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WITH FRIENDS LIKE THESE, WHO NEEDS ENEMIES?

By Blake Sando, Esq.

BEST PRACTICES TO AVOID INSURANCE AGENT E&O LIABILITY

Perhaps you have heard the above famous quote over the years. It has been attributed to the late 20th century American comedian, Joey Adams, according to the *Yale Book of Quotations*, and more recently, iterations of the popular line have appeared in the more popular (no offense to the talents of Joey Adams), Disney Films, like *Finding Nemo*.

Perhaps what the comedian (and *Marlin from Finding Nemo*) did not know at the time when they said it, it was not only comical, but very much applicable in describing the dilemma that many insurance agents are placed in every day when they are charged with the tasks of procuring insurance for their customers, and at the same time adhering to stringent guidelines and demands established by their underwriters and insurance carriers.

While relationships get formed, professional friendships get made, insurance business gets done, and general good-will is espoused among the agents and their respective customers and clients, all it takes is one inadvertent oversight or omission of detail from the customer during the insurance procurement process, and/or an overly aggressive claim denial from the insured's carrier, coupled with a significant uninsured or underinsured losses, and years of friendship and good-will can quickly become soured. The agent is then placed in the unenviable position of defending themselves from the competing interests of long-standing customers and carriers in the claims process, now adverse to each other in light of the uninsured/underinsured loss, and all of whom are supposed to be the insurance agent's professional "friends."

The good news is that with improvements to technology, it is now arguably easier than ever for insurance agents and professionals to develop best-practices to attempt to insulate themselves and sometimes even deter E&O claims from being pursued against them.

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BLAKE'S TOP FIVE INSURANCE AGENT "BEST PRACTICES"

Here are my Top Five Best Practices from defending insurance agents from lawsuits over the past 17 years. While these are by no means the industry-standard among agents, these best practices can nevertheless still assist agents in protecting themselves from E&O liability and exposure.

1

THE AGENT'S FILE IS THE "BEST ASSET" IN DEFENDING AGAINST AGENT E&O LIABILITY

If/when an E&O Claim arises, and counsel is retained to defend the agent, the first question the agent will or should receive is "let me see your file." The reason is because in civil litigation the burden of proof is merely a preponderance of the evidence (51% standard; more likely than not), meaning that when it comes to litigate the factual issues of what was decided, what was discussed, what was provided, what was received, it will inevitably become a swearing contest between the agent and the plaintiff-customer about what they respectively recall.

However, a file containing emails between the insured and agent (and the agent and the underwriter), signed applications, commercial written proposals, written policies, policy documents, and transmittal emails where the policies are provided to the insured every year/renewal, all help in clarifying what the insured might "remember," or "mis-remember," about what occurred during the procurement process.

Many states have different statutes of limitations. In Florida, there exists a four-year statute to sue agents when the cause of action accrues. However, the action does not accrue until the underlying coverage dispute has been resolved. In that regard, it is recommended that agents and agencies maintain files even after the insured has ceased being a customer of the agency, and perhaps even after the applicable state statutory requirement(s) for maintaining files and policy documents has passed.

These files are almost always more beneficial and helpful to the defense of the agent, and with technology, are now more able to be maintained, scanned and stored.

2

DOCUMENT ALL DISCUSSIONS AND DECISIONS IN WRITING

Of course, a file is only as good what is in it. If an agent does not develop a best practice of confirming discussions and decisions that are made by the insured-customer during the procurement process with respect to policy limits sought, exclusions in coverage disclosed, the availability of better insurance coverage (albeit more expensive), then the advantage of the file becomes less meaningful in the defense of the agent.

A simple 2-line email to the insured, "*please allow this to confirm our discussion today....,*" although perhaps sounding formal, is a great tool for the defense-lawyer to have to prove that discussions were had and subject matters were discussed, even when the insured might not "remember," that they did occur, and then to save and keep the email in the file for the customer.

With the advent of technology, it is now easier than ever for agents to document and confirm discussions with their customer, and to likewise confirm any "exceptions," that an underwriter may give them when writing a risk that is technically not in compliance with applicable underwriting guidelines, but which a carrier or underwriter may agree to "waive," for the specific risk to be insured.

3

ALWAYS QUOTE BETTER COVERAGE AND MAINTAIN QUOTES EVEN FOR INSURANCE THAT IS REJECTED BY THE CUSTOMER

A common trend in E&O litigation is the increase in "under-insured" litigation against an agent, where the insured has a policy that provides coverage for the loss, but where the insured is nevertheless woefully under-insured and therefore exposed. I often hear clients tell me that "*I know my customer, and I knew that they only wanted the cheapest coverage available*." While that might be true, when it comes time to litigate, the defense will need to prove that fact.

In order to do so effectively, it is recommended that at every renewal the agent should quote their customer better coverage. If the customer rejects the coverage, so be it, but at least there will be a paper trail to show that the customer was presented and rejected better coverage. In that regard, it is essential that the agent save and maintain the quotes (even the quotes that are rejected by the insured) in the agent file so that they are there, if a claim ever does later arise.

4

STAY IN YOUR LANE: DO NOT BECOME AN ADJUSTER OR A LAWYER AND OPINE ON THE OUTCOME OF ANY INSURANCE CLAIM

Agents are in the business of procuring insurance. They are not in the business of adjusting claims or advocating for outcomes to claims, even though many agents try (with good intentions) to do so.

When a claim does arise, it is important that the agent always recommend to the insured that they report the claim. While there may be some limited valid reasons why the insured independently chooses not to report a claim, it should not be done at the suggestion or recommendation of the agent.

Once the claim is reported, it is imperative that the agents gets out of the way of the claims process. This is often when problems arise when the agent attempts to help. At the end of the claims process, there will inevitably be one side that is happy with the outcome of the claim and one side that may not be. It is important that the agent does not expose themselves needlessly by saying "*don't worry, it's covered,*" and/or engaging in actions that may be perceived to be adverse to one side or the other. The agent has no control over the claims process and despite years of experience witnessing claims-outcomes, the agent should nonetheless remain silent on how a claim will ultimately be decided.

5

TALK TO YOUR REAL FRIENDS: THE AGENT'S LAWYER AND THEIR E&O CARRIER

There is only one true professional "friend(s)" that the agent has in this industry when disputes and claims do arise: It is the agent's E&O carrier and the lawyer retained to represent them.

E&O carriers and defense-lawyers can do many things. However, one thing they cannot do is assist and defend an insurance agent who has not sought their assistance. When words get said by agents (in emails and in depositions), documents get produced by the agent in response to a "friendly" document request from a plaintiff's lawyer or even a subpoena, emails get written to plaintiff-insured's attorneys, there is nothing that a defense-lawyer can do to un-do what the agent has already said and done when they were not represented by counsel.

Therefore, it is imperative that when a dispute or adverse situation does arise, the agent timely puts their E&O carrier on notice, who can then retain counsel on their behalf.

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5

TALK TO YOUR REAL FRIENDS: THE AGENT'S LAWYER AND THEIR E&O CARRIER

The retention of counsel for the agent has two important benefits, both practical and legal. First, as a practical matter, the agent can credibly tell the insured and carrier involved in the claim dispute that the agent is now represented by counsel and as much as the agent might want to be "helpful" to the carrier and/or the insured and responsive to such requests, all such requests and communications need to go through the agent's counsel and their E&O carriers. This dynamic takes the pressure off the agent to be an advocate for one side or the other and allows the agent to do what agents do best, which is to focus on their business of selling insurance.

The second benefit of retaining counsel through the E&O carrier is that often the scope and involvement of the agent in the claims process can be limited or eliminated with the assistance of counsel. As much as plaintiff-insured's lawyer claims they might "need" the agent to say this, produce that, or testify over here, the legal reality is that in most states insurance coverage disputes are resolved by the Court reviewing the four corners of the complaint and the written policy, without considering extrinsic evidence of anything the agent might "say," which is often irrelevant for coverage determination. To the extent that a court does allow limited discovery that involves the agent, the defense-lawyer can help that agent review document requests, make objections, and prepare the agent to testify in a clear and concise manner that would not open the agent to a future E&O claim if the plaintiff-insured's claims for coverage prove unsuccessful. Keep in mind many plaintiff-insured's lawyers have a "plan B," for their insurance coverage case, which may include suing the agent based upon testimony provided by the agent during the coverage litigation if the coverage action is not successful.

The good news is that with improvements in technology, it is easier than ever for agents to protect themselves from E&O exposure by following some Best Practices, and which will hopefully help keep their professional "friends" as "friends," rather than potential adversaries in a future litigation.

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Blake Sando is a partner at the Florida law firm of Cole, Scott & Kissane where he has been defending insurance agents and other professionals in Florida for the past 17-years. Mr. Sando is a frequent speaker on topics of Insurance Agent E&O Liability for the Florida Association of Insurance Agents ("FAIA") and the Academy of Insurance.

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