What Your Attorney Really Wants From Risk Management (And What Risk Management Really Wants from Its Attorney)

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What a risk manager wants from the attorney representing the entity will vary depending on the issue. However, in many ways what your attorney wants from you, as a risk management professional is the same thing that most people want in a positive relationship. With that in mind here are some things you might consider.

Expectations

Expectations set the tone for any relationship. Everyone involved in a relationship should have a clear understanding of the expectations. If expectations are not communicated, they are assumed. Assumptions can be wrong. Your attorney should be communicating with you about things you can do to help the attorney properly represent the client.

- What are your attorney's expectations of the risk manager? Do you know?
- What are your expectations of your attorney? Does your attorney know?

If you do not know the answers to these questions, you should talk to your attorney.

Develop a Relationship with Your Attorney

Getting to know you – your needs, proclivities, personality, and quirks.

Establish responsibilities.

Let your attorney know you can and will help, and then do it.

The attorney is an advocate for the client. The client controls whether to settle or fight. Let your attorney know what you would like to do and why. Your attorney wants to know the result the risk manager (or in a broader sense the client) wants or needs. Remember, your attorney advises; the client decides.

It is All about Teamwork

The risk manager and the attorney can and should be an effective team – their work and objectives should be complimentary. You are both on the same team, and if you are not and you have any say in the

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selection of the attorney, find an attorney who will be on the team. Remember, the attorney is akin to the coach in professional sports, not the owner.

Work together to mitigate the impact of a claim. The sooner, the better.

Alert the attorney to potential claims.

Asking is better than not asking - When possible, ask before acting or trouble arises; do not let it fester – make your attorney aware of potential trouble – there may be ways to avoid an issue; ways out of it; ways to lessen the impact; or defenses that might be available.

Do not be afraid to ask your attorney for assistance and advice. Presumably your attorney possesses specialized knowledge or knows where to find it, so take advantage of it.

Consult, consult, consult!

Investigate

Unless it is not your responsibility, conduct a thorough and *appropriate* investigation, as soon as reasonably possible, of the event or action. Why? Presumably, a person's memory of an event is better the closer it is to the event. The brain has a way of filling in blanks, especially the more time there is between the event described by a person and the time of the description. Things have a way of changing.

The investigation should include relevant and material statements from witnesses. Secure photographs and other video evidence relevant to the claim. How?

The scope of the investigation will depend on a number of factors, including the type of claim, i.e. tort action, contract claim, employment claim.

When detailed fact-finding is necessary, interview and take statements from all the affected parties and any third party who could reasonably be expected to have relevant information. Effective interviewing is a skill and there are a variety of techniques that can be used. Take same time to read up on the interviewing process so that you can have the techniques available depending on the circumstances.

Regardless of the technique used there are a few things to keep in mind when interviewing the parties and witnesses to an event. Do not offer an opinion. You want to get the "facts" as that individual sees them. Ask open-ended questions. Open-ended questions do not suggest an answer. Frame the question so the individual being interviewed does not know the answer that is expected. For example, you might ask the witness to tell you what happened. But asking something like, "the light was red wasn't it", suggests the answer to the question.

After you ask **LISTEN AND HEAR** (e.g. comprehend what is actually being said, not what you think is being said) the "story" in the way the witness wants to tell it. You want them to talk for as long as they want to talk. Once you have the "story" you can go back and have the witness tell it in chronological order, and ask follow up questions for clarification.

Follow up, especially if the witness's statement is or seems contradictory or is made in a way that is not understandable. If they say they don't know something, document that information. Sometimes what a witness doesn't know is more important than what they do know.

Do not assume; this is harder to avoid then one might think. It takes practice and an open mind.

Your purpose is to find out why and how a witness knows the information they are giving. Their location in relation to the event is important. A person can be very close to an event and not see it. To help uncover this information ask the person being interviewed what he or she was doing just before and at the time of the event. In other words, what was the witness's opportunity to observe the events? Always follow up on anything you don't understand and go wherever an answer to a question or a comment leads. You might find gold.

You may find it useful to electronically record the interview, so you can get the details accurately. There are pros and cons to the practice, so discuss this with your attorney. If you choose to record start with the date, time, and a verbal acknowledgment on the recording from the person that they understand it is being recorded, and they verbally consent to the recording. Make sure the person makes a verbal response to the consent that can be understood. Yes or no is the best answer. While the consent of the other party may not be required in some states, it is still good practice to obtain the consent of the person being interview. It is hard for the person to later yell "foul", if you have their consent. If the person declines consent, turn the recorder off and take notes.

Many times at the start of an investigation you may know only a few people who know something about the event. During the interviews you will likely learn of other individuals who may know something about the event. So, the breadth of an investigation can, and usually does, expand, depending of what you learn.

Find out whether the person knows the "facts" first hand, i.e. actually witnessed the event, or is recounting something someone else told them. Why is that important? Because repeating what a person was told by someone else may lead to fruitful information, but it is generally not admissible in a court. It is hearsay. While there are a few exceptions, generally hearsay is not allowed in a court as evidence. It might be helpful to know the information and use it to discover admissible evidence or to fully understand the claim, so it is important to document such statements. Just make sure in the documentation you indicate how the witness knows the information. It will help the attorney evaluate the information.

Your opinions and observations should not be part of the documentation, unless your attorney asks for it. If you want to express your opinion to your attorney, do it privately and preferably verbally. If that is not possible, and you have to express your opinion, do it at home, in private, to yourself.

Be on the lookout for clues. It helps to know what kind of information is relevant and that depends on the type of claim. Ask your attorney to guide you.

The following are some of the types of question to ask the parties and potential witnesses, keeping in mind that an investigation should be tailored to the particular facts.

- Who, what, when, where, and how: *Who* was involved? *What* exactly occurred? *What* was said by whom? *When* did it occur, (date, time)? *Where* did it occur? *How* did it affect the person interviewed?
- Describe the events that led up to the event.
- What did you (the witness) see or hear?
- How did you (the witness) react? What response did you (the witness) or others make or do?
- Are there any individuals who know about this situation?
- Are there any written information or documentation, i.e. letters, emails, text messages, Facebook accounts, photographs, and, if so, where can it be found?

- Is there any physical evidence and, if so, where it can be found?
- Did you (the witness) tell anyone about it, and if so, who?
- Did anyone see you (the witness) immediately after event, and if so, who?
- Do you (the witness) know of any other information?
- What did any party or witness say to you (the witness) or you (the witness) heard them say?
- When and what were the circumstances that allowed you (the witness) to have the information?

If there are conflicting versions of relevant events, record them carefully and in detail. Remember, if it is not written down contemporaneously, it will be difficult to accurately recall all the events and statements in detail in the future. One technique when attempting to collect additional information or get a clearer picture of the events from the witness is to recall a statement the witnesses made, explain to the witness that you are confused, and ask if the witness could clarify a point or restate it to assist you in having a better understanding of the situation. Generally, witnesses want to be helpful and to be understood, so this technique may help you gain a better "picture" of what this witness tells you. Try to make sense of the statements.

Just because witnesses recount different "facts" does not necessarily mean someone is lying. It might just mean someone is wrong. Maybe everyone is wrong. Witnesses explain things from their perspective. So, it is important that the investigator understand the perspective of the witness. An individual's memory is not a videotape. The brain can and often does fill in the gaps in one's memory without even being aware that there is a gap. To the individual that is the way it happened. It may be somewhat disconcerting to realize that we can have a difficult time distinguishing between the reality and the belief of what happened. But that is the way it is, and it is helpful to know this is a normal human process. This may come as a shock; we are all fallible.

Always keep in mind that a picture is worth a thousand words. A really good picture is worth a few more words than that and can sometimes save the client a few bucks to boot. So, learn to take meaningful photographs; photographs that show the conditions existing, as close as possible to the time of the event, and the location relative to landmarks and such. Use a common item in the picture such a tape measure to show scale.

There are a number of good websites with a variety of investigation techniques. Take advantage of them. For example, see https://www.eeoc.gov/policy/docs/harassment.html. The document is entitled "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisor" and includes sections entitled "Effective Investigative Process" and "Questions to Ask Parties and Witnesses". I strongly suggest following this guide when investigating alleged workplace harassment of any kind. It is also useful as a guide for other types of investigations.

Review an event with an eye to preventing it or a similar event from occurring in the future.

Share the results of your investigation with your attorney. It may raise additional questions that you will need to pursue. In fact, be prepared to have your attorney to question you about what you did and didn't ask. This should be expected, and you should welcome it. Your attorney should know what is really important and critical.

Attorneys want to "lock down" facts, so follow up may be needed. For example, you may have asked the right questions, but didn't really lock in some aspect of the investigation that would effectively prevent a witness from changing the story without looking like a fabrication. You really want to completely establish the "facts" and the events, so there is no "wiggle room".

It happens all the time that facts are collected, but are really incomplete, and a witness you think is ironclad turns out to be Houdini. Some people are slippery, and they have had a lot of practice at it. Sometimes it takes a series of questions and responses to completely "close the door" on an event or a witness. Remember, a "fact" and reality are not always the same. Nail it shut.

Provide witness statements that are coherent, and understandable. General Douglas MacArthur is reputed to have said that he did not want to issue orders that could be understood; he wanted to issue orders that could not be misunderstood. That is hard to do, but strive to document an investigation so that it cannot be misunderstood.

A Few Other Observations and Thoughts

Always remember - employment law is not written for the benefit of employer. Members of the jury are employees, and often have experienced "unfair" treatment by an employer, or they know someone, such as a relative, who has been "unfairly" treated. Most of them have never been involved in disciplining or terminating an employee. If an employer expects to win an employment law case presented to a jury, the employer is going to have to show that the employee in question was treated "fairly" by the employer. The proof of "fairness" should be obvious.

Listen.

Always be truthful to your attorney.

Work to be better every day.

Fight or flight - Know when to fight, know when to run.

Do not make admissions. Be careful what you say and write. Be savvy, act savvy. Keep in mind that, in general, attorney-client privileged communication applies only when the communication is private between the lawyer and the client for the purpose of giving or getting advice. Generally, communication conducted in the presence of a third party is not privileged communication. Communication made for the purpose of perpetrating a fraud or crime is not covered by the privilege. The rules and law governing attorney-client privileged information varies widely from state to state, so talk to your attorney about it.

Be competent in your work, and strive on a daily basis to improve and expand your knowledge base. Expect the same of your attorney.

There are a lot of deadlines in the legal world, and there are usually serious consequences for missing the deadlines. Respond to requests from your attorney in a timely manner.

As applicable, let your attorney know if there is insurance coverage and how much. Have the policy available for review and know where the original of the policy is located. Be proficient in understanding language used in insurance policies, especially the technical terms.

Always document. Work with the general assumption that if it isn't written, it didn't happen. While this is not universally true, people generally ascribe credibility to words written at or near the time of an event.

Save everything, notes, emails, text messages, Facebook entries, and such.

Have as a primary goal the safety of individuals and property and the avoidance of cost, if reasonably possible. Take action to avoid or reduce future risk.

Identify meaningful risk.

Litigation avoidance is almost always the cheapest way to resolve a legal issue.

Have a complete knowledge of the organization.

Conclusion

The risk manager and the attorney should work and function as a team. A team should have a common goal. Make sure your attorney and you have a common goal. Work to develop a relationship with your attorney so that matters can be addressed effectively and efficiently.