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Crawford's Client Newsletter | *May 2013*

Sandy's Surge

Superstorm Sandy left a trail of devastation from the Caribbean to Canada, with a huge impact on the Northeastern U.S. The claims handling process represents a long-term situation.

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Claims adjusters were in the thick of one of the worst storms in decades to strike the Atlantic seaboard. Dubbed anything from "hybrid" to "Frankenstorm", superstorm Sandy left a trail of damage from Jamaica to New York, also causing at least $100 million in insured losses in Canada.

But by far the worst devastation occurred in New York and New Jersey. When Sandy made landfall in the U.S. Northeast on October 29, 2012, a massive storm surge resulted in significant flooding in key areas, such as Staten Island and Lower Manhattan. This caused severe power outages, swamped roads and train tunnels, triggered massive property damage and crippled transportation in the region for weeks.

With 120-130 km/h (75-80 mph) winds hurling an unprecedented 4-meter (13-foot) surge of seawater at New York City, Superstorm Sandy hit fast and with force at the end of October. In its wake, it left a total of 175 people dead, more than 8 million without power, flooded the New York subways and closed the stock market for two days.

In a final study released in February 2013, the National Hurricane Center estimated Superstorm Sandy caused $50 billion in total economic loses in the U.S., the second-largest loss since 1900. Hurricane Katrina, which flooded much of New Orleans in 2005, led to $108 billion in total losses. In a January 2013 report, Munich Re put estimated insured losses at $25 billion, although it noted that number could rise.

Crawford has been, and will continue to be, at the centre of handling the thousands of claims resulting from Superstorm Sandy. The large volume of claims includes

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Inside

Sandy's Surge

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marine, transportation, property damage to schools, businesses, amusement arcades, boardwalks, retail stores, healthcare facilities and high-value brownstone homes.

Two primary areas of focus for Crawford's management immediately after Sandy were ensuring adjuster access to the affected regions and achieving the proper levels of case load balancing. The first task posed some unique challenges.

The biggest obstacle facing adjusters involved travel delays due to a major fuel shortage and massive infrastructure damage. As of November 6, more than a week after the storm, roughly 75 percent of New Jersey's gas stations (and 25 percent of New York's) were closed either because they had no gasoline, no power or both. Stations with electricity were having difficulty staying supplied with gas because of damaged roads and difficulties coordinating deliveries from suppliers.

As of November 6, there were slightly less than 1 million customers without power in 21 affected states, down from the more than 8.5 million at the outage peak, according to the U.S. Department of Energy.

While these infrastructure issues slowed response efforts somewhat, Crawford's management team drew on their vast expertise and worked diligently to mitigate the transportation issues as best as possible. For example, Crawford's management team deployed adjusters from the Allentown, PA office to the high volume claims areas of New York and New Jersey to maximize efficiency. Crawford also increased field staff deployments in affected areas ranging from Virginia to Massachusetts and the inland states of Ohio and West Virginia.

As Crawford works through the significant claim volume coming out of this major storm event, its management team and staff will continue to scale up and support clients with a broad network of adjusters. This will ultimately turn out to be a long-term event, and one Crawford is committed to in helping meet the expectations of client's policyholders in a time of need.

In terms of the claims volumes, more than 642,000 homes and businesses were damaged in New York and New Jersey alone. The storm damaged or destroyed 305,000 housing units and disrupted more than 265,000 businesses in New York.

Approximately $500 million in insurance claims related to Hurricane Sandy had been filed as of January 22 in New Jersey, according to the state's Department of Banking and Insurance. It notes there have been approximately 36,000 commercial property damage claims made, with approximately $255.6 million in losses paid. Business interruption claims in New Jersey, thus far, have totaled approximately 12,000 with $53.4 million paid.

Crawford's Sandy Stats

- Over 45,000 assignments received by Crawford
- 1,500 GTS assignments
- 562 adjusters utilized during peak period
- Crawford Canada supplied approximately 20 resources
- 81% of all assignments were closed as of Feb 1, 2013

In Canada, insured losses from Sandy-related severe weather will reach at least $100 million for Ontario and Quebec alone, with insurance companies reporting a combination of wind and water damage along with some business continuity claims.

Several weather analysts have dubbed Sandy a "hybrid" storm, which combined the elements of a hurricane with those of a massive fall/winter storm. Scientists note that hurricanes and winter storms are powered by completely different energy sources – with hurricanes drawing energy from the evaporation of seawater, while winter storms are fuelled by horizontal temperature contrasts in the atmosphere. Hybrid storms are able to draw from both energy sources.

Another element that made Superstorm Sandy so unique was its size – with gale force winds extending over a massive diameter in excess of 1,600 kilometers. It was the largest hurricane (later downgraded to a tropical storm) since the National Hurricane Center began taking such measurements in 1988. While Sandy generated sustained relatively minor winds (for a hurricane) in the range of 120 km/h, its size generated a huge storm surge that affected more than 1.4 million people in 11 U.S. states.

"Storm surge" is an abnormal rise of water generated by a storm, over and above astronomical tides, according to the Center for International Earth Science. It is sensitive to many factors, including the track, speed and intensity of the storm and coastal features such as bays and estuaries. Several commentators have observed that the New York area rests on a relatively long and shallow shelf, with more than 500 miles of coastline features such as small bays, inlets and other potential funnels that can channel rising sea waters far inland.

Due to this storm surge, many of the resultant losses from Sandy could be attributable to overland flood, rather than wind damage. Standard insurance homeowner policies do not cover overland flood, although the U.S. has had a federal flood insurance program in place since 1968. The effects of the storm surge and the nature of the insurance claim may lead to questions of policy interpretation and coverage disputes.

"As families and businesses continue the rebuilding process, many of them have, and will continue to look to their insurers for funds to help rebuild and cover losses," notes the global law firm Simpson Thacher in a Memorandum, Potential Insurance and Reinsurance Implications of Hurricane Sandy, published January 30, 2013.

"Insurers, who have already faced pressure from federal, state and local government to quickly pay out claims, will be forced to confront difficult issues regarding the scope of their coverage for these losses," Simpson Thacher adds.

Potential coverage disputes may pale in comparison to the future threat of increased storm surge activity along the eastern coastline of North America. In Canada, Hurricane Juan was an exceptional storm that caused a record water

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Who's the Expert Now?

New rules have placed a higher level of judicial scrutiny on the role of expert witnesses in Ontario, particularly in complex cases involving medical diagnoses.

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For years, courts have expressed concern about the trend of 'hired gun' expert witnesses retained by plaintiff or defendant lawyers. Given that trial judges are not specialists in technical matters, such as medical or psychiatric conditions, these experts are relied upon to clarify the issue at hand.

The Ontario Rules of Civil Procedure were changed in January 2010 to include, among other items, revamped duties of experts under Rule 53.03. In particular, the amended rules require experts to acknowledge their duty "to provide opinion evidence that is fair, objective and non-partisan."

This acknowledgement of expert duty, known as Form 53, also states that experts are expected to provide evidence that is related only to matters within their area of expertise and to provide "such additional assistance as the court many reasonably require."

Experts must now sign the Form 53 acknowledgement and attach it to their reports. As a further measure to ensure impartiality, the form emphasizes that the expert's duty to the court "prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged."

Additionally, the new rules set out a long checklist of items that should be included in every expert report, such as the expert's area of expertise, qualifications, employment and educational experience. These also require the expert to disclose any instructions provided by lawyers or clients in relation to the proceeding, as well as background research, documentation and "foundational material" that led to the opinion.

Case law and judicial commentary have already emerged in the wake of the new expert rules. In Beasley and Scott v. Barrand (2010), an insurer sought to have three medical assessment reports admitted pursuant to Rule 53.03. The plaintiff was injured in a motor vehicle accident in 2002 involving a car and a motorcycle. The three medical doctors who authored the reports signed the Form 53 acknowledgement of expert's duty.

Justice Patrick Moore denied the application to file the medical reports, finding that the acknowledgement forms "are seriously flawed: it appears clear to me that the doctors did not take time to read and reflect upon the content of the form before signing it and that affords me no comfort to believe that these experts understand their duty to assist the court with opinion evidence that is fair, objective, non-partisan and within the area of expertise of each doctor."

> "...the amended rules require experts to acknowledge their duty 'to provide opinion evidence that is fair, objective and non-partisan.'"

The Beasley finding could render independent medical examinations (IMEs) far less relevant to court proceedings. Indeed, it is more likely that IME assessors retained in accident benefits or disability claims will be limited to giving fact evidence only, not opinion-based evidence.

Paul Famula, Manager, Crawford Legal Services, says there is a nuance about the Beasley case in that the defendant was attempting to use the Accident Benefits (AB) Insurer Examination (IE).

"That created the problem in that the AB report was generated for another purpose," Famula notes. "While the AB IE can be used for evidence, those experts cannot be called to give expert testimony. So I think the message is that in a tort defence, even though you have these AB IEs, you will still have to get an IME for your defence."

In another case involving insurance and medical examinations, Bakalenikov v. Semkiw (2010), another judge commented on the new duty of experts.

"Each court expects and relies upon frank and unbiased opinions from its experts," noted Master D.E. Short. "This is a major sea change, which requires practical improvements to past opaque processes. At the initial stages skilled, licensed professionals clearly must be taken at their word that on principle they take their Form 53 Undertaking to Court seriously."

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7 Steps for Environmental Claims

Of all the complex types of claims adjusters are faced with, environmental losses can be particularly daunting to manage.

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Claims professionals may not be familiar with the technical jargon used by consultants or may have only limited knowledge of the regulatory framework or remediation options.

What can the adjuster do to manage these types of losses successfully? What information should be gathered? What type of expert should be retained? What regulatory/reporting requirements need to be met to achieve site closure?

While the particular circumstances of an environmental claim may be unique (contaminants, etc.), there are similar general steps to handling these losses. Here are seven key techniques.

1. Identify the environmental exposures

Environmental exposures, including such factors as the presence of a sump pump in a home's basement or water or storm mains on commercial/industrial lots, may influence the size of a claim. In both cases, the subsurface utilities provide migratory pathways that allow the contaminants to broaden the extent of first-party damage or lead to third-party impact. Contaminants may affect soil, groundwater, surface water, sediment or air. It is critical to identify potential environmental exposures to minimize, mitigate or abate the impacts.

2. Hire a qualified consultant/ engineer

A qualified consultant should be retained at the outset of an environmental claim. This consultant should have a P. Geo. (Professional Geosciences) or P. Eng. (Professional Engineer) designation, or sufficient training in environmental sciences, hydrogeology or geosciences. In some jurisdictions (i.e. Ontario), regulatory standards require qualified persons to sign off on environmental reports. The adjuster needs to be confident that the approaches undertaken by the consultant are technically sound and defensible.

3. Notify the appropriate regulatory agencies

The release of chemicals or contaminants to the environment (fuel oil spill or chemical spill) requires notification to the appropriate regulatory agency. The consultant or adjuster may make the notification on behalf of the insured, as long as the insured has granted permission. Notification may result in the issuance of a field order by the regulatory agency that requires a full subsurface assessment and/or remediation. It is important to complete this step to clearly understand regulatory requirements.

> "While the particular circumstances of an environmental claim may be unique...there are similar general steps to handling these losses"

4. Determine/establish regulatory standards

An understanding of regulatory standards and site closure requirements should be established immediately among the insured, the carrier and the adjuster. Too often, these requirements are not clarified, and project costs may be questioned post-loss (i.e., during subrogation or recovery efforts). Make certain that assessment and remediation standards are discussed first to avoid such cost discrepancies.

5. Assess soil and groundwater impact

To determine the extent of impacts to soil and/or groundwater, the consultant should recommend a subsurface assessment program. This can be achieved through a borehole or test pit program. Information from this assessment is used to prepare cost estimates for a remediation program. The soil sampling should provide the lateral extent (how widespread) and vertical extent (how deep) of impact. Failure to obtain as much information as possible during the Phase II ESA (Environmental Site Assessment) will ultimately result in additional mobilization, subcontracting and consultant fees.

6. Remediate soil and groundwater

Selecting an appropriate remediation program typically depends on cost, site access and the time necessary to achieve regulatory standards and site closure. Remedial options, each with variables and limitations, include:

Dig and Dump: This relatively short-term solution of soil excavation and disposal is dependent on site access and

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Evironmental Claims

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the soil tonnage required for removal, as well as other variables such as underpinning requirements, house relocation costs and designated substances.

Groundwater Pump and Treat: Water collection and treatment utilizing a granular activated carbon (GAC) filter system. All groundwater pump and treat systems require a Certificate of Approval to operate, notification to the appropriate regulatory agency, and pre-, mid- and post-groundwater sampling while the system is operational.

In Situ Chemical Oxidation (ISCO): Application of oxidants to the subsurface to treat both soil and groundwater impacts. This method of remediation requires a certificate of approval and notification to the appropriate regulatory agency. The consultant should work with a trained hydrogeologist.

Risk Assessment: Using the information obtained during the Phase II ESA, soil and groundwater concentrations are applied to a scientific model that calculates modified standards for the site. The modified standards are measured to determine the potential environmental and human health effects.

Bioremediation: Application of microbes or nutrients to the subsurface to remediate soil and groundwater impacts. Bioremediation is typically a long-term solution that requires a certificate of approval and notification to the regulatory agency.

> "Adjusters who handle environmental claims need to be knowledgeable about relevant regulations and compliance requirements."

7. Prepare an environmental report

A report detailing the soil/groundwater remediation program should be prepared and signed by the qualified individual. The information provided should include:

- The timeframe in which the work was undertaken
- Volume of soil/groundwater recovered from the site during remediation
- Final concentrations of soil/groundwater samples from confirmatory sampling program
- Listing of the appropriate Site Condition Standards (SCS)
- Scaled drawings illustrating the site location, subsurface investigations (boreholes and/or test pits) and excavation profile (including the location of wall and floor samples)
- A complete set of analytical data (including chain of custody and certificates of analysis).

Adjusters who handle environmental claims need to be knowledgeable about relevant regulations and compliance requirements. They should also have a clear understanding from the consultant of the assessment and remediation strategies best suited for a specific loss, in addition to any limitations. **P**

Article by Lori Festarini, Environmental Leader, Crawford Global Technical Services.

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Crawford Global Technical Services

GTS News

Paul Hancock, national director, Crawford Global Technical Services, is pleased to announce that the following employees have achieved the title of General Adjuster.

David Colyn
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David entered the insurance industry in 1995 and joined Crawford in 1998. He is a Chartered Insurance Professional, and a Certified Fire and Explosion Investigator. His areas of expertise include personal and commercial automobile, property, and liability exposures. David is a member of the Insurance Institute of Ontario, Past President of the Kitchener Waterloo Chapter of Ontario Insurance Adjusters Association and is presently active with the International Association of Arson Investigators.

Bill Dobson
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Bill began his insurance career in 1998 and joined Crawford in 2007. He has a BA in English and Kinesiology from the University of Western Ontario. He has extensive experience with accident benefits claims, focusing on soft tissue, complex and catastrophic injuries. He is also involved in property, bodily injury and liability claims. Bill has been a member of the Ontario Insurance Institute since 1998, as well as the Canadian Armed Forces Reserves since 1989.

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Michael has worked in the insurance industry and with Crawford since 1999. He specializes in residential property, bodily injury, general liability and school board liability. He became a Fellow Chartered Insurance Professional in 2006 and is a member of the Ontario Insurance Adjusters Association and the Canadian Independent Adjusters' Association.

Crawford Legal Services Update

Maintenance Service Contracts and Indemnity Clauses

The Limitations Act, 2002 (Ontario) is a statute whose general rule is that a claimant must start an action within two years from the date the claim arises.

There are four basic issues to consider in determining whether the occupier and/or the maintenance service provider will need to defend the claim:

1. Is the allegation of the cause of the incident covered by the maintenance service agreement?

The first and obvious matter to address is whether the agreement contemplated that a service would be provided that would have eliminated the hazard – in recent judicial terms is the "true nature" of the incident given rise from the injuries something that was contemplated by the agreement. If so, then we turn to the usual considerations under the Occupiers' Liability Act including was the maintenance program reasonable and was it in practice observed. Did the service provider comply with its obligations and did it document that it carried out its tasks.

2. Does the service/indemnity agreement require the maintenance service provider to have the occupier named in its liability policy? If so, is it a named insured in the service provider's policy?

Many maintenance contracts between the landlord/occupier and the service provider have a clause either requiring the service provider to name the landlord/occupier as an additional insured or to name them jointly as insured's in the insurance policy. Where such a clause exists in the policy of insurance, the landlord/occupier sits in the same position as the maintenance service provider in the eyes of the maintenance service provider's insurer. Thus, where the "true nature" of the claim falls within the responsibilities of the service provider, the service provider's insurer would owe a defence and potentially indemnity (depending on the facts of each case) to the landlord/occupier.

Where the maintenance service provider fails to add the landlord/occupier to their policy of insurance as a named or additional insured as required by their contract, the service provider will be exposed to considerable uninsured liability to defence costs and potentially indemnity.

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The maintenance service provider would be personally obliged to reimburse the landlord/occupier.

Link for full case text:
Cadillac Fairview v. Jamesway Construction 2011 ONSC 2633
http://canlii.ca/t/flfh0
Minto Developments v. Carslbad Paving 2012 ONSC 1574
http://canlii.ca/t/fqhvh

3. Aside from 2. above, does the policy provide "an extension of liability coverage" clause in relation to "insured contracts"?

Aside from any obligation to name the occupier in the service provider's policy, such a clause may in fact oblige the service provider's insurer to provide a defence to the occupier. If the service contract required that the occupier be named, the case is stronger than if not. While the occupier as a non-contracting party to the insurance policy would not have a right to coverage under this clause, the insured service provider could avail himself of this coverage.

4. Can there be more than one occupier that has an obligation to the claimant?

Yes. While an occupier may have contracted with a maintenance service provider to look after all maintenance on its property and to save harmless the occupier for injuries related to their services occurring on the same, the occupier may still be found liable for injuries to an invitee. As long as each party has some degree of control over the property in question and arguably has the ability to admit or exclude, there is the possibility that each party would be considered co-occupiers.

In the Soomre case noted below, the Court determined that while Sobey's contracted with the landlord for property maintenance it was also determined that Sobey's was aware of the particular hazard and that the landlord was not always fulfilling his maintenance obligations. The Court held that the co-occupier had a duty to ensure via inspection, that the other occupier was fulfilling its obligations under the contract and was doing so in a proper and competent manner. The Court stated "There remains a responsibility on each party to ensure that the property was being maintained in a proper manner. The court cannot allow an occupier to avoid its responsibilities under the Occupiers Liability Act by not paying attention to the maintenance practices of a co-occupier.". **P**

For full case texts, go to www.canlii.org and search "Wilson v. Arseneau, (2012)".

Notes by Daniel Marcovitch, B.A., LL.B.

Crawford Legal Services Update is provided by Paul Famula, manager, Crawford Legal Services.

Onwards and Upwards

Jim Eso, Senior Vice President, National Property & Casualty, will now assume direct accountability for Crawford's national field operations. In his new role, Jim will continue to report to Pat Van Bakel. Jim will remain responsible for our Catastrophe Services and Contractor Connection product lines as well.

Heather Matthews, Senior Vice President, National Claims Management Centre (NCMC), will now report to Pat Van Bakel, Chief Operating Officer, in one operations vertical. Our Appraisal Management Services division will now report to Heather and our former Healthcare Services division will be fully integrated into the NCMC under the newly formed Human Risk Services line.

Doug Woodburn, Vice President, Financial Performance and Analysis, has taken on the additional responsibilities of our administrative departments including: Human Resources; Training and Education; Audit and Quality Control; Governance, Licensing and Compliance; Real Estate and facilities; and, Information Communication and Technology.

Anita Zeitler has been promoted to Director, National Operations, Crawford Appraisal Management. Anita joined Crawford in June 2007 as Assistant Manager, Crawford Appraisal Management. She was promoted to Manager of Appraisal Services in 2010.

Branch Moves

For the most up to date listing of Crawford offices, please vist www.crawfordandcompany.ca and click on "Locations".

Crawford & Company 2012 4th Quarter Financial Results

Crawford & Company's full year consolidated revenues for 2012 before reimbursements totaled a record $1.177 billion for 2012, compared with $1.125 billion for 2011. Net income attributable to shareholders of Crawford & Company in 2012 was $52.6 million, compared with net income in 2011 of $45.4 million. Full year 2012 diluted earnings per share were $0.91 for CRDA and $0.87 for CRDB, compared with diluted earnings per share of $0.85 for CRDA and $0.83 for CRDB in the prior year.

Mr. Jeffrey T. Bowman, chief executive officer of Crawford & Company, stated, "Our fourth quarter 2012 consolidated operating earnings more than tripled last year's fourth quarter figures and were partly driven by our handling of claims from superstorm Sandy and very strong results from our EMEA/AP and Legal Settlement Administration segments. During the 2012 fourth quarter and full year, we set financial records for consolidated revenues, operating earnings, and operating cash flow.

"The Americas segment saw a surge in activity during the 2012 fourth quarter resulting from superstorm Sandy in the northeastern U.S. which exceeded our initial expectations heading into the quarter. This helped generate improvement in this segment over the 2011 fourth quarter, and should provide us with a good start to 2013.

"Our EMEA/AP segment results during the quarter were largely driven by the ongoing handling of catastrophic flood losses in Thailand, although we also saw improvements in our core U.K. and CEMEA operations. This segment was a very important performer for us during 2012.

"During the 2012 fourth quarter our Legal Settlement Administration segment was engaged in handling the Deep Water Horizon class action settlement, as well as a number of other meaningful class action and bankruptcy matters. We expect operating activity in this segment to be significant for us during 2013, although at a reduced rate as compared to 2012.

"In the Broadspire segment, we recorded a slight operating profit for the 2012 fourth quarter and full year. We remain focused on delivering stronger operating performance in this business and we are optimistic that we will show continued improvement in the upcoming year."

Mr. Bowman concluded, "I am pleased that our results reflect the management team's focus on our core strategic and operational goals and we expect to continue to expand market share, drive efficiencies and capitalize on the opportunities that present themselves in 2013. We are enthusiastic about our business and are very focused on delivering shareholder value. The initial guidance we are providing today for 2013 reflects the strength of our position in the markets that we serve around the world." **P**

Sandy's Surge

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level in Halifax in late September 2003, according to Natural Resources Canada. That storm, described as the worst to hit Halifax since 1893, caused $300 million in damage.

In a study of hurricane activity over the last 25 years, catastrophe modeling firm EQECAT notes that: "In recent decades, the loss contribution from storm surge has increased, as indicated by empirical data, EQECAT's post-event reconnaissance reports, and claims data. Storm surge losses impact direct property losses and also coverage for additional living expenses or business interruption."

And some say that storm surge activity is only expected to have a more dramatic impact in the years ahead.

"Superstorm Sandy's massive flooding is already unprecedented in recent decades," states an article in Scientific American magazine, *The Science behind Superstorm Sandy's Crippling Storm Surge*.

"According to experts, however, it is only going to become more likely in coming decades, thanks to a combination of local geography, vulnerable coastal development and already-happening sea-level rise as a result of climate change. In the future, it will not take a Frankenstorm like Sandy to inundate the region." **P**

Expert Witness

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Another new element of the amended rules for expert duties is the requirement that all instructions and correspondence between lawyers and expert witnesses will be producible before or at trial. This means that any attempt to influence or conceal the opinions of expert witnesses can be brought into the courtroom, much to the potential detriment of a plaintiff's or defendant's case.

Giving experts lots of time and an organized file on the case can help streamline the process, reduce costs and improve the odds of getting a balanced and comprehensive report. Advance preparation is even more critical with amendments to the time period for disclosing expert witness reports under Rule 53.03. In the past, expert reports had to be served at least 90 days before trial, but the new rules require lawyers to provide the reports 90 days before the pre-trial conference, with responding reports to be served at least 60 days before the pre-trial conference.

The changes to expert witness duties under Rule 53.03 may have fallen under the radar for some adjusters, insurance companies and claims examiners. However, it would be in their best interest to understand how these new rules will affect health-related claims, particularly in more complicated cases. **P**

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