



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

Episode 2 - Brokers: Friend, Foe, or Frenemy?

By [Lynda A. Bennett](#) and [Michael D. Lichtenstein](#)

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Lynda Bennett: Welcome to today's episode. We are your hosts, Linda Bennett and Michael Lichtenstein, of Lowenstein Sandler's Insurance Recovery Practice Group. In today's episode, we're going to be talking about a really important issue, which is the role that insurance brokers play in the policy placement process, as well as the claim dispute process. And Michael, what we'd really like to address at the top line is whether the broker is your friend, your foe, or your frenemy.

Michael Lichtenstein: Thanks Linda. Brokers are both your friend and your foe. So the correct answer is they're your frenemy. So let's talk first about brokers, large and small. An important question Linda, is whether you need a name brand broker. Everyone has heard of the Marshes and the Eons, really big brokers. Lots of employees, depth of knowledge, and a host of insurance policy areas. And the question is, do you really need them? And the answer is, it depends.

Michael Lichtenstein: For our large public clients, it almost always makes sense for them to go to the big brokers for most of their insurance coverage needs. Those brokers have a lot of depth of knowledge. They can advise on lots of different policies and they can help to put together sophisticated coverage portfolios. For our middle market clients, middle market brokers are typically appropriate. And for our smaller clients, they can even use smaller brokers, as long as those brokers have expertise in the areas that are important to those clients.

Michael Lichtenstein: Linda, one thing you and I have seen often is companies that start out small and then have great success and get larger and more sophisticated, often don't upgrade their broker until they have a claim and an issue with that claim. Because it's very popular when you're small and you're a startup to get a recommendation from your mother's uncles, cousin for an insurance broker. And that might be good enough for your needs at the time. But as your needs grow and you become more sophisticated, it's probably a good idea to be upgrading your broker.

Lynda Bennett: Michael, I couldn't agree more. And one of the things that I've seen over and over is clients are looking at their purchase of insurance as a pure procurement function. And not really focusing enough on having a broker who truly understands the risks that this company is facing. What is it that keeps you up at night that you should and will be able to ensure through an insurance policy? Versus using other risk transfer mechanisms.

Lynda Bennett: So the top line advice that I give to clients on this question is make sure that whoever your broker is really, truly understands your business, your risks, and what you're trying to protect against through the purchase of your insurance policy. Speaking of that, what is the role exactly that the brokers can do when we're going out to market to buy the policy? Other than getting us a price quote, what is it that they can and should be doing for us?

Michael Lichtenstein: They have two primary functions. The first is to negotiate the of your policy. In today's environment, there's really no such thing as an off the shelf policy. So policies can and should be negotiated. And as you mentioned in the first topic, it's really important for the broker to understand the risks that keep their client up at night so that they know which areas in the policy that they should be focused on when they're actually negotiating about language.

Michael Lichtenstein: The second issue they deal with is availability of coverage and price. You want a broker who has real experience with the types of coverage you're buying so that they know who the players are in the market from an insurance carrier perspective, and they know what the market prices for the coverage you're buying. And that will involve how much coverage you need, whether you have deductibles or self-insured pretensions, and other types of substantive policy issues.

Lynda Bennett: I agree, Michael. And one of the things I just wanted to add here is the way that brokers and coverage counsel can work together, hand in glove on the negotiation of these terms. What we find for some of our clients is the broker will give that off the shelf or just pass along the offering that has come from the insurer. And in fact, a lot of these policy terms can be negotiated further, if you ask.

Lynda Bennett: And so, one of the value adds that we bring to our clients is we work closely with the broker, come up with a list of the modifications that need to be made. The broker takes that back to the insurer, and we have a productive discussion that typically results in a stronger and better policy form for the price that's offered. So, that's great.

Michael Lichtenstein: Before you go Linda, let me add something here. And this is where the frenemy part really comes in. Brokers work with the same insurance carriers and the same underwriters time and time again. They'll make you feel like you're their most important client, but they have 100s of clients. And they're oftentimes working with the very same insurance carrier representatives. And it puts them in a bind. Because on the one hand, they want to get you the best language and

the best deal that they can. On the other hand, they see the carrier as a source of repeat business. So the harder they fight for you, the more difficult their fight might be on behalf of another carrier.

Michael Lichtenstein: So again, when you were mentioning about working hand in glove, policy holder lawyers don't have that conflict. We have only one client, it's our client, the policy holder. So working with the broker, we actually can give the broker cover. So the broker can say, "Yeah, I really need this policy language changed. It's not coming from me. It's coming from Linda and Michael. You know how they are. And that actually will help the broker do her job and get you the best language that can be obtained in the marketplace."

Lynda Bennett: Exactly right, Michael. But now let's flip over to the claim side and how does the broker fit in the context of a claim dispute or you're evaluating the terms and conditions of the policy? What happens to privilege? Can I send everything in anything that I get from my outside lawyers to the broker and have them weigh in?

Michael Lichtenstein: The answer, of course is no, you can't do that. The broker does have a role to play in the claim process, especially a good broker who has a lot of knowledge in a particular insurance coverage space. But what they aren't, they're not your lawyer. They're not part of your litigation team. And if you've hired outside coverage counsel, or you're a lawyer inside of the policy holder, there are certain things you simply can't share with the broker. Because you don't enjoy an attorney-client privilege. You don't enjoy a work product doctrine privilege. And if you actually end up in litigation with a carrier, all of your communications with your broker are discoverable. That's not what you want. In litigation, you don't want to give the carrier the roadmap to your legal theory on the claim. So it's not that you have to cut them out completely. You have to be judicious about what you share with your broker and what you don't.

Lynda Bennett: Totally agree. And I'll just share one of our best practices, which is when we're evaluating a claim, the potential coverage for a claim and we're sharing that information with our client, we routinely Mark any and all of those communications as privileged and confidential. And explicitly flag that, that cannot and should not be shared with your broker because you do want to preserve the privilege.

Michael Lichtenstein: This is another frenemy area for the broker, because as we know, brokers go back to the same insurance carrier claim handlers all the time. And your broker may be telling you that you don't have a particularly strong claim. And they're not that excited about presenting it for you. This is another opportunity where you and I get to step in and actually make the broker's life easier. Because they can go back to the claim handler and say, "Look, I know this claim it has some hair on it say. But you know, Lyndon, Michael." And can present our argument or let us present the argument in favor of coverage for a particular policy holder. And help protect their relationship, while at the same time advancing

our client's interests. It's another situation where the frenemy that is our broker has a little bit of a divided loyalty. But policy holder counsel, like you and I don't.

Lynda Bennett:

I think we've laid a strong foundation in today's episode about the importance of the broker relationship, both in the policy placement, as well as what happens on the claim side. But it certainly is consistent with our theme that the insurance area is complex and the relationship between the policy holder and the broker is certainly complex. In fact, we have a little bit more to peel back on this onion of the broker relationship. So we hope that you'll join us for our next episode, where we will be addressing whether one broker is sufficient, or if you need more.

Kevin Iredell:

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