

Telemedicine During COVID-19: Managing Medical Malpractice Risk

When an active physician-patient relationship has been established,¹ telemedicine can help you meet your legal duty of care during the COVID-19 pandemic. As always, management of patient expectations is critical in mitigating liability risk. It is also helpful to keep in mind the following tips.

Follow up with patients requiring care. When following up with patients, check to see if their conditions are progressing and determine if a telemedicine visit is appropriate or an in-person exam is necessary. For cases in which you aren't able to render timely and appropriate care, you will need to direct patients to where they can obtain such care. You should also advise the patient of the medical consequences if recommended care is not obtained promptly. (Note: Some states have passed legislation that may protect you from liability due to delays in surgery during this pandemic. Also confirm that your medical malpractice insurance company will cover such suits.)

Telemedicine visits should be fully integrated into your existing documentation system. Documentation of the telemedicine service not only will be helpful for billing and reimbursement but also will ensure a complete account of care, which would be critically important in the defense of a medical malpractice claim.

Document that the patient consented to telemedicine. Obtain consent and

remind patients that communicating via telemedicine is not the same as a face-to-face exam. If you can't get the patient to sign a consent form, verbal consent should be obtained and documented in the medical record—for example, "Patient initiated a request for care and consented to care by phone." If there is a fee for the telemedicine visit, be sure to notify the patient.

Meet state requirements. The Center for Connected Health Policy has posted information on telehealth-related laws (www.cchpca.org/telehealth-policy/current-state-laws-and-reimbursement-policies#). Also check with your state regulator to see if it has introduced any temporary waivers or other regulatory changes during the current pandemic.

Meet ADA requirements. Be sure that your telemedicine protocols include specific accommodations for patients with special needs. The Americans with Disabilities Act (ADA) requires practices to communicate effectively with people who have vision, hearing, or speech disabilities (www.ada.gov/effective-comm.htm).

Do not use a public-facing platform for telemedicine. The best way to ensure privacy when providing telemedicine services is to adhere to HIPAA's rules on Protected Health Information (PHI). However, at the outbreak of the COVID-19 pandemic, many practices weren't set up to provide HIPAA-compliant telemedicine services. Recogniz-

ing this, the Department of Health and Human Services Office for Civil Rights is exercising its enforcement discretion during the national public health emergency: If physicians are providing telehealth services in good faith, the agency will not impose penalties on them for using an electronic platform that doesn't comply with HIPAA's regulatory requirements as long as the platform is not public facing.² For example, this exception allows you to use FaceTime, Facebook Messenger video chat, Google Hangouts video, Skype, and text, even though those platforms are not HIPAA compliant. However, you are not permitted to use Facebook Live, Twitch, and TikTok because these are public-facing platforms that allow others to view an exchange.

Telemedicine Resources

Risk management. The Ophthalmic Mutual Insurance Company (OMIC) offers free resources online (www.omic.com). These include consent forms for the telemedicine visit (www.omic.com/telemedicine-consent-form) and for elective services during the pandemic (www.omic.com/covid-19-consent).

Practice management. For more information on the practice management aspects of telemedicine, visit aao.org/practice-management/telehealth.

1 www.omic.com/when-is-a-physician-patient-relationship-established/. Accessed June 30 2020.

2 www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html. Accessed June 30, 2020.