

Telemedicine/Telehealth and COVID-19: Effective Risk Management Strategies to Reduce Potential Professional Medical Liability

Fairfield County Medical Association

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WHAT IS TELEHEALTH?

- Telehealth or Telemedicine?
- AMA: “use of information technology to provide clinical health care from a distance.”
- FSMB: “practice of medicine using electronic communications, information technology or other means”
- CMS: “two-way real-time interactive communication between the patient and distant site physician.”

MODALITIES

- Real-time synchronous video
- Store-and-forward
- Mobile health
- Remote patient monitoring

MODALITY EXCLUSIONS

- Telephone conversations
- Email
- Instant Messaging
- Text
- May be permitted in some states

LICENSURE AND CREDENTIALING

- Generally, practitioners must be licensed in the state where the patient is located
- Special purpose license
- Exceptions
- Federation of State Medical Boards' Model Policy
- Credentialing and privileges
 - Physicians must be credentialed and privileged at the hospital where the patient is located

STANDARD OF CARE

- Distant site v. originating site
- Physician/provider patient relationship
- Patient examination
- Prescribing
- Technology
- Equipment
- Continuity of care
- Control over care
- Licensure
- Consent
- Documentation
- Policies and protocols

THE TELEHEALTH RECORD – CONTENT

- Review of old records
- Chief complaint, history of present illness, review of systems, past medical history, family and social histories
- Evaluation results, diagnosis
- Recommendations
- Treatment
- Plan for follow up
- Length of time of encounter, particularly time counseling and coordinating care
- Coordination of care
- Any disruptions secondary to equipment failure
- Patient feedback

THE INFORMED CONSENT

- Scope of service
- Names of professionals, credentials and locations
- Benefits and risks
- Follow-up care
- Coordination of care
- Patient access and disclosure of information
- Billing
- Financial interests
- Right to refuse/revoke

MEDICARE COVERAGE/RESTRICTIONS

- Dramatically broadened since COVID-19 crisis
- No longer need real-time synchronous video in many cases. Audio-only permitted for many codes
- No longer need patient physically present at qualifying originating site for some services
- Broadening types of facilities and practitioners who can provide telehealth
- Dramatic increase in number of certain codes

MEDICAID AND PRIVATE PAYERS

- CT Medicaid permits telemedicine
- Many limitations removed because of COVID-19
- Private payer coverage on plan-by-plan basis
- Special rules concerning reimbursement due to COVID-19

STATE LAW RESTRICTIONS

- In-person consultation
- Teladoc case (*Teladoc, Inc. v. Texas Medical Board*, 112 F. Supp. 3d 529 (W.D. Tex. 2015))
- FTC/DOJ position
- New Texas rules

DEA RESTRICTIONS

- Ryan Haight Act, 21 U.S.C. § 802(54)
- Curb internet prescription abuse
- Dispensing of controlled substances
- Only if state law permits
- DEA registration where patient located
- Requires prior in-person exam
- Unless can meet telemedicine exception

DEA TELEMEDICINE EXCEPTIONS

- At hospital
- With appropriately licensed practitioner
- Indian Health Service practitioner
- Declared public health emergency
- Special telemedicine DEA registration
- Special Registration for Telemedicine Act of 2018
- Waiting for proposed rule

POLICIES AND PROTOCOLS

- Documentation (includes privacy, confidentiality and informed consent)
- Space
- Equipment and connectivity
- Patient rights and responsibilities
- Emergency care
- Quality improvement
- Training
- Prescribing
- Billing
- IT department

VENDOR CONTRACTS

- Responsibility for errors and omissions
- Limitation of liability provisions
- Indemnification and hold harmless provisions
- Implementation issues
- Technical assistance
- What happens upon termination
- Post-termination obligations

UNIQUE LIABILITY ISSUES

- Long-arm jurisdiction
- Choice of law
- Applicable standard of care
- Unique laws governing telemedicine

UNIQUE LIABILITY ISSUES (CONT'D)

- In-person v. video conferencing?
- Misdiagnosis from image distortion misdiagnosis
- Incomplete telemedicine examination
- Prescribing based on video examination
- Failure to provide telemedical support

UNIQUE LIABILITY ISSUES (CONT'D)

- Ensuring privacy and confidentiality
- Proper MDDS training and operation
- Appropriate MDDS maintenance
- Backup systems in place
- FDA regulation?

RISK MANAGEMENT PRACTICES

- Telemedicine QA integration
- Appropriate patient communication level
- Encounter termination if minimum quality standards not met
- Telemedicine performance improvement monitoring
- Review and adopt treatment protocols

RISK MANAGEMENT PRACTICES (CONT'D)

- Understand equipment documentation
- Keep up with equipment training
- Follow manufacturer protocols
- Observe all update and required maintenance procedures
- Keep up with technological advances
- Backup and contingency protocols
- Report issues to manufacturer/service provider

INSURANCE COVERAGE ISSUES

- Geographic or jurisdictional limits
- Remote site coverage
- Telemedicine specifically included/excluded
- Negligent credentialing coverage
- Individual or shared limits
- Carrier has multi-state authority

LIABILITY INSURANCE ISSUES (CONT'D)

- Avoid unlicensed activities
- Coverage for injury caused by equipment malfunction
- Business interruption coverage for malfunction
- Cyber risk coverage
- Interplay with general liability and cyber risk policies
- Additional costs?



QUESTIONS?



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Known as a skilled trial lawyer with over 25 years of experience in the area of health care and commercial litigation, Roy Breitenbach helps health care providers and other clients successfully and efficiently resolve their business, employment, and disability access disputes. He particularly focuses on working with health care providers to resolve their disputes with managed care companies and other third-party payers, helping employers avoid and, if necessary, successfully resolve, employee disputes, and working with health care providers and other business to resolve disability access disputes with patients or customers. Mr. Breitenbach also has extensive experience in helping clients successfully navigate “business divorces” and unfair competition problems.

Garfunkel Wild, P.C. (GW) was founded over forty years ago with a single purpose in mind—to attend to the specific business and legal needs of its clients in the health care industry and beyond. Our attorneys include physicians, nurses, former prosecutors, technology experts, former government officials and regulators.



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Barry B. Cepelewicz, M.D. holds dual degrees in law and medicine, providing a unique perspective to providers (including physicians and hospitals) on healthcare related matters. For over three decades, he has represented healthcare related entities in transactional, regulatory, and litigation matters, including creating large single and multi-specialty group practices and other joint ventures, and successfully defending providers in State and Federal investigations. He is also considered an authority in telemedicine. Mr. Cepelewicz has served as General Counsel to medical societies, hospitals' medical staffs, healthcare businesses and start-up companies. He lectures extensively to physicians, including at CME provider seminars.

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