Telehealth Insurance: Topics

1. Sources of Malpractice Liability
2. Insurance
3. Managing Liability with “Informal Consults”
Traditional Sources of Malpractice Liability

Elements of a Medical Malpractice Claim

- **Duty.** The provider owes patients a duty to act in accordance with the "standard of care."

- **Breach.** The provider has deviated from or fallen below the standard of care.

- **Causation.** The provider’s breach of the standard of care caused or contributed to causing some harm to the patient.

- **Damages.** The harm resulted in damages (financial, emotional, etc. for the patient).

Lack of informed consent

Exceeding scope of practice
New Sources of Potential Liability

“...[I]t is likely that malpractice lawyers will take advantage of emerging technologies as a new opportunity for litigation.”

-Science and Technology Law: The mHealth Revolution: Legal Implications of Mobile Health Technology. Vol. 30 No. 4 by Deborah Runkle.

- Will a “telehealth” standard of care emerge?
- What standard of care is owed to patients who are monitoring their own health?
- Is the standard breached if the technology fails?
Selecting a Carrier for Telehealth Malpractice Insurance

- Select a carrier that offers a well-defined and thoughtful telemedicine malpractice coverage product.

- Under some policies, the carrier retains the right to selectively deny coverage. Common reasons for selective denial include:
  - The patient or service provided is not located in a state where the insurance company is licensed;
  - The physician/exposure presents an above average risk; and
  - Coverage disallows telemedicine direct patient care, but does allow peer-to-peer physician consultations.
Scope of Policy

- Ensure the policy extends coverage to:
  - All states where the provider wants to provide services.
  - Other entities and Tax IDs
  - Other innovate delivery models (e.g., white labels, telehealth staffing models, leased providers, etc.)

- Ensure the malpractice carrier itself is licensed in all the states where the provider wants to provide telemedicine services (i.e., where the patients are located).
  - Keep in mind: insurance is regulated at the state level.
Scope of Coverage

- Obtain **written assurances** from the carrier that the medical malpractice liability insurance policy covers telemedicine malpractice lawsuits.

- Determine if the policy includes coverage for claims brought by a **state board of medicine** against the physician for standard of care and regulatory compliance issues.

- Explore the option of a **separate service-line or add-on policy** if the telemedicine service is only interpretive (e.g., telepathology, teleradiology) in a peer-to-peer consultation setting, and not a direct-to-patient model.
An “informal consult” has not been found to create legal exposure because courts have typically not found the existence of a physician-patient relationship between the patient and the “informally consulted” physician.

More recently, courts have found legal exposure may arise from certain consultations even where there is no formal physician-patient relationship.
Facts that May Reduce Liability after an “Informal Consult”

- The physician consulted has not examined the patient;
- The physician consulted has not communicated directly with the patient;
- The physician consulted has not reviewed the patient’s medical records;
- The physician consulted has no obligation for formal consultation, i.e. no formal referral has been made;
- The physician consulted has neither billed nor received payment for professional services in connection with the consultation;
- The physician consulted has provided the opinion and advice solely to the treating physician; and
- The treating physician has remained in control of the care and treatment of the patient.