

What You Do and Don't Do When a COVID-19 E&O Suit Arrives

COVID-19 has changed the agent's errors and omissions (E&O) landscape for the next several months. While we can't predict the number of agents who may have E&O claims at this point, the odds are high that if you don't get sued, an agent you know will.

Proper actions and reactions when threatened or served with an E&O suit arising out of this pandemic are of utmost importance. Once a threat is made or a suit filed, the allegedly improper act or omission has already occurred - don't worsen the situation by making bad decisions. Remember these "dos" and "don'ts" if you find yourself in an E&O situation.

Let's start with the first **MAJOR** don't: **Do not overreact to the claim.** Understand that there is no shame in being accused of an error or omission, especially given the weird aspects of this COVID-19 situation. Even the best practices and procedures may not protect the agency right now. Anger, either toward yourself or others, is counterproductive and serves only to increase the weight of the situation.

Do Not Do These Things

Do not, under any circumstances, alter the client's file. What's done is done. Making changes creates the appearance that there is something to hide. Accept what is there and prepare for what comes next.

Do not discuss the claim with anyone other than the claims representative, defense attorney or any other member of the office directly involved in the claim. The only individuals who need to be involved in any discussion related to any E&O claim are those personnel directly related to the care of the plaintiff's account and those defending the agency.

Do not make any admission of liability or wrongdoing; and do not offer or make payment.

Do not provide any written or recorded statement to the plaintiff without your E&O carrier's claim representative present.

Do not allow inspection, copying or removal of client files and records without consulting with your E&O claim representative.

Do not try to manage the claim on your own. The E&O carrier has more experience and is better able to manage the process. Allow those with more experience and resources to manage the suit.

What to DO

What should your immediate and ongoing "do's" be following an E&O claim?

Notify the E&O carrier of a "claim" or potential claim immediately. Provisions in the E&O policy require the insured to notify the insurance carrier as soon as practicable following the receipt of a "claim" or any indication of a potential claim.

Listen for “trigger” words or questions. Some words, phrases or questions just don’t seem normal, in fact, they sound like something a lawyer would say. If your client uses terms like “duty,” “breach” or “breach of duty,” assume they have been talking with a lawyer. Also pay attention to the questions that are asked, does it seem like they are trying to trap you into admitting something? Notify the carrier of a potential claim if words or phrases seem to indicate a lawyer is already involved.

Assume every conversation is being recorded. Regardless of the legalities of recording a conversation, assume your answers are being recorded. Pick responses carefully.

Gather and organize all pertinent records related to the insured and the situation. But when doing this, remember the second "don't" - don't alter them. The claim representative needs all the information to conduct an investigation and prepare and provide a proper defense.

Write down all the information known about the incident surrounding the claim. Each member of the team directly related to the client and the incident giving rise to the E&O claim should record all they can remember about the incident or incidents on which the claim is based. This should be a factual narrative statement in chronological order. Leave out opinion and emotion. This is the time to act like you are talking with Joe Friday from Dragnet – just the facts. Who, what, when, where and why is all that should be contained in these accounts.

Assign one person as the claim leader. One person should be assigned the duty to report, track and manage all COVID-19 E&O claims within the agency.

Cooperate with the E&O carrier. This includes providing information and facts that look bad for the agency. Hiding or hedging certain aspects of the facts surrounding the situation on which the claim is based creates distrust between you and your insurer; it also makes the agency look guilty. The insurer is on your side.

Make sure you comply with all policy conditions and requirements. If the agency fails to comply with all E&O policy conditions, coverage may be jeopardized.

Hopefully, You Will be Spared

Hopefully, you and your agency will not need this information. If not, that’s great. But given the uncertainty of this current situation, it’s better to be prepared.