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Legally Protecting Yourself During the Pandemic

by Mark Brinton, Esq., UMA General Counsel¹

The circumstances in which you are practicing medicine during the public health emergency caused by the COVID-19 pandemic are extraordinary. The way you are able to treat patients is being influenced by the high demand for certain services, constrained resources, the need to modify patient encounters to conserve resources and reduce the risk of spreading infection, and other healthcare providers unable to practice because of illness or exposure. And you are being forced to adapt to rapidly changing circumstances.

These circumstances and the care you are providing could affect your personal liability, whether license discipline or professional practice liability, so you should consider ways you can reduce your potential liability. In general, your responsibility and possible liability will be shaped by the circumstances you are working under. You can better protect yourself by thinking about, communicating, and recording the significant aspects of those circumstances.

It is always important to provide your patients information so they can give informed consent to treatment, and it is even more critical now. You may want to take a moment to reflect on and decide what you would want to tell regulators or plaintiffs were the known risks and incorporate this into your informed consent documentation. This can also be a useful road map for more patient-specific note that needs to be made after the visit is complete.²

You might want to begin by adding to the record of each patient encounter, "NOTE: This encounter occurred during the COVID-19 pandemic crisis."³ Patients need to be told of any relevant constraints or other reasons you were not able to do or perform any aspect of quality of care that you would have preferred to do or that their care was changed in some way. You should document this information and your discussion with the patient in the patient's medical record. Documentation is everything. The more complete the explanation, the better, especially when it comes to care affected by the pandemic.⁴

When possible, engage the patients in the decision-making and give the patients options, such as choosing a telehealth visit now or an in-person visit sometime in the future, or trying available treatment now or waiting to take a more complete approach later. And make a record of the discussion and decision.⁵

If relevant, document how something on a telemedicine visit could not be done unless an in-person visit is made. Consider documenting specifically why the in-person visit isn't possible for that patient's presenting condition(s) and the facility's circumstances. There should probably also be a statement in the record if you considered an alternative point of care for the condition(s) presented, such as another

facility or clinic that does permit, or has capacity, for an in-person visit under the patient's presenting circumstances.⁶

If some aspects of the constraints being imposed on a patient seem unreasonable or inappropriate, consider advocating for your patient, e.g., for needed surgery that is being denied, and again document your efforts and the results.

Keep in mind that your professional liability carrier, your employer, your attorney, and others may have additional suggestions that you should apply to your situation.

We are providing this legal information to UMA members to help you make better decisions during this extraordinary time. This information is not legal advice and cannot take the place of legal advice. If you want legal advice or legal representation, we will be happy to refer you to attorneys who can help.

¹ With suggestions and language from the following fellow attorney members of the American Society of Medical Association Counsel:

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