Telehealth and Legal Implications for Nurse Practitioners

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ABSTRACT

Telehealth, which uses electronic information and telecommunications technologies to support long-distance clinical healthcare, is a growing trend that offers improved patient access, cost savings, and more engaged patients with better outcomes. For nurse practitioners who deal with patients in a variety of settings, telehealth can help improve healthcare delivery to underserved populations. However, there are challenges including wide variations in the rules, regulations, and practice guidelines surrounding telehealth. Nurse practitioners should implement practical advice and tips for utilizing telehealth, as well as risk management strategies to ensure better patient care and avoid malpractice litigation or licensing issues.

Keywords: best practices, liability, malpractice/disciplinary action, nurse practitioners, risk management, telehealth, telemedicine

INTRODUCTION

Telehealth, or the use of electronic information and telecommunications technologies to support and promote long-distance clinical health care, patient and professional health-related education, public health, and health administration, is a rapidly growing trend in health care.[1] The term "telehealth," which can be used interchangeably with "telemedicine,"[2] encompasses real-time, audio-video communication tools that connect providers and patients in different locations; store-and-forward technologies that collect images and data to be transmitted and interpreted later, and remote patient-monitoring tools such as home blood pressure monitors.[3] Although the practice is not new, advances in health care information technology innovation and the expansion of access to health care under the Affordable Care Act have provided a significant boost to telehealth, bringing providers and patients together in ways that were unheard of even a decade ago.[4]

Hospitals are embracing the trend. In a 2013 survey, 52% of hospitals reported they were using telehealth, and another 10% said they were beginning the process of implementing telehealth services.[5,6] Health care consumers also appear ready for telehealth, with 64% of Americans reporting that they would attend an appointment via video telehealth.[7]

Although telehealth was originally developed with the goal of reaching rural and underserved patients and providing basic care, recent research has supported integrating telehealth into a variety of medical specialties. For example, a study in the *Journal of Clinical Psychiatry*[8] found that telemedicine is a "viable alternative modality for providing evidence-based psychotherapy for elderly patients with depression.[p. 1704, 1709]" This is supported by a new study from Harvard Medical School and the RAND Corp. that shows an average 45 percent jump per year in mental health telemedicine visits among rural patients over the decade.[9] Another study in *Annals of Allergy, Asthma and Immunology* found that telemedicine appointments may be just as effective as in-person visits with an allergist.[10]

However, as with all technology, there are pros and cons associated telehealth. Some of the advantages include improved patient access, cost savings and increased efficiency, and more engaged patients with improved outcomes.[11] Disadvantages include

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limited physical examination, potential for technical problems and security breaches, and regulatory and industry barriers.[11] Rules defining and regulating telehealth are evolving and vary widely across states, and health care groups are issuing different guidelines about the standard of care that applies in telehealth encounters.[12] For example, in 2016, the American Medical Association adopted ethical guidance on telehealth and telemedicine,[13] and in 2015, the American Academy of Pediatrics issued recommendation of telemedicine in pediatric health care,[14] but the rules and regulations addressing nurse practitioner (NP) requirements differ from state to state, and this variability creates confusion for NPs involved in the practice of telehealth.

With this in mind, for NPs who are providing health care directly to patients in both rural and urban settings and in locations ranging from clinics and hospitals to emergency/urgent care sites, private physician or nurse practitioner practices, and nursing homes, among others, using telemedicine can help improve health care delivery to underserved populations. Although telemedicine promises to transform health care, it also raises a number of questions. This article discusses several important issues for NPs surrounding the use of telehealth. Nurse practitioners should become familiar with potential legal implications and risks surrounding telehealth to ensure best practices for patients and to avoid litigation and licensing issues.

ISSUES WITH TELEMEDICINE AND RISKS FOR NPs

With the rapid expansion of telemedicine comes the increased potential for liability issues. As a result, NPs should be aware of certain aspects of telemedicine that might create liability problems. Some of the most critical issues include the following.

- *Licenses and credentialing.* Typically, a nurse practitioner is licensed only in the state in which he or she practices medicine. Now, however, telemedicine technology allows NPs to assess patients remotely and in a variety of settings, and could include patients located across state borders, making this single state license (one license for every state in which an advanced practice registered nurse practices) uneconomical for practitioners or employers.[15]

Efforts are underway to streamline the license process for NPs who practice across state lines. The APRN Compact, spearheaded by the National Council of State Boards of Nursing (NCSBN), allows an advanced practice registered nurse (APRN), such as a certified nurse practitioner, to hold one multistate license with a privilege to practice in other compact states.[16] The plan is to make requirements more consistent and licenses more portable, to train APRNs well, and then allow them to practice at the extent of their training.[17] The APRN Compact will come into effect once 10 states have enacted the legislation. According to the NCSBN, as of this writing, 3 states had enacted APRN Compact Legislation (Idaho, Wyoming, and North Dakota), and states including Iowa (pending SB 430) and West Virginia (pending SB 2521), have pending legislation.[18]

Additional efforts to shape the regulation of APRNs include the Consensus Model for APRN Regulation: Licensure, Accreditation, Certification and Education (APRN Consensus Model), which was completed in July 2008 and endorsed by 44 organizations.[19] The APRN Consensus Model, when implemented, will standardize each aspect of the regulatory process for APRNs, resulting in increased mobility for APRNs and increased access to APRN care.[19] Implementation of the Consensus Model has occurred incrementally. Although full implementation was targeted for 2015, as of August 2016, only 15 states had full implementation, and 10 states had achieved implementation ranging from 75% to 96%.[20]

The bottom line is that there is wide variation from state to state in telehealth rules and regulations. NPs working in several states (in person or via telemedicine) could be at risk for legal action from regulatory authorities such as the Board of Nursing if they do not have the appropriate licenses, certifications, and training or experience within the scope of practice in each state required to practice.[21]

- *Reimbursement.* In general, telehealth reimbursement policies differ greatly across state Medicaid plans and private payers, and the Centers for Medicare and Medicaid Services' telehealth coverage reimburses only for specific services when they are delivered via live video and is limited to strictly defined rural areas, for specific services, and when the patient is located

in a specified health care facility by certain providers.[22,23] An analysis of state telehealth Medicaid policies showed that although states may use similar language in their policies, no two states are alike in how telehealth is defined and regulated.[24] The review also revealed that 34 states and the District of Columbia have laws addressing private payer reimbursement for telehealth. This disparity can create a confusing environment for NPs using telehealth systems, especially with patients in multiple states.[24]

- *Fraud and Abuse.* As the use of telemedicine increases, care also should be taken to ensure that business arrangements involving the incorporation of telemedicine systems do not violate federal anti-kickback and Stark Law statues. Anti-kickback law prohibits providers from receiving compensation, involving federal health care payer dollars, for referrals, or making referrals to another entity in which the referring provider has a financial interest.[25-27] Penalties for anti-kickback violations can include significant fines, imprisonment, and exclusion from the Medicare and/or Medicaid program.[27] The Federal Physician Self-Referral Law, commonly known as the Stark Law, prohibits a health care provider (or an immediate family member of such provider) from referring Medicare patients to entities providing designated health services if that provider, or the provider's immediate family member, has a financial (ownership, compensation, or investment) interest in the entity.[28] Sanctions for violations of the Stark Law include no billing, refunds, denial of payment, and civil money penalties, as well as exclusion from participation in Medicare and Medicaid programs.[29]
- *Patient Privacy and Use of Appropriate Equipment.* Medical information is protected under a number of laws, including HIPAA (Health Insurance Portability and Accountability Act of 1996), HITECH (Health Information Technology for Economic and Clinical Health), and COPPA (Children's Online Privacy Protection Act). These requirements are the same for in-person visits and for telehealth consultations, and they extend to telehealth technology. The Federation of State Medical Boards has defined telehealth technologies as "technologies and devices enabling secure electronic communications and information exchange between a licensee in one location and a patient in another location with or without an intervening health care provider.[p. 3],[30] These may include multimedia communications equipment, mobile health applications, and 2-way video interface platforms. As with any Internet-enabled device or service, there is risk of a data breach, which may put sensitive patient information at risk of exposure.[31]
- *Peer Review.* Increased use of telehealth means that health care organizations and practitioners need to develop guidelines for monitoring telehealth practitioners such as nurse practitioners and sharing internal review information. Federal law requires that, at a minimum, this shared information must include adverse events that result from a practitioner's telemedicine services and complaints a health care organization receives about a practitioner.[32,33]

PRACTICAL ADVICE AND TIPS FOR USING TELEMEDICINE

As discussed, there are potential liability issues associated with telehealth services. Nurse practitioners should consider the following recommendations when using telehealth systems to ensure patient safety, limit risk, and help protect themselves from malpractice and Board of Nursing/license issues.

- Learn the license and prescribing requirements of home and telemedicine states (location of the patient if different from that of the NP). Become familiar with the Nurse Practice Act in each state where patients will be located because there could be differences in standards of care. For example, some states might require an in-person patient visit before setting up subsequent telemedicine visits.[34] Ensure that you have appropriate credentials and privileges to provide telehealth services in all appropriate states.[21]
- Ensure HIPAA compliance and other patient privacy and security requirements. Technology used for telemedicine should be HIPAA-

compliant with proper encryption to protect data. Storage of electronic files, images, audio/video tapes, and other data needs to be done with the same precaution and care ascribed to paper documents.[35] Keep in mind that many mobile apps are not HIPAA-compliant and are not approved by the Food and Drug Administration. Further, although not all video protocols are HIPAA-compliant, there are many compliant tools that can be supported on laptops, desktops, and mobile computers.[3] Consumer services such as FaceTime and Skype do not support HIPAA-compliant videoconferencing because they are not encrypted.

- If possible, work to create a telehealth examination room that integrates technology into the regular flow of the examination and to reproduce the images at the consulting clinician site with clarity and accuracy. Evaluate physical environment and determine minimal acceptable levels of privacy. Take steps to ensure that the environment where the telemedicine interaction takes place, both at the originating and distant sites, is secure and that any patient information is not inadvertently exposed.[35] In-depth information is available online regarding telehealth room design.[36]
- Complete basic training in the telehealth system in use at your practice or hospital and participate in all training updates. This is important if you work as an independent contractor practitioner at several practices or hospital locations and each uses different telehealth platforms. Conduct dry-run visits with stand-in patients to become comfortable with the technology and procedures. Conduct routine audits of equipment and software functionality, and know how to respond to equipment malfunctions.
- Secure appropriate patient consent. Telemedicine forms are available from the American Telemedicine Association (see https://thesource.americantelemed.org/resources/telemedicine-forms). Obtaining informed consent at each encounter is the recommended best practice unless services are provided in an emergency.[3] Ensure that the patient knows how information from the visit will be used.
- Educate the patient (in writing or verbally and in language patients can understand). Make sure the patient understands who is providing the telemedicine services and their license designation (ie, a nurse practitioner vs a medical doctor). Provide a brief bio and add a signature with appropriate designations to e-mail communications (academic degree should be placed immediately after a surname and before professional designation and certification credentials).
- Describe the nature of telemedicine compared with in-person care (scope of service) as well as providing written information. Provide information about the encounter, prescribing policies, communication and follow-up, record-keeping, scheduling, privacy and security, potential risks, mandatory reporting, credentials of the distant site provider, and billing arrangements.[37]
- Schedule an in-person first visit, if possible. If not, conduct a thorough patient evaluation, including the following:
    - Identifying information
    - Source of history
    - Chief complaint(s) and detailed review of symptoms
    - History of present illness
    - Associated signs and symptoms
    - Past medical history
    - Family history
    - Personnel and social history
    - Medication review
    - Allergies including medications, nature, and severity of reaction
    - Detailed review of symptoms
    - Provider-directed patient self-examination to include use of peripheral devices (eg, blood pressure cuff, glucose monitor, urine dipsticks, thermometer, body weight scale), as appropriate.[37]
- Review the patient's cultural competence. Take into consideration the patient's age, disability

status, ethnicity, language, gender, sexual orientation, geographic location, language, religion, and socioeconomic status.[37] For example, senior patients may not be computer savvy. If the patient cannot understand because of a language or other barrier, telemedicine should not be used.[38]

- Know when to recommend that the patient needs to see a health care professional for an in-person visit.
- All communications with the patient (verbal, audiovisual, or written) should be documented in the patient's unique medical record (electronic medical record or paper chart) in accordance with documentation standards of in-person visits. Be sure to document follow-up instructions and any referrals to specialists. Also, fully document the specific interactive telecommunication technology used to render the consultation and the reason the consultation was conducted using telecommunication technology, and not face-to-face, in the patient's medical record, in accordance with state and federal regulations.[39]
- Prepare an emergency or contingency plan in case of technology breakdown, and be sure to communicate that information to the patient in advance of a telehealth encounter.[37]
- Consult telehealth guidelines (the American Telemedicine Association has many practice guidelines[40] in the field) and work with your health care organization to develop telemedicine practice guidelines as needed, as well as the Telehealth Resource Center.
- Ensure that there is a quality improvement program and review process. This should cover equipment or connectivity failures, number of attempted and completed visits, patient and provider satisfaction with the virtual visit, patient or provider complaints related to the virtual visits, measures of clinical quality such as whether the visit was appropriate for virtual encounter, and recommendations consistent with appropriate standard of care.[41]
- Be aware of working via telehealth in states without a license in areas providing services outside of conventional health care. These might include providing telemedicine services while partnering with a chiropractor, which could raise a red flag with the Board of Nursing, or providing consultative alternative or integrative medicine therapeutic information to patients, such as lifestyle or nutritional approaches.
- If the NP is operating an independent practice, he or she should become familiar with reimbursement requirements, including Medicare, Medicaid, and private coverage. Online resources are available for Medicare[23] and Medicaid,[42,43] but NPs may have to contact individual health plans so that payer requirements are well understood. This could be especially important for services that might be deemed out of network.

MEDICAL MALPRACTICE AND DISCIPLINARY INSURANCE

As noted earlier, telehealth has seen rapid growth, but rules defining and regulating telehealth differ widely from state to state and are constantly evolving. There is no clear consensus regarding guidelines and standards of care among health care groups. Although insurers are reporting that they have seen little to no telehealth claims (personal communication, Michael Loughran, president of Nurses Service Organization, May 10, 2017), NPs need to understand what their professional liability insurance policies do and do not cover. It is recommended that nurse practitioners carry their own malpractice/disciplinary insurance (vs malpractice insurance for the hospital or private practice where they are working).

Many current professional liability policies exclude telehealth from coverage, so additional coverage would be required to ensure protection from liability issues. Examples of items that might not be included are negligent credentialing, errors and omissions, privacy breaches, and disruptions of service during equipment failures.[44] NPs should obtain written assurances from their insurer that medical malpractice liability insurance policies cover telehealth malpractice. Additionally, if the NP will be providing services across state lines, it is recommendation that the NP ensure that his or her malpractice liability extends coverage to multiple states. NPs also could seek legal

counsel to better understand how they are covered and what they will need.[31]

CONCLUSION

Telehealth is a rapidly growing area of health care, improving patient access to care, reducing costs, and increasing efficiency. However, there also are potential legal issues associated with treating patients at a distance. NPs, who play a key role in providing health care in the United States, should anticipate a growing role for telehealth and master the technology to facilitate patient care. They also should be aware of and comply with federal and state legal requirements, as well as follow best practices to ensure patient safety. Finally, with the added responsibility of using telehealth technology to assess and treat patients, come added risks for health care professionals. NPs need to protect themselves by securing their own professional liability insurance (with the appropriate telehealth coverage) to protect their careers. JNP

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