Diagnosing Telemedicine Liabilities and Risks

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8/8/2016

The same technology that helps people communicate all over the world and do their jobs more efficiently has made its way to healthcare. Telemedicine promotes better patient care and faster access to medical services, and it's increasingly popular in the United States.

Telemedicine is the practice of assessing patients remotely using videoconference, digital photography, chat or other technology, or monitoring chronic conditions using remote technology, rather than meeting in person. This saves time and money, and enables patients and physicians to meet no matter where they're located. Think of a patient living in a rural area who needs to see a specialist. While an in-person visit may be required at first, follow-ups can be conducted via videoconferencing. Likewise, patients with chronic conditions are able to get needed care via telemedicine rather than frequent, in-person visits.

Telemedicine has grown-and will continue to grow-as technology advances. It's saving patients, providers and payers money, and gives patients greater access to high-quality healthcare. The Medicare Telehealth Parity Act of 2015 expanded telehealth coverage to Medicare beneficiaries to include both rural and urban areas, and to streamline the payment system.

Studies have shown that there is little difference between the care given in-person and the care given via telemedicine appointments, and medical malpractice-related claims substantiate that data. So far, there have been only a handful of reported telemedicine claims. One reason may be that the number of telemedicine visits, compared to in-person visits, is so low. Another reason may be that liability suits have been settled out of court and not reported. And even when claims are settled, confidentiality agreements may prevent any information from being disclosed.

However, it isn't difficult to foresee potential liability issues as telemedicine use continues to grow.

With that in mind, it's vital for underwriters, lawyers, insurance brokers and healthcare professionals to gain a deeper understanding of telemedicine liability and regulatory issues, and the large gaps in coverage that may exist with current professional liability policies. Here are liability issues to consider:
1. **Location** - If a telemedicine claim against a physician is filed, geography could play a part in determining who is liable. Technology enables people to communicate from anywhere; however, standards haven’t been set for physicians who give medical advice and virtual care across state lines. Since care is provided in a patient’s state, that state’s laws may prevail. However, this hasn’t yet been tested in the legal system.

2. **Malpractice complexities** - Medical malpractice claims are already highly complex. They sometimes involve a patient’s account of a situation versus a physician’s, and communication between the two. Telemedicine further complicates this because of the technological component. Issues related to technology malfunctions could lead to a malpractice claim.

3. **Standard of care** - What’s considered “good” care by a physician may be inadequate to a patient. There are various rules and regulations regarding the standard of care, and they vary by state. Unfortunately, most states haven’t yet determined a standard for telemedicine, except Hawaii, Colorado and Texas. But even these standards are flawed: They’re somewhat inflexible, can be construed as vague and become obsolete quickly because of changes in technology.

4. **Data breaches** - Medical information is protected under a number of laws, including the HIPAA privacy act as well as the Health Information Technology for Economic and Clinical Health Act (HITECH) and the Child Online Privacy Protection Act (COPPA). As with any Internet-enabled device, there’s some risk of a data breach, which may put patient information at risk of being exposed. This may give others access to sensitive medical information.

5. **Incorrect diagnosis/prescription** - Undetermined requirements for telemedicine can lead to an incorrect diagnosis or incorrect prescribing, possibly because a telemedicine exam isn’t a complete physical exam that would normally take place in person. Similarly, if a patient is sending a picture of a physical issue such as a rash, a distorted image could lead to an incorrect diagnosis. The physician is subject to professional liability claims, in this case.

6. **Fraud and abuse** - Clear guidelines are set for medical fraud and abuse for in-person doctor visits. However, in the world of telemedicine, what constitutes virtual abuse, and how can patients confirm that the physician is as credentialed as he or she says. This is yet another area that needs to be standardized.

A number of standards or guidance around telemedicine need to be set before physicians can safely give medical advice to patients. In addition to these liability issues, it’s also important to understand what a professional liability insurance policy does and doesn’t cover.

As mentioned, many current professional liability policies exclude telemedicine from coverage and you will need additional coverages to ensure you’re
protected from the numerous telemedicine liability issues. Newer policies tend to cover telemedicine, a trend which will continue as more practitioners offer the service. Likewise, most medical malpractice policies include questions around telemedicine service. It's important to seek counsel to better understand how you're covered and what you need to ensure you can safely give medical advice via telemedicine.

1 “Research Outcomes: Telemedicine’s Impact on Healthcare Cost and Quality.” American Telemedicine Association

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