

Navigating the Digital Shift: Defending Medical Malpractice Claims in the Era of Patient Portals

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WWith the recent implementation of the 21st Century Cures Act and modifications to the HITECH Act, many patients may now quickly and easily access their electronic health information. Whether through a website, an app, cell-phone, or smart watch, patients have real-time access to most areas of their patient record via their patient portal.

The implementation of the patient portal undoubtedly has impacted the patient-physician relationship, particularly the communications regarding diagnoses and treatment plans. On the one hand, communication via the patient portal provides an ease with managing appointments, specialty consults and follow-up testing. It also allows physicians to respond to patient queries between visits more efficiently and quickly. Conversely, patients may be receiving test results or seeing physician clinical notes before a provider has the opportunity to review test results and educate the patient on the meaning of the medical information. Patients may also rely too much on

electronic, as opposed to verbal communications, and may misunderstand the information being provided to them through the portal. What is even more concerning is that patients may neglect to review their online portal despite health care providers believing the message or test result has been received.

Over-reliance on the patient portal could lead to drastic adverse events. For example, a laboratory result or concerning radiology finding may be uploaded to the patient portal along with a message from the provider to obtain follow-up or additional testing. But what happens if, for whatever reason, the patient does not see the message or the results, and is unaware of the need for follow-up medical care? A simple miscommunication like this could result in an extremely poor outcome, such as delayed cancer treatment, cardiac event or a stroke. Some patients may even inadvertently “sign up” for the use of patient portals agreeing to the terms and use, but then never actually access it! Additionally, as we become more

reliant on text messaging and emails (as opposed to telephone and in-person conversations), patients tend to utilize patient portal communications as first lines of reporting new symptoms to providers who may not see such messages until it is too late.

Recent Case Law Involving Patient Portals

Recent case law affirms such adverse events. In *Langford v. Irgau*, No. N24C-09-184 DJB, 2025 WL 1013491, at *1 (Del. Super. Ct. Apr. 1, 2025), the Delaware Superior Court denied the defendants' motion to dismiss based on a statute of limitations argument. In this case, a doctor performing gallbladder surgery ordered an abdominal CT prior to surgery, which showed a visualized lung base demonstrating a mild focal opacity, and additional testing was recommended to exclude a carcinoma. A courtesy copy of the CT report was provided to the plaintiff's primary care provider, but it was never uploaded to the patient's portal. Eight years went by and, in 2023, the plaintiff underwent a CT scan for an unrelated reason, but the report indicated "a 23 mm lingular opacity. ... Malignancy cannot be excluded. Follow up enhanced CT of the chest is recommended for more thorough evaluation of the thorax." Again, the report was not uploaded on the patient portal and the patient was not advised of the incidental findings. The plaintiff did not learn of the findings until June 2024, during a hospital visit. By this time, she was diagnosed with Stage IV lung cancer that had metastasized to her brain and lymph nodes.

In *Currie v. United States*, No. 23-CV-3519 (NSR), 2024 WL 2158596, at *1 (S.D.N.Y. May 14, 2024), the U.S. District Court for the

Southern District of New York evaluated medical malpractice claims brought pursuant to the Federal Tort Claims Act. This case involved a pregnant patient who began experiencing heavy bleeding and raised concerns with her OB/GYN practice about a possible miscarriage. After repeated calls, she was advised to have an ultrasound, which was performed on Nov. 1. The results were uploaded to her patient portal on Nov. 5, at which point she was informed that her OB/GYN was on vacation. On Nov. 16, the patient fainted and was directed by the practice to seek emergency care. A large ruptured ectopic pregnancy was subsequently discovered and emergency surgery was necessary.

These are just two examples illustrating how patient-portal issues can become an integral part of medical malpractice litigation. As such, it is critical to incorporate any patient-portal issues into your initial investigation and preparation of the case, as well as throughout each phase of discovery, including paper discovery and depositions.

Defending Claims Involving Alleged Patient Portal Miscommunication

Litigation involving allegations of negligence based on patient-physician communication through a patient portal is becoming increasingly common as their use takes on a bigger role in medical treatment. In the medical malpractice litigation setting, the first critical step to defending a claim involving alleged miscommunication via the patient portal is to secure all relevant documentation associated with the patient portal.

Initially, it must be determined whether the patient “signed up” for the patient portal and consented to a user agreement including terms of use. It is essential to obtain any written institutional policies, procedures, or protocols that address how physicians and patients are expected to use the patient portal as these can be key documents for use in defending both your physician at his/her deposition and deposing the plaintiff as to their use of the portal during the treatment at issue. This documentation can also be a helpful litigation tool for demonstrating that the institution and physician have clear communication policies.

Additionally, an accepted User Agreement with explicit terms of use for the patient portal emphasizes the shared responsibility of the physician and the patient. Today, the patient has an active role in managing communications with the physician. An accepted User Agreement may be the key to defending against a claim that the patient did not see a message that was clearly communicated to them via the portal.

Follow the Metadata and Audit Trail

In cases where timing, content or interpretation of patient portal messages is at issue, the metadata and audit trail related to the patient’s use of the patient portal can be critical to an effective defense. Each patient portal will have a specific audit trail that is separate from the audit trail associated with the patient’s electronic health record. The detailed logs from the patient portal system will include timestamps as to when the patient portal was accessed by the patient (or an approved user) and will indicate whether messages were viewed, and which areas of the patient portal were accessed.

This objective data can clarify the timing of communication such as when messages were sent by the physician and how quickly the physician responded to the patient, and can be key evidence in dispelling claims of missed or delayed communication.

Another key defense is ensuring that patient-portal communications are correlated to the hands-on care and treatment. For example, providers should be prepared to explain what type of in-person communications took place with the patient regarding the portal; what the provider anticipates the portal or test results may show; and the follow-up discussions between the patient and provider at the next visit.

A critical final step in defending claims of alleged failures or miscommunications involving the patient portal is to retain expert witnesses who are well-versed in current electronic health record systems and digital communication standards in health care. These experts can explain how information is documented, transmitted, and accessed within the portal, helping to establish whether the provider’s actions aligned with accepted standards of care. They can also contextualize the timing and content of messages, clarify the technical capabilities and limitations of the system, and address common misunderstandings about digital communication in clinical practice. By providing an objective, informed analysis, such experts can help counter claims that a provider failed to communicate appropriately or that the portal itself was improperly used, ultimately strengthening the defense’s position. The experts will also surely assist defense counsel in becoming intimately aware with the functionality of the patient portal so that counsel could effectively explain it to opposing counsel and the

court, and appropriately question witnesses regarding the technology.

The rise in usage of patient portals has greatly influenced the physician-patient relationship and, in turn, presents new challenges in communication that have the potential to give rise to malpractice claims. Allegations of miscommunication through patient portals will hinge on whether the provider took reasonable steps in communi-

cating with the patient and whether the patient was properly informed of their responsibility in using the portal.



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