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## Why expert witnesses can be critical in coverage litigation

### Documenting a file with an unintended reader in mind

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Insurance brokers and claims professionals are often reminded to document their files: "If it's not in writing, it didn't happen."

File notes, memos, emails and correspondence take on special importance in litigation, but even before trial those documents are likely to be carefully reviewed by an unexpected reader: an expert witness.

Insurance professionals' work is reviewed in the clarity of 20/20 hindsight during bad faith and agent/broker E&O litigation. It's likely that the defense and plaintiffs' attorneys will have the case reviewed by an expert to determine what standards and expectations the professionals were required to meet, and whether they did so.

Coverage disclaimers leave someone "holding the bag." Without insurance funds to mount their defense or to pay an adverse verdict, and with few other options, liability insurance policyholders often turn to suits against the carriers for bad faith and also name their insurance brokers for failing to procure the appropriate coverage.

#### The claim file

When an expert in a bad faith action reviews a claim for an alleged improper denial of coverage, the overriding question is whether the carrier put its interest before the interests of the insured, assuming that there was some possibility that the claim might have been covered. The general tenor of the expert's review will be whether the carrier targeted the investigation solely to deny coverage.

An expert will review your notes, the thoroughness of the investigation, the level of managerial input, and compliance with policies and procedures in the claims manual.

The insurer's investigation needs to be thorough. That said, if there exists one or more completely dispositive bases to deny coverage, such as the claim against the insured having been first made before the policy period of a claims-made policy, the investigation need not widen to determine facts that will not be covered regardless of their importance to the insured's case.

Further, some states' laws only require the insurer to look within the "four corners" of the claim against



the insured and the explicit terms of the policy. When a duty to further investigate does exist, an expert will examine whether a material area of investigation was not pursued.

Managerial oversight of the coverage determination should be meaningful. The experience of the supervisor or manager is important when coverage is the issue.

Claims manuals set internal policies and procedures for proper coverage investigations and determinations. Following the internal policies and procedures of the claims manual are necessary elements of avoiding bad faith.

#### The broker's file

E&O claims against brokers and agents can come from two different directions. The broker may be sued by the insured/claimant or, less frequently, by the carrier. In many

coverage cases filed against insurers, the insured also names the broker, and cross claims may be filed between the broker and the carrier. Relationships can be irreparably damaged by these claims.

Not all E&O suits can be avoided; however implementing some simple practices will make them less likely:

- **Know what you're selling.** Coverages such as earth movement and builders' risk are sold with the expectation of common policy language, but this is not always the case. For example, earth movement policies may exclude sinkhole or mine subsidence losses, and Builders' Risk policies sometimes exclude subcontractors' liability.

- **Obtain sign-offs when necessary.** When sign-off forms are not required, documenting in writing that the insured has rejected a recommended coverage can be the "stitch in time that saves nine," and makes the defense expert's job much easier.

- **Document communications with the policyholder and carrier.** An example: a broker secured coverage for an insured with a policy providing that the carrier would give notice 90 days prior to any cancellation. However, the insured and broker received a notice of cancellation only 30 days before the renewal. The broker contacted the carrier and obtained a 60-day extension to put the coverage out to bid. Ultimately, the same carrier that canceled the original policy was the low bidder for the new coverage, but with much lower limits of liability.

- **Adherence to written internal policies and procedures.** Documents showing

that a broker followed the firm's internal procedures certainly aids the broker's defense.

- **Report claims timely.** Brokers give notice of claims in different ways: phone, email, overnight mail, regular mail and even by fax. Use the method specified in the policy. Don't let personal preference create a problem with complying with the insurance policy's requirement. Although it's not required, the "belt and suspenders" method is safest: Send notice in the manner the policy states, plus one other reliable method.

Which carriers should receive the notice? Some brokers report only to the carrier that they believe is most likely to afford coverage, without considering other carriers whose policies may also be triggered. This can be a dangerous practice if it delays reporting to other carriers that also potentially provide coverage past the reporting deadline, or in a manner that prejudices the carrier.

### What happens at trial?

When broker E&O cases come before a jury, judge or arbitrator, most of the work, communications and relationships that existed before trial no longer matter. The only things the decision makers see and hear are those that come into evidence. While personalities and good intentions can influence outcomes, the facts and the legal standards form the basis on which E&O cases are to be decided.

What are the facts, or, what really happened? The former president of the California State Bar Association has said that every lawsuit is really three distinct cases: the one that walks in the door, the one that you

think you know through the discovery process, and the one the jury hears. That third case is the only one that matters to the outcome.

Courtroom dramas depict judges and juries being swayed by surprising testimony from the witness stand. But in real life the voices that often speak most loudly are the silent ones on paper, written when the parties weren't contemplating that they would someday be litigants against one another, when self-interest hadn't colored their memories.

Experienced insurance professionals don't need a Sherpa guide to lead them through a claim file, but many jurors and judges do not speak the insurance language. They need an expert to explain, in plain English, what industry terms and standards are. With clashing experts testifying, the defendant's well-documented case gives the defense expert more credibility.

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