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Strictly Speaking

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Defending Fire Claims 101: Investigationby *Brian J. Benoit, Ryan M. Frierott, James M. Rozak*

"The temptation to form premature theories upon insufficient data is the bane of our profession." - **Sir Arthur Conan Doyle's Sherlock Holmes**

A thorough scene investigation of your next fire case may be the difference between a claim being dropped and a claim being litigated. The timeliness of the investigation and methods employed will ensure that all case facts have been uncovered and important evidence is preserved.

Early and thorough responses will facilitate: cost containment; the accurate identification of culpable parties; preservation of evidence; and the identification of frivolous or exaggerated claims. In sum, thorough fire scene investigations can translate into the ability to make early case decisions that preserve both legal defenses and hopefully, the bottom line.

Claim Notification = Early Involvement

Consider your next early claim investigation an opportunity to seize control of the investigation by getting involved when the case is taking shape. Early involvement is your best chance to protect your ability to inspect the evidence.

Typically, the first investigators on a scene will be fire officials who suppress the fire, determine the cause, rule out criminal culpability, and ensure the safety of the scene for its preservation or overhaul. Once public officials have released the scene, the property owners, their insurers and experts take control. The insurer or their attorneys will inspect the scene for potential entities from whom the subrogating carrier may recover money paid out to its insured. If, during the subrogating insurer's inspection, it is determined that your company or client may be at fault, they are required to preserve the scene and notify you of an opportunity to inspect the scene. Notice from a subrogating carrier, that your company or client may be culpable, should elicit an immediate response, in writing, requesting that your opportunity to inspect the scene, and evidence, be preserved.

Early Involvement = Accurate Facts and Preserved Evidence

You received notice, requested that the scene be preserved in its current state, and are working to set up a joint inspection; now what? Prepare to go to the scene inspection. Request public official reports, insurer's photographs, research the location, notified parties, and their products. The claimant's representative should have reports and photos, depending on the size of the loss, from the Fire Department, Fire Marshal, Police Department, medical care providers and perhaps others. In addition, the claimant's representative may have drafted a report or taken photographs during their investigation which they may be willing to share.

Going into an investigation with public reports and photographs in hand will help to determine whether the scene has been altered, forecast possible theories of liability, and identify potential witnesses to interview while at the scene. Often, occurrence witnesses, neighbors or workers are accessible for interviews prior to the filing of a lawsuit at a time when their memories are fresh.

Early Involvement of a Qualified Fire Investigator = A Credible Trial Expert and Advisor

A fire scene examination should be attended by a Certified Fire Investigator (CFI) or a Certified Fire and Explosion Investigator (CFEI), commonly known as "CFIs." The CFI will be the first person to set foot into the scene on your behalf. His or her observations and opinions will shape the way your case is defended. It is advantageous to retain a CFI who is familiar with the public officials (firefighters and fire marshals) and the expert for the other parties involved. A good working relationship between investigators and officials results in the free flow of information and opinions during the scene inspection. Often, investigators share their opinions with one another, thereby providing early insight into an expert's confidence in the subrogee's case against your company or client.

When selecting a CFI, consider their adherence to commonly accepted standards for fire investigations, including: NFPA (National Fire Prevention Association); and ASTM (American Society for Testing and Materials). Those organizations promulgate standards which courts find authoritative when considering the basis for an investigator's opinions. Adherence to NFPA and ASTM standards indicates that the fire investigation was conducted through reliable scientific methodologies and short circuits an opposing attorney's challenge to the validity or credibility of an expert's opinions. For a more detailed analysis on Courts' treatment of NFPA 921 as an authoritative treatise on conducting fire investigations, see "Smoking Out Judicial Treatment of NFPA 921: Guide for Fire and Explosion Investigations", Defense Research Institute, For the Defense, December 2008.

Attend the Scene Inspection = First Hand Knowledge of the Players and Facts

The scene investigation adds a dimension to the defense of a case that cannot be matched through viewing photographs or reading reports. Only after attendance at the scene inspection can an expert, attorney, or company's representative gauge the dollar amount of the loss, explore external factors that may have played a role in the fire, and evaluate how the experts conduct their investigation. An accounting of the inspection by a non-expert helps to provide an objective opinion about the confidence of each expert in their respective theory and other defense issues that may arise (i.e. contributory negligence and damages inflation by claimant). Finally, a working knowledge about how a fire scene exam is conducted will be of benefit when deposing an expert, negotiating a settlement, or during cross examination.

Conclusion

By seizing the opportunity to investigate the scene you will protect against premature and thinly supported liability theories which may prejudice the defense in the long run. Early intervention will eliminate the possibility that your defense will be built on unsupported theories and insufficient data. With the proper procedures in place, conducting an effective scene investigation is "elementary, my dear Watson."

Practice Tips

- Get in Early: The earlier an investigation is scheduled, the less chance the evidence will be spoliated or altered.

Know Your Expert: Use experts that come recommended from trusted sources. Perform a *Daubert* check - research an expert's litigation history for any successful evidentiary challenges waged against him or her.

Research the expert's involvement in organizations that may be detrimental to your defense cause.

- Attend the Scene Inspection: If a picture is worth one thousand words, being there is priceless.
- Take an Active Role: Set the pace at the outset by being proactive in the investigation and let the claimant know that you intend to vigorously defend the case.

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*Part II of the Series – Fire Claims 102: Objectives for an Effective Evidence Examination

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Also contributing to this article was **James M. Rozak** who the authors thank for his contribution and oversight of this article and extensive knowledge from years investigating fire and accident scenes. Mr. Rozak is a litigation partner at Wiedner & McAuliffe, Ltd. His practice is focused primarily on product liability, premises liability defense, and commercial litigation. He has gained extensive nationwide experience in both state and federal courts as national counsel for several major consumer appliance manufacturers and is the chair of DRI Products' Fire and Casualty Special Litigation Group.

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