



COVID-19 Is Changing Liability Risks and Litigation in Healthcare

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Across the spectrum of care, healthcare delivery is changing as the COVID-19 pandemic continues, creating additional pressures to maintain patient safety and shaping new liability risks for hospitals, group practices, and solo physicians.

Understanding how these new risk exposures are unfolding—and how adverse events may be litigated in a courtroom environment also under strain—is the first step to taking protective measures.

Mr. Fleming offers his expert insights:

Q) What kinds of lawsuits do you expect to see linked to the COVID-19 pandemic?

A) Extraordinary circumstances and a steady stream of directives (and revisions thereto) from state and local governments have pressed physicians, practices, and hospitals to practice medicine in ways they never have before—or to not practice medicine, when certain elective forms of care have been suspended by government action, often to conserve PPE and other resources. In spite of reasonable efforts under difficult conditions, it's likely that some adverse events will be traced to this time.

It is important to note that “elective” in this context does not mean unnecessary or optional. It includes important screening and diagnostic procedures such as colonoscopies, some cancer and cardiac surgeries, and most dental procedures. Delay of elective procedures may be a source of increased litigation—many biopsies for cancer, for instance, have lately been delayed, and delay in diagnosis was already one of the most expensive areas of litigation pre-COVID19.

Other delays in care may be linked to access issues. Telemedicine has been a lifesaver for many during this crisis, but some vulnerable patients may lack access. Infrastructure can also present a barrier to telemedicine care, as some do not have sufficient internet bandwidth for video visits.

Moreover, circumstances have forced physicians to use telemedicine in ways they usually might not. Telemedicine is ideally an adjunct to in-person care, and therefore not the best option for a first visit with a new patient, but during peak infection risk, exceptions had to be made.

Among our infrequent telemedicine claims pre-COVID-19, misdiagnosis of cancer was the top allegation, and I can't imagine that risk of misdiagnosis has decreased, given the spike in telemedicine usage under nonoptimal conditions.

Also, I anticipate that some COVID-19-related cases will focus on shortages of personal protective equipment (PPE)—those claims may come from patients or employees.

Q) As you've said, providers are delivering care differently during COVID-19. How do these changes diminish or increase risks?

A) In the crush of managing a public health crisis, many hospitals and practices have had to take temporary measures that impact patient safety: Some of these measures mitigate certain risks but may amplify others.

Healthcare providers in hard-hit areas are working longer hours, sometimes with insufficient PPE, sometimes in large tents put up in parking lots or other overflow sites. In surge locations, staff from other departments may be covering in the emergency department (ED) or intensive care unit (ICU)—this could increase the risk of communication gaps. All of these resource-stretching measures, taken together, may add up to a risk profile that is more than the sum of their parts.

While responding to health directives from state and local governments, as well as advisories from the Centers for Disease Control and Prevention (CDC) and other trusted sources, hospitals and practices will continue to experience unavoidable delays in treatment to all patients. Testing delays do not help.

In addition, by patient preference, many routine checkups and tests have been delayed, not to mention routine procedures. Adverse events linked to these delays could affect physician liability.

Q) What can physicians and practices do to protect themselves during the pandemic?

A) Conscientious documentation becomes a witness for the physician in the courtroom. In the COVID-19 era, practices may benefit from documenting not only individual patient interactions, but how the practice is following CDC infection control guidelines and recommendations from state and local health authorities at particular points in time. This could be as simple as jotting a daily note in an electronic calendar.

Q) How are courtroom changes during the pandemic challenging defense teams?

A) In a recent medical malpractice suit, a physician member of The Doctors Company, with assistance of counsel and The Doctors Company's support, secured a defense verdict despite many changes in the courtroom environment that could have posed problems if we had not been prepared to adjust.

We've seen firsthand how physicians facing a court hearing during COVID-19 need a legal team that is prepared for changes in depositions, jury selection, and the trial itself. For instance, depositions may be completed by video, with multiple screens for the attorneys, parties and exhibits, and jury selection may take place partly via written communication. During trial, showing evidence must be done differently, so defense teams need solid technology skills in settings where counsel can publish exhibits to the jury using large screens.

Some courts are taking 15-minute breaks every hour for better ventilation and cleaning. This breaks the momentum when an attorney is speaking with a witness, reduces the overall trial time per day, and prolongs the trial duration. Taking time out of a practice to participate in an extended trial can further stress a stretched practice.

Q) Litigation stress places a burden on physicians at any time. How is this different during the pandemic?

A) Individual trials are taking longer, compounding delays from the existing backlog. This keeps physicians in limbo—and could even affect their credentialing. As previously reported by [RAND](#), pre-pandemic, on average, physicians were already spending more than 10 percent of their careers living under the shadow of an open malpractice claim.

It is true that at any time, even the best of physicians could find themselves [facing an unexpected lawsuit](#). And states around the country handle cases differently. That's why our members are supported by legal teams with deep roots and expertise in members' local venues. In addition, knowing that the [stress of malpractice litigation](#) affects physicians deeply, and knowing that preparation is the key to victory, [we support our members through in-depth litigation preparation](#).

Like the COVID-19 pandemic itself, pandemic-related risk exposures are fluid. Physicians, practices, hospitals, and systems are facing rapid changes in liability exposures at the same time as the day-to-day business of healthcare is changing under their feet. The Doctors Company is prepared to assist our members through lawsuits during these unprecedented times so that, even with changes in the courtroom, members can present their best defense.

The guidelines suggested here are not rules, do not constitute legal advice, and do not ensure a successful outcome. The ultimate decision regarding the appropriateness of any treatment must be made by each healthcare provider considering the circumstances of the individual situation and in accordance with the laws of the jurisdiction in which the care is rendered.