

# SECOND OPINION

INSIGHT ON INSURANCE ISSUES



## Ready or Not, Telehealth is Here to Stay

In the beginning of 2020, we saw how quickly COVID-19 rose to a pandemic level and, as a result, how many healthcare providers were thrust into telehealth to meet the needs of their patients. During this current pandemic, use of telehealth has accelerated exponentially, forcing healthcare providers to embrace and expand their use of telehealth platforms in order to accommodate the social distancing needs of their staffs and patients. Few healthcare providers were prepared for this shift.

As the days, weeks and months go by, telehealth will remain (and could, in some areas, become the preferred way some providers practice on a go-forward basis). This shift to telehealth brings its own set of exposures and potential liability. As a broker, what questions do you need to be asking your insureds? How might telehealth present additional legal and ethical challenges for your clients?

### Some Background

Telemedicine technology first began as a form of healthcare delivery in the late 1960s due to the needs of the National Aeronautics and Space Administration (NASA) and the Nebraska Psychology Institute.<sup>1</sup> Throughout the last 50 years, as technology and acceptance has increased, the use and practice of what is now called telehealth has expanded. However, there had been multiple barriers standing in the way of widespread adoption of telehealth technology and remote monitoring tools. Financial, regulatory and technological challenges made it more difficult to advance the adoption of this practice. In fact, we addressed this topic in a previous issue of [Second Opinion in 2018](#).

Enter the pandemic, regulatory relaxation to ease the burdens during the crisis, and the need to find virtual ways to communicate – and traditional medical practice will never quite be the same .

### What does Expanded Telehealth Adoption Look Like from an Insurance Perspective?

This shift from in-person to virtual visits comes with its own set of exposures and potential liability coverage issues. So far, lawsuits have been few and far between. However, in a related case, WebMD is currently in the midst of a lawsuit citing the digital health company's alleged disregard for patient well-being.<sup>2</sup> The allegations range from “deceptive marketing and sale” of STD lab tests, lack of meaningful review of patient information, and failure to abide by several measures established by state legislatures and medical boards.

The same ethical issues around caring for patients face-to-face in an office apply in telehealth settings: maintaining a strong patient-physician relationship, protecting patient privacy and seeking the best possible outcome. While telehealth is a technology that has the potential to provide a variety of improvements in health care, it also has the potential to push the boundaries of informed consent, the competence of the provider, as well as run counter to a number of regulatory issues. What's more, it is likely that medical professionals will possess varying degrees of aptitude and knowledge needed to operate this new technology. Some of the risks associated with telehealth can create challenges around what "informed consent" may mean. The ability to inform patients and make sure there is a good level of understanding of the scope of telehealth is critical.

With expanded use of telehealth services, certainly the potential for claims against providers will expand as well. When you meet with your clients, you will need to discuss how telehealth is likely to impact their practices, including:

- If their policy covers telehealth?
- Are their systems able to protect patients from cyber threats?
- How does the practice obtain patient informed consent for telehealth?
- Have they converted to a HIPAA-compliant platform and obtained a Business Associate Agreement from the platform provider?
- Is the network secure and encrypted?
- Are all providers licensed in the states where the patients are located, if services are being provided in multiple states?

From an underwriting perspective, you will need to work with your carrier to ensure that Telehealth coverage is included in the policy and to what extent. Communication will be key. When reviewing policies, we'll want to know more about the nature of the risk and the best practices currently being implemented, including:

- Do they obtain **Telehealth Informed Consent** for each and every patient?
- What percentage of the practice is devoted specifically to telehealth services?
- Are they employing a written agreement or contract to provide third-party telehealth services?
- What specific telehealth practices are being performed?
- Are all technologies being utilized verified to be in compliance with HIPAA requirements?
- Are third-party Business Associate agreements in place with those providers?
- How is medication prescribed? By which electronic means? Are DEA-scheduled drugs prescribed and what precautions are implemented for controlled substance prescriptions to be compliant with the Ryan Haight Act?
- A description of prescription protocols for patient follow up.
- Is the provider licensed in all states where services are being provided?

### **While so much has changed, so much is still the same...**

Just as before, concerns around Telehealth focus on HIPAA compliance and the internal policies in place to meet the federal and state standards and best practices for privacy and quality care. As noted above and in our [Risk Management Healthcare Advisory on Post COVID-19 best practices](#), several of the HIPAA requirements were waived so professionals could quickly move to the telehealth platform. As states begin

to open businesses and the crisis abates, will pre-COVID-19 policies and regulations once again be enforced? As a healthcare provider it's critical that best practices are in place and followed.

This might also be a good time to review other policies in conjunction with Telehealth exposures. For example, the WebMD case cited earlier could have D&O exposure, including Regulatory. A D&O policy would cover Regulatory issues including HIPAA defense expenses (both would likely be sublimited). Additionally, Telehealth could have Employment Practices Liability implications (wage issues for providers, discrimination issues for those without access to coverage).

Clients should also consider the purchase of a cyber policy; since exposures are virtual it's important to know that that they are protected. If you read and/or listen to the news, you know that cyber attacks against healthcare providers are increasing. A cyber policy may protect the breach of personal health information (PHI), personal credit card information (PCI) and personally identifiable information (PII). A cyber policy will complement the medical professional policy in the event a claim would arise. There is not an overlap of coverage with these two policies, however as more insureds practice telehealth there is a need to ensure there is complete coverage for services being provided.

<sup>1</sup> According to a paper written by researchers from Saint Louis University and Bentley University and published in the *International Journal of Environmental Research and Public Health*.

<sup>2</sup> <https://www.beckershospitalreview.com/legal-regulatory-issues/telehealth-advocacy-group-sues-webmd-for-violation-of-patient-trust-3-notes.html>

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