

5 Tips To Strengthen Your Insurance Legal Writing

By **Jeff Sistrunk**

Law360, Los Angeles (June 15, 2016, 5:52 PM ET) -- Making a clear, concise argument in a written brief or memorandum poses a challenge for any attorney. But insurance lawyers can face a particularly tough task in distilling into an easily readable form, the daunting legal jargon and tangled webs of contractual relationships that are intrinsic to the field.

Here, attorneys discuss how insurance lawyers can strengthen their writing, from eliminating the use of certain terms, to avoiding melodramatic language.

Nix 'Insurer' and 'Insured'

While it may be tempting to refer to an insurance carrier as an "insurer" and a policyholder as an "insured" to save space in a brief, the close visual and phonetic similarities between the two words can easily lead to confusion and make for an unpleasant reading experience, attorneys say.

"For consistency and clarity, refer to the insurer as the insurance company and the insured as the policyholder," said Anderson Kill PC shareholder Joshua Gold.

Moreover, it is easy for lawyers to accidentally use one term instead of the other while typing a brief. Such errors can cause a judge to do a double-take and distract from what may otherwise be a strong legal argument, according to attorneys. Gold noted that he has seen references made to either the "insurer" or "insured" in briefs and court decisions where "clearly the other term was meant to be used."

"Those terms are easily misplaced in the confines of a long brief," Gold said.

Unlike major spelling and grammatical errors, misuses of "insured" and "insurer" won't always be caught by a proofreader or editing software, attorneys say.

"Spell check isn't going to save you in this situation," Gold said.

Get to the Point

Insurance coverage cases often have sprawling factual and procedural histories involving multiple claims, insurance companies and policies. And with courts often crunched for time, it is critical for lawyers to lay out their most important arguments and supporting case law both in a brief's table of

contents and introductory paragraphs, attorneys say.

"You don't want to have a first page setting out the standard for summary judgment," said Nossaman LLP partner Steven E. Knott. "Start with your key arguments. If you can't win in the first sentence, then win in the first paragraph."

In any insurance brief, the analysis of the facts should start with the language of the policy at issue, according to Knott's colleague, Nossaman partner Joan Cotkin. The policy language can then serve as a jumping-off point to examine the specific circumstances of the case and relevant legal precedent, Cotkin said.

"Everything else depends on what the policy says," Cotkin said. "Cite the key points you want to highlight in the policy, and then organize your facts and case law around those. That's a critical thing that's sometimes left out or put in later in the brief."

A good insurance brief should also lay out precisely what sort of relief a client is asking for, both in the introduction and the conclusion, attorneys say.

"If you make judges search for what you want and why, they could become angry with you," Knott said. "A very good general rule is tell them what you are going to tell them, tell them, and then tell them what you told them."

Don't Be Dramatic

Lawyers representing insurance companies or policyholders should take care to not use needlessly inflammatory language or press overly aggressive positions in letters or court briefs early on in a coverage dispute, attorneys say.

Insurance lawyers who haphazardly throw around unsubstantiated claims from the outset of a dispute risk losing credibility with the court and opposing counsel, so it is wise for them to consider how sensitive phrases will be perceived in writing, according to attorneys.

"There are certain buzzwords that require significant thought before they are invoked," said Michael Best & Friedrich LLP partner Eric Barber.

For instance, overzealous policyholder-side attorneys may assert a bad faith claim in letters sent to an insurance company before obtaining any concrete evidence to support such a claim. But alleging bad faith where it is not yet warranted can negatively affect negotiations between the policyholder and the carrier, attorneys say.

"You risk escalating the process quickly and lose opportunities to get an insurer on board with coverage," Barber said.

Pick the Right Cases

Insurance lawyers sometimes fail to do sufficient research on prior court decisions on a particular issue before citing them in briefs, which can result in submissions chock-full of case citations that don't actually support a client's position.

Even when a prior ruling dealt with the same type of policy or coverage issue in the case at hand, it is easy to miss subtle differences in policy language or factual circumstances between the two cases, attorneys say.

"When writing about cases dealing with a type of policy or specific language in a policy, are you comparing apples with apples, or apples with oranges?" Barber asked. "Too often people don't look to the underlying source material and see whether unique policy language might make a difference in whether that case is helpful or not."

Fortunately, the policies involved in a given case are typically available as part of the public record, either in physical form at a courthouse or in digital form in online archives. Insurance lawyers should take the time to closely compare the policy language involved in a prior case with that involved in their own case, attorneys say.

"If you can get your hands on the insurance policy on which a court based its decision — it's often attached as an exhibit to the complaint — this will undoubtedly help you better explain in writing why that case is helpful or inapplicable," Barber said.

Trim the Jargon

In even the most straightforward insurance coverage disputes, lawyers can quickly wander into the weeds and start writing in impenetrable legalese. Many insurance concepts, such as allocation of liability among multiple insurers, may confound a judge unless they are simplified.

Even though it may take extra effort, insurance lawyers should strive to present their position in the clearest terms possible, attorneys say.

"Avoid jargon as much as humanly possible," Gold said. "While the law values specialists, and it is natural to want to use technical terms, that's almost always a bad idea with a judge or jury, as they are not always familiar with industry jargon."

Analogies and hypothetical scenarios can be an insurance lawyer's best friend when it comes to breaking down complex concepts. For example, in a case involving allocation, a lawyer can present a hypothetical situation involving an insurance claim of \$1 million or another round number to demonstrate how a claim may be spread proportionally out over several policies.

"Explain the concepts in a way that is understandable to someone who is not from the insurance industry," Gold said.

--Editing by Katherine Rautenberg and Edrienne Su.
