

Lawsuits, Legalities and E&O Claims

You've just received a subpoena requiring you to produce all the documents in one of your client's files or to give your deposition. The subpoena looks very "legal" and contains language advising that ignoring it is not an option. Since neither you nor your agency is named in the lawsuit, you're prepared to make copies and turn over the documents or go sit for your deposition.


Is this the right decision? Probably not.

Receipt of a subpoena, even one simply requesting documents, constitutes a "claim" under most professional liability insurance policies. A subpoena or a request to produce documents or give a written or recorded statement should be immediately reported to your errors & omissions carrier.

Today, agents are routinely sued for failure to procure adequate coverage for their clients and many still fail to report requests for production of documents to their professional liability carriers until after they've produced materials or given depositions. Consider the following examples:

- Your client files suit against the carrier for declination of coverage. The client does not sue you. During the course of the litigation, either the client or the carrier's lawyer requests, via a subpoena, to depose you or your staff. The subpoena requires you to bring a full copy of your file to the deposition, including any and all handwritten notes. Six months after the deposition, the client's lawyer sues you or your agency for professional negligence based on information given during the deposition(s).
- Your agency procures coverage for a client. After the carrier denies coverage for the underlying loss, the carrier demands that you provide it with a written/oral statement regarding how you serviced the account. Three months after providing a statement, the carrier sues the agent for breach of the agency/producer agreement.
- You receive a Department of Insurance notice to produce a copy of your file to a state regulatory agency. Based on the information produced, the state regulatory agency issues a fine against your agency or the carrier.

The common theme in all these examples is that you or your agency was not sued, at least initially. The request for a deposition or produce documents seemed rather innocuous. Nevertheless, you should have reported such requests for information to your E&O insurance carrier. While agents should read their own E&O policies to better understand how a "claim" is specifically defined, many policies define "claim" as a request to take a recorded statement and/or service of a subpoena or any other notice of legal process. As a result, many policies define "claim" more broadly than a lawsuit filed against the agency in question, and attempting to take care of it on your own could jeopardize your coverage.

If you receive notice to produce copies of your files, whether formally via a subpoena or informally, notify your carrier as soon as possible. Failure to promptly report claims and potential claims to the carrier may jeopardize coverage under the terms of the agent's policy. Read your professional liability policies to understand what constitutes a "claim" under the insuring agreement. If there is professional liability coverage, work with your carrier and defense counsel to produce the documents or give testimony in the most effective and efficient manner. Followed correctly, these guidelines may help agents avoid putting themselves and their agencies at risk. 

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Early Reporting Equals Better Protection

If agents immediately report the request for a deposition, statement or to produce documents to the professional liability carrier, the carrier will be in a better position to assist the agency in the initial production. While the carrier may not be able to prevent the agency from becoming involved in the litigation, it can take steps that will aid in the future defense of the agency. With proper notice, the carrier may be able to hire defense counsel to prepare the agency for the deposition, to aid the agent in preparing her oral/written statement, and/or to review the agent's file to produce to the department of insurance. While agents are insurance professionals, they do not always understand how producing a copy of file materials could adversely affect their agency's interest. On the other hand, lawyers hired by professional liability carriers are in a much better position to produce such documents with an eye toward avoiding future litigation.

—A.V.