



Telemicrophone Credentialing and Privileging Exposure and Management Liability Coverage

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Insureds may ask their management liability insurance broker or carrier a question such as, "Are we liable if...?" When a broker or carrier is asked this question in relation to an organization's existing or contemplated telemicrophone services, the answer may require a few questions in return before a specific answer can be given. But given that the healthcare organization's governing body is ultimately responsible for ensuring the mission and vision of the organization, as well as the operation of the organization, the answer may very well be, "Yes."

The applications for telemicrophone are growing exponentially, as are the variety of settings and types of providers who participate in them. Indeed, it seems that telehealth is here to stay, but the jury is still out on whether some of the touted benefits are proving to be true. And, it continues to be a hot topic of state and federal legislatures. There is currently significant variation in state laws governing telemicrophone.

Management Liability Risks

There are some possible risk exposures for organizational leadership to consider in implementing a safe, compliant and effective telemicrophone program. In healthcare organizations, as noted earlier, the governing body's (Directors and Officers) oversight responsibilities are ultimate and ongoing. One important goal for any enterprise risk management program is to protect the assets of the organization. This includes not only the financial assets, but all of the domains of risk. In the context of this discussion, organizations would be wise to consider the potential liability exposures associated with telemicrophone for its governing body.

One of the risk exposures for a telemicrophone program that may trigger a claim under a D&O policy is medical staff credentialing and privileging. Oversight of medical staff credentialing and privileging is a major area of responsibility for the governing body in healthcare organizations.

Implementation of a risk management process, based upon the steps identified below, will assist organizations to identify, analyze, treat and monitor potential risk exposures as a telemicrophone program evolves.

Risk Identification

Many of the key risk exposures related to telemicrophone are well known and generally include, but are not limited to, the following:

- Information privacy/data security
- Potential technology-related issues (e.g., failure, resolution, and accuracy)
- Data ownership/retention/destruction/e-discovery
- Credentialing/privileging of providers
- Patient selection, communication, education
- Documentation of communication and encounters
- Consent for use of technology/treatment
- Health insurance payer coverage/reimbursement
- Billing

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- Compliance
- Contracts/agreements
- Liability insurance coverage

Analyzing the Risk

Telemedicine provider credentialing and privileging decisions by the governing body may expose members of the governing body to claims under the related theories of direct or corporate negligence, duty of care for patient safety, negligent hiring and negligent selection of independent contractors and negligent credentialing. The tort of negligent credentialing is currently recognized by at least 30 states.

A series of questions that organizational leadership should ask themselves as they evaluate telemedicine risk exposures related to credentialing and privileging includes, but may not be limited to, the following:

- Does your governing body understand its role and responsibilities regarding credentialing and privileging? Even when a third-party credentialing verification organization is used, privileging decisions are still the responsibility of the hospital's governing body.
- Are you a hospital telemedicine site? A free-standing telemedicine site? An originating site or distant site? Is there a solid understanding about how telemedicine credentialing and privileging should be done depending on your role?
- Have you met all applicable federal and state statutory requirements for a telemedicine license? How about applicable state medical/licensure board requirements for all licensed practitioners? Non-licensed? What are the exceptions to the requirements?
- Have you met all applicable accreditation standards and requirements?
- Are there written policies and procedures in place that outline the credentialing and privileging appointment and reappointment processes, criteria for telemedicine activities, scope of practice protocols, OPPE and FPPE and the data from the originating and distant sites that must be collected and analyzed (and acted on)? How will the originating site be notified of privilege or license revocations or suspensions?
- Do your hospital or medical staff bylaws and rules and regulations accurately reflect these issues for telemedicine: federal regulatory and state specific licensure requirements (for all providers); current CMS CoPs; health insurer panel requirements for credentialing; the privileged provider's medical staff category?
- Does the current structure of your quality-improvement and peer review programs adequately protect shared data between originating and distant sites?
- Is there a compliance plan that addresses billing practices and regulatory noncompliance?
- Are there written agreements in place between the distant site hospital or entity and the hospital seeking services?
- Do you have the appropriate medical staff leadership and medical staff services resources to manage your credentialing and privileging activities?
- Are there appropriate, required governing body, medical staff leadership and medical staff services training and education on credentialing and privileging for telemedicine?

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Analyzing Insurance Coverage

By way of this next series of questions, organizations can begin to bring into focus some possible strategies for treating telemedicine risk exposures by using one of the risk management techniques, risk transfer, to ensure the right coverage for those risks is in place:

- Will existing health professional liability (HPL) coverage address errors and omissions on the part of distant-site physicians and practitioners?
- Is there adequate coverage limits for the telemedicine activities and providers?
- Are there subcontractors allowed? If so, confirm the subcontractor's insurance coverage and limits.
- Are there shared or individual coverage limits? Which should be required to meet risk financing needs?
- Are there any jurisdictional limits for coverage under the policy? State-to-state provider licensure?
- Are there practitioners practicing outside of the U.S.? Is there any exposure in countries outside of the U.S.? Will HPL coverage extend to such services?
- Is the current insurance carrier licensed to write coverage in multiple states? Foreign countries?
- What types of insurance coverage are in place for negligent credentialing, where claims are based on reliance on credentialing and privileging information submitted by a distant-site hospital or distant-site telemedicine entity?
- Does the organization have appropriate coverage for business disruption (e.g. the third-party vendor stops offering the service)?
- Are insurance coverages (at limits set in medical staff bylaws approved by the governing body) in place for credentialing and privileging legal exposures:
 - Does the telemedicine provider have professional liability coverage for this service?
 - Does the telemedicine provider have cyber risk coverage?
 - Does the cyber risk/technology E&O coverage extend to the telemedicine activities?
 - What types of insurance coverages and limits will be required by contract of the distant-site hospital and distant-site telemedicine entities?
 - Will the contract preclude shared coverage among the (ever-changing) list of care providers and the distant-site hospital or distant-site telemedicine entity?

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- Will the insurance coverage include indemnification coverage for cost of defense up to the point of disposition of a regulatory investigation based on the telemedicine services furnished by the distant-site hospital or distant- site telemedicine entity?
- Review of insurance coverages should extend to the various layers of an insurance program such as excess carriers and specialty programs such as RRGs, insurance trusts and captive insurance plans.

In Summary

Organizations can address one of the possible risk exposures for its leadership and governing body: credentialing and privileging for a telemedicine program by developing an enterprise risk management discipline of comprehensive risk identification, analysis, treatment/technique and evaluation. In this way, when the question "Are we liable for, or "if" ...?" is asked, the answer can be more easily answered and everyone can sleep a little better at night.

If you have any questions or would like additional information, please contact [Stacy Paquet](#).

About the Author

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To learn more about how OneBeacon Management Liability can help you find a tailored solution for your organization, please contact Stacy Paquet, Senior Vice President at spaquet@onebeacon.com or 212.440.6521.

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