Legal Considerations for Telemedicine Practice in a Post-Pandemic World

Transcript

Allan Gibofsky, MD (Co Host): A telemedicine visit is a visit. It requires the same kinds of adherence to standards of care as if the patient were in your office. The standards of care are not relaxed because the patient is being seen via a computer screen.

Meghna Rao (Host): Welcome back to season 2 of the *Rheumatology Advisor* podcast, Rheum Advisor On Air. I'm Meghna Rao, senior editor of *Rheumatology Advisor* and the host of this podcast.

In this series, we will be joined by expert clinicians and researchers to discuss emerging and compelling topics in rheumatology. These perspectives may be related to the management of rheumatic disease, guideline updates, patient care, data from conferences and scientific meetings, and much more.

So, let's dive in!

Dr Gibofsky: I'm Dr Allan Gibofsky, professor of medicine at Weill Cornell Medicine and attending rheumatologist at the Hospital for Special Surgery, where I direct the clinic for Inflammatory Arthritis and Biologic Therapy. My main areas of interest are inflammatory arthritis and legal medicine. I also hold a JD from the Fordham University School of Law.

With me today is my close friend and colleague, Dr David Goldberg. Dr Goldberg's CV is even longer than mine. He is a graduate of the Yale University School of Medicine. He completed his dermatology residency and dermatologic surgical fellowship at New York University Medical Center, and he's been chairman of the Ethics and International Committees of the American Society for Laser Medicine in Surgery. He's been the recipient of numerous awards in laser medicine and cosmetic dermatology. Like me, he is also an MD/JD. David is a clinical professor of dermatology and former director of laser research and Mohs surgery at the Icahn School of Medicine at Mount Sinai in New York City, and he is currently clinical professor of dermatology and chief of dermatologic surgery at Rutgers New Jersey Medical School. He has published extensively, he is an international expert and speaker, and he is the clinical director and director of cosmetic dermatology and clinical research for one of the largest dermatology groups in the United States. David, welcome.

David J. Goldberg, MD, JD (GUEST): Thanks, Allan.

Dr Gibofsky: So, David, we're going to be discussing a very contemporary topic in both my specialty and yours: telemedicine. During the COVID-19 era, telemedicine became a new service and a new avenue for patients to access medical care. While this had, in fact, been done beforehand in various guises,

we now saw an explosion of telemedicine for obvious reasons: the absence or the inability of patients to come in person to clinics and hospital facilities. The rate of patients using telemedicine services superseded even the rate of information dissemination of the legal and ethical considerations for clinicians such as us, who were providing care using these avenues.

And, I think it's safe to say that, while we've rebounded from the "no visits" at the beginning of the pandemic to the current state of affairs, there is still a percentage of visits in virtually every practice, in every hospital setting, and in every outpatient setting that is still telemedicine. We've learned, if nothing else, that we may not need to see every patient physically, but we still need to keep track of patients over time, longitudinally, by methodologies other than just a phone call.

So, David, let me propose to you the first question that we, as attorney physicians, often deal with: what are liability issues in the practice of telemedicine?

Dr Goldberg: Yes, it's a great question, Allan. And first of all, in my field, in dermatology, it turns out telemedicine is really not all that new. There have been studies, both within the VA hospital system and the Kaiser-Permanente system in California, that show that telemedicine, or teledermatology in my field, actually is very helpful for patients who can't get into offices. And a lot of it in my field is, of course, based on photography. So, if there's good photography, there is a pretty good correlation to an equality of care done in the office and done through telemedicine.

The legal issues — and there aren't just legal issues; there are medical issues, social issues, and legal issues — as relates to telemedicine for all of us are where are you practicing, which patients you're seeing, and do you have a license to practice within that state where someone reaches you. And medical issues, especially in teledermatology, are, "can I even see what they're trying to show me," which is one of the problems we ran into at the start of the pandemic. People download an app, and they're sitting in their living room, which is not a controlled setting. They want to show you a spot on their leg. And, instead of shining their phone or their iPad on their leg, we end up seeing the chandelier. And so, we've got medical issues, and they lead to legal issues, whether it's licensing issues, or medical malpractice issues. People make mistakes.

Dr Gibofsky: Yes, I think you've brought up several good points, David. Licensure is critical. During the pandemic, as you know, many states, particularly border states but other states as well, relaxed their telemedicine restrictions. In most states, you are required to have a license to practice telemedicine not just where you are located but where the patient is, as well. Many of us have patients who are "snowbirds," many of us have patients in border areas, and many of us have patients in other states, as well, who travel. During the pandemic, all of those restrictions were removed; however, they've since come back. So, if I'm based in New York and not licensed in a jurisdiction where my patient lives, and yet I'm doing a telemedicine visit,

the least of my concerns is the fact that I won't get paid for the visit. Instead, I am actually practicing medicine without a license in that jurisdiction.

Dr Goldberg: Which, of course, is a felony in most jurisdictions.

Dr Gibofsky: Yes, and you mentioned things like the quality of the phone call and the quality of the computer, if that's what you're doing.

Another point to keep in mind is that a telemedicine visit is a visit. It requires the same kind of adherence to standards of care as if the patient were in your office. The standards of care are not relaxed because the patient is being seen by a computer screen. Your methodology for conducting the visit must adhere to the Health Insurance Portability and Accountability Act (HIPAA). Your recordkeeping must be HIPAA compliant. I think those are the kinds of things that we don't always think about, that it's just a Zoom call with a patient, but it's really much more than that.

Dr Goldberg: You also alluded to the issue of coding and billing. Prior to the pandemic, it was very hard to be reimbursed for any kind of telemedicine. During the pandemic that was relaxed, but it seems to be coming back and rearing its ugly head again, too. As you said, you end up spending at least as much time with a telemedicine visit as you do with a patient visit in your office. You've got all the legal requirements, and then you have the coding requirements, which have to be the same as at the office. And, there is a chance — granted it's better than it used to be — that you may not get paid.

Dr Gibofsky: Yes, and let me reiterate a point I made a minute ago, which is the practice of telemedicine is the practice of medicine. And so, the malpractice of telemedicine is the malpractice of medicine and requires — or at least exposes — a physician to all of the elements of duty, breach, causation, and damages, which are going to be analyzed in the context of litigation that arise out of a telemedicine visit as it might arise out of an in-person visit.

Dr Goldberg: Yes, and no doubt about that. And in my field, one of the things we worry about the most is missing a melanoma. Obviously, that's one of the few life-threatening issues in dermatology, and I'm always uncomfortable seeing a grainy picture through a telemedicine visit. So, what I advocate, and what I tell my fellows, is that if you do a telemedicine visit, there's got to be a little bit of a disclaimer in the visit, and that is that, as much as there are studies that show that teledermatology or telemedicine is the same as in the office, in real life it's not a controlled environment. So, it's not the same. The disclaimer always is, "if there's any question here, I still need you to come in."

But, to your point, telemedicine is here to stay; it is not going away.

Dr Gibofsky: Oh, absolutely. What we're seeing in my specialty of rheumatology — and we've got some studies that were just presented at our international meeting a couple of weeks ago — is that telemedicine is probably appropriate for monitoring disease progression and disease activity in some of our conditions, like rheumatoid arthritis, for example. But there is

really limited evidence and limited research on the effectiveness of telemedicine in the diagnostic phases of rheumatic diseases. I suspect, as you pointed out, that's probably true in your specialty, as well.

Dr Goldberg: Oh, for sure. For someone who hasn't been in the office for 6 months for the treatment of their acne and needs to determine if they need the same refills they've had before or a slight variation, I'm very comfortable doing that over a camera. You can get a pretty good sense of what their face looks like, and this is not a life-threatening condition. But as I said, there are things that both you and I deal with that are much more serious and that I would argue are not best evaluated just through telemedicine.

Dr Gibofsky: So, David, I think I know how you're going to answer this question, but let me ask it nonetheless. Should a physician see a new patient via telemedicine or only for follow-ups?

Dr Goldberg: Well, you alluded to the fact that in an ideal situation, to keep yourself out of trouble, you don't do anything that's going to be crazy. You would make sure you have a license in that state and that the patient lives in that state. I would also argue — and again, I've lectured on this issue — that telemedicine, for the most part, both for the sake of our patients and ourselves, ideally ought to be kept to your current patients. When you're dealing with new patients, it just raises all kinds of issues.

Dr Gibofsky: Yes, absolutely. My own rule is that I would not see a new patient via telemedicine. I would only see patients who are known to me or conduct follow-ups of patients who are known to me, for just those reasons. If the patient is not known to you, then even the concept of developing the physician-patient relationship becomes somewhat strained when done through a computer screen.

Dr Goldberg: Yes, and there are other limiting factors in telemedicine. One is that ideally, you have to have some sort of HIPAA-compliant connection between you and the patient. That generally will cost the physician some money. When using some of the telemedicine-type platforms, patients have to log in and pay a fee, and they are not very happy about that. I know many dermatologists who have tried to get their patients to sign an insurance waiver, which means they have insurance and the physician is part of that third-party carrier system, but they try to get them to waive that insurance through telemedicine. That's very questionable legally and ethically.

Dr Gibofsky: So, David, you brought up the topic of insurance. If you're seeing patients in multiple states, as I know you do, and they're doing telemedicine visits in multiple states, do those visits raise any liability insurance concerns in terms of what the carrier needs to be notified of or whether additional premiums need be paid for those kind of services?

Dr Goldberg: As you know, Allan, I have offices in New York, New Jersey, and Florida. Florida requires separate malpractice insurance from the policy that I have for New York and New Jersey. And so, when I go down to the Florida office, there are occasional patients from the New York and New Jersey areas who reach out to me, who want to speak to me, and these are patients of mine

in one of my offices that are in states that I have licenses. But now, I'm practicing in the state of Florida. That's a separate [medical malpractice] carrier. With that in mind, I have notified my medical malpractice carriers in all of these states that I practice in the other states, They actually have not charged me more for it, but it's sort of an umbrella policy to give me protection.

Dr Gibofsky: That is interesting. So, as a practical matter, it might be appropriate for colleagues who are practicing telemedicine to notify their carriers, particularly if there is more than one carrier involved in the states in which they're practicing, about their activities concerning the telemedicine sphere.

Dr Goldberg: Remembering that they still have to have a license to practice medicine in that state.

Dr Gibofsky: Of course.

So, what other problems might we see going forward, David? I think we would agree that telemedicine is here to stay. What should we be doing to protect ourselves, as it were, from the evolution of telemedicine?

Dr Goldberg: Yes, telemedicine clearly is here to stay. But, as time goes on, we can expect more federal and state government involvement; that's just a given. But, on the flip side, the apps — which are pretty good — are only going to get better, and that probably ought to help us better care for our patients.

But, the way to minimize risks of liabilities is to use broad disclaimers. Tell patients that if there is any issue and they are far from you, they should see a physician who is right nearby them. And, as we discussed earlier, in the end, use telemedicine only on your own patients.

Dr Gibofsky: Yes, I think that's true. I think our colleagues should also be aware that certain states may have prescribing restrictions, if the prescription arose out of a telemedicine visit. It is, of course, difficult, if not impossible and if not illegal, to prescribe a controlled substance without having seen a patient in person. So, telemedicine visits would foreclose that avenue of prescription.

Our colleagues should be aware that there's also the potential for fraud and abuse in the context of telemedicine. The Justice Department is particularly interested in referrals of patients for assistive devices and for other services that arise out of telemedicine. We've seen things like Operation Rubber Stamp, Operation Brace Yourself, and Operation Double Helix, which have been designed in order to eliminate fraud and abuse, not just in the area of government-sponsored visits but also government-sponsored telemedicine visits.

So, this is a thorny area that we need to negotiate with caution.

Dr Goldberg: Agreed.

Dr Gibofsky: David, with the evolution of medical practice, how do you envision telemedicine being shaped as a result of legislative initiatives?

Dr Goldberg: Well, the irony is that more of us are concerned about all the issues we discussed in telemedicine, and yet the flip side is that there's no question that the patient population at large is going to demand telemedicine be here to stay. So, there's no end in sight. It will develop, and it will get much bigger with time.

As to your point, there is a lot of potential for fraud, abuse, and negligence in this arena. My advice to people just starting is to be very careful when practicing telemedicine. They should be careful how they do it, make sure they have licensure, make sure they have medical malpractice insurance, and document, document, document to make sure that the coding is not questioned.

Dr Gibofsky: I would agree with all of that. I see the legislature actually making it easier for patients to undergo telemedicine visits, I think, in response to lobbying by the insurance industry, which has recognized that telemedicine visits can potentially be cheaper than in-person visits in most instances. I think we are going to see expansion of telemedicine and telehealth rather than curtailment or restriction.

I don't see restrictions on the licensing laws or scope of practice laws that will continue to require practitioners to have licenses in both the state in which they practice and the state in which the patient is situated. Because, for a large part, those license laws are less for purposes of deeming competency of the practitioner than for garnering revenue for the jurisdiction.

Dr Goldberg: So true.

Dr Gibofsky: David, thank you for taking the time out of your very busy day to spend a few minutes with me on this podcast. I hope this is something that our listeners will find enjoyable and educational. I sincerely hope that we can chat once again on further podcasts, either in rheumatology, dermatology, or legal medicine. Thank you, David.

Dr Goldberg: Thanks, Allan.

Meghna: Please stay tuned for more episodes in this series. For more information on *Rheumatology Advisor* and this podcast, you can reach out to us at editor@rheumatologyadvisor.com. We at *Rheumatology Advisor* look forward to delivering timely evidence-based news to you. You can also sign up for our free e-newsletters on the site.