Don't Take on Duties You Don't Owe

Disagreements about the quality of the services an agent provides customers are inevitable in today's litigious climate. The key to both preventing disagreements and ensuring the best possible outcome of any legal dispute is to provide prompt and professional services. To do this, agents must understand their duties to customers. These legally imposed duties form the minimum standard that agents are held to in the event of an E&O claim. While it is a good business practice to do more than the minimum, taking on too much can create more problems.

Under the statutory and case law of several states, insurance agents have varied duties to customers. In some jurisdictions, agents are merely "order takers" responsible for giving customers exactly what they ask for (or promptly advising that they cannot procure an order). In other areas of the country, based on what agents knew or should have known about a customer, agents may have additional duties to recommend coverage types and/or limits that they believe are appropriate, even when the customer did not request them. The courts generally will evaluate the agency or agent's actions against the applicable standard. Those who fall short of the duty they owe are in for an expensive lesson.

In an effort to provide better service to the customer, agents often inadvertently assume a greater duty than the minimum imposed by law. When an agency's actions can be seen to suggest a risk management relationship, the plaintiffs' attorney will try to characterize the agent/customer relationship as a "special relationship," which means that the courts are prone to hold the agent to a much higher standard than the minimum duty imposed by law.

The most obvious way to inadvertently create a special relationship is to hold out the agency as a risk manger or to offer a "full service" insurance agency or "one-stop shopping." Promotional materials or statements on an agencies' Web site or business cards often use this verbiage. Even using promotional messages instead of hold music can create additional duties. While some may look at the advertising statements as puffery, a careful review of exactly what your agency is telling its customers about what it will and will not provide, regardless of where the message comes from, is an essential part of the agency's own internal risk management.

Reviewing both the duty the law imposes on agencies and any additional duties that they take on as a result of their own representations is a central theme in good agency risk management. A thorough review of your agency's communications, advertising and promotional materials will not prevent all litigation. However, knowing what standard your agency's actions will be held to in the event of a disagreement will help the agency minimize its risk and understand its liabilities.

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Best Practices for Avoiding E&O Claims

You haven't even written the account, yet you must be careful to not create E&O exposures. Here are some proactive steps you can take to help prevent a possible future E&O claim.

- Develop a written procedure for reviewing marketing and advertising materials.
- Always check advertising and marketing materials to be certain they do not over-promise benefits of policies or services to be received.
- Avoid use of terms like "all risk" that imply that coverage is broader than is actually the case.
- Be sure to review all materials that agency personnel, including producers, develop themselves prior to distribution.
- Remember that the same rules for printed materials apply to the agency's Web site. Include disclaimer language on any proposal.
- Review coverages provided and options offered and rejected with the client.
- Advise customer in writing of coverages that cannot be placed.
- Document in writing any coverage declined by the applicant.

—J.D.