Insurance Agent E&O-Episode 1

PLUS Staff: [00:00:00] Thank you for listening to this PLUS podcast, Insurance Agent E&O. Before we get started, we would like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

With the housekeeping announcements out of the way, I'm pleased to turn it over to Dana Gittleman.

Dana Gittleman: Thanks Tyla, and thanks to our listeners for tuning in today. Good afternoon. My name is Dana Gittleman. I am a shareholder in the Philadelphia office of Marshall Dennehey, where I have been practicing in the Professional Liability Department for nearly the entirety of my legal career.

My practice focuses on the defense of professionals, including insurance agents and brokers, real estate professionals, lawyers and directors and officers. Marshall Dennehey is a regional defense firm with 19 offices in seven states from Connecticut to Florida. [00:01:00] I'm joined by my colleague Jeremy Zacharias for this podcast on risk management tips for insurance professionals, claims handling best practices, and tips for navigating complex issues in professional liability litigation.

I practice in Pennsylvania, Jeremy practices in New Jersey, but the risk management considerations we are relaying today are not state or jurisdiction specific. Rather, these tips can be applied regardless of where the insurance transaction takes place.

Jeremy Zacharias: Thanks Dana. And a matter of brief background on myself as Dana indicated, my name is Jeremy Zacharias, and I'm a member of the Professional Liability Department at Marshall Dennehey, where I represent and defend attorneys, accountants, insurance producers, corporate directors and officers, and financial institutions among others.

I represent clients also in the data and privacy sector with intellectual property cases as well. I'm an active member of PLUS where I currently serve on the PLUS Board of [00:02:00] Trustees and the PLUS Mid-Atlantic Chapter steering committee. This is our first podcast and what we expect to be a series on risk management tips.

Dana, in terms of risk management tips, what really is on the top of your list?

Dana Gittleman: If you take one thing away from this podcast, let this be it: memorialize communications. Memories fade, recollections vary, and credibility is typically important in claims handling and lawsuits. Emails and agency diary software make the process of recording and timestamping discussions easier.

It is important to use these resources to accurately summarize insurance coverage requests, as well as coverages or limits that are offered and rejected. Jeremy, in your practice, where have you seen this issue go awry?

Jeremy Zacharias: Dana, with memorializing communications with the insurance E&O perspective, this develops a big issue with defending [00:03:00] clients.

Claims might have happened a year, two years, three years ago, and the issue of memory fading is an absolutely real thing. Agents may not recall a select conversation. The conversation is not documented in an email or letter or a note system, and so it's really a credibility determination. It's a situation where the insurance producer may remember what happened, may have a recollection, but it's a situation of not remembering fully what the insured came to the agency for, what was requested, what the conversation was like, what was provided, and frankly what wasn't provided.

And inevitably the memories will be at the benefit of the insured, you know, plaintiff in an insurance E&O case, and we're playing catch up if there's no documentation for these situations.

A few cases come to mind that we recently handled internally for insureds. It's sloppy reporting. [00:04:00] It's lack of reporting. It's lack of documentation. And if something happened two years ago, it really is playing catch up regarding really recreating the file from what actually happened.

Because plaintiffs will always prosecute a case to their benefit. They will never remember wanting the cheapest or the most, cost effective policy out there when the lawsuit's filed, they would've paid a premium times 10 for any coverage, full coverage. And it's our job as defense counsel for the insurance producer to disprove that to impeach the credibility of that plaintiff, and it will definitely help to impeach that credibility of that plaintiff if we have documentation in place.

Dana Gittleman: Generally speaking, some examples of topics to memorialize include types and amounts of coverage, including endorsements and exclusions, vacancy or occupancy status, any differences or changes between an [00:05:00] existing or prior policy and new coverages, particularly if coverages are removed or limits are decreased, disclosure of a non-admitted carrier's financial health, and solvency and payment arrangements if the policy is an agency bill policy.

I know I have seen these in my practice specific to the contemporaneous note entry. I had a case recently where the claims professional thought that she was doing the right thing by going back into the agency management software system to augment her notes, add additional details.

Unfortunately, where the notes are timestamped it's best off to leave the note as is, and I analogize this to a hospital record. It's best off if the record is as it stands rather than seeing that nurses or other medical professionals have gone back in and edited the document. Jeremy, have you [00:06:00] seen that instance in your practice?

Jeremy Zacharias: Absolutely, Dana. It's a situation where it is effective to have a proper note system, but leave the note system as it is. Spoliation of evidence is a big issue. A mentor had told me a long time ago a bad truth is better than a good lie. In terms of the note system, the facts are the facts.

In a case, the better the notes are, the better the defense would be. What coverages were requested, what coverages were offered to the insured in terms of a property policy, what discussions were had about the occupancy status? All these will go to a note system and a contemporaneous memo to the file or letter to the insured is really best practices.

Again, going through certain malpractice cases with insurance producer clients. It's a situation for if that memorialization letter was in the file and was sent to the insured, it would've been a better defense than recreating everything after the [00:07:00] fact.

Dana Gittleman: As you well know, Jeremy, litigation often can involve a “he said, she said” battle as between the parties. A robust agency management system with timestamped notes can alleviate some of the credibility issues that arise when neither party has a record of what transpired. It is best practice to record notes contemporaneously or as soon as practicable.

You want to avoid any potential presumption that notes for changes were updated in anticipation of litigation. Also, entering notes contemporaneously mitigates against forgetting the details and allows for timely follow up on any outstanding issues. Contemporaneously entered agency management notes are best practice communications with a reply showing the insurance customers assent or read receipt are even better.

Jeremy Zacharias: Dana, that's a great point and this is completely true and applicable with insurance producers.

It's [00:08:00] important to remember when discussing certain coverages with insureds, this memorialization process. Documentation is key to providing a solved defense to any claims that may arise. For example, within a certain file, there should be a template or a note system of what did the client come to the agency for? When did they come? Did they come with an existing policy, or did they come with an open request for coverage?

It becomes very important, especially in certain jurisdictions with the standard that the insurance producer is held to. In terms of an existing policy, did the insured come for a better rate or for additional coverage?

Those conversations and memorialization of those conversations will be vital to any defense. Did the client tell you details about certain businesses or risk assessment? The case right now where the allegation in an insurance malpractice case is failure to provide a workers' compensation policy.

But talking to my client, nothing regarding any employees of the institution were ever [00:09:00] discussed. The client came to us with existing contents policy for a renter's policy, but nothing to do with employees were ever discussed for invocation of that workers' compensation coverage.

Also, did the client decide to extend coverage to what he or she wanted? Did the client come to you with a property policy but wanted to provide a contents policy or a commercial policy to add on to existing policy?

Where certain coverages are offered and ultimately rejected, this should be documented to show that certain policies were offered. These policies included this premium, and it was rejected for any number of reasons, but to memorialize it, it was actually rejected. Document all these conversations contemporaneous with any discussion to make this best practices.

Once an insurance producer does this, many times, this will become second nature for this. Our next tip involves communications between parties and counsel. So, this is after [00:10:00] litigation is filed on a certain situation after a claim is made and communications between parties and counsel.

Once a claim is submitted, a letter of representation is received, or a lawsuit is filed. It's extremely important to instruct the insured to cease communications with parties, representative or unrepresentative. The pro se is potentially latching on every single word said by an attorney or even a party to use against you.

Seemingly innocent conversations could become harmful admissions at trial if an insured's cavalier with discussions with parties. It is a very true fact that self-preservation is a real thing. If your client has a conversation with a co-defendant and that conversation could be used against you in favor of that co-defendant, you could bet that a cross claim will be filed to preserve that co-defendant's position in the case.

In terms of examples regarding communications used against the client in a case, we had [00:11:00] situations where our client on their own, spoke to a co-defendant that they have a business relationship with, an ongoing relationship with. Inevitably, that relationship went south and those conversations were used against our client as a implicit admission in a cross claim that was filed later on.

So, you never know when that's going to happen. You could be cordial and professional on day one, but on day three you never know what's going to happen. So, best practice is to advise your clients if any discussions are had, to make that with the attorney so it's protected by the attorney-client privilege.

Dana Gittleman: As Jeremy just alluded to, sometimes there is an ongoing relationship between an insurance agent and the insurance customer who has filed a claim or a lawsuit against them. Questions arise as to how to navigate that business relationship and whether the relationship should be terminated entirely due to litigation.

That is a personal decision based upon a multitude of factors, but generally speaking, the answer is no. There's no need to terminate an ongoing business [00:12:00] relationship. However, we do recommend that insurance brokers avoid discussing the pending claim or litigation with the insurance customer and keep the communications focused on the insurance procurement or renewal process at issue.

Jeremy Zacharias: That's absolutely right, Dana. You never know when a seemingly harmless comment could be used in litigation. Self preservation, like I said before, is very real. Everyone is out to provide their own defense in the case. The gloves are off at that point, so definitely protect yourself and your client's interest for having that conversation.

Dana Gittleman: You want to think as though any communication could be blown up and shown to a jury. On the topic of communications, it is critical to ensure the confidentiality of communications relating to the client's seeking of legal advice or legal services.

This is known as the attorney-client privilege. This privilege attaches unless it is waived, for example, by having a third party in the [00:13:00] room during discussions or forwarding emails from an attorney to a third party. It is important once a claim or litigation arrives, not to disclose any conversations or information shared with counsel with any other party.

Jeremy Zacharias: Dana, that's an extremely important point. The disclosure of conversations with a third party, it leads to very intense motion practice with courts for invocation of the waiver of privilege. It pins the attorney against the client at times and it's really being on the defensive beyond reason.

Waiver of privilege can open the door to a myriad of thorny issues. It's important to remind clients that anything set outside the scope of the attorney-client relationship is discoverable and can be used against that client either on depositions, on cross-examination during trial, or throughout the case as an admission.

Tell your client to cease any discussions with any co-defendants or parties to the case. If the client wants to discuss [00:14:00] strategy, this should be conducted through the auspices of the attorney-client relationship or a joint defense agreement with other counsel, but it's attorney to attorney that that conversation is happening versus client to client.

The attorney can discuss any issues with joint defense agreements in place to preserve that privileged discussion. That joint defense agreement should be memorialized in writing. My best practice is usually it's in writing. It's signed by all counsel that's signing onto that joint defense agreement.

Explain to your client that if a discussion with another party may aid a defense, this discussion should be shuttled between the attorneys to protect any privileges. It is a very specific portion of the attorney-client privilege, but

waiver creates a big issue in the case that's really a satellite side litigation that really is detracting from the actual claims of the case.

Dana Gittleman: Remember that the attorney is an advocate. We can best do our jobs when we are provided with comprehensive files and an honest version of the facts. The [00:15:00] good, the bad, and the ugly.

Jeremy Zacharias: Risk management is a critical aspect of any insurance agent and broker's profession.

They advise on risk for certain insureds. They procure policies to mitigate against risk. It's their bread and butter. While no one wants to be embroiled on litigation. These tips discussed today along with the future forthcoming installments of this podcast can help with mitigation risk both before and after a claim arises.

On behalf of Dana and myself, we want to thank you for your time today. We look forward to resuming with various other topics and tips later this summer on the additional series of this podcast. Should you have any questions about the content on this podcast or future sessions, please feel free to contact Dana or myself via email or phone.

PLUS Staff: Thank to for listening to this PLUS podcast. If you have ideas for a Future PLUS podcast, please complete the Content Idea form on the PLUS website.