Navigating NJ Telehealth and Telemedicine in the Climate of COVID-19

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In just over a month, the COVID-19 pandemic has changed our way of life at virtually every level of society. People are socially distancing, sheltering in place, and ultimately, simply trying to adjust to the "new normal," with everything that comes with it.

For their part, medical providers across the country have gallantly responded to the crisis, employing every tool in the toolbox to meet the current challenges. Given the nature of the pandemic, it comes as no surprise that among these challenges, demand for medical treatment and other health-related services has skyrocketed. And, as the traditional approach of "in-person" medical treatment has been curtailed (and in many cases, ground to a halt), the need for telemedicine and telehealth services has been propelled to the forefront.

While telemedicine has been practiced and regulated in New Jersey for several years, the COVID-19 pandemic has rapidly shifted the legal landscape regarding this practice, particularly throughout the last six weeks. As the crisis progresses, health care practitioners at every level should be kept apprised of new developments in the law, which can impact their practices, their patients, and their peace of mind.

Best Practices as Guided by the NJ Telemedicine Act

Best practices are defined through accepted professional standards, along with New Jersey's Telemedicine Act, codified at NJ Rev Stat §45:1-62, *et seq.* (2017). The legislation received near-unanimous bipartisan support, and became effective on July 21, 2017. It explicitly establishes that a provider is held to the same standards of care during a telemedicine visit, as would be required during an in-person visit.

Before initiating the visit, the provider must confirm that the standard of care would be met through telemedicine care. If the patient's condition requires an in-person assessment, or the equipment presents technical difficulties, it is incumbent on the provider to convert from telemedicine to in-person treatment. A provider-patient relationship may first be established via telemedicine, without a preliminary in-person exam taking place. At the onset of each telemedicine visit, the provider must confirm the patient's identity by having the patient provide demographic information.

The provider is also required to confirm identity and credentials, by license, title or specialty/board certifications, and these credentials must be available to the patient both during and after the telemedicine consult. The patient must have

access to the provider's contact information, with the ability to promptly contact the provider within 72 hours after telemedicine treatment. Medical records must be provided upon patient request.

Before the first telemedicine consult with a new patient, the provider must discuss the patient's medical history and identify any other medical records which would provide a complete understanding of underlying medical conditions. With an existing patient, the provider may review medical history throughout the consult. A specialist may assist a telehealth patient in establishing a relationship with a nearby primary care provider, and may also refer a patient for care with another specialist for emergent or complementary care.

A provider may not prescribe medications as a consequence of a telemedicine visit, unless a formal provider-patient relationship has been established through real-time, two-way communication. Stand-alone e-communication like an e-mail, chat room or online questionnaire does not create the valid provider-patient relationship that is necessary to issue a prescription, and Schedule II drugs may only be prescribed via telemedicine after an in-person visit has taken place.

Every three months, the provider must conduct regular examinations, via telemedicine or in-person, before re-issuing a prescription for a Schedule II controlled substance. The act also requires compliance with federal law, including the Controlled Substances Act and the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, which requires that a valid prescription be issued before an online pharmacy dispenses a controlled substance.

In addition to the professional standards promulgated in the Telemedicine Act, providers should take additional steps to ensure best practices, particularly regarding documentation. Both in-person and telemedicine visits involve documentation of the review of symptoms, examination, assessment and plan of care. Telemedicine treatment requires additional documentation, including the location of both the provider and patient at the time of the visit. The patient record should contain the cell phone and home phone of the patient, so that the provider may contact the patient in the event of technical difficulties. Medical care via telemedicine may not be provided during an audio telephone call, but the provider may speak with the patient on the phone, to establish whether another telemedicine platform may be used, or if the patient should present for an in-person visit.

Charting a brief statement regarding the circumstances of the visit would be helpful for providers, such as noting that the visit was a previously scheduled telemedicine visit, or in response to an emergent or urgent request by the patient.

The provider should also note the telemedicine platform that was used, whether it was the electronic platform created by a health system, or an appropriate non-public facing platform (i.e., Skype for Business/Microsoft Teams, Zoom for Healthcare, Updox, Vsee, Doxy Me, Google G Suite, Google Meet, and others). If a telemedicine consult utilizes another non-public facing platform, the provider should include a brief description of the reason causing the use of that platform, especially in circumstances where the patient requires exigent medical attention. Providers must avoid the use of public facing platforms such as Facebook Live and Tik Tok.

While the New Jersey Telemedicine Act does not explicitly require that the provider obtain the patient's informed consent prior to

engaging in a telemedicine consult, it would be helpful for the provider to both establish and document that the patient was aware of potential privacy issues with telemedicine, and elected to move forward with the visit.

Expanding Health Care Access Through Medical Licensure Waivers

Among its impacts on everyday life, one of the primary byproducts of the COVID-19 pandemic involves a sudden and exponential demand for medical treatment and other health-related services. In order to meet this demand, governments at both the state and federal level have implemented measures to relax or waive regulations related to the provision of medical treatment. One such set of measures that has particularly influenced the COVID-19 response pertains to the topic of medical licensure.

As there is no national license to practice medicine in the United States, medical licensure has traditionally been regulated by the states. Prior to the COVID-19 crisis, if a provider wanted to practice medicine in New Jersey, he or she had to be licensed in New Jersey. Under the New Jersey telemedicine statute, N.J. Stat. §45:1-62, the same requirements applied to a physician practicing telemedicine.

The COVID-19 crisis has changed the landscape of medical licensure requirements, at least for the time being. On March 13, 2020, the Department of Health and Human Services issued guidance to the states detailing potential measures to employ in response to the COVID-19 response. These measures included a temporary waiver of licensure requirements for health care providers, which Governor Phil Murphy "partially" adopted by signing bills A3680 and A3682 on March 19, 2020.

Under this emergency legislation, New Jersey still requires out-of-state physicians to obtain a New Jersey license before they can provide in-person treatment or telemedicine services. However, the process has now become substantially accelerated. By utilizing a temporary "licensure through reciprocity" system, out-of-state practitioners can bypass traditional requirements (such as criminal background checks, submission of malpractice insurance confirmation, etc.), and obtain a New Jersey license through the completion of a one-page form. Following approval, out-of-state clinicians can provide in-person and telemedicine services to patients in New Jersey for COVID-19 treatment, as well as other unrelated conditions.

On April 1, 2020, Governor Murphy furthered these efforts by signing Executive Order No. 112. Not only does the order establish additional methods to expand New Jersey's health care workforce, it allows for the reactivation of licenses of recently retired health care professionals, and grants temporary licenses to physicians licensed in foreign countries.

Litigation and Liability

Beyond the issue of regulation, the COVID-19 crisis also presents us with novel issues regarding health care malpractice litigation. Since the inception of the pandemic, health care providers have been faced with a slew of ongoing challenges. First, COVID-19 is caused by a novel virus, and as such, its development, diagnostic criteria, and treatment modalities are not well understood in humans. Second, the United States health care system has experienced significant shortages of medical providers, as well as medical supplies to treat the disease, including, most notably, tests and ventilators.

All of these factors have significantly strained health care providers' ability to effectively

respond to the pandemic. There is also, of course, the specter of potential litigation regarding the diagnosis and treatment of COVID-19. To alleviate these pressures, there has been a push across the country for federal and state legislation to provide medical practitioners with civil liability immunity as they confront this unprecedented threat. New Jersey is one such state that has answered this call.

On April 14, 2020, Governor Phil Murphy passed S-2333/A-3910, which, like similar laws passed in other states, gives medical providers a much needed safety net. The law provides individual practitioners and health care facilities with immunity "for civil damages for injury or death alleged to have been sustained as a result of an act or omission … in support of the State's response to the outbreak of the coronavirus disease." Notably, the immunity pertains to health care services rendered in-person, as well as those provided via telemedicine and telehealth. In order to expand resources available to treat the pandemic, S-2333/A-3910 also allows physicians to diagnose or treat patients "outside the normal scope of the health care professional's license or practice."

The law is retroactive to March 9, 2020, and contains exceptions for gross negligence, recklessness, willful misconduct, fraud, or criminal activity.

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