

Michigan State Medical Society

Legal Alert

Health Law Update

Patient Portals: What Physicians Need to Know

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Physicians are increasingly offering their patients the means to interact with electronic health records systems (“EHR”) through web-based portals. The technology necessary for a physician to host a patient portal is typically furnished by the vendor of the physician’s electronic health records system. A medical practice typically purchases the vendor’s software module for the portal and must maintain the necessary hardware and internet website through which patients may access the portal.

Physicians Have Flexibility to Determine Their Portal’s Features.

These features may include permitting patients to view clinical treatment information, requesting an appointment with their physician, and communicating with their physician or staff via the portal’s secure messaging system. Physicians who host patient portals need to be aware of various legal, regulatory and other issues, including those described in this Legal Alert. Some issues may be unique to electronic information, while other issues apply equally to patient health information whether in electronic or paper form.

Patient Portal Policies and User Agreements.

It is advisable for physicians to adopt policies and procedures governing their portals and to require the use of informed consent and user agreements to document each patient’s understanding and agreement to the permitted uses and limitations of their portals. Such policies, procedures and informed consent/user agreements may be relevant if liability claims are asserted against physicians, whether arising from use of the portal or with respect to treatment which is the subject of communications made using the portal. A sample patient portal policy and procedure document and a sample patient portal informed consent and user agreement accompany this Legal Alert. It is important for physicians to appropriately modify and customize these sample documents to meet the specific features of their portal systems and to update these sample forms periodically to address improvements and other changes in the functionality and operation of their portal systems.



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Meaningful Use Incentives. The Medicare and Medicaid EHR incentive programs provide financial incentives for physicians and other providers to achieve the “meaningful use” of certified EHR technology per governmental standards. Beginning in 2015, Medicare (but not Medicaid) will reduce payments to physicians and other providers who are eligible but choose not to participate. Eligible physicians and other providers must also comply with data reporting requirements. Patient portals can help physicians meet some, but not all, of the meaningful use requirements (referred to as “measures”). For example, of the standards applicable in 2011 and 2012, patient portals can help physicians achieve two of 15 core measures (i.e., providing patients with an electronic copies of their health information, and providing clinical summaries for each office visit) and two of 10 menu set measures (i.e., providing patients with timely electronic access to their health information, and the use of certified EHR technology to identify patient-specific education resources). The Medicare incentive program requires eligible professionals to achieve all 15 core measures and five of the 10 menu set measures in 2011 and 2012.

HIPAA Compliance. Physicians and their office staffs are obligated to comply with HIPAA’s privacy and security standards, whether patient protected health information is in electronic, paper or other form (e.g., verbal conversations, etc.). For example, physicians and staff should log-off from work stations when not present, and work stations should have automatic log-off functionality. Additionally, with the use of messaging features common in portal modules, it is vitally important for physicians and their staffs to confirm that all “to” fields are properly filled out before messages are sent. For purposes of the meaningful use incentive program, physicians and other providers must attest to the use of EHR technology that is certified by the Office of the National Coordinator Authorized Testing and Certification Body (“ONC-ATCB”). The security and privacy standards governing ONC-ATCB certification were designed by CMS to assist providers in being HIPAA compliant. However, CMS has stated that the use of ONC-ATCB certified EHR technology alone does not equate to compliance with HIPAA’s privacy or security rules. Consequently, physicians and other providers should not expect that by purchasing ONC-ATCB certified EHR technology, including patient portal modules, they are necessarily purchasing compliance with HIPAA.

Professional Liability Exposure. EHRs are intended to promote improved quality of care, efficiency and patient access to personal health information. However, physicians and their staffs should operate under the premise that all communications and other activity within a portal will be discoverable and could be used as evidence in professional liability medical malpractice litigation.

EHRs may contain features which may increase a physician’s risk exposure to professional liability malpractice claims. For example, many EHR systems may contain practice guidelines or predetermined clinical standards, such as for prescriptions (prescription refill requests are a common patient portal functionality). Physicians may be exposed to malpractice liability for violating such standards if the patient has an adverse event. Physicians should understand the practice guidelines and clinical requirements embedded in their EHR systems and follow such standards or document



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the reasons for departing from such standards. Additionally, physicians should exercise sound professional judgment when responding to patient requests communicated via a portal to refill prescription medication or for other services and should not use such communications to furnish triage, diagnosis, or as a substitute for appropriate in-office encounters and examinations.

When responding to patient communications via a portal or otherwise, physicians should keep in mind that if malpractice claims are asserted, physicians could be held to a standard of knowing all information contained in the record, irrespective of its source, relevancy or age, or the volume of information contained in the record. The audit trail function will record a physician's review or lack of review of the record. Because physicians should be able to depend on a history furnished by the patient, who presumably is reliable as to his or her medical history, physicians should document this in the record in appropriate circumstances. Disabling or overriding system functions could expose physicians to liability, undermine their credibility in malpractice litigation, and could result in non-compliance and liability exposure under HIPAA.

American Medical Association Guidelines. The American Medical Association (“AMA”) has adopted guidelines for physician-patient electronic communications. Although written with e-mail communications in mind, the AMA guidelines furnish practical guidance for electronic messaging through patient portals. The AMA guidelines note that new communication technologies must never replace the interpersonal contacts that are the basis of the physician-patient relationship. Rather, e-mail and other forms of electronic communication should be used to enhance such contacts. Among other things, the AMA guidelines call on physicians to establish turnaround times for responding to messages, exercising caution when using e-mail for urgent matters, informing patients about privacy issues, and designating the types of transactions (e.g., requests for prescription refills, appointment scheduling, etc.) and subject matters (e.g., mental health, etc.) which may be the subject of such communications. Physicians should explain to patients that their messages should be concise when messages become too lengthy and if messaging is prolonged, the physician should notify the patient to make an office appointment to discuss the matter in person. Physicians should develop a patient-clinician agreement for informed consent which should address various matters including communication guidelines, providing instructions for when and how to convert to phone calls and office visits, and describing security mechanisms in place, including double-checking all “to” fields prior to sending messages. The AMA guidelines are available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/young-physicians-section/advocacy-resources/guidelines-physician-patient-electronic-communications.page>.

Other Issues. Physicians should not prescribe or renew prescriptions for controlled substances requested via portals. The usage of portals by minors can be problematic. Consent by a parent or guardian may not be legally sufficient to cover information relating to health care services (and the related health care information) which an unemancipated minor may consent to by law, absent the knowledge or consent of a parent or legal guardian.



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ABC Medical Practice Patient Portal Policy and Procedures

ABC Medical Practice (the "Practice") offers its patients, as a courtesy and as an optional service, the use of a secure web-page portal (the "Portal"). To use the Practice's Portal, you must contact the Practice to enroll in the Portal system. You must agree to the Practice's Portal Policy and Procedures by signing the Informed Consent and User Agreement. The Practice will then enter your name, address, phone number and e-mail address into the Portal software and will provide you with your access code to the Portal's Web site.

You will receive an e-mail containing a link to the Portal's web site (call the Practice's office if you do not receive this email within 48 hours of submitting your enrollment forms). Click on the link in this e-mail to access the Portal's web page. You will need your access code in order to complete this step. A confirmation e-mail will be sent to notify you when you have successfully completed the enrollment process.

Important Information Regarding the Patient Portal

- Use is limited to non-emergency communications and requests.
- In an emergency, call 911 or go to the nearest emergency room.
- You should normally allow up to 48 business hours to receive a response from your physician or the staff to your communications and requests, although depending on the communications volume a longer period of time may be required before you receive a response.
- The Portal does not provide internet based diagnostic, triage and other medical services. A diagnosis can be made and treatment rendered only after the patient sees the physician at the office.

Patient Portal Features

- Access to Health Information: You may view a clinical summary concerning your most recent office visit, as well as lab and test results. You may request an electronic copy of your health information.
- Appointment Requests: You may request an appointment at our office. This is request only, and the office staff will contact you via the Portal's messaging system or by phone with an actual scheduled appointment day and time.
- Educational Resources: You may view educational resources on various topics listed in the Portal's library.
- Medication Requests: You may request a renewal of prescriptions for medications. Requests will not be accepted for new prescriptions or re-fills for conditions for which you are not being treated by your physician at the Practice. The Practice does not renew prescriptions for narcotics and other controlled substances through the Portal; you must call the office regarding such matters and for initial prescription requests.
- Messages: You may send messages to your physician or the staff, and you may view and respond to messages they send to you. These messages may address medication questions, requests for test results, routine follow-up questions concerning a specific condition, billing matters, etc. Communications regarding sensitive subject matters, such as mental health, HIV, etc., are not permitted through the Patient Portal.



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- Additional Functionality: Additional functionality may be added in the future, such as permitting you to make changes to your demographic information, or changes/additions to your health records, medication lists, etc., provided, however, that no change in the permanent record which we maintain will be made without the Practice's review of such information.

Etiquette When Using the Portal System

- Confirm that your name and other personal information in a message is correct.
- Please be concise.
- Review the message before sending it to make sure that it is clear and that all the relevant information is included.
- The system will send a notification to your e-mail address when a message has been sent to you in the Patient Portal.
- Your physician or the staff, in their judgment, may decline to respond to a communication, or to protracted communication requests, and may ask you to schedule an appointment at the office concerning the matter.
- You are responsible to update your contact information with the office as soon as it changes, including the email address you designate for messages outside of the Portal system.
- Although your physician or the staff will use reasonable efforts to respond within 48 business hours of receiving your request, you are responsible to monitor whether you have received a response to your requested communication. If you have not received a response to a communication request, you should call the office.

Privacy

- All messages sent to you will be encrypted.
- Electronic messages from you to your physician and any office staff should be through the Portal. Messages outside of the Portal system are not secure. Your physician and the office staff will normally send electronic communications only through the Portal's system, except as noted otherwise in these Policies and Procedures.
- Any of the Practice's staff may read your messages or reply to you, so that you may receive a response in a timely manner.

Privacy Protection of Your Health Information

All communications concerning your personal health information carry some level of risk. While the likelihood of risks associated with the use of our Portal communications system is substantially reduced, there are risks which are important for you to understand. It is important for you to consider these risks each time you intend to communicate with us using the Portal system. You should communicate in a manner that reduces the likelihood of the risks occurring. Some helpful things to keep in mind include:

- Do not store, send or access messages on your employer-provided computer or hand-held device. Personal information is normally accessible by your employer.
- Use a screen saver or close your messages so that others nearby cannot read them.
- Keep your username and password safe and private.



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- If you think someone has learned your password, you should promptly change it using the Portal.
- Never use a public computer to access the Portal.

The Practice, its physicians and staff are not responsible to you for security infractions or intrusions resulting from your failure to follow prudent security measures when you access the Portal, including those described above, or for network infractions beyond its reasonable control.

Access, Use of Online Communications and Conditions of Participation

- The Portal is offered by the Practice, as a courtesy and as an optional service. Use of the Portal is restricted to current patients and is subject to all terms and conditions of the Practice's Patient Portal Policies and Procedures.
- All communications via the Portal will be included in the clinical record maintained by the Practice.
- Online communication does not replace any of the other ways in which you can communicate with your physician. It is an additional option and not a replacement. You are encouraged to contact the office via telephone, mail or in person if you need further assistance.
- In addition to online communication, you may be directed to contact us via telephone or in person at any time.
- The Practice does not guarantee that the Portal system will be accessible 24 hours a day, 7 days a week. The Portal system may be unavailable, without prior notice to you, due to routine maintenance or due to circumstances beyond the control of the Practice. The Practice may suspend or terminate operation of the Portal without advance notice to you. The Practice and its physicians and staff shall have no liability or responsibility to any patient or other person authorized by the patient who is unable to access the Portal system for any reason.
- The Practice does not permit minors to use the Portal, whether or not they are legally emancipated.
- The Practice may disenroll at any time, without prior notice and without cause or for cause in its discretion, a patient or other individual from use of the Portal.
- By logging onto the Portal, you agree to all terms and conditions of the Practice's Patient Portal Policies and Procedures, and any amended or superseded Policies and Procedures adopted by the Practice. The Practice may amend, supersede or rescind its Patient Portal Policies and Procedures at any time, without prior notice. The Practice will make reasonable efforts to post such matters on the Portal, but by logging onto the Portal you agree to any such amended or superseded Policies and Procedures. The Practice shall have the discretion to determine how its Patient Portal Policies and Procedures apply in a given situation, and its determination shall be final, binding and non-reviewable. The Practice is the owner of all of its records and data, whether in electronic, paper or other form, subject to such access, copying and other rights as may be provided to the patient by federal and state law.
- If you receive access to health care information which is not yours, you must immediately stop viewing such information and immediately notify the Practice via a secure message on the Portal or by phone call.



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SAMPLE PATIENT PORTAL INFORMED CONSENT AND USER AGREEMENT

ABC Medical Practice
Patient Portal Application, Informed Consent and User Agreement

Patient Information

Name _____ DOB _____

Address _____

E-mail Address _____

*Optional: Allow Portal Access to My Health Information to the Following Individual

Name _____ DOB _____

Relationship to Patient: _____

Address _____

E-mail Address _____

Permissions to: (You Must Write "Yes" or "No" to Specify the Level of Access Requested)

Appointments: View only _____ or Full Access _____

Health Information: View only _____ or Full Access _____

Medication Requests: View only _____ or Full Access _____

Secure Messaging: View only _____ or Full Access _____

Purpose of this Form

ABC Medical Practice (the "Practice") offers a secure way for its patients to view certain parts of their health information maintained in an electronic health record and to communicate with their physician and office staff. While secure messaging can facilitate communications, it has certain risks. In order to manage these risks, there are some conditions of participation. This form is intended to document that you have been informed of these risks and conditions of participation, that you accept the risks, and that you agree to the conditions of participation and to the Practice's Patient Portal Policies and Procedures and as they may be amended or superseded from time to time.



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How the Patient Portal Works

A secure web portal is a kind of webpage that uses encryption to keep unauthorized persons from reading communications, information or attachments. Secure messages and information can only be read by someone who knows the correct password or token to log in to the portal site.

Protecting Your Private Health Information and Risks

This method of communication prevents unauthorized parties from being able to access or read messages while they are in transmission. However, keeping messages secure depends on two additional factors: the secure message must reach the correct email address and only the correct individual (or someone authorized by that individual) must be able to access it. Only you can make sure these two factors are present. Please make sure we have your correct email address and are informed if it ever changes. You also need to keep track of who has access to your email account, so that only you, or someone you authorize, can see the messages you receive from us.

Conditions of Participating in the Patient Portal

Access to this secure web portal is an optional service and we may suspend or terminate it at any time and for any reason. If we do suspend or terminate this service, we will notify you as promptly as we reasonably can.

By signing below, you acknowledge that you have read and agree to comply with the Practice’s Patient Portal Policies and Procedures, which have been provided to you. If you do not understand or do not agree to comply with or do not consent to our policies and procedures, please do not sign this form. If you have any questions or need further information, please let us know before signing the form.

Patient Consent and Agreement:

Patient Name: _____

Patient Signature: _____

Date: _____

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