

DOCTORS



Volume 26, No. 1

Spring/Summer 2018

VICARIOUS LIABILITY

THE BUCK STOPS WHERE?

find out...

- What is vicarious liability?
- What does the law state in both Maryland and Virginia?
- What are the ways you can protect yourself and your practice?

A LETTER FROM THE CHAIR OF THE BOARD

Dear Colleague:

Liability exposure in a medical practice can arise in a number of ways. Most of you realize that you are responsible for your own professional actions. What may be surprising to learn is that you, your medical group, or your professional association may be held responsible for the conduct of others in your office or practice. Frequently, this confusion arises from the failure to appreciate and understand the concept of vicarious liability. This newsletter discusses the basic theories and circumstances under which you may be held responsible for the acts of others and how to protect yourself from liability.



George S. Malouf, Jr., M.D.
Chair of the Board
MEDICAL MUTUAL Liability Insurance Society of Maryland
Professionals Advocate Insurance Company



ISSUE HIGHLIGHTS



LIABLE FOR ACTIONS OF OTHERS **1**



VICARIOUS OR THIRD PARTY LIABILITY **2**



HOW DO YOU PROTECT YOURSELF? **5**

DOCTORS RX

Elizabeth A. Svoisky, J.D., Editor
Vice President - Risk Management

Dr. George S. Malouf, Jr., M.D., Chair of the Board
MEDICAL MUTUAL Liability Insurance Society of Maryland
Professionals Advocate® Insurance Company

Copyright © 2018. All rights reserved.
MEDICAL MUTUAL Liability Insurance Society of Maryland

Articles reprinted in this newsletter are used with permission. The information contained in this newsletter is obtained from sources generally considered to be reliable, however, accuracy and completeness are not guaranteed. The information is intended as risk management advice. It does not constitute a legal opinion, nor is it a substitute for legal advice. Legal inquiries about topics covered in this newsletter should be directed to your attorney.

All individuals involved in the creation and planning of continuing medical education activities sponsored by MEDICAL MUTUAL are expected to disclose to program participants any real or apparent conflict(s) of interest related to the content of their presentation. All individuals in control of content for this education activity have indicated that they have no relevant financial relationships to disclose.

CONTACT

Home Office Switchboard	410-785-0050
Toll Free	800-492-0193
Incident/Claim/ Lawsuit Reporting	800-492-0193
Risk Management Program Info	ext. 215 or 204
Risk Management Questions	ext. 224 or 169
Main Fax	410-785-2631
Claims Department Fax	410-785-1670
Web Site	mmlis.com proad.com



VICARIOUS LIABILITY

The Buck Stops Where?

Our story, thus far:

On March 1, a long-standing patient (a 35-year-old mother of two) is seen at your practice complaining of chest pain that she describes as a muscle strain after a particularly heavy Pilates workout at the gym. She also complains of some difficulty breathing stating, "It hurts when I inhale."

*She is seen by your nurse practitioner who performs an examination that reveals stable vital signs, no fever, and clear breath sounds bilaterally. He is able to elicit the symptoms only intermittently. He recommends Ibuprofen for muscle strain. The patient is **not** given a follow-up appointment, but is advised to schedule an annual well-patient exam in four months or so.*

You do not see the patient.

Two days later, your patient has a massive myocardial infarction and dies. You receive a medical malpractice lawsuit alleging wrongful death for failing to order appropriate studies to diagnose myocardial ischemia on March 1.

The lawsuit does not allege that you were negligent in hiring the nurse practitioner; nor does it assert that you failed to properly supervise him. The sole theory of liability against you is that your nurse practitioner was negligent, and you are liable as his employer/principal.

Can you be held liable for this?

Well, yes, actually, you can.

This is the employer/employee or principal/agent application of vicarious liability.

The term, "vicarious liability" simply means that a defendant can be held liable based upon the conduct (actions or omissions) of *someone other than* the person being held liable.

State law provides a number of avenues that permit a plaintiff to establish vicarious liability and hold a practitioner or institution liable for the actions or omissions of others. Under Maryland law, vicarious liability will apply to an employer or principal if it can be demonstrated that a third party was acting as the employee or agent of the employer/principal.¹ Additionally, Maryland law recognizes the theory of apparent agency, which imposes liability for the actions of a third party who clearly is not your agent or your employee.²

Virginia law provides that an employer is vicariously liable for an employee's acts committed within the scope of employment.³

Vicarious liability can be imposed on the employer even if the third party provider was an independent contractor (also known as a 1099 contractor) and not a traditional employee (who receives a W2 at the end of the year).



Ben Vaughan
The author of "Vicarious Liability – The Buck Stops Where?" is a senior partner in the law firm of Armstrong, Donohue, Ceppos, Vaughan & Rhoades, Chtd. He regularly defends complex and complicated medical malpractice cases throughout Maryland and the District of Columbia.



Did you know?

You could be held liable for the actions of your nurse practitioner in the event they are sued, even though you never saw the patient yourself.

VICARIOUS OR THIRD PARTY LIABILITY

If you find yourself confronted with a claim in which someone seeks to hold you liable for the conduct of another, the threshold questions to be answered are:

1. Whether that individual was acting as your employee and, if so,
2. Whether he or she was acting within the scope of his or her employment at the time of the action/omission that has generated the lawsuit.

Was the “Other” Your Employee?

For you to be found liable for the conduct of another individual, it must first be determined whether that individual is your employee (putting aside the theory of apparent agency for a moment).

The overarching consideration in answering the question of whether the individual was your employee is whether you had the right and the ability to control the individual’s conduct. If the matter proceeds to trial, the judge will provide the jury with instructions on the appropriate law defining employers and employees. The judge may further instruct the jury to look at several factors, one of which is whether the employee was subject to the employer’s control.

In the example above, the question of whether you could be held liable for the conduct of your nurse practitioner (despite the fact that you did not treat the patient during the initial visit)

will depend on whether you had the right and ability – within your professional relationship – to control the nurse practitioner’s conduct.

If the answer to that question is “yes,” and you *did* retain the right and ability to control the professional conduct of your nurse practitioner, then the law likely would view you as the employer of the nurse practitioner who would be your employee. As such, you likely would be subject to liability for the actions of the nurse practitioner under a vicarious theory of liability, in addition to any direct claims against you alleging negligent supervision.

Was the Nurse Practitioner Your Employee?

So how do you determine whether an individual is considered your “employee” in the eyes of the law?

The existence of an employment contract should supply the answer to that question.

In the **absence** of an employment contract, a judge might provide a jury instruction that advises the jury that the determination of existence of an employee/employer relationship is dependent on whether:

1. You have the power to select and hire the employee;
2. You pay the employee’s wages;
3. You have the power to discharge the employee;
4. You have the power to control the employee’s conduct;

5. The work is part of the regular business of the employer (*only in Maryland*)

If most or all of the factors above are answered in the affirmative (especially No. 4), it is likely that the nurse practitioner will be found to be your employee. If so, you can be held liable for his conduct, regardless of whether or not you participated in the health care provided by the nurse practitioner.

SCOPE OF EMPLOYMENT – PART I

The inquiry does not end with the question of the *nature* of the relationship. Once it is determined that the nurse practitioner was your employee, the next question to be answered is whether he was acting within the *scope* of his employment. You can only be held liable for his conduct if, in fact, he was acting within the scope of his professional relationship with you.

The question of “scope” generally entails two concepts:

1. Whether the conduct was in furtherance of your business and in accordance with that for which you hired the person; and
2. Whether his actions were foreseeable.

In the example above, assuming you hired the nurse practitioner to see patients, handle their complaints, and treat their ailments within the scope of his licensure, then likely his actions would be within the scope of his employment relationship and could trigger your vicarious liability.

What can you do?

Consider entering into an employment contract with your employee that details the employee’s responsibilities. It might include a description of the scope of duties, on call responsibilities, expectations for performance, and licensing requirements. In the absence of an employment contract, it is prudent to develop office policies delineating the scope of practice of your employees. For example, if your practice has a strict policy banning the prescribing of opioids, this should be clearly outlined in an employment agreement - specifically with those who have the legal authority to prescribe opioids, and/or included in the office policy. Without this delineation of responsibilities, you potentially could find

yourself being held liable should one of your employees be sued.

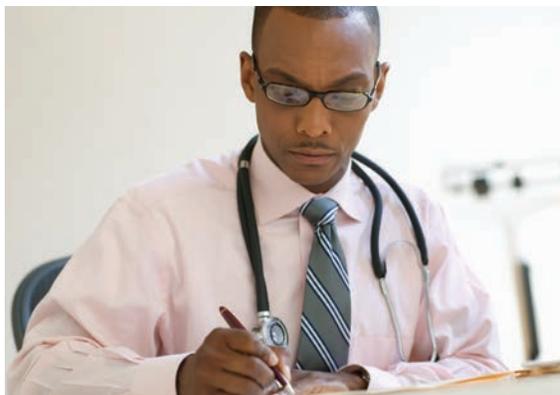
SCOPE OF EMPLOYMENT - PART II

Let’s change the facts of the above example just a bit.

Instead of your patient receiving advice from your nurse practitioner during a face-to-face encounter, that patient is advised by your receptionist during a phone conversation to try over-the-counter medications for her complaints.

Now, the answer to the question is less clear. Assuming your receptionist is not a professional health care provider, you probably did not hire her to give medical advice. If that is the case, you *might* successfully defend a claim of vicarious liability on the grounds that your receptionist – your employee – was acting *beyond* the scope of her employment relationship and you cannot be held liable for her actions.

Unless you adopted or ratified those actions.



LIABILITY FOR ACTS BEYOND THE SCOPE – RATIFICATION/ADOPTION

You may be held liable for the actions of your employees that exceed the scope of their employment if you are found to have “adopted” or “ratified” their actions.

Ratification can include silence or failure to object when advised.

Simply put, you might be subject to liability even under circumstances where your employee has exceeded the scope of her employment if,



What can be done?

Enter into an employment contract with your employee that should outline the scope of their employment with you and your practice.



Consider This:

Depending on certain criteria, there is a potential that you or your practice could be held liable for the intentional and/or criminal acts of your employees. However, having a “code of conduct” in place identifying what is and what is not acceptable behavior, will help mitigate the risk of being named as a defendant.

upon learning of the action, you did nothing to correct it. Moreover, you might be held liable if the act in question is just the latest of a series of similar acts that you either knew about, or of which you have sufficient notice that you ought to have known about it and did nothing to correct. In such instances, you might be held liable for the conduct of your employees.

What can you do?

It is important that you conduct periodic refresher meetings or office-based training with your staff that includes a discussion of the scope of their employment and job duties. You should periodically discuss what is allowed within the scope of their employment and those matters that are *outside* of the scope. This is particularly important as scope of duties may change due to amendments to the law or changes in your practice, and it is important that employment contracts and/or office policy remain up-to-date and reflect current roles and responsibilities. If an employee is acting outside of the prescribed scope of duties or responsibilities, it may be necessary to discipline that employee or consider termination if warranted. If you fail to take decisive action, it may put you and your practice at risk of being held liable should you be named in a lawsuit.

INTENTIONAL/CRIMINAL ACTS

The next question might be thought of as defining the outer limits of your exposure: Can you be held liable even if the actions of your employee are criminal in nature?

Generally, it is far more difficult for you to be held liable for criminal or unlawful conduct of your employee, but it is not impossible. If the act, despite its unlawfulness or criminality, was of the type that would be within the scope of your employee’s responsibilities, and if the act was committed by the employee for purposes associated with your practice (rather than purely personal reasons or purposes having nothing to do with your practice), and if the harm arising from that act was foreseeable, then you could, conceivably, be found liable.

To illustrate, let’s change another fact or two in the example, above. Suppose your nurse practitioner conducted an exam of your patient without a chaperone and, during the course of that exam, allegedly assaulted the patient.

Could you be held liable for the unauthorized, unlawful, and possibly criminal actions of your nurse practitioner?

Different Coverages for Extenders:

1. **Shared limits** – The Physician extenders share limits with the corporate entity. The Physician extender and corporation share one policy limit.
2. **Shared separate limits** – A separate limit in addition to the corporate limit is shared among all the Physician extenders.
3. **Individual policy/limits** – The Physician extenders have an individual limit.

Other ancillary providers not listed (nurses, techs, medical assistants, etc.) may also be added to the corporate policy sharing limits often times at no charge.

In the example, the nurse practitioner could be acting within the scope of his employment generally by examining your patients. The question of whether an assaultive exam without a chaperone was beyond the scope of his employment might very well be considered a factual issue to be resolved by the jury. If so, the jury would resolve it in accordance with the judge’s instruction. Their decision may turn on additional facts, for example the extent to which you had well-articulated office policies prohibiting the conduct that was at issue, the efforts you had made to educate your staff with respect to such policies, and the extent to which similar actions had occurred in the past without rebuke or effective remedial measures in response.

What can you do?

Ensure that you have a code of conduct in place that identifies what is and what is not acceptable behavior for an employee, what constitutes a violation, and what consequences will befall an employee who violates the code of conduct. Employees who commit a severe infraction may be terminated, even if it’s a first offense, particularly if the employee has participated in an illegal activity. The code of conduct

should be reviewed with staff and periodic training or discussion should take place so that employees are aware of your expectations and the consequences for violating the rules.

APPARENT AGENCY/AUTHORITY (MARYLAND ONLY)

There are occasions where you may find yourself facing vicarious liability for the actions of someone who clearly is not your agent or your employee. This could come about by virtue of the doctrine of *apparent agency*.

Apparent agency is a legal theory by which a person who is not the principal or employer of another, but whom the public *perceives* to be the principal or employer of another can be held liable for the actions of the other person if the perception of the principal-agent/employer-employee relationship is "reasonable."

This situation arises most frequently in cases in which a hospital is sued for the actions of a hospital-based Physician. In cases in which the patient's only contact with the Physician is in the hospital, and the patient has no reason to think that the Physician is not employed by the hospital, the hospital may be held liable for the actions of the Physician, even though the Physician is not employed by the hospital and is not subject to the control of the hospital and cannot be said to be the agent or employee of the hospital.

The Courts of Maryland have determined that under such circumstances, the public may perceive that the Physician is the employee of the hospital. If so, and if that perception is "reasonable," then the hospital may be held liable for the actions of the Physician just as if the Physician was an actual employee of the hospital. See, *Mehlman v. Powell*, 281 Md. 269, 378 A.2d 1121 (1977).

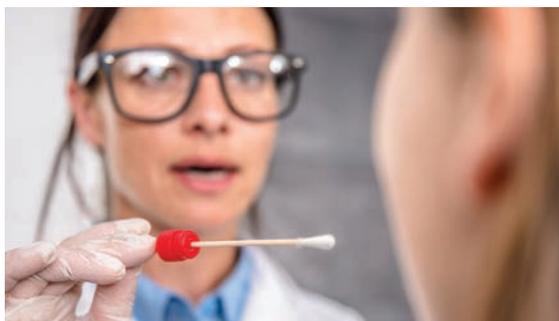
This is called "apparent agency." It is apparent to the public that the actor is the agent of the facility; thus, the appearance of agency, if reasonable, may serve as the basis for vicarious liability of the apparent principal. This doctrine has been applied in cases involving emergency Physicians, radiologists, and similar hospital-based Physicians.

Could this theory be applied to situations in which the apparent "principal" is a Physician

or practice-group? It is possible, although less likely. If the Physician or practice group takes actions by which a member of the public might conclude that a non-agent, non-employee is the agent or employee of the Physician or group, and if a member of the public reasonably relies upon those actions and the appearance of agency, then the doctrine of apparent agency may apply. It is far less common in this setting, however, than in cases involving hospital-based care.

What can you do?

Depending on your practice arrangement, it is important to demonstrate to patients that certain providers are not employed by or work for your practice. For example, you may own your practice and rent out office space to another health care provider who is unaffiliated with your practice. A patient of that other health care provider may not know that the provider is an unaffiliated employee or agent and may name you in a negligence action. To help avoid this situation, you may provide a written disclaimer advising patients that your practices are unaffiliated. This also may entail changing office letterhead, utilizing different branding around the office where names are shown, and even using different embroidered lab coats or badges to help patients make the distinction.



IS THERE ANY RECOURSE?

You may have recourse against the employee – or the apparent agent – for indemnification. The law permits you to seek indemnification against the employee or apparent agent for reimbursement/indemnification of monies paid as a result of the actions of the employee or apparent agent. However, this course of action may cause more problems than it solves. The first question to consider is whether the employee/apparent agent has separate coverage or sufficient funds to make such an indemnification action feasible or



Did you know?

Under Maryland's Apparent Agency, you could be held liable for the actions of a non-agent and/or non-employee if a member of the public reasonably believes they work for you. This could happen when you rent space to another provider in your office, but there is little to delineate the separate practices.



For Further Assistance

You can call the **MEDICAL MUTUAL or Professionals Advocate Risk Management Department** for additional guidance.

plausible. The second issue is consideration of any professional relationships and/or business arrangements that may be affected by such an action.

For example, you may have an on-going business relationship with the apparent agent whose actions have triggered your liability – and thus your right of indemnification – which may be negatively affected by an indemnification action by you, particularly if that apparent agent is not covered by liability insurance. As discussed, another health care provider with whom you have a contractual relationship or some less formal arrangement, but who is not your actual employee, may be considered your apparent agent under Maryland law. Their actions/omissions might trigger your liability as their apparent principal. An indemnification suit against them may have an impact on an otherwise beneficial relationship which may be a factor to consider in deciding whether an indemnification action is desirable. For this reason, it is advisable to ensure that any person who could serve as your apparent agent have appropriate liability coverage.

These are issues to bear in mind whether you are the apparent principal pondering the prospect of seeking indemnification from your “employee” or your “apparent agent,” or whether YOU are a hospital-based Physician whose care and treatment is serving as the basis of a suit against a hospital on an apparent-agency theory.

What can you do?

It is important that your employees, and those that the public may perceive as your employees, maintain appropriate professional liability insurance and that their insurance be in good standing and in full effect. You should annually review their coverages and insurance with them to ensure they are maintained and appropriate to your practice

HOW DO YOU PROTECT YOURSELF AND YOUR PRACTICE?

Consider the following:

1. Enter into employment agreements and/or develop office policies that clearly delineate the scope of practice of your employees;

2. Conduct and participate in periodic refresher-meetings/in-service trainings with your staff during which scope of employment and duties are reviewed. The review should include a well-articulated discussion of those matters that are within the scope of employment and those matters that are beyond the scope;
3. In the event you rely upon the services of a *non*-employee or rent space to another provider who may appear to the public to be your employee, consider a written disclaimer to be disseminated to your patients advising that such person is *not* your employee, but is an independent contractor. Also consider using different signage or branding around the office;
4. For all non-employees upon whose services you may rely and who may appear to the public to be your employee, make certain that that person maintains appropriate professional liability insurance and that the insurance is in full force and effect; and
5. If you have employees/agents on your staff, it means you have reserved the right to control their actions. Be judicious and responsible in the exercise of that “control.” Supervise where and when appropriate and in a manner that will be effective.



FOR MORE INFORMATION,
VISIT
MMLIS.COM/VICARIOUS
OR
PROAD.COM/VICARIOUS

references

¹ See *Cox v. Prince George’s County*, 296 Md. 162, 460 A.3d 1038 (1983).

² Except for the discussion of apparent agency, which only exists in Maryland, throughout the newsletter we will use the phrase employer/employee when discussing issue of vicarious liability in both Maryland and Virginia, although Maryland does recognize the terms principal/agent in addition to employer/employee.

³ See *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391 (1988).

CME TEST QUESTIONS

1. It is not necessary to establish a code of conduct for your employees as they are adults and should know what constitutes acceptable behavior in an office setting.
A. True B. False
2. You can be held liable for the actions of your employees that exceed the scope of their employment if you are found to have adopted or ratified their actions.
A. True B. False
3. You can be held liable for another's conduct only if you participated in the health care provided.
A. True B. False
4. Vicarious Liability refers to a theory of liability based upon your own actions and not the actions of others.
A. True B. False
5. It is important that employee contracts and office policies remain up-to-date and reflect any changes in the laws or changes in your practice.
A. True B. False
6. Virginia law recognizes the theory of apparent agency, which imposes liability for the actions of a third party who clearly is not your agent or your employee.
A. True B. False
7. Under certain circumstances, you could be subject to a direct claim of negligent supervision of your employee.
A. True B. False
8. It is impossible for you to be held liable for criminal or unlawful conduct of your employee.
A. True B. False
9. Employers should only advise employees of what is within the scope of their employment.
A. True B. False
10. An important factor in determining whether someone is your employee is whether you have the power to control their conduct.
A. True B. False

Instructions – to receive credit, please follow these steps:

Read the articles contained in the newsletter and then answer the test questions.

1. Mail or fax your completed answers for grading:
Med•Lantic Management Services, Inc. | Fax: 410-785-2631
225 International Circle | P.O. Box 8016 | Hunt Valley, Maryland 21030
Attention: Risk Management Services Dept.
2. One of our goals is to assess the continuing educational needs of our readers so we may enhance the educational effectiveness of the *Doctors RX*. To achieve this goal, we need your help. You must complete the CME evaluation form to receive credit.
3. Completion Deadline: August 31, 2018
4. Upon completion of the test and evaluation form, a certificate of credit will be mailed to you.

CME Accreditation Statement

MEDICAL MUTUAL Liability Insurance Society of Maryland is accredited by the Accreditation Council for Continuing Medical Education (ACCME) to provide continuing medical education for Physicians.

CME Designation Statement

MEDICAL MUTUAL Liability Insurance Society of Maryland designates this enduring material for a maximum of one (1) *AMA PRA Category 1 Credit*.[™] Physicians should claim only the credit commensurate with the extent of their participation in the activity.

CME EVALUATION FORM

Statement of Educational Purpose

Doctors RX is a newsletter sent twice each year to the insured Physicians of MEDICAL MUTUAL/Professionals Advocate.[®] Its mission and educational purpose is to identify current health care-related risk management issues and provide Physicians with educational information that will enable them to reduce their malpractice liability risk.

Readers of the newsletter should be able to obtain the following educational objectives:

- 1) Gain information on topics of particular importance to them as Physicians
- 2) Assess the newsletter's value to them as practicing Physicians
- 3) Assess how this information may influence their own practices

CME Objectives for "VICARIOUS LIABILITY - THE BUCK STOP WHERE?"

Educational Objectives: Upon completion of this enduring material, participants will be better able to:

- 1) Understand terms and definitions of Maryland and Virginia statutes that could be applicable to you and your practice
- 2) Gain an understanding of potential scenarios in which you and your practice could be held vicariously liable
- 3) Learn ways to protect yourself and your practice from potential vicarious liability claims

	Strongly Agree				Strongly Disagree
Part 1. Educational Value:	5	4	3	2	1
I learned something new that was important.	<input type="checkbox"/>				
I verified some important information.	<input type="checkbox"/>				
I plan to seek more information on this topic.	<input type="checkbox"/>				
This information is likely to have an impact on my practice.	<input type="checkbox"/>				

Part 2. Commitment to Change: What change(s) (if any) do you plan to make in your practice as a result of reading this newsletter?

Part 3. Statement of Completion: I attest to having completed the CME activity.

Signature: _____ Date: _____

Part 4. Identifying Information: Please PRINT legibly or type the following:

Name: _____ Telephone Number: _____

Address: _____



RISK MANAGEMENT NEWS CENTER



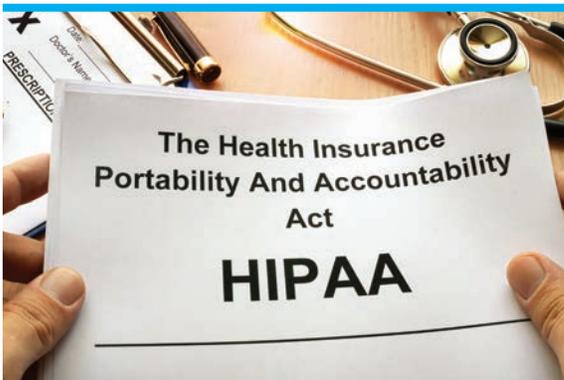
EXPERTS AVAILABLE TO ANSWER RISK MANAGEMENT QUESTIONS

When you have concerns about a communications problem, discharging a patient, or a compliance issue, our risk management staff is here to offer guidance. Our risk management department includes experts with extensive medico/legal backgrounds ready to give you a fast response. Contact us today at 410-785-0050 or toll free at 800-492-0193.



RISK MANAGEMENT EDUCATION CAN REDUCE LIABILITY RISK

Did you know you can find education resources on our web sites? For your convenience, many risk management materials are provided online for 24/7 access. Offerings include forms and publications, stress management ideas, podcasts, past *Doctors RX* newsletters, quick reference guides and more. Visit mmlis.com or proad.com to view all our resources.



WE CAN PROVIDE ASSISTANCE WITH HIPAA COMPLIANCE

Understanding and interpreting the key aspects of HIPAA can be a challenge. On our web sites, you can find a glossary of terms, summary of the basics, HIPAA training and more. We are available to provide the proper information and guidance for you to make sure that your practice is in compliance. Visit mmlis.com or proad.com to view our HIPAA resources page.



SUPPORT FOR OFFICE STAFF AVAILABLE ON OUR WEB SITES

In today's world of constantly evolving technology, practice management has expanded to include new responsibilities. It has become more vital than ever to increase awareness of potential liability issues. Our online practice management resources provide timely information on HIPAA and EMR compliance, employment issues and more. Visit mmlis.com or proad.com.



MEDICAL MUTUAL offers a variety of online tools and resources that are specially designed to help Doctors identify and address preventable issues before they escalate into potentially serious legal action.

DOCTORS



Publication of MEDICAL MUTUAL/Professionals Advocate®



THE BEST INSURER FOR YOUR PRACTICE

UNMATCHED CLAIMS DEFENSE

Our aggressive and proactive claims team has spent decades defending local Doctors. We hope you never face a claim, but if you do, rest assured you will receive the strongest possible defense.



UNRIVALED RISK MANAGEMENT

You are the first line of defense against unnecessary claims. Our risk management experts develop informative new education programs each year so you can stay up-to-date on the latest risks.



UNBEATABLE SERVICE

Our customer service professionals provide a prompt response so you can get back to your busy day, and our comprehensive online services are always available. Help is available when you need it.



UNEQUALED ADVOCACY

We advocate on your behalf on the important professional liability issues that affect your practice. We support tort reforms that maintain a fair legal environment for Doctors in the legal system.