



Medical Professional Liability Risks of Telemedicine

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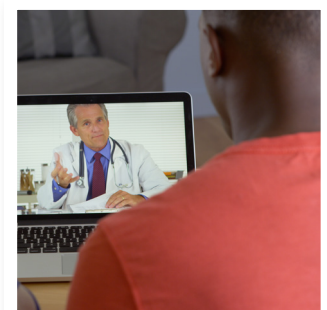
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Medical Professional Liability Risks of Telemedicine

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Telemedicine is now mainstream;¹ the numbers speak for themselves. According to a recent industry report, the global telemedicine market is expected to be a \$35 billion industry by 2020.² A separate report found that the market for telemedicine technologies was approximately \$18 billion in 2014, and expected to grow at a compounded annual growth rate of approximately 19 percent.³ The American Telemedicine Association estimates a majority of hospitals now use some form of telemedicine. Just two years ago, there were approximately 20 million telemedicine video consultations and that number is expected to increase to about 160 million by 2020—a 700 percent increase.⁴

Large employers are also getting in on the act. Per an annual survey conducted by Towers Watson and the National Business Group on Health, 90 percent of employers plan to offer telemedicine services by 2018.⁵ It is estimated that about one-third of employer group plans already cover telehealth in some form. Another 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.⁶

The telehealth trend is being driven by many factors; chief among them is more favorable consumer attitudes towards telehealth services. For example, a recent study found that 70 percent of patients are comfortable communicating with their health care providers via text, e-mail or video, in lieu of seeing them in person.⁷ According to an Anthem study, 74 percent of consumers indicated that they would use telehealth services when seeking care for certain non-urgent conditions. There are other studies that show similar results.



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, while others offer video consultations via smartphones and other mobile devices. Medical specialties ranging from urgent care, radiology, chronic disease management, concussion

screening/monitoring and psychology are now common as part of the telehealth menu of services. As patient care is provided on a 24-hour basis accessible from virtually any location, telemedicine can be optimal for many who may prefer to seek healthcare services on an alternative basis to traditional physician office or facility settings, or more importantly, for those unable to access in-person services due to factors such as distance from providers.

Telehealth Liability—The Real Numbers

There are many legal and regulatory issues implicated 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 the health care services are provided. This argument has not been supported by the data.

The Physician Insurers Association of America (PIAA) published a July 2015 article that compared telephone treatment MPL claims versus overall MPL results within the PIAA Data Sharing Project (DSP)—a very large database of MPL claims.⁸ The numbers make for interesting reading.

- Of the 94,228 total claims in the DSP during the period from 2004-2013, a total of only 196 claims were linked with telephone treatment.
- Of those 196 reported claims, 56 resulted in some form of claim payment.
- The total indemnity loss for related to telephone treatment was only \$17 million, compared to \$8 billion for the total of all MPL losses in the DSP.
- Telephone treatment claims thus represented only about 0.21% of all MPL losses.
- The average indemnity loss was also lower for telephone treatment at \$303,691, compared to \$328,815 for all MPL claims within the DSP.

Even acknowledging that the number of virtual care claims will likely have increased since 2013 given the greater prevalence of telehealth, the PIAA data shows almost no malpractice activity related to telehealth. The doomsday scenario painted by many telehealth critics has not come to pass. Unfortunately, however, 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. Crico Strategies published a study in 2015 in which it analyzed 23,658 MPL (from 2009–2013), and concluded that 30 percent of those cases involved some form of communication failure.⁹ In the cases where communication was a factor, 55 percent involved a miscommunication between the provider and the patient. Given the episodic nature of telemedicine treatment today, provider-patient communication may be impacted potentially leading to increased MPL liability exposure.

Medical Professional Liability 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 in play multiple policies and multiple sets of limits.

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”. 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 (i.e., 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.

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 land line 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 the instance in which a provider is not appropriately licensed.



International Telemedicine

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

In many countries, health care 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.¹⁰ An E.U. physician registered in his or her home E.U. member state can provide virtual care services to patients in another E.U. member state even if that physician is not registered in the member state in which the patient is located.¹¹ Most countries, however, do not share this approach to licensure.

As is the case with domestic telemedicine, inappropriate licensure may lead to coverage exclusions under MPL policies. This is especially problematic in the international context given the many different legal approaches to professional licensure. Providers need to fully understand the licensure/registration laws in all countries in which they want to provide services to ensure they are properly covered under their MPL policies.

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 longstanding 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. Coupled with the relative novelty of virtual care, telemedicine related to these conditions may lead to increased liability losses. One thing seems certain; the 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.
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- 3 *Global Telemedicine Market Outlook 2020*, RNCOS (May 2015).
- 4 *Telehealth Video Consultations*, available at <https://www.tractica.com/research/telehealth-video-consultations/>.
- 5 *High-Performance Insights - Best Practices in Health Care*, 2015 20th Annual Willis Towers Watson/National Business Group on Health Best Practices in Health Care Employer Survey, available at <https://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2015/11/full-report-2015-towers-watson-nbgh-best-practices-in-health-care-employer-survey>.
- 6 *Current Telemedicine Technology Could Mean Big Savings*, available at <https://www.towerswatson.com/en-US/Press/2014/08/current-telemedicine-technology-could-mean-big-savings>.
- 7 *Global Customer Experience Report*, Cisco (Mar. 2013).
- 8 *Telemedicine and MPL: The Story So Far*, Physician Insurers Association of America (July 2015).
- 9 *Malpractice Risks in Communication Failures*, Crico Strategies Annual Benchmarking Study (2015).
- 10 Mutual Recognition Act 1992.
- 11 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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