

Insurance Agent E&O Best Practices



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Berkley Service Professionals

At Berkley Service Professionals, we transform uncertainty into opportunity so our clients can confidently build a better tomorrow. We do this by providing customized professional liability insurance solutions for miscellaneous nonmedical professionals. We are highly experienced underwriters whose expertise enables us to understand the inherent professional liability risks of service professionals and we excel at writing complex accounts. Berkley Service Professionals responds quickly with innovative coverage solutions that fulfill the needs of our brokers and their clients. We provide high-quality, results-oriented, expert in-house claims management. Our mission is to relentlessly protect our clients' work, reputation and dreams.

**Berkley**
Service Professionals
A Division of Berkley Managers Insurance Services, LLC
| a Berkley Company

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Facilitated by Laura Gookin



Senior Vice President
Berkley Service Professional

- Joined Berkley Service Professionals in July of 2016
- More than 30 years of experience as a professional liability risk analyst
- Prior to joining Berkley, helped create a successful nonstandard professional liability facility for a leading worldwide insurance company, a managing general agency and several leading domestic insurance carriers
- Since 1991, she has worked as a professional liability risk analyst specializing in all lines of professional liability
- Licensed insurance agent and surplus lines broker in the state of California
- Earned her RPLU designation



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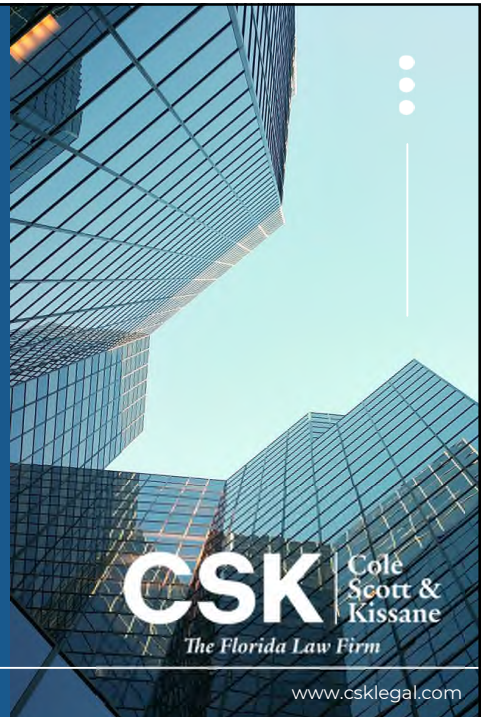
Blake Sando

- Partner at Cole, Scott & Kissane
- Practiced professional malpractice defense for the past twenty (20) years
- Experience defending insurer bad faith litigation, civil rights claims, negligent security claims, professional malpractice claims, cyber security and wire fraud matters, Errors and Omissions cases
- Focuses his law practice on the defense of attorneys, insurance agents, title agents, closing agents, appraisers, surveyors, accountants and real estate agents and other professionals who are sued for malpractice and professional negligence
- Represents a host of other companies and professionals in both general litigation and transactional matters

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Insurance Agent E&O Best Practices

Blake Sando
Cole, Scott & Kissane, P.A.



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Statistics

- It is estimated that one out of eight agents will report an errors and omissions claim to their carrier each year.
- For insurance agencies, E&O claims can be expensive. The average E&O claim severity is \$40,000 and has been increasing by about 10% annually, according to industry reports.
- The cost to defend such claim and to pay damages can be devastating to an agent or agency. Claims against insurance agents mostly arise from policyholders but can also arise from the carrier with which the agent places business.



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Duties of an Insurance Agent – Duty of Care

- The general rule is that an insurance broker **is considered the agent of the insured** rather than the insurer in matters connected with the procurement of insurance. *Auto-owners Ins. Co. v. Yates*, 368 So.2d 634, 634 (Fla. 2d DCA 1979); *T&R Store Fixtures, Inc. v. Travelers Ins. Co.*, 621 So.2d 1388,1389 (Fla. 3d DCA 1993).
- “The general duty [of an agent] requires the agent to exercise due care in correctly advising the insured of the existence and availability of insurance, including the availability and desirability of obtaining higher limits, depending on the scope of the agents undertaking.” *Adams v. Aetna Cas. & Sur. Co.*, 574 So.2d 1142, 1155 (Fla. 1st DCA 1991).
- “[A]n insurance agent is required to use reasonable skill and diligence, and liability may result from a negligent failure to obtain coverage which is specifically requested or clearly warranted by the insured’s expressed needs.” *Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc.*, 530 So. 2d 422, 423 (Fla. 1st DCA 1988).



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Duties of an Insurance Agent – Fiduciary Duties

- It is well settled that an insurance broker has a fiduciary relationship with an insured and that the “broker must inform the insured of all material facts within the broker’s knowledge that may affect the transaction or the subject matter of the relationship. More significantly, the broker must not mislead the insured.” *Southtrust Bank & Right Equip. Co. of Pinellas Cty. V. Exp. Ins. Servs., Inc.*, 190 F. Supp. 2d 1304, 1308 (M.D. Fla 2002).
- When an insurance broker has a “**special relationship**” with its client, an enhanced duty of care to advise the client is triggered. *Tiara Condo. Ass’n, Inc. v. Marsh, United States, Inc.*, 991 F. Supp. 2d 1271, 1280 (Fla. S.D. 2014).



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Duties of an Insurance Agent – Six Special Relationship Factors

Relevant factors that are considered when determining whether a “Special Relationship” between the agent and insured exists.

1. Representations by the broker about its expertise
2. Representations by the broker about the breadth of the coverage obtained
3. The length and depth of the relationship
4. The extent of the broker’s involvement in the client’s decision making about its insurance needs
5. Information volunteered by the broker about the client’s insurance needs; and
6. Payment of additional compensation for advisory services.

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Florida Tort Reform

Two-year Statute of Limitations on Negligence Claims

Reduces statute of limitations for general negligence cases from four years to two years from date of loss. The new SOL is applicable to accidents occurring after March 24, 2023.

Modified Contributory Negligence

Amends Florida's comparative negligence system from a "pure" comparative fault system to a "modified" contributory negligence system in which a Plaintiff who is more than 50 percent at fault for his or her own injuries is barred from recovering.

Third-Party Bad Faith

No bad faith action will lie if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim.

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BLAKE'S TOP FIVE INSURANCE AGENT "BEST PRACTICES"

Here are my Top Five Best Practices from defending insurance agents from lawsuits over the past 17 years. While these are by no means the industry-standard among agents, these best practices nevertheless still assist agents in protecting themselves from E&O liability and exposure.

1

The agent's file is the "Best Asset" in defending against agent E&O liability

2

Document all discussions and decisions in writing

3

Always quote better coverage and maintain quotes even for insurance that is rejected by the customer

4

Stay in your lane: do not become an adjuster or a lawyer and opine on the outcome of any insurance claim

5

Talk to your real friends: The agent's lawyer and their E&O carrier

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1

The agent's file is the "Best Asset" in defending against agent E&O liability

- Burden of proof is merely a preponderance of the evidence
- During litigation the factual issues will inevitably become about what they respectively recall
- A file containing emails, signed applications, commercial written proposals, written policies, policy documents, and transmittal emails provided to the insured can help insured "remember," or "mis-remember," what occurred during the procurement process
- Many states have different statutes of limitations
- Maintaining files after being a customer, and perhaps after the applicable state statutory requirement(s) have passed is recommended

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Document all discussions and decisions in writing

- A file is only as good what is in it
- Develop a best practice of confirming discussions and decisions that are made
- A simple 2-line email to the insured, "please allow this to confirm our discussion today....," is a great tool for the defense-lawyer
- With the advent of technology, it is now easier than ever for agents to document and confirm discussions with their customer, and to likewise confirm any "exceptions," that an underwriter may give them

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3

Always quote better coverage and maintain quotes even for insurance that is rejected by the customer

- A common trend in E&O litigation is the increase in “under-insured” litigation against an agent, where the insured has a policy that provides coverage for the loss, but where the insured is nevertheless woefully under-insured and therefore exposed
- It is recommended that at every renewal the agent should quote their customer better coverage
- If the customer rejects the coverage at least there will be a paper trail to show that the customer was presented better coverage
- It is essential that the agent save and maintain the quotes (even the quotes that are rejected by the insured) in the agent file if a claim ever does later arise

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Stay In Your Lane:

Do not become an adjuster or a lawyer and opine on the outcome of any insurance claim

- Agents are in the business of procuring insurance
- When a claim does arise, it is important that the agent always recommends the insured report the claim
- Once the claim is reported, it is imperative that the agents gets out of the way of the claims process
- It is important that the agent does not expose themselves needlessly by saying “don’t worry, it’s covered,” and/or engaging in actions that may be perceived to be adverse to one side or the other
- The agent has no control over the claims process and should remain silent on how a claim will ultimately be decided

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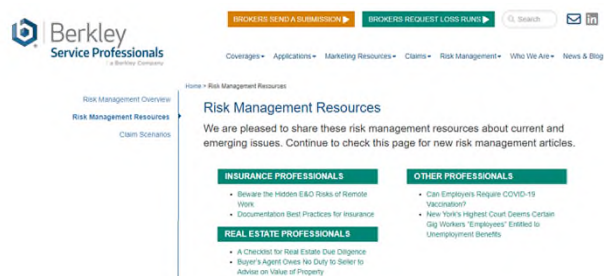
Talk to: The agent's lawyer and their E&O carrier

- The retention of counsel for the agent has two important benefits, both practical and legal
- An agent can credibly tell the insured and carrier involved in the claim dispute that the agent is now represented by counsel
- The second benefit of retaining counsel through the E&O carrier is that often the scope and involvement of the agent in the claims process can be limited or eliminated with the assistance of counsel
- The legal reality is that in most states insurance coverage disputes are resolved by the Court reviewing the four corners of the complaint and the written policy
- With improvements in technology, it is easier than ever for agents to protect themselves from E&O exposure

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Summary


- Berkley Service Professionals (BSP) offer claims made and reported professional liability insurance for licensed non-medical professionals and miscellaneous service exposures
- BSP products currently include: Insurance Agents/Brokers E&O, Real Estate Agents/Brokers E&O, Manufacturers E&O, Miscellaneous Services E&O and Excess E&O insurance




Available Risk Management Resources on BerkleySP.com

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Questions?

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