Independent Claim Organizations and Use of Experts

Disclaimer:*This piece is prepared for the members insured by Claim Professionals Liability Insurance Company, RRG ("CPLIC"). The information provided in this document is not legal advice. It is prepared by fellow CPLIC members as an evolving, working document to assist members in the normal day-to-day claim handling operations. As with all CPLIC guides and documents, if you have any questions about applicability of the concepts outlined, please seek assistance of local counsel and the specific client(s) for whom you provide claim-related services.*

Principle of Agency

In most states and situations, the independent adjusting company ("IA") serves as a hired consultant to the insurance or self-insurance organization. This is commonly referred to as a relationship of agency. When hired to investigate a claim or under contract as a third party claims administrator, the IA firm becomes an agent of the insurance or self-insured organization, referred to as the principal. In such a relationship, the IA firm is only empowered to investigate and act upon a claim up to the level of authority conferred upon it by the hiring organization. As with many topics covered by CPLIC Risk Management, the concept of agency and the limitations to authority conferred upon the IA from the principal must be acknowledged and staff trained to understand fully the limitations of the authority. Staying within the conferred authority in each and every claim assigned to the IA is a primary key to effectively managing the IA organization's exposure to professional liability (Errors and Omissions). This concept is very important when considering the retention of an expert on a claim.

What is an Expert?

One way to look at the expert topic is to first address who is *not* an expert. In the insurance and self-insurance claims industry, experts run a wide gamut, from a painter in a local body shop to a forensic psychologist. The number of variables in expert investigation and testimony is nearly infinite, varying with the number of differences in claim situations. With the exception of claim investigation policies and procedures, it is important to remember and train the IA staff that independent claims professionals are *not* experts. While staff may deal with a certain type of claim or situation on a high volume basis and see many hundreds or even thousands of situations in the development of claim information, and therefore develop a keen eye to identifying situations, staff remains essentially the eyes and ears for the principle (insurance or self-insured organization).

An expert for the purposes of this presentation is one who has training, education and real-world experience in a specific topic or specialty, whose specific experience is necessary to the proper investigation and determination on the claim at issue. Most IA staff is trained in the investigation and handling of claims. Most are not trained in forensic psychology, accident reconstruction, and so on. While the principal, carriers and self-insureds, may "expect" staff's opinion on who is at fault for the accident, and staff's opinion based upon their many years of handling similar claims may be valid and most times correct, such opinions do not qualify as expert opinions. Staff should be trained and procedural checks and balances put in place to ensure that reports and communications with the principal and others involved in a claim to clearly identify that the opinions of the IA are not expert in nature, but limited to common observations of the trained claims professional.

Another reason why IA staff is generally not to be considered an expert is conflict of interest. Staff is generally responsible for investigation of facts surrounding a claim situation, from coverage to liability. The individual that gathers the information should not and cannot be the same person that serves as an expert for the application of that information. In a worst-case scenario, such as a bad faith law suit alleging improper claims practices, IA staff may be asked to identify specifically what qualifies them to have made certain representations as to coverage, liability or amount of damages. Such a situation is more easily defended by counsel when IA staff has avoided even the appearance of a conflict of interest. The topic of conflict of interest is too broad for this document. However, it is important to remember, check for and internally proceduralize the review and elimination of conflicts which may reflect poorly upon the IA in the claim or in later litigation.

So who qualifies as an expert? A generally accepted definition of the term expert when used in conjunction with claims handling is:

> *Expert: One who through education, training and experience has special skill or knowledge in some particular field and will be viewed by a court as a specialist and/or authority in that particular field.*

As is evident, IA staff might be considered “expert” in the investigation and handling of claims, but few would qualify as an “expert” on topics beyond the investigation and handling of claims. Therefore, it is important to identify in reports, letters, e-mails and other communications that the opinions and observations of IA staff are just that, opinions and observations…not to be confused with expert level opinions that may be necessary to make a reasonable claim determination at the client / principal level. Simply stated, train staff to not overstep their bounds when communicating to the client or to others involved in a claim.

To complete the discussion of “What is an Expert?”, it is important that an IA create through questioning, observation and investigation demonstrable qualifications of an expert considered for use on a claim. The commonly obtained documentation includes:

- the expert and/or firm resume,
- list of higher education and recent continuing education / training,
- list of expert and/or firm references,
- list of similar situations handled previously, and so on.

Qualifying an expert is one of the single best protections against a claim against an IA for negligent hiring / retention of an expert. Check references. Document why the knowledge and experience of the expert is required on the claim.

When is an Expert Required?

One of the things that IA staff struggle with, particularly when dealing with multiple client organizations, each with their own rules, procedures and requirements, is identification of when an expert is required as a necessary step in the investigation. Further, each client organization has its own “taste” for use of (and payment of service fees for) an expert. Internal communication between IA staff and management is effective at addressing this on a case by case basis. The goal is to seek a reasonable balance between the “perfect”, court-ready investigation and the day-to-day claim procedures and expense pressures upon client organizations.

Retention of an expert is generally indicated when the issue is technical beyond the common understanding of the layperson and community at large. For example, consider a case assigned where a person walking on a sidewalk is struck and killed by a falling 20 ton satellite. An expert would most likely not be necessary to determine the cause of death. Most non-industry people would recognize that a 20 ton satellite falling from orbit and landing on and crushing a human body was probably the cause of death. One would still in most cases want to obtain the coroner’s report, but retention of a physician to secondarily opine on the cause of death is probably not indicated. A rule observed by many is: “If it’s obvious, an expert is probably not required.” Using the same hypothetical, determination of what caused the satellite to fall from orbit is likely an issue for an expert. Most would commonly agree that a contributing cause of the satellite crashing to earth was gravity. However, the claim made by the estate of the deceased will most likely allege negligence of a person or organization that allowed the natural force of gravity to pull the satellite to the ground. It is the investigation of this potential negligence that is beyond the common understanding of a layperson and best commented upon by an expert in satellite technology in this example.

Who is Authorized to Hire / Retain an Expert?

In the context of agency, the IA organization is only authorized to the level explicitly provided by the principal. In some cases, an IA has a specific written contract or agreement (such as a workers' compensation third party claims administration contract) that specifically grants authority to the IA to hire experts. The retention of an expert under such an agreement is controlled by the agreement. However, care should still be given to communicate timely with the client prior to the hiring of the expert to assure concurrence. While the IA may identify need for an expert, even if the agreement confers a level of authority for retention of an expert, a claim of professional liability becomes much easier to defend / defeat if the client has agreed with the decision to hire an expert before the expert is retained. Not only is this a good practice from a professional liability risk management perspective, such proactive communications between the IA and the principal can tend to make the relationship much stronger and trusting over time as well.

In all other situations where there is no formal contract or agreement, the IA must ASSUME THAT THERE IS NO AUTHORITY to hire an expert on a case. Any assumption to the contrary may lead to a claim of professional liability, ranging from the obligation to pay the expert's fees up to a worst case result of the IA's obligation to reimburse the principal for payment of the claim. Staff should be trained to assume no authority and act to hire an expert only when such authority is explicitly provided by the insurance or self-insured organization.

Having no authority to directly hire an expert does not eliminate the IA's responsibility to identify the need of an expert on a claim to the principal. Staff should be trained to identify such needs on claims and, with internal review and authority completed, communicate the need(s) to the principal. Failing to identify the claim need for an expert can be an equal exposure to a claim of professional liability.

Who Hires the Expert?

An expert on a claim is a service provider to the principal. This must be clearly communicated to the expert from the moment retention is discussed, preferably in written form. Should an issue with fees or work product later arise, the IA needs to be in a position to have not directed or controlled the work of the expert in order to mitigate any claim of IA professional liability. The expert works for the client insurance or self-insured organization. The IA provides necessary information to enable the expert's work, passes through information and direction from the principal to the expert and finally communicates the experts opinion(s) to the principal for inclusion in its decision making process.

This sounds easy to accomplish, but those in the IA business know that the shades of gray are limitless. Many IA firms have relationships with experts that they "have used" on many occasions. In some jurisdictions, such as in a rural area, there may be very few selections to choose from. For example, there may be only one fire cause and origin investigator located within 300 miles of the fire location. Problems can arise when these relationships become too casual or too close. It is important to do everything possible to encourage and enhance the IA relationship with experts in its area to get the highest quality results. At the same time, the IA firm must remain firm in its implementation of an arm's length relationship between the IA firm, its staff and the expert and ongoing communication of who the expert's client is…the principal.

In many cases, this is addressed by use of an assignment form which outlines who the client is, the scope and depth of the assignment, the purpose of the assignment and in some measure what role the IA firm serves in the process. In the cases where allegations of professional liability have been alleged against an IA for improperly retaining an expert or hiring the wrong expert, language on an assignment form of this nature, which is provided to the expert and principal concurrently, provides a strong defense.

What is the Expert Hired to do?

The written assignment form discussed above is simply the most effective method of retaining an expert. This includes the scope and depth of the assignment. Staff should be trained with specific examples and annual refreshers what specifically is to be communicated through use of the assignment form. In addition, staff should be trained to obtain a signed copy of the form back from the expert before the work begins to assure that the expert understands the scope and depth of the assignment.

Leaving an expert assignment "open" is an exposure to professional liability for the IA. For example, a principal makes a claim against the IA when they receive a bill for $50,000 from an expert for "services rendered". The principal understood the assignment to be limited to "viewing of the accident scene and an informal opinion of the cause of the auto accident". The expert, on the other hand, took physical measurements, obtained video from 15 surrounding surveillance cameras, created a database and created a computerized reconstruction of the accident. If the assignment was not specific in scope and depth, and acknowledged in writing by the expert prior to work beginning, the huge service fee may be claimed by the principal as a professional liability of the IA.

The IA firm must be specific with a retained expert as to who their client is, who is responsible for the service fee, what the purpose of the assignment is and what the scope and depth of the assignment is. In summary, if the IA is not specific as to these issues in the process of retaining an expert, the IA may be exposed to an increased risk of professional liability.

Working with an Expert

Restating, the definition of an expert is one, who through education, training and experience, is uniquely qualified to render an opinion. An expert is hired on a claim to investigate and evaluate a specific topic, such as fire cause and origin, medical causation of a particular condition, and so on. It is important to "let them do their job".

A classic argument made against an IA in the context of a bad faith type claim is that the expert's opinion was directed by or tarnished by actions of the IA. From a risk management standpoint, use of an assignment form which clearly and timely delineates the purpose, scope and depth of the assignment as authorized by the principal is the single best defense against claims made later by any of the parties involved in the claim against the IA and its staff.

Once the expert is retained and the assignment communicated, it is important to "let them do their job". Follow up by IA staff is necessary on a timely basis to assure that expert results (report, video, etc) are received in the form and within the time parameters necessary for the claim. Otherwise, "let them do their job".

Summary

Claims made against an IA firm or its staff for professional liability arising out of the hiring of an expert on a claim or series of claims are relatively infrequent, but an ongoing, ever-present exposure. Managing the risk from the standpoint of the IA is relatively simple:

1. Remember that the IA serves as an agent of the insurance or self-insurance organization, and as such are authorized to retain an expert only when provided express authority to do so;
2. Train and educate IA staff what constitutes an expert and the limitations upon an IA staff member with respect to their opinions and observations on claim issues;
3. Timely identification of the need for an expert and varying levels of IA staff involvement in reviewing situations to ensure experts are recommended to the client when necessary;
4. Effective and timely communication, in writing, of the purpose, scope and depth of the expert's job on the claim;
5. Always avoid actual and the appearance of conflict of interest, and:
6. Allow the expert to do their job.

Prepared by:
Michael J. Marsh, RPA, President, Midland Claims Service, Inc., Billings, Montana
Date: June 17, 2008