



“SORRY” SEEMS TO BE THE HARDEST WORD

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I admire a person who can admit it when they're wrong. In fact, it's an important part of a healthy relationship. However, there's a unique relationship that requires a delicate balance between a full mea culpa and outright denial. This is the insurance agent-customer dynamic in the face of an Errors & Omissions claim.

Unlike a spouse or best friend, customers don't pledge their loyalty to you and they also hold the power of being able to walk away when things get rough. We understand that for these reasons, and others, it's tempting to

quickly admit to an error in the face of an uncovered loss. You may think, “That's what my E&O insurance is for, right? To come to my defense when I have made an error or been accused of one.” Yes of course it is; however, read on and learn from our veteran Claims attorneys the many ways not admitting liability can help in defending you against an E&O claim:

First, let's get the big question out of the way. What should I say when I may have made an error? We suggest the following responses:



“Out of an abundance of caution, I reported this matter to my Errors and Omissions carrier. I don’t want to appear to be evasive, but I’ve been warned by my carrier that I could put my coverage in jeopardy if I get involved beyond this point. I’m happy to refer you to the claims professional at Westport Insurance Corporation.”

If you can’t remember the details about the coverage in question, simply say, “I don’t believe I made an error but if you think I have, I do carry Errors & Omissions insurance and will submit your thoughts on the matter for them to investigate.”

These sentiments can come off as formal and stiff when answering to a long-time client or someone you know well. It’s best to keep it simple and with all the empathy you can muster, say, “I’m sorry this happened to you. I’ll do everything I can to work with my E&O carrier to get this resolved.” At the same time, you may acknowledge the facts with your

customer simply because they will be revealed in the discovery process and/or a court of law. No sense in pretending you don’t know what the coverages are and what’s been alleged in the claim.

NOT ADMITTING LIABILITY: LESSON ONE

Your error may not be the true cause of an uncovered loss. Maybe your client’s policy canceled for non-pay before the loss, which led to the carrier’s coverage denial (not your error). Sometimes our defense for you might be that the carrier’s own underwriting guidelines conflict with the coverage position they’re taking during mediation. Clients with entangled contractual relationships such as contractors/sub-contractors and lessors/lessees present difficult cases with cloudy waters of liability. Don’t make it easy for their attorneys to make you the focus of fault.

An unfortunate example of Lesson One: Customer John Doe calls your office and asks you to add a car to his auto policy. You take down the information he gives you and tell him to consider his new auto covered. When you get off the phone, urgent emails catch your attention and you find a walk-in customer waiting for you. At 5 o’clock you see John’s file again and realize you never sent the new car information to the auto carrier. You leave John’s file on your chair so that you remember to handle his request first thing in the morning.

NOT ADMITTING LIABILITY: LESSON TWO



Upon your arrival to the office the following morning, you boot up your computer with the intention of adding John's new auto. However, due to the crush of business, you forget to take care of it. Three weeks later you have a voicemail from John saying that his daughter was involved in a fatality motor vehicle accident in the new car.

You immediately send an email to John's auto carrier, admitting that John had asked you to add the vehicle three weeks earlier, but that you didn't submit his change request before learning of the accident. You ask for coverage to be backdated and add that "John made no mistake, the mistake was my own." You cc the underwriter and John to be sure everyone knows this is on you.

The underwriter replies with a refusal to backdate coverage and advises you to instead report your mistake to your E&O carrier. In the investigation of the claim, it is determined that the motor vehicle accident had occurred prior to John's request to add the vehicle. In fact, John had owned the car for a month prior to the accident. These new facts would have made good defenses to John's claims of negligence against your agency. But now, John's skilled attorney uses the only evidence he has against you; the email that you sent, admitting your mistake.

When discussing a claim or potential claim, if the person you are speaking with is not YOUR attorney, they are not YOUR friend. You and your client may consider each other to be friends, or friendly, but, a plaintiff's attorney will capitalize upon a candid comment between you and your customer as an admission of liability. Always speak with your customer as if they're recording you because in some states, it's legal and they are. You may innocently admit to your customer that you forgot that their California work comp policy doesn't cover full time employees in Nevada, but the plaintiff's lawyer will pounce on this like a velociraptor. And it's a done deal when you've been recorded as saying as much. Additionally, offering to pay for or settle a claim from your agency's own dollars is red meat for a trial attorney. Admit you made an error or offer to pay and, Chomp! Gotcha.

NOT ADMITTING LIABILITY: LESSON THREE

An admission of liability puts the focus on the agency when perhaps the focus should be on the acts of the broker or policyholder. Your alleged or real actions may not rise to the level of legal liability. Let us work through the claim allegations and make the plaintiff's lawyers prove that you breached your standard of care as set forth by the laws in your state. When the broker sent you the proposal, it included all the coverages you had requested, but when the broker sent you the policy, it may not have included all the coverages you requested, and they failed to tell you. You may not have caught the error when the policy went out to your client but in many states, the policy holder has a duty to read the policy. The broker will have to answer to his or her liability in the matter as well.

NOT ADMITTING LIABILITY: LESSON FOUR

Be cautious when communicating with your carriers about potential claims. Unlike days gone by, we have witnessed a trend in which carriers pursue the errors of their agents to absolve themselves of contributing to a settlement. An admission of wrongdoing to the

carrier, or a confession to an ignorance of laws, underwriting standards, or binding agreements will be fodder for their defense, not yours.

Written coverage interpretation discussions between you and the underwriter have also been used to highlight an agency's lack of insurance acumen, fanning the flames of the claim allegations. Be sure your staff knows how and when to communicate with carriers in the event of an accusation or claim. Never hand over files or testify without first notifying your E&O carrier.

You put your trust in us each time you renew your E&O policy with Westport Insurance Corporation. Should a subpoena, potential claim, or claim arise, allow our Claims adjusters to demonstrate how we've earned our reputation for superior coverage and protection of independent insurance agents for over 30 years. Contact your Big "I" state program manager to learn more.

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