

Liability Concerns Shouldn't Stop SMS



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SMS is essentially a quality management approach to controlling risk. Corporate lawyers tend to obsess about potential liabilities associated with aircraft, so they should love SMS.

Except that they don't. Lawyers also fear records. They hate having information that can be subpoenaed, especially if there is no clear regulatory requirement to retain the records. Corporate counsel for Part 121 and Part 135 air carriers learn to live with these records because a carrier can utilize voluntary disclosure programs to avoid or minimize enforcement action following self-discovered mistakes.

Small FAR Part 91 flight departments don't have access to the voluntary disclosure process used by the air carriers. The only motivation to incorporate SMS into these flight operations is the strong data indicating that these programs do in fact reduce the risk of serious accidents.

What SMS records could frighten a corporate attorney? One of the key elements of SMS according to the FAA is "auditability." A focused SMS program should identify the hazards of a particular flight operation. For example, if the flight department regularly flies into an airport where the runway length leaves little margin for error, the SMS program should identify this hazard and prompt the flight department to document how they are managing the safety risk. The corporate attorney would not like the fact that the company now has

documented knowledge of a risk. Why are we taking the risk? We should stop taking the risk instead of managing the risk.

Once hazards have been identified and safety controls for those hazards have been implemented, the company must audit its on-going use of the safety controls. The FAA's concept of "auditability" encompasses records showing all three steps: 1) Identification of hazards, 2) Management of the identified hazards and 3) Audits of the management process.

These concepts have been practiced by flight crews without documentation for years. Pilots brief and de-brief flights. They brief to identify hazards before an operation. They de-brief to assess how well they addressed those hazards. If their de-briefing identifies possible violations, they might write their NASA forms together.

Sometimes the obstacle to adoption of SMS in a Part 91 flight department is not the corporate counsel downtown, but the pilot in the flight department who has watched enough law-related television to feel like a lawyer. To a cynical pilot, the recordkeeping functions of SMS may look like a plot by upper management to record poor performance.

Corporations and flight departments should view Safety Management Systems as managing safety, period. SMS is not a tool for dealing with management vs. labor issues. As SMS concepts evolved in

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The 310-foot (94 m) ferry was at the end of its 5-mile (8 km), twenty-five-minute trip from Manhattan to St. George, Staten Island. On board were approximately 1,500 passengers, well below the maximum capacity of 6,000. Winds were particularly heavy that afternoon, with gusts of more than 40 mph (64 km/h). The water in New York Harbor was described as "very choppy."

Instead of docking, the ferry angled away from its berth and slammed full-speed into a concrete maintenance pier, a concrete platform supported by pilings. The accident was the worst in the ferry service's 98-year history.

airline world, anonymity was a key element in convincing pilots that they could participate in the program without retribution. In a pilot pool that numbers in the 100s, a pilot can anonymously describe his own mistakes, or the mistakes of others, with some degree of confidence that no one will ever connect the report to his personnel file.

Anonymity in a small flight department cannot work. For SMS to work, the front line participants have to believe in the system. Pretending to implement an anonymous program in a flight department where everyone knows each other will doom the program. Some SMS functions can be outsourced to third parties, but outsourcing cannot create anonymity in a small flight department. If pilots can be convinced to grade themselves and each other in an honest and open fashion, then SMS can provide at least the same benefits that it provides in large-scale flight operations.

With these recordkeeping concerns in mind, I did a survey of case law to find out what battles had been waged by attorneys over Safety Management Systems records. Because I can only research reported cases, I don't have a perspective on cases

that settled out of court or have yet to reach a reported decision. The biggest surprise about the cases was that I did not find disputes over SMS recordkeeping. In fact, I didn't find any aviation-related SMS cases at all. The cases that I found were maritime cases, and the focus on Safety Management Systems had nothing to do with recordkeeping.

The maritime cases raised the issue of whether it is negligent *not to have a SMS program*.

The most interesting of these cases stemmed from the October 15, 2003 crash of the Staten Island Ferry *Andrew J. Barberi* into a pier, which killed eleven passengers and injured many more. In February of 2007, in ruling on liability, the federal judge specifically noted the lack of SMS.

It is not surprising that the Staten Island Ferry's rules were not followed given the haphazard way in which they were disseminated. At the time the accident occurred, the internal rules were neither well understood nor effectively enforced. The Staten Island Ferry had no formal safety management system. There was no single manual that was readily accessible to crew members. There was no mecha-

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-nism to monitor who had received the procedures and at what time. And there was no system for ensuring that the rules were actually obeyed....Instead, according to Captain Gansas, "there was 'on the job' training and the policies and procedures were passed down from the senior Captains and Assistant Captains" by word of mouth.

The court noted, by way of criticism, that the Washington State Ferries, the largest ferry operator in the United States, has a Safety Management System that had identified the danger that led to the crash of the *Andrew J. Barberi*.

This and other maritime cases wrestle with the legal concept of industry standards. Once SMS becomes an industry standard for Part 91 flight departments, those operations that don't have SMS appear negligent for not living up to the standard. At this point in the evolution of SMS, anecdotal evidence suggests that most flight departments at least have a book about SMS on the shelf. Depending on how a survey was conducted, we may have already reached the point that SMS is reported to be an industry standard. The real work now for flight departments is to take the SMS book off the shelf and do the ongoing self-assessment that makes these programs worthwhile.



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