

# Insurance Agent E&O-Episode 2

## Transcript

**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 Jeremy Zacharias.

**Jeremy Zacharias:** Thanks Tyla, and thanks to our listeners for tuning into our second installment of the Insurance Agent E&O podcast.

Good afternoon, my name is Jeremy Zacharias and I'm a member of the Professional Liability Department of Marshall Dennehey, based in Philadelphia, Pennsylvania. Marshall Dennehey is a regional defense firm with eighteen offices in seven states from Connecticut to Florida. I represent and defend attorneys, accountants, insurance producers, corporate directors, officers, and financial institutions among other clients.

I also represent clients in privacy and data breach matters and handle cases involving intellectual property, [00:01:00] copyright, trademark infringement, as well as trade secret, trade dress, technology, and media-related litigation. I'm also an active member of PLUS, where I currently serve on the PLUS Board of Trustees and on the PLUS Mid-Atlantic chapter steering committee.

I am joined today by my colleague Dana Gittleman, for this podcast on risk management tips for insurance professionals, claims handling, best practices, and tips for navigating complex issues in professional liability litigation. Dana, can you please introduce yourself briefly?

**Dana Gittleman:** As Jeremy stated, my name is Dana Gittleman and 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. I also have experience in product liability and coverage matters. I practice in

Pennsylvania, Jeremy, mostly in New Jersey, but the risk [00:02:00] management considerations we are relaying today are not state or jurisdiction specific.

Rather, these tips can be applied regardless of where you service insurance customers. This is our second podcast in a series on risk management tips. We hope that you have listened to the first installment and if not, encourage you to do so.

**Jeremy Zacharias:** Thanks, Dana. In this second installment, our focus will be establishing personal contact with your client early into the representation, the reason for it, and certain best practices with doing so.

Also, we will discuss the reasoning and effectiveness in retaining a liability expert early in a case. Strategic and tactical pointers in association with the same. Finally, in representing clients and insurance producer malpractice claims, a detailed knowledge of the underlying litigation is necessary in order to develop proper defense strategy.

These three topics will be covered in today's installment, so we hope you enjoy. Let's dive deeper into these topic areas. Establishing personal [00:03:00] contact with clients while maintaining professionalism is a key strategy for lawyers and professionals aiming to build rapport, foster trust, and ultimately provide better service to your client.

The first practical pointer is to go beyond the case details. Understanding your client's needs and concerns are vital to a representation. Actively listening to a client's story, their perspectives, their concerns. It's important to grasp their personal situations, not just the legal details. Each client representation is unique.

Make it feel to the client that is a personal situation for them as well. Also, show empathy and compassion. When a client is retaining your services, it's a very stressful time for that client. Acknowledge the emotional toll that the legal process can take and offer support. Offer support in terms of providing a roadmap that will lay out the foundation [00:04:00] for the representation.

Also be mindful to tailor your approach. Personalize your communication style and content to fit each client's specific needs and preferences. To add another personal touch to a client representation, remember key dates and milestones that are client specific. Show that client that you remember personal details, even if not directly related to that potential case.

Demonstrate genuine interest and care. It shows that you go the extra mile with remembering details for the client. The next practical pointer in this topic area is to focus on communication and transparency. Establish clear communication channels and expectations early on. Discuss with that client the preferred methods of contact and response times upfront. Expectations will alleviate a lot of stress the client has if you do this upfront.

Provide regular updates to this client as well. Keep clients informed about case progress, even though there's no major developments. Don't [00:05:00] let weeks go by without any updates. If there's no updates to report, provide a brief note to a client saying, "no updates to report, but just checking in."

Simplify complex legal terms, especially with insurance producer E&O claims, the lawyer is not the client. It's an insurance professional that may be facing litigation for the first time. Use plain language to explain legal concepts and processes to provide things in layman's terms, aspects, complex legal determinations in layman's terms for your client to understand this. Be open and honest. Be upfront about potential challenges, risks, and costs.

It is a bad situation when a client is saddled with a surprise bill or a surprise invoice that was not expected. If you provide upfront costs and explanations of the same, this will also foster that professional relationship. Also encourage questions and feedback. Create a safe [00:06:00] and inviting space for a client to voice concerns and offer feedback on the representation.

This will further solidify that professional relationship if litigation rises in the future to lead to repeat business, potentially. The next practical pointer is to demonstrate expertise and competence. Like any representation, confidence is key to effective representation, but with insurance producer claims, this goes even further.

Highlight your experience and track record. Showcase relevant experience in handling similar cases in the past. Offer well-resourced solutions. Provide your client with clear expectations and tailor legal strategies to meet their unique needs and goals. With demonstrating expertise, this also includes sharing relevant insights, industry trends, and proactive advice that adds value.

If you do this, it shows that you're doing your homework to the client, that you know what you're talking about, and you are that best advocate for the client when it comes time [00:07:00] to negotiate, or present the case in court. With all this, it is also very important to maintain professional boundaries.

Prioritize professionalism. Treat clients with respect and dignity in all interactions. Every single conversation, every single phone call, every single Zoom or Teams call, provide clients with the professionalism they deserve. In adhering to the rules of professional conduct, uphold confidentiality at any regard. Emphasize your commitment to maintaining confidentiality of client information, whether it's through tech portals, maintaining the client file, or email correspondence.

Make sure that you implement secure communication channels. This is firm-specific. Make sure that you have clear and direct communications channels with the client. Use the latest technology trends like encrypted email and client portals to relay sensitive client information, especially if it pertains to financial data, social [00:08:00] security information, or medical information, if the case is specific to that. In line with this is leveraging technology. Use the client portals that are specific to a client. They are tested, they're vetted, and they are a secure way of maintaining client information. Provide a centralized location for case information, updates and communication.

This should be addressed upfront in representation so that the expectation is aligned with that as well. Video conferencing is a very effective tool. In a post-COVID world, it is almost used daily. Facilitate face-to-face interactions, even when meeting in person is not possible.

That adds a personal touch to the client representation if a client is not in your jurisdiction. Utilize practice management software, streamline communications, billing, and document management are also other tips that we recommend. By integrating these strategies, lawyers can build strong relationships based on trust, empathy, and clear [00:09:00] communication.

This will lead to higher client satisfaction, positive reviews, and increase referrals in the future. Dana, in addition to the importance of establishing personal contact with your client, why is retaining the appropriate liability expert also key?

**Dana Gittleman:** For those of you who have been keeping track, we're now on tip number five, expert retention, as Jeremy just stated.

While expert retention can be an expensive undertaking, it is a critical component of building a strong defense in 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.

Retaining an expert early in litigation can facilitate information gathering as they may be able to identify information to be elicited in discovery, which could help form their opinions in the case on key [00:10:00] issues. 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.

**Jeremy Zacharias:** Thanks, Dana. The last topic of discussion for today, which is topic six in the top ten list of topics, is the importance of considering the underlying litigation in any insurance E&O case. Insurance E&O claims often arise from underlying litigation. It could be a fully developed litigation, or it could be litigation that's in tandem with a certain malpractice allegation.

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 from the underlying litigation. At times, Dana and I have litigation that is currently ongoing and the malpractice allegation is in tandem with [00:11:00] that ongoing litigation.

You could still preserve dockets, pleadings, and discovery, but it'll be real time updates to the client to make sure they know the current status of that underlying litigation, or that parallel litigation if it's ongoing. Understanding and analyzing the underlying litigation is fundamentally important in any insurance E&O case for several key reasons, and I'll go through those right now.

The first is determining if the E&O policy is even triggered. An E&O policy covers claims alleging errors and omissions of professional services, as a very fundamental matter. These professional services could be invoked based on negligence, misrepresentation, or the failure to meet industry standards, in terms of what arises out of the E&O claim.

Reviewing the allegations and the claims in the underlying lawsuit helps determine if those actions are covered under the E&O policy's terms and conditions. If not, then that's a separate coverage determination for a separate podcast. This next [00:12:00] aspect is assessing the insurance duty to defend.

A core feature of many E&O policies is the insurer's duty to defend the policy holder in the underlying litigation. This duty is typically triggered if the allegation in the underlying lawsuit potentially fall within the policy's coverage. Analyzing the underlying lawsuit is essential to determine if the insurer has a duty to provide a defense.

And this also pertains to understanding potential damages of an E&O lawsuit that will be tied to the underlying lawsuit. The underlying lawsuit specifies the damages being sought by a plaintiff as a result of a potential error or omission of the representation, or the retention. Knowing the potential damages can help determine the potential exposure and the adequacy of the E&O policy limits.

In terms of identifying potential defenses, a lawyer must examine the facts and legal theories presented in the underlying lawsuit that could help identify [00:13:00] potential defenses against the claim. An example of this could be analyzing the underlying lawsuit that may reveal that damages weren't directly caused by professional actions, or that claims are without merit.

It could be a situation of contributory negligence on part of the plaintiff, or a New Jersey comparative fault. It could be that a co-defendant is more susceptible or that a certain insurance company wrongfully disclaimed on a policy that should have covered a potential claim. There are certain defenses that could be invoked on behalf of the broker or producer that could be used as a potential defense in an E&O claim.

Guiding claims handling and strategy is also important to remember. The underlying litigation provides crucial context for managing E&O claims. It helps in formulating a defense strategy, determining whether to settle or litigate a claim, or assessing a potential impact of a professional business or reputation.

With knowledge of the underlying litigation, this also has a huge impact on [00:14:00] settlement negotiations. If a settlement is pursued, understanding the strengths and weaknesses of the underlying case based on the lawsuit is critical for negotiating a favorable settle amount. "Is a case over or undervalued? Is it demand in line with what the valuation of the case is?"

Also understanding the limitations of certain coverage. The underlying lawsuit helps clarify which exclusions and limitations in the E&O policy may apply. For instance, if the lawsuit alleges intentional wrongdoing such as fraud or something intentional, the policy might exclude coverage as E&O policies generally don't cover such intentional acts.

The underlying litigation is not just a separate legal matter, but a fundamental component that significantly influences the handling and outcome of insurance E&O case. It provides the necessary information to determine coverages, assess defense obligations, and formulate an effective strategy to address the claim.[00:15:00]

Risk management in totality is a critical aspect of any insurance agent or broker's profession. While no one wants to be embroiled on litigation, lawsuits inevitably happen, especially with an insurance broker that has volume business. These tips, along with the forthcoming third installment, can help mitigate risk both before and after a claim arises.

Thank you again for your time today. We look forward to resuming with the remaining tips in the third installment of this podcast, and we really hope that you would join us. Should you have any questions, please feel free to contact Dana or myself via email and phone. Thank you.

**PLUS Staff:** Thank you 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.