

# Do Virtual Patient Visits Increase Your Risk of Being Sued?

Neil Chesanow | October 22, 2014

## A New Way to Get Sued?

Virtual patient visits—in which physicians interact with patients by computer, tablet, or even smartphone via videoconferencing, rather than in person during an office visit—are expected to grow exponentially in the next year or two.

Many physicians are concerned that malpractice suits arising from these remote visits will grow exponentially as well.

"How in our right minds can we divorce ourselves from a face-to-face interaction and physical examination with our patients," one doctor worried [in a recent comment to Medscape](#), "and still consider that we are giving good medical care?"

Many other physicians, who don't share this doctor's reservations and are considering offering virtual patient visits, nevertheless wonder, [as another doctor recently asked us](#), "What is the status of medical liability insurance coverage for online practice?"

To get some perspective, we asked experts at major medical malpractice insurers and virtual physician networks. Here's what they have to say.

### A Low Incidence of Claims to Date

While some form of telemedicine has been practiced in the United States for over 50 years, very little is known about the liability risks associated with it. According to a blog post by emergency physician and attorney Joseph P. McMenamain, MD, JD, a member of the legal resource team at the Robert J. Waters Center for Telehealth & e-Health Law, there are several reasons for this.<sup>[1]</sup>

First, the number of remote patient visits compared with the number of inpatient visits has been and still is miniscule, Dr McMenamain writes,<sup>[1]</sup> although this is soon expected to change. Second, a high proportion of liability suits involving telemedicine have been settled; settled cases don't get reported as much as litigated ones do, so it's hard to learn about them. Third, many settlements include confidentiality agreements that forbid the parties from disclosing the details.

Be this as it may, malpractice insurers aren't particularly concerned that physicians remotely interacting with patients will expose their client doctors—or their firms—to an avalanche of new liability risks simply because they are practicing telemedicine per se. Their perception is that the number of lawsuits arising from virtual patient visits has been low and is likely to remain low.

"The number of claims involving telemedicine is very small," believes Robert D. Francis, MBA, chief operating officer at The Doctors Company, the nation's largest physician-owned malpractice insurer. "That's because, even though telemedicine has been around for a long time, it's only over the past few years that it has started to grow significantly, particularly where video visits are involved."

"It's still somewhat of an emerging area," agrees Howard H. Friedman, president of the Healthcare Professional Liability Group and chief underwriting officer and chief actuary at ProAssurance, a large malpractice insurer. "But there has been a certain amount of acceptance, and it's an expanding area of medicine, just because of the potential cost savings and the increased access to physicians."

It's not as if a malpractice attorney can claim, in 2014, that the mere fact that a doctor conducts video visits—or

communicates with patients remotely by phone, secure email, or even texting—is a deviation from standard medical practice. Increased use of telemedicine is called for in the Affordable Care Act, and members of Congress on both sides of the aisle are pressing for its expansion.

"People have sued hospitals because they *didn't* use telemedicine," Jonathan Linkous, CEO of the American Telemedicine Association, recently told Medscape. "The claim was that this is now the standard of care."

---

## Major Virtual Networks Limit Liability

Physician concerns about the liability risks of virtual patient visits often arise from a misunderstanding of the ailments that these visits are primarily intended to address.

American Well, based in Boston, Massachusetts, hosts one of the nation's largest virtual physician networks, with insurers such as United Healthcare and WellPoint as clients. "A lot of telehealth programs, such as we operate, are often dealing with low-acuity-type conditions," points out Medical Director Peter Antall, MD. "It's hard to cause real harm when diagnosing a cold in a healthy host."

Common issues addressed by American Well's 200-300 board-certified physicians, most of whom moonlight in addition to their regular jobs, include acute bronchitis, cough, sinusitis, acute pharyngitis, acute cystitis, urinary tract infection, abdominal pain, diarrhea, fever, acute conjunctivitis, painful urination, influenza, respiratory infection, headache, strep throat, and smoking cessation.

"There are always exceptions," Dr Antall, a pediatrician, hastens to add. "It's when you have patients with chest pain or strokes—high-acuity situations—where you, of course, worry." However, network physicians are trained to refer patients with potentially urgent or emergency conditions to a local emergency department, their primary care physician, or an appropriate specialist, he says.

"We have a robust quality management program," he adds. "We give physicians feedback, audit their charts, and have resources to help them make the proper referrals, whether it's to a poison control center, a local ER, or a suicide hotline."

The network has been operational for about 2.5 years. "Not only have we not had any malpractice claims, we've not had any physicians brought before medical boards," Dr Antall says. "We haven't even had a chart claim to date."

Another major virtual network, with about 2000 board-certified physicians, is run by MDLIVE, based in Sunrise, Florida. Its clients include hundreds of self-insured employers and hospitals nationwide, as well as the insurer Cigna. Founded in 2009, "we haven't had a single documented claim," says General Counsel Justin Stone, JD.

On its website, MDLIVE explains that "while MDLIVE telehealth plans are not intended to replace your primary care physician for common or chronic conditions, a virtual consultation can sometimes replace a doctor office or emergency room visit. Communication with your primary care physician is important for continuity of care."

"There's actually a lesser liability risk in our telemedicine delivery model than in an in-person model of care, simply because we only deal with minor acute-care conditions," Stone contends. "We have the ability to limit the risk simply because we're not seeing chronically ill or very sick patients."



---

## What About Smaller Networks and ACOs?

Major national networks such as American Well, MDLIVE, and Dallas, Texas-based Teladoc are multimillion-dollar enterprises with other multimillion-dollar businesses as clients. Because they have high exposure, they are under intense scrutiny by state regulators and medical boards and have the legal resources to ensure that they comply with state regulations governing telemedicine transactions.

But they are no longer the only players in town. Smaller, less-visible virtual networks at the state, regional, and national levels are springing up across the country. Accountable care organizations (ACOs), patient-centered medical homes (PCMHs), and independent physician practices are also increasingly establishing online presences, either by leasing space on preexisting networks or by hiring videoconferencing technology providers to add virtual-visit functionality to their practice websites.

"It's really the Wild West out there in some of these cases," Dr Antall observes. "I can't believe how little oversight there is on some of these doctors. Those are the programs I believe will have trouble with malpractice."

While offering online consultations to patients isn't distance-dependent—from a purely technological perspective, a physician in Florida can just as easily conduct a video visit with a patient in Tacoma, Washington, as she can with a patient in Tampa or Miami—every state has different rules for the conduct of video visits. Even the legal definition of what telemedicine is varies widely from state to state. Whether these often-unclear regulations are understood and correctly followed by new telemedicine startups that operate under state radar is anyone's guess.

"One of the biggest problems is on the licensure side," notes Robert Francis of The Doctors Company. "That can create coverage issues. Each state develops its own rules as to where the physician must maintain a license in the delivery of telemedicine services. Most states require the physician to be licensed in the state where the patient is located. That is going to become more and more of a problem as you have national telemedicine organizations hiring physicians from all over the country and providing services."

ProAssurance's Howard Friedman expresses similar concerns. "In most states, there have not been any modifications to the law regarding telemedicine practice," he says. "You still are dealing with law that requires a physician to be licensed to treat patients in a given state. So the question is: Where is the treatment being rendered?"

Some states do have reciprocity agreements that let out-of-state physicians practice telemedicine with their residents. But in no state is there automatic reciprocity as there is with, say, state drivers' licenses.

For an out-of-state doctor to virtually consult with patients in New Mexico, for example, the doctor must complete a telemedicine application that includes work history, hospital affiliations, malpractice coverage, disciplinary actions, references, and more; pay a \$400 fee; submit an "Application Oath" that includes a color passport-quality photo taken within the past 6 months; and have verification of licensure sent to the New Mexico Medical Board directly from his or her own state medical board.<sup>[2]</sup>

About the only thing an out-of-state doctor doesn't need to do to consult with New Mexico patients virtually is take a state licensing exam.<sup>[2]</sup> Other state reciprocity agreements, where they exist, are similarly arduous to comply with. According to a 2010 survey, 16.8% of physicians have two active licenses but only 5.9% have three or more.<sup>[3]</sup> This is undoubtedly why.

---

## e-prescribing Regulations Vary Widely

State regulations for e-prescribing as part of a virtual visit vary widely too. In some states, for example, a physician is prohibited from prescribing "dangerous" drugs or devices online—this is California's verbiage—without an in-office patient exam first.<sup>[4]</sup> Which drugs are considered dangerous aren't specified in the regulation.

In some other states, Schedule II drugs, drugs for psychiatric conditions, some sleep medications, or controlled medications in general either cannot be prescribed as part of a virtual visit or can be prescribed online only if the

patient has been examined by the prescribing physician in the office first. In New Jersey, Indiana, Tennessee, Colorado, and Idaho, physicians can't do e-prescribing as part of a virtual visit, period, regardless of the drug.<sup>[5]</sup>

In Arizona, on the other hand, the law on online prescribing states: "Physicians are prohibited from issuing a prescription to patients without having a physical or mental health status examination to establish a provider-patient relationship." However, the examination "can be conducted during a real-time telemedicine encounter."<sup>[6]</sup> No other restrictions on medication prescription are specified.

---

## Minimize Your Malpractice Risks

Seeing patients virtually isn't inherently riskier than seeing them in the office, malpractice insurers believe. Nevertheless, you can take steps to minimize your exposure to a malpractice suit, and not jeopardize your coverage, during e-visits.

If your policy was issued when you were exclusively doing office visits, you should inform your insurance carrier that you plan to join a virtual physician network or add videoconferencing functionality to your practice website. Depending on the insurer and your policy limits, your online interactions with patients may or may not be covered, or may be covered for an extra fee.

"Our medical professional liability policy currently has an exclusion for telemedicine," explains Robert Francis of The Doctors Company. "We remove that by endorsement (that is, by adding a rider to the policy) when an insured physician tells us they will be engaged in telemedicine." This may incur an additional charge, he says, depending on how the firm evaluates the risk.

However, The Doctors Company policy form is 5 to 6 years old. "We are releasing a new policy form in 2015 that will remove that exclusion altogether," Francis says. "So there will essentially be automatic coverage under our policy."

"Many if not most carriers have begun to ask whether you are involved in telemedicine or are involved in any types of different practice patterns where you're not directly seeing patients," Howard Friedman says. "If you have historically answered no and then you take on a telemedicine contract, you have an obligation to disclose that change in your practice, and then the carrier will evaluate whether it's something they want to insure."

"The physician needs to address that with their insurer," Friedman cautions. "Otherwise, at minimum, you may wind up in a dispute with the insurer, and in the worst-case scenario, you may wind up without coverage if you had been asked in the past and answered no, and now you are involved in telemedicine."

It's especially important to keep your insurer in the loop if you plan to practice telemedicine in multiple states, Friedman says.

"Are your coverage limits adequate for the different jurisdictions in which you plan to practice?" he asks. "In Florida, for example, many physicians carry only \$250,000 of coverage. With Florida's asset protection laws, that's all many physicians feel they need. But if you're seeing patients via telemedicine in New York or Chicago, that may not be adequate."

"Even if a physician becomes licensed in another state," Friedman adds, "that in itself doesn't necessarily mean that his or her insurance is applicable or adequate in that other state."

---

## Know Your State Regulations

If you plan to join a preexisting virtual network, it may already have established rules on what you can and cannot do during an online patient visit based on regulations of the states in which the network operates. However, this may not be universally true. And if you seek to establish an online presence for your ACO, PCMH, or independent practice, as

more and more doctors are doing, the burden of understanding and complying with state telemedicine regulations is on you.

To make this easier, online resources are available. The American Telemedicine Association, for example, issues state report cards, grading each state from A to F, on the reasonableness of its telemedicine practice standards, licensure requirements, and policy on Internet prescribing. A [PDF](#) file with pertinent details can be downloaded from the American Telemedicine Association website. The document is intended for policymakers in Washington, not physicians, but any physician who is considering virtual visits with patients, and who is concerned about the malpractice risk, would benefit from perusing it.

Also worth checking out is the Center for Connected Health Policy's [interactive US map](#) detailing telemedicine law and policies by state. Click on any state to learn how telemedicine is defined; reimbursement issues; email, phone, and fax policies; regulations for e-prescribing as part of a virtual visit; regulations for remote patient monitoring; rules for obtaining informed consent from patients; details on cross-state licensing agreements for both physician-patient interactions and physician-physician consultations; and other regulatory issues.

Speaking of informed consent, many states require physicians to obtain it from patients before a virtual visit begins. This is commonly done by having the patient read and click their agreement on an electronic document analogous to that often required before you can install new software on your computer. The document should define for the patient what telemedicine is, including its benefits and limitations, and should outline both the physician's and the patient's responsibilities as part of a virtual visit. Many versions of this verbiage are available online. West Virginia University's is an example. You can view it [here](#).

### **Is the Risk of Being Sued Apt to Grow?**

Other liability concerns are likely to surface in the near future. Take remote monitoring of patients with uncontrolled chronic conditions in their homes with the use of biometric devices that wirelessly transmit real-time data to physicians. An increasing number of hospitals are now doing this with their cardiac patients to reduce the number who require readmission within 30 days of discharge—which, if they are Medicare patients, incurs onerous financial penalties.

In the next year or two, it is expected that more ACOs—especially those that take risk—will follow suit, because they will be economically incented to improve patient outcomes, making tight monitoring of at-risk patients at home a must.

This raises a host of legal issues. Who's responsible for the monitoring equipment? The patient? The patient's doctor? The visiting nurse, if there is one? The ACO, if one is involved? The hospital, if it runs the ACO? The virtual network, if the doctor is a member? The device manufacturer? Some combination of these?

How accurate are the data the device generates? Will the patient know how to use the device properly? What if the patient drops it on the floor or spills coffee on it, and as a result the device sends the monitoring doctor erroneous data? What if, say, a wireless ECG sends real-time data remotely to a monitoring physician, indicating that the patient is having an adverse event at 2 AM, but the physician doesn't view the data until 8 AM when he arrives at the office?

"There are significant liability issues associated with the use of this kind of technology," Francis says. "There are always liability issues associated with the use of technology—in its performance or malfunction—in the hospital or office setting. The expansion of that technology into the outpatient or home setting will only increase the potential for liability issues to arise. Those issues will need to be dealt with, both in the informed consent process as well as in the courtroom."

---

## **Risky or Not, Virtual Visits Will Grow**

It isn't clear to experts at this point whether virtual patient visits will increase physicians' liability risk or lower it. If malpractice insurers had serious concerns, however, they would be reticent to cover it. Yet the opposite appears to be

true.

"I don't think we can say that telemedicine will necessarily generate higher losses, because that would be defined by the standard of care," Francis says. "We as insurers certainly don't set the standard of care. But we do try to provide the product that physicians need to engage in the normal practice of medicine, and telemedicine is becoming part of the normal practice of medicine. It is becoming such an integral part of providing healthcare across the country that we don't have any interest in excluding coverage for that, and I think that most carriers will come to the same conclusion."

"That's not to say there won't be liability issues encountered," Francis continues. "With any new technology or any change in the way healthcare is delivered, you open up the possibility of additional avenues of liability. But our hope is that the care delivered overall will be better, and that better chronic disease management will improve outcomes. Any time you improve outcomes, you lessen liability claims, even though you might have a few extra liability claims because things do break and technology does malfunction."

"The industry is growing so rapidly that I think we'll be hard-pressed to find any physician not providing some sort of telemedicine within the next 2 to 3 years," predicts MDLIVE's Justin Stone. His network, and American Well's, build in malpractice coverage for their member physicians: \$1 million per incident and \$3 million in aggregate. "This is something that is coming, that is needed, given the stresses on the healthcare system in the United States," Stone is convinced. "We need to take advantage of good technology to help alleviate those stresses."

The prospect of new vulnerabilities to liability suits doesn't seem to be deterring many doctors from wanting to practice telemedicine. Both MDLIVE and American Well have growing waiting lists of physicians who seek to join. "We have doctors who are calling us all the time," says Stone. "Everyone wants to get on the train."

## References

1. McMenamin JP. Malpractice, medical errors, telemedicine malpractice. Robert J. Waters Center for Telehealth & e-Health Law. March 12, 2013. <http://ctel.org/2013/03/malpractice-and-telemedicine/> Accessed October 4, 2014.
2. Instructions for completing the license application for telemedicine license. New Mexico Medical Board. <http://www.nmmb.state.nm.us/pdf/files/MDAppTeleMedicine.pdf> Accessed October 4, 2014.
3. Young A, Chaudhry HJ, Rhyne J, Dugan M. A census of actively licensed physicians in the United States, 2010. *J Med Regulation*. 2011;96:10-20.
4. Center for Connected Health Policy. California. 2014. <http://cchpca.org/jurisdiction/9> Accessed October 4, 2014.
5. LiveHealth Online. Discover where LiveHealth Online is available. <http://www.livehealthonline.com/availability.html> Accessed October 4, 2014.
6. Center for Connected Health Policy. Arizona. 2014. <http://cchpca.org/jurisdiction/24> Accessed October 4, 2014.

Medscape Business of Medicine © 2014 WebMD, LLC

Cite this article: Neil Chesanow. Do Virtual Patient Visits Increase Your Risk of Being Sued? *Medscape*. Oct 22, 2014.