Summary of Findings:
Malpractice and Telemedicine

By: Christa M. Natoli

December 2009
Disclaimer

This publication was made possible by grant number G22RH20216 from the Office for the Advancement of Telehealth, Health Resources and Services Administration, DHHS.

Information contained in this report is current up to the date listed on the report. Note that the information is subject to change following action taken by a state's legislature, state agencies, state medical boards, or other applicable state government agency or body. CTeL will make every effort to provide the most current information.

The views and opinions expressed in the forgoing publication are solely those of the author and do not necessarily represent the views and opinion of the Center for Telehealth & e-Health Law, its Board of Directors, or its staff.
Acknowledgments

Christa M. Natoli has worked with CTeL since June of 2009. Originally from Ohio, she has extensive policy experience and knowledge in a broad range of areas including health care, environmental justice issues, nutrition and education policy, and international affairs.
Welcome to CTeL

The Center for Telehealth & e-Health Law (CTeL) was founded in 1995 to overcome the legal and regulatory barriers to the utilization of telehealth and related e-health services. CTeL, formerly known as the Center for Telemedicine Law, was created under the vision and leadership of a number of individuals and organizations, including Dr. Yadin David, Bob Waters, the Mayo Foundation, the Cleveland Clinic, the Midwest Rural Telemedicine Consortium, and the Texas Children’s Hospital.

CTeL has established itself as a leader in the telehealth community and is known for its ability to compile and analyze complex legal, regulatory and public policy information. CTeL provides vital support to the community by providing critical analysis and information on legal and regulatory issues on topics such as reimbursement, licensure, telecommunications, FDA regulations, privacy, and accreditation.

For additional information about the Center for Telehealth & e-Health Law, please feel free to contact us at:

Center for Telehealth & e-Health Law
1500 K Street, NW
Suite 1100
Washington, DC 20005-3317
202.230.5090 | Fax 202.230.5300
info@ctel.org | www.ctel.org
Overview of Malpractice and Telemedicine

Recent advances in medicine and technology have transformed the way in which patients access health care services. Unfortunately, these same medical advances also pose new complications for traditional medical malpractice claims, such as jurisdictional and procedural issues and duty of care concerns.

As of this writing, the legal community has seen very little legal precedence on telemedicine malpractice claims, compared to general medical malpractice actions. The main reason for this lack of precedent is that telemedicine is still a relatively new tool being used in the administration of health care services.

However, we do know that the majority of legal actions that have been brought against telehealth providers proceeded as a result of telemedicine practitioners prescribing medications over the internet, rather than actions having been brought because care was negligently administered through telemedicine.

Jurisdiction: Procedural Issues

According to Telemedicine and E-Health Law, a legal case book, telehealth providers administering care across state lines may have to confront the issue of personal jurisdiction; that is, the state court’s ability to require the defendant (i.e. the physician) to appear in the plaintiff’s (i.e. the patient) home state.

In 1997, the Federal Court for the Western District of Pennsylvania heard the case of Zippo Manufacturing Company v. Zippo Dot Com, 952 F. Supp. 1119 (W.D. Pa. 1997), one of the first cases on “personal jurisdiction over Internet activities.” The Court was made responsible for deciding the issue of whether Zippo Dot Com, an Internet-based subscription news service located in California, could be sued for trademark

---


infringement in Pennsylvania. The Court held that Zippo Dot Com could be sued in Pennsylvania because the defendant had sufficient “presence” in the state.\(^3\)

Similarly, in cases involving medical malpractice and telemedicine, the Court will look at the defendant’s presence in the state seeking personal jurisdiction in deciding whether an action can be brought in the plaintiff’s home state, rather than in the defendant’s home state.

Additionally, in cases that span across state lines, the choice of law is also an issue; that is, which state’s law will govern the case. In telemedicine malpractice lawsuits, neither the defendant nor the plaintiff should automatically assume that the laws of the state where the case is being heard will automatically govern the case.\(^4\) Instead, the court may analyze where the event took place, as well as where a majority of the defendants and/or plaintiffs reside.

To date, the issue of choice of law has not been a matter of concern for telemedicine cases.

---

**Duty of Care**

Physicians providing health care services to patients have a responsibility to protect the patient from any foreseeable harm. This is known as “duty of care.” According to the article *Duty of Care: Medical Negligence*, “a person who performs an operation negligently or a nurse who gives an overdose of a drug, is personally liable to compensate the patient injured. If the act is preformed under the direction of another, however, the other will be liable.” The author continues to explain that in some situations, “the negligence of a director [i.e. specialist] will exonerate the actor [i.e.

---

\(^3\) In *Internal Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court held that the defendant must have a sufficient level of “presence in state to make the personal jurisdiction reasonable.” In the case of Zippo Dot Com, the Court found that the defendant had over 3,000 paying subscribers, which constituted a sufficient “presence” in the state to make the use of personal jurisdiction over the defendant reasonable.

\(^4\) According to the *Telemedicine and E-Health Law* case book, courts have not yet been asked to consider the issue of “choice of law in the context of a malpractice action that involved telemedical practices, such as video conferencing, transmission of medical data over a networks or cyber medicine.” Fleisher, Lynn D. Ph.D and Dechen, James C. Ph.D (2006). *Telemedicine and E-Health Law*. Law Journal Press.
general practitioner[5], but skilled staff ought to be aware when instructions are careless and have a duty to at least check on their accuracy.”

Generally, physicians providing care via telemedicine have the same responsibilities and obligations regarding duty of care to their patients as physicians practicing medicine without the use of telemedicine technologies. However, in situations in which the telemedicine practitioner provides a medical consult to another physician at a distance, a physician-patient relationship is not typically established.

In 1993, the Texas Court of Appeals found in *Lopez v. Aziz*, 852 S.W.2d 303, 304[8] that an obstetrician who was consulted by a patient’s general practitioner did not establish a relationship with the patient. According to the *Telemedicine and E-Health Law* case book, “under cases like *Lopez*, physician-to-physician consultations will generally be shielded from malpractice liability,” because a physician-patient relationship was not established.

---

**Telemedicine Medical Malpractice Cases**

The below information is the result of an exhaustive investigation of cases involving telemedicine malpractice actions. The search results uncovered that telemedicine providers to date have not been a party to any litigious action involving telemedical malpractice. However, research did show that the majority of cases involving telemedicine providers and alleged negligence claims concern physicians prescribing medications to patients across state lines without previously examining the patient. A sample of those cases are listed below:

---

5 This scenario may apply to a physician receiving a medical consult from a specialty physician who receives negligent information.


7 In *Roush v. Southern Arizona Ear, Nose & Throat* (Ariz. App. Div.2), a “tortious slander” action was brought against the defendant, a physician, who during a telemedicine consultation stated, in front of two medical assistants, that the plaintiff’s “problem was never an ear problem” but a “brain disorder” and that his “problem was all in his head.” This case illustrates that telemedicine practitioners are held to the same professional standard of care as practitioners providing care without the use of telemedicine technologies.

8 The consultation in *Lopez* took place over the phone.
In *Hageseth v. Superior Court*, a doctor based in Colorado prescribed a generic version of Prozac to a patient located in California. The doctor prescribed the medicine after the patient filled out an online questionnaire; this was the extent of the doctor-patient interaction. After the patient committed suicide, the San Mateo District Attorney’s office filed a criminal complaint. The California Court of Appeals (the state intermediate court) held that California had jurisdiction over the case even though the doctor never physically entered the state, because the defendant intended his acts to have effects in California. See 150 Cal.App.4th 1399, 1417 (2007).9

In *U.S. v. Kanner*, the defendants owned and operated PharmaCom, an online prescribing company that allowed customers to receive non-controlled prescription drugs over the Internet by answering questions on a medical questionnaire. Physicians never saw the patients, and there was no previous physician/patient relationship.10

In *U.S. v. Hernandez*, a Florida physician administered non-controlled substances over the Internet without previously examining the patient.11

---

**Conclusion**

Overall, telemedicine providers are held to the same standard of care as those who administer health care services without the use of telemedicine technologies. However, telemedicine practitioners may find that they will be subject to procedural and jurisdictional rules to which practitioners providing care in one state are not subject in legal proceedings.

Traditionally, telemedicine providers who have been found liable for malpractice have been found guilty of writing prescriptions over the Internet for patients without first properly examining the patient, thereby breaching their duty of care to the patient. There have been no legal actions found against telemedicine providers for telemedical malpractice claims.

---

10 2008 WL 2663414 (N.D. Iowa).
11 07 Crim. 60027 (S.D.FL., Apr. 6, 2009).