

The background of the slide is a photograph of an industrial facility, likely a refinery or chemical plant. It features several large, cylindrical storage tanks or processing units, interconnected by a complex network of pipes and walkways. The scene is bathed in the warm, golden light of a low sun, creating long shadows and a hazy atmosphere. A prominent green rectangular box is overlaid on the right side of the image, containing the main title and subtitle.

Doing Right When Things Go Wrong

Ethical Considerations in Incident Response

Agenda

We've had an event – Now what?

- Immediate Actions
- Initial Response
- Preservation of Evidence
- Litigation Decisions

Practicing Law as an In-House Counsel

- The Rules of Professional Conduct apply to all State Bar members.
- This includes out of state licensed in-house counsel under TEX. DISCIPL. R. OF PROF'L CONDUCT, 5.05(c).

Practicing Law as an In-House Counsel

- A lawyer admitted to practice law in a jurisdiction outside this state, and not disbarred or suspended from practice or the equivalent thereof in any jurisdiction, may provide legal services solely to the lawyer's employer or its organizational affiliates, provided that this jurisdiction does not require pro hac vice admission.
- Only a lawyer who is admitted to practice in the State of Texas may hold out to the public or represent that the lawyer is admitted to practice in Texas.

Duty of Loyalty

Loyalty is an essential element in the lawyer's relationship to a client.

TEX. DISCIPL. R. OF PROF'L
CONDUCT, 1.06, cmt. 1.

Who is the client?

The Organization

A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, [] the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

TEX. DISCIPL. R. OF PROF'L CONDUCT, 1.13 (a).

What is an Upjohn Instruction?

- *Upjohn Co. v. United States*, explained that the attorney-client privilege “exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” 449 U.S. 383 (1981).
- An Upjohn instruction is a disclosure to company employees that legal representation is not extended to the employee, but covers the company only.
- Counsel represents the company in an investigation, not the witness.
- Privilege belongs to the company, not the witness.

IMMEDIATE ACTIONS

First Steps

- Find out the basics of what happened
- Determine if there have been injuries or loss of life
- Contain the damage
- Whom should I involve?
- Interview persons with knowledge
- Preservation of evidence
 - Physical Evidence Preservation
 - Accident Documentation Checklists and Investigation
 - E-Discovery Preservation and Issues
- Public relations and social media control

Ethics in Investigation – Competent and Diligent Representation

A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

- (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
- (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

TEX. DISCIPL. R. OF PROF'L CONDUCT 1.01(a).

Ethics in Investigation – Competent and Diligent Representation

- Counsel must be competent in legal issues surrounding accidents
- Consider retaining subject matter experts early in an investigation to understand the factual issues and circumstances to inform legal assessments
- Engage competent outside counsel early in an investigation

INITIAL RESPONSE

What type of incident is it?

- Immediate response does not require minutia, but a general understanding of what happened is necessary for the correct entities to be notified

Who do I call?

- This depends on the type of incident
- National Response Center?
- Local fire and police departments?
- OSHA?
- Legal?
- Family communications?
- Insurance broker and insurer?

Practice tip: Reference the Catastrophic Response Checklist which is available upon request.

Required Reporting

- In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

TEX. DISCIPL. R. OF PROF'L CONDUCT, 4.01.

- This includes
 - Government investigators
 - Other companies involved
 - Insurers

Assemble the Team

- Attorneys
- Company operations
- Claims
- Identify experts
- Media Consultant

Witness Statements and Interviews

Under Texas Disciplinary Rule of Professional Conduct 4.02, in-house counsel must not communicate with a party they know is represented by an attorney:

- Without the consent of the party's attorney
- Unless authorized by law or a court order to communicate directly with the party

Witness Statements and Interviews

The human memory is fallible

- When able, make sure to talk to anyone and everyone that has information regarding the incident
- Formal interviews will undoubtedly happen at a later date, but it is important to talk to everyone, ask questions, and take notes

Upjohn Instruction

- Provide an oral instruction before the interview
- Ensure the witness understands the instruction
- Create a written record that the instruction was discussed

Practice tip: Every investigation is different. Analyze the circumstances of the incident to provide a proper warning.

Witness Statements and Interviews

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. See TEX. DISCIPL. R. OF PROF'L CONDUCT 3.03, 8.04(a)(3). The prohibition on dishonesty applies to all communications even when you are not the one making the statement.

Witness Statements and Interviews

Oral Statements and Interviews

- Government responders should not talk to any personnel without an attorney present
- Even better, an attorney should interview the person beforehand, so nothing is a surprise
- This can double up as an opportunity for the witness to draft a written statement

Witness Statements and Interviews

Written Statements

- Written statements will likely be required by government agencies for their investigation
- The statements do not have to be drafted in the presence of any investigators
- The statements can be drafted and signed at another time

Helpful Hints

- Document the name, affiliation, and contact details of everyone you meet
 - Follow-up interviews may be necessary
- Take notes of everything
 - Note any witnesses' refusal to sign or initial the statement

Helpful Hints

- Practice the company response plan in drills to ensure when something happens everyone knows what to do and who to contact
- Advise witnesses in a nonthreatening manner that making a false statement could result in a criminal offense

Is the Investigation Privileged?

- For an investigation to be privileged, it must be made in the anticipation of litigation—to enable counsel to provide legal advice.
- If performed in the ordinary course of business, the investigation will not be protected.

In re Fairway Methanol LLC, 515 S.W.3d 480, 491 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

If privileged, counsel cannot reveal confidential information.

TEX. DISCIPL. R. OF PROF'L CONDUCT, 1.05(b).

Is the Investigation Privileged?

- Attorney-Client Privilege; TEX. R. EVID. 503(b)
 - Confidential communications between attorneys and clients (or their representatives) made to facilitate the rendition of professional legal services to the client

Is the Investigation Privileged?

- Work Product Protection; TEX. R. CIV. P. 192.5
 - Communications or material prepared, or mental impressions developed, in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents
 - Attorney mental processes are "core" work product and not discoverable

What is Privileged?

- Texas and Federal Courts apply the subject matter test from *Upjohn*
- The subject-matter test protects a communication made by an employee at the direction of a corporate superior for the purpose of securing legal advice

What is Privileged?

- Attorney-client privilege extends to any corporate employee, if:
 - (1) The communication is made at the direction of the employee's superiors in the corporation; and
 - (2) The subject matter is within the scope of the employee's duties

In re Fairway Methanol LLC, 515 S.W.3d 480, 487 (Tex. App.—Houston [14th Dist.] 2017, no pet.)
- The privilege applies to communications between the company and outside counsel

In re Fairway Methanol LLC, 515 S.W.3d 480 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

Helpful Tips

- Educate employees about importance of writing in an email whether they are relaying or seeking legal advice
- Limit recipients of privileged information
- Educate employees on the importance of not forwarding legal advice

PRESERVATION OF EVIDENCE

The Duty to Preserve

- A duty to preserve arises when: (1) a party knows or reasonably should know that there is a substantial chance that a claim will be filed; and (2) that evidence in its possession or control will be potentially relevant to that claim. *Adobe Land Corp. v. Griffin*, L.L.C., 236 S.W.3d 351 (Tex. App.—Fort Worth 2007, pet. denied).
- In federal court, the duty to preserve has been found to attach to items that a party has the right, authority, or practical ability to obtain. See, e.g., *Crown Battery Mfg. Co. v. Club Car, Inc.*, 185 F. Supp. 3d 987 (N.D. Ohio 2016); *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009).

The Duty to Preserve

- A party that has a duty to preserve evidence has a duty to exercise reasonable care in preserving it. *Clark v. Randalls Food*, 317 S.W.3d 351, 357 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

What Triggers the Duty to Preserve?

- Reasonable anticipation of litigation or investigation
- Possible triggers:
 - Unequivocal threat of litigation
 - Specific demand to preserve
 - Catastrophic incident
 - Cease and desist letter
 - Escalation of a dispute to legal department
- Fact-sensitive assessment
- The duty will most likely arise before a claim letter or lawsuit

Ethical Considerations in Evidence Preservation

- A lawyer shall not knowingly make a false statement of material fact or law to the tribunal.

TEX. DISCIPL. R. OF PROF'L CONDUCT 3.03 (a)(1).

- A lawyer shall not falsify evidence or assist a witness to testify falsely.

TEX. DISCIPL. R. OF PROF'L CONDUCT 3.04 (b).

- In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

TEX. DISCIPL. R. OF PROF'L CONDUCT 3.02.

Ethical Considerations in Evidence Preservation

- A lawyer shall not unlawfully obstruct another party's access to evidence—unlawfully alter, destroy or conceal a document or other material.

TEX. DISCIPL. R. OF PROF'L CONDUCT 3.04 (a).

- Texas makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See TEX. PEN. CODE, §§ 37.09(a)(1), 37.10(a)(3).

TEX. DISCIPL. R. OF PROF'L CONDUCT 3.04, comment 2.

What if Evidence is Not Preserved?

- Spoliation Claims
- Bad Faith
- Adverse Inference
- Dismissal
- Waiver of Privilege

Preservation Letters

- In a major event, it is likely that other claimants or parties will send evidence preservation letters to you
- It is equally important to submit letters to parties that will have evidence to support your position and case

Preservation Letters

- Be sure to include in the preservation letter a request for all evidence to be preserve
- Also, remember to secure your own evidence, including lines, failed equipment, electronic device information, emails, etc.

Electronically Stored Information Preservation

Address preservation immediately

Confirm active supervision of legal holds

Identify key players and ESI locations

Assess agreed search term protocols

Custodian interviews may be necessary

Routine deletion may need to be suspended

Confirm the process is defensible and documented

Counsel may need to amend and reissue the hold

Reassess key players

Oversee compliance. Monitor. Audit.

Types of Electronically Stored Information

- Email
- Word Processing Files
- Spreadsheets
- Databases
- Web Pages
- CAD Drawings
- Instant Messages
- Videos
- Voice Mail
- PDFs
- Image Files
- System Files
- Social Networks: Facebook, Twitter, YouTube

Electronically Stored Information

Courts increasingly expect parties and their counsel to assume an active supervisory role in implementing and monitoring litigation holds. Litigants are expected to involve their information technology departments as key stakeholders in the preservation process. In addition, sanctions on parties and their counsel continue to present a significant risk of failing to comply with the ESI requirements of the Federal and Texas Rules of Civil Procedure.

Physical Evidence and Chain of Custody

- Label and tag
- Photograph
- Every step of handling evidence must be recorded in a chain of custody form or log
 - Who collected the evidence
 - When was it collected
 - Note when and to whom the evidence is transferred to
 - Include observation of the condition
- Evidence storage

Helpful Hints

- Develop standardized procedures
- Use tamper-proof labels and seals
- Maintain a detailed log
 - Names and signatures of the person handling
 - Date and time stamps
 - Purpose of handling
- Train investigators and staff

LITIGATION DECISIONS

Review All Relevant Contracts and Insurance Policies

- Identify every contractor that was involved in the work
- Review all of the contracts
 - Indemnity obligations?
 - Legal defenses?
- Identify all possible types of insurance
 - Spot coverage issues

Evidence in Litigation

- Spoliation is the improper destruction of, failure to produce, or failure to explain the non-production of evidence relevant to a case. *Brewer v. Lennox Hearth Products, LLC*, 601 S.W.3d 704, 722 (Tex. 2020).
- The Texas Supreme Court held that a spoliation analysis involves a two-step judicial process: (1) the trial court must determine, as a question of law, whether a party spoliated evidence, and (2) if spoliation occurred, the court must assess an appropriate remedy. *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 14 (Tex. 2014). “Courts have broad discretion to utilize a variety of remedies to address spoliation, including the spoliation instruction.” *Id.* at 17.

Evidence in Litigation

- The Texas Pattern Jury Charge provides the following Instruction on Spoliation:

[Name of spoliating party] [destroyed/failed to preserve/destroyed or failed to preserve] [describe evidence]. You [must/may] consider that this evidence would have been unfavorable to [name of spoliating party] on the issue of [describe issue(s) to which evidence would have been relevant].

Social Media Considerations

- A well-known example involved the surviving husband in a wrongful death case who shared a picture of himself on Facebook in which he was drinking a beer and wearing a t-shirt that read:

“I ♥ Hot Moms.” His attorney instructed him to delete this picture, but not before it was spotted and obtained by defense counsel, ultimately resulting in an adverse inference instruction to the jury and a fine of more than \$700,000.

See Allied Concrete v. Lester, 285 Va. 295, 302 (2013).

Social Media Considerations

- Attorneys may not make a false statement of material fact to a third person. TEX. DISCIPL. R. OF PROF'L CONDUCT 4.01.
- Attorneys are prohibited from communicating with a represented opposing party about the subject of the representation. TEX. DISCIPL. R. OF PROF'L CONDUCT 4.02.
- Taken together, these rules prohibit friend requests to represented witnesses

Social Media Considerations

The New Jersey Supreme Court's Disciplinary Review Board concluded that an attorney should receive an admonition for directing a subordinate to "friend" an adverse, represented party on Facebook. *In re John J. Robertelli*, No. DRB 19-266, No. XIV-2010-0485E (Disciplinary Review Board Apr. 30, 2020).

The Philadelphia Bar Association Committee issued an opinion stating that a friend request from an attorney to a third party made without identifying himself as counsel would violate RPC 8.4(c) because the planned communication with the witness was deceptive.

Ethics in Investigation

Behaving professionally involves more than following the minimum rules of conduct. It involves following standards of behavior. Such violation may not result in court-ordered penalties, but nonetheless, have adverse consequences.

The Liskow logo features the word "Liskow" in a white, sans-serif font. A small green leaf-like icon is positioned above the letter "i".

Liskow

A large, semi-transparent green rectangular overlay covers the right side of the image. The word "Questions?" is written in white, bold, sans-serif font in the center of this overlay.

Questions?



Michael A. Golemi

Liskow & Lewis

magolemi@liskow.com

713-651-2914



Alma F. Shields

Liskow & Lewis

ashields@liskow.com

713-651-2974