

## **Insurance Agent and Broker Malpractice: Identifying and Mitigating Risks, Defending E&O Claims**

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# Insurance Agent and Broker Malpractice: Identifying the Risks, Understanding the Law, and Defending the E&O Claim

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# Traditional Agent/Broker E&O Exposures

- Failure to Purchase the Coverage Requested
- Failure to Name an Additional Insured
- Negligence in the Issuance of Certificates of Insurance
- Negligence in the Processing of a Claim
- Negligence in Failing to Advise With Regard to Coverage

# E&O Statistics

- Renewals consistently generate ~25% of claims against agents/brokers
- Recommendation of limits or coverage consistently generate ~5% of claims, but almost 15% of losses paid
- \* Statistics (on this and following slides) per National Assn of Professional Agents 2018

## E&O Statistics (cont'd)

- E&O Claims by Line of Insurance
  - 65% commercial lines
  - 30% personal lines
  - 5% other
- Aberrations
  - 3-5% of all E&O claims involve flood losses
  - 10-12% of all CGL claims involve claims-made policies
  - 10-15% of CL claims involve certificates or AI coverage
- 50/50 procedural vs. knowledge based errors

## E&O Statistics (cont'd)

- Within commercial lines, the number one line is commercial liability followed by commercial property
- However, more dollars are spent on paying commercial property agent/broker E&O claims
- Professional liability traditionally doesn't generate a lot of E&O claims, but when claims arise they tend to be very large, often in the \$5 million area

## E&O Statistics (cont'd)

<b>Basis of E&amp;O Claim</b>	<b>Personal Auto</b>	<b>Homeowners Dwelling</b>	<b>General Liability</b>
Inadequate Limits	<b>14%</b>	12%	4%
Wrong Coverage	8%	13%	<b>18%</b>
Misrepresentation	13%	23%	<b>24%</b>

## E&O Statistics (cont'd)

- Top causes of claims for P&C insurance agents:
- Failure to carefully explain policy provisions (7 percent of claims).
- Failure to adequately identify exposures (6 percent).
- Failure to recommend coverage (5 percent).
- Sending inaccurate or incomplete client information to an insurer (5 percent).
- Failing to provide timely notice of a claim to the insurer (4 percent).

## E&O Statistics (cont'd)

- Top causes of claims for Life and Health insurance agents:
- Failure to provide insurance (13 percent of claims).
- Failure to explain coverage effectively (11 percent).
- Making an administrative error (11 percent).
- Failure to make a requested policy change correctly (9 percent).
- Calculating a premium incorrectly (6 percent).

# Risks in Placing Coverage

# Which Quote is Real?

- A. Once an insured has received a policy and the declarations pages, it has “conclusive presumptive knowledge” of the terms and limits.
- B. Upon receipt of a policy without objection, the insured is “presumed to have known, understood and assented to its terms,” and thus cannot be heard to complain that the broker has failed to obtain the requested coverage.
- C. “An insured has a right to look to the expertise of its broker with respect to insurance matters. And it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy. It is precisely to perform this service as well as others that the insured pays a commission to the broker.”

## Which Quote is Real?

- D. “While it is certainly the better practice for an insured to read its policy, an insured should have a right to look to the expertise of its broker with respect to insurance matters. The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker.”
- E. “I am so busy doing nothing that the idea of doing anything – which as you know, always leads to something – cuts into the nothing and then forces me to drop everything.”

# Which Was A Real Quote From A Court Decision?

1. Quotes A and B?
2. Quote C?
3. Quote D?
4. Quotes C and D?
5. Quotes A - D?

# Broker Duties in Regards to Placing Coverage

# *Myers v. Yoder*, 921 N.E.2d 880 (Ind. Ct. App. 2010)

- Couple purchases builder's risk insurance when constructing home.
- Convert coverage to a homeowner's policy after construction.
- When homeowner's coverage first placed, broker completes a replacement cost estimator.
- New broker moves them to new insurer.
- Couple requests "full coverage."
- No new cost estimation done.
- Gas explosion destroys home.
- Cost of replacement exceeds policy limits by \$87,592.00.
- Couple sues broker for failing to advise them to obtain higher limits.

Is broker liable?

# No Duty To Advise Found

Court finds no duty to advise owed. In so holding the court noted:

“To hold otherwise would allow a damaged insured to make a ‘fully covered’ allegation against an insurance agency each time an insurance policy did not cover a particular type of loss. To protect against such claims, perforce this would place upon an agency the duty of intuitive foresight and an explanation of every term, condition, limitation, exclusion or restriction in coverage to an insured so that the policy might provide ‘full coverage’ under any and all circumstances. We will not place such an impossible burden upon an insurance agency but . . . we will leave the burden upon the insured to examine his policy and determine if the coverage desired is provided.”

Myers, 921 N.E.2d at 889 (quoting *Etheridge v. Associated Mut., Inc.*, 288 N.E.2d 58 (Ga. Ct. App. 1981), reh’g den. (Dec. 9, 1981 (without citation))

# Insurance Agent/Broker Basic Duties

- Exercise good faith and reasonable skill, care and diligence in procuring insurance requested in accordance with client's instructions.
- Obtain coverage which is not void.
- Obtain coverage which is not materially deficient.
- Obtain the coverage undertaken to be supplied at the requested limits.
- Obtain requested coverage for client within reasonable time or inform client of inability to do so.

# Typically No Duty To Advise Absent “Special Circumstances”

- Basic Principle:
  - Insurance agents and brokers are not personal financial counselors and risk managers, or guarantors of their clients’ liabilities. Generally, therefore, agents/brokers have no duty to advise as to specific types of coverages to obtain, limits, or additional or optional coverages to purchase in the absence of “special circumstances” or a “special relationship”

## Reasons:

- Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the brokers are informed and asked to advise and act.
- Making agents and brokers generally responsible for identifying possible deficiencies in coverages requested would subject agents and brokers to liability for failing to advise regarding every possible option, including with respect to (agents) coverage offered by competing companies.
- If such fiduciary obligations beyond the duty to procure the requested coverage were found to apply absent a “special relationship,” insureds could choose not to purchase increased limits or optional coverages available, and then sue the agent/broker for failing to recommend it, and end up using the agent’/broker’s E&O coverage as their excess of loss insurance.

# Prevailing Authority

- *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 13 (Mo. 2012) (neither insurance agents nor insurance brokers have a general duty to advise the insured on the insured's insurance needs or on the availability of particular coverage)
- *Sadler v. Loomis Co.*, 776 A.2d 25, 40 (Md. Ct. Spec. App. 2001) (agreeing with other jurisdictions that “the insured is generally considered best able to balance the factors relating to potential economic loss against the expense of purchasing additional insurance, the likelihood that a particular risk will materialize, and the insured's own comfort level with the risks versus the cost of greater protection”)

# Prevailing Authority

- *Peter v. Schumacher Enter., Inc.*, 22 P.3d 481 (Alaska 2001) (finding that because “question of adequacy of coverage is necessarily a matter of opinion,” insured is better suited to determine amount of policy limits he/she wants)
- Appleman on Insurance Law & Practice Archive § 87.6 (2013) (“an insurance agent has no general duty to advise an applicant or insured regarding coverage deficiencies or needs”)
- “Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status.” *Murphy v. Kuhn*, 682 N.E.2d 972, 976 (N.Y. 1997)

# Fiduciary Duty

- But note: In New Jersey it has been held that “[w]ithout question, insurance brokers and agents owe a fiduciary duty of care to insureds.” President v. Jenkins, 357 N.J. Super. 288, 308 (N.J. Super. Ct. App. Div. 2003).
- So the heightened duty of care that would normally be viewed only as arising in the context of “special circumstances” or a “special relationship” is going to apply to New Jersey brokers in any event.

*Ambroselli v. C.S. Burrall & Son, Inc.*, 2013 U.S. Dist. LEXIS 15585 (S.D.N.Y. Feb. 5 2013)

- Insured owns Victorian home operated as a bed and breakfast
- Property insured for \$250,000.
- Broker uses cost estimator to recommend increasing limits to \$435,000.
- Over next two years coverage automatically increased for inflation.
- Fire destroys home, and limits of almost \$500,000 paid in full.
- Nonetheless, the costs of rebuilding the home exceeds the insurance by several hundred thousand dollars.
- Insured sues broker claiming he should have advised her to purchase higher limits.

Is broker liable?

## **RESULT:**

Broker's Motion for Summary Judgment denied.

## **REASON:**

“[T]he evidentiary proof raises a material question of fact as to whether [the agent] took on the obligation to estimate the value of the B&B so that it would be properly insured.”

# Pop Quiz

- What's the difference between *Myles v. Yoder* and *Ambroselli v. C.S. Burrell & Son, Inc.* that led to the different results?
- Can we draw any conclusions from these decisions?

## Factors Influencing When “Special Circumstances” Or A “Special Relationship” May Exist

- The receipt of compensation in addition to the customary commissions paid by the insurer, such as for a “service fee.”
- Counseling of the insured with respect to specialized coverage or a specific coverage issue.
- The agent’s/broker’s declaration that he is a highly skilled insurance expert, coupled with the insured’s reliance thereon.
- The agent’s/broker’s exercise of broad discretion in servicing the insured’s needs.
- A course of dealing over an extended period sufficient to have put an objectively reasonable agent/broker on notice that his advice is being specially relied upon.
- An ambiguous request for coverage that requires clarification.

*Gateway Holdings, Inc. v. Richfield Hospitality Services*, 2013 Mo. App. LEXIS 112 (Ct. App. Mo., E.D., Div. 3 Jan. 29, 2013)

- Boxing event to be held at hotel.
- Promoter agrees to obtain general liability coverage in the amount of \$5 million to cover audience and participants, and have an ambulance on standby at hotel.
- General liability coverage purchased has “athletic participant exclusion.”
- Promoter sent specimen copy of policy and okays purchase.
- Boxer collapses after fight, no ambulance available; suffers severe health problems as a result, and obtains judgment far in excess of \$5 million.
- Claim made against broker for failure to purchase correct coverage.

Is broker liable?

## **RESULT:**

Broker's Motion for Summary Judgment granted, but reversed on appeal.

## **REASON:**

There was testimony that promoter told broker he had separate coverage for participants, but it was very limited and promoter still wanted CGL policy to cover participants. In reversing the trial court, the appellate court noted that “the promoter’s acceptance of the specimen copy does not automatically relieve [the broker and the producer] of their duty to procure the type of insurance coverage [the promoter] requested.”

# Duty To Read Policy

- It is a basic principle throughout the United States that insureds have a duty to read their policy.
- This is significant, because it places responsibility on the insured regardless of any representations that the agent/broker may have made.

# Effect

## **Even Where Insurance Agents/Brokers Misrepresent Coverage Courts Have Held Duty To Read Trumps Misrepresentation**

- *Dill v. Colony Ins. Co.*, 2013 S.C. App. Unpub. LEXIS 366 (Ct. App., S.C. June 26, 2013) (Granting summary judgment dismissing claims against insurance agent for negligent misrepresentation because “one cannot complaint of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument . . . .”).

# Effect

- *Mladineo v. Schmidt*, 52 So. 3d 1154 (Miss. 2010), reh'g den., 2011 Miss. LEXIS 112 (Miss. Feb. 17, 2011) (dismissing negligent misrepresentation claim because “duty to read” and “imputed knowledge” doctrines worked to make it unreasonable for insureds, as a matter of law, to rely on any representations contrary to the policy terms made by broker)
- *Alfa Life Ins. Corp. v. Colza*, 2014 Ala. LEXIS 64 (Sup. Ct. Ala. May 9, 2014) (“when documents available to the insured clearly indicate the insurance in fact procured for the insured is not what the insured subsequently claims he or she requested the agent to procure,” the agent is entitled to summary judgment dismissal of any negligent procurement claim based on the insured’s contributory negligence).

However . . .

The Ever Expanding Perception of  
Insurance Brokers as Experts Has  
Changed the Conversation

# Are Insurance Brokers Experts?

# Historical Precedent Says So

“Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent’s hands.”

*McAlvain v. Central Ins. Co.*, 97 Idaho 777, 554 P.2d 955, 958 (Idaho 1976)

“Consumers . . . view an insurance agent . . . as one possessing expertise in a complicated subject.”

*Rempel v. Nationwide Life Ins. Co., Inc.*, 471 Pa. 404, 370 A.2d 366, 368 (Pa. 1977)

# And The Courts Are Still Saying So Today

- *National Fire & Marine Ins. Co. v. Infini PLC*, 2019 WL 95894, \*8 (D. AZ Jan. 3, 2019)
- “Part of the reason that insured persons hire insurance brokers is to have them navigate complex insurance agreements.”

# Complexity of Coverages Feeds Into The Narrative

## Example:

- *AAS-DMP Management L.P. Liquidating Trust v. Acordia Northwest, Inc.*, 63 P.3d 860 (Wash. App. Div. 1. 2003), review denied, 79 P.3d 445 (Wash. 2004)
- Policy covering ocean crab processing ship was so long and complex the broker prepared an 80 page policy summary, and the broker had traveled to London on multiple occasions to negotiate the policy with an underwriting syndicate.

# As Do Broker Promises

**A look over the years at broker website descriptions of services provided reveals promises to:**

- Provide a “range of experience in specific industries to offer you exactly the coverage you need.”
- Provide “tailor-made risk management solutions based on expert advice.”
- Provide “strategic decisions analysis.”
- “Review insurer solvency.”
- “Design comprehensive and complete programs for both insurance and risk management.”
- Provide “performance beyond the required . . . in all we do.”
- “Create the best products and services for your needs.”
- Negotiate with insureds to “secure the most favorable terms for you.”

## Result: There Is A Growing Judicial Willingness To Accept Claims Of Reliance On Agent's/Broker's Representations Over "Duty To Read"

- *Baseball Office of the Comm'r. v. Marsh & McLennan*, 742 N.Y.S.2d 40, 42 (N.Y. App. Div. 1st Dep't 2002)
  - "An insured has right to look to the expertise of its broker with respect to insurance matters. And it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy. It is precisely to perform this service as well as others that the insured pays a commission to the broker."
- *Drelles v. Manufacturers Life Ins. Co.*, 881 A.2d 822, 840-41 (Pa. Super. July 5, 2005) (citations omitted)
  - "[A]n insured has the right to rely on the representations made by an insurance agent because of the agent's expertise in a 'complicated subject.' In view of the trust placed in insurance agents, it is 'not unreasonable' for consumers to 'rely upon the representations of the expert rather than on the contents of the insurance policy itself, or to 'pass' when the time comes to read the policy."

# Duty To Advise Where Coverage Requests Are Ambiguous Or The Insured May Be Perceived To Be Implicitly Seeking Advice

## *Langwith v. American National Gen. Ins. Co.*, 793 N.W.2d 215 (Iowa 2010)

- Couple has for years purchased substantially all of their insurance from agent
- Auto policy in place for couple and their two children, with limits of \$250,000 and umbrella policy with a \$3,000,000 limit
- Son (“Ben”) has license suspended, and as a result his coverage under underlying auto policy is cancelled, and endorsement is added to umbrella policy precluding coverage for loss caused by him
- Once son’s license is reinstated, mother asks agent “what can we do about Ben?”
- Agent recommends and purchases separate high risk policy for Ben with \$250,000 limit; umbrella coverage not discussed
- Ben has accident driving father’s car, severely injuring passenger - - and father is liable under Iowa owner liability statute
- Couple sues agent for negligence, and breach of fiduciary duty

## RESULT:

Agent granted summary judgment on grounds she had no duty to advise couple re: additional coverage, but decision reversed on appeal in Iowa Supreme Court.

## REASON:

Reason: Mother's inquiry as to "what they could do about Ben" could reasonably be found by a fact finder to have been understood by the agent as a request for professional guidance regarding liability coverage that would protect the couple.

NOTE: This decision was subsequently legislatively reversed, with a statute passed providing that an expanded agency agreement sufficient to require a greater duty of care from an insurance producer exists only when the insurance producer holds himself out as an insurance specialist, consultant or counselor and receives compensation for such consultation and advice apart from the premiums paid by the insured.

# Duty to Inquire

- In *Economy Fire & Cas. Co. v. Bassett*, 179 Ill. App. 3d 765, 565 N.E.2d 539 (5<sup>th</sup> Dist. 1985)
- Insured that operated a licensed baby-sitting business out of her home was sued when a child was injured, because she was covered by a standard homeowner's policy, which excluded losses arising out of the insured's business activities.
- Insured sued broker after claim was denied, arguing that the broker had negligently procured a policy that was inadequate for the insured's needs.
- Insured never asked for coverage for her business. Broker admitted that she was aware of the babysitting being done, but didn't believe the insured's babysitting service was a "business" under the meaning of the policy. Broker also admitted she never made an inquiry with representatives of the insurance company to determine whether the insured's babysitting services were covered.
- The issue for the court was, with this knowledge in hand, did the broker have a duty to inquire as to coverage for the baby-sitting business and advise the insured with regard thereto?

# Duty to Inquire

## RESULT:

- The trial court entered judgment in favor of the broker, but on appeal the Appellate Court concluded that, as the broker “knew or should have known” that the insured might need additional coverage for her babysitting service, the broker’s actions in procuring the policy without making inquiry as to whether the babysitting service was covered and not advising the insured with regard to this was “devoid of reasonable care, skill, and diligence required by law.”

# Duty to Inquire

- *National Boulevard Bank v. Brokerage Resources, Inc.*, 42 Ill. App. 3d 940, 356 N.E.2d 988 (1<sup>st</sup> Dist. 1976)
- Insured renovating and converting a building into four apartments suffers a fire that destroys a substantial portion of the building. After investigation, the insurers who had issued coverage for the building deny coverage on the grounds that the premises were vacant for more than 60 days, in violation of the terms of the policies.
- Insured alleged that broker was negligent in failing to add a vacancy endorsement. While broker argued he had never been told by the insured that the building would be vacant during remodeling and denied any independent knowledge of the building's vacancy, the broker never inquired as to whether the building would be vacant, despite being asked to purchase coverage specifically for the renovation, and despite acknowledging that such information would be material to the risk.

Was the broker negligent?

# Duty to Inquire

## RESULT:

- Broker found negligent. Court held it was immaterial whether the broker actually knew the building was vacant, because since the broker was aware the building was being extensively renovated, he “had a clear duty to learn” of the vacancy in light of the materiality of the issue to the risk.

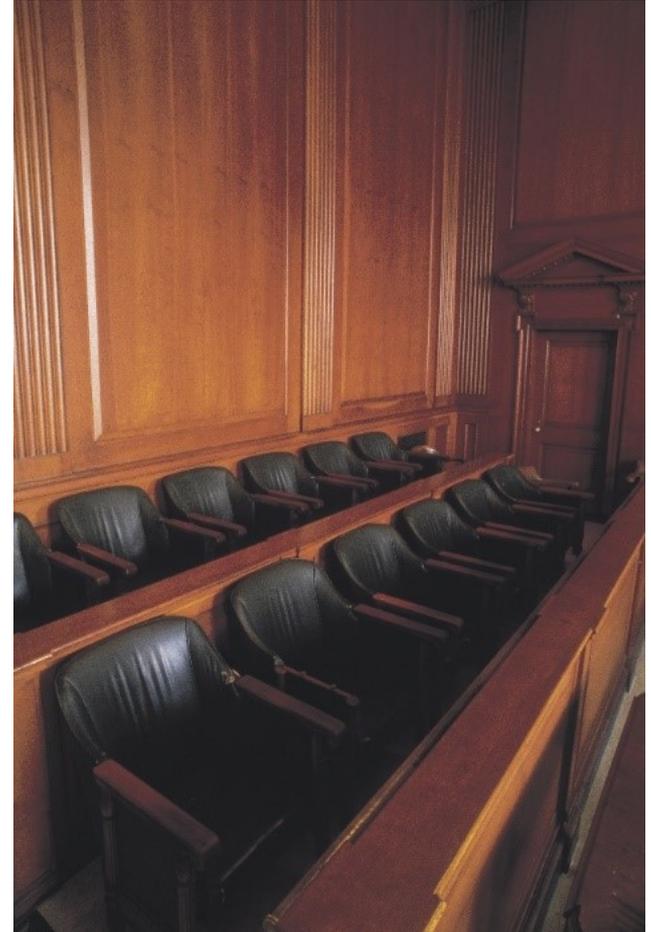
# Defending the E&O Claim

# Juror Perceptions



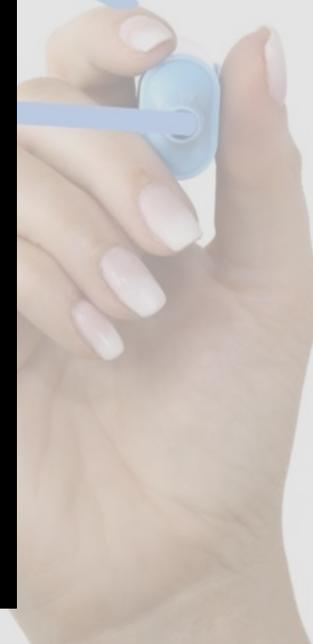
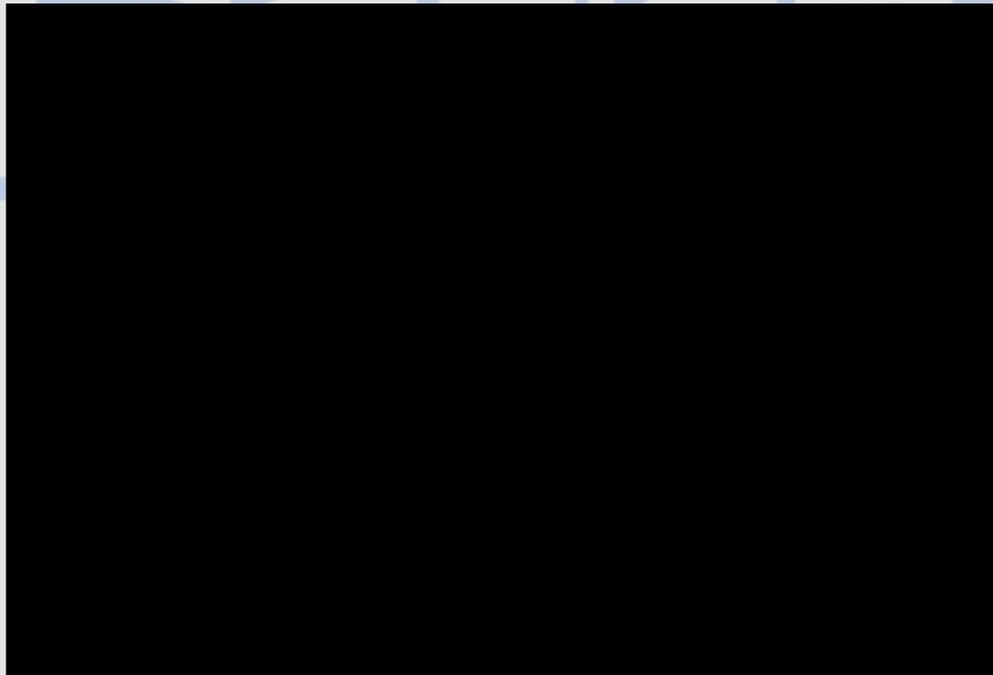
# Do Jurors Respect and Appreciate the Work Done by Insurance Brokers and Others Who Provide Insurance Services?

1. Definitely
2. Probably
3. Probably Not
4. Definitely Not



INSURANCE

BROKER



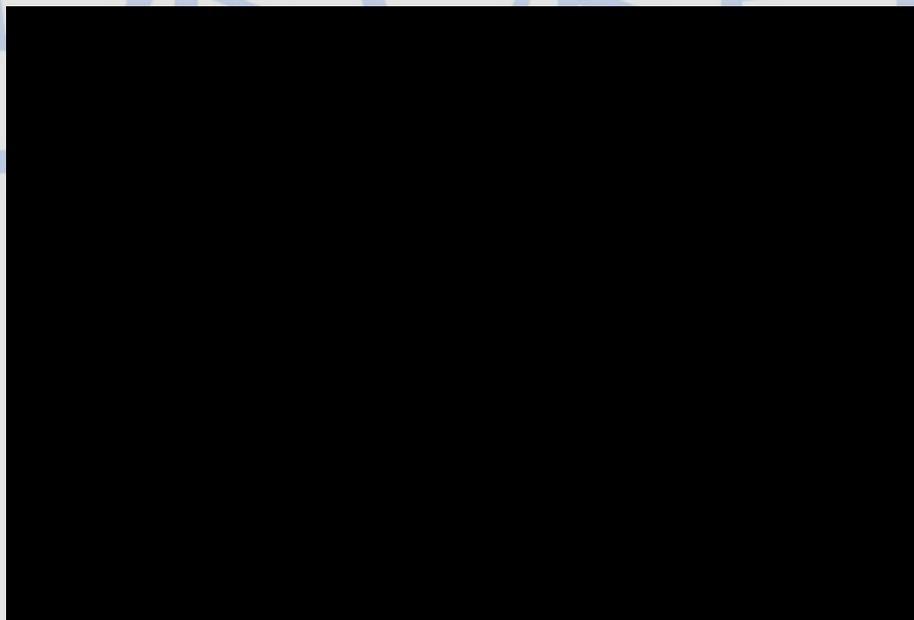
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# INSURANCE BROKER



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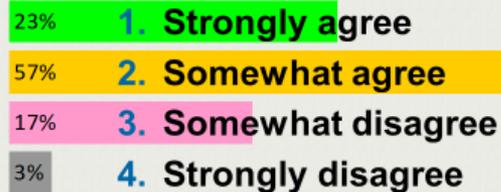
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# INSURANCE

**Insurance companies write their policies in language that is too hard to understand.**

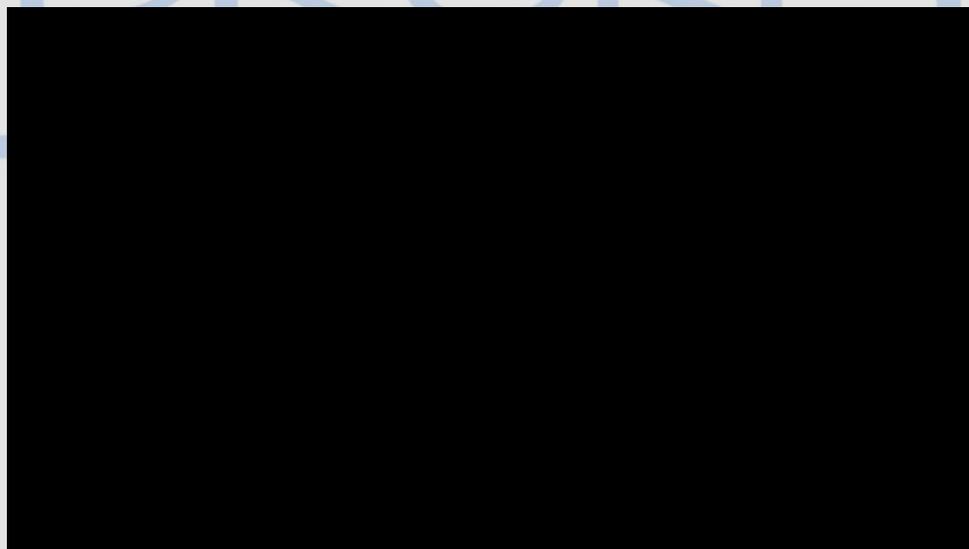


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INSURANCE  
BROKER



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# Assessing the Risk

- Gathering/Preserving Information
  - Understanding the scope of the ESI challenge confronted, and the risks of failing to do so
  - What you need to do
  - The critical importance paper still plays

# Assessing the Risk (cont'd)

- Identifying witnesses
- Interviewing witnesses
- The special issues and concerns presented by former employees
- Identifying problem witnesses early on, and working to address the problems

# Identifying the Applicable Law

- In situations where the agent/broker is alleged to have acted negligently or engaged in other misconduct in one state, the insured does business in another, and the insured risk is located in one or more additional locations, which state law applies?
- Choice of law rules of forum state will control
- Law may be different depending on the actor, and depending on the issue

# Establishing Themes

- Establishing themes early is critically important
  - Is the insured a “careful reader,” “highly sophisticated,” a “price buyer,” as opposed to a “risk buyer”, an established “risk taker”?
  - Can it be established that the insured is “super cost conscious” and a very “skeptical consumer”?
  - Is the insured a “particularly experienced and knowledgeable purchaser of the specific coverage in issue”?

## Establishing Themes (Contd)

- “This is wrong! How many times are you going to make the same mistakes? IDIOTS!!!!!!!!!!”
- “Are you retarded?”
- “Why are we pointing fingers at the broker? Every year he tells us we should be purchasing more insurance!”

# Treating Depositions as the Start of Trial

- In a high stakes litigation, it is imperative to treat depositions as the start of trial
- Mistakes/errors/faulty recollection resulting from failure to be fully prepared will be characterized at trial as ineptness or attempts to deceive
- Non-credible/unlikable witnesses can do immense damage
- Prepping witnesses thus needs to go beyond just reviewing the documents and issues



# Preparing Witnesses to Testify

## Shortest Possible True Answer

Please bring your vehicle to a speed not exceeding zero miles per hour at this coordinate in space and time as there is other vehicular traffic moving in a direction perpendicular to your own and may intersect with your vehicle's current trajectory.



### Additional Words Are Expensive

# Preparing Witnesses to Testify

## Teach

**LISTEN** to the question

**THINK** about the question

**FORMULATE** the answer

**PAUSE**

**SPEAK** the answer

**STOP**

# Preparing Witnesses to Testify

## Teach

### Four Great Answers

Yes

No

I don't know

I don't remember

# Experts

- It is also critical to identify necessary experts, fully vet and retain early
  - Because broker E&O cases can often be defended based on the availability of the absent coverage, this may include experts in the types of available coverage, cost, standard forms, and optional coverages
  - Because broker E&O cases can often be defended based on arguments that the claim wouldn't have been covered, experts with regard to loss causation, the appropriate number of occurrences, and coverage issues generally may also be necessary
  - Because broker E&O cases can often be defended based on the valuation of the loss, damages experts will typically be needed

## Experts (cont'd)

- Things to be wary of:
  - Sloppiness/mistakes
  - Unsupported assumptions
  - Factual argument/excessive factual detail
  - Offering expert opinions beyond scope of expertise
  - Being too much of an advocate
  - Offering opinions on the ultimate issue
  - Lack of backbone

# Making Effective Use of Jury Science

- Usefulness in assessing value
- Usefulness in organizing opinions of interested parties
- Dangers of confirmation bias

# Trial

Five quick comments:

- This is the jury consultant's sandbox; make use of his/her expertise to the fullest
- The adage is true: openings and closings are where cases are often won or lost – prepare accordingly
- Understand and respect the critical importance of jury selection
  - **76%** of jurors believe that corporate executives lie and cover up
  - **30%** believe that it takes “billions” to send a message to corporations
  - **71%** do not believe there should be caps on juror awards
  - **45%** will ignore a judge's instructions

## Trial (cont'd)

- Because the law regarding broker duties and the existence of a “special relationship” can vary significantly depending on the applicable law, jury instructions play an especially critical role
- Tech smart, savvy and visually compelling presentations are no longer an extra; they are essential

# Questions?





# Thank You!

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