The merger of two or more law firms can be exciting and hopeful. However, merging firms should not ignore the potential for increased legal malpractice and ethical risks that may come along with the new endeavor. If your firm is considering joining forces with another, here are some pointers to help keep your risk in check.

**Why Firms Merge**

Generally speaking, the larger the firm, the higher the revenue per lawyer and profit per partner. Many suppose this is because clients believe, whether rightly or wrongly, that bigger firms have superior talent and that the reputation of a “BigLaw” firm will give the client an advantage over a comparatively unknown solo practitioner or small firm. In addition, many clients seek out firms with a presence in more than one geographic area so they can use the same law firm regardless of jurisdiction.

With this in mind, firms often seek to merge with other established firms to expand their client base, breadth of services offered, or locations in which they can provide service. For some, the perfect merger would be with a firm that already provides similar expertise; the goal is to increase the size of the firm. For others, merging complimentary practices is the goal; a transactional firm merged with a litigation firm would mean neither would need to refer work outside the firm. For still others, the motivation for a merger is the opportunity to provide service to current clients in a city or area where the larger firm does not currently provide service.

**When Merging Firms Meet: Conflicts**

Once a firm has merged, however, it is not just the profits that may increase. Merged firms may face higher malpractice risks in part because of increased conflicts. Conflicts are among the most common basis for legal malpractice claims. Some firms may attempt to minimize potential conflicts to ease the merger or to avoid losing important clients. Failing to investigate, ignoring altogether, or overlooking by conducting an inadequate conflict check can lead to costly malpractice claims as a result of actual or potential conflicts.

It is imperative that lawyers and law firms who seek to merge with others fully and honestly identify actual and potential conflicts.

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**Medical Malpractice: Defending Against Hindsight Bias**, By: Mark V. Gende, Esq. and Joseph D. Spate

It happens every Monday morning. Commentators and spectators look over replays of football games that took place over the weekend to weigh in on how they would have performed differently than faltering quarterbacks. This natural tendency is called hindsight bias. However, passing judgment after knowledge of the outcome is much easier than making game-time decisions with limited knowledge and in a fast-paced environment.

As Malcolm Gladwell once observed, “[w]hat is clear in hindsight is rarely clear before the fact.” Malcolm Gladwell, *The New Yorker*, “Connecting the Dots” (Mar. 10, 2003). Yet, in the medical malpractice context, juries sometimes find doctors liable for failing to notice something that was not very noticeable at the time:

“[I]n the context of medical malpractice actions, research studies support the contention that plaintiffs often receive payments for alleged malpractice even if the physician’s performance was defensible.” Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 Or. L. Rev. 587, 589 (1994). Hindsight bias is a real threat to excellent doc-
potential conflicts and obtain informed waivers from all affected or potentially affected clients. Consulting with outside professional liability counsel to determine whether a particular situation is a conflict under the Rules and whether a waiver is required may be a prudent step to both identify conflicts and properly resolve those that exist.

If conflicts are too great, the merger may not be in anyone’s best interest. For example, even if concurrent representation of certain clients does not rise to the level of an actual conflict, perceived conflicts if a merged firm now represents clients who are business competitors, or who are on opposite ends of a public issue, can also increase the risk of malpractice or ethical complaints being brought against the firm. The “business conflict” can be almost as problematic in terms of client relations as can be actual conflicts barred by the Rules.

In the insurance defense firm context, some firms take the position that they will never represent insureds in coverage disputes or plaintiffs in personal injury suits, whereas others take on such work if the chance of success is sufficiently high and worth the investment and risk to other aspects of their business. Each firm’s philosophy in handling such work should be considered during merger discussions as it relates to future work for some partners who have made that work an important part of their practice. In addition, the interests of clients who may have to be referred to other lawyers should be central to those discussions between the firms considering merger.

**Firm Organization**

In addition to addressing conflict issues, from a practical perspective, merging lawyers and firms need to ask and answer the hard questions, and not assume that everything will work out in the end. Will existing partners in the merging firms continue to be partners in the merged firm? Who will be the equity or capital partners? How will the partnership be structured? Will it be an LLC, a PLLC, a corporation, or a partnership? What are the book of business requirements for existing and new partners, and who gets to decide on profit sharing? How will new partners be admitted to the firm? If certain partners or associates opt out of the merger, how will their client files be transferred, assuming their book of business chooses to go with them? How will money owed for leases or utilities be handled going forward? If the firm will have income from a number of states, how will state income tax be handled if there is profit sharing among the partners?

**Defense and Insurance Considerations of a Merger**

It is also essential that the merged firm has appropriate malpractice insurance given the changes in number of attorneys, practice areas, and size and sophistication of cases. Merging firms should be certain to discuss their newly formed firm with their respective malpractice carriers and brokers. A change in the type of work being done, the jurisdiction in which it is being done, and the loss history of the attorneys doing the work all could affect the appetite of certain insurers for the risk and the premium to be charged. The firms should also discuss the procedure the newly conceived firm will employ for determining if claims have been made or if potential claims have been advanced. Make sure questions related to potential claims are identified in applications for insurance to put the firm in the best position to have coverage and to avoid rescission of the policy.

There may be several options of malpractice insurance coverage available to firms. The first step is deciding which firm’s insurance broker is the one to vet those options for a firm and be the broker for the new firm. It may be the acquiring firm’s broker who performs that function, but it doesn’t have to be. Many factors can be considered in making this decision, such as which broker is better suited for the job due to professional liability insurance expertise, market relations and leverage and firm business relationships. Once the merged firm’s broker is chosen, discussions of the options for insurance coverage have to be discussed.

**Acquired Firm Purchases an Extended Reporting Period**

The cleanest option, but what may be an expensive one, is for the firm being acquired to purchase the Extended Reporting Period (ERP) on their policy. An ERP extends the insurance policy currently in place for whatever terms of ERP are available on the policy and the firm decides to purchase. If the acquired firm is covered on an ERP, then the acquiring firm transfers the risk for malpractice claims from legal services before the firms were merged to the insurance carrier, subject to the limitations of the coverage available. This way the acquiring firm does not have as much risk for legal services they did not provide or control.

There are different types of ERP’s or “tails” on policies (as commonly referred to in the insurance industry). A unilateral tail is only available if the insurer cancels or non-renews the policy. A bilateral tail is available if either the insurer or the insured cancels or non-renews the policy. The Extended Reporting Period usually allows the firm to cancel their policy and secure a return premium for the unearned portion of the policy period, minus a short rate premium penalty for cancellation by the insured.

Unfortunately, many times firms don’t place enough importance on the Extended Reporting Period’s options on their policy until they need them. These terms cannot be renegotiated mid-term on a policy, so it is wise for firms to understand them before they bind...
**LAW FIRM MERGERS: ETHICS/INSURANCE, CONT’D**

Another feature of ERP’s is the term and cost and which firm will pay for it. Several questions have to be asked to determine if it is adequate. Will the ERP term (length of time available to extend the policy) for the acquired firm cover the statute of limitations for legal malpractice for the states where the legal services were provided? Do the statutes of limitation in those states run from date of discovery of the wrongful act or from when the wrongful act occurred? Does the work provided include a long discovery period, such as estate work?

Often times insurance policies include notice provisions to carriers for when a firm acquires a new firm or group of attorneys from another firm or the number of attorneys at the firm changes in a material way. Understanding these terms of a firm’s policy and complying with them is also critical in maintaining appropriate coverage.

It should be considered whether the ERP available has been eroded by claims that have been made and closed or is subject to erosion or exhaustion by claims that have not been resolved or potential claims reported on the policy. In some insurance policies the limit of liability on the ERP is partially or fully reinstated when purchased, but most often the ERP limit does not reinstate. The terms of the actually policy have to be considered as well as the claims/potential claims reported on the policy.

Normally policy limits are for a one year period, another consideration is what limit is available on the ERP is that the limit is spread over a time period of one year to an unlimited period, depending on the terms available on the policy.

When the acquired firm purchases an ERP, they then should be added to the merged firm’s policy based on date of hire to the firm. If individual underwriting is performed on a firm, the premium for the new attorneys would be at its lowest point because the insurance company is not picking up any exposure for prior legal services. The premium charge for these attorneys will increase however, as the exposure for legal services increases for the firm.

Finally, in the current marketplace, the firm may also be able to purchase a clean limit of liability on a standalone ERP from a different insurance carrier. It is worth the time to explore options in the marketplace to compete with terms available on the firm’s insurance policy.

**Acquiring Firm Adds of Prior Acts Coverage for Acquired Firm**

The acquiring firm’s insurance carrier may be amenable to adding the prior acts of the acquired firm to the merged firm’s policy. How much they will charge for this increased exposure will depend on individual carrier.

When choosing this option, it is important that firms appreciate they may be taking on risks beyond increased premium costs. The risk of taking on the liability on their policy of legal services performed outside their control need to be considered. What about the legal services of attorneys who are no longer with the firm? Was there a “problem” lawyer who is no longer with the current firm, but whose prior acts will be picked up as well? Policies cover the prior acts of current and “past” attorneys, so consider how many attorneys were at the firm prior to the merger and who they were when making this decision. Also think about whether there were prior areas of practice that increase the risk for severe claims.

A firm should understand not only the terms of the ERP on their insurance policy, but the following important definitions: Named Insured, Insured, Predecessor Firm, Successor Firm. These definitions and others are important in determining coverage. If an acquired firm does not meet the definition of Predecessor firm on the policy for example, it may be necessary to specifically add the prior firm entity by endorsement. Coverage language will determine who is covered and who isn’t.

It is vital for the combining firms to obtain clarity regarding: 1) how existing malpractice or ethics claims will be covered once the firms merge, 2) how malpractice or ethics claims which arise out of legal services provided prior to the merger, but which are made after the merger, will be covered, and 3) who is responsible for deductibles and premiums. Some legal malpractice insurance policies specifically provide that any lawyer insured by the policy is individually responsible for the deductible. Others simply state that “the firm” is responsible for any deductible. Be certain that you know what your legal malpractice insurance policy states, and that everyone in your firm understands the risk they may have for deductibles both as a firm and as an individual.

There might also be arrangements between the combining firms to defend and indemnify the partners of the other in the event that a claim that arises out of work that occurred prior to the merger. The advantage of such an arrangement is that it prevents the pointing of fingers in the malpractice litigation that would principally benefit the underlying plaintiff. Should there be an adverse outcome or a settlement on the underlying lawsuit, the firms could then resolve apportionment in subsequent litigation or arbitration. Any arrangement of this sort would have to be pre-approved by insurance underwriters and claim personnel.

**Other Concerns**

The effective date of merger affects conflicts, tax obligations, insurance coverage, pension and retirement.
LAW FIRM MERGERS: ETHICS/INSURANCE, CONT’D

obligations, and other legal obligations. All involved lawyers should be certain that they have obtained and maintained appropriate insurance for both pre- and post-merger acts.

If technological and administrative systems are changing, be certain everyone understands how the current system works to avoid calendaring mistakes or missed deadlines. This may involve a change in firm name or substitution of counsel being filed in a given case. Failure to ensure all lawyers and staff are properly trained on the system can lead to increased risk for ethical and legal malpractice issues.

Clients of the new firm should also be contacted and advised of the merger. As engagement letters are generally not transferable, new engagement letters likely need to be executed so that it is clear to the client who is representing them. In the insurance defense context, insurer clients will need to be advised and billing procedures will need to be addressed to make sure that bills in conformity with guidelines are issued moving forward.

Trust account administration is an issue that must be paid special attention to. Bar regulators look closely at trust accounts to make sure that client funds are properly accounted for and protected. How any retainers are to be handled by the combined firm should be closely monitored by the lawyers responsible for the matters in which retainers have been paid.

Conclusion

The optimism that rightfully accompanies a merger should not obscure the critical and fundamental issues that should be addressed when consummating a merger. Mitigating the risks of conflicts, appropriately handling insurance issues to address specific risks, and administrative issues to preclude simple errors can be the difference between a successful merger and an unsuccessful one.

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DEFENDING AGAINST HINDSIGHT BIAS, CONT’D

Hindsight bias, also referred to as “creeping determinism,” (Gladwell, supra) can be defined as “the tendency for people with knowledge of the actual outcome of an event to believe falsely that they would have predicted the outcome.” Leonard Berlin, Radiology Errors and Malpractice: A Blurry Distinction, 189 Am. J. Roentgenology, 517, 521 (Sept. 2007). Said another way, it is “the inclination to see events that have already occurred as being more predictable than they were before they took place.” All people, including jurors, are susceptible to such bias in their determinations. Berlin, supra, at 521.

The Effect of Hindsight Bias on Juries

In the medical malpractice world, juries submit to hindsight bias when they find doctors liable for failing to notice the presence of a condition that would have been very difficult to notice [at the time].
Even the mere existence of a bad medical outcome can negatively impact a doctor’s credibility at trial. “Those who know of the poor [medical] outcome are significantly more likely to deem the practitioner negligent than if exactly the same procedure had led to a less severe outcome.” Id. at 637. Insurance companies may settle medical malpractice cases for fear that the physician will appear to be negligent in hindsight even though such a determination would not be warranted in foresight. Id. at 589. “Unfortunately, the law provides no protection for the physician against the effects of the hindsight bias.” Id.

The Judiciary’s Treatment of Hindsight Bias

Courts across the country have taken steps to stem the tide of hindsight bias. For example, the state of Ohio applies the “professional judgment rule” standard of care to psychiatrists in its determinations of medical malpractice. See Littleton v. Good Samaritan Hosp. & Health Ctr., 39 Ohio St. 3d 86, 529 N.E.2d 449 (1988). Under that standard, a psychiatrist will not be held liable for the violent acts of a voluntarily hospitalized mental patient subsequent to the patient’s discharge if certain requirements are met. 529 N.E.2d at 460. The court in Littleton reasoned that “[c]ourts, with the benefit of hindsight, should not be allowed to second-guess a psychiatrist’s professional judgment.” 529 N.E.2d at 459-60.

On the other hand, courts do draw a line when considering the extent to which malpractice, such as misdiagnosis, may be excused. In Wisconsin, an emergency room doctor was found liable for negligently diagnosing a patient with Bell’s palsy and failing to inform the patient of the availability of a carotid ultrasound as an alternative means of determining whether he had suffered an ischemic stroke rather than an attack of Bell’s palsy. Jandre v. Wisconsin Injured Patients & Families Comp. Fund, 340 Wis. 2d 31, 813 N.W.2d 627 (2012).

Furthermore, a court may rebuff defense counsel’s attempts to inform the jury of hindsight bias. In the state of Washington, a doctor was sued for failure to diagnose mediastinal malignant thymoma on a chest x-ray, and in his closing argument, the defense attorney attempted to persuade the jury that failure to observe the tumor in the e-ray did not constitute negligence because the tumor was barely evident and could have been interpreted as a normal structure by any reasonable radiologist. Gehlen v. Snohomish Cty. Pub. Hosp., 106 Wash. App. 1062 (2001). The jury, however, returned a verdict for the plaintiff. On appeal, the defense attorney argued that the jury should have been instructed on hindsight bias, but the appellate court held that the jury instruction was proper and that an instruction on hindsight bias would have created a risk of jury confusion. Id.

How to Defend Against Hindsight Bias in Medical Malpractice Cases

In order to stem the tide of hindsight bias in your medical malpractice cases, you can take the following measures.

1. Educate the jury early about the existence of hindsight bias. Even though all people are susceptible to hindsight bias, they are reluctant to recognize its influence on their judgment. By confronting jurors early about their own tendencies, defense counsel can encourage objectivity in the jury’s adjudication of the case.

2. Recently, a study was conducted on mock jurors to determine which methods most effectively inoculate a jury against hindsight bias. The study concluded that, to defend against hindsight bias, defense attorneys ought to construct a case story that includes the following components: “a plausible alternative to the event’s outcome; presentation of unforeseeable information that became available after the fact; multiple appeals to jurors to focus on the pre-outcome time period when making their decisions; and explicit cautions against ‘Monday-morning quarterbacking[,]’” that is, using hindsight bias. By crafting a case story that includes those factors, defense attorneys can reduce jury bias.

3. Show the jury examples of hindsight bias. Jurors are everyday people who appreciate everyday examples. One such example is the children’s game, “Where’s Waldo?” Hindsight bias is said to create a “Where’s Waldo” effect, whereby an object is easier to spot when the observer knows what he is looking for and knows the object is present somewhere in front of him, much like a child looking for the image of the character “Waldo” within animated images.

4. Another analogy to hindsight bias is the act of seeing a particular star in the night sky. If a careful observer looks skillfully for a specific star that he knows to reside in a particular point in the night sky, he is much more likely to find it than a person who is told to look up at the night sky and later asked to recall seeing a specific star. Defense counsel must impress upon the jury the unreasonableness of demanding a doctor to have the same level of certainty before a diagnosis as he does after a condition is confirmed by worsening symptoms or other means.

As previously alluded to, the analogy of “Monday-morning quarterbacking” can effectively convey the prevalence and folly of hindsight bias. Again, Monday-morning quarterbacking refers to the tendency of spectators to review the outcome of a quarterback’s performance to claim they would have acted differently in that same situation. Obviously, it is much easier to...
DEFENDING AGAINST HINDSIGHT BIAS, CONT’D

make such judgments with the benefit of hindsight and without the rush of game-time pressure. Juries can be educated on the need to avoid hindsight bias by using any of these analogies.

Secure an appropriate jury instruction on hindsight bias. Another way to curtail jury hindsight bias is through a jury instruction. Such an instruction is especially relevant in the radiology context:

There is an absolutely unavoidable “human factor” at work in the review of films; some abnormalities may be missed, even the obvious ones; the mere fact that a radiologist misses an abnormality on a radiograph does not mean that he or she has committed malpractice; and not all radiographic “misses” are excusable. Therefore, the focus of attention should be on issues such as proof of competence, habits of practice, and use of proper techniques.

Defense counsel should propose a jury instruction that includes these principles and is tailored to the specific malpractice issue before the jury. While a jury instruction alone will likely not be enough to overcome juror hindsight bias, it can be an effective starting point.

Conclusion

Hindsight bias is a very real and present threat to doctors defending against medical malpractice claims. A jury may look favorably upon an injured plaintiff’s cause of action even when a competent doctor would not have been able to make such a diagnosis. However, while combatting hindsight bias can be difficult, it can be done through effective communication with the jury. By adopting some or all of these strategies to defend against hindsight bias, you can enhance the strength of your client’s case and your chances for a defense outcome.

Endnotes

3. Id.
5. Id.
7. Id.

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STRATEGIC RESPONSE TO CLIENT DEPOSITION USE AT TRIAL BY PLAINTIFF, BY: THOMAS A. LANG, ESQ.

In medical negligence cases, plaintiffs’ counsel will often call the defendant doctor as an adverse witness during plaintiff’s case in chief, in order to elicit damaging admissions, and to start the trial on by putting the defendant immediately on the defensive. However, this practice seems to be evolving. Putting the defendant doctor on the stand as the first witness or one of the first witnesses in a trial allows plaintiff to “strike first” in eliciting concessions and admissions from the defendant. However, this practice also allows a tactical opportunity for the defendant physician. As the first witness in the case, the defendant is the first physician – the first qualified expert – to educate the jury and frame the medical issues at the heart of the case, and explain his or her conduct. A defendant who is well spoken, thoughtful and sympathetic will generally be able to convey those qualities to a jury, even under cross examination, and certainly upon re-direct.

Accordingly, it is becoming more and more common for the plaintiff’s bar to use the deposition testimony of the defendant physicians as substantive evidence at trial, by playing or reading substantial excerpts of the defendant’s deposition testimony to the jury. While it is axiomatic that admissions of a party are admissible at trial and are not considered hearsay, there is a difference between opposing counsel using a ten second video clip of a defendant doctor’s deposition testimony as a means of impeachment (something that can often be avoided altogether, with sufficient preparation) and playing several lengthy excerpts of the de-
CLiENT DEPOSITION USE AT TRIAL, CONT’D

The use of deposition testimony as substantive evidence has also been permitted in state courts. See, e.g., In re Rennick, 181 Ill. 2d 395, 406 (1998) ("An admission by a party is substantive evidence admissible as an exception to the rule excluding hearsay."); Behrstock v. Ace Hose and Rubber Company, 496 N.E.2d 1024, 1030-31 (1986); Felton v. Hulser, 957 S.W.2d 394, 398 (1997) (holding that, pursuant to the Missouri Rules of Civil Procedure allow for the use of a party’s deposition may be used “for any purpose” even though the party is present in court and able to testify or has testified.)

The lack of an existing inconsistency between the party’s live testimony and his admissions is not a valid basis for a trial court to refuse the request to read the party’s admissions to the jury. Id. While a statement is usually damaging to the party against whom it is offered, an admission does not need to be against the interest of the party, and any relevant statement is admissible as substantive evidence. Estate of Lewis, 549 N.E.2d 960, 964 (1990).

There is no foundation requirement predating the introduction into evidence of admissions, including those contained in discovery depositions, and the availability of the party opponent at trial is not relevant. Security Savings and Loan Assn., v Commissioner of Savings and Loan Assn., 696 N.E.2d 320 (1979). The only admissibility requirement is that the admission be relevant to and have a material bearing on the issues of the case. Bargman v. Economics Laboratory, Inc., 1029 537 N.E.2d 960, 964 (1989).

Preparation at deposition and at the time of trial

Preparation for the potential use of a client’s deposition testimony starts at the time of the defendant’s deposition. At the time of deposition, the defendant does not have the benefit of knowing the full constellation of criticisms which could or will ultimately be offered against him or her, or the substance of testimony from other fact witnesses or other physicians involved in the care. There is only so much that can be anticipated for a deposition. However, the knowledge that the testimony can potentially be submitted as substantive evidence should impact the preparation for the deposition, and certainly impact the objections raised at deposition. The objections raised at deposition should be detailed, and offered with the mindset that the questions being asked, and the client’s responses, could be played verbatim to a jury at the eventual trial of the case.

At the time of trial, the party intending to use the testimony as substantive evidence will often raise the issue in a motion in limine. Ideally, the motion
will contain the specific testimony that counsel intends to use at trial, allowing defense counsel the opportunity to raise a general objection to the use of the testimony, as well as specific objections as appropriate. However, it cannot be assumed that opposing counsel will take these steps, and disclose the specifics of what testimony they will use at trial. Accordingly, it may be worthwhile to affirmatively raise the issue in defendant’s motions in limine, in order to verify whether or not opposing counsel plans on using deposition testimony or statements by a party as substantive evidence, and identifying what specific testimony may be used.

In presenting this motion in limine, the point should be made that the use of defendant’s deposition testimony as substantive evidence differs from its use as impeachment (where notice requirements are much more lenient, to the extent that they exist at all.) The argument can be made that the substantive use of the testimony should be disclosed to all parties, in advance of its use, including the specific page and line citations to the deposition testimony.

Obtaining advance notice of the testimony to be offered by plaintiff serves two purposes. First, it allows you to lodge timely and appropriate objections to the evidence, before it is heard by the jury, and to preserve the record on appeal. Once the specific testimony has been identified, specific objections to the testimony should be raised at the time that the testimony is offered into evidence, not just when the general concept is raised during motions in limine. Objections based on relevance, cumulative nature of the testimony, form of the question, rule of completeness, prejudice, etc., may all be appropriate, and should be offered for each instance in which they apply. It is crucial to know the specifics of what plaintiff plans on presenting to the jury, to preserve these objections at the time the testimony is being offered into evidence.

Second, (just as importantly) obtaining advance notice of the specific testimony to be introduced by opposing counsel allows you an opportunity to prepare your own submissions of the client’s testimony to the jury, and/or to make an offer of proof as to what testimony you would submit to the jury, in order to “complete the narrative” of the testimony being offered by plaintiff, or to demonstrate that it is being taken out of context. (See Fed. R. Evid. 106, “If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”)

If there is a valid argument that the testimony being offered by opposing counsel requires, in fairness, the introduction of additional testimony, you should be prepared to have that testimony on hand, ready to submit to the jury. Objecting to the use of the testimony under the rule of completeness, or that the testimony is being taken out of context, without offering specific evidence as to what additional testimony is necessary to complete the story makes it difficult to argue on appeal that the defendant was prejudiced by the use of his or her deposition testimony as substantive evidence at trial. It goes without saying that parties and their attorneys need to be deeply familiar with the defendant’s deposition testimony going into trial. Knowing what specific portions of the defendant’s testimony is going to be offered by plaintiff’s counsel to the jury as an admission will allow you to have your own excerpts at the ready for submission to the jury to clarify or complete the narrative. While an offer of proof can be made during defendant’s case in chief, making these offers at the time of plaintiff’s submission should be considered, in that the evidence offered in response to plaintiff’s submission will help inform the trial court and the appellate court as to the context of the testimony being offered and to demonstrate any potential prejudice on appeal.

Additionally, objections should also be considered if opposing counsel intends to use the party opponent testimony more than once during the trial (e.g., during opening statements, during the course of plaintiff’s case in chief, and then during closing arguments.) While opposing counsel can make reference to the admissions during opening statement and closing argument, the act of actually playing a video clip of your client’s testimony more than once can be objected to as cumulative evidence.

Use of Plaintiff’s Deposition Testimony

Finally, it cannot be over looked that the deposition testimony of plaintiff is just as ripe for use as substantive evidence at trial, and consideration should be made for introduction of that testimony in defendant’s case in chief. It could avoid a potentially messy cross examination, and eliminate the need to impeach a plaintiff who will refuse to agree to prior admissions made under oath. The fact pattern of every trial is different, and the use of deposition as substantive testimony depends on a variety of considerations, but if plaintiff’s bar is going to consistently use it as a tool at trial, defense counsel should be equally prepared.

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“How can it be that we have no coverage for that! We bought multiple insurance policies, property, general liability, commercial auto, E&O, and D&O and we still have no coverage? How can that be!”

Gaps in coverage occur. When this happens, it is the claims professional’s unpleasant task to tell the insured there is no coverage. It is an absolute certainty the decision will be challenged by senior personnel in multiple departments.

This article attempts to help defense counsel, who tend to avoid coverage issues at all costs, understand how these gaps manifest themselves because not knowing were the coverage gaps are can put your client at risk. In the interests of brevity, I will be focused on the common gaps I have seen between the General Liability and E&O coverage and ignore the potential need for the insured’s independent counsel (Cummins counsel) type issues.

Sophisticated commercial entities purchase multiple policies to protect them from foreseeable risks, and all is right with the world. That is, until a claim arises from what should be a foreseeable risk. Depending on if the jurisdiction allows a carrier to find coverage outside the wording of the complaint, the problem can arise through the wording of the complaint, as a function of the litigation process, or due to changing insurers.

The way the claim is presented can serve to remove it, at least partially, from coverage. In addition to the way the complaint is worded, the coverage gap may materialize at almost any point in the litigation, even in the verdict slip.

Background

Insurance policies are contracts with specific language designed to cover loss related to covered perils. They have declarations, insuring agreements, definitions, conditions, and exclusions. However, the real world comprises an unlimited set of possibilities. Coverage is triggered where the possibilities cross with policy language. Coverage is determined by comparing what happened and what is claimed as damage to the policy language.

General Liability (GL) policies provide coverage for loss due to an occurrence to which the insurance applies and cover claims for bodily injury, personal injury and property damage. How these are defined also depends on the jurisdiction and the wording of the specific policy. GL policies typical use language such as:

This insurance applies to “bodily injury” and “property damage” only if:

The “bodily injury” or “property damage” is caused by an “occurrence”...

While bodily injury has been defined by the courts to include or exclude emotional injury without physical injury, policies generally define bodily injury as:

“Bodily Injury” means bodily injury, sickness or disease sustained by a person, and includes death resulting from any of these at any time.

GL policies generally define an “occurrence” as:

An accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Black’s Law Dictionary adds that an occurrence is, “neither expected nor intended from the standpoint of the insured party”.

The trigger for coverage in Errors and Omissions (E&O) policies is complex. They are generally written on a “claims made and reported” basis for “wrongful acts” which occurred after the retroactive date and for which claims are made and reported to the carrier during the policy period in which the claim was made. E&O policies usually have language intending to exclude injuries. This can be broad and exclude all injuries, or more narrow and exclude injuries resulting from specific wrongful act or exclude specific types of injury (e.g., emotional injury, bodily injury, personal injury). In short, the intent is to exclude coverage usually provided by GL and other policies.

E&O policies generally define “wrongful acts” as:

Any alleged or actual acts, errors, misstatements, misleading statements or omissions of an insured in the scope of its duties for the insured; or employment claims.

Acts, errors, misstatements, etc., can be intentional by the insured. Putting a practice in place is not an accident or occurrence, it is intentional. Even if it is later found that the practice unfairly discriminated.

E&O policies also exclude coverage for any damage related to an “injury”. A typical E&O policy exclusion for injuries could read:

For a claim other than an employment claim, bodily injury, sickness, disease death, disability, shock, humiliation, embarrassment, mental injury, mental anguish, emotional distress; oral or written publication in any manner of material that slanders or libels a natural person or organization, or disparages persons or organization’s goods products or services; or for damage to or destruction of any property, tangible or intangible including diminution of value or loss of use. This exclusion applies whether any of the aforementioned injury or damage is caused by the insured or by any other natural person, organization, or legal entity or such injury or damage arising out of or is caused by intentional, reckless or negligent acts, errors or omissions and regardless of the legal theory...
pled including alleged civil rights violations. While this language excludes coverage for all types of injuries, other policies are less restrictive. We will use the language cited here for our purposes.

The Coverage Gap: GL v. E&O
It is the exclusion for damage arising from injuries under the E&O policy versus the requirement that the injury due to a wrongful act or alleged civil rights violation by the insured arises from a practice of the insured.

Example:
A suit is filed alleging certain policies of the insured’s business practices (e.g., vetting vendors, sales, marketing) caused physical or emotional injury.

Generally, allegations which allege a civil rights violation based on unfair discrimination due to the business practices of the insured will not fit the definition of an occurrence. They are conscious, intentional decisions which may have yielded disparate outcomes or disparate treatment and were likely in place for years. These practices were intended from the standpoint of the insured. They were not an accident or a continuous repeated exposure to substantially the same general harmful condition. They do not meet the definition of an occurrence and damages resulting from these practices are not covered by the GL policy.

E&O policies provide coverage for wrongful acts that took place after the retroactive date, provided the claim is made and reported to the carrier in the same year it is made. (More on this later.) However, the E&O coverage excludes damages from bodily injuries. Although a qualified defense with a partial disclaimer for any award for damages as a result of any injury may be provided.

Hence the insured is left to fend for themselves, or more likely file suit for coverage and bad faith against the carrier and possibly even the agent.

Defense counsel should be aware that if coverage is available, it is not likely to be any sort of blanket coverage for damages claimed. Coverage is more likely to be narrowly applied to only covered damages.

The Coverage Gap: Changing Insurance Policies

Another frequently seen coverage gap occurs as a result of switching E&O carriers. The insurance industry is a competitive market and insureds are often seeking ways to improve profit margins. Lower expenses by reducing the costs of insurance can seem an attractive option. But this can create another coverage gap.

As previously noted, the trigger for coverage that a claim is made for wrongful acts which occurred after the retroactive date, and reported to the carrier during the policy period in which the claim was made. The definitions of what constitutes a claim and when the claim is made vary from when the insured has knowledge of circumstances which may give rise to a claim, to when the insured receives written notice of a potential claim to only when suit is filed.

Of these, the knowledge of circumstances definition can create coverage issues. The knowledge of circumstances trigger usually means that a claim is made when the insured first has knowledge that something, some practice of the insured, or wrongful act, may lead to a demand for damage. The gap occurs when during the period between when the insured has this knowledge and when either written notice or suit is received, the insured changes insurance carriers. The definitions of the trigger (knowledge of circumstances, written notice or suit) may have changed. This can create potentially catastrophic coverage issues.

Example:
In June of 2016, the insured realizes that an error was made in 2015 which could impact how vendors have since been selected and paid. A check of the current E&O policy reveals that a claim is defined as a suit and a claim is deemed to have been made when the insured receives the suit. As there is no claim made yet, no report is made to the carrier. In July of 2017, the insured switches E&O carriers. The insured was sufficiently sophisticated and careful to make sure the retroactive date encompassed 2015. However, to obtain a lower rate the new insurance policy defines a claim changes to knowledge of circumstances and a claim is deemed to be made at the earliest date the insured gained this knowledge.

In December 2017 (beyond any late reporting period of the earlier policy) a suit is received alleging damages from the insured’s 2015 error. The insured reports the suit to the new carrier. The new carrier analyzes coverage and promptly disclaims. The disclaimer explains that the claim, as defined in the current policy, was made in 2017 when the insured had knowledge of circumstances which were likely to give rise to a suit. This claim was made in the prior policy period. As coverage requires the claim to be made and reported in the current policy period, there is no coverage. The insured then reports the suit to his prior carrier, who also disclaims coverage. In their analysis, the written notice of a suit was received by the insured after the policy expired and beyond any extended reporting period. Therefore, the claim was not made during the prior carrier’s policy period and there is no coverage. The difference in the definitions of what is a claim and when it is made between the two policies created a coverage gap.

The Coverage Gap: Trial

I have personally seen statements made during depo-
COVERAGE GAP CONUNDRUMS, CONT’D

sitions, documents produced in discovery and even the jury charge eliminate coverage for the insured under either the GL or E&O policy or both. Example:

Suit was filed in federal court against a public entity alleging the discriminatory practices of the insured facilitated or otherwise allowed the actions of an employee to injure a non-employee. In addition to damages from the alleged deprivation of a civil right, damages for physical and emotional injuries were claimed.

An analysis of the GL coverage indicated the practice of the insured is not an occurrence. Therefore, the GL carrier disclaimed coverage.

An analysis of the E&O coverage indicated there may be coverage for damages arising out of activities found to be discriminatory, but no coverage for damages arising out of any injuries. Therefore, the E&O carrier provided a qualified defense under an ROR and partial disclaimer letter which excluded any damages for injuries.

At the close of the case, the jury slip asked the jury (paraphrasing) if they found that the practices of the insured caused injury to the plaintiff and if so, what do they award to the plaintiff for the injuries? The jury found in the affirmative and awarded damages to the plaintiff for injuries.

When the claims professional saw the verdict slip, a coverage declination letter was issued pursuant to the ROR/partial disclaimer. Phones rang off the hook and threats of bad faith soon followed. Fortunately, a new trial was granted on post-trial motions.

Though defense counsel doesn’t control what the judge puts on the jury slip, they need to be aware of the potential to exclude coverage. While we were confident the judge meant “injury” in a more generic way to include damages for civil rights violations, as we operated in a four-corner analysis state (sometimes referred to as an eight-corner analysis), and coverage was disclaimed.

The Coverage Gap: During Litigation

The gap can rear its ugly head at any time during the litigation. Statements made by the insured relative to knowledge of circumstances or receipt of written documents may impact coverage. I have seen cases when the plaintiff, in response to a production request from the insured, has produced documents establishing that the insured had knowledge of circumstances which might give rise to a demand for damages for many years prior to the claim being reported. I have also seen cases where plaintiff produced letters threatening suit years before anything was reported to the carrier. This kind of information can cause a carrier to rescind coverage.

In summary, while not diminishing the ability to defend the client, defense counsel should be cognizant of how litigation activities may identify coverage gaps and the impact this can have on your ability to defend your client.

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MEDICAL MALPRACTICE TRIBUNAL PROCESS OVERHAUL,
BY: ANTHONY E. ABELN, ESQ. AND JOHN K. BABCOCK, ESQ.

The Supreme Judicial Court of Massachusetts has recently approved a new rule which will have a significant impact on the litigation of medical malpractice cases across the Commonwealth. Superior Court Rule 73, effective on January 1, 2018, aims to improve the ailing medical malpractice tribunal process codified by M.G.L. Chapter 231, § 60B. Rule 73 also attempts to expedite the process of scheduling trials in medical malpractice cases, which notoriously take much longer to reach the trial stage than their civil counterparts.

Under the current statute, the Court is directed to convene a three-member panel, or “tribunal,” consisting of a judge, legal member, and medical member, within 15 days of the filing of a Complaint. The tribunal is tasked with reviewing Offers of Proof submitted by the plaintiff’s attorney, which sets forth the basis for the plaintiff’s case, and which generally requires a signed affidavit from a qualified medical expert supporting the plaintiff’s allegations. The bar for the plaintiff to overcome is relatively low; as it has generally been determined to be a “directed verdict” standard.

Enacted in 1976, Section 60B is supposed to serve as an early screening process for frivolous cases and to promote the timely and efficient litigation of medical malpractice cases. If the plaintiff’s Offer of Proof meets the low standard, the matter proceeds. If found to be insufficient, plaintiffs can still proceed, but are required to post a $6,000.00 bond payable to
the defendant in the case of a defense verdict at trial. In recent years though, the courts have been encountering increasing difficulty in finding qualified physicians and other medical professionals willing to serve as medical members for tribunals, resulting in significant scheduling delays.

In practice, tribunals are often not convened until a year or more after a case is filed. These delays grind discovery to a halt. Plaintiffs’ attorneys often wait to provide their Offers of Proof to defense counsel until just before the tribunal is scheduled (and they are not required to do so under the statute). In turn, defense counsel often seeks to limit written discovery and depositions and avoid expending legal resources before understanding the specific details of plaintiff’s claim. This delays the entire litigation process, and results in trials routinely being scheduled several years after cases are filed.

The new approved Rule 73 goes a long way to fix some of the disabling problems afflicting the current tribunal process, but questions remain regarding the implementation of the several of the new rule’s directives. Some of the of new rule’s greatest hits and misses are set forth below.

**Rule 73 now requires plaintiffs to file an Offer of Proof within 15 days of filing a Complaint.** This is certainly a step in the right direction. There will no longer be delays by plaintiffs’ attorneys in providing an Offer of Proof until a tribunal is convened. Defense counsel will now have notice of a plaintiff’s detailed claims and the particulars of the plaintiff’s expert opinions within weeks of the Complaint being filed. However, while this change clearly serves to mitigate delays in the discovery period, it does nothing to expedite a defendant’s statutory right to a tribunal.

**Defense counsel must now file a “demand for tribunal” within 30 days after filing an Answer; or waive the tribunal all together.** Under the current statutory scheme, a tribunal is held in every case without question. There are often cases, though, where defense counsel challenges liability, but concedes that the plaintiff has filed an Offer of Proof which is sufficient by the judge, the defendant can request that the matter be reconsidered by a full tribunal once a medical member can be assigned. The Court is directed by the rule to allow such a motion “unless it determines that allowing the motion would unduly delay the trial.”

This provision is concerning for a couple reasons. First, the new 90-day deadline provides yet another roadblock to a defendant asserting his or her statutory right to a tribunal. Most clerks and attorneys will agree that it is rare to find qualified medical tribunal members within 90 days. Second, this language gives the Court broad discretion to entirely forego a tribunal if it might delay a pending trial. This creates the possible scenario of a matter proceeding to trial without affording the defendant his or her statutory right to a full tribunal; a situation which appears to be sanctioned by Rule 73.

Rule 73 should be lauded for addressing many of the existing deficiencies in the current medical malpractice tribunal process. Of note, the new rule also contains a provision requiring that trial assignment conferences in medical malpractice cases be scheduled within 18 months of filing, which will certainly help in alleviating historical delays. However, it seems that the biggest impediment to Rule 73 moving forward will likely still be difficulty in recruiting qualified medical members to serve on tribunal panels. A number of methods have been proposed to raise the incentive for tribunal volunteers, such as increasing the current stipend, or granting continuing professional education credits to participating providers. Medical professionals and their attorneys can be hopeful that the Legislature and the Court will monitor Rule 73’s impact; and take further necessary steps to ensure that medical defendants’ statutory rights are protected.

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