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## Only You Can Help Prevent Preservation Issues

By Amanda J. Podlucky, Esq. | October 24, 2016

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An insured's response following an incident often greatly impacts the litigation should a claim or lawsuit arise. Claims professionals and defense attorneys rely on the insured to take proper precautions post-incident and conduct an investigation, complete accident reports, take photographs and gather statements that can be used to defend a claim. Yet, gathering this crucial information and [preserving evidence](#) such as surveillance footage or other materials may be unknown territory for the insured, especially if it is their first exposure to litigation. Oftentimes, the insured will delay reporting the incident, and the longer the delay in putting the insurance carrier on notice, the more difficult the defense could ultimately be.

Meanwhile, a claimant could have already contacted an attorney and started setting up a claim. The claimant's attorney could conduct their own investigation and gather preliminary evidence, providing an advantage over the insured and laying the foundation for time-consuming and costly litigation.

### First Line of Defense

Because claims professionals are at the forefront of claims, and have the knowledge and experience to thoroughly handle claims, it is important that they assist with initial investigation and preservation efforts. If the claims professional is the only one communicating with the claimant's attorney, it is imperative that he or she promptly reports any and all requests to the insured and follows-up to ensure preservation efforts are taken. If surveillance footage is requested, claims professionals should promptly request the footage along with any applications needed to view it. Following a motor vehicle accident, claims professionals should ensure that any vehicles, or parts thereof, are stored and preserved for later inspections. Whether an insured is unsophisticated when faced with the possibility of a claim, or is failing to take proper precautions, it is crucial that claims professionals understand the importance of their initial involvement with the claim in order to help minimize exposure.

Ensuring that a claimant's attorney receives responses to initial requests for information and preservation of evidence will not only send the message that the claim is being taken seriously and properly handled, it will also ensure that spoliation is not an issue down the road. [Failing to preserve evidence](#) that is specifically requested after an incident could lead to serious monetary sanctions, unfavorable presumptions against the insured, or even adverse inference instructions being given to the jury in a case that would have otherwise had strong defenses.

## **Litigation Holds**

Once a claim goes to suit and defense counsel is retained, most insurance carriers have objectives to efficiently resolve the claim. With litigation costs on the rise, carriers are mindful of fees that go along with defending suits and will look to their defense counsel to prepare a litigation budget in order to manage expectations. The quickest way to derail a budget or send an otherwise straightforward case spiraling toward costly headaches is when discovery violations arise due to the spoliation of evidence, particularly in circumstances where the headaches could have been avoided. This is why best practices dictate that all potentially relevant items be preserved and placed under a litigation hold, even when an insured did not receive a formal preservation request or necessarily have a duty to preserve specific potential evidence.

Items that should be placed under a litigation hold may include any post-incident investigative materials along with print, electronic and digital materials created in the normal course of business directly relating to the underlying claim, accident, product or vehicle at issue. These items may be located on company servers, external drives or on devices such as company-issued cameras, cell phones or tablets. It is important that claims professionals consult with local counsel in the jurisdiction where the claim is pending with regard to preservation duties and requirements to ensure their understanding of any obligations. Local counsel can also connect carriers and insureds to electronic discovery providers to assist with the extraction of electronic information when appropriate. Many jurisdictions require that the duty to preserve is triggered when a claim is reasonably foreseeable, although that analysis can vary across jurisdictions, or even among courts, within the same jurisdiction. It is recommended that both the insured and carrier err on the side of caution in gathering and preserving potentially relevant information.

## **Pave the Way Toward Success**

If every claims professional and defense attorney were issued a crystal ball, handling claims and preparing to defend against lawsuits would be much easier and less costly. Unfortunately, both must rely on prompt and thorough claims handling, which starts immediately upon notice of an incident. It is the claims professionals who have the understanding and know-how to help pave the way toward a successful defense by guiding an insured through the crucial post-incident phase of a claim. Their knowledge will also help parties avoid unnecessary and costly issues surrounding the preservation and disclosure of relevant evidence which could significantly impact the ability to successfully defend an otherwise defensible claim.

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