



## Telemedicine Liability Considerations

The COVID-19 pandemic has forced the sudden adoption of telemedicine by many practices and systems, accompanied by government and payer emergency measures that make providing virtual care easier. Given this rapid growth, it is important to look at potential risks associated with telemedicine.

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### **TARGET AUDIENCE**

The intended audience for this program is healthcare professionals who manage patients in an office, clinic, or urgent-care setting, including physicians, nurses, and administrators.

### **EDUCATIONAL OBJECTIVES**

- Define the elements of negligence in a healthcare liability action
- List risks associated with treating patients via telehealth
- Apply documentation to support a Telehealth visit

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## Telemedicine Liability Considerations

### Disclosure to Learners

**Commercial Support:** There was no commercial support obtained for CME activity offered for this program.

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**Obtaining Your CME Credit:**

Please make sure you have completed the online post-test and evaluation at this [LINK](#). This will allow us to complete your CME attendance certificate.

Planners and Speakers Disclosures:

The following planners or speakers have **no** financial relationship to disclose:

John L. "J." Baugh JD, CPA  
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## **SPEAKERS**

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**Julie Loomis, RN** is Assistant Vice President of Risk Education for SVMIC where she develops educational programs and assists policyholders and staff with risk management issues. Ms. Loomis is a member of the Tennessee Bar Association, Medical Group Management Association and American Society of Healthcare Risk Managers (ASHRM). She recently contributed to ASHRM's Medication Safety Pearls. She serves on the Risk Management Committee of the Physician Insurers Association of America. Ms. Loomis is a speaker on risk management and professional liability topics at medical professional association meetings, medical schools and residency programs, and industry seminars.

**Kathleen W. Smith, J.D.** is a Senior Claims Attorney in the Claims Department of SVMIC. Ms. Smith is a licensed Tennessee attorney admitted to practice law in all Tennessee state courts and before the United States District Court for the Middle District of Tennessee. She is a member of both the Tennessee Bar Association and the Nashville Bar Association. Ms. Smith manages litigated and presuit claims brought against SVMIC policyholders in all jurisdictions where SVMIC insures medical providers. She also advises SVMIC policyholders with the varied legal, regulatory and risk management issues arising during the day-to-day provision of healthcare. Prior to joining SVMIC, Ms. Smith practiced law with a defense litigation firm, defending SVMIC policyholders in medical malpractice lawsuits.



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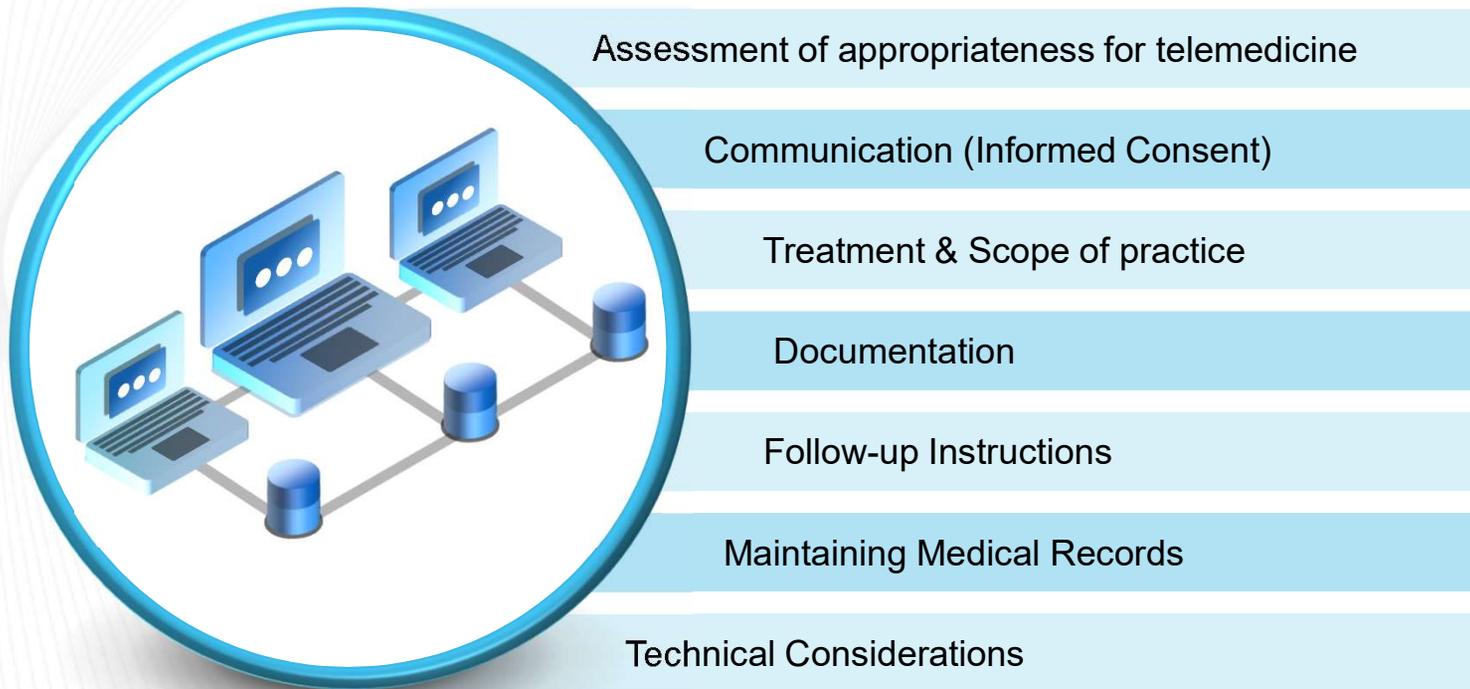
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# Telemedicine Liability: The Usual Suspects

Telemedicine offers physicians an alternate means for the delivery of care, as long as it meets the standard of care.



# Elements of Negligence

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## The Elements of Negligence:

1. Duty
2. Breach
3. Causation
4. Proximate Cause
5. Damages

# Elements of Negligence

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In a health care liability action, the claimant shall have the burden of proving by evidence....:

- (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
- (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
- (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

# The Physician-Patient Relationship

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A physician-patient relationship can be established by way of telemedicine regardless of whether there's been a prior in-person encounter between the physician and the patient.



The physician-patient relationship is generally created when you have mutual consent between the physician and the patient and that communication can be expressed or implied.



Caution when using FaceTime or other smartphone app

# Consent

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- As with in-person encounters, physicians must obtain the patient's consent for treatment
- Optimally, physicians should consider developing a specific telemedicine informed consent form for the practice
- Virtual telemedicine platforms have that capability (your EHR may also)
- Verbal consent may be sufficient under the circumstances
- Consider creating macros to ensure documentation of patient consent, discussion of confidentiality barriers, and documentation of time spent in the visit.

# Consent for telemedicine encounter

## Considerations for Verbal Consent include:

- Physician must disclose the name, current and primary practice location, medical degree and recognized specialty area if there is one.
- Ask the patient to disclose his/her current location.
- If treating new patients via telemedicine, then the consent should also include a general consent for treatment.
- Physician should disclose that a telemedicine encounter has benefits of improved access to medical care by allowing you to remain at your home to access care. There are some unique risks to receiving care via telemedicine such as: I may not be able to completely assess your condition given the diagnostic limitations, namely the inability to touch or smell. There may be limitations in the equipment, security or connection which may render the visit inadequate for treatment or may result in a breach of privacy. If I am unable to adequately assess you then I will refer you for in-person treatment.
- Do you understand the benefits and risks of telemedicine?
- Do you have any questions before we proceed?
- Do you wish to continue with this telemedicine visit?

## Jury Instruction – Informed Consent

### T.P.I. – CIVIL 6.25 Informed Consent

1. A (physician) has a **duty** to give a patient certain information **before** treating the patient; the information the physician **must** disclose is that information about the treatment involved and its attendant **risks** to enable the patient to make an **intelligent** decision about whether to undergo the treatment.

Jury Instruction – Informed Consent  
T.P.I. – CIVIL 6.25 Informed Consent

2. In determining how a reasonable patient would have acted under the circumstances, you should consider the testimony of the plaintiff, the plaintiff's [*idiosyncrasies*], [*fears*], [*age*], [*medical condition*], [and] [*religious beliefs*], the presence or absence of alternative [procedures], [treatments] and the potential risks and benefits thereof, and the impact of no [treatment], [procedure] on plaintiff's health.

# Assessment of appropriateness for telemedicine

A physician must have appropriate patient medical records or be able to obtain information during the telemedicine encounter adequate to treat the patient.

- All pertinent data and information from any telemedicine encounter.
- The technology used must be entered into the medical record. Quality of transmitted information

Can the physician form an opinion?  
If not:

- Declare so to the patient; and
- Direct the patient for an in-person visit or request additional data

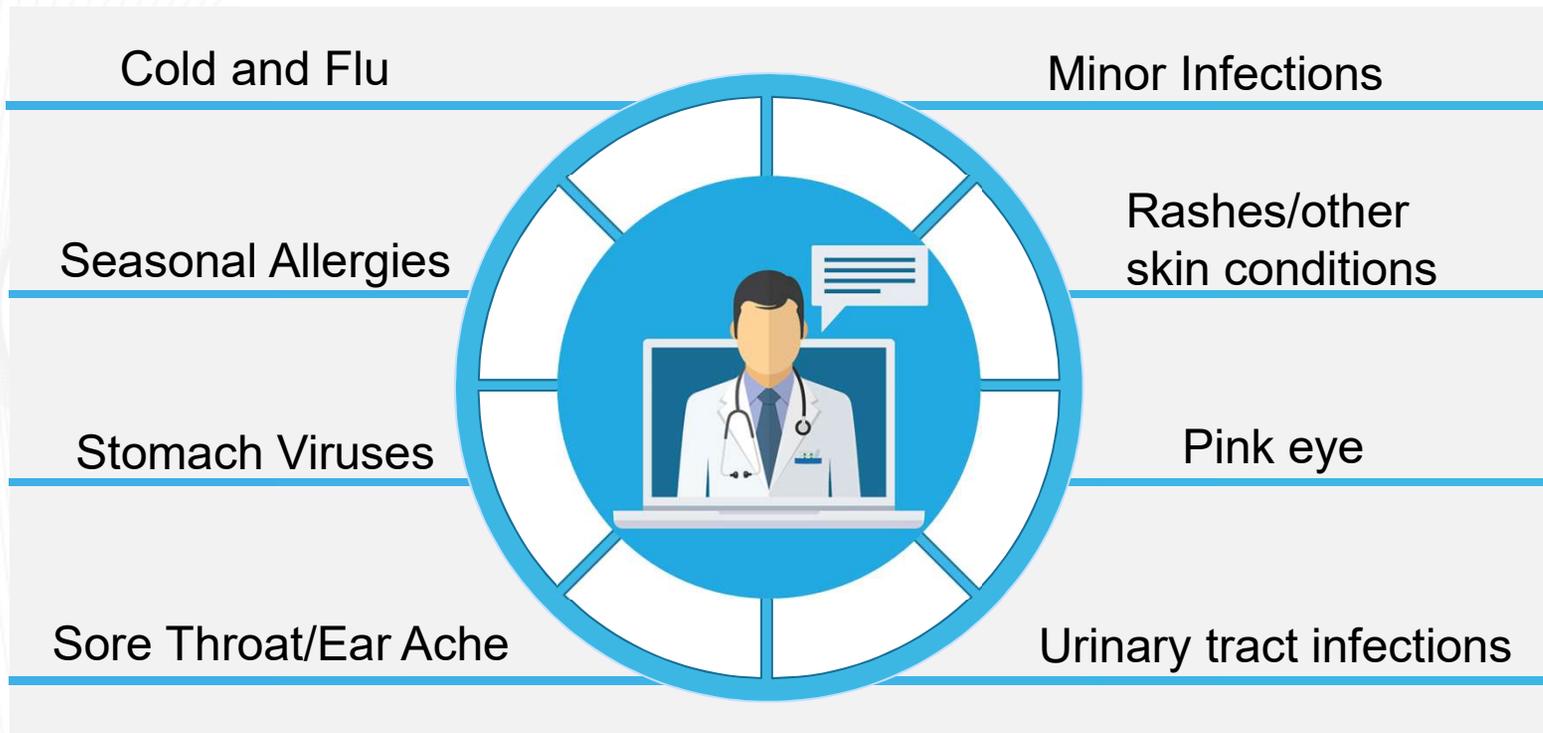
## Scope of Practice and Standard of Care

There's nothing virtual about virtual medicine – Remember you're providing health care to patients.

- Continue to meet standards of care when delivering care by telemedicine
- Treat the patient just like you would in the office
- Comply with laws and regulations in the treatment of patients
- Look to the location of the patient to determine the standard of care
- Telemedicine is not something to dabble in and if you're new to the process, consider engaging your EHR vendor to get you started
- Look at options with your EHR or explore other virtual commercial products, particularly if you believe telemedicine is a natural extension of your current practice

# Typical telemedicine services

Prior to the COVID-19 pandemic, most telemedicine services treated common ailments such as:



# Telemedicine During COVID-19

## Partial suspension of licensure requirements

- Health care professionals allowed to temporarily practice in this state are permitted to engage in telemedicine services with patients

## Partial suspension of advanced practice practitioner rules

- Chart reviews
- Remote site visits
- Collaborative agreement requirements until May 18

## HHS relaxed technology requirements

- Not enforcing compliance rule regarding allows FaceTime and Skype.
- NO public-facing remote communication products (no group chat)
- Remember there is a separate duty of physician-patient confidentiality. This is separate from the HIPAA security rule.
- Keep the remote communication device locked.

# Documentation

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- The most important defense tool if care is later challenged
- Obtain consent for a telemedicine encounter
- Documentation must be contemporaneous, include your exam, impression and plan
- Acknowledge when telehealth is not appropriate and refer for in-person visit
- Document referral for necessary testing or consultation
- Follow-up recommendations & provide contact information



# Medical Records



- Where is the physician storing the information from the encounter?
- What is the document retention period(s)?
- How does the physician get access to the information?
- How does the patient get access to the information?
- How does the MPL insurer/payer get access to the information in the event of a claim or audit?
- Multi-state considerations for document retention

## FAQ: Should I place a statement in the medical record that treatment was provided during COVID-19?

Answer: No. SVMIC does not recommend creating a separate statement that treatment was provided during COVID-19. Many of these statements include language waiving liability or outlining a list of deficiencies. Such a statement may not shield a physician who provides substandard or unnecessary care.

- Liability exposure will not be waived by a statement of the challenges of providing care during this unprecedented time.
- Keep in mind, the decision to provide care and offer treatment, may expose a physician to liability, if:
  - The necessary treatment is determined to be below the standard of care
  - Unnecessary treatment or treatment without consent is provided (even if the treatment would be within the standard of care)

# Telemedicine Liability Coverage

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- Contact your Medical Professional Liability Carrier to ensure appropriate coverage
- Generally, telemedicine is covered under your SVMIC policy when:
  - You are practicing within the scope of your licensure;
  - You are following the telemedicine guidelines, if any, of your state medical board;
  - Providing care to an established patient; and
  - Establishing a relationship with a new patient who resides within the state in which coverage has already been agreed upon by SVMIC.\*
- \*To provide telemedicine to new patients outside your SVMIC coverage area, contact the Underwriting Department.

# Medical Records



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# Key Considerations When Practicing Telemedicine

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- 1) Contact the Medical Board in every state where you plan to treat patients.
- 2) Review the Board regulations for every state where the patient is located.
- 3) Contact your Medical Professional Liability Carrier about coverage for telemedicine. NOTE: If a claim arises, you will likely be sued in the state where the patient is located and would have to defend it there.
- 4) Be sure you are comfortable with the standard of care for the visit. You can adequately assess the patient's complaints, adequate exam, develop a diagnosis, recommendations, follow-up plan and other aspects.
- 5) There could be a coverage issue if the care violates licensing rules and regulations. That may be an exclusion from coverage.
- 6) Contact the patient's healthcare insurance carrier and ensure they will pay for this visit. A) If the carrier won't, then that might red-flag a bigger concern with the visit. B) It is important to address that with the patient upfront and avoid a surprise to them and hopefully limit problems with the patient paying later.
- 7) Address the practice of telemedicine with your own group/employer to ensure telemedicine is allowed. The group may already have policies and procedures that should be followed to avoid a defense issue if care is challenged.

# Key Considerations When Practicing Telemedicine

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- 8) It is important to remember that the telemedicine visit should be within the physician's scope of practice (diagnosis, consultation, treatment, follow-up and other aspects)
- 9) Both the physician and the patient must utilize adequately sophisticated technology to enable the remote physician to verify the patient's identity and location with an appropriate level of confidence.
- 10) Even with relaxed HIPAA technology requirements, remember the physician-patient conversations are confidential. It is the provider's responsibility to discuss the question of confidentiality and identify who is in the room with the patient as well as the provider.
- 11) Obtain consent from the patient to treat them by telemedicine. This conversation may be documented as written or verbal, depending on state requirements. A simple consent form or verbal conversation should suffice. A macro may be developed to assist. Document any consent discussion.
- 12) Document thoroughly. Pay attention to an appropriate examination, clinical judgment and differential diagnosis. Your documentation should support the care provided and follow-up discussion.
- 13) Telemedicine is not appropriate for all conditions. Refer patients for in-person treatment when indicated. Do not attempt to practice medicine via telemedicine if diagnostic testing or consultation with a specialist would be required at an in-person visit (unless you can accommodate those needs).

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A copy of these materials and other resources including a link to obtain CME credit for this course can be found on the Telemedicine Education Series launch page on the TMA website at:

<https://tnmed.org/assets/files/education/telemedCME.pdf>

THANK YOU

### **Informed Consent Process**

Send the Telehealth Informed Consent to the patient via e-mail, fax, or U.S. mail before the appointment if at all possible. Consider posting the consent form on your website or patient portal and direct the patient to access it there. Ask the patient to sign the consent and return it to you. The patient could take a photo of the signed form and send it to you, scan the signed form and send it to you, or mail it back to you.

If you have not received a signed consent form from the patient, at the beginning of the telehealth visit you will need to:

1. Ask the patient if he/she has read the consent form;
2. Ask the patient to return the signed consent form;
3. Ask the patient if he/she agrees to have today's services provided through telemedicine.

You will need to include a statement in the visit notes of the patient's medical record that the patient has received or has been sent the practice's telehealth consent form and verbally agreed to receive treatment via telemedicine today.

If it is an urgent visit and you are unable to send the form in advance, you will still need to get the verbal consent from the patient and send the form to the patient after the visit.

### TMA Telehealth Patient Consent Form Template

I (patient name/guardian) \_\_\_\_\_ hereby provide (name of practice or provider) \_\_\_\_\_ permission to provide medical treatment and or medical consultation to (patient name) \_\_\_\_\_ by means of telemedicine.

Patient's Full Name: \_\_\_\_\_

Patient's Date of Birth: \_\_\_\_\_

Date of Telemedicine Visit: \_\_\_\_\_

Provider Performing Service: \_\_\_\_\_

Provider's Type of Degree (MD/DO, APRN, PA): \_\_\_\_\_

Provider's Medical Specialty (if applicable): \_\_\_\_\_

Facilitator with Patient (if applicable): \_\_\_\_\_

Title of Facilitator (LPN, RN, MA): \_\_\_\_\_

Patient understands and consents:

1. That receiving medical services through telemedicine technology, especially in emergency times such as pandemics, help protect patients and medical providers from exposure to contagious diseases. However, not all medical conditions can be treated as effectively as through an in-person visit. Telemedicine cannot treat most emergency conditions.
2. (If applicable) That all releases, assignments, history, privacy, and other forms that I have previously signed for practice apply to this visit by telemedicine technology.
3. To receive medical services and/or consultation through a telemedicine visit with my provider today instead of receiving the requested service(s) during an in-person visit.
4. That details of my current and relevant past medical history, exams, x-rays and other imaging, lab tests, and other diagnostic and treatment information will be discussed with other health care professionals through the use of interactive video, audio, and telecommunication technology.
5. That my provider might perform a physical examination through the use of such technology or (if applicable) through the use of a practice facilitator who is in the room with me.
6. [If applicable] That non-medical person facilitators may be present with me and they will help operate the telecommunication technology.
7. That video, audio, or digital recordings may be made of the visit.
8. That the rights described in the HIPAA authorization that I signed from (name of practice) applies to this telemedicine visit. Additionally, none of my patient-identifying information or images from this visit will be shared with researchers or others without my consent, unless authorized by law.
9. That reasonable and appropriate efforts have been made to eliminate any confidentiality risks associated with the telehealth services. (If applicable) I understand that the practice cannot control the location where I am in terms of confidentiality and privacy. All existing

confidentiality protections under federal and Tennessee state law apply to information disclosed during this telemedicine visit.

10. That the telemedicine service will be similar to a regular in-person office visit with provider, except that interactive video technology will allow me to communicate with my provider by remote means. I understand that a medical record of the visit will be created by the provider and that my rights regarding such record are the same as my rights regarding any of my other records created by a practice provider. I also understand that not all medical conditions are capable of being treated by telemedicine means. Further, a follow-up in-person visit to this or another provider might be recommended during this telemedicine visit for further care, testing, or evaluation.
11. That I may withhold or withdraw my consent to the telemedicine visit at any time without affecting my right to future care or treatment from provider. Withdrawing my consent does not create a risk, loss of, or withdrawal of any benefits for which I would otherwise be entitled. Any time during my telemedicine visit I understand that I can stop and request an in-person visit, I have the option to consult with a provider of medical services in person.
12. That my provider can withdraw from providing services during the telemedicine visit for any reason, including if a determination is made in the provider's best medical judgment that treatment can no longer be safe, private, or effective through telemedicine. In that event, the provider can instruct me to seek in-person care from this or another provider and I agree to follow such recommendation or directive, especially if I require emergency care.
13. That this telemedicine visit will be paid for by my health insurance plan. However, in the event that it refuses to pay provider, I may be held financially responsible for any and/or all telemedicine services rendered to me by provider.

I have been given an opportunity to ask questions about my telemedicine visit today and I agree to receive my care today through a telemedicine visit.

Patient or Authorized Signatory: \_\_\_\_\_ Date: \_\_\_\_\_  
Print name of Signatory: \_\_\_\_\_ If Signatory is a person other  
than the patient, describe the relationship to patient: \_\_\_\_\_

Witness (if required): \_\_\_\_\_