

First:

The policy could have been issued in the first instance or transferred to the trust. This is so simple and basic that it almost deserves no comment. If an insurance adviser is part of the "team", rather than someone whose only involvement is completing the application and getting the policy issued, the chances of oversight should be eliminated. This becomes a crucial element of the overall planning process, especially if the purpose of the insurance is communicated and understood and the agent has the requisite estate and gift tax expertise.

Second:

What about the insurance policy itself? If the attorney is discussing an irrevocable insurance trust with his client, there must obviously exist the need for an insurance policy. Who is responsible for getting the policy issued with the appropriate owner and beneficiary? Is this communicated to the client in writing? It is not unreasonable to assume that the client is relying on both, and will look to both if there is any problem. Who is responsible for getting the policy issued in proper form to the appropriate person or entity? Both the attorney and the agent are responsible here. Here again, it is not unreasonable to assume that the client is relying on both, and will look to both if there is any problem. Finally, who is responsible for selecting the insurance product best suited to the estate planning need, analyzing the relative strength of the insurer, and explaining the product and the "illustrations" to the client? It is suggested that the attorney is the party responsible here; after all he is suggesting the need for insurance, or agreeing that it is a necessary component of the overall estate plan. Where does his information come from, how is it presented, and how many companies and/or policies have been compared in the analysis? In most cases the product design, presentation, and product analysis come from the agent, but that does not help the attorney much when he is sued by an unhappy client because the

assumptions behind the illustrations were not properly explained, or the company experienced financial difficulty, or a different type of policy was better suited to the estate planning need. In many cases, the attorney also serves as Trustee of the insurance trust, an act in and of itself which places the attorney directly in a fiduciary capacity and creates increased liability. Even if the policy is selected with appropriate deliberation, due care, communication, and issued in the proper manner, who is annually monitoring the policy performance, and the insurer, as time goes on? The Trustee is obligated to do this, but, here again, we all should limit what we do to what we do best and it is the insurance adviser who is best equipped to provide the attorney with the appropriate information and documentation.

The bottom line is that the insurance adviser plays a pivotal value added role in helping an estate planning attorney carry out his fiduciary obligation in the evaluation and proper implementation of insurance products.

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**Massachusetts Society
of Licensed Insurance Advisors**

c/o

The Insurance Library Association of Boston
156 State Street
Boston, MA 02109



The Adviser

Massachusetts Society of Licensed Insurance Advisers

Editor - John Paul Sutrich

Spring 1999

Upcoming Events

Wednesday, March 24, 1999

Speaker: Jason Adkins, Esq.

Topic: Mutual Insurance Holding Companies

Wednesday, April 21, 1999

Speaker: Commissioner, Linda L. Ruthardt

Topic: The Changing Insurance Regulatory Climate

Wednesday, May 26, 1999

Speaker: John Addeo, Former President USI Corp.

Topic: The Changing Landscape of Insurance Product Distribution

Note: The meeting will be held at the Downtown Harvard Club. Registration is at 11:30 a.m. Cost is \$30.00 in advance and \$35.00 at the door. For additional information and reservations, call the Insurance Library of Boston, at 617-227-2087.

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Business in the 90's The Internet, Big Brother & You!

by John M. Sullivan

You have just had a major accident twelve hours ago, the injured are at the hospital and appear to be reasonably well given the scope of the accident. You have met with OSHA and all required safety items for this case are in place but some unrelated and less significant issues have resulted in a citation, the workers compensation carrier has been notified, and you feel that things are going as best as can be expected. In short everything is under control, but you still wonder what can happen and in the pit of your stomach you know this is not good.

Welcome to the information age. You were right to be concerned because in the age of information you can no longer hide. The loss will impact your insurance program. Your experience modification will go up, you may lose the deviations on your Workers Compensation program. Your liability program may rise as well. Overhead costs will increase. If you think I am wrong let me explain what happened to a client of mine.

The client is a major player in the local construction business. He had two serious accidents within six weeks of each other where other people cause the accident but were he was contractually liable for the actions of his subcontractors. When the subcontractors failed to have sufficient insurance the injured parties threaten the GC who immediately came to the client with the hold harmless portion of the contract which gave the GC the right to pass on any charges to the client. The client is waiting settlement. The insurers have set their reserves and the client is faced with significant premium increases in the near future. Client immediately calls in a new insurance broker who completes new applications and asks about losses. The client states that there is an incident pending but that he has a certificate of insurance from the subcontractor which he believes to be sufficient. He produces a copy which is then filled with the application. If this all sounds familiar get ready for the new ending.

You see the new underwriter calls for a meeting with the client. Everyone agrees it's a good idea and the meeting is scheduled. Prior to the meeting the new underwriter logs on the internet goes to the OSHA web page (www.OSHA.gov) calls for all the citations that the prospective client has had in the past 5 years *and gets them*. He then gets the OSHA report on the most recent citations, along with the schedule of the fines both proposed and paid. The underwriter asks for the clients fall protection program citing that in the past five years he has six citations from OSHA four of which were on fall protection. The client gives him one that he copied from someone two years ago. The underwriter smiles and hands the client the new (45 days old) OSHA regulation for his specialty and tells the client that he would only consider him once he has made the new procedures a standard operating procedure within his organization. The underwriter smiles thanks everyone for attending the meeting gets up and leaves. There a four carriers willing to consider this type of risk, with the incumbent not happy and one underwriter already rejecting the client, half the market is gone. Not a good day! The client says he should have paid attention to our warnings on a fall protection program sooner. I worry who else can get this information.

Welcome to the information age, where nothing that is public record is not available to someone who wants it in an instant. I must come clean, you see for years I searched for those

OSHA records because I thought that they would provide a good source of potential clients. I was told that they were not available. I pursued because I felt that they were public records. Then I was told that they might be available but only from OSHA in Washington DC and then only after filing a freedom of information act form. Too much work without a known ratio of success. However, you can imagine my interest when I saw the underwriter with them in his hand.

Needless to say once I found how to obtain them I queried the records of all my major clients. You can imagine my shock when client after client came up on the screen, many with multiple violations. So I went to the clients and asked them about the records. Most clients were stunned. How did I get them? What does it say (you would be amazed)? Who can get the list? Who else is on the list? I suddenly understood not only was Big Brother watching, he was talking.

I studied the list for several months. I saw how the OSHA inspections have patterns. A local crackdown after a big loss and then a complete walk through of all the major players in one industry nationwide. Trends towards inspections in one region or industry segment. It's all there. All the things we had suspected for years right on the screen with a dozen clicks of the mouse. All in a format that can be sorted, resorted and reviewed. So big deal I thought, as long as we addressed the citations at renewal what was the concern, plus it was only one underwriter working for one company. Then I had lunch with the outgoing COO of a major insurance company.

The luncheon proved to be very interesting. We had the normal banter about business, yes it was good, no this was not a market cycle issue but rather a complete change in how the insurance market runs, but what came next almost knocked me off my seat. He started talking about the Internet and how he finally got the organization to start using the information that was out there to service its insureds. He talked about empowering his employees, about getting them the information they need to do their job, about the concept of selective underwriting where they would write only the best of the industry. He talked about the need to develop industry specific expertise, available to customers nationwide, that could be a force in helping those customers run their companies better. But for some reason, I kept seeing that underwriter handing the client a copy of the new OSHA regulations a few weeks earlier.

Now I used to work for this insurance company about ten years ago. Once in a meeting it came out that they were looking to write a major prospect. I had gone to college with the owners son and mentioned that I would be happy to call him and see if we could talk. No I was told it was not in my territory and it would be too hard to credit everyone if we wrote the account, I suggested we write the account first and give everyone the credit (translated commission) after we got the sale. It never happened and I left the company. Now the President is telling me that it is a normal operating practice!

I got back to my office and found a message from one of my clients requesting I call up the OSHA records of two of his competitors. I get them, fax them to him and call him the next day to see if he got them. He says thanks he got them, it was great, you see he included them in a bid because he felt the client should know who he was hiring. Stunned, I hung up the phone. I knew

it was a logical move if not brilliant move on my clients part, but I wondered had all this gone too far. After all only six months ago we know you could get this information.

Welcome to the information age, the rules have changed! The new reality is something we all have to address. You see the client above wasn't the lowest bidder *but he won the job*. Any guesses why? For the first time we all may have to face explaining our past in order to get some opportunity in the future. The client who won had always marketed his professionalism and safety record as part of any of his presentations but now he could not only market his strength, but he could emphasize his competitors weakness, on OSHA letterhead and all.

So how do you play now that the rules have changed? I think it is important that you update your safety plan immediately. You see in follow-up conversations that I had with the underwriter who started the whole saga, he claimed that if the client's safety plan had been recently updated he could have understood the omission of the new standards, after all they were only 45 days old. Other clients have called wanting to address specific issues and only updated certain parts of their safety plans. Still others created separate programs addressing only certain issues. I believe there are two reasons. One is to disarm the guy at the bidding war (yes we have been bad but here is our new plan) second, OSHA almost always brings in the failure to train provisions of the law when they cite a contractor. They know the contractor usually can't prove that he trained the employee if they did, and more often than not the employee denies it if asked, without the paperwork to prove it the contractor loses. This means multiple violations, better known as fines.

So now that I've updated my safety plan what else do I do? Train, Train, and Train! You have to be able to show that you take this seriously. What better way than to show the customer that then to show him your training, of course you will have material addressing the recent OSHA violations and his specific exposures were either recently addressed or on the schedule for the next training session. Then be sure to do it! Addressing these issues I believe will be of utmost importance. Customers understand these problems but don't want the attention and the slowdowns that major accidents can bring. If you have had past problems show that you have addressed them. And above all document, document, document.

In recent weeks, we gotten many calls from clients, most of which have had OSHA problems in the past twelve months. As the bidding intensifies for next springs work those clients will be ready, as their insurance renewals come along they are continuing to get substantial discounts, which translates into lower overhead costs. And in at least one case when the OSHA inspector called, he eliminated failure to train citations from his report, once presented with the material. Those of you who will have to compete against these clients may want to consider your own position. They know their OSHA record, and they know the competitions (a.k.a. yours) record as well.

You've been told this before. You ignored it before. But this time is different. The Internet changes everything, the information is available and the kids know it. Watch and see if you don't see it this spring. Many of us will find it hard. After all it's not easy to teach an old dog new tricks. However, the information is out there and people are learning how to use it. 50,000 people

are signing up for internet access each day. Like the computer, you may not like it but it is here to stay. And like the computer, which gave everyone access to the same software programs, and lowered costs in the construction business because it quickly set-up industry standards. The internet will level the playing field. Good news for some bad for others. The mystery will be gone. Hiding will not be an option.

FINDING MORE NEEDLES IN CYBERSTACKS

by Frank Licata, CPCU

This is the second of our articles on finding value on the Internet. These are sites that should definitely help you in your practice at one time or another.

The Insurance Library's site is now up and running (www.insurance-library.org). You can review their course schedule and sign up for a course online. The real utility of the site will be evident when we can access online the library's database of books and publications and articles which they have archived. Then we will be able to really efficiently search for the information we need. We've been told that this is being planned.

Do you have a situation, claim or otherwise, which calls for legal advice? The Martindale-Hubbell law directory (www.lawyers.com) is a very comprehensive guide to law firms. Input city, state, practice specialty and hit search. You will get a listing of almost all the firms practicing in the chosen areas. For example, a search for law firms in Boston with an insurance practice resulted in 246 possibilities. Pick the firm you want to explore, click and quickly obtain a firm profile and bios of all the firm's attorneys. This is an excellent resource.

Furthering that theme, we're not lawyers but every day our work involves liability issues. Sometimes we need to do some basic legal research. For example, almost all employment practices liability policy forms exclude claims arising from the Fair Labor Standards Act. Recently, we were studying proposals, and needed to know what we were buying and, more importantly, what we were not buying. Research at the Cornell Law School Legal Information Institute (www.law.cornell.edu) yielded the answer. The Fair Labor Standards Act covers minimum wage, maximum hours, overtime, child labor, etc.

To illustrate navigation at this site, let's find the Fair Labor Standards Act as follows:

In the left-hand border, click US Code, then Table 29 Labor, then Chap 8 Fair Labor Standards. You can also find it via the search engine on the home page. As with most search engines, this one gives you articles about the subject rather than giving you the law itself, although the actual law may be buried in there. If you know where you're going, an index is more direct than a search engine.

Until we get the insurance library's database on line (I'm not pushing, Jean) Business Insurance might provide a good substitute (www.businessinsurance.com). This site provides a surprisingly large amount of information at no cost. Under Updates, you can see headline stories from the regular weekly magazine which are posted on the Friday before the Monday publication. It

includes a reasonable summary of the story so that you can get a jump on the week's news. This is a nice overview before you actually sit down to read the print magazine, and can be even more valuable if you don't now receive the print version. The real value of the Business Insurance web site is the article archives. The archives add real content (if you think the original Business Insurance articles have content in the first place) because they are searchable by subject. You can search the two most recent issues for free, but a search of all back issues will cost \$80 per year for print subscribers and \$120 per year for non-subscribers. To test the search feature, I inserted the subject Y2K, hit Submit, and got eight articles (seven about Y2K and one about HMOs!). The articles were either the complete original article or a very substantial summary. It would seem that subscribing to the entire archive would pay for itself quite readily. If you don't subscribe, the web site contains complete article archives in two areas: Cyber Beat contains over two years worth of technology related articles, and Global Focus gives you over three years of international insurance stories. I don't want to confuse by adding more Cyberstacks that need to be searched for needles, but I consider this a simplification: Get rid of all your various and sundry lists of insurance links and just use this one. Ultimate Insurance Links (<http://1165.227.195.22>) is the most comprehensive and best organized list of insurance links I've found. If you enter this labyrinth, be sure to carry water and oxygen and drop breadcrumbs so you can find your way out. Also, when you return, let us know about sights (and sites) you've seen. We'll publish them here in the Advisor. Pleasant journey.

The Estate Planning Attorney and The Licensed Insurance Adviser A Marriage of Necessity

By: Edward L. Wallack, Esq., CLU, ChFC
John J. Yagjian, Esq.

Stevenson v. Severs F.3d. (D.C. Cir. 1998) presents yet another reason why a trusted and knowledgeable licensed insurance adviser should be part of every estate planner's team. In that case a client retained an attorney and insurance agent to set up an irrevocable life insurance trust to which policies insuring the life of the client were to be transferred. Although the attorney created the life insurance trust, the life insurance policies were never transferred to the trust.

Nine years after the fact, the client retained a new attorney who discovered that the policy transfer had never been done. The client sued the attorney and agent, alleging among other matters that the attorney had breached a duty that he owed to her and that breach was the proximate cause of any loss. The appellate court in this case remanded the case to the trial court to consider whether the attorney, agent or both neglected to perform a reasonably expected duty, which resulted in and was the proximate cause of any loss suffered by the client.

This is not the first nor will it be the last case where, had a licensed insurance adviser been involved, an attorney would have been able to limit the possibility of a successful lawsuit. Let's look at what might have been done.