



Physicians Caring for Texans

TMA Office of the General Counsel

Texas Laws and Regulations Relating to Telemedicine

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The enactment of recent legislation has marked a significant shift in how physicians may provide telemedicine in Texas. This document describes the new Texas legal and regulatory requirements that apply to a physician providing telemedicine medical services.¹

What Is Telemedicine? How Is Telemedicine Different From Telehealth?

Senate Bill 1107 (85th Texas Legislature, 2017) amended the Texas state law definition of a telemedicine medical service to mean “a health care service delivered by a physician licensed in this state, or a health professional acting under the delegation and supervision of a physician licensed in this state, and acting within the scope of the physician’s or health professional’s license to a patient at a different physical location than the physician or health professional using telecommunications or information technology.”²

This amended definition represents an expansion of the term’s meaning. Previously, by Texas’ statutory definition, telemedicine had to be initiated by a physician and had to require the use of “advanced telecommunications technology.” Additionally, Texas’ definition previously explicitly excluded the use of a telephone. These limitations are no longer in the definition.

Although in some contexts “telehealth” may be used interchangeably with “telemedicine,” the Texas law has a distinct definition for the term. While “telemedicine” refers to health care services delivered remotely by a Texas physician or a health professional acting under delegation and supervision of a Texas physician, “telehealth” means a “health service, *other than a telemedicine medical service*, delivered by a health professional licensed, certified, or otherwise entitled to practice in this state and acting within the scope of the health

¹ Note that in addition to Texas laws and regulations, many federal requirements may apply to a physician’s provision of telemedicine medical services. This document may mention some of these federal law considerations, but discussing them in depth is beyond the document’s intended scope.

² §111.001(4), Tex. Occ. Code.

professional’s license, certification, or entitlement to a patient at a different physical location than the health professional using telecommunications or information technology.”³

So in the context of Texas state law, the two terms “telehealth” and “telemedicine” are mutually exclusive. Only physicians and health professionals acting under the delegation and supervision of physicians provide telemedicine medical services.

Legal Guidelines for Providing Telemedicine

Must a physician see a patient in person before or after a telemedicine encounter?

Until 2017 when SB 1107 was enacted, Texas imposed on physicians and patients relatively stringent physical encounter requirements for telemedicine visits. The bill significantly shifted this paradigm, removing express statutory authorization for the Texas Medical Board (TMB) to require a face-to-face consultation between a new patient and a physician providing a telemedicine medical service within a certain number of days following a telemedicine encounter. Further, the bill explicitly stated that TMB rules “must allow for the establishment of a practitioner-patient relationship by a telemedicine medical service” in a way that complies with other parts of the bill, further indicating the move away from imposing a general requirement for face-to-face or in-person evaluations.⁴

Notably, TMB is still authorized to adopt rules that “ensure that patients using telemedicine medical services receive appropriate, quality care,” but TMB has not relied on this authority to adopt rules to specify whether and in what circumstances an in-person examination is required in relation to a telemedicine encounter.

In short, there is no express legal or regulatory requirement that blanketly requires a face-to-face or in-person examination of a patient in connection with a telemedicine visit.

Still, two other important legal requirements nevertheless will limit how telemedicine should be provided and the types of services that can be provided through telemedicine. These are (1) requirements to comply with the applicable standard of care, and (2) requirements to establish a “practitioner-patient relationship.”

What standard of care applies in a telemedicine encounter?

SB 1107 and corresponding TMB rules specify that, when providing telemedicine, the standard of care that applies is the same that would apply to the provision of the same health care service or procedure in an in-person setting.⁵

Generally, the standard of care is described as the following, as articulated by the Texas Supreme Court: “A physician who undertakes a mode or form of treatment which a reasonable

³ § 111.001(3), Tex. Occ. Code (emphasis added).

⁴ § 111.006(a), Tex. Occ. Code; 22 TAC § 174.6(a)(1).

⁵ § 111.007, Tex. Occ. Code.

and prudent member of the medical profession would undertake under the same or similar circumstances shall not be subject to liability for harm caused thereby to the patient.”⁶ In other words, the standard of care that applies to a physician generally is the actions that a reasonable and prudent physician would take in the same or similar circumstances.

In the telemedicine context, then, the standard of care that applies is that which would apply to the physician providing that medical service *if the patient were physically present with the physician*.

What is the relationship between a physician and patient in a telemedicine encounter?

In addition to the requirement to meet the in-person standard of care, a physician is required to establish a “practitioner-patient relationship” in order to provide telemedicine medical services.⁷ Note that the language of the bill and the corresponding TMB rules both refer to the required relationship as a practitioner-patient relationship, but for physicians, this is effectively the patient-physician relationship.⁸ This document will use the statutory and rule term, “practitioner-patient relationship,” in the context of the legal requirements, but readers should keep in mind the application of this requirement would be to the physician and the relationship with a patient.

Neither the bill nor corresponding TMB rules explain what is required to establish the practitioner-patient relationship.

Historically, TMB has imposed particular requirements to establish the requisite relationship. Physicians must complete such tasks as establishing the patient’s identity, documenting and performing patient history, discussing with the patient the diagnosis and treatment options, and providing for follow-up care before a proper patient-physician relationship could be said to be established.⁹ Following the enactment of SB 1107, though, TMB repealed its more rigid rules. Thus, TMB expectations are not clear.¹⁰

Generally, a patient-physician relationship is established as a result of a contract, express or implied, that the physician will treat the patient with proper professional skill.¹¹ Establishing the relationship does not require the formalities of a contract, and can arise from the acts and conduct of the parties, it being implied from the facts and circumstances that there was a mutual intention to contract.¹² The same may be true in a telemedicine context, with the physician

⁶ *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977).

⁷ 22 TAC §174.6(a)(2).

⁸ Tex. Occ. Code §551.003(34).

⁹ 35 *TexReg* 9085 (adopting 22 TAC §174.8[a]).

¹⁰ Expectations may be made clearer through TMB enforcement, but as of August 2019, TMA is not aware of any enforcement actions arising out of a failure to establish the prerequisite patient-physician relationship before providing telemedicine medical services.

¹¹ *Ortiz v. Shah*, 905 S.W.2d 609, 611 (Tex.App. – Houston [14th Dist.] 1995, no writ).

¹² *St. John v. Pope*, 901 S.W.2d at 424; *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex.1972).

agreeing to undertake diagnosis and treatment of the patient, and the patient agreeing to that treatment.¹³

What licensure requirements apply to providing telemedicine?

When physicians treat patients across state lines through telemedicine, it is usually seen as the physician – not the patient – who is traveling across state borders.¹⁴ This is rooted in each state’s responsibility to protect the health and welfare of its citizens by regulating the practice of medicine.

This is the case in Texas. “Telemedicine” is defined in Texas law to be remote medical services provided to a patient by a physician who is *licensed in Texas*.¹⁵ TMB further requires that in order to provide telemedicine medical services to residents of Texas, a person must be licensed to practice medicine in Texas.¹⁶ There are limited exceptions for out-of-state physicians in certain circumstances in which physicians would not have to be licensed in Texas to provide certain services.¹⁷ Additionally, TMB offers a limited out-of-state telemedicine license that allows a physician to practice medicine across state lines. Under such a limited license, an out-of-state physician may interpret diagnostic testing and report results to a Texas physician or may follow up with patients where the majority of patient care was rendered in another state.¹⁸ A person holding this limited license is not authorized to physically practice medicine in the state of Texas unless that person also has a current full license to practice medicine.¹⁹

Most other states adopt the same perspective of the *physician* crossing state lines, requiring state licensure for providing telemedicine services for patients who are physically present in that state. This would apply even for patients who are only visiting the state or who wish to remotely see an out-of-state physician with whom they already have a patient-physician relationship. To be more specific, a Texas physician must be aware of other states’ licensure requirements because in order to provide telemedicine medical services to a Texas resident visiting another state or to another state’s resident who had come to Texas for treatment and then later returned home, the Texas physician would be subject to *that state’s licensure requirements*.

¹³ See e.g., *Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine*, Federation of State Medical Boards, available at: www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf.

¹⁴ TMA policy 290.008 Telemedicine Use in Protecting the Health and Welfare of Citizens. (Board of Trustees, p 18, I-95; reaffirmed BOC Rep. 3-A-05; amended BOC Rep. 4-A-15) (as of August 2019).

¹⁵ §111.001, Tex. Occ. Code.

¹⁶ 22 TAC §174.8.

¹⁷ See e.g., §151.056, Tex. Occ. Code; 22 TAC §172.12(f). These include providing only episodic consultations for a Texas physician in the same specialty, providing consultations to a medical school or certain other government-related health institutions, physicians in a bordering state who order home health or hospice services for a Texas resident, furnishing medical assistance in case of an emergency or disaster where there is no fee for the assistance, and informal consultation on an irregular or infrequent basis without the expectation or exchange of compensation.

¹⁸ 22 TAC §172.12(c.)

¹⁹ *Id.*

Are there specific requirements relating to telemedicine on informed consent or privacy notices?

Texas law provides that a physician who provides or facilitates the use of telemedicine medical services “shall ensure that the informed consent of the patient, or another appropriate individual authorized to make health care treatment decisions for the patient, is obtained before telemedicine medical services ... are provided.”²⁰ Though the informed consent obligations are technically the same, because of the special nature of telemedicine, physicians should still make special consent considerations when providing telemedicine medical services.²¹

In addition to obtaining informed consent, Texas regulations also impose specific requirements for telemedicine regarding providing notices relating to privacy and confidentiality and notices regarding the complaint process for any alleged misconduct.

Notices of privacy practices are an important part of complying with federal and state privacy and security requirements. Physicians should provide a notice of privacy practices in accordance with federal privacy requirements and must make a good-faith effort to obtain the patient’s written or electronic acknowledgement of the notice (which can be obtained through email).²²

Additionally, physicians must provide notice of the method by which patients may file a complaint with TMB. This notice may be provided on the physician’s website or with informed consent materials.²³ TMB rules indicate that this notice must be provided before the telemedicine medical service is provided, and may be by a prominently displayed link on the physician’s website, in a provider app, by a recording, or in a bill for services.²⁴ The notice must be in at least a 10-point, easily readable font, and must contain exactly the text that TMB rules provide for such a notice.²⁵

Are there any special requirements for issuing a prescription through telemedicine?

Issuing a prescription through telemedicine is subject to the same standards and requirements that would apply in the in-person setting. The law also imposes additional requirements on the issuance of prescriptions through a telemedicine encounter. Ordinarily, to be valid, a prescription must be issued for a legitimate medical purpose by a prescriber acting in the usual

²⁰ §111.002, Tex. Occ. Code.

²¹ TMA policy, for instance, advises physicians communicating with patients electronically to obtain informed consent “regarding the appropriate use, limitations, potential fees, and risk of this form of communication. Consent documents should include explicitly stated disclaimers, and service terms. The consent should establish appropriate expectations between physician and patient, and should become part of the legal documentation and medical record.” TMA policy 290.009 Guidelines for Electronic Communications with Patients (TF Rep. 1-A-01; substitute CC Rep. 1-A-03; amended CC Rep. 2-A-04; amended CPMS Rep. 2-A-16).

²² 22 TAC §174.4.

²³ 22 TAC §174.4.

²⁴ 22 TAC §178.3.

²⁵ 22 TAC §178.3; the prescribed text is at 22 TAC §178.3(b)(1).

course of the prescriber’s practice, and there must be a valid practitioner-patient relationship.²⁶ According to Texas law, in order for there to be a valid “practitioner-patient relationship” for purposes of being able to establish a valid prescription through a telemedicine encounter, the physician must meet particular relationship or technology requirements in one of three ways:

1. Have a preexisting practitioner-patient relationship in accordance with applicable rules,
2. Communicate with the patient in accordance with a valid call coverage agreement in accordance with Texas Medical Board rules, or
3. Use appropriate technology that can provide access to necessary clinical information.²⁷

Each of these options is described briefly below.

Preexisting Relationship. The first way to establish a valid practitioner-patient relationship is to have an existing practitioner-patient relationship established in accordance with TMB rules. Physicians may consider the guidelines for establishing a practitioner-patient relationship that are described above.

Call Coverage. The second way to establish a valid practitioner-patient relationship is to communicate with the patient pursuant to a call coverage agreement established in accordance with TMB rules. TMB rules allow for physicians to provide medical services through a call coverage agreement to another physician’s established patients.²⁸ In order to provide call coverage, TMB rules require the requesting and covering physicians to enter into an agreement – which may be oral or written – that requires the covering physician to provide to the patients’ primary physicians who are parties to the agreement a report about the medical intervention or advice provided.²⁹

Appropriate Technology. The final way to establish a valid practitioner-patient relationship for purposes of establishing the validity of a prescription is to provide required follow-up and use technology that allows the physician to have access to, and the physician uses, the relevant clinical information that would be required to meet the standard of care.³⁰ More specifically, the technology must be one of the following:

1. Real-time audio-visual interaction;
2. Asynchronous store-and-forward technology, as long as the physician uses clinical information from either clinically relevant photographic or video images (including diagnostic images) or the patient’s relevant medical records (such as the relevant medical history, laboratory or pathology results, and prescriptive histories); or
3. Another type of audio-visual interaction that allows the physician to comply with the standard of care.

²⁶ §562.056(a) and (a-1), Tex. Occ. Code.

²⁷ §111.005, Tex. Occ. Code.

²⁸ 22 TAC §177.20.

²⁹ *Id.* The agreement may also determine the timing and method in which the report is provided and who should receive the report.

³⁰ §111.005, Tex. Occ. Code.

If relying on technology to establish the validity of a prescription, there is a specific requirement that the physician provide to the patient guidance on appropriate follow-up care and, with patient consent, provide a report to the patient’s primary care physician containing an explanation of the treatment, analysis, diagnosis, and patient condition.³¹

State law and regulation provide a few additional blanket prohibitions or limitations relating to prescriptions issued as a result of a telemedicine medical service. First, state law provides that a prescription for an abortifacient issued through telemedicine is not a valid prescription.³² Also, TMB rules state that treatment of chronic pain through the use of telemedicine medical services is prohibited unless it is otherwise permitted by federal or state law.³³

Physicians issuing prescriptions through telemedicine also must note important federal laws and regulations relating to the subject. More specifically, the Controlled Substances Act, as amended by the Ryan Haight Online Pharmacy Consumer Protection Act, addresses the prescription of controlled substances through the internet. The act says no controlled substance can be delivered, distributed, or dispensed by means of the internet³⁴ if the prescription is not issued for a legitimate medical purpose by a physician who has conducted at least one in-person visit or who is a covering physician providing coverage for another physician who has seen the patient in person within the previous 24 months.³⁵ This prohibition does not apply, however, to a physician engaged in “the practice of telemedicine.”³⁶ The “practice of telemedicine” is a statutorily defined term to mean the practice of medicine in accordance with applicable federal and state laws by a practitioner who is at a location remote from the patient and is communicating with the patient through a telecommunications system that complies with applicable federal rules. In addition to those requirements, the practitioner’s practice also must meet the requirements associated with at least one of seven circumstances.³⁷

Those seven circumstances include treatment in a hospital or clinic, treatment of a patient who is in the physical presence of another practitioner, special registration from the U.S. Drug Enforcement Administration (DEA), or treatment provided in a public health emergency.³⁸ Although the “special registration” circumstance has been in law for many years, DEA has never adopted rules that specify how to actually obtain such special registration. In October 2018, however, President Trump signed into law the Special Registration for Telemedicine Act of 2018. That law requires DEA to promulgate final regulations specifying the circumstances in

³¹ 111.005(b)(2), Tex. Occ. Code.

³² §111.005(c), Tex. Occ. Code.

³³ 22 TAC §174.5(e)(2)(A).

³⁴ “Internet” is defined broadly to mean “collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocol to such protocol, to communicate information of all kinds by wire or radio.” 21 U.S.C. §802(50).

³⁵ 21 U.S.C. §829(e).

³⁶ 21 U.S.C. §829(e)(3).

³⁷ 21 U.S.C. §802(54).

³⁸ 21 U.S.C. §802(54).

which a special registration may be issued, and the procedure for obtaining that registration.³⁹ As of August 2019, it does not appear that DEA has finalized its special registration rules, but it should be doing so in the near future. If providing controlled substances through telemedicine medical services, it is important that a physician pay careful attention to most recent regulations as well as the technical details of the exceptions under “the practice of telemedicine” to ensure the telemedicine practice does not run afoul of federal law.

Must a physician keep and maintain records of telemedicine encounters?

Physicians providing telemedicine medical services are under the same obligation to keep and maintain an “adequate medical record” as they are if the services are provided in person.⁴⁰ In application, communicating with patients electronically means there may be an electronic memorialization of the communication.

Separate Requirements That Apply to Providing Mental Health Services Through Telemedicine

Providing mental health services is included in the practice of medicine, so laws and regulations generally applicable to the practice of medicine apply. However, Texas law exempts the provision of mental health services via telemedicine from certain requirements that otherwise apply to telemedicine services, including the detailed requirements relating to the practitioner-patient relationship described above.⁴¹ Though mental health is exempted from these statutory requirements, the Texas Medical Board has adopted rules that apply specifically to providing mental health services through telemedicine. These rules are largely similar to requirements for providing other telemedicine medical services.

First, TMB rules state that to provide mental health services through telemedicine, one must be properly licensed or certified⁴² or, for an out-of-state physician, must either fall within one of the exceptional circumstances or have an out-of-state telemedicine license as discussed above. As with other telemedicine medical services, a physician providing mental health services must establish a practitioner-patient relationship and must comply with the standard of care that applies in an in-person setting, and may not treat chronic pain with scheduled drugs through telemedicine unless expressly authorized to do so by law.⁴³ TMB rules on mental health services provided through telemedicine also specify that complaints regarding violations of rules related to mental health services may result in TMB investigation and discipline.⁴⁴

How Can Physicians Receive Payment for Telemedicine Medical Services?

³⁹ Pub.L. 115-271, Title III, § 3232, Oct. 24, 2018, 132 Stat. 3950.

⁴⁰ 22 TAC §174.6(a)(3); §165.1.

⁴¹ §111.008, Tex. Occ. Code. Mental health services are excluded from the application of Chapter 111, Occupations Code. That chapter otherwise imposes requirements for telemedicine medical services relating to informed consent, confidentiality, and the requirements relating to the practitioner-patient relationship described above.

⁴² 22 TAC §174.9(1).

⁴³ 22 TAC §174.9(3), (4), (6).

⁴⁴ 22 TAC §174.9(5).

In addition to considering whether a physician may be able to provide a particular telemedicine medical service in compliance with state and federal law and regulations, the physician also must consider how to be paid for that telemedicine medical service. For physicians accepting payment in a capitated model, for instance, telemedicine may be more easily integrated into health care delivery to increase the cost-efficiency of seeing patients.⁴⁵ For physicians who rely on fee-for-service payments, on the other hand, the value of telemedicine may depend more on the ability of the physician to get paid for the telemedicine medical services provided.

Commercial insurance

Effective Jan. 1, 2020, certain state-regulated health benefit plans⁴⁶ must provide coverage for a covered health care service or procedure delivered by a preferred or contracted health professional to a covered patient as a telemedicine medical service or telehealth service on the same basis and to the same extent that the plan provides coverage for the service or procedure in an in-person setting.⁴⁷ This requirement clarified an earlier enacted law, which prohibited certain state-regulated health plans⁴⁸ from excluding from coverage a covered health care service or procedure delivered by a contracted physician as a telemedicine medical service solely on the basis that the service was not provided in person.⁴⁹ Additionally, also effective Jan. 1, 2020, those health plans to which these requirements apply also prohibit the plans from limiting, denying, or reducing coverage for a covered health care service or procedure delivered as a telemedicine medical service or telehealth service based on the health professional's choice of platform⁵⁰ for delivering the service.⁵¹ The prohibitions on limiting, denying, or reducing coverage, and on excluding telemedicine medical services on the basis that the service is not provided in person, do not apply, however, to telemedicine medical services or telehealth services provided by only synchronous or asynchronous audio interaction, including audio-only telephone conversations, text-only email messages, or facsimiles.⁵²

These requirements should allow contracted or in-network physicians to be paid for covered services they provide through telemedicine to covered patients, and allows them to do so using the platform of their choice. This still does not mean that the telemedicine medical service will be covered at the same rate as the same medical service provided in an in-person setting. Additionally, if the telemedicine medical service is related to a service the physician already provided, it is possible the plan may consider that to be bundled into payment made on the original service.

⁴⁵ See e.g., Sabrina R. Gallo, Telemedicine: The Link to New Value-Based Payment Models, Law360 (Jan. 17, 2017), available at: www.law360.com/articles/881658/telemedicine-the-link-to-new-value-based-payment-models.

⁴⁶ This applies to certain health benefit plans delivered, issued for delivery, or renewed on or after Jan. 1, 2020.

⁴⁷ §1455.004(a)(1), Tex. Ins. Code, as added by HB 3345, 86th Reg. Sess. (2019).

⁴⁸ §§1455.002-.003, Tex. Ins. Code

⁴⁹ §1455.004(a)(2), Tex. Ins. Code.

⁵⁰ “Platform” is defined to be “the technology, system, software, application, modality, or other method through which a health professional remotely interfaces with a patient when providing a health care service or procedure as a telemedicine medical service or telehealth service.” §1455.001(2-a), Tex. Ins. Code, as added by HB 3345, 86th Reg. Sess. (2019).

⁵¹ §1455.004(a)(3), Tex. Ins. Code, as added by HB 3345, 86th Reg. Sess. (2019).

⁵² *Id.*; §1455.004(c), Tex. Ins. Code.

The law establishes a general framework for payment by commercial insurance, but the details of payment will depend on the terms of the contract with the health plan and the health plan's payment policies and provider manual. Physicians should thus pay careful attention to network agreements with health plans to ensure the agreement provides for payment for telemedicine, and if so, in what circumstances, and for which billing codes and modifiers.

To facilitate transparency about telemedicine payment, Texas law requires health plan issuers to publish the issuer's policies and payment practices for telemedicine medical services.⁵³ This information must be displayed on the health plan's website in a conspicuous manner.⁵⁴

If a health plan does not provide coverage for telemedicine medical services a physician provides, the physician may be able to bill the patient for the service. Even for this, though, the physician should consult any participation agreement the physician has with the patient's health plan to ensure there are not restrictions associated with directly billing the patient. Some health plans, for instance, may require advance notification to the patient that the service is not covered.

Aside from payment from commercial health plans, physicians providing telemedicine medical services for beneficiaries of Medicaid and Medicare may be eligible for payment if they meet those programs' respective requirements.

Medicare

Medicare pays for a limited number of Part B services furnished by an "interactive telecommunications system" when certain technological, practitioner, and location conditions are met. First, Medicare requires that to be payable, a telemedicine medical service must be provided by an "interactive telecommunications system," which is defined to mean "multimedia communications equipment that includes, at a minimum, **audio and video equipment permitting two-way, real-time interactive communication** between the patient and distant site physician or practitioner" and does not include telephones, facsimile machines, and electronic mail systems.⁵⁵

The actual list of "Medicare telehealth services"⁵⁶ for which Medicare provides payment is annually reviewed and updated, and can be accessed on the Centers for Medicare & Medicaid Services (CMS) website, where members of the public also have the opportunity to submit

⁵³ §1455.006, Tex. Ins. Code.

⁵⁴ §1455.006, Tex. Ins. Code.

⁵⁵ 42 C.F.R. §410.78(a)(3) (emphasis added). In order to receive payment for Medicare telehealth services, they must be provided using an interactive telecommunications system, *except* for federal telemedicine demonstration programs in Alaska or Hawaii, where payment is permitted when asynchronous store-and-forward technologies are used as a substitute for interactive telecommunications systems. 42 C.F.R. §410.78(d).

⁵⁶ Note the distinction between what Medicare calls "telehealth" and what is considered "telehealth" under Texas law. Here, "telehealth" would include services provided by a physician, those services that Texas law refers to as "telemedicine medical services."

requests to add or delete services on an ongoing basis.⁵⁷ For instance, in the 2019 Physician Fee Schedule Final Rule, CMS announced it was adding new codes related to prolonged preventive services in response to comments to add various services as Medicare telehealth services.⁵⁸

Medicare also requires the services to be provided by physicians or certain other practitioners (including nurses, physician assistants, or psychologists) as long as the physician or practitioner is licensed to furnish the service under state law.⁵⁹

Medicare also has very specific requirements relating to the location of the patient receiving the services. To be payable under Medicare, services must be furnished to a beneficiary at certain “originating sites,” which include the office of a physician or practitioner, a hospital, and a rural health clinic (among others), and the originating site, except for certain exceptional circumstances, must meet certain geographic qualifications: The site must be located either in a health professional shortage area outside of a metropolitan statistical area, or in a rural census tract or a county that is outside of a metropolitan statistical area.⁶⁰ The U.S. Health Resources and Services Administration maintains a Medicare Telehealth Payment Eligibility Analyzer that allows users to input an address to determine whether the address may be eligible for Medicare telehealth originating site payment.⁶¹

There are, however, special geographic exceptions for the use of telehealth services to treat end-stage renal disease (ESRD), acute strokes, or substance use disorders. Following a 2019 change in law,⁶² the geographic qualifications for an originating site (that the site must be in a certain health professional shortage area or in certain rural census tracts or counties) does *not* apply for the following telehealth services:

1. Home dialysis monthly ESRD-related clinical assessment services provided in accordance with applicable law on or after Jan. 1, 2019, if the originating site is a hospital-based or critical access hospital-based renal dialysis center, a renal dialysis facility, or the individual’s home;
2. Services provided on or after Jan. 1, 2019, for purposes of diagnosis, evaluation, or treatment of symptoms of an acute stroke; or
3. Services provided on or after July 1, 2019, to an individual with a substance use disorder diagnosis, for purposes of treatment of a substance use disorder or a co-occurring mental health disorder.

⁵⁷ Accessible at: www.cms.gov/Medicare/Medicare-General-Information/Telehealth/index.html (last accessed July 31, 2019).

⁵⁸ 83 *Fed. Reg.* 59452, 59492.

⁵⁹ 42 C.F.R. §410.78(b)(1).

⁶⁰ “Metropolitan statistical area” and “health professional shortage area” are both defined terms in federal regulation. For more details, see 42 C.F.R. §410.78(b)(4)(i) and (ii).

⁶¹ Accessible at: <https://data.hrsa.gov/tools/medicare/telehealth> (last accessed July 31, 2019).

⁶² Substance Use-Disorder Prevention that Provides Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT for Patients and Communities Act), Pub.L. 115-271, Title III, §2001, Oct. 24, 2018, 132 Stat. 3925; Bipartisan Budget Act of 2018, Pub.L. 115-123, Division E, §50325, Feb. 9, 2018, 132 Stat. 205.

Other recent changes to Medicare law and regulation mark a willingness to allow physicians to use telehealth for the benefit of their patients. A particularly significant change was released by the CMS in the 2019 Physician Fee Schedule final rule. There, CMS sought to modernize Medicare physician payment by distinguishing certain “communication technology-based services” payable under the physician fee schedule from other “Medicare telehealth services” that are subject to the limitations described above.⁶³ These communication technology-based services include a virtual check-in,⁶⁴ remote evaluation of prerecorded patient information,⁶⁵ and interprofessional internet consultation.⁶⁶ By offering payment for these services that will not be subject to the Medicare telehealth limitations, CMS thus aims to “increase access for Medicare beneficiaries to physicians’ services that are routinely furnished via communication technology.”⁶⁷

The expansion of the availability of telehealth services under Medicare extends also to Medicare Advantage plans. Under the Bipartisan Budget Act of 2018 and subsequent enacting regulations, Medicare Advantage plans will now be authorized to include “additional telehealth benefits” – telehealth benefits beyond what original Medicare allows – in their bids for basic Medicare benefits, starting in plan year 2020.⁶⁸

Workers’ compensation system

Physicians also may be able to bill and be paid for certain telemedicine medical services provided to injured workers in the Texas workers’ compensation system. To do so, the Texas Department of Insurance’s Division of Workers’ Compensation (DWC) requires physicians to comply with generally applicable payment rules for medical billing and processing for the

⁶³ 83 *Fed. Reg.* 59452, 59483

⁶⁴ This code will be described as HCPCS Code G2012 (Brief communication technology-based service, e.g., virtual check-in, by a physician or other qualified health care professional who can report evaluation and management services, provided to an established patient, not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment; 5-10 minutes of medical discussion). See 83 *Fed. Reg.* 49452, 59483.

⁶⁵ This code will be described as HCPCS Code G2010 (Remote evaluation of recorded video and/or images submitted by an established patient [e.g., store and forward], including interpretation with follow-up with the patient within 24 business hours, not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment). See 83 *Fed. Reg.* 49452, 59486.

⁶⁶ This consultation will be under CPT codes 99451 (Interprofessional telephone/internet/electronic health record assessment and management service provided by a consultative physician including a written report to the patient’s treating/requesting physician or other qualified health care professional, 5 or more minutes of medical consultative time); 99452 (Interprofessional telephone/internet/electronic health record referral service(s) provided by a treating/requesting physician or qualified health care professional, 30 minutes); and 99446-99449 (Interprofessional telephone/internet assessment and management service provided by a consultative physician including a verbal and written report to the patient’s treating/requesting physician or other qualified health care professional; 5-31 minutes of medical consultative discussion and review [depending on code]).

⁶⁷ 83 *Fed. Reg.* 59452, 59483

⁶⁸ Pub.L. 115-123, Division E, §50323, Feb. 9, 2018, 132 Stat. 205; see also Contract Year 2020 Medicare Advantage and Part D Flexibility Final Rule (CMS-4185-F), April 5, 2019 (fact sheet), available at: www.cms.gov/newsroom/fact-sheets/contract-year-2020-medicare-advantage-and-part-d-flexibility-final-rule-cms-4185-f.

workers' compensation system, and with "Medicare payment policies,"⁶⁹ but with one significant exception.⁷⁰ Whereas Medicare payment policies require the patient receiving the telemedicine medical services be in a certain authorized "originating site," DWC rules allow a physician to bill and be paid for telemedicine services provided on or after Sept. 1, 2018, within the workers' compensation system "regardless of where the injured employee is located at the time the ... services are provided."⁷¹

All other Medicare payment policies – including requirements that payable services be limited to certain specified "Medicare telehealth services" and that the services be provided through the use of certain modalities that include, at a minimum, audio and video equipment permitting two-way, real-time interactive communication – still apply.

Medicaid and Medicaid managed care

The Texas Medicaid program allows payment for telemedicine medical services. For the most part, Texas Medicaid telemedicine payment policies align with generally applicable state law and regulation. The Texas Health and Human Services Commission (HHSC) establishes policies for payment for telemedicine medical services. These include requirements that the physician be licensed in Texas, have a valid practitioner-patient relationship, abide by the in-person standard of care, obtain informed consent to treatment, provide written notification of privacy practices in certain situations, and provide patients with guidance on the appropriate follow-up care.⁷² Further, in accordance with federal law, physicians providing telemedicine services must be enrolled in Texas Medicaid.

Medicaid policy regarding telemedicine modalities and how that affects payment is also similar to what applies as described above, meaning that telemedicine medical services must be provided using appropriate technology as spelled out in state law, and that payment is not required (though a Medicaid managed care organization [MCO] has the option to provide payment) for telemedicine medical services that are provided through only synchronous or asynchronous audio interactions.⁷³

Texas Medicaid also maintains a distinction between patient site (where the patient is physically located) and distant site (where the physician or provider is physically located). HHSC policies do not seem to place restrictions on the types of settings that may be a patient site, and they do specify that the patient's home may be a patient site. The site distinction also may have meaning as relates to payment, as patient-site providers, if any, may be paid only for the facility fee. Patient-site providers may charge for other services performed at the patient site by submitting them separately.⁷⁴

⁶⁹ "Medicare payment policies" is a defined term to mean "reimbursement methodologies, models, and values or weights including its coding, billing, and reporting payment policies as set forth in the Centers for Medicare and Medicaid Services (CMS) payment policies specific to Medicare." 28 TAC §134.203.

⁷⁰ 28 TAC §133.30.

⁷¹ 28 TAC §133.30(d).

⁷² §3.2.1, *Texas Medicaid Provider Procedures Manual*, Vol. 2 (Aug. 2019).

⁷³ *Id.* at §3.2.2.

⁷⁴ *Id.* at §3.2.3.

For distant site providers, payment for telemedicine medical services provided in the Medicaid program is, as of August 2019, still limited to only a handful of procedure codes.⁷⁵ Notwithstanding the Texas Legislature’s recent enactment of Medicaid telemedicine reforms, HHSC has a responsibility to ensure that payment for telemedicine medical services is provided in a cost-effective manner and only in circumstances in which the provision of those services is clinically effective.⁷⁶ Consequently, HHSC is going through a rigorous and lengthy process of reviewing services that may be cost- and clinically effective when provided as telemedicine medical services. Within the next year, the number of codes for which Medicaid payment is available for telemedicine medical services will increase, though perhaps not as quickly as for commercial health plans or Medicare.

Medicaid MCOs must abide by the *Texas Medicaid Provider Procedures Manual*, including policies relating to telemedicine payment.⁷⁷ The MCOs, like Medicaid fee-for-service, are allowed to pay physicians only for the limited list of services for which HHSC has authorized the use of telemedicine. However, it must be noted that the Medicaid MCOs may still impose telemedicine utilization management policies different from Medicaid fee-for-service, including prior authorization and claims and encounter data filing.

Physicians wanting to monitor the expansion of Medicaid payment for additional telemedicine medical services should consult the Medicaid manual and their Medicaid MCO contracts.

Within the next year, Medicaid telemedicine payment policies will be broadened. TMA advocacy resulted in new legislation directing HHSC to expand the number of telemedicine medical services for which Medicaid fee-for-service and Medicaid MCOs will be able to pay. Other reforms included removing burdensome and unnecessary administrative prerequisites for Medicaid payment of telemedicine medical services, including eliminating the requirement that a telepresenter must be with the patient. Additionally, lawmakers repealed statutory prohibition on the use of Medicaid remote telemonitoring beyond September 2019.

As noted above, Medicaid MCOs must abide by the state’s Medicaid telemedicine and telehealth payment and policy requirements. However, as more MCOs encourage the use of telemedicine and telehealth services, lawmakers specified that Medicaid MCOs, like their commercial counterparts, cannot limit a physician’s choice of platform for providing telemedicine medical services.⁷⁸

Already, Medicaid fee-for-service and MCOs cannot deny payment on the sole basis that the service was not provided in person – the same requirement for commercial payers.⁷⁹ The legislature also directed HHSC to ensure that the use of telemedicine in Medicaid managed care promotes and supports patient-centered medical homes.⁸⁰

⁷⁵ The complete list of those codes can be found in the *Texas Medicaid Provider Procedures Manual*: www.tmhp.com/Manuals_PDF/TMPPM/TMPPM_Living_Manual_Current/2_Telecommunication_Srvs.pdf.

⁷⁶ §531.02174(b), Tex. Govt. Code.

⁷⁷ Letter from Stephanie Muth, state Medicaid director, to Douglas Curran, MD, et al., (March 4, 2019).

⁷⁸ §531.0217(d), Tex. Govt. Code, as amended by SB 670, 86th Reg. Sess. (2019), eff. Sept. 1, 2019.

⁷⁹ Id at §531.0216(g).

⁸⁰ Id at §531.0216(g).

Are There Any Additional Requirements Physicians Should Consider?

In addition to the state laws and regulations and ethical guidelines discussed above, telemedicine also may be subject to several federal laws and regulations. The following list is an overview of some of the federal laws and regulations that should be considered, and it is not intended to be comprehensive.

Federal and State Privacy and Security Laws. Because telemedicine uses information or telecommunications technology to connect with patients remotely, physicians providing telemedicine medical services will need to be concerned with how information about the patient is transmitted and stored. This implicates the federal Health Insurance Portability and Accountability Act (HIPAA) and Health Information Technology for Economic and Clinical Health Act laws and corresponding federal regulations as well as state privacy laws, such as the Medical Records Privacy Act. No one type of technology is guaranteed to be “HIPAA compliant,” despite what marketers may advertise. While it is important to ensure that the technology used to provide telemedicine is capable of complying with privacy and security standards, a physician providing telemedicine should ensure that his or her own telemedicine related practices also comply.

Medicare and The Joint Commission Credentialing and Privilege Requirements. While it is facilities that must comply with Medicare and The Joint Commission requirements relating to privileges and credentialing, individual physicians should be aware of the effect of having telemedicine privileges at a facility. For instance, a physician in one case contracted with a telemedicine entity that provided services for several hospitals. When the physician resigned her privileges at one hospital, she was surprised to learn that the resignation was reported to the National Practitioner Data Bank because the hospital had expressed concerns about the quality of her services.⁸¹

Medicare Payment Policies. Physicians who treat Medicare patients should be aware of Medicare payment policies before providing services to those patients through telemedicine. Medicare’s policies allow for payment for telemedicine medical services in very limited circumstances based on certain criteria including technology, geography, provider type, and facility type. Details are discussed above in relation to payment under the Medicare program.

Federal and State Fraud and Abuse Laws. The federal Stark law generally prohibits a physician who has a financial relationship with an entity from referring Medicare or Medicaid patients to the entity for certain designated health services, except in certain circumstances. The federal antikickback statute prohibits individuals from knowingly and willfully offering, paying, soliciting, or receiving remuneration to induce referrals of items or services covered by Medicare or other federal payment programs. Texas law imposes similar requirements. For example, the Texas Patient Solicitation Act prohibits knowingly offering to pay or agreeing to accept any remuneration for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency.

⁸¹ *Miller v. Imaging on Call, LLC*, 3:13-CV-00679 JAM, 2015 WL 150287, at *1 (D. Conn. Jan. 12, 2015).

A physician providing telemedicine should ensure compliance with these laws and pay careful attention to the equipment, facilities, and third parties involved in implementing telemedicine into the physician's practice.

Food and Drug Administration Regulations. The U.S. Food and Drug Administration (FDA) regulates medical devices (and even mobile apps if they are an extension of a medical device). A physician who uses telemedicine should consider whether the technology he or she uses to provide the telemedicine is subject to FDA oversight.

Conclusion

Telemedicine may have many applications and may present new opportunities for physicians in their medical practice. At the same time, many state and federal legal considerations ought to be made before doing so. Consultation with private counsel is recommended to help ensure a physician is in compliance with all applicable law and regulations in incorporating telemedicine into the physician's practice.

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