

## *What have you done to protect your agency?*

**By Chris Burand**

Historical trends indicate more suits occur during poor economic times. So as the economy deteriorates, agents should anticipate being sued more often. Likewise, our recent period of extended economic strength and prosperity likely acted to reduce suits. Without realizing it, many agents grew complacent during the good times and many are now unprepared for suits arising from bad economic times.

Agents have many opportunities to prepare their agencies against the rising risk of a lawsuit, but three critical areas are too often over-looked: 1) determining your professional status, 2) improving your use of technology, and 3) instituting the use of coverage checklists.

### **Professional Status**

The distinction between agents and agencies selling insurance at a very high, professional level and those that are simply peddlers is an increasingly critical issue. Oversimplifying the situation somewhat, it basically boils down to professionals having a responsibility to offer the appropriate coverages to insureds and peddlers basically having no responsibility to do much except to not cheat, lie, or steal.

The implication is that if the agent is advertising expertise, advertising consultative selling, advertising they will complete thorough reviews of coverage and price, or even advertising they will develop a long-term relationship with their clients, then they are implying they are professionals and therefore, they have to meet professional standards.

A professional is interested in educating their clients about their needs rather than just talking about the coverages the insured is most likely to purchase. A professional is not worried about the client asking a coverage question about which the agent does not know the answer because they will study and research the question themselves or they will ask a coverage resource person within their agency. A professional has a much higher responsibility to the client to offer the right coverages and the right advice.

I have read and collected a considerable volume of case law on this subject and the professional responsibility exposure seems quite clear to me. Yet, I have read and heard many attorneys state that my perspective on this situation is entirely wrong. I am not an attorney, so I must respect their opinion, however, three aspects must be considered:

- A distinction must be made between being sued and winning versus not being sued at all. Agents win approximately 80% of all E&O claims so the issue is not really winning, it is about never being sued. Do not let an attorney convince you that a sloppy practice is acceptable because they will eventually win the case for you. O.J. eventually won his case too.
- Many attorneys do not distinguish between professional agents and peddlers. The case law most often cited, from what I have read, involves peddlers. Peddlers have very little responsibility to offer the correct coverages. It is rare that I have heard an agent's attorney ever cite professional agent standards case law, but a lot of it exists.
- If an agent advertises the best combination of price and coverage and the insured incurs a

loss for which they have never been offered protection, the agent clearly made a promise and failed to keep it. I have reviewed many agents' web sites which make all-encompassing promises. While most of these agencies never have any intention of keeping such promises for all their customers, especially their small customers, their intent was not malicious. They just did not think it through. Very few of the articles and opinions written by attorneys that I have read address this important distinction.

Agents need to clearly define whether they are professionals or peddlers and then they must ensure every aspect of their agency—their advertising, their procedures, and their people—uphold their chosen standard of service.

### **Technology**

Most agents did not have web sites the last time the economy was poor or if they did, their web exposure was minimal. Today, agencies have huge and beautiful web sites, often advertising services to everyone. But, as discussed above, most agencies do not actually offer all services to everyone. Several attorneys have advised me that advertising services the agency does not actually provide goes beyond E&O. Advertising services that are not provided is usually called fraud.

Please note, even if the agency takes action and changes their site to add the proper disclaimers stating that such services are not offered to everyone, web pages, like email, almost always leave an electronic record somewhere allowing attorneys to find your old promises even after you delete them. Once such archive is the WayBack Machine. Visit their site, at [www.archive.org](http://www.archive.org), to view your web site's history and to learn how to remove your site's history from their archive.

In fact, litigation discovery has taken the most expensive part of litigation and made it even more expensive through huge database, email, and file searches. Software can now find almost anything anyone has ever filed or written electronically. A famously viscous French Cardinal, Cardinal Richelieu, wrote many centuries ago, "If you give me six lines written by the hand of the most honest man, I will find something in them which will hang him."

Making this situation worse, less than 1% of the agencies I've reviewed have proper record retention policies so the ability to find information that can prosecute innocent agents is huge. Record retention policies are complicated, many of the record retention guidelines used by agents are wrong, and many of the agency management systems do not allow proper file destruction. I strongly encourage agents to hire expert record retention attorneys to address this serious exposure.

### **Coverage Checklists**

Coverage checklists have always been critical, this has not changed. After all, most E&O claims involve an insured not having adequate coverage so it goes to reason that if they were offered proper coverage, they are much less likely to have an uncovered claim. With more agents advertising their professionalism, coverage checklists are more important because NO other method exists for offering clients the coverages they really need! There are no shortcuts!

In a poor economy, people purchase less insurance which increases the odds they will incur uncovered losses. What defense does a professional agency have that advertises they will look

after their clients' needs but does not offer the right coverages?

E&O claims are very likely to rise and every E&O claim significantly negatively impacts an agency through stress, lost opportunities, lost productivity, and potentially higher E&O insurance rates. To reduce your exposure, determine whether you are a professional or a peddler and then act accordingly, manage your data properly, and always use coverage checklists!

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December 2008