Telemedicine and Liability Issues in Nebraska

Although the definitions of telemedicine and telehealth vary at the state and federal level, “telehealth” in Nebraska has been defined as the use of medical information electronically exchanged from one site to another, whether synchronously or asynchronously, to aid a health care practitioner in the diagnosis or treatment of a patient. It includes services originating from a patient’s home or other location, asynchronous services involving the acquisition and storage of medical information at one site that is then forwarded to or retrieved by a health care practitioner at another site for medical evaluation, and telemonitoring.

Physician-Patient Relationship

Formation of a physician-patient relationship is usually clear in the traditional practice setting, but it may not be as clear where a physician has no in-person contact with a patient or where the physician is advising another practitioner who is at the patient’s location. Even if the physician is just advising another practitioner, the consultant may be also be considered a “treating” physician if:

- The consultant interprets patient data such as labs, EKGs, or imaging studies.
- The consultant participates in diagnosing the patient and prescribing a course of treatment.
- The treating practitioner must rely on the consultant’s expertise rather than exercising his or her judgment in treating the patient.

If a physician is being paid to provide consulting services, that may be a factor in determining whether the physician has a “contractual” obligation to the patient.

Proper documentation of a telemedicine encounter is important for showing the existence of a physician-patient relationship. A physician providing consultation via telemedicine will want to carefully review any contractual agreements as well as documents used to memorialize a patient’s agreement to be treated through telemedicine.

Standard of Care—Medical Liability

In a medical liability case, a physician is held to the standard of reasonable and ordinary care, defined as “that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.”

Although this hasn’t been specifically addressed in Nebraska law, a practitioner will likely be held to the same standard of care as in a traditional encounter and not a “telemedicine” standard. The Federation of State Medical Boards, in its model telemedicine policy, takes this approach: “[A] physician using telemedicine technologies in the provision of medical services to a patient (whether existing or new) must take appropriate steps to establish the physician-patient relationship and conduct all appropriate evaluations and history of the patient consistent with traditional standards of care for the particular patient presentation. As such, some situations and patient presentations are appropriate for the utilization of telemedicine technologies as a component of, or in lieu of, in-person provision of medical care, while others are not.”

Whether approaching a patient differently under the “circumstances” of a telemedicine encounter meets the standard of care will depend on expert testimony and the facts of a case. Some specialty societies have developed telemedicine guidelines. Although treatment guidelines don’t define the standard of care, they may...
be considered as some evidence of the standard of care if an expert in the same field would reasonably rely upon them when treating a patient.

Informed Consent

When a patient is being treated remotely, the informed consent process should include any pertinent benefits, risks, and alternatives that are unique to the telemedicine setting.

The patient should understand the limitations of telemedicine and that the physician may decide that it is inappropriate to evaluate and treat, or continue to treat, the patient through telemedicine. While there is no one informed consent process that would be applicable to all telemedicine encounters, the American Telemedicine Association guidelines\(^1\) include some recommendations that are relevant in many cases.

- The provider should set appropriate expectations in regard to the telemedicine encounter. This may include prescribing policies, scope of services (including the structure and timing of services), communication and follow-up.
- Topics to be reviewed with patients include confidentiality and the limits of confidentiality in electronic communication; an agreed upon emergency plan particularly for patients in settings without clinical staff immediately available; the process by which patient information will be documented and stored; the potential for technical failure; procedures for coordination of care with other professionals; a protocol for contact between visits; and conditions under which telemedicine services may be terminated and a referral made to in-person care.

The Nebraska Medicaid program requires a health care practitioner who delivers a health care service to a patient through telehealth to ensure that certain written information is provided to the patient prior to the initial telehealth consultation. The patient must sign a written statement that the patient understands the written information and that the information has been discussed with the practitioner or his or her designee. A sample form is available via the following link: [http://dhhs.ne.gov/Documents/471-000-10.pdf](http://dhhs.ne.gov/Documents/471-000-10.pdf)

Abandonment

When a physician acts as a primary treating physician through telemedicine, rather than as a consultant, it is essential that the patient understands how to receive follow-up care and with whom. In the absence of any special agreement limiting the physician’s service, a physician may face an abandonment claim if the physician unilaterally ends the physician-patient relationship when a patient requires ongoing care and the patient has not been given proper notice.