

TELEHEALTH INSURANCE COVERAGE

Washington State Telehealth Collaborative Meeting

March 23, 2018



Anchorage. Bellevue. Los Angeles. New York. Portland.
San Francisco. Seattle. Shanghai. Washington, D.C. | dwt.com



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.

Managing Liability with “Informal Consults”



- 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.