

MEDICAL PROFESSIONAL LIABILITY RISKS OF TELEMEDICINE



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Telemedicine is now mainstream;¹ the numbers speak for themselves. According to a recent industry report, telemedicine is projected to be a \$244 billion industry in the U.S. alone by 2032.² A separate report found that 84% of employers believe integrating virtual health and in-person care delivery is essential.³ In addition, new data show that the percent of physicians that used telemedicine jumped from 15% in 2018 and 2019 to 87% in 2021.⁴

Large employers are also getting in on the act. A Towers Watson study concluded that U.S. employers could potentially save up to \$6 billion per year if their employees routinely engaged in remote consultations for certain medical problems instead of visiting emergency rooms, urgent care centers and physicians' offices.⁵

The telehealth trend is being driven by many factors; chief among them is more favorable consumer attitudes toward telehealth services. For example, more than 70% of younger generations (Gen Z, millennials and Gen X) said they prefer telehealth because of convenience.⁶ Utilization has also been increasing with 50% of households reporting that they used telemedicine in the last year scoring an 86% satisfaction rate.⁷

As a result, U.S. consumers have seen a huge increase in the number and diversity of healthcare providers offering various forms of telemedicine services to patients. Telemedicine providers vary in technological sophistication, with some providing care via telephone and others offering video consultations via smartphones and other mobile devices. Medical specialties ranging from urgent care, radiology, chronic disease management, concussion screening/monitoring and psychological assessments are common as part of the telehealth menu of services. As patient care is provided on a 24-hour basis and accessible from virtually any location, telemedicine can be optimal for many who prefer to seek healthcare services in an alternative setting to a traditional physician's office or healthcare facility. Additionally, telemedicine offers a viable alternative for those unable to access in-person services due to factors such as distance from providers.

TELEHEALTH LIABILITY

There are many legal and regulatory issues associated with the use of telehealth, including cross-border licensure, prescribing, credentialing and cybersecurity. One issue discussed less by telehealth stakeholders concerns potential liability exposure—a principle concern for any evolving healthcare industry segment.

Medical professional liability (MPL) is the primary liability exposure for nearly all healthcare providers. Many telehealth skeptics have long argued that the nature of remote or virtual consults would lead to an increased risk for malpractice given the nature of how healthcare services are provided. While this argument has not been supported by the data, unfortunately, the increasing use of telehealth will invariably lead to greater professional liability claims, and telehealth providers must protect themselves from this exposure.

One potential factor that could lead to increased claims involves communication. Lack of communication is often the root cause of many medical malpractice allegations and claims. Given the episodic nature of telemedicine treatment today, provider-patient communication may be impacted, potentially leading to increased MPL exposure.

It is advisable when purchasing MPL coverage that the buyer always seek a policy that allows for the reporting of facts and circumstances that might lead to a claim or so-called incident reporting.

MPL INSURANCE

The encouraging news for telehealth stakeholders is that there are many more MPL insurance options today than existed even five years ago and the insurance is relatively affordable after years of positive underwriting results.

Telemedicine providers seeking liability protection should purchase MPL insurance at the inception of the business and before patient encounters commence. As a rule, it is in the best interest of the telemedicine provider to purchase MPL insurance coverage that provides protection to all healthcare providers and the healthcare entity on a shared basis per occurrence and in the aggregate. The shared limits approach is more cost-effective as opposed to having each individual healthcare professional carry his or her own individual limits. The shared limit approach also precludes a clash loss, in which a claim naming multiple defendant entities and/or individuals puts multiple policies and multiple sets of limits in place.

It is advisable when purchasing MPL coverage that the buyer always seek a policy that allows for the reporting of facts and circumstances that might lead to a claim or claim, also known as incident reporting. A policy with incident reporting language allows the insured to report potential claims or bad outcomes as soon as they become known to the insured party. The incumbent carrier will then be responsible for that claim after proper notice is given, even if the insured changes carriers before a written demand for damages should occur.

The alternative to incident reporting is a policy that permits reporting of claims only when a written demand for damages has been made. Such an approach can become problematic, given that much can occur between the time of a known incident and when a written demand for damages takes place (e.g., a carrier potentially non-renewing an insured who may be aware of one or more medical incidents, but could not report the claims due to the absence of an actual written demand for damages).

ENHANCEMENTS TO A POLICY

There are important MPL policy enhancements that can be obtained if properly negotiated. For example, sexual abuse claims and punitive damages are often excluded from MPL insurance coverage. These provisions, however, can be added to an MPL policy.

LEGAL ISSUES – LICENSURE

Licensure is perhaps the largest liability exposure facing providers. Most telemedicine providers make reasonable efforts to ensure that a patient is treated by an appropriately licensed professional in the state where the patient is located at the time the telehealth services are provided. While many telehealth providers may be able to confirm patient location via geolocation data provided by the mobile device used by patients, that is not always the case.

It is not uncommon to see coverage exclusions for treatment rendered by any individual who fails to obtain the proper professional license in the state or locality in which the treatment was provided.

There are many scenarios in which licensure issues arise. For example, a patient begins a video consult in one state while a passenger in a vehicle that then crosses into another state prior to the consult being completed. There are many other examples. Telemedicine providers using traditional technology, such as a landline telephone, must confirm the exact patient location before matching the patient to a duly licensed professional. Most telemedicine providers employ physicians and other professionals that carry licenses in multiple states to help address these potential concerns.

The reason these scenarios are significant in the context of liability is because some liability policies exclude coverage if a healthcare provider is not appropriately licensed in the state in which the patient is located at the time virtual services are provided. MPL insurance policy exclusions should be carefully reviewed, especially as it pertains to the licensure issue. It is not uncommon to see coverage exclusions for treatment rendered by any individual who fails to obtain the proper professional license in the state or locality in which the treatment was provided. These exclusions are common in physician MPL coverage. Note that there are also exclusions for criminal activity, which could be implicated in these cases if the practice of medicine without a proper license is deemed criminal in the jurisdiction where treatment is provided. It is always best to confirm coverage with endorsements that provide coverage, even in instances in which providers are not appropriately licensed.

INTERNATIONAL TELEMEDICINE

International telemedicine continues to grow. There are many examples—from American expatriates using virtual healthcare services provided by physicians located in the U.S. to Americans seeking less expensive care via telemedicine from healthcare providers located outside the U.S. International cross-border treatment implicates complex licensure issues. In other words, healthcare provider licensure will be a major concern in international telemedicine as the rendering of healthcare could potentially violate a country's healthcare laws and policies.

In many countries, healthcare providers are not permitted to provide services unless they hold a valid license or registration in the country or local jurisdiction where they are providing such services. Mutual recognition and related laws reduce some of the burden. For example, Australia and New Zealand have created a mutual recognition model permitting physicians in Australia and New Zealand to practice in certain states/territories in Australia and New Zealand where they are not registered.⁸ An EU physician registered in his or her home EU member state can provide virtual care services to patients in another EU member state, even if that physician is not registered in the member state in which the patient is located.⁹ Most countries, however, do not share this approach to licensure.

CONCLUSION

In the near future, we anticipate that any telemedicine specialty that runs a risk of failure to diagnose a serious disease coupled with the probable lack of a long-standing provider/patient relationship could lead to increased liability losses. In particular, cardiovascular disease, chronic disease management and oncology tend to include high-severity cases that have higher incidences of negative patient outcomes. The relative novelty of virtual care, telemedicine related to these conditions may lead to increased liability losses. One thing seems certain: negligible malpractice activity in telehealth is unlikely to continue.

¹ For purposes of this article, the terms “telemedicine” and “telehealth” will be used interchangeably (unless otherwise indicated), and will mean the delivery of health-related care, services, education and information via telecommunications technology, which includes videoconferencing, remote monitoring, electronic consults and wireless communications.

² Global Market Insights

³ Value-based Purchasing Employer Guide

⁴ Use of Telemedicine among Office-Based Physicians, 2021

⁵ Towers Watson

⁶ AHA Center Health Innovation Market Scan

⁷ Telehealth use and Satisfaction among U.S. Households

⁸ Mutual Recognition Act 1992.

⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce).



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About the Author.

Larry Hansard, M.S.M., is the National Director for the Digital Health & Telemedicine team. Larry has over 33 years of experience in the insurance industry and has worked in national brokerage firms as well as small regional organizations. He is a noted speaker on topics affecting the healthcare industry, including captive insurance companies, medical professional liability and general risk management issues. Larry previously served as an account executive on a large portfolio of healthcare accounts and as the National Healthcare segment leader for industry-specific teams.

René Quashie is the first-ever vice president of policy and regulatory affairs of digital health at the Consumer Technology Association (CTA). Quashie provides guidance on key technical and regulatory issues relating to consumer digital health technology products, services, software and apps. Quashie also works on behalf of CTA's Health and Fitness Technology division, which supports the consumer health technology industry through advocacy, education, research, standards work, policy initiatives and more. CTA works closely with federal agencies like the FDA, CMS, FCC and the Office of the National Coordinator for Health Information Technology. Prior to working at the CTA, Quashie was in private law practice at several national firms for two decades, focusing his work on healthcare issues including digital health, reimbursement and privacy. He earned his law degree from George Washington University.



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