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Mansfield Rule Certified 2022-2023

Stay Vigilant About Malpractice Risks with Telemedicine, Health Risk Management, featuring Abbye Alexander, Christopher Tellner, 2-1-22

The dramatic increase in the use of telemedicine is raising concerns about the potential for malpractice issues related to this form of caregiving, with some experts cautioning a wave of lawsuits could be on the way. Adherence to key principles of patient safety and risk management can reduce the risk...(*full article at link below)*

HIPAA Concerns: As the pandemic abates, telehealthcare may recede as well, but it is unlikely to return to pre-pandemic levels as both providers and patients have enjoyed its convenience, says Christopher Tellner, JD, partner with Kaufman Dolowich Voluck in Blue Bell, PA. While this area of the law is in its infancy, there are several established principles of which healthcare providers and patients should be aware. Telemedicine technology must be compliant with HIPAA, state-based laws regarding health information, and informed consent requirements, Tellner notes.

Regarding telemedicine, the threat of a HIPAA violation may be heightened due to the threat of hacking or impermissible third parties eavesdropping on a telemedicine visit. "While a provider's responsibilities under HIPAA do not change generally when engaging in the practice of telemedicine, certain aspects of HIPAA have been relaxed during the COVID-19 pandemic, particularly the security rule requirement that the telecommunication platform used meet certain technical security requirements," Tellner says. "This relaxed standard should not be expected to last, and providers should be cognizant of whether the platforms they use satisfy HIPAA."

The doctrine of informed consent was first recognized as the patient's right to control the healthcare he or she received. The doctrine has since been extended to include the patient's right to control his or her health information, Tellner says. Over the years, several elements have been held to encompass a patient's informed consent. "The patient must have the capacity to make decisions on their own behalf, which includes the mental capacity to understand the decision the patient is making. A patient must be given sufficient information that would enable a reasonable patient to understand the decision the patient must make, and to understand the possible consequences of that decision," Tellner explains. "Due to the less formal nature of telemedicine, informed consent may be overlooked during the provision of telemedicine. However, informed consent requirements are no less stringent when providing virtual care than in the provision of in-person care, and cannot be overlooked."

State Lines May Complicate: Every healthcare practitioner is governed by a state licensing board and is subject to state licensing guidelines, notes Abbye Alexander, JD, partner with Kaufman Dolowich Voluck in Orlando. A major, unclear legal issue courts nationwide are grappling with is the effect of a health practitioner's provision of remote care and on the standard of care applicable to that particular practitioner. Practitioners may be located in different states than patients. There will be different malpractice laws, standards of care, immunity provisions, statutes of limitations, or damage limitations in the practitioner's state than the states in which their patients are receiving the virtual care.

"This issue becomes more complicated by the common exclusion in malpractice insurance policies regarding unlicensed activities engaged in by the practitioner, which could be implicated if the practitioner is engaging in a practice within the scope of his or her license in the state they are providing care, but the location where the patient is receiving care is outside the scope of the practitioner's license," Alexander says. "We can anticipate an increase of litigation in this area. Litigation that arises in this area should be monitored."

Practitioners should understand the geographic scope of their patients to better ensure the care provided is permissible across jurisdictional lines. “Malpractice concerns can have serious, disastrous impacts on providers and patients alike. This fact has not changed in light of the shift toward telemedicine, but telemedicine poses different malpractice dynamics than the in-person provision of care,” Alexander says. “Health providers should discuss malpractice concerns specific to telemedicine with legal counsel and malpractice insurance carriers to ensure compliance with evolving regulations and standards of care, and to ensure coverage in the event of a telemedicine malpractice incident.”

For full article, references, and sources, please see link below.

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