With increased reliance on telemedicine, many physicians question whether the elimination of in-office, face-to-face patient encounters increases their potential medical practice liability risks. Approximately 90% of health care organizations use or plan to implement telehealth platforms. In states permitting telehealth, 95% of large employers offered telehealth to employees for minor, non-urgent services in 2018.

Through algorithm-assisted diagnosis, patient data collection and analytics, telemedicine may minimize errors and improve outcomes. Consequently, physicians may face liability exposure in different venues as patients may choose or be required to file any malpractice lawsuits in their own states, where the relating physician may not be licensed. This poses unique issues as to licensing, differing standards of care and malpractice insurance.

The American Telemedicine Association defines telemedicine as a health care provider’s provision of services to a patient using telecommunications technology, where the patient and provider are in different locations. Telemedicine may involve videoconferencing, remote patient monitoring or image capturing, and the use of peripheral digital diagnostic medical devices. The technology used must comply with HIPAA, HITECH and state regulations and providers must abide by all in-person medical practice standards, medical licensing boards and informed consent requirements.

Although there are few legal opinions that specifically address telemedicine malpractice, several issues repeatedly arise. Prisoners have asserted federal constitutional claims arising from alleged medical neglect by telemedicine providers as “deliberate indifference to a serious medical need.” Despite the fact that “mere negligence or malpractice” does not amount to a constitutional violation, these allegations could support medical malpractice claims.

While telemedicine affords health care access to patients in remote areas where care otherwise may be virtually non-existent, physicians must consider whether such practice exceeds the scope of their medical licenses as telemedicine often crosses state lines. Most reported telemedicine malpractice cases involve physicians who prescribed medication across state lines without conducting in-office patient exams.

For example, it has been held that physician review of patient questionnaires submitted over the internet was insufficient to prescribe medication absent physical examinations verifying patients’ health. A pharmacy was held to have violated Arizona state law when it dispensed medication pursuant to such prescription orders. Telemedicine raises issues not only regarding a physician's state licensure but also a third party’s potential liability for accepting prescriptions from an out-of-state physician.

Providers should seek advice from counsel to best understand potential liability as telemedicine poses unique medical malpractice risks and complicates traditional medical malpractice claims due to distinct issues regarding jurisdiction, procedure and duty of care. Jurisdictional exposure turns on whether physicians unlicensed in remote states are permitted to provide telemedical care for those states’ residents. Significantly, physicians and patients may be located in states with different liability laws, statutes of limitations, standards of care or...
damage caps.

Choice of law issues arise where it is unclear whether the law of the patient's state or the provider's state shall govern. Unresolved jurisdictional issues may make it difficult for insurance companies to assess financial risks. Moreover, unauthorized medical practice can result in disciplinary action in the physician's own state and potential prosecution for unlicensed medical practice in the patient's state. Providers should confirm that medical malpractice policies tailored for in-office encounters include telemedicine.

Finally, many malpractice policies exclude unlicensed activities, so physicians also must understand state licensing provisions and coverage requirements in other states.


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