

# Part III

## Conflicts for the Agent

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### The Agent/Producer and the Insurer

The basis for the agent's relationship with each insurer is the agent's contract. It establishes a power- and responsibility-sharing arrangement between the two unequal parties. Remember, regardless of how you view your situation with an insurer and regardless of what your state license calls you, the Law of Agency decrees that an agent-principal relationship exists even for a single transaction. Your primary company and your secondary companies are equally important contractually.

The contract grants the agent the power to act on behalf of the principal and defines the actions he is allowed to undertake. Only authorized actions may bind the principal. However, agent's authority comes in three forms--expressed, implied and apparent--and the latter often is the source of conflict and confusion.

Expressed authority is that which is specifically granted by contract language, such as the power to complete and remit applications for insurance.

Implied authority logically flows from express authority, such as the implied right to possess blank application forms.

Apparent authority arises when the principal allows an agent to perform acts that are neither expressed nor implied, such as permitting the agent to make minor corrections to an application without the knowledge or consent of the applicant or the insured. By doing so, the principal creates the appearance of authority. If a third party relies upon that apparent authority, then the principal will be bound by the actions of its agent.

However, actions of an agent alone are not enough to create apparent authority; the principal must acquiesce, even by silence. This legal interpretation is the reason insurers often promulgate long lists of rules consisting primarily of actions that are not authorized and will not be tolerated by the principal. It is only when the agent is clearly acting outside his authority that his actions cannot bind the principal.

Even when an agent is acting quite properly within the express and implied powers of his agency, his authority is not unlimited. It is always subject to statute law and the regulations of the appropriate department of insurance. No agent, for example, has the authority to make any changes in published policy provisions.

Consider one common circumstance where agents often exceed their authority--the collection of life premiums after the initial premium.

Most of us have had clients hand us a check (or cash) for a late premium, even though standard contracts do not grant the agent the authority to accept those payments. Most companies also quietly permit the practice, even those that specifically forbid the practice!

The rationales are that refusing the late premium would be rude and could cause serious trouble for the insured. Furthermore, many insureds commonly pay their P&C premium to that agent at his office; they assume that by paying us, they have indeed paid the company.

But P&C contracts specifically authorize the acceptance of subsequent premiums, so the P&C agent is acting within his expressed authority and he is acting for the principal.

The potential ethical dilemma for life agents (and life companies) rarely surfaces--unless the agent misplaces the premium or forgets to remit it in a timely manner. Then is he still acting within his authority and has the insured in effect paid the company?

Most companies (and most courts) say "yes". And most still say "yes" even when the agent deliberately failed to remit the premium, in order to protect the public. But while the first situation might result in a bond or E&O claim, the second is clearly fraud--criminal conversion.

So, how can you protect yourself from this mess? Either never accept any subsequent premiums (and be labeled a jerk); or, never lose the premium!

In addition to contractual issues the agent also owes the principal his best efforts. And nowhere are best efforts more important than in the proper completion of the application.

This means the agent must ensure that all questions are answered thoroughly and correctly, as we discussed before, but also that all the other elements of the process be handled scrupulously. There are legal liabilities for failing to do so.

These elements, which can become routine and therefore sometimes slighted, include the notifications of the inspection, motor vehicle and credit reports and the Medical Information Bureau screening.

Remember, even though the various reports might have been derived from public sources, they are considered proprietary to the insurer under the Fair Credit Reporting Act and cannot be disclosed to the applicant and are not included in the policy with the application itself. Your client probably won't appreciate this distinction.

Not so for the MIB report. It must be shared with the insured, if requested, although any confidential medical information can only be transmitted through the insured's designated physician. Your client won't like this, either.

Then there is the issue of the conditional receipt, if the policy has been pre-paid. Because the terms differ from company to company, and the coverage provided can be dramatically

different, it is critical to read the receipt yourself before you try to explain it to your client. Sounds obvious, but the conditional receipt is the basis of a lot of lawsuits.

And if you write non-prepaid cases, which is the norm in business and estate situations, then you must also ensure that the other parties are quite aware of the implications. Sending a follow-up letter explaining that no insurance is in force during underwriting might be prudent. Please phrase this carefully.

Finally, an agent also is responsible to his principal for the timely delivery of issued policies. Companies have different procedures for this, but virtually all require that the agent obtain a signed delivery receipt to confirm the beginning of the "free look" period. Remember, however long this period is in your state, it doesn't start until the policy has been delivered to the policyowner--that means placed in his hands. Courts have enforced the right of rescission in cases where the policy had not be properly delivered several years after issuance. Can you afford to send back years of commissions because you didn't make a proper delivery?

## **The Agent and His Customers**

Making the ethical sale is a lot harder today than it was a few years ago. There is no question that legal requirements and expectations have multiplied and that the public is more vigilant for transgressions.

Replacements were once a major source of conflict--and still can make agents mad at each other--but recent rules have clarified the process so that there really is no excuse for not following them to the letter. Almost every state has adopted the model rules so there is no confusion in any jurisdiction.

The only possible problem could be which transaction constitute "replacement." Many states have exempted specific products, such as group or variable life or annuities, from the replacement requirements. But you can't go wrong assuming any exchange is a replacement.

Also, most states also share the same definitions of what a replacement transaction entails, and it is a comprehensive list. But a few add one more to the standard five--any change in the existing policy's dividend option. Make sure you know which requirements apply to your situation.

For the record the standard five "replacement transactions" include:

1. Any rescinded, lapsed or surrendered policy.
2. Any change to reduced paid-up or extended term insurance, or any change to automatic premium loan.
3. Any change that would result in a reduction of benefits.

4. Any change subjecting the policy to substantial borrowing (a per cent that varies by state).
5. Any release of a substantial per cent of the policy's cash value (again varying by state).

Remember, a replacement transaction takes place if either you or the customer suggests it, or if you have reason to believe the customer will be making a replacement--even if the customer says he will not. You're the one with the license and the liability. When in doubt, file the form.

Illustrations are a recent source of contention. Many companies now expect agents to deliver the entire proposal, including all the tedious boilerplate, and also expect a signed copy in return. The industry has done much to improve the integrity of illustrations but creative agents can chafe under new marketing rules (which are always written by the legal department).

But many states have codified these illustration rules and they must be followed, even if your customer's eyes are glazing over. It is not impossible to be interesting and thorough at the same time. It is mandatory to be thorough.

While not a source of much legal conflict, poor service is a major customer complaint. And customers complain by buying their next policy from somebody else.

We all pride ourselves on our good service. Is it ethical to renege on that promise? While the Law of Agency makes service the responsibility of the insurer, most insurers allow their agents to fulfill those duties. Yes, the agent can provide free labor for the company but he can also be the one who benefits from regular contact.

Two areas where service is vitally important are working with rated customers and handling death claims. We, and our industry, are usually judged by how well we respond in difficult circumstances.

The ethical agent should do all he can to place the rated policy, once he has determined it is the best available offer, and all he can to reduce or remove the rating as time goes by. And no duty is more compelling than delivering the check to the widow. Every agent remembers his first death claim--and all the others, too.

Finally, the ethical agent must ensure that he has maintained the confidentiality and security of his customer's personal records. This means, of course, not being careless in disclosing information but also being careful to ensure that it is secured properly. Proper security can be expensive but is a necessary component in protecting yourself from liability.

"Are You in Compliance?" also stresses that ethical business behavior requires agent to document client files carefully whenever making any actions on their behalf.

"The file should allow you to properly assess the need for insurance, and it should substantiate the reason for the sale," the booklet states. It recommends agents send a discovery agreement after every fact-finding interview, maintain all complete illustrations and proposals, update case notes regularly, log telephone calls and file delivery receipts. Your E&O insurer will agree.

## **The Agent and His Peers**

"Fair dealing" is the business concept that should govern how an agent interacts with his professional peers--attorneys, accountants, trust officers, stockbrokers and bankers. It means simply that each recognizes the abilities and experiences of the other. It also means that no one transgresses into the realm of another professional; we'll discuss how to avoid that sin in the next section.

"Fair competition" is the concept that agents should follow in their dealings with each other. It means recognizing the professional competence of each other--and the integrity of each agent's insurer. Easier said than done. But membership and participation in professional societies will bring you into contact with your peers and should help you appreciate your common goals.

And if "fair dealing" and "fair competition" fail, remember the Golden Rule. You treat others as you wish to be treated. You be the ethical agent.

Lastly, a word commonly heard in our industry is "professionalism". We've discussed the requirements for being a professional, but one bears repeating: a professional should act like one.

It's not your education or experience or company affiliations that will convert your insurance customers into clients--it's your own behavior. The conscientious, ethical professional has clients.