

Is it Time to Permanently Incorporate Telehealth Into Our Health Care Delivery System?



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There is no question that during the pandemic and duration of the public health emergency, telehealth rose to the occasion demonstrating its tremendous benefits to the health care industry and will likely remain an integral part of the health care delivery system. As we move out of the pandemic and the public health emergency wanes, providers should exercise caution and stay abreast of legal developments as they adopt long term telehealth policies and procedures.

The benefits of telehealth were tested during the pandemic when many laws and regulations that previously hindered the adoption and growth of telehealth as a viable means to deliver care and services were relaxed or waived. As we endeavored to reduce the spread of the virus and assure access and continuity of care, telehealth became the primary means of care delivery. As reported in the Wall Street Journal on March 29, 2021, the number

of telehealth visits at the Cleveland Clinic increased from 37 thousand to 1.2 million during the period of 2019 through 2020. Also as reported by the Wall Street Journal, 12.1 million Medicare beneficiaries, which is more than 36% of patients with Medicare, received health care by telehealth between mid-March through mid-August 2020. The experience in the Capital Region was no different. Enhanced access to health care through telehealth during the pandemic provided the opportunity to compile data from which to derive best practices as telehealth becomes a permanent addition to the health care delivery system. As best practices evolved based upon the evidence, federal and state legislators became better positioned to advocate for permanent changes to the laws and regulations that previously restricted the adoption of telehealth as a viable means of delivering health care services.

For instance, prior to the pandemic, in order to receive telehealth services, the Centers for Medicare and Medicaid (“CMS”) required that (i) the patient be located in remote or rural geographic location, (ii) the patient travel to an acceptable originating site such as a physician’s office, hospital or clinic, and (iii) the patient have an existing relationship with their telehealth provider. CMS further required that the provider be located at a hospital, clinic, physician’s office or other Medicare eligible place of service. Telehealth services could not be rendered from a federally qualified health center (“FQHC”), a rural health clinic (“RHC”) or any other location not recognized by CMS for reimbursement purposes. Finally, not all providers were authorized to render telehealth services and many services were ineligible for reimbursement when delivered using telehealth.

Similarly, in the state of New York, the list of providers authorized to render health care services using telehealth was severely limited and reimbursement was not on par with that of an in-person office visit.

The data gathered during the pandemic demonstrated overwhelming clinical and economic benefits from the increased availability and use of telehealth during the pandemic. As a result, significant changes to federal and state laws and regulations may be expected. Proposals to eliminate the geographic and originating site requirements are pending. Patients will no longer need to undergo an in-person evaluation prior to receiving a telehealth service. Group psychotherapy and substance use disorder treatment will be a permanent addition to the list of services eligible for reimbursement under Medicare, and accordingly, the list of providers authorized to render telehealth services will be greatly expanded. Finally, reimbursement for telehealth visits will be on par with that for in-person visits.

Notwithstanding these tremendous advancements in existing laws, as the pandemic wanes and many of the laws that were relaxed resume in full force and effect, significant legal challenges remain as providers establish their telehealth practice protocols going forward. Providers are encouraged to exercise caution and consult competent counsel when necessary.

The most significant barriers to expanding a telehealth practice are the current state licensure laws. During the pandemic, many states waived their licensure requirements and allowed providers duly licensed and in good standing to provide services under their license in states in which they do not have a license. These licensure requirements were waived to allow duly licensed providers to assist in meeting patient need during a surge without having to undergo a long arduous process of obtaining a license in other jurisdictions. Once the public health emergency is lifted, states will resume full enforcement of their licensure laws, which may/may not include a process, short of a full licensure application, for a provider to register as a telehealth provider. The licensure laws for each state must be carefully reviewed on a case by case basis to understand the risks and benefits of such registration (if available) and avoid the pitfalls of practicing in a state without a license. It is important to recognize that when providing telehealth services, the location of the patient dictates the state in which the provider must

have a license.

Other issues providers need to be aware of include the following:

- **Reimbursement:** Providers should confirm that the payors with which they participate cover telehealth services, to what extent coverage is available, and whether there are specific criteria that must be met including, but not limited to, documentation, informed consent, and patient notifications to qualify for reimbursement.
- **Prescribing:** The laws governing prescribing via telehealth are, at a minimum, confusing. federal laws seem to suggest that a provider with authority to prescribe medications is permitted to prescribe when engaged in telemedicine, however, other federal laws limit the scope of telemedicine. State laws seem to suggest that a provider may prescribe if he/she/they obtain a “special registration” from the Attorney General, however, there are no regulations to describe this “special registration.”
- **Professional Liability Coverage:** Providers should notify their professional liability insurance carrier of any services being provided by telehealth and inquire about risk management strategies to avoid unexpected increases in premium payments.
- **State-Specific Standards of Care:** Providers who are appropriately licensed and provide telehealth in multiple states should fully understand and comply with state-specific requirements pertaining to acceptable modalities, informed consent, standards of care, continuing medical education requirements and income tax implications.
- **Privacy and Security:** As the public health emergency declarations expire, the enforcement of applicable privacy and security requirements will resume in earnest. Be sure that the platform on which telehealth services are provided are compliant with applicable state and federal privacy and security requirements.

The evidence suggests that it is time to permanently incorporate telehealth into our health care delivery system. The past year afforded the health care industry to gather the evidence necessary to identify best practices to allow telehealth to serve a permanent and prevalent role in the delivery of health care services to enhance access, assure continuity of care, optimize patient outcomes and satisfaction, and reduce overutilization and unnecessary costs.

Should you have questions about how to incorporate telehealth into your practice, feel free to contact any member of the Lippes Mathias Wexler Freidman Health Care Practice Team.

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