

Digital Medicine Liability and Risk: What You Need to Know



When adopting any new technology, you will need to understand and assess your liability and risk. Some common legal risks and liability questions associated with digital medicine may include but are not limited to:

- Medical liability
- Licensing
- Consent
- Privacy and security

Considerations to assess in order to understand potential liability and attempt to mitigate risk when implementing digital health solutions may include but are not limited to:

- Check to see whether or not your malpractice carrier covers digital health practices under your current policy. Some carriers may require disclosures of these practices to receive coverage.
- Know your federal and state laws around various types of digital medicine. Different states may have different definitions, statutes, regulations, sub-regulatory guidance, or case law as it relates to the licensing, practicing digital health, and consent. States may differ as to whether you need to have an established physician-patient relationship prior to performing telemedicine (and potentially other digital health solutions) and may also have different requirements for informed consent related to telemedicine and telehealth.
- Determine whether you will need to update any informed consent forms to comply with new and modified telehealth laws. All conversations with patients regarding digital health solutions should be an open, two-way discussion about the benefits, risks, alternatives, and potential consequences in choosing to use (or not) digital health solutions.
- Digital health solutions can be negatively impacted

by loss of internet or power, software incapability, interrupted or slow internet transmissions, and more. Delays in care without proper backup plans can result in serious consequences to patients. To assess and balance potential liability, it's beneficial to have a plan in place in case the digital health solution fails and to discuss the plan and alternatives with patients. This topic may also be addressed in contracting with the digital health solution vendor.

- Protect yourself and your organization/practice during the contract process with your future vendor partner. Some contract provisions that relate to liability include but are not limited to:
 - **Indemnity clauses** - The clause, among others, addresses and apportions certain risks between contracting parties. It often specifies under what conditions each party must compensate the other party for intentional or unintentional harms, claims, or other liabilities. You may be able to manage your potential risk by limiting your overall or total liability to a manageable amount through a specific dollar cap, the amount of your investment, or other ways.
 - **Choice of Law Provision** - This clause dictates what state, federal, or international laws the contract operates under. Make sure you are comfortable with the jurisdiction chosen.
- Technology has increased connectivity and collaboration in all facets of the health care delivery systems, so particular attention should be paid to the cybersecurity practices at your organization as well as with your future digital health vendor.

In all situations, however, you should obtain legal advice from an experienced attorney whenever you are entering into a legally binding agreement.

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