



ALFA International
THE GLOBAL LEGAL NETWORK

2022 Insurance & Professional Liability Seminar

June 22-24, 2022

DON'T DO THAT!

Common Mistakes That Lead to Litigation

Rick Shoultz

Moderator

LEWIS WAGNER, LLP

Indianapolis, Indiana

Rshoultz@lewiswagner.com

Kathryn Terry

PHILLIPS MURRAH, P.C.

Oklahoma City, Oklahoma

Kdterry@phillipsmurrah.com

Common Mistakes That Lead to Litigation

Do you find that your insurance professionals are coming to you with confessions, like . . . “Oops I did it again.” Or perhaps, even better, you learn of transgressions when a charge of bad faith or unfair and deceptive practices hits your desk? In this roundtable, we will identify and discuss common mistakes that are made every day that can lead to dissatisfied insureds, claimants and lead to legal trouble. We will identify typical mistakes and discuss best practices to avoid them.

1. Insurer Attention to File

- a. Insurers are very busy, but . . .
 - 1. Must devote time to addressing the claim
How and why?
 - 2. Consider documentation of time spent addressing the claim
How and why?
 - 3. Must outline activity in arriving at claim decisions
How and why?
 - 4. Consider selection of expert consultants (IMEs, Estimators, Engineers, Medical Directors) carefully to avoid challenge as “biased tool”

2. Rescission of Policies

- a. Because Insureds are losing coverage, Insurers must be careful
- b. Elements to establish
 - 1. Different requirements in states
 - a. Some states require “intent to deceive” by insured
 - 1. How do you establish
 - 2. How do you demonstrate?
 - 3. How do you investigate?
- c. Problems experienced by P&C carriers
 - 1. ALI Restatement view on rescission
 - 2. Underwriting uncertainties on whether misrepresentation is prejudicial to insurer or would have resulted in no policy being issued
 - 3. Underwriter reluctance to offer or support opinion

3. Bad Faith Setups

Common Mistakes That Lead to Litigation

- a. Insurers are targets - \$\$\$
- b. Types of Insurer Setups
 - 1. Failure to Settle
 - a. How to demonstrate Insurer was reasonable in evaluation
 - 2. Time limitations on Settlement Demands
 - a. What to do when received
 - b. How are states addressing time limitations?
 - 3. Delay by Insurer
 - a. Delays happen. What do you do when they happen?
 - 4. Failure to Investigate Claims
- c. Suits for Bad Faith Against Adjusters
 - 1. Efforts to Include Adjusters as Defendants
 - 2. State positions vary

4. Insurer Dilemmas When Facing Multiple Claims or Claimants

- a. Balancing of Insured's interests
- b. Avoid giving preferences
 - 1. Preference to Named Insured over Additional Insured
- c. Interpleader
 - 1. Use when you have competing claims from multiple claimants
 - a. Multiple personal injury claimants
 - b. Multiple beneficiaries of life policy
 - 2. Claimant or Insured concerns regarding delays to resolution by filing interpleader action
- d. Exhaustion by resolution of certain claims which impact others
- e. How coverage questions are involved in interpleader matters

5. Erosion of Attorney Client Privilege for Insurers

Common Mistakes That Lead to Litigation

- a. Court disdain of privilege for insurer
- b. Many bad cases being issued
- c. Views of insurer's use of in-house counsel
 - 1. As attorney
 - 2. As investigator of claim
- d. Use of outside counsel
 - 1. Avoid as investigator until coverage decision is made
- e. In-House v. Outside Counsel
 - 1. Reporting
 - 2. Providing evaluation of claims
 - 3. Advice of counsel defense
 - 4. Deposition preparation
- f. Effective Preparation of claims professional for deposition