



SHOW ME THE EVIDENCE!

**INSPECTING
EVIDENCE THAT
DOES NOT
BELONG TO YOU**

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EVIDENCE RETENTION AND PRESERVATION ARE OFTEN DONE AS A MATTER OF COURSE IN LOSSES THAT MAY HAVE SUBROGATION POTENTIAL. UNFORTUNATELY, ROADBLOCKS ARE FREQUENTLY ENCOUNTERED WHEN TRYING TO EFFECTIVELY MAINTAIN EVIDENCE NECESSARY TO A SUBROGATION CASE. ONE SUCH ROADBLOCK INVOLVES LOCATING AND RETAINING EVIDENCE THAT IS IN THE CUSTODY OR CONTROL OF SOMEONE OTHER THAN YOUR INSURED. IN THIS SITUATION, THE FRONT LINE ADJUSTER CAN BE INSTRUMENTAL IN MAKING SURE EVIDENCE IS PROPERLY PRESERVED.

There are many instances when evidence needed to prove your case, or evidence needed to rule out other potential causes of loss, does not belong to your insured. This is frequently the situation in exposure losses, landlord/tenant situations and condominium losses; however, this may also occur when an insured has items or products owned by its clients or customers in its possession (such as a dry cleaning business or auto body shop) or when a residential insured has long-term house guests. Arguably, the front line adjuster is in the best position to identify those in possession of the desired evidence, and will have the opportunity to make the initial requests to preserve the evidence. In addition to taking action to preserve evidence, the front line adjuster should immediately advise the subrogation adjuster or subrogation counsel of the situation so those individuals may take appropriate action as well.

It is important to remember that

evidence in the possession of someone other than your insured may not only include physical evidence, but may also include documentation or electronic evidence, such as alarm records, work orders or contracts for recent work performed at the property, purchase invoices that provide identifying information or emails suggesting prior problems leading up to the subject loss. These documents may be vital to your subrogation claim. Thus, at the outset, it is important to gather them and to notify others not to destroy them. As time passes, these items may be discarded, destroyed or lost, much to the detriment of your subrogation case.

There are many different ways to retain evidence and the “right” way may differ depending on the situation. Therefore, a decision as to how to proceed must be made based on the facts of each case. Perhaps the simplest scenario is when representatives of the party who owns or controls the evidence are present at the scene at the same time as your representatives. In this situation, communications between the representatives may be all





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that is needed to ensure that all necessary evidence is appropriately retained. A more complicated situation presents itself when others' representatives are not present at the scene and efforts to coordinate with them have been unsuccessful. In these situations, alternative approaches to securing the evidence must be used.

For example, in a landlord/tenant situation, in which the other party has an insurance carrier and a cause and origin investigator, the most prudent approach is to have your front line adjuster and expert photograph, in detail, any evidence that does not belong to your insured, which you wish to retain. The expert should place a conspicuous evidence tag on the desired evidence. Photographs should also be taken after the evidence is tagged in order to document your efforts should the evidence disappear in the future. These steps should be sufficient if you verify that the scene is secure and feel comfortable that any risk of vandalism or evidence tampering is minimal. When combined with immediate written notice of your desire to have the tagged evidence maintained and request to be notified upon its removal from the scene, this approach is an effective way to retain and preserve evidence important to your case. In addition, written notice to maintain and produce documentary or electronic evidence should be forwarded to the adverse party as soon as is practicable after the loss occurs. This

efforts to protect your interests without violating anyone else. Moreover, you will have set the stage for a future spoliation claim, should the requested evidence be discarded by others without your authorization.¹

Be mindful that simply photographing and tagging physical evidence may not be enough to safeguard the evidence if the loss occurred in a neighborhood known for vandalism, looting or theft, and the loss scene can be easily secured. Also, before authorizing your expert to simply take possession

of evidence belonging to others, consider whether evidence has been adequately photographed before being disturbed, whether detailed records as to the chain of custody will be kept, along with the evidence's original location and condition. Proceeding without appropriate safeguards can have serious ramifications, including claims of spoliation against you or other legal issues that could arise because you took possession of something owned by someone else. Therefore, you must carefully weigh

the consequences of your actions deciding how to take custody of evidence that is owned or controlled by another party.

At some point, you may also be faced with a situation in which the party controlling a scene will not provide you with access to the scene. In this situation, you may have to petition the court for immediate injunctive relief, requesting that the court order the party controlling the scene to allow you access. Remember that seeking injunctive relief can be time-consum-

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ing. On the other hand, it may be a step that is essential to protecting your interests and right to inspect the scene.

Serving request for injunctive relief is supported by the National Fire Protection Association's Guide for Fire Explosion Investigations:

27.2 Understanding between the Parties. Interested parties should be allowed to participate in the investigation and examine the evidence in its undisturbed condition. No party should remove evidence or materials without adequate notice to other interested parties.

27.2.1 Different parties can conduct a joint investigation and still have separate and independent examinations. A joint investigation allows recording and examination of the scene as it is altered or examined or as evidence is collected. Allowing all interested parties an equal opportunity to establish the facts should eliminate future accusations of wrongdoing, such as altering the evidence or hiding facts. The parties should work together through coordination of the investigation. Personal interest should be subjugated to the truth.

Additional arguments can also be used to convince a court that you are entitled to be present and participate in a scene inspection. Courts are cognizant of the standard practice in the industry to include all interested parties in loss scene inspections, and recognize that it may be difficult to re-create or simulate a loss scene to allow others to

make independent observations. Your argument to the court will be that any interested party not included in the initial scene inspection faces an unfair disadvantage because the parties present at the scene will be the only parties allowed to perform the only investigation based on an examination of the actual loss scene. It will weigh heavily

in your favor if you can show that the adverse party's initial scene investigation, in your absence, is likely to irretrievably disturb or destroy key evidence of liability and damages resulting from the loss. The court will likely rule in your favor if the parties who were excluded from the inspection will suffer irreparable harm under the



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circumstances, and that irreparable harm is outweighed by any potential burden to the adverse party, including others in the investigation.

In light of these concerns, there is a compelling argument that representatives of exposure losses need to be present during investigations of the original loss scene. Likewise, prejudice could result if injured parties who may have subrogation claims are precluded from involvement in the investigation.

In conclusion, it is important to remember that your insured's evidence may not be all the evidence needed to assert a successful subrogation action. Physical items of evidence, as well as documentation and electronic evidence, owned or controlled by others, may be just as, or even more, important. Early action by the front line adjuster, subrogation adjuster and subrogation counsel is necessary to effectively retain and preserve all evidence. Often, securing necessary evidence is easily accomplished with the cooperation of the adverse party; however, keep in mind that seeking judicial intervention may be necessary in order to protect your subrogation rights.

Endnotes

1. It should be noted that spoliation is treated differently, depending upon the jurisdiction and whether the claim arises out of negligent spoliation or intentional spoliation, or both. In some states, you may be able to assert an independent action based on claims of intentional or negligent spoliation of evidence.

When it's
not just your
profits,
but your
reputation
on the line...



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reputable
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Reputable *adj* having
a good reputation

Reputation *n* 1 : the
estimation in which a person
or thing is generally held...

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