

CLE Seminar for In-House Counsel
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Telehealth: Navigating Emerging Opportunities

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Overview

Today's presentation will cover:

- 1) Evolution of Telehealth
- 2) Telehealth Models and Applications
- 3) Fraud and Abuse
- 4) Reimbursement for Telehealth Services
- 5) Scope of Practice, Supervision, Licensure
- 6) Risk Management, and Information Privacy and Security Issues, and Patient Consent
- 7) Questions/Discussion

The Evolution of Telehealth

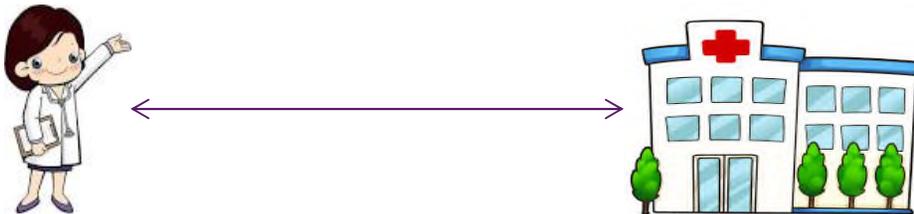
- The evolution of technology is making new telehealth applications and arrangements possible and even more relevant to a number of industries including: hospitals, patients, employers, insurance companies, technology vendors, communications platforms, start-ups and other stakeholders.
- Advancements have affected:
 - Electronic Health Records
 - Information Technology
 - Telecommunications Devices and Networks
 - Broadband, Network Access, and Modem Speed
- New technology has allowed for new and innovative arrangements to deliver care through Telehealth
- But regulations and reimbursement are not keeping up with this rapid pace

Overview

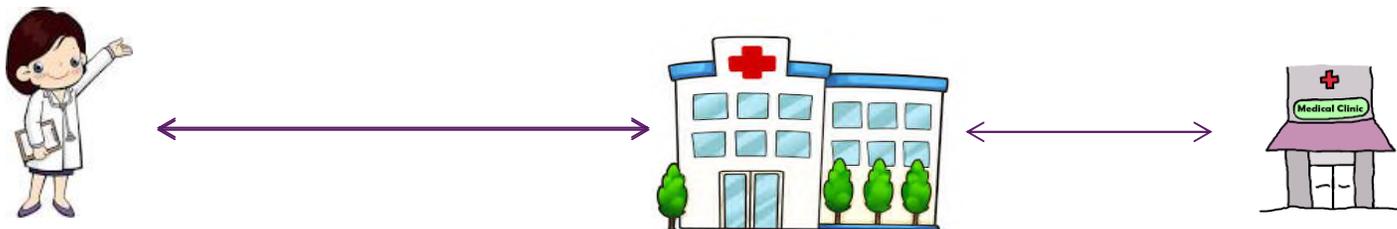
Telehealth Models and Applications

Exemplary Telehealth Models

- Hospital contracts with Physician Group to receive direct telehealth coverage services for Hospital patients (e.g., emergent teleneuro/stroke to ED patients, inpatient hospital consults, outpatient MFM services)

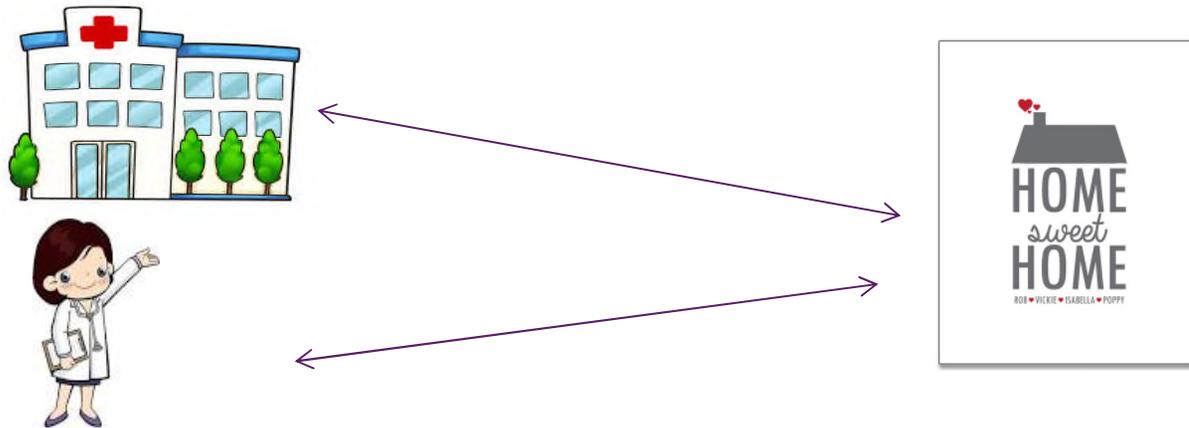


- Hospital (**Hub**) contracts with smaller remote facility (**Spoke**) to extend Physician Coverage arrangement to remote community for benefit of that community (e.g., emergent teleneuro/stroke, emergent inpatient behavioral assessment to ED patients)



Exemplary Telehealth Models (cont.)

- Remote Patient Monitoring (e.g., transplant, patient medication compliance, chronic care management)



- Telehealth Services on Employer Campuses
- Physician-to-Physician (consult)
- Physician-to-Extender
- Direct-to-Consumer

Fraud and Abuse Considerations

Fraud and Abuse Considerations

Applicable to Telehealth Arrangements

- Providers furnishing telehealth services have to be conscious of several complex federal and state health care fraud and abuse laws.
- Applicable laws and regulations include:
 - **Federal Anti-Kickback Law**
 - **Federal Stark Law**
 - **False Claims Act and Civil Monetary Penalties**
 - **State Fraud and Abuse Laws**
- Legal risk can arise out of the way the telehealth arrangement is structured, paid for, operationalized, and the manner by which providers bill and collect for telehealth services.

Reimbursement for Telehealth Services

Medicare Telehealth Payment Background

- The Social Security Act ("**SSA**") (§ 1834(m)(4)(F)(i)) defines Medicare telehealth services to include only certain categories of services:
 - Professional consultations
 - Office medical visits and psychiatry visits
 - Any additional service specified by the HHS Secretary when furnished via a telecommunications system
- CMS established a process to annually update the list of Medicare telehealth services

Medicare Telehealth Reimbursement Requirements

- Medicare makes **payments** to the following for telehealth services:
 - 1) Clinical setting where patient is located gets small fee
 - 2) Practitioner gets paid professional fee
- Payments are subject to certain limitations:
 - 1) Originating site geographic location requirements
 - 2) Provider site and provider type requirements

Medicaid Reimbursement for Telehealth

- Substantial state variation in Medicaid laws and regulations
- Medicaid reimbursement can be broader than Medicare
- State law where patient is located controls
- States can determine:
 1. Whether to cover Telehealth services
 2. Types of services to cover
 3. Where Telehealth services can be provided (originating sites, etc.)
 4. Synchronous and/or asynchronous
 5. Types of distant site providers that may provide Telehealth services
 6. How much to pay for covered services

Private Payer Reimbursement for Telehealth

- 38 states and DC have private payer reimbursement laws for telehealth services
- A subset of these states have Telehealth Payment Parity laws
- Parity does not always mean = coverage

Parity means that Telehealth services have to be covered if the services are covered when provided face-to-face, but this does not necessarily mean that the same rates apply if the services are provided via Telehealth (whether that is required depends on the particular state's parity law)

Changes in the Telehealth Reimbursement Landscape

- Recent legislation and regulations have changed the landscape of Medicare telehealth coverage, including:
 - **The CY 2018 Physician Fee Schedule Final Rule**
 - Expands coverage for Remote Patient Monitoring- another way of using telecommunications systems used to provide care to patients
 - **The Bipartisan Budget Act of 2018**
 - Expands coverage for telestroke consultations starting 2019
 - Eliminates geographic limitations for telestroke services

Other state laws and regulations: scope of practice, supervision, and licensure

Scope of Practice and Physician Supervision

- Most state law and guidance on telehealth has been issued by State Medical Boards **applicable to physicians**
- What about Non-Physician Practitioners (NPPs)
- NPPs include:
 - **Advanced Practice Registered Nurses (APRNs)**
 - **Physician Assistants (PAs)**
 - **Registered Nurses (RNs), and**
 - **Medical Assistants (MAs)**
- Degree of independence and physician supervision requirements vary by state (some geographic requirements for supervision/collaborating practice arrangements)
- More requirements applicable to remote prescribing

State Licensure for Telehealth Practitioners

- Telehealth licensure varies state by state
- **Rule of thumb:** physician must be licensed (fully or for telehealth purposes) in the state where the patient is located
- The Interstate Medical Licensure Compact (“**IMLC**”) = Agreement between **22 states** and **29 Medical and Osteopathic Boards** allowing **voluntary expedited licensure** for qualified physicians who would like to practice in multiple states

Risk Management

Liability, Insurance, Privacy,
Consent

Liability and Insurance

- Standard of Care for Telehealth Services
- Professional Liability Insurance
 - Coverage Where the Patient Is
 - Watch for:
 - **Increased Coverage Limits (Virginia)**
 - **State-Mandated Patient Protection Funds**
 - Don't Forget the Tail
- Cyber and Privacy Liability Insurance
- Workers' Compensation Insurance Where the Patient Is
- General Commercial Liability Coverage
 - Injury or Damage Arising Separately from a Professional Duty



Patient Health Information

- Patient Health Information Pathway Depends on Service Configuration
 - Physician Furnishing Services Directly
 - Physician Contracted with Institutional Provider to Furnish Services
 - Physician Enters Patient Health Information Directly into Hospital EMR/EHR
 - **Timeliness**
 - **Formatting**
 - **Access**
- Remote Monitoring
 - Automatic Upload to Database - Who Maintains?
 - Responsibility for Monitoring
 - Timeliness of Monitoring
 - Outcome - Who Do You Call?
 - Where is Data Maintained - International

Patient Health Information

- Where Will Patient Health Information “Live”?
 - EMR/EHR Only
 - Copy maintained and accessed on Provider’s platform
- What Telehealth Information Should be Stored?
 - Full video of encounter?
- When is a Business Associate Agreement Required?

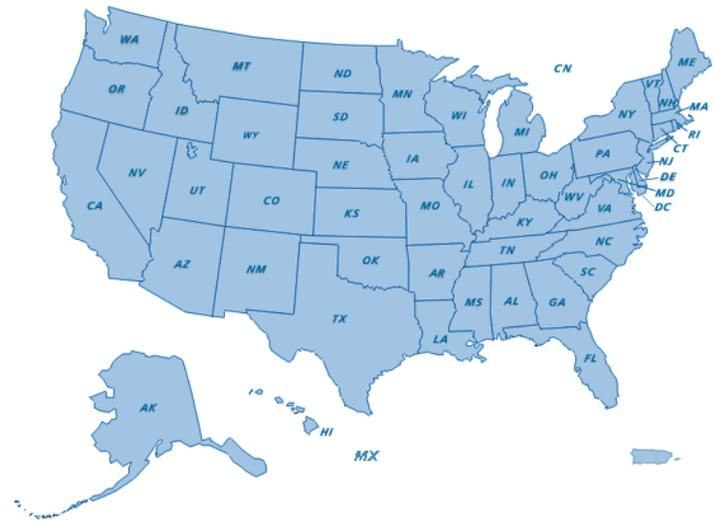
Patient Health Information

- Telehealth Device Encryption
 - HIPAA's breach notification requirements apply to “unsecured” health information
 - Using Skype®, FaceTime® or other unencrypted devices to perform Telehealth services



Patient Consent for Telehealth Services

- States Vary in Consent Requirements for Telehealth Services
- Medicaid May Impose Additional Requirements
- Check if State Requires:
 - Oral
 - Written
 - Other Indicia of Consent
- Key Elements:
 - Written Consent
 - Signed by Patient/Representative
 - Maintained with Patients Medical Records



Telehealth Contracting - Top Seven

- Physician Credentialing for Institutional Providers
 - Credentialing Fees
 - Medical Staff Dues
 - Medical Staff “in-person” Requirements
 - Privileged Relinquishment
- Telehealth Records
- Physician Replacement
- Who Pays for Physician Medical License?
- Who Pays for Physician DEA Registration?
- Who Pays for Physician Telehealth Device Software License?
- Shift Cancellations

Thank you



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