

Emerging Issues in Claims Handling for Insurance Professionals

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- ❖ **Polls:** During the course of the program you will be asked to participate in three (3) polls. Enter your answer in the text box provided.

Questions and Polls



Participants



Q&A



Polls

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Meet Today's Presenters



David J. Alfini is a partner in Hinshaw's Personal Injury and Property Damage Group. David represents clients in matters involving construction defects, product liability, long-term care, toxic exposure, and premises liability.



Adam S. Guetzow is a partner in Hinshaw's Personal Injury and Property Damage group. Adam defends clients in products liability, premises liability and general liability cases at both the local and national level.



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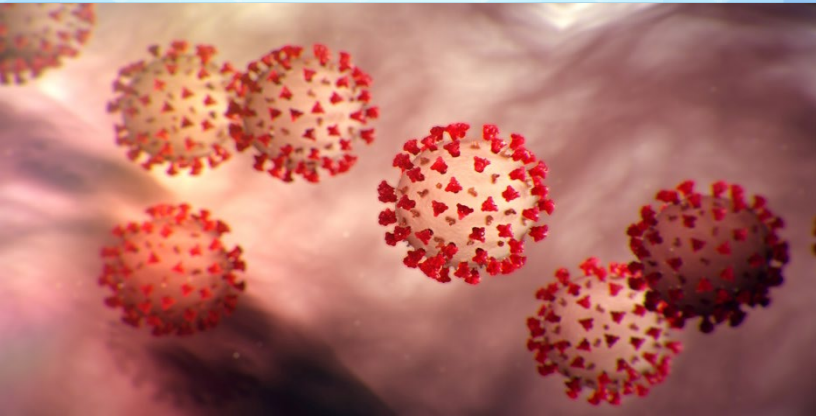
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Society of Claim Law Associates



- ❖ The Society is an organization of insurance claims people who have earned claims law designations from American Educational Institute (AEI).
- ❖ Governed by a volunteer Board of Trustees who are elected and who have all earned their SCLA designations.
- ❖ The Society builds upon the AEI foundation by providing members with continuing educational resources and opportunities.
- ❖ Co-host of the Claims Education Conference each May (next date: May 10-13, 2022) with a Designation Conferment Ceremony for AEI designees.

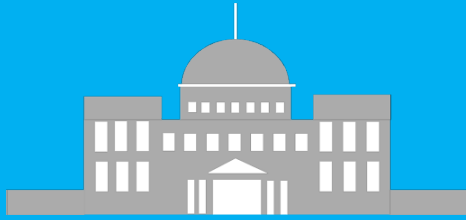




Claims Management in the Age of COVID-19



States Toll Statutes of Limitations in Light of COVID-19



Since March, many states have taken some form of action to suspend Statutes of Limitations and deadlines set by court rules in order to cope with the ongoing pandemic.



One of the tried and true defenses to a claim is that the Statute of Limitations has expired. Before COVID-19, this was a simple determination. Now it is not.

State-Specific Orders

Kentucky	Grand jury proceedings shall be conducted remotely beginning 11/30/2020. In the event it cannot be conducted remotely, the 60-day period provide for in RCr 5.22(3) shall be tolled and the matter shall be presented within the expiration of Administrative order 2020-72.
Florida	Florida has NOT extended statutes of limitations.
New Hampshire	Court's order extended deadlines set forth in court rules, court orders, statutes, ordinances, administrative rules, administrative orders that was extended to May 4, 2020. No longer in effect except the deadlines for scheduling or hearings may be extended as the needs of the trial court require effective through February 22, 2021.
Texas	All Courts in Texas may in any case, civil or criminal, except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than April 1, 2021.

Suspensions Impacting Claims

Although different jurisdictions have enacted various SOL suspensions, parties should *generally* be aware that they may have *additional time* to file a lawsuit because of the current environment

In affected states, these tolls are placing a *pause* on claims, causing *significant delays* to claimant recovery

As a result, claim resolution is at a *standstill* in many states



Coronavirus Upends U.S. Court Systems Nationwide



Kentucky

“All civil and criminal jury trials shall be postponed until April 1, 2021, with in-custody criminal taking priority over all other matters”



Florida

Some circuits have temporarily suspended in-person jury trials or non-jury trials and jury proceedings while others are temporarily limiting the number of trials permitted to proceed



New Hampshire

All in-person proceedings in the circuit courts will remain suspended through Feb. 22, 2021, with exception to criminal & family proceedings



Texas

In-person jury proceedings including jury selection and trials are generally prohibited, prior to Feb. 1, 2021

Case Management Delays

- ❖ COVID-19 is directly impacting how quickly matters can be resolved
- ❖ Claims resources including IME's and field investigative services are limited
- ❖ Thousands of civil litigation trials have been delayed for several months, some for years
 - ❖ Courts have extended deadlines. No time emergency to hold IME's.
- ❖ Shelter in place orders are making it difficult for staff to travel to hold examinations
- ❖ Many doctors stopped performing non-essential procedures
 - ❖ IME's don't treat patients
 - ❖ Merely prepare evidence for litigation / deemed as non-essential



How to Drive Resolution During a Global Standstill



- ❖ Mediators are finding virtual ways to provide backlogged courts with some much needed relief
- ❖ While mediators have traditionally assisted parties to resolve disputes through face-to-face processes, it's quickly adapted in it's response to COVID-19
- ❖ Online Dispute Resolution (ODR) allows parties to negotiate remotely and to continue to resolve lawsuits/disputes even in the age of cancelled hearings, postponed trials and social distancing

Damages

Loss of Taste & Smell



Aging can cause you to lose olfactory nerve fibers in your nose. Taste bud abilities often begin to decline.

Anything that irritates or inflames the inner lining of your nose can affect your senses of smell and taste (cold, sinus infection, flu).

Trauma to the head, neck or brain can all damage the nerves that lead to the smell center of your brain.

Dementia, Alzheimer's, Parkinson's, Diabetes, MS, all can damage the nerves that lead to the smell center of your brain.

Trial After COVID-19

Q: Will juries be more or less generous when trials begin?

More Generous	Less Generous
<ul style="list-style-type: none">- People will realize that we are all in life together. Likely outcome of a universal crisis is that people will be more aware of their sense of community- Jurors may have a sense of fear that this could affect them or their loved ones- The “deep pocket” image businesses once had may dwindle with more businesses closing and going out of business	<ul style="list-style-type: none">- Less tolerance for information that is not real during the age of coronavirus- More demands for expertise and knowledge. Jurors in the future could demand even more evidence of what happened, why it needed to happen that way, or how it could’ve been prevented- Potential jurors may be in denial in the face of fears of the coronavirus





Social Media in Claims Handling



The Impact of Social Media in 2021



Nearly **60%** of the world's population is now on digital



98% of users report using at least one other platform



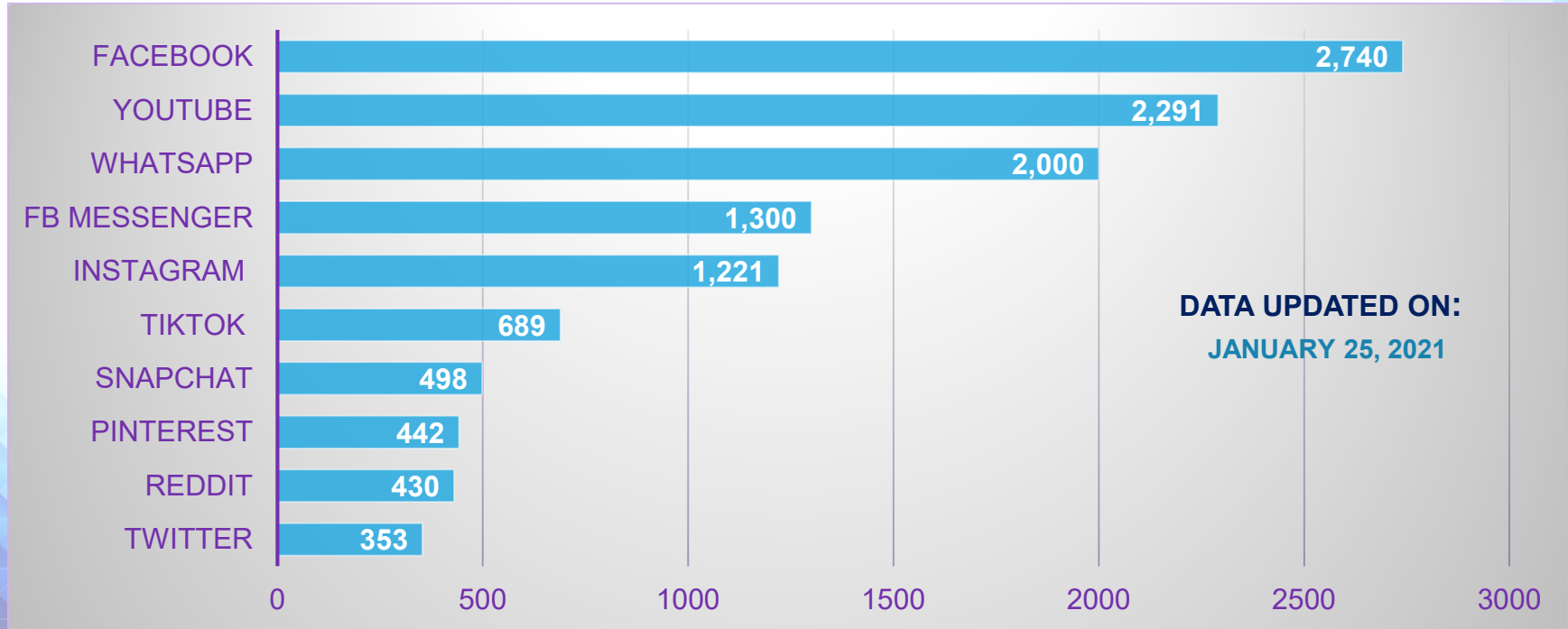
Users have increased by more than **1 BILLION** in the past 3 years



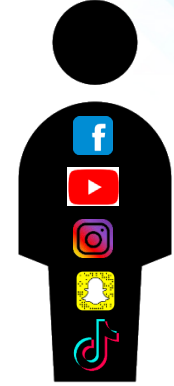
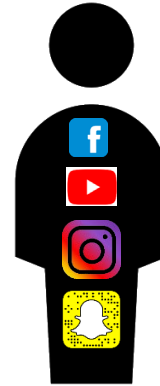
Ages 16-64 report spending 2 hrs. 24 minutes daily
(Almost one **FULL DAY** a week)

The World's Most-Used Social Platforms

Based on Monthly Active Users, Active, User Accounts, Advertising Audiences, or Unique Monthly Visitors (In Millions)



Generational Split



BABY BOOMERS	GEN X	MILLENNIALS	GEN Z
57-75 yrs.	41-56 yrs.	25-40 yrs.	6-24 yrs.
Facebook, YouTube	Facebook, YouTube, Instagram	Facebook, YouTube, Instagram, Snapchat	Facebook, YouTube, Instagram, Snapchat, TikTok



facebook

**The Audience that Knows You -
Pictures, Posts, Videos**



Instagram

**The Hollywood of Social Media -
Pictures, Videos**



SnapChat

**Where You Connect with Your Very Close Friends -
Disappearing Pictures**



TikTok

**The Audience that Knows You -
Videos**



twitter

**Where to Find What's Happening Now -
Posts**

Uncovering Key Details Using Social Media

- ❖ Currently, there are no laws in place restricting any person to scour social media
- ❖ ***“Persons who share information PUBLICLY have no reasonable expectation of privacy”***
- ❖ The courts have held that when social media accounts are created, users are essentially consenting to the possibility their personal information may be shared with others, as there is no guarantee that the pictures & information posted will not be further broadcasted

If You See It, Secure It

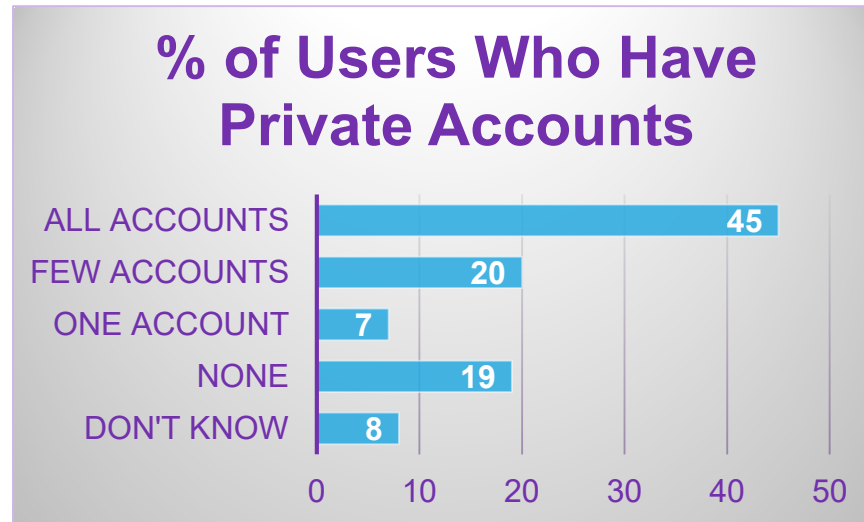
- ❖ If you see it, secure it. Social media posts can be deleted just as quickly as they are uploaded. The moment relevant social media content is found, it should be saved by:
 - ❖ Screen printouts on paper
 - ❖ Saving an electric file directly onto the company's server
 - ❖ Saving on separate storage media such as a flash drive
 - ❖ Screen capture or recording software
- ❖ Written descriptions are **NOT** enough! Posts can be here today and gone tomorrow

Public v. Private



This account is private.
Follow to see their photos and videos.

- ❖ The shift from public to private social media is happening right before our eyes
- ❖ More people are becoming aware of the consequences that their posts may have on their professional and personal lives



Running into a Private Account: *Now What?*

Consider this scenario:

An adjuster runs into a private social media profile. As a result, that same adjuster creates a fake profile pretending to be “Sally Susan” in order to gain access to the account. The adjuster then uploads a picture of a stranger they found on the internet to the account in an attempt to make the fake account more “believable” and sends out a friend request.

Is this a legal violation?



The Answer: POSSIBLY!

- ❖ **States are slowly, but surely implementing statutes to specifically address online impersonation**
- ❖ California, Hawaii, Mississippi, New York and Texas have already enacted statues containing language explicitly referring to internet impersonation

Texas

§ 33.07 **ONLINE IMPERSONATION** - A person commits an offense if the person, without obtaining the other person's consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to:

- (1) Create a web page on a commercial networking site or other Internet website;

OR

- (2) Post or send one or more messages on or through a commercial social networking site

Ethical Dilemma

- ❖ While not all states have addressed online impersonation, an ethical dilemma still remains
- ❖ Sending a friend request or follow request to see private posts may be a violation of ethical guidelines within organizations
- ❖ Impacting reputations
- ❖ Waiting for court ordered social media content can avoid both legal and ethical implications

How to Develop an Ethical Search Plan

- ❖ Run a full social media search. If you happen to run into one private account, the individual may have other social media platforms that are not private.
- ❖ Check the accounts of close family and friends. Even if you run into a dead end, it's possible close family and friends may have public social media platforms displaying comments and tagged photos of the individual.
- ❖ Some adjusters are creating a "Social Media Release" in order to obtain the information early on in a claims investigation. Adjusters can also create a list of questions directed at social media usage that can be asked during a recorded statement.



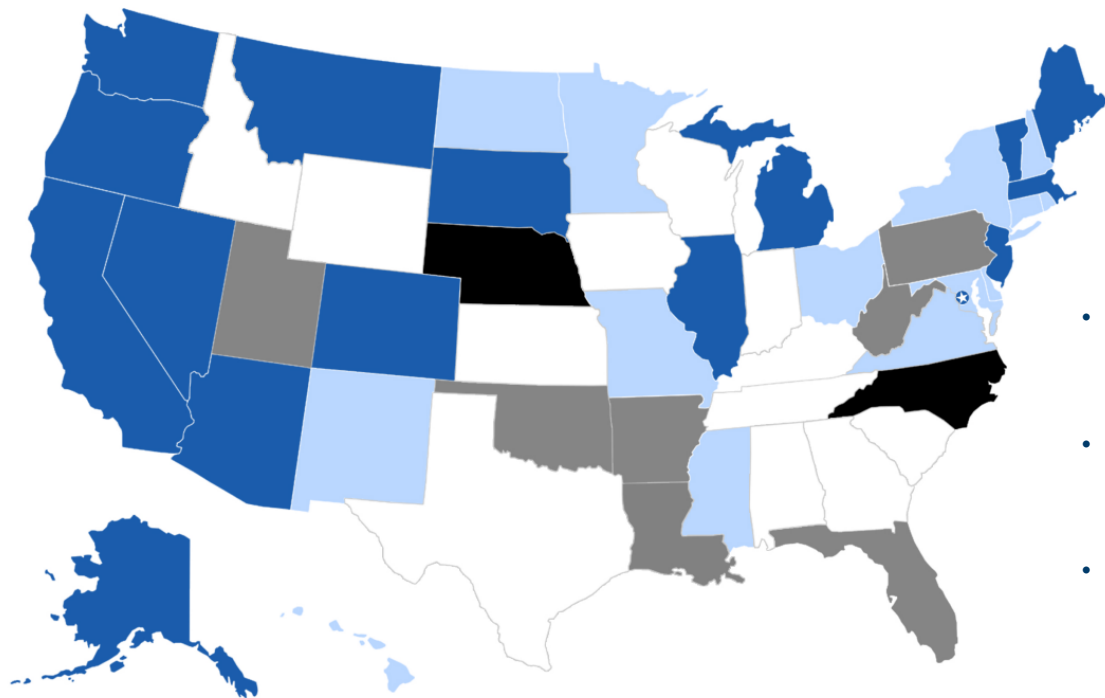
Controlled Substance in Claims Handling



Is Marijuana Legal?

The Answer: *It Depends!*

- ❖ Marijuana remains a Schedule I controlled substance under the Controlled Substances Act (CSA) see 21 U.S.C. §§ 841(a)(1), 844(a)
- ❖ Meaning that, with limited exceptions, its manufacture, distribution, and possession is a **FEDERAL** crime
- ❖ However, each state has enacted its own controlled substance laws. As a result, states have sometimes opted to impose state law controls that are either more or less strict than those of the CSA



- 15 States plus D.C. have legalized recreational marijuana
- 35 States have approved medical marijuana
- Possession, distribution, concentrates, all differ across state lines

Cannabis is legal for adults and is taxed and regulated similarly to alcohol; state also has a medical cannabis law

States that both have a medical cannabis law and have removed jail time for possessing small amount of cannabis

D.C. legalized possession and cultivation for adults; it also has a medical cannabis law.

States that have removed jail time for possessing small amounts of cannabis

States with medical cannabis laws

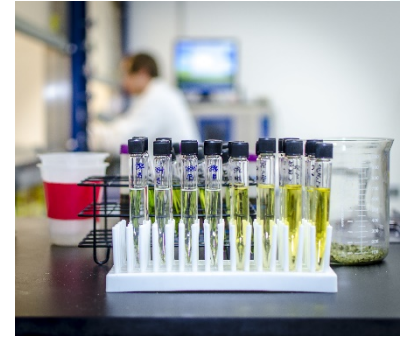
Rising States, Rising Concerns

- ❖ With legality rising nationwide, businesses are hiring increasing numbers of employees who may be using marijuana
- ❖ If employees are using marijuana in accordance with state laws, this means they are going to test positive for marijuana use

Consider this: A delivery driver who tests positive for THC gets into an auto accident. Who is responsible?

Understanding Current Testing

- ❖ THC is detectable for up to:
 - ❖ Up to 90 days in hair
 - ❖ 3 days to a month or longer in urine
 - ❖ 48 hours in saliva
 - ❖ 36 hours in blood
- ❖ This means that marijuana is usually much more difficult to detect and test than alcohol. It's nearly impossible for employers to determine if a positive drug test for marijuana is the result of drug usage during work or non-work hours.



Understanding Current Testing (*continued*)

- ❖ Additionally, the factors that influence exactly how much THC one has consumed are blurred
- ❖ **What can impact a test?**
 - ❖ Frequency, metabolism, hydration
 - ❖ Amount of product in preparation
 - ❖ Whether or not the preparation is shared with others
 - ❖ Amount of ventilation
 - ❖ Inhalation technique (pipe vs. edible)
- ❖ There are currently no testing techniques available to pin point exactly *when* an employee last used marijuana



Marijuana in the Workplace

- ❖ The federal Americans with Disabilities Act (ADA) and Rehabilitation Act expressly exclude from coverage employees or applicants “who [are] currently engaging in the illegal use of drugs. 42 U.S.C. § 12114(a); 29 U.S.C. § 701(a);
- ❖ Although several jurisdictions have legalized medical or recreational marijuana use, **NONE** require employers to permit employees to use or consume marijuana ***in the workplace or on working time.***

Testing Based on Reasonable Suspicion

- ❖ Could be prompted by the following observations while in the workplace:
 - ❖ Strong odors
 - ❖ Dilated / watery / red eyes
 - ❖ Slurred speech or an inability to verbalize
 - ❖ Sleeping, falling unconscious or otherwise being nonresponsive
 - ❖ Questionable movements, twitching or staggering
 - ❖ Argumentative, irritable or drowsy behavior



What Our Courts are Saying

- ❖ An employer need not accommodate medical marijuana use.
Johnson v. Columbia Falls Aluminum Co.
- ❖ The California Supreme Court has refused to require employers to accommodate marijuana use.
Ross v. RagingWire Telecommunications, Inc.
- ❖ An exception to the employer's drug policy to permit offsite marijuana use may be a reasonable accommodation where the employee's physician determines that marijuana is the most effective treatment for the employee's disability and that any alternative medication permitted by the employer's drug policy would be less effective.
Barbuto v. Advantage Sales and Marketing, LLC

The Department of Transportation

- ❖ The Department of Transportation's Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize “medical marijuana” under a state law to be a valid medical explanation for a transportation employee's positive drug test result.
- ❖ It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's (DOT) drug testing regulations to use marijuana.
- ❖ The "Act" required DOT Agencies to implement drug testing of safety-sensitive transportation employees in the aviation, trucking (including school bus drivers, and certain limousine and van drivers), railroads, mass transit, and pipelines industries.
- ❖ Therefore, Medical Review Officers (MROs) will not verify a drug test as negative based upon learning that the employee used “recreational marijuana” when states have passed “recreational marijuana” initiatives.



Technology Advances Impacting Claims



Permissible Cell Phone Use

- ❖ 22 States prohibit **all** drivers from using handheld cellphones while driving
- ❖ 48 States have banned text messaging while driving

Kentucky	Florida	New Hampshire	Texas
No current Handheld Ban	Handheld Ban in school and work zones	Active Handheld Ban	Handheld Ban in school zones

❖ *Company Guidelines Control*

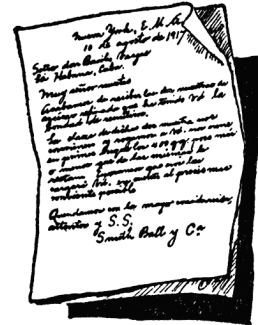
GPS Investigation

- ❖ Questioning whether or not the company is using fleet tracking
- ❖ **Fleet tracking** is a management system that uses GPS to monitor the activity of tracked assets
- ❖ Uses telematics technology collected in near real time
- ❖ Users can choose from a wide selection of tracking hardware and accessories (plug-and-play devices, integrated dash cameras, powered and unpowered asset trackers, wireless cargo monitors, ID card readers)
- ❖ Companies such as Verizon Wireless, Onfleet, Wialon

Litigation Hold Letters

“Each litigant is entitled to every man’s evidence”

- ❖ A litigation hold letter puts the recipient on notice to preserve evidence – a tool for preserving evidence that might be otherwise lost or destroyed
- ❖ Alerts the recipient that it must
 - ❖ Identify
 - ❖ Locate
 - ❖ And Preserve **Relevant Information**



Violating a Litigation Hold Letter

- ❖ Disregarding or failing to properly implement a litigation hold can open the door to **spoliation sanctions**
- ❖ “***Spoliation***” is the loss or destruction of evidence relative to a legal proceeding
- ❖ The Judge will evaluate whether spoliation has occurred, it’s impact and craft an appropriate sanction in response
- ❖ Sanctions range from
 - ❖ Monetary punishment
 - ❖ Adverse Jury Instructions
 - ❖ EVEN defaulting the offending party in certain circumstances



Medical & Healthcare Changes in Claims



Advances in Arthroscopic Surgery

- ❖ Arthroscopic surgery offers
 - ❖ Less recovery time
 - ❖ Fewer complications
 - ❖ Less scarring
- ❖ Due to these factors, these surgeries are gaining popularity amongst surgeons as well as patients all over the world particularly in *orthopedic procedures*
- ❖ The global Arthroscopic Devices market was valued at 4.32B in 2018 and is expected to reach **7.05B** by 2026



Delays in Treatment Due to COVID-19

- ❖ COVID-19 causing hospitals and physician practices across the U.S. to **temporarily halt** non-emergency procedures (“elective”)
- ❖ Many providers in some states (Texas & Florida) resumed elective care, but also had to **intermittently stop and start** elective procedures due to fluctuations in COVID-19

Delays in Treatment Due to COVID-19

- ❖ A May 2020 study of orthopedic surgery volumes by the *Journal of Bone and Joint Surgery* suggested even under the most optimistic scenario, the U.S. may face a cumulative backlog of more than a million total joint and spine surgery cases by mid-2022
- ❖ May need up to **16 months** to work through the backlog of orthopedic care

QUESTIONS?

Save the Date!



Claims Education Conference Webinar Series continues

- ❖ Tuesday, May 11, 2021 – Claims Handling Ethics (two hours)
- ❖ Tuesday, October 12, 2021 – TBD (one hour)

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Thank You



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