



ADVANCING ETHICS, COOPERATION AND EDUCATION

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Working with a Difficult Insured: Strategies to Effectively Work Together

I. Choice of Counsel

Choice of Counsel Issues

One of the most important considerations a claims handler must make is what defense firm to use to represent the Insured's interests. Generally, in a duty to defend policy, the carrier selects counsel from a panel of firms generally used and approved by the carrier. Sometimes, the Insured will want to proceed with a firm of their choosing. Consider the below reasons and strategies justifying the retention of a panel firm while keeping the Insured happy and on the same page as you.

When to use Choice of Counsel

State statutes dictate when an Insured has the right to independent counsel, and it usually arises when a conflict of interest exists. Sometimes a carrier will make a business decision to allow an Insured to proceed with their firm. A consideration may also be made when a matter has a high retention which is unlikely to be eroded. A firm who has intimate knowledge of the matter may also be considered.

Strategies to Retain Panel Counsel

It is important for you to give the Insured an opportunity to discuss why they want to proceed with their choice of counsel. Reiterate that the carrier's goals are in line with the Insured's goals, as both parties are looking to resolve the matter as efficiently as possible. The Insured should feel more comfortable after you explain the panel firm you would like to assign is experienced in this area of law and has obtained favorable results previously. If they are still

pushing back, discuss how this is just the plain language of the policy. At this point, they may want the matter escalated within the carrier. Make sure you and your manager are on the same page regarding counsel assignment.

Why Panel Counsel is Best Alternative

Panel firms have a more intimate knowledge of the carrier's billing systems and best practices. As a claims handler, this is important because they know what you and the carrier expect. Off-panel firms do not usually work with carriers often, potentially creating issues when you expect a litigation report, update, or budget within a certain timeframe. Your panel counsel probably specializes in the line of business for which they are on panel, while an off-panel firm may not. Panel firms also have pre-negotiated rates for the carrier that are generally lower than those at which they usually bill, and may be lower than those of the Insured's choice of counsel.

Manage Expectations

Avoid the possibility of the Insured alleging bad faith by making sure you communicate clearly and in a timely manner. Treat them not as an adversary but as a teammate. Consider a less standard, more creative resolution if the Insured continues to be unhappy with the claims handling. By treating the Insured with respect, they become much easier to work with, which in turn makes your job easier.

II. Difficult Insureds

The Unsophisticated Insured

One type of difficult insured that claim professionals often face is the unsophisticated insured. Generally, the unsophisticated insured is not knowledgeable as to risk management, insurance, and risk financing practices. Unsophisticated insureds are often small businesses that do not typically face large claim volumes. Unsophisticated insured's lack of experience, lack of knowledge, and anxiety over their livelihood and general distrust of Insurance companies often presents a challenge for Claims Professionals. In dealing with difficult unsophisticated Insureds, the most challenging hurdle to overcome is their general distrust and negative perception of insurance companies. In order to overcome this hurdle, claims professionals must provide these insureds with excellent customer service through communication, assurance, transparency, patience, and by setting boundaries.

The Sophisticate Insured

A second type of difficult insured that claims professionals often face is the sophisticated insured. The sophisticated insured is knowledgeable as to risk management, insurance, and risk financing practices, and does not require the same level of protection under insurance laws as an average insurance consumer. Generally, sophisticated insureds are middle market and large multinational companies that have a good understanding of the insurance products they purchase and are familiar with the claims process. The challenges claims professionals face in handling claims for sophisticated insureds can vary. Dealing with a sophisticated insured often requires the claims professional to be responsive, adaptable, cooperative, assertive and firm.

The Uncooperative Insured

A third type of difficult insured that claims professionals often face is the uncooperative insured. The uncooperative insured can often hinder the claims process and expose itself and carriers to further liability. The uncooperative insured may be unwilling to provide necessary information to assist in coverage evaluation, unwilling to work with defense counsel, and unwilling to enter a reasonable and fair settlement. Additionally, the uncooperative insured may be unwilling to communicate with the insured directly and may often rely on intermediaries. Dealing with the uncooperative insured can be challenging. Although most policies have cooperation clause, disclaiming coverage based on the cooperation clause should generally remain the last resort. It may not always be possible to fully gain the cooperation of an uncooperative insured, but there are means to foster better communication to advance the claims process.

Managing Your Response to Difficult Insureds

Dealing with difficult insureds may be the most challenging and stressful aspect of the claims profession. However, by taking a proactive approach, claims professionals can overcome most issues that arise when dealing with difficult insureds. Being customer service focused can often build trust and foster cooperation between claims professionals and difficult insureds.

III. Defense Counsel Strategies for Settlements

Preparing for the Negotiation

At the outset of the case, defense counsel should always clarify their role as retained counsel to defend the Insured. The tripartate relationship, under which the insurance carrier hires defense counsel to represent the Insured creates a very delicate balance between the parties. As defense counsel, you must be clear that your role is to defend your client- the Insured. Give the insured a voice in their defense and understand their goals. Make sure you are listening to the insured and keeping them just as well informed as you are the carrier. When it comes time to discuss settlement, make sure to document the settlement parameters.

What can Derail Your Settlement Discussions?

There are many pitfalls that can be encountered when engaged in settlement discussions under an insurance policy. Failure to communicate, manage expectations and establish goals can sour the confidence the Insured has in counsel and the process. When this happens, the chance of resolution decreases. Defense counsel must make sure the Insured is involved to the extent they want to be involved, must never lose patience with the insured and avoid last minute surprises. Defense counsel will only be able to enable settlement if they have laid the groundwork with the Insured through good communication which educates and empowers the Insured.

What Happens When the Insured Wants to Settle, but Insurer Does Not?

Oftentimes, the Insured just wants the litigation to end without any exposure outside of the policy limits. In those cases, defense counsel needs to provide the Insured with a pathway to communicate with the carrier. Counsel must strike a delicate balance between Insurer and Insured, provide a solid analysis of the case value and be willing to creatively discuss alternate options. No matter what happens, counsel must not make recommendations based upon the promise of future work.

What are Some Strategies with an Insured that Does Not Want to Settle?

We all encounter cases that involve the “business decision” settlement. Plaintiff’s lawyers understand that no matter what the facts of the case are, there usually is a settlement value simply for eliminating the risk of the unknown. Insureds, especially those who have little litigation experience, often want to draw a line in the sand when they believe they have done nothing wrong. In those cases, you must be prepared to advocate for settlement if it makes solid business sense (especially in those cases where the carrier controls settlement). Discuss the goals you set initially, establish that those goals can be reached by settlement, discuss the business side of risk and that settlement does equate to an admission of liability.

Navigating the Policy Limits Demand?

The trickiest settlements involve policy limits demand. In Texas, this demand is known as *Stowers* demand, following a Texas Supreme Court case which provided recourse to the Insured when the carrier negligently failed to settle a claim within policy limits. The issuance of such a demand will trigger certain actions as the demand itself is designed to create tension between the Insured and the carrier and places defense counsel squarely in the middle of that tension. In such cases, defense counsel must be prepared to push both the Insured and the carrier toward the best outcome. In cases where the tension is unable to be resolved, recommending outside counsel to the Insured is a good mechanism to protect their rights, your role and to allow the carrier to clarify and buttress their settlement strategy and decision making. Defense counsel needs to make sure they provide a well-reasoned case evaluation so that the Insured and carrier have sufficient information to make reasonable settlement decisions.