The Evolution of Healthcare Claims in the Wake of Telemedicine

Melissa J. Brown, Esq.
Amanda A. King, Esq.
Marci Mitkoff, Esq.
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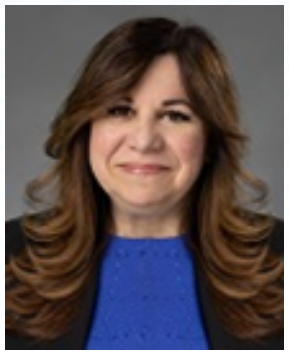
Speakers

Melissa J. Brown, Esq.

Partner
New Jersey & Pennsylvania
mjbrown@grsm.com



Marci Mitkoff, Esq.

Partner
New York & New Jersey
mmitkoff@grsm.com

Amanda A. King, Esq.

Partner
Florham Park
New Jersey & New York
aaking@grsm.com

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Telemedicine Across the 50 States

Amanda A. King, Esq. · 12/12/2023

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Telemedicine/Telehealth

Telemedicine or Telehealth is the use of electronic methods of transmitting information and communicating to provide care when the patient and physician are not in the same geographical location at the same time.

What Does Telehealth/Telemedicine Look Like

- Healthcare applications where patients can sign up for and attend appointments virtually on their cell phone, tablet or computer through video-conferencing
- Treatment rendered remotely by your usual physician via telephone call or video conferencing
- Using online portals to upload documents and other information for doctor review
- Intraoperative monitoring by physicians off-site through real-time electronic data transmittal

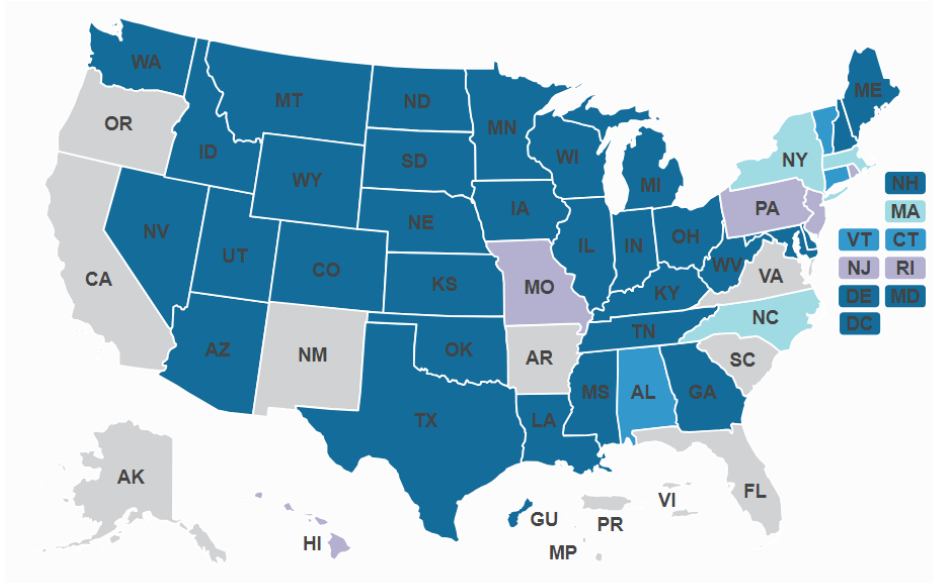
The Increased Use of Telehealth Post Covid-19

- Telehealth usage increased significantly in 2020 after Covid-19 rendered in-person care less desirable and accessible.
- In February 2020, the CDC issued guidance advising persons and health care providers to adopt social distancing practices and specifically recommended that health care facilities and providers offer clinical services through virtual means such as telehealth.
- While telehealth utilization has changed since the steep increase from the early stages of Covid-19, it remains above pre-pandemic levels and it is clear that telehealth is here to stay.

Potential Claims

- Practicing Medicine Across State Lines:
  - Temporary Emergency Licenses for Out-of-State Practitioners During the Pandemic
  - Interstate Medical Licensure Compact (IMLC)

Participating States



= Compact Legislation Introduced
= IMLC Member State serving as SPL processing applications and issuing licenses*
= IMLC Member State non-SPL issuing licenses*
= IMLC Passed; Implementation In Process or Delayed*

Potential Claims (cont'd)

- Practicing Medicine Across State Lines:
  - Nurse Licensure Compact (NLC)
  - Audiology and Speech-Language Pathology Interstate Compact (ASLP-IC)
  - Occupational Therapy Compact (OT compact)
  - Physical Therapy Compact (PT compact)
  - Psychology Interjurisdictional Compact (PSYPACT)
  - Emergency Medical Services Compact (EMS Compact)

Potential Claims (cont'd)

- Privacy and Security Concerns/HIPAA Protection
  - HIPAA Compliance
    - The U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) has issued guidance.
  - Three key factors associated with telehealth privacy and security: environmental, technology, and operational factors.
    - Environmental Factors: lack of private space, difficulty sharing sensitive health information remotely, and videoconferencing may inadvertently expose the patient's living conditions to the provider.
    - Technology Factors: technology data security issues (hacking of video visit), limited access to internet and technology, access to digital services like cellular data or Wi-Fi, digital literacy, and poor quality of audio or video.
    - Operational Factors: privacy and security concerns, reimbursement and payer denials, technology accessibility, training and education, maintenance and updating devices, etc.

Potential Claims (cont'd)

- Medical Malpractice Liability
  - Legal Issues and Claims Involved:
    - » Choice of Law
    - » Prescribing Medication Out-of-State
    - » Errors in Prescribing Medication
    - » Misdiagnosis
    - » Miscommunication
    - » Failure to Recognize When Telemedicine Is Not Sufficient/Appropriate
    - » Failure to Provide Diligent Real Time Monitoring
    - » Deviations from the Standard of Care

How are Different States Handling Telehealth Medical Malpractice Claims and the Standard of Care?

How Some Telehealth Companies Are Integrating Technology and At-Home Kits to Meet the SOC

- Blueberry* is a pediatric telehealth company that sells a subscription-based service that comes with an at-home medical kit (includes ear scope that can record video, a pulse oximeter, and a thermometer
- Their application walks you through performing an at-home exam with the medical kit to send your child's vitals, ear exam, and/or photos
- Then you speak with a pediatrician to get a diagnosis, prescription (when appropriate) and doctor's note

*We are not endorsing this company/product.

Predictions for the Law Developing in Response to Telehealth and the Future of Telehealth

- Expansions of Telehealth Access Under Temporary Pandemic Regulations:
  - We are already seeing temporary measures being codified into law to make expanded telehealth access permanent.
- Licensing:
  - We're going to see increased reciprocity and reduced barriers to telehealth access that crosses state lines due to the location of the physician and patient.
- Methods and Technology:
  - We're going to see developments in the security and features of the platforms utilized to provide telehealth to address privacy concerns and increase the ability of patients and providers to share information in real time.
  - We're also going to see development of at-home medical devices that can be utilized to transmit biometric data to providers in real time.

Midlevel Providers and Malpractice Claims

Marci D. Mitkoff, Esq. · 12/12/2023

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MEDICAL CARE ENVIRONMENT IN THE UNITED STATES

- The U.S. continues to face physician shortages due to physicians leaving practice, the aging of the population, increased demands for healthcare because more people have insurance coverage after the passage of the Affordable Care Act, and higher rates of chronic diseases.
- The American Association of Medical Colleges estimates that the U.S. will face a physician shortage of approximately 122,000 physicians by 2035. Although new medical schools have opened in the past several years and some medical schools have expanded the number of seats, because Congress has **not** significantly expanded the number of residency spots which are funded by Medicare.
- The existing and anticipated physician shortage has propelled nurse practitioners (NPs) and physician assistants (PAs) into service to alleviate the pressures associated with a physician shortage.

EDUCATION AND TRAINING OF MIDLEVELS IN COMPARISON TO PHYSICIANS

- NPs usually complete an undergraduate nursing program and earn a master's degree that generally takes two to four years and includes approximately 500-750 hours of clinical training. Online-only programs are allowed.
- PAs have bachelor's degrees and a master's degree, which is generally three years and includes more than 2000 hours of clinical training.
- Physicians, whether they are M.D.s or D.O.s, have bachelor's degrees, 4 year graduate degrees and must complete 3-7 years of residency training beyond that, depending upon their specialty. Between medical school clinical rotations and residency, physicians get between 12,000 and 16,000 hours of patient-care experience.

THE NUMBER OF MIDLEVELS IN THE UNITED STATES

- There are approximately 385,000 nurse practitioners in the U.S.
- Between 2010 and 2017, the number of NPs doubled.
- The U.S. Bureau of Labor Statistics projects that the number of NPs will increase by 46% by 2030.
- There are approximately 158,000 PAs in the U.S.
- The PA profession grew 28.7% between 2017 and 2021.

STATES WHERE NPS CAN PRACTICE INDEPENDENTLY

Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington and Wyoming.

NPS DELIVERING EMERGENCY CARE WITHOUT PHYSICIAN SUPERVISION

- The National Bureau of Economic Research in a working paper reported that NPs delivering emergency care without physician supervision or collaboration in the Veterans Health Administration increase length of hospital stays by 11% and raise 30-day preventable hospitalizations by 20% compared with emergency physicians.
- This may reflect either that "NPs have poorer decision-making over whom to admit to the hospital, resulting in underadmission of patients who should have been admitted and a net increase in return hospitalizations, despite NPs using longer lengths of stay to evaluate patients' need for hospital admission."
- Or, the other possibility is that "NPs produce lower quality of care conditional on admitting decisions, despite spending more resources on treating the patient (as measured by costs of ED care. Both possibilities imply lower skill of NPs relative to physicians".
- David Chan, M.D. and Yiqun Chen, PhD, authors of the paper.

SALARIES OF NPS AND PAS

- In 2022, according to the American Association of Physician Assistants, the median compensation was $120,000.
- According to the U.S. Bureau of Labor Statistics, NPs earn an average salary of $121,610.
- Hospitals and medical practices save money if they hire a PA or NP instead of a physician. In 2022, the average physician income was $352,000 according to Medscape.

CLAIMS AGAINST NPS ARE INCREASING IN BOTH NUMBER AND AMOUNTS

With rapid growth of the profession, there is a significant increase in medical malpractice claims against NPs.

- A study by CNA Insurance Company and the Nurses Service Organization examined 232 professional liability claims against NPs for claims closed between January 1, 2017 and December 31, 2021, reflected that the average total incurred was $332,137, an increase of 10.5% compared to 2017.
- Claims against NPs which resolved for more than $500,000, represented 21.5% of all claims in a 2022 dataset, compared to 13% in the 2012 dataset.
- The injury alleged in over 45% of NP malpractice cases was death, with the most common causes including infection/sepsis, cardiac arrest, and cancer.
- Claims against family NPs were most prevalent. The majority of those claims involved diagnosis, treatment and care management, and medication errors.

PHYSICIAN/HOSPITAL LIABILITY FOR MIDLEVELS

- Direct liability for their own actions, which can include negligent supervision. This direct liability results when it is proven that injury to a patient is a result of physicians' negligent supervision, rather than the actions of the midlevel.
- Supervising physicians or hospitals may face direct liability for allegations of negligent hiring if the individuals who hired the midlevel knew, or should have known, that the midlevel was unqualified or otherwise unfit to perform the professional services they were hired to perform. They may also be held liable if the hiring individuals fail to use due diligence prior to hiring the midlevel, to ascertain if they are capable of performing the duties to which they will be assigned.
- Vicarious liability if the midlevel performs negligent acts and it is determined that the supervising physicians could have controlled their activity. Vicarious liabilty is still possible if the midlevel is not a named defendant in a lawsuit or if the midlevel was dismissed from the lawsuit.

HOW TO DECREASE MALPRACTICE CLAIMS AGAINST NPS AND PAS

- Better history taking and communication with patients. Midlevels should ask clarifying questions to obtain all necessary history and information and listen to the patient's concerns by providing clear answers and realistic expectations.
- Midlevels should follow the applicable policies and protocols of the hospital or healthcare facility for documentation.
- They should not hesitate to make a referral especially in serious or emergent situations.
- Complete continuing education.

Affidavit of Merit Statutes Across the 50 States

Melissa J. Brown, Esq. · 12/12/2023

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What is an AOM Statute?

Alternatives: Pre-Litigation Screening Procedures

- Reduce number of frivolous claims against licensed professionals and other healthcare agents and/or employees in the judicial system;
- Limited pre-suit discovery: expert opinions sometimes required;
- Panel opinion is admissible evidence depending on the State;
- Examples: Idaho, Indiana, Louisiana, Maine, Nebraska, New Mexico

States Requiring Affidavit or Certificate of Merit

- **29 States Require an AOM**

Arizona	Arkansas	California	Colorado	Conneticut	Delaware
Florida	Georgia	Hawaii	Illinois	Kansas	Maryland
Michigan	Minnesota	Mississippi	Missouri	Nevada	New Jersey
New York	North Dakota	Ohio	Oregon	Pennsylvania	South Carolina
Tennessee	Texas	Utah	Vermont	West Virginia	

Certificate of Merit in New York

- CERTIFICATE OF MERIT

- Payne N. Sufferen, an attorney duly admitted to practice in the State of New York, affirms, under the penalties of perjury, the following:
- That I am a member of the law firm of Dewey, Cheatham & How, counsel for the plaintiff(s) in the within action, and as such am fully familiar with all the facts and circumstances surrounding the within action. That I have reviewed the facts of this case and have consulted with a physician who is licensed to practice in this state and who I reasonably believe is knowledgeable in the relevant issues involved in this particular action and I have concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of the within action.
- Dated: New York, New York
- December 30, 2021

No AOM Statutes to Date

- Alabama
- Alaska
- District of Columbia
- Kansas
- Montana
- New Hampshire
- New Mexico
- Oklahoma
- Rhode Island
- South Dakota
- Virginia
- Washington
- Wisconsin
- Wyoming

We will continue to monitor these states for any future legislative updates.

Where do paraprofessionals fall under these statutes?

Paraprofessionals as "Healthcare" Professionals?

- These States' definitions for healthcare "professionals" and med mal actions imply that paraprofessionals and employees and/or agents of licensed providers and medical institutions may be subject to AOM requirements:
  - Delaware
  - Minnesota
  - Pennsylvania
  - Tennessee
  - Texas

"Licensed" Professionals Only

- Some States apply AOMs to claims against "licensed" professionals only, or narrower subsets of certain professional practices. Examples:
  - California (architects, engineers, land surveyors);
  - Georgia (attorneys, accountants, medical doctors, and other enumerated positions);
  - Kentucky (long-term care facility, physician, surgeon, and other named positions);
  - Oregon (design professionals and real estate licensees);
  - South Carolina (architects, attorneys, certified public accountants, and other named positions);
  - Texas (architects, engineers, landscape architect, and professional land surveyors).
- *Statutory text bars application to paraprofessionals...*

Where do we go from here

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