



# Disaster Response -- Don't Forget ESI

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# Disaster Response -- Don't Forget ESI

- **Possible Crises**

- Serious accident or injury
- Natural Disasters
- Disease or Pandemic
- Terrorist Threats
- Activism, on-site or online
- Environmental
- Crime by employees or volunteers
- Workplace violence



# Response to Disasters

## 1. Gather Background Details

- Secure accident site and restrict access
- Determine type and extent of incident and damage
  - What happened? Get all details
  - Evaluate normal operating procedures

# 1. Gather Background Details

- Identify witnesses and isolate
  - Preliminary interviews as soon as possible
  - Remember to ask about sources of ESI and other documents
- Identify other key players
  - Interview as soon as possible

# 1. Gather Background Details

- Where did event occur? Get precise description and location
  - Site visit/inspection as soon as possible
- Review precursor events
  - Similar accident ever occur there?
- Describe the response to the accident, thus far
- Always keep an eye out for sources of ESI



## **2. Post-Accident Logistics and Coordination**

- Security of accident site
- Security of command center
- Secure, isolated facilities for the families of any victims
- Only authorized individuals employed by the employer AND approved by counsel should prepare investigative documents and related reports

## 2. Post-Accident Logistics and Coordination

- Dealing with the press
  - Identify company media point person, or appoint one
  - What procedures in place for handling media inquiries?
- Analyze contractual issues
  - Make *force majeure* claims?
- Always keep an eye out for sources of ESI



### **3. On-Site Investigations**

## **So Begins the “Blame Game”**

- Local/State/Federal Law Enforcement
- Government agencies
  - OSHA
  - EPA
  - MSHA
  - FAA
  - NTSB
  - USCG





### 3. On-Site Investigations

- Insurance carriers
  - Notice(s) sent?
  - Alert coverage counsel
- Plaintiff's Attorney???
  - The reality is that every serious accident is a potential civil action



### 3. On-Site Investigations

- Plaintiff's attorneys probably would want to view the scene at the time of the initial investigation
- Make the best record possible
- May not be physically present, but it is as if he or she is!

## SPOLIATION

### 3. On-Site Investigations

- Involve outside experts?
  - Be prepared for “disaster chasers”
- Remember ESI!
  - IT recovery
- Anticipate document requests
  - Any document requests? Provided?

### 3. On-Site Investigations

- Never leave the inspector unaccompanied at the worksite!!
  - Take comparative samples
  - Replicate drawings, measurements and photos
  - Don't allow anyone to perform “demonstrations” for the inspector
- **BTW: You are creating ESI!**

### 3. On-Site Investigations

- Anticipate witness interview requests
  - Who is preparing interviewees for interviews?
  - Only prepare written statements at direction of counsel (to maintain privilege)
  - Try to get workers' consent to be present during interviews (or get copies of their statements)
  - Ensure that a record is made or that good notes are taken



### **3. On-Site Investigations**

- Need to be thinking about possible impact of interviews on:
  - Civil litigation
  - Other governmental investigations
  - Possible criminal investigation
  - Stockholder derivative/class action suits



### 3. On-Site Investigations

- Avoid any false statements or knowingly giving false information

**NO FALSE STATEMENTS – EVER!**

## 4. Preservation of evidence

- Always keep an eye out for sources of ESI
- Implement crucial litigation hold(s)
- Assemble an e-discovery response team to help take care of your ESI preservation duties
  - Chain of custody and control issues – who will be your witness?



## 4. Preservation of evidence

- Handle the unique demands of preserving different types of ESI, such as:
  - Internet (website updates and blogs)
  - Social media
  - Text messages
  - Voice mail
  - Instant messaging
  - Backup tapes
  - Laptops, Netbooks, portable hard drives, and memory sticks

## 4. Preservation of evidence

- Focus preservation requests/litigation hold requests to client and matter at issue
- Understand the factors that trigger the duty to preserve relevant ESI
  - The duty to preserve evidence arises when a party reasonably anticipates litigation

## 4. Preservation of evidence

- Create company-wide awareness of the need to preserve relevant ESI
- Need to image hard drives or at least emails and 'My Docs' of key players?
- Avoid any allegation of or concern about obstruction of justice, tampering with evidence, falsification or alteration of records that are required by law to be kept for government agencies, etc.
- More in depth witness interviews

## **5. Start Preserving Third Party Information**

- Try to get copies of police, EMR, coroner reports ASAP
- Save Internet and other media coverage
- Investigations by others
- Freedom of Information Act (or state law equivalents) Requests



## 6. Early Evidence Assessment and Strategies for Search, Retrieval and Review

- Never too early to start

## 7. Legal Aftermath: Crime & Punishment

- Many regulated industries involve potential criminal violations:
  - Violations of regulatory standards can be punishable by incarceration and/or monetary criminal penalties
  - Providing false statements or documents can be punishable by incarceration and/or monetary criminal penalties
  - Imprisonment also possible where there is conspiracy or obstruction of justice
  - State officials can prosecute under criminal statutes – e.g. negligent homicide, manslaughter, reckless endangerment, assault and battery

## **8. Internal investigation? Might be good idea**

- Define scope of investigation
- Select and brief investigative team, and make work assignments
- Interview witnesses
- Obtain evidence

## 8. Internal investigation? Might be good idea

- Analyze data (including police and government reports, autopsies, etc.)
- Determine causation and remedial measures
- Conduct post-investigation briefing
- Prepare summary report



## 8. Internal investigation? Might be good idea

- Inform everyone with need to know of corrective actions
- Implement actions needed to remediate conditions
- Train/retrain employees
- Follow-up to ensure results achieved to prevent future incidents



## 9. Other Effects

- Diversion of management's attention from our day-to-day business
- Negative media attention
- Negative perceptions about safety record affecting ability to attract skilled labor
- Increased premiums for insurance
- Increasingly strict federal, state and local health and safety laws, regulations and enforcement policies

## **10. Avoid any aggravating circumstances**

- The psychological “blame game”
- Fellow workers frequently blame themselves
- It is important for those participating in any investigation to be aware of these feelings and understand the participants’ grief