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Tales from the E&O Crypt

Living dangerously is fine if you're playing a part in a Wes Craven movie. If your character is likeable, you're sure to be resurrected in the next film. The real world, regrettably, is less forgiving. Last month's "E&O Angle" covered scary E&O blunders. Here are some additional ones to be aware of:

A common error is admitting blame. Confession may be good for the soul, but it's terrible for coverage. Most E&O policies contain terse language to the effect that: "The Insured *shall not,* without our written consent, admit liability." The challenge of obeying that admonition when an irate customer calls about missing or inadequate coverage may seem daunting at first blush. Understand, though, that there is an important difference between acknowledging a problem exists and accepting blame for creating it. Listen to your customer's concerns. Agree to investigate. You can even indicate, if need be, that you will report the matter to your E&O carrier. Do not, however, make any promises or guarantees regarding the outcome. This includes assurances to your customer along the lines of, "If the carrier doesn't pay this claim, I'm sure my E&O carrier will!"

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Equally suspect is the insurance professional's decision to act as mediator when a dispute arises. More than one agent has walked into a room free of liability, but left with a bull's-eye on his back because he or she tried to negotiate a settlement among the various (guilty) parties involved. Did the parties properly document the deal? Were the responsibilities of the various parties laid out carefully? Who will pick up the tab if one party defaults on its commitment? Was the agent even released? If the deal put together by the agent goes sour and the customer is forced to file suit to protect her rights, it's a safe bet that the person who orchestrated the deal-gone-bad will receive top billing in the complaint filed with the Department of Insurance or, worse yet, the nearest state or federal court.

To make matters worse, that word "shall" probably shows up again in your policy: "The Insured *shall not,* without our written consent, participate in any settlement discussions nor enter into any settlement." The upshot of these provisions: leave the negotiating to others.

Is there ever a situation where the insurance professional should take an active role in resolving the issue, usually by working with and encouraging the carrier to find coverage and pay the loss? Of course. There are bound to be situations that are recoverable. But once you face what amounts to a claim, or potential claim, it's best to pursue that course of action in consultation with your E&O carrier.

The next time you sense a hint of danger ahead in your insurance practice, remember the old saying, "When you find yourself in a hole, stop digging." Turn the claim over to your carrier, and leave the nightmares to Wes Craven.

Matthew R. Davis, Esq., is a claims specialist at GE Insurance Solutions.

The Uh-Oh Moment

A "claim" is easy to identify: suit papers, a department of insurance complaint against you or a demand letter of any sort almost certainly qualify. A bit less obvious, the typical policy defines a "potential claim" as "a proceeding, event or development which has resulted in or could result in the future result of a 'claim' against the insured." In lay terms, there is a moment in the discussion when the phrase "uh oh" spontaneously springs to mind, accompanied by a sinking feeling. That is the fork in the road where you need to stop, consider, make the right choice and act on it at once.

—M.D.