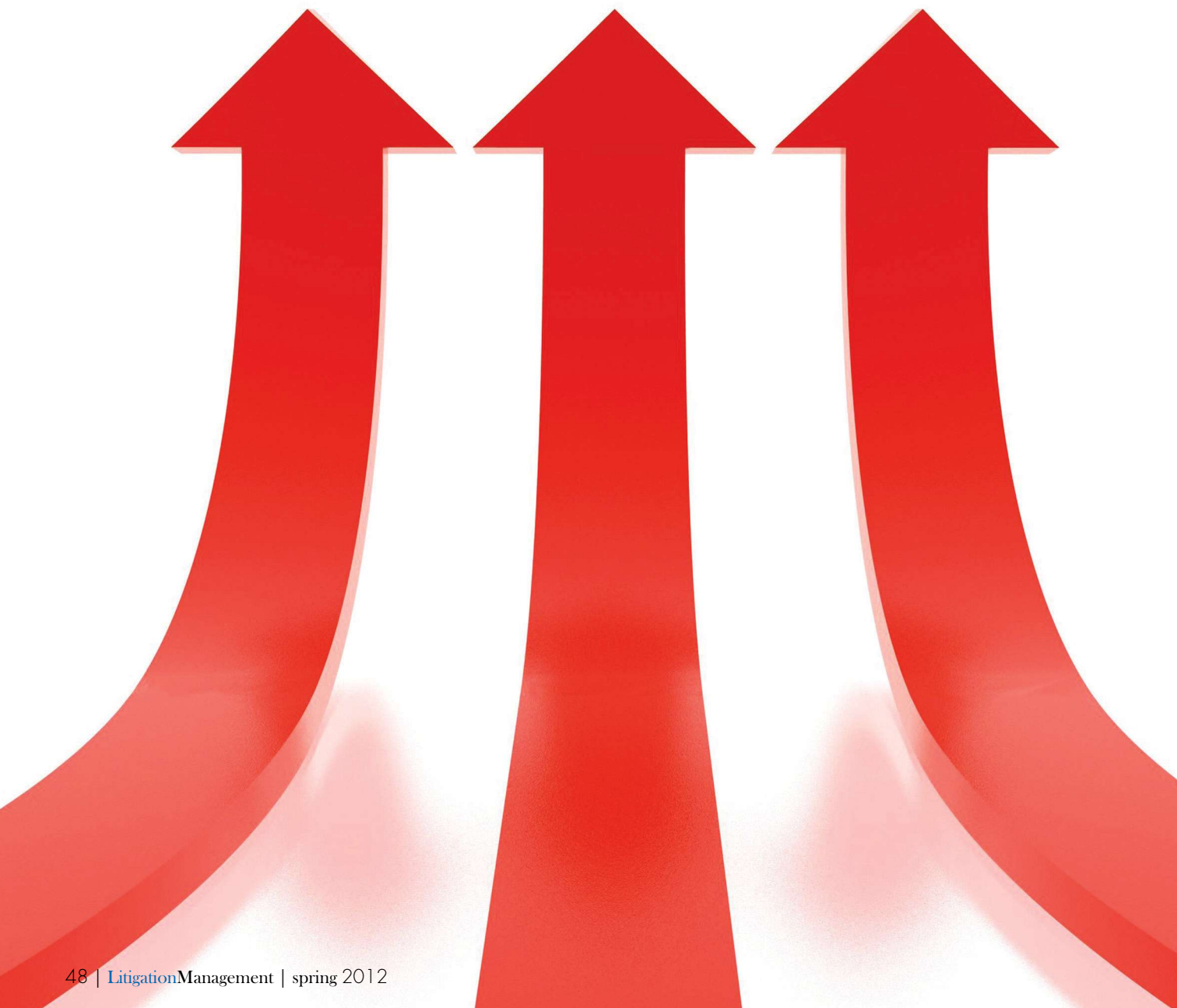


# The Three-Way MIRROR

Multiple Views On Early Investigation



*A unique look at investigation of claims and incidents from three perspectives — the litigation manager, the expert and the defense counsel.*



## The Litigation Manager's Perspective

By Randy F. Jouben

**F**ar too many individuals charged with controlling the litigation management process are under the mistaken belief that their role begins when a claim is made or when the summons is served. Since any incident can have a major impact to your operation, it is imperative that a response plan is developed even before you have to put it to work.

Proper incident management should be exercised no matter the nature of the event or injury. Responding to the injured party's needs establishes a rapport between the establishment and the injured party, and allows the responder the opportunity to gain firsthand knowledge of the incident. This is vital should additional investigation be required. Although accident investigation is not the primary responsibility of staff members, managers should be trained in how to respond to incidents, including what to look for and how to listen at an incident scene. Management should be sensitive to clues that indicate that a full incident response team may be needed as opposed to just a local investigation.

Another critical first step in the litigation process is to secure the scene and preserve evidence. Although major incidents warrant calling risk management so they can contact counsel and forensic experts to complete the investigation, seemingly minor cases can be lost in trial because no one documented the scene properly or because critical evidence was thrown out. Now that virtually every cell phone contains a digital camera, it is easy to document the location at the time of loss. With the prevalence of security cameras, a great deal of additional information may be available, but only if the recording is properly isolated and maintained. Management must take note of what occurred as well as document the names additional staff or witnesses who were present. When it comes to incident response planning, a procedure must be in place to gather and protect chain of custody information so once materials are gathered at the scene they can be prop-

erly transferred to risk management, the claims adjuster or legal counsel.

Although litigation management may seem like a very complex concept, the first step begins with basic claims handling and common sense. Beginning with the end in mind is a fundamental principle in this process.



## The Expert's Perspective

By Ryan Siekmann

**T**he process of keeping incident management from turning into crisis management has to begin well before a loss occurs. A reliable team consisting of all experts, investigators, specialists, counsel, surveyors, etc. should be established and known to your clients, colleagues and team members. Many corporations, law firms, and insurance carriers today distribute "24-Hour Response" lists to their clients and loss professionals so in the event of an incident, they can have their team on the ground and accessing the necessary information as soon as possible. This is a great practice and one that many successful companies and claims professionals exercise on a day-to-day basis.

From an expert's perspective, there is a lot of money spent during the litigation process that could be avoided had there been a plan and team in place before the loss occurred. The sooner an expert can obtain the necessary information needed for their analysis, the quicker decisions can be made regarding negligence, fault and ultimately how any financial obligations will be settled. Experts are retained to give independent, unbiased opinions as to how and why a loss occurred. Whether an expert's professional opinion is for, against or undetermined to their client, money that will be spent on future litigation costs can be saved if the involved parties know what they are dealing with up front.

One market factor that is a daily battle for the forensic expert profession is the commoditization of the engineering and expert witness industry. Everyone knows, including expert companies, that not every loss requires a Ph.D. with 30 years of experience and a four-page resume. At the same time, you do not want to send the closest and the cheapest "expert"

to a multi-million dollar loss. Claims and litigation professionals need to make sure they know their incident response team and what they can expect from each team member.

Litigation professionals need to evaluate their return on the dollars spent when hiring experts. Are your experts billing at a lower hourly rate but invoicing more hours than a company that might have higher rates but bills fewer hours? Are you able to cut down on claims payments and litigation costs when a certain company is hired? Are your current expert reports going to stand up to a Daubert/Frye challenge from opposing counsel?

When arranging response teams for certain practice areas, carrier lines of business or risk management exposures, it is important to make sure the appropriate team is in place. This involves keeping cost and litigation factors in mind, while still providing an expert capable of withstanding a Daubert or Frye challenge if the loss ends up in litigation. In today's legal system, companies have to think of every claim having the potential to go the distance and end up in litigation.



## Outside Defense Counsel's Perspective

By Scott W. Bermack

**H**aving defended retailers and property owners for more than 20 years, there are only a few things I enjoy more than getting a call from a client within 24 hours of a significant incident or event. What a luxury! I have an opportunity to inspect conditions, meet and evaluate eyewitnesses and speak with management personnel responsible for the smooth operation of the premises. One cannot overestimate the importance of preserving evidence, such as surveillance footage, and of capturing impressions either in photographs or in written statements. Review by expert witnesses at this point can be comprehensive in scope and enlightening in substance. Further, such early involvement also allows defense counsel to work with the client to develop a corporate response plan and help all involved to speak with one voice to the extent crisis management is appropriate.

In retail operations in particular, the work force tends to be young and somewhat transient, so locating key witnesses become more challenging with each passing month. By the time suit is filed, often years later, former employees — even management level — can either disappear or become hostile. Working with the team early on empowers the employees to assist in formulating a defense strategy, which can be ready if a lawsuit is filed. Reducing the facts to sworn statements can become quite useful in the face of witnesses who either can't recall the circumstances or change their version by the time formal discovery is underway.

I've made the recommendation of early claim investigation to many risk management groups and a nearly universal response is that management wants its employees to sell widgets, not investigate claims. While I certainly recognize that sales must be a priority, there aren't too many defendants who are comfortable losing defensible cases because a key piece of evidence was destroyed or a critical witness could not be located.

Not every accident results in a lawsuit and indeed, not every exposure warrants the early intervention of counsel. Identifying those losses where the potential damage justifies the expense of preparing an early defense will pay for itself in no time. [LM](#)

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