Reporter
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TEXAS MEDICAL LIABILITY TRUST
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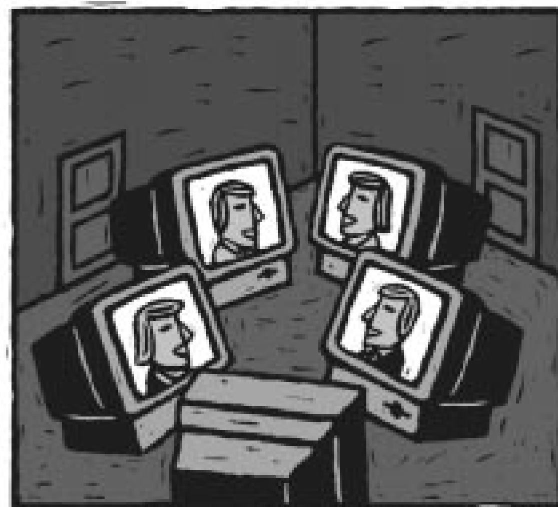
Practice issues in telemedicine

by Lynne Dakers, RN, JD, Risk Management Representative



Confidentiality

The internet is not secure. Medical information transmitted via the internet may be intercepted and read by unauthorized persons. Rather than being deleted after read, it may linger on the server site indefinitely. The information may also be altered or deleted without the sender or receiver ever being aware. Moreover, some companies consider electronic mail corporate property and messages sent or received from work may be monitored.

Maintaining patient confidentiality is of supreme importance in any provider setting. Even though no security system will be completely immune from "discontented insiders or determined hackers,"[1] health information managers must vigilantly develop and implement privacy safeguards. The most successful security measures combine effective policies with proven security hardware and software tools. The American Health Information Management Association and the Medical Transcription Industry Alliance have joined together to make the following recommendations:

- Applications on the internet that contain patient-identifiable health information must be carefully designed to protect confidentiality.
- Appropriate security measures and available technologies should be employed to protect confidential health information from unauthorized access or alteration. These measures include encryption, secure transmission protocols, and firewalls.
- Text, voice, image, and other patient files transmitted or maintained on the internet should be encrypted. Whenever possible, patient-identifiable information should exist as a separate file.
- Photographs and other images that may identify the patient should be used only with expressed consent.
- After completion of transcription services, no files (text, voice, or image) should remain on the transcriptionist's hard drive. Temporary files with patient identifiable information should be deleted and any patient lists should be deleted or returned. Any files stored outside the transcriptionist service bureau should have the same level of physical and electronic security as files kept by the service bureau.
- Print functions should be limited.
- Audit trails should record all individuals who access, modify, or delete any report.
- Client-side file caching by an internet browser should be disabled. This prevents the localized save of patient data on the client's computer.
- All employees and contractors should be educated about privacy and confidentiality issues, including the use of electronic mail and online discussions. Written confidentiality statements should be signed at the time of hire and annually thereafter. Such policies should be updated periodically to address issues raised by the use of new technologies.
- Organizations should develop, implement, and enforce policies and procedures to protect confidential information in internet applications.[2]

Personal jurisdiction and licensure

Although there is not a large body of law directly on point, there are some ways by which practitioners with internet connections can reduce the risk that they may have to defend themselves in a lawsuit in another state. With email and direct patient communication, practitioners should discourage communications from out-of-state residents, not only to avoid having to defend a lawsuit in that state, but also because it would probably be construed as practicing medicine in that state (presumably, without a license).

With regard to web sites, most courts have applied an "interactive-passive" test, conferring personal jurisdiction in cases where "interactive" uses of the internet, such as selling, conducting business through numerous contacts, or entering into specific dealings with residents, have taken place in the state. Where the operator maintains a "passive" web site that merely makes information available for browsing, courts have been hesitant to assert personal jurisdiction. As with any area of the law, the distinction becomes less clear where a web site is neither strictly active nor passive. Factors such as email addresses and toll-free numbers posted on web sites may be viewed as attempts to transact business with out-of-state users.[3] Practitioners are encouraged to add a line to their web site disclaimer instructing visitors to their web site that the site is provided for residents of their state only and any others who read it do so at their own risk.

Patient satisfaction/consumerism

Many consumers expect their doctors to be internet literate and to help them filter medical information available on the web. Some important new responsibilities of the physician are

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to recognize that patients are accessing health information over the internet, encourage patients to discuss their findings, help them interpret this information, and guide them to credible sources. Of note, half of internet users surveyed in a study by Cybercitizen Health expressed a desire for electronic access to their physician and nearly a third of those said they would change doctors to get it.[4]

Professional Guidelines

Absent legislation regulating the practice of medicine over the internet, the AMA published an "interim report" on internet prescriptions this past June.[5] The AMA board asserted that proper standards of care for diagnosis and treatment decisions involving prescriptions for medication require an"adequate" history and an "appropriate" examination. A prior history and/or examination need not be repeated if there has been a recent visit or it is an established patient with routine use. Benefits, risks, and alternatives to treatment must be disclosed. Additional interventions and follow-up care may be required as the prudent practice of medicine dictates.

Telemedicine Policies & Procedures

AHIMA has suggested that goals of telemedical services be designed around patient care needs rather than the technology. Processes should have as minimal a variation from standard patient encounters as possible. Forms and policies that are already in place should be used and followed and modified only if necessary.

Liability of Advanced Technology

While new technologies such as the advancement of computers in medicine undoubtedly are the wave of the future and will redefine the standard of care, practitioners must also be aware of the concurrent evolving areas of potential liability. As technology increases in sophistication, so will patient expectations. Practitioners who use new technologies must update their skills appropriately. The obligations of practitioners to upgrade their systems will constantly be at issue. Equipment failure or deficiencies may negatively effect patient care. Prac-titioners may unwittingly establish a physician-patient relationship through telemedical consultations if they do not define the limits of their participation up front. Indirect patient encounters ("faceless medicine") may place practitioners at a disadvantage, since patients may be more likely to bring suit if dissatisfied with an outcome. The potential to recover large rewards from telecommunication companies with deep pockets may also create incentives to bring suit.

Conclusion

These issues are not all-inclusive. Commentators have also suggested concerns in such areas as reimbursement, malpractice insurance underwriting, anti-kickback statutes, and contractual relations. While there may be areas of uncertainty as to the prevailing law and the established standard of care, the prudent practitioner will apply long-held doctrines of good medicine to this evolving area of medicine.

Notes

1. *Health Information Systems and Telemedicine,* arentfox.com Telemedicine Newsletter: Issue 1, Copyright 1995.

2. *Issue: Confidential Health Information and the Internet,* AHIMA Position Statement, January 1998.

3. *Internet Jurisdiction: The Evolving Test for Jurisdiction,* Findlaw.com, Copyright 1999.

4. *Doctors Swept Up By Connected Consumers,* Medscape, Copyright 1999.

5. *The AMA Takes a Stand: Guidelines Needed for Online Physicians,* Medical Malpractice Law and Strategy, November 1999

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A crucial juncture —

time to rally around a medical errors strategy or pay the bigger price

by Clark W. Bell

The daunting task facing health care providers is to create systems that can better identify, track, evaluate and prevent medical errors without enhancing the ability of malpractice parasites to unduly profit from a more open communications process.

Achieving that goal will not come easily. With Bill Clinton digging in his populist heels, the medical-errors dilemma is destined to become entwined in the rhetoric of the Patient Bill of Rights and other partisan squabbles.

Yet it's crucial that hospitals, health systems and physicians not duck the issue. Much more is at stake than the cost of implementing a tracking system or potentially higher insurance rates. The plain truth is that the image of health care providers hangs in the balance.

Providers' credibility and reputations have plunged since cost containment and managed care disrupted the once cozy fee-for-service cottage health care business. Avoiding further image erosion will require providers to rally around a medical errors strategy that puts patients ahead of protocol, protectionism, embarrassment and fear.

Health care managers should support a system that encourages the reporting of errors and the timely analysis of how to avoid similar mishaps in the future. Information and statistics must be shared with peers and the public. Surgeons and their support staff should meet before and after an operation to discuss the procedure. Providers, insurers and patient groups should determine whether the more frequent use of autopsies could shed insight into medical errors.

In return for their commitment to create a culture better equipped to deal with medical errors, providers should expect peer review confidentiality and other legal protections.

Although the trade-offs seem risky, there's a greater gamble in having a mandatory reporting system with no safeguards rammed down the throats of providers. You can bet that topic will be seriously discussed in Congress and on the campaign trail.

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Parental notification law what it requires physicians to do

by Johanna Franke

As of January 1, 2000, physicians are obligated to notify a parent, managing conservator or legal guardian of a pregnant, unemancipated minor at least 48 hours before an abortion is performed unless an emergency exists. If you suspect the young woman has been physically or sexually abused, immediately report this to the Department of Protective Regulatory Services at (800) 252-5400.

A physician can perform abortions on minors when:

- the physician has notified a parent, managing conservator or legal guardian in person, or by telephone, 48 hours before the procedure;
- the physician has made reasonable efforts to notify a parent, managing conservator or legal guardian without a response, and 48 hours constructive notice is given by certified mail, restricted delivery;
- the minor has been authorized by the judge of a probate court, county court at law, district court or court of appeals to consent to the abortion without notifying a parent, managing conservator or legal guardian;
- the court has failed to act upon a minor's application within two working days after she has filed the application; or
- it is medically necessary to avert the minor's death or to avoid a serious risk of substantial and irreversible impairment of a major bodily function.

The Texas Department of Health has created a brochure for pregnant minors considering abortion and a flyer for physicians with information on the new law. These materials were included in a mailout TDH sent to all clinics and physicians who have previously reported abortions to TDH. Physicians can obtain copies of the minor brochure and physician flyer, as well as forms to report emergency abortions and third trimester abortions to TDH, by calling (512) 458-7509. These materials also are available at TDH's web site at www.tdh.state.tx.us/bvs.

Other internet resources include:

- For full text of Senate Bill 30, the parental notification law, go to Texas Legislature Online at www.capitol.state.tx.us/tlo/billnbr.htm, select "76th Regular Session — 1999," and type "SB30" in the bill number box.
- To view the Texas Parental Notification Rules and Forms written by the Special Subcommittee on Parental Notification Rules and the Supreme Court Rules Advisory Committee, go to the Texas Judiciary Online at www.courts.state.tx.us and select one of the links under "Parental Notification Forms."
- For recent amendements to abortion facility reporting and licensing regulations, see the September 24, 1999 issue of the *Texas Register* online at www.sos.state.tx.us/texreg/archive/September241999/PROPOSED/health-services.html#384.
- To learn more about teenage pregnancy prevention, visit the "Physician Resources" area in the "Health and Science" section of Texas Medical Association's web site at www. texmed.org.

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Inside INSURANCE

Defense within/outside limits — is it really important?

by Theo van Eeten

Have you ever been sued? While that is always a traumatic experience, there is some consolation in the fact that you can grab all that paperwork, turn to your insurance company and scream "help!" The insurance company will jump into action and start the process to defend you. In most cases this is true, even if a lawsuit is groundless, false or fraudulent. As a matter of fact, having the insurance company provide your defense may very well be one of the most important reasons you have insurance, especially in the professional liability arena.

Just to give you an idea of how much it costs to defend our policyholders, 44.8 percent of the total amount incurred for losses has been spent to defend physicians, while 55.2 percent of the total has been spent on actual judgments or settlements. In other words, the overall cost to defend policyholders is almost half of all money we pay out to bring claims to a conclusion. Based on this statistic, it is easy to see how important it is that your professional liability policy provides adequate coverage for defense costs.

Generally speaking, there are two ways that insurance policies deal with the payment of defense costs.

First, there is the method that includes your defense cost in the overall limit of the policy. In other words, the policy will never pay out more than the stated limit for defense and indemnity payments combined. It is obvious that the expense to defend a lawsuit can seriously erode or even eliminate other coverage entirely.

It is also important to realize that the above percentages are averages and may not be applicable to you, thus complicating your decision regarding how much insurance (limits) to buy in case defense costs are included in the limit. In that case the physician not only needs to decide how much insurance is needed for possible mistakes, but also how much is needed to defend against possible lawsuits.

The second method is that defense cost is a "supplementary" payment, a benefit that is provided to you over and above the limit of the policy. For the insured the second method is obviously the preferred method, as the entire policy limit remains preserved for the payment of indemnity, if any is required.

TMLT's professional liability policy treats defense costs as a supplementary payment, preserving your entire policy limit if an indemnity payment needs to be made. We believe that this is the most desirable coverage for our insureds and we are pleased to be able to provide you with this excellent benefit as part of your overall coverage.