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## COVID-19 fuels questions about patient waivers, standard of care for telemedicine

by James P. Scibilia M.D., FAAP



For the latest news on COVID-19, visit <https://www.aapublications.org/news/2020/01/28/coronavirus>.

AAP Fellows often send questions to the Committee on Medical Liability and Risk Management. While the committee is unable to give specific legal advice, it can give some general information that may be helpful. As always, it is important to recognize that laws vary state-to-state, and legal decisions depend on the facts at hand. It is important to consult a qualified attorney for legal issues affecting your practice.

**Q: I have heard of practices requiring patients to sign waivers from liability for COVID-19 exposure or an infection resulting from a visit. Will these provide legal protection if one of my patients gets ill from an exposure in my office?**

A: A variety of online forms have circulated that purport to provide broad liability protection to practices when a patient develops COVID-19 infection from exposure during an office visit. These liability waivers may offer a small measure of protection, but they do not cover all potential liability. Waiver documents will not cover willful or intentional acts or reckless behaviors. Courts generally have sided with plaintiffs in cases involving waivers, and they broadly interpret the definition of reckless or intentional behavior.

To shield providers, the waiver should define the waived liability narrowly and specifically, clearly state the COVID-19 epidemic as the inciting event and include a fixed duration for the waiver. The patient's representative should have an opportunity to review and ask questions about the document, and there should be clear guidelines for how staff should respond when patients refuse to sign. This would be especially important when a parent arrives with a sick child who needs care but refuses to sign; turning this patient away could result in a claim of abandonment.

**Q: I read that my state offers immunity for health care providers from lawsuits during the COVID-19 epidemic. Will this cover any bad outcome in my practice during the crisis?**

A: Many states have enacted some liability protections for physicians during the pandemic, but most have restrictions in coverage. In some cases, the law provides general liability protection, but most states have narrowly focused protections and these often are based on direct care of patients with COVID-19 infection.

Since these are state-specific, it is imperative for clinicians to investigate the laws pertaining to their practice



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sites. This may be especially important for physicians who work in several states where these legislated protections may vary dramatically.

Some federal laws have been modified during the epidemic to allow care to be provided in new clinical environments necessitated by the pandemic. In particular, the Office of Civil Rights at the Department of Health and Human Services relaxed enforcement of some Health Insurance Portability and Accountability Act rules with regard to telecommunication with patients. However, providers should stay vigilant for rollback of these provisions.

**Q:We are providing a lot more care through telemedicine, and my partners are uncomfortable diagnosing and treating patients who are available for exam only via video or telephone. How does the "standard of care" apply to telemedicine?**

A: Standard of care is a critical component in assessing liability in tort actions. The standard of care is not a precise and fixed level of care but is determined by specific characteristics of the patient, circumstances of the care provided, disease process and recently, availability of medical services during the pandemic.

Generally, a standard would be determined as the level of care a prudent health care professional would provide given the same set of circumstances in a specific patient. "Standard" care prior to the pandemic should be modified by the limitations placed on providers and health systems during this national emergency.

If there are concerns about the child's clinical status or a physical examination is required, then the patient should be examined in the office or emergency department. As with many aspects of liability protection, documentation and clear explanation of decision-making during telemedicine encounters are the best protection for providers.

*Dr. Scibilia is chair of the AAP Committee on Medical Liability and Risk Management.*

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