

CHAPTER 6

USE OF OUTSIDE PROFESSIONALS¹

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I. Introduction

It has been said that the investigation of an employee dishonesty or other fidelity bond claim can be one of the more challenging endeavors a claim handler can undertake.² Large employee dishonesty claims, in particular, can be complicated, involving literally tens of thousands of pages of documents and the need to interview numerous witnesses, sometimes in multiple states or even other countries. At the outset, the claim handler is faced with making a decision as to whether she has the necessary resources in-house to investigate the claim. To put it simply, the claim handler must determine whether she needs outside assistance from other professionals, such as accountants, attorneys, or private investigators.

It is important for the claim handler to control those factors she can to create a positive claim experience for the insured. There are many

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1. This chapter is a revised and updated version of the chapter of the same name in the first edition of this book, George Buleza & Christopher J. Franklin, *Use of Outside Professionals*, in *HANDLING FIDELITY BOND CLAIMS* (Michael Keeley & Timothy Sukel eds. 1999). While the chapter has been substantially rewritten, this new text nevertheless borrows from the chapter previously written by Messrs. Buleza and Franklin. Thus, the author gratefully acknowledges the contribution of Mr. Buleza and Mr. Franklin.
 2. Michael Keeley & Sean Duffy, *Investigating the Employee Dishonesty Claim: Interviewing Witnesses, Obtaining Documents, and Other Important Issues in HANDLING FIDELITY BOND CLAIMS* 151 (Michael Keeley & Timothy M. Sukel eds., 1999).

factors outside the claim handler's control, such as the criminal investigation, availability of documentation from financial institutions, cooperation of witnesses and limits of available coverage, all of which can create angst for any insured. However, the claim handler can control the timely administration of the claim review process and thereby manage the insured's expectations. By managing the insured's expectations regarding timely administration of the claim review process, the claim handler can avoid the development of unreasonable expectation and subsequent disillusionment, disappointment and dissatisfaction of both the insured and the agent, regardless of the coverage determination.

This chapter discusses those instances when an in-house claim handler may need the use of outside professionals. In deciding whether to retain an outside professional, the claim handler should consider the following:

1. The insurer's duties in investigating a claim.
2. Why use an outside professional.
3. When to use an outside professional.
4. How to find an outside professional.
5. How to retain an outside professional
6. How to manage an outside professional.
7. Evaluation of performance after completion of assignment.

Each of these factors is discussed in the following sections of this chapter.

II.

The Insurer's Duties in Investigating a Claim

Once an insured suffers a loss it believes is covered by its fidelity policy, its main expectation is to be paid in a timely manner. It is the claim handler's challenge to help manage the insured's expectations by conducting a timely investigation, while at the same time reminding the insured that just as its own investigation took time, so will the insurance company's investigation take time. Additionally, it is important for the insured to remember that it ultimately is the duty of the insured, not the insurer, to prove that it has sustained a covered claim.

Once the claim handler receives notice of a loss, it should establish lines of communication with the insured, and help the insured develop an

understanding of the claim review process, including the insured's duty to complete and submit a proof of loss within the time period set forth in the fidelity bond. It is not unusual for an insured to seek guidance in completing the proof of loss. The claim handler may provide general guidance such as the insured should submit all documents and information that the insured believes establishes the existence and amount of loss. However, the claim handler should be careful not to state that providing any specific documents or information will prove either the existence of or amount of a covered loss. In addition, the claim handler should be certain to preserve all of the insurer's rights and defenses under the fidelity bond and applicable law.

Once the insured submits its proof of loss, the insurer has a duty to conduct a timely investigation.³ Many states have enacted Unfair Claims Practices statutes or regulations setting forth certain duties of the insurer regarding claims handling. These statutes and regulations often specify time limitations within which the insurer must act. Hiring outside professionals can be a means to be certain the insurer's duties are met.

III.

Why Use an Outside Professional

The basic reasons why the claim handler should retain an outside professional are:

1. The insurer's internal resources will not be sufficient to fulfill its duty to investigate the claim in a timely manner.

If the claim handler prepares a work plan, it should:

- a. describe the work and review to be done, and
- b. estimate the time necessary to undertake each portion of the review.

3. For a thorough discussion concerning an insurer's analysis of the insured's proof of loss as well as the insured's investigation, see Dolores Parr, *The Insured's Proof of Loss: Analysis and Response by the Insurer*, *infra* ch. 5; Michael Keeley & Sean Duffy, *Investigating the Employee Dishonesty Claim: Interviewing Witnesses, Obtaining Documents, and Other Important Issues*, *infra* ch. 7.

Once the work plan is clarified, the claim handler should consider whether the work necessary to resolve the issues can be accomplished in-house. To decide this question, the claim handler must realistically assess whether the insurer has qualified in-house personnel available to perform the needed work in the time frame that is expected.

2. The claim handler does not have the experience or expertise to address a portion or several portions of the claim review process.

Losses involving extensive witness interviews often require experience, expertise and time. An outside professional could more efficiently conduct such interviews and advise the claim handler of the results. The claim handler could participate in the more important interviews to obtain firsthand knowledge about the claim.

The loss may also involve a complex or time-consuming accounting analysis. Compiling different accounting calculations or analyzing voluminous data is best conducted by those outside professionals who do that type of work on a routine basis.

IV.

When to Use an Outside Professional

Deciding when to utilize an outside professional obviously is a judgment call to be determined by the insurer's claim handling philosophy, as well as the specifics of the particular claim. Each fidelity claim has its own unique set of rules, and thus there can be no hard and fast set of rules to be followed in every claim. When timeliness is a factor, the outside professional should be involved early in the claim review process. This will help ensure a timely response, that the same inquiries and requests are not made more than once and facilitate the insured's cooperation with the outside professional.

When the outside professional is retained to provide experience or expertise the claim handler does not have, the retention may occur at a later time, depending upon when the experience or expertise is needed in the claim review process. However, the claim handler should

communicate with the outside professional early on to learn what documents and information the outside professional will need to review. For example, if there are initial meetings with insureds prior to receiving the proof of loss, it may be beneficial to have the outside professional participate in the initial meeting, either in person or by conference call.

Depending upon how well the claim review process has been explained, the insured may have the expectation that payment will be forthcoming after the insurer does an initial review of the submitted proof of loss. Therefore, it is imperative the claim review process is carefully explained to the insured, including the role of the outside professional and timeframes regarding how long the insurer's investigation will take. It is important to consider including the outside professional during these discussions so all parties are aware of each other's expectations and abilities. The claim handler should communicate first with the outside professional as to anticipated time frames.

If an outside professional is retained to assist with reviewing avenues of recovery and restitution, explain this role in detail to the insured and the expected role of the outside professional. If an outside professional is retained by the insurer, the role of the outside professional must be carefully explained to the insured. Also, the role of the insured should be explained in detail, including cooperating with the outside professional. Given that rights, duties and potential defenses are triggered upon discovery of a claim, serious consideration to retain an outside professional should be made sooner in the claim process rather than later. The unique facts of each claim, the exposure to the company, as well as the likelihood of coverage litigation, should all be included in this analysis.

The simplest answer to the question when to hire an outside professional is to have a thorough understanding of why the outside professional is being hired.

V.

How to Find an Outside Professional

There are many qualified outside professionals in the fidelity industry. However, selecting the right one for a particular claim may not be immediately obvious. This section discusses various factors to help the claim handler select the right outside professional.

A. Professional Qualifications

The following are questions to ask concerning the outside professional's qualifications:

1. Does the outside professional have the required professional licenses, such as CPA, attorney-at-law, private investigator, or independent adjuster, including any continuing education requirements?
2. Does the outside professional have all insurance required by the insurer, including professional liability, fidelity with the insurer as an additional named insured or loss payee if possible, workers compensation, and general liability?
3. Is the outside professional a member of fidelity claim and insurance organizations?
4. Has the outside professional authored any articles regarding fidelity claims?
5. Does the outside professional provide approved training to the insurer's staff?
6. What does the outside professional's curricula vitae reflect regarding education, experience and expertise?
7. Does the outside professional do conflict of interest checks?
8. Does the outside professional use retention and engagement letters?
9. Does the outside professional provide a work plan and budget?
10. Are the outside professional's billing rates and time keeping practices in conformity with the insurer's policies?
11. Does the outside professional utilize a diary system for correspondence with the insured in conformity with applicable Unfair Claims Practices Regulations? Does the outside professional utilize a diary system that meets the insurer's requirements?

B. Trust – A Primary Consideration

The outside professional will have a significant impact upon the insurer's relationship with the insured. The claim handler must trust the outside professional's conduct will be a positive, professional reflection upon the insurer and will not jeopardize the insurer-insured-broker relationship. Ultimately, however, whether there is coverage for the

insured's claim is a decision that must be made by the claim handler. Yet, the claim handler obviously is depending to a great extent upon the input and advice received from the outside professional. Thus, the outside professional must be someone whom the claim handler can trust to do a competent, thorough, timely, and unbiased investigation and analysis of the claim.

C. Other Sources

Another source for obtaining outside professionals is the claim handler's professional network. The fidelity industry is perhaps unique for the significant number of professional organizations and professional seminars that are regularly held at various venues across the United States. These programs present an excellent opportunity for the claim handler to meet with his or her peers and to meet outside professionals firsthand. Thus, when the need arises, the claim handler can call upon these sources for recommendations around the country. This can be particularly helpful when the claim involves geographic or linguistic issues. Another source can be minority development programs and organizations.

VI.

How to Retain an Outside Professional

A. Meeting the Insurer's Requirements

The claim handler should verify the outside professional meets all the insured's retention requirements. These include:

1. Selection from an approved list.
2. Obtaining a no-conflict of interest letter.
3. Execution of an engagement letter or retention agreement. The engagement letter or retention agreement should specify and clarify how much the outside professional charges for persons assigned to the file, whether the charges are by the hour or by the task, how disbursements and expenses are to be billed, and how often invoices will be submitted.
4. The vendor's Federal tax payor ID information.

5. Whether there is a requirement for the outside professional's invoices to be reviewed by third parties to ensure billing guidelines are being followed. Such practices have become somewhat controversial in that an issue of whether confidentiality of work product remains when a third party reviews the invoices. It is important the outside professional, before being retained knows, understands and accepts the company's practice of having its invoices reviewed by a third party.
6. If the insurer has claim handling code of conduct or code of ethics, a copy should be provided by the claim handler to the outside professional. The retention agreement should mention the outside professional has received, reviewed and will abide by the insurer's code of ethics as well as the code of ethics applicable to the outside professional.

Some insurers may not require execution of a separate retention agreement if the outside professional is already on an approved list.

B. Specifying the Scope of the Work

Regardless of whether a separate retention agreement is obtained, the claim handler and the outside professional should develop a clear and agreed-upon understanding of the work and tasks to be undertaken by the outside professional and the claim handler. It is recommended this understanding be memorialized in writing, including estimated time, rates and expenses.

It also is important for the claim handler to clarify who in the firm will be performing various tasks and who has responsibility for the file. It may be more cost effective to have associates or paralegals do routine document inspections. However, the claim handler must ensure the needed information is being accumulated and analyzed by the outside professional who is responsible for the file and is advising the claim handler.

C. Who Should Retain The Non-Lawyer Professional

Consideration should be given to whether the claim handler or outside counsel should hire a non-lawyer outside professional such as an accountant or investigator. This decision may depend upon whether the

claim handler anticipates there will be litigation in connection with the claim. Although it is arguable that all such communications are protected regardless of who hires the professional, retention of the non-lawyer professional by outside counsel and routing of all reports through outside counsel lends support to the position the content that such reports are protected by the attorney-client privilege.⁴

While it is important to preserve the attorney-client communication and attorney work-product privileges, it is also important to be able to demonstrate the extent of the insurer's investigation. The claim handler must balance the need to preserve these privileges so there will be unfettered communication between the claim handler and counsel with the need to document the extent of the investigation. Consideration should be given to separate communication setting forth strictly facts and communication regarding analysis of coverage issues. Unfortunately, in these days of rampant litigation and bad faith claims, some overly aggressive lawyers attempt to argue consideration of coverage issues by the insurer is merely a ruse to attempt to find a way to deny the claim. Nothing could be further from the truth.

Keep in mind the work product of the attorney who assisted in the investigation before litigation is anticipated may become a battleground for discovery motions should litigation become necessary. Neither the claim handler nor the outside professional should presume that communication is subject to a privilege and communication that is intended to be privileged should be so identified. A careful analysis must be done, when it is anticipated a claim might lead to litigation, in order to determine whether separate litigation counsel should be retained in anticipation the investigation counsel could become a fact witness.⁵

4. For a thorough discussion of such evidentiary issues, see Michael Keeley, *The Attorney-Client Privilege and Work Product Doctrines: The Boundaries of Protected Communications Between Insureds and Insurers*, 33 TORT & INS. L.J. 1169 (1998).

5. See *Id.*

VII. How to Manage an Outside Professional

A. Define, Follow and Adjust, When Needed, the Scope of The Assignment

The initial and perhaps most important step in managing the relationship with the outside professional is to clearly define the scope of the anticipated work. As mentioned above, every claim has its own unique set of facts and circumstances, and thus its own investigation requirements. Although an experienced outside professional may have been involved in hundreds of claims, it is critical that the claim handler review at the outset with the outside professional the claim handler's expectations about how the investigation will proceed. A clear line of communication must then remain open between the claim handler and the outside professional as the investigation may require the scope of the work to change along the way. Ideally, the claim handler and outside professional will work together as a team, each benefiting from the other's insight and experiences.

B. Monitoring Work During Assignment

The claim handler must keep in mind that he or she has primary responsibility for the claim. As a result, monitoring the work being performed by the outside professional during the claim review process is crucial. Keeping in close contact with the outside professional throughout the claim review process should bring to light any problems such as misunderstanding of the assignment, performing unauthorized work or performing poor quality work.

The claim handler should not have to contact the outside professional as to the status of the claim. The claim handler should be provided a well-documented status and claim review process by the outside professional.

The claim handler should carefully monitor the request for additional information and documentation. There should be documented communication by the outside professional or the insurer with the insured every thirty days or as required for fair claim practices. The outside professional should clearly explain why the information requested is going to help in resolving the claim. An insured will quickly become frustrated with the process if it is perceived the insurer's

investigation is a “fishing expedition.” Worse is when the insured feels document requests are duplicative and designed to delay resolution. Therefore, it is imperative the claim handler has a clear understanding as to the focus of the outside professional’s investigation and the specific need for the information and/or documentation requested.

An important aspect of the relationship between the claim handler and outside professional is the outside professional’s written report. Although not necessarily required in every case, written reports prove very helpful in complicated claim investigations. The reports should not only summarize the facts of the claim, but also provide details of the outside professional’s investigation, including a chronological history of the facts of the claim.

One simple method of managing communications with the outside professional is to have a clear understanding as to the form of communication. Clarify and instruct the outside professional as to whether you want communication by electronic mail, mail or facsimile. Specifying the insurer’s preferred and desired method of communication will prevent miscommunication and avoid duplication in claim files.

In certain situations, the claim handler might want to consider sharing a part of the contents of the outside professional’s reports, analysis or calculations with the insured. Putting aside the issue of waiver of privilege, sharing the reports and calculations can provide the insured a clear understanding as to the effect of missing documentation and information on the insurer’s findings and decisions. This may be particularly helpful when the issue of quantifying the loss is in dispute. Disclosing the outside professional’s report may go a long way in educating the insured as to what portions of the sustained loss are addressed by the coverage.

Agreement should be reached as to whether the claim handler requires a copy of all documentation reviewed and analyzed by the outside professional or whether summaries are sufficient.

The outside professional should keep the claim handler informed of witness interviews or other meetings so the claim handler can participate, if appropriate.

VIII.

Evaluation of Performance after Completion of Assignment

Many insurers have developed written evaluation procedures and forms to be completed by the claim handler following use of an outside professional. Such reports are important for a number of reasons. First, they obviously document not only the type of services provided in a given claim by an outside professional, but whether the outside professional met the claim handler's expectations and facilitated a timely and thorough investigation of the claim. Such written evaluations also can assist the company in continuing to evaluate generally the need for use of outside professionals in the claim process.

The claim handler should consider sharing at least the overall results of the evaluation with the outside professional. Many outside professionals prefer such feedback to ensure they are meeting the insured's needs and for their own self-evaluation. Honesty and frank discussions will be appropriate and appreciated by the outside professional.

IX.

Conclusion

In the end, the responsibility for conducting a thorough and reasonable investigation, and ultimately reaching a coverage conclusion, remains with the claim handler. The ultimate goal when retaining an outside professional is to help the claim handler fulfill this responsibility in the most efficient and effective manner.