

THE SCOPE

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EDITORIAL STAFF

Publisher

Thomas Gray, Esq.

Editor

John Scott

Staff

Rafi Cheema, Esq.

Kathleen Harth

Pastor Jorge

Shelly Kriete

Matthew Lamb, Esq.

John W. Lombardo, M.D., FACS

Patricia Mozzillo

Elizabeth Ollinick, Esq.

Tammie Smeltz, RPLU

Daniela Stallone



EXECUTIVE MESSAGE

Dear Policyholders,

Welcome to MLMIC's first issue of *The Scope* that features content for both our dental and medical policyholders.

This change is inspired by the acknowledgment that many risk pitfalls and practice enhancements that apply to one healthcare provider's specialty can apply to others and, at times, all. This issue's article on text message interactions between patients and providers provides a good example of the healthcare risk management truism that communication is key.

Illustrating points of this feature article, we provide a medical case study and a dental case study, both of which highlight where text messaging may have contributed to a poor patient outcome and certainly complicated the defense of malpractice allegations. Regardless of your practice specialty, should you choose to text with patients or other practitioners regarding patient care, there are lessons in both cases.

We at MLMIC have found case studies to be effective learning tools, and, going forward, medical and dental case studies will be features of every edition. In reading the fact patterns, you might identify the moments where care obviously or arguably deviated from the standard, and you may see examples of excellent care where bad patient outcome and ancillary issues led to settlement or a verdict. Those of us at MLMIC who help manage your risk and those who manage our insured's lawsuits learn from each and hope that you too will benefit from the experience of your colleagues.

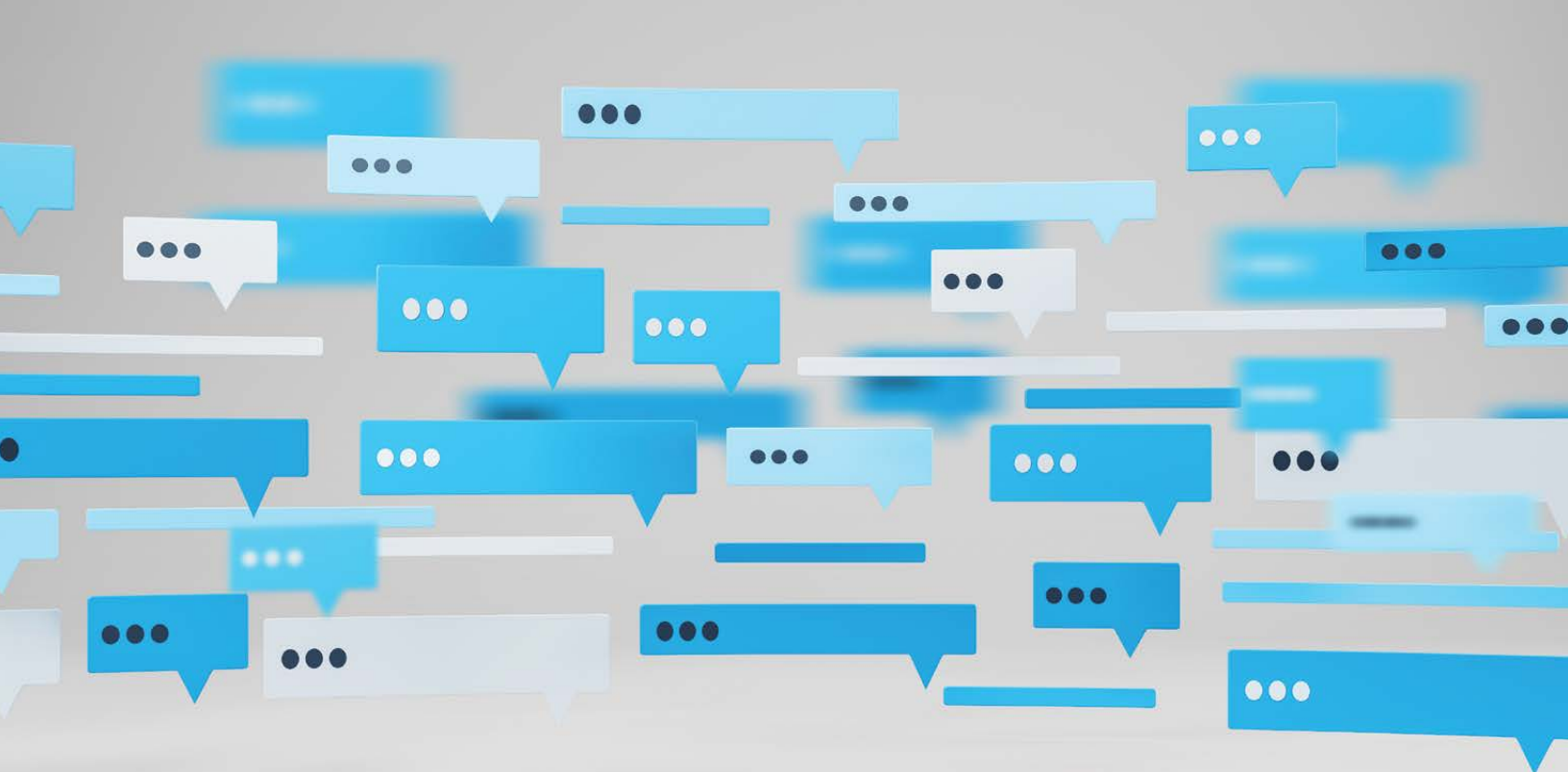
Best regards, and know that we're here to look after you while you look after your patients.

A handwritten signature in black ink, appearing to read "Tom Gray". The signature is fluid and cursive, with a long, sweeping tail.

Tom Gray, Esq.

Senior Vice President, MLMIC Risk Management

tgray@mlmic.com



The Risks of **Text Messaging With Patients**

The use of text messaging for patient communication may be convenient, increase patient engagement, and enhance the provider-patient relationship. However, providers should weigh the benefits of using text messaging, including text messaging from a personal cellphone, against the potential risks. Communicating with patients via text messaging opens the door to poor patient outcomes, complications in the defense of dental and medical malpractice claims, and violations of patient privacy laws.

Patient Safety and Liability Exposure

Miscommunication

Text message threads are a breeding ground for miscommunication. The messages are intended to be clipped representations of the more detailed statements and questions employed in verbal communication. Autocorrection, typos, emoticons, abbreviations, and a lack of non-verbal cues can lead to misinterpretation. Determining whether a message responds to the immediately preceding message rather than another message in the thread can also result in misunderstandings, and messages can easily be sent to the wrong recipient due to the autopopulate function on many devices. As a result, text messaging is not conducive to the exchange of complex and confidential information often required in the dental and medical context. The heightened potential for miscommunication when texting increases the likelihood of misdiagnoses and other medical errors, which can result in dental and medical malpractice lawsuits.

As a result, text messaging is not conducive to the exchange of complex and confidential information often required in the dental and medical context.

Given the nature of text messaging, providers are urged to consider verbal communication or in-person assessment when exchanging complex information such as subjective descriptions of physical symptoms or detailed treatment instructions. If the patient initiates communication by text message, the provider should consider whether the circumstances warrant a switch from text messaging to verbal communication. This is particularly important if the patient is taking mind-altering medications or has a mind-altering condition such as pain. Providers should also ensure each message is sent to the correct recipient and pause to review each message for clarity and typos before pressing send. Asking whether the

patient has questions and switching to verbal communication if the patient's responses indicate confusion are also good practices to reduce the risk of medical or dental malpractice liability.

Delayed Treatment

In addition to the risk of miscommunication, providers who choose to text patients via their personal cellphone may face medical or dental malpractice liability for delayed treatment. Allowing patients to text a provider's personal cellphone is not uncommon today. Providing patients with a personal cellphone number can reassure patients and make them feel that their dental or medical provider cares more about their well-being. However, while there are benefits to giving out a personal cellphone number, providers should also consider and plan for the risks. Unless the provider intends to be immediately available to the patient at all times of the day and night, providing a personal cellphone number can create false confidence, leading to poor patient outcomes. Patients who text the provider may wait an extended period for the provider's response rather than seeking emergency care. In some cases, the patient may not realize that their symptoms indicate the need for emergency treatment. If the delay results in a poor patient outcome, the provider can face a malpractice claim for delayed treatment. Plaintiffs may argue that the delayed response exacerbated the condition, resulted in the need for more extensive treatment, or, in some cases, resulted in death. To mitigate the potential for such claims, providers who allow patients to contact them on personal cellphone rather than using an on-call service must plan for the possibility of delayed response. This includes ensuring, in advance, that patients understand any limits on the provider's availability and explaining to them the circumstances under which they should immediately seek emergency treatment or contact an on-call provider or answering service. In addition, if the feature is available on the provider's cellphone messaging application, the provider should consider turning on the automatic response message advising patients of the provider's unavailability and directing them to call 911 in case of an emergency.

The Pitfalls of Photographs

Patients may include cellphone photographs with text messages to aid diagnosis. While photographs may appear to be helpful, they remain subject to criticism in dental and medical malpractice actions. Plaintiffs may challenge the quality of the photograph by arguing, for example, that the color is inaccurate or that the photograph provides an incomplete picture of the affected area. Before diagnosing a condition based on a cellphone photograph, providers should consider whether an in-person assessment is more appropriate based on the physical condition under consideration.

Gaps in the Records and Missing Evidence

Failure to retain text messages in patient records can violate the Health Insurance Portability and Accountability Act (HIPAA) record-keeping requirements, compromise patient care, and complicate a provider's defense in a medical or dental malpractice action. Text messages exchanged via a personal device are difficult to include in the EHR. Inputting the messages may require printing, dating, signing, and scanning the information to the record. As a result, text messages often do not make it into the patient's record. Regardless of the burden, all clinically significant patient information should be imported to the patient's record. This includes information exchanged via text message. Failing to input information from text messages in a timely manner creates gaps in the chronology of care, which can compromise critical decision making and lead to misdiagnosis based on a lack of complete clinical picture.

Text messages can be used as evidence to resolve disputes or demonstrate adherence to the standard of care.

Gaps in a patient's medical or dental record due to absent text message exchanges can also complicate the defense of a medical or dental malpractice claim. Text messages can be used as evidence

to resolve disputes or demonstrate adherence to the standard of care. Text messages that are not imported into the medical or dental record and are lost or deleted may create difficulties in justifying diagnosis and treatment decisions.

Failing to import text messages into the patient's record also lends itself to penalties in litigation. If the provider is not consistent with which messages are saved and deleted, or messages are auto-deleted based on device settings, the plaintiff may claim that the provider intentionally deleted a particular message or, in legal terms, "spoliated" evidence. If the court agrees with the plaintiff's argument, the judge may instruct the jury to infer that the missing text message would have been unfavorable to the provider or may prevent the provider from using the missing message to support the defense.

What Would the Jury Think?

Text messaging is generally an informal, hasty method of communication, ripe for off-the-cuff statements that are not up to professional standards for patient communication. Informal or unprofessional text messages can affect the optics of a dental or medical malpractice lawsuit, invoking an emotional response from a jury, which can turn a defensible case into a settlement or result in higher damages awards. Providers should avoid overly friendly communications and consider whether they would want the message read to a jury.

Text Messaging and HIPAA Compliance

First, it must be noted that while HIPAA does apply to text messaging, it does not prohibit the use of text messaging in healthcare. Text messaging using an unsecured platform such as Short Message Service (SMS), generally included on personal cellphones, is permissible if a patient initiated the communication by unsecure text or exercised the right to request confidential communication by unsecure text. In all other circumstances, any communication of protected health information (PHI) transmitted by text must be conducted via a HIPAA-compliant text messaging service.



The Security Rule

The Security Standards for the Protection of Electronic Protected Health Information,¹ commonly known as the Security Rule, requires providers to implement safeguards to protect the confidentiality, integrity, and availability of electronic PHI (ePHI).

Protecting ePHI requires providers to put access controls in place and encrypt data while it is in transit and at rest.

Protecting ePHI requires providers to put access controls in place and encrypt data while it is in transit and at rest. Access controls limit who can view and send messages containing PHI, and encryption ensures that even if the message is intercepted, the data remains unreadable to unauthorized parties. Additionally, access controls are designed to ensure that ePHI cannot be altered or accidentally destroyed.

In summary, the Security Rule technical safeguards require providers who are subject to HIPAA to:

- ensure that only authorized users who require the information to perform their duties have access to PHI

- put in place a method to monitor the activity of authorized users
- require authorized users to confirm their identities with a unique username and password
- establish policies and procedures to ensure PHI is not altered or destroyed; e.g., the auto-delete function that is featured on many cellphones will delete messages after a certain time period and should be disabled
- encrypt PHI to ensure it is unusable if it is intercepted after it is transmitted outside the provider's security system²

Most cellphone text applications use a standard text messaging platform or SMS. Providers should be aware that SMS texts fail to meet the requirements of the Security Rule. Senders of SMS text messages have no control over the messages after they have been sent. Messages can easily be sent to an incorrect recipient or forwarded on by an intended recipient to an unauthorized user, and SMS platforms do not encrypt data, so messages can be easily intercepted.

Minimum Necessary Standard

In the context of text messaging, the HIPAA “minimum necessary standard” requires healthcare professionals to limit the PHI they share through texts to the purpose of the communication. The

¹ 45 CFR Part 160 and Part 164, Subparts A and C

² 145 CFR § 164.304

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minimum necessary standard can ensure that no extra information is at risk of exposure.

Patient Preference and Consent

Patients have the right to waive HIPAA privacy protections and can choose to communicate by less secure means such as unsecure text messages. Under §164.522(b) of the HIPAA Privacy Rule, patients have the right to request confidential communications by “alternative means,” which includes an unsecure text message application or platform. If the request is “reasonable,” the provider must agree to the request even if the alternative method introduces risks to the confidentiality, integrity, and availability of PHI.

In such cases, providers need to obtain explicit consent from patients before sending text messages containing PHI. The less secure communication should occur only after obtaining the patient’s written consent. This applies regardless of the messaging platform, including SMS platforms typically used on personal cellphones. Dental and medical practices should develop consent forms that clearly outline the scope of communication and the purpose for which text messaging will

Dental and medical practices should develop consent forms that clearly outline the scope of communication and the purpose for which text messaging will be used.

be used. Providers should also inform patients about the risks and benefits of using text messaging for the communication of PHI, including the possibility of interception or unauthorized access to messages. The consent form should explain the limited confidentiality of such communication, memorialize the patient’s agreement with the waiver of privacy, and require the patient’s signature.

Risk Management Tips

Providers who choose to use text messaging as a mode of communication with patients should develop and implement clear policies and procedures to ensure text messaging is as risk-free as possible.



Documentation

- Develop clear policies for retaining text messages used for clinical decision making in the patient's medical record.
- If the EHR does not integrate text messages, develop a system to ensure that text messages are included in the medical record. One option is to print, sign, date, and scan the message into the EHR. Another option is to dictate or transcribe the text message into the EHR verbatim, including the time, date, and identity of the sender of each message within the thread, and note that the communication occurred via text message.

HIPAA Compliance

- Unless a patient explicitly consents in writing to communication by unsecure means, do not include PHI in non-encrypted messages.
- Do not provide patients with a personal cellphone number that uses an unsecure platform such as SMS until the patient consents in writing and understands the implications of texting through an unsecure platform.
- Consider using a HIPAA-compliant messaging platform designed specifically for healthcare communication and that provides encryption, access controls, and secure storage of PHI.
- Double-check the patient's phone number before pressing send to avoid sending information to the wrong recipient.
- If a text message containing PHI is sent to the wrong recipient, notify the intended recipient and request deletion of the message from the unintended recipient's device. Document the incident to maintain an audit trail.
- To protect against risks related to lost or stolen devices, ensure devices are protected with strong passwords and two-factor authentication.
- Regularly update devices to obtain security updates.

Professionalism and Clarity

- For complex or sensitive information, or where a patient is taking mind-altering medications or has a mind-altering condition, including pain, opt

for in-person or telephone conversations to avoid miscommunication. Absent unusual circumstances, avoid diagnosis based on cellphone photographs.

- Avoid using abbreviations, textese, overly informal language, or emoticons, and carefully review for any autocorrect errors before pressing send.
- Avoid making statements that could be construed as an admission of fault.
- Consider how a judge or jury would perceive the message.
- Confirm receipt of texts; for example, by using cellphone read receipt options.
- Ensure the patient understands all instructions.

Emergency Situations

- When providing patients with personal cellphone numbers, ensure (in addition to prior consent) that the patients understand any limitations on the provider's availability and when to seek emergency treatment.
- If personal cellphone numbers are provided, set boundaries to ensure the personal cellphone is used only under specified circumstances and at specified times.
- If text messaging is available at all hours, advise patients of the time period during which they can expect a response, and direct patients to urgent care or an emergency department in the case of an urgent situation.

Conclusion

Texting as a mode of communication with patients has some benefits. However, providers should remain aware of the pitfalls of text messaging and implement risk management strategies to avoid privacy violations, poor patient outcomes, and complications in defending dental and medical malpractice actions.



Elizabeth Ollinick is an Attorney with MLMIC Insurance Company's Legal Department.

eollinick@mlmic.com

FROM MLMIC.COM



July 23, 2025

Open Bar: Handling Arons Interview Requests From Attorneys

Question: I've received an attorney's request to discuss patient information, but I'm not named in the lawsuit. How do I proceed?

Response: In the worlds of medicine and dentistry, it is not unusual for non-party treating providers to receive a request from an attorney to discuss a patient's medical or dental condition. As is required, this request is typically accompanied by an *Arons authorization* (also known as a speaking authorization) signed by the patient. The term comes from the New York case *Arons v. Jutkowitz*, in which the Court of Appeals ruled that attorneys may privately interview an adverse party's treating physician when the adverse party has affirmatively placed their medical condition in controversy. A party places their medical condition in controversy by bringing a lawsuit alleging injuries, which waives their physician-patient privilege.

HIPAA safeguards require adherence to certain procedural steps when requesting an *Arons* interview.

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June 26, 2025

The Verdict: Beyond the Exam Room: Bridging the Gap in Dental Care With Emmaus Ministries

In the latest episode of MLMIC's podcast, *The Verdict*, host Tammie Smeltz, RPLU, interviews true champions of community health, Sheila Austin, R.N., from Emmaus Ministries, and volunteer dentists Stephen Streiff, D.D.S., and Gerald Danaher, D.D.S., about their mission to provide essential dental care to Syracuse, New York's underserved population.

The conversation explores how Emmaus Ministries addresses the significant barriers many face in accessing quality dental care, which often leads to preventable pain and long-term health issues.

[Read More >>](#)

July 30, 2025

Elevate Your Practice: Curated Insights for Your Medical Office

Navigating the ever-expanding volume of information in the medical field can be a daunting task. How do you efficiently discern critical insights that truly make a difference in your daily practice? At MLMIC, we recognize this challenge. That's precisely why we've meticulously compiled a selection of vital articles, providing you with clear, concise summaries and direct access to the most impactful industry news and analysis. Think of this as your essential guide to staying sharp and comprehensively informed.

Digital Insights From the American Medical Association

This insightful article from the American Medical Association emphasizes that in the digital age, doctors must excel in both traditional clinical practice and the evolving digital healthcare landscape.

Anticipation of New Dietary Guidelines in the United States Pertaining to Alcohol Consumption

The U.S. government is reportedly expected to remove its long-standing recommendation to limit daily alcohol consumption to one or two drinks from the upcoming 2025-2030 Dietary Guidelines for Americans.

The Use of Artificial Intelligence in the Field of Fertility

Artificial intelligence is significantly advancing male infertility diagnosis and treatment.

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CASE STUDY:

Credentialing Calamity



The patient in this case was a 50-year-old married female who was employed at the medical facility where she was initially treated. She expressed an interest in excess fat removal, breast implants, a revision to her belly button, and abdominoplasty. The practice owner, a MLMIC-insured anesthesiologist, referred the patient to a plastic surgeon at the practice.

The patient presented to the medical facility where she worked and was noted to have a history of smoking two packs of cigarettes per day, five pregnancies, left-knee surgery, and a previous abdominoplasty, and to have lost 150 lbs. during the previous year.

A consent form was obtained for mastopexy with breast implants, a repeat abdominoplasty, and a umbilicoplasty. The non-MLMIC policyholders provided anesthesia and performed the surgical procedures. The pre-operative diagnosis was bilateral breast hypoplasia with ptosis and residual abdominal elastosis. Over the course of seven hours, the procedures were accomplished

and saline implants inserted in both breasts with no complications.

Post-operatively, a Jackson-Pratt drain was put in place, and the patient was instructed to use a compression garment for 72 hours. She was noted to be awake, alert, and stable during recovery, with minimal pain, and was discharged home later that day with instructions on changing her dressings and taking oral antibiotics.

The plastic surgeon left for a four-week vacation the day after the surgery.

The patient did not report any open wounds when she changed her own dressings three days

post-operatively. One week post operatively, however, the patient noted that her abdominal wound was completely open with fluid discharge. She sent text messages to the plastic surgeon and the anesthesiologist and was advised to see the anesthesiologist in the office. She presented to the office and was seen that day by the anesthesiologist along with the gastroenterologist who initially performed the patient's pre-op exam, who observed the dressing change and suggested wound irrigation. The patient was instructed in wound care and advised to see the plastic surgeon upon his return to the office.

She sent text messages to the plastic surgeon and the anesthesiologist and was advised to see the anesthesiologist in the office.

The patient later returned for a second post-operative visit, and the anesthesiologist became alarmed at the significant discharge and progression of the wounds. He instructed the patient to discuss further wound care with the gastroenterologist, who reviewed photographs of the patient's wounds but failed to examine the patient or refer the patient to a specialist.

Upon his return from vacation, the plastic surgeon resumed treatment of the patient, during which time he performed three surgical repairs and debridement. However, the patient continued to text the anesthesiologist and plastic surgeon, stating that the wounds were not healing.

The patient subsequently presented to the local hospital emergency room with complaints of wound dehiscence, which was noted on bilateral breasts and the patient's abdomen, along with erythema and yellow discharge. Upon admission, she was also noted to have cellulitis and infected incision lines. She complained of pain and was placed on IV antibiotics.

A non-party plastic surgeon at the hospital performed debridement of all wounds with

placement of a wound VAC and diagnosed necrotizing fasciitis of the breasts and abdomen, with pathology confirming infected necrotic tissue. The patient was hospitalized for two weeks with a course of pain management, medication, and wound treatment. She was discharged with the wound VAC and home health nurses for daily dressing changes.

Several months later, the patient was seen at the hospital for outpatient replacement of the abdominal skin graft, with her thigh as the donor site, due to a non-healing abdominal wound, which was confirmed to be necrotizing fasciitis.

Four months later, the wounds were noted to be healed by the non-party plastic surgeon. The patient kept in touch with the MLMIC-insured anesthesiologist throughout the pendency of her recovery and later returned to work at this policyholder's medical facility.

One year later, the patient brought a lawsuit against the plastic surgeon and the anesthesiologist who had performed the surgery, along with the facility and our insured anesthesiologist, alleging improper care following breast and abdominal reconstruction, resulting in necrotizing fasciitis that required multiple surgical debridements that left severe scarring.

MLMIC's experts in anesthesia and general surgery found this to be a case with a poor outcome, and although our insured anesthesiologist was not involved directly with the patient's care, she received multiple text messages from the patient without offering treatment to the patient or referring her to a wound care specialist. She was also criticized for allowing the plastic surgeon, who had licensing issues, to work at the facility without insurance. In addition, following the procedure, the patient's chart could not be found, and there was speculation that the patient or the plastic surgeon may have removed the record from the facility. The plaintiff's counsel argued that he would request a missing records charge at trial.

The defense for the anesthesiologist, the practice's owner, was that she had a minor role in this case. However, due to issues with the missing chart, poor

credentialing, and allowing an uninsured physician to work at the facility, a decision was made to settle the case on behalf of the practice's owner.

A Risk Management and Legal Analysis

The facts in this case illustrate why it is crucial to ensure that all professionals in a surgical center or practice have current New York State licensure and medical professional liability (MPL) insurance with the appropriate limits of at least \$1/3 million.

Was the patient in this case a suitable surgical risk? The surgeon and the anesthesiologist should have been very concerned that she was 50 years old with a history of obesity and that she smoked two packs of cigarettes a day, which can lead to poor healing. There is no indication that she was required to obtain pre-operative clearance from her medical physician, which should have occurred.

There is no indication that she was required to obtain pre-operative clearance from her medical physician, which should have occurred.

Additionally, no one at the surgery center checked the licensure, current MPL insurance status, and other credentials of the plastic surgeon to make certain that he was eligible to work at that center. The only conclusion that can be drawn is that the practice was so intent on having him work there that it did not bother to obtain these items, which is an essential aspect of every credentialing process. It was determined later that the plastic surgeon lacked MPL insurance coverage and that he had licensure issues and should therefore not have been permitted to operate on any patient at the facility.

Unfortunately, the surgery center paid dearly for its failure to ensure that the physician had essential credentials, licensure, and medical malpractice insurance, as well as the appropriate skills to properly care for this patient. In addition, it is very possible that because the patient was a long-time employee of the surgical center, many of the items that would normally be requested of patients were glossed over.

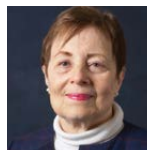
Since the plastic surgeon lacked MPL insurance, the patient's attorney had to focus on other personnel for whatever assets or insurance the surgery center and anesthesiologist had. Although the medical record may well have shown that the patient was appropriately cared for in the center, the defense was compromised by the fact that the surgeon was not properly credentialed by the center, which did not even verify whether he was licensed in this state. An additional concerning factor was that the patient's medical record was inexplicably missing from the surgery center.

Credentialing Overview

Complete and thorough credentialing of healthcare professionals is a crucial process to confirm qualifications and ensure competency to appropriately treat patients. Verification of a provider's education, residency training, board certifications, and state licensure is a vital prerequisite to determine whether individuals are qualified to provide quality healthcare. A comprehensive background check will reveal the existence of any malpractice claims, disciplinary actions, and/or criminal activity. Systematic and periodic credentialing assists in assessing whether individuals are qualified professionals who meet required standards based on education, training, and experience. If executed properly, credentialing has a positive impact on malpractice risks by confirming competency to perform quality healthcare responsibilities.



Kathleen Harth is Assistant Vice President of Claims with MLMIC Insurance Company.
kharth@mlmic.com



Donnaline Richman is an Attorney with the Legal Department of MLMIC Insurance Company.
drichman@mlmic.com



Marilyn Schatz is an Attorney with the Legal Department of MLMIC Insurance Company.
mschatz@mlmic.com

CASE STUDY:

Popcorn, Porcelain...and Loss of Vision?

The patient in this case called her MLMIC-insured dentist on a Sunday, crying hysterically. She also text messaged him that day complaining of severe pain and swelling in her right-side temple area and that she was running a fever. Later that day, the dentist opened his office to see this patient.

During the first hour of the patient's visit, she was placed on 1,000 mg of clarithromycin. An X-ray showed a porcelain fused to a metal crown on tooth #3, which was sensitive to touch. The patient explained that when she was eating popcorn, she bit down on a kernel and experienced a shooting pain in her face, with subsequent swelling. This patient had fractured tooth #3 two years earlier, and a different dentist had performed a crown buildup and placed a porcelain fused crown. Oddly though, the crown was not cemented in place and popped right off.

The insured dentist diagnosed the patient as having multiple vertical fractures, which is why she had

pain when she bit down. He also indicated that the surrounding gingiva was readily bleeding and swollen. The dentist did not want to perform a root canal because it would fail as the tooth was fractured. He therefore recommended, due to the abscess, that the tooth should be removed.

The patient explained that when she was eating popcorn, she bit down on a kernel and experienced a shooting pain in her face, with subsequent swelling.

During this visit, the dentist subsequently flapped teeth #2-6, cleaned and debrided plaque and tartar with severe bleeding, and removed tooth #3. The dentist's chart indicates that he had to remove part of the palatal root because it was very fused to the bone. Before closing the patient, the dentist rinsed out the area with Biotene and chlorhexidine to reduce inflammation. The patient was then sutured and went home with the verbal direction that she may need to see an oral surgeon at some point later. She was given a ten-day prescription of 500 mg clarithromycin, to be taken twice a day.



The day following the tooth extraction, the dentist called to check on his patient, and she requested that he provide her with a note to excuse her from work. He met the patient outside of her apartment building to deliver the note, and it was later indicated in his chart that, while her face looked puffy and she had a yellowish-brown color underneath her right eye, she told him that she felt better.

He texted her back indicating that she should be seen, however, the patient refused to be seen due to prevailing Covid.

Two days later, the patient sent a text message to the dentist to complain that her swelling was worse and her eye was swollen shut. He texted her back indicating that she should be seen, however, the patient refused to be seen due to prevailing Covid. He then texted the patient that she should apply hot, moist compresses to the area.

The dentist texted his patient later that night and she replied to say that she was using the compresses and felt much better. He messaged back telling her to keep using the compresses, take her antibiotics, and he would text her on the following day.

However, the insured dentist then texted the patient later that night indicating he was worried about her and that he wanted her to double up on one dose of her antibiotic. He gave her instructions on how to take that antibiotic; he wanted her to stay on the 12-hour dose window, but at the next dose, she was to take two pills instead of one. He advised her to continue with the compresses because he had been concerned when he had seen her outside her home. He felt that an infection might be setting in but advised her not to worry as “it will turn around.” He indicated in his message that an infection will calm down, but must reach its maximum point prior to improving.

He then texted her 20 minutes later indicating that he knew the patient was suffering from a fever. He said he had concerns about her being infected with Covid because she had left him a message saying she was sweating and not feeling well. In his message, he instructed her to seek treatment if she started to run a fever higher than low grade. He said he would try to reach her later that night.

Two days later, the dentist received a call from the local hospital advising that an oral surgeon was seeking the patient’s records and the patient was going to be evaluated. The dentist tried to reach the patient after that phone call but was unable to do so.

The patient had sought treatment at an urgent care center one day prior due to vision problems. Her

right eye had swollen shut and there was discharge from the eye. She was then referred to the hospital. There, she was diagnosed with peripheral cellulitis in her right eye with a principal finding of an abscess of the right orbit. She was considered critically ill and was put on IV Rocephin and vancomycin.

Ophthalmology noted that she had no vision in the right eye.

The patient underwent exploratory surgery of the right orbit, with drainage. The operative report indicated that upon opening the orbital septum, pus came forth, decompressing the eyelid and the septum. The surgeon was able to visualize the surface of the globe and found the conjunctiva was eroded laterally in the eyelid and pus was noted. A separate incision was made in the septum, and more pus was expelled. Further surgery was done

by an ENT, who also indicated that drainage was done at temple, scalp, and facial abscess and that the patient had a masticator space abscess.

A culture was done that showed the patient had rare streptococcus. She remained hospitalized for ten days. Ophthalmology noted that she had no vision in the right eye. The patient was discharged with a midline placed and was to continue to receive IV antibiotics for another month, with close follow up by infectious disease, ENT, and ophthalmology specialists.

A lawsuit was subsequently filed by the patient. The case was reviewed by an infectious disease expert, who opined that the insured dentist departed from the standard of care by prescribing clarithromycin. He commented that a different antibiotic would have stopped the infection from progressing, and the patient would not have lost her vision.

EVENTS AND ENCOUNTERS



NYSDA Residents Event — Bronx, NY

MLMIC was honored to sponsor the annual New York State Dental Association Residents Event on August 14. The MLMIC table was a hub of activity with dental residents and friends from the Bronx County Dental Society and other surrounding dental districts. MLMIC is proud to help young dentists gain an understanding of the legal, risk management, and professional liability aspects of dentistry as they begin their careers.



Westchester County Medical Society Annual Dinner

Photo: MLMIC Chief Medical Officer, John Lombardo, M.D., FACS; David Jakubowicz, M.D., FACS, President of the Medical Society of the State of New York; and Thomas Lee, M.D., FACS, Executive Director of the Medical Society of the State of New York.

MLMIC supports county medical societies throughout New York and was proud to sponsor the Westchester County Medical Society Annual Dinner and Meeting in June.

A dental expert opined that the dentist met the standard of care. He found that the insured appropriately removed the tooth when the patient came in and appropriately placed the patient on antibiotics. The dental expert opined that the patient was “lucky to be alive,” as this type of infection was very rare.

The District Claim Committee ultimately found that the dentist did depart from the standard of care. As such, this case did not proceed to trial, and the decision was made to settle.

A Legal and Risk Management Analysis

Texting Patients and HIPAA Concerns

Analyses of medical and dental malpractice cases usually involve delving into whether the defendant practitioner(s) departed from the “standard of care,” which is used to determine whether malpractice was committed. If the defendant fails to utilize the level of skill and care that a similarly qualified provider would utilize, then malpractice has been committed.

The case at hand, however, is more than a deep dive into the standard of care. What makes this case interesting to cover and why MLMIC has, in fact, chosen to write about it, is that it involves the exchange of text messages between a dentist and a patient and provides us with an opportunity to present lessons on the risks and legal implications of text messaging as a method of communication between healthcare professionals and their patients, specifically, the application of HIPAA.

In this case, the bulk of communication between the dentist and patient occurred through the medium of text messages, which has become very common, with many physicians, healthcare providers, and patients opting for their convenience.

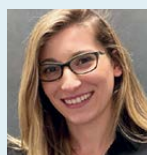
So, is it permissible for physicians and dentists to use text messages to communicate PHI to their patients? Yes, HIPAA allows healthcare professionals to communicate PHI to patients through an unsecure text messaging platform under two circumstances: 1) if the patient initiates contact through text messages or 2) if the patient requests or consents to the exchange of PHI through a text message platform that the patient knows is unsecure. Apart from these two exceptions, the HIPAA Security Rule (as detailed on page 5) requires certain safeguards to be implemented to ensure that PHI remains protected.

On multiple occasions, the dentist in this case seems to have taken time out of his personal life to both see the patient and initiate contact via text. Clearly, the dentist was devoted to taking care of the patient. However, if the dentist never obtained the patient’s consent to use an unsecure messaging application and the dentist’s cellphone messaging application was not HIPAA-compliant and protected from unauthorized use, the dentist could have faced HIPAA complaints in addition to this dental malpractice action.

Although the result of the case at hand did not depend on the method of communication utilized, it nonetheless provides us with a cautionary tale on the need to understand HIPAA rules on texting, which has clearly become an integral part of contemporary healthcare patient communication practices. Accordingly, it is very important that providers not only remain cognizant of any HIPAA-related guidelines but also implement adequate risk management measures to ensure compliance.



Rafi Cheema is an Attorney with MLMIC Insurance Company’s Legal Department.
rcheema@mlmic.com



Brianna Mulazzi is a Claims Unit Manager with MLMIC Insurance Company.
bmulazzi@mlmic.com



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P.O. Box 1287
Latham, NY 12110

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