



IT COSTS A LOT TO GET SUED (EVEN IF YOU'RE IN THE RIGHT)

A SMALL BUSINESS GUIDE
TO ERRORS & OMISSIONS

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INTRODUCTION: WHAT ARE ERRORS & OMISSIONS?

Errors and Omissions are mistakes or oversights made by a professional while carrying out their professional work. The thinking goes that if you're a professional – someone with special skills or training to perform a job – then your customers, clients, or patients can expect you to possess a certain level of competence in your work. You are expected to uphold what's called a "standard of care."

In other words, professionals should "know better" than to make certain mistakes while doing their job. A dentist, for example, is expected to be able to recognize a cracked tooth and recommend treatment. An architect should be able to design a new police station without structural flaws. And a lawyer is expected to provide sound legal counsel to her clients.

Because of this expectation, professionals of all stripes can be held responsible (or "liable" in legal terminology) for providing less-than-stellar services. When someone outside your business feels you haven't lived up to expectations, they can file an errors and omissions claim against your business in an effort to recoup their financial loss.

MALPRACTICE CLAIMS: NOT JUST FOR HEALTHCARE PROVIDERS

When most of us hear the word "malpractice," we think of healthcare professionals, probably because those cases tend to get media attention. But almost any small-business owner who provides professional services can be accused of malpractice.

Different industries have various ways of referring to malpractice, but the following terms mean roughly the same thing:

- **Malpractice.** This term usually refers to cases involving medical practitioners, lawyers, and public officials.
- **Errors and omissions.** This term is used in fields that involve some kind of technical or mathematical finesse, such as accounting or IT.
- **Professional liability.** This may be the most common term concerning professional errors. Some industries replace "professional" with a more specific term, such as "photographer's liability."

Luckily, insurance providers have designed a type of insurance to protect all kinds of professionals from the high cost of these service-related claims. Unsurprisingly, this policy goes by different names – Professional Liability Insurance, [Errors and Omissions Insurance](#), or Malpractice Insurance – depending on the profession in question. You'll see all of these terms throughout this guide.

But the best part of this multi-named policy? It protects you from professional lawsuits even when you haven't made a mistake.



In 2008, small businesses paid for 81% of all tort costs in the United States.

ERRORS & OMISSIONS CLAIMS: EXPENSIVE EVEN WHEN YOU DON'T MAKE A MISTAKE

As a small-business owner, you can be sued for professional liability claims even if you perform your work without a hitch. That's because these claims often stem from factors that are largely beyond your control, including a client's...

- Unmet expectations (no matter how outlandish they are).
- Fundamental misunderstanding of the limitations of your profession.
- Confusion, possibly as the result of not having read the contract.
- Personality "quirks" that make it difficult to negotiate.

You might be thinking that claims stemming from these issues probably wouldn't hold up in court – or even get there in the first place. And you might be right. But for most small-business owners, that doesn't matter. You still need to hire legal counsel as soon as a formal complaint arrives, which can cost thousands of dollars, even if you never go to court.

Small businesses are not safe from expensive settlements or judgments just because they don't have deep pockets. In fact, research shows that small businesses in this country pay the majority of liability costs.

According to the U.S. Chamber Institute for [Legal Reform's Tort Liability Costs](#) for Small Business report, **small businesses bore 81 percent of America's \$105.4 billion in tort liability costs** in 2008 – even though small businesses only accounted for 22 percent of the revenue.

A 2005 [Small Business Administration report](#) found that the **cost of litigation in the cases it studied ranged from \$3,000 to \$150,000**. Only one-third of those cases cost less than \$10,000.

Don't like the sound of those numbers? Then protect your small business from these expensive claims. Consult this guide to find out...

- What errors and omissions lawsuits are and how you can deal with them.
- How errors and omissions lawsuits affect professionals in various industries.
- What you can do to reduce your chances of being sued for professional liability.

\$3,000 – \$150,000: Typical cost of litigation for small businesses.



CHAPTER 1

ERRORS & OMISSIONS
LAWSUITS:
THE BASICS

ERRORS & OMISSIONS LAWSUITS: THE BASICS

Before you can understand how to protect yourself from malpractice lawsuits, you must understand how they work. This chapter discusses events that trigger these claims, the people who file them, how a civil lawsuit works, and how to prevent disputes from happening.



About 2/3 of all medical malpractice claims are withdrawn, dismissed, or dropped before the case goes to trial.

UNDERSTANDING ERRORS & OMISSIONS LAWSUITS

An errors & omissions lawsuit can happen to anyone. But what exactly happens when someone is unhappy with your work and decides to sue your business?

Many E and O claims can be resolved before they become a full-fledged lawsuit. Let's take medical malpractice lawsuits, for example. [According to the medical news site Medscape](#), about two-thirds of all medical malpractice claims are withdrawn, dismissed, or dropped. Only about 8 percent of these lawsuits ever reach a courtroom.

As with any lawsuit, your best chance of weathering an errors and omissions claim is to know what to expect. Take a look at how these claims work, starting with the types of situations that can prompt them.

WHAT CAUSES E & O CLAIMS?

The first stop on the road to an E & O claim happens when a third party (someone who doesn't work for your business) expresses dissatisfaction with your professional services. If you can't find a way to resolve the issue, you could receive a "formal complaint" (or a "summons") from that person's lawyer.

Only about 8% of medical malpractice lawsuits go to trial.

This document outlines your alleged transgression.

Remember, errors and omissions claims are related to the work you do. Some common claim triggers include...

- **Professional mistakes or oversights.** If you're a healthcare professional, this might mean that your patient believes you've violated a standard of care. If you're an architect, a client could blame your design for the flooding problems in their new home.
- **Violations of professional standards.** Let's say a veterinarian is accused of misdiagnosing an ailing dog's condition. The pet owner could sue the vet for malpractice to try to recoup the cost of the pup's expensive care.
- **Simple negligence.** This type of professional liability claim deals with "human errors" – the kind that could happen to anybody. For example, when the vet's assistant lets the dog outside, the dog slips his leash, runs across the road, and gets hit by a car. The pet owner could accuse the vet of negligence and sue accordingly.
- **Breaches of contract.** Say you're a graphic designer and you're working on a website for a big client. At the last minute, they change up the design, which pushes the schedule back two weeks. The client decides that you agreed upon a specific launch date in your contract and every day it's not up, his company is losing money. He sues for damages. (See our blog post ["Do Freelancers Need E&O Insurance?"](#) to find out why one-person shops have professional liability.)
- **Misunderstandings.** Many errors & omissions claims stem from the simple fact that you are a professional and your client is not. Your clients might not always understand how things work or why the project is not going exactly according to plan. If they perceive the issue as a mistake on your part, you could be sued.
- **Undesired outcomes.** Sometimes clients and customers are simply disappointed in your work. They expected one thing, and you delivered another. Basically, you can be sued any time a client or customer is unhappy with the results you deliver. For example, a lawyer could be sued for legal malpractice if the client doesn't like that they didn't win their case.

It's important to realize that many complaints don't have anything to do with the quality of a professional's work. If someone ever feels slighted or that they didn't "get their money's worth," your business could end up getting served with a formal E&O complaint.

Unhappy customers are the #1 cause of errors and omissions claims.

WHO CAN MAKE ERRORS & OMISSIONS CLAIMS AGAINST YOUR BUSINESS?

Now that you know what errors and omissions claims are, let's talk about the people who make them. In short, anyone who doesn't work for your business can file an E and O claim against you if they feel they've been negatively affected by your work. Because errors and omissions claims revolve around the type of work that you do, it makes sense that the people who pay for your services are the ones filing these claims. These include:

- **Patients.** If you are a doctor, massage therapist, nutritionist, or another healthcare professional, the people you treat and / or advise can file a malpractice claim against your practice. Here's a [real-life case study](#) involving a physical therapist and a woman receiving treatment after an ankle surgery. In order to relieve pain, the physical therapist placed a hot pack on the patient's ankle. Although the patient did not complain of the temperature during the session, she later reported a small burn on her ankle. She claimed the burn was inhibiting her ability to move, keep her daily exercise routine, and visit the beach. She sued the physical therapist for malpractice. The two parties came to a five-figure settlement out of court. In addition to the settlement, the therapist's legal defense fees were around \$34,000.
- **Clients.** If you are an engineer, real estate professional, or someone else who uses contracts or provides services, your clients can file E&O claims against your business. Take a look at this recent case, [reported by silive.com](#), involving a famous architecture firm and the New York City borough of Staten Island. The city's Construction Authority filed a \$1.4 million lawsuit against Ennead Architects (the firm that designed former President Clinton's presidential library), alleging that its "defective" design caused a recently constructed playground to crumble.
- **Customers.** If you own a business that sells products or services to customers, know that they can sue you if they feel your work is not up to par. The [Huffington Post recently reported](#) on a lawsuit against PetSmart regarding a grooming incident. An English bulldog puppy was allegedly strangled during a grooming session at the store. The business called the dog owners to report that the dog was vomiting blood. The pet owner took the dog to the vet, but it died shortly thereafter. The pet owner rejected a \$2,000 check from PetSmart and filed a \$25,000+ lawsuit instead.

As we've mentioned, an errors & omissions claim is just the first step on the road to a full-blown lawsuit. So what does being sued entail? Does it mean you broke the law? If the lawsuit goes to court, will you be tried as a criminal? In the next section, we explore these questions and more.

ERRORS & OMISSIONS LAWSUITS: CIVIL, NOT CRIMINAL

If your business ever faces an errors and omissions lawsuit, it will likely be tried as a civil case, as opposed to a criminal one. What's the difference, you ask?

Civil cases are brought to the court by someone (the "plaintiff") who says that another party (the "defendant") caused them an unfair loss. For example, one of your

clients could claim your photography studio ruined his wedding day by not capturing certain moments. In order to "get even" for this perceived loss, the plaintiff usually asks for money or some other kind of restitution.

On the other hand, criminal cases involve crimes. Those cases are used to regulate and reinforce the social laws that prevent us from threatening the safety, health, or welfare of others. When a defendant is found guilty in a criminal case, they're punished, possibly with prison time.

Think about the difference between criminal and civil cases this way: criminal cases lead to possible punishment, whereas civil cases aim to end in conflict resolution. This is not to say that forking over your time, a \$20,000 settlement, and \$5,000 in lawyers' fees won't still *feel* like a punishment.

Now let's take a step back and see how E&O lawsuits function as civil cases.



WHAT KINDS OF DISPUTES LEAD TO CIVIL LAWSUITS?

Because the goal of a civil lawsuit is to end a dispute between two parties, it's important to be aware of the "civil wrongs" that lead to these cases. Most civil wrongs small businesses encounter are called "torts." Torts are divided into several categories, including...

- **Property torts.** Example: you are a pet groomer who specializes in show-dog styling. One day, you are working on a Pomeranian who falls off the grooming table and breaks two legs. The Pom's show days are over. The pet owner sues you not only for the cost of veterinary care (in this case, the pet would likely be considered "property"), but also \$500,000 dollars in damages because the award-winning pooch can no longer work the show circuit.
- **Liability torts.** Example: your business sells a product that ends up giving a customer a severe allergic reaction caused by an undeclared allergen. The customer files a lawsuit against your business. (For more information on this type of claim, read our blog post ["5 Tips for Understanding Potential Product Liability."](#))
- **Dignitary torts.** Example: you are a freelance transcriber who tweets about one of your client's shoddy payment methods. Your client sues you for defamation, claiming that the tweet is untrue and damages his business's image. (Read more about this real-life case here: ["How Commercial General Liability Insurance Can Protect You from an \\$82,630 Tweet."](#))
- **Infringement liability.** Example: your small brewpub names a beer after Starbucks Frappuccino drink. The corporate coffee giant threatens to sue you for trademark infringement. (Seriously. Read ["How to Protect Your Bar or Café from a Starbucks Lawsuit"](#) for more on this story.)
- **Negligence.** Example: you own a learning center that offers tutoring services for grades K-12. The mother of one of your students is angry because her daughter needs to be held back a grade. She claims you weren't doing the kind of job that is expected from a professional and is suing you for the cost of the tutoring and \$150,000 in emotional damages to compensate for her child's low self-esteem. And this, friends, is an example of an errors and omissions lawsuit.

Unfortunately, small businesses are often the target of tort lawsuits. And some of the easiest claims to bring against a small-business owner are E&O claims. These lawsuits typically deal with negligence – the allegation that your work does not meet professional standards. Often, these cases turn into "he-said-she-said" arguments that cost business owners a lot of time and money.

HOW CAN SMALL-BUSINESS OWNERS WIN A CIVIL LAWSUIT?

All defendants are innocent until proven guilty – and an errors & omissions lawsuit works no differently. This places the “burden of proof” on the person who initiates the lawsuit. Because errors and omissions lawsuits are civil cases, the plaintiff (your client) must prove they are “more correct” in the dispute than you are. In order to rule in favor of the plaintiff, juries are often told that they must be “51 percent sure” that you are guilty of the allegations.

HOW & WHY TO PREVENT ERRORS & OMISSIONS LAWSUITS

As a small-business owner, you are no stranger to high demands. You single-handedly built your business from the ground up. Chances are, you're willing to do what it takes to keep your clients happy.

But what if there was nothing you could do to make a client satisfied with your services? What if you flawlessly handled their taxes, defended them in court, or treated their ailment and they still sued you?



As we've mentioned, your business can be sued when you've done nothing wrong. Most of the time, errors & omissions lawsuits come down to how your client perceives the worth of your services.

If you think you won't ever be sued, know that **34 percent of small-business owners have been sued** at some point in the last decade.

HOW TO PREVENT AN ERRORS & OMISSIONS LAWSUIT: 7 TIPS

Preventing an errors and omissions lawsuit is much more affordable than winning one. To keep your business out of court, keep these seven tips in mind.

1. BE CAREFUL

If your business provides services, you can be sued. Your client's attitude toward your business will largely determine whether or not they decide to drag a dispute to court. For these reasons, be sure you check and double-check your work. A tax professional, for example, may run her numbers again to make sure she doesn't make an oversight that could cost a client thousands of dollars. A freelance writer might check his content against the terms of his contract to ensure he's delivered what he promised.

2. USE CLIENT CONTRACTS

Though contracts can't guarantee that a client won't sue you for supposedly breaching said contract, they can minimize your exposures by clearly spelling out your obligations. Lay out the scope of your representation if you're a lawyer. Get in writing the exact services you provide if you're a marketing consultant.

In addition to specifically outlining your services, your client contract should also provide...

- Dispute resolution steps.
- Fee agreements (including payment dates, hourly or per-project rates, and payment methods).
- Project deadlines or check-in dates.
- Both parties' signatures.

In order to make sure your contract will hold water in court, it's always a good idea to have a lawyer review it.

3. COMMUNICATE WITH CLIENTS

Managing client expectations is one of the key ways to prevent an E and O lawsuit. If they understand in no uncertain terms what they're getting from your business at the start, they have less room to feel disgruntled over the outcome.

If a client complains about the progress or result of your work, be sure to take the time to respectfully and thoroughly address their concerns. Offer solutions rather than excuses. When a client feels as

though they are being listened to and that their input is valued, they're much less likely to sue.

Good communication means...

- Sending your client updates on the status of a project.
- Keeping clients updated about what you're doing for them.
- Quickly resolving complaints.

To learn more about how good customer service can spare you a hefty liability lawsuit, read our blog post ["6 Customer Service Strategies to Prevent Liability Lawsuits."](#)

4. PROPERLY TRAIN AND SUPERVISE EMPLOYEES

Remember that if your employee makes a mistake, your business can be held liable for neglecting to train or supervise them. Before you let your employees represent your business, ensure they have adequate training and supervision. For example, if you own a small medical practice, your staff will need to understand basic standards of care and how to avoid HIPAA violations.

5. REFER CLIENTS OR PATIENTS TO SPECIALISTS WHEN NECESSARY

Sometimes, you will reach the point in your client relationship when you can no longer meet their needs. Knowing your limits can help you avoid allegations that your advice caused your client financial losses. If you don't know how to best advise a client, refer them to a specialist. For example, say you're creating a content marketing campaign for a client, and they want graphics to accompany the material. You'd want to reiterate the scope of your services and refer them to a graphic designer for their other needs.

6. KEEP AN ORGANIZED CALENDAR SYSTEM

Regardless of your profession, missed deadlines or double-booked appointments can cause your clients to lose money. So be sure you keep an organized calendar, and don't stretch yourself too thin!

7. DOCUMENT CLIENT COMMUNICATIONS

If you are hit with an E&O claim, having documentation of all client communications can help ensure you aren't wrongfully sued. Specifically, keep a record of advice or instructions that involve critical issues or outcomes (especially if they involve client instructions and decisions). Be sure you keep

documentation of any follow-up correspondence, too.

THE COST OF A PROFESSIONAL LIABILITY CLAIM

Professional liability claims can be costly, which is why it's important to prevent the claims you can. The cost of legal defense for a claim that never makes it to court comes to between **\$2,000 and \$5,000** – a small fortune for many small-business owners. If it takes you a long time to settle or you never reach an agreement, your costs only balloon from there. In addition to lawyers' fees, you'll be responsible for...

- **Settlements.** The agreement you reach with the plaintiff out of court.
- **Judgments.** The amount a judge orders you to pay if you lose.
- **Expert witness fees.** The cost of bringing in experts to testify on your behalf.
- **Other court costs.** For example, if you lose a lawsuit, you may have to pay the plaintiff's fees.



Every year, small businesses (those that make less than \$1 million in revenue) pay around **\$33.9 billion** in self-insured and uninsured commercial liability tort costs. In the next section, we discuss how small-business owners can deal with unexpected errors & omissions lawsuits.

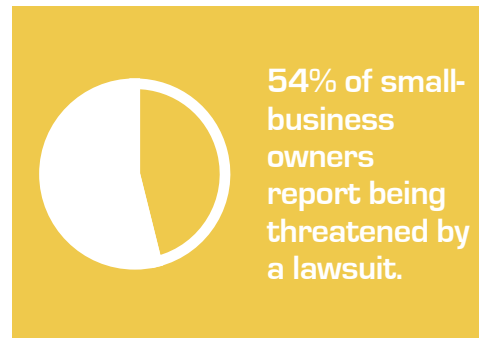


CHAPTER 2

DEALING WITH
ERRORS & OMISSIONS
LAWSUITS

DEALING WITH ERRORS & OMISSIONS LAWSUITS

Now that you understand the basics of professional liability and civil torts, it's time to explore the inner workings of an errors and omissions lawsuit. In this chapter, we take a look at how to handle claims, find an attorney, fund your lawsuit, and more.



WHAT HAPPENS WHEN YOU'RE SUED: A GUIDE TO HANDLING ERRORS & OMISSIONS CLAIMS

Errors & omissions claims are the stuff of nightmares for most small-business owners – and for good reason. According to the [U.S. Chamber Institute for Legal Reform](#) [PDF], **more than 50 percent of small-business owners** interviewed said they have been threatened with a lawsuit. And many of these suits are filed without merit.

Even though most errors and omissions lawsuits are dropped or dismissed before they ever reach the courtroom, even receiving a formal complaint can be anxiety-inducing.

WHAT HAPPENS AFTER YOU'RE SERVED WITH AN E AND O COMPLAINT?

As soon as you receive a formal complaint, you should immediately contact your insurance provider (if you have one). Most E & O Insurance policies stipulate that insurers have the “duty to defend” you. That means your provider will find a lawyer who specializes in E & O lawsuits to provide you with legal counsel.

This is one of the reasons why it's extremely important for small-business owners to carry Errors and Omissions Insurance with the rest of their [small business insurance](#). Without it, you would have to

orchestrate a defense on your own. (For more information on finding a lawyer on your own, [jump to the next section.](#)) However, most insurance policies have instructions about how quickly you must contact the insurer in the event of a complaint. If you don't notify them in time, your benefits could be void.

Once you have a lawyer, they will read through the formal complaint, which includes information such as...

- The names of everyone involved.
- A summary of the case's facts.
- A list of allegations (called "counts") with the legal theory (laws and previous court decisions) to back them up.
- The demands – usually an amount of money – of the plaintiff.



Notify your E&O Insurance provider right away about complaints.

The lawyer also asks you questions about the case. Your insurance provider may do their own research to see if the plaintiff is up to no good (e.g., has a history of fraudulent claims). Then your lawyer will decide what to do next. There are a few options:

- **Answer the complaint.** This is where the defendant (the person being sued) admits to or denies the allegations of the claim and explains why. You might explain the issue is not your fault but may be someone else's. Essentially, this is your response to the claim.
- **Try to dismiss the claim.** Based on the specifics of the complaint, your lawyer may try to have the claim dismissed on legal grounds. Perhaps your lawyer believes it's baseless. Or maybe too much time has passed between the incident and the filing (this is called the "statute of limitations").
- **Countersue.** Depending on the situation, you can turn around and sue the plaintiff. The complaint process starts over, but if the suits go to trial, both cases will be tried as one.
- **Do nothing.** This really isn't an option because if you do nothing, the judge may award the plaintiff everything they're asking for in what's called a "default judgment." But this could happen if a business owner is unfamiliar with lawsuits and doesn't seek legal counsel. Generally speaking, you need to respond to the court within 20 to 30 days.

If the claim is dismissed, you have nothing more to worry about. And if your Errors & Omissions Insurance provides funds for legal defense (most do), you won't pay anything more than your deductible.

If you don't respond to a complaint, the judge might automatically side with the plaintiff.

If the claim isn't dismissed, you'll have a meeting with the court to set deadlines. Often, one of the deadlines will be for a mandatory settlement conference where you'll have the chance to settle the dispute out of court.

If you can't reach an agreement during the settlement process, you'll enter the period of "discovery," where you and your lawyer gather evidence for your defense. This might include paperwork (medical records, sales receipts, invoices, etc.), written testimony, and interviews with the attorneys.

Before the case actually goes to trial, you and your lawyer can try to...

- **Get the case dismissed** on legal grounds.
- **Go directly to judgment.** This is only for cases where the facts aren't disputed. The judge will decide how much to award the plaintiff without a jury. Errors and Omissions Insurance can cover the cost of judgments.
- **Settle the case out of court.** This is usually the cheapest option, though you'll likely still have to pay the plaintiff a settlement (which your E and O coverage can pay for).

Essentially, you can decide to settle a case at any point during the process – even during the trial. Most of the time, settlement is the most cost-effective solution for everyone involved. For a more detailed look at the possible outcomes of a lawsuit, [jump to Chapter 3](#).

HOW TO KEEP YOUR COOL & LISTEN TO YOUR E&O LAWYER

Finding yourself in the middle of an E&O lawsuit can be unnerving, but it's important to remain calm and follow your lawyer's instructions. Litigation is tricky business, and even a seemingly innocuous remark – if overheard by the wrong ear – can hurt your chances of winning your case.

Here are a few general tips to make the process easier:

- **Don't beat yourself up.** Keep in mind that many errors & omissions lawsuits have nothing to do with your ability to do your job – despite what the plaintiff is claiming. Just realize that this lawsuit is a learning experience and there are steps you can take to prevent similar lawsuits in the future.
- **Be honest and thorough with your counsel.** Even though the process might be scary, there is no point in lying to your lawyer or your claims representative. It will only hurt you in the long run. Strive to describe the details of the claim with the greatest precision and accuracy possible. To make his easier, it's a good idea to keep track of all client / customer / patient communication – especially when you suspect they are unhappy – so you have it on hand in case of a lawsuit.
- **Keep it confidential.** As with any lawsuit, you shouldn't talk about your E&O claim with anyone – except your lawyer and claims representative, of course.

- **Never say you are “sorry.”** You should never “admit guilt” without your lawyer’s consent. Even saying “I’m sorry” or “I apologize” to the plaintiff could be used against you in court.
- **Never make decisions without your lawyer.** For example, you should never tell the plaintiff you’d like to settle without talking to your lawyer first. In fact, you shouldn’t talk (or write) to the plaintiff at all unless your lawyer is present.
- **Don’t touch your records.** Don’t allow anyone to look at the records related to your claim unless you’ve obtained approval from your claims representative. The records should never be removed, copied, or altered in any way – including any “clarifying” remarks you may wish to add, no matter how helpful they may seem. If your case goes to trial, the altered records could damage your integrity.

Besides helping you prepare for the best defense possible, these tips also help you stay on your insurer’s good side. In some cases, a failure to follow the rules could threaten your Errors and Omissions coverage.

WHERE CAN I FIND AN ATTORNEY?

Finding a defense attorney for an errors and omissions case can be downright daunting – especially if you don’t have E&O Insurance, which allows your insurer to provide a lawyer for you. However, there are a few other routes that can lead you to legal representation.

GETTING STARTED: FINDING AN E&O ATTORNEY ONLINE

Unless you have friends or relatives who are attorneys and can point you in the direction of a lawyer who specializes in professional liability litigation, word of mouth referrals may not get you very far. So when you’re starting from scratch, the Internet may be your best resource for generating a list of prospective defense attorneys. A good place to start may be...

- [Martindale-Hubbell Legal Directory](#).
- [Lawyers.com](#).

Both of these online directories are free and allow you to search for lawyers in your area. You can filter your search based on your location and the law firm’s area of practice. Note: when searching for an area of practice, the most helpful search terms are usually “malpractice,” “professional liability,” and “professional negligence.”

HOW TO TELL IF THE DEFENSE ATTORNEY IS RIGHT FOR YOUR SMALL BUSINESS

Once you have a list of potential defense attorneys, you'll need to consider each lawyer's...

- **Biographical information.** Search the attorney's website to ensure they specialize in defending errors & omissions. The profile for the lawyer and their firm should give you an idea their typical client (e.g., injured patients vs. the doctor accused of wrongdoing). Usually, malpractice attorneys specialize in representing either plaintiffs or defendants – not both. If you're not sure about an attorney's services, call their office and ask.
- **Experience with small businesses.** Unfortunately, it's not enough to find an attorney who represents defendants in E&O lawsuits. You want to find a legal representative who has experience in your industry or with small businesses. For example, many attorneys do not have the requisite expertise to take on a medical malpractice case.
- **Standing with your state bar association.** Find out if your prospective lawyer is in good standing (i.e., has been admitted to the bar of your state, meets client security fund requirements, and is not disbarred or under suspension). Simply look the attorney up on your state bar association's website, which you can find on the [American Bar Association's interactive map](#).
- **References.** Before you hire an attorney, talk to people who can comment on their expertise, experience, and trustworthiness. Usually, you can ask a lawyer for a list of references, such as past clients or professional associates.
- **Track record.** Ask your potential lawyer about the percentage of their cases that involve malpractice. A higher percentage of malpractice work means they'll have more experience. You'll also want to know the percentage of cases that go to trial or settle out of court. Typically, settling is less expensive for defendants.

Keep in mind that good lawyers are usually very busy. So don't discount a prospective attorney simply because they couldn't meet with you immediately. At the same time, formal complaints are time-sensitive. Remember, you usually need to file a response within 20 to 30 days of receiving the summons.

You have limited time — often 20 to 30 days — to respond to a legal summons.

THE PITFALLS OF FINDING AN ATTORNEY ON YOUR OWN

You don't want to hire just anyone to protect your business and your livelihood. You want to find someone with the skills and savvy to resolve the matter quickly so you can get back to running your business.

But as small-business owners know, time is money. The more effort and energy you spend on hunting down good legal counsel, the less time you have to grow your business.

Plus, hiring an attorney is expensive. Not to worry – in the next section, we'll explore some ways to fund your legal defense.



LAWSUIT FUNDING TIPS FOR SMALL-BUSINESS OWNERS

So you've been hit with an expensive errors and omissions claim. You have an idea about what to expect from this kind of lawsuit. But now you're wondering how you're going to pay for all your defense fees and any settlements or judgments made against your business.

There are a few options for generating the funds your business needs to survive a costly legal entanglement. Here, we'll discuss your small business's lawsuit funding options, ranked from most viable to least:



OPTION 1: PURCHASE AN ERRORS & OMISSIONS INSURANCE POLICY

The easiest way to ensure you have the finances to weather an E&O lawsuit is to purchase [Errors and Omissions Insurance](#). When you have an active policy, you don't have to worry about hunting down an attorney, as most of these policies include a "duty to defend" provision. That means you'll enjoy...

- Having your insurance provider orchestrate a legal defense of the charges against you.
- Financial coverage for your legal defense fees, settlements or judgments, and other court costs.

OPTION 2: CREATE AN ACCOUNT FOR LEGAL DEFENSE COSTS

Though having insurance is your best lawsuit-funding option, you could feasibly set money aside every month in a personal legal defense fund. Usually, a "legal defense fund" refers to nonprofit charities that help pay for public litigation efforts. While these kinds of funds are tax-exempt, yours will not be because it is for your business's interests.

This option may sound appealing at first, but consider this: between the costs of running your business, paying your employees, paying commercial rent and loans, and covering utilities, chances are you won't be able to set aside enough to cover a \$100k settlement or judgment.

OPTION 3: BORROW FROM FRIENDS AND FAMILY

If you are fortunate enough to have friends and family with deep pockets and charitable mindsets, you might have some success pooling resources to pay for your E&O lawsuit costs. However, relying on the kindness of others is a tenuous business protection strategy. After all, you never know when your friends and family will fall on hard times (or change their minds).

OPTION 4: SETTLE PROFESSIONAL LIABILITY LOSSES WITH THE BANKRUPTCY OPTION

Bankruptcy is a heartbreaking and stressful route – and an expensive one, too. According to an [article by Entrepreneur](#), lawyer and court filing fees alone can quickly climb to \$8,000 or \$9,000. Plus, filing for bankruptcy hurts your business and personal credit scores for years.

Only consider bankruptcy as an option if...

- Your bank account is drained.
- You don't have E&O Insurance.
- You owe a debilitating amount of money for a settlement or judgment.

Even if all three conditions are true, filing for bankruptcy may not be your best option. There's no guarantee you can keep your house or other property.

If you're a sole proprietor, you can file for Chapter 13 or Chapter 7 bankruptcy, which can be used for personal debts or business debts. If you're an LLC owner, bankruptcy may not protect your personal property from collection if you've pledged your personal assets as collateral.

Here are the differences between filing options:

- **Chapter 7 bankruptcy.** This allows you to sell your assets (save for property that's exempt under state or federal law) to pay off your debts. You only want this option if you're trying to make a clean break from your failed business. Chapter 7 eliminates unsecured business debts (such as lawsuit judgments). However, your credit rating will be negatively affected for several years.



- **Chapter 13 bankruptcy.** You'll use your income to pay off your losses after you propose a plan to pay off your debt over three to five years. The upside is that you don't lose your property when filing for Chapter 13. Your credit will still be negatively impacted, though.

As you can see, both of these options should only be last-ditch efforts to scrap or salvage your business. Filing for bankruptcy is by no means an option you should plan to take. And it's worth noting that some judgment liens can remain attached to your property even if you file for bankruptcy (e.g., a lien on your house).

You can read more about bankruptcy in Nolo.com's article "[When You Can't Pay Your Business Debts: Personal Liability and Bankruptcy Options.](#)"

DON'T WASTE TIME WITH LAWSUIT LOANS

Lawsuit loans are cash advances given to plaintiffs by a third party before a case is settled. In exchange, the lender receives a percentage of the judgment or settlement. If a case isn't successful, the lender could lose money. For this reason, the third-party lender is usually very selective about the cases they fund, opting for the ones with the highest probability for success.

If you're wondering whether you can get lawsuit loans to cover yourself when you're sued, the quick answer is no. These "loans" are only available to plaintiffs. Defendants aren't usually funded.

And that may be a blessing in disguise. [According to the New York Times](#), these loans usually come with exorbitant interest rates. In some cases, interest and fees escalated to 76 percent of the loan amount in the first year.



Lawsuit loans are usually only for plaintiffs and cannot help defendants fund their lawsuits.



CHAPTER 3

POTENTIAL
OUTCOMES IN
ERRORS & OMISSIONS
LAWSUITS

POTENTIAL OUTCOMES IN ERRORS & OMISSIONS LAWSUITS

Let's explore the potential outcomes of errors and omissions claims in more detail. In this chapter, you'll discover the differences between settlements and judgments, how to avoid going to court, and why winning an errors & omissions lawsuit still costs money.



SETTLEMENTS VS. JUDGMENTS: WHAT'S THE DIFFERENCE?

As we've mentioned in previous chapters, an errors & omissions suit can progress in three ways:

- The case is dropped or dismissed.
- The case is settled out of court.
- A judge or jury makes a decision on the case.

If the lawsuit is dropped, you will only be responsible for paying your attorney's fees. The other two options are significantly more expensive and will lead to you paying either a settlement or judgment.

If you've never been sued before, the terms "settlement" and "judgment" may just seem like legalese that essentially means "money you have to pay someone else." But that's not all there is to these two words.

WHAT IS AN E&O SETTLEMENT?

Before an E and O claim goes to court, you and the plaintiff can decide to resolve the issue. This option is called a “settlement,” which means you will pay a certain amount of money to the injured party if they agree to end the case.

Typically, settlements are less expensive than letting the case go to trial. However, even if the suit goes to court, you and the plaintiff can decide to settle at any point.

If you don't have Errors & Omissions Insurance and you have to account for settlement costs yourself, you may be able to work out a structured settlement. This happens when the plaintiff settles the case for a large sum of money and your attorney strikes a deal that allows you to pay the amount in installments over time.

You and the other party can choose the payment schedule. For example, you and the plaintiff may decide on annual installments, which means you'll pay a lump sum each year until the settlement is paid off.

WHAT IS AN E&O JUDGMENT?

If an errors and omissions lawsuit doesn't settle, it will be tried in court (assuming it has legal merit). Because these lawsuits are civil torts, your punishment – if any – will be monetary. The court will decide whether or not your business is liable for a third party's financial losses.

If your business is liable, the court's next decision will be how much money you owe the other party to make them "whole."

This decision is called a "judgment" (or "verdict"). Usually, you'll hear the word in a sentence such as "The court awarded a judgment for the plaintiff in the amount of \$20,000." When you have E&O Insurance, your insurer pays this debt for you (up to your policy's stated limits).

If you fail to voluntarily pay the judgment, the plaintiff can file a judgment lien against your business to ensure you pay what is owed. A judgment lien attaches to your property and assets until your debt is satisfied.

WAYS TO REMOVE A JUDGMENT LIEN

To have a judgment lien removed from your property, you can...

- 1. Pay off the debt.** If you pay off the judgment that you owe, the creditor (i.e., the winning party that you owe money to) will file for the release of the lien. Once the lien is removed, you can do whatever you want with your property (such as sell, trade, or transfer it).
- 2. Claim the property with the lien as exempt.** Depending on your state laws, you may be able to claim certain property as exempt from collection. The court will decide whether the property qualifies for this classification.
- 3. File for bankruptcy.** This option should only be exercised as an absolute last resort. Filing bankruptcy will hurt your credit (and possibly shut down your business for good), but it will also fast track your request to remove the lien.

HOW SMALL BUSINESSES CAN AVOID GOING TO COURT

When a client files a claim against your business, you may think all you can do is hire a lawyer and prepare for trial. But that's not always true.

You can suggest mediation, a concept that your client may have never even heard of. E & O claims are particularly good candidates for mediation because they often stem from hurt feelings and misunderstandings – not the professional errors they allege. Mediation gives both parties a chance to air their grievances and resolve a problem, all outside the formalities of the courtroom.



WHAT IS MEDIATION?

Mediation is a way for disputing parties (e.g., you and a client who is unhappy with your work) to reach a resolution. It's an alternative to full-blown litigation that can save everyone a considerable amount of time and money.

It's also less formal than litigation. While there are specific steps to follow, lawyers are generally unnecessary. Instead, a mediator is present. A mediator is an impartial third party who helps you and your client reach an agreement. Mediators do not determine who is right or wrong in a dispute. They are simply there to assist.

Mediation can be suggested before or after an errors & omissions lawsuit is filed. A judge may even order you and your client to try mediation before the case can go to trial. Because you can't always count on a judge to do that, though, you should at least try to put this option on the table.

To help steer your client toward mediation, emphasize the benefits, outlined below.

HOW SMALL-BUSINESS OWNERS & THEIR CLIENTS BENEFIT FROM MEDIATION

Mediation tends to benefit both small-business owners and the unhappy party by...

- **Saving time.** Generally speaking, mediation can resolve most issues in a day or less. If the dispute is complex, mediation might take several days. Additionally, mediation can usually begin within a few weeks of requesting the meeting. Lawsuits can take months – even years – to go to trial.
- **Cutting costs.** You and your client will split the cost of hiring a professional mediator. There are some nonprofit organizations that offer mediation services for a very low fee. Other professional mediators may charge by the hour. For example, a typical mediator might charge \$250 an hour plus a \$250 administrative fee. If your mediation took four hours, both you and the other party would pay only \$625 – much less than the cost of weeks upon weeks of legal counsel. Remember, even dropped or settled claims can cost thousands of dollars in attorney fees. A full-fledged trial can easily set you back \$100,000 or more.
- **Salvaging the relationship.** Unlike a trial, there is no “winner” or “loser” in mediation. Mediation is simply a way for two parties to decide how to resolve an issue. There is no threat that a jury is going to “punish” one party with a huge judgment. Both parties get the chance to voice their concerns, which can provide valuable insight and prompt practical solutions. That’s why mediation is a good way to settle disagreements with people you still want in your life.
- **Maintaining privacy.** What happens in the mediation room must legally stay in the mediation room. Anything said during mediation can’t be used in court. Compare that to a trial, where details about the case are eventually disclosed to the public. Depending on the situation, local media could even report on your lawsuit. But mediation is a relatively quiet affair. And because the process is designed to be as diplomatic and mutually beneficial as possible, there is less of a chance that this dispute will hurt your public image.

The best part? Mediation expenses can usually be covered by your Errors & Omissions Insurance policy. But because mediation is relatively inexpensive, some small-business owners won’t need to file a claim with their insurance and risk raising their premiums.

WHAT IS THE DIFFERENCE BETWEEN MEDIATION AND ARBITRATION?

Arbitration is another way to resolve disputes outside of a courtroom, but it is distinct from mediation in several ways. For one thing, it's more formal than mediation (though less formal than a lawsuit). An arbitrator (who is a neutral third party) listens to arguments from both sides, reviews the evidence, and then comes to a decision about the dispute. A mediator simply facilitates the discussion between feuding parties.

Businesses frequently write arbitration clauses into their contracts. For example, a contractor may include a clause in their client contracts that says any disputes must be arbitrated. If a client signs the contract, they forfeit their right to sue or appeal the arbitrator's decision. Arbitration tends to cost more than mediation but less than a lawsuit. Your E and O policy will likely cover the cost of arbitration, too.

To read more about how mediation can benefit you, read "[Mediation for Small Businesses](#)" on Nolo.com.

WHY WINNING AN E&O LAWSUIT STILL COSTS MONEY

What does it mean for a small-business owner to "win" their errors and omissions lawsuit? For now, let's say that "winning" is any outcome other than the court finding you liable and ordering you to pay a judgment to the injured party.

Even if you "win" your case, the lawsuit can still be a drain on your resources. Consider the following best-case scenarios:

- **Dismissed or dropped claims.** When errors and omissions claims are completely frivolous, your lawyer can convince the court to dismiss the case. Notice how we've already mentioned lawyers – lawyers who need to be paid for their legal counsel. Every lawsuit requires an attorney's help so you don't miss key legal arguments in your answer to a plaintiff's formal complaint. If you ignore the complaint, you risk being found liable to pay whatever the plaintiff requested in a "default judgment."
- **Settlements.** When you and the plaintiff reach an agreement out of court, it's called a "settlement." Usually this involves paying less money (in legal fees, damages, and lost productivity) than you would in court, which is why many small businesses (including faultless ones) choose to settle. The National Federation of Independent Businesses (NFIB), an organization that advocates for small-business tort reform, [estimates](#) that the **average cost of a liability case that goes to trial is around \$100,000**. The threat of six figures persuades many small-business owners to settle.

- **A verdict in your favor.** If your errors & omissions lawsuit makes it all the way to a jury trial and that jury rules in your favor, you're still on the line for court fees. Sure, in some situations the plaintiff may be ordered to pay your legal costs, but that's not always the case. Plus, your lawyer will need to be paid. Plus, these cases can drag out for years, consume your time and attention, and ultimately hurt your business's productivity (and its reputation). Also, there's always a chance the plaintiff will appeal the case and the process will begin again.

HOW SMALL BUSINESSES CAN PROTECT THEMSELVES FROM THE COST OF E AND O LAWSUITS

Though an errors and omissions lawsuit can cost your business money even if you win, you don't have to play the game alone. Small business insurance policies, such as Errors & Omissions Insurance, are designed to help business owners pay for lawsuits – including frivolous ones.

If you are interested in purchasing this coverage, [contact an insureon agent](#). An agent that specializes in serving your industry will gather quotes from several top insurance providers and deliver them to your inbox.



CONCLUSION

CONCLUSION

Clients don't need much to claim your business made them lose money – and suddenly, you have an errors and omissions lawsuit on your hands. A lawsuit forces you to hire a lawyer, which is expensive even when the suit is dropped. In worst-case scenarios, the lawsuit drags out for years, you lose the case, and you have to pay your client damages. Fortunately, you can buy an E&O Insurance policy to help you cover these unexpected and inconvenient costs. That way, you can stay focused on your business – not complicated legal distractions.

