Over the objections of the owner's attorney, information that the owner had not only filed a claim, but his insurance company was all but ready to pay the claim subject to another inspection by its surveyor, was made known in open court after my questioning. The owner also claimed loss of use: past, present and future. I now had a name of an insurance company, an address, a telephone number, a claims adjustor, and a claim number. Armed with this information I could now present the findings of our expert directly to the claims adjustor assigned by the owner's underwriters, thus stopping a subrogation claim against the marina before it started.

In the end, the owner lost. He didn't collect a penny from the marina and worse yet, he didn't even collect from his own insurance company! The whole legal process took less than four months.

In the above case, the owner's insurance company was happy with the result because they now had solid, concrete evidence which was not only useful to them in this case but in future cases of similar import. It also educated them that not all surveyors are alike, just as all attorneys are not alike, and that you get what you pay for.

As for the owner's claim for loss of use, an award was not granted and would not be granted under American Maritime Law for recreational vessels. But who would have known that except for a knowledgeable maritime attorney?