

## **Five Major Medicolegal Considerations in the Telehealth Era**

### **Telemedicine is Now A Mainstay of Medical Practice**

One of the positive outcomes following the pandemic was the explosion of the use of telemedicine across hospital systems and medical practices. Telemedicine offers a fast, convenient, and cost-effective way for patients to access medical care. It is especially valuable in underserved areas, where medical access may be difficult, or with patients that have chronic medical conditions or behavioral health diseases where regular in-person visits may not be necessary. Telemedicine services are now evolving to even more sophisticated technologies, such as the use of wearables for remote patient monitoring, or AI technologies to predict patient behavior and risk. According to the AMA, 85% of physicians said they were currently using telemedicine. While telemedicine adoption continues to accelerate and evolve, many areas in the digital space pose major medicolegal risks.

### **Incomplete Examinations from Video Visits**

One shortcoming of video visits is the limitation by which a medical provider can perform a physical exam. While low acuity, urgent-care type visits often are very suitable for video visits, more complex problems more often do require a physical examination to arrive at an accurate diagnosis. Reliance on video visits may lead to incomplete exams, increasing the likelihood of misdiagnosis and a medical malpractice case. For example, if a patient complains of abdominal pain during telehealth, it will be difficult to arrive at an accurate diagnosis without a proper physical examination. A pre-pandemic analysis by a medical professional liability firm calculated that nearly 70 percent of telehealth medical malpractice claims were related to diagnostic issues – either missed diagnosis or misdiagnosis.

### **Physician-Patient Relationships and Scope of Practice**

Simply doing a video call from a private phone could put a provider at significant risk. In most states, there must first be an established patient-physician relationship with an in-person exam before telemedicine visits can be scheduled. In addition, providers must also obtain informed consent from patients before providing telemedicine services. Informed consent requires a discussion about telehealth technology and an overview of privacy and security considerations, among other topics. States also vary widely on how they define “scope of practice” with some states being quite liberal in allowing physician assistants and nurse practitioners to practice telemedicine independently, while others require direct supervision by or direct care provided by a physician. Finally, state licensure also is a major consideration. Multiple state licenses may be required to be obtained and maintained by a provider if they will be providing care across state lines or within a particular region.

### **Privacy and Security Safeguards**

Tech-based solutions are always open to malware risk and cyber threats. This is especially important when private health information (PHI) can be accessed during an attack. Common practices such as using a private email account or using a personal computer to store data place both patient and provider

at significant risk. Optimizing security and compliance risk now also can minimize malpractice risk as well. Telemedicine has now extended beyond video visits to remote patient monitoring, another telehealth industry that monitors patient physiologic parameters through the use of devices and wearables. Providers and RPM companies need to ensure that the data being captured is solely for medical monitoring of the patient and that additional data points are not being captured which can be leveraged.

### **Fraud and Kickbacks**

Finally, healthcare fraud in telemedicine remains high, with the DOJ recovering over 4.5B in fraud loss in 2021 alone. Many cases involved federal provisions that were exploited by companies during the COVID-19 pandemic, and involved issues such as upcoding time and complexity of medical care rendered, billing for services not rendered, and elaborate kickback schemes. One of the largest federal cases involved a scheme involving a medical device company that paid kickbacks to physicians working for telemedicine companies to induce them to prescribe orthopedic braces that were not deemed to be medically necessary. Those involved in the scheme billed Medicare over \$1.7 billion for the braces, which paid out \$900 million.

While the innovations in telehealth have been a boon to patients by improving access and convenience to medical care, medicolegal issues will continue to expand in this digital health space. As the field has cemented itself as a new way that medicine will be offered to patients, providers, telehealth companies, and patients will need to be well aware of the medicolegal risks that accompany its many benefits.