

# Telemedicine: Legal Considerations

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# Disclosures

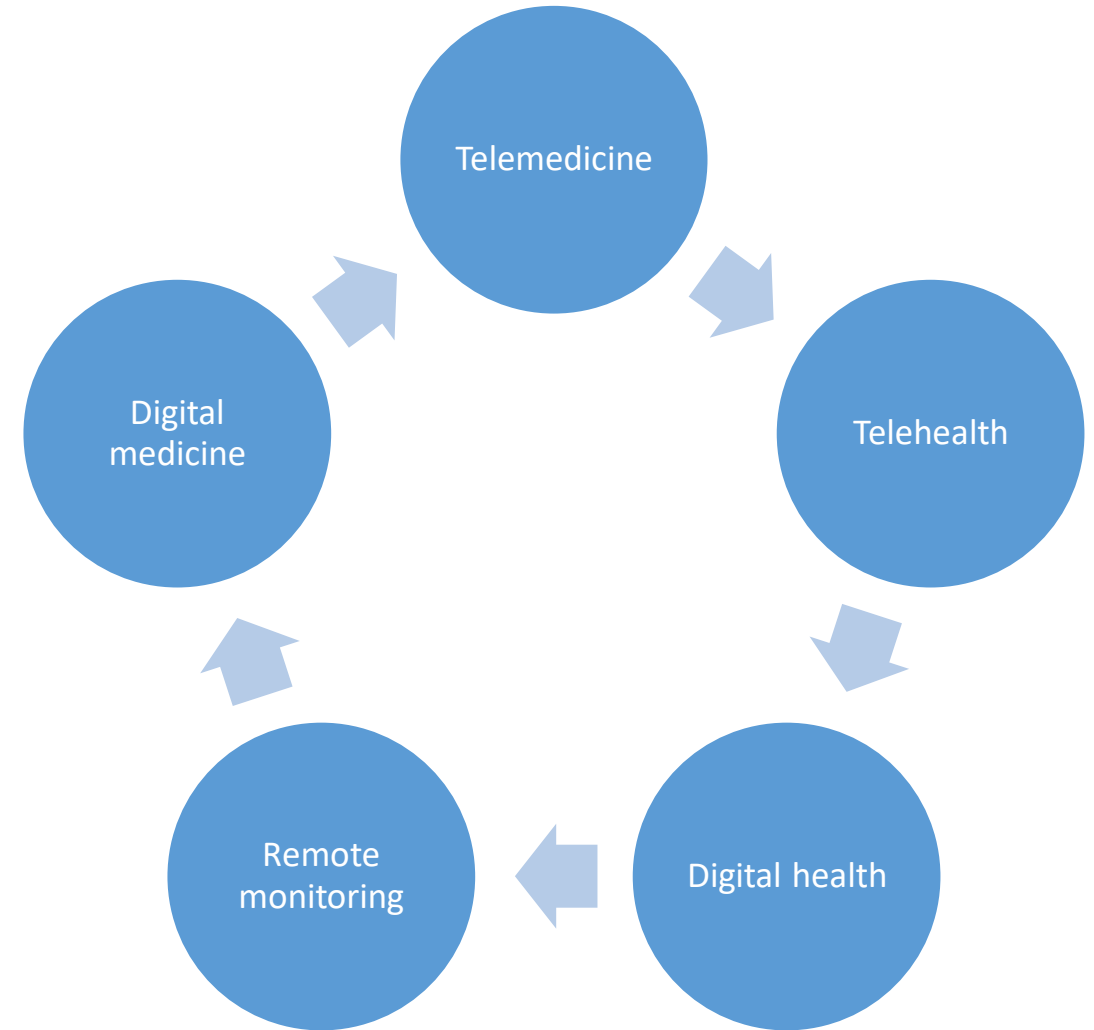
- The views expressed in this are solely those of the presenters; they should not be attributed to their places of employment, colleagues, or clients
- This presentation is not intended to provide a comprehensive review of all potential issues associated with telemedicine and should not be construed as medical or legal advice
- The intention of this presentation is to identify and provide pragmatic tips for addressing issues that may arise for practitioners using or considering the use of telemedicine with their practice

# Objectives

- Describe telemedicine and how it can facilitate clinical care from a distance
- Describe the legal and regulatory issues potentially impacting telemedicine services
- Describe different steps that PAs can take to increase compliance with legal and regulatory requirements regarding the use of telemedicine
- Analyze different clinical situations and distinguish factors in the scenarios that are non-compliant with the legal and regulatory requirements regarding the use of telemedicine

# Telemedicine Defined

- General terms are (for the most part) interchangeable:
- According to the American Telemedicine Association, “telemedicine is the remote delivery of healthcare services and clinical information using telecommunications technology”
- It is important to note that definitions of telemedicine vary by state and federal agency



# Telemedicine Modalities

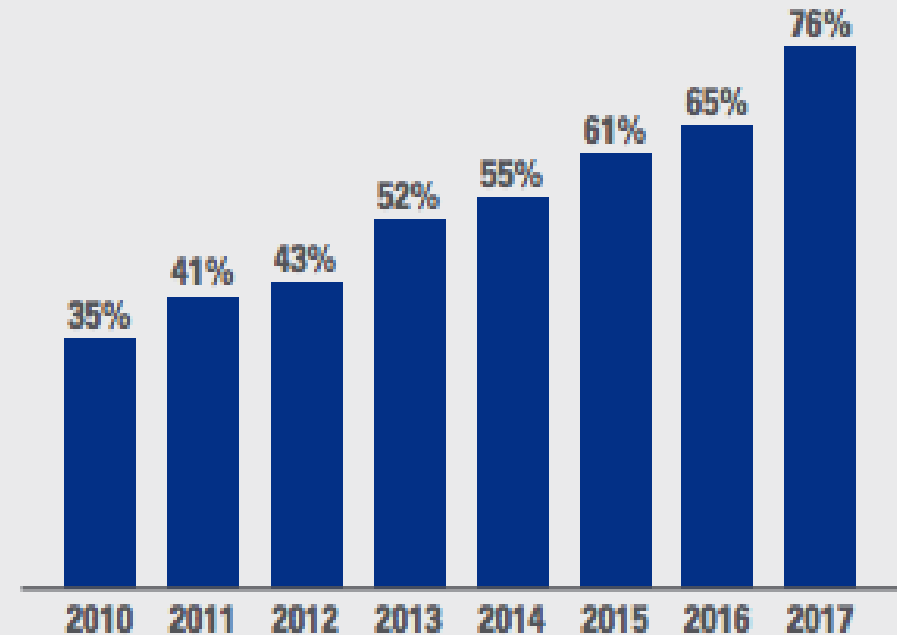
- Live audio or video → Synchronous real-time
- Interactive audio → Store and forward
- Store and forward → Asynchronous (not real-time)
- Remote patient monitoring (including wearable technologies)
- Email/phone/fax → Rarely acceptable form of delivery unless combined with other method(s)

# Using Telemedicine in 2020

- 76 percent of U.S. hospitals connect with patients and consulting practitioners at a distance through the use of video and other technology (American Hospital Association)
- 90% of healthcare executives say their organizations are developing or already have a telehealth application (Foley & Lardner Law Firm)
- More and more consumers and physicians download health and wellness applications for use on their cell phones (American Telemedicine Association)

## Use of telehealth in hospitals has grown rapidly.

Percent of hospitals fully or partially implementing computerized telehealth system, 2010-2017



Source: 2011 to 2018 AHA Annual Survey IT Supplement

# Benefits of Telemedicine

- Efficient, cost-effective patient care (and lower costs)
- Cost/Penalty avoidance
- Collaboration between providers to help improve patient care
- Patient satisfaction
- Access to specialty care
- Access to care for patients in rural areas

# Current Uses of Telemedicine

Second opinions

Mental health services

Remote patient  
monitoring/Telehealth

Urgent care or after-  
hours care

Outpatient hospital  
services

Emergency  
department services

Skilled nursing facilities

Inpatient hospital  
services

Telestroke

Tele-ICU

Telepharmacist

Destination medical  
services



# Medical and Legal Considerations

- Location
- Licensure
- Credentialing and privileges
- Regulatory considerations
- Practice standards
- Prescribing
- HIPAA
- Malpractice insurance

# Location

- General rule: The location of the patient drives the licensure – some form of this in all states
- The PA must be licensed in the state where the patient is located at the time of the telemedicine consult
- More complicated for multi-state platform
  
- Some states explicitly address this in law or guidance and are very strict (New Hampshire)
- Some states indirectly address this by including diagnosing or providing treatment through “electronic or other means” as part of the practice of medicine (Georgia, Mississippi, West Virginia)
- Other states are silent (Massachusetts)

# Licensure Exceptions

- Bordering State – Allows practice of medicine by out-of-state providers who are licensed in bordering state
  - Virginia provides license reciprocity for those providing telemedicine services to patients in Virginia if the physician is licensed in a bordering state: Maryland, Washington D.C., North Carolina, Tennessee, Kentucky, and West Virginia
- Consultation – Allows an unlicensed provider to practice medicine in peer-to-peer consultation with a licensed provider in the state
- Follow-up Care – Allows provider to provide follow-up care to his or her established patient
  - Indiana, Illinois, Ohio

# Licensing – Changes due to COVID-19

- Many states including the District of Columbia, Guam and Puerto Rico have introduced legislation to support state action related to COVID-19
- Many states are relaxing licensing laws temporarily
- For example, many states now allow you to practice in their state if you have an unrestricted state license in another state
- Some states are requiring you to apply for a temporary license
- Check with your state individually though, because each state has individual laws

# Licensure: Future

- Physicians: Interstate Medical Licensure Compact (“IMLC”)
- Allows reciprocity in states participating in the IMLC (and Guam)
  - NOT AVAILABLE FOR PAs (WHY NOT??!!!!)
  - An expedited route to licensure for certain physicians to practice in multiple states
  - Eligible physicians can obtain licenses to practice medicine in 22 states
  - Allows an eligible physician’s application to be expedited by leveraging the existing information previously submitted in their state of principal licensure

# Credentialing and Privileges

- Telemedicine provider credentialing requirements are usually based on the source of payment the patient chooses to use for the service
- CMS Conditions of Participation for Hospitals
  - A hospital is required to have a credentialing and privileging process for physicians and practitioners providing services to the hospital's patients, including those who provide services via telehealth
  - CMS permits the hospital receiving the telehealth services to rely on the privileging and credentialing decisions made by the hospital or entity providing the telehealth services, provided certain requirements are met
  - A hospital must have a written agreement in place with the distant-site hospital/telehealth entity – 42 C.F.R. 482.12(a)(8), (a)(9)
- By proxy
  - An expedited process to permit the hospital receiving the telemedicine service (originating site) to rely on the privileging and credentialing decisions made by the hospital or entity providing the telemedicine (distant site)

# Practice Standards

- Arbitrary rules that were developed by boards of medicine
- Clinicians requested development of telemedicine practice standards
- Different states have different rules - some states include different parts of these, others do not
- More and more states are passing legislation directing healthcare professional boards to adopt practice standards for its providers utilizing telehealth

# Practice Standards

New patient vs  
established  
patient

Verify patient  
identity

Originating site  
restrictions

Patient site  
telepresenter

Modality of  
communication  
technology

Remote  
prescribing

Record keeping  
and record  
sharing

Informed  
consent

Patient choice  
of provider

Disclosures

Malpractice  
insurance  
considerations

Credentialing



# Practice Standards

- AMA: Ethical Practice in Telemedicine
- Physicians who respond to individual health queries or provide personalized health advice electronically through a telehealth service should discuss or confirm the following with the patient:
  - The limitations of the relationship and services provided
  - How to arrange follow-up and continuity of care
  - How collaboration is key - inform the primary care provider, even if in person care is not needed immediately, and involve the patient in shared-decision making to some extent
  - The importance of privacy, security, integrity of patient information and quality of care
  - The patient's identity (name, location, DOB, parent/guardian)
  - That telemedicine is appropriate for the patient's needs
  - The indication, appropriateness, safety of prescriptions and limitations via telemedicine

# Online Prescriptions

- All states allow prescribing via a live-video telemedicine encounter in the context of a *valid* physician-patient relationship
- What constitutes a valid provider-patient relationship?
  - (Depends on the state – some states require a physical exam to be administered prior to a prescription but some states allow the use of telehealth to conduct the exam)
- What constitutes a valid prescription?
- Consider the modality of the telemedicine interaction (state law)

# Online Prescribing – Controlled Substances

- Ryan Haight Act (2008): Online Pharmacy Consumer Protection Act
  - No controlled substance may be delivered, distributed, or dispensed by means of the internet without a valid prescription, which requires an in-person medical evaluation
- Special Registration for Telemedicine Clarification Act (2018)
  - Still in process - providers who apply for and obtain the special registration are allowed to use telemedicine to prescribe controlled substances without an in-person exam
- Some states have responded by expanding the list of drugs that may be prescribed by authorized prescribers via telemedicine to include certain controlled substances
- Some states require ongoing in-person examinations every three months for the duration of the prescription
- **Remember:**
  - To prescribe controlled substances via telemedicine, you must comply with both state and federal laws
  - You must have a DEA license in the state in which you are prescribing

# HIPAA

- Health Insurance Portability and Accountability Act (1996)
- The same requirements for patient privacy and confidentiality that apply for in-person visits apply to visits conducted via telemedicine
- The provider has the identical responsibility to protect patient information
- The storage of electronic files, video, and images need to be approached with the same caution as one would take with physical documents
- Providers who want to be compliant should follow these rules:
  - Fully encrypted data transmission
  - Peer-to-peer secure network connections
  - No storage of video
- Be prepared to educate patients about the steps that you are taking

# HIPAA – Changes due to COVID-19

- Privacy rules temporarily relaxed
- Health professionals who want to provide telemedicine services to patients can use any non-public facing audio or visual service that is available
- This discretion applies to telemedicine services provided for any reason, regardless of whether the telemedicine service is directly related to the diagnosis and treatment of health conditions related to COVID-19

# Fraud and Abuse

- All laws remain in place even during telemedicine consultations!
- Compliance Red Flags:
  - Not following Anti-kickback laws
  - Not following Stark law
  - Not following safe harbor act
  - No valid doctor-patient relationship
  - Phone only – cold-calling patients
  - No “real” medical group
  - No charge for telemedicine consultation – billed as on-site

# Malpractice Insurance

- Tort liability for telehealth is rooted in negligence
- Providers should adhere to the same standard of care in telehealth settings as they would when delivering care in person
- Less is known of telehealth lawsuits than is known about those arising in an in-person setting because only a fraction of the total malpractice claims involve telehealth

# Telemedicine Payment – Revenue Streams

Government Fee-  
For-Service  
(Medicare,  
Medicaid)

Medicare  
Advantage,  
Medicaid MCOs

Commercial health  
plans, employer  
health plans

Institutions,  
providers

Self-pay, cash

Cost savings and  
cost avoidance  
(high-deductible  
options)



# Telemedicine Payment – Questions to ask

- Are there rules regarding service parity or payment parity?
- Which CPT and HCPCS codes are acceptable for telemedicine billing?
- Do I need to use a modifier (95/GT/GQ/25)?
- Are there any restrictions on the location of the provider or the patient?
- Does the reimbursement rate match the in-person rate?
- Which providers are eligible?
- Are there any specific items that must be in the clinical documentation?

# Telemedicine Payment - Medicare

- Patient must be in qualifying rural area
- Patient must be at one of eight qualifying facilities (originating site)
- The service must be provided by an eligible provider
- Technology must be real-time audio-video
- The service must be among the CPT codes covered by Medicare
  - Virtual Check-ins (G2012)
  - Remote Evaluations (G2010)

# Medicare Exceptions due to COVID-19

- New rules announced March 17, 2020 and are retroactive to services provided on or after March 6, 2020
- If the patient is not in a rural area and not in a qualified “originating site” you can still bill for telemedicine visit
- A covered healthcare provider that wants to use audio and video communication technology to provide telehealth to patients during the COVID-19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients
- The requirement for a patient to be established, and seen within the last 3 years, is not being enforced for the duration of the COVID-19 emergency order
  - Some state Medicaid, and other payer policies may vary

# Scenario #1

- A patient presents with a painful red rash that has spread. You are concerned it could be Stevens-Johnson Syndrome. You are the only provider on-site and you do not want anything bad to happen on your watch. You consult the dermatologist. It is Saturday and the dermatologist is at the beach. The dermatologist asks you if you can send a photo of the patient's rash to his cell phone. **Can you do this?**

## Scenario #2

- You are providing telemedicine for a company that provides urgent care consultations. Your patient is a young mother who is concerned about her 14-month-old son. He has been irritable for 2 days, febrile for 1 day, with decreased *per os*/po intake for 1 day and some intermittent tugging on his right ear. He was a full-term vaginal delivery and has otherwise been healthy. Vaccines are up-to-date.
- Based on the history you have obtained from the mother; you consider the diagnosis most likely to be otitis media. **Can you prescribe an antibiotic for this child?**

# Scenario #3

- You are working in the clinic, and the electronic medical record system has not been working for two hours. Your day is going awesome.
- Your patient from earlier in the week had his knee MRI yesterday and he called the office to get the results. You saw the results this morning and you were going to send the patient a copy of the report through the EMR system when you had downtime.
- The patient is eager to get the results and in addition to calling the office, he has now emailed you asking if you could Facetime with him to explain the results to him. **What should you do?**

# Scenario #4

- Lucky you! You are on vacation in a non-quarantined tropical location.
- Unfortunately, the office cannot stop calling you with questions about your patients.
- You decide to go sit in your hotel room so you can send some messages to your concerned patients and video-chat with one of your patients while you are logged into the clinic's EMR program. **Can you do this?**

# Final Thoughts

- States laws vary regarding telemedicine and they are **CHANGING DAILY** with COVID-19
- Practice Standards are important – use your best professional judgement and document medical-decision-making
- Telemedicine is **DEFINITELY** here to stay



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