TELEMEDICINE
THE EMERGING LEGAL LANDSCAPE

Clyde A. Bernett, Jr.
Associate General Counsel

Johns Hopkins University
Office of the Vice President
and General Counsel

October 10, 2015
Presentation for the Maryland College of Occupational and Environmental Medicine (MCOEM)

Disclaimer

Nothing in this handout or presentation constitutes legal advice. This is general information based on the personal experience and research of the presenter and is not sanctioned or endorsed by the Johns Hopkins University, Johns Hopkins Hospital, Johns Hopkins Health Systems, or any of their affiliates in any way.

Consult with a lawyer, medical board, insurance professional, and/or any other professional before acting on any information presented in this presentation.
**TOPICS**

- General Information/Terminology.
- Federal and State Law.
- Telemedicine and Nursing.
- Telemedicine and Workers’ Compensation.
- Fitness for Duty.
- Telephonic Case Management.
- Telemedicine and Medicare/Medicaid.
- HIPPA.
- Advantages/Disadvantages.
- Best Practices.

**TERMINOLOGY**

Telehealth/Telemedicine

Telehealth is a collection of means or methods for enhancing health care, public health, and health education delivery and support using telecommunications technologies.
TERMINOLOGY
Telehealth/Telemedicine

• Generally, Telemedicine is defined as “the use of medical information exchanged from one site to another via electronic communications to improve a patient’s clinical health status.” (American Telemedicine Association).

The Definition of “telemedicine” differs from state to state depending on state law.

Definition of Telemedicine Maryland

“Telehealth means the use of telecommunications and information technologies for the exchange of information from one site to another, for the provision of health care to an individual from a provider through hardwire or Internet connection.”

Source: MD Health Occupations Annotated Sec. 2-101.

Telemedicine means, as it relates to the delivery of health care services, the use of interactive audio, video, or other telecommunications or electronic technology:

By a health care provider to deliver a health care service that is within the scope of practice of the health care provider at a site other than the site at which the patient is located; and

That enables the patient to see and interact with the health care provider at the time the health care service is provided to the patient.

In the state of Maryland, telemedicine interaction is permitted in lieu of an in-person examination and to establish a patient-physician relationship.
**Definition of Telemedicine**

**Virginia**

Telemedicine services means the use of electronic technology or media, including interactive audio or video for the purpose of diagnosing or treating a patient or consulting with other health care providers regarding a patient’s diagnosis or treatment. ‘Telemedicine services’ does not include an audio-only telephone, electronic mail message, facsimile transmission, or online questionnaire.”

*Source: VA Code Annotated Sec. 38.2-3418.16 (2012) & Senate Bill 1227, House Bill 2063 (2015)*

---

**Definition of Telemedicine**

**District of Columbia**

Telehealth” means the delivery of healthcare services through the use of interactive audio, video, or other electronic media used for the purpose of diagnosis, consultation, or treatment; provided, that services delivered through audio-only telephones, electronic mail messages, or facsimile transmissions are not included.

No reference found. *Source: DC Code Sec. 31-3861.*
Different Platforms
Store and Forward

Store-and-forward solutions enable healthcare providers to forward and share patient medical data (lab results, images, videos, records) with a provider at a different location. These platforms offer a kind of sophisticated, secure, email platform – a way to share private patient data online in a secure way.

Store-and-forward telemedicine works best for interprofessional medical services – where a provider needs to outsource diagnosis to a specialist.

Store-and-forward telemedicine is a great way to increase healthcare efficiency since a provider, patient, and specialist don’t need to be in the same place, at the same time.

Different Platforms
Remote Patient Monitoring (RPM)

Remote patient monitoring allow healthcare providers to track a patient’s vital signs and other health data from a distance. This makes it easy to watch for warning signs and quickly intervene in patients who are at health-risk or are recovering from a recent surgery, for example. This type of telemedicine is sometimes also called telemonitoring or home telehealth.

Many RPM solutions record and transmit a patient’s medical data automatically, generating a regular report for the physician.

The key to successful remote patient monitoring telemedicine is having the right health tracking tools in the patient’s home.
Real-time telemedicine requires a live interaction between either a health professional and patient, or between health professionals, using audio and video communication. **Think Videochat.**

With simply a compatible device, internet connection, microphone, and webcam – a patient can now get medical treatment. That’s the beauty of real-time telemedicine.
TOP TELEMEDICINE MEDICAL SPECIALTIES

- Teleradiology
- Telepsychiatry
- Teledermatology
- Teleophthalmology
- Telenephrology
- Teleobstetrics
- Teleoncology
- Telepathology
- Telerehabilitation

Telemedicine and Federal Law

- National Broadband Plan (FCC 2010).

- Health Information Technology for Economic and Clinical Health Act (HITECH-2009).
  - Electronic health records (EHRs) were mandated to improve quality and decrease cost.

- Patient Protection Affordable Care Act (2009).
  - Established the Center for Medicare and Medicaid Innovation within the Center for Medicare and Medicaid Services.
Telemedicine and State Law

- Powers granted by the U.S. Constitution to States to adopt laws to protect the health, safety, and general welfare of its citizens.

- Telemedicine regulations vary widely from state-to-state.

- The number of telemedicine-related legislation currently on the table is at an all-time high.

- Most U.S. states have passed new telemedicine regulations recently, or have a proposed bill awaiting decision.

Telemedicine and State Law

- Currently, 49 state medical boards require physicians practicing telemedicine to be licensed in the state where the patient is located. However, Physician licensure and medical practice policies vary in each state.

- Pre-existing Physician-patient relationship: In many states, current regulations require that any provider and patient doing a telemedicine visit have a pre-existing relationship. Usually this means that the provider and patient need to have had at least one in-person visit.

- Resources to learn more about telemedicine legislation and stay up-to-date:
  - The National Telehealth Policy Resource Center
  - Visit your state Medicaid agency website
  - American Telemedicine Association state legislation matrix
**Telemedicine and State Law**

**Licensure**

*Full State Licensure:* State specific licensure for all physicians practicing in the state. An out-of-state physician cannot legally consult with, treat, or diagnose in that state without a state license.

*Consultation Exception:* An exception to the state licensure laws which allows a physician not licensed in a particular state to practice medicine at the behest of, and in consultation with, a referring in-state physician.

*Interstate Medical Licensure compact:* Allows a single state (one-state-license) professional medical license to practice in multiple states.

---

**Reciprocity**

Cross-state licensing that allows providers to provide care to a patient in a nearby state, without holding a full license to practice in that state.
Telemedicine and State Law

**Licensure**

**Maryland**

A physician providing services through telemedicine must have a Maryland license if they are located in Maryland, or if the patient is located in Maryland.

**Exception:** Physicians practicing in the adjoining states of Delaware, Virginia, West Virginia, and Pennsylvania.

---

**Telemedicine and State Law**

**Licensure**

**Virginia**

- Requirements for telemedicine are on par with requirements for in-person services, not including prescribing.

- Requires full license and allows **provider to provider exemption**.

- Extends licensure reciprocity to bordering states: North Carolina, Kentucky, Maryland, and District of Columbia.
Telemedicine and State Law

Licensure
District of Columbia

- Requirements for telemedicine are on par with requirements for in-person services, not including prescribing. **No unique practice standard requirements for telemedicine.**

- Requires full license, and allows provider to provider exemption.

- Extends licensure reciprocity to bordering states: Maryland and Virginia.

- Allows physical examination/relationship to be established via telemedicine.

---

Telemedicine and State Law

Licensure Facts

- Michigan, North Dakota, Pennsylvania and South Dakota are the only states that do not allow some type of licensure exemption for physician-to-physician out-of-state consultation.

- **Currently, the only states that allow licensure reciprocity for bordering states are Maryland, New York, Virginia and the District of Columbia.**

- Alabama, Louisiana, Minnesota, Nevada, New Mexico, Ohio, Oregon, Tennessee and Texas are the only states that extend a conditional or telemedicine license to out-of-state physicians.
Telemedicine and State Law

Parity Laws

Currently, 29 states and the District of Columbia have passed telemedicine parity laws (including Maryland and Virginia).

A telemedicine parity law requires private payers to reimburse for telemedicine, though the specific restrictions on reimbursement often vary by state.

In many cases, private payers reimburse for the same amount as the comparable in-person medical service.

Credentials

Q: Do provider/specialists have to be credentialed to practice telemedicine?

A: It depends.

Credentialing is not required when a patient is referred by one physician to another and that patient has an in-person encounter with the second physician. However, the requirements for telemedicine may be different.
Credentials

Q: Do the telemedicine providers have to be credentialed at the facility where the patient is located?

A: The most likely answer is “yes” under current Medicare requirements.

The Joint Commission policies, however, do allow an exception in Joint Commission accredited facilities. This exception occurs when a physician is providing advice to another physician in a remote facility via telemedicine and the remote physician retains responsibility for the care of the patient.

Prescribing

Prescribing is acceptable for live-video telemedicine sessions, where the visit can substitute for an in-person exam.

Prescribing is also ok for telephone consultations, as long as the provider has a pre-existing relationship with the patient.
Maryland: No

Virginia: No

D.C.: Yes, but not for required interpretive services such as store and forward and remote patient monitoring.

Best Practices: Before the first telemedicine visit, providers should explain to patients how telemedicine works (when service is available, scheduling, privacy etc), any limits on confidentiality, possibility for technical failure, protocols for contact between virtual visits, prescribing policies, and coordinating care with other health professionals.

Interchangeable terms are Telenursing, Telehealth Nursing, eNursing, Remote Patient Monitoring, Telepractice, Telecare

Telenursing is a subset of telehealth and is defined as “the use of technology for delivering nursing care from a distance,” according to the American Telemedicine Association.
Telenursing

Telehealth nursing is practiced in the home, healthcare clinic, doctor’s office, prisons, hospitals, telehealth nursing call centers and mobile units.

Home telehealth nurses use systems that allow monitoring of patient data and physiologic parameters, such as, blood pressure, heart sounds, blood glucose, oxygen levels, respiratory peak flow, and weight measurements via a phone or Internet connection.

Telehealth nursing is also used by call centers operated by managed care organizations, and staffed by RN case managers who conduct patient triage, education, counseling to regulate patient access/flow and decrease ER use.

Competencies: The competencies a nurse must use during telehealth session are defined by the International Council of Nursing (ICN).

Certification: There is no national certification requirement for telenurses in the U.S., but some specialties require or recommend certification. The American Academy of Ambulatory Care Nursing (AAACN) has more information on specific certification requirements.

Licensure: May require an additional license to practice across state lines.
**Interstate Compact on Nurse Licensure**

The Interstate Compact on Nurse Licensure allows for “mutual recognition” of nursing licensure among states that agree to the Compact (Think Driver’s License).

Currently, the following states are members of the Compact: Arizona, Arkansas, Colorado, Delaware, Idaho, Iowa, Kentucky, Maine, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

---

**Telenursing**

**Best Practice**

Providers should comply with each patient’s state laws and state board recommendations governing the practice of telenursing, and be knowledgeable of state laws regarding emancipation, privacy, access to medical information, and rules regarding what specific information the provider must give before local informed consent requirements are met.
Telemedicine and Workers’ Compensation

- Profession lagging in the use of telehealth and telemedicine.

- **Benefits to employer:** Cost savings, better access to care, immediate triaging of injuries, and faster claims closing.

- **Benefit to employees:** fast non-emergency care, healthcare access to remote employees, increase injured worker satisfaction with process (shorter wait times), conformity among second opinions, fewer disputes.

---

Telemedicine and Workers’ Compensation

What Type of Industry Claims will Benefit from Telemedicine?

**Low Hazard Industry:** retail and office workers that typically generate low severity claims are good candidates.

**High Hazard Industry:** factory, oil, gas, and transportation workers that generate high severity claims that usually require emergency room visits are not good candidates.
Telemedicine and Workers’ Compensation

What is the Financial Impact?

- Potentially minimize the need for employees to leave work, which improves productivity.
- Eliminate the need for an in-office visit and shorten the duration of a claim.
- Opportunity for higher quality provider, which could increase returns tremendously across claims costs, return to work, litigation, and medical.
- Note: estimated more than $6 billion a year in health care savings to U.S. Companies (Towers Watson 2014).

Fitness-for-Duty

- In general, behavioral health emergencies such as suicidal, homicidal, and acutely psychotic patients should not be managed via telehealth (telepsychiatry).
- If there is no other option available, telepsychiatry could be utilized while other options are pursued.
- If providing telepsychiatry for emergency issues, consider options if acute hospitalization of the patient is indicated. At a minimum, resources in the patient’s immediate area should be identified and documented, and the patient informed of those options.
Fitness-for-Duty

Non-Emergency Evaluations

- Generally use of telemedicine/telehealth okay: forensic evaluations, disability determinations, medication monitoring, and assessments of fitness for duty and return to work evaluations.

Telephonic Case Management

- Cost effective and efficient means of monitoring and engaging individuals with chronic illnesses or weak circle of care.

- About 54% telephonic case managers make contact with patients from virtual work/home spaces.

- Tools of the Trade: Use of telephone, electronic health records, case management software.

- 77% of telephonic case management practice performed by nurses.

- Currently no specific telehealth regulations.
Medicare reimburses for telehealth services offered by a healthcare provider at a distant site, to a Medicare beneficiary (the patient) at an Originating Site. The originating site must be in a HPSA (Health Professional Shortage Area).

The types of originating sites authorized by law are:
- physicians or practitioner offices
- Hospitals
- Critical Access Hospitals (CAH)
- Rural Health Clinics
- Federally Qualified Health Centers
- Hospital-based or CAH-based Renal Dialysis Centers
- Skilled Nursing Facilities (SNF)
- Community Mental Health Centers (CMHC).

Note: Independent Renal Dialysis Facilities are not eligible originating sites.
Telemedicine and Medicare Eligibility

In order to be eligible for Medicare reimbursement:

1. The patient must be in a Health Professional Shortage Area (HPSA).
2. The patient needs to be receiving virtual care at one of the clinical Originating Sites authorized by law (see previous slide), that is also located within a HPSA.
3. However, there is no limitation on the location of the health professional delivering the medical service (referring site).
4. To see if the health facility is in a HPSA, use the Centers for Medicare and Medicaid Services (CMS) tool on the U.S. Department of Health and Human Services, Health Resources and Services Administration website: http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx

Telemedicine and Medicare

Facility Fees

In addition to reimbursement for the telemedicine service, Medicare will pay the originating site a facility fee.

For example, if you’re a primary care provider with a patient in your office and you do a telemedicine visit to consult a physician in another location, you could bill for two separate things – the telemedicine service, and a facility fee for using your practice to “host” the patient visit.

Check Healthcare Common Procedure Coding System (HCPCS) code Q3014 for a full description on facility fees.
Under Medicare, the following healthcare providers can use telemedicine:

- Physicians
- Nurse Practitioners
- Physician Assistants
- Nurse Midwives
- Clinical nurse specialists
- Clinical Psychologists
- Clinical Social Workers
- Registered dietitians or nutrition professionals

Medicare primarily only reimburses for live telemedicine, where the physician and patient are interacting in real-time through secure, videochat. **(only exception is in Hawaii and Alaska, where Medicare reimburses for store-and-forward telemedicine as well).**

Only certain CPT and HCPCS codes are eligible for telemedicine reimbursement.

When billing, use the GT modifier for telemedicine services.

Curious what Medicare will reimburse for a telemedicine visit? Use the Medicare Physician Fee Schedule Lookup tool to type in your code and check rates based on your location.
Telemedicine and Medicaid

Unlike with Medicare, Medicaid programs are state-run and therefore subject to state law on telemedicine practice.

Based on the Center for Connected Health Policy’s recent report, here’s a quick overview of what Medicaid reimbursement for telemedicine looks like across the U.S.:

- 47 states and D.C. Medicaid programs cover live video
- 9 state Medicaid programs offer some reimbursement for store-and-forward, not counting states that only reimbursed for tele-radiology.
- 16 state Medicaid programs reimburse for remote patient monitoring
- 3 state Medicaid programs (AK, MN, MS) offer coverage for all three types of telemedicine
- 29 state Medicaid programs offer a transmission or facility fee when telehealth is used

Telemedicine and Medicaid

Three (3) sources to use to track Medicaid coverage of telemedicine:

- The National Telehealth Policy Resource Center.
- Your state Medicaid agency website.
Telemedicine and Medicaid

Factors that Affect Medicaid Reimbursement for Telemedicine

Health Services covered
Eligible providers (NPs, PAs)
Is cross-state medical licensing allowed?
Is a pre-existing relationship with patient required?
Location restrictions on patient or provider
Applicable CPT codes
Type of fee reimbursed (transmission, facility, or both)

Who Pays for Telemedicine?

Medicare
Medicaid
Private Payers
Patients
HIPAA and Telemedicine

Like all technology in the healthcare space, telemedicine solutions need to be HIPAA compliant to protect patient privacy.

Technology used for telemedicine services needs to ensure high-level security and prevent any breaches of patient personal health data.

Not only does the telemedicine platform need to be compliant, all providers, patients, and staff using the tool need to ensure they are in compliance with HIPAA.

Benefits of Telemedicine

- Increased Access to Healthcare (rural and underserved communities).
- Improves Health Outcomes.
- Reduces Healthcare and other costs.
- Fill Shortage of Healthcare Providers.
- Patient Satisfaction.
Disadvantages of Telemedicine

- Electronic Glitches.
- Physician Resistance.
- Privacy and Data Security.
- Inadequate Assessment (by physician and patient self-diagnosing).
- To borrow an old adage meant for lawyers representing themselves in court “a man or woman who is his or her own doctor has a fool for a patient”.

Barriers to Telemedicine

Legislation: State legislation determines the restrictions and often, the reimbursement rates for telemedicine services administered in that state.

Reimbursement process: Reimbursement for telemedicine services is often not as straightforward for traditional medical services.

Implementation/Equipment costs: Most telemedicine programs do require the purchase, set-up and staff training of new technology and equipment – some of which may be outside the budget of providers in smaller independent practices.

State Licensing requirements: Healthcare providers currently earn their medical licenses for a specific state. This presents a problem for telemedicine, as the entire goal is to break down geographical barriers between a patient and provider.
Liability

- No reported cases where the claim was based on use of telehealth or telemedicine.

- **Civil and Criminal penalties for practicing without a license!**
  - Consult your legal counsel.

Best Practices

1. Healthcare providers should create a dedicated space for telemedicine visits to ensure privacy, proper lighting and audio, and avoid interruptions. When possible, providers should place their camera on a level stand and position the camera at eye-level.

2. Establish a plan for emergencies and communicate it to the patient before the visit. Make sure to have all information on hand for referrals and request transfers.

3. Always interact with the patient in a culturally competent way, in the language familiar to that patient. If the patient cannot understand because of language barrier, telemedicine should not be used.

4. Use professional judgment to determine when telemedicine is appropriate for the patient case, and when it is not. Also, the patient evaluation should be based on the patient’s **medical history** and access to their **medical record** whenever possible.
Best Practices

In general, follow the same standards as in-person medical services:

- Practice by the same code of ethics.
- Comply with security guidelines of HIPAA.
- Provide proper documentation to the patient and patient’s primary care provider.
- Follow your licensing and credentialing guidelines.

Strategies To Consider When Determining Whether To Incorporate Telehealth/Telemedicine In Your Business

- Research
- Estimate
- Set Goals
- Investigate
- Gauge Interest
- Set Expectations
Q & A

THANK YOU