



Swiss Re Corporate Solutions: Attorney Survey of Agents E&O Litigation

A value-added risk management service of the Big "I" Professional Liability Program and Swiss Re Corporate Solutions.

Table of Contents

Introduction: Attorneys Share Thoughts on Agents E&O Claims	2
Section 1: Inside Your Defense Counsel from Swiss Re Corporate Solutions– Getting to Know Them.....	3
Section 2: Common Allegations Made Against Agents.....	6
Section 3: Things to Remember When Claims Occur	7
Section 4: Most Common Agent Errors Attorneys See	8
Section 5: Preventing E&O Claims	9
Section 6: Prevailing When It Happens to You	11
Section 7: What’s Exposing Your Agency?	12
Section 8: What’s In Your File – Good Documentation?.....	13
Section 9: Naughty or Nice: Checklists.....	15
Section 10: Lessons Learned: Cases with Happy Endings	16
Section 11: Preparing and Participating in Depositions.....	20
Section 12: Preparing and Participating in Mediations.....	21
Section 13: Emotions During the E&O Claims Process	22
Section 14: It Takes Time to Make a Claim Go Right	23
Section 15: What Should You Be Looking For In a Claims Department	24

This survey is intended to be used for general informational purposes only and is not to be relied upon or used for any particular purpose. Swiss Re Corporate Solutions shall not be held responsible in any way for, and specifically disclaims any liability arising out of or in any way connected to, reliance on or use of any of the information contained or referenced in this article. The information contained or referenced in this article is not intended to constitute and should not be considered legal, accounting or professional advice, nor shall it serve as a substitute for the recipient obtaining such advice.

Introduction: Attorneys Share Thoughts on Agents E&O Claims

Survey of Swiss Re Corporate Solutions Panel Counsel Members Provides Real-World Information



Earlier this year, Swiss Re Corporate Solutions and Big “I” agency E&O risk management team developed a survey to gain more perspective into the agent’s E&O litigation environment and to get real-world feedback from the outstanding attorneys on the front line defending your interests. The survey was delivered to one panel counsel attorney from Swiss Re Corporate Solutions in each state. The attorneys that responded had an average of 24 years of experience working with Swiss Re Corporate Solutions to defend policyholders. Collectively they have handled thousands of agency E&O cases. A review of the responses provides some great direction on where E&O claims may be lurking in the agency and how to avoid them.

Section 1: Inside Your Defense Counsel from Swiss Re Corporate Solutions– Getting to Know Them

Ever wonder what makes the panel counsel attorneys from Swiss Re Corporate Solutions tick? In a recent survey we found out a little more about the folks that defend you when an E&O claim happens. One thing is for sure, there is a lot more to them than just knowing the legal process. Whether it's a dream about being a coach or the children that make them smile, here are some of their responses:

What is your greatest strength?

- ✓ Ability to think through a problem thoroughly and develop a solution
- ✓ Commitment to seeing the job through
- ✓ Ability to focus on the big picture
- ✓ Preparation
- ✓ Perseverance and determination
- ✓ Passion for defending agents
- ✓ Creativity in addressing challenges
- ✓ Ability to recognize and simplify issues
- ✓ People skills
- ✓ Sense of humor
- ✓ Communication skills
- ✓ Tenacious negotiator

We asked the attorneys what profession they would be if not an attorney. Surprisingly, there were not many insurance agents listed but we won't hold that against them. A coach and teacher were popular answers to these questions. Also, like the beloved Seinfeld character George Costanza, we even had a marine biologist and an architect. Check them out:

If not an attorney, what?

- ✓ Coach
- ✓ Sportswriter
- ✓ Business owner
- ✓ Architect
- ✓ Airline pilot
- ✓ Teacher/Professor
- ✓ Guitarist
- ✓ Rock Star
- ✓ Chef
- ✓ Handyman
- ✓ Marine biologist
- ✓ Carpenter
- ✓ Doctor

- ✓ Investment advisor
- ✓ Life Counselor
- ✓ Advertising Executive

When involved in an E&O claim it really isn't a time for smiling. But we asked the attorneys what makes them smile. As you probably suspected family was often the catalyst for that big grin. Here's how they responded:

What makes you smile?:

- ✓ Children/Grandchildren
- ✓ Discovering a new song
- ✓ Puns and irony
- ✓ Dinner with friend
- ✓ Seeing the happiness of family
- ✓ A good result for agents
- ✓ A beautiful sunset
- ✓ Satire
- ✓ A home run on a sunny day
- ✓ Music
- ✓ Pet dog
- ✓ Another smile
- ✓ Monty Python

A motto is a phrase that formally summarizes the general motivation or intention of someone or an organization. It can be a rule or slogan that dictates underlying actions. We put the attorneys from Swiss Re Corporate Solutions on the spot with a survey question about their favorite motto. Hear what they had to say and may they provide you with much inspiration:

Favorite Motto:

- ✓ "Be prepared"
- ✓ "I see no need to fail when success is offered every day."
- ✓ "Igitur qui desiderat pacem, praeparet bellum." – If you want peace prepare for war.
- ✓ "All honest labor has honor."
- ✓ "I am the common denominator in all my problems."
- ✓ "Do unto others as you would have them do unto you."
- ✓ "Never give up."
- ✓ "Your hard work will soon show results."
- ✓ "And this too shall pass."
- ✓ "Live Free or Die"
- ✓ "Be careful what you ask for, you may get it."
- ✓ "Unto thine own self first be true."
- ✓ "If it's worth doing, it's worth overdoing."
- ✓ "I'd rather be hated for who I am than loved for who I am not."
- ✓ "A lawyer who represents himself has a fool for a client."

- ✓ Carpe Diem
- ✓ "Trust but verify."
- ✓ "Life is what you make it."
- ✓ "Would you rather be happy or right?"
- ✓ "A man who walks but a mile a day will get round the world at last."
- ✓ "Nearly all men can stand adversity, but if you want to test a man's character, give him power."
- ✓ "No substitute for preparation."
- ✓ "If you want something done well, do it yourself."
- ✓ "Even a broke clock is right twice a day."
- ✓ "That which does not kill you makes you stronger."
- ✓ "Nothing is impossible."

Section 2: Common Allegations Made Against Agents

An allegation is an assertion made by a party that must be proved and supported with evidence. Allegations can be made on “information and belief” if the person is not sure of all the facts. It’s important for agents to remember that until each statement is proved it is only an allegation. Just because you have a claim made against you doesn’t mean you did anything wrong or breached your legal duty. We also surveyed the panel counsel attorneys from Swiss Re Corporate Solutions for their thoughts on what the most common allegations against agents. Based on the claims data that we consistently review there were really no surprises. However, this information can be very useful for agencies from a risk management perspective as they give direction on agency procedures that can be reviewed to make sure the agency is doing everything they can to avoid exposing themselves to the potential claim. Share these with your staff and ask them to keep in mind that if you’re not doing your job properly and following agency procedure one of these allegations could come in a lawsuit. And remember the customer’s file will tell the story, so document thoroughly.

I DID WHAT?

Most Common Allegations Against Agents

- ☛ Failure to procure appropriate coverage or adequate limits
- ☛ Failure to advise of policy exclusions or limitations (coverage gaps)
- ☛ Negligent determination of inappropriate property values
- ☛ Failure to advise about coinsurance penalty
- ☛ Negligent misrepresentation of coverage
- ☛ Failure to handle claims properly causing carrier denial
- ☛ Breach of fiduciary duty
- ☛ Exceeding binding authority or binding an unacceptable risk (Carrier claim against agent)
- ☛ Failure to properly handle coverage for additional insureds and certificate holders
- ☛ Holding themselves out as an expert or risk management specialist
- ☛ Failing to explain audit provisions in policies



Section 3: Things to Remember When Claims Occur

Being sued in an E&O claim is unfortunate, but that is why you purchase Professional Liability insurance. Emotions can run wild when it happens to you, but there are some things that you need to remember. Most importantly you need to get your E&O carrier involved as soon as a potential incident arises. You also need to make sure you understand the Report and Notice Provisions of your E&O policy to make sure you or your staff don't do anything that would jeopardize the coverage afforded by the E&O policy.



- ✓ Remember that just because you are sued doesn't mean you did anything wrong
- ✓ Provide E&O carrier immediate notice of claim
- ✓ Never admit liability or tell the customer, "Don't worry, I have E&O coverage."
- ✓ Only discuss matter with E&O carrier and appointed defense counsel
- ✓ Preserve, organize and provide all documents related to the account to your E&O carrier or defense counsel
- ✓ Do not give up any portion of the customer file without a subpoena or consulting with an attorney
- ✓ Never talk with the plaintiff's side without representation
- ✓ Learn from the experience and find ways to improve the agency's operations
- ✓ Fully cooperate in every way with the E&O carrier and defense counsel
- ✓ Getting sued is not the end of the world
- ✓ Agents may be sued just to keep the case in state court
- ✓ Trust your E&O carrier
- ✓ The case will likely turn on credibility and documentation

Section 4: Most Common Agent Errors Attorneys See

The panel counsel attorneys from Swiss Re Corporate Solutions average almost 25 years of experience in defending insurance agent's E&O claims. They have seen the good, the bad, and the ugly. We asked them to provide their thoughts on the common errors they see agents make, causing them to be involved in an E&O claim. Review the items listed below and take stock of your agency's performance and if there are areas of improvement needed to prevent these errors.



Most Common Errors Attorneys See When Defending Agents

- Attempts to negotiate with the carrier on behalf of the customer after the denial of a claim
- Failing to document coverage discussions where the customer declined to purchase coverage, including higher limits
- Lack of timeliness in delivering the policy to the customer
- Failing to comprehensively document telephone conversations with customers
- Lack of compliance with carrier requirements in placing coverage
- Failing to follow internal steps outlined in the agency's procedures manual
- Lack of communication in understanding the customer operation or coverage needs
- Failure to respond in a timely fashion to customer inquiries and questions
- Dabbling - getting outside of the agents expertise
- Not identifying differences in coverage when renewing a policy on a different policy form
- Making coverage determinations on behalf of the carrier
- Failing to discuss updating coverage as their customer grows
- Not getting signed applications from their customers
- Holding yourself to be an expert or risk manager when you are not
- Lack of knowledge of the product they are selling
- Overstating or misrepresenting the products coverage

Section 5: Preventing E&O Claims

An Ounce of Prevention Equals a Pound of Professionalism

Ben Franklin said “an ounce of prevention is worth a pound of cure.” Unfortunately, in our imperfect and hectic world we often lose sight of being proactive and are more reactive. We asked the panel counsel from Swiss Re Corporate Solutions what agents could do to prevent E&O claims or at least to get them resolved quickly. Below are their responses for your review to see how your agency stacks up. Take a moment and get PROACTIVE by sharing these with your staff and talking about this list at your next staff meeting. It will be worth the time because not only will these best practices help reduce your E&O exposure but can also improve your profitability and professionalism.

Best Practices To Prevent E&O Claims or Get Them Resolved Quickly:

- ✓ Understand the standard of care owed to your customer and how this may vary depending on the state in which you are doing business Maintain standard agency procedures that address each type of customer transaction
- ✓ Audit to ensure standard agency procedures are adhered to by all agency staff, and that file comments are at the professional standard desired by your agency
- ✓ Thoroughly document customers files with requests for coverage, both offered and rejected
- ✓ Use surveys/coverage checklists to identify customer’s exposures and to document the acceptance or rejection of coverages
- ✓ Voice mail, email, fax, or other electronic communication should contain a disclaimer stating coverage cannot be bound without speaking with a licensed representative
- ✓ Implement a standard procedure to review policies and endorsements for accuracy, recognizing that non-admitted policies in particular may contain non-standard coverage conditions or exclusions
- ✓ Deliver policy on a timely basis and document policy was delivered while also including language your customer to read their policy to ensure that is in accord with the insurance ordered by the customer and to contact your agency if any changes are desired. (Note: State laws may require varying levels of delivery confirmation)
- ✓ Utilize the agency management system at all times and for all communications/correspondence
- ✓ Send written correspondence to customers confirming declined coverages
- ✓ Include disclaimers on all coverage summaries and policy delivery correspondence.
 - Example language: PLEASE READ YOUR POLICY CAREFULLY: This is a proposal (or summary) provided for illustration purposes only; it is not a legal contract. It is provided to facilitate your understanding of your insurance program. Please refer to the actual policies for specific terms, coverage, conditions, limitations and exclusions that will govern the event of a loss. Specimen copies of all policies are available for review prior to the binding of coverage. In assisting you with your insurance needs we have been dependent upon information provided to us by you. If there are other areas that need to be evaluated prior to binding of coverage, please bring them to our attention. Should

any of your business operations or exposures to loss change after coverage is bound, it is the customer's responsibility to let us know promptly so proper coverage(s) can be discussed.

- ✓ Avoid "renew as is" - Discuss with customers what has changed since last year and offer increased limits or additional coverages
- ✓ Stay within your comfort zone and area of expertise
- ✓ Be aware of how policies you place integrate and overlap, especially regarding umbrella and excess policies
- ✓ Instill a "claims prevention" mentality among agency staff
- ✓ Submit ALL claims to the carrier in a timely manner and do not make coverage determination on behalf of the carrier
- ✓ Have the customer sign, date, and initial applications, where required
- ✓ Require continuing education to staff beyond just what is required to maintain licenses
- ✓ Have service standards and respond to all customer inquiries in a timely fashion
- ✓ Do not alter standard Certificates of Insurance forms or indicate coverage or limits that do not exist on the actual insurance policy
- ✓ Require written confirmation from the insured before making any changes to an existing policy, or if accepted via telephone, send written confirmation to the customer verifying change

Section 6: Prevailing When It Happens to You

After A Claim – Top Things An Agent Can Do To Prevail:

We asked the panel counsel attorneys from Swiss Re Corporate Solutions the top things an agent can do to prevail if an agent does have an E&O claim. Their responses are below but many were universal stressing to be honest, to preserve all documentation associated with the customers file, to fully cooperate with defense counsel, and to avoid discussing the claim with anyone outside of the agency.

- ✓ Involve your E&O carrier early and as soon as you become aware of an incident that could potential give rise to a claim
- ✓ Never give a deposition without contacting your E&O carrier and being accompanied by the agreed upon attorney
- ✓ Immediately write a chronology of events or summary of facts leading up to the claim
- ✓ Identify all people in the agency that may have relevant information on the underlying claim
- ✓ Make sure that agency staff do not talk to the customer, customer's counsel, or other outsiders regarding the claim, refer them to your E&O carrier
- ✓ Fully cooperate with and take advice offered by your defense counsel
- ✓ Don't withhold or delete any communications
- ✓ Make your best efforts to gather, assemble, and preserve all documentation and information relating to the claim and thoroughly learn the file
- ✓ Be truthful
- ✓ Work with defense counsel to thoroughly prepare for depositions
- ✓ Testify persuasively and politely to make a positive impression
- ✓ Do not discuss the case with anyone other than your E&O carrier or defense counsel
- ✓ Remain calm and let your attorney do the worrying for you



Section 7: What's Exposing Your Agency?

Danger, Will Robinson!

Sometimes agents just have too much on their plate to make E&O risk management a priority. It's one thing not to be proactive and it is wholly another thing to be unnecessarily increasing liability with dangerous activities. We asked the panel counsel from Swiss Re Corporate Solutions to tell us their opinions on the most dangerous things that agents could do to expose themselves to E&O claims. Take a moment to look in the mirror – are these you?

Most Dangerous – Things Exposing Your Agency to an E&O Claim

- ☛ Having agency procedures in place that are not strictly followed by all agency staff
- ☛ Advocating in writing on behalf of the customer once a claim had been submitted and denied by the carrier
- ☛ Lacking thorough understanding of the products being sold to customers
- ☛ Misrepresenting the scope of coverage procured
- ☛ Making a coverage determination on behalf of the carrier
- ☛ Failing to offer additional coverages and increased limits
- ☛ Failing to document the customers declination of coverages and limits
- ☛ Issuing binders outside the scope of the agency's binding authority
- ☛ Making representations about the adequacy of coverage – “fully covered”
- ☛ Dabbling in areas outside of the agency's expertise
- ☛ Over-promising in advertising materials, creating a “special relationship” with or reliance by the customer
- ☛ Renewing policies “as is” without a review of possible changes in exposures
- ☛ Failing to review the policy to make sure it matches the application and proposal
- ☛ Having the customer sign a blank application or signing customer's name on their behalf
- ☛ Modifying the language on a Certificate of Insurance or using it as a way to add an Additional Insured endorsement (without actually adding the AI endorsement itself)
- ☛ Failing to understand the customer's business/operation



Section 8: What's In Your File – Good Documentation?



Good File Documentation – What Should Be Included and What Should Not

Imagine one of your customers' files projected up on a big screen in a court room for all to see. Would you feel comfortable that the file would provide a clear and understandable timeline of all of the interactions with the customer? Would it cover the Who, What, Why, When, and How? Documentation should provide a road map of

daily activities backed up by signed applications, checklists, and proposals identifying coverage that were accepted and rejected. Agents generally do not lose E&O cases because of too much documentation. Are all employees following standard documentation practices for all customers, all of the time? And when was the last time random files were reviewed for verification?

- ✓ File should include all communications with the customer including in-person discussions, phone calls, faxes, texts, and electronic communications
- ✓ Any discussion of coverages and exclusions should be documented, including whether they were accepted or rejected. Ideally customer signatures are obtained on forms acknowledging declinations
- ✓ E&O coverage checklists serve as solid documentation
- ✓ The prior year's E&O coverage checklist, sent to the customer at renewal to inquire if anything has changed, can then be used as documentation
- ✓ Written confirmation of insured's desired limits
- ✓ Note when policy was delivered to insured
- ✓ A transmittal letter included with the policy stating that all policies have conditions and exclusions which impact coverages, and it is the insured's responsibility to read the policy in detail and to contact the agency with any questions or requests for changes
- ✓ All endorsements issued should have an activity log identifying either the insured's request or the carrier's requirement. Documentation of addition of endorsement delivery is also very important.
- ✓ Documentation that any claims reported to the agency were immediately reported to the carrier
- ☛ Do not include comments about a claims (i.e.: attorney client privileged information), or the merits of the claims, or your opinion as to whether or not there is coverage
- ☛ Resist the urge to go to bat for your customer when a claim is denied by the carrier
- ✓ Documentation should be clear, concise, consistent, include what was done or discussed with specific dates and times, and able to be understood by all agency staff

- ✓ Daily activity logs, copies of change orders, premium adjustments, premium audits, applications, renewal applications, declaration pages, and access to all policy forms described on declaration page should be in the file
- ✓ Documentation should include unalterable date/time stamp
- Just the facts - personal asides and comments should not be included in the customer file
- ✓ The objective of good documentation is to recreate the transaction in complete detail of the step-by-step process used to serve the customer
- Do not put E&O claim information into the file of the customer involved
- ✓ Correspondence and conversations with the carriers should also be documented
- ✓ All staff should use the same system and procedures in documenting customer files
- ✓ Good documentation procedures will prove both that a specific event did or did not occur
- ✓ Documentation should state that the agent was asked to quote only the same coverage as prior policy upon renewal, if indeed this is the case
- ✓ Record of agency issued Certificates of Insurance should be kept and a copy sent to the insurance carrier(s)

Section 9: Naughty or Nice: Checklists

Checklist Marks the Spot

Using risk exposure questionnaires and checklists helps agency staff to better understand their customers' operation, gathers the appropriate underwriting information, identifies gaps in coverage, and serves as valuable customer file documentation. The Big "I" provides a tool to help agents with risk exposure analysis called the Big "I" Virtual Risk Consultant which is available exclusively to Big "I" members (www.iiaba.net/VRC). We asked the panel counsel attorneys from Swiss Re Corporate Solutions if they recommend the use of risk exposure questionnaires and E&O coverage checklists and what are the considerations? Below are their responses:



- ✓ Questionnaires and checklists should be utilized consistently and in full, completed in their entirety.
- ✓ Checklists are a ready way for agency staff to double check to make sure that all relevant information has been provided to the customer and all of the customer's needs touched upon
- ⚠ Beware that questionnaires and checklists often don't adequately address the amount of the coverage needed – always offer higher limits
- ⚠ The agency procedures manual should define when questionnaires and checklists are used (new and renewal business) and this should be adhered to by all employees
- ⚠ Be aware of the applicable standard of care and duty to advise in the state in which you are doing business, as questionnaires and checklists could potentially broaden the scope of that duty
- ✓ Checklists should be comprehensive, signed by the customer, and updated annually
- ✓ Use of checklists can increase sales and improve the relationship with the customer

Section 10: Lessons Learned: Cases with Happy Endings



Take a look at these of examples of E&O claims and what the agency did well. Share these with your staff and talk about how your agency would fair if it happened to you.

- ✓ **FLOOD WAIVER** - An insured suffered a flood loss, then sued its agent for damages for failing to advise that her homeowner's policy did not cover all hurricane damages, including flood, since it had a "hurricane deductible." The agent's customer file included a signed flood insurance waiver. When provided with a copy of this waiver, the Plaintiff's counsel in turn provided us with an order of dismissal with prejudice.
- ✓ **LESSER COVERAGE** - The agent was accused of changing the renewal policy to one of lesser coverage. The agent sent a letter outlining the prior year's coverage and confirming the differences in the new reduced coverage requested by the customer. The confirmation letter reflected the agreement between the agent and customer of the lesser coverage. The customer never contested the written agreement until suit was filed.
- ✓ **DECREASE REPLACEMENT COST VALUE** – The agent met with the plaintiff at renewal to review the insurance for the plaintiff's commercial building. The plaintiff decided to reduce the RCV on the building based on the decreasing property assessments. A CSR for the agency sent two letters after the meeting confirming the plaintiff's decision to decrease the RCV of the building. After a loss the plaintiff insisted that he did not instruct the agent to decrease the RCV and claimed that the confirmation letters from the agency were not received. The agent made a persuasive witness and the two letters confirming the reduction of coverage provide an excellent defense.
- ✓ **FOR THE 5TH TIME, DO YOU WANT FLOOD COVERAGE?** – An agent insured a small manufacturing facility. During the first visit with the customer the agent observed a creek about 50 yards behind the building. The agent recommended flood insurance in the proposal on the first visit and on every subsequent visit to the property. Each year the customer file was documented to show the recommendation and subsequent rejection by the customer of recommended flood coverage. In the 5th policy year the insured suffered significant flood damage when the creek overflowed its banks during a "storm of the century". The insured alleged that the agent failed to adequately explain the "water" exclusion in his policy thereby confusing him about the necessity of flood coverage. The documentation of offering flood coverage won the day.
- ✓ **DON'T ROCK THE BOAT** - The plaintiff alleged failure to procure liability insurance coverage for its rental of small boats. The agency file (all contained on the agency management system) clearly documented that the customer called and canceled the insurance on the rental boats stating that the business was no longer renting boats. Then later, when the business again sought to procure the insurance, the agency well-documented its requests for information from the client to underwrite the policy. The customer file documented the customers repeated

failure to provide the information, including an inquiry on the day of the accident wherein the customer said they were busy and would get back to the agency later in the week with the underwriting information. The agency documented well the customer's original decision to cancel the coverage. The file also contained all of the agent's attempts to get the required information to re-procure the coverage, which efforts might have been successful but for the client's failure to timely provide the underwriting information. The agency personnel made good impressions during the deposition.

- ✓ **UNDERINSURED AND STILL TRYING TO SAVE MONEY** - The insured was grossly underinsured for the value of property stored at their record storage facility. Using faxes, emails and letters, the attorney was able to show that whenever the insured had requested info on buying more coverage, a CSR for the agency had responded with the requested information within 24 hours. There was a pattern where the insured would request information, get it, then start questioning ways to reduce the cost as opposed to the original reason of increasing limits. The policyholders would then inevitably drop the inquiry. This happened in fits and spurts over a period of years, and the insured just never pulled the trigger to buy the additional coverage needed. The agency was always prompt in providing the appropriate information needed to do so. The attorney was able to show a pattern and practice for the insured calling and not acting on the information provided by the agency. The case settled for a fraction of the underlying damages. This case demonstrates how the agency's conduct and record-keeping brought about a favorable result.
- ✓ **A TOUCHY SUBJECT** - An agency was sued by its customer, a boat manufacturer, because the manufacturer had an EPLI claim but no EPLI coverage. The boat manufacturer was seeking reimbursement of attorney fees spent to defend the claims and the amount paid to the claimant to settle the manner. The combined amount the manufacture was suing the agent for was well over \$100K. After reviewing the agency's customer file the attorney found that the proposal had clearly listed the fact that the policies available had no EPLI coverage. In addition to clearly listing in the proposal that the coverage available did not provide EPLI coverage, the agency had the customer sign and date the proposal and also had the customer initial each page. This documentation got the lawsuit dismissed.
- ✓ **EXACT COVERAGE REQUESTED: AGENT MEETS LEGAL DUTY** – This case summary highlights the need for agents to know their state's duty to advise and standard of care. The agent gave the customer the precise coverage he had requested. The agent's file was well documented and demonstrated that they had in fact obtained the coverage exactly as it was requested by the customer. However, when the customer sustained an uncovered loss, he sued the agent claiming that the agent should have not only procured the coverage that he had specifically requested, but the coverage that would have covered this specific claim. While the agent had clearly met his obligations under current state law, and a summary judgment in favor of the agent was obtained, counsel for plaintiff proceeded with an appeal to the State Court of Appeals in an effort to expand the agent's duty to suggest coverage according to the insured's business operations. When agents go beyond their legal duties as a normal business practice, make sure that employees are careful to execute in the risk exposure assessment process and in offering and appropriate coverage for the customer. Document files accordingly.

- ✓ **COINSURANCE EXPLANATION DOCUMENTATION TO THE RESCUE** - An agent sold a builder's risk policy and asked the insured for the completed value. The insured initially advised it was \$3 million and then reduced it to \$1.5 Million. As result of the reduced value, the very astute agent provided a letter fully explaining the co-insurance penalty one could face if they were underinsured. A loss occurred and sure enough the customer was underinsured. The case was tried and the jury returned a defense verdict in favor of the agent. The jury advised the court that the one piece of evidence that influenced them to side with the agent was the letter from the agent explaining what would happen if the insured was underinsured. A suggested best practice could be that all customers receive with their policy a letter explaining co-insurance.
- ✓ **CONCRETE EVIDENCE - STOP-GAP/EMPLOYERS LIABILITY DOCUMENTATION** - An agent was asked to quote a concrete statue manufacturing company for liability. The company had been insured with Carrier A for 25 years, however, their agent representing Carrier A died and they found the new agent. Not representing Carrier A, the new agent provided a liability coverage proposal for coverage with Carrier B. Midway through the first policy term with Carrier B, the owner of the concrete statue manufacturing company decided that he felt more comfortable being insured with Carrier A. He knew what to expect with Carrier A and wanted to return to them for coverage. It was purely a comfort issue with the carrier and not the agent. The owner had his office manager call the home office of Carrier A and obtained the name of an agent that could write the coverage for them with Carrier A. The new agent representing Carrier A met with the owner and the owner provide the history of being a long time insured and asked for a quote from Carrier A. The agent was instructed to set up a meeting with the office manager which he did. The office manager gave the agent a copy of their current policy with Carrier B and instructed him to quote with Carrier A the same coverages and the limits currently written by Carrier B. The agent did exactly that and was instructed to order the policy. When the agent reviewed Carrier B's policy, he mistakenly thought there was a Stop-Gap Employers Liability Endorsement for operations in a monopolistic state. The agent's quote request to Carrier A included request for Stop Gap coverage. Carrier A would not provide a quote for the coverage as the concrete manufacturing facility class code did not qualify for a Stop-Gap endorsement. The agent advised the insured that Carrier A refused to write the Stop-Gap Coverage endorsement. The insured acknowledged the lack of coverage but still ordered the policy. The policy was renewed the next three years, with each year the insured asking the agent to duplicate the prior year's limits and coverage. Each renewal the agent followed the instructions of the insured. The customer reviewed the policy form and paid for the policy, but never requested any other changes to the policy nor addition of the Stop-Gap coverage. In the fourth policy year an employee died in a work-related accident and the insured was sued for intentional tort for which there was no coverage. The concrete statue manufacturing company owner sued the agent alleging he failed to provide the "full coverage" requested. The agents file documented every interaction with the customer and the carriers. In summary agent's file contained all of the documentation necessary to defend the agency.
- ✓ **COMPLETED PRODUCTS CREATE LIABILITY?** - The agent procured products liability insurance for a shocks and struts manufacturing company. The owners of the company were nearing retirement, sold the company to another firm and then canceled their products liability

insurance. Subsequently, a person was injured due to a failed strut. The insurance company denied the claim on the basis that the company's product liability did not cover the products after the coverage was cancelled. The company and its owners were sued for the personal injury. The agent was sued for failing to properly advise and obtain coverage for products after the sale of the company was finalized. Unfortunately, the agent's lack of experience was a challenge in defending the claim. Furthermore, the company and owners argued that the agent assured them that they were properly covered for products liability after the sale. The attorney of the owners failed to show that the agent had a special relationship with the company which would have increased the duties owed by the agent, thus the court granted partial summary judgment in favor of the agent on the issue of failure to advise. The trial resulted in a jury verdict in favor of the agent on the issue of failure to obtain the proper coverage. The jury sided with the agent because they felt the company owners were sophisticated businessmen who should have known what type of coverage that they needed. In addition, the defense attorney was able to show that the company owners were the ones who made the decision to not purchase the additional coverage.

Section 11: Preparing and Participating in Depositions

Many agents have never participated in a deposition. A deposition is part of the pre-trial discovery (or fact finding) and is set up by one of the attorneys involved to gather sworn testimony. A court reporter transcribes the testimony. The transcript can be used in trial to either contradict or refresh the memory of the witness. The deposition can be the foundation to a successful defense of the agency. As one panel attorney from Swiss Re Corporate Solutions said, “The best deposition results are the product of the best deposition preparation.” Here is some advice from the panel counsel for Swiss Re Corporate Solutions for preparing and participating in a deposition:

- ✓ Tell the truth – the truth is what you know for a fact, not speculation and guessing
- ✓ There is no substitute for preparation, devote adequate time for counsel to prepare agency staff for the deposition – BE PREPARED
- ✓ Follow the advice and recommendations of counsel
- ✓ Understand your legal standard of care and duty to advise
- ✓ Know every detail of the customer file and your interactions with the customer and carrier like the palm of your hand
- ✓ Where possible be familiar with the depositions of other agency personnel or the insured
- ✓ Listen carefully to what is asked and answer accordingly
- ✓ Don’t be afraid to ask for clarification of a question
- ✓ Concisely answer only the question asked and do not volunteer information in an effort to get your version of the facts out there
- 🔦 Do not rush in reviewing the documents presented to you, thoroughly review them prior to responding
- 🔦 Do not bring the customer file with you to the deposition unless specifically asked to do so by your attorney
- ✓ Depositions can be adversarial and you don’t have to agree with what is asked simply because it is asked
- ✓ Try not get emotional, stay very factual
- ✓ Consider holding a mock deposition to be better prepared for the real thing
- ✓ Formulate responses to questions in your head and don’t “think out loud”
- ✓ Don’t let the opposing attorney put words in your mouth. They will try!
- ✓ Don’t take anything personally , either in the process of preparing for, or in the deposition itself
- ✓ Look professional (be dressed neatly and clean cut) and be polite
- ✓ Don’t be afraid to ask for breaks during the deposition to keep you fresh or to speak in private with your attorney
- ✓ Remember that there is nothing wrong with answering “I don’t know” or “I don’t recall” because taking an oath to tell the truth doesn’t suddenly make you all knowing

Section 12: Preparing and Participating in Mediations

The financial costs of fighting out a claim in court are extremely high so mediation is often a preferred route to settle disputes. Mediation is the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. Generally, mediations are not determinations of whether the agency is anything wrong and do not constitute an admission of liability. While not every mediation is successful, it can serve as a valuable way for defense attorneys to better understand plaintiff theories and facts allowing for a more targeted defense if the dispute does go to trial. Your defense counsel may or may not want you to attend mediation proceedings.

Supporting the adage that the truth usually lies somewhere in the middle, a good mediation is one in which both parties leave unhappy but the case is ultimately resolved. Here is some advice from the panel counsel for Swiss Re Corporate Solutions for preparing for and participating in a deposition:

- ✓ Be honest
- ✓ Tough skin - Be open-minded and non-confrontational especially when listening to the plaintiff's introductory comments
- ☛ While mediators encourage interactive dialog, don't offer information or observations unless requested to by counsel
- ✓ Patience – it can be a slow process and immediate results don't happen; bring your i-Pad
- ✓ Meet with your attorney in advance of the mediation to understand the maximum and probable exposure to liability and potential damages outcomes to make sure you have the same goals for the process
- ✓ Prepare your negotiation strategy in advance of the mediation, including at which point you walk away and go to trial,
- ☛ Do not bring the customer file or other documentation to the mediation unless specifically asked to do so by your attorney
- ✓ Know your E&O deductible and be prepared to expend it to resolve the case, even if your E&O policy provides first dollar defense

Section 13: Emotions During the E&O Claims Process

Swiss Re Corporate Solutions to Your Emotional Rescue

Consumers typically can't wait to 'open the box' of a typical purchase. Not so with insurance. Insurance can be a frustrating product for consumers. It's no different for insurance agents purchasing professional liability to insure their business. On average about 1 and 7 agents will report a potential claim. A little more than one-half will not develop into a claim, and will simply close with no further action. The end result is that roughly 1 in every 15 agents have a claim requiring the carrier to defend the agent or post a claim reserve in a given year. Keep in mind that claims against insurance agents tend to mirror the insurance market cycles - fewer claims against agents in the soft market, and increasing claims frequency in the hard market. Also consider that more and more claims involve carriers suing their agents for liability generated from perceived agent errors. It's not at all unlikely that your agency may be involved in an E&O claim during the life of the agency's operations.

Remember, just because a carrier contract requires the agency to carry a certain E&O limit doesn't mean those limits meet your agency's actual level of exposure to loss. As you compare coverages offered by different E&O carriers, treatment of defense costs is key. Nearly 33 cents of every dollar paid in the handling of an E&O claim is for defense. To have the same level of protection of a policy with \$2M limit with defense outside the limits you actually need a defense inside the limits policy with \$3M limits, to compensate for the cost of defense.

The unfortunate reality is that plaintiffs seek deep pockets. The agency's E&O policy is an attractive source of limits, whether or not a mistake was truly made. Interestingly enough, a number attorney's compared the emotions to those of grief: denial, anger, bargaining, depression, and acceptance. While you're not going to die from an E&O claim it is important to have proper limits and a carrier that will mount a knowledgeable and aggressive defense. You worked hard to grow and prosper and adequate E&O insurance is a prudent way to help protect your investment. If a claim is made against you or your agency, here are some of the emotions that the panel counsel for Swiss Re Corporate Solutions observed from the agents involved.

✓ Anger	✓ Frustration	✓ Anxiety	✓ Depression
✓ Denial	✓ Irritation	✓ Sense of Injustice	✓ Embarrassment
✓ Self-doubt	✓ Acceptance	✓ Relieve	✓ Fear
✓ Stress	✓ Indifference	✓ Inadequacy	✓ Helplessness

"Certainty of settlement normally beats taking a case to verdict and not knowing the end result."

"If you sell big policies, you have big E&O exposure, and should have big limits."

Section 14: It Takes Time to Make a Claim Go Right

Average Staff Time Dealing With a Claim

Being involved in E&O claims can be stressful and time-consuming, especially if it goes to trial. We asked the agents E&O panel attorneys from Swiss Re Corporate Solutions to provide some thoughts on the average amount of time E&O claims can take away from staff's daily activities. Their answers varied depending on the complexity and amount of the claim against the agency. Many of the attorneys recognized the importance of minimizing the impact on the agency's time in dealing with the claim. The time spent will vary depending on which part of the



claim cycle one is in. A reoccurring theme was that agency staff must be committed to the defense of the case, and willing to invest the time for a successful outcome. Here are the attorney's responses:

- ✓ On average, 15-20 days per lawsuit if the claim is taken to trial
- ✓ Document production tends to be very time consuming, taking several days or even weeks or complete
- ✓ Agency staff's time can be very concentrated in the days immediately the receipt of the claim. This time spent on responding to paper discovery, preparing for deposition and trial, and the days of trial itself.
- ✓ The distraction time for agency staff, while low in the beginning of the case, increases as the case proceeds
- ✓ At certain points the agent may be devoted full time to the claim process
- ✓ The amount of time varies, but a fair estimate is anywhere from 10 to 250 hours participating in the E&O claims process
- ✓ Estimates on time spent don't include the number of sleepless nights for agency staff involved

A pound of prevention - "It is better to spend a few extra minutes during the day following good E&O risk management practices than to spend year involved in an E&O lawsuit."

Section 15: What Should You Be Looking For In a Claims Department

Like the overall insurance marketplace, the agents E&O marketplace has been very soft. Agencies have been extremely challenged in growing their business and managing expenses. In a tough economy agencies may be cutting back and refocusing, just like your customers. You most likely advise your customers – good price does not necessary mean good value. Now is the time to follow your own advice. The true value of an E&O policy is in how an E&O carrier handles your claim. Big “I” Professional Liability Program is celebrating its 25th anniversary with Swiss Re Corporate Solutions as its endorsed agents E&O carrier. Quality claims handling by the claims team from Swiss Re Corporate Solutions has been a key feature in making the program a valuable member benefit.

We also asked the attorney’s that work with Swiss Re Corporate Solution to ask what agents should look for in their E&O carriers claims department. Many of these attorneys have worked with other carriers in the past and offer valuable guidance. Here is their advice:

- ✓ Promptly contacting the policyholder to acknowledgment that the claim is received
- ✓ Knowledgeable claims adjusters with the expertise to provide an honest initial evaluation/assessment of the agents liability exposure
- ✓ The ability to provide a clear explanation of the pros and cons of resolving the claim without litigation
- ✓ Clear understanding of the claims and litigation process up front
- ✓ Willingness to support policyholders and to take claims to trial when clear liability is not present
- ✓ Representatives who can dig and uncover relevant details
- ✓ Prompt response on all communications
- ✓ Continued communication with policyholder on the status of the claim
- ✓ Knowledgeable about underlying insurance coverage and agents standard of care by state
- ✓ Ability to comfort agents and to make them feel comfortable focusing on running their agency
- ✓ Appropriately staffed with professionals who are intelligent and have a depth of substantive knowledge and experience
- ✓ Provide guidance and practical tips on how to avoid similar future E&O claims
- ✓ Willingness to write letters on behalf of the agent to influence the primary carrier that coverage is available under the primary policy
- ✓ Willingness of the claims team to step in early on potential incidents to help prevent from turning into an actual claim
- ✓ Provide an early explanation of how the deductible process works
- ✓ A claims team with a good relationship with the underwriting department and willingness to discuss (or at least listen to) agent concerns of how the claim may affect their insurability and future premiums
- ✓ Expertise in the daily operations of insurance agencies
- ✓ Empathy