

Navigating the E&O of Professional Liability Exclusions


Today's adverse economic climate has had a significant impact on the way that business is conducted on Main Street and beyond. Many businesses have been forced to diversify their products and services in order to generate revenue. These market changes create significant risks because clients are reluctant to make changes that translate into higher premiums. One problematic risk for insurance agents is a change in a commercial client's operation that triggers the applicability of the "professional services" exclusion in the commercial general liability policy (CGL).

A CGL indemnifies against an insured's general liability. In particular, a CGL policy covers risks broadly, absent policy provision limitations, exclusions or conditions that may be implicated by a specific type of loss, such as employment practices liability claim. The insuring agreement of the standard CGL policy typically provides, "We will pay those sums which the insured becomes obligated to pay as damages because of bodily injury or property damages to which this insurance applies." The CGL policy also typically contains some type of professional services exclusion that precludes coverage for liability arising out of the rendering or the failure to render professional services. Many CGL carriers now use professional services exclusionary endorsements that contain schedules listing the specific services and operations of the policyholders that are not covered under the relevant policies. Generally, the definition of the term "professional services" has been construed to require more than mere employment, such an activity that requires skill, training or technique. This term may be interpreted differently depending on the state in which the insurance coverage is bound.

From the practical standpoint, the insurance agent faces significant E&O exposure when he or she is not told about changes in the direction and plans of the commercial client's business. This risk is greater with small and mid-size commercial clients, who are more inclined not to purchase professional liability insurance, but are more apt to dabble in activities that are not disclosed to their insurance agents and CGL carriers. Whether it is your small trucking account that hauls water—but in the economic downturn has started to haul one or two loads of jet fuel a month to the local airport—or the one-person real estate sales account that moved to real estate management, such changes can lead to catastrophic claims that may not be covered under the client's CGL policy.

The first step to avoiding coverage gaps under a CGL policy is for the agent to have information of the client's business. The prudent agent can obtain this information with specific questions about the types of services offered by his commercial client at the time that new coverage and renewal coverage is procured. The agent should also document the agency's file with the information provided by the client in response to the questions. In addition, the agent should ensure that the client's response is always consistent with information that has been provided on insurance applications for new and renewal coverage. Further, if any clients who have declined to purchase professional liability coverage but perform specialized services should be documented via sending a letter of confirmation that such coverage was offered but declined. Such documentation will play a major role in the defense of suits brought against agents.

The second key to reducing E&O exposure posed by the professional services exclusion in a CGL policy is that both agent and client should read the CGL policy, including all exclusions, endorsements and schedules carefully so that problematic language, errors and significant coverage limitations are discovered and discussed early. This practice affords the prudent agent with an opportunity to seek corrections and coverage enhancements (if available) from the CGL carrier or other carriers prior to the occurrence of any uncovered loss.

Remember that if the procurement of the CGL policy and the agent's knowledge of the relevant professional services exclusion is later questioned, any resulting legal action may ultimately be resolved based upon how a court and/or jury perceives the agent's credibility against that of her customer. In this regard, the agency's file will provide the best weapon in defending a frivolous lawsuit. 

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Knowledge + Information = Fewer Claims

Knowing the product being sold and knowing the customer are two key factors in growing an agency and avoiding E&O claims. The Big "I" Virtual Risk Consultant offered exclusively to members includes the PF&M tool with coverage form analysis, examples, endorsement listings and risk exposure assessment tools to assist staff in identifying coverage needs of commercial lines customers in hundreds of different industries.

Swiss Re Corporate Solutions E&O policyholders can view a sample E&O claim involving the professional liability exclusion of the CGL and how the agency successfully defended itself at www.iiaba.net/eohappens. Login with IIBA user name and password credentials.

—C.I.