

The Dangers of Advocating for Your Clients


Everyone recognizes that insurance is a business built on relationships. Agent/client relationships take years of hard work to establish and maintain. Yet, significant dangers arise for agents when a dispute occurs over the existence of or the amount of coverage for a claim. Often because of the relationship, it's natural for the agent to try to help his or her client. Agents need to realize they're navigating a legal minefield—attempting to advocate on behalf of their client while protecting themselves and not jeopardizing their own E&O coverage. Actions taken by an agent prior to reporting a claim to their E&O carrier could result in a denial of coverage.

The typical E&O policy prohibits an insured from admitting liability or participating in any settlement discussions or entering into settlement agreements. Thus, admitting mistakes or offering settlement in the face of a claim jeopardizes E&O coverage.

While an agent's inclination is to help a client after they've suffered a loss, remember that any comments made to a client can and likely will be used against an agent in subsequent litigation. With that in mind, it's important to be careful about apologizing or saying anything that could be construed as admitting an error. Furthermore, avoid making any offers of settlement or offers to pay if the carrier does not. Avoid comments such as: "Don't worry, my E&O insurance will pay for this," or "I'm sorry I didn't recommend higher limits." Agents may be questioned about any such remarks at a deposition or trial and those remarks will be presented as an admission of liability.

When a client has a coverage dispute, the agent will often write to the carrier explaining that a mistake was made in the agent's office and ask the carrier to reconsider its coverage position. Unfortunately, the result is often not only that the carrier fails to change its coverage position, but that the agent's letter eventually shows up at the trial as evidence of the agent's mistake or negligence. Moreover, even if the carrier does pay the claim, the carrier may later use the letter to collect reimbursement from the agent.

There are a few instances where admitting an error might be appropriate—such as in a reformation argument or a request for an ex gratia payment. An insured may seek reformation of an insurance policy to correct a mutual mistake. A mistake is mutual when both parties to the contract mean one thing, but the written contract says another. In the context of policy reformation, the agent and the client agree as to what coverage is being placed, but the policy does not reflect that agreement. If the agent has binding authority with the carrier, then the agent is arguably acting as the carrier. Thus, while the agent may have made a mistake obtaining the policy, the mistake is attributable to the carrier for purposes of reforming the policy. Once the policy is reformed, the carrier must provide coverage under the reformed policy. While this is a sound strategy in certain situations, it must be carefully employed.

These admissions, however, should only be undertaken after consultation with and with the assistance of your E&O claims handler. Consequently, an agent needs to balance the relationship with a client by showing empathy, while at the same time avoiding admitting liability or any other action that would jeopardize E&O coverage. 

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In the Event of an E&O Claim

If you find yourself in an inquiry or accused by a client, here are a couple of suggested responses:

- "Out of an abundance of caution, I have reported this matter to my errors and omissions carrier. I don't want to appear uncooperative, but they've cautioned me against discussing this matter further. If you'd like to discuss this matter, I can refer you to the appropriate claims professional."
- "I don't believe I made an error, but if you think I have, I do carry errors and omissions insurance and you may make a claim." Then ask them to put their thoughts in writing and say you'll forward those to your E&O carrier.

These approaches recognize and seek to balance the importance of maintaining the client relationship with the agent's interest in not making damaging admissions or violating the terms and conditions of the E&O policy.

—K.N.