

# E&O Risk Management: Meeting The Challenge Of Change



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# E&O Risk Management: Meeting The Challenge Of Change

Agency/Carrier Relationships – Law of Agency



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# Agent/Carrier Relationships - Law of Agency

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## Objectives:

- *Learn the concept of the law of agency*
- *Understand how the agency relationship is established*
- *Provide a closer look at the agents duties to carriers*
- *Explore key provisions of agency agreements and underwriting guidelines that could create potential E&O exposures*

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## INTRODUCTION

Independent insurance agents are uniquely positioned to meet their customers' insurance needs with access to multiple carriers in the insurance marketplace. While this is a great strength, the relationships with carriers and customers and the duties agents owe to each can become blurred. It is critical that insurance agents understand these relationships so they can protect themselves against potential claims arising out of a failure to meet the minimum standards of care owed each of these parties.

This module explores how the law of agency affects agencies' legal and business relationships between themselves and their insurance carriers. It will look at how agency relationships are created and how to reduce potential E&O exposure from various duties and obligations. Agencies need to be vigilant in regard to meeting the duties of their authority in representing carriers as well as how that authority is perceived by others. In recent years there has been an increase in the number of claims where the insurance carrier either pursues a direct action against the agent prior to payment of a claim or pays the underlying claim and then seeks to recover the loss payment from the agent. If a carrier is financially harmed as a result of an agency's wrongful acts, the carrier may have a right of action against the agency for any damages it sustains. In past years, this may have not happened but don't bank on the agency being safe from anyone when there's money on the table.

## THE LAW OF AGENCY

"Agency" is a term that denotes a legal relationship established when one party represents another. Before an "agency" relationship is created, both parties must voluntarily agree to enter into the relationship which can be done in writing or orally. When an "agency" relationship is created the agent steps into the shoes of the principal and acts on the principal's behalf, per the terms of the agreement. In the insurance agency relationship, the agent often acts on behalf of the carrier in an insurance transaction with a third party (the insured).

## ESTABLISHING AN AGENCY RELATIONSHIP

An agent has ***three types of authority to bind a principal*** to any agreement made with a third party. These authorities are recognized under the law of agency for all agents, including insurance agents. They include:

1. Express Authority
2. Implied Authority
3. Apparent Authority

Anytime an agency is unsure about its authority in representing the carrier, the carrier should be contacted for clarification.

## **Section 1: Express Authority**

Under the law of agency, express authority may be oral or written. In either case, the principal expressly indicates the extent of authority they are granting to their agent to act on their behalf. This generally comes in the form of an agency agreement. These agreements are unique to each carrier and it is extremely important that agents thoroughly review each carrier agreement and understand the duties both they and the insurance company have. If an agent has any questions or concerns about the agreement, they should consult with an attorney. Agency agreements outline the duties the agent owes to the carrier in exchange for the right to market the carrier's products. Various provisions may be individually negotiated with each agency but most agency agreements address (within the contract or by attached addenda or schedule) the following:

- Types of policies that can be sold and territory where the agency is authorized to operate
- Binding authority (what types of policies the agent may bind, what limits may be bound, what types of vehicles, timeframes for forwarding submissions on coverage is bound, etc.)
- Policy issuance procedures (how/when applications must be transmitted to the carrier; training agency personnel on the use of the carriers' proprietary software is extremely important.)
- Broker of Record requirements
- Premium collection and remittance procedures (direct and agency bill)
- Commission rates, profit sharing plans or other contingencies
- Mix of business (e.g. Personal Lines and Commercial Lines, Personal Lines only, etc.)
- Indemnity obligations of the parties
- E&O insurance requirements (limits and deductible)
- Claims handling procedures
- Intellectual property matters, including the use of carrier trademarks, logos, etc.

Provisions in the agency agreement and any attached addenda should be strictly followed. Not doing so will open up the agency to potential E&O exposure from the carrier.

**Risk Management Tip:**

**Express authority may be created by either a written or oral contract. If the contract is oral, disputes may later arise regarding the scope of duties or obligations under the agreement. If at all possible, it is preferable that the terms of any agency relationship be memorialized in writing in order to avoid any potential misunderstanding with respect to the duties and obligations of either party, and to ensure that the duties and obligations which are enforced are those which were understood at the time the agency relationship was established. When in doubt, document.**

**Section 2: Implied Authority**

Not everything that an agent is required to do in an insurance transaction is found in the agency agreement or the attached addenda. There are certain duties that an agency must perform that are implied in the performance of duties on behalf of the principal. Establishing an agency relationship through implication, where there is an express agency relationship, the courts may also extend the agent's authority to that which is implied in the relationship – i.e. that authority which is proper, usual and necessary to the exercise of the authority expressly granted. For example, if not specifically addressed in the agency agreement, implied authority may allow an agent to:

- accept payment of an insurance premium on behalf of the carrier
- issue automobile ID cards or other evidence of insurance placed with the carrier
- place a carrier's logo on signs, websites, etc. to advertise their relationship

**Section 3: Apparent Authority**

Apparent authority occurs when a third party believes, by all appearances, that the agent has authority to transact business on behalf of the principal, even when no authority actually exists. If the carrier has created or allowed a situation to occur such that a *reasonable* third party would assume that the agent has authority, the principal may have to honor the contractual promise made by its agent.

Agents may bind the carrier to a policy with a third party even in cases where the carrier did not authorize the agent to do so. See the below example:

### **EXAMPLE OF APPARENT AUTHORITY**

*A customer routinely buys and sells commercial real estate. In the past, the customer contacted the producer when they purchased a new property. Each time they gave that producer information over the phone about the property and the producer verbally indicated that coverage was bound and followed up with a written binder. On this occasion the newly acquired property did not fit the underwriting appetite of the usual carrier and the producer said not to worry they would bind it with a surplus carrier. The producer did not have the same binding authority with the surplus lines market, but failed to mention this to the customer. Within hours of the producer's verbal confirmation that the coverage was being bound, the property suffered a loss. If the customer reasonably believed that the producer had the authority to bind coverage, the courts could hold the surplus lines carrier responsible. The carrier then would in turn make claim against the agency.*

The purpose of “apparent authority” is to protect the third party, even though it may seem unfair for the principal to be held responsible for the wrongful acts of their agents. Although the carrier may be held responsible for the agent’s actions, the carrier may decide to bring an action against the agent to recover any costs incurred.

## **GENERAL AGENT DUTIES TO CARRIERS**

Because of the Law of Agency, there are various general obligations an insurance agent may owe to an insurance carrier, which differ, depending upon the carrier, and the circumstances, as well as the law of each state. Obviously, complying with the terms of the agency agreement is a given but there are other general duties to consider:

- Fiduciary Duty
- Loyalty
- Accounting – Collection of Premium
- Disclosure of information

### **Section 1: Fiduciary Duty**

The word fiduciary comes from the Latin *fides* which means faith and *fiducia*, meaning trust. Where a high level of trust arises in connection with the insurance agent-principal relationship, it can be considered to be a fiduciary one.

Often fiduciary relationships involve the handling of money. The producer-carrier relationship falls in this category. Producers may have state laws that regulate the ability or inability to commingle funds of the agency and their carriers. These state laws may require that trust accounts be established to protect the carriers' money from potential agency creditors. Regardless of these state laws, however, the carrier must have a high degree of trust that any money received by the producer, that belongs to the carrier, will be promptly sent to the carrier at the appropriate time.

In the agency-carrier relationship the agent also acts as the carrier's front-line underwriter. The producer, as the legal representative of the carrier, has usually been granted binding authority. The carrier must place their trust in the producer to only bind coverage exposures that meet the carrier's underwriting guidelines

## **Section 2: Loyalty**

The agent has the duty of loyalty to its principal. The duty of loyalty embraces several subsidiary obligations, including:

- refraining from competing with the principal,
- taking action on behalf of or otherwise assisting the principal's competitors,
- not acquiring a material benefit from a third party in connection with actions taken through the agent's use of the agent's position,
- not using or communicating confidential information of the principal for the agent's own purposes or those of a third party.

***Challenge of Perceived Dual Agency*** - In some states, where a customer procures insurance through an agent, a dual "agency" relationship may be found to exist. As an agent this can create a question of who you are representing during the insurance buying process. Customers may not be clear about whom an independent agent represents and may assume that the agent is only representing the customer's interest. In a single insurance transaction, an independent insurance agent's representation may vary between the customer's interest and that of the carrier.

## Class Discussion

*A prospect inquires about purchasing automobile insurance. The agent discusses basic auto insurance coverage, including your state's mandatory coverage(s). The agent assists the prospect in deciding which coverages would best fit their specific needs. The prospect then inquires about the cost of the proposed auto insurance program. The agent reviews the prospect's driver information, driving record and loss history. The agent determines which of the carriers represented would find this prospect acceptable, based on their underwriting guidelines. Taking into account that carrier's application, the agent obtains any additional required information. Along with the auto quote the agent discusses some the carrier's proprietary endorsements, including the additional cost of each option. The prospect decides to purchase the auto policy, including some of the endorsement options discussed. The agent prepares a binder and collects the premium due.*

- *Based on the above scenario, when is the agent a representative of the prospect and when are they a representative of the carrier?*
- *At various stages in this insurance transaction would the agent simultaneously owe duties to both the prospect/insured and the carrier? What are those duties?*
- *Do you believe that independent insurance agents have a greater exposure to an E&O loss due to this dual "agency" exposure, when compared to other insurance marketing systems? Why or why not?*
- *What suggestions can you make to avoid a possible E&O claim arising out of this and similar situations?*

### **Section 3: Accounting – Collection of Premium**

Often times the premiums due on a new insurance transaction are collected by the producer and checks are made out by the customer to the agency, and then owed to the carrier (less any commission due). These net premiums may be held for a period of time before the agency turns them over to the carrier in accordance with the terms of the agency agreement. The majority of states require that the agency must be able to distinguish the money owed to

carriers from operating funds belonging to the agency. Individual state insurance laws dictate whether the producer may or may not commingle the premiums owed to a carrier with their own funds. The commission portion of these funds cannot be moved to the agency's operating account until the carrier has been paid (or funds returned to the customer, in the case of return premium.) In the absence of state commingling laws, there are Federal fraud statutes governing the use of other peoples' money. Regardless of whether the agency is required by state law to have separate accounts, at a minimum, agencies must be able to provide an accounting of these funds.

#### **Section 4: Disclosure of Information**

Since the agent is representing the principal, and since the agent's knowledge is imputed to the principal, it is reasonable for the principal to expect that their agent will provide them with any material information of which the agent is aware. In an insurance transaction, this material information would affect the carriers' decisions regarding acceptance or denial of the account, the extent of coverage offered based on the understanding of the exposures being transferred, and the premium charged for this transfer of risk. Below are a couple of examples commonly experienced by agents:

1. The customer asks the agent if they should turn in a claim for fear the insurer will cancel or non-renew them. As soon as the agent becomes aware of a claim, they agent has a duty to report this to the insurer regardless of the customers instructions to the contrary. Explain to the customer that failure to report a claim to the carrier on a timely basis could result in the claim later being denied for late notice. The agent could be held responsible in the form of an E&O claim.
2. The agent becomes aware of a change in the risk mid-term. An example may be an elderly widow dies and her adult children have her house on the market. The agent should report this to the carrier.

## Class Discussion

*During a routine agency audit, an agency principal has discovered that one of their new producers has provided inaccurate payroll information to one of their carriers on several accounts. The error may simply be a mistake due to the producer's inexperience or the inaccurate reporting may be intentional to reduce the premium for competitive reasons.*

- *What steps should the agency take to correct the situation?*
- *What changes should the agency make to ensure this does not occur in the future?*



# E&O Risk Management: Meeting The Challenge Of Change

**Compliance with State and Federal Laws**



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# Compliance with State and Federal Laws

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## Objectives:

- *Understand the need to comply with both state and federal laws and regulations.*
- *Discuss potential laws that may apply to agents.*

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# INTRODUCTION

An agent's most basic obligation is to comply with state and federal laws, including statutes and regulations. It is important to understand what laws apply to agents and what they must do to comply with them. Not following the law opens agencies up to the risk of the following:

- Fines,
- Loss of license,
- Potential crime penalties,
- Damage to reputation,
- And loss of customers.

Below is a sample list of some state and federal laws with which an agent may need to comply. This list, however, is not intended to be exhaustive. We suggest that you consult with your attorney or your Big "I" state association to discuss the laws that affect you.

## **Section 1: State Laws**

### ***Unfair Trade Practices***

These laws address acts an agent should not engage in. Since insurance law guides these practices, it would be unnecessary for an agency agreement to outline illegal or tortious practices. Although each state's laws are unique, virtually every state's laws are based on the NAIC model act and prohibit:

- Defamation - The act of making untrue statements about carriers, customers, or other agents which damages a reputation.
- Misrepresentation - Misstating facts about coverage or services offered by the agency to obtain money, goods or benefits of another to which the accused is not entitled. This can include misleading the carrier as to material facts affecting a policy or settlement of loss, either by directly or indirectly lying. This can void policies.
- False Advertising - The use of false or misleading statements in advertising the agency's services.
- Unlawful Rebating - An inducement to purchase an insurance policy that is not in the insurance contract.

## ***Unfair Claims Practices***

Agency staff should be aware of their state's claims practice laws which protect insureds and claimants during the claims process. Although these laws directly apply to insurance carriers, agencies may also have claims handling authority and, therefore, may also be required to comply. Each state's laws are unique, but most address various issues of unfair handling of the claim including:

- Timeframes for communications with claimants and insureds
- Timeframes to deny or affirm coverage
- Timeframes for making claim payments
- Coverage and policy provision misrepresentation

## **Section 2: Federal Laws**

Although the McCarran-Ferguson Act (Public Law 15) establishes that insurance regulation rests with the states, there are some federal laws that also affect the operations of an insurance agency.

### ***Fair Credit Reporting Act (FCRA)***

This act is not specific to the insurance industry. Rather it applies to any industry that accesses personal financial information or "consumer reports" which is very broadly defined. The most common issues for agencies relating to FCRA are the furnishing of Motor Vehicle Records ("MVRs") on drivers to their employers who are the agency's insured. The act protects consumers against improper handling of this information and establishes procedures for protecting the information. Your state may also have its own laws which may be even more stringent than their federal counterpart. It is important that agents be familiar with the requirements and restrictions of the FCRA and to be informed on the distinction between using MVRs for insurance underwriting versus employment.

### ***Gramm-Leach- Bliley Act (Financial Services Modernization Act of 1999) or "GLBA"***

GLBA puts great restrictions on "non-public, personal financial information" (NPFI). The agency must therefore be very careful how and to whom it shares NPFI of its insureds. The law also imposes strict but vague requirements regarding security and integrity of data. Lastly, GLBA requires that each "financial institution" – which includes insurance agencies – to send an annual privacy notice to personal lines customers, just like banks and credit card companies do.

### ***Sarbanes-Oxley Act (SOX)***

Following a number of high profile corporate accounting scandals, SOX was enacted and contains specific mandates and requirements for the financial reporting of public companies.

### ***Electronic Signature in Global and National Commerce Act (ESIGN)***

Most states have their own law relating to electronic signatures. This, however, is a federal act that outlines guidelines for intrastate commerce. ESIGN has the general intent of assuring that a contract or signature may not be denied legal effect solely because it is in electronic form.

### ***Telephone Consumer Protection Act (TCPA)***

The FCC and the FTC have established a national “Do-Not-Call” list which prohibits telemarketers from calling parties unless they have an established business relationship. It also generally prohibits most unsolicited facsimile (fax) advertisements.

### ***CAN-SPAM***

The FCC has enacted rules that prohibit sending unwanted commercial email messages to wireless devices and computers without prior permission. Commercial messages are those that primarily advertise or promote products or services.

### ***HIPPA***

The Health Insurance Portability and Accountability Act (HIPAA) requires the security of health data and non-public information.

**Risk Management Tip:**

This list is not exhaustive and there are numerous other laws and regulations that bear on the operations of an insurance agency. It is important that agency management keep up to date by regularly reviewing insurance related publications and taking advantage of insurance-related education opportunities offered by the national and state IIABA associations. The Legal Advocacy section of [www.iiaba.net](http://www.iiaba.net) maintained by IIABA's Office of the General Counsel provides an excellent resource for learning more about federal laws and regulations affecting the insurance industry.

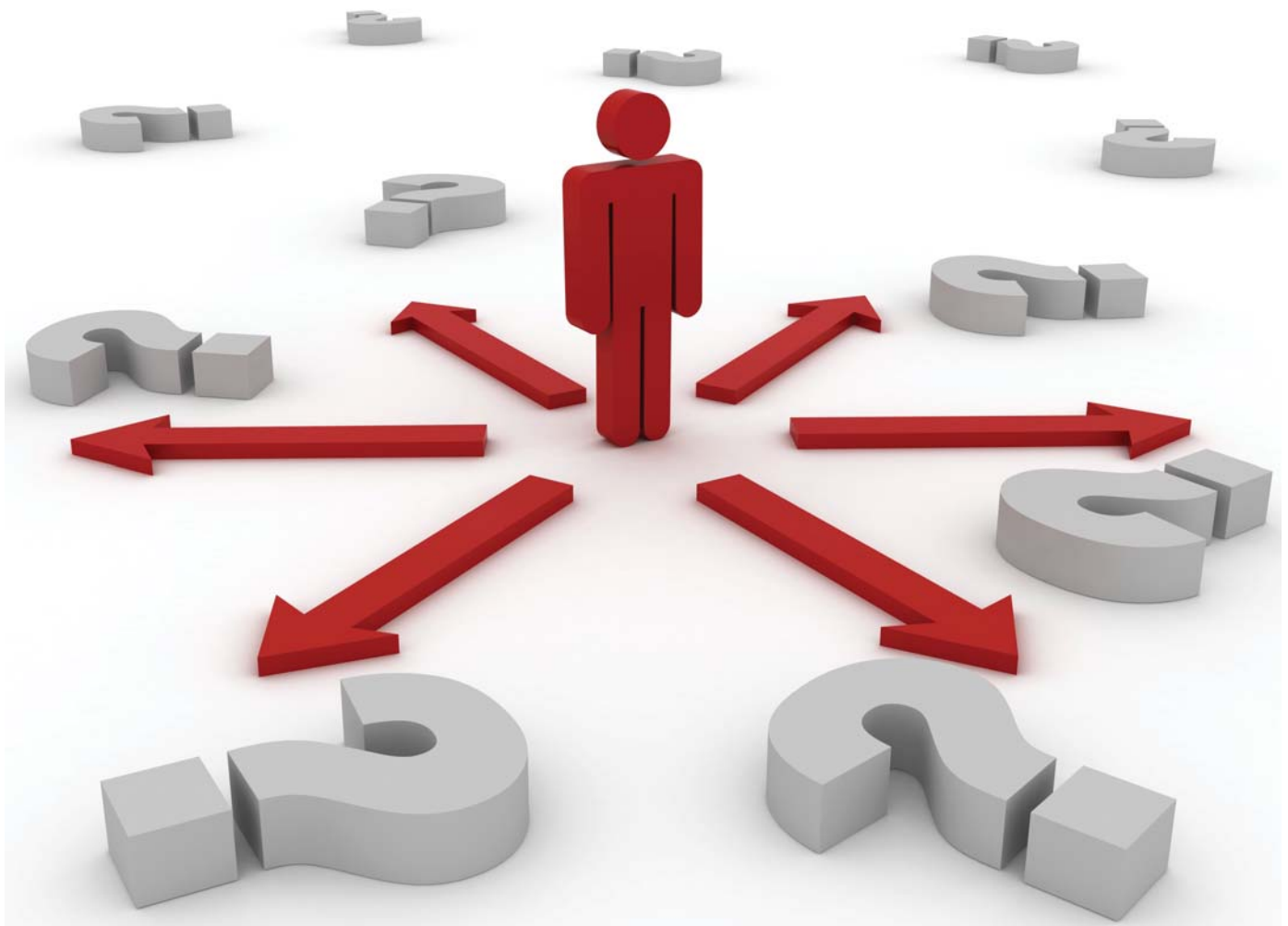
**Discussion Topics**

- *What are some state laws that most prominently affect agencies duties to customers and their operations and procedures?*
- *What are some recent laws for which agents may not be fully aware?*
- *Protection of personal information is a major issue, what are your states requirements? What types of private information does your agency collect?*



# E&O Risk Management: Meeting The Challenge Of Change

## Understanding Agent Duties



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# Understanding Agent Duties

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## Objectives:

- *Understand duties owed to clients.*
- *Explore what determines an agent's standard of care.*
- *Considerations in managing legal duties and a running an agency.*

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## INTRODUCTION

Do you know the legal duties that you may owe to customers? Do you have an obligation to advise customers of the need for coverage, to determine values, or to offer increased limits? Understanding the duties you owe to customers is critically important as the minimum duties can lay the foundation for how your agency operates. It allows the agency to consciously decide on the level of service it provides to customers and put procedures in place to minimize E&O exposures for going beyond the legal duty.

This section will explore how an agent's standard of care is determined along with key components for determining negligence on the part of the agent. Legal standards vary by state in establishing an agent's duties. The concept of balancing your legal duties to the customer while running the agency in a way that creates more customer value and increased agency revenue is also explored in this section. It is important to remember that just because an E&O claim is made against the agency, it does not mean that the agency's duties to the customer were breached or that negligence exists.

## DUTIES TO CUSTOMERS

In all states, agents/brokers can be held liable for their negligence in providing services to their customers. Each state's laws differ regarding the duties an agency owes to its customers. Similarly, different states have varying requirements of establishing standards of care with respect to the relationship between an agent and its customer. Awareness of the standard of care is a baseline for establishing how an agency operates including whether the agency simply takes customer orders, specializes in certain coverages, or performs more thorough risk analyses in an effort to advise customers of available coverage.

### **Section 1: Negligence – Prove it!**

Negligence is created when the actions of agents fall below the standards of care established by law that would be expected of a reasonably prudent agent acting under similar circumstances. There are four (4) requirements that must be met for a customer to prove that the agency was negligent. Agents are, at a minimum, held to this standard of care.

**Negligence requires that all four of the following are met:**

1. A duty existed.

**Duty Example:** The owner of an apartment building goes to an agency and asks for help obtaining coverage for his property, including coverage for loss of rent. The agent agrees to do so. At this point a duty is created either to procure the coverage requested or explain to the customer why coverage cannot be obtained. Some states require that an agent recommend specific coverages like "loss of rent" by virtue of his professional training and knowledge. Others require a 'special relationship,' e.g., one based on prior course of dealing, in order to impose a duty beyond simply procuring the coverage requested. All jurisdictions will find a duty where, as here, the broker agrees to an explicit request.

2. The duty was breached.

**Breach Example:** The agent submits the application to the carrier on a timely basis, but forgets to request coverage for loss of rent, which is not ordinarily covered but could easily be endorsed onto the policy. The agent having failed to procure the coverage he agreed to obtain, his duty to his customer has been breached.

3. Proximate cause - A connection between the breach and duty showing that the particular error or omission was a cause of the loss.

**Causation Example:** During the policy period a fire occurs in the fully occupied apartment building and, as a result, the building's tenants, who are forced to move elsewhere until substantial repairs are completed, stop paying rent. When the owner submits a claim for that 'lost rent' the carrier properly denies the claim, so the agent's error has caused an uncovered loss. If, on the other hand, the carrier offers several reasons for the denial, e.g., misrepresentation on the application, or if coverage could not have been obtained for some reason, the agent may argue that his error was not the legal cause of the owner's loss.

4. *Actual damages occurred as a result of the breach.*

**Damages Example:** *Because the agent's failure to fulfill his task resulted in a denial of coverage, the owner sustained damage: the lost rent he should have received from his carrier for the 90 days it took to complete repairs and get the tenants back into his apartment building.*

### ***To Whom Is A Duty Owed?***

An insurance agent or broker may be found liable for negligence regardless of whether the duty owed is to the insurance carrier or to the customer. In addition, while some states require that the person or entity bringing a lawsuit must have a relationship with the insurance agent, other states allow an action to be maintained by anyone affected by the agent's negligence, such as an underlying tort claimant or party of interest, such as a Loss Payee or Additional Insured.

### **Section 2: What is standard of care and why is it important?**

The standard of care is the degree of prudence and caution required when rendering services to customers. The level of standard of care is closely dependent on the circumstances and is based on how a reasonable agent would react under similar circumstances. Failure to meet one's standard of care can result in a claim of negligence being made resulting in the potential for damages owed to the injured party.

The determination of the legal standard of care varies in each state. Knowing your state's standard of care is important because your agency maybe operating in a way that creates an increased duty or a "special relationship" that could increase the chances of negligence claims being made against the agency in the event of an error or omission. How you run your agency to best meet the needs of customers while maximizing the profitability of the agency could be increasing your legal exposure because you are going above minimum legal standards owed. Agency best practices and legal duties are two separate issues; however, agencies need to be aware of their exposures and implement procedures to minimize risk.

### **Section 3: Differing Levels of Standard of Care**

In general, agents across the country have a duty to use the care and skill of a reasonable agent in similar circumstances to procure the coverage requested by the customer. If coverage requested cannot be procured then the agent must notify the customer. More specifically, the standard of care for agents in each state is determined by state courts and can be divided into two categories: 1) Non-professional or order-taker status; and 2) Professional standard of care. To further determine the care status, the court will assess whether a "special relationship"

exists which can potentially increase the standard. Everyone in the agency needs to be aware of the circumstances in determining how a special relationship is created.

### ***Non-professional Standard of Care***

In many states, insurance agents are not subjected to a professional standard of care. This means that in these states the agent's only obligation is to procure the coverage requested by the customer and to let customer know if that cannot be done. In these states, insurance agents typically only owe a duty to their customers to procure requested coverage or advise the insured of their inability to do so. The question of what constitutes a sufficient request to trigger a duty to procure a particular type or amount of coverage has been a source of continued litigation. Clear lines of communication with an insured are important in minimizing risk of loss. Where possible, it is preferable to obtain written confirmation from insureds regarding any specific coverage requests, and to document all steps, including the final outcome of any such requests.

### ***Professional Standard of Care***

In other states, insurance agents are considered professionals. This means an insurance agent's basic standard of care recognizes the insurance professional's skills and knowledge required to perform his/her duties. As professionals, agents have more of an advisory role meaning they may be expected to uncover and then inform customers of the possible loss exposures they face and offer insurance solutions. Therefore, the prudent agent's acts or failure to act will be based on this expected minimum level of professional service. States often require a "special relationship" to exist for the professional standard of care to apply. There are varying degrees of how easily the special relationship can be established.

## **Section 4: Determining Standard of Care and the "Special Relationship"**

As indicated above, courts will often look to the nature of the relationship the agent maintains in order to determine the standard of care to be applied, particularly in states which do not treat insurance agents and brokers as professionals. Where the courts consider the nature of the relationship in order to define the duty owed, there are different factors that may be considered. Below are some factors the court might consider that could increase the standard of care or create a "special relationship" in the eyes of the courts.

### ***Factors in Determining Higher Standards or Existence of Special Relationship:***

- **Claims of Expertise:** Holding yourself out as a highly skilled insurance expert and the customer relies on this representation:
  - Advertising that the agency/agent is a skilled practitioner, specializing in a particular line (i.e. manufacturers, trucking concerns, homeowners, auto, etc.)

- Various forms of advertisement using words or phrases such as “full service agency”, “counselor”, “advisor”, “extensive knowledge”, “expert”, “highly qualified”, etc.
- Indications or promises of the possession of special skills beyond the usual skills of other agents with a similar background.
- **Agreement or Additional Compensation**: Having a service contract or accepting additional compensation, such as fees, beyond commission compensation for specific services
- **Length of Customer Relationships**: Long-term relationships with the customer would be viewed differently than the relationship with a new customer. This is important when the agent knows from past experience that the customer specifically asks for and relies on the advice of the agent.
- **Rendering of Advice**: The agent is asked by the customer and agrees to provide advice. Or the agent assumes the duty to provide guidance or advice without the explicit request of the customer.

### Discussion Topics

- *Does simply having additional designations or a higher level of education with a deeper knowledge of insurance products in itself create a greater standard of care?*
- *In the state where my agency operates do the following meet an agent’s standard of care or increase it? In the absence of a special relationship would be they considered the meeting the minimum standards or best practices for running they agency?*
  - *Offering increased limit options*
  - *Offering additional coverages not requested by the customer.*
  - *Highlighting exclusions in the policy.*
- *All of the following “promises” appear on current agency websites. Discuss whether you believe that there may be a higher degree of expectation and what the agency can or should do to assure that they can meet these promises:*
  - *"To provide our Policyholders with as near perfect protection, as near perfect service, as is humanly possible, and to do so at the lowest possible cost."*

- *“Our agents take pride in providing outstanding service. Unlike most agencies, we continually check on your policies to make sure you are receiving the best rates possible”*
- *“Our years of experience and education allow us to guide our clients in making well-informed decisions regarding their insurance needs.”*
- *“At (name withheld), our approach to claims management goes beyond the standard process, to true claim advocacy.”*

#### **Risk Management Tip:**

**Agents should be cautious when undertaking more responsibility than is required under the law of their state. If you undertake that duty, you may be responsible for fulfilling all of the obligations associated with that duty for every customer.**

## **AGENCY PRACTICES VS. LEGAL DUTY**

It is important to be knowledgeable about the prescribed legal requirements in your state, however, meeting the minimum requirements is not necessarily the way you may choose to run your agency. Generally, it takes an uncovered customer loss to create an E&O claim so ensuring that customers have adequate coverage and limits can reduce an agency’s exposure to loss. Uncovering customer exposures and offering coverages and increased limits that may be appropriate may better serve your customer and provide the agency with more opportunity to increase revenue. The bottom line is that whatever the agency’s operational practices are for working with customers they should consistently strive to fully communicate and follow-up to meet these standard practices - “say what you do, and do what you say.”

### **Section 1: Creating a Duty Where None Previously Existed**

Agents should always be mindful of creating additional duties when creating office procedures. Certain duties, while they may seem to be of value to the customer, can have a drag of agency performance and substantially increase E&O exposure. Here a couple of examples:

1. **AVOID THE PRACTICE OF CONTACTING CRONICALLY LATE-PAYERS:** As a “value-added service” the agent would call an insured about late payments as a “reminder.” The insured came to rely

on the agent's phone calls, and generally disregarded notices from the insurer or premium finance company. A loss occurred and there was no coverage in place because of a policy cancellation for non-pay. The insured blamed the agent saying they didn't call in the prior month to remind them of that payment was due which they generally relied on.

2. SAYING IT'S TAKEN CARE OF BEFORE IT REALLY IS: An agent who specializes in equine insurance takes a phone call from the insured late on a Friday afternoon indicating he just purchased a \$3M race horse. Agent says he'll take care of it, but was able to secure only the first \$1M coverage before the markets closed. On Sunday, the horse was standing under a tree in a thunderstorm, and was struck by lightning and killed. Agent lost \$2M E&O claim. Only confirm that coverage is in place after it is truly bound and remind customers of this.

# E&O Risk Management: Meeting The Challenge Of Change

**An E&O Claim - 360° View**



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# An E&O Claim - 360° View

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## Objectives:

- *Understand what an E&O claims is*
- *Use claims statistics to identify areas to focus risk management efforts*
- *Review the specific types of errors made*

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## INTRODUCTION

Often it takes an uncovered loss to create an E&O claim. Generally speaking, an uncovered loss would be caused by:

1. A lack of appropriate type of coverage, or
2. Inadequate values or limits to cover the full loss.

E&O claims don't discriminate by the size or location of agencies. All agencies, regardless of staff size, must proactively address E&O risk management!

Statistics show that annually one (1) in seven (7) insurance agencies and brokerages will report a potential E&O claim. Statistics also indicate that approximately 50% of those reported claims are closed with no defense reserves or indemnity payment made.

E&O claims statistics have fluctuated over the years and are often influenced by market cycles which drive changing behavior of insurance buyers, carriers, and agents. Catastrophic events such as tornados, hurricanes, flooding, earthquakes, and wildfires can be the catalyst for the discovery of uncovered losses that lead to E&O claims against agents.

In those cases where the claim goes forward, the agency may or may not have actually made a mistake. Just because an E&O claim was made against you doesn't mean that the agency staff did anything wrong or breached your legal duty. It may simply be that the agency finds itself in the uncomfortable situation of an allegation being made against them because of their inability to prove that they are not responsible. Unfortunately, many E&O claims allegations are "he said, she said" and **this is where documentation, combined with good E&O risk management procedures that are invariably followed, is a key defense mechanism.**

## ERRORS AND OMISSIONS DEFINED

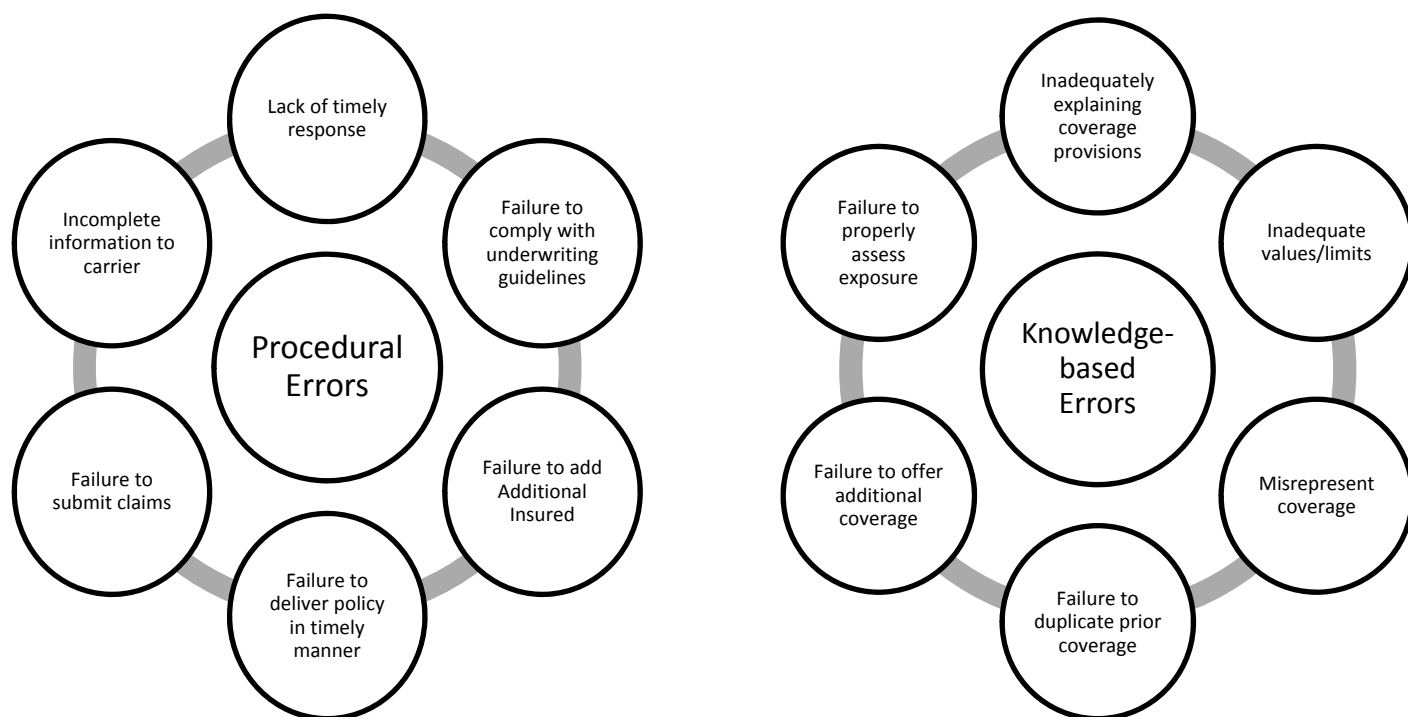
Errors and omissions can simplistically be described as "I made a mistake" (error) or "gosh I missed that" (omissions). When we look at E&O in this way, the mystique of "wrongful acts" can be described as human failings. An agency that has good E&O risk management procedures in place, that are enforced and monitored, can reduce their E&O exposure. This is especially true for those claims that could result from an omission.

### **Section 1: Procedural vs. Knowledge Based Errors**

E&O claims can generally be broken down into two categories: procedural errors and knowledge-based errors. The spread of claims between these two categories is about 50/50 and in some cases there is overlap between the two. So, to truly reduce E&O exposure both error types need to be addressed. It is worth noting that knowledge-based types of errors

could include a lack of product understanding or technical coverage knowledge as well as giving bad advice to customers.

### What are examples of procedural and knowledge-based claims?



## **Section 2: Agency E&O Culture - Staff Awareness**

Making sure the agency staff follows agency procedures is one thing, but making sure they understand the concept of how errors and omissions may occur in the agency is also important, especially how it applies to them. The actions or lack of action of agency staff (including: owners, producers, CSRs, account managers, accounting staff, clerical personnel) ultimately affects the agency's E&O exposure. Employees may lose sight of this. A culture of E&O awareness can keep it top of mind and is the first step in successfully avoiding claims. Open discussions will create an environment where agency staff is more comfortable making managers aware of potential E&O claims. This will facilitate better claims reporting and meeting your E&O policy's reporting requirements to ensure coverage. If employees fear discipline or reprisal they may delay bringing a situation to management's attention until it is too late for either the agency or its E&O insurer to resolve the problem.

### FACT CHECK:

Swiss Re Corporate Solutions data reveals that agencies that attend an E&O risk management seminar have fewer claims. The more agency employees that attend a seminar, the better. Consider having an in-house seminar for all employees.

### Class Discussion

- *What are some of the reasons why a customer might have an uncovered claim from a lack of coverage?*
- *What are some things agency staff can do to avoid claims from inadequate limits?*
- *What factors may cause an increase in E&O claims when the insurance marketplace experiences a hardening?*

## E&O CLAIMS STATISTICS

The E&O claims frequency statistics provided by Swiss Re Corporate Solutions provide guidance for an agency to determine their E&O exposures. They not only give you an understanding of the types of errors being made, they provide your agency with direction on where to focus your risk management efforts including:

- On whom to focus in reinforcing the importance of risk management,
- Areas of potential weakness in agency operations creating exposures and,
- Product education and training needs.

### Section 1: Who is suing agents?

It is not only insureds that can and do bring claims against insurance agencies. Past claims experience shows that claims come from the following sources:

1. **Customers** – The vast majority of the time it is the customer bringing claims against the agent for failing to procure or recommend the coverage to protect them.

2. **Carriers** – In the past decade there has been a visible trend in the number of E&O claims involving the carrier against the agent. These types of claims can be a result of agents:

- Exceeding their binding authority

**Example:** An agency may be granted binding authority by the carrier to bind policies up to specified limits, e.g., \$250,000, without first submitting the application to the carrier for approval. When the agent binds a policy containing limits in excess of \$250,000 and a large loss occurs, the carrier is likely to deny on the basis that the agent exceeded his authority -- or will cross-claim against the agent, seeking indemnity.\*

- Not adequately explaining policy provisions

**Example:** The agent obtains a policy for her customer's newly acquired property that contains a '60 day vacancy' clause. When the new owner fails to occupy the new property for over 60 days a water leak occurs and substantial damage occurs to the building while it is unoccupied. Both the customer and the carrier that denies coverage based on the vacancy clause will argue that the agency failed to properly explain the policy provisions.\*

- Failing to comply with underwriting guidelines

**Example:** An agent has binding authority with a carrier that insures boats, subject to the carrier's underwriting guidelines, which restrict coverage to pleasure crafts under a specified horsepower and length. After a serious loss occurs, the carrier investigates and determines that the boat in question slightly exceeds both limitations -- and denies coverage. If forced to pay the loss, the carrier will file suit against the agency for failing to comply with its guidelines.

- Providing inaccurate or incomplete information to carrier

**Example:** An agent remarkets an account to a new carrier, but fails to include information regarding prior losses. When a new loss occurs the carrier takes the position that a material misrepresentation occurred and, had the information about the prior losses been known, then it would not have insured the customer. The carrier pays the loss and files suit against the agency to recoup its claim payment.

- Failing to provide timely notice of a claim to the carrier

**Example:** If an agent fails to provide the carrier with notice of a claim, timely notice to the agent could be deemed timely notice to the carrier. In that case, the carrier could pay the claim and then file suit against the agency, arguing its investigation of the loss was prejudiced by the delay in receiving notice of the loss. One such example would be an auto loss wherein the car was repaired before the carrier had a chance to inspect it.

3. **Third parties** – Sometimes agents can be sued by third parties. These claims often involve:

- Failure to add an Additional Insured or Loss Payee

**Example:** Agency customers frequently are obliged to add a party with whom they contract to the policy as an 'additional insured,' or in the case of a lender, to be named as an 'additional loss payee.' If the broker fails to make that change to the policy, the uninsured third party or lender will attempt to hold the agency responsible.

- Misrepresentation or inaccurate information on Certificates of Insurance

**Example:** Many COI claims occur when an overworked (or undertrained) staff member issues a COI, as requested by the customer, without first checking to confirm that the coverage being certified actually does exist as represented. In some cases, the customer was not even obliged to provide the coverage in question -- that is, until it represented to a third-party via COI that the coverage was in place.

- Failing to procure coverage that was relied on by a third party

**Example:** Landlords often require tenants to obtain insurance for the leased premises to cover damage caused by the tenant or others. If the agent is aware of that requirement but neglects to obtain the required coverage, the landlord may pursue a claim against the agent.

4. **Regulatory/governmental entity** – In responding to complaints, regulatory bodies can investigate the insurance operations of agencies. Some E&O policies offer some amount of coverage for expenses in defending these investigations. These allegations may include:

- Fraud or intentional misconduct

**Example:** *In the event it is discovered that an employee has been embezzling premium monies, the state Department of Insurance may initiate a regulatory proceeding against the agency for failing to supervise an employee.*

- Failure to return premiums

**Example:** *If an agency agrees to handle a customer's account on an agency bill basis and holds premium monies in a trust account, but fails to return any premium refunds, the Department of Insurance could initiate a proceeding against the agency. This could be the case even if the agency applied the return premiums to the customer's other policies.*

- Unfair claims practices

**Example:** *If an agency has claim-handling authority, acts that violate state law might include: failure to respond to the claim promptly; misrepresenting significant facts or insurance policy provisions; or denying claims without a reasonable investigation.*

## **Section 2: Who in an agency is most likely to be involved in an E&O claim?**

9 out of 10 claims involve the following categories of staff. They are listed below in descending order of frequency:

1. Producers – The types of errors where producers are most frequently involved include: coverage type and limit recommendations, policy interpretation, application and policy issuance errors. They are also involved in a surprisingly high number of claims involving failure to provide timely notice of a claim to the carrier.

Here are more specific errors involving producers:

- Not explaining policy provisions

**Example:** A broker's failure to explain the definition of "vacant" in a homeowner's policy may lead to uncovered losses, most notably for vandalism or water damage. Vacancy is defined by courts and in individual policies based on the amount of furniture/personal property that is left in the home, or the length of time it is left unoccupied, e.g., when a home that is for sale remains unsold for an extended period of time.

- Recommending inadequate value/limit

**Example:** This often occurs when an agent relies on documents that are provided by the customer, but were prepared by a third party. Relying on inaccurate square footage or age of a structure can lead to inadequate coverage. In addition, claims can occur when the customer requests only minimum required limits and the agent does not have process for always offering higher limit options.

- Failure to recommend coverage type

**Example:** Excess flood and wind coverages in coastal areas are examples of coverages that a broker should recommend to a customer based on his knowledge of the customer's location and the nature of the property.

- Inaccurate information to the carrier

**Example:** This can occur when an agent fills out an application without asking the customer each question individually, e.g., whether he has been charged with a DUI, or if the premises has a monitored alarm. Although the agent may ask the customer to review the application before signing it, errors often are not noticed because "I just signed where my agent told me to sign..." If the question is answered incorrectly, the carrier may declare its policy void.

- Inadequate identification of exposures

**Example:** Home businesses and non-owned auto usage for business purposes can cause coverage gaps when agents fail to familiarize themselves with the customer's business.

- Failing to duplicate prior coverage

**Example:** Failure to obtain a copy of the prior policy or dec sheet when replacing coverage which leads to gaps in coverage such as a hurricane deductible or a sublimit on the new policy.

2. Licensed customer service representatives – CSRs are most frequently involved in errors involving the claims process, handling applications, certificates of insurance, and policy cancellation.

Here are some specific errors involving CSRs:

- Failing to provide timely notice of a claim

**Example:** A commercial customer reported an auto claim to the agency to report to the carrier. The CSR reported to the primary carrier but not the excess carrier. The agency faces exposure if the claim exceeds the primary limits because the claim was not sent to the excess carrier in a timely fashion.

- Mishandling application resulting in failing to procure coverage

**Example:** A customer sent in several renewal applications for multiple properties, along with the renewal premiums. The CSR failed to submit one of the applications and the error was not discovered until months later when a fire loss at the missed location was reported.

- Not notifying the customer of policy cancellation

**Example:** A customer's fire policy cancelled six times due to non-payment of premium, and each time the CSR would contact the customer to advise that the premium needed to be paid. A year later the customer suffered a fire loss and the carrier denied coverage because the policy cancelled for unpaid premium. The customer alleged the agency failed to contact him as they had in the past regarding the payment of the premium.

- Failing to add Additional Insured or Loss Payee

**Example:** A customer asked the agency to add the auto lender as a loss payee to his auto policy. The vehicle was totaled in an accident and the carrier paid the proceeds to the named insured only. The lender is looking to the agency for payment of the loan balance.

3. Account Managers – The error profile for account managers is very similar to that of producers. They are most frequently involved in errors relating to the recommendation of coverage and limits and assessing customer risks. The data also shows that account managers do a little better when it comes to explaining coverage to customers than producers.
4. Owner/Partner/Sole Proprietor/Principal – Looking at the claims data it seems that owner/principals are “jacks of all trades”. Claims involving them are spread pretty evenly across the different processes. This is likely because they are involved in so many facets of the agency, especially when it comes to important accounts. In smaller agencies the term “cook, bottle-washer, and waiter” may apply. Interestingly, owners have the highest percentage of recommendation errors such as failing to recommend coverage or adequate limits.

### Class Discussion

- *Why are producers and CSRs most frequent involved in E&O claims?*
- *Does your agency have staff meetings that specifically address the importance of agency E&O risk management?*
- *Of the types of errors described above which do you think are the easiest to avoid? The most difficult?*

### **Section 3: What transactions are driving claims frequency?**

The two transaction areas that make up agency’s largest profit margins also drive claims frequency. Not surprisingly, 40% of all claims frequency arises from new business followed by renewals at approximately 25%. When it comes to new and renewal transactions the following process steps drive frequency:

- Risk assessment and recommendation errors

**Example:** An agent's failure to ask probing questions of his customer and, where possible, visit the property insured, can lead to errors regarding such matters as: geographic location, activities undertaken, hazardous chemicals/processes utilized, supply chain disrupts, and jurisdictions where employees live/work.

- Policy issuance errors

**Example:** The failure to accurately identify the persons and property insured. Also, failing to forward policy in a timely basis so the customer can review it for accuracy.

- Application errors

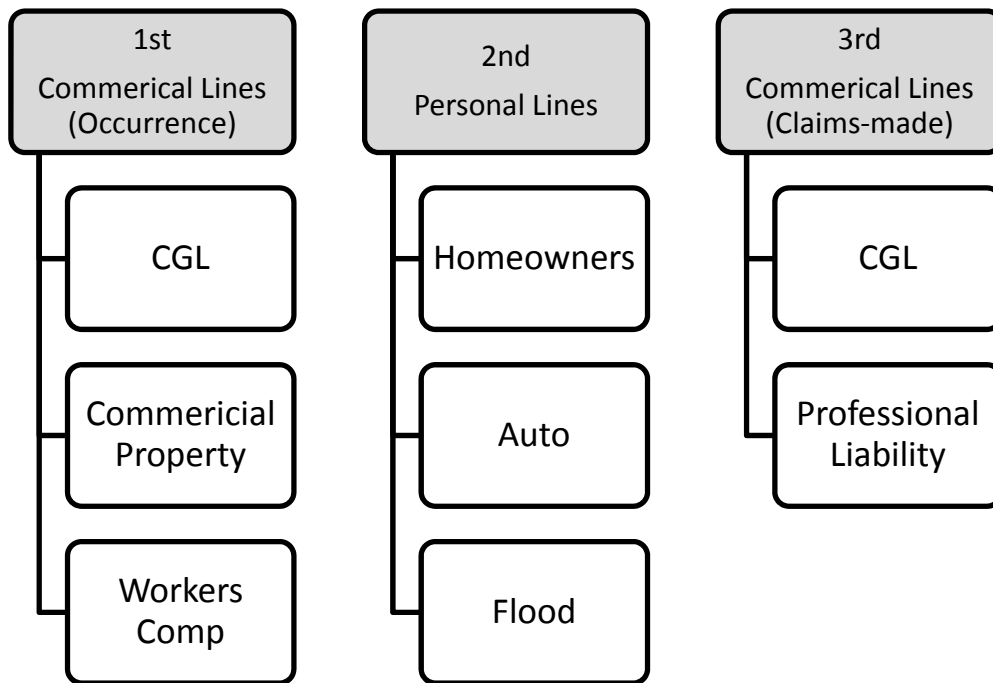
**Example:** Common application errors include missing medical history on life & health policies, and errors regarding the value and/or square footage of the property insured. If there are misstatements in the application, both the customer and the carrier are likely to blame the agent who prepared and submitted the application -- particularly if it was filled out by the agent -- when the carrier denies coverage, or pays less than the entire loss.

- Failure to duplicate prior coverage

**Example:** Both with renewals and new or remarketed coverages, agents often fail to compare the policy issued to the quote to ensure that the coverages requested are in place. Carriers often add sub-limits or remove small coverages. Certain perils are frequently excluded, such as pollution and snowplowing coverages. Oftentimes, these are changes that the carrier was willing to reverse by endorsement for a nominal fee which the customer readily confirms he would have paid.

#### **Section 4: What types of policies are driving claims frequency?**

Any policy not properly written could generate a claim. It is no surprise to any agency to find that commercial lines forms make up about 60% of the claims frequency by type of coverage. Commercial lines frequency of E&O claims is double that of personal lines. Below are the underlying coverages most frequently involved in E&O claims:



### Class Discussion

- *Why do you think twice the amount of claims come from commercial lines versus personal lines?*
- *At what point in their process of working with customers are a producer and CSR most vulnerable or likely to make an error?*
- *Why do 1 in 5 errors involve the CGL policy? What makes it so prone to be involved in E&O claims?*

### **Section 5: What type of error/omission are others alleging an agency has made?**

An agency can be accused of making any type of error or omission. Just because a claim is made doesn't mean you did anything wrong. However, below are the errors/omissions that have been alleged by customers, carriers and others in descending order of frequency:

- Failure to procure coverage

**Example:** A customer tells his agent that he plans to make an acquisition of new property, but the broker never follows up to determine whether the purchase was completed. Meanwhile, the newly acquired property sustains a loss and the customer expresses surprise that coverage was not obtained.

- Failure to adequately explain policy provisions

**Example:** A common complaint in the wake of commercial property losses is that the agent failed to explain the policy's 'coinsurance' provision, as a result of which the insured is underinsured.

- Failure to adequately identify exposures

**Example:** Because the agent is not entirely familiar with the customer's business and property and isn't using risk assessment questionnaires, a new provision on a policy that excludes coverage for a particular peril -- one for which the customer requires coverage -- is overlooked by the agency at renewal.

- Failure to recommend coverage type

**Example:** The agent, through lack of familiarity with his customer's operations, never learns that the customer's officers and employees routinely use their own automobiles on the job. As a result, when one of the employees is involved in a serious at-fault auto accident on the job, coverage is denied by the customer's business auto carrier because the agent failed to recommend and procure 'non-owned auto' coverage.

- Inaccurate/incomplete information provided to the carrier

**Example:** Agents placing coverage on commercial property routinely rely upon the customer to provide information regarding the building's square footage and present value. The carrier relies on that information and common estimates of construction costs to conclude that the limits requested offer adequate 'replacement cost' coverage. When the building burns to the ground, and it is discovered that the actual square footage was substantially more than represented, the customer likely is substantially underinsured -- especially if a coinsurance penalty is assessed.

- Failure to provide timely notice of a claim to the carrier

**Example:** The agent reports a workplace injury for his customer, and tenders it to his customer's workers compensation carrier. He neglects to consider that the general contractor has 'additional insured' status on the customer's GL and excess policies. As a result, when the employee sues the general contractor months later and the claim is turned in to those carriers, they deny for late notice.

- Negligent misrepresentation

**Example:** An agency issues a COI showing 'additional insured' status for a third party, e.g., a contractor, where none exists. This can occur in situations where there was no obligation on the part of customer to provide such coverage, but the COI recipient claims to have relied on the COI to its detriment.

- Failure to add an Additional Insured/Loss Payee

**Example:** The customer provides its agent with a copy of its contract with a general contractor, which contains a provision requiring that the other party to the contract be named as an 'additional insured' on the customer's policy. The agent does not carefully review the contract and does not ask the carrier for an 'additional insured' endorsement.

- Failure to duplicate prior coverage

**Example:** The agency fails to note that particular activities, e.g., snowplowing, which were covered on an expiring policy, are now excluded on the replacement policy. Policies placed with a new carrier upon expiration of an old policy often have new exclusions or other limitations on coverage that avoid notice -- until a claim occurs.

- Alleged failure to pay claim

**Examples:** Decisions regarding the payment of claims typically are within the discretion of the carrier, but some E&O claims occur because the claim report is made late, or is not made to all carriers with possible coverage, e.g., workers compensation, CGL and excess/umbrella.

- Failure to recommend adequate value/limit

**Example:** Agents open themselves up to claims when they (1) fail to verify the exposure characteristics of the property to be insured, e.g., square footage, (2) fail to recommend an appraisal to an unsophisticated customer, and/or (3) fail to recommend periodic increases in limits to keep pace with inflation in replacement costs. Even if the property is not a complete loss, inadequate limits may lead to the carrier's imposition of a coinsurance penalty, for which the broker will be blamed.

- Failure to notify customer (re: policy cancellation)

**Example:** Customers who suffer an uncovered loss following the untimely cancellation of their policy routinely insist that they received no notice of the cancellation (while the broker usually has a copy in its file) and counted on their broker to provide notice and procure replacement coverage.

\*\* Note: Claims examples were provided courtesy of Swiss Re Corporate Solutions.



# E&O Risk Management: Meeting The Challenge Of Change

## Agency Defenses - Documentation



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# Agency Defenses - Documentation

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## Objectives:

- *Documentation and Invariable Practice are the Key to E&O Defense*
- *Know why customer file documentation is important*
- *Understand what is good file documentation and what should be included*
- *Share disclaimer language the agency can use*
- *Review customer file retention considerations*

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## INTRODUCTION

Documentation combined with consistent agency procedures/practices are key defenses when an agency is confronted with an E&O claim or potential claim. If an E&O claim occurred in your agency today, would it be prepared to defend itself? Do you have the proper policies and procedures in place to insure that your E&O carrier could mount a compelling defense?

As the technology used in agencies has evolved over time, so have the requirements for securing comprehensive documentation in the customer file. Documentation today often has to integrate “agency management information systems” (or “AMIS”), document management softwares, email systems such as Outlook, phone systems, voicemail-to-text softwares, and carrier underwriting and policy issuance systems. All may have overlapping features and the agency must make well-thought out decisions as to what functionality will be used for each system. Procedures must then be put in place and audited for compliance for true consistency.

Often, E&O claims or potential claims can come down to “he said, she said” scenarios involving a lack of coverage or insufficient limits. Documentation of the insurance transactions and interactions with customers is the most important factor in being able to defend yourself against allegations you erred. But documentation must also be tied to invariable internal procedures and practices to bolster your claims defense.

Documentation is the key to an effective defense, however, documentation can only verify what actually took place. How do you defend against allegations of failing to follow through on a request when you have no record of any contact between the agency and the other party? There would be no documentation because the agency's position is that the request never took place. Therefore, the agency's most effective defense is its internal procedures manual and the consistency of its business practices. Invariable internal procedural practices require “everyone doing it the same way, all the time, for everyone”. When the agency needs to prove that it didn't do something or the request was never received, that is when consistent business procedures provide a defense.

While thorough documentation and invariable practices are the overarching keys to success, this section also focuses on other weapons the agency can use in tandem to provide a line of defense if a claim arises as well as potentially avoiding claims from being made in the first place. These include use of disclaimers, written follow-ups, E&O coverage checklists, and not holding yourself out as an expert.

## DOCUMENTATION

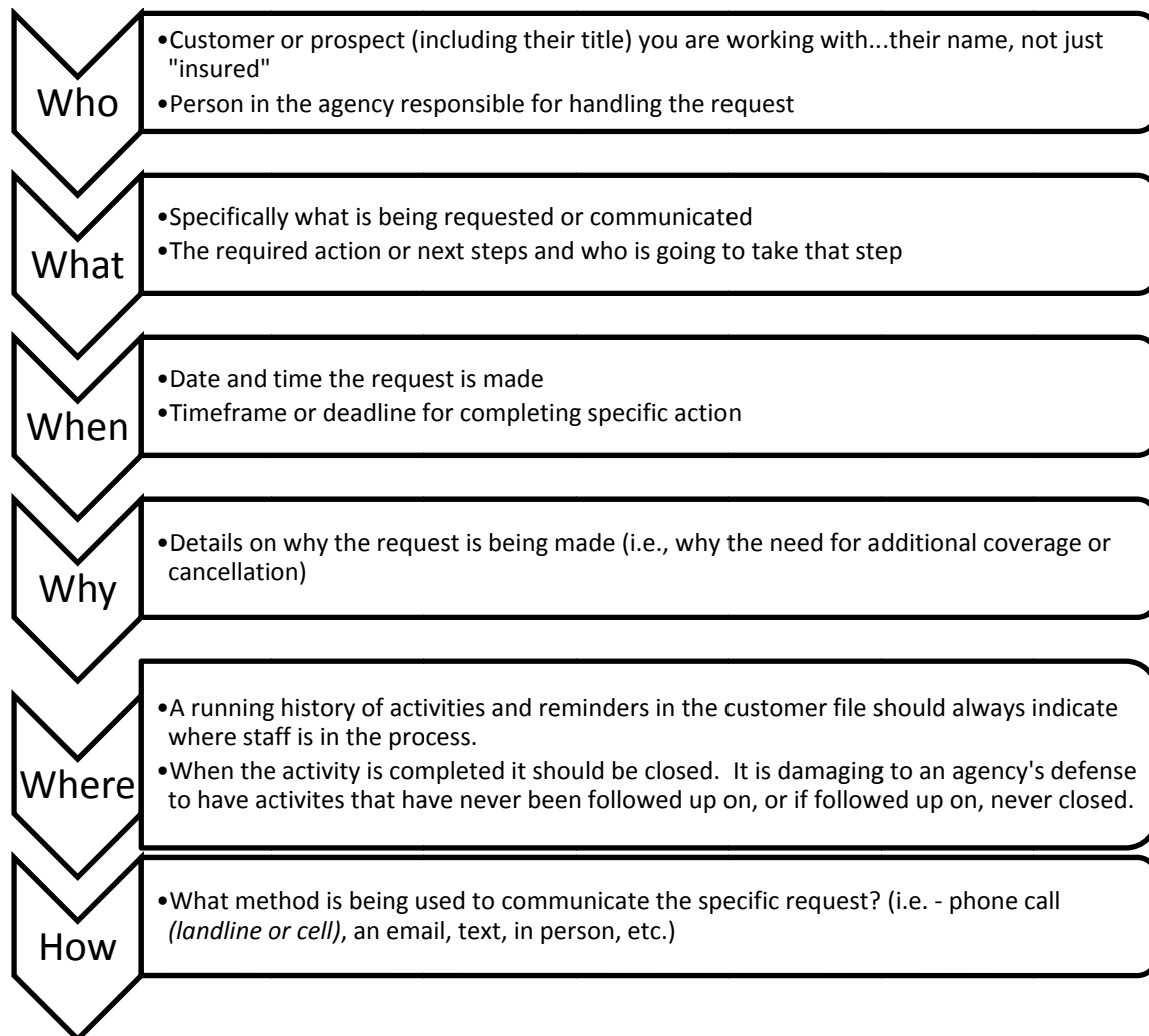
Common sense might dictate that there can never be enough documentation when it comes to defending an allegation of wrongful acts. However, it is not just the quantity of the documentation that is important, but also its quality. Since it would be nearly impossible to recall every conversation or point of contact between the agency and customers, documentation can represent the difference providing a defense against the allegation(s) and the need to settle.

### **Section 1: Let file documentation tell the story**

What to document, how much to document, and how detailed the documentation should be are questions that often arise when discussing this important issue within your organization. How do you know if there is enough documentation? The answer is an easy one to say - but not an easy one to do. As a guideline, assume your entire agency staff pooled their money and have just won your state's largest lottery jackpot! They all announce that they will not be returning to work. When new staff is hired will they be able to clearly understand the agency's customer files and provide service immediately or will there be upheaval and crisis? The sufficiency of documentation is revealed at the point it is retrieved, not when it is created.

Agency files should tell a story. Anyone in your office should be able to open a file and follow along in the story without having to request information or explanation from others. Remember, the ability to provide optimal customer service relies on all agency staff knowing what has been discussed with the customer. The story should indicate what all good stories have in common. Below is a formula for complete documentation.

## Formula for Complete Documentation



### **Section 2: What types of communications should be in the customer file?**

The ways we communicate with our customers and carriers have changed over the years. With more ways to communicate it is easy for certain correspondence and conversations to miss finding their way into the customer's file. There is also the potential for correspondence to become more relaxed with certain communication media, such as email and text messaging. More relaxed communication is fine as long as professionalism is maintained and all communication is documented and clear to all parties. Operational agency management/oversight from a global perspective is needed in the area of procedures and documentation of communications.

## Communication Media Considerations

### In-person Discussions

- Providing mobile access to the agency management system.
- Following up with documentation in the agency management system is important.
- Notes made during the meeting should be entered (or scanned) in the agency management system as soon as possible following the discussion and preferably by the person who was directly involved.
- Document the duration of the conversation.
- Email can be a good way to transmit the notes from a conversation to an Account Manager or other individual in the agency, then attach the email to the customer's file.
- If possible, follow up in writing to confirm the conversation.

### Phone Calls (landline and mobile)

- Headsets and dual monitors can greatly influence employees' ability to document phone conversations in the agency management system accurately and timely.
- Cell phone conversations should be immediately documented in the agency management or an email to be attached.
- Note the duration of the conversation.
- If possible, follow up in writing to confirm the conversation.

### Emails

- Ensure email transmissions are secure and compliant with all state and federal privacy laws, especially with respect to personally identifiable information.
- Integrate email and agency management system communications.
- The email transmissions should include a disclaimer of confidentiality of information and

that coverage cannot bound until confirmed in writing with a licensed agent.

- If customers use email to report a claim or make policy change requests, a disclaimer should indicate that an e-mail is not effective until a confirmation is received from the agency.
- Email should never be used as the primary suspense system and all customer related email should be immediately attached to the customer's file.
- An effort should be made to have an empty email inbox at the end of the day in the same way of the days of a paper inbox.
- Email "threads" should be attached immediately in the customer file; these messages should not remain in individual employees' Outlook inboxes.

### **Instant Messages and Live Chats**

- Provide instant answers, but they need to be consistently documented in the customer file immediately as well (IM's with carriers as well).
- Be careful of making statements of coverage determination.
- Clear standards should apply to all staff.

### **Faxes (traditional and electronic)**

- Include a disclaimer.
- Faxes should be attached to the customers file.
- Stand-alone fax machine should receive faxes in a secure room and have a process for distribution.
- As faxes continue to become less frequently used you may want to consider only used secure email and secure "dropbox" technologies for large files.

## Text Messages

- Written procedures should include clear standards applying to all staff for customer or carrier texts.
- Messages must be kept professional avoiding informal text shorthand.
- Documentation should include the author's name, date, time and summary of the text included in the customers file.
- Consistently attach texts immediately from both customers and carriers in the customer file.

## Websites

- The website pages should include a disclaimer.
- If the agency has an interactive website that allows customers to report claims or request policy changes, a disclaimer should be used that a claim or request is not effective until a confirmation is received from the agency.
- Ensure your site is compliant with all state and federal privacy laws, especially with respect to personally identifiable information.
- Post a privacy statement on the website if customers can submit personal data through the website.
- If the agency has an interactive website, care should be taken to retrieve all incoming messages and requests for prompt handling with responsible parties clearly outlined.
- Ensure that if a website visitor can submit personal data, that the information is transmitted securely.

## Social Media

- General discussion and networking is OK but when it becomes specific to the insurance

needs of the person it should be brought into the normal flow of business.

- Disclaimers should advise customers that these vehicles should not be used to communicate specific, personally identifiable information to the agency and any content becomes the property of the agency.
- Remember that whatever is "said" is not easily removed after the - think before your post!

### **Voice Media**

- Include a disclaimer that customers cannot bind or alter coverage via voicemail.
- Disclaimers should be used on both the agency's main message and each employee's message.
- Voicemails can be retained either in the original recorded in a .wav format or in written format generated by a software that generates voice to text, and attached to the customers file.

### **Section 3: Characteristics of Proper Documentation**

As noted above, the documentation must tell a clear and complete story including the who, what, where, when, why, and how of the agency's interaction with customers and carriers. Whether your agency is completely automated or still has hard-copy files, proper documentation has the following characteristics:

- Documentation should be clear, concise, consistent; include what was done or discussed with specific dates and times, and easily understood by all agency staff
- Don't use random abbreviations or jargon that could be misunderstood when the information is retrieved by another party
- Documentation should include unalterable date/time stamp (Note: this is only possible in an automated environment)
- The objective is to be able to recreate the transaction step-by-step in the same manner as the process was used to service the customer initially
- All staff should use the same system and procedures in documenting customer files
- Daily activity logs, copies of change orders, premium adjustments, premium audits, applications, renewal applications, declaration pages, and access to all policy forms

described on the declarations page should be in the file or easily accessible using a carrier website

Things to avoid:

- Do not include comments about a claim, its merits, or your opinion as to whether or not there is coverage
- Resist the urge to go to bat in writing for your customer when a claim is denied by the carrier – the denial may be proper and can become evidence if an E&O claim is made
- Just the facts - personal asides and comments should not be included
- Do not put E&O claim information into the file of the customer involved

#### **Section 4: Key Elements of the Customer File**

The ultimate goal of documentation in the customer file would be to have every point of contact with a prospect, customer, carrier or outside third party documented. However, it's more important to document some things than it is others. For example, it's less important to document a call wishing a customer happy birthday than it is to document that excess flood coverage was offered and rejected by the customer. Also, keep in mind that the frequency of claims involving carriers against agents is increasing, so it is important to document all carrier correspondence and conversations.

#### **Important Documentation in the Customer File**

##### **New Business: Coverage and exclusion discussions**

- Documentation regarding who initiated the discussion and when.
- What coverages were initially requested and what additional coverages were accepted or rejected.
- Ideally customer signatures/initials are obtained on forms acknowledging declinations or a written follow-up is sent.
- Customer signatures should on all applications.
- Use consistent proposals with appropriate disclaimers.

## **Renewal: Coverage and exclusion reminders**

- A transmittal letter with the policy stating that all policies have conditions, definitions, and exclusions.
- Remind the insured of their responsibility to read the policy in detail.
- It is the customers' responsibility to make the agent aware of changes in their insurance needs and to request changes to coverage.

## **Limits and Values**

- Limits are set by the customer including written confirmation of the insured's desired limits and values.
- Offer increased limit options and let them know that they can call anytime to increase limits.

## **E&O Coverage Checklists**

- Checklists serve as solid documentation and should not be seen as a “training tool” only. In fact, checklists make great sales tools! Each additional coverage sold is a potential increase in sales.
- At renewal consider sending the prior year's checklist to inquire if anything has changed. It is beneficial to have written confirmation from customers of any changes or verifying the status quo.
- Ideally customer signatures/initials are obtained on checklists.

## Claims

- Let customer know duties in event of claim during new business process.
- Report all claims immediately to the carrier that are reported to the agency, and document that the carrier has been notified.
- An acknowledgment letter should be sent to any insured or claimant immediately after a claim is reported to the agency outlining the process and to management insureds expectations.

## Endorsements and Cancellations

- All endorsements issued should have an activity log identifying either the insured's request or the carrier's requirement.
- Proof of the addition of the endorsement to the policy is also very important.
- Written confirmation of cancellation back to the insured including who requested and the effective date.

### **FACT CHECK:**

**Is the story in the customer file or in your head?**

**If, while you are attending this seminar, you have to contact your office throughout the day because they cannot function without information you have or may have regarding any insured or prospect, your agency may have a documentation void!**

## DOCUMENTATION AND YOUR DEDUCTIBLE

**Good documentation protects the agency and can potentially save the agency money at the time of a claim!**

If your agency's E&O coverage is with Swiss Re and the agency has implemented sound documentation procedures for the offer and rejection of coverage to customers there is an opportunity to save thousands of dollars under Swiss Re Corporation Solutions' "Deductible Reduction" feature.

The Deductible Reduction provision **provides up to a 50% reduction of the deductible (up to a maximum of \$12,500)** for ***claims alleging failure to procure coverage where Swiss Re determines the agency has written documentation*** in the customer file refuting such a claim. With about 1 in 4 claims alleging failure to procure coverage, this policy feature can result in significant cost savings if the refusal of coverage and higher limits is documented.

To help you receive the Deductible Reduction and improve the insurance knowledge of agency staff, the Big "I" offers the Big "I" Virtual Risk Consultant Powered by Rough Notes. For more information, contact your state association.

## ELECTRONIC VS. PAPER FILES

Take a minute and think about how it would appear to a court if the information for each customer was scattered about between both electronic and paper files in an unstructured way. How easy will it be for a plaintiff's attorney to question the validity of any documented information if the paper and electronic versions contain varying degrees of information depending on the agency staff person? Agencies should be using only one file storage method and all transactions pertaining to a customer should be located in that file. It is very difficult to have consistent procedures, with both. Agency staff tends to deviate or "make choices" when an automated environment is not mandatory. By eliminating the need for "making choices" there is consistency. These files must be accessible to appropriate agency personnel and available for use as evidence in court, if necessary.

Documentation is only effective if the information in the files can be considered accurate. Any possibility that the information can be found suspect will diminish or eliminate the protection that documentation provides the agency. There needs to be only one source of customer information. Today, that information is likely more effective when it is in electronic form.

Electronic files provide a stronger and more credible defense than paper files since as data is created, edited and expanded upon, the automation system records the date and time of these changes. Paper files, on the other hand, have the disadvantage, when used as a form of defense, in potentially lacking creditable proof as to the exact time and date that the documentation was created. Some agencies may have maintained paper files to retain original documents, such as original signed applications, checklists, waivers, etc. With the ease and minimal cost of scanning, these documents can be scanned and attached to the customer's records.

"Scanning" is just one part of total document management. Unfortunately, "scanning" software programs can be primitive in nature from a retrieval standpoint and agencies may be slow to replace old procedures with new technology. This is a critical area and agencies struggle to eliminate paper, even though the tools to do so have existed for many years. Operations management is the key to successful implementation and oversight. Many agencies have no scanning workflows documented in procedures manuals and training has not been made a priority. Often desktop scanning rarely gets done in a timely manner. The incorrect use of systems leads to E&O claims and service issues.

## **Section 1: Electronic Files – Admissibility in Court**

Courts have recognized the admissibility of electronic records in court cases, including insurance agent E&O claims. Today electronic records may be considered more credible because of the ability to determine when information was entered into the automation system. Computer generated correspondence has the date and time produced embedded in the system; therefore, alterations are not easily accomplished. Additionally, copies of original documents are no longer necessary as long as the agent can produce a hard copy of original documents. Therefore, scanning has become a viable method of retaining documents in an electronic version. Of course, information stored electronically presents a different set of challenges in securing personally protected information.

## **Section 2: Electronic Signatures**

The Electronic Signatures in Global and National Commerce Act (ESIGN) was enacted in 2000 and made electronic contracts and signatures legal and enforceable as paper contract with ink signatures. This is important for agencies when it comes to signatures on applications, proposals, quotes, and policies. Many states have adopted laws establishing the legal validity of electronic signatures in a similar manner as the federal law. However, the federal ESIGN law ensures that electronic contracts and electronic signatures are valid in all states, providing the guidance for intrastate commerce.

## Class Discussion

- *What ways has your agency integrated agency management information systems to create thorough documentation in customer files? Has this improved customer service?*
- *Are there any special state requirements pertaining to electronic records and signatures?*

## E&O COVERAGE CHECKLISTS

A comprehensive checklist of coverages provides a roadmap of products to offer and provides a tool to document the coverages offered, accepted, rejected or not applicable to the customer. Using coverage checklists is a proven E&O defense method that decreases the agency's vulnerability to an E&O claim while increasing sales. Checklists are not just a learning tool for new employees. Comprehensive coverage checklists, used consistently, provide an agency with an additional defense against the most common E&O claims – "failure to procure the coverage requested", "failing to recommend coverage", "failing to identify exposures", and "not adequately explaining policy provisions".

## CUSTOMER SIGN-OFFS, ACKNOWLEDGEMENT FORMS, WRITTEN FOLLOW-UP DISCUSSIONS

The defense of an E&O claims can be bolstered when the customer file includes customer acknowledgement that an exposure exists, coverage is offered, and the insured makes the decision not to transfer the risk through the purchase of an insurance product. Customer acknowledgement can be documented by the agency through the use of customer sign-offs, coverage acknowledgement waiver forms, and written follow-up of discussions.

The insurance proposal to your customer can provide a wealth of documentation to defend an E&O claim. It outlines coverages offered, highlights coverage limitations, and any insured requirements. It can also incorporate the E&O coverage checklist. Customer sign-offs acknowledging what was discussed should be included in the proposal process. It is also a good idea to have the customer initial each page of the application and sign where required.

Many agencies may simply present proposals exactly as they are generated from carrier underwriting systems. These proposals may not include appropriate disclaimer information or

an area for customer sign-off. The agency may want consider adding a supplemental page for both of these.

Some states require acknowledgement waivers to be signed when the insured chooses not to purchase certain types of coverage such as UM/UIM, earthquake, and flood coverages. ACORD also offers some template forms. Carriers, in their agency agreements, may specifically require waivers when certain coverages are rejected. Agents should be knowledgeable of state or carrier requirements regarding the use of waivers.

We would have a fairly impenetrable wall of defense if we required insured's to sign waivers every time they declined any offer of insurance. We would also have a limited number of customers, since doing business with us would be daunting and difficult.

Waivers are important for E&O defense; therefore, agencies need to determine when a waiver is required. For example, insureds whose property is located in a flood zone may be required to sign a waiver if they reject the offer of flood coverage. Along with the waiver, the insured's file should include the agent's notes as to any discussion that lead up to the coverage rejection.

Once a waiver is obtained it is important, at least at each renewal, to continually have written follow-up with customers reminding them of discussions /decisions previously made that no coverage exists for the identified exposure. Equally important is leaving the decision to reintroduce the subject of coverage up to the customer. Correspondence should indicate that no further steps will be taken to obtain coverage without written request by the customer.

## **SIGNED APPLICATIONS**

A carrier may not require a completed and signed application; however, a completed and signed application should be obtained from all insureds for the agencies records. With the variety of ways an agency obtains quote/proposal information, there may not have been any need for a completed application through the proposal/quote phase. Before the delivery of a policy, an agency should have obtained a signed application from all new business customers.

Insurance policies are legal contracts and as such are subject to the common law rule of "parole evidence". All of the oral or written information agreed to during the negotiation processes noted above, is reduced to a written contract – the insurance policy. Once the policy has been issued, the agreement between the insured and the carrier is what is in the policy, not in any proposal or oral promise made before the policy's issuance.

The application can be seen as the final pre-policy issuance agreement. The insured's signature on the application indicates what exposures they are transferring to the carrier and verifies that the underwriting information, used to affect this contractual relationship, is accurate.

Regardless of previous discussions, information on proposals, emails, text messages, etc., the application can be seen as the insured's final insurance purchasing decision.

Some agencies are not having insureds sign these applications, or are having them signed perhaps after the fact. Because different carriers have different approaches, it's important to address the variations and appropriate ways to handle each situation in agency procedures. These types of changes often don't make it into agency procedures.

## **USE OF DISCLAIMERS**

In our 24-hour non-stop life style, communicating with others can occur at any time, not just during office hours. Agencies must, therefore, manage expectations of customers by providing disclaimers for all forms of available communications. Disclaimers aide in the defense of E&O claims and reinforce customer communications with clear guidance. Nearly all of communications media can include disclaimer language. Below is some sample disclaimer language that you can review with your attorney and then implement in your agency.

### **Section 1: Voice Mail Sample**

*You have reached the voice mail of [NAME] and today is [DATE]. I am currently [IN or OUT] of the office. Please leave a detailed message, and I will return your call as soon as possible. If you require immediate assistance, press 0 and asked to be connected to [BACK-UP PERSON] who can assist you. For your protection, coverage cannot be bound, added or changed via voice mail, email, fax, or online via the agency's website, and is not effective until confirmed directly with a licensed agent. Thank you for calling and have a great day.*

### **Section 2: Website Sample**

*Statements on this web site as to policies and coverages provide general information only. This information is not an offer to sell insurance. Insurance coverage cannot be bound or changed via submission of any online form/application provided on this site or otherwise, e-mail, voice mail or facsimile. No binder, insurance policy, change, addition, and/or deletion to insurance coverage goes into effect unless and until confirmed directly by a licensed agent. Any proposal of insurance we may present to you will be based upon the information you provide to us via this online form/application and/or in other communications with us. Please contact our office at [insert phone number] to discuss specific coverage details and your insurance needs. All coverages are subject to the terms, conditions and exclusions of the actual policy issued. Not all policies or coverages are available in every state. Information provided on this site does not constitute professional advice; if you have legal, tax or financial planning questions, you should contact an appropriate professional. Any hypertext links to other sites are provided as a convenience only; we have no control over those sites and do not endorse or guarantee any information provided by those sites.*

### **Section 3: Fax, Email and Instant Message Sample**

*This transmission contains information that may be confidential or privileged, and is intended only for the recipient identified above. If you received this transmission in error, please notify the sender immediately, delete all copies, and be aware that any disclosure, copying, distribution or use of the contents of this transmission is strictly prohibited. Also, for your protection, coverage cannot be bound or changed via voice mail, email, fax, or online via the agency's website, and is not effective until confirmed directly with a licensed agent.*

### **Section 4: Claims Reporting Sample**

Agencies that use email or have interactive websites that allow customers to report claims may consider the following disclaimer:

*An email will not be effective to report a claim or request a coverage change until such time as you receive a confirmation from us that the claim submitted or change requested has been processed.*

### **Section 5: Social Network Sample**

*The (Agency Name) cannot bind or alter coverages or accept reported claims via social networking. Further, the information provided is intended for general situations and should not be used to communicate client specific information to the agency. Any content a customer provides become the property of the agency and the agency is at liberty to add, modify or delete any content that is not acceptable.*

### **Section 6: Proposal Language Sample**

The customer's insurance proposal is an opportunity to reiterate some things that could help avoid an E&O claim and support your agency's defense. It can drive home the fact that you are procuring the coverage they have requested based on the information they provided and that additional coverages and increased limits are available should they want them. It can provide direction for duties should a claim arise and highlight general insurance concepts such as insurance to value or limitations of the policy. The proposal should also remind the customer to review their policies to make sure they are acceptable.

**Sample Coverage Rejection:**

| Coverage Recommendation   | Customer Rejection Confirmation |
|---|---------------------------------|
| Management Liability – Directors and Officers Coverage and Fiduciary Liability  | _____ Initial                   |
| Privacy/Cyber Liability   | _____ Initial                   |
| Property Coverage Extension – Higher Limits Available   | _____ Initial                   |
| Umbrella/Excess Liability – Additional Liability Limits   | _____ Initial                   |
| Pollution Liability – On Site/Off Site/Contractor's   | _____ Initial                   |
| Flood and Earthquake Coverage   | _____ Initial                   |
| Hired Vehicle Physical Damage   | _____ Initial                   |
| <p>I understand and acknowledge that the above insurance policies have been offered to me and that I have decided not to purchase the coverage at this time. The potential financial impact of not having these important coverages has been discussed with me and I realize that my rejection of these options may result in the denial of claims in the future that may have otherwise been covered by the above offered coverages . In addition, it is my responsibility to request quotations for these coverages on all future renewals and to review coverage values and limits required which can change over time.</p> <p>Customer Signature: _____</p> |                                 |

Date Signed: \_\_\_\_\_

Note: Copies of this signed acknowledgment should be maintained in both your file and our agency's records

*PLEASE READ YOUR POLICY CAREFULLY: This is a proposal (or summary) provided for illustration purposes only; it is not a legal contract. It is provided to facilitate your understanding of your insurance program. Please refer to the actual policies for specific terms, coverage, conditions, limitations and exclusions that will govern in the event of a loss. Specimen copies of all policies are available for review prior to the binding of coverage. It is important to read your policies upon delivery! In assisting you with your insurance needs we have been dependent upon information provided to us by you. If there are other areas that need to be evaluated prior to binding of coverage, please bring them to our attention. Should any of your business operations or exposures to loss change after coverage is bound, it is your responsibility to let us know promptly so proper coverage(s) can be discussed.*

## **DOCUMENTATION RETENTION CONSIDERATIONS**

The documentation contained in the customer file that should be retained and for how long may be dictated by your state's law. The agency should be familiar with these laws and your IIABA state association or insurance division can likely provide direction about existing laws and how they apply. Some state codes may be specific, providing a breakdown by line of business, while others will simply require general time frames of customer file retention. Beyond state requirements, agencies should develop a standard practice for retaining records.

### **Section 1: Customer File Retention Considerations**

As a starting point, included below is a records retention schedule provided by Swiss Re Corporate Solutions. For purposes of this publication the schedule below focuses on primarily on customer files. A complete record retention schedule can be found at the Big "I" Risk Management Website ([www.iiaba.net/EOhappens](http://www.iiaba.net/EOhappens)). It is also a good idea to consult with your attorney in developing the agency's record retention practices.

## Sample Record Retention Schedule

P= Permanent

S= Until Superseded

| Type of Record                                       | Retention Period | Comments  |
|--|------------------|---|
| <b>Correspondence:</b>                               |                  |   |
| General (with Clients, Insurers, Third Parties)      | 3                | How long you keep copies of correspondence depends on the nature of such correspondence and your agency's "comfort" factor.   |
| Transitory   | 30 days          |   |
| Legal & Important Matters                            | P                |   |
| Interoffice Correspondence                           | 3                |   |
| Type of Record                                       | Retention Period | Comments  |
| <b>Agency/Company Files:</b>                         |                  |   |
| Agency Contracts                                     | P                | In a dispute between an agency and a carrier, the agency's defense is often dependent on proper file documentation of the agency's authority.   |
| Contingency Agreements                               | P                |   |
| Initial Letter of Appointment                        | P                |   |
| Underwriting Guidelines (including Prohibited Lists) | S + 3            |   |
| <b>Client Record Files:</b>                          |                  |   |
| Agent of Record Letters                              | P                | Our recommended retention period is longer for commercial lines accounts than for personal lines, due to the potential for tail coverage, occurrence policies, and product liability coverages. E&O claims arising out of such coverages may take longer to surface than claims based on personal lines policies. |
| Applications (expired)                               | 3                |   |
| Appraisals   | S                |   |
| Binders  | 3                |   |
| Client, Data Sheets (Lost Accounts)                  | 3                |   |
| Claim Reports (Closed)                               | 3                |   |
| Expiration Slips/Policies not Taken                  | 3                |   |
| Loss Drafts  | P                |   |
| Coverage Recommendations                             | S + 3            |   |
| Survey Reports                                       | S + 3            |   |
| Client Files (Personal Lines-Closed)                 | 3                |   |
| Client Files (Commercial Lines-Closed)               | 5                |   |

## Class Discussion

- ***Does your state have any record retention requirements for insurance agents?***
- ***Are there any special state requirements pertain to electronic records and signatures?***

Agencies should retain records for a number of reasons. Customer information is the agency's largest asset. Retaining policyholder records allows the agency to continue to retain accounts and offer an increased level of service over the customers' life cycle. Agencies may not want to rely solely on their carriers to retain customer records since the record retention policies of carriers may not be in line with the goals of the agency.

Unless your state has specific customer file retention guidelines, agencies are on their own in determining how long to retain information. During the "non-electronic age", retaining paper records took up large portions of real estate and agencies often made decisions to purge old records simply due to storage issues. Today, records can quickly, efficiently and cheaply be scanned and stored in a variety of media options. The need to purge old records due to space constraints should no longer dictate the length of record retention. Keep in mind that just because it is cheaper for an agency to store old customer files forever, doesn't mean it necessarily should.

Older paper records may not contain the same level of documentation as is being utilized in current operations. Documentation can be a double-edged sword, meaning good documentation in the customer file can save you but conversely poor documentation can sink you. In setting the records retention policy, the agency needs to think through a standardized process going forward for which files to keep and how long they should go back in time. Simply scanning everything in old paper files, for example, may not be the best decision. Some purging of the files may be necessary so that the scanned records contain only relevant and pertinent information. Both current and past files, whether in paper or electronic form, may contain personal information that is required to be protected. One of the benefits of not keeping customer files ad infinitum is that the agency doesn't have to protect sensitive data it no longer has, reducing exposure from potential data breaches.

The timeframe for storing customer files which is establishing in the agencies record retention policy may vary by the line of business and the time of policy. For instance, claims-made policies, where the insured has purchased a supplemental extended reporting provision, require additional retention time frames in recognition of the long-tail coverage. It is generally recommended that commercial lines policies be retained longer than personal lines policies.

**The Key:** File documentation is rule number one when it comes to protecting against an E&O claim. When retaining files, be sure to include any correspondence regarding coverage decisions, waivers, signed applications, etc. Any retained dead file should provide a story in the same manner as active files.

## **Section 2: To Keep or Not to Keep Copies of Forms**

Should an agency retain copies of policy forms or endorsements for all its customers? Some carriers have stopped providing paper policies or give the agency the option. Agencies may have to decide if they will rely on the electronic policy view to access the policies/endorsements from the carrier's website or to retain policies in their office. When archiving customer files the question of retaining policy forms and endorsements must be revisited.

Since, over time, policy forms and endorsements are updated and replaced, where will the agency be able to access old forms/endorsements if a claim is brought several years from today? Your agency may decide not to retain copies of policy forms/endorsements since obtaining standard forms from ISO, AIS or NCCI, may be seen as a viable avenue. However, because insurance policies are often customized or manuscripted, the use of a standard form in one policy is not by itself proof that it was included in a different policy. Since statutes of limitation may allow a claim to be brought several years after a loss, it's important to have one copy of each form used by agency customers and to retain the declaration page to reference coverage and exclusions on the specific policy.

## **Section 3: Disposal of Customer Files**

Security of private information is an on-going issue for agencies. When purging records and disposing of customer files it is important to take the same security actions and steps that are utilized daily. The privacy of confidential information is important to both the agency and its customers, and security breaches may put the agency at risk of regulatory action or civil or criminal litigation. Some federal and state laws require certain financial entities to implement comprehensive privacy policies. Disposal of non-public private information requires careful handling and agencies should have a process in place.



# E&O Risk Management: Meeting The Challenge Of Change

## E&O Considerations of Agency Operations



Big "I"  
**PROFESSIONAL  
LIABILITY**

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Corporate Solutions



# E&O Considerations of Agency Operations

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## Objectives:

- *Review the areas of an agency's operations that can be the cause of E&O claims*
- *Recommend tips to procedural steps that can reduce E&O exposures*

## What's Covered:

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## INTRODUCTION

The operations of insurance agencies can vary based on size, representation and geographic location. Over time agencies have had to adapt their operations because of changes in carrier capabilities and workflows, the implementation of tools like upload/download, the elimination of paper in favor of digital documents, the use of digital marketing (websites, blogs, social media, etc.) and comparative raters. This module is based on a generic agency and may not exactly represent your operations.

This module will explore areas in the agency's daily operations that may open the agency up to an E&O loss. While it may not follow your agency's operations exactly, the E&O considerations often still apply.

Agencies must have procedures in place to assure that consistent practices across all employees, as well as strong documentation of communications and agency actions are cornerstones of all agency operations. However, it is a fact of doing business today that for every company an agency represents there may be special or unique procedures that must be followed for various operations. A standard procedures manual, therefore, will address some of the basic and consistent steps as well as carrier-specific processes involved in the agency operation. Agency personnel must be relied upon to keep on top of individual carrier requirements and modify procedures when appropriate. Agency meetings, interoffice communications, training sessions, current written guidelines per carriers, along with periodic operation audits, will play an important role in assuring compliance.

In order to begin to establish a procedures manual for your individual operation, an assessment of your operations is necessary. Procedures need to address both the automated and manual functional environments for the various daily agency operations. For those agencies that have fully embraced the electronic workflow, the way the agency operates on the personal lines side may still be different from that on the commercial lines side. Employee benefits practices may also have other unique procedural and system requirements. In one organization, different departments may operate in different environments. How an agency is structured can vary, however, consistent practices are vital for all procedures.

### **Risk Management Tips for the Agency**

Written procedures are effective only if all appropriate staff are trained and knowledgeable on:

- Insurance Coverages – ISO and company-specific forms
- ACORD forms
- Effective use of the agency management system
- Agency basic procedures per process
- Carrier-specific procedures per process
- Responsibility and authority applicable to their position
- State laws and regulations that apply in the various states in which the agency writes business
- Procedures to protect the security of customer and employee information
- Procedures to use digital marketing tools effectively

## **MARKETING THE AGENCY**

Computers and the Internet have changed the way agents market their services and have made it easier to create their own marketing material and campaigns. Gone are the days of simply putting an advertisement in the Yellow Pages. The ways agents market themselves include using the following: websites, cold calls, brochures, advertisements, newsletters, and social media outlets like Facebook, Twitter, and blogs. While the media may change the principles of E&O risk management largely remain the same. From an E&O standpoint, care must be taken as to how an agency markets their products and services and presents their services to the public. Statements made in advertisements or social media can influence the standard of care expected from customers. Agencies should have procedures in place that match the representations made in advertising materials.

### **Section 1: Promotional Language Used**

Here are some considerations when creating content for marketing the agency. It truly is a balancing act of trying to trumpet the strengths of the agency while not raising customer expectations beyond the agency's capabilities. It is difficult for an agency to be all things to all customers. However, each organization wants to distinguish itself from others. Often times the agency may be overly zealous in its description of services and products offered. Care must be taken to assure that services promised can be delivered. As mentioned earlier, when statements are made regarding specialized expertise, the standard of care can be increased.

Below are a few examples of statements found on agency websites with the language of concern highlighted:

**Example of the “Expert Agency” that specializes:**

*“XYZ Agency is a full-line independent insurance agency offering auto, home, and business insurance. **We are also experts that specialize** in Employee Benefits in the workplace. These include group medical, life, cancer, accident, disability, vision, and long-term care.”*

Broad promises may increase the expectations of customers.

**Example of the Customizing Agency:**

*“ABC Agency represents many of the leading insurance companies in the world. That means we can **tailor custom insurance programs** specifically for you or your company **without the expense of coverage you don’t need.**”*

Uncovering an insured’s loss exposures requires careful evaluation. Making promises of a higher level of loss exposure evaluation may place an agency in a difficult position if a claim is made against the agent/agency for inadequate coverage.

**Example of Evaluator Agency:**

*“We will carefully **do a thorough risk exposure assessment, evaluate your current insurance coverage and provide you with fair and reasonable comparisons** based on an honest assessment of your needs. **We will never knowingly over or under insure you.** Our primary goal is to always be honest and fair, because, to be honest, we want to be your insurance partner for life!”*

Agency websites and proposals commonly use verbiage such as, "Our experienced staff can handle all of your insurance needs..." or "We will tailor an insurance program to fit the needs of your business..." Those representations can create a 'special relationship' giving rise to a

heightened duty to perform, especially in so-called 'order taker' states where, but for that language, there would have been no duty to recommend a particular coverage or limit.

## **Section 2: Prospecting and Advertising**

Agency growth from new business and account rounding is a challenge for all agencies. In the hunt for new business agencies may look to utilize leads from outside sources for direct contact, referrals, and social media. Agents also maximize their website visibility and include access to online quotes or a “contact me for a quote” response field. They may offer an “instant chat” feature that allows customers to “instant message” with agency staff. While it’s a nice tool, the agency needs to make sure correspondence from instant chats is documented in customer files. It is important that agencies include appropriate disclaimer language with all types of communications media to advise customers that no coverage is in effect until confirmed by the agency. In addition, agency staff will join community oriented organizations, sponsor community events, join online communities and sit on not-for-profit boards. Is the agency protected under the agency E&O policy for these types of activities, especially when procuring the coverage for an organization where the agent sits on the board? All of these are viable ways of engaging prospects but consideration to the E&O exposures must be given.

The first step is for the agency to understand both state and federal advertising and solicitation laws. For example, CAN-SPAM prohibits sending unwanted commercial email messages to wireless devices and computers. Agencies should always provide these email recipients the option to opt out of receiving emails. The Telephone Consumer Protection Act (TCPA) has established a “do not call” list which prohibits telemarketers from calling parties unless they have established a business relationship, including a prohibition on unsolicited facsimile advertisements. The same laws that apply to paper advertisements may also apply to online communications as well. Privacy laws may also be at play when utilizing leads purchased from outside sources if it includes personally identifiable information. This data should be protected in the same manner as other data.

Solicitation letters and emails are other prospecting tools that are designed to spark the interest of the prospect for the purpose of scheduling an appointment to discuss their insurance needs. These solicitation documents are easily standardized in the agency management system and accessible by agency personnel. Whether you send “snail mail” or email to prospects, the information in the body of the letter/email must not overstate benefits provided by an insurance policy, agency knowledge and experience or services provided.

**Example:** *An agency's solicitation letter states that the agency is a "full service insurance agency." The agency places the requested property coverage for a customer, but the limits of the policy are determined to be inadequate after a fire loss. While most states only require that an agent obtain the coverage requested by the customer, such advertising can result in a much higher duty for the agency to fulfill. Plaintiff attorneys will point to advertising or agency websites to show that an agency promised much more than what state law requires.*

#### **Advertising and Prospecting Risk Management Tips:**

- **Be familiar with state and federal advertising and solicitation laws.**
- **The agency's advertisements must reflect the agency's actual knowledge, experience, quality of service, and market options.**
- **Using superlatives to describe the agency that sound good but are not backed up by operations, increases the agency's E&O exposure.**
- **Simply put, you will be "putting your money where your mouth is" if the customer relies on these marketing statements and the agency does not live up to the advertisement.**
- **The agency should have a process for senior management to review all advertising and solicitation materials on an ongoing basis.**
- **Review all marketing pieces to avoid the use of terms that imply that coverage is broader than actually available.**
- **Don't over-promise market capability or carrier representation.**
- **Email solicitations and newsletters should include appropriate unsubscribe language.**
- **Protect private information included in leads from outside sources.**
- **Document initial conversations with prospects in the agency management system.**
- **Encrypt personal private information collected from the agency website.**

## Discussion Topics

- *How does your agency describe itself and its services in marketing materials?*
- *Does your agency have a procedure in place for developing and approving marketing materials?*
- *How has marketing the agency changed in the past 10 years?*

## NEW BUSINESS PROCESSING

### **Section 1: Gathering Application Data and Assessing Customer Exposures**

The process of gathering information about customers' insurance exposures is one of the most critical in terms of preventing E&O claims before they happen. It has also changed over time with insurance carriers providing agents with underwriting systems where application information can be input directly by the agent and access to quotes is almost instantaneous. While decreasing quote turnaround time, the underwriting systems have opened agents up to a different set of E&O exposures that they need to contemplate, because the application and risk assessment process have become less formalized and more streamlined. Carriers may no longer require a signed application on personal lines and small or middle market accounts. Instead of the customer completing a formal application, as in years past, the agent may be more inclined to take notes for those questions needed to obtain a quote in the carrier underwriting system. The challenge is that without a signed application there is nothing for the agency to fall back on if the customer provides inaccurate information, misrepresents its exposures or declines certain optional coverages. The misrepresentation of information from the customer becomes that of the agent. Agents may also be less likely to present the customer with the information they provided to review for accuracy. Exposure from data entry errors has also increased. This is especially important with carriers downloading customer information directly into the agency's management system, possibly overwriting existing information. Agencies should make sure that a carrier's download does not overwrite the data on the customer's application. If it does, the agency should create and retain an image of the customer's original application.

Just because a carrier does not require a completed and signed application doesn't mean the agency shouldn't retain one. As mentioned above, the inaccurate information of the customer falls to the agent. E&O attorneys find that the insured's signed application is often a critical

piece of evidence in defending the agency in an E&O lawsuit. Insurance policies are legal contracts and as such are subject to the common law rule of “parole evidence”. All of the oral or written information agreed to during the negotiation processes noted above, is reduced to a written contract – the insurance policy. Once the policy has been issued, the agreement between the insured and the carrier is what is in the policy, not in any proposal or oral promise made before the policy’s issuance.

The application can be seen as the final pre-policy issuance agreement. The insured’s signature on the application indicates what exposures they are transferring to the carrier and verifies that the underwriting information, used to affect this contractual relationship, is accurate. Regardless of previous discussions, information on proposals, emails, text messages, etc., the application can be seen as the insured’s final insurance purchasing decision. So before the delivery of a policy, an agency should have a signed application form from all new business customers.

**Example:** *An agency signs an application for a customer that is used to place workers compensation coverage for the customer. The application fails to show that the customer has employees working in New York. An employee is hurt on the job while working in New York, and the claim is denied by the workers compensation carrier. Even though the customer reviewed and approved the application, the customer will now argue that it was never given the chance to review it, did not sign it, and cannot be held responsible for incorrect or missing information in the application. Signing an application on behalf of a customer could be considered fraud or forgery. The agency should always obtain the customer's signature on an application.*

Here are some E&O considerations when gathering information from the insured:

**Risk Management Tips for the Application Process:**

- **Never sign an application on behalf of the customer.**
- **Have the insured review the application and sign and initial each page.**
- **Verify when carriers do not require that the agency retain a signed application. For small and middle market accounts where the company may not require a signed application, it is a best practice for the agency to get a signed application anyway. At a minimum, agency staff should recap the information provided by the insured along with getting their signature attesting the accuracy of the information. The applicant should respond verifying accuracy of information and documentation should be maintained.**

- **ACORD forms should be used to assure consistency, unless specific carriers require the use of their proprietary forms.**
- **When emailing an application to a carrier, use secure email. TLS secure email is recommended when emailing between the agency and carrier. See ACT website for more information on TLS.**

Failure to adequately identify exposures and failure to recommend coverage are two of the most common E&O claim allegations against agents. Uncovering exposures and offering coverage will not only help protect the agency from E&O claims but increase revenue and benefit the customer by cross-selling or account rounding. Yet, some producers are often hesitant to offer additional coverage options because the customer is simply looking for the best price. **Making the decision of what coverage to purchase is the job of the customer not the agent.** Producers need to understand the complexities of customer operations by asking the right questions and offer coverage that may be available for potential exposures. If the customer doesn't want to purchase the coverage at least it would be documented that it was offered. Producers are often challenged with customers having limited time and willingness to answer the often voluminous questions provided by risk exposure analysis questionnaires. While this is completely understandable, the questionnaires can be used by the producer in advance as a starting point to guide discussions. Throughout the quoting process, producers can go back to the customer to gather additional information. Some agents may reserve more thorough risk exposure analysis processes for larger accounts because of the perception that the smaller accounts are simply looking for the best price, but smaller accounts may present the same E&O exposures as larger ones, when the insured is not presented with all of its options. In addition to questionnaires and coverage checklists, other fact-finding options include:

- Researching the prospect's website
- Physical inspection of the premises or operations
- Financial statement review
- Interview with key personnel
- Reviewing the organization's product brochures, etc.

Visiting the customer's premises is also a good way to avoid E&O claims. Often times the customer requests the specific coverage they want but a review of the premises often uncovers exposures that may have not been contemplated. It can also reduce E&O claims from carriers due to writing accounts that may be outside of underwriting guidelines.

Staying within your area of expertise is important as well. It is easy to say but hard to do when an opportunity to write a substantial account presents itself. Some of the following risk

characteristics may require a need for additional expertise on behalf of the agency:

- Complexity/scope of operations
- Number of locations
- International operations
- Large network of supply chain vendors
- Products and completed operations
- Familiarity with specialty coverages

It is important to review the customer's existing coverage and limits to make sure the agency is at least matching the current coverage. Customers generally come to the agency and ask for a price on their existing coverage. However, their existing coverage may be inadequate or have gaps for existing exposures. Agency staff can't simply rely on the incumbent agent or the current insurance to properly assess the risk because to do so could turn into a potential E&O claim for the new agent. When the agency places the customer with a new carrier, or the current carrier changes its coverage, the agency should point out such differences to the customer.

**Risk Management Tips for Assessing Customer Exposures:**

- **Stay within your area of expertise – in terms of coverage and type of account.**
- **Gather information from the right party – the person in possession of the information the producer and carrier require.**
- **Agency procedures should include using of standardized checklists or questionnaires.**
- **Checklists are an invaluable tool for agents, regardless of experience. A source available to Swiss Re Corporate Solutions policyholders are sample checklists located at [www.iiaba.net/EOhappens](http://www.iiaba.net/EOhappens) and for a more comprehensive tool learn more about the Big "I" Virtual Risk Consultant at [www.iiaba.net/VRC](http://www.iiaba.net/VRC).**
- **Checklists should be periodically reviewed to assure that they reflect current coverage options and exposures.**
- **Document any areas that were not discussed, with the specific reasons.**
- **Verify the physical location of the prospect with respect to flood zones, earthquake zones or other special hazards (Note: Stay abreast of changes in the flood maps).**
- **Point out coverage differences when the customer is put with a new company or the current carrier changes its coverages at renewal.**

## Discussion Topics

- *Which of the agency's carriers don't require a formal signed application?*
- *How does the agency adapt its internal procedures when a carrier does not require a formal signed application?*
- *When working with carrier underwriting systems how does your agency have the customer confirm the information provided is accurate?*
- *What tools does your agency use to assess the risk exposures of customers?*
- *What are the types of situations where the coverages provided to current customers changes and how do you handle these?*
- *How many attendees have heard of the Big "I" Virtual Risk Consultant powered by Rough Notes and exclusively available to Big "I" members ([www.iiaba.net/VRC](http://www.iiaba.net/VRC))?*

## **Section 2: Proposals and quotes**

How quotes and proposals are handled with prospects and customers can influence the agency's level of E&O exposure. The documentation included in proposals such as coverages offered, coverage limitations, and insured requirements are invaluable. The disclaimer language in proposals also reinforces customer communications with clear guidance. Similar to how agencies handle applications, how they handle proposals has also changed with the use of carrier underwriting systems.

The use of formal written proposals/quotes can vary in an agency, due to both the size and complexity of an account and whether the account is personal or commercial. Formal proposals/quotes, for example, may not be utilized for some personal lines and small to middle market commercial lines accounts. Agency staff may gather underwriting information from the prospect and enter it into the agency management system. This information may then be uploaded to a comparative rating program or individual carrier website for quoting. Premium quotations, along with other relevant information, are compared and the staff member determines which company(s) will be recommended to the prospect. The agency and the prospect will review and discuss the information, most often by phone. If the prospect decides to move forward with the purchase of coverage, no formal proposal is issued.

In commercial lines operations how proposal/quote information is received varies. Small commercial lines accounts are often quoted by accessing each carrier's website. More complex commercial lines accounts usually require the completion of a set of applications that may be e-mailed, faxed or mailed to the underwriter for quotation.

Proposals and quotes received from carriers should include all relevant information regarding their product and coverages along with the terms and price. Agency operations can vary on what is presented to the prospect. Some agencies choose to present the personal lines or small to medium size commercial lines proposals/quotes that are generated directly from carrier underwriting systems with no modifications. Other agencies enter the carrier's information on an agency proposal/quote template to create an agency-generated proposal/quote document. Both methods have their benefits and their shortfalls. The proposals taken directly from carrier underwriting systems may not include offers of higher limits, additional endorsements available, other applicable stand-alone coverage offered/accepted, appropriate disclaimers, duties in the event of a claim, or an area for the customer to sign-off verifying the agency relied on information provided by the customer. Consider a supplemental form when using a carrier specific proposal. When using a custom agency proposal, agency staff needs to take care to accurately input data into the proposal template. Proposal language should also encourage the prospect or insured to request a copy of any proposed coverage form, since the proposal is not a contract of insurance.

For larger commercial lines proposals, agencies generally prefer to use their agency proposal template due to the complex nature of these accounts. This allows the opportunity to include information on the agency and staff along with coverage details, options, risk management suggestions, carrier financial ratings, and price. Keep in mind, the more information contained in the proposal, the more the need to ensure its accuracy.

***Example:*** An agency failed to compare the application to the proposal/quote to confirm that the proposal/quote reflected the coverage requested. The fact that the requested coverage was not quoted or in the policy was not discovered until there was an uncovered loss. The agency should have compared the application to the proposal/quote to ensure that the requested coverage was bound.

#### **Risk Management Tips for Proposals and Quotes:**

- Document any coverage discussions with prospects, insureds, and carriers.
- Procedures should indicate which type of proposal is the preferred method for account type (directly from carrier system or agency template).
- Whether using the carrier's proposal or an agency proposal, provide sufficient details so the prospect understands what is being proposed and can make an informed decision.
- Do not make coverage decisions on behalf of the prospect.
- Clearly indicate if coverage presented is modified from: what was applied for, what is was provided from previous carriers, or from the current carrier upon renewal.
- Offer coverage options and higher limits, beyond what was requested by the prospect.
- Recommend other policies such as flood insurance, earthquake, umbrella, crime, environmental impairment, employment practices liability, cyber liability and inland marine.
- Have the prospect initial or sign off on any recommendation rejected.
- Include disclaimer language for all proposals.
- Include reminders of any areas of the customer's operations not reviewed.
- Provide any necessary additional steps or information needed to effect coverage.
- Make sure the customer knows if the premium is subject to audit at the end of the policy term.
- Definitions and/or explanations of general technical insurance terms can be included with specific reference that these are examples and insured should read their policy.
- Include payment options on all proposals.
- Include a disclaimer when using replacement cost software to determine values.
- The agency employee should document when performing a function on the carrier's website, or add to an activity automatically set up by the agency management system where appropriate.

### **Section 3: Binding and Policy Issuance**

Agency personnel should know their binding authority and underwriting restrictions for each carrier represented. The speed at which policies are generated in today's automated environment has reduced the usage of binders. Agents can quickly receive policies through carrier websites. In addition, separate binders may or may not be utilized since some applications, such as the ACORD homeowner's application, can serve as a binder.

Since a binder is evidence of insurance that follows the provisions of the policy itself it is important that the information on it be accurate. Verify the information is consistent with the application and the proposal. When binders are issued, a suspense or activity should be created in the agency management system so the binder does not expire without the policy being issued.

The use of binders can vary between personal lines and commercial lines.

**Example:** *An agency was asked to bind auto coverage for a customer. The application and premium payment was received but never forwarded to the insurance company, and a subsequent auto loss was uncovered. The agency should have "tickler" or diary systems in place to ensure the coverage has been timely bound. A diary system will prompt an agency to confirm that the request to bind has been sent, and that the coverage has been bound. This will help prevent long gaps in coverage, and future E&O claims.*

#### **Risk Management Tips for Binders:**

- **Be familiar with state binder laws. (Example: number of days and coverage type)**
- **Create a central location where agency staff has access to binding requirements and restrictions for all carriers and make sure it is updated periodically.**
- **Use current ACORD binders.**
- **Do not verbally bind coverage.**
- **Obtain prior approval from the company if not sure the agency has binding authority on a certain risk.**
- **Include assigned policy numbers on binders when possible.**
- **Don't try to reiterate policy language on the binder but provide enough information outlining coverage.**
- **Create an activity/suspense in the agency management system for receipt of policy and extend accordingly.**
- **Monitor binder activity to make sure they are being replaced with policies in a timely fashion.**
- **If obtaining coverage through a surplus lines market, your agency may not have the authority to sign binders.**

The way both agencies and policyholders receive their policy forms has evolved with technology. Depending on the specific carrier and the line of business, agencies often need to make decisions on how policies are delivered to the customer as well as the agency. Policy delivery workflows can be any of the following:

- **Traditional Delivery** - Hard copy of the policy mailed directly to the agency and in turn delivered to the customer.
- **Carrier Hard-copy Delivery** – Carrier mails a hard-copy of the policy form directly to the customer and agency.
- **Agency Printed** - Policy printed by agency directly from a carrier’s email or system and then mailed or emailed to the customer.
- **Agency Paperless Delivery** - Agency downloads electronic copy to the agency management system and emails the policy to the customer.
  - **Delivery via CD** - The agency may also receive a CD of the policy from the carrier and then hand delivers or mails it to the insured.
  - **Policy on Agency Website** – Policy is made available to the insured on the agency website. The agency sends an email to the insured with a link to retrieve the policy on the agency website. The agency website tracks when insured accesses policy and follows up with the agency when the customer does not retrieve the policy within a given time.
- **Carrier Paperless Delivery** – Company sends policy directly to insureds and agency downloads from carrier website.

Agencies have had to adapt their workflows to accommodate the expanded methods of policy delivery. While these methods may streamline the process providing cost savings in delivery and file storage, they can be a challenge to the agency because not all carriers do it the same way.

When it comes to electronic delivery of policies, it is important for agencies to be familiar with state laws affecting electronic delivery. Most states have adopted some form of the Uniform Electronic Transaction Act (UETA) but each states’ laws may vary. For example, a common requirement is that certain insurance documents must be “mailed or delivered” to the insured. In some cases the insured must have previously agreed to receive policies via electronic delivery. When policies are sent electronically to customers, the agency should consider the following:

- State law permits the policy to be delivered electronically.
- The insured has consented to receive the policy electronically, whether by CD, email, or accessing the agency’s secure website.

- Emailed policies are sent via secure email. While TLS email is a good solution for agent-carrier communications, agencies most likely will need a proprietary email solution for sending secure email to customers.
- The customer should acknowledge receipt of an emailed policy or the agency should use a registered email solution that notifies the agency when the email is received by the insured.
- Agency should follow up with customers who have not acknowledged receipt of the emailed policy or when the customer has not accessed the electronic copy of the policy on the agency's website. (There is no automatic presumption that emails are received, as there is with traditional mail delivery.)

From an E&O standpoint, the electronic receipt and delivery of the policies may also cause agency staff to become complacent in their review of both new and renewal policies for accuracy and comparing to applications and quotes/proposals. Direct delivery of the policy from the carrier to the customer may also prevent the agency from including a cover letter reiterating coverages offered and not taken, the importance of reading the policy, who with the agency is servicing the account, and what to do in the event of a claim. When delivering policies electronically, the agency also needs to consider the security required if protected personal information is involved. Finally, a process should be in place to verify the policy has been received by the customer.

**Example:** *The agency requests a deductible of \$500 per vehicle on the customer's commercial auto application. The policy is issued with a \$2,500 deductible per vehicle, which is not discovered until the policy owner has a hail claim that affects every car in the fleet. The agency had not reviewed the policy to determine that it was issued consistent with the application.*

#### **Risk Management Tips for Policy Delivery:**

- **Review policies for accuracy against applications, quotes/proposals and other correspondence.**
- **Deliver policies in a timely fashion.**
- **Encourage the policyholder to read the policy.**
- **Emailed policies should be sent using a secure connection to protect sensitive information.**
- **Agencies should have a process in place when providing customers with electronic policies, including the verification of receipt of the policy by the customer.**
- **Agencies should verify they are in compliance with the appropriate state laws regarding electronic policy delivery.**

# POLICY SERVICING

## Section 1: Policy Changes and Endorsements

The types of errors seen in the handling of policy changes and endorsements include:

- Failure to add endorsement requested
- Failure to add additional insured/loss payee
- Making policy changes requested by unauthorized person

From an E&O risk management procedural standpoint, how policy changes and endorsements are handled will depend on the specific carriers' workflow. Although these procedures vary, no change should be made unless the request was ordered by the named insured. Information received from a third party, such as a car dealership, should be verified with the insured before a change is ordered. Changes to the policy that cannot be made immediately by the agency should have a suspense/activity created in the agency management system for follow-up. Another consideration is the effect the policy change or endorsement will have on the customer's other policies. This is especially important when it comes to excess policies.

When policies are handled by a carrier service center, the contract should clearly outline the agency is held harmless for the errors of the carrier. There should be clear communication with customers on the process for policy changes. Voice mails and out of office automatic emails, websites and social media sites should include disclaimers that coverage cannot be bound or changed until confirmed by the agency.

**Example:** Claims often occur when the agency is told of an impending change in exposure, but no one follows up to find out whether and when the change in question would take place, e.g., when a real estate closing on a new property is delayed to an unspecified date, or it is reported to the agent that a customer's teenage son will be getting his driver's license on his upcoming birthday. Others occur when newly added property is not evaluated with the same level of attention to detail as the original property, e.g., when a real estate investor adds yet another building to his holdings and the broker accepts without question his customer's evaluation of square footage and replacement cost.

**Example:** The carrier issues a quote that includes theft coverage, as requested, but also lists endorsements that had not been requested by the agency. The agency binds coverage without inquiring as to the nature of these endorsements, the policy is issued. When a theft loss occurs the carrier investigates and determines there was no 'active

*central station alarm' as required by one of the endorsements on the policy. The claim was denied.*

**Risk Management Tips for Policy Changes and Endorsements:**

- Change requests to add or increase coverage should be handled as critical items in the agency's workflows.
- Change requests must only be received from the named insured.
- Insured records are updated to include exactly who ordered the change, the date the request was received, the reasons and details regarding the change request.
- Confirm reductions in coverage (decrease limits, removal of locations, etc.) with the insured, in writing or require the insured to put such requests in writing before making the change.
- Carrier service center contracts should include language holding the agency harmless for the service center's mistakes.
- In situations where divorce or separation may be involved, use caution in making policy changes and consider getting requests in writing.
- Include disclaimers on voice mails, out of office automatic emails, websites, and social media sites.
- Understand that the agency may not have binding authority for certain changes.
- If the change cannot be made effective immediately notify the customer that coverage is not in effect until confirmed by the carrier.

## **Section 2: Claims Handling**

Most agencies, if involved in the claims process, take the first report of loss and forward the information to the carrier for handling. Professional handling of the first report reinforces an agency's customer service skills and can lighten a very unsettling situation for the insured. But it can also present a significant E&O exposure if claims are not handled appropriately. The most important things in avoiding E&O claims are to:

- Report claims to the carrier the same day received,
- Not to make coverage determinations on behalf of the carrier,
- And, to report the claim to all carriers where the insured has policies that may include some coverage (i.e. umbrella, excess carriers, D&O, and professional liability).

Although an agent may believe initially that a claim may not reach the level of an umbrella or excess policy, report the claim to them anyway as circumstances can change at any time unbeknownst to the agent.

Depending on the size of the agency, either a customer service representative or a dedicated claims person usually takes the first report. Managing the customers' expectations requires professional handling and clear, precise information. If a producer is contacted, the insured should be turned over to the appropriate staff member. In complex claims, producers may become involved in assisting the insured to respond to carrier inquiries and requests, but must proceed with caution and not become too entangled in the claims process.

While no agent wants to see his or her customers have uninsured losses and might wish to advocate on behalf of the customer with carriers, care does need to be taken in how this is handled. As an agent, you may not necessarily agree with the carrier's interpretation of policy language used to deny a claim. A healthy discussion of the language can help influence a change in the carrier's position to get the claim covered. The Big "I" Virtual University "Ask the Expert" service has proved a valuable resource that has helped agents in these situations. Unfortunately, claims scenarios arise where an agent's error or omission may be the root cause for the denial of the claim. Out of a desire to get the claim paid, agents have advocated for their customer by admitting in writing to the carrier that they erred and that the customer should not suffer. The customer is often copied on such letters. Unfortunately, many carriers will not or cannot change their claims denial position and the customer is left with a written document admitting error. This is very detrimental to any E&O carrier's defense and could violate the reporting and notice provisions of the agency's E&O policy, which provides that the insured shall not admit liability. When a customer experiences a potentially uncovered claim which could result in a potential E&O claim, get the agency's E&O carrier involved early as it will often step in and advocate on behalf of the agency and the customer with the underlying carrier. There is no downside to involving your E&O carrier as soon as you discover such a situation.

**Example:** *The named insured contacts his agent about a letter received from an attorney regarding a possible pollution spill. The agent asks his customer if he would like to file a claim, but the customer (verbally) responds that he would rather wait to see if a lawsuit is filed to keep his loss history 'clean'. When a lawsuit is filed the following year the customer promptly tenders it to his carrier, but the carrier denies the claim based on late notice as the policy had a six month deadline on reporting pollution claims. The customer has 'no recollection' of telling his broker to wait to file the claim. Instead, he recalls relying upon his agent's advice in all such matters.*

**Example:** The insured reported a broken basement window. The cost of repairing the window was less than the deductible so the agency advised the insured it was up to them to decide if they wanted to turn the claim in. The insured declined. A month or so later the insured called to advise that apparently the window was broken by a thief who had stolen tens of thousands in jewelry. The company paid the claim and sued the agency for failure to report the claim appropriately.

**Example:** The insured called to report a little water damage. When he learned what the deductible was, he declined to turn the claim in and the agent did not report it. The insured called back later to report the little water damage had resulted in major mold damage.

**Example:** The insured called to ask about the deductible on his boat. He thought he'd scratched the bottom on some coral. When he learned what the deductible was, he declined to turn the claim in. The next day he called the agent to turn in a claim for his sunken boat. He'd hit the coral harder than he thought.

**Example:** The insured called to report a little auto accident. They felt they could repair their car for less than the deductible so they didn't turn the claim in. The agent did not report the claim and failed to ask for details about the accident such as what it was the insured hit. The damage to the other party was significant and included bodily injury.

#### **Risk Management Tips for Handling Claims:**

- Treat all claims as critical – they should generally be handled the same business day they are received. Notify all carriers that MIGHT provide defense or coverage.
- Explain the carrier's and agency's role in the claims process – do not deny or affirm coverage.
- Provide information on when the policyholder can expect to be contacted by the adjuster.
- Encourage the insured to contact you if he or she has not been contacted by the carrier within the expected timeframe.
- Advise the policyholder of any loss conditions or duties that apply (contacting the police, protecting property from further damage, making the property available to the carrier for a physical inspection, etc.).
- Don't advise the insured who to hire to make repairs unless directed to do so by the carrier.
- Report all claims that are reported to the agency to the carrier, regardless of instructions from the customer to the contrary.

- In the case of property losses that are below the deductible, inform the insured diplomatically that these losses are their responsibility.
- Send an agency standardized, written verification of the reported of a claim.
- Create a suspense/activity to follow up with the policyholder within 72 hours.

### **Section 3: Handling Renewals and Remarketing Accounts**

While E&O claims are more frequently generated from new business related processes, handling renewals and remarketing accounts does have E&O exposure. Today, carriers are more actively involved in the handling of direct bill renewals which has reduced the amount of processing by the agency. Unfortunately, the ease of processing may lead to complacency in the review of changes in customers' risk exposures and reduce the amount of proactive account rounding or offering of increased limits. While they may not receive the same amount of attention as agency bill accounts, direct bill policies should not be ignored or left on "autopilot". Regardless of the size of the account, the agency may consider reaching out to the customer at renewal time to request updated information and changes in exposures. This can be handled on an automated basis and does not create a workflow problem.

As the insurance market changes or policies get non-renewed or cancelled, there is a need to remarket accounts. The remarketing of accounts presents E&O exposures similar to that of the new business process. When it comes to the application process, there may be a tendency for agency staff to simply input existing application data into a new application without having the customer review it – a dangerous practice. In addition, when accounts are moved to a new carrier, the policy needs to be thoroughly reviewed to identify any reductions in coverage that should be shared with the customer. The agency should have a procedure for how often accounts are remarketed. Moving accounts should always be done with an abundance of caution.

Understanding the carrier's non-renewal processes is important. Insureds can decide to sever their relationship with the carrier, usually without notice. Carriers, however, are typically required to offer a renewal, unless they have complied with the state's non-renewal notification requirements. For this reason, agencies should provide current information to all staff regarding the state's non-renewal laws and regulations.

Some states have a separate renewal notification requirement for carriers to formally offer a renewal, possibly including the anticipated renewal premium. If applicable in your state, agencies should provide current information to all staff regarding the state's renewal laws and

regulations. Although agencies are not required to provide the renewal or non-renewal notice, it is good for staff to be aware of non-renewal notice requirements.

**Example:** *After shopping around the renewal of a CGL policy for his customer, an agent advises the customer that he had located a policy that had the same terms and a lower premium. The customer readily accepts this policy. A claim is subsequently made by an employee of the customer against an additional insured -- but not against the customer. The carrier denies coverage for the additional insured due to an exclusion for claims "based on the sole negligence of an additional insured". The expiring policy did not have this exclusion and would have provided coverage to the additional insured for this claim.*

#### **Risk Management Tips for Renewals:**

- **Agency management should determine the number of days prior to expiration to run the list of all renewals. Remember to account for short-term and extended policies.**
- **Use checklists to uncover current loss exposures on renewals.**
- **Recommendations on coverage, limits, upgrades can be reiterated with each renewal review.**
- **Any recommendations rejected should be verified in writing.**
- **Updated signed applications, if applicable, should be obtained.**
- **Agency standardized cover letters, reviewing policyholder specific information, should be sent with the renewal policy or as a separate correspondence on direct bill or downloaded policies.**
- **If the insured has indicated that they prefer to receive their policy by email, the agency must be able to demonstrate that the policy was received by the insured.**
- **Include payment options for all renewals.**
- **For renewals that are downloaded, such as personal lines and small to middle market commercial accounts, the agency should have a process in place for reviewing the accuracy of accounts being downloaded.**
- **If a renewal is not going to be offered by the agency, the insured should be notified in writing well in advance of the renewal date.**

## Discussion Topics

- *What are the renewal notification requirements in your state?*
- *What process does your agency have in place to review changes in exposures on direct bill renewals?*
- *How often does the agency remarket accounts?*
- *What procedures are in place to ensure any policy replaced with a new carrier offers at least as broad of coverage as the prior policy?*

### **Section 4: Auditable Policies**

When writing policies that are auditable, be sure to encourage insureds to provide information based on their best educated projection. Explain the downside of under estimating the auditable premium base. The savings at the inception becomes a burden at the expiration. Along with the renewal premium, a large audit results in a fully earned premium due at the time of the audit!

#### **Risk Management Tips for Audits:**

- Audits should be discussed at the time of writing new or renewal business.
- Producers and CSRs should verify in writing, with new and renewal business, that the premium is provisional and therefore, subject to audit.
- The agency should develop standard audit language to be used on cover letters when transmitting policies, at the time of an applicable endorsement change and following cancellation or nonrenewal
- Information on how the audit premium will be determined should be included
- Workers compensation policies for contractors and employee leasing firms may require special discussions and agencies should be aware of NCCI changes in experience rating application.
- For contractors workers compensation policies, create a suspense or activity to send a reminder, to keep certificates of insurance on file for subcontractors.
- Consider sending a six month notice to remind auditable accounts of the audit provision at the end of the policy term or to request mid-term figures to avoid a large audit.
- When possible, request a copy of any company audit from the insured.

- **Establish a written procedure for handling audits and provide staff training on the procedure.**

## **Section 5: Cancellations and Non-Renewals**

Cancellations and non-renewals can take a number of forms (mid-term cancellation, non-payment, insured request, etc.) and can be initiated by either the carrier or the customer. How these cancellations are handled can vary by policy terms, the state law for cancellations, and the type of policy involved. In general terms, the cancellation process is between the policyholder and the carrier and the agency should be cautious in its involvement. While no agency wants to lose an account, care needs to be taken on how cancellations are handled including how or if the policy will be replaced with another carrier.

Automation has eliminated duplication of effort on so many fronts. However, in the paper world, carriers would mail a written cancellation or non-renewal notice to agents and insureds. Depending upon the carrier's operating procedures, an agency may be the last to know about the cancellation or not even receive an alert.

For commercial lines accounts, agents often receive notifications from carriers for policy cancellation – in paper or electronic form. With respect to personal lines, however, the agent may or may not receive a notification. This can differ based off state law. If notification is not sent, agency should review the carrier communication log daily or check the individual carrier's websites is necessary to determine whether any insureds have been notified of a mid-term cancellation.

For cancellation with non-pay accounts, a key E&O exposure exists when an agency interjects itself into the cancellation process by frequently reminding the customer to pay their premium. Customers will tend to rely upon this second notice from the agency. This increased standard of care places the agency in the position of becoming responsible to remind the insured of their payment responsibility and the customer relies upon this. Two reasons that agents often give for the second notice are customer service and the potential loss of customers. Although this would, at first blush, appear to be a sound business practice, the cost to the agency for this procedure must be fully evaluated. If the increased E&O exposure alone is not enough to discourage the practice, then take the time to determine the monetary costs to the agency for the time invested in making this second notice. Instead of reminding customers to pay their premium, having an exit interview process in place is a way to discuss the customer's ongoing insurance needs without raising the standard of care through on-going reminders. Customers should understand that their payment must reach the carrier by the due date and that

replacement coverage may not necessarily be available if there is cancellation for non-payment of premium.

Some other E&O considerations involve the reinstatement of coverage and the remarketing of the account. In situations where the carrier cancels or non-renews an account, agency staff needs to clearly communicate with the customer on whether an attempt to replace coverage will occur or if the customer should obtain coverage through another agency. The timing of replacing coverage is important to avoid any coverage gaps.

**Example:** *The named insured pays its (overdue) premium directly to the agency three days prior to the policy's effective cancellation date. The policy had been issued through a surplus lines agent. The agency mails a check by 1st class mail directly to the carrier, but the carrier never confirmed receipt of the payment. When a loss occurs the following week the carrier denies coverage claiming the agency was not its agent and the agency check was not received until two days after the effective cancellation date.*

**Example:** *A customer contacts the agency and requests cancellation of a health policy at the end of the month. The agency sends the cancellation request in without specifying an effective date, so the carrier cancels effective immediately. The customer becomes ill before the end of the month -- during the resulting gap in health coverage -- and incurs significant, uncovered medical expenses.*

**Example:** *The agency issues a binder on a homeowner's policy. The carrier sends a request for additional information, but the agency does not respond to this request on a timely basis, so the carrier issues a cancellation. The cancellation became effective on the same date as a moratorium on binding of coverage due to an approaching storm that causes uncovered wind damage to the home.*

#### **Risk Management Tips for Cancellations and Non-renewals:**

- **Don't provide continued notice reminders to direct bill customers being cancelled for non-payment.** If the agency decides to go beyond the regular standard of care in making notifications to customers of direct bill late notice/cancellation notice then it is important to be consistent. If notice is given in a special situation, make clear to the customer not to expect future reminders and document the discussion
- **Don't interfere with the carrier's right to notify an insured of cancellation or nonrenewal.**
- **Avoid giving the insured the idea that the agency can have coverage reinstated or rewritten unless first verified with the carrier.**

- **If replacement of coverage is necessary, determine possible carriers.**
- **If coverage is going to be replaced, inform the insured of any reduction in coverage, limits, options, or restrictions, in writing before coverage is replaced and document the insured's acceptance.**
- **If coverage is replaced, compare the replacement coverage and the expired coverage for variances.**
- **If coverage is replaced in an E&S market, provide information regarding the differences between the standard market and the surplus lines market, including that the policy is not backed by the state guaranty fund in most states.**

# **E&O Risk Management: Meeting The Challenge Of Change**

## **E&O Exposures When Using Social Media**



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# E&O Exposures When Using Social Media

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## Objectives:

- *Determining the agency's social media goals*
- *Understand E&O considerations when using social media*
- *Learn about agency procedures when using social media*

## What's Covered:

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## INTRODUCTION

Social media networks are increasingly becoming an important marketing tool for many insurance agents. Since technology changes daily, the number of networks is expanding rapidly. Currently, the more popular ones are Facebook, Twitter, LinkedIn, and Google +. These networks are free and easily available and agencies are looking to gain a marketing edge through the power of the web to increase their name recognition, market their services, and to connect with customers. Some of the same E&O risks apply to agency websites and blogs.

Most sites allow the creation of a home page by following a template provided to the user. Depending on the specific social media site, the profile template may be limited to key information an agency may wish to have known about their organization, along with an uploaded photo. Or it can be as robust as a site containing multiple photos, videos, and links to other sections of the site (as well as to other sites) containing additional content created and posted by the agency. Users of the site typically invite other users to join their community, and the invitee is free to accept or decline. Most sites also offer blogs, chat rooms, forums, and search capabilities to help locate other users based on your chosen search filters.

Many agencies already actively use social media, while others are still exploring it. In many cases, agencies use social media postings to draw users back to their agency websites. While social media is an excellent way to connect with customers, increase visibility of the agency, and build relationships with prospects, its usage does have some E&O exposure. Potential E&O exposures include:

- Contractual Liability
- Advertising
- Defamation
- Breach of personal data
- Misrepresentation

Agencies need to have a social media policy guiding how employees can use social media in connection with the agency, define acceptable behaviors, and clearly state when discussions should move from social media into the traditional agency workflows. The social media website should also clearly state how customers can use it and integrate this into agency workflows. It is very easy to see how customers might use social media sites to communicate answers to applications, to notify the agency of claim, or request changes to their policy. The agency needs to be prepared for these types of scenarios.

## BENEFITS OF SOCIAL MEDIA

With millions of people engaged on a daily basis, social media presents the opportunity to touch more customers and prospects. Social media sites attract visitors who can provide an otherwise untapped source of suspects and prospects for the agency. General insurance information can be communicated to a broader audience, beyond the current customer base, that may increase the agency's name recognition and professional standing in the community. It is a platform where agency services and expertise can be highlighted as well as show an agency's community involvement, such as blood drives, charity events sponsored, etc. Another benefit is using social media as a communications tool during times of disaster, sharing vital information on preparedness, post event updates, and claims reporting.

If the agency is planning to venture into the use of social media network platforms, give careful thought to what the goals are in using these tools before beginning. The use of any social media sites can increase your agency's E&O exposures and careful thought needs to go into how it is used across the entire agency. One of the first steps is to create a social media policy and train employees. Once the agency has decided on the goals, consult with qualified legal counsel for advice specific to your planned use of these sites, and applying the risk management tips included in this module. Pay particular attention to advertising laws and the contractual liability created in social media user agreements.

To create a social media presence some agencies may work with service providers that work specifically within the insurance industry segment. This may include buying websites, advertising, and lead development from vendors. It is important to realize that just because an agency buys a service does not mean the agency is not responsible for everything that service provider states. These services providers may offer generic websites and social media advertising stating all kinds of great services that the agency may offer. The agency needs to make sure that the information accurately depicts the specific products the agency offers and the service standards.

**Example:** *An agency bought a pre-package website and social media service and the vendor did not remove their boiler-plated health insurance section. The website and social media stated this agency was selling group health insurance which they were not licensed to sell and do not offer! Furthermore, the agency owner had no idea he was advertising a product since he had never reviewed the product he had purchased.*

## Discussion Topics

- *Does your agency use social media? What are the goals of using it?*
- *Does your agency have a social media policy?*

## E&O CONSIDERATIONS

Email replacing formal written letters and memos seemed to make communicating a less formal process. In social media, the discussions tend to be more casual and take place more quickly than even emails, making it easier for a statement to be taken out of context. In addition, the information posted on social media is able to achieve instantaneous worldwide distribution. An electronic record is also created which can survive indefinitely. So, while the E&O exposures may not necessarily be new to agency operations, the visibility provided by social media websites can magnify them.

### General Social Media Tips for the Agency:

- Agencies should have a procedure related to the use of any social media site. The guide should be consistently monitored, managed and adapted.
- Social media by its nature is personal and agency employees can help promote the agency while building their personal brands. What employees do on their personal sites, however, can reflect on the agency and detract from the personal brands they are trying to build. It is important for agencies and employees to discuss where the business and personal aspects of social media intersect.
- Employee training should include instructions regarding conversations that are no longer “general” in nature and the need to move to the agency’s usual workflow procedures.

## Section 1: Contractual Liability - E&O Exposure

Contractual liability exposures may exist when accepting the site’s user agreement. The provisions of the user agreement may be broad including the requirement to hold harmless and indemnify the site.

**Contractual Liability Tips for the Agency:**

- Before venturing into the social media arena, read the user agreement, privacy statement, and “do’s and don’ts” thoroughly.
- Consult with your legal counsel, if needed, to be sure you have a full understanding of the liabilities to which your agency is agreeing.

**Section 2: Advertising – E&O Exposure**

Using social media sites often include creating a homepage. The creation of the homepage can increase the agency’s advertising liability exposure. Insurance regulations include advertising guidelines, with some states’ regulations specifically mentioning the internet. So advertisements that appear on the Internet may be subject to all applicable existing statutory and regulatory guidelines, as with any other medium. A challenge is that the lines can easily be blurred when an individual or employee uses the agency name, logo, or other advertising identifier as part of their personal social networking site. Does this constitute advertising for which the agency can be held liable? That is why it is important to use the same level of care in reviewing all agency advertising including those on social websites.

Agencies may also post information and articles about general insurance topics to educate customers and drive traffic. If the articles are written internally by agency staff care should be taken to make sure the material is accurate. All articles should be reviewed before posting. When posting or linking to articles written by another source, permission should be received prior to re-publishing. This will help avoid exposure from misuse of trademarks and copyrighted material.

#### **Advertising Tips for the Agency:**

- Follow all statutory and regulatory guidelines regarding advertising liability.
- Each agency should have a process in place to review all marketing material, regardless of medium.
- An agency procedure should also be established that addresses to what extent employees have permission to link to the agency's sites, or use the agency name, logo, or other advertising material on their personal sites.
- Have a procedure for responding to criticisms regarding the agency that gets posted on blogs or in chat rooms or forums. Consideration should be given to having one person designated to whom employees can refer unflattering online postings.
- If posting original materials created by the agency it should be reviewed to ensure accuracy.

#### **Discussion Topics**

- *Are you familiar with the advertising laws and regulations in your state?*
- *Does your agency post articles on your website or social media site? If so, where does the content come from?*

### **Section 3: Defamation**

Agencies have always faced exposure to defamation from verbal discussions and written communications. Most social networking sites feature blogs, chats or forum discussions. Participating in these discussions can present exposure to defamation, or in this case, libel since the discussion is in written form.

Commercial speech – speech which proposes an economic transaction – is entitled only to limited First Amendment constitutional protection. Currently, there is no clear answer as to the

level of First Amendment protection, business representatives will receive when they write or respond to a blog.

Discussions taking place on blogs and in chat rooms or forums tend to be less formal, may include more opinion than fact, and tend to move quite rapidly between many parties. Twitter limits text comments to no more than 140 characters. The end result is that it is much easier to make a statement that is taken out of context resulting in a claim against the agency for libel. In addition, defamatory comments will be viewed by large audiences and the electronic record can survive indefinitely.

## **Section 4: Privacy Issues**

Insurance professionals are regulated by federal and the individual states they operate in regarding the disclosure of private personal information of their customers. The interactive spaces on social networking sites are not secure spaces for discussing personally identifiable information. When a social conversation moves from the general insurance type to specific needs of individuals, the agency staff must be vigilant to move the conversation to the usual agency workflow procedures. Customers may be lulled by the apparent anonymity of the social media and begin to give personally identifiable information. Agency staff must be prepared to respond to protect the release of private information.

### **Tips for Dealing with Defamation and Privacy Issues of Using Social Media:**

- It is important to keep all social media posts positive and based on fact.
- Often a negative comment that may be posted by a customer can be turned into a positive one if the agency takes the discussion offline and addresses the customer's problem.
- The agency should establish guidelines for employees so they know when to take a discussion offline and put the customer into the normal flow of business procedures.
- Procedures should ensure that personally identifiable information is not included in social media communications.
- Disclaimers should be included on any social media site so that customers understand up-front how the site can be used.

## **Section 5: Incorrect Advice and Misrepresentation**

Operating in the virtual world has the same exposure faced every day by insurance professionals in the rendering of their professional services. The standard of care in providing professional service is no less than that imposed on the agency in traditional communication vehicles. The same agency procedures your staff follows regarding risk analysis, recommendations, and documentation also apply to all content and discussions on social networking sites. Responding to specific coverage questions or sharing inaccurate information can create E&O exposure.

### **Tips to Prevent Incorrect Advice when Using Social Media:**

- Use standard disclaimers such as those used in voice mail, email, and on the website. Below is a sample:  
"Statements on this website as to policies and coverages and other content provide general information only and we provide no warranty as to their accuracy. Further, the ABC Agency cannot bind or alter coverages or accept reported claims via this Internet platform. Questions relating to specific coverage should be discussed using the agency's regular workflows. Please contact a licensed agent directly."
- Have clear agency procedures as to who within the agency can make particular social media posts and subject those posts to a review process. Many agencies have designated a "Community Manager" who manages the agency's social media presence.
- Be clear in the agency's procedures that established processes and workflows apply to all discussions and service focused on an identifiable risk or individual or business generated through the social media site and that these conversations are documented in the agency management system.

## **Section 6: Referrals**

Making referrals to customers and vendors on websites and social media sites can have a very positive business benefit but should be handled with care to avoid creating an exposure for negligent referral. The referral should be done in a way that reflects on your experience with the vendor. If it is an actual vendor referral, the best practice recommendation is to provide at least two referrals, leaving it to your customer to choose which vendor to use. If the agency site links directly to a client or vendor, make sure you have that party's permission, to avoid any

exposure to allegations of trademark infringement or unfair use of cyber marks from the vendor.

**Tips for Mitigating Allegations of Negligent Vendor Referrals:**

- **Obtain written permission from the vendor or site when linking to another website or article.**
- **Always provide more than one selection for each type of vendor, leaving the choice to the customer.**
- **Ensure there are appropriate disclaimers regarding the services being provided by these vendors.**

## **AGENCY PROCEDURES**

Agency procedures for social networking should require employees to keep their discussions professional and distinguish between statements of fact versus those of opinion. Comments that can be construed as leading or participating in attacks on either individuals or businesses should be avoided.

Employees should limit their focus to a generalized discussion of an insurance topic. When a discussion becomes specific as to an identifiable risk or individual, it is no longer appropriate for an interactive space, and should be moved offline. Once moved offline, a discussion specific to an identifiable risk or individual should then move into the agency's established workflow process. This provides the standard servicing and documentation that would occur had this discussion taken place in person, via phone or within email.

### **Procedural Considerations for Using Social Media:**

**Establish written agency procedures addressing employee use of social networking sites, including:**

- **Who within the agency has permission to participate on behalf of the agency,**
- **Define acceptable behavior (professional, fact versus opinion, no leading or participating in attacks on individuals or businesses),**
- **Employee sites should make clear they reflect their own views and not those of the agency,**
- **Identify when a discussion should be moved offline and into agency workflow, and**
- **Make clear the consequences of non-compliance to employees. Just as social media can enhance the agency's brand, if used improperly, it can detract from that brand.**

## **ADDITIONAL RESOURCES AVAILABLE ON SOCIAL NETWORKING**

IIABA's Agents Council for Technology has several articles and recorded webinars available to assist agencies in using social media. These include an Independent Agent's Guide to Creating a Social Media Policy and sample disclaimers for agency websites and social media sites. ([www.iiaba.net/act](http://www.iiaba.net/act) and click on the "Websites and Social Media" quick link.)