

Above and Beyond: When Web Sites Create Additional Duties

In today's competitive market, every agency wants to distinguish itself from its competitors. Consumers are increasingly computer-savvy, so you may decide to advertise your agency's services on a Web site. You may promise your clientele you will go above and beyond the call of duty to meet their needs. There is nothing inherently wrong with this—excellent customer service is the cornerstone of any successful agency. You must realize, however, that Web sites with promises to go above and beyond the call of duty may actually create a higher duty than courts ordinarily would use to determine whether your agency fulfilled its legal obligation to a particular client.

Generally, an agent-policyholder relationship is considered an arms-length business relationship. In most jurisdictions, the general rule is that an agent's duty is to provide the coverage its client requests. This is commonly referred to as the "order-taker" duty. The rule varies from state to state and a minority of courts have held that an agent's duty is higher than that of an "order-taker," but this discussion will focus on the general rule.

The "order-taker" duty does not generally require that an agent recommend additional coverages, set coverage limits, recommend higher limits or assess a policyholder's risks and coverage needs. The agent may rely upon the information provided by the prospective policyholder and must act with reasonable care to place the coverage requested, or timely notify the client of the inability to place coverage. As with most rules, this one is subject to a number of exceptions. Statements on your Web site may open the door to the "special relationship" exception, which is becoming more popular in litigation against agents.

The "special relationship" exception recognizes that, based on a course of conduct, a more involved relationship may develop between an agent and his client. As a result of this "special relationship," an agent may owe his client a fiduciary duty, which generally requires the agent to assess the client's needs and recommend appropriate coverages to meet those needs. Each jurisdiction has different tests for determining whether or not a "special relationship" exists. One recurring element in these tests is whether the agent assumed responsibilities beyond those normally owed, whether by express agreement with or by making a unilateral promise to its client upon which the client relies.

How can you address this potential of increased risk? Be certain your agency provides the service your Web site advertises. For example, say your client requests a simple homeowner's policy without sewer back-up coverage and then suffers a loss that would only have been compensable if that coverage was endorsed onto the policy. In a typical "order taker" jurisdiction, the agency should not be liable as it procured the coverage requested. However, if your Web site states that "We will leave no stone unturned in making sure you have complete coverage," your client can testify that he relied on your agency to make sure he had complete coverage as advertised, and your agency can be found liable for failing to fulfill the duty stated on your Web site. If you review your Web site and determine that your agency is not providing what it advertises or does not have the capability to do so, revise the Web site.

As important as actually providing the services, you need to be able to prove the services were provided. Your file documentation, standing alone, should include the evidence necessary to show that you have performed to the level of expectation a client could allege your Web site creates. In the above example, if you offered and the client declined the sewer back-up coverage, a short letter outlining the offer and confirming the declination would go a long way toward proving that your agency met its duty to the client. [\[A\]](#)

Dawn Goeres, JD, CPCU, is SwissRe's assistant vice president, claims and liability management.



Avoid Promises You Can't Keep

What constitutes a unilateral promise? Review your Web site. Do you characterize your agency as one that acts as a "consultant," "partner" or "long-term business partner" with its clients? Do you identify your staff as experts who essentially function as "unpaid" extensions of your client's staff? Do you say that an account executive will work with the policyholder to evaluate and identify potential loss exposures? Do you advise that you will structure an insurance program that fits your client's every need? Do you state that you will assist your client with "every step" of the insurance process?

These statements alone do not create the "special relationship." Courts also look to whether the client relied on the promises and statements at issue. Your client can meet this element, however, by producing only minimal evidence that it relied on your representations. This means, among other things, that any litigation involving a question of whether or not a special relationship and the attendant heightened fiduciary duties exist is more likely to be protracted than litigation involving the more general "order-taker" duties of a business relationship. A jury instructed to evaluate your conduct against this higher standard is more likely to find that you breached your duty to your client and therefore must pay damages.

—D.G.