

Coverage Checklists and E&O

By Chris Burand

Fact: Most agencies do not use coverage checklists.

Question: From an E&O perspective, should they?

One of the weak arguments agents often use for not using coverage checklists is the agent believes that if they use coverage checklists and mess up, they will be in more trouble than if they did not use checklists at all. This argument clearly rests on the assumption that a person would rather be providing inadequate coverages to all clients rather than providing the right coverages to some and not others. An opposing attorney in court would probably summarize this by saying, "So, you prefer being incompetent all the time instead of just some of the time?"

A case covered in the November 14, 2005, *National Underwriter* clearly blows this argument away. The author of this great article, Peter Biging, Esquire, described the legal reasoning behind an appellate court ruling against a broker for not offering a specific coverage to an insured. The really interesting aspect of this case is the carrier had already been sued and had already paid! In the author word's, "...the court held that the issue of whether the insurer should have defended the claim was independent from the issue of whether the business manager and broker failed to provide competent advice."

In other words, the court's position in this case was that the broker was not only in the business of selling insurance but in the business of providing professional advice too. The broker was responsible for offering professional advice whether a checklist was used or not. So why not make life easier and less risky by using a coverage checklist?

This case is not unique for finding that agents and brokers owe clients professional advice. Many cases and many jurisdictions, though certainly not all, hold that if an agent or broker holds themselves out as a professional, then they owe professional advice to their clients. This case is even more poignant though because the carrier paid the claim and the broker still lost.

In a must read article, "Insurance Agent and Broker Liability" by Douglas R. Richmond in the *Tort Trial & Insurance Practice Law Journal*, Fall 2004, the author clearly makes a distinction between those agents and brokers that hold themselves to the public as experts and/or professionals versus those simply peddling insurance. The peddlers clearly have less responsibility to advise clients of coverage issues. To me, the issue really rests on one question: "Is the client depending on you to identify coverages they should consider purchasing?"

After a loss, the client will often claim they were depending on their agent or broker. So if you are going to be a peddler, have the insured sign a statement saying they do not consider you to be a professional or an expert in insurance coverages and therefore, they did not depend on you to advise them in any way.

If you do not like this approach, a coverage checklist is your best option. Used early in the fact-finding process, it can minimize quote time and minimize the importance of price. With a coverage checklist, the agency is better protected because the insured is taking responsibility for selecting coverages (if the checklist is used appropriately which involves completing it with the insured present and with the insured signing it). The agency can also better document that it considered and discussed a long range of coverages with the insured. Last, the insured will probably buy more insurance and the more insurance they buy, the less likely they will have an uncovered or contested claim. (For free sample checklists, got to www.burand-associates.com.)

Few agencies use coverage checklists and with the way case law seems to be evolving, insurance professionals are going to be held to higher standards in many jurisdictions. So, how would you answer the question: "From an E&O perspective, should agencies use coverage checklists?"

NOTE: Every state and every situation is different so obtain legal advice specific to your state and situation. None of the materials in this article should be construed as offering legal advice, and the specific advice of legal counsel is recommended before acting on any matter discussed in this article. Regulated individuals/entities should also ensure that they comply with all applicable laws, rules, and regulations.

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