

THE SCOPE



DENTAL EDITION

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FIRST QUARTER 2022

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Ensuring Technology
Works for You

CASE STUDY:
Disastrous Treatment
Leads to Settlement

Talk Studio: New
York Healthcare Laws
Signed and Vetoed by
Governor Hochul

NY



MLMIC
The Scope
Dental Edition

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EXECUTIVE MESSAGE

You Care for Them. We Care for You.

I have always thought this should be MLMIC's motto — "You Care for Them. We Care for You." Why? Because I can't remember a time when it was more difficult to be a dentist practicing in New York. The stresses on all of you are enormous, and many, and I'm so grateful you have decided to carry on. You have my gratitude and my admiration, as well as that of the entire MLMIC Family.

For those of you who have been, or are unfortunately being, sued, you need to know that MLMIC takes that fight as personally as you do. A plaintiff's attorney once said to me, after I was sued and we beat him at trial, that "it wasn't personal." How wrong he was! MLMIC knows many of our policyholders personally, and we know each of the local climates in which plaintiff's attorneys bring these lawsuits better than any other company — we also live here and have for over 45 years. For MLMIC, these are "home games," not "away games." I strongly believe that this helps in our defense as we are personally invested in seeing each of you survive, and succeed, in this difficult atmosphere.

For those of you who have not been sued, and that is about half of you, we offer a great many ways to help keep it that way — including, but not limited to, risk management education, instructional office surveys, and a 24/7 risk management hotline to answer your questions. The list is voluminous and can be explored at [MLMIC.com](https://www.mlmic.com). There may be ways we can help you that we haven't even thought of yet! If so, please feel free to call or email me at any time.

So how else can MLMIC care for you? Thanks to the financial backing of Berkshire Hathaway, we now offer a wide variety of products and services to make your professional life a bit easier, including cutting-edge discounts on many of our policies. To see if you are eligible, call Dental Underwriting at (800) 683-7769.

Again, and most important, thank you for all that you do. Our profession is noble, and I am proud to be among you. Please always remember, as they say in the military, "We've got your six."

You Care for Them. We Care for You.

Thank you.

A handwritten signature in black ink, appearing to read "John". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

John W. Lombardo, MD, FACS

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Interoperability — Ensuring Technology Works for You

Healthcare organizations have a duty to provide a safe environment for patients. But while patient safety, which includes the safe use of equipment and devices, continues to be a primary focus across the healthcare continuum, increased efficiencies in the delivery of healthcare are also necessary to both maintaining a professional organization's financial stability and continuously improving the patient experience. Technologies like artificial intelligence, 3D printing, robotics, remote monitoring, and nanotechnology seem to be constantly implemented or updated. Employing such technologies, and having them all work together efficiently and safely, creates additional considerations for healthcare organizations.

Technological advances do not come without threats to patient safety, and their implementation and operation require management strategies to mitigate both harm to patients and the resulting professional and general liability claims. Possible dangers can be related to systematic issues such as design flaws, operative failures, and/or user errors such as misuse and employing workarounds. This article will focus on interoperability issues and offer suggestions for leadership and risk managers alike to consider when deploying new technologies.

According to the Healthcare Information Management Systems Society, interoperability is "the ability of different information systems, devices and applications to access, exchange, integrate and cooperatively use data in a coordinated manner, within and across organizational, regional and national boundaries." Federal mandates such as the Interoperability and Patient Access final rule (CMS-9115-F)(85 FR 25510), which went into effect on June 30, 2020, are expected to boost the exchange of data through new Application Program Interfaces (API) and Fast Healthcare Interoperability Resources (FHIR). While focused on payment data and patients' access to their health information, the final rule is an initiative that begins to address interoperability issues on a more global level.

Whenever technology is involved in healthcare, there is the potential for failures, both systemic and those involving human error. Communication

among all forms of technology needs to occur in a seamless manner so that healthcare professionals can have access to all necessary information and can provide appropriate care. Lack of data integrity and poor functionality both present risks to patient safety; if interoperability failures occur, the results can be catastrophic.

Lack of data integrity and poor functionality both present risks to patient safety; if interoperability failures occur, the results can be catastrophic.

The connectivity of the systems and programs used within an organization, as well as those connected to externally, and the accurate transmission of information, both internal and external, to organizations communicating among themselves are vital to patient care and safety. And while healthcare providers usually associate computer/digital technology with interoperability, it is worth noting that interoperability factors can also apply to other devices within your organization.

Unfortunately, MLMIC Insurance Company has seen an increase in patient safety events that resulted from a lack of interoperability. The following case examples identify some of these risks.

Transmission Errors or Omissions

At one facility, data was not being displayed on the workstations after the data system server was moved off-site. There was no testing on the unit prior to this move. After investigation, it was found that a recent firmware update for wireless access points inadvertently caused some devices to lose the ability to operate wirelessly.

At another facility, the transmission of an imaging report indicating necessary follow-up was not directed to the appropriate module in the EHR, which created a dangerous delay in diagnosis. Similar events have occurred in which the information was transferred to the wrong patient's record. In addition to the patient safety concerns, these errors in transmission can create privacy issues.

Interfaces

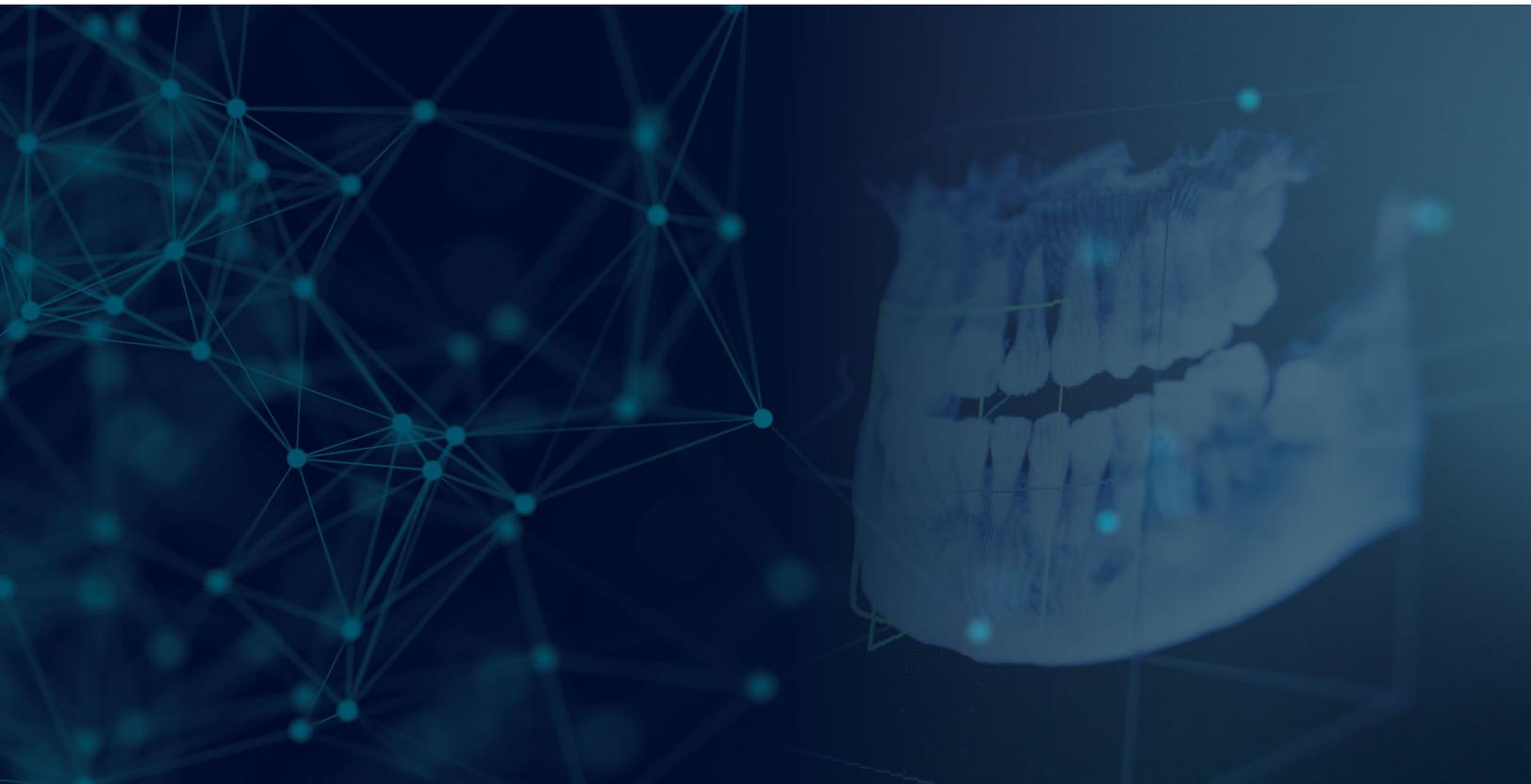
When a pharmacy at a facility updated its medication library, the medication choices in the computerized order entry module were not reconciled. The system was not tested before it was implemented with missing and duplicated

medication choices and many incorrect dosing parameters. Fatal medication errors occurred before this issue was identified.

In addition to the patient safety concerns, these errors in transmission can create privacy issues.

The volume and speed of the advancement in technologies essential to healthcare and its rapid evolution are incredible and unlikely to slow down. In addition to the burden of costs associated with adding and maintaining technology, these near-constant developments make maintaining competency and expertise challenging. It is imperative each organization create and maintain a robust technology program to address issues that can occur across an organization. Remaining vigilant and exercising proper leadership, expertise, and oversight are critical to ensuring that programs are in place to monitor connectivity and operational flow.

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INTRODUCING

Mercado May-Skinner

ATTORNEYS & COUNSELORS-AT-LAW

EMPLOYEES OF MLMIC INSURANCE COMPANY

After nearly 35 years of superb service to MLMIC Policyholders, the law firm of Fager Amsler Keller & Schoppmann, LLP (FAKS) was dissolved, making way for the new in-house law firm of Mercado May-Skinner (M&M). M&M will build on the standard of legal excellence MLMIC Policyholders have come to expect and will continue to provide risk management advice, medical malpractice defense, legal analysis, and related legal services. Nancy May-Skinner, Esq., and Al Anthony Mercado, Esq., will co-manage M&M and previously managed the respective Upstate and Downstate regions for FAKS. Contact M&M in Syracuse at (315) 428-1380, Colonie at (518) 786-2880, or Long Island at (516) 794-7340 or (877) 426-9555.

CASE STUDY:

Disastrous Treatment Leads to Settlement

A 59-year-old patient presented to the MLMIC-insured dentist with a history of heroin dependency and poor dentition. Over the course of five years of treatment, the dentist placed implants at teeth #7 and 9, mini implants in the spaces of #4, 5, 12, 13, 14, 19, 20, and 21, and posts and cores in teeth #9 and 11. Crowns were prepped on #8, 9, 10, and 11. A root canal on tooth #28 was begun but never completed, and the tooth was eventually extracted. During the treatment period, each of the 10 implants failed.

Ultimately, all 10 implants and remaining teeth were removed by a subsequent treating dentist, and the patient needed full mouth reconstruction. In total, 19 teeth required extraction. The patient also required a bone graft and implants on 18 teeth. A treatment plan by the subsequent treating dentist included future damages in the amount of \$89,500. The patient had an outstanding balance of almost \$50,000 after paying \$15,000 for the work performed.

A treatment plan by the subsequent treating dentist included future damages in the amount of \$89,500.

A lawsuit was instituted in which the patient claimed she had difficulty eating and speaking, and suffered from pain, discomfort, and embarrassment. There was no claim for lost earnings. She admitted at her deposition that she continues to take Suboxone and had been taking it for 10 years to treat her heroin dependency. She did not have dental insurance and paid \$20,000 in cash to the insured dentist.

An expert review of the treatment provided by the MLMIC-insured dentist revealed nothing positive to assist in defending this case. Documentation in the records was poor, with missing pages, and the records were commingled with those of the patient's daughter. Billing records were confusing, as dates were missing or inaccurate. Several

procedures were performed without obtaining written informed consent. Some consents that were obtained did not include authorization for treatment that was provided by the dentist.

Documentation in the records was poor, with missing pages, and the records were commingled with those of the patient's daughter.

The treatment plan that included the use of mini implants to do a permanent full-mouth restoration was noted to be a deviation. The implants were poorly placed in questionable bone and were doomed to fail. The decision to restore the anterior teeth without posterior support is a deviation that caused excessive wear to the anterior teeth. The crowns fit poorly and were not seated on tooth structure.

Prescriptions given by our insured for controlled substances appear to be contraindicated for treatment that could not have caused pain. It was questionable as to whether the insured queried the New York State I-STOP registry prior to prescribing, which is a legal requirement. Although the preexisting condition of the patient's mouth was poor, the films dated upon initial presentation indicated that the lower seven anterior teeth probably could have been saved and used to support a partial denture.

The lawsuit was clearly indefensible due to poor documentation, sloppy recordkeeping, and numerous liability issues. MLMIC's Claims Management team recognized that the value of this case would likely increase if the deposition of the insured was taken. The patient's attorney was willing to negotiate prior to taking the testimony of our insured and demanded \$350,000 to resolve the case. Through aggressive negotiations, MLMIC was successful in settling this case for \$91,000.

A Legal and Risk Management Analysis

The numerous failings of the dentist in this case may seem farfetched, but the cumulative effect resulted in the ultimate decision to settle this lawsuit. Each individual risk management issue deserves the careful attention of all dental providers, since they frequently contribute to the indefensibility of malpractice cases.

The question arises as to whether this patient required a higher level of dental care than the general dentist could have provided.

The first and most obvious concern is the failure of the dentist to recognize that the patient had a history of heroin abuse and had been taking Suboxone for many years. A patient with such a history would likely have had very poor nutrition and dentition, which would have impacted the health of her teeth and gums. The question arises as to whether this patient required a higher level of dental care than the general dentist could have provided. At some point over the five years of treatment, and especially when the implants began to fail, the dentist should have transferred the patient to a more highly skilled and specialized provider with experience in treating the drug addicted. It is likely that the dental needs of this patient were well beyond the skills and experience of this dentist.

The most significant key to a good defense of a dental malpractice case is good documentation. In this case, not only were there scant entries in the patient's paper records, but, in fact, numerous pages were missing or never existed. If the suit had gone to trial rather than being settled, the patient's attorney could have requested a jury charge from the judge to imply that those pages were intentionally missing

from the record. In addition, commingling records of the patient's daughter with the patient's records represented an additional element of sloppiness in office procedures, which could have been imputed to the dentist.

There was little evidence of reasonable and adequate informed consent for each procedure performed on this patient. Lack of informed consent was a clear basis for this lawsuit, since the patient apparently was not advised in any detail about the risks and benefits of, and alternatives to, the treatment performed at each stage. In addition, the option of no treatment, as well as the obvious need for transfer to a higher level of dental care, were absent from informed consent discussions and documentation. In this particular and very complex situation, general consent to treatment is deemed to be extremely inadequate. Instead, a clear and well-written treatment plan accompanying the consent process was indicated and, unfortunately, lacking.

Lack of informed consent was a clear basis for this lawsuit, since the patient apparently was not advised in any detail about the risks and benefits of, and alternatives to, the treatment performed at each stage.

Yet another key element of the substandard care provided by this dentist was the failure to appreciate that a lengthy history of heroin addiction had a negative impact on the patient's bone structure. This condition resulted in poorly placed and failed implants. The dentist never considered the need to provide posterior support for the anterior teeth, which resulted in excessive wear.

It is also noteworthy that prescribing controlled substances to a former heroin addict who was on Suboxone makes no sense from a dental or medical perspective. Apparently, the dentist did not check the New York State I-STOP registry before prescribing narcotics for the patient, which is in direct violation of NYS laws governing controlled substances. The patient, in fact, took these medications even though the procedures for which they were prescribed do not generate pain when Suboxone is taken.

It is also noteworthy that prescribing controlled substances to a former heroin addict who was on Suboxone makes no sense from a dental or medical perspective.

Finally, the MLMIC claims department quickly realized that this dentist would not make a good witness at a deposition or trial. A serious attempt was made to settle the lawsuit due to the risk that a jury may have increased the projected value of the case beyond that which was anticipated. The claims staff was quite successful in this effort and resolved the suit for a reasonable amount without the dentist ever having to testify.



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Stay Connected

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

LinkedIn

Follow us for important industry updates and risk management resources.

www.linkedin.com/showcase/MLMIC-dental



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

www.twitter.com/MLMIC4Dentists

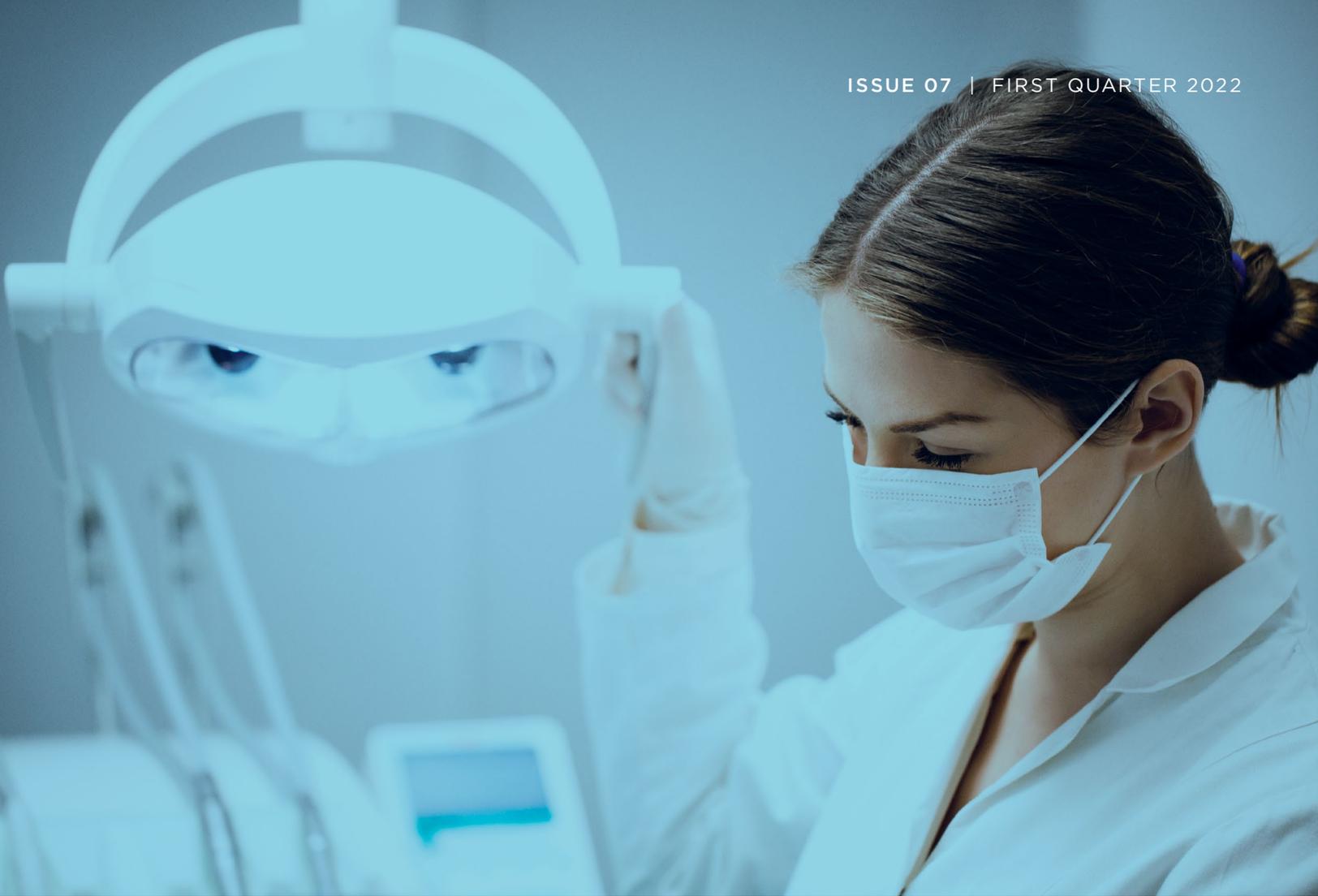
MLMIC Dental Impressions

Stay current with MLMIC's Dental Impressions monthly newsletter. Sign up at:

MLMIC.com/dentists/blog

To stay vigilant and mitigate potential liability risks, please consider the following recommendations:

1. **Establish an enterprise-wide management plan** to support patient safety by creating policies, guidelines for use, and roles and responsibilities for technology and interoperability processes. It is important to maintain strong communication between the clinical engineering and IT departments and to involve your Risk Manager in the development of these programs.
 - Assess whether customizations still function appropriately following updates.
 - Review interface maps.
2. **Develop a multidisciplinary “Selection, Acquisition, and Replacement Plan” to address:**
 - Organizational needs
 - Regulatory requirements
 - Technology obsolescence
 - Opportunities to increase services and/or technology
 - Standardization of processes and devices, where possible
 - Additional budgetary considerations
3. **Maintain inventory and records documentation:**
 - Include all equipment and devices.
 - Develop a criticality rating system, which is used to determine how often equipment should be inspected or maintained.
 - Outline inspection and maintenance schedules.
 - Document any testing and calibration prior to initial use, as well as inspections, maintenance, and repair activities, including who performed the work, full device identification (model and serial number, internal tracking numbers, etc.), device location, and any manufacturer-specific requirements.
4. **Establish a change control plan** to specifically address compatibility and connectivity needs with new or updated devices and applications:
 - 5. **Consider contract language** requiring technology vendors to provide advance notice of impending changes.
 - 6. **Perform periodic functionality testing**, which is especially important following any security updates.
 - 7. **Provide the following guidance** for the management of unexpected events:
 - Provide immediate care for the patient, if required.
 - Remove suspect or malfunctioning equipment from use.
 - Sequester the piece of equipment using lockout-tagout, a safety procedure used to ensure that machines are properly shut off and not able to be started up again prior to the completion of maintenance or repair work.
 - Promptly notify your professional and general liability carrier if patient harm occurred as a result of equipment malfunctioning. Contact your liability carrier before returning the device to the vendor or sending it for outside inspection.
 - Include these events in your event reporting system.
 - 8. **Monitor all device recalls and alerts.**
 - 9. **Maintain a strong and ongoing training and competency program.**
 - Education should be provided by a knowledgeable expert.



10. Communicate to staff the importance of reporting issues or suspected issues.

11. Address any nonstandardization/differences in devices that may look alike, but function differently:

- Alarm parameters
- Dose and rate settings on pumps
- Connections and tubing, etc.

12. Explain default settings and how to appropriately change them if necessary.

13. Establish quality/risk activities specific to each technology and its interoperability requirements.

- Track trends and analyze events that involve technology interoperability as a contributing factor.

14. Develop a policy and procedure for instances when patients are allowed to use their own devices, as the facility or practice may be at risk of liability for issues such as appropriate use, proper maintenance, repair, or storage. According to **ECRI**, “The key question to consider is, ‘Is there a risk of serious injury or death should the equipment fail?’”



Danielle Mikalajunas Fogel, Esq.



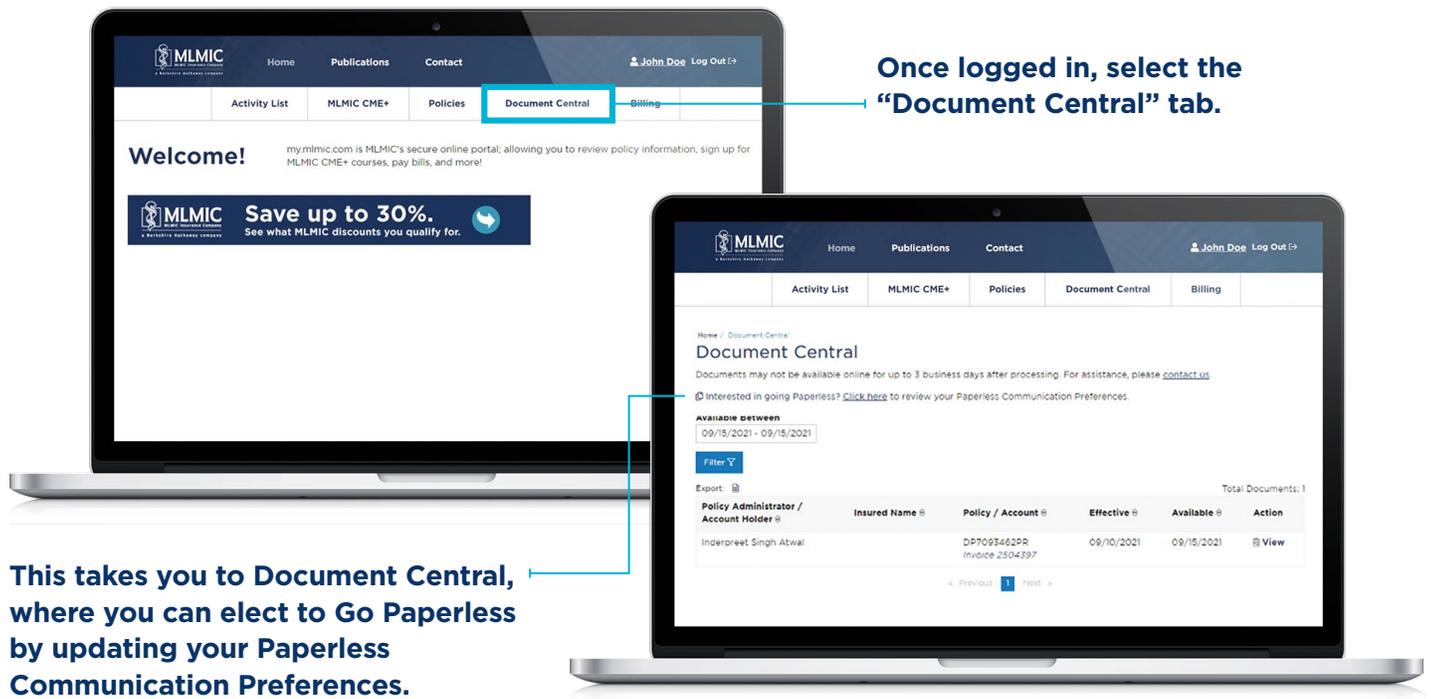
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Policyholder Reminders

Go Paperless – MLMIC’s Online Portal Access

Authorized visitors to the MLMIC portal who have established applicable access can view and download copies of their policy documents and invoices. The portal also provides visitors with the ability to pay premiums online. These items are accessible 24/7 on our website, MLMIC.com. First-time visitors can access the portal to establish login credentials. The process is simple, fast, and efficient.

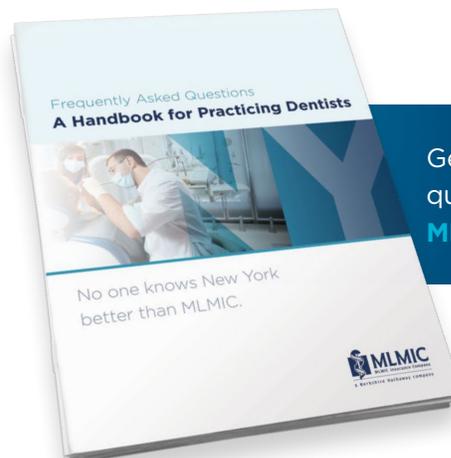
The MLMIC portal also provides authorized users the ability to opt into electronic document delivery only. A notification via email would be received each time a new policy document or invoice is ready to be viewed.



MLMIC’s Handbook for Practicing Dentists

If you haven’t yet taken a look at MLMIC’s *Handbook for Practicing Dentists*, here’s one of the frequently asked questions that it covers.

Q. What is my responsibility or liability if a patient fails to have a laboratory or other test performed or fails to keep an appointment with a specialist?



Get the answer to this question and more at MLMIC.com/handbook

TALK STUDIO

New York Healthcare Laws Signed and Vetoed by Governor Hochul

MLMIC Insurance Company is proud to present a new episode of *Talk Studio*, a video series on important and trending issues in professional liability, healthcare law, and risk management.

In this episode of *Talk Studio*, attorneys Nancy May-Skinner, Esq., and Marc Crow, Esq., discuss recent actions taken by Governor Kathy Hochul on New York State legislative measures related to pre-judgment interest, comprehensive insurance disclosure, and hearsay. New bills signed into law by the Governor took effect December 31, 2021.



Nancy May-Skinner and Marc Crow discuss New York healthcare laws signed and vetoed by Governor Hochul.

 [Click here](#) to view the episode.

AM Best Affirms Credit Rating of MLMIC Insurance Company

MLMIC Insurance Company is pleased to announce that **AM Best has affirmed MLMIC's A+ credit rating.**

FROM THE PRESS RELEASE:

“The ratings reflect MLMIC’s balance sheet strength, which AM Best assesses as strongest, as well as its adequate operating performance, limited business profile and appropriate enterprise risk management.

The company underwrites risks only within New York state, which is one of the nation’s most challenging markets for medical professional liability. However, management has been able to operate successfully through underwriting cycles while maintaining MLMIC’s leading market position within New York. In addition, risk management capabilities have proven appropriate for the risk profile of the company.”





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