

Liability and Patient Standards of Care in Response to COVID-19



Benjamin Jackson
bjackson@mwlaw.com
(501) 688.8887

04/10/2020

Patient standards of care have always been a moving target, dependent on specialty, circumstances, and resources. Add in a global pandemic and this standard for the treatment of COVID-19 is in a constant state of flux. Novel issues have been elucidated, but with it, novel liability protections have been implemented. This article serves as an update for the relaxed standard of care during the COVID-19 outbreak, as well as identifying best practices for COVID-19 specific issues.

Federal Liability Protections

Scope of Immunity for Healthcare Providers – The broadest liability protection for healthcare providers is the Public Readiness and Emergency Preparedness Act (“PREP Act”). While elective and non-essential medical procedures have been delayed or canceled, many specialist physicians’ day-to-day work has decreased. However, the number of COVID-19 patients is on the rise, causing surges in Intensive Care Units (ICUs). While the typical medical malpractice insurance policy only covers a physician’s specialty, the PREP Act allows the physician to treat COVID-19 patients with immunity. Specifically, the PREP Act has a broad scope of treatment protections for countermeasures including “antiviral medications, other drugs, biologics, vaccines, diagnostics and/or devices (e.g., COVID-19 testing and respiratory therapy) to treat, diagnose, cure, prevent or mitigate COVID-19.” For example with the PREP Act, orthopedic surgeons and dermatologists can now pick up the slack in the ICU and treat COVID-19 patients without risk of litigation for the duration of the pandemic. Moreover, this protection is not limited to doctors, but to any healthcare provider, including nurses and physician’s assistants. The only exception to this law is that healthcare providers cannot act with gross negligence or intentional misconduct. Further, this liability extends administering of any FDA authorized emergency use drugs, procedures, or diagnostic tests found [here](#).

Volunteer Healthcare Providers – Additionally, there is immunity for volunteer physicians. In response to the rising number of COVID-19 cases, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) was enacted on March 27. Among other things, the law provides that volunteer physicians and healthcare providers cannot be held liable for diagnosis, prevention or treatment of COVID-19 during the duration of the Public Health Emergency. Similar provisions have always existed in the Volunteer Protection Act and in the Health Insurance Portability and Accountability Act (“HIPAA”), but the CARES Act preempted additional rules and regulations that existed in its predecessors. For instance, the Volunteer Protection Act was only applicable to healthcare provider working with nonprofits and government entities, while HIPAA only provided liability protection for free health clinics and required volunteers to be sponsored by a supervising physician. The CARES expands the scope of volunteer work to any healthcare entity without the need for direct supervision. But like the PREP Act, these laws do not give protection for gross negligence and intentional misconduct.

Arkansas' Response to COVID-19

Telemedicine – On March 11, 2020, Governor Asa Hutchison signed an executive order that expanded the use of telemedicine in Arkansas. Specifically, the order (1) suspends provisions that require an in-person encounter or a face-to-face examination to allow time audio and visual means to establish a professional relationship and (2) allows reimbursement to health care providers who take advantage of this provision. While telemedicine has been extended and unless a malpractice policy indicates, medical malpractice protections do not extend to services given to patients located outside of Arkansas. More information about Arkansas' expansion of telemedicine can be found [here](#).

Moreover, as a best practice, physicians practicing telemedicine with a new patient, should document consent either through written or oral means. Additionally, HIPAA provisions have been relaxed in order to diagnose COVID-19 cases, and platforms approved by the Department of Health and Human Services include Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype. More information can be found [here](#).

Out of State Licenses – Arkansas has implemented the Uniform Emergency Health Practitioners Act (UEVHPA), which removes the border barrier for volunteer, out of state physicians to practice inside Arkansas during an emergency. However, to practice those physicians must register with the state [here](#).

Best Practices

With the spread of a pandemic, new issues arise that are not seen in the regular practice of a physician. These issues arise due to staffing shortages, lack of resources, and increased number of patients. To deal with the surge capacity, best practices are identified below.

Lack of Resources – When determining resource allocation, such as ventilators and PPE, planning procedures must be implemented on the front end to avoid any delay in patient treatment. While these policies will not constitute the standard of care if litigation arises, they provide the guidance on the how hospitals can ethically and effectively distribute their scarce resources. Moreover, the policies should be rooted in ethical principles, like fairness, life-saving effectiveness, transparency, and consistency. An example of a strategy for scarce resource allocation can be found [here](#).

Triage Procedures – With the surge of patients during a pandemic, efficient triage procedures must be implemented, so that patients can receive care timely and effectively. Considerations for triage for patients include extending supplies and resources, expanding the scope of healthcare providers, and prioritizing patients who would benefit from resources. Moreover, any decisions in triage should be communicated to the patients for whether or not they will be receiving care or services. An example of a triage procedure for a crisis standard of care can be found [here](#).