Introduction

Often as defense counsel you have a distinct advantage over plaintiff’s counsel because you receive notice of an accident before plaintiff’s counsel is consulted and retained. This advantage can be effective pre-suit, in settlement negotiations and at trial, but only if you move quickly.

Most jurisdictions have three-year statutes of limitation for negligence actions. Some plaintiffs’ lawyers wait years before filing suit. A lot can happen in three years: employees move or may be fired, memories fade, and documentary and physical evidence can be lost or destroyed. If the insurer waits to retain you until its insured is served with process, you will have lost your advantage.

The key is how promptly you receive notice of the accident from the insurer or the self-insured client and how quickly you are assigned or retained and begin your investigation to discover and preserve the physical evidence you need for your defense.

An effective way of increasing the likelihood of receiving prompt notice of an accident that resulted in serious or fatal injuries
is by working with the insurers for whom you regularly defend and your self-insured clients to develop a pre-accident plan, including prompt notice and assignment of the case to you.

**Pre-Accident Planning For Self Insureds**

Serving as counsel for a self-insured company gives you the opportunity to make recommendations to the CEO or risk manager about pre-accident planning. Planning should include assembling a team that can respond quickly to accidents occurring on the company’s premises. The company’s own staff may be more effective in determining the cause of an accident than any outside experts you hire, however it is hard to think of circumstances under which testimony would be easier to impeach.

When an accident occurs on your client’s premises, the company’s departments should be consulted and enlisted to provide your independent experts with technical assistance. Never pass up the opportunity to get an education about an accident and its cause(s) by speaking with your own client’s engineering, health and safety, security, and risk management departments.

Make certain your pre-accident planning provides that in the event of an accident on the premises, department heads are immediately notified and employees are advised not to contaminate, dispose of, or destructively test physical evidence from the accident scene. Departments should be advised that in the aftermath of an accident their only contact with physical evidence should be preserving the state and condition of the evidence, for example, where the evidence is threatened by weather or souvenir hunters.

**Pre-Accident Planning With Insurers**

An insured’s awareness of his responsibility to promptly report a potential claim to his insurer often means the insurer receives notice of a claim within twenty-four to forty-eight hours after an accident. Usually the more serious the injuries the sooner the claim is reported. Where the claim includes serious or fatal injuries the insurer needs to notify you immediately if you are to have any shot at preserving physical evidence. To accomplish this you need a close working rela-
tionship with the casualty claims manager for the insurers for whom you regularly defend.

Work with the insurer to develop a notification system triggered by the seriousness of the injuries sustained in the accident.

Insurance companies have “hot-lines” for insureds to use in reporting accidents or potential claims for the first time. Recommend to the insurer that you conduct seminars for their employees who take these initial phone calls from insureds. The following is a proposed outline for such a seminar:

Claim Information

a. Name, address, phone number, social security number
b. Date, time, and location of accident
c. Description of accident
d. Whether law enforcement or any state or federal agency responded and investigated
e. Description of physical evidence
f. Location of physical evidence
   (1) motor vehicle collision: location of all vehicles
   (2) homeowner claim: location of instrumentality causing accident (i.e. ladder, dog, stairs, flooring)
g. Advice to insured not to dispose of physical evidence
h. Number of persons injured
i. Description of injuries
j. Description of medical treatment (hospital: in-patient or out-patient)

Characterizing The Loss

a. Low priority - property damage
b. Medium priority - bodily injury with out-patient hospitalization
c. High priority - bodily injury requiring in-patient hospitalization

**High Priority Claims**

a. Immediate notification to supervisor/casualty claims manager
b. Notify defense counsel

If you can convince the insurer to follow this simple plan, you can reduce the delay in your opportunity to discover and preserve physical evidence and increase the strength and effectiveness of your defense.

The person taking the initial information over the phone from the insured about the claim usually completes an intake form. Remember that these forms are completed regardless of the severity of the accident and resulting injuries and in most jurisdictions they will not receive work product protection and can be discovered by the plaintiff.

**A Plan Of Your Own**

Not only is it critical for an insurer to have a plan that provides defense counsel with early notice of a potential claim involving serious or fatal injuries, but you also need a plan so you can immediately respond.

Our firm's policy is to make an inspection of an accident scene within 24 hours after notice of a claim is received from a carrier. Our firm represented a campground where a drowning occurred as the result of an allegedly defective swan boat operated by our client. The injured passenger alleged that the boat began taking on water as soon as it entered the water. The accident occurred in August, towards the end of our client's business season. The campground's insurer assigned defense of the claim to our firm pre-suit. Shortly after being retained we headed to the campground. It is a good thing we did. Local authorities had wrapped up their investigations and the campground was preparing to send the subject boat to the local landfill. The boat was crucial to our defense and our client, as a potential...