THE LEGAL LOWDOWN:
TELEHEALTH

Heather Skelton
Partner
Gardner Skelton, PLLC

Desirae Hutchinson
Associate
Gardner Skelton, PLLC

Dear Heather: I am a North Carolina physician with a growing interest in telemedicine given the ongoing COVID-19 pandemic. Is telemedicine here to stay? Are there laws regarding telemedicine? As a licensed physician, can I engage in telemedicine services with patients in any nearby state? What should I consider when determining whether a procedure is appropriate for telemedicine?

– Dr. "Web"side Manner

Dear Dr. "Web"side Manner: Telemedicine services have rapidly increased in popularity for both physicians and patients following the COVID-19 pandemic. Telemedicine is likely here to stay, in part, due to the nation's shift in focus from volume-based to value-based care. These services support corresponding objectives like accessibility, quality, and patient centricity.

North Carolina law does not directly address telemedicine, but N.C.G.S. § 90-18(a) requires a person to be licensed and registered in this state to engage in the practice of medicine and surgery. Telemedicine is regulated through the North Carolina Medical Board (NCMB) and state pharmacy statutes. In North Carolina, the practice of medicine occurs in the state where the patient is located. As such, any person practicing telemedicine with patients located in NC must also be NC licensed.

The NCMB has provided guidance on telemedicine practices. Generally, physicians should use their professional judgment in determining the appropriate modality of care for patients. The NCMB is clear, however, that written patient questionnaires without accompanying evaluations could be illegal and subject a licensee to discipline. Further, the NCMB has condemned licensees who prescribe controlled substances for the treatment of pain when the sole patient encounter is through telemedicine and there are no other licensed healthcare providers involved in the initial and ongoing evaluations of the patient. The position statement (accessible from the NCMB website) raises other important points addressing appropriateness and confirms that there is no separate standard of care for telemedicine.

Knowing which types of services are eligible for reimbursement is essential, but coverage is also continually evolving. Since all payers provide regular updates on coverage, staying abreast of these changes is crucial. Recently, certain flexibilities authorized following the implementation of the federal COVID-19 Public Health Emergency (PHE) were extended through December 31, 2024, under the Consolidated Appropriations Act of 2023. Some flexibilities, however, may be sunsetting soon while others may have been implemented permanently.

If you plan to have a telemedicine visit with a patient located in another state, you should check with that state's medical board prior to the visit to determine the rules. States are not uniform in their approach. Generally, there are three stances that states take when addressing licensure requirements for telemedicine. Some states require out of state physicians practicing across state lines to have full licensure in those states. Others require that physicians practicing across state lines obtain a special purpose license to do so. The remaining states do not have licensure statutes and regulations that directly address telemedicine. Aside from these approaches, some states offer exceptions for consultations, licensure through reciprocity, or limited licensure. The Federation of State Medical Boards (FSMB) maintains an updated list of states that have relaxed or waived requirements in response to the COVID-19 pandemic.

As you implied in your questions, an increase in a trend often inevitably leads to heightened scrutiny. With the increased use of remote services, fraud and abuse has also been on the rise. The Department of Health and Human Service (HHS) Office of Inspector General (OIG) recently published a Special Fraud Alert outlining seven illustrative suspect characteristics typically present in practitioner and telehealth arrangements. The OIG's use of the word "telehealth" refers to telehealth (inclusive of non-clinical services), telemedicine, and telemarketing companies collectively. Some of those characteristics include: 1) the purported patients for whom the practitioner orders or prescribes were identified or recruited for free or low out-of-pocket cost items of services; 2) lack of sufficient practitioner contact with a patient to meaningfully assess the medical necessity of items ordered or prescribed; 3) practitioner receipt of compensation based on volume of items or services ordered or prescribed disguised as the number of medical records reviewed; 4) arrangements that involve furnishing items solely to federal health care program beneficiaries; 5) billing federal health care programs despite the Telemedicine company proclaiming that items and services are furnished to commercial beneficiaries only; 6) furnishing one or a single class of products thereby restricting a Practitioner's treatment options; 7) the practitioner is not expected to follow up with patients or is impeded from doing so. Any combination of these factors could trigger scrutiny from OIG.

The OIG's reluctance to release many Special Fraud Alerts over the decades demonstrates a clear Government interest in combatting telehealth fraud. A healthcare attorney can help you navigate these complex rules and regulations.

The information provided in this column does not and is not intended to constitute legal advice.