



THE DEFENSE LINE

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TELEMEDICINE: Welcome to the Future

By Rachel E. Brown and John T. Sly



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Can Workers Walk Off the Job Due to Fears of Exposure to the COVID-19 Virus? Coronavirus, Paid Sick Leave, and the Americans with Disabilities Act Cases Are Resolving Online. So Why Are Lawyers Reluctant To Try It?

Also Included

**Remote Mediation Suggested Practices for Lawyers
Tips for Remote Depositions**

Telemedicine: Welcome to the Future

Rachel E. Brown and John T. Sly



Telehealth has become an essential tool for all health care professionals. This is particularly true in the face of the COVID-19 pandemic. On April 3, 2020, Governor Hogan signed new telehealth bills into law that expand the definition and use of telehealth. The laws went into effect immediately.

An Expanded Definition of Telehealth

Maryland’s formal definition of telehealth now includes asynchronous services. MD Code, Health Occupations, § 1-1001(e). Health care providers are now authorized to establish a practitioner-patient relationship through synchronous or asynchronous telehealth interactions. An “asynchronous telehealth interaction” means an exchange of information between a patient and a health

care practitioner that does not occur in real time. HO § 1-1001(b). Telehealth does not include the provision of health care services solely through audio-only calls, email messages, or facsimile transmissions.

Asynchronous telehealth communications allow patients and providers to interact on their own timelines. One can imagine, however, the potential pitfalls for health care providers utilizing this mode of communication. Providers must be vigilant — a telehealth practitioner is held to the same standards of practice applicable to the in-person health care setting. Health care providers should consult with their insurance carrier to ensure professional liability coverage for telehealth services.

Contemporaneous record keeping is also extremely important. Documentation should include what was known at any particular time and why the care provided was in response to what was known to the provider. Documentation should also indicate that the patient understood the information provided during the consent process before receiving any telehealth services.

One can imagine a circumstance where a patient has notified a provider through an asynchronous communication about certain symptoms. The provider may then respond

with specific recommendations and instructions not knowing that the patient’s circumstances have changed during the interim. Providers must understand that medicine and the law have yet to develop clear guidelines regarding the timeliness of communications in an asynchronous environment.

Privacy and Security Requirements for Modes of Telemedicine Delivery

Health care providers seeking to communicate with patients and provide telehealth services through remote communications technologies must abide by the requirements of respective state and federal privacy laws. All laws regarding the confidentiality of health information apply to telehealth interactions in the same manner as the laws apply to in-person health care interactions. HO § 1-1004(b). Accordingly, health care providers performing telemedicine must comply with regulatory requirements under HIPAA and Maryland’s Confidentiality of Medical Records Act, MD Code, Health General §§ 4-301-4-309.

Providers must develop policies and procedures to implement necessary safe-

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guards to ensure patient PHI is transmitted and stored securely. Beware — some telehealth technologies may not be compliant with these requirements. Health care providers should utilize platforms that include security features to protect PHI transmitted between health care providers and patients (e.g. end-to-end data encryption, unique individual logins and passwords). Health care providers should consider whether to enter into a business associate agreement (BAA) with any such provider. Additionally, telehealth should be provided in a dedicated space that allows for the implementation of reasonable HIPAA safeguards that limit incidental use of the communication platform to limit any inadvertent disclosure of protected health information. Bottom line — health care providers are ultimately responsible for safeguarding PHI for health care services provided in-person or remotely.

Telehealth Prescribing Pitfalls

Prescribers must be cautious and understand state and federal laws regarding prescriptions. In Maryland, a health care provider must perform a clinical evaluation (which can be through a synchronous or an asynchronous telehealth interaction) that is appropriate for the patient and the condition with which the patient presents prior to issuing a prescription.

Further, a provider cannot prescribe a Schedule II opiate for the treatment of pain through telehealth unless the individual receiving the prescription is in a specified health care facility or the Governor has declared a state of emergency due to a catastrophic health emergency. Providers are also still limited by any other applicable regulations or limitations under federal and state law relating to prescribing controlled dangerous substances.

Telehealth and Billing

If a provider does not see the patient, how does one bill for the interaction? The Maryland State Medical Association (“Med Chi”) has been working with providers and third-party payors to develop new codes for billing. This is still a work in progress so any provider seeking to engage in telehealth services is strongly advised to consult with relevant insurers to confirm the relevant codes and any further information they may require for billing.

Telehealth and the Law

We have touched on some of the legal pitfalls that may present in the telehealth arena —

especially in the context of asynchronous communications. Any lawyer advising health care facilities and providers needs to be aware of the new statute and rules that have been adopted in Maryland. We recommend that providers be conservative in their approach to this new technology. While helpful, and potentially indispensable, telehealth brings new risks. Has the provider met privacy requirements? Has the provider responded in a timely fashion to an asynchronous communication from a patient? When does the circumstance require follow-up by the provider to an asynchronous communication before making recommendations? Will juries defer to a provider’s impression of a patient’s situation when it occurs virtually?

And, what will be required by third-party payors, including Medicare and Medicaid, to demonstrate the care provided comports with invoices?

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We are entering a brave new world in the provision of medical care. New challenges will present themselves to both the practitioner and the lawyer advising and defending the provider. To both, we stress caution while collectively navigate these uncharted waters.

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Editors’ Corner

The editorial staff are pleased to present this edition of *The Defense Line*. We appreciate MDC members that took time to submit articles for this edition especially in light of the unique circumstances and challenges we are facing. The articles in this edition are dedicated to navigating through legal issues that are likely to arise in a time, such as now, when remote interactions and social distancing are the norm. We wish to thank the contributors to this edition: **Rachel E. Brown** and **John T. Sly** of Waranch & Brown, **Leslie Robert Stellman** and **Adam Konstas** of Pessin Katz Law, **Jeff Trueman** of Jeff Trueman Mediation & Negotiation, and the entire MDC membership for the resilience and dedication you have shown and continue to show during these unprecedented times.

If you have any comments or suggestions, or would like to submit material for a future edition, please contact the Publications Committee.



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