The Design Professional ("DP") is generally thought of as the eyes and ears of the Owner on the construction Project. In fact, most construction documents memorialize that relationship, and in practice it usually works pretty well. When the Project is on time and under budget, life on the Project is good. We all have seen issues occur in a Project when errors of construction or design delay the Project and cause significant damages. But what happens when the cause of the delay and the resulting damages is the Owner? The answer to this question depends less on the Owner and more on the actions of the DP during the Project.

Let me put it in terms of the latest Super Bowl. With a little over three minutes left in the game (Project), Manning makes a thirty-eight yard pass to Manningham (General Contractor). The official on the sideline (DP) calls the catch good (Change Order for damages and delay). The Patriots coach (Owner) throws the flag challenging the call (thinks it isn’t Owner-caused delay). The replay (project documentation) clearly shows that Manningham had control of the ball and was in bounds. This play starts the drive that wins the Giants the game. The sideline official (DP) called the game according to the rules and was backed up on his call by the replay camera (project documentation). Establishing the rules at the beginning of the game, impartially enforcing them during the game, and maintaining good documentation will help to manage everyone’s expectations and thus reduce risk for the DP.

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Milan Matharu passed away two days after his birth in 2005. His parents believed that a negligent omission by the mother’s doctor seven years earlier caused Milan’s death. This factual scenario required the Pennsylvania courts to determine whether a child or his estate has a viable cause of action against his mother’s physician for a tort which allegedly occurred before his conception but led to his death? The Superior Court sitting en banc and without dissent permitted Milan’s estate to pursue such a claim against his mother’s previous physician. See Matharu v. Muir, 2011 PA Super. 134, 29 A.3d 375 (2011). Routine blood work during Milan’s mother’s first pregnancy showed that she lacked a specific protein on the surface of her red blood cells, thereby designating her as Rh-negative. See id. at 378. The father possessed the protein and was therefore designated as Rh-positive. See id. Neither parent’s status caused them any health concerns, but if the unborn baby inherits the father’s Rh-positive
Pre-game Warm Ups—Getting the Program Right in the Beginning

There are those Owners that you just can't deal with; they're the ones that make constant documentation and long contracts necessary. It is important to advise such Owners at the time of an addition or deletion to the design of the impact of such a change to the schedule. It is not enough to verify that the Owner wants to add an access ladder and safety railing to a piece of equipment on the Project, the additional costs, and impact on schedule need to be related as well (this information is often obtained directly from the GC in the form of a bid for a change to the contract, either through use of an addendum or Change Order). The Owner must fully understand that any such changes to cost or delay in completion will be the Owner's responsibility. Some Owners may respond that the option should have been offered before letting the contract and that such an omission is a design error. Therefore, it is important to document exactly what the Owner wants (the Program) in the beginning and offer that option to, and rejected by, the Owner.

We litigated a case in Mississippi a few years ago that details this situation well. The Owner had a franchise to build and operate a hotel for a national chain. My client was the Architect who took the project from the Owner's expectations must be managed. Delays in starting the Project can cause the cost of the Project to increase, and a Claim Manager in the Professional Liability Claims Unit of General Star Management Company, a Berkshire Hathaway Company. The views expressed in this article are those of the author and do not necessarily reflect the views of General Star Management Company, its parent or affiliates.

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First Half—Delay Before Bid

A change in the Owner's status can spell delay before the project is awarded to a GC. Financing is usually, but not always, at the heart of delay change. Regardless of the actual cause, at the start of the delay, the event must be documented and the Owner from the measure must be managed. Let me use an example that came up with a client recently. The Owner was an industrial client who contracted with the DP to design a new gas processing unit for a portion of Owner’s existing complex that was vacant. The area was previously used for rainwater runoff. The design was finished and the DP submitted a final set of contract documents to the Owner. The Owner, in the meantime, had a change in management and decided to table the Project for the time being, which was not a problem. Ten years later, after the market turned around, the Owner decided it wanted to bring the Project to reality. If the event is a likely change in Code requirements, site conditions and general state-of-the-art for the equipment and/or processes used in designing the Project. Finally, I asked my client if his rates had changed in the intervening years (which they had) and asked if he really wanted to redesign the Project for free or at the old rates; he did not. In this instance, when the Owner decided to resuscitate the Project, a letter outlining these concerns was sent to the Owner. There were some tense moments and some posturing by both sides, but the lines of communication were maintained and the documentation as to the cause for the delay was sufficient such that the Owner, although not happy about the increased cost, ultimately understood and agreed to negotiate a new contract. The Project was redesigned and is being built today.

What we learn from this example is that the wise DP should immediately send the Owner a letter once the delay is evident: 1) memorializing the Owner’s choice to delay the Project for Owner’s own reasons (state if those reasons are known), 2) stating that the services of the DP are no longer needed and the responsibilities of the DP under the agreement are at an end until such time as the Owner wishes to revive the Project, 3) warning the Owner that a delay in bid and construction could result in a change in state conditions, code requirements, state-of-the-art, and/or other unknown issues which would necessitate the redesign of the Project, 4) warning the Owner that delays in starting the Project can cause the cost of the Project to change, including but not limited to many jurisdictions. As a result, lawyers, design professionals, accountants and other professionals, can be sued by non-clients in many states. The judicial philosophy underlying this expanded exposure of traditional professionals might not apply to the miscellaneous professional. We will have to see how the courts address this important issue.

Another shield available to the miscellaneous professional is the contract for services. Clauses such as warranty disclaimers, damages caps and other favorable terms that do not appear (or would not be found enforceable) in traditional professional engagement letters might be effective in an MPL claim. Miscellaneous professionals are a large and fast-growing segment of the economy. The insurance industry has taken note and has responded with a liability product that may soon eclipse all other forms of professional liability insurance in terms of number of policies written and premium dollars. This is one sidish that is destined to become the main course.

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The judicial philosophy underlying this expanded exposure of traditional professionals might not apply to the miscellaneous professional.
INSURANCE COVERAGE FOR MISCELLANEOUS PROFESSIONAL LIABILITIES

BY: JONATHAN S. ZIJS, AND SONIA K. DHALIWAL

Question: What are these five job classifications that have in common: credit counselor, interior decorator, answering service, ticket broker and auctioneer? Answer: All of the insurance industry they are all “miscellaneous professionals.” While there is no formal definition, in generally accepted parlance, miscellaneous professionals are those who provide services for a fee, subject to a standard of care. As the U.S. economy evolves away from labor and manufacturing, and toward services, this worker class is growing dramatically. In fact, the U.S. Bureau of Labor Statistics projects that by 2018, nearly 13 percent of the total work force will be professional service providers. Meanwhile, new professional service disciplines are emerging at a rapid rate.

The insurance markets have recognized the exposure of miscellaneous professionals to claims of negligence in the performance of their services — or non-practice. The industry has responded to this need with professional liability insurance for miscellaneous professionals (MPL insurance). Modeled on traditional professional insurance developed decades ago for doctors, lawyers, agents/brokers, accountants, architects and engineers, MPL insurance provides defense and indemnity coverage to claimants in cases of negligent performance of service has caused an economic injury. Claims made against miscellaneous professionals have certain common attributes. These typically include allegations that the miscellaneous professional has breached or broken a contract and/or that a lack or negligent performance of service has caused an economic injury. Claims made against miscellaneous professionals have certain common attributes. These typically include allegations that the miscellaneous professional has breached or broken a contract and/or that a lack or negligent performance of service has caused an economic injury. Claims made against miscellaneous professionals have certain common attributes. These typically include allegations that the miscellaneous professional has breached or broken a contract and/or that a lack or negligent performance of service has caused an economic injury.

There is of course an inherent challenge to underwriting this line. Many miscellaneous professional entities are new, small businesses, and have little or no programmatic sense of risk management. Moreover, perhaps the key feature of the insured — the activities that are subject to coverage — might be more fluid or mutable than meets the eye (or than meets the coverage application). So, for example, a retailer who specializes in construction, or a bookkeeper who from time to time does investments advice, can present some unanticipated risks for the insurer. One way taken to address the applicable policy definition of the service insured is the source of prevention.

On the customer side, business owners benefit greatly from MPL protection. Increasingly, vendor contracts require that MPL coverage is procured, and stipulate terms such as maximum allowable deductibles and minimum liability limits. Access to skilled defense counsel is another advantage of MPL insurance.

MPL claims often lend themselves to early resolution, unlike the bulk of traditional professional liability claims. There are some specific reasons for this. While the applicable laws may vary widely from state to state, certain defenses may have even more vitality for miscellaneous professionals than they do for lawyers, doctors, accountants and their ilk. For example, once upon a time, in order to sue a professional, one had to have privity of contract with the professional — that is, be his or her direct client. The requirement of privity has eroded in many labor and cost savings, and (3) depending on the length of the delay, stating that new terms for the DP's fees may be necessary. If the Owner still wishes to proceed with the delay of the Project that is affordable, it is necessary to protect the Architect in a situation that the Owner causes.

Although this scenario can happen with any Owner, it more often occurs with the less sophisticated ones. A new homeowner, for instance, might not want to decide the color scheme or the wall covering until they have their friend/sister-in-law/mother visit the site. So, the Owners certainly within the purview of the Owner, but waiting can have an impact on the GC and its suppliers, resulting in a Project delay. Documentation of the timeline and any departure from same by the Owner is crucial. It is also advisable to remind the Owner, in writing, of the deadlines necessary to proceed. A current schedule and advance notice to the Owner when his/her actions or inactions impact that schedule. You know the GC will document all delays and seek to be compensated for them. Documentation of the actual cause of the delay, even if the Owner is your friend, is imperative. Another example occurred when a local couple hired an Architect to design their dream home. This home had everything, including solar power on the roof, custom design in the house schedule and medical issues, and other health related improvements. When the bids came in, the Owner decided that none were too expensive and decided to delete the solar power and certain medical improvements. During construction, the Owner continued to resist the project site and directed the Contractor to make certain changes and additions to the Project. The Architect was not aware of the Owner’s changes until he received a change order from the GC. The Architect was finally forced to terminate the Contract because of the Owner's actions. An unfortunate result, but the actions were necessary to protect the Architect in a situation that the Owner caused.

Postgame Analysis

Most Owners just want a useable completed Project. It is the few that cause trouble because of the positions they find themselves in or the choices they make. It is for these individuals that you must always take certain precautions. In case I haven't been clear, it is important that the DP do the following on each Project: 1) establish the contractual relationship early on by having a written and signed contract, 2) understand and follow the contract documents, 3) be fair and impartial in enforcing the contractual provisions as to all parties, even the Owner, 4) and to the prior, clearly establish in writing the program for the Project and confirm all design recommendations and changes, along with the Owner’s choices and decisions; and 4) document everything no matter how inconsequential it may appear at the time, because the one time you don’t will be the one you need it!

It’s not just about winning or losing, it truly is how you play the game. And because we don’t always have instant replay on the Project, documentation of the DP’s communications with the Architect is crucial.

If you can’t point to a document that reflects the decisions on the job and the choices made by the Owner, you have to rely on a jury. The following are the recommendations that the Architect and sub-consultants, which would increase the cost of their professional services contract. Finally, the changes ordered by the Owner caused certain defenses may have the withdrawal of the Architect’s approval of the drawings and specifications, which is why the fact that the construction was not based on the permitted drawings. The Architect’s recommendations were immediately reduced to writing to memorialize the conversations the Owner had with the Architect. The reason for the initial conversation was an attempt to preserve the business relationship that the Architect had with this Owner; both belong to the same church. The follow-up in writing was necessary to document the situation and avoid the likely blame from the Owner that the inevitable cost overruns and delays were someone else’s fault. Ultimately, the Owner continued in his own words, the Architect continued to memorialize all the conversations and warnings issued to the Owner, and the Architect was finally forced to terminate the Contract because of the Owner’s actions. An unfortunate result, but the actions were necessary to protect the Architect in a situation that the Owner caused.

“Documentation of the timeline and any departure from same by Owner is crucial.”
status it could have severe implications for subsequent pregnancies. See id. If the red blood cells from an Rh-positive fetus enter the mother’s system, the mother’s body may produce Rh antibodies that would treat the fetus like an unwanted intruder. This condition is known as becoming sensitized or isoimmunized. To prevent this serious condition, the mother is usually injected with a Rh immunoglobulin (RhoGAM) at the 28th week of gestation and within 72 hours after birth if the baby is Rh-positive. See id.

The mother was properly administered RhoGAM during her first pregnancy. See id. But she was not properly administered RhoGAM during her second pregnancy. See id. This omission may have had tragic consequences during the mother’s sixth pregnancy. During that pregnancy, the mother was iso-immunized and the parents alleged that Milan passed away due to the doctor’s failure to administer RhoGAM during the second pregnancy. See id at 379. Milan’s parents sued the physician who cared for her during the second pregnancy despite the fact that he did not provide any care during her sixth pregnancy. See id at 378-79. When presented with a motion for summary judgment, the trial court determined that the executors of Milan’s estate sufficiently established that the mother’s physician owed a duty to the mother’s children conceived after the abortion. See id at 384. The trial court certified the decision for immediate interlocutory appeal. See id. at 380.

The Superior Court accepted the interlocutory appeal and certified the trial court affirmed with some stipulation. The court noted that it was chiefly to subject a physician to third-party liability and therefore required compelling circumstances to do so. See id at 385. Further, it acknowledged that permitting this cause of action would potentially subject physicians to lawsuits many years after the alleged negligence. But the court believed that any unfairness involved in this expansion of liability was an issue for the legislature to address. See id at 384.

Previously, the Pennsylvania Supreme Court had only extended physician liability to third parties when the physician failed to protect someone from the transmission of a communicable disease. See D’Amico v. Lynn, 529 Mass. 590 (2019) (where the physician’s duty extended to third-parties who were brought within the “foreseeable risk of harm.”). See id at 362.

The Monmouth court found this situation essentially similar to the D’Amico rationale. The administration of RhoGAM was meant to “protect future unborn children . . .” and not provide any physical health benefit to the mother. See id. at 387. Milan was therefore in the class of persons who was likely to suffer harm from the physician’s omission. Consequently, Milan was within the “foreseeable risk of the risk of harm” and therefore the suit was allowed to go forward. The states that have considered the viability of pre-conception torts have not ruled uniformly. Many courts have been uncomfortable stretching the boundaries of duty to accommodate pre-conception torts. See, for example, in Albino v. City of New York, 54 N.Y.2d 269, 429 N.E.2d 786 (1981), parents alleged that during an abortion for a previous pregnancy, the
Evidence of a patient's poor dental hygiene may be admissible on the issue of causation.

Dentists, as with other health care providers, often are the beneficiaries of legislative shortening of limitations statutes as an element of tort reform. The shorter malpractice limitations statute may even apply to the actions of an unlicensed dental impactor. See Adorno v. Velozquez, 39 Misc. 3d 881, 855 N.Y.S.2d 343 (Sup. Ct. 2008) (adding, however, that the state's longer fraud statute may apply). In a recent dental implant case, the plaintiff provided the witness is sufficiently familiar with the issue involved. See, e.g., Robson v. Torini, 911 S.W.2d 246, 249 (Ark. 1995) (noting that changing dental implants has sufficient foundation provided the witness is sufficiently familiar with the issue involved).

Recent dental claims have addressed whether a plaintiff's poor dental hygiene is admissible on the issue of causation. Anticipatory testimony that the opinion was consistent with the causation elements to the claim.

“... evidence of a patient’s poor dental hygiene may be admissible on the issue of causation.”

PLDF Committees
The Professional Liability Defense Federation’s nine substantive committees include:
- Medical
- Other Healthcare
- Legal
- Accounting
- Investment
- Corporate Governance
- Insurance
- Construction
- Design

PLDF and Diversity
The Professional Liability Defense Federation supports diversity in our member recruitment efforts, in our committee and association leadership positions, and in the choices of counsel, expert witnesses, and mediators involved in professional liability claims.

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Stuart T. O’Neal is a member of Burns White LLC and is based out of the firm’s Philadelphia office. He graduated from Villanova University School of Law, and is admitted to practice in Pennsylvania. Mr. O’Neal’s practice focuses on the defense of long-term care facilities, hospitals, physicians and professionals of all types in civil litigation and administrative matters. He also manages a wide variety of commercial, employment and contractual disputes. Mr. O’Neal is President of PLDF.

Marc L. Penchansky is an associate at McCormick, Culbertson, Dutt, Hargis & Penchansky. He has filed a petition for allowance of appeal with the Supreme Court of Pennsylvania (542 MAL 2011). At the time of the writing of this article, the Supreme Court has not decided whether to hear the case.

Endnote

“... the holding in Matharu could be extended to other situations involving third parties.”

Marc L. Penchansky, Esq.
Failure to diagnose and delayed diagnosis of cancer: medicolegal issues

By: Thomas D. Jensen, Esq.

The average older patient award was $495,417. Joel Wolpert, 34 App. Div. 3d 307, 863 N.Y.S.2d 63 (2008) (affirming summary judgment in part on grounds plaintiff's expert failed to refute defense expert's opinion that numbness after apicoectomy may occur in the absence of negligence). Causation is a key defense, not only as to negligent treatment, but also as to negligent non-disclosure. See, e.g., Anzalone v. Woodbridge Dental Associates, P.C., 97 App. Div. 3d 1078, 1080, 861 N.Y.S.2d 799 (2008) (involving a dentist who failed to inform patient of root canal risks but "plaintiff's expert did not provide any opinion at all [about causation]").

Alleged Claims

Dental malpractice suit papers ordinarily do not limit the claim to a negligent treatment cause of action. Claims for negligent non-disclosure (informed consent), battery, breach of contract, res ipsa loquitur, and even fraud may be punished. Recent case law illustrating jury's chary slope of claims. A res ipsa loquitur instruction, for example, may be given when in the absence of direct evidence of negligence by a dentist, the type of injury alleged would not reasonably to be expected or which would not occur except under exceptional circumstances. Causation is a key defense, not only as to negligent treatment, but also as to negligent non-disclosure. See, e.g., Anzalone v. Woodbridge Dental Associates, P.C., 97 App. Div. 3d 1078, 1080, 861 N.Y.S.2d 799 (2008) (involving a dentist who failed to inform patient of root canal risks but "plaintiff's expert did not provide any opinion at all [about causation]").

Alleged Claims

Evidence admissibility issues presented in dental malpractice cases mirror those frequently encountered in other professional liability contexts. Questions concerning expert witness qualifications, the common knowledge exceptions, applicability of the common knowledge exception, plaintiff's hygiene role in the dental outcome, and the like are typical. With respect to experts, before trial in seeking summary judgment a defendant dentist may offer his or her own affidavit confirming that pretrial discovery has satisfied all obligations. Stonevage v. Minam, 309 App. Div. 2d 918, 766 N.Y.S.2d 973 (2003) (overruling the defense expert's summary judgment motion).

Allied Claims

Dental malpractice suit papers ordinarily do not limit the claim to a negligent treatment cause of action. Claims for negligent non-disclosure (informed consent), battery, breach of contract, res ipsa loquitur, and even fraud may be punished. Recent case law illustrating jury's chary slope of claims. A res ipsa loquitur instruction, for example, may be given when in the absence of direct evidence of negligence by a dentist, the type of injury alleged would not reasonably to be expected or which would not occur except under exceptional circumstances. Causation is a key defense, not only as to negligent treatment, but also as to negligent non-disclosure. See, e.g., Anzalone v. Woodbridge Dental Associates, P.C., 97 App. Div. 3d 1078, 1080, 861 N.Y.S.2d 799 (2008) (involving a dentist who failed to inform patient of root canal risks but "plaintiff's expert did not provide any opinion at all [about causation]").

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