



2022 CLM Focus: December

What the Books Don't Tell You : Frequently Overlooked Investigative Tactics in Litigation

I. Information to Gather at the Initiation of a Claim

Initial Information Gathered

Upon receipt of notice of a claim, most companies and adjusters initially go through a by-the-book approach to obtaining information surrounding the claim. The professional obtains a recorded statement from the Plaintiff, accident reports and notices of injury, wage records in workers' compensation cases, and will send Plaintiff and/or his/her attorney a letter detailing the professional's involvement in the case and the next steps.

Often, defense attorneys are brought in after this initial investigation is completed, and most of the documents gathered are not subject to the attorney-client privilege and work-product doctrine. There is also other information important to a claim that has not been gathered at this point, which is what we will discuss in this course.

It is important to gear a claim's defense toward litigation at the onset of the investigation. Failing to do so overlooks crucial information and places additional burden on the company and/or employer later in the case.

Accident Reports, Notices of Injury

Accidents reports and notices of injury are the first documents usually received from a company regarding a new claim. The documents include an Accident Report completed by the company/employer, a Notice of Injury in workers' compensation cases, and/or an Accident Report completed by the Plaintiff him/herself.

These documents are important because they usually name witnesses to the incident and give the initial facts surrounding the claim. What is the next step most professionals take after receiving the Accident Reports? In general, a professional will begin by obtaining Plaintiff's Recorded Statement and interviewing witnesses listed in the Reports.

Plaintiff's Recorded Statement

Obtaining Plaintiff's recorded statement is a crucial part of investigation. Asking Plaintiff detailed, specific questions is significant to defending a claim. Professionals are encouraged to follow-up if the Plaintiff is being vague, and continue asking questions specific to the facts.

This is a great opportunity to obtain information about where a Plaintiff typically treats for medical issues and where the Plaintiff treated for the incident. Some adjusters obtain a physician list, and this can be extremely helpful. Requesting a HIPAA authorization at this point also proves helpful, as professionals can get the ball rolling on obtaining certified medical records. Gathering medical information surrounding the Plaintiff at the onset of the claim provides professionals with additional information supporting an acceptance or denial of a claim. Determining which pharmacy(ies) are used by Plaintiff can also provide crucial information, as pharmacy records identify prescribing physicians who may not have been otherwise identified.

Interviewing Witnesses

Generally, in the event another person witnessed the incident, a Plaintiff will likely list that person in his Accident Report. Obtaining the witness's contact information and interviewing the witness provides objective circumstances surrounding the incident. And interviewing witnesses early dispenses with the risk that the witness/employee will leave the company and subsequently become a hostile witness. If possible (and the jurisdiction allows it), obtain signed affidavits/sworn statements to preserve the evidence in the event that the witness is unavailable or uncooperative later on.

Attorney-Client Privilege and Work-Product Doctrine Concerns

The attorney-client privilege and work-product doctrine are two privileges heavily utilized in litigation. It varies among state and federal courts, but in general, the definitions are as follows:

- Attorney-Client Privilege: There are four basic elements→ 1. A communication; 2. Made between counsel and client; 3. In confidence; and 4. For the purpose of seeking, obtaining or providing legal assistance to the client.
- Work-Product Doctrine: There are three requirements→ 1. Documents and tangible things; 2. Prepared in anticipation of litigation or trial; and 3. By or for the party or by or for the party's representative.

Many times, we see issues here with in-house and outside defense counsel. In-house counsel will assist in the initial investigation, and then argue that investigation was protected by the attorney-client privilege or work-product doctrine. At this point in the course, attendees will participate in multiple hypothetical situations determining whether a privilege applies:

Question 1: In-house counsel drafted a memorandum for her Company where she gave advice as to the disclosure of certain data during contract negotiations, i.e., what should and should not be disclosed. The memo was inadvertently produced in litigation unrelated to the contract negotiations. Company asserted attorney-client privilege. Was the memorandum privileged?

Question 2: In-house counsel took minutes during a company meeting. Plaintiff requested minutes in discovery to corporation. Were the minutes privileged?

Question 3: The risk manager takes a recorded statement from Plaintiff. In discovery, Plaintiff seeks the audiotape. Company objects, citing the work-product doctrine. Is the audiotape protected by the work-product doctrine?

Question 4: Before suit is filed, Insurer takes recorded statements from Insured's employees and later transcribes them. In post-suit discovery, Plaintiff seeks production of the transcriptions. Insurer objects, citing the work-product doctrine. Are the transcriptions covered by the work-product doctrine?

Question 5: After litigation is filed, the Nurse Case Manager emails the adjuster and provides opinions regarding the Plaintiff's medical status that are not included in the nurse's formal report. Plaintiff requests all communications from the Nurse Case Manager regarding the Plaintiff. Is this covered by the work-product doctrine?

In general, whether a professional's "investigation" is protected by the work-product doctrine depends on whether the item was prepared "in anticipation of litigation." So when is that point?

A good example of when work-product easily kicks in is if you have notice of the claim. We have many cases where this is the case, like in a Colorado federal decision, where the court held that "documents prepared by insurer after it was informed of demand against its insured with a copy of a draft complaint was protected by the work-product privilege." *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125 (D. Colo. 1993).

But what if you don't have notice of a claim? It gets stickier. There is an interesting case out of a federal court in Iowa, where the Court held that the "point in time in which insurer's investigation of insured's claim changed from being one in the ordinary course of business (which is discoverable) to one in anticipation of litigation (which is not discoverable) was when insurer actually attempted to rescind the policy."

St. Paul Reinsurance Company, Ltd v. Commercial Financial Corp., 197 F.R.D. 620,637 (N.D. Iowa 2000).

Claims File

One of the most requested documents from Plaintiffs in discovery is likely the claims file. Often, it is a blanket request for the entire claims file, a broad demand deemed too vague to be proper by most courts. At this point, attendees will discuss various demands for claims files and determine whether they are “proper”:

Example 1: “Please produce the entire claims file as prepared and maintained by Third-Party Administrator, John Doe.” Is this a proper request for a claims file?

Example 2: “Please produce Plaintiff’s wage records contained in the claims file.” Is this a proper request for a claims file?

In the event a proper request is demanded, the adjuster must have his “ducks in a row” in the claims file to avoid any discovery production disputes and fact and theory confusion. Professionals should always maintain fact-specific, detailed claims files, geared toward later litigation.

III. Utilizing Surveillance Pre- and Post- Litigation

Surveillance of a Plaintiff is often helpful both before and after a suit is filed. With surveillance, you can obtain a real-time view of how the Plaintiff is reacting to their alleged injuries and an indication of what, if any, work they could potentially complete. Often times, if you obtain surveillance mitigating damages, early settlement will be possible. If not, favorable surveillance can assist in a Motion for Summary Judgment and/or credibility determinations at trial.

Surveillance should be obtained during especially active times, like holidays or vacations or when the weather is expected to be nice (understanding that parts of the country have long periods of poor weather and surveillance must be conducted). There are a multitude of private investigation companies, specialized and certified in surveillance in investigations. It can also be helpful to split surveillance into two periods, so if the Plaintiff knows or suspects surveillance has already been conducted, they are more likely to have their guard down for the second round.

After obtaining surveillance, it is crucial you determine when such information must be produced to opposing counsel. If surveillance is improperly withheld, you run the risk of the Judge ruling you may not utilize the surveillance as evidence at trial. States and federal courts have different rules regarding production of surveillance and it is imperative professionals are aware of these rules prior to obtaining surveillance of a Plaintiff.

IV. Utilizing Social Media in 2022

Everyone has social media in 2022. Whether it be Facebook, Instagram, TikTok, or Snapchat, social media is a public or private tool where Plaintiffs feature their lives and sometimes, helpful information regarding their injuries and the claim itself. It is important to search a Plaintiff's social media at the onset of a claim, as well as request they preserve their social media as potential evidence in any litigation. The earlier this is reviewed and preserved, the better. Plaintiffs' attorneys will instruct their clients to lock down their accounts, making it more difficult to obtain helpful evidence. Don't forget to review LinkedIn, as it can provide information regarding Plaintiff's work activities, and to review the accounts of Plaintiff's close family members for "tagging" of Plaintiff.

Social media evidence has become more and more common at the Motion practice level as well as trial. With proper preservation of evidence, courts and juries will consider a party's social media in making credibility determinations, and potentially in damage estimates. Preservation of social media can also aid in early settlement.

V. Additional Tactics to Aid in Defense of Case

Consistent Protocols

The decision-makers of a claim (in-house counsel, risk managers, insurance professionals, outside counsel) should gear their investigations to preserve any privileges in discovery. Claims files should be detailed with fact-based reporting, and surveillance should be taken initially and expertly. Outside counsel should be involved for witness interviews, and work-product should be protected.

A developed claim reporting protocol that reflects risk intangibles and corporate realities will ensure compliance and protect the company's interest. Risk managers are crucial for defense of a claim, and educating and training employees on claim protocols will aid in later defense.

Fraud in Workers' Compensation

Fraud in workers' compensation matters is the topic on which most insurance professionals request information. States differ on how they handle fraud allegations. In California and Mississippi, insurers must report fraud to their Attorney General, who then prosecutes the case, and if fraud is found, the Claimant is required to pay back any benefits received due to fraud and may potentially be subject to jail time or additional penalties.

However, in Louisiana, fraud is discovered by the insurance professional and determined to be present by the Workers' Compensation Judge, workers' compensation benefits may be terminated. Examination into fraud in states like Louisiana is crucial if the facts suggest fraud and should be meticulously investigated.

On the other hand, some states like Iowa recognize bad faith on the part of the insurance carrier for unreasonable denial or delay of benefits. It is therefore crucial that timely investigation is performed. Investigative actions should be described in the claim file, and the basis for denial decisions should be clearly communicated. New evidence should be reviewed and considered as it is received, and the denial position should be periodically reevaluated to ensure the reasonable basis for denial remains.

What is the most unexpected source of information where you received helpful information? Technology.

- Orange Theory records
- Peloton records
- Fitbits
- Apple Watch Health

VI. Question and Answer