

# Top 10 Immediate Considerations for Claims Handling

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Receipt of lawsuit papers is daunting, but early action and consideration for developing a defense framework can uncover important information and mitigate the risk of last minute, “eve of trial” revelations. While not exhaustive, this list of immediate considerations for litigation provides a few tips for claims handling.

(1) Memorialize Conversations. The adage, “if it’s not written down, it didn’t happen” is all too prescient in litigation. Memories fade, recollections vary and credibility typically is important to lawsuits. Thus, it is important to memorialize conversations with the insured and timely request a copy of the insured’s client file relative to the insurance transactions giving rise to the litigation. Often, initial communications are critical in identifying and analyzing the material issues.

(2) Cease Communications with Parties. It is also important at this early juncture to instruct the insured to cease communications with parties, represented or unrepresented, and parties’ counsel. Seemingly innocent conversations could become harmful admissions at trial if insureds are cavalier with respect to information related to the litigation.

(3) Attorney-Client Privilege. Insureds should also be instructed not to disclose any conversations or information shared with counsel,

which could breach the attorney-client privilege.

(4) Establish Personal Contact. Our culture rewards expediency, though the easiest or quickest path is not always the most advantageous. Where appropriate and feasible, encourage in-person meetings to establish personal relationships, in contrast to email or telephone calls. Listening, making eye contact, engaging in a thoughtful exchange of ideas and information, and establishing a personal rapport builds trust and satisfaction.

(5) Retain Liability Expert. Expert retention is one of the most expensive, yet critical, aspects of defending a professional negligence action against an insurance agent or broker. An expert can help frame the issues in the case, interpret complex insurance provisions, identify critical deponents and record custodians, and develop pointed questions for key depositions. The defense strategy is not formulated in a vacuum, and consulting with and engaging a liability expert early can provide a knowledgeable ally throughout the litigation process.

(6) Consider Underlying Litigation. Insurance E&O claims often arise from underlying litigation. It is critical to compile documents related to that litigation, including dockets, pleadings, discovery, deposition transcripts, and motions to ascertain relevant facts and

establish potential defenses arising therefrom. Continue to monitor the underlying proceedings if the case remains active and consider the pros/cons of staying the E&O action pending the outcome of the underlying action. Key witnesses in an underlying litigation can be assets in the subsequent negligence action. For example, a witness to an underlying personal injury can provide insight into the plaintiff event space's policies and procedures respecting serving liquor and liquor liability insurance practices.

(7) Consider Other Litigation. A simple docket search can uncover information about other lawsuits involving the parties and impact potential damages exposure. A prior personal injury or evidence of preexisting financial troubles can aid in establishing that the subject insurance transaction and subsequent loss was not the exclusive cause or source of damages.

(8) Business and Personal Relationships. The insured and their customer may have a longstanding business or personal relationship that they seek to preserve. A preexisting relationship may impact the parties' attitude toward the lawsuit, including testifying about unfavorable interactions and conversations; engaging in aggressive discovery; or favoring early resolution. While this should not color the litigation strategy, it is important to consider any preexisting relationships

between the parties which could impact their desired outcome.

(9) Stay Organized. An organized file is an invaluable asset in litigation. Compiling key documents and creating a timeline of salient events facilitates convenient access to important records throughout the litigation.

(10) Get Creative. Every case is different, and a one size fits all approach will not suffice. Depending on the nature of the allegations, it could be equally – if not more – important to issue record subpoenas to prior brokers and carriers, as to subsequent brokers and carriers. Suit-specific subpoenas based on the nature of the case can uncover important evidence for impeachment: financial records, computer hardware or software, medical records, surveillance footage, and social media exports should all be considered.



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