A Nightmare on E&O Street

LOUIS QUAIL/GETTY IMAGES

Even the casual film-buff knows the name Wes Craven. The former B-movie director made a considerable reputation for himself by creating horror films like "The Hills Have Eyes" (I and II), "Scream" (I, II and III) and "Nightmare on Elm Street" (I through VI, at last count). With minor variations, the films' storylines tends to be the same. In the first scene, the hero faces a perilous choice: "Should I stop at this dark, scary house?" In the second scene, propelled by some inexplicable compulsion, the hero makes the wrong decision: "I guess nothing could go wrong if I just peek inside…" And, of course, in the third scene, mayhem ensues. In the balance of the film, the three scenes repeat until the supply of protagonists—like the bucket of popcorn—is gone. The shouts of the audience not to open that unmistakably sinister door sadly all go unheeded.

Curiously, the nightmare of the average professional liability claims handler follows a remarkably similar plotline. In the first scene, her insured encounters a thorny problem with a customer's coverage. As in most horror films, the problem often is one she did nothing to create. In the second scene, the agent heroically wades in to try and fix the problem. In scene three, mayhem ensues. But instead of horror film gore, it's buckets of money that fly as lawyers are hired, suits are filed and retentions vanish like ghosts in the night. Somewhere around the third act, someone belatedly calls the agent's E&O carrier (the local sheriff in Craven's films), but by this time, it is simply too late to save the hero.

The life-altering details of scene two, when the "I can fix this myself!" decision is made, could use some elucidation, as most of these mistakes can readily be summed up and avoided.

The most egregious error of all: Deciding not to report the claim "until I really have to." The basic problem with that decision (one that your Reservation of Rights/Declination letter fully explains) is that E&O policies don't leave that choice in the agent's hands. Instead, your policy likely contains language along the lines of: "The insured *shall* provide written notice of any 'claim' or 'potential claim' *as soon as practical.*" (Think: e-mail, fax or express mail *today*.) Your failure to abide by that "shall" requirement could easily result in your E&O coverage disappearing just when you need it most.

This reporting requirement is not unreasonable. Indeed, it exists in large part for the agent's own protection. Consider that most insurance professionals have had few, if any, previous E&O claims. That's the positive side of the equation. The flip side is that, when it comes to addressing an E&O situation, most are relative novices with little practical knowledge about how to proceed, much less an understanding of applicable law. Your E&O carrier, on the other hand, is staffed with claims professionals who handle such matters on a daily basis. (Westport Insurance Corporation's claims professionals average 13 years of claims handling experience). Moreover, they maintain a list of attorneys in each state and province who specialize in insurance agent E&O claims—genuine experts to whom they can, and regularly do, turn for in depth advice regarding the unique nuances of local law and their application to individual cases.

With these resources primed and ready—not to mention already paid for, in part, by your premiums—why go it alone? Do you fear that your premiums may rise? While that is not a certainty, it beats the alternatives of a hefty deductible payment or, worse yet, no coverage at all.

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I Object!

A less-obvious mistake is turning over documents or appearing for a deposition without first consulting your carrier. Many E&O policies provide for defense counsel to assist the insurance professional in responding to such legal inquiries with *no* deductible payment. They do this to help avoid trouble before it happens, which is a win-win for agents and carriers.

It's an uphill battle—on a steep hill—to avoid liability once you make an inadvertent admission under oath or disclose documents that opposing counsel was not entitled to.

—M.D.