

# E&O Claims Advisor

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



Swiss Re  


November 2008

## Two Birds with One Stone

One of the most important things you can do to protect your agency from a E&O claim is to create a culture that emphasizes an awareness of the critical nature of E&O loss prevention. A great way to do this is to send all of your staff to a state Big "I" sponsored agency E&O seminar. As a member you generally get preferred rates and continuing education (CE) credits towards insurance licensure and the recently updated E&O seminar contains valuable claims data around what is causing agency E&O claims. By attending the seminar, agency staff not only improve their knowledge of best practices for agency E&O risk management, they also earn credit hours towards CE requirements. This kills two birds with one stone and is a good use of your budget in a tightening economy.

Big "I" state associations are leaders in the insurance industry with their E&O education services. State Big "I" E&O classes target the claims drivers specific to your state and their approved, high-quality instructors are familiar with ways to reduce your agency's exposure to claims. Many Big "I" associations also offer in-house seminars, which may make 100% agency staff attendance even more feasible. Staff E&O awareness is the most important step an agency can take to avoid the time and headache of being involved in a claim, and these same steps can improve overall business practices, creating a more efficient and profitable agency.

Office Routing	

A close-up photograph of a fountain pen writing the word 'Liability' in blue ink on a white surface. The pen is positioned at the top right, and the ink is still wet, showing some bleed-through and a slight shadow.

**The Checklist Issue:  
Dotting your "i"s and  
crossing your "t"s.**

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For questions or comments about the E&O Claims Advisor email [EO@iiba.net](mailto:EO@iiba.net).

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# Agency Staff News

## *Make your Mark with a Risk Analysis Checklist*

The essence of an E&O claim is pretty simple when you think about it. We don't see many claims in the Big "I" Professional Liability Program for "over-protecting the assets of my company," "offering me coverage that I really didn't need," or "responding too quickly and thoroughly." Instead the claims are "failure to procure the coverage requested," "failing to recommend coverage," "failing to identify exposures," and "not adequately explaining policy provisions." Using risk analysis exposure checklists can make your agency staff less vulnerable to agency E&O claims. The benefits of an agency using risk analysis checklists are numerous.

### Benefits of Risk Analysis Checklists

1. **Helping the agency reduce exposure to both knowledge and procedural-based E&O claims.**
2. **Providing some vital documentation for the client file - a valuable defense tool.**
3. **Making it easier for producers to identify client risk exposure and to fill gaps in coverage.**
4. **Facilitating an increase in agency premium production through cross selling opportunities, uncovering hidden profits.**
5. **Providing a more clear picture of clients needs and understanding of their business, increasing the client perception of professionalism.**

Below are some common questions about using checklists with answers from the LCWG:

1. **Is using a checklist a recommended best practice for agencies?** Yes, using checklists has a number of benefits in avoiding E&O claims and improving the agencies ability to increase production. There should be a single checklist or system of lists used by all agency personnel.
2. **Does using a checklist increase the agency's standard of care with its customers?** The standard of care an agency must meet is largely determined by the state in which you are doing business. However, using a checklist is simply a best practice which does not in itself necessarily establish a higher standard of care. Nor, does not following a best practice mean that an agency is negligent in the duties owed its client. Use of checklists may improve your agency operation and eliminate exposure to claims for failure to procure coverage.

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3. **Will using a checklist help in the defense of an E&O claim?** In general, Swiss Re indicated that the more often a comprehensive coverage checklist can be used, particularly in jurisdictions with challenging legal environments, the better position they will be in to offer a solid defense.

### Why a checklist?

The leading driver to E&O claims is "failure to procure coverage." These types of errors can be both knowledge based and procedural in nature. Knowledge-based errors occur because of inadequate training, lack of coverage familiarity, or an inability to properly analyze risk exposures. Procedural-based errors are those generated from a lack of timely action or follow-up, including not properly documenting the client file. CHECKLISTS CAN HELP ADDRESS BOTH TYPES OF E&O CLAIMS.

The benefits of checklists are clear. Search the Big "I" Professional Liability Programs seminar on "A Practical Guide of E&O Risk Management" and the only phrase you'll likely see more frequently than "Use a checklist" is "Document the client file accordingly." Given the varying complexities of accounts and their willingness to participate in a thorough risk analysis review, is it realistic to use an exposure checklist on all accounts? After surveying Best Practices agencies on their use of risk analysis checklists, the Loss Control Working Group ("LCWG") for the national E&O program worked with Swiss Re team members to provide practical guidance for using risk analysis in the real-life agency world.

### What is LCGW?

The Loss Control Working Group ("LCWG") is a group of agency volunteer leaders and state association staff which works to develop E&O risk management tools and guidance.



**Agency best practices don't in themselves increase your standard of care.**

# Agency Staff News Continued

**4. Does the agency need to use a risk analysis checklist on all customers?** In a perfect world, yes, a checklist would always be used. For all practical purposes, however, it is unrealistic to expect a checklist be used for every customer. Agencies should establish a procedure that defines when checklists should be used, what checklist should be used, and how the documentation is to be completed and maintained. Criteria may include, for example, all new business accounts, complexity of a customer's insurance needs, the uniqueness or severity of a type of exposure, or perhaps all accounts every third renewal. The criteria for accounts should not be one based on premium size or account commission.

For those accounts where a checklist is not required the LCWG felt that the agency could provide customers with written confirmation that the agency procured the coverage requested by the customer and offer to provide a more thorough risk exposure analysis upon request.



**Following checklist procedures must be mandatory with no exceptions. Compliance with the procedure should be a key ingredient of employee reviews. Being able to establish and show a pattern of practice is beneficial in defense of E&O claims.**



**Agencies should have criteria other than premium and commission to determine where checklists are used. Their procedures should dictate when the checklist should be completed and by who in the agency. Be sure the checklist lists who at the client was interviewed and is dated.**

**5. Should risk analysis checklists be used on both new and renewal business?** This will depend on the procedures your agency develops and implements. Using checklists on both new and renewal accounts can have a very positive affect on reducing your agency's E&O exposure. Claims are frequently generated from accounts that are renewed "as is". Both the exposures of personal and commercial lines customers change over time and checklists can unveil exposures that are sales opportunities.

**6. Should we develop our own agency risk analysis checklists or purchase commercially available ones?** While our survey of agencies revealed that agents preferred to customize their own, it is better for an agency to purchase commercially available or "industry-standard" checklists. Checklists should be thorough, current, and standardized. It can be challenging for an agency to develop and update a comprehensive checklist without missing something. In addition, using commercially available checklists means that agency staff are less likely to modify them. For consistency in procedures, all agency staff should use the same checklists for customers meeting the pre-determined criteria and follow procedures. Agency management systems also offer risk analysis checklists as part of the system.

**Where can your agency find commercially available checklists?** Below are some companies that offer access to risk analysis checklists. Some may offer generic commercial and personal lines checklists while others provide risk specific checklists. This information is provided strictly as a resource where agencies can start the process of searching for commercially available checklists for the agency to use. By including a resource in this list, we are not endorsing any of these vendors. There may also be other vendors in the market offering checklists as well.

*www.roughnotes.com*

Producers Commercial and Personal Lines Risk Survey

*www.irmi.com*

IRMI's Exposure Survey Questionnaire, 5th Edition

*www.amsservices.com*

AMS Producer Plus

*www.silverplume.com*

Sage by SilverPlume

*www.nationalunderwriter.com*

FC&S Online

*www.insuranceskillscenter.com*

Insurance Skills Center Coverage Checklists



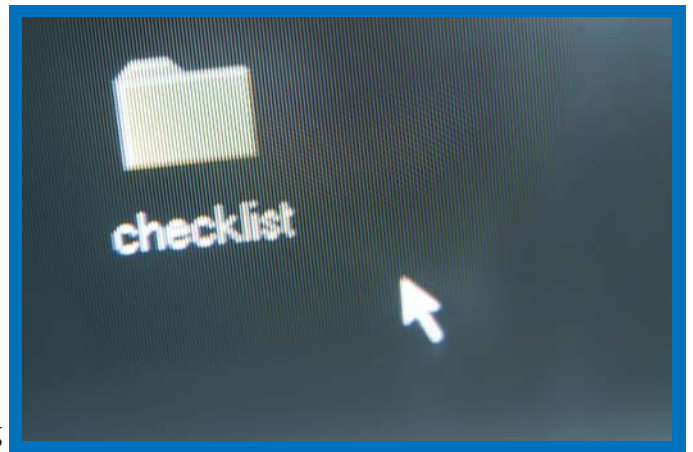
**Using checklists on renewals can unveil changes in customers' exposures and sales opportunities resulting in hidden profits.**

**Visit [www.independentagent.com/EOHappens](http://www.independentagent.com/EOHappens) to view a free sample personal and commercial lines checklist.**



# Producer Tips

Almost 50% of E&O claims involve the allegation of failure to procure coverage, failing to identify exposures, and failing to recommend coverage. The good thing is that producer's interests in avoiding these claims are directly related to increased sales and client satisfaction. While the standard of care in the state you are doing business will dictate your legal duties in procuring coverage for your client, below are some tips that may help you avoid E&O claims, identify gaps in coverage, and sell more coverage. Keep in mind that this does not mean you should go out and hold yourself out as something you're not.



**E&O Tip #1: Use a checklist.** I know you're probably getting tired of hearing this but there are a lot of benefits (which we've listed above) to using checklists. If your agency has these as a tool to use that is great, but make sure all staff are using the same checklists and using them as outlined by the agency's procedures manual.

**E&O Tip #2: Use several methods to identify your clients' exposure to loss.** A checklist is just one method for identifying coverage needs. Physical inspections, employee interviews, reviewing marketing materials and websites, and financial statement analysis will provide you with a better understanding of your client's operation. Understanding past losses may also provide some insight of their insurance needs.

**E&O Tip #3: Offer increased limits options to new and renewal clients.** The decision of how much limits to carry is ultimately up to the customer but it doesn't hurt to explore higher limits and include them as an option in customer proposals. For renewal accounts changes in current insurance rates may make higher limits more affordable and help stem eroding customer premiums. You can also stimulate your client's thinking on limits by engaging in a discussion of their maximum possible loss and their probable maximum loss.

**E&O Tip #4: Continue to educate yourself to become more of a coverage technician.** The more you know about the options for coverage that can insure your clients' exposures, the more insurance you will sell. This will result in better client relationships and a reduction in the possibility of being involved in a claim. Remember that being a coverage technician does not mean you should be the one to determine if claims of clients are covered under their policy form - that is the carrier's job.



**Maximum possible loss is the clients worst nightmare unfolding, in other words, the worst possible loss at the worst possible time. This will help determine the outer most limits needed to cover such an event.**



**Probable maximum loss is the largest loss that is likely to occur.**

# The Real World: Producer Case Study

## Murphy's Law

Charlie, a busy partner in a growing law firm (currently 30 employees) and David, an experienced producer of a large agency, meet to discuss procuring coverage for the firm since the retirement of its previous agent. Before the meeting, David reviews the coverages that were placed by the previous agent and gives Charlie a proposal which duplicates that previous coverage. Although the agency has a checklist and a procedure which dictates the review of all the items on the checklist with any new client, David chooses not to use the checklist as he's confident he's placed the appropriate coverage based on his review of the prior policies. What's more, Charlie is very impatient and in a hurry to get back to the office, David even takes a moment to congratulate himself for verifying that the new policies properly address the retro dates needed for newest members of the firm.

## Oldie but Goodie

Back at the law firm, Janice, 66, the long time secretary of the firm, had her annual performance review on January 15. At that time, she was issued a written review by Amy, the new office manager, which included a statement that her attitude and behavior were having a negative effect on the morale and productivity of the law firm. Amy often made off-handed comments asking Janice when she was going to retire and why she continued to work at her age. Over the next couple of months, Janice took several days off for various doctor's appointments and tests. When Janice was out of the office, it fell to Amy to cover her work load. At the end of June, the law firm terminated Janice's at-will employment citing her poor performance review and failure to improve her attitude.

Janice filed an EEOC complaint and ultimately a lawsuit alleging damages because of wrongful termination based on discrimination under the Age Discrimination in Employment Act of 1967

(ADEA). She alleged that her termination was based solely on her age and that the younger office manager was using her performance review as an excuse. After all, she had received the same comments in previous reviews and there had been no repercussions.

## Where's the EPL Coverage

The law firm turned the claim in to the agency and it was at this point that the agency realized there was no coverage for the firm. Employment Practices Liability Insurance (EPL) protects employers from liability for wrongful employment practices and can be endorsed onto a Business Owner's Policy (BOP) or written as a standalone policy. Since this was excluded under the CGL policy, the firm then made an E&O claim against the agency for failing to offer this type of coverage.

## Caveat Emptor - Maybe Next Time

If David had taken the time to use the coverage checklist, he would have been able to explain and offer this coverage to the law firm. When the prior agent first began placing coverage, the firm may have elected to forego EPLI coverage based on the relatively small number of employees and their long-term relationships. However, had David used the checklist and engaged Charlie in a conversation regarding the growth of the law firm, they would have discussed that CGL policies typically exclude coverage for employment-related claims and that without the EPL endorsement, the law firm has a gap in coverage and is exposed to losses from claims of discrimination through violations of Title VII, Age Discrimination in Employment Act and Americans with Disabilities Act.



# CSR Tips

Meeting the clients exposure needs is a team process. Let's face it, with the opportunity to insure clients from so many different industry segments, it's not an easy thing to do. Here are a couple of tips that CSR's can do to keep the agency safe from expensive and time consuming E&O claims.

**E&O Tip #1: Make sure the same checklists are being used consistently by producers.** The same risk analysis checklist should be used by all of the producers when a client falls within the criteria set by the agency for using checklists. The checklist should be completed thoroughly by the producer and if not, have the conversation with the producer for anything that is missing. If you discover exposures that have not been addressed let the producer know. Document the client file with the producers comments.

**E&O Tip #2: Don't simply renew accounts "as is".** E&O claims frequently stem from the policy being renewed "as is". Your customer's risk exposure changes with time and you can be the one who helps make sure that their insurance evolves with them. By doing so you are putting your agency in a position to add value to your customer and increase commission income. Work with the producer to do this, using a checklist if the account meets the agency's established criteria for doing so.

**E&O Tip #3: Thoroughly document conversations with customer and agency staff.** Comprehensive documentation is the most important thing agency staff can do to keep them from being involved in an E&O claim or to provide a solid defense should an E&O claim occur. E&O claims are frequently swearing matches where the customer is saying one thing and agency staff says another. Documenting and following agency procedures will show the agent did what said they did. Don't let documentation of client conversations fall to the back burner because it will come back to haunt you. Important elements of documentation include; who initiated the call, the date and time of the call, and the action required. A clients declination of coverage or limits offered is important information to document, as well as a tracking of the status of claims submissions to the carrier.



# The Real World: CSR Case Study

## A Nip/Tuck Error

Betty is a CSR for an agency specializing in commercial insurance. She primarily works with Bob, one of the agency's top producers. Bob's practice is to meet with the clients and discuss insurance over a meal, where he usually takes general notes then follows up with Betty about any changes that need to be made.

At the request of the agency's risk manager, Bob is starting to use coverage checklists when he meets with clients. He finds them a bit cumbersome and he's more concerned with having a robust discussion with the client than filling out a form while he meets with them.

One of Bob's larger accounts is Alton Surgi-Center. Alton is a small outpatient surgery center that specializes in plastic surgery. As Alton's insurance is up for renewal, Bob meets with the president and risk manager to discuss their insurance needs. After a brief discussion in which the clients tell Bob they see no need to make any changes, Bob draws a line down his checklist, reflecting "no change" under each additional insurance endorsement. The discussion then moves on to college football. Toward the end of the meeting, the president tells a story about Dr. Borhn, one of the center's doctors who has a short temper and has a reputation for occasionally yelling at nurses and other doctors during surgery. The risk manager then follows up the story, telling Bob, "you know, seriously, you probably should add EPLI to the policy, in case one of these nurses sues us". Everyone laughs, and Bob responds

that the endorsement can be added for "next to nothing" and he'll make sure it is added.

## Check Marks the Spot

Back at the office, Bob begins to put the renewal documents together for the CSR. Remembering his discussion, he quickly draws a line next to "EPLI Endorsement" which in effect crosses out the negative check box and points towards to the box that indicates "add" it to the policy. Bob then drops the checklist in the outbox and hurries out to a lunch meeting with another client.

After Bob leaves, Betty picks up the renewal paperwork from Bob's desk. She sees he has done his customary job completing the checklist, marking straight down the sheet. This is typical of most of his renewals, especially as he still has a habit of telling her about changes, regardless of what the sheet indicates. Betty takes the checklist, briefly noting what appears to be a stray pen mark across the line near EPLI and processes the renewal with no changes. The policy is issued and as usual Betty reviews the coverage and confirms it matches the coverage checklist.

## Birthdays Suit? No Lawsuit!

About three months later, a nurse sues the Surgi-Center for sexual harassment alleging a number of the aforementioned incidents with Dr. Borhn. The risk manager calls Bob, who assures him there's coverage for the claim and instructs him to turn the claim into the liability carrier. After the carrier denies coverage, a short internal

investigation reveals the error and this matter is turned into the agency's Errors & Omissions carrier.

## Procedural Face Lift

The agency intended to update its procedures to comply with good risk management practices. Although this is a laudable effort, care should be taken to address inconsistent implementation. In this case, the CSR relied on a system that was being inconsistently used - namely filling out the coverage checklist and continuing to use the old system in which Bob told her of any changes. Ideally, the coverage checklist should be checked - box by box - by the producer while he's discussing coverage with the client. More importantly, the system used for filling out the checklist and communicating changes needs to be consistent so that both the producer and CSR understand and can properly place the coverage. And, Betty would be well served to question Bob about any stray marks on the coverage list.

## Quick, Call a Doctor!

After a brief investigation, the E&O carrier confirmed liability against the agency and settled the case on behalf of Alton. Despite the quick resolution, the employment litigation against Alton moved slowly and the Surgi-center decided to move its business at the next renewal to one of Bob's competitors. In addition to the loss in premium, the added stress of the claim and loss of a valued client has drastically changed Bob's working relationship with Betty.

# DID YOU KNOW

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