

DOCTORS

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COVID KERNELS WHAT WE KNOW NOW

find out...

- Do you have immunity in Maryland or Virginia during the COVID-19 pandemic?
- How do you implement appropriate infection control policies in your practice to better protect patients and your practice?
- What are some helpful tips when engaging in telehealth visits with patients?

A LETTER FROM THE CHAIR OF THE BOARD

Dear Colleague:

2020 has been a very challenging year for our members, and we applaud your resilience in adapting to the changes that the pandemic has brought to you and your practice. This issue of *Doctors RX* will examine the information that we currently have on the availability of health care provider immunity as well as a series of tips to help you mitigate your liability risk in the days to come.



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COVID KERNELS

WHAT WE KNOW NOW

The world has changed in a variety of ways since COVID-19 began to spread. As a health care provider, you probably know this better than most. Your medical practice has had to quickly adapt. You've had to stay abreast of the latest Centers for Disease Control ("CDC") guidelines and state department of health guidance. You've had to stay on top of federal, state, and local government orders. And you've had to make decisions on whether and how your practice could continue to conduct patient visits in person, through telehealth, or some combination of the two.

With the plethora of new and changing information, you may have wondered: What are my legal protections in this COVID-19 world? What can I do to further safeguard myself and my practice from liability when providing care in an in-person or virtual environment?

In this article, we will tackle these questions. We begin with a summary of Maryland and Virginia immunity statutes most applicable to providing health care services during a pandemic. At first blush, these immunity provisions may seem attractive and give you the sense that you are protected from a wide range of actions or inactions. The truth is that there is still considerable uncertainty with how these laws will apply. But there is something you and your practice can do now. It is more important than ever to stay vigilant and exercise many of the sound risk management measures you have had in place for years. Whether you are caring for patients in person or via telehealth, the

tips below are a combination of some old and new measures to help you and your practice mitigate your risk and protect yourself in the event of future litigation.

"It is more important than ever to stay vigilant and exercise many of the sound risk management measures you have had in place for years."

COVID-19 IMMUNITY?

In the wake of the ongoing COVID-19 pandemic, there has been considerable discussion on health care provider immunity. Frequently absent from these discussions, however, is a critical point. **Immunity statutes do not protect Doctors from a patient filing a lawsuit.** Instead, immunity statutes provide Doctors with an affirmative **defense** argument should litigation arise. So, as you read the summaries below, think of immunity as one of the most powerful tools in your defense toolbox. But, remember that the success of any defense, including immunity defense, will heavily depend on the factual circumstances of each case.

Maryland Immunity

On March 5, 2020, Maryland Governor Larry Hogan issued a Proclamation declaring a state of emergency and catastrophic health emergency due to COVID-19 ("Proclamation").



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Remember...

Immunity statutes could help a Doctor in the case of litigation but don't prevent a patient from filing a lawsuit.

By issuing this Proclamation, the immunity provisions of Maryland Code, § 14-3A-06 of the Public Safety Article were activated to provide Doctors with immunity from civil and criminal liability if the Doctor “acts in good faith and under a catastrophic health emergency proclamation.” But don’t let this seemingly straightforward language fool you. It must be reviewed in context.

On May 6, 2020, Governor Hogan renewed the Proclamation and confirmed that these immunity protections indeed apply to a Doctor if the Doctor acts in good faith under the emergency proclamation *and* in accordance with government orders. That same day, the Maryland Department of Health (“MDH”) issued its own interpretation of immunity during COVID-19 opining that it “does not construe the immunity provisions in Pub. Safety Art. § 14-3A-06 . . . to apply to a health care provider or facility performing non-COVID-19 related procedures or appointments.” Both the State’s Proclamation and MDH’s interpretation have consistently been renewed and remain in effect as of the date of this article.

So, what does this mean for you? As unsatisfactory as this will sound, the breadth of situations where Maryland immunity would apply is unclear. On the one hand, if you were providing routine care for a non-COVID-19 patient during the catastrophic health emergency and a lawsuit arises concerning such care, immunity will likely not apply. Conversely, if you were caring for a COVID-19

patient during a catastrophic health emergency and were following any applicable orders issued by the Governor or other State officials, an immunity defense may apply. Beyond this, the full scope of immunity in Maryland will remain an issue to be resolved by Maryland courts.



Virginia Immunity

Virginia immunity is less obscure. On March 12, 2020, Virginia Governor Ralph Northam declared a state of emergency due to the COVID-19 disaster. Declaring this disaster triggered the two immunity statutes discussed below.

Virginia Code, § 8.01-225.01A

Virginia Code, § 8.01-225.01A confers on a Doctor immunity from civil liability when the Doctor is unable to provide the requisite health care to a patient, because the Doctor



must voluntarily or mandatorily abandon the Doctor's practice to deliver health care to those injured by a disaster, such as those injured by COVID-19. This immunity is available only if that Doctor's actions or omissions are "in the absence of gross negligence or willful misconduct."

On April 28, 2020, Governor Northam issued Executive Order 60 clarifying that immunity could apply to situations involving decisions like the temporary withholding of health care services performed at certain locations, including Doctors' offices, when the State prohibited elective surgeries and procedures requiring PPE. The Order qualified this by adding that the delay in care must not have been "anticipated to cause harm to the patient by negatively affecting the patient's health outcomes, or [to] lead[...] to disability or death."

So, what does this mean for you? While the full scope of the immunity provided under Virginia Code, § 8.01-225.01A is inexact, what we can discern is that an immunity defense could be used if (1) during the COVID-19 emergency, you had to delay a procedure, consultation, or surgery that required PPE for an existing patient, in accordance with state order or guidance, **to care for a suspected or confirmed COVID-19 patient or patients**; (2) the delay of care to an existing patient was not done with gross negligence or willful misconduct; and (3) the delay of care to the existing patient was "not anticipated to cause harm to the patient by negatively affecting the patient's health

outcomes or [to] lead[...] to disability or death."

Virginia Code, § 8.01-225.02A

The second statute, Virginia Code, § 8.01-225.02A, provides a Doctor with immunity from civil liability arising from delivering or withholding care when the health care provider is unable to provide the normally required level or manner of care because "the emergency [such as the COVID-19 disaster] and subsequent conditions cause[...] a lack of resources, attributable to the disaster . . ." Here too, a Doctor's decisions must not be with gross negligence or willful misconduct for this immunity to apply.

Governor Northam's Executive Order 60 also dispelled vagueness as to the application of this immunity statute by detailing some conditions and lack of resources that would qualify for immunity protection. Although Executive Order 60 explicitly did not provide an exclusive list, some conditions and resources are: (1) insufficient equipment and supplies such as PPE, drugs, or blood products, (2) unavailability of trained staff, and (3) implementation of triage protocols or scarce resource allocation policies.

So, what does this mean for you? This immunity statute appears to provide the widest range of protection. For instance, you might be able to use this immunity defense if (1) during the emergency and pursuant to government order or guidance, you needed to postpone a procedure, consultation, or surgery for a patient



Did you know...

It is important for Doctors to stay up to date on government Orders and to document when they learn about new, changing rules and regulations, as it could help them in the case of potential litigation.

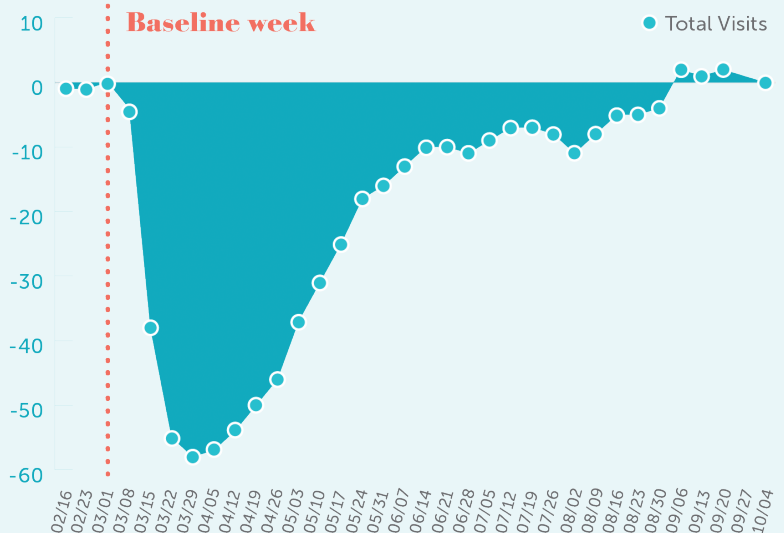
In-Person Patient Visits

Visits to ambulatory providers fell to 57% in early April. Since then, in September and October, visits started returning to pre-pandemic levels.

Note: Data are presented as a percentage change in the number of visits in a given week from the baseline week (March 1-7).

Source: Ateev Mehrotra et al., The Impact of the COVID-19 Pandemic on Outpatient Care: Visits Return to Prepandemic Levels, but Not for All Providers and Patients (Commonwealth Fund, Oct. 2020).

<https://www.commonwealthfund.org/publications/2020/oct/impact-covid-19-pandemic-outpatient-care-visits-return-prepandemic-levels>



Don't forget to Document!

“Documentation provides evidence needed to defend any future claim, including evidence needed for an immunity defense.”

because of insufficient PPE or scarce resource allocation policies; (2) your decision was not done with gross negligence or willful misconduct; and (3) your decision was “not anticipated to cause harm to the patient by negatively affecting the patient’s health outcomes or [to] lead[...] to disability or death.” Unlike Virginia Code, § 8.01-225.01A, this immunity does not require you to demonstrate that you were caring for a suspected or confirmed COVID-19 patient.

TIPS FOR PATIENT VISITS DURING COVID-19

As you have probably gathered by now, immunity protection may apply in a myriad of situations, but the extent of that protection has not yet been defined by the courts. While you should know what protections may be available under the law as you provide health care services during the pandemic, you should also take some concrete actions to mitigate your risk and defend against any future medical malpractice claims. The tried-and-true risk management tips below will aid you and your attorney in establishing a defense should litigation arise.



Document, Document, Document!

Just as in times before COVID-19, documentation and having a complete patient record are vital to protecting you and your practice. Documentation provides evidence needed to defend any future claim, including evidence needed for an immunity defense. Regardless of whether you are providing care in person or by telehealth, you should adhere to best practices for documenting your interactions with patients. Below are some items that should appear in every one of your patient’s medical records:

- The date and substance of all communications with patients (regardless of the form of communication)
- All observations during a patient visit
- All explanations provided to a patient concerning treatment recommendations
- *If government guidance is applicable to your decisions concerning a patient, document this government guidance and your understanding of the government guidance at the time*

Infection Controls and Policies

The CDC and some state health departments recommend or require Doctors and their practices to implement infection control measures during COVID-19. In Maryland, for example, MDH requires that health care providers resuming non-urgent or elective procedures and appointments comply with, among other things, CDC infection controls, and the failure to comply with such controls



could subject the Doctor to professional discipline. Additionally, both Maryland and Virginia currently require individuals to wear face coverings or face masks while indoors, including in Doctors' offices, except in certain specified circumstances. Keep a record of what your practice has done to comply with CDC guidance and any state or local order. Having documentation of your actions preserves your ability to demonstrate your compliance and could serve as valuable proof of compliance if litigation or disciplinary action were to arise.

You further understand that recommendations and guidelines regarding COVID-19 are subject to modification.

Signed Acknowledgment Forms for All In-Person Patients

If you and your practice are seeing patients in person, you should consider having patients sign an acknowledgment form recognizing the risk of COVID-19 transmission. An acknowledgment form signed by all in-person patients could provide you and your practice with legal protections should a patient claim the patient contracted COVID-19 at your practice.

Consider using the following template:

COVID-19 is an infectious virus that currently has no direct treatment and for which there is no current vaccine. While we have taken reasonable steps to limit the potential for transmission of COVID-19 in our office, you agree that you understand

transmission of COVID-19 is still possible.

You understand that our office offers a HIPAA-compliant telemedicine option. However, your care and/or your preference requires an in-person visit with our staff and health care providers. When required to provide you care, our staff and health care providers may be within six (6) feet of you and may touch you and your personal objects. You understand that person-to-person contact may increase the chance of COVID-19 transmission. It may be necessary that you quarantine and/or take other steps in the event it is determined that you may have been exposed to COVID-19.

You must ensure that any statements made in this acknowledgment form are accurate and that you customize this template to fit your practice. For instance, do not include the phrase, "You understand that our office offers a HIPAA-compliant telemedicine option," if your practice does not offer a telemedicine option. Keep each signed acknowledgment form in the patient's medical record.

MORE TIPS SPECIFIC TO TELEHEALTH

- **The Laws Still Apply:** Telehealth may be a different means of providing care, but all informed consent and standard of care requirements still apply.
- **HIPAA Still Applies:** Remember that HIPAA still applies to all telehealth



The Rise of Telehealth

During the COVID-19 pandemic, telehealth has grown increasingly more popular. Nearly half (43.5%) of Medicare primary care visits were provided via telehealth in April, compared to less than one percent before the public health emergency in February (0.1%).

SOURCE: <https://aspe.hhs.gov/pdf-report/medicare-beneficiary-use-telehealth>

FOR MORE
INFORMATION, VISIT

MMLIS.COM/COVID-19
OR
PROAD.COM/COVID-19

visits. Although the United States Department of Health and Human Services Office for Civil Rights (“OCR”) issued a notice of enforcement discretion regarding HIPAA compliant telehealth platforms, this notice does not guarantee that OCR will not take enforcement action. This notice also does not provide enforcement discretion in other aspects of HIPAA. Therefore, you and your practice must continue to adhere to HIPAA, and we strongly encourage all Doctors to only use HIPAA-compliant telehealth platforms.

- **Patient Consent to Telehealth:** Remember to always obtain the patient’s consent before conducting a telehealth visit. Document or record this consent in the patient’s medical record. If you opt to electronically record the consent, ensure that the patient has first consented to being recorded. *In Maryland, all parties must consent to being recorded, so document in the patient’s medical record that all parties have consented to any recording regardless of whether it is a video or audio recording.*
- **Your Location:** Only conduct telehealth visits when you are physically located in a state where you are licensed to practice and have medical malpractice insurance coverage. For any telehealth visit, document your physical location in the patient’s medical record.

- **Your Patient’s Location:** Similarly, confirm that the patient is physically located in a state where you are licensed to practice and in a state where you have medical malpractice coverage *before* conducting a telehealth visit. Document the physical location of the patient in the patient’s record.

CONCLUSION

As you and your practice continue to navigate this new COVID-19 world, keep in mind that you have immunity protections in some situations, but do not rely on immunity. One of the best ways to mitigate your risk and protect yourself, regardless of the mode of patient care, is to Document, Document, Document! Document all policies and procedures you have put in place pursuant to government order or guidance. Document all communications with a patient regardless of the method of communication. Document your thought process when caring for a patient and whether any government orders or guidance are applicable to that patient’s care. Document you and your patient’s location when using telehealth. And, document and keep a record of all acknowledgment forms for in-patient visits. By implementing these simple strategies, you can protect yourself and your practice while doing what matters most: continuing to provide the care that your patients need during these challenging times.

This article is provided for general information purposes only and is not intended to be legal advice. Please contact your attorney for additional information on this subject matter.



CME TEST QUESTIONS

1. Current state immunity statutes have been tested in the courts.
A. True B. False
2. It is not a good idea to document government guidance applicable to your decisions vis-à-vis patient care in the record.
A. True B. False
3. Telehealth is a different means of providing care and all informed consent and standard of care requirements still apply.
A. True B. False
4. You do not need to obtain a patient's consent prior to conducting a telehealth visit.
A. True B. False
5. You do not need to customize your acknowledgement form to fit your practice. One size fits all.
A. True B. False
6. You should comply with CDC and state health department guidelines regarding necessary infection control measures during COVID-19.
A. True B. False
7. Federal HIPAA regulations do not apply to telehealth visits.
A. True B. False
8. You should document all communications with a patient regardless of the method of communication used.
A. True B. False
9. Immunity statutes protect Doctors from a patient filing a lawsuit.
A. True B. False
10. The defense of an immunity lawsuit will depend on the factual circumstances of the case.
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.

Mail or fax your completed answers for grading:

Med•Lantic Management Services, Inc. | Fax: 410-785-2631
P.O. Box 8016 | 225 International Circle | Hunt Valley, Maryland 21030
Attention: Risk Management Services Dept.

1. 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.
2. Completion Deadline: March 31, 2021
3. 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 "COVID Kernals, What We Know Now"

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

- 1) Have a better understanding of immunity laws in both Maryland and Virginia
- 2) Understand infection control policies and procedures in the wake of COVID-19
- 3) Identify liability issues as it pertains to telehealth in their practice



Strongly Agree Strongly Disagree

Part 1. Educational Value:

5 4 3 2 1

I learned something new that was important.

I verified some important information.

I plan to seek more information on this topic.

This information is likely to have an impact on my practice.

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



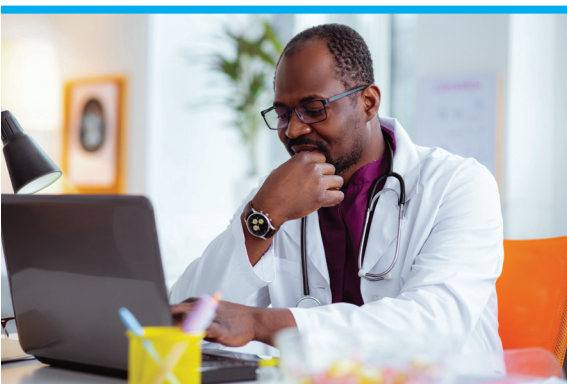
IT'S NOT TOO LATE TO REGISTER FOR A RISK MANAGEMENT PROGRAM

Although 2020 is coming to an end, there is still time to register to take a risk management education program. Upon completion of a program, you will be eligible to receive a 5% discount on a 2021 renewal policy and CME credits. Home study and online risk management education programs are available. For additional information and to register, visit our web site at mmlis.com or proad.com



NEW RISK MANAGEMENT PROGRAM: FINDING RESILIENCE DURING A PANDEMIC

A free 1.5-hour webinar, "Finding Resilience During a Pandemic," presented by Lynne Hughes will be held from 6:00 to 7:30 p.m. on December 10th. Lynne Hughes is a recognized expert on helping people navigate transition. Insureds will receive CME credit for attending, but no risk management discount. The webinar will focus on how to navigate the impact of COVID-19, including strategies on how to stay balanced and avoid burnout. You can register for this free program at: mmlis.com/risk-management/programs or professionalsadvocate.com/risk-management/programs



FREE RESOURCES AND GUIDANCE PROVIDED IN "RESOURCES FOR YOUR PRACTICE" ENEWSLETTER

Our *Resources for Your Practice* eNewsletter makes it convenient to access timely information and tools for your practice. Every quarter, the eNewsletter is sent directly to your email inbox, providing you with helpful resources and news. Our most recent issue included guidance on how to respond to medical records requests, downloadable professionally designed signs for your office, and more. If you are not receiving this informative eNewsletter, contact our Customer Service Department at 410-785-0050 or 800-492-0193 to make sure the email address on file for you is accurate.



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DOCTORS

Publication of MEDICAL MUTUAL/Professionals Advocate®



PRACTICE MANAGER TOOLBOX: A NEW ONLINE RESOURCE FOR PRACTICE MANAGERS

As an insurer with decades of experience protecting Doctors in this area, we have the background to understand the many different challenges routinely faced by Practice Managers. Whether it's keeping up with the constant introduction of new laws and regulations, changing health care standards, patient-related service issues, or even the challenges of a global pandemic, Practice Managers are expected to be knowledgeable and decisive. That's why we are excited to introduce yet another way we are supporting your practice. Our new Practice Manager Toolbox is a convenient online resource specifically designed to provide relevant and timely guidance to Practice Managers on the wide variety of scenarios faced day-to-day. The resources provided through the Practice Manager Toolbox include such important topics as practice operations, patient engagement, compliance, billing and insurance, cyber liability, EHR optimization, and more. Practice Managers must register to get access to the Practice Manager Toolbox section of our web site. In consideration for registering, Practice Managers also can choose a free gift! Learn more at mmlis.com/practice-manager-toolbox-faq and proad.com/practice-manager-toolbox-faq