TELEMEDICINE: GUIDANCE ON NAVIGATING ETHICAL AND LEGAL IMPLICATIONS

In a pandemic, offering health care remotely via telemedicine provides alternative ways in which patients and physicians can engage with each other. These technologies impact the healing relationship beyond the expected challenges of privacy and confidentiality (Langarizadeh, 2017). The patients (or their proxy) expect that their physicians will place patient welfare above other interests and provide continuing competent care (AMA Code of Medical Ethics Opinion 1.2.12). The principles of bioethics namely beneficence, non-maleficence, justice and autonomy, continue to apply and must be upheld in these trying times.

This telemedicine guidance document from the faculty, alumni and graduate students of the UP Manila Medical Informatics Unit is fifth in the series. The use of “guidance” (advice) rather than “guideline” (rule) was deliberate and is most applicable to this particular document. While comments were solicited from legal and ethics experts, what is in this document is only indicative and will likely evolve as outcomes are evaluated and critically reflected upon. This may be useful for:

- Filipino physicians engaging in telemedicine
- Medical specialty organizations supporting their members in transitioning to telemedicine

This guidance seeks to answer the following questions:

- **Under what circumstances is the use of telemedicine ethical?**

Telemedicine should be used to provide healthcare access to patients who cannot see a physician within a safe and acceptable time frame. The physician should be able to recommend in-person consult in case of emergency, and consider steps to eliminate conflict of interest.

- **What are the ethical considerations when using social media platforms for telemedicine?**

The following need to be considered when using social media platforms for telemedicine: patient privacy and security, data ownership and possible erosion of the patient-physician relationship and professional boundaries.

- **How can an informed consent for telemedicine be obtained?**

A telemedicine consent must be freely given, specifically expressed by the patient, with careful consideration of how it was extracted in the context of oral, written or other technological means. Where consent is the basis of processing of sensitive personal information, consent should be expressed at every teleconsultation session.

- **How can a physician determine the professional fee for a teleconsultation?**

Professional fees should be commensurate to the services, considering the patient's finances, case nature, time consumed and physician skill.

- **What are the malpractice risks with telemedicine?**

The malpractice risks include failure to diagnose, negligent treatment, and medication cases. These stem from miscommunication, poor image qualities, and lack of proper documentation or workflow protocols.

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ACKNOWLEDGMENT:

We are thankful to the following experts for generously providing comments and insights in the development of this guidance:

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Date released: **3 June 2020**

- **Under what circumstances is the use of telemedicine ethical?**

Telemedicine should be used to provide healthcare access to patients who cannot see a physician within a safe and acceptable time frame. The physician should be able to recommend in-person consult in case of emergency, and consider steps to eliminate conflict of interest.

The World Medical Association (WMA) Statement on the Ethics of Telemedicine in 2007 (amended 2018) says that telemedicine should be employed in situations when a physician cannot be physically present, within a safe and acceptable time period, and where it has been proven to be safe and effective. Medical specialty organizations may need to review the evidence base for low resource settings to provide guidelines for Filipino physicians.

While telemedicine can make healthcare accessible, there are those who will be disenfranchised because of knowledge gaps, equipment costs and internet bandwidth. (Langarizadeh, 2017). The physician should be aware and respect difficulties that may arise with technology, and thus must be prepared to recommend in-person consultation when connecting via telemedicine is impossible and in cases of emergency.

The American Medical Association (AMA) Ethical Practice in Telemedicine, Opinion 1.2.12, adds that all physicians who participate in telemedicine have an ethical responsibility to disclose financial interests in the application or service and take steps to manage or eliminate conflict or interest.

While an in-person consultation remains the gold standard (DOH-NPC JMC 2020-0001) and follow up teleconsultation visits are more likely to be successful (Medical Council of India, American Association of Neurology; 2020), patients are likely to be seen by a particular physician for the first time via telemedicine because of the CoVID-19 pandemic. In this less than ideal situation, upholding the following principles of healthcare ethics can help establish the therapeutic relationship between the physician and patient.

- *Confidentiality:* Despite being a new patient, he/she should feel secure that the physician is taking the necessary precautions to keep the teleconsultation confidential as it is being conducted, and afterwards, that the documentation made is secure.
- *Informed Consent:* The patient should not feel forced to be in a teleconsultation. They should fully understand the benefits and limitations of telemedicine, especially since it will be the first encounter with this particular physician.
- *Autonomy:* While the patient can withdraw consent and seek consultation elsewhere, the physician has the discretion to choose if a first visit via teleconsultation is appropriate.
- *Truthfulness:* As the physician and patient are meeting for the first time virtually, the patient must be truthful in giving information to the doctor to help ensure a correct diagnosis and subsequent management. The physician must truthfully disclose the limitations of his expertise (i.e. the patient needs to see another specialist) or of the technology (i.e. cannot evaluate skin rash because of poor camera quality).

- *Justice:* While telemedicine for the first consultation is not ideal, it may be just if it will be the means to provide the best possible care and assistance to the patient at present, given the circumstances.
- *Beneficence:* The physician is unable to conduct a thorough physical examination if the patient's first visit is via telemedicine. Despite this limitation, the patient may be best served through a teleconsultation, when their condition may worsen in its absence.
- *Non-maleficence:* Especially in the setting of a first visit via telemedicine, the physician should give specific follow up instructions, including when an in-person visit may be necessary.

- **What are the ethical considerations when using social media platforms for telemedicine?**

The following need to be considered when using social media platforms for telemedicine: patient privacy and security, data ownership and possible erosion of the patient-physician relationship and professional boundaries.

As about 74 million Filipinos are using social media platforms, with a majority on Facebook (Kemp, 2020), the use of social media for telemedicine has surfaced as a convenient way to communicate for physicians and patients. The following points need to be considered:

1. Patient privacy and security

The US Department of Health and Human Services Office for Civil Rights (OCR) lists the following platforms as HIPAA-compliant video communication products: Skype for Business, Updox, VSee, Zoom for Healthcare, doxy.me and Google G Suite Hangouts Meet (Accessed HHS.gov). While the Philippines is not covered by HIPAA, compliance with HIPAA has become a surrogate for evaluating the security of health-related software.

In March 2020, the OCR released a notice allowing health care providers to use social media platforms (e.g. Apple FaceTime, Facebook Messenger Video Chat, Google Hangouts, Viber, and Skype) to provide telehealth during the COVID-19 pandemic despite previous Health Insurance Portability and Accountability Act (HIPAA) restriction. This does *not* include public facing applications like Facebook Live or TikTok. As the Philippines is not covered by HIPAA but by the Data Privacy Act of 2012, such relaxation of the HIPAA rule may not necessarily apply locally. Shachar, et. al (2020) recognizes that this approach to use social media was needed to provide access of telemedicine to many. However, long-term issues with these platforms such as privacy and security will require consideration. Healthcare physicians are advised to ensure that available encryption and privacy modes are enabled and patients are informed that there are concerns with the use of such applications.

The Health Privacy Code of the Philippine Health Information Exchange Framework (2016) mentions these security & privacy responsibilities towards the use of Social Media: "Health care professionals shall always be mindful when posting on social media that any content, once posted online, may be easily disseminated to others and is essentially irreversible." Physicians must also

consider whether the telemedicine platform they are intending to use has protocols to prevent unauthorized access and to protect the integrity of patient information while receiving, storing, and transferring (AMA Code of Medical Ethics Opinion 1.2.12; Langarizadeh, 2017). Facebook's history of data breaches, as mentioned by Sanders & Patterson (2019), is particularly concerning in this regard.

A patient's images may be sent via social media messaging, with serious implications for privacy. Most often, since these images do not follow guidelines to make the patient unrecognisable (Prateek, 2017), health professionals need to disclose the current Terms of Service of social media platforms and inform patients when obtaining consent (Al-Balushi, 2020). Although patients have the right to retract their consent, once an image has been uploaded to social media, retrieving all possible copies becomes impossible (Palacios-Gonzáles, 2015), especially in case of a data breach.

2. Social media and data ownership

According to Petersen and DeMuro (2015), the terms and conditions of most social media sites provide the position that *they* own the data *you* generate. Some may have used a public social media site in the diagnosis and/or treatment of patients which has been done with Facebook for the diagnosis of common skin conditions and rare congenital diseases (Garcia-Romero, 2011). In such cases, the social media site's Terms of Service will determine how the data may be used.

Chretien (2013) also says that posts on unsecure open sites such as third party websites like Facebook and Twitter, whether public or private, will ultimately belong to the third party. Facebook data use policy states that they can access, preserve and share user information in response to a legal request within and outside of the US, and that this information may be shared.

3. Social Media and the Patient - Physician Relationship

The AMA Code of Ethics Opinion 9.124 and the World Medical Association (WMA) Statement on the Professional and Ethical Use of Social Media agree that we must maintain appropriate boundaries for patient-physician relationships. Traditional healthcare communication is characterized by confidentiality, trust, and privacy. However, since technologies impact data privacy and security, the physician-patient relationship may suffer in consequence (Denecke, 2015).

Establishing a social media relationship, for example to add a patient as a "friend" or ask a patient to add a physician as a "friend" is ethically questionable (Denecke, 2015; Chretien, 2013). This is because the professional boundaries of such interactions become unclear. Guseh (2009) and Chretien (2013) advise physicians to *never* extend a request to become a social networking "friend" with a patient. Such online "friendships" compromise the physician-patient relationship, leading to interactions that are extraneous, do not prioritize the patient's therapeutic interests, or lead to problematic physician self-disclosure whether it is intentional or inadvertent.

As an example by Denecke (2015), physicians can access personal health behaviors of patients, such as if they quit smoking or maintain a healthy diet. This is called "*patient-targeted Googling.*" Physicians should be sensitive to the way this information is publicly displayed and exercise judgement. Al-Balushi (2020) enumerates several examples such as how some psychiatrists use social media to gain collateral history of their patients. This should not be done without the patient or their designated proxy's consent. Digitally tracking a patient's personal behavior threatens the trust needed for a strong physician-patient relationship and influences the treatment of the patient.

Healthcare professionals, not just physicians, have had their character judged on how they represent themselves online. Al-Balushi (2020) explains this as society's expectations that healthcare professionals are on a pedestal--to be role models that should be emulated, to be healthy and fit, and free from family or behavioural issues. The use of social media raises concerns on what constitutes the line between professional and personal identity (Parsi & Elster, 2015).

In Article V Section 5.4 of the Philippine Medical Association Code of Ethics, "for the promotion of medical practice, physicians may use professional cards, internet, directories, and signboards." It further states that "signboards and **internet postings** should contain only the name of the physician, field of specialty, office hours and/or office or hospital affiliations. The act of physicians in publishing their personal superiority, special certificates, post-graduate training, specific methods of treatment, operative techniques is not allowed." Availability of information about the physician via social media has allowed patients to develop a familiarity to a practice before entering a physician's office. However, it can also influence the patient's judgement. Instead of relying on their personal interactions with their physicians, patients might look at a skewed online perception of the physician. When this perception is not borne out, such as not meeting heightened expectations or if complications arise, patients can feel betrayed or deceived. This phenomenon is known as "*institutional betrayal*" (Smith & George, 2018).

- **How can an informed consent for telemedicine be obtained?**

A telemedicine consent must be freely given, specifically expressed by the patient, with careful consideration of how it was extracted in the context of oral, written or other technological means. Where consent is the basis of processing of sensitive personal information, consent should be expressed.

The Data Privacy Act (DPA) of 2012 defines **Consent** in Sec 3.b as "Consent of the data subject refers to any **freely given**, **specific**, **informed indication of will**, whereby the data subject agrees to the collection and processing of personal information about and/or relating to him or her." The Recital 32 of the Regulation (EU) 2016/679 or the General Data Protection Regulation (GDPR) also defines that consent can be given "by a written statement, including electronic means or an oral statement. This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context, the data subject's acceptance of the proposed processing of his or her personal data."

Manifestation of diseases may differ from patient to patient and so "the element of ethical duty to disclose material risks in the proposed medical treatment cannot thus be reduced to one simplistic formula applicable in all instances" (Patdu, 2017). Teleconsultants should tailor-fit their disclosure of risks for each patient.

In DPA Sec 13.e, consent may be not required if processing is for medical purposes. However, since a third party telemedicine platform provider is being used, consent becomes a requirement. Obtaining consent impacts **patient autonomy** (Odhiambo, 2018). The principles of transparency, legitimate purpose, and proportionality mentioned in the DPA reminds us that the patient has the right to be informed of why, how and to what extent their personal information is being processed.

Where consent is the basis of processing of sensitive personal information, consent should be thus ***expressed***. An NPC Advisory (Opinion No. 2017-42) says that we "must never assume the data subject's consent for any activity involving his or her personal information." The GDPR supports this in that, "Silence, pre-ticked boxes, or inactivity, does not constitute consent." In some cases there may be subtle design features in social media such as developers using pop-up windows that "nudge" users to a desired direction. In the health care context, this can be in direct conflict with medical ethics (Terasse, 2019). Likewise, Denecke (2015) cautions that while a checkbox may fulfill legal requirements, it is not sufficient to meet the underlying ethical basis in the case of elderly users, some of whom may be mildly cognitively impaired. The patient's consent must be obtained at **each** encounter prior to conducting a telemedicine consultation (American Association of Neurology, 2020; Rheuban, 2018).

Suitable tutorial sessions and workshops on consent decisions and processing can be done involving all interested stakeholders: the patient, their caregiver(s), and health care professionals in an effort to help all parties understand what is being consented to (Denecke, 2015). In the setting of hospital institutions, consent forms must be approved by the Legal Team, Data Privacy Officer, and Quality Management Officers.

- **How can a physician determine the professional fee for a teleconsultation?**

Professional fees should be commensurate to the services and considering the patient's finances, case nature, time consumed and physician skill.

Shachar (2020) argued that since telehealth visits tend to be shorter and include fewer diagnostic services than inpatient visits, payment at identical rates as in-person would represent overpayment. This implies that professional fees should be close but not identical to in-person visits. However, we refer back to our previous guidances especially on pages 14 of *Telemedicine for Health Professionals Guidance* & page 9 of *Teleconsultation Guidance for Filipino Clinicians*, on how to achieve a high quality teleconsultation and projecting a natural environment. This is to ensure that telemedicine would not be inferior to in-person consult.

We also refer to the Philippine Medical Association Code of Ethics Article 2 Section 7 statement which says that: "Professional fees should be commensurate to the services rendered with due

consideration to the patient's financial status, nature of the case, time consumed, and the professional standing and skill of the physician to the community." That statement can be applied even if the consultation is done virtually.

In conclusion, the physician can determine their professional fee based on their consideration of the following: the patient's financial status, nature of the case, time consumed, and professional standing and skill. Knowledge of the benefits and shortcomings of telemedicine may also be a factor in deciding on a professional fee. It is in the physician's discretion if the length of time rendered in a teleconsult was adequate to arrive at a satisfactory diagnosis. Similarly, if the physician determines that the diagnostic exams ordered in a teleconsult would have been the same had an in-person visit had transpired, then having a similar rate to in-person consults may be considered.

- **What are the malpractice risks with telemedicine?**

The malpractice risks include failure to diagnose, negligent treatment, and medication cases. These stem from miscommunication, poor image qualities, and lack of proper documentation or workflow protocols.

According to the U.S Center for Connected Health Policy, medical malpractice claims involving telemedicine have been very few and majority are settled out of court. A recent JAMA article by Fogel and Kvedar (2019) analyzed medical malpractice cases from "*direct-to-consumer*" (DTC) telemedicine services, which are telemedicine services without a prior physician-patient relationship, in a legal case database in 2018. They did ***not*** identify any case of medical malpractice reports. This may be due to the low risk conditions associated with the service such as "sinus problems, allergies". High risk telemedicine services such as tele-stroke services need prior in-person encounters with physicians. Also, DTC teledermatology services treat only acne and do not prescribe medications such as isotretinoin. They also have routine documentation to patients advising them to seek in-person consultation. There is a lack of accessible information on medical malpractice using telemedicine in the Philippines.

Miscommunication between patient and physician is a significant patient safety issue. In a study by Katz, et. al (2007) they noted that in telephone medicine, the most common allegation was failure to diagnose, followed by negligent treatment, and medication related cases. The leading error type was poor documentation while faulty triage decisions came at a close second due to incomplete history taking over the phone. Lack of workflow policies and protocols result in dropped messages and delayed responses to patients.

Misdiagnosis as the cause of malpractice suits may stem from different reasons. It may be due to poor transmission of images in case of teleradiology due to poor internet connection causing inability to identify very small radiological abnormality (McLean 2006) or unstable connection during history taking causing miscommunication between the patient and the health care professional. Poor transmission of images was also a problem in telepathology and teledermatology. Ernasäter et al (2012) analyzed characteristics of all malpractice claims arising

from a telephone medical advice service in Sweden. Miscommunication or failure to listen to the callers was the most common reason for malpractice claims.

Other causes of malpractice in telemedicine are lack of proper informed consent, violations of confidentiality and data privacy, and negligence from online or telephone prescription. It is very common to give telephone prescriptions to a patient complaining of a seemingly mild symptom. Like conventional medicine, data acquired in telemedicine must be handled with utmost care. Any breach in security may compromise the data stored in it and may cause disclosure of sensitive information (Caryl 1997).

These risks can be mitigated by putting in place workflow policies and protocols such as protocols on effective communication, accurate documentation, and proper handling of messages and calls.

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