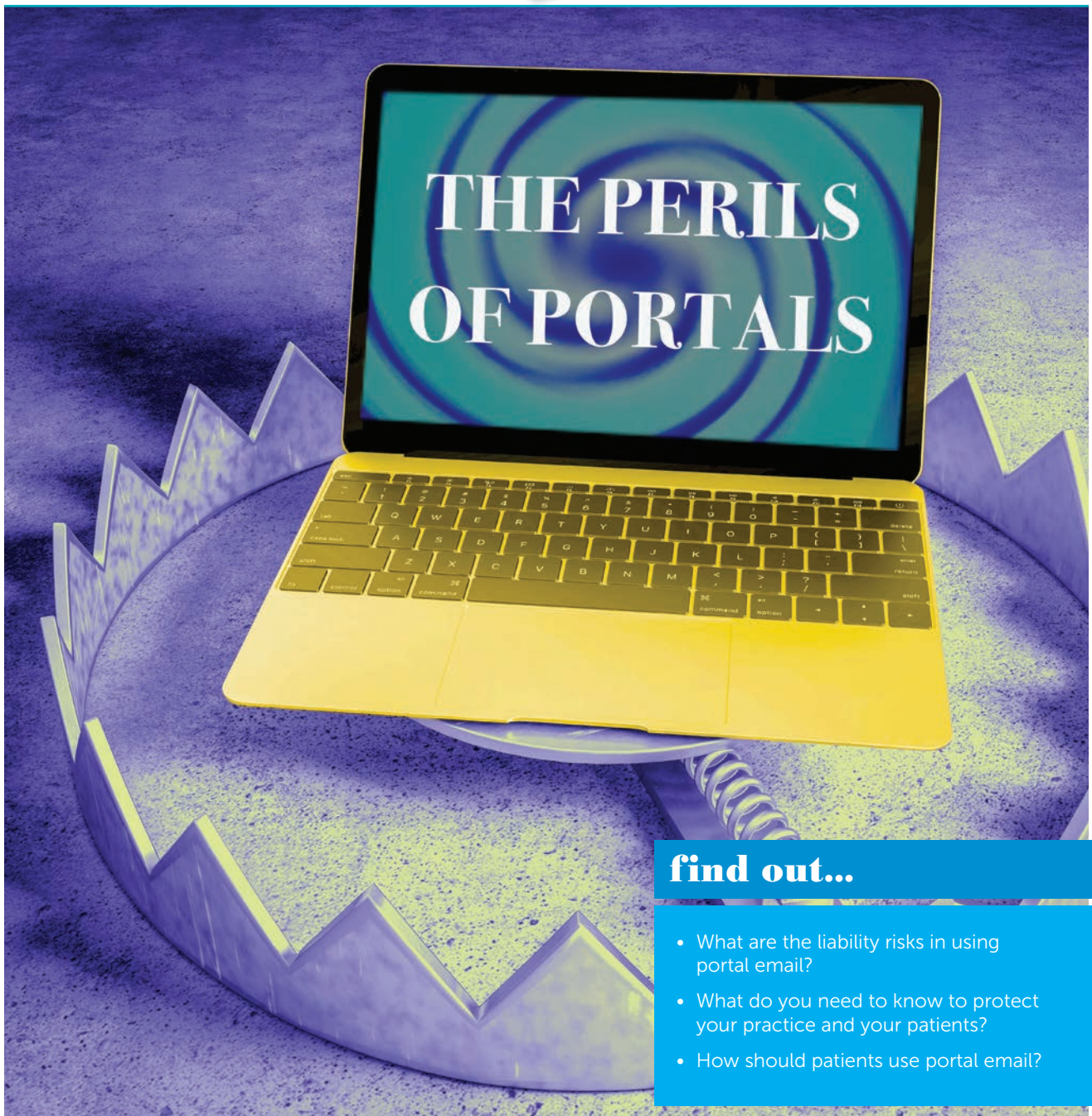


# DOCTORS

Volume 26, No. 2

Fall/Winter 2018



## find out...

- What are the liability risks in using portal email?
- What do you need to know to protect your practice and your patients?
- How should patients use portal email?

## A LETTER FROM THE CHAIR OF THE BOARD

Dear Colleague:

Patient portals are a regular part of many Physician practices, giving patients the opportunity to be more involved in their own health care. One aspect of the portal is the ability for patients to communicate with the practice via email. This edition of *Doctors RX* provides information on what should and should not be transmitted in this format.



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



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## DOCTORS RX

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Risk Management Questions	ext. 224 or 169
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Web Site	mmlis.com proad.com



## THE PERILS OF PORTALS

### THE SETTING

The patient, a 61-year old male, is seen by you on May 1 for occasional abdominal pain, palpitations and belching. You have seen him before for annual physicals and he has mildly elevated cholesterol. The patient has a history of GERD. After a thorough history and physical, your assessment is the patient is experiencing an episode of GERD and you recommend a proton pump inhibitor. This routine interaction seems, well, routine.

On May 2, the patient emails you through the practice's email portal that he had not slept well and that his pain has become constant, sharp and is now located in the area of his solar plexus. Was this against practice protocol on the appropriate use of portal emails? Did the practice have policies in place whereby patients were advised not to use the portal email for material status changes or urgent matters?

You view the email on May 3. You email back that the pain he is describing is not uncommon with severe acid reflux and you provide the name of a GI specialist. You also advise the patient to call your office if the pain does not improve. Should you have called the patient back, rather than send an email through the portal?

You do not hear back from the patient.

On May 4, the patient dies from a myocardial infarction.

You receive a lawsuit alleging you were negligent in your care and treatment of the patient on May 1, May 2 and May 3 and that your negligence was the direct cause of the patient's death.

### EVALUATION: STRENGTHS AND WEAKNESSES

The defense of this case appears strongest as of May 1, even with the unfortunate outcome. There was a history and physical and an opportunity to observe the patient. Questions could be asked. Answers could be given. A reasonable diagnosis was made after a careful thought process.

#### *What about after May 1?*

The situation began strong in that the Physician had an established portal email for secure electronic interaction with the patient. This is important since protected health information should not be passed over general internet exchanges (such as unencrypted web-based email accounts like Gmail or Yahoo). However, an email portal is not a proper tool for diagnostic evaluation. An in-person evaluation, or at the very least a phone call, was necessary to bring clarity to the patient's complaints. On May 2, there was no opportunity to observe the patient after the May 1 visit. Or to ask questions about what "constant and sharp" meant. Or determine the specific location of the pain. Advice was given to the patient without ever knowing the answers to those questions.



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*The author of "The Perils of Portals" is an attorney with Armstrong, Donohue, Ceppos, Vaughan & Rhoades, Chtd. He regularly defends Physicians in medical malpractice cases and represents health care providers before professional licensing boards.*



## Your digital relationship

*The technological advances of communication, however, mean that the relationship between Physician and patient is no longer limited to the traditional, clinical, face-to-face setting.*

You cannot even be sure the patient ever got your portal email response. Offering medical instructions over email for potentially urgent medical issues potentially lessens the strength of your liability position. In this example, receiving an email from a patient with, what could be, urgent medical complaints that do not receive an immediate response could be more difficult to explain if you have not set up the proper policies and disclaimers in the first place.

Instead, on May 3, the Physician should have initiated direct contact with the patient to ask the questions above, rather than providing an email response. In addition, it may have been even more appropriate, based on the patient's responses, to advise the patient to come into the office for an evaluation or present to the nearest emergency department.

Communication is a vitally important part of the Physician-patient relationship. Better communication can lead to increased patient satisfaction and improved patient outcomes. The technological advances of communication, however, mean that the relationship between Physician and patient is no longer limited to the traditional clinical face-to-face setting. Email and texting would seemingly be channels by which Physician-patient communication could be improved and enhanced. While that indeed may be the case, caution also must be exercised so as not to increase potential liability for yourself and your practice.

## THE POSITIVES OF PORTAL EMAIL

The American Medical Association (AMA) recognized the potential benefits of the use of electronic email via a web portal as a "useful tool" in the practice of medicine as far back as 2003.<sup>1</sup> While there may initially have been reluctance by patients to communicate with their Physicians by email, recent studies have shown more patients are willing to embrace email communication with Physicians,<sup>2,3</sup> and the advantages of email to both patients and Physicians include efficiency and convenience. There can be improved documentation and confirmation that both Physician and patient have read the respective emails received and sent. Email can be used to help adherence and compliance with treatment plans. It also can be useful for increasing the effectiveness of "self-management" of chronic diseases and conditions such as long-term anti-coagulation and diabetes.

Email also may lead to fewer clinic and office visits and provide access to patients for whom access can be difficult such as those in remote locations, those with a disability, and those with transportation issues.<sup>4</sup> What's not to like about this helpful "adjunct" to Physician-patient communications?

## THE PITFALLS

The AMA has noted that email should not be used to establish a Physician-patient relationship and that there are inherent limitations with email that need to be



communicated to the patient. An updated Opinion, AMA 2.3.1, *Electronic Communication with Patients*, broadened the scope beyond email to “electronic communication,” to include email and text messaging, but reiterated the same principles as did its predecessor Opinion in 2003.<sup>5</sup>

The primary concern for the use of email in a clinical evaluation is the inability to see the patient, ask questions and address the urgency of the situation. Returning to our case example, the timing of onset, severity, specific location and other descriptors of the abdominal/ solar plexus pain is all information that could not be gleaned simply from an email. Is the patient suffering from GERD or a potential cardiac event? The Physician cannot “assess” an email the way he or she would “assess” a patient in a face-to-face encounter. Even a telephonic interaction allows for a real time “Doctor-patient” discussion. Additionally, there is always the potential for ambiguity or misinterpretation of the written word. Does the patient understand “solar plexus” the way a Physician does?

Another issue as to “urgency” is the time lag. A Physician may not be looking at a screen when the patient sends an email. Similarly, the patient may not be looking at a screen when the Physician sends a response. An email exchange, by design, is not in real time. Yet the patient may have an expectation that his or her emails are being reviewed and he or she will receive “timely” responses from his or her Physician.

Also, even email exchanges within and through a secure patient portal can have issues related to privacy. Who other than the patient may be reading the email, either on the patient’s side or the Doctor’s side? Also, how are emails to be stored and retrieved? Email exchanges (and text exchanges) are considered part of the patient’s “medical record” and therefore need to be preserved and retrievable. Finally, where there is technology, there can be glitches. All of us, Physicians and non-Physicians, have had emails kicked back, lost or sent to unintended recipients.



## SECURITY CONCERNS

It is important to delineate between *portal* email and unsecured web-based email addresses, such as Gmail, Hotmail or Yahoo. While a patient may determine that email is the preferred method of communication



### Did you know...

*Email exchanges (and text exchanges) are considered part of the patient’s “medical record” and therefore need to be preserved and retrievable.*



### Reminder:

*Always assume that any electronic communication could potentially be viewed by someone else as others may have access to the patient's email, phone or tablet computer.*

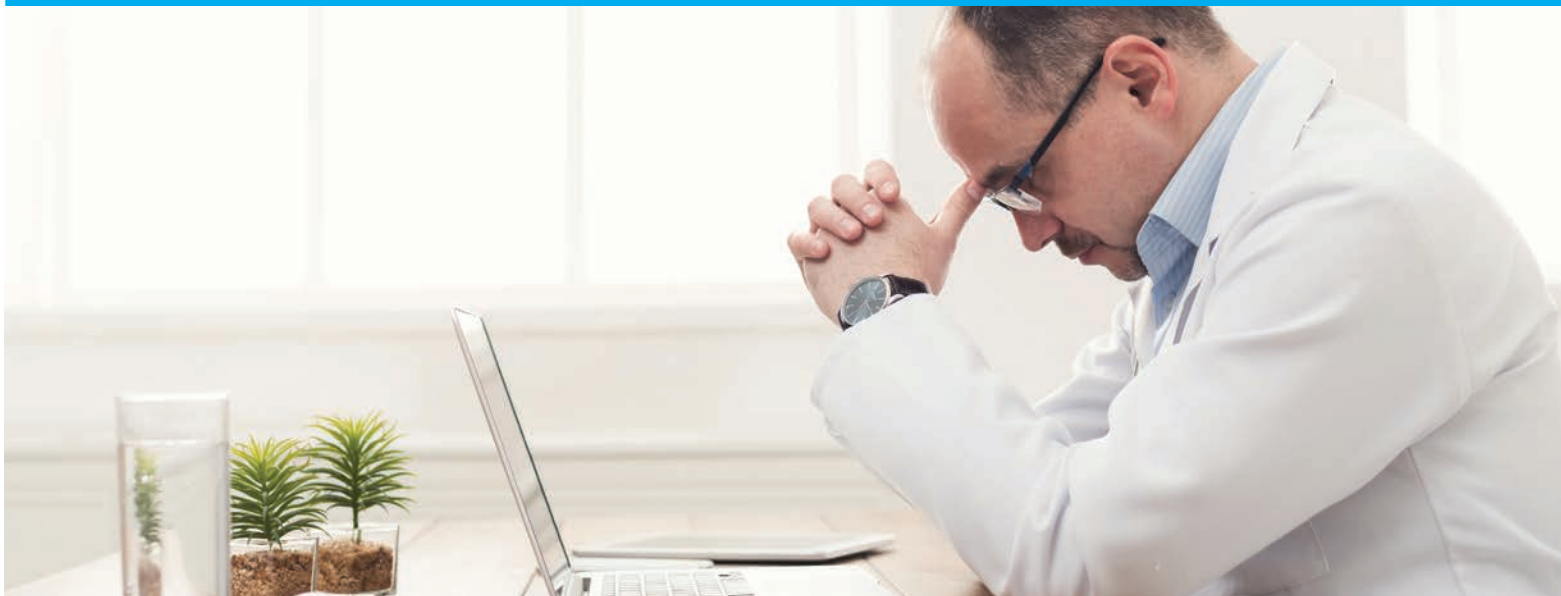
with the Physician, relaying sensitive patient information—like treatment, disease, or any personal identifiable information via the practice's web-based email account—should be limited. Emails and communications through the practice's designated electronic health record system (portal) are usually encrypted and safeguarded against the many dangers that are encountered on the internet. Not only that, a record of the communication can be automatically stored within the patient's health record. If you *must* communicate using any other email source (other than the EHR's portal), remember to divulge *only* the minimum necessary amount of information to the patient. Always assume that *any* electronic communication could potentially be viewed by someone else as others may have access to the patient's email, phone or tablet computer.



## WHAT TO DO

So how to best maximize the benefits while dealing with potential pitfalls? The AMA has issued guidelines for patient-Physician electronic mail and has helpful communication and medical-legal and administrative guidelines as well. The American College of Physicians has also issued a policy statement concerning online medical interactions. First, if using email, a decision needs to be made by the Physician as to what it will be used for. The best practice may be to consider using it only for matters that are not time-sensitive, such as prescription refills, lab and test results, and appointment reminders and pre-appointment instructions. Matters that are urgent, emergent or highly sensitive or personal are not suited for email.

The concept of "informed consent" also applies in ensuring that the Physician and patient have the same set of expectations. The types of transactions permitted over email should be spelled out. The patient should be instructed that emails should be concise and identify the type of "transaction" in the subject line, such as prescription, appointment, advice, etc. Other limitations and disclaimers regarding the use of email should be made clear. One such disclaimer should be a reminder to contact the Physician's office (or call 911) in case of an emergency. Everything from the use of auto-reply to security reminders to the length of emails should be included in a "portal agreement" with a patient. Not only should the patient be advised of this, the



patient also should sign the portal agreement and acknowledgment of the limitations of that system. It is entirely appropriate to have language in such an agreement that lets the patient know that if the guidelines are not adhered to, the email relationship can be discontinued. The patient should be provided with a copy of the agreement.

If a Physician chooses to incorporate email with patients as part of the medical practice, the Physician's written policies also should reflect all of the above boundaries of email and the security provisions. The practice's confidentiality policies should be updated to include email communication.

As technology evolves, communication does too. That communication, including that between Physicians and patients, will continue to change as well. Patients will increasingly desire easier access to Physicians and to their records. Physicians will likewise want to accommodate patients and improve their communication with available technology. This communication in the digital world can be accomplished with email and its benefits enhanced as long as Physicians recognize potential pitfalls and use appropriate safeguards.

**There are also administrative guidelines that should be used, discussed and documented in the agreement. Consider including the following:**

- A description of security mechanisms in place such as password-protected screen savers for desktop work stations in the office, hospital and at the provider's home (if applicable);
- A statement that the patient's email will not be forwarded to a third party without the patient's consent, will not be used in marketing schemes, and will not be shared with family members;
- A description of the frequency of back-ups of emails onto long-term storage with a definition of relevant terms.

**The practice's portal policy with the patient should include the following sections:**

1. The services provided through the patient portal
2. Secure messaging guidelines and patient responsibility
3. Privacy and Security practices of the portal (Notice of Privacy Practices)
4. Other terms and conditions of the portal



**Use appropriate safeguards:**

*This communication in the digital world can be accomplished with email and its benefits enhanced as long as Physicians recognize potential pitfalls and use appropriate safeguards.*



### **For Further Assistance**

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

### **Additionally, the practice should provide information in the patient agreement regarding policies and limitations relating to the portal – for example:**

- No use of portal communication if there is an emergency—call 911 or go to the nearest Emergency Department
- No Internet-based triage and treatment requests. Diagnosis can only be made and treatment rendered after the patient schedules and sees a provider
- No sensitive subject matter (HIV, mental health, out-of-work notes, etc.)
- No request for narcotic pain medication will be accepted through the portal
- No request for new prescriptions or refill medication for conditions not currently being treated by the provider(s)
- Practice response time for a non-urgent email
- Information regarding what to do if a patient loses/forgets his/her username or password

FOR MORE INFORMATION,  
VISIT  
[MMLIS.COM/PORTALS](http://MMLIS.COM/PORTALS)  
OR  
[PROAD.COM/PORTALS](http://PROAD.COM/PORTALS)

### **references**

- <sup>1</sup> AMA Opinion 5.026—the use of electronic email, June 2003.
- <sup>2</sup> Journal of Medical Internet Research – the Use of Physician-Patient Email: A Follow-up Examination of Adoption and Best-Practice Adherence, 2005-2008.
- <sup>3</sup> Patient Use of Email, Facebook, and Physician Websites to Communicate with Physicians: A National Online Survey of Retail Pharmacy Users, 2015.
- <sup>4</sup> Email Communication in the Management of Gastroenterology patients: A Review, Can J Gastroenterol Hepatol, Vol. 28, No. 3, March 2014.
- <sup>5</sup> AMA Principles of Medical Ethics: 2.3.1 Electronic Communication with Patients, 2016.
- <sup>6</sup> AMA Policy – H-478-997 Guidelines for Patient-Physician Electronic Mail.
- <sup>7</sup> Annals of Internal Medicine - Online Medical Professionalism: Patient and Public Relationships: Policy Statement from the American College of Physicians and the Federation of State Medical Boards, April 2013.





## CME TEST QUESTIONS

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1. Email messages are a quick and convenient mechanism for patients to establish a Physician-patient relationship.  
A. True    B. False
2. Portal email messages are just as secure as other web-based email addresses (i.e., Gmail, Hotmail, etc.)  
A. True    B. False
3. Practices should adopt administrative guidelines for the handling of email messages to the practice.  
A. True    B. False
4. Patient Portals should never be used to communicate an emergency or urgent issue.  
A. True    B. False
5. Communication via the Patient Portal is not included in a patient's medical record.  
A. True    B. False
6. Most patients already know what the limitations of email communications are.  
A. True    B. False
7. The AMA has broadened the scope of electronic communications to include texting with patients.  
A. True    B. False
8. Patients can be terminated from the use of portal email with the practice if practice guidelines are not adhered to.  
A. True    B. False
9. Patients can use the Patient Portal to request new prescriptions.  
A. True    B. False
10. A practice portal policy must provide patients with information on what services will be provided through the portal.  
A. True    B. False

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### 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: March 31, 2019
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

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# 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.<sup>®</sup> 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 achieve 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 "The Perils of Portals"

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

- 1) Distinguish between portal email and web-based email communication
- 2) Identify liability issues with the use of portal email
- 3) Appreciate the importance of a practice portal policy and patient agreement
- 4) Identify what patients need to know regarding the use of portal email communication with the practice

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

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**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: \_\_\_\_\_

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# RISK MANAGEMENT NEWS CENTER



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While our live Risk Management education sessions have ended for the year, the last day to sign up for our online HIPAA Modules and Case in Point is December 1. In order to receive your CME credit and premium discount, you must submit your tests and evaluations no later than December 15.



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Our Risk Management experts are in the process of developing informative new education programs for 2019 so that you can stay informed about the latest risks. Be on the lookout for an updated Risk Management brochure containing all the valuable information you'll need to register for next year's programs.



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# DOCTORS



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When you scroll our home page one of the first things you'll see is the eye-catching, animated feature of the most current news, events and blogs. Each section is color-coded accordingly and associated with recognizable icons that highlight the newest education programs, publications, resources and company announcements.

The new sites also feature a curated search made up of content preselected by our Risk Management and legal experts for the most productive and informative experience.

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