





Under Investigation

The Fundamentals of Property Claims Investigations and the Role of SMEs

By Pete Fowler

"If you can't describe what you are doing as a process, you don't know what you're doing." - W. Edwards Deming

For this article, property claims include all types of building or real property damage claims: water or fire damage; catastrophic events; construction defects; slip, trip, and fall; habitability; landlord-tenant; premises liability; and anything that might make someone sad or mad enough about building or buildings to file a claim or initiate litigation. The author—founder of a subject matter expert (SME) consulting firm who has gathered input from and the perspectives of many insurance carrier claims managers—wrote this to memorialize the fundamentals of investigating claims with the aid of one or more SMEs.

WORKING BACKWARDS

"If you can't explain it simply, then you don't understand it well enough." - Albert Einstein

At the conclusion of a successful SME assignment, regardless of size, claims professionals deserve a presentation, in less than five minutes, that is graphic-intensive, correct, clear, concise, and precise. It should include:

- An overview of the situation.
- All the information that is and is not available.
- What they have done.
- What they think (opinions or hypothesis, including answering, "How much?" and "Who is responsible?")
- What they recommend.

Five minutes is a quick flyover, so the SME needs to be able to drill backwards into underlying details. If it takes them 45 minutes to get to the point, then they "don't understand it well enough."

THE FUNDAMENTALS

"The expert in anything was once a beginner, mastering the basics through relentless practice." - Helen Hayes

Master claims professionals and SMEs can make magic with expertise developed through the proverbial 10,000 hours, but first the fundamentals must be mastered. The fundamentals in football are blocking and tackling; in music, scales and rhythm; in carpentry, measuring and cutting. This article is for colleagues with less than 10,000 hours served, and for their managers and mentors. When we structure evidence in the following way, we increase "muscle memory," decrease waste, and enable the mind's magical pattern recognition.

The fundamentals for SMEs are: understand the scale of the assignment; gather, organize, summarize, and understand 100% of the available evidence; conduct onsite investigations; explain the physicality of the property and what happened before, during, and after this claim; define the scope, methods, and costs of repairs; if applicable, assign and/or allocate responsibility.

All SME work should be: correct, clear, concise, precise, and objective (our mnemonic is C3PO); graphically intense because a picture is worth 1,000 words, and a good diagram is worth 1,000 pictures; performed with "forensic" level professionalism (explained below); and "coverage aware."

Coverage analysis is a critical part of the process from beginning to end, and well beyond the scope of this piece. Before hiring an SME, the claims professional should analyze coverage and explain concepts and policies to the SME, as necessary. Coverage analysis pertains to the policy(ies) the claims professional is adjusting a claim under, but also includes a recognition/understanding of other types of insurance that may come into play related to the ultimate disposition

of the claim. “Coverage aware” SMEs understand insurance basics and the context for the current investigation. They recognize that this level of knowledge is enough to be dangerous and they do not offer opinions beyond the sphere of their expertise.

SME work should be performed at increasing levels of depth, with explicitly agreed-upon deliverables and hold-points at each level where SMEs present their work so claims professionals can manage the spending of the right amount of time and money, at the right time. We recommend the following project plan analysis levels:

- Level 1 Initial/Desktop Investigation (usually 4-10 hours).
- Level 2 Preliminary Investigation (+/- 8-80 hours).
- Level 3 Investigative Analysis (+/- 60-160 hours).
- Level 4 Detailed Analysis (+/- 100-200 hours).
- Level 5 Final Analysis (200+ hours).

We do not move from one level to the next without explicit agreement, because in claims, no one likes surprises. Often, at the conclusion of a Level 1 analysis, the claims professional has all they need to pay and close the claim, but sometimes the Level 1 recommendations include further work, such as onsite investigations, testing, evaluating testimony, scope and cost estimates, and even delivery of expert testimony in deposition, arbitration, or trial.

CLAIMS VS. LITIGATION

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.” - Abraham Lincoln

Put simply, insurance claims professionals are obliged to investigate claims. This sometimes involves hiring an SME. The majority of property claims are completed transactionally in the normal course of business, but any one of them could end up in litigation.

Claims professionals should work with attorneys to ensure that qualified experts have been vetted and retained at the outset.

Therefore, claims professionals need to be “litigation aware,” which is similar to SME “coverage awareness.” When an SME is hired to aid in investigating a non-litigated claim, we call the SME a consultant. Work by a consultant (inspections, reports, scopes of work, and estimates) becomes part of the claim file and may be discoverable in litigation. The gray area between transactional and litigated claims is where professional judgment is required to balance costs and risks, and where “litigation aware” professionals shine. High-risk claims often have a lawyer hired early, who then hires the SME.

Most cases settle, either pre-litigation or prior to trial in a litigated matter. There are occasions, however, where a case proceeds through a trial or arbitration. Because of this, litigated cases need to be treated with care. Claims professionals should work with attorneys to ensure that qualified experts have been vetted and retained at the outset. Strengths and weaknesses of the claim at issue should be critically analyzed by the expert; and discussions between the expert, the attorney, and the claims professional should occur. Experts should clearly understand the scope of their retention and execute their work on that basis. The aim is to obtain enough information to properly evaluate the value of the claim at issue and hopefully arrive at a settlement. If resolution cannot be reached, the expert deliverable should serve to benchmark the claim to the true value of the exposure.

FORENSICS

“We have an obligation to dissent.” - Marvin Bower, McKinsey & Co.

When the claim is in litigation, a lawyer is hired first. The attorney should hire the SME, and all correspondence should run through the attorney. SMEs become “experts” when they are disclosed as such by a lawyer during litigation; prior to that they are “consultants.” In most jurisdictions, an expert’s file will be subject to review by the opposing parties prior to SME testimony. If the SME consultant is never named an expert, his or her work will likely remain privileged, never to be seen by the opposing parties. This is why it may be beneficial to have both consultants and experts retained.

Regardless of claim status, all SME work should be conducted at the level of forensic professionalism that a judge would allow to be presented, based on the rules of evidence. SMEs should use reliable methods, applied reliably. The work must be systematic and objective to determine the cause, extent, and circumstances; and the documentation must be good enough for presentation in testimony. Investigative standards should include: observation, hypothesis formulation testing the hypothesis (at minimum seeking contrary evidence), analysis, conclusions, and recommendations.

SMEs must show how they came to their conclusions. All work should conform to a reliable forensic protocol. The foundation stones of a good analysis can be shown to clients, key players, judges, and juries. Good, systematic work is persuasive.

SME ethics are beyond the scope here, but we need to acknowledge that SMEs are sometimes hired by

attorneys to give opinions that are helpful to their client, rather than purely investigative. If an SME sells helpful opinions regardless of the evidence, this is not forensic. SMEs must always be open to integrating new evidence and revising their conclusions when the evidence is compelling. Telling claims and legal professionals only what they want to hear, rather than objective opinions based on evidence, is SME negligence.

To avoid surprises, SMEs should hypothesize as early as possible and share those thoughts with the client. If the SME cannot help, then the billing should be kept to a minimum. The American legal system is based in advocacy, so SMEs should not be upset with an attorney for zealously advocating.

FILE ANALYSIS

“Data! Data! Data! I can’t make bricks without clay.” - Sherlock Holmes

By “file,” we mean 100% of the available evidence: interviews, statements, testimony, documents, reports, photos, video, inspections, testing, and legal documents. When an SME’s file is a mess and they cannot find what they need to support their arguments, people lose faith. When the file is professionally collected, organized, indexed, summarized, and analyzed, and the SME can quickly find, reference, retrieve, and share everything, people think this person has their act together, and the assignment is safe in their hands.

Human ability to understand a large pile of evidence is strongly influenced by the organizational scheme. If evidence from disparate sources is in a physical or digital pile, it is tough to understand. When they are organized into a sensible file, it can read like a story—transformed from data into usable information. Someone reading evidence organized from numerous sources can be the first person to genuinely understand the situation.

When this evidence-based understanding is shared, then others can easily understand, and contentious matters can move toward resolution.

If we organize evidence in a consistent way across all our different property claims, deep expertise can be developed in a shorter time because the human mind is an amazing pattern recognition machine. Deep expertise by SMEs and claims professionals leads to great decisions.

ONSITE INVESTIGATIONS

“You see, but you do not observe.” - Sherlock Holmes

Determining the origin and cause of a property claim can be a critical part of the evaluation, especially when there is litigation or the possibility of subrogation. Before onsite investigation, work includes gathering evidence and information that will aid in the observations and documentation. This might include maps, plans, satellite or aerial images, photographs, statements or testimony, contracts, and invoices.

During an onsite investigation, careful observation and work ethic are most important. There should be 25 to 100 photographs per hour. Sketches and diagrams with dimensions can be key.

After a forensic onsite investigation, the photographs and notes should be processed so a user can read through documentation like a story. People who were not there should be able to understand and rely on the documentation, even for testimony. Transcribing field notes for each photograph deepens understanding and enhances the value; unannotated photographs can be confusing.

The SME must explain what the investigation means. Sending raw data and expecting a client to interpret it is negligence. Often, the data is made into graphics that move the client from the big picture to the details while maintaining orientation. If anyone gets lost, the work is not excellent.

SCOPE AND COSTS

“Don’t ask the barber if you need a haircut.” - Warren Buffett

It is not uncommon to come across people with scant construction experience who are taught to use estimating

software to determine a claim’s value. These tools combine defining the scope of work and costs into a single step. This is fantastic for small, transactional claims where a few percentage points of difference are not worth the high cost of hiring SMEs to define the scope and costs of remediation.

Professional cost estimators with identical scopes of work—like they are in plans and specifications for public construction projects—commonly come within 2% to 5% of one another. So why do contentious claims have estimates two to five times one another? The primary reason is scope differences, meaning, what is actually wrong and what is the actual fix. Another reason, to a lesser degree, is dramatic differences in costs.

Some insurance professionals prefer free estimates from preferred contractors/vendors. Warren Buffett’s admonition reminds us to align incentives. If someone does something for free that costs them money, then they are accounting for the costs somewhere else. When costs are hidden, they are impossible to manage. Large claims often involve complex construction projects. To specify the correct scope of work, one or more SMEs are generally required. If the scope is not defined precisely, then the costs are likely to vary widely.

Professionals should have high expectations of one another, whether co-workers or when one is a vendor. To successfully manage the work of an SME on a property claim, the claims professional should define what good performance looks like, in writing, and make sure everyone agrees, then compare performance to that standard. The SME should make clients feel safe by executing a forensic investigation adhering to the fundamentals, including communicating correct, clear, concise, precise, and objective observations and opinions. ■

Pete Fowler is chief quality officer at Pete Fowler Construction Services, Inc. pf@petefowler.com