

8 FATAL MISTAKES LAWYERS MAKE WHEN DEALING WITH INSURANCE BAD FAITH

By Mike Abourezk*
Another POA exclusive



I have reviewed hundreds of claim files and attorney files, and often get calls from lawyers asking for advice on how to best write letters to an insurer that is committing bad faith. I deal extensively with this subject on my website, www.abourezk.com. Here are 8 of the most costly mistakes that I see lawyers make.

MISTAKE NO. 1: Trying to “set up” a bad faith case. Some lawyers think that when they see bad faith behavior by an insurance company, they need to hide the ball and hope the company will continue to commit bad faith. I think just the opposite.

ADVICE: The best way to “set up” an insurance company is to give it every opportunity to do the right

thing. Don't hide the ball and hope they will commit bad faith. Give them all of the facts, tell them the applicable law. If they do the right thing ... that's great. If they ignore you, then they have done a better job of setting themselves up than you can ever do. Don't worry that you will lose out on a bad faith case. Unfortunately, there are plenty of them. If you behave the way I am telling you here, you will either get coverage (assuming your client deserves it), or your client will have an obvious case of bad faith.

MISTAKE NO. 2: Writing nasty letters to the company-Threatening to sue for bad faith. When it comes time to try the case, tough talk just makes you look like a jerk, and makes the jury want to line on the side of the insurance company. In fact, one of the first lines of defense in a bad faith case is for the insurance company to point at the plaintiff's lawyer and suggest that he or she is the driving force for the entire case.

ADVICE: Be pleasant. Tell them that there is no basis for denial. Give them the accurate facts and the accurate law. Tell them that your client needs his coverage, and offer any help you can give to assist the company in evaluating the claim. If they ignore you, then write them again. Forget flamboy-

ance. Be simple.

MISTAKE NO. 3: Writing long winded letters in a lecturing tone. These make lousy trial exhibits, and diffuse whatever legitimate points you have.

ADVICE: Keep your letters short, to the point, and end by offering whatever help you can give. When you get no response, write again. Three short letters asking for help, all short and to the point, and all ignored by the company, are much better than one long winded one.

MISTAKE NO. 4: Overreaching on the value of the claim. Too many lawyers think their job is to get everything they can, and when they get that, to get some more.

ADVICE: If you can get what is fair, then you have done a good job. The typical lawyer's habit of trying to get every last cent is death to a bad faith claim. In trial, the whole story you are trying to tell is one of a company that seeks to get every advantage it can over the policyholder. If the policyholder's lawyer is playing the same game with the insurance company, the jury can smell it and you have lost the high ground.

MISTAKE NO. 5: Whining about “my poor client”- or overusing hyperbole. As with overreaching on the

value of the claim, don't exaggerate about your client either. It makes you look like the kind of lawyer that juries don't like. Similarly, in our sense of outrage we often express ourselves in the BIGGEST, and MOST COLORFUL, and MOST EXTRAVAGANT terms we can concoct. This kind of language falls flat. It compromises your credibility.

ADVICE: If your client is having problems because of the denial or delay in payment, say so. But don't overplay it. Nothing that you can exaggerate is more powerful than simple honesty. Look at your letters. Remove words ending with the letters “ly”. If the facts are clear, introducing them with the word “clearly” or “obviously” is not going to make them any more so. This kind of letter writing, short and to the point, makes a great exhibit at trial because it is simple, and honest.

MISTAKE NO. 6: Delaying your response to the company. The insurance companies use delay on a policyholder the same way that you use hot water on a sticky jar lid ... to loosen it up. As time passes, the policyholder softens up, gives in, and takes less. It is hard to complain about delay, though, when the policyholder's own lawyer takes weeks or months to answer letters, or provide information.

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ADVICE: Never let the ball linger in your court. Always get it back in their court. Get them what they ask for, do it quick, and then ask if they need anything else. Any delay must always come from them.

MISTAKE NO. 7: Failing to ask questions. The insurance company has a duty to provide the insured with full and fair disclosure of the facts and the law on which it bases a denial. Ask them to live up to this duty. They usually fail miserably.

ADVICE: Ask the company for specific information. What investigation have you conducted? What facts have you uncovered? Who have you interviewed? Will you supply us with copies of your claims file? For some reason claims personnel ignore these questions as if they are too stupid to even address. This makes for a great opening statement that will have a jurors setting their jaws and seething.

MISTAKE NO. 8: Missing the opportunity to give the insurer one last chance to avoid litigation. When the case goes to trial, the defense loves to play the "greed" card

against both the policyholder and the policyholders's lawyer.

ADVICE: When appropriate, and with the permission of my client, I will sometimes write the company a polite letter offering to drop our claim and let the company keep our money if the company is also willing to admit that they violated the unfair claims practices laws and agree to an audit of their claim files in order to correct similar violations perpetrated against other policyholders. They never accept. Later, when they try to play the "greed" card against us, this letter and their refusal to even answer it becomes a huge problem for the company. If it goes into evidence, the defense may as well go home. Even if the judge decides not to automatically allow admission of the letter into evidence, (s)he will often warn the insurer that arguments of greed and manipulation by the plaintiff will kick the door open to admission of the letter.

*About the Author:

Mike Abourezk is a trial lawyer based in Rapid City, South Dakota, who focuses on insurance bad faith. He was named Trial Lawyer of the Year by the South Dakota Trial Lawyer's Association, as well as Mid-West Warrior of the Year by the Gerry Spence Trial Lawyer's College, and was given the Steven J. Sharp Public Service Award by the Association of Trial Lawyers of America for his role in bringing a successful national class action to recover insurance benefits for cancer patients. He is a member of the Inner Circle of Advocates, described by the Washington Post as "a select group of 100 of the nation's most celebrated trial lawyers". His [website](http://www.abourezk.com), www.abourezk.com offers dozens of articles on insurance bad faith and is available as a free resource for both policyholders and lawyers who need help with unfair treatment by an insurance company

