WHAT CONSTITUTES "PROFESSIONAL SERVICES"?

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CONTEXT

Many general liability policies exclude coverage for liability due to an insured's rendering or failure to render professional services. Most professional E&O insurers, on the other hand, intend to insure precisely that kind of liability. Policies usually express those intents by using the phrase *professional services* (or something similar) in either an exclusion or an insuring agreement.

Most policies make little effort to define the phrase *professional services* — perhaps because it evades precise definition. Even in policies attempting to define it, most such definitions are little more than statements to the effect that *professional services* means "any services of a recognized profession"[1] or "includes but is not limited to" a list of services.[2] The first such definition provides little enlightenment. The second kind of definition is often useful and instructive, but neither (a) defines *professional services* generally nor (b) provides clear guidance regarding whether services not on the list should be deemed professional or non-professional.[3]

That lack of definition can be problematic, because today people often use the term *professional* to refer to a wide array of callings, vocations, occupations, and jobs. Many

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occupations involve the use of one's mental faculties and judgment and require some form of specialized education or training, licensure, regulation by competency boards and government agencies, and adherence to a code of conduct or ethical practices. Also, people in almost every conceivable kind of job may sometimes refer to themselves as "professionals," if only to differentiate themselves from amateurs and part-timers. To complicate matters further, even those who qualify as "professionals" in almost anyone's book (*e.g.*, physicians, lawyers, accountants, architects, engineers, *etc.*) are often assisted by non-professional or paraprofessional personnel, and sometimes perform services requiring no particular technical expertise. As a result, there are frequent disagreements between insurers, and between insurers and their insureds, as to whether particular acts or omissions constitute the rendering or failure to render "professional services."

When trying to decide whether a particular act or omission constitutes the rendering or failure to render a "professional service," some insurance and risk management professionals focus exclusively on the kind of person who committed the act or omission: if the actor was a "professional" acting in the course of his or her profession, they conclude the act or omission was a "professional service"; if not, then not. There are two serious problems with that approach: (a) it leaves plenty of room for argument over who is or is not a "professional" and (b) it is not how most courts decide such issues, and can therefore lead to coverage positions that will not survive in court.

Disagreements over what constitutes a "professional service" have resulted in a large body of case law, in a wide variety of factual contexts. That case law is so fact-dependent, and its results so variable (both case-to-case and court-to-court), that it is difficult to do more than generalize about some of the basic concepts and approaches courts use to make such decisions.

COURTS' GENERAL DEFINITION OF "PROFESSIONAL SERVICES"

Although there is no single, standard, "bright-line" legal definition of *professional services*, most courts agree the phrase refers broadly to a calling, occupation, or business that (a) is followed by the insured, **and** (b) involves specialized education, knowledge, labor, judgment, and skill, **and** (c) is predominantly mental or intellectual (as opposed to physical or manual) in nature.[4] Some courts have suggested a "professional service" must also be performed in the

course of the insured's practice, pursuant to some express or implied agreement and for which it could reasonably be expected some compensation would be due.[5]

Three points about the above definition are noteworthy. First, although it sets the terms of debate, it still leaves plenty of room to argue about whether particular services are or are not "professional." Second, it encompasses far more than the traditional "learned professions."[6] Third, the identity of the actor matters: if I handle a coverage dispute for a client in the regular course of my law practice, I am clearly providing a professional service. However, if I design an office building for that client, I might not be providing a professional service: even though architecture is a profession, it is arguably not one when I dabble in it as an amateur with no training, knowledge, or experience in that discipline.[7] The same should go for an architect writing a coverage opinion.

THE IMPORTANT QUESTION IS USUALLY THE NATURE OF THE ACT OR SERVICES, NOT JUST WHETHER THE ACTOR WAS A PROFESSIONAL

Although the identity of the actor matters, it does not by itself determine the issue: not everything a professional does is a "professional service." When determining whether something constitutes a "professional service," most courts focus on the nature of the conduct, not just on the title or position of the actor. That is, the question of coverage usually turns on the nature and context of the alleged conduct, not just on whether the alleged tortfeasor happens to be a professional. Thus, a number of courts have held that a professional acting in a capacity that does not require the special training, knowledge, or expertise of his or her profession is not performing "professional services."[8]

Similarly, a number of courts have held that a professional is not performing "professional services" by managing routine commercial or business aspects of his or her practice, such as renting office space, hiring and firing employees, soliciting business, *etc.*[9] However, this is not necessarily the case when the insured performs such services for others, such as where an insured pre-screens potential employees for a client and gives advice about which ones to hire.[10]

In cases where a professional abuses his professional knowledge or relationship to commit deliberate misconduct for his own profit or gratification (*e.g.*, a physician who sexually abuses a patient), many courts have held such misconduct is not part of any "professional

service."[11] However, a few courts have sometimes taken a different view: where the allegedly tortious conduct took place in the course of providing a professional service and was "inseparably intertwined with" that service, those courts have held the tortious conduct was necessarily part and parcel of "professional services," even if it was otherwise clearly neither professional nor a service.[12]

CONDUCT MAY BE A "PROFESSIONAL SERVICE" EVEN IF PERFORMED BY NON-PROFESSIONALS, PARAPROFESSIONALS, OR INDEPENDENT CONTRACTORS

Most "professional services" involve clerical or administrative functions to at least some extent. In most professional practices, such functions are often delegated to and performed by non-professional or paraprofessional support staff: receptionists, clerks, secretaries, administrative assistants, and so forth. Although such support functions may seem strictly clerical or administrative when viewed in isolation, they can be critical to the proper delivery of professional services; even a seemingly trivial clerical or administrative error may sometimes lead to dire consequences. The professional may be liable for such consequences, even if the actual error or omission was committed by a non-professional employee in the course of a routine clerical function.

In such cases, a number of courts have held that "professional services" exclusions applied to clerical, administrative, or support functions performed by non-professionals.[13] Similarly, at least one court has held that a "professional services" exclusion barred coverage of the insured's liability for work the insured subcontracted to another professional in the same profession, because the subcontract did not diminish the insured's professional role or eliminate its responsibility for the over-all work.[14]

AN INSURED'S POTENTIAL LIABILITY MAY BE BASED ON BOTH "PROFESSIONAL SERVICES" AND THINGS OTHER THAN "PROFESSIONAL SERVICES"

A claim may allege facts that, if true, could give rise to potential liability for either ordinary negligence, professional malpractice, or both. This can be true even if the plaintiff's pleadings formally allege only a claim for professional malpractice: in many jurisdictions, the duty to defend depends more on the facts alleged in the complaint than on the formal legal

theories plaintiff's counsel chooses to plead. In such a case, a "professional services" exclusion often will not, by itself, negate a duty to defend the entire action, because of the remaining potential liability for ordinary negligence.[15]

HOW A POLICY MENTIONS "PROFESSIONAL SERVICES" CAN MAKE A DIFFERENCE

The precise context in which a policy uses a phrase like *professional services* can make a difference in how a court interprets and applies it. As noted at the outset, *professional services* and similar phrases can appear in either an insuring agreement or an exclusion, depending on the insuring intent. Courts usually read insuring agreements broadly, in a way calculated to broaden coverage. Exclusions, on the other hand, are usually read narrowly and strictly; again, in a way calculated to broaden coverage. This means the same court may well read a phrase like *professional services* differently in different cases, depending on its location and function in the policy.

The wording of the sentence in which the phrase appears can also make a difference. Either an insuring agreement or an exclusion might speak in terms of liability "arising from," "arising out of," "caused by," "due to," "because of," "by reason of," or "for" the insured's rendering or failure to render "professional services." Many courts interpret the phrases *arising out of* and *arising from* quite broadly — *i.e.*, as "originating from," or as referring to "but for" causation — while giving a more restrictive meaning to the others. Therefore, a liability that "arises out of professional services" is not necessarily also "caused by" or "for" those "professional services."

RECOMMENDATIONS

There are many dozens, perhaps hundreds, of reported decisions discussing the meaning of the phrase *professional services* in an insurance policy. The cases surveyed in this monograph comprise only the tip of a jagged legal iceberg. When confronted with an actual dispute, there is no substitute for a careful analysis of the specific facts of your case, coupled with a careful review of the case law to identify cases decided on similar facts and policy language.

Also, when drafting policy language or negotiating "professional services" language in insurance policies, underwriters and risk managers need to be aware of (a) how courts have interpreted *professional services* and (b) precisely how that phrase is to be used in the policy.

NOTES

[1] *E.g., Hedmann v. Liberty Mut. Fire Ins. Co.*, 158 Or.App. 510, 974 P.2d 755 (Ct.App. 1999).

[2] *E.g., State Automobile Mut. Ins. Co. v. Alpha Engineering Services, Inc.*, 208 W.Va. 713, 542 S.E.2d 876 (2000); *Sommers v. State Farm Fire & Cas. Co.*, 764 So.2d 87 (La.App. 2000); *Erie Ins. Exchange v. Colony Dev. Corp.*, 136 Ohio App.3d 406, 736 N.E.2d 941 (10th Dist. 1999); *St. Paul Ins. Co. v. Texas Dept. of Transp.*, 999 S.W.2d 881 (Tex.App., 1999); *Propis v. Fireman's Fund Ins. Co.*, 112 A.D.2d 734, 492 N.Y.S.2d 228 (4th Dep't 1985).

[3] Such list-type definitions are most persuasive when the claim is based on one of the activities explicitly listed in the definition. *E.g., State Automobile Mut. Ins. Co. v. Alpha Engineering Services, Inc.*, 208 W.Va. 713, 542 S.E.2d 876 (2000); *Utica Lloyd's of Texas v. Sitech Engineering Corp.*, 38 S.W.3d 260 (Tex.App. 2001). On the other hand, courts may interpret such list-type definitions to mean that anything not similar to the listed services is **not** a professional service. *E.g., Sommers v. State Farm Fire & Cas. Co.*, 764 So.2d 87 (La.App. 2000).

[4] *E.g., R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002); *Tradewinds Escrow, Inc. v. Truck Ins. Exchange*, 97 Cal.App.4th 704, 118 Cal.Rptr.2d 561 (Ct.App. 2002); *Abrams v. State Farm Fire & Cas. Co.*, 306 Ill.App.3d 545, 239 Ill.Dec. 534, 714 N.E.2d 92 (1st Dist. 1999).

[5] *E.g., Merlin B. Smith, Inc. v. Travelers Property Casualty*, 811 So.2d 1097 (La.App. 2002); *cf., Hedmann v. Liberty Mut. Fire Ins. Co.*, 158 Or.App. 510, 947 P.2d 755 (Ct.App. 1999) [physician who drugged woman for purpose of seducing her was not rendering "professional services," in part because she was neither a patient nor a member of the health plan with which physician was affiliated]. If that requirement were strictly enforced, it would mean that complimentary services performed for family, friends, or clients (*e.g., pro bono* legal services) could never be "professional services," even if otherwise clearly professional in nature. I am unaware of any case that so holds.

[6] *E.g., Tradewinds Escrow, Inc. v. Truck Ins. Exchange*, 97 Cal.App.4th 704, 118 Cal.Rptr.2d 561 (Cal.App. 2002) [escrow services are "professional services]; *Merlin B. Smith, Inc. v. Travelers Property Casualty*, 811 So.2d 1097 (La.App. 2002) [forester marking trees to be cut was performing a "professional service"]; *Titan Indem. Co. v. Williams*, 743 So.2d 1020 (Miss.App. 1999) [high school teacher's supervision of students was a "professional service," separate and apart from giving instruction in any academic discipline; *dicta*]; *State Farm Lloyds v. Performance Improvement Corp.*, 974 S.W.2d 135 (Tex.App. 1998) [management consultant who screened client's job applicants was performing a "professional service" for client]; *Alpha Therapeutic Corp. v. St. Paul Fire & Marine Ins. Co.*, 890 F.2d 368 (11th Cir. 1989) [lab technician testing plasma samples for hepatitis B virus was performing a "professional service"].

[7] *Cf., Sommers v. State Farm Fire & Cas. Co.*, 764 So.2d 87 (La.App. 2000) [service as executor of a decedent's estate was not an excluded "professional service," because insured (a) did not pursue such service regularly or as a vocation, and (b) had no special education, knowledge, or skill in how to be an executor].

[8] *E.g., R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002) [nurse's failure to report physician's unethical sexual molestation of patient did not involve covered "professional services," because determination of what constitutes immoral or unethical conduct by a physician is not a topic as to which a nurse receives or needs special training, learning, or attainment]; *Reliance Ins. Co. v. National Union Fire Ins. Co.*, 262 A.D.2d 64, 691 N.Y.S.2d 458 (1st Dep't 1999) [engineer on construction project was not providing excluded "professional services" when inspecting whether contractor was in compliance with contract and relevant safety laws; such inspection services did not require any engineering acumen, but only normal powers of supervision and observation]; *Chemstress Consultant Co., Inc. v. Cincinnati Ins. Co.*, 128 OhioApp.3d 396, 715 N.E.2d 208 (Ct.App. 1998) [even if engineer supervising construction project did not have a "professional" duty as an

engineer to safeguard workers at the site, it could still have such a duty based on general negligence principles; therefore, exclusion for "Professional Liability or Malpractice…in the conduct of any business, trade, (or) profession" did not bar a duty to defend construction worker's bodily injury claim]; *but see*, *Brockbank v. Travelers Ins. Co.*, 12 A.D.2d 691, 207 N.Y.S.2d 723 (3rd Dep't 1960), *appeal denied*, 9 N.Y.2d 609, 210 N.Y.S.2d 1025, 172 N.E.2d 293 (1961) [exclusion for "injury…due to…nursing services or treatment, or…any service or treatment…of a professional nature" barred coverage for claim of negligence in failing to properly place or adjust sideboards of patient's bed in convalescent home].

[9] *E.g.*, *Atlantic Lloyd's Ins. Co. of Texas v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472 (Tex.App. 1998) [lawyers' solicitation letter to potential client was not a "professional service," even though a lawyer's solicitation of business is regulated by professional disciplinary rules; soliciting work may be an unavoidable aspect of practicing law, as of any business, but requires no particular specialized legal knowledge or training]; *Mork Clinic v. Fireman's Fund Ins. Co.*, 575 N.W.2d 598 (Minn.App. 1998) [clinic's hiring and retaining physician who sexually abused patient was in the nature of administrative actions, not "medical services," and was therefore not within scope of professional E&O coverage]; *Propis v. Fireman's Fund Ins. Co.*, 112 A.D.2d 734, 492 N.Y.S.2d 228 (4th Dep't 1985) [insurance agency was not performing "professional services" when it hired, then fired, a special agent; such business activities are not inherent in the practice of the profession of underwriting, as opposed to any other occupation, calling, or vocation]; *cf.*, *Beauty by Encore of Hicksville, Inc. v. Commercial Union Ins. Co.*, 92 A.D.2d 855, 459 N.Y.S.2d 848 (2nd Dep't 1983) [exclusion for "tonsorial services" did not apply to claim that beauty shop customer was injured when she lit a cigarette and thereby ignited her hair, to which a flammable bleaching mixture had been applied: "[The insured] was negligent because the proprietor failed to warn the patron of the danger of smoking…not because of the rendering of or failure to render tonsorial services."]; *Ruotolo v. Aetna Cas. & Surety. Co.*, 56 Misc.2d 45, 287 N.Y.S.2d 622 (Sup.Ct., N.Y.Cty., 1968) [exclusion for "tonsorial services" did not apply to claim that barber accidentally poked customer in eye with whisk broom while brushing customer's clothes: "…[T]he act of a barber in brushing the clothing of a patron with a whisk broom is not part of the tonsorial service. It may be part of the business, just as helping a customer on with his coat or opening the door to facilitate his ingress or egress. But in no sense can it be considered a part of the tonsorial art."].

[10] *E.g.*, *State Farm Lloyds v. Performance Improvement Corp.*, 974 S.W.2d 135 (Tex.App. 1998) [pre-screening employment candidates and giving hiring advice as a management consultant was a "professional service"].

[11] *E.g.*, *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002) [physician's sexual abuse of patient was not within scope of E&O coverage for "professional services"]; *St. Paul Fire & Marine Ins. Co. v. Engelmann*, 639 N.W.2d 192 (S.Dak. 2002) [physician's alleged rape of patients during gynecological examinations was not within scope of E&O policy's coverage for "damages resulting from…[the] providing or withholding of professional services"]; *Hedmann v. Liberty Mut. Fire Ins. Co.*, 158 Or.App. 510, 974 P.2d 755 (1999) [physician who used his medical knowledge to drug and seduce non-patient was not providing excluded "professional services," so GL insurer had duty to defend]; *but see*: *Westchester Fire Ins. Co. v. Metropolitan Life Ins. Co.*, 280 A.D.2d 331, 721 N.Y.S.2d 14 (1st Dep't 2001) ["professional services" exclusion applied to claims that life insurer trained its agents to defraud customers] and *Abrams v. State Farm Fire & Cas. Co.*, 306 Ill.App.3d 545, 239 Ill.Dec. 534, 714 N.E.2d 92 (1st Dist. 1999) ["professional services" exclusion applied to claim that lawyers participated in scheme to defraud insurance company by staging "sudden stop" accidents].

[12] *E.g.*, *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, 720 P.2d 540 (Ct.App. 1986) [claim that osteopath unnecessarily manipulated patients' clitorises during routine gynecological exams was within scope of covered "professional services," because alleged tortious conduct occurred during the course of professional services and was "intertwined with and inseparable from" those professional services].

[13] *E.g.*, *Utica Lloyd's of Texas v. Sitech Engineering Corp.*, 38 S.W.3d 260 (Tex.App. 2001) [engineering firm engaged in "professional services," despite a conclusory allegation that those services were performed by engineering and non-engineering personnel]; *Millers Cas. Ins. Co. of Texas v. Flores*, 117 N.M. 712, 876 P.2d 227 (1994) [patient was seriously injured when unsupervised and untrained physician's assistant injected her with contraindicated drug; coverage was excluded by "professional services" exclusion in physician's business GL policy; physician's "hiring and supervision of employees to assist in giving care to his patients constituted an integral part of providing medical services…."]; *Alpha Therapeutic Corp. v. St. Paul Fire and Marine Ins. Co.*, 890 F.2d 368 (11th Cir. 1989) [supply of blood plasma was contaminated by hepatitis B because of lab

technician's error in transcribing test results; coverage was excluded by "professional services" exclusion in GL policy]; *Northern Ins. Co. of New York v. Superior Court*, 91 Cal.App.3d 541, 154 Cal.Rptr. 198 (Ct.App. 1979) [pregnant patient was subjected to unwanted abortion when physician's clerical employee mistook her for another patient; even though error was arguably "administrative," not "professional," claim was excluded by "professional services" exclusion in GL policy because "a physician has the professional duty to correctly identify a surgical patient before undertaking a particular procedure. The fact that the physician utilizes the assistance of a non-physician in the performance of that duty cannot alter the professional nature of that nondelegable duty."]; *Brockbank v. Travelers Ins. Co.*, 12 A.D.2d 691, 207 N.Y.S.2d 723 (3rd Dep't 1960), *appeal denied*, 9 N.Y.2d 609, 210 N.Y.S.2d 1025, 172 N.E.2d 293 (1961) [exclusion for "injury…due to…nursing services or treatment, or…any service or treatment…of a professional nature" barred coverage for claim of negligence in failing to properly place or adjust sideboards of patient's bed in convalescent home].

[14] *Herzog Contracting Corp. v. Oliver*, 805 So.2d 313 (La.App. 2001), *writ denied*, 812 So.2d 632 (2002) [analytical laboratory subcontracted part of soil analysis to another laboratory, but remained responsible for entire project; lab's client was not aware part of work was subcontracted].

[15] *E.g., St. Paul Fire and Marine Ins. Co. v. Engelmann*, 639 N.W.2d 192 (So.Dak. 2002) [although physician's alleged rape of patient did not involve providing or withholding "professional services," and was therefore not covered by E&O policy, allegations that he performed examination negligently by using improper positions, procedures, and methods were within scope of "professional services" and therefore were covered]; *Erie Ins. Exchange v. Colony Dev. Corp.*, 136 OhioApp.3d 406, 736 N.E.2d 941 (Ct.App. 1999), *reconsideration denied*, 136 OhioApp.3d 419, 736 N.E.2d 950 (2000), *appeal not allowed*, 88 OhioSt.3d 1502, 727 N.E.2d 925 (2000) ["professional services" exclusion in condominium developer's policy excluded coverage for claims of negligently designing condominium complex, but did not exclude claims of poor construction; construction activities are not "professional services"]; *Hartford Accid. & Indem. Co. v. Regent Nursing Home*, 67 A.D.2d 935, 413 N.Y.S.2d 195 (2nd Dep't 1979) ["Malpractice and Professional Services" exclusion in nursing home's GL policy did not exclude duty to defend, because facts raised possibility that insured might be liable for both ordinary negligence and professional malpractice].