



*About this article: A noted law firm specializing in agencies' E&O defense work provides several recommendations as to how agencies can use their technology most effectively to protect against E&O exposure.*

## **E&O Considerations for the Automated Agent**

By Keidel, Weldon & Cunningham, LLP

Technology is providing agents and brokers (“agents”) today with several tools to increase sales and profitability, as well as to provide better customer service. Automation is also helping many agencies manage their E&O risks more effectively, because of its capabilities to retain accurate data, foster consistent processes, document transactions and conversations and generate reports to monitor adherence to agency procedures. However, if the agency does not implement its technology in a disciplined way, this same technology can be used against the agency in connection with an E&O claim or lawsuit.

ACT requested the law firm, Keidel, Weldon & Cunningham, to provide this overview of E&O considerations agents should keep in mind when using technology, given the firm’s expertise in defending agents in E&O lawsuits.

### **Electronic Delivery of Insurance Policies**

It is crucial in defending many E&O claims and lawsuits that the agency be able to demonstrate that it delivered the insurance policy to the customer. Without this evidence, we are unable to raise one of our most valuable defenses – the “Duty to Read” defense. However, many agencies are now delivering insurance policies and other insurance documents to customers in electronic form rather than in paper form. Providing insurance documents to customers in this way can help save both time and money and also allows the agency to provide a higher level of customer service.

Any agency that is contemplating the delivery of electronic copies of insurance documents to customers should follow a few simple steps in order to better serve the customer and help protect against an E&O claim or lawsuit. First, the agency should make certain that the customer consents to electronic delivery and understands that going forward, until such time as he or she indicates otherwise, he or she will only receive electronic copies of insurance documents and will not receive paper copies. The best practice for the agency to follow is to have the customer sign a letter acknowledging his or her acceptance of this practice.

If policies are being emailed to customers, the agency should not rely upon automatic receipts, since sometimes they can be falsely generated by the recipient’s antivirus software. Instead, the agency should request that a customer who is sent a policy by email affirmatively respond that he or she has, in fact, received the email and attachment. If the

customer does not affirmatively respond, the agency should be sure to call the customer to confirm receipt, and then be sure to make a note of that conversation in the agency management system.

If a customer is being provided with an electronic copy of his or her insurance policy that is contained on a CD, the agency should be sure to send or hand deliver that CD along with a letter stating that the electronic document is the policy and that the customer should be sure to review the policy carefully and advise the agency of any questions he or she may have or changes that need to be made.

In addition to email or delivering a copy of the insurance policy on a CD, there is also an electronic system whereby an agency sends an email to the insured with a link to a stand-alone secure server where the client can obtain a copy of his or her policy. If the insured retrieves an electronic copy of his or her policy, the agency management system is documented to show that it was retrieved, by whom it was retrieved and when it was retrieved. However, if the insured does not retrieve the electronic copy of his or her policy, an email is sent to the agent to advise that the policy has not been retrieved. The agency can then either send the customer another email reminding him or her to access the policy through the secure portal or print the policy out and send it the old fashion way via the mail.

#### **Notes of Discussions with Insureds and Insurers**

The rule within every agency should be that all employees must consistently make notes within the agency management system of any discussions with insureds, insurers or anyone else that concern in any way issues related to coverage or claims. The agency management system notes the date and time for any such notes which are entered. These notes can be very powerful proof if needed to defend the agency against an E&O claim or lawsuit. There are five important aspects to documenting any communications, and they are as follows:

1. Note the date, time and duration of the conversation;
2. Note the name and title of the individual that your agency is communicating with;
3. Note how the conference took place, such as office conference, telephone conference and/or cell phone conference;
4. Note the salient points of the conversation; and,
5. If possible, follow-up with the insured in writing to confirm the conversation.

While this seems extremely basic, you would be amazed at how many times we open an agency's file and the notes are missing such details as whom they spoke with, or where the conversation took place, or even the issues that were discussed. Without some, or all, of this basic information, it may be more difficult or even impossible to defend an agent in an E & O claim properly.

#### **Activities Noted in the Agency Management System**

Activities that are created within the agency management system are a great way for employees to diary matters for follow-up. No matter what agency management system

you are utilizing, the first and most important thing to confirm is that any activity performed is reflected by an activity within your system. For example, if your agency creates a certificate of insurance for a customer, your agency management system should create an activity in the activity log that corresponds to the creation of the certificate of insurance. This would likewise apply to any other type of task, such as the completion of applications, change endorsements, performing a function on the carrier website, etc.

The second most important thing to keep in mind is that the activities that are created should always be closed when the activity has been completed. A very powerful piece of evidence in defending E&O claims and lawsuits is to demonstrate that an activity was opened, handled and then closed when completed. Conversely, it can be very damaging for an agency to have activities within its agency management system that have never been followed up on; or if they have been followed up on, they have not been closed. Accordingly, every agency should make certain that all employees are creating, following up and then closing all activities within the agency management system.

### **Voice Mail Messages and Disclaimers**

Voice mail messages are regularly left by customers on the voice mail system of agencies, asking questions on coverage, reporting claims, and requesting changes in coverage. For this reason, it is recommended that a voice mail disclaimer be used on both the message for every employee and also on the main message for the agency. This disclaimer should state that coverage cannot be bound or modified, nor can a claim be reported, by use of the voice mail system.

In addition, it is a good practice for an agency to consider adopting a procedure whereby voice mail messages are retained either in the original recorded form or in written form. Some agency management systems are compatible with phone systems to allow a copy of voice mail messages to be attached to an insured's electronic file. There are also programs that exist where you can have a written version of your voice mail messages sent to you by email and then retain that written version of the message.

### **Disclaimers for E-mail, Websites and Social Media Sites**

In addition to a disclaimer on voice mail, it is also important for every agency to have similar disclaimers on their email transmissions, websites and social media sites. Some agencies advise us that they like to use email for their customers to report claims. For those agencies, the disclaimer might state as follows:

“Please note that 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.”

Additionally, some agencies have interactive websites that allow customers to report claims or request policy changes. A similar type of disclaimer should be used for those interactive web sites as well.

Where an agency or brokerage is utilizing a social media site like Facebook or Twitter, the agency should use a disclaimer similar to that mentioned above with the addition of advising that these vehicles should not be used to communicate client specific information to the agency, any content the customer provides becomes the property of the agency and the agency is at liberty to add, modify or delete any content that is not acceptable.

### **Certificates of Insurance**

Certificates of insurance are still one of the largest sources of E&O claims and lawsuits. As such, it is important for every agency to have good documentation concerning how certificates were issued in the event an issue arises related to a certificate. The agency should be sure to retain, either in paper form or electronically, a copy of every certificate of insurance issued.

While agency management systems will automatically save a copy of the certificates on the system, one problem we have encountered is that many of those systems will only print out the current date (not the date that the actual certificate was issued). Because of the importance of having an exact copy of the actual certificate that is issued (including the exact date it was issued), agents should make certain that if they are saving the copies of certificates electronically, and not in a paper form, that their agency management system will either:

- (a) print out the date that the certificate was actually issued if the certificate is printed at a later date; or
- (b) scan a copy of the certificate that is actually issued by the system and maintain an electronic copy of it within the respective insured's file.

### **ACORD Forms**

It is equally important that every agency use the most current and up-to-date ACORD forms in connection with its daily operations. Doing so will help protect the agency from potential E&O claims and lawsuits and will often also help better serve your customers.

For example, the ACORD 80 Homeowners Application was revised in October 2009, but some agencies appear to still be using the earlier versions of the application. The new ACORD Homeowners Application now contains five pages and it is akin to a checklist of coverages and exposures which is one of the best means to dispute a claim by a customer that coverages were never reviewed. Reviewing the completed application with customers will help protect the agency from claims that the agency did not review a particular type of coverage with the customer or ask about a certain exposure that may exist.

Another form that is often not used by agencies in its most current version is the ACORD 25 Certificate of Insurance. The most recent version of the ACORD 25 is the May 2010 edition. As mentioned above, because certificates of insurance are involved in a great many E&O claims and lawsuits, it is of the utmost importance that agencies use the most recent version of the ACORD 25 Certificate of Insurance.

## Downloads and Uploads

Another area we would like to address is the agency's uploading and downloading documents and information from the insurers with whom they do business. While we understand that uploading and downloading has become a major tool to increase agency efficiency, there are several points to keep in mind:

1. Confirm that your agency management system is not allowing your agency's downloads to change the applications from insureds unless it creates a new version.
2. Downloads can greatly enhance the accuracy of the agency's data which is essential when counseling insureds, but it is important to audit these downloads regularly to make sure they are accurate and that the agency's database contains good data overall.

Critical to all of these recommendations is that the agency incorporate them into its written procedures, train its employees on them and require that they be followed, as well as audit the agency's systems regularly to make sure the procedures are being followed.

This overview is not meant to be an exhaustive list of potential E&O issues that you may face when you examine the electronic side of your business. Agencies should always keep in mind all of the other E&O risk management principles that they have learned and how the technology they are using might impact them.

**Editor's Note:** Additional ACT articles on agency E&O and risk management issues are available on the ACT website, such as "Don't Get Caught in the Web" (agency website exposures); "Agency E&O Considerations When Using Social Media"; "Creating a Social Web Policy for Your Independent Agency" (comprehensive checklist); and "ACT Prototype Agency Information Security Plan" (tool to build your agency's written information security plan). All of these tools are available at the "Websites & Social Media" Quick Link in the gray shaded portion on the left of the ACT home page ([www.iiaba.net/act](http://www.iiaba.net/act)), except the prototype agency information security plan is at the "Security & Privacy" Quick Link.

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