

E&O Claims Advisor

An exclusive risk management service of the
Big "I" Professional Liability Program



Fall 2009

Big "I" Virtual Risk Consultant Powered by Rough Notes Introduced Exclusively to Members

IIABA recently introduced a new web-based agency resource called the Big "I" Virtual Risk Consultant ("VRC") Powered by Rough Notes to help members better serve their customers, generate increased sales and lower their exposure to E&O claims. The VRC can transform the way your agency serves its customers by improving the knowledge and professionalism of agency staff - creating opportunities for revenue growth. For more details and to purchase, visit www.iiaba.net/VRC. To see the VRC in action, click here to experience a limited demo. Here are some more details on the tools the VRC offers:

Commercial and Personal Risk Assessment Tools

Narrative descriptions of operations of businesses in more than 650 different industries including minimum coverage recommendations, customized exposure identification surveys, tools to assist in creating winning proposals, and thorough coverage checklists for valuable customer file documentation should an E&O claim against the agency arise. Also included are recommended SIC, NAICS, GL, and WC classification codes.

Coverage Reference Resources and Proposal Tools - PF&M (Policy Forms and Manual)

A complete resource library of property/casualty policy forms, court cases, explanations of coverage with examples, and lists of endorsements. It also offers suggested brochure wording, proposal language, and exposure analyses. An ACORD® forms library allows agency staff to have ACORD® applications at their fingertips.

Marketing and Prospect Resources

Hundreds of templates of professionally written letters that can be used as a starting point for prospecting, account development, and general account activity. Access to articles and content on topics important to clients that the agency can use to keep their website and newsletters current.

The VRC was created at the direction of Big "I" volunteer member agents like you. They wanted a comprehensive tool to help them grow their business while avoiding agency E&O claims.

It also had to be affordable. VRC is an extraordinary asset with an incomparable price. Visit www.iiaba.net/VRC to purchase.

Office Routing	

"One in five claims that we see with the Big 'I' Professional Liability Program are a direct result of recommendation or risk assessment errors alleged against the agent," says David Hulcher, Big "I" director of agency E&O risk management. "The VRC will go a long way to help agents avoid these types of claims and will increase the professionalism of agency staff."



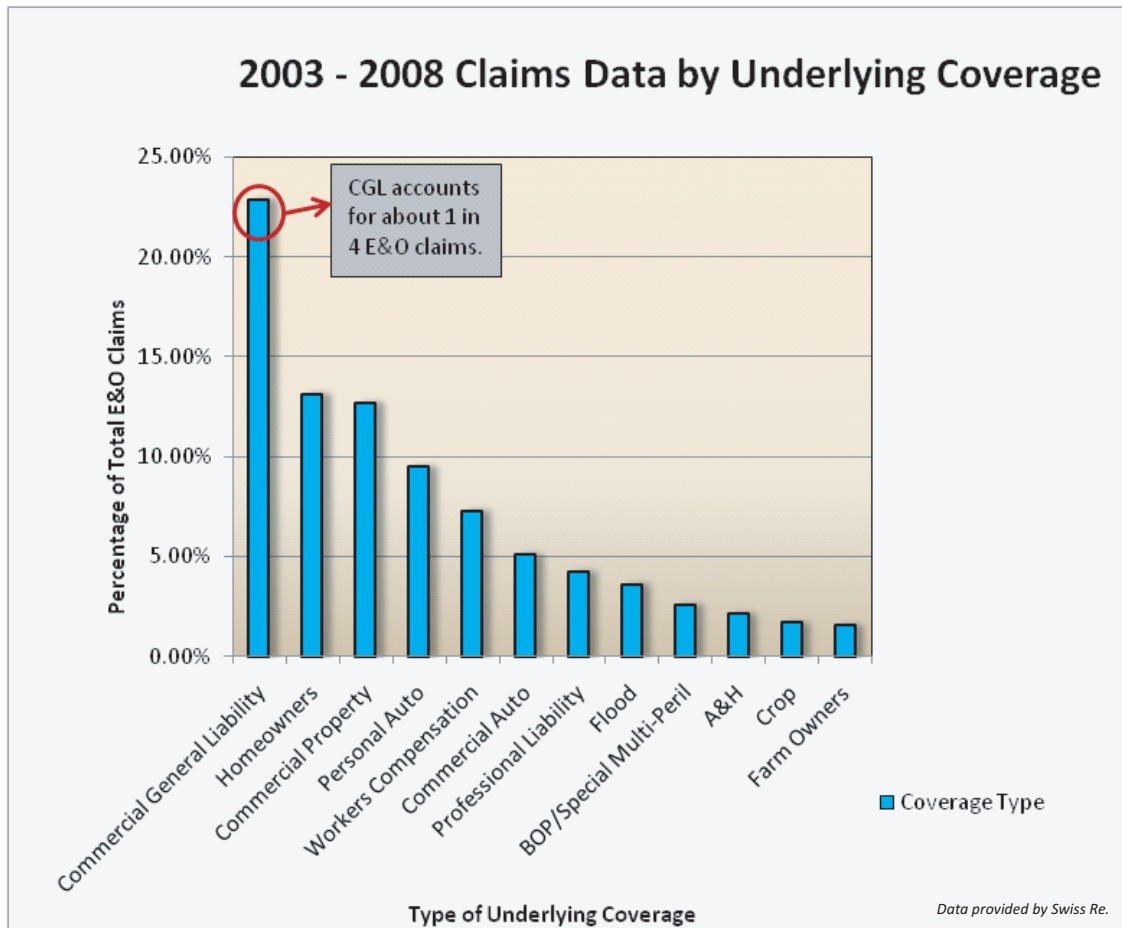
Created by Agents, For Agents!

"The VRC is a culmination of a diligent search of the marketplace for an affordable and easy to use risk analysis tools that will help agencies grow their business. It is thorough, affordable, and easy to use. The product is supported by a strong partner in Rough Notes and their 130 years of experience providing technical insurance content to agents. I strongly believe that member agents will see a positive return on investment, whether it is in growing their business or avoiding the cost of their E&O deductible, by subscribing to the VRC," says Jack Sherrill, chairman of the Big "I" loss control working group and founder and senior partner of Sherrill & Company in Savannah, Ga.

Agency Size (per state)	Annual Subscription Price	Four -Year Subscription Price (Best Value!)
Up to 15 users per agency	\$250	\$750
More than 15 users per agency	\$500	\$1,500

COMMERCIAL GENERAL LIABILITY COVERAGE: AN E&O CHALLENGE

By Judith G. Durst, CPIW, CPCU, AU, ARE, Director of Education, IIABNH



Commercial General Liability (CGL) is the underlying coverage involved in nearly 1 in 4 E&O claims made against agents in the past 5 years according to claims data from Swiss Re, the endorsed carrier for the Big "I" Professional Liability Program. This is more than any other underlying coverage. This disproportionate amount of E&O claims involving CGL is likely because the broad use of the form, the diverse types of underlying risks the form insures, the vast number of endorsements, volumes of certificates of insurance, and issues related to providing additional insureds. The following will explore some of the areas of greatest concern when dealing with these coverage parts of CGL.

Risk Assessment: The First Step for Any Coverage

The top four types of E&O errors are the following:

1. Failure to procure proper coverage
2. Failure to adequately explain policy provisions
3. Failure to identify exposures
4. Failure to recommend the correct type of coverage.

When you are working with a client does your agency first research specifics about the customer's type of business and operational exposures associated with it? Do you review their website to get a better understanding of scope

Did you know? *The Big "I" Virtual Risk Consultant identifies approximately 200 endorsements by form number and title available to modify or attach to the Insurance Services Office (ISO) Commercial General Liability (CGL) Coverage Forms. This list does not include any state specific endorsements or any of the various ISO Terrorism Endorsements. It also provides recommended CGL class codes.*

Agency Staff News

COMMERCIAL GENERAL LIABILITY COVERAGE: AN E & O CHALLENGE (Con't)

of their services? Do you use risk specific questionnaires to determine not only their CGL exposures but others as well? It is very difficult to think of every possible risk exposure that the insured could have but questionnaires can provide you a road map to uncover them. Checklists can be used during the proposal presentation process to document coverages that are offered and accepted and those rejected by the customer. This serves as valuable client file documentation should a claim arise. Industry specific questionnaires and checklists are highly recommended for use no matter the type of customer being insured or the particular line of coverage being offered.

Utilizing more than one method to identify risks is preferable. Your agency should consider coupling industry specific questionnaires and checklists with an inspection of the insured's premises or operations, interviewing the right people, asking lots of questions, doing a flowchart, looking at financials, etc. It can't be stressed enough how revealing looking at the insured's website can be. You will see firsthand what the insured is promising to the public. The idea is to uncover not only the risks that can be insured but those that cannot as well. Only then can the insured prepare for the retention he/she may have to face in the future.

Understand the CGL Policy Form

As with any insurance product you are selling you must be familiar with the language in the policy form being used. If you are using the ISO CGL coverage form, be familiar with the limitations, exclusions, definitions and extensions of coverage. Forms change over time and not all carriers will use the same form so don't assume that you will remember them all. I teach CGL coverages and I don't remember them all! Don't forget to check state exceptions, especially if it's a state that is not your primary state of operation. Coverage may be taken away or broadened utilizing these endorsements and they will be added to all CGL policies written in that state.

Who's Insured? Partnerships, Joint Ventures & LLC's

In reviewing the "Who is an Insured" provisions of the ISO CGL coverage form, included is coverage for newly acquired or formed organizations over which your insured maintains ownership or majority interest. The provision specifically excludes newly acquired or formed partnerships, joint ventures or limited liability companies (LLC). It further limits coverage for any current or past partnership, joint venture or LLC that is not shown as a Named Insured in the Declarations. Insureds are always forming new LLCs based on the advice of their accountant. Do you advise them when you write the coverage and at each renewal, that there is no CGL coverage

Policy Forms and Manual (PF&M) on the Big "I" Virtual Risk Consultant provides P&C policy forms analysis and explanations along with examples. It also includes lists of endorsements that are available.

for the newly formed, current or past LLC unless they are shown as a Named Insured in the Declarations? It should be included in all of your proposal forms.

CGL Endorsements and Class Codes

Don't forget to run through all of the endorsements that are available to be added to the CGL coverage form. It takes time to run through the list to see if there are any endorsements that would be beneficial to your insured. I know, you're thinking that they probably won't buy it. You're missing the point. The problem is that if you don't offer it to them and a claim occurs that would have been covered by that endorsement, you have no defense against an E & O claim. The insured is going to tell the judge "If it had been offered to me, I certainly would have purchased it!" You want to offer the insured as much as possible in the way of handling their CGL exposures. Document your file when coverage is offered and rejected. Confirm everything in writing to the insured. Remember, you are building a defense in the event an E & O claim is filed.

Endorsements can be added when a specific class code is used. You should be checking the CGL section of the Commercial Lines Manual for any footnotes that might apply to the class code you are utilizing. The footnote could indicate that an exclusionary endorsement will be added automatically to the policy. Be careful in determining the correct class code for the insured's operations. The Big "I" Virtual Risk Consultant can provide recommended CGL class codes to help you classify the insured correctly.

Additional Insureds

Speaking of endorsements, how about all those additional insured endorsements? When you issue a certificate indicating an additional insured, the policy must be endorsed to reflect the additional insured status through the use of the proper AI form. Read those additional insured endorsements because they provide only on-going operations additional insured status. There is a separate endorsement for completed operations coverage for additional insureds. That endorsement must be added as well if the additional insured is to apply to both on-going and completed operations.

Of course, you have the blanket additional insured endorsement on the policy so you don't have to worry, right? Wrong! Most blanket additional insured endorsements require that there be a written contract between the insured and the additional insured. If there isn't a written contract, there is no additional insured status provided under the form. You would need to add another additional insured endorsement to accomplish this. When an insured calls looking for a certificate to be issued, don't forget to ask if there is a written contract.

Agency Staff News

COMMERCIAL GENERAL LIABILITY COVERAGE: AN E & O CHALLENGE (Con't)

CGL & Leased Property Damage

Most insureds sign a lease to a premises at some point in their business career. We all know that a lease is one of the “insured contracts” under the ISO CGL form, right? The policy provides a limited amount of coverage for “damage to premises rented to you”. Actually, most carriers include a minimum limit of \$100,000. Is it enough? Remember that this coverage is designed to provide coverage for the portion of the premises occupied/rented by the insured. This portion of the premises is excluded under the care, custody or control exclusion. The rest of the building is covered under Property Damage coverage. What if your insured occupies 75% of a \$5,000,000 building? They have an exposure to \$3,750,000 in damages if they are legally liable for damage to that portion of the property. This coverage can be increased but you won't find an endorsement in the ISO arsenal of CGL endorsements. The coverage can be increased by adding the Commercial Property form Legal Liability coverage.

Employees Benefits Liability Endorsement

If your account offers employee benefits, they have an exposure to an error being made in the administration of those benefits. The ISO Employee Benefits Liability endorsement is designed to cover this exposure. If you have sold them a Fiduciary Liability Policy, the employee benefits coverage is included so you don't need the endorsement added to the CGL. If you do add the Employee Benefits endorsement, remember that this endorsement is a claims-made form and it has a retroactive date. It's very easy to forget that and not check the retro date at renewal.

E&O Exposure

Professional liability is not excluded under the ISO CGL form unless the classification has an exposure then an endorsement is added to exclude the exposure. Make sure you bring professional exposures to the insured's attention. Get them to complete a professional liability application and obtain a quotation for them. This will allow the insured to determine if they want to transfer the exposure by purchasing insurance or if they want to retain the exposure in part or entirely. Once again, document your file accordingly.

How Much Is Enough?

What about liability limits? CGL policies include aggregates that should be at least two times the occurrence limits. Do you explain to your insured how the aggregate works? Most insureds do not fully understand the insurance business so you'd be very surprised by what they believe the aggregate is! Ask them sometime.

How much is enough? Your clients ask you that all the time. I would tell my insureds that I had no idea. I can't predict how a court case will play out or who is going to present a claim. All I can do for him/her is give them the opportunity to see what limits are available and what each incremental increase will cost. They have to make a decision on their limits based on what they feel comfortable with. Cost will always be a

concern for them but they also need to consider the level of risk they are willing to retain. As an example when I worked in an agency, I started at \$1,000,000 per occurrence with a \$2,000,000 aggregate, added the CG 2503 (Designated Construction Projects General Aggregate Limits) & CG 2504 (Designated Locations General Aggregate Limits) and recommended increased limits through an umbrella policy. Remember nothing stays the same and neither should your offer of coverage. You also need to continue to recommend higher limits at renewal.

When discussing limits of liability with your clients, it's not a bad idea to check what types of CGL suits have been brought in your area and what the outcome was. You could also check with industry associations to get a history of losses that might come about from your insured's operations. It doesn't mean that it will happen to them but it does tell them that you aren't just trying to scare him/her into a higher limit just for the additional commission income.

Audit Provisions Issues

It is very important that you explain to your insured that most CGL policies are auditable. Include the words “estimated premium” on your proposal so the insured can see that the premium listed isn't the final premium for the term. Explain to the insured how the final premium will be calculated. You might even want the auditor to visit the insured to provide the insured with details of what documents will be needed at the time of audit. You would be surprised at how many insureds do not fully understand this concept. Include detailed information about audits in your new business proposal as well as all renewal proposals. Be very clear what the premium bases will be and that the insured should be reviewing it regularly so it can be adjusted as needed. It will be much easier to deal with increasing exposures during the policy term when payment options may be more flexible than at audit.

Truckers and CGL

What about truckers and their need for CGL coverage. I have heard several individuals indicate that since they deliver by truck, they don't have a need for CGL coverage. Wrong! Under the CGL and ISO Commercial Auto forms, you will find the loading and unloading exclusions. The idea of having these on both policies is that the two forms will fit together like pieces of a puzzle. When one ends, the other begins. Let me give you a couple of areas you might want to keep in mind. The auto policy ends abruptly and the CGL takes over if the loading or unloading is being done by a mechanical device not attached to the auto. How does your insured deliver their product?

After reviewing this with the insured, you find that they deliver by hand truck or by hand. So you think you are all set, right? The loading and unloading is all auto exposures. Not so fast! Once the product is placed in its final resting place, the auto policy will no longer cover the operations of the insured. So while your insured is walking back to his truck, his operations of loading and unloading have been

Agency Staff News

COMMERCIAL GENERAL LIABILITY COVERAGE: AN E & O CHALLENGE (Con't)

completed and any injury or damage he does at that point would be covered under the CGL, if he is legally liable. Of course, if you didn't sell him a CGL. Back to the E & O problems again!

"Your Work" & "Your Product"

Agents have the best intentions when writing a CGL for a client. One of the areas that has to be explained completely to an insured is the "your work" or "your product" exclusions. The CGL is not designed to provide a warranty for your insured's work or product. If the roof leaks after the insured installed a new roof, the CGL will pay for the resulting damage, if the insured is legally liable, but it will never pay for the repairs to the roof. The same thing happens with the insured's product. If the product causes injury to someone or damage to someone's property, the CGL will pay for the injury caused or the property damage done, if the insured is legally liable. It will never pay for the product itself or repairs to it. Nor will it guarantee that the product will perform as promised.

When dealing with a client who produces a product, you need to bring to their attention that there is no coverage for product recall expenses under the standard CGL. They must purchase that coverage for an additional premium. Another recommendation you want to keep in mind when talking to the insured about their exposures to loss.

Completed and Discontinued Operations

What about when the insured retires from his business? Do you just cancel the CGL and say "Have a great retirement"? Do you offer them discontinued operations coverage? You might say that they don't need the CGL anymore because they aren't operating a business any longer. What about completed operations? Let's say that you are a contractor and you build decks. You have built hundreds of decks in the last 10-15 years. This year, you decide to retire on January 1st. You cancel your CGL policy and go to Florida. Three years later, one of your decks collapses and injures 4 people. The CGL that was in effect when the deck was built will not respond because the definition of an occurrence is when the injury or damage is incurred. Three years later, you don't have a CGL policy in effect. So there goes your retirement money to pay damages and lawyer fees, of course until your lawyer advises you to sue your agent for not recommending discontinued operations coverage. Most clients will not purchase the coverage but that's not the problem. The problem is that you, the agent must identify this exposure and offer solutions to the insured. Documentation in the agent's file that the coverage was offered and the insured didn't buy it could save the agent in an E & O situation.

Other Potential Trouble Areas of CGL

Claims-made CGL Form Consideration

The carrier is not willing to write the CGL coverage unless it is on a claims-made basis. You don't get involved in claims-made policies very often. You need to brush up on the pitfalls of claims-made like the retroactive date. Never change the retroactive date once it has been set. It should

reflect the effective date of the very first claims made policy. By changing that date, you could leave your insured with a large gap in coverage.

Claims-made to Occurrence Form

You finally have an opportunity to place the insured's CGL coverage with a carrier who will write it on an occurrence basis rather than the claims-made basis you have had it written on for the last few years. Going from occurrence to claims-made is usually uneventful but going back to occurrence from claims-made can cause lots of problems. First of all, the claims-made form provides an extended reporting provision but it is very limited. Basically it provides the insured with a 60 day period after the expiration of the claims-made policy to report any incidents that may give rise to a claim in the future. If the insured is aware of the situation and advises the carrier within the 60 day time period, the form allows for a period of 5 years for the claim to actually be made. It's not always possible for the insured to know something has happened that quickly. The new occurrence form will not pick up anything that happened before its effective date. So what do you do? You'll need to quote the insured an extended reporting endorsement. The insured may not buy it but offer it anyway and document your file accordingly.

Non-admitted CGL Form

CGL coverage placed with a non-admitted carrier could also pose a problem. Never assume that the forms utilized will be ISO. Even if they are ISO forms, what edition date of the form is being used? Anyone remember M&C (Manufacturers and Contractors) and OL&T (Owners, Landlords and Tenants)? Check some of the non-admitted CGL policies and you might be surprised to find these old friends.

Above are some of the key areas to consider in avoiding E&O claims related to CGL. While it's difficult to avoid all possible E & O situations, using risk specific questionnaires and checklists to understand the exposures of your customers and thoroughly understanding the CGL form can go a long way toward satisfying the customer while protecting the agency. Customer file documentation should include every conversation and signed checklists outlining coverages offered and accepted and those rejected. Remember that each time you work on your insured's account, you are setting up your defense in the event of an E & O claim.

Judith G. Durst, CPIW, CPCU, AU, ARE, has been in the insurance industry for over 30 years, having experience in both the agency and company side of the business. Judy is past President of the NH Chapter of CPCU as well as the former Education Chairperson & Coordinator for the Chapter. Judy has been an insurance instructor for more than 20 years and has been recognized as an Outstanding Course Leader by the American Institute. Judy joined the Independent Insurance Agents & Brokers of NH as the Director of Education in January of 2005.

A close-up photograph of a computer keyboard with three miniature figures of business professionals standing on the keys. One figure is a man in a suit, another is a man in a blue suit and hard hat, and the third is a woman in a brown suit. The keyboard keys are visible, including 'J', 'K', 'L', 'N', 'M', 'O', 'P', 'Q', 'R', 'S', 'T', 'U', 'V', 'W', 'X', 'Y', 'Z', '1', '2', '3', '4', '5', '6', '7', '8', '9', '0', and 'Enter'.

Agency E&O Considerations When Using Social Media

By Sabrena Sally, CPCU

Not a day goes by without my email containing an invitation to join a social networking site. Whether used for business contacts, maintaining contact with friends and family, or to reconnect with acquaintances from years past, the use of social networking sites is rapidly increasing. According to one internet research firm, 2008 saw the use of social networking sites overtake email by Internet users across the world.

Much discussion has taken place on how to best harness the power of social networking for the benefit of your insurance agency. ACT and other organizations have written extensively on the power of social media to enhance agency online marketing and to generate “virtual” referrals. The focus of this article, however, is to examine the risks that agencies need to take into account when they take advantage of these opportunities to broaden their reach. I will examine the more common errors

and omissions risks that can be associated with the use of social networking, along with steps you can take to mitigate those risks.

If you are not familiar with social networking sites, here is a brief discussion of the most common functionalities. This is by no means all-inclusive, as the technology changes daily. Most sites offer the ability to create a homepage following a template provided by the site. Depending on the site being accessed, the profile template may be limited to key information you wish to be known about your agency 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 you have created and posted. 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.

Rules of the Site

Posted privacy statements and user agreements are standard on social networking sites, and most also include a list of “do’s and don’ts” to follow when using the site. Although containing lengthy legal terminology, it is in your best interest to fully read a site’s user agreements and privacy statements before agreeing to the terms of usage. User agreements tend to be very broad in favor of the site owner, commonly giving the rights to the site to use all content posted by users, and retaining the right to remove, discard or withhold user posted information at any time. User agreements usually state that the site assumes no responsibility to monitor disputes between users, and contain hold harmless/indemnification

agreements in favor of the site for damages suffered by the site as a result of content posted by a user or as a result of any actions of the user while using or misusing the site.

Now, let's assume you have read the user agreements, privacy statements, and "do's and don'ts" of a site you have chosen to use. You are ready to sign up. But wait! Don't hit that submit button too quickly. Instead, take some time to consider what type of errors and omissions exposures your agency may face by using the site.

Overview of E&O Exposures

The exposures can range from advertising, contractual liability, defamation, offering erroneous recommendations, and may even extend to antitrust issues. These are not new exposures to your agency, but the nature of social networking sites does impact errors and omissions exposures in several ways. Information entered on social networking sites is able to achieve instantaneous worldwide distribution in a matter of seconds. An electronic record is also created which can survive indefinitely. In addition, discussions taking place on these sites tend to be more casual and take place more quickly than even email communication, making it easier for a statement to be taken out of context. Let's drill down to the most common errors and omissions exposures faced by agencies using social media.

Contractual Liability

The user agreement on the site most likely contains a requirement that you hold harmless and indemnify the site. The agreement at one popular site is quite broad, stating:

"...you shall indemnify and hold us harmless from any damages, losses and costs related to third party claims, charges or investigations, caused by your failure to comply with this agreement, including without limitation your submission of content that violates third party rights or applicable laws, caused by any content you submit to us, or caused by any activity in which you engage through the site."

That provision in itself is amazingly broad, but it becomes even more so when you look at the definition of the site agreement. The site agreement in this particular case states that you must comply with all applicable laws, the "Do's and Don'ts" posted on the site, the notice and take-down procedures of the site, the site privacy policy, and any other notices of the site.

Advertising Liability

You most likely will create some type of agency home page, so let's look next at advertising exposures. The insurance regulations in several states specifically mention Internet advertising. For example, this excerpt from NY L Circular Letter No. 5 (2001) is both specific to Internet advertising and broad in scope:

"Advertisements that appear on the Internet are subject to all applicable existing statutory and regulatory guidelines and restrictions applicable to advertisements in any other medium."

It is clear that the same level of care should be given to agency advertising on social networking sites as is given to the agency's traditional advertising. Where the line can easily be blurred, however, is when an individual agency owner or employee uses the agency name, logo, or other advertising identifier as part of their personal social networking site.

Does that then constitute advertising for which the agency can be held liable? That question has yet to be settled. The agency's exposures from advertising on these sites can be mitigated by following the same legal vetting process as is used for traditional advertising. 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 (more on this procedure later).

Defamation

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. Your agency has always faced exposure to defamation from verbal discussions and written communications. On social networking sites, however, 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. In fact, the popular site 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. Unlike verbal discussions, comments made on the interactive features of social networking sites or in blogs that accompany online articles are captured electronically and can be stored indefinitely, further exacerbating the issue of less formality.

Keeping in mind that commercial speech - speech which proposes an economic transaction - is entitled only to limited First Amendment constitutional protection, there is a real question as to the level of First Amendment protection business representatives will receive when they write or respond to a blog. The answer is not yet clear. As this area continues to develop, you would be well served to consult with legal counsel experienced in First Amendment law for guidance on creating the agency's policy regarding the content you will permit on blogs on your agency's behalf.

Privacy Issues

Closely tied to defamation is public disclosure of private facts, which occurs when someone reveals information that is not of public concern, and the disclosure of the information would be offensive to a reasonable person. The interactive spaces on social networking sites are not secure spaces for discussing personally identifiable information.

Agency Procedures for Social Web Use

Agency procedures for social networking should require employees to keep their discussions professional and they should 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.

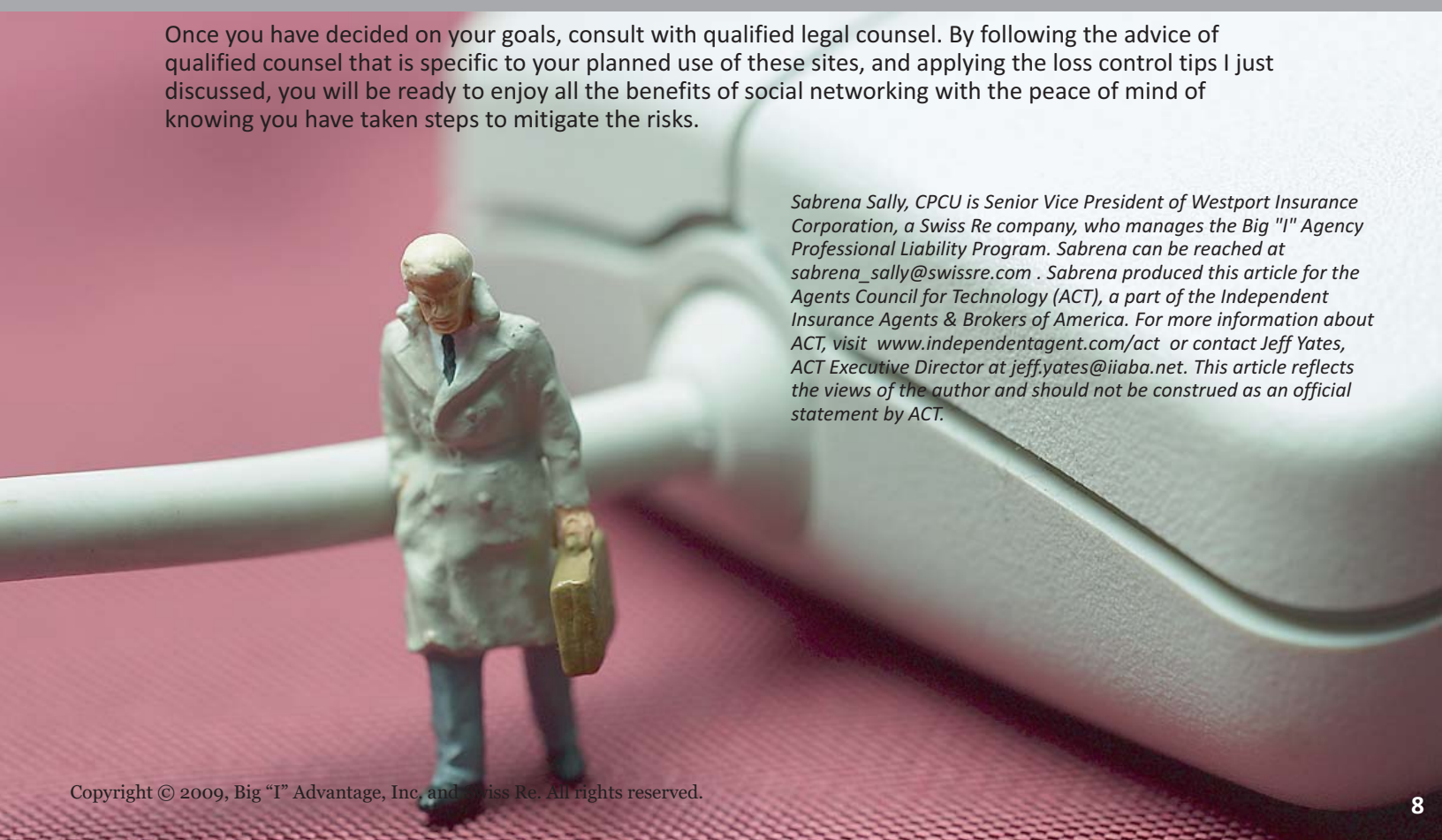
Incorrect Advice

Agencies face exposure every day when rendering or failing to render professional services. Operating in the virtual world of the social web is no exception. Whether it is the advertising of agency services provided as part of the agency home page or comments made in a chat area discussion, the standard of care in providing professional services is no less than what exists in more traditional venues.

The standard disclaimers used on your agency's voice mail, email, and website also should be used on social networking sites. The same agency procedures your staff follows regarding risk analysis, recommendations, and documentation also apply to all content and discussions on social networking sites. As mentioned above, the interactive features of social networks do provide unique challenges. The written procedures your agency establishes to address social networking will not only guide agency staff behavior while using these sites, but will also help protect your agency against allegations of errors and omissions.

Armed with an awareness of the main errors and omissions exposures that can arise from use of social networking sites, you are almost ready to take advantage of the opportunities presented while still protecting your agency against unexpected exposures. But before getting started, give careful thought to what your goals are in using these tools. Do you plan to use sites such as Facebook or LinkedIn more as another venue in which to advertise your agency? Or, are you considering jumping in with both feet and actively participating in or running an interactive discussion to generate new "fans" who can become prospects?

Once you have decided on your goals, consult with qualified legal counsel. By following the advice of qualified counsel that is specific to your planned use of these sites, and applying the loss control tips I just discussed, you will be ready to enjoy all the benefits of social networking with the peace of mind of knowing you have taken steps to mitigate the risks.



Sabrena Sally, CPCU is Senior Vice President of Westport Insurance Corporation, a Swiss Re company, who manages the Big "I" Agency Professional Liability Program. Sabrena can be reached at sabrena_sally@swissre.com. Sabrena produced this article for the Agents Council for Technology (ACT), a part of the Independent Insurance Agents & Brokers of America. For more information about ACT, visit www.independentagent.com/act or contact Jeff Yates, ACT Executive Director at jeff.yates@iiba.net. This article reflects the views of the author and should not be construed as an official statement by ACT.

Producer Tips

As the CGL policy form is the underlying coverage in 1 in 4 E&O claims, producers need to pay special attention when working with customers to procure coverage. Here are a few tips that can help you avoid E&O claims relating to CGL. Be sure to read the above article on common traps of the CGL policy.

E&O Tip #1: Know the CGL policy form you are selling. Be familiar with the CGL limitations, exclusions, definitions, and endorsements. This can be the difference in providing your customer with the coverage that was intended and having an E&O claim. Many carriers have their own coverage forms and endorsements. ALWAYS read the forms and compare them to the ISO coverage forms. Please don't take anyone's word for it. Find out yourself what the differences are and let your insured know.

E&O Tip #2: Advise customer about a lack of coverage in the CGL for newly formed Partnerships, Joint Ventures & LLCs. Do you advise them when you write the coverage and at each renewal, that there is no CGL coverage for the newly formed, current or past LLCs unless they are shown as a Named Insured in the Declarations?

E&O Tip #3: Explain audit provisions of CGL. It is very important that you explain to your insured that most CGL policies are auditable. Include the words "estimated premium" on your proposal so the insured can see that the premium listed isn't the final premium for the term. Explain to the insured how the final premium will be calculated. You might even want the auditor to visit the insured to provide them with details of what documents will be needed at the time of audit.

E&O Tip #4: Never change the retroactive date on a claims-made form once it has been set. It should reflect the date of the very first claims made policy. By changing that date, you could leave your insured with a large gap in coverage.

E&O Tip #5: Be aware of problems moving from a claims-made to an occurrence policy form. This can cause major problems. The new occurrence form will not pick up anything that happened before its effective date. Quote the insured an extended reporting endorsement and document your file accordingly.

E&O Loss Control Tips When Using Social Media:

1. Read the social network 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.
2. Be sure your agency advertising on the site complies with all statutory and regulatory guidelines.
3. Establish an agency procedure addressing employee linking to agency sites or use of agency name, logo, or other advertising on their personal social networking sites.
4. Consult with qualified legal counsel for guidance on the agency's policy on blogging.
5. Establish written agency procedures addressing employee use of social networking sites, including:
 - a. Who within the agency has permission to participate on behalf of the agency
 - b. Define acceptable behavior (professional, fact versus opinion, no leading or participating in attacks on individuals or businesses)
 - c. Employee sites should make clear they reflect their own views and not those of the agency
 - d. Identify when a discussion should be moved offline and into agency workflow
 - e. State the consequences of non-compliance
6. Use standard disclaimers such as those used in voice mail, email, and on website

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.

The Real World: Producer Case Study

Don Jackson was a producer for Mainstreet Insurance Agency. He was approached by Ace Window and Door Products Co., Inc.'s (Ace) to place its CGL coverages. As part of the CGL package, Ace wanted Products Liability coverage to be included. Don was able to place the primary CGL with Exxo Insurance Company and Umbrella coverages with Wie Mutual. The primary policy had a \$1 million each occurrence limit with a \$2 million general aggregate and a \$2 million products aggregate. However, Ace was unhappy with the primary coverage and so asked Don to search for other options.

Twice the Fun on Double Brokered Accounts

Not having other markets for this class of business, Don contacted a broker, BMSI, to obtain alternatives. BMSI was familiar with a program for window manufacturers that was only accessible through another broker, SSI.

Don sent BMSI copies of the applications Mainstreet had used to obtain the original Exxo primary policy. The applications called for a \$1 million occurrence limit with a \$2 million general aggregate and a \$2 million products limit on the primary policy. SSI prepared a proposal that included a primary policy by Zio Insurance and an umbrella policy by Absolute Insurance. Two different employees at SSI handled the primary and umbrella policy applications. The proposal and ACORD® applications at that time indicated the primary policy would have a product aggregate of \$2 million. Neither the application nor the proposal indicated whether the aggregate limit of the primary policy could be eroded by defense costs.

Broker Takes the Lead

As the placement moved forward, SSI began to really take control of the process. Don became comfortable letting the process move forward since he didn't have to do much of the work but would still be getting his commission for Mainstreet. SSI, BMSI and Mainstreet presented the proposal containing the Zio and Absolute

coverage to Ace. Mainstreet's role was limited to setting up the meeting with Ace. SSI handled most of the presentation.

The Zio policy went into effect with a products aggregate limit of \$1 million, with defense costs inside of the limits. Unfortunately, the Absolute umbrella policy contained provisions that required the primary policy to have a \$2 million products aggregate limit and with defense costs outside the limits. SSI sent a fax to Mainstreet indicating coverages had been bound per the proposal. When the policies went into effect, Don and Mainstreet were not aware of a potential \$1 million gap, which could be eroded by defense costs because Don had not been privy to communications between SSI and Absolute and had not seen the policies.

Cursory Policy Review

Three months later, Mainstreet received a copy of the policies and reviewed them per Mainstreet's practice. However, the discrepancies were not noticed. The following year, Mainstreet and SSI prepared renewal applications and proposal, which again called for a \$2 million aggregate products liability limit. The policies were, however, renewed with the same \$1 million coverage gap.

Ace sold windows to Hotels Inc. for installation in hotels across the country. Hotels Inc. alleges the windows were defective and leaked. Various negotiations and suits followed with Hotels Inc. claiming more than \$50 million in damages. The specific claims against Don and Mainstreet allege a \$1 million gap in coverage in each of the two policy years. Additionally, the umbrella carrier sought to rescind the policy because the underlying policies did not comply with their requirements for underlying coverage. A successful rescission action would have increased the exposure of Mainstreet and the brokers not only to the \$2 million gap but also to the \$20 million in umbrella coverage that would no longer be available.

Where Did the Agent Go Wrong?

When Don lost control of the process, he really became disengaged and may have relied too heavily on the brokers to deliver what they were promising. He did little to make sure that the correct coverages were being placed. Although Mainstreet had a process in place to look at the policies before sending to the customer, the review was not done thoroughly enough or they did not have an experienced person who was adequately trained to review policies in those lines of business. The oversights with this customer were that the Products Liability limit on the policy did not match the amount listed on the application and the Umbrella provision requiring minimum underlying limits was overlooked. The mistakes were compounded at renewal when Mainstreet took a more active role in the process but basically just relied on the work that had been done incorrectly by the brokers the year before.

What Do You Think Was the Outcome?

The umbrella carrier sought to rescind the umbrella policies stating that the underlying coverage did not meet their requirements. Hotels Inc. entered into a settlement agreement with some of Ace's insurance carriers that were not disputing coverage and received \$25 million. Ace also agreed to a consent judgment of \$55 million allowing Hotels Inc. to seek to collect that judgment against the non-settling carriers. Ace also assigned all its claims against the agents and brokers. The lawsuit was divided into separate phases for trial. In the first phase the court heard the case between the window installer and its umbrella carrier. Fortunately for Don and Mainstreet, the court did not allow the carrier to rescind the policies, which would have added \$20 million of damages to the claims against the agents and brokers. After this favorable ruling, there was still a \$2 million gap in coverage for the two policy periods. The brokers were able to settle the claim with Hotels Inc (on behalf of Ace) with Don and Mainstreet contributing in the mid six figures including their own \$10,000 deductible.

CSR Tips

Here are some things for CSR's to think about when working with CGL policy forms. Remember you can be the last line of defense for preventing and E&O claim.

E&O Tip #1: Always check the policy against the application. Make sure your policy matches what you ordered from the carrier. Failing to review the policy form when it comes in from the carrier can result in obvious claims that could have easily been prevented.

E&O Tip #2: Pay attention to the edition dates of the policy forms and endorsements. New edition dates can spell coverage reduction in many cases. It's important to be familiar with the particular policy form being reviewed.

E&O Tip #3: Always review all of the endorsements that have been added to the policy. Carriers may add exclusionary endorsements that were never discussed with the producer/CSR. Make the customer aware of these policy exclusions and provide coverage alternatives in writing that are documented in the customer file.

E&O Tip #4: Be cautious when answering coverage questions. When faced with a coverage question provide the customer with the relevant policy language and confer with the insurer if coverage is present. Document the customer file with discussion with insurer.

The Real World: CSR Case Study

ABC Contracting, Inc. ("ABC") entered into a construction contract requiring that it carry CGL limits of \$5 million per claim and \$10 million in the aggregate. At the time of contracting, ABC had CGL limits of \$1 million per claim and \$2 million in the aggregate with Secure Insurance Company. ABC contacted its insurance agency, Taggart Insurance Agency ("Taggart"), by fax and requested the increase in the limits of liability. Specifically, ABC made the request to John, the CSR assigned to Taggart's account.

Gut Instincts Lie—Documented Files Don't!

John has a "gut" feeling that he contacted the underwriter at Secure and requested that she increase ABC's limits. However, he has no specific recollection of forwarding the request to Secure. He did not complete an application and neither Taggart's file nor its electronic activity log contain any documentation or other evidence that John called Secure. John believes that the Secure underwriter may have told him that she would have to get additional authorization for the request, and that she would contact John to finalize the increase in limits. There is no documentation in Taggart's file showing that John followed up on the request.

The Secure underwriter cannot remember receiving the request, and there is no documentation of the request in Secure's file. Also, the underwriter claims that she would not have agreed to increase the limits.

Project Work Begins

ABC began work pursuant to the construction contract. There is some evidence that ABC, the general contractor and the project owner were aware that ABC lacked the required CGL limits. Two weeks into the work, an employee of ABC suffered a severe injury at the construction site requiring seven months of hospitalization and ultimately resulting in his death.

The employee's estate and wife sued ABC for wrongful death and emotional distress. Taggart immediately recognized that it could have a problem when it was revealed that the limits had not been increased and reported this claim to its E & O carrier.

Breaking Down the Situation

There was no dispute that ABC requested that Taggart increase its CGL limits because the faxed request is in Taggart's file. John has a "gut" feeling that he contacted Secure, but Taggart's electronic activity log does not support John's gut. Also there is no documentary evidence (notes from a phone call, faxed request and confirmation or e-mail correspondence) of the request being transmitted to Secure. In fact, John's file is silent when it comes to the

request being forwarded to Secure including any follow up steps taken to check request's status.

The Secure underwriter denies receiving a request and her file shows no evidence of such a request. There is evidence that Secure has issued CGL policies in these circumstances with limits of \$5 million/\$10 million. John also acknowledges that he had other markets for the increased limits even if Secure denied the request. ABC had sufficient assets to pay the premium for the increased limits either with its own money or through a premium financing company.

What do you think was the outcome?

Once the claim was made, Secure confirmed coverage and quickly offered its \$1 million limits in an effort to settle the claim. The maximum exposure to Taggart was \$4 million - the difference between the existing CGL limits (\$1 million) and the requested limits (\$5 million). In this claim, the likely verdict potential for the claim was \$4.5 million. As a result, the likely exposure to Taggart was \$3.5 million.

Taggart argued that it was entitled to a discount on the settlement to reflect that there was some evidence that ABC and the other construction parties knew that the contractually required coverage was not in place when work began, therefore waiving that requirement. The claim settled for a total of \$3.5 with Secure paying \$1 million and Taggart paying \$2.5 million.

Taggart and John's lack of file documentation and activity log notes were the biggest hurdle for Taggart to overcome in avoiding liability in this claim. The best evidence that Taggart forwarded the request to Secure was John's "gut" feeling that he had done so. Alone, that evidence is weak. However, when combined with a lack of file notes, phone records, fax records, emails and testimony from the Secure underwriter, Taggart faced an almost certain finding of liability. Juries find contemporaneous notes and file records much more credible than a CSR's recollection and "gut" feelings months or even years after the disputed transaction. A fax confirmation page and a file note indicating a quick follow up phone call to Secure could make this claim defensible, or at least result in a greatly reduced payout on Taggart's behalf. The fact that Taggart had the latest technology in file maintenance and diary systems did not overcome a CSR's inattentiveness and workload.

Newsletter disclaimer: The information provided in this newsletter is for informational purposes and is not intended as legal or other professional advice. Please procure the appropriate legal or other professional advice and services to address your individual circumstances. There is no representation, guaranty or warranty made as to the sufficiency or accuracy of the information provided. The premise of the above claim scenario(s) is based in part on actual errors and omissions claim(s). The facts and circumstances may have been revised to better illustrate the subject matter. For questions or comments about the E&O Claims Advisor email EO@iiaba.net.

CGL: Tips from VU Experts



By Bill Wilson, CPCU, ARM, AIM, AAM is Director of Big "I" Virtual University

The line of insurance with proportionately the highest incidence of E&O claims is CGL coverage. This is probably not surprising given the broad use of this liability coverage, the complexity of exposures that it's used for, and the number of endorsements that can be overlooked. We polled the VU faculty to see if we could get some more specific examples of things to look out for in the CGL program that could lead to E&O claims. Here were some of their comments:

What the VU Experts Had to Say

- ▶ The sheer size of the CGL's scope of coverages, plus the extremely diverse types of risks covered, make it the Mt. Everest of insurance in my estimation.
- ▶ There are a huge number of endorsements, some of which provide additional coverages, and some of which restrict/exclude coverages, which adds to the complexity of what customers need.
- ▶ In any given agency, there are probably several editions of the CGL in use, considering all the liability markets an agency of any size might have access to. And not only are there different editions of the ISO CGL around, many insurers, and certainly many surplus insurers, have either a proprietary edition, or have some unique endorsements which change coverage.
- ▶ Many commercial liability insureds sign contracts with their customers, and the provisions/requirements of most business contracts used today demand coverages and/or conditions which can be difficult, if not impossible, for the CGL to adequately respond to.
- ▶ Coordinating the CGL with excess, buffer, and/or umbrella policies is usually challenging, given that these policies are usually not standard.

- ▶ The fact that most producers are out chasing new business and delegating to staff the chore of packaging and delivering the policy for the client, and you have now created the perfect recipe for misunderstandings, gaps in coverage, and ultimately E&O claims against the agent.
- ▶ CL only covers BI/PD not "any and all." (Get the word blanket out of your vocabulary.)
- ▶ Be sure to understand the differences between Named Insureds and Additional Insureds. There is no such thing as an "Additional Named Insured" endorsement.
- ▶ The pollution exclusion is NOT absolute.

Quick Tips from a VU Expert

The agents who have done the best job of avoiding these pitfalls relating to the CGL policy do the following:

1. Stay close to their clients and talk to them, in person, at least once a year to make sure they know what the insured is doing in his or her business.
2. Understand the insured's industry so that the agent can independently assess the most likely risks for that client.
3. Ask the insured questions that draw out the need for extensions of coverage or new coverages to protect against most likely risks. Even if they don't buy it, by documenting that they had the discussion, the agent might dodge the E&O bullet later.
4. Thoroughly understand the coverage you are offering.
5. If the customer doesn't buy it, document your file.
6. If the client won't buy sufficient cover for the likely risk (i.e., if an unreasonably low limit makes the insured a candidate for a limits demand on every claim), then don't take the business.
7. Don't process renewal applications for insureds who habitually wait till the very last minute (after ignoring all your prior reminders, requests, offers to fill out the application for them, etc.) to seek a quote.
8. Make sure your outgoing voicemail message and email out-of-office response states that coverage can't be bound by voicemail or an email request.

Do you have CGL stories to tell? If so, email bill.wilson@iiaba.net.

Agency Shield Program™ - Protection Moment

Attracting new clients and writing new business is one of the greatest challenges in the insurance industry. Producers work very hard to get business on the books and are often highly incented for this. While putting together a winning proposal is always very gratifying, every new account creates a new E&O exposure for the agency.

The Swiss Re claims team receives claims on a daily basis where the agent didn't take the time to review the policy for accuracy prior to delivering it to the customer. Once an account is on the books, strong procedures can help you avoid E&O claims relating to the policy receipt and delivery process. Does your agency have a procedure in place to make sure

policies include the coverage that was anticipated? If not the Agency Shield Program™ recommends the following steps:

Step 1: Develop a review checklist to ensure new policies are accurate and issued as requested. Review of applications, questionnaires, coverage checklists, and proposals should be incorporated into the review process.

Step 2: Agency managers should meet with staff to outline the new process and ensure that process is understood and followed. It should be stressed that policies should be reviewed prior to being delivered. Established timeframes for policy reviews should be put in place. This is especially important

because policies should be delivered in a timely fashion especially in states where there is an established duty for the customer to read their policy.

Step 3: Workflow should address who is responsible and what steps are to be taken regarding incorrect policy documents. Customers should be made aware of the error and be kept abreast of status of correcting it.

Step 4: Monitoring to make sure staff is reviewing policies upon receipt is key to a successful process. Audit compliance and build it into your procedures manual and audit process regularly.

Agency Shield Program™ Available Through State Associations

Need help reviewing your agency's processes and procedures to ensure that you are running the agency as efficiently and effectively as possible while protecting yourself from E&O claims? The Agency Shield Program (ASP™), available exclusively for Swiss Re policyholders, is an E&O claims prevention consulting program designed to reduce E&O exposure, improve client service and build sustainable, profitable processes. This self-paced program is not only affordable and an easy way to reduce the agency's exposure to E&O claims and improve client service, it also offers an additional 10% credit on your Swiss Re E&O policy for completion and implementation.

To learn more about the benefits of the Agency Shield Program or to purchase visit: www.iiaba.net/EO. While there check out the ASP webinar for detailed information.

