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ATTORNEYS & COUNSELORS AT LAW

Pre-Suit Investigations


What you don't know could hurt your case.

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Today's Presenters

			
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Obstacles, Booby Traps & Landmines

- Every client, carrier, TPA and lawyer wants to avoid surprises.
- By involving an attorney, the majority of the investigation will be protected by the attorney/client privilege.
- The primary goal of a pre-suit investigation is to discover hidden threats to your defense.
- Because we don't have the usual discovery tools to rely on – a pre-suit investigation requires more thought, more creativity and more effort.

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Obstacles, Booby Traps & Landmines


- The reward for this effort is knowledge – and in this case, KNOWLEDGE IS POWER!
- Knowledge is what neutralizes surprise.
- How do we gather that knowledge?

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Why are Pre-suit Investigations Important?


- Gets you ahead and out in front
- Preserves the attorney/client privilege
- Identifies main issues and potential, future issues
- Saves time and money
- Could result in resolution of the claim
- Already prepared, if the claim turns into litigation

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Components of a Pre-suit Investigation


- Identification of key facts
- Identification of key documents and issues
- Identification of potential witnesses
- Need for expert witnesses
- Legal strategy
- Analysis of any expected defenses and potential third-party claims

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Identification of Key Facts


- Contact your attorney early.
- Who, what, why, when, where and how?
- Create a post-accident or post-event report.
- Report is handled by a designated individual for consistency.
- Avoid providing opinions or remedial measures in a post-event report.
- Just provide facts.

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Methodologies


- FOIA – access to public records (not just police investigation, building department records, tax records)
- Online services – Accurant and others provide a wide-angle view of a party's public presence (i.e., ownership of real property, ownership of vehicles, court cases, bankruptcy, known associates)
- Cleveland Index Bureau
- Online court records state; federal bankruptcy proceedings
- Westlaw, Lexis for mentions of specific parties
- Research revealed a claimant's previous lawsuit defended by same law firm but not revealed in conflict check.
- Recording telephone conversations where investigator participates

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Identification of Key Documents & Items


- Photographs
- Videos
- Tangible evidence
- Preservation and Electronically-Stored Information (ESI)
- Alert IT
- **Pro Tip:** send a copy of post-event report to your insurance carrier.

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Identification of Potential Witnesses

- Witness interviews form backbone of pre-suit investigations.
- Establish protections of attorney-client privilege early.
- Differing narratives from top to bottom of organization chart
- Speaking with witnesses when her/his memory is fresh.
- Potential for employees with knowledge to leave company.
- Leads to discovery of other facts, documents and witnesses.
- Identification of friendly, hostile and third-party witnesses.


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Early Retention of Expert Witnesses

- Expert witnesses do more than testify at trial, they help build winning cases.
- Early retention of expert witnesses helps define scope of investigation.
- Leverage expert’s expertise when interviewing witnesses.
- Early input from experts can ensure critical evidence is subject of preservation notice.
- Can assist in identification of friendly, hostile and third-party witnesses


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Early Retention of Expert Witnesses

- Make pre-litigation decisions regarding site and lab exams based on their potential impact in litigation.
- During pre-litigation phase, experts can direct our and opposing side’s investigation, narrowing scope of litigation.
- Potentially qualified privilege for non-testifying expert consultants retained specifically in anticipation of litigation.
- Expert can “guide” opposing experts toward data, studies and other information beneficial to our defense.
- Ensure investigations and examinations are performed according to scientific method.

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Preservation of Evidence & Avoidance of Spoliation of Evidence

- Identification and interviews of key witnesses
- Witness recollection of events better immediately after incident
- Ability to collect all reports and statements prepared regarding this incident
- Ability to collect any inspection reports, store inspection forms and employee schedules


Continued

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Preservation of Evidence & Avoidance of Spoliation of Evidence


- Ability to review and retain all potentially relevant surveillance video
- Ability to inspect scene close in time to when incident occurred
- Ability to photograph scene close in time to when incident occurred
- Avoid potential dangers associated with claimed spoliation of evidence

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Early Evaluation of Liability

- Early analysis of liability for incident
- Key decisions can be made regarding early settlement, potential basis for summary disposition, or potential need for trial of case.
- Key decisions can be made regarding potential areas that need discovery to be flushed out.
- Key decision can be made regarding potential helpful and harmful evidentiary issues.

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Identification of Defenses & Potential Third Parties

- Identification of potential third parties involved in incident (i.e., vendors, subcontractors, customers, etc.)
- Identification of potential source of express contractual indemnification (i.e., landlords, tenants, vendors, product manufacturers, etc.)
- Ability to put potential third party or potential source of indemnification on notice early in the potential litigation process
- Ability to potentially avoid a lawsuit by identifying potentially responsible party to plaintiff's counsel
- Ability to determine non-parties/Notices of Non-Party Fault



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Key Takeaways

- Attorney involvement in pre-suit investigations creates the attorney/client privilege early and can help protect much of what is learned during the investigation.
- Attorney involvement often results in managers and staff prioritizing investigation follow-up
- Ability to preserve evidence and lock witnesses into statements early.
- An early review of the issues involved to assist with legal strategy.

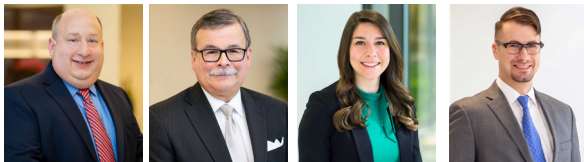


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Questions?



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Have a Great Day

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