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ELANY Board Past to Present: From left to right: David Isenberg, Joseph Caligiuri, Lance Becker, Walt "Clyde" Frazier, Margaret Beime, Kevin McGill, Donald Privett, Robert Shapiro, Lee Orabona, Daniel Maher, Guy Migliaccio

2015 ELANY Annual Members' Meeting

Walt "Clyde" Frazier
Featured Guest Speaker

While this year's NY Knicks team set a franchise record for most losses in a season (65), this year's ELANY guest speaker, former NY Knicks' legend Walt "Clyde" Frazier, put on a winning "championship" performance at our 2015 Annual Members' Meeting.

Approximately 100 members, insurer representatives, attorneys in the industry and others attended the meeting, which was held on May 6, 2015 at the India House in lower Manhattan. From the minute "Clyde" arrived to sign autographs and take pictures with attendees to the "Q & A Session" at the end of his thought provoking and entertaining presentation, it was apparent that the audience had a great time and really enjoyed "Clyde's" message and presence.



"Clyde" started off his speech by posing the question "What is wrong with having too much or having too little?" He pointed out that today's kids know the price of everything but the value of nothing. He noted that when parents give their kids everything, the kids do not work hard. They have everything but really have nothing—no self-esteem, no respect for others, no real values. "Clyde" mentioned the need for better communication between parents and their children, teaching kids about the importance of hard work, respect for others, and the need for positive role models for kids.

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Featured Guest (continued)



Daniel Maher, Executive Director of ELANY, and Walt "Clyde" Frazier.

"Clyde" also discussed his own "Keys to Success," which included having a flexible game plan and set of goals, being self-confident (when you don't believe you can't achieve), self-mastery (diet and exercise), being self-motivated, working on your weaknesses, utilizing your time wisely, having a tenacious work ethic, and the importance of networking and teamwork. "Clyde" noted that no one plans to fail, but many of us fail to plan.

Stamping Fee Reduction—Reminder

The new reduced stamping fee of **0.18%** should be charged on all **excess line policies** that have an **effective/inception date on or after July 1, 2015**. (This means 18 cents per hundred of premium instead of 20 cents per hundred of premium.)



The stamping fee on **endorsements** will be the same percentage as charged on the original policy filed. Therefore, on policies filed with an effective/inception date on or after July 1, 2015, the stamping fee is 0.18%. The fee for endorsements on policies incepting July 1, 2005 through June 30, 2015 will remain 0.2%; for endorsements on policies incepting July 1, 2004 through June 30, 2005, the stamping fee is 0.3%; and for endorsements on policies incepting prior to July 1, 2004, the stamping fee is 0.4%.

Please note it is the **effective/inception** date of the excess line policy that determines which stamping fee rate is charged on all policies and endorsements.

The excess line premium tax remains at 3.6% on New York written premium.

New York "Export List" Is Underutilized

The "export list" sets forth types of insurance coverages that the New York Superintendent of the Department of Financial Services has determined are generally not available from licensed insurers, and therefore, three declinations are not necessary pursuant to the requirements of Section 2118(b)(4) of the NY Insurance Law.

ELANY recently reviewed export list transactions data submitted for the year 2014. The review indicated that excess line brokers and producing brokers are not fully taking advantage of the export list coverages. The following export list categories are substantially underutilized:

Construction Liability Coverages:

- **SMP coverage**—for general contractors, subcontractors and all construction trades, primary and excess.
- **Builders Risk Insurance**—coverage for construction projects where the total insured values exceed \$10 million.
- **Manufacturers & Contractors**—for general contractors, subcontractors and all construction trades primary or excess.
- **Owners, Landlords & Tenants**—for general contractors, subcontractors and all construction trades, primary and excess.
- **Owners, Contractors Protective**—primary and/or excess liability coverage.
- **Contractors Excess Liability**
- **Asbestos Abatement Contractors**
- **Environmental Contractors**

The grand total for new and renewal export list transactions in 2014 was 8,477.

ELANY's analysis indicates at least 16,000 construction liability transactions were reported with declinations, even though they appear to qualify as export list transactions.

The review also indicated that a substantial number of transactions involving **Contract Frustration, Flood Insurance and Vacant or Unoccupied Buildings** coverages (approximately 1,300) were being submitted to ELANY with diligent search declinations, even though these type coverages are on the export list.

ELANY realizes that it takes time for licensees to become familiar with the export list coverages. However, we are once again urging member excess line brokers, their staff, and their retail producers to become familiar with the "export list" coverages, and more importantly, to utilize the "export list". Use of the export list streamlines the declination requirement process making it easier to file excess line documents with ELANY, and thereby, saving brokers time and money.

It is important to remember that use of the “export list” only exempts the broker from the diligent search effort requirement. The filing of affidavits and related documentation is still required.

For the complete list of all coverages included on the “export list,” please log onto our website www.elany.org click on “Lexicon/FAQ Topics” and search for “Export List”. Should you have any export list questions, please contact Gene Nunziata, Education/Communications Director, by e-mail enunziata@elany.org or by telephone **(646) 292-5584**.

Producer Licensing Requirements

If it Quacks or even waddles a little to a regulator it's a duck.

Following is a discussion on activities that occur within the production of insurance policies that trigger state licensing requirements. One caution, however is that this is a general conversation, it is not designed to be state specific and is tailored largely to the Producer Licensing Model Act (PLMA). The PLMA although adopted by the National Association of Insurance Commissioners is of course guidance to each state that needs to be adopted and passed into Law. This model was adopted in 2002 and each state has adopted all or part of it. So there are state deviations that we will not address.

Before one can talk about the possibility of applying exemptions one needs to be aware that compensation is the bottom line and therefore the starting point of our discussion. Any compensation, or other valuable consideration based on production, policies or number of customers generally will be considered a commission. Most statutes prohibit the payment or receipt of a commission unless the person is licensed with the line of authority for the kind of insurance generating the commission. And of course, anyone who sells solicits or negotiates insurance by definition needs a license regardless of the form of compensation.

To be safe but not so cost effective one can consider licensing all staff that has contact with an insured or the insureds representative, a.k.a Broker. Should one decide to analyze their office activities and adequately provide guidance and appropriate levels of supervision to their personnel certain exemptions could be applied, albeit very carefully.

The following analysis is divided into three sections, law exemptions from the Producer Licensing Model Act, clerical activities related to selling, soliciting and negotiating the sale of insurance and clerical activities in the service and support of the existing book of business amalgamated from several sources and my experience as a career regulator. The NAIC has distributed amongst the regulators a table of licensable and non-licensable activities that aligns with this pre-

sentation. California and New Jersey, for example have descriptive legislation, while New York has a series of opinions from their Office of General Counsel over a period of years and Florida has issued a detailed bulletin. One theme as you peruse these exemptions for clerical activities is that direct supervision by a licensed producer seems implied even when not expressed.

Licensing analysis: Common exemptions:

A portion of the NAIC Producer Licensing Model Act relating to exemptions is set forth below. It is part of the uniform handling across the states. Most of these exemptions are codified in State Insurance law.

PLMA Section 4B. Exceptions to Licensing

“A license as an insurance producer shall not be required of the following:

1. An officer, director or employee... of an insurance producer, provided that the officer, director or employee does not receive any commission on policies written or sold to insure risks residing, located or to be performed in this state **and**:
 - (a) The officer, director or employee’s activities are executive, administrative, managerial, clerical or a combination of these, and are only indirectly related to the sale, solicitation or negotiation of insurance; or
 - (b) The officer, director or employee’s function relates to underwriting, loss control, inspection or the processing, adjusting, investigating or settling of a claim on a contract of insurance; or
 - (c) The officer, director or employee is acting in the capacity of a special agent or agency supervisor assisting insurance producers where the person’s activities are limited to providing technical advice and assistance to licensed insurance producers and do not include the sale, solicitation or negotiation of insurance;”

In addition there are exemptions for furnishing information for administration of groups, acting as an enroller, administering insurance programs for your employer, association or trust, employees engaging in inspections, rating and risk classifications, supervising and training producers, adjusting losses (although this could trigger its own licensing requirements), general advertising and certain professionals such as attorneys who provide general insurance advice when providing other professional services all of course without receiving compensation based on selling, soliciting or negotiating insurance. There is also an exemption from non-resident licensing for commercial multistate risks where the producer is licensed in the state where the insured has its principal place of business.

The following duties do not require a license or constitute “non licensable activities:

For the most part states would agree that no license, therefore, no agency appointment is required for persons performing the following activities as part of their job.

1. Clerical activities indirectly related to the solicitation, negotiation, or effecting the sale of insurance:
 - (a) Distribution of brochures, business cards, or other general information, advertising insurance agencies or insurers, or insurance products, services or promotions, provided that unlicensed persons do not analyze, give advice or make recommendations concerning insurance contracts or potential insurance contract terms to applicants for insurance coverage, potential applications for insurance coverage, or policyholders.
 - (b) Preparation of applications for insurance coverage without any contact with applicants, other than minimal data clarification.
 - (c) Obtaining underwriting information from third parties, including, but not limited to, the Department of Motor Vehicles, credit reporting agencies and other insurance companies.
 - (d) Preparation of binders, certificates, endorsements, identification cards, policies and similar evidences of insurance, under the supervision of licensees and for the review and signature of licensees, provided that the unlicensed persons are not signing such documents, either in their names or in the names of the licensees.
2. Clerical activities involving the making of changes to existing insurance policies or providing indirect insurance marketing and servicing support that are generally exempt from licensure, may include:
 - (a) Dissemination of buyers’ guides for insurance, applications for insurance coverage, insurance coverage selection forms, or related forms, in response to consumer requests, provided that unlicensed persons do not analyze, give advice or make recommendations concerning insurance contracts or potential insurance contract terms to applicants for insurance coverage, potential applicants for insurance coverage, or policyholders.
 - (b) Receiving information from applicants for insurance coverage, potential applicants for insurance coverage, or policyholders, or recording information from applicants for insurance coverage, potential applicants for insurance coverage, or policyholders to give to a producer for response, provided that the unlicensed persons do not analyze, give advice or make recommendations concerning insurance contracts or potential insurance contract

terms to applicants for insurance coverage, potential applicants for insurance coverage, or policyholders.

- (c) Scheduling appointments with producers to discuss insurance, provided that there are no conversations, or other exchanges of information concerning insurance contracts or potential insurance contract terms between unlicensed persons and applicants for insurance coverage, potential applicants for insurance coverage, or policyholders.
- (d) Communicating with applicants for insurance coverage, potential applicants for insurance coverage, or policyholders solely in order to obtain factual information requested by licensees, provided that unlicensed persons do not analyze, give advice or make recommendations concerning insurance contracts or potential insurance contract terms to applicants for insurance coverage, potential applicants for insurance coverage, or policyholders.
- (e) Acceptance of insurance premiums for delivery to producers.
- (f) Receiving and recording insureds’ requests for additions or deletions to existing insurance policies, and preparing endorsement forms for the review and signature of licensees.
- (g) Responding to an insured’s questions with factual information about their coverages that already exist i.e. limits, effective dates—no explanations interpretations or advice or opinions.
- (h) Secretarial, administrative assistance i.e. answering phone, faxes and emails in line with above.
- (i) Merely acting as a go between for licensees and applicant for insurance coverage, potential applicants for insurance coverage, or policyholders.

The triggers for a license can also be contextual to the transaction so not everything applies equally given the particular circumstances. And, in the art of applying law and regulation, the regulator will draw the bright line that agrees or disagrees with an assertion that certain activities are exempt from licensure. It is the regulators job to apply these statutes to the extent that provides the greatest consumer protection and fairness to the competitive forces within the producer community.

This is not legal advice. I am not an attorney and Westmont Associates is not a legal firm and does not render legal advice or opinions.

Jack Chaskey was a regulator for over 33 years with the New York Insurance Department. He supervised the investigations unit and represented the New York Department at the NAIC for over 10 years with respect to all matters involving licensing and compliance issues. He



is retired from the New York Department and currently consults with Westmont Associates on compliance and regulatory matters nationally. If you are interested in further advice or information concerning this matter or any other regulatory matters, please feel free to contact Jack or Westmont Associates at the address or numbers listed below.

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Determining Excess Line Premium Tax When Policy Covers Risks Located Both in the United States and Outside the United States

ELANY was recently asked to provide information regarding excess line tax requirements when New York is the “home state of the insured” and where the excess line policy covers risks/property located both inside the United States and outside the United States.

The New York State Department of Financial Services (DFS) addressed this excess line tax issue in **Circular Letter No. 9(2011)** dated July 22, 2011.

In general, when New York is the “home state of the insured” under an excess line insurance policy with an effective date on or after July 21, 2011, 100% of all written premium is subject to taxation, even when the policy covers risks or property located in other **states** as well as New York.

However, when New York is the “home state of the insured” under an excess line insurance policy with an effective date on or after July 21, 2011, and where the policy covers risks or property located both in the United States and outside the United States, **only that portion of the premium attributable to the risks or property located in the United States is subject to taxation.**

An excess line broker should utilize the premium tax allocation rules and schedule contained in **Appendix 5 of Regulation 41** when determining the premium allocable to the United States risks or property excess line taxation purposes.

Department Of Financial Services— Insurance Division

Comings And Goings

Congratulations to Anthony Albanese on being named Acting Superintendent of the Department of Financial Services, and to Troy Oechsner on being named Acting Executive Deputy Superintendent.

Best wishes to recent Department retiree Nancy Yee, who headed the Excess Line Unit for seven years and to Marina Lutchman, who is succeeding Nancy in that role.

Congratulations to Mark Wade on his promotion to Executive Director of the NYS Workers’ Compensation Board, Rob Easton on becoming the Chief Compliance Officer at McGraw Hill Financial, and Superintendent Ben Lawsky, who will be starting his own legal and consulting firm.

In Memory of Roy Vasile and Dominick Piccininni

ELANY is mourning the loss of two good friends from the industry—Roy Vasile and Dominick Piccininni. Roy and Dominick helped present several very successful mock court proceedings with ELANY regarding Labor Law 240 back in 2005 and 2006.

Dan Maher said, “He envied the skills of Roy and Dominick as lawyers, not in a jealous way, but more in awe of their analytical skills and their ability to try cases. They were the lawyers you went to as a lawyer for the advance course.”

Aside from the practice of law, these were two wonderful down to earth guys. Dominick was witty and could make anyone laugh within a minute of your first conversation. Roy, notwithstanding a full time plus trial practice, was very involved in his community and raised his five children for five years on his own, due to the untimely death of this wife, Catherine.



Dominick Piccininni



Roy Vasile

CALENDAR

2015	
July	
Thursday–Sunday July 16–July 19	The National Conference of Insurance Legislators (NCOIL) Summer Meeting Hilton Indianapolis Hotel & Suites Indianapolis, Indiana
August	
Friday–Monday August 14–August 17	National Association of Insurance Commissioners (NAIC) Summer Meeting Hyatt Regency Chicago Chicago, Illinois
September	
Wednesday–Friday September 9–September 11	National Association of Professional Surplus Lines Offices (NAPSLO) Annual Convention Manchester Grand Hyatt & Marriott Marquis San Diego, California
November	
Thursday–Sunday November 12–November 15	The National Conference of Insurance Legislators (NCOIL) Annual Meeting Hilton Palacio Del Rio San Antonio, Texas
Thursday–Sunday November 19–November 22	National Association of Insurance Commissioners (NAIC) Fall Meeting Gaylord National Hotel and Convention Center Washington, DC
December	
Wednesday December 9	Insurance Industry Charitable Foundation (IICF) Northeast Division Annual Benefit Dinner Waldorf Astoria Hotel New York, New York

2016	
February	
Friday–Sunday February 26–February 28	The National Conference of Insurance Legislators (NCOIL) Spring Meeting Little Rock Marriott Little Rock, Arkansas
May	
Sunday–Wednesday May 22–May 25	American Association of Managing General Agents (AAMGA) Annual Meeting J.W. Marriott Desert Ridge Resort Scottsdale, Arizona
July	
Thursday–Sunday July 14–July 17	The National Conference of Insurance Legislators (NCOIL) Summer Meeting Portland Marriott Downtown Waterfront Portland, Oregon
November	
Thursday–Sunday November 17–November 20	The National Conference of Insurance Legislators (NCOIL) Annual Meeting Paris Las Vegas Las Vegas, Nevada



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