

HEALTH LAW

Expert Analysis

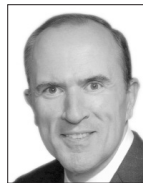
## Telemedicine: Legal And Practical Considerations

**W**e last wrote about telemedicine in this column 15 years ago. Much has happened since then, so it's time for a refresher on some of the legal and practical issues related to telemedicine.

Telemedicine comes in many variations. It can be a physician sitting in an office at a hospital, viewing a patient's X-ray, laboratory tests and medical record, and discussing treatment options with the patient via video conference. It can be a telemetry unit in an ambulance relaying a patient's heart function information to a physician in a hospital's emergency room, enabling the physician to instruct the ambulance crew in stabilizing and caring for the patient during transportation to the hospital. It can be a midwife communicating with a distant obstetrician to manage complications that arise with a delivery of a baby in a birthing center or at home. It can be an internist at a hospital on the East Coast consulting with a physician on the West Coast who has expertise in an obscure medical condition. Outside of general medicine, video consults have been used widely and successfully in the behavioral health area.

The use of telemedicine, which for decades has been touted as the future of medicine, has in fact developed rather more slowly than most experts initially anticipated. There are several reasons for this. For a long time, the Medicare and Medicaid programs and most private insurers and plans would not pay for most telemedicine encounters. Moreover, state licensing laws (enacted when telemedicine was inconceivable) have been construed to require that if a physician licensed in one state wanted to use audio/video technology to treat a patient in another state, the physi-

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cian would also have to be licensed in the state where the patient is located. This has been a significant disincentive for physicians. Lastly, the picture quality of the telemedicine media was for many years not optimal for an effective examination of the patient.

However, a confluence of factors seems to assure a brighter future for telemedicine. Hospitals are consolidating or closing, meaning there are fewer facilities to serve their populations. There is a shortage of physicians, particularly specialists, in many suburban and rural areas. The lower costs and convenience of a telemedicine consult, and the increasingly vivid pictures afforded by computer, smartphone, tablet, and television screens, are making the diagnosing and treating of patients from a distance an increasingly attractive option. This is particularly so for patients with chronic diseases who need regular follow-up but not necessarily an on-site visit to a hospital or a physician's office. Research and Markets recently issued a report predicting that telemedicine use will grow by 18.5 percent per year through 2018.<sup>1</sup>

### Definition

Telemedicine is sometimes referred to variously as e-health, telehealth, and virtual consults. However, the Centers for Medicare and Medicaid Services (CMS) differentiate the terms telehealth and telemedicine for reimbursement purposes. CMS's Medicaid website<sup>2</sup> states:

For purposes of Medicaid, telemedicine seeks to improve a patient's health by

permitting two-way, real time interactive communication between the patient, and the physician or practitioner at the distant site. This electronic communication means the use of interactive telecommunications equipment that includes, at a minimum, audio and video equipment.

Telehealth (or Telemonitoring) is the use of telecommunications and information technology to provide access to health assessment, diagnosis, intervention, consultation, supervision and information across distance.

Thus, CMS uses "telemedicine" to refer to the actual remote clinical services being provided, and "telehealth" to refer to the technology used in enabling the provision of remote clinical services.

A key condition for payment for telemedicine services by Medicare, Medicaid, and other government health benefit programs is that physicians and other providers practice within the scope of what is permitted by state licensing statutes. Each state has its own approach to regulating telemedicine, so let's go over what New York law allows and doesn't allow.<sup>3</sup>

New York Public Health Law §2805-u defines telemedicine as:

...the delivery of clinical health care services by means of real time, two-way electronic audio-visual communications which facilitate the assessment, diagnosis, consultation, treatment, education, care management and self-management of a patient's health care while such patient is at the originating site and the health care provider is at a distant site.

New York's Education Law (Ed. Law) §6521 defines the practice of medicine as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition." Ed. Law §6522 requires that "Only a person licensed or otherwise authorized under this article shall practice

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medicine or use the title 'physician.' Accordingly, a physician (or other practitioner) who wishes to diagnose and treat a patient located in New York by way of telemedicine must be licensed in New York.

Ed. Law §6526 contains very narrowly tailored exceptions to this licensing requirement. A relevant exception is §6526(2) which allows a physician licensed in a state that borders New York and resides near a New York border to practice medicine as long as the physician's practice in New York is limited to the vicinity of the border, and as long as the physician "does not maintain an office or place to meet patients or receive calls" within New York. Another exception is §6526(3) which allows a physician licensed in another state or country to practice medicine only to the extent that the foreign physician is meeting a physician who is licensed in New York for purposes of consultation, and only to the extent of the consultation.

Another exception would seem to be in the case of a patient who resides in New York, travels to New Jersey and establishes a physician-patient relationship with a New Jersey-licensed physician, and is treated in the physician's New Jersey office. Follow-up care by the New Jersey physician via telemedicine when the patient returns to New York would seem to be appropriate as long as it is limited to the medical problem for which the patient sought care in New Jersey in the first instance. Ongoing care of the patient for other medical conditions would require the physician to obtain a New York license if the care is to be provided via telemedicine; otherwise, the patient must travel to New Jersey for further care and treatment.

Assuming a physician is licensed in New York and using telemedicine to treat patients, most other requirements of an office visit apply.

1. A physician-patient relationship must exist. If a physician, physician assistant, or other licensed practitioner provides professional advice, treatment or therapy, there is then a presumption that a professional relationship has been established whether or not the patient has been charged or paid a fee for the service.

2. The physician must display or otherwise make available to the patient a copy of the physician's medical license, either before or during the initial telemedicine encounter.

3. The physician must keep an accurate medical record of the telemedicine consultation, either on paper or as part of an electronic medical record. If the physician wishes to record and store a video of the encounter, it must be with the patient's prior consent.

4. The patient must give his or her informed consent to any treatment or procedure.

5. The physician must exercise good medical judgment in determining whether a telemedicine encounter is appropriate for diagnosis and treatment, or whether a face-to-face encounter with the patient is needed. Once a physician-patient relationship has been established, the physician must be accessible for follow-up care and consultation as needed.

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6. The physician must safeguard the privacy of the telemedicine encounter itself, the record kept of the encounter, and any subsequent exchange or transfer of the patient's personal health information to authorized third parties in accordance with the Health Insurance Portability and Accountability Act (HIPAA) privacy rules<sup>4</sup> and applicable state law.

7. If the physician will be billing for the telemedicine encounter, the physician should make certain beforehand that the encounter is reimbursable and that it is conducted in accordance with and meets all requirements of the third party payor, be it Medicare, Medicaid, or a private insurer or plan.

8. The physician should also make certain beforehand that whatever professional liability insurance policy covers her practice includes coverage for telemedicine encounters.

#### Drug Abuse

An area rife with abuse has been the use of telemedicine consults or a simple Internet questionnaire to enable patients to obtain controlled substances, particularly painkillers. Physicians must comply with all federal and state laws and regulations when prescribing controlled substances. In New York, with few exceptions, a physician can issue a prescription for a controlled substance only after the physician has actually examined the patient for whom the prescription is intended.<sup>5</sup>

#### Other Considerations

Non-physician entrepreneurs who see opportunities in telemedicine should be aware of how limited those opportunities may be under New York law. As we have pointed out in many columns, New York has a strict prohibition on the corporate practice of medicine, meaning that only physicians, physician-owned professional corporations or partnerships, and licensed facilities such as

hospitals may employ physicians and provide medical services.<sup>6</sup> Fee-splitting or fee-sharing of any kind by physicians with lay persons or entities is prohibited by law.<sup>7</sup> Lastly, New York law also prohibits the operation of for-profit patient referral services.<sup>8</sup>

#### The Future

Various bills to encourage the use of telemedicine by easing some of these legal restrictions have been introduced in Congress and the New York State Legislature. For example, bills have been introduced in the State Senate and Assembly that would require health plans and the Medicaid program to pay providers for telemedicine encounters to the same extent that they would be covered in person at the provider.<sup>9</sup>

New York has taken a small but significant step to facilitate telemedicine consultations among hospitals in the state. Public Health Law §2805-u, enacted in 2013, facilitates the credentialing of physicians who have admitting privileges at one hospital, but who want to use hospital telemedicine capabilities to treat patients at another hospital. Moreover, last month, the Federation of State Medical Boards issued new voluntary guidelines "intended to facilitate the growth of telemedicine...while providing consumers with appropriate and needed protection."<sup>10</sup> The Federation and a number of state medical boards are attempting to create an Interstate Medical Licensure Compact, under which participating states would retain their medical licensure and disciplinary authority, but share information and processes in order to expedite licensure for physicians seeking to practice in multiple states.

"Science annihilates distance," observed a character in Evelyn Waugh's *Brideshead Revisited*. Science—and consumer demand—may eventually do the same to some of the current legal obstacles to the practice of telemedicine.

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1. Research and Markets, "Global Telemedicine Market Outlook 2018," March, 2014, available at [http://www.researchandmarkets.com/reports/2775117/global\\_telemedicine\\_market\\_outlook\\_2018.html](http://www.researchandmarkets.com/reports/2775117/global_telemedicine_market_outlook_2018.html).

2. <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Telemedicine.html>.

3. See, also, Special Committee on Telemedicine, N.Y. Board for Professional Medical Conduct, "Statements on Telemedicine" found at the NYS Department of Health's website: <https://www.health.ny.gov/professionals/doctors/conduct/telemedicine.html>.

4. 45 CFR Parts 160, 162 and 164.

5. 10 NYCRR §80.63(d).

6. See, e.g., *United Calendar Mfg. Corp. v. Huang*, 463 NYS2d 497 (1st Dept. 1983).

7. Ed. Law §6531; See also 8 NYCRR §29.1(b).

8. N.Y. Public Health Law §4501(a). See, Serbaroli, "New York's Prohibition on For-Profit Medical Referral Services," *NYLJ*, July 30, 2002, p. 3.

9. Assembly A-09129; Senate S-04337b.

10. Available on the Federation's website: [www.fsmb.org](http://www.fsmb.org).