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# THE SCOPE

## DENTAL EDITION

NY

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## INSIDE





EXECUTIVE MESSAGE

# To Our MLMIC Insurance Company Policyholders:

Have you been sued by a patient for malpractice? Approximately 50% of MLMIC Insurance Company's physician policyholders have. Before I became Chief Medical Officer, back when I was another MLMIC insured, I became one of those 50%.

Most practitioners who have been sued for malpractice do not want to talk about it, and that is understandable. In my experience, it is a mostly negative, unpleasant series of events.

I would encourage you to visit YouTube to view the first episode of **MLMIC's Talk Studio:** a presentation on my experiences in which I describe how it feels to be sued. By bringing this process "out of the shadows," I hope to both help prepare other practitioners for what to expect when sued and also commiserate with my peers who have gone through this ordeal. For them, knowing that their experience was not unique may provide some level of comfort.

Future episodes of MLMIC's Talk Studio will offer other presentations of interest to MLMIC's policyholders, as well as to their administrators. Most recently, two attorneys from Fager Amsler Keller & Schoppmann, LLP, counsel to MLMIC Insurance Company, **discussed the 2021 NYS Legislative Session** and its ramifications to healthcare as documented in the most recent issue of **The Albany Report.**

As always, I welcome any comments, questions, and suggestions you may have.

**John W. Lombardo, MD, FACS**
*Chief Medical Officer*, MLMIC Insurance Company
**jlombardo@mlmic.com**

# Defending the Dental Small Claim: A Sense of Humor Can Help

**Fager Amsler Keller & Schoppmann, LLP**

*Originally published in MLMIC Insurance Company's* Dental Dateline *newsletter, the following article then reported that the number of dental professional liability cases filed in New York's small claims courts had significantly increased over the previous 10 years.*

MLMIC Insurance Company continues to see small claims suits filed against our insured dentists throughout the state. Disgruntled patients seem determined to drag dentists into court to seek compensation and air their grievances about perceived negligent treatment. Ease of access to city courts, coupled with a patient's unrealistic expectations, can put a dentist on defense.

If you are being sued by a patient in small claims court, promptly call **MLMIC Insurance Company.** A determination will be made, based upon the allegations, whether to assign an attorney. Resist the urge to handle the case yourself just because it is in a small claims court. If nothing else, in many cases of negligence, when you are represented by legal counsel, a judge may grant professional courtesy and hear your case earlier than if you did not have an attorney. This may save you many hours away from the office, particularly when there is a crowded municipal court docket.

## The Claim

Some disenchanted patients use the opportunity to complain that the new dentures they inserted this morning do not feel exactly the same as the ones they have worn for the past 30 years or, oftentimes, the same as their natural teeth did. The term demonstrative evidence takes on new meaning when, on a rare occasion, a claimant removes his dentures to show the judge the alleged shoddy workmanship. It is an interesting legal and aesthetic experience for all involved.

Other than these disenchanted claimants occasionally waving their dentures in front of the court, what can you expect from your day or days in small claims court?

A small claim proceeding is commenced like this: For a nominal fee, usually $15 to $20, a dissatisfied patient files a "Notice of Small Claim" with the city court or, in towns and villages, the justice court, and becomes a "claimant." The notice usually contains allegations of negligence, although even this basic information can be indecipherable at times. It is almost a given that most notices of claim lack the usual legal terms that advise a defendant about the precise nature of the complaint(s) against the dentist. However, despite some very unusual claims, it is unlikely that a claim containing outlandish allegations (e.g., that the defendant dentist "implanted a transistor in my tooth causing me to receive a continual broadcast signal from a radio station on Saturn") will prevail.

> **The notice usually contains allegations of negligence, although even this basic information can be indecipherable at times.**

On occasion, the claim of malpractice arises as a counterclaim or response to a small claims action by the dentist or collection agency to collect unpaid dental fees. Usually, the defendant dentist is able to ascertain the nature of the claim based upon what happened during the last few office visits or from recent correspondence from the patient. Regardless, the patient must provide the specific details of their complaint at the hearing.

Many claimants appear in court without counsel, or "pro se." When claimants are not represented by counsel, the judge or hearing officer tends to be more patient with the claimant. Moreover, the rules of evidence and procedure do not apply in small claims court. Essentially, the claimant is given a full opportunity to tell their story. The length and tone of the claimant's presentation depends a great deal upon the judge. It is important to understand that sometimes the judge in a local court is not a lawyer. This is particularly true in rural communities.

> **Moreover, the rules of evidence and procedure do not apply in small claims court.**

## The Trial

Although you may have preconceived notions of what a courtroom atmosphere is like from watching television shows about lawyers, those expectations may require readjustment. For instance, the physical environment of the courtroom might not be what you expect. In some small claims courtrooms, the "courtrooms" have a judge's bench, a jury box, and tables for the parties. These are often located inside

an actual "courthouse." However, there are also "courtrooms," which consist of a room with a folding table and chairs.

The judge is seated on one side of the table, and you and the claimant may stand shoulder to shoulder on the other side. The building in which that type of courtroom is housed may also host other community activities, such as bingo. Further, while your case is being argued, dozens of other people may be waiting their turn to be heard by the judge. This means that your friends, neighbors, and possibly other patients may be sitting in the courtroom and listening to the plaintiff speak about you. You may well be the only non-lawyer professional present. Because most small claims cases typically involve landlord/tenant disputes or faulty workmanship by a homeowner's contractor, in this arena, a dental professional liability case clearly stands out.

> **This means that your friends, neighbors, and possibly other patients may be sitting in the courtroom and listening to the plaintiff speak about you.**

As in a regular trial, the claimant presents his/her case first, followed by any witnesses brought to court to support his/her claims. In most of these courts, the judge questions the claimant about the details of the case. In all courts, the defendant then has the opportunity to question the claimant after the claimant has completed their case presentation. This right to question a party, or a witness, is not one of the procedural rules that is "relaxed." When it is the defendant's turn to present, the same rules apply.

It is important that you be represented by counsel, even though the demand is for a "small monetary claim," since the same reporting requirements to insurers and government agencies often apply, as they do when a verdict is reached in New York State Supreme Court. Although it is important to have an attorney in such a court proceeding, some small claims judges may direct the defense attorney to keep their contribution "small," particularly when the claimant has appeared pro se. The advantage to you in having counsel is that your attorney will prepare you for testimony and organize the presentation of your case. If, however, the court is run in a more formal manner by the judge, your attorney will be allowed to question you and elicit your side of the story in a coherent, organized manner. Either way, the claimant also is permitted to question you at the conclusion of the "defendant's proof." Consider this portion of the proceedings to be a trial of your patience.

> **The advantage to you in having counsel is that your attorney will prepare you for testimony and organize the presentation of your case.**

Many questions from pro se plaintiffs will not be "questions" at all. Rather, they are often comments and opinions about your inabilities as a professional, as well as your shortcomings as a human being. Most judges will intervene and stop the claimant at this point, because personal attacks are not a permissible part of the process. Nevertheless, it can be very hard to keep your composure when someone whom you have gone out of your way to help makes you appear to be incompetent and/or only after their money.

## Arbitration

Some courts require the parties to appear on the hearing date but do not try the case on that date. Instead, the parties are directed to try to mediate the case for reasons of judicial economy, as cases that are settled do not take up the court's time. If, however, the parties cannot reach an agreement, a later trial date will be scheduled. Fortunately, many judges are sympathetic to the demands of a dentist's office schedule when this concern is presented by counsel and will agree to hear the case the same day, again as a professional courtesy. Nevertheless, the trial could require a full day out of your office. One way to minimize the time you spend in court is to request that your attorney contact the court and the claimant in advance, and make it known to both that the case will not be settled. At that time, counsel can request that a hearing be scheduled. Many courts will agree to this request.

Some New York counties require that all claimants in a small claims matter submit to mandatory arbitration. This entails a full hearing before a judicial hearing officer, usually an attorney or a retired judge, who issues a "nonbinding decision." The losing party in these situations can request a "trial de novo," or new trial. This is basically the legal equivalent of a "do-over." The matter is then tried again before a judge, as if the initial hearing never happened. While the two-procedure system is definitely an inconvenience for the defendant, particularly one who gets a favorable decision from the arbitrator, the arbitration does prepare the defendant and counsel for the arguments the plaintiff will make at trial. Further, this also forces the claimant to win the case twice if the arbitrator has decided in favor of the claimant. Fortunately, judges are less likely than arbitrators to partially satisfy both parties by "cutting the baby in two," because they are bound to apply the controlling law in professional liability cases.

**The losing party in these situations can request a "trial de novo," or new trial. This is basically the legal equivalent of a "do-over."**

At the close of proof, the judge makes his/her decision … or not. Sometimes a judge waits and issues a written decision days, weeks, or months after the hearing. There is a sound reason for not issuing a decision from the bench at the close of arguments. Losing claimants have been known to take defeat rather poorly. Thus, mailing the decision eliminates the possibility of an emotional or physical outburst in the courtroom. Unfortunately, the decision of the small claims judge may not be final. As rare as it is, a losing claimant may appeal the decision to a higher court.

## Case Study #1

### A Small Claims Trial

*The patient in this case saw the MLMIC-insured dentist for implant restoration on teeth #29 and #30. Prior to her visit, she had had implants placed in Brazil, two at #29 & #30 and one at #19. The implant at #19 had failed prior to her visit with the dentist. The patient was interested in having the implants at #29 & #30 restored and provided the information on the implants necessary to order the parts. The dentist explained to the patient what her insurance would cover and then gave her an estimate of what she would be responsible for. She agreed, and the dentist ordered the parts for an impression. The patient returned for impressions and paid her full copay of $1,625. Prior to this appointment, the insured had sent a preauthorization for services, but the insurance carrier requested additional information.*

*The patient's dental insurance carrier subsequently downgraded the approval from implant to partial denture when it learned that tooth #19 was missing. The patient was made aware of this and refused to pay the added cost associated with placement. She subsequently had new crowns placed in Brazil and demanded the return of her $1,625. As the insured already paid for the impression and lab parts, as well as the two crowns, the dentist offered a nominal refund in good faith, which was refused.*

*At the small claims trial, the dentist made an excellent witness. His attorney was able to produce office policy and consent forms signed by the patient that stated she was responsible for payment. It was demonstrated that the insured was paid only for the work performed and was not responsible for the failure of the patient's insurance carrier to cover the remaining costs associated with the placement of crowns in Brazil. The judge reserved decision initially and dismissed the case the following day.*

## The Burden of Proof

The statute which governs small claims procedures provides that the "court shall conduct hearings upon small claims in such a manner as to do substantial justice between the parties...." That is an imprecise standard which initially appears to permit the judge to decide a case based upon what she/he thinks is fair. Fortunately, the statute also requires the judge to render her/his decision in accordance with "the rules of substantive law." That is good news for the dentist defendant because the claimant must meet what is known as "the burden of proof."

In the New York State Supreme Court, which is the initial trial court for dental professional liability cases above the monetary limits of the small claims court, the plaintiff must prove that the defendant has departed from the accepted standard of care and that the dental negligence was the cause of the plaintiff's injury. In most cases, this requires testimony of an expert witness. Since $3,000 is the maximum award allowable by law in village and town courts for a successful claimant ($5,000 in city courts and $10,000 in New York City), claimants very rarely hire an expert. By law, the claimant must have an expert, in most cases, testify to win the case. Practically speaking, unless the claimant has a friend or relative who is both a dentist and willing to testify for free or a nominal fee, it would cost the claimant more to properly prove the case than the claimant could recover from the court.

So, why do people even bother to sue a dentist in a small claims court? Sometimes they are legitimately

## Case Study #2

### The Need for Expert Testimony

*The patient in this case sought treatment from a MLMIC-insured dentist for the replacement of crowns. Once these crowns were placed, the patient expressed dissatisfaction with their color, claiming they were too dark. The dentist agreed to replace these crowns. After replacing the first round of crowns with a lighter shade, the patient gave the green light, and they were permanently cemented in.*

*Almost a year later, the patient returned to the dentist complaining about the color of the crowns and eventually brought a small claims suit requesting $5,000. The court educated her that she would need an expert and the patient stated that she would retain one for the trial. On the day of trial, the dentist and his attorney appeared and were told by the court that the plaintiff had submitted a letter withdrawing the case as she was unable to find an expert to testify.*

aggrieved and simply do not know how the system works, i.e., that they require an expert to testify for them. Alternatively, they may be convinced that, despite this, they can somehow succeed. While moral outrage may work in the scripted world of TV judges, it does not usually work in the real world. However, there are occasions when a claimant does succeed in small claims court, despite the lack of expert testimony to support the case. For instance, the judge may rule for the claimant based upon the notion of substantial justice, even though he/she failed to meet the burden of proof, and award damages to the claimant. In such cases, an appeal to a higher court may overturn that decision.

## Appeals

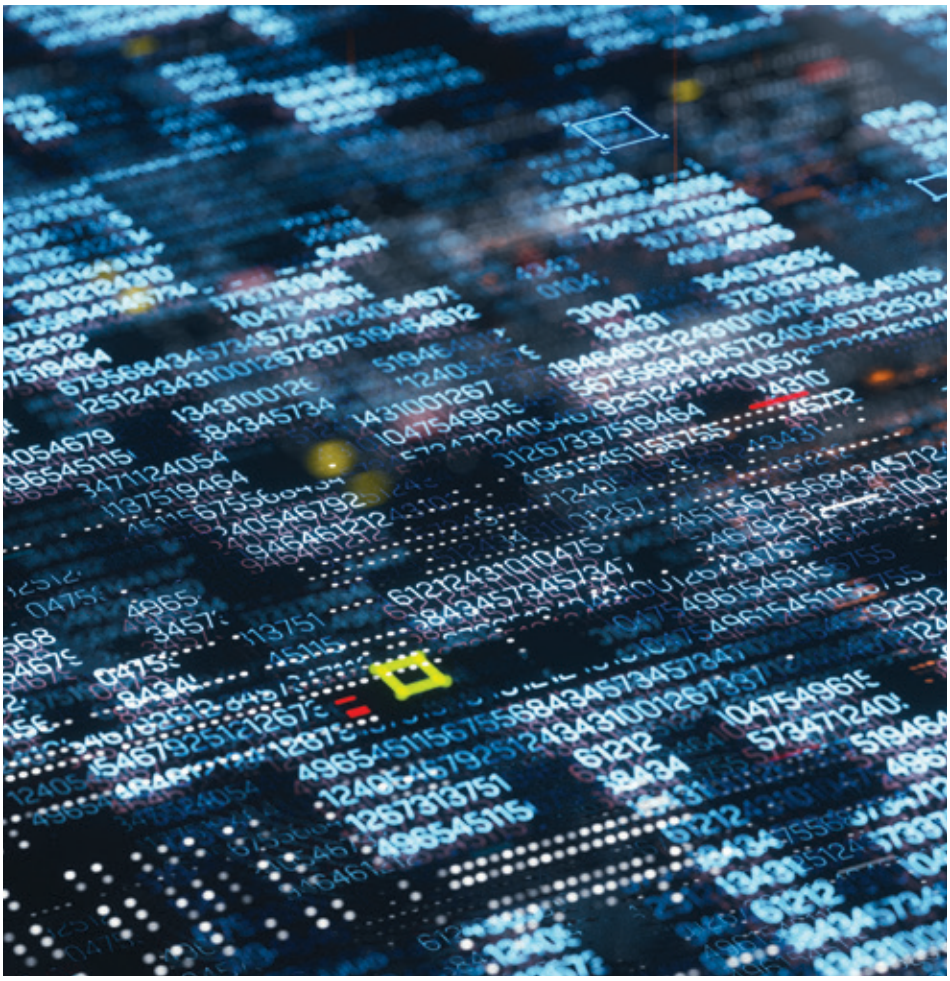
At the appellate level, the issues that the dentist's counsel can contest on appeal are only matters of law and not matters of fact. In other words, no new testimony is taken, nor is new evidence admitted. The lawyer, or the party who takes the appeal, must argue that the small claims court made an error of law in deciding the case in favor of the claimant. Thus, if the judge decided in favor of the claimant, despite the lack of any expert testimony to support the allegations of a deviation from the standard of care, that would be considered an error of law. If no expert testimony was provided by the claimant at the small claims level, and was required, the decision for the claimant is likely to be overturned.

In summary, while there may be entertaining and even humorous aspects to the case presented against you in a small claims court as noted above, a verdict against you may also have serious repercussions on your time, reputation, or even your professional liability history and credentials. Therefore, it is important that you notify MLMIC of service of a small claim proceeding promptly to protect your legal rights.

**Fager Amsler Keller & Schoppmann, LLP**

**Keith Vaverchak** is a Unit Manager with MLMIC Insurance Company's Claims department.

**kvaverchak@mlmic.com**



## National Practitioner Data Bank

The **National Practitioner Data Bank** (NPDB) is a web-based repository of reports containing information on professional liability payments and certain adverse actions related to healthcare practitioners, providers, and suppliers. Established by Congress in 1986, it is a workforce tool that prevents practitioners from moving state to state without disclosure or discovery of previous damaging performance.

A small claims court lawsuit that is decided in favor of a defendant does not have to be reported by the defendant or a professional liability insurance carrier to the NPDB. However, if the parties agree to a monetary settlement to the patient, or the patient otherwise prevails in a small claims case, payment by a dentist or an insurer must be reported to the NPDB. All settlements and judgments resulting in monetary payments to patients are reportable whenever patients make written demands for money.

## Stay Connected

**Get the latest updates and industry news from New York's #1 dental professional liability insurer. No one knows New York better than MLMIC.**

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Follow us for important industry updates and risk management resources.

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Get headlines and alerts that impact patient care in New York.

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# Website Compliance with the Americans with Disabilities Act

Since the implementation of the Americans with Disabilities Act ("ADA") in 1990, numerous lawsuits have been initiated alleging disability discrimination in "places of public accommodation." Recently, the number of ADA lawsuits has skyrocketed with claims that a business website is inaccessible to users who are visually or hearing-impaired or have limited English proficiency. It has been determined that websites fall under the definition of places of public accommodation.

The healthcare sector has been heavily targeted for ADA violations due to noncompliant websites, resulting in significant monetary implications and compliance costs relative to injunctive relief, as well as awards for attorneys' fees. Therefore, it is essential that providers assess their website for ADA conformity and implement modifications, if necessary, to minimize the potential for litigation and liability.

Healthcare providers, in conjunction with knowledgeable web designers, should make every effort to evaluate websites for ADA compliance. All measures should be taken to ascertain whether a website is accessible by all individuals, including those who have visual, auditory, or physical disabilities, or limited English proficiency. However, there are no clear ADA regulations that govern compliant web content. Courts have often cited the Web Content Accessibility Guidelines ("WCAG") to determine whether a website complies with ADA mandates. These guidelines are a very useful technical reference that focus on whether content is perceivable, operable, comprehensible, and robust.

To assist in determining uniform accessibility by all potential users, evaluation of content should include, but not be limited to, focusing on the overall appearance of the site, the availability of closed-captioning for all video content, the ability of users

to follow and control content, and the inclusion of content in several languages. In general, assessment of a website should address whether it provides effective communication and whether the site can be successfully navigated by prospective users.

Although ADA website compliance can be quite challenging, signs of good faith efforts to accommodate all possible web users will be helpful when faced with disability discrimination lawsuits. ADA litigation that targets websites can result in costly outcomes, and therefore, a proactive approach toward enhanced accessibility is strongly encouraged.

**Marilyn Schatz** is an attorney with Fager Amsler Keller & Schoppmann, LLC.

**mschatz@fakslaw.com**

## From Our Policyholders:

**Dr. Renuka Bijoor**

"I cannot tell you how much I appreciate the support and guidance I recently received from MLMIC. As practicing dentists, there will always be moments when we need some hand-holding to lead us out of a blind spot, or a patient ear to sound out our concerns in confidence.

Luisa Fernandez (Senior Dental Underwriter) gave me a patient listening and then directed me to Jodie Parrotta (Claims Specialist), who was unbelievably considerate and supportive and just what I needed at that moment. I am so grateful that MLMIC provides this level of support to all their policyholders, and I am so glad that this is the carrier I picked to ensure that I don't have sleepless nights!"

## FROM THE BLOG

MLMIC's dental blog provides ongoing and up-to-date news and guidance on important events and announcements that affect the practices of our dentist and oral surgeon policyholders.

You can also sign up to receive MLMIC's Dental Impressions – featuring the latest MLMIC Insurance Company news, and links to relevant and valuable industry articles.

JULY 26, 2021

### Be Prepared: Five Tips for Dental Residency

Residency can be very different from dental school. Having an idea of what to expect will help you start on a strong note. Read our top five tips for new or soon-to-be-new dentists as they prepare for residency. **READ MORE**

JUNE 14, 2021

### ADA and Federal Government Align on Priorities to End Opioid Epidemic

The Biden-Harris administration recently released its Statement of Drug Policy Priorities to continue the effort to end the opioid epidemic. The list works in tandem with the American Dental Association's similar goals to curb opioid use. Knowledge about opioid prescription misuse is crucial for dentists, who prescribe one in 10 opioid prescriptions in the United States. **READ MORE**

# Risk Management Checklists

MLMIC's series of Risk Management Checklists is designed to assist dentists and their administrators and staff with identifying potential areas of risk in the dental office setting. The strategies presented are drawn from risk management principles as well as our analysis of closed dental professional liability claims that involved office practice issues, improving patient care and satisfaction, helping prevent adverse outcomes, and minimizing professional liability exposure.

**To download a complete set of MLMIC's Risk Management Checklists, visit www.mlmic.com/why-mlmic/services-resources/checklists.**

## COMMUNICATION — CHECKLIST #4

### COMMUNICATING AND FOLLOWING UP CRITICAL TEST RESULTS

The communication of test results is an important part of providing care and may involve various healthcare professionals. Test results may be overlooked, lost, scanned into the wrong record, etc. Abnormal test results requiring follow-up present an additional risk if they are not received, reviewed, or communicated to the patient. This may result in missed or delayed diagnoses, patient injuries, and subsequent claims of malpractice. If a dentist orders a test, he or she is responsible for ensuring that the results have been received and reviewed. Dental practices should have policies and procedures in place for the management of test results.

| | YES | NO |
|---|---|---|
| 1. All ordered tests are documented in the patient's record. | ☐ | ☐ |
| 2. A process is in place to confirm and document the receipt of test results. Many electronic record systems allow practices to efficiently track pending laboratory/diagnostic studies. | ☐ | ☐ |
| 3. Patients are advised of all test results, normal or abnormal. This communication is documented in the record. | ☐ | ☐ |
| 4. All incoming laboratory reports and diagnostic tests are reviewed and authenticated by the dentist. | ☐ | ☐ |
| 5. The dentist documents communication of the test results to the patient. Any recommendations or interventions should also be documented. | ☐ | ☐ |
| 6. A system is in place for the follow-up of pending laboratory/diagnostic test results for their patients who have been discharged from the hospital, emergency department, or other dental provider the patient may have seen. Receipt and review of these results are documented in the patient's record. Communication of the results to the patient is also documented. | ☐ | ☐ |
| 7. Dentist responsibility for follow-up when tests are ordered for a patient by another specialist or consultant is clearly established. | ☐ | ☐ |

MLMIC Insurance Company Risk Management Department, (518) 786-2815, **RMC@mlmic.com**

# Access more options. More convenience.

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- Employment Practices Insurance
- Business Owners Policy (BOP)
- Worker's Compensation
- General Liability
- Data Breach
- Commercial Umbrella

**For a quick, no-obligation quote for your practice, contact Ellie Sistevaris: ellie.sistevaris@medpro.com, or call (888) 562-8979.**

# Have you seen Talk Studio yet?

Check out MLMIC's new video series on important and trending issues in professional liability, healthcare law, and risk management.

**Recent episodes of Talk Studio include:**

- Malpractice lawsuits from a defendant's perspective
- 2021 Legislative Impacts on New York Physicians and Hospitals

**Watch now at MLMIC.com/talkstudio.**


P.O. Box 1287
Latham, New York 12110

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**(800) ASK-MLMIC**