QUARTERLY COVERAGE

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West Virginia Mutual Insurance Company

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Letter from the Chairman

This edition of *Quarterly Coverage* details the robust WVMIC response to the COVID-19 pandemic, with special emphasis on risk management and underwriting issues. Obviously, the crisis has caused extensive disruption in the provision of healthcare services. Your Mutual staff has been functioning extremely well with most of our fantastic team working remotely. In March, our Underwriting and Risk Management staff authored an excellent document regarding the usage of telemedicine during the COVID-19 crisis. This white paper contains valuable information about the relaxation of the rules regarding telemedicine during the crisis and offers best practices to physicians as they have adapted to it.

This edition also contains regulatory guidance offered in a piece done by one of our Jackson Kelly medical liability attorneys, John Huff, and it is reprinted by permission from a previous JK e-newsletter. Mr. Huff extensively discusses how West Virginia code regarding telemedicine impacts you as you endeavor to utilize it, and, therefore, it is extremely useful information to avoid pitfalls in its usage.

With regard to federal guidelines, I feel sure you know by now that telemedicine is being reimbursed at the same rate as face-to-face visits during the COVID-19 crisis. Indeed, hearty congratulations are in order for the West Virginia Board of Medicine, including Dr. Kishore Challa, its President, Dr. Ashish Sheth, its Vice-President, and Mr. Mark Spangler, its Executive Director. These gentlemen were successful in lobbying federal officials at HHS and CMS to reimburse telephone telemedicine at the same rate as video telemedicine, which is of great importance to those rural West Virginians who are without adequate broadband access.

Finally, in this edition, readers will note an excellent article by Brenda Thompson and Megan Williams of our risk management department regarding the need to maintain excellent communication with patients, in general, and especially during the pandemic chaos, so that gaps in care don't develop and lead to potential medical liability lawsuits. Indeed, your Mutual has been and continues to actively lobby the governor and the legislature for needed COVID-19 lawsuit immunity protections during the time of the emergency that many states have already enacted. You can be assured that we will always advocate for you, as we are ***Physicians Insuring Physicians.***

R. Austin Wallace, MD

TREATING BY TELEMEDICINE:
More Than Just Picking Up the Phone and Calling-In a Prescription

By John M. Huff, Member, Jackson Kelly, PLLC

Although the West Virginia Board of Medicine ("WVBOM") suspended some provisions of the West Virginia Medical Practice Act[1] to allow for greater use of telemedicine, it has not suspended all provisions of the telemedicine statute.[2] In a departure from W. Va. Code § 30-3-13a(c), the WVBOM now states that "if audio only communication satisfies the standard of care for a particular patient presentation, it may be used to establish a provider patient relationship and to provide patient care."[3] This is a further relaxation of the WVBOM's previous position that the initial encounter between a physician and a patient could take place via an audio only communication – consistent with the standard of care – for the purpose of evaluating and/or treating COVID-19 patients while all other telemedicine encounters had to comport with the statute as written.[4]

However, although the WVBOM has relaxed these portions of the telemedicine statute, it has not relaxed the portion of the statute that discusses the actual practice of telemedicine.[5] Pursuant to W. Va. Code §

30-3-13a(d),[6] a physician practicing telemedicine must fulfill eight requirements for each visit.

First, the physician must "[v]erify the identity and location of the patient."[7] This is important, because "[t]he practice of medicine occurs where the patient is located at the time the telemedicine technologies are used."[8] So, the physician needs to be sure they are licensed and practicing medicine in accordance with the telemedicine statute and/or rules in the state in which the patient is located when providing telemedicine services.[9]

Second, the physician must provide the patient with both their identity and qualifications to ensure that the patient is clear as to the physician's medical specialty.[10]

Third, the physician must provide the patient with their physical location and contact information.[11] This will allow the patient to know where the physician is located and how to get in touch with the physician to follow-up should any problems arise.[12]

Fourth, the physician must establish a physician-patient relationship that conforms with the standard of care. At this time, during the COVID pandemic, the physician-patient relationship may be established through audio only communication if it "satisfies the standard of care for a particular patient presentation."[13] However, in a non-COVID situation, the physician patient relationship must be established in accordance with West Virginia's telemedicine statute.[14]

Fifth, the physician must determine if telemedicine is the correct medium for treating a particular patient's complaints.[15] Some complaints will lend themselves very well to telemedicine while others may require a more hands-on examination or emergency treatment that is not possible via telemedicine.[16] However, regardless of the situation, the physician must use their discretion to determine if a particular patient presentation is appropriate to be treated through the medium of telemedicine.[17]

Sixth, the physician must obtain the patient's consent to be treated by telemedicine.[18] This most likely will involve the physician explaining the risks and benefits of being treated by telemedicine so that the patient can make an informed choice regarding whether they want to continue with treatment via telemedicine or make their way to a physician's office or emergency room.[19]

Seventh, the physician must "[c]onduct all appropriate evaluations and history of the patient consistent with traditional standards of care for the patient presen-tation."[20] As stated, even though the patient is being treated via telemedicine, the physician must still use the same standard of care that he or she would use if the patient was sitting in front of them in their office.[21]

Eighth, the physician must "[c]reate and maintain health care records for the patient which justify the course of treatment and which verify compliance with the requirements of this section.[22] In creating these medical records for telemedicine encounters, it is important to include a note that verifies that each step of the statutory requirements were met.[23]

Although many of these steps seem intuitive, it is important to have them noted in the patient's medical record to ensure that if the physician is later sued or has to defend a complaint from the West Virginia Board of Medicine, it is both noted and verified that the physician was practicing telemedicine in accordance with the statutory requirements.[24] The telemedicine records that a physician develops for a patient must also be "accessible and documented for both the physician…and the patient, consistent with the laws and legislative rules governing patient health care records."[25] Further, laws governing confidentiality and patient access to medical records apply equally to a patient's telemedicine medical records.[26] Moreover, "[a] physician…solely providing services using telemedicine technologies shall make documentation of the encounter easily available to the patient, and subject to the patient's consent, to any identified [health] care provider of the patient.[27]

Upon examination of West Virginia's telemedicine statute, it is clear that physicians need to be vigilant in both following and recording the steps they take when treating a patient via telemedicine.[28] To avoid unnecessary documentation issues if the physician is sued or faces a complaint from the West Virginia Board of Medicine, it is important that the physician notes how they met each of the eight steps set forth in W. Va. Code § 30-3-13a(d). In so doing, the physician will help themselves greatly if they are ever called upon to defend their care of a particular patient.

References

1 W. Va. Code § 30-3-1 et seq.

2 W. Va. Code § 30-3-13a.

3 https://wvbom.wv.gov/article.asp.

4 https://wvbom.wv.gov/article.asp; see also John M. Huff, To Treat or Not to Treat via Telemedicine? That is the Question, https://www.jacksonkelly.com/health-law-monitor-blog/to-treat-or-not-to-treat-via-telemedicine-that-is-the-question (March 25, 2020).

5 See W. Va. Code § 30-3-13a(d).

6 It is important to note that these requirements "do not apply to the practice of pathology or radiology medicine through store and forward technology." W. Va. Code § 30-3-13a(d)(9).

7 W. Va. Code § 30-3-13a(d)(1).

8 W. Va. Code § 30-3-13a(b)(1).

9 See id.

10 W. Va. Code § 30-3-13a(d)(2).

11 W. Va. Code § 30-3-13a(d)(3).

12 See id.

13 https://wvbom.wv.gov/article.asp.

14 W. Va. Code § 30-3-13a(c).

15 W. Va. Code § 30-3-13a(d)(5).

16 See id.

17 See id.

18 W. Va. Code § 30-3-13a(d)(6).

19 See id.

20 W. Va. Code § 30-3-13a(d)(7).

21 See id.; see also W. Va. Code § 30-3-13a(e).

22 W. Va. Code § 30-3-13a(d)(8).

23 See id.

24 See id.

25 W. Va. Code § 30-3-13a(f).

26 Id.

27 Id.

28 W. Va. Code § 30-3-13a(d).

ESSENTIAL COMMUNICATION IN HEALTH CARE:
Protect Patients and Decrease Liability

It is essential to maintain accessible and reliable lines of communication with patients, especially in times of uncertainty and anxiety, such as during a worldwide pandemic. Covid-19 has shifted the way medicine is practiced reducing in-person visits, however, we cannot relax the way or frequency in which we communicate with our patients. "Communicating in a Crisis is different. People take in information differently. People process information differently and they act on information differently."[1]

Research indicates communication errors occur more frequently in the outpatient setting than the inpatient setting and "37% of all high-severity injury cases, including death, involve a communication failure".[2]

While we should always be responsive to patients, during times of crisis, when office hours and/or staffing may be lessened or changed, maintaining open lines of communication with patients should not change. We discuss during our Loss Control and CARE seminars the importance of communication and how that may impact the patient/provider relationship. Here are some recent examples, where communication failures lead to unsatisfied patients and/or could lead to potential harm;

- Patient attempted to contact their primary care physician. After three every-other-day phone calls, the call had not been returned.
- Parent contacted a pediatricians' office regarding request for vaccine records needed for school admittance. The mother was told she would "get it quicker" by contacting the Board of Education.
- A patient with Parkinsons' disease needed a renewal on their medications. After multiple attempts to contact the physician office by both the patient and their pharmacist, the patient could not get a script renewed for ten days. As a result, the patient is now jittery, has balance issues, as well as other effects of not having their medications.
- A provider/office fails to respond to several phone calls from a diabetic patient and the patient collapses at home and dies from diabetic ketoacidosis. The calls were documented by a member of the provider's staff but never relayed to the provider.

"Communication is the lifeblood that makes healthcare work. More than just listening for facts, communication is at the core of building sacred, trusted, and healing relationships between doctors, nurses, patients and families. It is what keeps care team members connected to their healing purpose and allows them to understand and serve the needs of patients and families."

The Centers for Disease Control and Prevention's Crisis + Emergency Risk Communication states that, "The right message at the right time from the right person can save lives".[3] Failure to perform any one of these rights may result in patient harm and likewise, increases liability for physicians as patients perceive that their physician is uncaring. Lack of, or perceived lack of communication from a patient's healthcare provider may heighten the potential for litigation, particularly during uncertain times.

Tips for Effective Communication:

- Ensure staff are relaying consistent messages regarding office hours, when to expect return phone calls, test and lab results, screening procedures for in-office appointments and procedures for conducting telemedicine visits to patients.
- Make detailed documentation of all communication between patients and the healthcare staff both during and outside office hours. Documentation should include but is not limited to: date and time of call, who called, the name of the patient, chief complaint, associated signs and symptoms, questions asked by the patient, answers given, any necessary follow-up and medications prescribed as well as the name of the staff member who took the call. Guidelines for documenting communication with patients should be reviewed periodically with staff to ensure accuracy of medical records.
- Staff directives regarding timeliness of handling calls and when to relay infor-mation to the provider and/or back to the patient should be clear and concise.

From appointment scheduling to returning patient phone calls, we must continue to be available to patients and be diligent in our documentation. Patient care often suffers when health care providers poorly communicate between each other and their patients. It is crucial that all members of a healthcare team communicate efficiently and effectively. This communication directly impacts patient safety and healthcare outcomes.[4] To help reduce liability related to communication failures, it is crucial to review the modalities and methods utilized by each provider and their respective office staff, to ensure consistency.

Please feel free to contact us with any questions related to communicating with patients.

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1, 3 Waters, Kellee. (2018). Introduction to Crisis + Emergency Risk Communication. Centers for Disease Control and Prevention. https://emergency.cdc.gov/cerc/training/pdf/slides_050118_intro_to_cerc.pdf. Clinical Communication Deconstructed: A Framework for Successful, Human-Centered Communication. https://cdn2.hubspot.net/hubfs/498900/Research_Report_Clinical_Communication_Deconstructed_Vocera.pdf

2 Hoffman, J., Siegal, D., and Bergquist, K. (2015). Malpractice Risks in Communication Failures. Risk Management Foundation of the Harvard Medical Institutions Incorporated. (1-24). Crico Strategies.

4 Bergener, A. (2017). Enhancing Communication to Improve Patient Safety and to Increase Patient Satisfaction. The Health Care Manager, (36) 3, 238-243. doi: 10.1097/HCM.0000000000000165

The Mutual's Response to COVID-19

Our staff began planning for a potential business disruption related to COVID-19 early in 2020. This included internal planning to ensure we could continue to serve our policyholders during an office closure. We wanted to ensure that Underwriting, Claims and Risk Management would be able to continue to service our policyholders during an office closure. Many of our staff were able to work from home and business continued as normal. Through conversations with our insureds, we quickly began to assess how this would begin to affect our insured physicians from a business standpoint and began preparing guidance based on those conversations.

We initially received many calls from our insureds regarding their use of telemedicine during the state-wide stay-at-home order. Consequently, in late March, our staff created and distributed detailed guidance related to the use of telemedicine. The article was sent to all insureds and posted on our website. It detailed the various federal and state requirements along with other relevant resources regarding appropriate uses of telemedicine. The intent of the document was to aid our insureds during the initial phase of using this technology in their practice.

Another question our insureds had after the stay-at-home order was lifted was related to reopening the office. Our risk management staff worked directly with offices and provided guidance related to safely reopening and operating during a pandemic. Emphasis was placed on proper sanitization procedures along with other infection prevention protocols.

Our Risk Managers also provided some valuable guidance from the CDC and others reinforcing the importance of patient communication during this pandemic. The article, which is included in this Newsletter, describes the importance of communication not only to protect the patient, but also to decrease physician liability.

We want our insureds to know that even during these challenges, we continue to be a resource and a partner with our insured physicians.

Use of Telemedicine in Your Practice

If you are using telemedicine in your practice, please contact the Underwriting department so your use can be documented in your file. We ask that you do this whether you have just started as a result of the pandemic or if you had previously incorporated its use into your practice.

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