



Telemedicine: Physicians Would Be Prudent to Mitigate Liability Risk

These tips will help keep you out of trouble.

BY TIMOTHY E. PATERICK, MD, JD

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The COVID-19 pandemic altered the practice of medicine across the United States. A major change was the introduction of the widespread use of telemedicine. Many medical practices in private and academic settings found that the pandemic, with its emergency and practice restrictions, made telemedicine a cost-effective and efficient approach to render medical care to their patient base. It also represented an approach to mitigate the financial losses inherent in pandemic restrictions. As the pandemic has waned, many medical practices continue to use telemedicine as one way to render medical care.

The questions physicians would be prudent to consider are: (1) What are the liability risks associated with practicing telemedicine?; and (2) What are the steps a physician can take to mitigate that real risk?

The Fiduciary Duty

The COVID-19 pandemic has definitely altered physician medical prac-

tice patterns, including the widespread use of telemedicine. What has not changed since medical practice pattern restrictions were introduced is the fiduciary duty of physicians to do what is in the best interest of patients in a prudent and timely fashion. Despite medical practice alterations, the standard of care remains the staple of liability

are primarily used for reimbursement purposes. The American Telemedicine Association (ATA) uses a broad definition, which encompasses existing telemedicine technology and how healthcare is delivered. The ATA defines telemedicine as “the use of medical information exchanged from one site to another via electronic communications

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determinations.

Succinctly stated, if a physician-patient relationship exists, an attempt to provide medical care in the best interest of the patient must be offered, or the patient must be referred to a medical facility where similar medical care can be obtained.

In the challenging times of high COVID-19 infectious risk, telemedicine was considered a way for physicians to meet their fiduciary duty while lowering their risk of contracting or spreading COVID-19 infection.

Reimbursement Changes for Rendering Medical Care

CMS and many private insurers provided definitions of telemedicine that

to improve a patient’s clinical health status. Telemedicine includes a growing variety of applications and services using two-way video, email, smartphones, wireless tools, and other forms of telecommunications technology.” With these virtual tools, physicians can continue to assess the need for medical care and convey the importance of medical care to patients.

Telemedicine: Caveats for Physicians

If you are a practicing physician using telemedicine who is entering into doctor-patient relationships, you usually must be licensed in each state in which you render medical care to patients. So if a physician is physically

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located in Minnesota, but the patient is located in Iowa, then the physician must be medically licensed in both states. You must be licensed in Minnesota because you are engaging in the practice of a profession that the state of Minnesota regulates. You must be licensed in Iowa because Iowa regulates medical practices and aims to protect its residents through the state licensing regulations.

If physicians wish to practice telemedicine/medicine in several states, they must review the laws pertaining to medical practice in each state in which their patients are located, and whether the state has enacted laws to facilitate telemedicine across state lines. As a licensed physician, you will need to be familiar with state laws governing in-person medical histories and physical examinations and professional standards of care.

Case Study

The case of Richard Holmes, MD, is an “eye opener” for all physicians engaging in the practice of telemedi-

scription of any drug requires an appropriate physical examination.

- The prescription of Viagra requires the physician to obtain a detailed history, including urological, neurological, cardiorespiratory, and psychological elements, and to make a good faith effort to confirm that history with physical examination.

- With respect to prescribing

The California Medical Board stated the respondent failed to obtain an adequate history or perform a physical examination, thereby failing to meet the standard of care with respect to prescribing Viagra. The Board stated these failures, separately and collectively, represent extreme departure from the standard of care.

The California Medical Board fur-

It is incumbent upon physicians to initiate contact to remind patients that they need follow-up on known health issues.

Viagra, an appropriate examination would be focused on determining the etiology of the erectile dysfunction, and excluding contraindications to the use of phosphodiesterase inhibitors.

- With respect to Viagra prescription, a genital examination must be performed, to exclude anatomic defects and to detect previous undiagnosed hypogonadism.

- With respect to Viagra prescrip-

tion, the physician’s process in identifying the patient was an extreme departure from the standard of care. The Board stated:

“With the respect to the prescription of Viagra, Respondent failed to confirm that the Board’s Investigator was indeed a man of a certain weight and height. The prescription of Viagra to an unknown patient of unknown demographics is dangerous, as Viagra is highly sought after by some men, some of whom have been denied a Viagra prescription by their personal physician because of life-threatening contraindications. Respondent’s failure to attempt to confirm the Board’s investigator identity is an extreme departure from the standard of care.”

So, in the case of Holmes, even though California allows prescribing based upon responses to questionnaires, the Medical Board of California did not believe Holmes met the standard of care when he did just that.

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cine (In re Richard Holmes, M.D. First Amended Accusation, Case No. 800-2014-008269, at 10). In that case, the California Medical Board suspended the medical license of Holmes after he prescribed Ella and Viagra to two fake patients who used the Kwikmed portal. An investigator created two fake patients, one to order Ella, an emergency contraceptive, for a friend who might be pregnant, and Viagra for herself posing as a male patient. Holmes issued both prescriptions.

A synopsis of the exhaustive Medical Board of California review follows. They stated that:

The standard of care for the pre-

scription, vital signs must be taken, to exclude undiagnosed hypertension or arrhythmia.

- With respect to Viagra prescription, a cardiorespiratory examination must be performed, to exclude undiagnosed valvular heart disease or underlying lung disease.

- With respect to Viagra prescription, a neurological examination must be performed to exclude alcoholic and diabetic peripheral neuropathy.

- With respect to Viagra prescription, a psychological history must be performed to exclude psychiatric disease as an etiology for sexual dysfunction.

Physicians Must Develop Mitigation Practices When Practicing Telemedicine

The case of Holmes should raise physicians’ awareness of the risk and potential liability associated with telemedicine and explain why physician practices need policies to mitigate those risks of liability.

Mitigation policies are important and necessary for the medical practice. It is imperative that physicians stay connected to patients. It is incumbent upon physicians to

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initiate contact to remind patients that they need follow-up on known health issues. If they are unwilling to use telemedicine tools and need follow-up care, they must be seen, or referred to medical care of similar expertise. It is up to the physician to determine and communicate the urgency of being seen to the patient. That communication must be documented in the medical record.

Utilize the Knowledge of Your Medical Practice Insurance Company to Help Guide Your Telemedicine Practice

Contact your medical professional liability (MPL) company to confirm that they extend medical malpractice coverage for medical care rendered via telemedicine. Most insurers provide medical malpractice coverage, but require the physician to comply with state and federal regulations.

The Federation of State Medical Boards (FSMB)¹ maintains a list of states that are waiving in-state licensure requirements for telemedicine. As of May 13, 2020, state licensure waivers had been issued in 49 states. Without these waivers, physicians should practice prudently and should treat only patients who are located in states where they have a medical license. Confirming a patient's domicile should now be on a checklist for medical practice protocols.

There May Not Be a Waiver or Blanket Exemptions in States Where Your Patients Are Located

Keep in mind that COVID-19 conditions differ in different states, are fluid, and are subject to change. In the event of a malpractice claim, plaintiff attorneys will check to confirm you complied with state laws. Failure to comply can negatively impact the defense of a medical professional liability claim.

Plan to Integrate Telemedicine into Medical Practice and Account for Its Limitations

The following Golden Rules govern the practice of telemedicine:

- Telemedicine tools are only as effective as the physicians who use

them. Physicians must decide which patients are good candidates for telemedicine, whether the patient is willing to participate, and whether the patient's health conditions can be adequately treated with telemedicine tools. Medical practice protocols must address how to handle patients desiring to participate in the practice of telemedicine and how to handle patients who feel virtual visits are ineffective.

minor. The Ophthalmic Insurance Company (OMIC) offers two consent forms on their website for use in your medical practice.³

- Physicians would be prudent to check with their MPL insurance company for a telemedicine consent form that will help document this discussion with patients. Physicians must consider safety issues for patients, staff, and themselves. It would be prudent to have a staff

Physicians would be prudent to check with their MPL insurance company for a telemedicine consent form that will help document this discussion with patients.

- Before introducing telemedicine into their medical practice, physicians need to complete a comprehensive assessment of the available telemedicine tools available. Considerations should include whether a physician records a video session for documentation. Do privacy protection features comply with HIPAA regulations? CMS has stated that medical practices must continue to implement safeguards to protect patient information against intentional or unintentional impermissible use or disclosures.

- Ensure your medical practice has medical practice protocols that include specific accommodations for patients with special needs. The American with Disabilities Act (ADA) for Title 11 (state and local government services) and Title 111 (public accommodations and commercial facilities) requires medical practices to communicate effectively with patients who have communication disabilities. The ADA has issued specific audiovisual requirements for individuals with special needs.²

- Proactively managing patient expectations is part of every encounter with patients. A well-executed informed consent process regarding telemedicine should be an integral component of practice protocols. Two types of consent forms should be used to document consent to treat minors: (1) proxy consent; and (2) pre-authorization to treat a

member join physicians on video conferencing sessions to document the encounter and provide a witness if there are allegations of inappropriate behavior.

Conclusion

The Holmes case spotlights the liability risk telemedicine can pose to the practicing physician. Telemedicine is a complex physician-patient interaction. As a fiduciary to the patient, a physician must understand all the complex medical, legal, and ethical issues inherent to the practice of telemedicine. Physicians would be prudent to know the state and federal rules and regulations regarding the practice of telemedicine and the potential liabilities associated with lack of compliance with these rules and regulations. **PM**

References

¹ U.S. States and Territories Modifying Requirements for Telehealth in Response to COVID-19. Last updated March 14, 2023. www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf

² ADA Requirements: Effective Communication. Last updated February 28, 2020. www.ada.gov/effective-comm.htm.

³ Ophthalmic Mutual Insurance Company. Consent for Proxy forms. www.omic.com/consent-for-proxy-forms.

Dr. Paterick is Professor of Medicine, Loyola University Chicago Health Sciences Campus, Maywood, Illinois; email: tpaterick@gmail.com.