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Technical Advisory

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Subject: Electronic Delivery of Policies to Insureds

Background: The benefits of the "Paperless Society" – much like Mark Twain's famous quip about his reported death – have been greatly exaggerated.

In a report by Hewlett-Packard issued in 2001, the observation was made that "the long-awaited paperless office is no nearer now than it was 30 years ago." Case studies in the report found that Web and email usage alone often cause a 40 percent increase in paper consumption.

"*The Myth of the Paperless Office*" is a widely-read book published in 2002 by MIT Press, which took a serious, scientific look at the role paper continues to play in our technological world. The phrase "paperless office" was reportedly first used in Business Week in 1975. The book in 2002 showed that "knowledge workers" use about 3 times more paper than "average workers."

At the same time, there can certainly be cost savings and increased efficiency in utilizing certain paperless transactions and records.

Main Points: The insurance industry, like most every other business, is heavily committed to electronic records and communications. As the "paperless" movement continues to work its way through all forms of transactions, one of the newest roles being applied to insurance is the electronic delivery of policies to insureds.

This has raised some questions about procedures, as well as potential E&O exposures, for agents.

Issue #1: Louisiana laws. The insurance statutes (Title 22) contain a requirement that the policy be "delivered" to the insured. No specified method of delivery is prescribed in the statute, which provides in pertinent part:

> *22:634. Delivery of policy*
>
> *A. Subject to the insurer's requirements as to payment of premium, every policy shall be delivered to the insured or to the person entitled thereto within a reasonable period of time after its issuance.*

In addition to Title 22, Title 9 (sections 9:2601 - 9:2615) contains the Louisiana Uniform Electronic Transactions Act (LUETA). It was enacted in 2001, and reflects the national effort to enable the smooth and effective use of electronic records and transactions. The Louisiana law was based on a model UETA act developed by The National Conference of State Legislatures (NCSL). At least 46 states have adopted the UETA model act.

According to the NCSL web site (www.ncsl.org), the model act was developed "*to provide a legal framework for the use of electronic signatures and records in government or business transactions, and to make electronic records and signatures as legal as paper and manually signed signatures.*"

This effort is referenced in one of the initial sections of the Louisiana UETA, as follows:

> *9:2604.B. This Chapter is intended and shall be construed to constitute an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws in 1999.*

Next, the LUETA has a provision that would seem to satisfy the requirement for policy delivery in the insurance statutes (22:634 – see above).

> *9: 2608. Provision of information in writing; presentation of records*
>
> *A.(1) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt.*

However, while 22:634 requires the "delivery" of an insurance policy without specifying the means of delivery, other Louisiana insurance statutes are more explicit. Of particular significance is 22:628, regarding mid-term changes in the policy. This requires the issuance of an endorsement, which must be provided to the insured. This duty is often delegated by the insurer to the agency, which must comply with the notification requirements in the statute below. [Emphasis added in last paragraph.]

> *22:628. Must contain entire contract with exceptions*
>
> *No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless it is in writing and physically made a part of the policy or other written evidence of insurance, or it is incorporated in the policy or other written evidence of insurance by specific reference to another policy or written evidence of insurance. This Section shall not apply to contracts as provided in Part XV of this Chapter.*
>
> *The provisions of this Section shall apply where a policy or other written evidence of insurance is coupled by specific reference with another policy or written evidence of insurance in existence as of the effective date hereof or issued thereafter.*
>
> *Any written agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be deemed to be physically made a part of a policy or other written evidence of insurance, within the meaning of this section, whenever such written agreement makes reference to such policy or evidence of insurance and is sent to the holder of such policy or evidence of insurance by United States mail, postage prepaid, at such holder's last known address as shown on such policy or evidence of insurance or is personally delivered to such holder.*

Some legal experts have serious doubts over whether or not the express requirement in 22:628, mandating that changes to an existing policy must be mailed to the insured, can be sufficiently satisfied by the language in LUETA 9:2608 (see above). Of particular concern is the situation where an insurer transmits the change (usually an endorsement) to the agency via mail or electronically, with instructions for the agency to send the change endorsement to the insured.

Experts argue that while such mid-term changes would clearly fall under the requirements of 22:628, it is unclear if the agency could rely solely on 9:2608 instead. Most agree that a review and possible revision of various sections of the insurance statutes be undertaken, in order to provide a more consistent legal guideline between the older Title 22 requirements and the newer provisions of LUETA.

For example, while the focus of this article is limited to the electronic delivery of policies to insureds, other parts of the insurance statutes in Title 22 prescribe that notices of cancellation or nonrenewal be delivered in varying ways. Some specify that such notices be "*delivered or mailed,*" while others require "*depositing it in a sealed envelope, directed to the addressee at his last known address…with proper prepaid postage affixed, in a letter depository of the United States Post Office."* (22:636.B.) Yet another section requires "*mailed by certified mail or delivered by the insurer*." (22:636..1.D.(1).)

In summary, the requirements in 22:634 to "deliver" the policy to the insured can be met via electronic means, following the guidelines in LUETA, in the opinion of most experts. However, agencies should not rely solely on such means where other contacts and dealings with insureds are undertaken, if the insurance statutes limit the communication of specific information (mid-term changes, cancellation, nonrenewal, etc.) to U.S. mail.

Issue #2: Practical concerns, including E&O. Industry experts offer several general, practical guidelines for the implementation of procedures for e-delivery of policies to insureds.

First and foremost, insureds must be willing to receive policies via electronic means. In Louisiana, the LUETA provides the following:

> *9:2605.B.(1) This Chapter applies only to transactions between parties, each of which has agreed to conduct transactions by electronic means.*

However, legal experts believe it is essential that such agreement be in writing. While this is not specifically required under LUETA, the potential E&O exposure is substantial. Here is how one legal expert described it.

> *"As to R.S. 9:2605 and 9:2608, the agent should have a written and preferably signed "agreement" with the client/insured memorializing the agreement to carry on the insurance transaction by electronic means. Otherwise, we are going to see situations where the client agrees ORALLY to the agent or CSR to carry on the transaction by such means but repudiates or denies such agreement when it is convenient or in the client's interest to deny such. Without some written agreement signed by the insured we are still faced with the "swearing match" between the insured and the agent."*

In addition, certain technical automation compatibility issues would need to be addressed and resolved.

From an E&O perspective, two issues must be addressed by the agency. The first is policy checking. Experts recommend that the same level of care and scrutiny the agency gives paper policies also be applied to policies in an electronic format. From the early days of automation came the expression, "Garbage in – garbage out." This pithy observation about the need for human supervision of any automated process is very relevant to e-delivery of policies. The electronic format is not inherently superior to the old paper format. Both types of policies must be thoroughly checked by the agency before forwarding to an insured.

Here is how one agency management expert described his concerns about an agency which takes its eye off the ball when dealing with computerized, electronic transmission of policies.

> *"The problem I foresee is that some agencies want to type something up, but if they do and they leave something out, they're toast. If they copy what the carrier sent and some part of the copy does not show up, the agency is toast. If the agency tells the client that they need to read the policy and that they, the agency is not responsible for whether the coverages are correct and for some reason the agency does not deliver the policy on time or in its entirety, the agency is toast."*

For further discussion of this issue, see the reprinted article at the end.

Another E&O concern is that safeguards be implemented which assure the proper sending and receipt of e-delivered policies. Receipt of the policy by the insured provides the agent with a substantial element of defense in any E&O litigation. This is true whether the policy is mailed, personally delivered, or transmitted electronically. And as with policies that were mailed or delivered, a letter of transmittal or cover letter should also accompany policies which were e-delivered to insureds. Such letters of transmittal affirm delivery of the policy to the insured, and requests the insured review the policies, to be sure they provide the coverages and limits requested.

Verification of the sending and receiving of policies transmitted electronically to insureds requires careful attention. See discussion in the article at the end. Consultation with an agency automation expert is advisable, in order to adopt a system that reliably (with documentation) verifies that the policies were transmitted and received.

In addition, sending policies to insureds via snail mail does not require proof of receipt by the insured. The burden is on the agency to prove that the policy was sent.

Newbies to the world of automation are often uncomfortable with the reliability of electronic transmission of information, including insurance policies. However, agency automation experts point out that top-tier agency management systems have a sophisticated and highly reliable "date stamping" system which records everything that was done to an account – whether it was an email, phone call, fax, or snail mail. In addition, courts usually place high reliability on automated records. Both the Federal and Louisiana Rules of Evidence provide guidelines for admissibility of automated records.

One agency automation expert offered the following comments about the reliability of a good agency management automation system, including “date stamping” and other issues.

“The vendors in the insurance industry have been very smart and sensible in setting up electronically datestamped records of EVERYTHING THAT WAS DONE -whether it is an email or a phone call documentation or a snail mail letter or a fax done from the system. Emails do not need any further documentation than any of those other items AS LONG AS THEY ARE SENT FROM THE AGENCY MANAGEMENT SYSTEM SO THAT THE ELECTRONIC DATE STAMP EXISTS IN THE ACTIVITY RECORD OF THE ACCOUNT. If any agency was using rinky-dink homegrown software or a non-standard vendor or was just emailing out of Outlook, then they would need to use email registration software. AT that point, I would tell them to go out and buy a good agency management system and get that datestamping and a myriad of other functions.

You really can rest assured that those systems are the safest and better than third party software. When we say agencies should use a "single source" in E&O classes, this is a good example of what we are talking about. I am really tired of the "email registration" vendor salesmen trying to scare agencies by misexplaining how the agency software works and how safe it is. It is a rip off for any agency with a system like Applied or AMS.”

On that point, the Louisiana UETA includes a provision that sets out a general framework for sending and receiving of electronic records, as follows:

9: 2615. Time and place of sending and receipt

A. Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) Is addressed properly or is otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record.

(2) Is in a form capable of being processed by that system.

(3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

B. Unless otherwise agreed between the sender and the recipient, an electronic record is received when it:

(1) Enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record.

(2) Is in a form capable of being processed by that system.

C. Subsection B of this Section applies even if the place where the information processing system is located is different from the place where the electronic record is deemed to be received under Subsection D of this Section.

D. Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the place of business of the sender and

to be received at the place of business of the recipient. For purposes of this Subsection, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the residence of the sender or recipient, as the case may be.

E. An electronic record is received under Subsection B of this Section even if no individual is aware of its receipt.

F. Receipt of an electronic acknowledgment from an information processing system described in Subsection B of this Section establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

G.(1) If a person is aware that an electronic record purportedly sent under Subsection A of this Section, or purportedly received under Subsection B of this Section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law.

(2) Except to the extent allowed by the other law, the requirements of this Subsection may not be varied by agreement.

Special thanks to Virginia Bates, Chris Burand, and Chuck Morgan for their expert advice in the research for this article.

Reference article. The Virtual University of the Independent Insurance Agents & Brokers of America (IIABA) has an excellent article on this subject, which is reprinted below. The VU is an excellent resource for member agents all across the country. At present, there are hundreds of technical articles in all major coverage lines, plus articles on E&O, agency procedures, automation, the Internet, customer service, and other topics of importance to agencies today. The article below is a prime example of the value and importance of the VU Library.

Access to the VU is free to all member agencies, but a password is required. For new subscribers, go to the VU home page http://www.iiaba.net/vu/ and follow the simple instructions to have a password sent to you via email.

Also, the VU sends out a bi-weekly newsletter (*VUpoint*), which is currently received by over 25,000 subscribers. Another feature of the VU is the "Ask an Expert" service, which fields questions from members. In fact, the article below originated as a question from a subscriber, with responses from 11 VU Faculty members. There are currently around 50 VU Faculty members, who all serve as volunteers in an ongoing commitment to the education of independent agents around the country.

“Electronic Delivery of Policies to Insureds”

IIABA Virtual University

Abstract

It In the last issue of The VUpoint, we looked at agency access to web based documents on an insurer's system. In this issue, we're going to look at the flow of documents from agency to insured as opposed to insurer to agency. Some carriers are reportedly providing policies to agencies on disk or via email. Should agencies print the policy forms and deliver them traditionally or is it OK to electronically deliver them?

Question: "Recently, we have been exposed to companies either sending us an insured's policy on a disk or emailing policies. This means that we have to print the policy before delivery. My question is, if the policy was not printed off but rather delivered on a disk or emailed to our insureds, is there an E&O exposure to our agency that we did not have by hard copy delivery? We think that delivery of a hard copy is a much superior service and will continue that practice. However, if this form of policy delivery becomes common practice, we will have to revisit the subject. Currently, I only know of two insurance companies that do this."

Answer: No doubt, electronic delivery is the wave of the future. While many people still like that tangible piece of paper, there are some advantages to electronic delivery from the standpoint of speed, convenience, archiving, searching, etc. Below are some observations from the VU faculty.

Faculty Response #1: This may raise a legal question about an agent's duty to deliver the policy. Does delivery by email or disk fulfill that duty? Separately, where is confirmation of receipt by the insured?

Faculty Response #2: You must determine that your insured can read the electronic version and get their permission or you should print it out and deliver it.

Faculty Response #3: We've seen it quite a bit the last two years and I believe it represents no new E&O exposure. Legally it is not an issue. Its just a different medium.

Faculty Response #4: This will become the practice, rather than the exception, in the future. Mailing policies is outdated and expensive. The E&O exposure is not how the customer receives the policy, it's whether the policy was issued as requested. When policies are sent directly to the insureds, many agents are not reviewing the policies. When policies were sent to the agent for mailing, I think they were more likely to be checked. No matter how the policies are delivered, there needs to be a procedure for reviewing them for accuracy.

Faculty Response #5: Great question. One issue is proving the policy was sent by email. Showing a judge your "sent" email list does not always hold up in court because it can be fairly easily manipulated. So if an agency wants proof they sent the policy, they need to invest in some software that proves the email was sent. Fortunately, such software exists and is fairly inexpensive. Such software is also valuable for E&O prevention in other areas as well.

Another factor is making sure you can prove the coverages that you sent. Since it is all electronic, and because some insureds are pretty good at changing documents electronically, the agency's electronic filing system must be excellent so no question exists with regards to its accuracy. In the event of a dispute between what forms were used, your files will win if your filing system is really good and has the proper security (for example, the security prevents anyone in the agency from changing the documents).

Another factor is making sure the agency is not emailing any information covered under any of the privacy laws such as HIPAA or FACTA. If the email does contain such data, then extra care should be taken to secure it. Outlook has a secure email feature that may be sufficient.

The last item I can think of is making sure the producer or CSR that is checking the policy is checking it as accurately as if the policies were on paper. Some people find that it is more difficult checking an electronic policy because they often have to look up from paper to a computer screen and then look back down again. One solution is using dual monitors and scanning the proposal and other documents into the agency's system. That way the checker can simply look between the two screens.

Faculty Response #6: I don't know of any insurance companies that are delivering their policies electronically to the insured. So far, even though the agent may get an electronic copy, the insured is still receiving a copy via USPS. This is an interesting question and one that I have not visited during E&O audits, however, I am going to start this practice.

I agree with you though, it still makes good sense to deliver to them (the client) a hard copy policy. It does provide you with one more opportunity to cross sell or to just plain make a contact. One other thought, in the event of closing on a sale, the final documents are still provided in hard copy. I believe that I would watch to see when, or if, lenders or attorneys decide to provide final documents electronically.

Faculty Response #7: Some insureds PREFER the electronic or CD version. Best idea (here is a novel idea)...ask the client and do what they prefer.

P.S. No E&O exposure if you comply with the form they need. I like to reference these questions to the White Paper that Steptoe & Johnson did for IIAA (so long ago it was before the "B" was in there) that relates to this question.

Faculty Response #8: The inquirer admits this is a business and not an insurance issue. However, the later part of my answer will indicate is indeed an insurance issue as well.
Some clients would PREFER an electronic policy rather than a paper version for both retrieval and storage. (I would count myself among that group.) However, the business question becomes whether or not it is fair and reasonable to IMPOSE such a delivery method upon a customer involuntarily. Some customers may not even have the capacity to read a CD transmittal by regular mail which would make the policy delivery equivalent to having written the policy in a foreign language.

If the agency is not receiving the policy through download and/or not able to see the full policy on the company website, then the agency would be well advised to retain a copy in whatever format they chose (electronic preferred because of physical storage space). None of us (companies or agents) should presume that an insured would appreciate or accept electronic delivery.

The second question becomes one of constructive delivery. E&O claims are successfully defended on the premise of constructive delivery if the agent deposited the policy in regular mail with a consistent procedure. In the instance of an electronic copy version, I would want delivery to occur by CD sent by regular mail to preserve that defense. An e-mail transmittal would not meet that requirement/condition. Remember, most policy terms regarding receipt of the insured of both the policy and any other notices, including cancellations and non-renewals, are still focused on MAILING to the address listed on the policy.

Faculty Response #9: Delivering a policy via e-mail is no different than delivering it by snail mail...the cost is just higher for the latter. I question your comment, “We think that delivery of a hard copy is a much superior service and will continue that practice.” It does not matter what you think is superior service, it only matters what your client thinks it is. In my case, delivery of a paper policy is not superior service because I store all of my important papers as electronic documents. You would be forcing me to take your paper and then scan it. I understand that everyone does not like this process. I think you should ask to find out what your clients like. Don’t assume because you do not like it, your clients do not like it.

As far as your question about additional E&O exposure, there is none that I know of. If you need to certify deliver of a document (certified mail, return receipt) then you may still need to use the USPS. But for normal policy delivery electronic will work just as well.

BTW, you can expect every insurance company you represent to begin, in the not too distant future, delivering agent copies of documents electronically. The cost benefits are obvious.

Faculty Response #10: I have used a "registered email" product for two years and it is an excellent product. It will determine any editing of the e-mail from one server to the next and can be verified from the end recipient back to the originator. However, the transmittal of a policy as an e-mail attachment may not necessarily be protected by Registered E-Mail TRANSMITTAL.

Most courts still interpret policy terms regarding transmittal looking to regular U.S. Mail and consistent procedures for transmittal by that method. Therefore, most E&O attorneys indicate that an e-mail receipt of delivery is NOT an adequate defense at trial and must instead be constituted by a separately originated e-mail message from the recipient. This is because it is possible to delete an e-mail without reading it and trigger a “read receipt” to the sender when in fact it was NOT read based upon E-mail settings. Transmittal for critical E&O loss prevention related documents.

I don’t believe we are yet at the point of being able to reply upon e-mail for E&O defense protection.

Faculty Response #11: Have you considered "registered email"? There are different kinds of registered email so it's important to know the differences. Some kinds of what I've heard people call registered email such as requesting confirmation the recipient has received the email using the standard Outlook are mostly worthless for this purpose. Other kinds are very good and are alleged to hold up in court, although I haven't personally seen such a case.

The way the good software works is impressive because it not only makes sure the person receives the email (or advises the sender the recipient didn't receive it) invalidating the claim the recipient didn't, it also secures the email so the sender nor the recipient can tamper with it. To me, this makes it a very valuable tool and several of my clients are already using it. It is not designed to be used for every email though because the cost would be too high. Used selectively, though, the cost is quite low.

Necessary Action: Circulate this Technical Advisory to all appropriate agency staff.