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Telemedical Malpractice Claims
CTeL Brown Bag Webinar
3/29/12

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Taxonomy of the Law, (Over-)simplified

- Criminal law
- Civil law
 - Contract
 - Tort
 - Intentional
 - Unintentional
 - Negligence
 - » Med mal

Why Claims are Inevitable

- Litigation: the national pastime
- 70% of the world's lawyers serve 5% of its population
- Contingent fees
- Lawyer ads
- The decline of personal responsibility
- Projected average annual year-over-year growth rate of telemedicine market over the next 5 y: 18.6%.
 - BCC Research, *Global Markets for Telemedicine Technologies*

Med Mal 101: The Elements of the Cause of Action

- Duty: The doctor-patient relationship
 - Volunteering: Tweets, chat rooms, etc.
 - Good Samaritan legislation?
- Breach: The standard of care
 - Tort law v. medical progress
 - Expert witnesses: who qualifies?
- Causation: The “so what?” question
- Damages
 - Medical expenses
 - Lost wages
 - Pain and suffering

Telemedicine's Unique (or, at Least, Characteristic) Risks

- Jurisdiction
 - Statute (example): N.C. Gen. Stat. Ann. § 90-21.12A: “A patient may bring a medical malpractice claim in the courts of this State against a nonresident physician who practices medicine or surgery by use of any electronic or other media in this State.”
- Venue
 - Contract?
- Choice of law: why it matters (examples)
 - Standard of care: local v. state v. national
 - Statute of limitations
 - Tort reform
 - Caps
 - Contract provisions?

Telemedicine's Unique Risks, 2

- The bedside manner
- Physical exam
 - “Prescribing medications based solely on an electronic medical questionnaire constitutes the failure to practice medicine with that level of care, skill, and treatment which is recognized by reasonably prudent physicians as being acceptable under similar conditions and circumstances...” FLA. ADMIN. CODE § 64B8-9.014(1).
- Verifying identity of patient and provider
- Privacy (see below)
 - Encryption?

Telemedicine's Unique Risks, 3

- Vicarious liability
 - Agency
 - Distant-site physician
 - Teleradiology and ostensible agency
- Equipment or power failure, inadequate resolution of monitoring equipment: product liability?
 - *Chabra v Southern Monterey County Memorial Hospital, Inc.*, WL 564566 (N.D. Cal. 1994) (teleradiologist alleged that a competitor's "excessive" use of teleradiology to transmit "non-emergency films" caused "poorer film quality and poorer correlation between radiological studies and pathological results...")

Telemedicine's Unique Risks, 4

- Proof sources
 - Encounter itself
 - Peer review information
- Few reported cases
- Insurance
 - Silence
 - Exclusions
 - Endorsements

Privacy

- HIPAA and HITECH
 - No private right of action, but worrisome anyway
 - As of 3/19/12, 4 major settlements in previous 15 months; 3 > \$1M
 - Hospitals, pharmacies, and a health plan
 - Need administrative, technical and physical safeguards for ePHI
- Do not forget state laws: May be more stringent than HIPAA; the more stringent law controls
 - May also permit private claims
- COPPA and pediatrics: Require parental participation in dealing with kids
 - *Cf.* state laws on access to reproductive or substance abuse services

Internet Ads Soliciting Telemedical Malpractice Business for Plaintiffs' Lawyers

The screenshot shows a Microsoft Internet Explorer browser window displaying the website for the Dover Law Firm. The browser's address bar shows the URL: <http://www.doverlawfirm.com/library/atlanta-medical-malpractice-attorney-looks-at-georgia->. The website's navigation menu includes: Home, Practice Areas, Library, Frequent Questions, Your Team, Testimonials, Case Results, and Contact.

The main content area features a Google Custom Search bar with a "Search Our Site" button. Below the search bar is the article title: **Georgia's Telemedicine Trend: Will You Need an Atlanta Medical Malpractice Attorney?**. The article text begins: "In 2006, there were 200 telemedicine sessions in Georgia. In 2011, there were more than 200,000 such sessions. While telemedicine is an exciting development in the practice of medicine, and one in which the state of Georgia is a nationwide leader, it is not without risks. If you are considering being a telemedicine patient, or if you feel that you have been the victim of a telemedicine mistake, then it is important to understand your rights and when you should contact an [Atlanta medical malpractice attorney](#)."

Below the article text is the sub-heading: **The Potential Benefits of Telemedicine in Georgia**. The text continues: "The biggest benefit of telemedicine is that it offers patients in rural areas remote access to doctors and specialists in big cities that may otherwise be unattainable because of cost and distance. Patients go to a local site, which may be located at a school or nursing home, where a nurse is present. The nurse is able to conduct a physical examination for the doctor to see. If the nurse looks in a patient's throat, for example, the image shows up on the doctor's screen. Similarly, the doctor can hear what the nurse hears through the stethoscope and can see, hear and engage a patient in discussion. It is believed that telemedicine can reduce hospital and

On the left side of the page, there is a "We Can Help With" section listing several legal services: Auto/Truck Wreck, Failure to Diagnose Cancer, Medical Malpractice, Wrongful Death, Brain Injury, and Workers' Compensation. Below this is a "Connect With Us" section featuring a logo for the Million Dollar Advocates Forum and the text "LIFE MEMBER MILLION DOLLAR ADVOCATES FORUM".

On the right side of the page, there are three promotional banners: "WATCH DOVER LAW FIRM TV HERE" with a play button icon, "Injury Lawyer Jeff Dover Interviewed on Georgia Radio Station 101.9" with a microphone icon, and "Free Reports" featuring a book cover titled "Lung Cancer: The Risks, the Signs, Diagnosis and Treatment".

The browser's status bar at the bottom shows "Internet" and "100%" zoom level.

As if We Had Too Little Litigation: Plaintiffs' Counsels' Ads

- Some patients might be “victim[s] of ... telemedicine mistake[s]”
- “Such patients should “understand [their] rights.”
- “Patients may be less secure in their diagnoses or follow-up treatment. They may be concerned that a doctor will make a mistake that could have been avoided if the doctor and patient had met in person.”
- Available free: *Why Did This Critical Medical Error Happen to Me?*
 - <http://www.doverlawfirm.com/library/atlanta-medical-malpractice-attorney-looks-at-georgia-telemedicine.cfm>

Plaintiffs' Counsels' Ads

- No showing:
 - Any practitioner actually breached the standard of care, or even made a “telemedicine mistake”
 - Any patient failed to “understand his rights,” or came to harm as a result
 - Any such harm “could have been avoided if the doctor and patient had met in person” or
 - Any court has actually entered judgment against a telemedicine clinician

Institute for Legal Reform, “The Plaintiffs’ Bar Goes Digital: An Analysis of the Digital Marketing Efforts of Plaintiffs’ Attorneys and Litigation Firms”

- Marketing efforts disguised as non-legal websites
- Attempts to incorporate content from law firm-sponsored sites into Wikipedia entries
- Concealed site ownership
 - No disclosure
 - Disclosure only by clicking on multiple pages
 - Tiny font

“The Plaintiffs’ Bar Goes Digital,” 2

- Network of sites “positioned as patient support groups, medical resources, official-looking government sites and e-advocacy organizations,” employing “.org” and “.us” as domain names
- Names incorporating medical terminology
- Providing info purporting to describe Rx options
- Collecting visitors’ individual’s contact information
 - <http://www.instituteforlegalreform.com/doc/the-plaintiffs-bar-goes-digital-0>

Prophylaxis

- Know the relevant literature
- Know applicable law in relevant jurisdictions
- Know law of adverse event reporting
- Secure carrier's written assurances of coverage
 - Heed insurer's admonitions, restrictions
- Need coverage from a 2d carrier?
- Limit or (better) avoid advertising; don't over-promise
- Avoid chat rooms and the like
- Blogs, etc.: general discussions only
- Apps: disclaimer re: validation

Prophylaxis, 2

- Don't be the first adopter; don't be the last
 - Eventually, standard of care may require telemedicine: telestroke?
 - *Washington v Washington Hospital Center*, 579 A. 2d 177 (D.C. Ct. App. 1990)(use of a CO₂ monitor, a relatively new innovation in 1986, allegedly would have helped identify a misplaced endotracheal tube and avoided patient's subsequent brain-damage. Within 1 y post-accident, monitors had become standard).
- Educate patients about when distance care is and is not appropriate

Prophylaxis, 3

- Limit services to patients seen in-person $x \geq 1$
 - *Cf.*, law of Internet pharmacies
 - *Hageseth v. Superior Court*, 150 Cal.App.4th 1399, 1417 (2007)(Cal. had criminal jurisdiction of Colorado MD not licensed in Cal. writing fluoxetine Rx for Californian)
- Provide services only where licensed
 - Risks: voiding coverage; discipline from BOM
- Practice Guidelines: a two-edged sword
 - Society of American GI and Endoscopic Surgeons' Guidelines for the Surgical Practice of Telemedicine
 - American Academy of Dermatology Position Statement on Telemedicine, etc.

Prophylaxis, 4

- Train staffers in the basics
- Allow adequate time for each encounter
- Avoid dx where PE is key
- Low threshold for requiring in-person evaluation
- Advice from MD only, or, where appropriate, NP, PA
- Document patient understanding
- Develop written instructions for common problems
 - Avoid abbreviations
- Make provisions for follow-up and continuing care

Informed Consent

- Know legal requirements in relevant jurisdictions
- Know whatever rules, or even recommendations, carrier might have
- Understand that form is mere evidence
- Don't simply re-purpose a form developed for in-person care
- Verify identity of signer
- Don't overstate benefits or understate risks
- Point out limitations inhering in the technology
 - Distortion of images with compression?

Informed Consent, 2

- To list of risks, add: the unknown
 - Point out that technique is relatively new
- Warn against use in emergencies
- Include assertion: all blanks filled in at time of signing
- Include assertion patient could ask questions, and he's satisfied with the answers
- Consider video as part of process

Model Privacy Notice for Consumers for PHRs
<http://healthit.hhs.gov/portal/server.pt?open=512&mode=2&objID=3770>

What are your organization's PHR data practices?

This website will generate an HTML page and PDF you can use to help your users or customers understand how your organization releases and secures their [PHR Data](#). Please read the [Implementation Guide \[PDF: 778 KB\]](#) to properly fill out the form and display your Privacy Notice on your site.

If you would like your company logo to be displayed on our website (healthit.hhs.gov/PHR_Privacy) to indicate that you are using the PHR Model Privacy Notice, please email us when you have uploaded the Notice onto your website. Send company name, company contact, and URL to the Notice to: onc.request@hhs.gov. You can also direct questions about the PHR Model Privacy Notice to this email as well.



Questions or Comments?

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