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Current Trends facing Insurance Brokers' Professional Exposure—and How Defense Counsel Can Help and Grow Their Own Firm

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Today's insurance broker faces numerous challenges regarding the service they provide to customers, TOGETHER with the exposure to a professional liability claim. Insurance has become more complicated than in the old days with only five policies required by any particular business. This has grown exponentially for many reasons, and now, there are probably 15 policies that should be a part of any corporate portfolio.

The role of defense counsel is equally challenged. Professional services, perhaps, should not be limited to simply defending their client while engaging in social activities with the source of the initial referral, i.e., the insurance company. Indeed, Counsel is in an excellent, and privileged, position to make logical and beneficial recommendations beyond just providing a defense. More on that later,

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Letter from the President

Kathleen V. Buck, Esq. | *Minnesota Lawyers Mutual Insurance Company*

Dear PLDF Members,

We are not quite at the 100-day countdown to our Annual Meeting, but we are close and have been filling these past few months with fun gatherings and insightful calls. We have also been laying the groundwork for an excellent September meeting. We are grateful to our members and committee chairs who have hosted and participated in valuable ses-

sions, sought out articles, and planned webinars. We have been lucky to spend time catching up with one another at local events and national conferences. From New York to Chicago, from Maryland to Tampa and on to Puerto Rico, our PLDF members took time to check-in with each other, celebrated better days and welcomed new connections. Thank you to

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One of the biggest challenges facing insurance producers today is how they conduct their own business and maintain the relationship to the client. Yes... Client and not customer.

as defense counsel could provide more services to their insurance broker clients that not only benefit the client, but also benefit the firm's own internal growth. This may be a novel approach, yet it has already been done by some of the larger national defense firms.

One of the biggest challenges facing insurance producers today is how they conduct their own business and maintain the relationship to the client. Yes... Client and not customer. It should be no surprise the "order taker standard" is the universal standard of care throughout the United States. While there may be differences by locale as to whether or not the length of the relationship is an element that might cause the standard of care to be elevated, nonetheless the order taker standard is the general purview.

The problem of the order taker standard, however, is that the insurance broker will still be named in any lawsuit. The allegations, whether they can be proven or not, will be that the broker held themselves out as experts, or promised to provide the best coverage and reviews. These are questions of fact that must be proven to prevail, and as we all know, 80 to 90% of all lawsuits settle before trial. Thus, while one may strictly adhere to the order taker standard in their relationship with their own "client," they will still be sued, and the case will probably be settled. Thus, nothing has been accomplished, except keeping lawyers employed.

Typically, a popular allegation against insurance producers is for misrepresenta-

tion, in that the insurance producers may have made misrepresentations about policies or coverage, causing losses to policyholders who feel misled. In addition, misrepresentation can also arise within "standardized proposal" formats stating the quotes and covers were customized to a client's true needs even though no such review was done, nor is the policy a manuscript form fulfilling that representation. Whether true or not, it is enough of a question of fact to sustain professional liability matters. Equally true are "talking points," generally found on the last page of the proposal recommending additional coverages. These result from the insurance producer's "concerns" that additional policies may be needed for their clients that go beyond what is currently proposed.

Given that many producers consider themselves simply salespeople, and often claim that they make more money by doing so, then one would expect they are constantly making recommendations as to additional policies or coverages to be sold. Yet, they rarely do that even though professing to make more money when they do. This is irreconcilable.

Whether or not producers have even read the policy is a big question, but it may be equally true that producers also fail to disclose material information about policies and coverage. These mistakes result in litigation even when arising from an order taker standard. Simply put, listing talking points on a proposal, as to numerous additional coverages that

should be reviewed, must be urged upon the client to show an attempt was made to discuss important matters for consideration as to any business or individual. A better approach would be to provide “ball park” premiums, the declination of which by the “client” eliminates E&O claims when documented.

For instance, one of the bigger policy types ignored is Director and Officer liability and/or Management Liability policies for a business entity. This is especially true with directors and officers who may have significant personal assets. How often does the agent try and point out that the way to secure personal assets for a high-net-worth individual must go beyond the Corporate D & O policy. This has been an issue for numerous matters in which I've served as an expert. Such recommendations were not made even though the firm did hold itself out as experts in commercial insurance.

Yet, as I have authored and spoken repeatedly in seminars and webinars, it is unquestioned most producers have more knowledge and experience regarding any particular coverage they have been involved with for over five years than any consumer or risk management department. Thus, why not utilize that knowledge and experience and provide the advice to eliminate a lawsuit rather than having one or winning one. However, with today's pressures for production, there are numerous challenges or conflicts with going beyond the order taker standard.

Foremost, is production pressure. More and more, insurance producers think of themselves as salesman, and not as a knowledgeable insurance advisor. Sadly, the source of that performance pressure is not only internal, but often driven by private investors and private equity companies who only care about a return on investment, and not how it is obtained. Even the NAIC is now looking into Private Equity investments in the

production and insurer arena. Notably, service and accuracy are less important than revenue. The same thinking has infected some claim operations and third-party administrators (TPAs).

As Christopher Burand recently proffered in an Academy of Insurance webinar, the biggest threat facing insurance producers today is that coming from cyber-liability insurance. Over 500 types of policies are now available for a variety of markets, some of which may actually cover something, many of which may not, and may not even cover social media frauds where the usage of the computer is not the source of the misdirection, the telephone is. I know of only one policy that advertises that it does cover such social media misdirection.

More important, I rather doubt anyone can claim to be an expert in cyber liability insurance when so many different policies are available from both admitted and non-admitted insurers. How can they possibly conduct due diligence in making any recommendation when they haven't reviewed the vast majority even when shopping out to the markets. In addition, of the 500 policies, not all are geared toward small businesses, nor middle-market companies, or even the larger companies. Thus, what may be available to a small business may not be available to a large one, and vice versa.

All of the policies being sold today are complicated. So are proper valuation reviews given this inflationary time, and thus are becoming a serious challenge. For instance, renewing any policy as is because the insurance company adopted automatic renewal directly to the policyholder with a copy to the producer sparks no further inquiry. It becomes easy therefore to renew as is and cost effective as well.

The challenge, however, is obvious. Who's going to do a better job assessing a customer's needs—the incumbent in-

urance producer or a competitor looking to take the account away as new business for them. Obviously, the competitor will dive deeper into the needs of the policyholder especially when they have been automatically renewing their coverage for the past several years. It is easy to claim that the policyholder themselves should understand evaluations may have increased as to property values, business interruption exposures, business personal property values, etc. However, as is often the case, despite the size of the company they are obviously very interested in managing their own affairs and revenue streams rather than protecting them given their “broker” claimed to be looking after their interests.

For an insurance producer to avoid meeting with the client annually to review valuations is a significant error. This even occurs with larger “captive producing” agency forces that promise annual reviews who then don't deliver. Consider too a new property concept. Some “landlords” no longer “lease” property. Rather, they “license” the use thereof. Yet I have seen no policy nor any endorsements that refer to both. That certainly makes “Additional Insureds” and other provisions problematical.

Documentation is equally critically important. This has been the standard for protecting oneself since the 1970s, yet it is amazing how little documentation is actually being generated. It is easy to confirm important conversations by email. Critical conversations might even be confirmed by fax, email, or a letter. Every insurance producer and firm utilize an agency management system. Yet the notes section of many of these systems are rarely used. This is a serious problem not only in defense of an Errors and Omission (E&O) claim, but a problem for counsel as well. The common statement that, “if it's not documented it didn't hap-

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pen," remains true today and is no different to what it was in the 1970s. Technology, however, has made documenting communications easier. Many agency management systems don't even allow the user access to a client account/record without later being prompted to record why and even prompting for a diary date if something is noted that may require a follow-up. These could include obtaining additional information, payment of an invoice, or simply setting up a renewal date for the forthcoming year. These systems should not be ignored.

Equally true, is a concept that the policyholder should read a policy or specimens provided. However, often proposals may not include specimens and they should. Whether the policyholder must read them is another matter, and frankly is a fiction. They may read the specimens, but will they understand what they're reading. The idea that they would even know the one policy might be enforceable in one given State, and not in another, is equally an absurd expectation to hold the consumer to be more knowledgeable than an attorney. Yet there are those who think so. But what is equally true is the producer probably has not read the policies nor the endorsements. Yet, the producer is the one that must take pre-licensing classes to get a license, they are the ones required to maintain their license by taking continuing education courses, and generally are required to remain up to date. It is inconceivable that a consumer would ever do that themselves so as to better understand the basics of insurance coverage let alone more complex solutions to complex needs.

This is where Defense Counsel can be a major resource. Typically, the role of defense counsel is to defend the insured when an E&O claim is made or a lawsuit is filed. There is no surprise there. But depending on the size of the agency, there may be other needs whether it's learning

Typically, the role of defense counsel is to defend the insured when an E&O claim is made or a lawsuit is filed.

There is no surprise there. But depending on the size of the agency, there may be other needs whether it's learning from a claim prevention standpoint, or documentation standpoint.

from a claim prevention standpoint, or documentation standpoint. Other needs may have nothing to do with the defense of any cases. I can think of several large defense firms with offices throughout the United States, and maybe even in foreign countries, that have gone beyond just defense work. Tax strategies, merger and acquisition opportunities, financing, technical assistance, are all additional services defense counsel can provide. Why limit your firm to simply being a defense firm when you can also have a tax department, marketing department, and risk management department to provide additional services to the insurance firm as introduced to you by insurers. There is nothing wrong with that. Counsel can provide a deeper breadth of services than the typical defense firm model. This gives rise to significant growth opportunities.

Defense counsel can assist insurance producers facing E&O challenges by providing not only legal representation but additional guidance. This could include subtle but important exculpatory language in proposal forms and how to safely make recommendations regarding other coverages that might be considered by the consumer. Defense counsel can also provide guidance and risk management practices and help insurance producers implement procedures to mitigate potential E&O risks. This creates additional reliance on your expertise and the fact that you care more about them—or

at least as much—as a relationship you have with insurers referring cases to your office.

Typically, lawyers are not the best at marketing, and would require some serious review and internal discussion to make such an important decision. However, if you wish to cement a relationship with a regional brokerage of any significant size, this is something to consider. If you have done a great job on their behalf while defending them, there is every reason to believe the client would consider you for other services beyond litigation. ■



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