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RISE to
CHALLENGE the
of



E&O Prevention

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An E&O Claim - 360° View

Objectives:

- *Understand what an E&O claims is*
- *Use claims statistics to identify areas to focus risk management efforts*
- *Review the specific types of errors made*

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INTRODUCTION

Often it takes an uncovered loss to create an E&O claim. Generally speaking, an uncovered loss would be caused by:

1. A lack of appropriate type of coverage, or
2. Inadequate values or limits to cover the full loss.

E&O claims don't discriminate by the size or location of agencies. All agencies, regardless of staff size, must proactively address E&O risk management!

Statistics show that annually one (1) in seven (7) insurance agencies and brokerages will report a potential E&O claim. Statistics also indicate that approximately 50% of those reported claims are closed with no defense reserves or indemnity payment made.

E&O claims statistics have fluctuated over the years and are often influenced by market cycles which drive changing behavior of insurance buyers, carriers, and agents. Catastrophic events such as tornados, hurricanes, flooding, earthquakes, and wildfires can be the catalyst for the discovery of uncovered losses that lead to E&O claims against agents.

In those cases where the claim goes forward, the agency may or may not have actually made a mistake. Just because an E&O claim was made against you doesn't mean that the agency staff did anything wrong or breached your legal duty. It may simply be that the agency finds itself in the uncomfortable situation of an allegation being made against them because of their inability to prove that they are not responsible. Unfortunately, many E&O claims allegations are "he said, she said" and **this is where documentation, combined with good E&O risk management procedures that are invariably followed, is a key defense mechanism.**

ERRORS AND OMISSIONS DEFINED

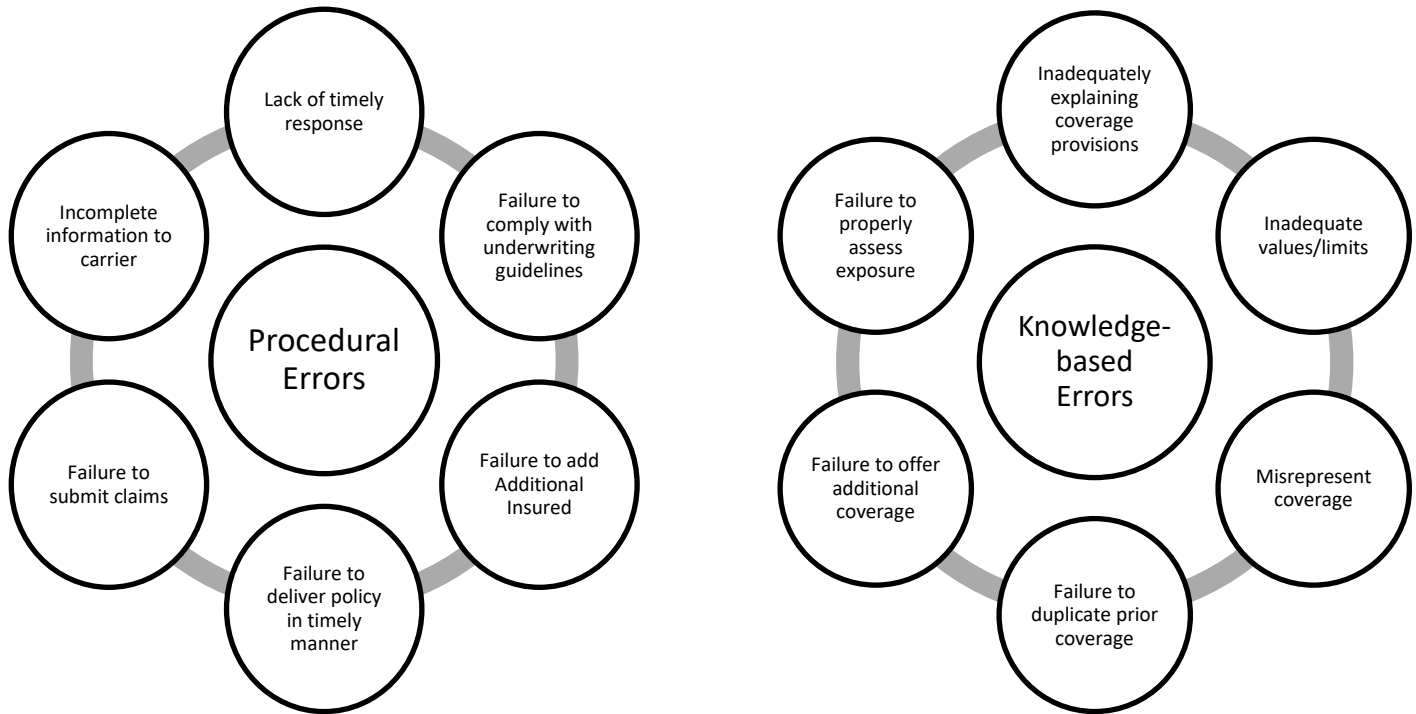
Errors and omissions can simplistically be described as "I made a mistake" (error) or "gosh I missed that" (omissions). When we look at E&O in this way, the mystique of "wrongful acts" can be described as human failings. An agency that has good E&O risk management procedures in place, that are enforced and monitored, can reduce their E&O exposure. This is especially true for those claims that could result from an omission.

Section 1: Procedural vs. Knowledge Based Errors

E&O claims can generally be broken down into two categories: procedural errors and knowledge-based errors. The spread of claims between these two categories is about 50/50 and in some cases there is overlap between the two. So, to truly reduce E&O exposure both error types need to be addressed. It is worth noting that knowledge-based types of errors

could include a lack of product understanding or technical coverage knowledge as well as giving bad advice to customers.

What are examples of procedural and knowledge-based claims?



Section 2: Agency E&O Culture - Staff Awareness

Making sure the agency staff follows agency procedures is one thing, but making sure they understand the concept of how errors and omissions may occur in the agency is also important, especially how it applies to them. The actions or lack of action of agency staff (including: owners, producers, CSRs, account managers, accounting staff, clerical personnel) ultimately affects the agency's E&O exposure. Employees may lose sight of this. A culture of E&O awareness can keep it top of mind and is the first step in successfully avoiding claims. Open discussions will create an environment where agency staff is more comfortable making managers aware of potential E&O claims. This will facilitate better claims reporting and meeting your E&O policy's reporting requirements to ensure coverage. If employees fear discipline or reprisal they may delay bringing a situation to management's attention until it is too late for either the agency or its E&O insurer to resolve the problem.

FACT CHECK:

Swiss Re Corporate Solutions data reveals that agencies that attend an E&O risk management seminar have fewer claims. The more agency employees that attend a seminar, the better. Consider having an in-house seminar for all employees.

Class Discussion

- *What are some of the reasons why a customer might have an uncovered claim from a lack of coverage?*
- *What are some things agency staff can do to avoid claims from inadequate limits?*
- *What factors may cause an increase in E&O claims when the insurance marketplace experiences a hardening?*

E&O CLAIMS STATISTICS

The E&O claims frequency statistics provided by Swiss Re Corporate Solutions provide guidance for an agency to determine their E&O exposures. They not only give you an understanding of the types of errors being made, they provide your agency with direction on where to focus your risk management efforts including:

- On whom to focus in reinforcing the importance of risk management,
- Areas of potential weakness in agency operations creating exposures and,
- Product education and training needs.

Section 1: Who is suing agents?

It is not only insureds that can and do bring claims against insurance agencies. Past claims experience shows that claims come from the following sources:

1. **Customers** – The vast majority of the time it is the customer bringing claims against the agent for failing to procure or recommend the coverage to protect them.

2. **Carriers** – In the past decade there has been a visible trend in the number of E&O claims involving the carrier against the agent. These types of claims can be a result of agents:

- Exceeding their binding authority

Example: An agency may be granted binding authority by the carrier to bind policies up to specified limits, e.g., \$250,000, without first submitting the application to the carrier for approval. When the agent binds a policy containing limits in excess of \$250,000 and a large loss occurs, the carrier is likely to deny on the basis that the agent exceeded his authority -- or will cross-claim against the agent, seeking indemnity.*

- Not adequately explaining policy provisions

Example: The agent obtains a policy for her customer's newly acquired property that contains a '60 day vacancy' clause. When the new owner fails to occupy the new property for over 60 days a water leak occurs and substantial damage occurs to the building while it is unoccupied. Both the customer and the carrier that denies coverage based on the vacancy clause will argue that the agency failed to properly explain the policy provisions.*

- Failing to comply with underwriting guidelines

Example: An agent has binding authority with a carrier that insures boats, subject to the carrier's underwriting guidelines, which restrict coverage to pleasure crafts under a specified horsepower and length. After a serious loss occurs, the carrier investigates and determines that the boat in question slightly exceeds both limitations -- and denies coverage. If forced to pay the loss, the carrier will file suit against the agency for failing to comply with its guidelines.

- Providing inaccurate or incomplete information to carrier

Example: An agent remarkets an account to a new carrier, but fails to include information regarding prior losses. When a new loss occurs the carrier takes the position that a material misrepresentation occurred and, had the information about the prior losses been known, then it would not have insured the customer. The carrier pays the loss and files suit against the agency to recoup its claim payment.

- Failing to provide timely notice of a claim to the carrier

Example: *If an agent fails to provide the carrier with notice of a claim, timely notice to the agent could be deemed timely notice to the carrier. In that case, the carrier could pay the claim and then file suit against the agency, arguing its investigation of the loss was prejudiced by the delay in receiving notice of the loss. One such example would be an auto loss wherein the car was repaired before the carrier had a chance to inspect it.*

3. **Third parties** – Sometimes agents can be sued by third parties. These claims often involve:

- Failure to add an Additional Insured or Loss Payee

Example: *Agency customers frequently are obliged to add a party with whom they contract to the policy as an 'additional insured,' or in the case of a lender, to be named as an 'additional loss payee.' If the broker fails to make that change to the policy, the uninsured third party or lender will attempt to hold the agency responsible.*

- Misrepresentation or inaccurate information on Certificates of Insurance

Example: *Many COI claims occur when an overworked (or undertrained) staff member issues a COI, as requested by the customer, without first checking to confirm that the coverage being certified actually does exist as represented. In some cases, the customer was not even obliged to provide the coverage in question -- that is, until it represented to a third-party via COI that the coverage was in place.*

- Failing to procure coverage that was relied on by a third party

Example: *Landlords often require tenants to obtain insurance for the leased premises to cover damage caused by the tenant or others. If the agent is aware of that requirement but neglects to obtain the required coverage, the landlord may pursue a claim against the agent.*

4. **Regulatory/governmental entity** – In responding to complaints, regulatory bodies can investigate the insurance operations of agencies. Some E&O policies offer some amount of coverage for expenses in defending these investigations. These allegations may include:

- Fraud or intentional misconduct

Example: *In the event it is discovered that an employee has been embezzling premium monies, the state Department of Insurance may initiate a regulatory proceeding against the agency for failing to supervise an employee.*

- Failure to return premiums

Example: *If an agency agrees to handle a customer's account on an agency bill basis and holds premium monies in a trust account, but fails to return any premium refunds, the Department of Insurance could initiate a proceeding against the agency. This could be the case even if the agency applied the return premiums to the customer's other policies.*

- Unfair claims practices

Example: *If an agency has claim-handling authority, acts that violate state law might include: failure to respond to the claim promptly; misrepresenting significant facts or insurance policy provisions; or denying claims without a reasonable investigation.*

Section 2: Who in an agency is most likely to be involved in an E&O claim?

9 out of 10 claims involve the following categories of staff. They are listed below in descending order of frequency:

1. Producers – The types of errors where producers are most frequently involved include: coverage type and limit recommendations, policy interpretation, application and policy issuance errors. They are also involved in a surprisingly high number of claims involving failure to provide timely notice of a claim to the carrier.

Here are more specific errors involving producers:

- Not explaining policy provisions

Example: A broker's failure to explain the definition of "vacant" in a homeowner's policy may lead to uncovered losses, most notably for vandalism or water damage. Vacancy is defined by courts and in individual policies based on the amount of furniture/personal property that is left in the home, or the length of time it is left unoccupied, e.g., when a home that is for sale remains unsold for an extended period of time.

- Recommending inadequate value/limit

Example: This often occurs when an agent relies on documents that are provided by the customer, but were prepared by a third party. Relying on inaccurate square footage or age of a structure can lead to inadequate coverage. In addition, claims can occur when the customer requests only minimum required limits and the agent does not have process for always offering higher limit options.

- Failure to recommend coverage type

Example: Excess flood and wind coverages in coastal areas are examples of coverages that a broker should recommend to a customer based on his knowledge of the customer's location and the nature of the property.

- Inaccurate information to the carrier

Example: This can occur when an agent fills out an application without asking the customer each question individually, e.g., whether he has been charged with a DUI, or if the premises has a monitored alarm. Although the agent may ask the customer to review the application before signing it, errors often are not noticed because "I just signed where my agent told me to sign..." If the question is answered incorrectly, the carrier may declare its policy void.

- Inadequate identification of exposures

Example: Home businesses and non-owned auto usage for business purposes can cause coverage gaps when agents fail to familiarize themselves with the customer's business.

- Failing to duplicate prior coverage

Example: Failure to obtain a copy of the prior policy or dec sheet when replacing coverage which leads to gaps in coverage such as a hurricane deductible or a sublimit on the new policy.

2. Licensed customer service representatives – CSRs are most frequently involved in errors involving the claims process, handling applications, certificates of insurance, and policy cancellation.

Here are some specific errors involving CSRs:

- Failing to provide timely notice of a claim

Example: A commercial customer reported an auto claim to the agency to report to the carrier. The CSR reported to the primary carrier but not the excess carrier. The agency faces exposure if the claim exceeds the primary limits because the claim was not sent to the excess carrier in a timely fashion.

- Mishandling application resulting in failing to procure coverage

Example: A customer sent in several renewal applications for multiple properties, along with the renewal premiums. The CSR failed to submit one of the applications and the error was not discovered until months later when a fire loss at the missed location was reported.

- Not notifying the customer of policy cancellation

Example: A customer's fire policy cancelled six times due to non-payment of premium, and each time the CSR would contact the customer to advise that the premium needed to be paid. A year later the customer suffered a fire loss and the carrier denied coverage because the policy cancelled for unpaid premium. The customer alleged the agency failed to contact him as they had in the past regarding the payment of the premium.

- Failing to add Additional Insured or Loss Payee

Example: A customer asked the agency to add the auto lender as a loss payee to his auto policy. The vehicle was totaled in an accident and the carrier paid the proceeds to the named insured only. The lender is looking to the agency for payment of the loan balance.

3. Account Managers – The error profile for account managers is very similar to that of producers. They are most frequently involved in errors relating to the recommendation of coverage and limits and assessing customer risks. The data also shows that account managers do a little better when it comes to explaining coverage to customers than producers.
4. Owner/Partner/Sole Proprietor/Principal – Looking at the claims data it seems that owner/principals are “jacks of all trades”. Claims involving them are spread pretty evenly across the different processes. This is likely because they are involved in so many facets of the agency, especially when it comes to important accounts. In smaller agencies the term “cook, bottle-washer, and waiter” may apply. Interestingly, owners have the highest percentage of recommendation errors such as failing to recommend coverage or adequate limits.

Class Discussion

- **Why are producers and CSRs most frequent involved in E&O claims?**
- **Does your agency have staff meetings that specifically address the importance of agency E&O risk management?**
- **Of the types of errors described above which do you think are the easiest to avoid? The most difficult?**

Section 3: What transactions are driving claims frequency?

The two transaction areas that make up agency’s largest profit margins also drive claims frequency. Not surprisingly, 40% of all claims frequency arises from new business followed by renewals at approximately 25%. When it comes to new and renewal transactions the following process steps drive frequency:

- Risk assessment and recommendation errors

Example: An agent's failure to ask probing questions of his customer and, where possible, visit the property insured, can lead to errors regarding such matters as: geographic location, activities undertaken, hazardous chemicals/processes utilized, supply chain disrupts, and jurisdictions where employees live/work.

- Policy issuance errors

Example: The failure to accurately identify the persons and property insured. Also, failing to forward policy in a timely basis so the customer can review it for accuracy.

- Application errors

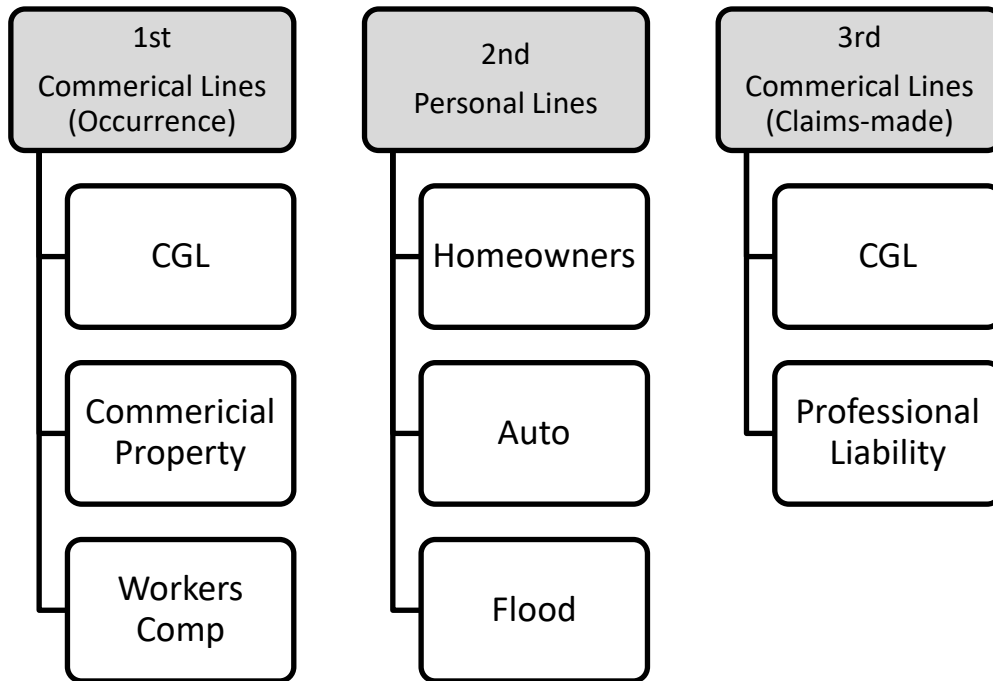
Example: Common application errors include missing medical history on life & health policies, and errors regarding the value and/or square footage of the property insured. If there are misstatements in the application, both the customer and the carrier are likely to blame the agent who prepared and submitted the application -- particularly if it was filled out by the agent -- when the carrier denies coverage, or pays less than the entire loss.

- Failure to duplicate prior coverage

Example: Both with renewals and new or remarketed coverages, agents often fail to compare the policy issued to the quote to ensure that the coverages requested are in place. Carriers often add sub-limits or remove small coverages. Certain perils are frequently excluded, such as pollution and snowplowing coverages. Oftentimes, these are changes that the carrier was willing to reverse by endorsement for a nominal fee which the customer readily confirms he would have paid.

Section 4: What types of policies are driving claims frequency?

Any policy not properly written could generate a claim. It is no surprise to any agency to find that commercial lines forms make up about 60% of the claims frequency by type of coverage. Commercial lines frequency of E&O claims is double that of personal lines. Below are the underlying coverages most frequently involved in E&O claims:



Class Discussion

- *Why do you think twice the amount of claims come from commercial lines versus personal lines?*
- *At what point in their process of working with customers are a producer and CSR most vulnerable or likely to make an error?*
- *Why do 1 in 5 errors involve the CGL policy? What makes it so prone to be involved in E&O claims?*

Section 5: What type of error/omission are others alleging an agency has made?

An agency can be accused of making any type of error or omission. Just because a claim is made doesn't mean you did anything wrong. However, below are the errors/omissions that have been alleged by customers, carriers and others in descending order of frequency:

- Failure to procure coverage

Example: A customer tells his agent that he plans to make an acquisition of new property, but the broker never follows up to determine whether the purchase was completed. Meanwhile, the newly acquired property sustains a loss and the customer expresses surprise that coverage was not obtained.

- Failure to adequately explain policy provisions

Example: A common complaint in the wake of commercial property losses is that the agent failed to explain the policy's 'coinsurance' provision, as a result of which the insured is underinsured.

- Failure to adequately identify exposures

Example: Because the agent is not entirely familiar with the customer's business and property and isn't using risk assessment questionnaires, a new provision on a policy that excludes coverage for a particular peril -- one for which the customer requires coverage -- is overlooked by the agency at renewal.

- Failure to recommend coverage type

Example: The agent, through lack of familiarity with his customer's operations, never learns that the customer's officers and employees routinely use their own automobiles on the job. As a result, when one of the employees is involved in a serious at-fault auto accident on the job, coverage is denied by the customer's business auto carrier because the agent failed to recommend and procure 'non-owned auto' coverage.

- Inaccurate/incomplete information provided to the carrier

Example: Agents placing coverage on commercial property routinely rely upon the customer to provide information regarding the building's square footage and present value. The carrier relies on that information and common estimates of construction costs to conclude that the limits requested offer adequate 'replacement cost' coverage. When the building burns to the ground, and it is discovered that the actual square footage was substantially more than represented, the customer likely is substantially underinsured -- especially if a coinsurance penalty is assessed.

- Failure to provide timely notice of a claim to the carrier

Example: *The agent reports a workplace injury for his customer, and tenders it to his customer's workers compensation carrier. He neglects to consider that the general contractor has 'additional insured' status on the customer's GL and excess policies. As a result, when the employee sues the general contractor months later and the claim is turned in to those carriers, they deny for late notice.*

- Negligent misrepresentation

Example: *An agency issues a COI showing 'additional insured' status for a third party, e.g., a contractor, where none exists. This can occur in situations where there was no obligation on the part of customer to provide such coverage, but the COI recipient claims to have relied on the COI to its detriment.*

- Failure to add an Additional Insured/Loss Payee

Example: *The customer provides its agent with a copy of its contract with a general contractor, which contains a provision requiring that the other party to the contract be named as an 'additional insured' on the customer's policy. The agent does not carefully review the contract and does not ask the carrier for an 'additional insured' endorsement.*

- Failure to duplicate prior coverage

Example: *The agency fails to note that particular activities, e.g., snowplowing, which were covered on an expiring policy, are now excluded on the replacement policy. Policies placed with a new carrier upon expiration of an old policy often have new exclusions or other limitations on coverage that avoid notice -- until a claim occurs.*

- Alleged failure to pay claim

Examples: *Decisions regarding the payment of claims typically are within the discretion of the carrier, but some E&O claims occur because the claim report is made late, or is not made to all carriers with possible coverage, e.g., workers compensation, CGL and excess/umbrella.*

- Failure to recommend adequate value/limit

Example: Agents open themselves up to claims when they (1) fail to verify the exposure characteristics of the property to be insured, e.g., square footage, (2) fail to recommend an appraisal to an unsophisticated customer, and/or (3) fail to recommend periodic increases in limits to keep pace with inflation in replacement costs. Even if the property is not a complete loss, inadequate limits may lead to the carrier's imposition of a coinsurance penalty, for which the broker will be blamed.

- Failure to notify customer (re: policy cancellation)

Example: Customers who suffer an uncovered loss following the untimely cancellation of their policy routinely insist that they received no notice of the cancellation (while the broker usually has a copy in its file) and counted on their broker to provide notice and procure replacement coverage.

** Note: Claims examples were provided courtesy of Swiss Re Corporate Solutions.

E&O Considerations of Agency Operations

Objectives:

- *Review the areas of an agency’s operations that can be the cause of E&O claims*
- *Recommend tips to procedural steps that can reduce E&O exposures*

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INTRODUCTION

The operations of insurance agencies can vary based on size, representation and geographic location. Over time agencies have had to adapt their operations because of changes in carrier capabilities and workflows, the implementation of tools like upload/download, the elimination of paper in favor of digital documents, the use of digital marketing (websites, blogs, social media, etc.) and comparative raters. This module is based on a generic agency and may not exactly represent your operations.

This module will explore areas in the agency's daily operations that may open the agency up to an E&O loss. While it may not follow your agency's operations exactly, the E&O considerations often still apply.

Agencies must have procedures in place to assure that consistent practices across all employees, as well as strong documentation of communications and agency actions are cornerstones of all agency operations. However, it is a fact of doing business today that for every company an agency represents there may be special or unique procedures that must be followed for various operations. A standard procedures manual, therefore, will address some of the basic and consistent steps as well as carrier-specific processes involved in the agency operation. Agency personnel must be relied upon to keep on top of individual carrier requirements and modify procedures when appropriate. Agency meetings, interoffice communications, training sessions, current written guidelines per carriers, along with periodic operation audits, will play an important role in assuring compliance.

In order to begin to establish a procedures manual for your individual operation, an assessment of your operations is necessary. Procedures need to address both the automated and manual functional environments for the various daily agency operations. For those agencies that have fully embraced the electronic workflow, the way the agency operates on the personal lines side may still be different from that on the commercial lines side. Employee benefits practices may also have other unique procedural and system requirements. In one organization, different departments may operate in different environments. How an agency is structured can vary, however, consistent practices are vital for all procedures.

Risk Management Tips for the Agency

Written procedures are effective only if all appropriate staff are trained and knowledgeable on:

- Insurance Coverages – ISO and company-specific forms
- ACORD forms
- Effective use of the agency management system
- Agency basic procedures per process
- Carrier-specific procedures per process
- Responsibility and authority applicable to their position
- State laws and regulations that apply in the various states in which the agency writes business
- Procedures to protect the security of customer and employee information
- Procedures to use digital marketing tools effectively

MARKETING THE AGENCY

Computers and the Internet have changed the way agents market their services and have made it easier to create their own marketing material and campaigns. Gone are the days of simply putting an advertisement in the Yellow Pages. The ways agents market themselves include using the following: websites, cold calls, brochures, advertisements, newsletters, and social media outlets like Facebook, Twitter, and blogs. While the media may change the principles of E&O risk management largely remain the same. From an E&O standpoint, care must be taken as to how an agency markets their products and services and presents their services to the public. Statements made in advertisements or social media can influence the standard of care expected from customers. Agencies should have procedures in place that match the representations made in advertising materials.

Section 1: Promotional Language Used

Here are some considerations when creating content for marketing the agency. It truly is a balancing act of trying to trumpet the strengths of the agency while not raising customer expectations beyond the agency's capabilities. It is difficult for an agency to be all things to all customers. However, each organization wants to distinguish itself from others. Often times the agency may be overly zealous in its description of services and products offered. Care must be taken to assure that services promised can be delivered. As mentioned earlier, when statements are made regarding specialized expertise, the standard of care can be increased. Below are a few examples of statements found on agency websites with the language of concern highlighted:

Example of the “Expert Agency” that specializes:

*“XYZ Agency is a full-line independent insurance agency offering auto, home, and business insurance. **We are also experts that specialize** in Employee Benefits in the workplace. These include group medical, life, cancer, accident, disability, vision, and long-term care.”*

Broad promises may increase the expectations of customers.

Example of the Customizing Agency:

*“ABC Agency represents many of the leading insurance companies in the world. That means we can **tailor custom insurance programs** specifically for you or your company **without the expense of coverage you don’t need.**”*

Uncovering an insured’s loss exposures requires careful evaluation. Making promises of a higher level of loss exposure evaluation may place an agency in a difficult position if a claim is made against the agent/agency for inadequate coverage.

Example of Evaluator Agency:

*“We will carefully **do a thorough risk exposure assessment, evaluate your current insurance coverage and provide you with fair and reasonable comparisons** based on an honest assessment of your needs. **We will never knowingly over or under insure you.** Our primary goal is to always be honest and fair, because, to be honest, we want to be your insurance partner for life!”*

Agency websites and proposals commonly use verbiage such as, "Our experienced staff can handle all of your insurance needs..." or "We will tailor an insurance program to fit the needs of your business..." Those representations can create a 'special relationship' giving rise to a heightened duty to perform, especially in so-called 'order taker' states where, but for that language, there would have been no duty to recommend a particular coverage or limit.

Section 2: Prospecting and Advertising

Agency growth from new business and account rounding is a challenge for all agencies. In the hunt for new business agencies may look to utilize leads from outside sources for direct contact, referrals, and social media. Agents also maximize their website visibility and include access to online quotes or a “contact me for a quote” response field. They may offer an “instant chat” feature that allows customers to “instant message” with agency staff. While it’s a nice tool, the agency needs to make sure correspondence from instant chats is documented in customer files. It is important that agencies include appropriate disclaimer language with all types of communications media to advise customers that no coverage is in effect until confirmed by the agency. In addition, agency staff will join community oriented organizations, sponsor community events, join online communities and sit on not-for-profit boards. Is the agency protected under the agency E&O policy for these types of activities, especially when procuring the coverage for an organization where the agent sits on the board? All of these are viable ways of engaging prospects but consideration to the E&O exposures must be given.

The first step is for the agency to understand both state and federal advertising and solicitation laws. For example, CAN-SPAM prohibits sending unwanted commercial email messages to wireless devices and computers. Agencies should always provide these email recipients the option to opt out of receiving emails. The Telephone Consumer Protection Act (TCPA) has established a “do not call” list which prohibits telemarketers from calling parties unless they have established a business relationship, including a prohibition on unsolicited facsimile advertisements. The same laws that apply to paper advertisements may also apply to online communications as well. Privacy laws may also be at play when utilizing leads purchased from outside sources if it includes personally identifiable information. This data should be protected in the same manner as other data.

Solicitation letters and emails are other prospecting tools that are designed to spark the interest of the prospect for the purpose of scheduling an appointment to discuss their insurance needs. These solicitation documents are easily standardized in the agency management system and accessible by agency personnel. Whether you send “snail mail” or email to prospects, the information in the body of the letter/email must not overstate benefits provided by an insurance policy, agency knowledge and experience or services provided.

Example: *An agency's solicitation letter states that the agency is a "full service insurance agency." The agency places the requested property coverage for a customer, but the limits of the policy are determined to be inadequate after a fire loss. While most states only require that an agent obtain the coverage requested*

by the customer, such advertising can result in a much higher duty for the agency to fulfill. Plaintiff attorneys will point to advertising or agency websites to show that an agency promised much more than what state law requires.

Advertising and Prospecting Risk Management Tips:

- **Be familiar with state and federal advertising and solicitation laws.**
- **The agency’s advertisements must reflect the agency’s actual knowledge, experience, quality of service, and market options.**
- **Using superlatives to describe the agency that sound good but are not backed up by operations, increases the agency’s E&O exposure.**
- **Simply put, you will be “putting your money where your mouth is” if the customer relies on these marketing statements and the agency does not live up to the advertisement.**
- **The agency should have a process for senior management to review all advertising and solicitation materials on an ongoing basis.**
- **Review all marketing pieces to avoid the use of terms that imply that coverage is broader than actually available.**
- **Don’t over-promise market capability or carrier representation.**
- **Email solicitations and newsletters should include appropriate unsubscribe language.**
- **Protect private information included in leads from outside sources.**
- **Document initial conversations with prospects in the agency management system.**
- **Encrypt personal private information collected from the agency website.**

Discussion Topics

- ***How does your agency describe itself and its services in marketing materials?***
- ***Does your agency have a procedure in place for developing and***

approving marketing materials?

- *How has marketing the agency changed in the past 10 years?*

E&O Exposures When Using Social Media

Objectives:

- *Determining the agency's social media goals*
- *Understand E&O considerations when using social media*
- *Learn about agency procedures when using social media*

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INTRODUCTION

Social media networks are increasingly becoming an important marketing tool for many insurance agents. Since technology changes daily, the number of networks is expanding rapidly. Currently, the more popular ones are Facebook, Twitter, LinkedIn, and Google +. These networks are free and easily available and agencies are looking to gain a marketing edge through the power of the web to increase their name recognition, market their services, and to connect with customers. Some of the same E&O risks apply to agency websites and blogs.

Most sites allow the creation of a home page by following a template provided to the user. Depending on the specific social media site, the profile template may be limited to key information an agency may wish to have known about their organization, along with an uploaded photo. Or it can be as robust as a site containing multiple photos, videos, and links to other sections of the site (as well as to other sites) containing additional content created and posted by the agency. Users of the site typically invite other users to join their community, and the invitee is free to accept or decline. Most sites also offer blogs, chat rooms, forums, and search capabilities to help locate other users based on your chosen search filters.

Many agencies already actively use social media, while others are still exploring it. In many cases, agencies use social media postings to draw users back to their agency websites. While social media is an excellent way to connect with customers, increase visibility of the agency, and build relationships with prospects, its usage does have some E&O exposure. Potential E&O exposures include:

- Contractual Liability
- Advertising
- Defamation
- Breach of personal data
- Misrepresentation

Agencies need to have a social media policy guiding how employees can use social media in connection with the agency, define acceptable behaviors, and clearly state when discussions should move from social media into the traditional agency workflows. The social media website should also clearly state how customers can use it and integrate this into agency workflows. It is very easy to see how customers might use social media sites to communicate answers to applications, to notify the agency of claim, or request changes to their policy. The agency needs to be prepared for these types of scenarios.

BENEFITS OF SOCIAL MEDIA

With millions of people engaged on a daily basis, social media presents the opportunity to touch more customers and prospects. Social media sites attract visitors who can provide an otherwise untapped source of suspects and prospects for the agency. General insurance information can be communicated to a broader audience, beyond the current customer base, that may increase the agency's name recognition and professional standing in the community. It is a platform where agency services and expertise can be highlighted as well as show an agency's community involvement, such as blood drives, charity events sponsored, etc. Another benefit is using social media as a communications tool during times of disaster, sharing vital information on preparedness, post event updates, and claims reporting.

If the agency is planning to venture into the use of social media network platforms, give careful thought to what the goals are in using these tools before beginning. The use of any social media sites can increase your agency's E&O exposures and careful thought needs to go into how it is used across the entire agency. One of the first steps is to create a social media policy and train employees. Once the agency has decided on the goals, consult with qualified legal counsel for advice specific to your planned use of these sites, and applying the risk management tips included in this module. Pay particular attention to advertising laws and the contractual liability created in social media user agreements.

To create a social media presence some agencies may work with service providers that work specifically within the insurance industry segment. This may include buying websites, advertising, and lead development from vendors. It is important to realize that just because an agency buys a service does not mean the agency is not responsible for everything that service provider states. These services providers may offer generic websites and social media advertising stating all kinds of great services that the agency may offer. The agency needs to make sure that the information accurately depicts the specific products the agency offers and the service standards.

Example: *An agency bought a pre-package website and social media service and the vendor did not remove their boiler-plated health insurance section. The website and social media stated this agency was selling group health insurance which they were not licensed to sell and do not offer! Furthermore, the agency owner had no idea he was advertising a product since he had never reviewed the product he had purchased.*

Discussion Topics

- *Does your agency use social media? What are the goals of using it?*
- *Does your agency have a social media policy?*

E&O CONSIDERATIONS

Email replacing formal written letters and memos seemed to make communicating a less formal process. In social media, the discussions tend to be more casual and take place more quickly than even emails, making it easier for a statement to be taken out of context. In addition, the information posted on social media is able to achieve instantaneous worldwide distribution. An electronic record is also created which can survive indefinitely. So, while the E&O exposures may not necessarily be new to agency operations, the visibility provided by social media websites can magnify them.

General Social Media Tips for the Agency:

- **Agencies should have a procedure related to the use of any social media site. The guide should be consistently monitored, managed and adapted.**
- **Social media by its nature is personal and agency employees can help promote the agency while building their personal brands. What employees do on their personal sites, however, can reflect on the agency and detract from the personal brands they are trying to build. It is important for agencies and employees to discuss where the business and personal aspects of social media intersect.**
- **Employee training should include instructions regarding conversations that are no longer “general” in nature and the need to move to the agency’s usual workflow procedures.**

Section 1: Contractual Liability - E&O Exposure

Contractual liability exposures may exist when accepting the site's user agreement. The provisions of the user agreement may be broad including the requirement to hold harmless and indemnify the site.

Contractual Liability Tips for the Agency:

- **Before venturing into the social media arena, read the user agreement, privacy statement, and “do’s and don’ts” thoroughly.**
- **Consult with your legal counsel, if needed, to be sure you have a full understanding of the liabilities to which your agency is agreeing.**

Section 2: Advertising – E&O Exposure

Using social media sites often include creating a homepage. The creation of the homepage can increase the agency's advertising liability exposure. Insurance regulations include advertising guidelines, with some states' regulations specifically mentioning the internet. So advertisements that appear on the Internet may be subject to all applicable existing statutory and regulatory guidelines, as with any other medium. A challenge is that the lines can easily be blurred when an individual or employee uses the agency name, logo, or other advertising identifier as part of their personal social networking site. Does this constitute advertising for which the agency can be held liable? That is why it is important to use the same level of care in reviewing all agency advertising including those on social websites.

Agencies may also post information and articles about general insurance topics to educate customers and drive traffic. If the articles are written internally by agency staff care should be taken to make sure the material is accurate. All articles should be reviewed before posting. When posting or linking to articles written by another source, permission should be received prior to re-publishing. This will help avoid exposure from misuse of trademarks and copyrighted material.

Advertising Tips for the Agency:

- Follow all statutory and regulatory guidelines regarding advertising liability.
- Each agency should have a process in place to review all marketing material, regardless of medium.
- An agency procedure should also be established that addresses to what extent employees have permission to link to the agency's sites, or use the agency name, logo, or other advertising material on their personal sites.
- Have a procedure for responding to criticisms regarding the agency that gets posted on blogs or in chat rooms or forums. Consideration should be given to having one person designated to whom employees can refer unflattering online postings.
- If posting original materials created by the agency it should be reviewed to ensure accuracy.

Discussion Topics

- *Are you familiar with the advertising laws and regulations in your state?*
- *Does your agency post articles on your website or social media site? If so, where does the content come from?*

Section 3: Defamation

Agencies have always faced exposure to defamation from verbal discussions and written communications. Most social networking sites feature blogs, chats or forum discussions.

Participating in these discussions can present exposure to defamation, or in this case, libel since the discussion is in written form.

Commercial speech – speech which proposes an economic transaction – is entitled only to limited First Amendment constitutional protection. Currently, there is no clear answer as to the level of First Amendment protection, business representatives will receive when they write or respond to a blog.

Discussions taking place on blogs and in chat rooms or forums tend to be less formal, may include more opinion than fact, and tend to move quite rapidly between many parties. Twitter limits text comments to no more than 140 characters. The end result is that it is much easier to make a statement that is taken out of context resulting in a claim against the agency for libel. In addition, defamatory comments will be viewed by large audiences and the electronic record can survive indefinitely.

Section 4: Privacy Issues

Insurance professionals are regulated by federal and the individual states they operate in regarding the disclosure of private personal information of their customers. The interactive spaces on social networking sites are not secure spaces for discussing personally identifiable information. When a social conversation moves from the general insurance type to specific needs of individuals, the agency staff must be vigilant to move the conversation to the usual agency workflow procedures. Customers may be lulled by the apparent anonymity of the social media and begin to give personally identifiable information. Agency staff must be prepared to respond to protect the release of private information.

Tips for Dealing with Defamation and Privacy Issues of Using Social Media:

- **It is important to keep all social media posts positive and based on fact.**
- **Often a negative comment that may be posted by a customer can be turned into a positive one if the agency takes the discussion offline and addresses the customer's problem.**
- **The agency should establish guidelines for employees so they know when to take a discussion offline and put the customer into the normal flow of business procedures.**
- **Procedures should ensure that personally identifiable information is not included in social media communications.**
- **Disclaimers should be included on any social media site so that customers understand up-front how the site can be used.**

Section 5: Incorrect Advice and Misrepresentation

Operating in the virtual world has the same exposure faced every day by insurance professionals in the rendering of their professional services. The standard of care in providing professional service is no less than that imposed on the agency in traditional communication vehicles. The same agency procedures your staff follows regarding risk analysis, recommendations, and documentation also apply to all content and discussions on social networking sites. Responding to specific coverage questions or sharing inaccurate information can create E&O exposure.

Tips to Prevent Incorrect Advice when Using Social Media:

- **Use standard disclaimers such as those used in voice mail, email, and on the website. Below is a sample:**
"Statements on this website as to policies and coverages and other content provide general information only and we provide no warranty as to their accuracy. Further, the ABC Agency cannot bind or alter coverages or accept reported claims via this Internet platform. Questions relating to specific coverage should be discussed using the agency's regular workflows. Please contact a licensed agent directly."
- **Have clear agency procedures as to who within the agency can make particular social media posts and subject those posts to a review process. Many agencies have designated a "Community Manager" who manages the agency's social media presence.**
- **Be clear in the agency's procedures that established processes and workflows apply to all discussions and service focused on an identifiable risk or individual or business generated through the social media site and that these conversations are documented in the agency management system.**

Section 6: Referrals

Making referrals to customers and vendors on websites and social media sites can have a very positive business benefit but should be handled with care to avoid creating an exposure for negligent referral. The referral should be done in a way that reflects on your experience with the vendor. If it is an actual vendor referral, the best practice recommendation is to provide at least two referrals, leaving it to your customer to choose which vendor to use. If the agency site links directly to a client or vendor, make sure you have that party's permission, to avoid any exposure to allegations of trademark infringement or unfair use of cyber marks from the vendor.

Tips for Mitigating Allegations of Negligent Vendor Referrals:

- **Obtain written permission from the vendor or site when linking to another website or article.**
- **Always provide more than one selection for each type of vendor, leaving the choice to the customer.**
- **Ensure there are appropriate disclaimers regarding the services being provided by these vendors.**

AGENCY PROCEDURES

Agency procedures for social networking should require employees to keep their discussions professional and distinguish between statements of fact versus those of opinion. Comments that can be construed as leading or participating in attacks on either individuals or businesses should be avoided.

Employees should limit their focus to a generalized discussion of an insurance topic. When a discussion becomes specific as to an identifiable risk or individual, it is no longer appropriate for an interactive space, and should be moved offline. Once moved offline, a discussion specific to an identifiable risk or individual should then move into the agency's established workflow process. This provides the standard servicing and documentation that would occur had this discussion taken place in person, via phone or within email.

Procedural Considerations for Using Social Media:

Establish written agency procedures addressing employee use of social networking sites, including:

- **Who within the agency has permission to participate on behalf of the agency,**
- **Define acceptable behavior (professional, fact versus opinion, no leading or participating in attacks on individuals or businesses),**
- **Employee sites should make clear they reflect their own views and not those of the agency,**
- **Identify when a discussion should be moved offline and into agency workflow, and**
- **Make clear the consequences of non-compliance to employees. Just as social media can enhance the agency's brand, if used improperly, it can detract from that brand.**

ADDITIONAL RESOURCES AVAILABLE ON SOCIAL NETWORKING

IIABA's Agents Council for Technology has several articles and recorded webinars available to assist agencies in using social media. These include an Independent Agent's Guide to Creating a Social Media Policy and sample disclaimers for agency websites and social media sites. (www.iiaba.net/act and click on the "Websites and Social Media" quick link.)

NEW BUSINESS PROCESSING

Section 1: Gathering Application Data and Assessing Customer Exposures

The process of gathering information about customers' insurance exposures is one of the most critical in terms of preventing E&O claims before they happen. It has also changed over time with insurance carriers providing agents with underwriting systems where application information can be input directly by the agent and access to quotes is almost instantaneous. While decreasing quote turnaround time, the underwriting systems have opened agents up to a different set of E&O exposures that they need to contemplate, because the application and risk assessment process have become less formalized and more streamlined. Carriers may no longer require a signed application on personal lines and small or middle market accounts. Instead of the customer completing a formal application, as in years past, the agent may be more inclined to take notes for those questions needed to obtain a quote in the carrier underwriting system. The challenge is that without a signed application there is nothing for the agency to fall back on if the customer provides inaccurate information, misrepresents its exposures or declines certain optional coverages. The misrepresentation of information from the customer becomes that of the agent. Agents may also be less likely to present the customer with the information they provided to review for accuracy. Exposure from data entry errors has also increased. This is especially important with carriers downloading customer information directly into the agency's management system, possibly overwriting existing information. Agencies should make sure that a carrier's download does not overwrite the data on the customer's application. If it does, the agency should create and retain an image of the customer's original application.

Just because a carrier does not require a completed and signed application doesn't mean the agency shouldn't retain one. As mentioned above, the inaccurate information of the customer falls to the agent. E&O attorneys find that the insured's signed application is often a critical piece of evidence in defending the agency in an E&O lawsuit. Insurance policies are legal contracts and as such are subject to the common law rule of "parole evidence". All of the oral or written information agreed to during the negotiation processes noted above, is reduced to a written contract – the insurance policy. Once the policy has been issued, the agreement between the insured and the carrier is what is in the policy, not in any proposal or oral promise made before the policy's issuance.

The application can be seen as the final pre-policy issuance agreement. The insured's signature on the application indicates what exposures they are transferring to the carrier and verifies that the underwriting information, used to affect this contractual relationship, is accurate. Regardless of previous discussions, information on proposals, emails, text messages, etc., the application can be seen as the insured's final insurance purchasing decision. So before the

delivery of a policy, an agency should have a signed application form from all new business customers.

Example: *An agency signs an application for a customer that is used to place workers compensation coverage for the customer. The application fails to show that the customer has employees working in New York. An employee is hurt on the job while working in New York, and the claim is denied by the workers compensation carrier. Even though the customer reviewed and approved the application, the customer will now argue that it was never given the chance to review it, did not sign it, and cannot be held responsible for incorrect or missing information in the application. Signing an application on behalf of a customer could be considered fraud or forgery. The agency should always obtain the customer's signature on an application.*

Here are some E&O considerations when gathering information from the insured:

Risk Management Tips for the Application Process:

- **Never sign an application on behalf of the customer.**
- **Have the insured review the application and sign and initial each page.**
- **Verify when carriers do not require that the agency retain a signed application. For small and middle market accounts where the company may not require a signed application, it is a best practice for the agency to get a signed application anyway. At a minimum, agency staff should recap the information provided by the insured along with getting their signature attesting the accuracy of the information. The applicant should respond verifying accuracy of information and documentation should be maintained.**
- **ACORD forms should be used to assure consistency, unless specific carriers require the use of their proprietary forms.**
- **When emailing an application to a carrier, use secure email. TLS secure email is recommended when emailing between the agency and carrier. See ACT website for more information on TLS.**

Failure to adequately identify exposures and failure to recommend coverage are two of the most common E&O claim allegations against agents. Uncovering exposures and offering coverage will not only help protect the agency from E&O claims but increase revenue and benefit the customer by cross-selling or account rounding. Yet, some producers are often hesitant to offer additional coverage options because the customer is simply looking for the

best price. **Making the decision of what coverage to purchase is the job of the customer not the agent.** Producers need to understand the complexities of customer operations by asking the right questions and offer coverage that may be available for potential exposures. If the customer doesn't want to purchase the coverage at least it would be documented that it was offered. Producers are often challenged with customers having limited time and willingness to answer the often voluminous questions provided by risk exposure analysis questionnaires. While this is completely understandable, the questionnaires can be used by the producer in advance as a starting point to guide discussions. Throughout the quoting process, producers can go back to the customer to gather additional information. Some agents may reserve more thorough risk exposure analysis processes for larger accounts because of the perception that the smaller accounts are simply looking for the best price, but smaller accounts may present the same E&O exposures as larger ones, when the insured is not presented with all of its options. In addition to questionnaires and coverage checklists, other fact-finding options include:

- Researching the prospect's website
- Physical inspection of the premises or operations
- Financial statement review
- Interview with key personnel
- Reviewing the organization's product brochures, etc.

Visiting the customer's premises is also a good way to avoid E&O claims. Often times the customer requests the specific coverage they want but a review of the premises often uncovers exposures that may have not been contemplated. It can also reduce E&O claims from carriers due to writing accounts that may be outside of underwriting guidelines.

Staying within your area of expertise is important as well. It is easy to say but hard to do when an opportunity to write a substantial account presents itself. Some of the following risk

characteristics may require a need for additional expertise on behalf of the agency:

- Complexity/scope of operations
- Number of locations
- International operations
- Large network of supply chain vendors
- Products and completed operations
- Familiarity with specialty coverages

It is important to review the customer's existing coverage and limits to make sure the agency is at least matching the current coverage. Customers generally come to the agency and ask for a price on their existing coverage. However, their existing coverage may be inadequate or have gaps for existing exposures. Agency staff can't simply rely on the incumbent agent or the

current insurance to properly assess the risk because to do so could turn into a potential E&O claim for the new agent. When the agency places the customer with a new carrier, or the current carrier changes its coverage, the agency should point out such differences to the customer.

Risk Management Tips for Assessing Customer Exposures:

- **Stay within your area of expertise – in terms of coverage and type of account.**
- **Gather information from the right party – the person in possession of the information the producer and carrier require.**
- **Agency procedures should include using of standardized checklists or questionnaires.**
- **Checklists are an invaluable tool for agents, regardless of experience. A source available to Swiss Re Corporate Solutions policyholders are sample checklists located at www.iiaba.net/EOhappens and for a more comprehensive tool learn more about the Big “I” Virtual Risk Consultant at www.iiaba.net/VRC.**
- **Checklists should be periodically reviewed to assure that they reflect current coverage options and exposures.**
- **Document any areas that were not discussed, with the specific reasons.**
- **Verify the physical location of the prospect with respect to flood zones, earthquake zones or other special hazards (Note: Stay abreast of changes in the flood maps).**
- **Point out coverage differences when the customer is put with a new company or the current carrier changes its coverages at renewal.**

Discussion Topics

- *Which of the agency’s carriers don’t require a formal signed application?*
- *How does the agency adapt its internal procedures when a carrier does not require a formal signed application?*
- *When working with carrier underwriting systems how does your agency have the customer confirm the information provided is accurate?*
- *What tools does your agency use to assess the risk exposures of customers?*

- ***What are the types of situations where the coverages provided to current customers changes and how do you handle these?***
- ***How many attendees have heard of the Big “I” Virtual Risk Consultant powered by Rough Notes and exclusively available to Big “I” members (www.iiaba.net/VRC)?***

Section 2: Proposals and quotes

How quotes and proposals are handled with prospects and customers can influence the agency’s level of E&O exposure. The documentation included in proposals such as coverages offered, coverage limitations, and insured requirements are invaluable. The disclaimer language in proposals also reinforces customer communications with clear guidance. Similar to how agencies handle applications, how they handle proposals has also changed with the use of carrier underwriting systems.

The use of formal written proposals/quotes can vary in an agency, due to both the size and complexity of an account and whether the account is personal or commercial. Formal proposals/quotes, for example, may not be utilized for some personal lines and small to middle market commercial lines accounts. Agency staff may gather underwriting information from the prospect and enter it into the agency management system. This information may then be uploaded to a comparative rating program or individual carrier website for quoting. Premium quotations, along with other relevant information, are compared and the staff member determines which company(s) will be recommended to the prospect. The agency and the prospect will review and discuss the information, most often by phone. If the prospect decides to move forward with the purchase of coverage, no formal proposal is issued.

In commercial lines operations how proposal/quote information is received varies. Small commercial lines accounts are often quoted by accessing each carrier’s website. More complex commercial lines accounts usually require the completion of a set of applications that may be e-mailed, faxed or mailed to the underwriter for quotation.

Proposals and quotes received from carriers should include all relevant information regarding their product and coverages along with the terms and price. Agency operations can vary on what is presented to the prospect. Some agencies choose to present the personal lines or small to medium size commercial lines proposals/quotes that are generated directly from carrier underwriting systems with no modifications. Other agencies enter the carrier’s information on an agency proposal/quote template to create an agency-generated proposal/quote document. Both methods have their benefits and their shortfalls. The proposals taken directly from carrier underwriting systems may not include offers of higher limits, additional endorsements

available, other applicable stand-alone coverage offered/accepted, appropriate disclaimers, duties in the event of a claim, or an area for the customer to sign-off verifying the agency relied on information provided by the customer. Consider a supplemental form when using a carrier specific proposal. When using a custom agency proposal, agency staff needs to take care to accurately input data into the proposal template. Proposal language should also encourage the prospect or insured to request a copy of any proposed coverage form, since the proposal is not a contract of insurance.

For larger commercial lines proposals, agencies generally prefer to use their agency proposal template due to the complex nature of these accounts. This allows the opportunity to include information on the agency and staff along with coverage details, options, risk management suggestions, carrier financial ratings, and price. Keep in mind, the more information contained in the proposal, the more the need to ensure its accuracy.

Example: *An agency failed to compare the application to the proposal/quote to confirm that the proposal/quote reflected the coverage requested. The fact that the requested coverage was not quoted or in the policy was not discovered until there was an uncovered loss. The agency should have compared the application to the proposal/quote to ensure that the requested coverage was bound.*

Risk Management Tips for Proposals and Quotes:

- **Document any coverage discussions with prospects, insureds, and carriers.**
- **Procedures should indicate which type of proposal is the preferred method for account type (directly from carrier system or agency template).**
- **Whether using the carrier's proposal or an agency proposal, provide sufficient details so the prospect understands what is being proposed and can make an informed decision.**
- **Do not make coverage decisions on behalf of the prospect.**
- **Clearly indicate if coverage presented is modified from: what was applied for, what is was provided from previous carriers, or from the current carrier upon renewal.**
- **Offer coverage options and higher limits, beyond what was requested by the**

prospect.

- Recommend other policies such as flood insurance, earthquake, umbrella, crime, environmental impairment, employment practices liability, cyber liability and inland marine.
- Have the prospect initial or sign off on any recommendation rejected.
- Include disclaimer language for all proposals.
- Include reminders of any areas of the customer's operations not reviewed.
- Provide any necessary additional steps or information needed to effect coverage.
- Make sure the customer knows if the premium is subject to audit at the end of the policy term.
- Definitions and/or explanations of general technical insurance terms can be included with specific reference that these are examples and insured should read their policy.
- Include payment options on all proposals.
- Include a disclaimer when using replacement cost software to determine values.
- The agency employee should document when performing a function on the carrier's website, or add to an activity automatically set up by the agency management system where appropriate.

Section 3: Binding and Policy Issuance

Agency personnel should know their binding authority and underwriting restrictions for each carrier represented. The speed at which policies are generated in today's automated environment has reduced the usage of binders. Agents can quickly receive policies through carrier websites. In addition, separate binders may or may not be utilized since some applications, such as the ACORD homeowner's application, can serve as a binder. Since a binder is evidence of insurance that follows the provisions of the policy itself it is important that the information on it be accurate. Verify the information is consistent with the application and the proposal. When binders are issued, a suspense or activity should be created in the agency management system so the binder does not expire without the policy being issued.

The use of binders can vary between personal lines and commercial lines.

Example: An agency was asked to bind auto coverage for a customer. The application and premium payment was received but never forwarded to the insurance company, and a subsequent auto loss was uncovered. The agency should have "tickler" or diary systems in place to ensure the coverage has been timely bound. A diary system will prompt an agency to confirm that the request to bind has been sent, and that the

coverage has been bound. This will help prevent long gaps in coverage, and future E&O claims.

Risk Management Tips for Binders:

- **Be familiar with state binder laws. (Example: number of days and coverage type)**
- **Create a central location where agency staff has access to binding requirements and restrictions for all carriers and make sure it is updated periodically.**
- **Use current ACORD binders.**
- **Do not verbally bind coverage.**
- **Obtain prior approval from the company if not sure the agency has binding authority on a certain risk.**
- **Include assigned policy numbers on binders when possible.**
- **Don't try to reiterate policy language on the binder but provide enough information outlining coverage.**
- **Create an activity/suspense in the agency management system for receipt of policy and extend accordingly.**
- **Monitor binder activity to make sure they are being replaced with policies in a timely fashion.**
- **If obtaining coverage through a surplus lines market, your agency may not have the authority to sign binders.**

The way both agencies and policyholders receive their policy forms has evolved with technology. Depending on the specific carrier and the line of business, agencies often need to make decisions on how policies are delivered to the customer as well as the agency. Policy delivery workflows can be any of the following:

- **Traditional Delivery** - Hard copy of the policy mailed directly to the agency and in turn delivered to the customer.
- **Carrier Hard-copy Delivery** – Carrier mails a hard-copy of the policy form directly to the customer and agency.
- **Agency Printed** - Policy printed by agency directly from a carrier's email or system and then mailed or emailed to the customer.
- **Agency Paperless Delivery** - Agency downloads electronic copy to the agency management system and emails the policy to the customer.

- **Delivery via CD** - The agency may also receive a CD of the policy from the carrier and then hand delivers or mails it to the insured.
- **Policy on Agency Website** – Policy is made available to the insured on the agency website. The agency sends an email to the insured with a link to retrieve the policy on the agency website. The agency website tracks when insured accesses policy and follows up with the agency when the customer does not retrieve the policy within a given time.
- **Carrier Paperless Delivery** – Company sends policy directly to insureds and agency downloads from carrier website.

Agencies have had to adapt their workflows to accommodate the expanded methods of policy delivery. While these methods may streamline the process providing cost savings in delivery and file storage, they can be a challenge to the agency because not all carriers do it the same way.

When it comes to electronic delivery of policies, it is important for agencies to be familiar with state laws affecting electronic delivery. Most states have adopted some form of the Uniform Electronic Transaction Act (UETA) but each states' laws may vary. For example, a common requirement is that certain insurance documents must be "mailed or delivered" to the insured. In some cases the insured must have previously agreed to receive policies via electronic delivery. When policies are sent electronically to customers, the agency should consider the following:

- State law permits the policy to be delivered electronically.
- The insured has consented to receive the policy electronically, whether by CD, email, or accessing the agency's secure website.
- Emailed policies are sent via secure email. While TLS email is a good solution for agent-carrier communications, agencies most likely will need a proprietary email solution for sending secure email to customers.
- The customer should acknowledge receipt of an emailed policy or the agency should use a registered email solution that notifies the agency when the email is received by the insured.
- Agency should follow up with customers who have not acknowledged receipt of the emailed policy or when the customer has not accessed the electronic copy of the policy on the agency's website. (There is no automatic presumption that emails are received, as there is with traditional mail delivery.)

From an E&O standpoint, the electronic receipt and delivery of the policies may also cause agency staff to become complacent in their review of both new and renewal policies for accuracy and comparing to applications and quotes/proposals. Direct delivery of the policy from the carrier to the customer may also prevent the agency from including a cover letter reiterating coverages offered and not taken, the importance of reading the policy, who with the agency is servicing the account, and what to do in the event of a claim. When delivering policies electronically, the agency also needs to consider the security required if protected personal information is involved. Finally, a process should be in place to verify the policy has been received by the customer.

Example: *The agency requests a deductible of \$500 per vehicle on the customer's commercial auto application. The policy is issued with a \$2,500 deductible per vehicle, which is not discovered until the policy owner has a hail claim that affects every car in the fleet. The agency had not reviewed the policy to determine that it was issued consistent with the application.*

Risk Management Tips for Policy Delivery:

- **Review policies for accuracy against applications, quotes/proposals and other correspondence.**
- **Deliver policies in a timely fashion.**
- **Encourage the policyholder to read the policy.**
- **Emailed policies should be sent using a secure connection to protect sensitive information.**
- **Agencies should have a process in place when providing customers with electronic policies, including the verification of receipt of the policy by the customer.**
- **Agencies should verify they are in compliance with the appropriate state laws regarding electronic policy delivery.**

POLICY SERVICING

Section 1: Policy Changes and Endorsements

The types of errors seen in the handling of policy changes and endorsements include:

- Failure to add endorsement requested
- Failure to add additional insured/loss payee
- Making policy changes requested by unauthorized person

From an E&O risk management procedural standpoint, how policy changes and endorsements are handled will depend on the specific carriers' workflow. Although these procedures vary, no change should be made unless the request was ordered by the named insured. Information received from a third party, such as a car dealership, should be verified with the insured before a change is ordered. Changes to the policy that cannot be made immediately by the agency should have a suspense/activity created in the agency management system for follow-up. Another consideration is the effect the policy change or endorsement will have on the customer's other policies. This is especially important when it comes to excess policies.

When policies are handled by a carrier service center, the contract should clearly outline the agency is held harmless for the errors of the carrier. There should be clear communication with customers on the process for policy changes. Voice mails and out of office automatic emails, websites and social media sites should include disclaimers that coverage cannot be bound or changed until confirmed by the agency.

Example: *Claims often occur when the agency is told of an impending change in exposure, but no one follows up to find out whether and when the change in question would take place, e.g., when a real estate closing on a new property is delayed to an unspecified date, or it is reported to the agent that a customer's teenage son will be getting his driver's license on his upcoming birthday. Others occur when newly added property is not evaluated with the same level of attention to detail as the original property, e.g., when a real estate investor adds yet another building to his holdings and the broker accepts without question his customer's evaluation of square footage and replacement cost.*

Example: *The carrier issues a quote that includes theft coverage, as requested, but also lists endorsements that had not been requested by the agency. The agency binds coverage without inquiring as to the nature of these endorsements, the policy is issued. When a theft loss occurs the carrier investigates and determines there was no 'active central station alarm' as required by one of the endorsements on the policy. The claim was denied.*

Risk Management Tips for Policy Changes and Endorsements:

- **Change requests to add or increase coverage should be handled as critical items in the agency's workflows.**
- **Change requests must only be received from the named insured.**
- **Insured records are updated to include exactly who ordered the change, the date the request was received, the reasons and details regarding the change request.**
- **Confirm reductions in coverage (decrease limits, removal of locations, etc.) with the insured, in writing or require the insured to put such requests in writing before**

making the change.

- **Carrier service center contracts should include language holding the agency harmless for the service center's mistakes.**
- **In situations where divorce or separation may be involved, use caution in making policy changes and consider getting requests in writing.**
- **Include disclaimers on voice mails, out of office automatic emails, websites, and social media sites.**
- **Understand that the agency may not have binding authority for certain changes.**
- **If the change cannot be made effective immediately notify the customer that coverage is not in effect until confirmed by the carrier.**

Section 2: Claims Handling

Most agencies, if involved in the claims process, take the first report of loss and forward the information to the carrier for handling. Professional handling of the first report reinforces an agency's customer service skills and can lighten a very unsettling situation for the insured. But it can also present a significant E&O exposure if claims are not handled appropriately. The most important things in avoiding E&O claims are to:

- Report claims to the carrier the same day received,
- Not to make coverage determinations on behalf of the carrier,
- And, to report the claim to all carriers where the insured has policies that may include some coverage (i.e. umbrella, excess carriers, D&O, and professional liability).

Although an agent may believe initially that a claim may not reach the level of an umbrella or excess policy, report the claim to them anyway as circumstances can change at any time unbeknownst to the agent.

Depending on the size of the agency, either a customer service representative or a dedicated claims person usually takes the first report. Managing the customers' expectations requires professional handling and clear, precise information. If a producer is contacted, the insured should be turned over to the appropriate staff member. In complex claims, producers may become involved in assisting the insured to respond to carrier inquiries and requests, but must proceed with caution and not become too entangled in the claims process.

While no agent wants to see his or her customers have uninsured losses and might wish to advocate on behalf of the customer with carriers, care does need to be taken in how this is handled. As an agent, you may not necessarily agree with the carrier's interpretation of policy language used to deny a claim. A healthy discussion of the language can help influence a

change in the carrier's position to get the claim covered. The Big "I" Virtual University "Ask the Expert" service has proved a valuable resource that has helped agents in these situations. Unfortunately, claims scenarios arise where an agent's error or omission may be the root cause for the denial of the claim. Out of a desire to get the claim paid, agents have advocated for their customer by admitting in writing to the carrier that they erred and that the customer should not suffer. The customer is often copied on such letters. Unfortunately, many carriers will not or cannot change their claims denial position and the customer is left with a written document admitting error. This is very detrimental to any E&O carrier's defense and could violate the reporting and notice provisions of the agency's E&O policy, which provides that the insured shall not admit liability. When a customer experiences a potentially uncovered claim which could result in a potential E&O claim, get the agency's E&O carrier involved early as it will often step in and advocate on behalf of the agency and the customer with the underlying carrier. There is no downside to involving your E&O carrier as soon as you discover such a situation.

Example: *The named insured contacts his agent about a letter received from an attorney regarding a possible pollution spill. The agent asks his customer if he would like to file a claim, but the customer (verbally) responds that he would rather wait to see if a lawsuit is filed to keep his loss history 'clean'. When a lawsuit is filed the following year the customer promptly tenders it to his carrier, but the carrier denies the claim based on late notice as the policy had a six month deadline on reporting pollution claims. The customer has 'no recollection' of telling his broker to wait to file the claim. Instead, he recalls relying upon his agent's advice in all such matters.*

Example: *The insured reported a broken basement window. The cost of repairing the window was less than the deductible so the agency advised the insured it was up to them to decide if they wanted to turn the claim in. The insured declined. A month or so later the insured called to advise that apparently the window was broken by a thief who had stolen tens of thousands in jewelry. The company paid the claim and sued the agency for failure to report the claim appropriately.*

Example: *The insured called to report a little water damage. When he learned what the deductible was, he declined to turn the claim in and the agent did not report it. The insured called back later to report the little water damage had resulted in major mold damage.*

Example: The insured called to ask about the deductible on his boat. He thought he'd scratched the bottom on some coral. When he learned what the deductible was, he declined to turn the claim in. The next day he called the agent to turn in a claim for his sunken boat. He'd hit the coral harder than he thought.

Example: The insured called to report a little auto accident. They felt they could repair their car for less than the deductible so they didn't turn the claim in. The agent did not report the claim and failed to ask for details about the accident such as what it was the insured hit. The damage to the other party was significant and included bodily injury.

Risk Management Tips for Handling Claims:

- **Treat all claims as critical – they should generally be handled the same business day they are received. Notify all carriers that MIGHT provide defense or coverage.**
- **Explain the carrier's and agency's role in the claims process – do not deny or affirm coverage.**
- **Provide information on when the policyholder can expect to be contacted by the adjuster.**
- **Encourage the insured to contact you if he or she has not been contacted by the carrier within the expected timeframe.**
- **Advise the policyholder of any loss conditions or duties that apply (contacting the police, protecting property from further damage, making the property available to the carrier for a physical inspection, etc.).**
- **Don't advise the insured who to hire to make repairs unless directed to do so by the carrier.**
- **Report all claims that are reported to the agency to the carrier, regardless of instructions from the customer to the contrary.**
- **In the case of property losses that are below the deductible, inform the insured diplomatically that these losses are their responsibility.**
- **Send an agency standardized, written verification of the reported of a claim.**
- **Create a suspense/activity to follow up with the policyholder within 72 hours.**

Section 3: Handling Renewals and Remarketing Accounts

While E&O claims are more frequently generated from new business related processes, handling renewals and remarketing accounts does have E&O exposure. Today, carriers are

more actively involved in the handling of direct bill renewals which has reduced the amount of processing by the agency. Unfortunately, the ease of processing may lead to complacency in the review of changes in customers' risk exposures and reduce the amount of proactive account rounding or offering of increased limits. While they may not receive the same amount of attention as agency bill accounts, direct bill policies should not be ignored or left on "autopilot". Regardless of the size of the account, the agency may consider reaching out to the customer at renewal time to request updated information and changes in exposures. This can be handled on an automated basis and does not create a workflow problem.

As the insurance market changes or policies get non-renewed or cancelled, there is a need to remarket accounts. The remarketing of accounts presents E&O exposures similar to that of the new business process. When it comes to the application process, there may be a tendency for agency staff to simply input existing application data into a new application without having the customer review it – a dangerous practice. In addition, when accounts are moved to a new carrier, the policy needs to be thoroughly reviewed to identify any reductions in coverage that should be shared with the customer. The agency should have a procedure for how often accounts are remarketed. Moving accounts should always be done with an abundance of caution.

Understanding the carrier's non-renewal processes is important. Insureds can decide to sever their relationship with the carrier, usually without notice. Carriers, however, are typically required to offer a renewal, unless they have complied with the state's non-renewal notification requirements. For this reason, agencies should provide current information to all staff regarding the state's non-renewal laws and regulations.

Some states have a separate renewal notification requirement for carriers to formally offer a renewal, possibly including the anticipated renewal premium. If applicable in your state, agencies should provide current information to all staff regarding the state's renewal laws and regulations. Although agencies are not required to provide the renewal or non-renewal notice, it is good for staff to be aware of non-renewal notice requirements.

Example: *After shopping around the renewal of a CGL policy for his customer, an agent advises the customer that he had located a policy that had the same terms and a lower premium. The customer readily accepts this policy. A claim is subsequently made by an employee of the customer against an additional insured -- but not against the customer. The carrier denies coverage for the additional insured due to an exclusion for claims "based on the sole negligence of an additional insured". The expiring policy did not have this exclusion and would have provided coverage to the additional insured for this claim.*

Risk Management Tips for Renewals:

- **Agency management should determine the number of days prior to expiration to run the list of all renewals. Remember to account for short-term and extended policies.**
- **Use checklists to uncover current loss exposures on renewals.**
- **Recommendations on coverage, limits, upgrades can be reiterated with each renewal review.**
- **Any recommendations rejected should be verified in writing.**
- **Updated signed applications, if applicable, should be obtained.**
- **Agency standardized cover letters, reviewing policyholder specific information, should be sent with the renewal policy or as a separate correspondence on direct bill or downloaded policies.**
- **If the insured has indicated that they prefer to receive their policy by email, the agency must be able to demonstrate that the policy was received by the insured.**
- **Include payment options for all renewals.**
- **For renewals that are downloaded, such as personal lines and small to middle market commercial accounts, the agency should have a process in place for reviewing the accuracy of accounts being downloaded.**
- **If a renewal is not going to be offered by the agency, the insured should be notified in writing well in advance of the renewal date.**

Discussion Topics

- ***What are the renewal notification requirements in your state?***
- ***What process does your agency have in place to review changes in exposures on direct bill renewals?***
- ***How often does the agency remarket accounts?***
- ***What procedures are in place to ensure any policy replaced with a new carrier offers at least as broad of coverage as the prior policy?***

Section 4: Auditable Policies

When writing policies that are auditable, be sure to encourage insureds to provide information based on their best educated projection. Explain the downside of under estimating the auditable premium base. The savings at the inception becomes a burden at the expiration. Along with the renewal premium, a large audit results in a fully earned premium due at the time of the audit!

Risk Management Tips for Audits:

- **Audits should be discussed at the time of writing new or renewal business.**
- **Producers and CSRs should verify in writing, with new and renewal business, that the premium is provisional and therefore, subject to audit.**
- **The agency should develop standard audit language to be used on cover letters when transmitting policies, at the time of an applicable endorsement change and following cancellation or nonrenewal**
- **Information on how the audit premium will be determined should be included**
- **Workers compensation policies for contractors and employee leasing firms may require special discussions and agencies should be aware of NCCI changes in experience rating application.**
- **For contractors workers compensation policies, create a suspense or activity to send a reminder, to keep certificates of insurance on file for subcontractors.**
- **Consider sending a six month notice to remind auditable accounts of the audit provision at the end of the policy term or to request mid-term figures to avoid a large audit.**
- **When possible, request a copy of any company audit from the insured.**

- **Establish a written procedure for handling audits and provide staff training on the procedure.**

Section 5: Cancellations and Non-Renewals

Cancellations and non-renewals can take a number of forms (mid-term cancellation, non-payment, insured request, etc.) and can be initiated by either the carrier or the customer. How these cancellations are handled can vary by policy terms, the state law for cancellations, and the type of policy involved. In general terms, the cancellation process is between the policyholder and the carrier and the agency should be cautious in its involvement. While no agency wants to lose an account, care needs to be taken on how cancellations are handled including how or if the policy will be replaced with another carrier.

Automation has eliminated duplication of effort on so many fronts. However, in the paper world, carriers would mail a written cancellation or non-renewal notice to agents and insureds. Depending upon the carrier's operating procedures, an agency may be the last to know about the cancellation or not even receive an alert.

For commercial lines accounts, agents often receive notifications from carriers for policy cancellation – in paper or electronic form. With respect to personal lines, however, the agent may or may not receive a notification. This can differ based off state law. If notification is not sent, agency should review the carrier communication log daily or check the individual carrier's websites is necessary to determine whether any insureds have been notified of a mid-term cancellation.

For cancellation with non-pay accounts, a key E&O exposure exists when an agency interjects itself into the cancellation process by frequently reminding the customer to pay their premium. Customers will tend to rely upon this second notice from the agency. This increased standard of care places the agency in the position of becoming responsible to remind the insured of their payment responsibility and the customer relies upon this. Two reasons that agents often give for the second notice are customer service and the potential loss of customers. Although this would, at first blush, appear to be a sound business practice, the cost to the agency for this procedure must be fully evaluated. If the increased E&O exposure alone is not enough to discourage the practice, then take the time to determine the monetary costs to the agency for the time invested in making this second notice. Instead of reminding customers to pay their premium, having an exit interview process in place is a way to discuss the customer's ongoing insurance needs without raising the standard of care through on-going reminders. Customers should understand that their payment must reach the carrier by the due date and that replacement coverage may not necessarily be available if there is cancellation for non-payment of premium.

Some other E&O considerations involve the reinstatement of coverage and the remarketing of the account. In situations where the carrier cancels or non-renews an account, agency staff needs to clearly communicate with the customer on whether an attempt to replace coverage will occur or if the customer should obtain coverage through another agency. The timing of replacing coverage is important to avoid any coverage gaps.

Example: *The named insured pays its (overdue) premium directly to the agency three days prior to the policy's effective cancellation date. The policy had been issued through a surplus lines agent. The agency mails a check by 1st class mail directly to the carrier, but the carrier never confirmed receipt of the payment. When a loss occurs the following week the carrier denies coverage claiming the agency was not its agent and the agency check was not received until two days after the effective cancellation date.*

Example: A customer contacts the agency and requests cancellation of a health policy at the end of the month. The agency sends the cancellation request in without specifying an effective date, so the carrier cancels effective immediately. The customer becomes ill before the end of the month -- during the resulting gap in health coverage -- and incurs significant, uncovered medical expenses.

Example: The agency issues a binder on a homeowner's policy. The carrier sends a request for additional information, but the agency does not respond to this request on a timely basis, so the carrier issues a cancellation. The cancellation became effective on the same date as a moratorium on binding of coverage due to an approaching storm that causes uncovered wind damage to the home.

Risk Management Tips for Cancellations and Non-renewals:

- **Don't provide continued notice reminders to direct bill customers being cancelled for non-payment. If the agency decides to go beyond the regular standard of care in making notifications to customers of direct bill late notice/cancellation notice then it is important to be consistent. If notice is given in a special situation, make clear to the customer not to expect future reminders and document the discussion**
- **Don't interfere with the carrier's right to notify an insured of cancellation or nonrenewal.**
- **Avoid giving the insured the idea that the agency can have coverage reinstated or rewritten unless first verified with the carrier.**
- **If replacement of coverage is necessary, determine possible carriers.**
- **If coverage is going to be replaced, inform the insured of any reduction in coverage, limits, options, or restrictions, in writing before coverage is replaced and document the insured's acceptance.**
- **If coverage is replaced, compare the replacement coverage and the expired coverage for variances.**
- **If coverage is replaced in an E&S market, provide information regarding the differences between the standard market and the surplus lines market, including that the policy is not backed by the state guaranty fund in most states.**