

# Preventing and Managing Chemical Catastrophes: A Practical Guide for In-House and Outside Counsel<sup>†</sup>

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## I. INTRODUCTION

Many small manufacturing clients falsely assume that major catastrophic events happen to industrial giants. To the contrary, many of the catastrophic chemical accidents occur at relatively small facilities. Perhaps due to this misconception, or for other unknown reasons, the level of knowledge and preparation varies from client to client and is typically dependent on the size of production. A catastrophic explosion, fire or release of toxic chemicals, however, will not discriminate based on the company's size or its level of sophistication. Therefore, even small and medium sized operations will benefit from prospective counseling, thorough hazard assessment, and careful preparation for such events. Practitioners' advice to their clients should extend beyond traditional regulatory compliance. As this article demonstrates, the key to a successful preventative program is a thorough analytical process guided by past experiences, outside non-binding recommendations, full knowledge and understanding of the production processes and hazards at the workplace, and careful steps to eliminate or minimize those hazards.

We will analyze the above, not-so-unusual incident in three phases:

- a. Before the incident (Prevention)
- b. Within the first 24 hours of the incident (Immediate Response)
- c. After the first 24 hours of the incident (Review and Follow-up)

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## II.

### PREVENTION AND RISK ASSESSMENT

#### A. *Identifying Hazards at the Workplace*

The natural starting point for any analysis of the potential for a chemical or industrial catastrophe is an analysis of the hazardous chemicals used or stored at the client's facility. The most important development in the OSHA standards was the passage of the Hazard Communication Standards in 1985 (HAZCOM).<sup>1</sup> The HAZCOM law requires that the manufacturer and supplier of a chemical must provide material safety data sheets (MSDS) and appropriate container labeling for hazardous products. As a result, this information is now readily available at most work places.

The first step in managing chemical hazards should be a careful analysis of the hazardous chemicals known to be present at the workplace. The OSHA mandated written hazard communication program should be available and a list of chemicals used in the workplace or at individual work stations should be reviewed.<sup>2</sup> The same chemicals found on the list of hazardous chemicals should match up to appropriate MSDS for the materials used or stored

<sup>1</sup> Occupational Safety and Health Standards, 29 C.F.R. § 1910.1200 (2008).

<sup>2</sup> 29 C.F.R. § 1910.1200(e)(i).



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at the facility. Chemicals must be evaluated under OSHA's HAZCOM law to determine if they are "hazardous."<sup>3</sup> Any chemical that is either a "physical hazard" or a "health hazard" is considered a "hazardous chemical."<sup>4</sup> If the intended conditions of the use of a chemical can be expected to involve hazards of elevated temperatures or pressures that may result in the release or creation of another hazardous chemical, those hazards must also be included in the MSDS.<sup>5</sup> In addition to the MSDS for a particular material, one should review technical bulletins, labels, instructions for use, and industry publications concerning the chemical or material.

<sup>3</sup> 29 C.F.R. § 1910.1200(b)(1).

<sup>4</sup> 29 C.F.R. § 1910.1200(c).

<sup>5</sup> See ANSI Z400.1-1998 "Hazardous Industrial Chemicals—Material Safety Data Sheets—Preparation."

The analysis of the information provided by the chemical manufacturers is the beginning, not the end of the analysis. The next step involves a careful analysis of the specific applications and processes in which chemicals are used in the particular work environment. Manufacturers and suppliers are not necessarily privy to this information. Some scrutiny of the manner in which the company uses, handles, and stores the chemical is part of a formal process safety management program that will be discussed in more detail later in this article.

#### *B. Assessing Hazardous Processes at the Workplace*

Of course, trying to predict a hazardous situation for each chemical or mixture of chemicals used in the workplace is not a certain science. Evaluation of the risks requires an identification of the hazard, and also an assessment of the hazard in terms of its nature and likelihood. In many instances, a walk-through of the plant is a good starting point because some potentially hazardous areas can be identified visually. Operations that create varying degrees of heat, dust or fumes should be the natural points of interest.

A clear understanding of the work processes and operations is critical to an accurate analysis and identification of potential hazards. Interviews with operators, supervisors and maintenance employees will reveal details that will assist in recognizing the typical hazards presented during normal operation as well as atypical situations. While this analytical work can and should be done by outside consultants or those familiar with the operations, an attorney who has a working knowledge of these processes can provide much better counsel when something does go wrong.

A review of historical documents is also warranted. Prior accident or near-miss reports provide a valuable tool for a better understanding of the types of mishaps and dangerous situations that may arise in the future. Equipment maintenance records may reveal chronic problem areas or a potential for future failure. Government hazardous waste permits and environmental emission reports may provide clues to future mishaps. Finally, a check of the OSHA website<sup>6</sup> can assist in determining if the business has had prior inspections or citations. The website is also useful for research into similar industries. Searching by standard industrial classifications, or SIC codes, can reveal businesses in a similar industry and the violations for which they have been cited. All of these sources of historical documentation should be reviewed with an eye toward identifying the potential for a major incident.

#### *C. Effective Hazard Communication and Training*

Lack of proper employee training is a common root cause of many chemical catastrophes. For instance, the lack of chemical hazard identification, the corresponding training program,

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<sup>6</sup> Occupational Safety & Health Administration, <http://osha.gov> (last visited Mar. 10, 2008).

and the lack of an EPA-compliant waste management program may be identified as the root causes of an explosion. Effective hazard communication and training of employees will ensure implementation and enforcement of the company's final hazard control program.

In addition to the labeling and MSDS requirements, the OSHA Hazard Communication Standard holds companies responsible for training workers about the dangerous chemicals used in the workplace.<sup>7</sup> Employees must be trained before they begin working with a hazardous chemical or whenever a new hazardous chemical is introduced to the work area. This training is required to provide *effective* information concerning the methods of detecting the release of a hazardous chemical, the physical and health hazards of that chemical, and the measures that the employees can take to protect themselves from such hazards. Training is also required on the labeling and MSDS system and on appropriate work practices and emergency procedures. A review of the written HAZCOM plan and an audit of its effectiveness is an essential first step in preventing chemical hazards in the workplace. Employee training should also include education about job-specific hazards, as well as the general hazards associated with the use, handling or storage of the hazardous materials specific to the workplace. Although standardized training about universal safety concepts is cost-effective and mandatory, it only serves as a foundation for more detailed training about specific hazards and processes at the workplace. A comprehensive training program will ensure the company's effective implementation of safety policies and procedures.

#### D. *Process Safety Regulations*

There are a variety of legal requirements and regulations that apply to chemicals known as "highly hazardous" chemicals, including reactive chemicals. In the aftermath of Union Carbide's Bhopal, India tragedy in 1984, the government became concerned about the potential for a similar chemical catastrophe at a United States chemical plant. In 1992, OSHA promulgated its Process Safety Management (PSM) Standard.<sup>8</sup> The PSM Standard is designed to assist employers in minimizing the consequences of catastrophic releases of "highly hazardous" chemicals, including toxic, flammable, highly reactive, and explosive substances. OSHA relied on sources like the NFPA's Hazardous Chemical Data to develop its list of "highly hazardous" chemicals.<sup>9</sup> If the process, use, storage, handling or manufacturing of such chemicals is above the threshold limits set forth in the appendix, then a PSM is required.<sup>10</sup>

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<sup>7</sup> 29 C.F.R. § 1910.1200(h).

<sup>8</sup> 29 C.F.R. § 1910.119.

<sup>9</sup> For a list of these chemicals see 29 C.F.R. app. A § 1910.119.

<sup>10</sup> 29 C.F.R. § 1910.119(a)(1)(i).

Although the standard currently regulates 137 chemicals and substances with toxic, explosive or reactive properties, some have criticized it as too narrow because there are literally thousands of potentially dangerous chemicals used in industry. The Chemical Abstracts Service (CAS) lists over eight million chemicals and over 235,000 substances that are regulated around the world.<sup>11</sup> Moreover, the OSHA list has not been updated since the standard was originally issued in 1992.<sup>12</sup> Recently, the PSM Standard has come under additional criticism because it fails to include many highly reactive chemicals, some of which have been involved in recent fatal explosions, fires and incidents. Indeed, the U.S. Chemical Safety and Hazard Investigation Board's (CSB) Report, *Improving Reactive Hazard Management*,<sup>13</sup> asserts that over half of the 167 accidents that it reviewed involved chemicals which were *not* covered by OSHA's PSM standard. OSHA has responded with some initiatives, but additional work is needed.

The PSM Standard is a performance standard that requires the workplace to follow a fourteen-step safety program. One portion of that standard requires the employer to conduct a process hazard analysis, which OSHA defines as "an organized and systematic effort to identify and analyze the significance of potential hazards associated with the processing or handling of highly hazardous chemicals."<sup>14</sup> The hazards of the particular process must be identified and the necessary safeguards set forth. It is the failure to conduct a process hazard assessment that has been identified by the CSB as a root cause of many of the serious incidents they have investigated.<sup>15</sup> Regardless of whether the particular chemicals are listed, it is good practice to recommend the voluntary development of PSMs or other industry specific process hazard analyses to companies that use chemicals in significant quantities.

In 1996, the E.P.A. promulgated its Accidental Release Prevention Requirements: Risk Management Programs (RPM).<sup>16</sup> In this standard, the E.P.A. identified covered substances based on toxicity and flammability, but not chemical reactivity. The law requires that for each process that uses the listed chemicals, there must be a hazard assessment, a prevention program and an emergency response program. The hazard assessment must evaluate the past accidental releases of regulated substances, including a five-year history of accidents involving the process above the threshold amounts. It must include an off-site consequence

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<sup>11</sup> See Chemical Abstracts Services, <http://www.cas.org> (last visited Mar. 10, 2008).

<sup>12</sup> Process Safety Management of Highly Hazardous Chemicals, 57 *Fed. Reg.* 6356-01 (Feb 24, 1992).

<sup>13</sup> Chemical Safety & Hazard Investigation Board, Hazard Investigation: Improving Reactive Hazard Management, Report No. 2001-01-H (Oct. 2002). *available at* [http://www.csb.gov/completed\\_investigations/docs/ReactiveHazardsInvestigationReport.pdf](http://www.csb.gov/completed_investigations/docs/ReactiveHazardsInvestigationReport.pdf).

<sup>14</sup> 29 C.F.R. app. C n.4 § 1910.119.

<sup>15</sup> See Chemical Safety & Hazard Investigation Board, <http://www.csb.gov> (last visited Mar. 10, 2008).

<sup>16</sup> EPA Air Programs, 40 C.F.R. § 68.

analysis which includes a worst case scenario. This means that the business must consider the off-site consequences of a release of the largest quantity of the substance from a vessel, or for flammables, a vapor cloud explosion.<sup>17</sup> As noted, a related prevention program designed to stop accidental releases and an emergency response program, if one occurs, must also be submitted in the written RMP documents. The development of these documents can be problematic for companies, especially after an incident occurs. Nonetheless, they are required under the regulations.

In many ways, the RMP requirements include the same basic elements of OSHA's PSM Standard. The major difference is that the PSM Standard applies to the workplace and employees, while the RMP program also requires a hazard assessment that considers the off-site consequences of an accident. The RMP reports, as noted above, are required to be submitted to the CSB and also to local and state emergency response teams. Although the two lists of applicable chemicals are fairly similar, the EPA's list contains more toxic chemicals, fewer flammables and explosives, and no reactive chemicals.

In addition to these government-mandated programs, several industry groups have published chemical process safety guidelines, many tailored to particular industries. For example, the American Institute of Chemical Engineers (AIChE), the American Chemistry Council (ACC), and the National Association of Chemical Distributors (NACD), each have standards that should be reviewed, especially if your client is a member of the organization. Following the Bhopal incident, the AIChE established the Center for Chemical Process Safety (CCPS), which publishes various safe process guides for particular industries.

A major criticism of the EPA and OSHA programs is that they are limited only to organizations that use, handle or store large quantities of highly hazardous chemicals. As can be observed from the CSB investigations, many tragic chemical incidents occur each year at facilities that use much smaller quantities of these chemicals. Conducting a workplace process hazard assessment in these facilities is clearly warranted and a good practice for an organization focused on prevention and safety. In contrast to the public nature of an EPA required RMP report, counsel could seek a similar report, but without the need to release it to the government and public surrounding the plant facility. In the event an accident does occur, these programs will only assist in the defense of later claims and suits.

#### E. *Environmental Reporting*

Another source of information about chemical hazards in the workplace is in the environmental reports required to be filed in most states and with the federal government. A manufacturing facility that uses more than the threshold amounts of any of over 300 listed toxic chemicals has a duty to comply with the provisions of Title III of the 1986 Superfund

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<sup>17</sup> 40 C.F.R. § 68.3.

Amendments and Reauthorization Act (SARA Title III).<sup>18</sup> The law requires that a MSDS for each chemical or a list of hazardous chemicals be provided to the Local Emergency Planning Commission (LEPC) and the local fire department.<sup>19</sup> Notification provisions of the law also mandate that private industry notify the community immediately following any emergency releases of toxic chemicals. A list of the chemicals considered "hazardous" or "extremely hazardous" substances is also provided within the statutes.<sup>20</sup> The overall purpose of these regulations is to inform the public and emergency responders of the risks that may be present in the event of an accident. Despite the threat of huge penalties (\$25,000 per day), many small companies fail to comply with these requirements. These regulations are important not merely for compliance purposes, but because they serve as a useful tool in prompt and effective management of an emergency situation.

SARA reporting is compiled annually into one large report known as the "Toxic Release Inventory," (TRI). The plant should have a "Form R" for each listed chemical that is manufactured, processed, handled or otherwise used in excess of the threshold levels. The EPA's website currently provides the TRI reports collected through the year 2006.<sup>21</sup> While this information is useful, it is only aggregate information.

Another source of data that should be reviewed is any report filed with the E.P.A. concerning any past spill or accident. Under the Resource Conservation and Recovery Act of 1976 (RCRA),<sup>22</sup> the E.P.A. promulgated extensive regulations dealing with the handling and disposal of toxic and hazardous waste. RCRA reporting or permits will give counsel an idea of the types of chemicals or materials leaving the facility and whether they were designated as "toxic" under those regulations. Also, permits are required if more than small amounts of a hazardous waste are stored on site. Waste generators are also required to conduct formal employee training for all personnel involved in waste disposal operations.

In addition to government reporting, if any, an analysis of many other company documents will assist in preparing a company to avoid chemical incidents. Review contracts with licensed hazardous waste contractors to determine how much waste is being shipped off site. Is the waste tested? Most contractors will provide these services for the waste they transport. Many will also provide employee training about hazardous wastes and their management. That training should be tailored to the particular operation so that it includes dangers of incompatible chemicals and wastes found at the facility.

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<sup>18</sup> Pub. L. No. 99-499 (codified as amended in scattered sections of 42 U.S.C.).

<sup>19</sup> 42 U.S.C. 11021(a)(1).

<sup>20</sup> See 42 U.S.C. § 11002(a).

<sup>21</sup> EPA, <http://www.epa.gov/tri/> (last visited Mar. 10, 2008).

<sup>22</sup> 42 U.S.C. §§ 6901 - 6992.



#### F. OSHA Hazwoper

Does the client conduct operations that involve employee exposure to hazardous waste or substances? OSHA also developed rules concerning employees who may be involved in any hazardous waste clean up or other operations. The OSHA "HAZWOPER" standard,<sup>23</sup> requires employers to develop and implement a written safety and health program for employees who are involved in hazardous waste operations. It requires extensive training for those designated to respond to hazardous waste spills or leaks or those who deal with hazardous waste. Keep in mind that any operation that can be considered the "treatment, storage [or] disposal" of hazardous waste is covered by this standard.<sup>24</sup> The employer must also create an emergency response plan to handle emergencies before they occur. Creation of similar emergency response plans under CERCLA will qualify.<sup>25</sup> Of course, the employer can choose to simply evacuate employees from the danger area when an emergency occurs, as long as that plan is written and so long as no employee is permitted to assist in handling the emergency.<sup>26</sup> In any case, the conduct of any of these hazardous waste operations on site is another point to consider in assessing the likelihood an unintentional release of hazardous chemicals and an ensuing crisis.

#### G. Non-Regulatory Recommendations and Guidelines

One useful, but seldom used, source of non-regulatory recommendations is the United States Chemical Safety and Hazard Board (CSB). The CSB is a non-regulatory organization that investigates chemical accidents in the United States. Unlike traditional regulatory agencies such as OSHA or the EPA, the CSB's purpose is purely investigatory. The United States Congress designed the CSB to be independent of those organizations so that its investigations will, where appropriate, review the effectiveness of existing regulations and their enforcement. Following the models of the National Transportation Safety Board (NTSB) and the Department of Transportation (DOT), Congress directed that the CSB gear its investigations with a view towards prevention of future occurrences. As such, it is a valuable educational tool to practitioners and their clients.

Originally created as part of the 1990 Clean Air Act amendments,<sup>27</sup> the CSB did not become operational until 1998. The CSB investigates a variety of chemical incidents resulting in death, serious injury, substantial property damage, or evacuation. Although it typically

<sup>23</sup> Hazardous Waste Operations and Emergency Response, 29 C.F.R. § 1910.120.

<sup>24</sup> 29 C.F.R. § 1910.120(a)(1)(iv).

<sup>25</sup> See 42 U.S.C. § 11003.

<sup>26</sup> See 29 CFR § 1910.120(q)(1).

<sup>27</sup> Pub. L. No. 101-549 (codified as amended in scattered sections of 42 U.S.C.)

investigates incidents involving extremely hazardous chemicals, it may also investigate less severe accidents. In addition, it is charged with the responsibility of reviewing the EPA-required "risk management plans," known as RMPs, submitted by the users and handlers of certain highly hazardous chemicals. A review of the investigations completed by the CSB shows that it has issued numerous recommendations to government agencies, private companies, trade associations, labor unions and other interested groups. There is no obligation to adopt any of the CSB recommendations, yet they are the principal means for affecting positive change. The CSB staff also tracks each safety recommendation and makes note of satisfactory implementation. These can be found at the CSB website.<sup>28</sup> It is also significant that the findings of the CSB may not be used in evidence in a civil suit for damages so that the potential civil liability does not cause a chilling effect on safety improvements.<sup>29</sup>

The CSB is also authorized to conduct investigations of chemical hazards even when no accident has occurred. In those instances, it can issue a report concerning a particular chemical hazard. To date, the CSB has issued two comprehensive hazard reports. The first was concerning reactive chemicals (2002), and the second was pertaining to nitrogen asphyxiation (2003). The CSB recently completed a third in-depth report dealing with the hazards of combustible dusts.<sup>30</sup>

Often, these investigations occur in response to a series of similar accidents and the CSB makes specific recommendations to avoid their recurrence. The CSB investigation into reactive chemicals, for instance, concluded that OSHA and the EPA should revise federal process safety regulations to better control these hazards. In response, in 2003 OSHA announced an initiative to address reactive chemicals, and the Center for Chemical Process Safety also took steps to develop comprehensive guidelines to improve chemical process safety management. The recent combustible dust report similarly calls for OSHA to implement a special emphasis program dealing with the hazards of combustible dusts. Copies of these in-depth reports can be found at the CSB website.

#### H. *Liability Insurance*

A final area that counsel should consider is the adequacy of liability insurance and building insurance coverage. Although beyond the scope of this article, it is obvious that proper insurance planning is essential for appropriate protection in the event of an occurrence. An annual policy review by a professional insurance broker or agent is recommended. As can be seen by some of the real case examples, a catastrophic chemical accident can result in unlimited potential liability.

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<sup>28</sup> CSB, *supra* n. 13.

<sup>29</sup> 42 U.S.C. § 7412(r)(6)(G).

<sup>30</sup> Chemical Safety & Hazardous Investigation Board, Combustible Dust Hazard Investigation, Report No. 2006-H-1 (Nov. 2006), available at [http://www.csb.gov/completed\\_investigations/docs/Dust%20Final%20Repor%20Website%2011-17-06.pdf](http://www.csb.gov/completed_investigations/docs/Dust%20Final%20Repor%20Website%2011-17-06.pdf).

When reviewing insurance, consider underwriting guidelines or loss control audits conducted by the carrier. Often, a liability insurance carrier will conduct underwriting or loss control audits of a facility. These audits are sometimes made in accordance with an insurance industry protocol or standard. Large liability insurance carriers publish guidelines and standards on topics such as fire protection, sprinkler equipment, material storage, ventilation systems and a host of other topics. Review and analysis of these outside source documents may reveal additional areas of concern.

### III.

#### THE IMMEDIATE EMERGENCY RESPONSE – FIRST 24 HOURS

Despite careful review of chemical use and processes in a plant and adherence to government regulations and industry standards, accidents may still occur. Resulting risks and liability to your client can still be minimized with proper emergency and disaster planning. What is the role of counsel once a chemical accident occurs? If counsel is to have an effective role in dealing with the events following an accident, they must be involved in the preparations and planning efforts before the accident occurs. Familiarity with the plant, its planning for disasters and emergencies, and the legal requirements will make you an asset to your client in times of crisis.

##### A. *Provide First Aid and Medical Attention to Victims*

Any company unfortunate enough to experience a catastrophic incident should first ensure that appropriate first aid is provided or emergency responders are alerted. While many large companies have sophisticated emergency response plans, you will find that many of your clients, unfortunately, do not. Nonetheless, you should review such plans if they exist, or recommend them if they do not. In any case, following the emergency response plan is a good first step in reacting to any serious incident. Call onsite first aid providers or EMS and local fire department, as appropriate. Provide transportation for the injured to a suitable emergency room or clinic.

The accident site should be secured to keep bystanders out and to preserve the scene for investigation. Also, if required to prevent recurrence or further damage or injury to personnel, shut off electrical power, process valves, or other sources of energy to affected areas. Obviously, the priority concern, as it relates to extinguishing fires or stopping the release of a product or other emission, must be for the health and safety of those on or near the site, including employees, contractors, responders and the public. The next level of concern is to avoid further or additional damage to plant and equipment. As soon as possible, and after consultation with counsel, implement any measures that would prevent a recurrence of the accident.

##### B. *Immediately Begin Accident Investigation*

Once the injured have been treated and transported, the designated company individual should begin the accident investigation. Legal counsel should be contacted and steps should be taken at the direction of counsel in anticipation of litigation.

Take written statements from all employees or other witnesses in the vicinity of the accident. Take photographs or videotapes to document the scene. Preserve tangible evidence and real time data recorded during the event and maintained electronically or through the use of computer systems, video surveillance systems, or computer modules used for operating equipment. Do not overlook advisory control and data acquisition systems that record flow pressures, rates and temperatures. Often these sources will provide critical information needed in the subsequent investigation and analysis. More importantly, loss or destruction of this information could later be considered spoliation of evidence.

*C. Notify Management and Counsel in Accordance with Policy*

Many companies have emergency plans and protocols that outline procedures for the notification of company management as well as counsel. It is always a good idea to review these plans with your client and consider the necessity of retaining counsel at the outset. Early and effective command and control of a catastrophic incident is paramount. As mentioned below, identification of a point person for media relations and company response is absolutely essential to effectively dealing with the media.

*D. Provide Any Notifications Required by Law or by Company Policy*

In addition to notifying emergency responders, do not overlook local or federal government requirements of notice of the release or spill of chemicals into the air, soil or water. In addition, if an accident results in a fatality or the hospitalization of three or more employees, OSHA must be notified. Designated employees must then complete an OSHA 101 form or a state first report of injury to the workers compensation officials. Try to keep a separate record to identify measures that can be taken to prevent a recurrence of the event and keep those documents in a file designated as an Attorney Work Product File. Even if it is later determined that they do not qualify for such privilege, setting them aside early in the process can help preserve the privilege where appropriate. Photographs and witness statements should initially be placed in this file and access to the file should be limited to those involved in the investigation and legal counsel.

*E. Prepare for and Cooperate with Government Inspections*

Designate a single point of contact for responding and working with government investigators. Local fire department investigators, OSHA, and state or federal EPA may begin investigations immediately depending on the severity of the incident or number of persons injured. Later, other government and insurance investigators will seek access to the scene and witnesses.

*F. Taking Control of the Media Response*

A catastrophic incident is almost certainly going to attract the attention of local and, perhaps, national media. Creating an effective media strategy will pay dividends down the road when civil and, perhaps, criminal actions are filed. The strategy starts with the development of an effective spokesperson long before there is an actual need. A media training

program will help you identify who can serve as an effective and believable spokesperson. In our media-drenched world, external image is just as important as internal knowledge and effective communications.

#### IV.

##### THE AFTERMATH OF A CATASTROPHIC ACCIDENT – FOLLOW UP

###### A. *Retain Consultants and Experts*

Immediately assess the need for consultants to assist in the accident investigation and begin the search for the best testifying experts in the fields implicated by the incident. Their early input can be invaluable in crafting an effective defense. Consider engineering, environmental and medical causation experts, depending on the nature of the catastrophic event.

###### B. *Enforce Effective Document Hold Orders*

Document hold orders should be issued immediately requiring all personnel to preserve documents of all types, including electronic information that may have relevance to the incident. Those individuals implementing these hold orders must also be aware of the new electronic discovery rules. This is important not only for the purpose of building a defense, but also to ward off sanctions for failing to produce relevant information.

###### C. *Conduct Document Sweeps and Plan for Electronic Document Management from the Start*

The overall cost of litigation can be minimized by efficiently handling the documents and other evidence from the inception of the potential lawsuit. All relevant and potentially discoverable documents should be identified and reviewed as soon as possible. Legal deadlines for responding to requests for production will be short. So, it is essential to get a head start on the process before the requests are formally propounded. Particular attention should be paid to collecting and assessing those documents required to be maintained by state or federal regulations. Documents should be collected, reviewed for potential responsiveness and privilege, and then imaged in a searchable format in anticipation of database or case management software applications.

###### D. *Be Proactive Against a Potential Sanctions Motion*

As we know, trial courts possess the discretion to impose a wide variety of sanctions for discovery abuses, including monetary penalties, attorneys' fees, dismissal of a claim, entry of default judgment, exclusion of experts, and establishment of liability. The purported purposes for discovery sanctions include securing compliance with the discovery rules, deterring other litigants from misconduct, and punishing those who violate discovery orders.<sup>31</sup> In cases of repeated and willful violations of orders, the courts are becoming increasingly

<sup>31</sup> See e.g., *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 161 S.W.3d 531 (Tex. App. 2004).

more willing to impose steeper sanctions in order to meet these goals, and courts of appeals most often defer to district courts' discretion in determining what sanction is just.

Federal Rule of Civil Procedure 37(b), concerning discovery violations, provides that a court "may make such orders in regard to the failure as are just." Those court decisions may include: ordering that the matters be taken as established for purposes of the litigation; refusing to allow the disobedient party to support or oppose certain claims or defenses; prohibiting designated matters from being introduced into evidence; striking pleadings or parts thereof; staying the proceedings; dismissing the action or any part thereof; rendering a judgment by default against the disobedient party; or, treating the misbehavior as contempt of court. Additionally, Rule 37(b) provides that the court "shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure," unless the failure was substantially justified or other circumstances render an award of expenses unjust.

The district courts have broad discretion in determining what sanctions to impose.<sup>32</sup> The appellate courts review their decisions for abuse of discretion.<sup>33</sup> The reviewing court often focuses on whether the sanction imposed appropriately meets the Rule 37 goals of punishment and deterrence.<sup>34</sup> As the United States Supreme Court stated:

If the decision of the Court of Appeals [which found that the district court abused its discretion in imposing sanctions] remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.<sup>35</sup>

One possible sanction is to allow evidence of discovery misconduct to be brought to the attention of the jury. This can result in the imposition of severe punitive damages.<sup>36</sup>

Dismissal is the ultimate sanction and will be imposed only in cases of willful and extreme misconduct.<sup>37</sup> The imposition of a default judgment is not an abuse of discretion in the face of flagrant disregard of discovery orders, even if the appellate court might have chosen a more moderate sanction.<sup>38</sup> In the face of persistent refusal to comply with discov-

<sup>32</sup> *NHL v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (*per curiam*); *Marshall v. Segona*, 621 F.2d 763, 766 (5th Cir. 1980).

<sup>33</sup> *NHL*, 427 U.S. at 642.

<sup>34</sup> *Chilcutt v. United States*, 4 F.3d 1313, 1321 (5th Cir. 1993).

<sup>35</sup> *NHL*, 427 U.S. at 643.

<sup>36</sup> *Pioneer Commercial Funding Corp. v. Am. Fin. Mortg. Corp.*, 797 A.2d 269, (Pa. Super. Ct. 2002) (punitive damages of \$337 million), *rev'd on other grounds*, 855 A.2d 818 (Pa. 2004).

<sup>37</sup> *Payne v. Exxon Corp.*, 121 F.3d 503 (9th Cir. 1997); *Young v. Gordon*, 330 F.3d 76 (1st Cir. 2003).

<sup>38</sup> *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976).

ery requests and orders of the court, "contradicting any inference of accidental oversight or confusion," the measure of default judgment may be the result.<sup>39</sup>

Dismissal is becoming more commonplace as a result of the courts' emphasis on deterring abuses and relieving crowded dockets. Factors that courts consider in determining whether dismissal is appropriate include whether neglect is attributable to an attorney rather than a client; whether the error was grounded in confusion or misunderstanding rather than willful disobedience; whether the other party is substantially prejudiced by the misbehavior; or whether the party is unable to comply, as when the requested information is unavailable.<sup>40</sup> Additional policy factors that may be considered include the public interest in the expeditious resolution of litigation, the court's need to manage its docket, and the policy favoring the disposition of cases on their merits.<sup>41</sup>

The due process clause of the Fifth Amendment places limits on the power of courts to dismiss an action without allowing the parties an opportunity for a hearing.<sup>42</sup> "Nevertheless, when a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion."<sup>43</sup>

Before dismissing a case, the district courts should consider whether less drastic sanctions would satisfy the deterrent aspects of Rule 37.<sup>44</sup> However, it has been held that, in egregious cases in which other sanctions have been imposed but violations continue it is not necessary to consider the alternative of lesser sanctions.<sup>45</sup>

Another sanction that may be applied for failure to abide by discovery orders is to establish certain facts related to the thwarted discovery as established.<sup>46</sup> Again, the repeated failure to abide by discovery orders after ample warning is essential to imposition of a sanction of such severity.<sup>47</sup> In addition, before imposing these measures it is important that the claim or defense which is to be taken as established is not found to be frivolous.<sup>48</sup>

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<sup>39</sup> *S.E.C. v. First Fin. Group of Tex., Inc.*, 659 F.2d 660, 665 (5th Cir. 1981).

<sup>40</sup> *See Marshall v. Segona*, 621 F.2d 763, 766 (5th Cir. 1980) (dismissal of suit was abuse of discretion); *Batson v. Neal Spelce Assoc., Inc.*, 765 F.2d 511, 515 (5th Cir. 1985).

<sup>41</sup> *Payne*, 121 F.3d at 507.

<sup>42</sup> *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

<sup>43</sup> *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976).

<sup>44</sup> *Batson*, 765 F.2d at 516.

<sup>45</sup> *Payne*, 121 F.3d at 508. Where an award of attorneys' fees is made, the court must also articulate a basis for its award. *Batson*, 765 F.2d at 517.

<sup>46</sup> *See, e.g., Ins. Corp. of Ir. Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

<sup>47</sup> *Id.* at 708.

<sup>48</sup> *Id.* *See also* *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710 (3d Cir. 1997) (testimony of plaintiffs' expert witness properly excluded as sanction for flagrant failure to comply with discovery orders that resulted in prejudice to defendant).

The United States Supreme Court has upheld the imposition of sanctions deeming personal jurisdiction of the court established due to the repeated failure to comply with discovery orders.<sup>49</sup> The Court stated two considerations in determining whether an order imposing such sanctions is appropriate: the sanction must be “just,” and it must “specifically relate[] to the particular ‘claim’ which was at issue in the order to provide discovery.”<sup>50</sup> Significant factors included warnings by the district court to the non-complying party that disregard of its orders would result in sanctions, and repeated unmet promises to obey the court’s orders. Because the thwarted discovery related to personal jurisdiction, the penalty of deeming jurisdiction established was sufficiently related to the claim sought to be proved through the discovery.<sup>51</sup>

It is particularly problematic to fail to preserve documents in the face of a court preservation order.<sup>52</sup> It is axiomatic that the imposition of sanctions for destruction of documents is within the trial court’s discretion. In matters such as this—which lie beyond the scope of Rule 37, Federal Rules of Civil Procedure (Fed.R.Civ.P.)—the court relies on its inherent power to regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices.<sup>53</sup>

Moreover, the courts have “a broad canvas upon which to paint in determining sanctions” for destruction of evidence.<sup>54</sup> Although Rule 37 does not by its terms apply to spoliation cases, its precepts are useful in formulating appropriate remedies.<sup>55</sup> Thus, it is imperative that document retention orders be circulated to key employees and an appropriate document policy implemented.<sup>56</sup>

Sanctions against the attorney, rather than the party, also will be awarded if fairness concerns so dictate. In *Chilcutt v. United States*,<sup>57</sup> the Fifth Circuit affirmed the imposition of sanctions against a U.S. Attorney defending the United States in a Federal Tort Claims Act lawsuit involving a litigant who had slipped and fallen at a United States Post Office.

<sup>49</sup> *Ins. Corp. of Ir., Ltd. v. Compagnie Dex Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

<sup>50</sup> *Id.* at 707.

<sup>51</sup> *Id.* at 708-09.

<sup>52</sup> *See Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997).

<sup>53</sup> *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 550-51 (D. Minn. 1989) (internal citations omitted).

<sup>54</sup> *Id.* at 551.

<sup>55</sup> *Id.*

<sup>56</sup> *See In Re Prudential Ins. Co.*, 169 F.R.D. 598, 617 (D. N.J. 1977). (finding that Prudential “has no comprehensive document retention policy with informative guidelines and lacks a protocol that promptly notifies senior management of document destruction. These systematic failures impede the litigation process and merit the imposition of sanctions.”)

<sup>57</sup> 4 F.3d 1313 (5th Cir. 1993).



The attorney repeatedly failed to produce an accident report and accident log that were important to the plaintiffs' case, claiming that he had conducted a search for these items but they either did not exist or did not contain any information related to the premises in question. After repeated warnings that sanctions would be forthcoming if those documents that were available and pertinent were not immediately provided, it came to light that they had been wrongfully withheld. Because several misrepresentations had been made by United States employees and representatives, the court decided to impose sanctions against both the attorney and the United States, including a finding that the plaintiffs' liability case had been established, and awarding the plaintiffs' expenses in attempting to obtain complete discovery. In sanctioning the attorney personally, the court remarked:

Attorneys are professionals. They are, in every respect, officers of the court, and officers of the court must comply with each court order when it is issued – not after two or three warnings to do so and not after lesser sanctions are imposed. "It [should be] universally understood that a court's orders are not to be willfully ignored, and, certainly, attorneys are presumed to know that refusal to comply will subject them and their clients to sanctions."<sup>58</sup>

## V. CONCLUSION

We are in a climate of litigation reform, and public policy favors curtailing the excesses of modern litigation. The abuse of the discovery process is an area of extreme concern due to the implications of protracting litigation and failure to meet the ends of justice. As officers of the court, attorneys must respect and obey the courts' rules and orders. Those that do not should beware. Sanctions can be levied against counsel or the client, and clients should be counseled that to abide by discovery guidelines in good faith is in their best interests. They will thank you for it later.

Today, many of the big plaintiffs' firms use sanctions motions as tools to try to gain a strategic advantage. The sanctions order is a specific goal from the outset, not something

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<sup>58</sup> *Chilcutt*, 4 F.3d at 1324 (quoting *Batson v. Neal Spelce Assoc., Inc.*, 765 F.2d 511, 515 (5th Cir. 1985)); see also, e.g., *Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir. 1993) (attorney fined \$3,000.00 to cover opponent's fees for bringing motions to compel after repeated "indifference to time limits" and "disobedience to court orders"); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365 (9th Cir. 1980) (fine of \$500.00 assessed against government attorney for failure to comply with court-ordered discovery not an abuse of discretion).

that just happens as discovery unfolds. The company involved in a catastrophic event must specifically plan against the ploy of alleged discovery abuses, especially if the case is pending in a jurisdiction where plaintiffs' counsel will likely be given great leeway in discovery.

The scariest proposition is that a company may find itself in a sanctions situation even when there has not been a willful violation of rules or court orders. Plaintiffs' attorneys often propound impossibly large numbers of Requests for Production seeking a wide variety of documents covering an extended time period. Multiple sites may house the requested documents and electronic discovery rules have broadened the nature of the task of recovering and producing those documents. When the company cannot respond in the allotted time, the plaintiff's counsel will rush to court and seek a compelling order and then a sanctions order requesting a Draconian consequence. It can and does happen!

Outside counsel and their clients should take a proactive position at the very beginning to be sure that discoverable evidence is ready for production in the most expeditious fashion so that they do not play into the hands of the plaintiff's counsel waiting for the opportunity to argue spoliation or failure to produce relevant evidence in a timely fashion.

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