TELEHEALTH AND COVID 19 – Thoughts and Outlook

written by Richard Leslie | June 1, 2020

Avoiding Liability Bulletin – June 2020

TELEHEALTH AND COVID 19 – Thoughts and Outlook

As a result of the coronavirus pandemic, or Covid-19, the delivery of medical and mental health services via telehealth is garnering increased attention by governmental entities, professional associations, and medical and mental health practitioners. I have written about telemedicine (e.g., physicians) and telehealth (a broader concept) in past articles of this Avoiding Liability Bulletin, and practitioners are able to access those articles by searching the archives at the CPH website. It is my view that upon a reexamination of the telehealth laws and regulations, both on the federal and state level, changes are likely to occur that will contribute to telehealth's increased utilization. New legal, ethical, and practice issues will continue to emerge as increased utilization of telehealth occurs – especially during the next year as the nation continues to deal with the pandemic.

As a result of the continuing pandemic, practitioners throughout the country are facing challenges as they deal with a variety of questions regarding legal, ethical, and practice issues about the delivery of services via telehealth and the continuation of, or reintroduction of, face to face sessions. There is a fear that the risk of liability is increasing as a result of the many decisions that practitioners must make because of Covid- 19. If a patient desires to have in person sessions only, and depending upon the circumstances, a practitioner may feel the need to terminate treatment and make a referral. This could raise some issues with regard to the patient feeling abandoned or improperly terminated. Or, suppose the practitioner is over 60 years of age and has an underlying medical condition that makes him or her particularly vulnerable to the disease. In-person sessions with patients would not be medically advisable in such situations. Perhaps the practitioner will want to disclose this to the patient in order to gain the patient's understanding of the need to terminate and refer, or to transition, where appropriate, to telehealth sessions. Would that be too much personal disclosure? Would a move to telehealth affect insurance reimbursement and out of pocket expenses for the patient? Should the fee being charged be adjusted?

Practitioners who have temporarily closed their offices and seen patients via telehealth are concerned about what to do when opening their offices when the circumstances warrant. What obligation do they have to ensure that all aspects of the office experience will create a safe environment for their patients? What if there is a shared waiting room – how will social distancing be practiced and will patients be asked to wear masks when entering the office and while in session? Will the therapist wear a mask even if the patient is uncomfortable with such a requirement? May practitioners require patients to submit to

a thermometer test prior to treatment? How will the office be properly sanitized and how will patients be aware of the changes that are made for everyone's protection? What about family therapy, couples therapy and group therapy? How will the delivery of such services during this critical time change – whether the sessions are held in an office setting or via telehealth? What if a patient has to temporarily move to an adjoining state in order to escape from a dangerous outbreak in his or her community – can the therapist continue to see the patient via telehealth without fear that he or she will be practicing without a license in the adjoining state? Should practitioners utilize a special informed consent form for face to face services during this pandemic, and if so, will the content need to change as things develop?

Some therapists are concerned that they may get sued by a patient who claims that he or she caught the virus while they were in the therapist's office. They may allege, among other things, that the practitioner was negligent in seeing them in person and that the therapist should have suggested or insisted upon moving to sessions via telehealth. Despite the fact that such an assertion would be difficult to prove, a claim or lawsuit might nevertheless be filed. Professional associations for the numerous regulated health care professions could seek liability protection by sponsoring or supporting legislation that would provide immunity from liability from such claims. The extent of the immunity and the conditions necessary to be entitled to the immunity would of course be hammered out in the legislative process. On the federal level, there is discussion in Congress about providing liability protection for small businesses (unrelated to health care) that reopen and subject themselves to allegations of spreading the disease.

While the above questions may be challenging, the legal and ethical issues presented must first be recognized and then careful thought must be given, and some research may need to be done, in order to answer the question and then act in a prudent and reasonable manner. Practitioners are not liable just because something goes wrong – or there is an honest error in judgment – they are liable when they do not act as the reasonably prudent practitioner would have acted under the same or similar circumstances (or some similar standard, depending on the state). Answers to these and other questions may vary with the particular state involved. National and state professional association websites contain valuable information about legal, ethical, and practice issues raised by the Covid -19 pandemic (e.g., the American Psychological Association, the National Association of Social Workers, and the California Association of Marriage and Family Therapists). Consultation with appropriate association personnel may be advisable and helpful. In some instances, consultation with a private attorney may be necessary.

One of the purposes for the use of telehealth as an alternative to face to face contact is to increase patient access to medical and mental health services under a variety of circumstances. It is well recognized that access to services in rural areas and medically underserved areas is made easier by the use of telehealth. Additionally, patients may simply prefer to receive treatment via telehealth for a variety of reasons, including the saving of time and eliminating the inconvenience and expense involved in face to face meetings. Over the years, lawmakers have realized that arbitrary roadblocks to receiving services via telehealth must be removed or mitigated in order to facilitate its increased usage. As an example, in California, a previous requirement that physicians obtain consent before each telehealth

session was replaced by the requirement of only an initial consent. Additionally, the requirement that there be an informed consent was replaced by requiring a simple consent.

State and federal laws or regulations vary widely with respect to insurance reimbursement and other issues related to various aspects of mental health services delivered via telehealth. Many of these laws or regulations (e.g., those related to Medicare and Medicaid) will be reviewed and amended (some have already been liberalized or eased on a temporary basis) because of the Covid-19 pandemic – and policymakers on the federal and state levels are discovering aspects of these laws that are overly restrictive. My expectation is that some of these laws/regulations will be permanently changed in order to facilitate the increased rendering of health services via telehealth. Arbitrary and unnecessary requirements or roadblocks will be eased or eliminated. The Federal Trade Commission has publicly expressed its views on behalf of consumers that support this trend.

Changes in telehealth law and practice will continue to occur because of the Covid-19 pandemic. The individual states treat the delivery of psychotherapy services via telehealth differently – so it is difficult if not impossible to address the many questions that arise (and those asked above) in each state and for each practitioner. It is incumbent upon practitioners and professional associations (both state and national) to help shape the landscape as the greater adoption of telehealth is certain to occur. The laws and regulations pertaining to psychotherapy via telehealth must be carefully reexamined so that arbitrary and unnecessary barriers continue to be lessened or eliminated. Telehealth should not, as technology has and continues to advance, be treated as if there is something inherently dangerous or fundamentally different involved than face to face therapy – or as if face to face therapy is necessarily more effective than therapy delivered via telehealth. Laws, regulations, and standards of practice should reflect that growing reality.