With the advent of the internet, there is a trend in the healthcare industry of moving away from face-to-face interaction between physician and patient to the delivery and sharing of medical information over the internet – known as “e-health” or “telemedicine.” Telemedicine may involve electronic transmissions of CT scans, MRIs and/or ultrasound pictures to external providers who in turn advise treating physicians. Although this trend comes with its efficiencies in terms of cost and time savings, there are also potential liabilities. Legal concerns involve patient privacy, proper licensing of the outsourced provider and the problematic context of malpractice in the case of negligence.

Background

The healthcare industry is just one of many industries that have been dramatically influenced by the Internet. As a result of the Internet, the healthcare industry in recent years has faced a paradigm shift in the way healthcare and medical services are provided. This shift is moving away from the theory that patient care should involve face-to-face interaction between physicians and patients located in the same room, and more towards the concept that the delivery and sharing of medical information over the Internet – known as “e-health” or “telemedicine” – can revolutionize, and hence improve, the way in which physicians treat their patients.

But change is not necessarily a good thing. Although telemedicine promotes consultation between physicians regarding a patient’s care, the electronic transfer and sharing of a patient’s information via the Internet presents potential legal liabilities and consequences of which physicians need to be aware.

Issues

One aspect of telemedicine – teleradiology – is illustrative of these points. Teleradiology is an emerging trend in telemedicine involving the electronic transmission of CT scans, MRIs and/or ultrasound pictures to companies operating in the United States or overseas which take advantage of time zone differences and the latest technology by having radiologists available who can quickly read and interpret the transmitted images and advise treating physicians. Used more often in rural areas and by smaller hospitals, which often experience a shortage of radiologists or do not staff radiologists in-house, teleradiology is viewed as improving the quality of healthcare by guaranteeing that well-rested radiologists are available 24/7.

But while some doctors and hospitals tout the benefits of teleradiology, the practice raises a host of legal concerns. For example, are properly licensed radiologists performing the work? Physicians are required to be licensed in any state in which they practice medicine, and many states include electronic consultations in their definition of the “practice of medicine.” Cyberspace, however, knows no boundaries, and telemedicine does not recognize state or international boundary lines. Remote
radiology operations which may be staffed with only one or two U.S. certified radiologists that approve reports prepared by less-qualified or un-licensed technicians, a practice known as “ghosting” may be worrisome. Given the difficulties in authenticating who is doing the work, policing such services remains a concern.

Another concern is that of patient privacy and the related issue of informed consent. The trend toward the use of teleradiology has resulted in several regulatory initiatives, including state and federal legislation designed to protect patient privacy and to ensure that patients are notified whenever information about them is transmitted elsewhere, especially overseas to countries that lack strong privacy safeguards. For example, Rep. Edward J. Markey (D-Mass.) and Sen. Hillary Rodham Clinton (D-N.Y.) recently introduced legislation that would require patient consent in advance of transmission.

As physicians and patients become more connected through telemedicine, malpractice also becomes an issue. Although establishment of the physician-patient relationship may seem more problematic in the context to telemedicine, courts have long held that such a relationship can be created even in the absence of the physician actually meeting, or coming into physical contact with, the patient. Given the dearth of case law involving medical malpractice over the Internet, it is likely that analogies will be drawn from other types of medical malpractice cases.

Questions concerning where a malpractice case can be filed when the alleged negligence of the overseas radiologist is at issue, and whether state or foreign law would apply, present additional exposure for hospitals. The inability to easily interact with the overseas radiologist also creates a risk management problem for the emergency physician in the decision to discharge the patient before the in-house radiologist is available for a discussion of the diagnosis.

Comment

In sum, the trend toward greater use of telemedicine is widening the spectrum of care that doctors can provide from afar and enabling more outsourcing of medical services overseas. But given the host of legal issues accompanying the use of telemedicine in treating patients, and the fact that telemedicine has developed without the benefit of any formal law aimed directly at the practice of medicine on the Internet, the users of such technology are left wondering whether to embrace telemedicine as a friend or ward it off as a foe to the medical profession. Until the many legal unknowns can be definitely answered, physicians may be reluctant to provide consultations over the Internet, thus keeping the healthcare industry as a whole from fully realizing the benefits of this truly revolutionary way of treating patients.