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Navigating through the Complexities of an Arson Investigation

I. Essential Members of Investigative Team

Special investigators have always played a lead role in an insurer's investigation of possible arson. A special investigator assists a claims handler in obtaining evidence of possible motive and opportunity. However, due to the plethora of information that can be obtained through digital and financial information, any arson investigative team must include a forensic digital analyst as well as a forensic accountant.

A forensic digital analyst can extract and review an insured's mobile devices to obtain a wealth of information regarding an insured. The information that resides on a mobile device can include:

- Incoming, outgoing and missed call history
- SMS text, application based, and multimedia message content
- Photographs, videos and audio files, including some voicemail messages
- Internet search history
- Geolocation data, cell phone tower related data as well as the location of Wi-Fi connections

While a forensic digital analyst reviewed digital data, a forensic accountant reviews and analyzes an insured's financial information to determine whether the insured had a financial motive at the time of the fire. Historically, adjusters and their managers in conjunction with a fire committee review the evidence obtained during the investigation to make a decision regarding any financial motive.

Now, insureds and their attorneys are increasingly questioning whether an insurance company's representatives have the necessary expertise as well as sufficient evidence to render an opinion regarding an insured's possible financial motive. As a result, insurance companies are hiring forensic accountants during the claims process to analyze the financial information and render an expert opinion regarding whether a financial motive exists.

II. Examinations Under Oath

Without a doubt, the examination under oath is clearly the most important avenue available to an insurer in an arson case. The value of this contractual tool in a policy of insurance was recognized over a hundred years ago by the United States Supreme Court in *Claflin v. Commonwealth Insurance Company,* 110 U.S. 81, 3 S.Ct. 507, 28 L.Ed. 76 (1983). Demanding an examination assists the investigation, adjustment and even the settlement of valid claims while also facilitating the development of potential subrogation claims against third parties. As a result, insurers should seek to examine an insured early in the investigation of the fire claim.

A key to any examination under oath is identifying, with particularity, the documents and information the insured is requested to bring the examination. In connection with claims in which the intentional act of arson is suspected, an insured should be demanded to provide documents that may provide circumstantial evidence of either motive and/or opportunity. Financial records can assist in determining whether a financial motive existed for an insured to intentionally set fire to property covered by a policy of insurance. A review of tax returns, bank statements, credit card statements, IRA statements and loan documents can provide a picture of the insured's financial condition, and thus a financial motive to have set the fire. An insured's social media accounts as well as call and text history of the insured's cell phone may also provide evidence of a possible motive and opportunity.

Realizing the potential incriminating evidence that could be obtained through a cell phone, an insured might "lose" his cell phone. What consequences might a court assess because of an insured losing his cellphone or otherwise failing to preserve the cellular data? A federal court has answered that question, holding the insured can be sanction for spoliation of the evidence.

The fraud being investigated by the insurers in *Corey Brown v. Certain Underwriters at Lloyds, London, et al.,* Case No. 16-CV-02737 (ED Penn. June 9, 2017) was an incendiary fire. The two insurers Certain Underwriters at Lloyds, London and Underwriters of Lloyds (collectively "Lloyds") suspected that the insured Corey Brown started the fire. When Lloyds denied Mr. Brown's claim, he filed suit. During discovery, Lloyds requested the insured produce his cell phone. Just before his production, Mr. Brown filed an objection claiming that he lost his cell phone "months ago." Lloyds then filed a motion seeking sanctions against Mr. Brown for spoliation of the evidence.

To demonstrate the grounds for spoliation sanctions, Lloyds argued it was prejudiced by the loss of location information contained in the phone as well as the substance of text messages and calls received or made at the time of the loss. The court concluded that the insured had control over his cell phone, and the information lost would have been "highly relevant to determine the merits" of the claim for insurance proceeds as well as Lloyds' counterclaim for fraud. Mr. Brown argued that there was no prejudice, because Lloyds had "ample opportunity" to examine the phone but declined to do so. The court rejected that argument finding Lloyds was "no less prejudiced by the loss of relevant evidence because they could have chosen to request" the cell phone at an earlier date. The court noted that Mr. Brown should not have been surprised by the request for his cell phone. At his examination under oath taken two years before, Lloyds specifically requested that Mr. Brown preserve any evidence that was on his cell phone for possible discovery. In addition, Lloyds requested the cell phone information within the time permitted for discovery.

Having found that the loss information was relevant, the court then considered whether Mr. Brown intentionally suppressed or withheld the evidence. Mr. Brown produced an affidavit in which he swore that he lost the phone, and "did not intentionally dispose of it." The court rejected that self-serving affidavit finding:

> *…that Mr. Brown's undetailed account of losing his phone is not credible and that, rather than innocently losing his phone, Mr. Brown made a deliberate choice to withhold it from production. In making that finding we note that Mr. Brown and his attorney did not notify Lloyds of the loss of relevant evidence that he had a known duty to preserve until hours before the requested time of production, even though its loss had supposedly been known for at least four months.*
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> *Mr. Brown has offered zero explanation as to how he came to lose his phone. He has also offered no indication that he took even rudimentary steps to preserve the evidence that existed on his phone, as was his obligation, or to take any measures to find the phone after it was somehow lost.*

Because of the insured's action, the Court found that Lloyds was prejudiced, and such prejudice was significant "enough to weigh in favor of sanctions." While Lloyds wanted the court to issue the ultimate sanction - the dismissal of Mr. Brown's claim - the court elected to issue an adverse jury instruction as it would "likely be sufficient to cure the prejudice" to Lloyds. The court thus would instruct members of the jury that "they may infer that if [Lloyds] were permitted to inspect Mr. Brown's cell phone, any evidence would have been unfavorable to Plaintiff."

Insurance companies should consider two possibilities following the federal court's decision. First, an insurer should acknowledge that it also could be found on the receiving end of spoliation sanctions if it fails to preserve material and relevant information. Insurers thus should ensure that procedures are implemented to preserve such information. Second, because a cell phone can contain material and relevant information, an insurer, early in the claim, should make a demand that the insured preserve cell phones as well as any other electronic evidence. These demands can be made in reservation of rights letters or in the written request for an insured's examination under oath. If the insured fails to preserve the evidence, and suit is filed, the insurer may be able to obtain sanctions because of the insured's spoliation of evidence.

III. Working with State and Federal Authorities

Over the years, insurance companies across the country have become more aggressive in fighting insurance fraud and in reporting their suspicions to local and state authorities. As a result, claims of bad faith, malicious prosecution and defamation claims against insurance carriers are likely to increase.

In 1947 the National Association of Insurance Commissioners (NAIC) first proposed a model Unfair Trade Practices Act, which encouraged insurance companies to share information concerning fraud with one another. Currently, almost every state has enacted statutes that provide immunity for insurance companies who disclose information obtained in an investigation if the disclosure is to prevent fraudulent or criminal activities. While the specific provisions of state immunity statutes may vary, the crucial factor in disclosing information about an insured, or past insured, is for an insurer to act in the utmost good faith when disclosing information to other insurers or local, state and federal authorities.

On the state level, there are statutes that typically require the insurance companies report all instances of insurance fraud and suspected incidents of insurance fraud. Such incidences would include fire claims in which the insurer has determined were intentional set or directed by an insured. Such disclosures pursuant to state statutes are clothed with immunity.

While complying with a state's immunity act in disclosing an insured's personal information, insureds can attempt to cast doubt on the validity of an insurer sharing information with authorities by allegations of conspiracy. Such allegations often arise in lawsuits filed by insureds whose fire claim is denied by insurance companies based on the intentional act of arson. Insureds will often attempt to deflect any possible wrongdoing on their part by arguing that the insurance company and the local authorities conspired to "pin" the fire on them. As a result, defense counsel for an insurer often must produce testimony and evidence to defeat such allegations. Therefore, insurers should take appropriate steps to demonstrate at trial that their investigations were independent of any other investigations. At a fire scene, the private and public fire investigators should meet and discuss a systematic method that allows everyone to independently review the fire scene and make an independent determination regarding the origin and cause of a fire.

Insurers can request information from other insurers and state and local authorities through various avenues. First, insurers can send an open records request to state and local authorities pursuant to certain state law. Most states have codified the right of the public, and therefore an insurer, to obtain public records, including files of police and fire departments but under certain conditions. For example, in Georgia, if the investigation is no longer pending in that all direct litigation involving said investigation and prosecution has become final or otherwise terminated, such investigative records can be obtained. O.C.G.A. § 50-18-70. While the Georgia courts prohibit disclosure of records concerning "pending" investigation, O.C.G.A. § 50-18-72(a)(4), such exemption from disclosure refers only "to imminent adjudicatory proceedings of finite duration." Parker v. Lee, 259 Ga. 195 (1989).

In arson claims, an insurer should discuss the status of the state and local investigation. Some authorities defer the conclusion of their investigation until the resolution of the lawsuit between an insured and the insurance company. In that circumstance, an insurer should have grounds to argue that there is no "imminent adjudicatory proceeding" as required to be exempt as an open request, and request that the state fire marshal or local fire department produce the requested investigative files.

While insurers can request other insurance companies to share information regarding a previous or pending claim under state immunity request laws, the National Insurance Crime Bureau (NICB) is another avenue to obtain another carrier's fire. The NICB is a non-profit organization formed in 1992 that works exclusively to prevent, detect, and

defeat insurance fraud through information, analysis, investigation, training and public awareness. The NICB partners with insurers and law enforcement agencies to facilitate the identification, detection and prosecution of insurance criminals. Insurance companies who are members of NICB can submit requests to NICB to facilitate obtaining information from other member carriers. Sharing of information through NICB should be protected by a state's immunity statute.

IV. IV. Science of Arson

Fire investigations have evolved greatly since *1992* when the first edition of *NFPA 921* that was printed and released. This edition clearly stated the investigators should not rely on techniques that have not been tested for scientific validity. *NFPA* established guides and methodologies relating to the scientific methodology of fire investigations Every investigation must be based on scientific data collected at the fire scene. The data allows the investigator to organize, test and confirm or disprove their hypotheses.

The scientific method of fire investigations is a systematic pursuit of knowledge involving the recognition and definition of a problem; the collection of data through observation and experimentation; analysis of the data; the formulation, evaluation and testing of hypotheses; and, where possible, the selection of a final hypothesis.

NFPA 921 list four factors that must be considered when determining a fires origin, *witness information and or electronic data*, *the observation and analysis of fire patterns*, *arc mapping*, and *understanding the effects of fire dynamics (NFPA 921 2017 edition).* For incendiary fires all other causes must be ruled out, heat producing items or appliances must be identified examined and tested before they can be ruled out.

The fire investigator must know fire patterns and understand that all fire patterns derive from two basic fire patterns, intensity and movement patterns.

> *6.4.1.1 Fire Spread (Movement) Patterns. Flame, heat, and smoke produce patterns as a result of fire growth and fire spread. Movement patterns are produced by the growth, spread, and flow of products of combustion away from an initial heat source. If accurately identified and analyzed, these patterns can be traced back to the origin of the heat source that produced them.*
> *6.4.1.2 Heat (Intensity) Patterns. Flames and hot gases produce patterns as a result of the response of materials to heat exposure. The various heat effects on materials can produce lines of demarcation. These lines of demarcation may be helpful to the investigator in determining the characteristics and quantities of fuel materials, as well as the direction of fire spread.*

Arson is a criminal act and is usually investigated by a public law enforcement agency, *NFPA 921 2017 edition* defines arson and incendiary fires in chapter 3.

3.3.14 Arson. The crime of maliciously and intentionally, or recklessly, starting a fire or causing an explosion.

3.3.116 Incendiary Fire. A fire that is intentionally ignited in an area or under circumstances where and when there should not be a fire.

Public investigators normally are the first to conduct fire investigations and submit an official government report and classification of the fire. A major problem with public agency investigations is the lack of resources or the failure to identify resources within other agencies of their governments. That being said the "Undetermined" classification of the fire is simply because they didn't have necessary data to support or rule out all causes.

Private fires investigators working for insurance companies or law firms can provide data for all heat sources and what further testing is needed to support or disprove a hypothesis.

During fire investigations it was once a common belief that if the fire scene had unconnected fires it was incendiary. The only thing needed was to collect fire debris samples and move on. It has been proven this theory is not scientific and can be disproved. Lithium-Ion batteries have been known to launched as far as twenty-five feet when they fail. Depending on the number of batteries that fail this will give the appearance of multiple unconnected fires. All fire scenes have to be properly analyzed, data examined, and hypothesis developed and tested.

Only after all accidental and natural causes have been identified, examined and ruled out can the determination move toward incendiary causes. When considering incendiary causes all data available to the insurance company, attorneys and fire investigation must be compared and considered.

Data the insurance company may have that is needed by the fire investigator include, claims history, length of time with the insurance company, recent modification to policy limits. Photos of the structure that were taken during underwriting of the policy, photo presented by the insured before the fire.

Modern technology allows a criminal to cause fires in ways that were not available just 5 years ago with the introduction of smart devices. All that is needed is an internet or cell signal and a smart device connected to an outlet.
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