

Legal and Ethical Obligations for Insurance Professionals

**“24” Ways to Get Into So
Much Trouble, Even Agent
Jack Bauer Can’t Save You**

“Legal and Ethical Obligations for Insurance Professionals”



This is the pre-show.
The webinar will go
live at 1pm ET.

March Webinar:



“Competing with Direct Sales & Captive Agency Insurers in Personal (and Commercial) Lines”

Bill Wilson, IIABA • Mark Fine, MBF Training and Consulting
Jamie Deapo, IIABNY • Ed Higgins, Thousand Islands Agency

Wednesday, March 25, 2015

1:00 p.m. to 4:00 p.m. Eastern Time

(includes three 10 minute breaks)

Are you tired of all the insurance commercials that shout “Price! Price! Price!”? Are you sick of the silly claim that someone’s exposures to loss can be analyzed and priced in 15 minutes or even 7 ½ minutes? Are you really, really, really ticked off about losing business to someone selling an inferior product yet claiming, “SAME COVERAGE, Better Value”?

If so, then sign up for this new 3-hour webinar!

<http://tinyurl.com/032515Webinar>

Presented by

Peter Biging, Esq.

Bill Wilson, CPCU, ARM

OUR LITIGIOUS SOCIETY

- *"Hit me, I need the money!"*
- Legal duties and obligations
- The Changing Landscape
- 3 kinds of E&O claims
- E&O statistics
- The Holy Trinity of E&O loss control

Which quote is real?

- A. Once an insured has received a policy and the declarations pages, it has “conclusive presumptive knowledge” of the terms and limits.
- B. Upon receipt of a policy without objection, the insured is “presumed to have known, understood and assented to its terms,” and thus cannot be heard to complain that the broker has failed to obtain the requested coverage.
- C. “An insured has a right to look to the expertise of its broker with respect to insurance matters. And it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy. It is precisely to perform this service as well as others that the insured pays a commission to the broker.”
- D. “While it is certainly the better practice for an insured to read its policy, an insured should have a right to look to the expertise of its broker with respect to insurance matters. The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker.”
- E. “I took a speed reading course and completed War and Peace in 20 minutes. It involved Russia.”

Which was a real quote from
a court decision?

Quote A?

Quote B?

Quote C?

Quote D?

E - All of them?

INSURANCE AGENT/BROKER BASIC DUTIES

- Exercise good faith and reasonable skill, care and diligence in procuring insurance requested in accordance with client's instructions.
- Obtain coverage which is not void.
- Obtain coverage which is not materially deficient.
- Obtain the coverage undertaken to be supplied at the requested limits.
- Obtain requested coverage for client within reasonable time or inform client of inability to do so.

Duty to advise as to coverage types, options or limits

Is there a duty to advise, generally?

Answer: Generally, no.

Basic Principle:

Insurance agents and brokers are not personal financial counselors and risk managers, or guarantors of their clients' liabilities. Generally, therefore, agents/brokers have no duty to advise as to specific types of coverage to obtain, limits, or additional or optional coverage to purchase in the absence of "special circumstances" or a "special relationship."

Duty to advise as to coverage types, options or limits

Reasons:

Insureds are in a better position to know their personal assets and abilities to protect themselves.

Making agents and brokers generally responsible for identifying possible deficiencies in coverages requested would subject agents and brokers to liability for failing to advise regarding every possible option, including (with respect to agents) coverage offered by competing companies.

If a duty to advise applied absent "special circumstances," insureds could make a business decision not to purchase increased limits or optional coverage available, and just sue the agent/broker for failing to recommend it, thereby using the agent/broker's E&O coverage as their excess of loss insurance.

Factors influencing when "Special Circumstances" or a "Special Relationship" may exist

The receipt of compensation in addition to the customary commissions paid by the insurer, such as for a "service fee."

Counseling of the insured with respect to specialized coverage or a specific coverage issue.

The agent's/broker's declaration that he is a highly skilled insurance expert, coupled with the insured's reliance thereon.

The agent's/broker's exercise of broad discretion in servicing the insured's needs.

A course of dealing over an extended period sufficient to have put an objectively reasonable agent/broker on notice that his advice is being specially relied upon.

An ambiguous request for coverage that requires clarification.

DUTY TO READ POLICY

It is a basic principle throughout the United States that insureds have a duty to read their policy.

This is significant, because it places responsibility on the insured regardless of any representations that the agent/broker may have made.

Even where insurance agents/brokers misrepresent coverage, courts have held duty to read trumps misrepresentation

Examples:

Dill v. Colony Ins. Co., 2013 S.C. App. Unpub. LEXIS 366 (Ct. App., S.C. June 26, 2013) (Granting summary judgment dismissing claims against insurance agent for negligent misrepresentation because “one cannot complain of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument . . .”).

Mladineo v. Schmidt, 52 So. 3d 1154 (Miss. 2010), reh’g den., 2011 Miss. LEXIS 112 (Miss. Feb. 17, 2011) (dismissing negligent misrepresentation claim because “duty to read” and “imputed knowledge” doctrines worked to make it unreasonable for insureds, as a matter of law, to rely on any representations contrary to the policy terms made by broker).

Even where insurance agents/brokers misrepresent coverage, courts have held duty to read trumps misrepresentation

Examples (cont'd):

Alfa Life Ins. Corp. v. Colza, 2014 Ala. LEXIS 64 (Sup. Ct. Ala. May 9, 2014) (“when documents available to the insured clearly indicate the insurance in fact procured for the insured is not what the insured subsequently claims he or she requested the agent to procure,” the agent is entitled to summary judgment dismissal of any negligent procurement claim based on the insured’s contributory negligence).

BUT...recent decisions indicate a growing judicial willingness to accept claims of reliance by agents'/brokers' representations over "duty to read"

Baseball Office of the Comm'r. v. Marsh & McLennan, 742 N.Y.S.2d 40, 42 (N.Y. App. Div. 1st Dep't 2002) "An insured has right to look to the expertise of its broker with respect to insurance matters. And it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy. It is precisely to perform this service as well as others that the insured pays a commission to the broker."

Drelles v. Manufacturers Life Ins. Co., 881 A.2d 822, 840-41 (Pa. Super. July 5, 2005) (citations omitted) "[A]n insured has the right to rely on the representations made by an insurance agent because of the agent's expertise in a 'complicated subject.' In view of the trust placed in insurance agents, it is 'not unreasonable' for consumers to 'rely upon the representations of the expert rather than on the contents of the insurance policy itself, or to 'pass' when the time comes to read the policy."

What is feeding the growing perception of agents/brokers as experts generally?

Judicial perceptions, which began taking root almost 40 years ago

“Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent’s hands.”

McAlvain v. Central Ins. Co., 97 Idaho 777, 554 P.2d 955, 958 (Idaho 1976)

“Consumers...view an insurance agent...as one possessing expertise in a complicated subject.”

Rempel v. Nationwide Life Ins. Co., Inc., 471 Pa. 404, 370 A.2d 366, 368 (Pa. 1977)

Complexity of coverages

Example:

AAS-DMP Management L.P. Liquidating Trust v. Acordia Northwest, Inc., 63 P.3d 860 (Wash. App. Div. 1 2003), review denied, 79 P.3d 445 (Wash. 2004)

Policy covering ocean crab processing ship was so long and complex the broker prepared an 80 page policy summary, and the broker had traveled to London on multiple occasions to negotiate the policy with an underwriting syndicate.

Broker Promises

A look at broker website descriptions of services provided reveals promises to:

- Provide a “range of experience in specific industries to offer you exactly the coverage you need.”
- Provide “tailor-made risk management solutions based on expert advice.”
- Provide “strategic decisions analysis.”
- “Review insurer solvency.”
- “Design comprehensive and complete programs for both insurance and risk management.”
- Provide “performance beyond the required...in all we do.”
- “Create the best products and services for your needs.”
- Negotiate with insureds to “secure the most favorable terms for you.”

Examples of exposures arising from the application process, and how courts are addressing same...

Material misrepresentation/omission in the policy application

Despite having signed the policy application, insureds often argue that they should not be responsible for same because they claim to have given the information to the agent/broker accurately, and he failed to take it down correctly; or they were asked to sign the application in blank, then provided the correct information, only to have the agent/broker fill it out incorrectly.

Case law generally provides that the agent/broker is not responsible for information contained in an insurance application that was reviewed and approved by the insured.

Nonetheless, courts have found issues of fact requiring trial based on these arguments. See, e.g., *N.H. Ins. Co. v. RRK, Inc.*, 230 W. Va. 52, 59-60 (W. Va. 2012); *Ficarra v. Security Mut. Ins. Co.*, 757 N.Y.S. 2d 59, 60 (N.Y. App. Div. 2d Dep't 2003).

Liability to third parties

- Where the insurance coverage is insufficient, third parties may argue that the agent/broker owed a duty not only to the insured, but to the general public.
- E.g., *Rapp v. Awany*, 205 F. Supp. 2d 279 (D.N.J. 2002); *Emahiser v. Complete Coverage Insurance, LLP*, 2014 U.S. Dist. LEXIS 143506 (W.D. OH Oct. 8, 2014)
- Arguments/claims of this type have generally proven to be unsuccessful, but they often involve horrific facts and this is an area to keep an eye on.

Liability to the insurer

- Claims can also be made that but for false or misrepresentative information on the policy the insurer would not be stuck providing a defense to a claim under a reservation of rights and/or litigating a coverage dispute.
- E.g., *Burlington Ins. Co. v. Okie Dokie*, 329 F. Supp. 2d 45 (D.D.C. 2004); *Century Surety Co. v. Crosby Ins. Inc.*, 21 Cal. Rptr. 3d 115 (Cal. Ct. App. 2004).
- Typically all that is involved in these situations is a coverage disclaimer, and litigation is limited to the insurer and insured. But where it is believed the agent/broker knew of and actively misrepresented the true facts, insurers have at times brought claims against the agent/broker.

Failure to procure the coverage requested

- Insured claims a request for a specific policy or type of coverage had been conveyed but the agent/broker failed to purchase same.
- Often can arise where insured doesn't have coverage for the specific risk causing the loss, but claims to have requested "full coverage," "comprehensive coverage," or "coverage against any possible risk."

When does duty to procure attach?

- Harris v. Albrecht, 86 P.3d 728 (Utah Sup. Ct. 2004) contains an excellent discussion of the definiteness and specificity necessary to give rise to a contractual or common law duty.

As to a contractual duty:

A contract to procure insurance may arise when the agent has definite directions from the insured to consummate a final contract, when the scope, subject matter, duration and other elements can be found by implication, and when the insured gives the agent authority to ascertain some of the essential facts.

86 P.3d at 73

- As to common law, a duty to procure can only arise where a promise had been made to procure the coverage at issue, or an assurance had been made that such coverage had actually been purchased. Id.

Relevant case examples

- *Avery v. Diedrich*, 734 N.W.2d 159 (Wis. Sup. Ct. 2007)
- *Mladineo v. Schmidt*, 52 So.3d 1154 (Miss. 2010), reh'g den., 2011 Miss. LEXIS 112 (Miss. Feb. 17, 2011).
- *Sea Trade Maritime Corp. v. Marsh USA, Inc.*, 2013 N.Y. Misc. LEXIS 4688 (Sup. Ct. N.Y. Cty., Oct. 21, 2013).
- *Gateway Hotel Holdings, Inc. v. Richfield Hospitality Services*, 2013 Mo. App. LEXIS 112 (Mo. Ct. App. Jan. 24, 2013).

Failure to advise

- Most dynamic of issues confronting agents and brokers E&O today.
- Typically involves claims where coverage doesn't respond to loss or limits are insufficient and insured claims appropriate coverage would have been purchased but for agent's/broker's failure to advise.

Significant recent case developments

Indiana Restorative Dentistry, P.C. v. Laven Insurance Agency, Inc., 999 N.E.2d 922, 2013 Ind. App. LEXIS 621 (Ct. App. Ind., Dec. 17, 2013).

Plaintiff sued against claiming it had relied on its agent to provide advice regarding the sufficiency of its business contents after it suffered a loss more than \$500,000 in excess of its limits.

At trial court summary judgment granted because:

- the agent's discretion to act on the insured's behalf in obtaining insurance renewals was limited to coverages and amounts reflected on forms completed by the insured in the renewal process.
- the agent did not provide insurance counseling and the type of insurance at issue — business property insurance — is a type of insurance common to nearly all small businesses.
- The agent did not hold itself out as being an insurance agent with skills over and above other insurance agents.
- The agent's compensation was limited to commissions on the premiums paid.

Significant recent case developments

Tiara Condominium Association, Inc. v. Marsh USA, Inc., 996 F.Supp. 2d 1271 (S.D. Fla. 2014)

A condominium association with an insurance committee composed of sophisticated business people (including an attorney and a retired insurance company executive) sued its broker for alleged negligence in procuring coverage that had yielded almost \$90 million in coverage for loss caused by two hurricanes that had hit in rapid succession, but was still \$40 million less than the cost of repair (including mold remediation). The insured had specifically asked if it could use a 2 year old building appraisal to set its limits (and rejected certain optional coverages relating to interior unit structures like cabinets and air conditioning units) in order to reduce its premiums, and was aware that the older appraisal would likely understate the building's current value. Nonetheless, the Court denied Marsh's motion for summary judgment, requiring a trial on whether there was a "special relationship." The Condo association argued that Marsh had agreed to act as its "risk management" and "financial risk" advisor, and thus had a duty to advise of the risks of using the older appraisal.

NOTE: *After a trial Marsh was found not to have a "special relationship" with the insured, and the case was dismissed.*

Significant recent case developments

Voss v. The Netherlands Ins. Co., 2014 NY Slip Op 01259, 2014 WL 696528 (N.Y. Ct. App. Feb. 25, 2014)

The insured owned a business which suffered water damages on three separate occasions, and substantial business interruption losses which exceeded the BI coverage limits. Although the insured had received the relevant policies, and was aware of the applicable BI limits, she sued her broker arguing that the broker had recommended the original BI limits, and promised to review them and make recommendations regarding sufficiency going forward. However, the broker never did so. Summary judgment was granted to the broker, but the decision was reversed on appeal.

The dissent found that while there may have been a special relationship at the inception, the absence of any advice at all on renewal coverages in the years that followed — even if it had been promised — established that there was no special relationship thereafter, and at the time the relevant policies were purchased. However, the majority concluded that the alleged promise to provide such service and failure to do so created an issue of fact as to whether there was “interaction regarding a coverage issue,” and thus a duty to advise.

3 Kinds of E&O Claims

- Those you can prevent
- Those you can defend
- Those you learn from

“One trouble with Americans is that we’re fixers rather than preventers.” — Gen. Jimmy Doolittle

E&O statistics

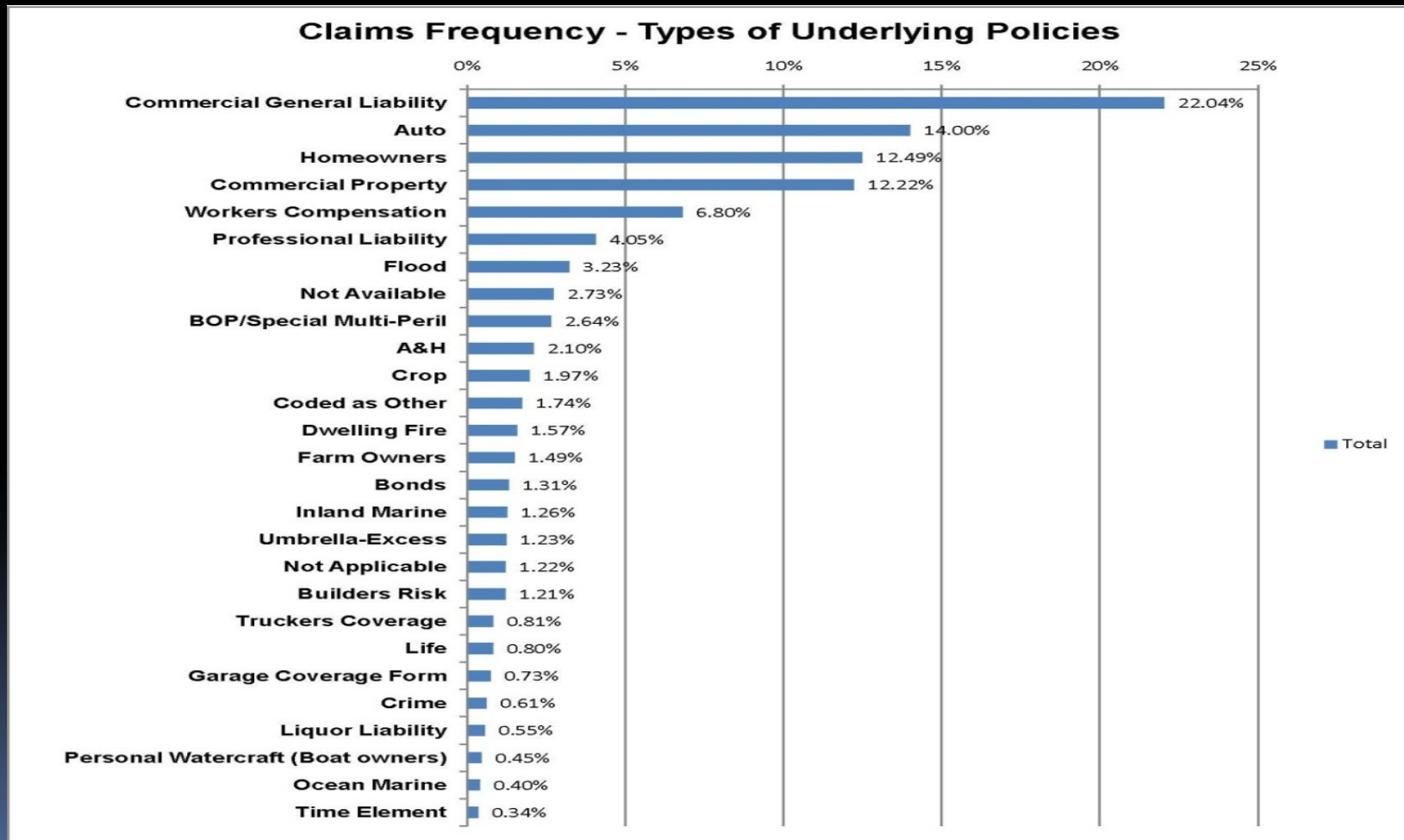
- **E&O Claims by Line of Insurance**

- 65% commercial lines
- 30% personal lines
- 5% other

- **Aberrations**

- 3-5% of all E&O claims involve flood losses
- 10-12% of all CGL claims involve claims-made policies
- 10-15% of CL claims involve certificates or AI coverage
- 50/50 procedural vs. knowledge based errors

E&O statistics (cont'd)



E&O statistics (cont'd)

Basis of E&O Claim	Personal Auto	Homeowners Dwelling	General Liability
Inadequate Limits	14%	12%	4%
Wrong Coverage	8%	13%	18%
Misrepresentation	13%	23%	24%

The Holy Trinity of E&O LC

- Consistency
- Communication
- Documentation

“In the following pages I offer nothing more than simple facts, plain arguments and common sense; and have no other preliminaries to settle with the reader other than that he will divest himself of prejudice and prepossession.”

Thomas Paine in Common Sense

#1 Management issues

- An E&O claim is usually a symptom of a “system” problem
- “Watch Quiz”
- CSR surveys
- Most E&O claims are preventable
 - “Accidents will occur in the best regulated families.” - Charles Dickens in David Copperfield
 - Invest in professional management

Management issues (*cont'd*)

- Organizational structure
 - “Once and done” (more feasible in an automated environment)
 - “Owning” the transaction...the Ritz Carlton way
- Procedures
 - Written, communicated, updated
 - Sources...experts, staff
 - “Invariable Practice” Rule (later)

Management issues (*cont'd*)



- **Ask the Expert: Lisa Harrington**
 - Managers spend too much time on “bad” employees and too little time with the good ones
 - Rather than have a hard conversation with a “problem” employee, managers will implement new policies that adversely impact the innocent
 - Hire correctly, have the right people doing the right jobs, properly train them, and take quick corrective action as needed
 - A small restructure or simple shift in duties can make everyone happier...happy employees aren't clock watchers

#2 Quality control

- The best way to win an E&O claim or law suit is to prevent it
- Use of E&O Audits
 - Implement written regularly followed agency wide practices and procedures designed to minimize the risk of E&O claims. Train your staff.
 - Spot check through the use of audits and quality control checklists, etc.

Quality control *(cont'd)*

- E&O audits are available through your E&O insurers or attorneys
 - Agencies can also develop their own audit checklists
 - Start by focusing on 2 or 3 key areas that have generated a significant amount of E&O claims
 - E.g. The agency's handling of certificates of insurance and additional insureds
 - Policy checking and delivery and the processing of endorsements
 - Timely claims handling

#3 Time management issues

- Crisis management
- Priorities and structure
- Efficiency vs. effectiveness
- Understaffing
- Chronic backlog

Time management issues (*cont'd*)

- Ask the Expert: **Chris Burand**



- Ineffective training
- Ineffective procedures
- Producers who won't do what they're supposed to do, causing the staff to do extra work
- #1 producer problem: Ineffective prospect qualification

Time management issues *(cont'd)*

- Ask the Expert: **Cheryl Koch**



- New places for work to hide
- Lack of uniform agency procedures/enforcement
- Duplicate paper and electronic processing
- Inability to distinguish between critical items and workflow
- Institutionalized backlog at agencies and insurers
- CSRs not trained in desk management

#4 Technology

- E&O Exposure From the Use of Social Media
 - Risks that result from taking advice/transactions out of normal agency processes
 - Incorrect advice; misrepresentation of policy terms
 - Business defamation; trade libel
 - Posting private consumer information on the social web
 - Advertising liability

General social media E&O risk management tips

- Step one : have a social media policy guide that all employees understand and adhere to
- Step two: Employees should know when to move from the social web and into the agency's normal business workflows and how to communicate this to customers.
 - Social contact to prospect
 - General insurance topics to specific topics of individual or business

General social media E&O risk management tips (*cont'd*)

- Use standard disclaimers where possible such as:
 - “The ABC Agency cannot bind or alter coverages or accept reported claims via social networking. Further, the information provided is intended for general situations and questions relating to specific coverage should be discussed using the agency’s regular workflows. Please contact a licensed agent directly.”

General E&O social media risk management tips

- Establish with the customer upfront how your agency does business including who and how the customer should contact you for their specific needs
- If customer activity does occur through a social media platform it should be documented in the agency management system.

Business defamation and trade libel on the social Web

- Business defamation is a false statement about a business, its products or services, that interferes with the company's business relations through damaging or derogatory remarks that cause its customers to look elsewhere

Business defamation and trade libel

Hypothetical:

- In an effort to be competitive , an insurance agent blogs that “ABC insurance company doesn’t pay claims”

Business defamation and trade libel E&O loss control techniques

- Social media policy should prohibit employees from making unflattering statements about competitors
- Employees should keep comments positive
- Employee sites should make clear they reflect their own views and not those of the agency
- State the consequences of non-compliance.

Advertising liability/use of social media

- One reason insurance agents and brokers use social media is to promote “branding”
- What if an agency is asked by a trade association to put the agency’s banner and hyperlink on the trade association’s website?
- Is that considered advertising? Is it permissible?
- Depends on the laws of the state the agency does business in

Advertising liability/use of social media (*cont'd*)

- Agents must comply with advertising regulations governing the State in which they are licensed and do business
- The New York State Insurance Department Circular Letter No. 5 2001, provides guidance for New York licensees who advertise on the web.
- If a N. Y. agency places its banner and/or a hypertext link on a non-licensee's website, it must be labeled as an "advertisement"
- And it cannot contain any endorsements from the non-licensee

Advertising liability/use of social media (*cont'd*)

- Use a written social media policy addressing employee linking to agency sites or use of agency name, logo, or other advertising on their personal social networking sites.
- Employee's sites should make clear that they reflect their own views and not those of the agency

#5 Wrong people/wrong jobs

- Caliper and Omnia
- Written job descriptions
- Restructuring
- Job swapping...Doug and Henrietta
- Tenured incompetency (including the SOB)
- "Mavericks"
- Education and mentoring

#6 Advice beyond expertise

- An inordinate number of E&O Claims are generated when an agent or broker takes on an account different from what they normally handle or gives advice as to policy terms without fully understanding those terms.
- E.g. Improper advice on a commercial property policy/business interruption

Advice beyond expertise

(cont'd)

- A hurricane destroyed one of a commercial client's locations, and a claim for Business Interruption was made.
 - The policy had a 90% co-insurance clause. The agent assumed that the proper way to calculate business interruption limits was merely profits.
 - The proper method to calculate limits for that coverage is profits plus continuing expenses.

Advice beyond expertise (*cont'd*)

- This resulted in an 82% coinsurance penalty, and an E&O claim against the agent.
- Rather than assume, the agent should have consulted the insurer as to the proper calculation and documented the insurer's advice

#7 Education and training

- "\$80 and I'm a Security Guard"
- Agent CE, the Spawn of Satan
- LearnNothing.com
<http://www.zalma.com/bzindex.htm>
- Investment vs. expense
- Focus on the critical things
- "Teach a man to fish..."

#8 Communications

- In a credibility dispute your position is stronger if you have documentation:
 - Use logs, files, confirming , letters, dated notes, etc.
 - Document client's needs and exposures
 - Document all coverages offered or quoted
 - Document all representations about coverages
 - Document the client's refusal to follow recommendations
 - Use of fully completed signed applications

Case example re: benefit of documentation

- Curanovic v. New York Central Mutual Fire Insurance, et. al
 - Plaintiff sustained a fire at his house, which had been uninsured for several months
 - Plaintiff and one of his sons went to the Insurance Agency to obtain Homeowners insurance
 - The insurance agent asked plaintiff questions and typed the answers on an application

Case example re: benefit of documentation (*cont'd*)

- Plaintiff could neither read nor write English, but did not inform the agent of this
 - The agent handed plaintiff the completed application, asked him to read and sign it if no corrections were necessary
 - Plaintiff signed the application.

Case example re: benefit of documentation (*cont'd*)

- After leaving the office, plaintiff's son told him that there were inaccurate answers on the application.
- One was the negative answer to the question, "[A]ny losses, whether or not paid by insurance, during the last 3 years, at this or any other location?".
- Plaintiff never spoke to the agent again and these misstatements were never corrected.

Case example re: benefit of documentation (*cont'd*)

- Plaintiff testified that he and his son called the agency several times but the agent was never available;
 - And that he told the receptionist there were mistakes on the application;
 - Plaintiff's son, a law student denied his father's testimony that he later went to the agency to advise of the mistakes

Case example re: benefit of documentation (*cont'd*)

- The Court was persuaded by the agency's record keeping when it summarily dismissed the case against the agency
- "The records contain no mention of any contact by or on behalf of plaintiff regarding any inaccuracies ... plaintiff's statements were self-serving and incredible on these points..."

#9 Marketing/advertising

- “No customer can be worse than no customer.” - Leopold Fechtner
- Promising more than you can/will deliver
- “We’re no worse than anybody else!”
- Man and a woman on a motorcycle
- “Complete Coverage Insurance Agency”
- Ads and slogans....

Marketing/advertising (*cont'd*)

- “The Complete Professional Service for All Your Insurance Needs”
- “If You Have the Need, We Have the Policy”
- “We CAN Insure You”
- “No Risk Refused”
- “Immediate Coverage!”

More....

Marketing/advertising (*cont'd*)

- “We Specialize in Auto Insurance Problems”
- “We Specialize in Apartment and Condo Insurance”
- “Any Driver • Any Age • Regardless of Record • All Vehicles”
- “Lowest Rates for Maximum Protection”
- “Same Coverage, More Savings”

More....

Marketing/advertising (*cont'd*)

- “We worry about your insurance needs so you don’t have to.”
- “We will continually review your insurance program so it meets your needs.”
- “Your partner for a secure tomorrow.”
- “Celebrating 85 Years of Insuring Your Expectations”

#10 Illusory coverage

- “An insurance provision is considered illusory if a premium was paid for coverage which would not pay benefits under any reasonably expected set of circumstances.” *Empire Fire & Marine Ins. Co. v. Sargent*, 2007 U.S. App. LEXIS 1518, *6 (7th Circuit).

Illusory coverage (*cont'd*)

- Exposure for selling policies (not technically illusory) where the risk to be excluded is integral to the nature of the customer's business
- E.g., selling a commercial property policy with a vacancy condition for a vacant building
 - Discuss the exclusion with the insured and document the file that insured denied coverage removing the condition. Ideally, have the insured sign off on the declination

#11 Exposure identification

- Failure to identify exposures or assuming a customer won't buy a coverage... "You don't need/want...EQ, flood, WC, etc."
- Failure to procure requested coverage... "A guy in a bar told me...."
- Signed and dated exposure/coverage checklists (Virtual Risk Consultant)
- Offering risk management solutions

#12 Insurable interest

- Generally, the insured *must* have an insurable interest in the subject of the insurance.
- In New York the amount recoverable under a fire insurance policy is limited by the insurable interest of the named insured.
 - *Vilagy v. Associated Mutual Ins. Co.*, 165 A.D.2d 616, 569 N.Y.S.2d 292 (4th Dept. 1991).

Case example re: E&O claim arising out of insurable interest

- Milgrim v. Fairmont Insurance Brokers, Ltd. Et. al. 2010 NY Slip Op 6161, 2010 N. Y. App. Div. Lexis 6250(2nd Dept. 2010)
- The plaintiff was a religious organization formed to purchase a home for Rabbi Schwartz
- Schwartz approached the broker for Homeowners insurance , but because Kadimah owned the premises Schwartz was required to purchase property insurance at higher corporate rates.

Case example re: E&O claim arising out of insurable interest *(cont'd)*

- Schwartz alleged that after insurance rates increased, the broker suggested that he obtain Homeowners insurance by listing Schwartz as the owner of the premises and Kadimah as the mortgagee even though there was no mortgage on the premises.

Case example re: E&O claim arising out of insurable interest *(cont'd)*

- Schwartz contended that he followed the broker's suggestion and for years he insured the premises through an individual Homeowners policy.
- In completing the application the broker indicated that Schwartz was the owner of the premises and that Kadimah was the mortgagee.

Case example re: E&O claim arising out of insurable interest *(cont'd)*

- The Broker contended that the underwriter was aware that Kadimah actually owned the property and authorized the Homeowners policy to be issued to Schwartz

Case example re: E&O claim arising out of insurable interest *(cont'd)*

- The premises was destroyed by fire approximately 17 months after Rabbi Schwartz moved to a nursing home and his son moved out of the premises.

- The insurer denied the claim for:
 1. Misrepresentations in the application re ownership, etc.
 2. Schwartz no longer resided at the premises
 3. No Insurable Interest

Case example: and E&O claim/ insurable interest

- What do you think the court held as between:
 - The insured and the insurer?
 - The insured and the broker?

Case example re: E&O claim arising out of insurable interest *(cont'd)*

- The court held that even if the broker was negligent, the insurer disclaimed coverage on the ground that the insured location was not Schwartz's residence premises on the date of the fire
- Thus the broker's negligence was not the proximate cause of plaintiffs' damages.
- Result: NO HARM NO FOUL!

Take Home Message re: E&O claim arising out of insurable interest *(cont'd)*

- Carefully obtain information regarding insurable interest in the premises, both at the time of the original application and upon renewal if circumstances have changed
- Have the insured sign a fully completed application
- Be able to prove delivery of the policy to arguably bind the insured to the terms
- Document with the underwriter any approved deviations from the guidelines, etc.

#13 Duplicating coverage

- Duplicating coverage (renewing “as is”)
 - “Death by Decimal”
 - Limits
- Not duplicating coverage
 - Bubba’s shopping center

#14 Additional insureds

- Certificates of insurance have historically created Major E & O Exposure
- The Number 1 Certificate Exposure is:
 - Failure to add or properly identify additional insureds

Additional insureds (*cont'd*)

Blanket additional insured coverage

- If the Insured is routinely requesting certificates of insurance, blanket additional insured coverage should be procured, with the insured's permission, if available.

Blanket additional insured endorsement

- Provide the blanket additional insured endorsement to the insured with an explanation of the requirements necessary to trigger it.
- (For example, “any person or organization for whom you are performing operations when you and such person or organization have agreed in a contract or agreement that such person or organization be added as an additional insured to your policy”)

Blanket additional insured endorsement (*cont'd*)

- Clarify and document an insured's request for a certificate "naming" an entity as an additional insured to determine if the policy needs to be endorsed or whether the required written agreement is in place sufficient to trigger the blanket additional insured endorsement.

Blanket additional insured endorsement (*cont'd*)

- Consider adding a disclaimer to the certificate as approved by your E&O insurer that the certificate holder is an additional insured only if the terms of the blanket additional insured provision of the policy have been met.

#15 Firing customers

- “No customer can be worse than no customer.” - Leopold Fechtner
- Dumping 1/3 premium volume
- Certificate-intensive contractor
- Minimum limits standards
- Only get referrals from superior customers

Firing customers *(cont'd)*

- Surplus Lines
 - 80% w/o procedures for qualifying or placing
 - Most do not verify E&O coverage
 - Most do not review brokerage agreement
 - Few actually read the E&S policies
 - Many do not caution the insured

#16 Certificate issues

- Certificates of insurance have historically created a serious E&O exposure.

Types of E&O Cases

- Failure to add or improperly identifying additional insureds
- Misrepresenting coverages that do not exist
- Modifying, altering or amending coverages
- Notice of mid-term cancellation to certificate holder

Certificate issues *(cont'd)*

Amending, Extending or Altering the Certificate is a Major Source of E&O Exposure

1. New York and New Jersey's Insurance Departments have taken the position that insurance agencies and brokers must not do this under penalty of regulatory
2. Doing so may constitute a new policy form subjected to filing requirements;
3. Doing so may violate the terms of your agency agreements

Certificates of insurance

Examples of Amending, Extending or Altering a Certificate, and the Resultant E&O Exposures:

- Mid-term notice of cancellation;
- Adding terms such as waiver of subrogation;
- Adding terms that the additional insured coverage is primary and non-contributing;
- Attaching to the certificate the underlying contract between the insured and the additional insured.

Recommendations re: certificates of insurance

Use the most current forms of the certificate. For example, ACORD form 25 (2009/01) .

On page 2, the 2009 certificate has been revised by Acord:

This Certificate of Insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

Recommendations re: certificates of insurance (*cont'd*)

- Implement a regularly followed practice and procedure for supplying both the front AND back (page 2) of the certificate to all parties.
- Send certificates with an email or cover letter asking the insured to review it for accuracy. Document your file. Consider keeping a certificate log.

Recommendations re: certificates of insurance (cont'd)

Send a copy of each and every certificate to the insurance companies listed even if they tell you not to send them. Document your file.

ACORD. CERTIFICATE OF LIABILITY INSURANCE DATE (month/year)

PRODUCER: _____ THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE

INSURED: _____ NUMBER A: _____
ADDRESS B: _____
INSURER C: _____
INSURER D: _____
INSURER E: _____

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF EACH POLICY. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE	POLICY EXPIRATION DATE	PERIOD OF EXPIRATION	LIMITS
GENERAL LIABILITY <input type="checkbox"/> COMMERCIAL, <input type="checkbox"/> PERSONAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> OCCUR				2	EACH OCCURRENCE \$ _____ PER OCCURRENCE PER \$ _____ MED EXPENSE LIMIT \$ _____ PERSONAL AUTO LIABILITY \$ _____ GENERAL AGGREGATE \$ _____ PERSONAL COMBOPASS \$ _____
DEVELOPER/AGENT/REALTOR/INSURER PER POLICY <input type="checkbox"/> PROD <input type="checkbox"/> SPLIT <input type="checkbox"/> AGG					
AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> BIENNIAL AUTOS <input type="checkbox"/> NON-OWNED AUTOS					COLLISION/REINFORCEMENT (if applicable) \$ _____ BODILY INJURY (per person) \$ _____ BODILY INJURY (per occurrence) \$ _____ PROPERTY DAMAGE (per occurrence) \$ _____
CARTRIDGE LIABILITY <input type="checkbox"/> ANY AUTO					AUTO ONLY - CA ACCIDENT \$ _____ OTHER THAN AUTO ONLY - CA \$ _____ AGG \$ _____
EXCESS LIABILITY <input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> COORDINATION <input type="checkbox"/> REDUCTION					EACH OCCURRENCE \$ _____ AGGREGATE \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
WORKING COMPENSATION AND EMPLOYER'S LIABILITY					PER EMPLOYEE \$ _____ PER EMPLOYEE PER YEAR \$ _____ PER EMPLOYEE PER YEAR PER POLICY \$ _____
OTHER					

5

DESCRIPTION OF OPERATIONS, LOCATION AND OTHER CHECKS LISTED AS REQUIRED BY INDUSTRY OR SPECIAL PERMITS

CERTIFICATE HOLDER: _____ ADDITIONAL INSURER, ISSUER LETTERS: _____ CANCELLATION

1

WHEN ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL endeavor to MAIL _____ DAYS BEFORE NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BY FAILURE TO DO SO SHALL BECOME AN OBSTRUCTION OR LIABILITY OF ANY KIND UPON THE ISSUER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE _____

ADDED 25-5 (7/7) © ACORD CORPORATION 1988

Can the certificate holder sue the agency?

- In some states the agent owes no duty to the certificate holder who is not an agency customer.
 - In other states the certificate holder may sue as an intended third party beneficiary of the agreement to make the certificate holder an additional insured

#17 Coverage/premium games

- Insuring teen drivers on their own policies
- Insuring personally owned autos on BAPs
- Insuring business owned autos on PAPs
- Underinsuring with guaranteed RC policies or blanket coverage w/o margin clauses
- If the BOP don't fit....

#18 Read the policy!

- E & O Claims can be avoided by careful policy checking and prompt delivery of the policy
- In many states, absent an affirmative misrepresentation of coverage, the general rule upon proof of the receipt of the policy, is that the insured is presumed to know the contents thereof, and in some cases even barring a claim against the insurance agent or broker for failure to procure coverage

Read the policy! *(cont'd)*

- Send a cover letter to the insured with the policy asking them to review it carefully and to contact you promptly with any questions, changes or additions.

Read the policy! *(cont'd)*

- Electronic delivery of policies is okay if:
- Insured agrees
- Insured is capable of receiving
- Confirm receipt
- Do not rely on your computer's return receipt. Your insured's virus software could have opened the policy and scanned it as spam
- Send an email asking for a reply that insured received policy.

#19 Mismanaging claims

- Advising insureds to not report
- Delay in forwarding claim or lawsuit
- Failing to notify umbrella carrier
- Goats and ghosts
- Accepting adjuster's denial without question
- Failing to monitor and document claims denial practices

#20 Timely claim notice

- CLAIMS HANDLING

Immediately report the claim to all potential insurers and all potential layers regardless of the severity of the claim or whether you think that there will be coverage.

Timely claim notice (*cont'd*)

- Contract Agents should recognize that the general rule is that “notice of a claim to an insurance agent equals notice to the insurer”
 - Report all claims even if you think there may not be coverage,
 - Otherwise you risk prejudicing the insurer’s ability to investigate and/ or to issue a timely notice of disclaimer.
 - Generally brokers will have no argument that notice to them is notice to the insurer unless provided by statute.

Timely claims notice

- Agency voicemail systems and websites should not permit the reporting of a claim via email or voice mail.
- Agents should IMMEDIATELY report the claim in writing and tender all summons and complaints or other pleadings (we suggest the ACORD loss form) to all potential insurers,
- All layers, all potential policy years the same day the claim is received by the agency and forward all pleadings keeping a copy of all that was forwarded . Document the file.

Claims handling



- Do not “monitor” the claim before reporting it to the umbrella or excess insurer.
- Agents should forward all bodily injury claims to all excess layers even if the umbrella or excess insurers tell you they are not going to open a file
- Document your file that you sent in the claim and the response from the umbrella or excess insurer.

Failure to report to the proper insurer, case study

- Martini v. Lafayette Studios Corp., 273 A.D.2d 112 (N.Y. App. Div. 1st Dep't 2000)
 - Plaintiff sought injunctive relief from Lafayette Studio Corp. ~ not covered under any insurance
 - 11/95 Plaintiff moved to amend the complaint to seek monetary relief and to add the Studio's board of directors as defendants

Failure to report to the proper insurer, case study (*cont'd*)

- Insurance broker reported to Atlantic which included D&O coverage for claims first made during the policy period 7/1/94 to 7/1/95.
- Atlantic initially stated it would provide a defense but never assumed the defense and then disclaimed in 4/97

Failure to report to the proper insurer, case study, *(cont'd)*

- In 4/97 when Atlantic disclaimed the broker then reported to Firemen's which had issued a policy providing similar coverage from 7/1/95 to 7/1/96
- Firemen's disclaimed for late notice and the court found that the insured's 17 month delay was unreasonable

Failure to report to the proper insurer, case study, *(cont'd)*

- The court held that Lafayette was entitled to recover from the broker “ All damages caused by [the broker’s] negligent referral of the claim to the wrong insurer.”

#21 Inconsistency

- Procedures
- “Dalton Syndrome”
- Following up with only some late-paying customers
- Providing cancellation notice to some insureds and/or certificate holders
- Exceptions for some customers (radar detectors)

Inconsistency (*cont'd*)

- The Invariable Practice Rule
 - "One way, all the time, by everyone"
 - **Florida 90.406. Routine practice.** Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

#22 Depositions/testimony

If you receive a subpoena or a request from anyone including the insurer for a:

- Deposition
- EUO
- Recorded statement
- Written statement
- Review of file

Promptly contact your E&O attorney/E&O insurer to protect your rights. Often heralds an E&O claim; you may be required to give notice under the terms of your E&O policy.

Depositions/testimony

An unfortunate letter or email is written by a well-intentioned producer or agency principal to an insurer trying to convince it to cover a disputed claim of the insured/agency customer.

“The road to Hell is paved with good intentions”



Examples of unfortunate letters/emails

- “Although the CSR, who we had to let go, forgot to request the endorsement, our intent as your agent was to provide...”
- “Mistakes were made on both sides”
- “We have no excuse for the mistakes we made, other than pure human carelessness, but you would have written it anyway”
- As a premier agent with a substantial premium volume, we request a one-time agency accommodation”

Potential legal consequences that flow from writing unfortunate letters/emails

- They are almost always copied to the insured;
- They then become the basis for drafting an E&O complaint against the agency and producer.

Potential legal consequences

- Unfortunate letters/emails become fodder for cross-examination of the author who becomes the target of an E&O lawsuit.
- The letter may be used as Exhibit "A" against you;
- Forces the agency and the E&O attorney into a defensive position;
- Reactive instead of proactive; and
- Damage control must be done to explain away the letter/email.

#23 Documentation

- Establish forms/format/standards
- Document all coverage rejections/reductions and sources of values/limits
- No dual systems
 - Electronic vs. paper (plus cell, PDA, VM, etc.)
 - Organizational vs. personal
- QC audits
- Corrective action

#24 Critical Defense Actions

- Documentation is critical. Look for it.
 - Check the agent's/broker's hard copy paper file.
 - Check the electronic file for everything regarding the account, both with regard to underwriting and claims handling.
 - Check the emails of everybody at the agency/brokerage who would have handled the account or any aspect of it.
 - Check for whether there may have been an automated system involved for these records

Critical defense actions

- Past history is important. Look at the whole picture, and dive into the details.
 - Has the agent/broker been providing advice or recommendations on other matters?
 - Has the insured refused to purchase the coverage, optional coverages or limits recommended with respect to other policies?
- Examine the agent's/broker's website and marketing materials.
 - What types of services are generally promised?
 - Is the agent/broker representing itself to be an expert?
 - Look to past iterations of website.

Critical defense actions

- Carefully examine any written contracts, and the type and scope of services promised.
- Look for post-loss communications with the insured.
 - Have any admissions been made?
- Carefully examine the entire underwriting file, look at what the insured has been sent, and when it should have been received.
 - Questionnaires?
 - Policy Summaries?
 - Renewal materials?
 - Declaration pages?
 - Endorsements?
 - Policies each renewal?

Critical defense actions

- Scrutinize the application.
 - Was anything misrepresented?
- Look to the past, including with prior brokers.
 - What did the insured purchase previously?
 - What was submitted with the application?
- Look to what has been done post-loss.
 - Has the insured continued not to purchase the coverage it claims your client should have recommended post-loss?
- Critically examine the claim and the policy in issue.
 - Are there grounds for arguing coverage would not have been available for the claim otherwise?
 - In this regard, getting hold of the insurer's claim adjustment file may be extremely helpful, as it may detail other grounds coverage would not have been available.

Critical defense actions

- Investigate the possibility of a statute of limitations defense.
 - Accrual of agent/broker negligence claims vary in different states, as do the applicable statutes of limitations.
- Investigate for dirt on the Plaintiff.
 - Has the Plaintiff been sued for fraud?
 - Any criminal history?
 - Investigate to identify possible dirt on your client.
 - Ever the subject of complaints to the State Insurance Department?
 - Ever sued for fraud?
 - Any criminal history?
 - Better to know of problems up front

Client risk mgmt guidance

To the extent you have the opportunity to do so, consider the following risk management ideas:

- Let customer dictate value or limit liability **and always document in writing**
- Try not to fall into trap of consistently renewing “as is”
 - Establish periodic re-evaluation of limits and coverage
 - Never simply “copy” pre-existing coverage from another agency
- Be aware of basic standard of care, and meet it

Client risk mgmt guidance

- Be mindful of circumstances which may impose higher duty, and particularly ambiguous requests
- Document in writing customer's refusal of coverage or limits
- Check policies and endorsements for accuracy before delivery to client, and that they match up with binder
- Avoid conduct which can be interpreted as rendering advice to the insured as to the specific types or amount of coverages to have in place

Client risk mgmt guidance

- When preparing coverage summaries, take care to ensure that they are not misleading or confusing, and specifically refer the insured to the relevant policy provisions; take the same care in responding to coverage questions presented by insureds
- Advise customer in writing of exclusions for major exposures or unique warranties
- In preparing policy summaries, include disclaimer that this is a summary only, and insured is encouraged to read policy

Client risk mgmt guidance

- Be sure advertisement is not “puffery”
- Weigh advertising statements against legal standard of care and make considered judgment as to how best to proceed
- Avoid use of terms such as “always, best, most favorable, comprehensive”
- Engage qualified legal counsel to review advertising

LIMERICKS

The agent was a wonder to all who beheld her
She made no secret of the special knowledge she had
But when there was a loss for which coverage was lacking
Her client was upset and soon sent her packing
Then sued her for giving advice that was

BAD

There once was an absolute duty to read
And to understand one's policy indeed
But as agents promise more
And reading policies becomes a chore
Some courts no longer see the

NEED

LIMERICKS

He thought his insurance agent was proficient
But it turned out his coverage wasn't sufficient
So when he suffered a loss he looked at the cost
And decided to sue his agent for the

COEFFICIENT

As he filled out the insured's application
He did so with a slight trepidation
For try as he might
He depended on the insured to get it all right
And if it wasn't there was sure to be

LITIGATION

Final comments and questions

- Questions?
- *"After all is said and done, more is said than done."*
- Contact us:
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