

THE SCOPE

DENTAL EDITION

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Disaster Protocols,
Before and After

Go Paperless —
MLMIC's Online
Portal Access

Risk Management Checklists:
Communicating with Low Health
Literacy Patients

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Editorial Staff

John W. Lombardo, MD, FACS — Publisher

John Scott — Editor

Thomas Gray, Esq.

Katherine Lagano

Matthew Lamb, Esq.

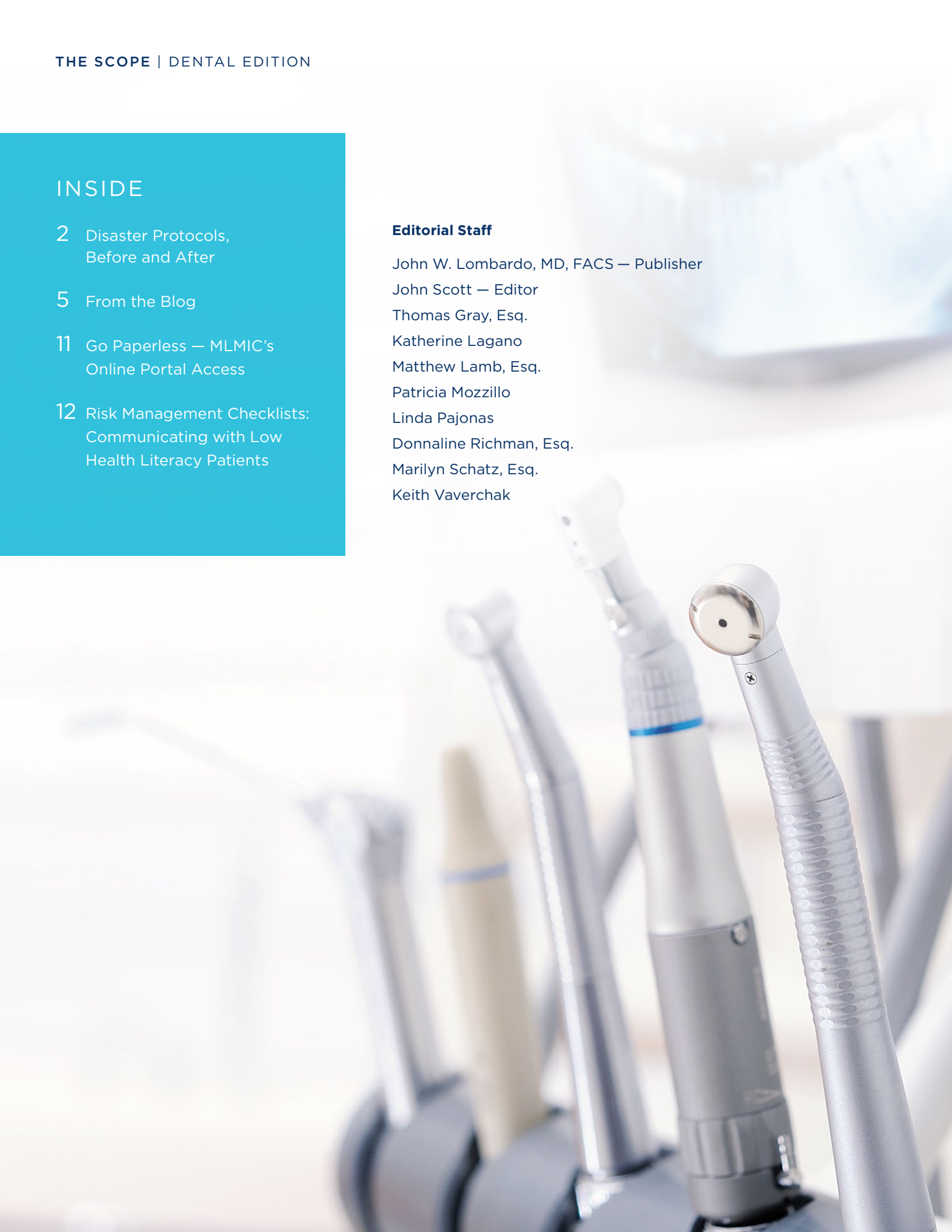
Patricia Mozzillo

Linda Pajonas

Donnaline Richman, Esq.

Marilyn Schatz, Esq.

Keith Vaverchak





EXECUTIVE MESSAGE

The Meaning in What We Do

We all seek meaning or purpose in what we do. What that meaning or purpose might be differs from person to person. For some, work is simply a means to provide for themselves or their families. For others, it provides funding for other pursuits or interests. My children gave me a plaque that I keep on my desk that says, “I work hard so that my dog can have a better life” (shows what’s important to them).

But seriously, for me, it’s simple. I find meaning and purpose in the fact that we are the frontline defenders, advocates, and allies for healthcare professionals. Unlike characters from a movie or TV show, healthcare professionals are our true heroes — people who put their health and safety on the line each and every day to care for all of us, our families, and our loved ones. MLMIC is proud to represent them, advocate for them, defend them, and protect them.

Each and every employee of MLMIC plays a part in protecting our policyholders. Underwriting and Finance find the right structures and the best pricing so that professionals can survive today’s tough healthcare economy. In Risk Management, we help protect these professionals from what they can’t or might not see — in themselves and others. In Claims, we defend them tirelessly throughout the arduous New York legal process. Through Human Resources, we bring the right talent to meet the demands and needs of our healthcare heroes. In Customer Service, live professionals represent us and show policyholders, every day, how much we care.

As individuals, we strive to be the very best at what we do, coming together as a larger, stronger team, in order to increase patient safety, improve outcomes, defeat needless and meritless cases, and drive better pricing and structures for those in healthcare who need it the most.

It is our meaning, our purpose, to protect healthcare professionals and institutions like no other — to provide service like no other. That is who we are. That is MLMIC.

We look forward to continuing to serve the interests of New York’s healthcare professionals, like no other, in 2022.

Happy Holidays and thank you.

A handwritten signature in black ink, appearing to read 'Michael Schoppmann', with a stylized flourish at the end.

Michael Schoppmann, Esq.

Chief Executive Officer, MLMIC Insurance Company

mschoppmann@mlmic.com

A dental X-ray of a human skull is shown in the background. A gloved hand is pointing at the lower right side of the skull. The entire image has a blue tint.

Disaster Protocols, Before and After

Fager Amsler Keller & Schoppmann, LLP

This past year, New York experienced some very destructive weather. Dentists and other professionals have unfortunately been affected, particularly by flooding. MLMIC Insurance Company and the attorneys of Fager Amsler Keller & Schoppmann, LLP have received telephone calls inquiring about how to deal with the loss of electronic and paper dental records that have been damaged or destroyed by floods and other types of storms.

Additionally, there has been an increase in inquiries regarding the loss of records from the infection of an electronic dental record system due to a ransomware attack. These types of attacks, recently detailed in the **Q2 issue of *The Scope***, have resulted in either a permanent loss of dental records, or a required payment of the requested ransom to regain access. Such predicaments may well be due to a dentist's failure to back up the electronic record system on a nightly basis, the inability to do so due to improper setup of the backup system, or an employee inadvertently infecting the system with malware.

When dental records have been damaged or lost by accident, natural disaster, or criminal computer compromise, prompt and appropriate action must be taken to mitigate the damage and/or loss. Immediate remedial measures must be undertaken for the benefit of patients as well as the dentist and the practice, as these losses may involve records from many years of treatment.

Records Retention Guidelines — Statutes of Limitation

Unfortunately, because of the various statutes of limitation to commence a lawsuit, nonexistent or incomplete dental records can severely compromise the validity of an otherwise defensible case.

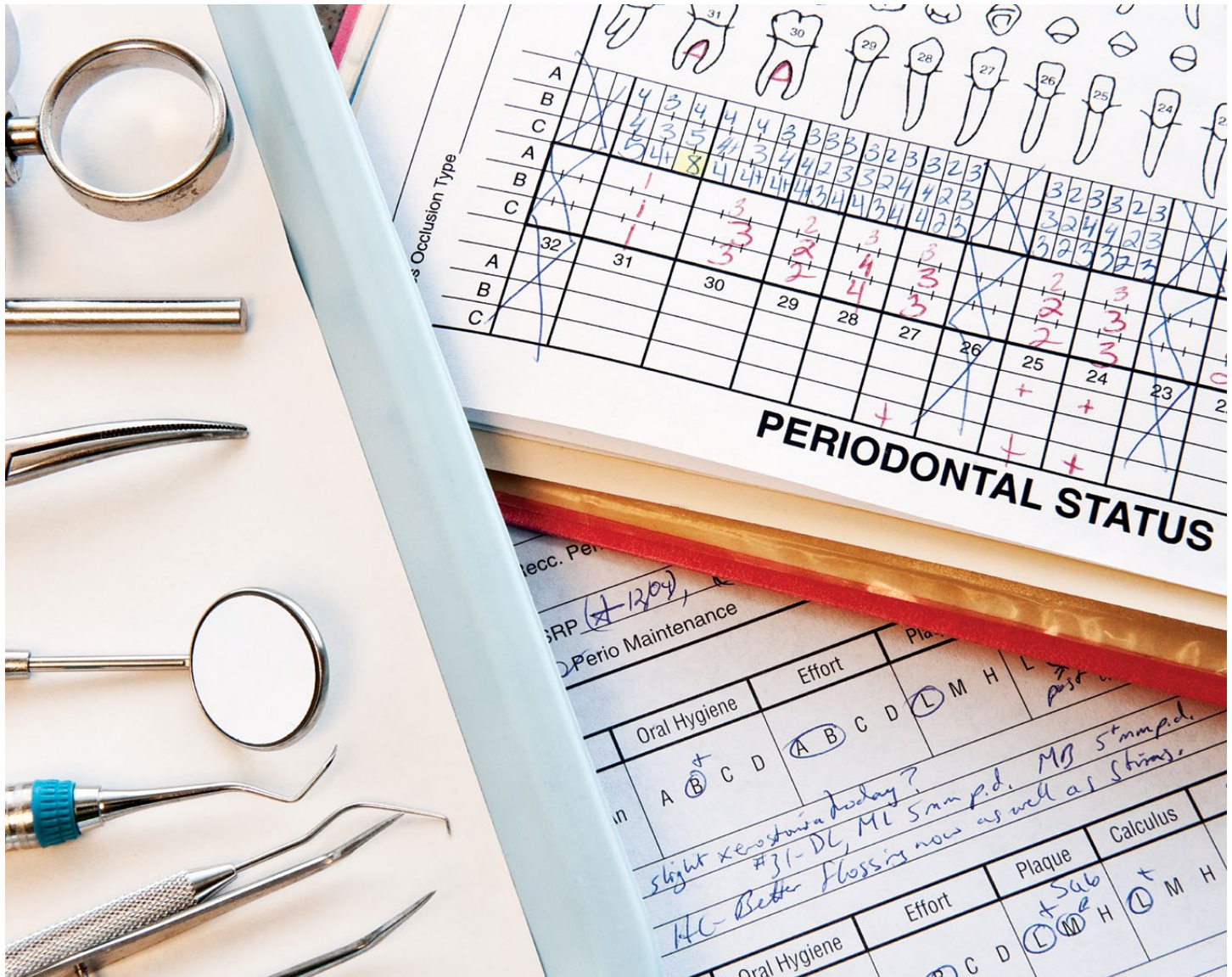
Until recently, there were only three ways to prolong or toll the statute of limitations. The first exception is *continuous treatment*, which allows a patient to commence a dental malpractice action within two and a half years from the last date of treatment for the same problem. When the dentist treats a patient for the **same** condition that gave rise to the alleged malpractice claim, the statute of limitations does not begin to run until either a) the termination of the professional relationship, or b) the physician no longer treats the patient for that condition. Some courts have held that the statute does not begin to run until the time of the patient's last appointment, even if the patient did not keep the appointment. The

date of last treatment may also include the date of the last prescription given to a patient. Continuous treatment does not include "examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition."¹

Some courts have held that the statute does not begin to run until the time of the patient's last appointment, even if the patient did not keep the appointment.

Another exception to the statute of limitations is a *retained foreign body*. When a malpractice action is based upon a "foreign body" unintentionally left in the plaintiff's body, "the action may be commenced within one year of the date of such discovery or of the date of the discovery of facts which would reasonably lead to such discovery, whichever is earlier." A "foreign body" does not include a prosthetic aid or device or a

1 CPLR § 214-a



broken instrument. It must be something introduced into the patient's body by the dentist that was not meant to be retained in the patient's body.²

There is also an exception to the two-and-a-half-year statute of limitations for *fraudulent concealment* of an injury or cause of the injury. This extends the statute to one year from the date of discovery of the fraud or the date when, by the facts known, the fraud could reasonably could have been discovered.³

Several years ago, however, the New York legislature passed yet another exception to the statute of limitations. Lavern's Law⁴ was named after a patient

whose cancer was not diagnosed within the normal statute of limitations. This law provides that if a lawsuit is based on the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the lawsuit must be commenced within two and a half years of when the patient knows or reasonably should have known of the alleged negligent failure to diagnose, or knows or reasonably should have known that such alleged negligent failure has caused injury, whichever is later. However, the lawsuit must be commenced within seven years of the alleged negligent failure to diagnose the cancer. Thus, a dentist's failure to diagnose an oral cancer would be subject to the statute of limitations contained in Lavern's Law.

² CPLR § 214-a

³ CPLR § 214-a

⁴ CPLR 214(a), CPLR 203(g)

Lavern's Law was named after a patient whose cancer was not diagnosed within the normal statute of limitations.

If a patient is an adult (18 years of age or older), a two-and-a-half-year statute of limitations is applicable for the patient to initiate a dental malpractice action. The statute of limitations on behalf of a patient who is a minor (under age 18) expires when the patient reaches age 20½, with a maximum time limit of ten years. However, a dentist's record retention obligations may extend even longer than the statute of limitations.

In general, we recommend that all dental records of adults be retained for at least seven years from the last date of treatment. However, if a dentist accepts federal insurance such as Medicare or Medicaid for the patient's dental care, an action may be commenced for filing a false claim for up to ten years. To capture all the above-described time periods, we now recommend that all records for adult patients should be retained for ten years from the date of last payment. Records of minor patients should be retained for ten years from the date of last payment, or until the minor reaches age 22, whichever is longer.

... we now recommend that all records for adult patients should be retained for ten years from the date of last payment.

Due to these lengthy record retention time periods, the impact of a fire, flood, or other act of nature, or a criminal invasion of a practice's computer system, can seriously impede the ability of a dentist to retrieve records to provide future dental care or assist in the defense of a dental professional liability lawsuit. In addition, when a professional's office becomes a disaster area due to fire or flood, the harm often extends beyond patient records to include financial records, models, and other dental information, as well as dental equipment, furnishings, and computer hardware.

FROM THE BLOG

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

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

A Dental Cavity-Free Future: What Will It Take?

Would it be possible to achieve a dental cavity-free future? A recent article says yes, if there are global collaborations and policy consensus. Caries and cavities are the world's most prevalent noncommunicable disease. Despite that, cavities are typically ignored in health policy. The authors of the article emphasize the severity of the issue and provide four recommendations for integrating oral health into overall wellness.

[READ MORE](#)

Risk of Spreading COVID-19 During Dental Procedures? Fairly Low, Study Finds

At the beginning of COVID-19, dental practices were initially seen as a particularly risky location to visit. After all, dentists work in patients' mouths, patients can't wear a mask during dental treatment, and we've come to understand that SARS-CoV-2 is present in the mouth. However, recent research found that dental procedures during COVID-19 are not much riskier than taking a drink of water.

[READ MORE](#)

Actions to Take After an Event:

Immediately notify the appropriate insurance company in the event of a loss of dental records.

Promptly taking photographs of the condition of the premises and its contents is important for showing an insurance adjuster what has been damaged or lost in the way of equipment, furnishings, and the premises itself, as well as the extent of the damage. This includes the loss or damage to patient records, photographs, X-rays, and other patient information.

Retaining the immediate services of a reputable restoration company is crucial and invaluable to possibly contain any damage, as every effort should be made to recover all or some of the affected records and equipment. EHR experts should promptly be contacted for assistance with attempting to retrieve electronic records, photographs, and X-rays. The insurer, NYSDA, or the local dental society may provide recommendations for reliable companies to assist in the restoration process. Also, both the New York State Department of Health and the federal government have current resources online to assist in the retrieval process. If you are unable to retrieve PHI, there are additional resources online to provide advice about handling this situation.

Cataloging all lost or damaged items, equipment, and records can be a very difficult task. An experienced company can assist in this undertaking.

Thorough documentation of all salvage efforts and the types and extent of the damage is essential. This evidence will also be helpful to refute potential allegations of “spoliation of evidence” should a dentist be unable to produce patient records and X-rays during litigation.

Records that are damaged beyond salvage or reconstruction of any type must be properly and safely disposed of in a manner that prevents usage by anyone else, or the ability to access any PHI. **Patients should also be notified of this loss of data.**

A HIPAA Business Associate agreement must be signed by any companies involved in restoration efforts in order to maintain the confidentiality of protected health and financial information. Such patient information must remain confidential even if records have been damaged. A dental professional’s duty to maintain the confidentiality of protected health information (PHI) is not waived merely because there has been a flood or other disaster.

Generating and maintaining a record of the disaster, including date, time, what was damaged, the sources used for record reconstruction or attempted retrieval of X-rays, models, photographs of the damage, as well as copies of Business Associate Agreements with companies hired to attempt to salvage these items, is crucial. This documentation will be useful for accurately replying to any future requests from an attorney, patient, government agency, or insurer for a copy of dental records that were damaged or unsalvageable. An appropriate response can be prepared regarding the date and extent of loss of any items requested, and the companies involved in the salvage and restoration process.



Establishing New Records

It can be difficult to try to recreate all the lost information to establish a new record. The information that must be obtained includes the patient's medical and dental history, medications, allergies, and consultations with other dentists or specialists. The record should also contain relevant financial and insurance information. One good source of such information may well be the patient's dental insurer, which may be able to provide information from a patient's prior dental visits.

When a patient's dental record is recreated, it must be clearly documented that it is a new record from a variety of sources due to damage or destruction of the original record. This notation will provide justification for failure to maintain original records for the required time frame. It will also serve as evidence in a dental professional liability lawsuit that records were not falsified.

... it must be clearly documented that it is a new record from a variety of sources due to damage or destruction of the original record.

Any disaster resulting in loss of paper records because of where and how they were maintained/stored, or failure to properly back up electronic records, can be very stressful, frustrating, and devastating to a dental practice. However, the difficulties and challenges can be made more manageable by following not only the above recommendations, but also those received from insurance, salvage, and computer companies. In addition, it is advisable to notify MLMIC about the loss of, or damage to, dental records. A MLMIC Underwriter should also be informed if a dental office must close for business during the retrieval or restoration process.

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MLMIC Dental Impressions

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Risk Management Actions

Paper records must be placed in waterproof and fireproof containers that are stored on shelves high above the floor. Carefully evaluate the custodial services of any storage company contracted to maintain records off premises to ensure that all records will be maintained safely.

Computer systems must be routinely checked to confirm the effective backup of electronic records.

Obtain adequate insurance coverage for both the contents of the dental office and cybercrimes. Carefully review and understand the terms, conditions, and exclusions of all insurance policies.

Case #1

Flood-Damaged Records

A 55-year-old male, a longtime patient of the MLMIC-insured dentist, was undergoing extensive dental work that included implants that were placed by an oral surgeon who worked in an adjacent office. The restorations, which consisted of upper and lower arches with crowns and bridgework, were to be completed by the MLMIC-insured dentist. This treatment was performed over a period of seven years, with various delays such as temporaries having to be redone on multiple occasions. When the dentist last saw the patient, he was still in temporary restorations.

When the patient subsequently began treatment with another dentist, this dentist noted poorly integrated implants with temporary restorations and visibly open margins. This dentist ultimately completed permanent restorations for the patient, with which he had no complaints.

The patient filed a lawsuit shortly after the second dentist completed this work. He alleged a negligent full-mouth restoration resulting in bone loss, extractions, and the need for re-treatment. The oral surgeon who placed the implants was also named in the litigation.

The dentist being sued reported to MLMIC that he was unable to produce much of the patient's record as there had been multiple floods in the building that affected not only his office records, but also those of the codefendant oral surgeon. Consequently, there was very little record of the patient's

dental care available for the defense of either the dentist or the oral surgeon.

The MLMIC expert who reviewed the case found that the few records that were provided were in shambles and seemingly pieced together. Despite having separate offices, the dentist and codefendant oral surgeon combined the remains of their patient records to provide a more complete chart. That this was not initially disclosed further complicated the issue. The MLMIC expert was unable to determine if the patient needed to lose all his teeth. Thus, without the benefit of complete records, it was not possible to determine whether any of the patient's teeth were in fact salvageable.

The MLMIC expert was unable to determine if the patient needed to lose all his teeth.

When the insured dentist presented to the District Claim Committee, he was defiant, defensive, emotional, and adamant about defending the case. He did not feel the lack of records was problematic, and he suggested that he could recreate his chart. However, the Committee voted to settle the lawsuit. It was felt that, given the facts and circumstances of this case, and, particularly, the loss of so many records, early resolution prior to the insured's deposition was necessary. As a result of the concerns indicated above and the lack of a defensible dental record, the case was settled prior to the deposition of the defendant for \$325,000.

Case #2

A Ransomware Attack

A dentist had come in to work over the weekend to complete documentation on patient records so they could be billed that coming week. To his surprise, the computer seemed to contain no patient records. He then received a message on the computer that in order to regain his practice's dental records, he would have to pay a substantial ransom of many thousands of dollars in bitcoin within a very limited number of days.

The dentist felt secure that he would not have to pay that ransom, as he would be able to retrieve all his records from the cloud, where they were to be backed up every night. However, he could not find any of his patient records on the cloud. He immediately called the software company that had installed the computer system. Unfortunately, the service person discovered that the backup system had never been properly installed

and connected. Thus, all the computerized dental records were in fact not properly backed up and therefore, lost... unless he paid the ransom.

Unfortunately, the service person discovered that the backup system had never been properly installed and connected.

The dentist opted to pay the ransom and was subsequently able to retrieve all his records. He promptly contacted the computer company that did not properly set up the backup program for his patient records and advised them of their potential liability in this situation. He then hired a new computer company to make certain that there was now a backup system in place, and the backup system was tested as soon as it was operable.



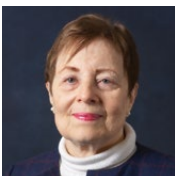
Linda Pajonas is a Claims Specialist with MLMIC Insurance Company.

lpajonas@mlmic.com



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

mschatz@fakslaw.com



Donnaline Richman is an attorney with Fager Amsler Keller & Schoppmann, LLP.

drichman@fakslaw.com

Go Paperless — MLMIC's Online Portal Access

Save time and effort by accessing your policy documents and invoices electronically and making premium payments online through the MLMIC Portal.

Policy Documents & Document Central

Authorized visitors to the MLMIC portal who have established applicable access can view and download copies of your policy documents and invoices. The portal also provides you with the ability to pay premiums online. These items are accessible 24/7 on our website, [MLMIC.com](https://www.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 and elect to no longer receive paper documents by mail. By opting into electronic delivery, you would receive an email notification each time a new policy document or invoice was ready to be viewed.

Once logged in, users with appropriate access can simply select the “Document Central” tab as seen here on the sample screen...

... where they will be taken to Document Central, with the ability to search and view policy documents and invoices and Go Paperless by updating their Paperless Communication Preferences.

The right screen displays the 'Document Central' page with the following table:

Policy Administrator / Account Holder	Insured Name	Policy / Account	Effective	Available	Action
Indrapreet Singh Atwal		DP7093462PR Invoice 2304397	09/10/2021	09/16/2021	View

Once logged in, go to the Document Central tab to access your policy documents and invoices. Here, you will also have the ability to Go Paperless by reviewing and changing your Paperless Communication Preferences.

Online Premium Payments

Authorized portal users can also make expedited electronic premium payments. Simply click the Billing tab to access the payment options, which include an Automated Clearing House (ACH) and credit card payments. Credit card payments are subject to a 3% surcharge. Completed payments will generate an automated email receipt from our payment processing partner that will be sent to the portal user's email address, confirming the transaction.



MLMIC.com portal login assistance, if needed, is available at (888) 234-0752.

Risk Management Checklists

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

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

COMMUNICATION

CHECKLIST #5

COMMUNICATING WITH LOW HEALTH LITERACY PATIENTS

The lay public often has limited knowledge and understanding of dental terminology. A patient's inability to understand dental information may be compounded by stress, age, illness, and language or cultural barriers. Effective communication with patients may improve compliance with treatment regimens, enhance the informed consent process, and increase safe medication use. Dental office practices can improve the patient experience, and reduce potential liability exposure, by employing the following recommendations.

	YES	NO
1. Lay terminology is used whenever possible. Technical terms are defined with simple language. Patient education materials are written in plain language, avoiding the use of medical or dental jargon.	<input type="checkbox"/>	<input type="checkbox"/>
2. Verbal instructions are reinforced with visual aids and printed materials that are easy to read, and include pictures, models, and illustrations. Consideration is given to the use of non-printed materials, such as videos and audio recordings, as indicated.	<input type="checkbox"/>	<input type="checkbox"/>
3. Assistance is offered to patients when completing new patient information or any other practice documents. This help is provided in a confidential way, in an area that is private and conducive to this type of information exchange. Patients are encouraged to contact us with any further questions.	<input type="checkbox"/>	<input type="checkbox"/>
4. Interpreters are used, if indicated, for patients who are not fluent in the English language.	<input type="checkbox"/>	<input type="checkbox"/>
5. Open-ended questions are used at the end of the encounter, rather than yes/no questions, to further assess patient understanding. Instead of asking, "Do you have any questions?" we say, "What questions do you have for me?"	<input type="checkbox"/>	<input type="checkbox"/>
6. Dentists and staff are familiar with and utilize the principles of the "teach back method" when reviewing new medications or treatment plans with patients. First, teach the information, then ask patients to repeat it back in their own words.	<input type="checkbox"/>	<input type="checkbox"/>
7. Patients and family members may be embarrassed by, or unaware of, their healthcare literacy deficits. Our dentists use an empathetic approach to increasing patient health literacy and enhancing the dentist-patient relationship.	<input type="checkbox"/>	<input type="checkbox"/>

Here are the answers you need to secure your practice.



Each year, legal counsel to MLMIC Insurance Company receives thousands of questions concerning professional liability, risk management, and dental healthcare law. Now, we've gathered the best responses and made them easy for you to access.

MLMIC's *A Handbook for Practicing Dentists* includes clear information on a range of issues, including:

- Informed Consent
- Navigating the Dentist/Patient Relationship
- Maintaining Dental Records
- HIV Confidentiality
- The National Practitioner Data Bank
- Handling Requests from Attorneys
- Diagnostic Test Follow-up... and more



View it now at
MLMIC.com/handbook

Read questions one by one or download
the entire handbook as a pdf.





P.O. Box 1287
Latham, New York 12110

New York City | Long Island | Colonie | Syracuse | Buffalo

(800) ASK-MLMIC