Have you completed your REQUIRED CME hours?!?!

Dade County Medical Association offers you the opportunity to complete your REQUIRED CME hours

Saturday, December 10, 2011
The Hyatt Regency Coral Gables
50 Alhambra Plaza
Coral Gables, FL 33134

<table>
<thead>
<tr>
<th>Presentation Topics</th>
<th>DCMA, BCMA &amp; PBCMS</th>
<th>DCMA</th>
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<tbody>
<tr>
<td>Time</td>
<td>Time</td>
<td></td>
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<tr>
<td>2 Hours – Prevention of Medical Errors</td>
<td>9:00 a.m. – 11:00 a.m.</td>
<td>$50.00</td>
</tr>
<tr>
<td>2 Hours – Domestic Violence</td>
<td>11:15 a.m. – 1:15 p.m.</td>
<td>$50.00</td>
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<tr>
<td>Receive all 4 CME credit hours for only:</td>
<td></td>
<td>$75.00</td>
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Objectives:
At the conclusion of the Prevention of Medical Errors presentation, the participant will be able to:
1. Recognize and prevent common performance and diagnostic errors.
2. Describe the elements of a root cause analysis.
3. Identify risk management measures designed to prevent high risk medical errors.
4. Meet the requirements set forth by F.S. 456.013(7). The objective of the Domestic Violence presentation is to:
Inform physicians of statistics regarding the examine of domestic violence in the State of Florida and nationwide, historical perspective, and the impact of domestic violence on children.

Mail this form with your payment, payable to: Dade County Medical Association
1501 N.W. North River Drive, Miami, Florida 33125 – Tel: (305) 324-8717, Fax: (305) 325-1316

Name: _____________________________ E-mail: _____________________________
Address: ___________________________ Amount Enclosed: ___________________________
Tel: _____________________________ Fax: _____________________________

The Dade County Medical Association is accredited by the Florida Medical Association to provide continuing medical education to physicians. The Dade County Medical Association designates this educational activity for a maximum of 4 AMA PRA Category 1 Credits™.

Physicians should only claim credit commensurate with the extent of their participation in the activity. NDA Statement: Please advise sponsor of special dietary or medical requirements.
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Regulatory Compliance • Practice Formation • Mergers and Acquisitions • Asset Protection and Estate Planning
MESSAGE from your PRESIDENT:

by Beny Rub, M.D.

ORGANIZED MEDICINE – BELONG

This November 2011 marks two months before the end of the year and two months before the start of the 2012 election year. As physicians we must reflect on what we need for our patients and ourselves, who we are and what is attainable. I bring this up because physicians need to recognize that the Dade County Medical Association is working on their behalf.

As I write this article, DCMA is preparing for a meeting with hospital Chiefs of Staff to go over the DCMA/FMA draft legislative agenda for the 2012 Session of the Florida Legislature so they can keep all physicians at their respective hospitals updated on the issues. The DCMA and DCMA/PAC are coordinating a breakfast meeting with Miami-Dade County legislators to review our legislative agenda with them as well. The goal is to educate and provide information to the legislators so that they can vote pro-medicine.

But we do not have the visible support of all physicians in Miami-Dade County through membership in the DCMA. We have less than 17% of physicians as members, yet when I and other Board members speak at the hospital medical staff meetings doctors in attendance agree with the DCMA/FMA legislative agenda. They readily acknowledge the DCMA is diligently working on their behalf, yet for some reason they do not join!

This is amazing to me.

Physicians work every day; they are joining bigger and larger practices with different working modules that their new groups are forming. Yet, these bigger and better groups are working alone. It seems they do not understand or do not want to understand the concept of collective unity, so that organized medicine can continue to get the job accomplished. Currently, we are corroborating with our pediatric colleagues.

This week I spoke to Doctor Lisa Cosgrove, the President of the Florida Chapter-American Academy of Pediatrics, Florida Pediatric Society. She is representing the Florida Pediatric Society who, along with the Florida Academy of Pediatric Dentistry, is involved in a class-action lawsuit against the State of Florida to increase the access of care for young Medicaid patients. This lawsuit, the MEDICAID ACCESS TRIAL, has been going on for six (6) years. The State has spent over $4 million dollars defending its-self against limiting the rights of our citizens to proper access and the rights of our fellow physicians and dentists to get proper reimbursement for their care.

The citizens of Florida are asking their representatives to ensure they have adequate medical services available to them, and that those medical services are rendered by good and qualified physicians and specialists. The physicians and ancillary specialists (i.e. psychologist, ABA therapist, physical therapist, speech therapist, among others) require better reimbursement. Currently Medicaid physicians are very few, in comparison to the private sector, a sector where more and more physicians are going into VIP and group practices and leaving solo careers. The reimbursement for Medicaid coding is usually -- on average -- about 50% less than the already low Medicare reimbursement. This is absurd! I have never been able to understand why this is different. These citizens need care which are provided only in certain clinics or group practices or teaching hospitals. We know in Miami-Dade County the serious economic problems that Jackson Memorial Hospital is going through because their largest patient population is Medicaid patients. Throughout the years JMH has suffered tremendously and every day we read in the newspaper where they are financially. Speaking about physician's practices, you do the math if the average Medicaid patient pays less than what your overhead is; it does not matter how many patients you see, you are still going to have a negative balance.

Yes there are always three sides to any story. In the case of the Florida Pediatric Society Lawsuit ongoing in Miami-Dade, the State of Florida mentions that there is adequate access to care and there are enough generalists and specialists available and they do not need to increase reimbursement.

We believe the contrary.

I know these are tough economic times for everyone and yes while a lot of people are losing their jobs, foreclosures are at an all time high, other economic problems, and now the physicians asking for increases in their reimbursements -- what a tough sell.

How this situation is resolved will determine the future of health care and a better economy for Florida. If physicians get better reimbursement, they will open their practices to more Medicaid patients and more Medicaid patients will require more staff; more staff means more jobs. More jobs will mean bigger budgets and all those ancillary services surrounding medicine will benefit, from stores to insurance to county facilities and most important more taxes for the State of Florida. And the third side of the story is the one that you are going to make for yourself.

To conclude, do not miss an opportunity to make an opportunity. I invite you to get involved. Your input counts, believe in yourself. This is how we are going to help physicians help care for our Florida citizens.

Beny Rub M.D. President,
Dade County Medical Association
Very soon, renewal postcards will be mailed to physicians whose licenses expire January 31, 2012. Remember, if your address is not current with the Board of Medicine, you may not receive the postcard. This postcard will be your one-time only reminder from the Board of Medicine. Check your medical license right now to see if your license expires January 31, 2012, and verify the Board of Medicine has your correct address. Don’t procrastinate; go online and see how easy it is to renew.

To begin the renewal process, go to www.doh.state.fl.us/mqa and click the red login button on the right side of the screen. Log in using your user id and pass code. If you cannot remember this information, click the Get Login Help button. In addition, there is a checklist at the bottom of this article that can be used as a tool when renewing your license.

CME Requirements

For physicians whose license expires January 31, 2012, your CME must be completed between February 1, 2010 and January 31, 2012. The following requirements must be met at the time of renewal:

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Hours</th>
<th>Details</th>
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<tbody>
<tr>
<td>Domestic Violence</td>
<td>2</td>
<td>This course is required every third licensing biennium. You are encouraged to go online to determine if you are required to meet this requirement for renewal.</td>
</tr>
<tr>
<td>Prevention of Medical Errors</td>
<td>2</td>
<td>This course has specific course content requirements that change every 2 years and are described in Rule 64B8-13.005, Florida Administrative Code (FAC). Go online to access the rule for more information.</td>
</tr>
<tr>
<td>General CME</td>
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<td>If domestic violence is due, 36 hours</td>
</tr>
<tr>
<td></td>
<td></td>
<td>If no domestic violence is due, 38 hours</td>
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Update Your Practitioner Profile

While logged in be sure to review your profile for updates and changes. Make any necessary changes at this time. Also, make it a regular habit of checking your profile because Section 456.042, FS requires changes be made within 15 days.

Designate Yourself as a Controlled Substance Prescribing Practitioner

While logged on and reviewing your profile, you can designate yourself as a controlled substance prescribing practitioner, as required in s. 456.44(2), Florida Statutes (FS), if applicable. This can be done online by simply checking the designated box. But remember, if this applies to you, this must be done no later than January 1, 2012.

Establish a Relationship with a Pain-Management Clinic

If you have a relationship with a pain-management clinic as provided in Section 458.3265(2), FS, be sure to establish that relationship while logged on. The Board of Medicine online services feature makes this easy for you to do. Remember you are required to notify the Board within 10 days of beginning or ceasing practice at a pain-management clinic.

Physician Workforce Survey

This survey is required by Section 381.4018, FS so do not skip this part of the online renewal. If you have elected not to renew online, be sure to download a paper copy of the survey from the Board of Medicine web site to complete and mail. This information is useful to the Department of Health in determining workforce shortage areas.

Renew Your License

When renewing, you attest that you have completed your CME requirements and you also elect the appropriate financial responsibility. Take one last minute to review for accuracy. When you are done, but sure to print the confirmation page as proof you renewed your license. This is especially important for physicians who wait until the last minute to renew.
For the first time, primary care providers that have posted a schedule of charges for medical services provided to patients can elect a one-time exemption from CME requirements and the renewal fee. When renewing online, physicians will be asked if this exemption applies. Section 381.026, FS outlines specific requirements for the sign, the exemption and also provides a definition of ‘primary care provider’. Be sure to read the law in its entirety to ensure compliance.

**Mailman (Interested Parties)**

This is a new feature that allows you to receive important information right to your inbox, such as new laws, rules and meeting information. Go to www.doh.state.fl.us/qa/medical and click on Mailman in the blue box on the left side of the screen. Enter your email address and hit Subscribe.

You can use the checklist below as a tool to assist you when renewing your license.

- I have met the CME requirements
- I have checked my Practitioner Profile and made updates or changes, if applicable
- I have established a relationship or removed a relationship with a pain-management clinic, if applicable
- I have designated myself as a controlled substance prescribing practitioner as provided in s. 456.44(2), Florida Statutes, if applicable
- I have completed the Physician Workforce Survey
- I have renewed my license and printed confirmation
- I have joined Mailman

Remember to renew your medical license and to renew early.
In tough economic times,
your best investment is in the **Dade County Medical Association**!

Dues statements are in the mail. Please pay from the statement, or pay your dues today via credit card, or mail, in the amount of $295 to the Dade County Medical Association, 1501 NW North River Drive, Miami, Fl 33125.

Credit card#______________________________
Expiration Date___________________________
Signature _______________________________

Email to phandler@miamimed.com or fax to 305 325-1316.

**Have You Paid Your 2012 DCMA Dues?**

**WHAT DOES THE DCMA DO FOR PHYSICIANS?**

Florida Legislative Victories
Political Action Committee Victories
Legislative and Regulatory Updates
Membership Has Value Program
Continuing Medical Education Seminars
South Florida Guide to Good Health and
Physician Directory of Members

Visit the DCMA website –
www.miamimed.com
For more member benefits
EMTALA (the Emergency Medical Treatment and Active Labor Act) was passed by Congress in 1986. The purpose behind the law was to ease the burden of public or so-called charity hospitals from having to treat indigent patients because other hospitals refused to treat such patients due to their inability to pay. EMTALA is a non-discrimination law rather than a law establishing standards of care. The scope of the law is very limited. A hospital’s obligation is to (1) provide an appropriate screening to determine whether an emergency condition exits and (2) if there is an emergency condition the facility cannot transfer a patient until the patient is stabilized or if other conditions of law are met.

A physician’s obligation under EMTALA essentially compels a physician who is on call to go to the hospital’s emergency department and to examine and treat a patient as necessary to satisfy the hospital’s screen and stabilize duty. Contrary to what some hospitals claim (and what some medical staffs decide), there is no obligation under EMTALA to see or treat a patient in a physician’s office. A positive or negative outcome has no bearing on the issue of EMTALA compliance. The futility of providing treatment to screen and stabilize is no defense to an EMTALA violation claim. Physicians who fail to comply with EMTALA can expect an investigation from the Office of Inspector General (OIG) of HHS and can face a civil monetary penalty of up to $50,000. Physicians who are found not to comply with EMTALA often face regulatory action (licensing board) and medical malpractice suits.

1. Medical Screening Examination (MSE) Requirement

42 USC §1395dd (a) requires a hospital to provide for an appropriate screening examination within the capability of the hospital’s emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition exists. The law proscribes the basic elements of an appropriate MSE, but does not go so far as to dictate the clinical particulars that must be implemented.

2. Stabilizing Treatment Requirement

Subsection (b) provides in pertinent part:

…the hospital must provide either –

(A) within the staff and facilities available at the hospital, such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c).

Under subsection (c) a patient who has not been stabilized may be transferred only if the individual (or his/her representative) understands the risk involved with the transfer and requests in writing transfer to another medical facility and a physician has a signed certification that based on the information available at the time of the transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another facility outweigh the increased risks to the individual…

The terms “to stabilize” and “stabilized” are defined in Subsection (e), but are subjective or situational in nature. The definition depends on the risks associated with the transfer and requires the transferring physician faced with an emergency to make a fast on-the-spot risk analysis. Federal Appeals courts have supported the position that “stabilize” for the purposes of transfer is a relative concept that depends on the situation.

3. The Transfer

Under subsection (c) of the law, a patient who has not been stabilized cannot be transferred unless there is a signed certification based on the information available at the time of transfer, the medical benefits reasonably outweigh the risk to the individual from effecting the transfer and only if the receiving facility has agreed to accept transfer of the individual and to provide appropriate medical treatment. Only unstable patients require a certification and consent of the receiving hospital. A patient who has been stabilized in the emergency room of the transferring hospital may be transferred to a receiving hospital without a certification and without an express written agreement of the receiving hospital. Stabilized patients may be transferred without any such limitation.

Conclusion

Medical staffs must be completely aware of EMTALA’s provisions to (1) ensure their members comply, and (2) have meaningful dialogue with hospital administrations, whose business objectives may conflict to some extent with those of the medical staff members. Physicians who are accused of EMTALA violations, either at the medical staff level, or as a result of an OIG investigation, need prompt and thorough guidance.

With over 20 years of healthcare law experience following his experience as legal counsel for the Florida Medical Association, Mr. Cohen is board certified by The Florida Bar as a specialist in healthcare law. With a strong background and expertise in transactional healthcare and corporate matters, particularly as they relate to physicians, Mr. Cohen’s practice immerses him in regulatory, contract, corporate, compliance and employment related matters. As Founder of the Florida Healthcare Law Firm, he has distinguished himself and his firm for providing exceptional legal services with the right pricing, responsiveness and ethics.
Chances are, if you were born or have family that has died in Miami-Dade County you have at one time or another requested a certified copy of a birth or death certificate from the Office of Vital Statistics in the Miami-Dade County Health Department. Since November 11, 1942 the Office of Vital Statistics in Miami-Dade has been providing public health services to the residents and visitors of our county. The Office of Vital Statistics in Miami-Dade County has two core functions: (1) Review of birth and death records for completeness and accuracy before acceptance as permanent records, and (2) prepare and deliver certified copies of Vital Statistics as requested by the public, government and private agencies. In addition, Vital Records Statistics provide vital information for epidemiological surveillance activities related to monitoring the health status and risk factors in Miami-Dade County’s population.

The Office of Vital Statistics issues and records approximately 31,336 birth certificates, and 18,774 death certificates a year. Prior to 2005 the collection of data in this unit was a manual process; however with the recent advances in computer technology the systems have become automated. Currently, the Vital Statistics Units in Miami-Dade and across the state utilize the E-Vitals Electronic Birth Registration System “EBR” as the mechanism by which births are registered via the internet. This system allows hospital birth registrars to electronically enter and register a birth record, and capture and store any required signatures. Similarly, the Bureau of Vital Statistics is currently implementing the e-Vitals Electronic Death Registration System “EDRS across the State of Florida; the system will allow funeral directors to initiate a death registration directly in the state data base reducing the entire registration process from several weeks to just a few days.

The Offices for Vital Statistics in Miami-Dade County are strategically located in South Dade, North Dade and the Health District Center. These offices serve a population of over 2.5 million residents and visitors to Miami-Dade County, more than 34 local hospitals, 88 funeral homes, 2 maternity centers and over 1022 assisted living facilities including 53 nursing homes and 6 hospices in our community.
This quote relates well to the present state of the medical-malpractice-insurance market. We are in a very "soft" market, meaning the premiums are low because the frequency of claims against doctors is at an historically low level in most areas. This in turn has created more competition, looser underwriting practices, and many more insurance companies offering doctors coverage.

Let's substitute "financially solid" for "fast" since "fast" is not something we look for in malpractice insurance. Since "good" is a bit general for our purposes, let's substitute it with "good claims defense," which is really what you are seeking when you purchase a malpractice-insurance policy. So here is our new quote:

**Financially solid insurer/good claims defense/cheap premiums:** You can only have two.

**Financially solid/good defense:** Financially solid insurance companies that, in fact, provide a good defense do so at great expense because they hire the best attorneys and the best expert witnesses. They do not just settle frivolous cases to protect themselves, but instead look out for their insured doctors. Almost by definition, these insurers can never be the cheapest since they are not cutting corners because they are charging adequate premiums to deliver a high-quality defense as they make a fair return on their investment.

**Financially solid/cheap premiums:** Some solid insurance companies have a strategy to offer cheap premiums, most often by sacrificing the quality of their defense of claims against their doctors and settling many more cases than the insurers charging a bit more. These insurers offer cheap "teaser" rates to get your business, and then increase their rates as soon as the market cycle changes and you have fewer options. Avoiding this group takes courage, insight, and good advice.

**Good defense/cheap premiums:** Some insurance companies say that they will defend their doctors, but in the end you can bet if their premiums are too low they will either become financially fragile and unstable or end up raising their rates or sacrificing the quality of their defense of cases against their doctors. Be careful and ask lots of questions with these insurers.

All of the scenarios of the latter two options could harm you and your practice's reputation, and ultimately cost you much more in the long run. Remember the saying that "cheap can get expensive very quickly."

In this maze of malpractice insurance, doctors and their administrators get very confused by the marketing hype of the multitude of brokers and insurance companies now offering coverage. Most find it very difficult to discern which insurance companies are in fact financially solid, which offer a good or great claims defense, which just roll over on their doctors by settling almost every lawsuit or threat of such, and which charge rates that are just teaser rates and completely unsustainable in even the short term. As pressure builds on doctors and administrators to cut their expenses as their incomes are decreasing, it becomes even more important to take the time to study the malpractice insurance marketplace or find an expert to help you through the maze.

Matt Gracey, Jr. is a medical malpractice insurance specialist with Danna-Gracey, an independent insurance agency based in downtown Delray Beach with a statewide team of specialists dedicated solely to insurance coverage placement for Florida’s doctors. To contact him call (800) 966-2120, or email: matt@dannagracey.com.

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**Did you receive money back on your premium last year?**

Many doctors have through the Dade County Medical Association Workers' Compensation Program.

The rates for all physicians throughout the state are set by the State of Florida. Your practice will pay the same price no matter where you choose to secure coverage. However, under the OptaComp program, you may be eligible for a potential dividend of up to 24.8%:

- $10K premium has returned an average dividend of 20%, or $2,000.
- $5K premium has returned an average dividend of $1,000.
- $2K premium has returned an average dividend of $400.

Your membership with the Dade County Medical Association (DCMA) can provide savings that can be paid back in dividends. OptaComp has returned a dividend for 11 straight years, with over $5 million over the past five years to Florida medical societies’ members: $250,000 of that went to DCMA members.

The OptaComp (rated “A” by A.M. Best) program is endorsed by the DCMA and is offered by Danna-Gracey, Inc.

For more information on the workers’ compensation insurance program through OptaComp, fax your information below or contact Tom Murphy or Bill Gompers at 800.966.2120.

Please fax back to 888.235.5008

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Name: ________________________________  Tel Number: ________________________
Contact Person: ________________________ E-mail: ______________________________
Policy Expiration: ______________  Current Insurer: __________________________
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We will not share this information with any other parties.

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Danna Gracey

**Endorsed by the Dade County Medical Association Workers’ Comp Program**

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info@dannagracey.com • www.dannagracey.com
In most law schools around our country, second year students take "Evidence". This is a technical class which teaches one rule and its exceptions after the next. What information is privileged and not, the hearsay rule and its dozen exceptions, relevant versus irrelevant testimony, and waivers all make up a body of law whose origins date back centuries to English common law. Rising above the trees to look at the forest, the general idea is to determine what information is fair and reliable to present to a jury. The thought goes that some information is simply too prejudicial or unreliable to be presented to a jury. At their core, the rules of evidence control information heard by jurors. Well, it seems that there are some new rules...

In the past several years one example after the next has emerged of jurors using social media and internet searches to "supplement" the information they are being provided at trial. Last year a New York trial court judge received word that a juror had conducted some independent research during the trial by performing "google" searches on the parties. Upon questioning, the juror admitted that he had “googled” the parties and gave the excuse that he was ‘curious.” Apparently he wasn’t the only curious juror. The trial court judge went on to question the remaining jurors. Eight of his fellow jurors also admitted to conducting independent internet searches. That is nine (9) out of the twelve (12) jurors. The judge was forced to declare a mistrial. This is not an isolated incident. In another case, when a juror heard contested testimony relating to the drug Paxil, the juror conducted internet research. The juror then shared the results of the Paxil research with fellow jurors. In yet another case, a juror was uncertain whether a defendant was guilty or not. What did she do? She conducted a poll on her Facebook page. This also resulted in a mistrial.

The problem of juror misconduct by use of the internet has become so common that courts now issue jury instructions on the topic. Federal courts now have standard jury instructions stating that jurors are not to do independent internet research on the parties, witnesses or facts of the case. Many believe that such instructions are futile. In August 2011 a Fort Worth, Texas juror plead guilty to contempt of court after it was discovered that he attempted to “friend” the defendant on Facebook during the trial. The juror’s attorney summed up the situation by saying: “It is a reflection of the times. Most everyone has smartphones now. They can hop on at almost any time. And there’s a lot of downtime in jury duty, so what most people do is hop on their phone.”

The social media revolution has inflamed other aspects of the trial process. Attorneys now devote effort to reviewing the other party’s social media use. In Bass v. Miss Porter’s School, the plaintiff had been suspended for cheating on an exam. The school requested all Facebook pages and Twitter documents that related to not only the exam, but the plaintiff’s alleged teasing and taunting of others. Here the court found: Facebook usage depicts a snapshot of the user’s relationships and state of mind at the time of the content’s posting. Therefore, relevance of the content of Plaintiff’s Facebook usage as to both liability and damages in this case is more than in the eye of the beholder than subject to strict legal demarcations… (No. 3:08 cv1807, 2009 WL 3724968, D. Conn. Oct. 27, 2009, Id at *1).

With that ruling, the plaintiff was forced to turn over 750 pages of her Facebook account.

In a 2010 case from Pennsylvania, a court when ruling to compel social media usage disclosure found:

Facebook, MySpace, and their ilk are social network computer sites people utilize to connect with friends and meet new people. That is, in fact, their purpose, and they do not bill themselves as anything else. Thus while it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters, it would be unrealistic to expect that such disclosures would be considered confidential (No. 113-2010 CD, 2010 WL 4403285 at *2).

Here the court ordered the plaintiff to produce his Facebook and MySpace user names and passwords and to preserve existing information and posts on these accounts.

These court rulings and others like them serve as a warning. Information that you post for friends or colleagues may well end up as a piece of evidence in a trial. A simple rant posting following an unpleasant appointment or difficult staff encounter reported in a Tweet could end up as a line of questioning in your deposition or trial. Social media sites have become a new frontier for lawyers to explore in litigation so be careful what you post.

The above discussion can be worrisome. Here are some tips on how to protect yourself:

Own your name as a domain name: Log onto websites like 1and1.com or godaddy.com and buy the domain name of your private and practice names. Domain names typically cost around $7.99 a year. It is a small price to pay if a patient or competitor of yours decides they want to own your cyber identity. It may also be wise to buy pejorative derivatives of your name; for example: drjoesmithsucks.com.

Electronically Monitor Your Online Reputation: This is as simple as going to Google Alerts and type in your name. Other firms, such as Medical Justice, offer a much more specialized search service. These services send you a note “as-it-happens” every time your name or your practice name is mentioned on the web. This allows you to react to any positive or negative comments in a timely manner.
Social Media

Have your employees sign a social media policy: Defining what your employees can and cannot do both in the workplace and at home, needs to be spelled out. If you fire an employee for something they’ve said online, that needs to be spelled out in your own company’s policy or you could be subject to a wrongful termination suit. These policies have become standard for larger institutions and help properly set expectations as to how staff and employees will use the internet.

Separate your personal social media activities from your professional activities: Healthcare providers should maintain both personal and private social media accounts. If you are worried about having to log in and out of multiple accounts a day you can use programs like hootsuite.com or tweetdeck.com to manage your accounts. Having separate accounts keeps your personal and private lives separate. Friending patients may cross professional boundaries. There are also issues with HIPAA and the HITECH Act when communicating with your patients online so be careful. A common professional way for physicians to stay in touch with patients is to start a fan page. Search Fan Page on Facebook and they will provide you with step-by-step instructions to start one.

Attempt to encourage patients to review your practice online via rating sites: Physicians like yourself probably have hundreds if not thousands of patients but the truth is only a couple of them have taken time to review you online. The simple fact is the majority of your patients like you, but the few who don’t let their voices be heard by reviewing you on multiple rating sites. Those reviews could cast you in a negative light to potential patients. To brighten the scope of your image, find ways to encourage your patients to rate you online. More accurate reviews will help marginalize negative outliers.

All of this indicates that an individual’s online reputation may have a major impact upon litigation that the individual is engaged in. In a very real sense, a defendant’s online reputation can become a major witness in his or her trial. While many physicians view the importance of their online reputation in terms of practice development and patient volume, they should be concerned for a whole other reason. Anyone engaged in litigation would be wise to begin taking action to address his or her online reputation.

Mike Sacopulos, JD, is general counsel for Medical Justice. Run by physicians for physicians, Medical Justice is a membership-based organization that offers services and proprietary methods to protect physicians’ most valuable assets — their practice and reputation. The company offers proactive services to deter frivolous medical malpractice lawsuits prevent Internet defamation and provide strategies for successful counterclaim prosecution. Medical Justice works as a supplement to conventional professional liability insurance. For more information visit, www.MedicalJustice.com email info@medicaljustice.com.
The information below does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained here are generalized and may not apply to all practice situations. First Professionals recommends you obtain legal advice from a qualified attorney for a more specific application to your practice. This information should be used as a reference guide only.

In this age of expanding theories of tort liability, physicians may find themselves responsible for more than their own acts. Most physicians realize they have responsibility for the actions of their office staff or those who are directly employed by them. However, they give little thought to the fact they may also be responsible for the acts of their partners, office staff, or others that act under their control or supervision. Liability can be divided into two broad categories – direct and vicarious.

Direct Liability
Direct liability is defined simply as being responsible for your own acts. If you deviate from the acceptable standard of care in the manner in which you practice medicine, then you are negligent and directly responsible.

Vicarious Liability
Vicarious liability encompasses those situations where you may have acted appropriately but find yourself responsible for the failure of another individual. The most obvious type of vicarious liability exists for partners. Some physicians have organized themselves into professional associations to avoid this situation. A partner is liable to the full extent of their own assets for the acts of their partner, which were conducted in the furtherance of the business of the partnership. This occurs even though one partner may have never seen the patient nor participated in the care. Physicians organize into corporate entities, such as professional associations, to avoid this scenario. Once the corporation is established, the physicians become employees rather than partners. Employees are generally not responsible for one another’s acts. Therefore, unlike in a partnership, the physician-employees of the professional association are effectively shielded from the vicarious liability for another physician-employee’s acts or omissions. However, a corporate entity does create another category of responsibility. The corporation employs physicians, physician extenders, and others to accomplish the work of rendering medical care. Consequently, the corporation (professional association) becomes the master and each of the employees becomes a servant. As a result, a theory of law called “respondent superior” comes into play. Under this theory, the corporation is responsible for the acts of each of its employees. A common example occurs when an office assistant renders medical advice on behalf of the physician by telephone. If, in doing so, the physician has fallen below the acceptable standard of care, this physician/employer or corporate employer can be held responsible.

Captain of the Ship
In addition to the categories of partners and employees are situations entailing a division of responsibility and thus, liability. State laws vary significantly in this regard. One of the most common examples is the operating suite. As the “captain of the ship”, the surgeon is generally thought to be in control of all activities occurring in the operating suite and, therefore, responsible for all treatment during the operation. The captain of the ship legal principle has evolved over the years. It is now recognized that there are other specialists in the operating room who perform independently of the direct supervision of the surgeon. The most obvious example is the anesthesiologist. Although surgeons have ultimate control over the operation, they do not have the technical skill or knowledge to control the details of the anesthesiologist’s activities, although the law is less clear with regard to non-physicians, such as a nurse anesthetist. Liability exposure under a captain of the ship legal principle may exist despite the absence of a statutory provision.

Surgical assistants generally have been held to be the responsibility of the surgeon. Although an operating assistant may have the same degree of skill as their operating surgeon, the surgeon actually directs the activities. The nurses may not fall under the responsibility of the operating room surgeon. It generally has been held that when they are performing acts that require professional judgment, they are under the surgeon’s supervision and control and, therefore, the surgeon’s responsibility. However, when they perform ministerial acts, such as sponge counting, they are under the responsibility of the hospital that employs them.

Borrowed Servant
The same rules that apply in the operating suite can be utilized to judge responsibility in other circumstances. If the physician exercises direct supervision and control over the acts of another, then they may have assumed responsibility for those acts. A good example is that of interns or residents in a hospital. If the physician is employed by the hospital, then the hospital becomes the master. Generally, the hospital will be responsible for their negligent acts. However, if the individual temporarily comes under the physician’s exclusive control and direction, the intern may have become the physician’s “borrowed” servant and the physician therefore may have assumed responsibility for the intern’s acts. Assessing liability generally is driven by the degree of control the master exercises over the servant.

The question of the consulting physician can be most closely analogous to that of the surgeon and anesthesiologist. If a physician finds it necessary to call in a specialist for a consulting opinion, one generally selects an individual with greater knowledge in that particular area. One does not exercise direct supervision and control over the consulting physician’s acts. As a result, the physician is not the master and not responsible for that individual. However, this does not mean that the physician calling in the consultant will always escape liability if the consultant performs incorrectly. Once a physician has taken on the obligation and duty of rendering medical care and attention, the physician cannot escape that
duty by delegating the responsibility to others. If the physician fails to use reasonable judgment in selecting a consultant or in ensuring that the consultant has performed the task, direct liability for selecting the consultant arises as well as liability for the consultant’s negligent act or omissions.

Apparent Agency

There are situations where one can assume responsibility for another even though one did not intend for the other to perform tasks on one’s behalf. This theory of law is called “apparent agency.” A real agency is created when one party confides to the other the management of some business to be transacted in the former’s name or on their behalf. An example of this is the office assistant or employee who passes along medical advice by telephone at the physician’s request.

However, what if the physician had instructed the assistant not to act in such a fashion? In spite of the doctor’s instruction, the assistant gives advice, which is erroneous and results in an injury. Generally, an employer is not liable for or bound by the acts or contracts of an agent, which are not within the scope of the actual or apparent authority of the agent. However, if a physician has conducted the affair in such a way as to lead patients to reasonably conclude that the agent, or assistant in this circumstance, is acting within his or her authority, the physician may be responsible.

The most common examples of “apparent agency” occur in hospitals. In most hospitals, the emergency room and department of radiology are staffed by independent staff physicians. However case law has held the hospitals responsible for the staff physicians on a theory of “apparent agency.” The courts applied the general reasoning set out above. They noted a reasonable person would have assumed the staff physician was either the employee or agent of the hospital. If that person relied upon that representation in seeking care, then both the hospital and the individual rendering the care would be held liable.

New Tactic by Plaintiff Attorneys
By Cliff Rapp, LHRM
Vice President, Risk Management First Professionals Insurance Company, Inc.

The information below does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained here are generalized and may not apply to all practice situations. First Professionals recommends you obtain legal advice from a qualified attorney for a more specific application to your practice. This information should be used as a reference guide only.

Bad handwriting and providing testimony without benefit of counsel can morph a doctor into a defendant thanks to a new tactic being used by plaintiff attorneys in Florida. Here’s how it works.

A plaintiff attorney will serve a physician with a “Petition to Take Deposition Pending Action and a Notice of Hearing”. Because the Petition is not a Notice of Intent to Initiate Litigation ("Notice of Intent") or a Complaint - the legal instruments most physicians typically associate with impending malpractice litigation - some doctors do not recognize the papers or their meaning. In any event, that’s what the plaintiff attorney is banking on. The plaintiff attorney then argues to the judge at the hearing that Florida’s pre-suit statutes requires a reasonable investigation before a physician may be sued and that such a reasonable investigation centers on the interpretation of the medical records.(*) The plaintiff attorney then argues that because the records are illegible, a reasonable investigation cannot be conducted. The physician’s records are then shown to the judge and if the judge agrees they are not clear or able to be read due to handwriting or use of medical symbols, will grant the plaintiff attorney the taking of a deposition of the doctor before any legal action is taken against the physician – typically the sending of a Notice of Intent. The physician then provides deposition testimony under the mistaken assumption that it is solely to clarify or interpret penmanship in the medical record. Because the doctor is not represented by counsel, the plaintiff attorney will elicit sworn testimony that is then used in a subsequent lawsuit brought against the physician. This is clearly an underhanded way to get sworn testimony from doctors with either no representation or little to no understanding of the facts of the case.

Contact First Professionals or your personal attorney whenever you receive any form of legal notice. Do not attend hearings or provide deposition testimony without benefit of legal representation unless specifically cleared to do so by First Professionals or your personal attorney.

* The specific legal argument can be located in the publication entitled “Plaintiff’s Verified Petition to take a Deposition Pending Action”. The plaintiff attorney is requesting an Order from the Court allowing the deposition pursuant to FL Rule Civil Procedure 1.290(a). This rule establishes a manner in which a person may request a Court to allow the taking of a deposition in any matter that may be cognizable in any Court. If the Court grants the Petition, any deposition taken under this rule may be used in any action involving the same subject matter brought in any court in accordance with Rule 1.330.

Cliff Rapp is a licensed healthcare risk manager and Vice President for Risk Management of First Professionals Insurance Company, a leading professional liability insurer. Mr. Rapp is widely published and a national speaker on loss prevention and risk management.
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