

New Rules for Professional Liability Claims

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presented by

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New Rules of Civil Procedure for Professional Liability Claims

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I. Introduction

On January 27, 2003, the Pennsylvania Supreme Court promulgated significant changes governing professional liability actions by adopting a new series and rules and amending several other Rules of Civil Procedure. The new rules are 1042.1 through 1042.8 and apply to malpractice claims against certain “licensed professionals.”

In essence, the new rules require the party bringing suit (plaintiff or joining party) against a professional to certify that a qualified expert in the field has provided a written statement opining that the professional has breached a standard of care.

Although the changes primarily affect initial case handling, the provisions will affect various stages of the case up through conclusion via settlement or verdict.

Two topics will be addressed today:

- (1) Who is a professional under Pennsylvania law (different than the definition in the new rules)?;

and,

- (2) What do the new rules say?

The new rules provide an additional tool in the defense of professional liability claims. The primary, existing tool for early dismissal is the Affidavit of Noninvolvement, which only applies to design professionals. For your reference, the Appendix includes the statute governing Affidavit of Noninvolvement.

II. Who Is a Professional Under Existing Law?

A professional liability claim is based on “error or omission” in the course of one’s profession. Obviously, not all jobs or occupations meet the definition of “professional.” We commonly use the term malpractice to describe a breach of standard of professional care.

Claims against professionals can be rooted in tort law or contract law. The duty owed by the professional can be determined by agreement, law, or the standard of care applicable to the profession.

The professional’s conduct is measured against the standard of care observed in the applicable profession, based on specialized education, knowledge and skill.

The main difference between a general liability case and professional liability case is the requirement for the plaintiff to submit expert testimony to establish certain elements of the claims, such as the standard of care, causation, or damages.

Pennsylvania law generally determines a “profession” based on common law (cases) or statute (licensing requirements) and focuses on the judgment necessary to perform the duties in that field. Mere licensing will not elevate an occupation to a profession. For example, barbers must be licensed, but barber malpractice is not a claim (currently) recognized by the courts.

Malpractice claims generally arise against health care providers, attorneys and design professionals, but there are others. Your organization may write errors and omissions coverage for some of these professions.

The following are examples of particular professions and the source for each:

<u>Profession</u> ¹	<u>Source</u>
Abstractor	<i>Hicks v. Saboe</i> , 521 Pa. 380, 555 A.2d 1241 (Pa. 1989)
Accountant	<i>In re Phar-Mor Securities Litigation</i> , 892 F. Supp. 676 (W.D.Pa. 1995)
Ambulance Service	<i>Morena v. South Hills Health System</i> , 462 A.2d 680 (Pa. 1983)
Architect	63 P.S. § 34.1
Attorney	<i>Hughes v. Conol-Penna. Coal Co.</i> , 945 F.2d 594 (3d Cir. 1991)
Auctioneer	63 P.S. § 734.1
Blood Bank	<i>Marcella v. Brandywine Hospital</i> , 838 F. Supp. 1004 (E.D. Pa. 1993)
Chiropractor	63 P.S. § 525.101
Court Appointed Professional in Bankruptcy Proceedings	<i>In re Metro Transportation Co.</i> , 113 B.R. 874 (Bankr. E.D. Pa. 1990)
Dentist	63 P.S. § 120
Engineer	63 P.S. § 148
Geologist	63 P.S. § 149
Home Care Facility	55 Pa. Code § 2620
Hospital	<i>Flagiello v. Pennsylvania Hospital</i> , 208 A.2d 193 (Pa. 1965)
Insurance Agent and Broker	40 P.S. § 232

1

See generally, *Stephen M. Feldman, Pennsylvania Trial Guide: Professional Malpractice* (3d ed. 1999). See also, Pennsylvania Code, Title 49 (“Professional and Vocational Standards”) [available at: <http://www.pacode.com/secure/data/049/049toc.html?bpoaNav=|>>].

Investment Broker	70 P.S. § 1-101; <i>Merrill, Lynch, Pierce, Fenner & Smith v. Perelle</i> , 514 A.2d 552 (Pa. Super. 1986), and federal statutes
Medical Laboratory	<i>Coldgo v. Bowman</i> , 601 A.2d 342 (Pa. Super. 1992).
Mental Health Counselor	<i>Tuman v. Genesis Assoc.</i> , 894 F. Supp. 183, 187-89 (E.D. Pa. 1995)
Nurse	<i>Navarro v. George</i> , 615 A.2d 890 (Pa. Cmwlth. 1992)
Personal Representative of Estate	<i>In re Estate of Kurkowski</i> , 409 A.2d 357 (Pa. 1979).
Pharmacist	63 P.S. § 390-1
Physical Therapist	63 P.S. § 1301
Physician	<i>Hamil v. Bashline</i> , 392 A.2d 1280 (Pa. 1978)
Physician's Assistant	63 P.S. § 422.13
Podiatrist	63 P.S. § 42.1
Real Estate Appraiser	<i>Dressler Assoc., Inc. v. John A. Welch Real Estate Appraisers, Inc.</i> , 632 A.2d 906, 909 (Pa. Super. 1993).
Real Estate Broker	63 P.S. § 455.201
Surveyor	63 P.S. § 149; <i>Wicks v. Milzoco Builders, Inc.</i> , 435 A.2d 1260 (Pa. Super. 1981).
Title Insurer	<i>Bortz v. Noon</i> , 698 A.2d 1311, 1318 (Pa. Super. 1997)
Trustee	<i>In re Estate of Campbell</i> , 692 A.2d 1098 (Pa. Super. 1997)
Veterinarian	63 P.S. § 485.1 <i>Price v. Brown</i> , 545 Pa. 216 (Pa. 1996).

If you need to confirm the status of a professional's license, visit the Commonwealth of Pennsylvania's professional license page at:

<http://www.licensepa.state.pa.us/default.asp>

As a practical matter, your organization may consider others to be professionals, and that conclusion is normally based on the existence of errors and omissions coverage for that "profession."

As seen below, **the new rules do not apply to every profession**. In order for the new rules to apply, the profession must be enumerated in the text of the new rule.

II. What Does the New Rule Require?

The rule changes affect several stages of case handling. Initially, a threshold determination must be made of whether the new rules apply to any given case.

For your future reference, complete copies of the Pennsylvania Supreme Court's Order and the new Rules are attached as an Appendix.

A. Who's Affected?

The first and most important thing to learn about the new rule is the ability to recognize when the rule might apply.

The new rules apply to *many* but not all licensed professionals. The new rule applies to claims against:

- medical doctors
- nurses
- dentists
- chiropractors
- pharmacists

- physical therapists
- psychologists
- veterinarians
- accountants
- architects
- engineers
- land surveyors
- attorneys.

Compare this list to your organization's insureds, and recognize that you will need to adjust initial case handling procedures. Also, refer to this list when considering the joinder of additional defendants based on different facts, bearing in mind that improper joinder could result in sanctions - not to mention the initial costs of having a "qualified expert" certify that the joinder² of the Additional Defendant has merit (see below).

Who Is Not Covered?

Although Rule 1042.1 applies broadly to *many* licensed professionals, certain groups of licensed professional will not receive any relief from the reform. Compare the "licensed professionals" listed in Rule 1042.1 against the list on Pages 3 and 4. Most notably, real estate agents and life insurance agents (common target of E&O claims) are not included within the scope of the rule. Additionally, construction managers fall outside this new rule. The bottom line is that only those professions specifically listed in the rule can invoke the rule's benefits.

B. Certificate of Merit

The Rule appears to confront non-meritorious claims against professionals. Although many of the better plaintiff's lawyers consult qualified experts prior to commencing a lawsuit, there are many instances where early consultation with a qualified expert does not take place and would have prevented a weak claim from being brought in the first place. In many cases, professionals must wade through discovery before having the opportunity to move for dismissal (summary judgment). By that point, significant

² These decisions must be resolved with strategic decisions made in response to the effects that the Fair Share Act will have on joint and several liability.

defense costs will have been incurred and the professional will have invested a substantial amount of personal time in defending the case.

Therefore, the new rule attempts to place the burden on plaintiff's lawyers to assure that the claim has merit before commencing an action against a professional. Combined with new Rule of Civil Procedure 1023.1 governing groundless actions and assertions, the new Rule will provide another tool to combat frivolous litigation.

1. What Must Be Filed?

A "Certificate of Merit" ("Certificate") must be attached to the Complaint or filed within 60 days after the Complaint is filed. The plaintiff's attorney must certify to the Court that another licensed professional has "supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work . . . fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm." The professional supplying the written statement must be an expert in the field.

The new rule includes a form Certificate.

In the addition to the written statement requirement, the Certificate can state that the claim against a particular defendant is based on that professional's vicarious liability for another licensed professional/defendant. In that case, a Certificate must have been filed against the other professional.

Finally, the Certificate can simply state that expert testimony will not be necessary to establish the professional's negligence.

2. Who Must File a Certificate?

In multi-defendant cases, the plaintiff must submit a Certificate for each professional in the case.

If a defendant files a counter-claim against a professional (typically in a breach of contract/failure to pay for services case), then the defendant must file a Certificate against the plaintiff/professional.

A defendant that joins a professional as an additional defendant is not required to file a Certificate *unless* joinder is based on an additional or different set of negligent acts. For example, Owner sues Architect for preparing faulty construction drawings and specifications, and Complaint includes Certificate of Merit against Architect. Then, Architect joins Engineer that prepared

3. When Must the Certificate be filed?

The Certificate of Merit should be filed with the Complaint but no later than 60 days after the Complaint is filed.

The trial court may extend the deadline for filing upon good cause shown for a period not to exceed 60 days; however, there is no limit to the number of extensions that may be obtained by motion. Extensions will likely be granted if counsel was obtained only shortly before the expiration of the statute of limitations or if medical records required for a complete review have not been obtained. In all instances, the moving party must show due diligence.

The most important thing to remember is that extension must be obtained *prior to the expiration* of the allowable time.

4. Response to the Certificate

The new rule extends the time to file a responsive pleading to 20 days after the Certificate of Merit is filed.

If the plaintiff fails to attach or file a "Certificate of Merit" (or filed a non-complying COM) within the allowed time, then the defendant/professional can file preliminary objections requesting dismissal of the Complaint. Another basis for attack is the lack of a *qualified* expert's certification.

The Prothonotary can also enter judgment *non pros* if the plaintiff fails to file certification within the required time and allowable extensions.

C. Discovery

Pre-Certificate discovery is allowed by the new rules but will be limited to requests for production of documents or requests for inspection. Basically, the plaintiff can obtain the medical records, client file, or project documents necessary for the qualified expert to make a conclusion. The plaintiff can also inspect a facility.

A plaintiff may not proceed to general discovery against a professional unless the Certificate has been filed. Only requests for production of documents and requests for inspection may be served before the Certificate has been filed. Of course, the trial court may grant leave for specific discovery needed to obtain information to support the written statement and Certificate.

Quite likely, the number of motions to compel and motions for protective orders will increase as the professional attempts to limit plaintiffs' fishing expeditions. The rules do not affect the professional's ability to seek a protective order from discovery not needed for the plaintiff to obtain the certification.

D. Trial Expert: Who Testifies?

The expert testifying at trial does not need to be the same professional that supplied the written statement supporting the certificate of merit. Therefore, it is conceivable that a potential expert otherwise reluctant to testify in marginal cases might be willing to provide a written statement.

E. Sanctions

In addition to the newly enacted sanctions available under Rule 1023.4 for improper certification, professionals should be encouraged that the written statement must be produced by the plaintiff at the conclusion of the proceedings against that professional, whether by voluntary dismissal, order of court, or verdict. Therefore, the professional can further compare the written statement and obtain sanctions *after* the lawsuit is concluded if the action or the COM were brought without proper factual or legal bases. Sanctions can be imposed on the party, the lawyer or the law firm.

F. Summary

The new rule represents a significant reform to cases where a professional's judgement is seemingly always challenged after a bad outcome. Before the aggrieved plaintiff can commence an action, counsel must now affirm that the case has merit after consultation with a qualified professional that has provided a written statement. The Rule goes even further to afford professional's relief in the event a plaintiff fails to adhere to the letter and spirit of these mandates. Overall, the new rule should be expected to reduce the instances of truly frivolous litigation.

III. Examples

Example 1.

Carl Client files Complaint against Albert Attorney for malpractice, alleging that Attorney failed to commence Client's personal injury action within the allowable time.

Does new rule apply?

Yes. Client's Complaint raises professional liability claim and Albert Attorney meet the definition of "licensed professional" set forth in Rule 1042.1(b).

Example 2.

Same as #1, except that the Complaint does not include a Certificate of Merit. Attorney files Preliminary Objections to Complaint.

What result?

Plaintiff may take one of the following actions in response to the Preliminary Objections: (1) files a Certificate of Merit indicating qualified professional has provided a written statement; (2) files a Certificate of Merit indicating that expert testimony is not needed to establish malpractice under the facts; (3) moves for an extension of time before the expiration of the 60 day period; (4) moves for an extension and serves discovery requests; (5) dismisses action against Attorney.

NOTE: If plaintiff chooses option 2, then plaintiff will be barred from submitting expert testimony on the standard of care and causation.

Example 3.

Hannah Homebuyer sues Sally Seller for misrepresentations and failure to disclose material defects in connection with the sale of residential property. Seller joins her agent, Barry Broker, as an additional defendant, alleging that only Broker could have made misrepresentations or failed to disclose the condition of the property and that Broker advised certain defects did not need to be disclosed. Broker files Preliminary Objections to Complaint to Join, arguing that Seller has failed to file a Certificate of Merit against Broker - a licensed real estate broker.

What Result?

Broker's Preliminary Objections are denied because real estate brokers are not enumerated in Rule 1042.1

Example 4.

Pat Plaintiff files a Writ of Summons against Arnold Architect (your insured), a general contractor and a mason, alleging negligent design and construction of a retaining wall. Architect is adamant that his only input on the retaining wall related to selection of brick color and that his consulting engineer designed the retaining wall.

What Result?

Architect may consider filing an Affidavit of Noninvolvement, setting forth factual basis to support dismissal under 42 Pa. C.S.A. § 7502. Preliminary objections cannot be filed until Complaint has been filed.

Example 5.

Bud Weiser files Complaint with Certificate against Val Veterinarian, alleging mis-diagnosis that resulted in death of Weiser's renowned and prize-winning horse. Court grants motion for summary judgment. Veterinarian demands that Weiser produce the written statement obtained from qualified expert. Weiser refuses and Veterinarian files motion to compel.

What Result?

Court will order Weiser to produce written statement pursuant to Rule 1042.7(a). If written statement does not meet standard, then Court could award sanctions against certifying attorney.

APPENDIX

- Order and New Rules Governing Professional Liability Actions
- Affidavit of Noninvolvement (Design Professionals)

Affidavit of Noninvolvement (Design Professionals)

42 Pa. C.S. § 7502

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 42. JUDICIARY AND JUDICIAL PROCEDURE
PART VII. CIVIL ACTIONS AND PROCEEDINGS
CHAPTER 75. COMMENCEMENT OF ACTIONS
SUBCHAPTER A. GENERAL PROVISIONS

42 Pa.C.S. § 7502 (2002)

§ 7502. Affidavit of noninvolvement

(a) DISMISSAL BY AFFIDAVIT.--IN ANY ACTION FOR NEGLIGENCE, ANY CONSTRUCTION DESIGN PROFESSIONAL WHO IS RETAINED TO PERFORM PROFESSIONAL SERVICES ON A CONSTRUCTION PROJECT MAY HAVE THE ACTION AGAINST SUCH CONSTRUCTION DESIGN PROFESSIONAL DISMISSED UPON THE FILING OF AN AFFIDAVIT OF NONINVOLVEMENT.

(b) TOLLING STATUTE.--THE FILING OF SUCH AFFIDAVIT SHALL HAVE THE EFFECT OF TOLLING THE STATUTE OF LIMITATIONS AS TO THE AFFIANT WITH RESPECT TO THE CLAIM AT ISSUE.

(c) REINSTATEMENT.--IF THE COURT DETERMINES THAT THE STATEMENTS MADE IN ANY AFFIDAVIT FILED UNDER SUBSECTION (A) ARE INACCURATE, THE COURT SHALL IMMEDIATELY REINSTATE THE ACTION AGAINST THE AFFIANT. IN ANY ACTION WHERE THE AFFIANT IS FOUND BY THE COURT TO HAVE KNOWINGLY FILED A FALSE AFFIDAVIT, SUCH CONDUCT SHALL CONSTITUTE JUST CAUSE FOR THE COURT TO INSTRUCT THE JURY THAT IT MAY AWARD EXEMPLARY DAMAGES IN RELATION TO SUCH CONDUCT.

(d) DISCOVERY.--IN ANY ACTION REINSTATED PURSUANT TO SUBSECTION (C), OR IN ANY CASE WHERE THE CONSTRUCTION DESIGN PROFESSIONAL IS LATER JOINED AS A DEFENDANT, ALL DISCOVERY TAKEN IN SUCH ACTION PRIOR TO THE REINSTATEMENT OR JOINDER MAY BE USED FOR ANY PURPOSE PERMISSIBLE UNDER ANY STATUTE OR RULE OF COURT AS IF THE REINSTATED OR JOINED DEFENDANT HAD PARTICIPATED FULLY IN

THE ACTION FROM THE DATE OF FILING.

(e) DEFINITIONS.--AS USED IN THIS SECTION, THE FOLLOWING WORDS AND PHRASES SHALL HAVE THE MEANINGS GIVEN TO THEM IN THIS SUBSECTION:

"Affidavit of noninvolvement." A statement, in writing, setting forth with particularity facts which demonstrate that the construction design professional is misidentified or otherwise was not involved with regard to the cause of the injury or damage, individually or through its servants or employees, in the performance of professional services which forms the subject matter of the action, signed by the party making it, and sworn to or affirmed before an officer authorized by the laws of this Commonwealth to take acknowledgments of deeds or to administer oaths.

"Construction design professional."

- (1) Any person who is an architect, professional engineer, landscape architect or land surveyor licensed by the appropriate State board to practice such profession in this Commonwealth.
- (2) Any corporation organized to render professional services through the practice of one or more of such professions in this Commonwealth.
- (3) Any employee of such professional who is assisting or representing the professional in the performance of professional services on the site of the construction project.

Affidavit of Noninvolvement (MCARE Act)

40 P.S. § 1303.506

PENNSYLVANIA STATUTES
TITLE 40. INSURANCE
CHAPTER 5C. MEDICAL CARE AVAILABILITY AND REDUCTION OF ERROR
(MCARE) ACT
CHAPTER 5. MEDICAL PROFESSIONAL LIABILITY

40 P.S. §§ 1303.506 (2002)

§§ 1303.506. Affidavit of noninvolvement

(a) GENERAL PROVISIONS.--ANY HEALTH CARE PROVIDER NAMED AS A DEFENDANT IN A MEDICAL PROFESSIONAL LIABILITY ACTION MAY CAUSE THE ACTION AGAINST THAT PROVIDER TO BE DISMISSED UPON THE FILING OF AN AFFIDAVIT OF NONINVOLVEMENT WITH THE COURT. THE AFFIDAVIT OF NONINVOLVEMENT SHALL SET FORTH WITH PARTICULARITY THE FACTS WHICH DEMONSTRATE THAT THE PROVIDER WAS MISIDENTIFIED OR OTHERWISE NOT INVOLVED, INDIVIDUALLY OR THROUGH ITS SERVANTS OR EMPLOYEES, IN THE CARE AND TREATMENT OF THE CLAIMANT AND WAS NOT OBLIGATED, EITHER INDIVIDUALLY OR THROUGH ITS SERVANTS OR EMPLOYEES, TO PROVIDE FOR THE CARE AND TREATMENT OF THE CLAIMANT.

(b) STATUTE OF LIMITATIONS.--THE FILING OF AN AFFIDAVIT OF NONINVOLVEMENT BY A HEALTH CARE PROVIDER SHALL HAVE THE EFFECT OF TOLLING THE STATUTE OF LIMITATIONS AS TO THAT PROVIDER WITH RESPECT TO THE CLAIM AT ISSUE AS OF THE DATE OF THE FILING OF THE ORIGINAL PLEADING.

(c) CHALLENGE.--A CODEFENDANT OR CLAIMANT SHALL HAVE THE RIGHT TO CHALLENGE AN AFFIDAVIT OF NONINVOLVEMENT BY FILING A MOTION AND SUBMITTING AN AFFIDAVIT WHICH CONTRADICTS THE ASSERTIONS OF NONINVOLVEMENT MADE BY THE HEALTH CARE PROVIDER IN THE AFFIDAVIT OF NONINVOLVEMENT.

(d) FALSE OR INACCURATE FILING OR STATEMENT.--IF THE COURT DETERMINES THAT A HEALTH CARE PROVIDER NAMED AS A DEFENDANT FALSELY FILES OR MAKES FALSE OR INACCURATE STATEMENTS IN AN AFFIDAVIT OF NONINVOLVEMENT, THE COURT UPON MOTION OR UPON ITS OWN INITIATIVE SHALL IMMEDIATELY REINSTATE THE CLAIM AGAINST THAT PROVIDER. IN ANY ACTION WHERE THE HEALTH CARE PROVIDER IS FOUND BY THE COURT TO HAVE KNOWINGLY FILED A FALSE OR INACCURATE AFFIDAVIT OF NONINVOLVEMENT, THE COURT SHALL IMPOSE UPON THE PERSON WHO SIGNED THE AFFIDAVIT OR REPRESENTED THE PARTY, OR BOTH, AN APPROPRIATE SANCTION, INCLUDING, BUT NOT LIMITED TO, AN ORDER TO PAY TO THE OTHER PARTY OR PARTIES THE AMOUNT OF THE REASONABLE EXPENSES INCURRED BECAUSE OF THE FILING OF THE FALSE AFFIDAVIT, INCLUDING A REASONABLE ATTORNEY FEE.