



Risk, Policy, and Professional Liability in a Pandemic

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May 21, 2020

Agenda

1. Telehealth Webinar Follow-Up
2. Regulatory Changes to Monitor
3. Impact of COVID-19 on Malpractice Litigation
4. Back to Business Resource Guide
5. Questions



Telehealth Webinar Follow-Up



Telehealth Is Here to Stay

» Stakeholders:

- Patient
 - » Social determinants of health
 - » Reduced no-show rates
 - » Improved compliance with follow-up care
- Physicians
- Employers
- Payers

“I think the genie’s out of the bottle. I think it's fair to say that the advent of telehealth has been just completely accelerated, that it’s taken this crisis to push us to a new frontier, but **there's absolutely no going back.** ”

– Seema Verma, CMS Administrator

Telehealth Poised to Become “Table Stakes” in Healthcare

- » Basic patient engagement and retention efforts will require effective telehealth
- » Elevated expectations for telehealth post-COVID-19



Integrated and well-supported services



Seamless experience for patients and providers



Ongoing promotion to patients



Expanded telehealth adoption must not ignore care disparities

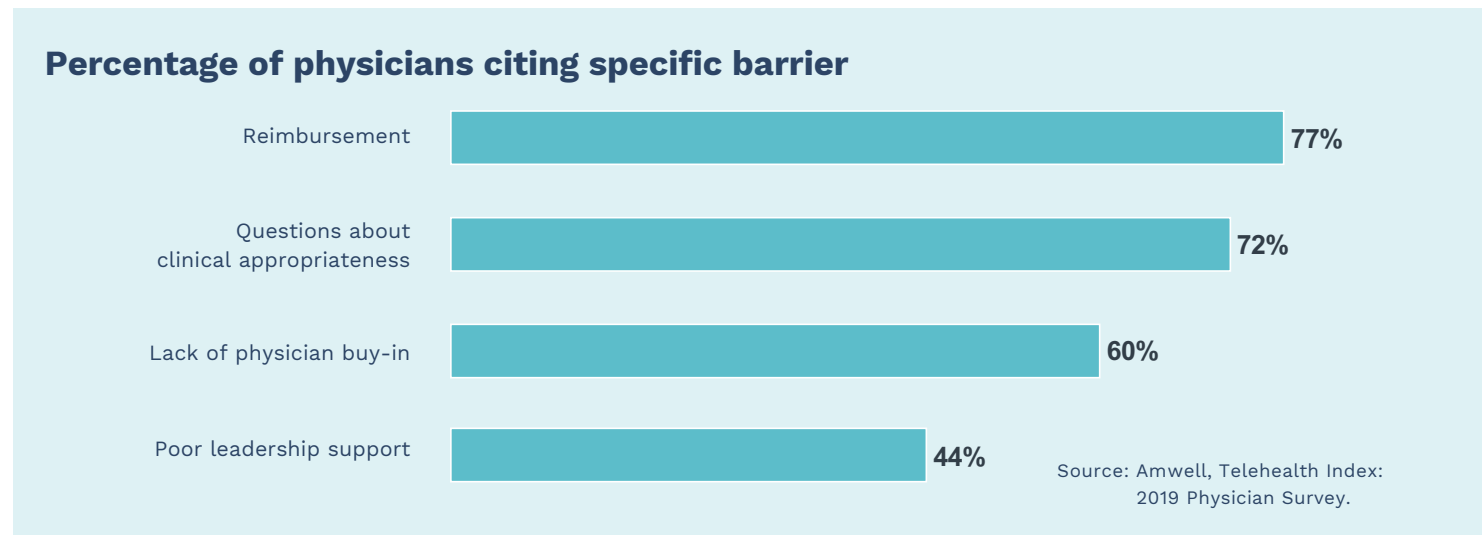
Delivery models reliant on patient access to technology and internet must not overlook the already underserved.

Future Considerations

- » Reimbursement parity—ATA priority
- » Licensure—very important to keep front of mind
- » ROI considerations
 - Cost
 - Logistics
 - » EHR integration
 - » Service providers
- » Risk
 - Scope of service—chief complaints
 - Emergency protocols

COVID-19 Answers Physicians' Greatest Concerns

» “National demonstration” addresses four prominent barriers to telehealth



Telemedicine Best Practices from Dr. Robert Caudill

- » Not better or worse—different
- » Cameras do not confer expertise
- » Clinical encounter is not made easier by the introduction of this technology
- » Handling the pace (↓ no show rate?)
- » Risks

Communicating with Telehealth

- » Failure in communication can be identified in 30% of medical malpractice cases (CRICO)
- » All telemedicine encounters require clear communication skills, both written and oral
- » Practical tips include:
 - Use a comfortable, quiet setting
 - Make eye contact with the camera, not the screen
 - Have patience with your patient

Risk Mitigation

- » Licensure—assure you are properly licensed
- » Logistics
 - Environment
 - Technology
 - Treatment protocols
 - Consent
 - During visit, ensure all patient questions are answered
 - Follow-up treatment plan
- » Avoid dangerous workarounds
- » Create back-up plans
- » **Excel at communication and documentation**



Documentation, Documentation, Documentation

- » Patient's request for telemedicine services
- » Patient's consent
- » Patient and provider location
- » Duration of visit, if needed for billing
- » Complete details of the visit
- » Avoid auto-fill documentation



Regulatory Changes to Monitor





REGULATORY CHANGES TO MONITOR—FEDERAL

Centers for Medicare & Medicaid Services



<https://www.cms.gov/about-cms/emergency-preparedness-response-operations/current-emergencies/coronavirus-waivers>

<https://www.cms.gov/files/document/covid-19-physicians-and-practitioners.pdf>

- » Telehealth   HHS OIG co-pay waiver guidance
- » Workforce & supervision requirements
- » Provider enrollment
- » Paperwork requirements
- » Stark law waivers
- » Non-emergent healthcare

REGULATORY CHANGES TO MONITOR—FEDERAL

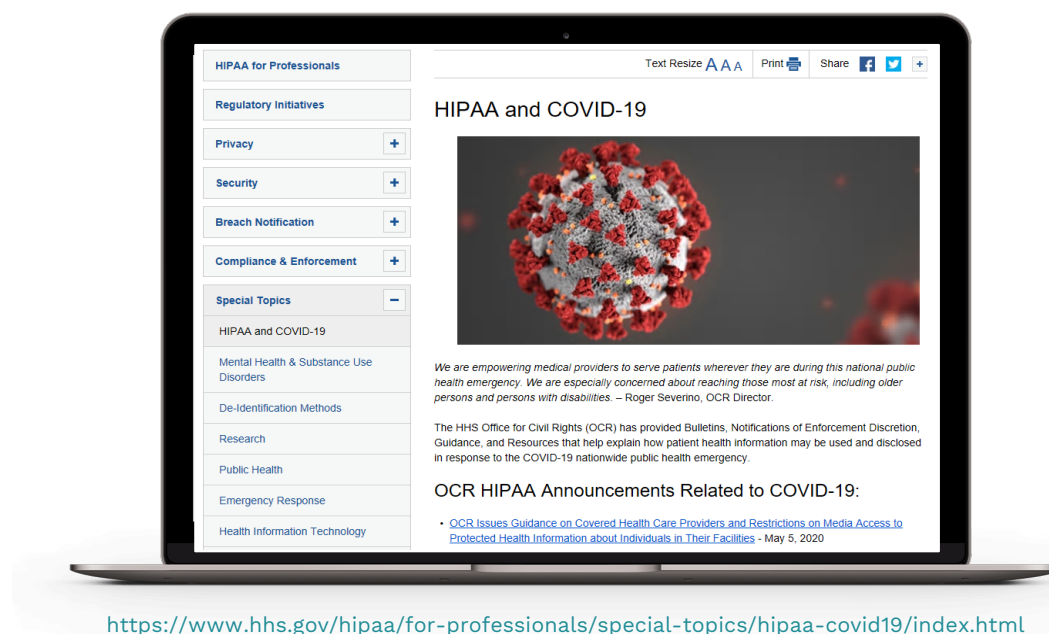
Office for Civil Rights

» HIPAA

- Guidance
- Enforcement discretion

» Civil Rights

- Complaints
- Bulletins



<https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/index.html>

REGULATORY CHANGES TO MONITOR—FEDERAL

Centers for Disease Control & Prevention

Care for Patients



Evaluation and Testing



Clinical Care Guidance



FAQs

Protect Patients and Workers



Infection Control



Optimize PPE Supply



Potential Exposure at Work

Facility Guidance



Preparedness Tools



Guidance for U.S. Facilities



Framework for Non-COVID-19 Care



<https://www.cdc.gov/coronavirus/2019-nCoV/hcp/index.html>

Other Federal Agencies

Industry-specific guidance

Personal Protective Equipment



<https://www.osha.gov/SLTC/covid-19/>



**U.S. Equal Employment
Opportunity Commission**

<https://www.eeoc.gov/coronavirus>



Employees at higher risk
of illness

Harassment due to
national origin

REGULATORY CHANGES TO MONITOR—STATE

State-Level Health Departments



REGULATORY CHANGES TO MONITOR—STATE

Medical Boards & Associations



Medical
Boards



American Hospital
Association™

Advancing Health in America

Medical
Associations

REGULATORY CHANGES TO MONITOR—STATE

Don't Forget Executive Action & Legislative Activity

- » Federal
- » State
- » Local



Impact of COVID-19 on Malpractice Litigation



Areas to Cover

1. Frozen Court Dockets
2. Healthcare Heroes “Effect”
3. State Protections of the Heroes
4. Litigation Financing “Surge”



COVID-19/MALPRACTICE LITIGATION

Frozen Court Dockets

Coronavirus Freezes Most Litigation Filings in New York State Courts, So Look Elsewhere for TROs and Preliminary Injunctions

Wednesday, March 25, 2020



Chief justice: NC courts freeze likely for months

Tags: courts, coronavirus, coronavirus government

Posted May 1, 2020 3:08 p.m. EDT

Updated May 1, 2020 5:34 p.m. EDT

Frozen-in-Place Courts Worry Defense Lawyers

By Jordan S. Rubin/Bloomberg Law | April 8, 2020



Courts will have to sort out major backlog of cases due to COVID-19 restrictions

by Sam Knief | NewsChannel 3 | Saturday, April 25th 2020

BATTLE CREEK, Mich. — A major backlog of court cases is among the many problems the COVID-19 crisis has created in society. When judges, lawyers and juries return to courtrooms, there's a good chance their caseload is going to be full.

Civil Jury Trials and COVID-19: How Civil Litigants Can Reach Resolution in the Wake of a Global Pandemic

When the trial courtrooms do re-open, what options will litigants have to see their cases to resolution? And as important, when jury trials recommence, what will they look like?

By Rob Shwartz and Diana Fassbender | April 22, 2020 at 11:03 AM

How Will We Thaw the Court Dockets?

Remote Courtrooms Here To Stay As Judges Tackle Backlogs

By **Aebra Coe**

Law360 (May 11, 2020, 1:23 PM EDT) -- Federal and state court judges say they are likely to rely heavily on remote courtrooms, including virtual trials, as the prospect of fully reopening the justice system to its former capacity remains a distant goal for many, and case backlogs and delays continue to mount.

I think [virtual trials are] going to be the wave of the future until we can reassure jurors and everyone walking into the courthouse that they are going to be safe.

In Pennsylvania, judges are conducting some court business remotely, but the Philadelphia Bar Association issued a public statement at the end of April encouraging even more use of tools like Zoom to move proceedings forward.



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Don't Let Virus Kill Personal Injury Biz, NJ Attys Told

By Jeannie O'Sullivan

Law360 (May 13, 2020, 5:52 PM EDT) -- Personal injury attorneys will suffer themselves if they don't advance their cases during the COVID-19 pandemic, a New Jersey State Bar Association convention panel warned Wednesday while emphasizing technology as a way to overcome the business slowdown.

The global health crisis has considerably reduced new civil filings related to car accidents and medical malpractice, which are the bread and butter for many of the small Garden State firms that comprise the association's membership, according to attorneys who presented the virtual seminar "New Knowledge for the New Normal: Civil Litigation in the Pandemic." The three-day convention, normally held every May in Atlantic City's Borgata Hotel Casino & Spa, is being held online this year to comply with social distancing orders.

5/20/2020

Is Anywhere Safe for a Jury Trial During the Covid-19 Pandemic? Try a School Gym. - WSJ



WSJ

The Libby Middle High School gymnasium in northwestern Montana will serve as a courtroom that accommodates social distancing.

PHOTO: LIBBY MIDDLE HIGH SCHOOL

By [Rebecca Davis O'Brien](#)

May 19, 2020 9:00 am ET

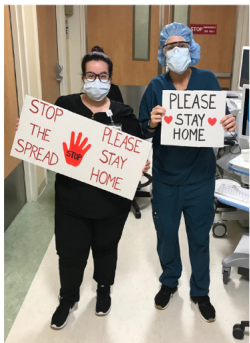
In the remote Kootenai Valley of northwestern Montana, the Libby Middle High School gymnasium has always been the main venue for youth sports and awards ceremonies. Beginning next month, it will become a courtroom.

COVID-19/MALPRACTICE LITIGATION

Healthcare Heroes Effect



HealthCare
heroes



#HEALTHCAREHEROES



Healthcare Heroes Effect

“Mistakes Will Be Made”: Two Med Mal Firms Pledge No Lawsuits Over Covid Errors

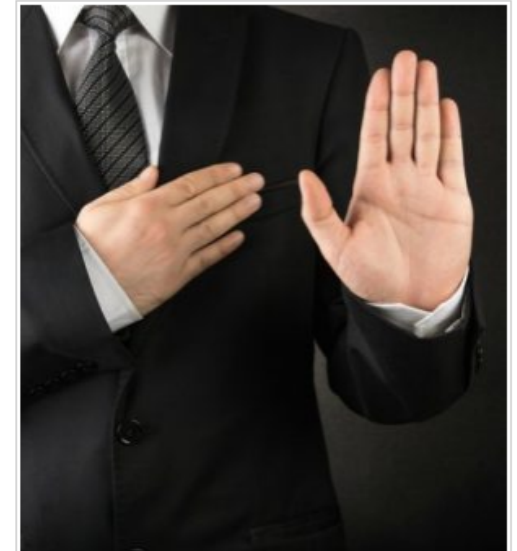
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May 18, 2020

Two Texas law firms with a medical malpractice specialty have pledged not to sue over efforts by healthcare providers in their handling of Covid-19 patients. In similarly-worded statements, the two firms lauded medical personnel who they said were doing their best under difficult and unprecedented circumstances. “As they develop responses, mistakes will be made,” said the statement from law firm [McGehee Chang, Landgraf, Feiler](#). “Some mistakes will hurt people. Some mistakes will look obvious in retrospect.” The other firm, [Brown, Christie & Green](#) – which unlike McGehee, Chang explicitly did include nursing homes in its non-target list – similarly honored health care workers, adding that it did not believe there is at this point “a true standard of care in light of the uniqueness of this situation.” However in its statement, the firm arguably did not close the door completely on lawsuits, qualifying its formulation by saying it won’t sue in cases where the provider “acted in good faith.” Both law firms are based in Houston.



State Protections of the Heroes

Expert Analysis

Health Providers Fighting COVID-19 Should Beware Tort Risk

By Lisa Ruggiero and Aileen McTiernan



Law360 (May 13, 2020, 5:50 PM EDT) -- As the COVID-19 pandemic continues to wreak havoc and cause personal and economic turmoil throughout the country, federal and state governments have reacted swiftly by issuing various executive orders and legislation in an effort to protect citizens and businesses during this unprecedented crisis.



More Expert Analysis

Useful Tools & Links

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While executive orders and legislation immunizing providers and facilities from liability are helpful, the interpretation of these immunities will be left to the judiciary as litigants advocate competing views. Thus, providers, facilities and other health care entities involved in the response effort should be careful to ensure continued compliance with state regulations and guidelines as those standards are likely to represent a barometer by which immunity will later be tested.

Immunity at the State Level

- » **Blanket civil immunity** for all care rendered in declared state of pandemic emergency:
 - Granted by executive orders in NJ and VA
 - Granted by legislation in NC
- » **To be determined civil immunity** by executive order in GA
- » **No immunity** at all in PA
- » **Some form of immunity** in 20 other states: AL, AR, AZ, CA, CT, HI, IL, IN, KS, LA, MA, MD, MI, MS, NV, NY, OK, UT, VT, WI

COVID-19/MALPRACTICE LITIGATION

Litigation Funding Companies



Law Firms Flock to Litigation Funders Amid COVID-19 Outbreak

Some litigation funders are seeing a flood of inquiries from law firms as they brace for the economic and litigation realities of life after the global pandemic.

By Alaina Lancaster | April 09, 2020

How COVID-19 Will Shape Litigation Funding: The Short-Term Effects

Finding itself in a position that was unthinkable just a few months ago, and with the disruption showing no signs of abating soon, the legal industry must now contend with a "new normal."

By Matthew Oxman and Allen Yancy | April 24, 2020 at 04:25 PM

Legal-Bay Announces Increase in Commercial Litigation Requests Due to Covid-19

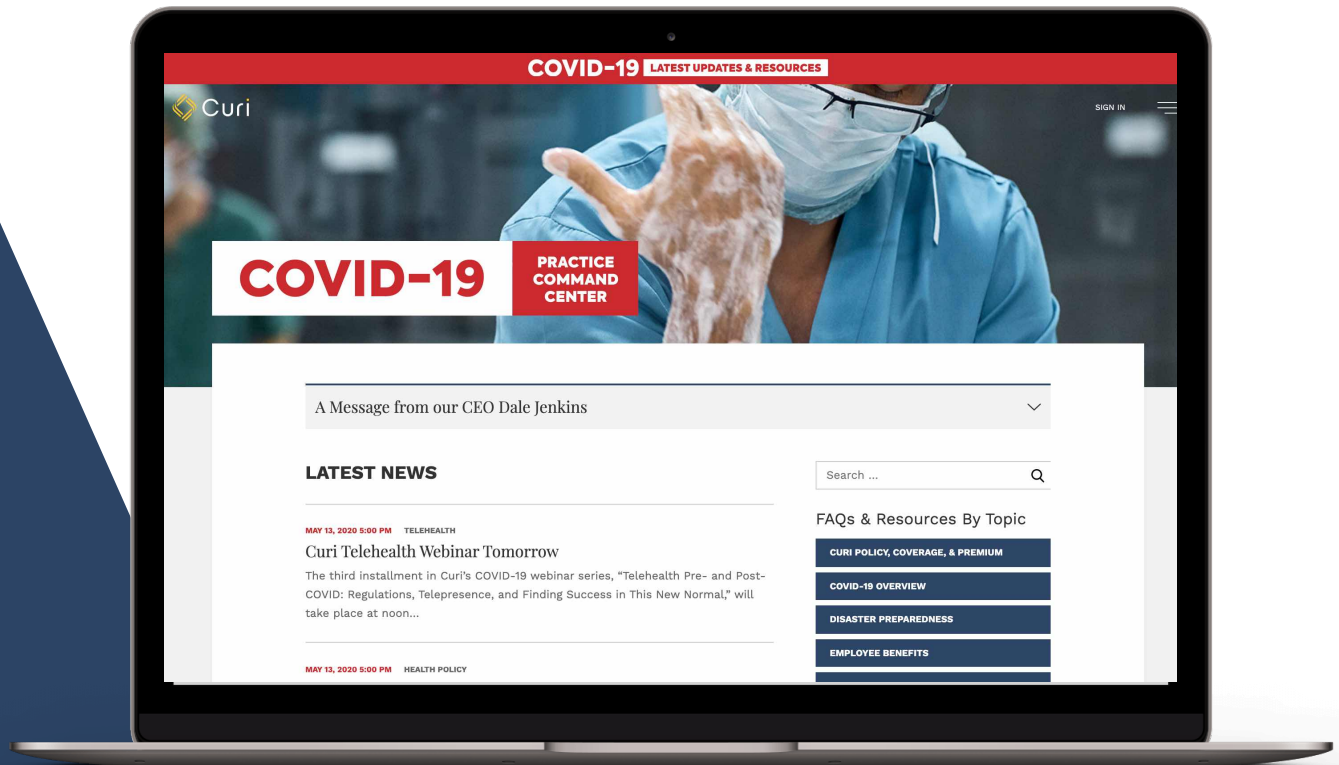
PRESS RELEASE PR Newswire

© May 11, 2020, 01:00 PM

 SHARE

CALDWELL, N.J., May 11, 2020 /PRNewswire/ -- Legal-Bay LLC, the Lawsuit Settlement Funding Company, announced that they have launched a new legal funding division for commercial litigation, lawsuit loans or advances, and attorney loans for law firms. Commercial litigation cases can be extremely complex and require expansive resources for both plaintiffs and law firms to fight properly. Legal-Bay sees this as an under-served market and has built a new division to accommodate the needs of this market.

Back to Business Resource Guide




BACK TO BUSINESS RESOURCE GUIDE

Getting Back to Business— A Roadmap to Reopening Your Practice

» Access the guide here:
<https://curi.com/covid-19/resource/getting-back-to-business-a-roadmap-to-reopening-your-practice/>





Getting Back to Business—A Roadmap to Reopening Your Practice

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COVID-19 RESPONSE

By the Numbers

- » COVID-19 Practice Command Center—4,222 page views in 33 business days
- » Getting Back to Business—A Roadmap to Reopening Your Practice—
1,026 page views
- » Curi's Resources for Running Your Business During COVID-19—1,381 page views

We are here for you. Contact our Risk Management and Patient Safety Department at risk.oncall@curi.com.



Questions?