Telemedicine Law and Regulation in Wisconsin

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Telemedicine is Growing Even Faster Than Anticipated

Foley's 2017 Telemedicine & Digital Health Survey: 2014 vs 2017

87% of respondents to 2014 survey did not expect their patients to be using telemedicine services.

76% of respondents to 2017 survey offer or plan to offer telemedicine.

Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)
Perception of Opportunities in Telemedicine

- Second opinions or specialty opinions: 53%
- Mental health services: 51%
- Remote patient monitoring: 51%
- Urgent care or after-hours care: 40%
- Outpatient hospital services: 35%
- Emergency department services: 32%
- Store and forward uses (excluding radiology and pathology): 32%
- Inpatient hospital services: 31%
- Te lestroke: 31%
- Destination medicine services: 23%
- Telepharmacist: 19%
- Other (please specify): 28%

Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)
Entrepreneurs In Highly Regulated Industries

**Spend time in the beginning to lay out your idea, plan, strategy, and tactics before executing.**

- “We’ll address legal issues after we are successful.”

**Understand the laws and regulations, then make informed business decisions.**

- “It’s probably fine because XYZ Corp. is doing it and they have VC/PE funding or are in the news.”

**Develop a realistic operating budget and consider strategic outside investors, but don’t relinquish control rights.**

- “We are bootstrapping it on a shoestring until we are successful.”
Telemedicine and Licensing

- Physician offering care via telemedicine is subject to licensure rules of the state in which the patient is physically located at the time of the consult.
- State law expressly or implicitly requires licensure if the patient is located in the state at the time of the consult.
- Special rules for VA physicians (eff. June 11, 2018).
- Special rules for military and qualified military contractors when patient is located on base.
- FSMB Interstate Medical Licensing Compact
Notable Exceptions for Telemedicine

- **Consultation**: Allows unlicensed physician to practice medicine in peer to peer consultation with a physician licensed in the state.

- **Bordering State**: Allows practice of medicine by out-of-state physicians who are licensed in a bordering state.

- **Special License or Registration**: Abbreviated license or registration for telemedicine-only care.

- **Follow-up Care**: Allows physician to provide follow-up care to his/her patient (e.g., post-operation).
Destination Medicine and Follow-Up Care
Online Second Opinions

1. Patient Contact
2. Select Hospital
3. Provide Initial 2nd Opinion / Assessment
4. Arrange Follow-up
5. Travel to Hospital
6. Travel Home
7. Receive Treatment
8. Post-Treatment Follow-up Care

Flow of Process:
- Patient Contact
- Select Hospital
- Provide Initial 2nd Opinion / Assessment
- Arrange Follow-up
- Travel to Hospital
- Travel Home
- Receive Treatment
- Post-Treatment Follow-up Care
Wisconsin Consultation Exception

- Wisconsin licensure not required for a physician located and licensed in another state or foreign country who is in actual consultation with a Florida-licensed doctor.
  - Exceptions to Wisconsin licensure include: “Actual consultation or demonstration by licensed physicians or perfusionists or certified respiratory care practitioners of other states or countries with licensed physicians or perfusionists or certified respiratory care practitioners of this state.” See Wis. Stat. § 448.03(2)(d)
  - Regulations also allow for such consultations, see Wis. Adm. Code § Med. 24.01, providing: “The rules in this chapter may not be construed to prohibit any of the following: (1) Consultations between physicians or the transmission and review of digital images, pathology specimens, test results, or other medical data by physicians related to the care of patients in this state and (2) Patient care in consultation with another physician who has an established physician-patient relationship with the patient.
Telemedicine Practice Standards
Telemedicine Practice Standards

- Modality Restrictions
- “Valid Prescription”
- Patient Consent
- Disclosures
- Choice of provider
- Verify patient identity
- Record-sharing
- Originating site
- Special registration
Wisconsin Telemedicine Practice Standards

Provider-Patient Relationship

- A physician-patient relationship may be established via telemedicine. See Wis. Admin. Code § Med 24.03.

- The technology and equipment used, however, must, at a minimum, provide information that enables the physician to meet or exceed the standard of minimally competent medical practice. See Wis. Admin. Code § Med 24.02.
Telemedicine and Evolving Modalities

Interactive Audio-Video

Asynchronous / Store & Forward

Interactive Audio w Store & Forward

Phone-only, form-based internet prescribing, AI
Wisconsin Telemedicine Practice Standards

Telemedicine Modality

- Telemedicine means the practice of medicine involving the provision of patient care, treatment or services through electronic communications is not prohibited by Wisconsin law. See Wis. Admin. Code § Med 24.02.

- Telemedicine does not include the provision of health care services only through an audio-only telephone, email messages, text messages, facsimile transmission, mail or parcel service, or any combination thereof.
Minimum Required Modality to Create Doctor-Patient Relationship

Interpretive summary only; not legal advice; state laws are constantly evolving and state laws must be analyzed and applied to a specific clinical application.
Minimum Required Modality *After* Creating Doctor-Patient Relationship

Interpretive summary only; not legal advice; state laws are constantly evolving and state laws must be analyzed and applied to a specific clinical application.
Wisconsin Telemedicine Practice Standards

Telemedicine Evaluation

- Before providing treatment recommendations or issuing a prescription, the following elements must have been met:
  1) Physician is licensed to practice medicine and surgery by the Wisconsin medical examining board
  2) The physician’s name and contact information have been made available to the patient.
  3) Informed consent as required under s. 448.30, Stats., and ch. Med 18.
  4) A documented patient evaluation has been performed that includes a medical history and, to the extent required to meet or exceed the standard of minimally competent medical practice, an examination or evaluation, or both, and diagnostic tests.
  5) A patient health care record is prepared and maintained as required under ch. Med 21.
Telemedicine Prescribing

- Can prescribe via telemedicine.
- However, providing treatment recommendations, including issuing a prescription, based only on a static electronic questionnaire does not meet the standard of minimally competent medical practice. See Wis. Adm. Code § Med 24.07.
Wisconsin Telemedicine Practice Standards

Telemedicine Prescribing

- Wisconsin is silent on requirements specific to controlled substance prescribing via telemedicine
- Federal Ryan Haight Act.
- Same standards apply - “minimally competent medical practice”
Recording Telemedicine Consults

Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)

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Payment and Reimbursement Landscape
Telehealth Sources of Revenue

- Government FFS (Medicare, Medicaid)
- Medicare Advantage, Medicaid MCOs
- Commercial Health Plans
- Employer Self-Funded Plans
- Employer Pay (OOP)
- Institutions, Providers
- Self-Pay / Cash
- Cost Savings and Cost Avoidance
What Are Your Sources of Payment?

- Self-Payment
- Commercial Insurance (incl. employer-pay)
- Medicare Advantage
- Medicaid Managed Care
- Medicare FFS
- Medicaid FFS
Hot Issues in Medicare Telehealth Compliance

- Qualifying rural area
- Qualifying originating site
- Eligible modality
- Overseas providers
- Distant site billing for orig. site facility fee
- Reassignment to originating site
- Charging beneficiaries out of pocket for telehealth services

- Telehealth vs non-face-to-face services
- Telehealth admitting physician
- Incident to billing
- Global surgical period and post-op, follow-up care
- G code and consultations
- Telemedicine and EMTALA
- Conditions of Participation vs. Conditions for Payment
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Beyond In-Person Exams
Beyond In-Person Exams

Federal
- Anti-Kickback Statute
- Physician Self-Referral
- Civil Monetary Penalty Law
- Payer Rules (including Medicare, Medicaid)
- HIPAA
- FTC, FDA, DEA

State
- Patient Brokering Acts
- Fee-Splitting Laws
- Self-Referral Laws
- Corporate Practice of Medicine
- eCommerce
- Insurance Laws
- Supervision of NPPs
- Privacy & Security
- Medical Advertising

International
- Foreign Corrupt Practices Act
- US Export Control Laws
- US Anti-Terrorism Laws
- US Anti-Boycott Laws
- International Corporate Laws and Tax
- Data protection; data ownership; data sharing
- Intellectual Property
Selected Reading

- Sharing and Mining Patient Data in Digital Health and Telemedicine: Laws You Need to Know
- Is My Telehealth App Subject to HIPAA?
- Telemedicine Providers: Are My Doctors Employees or Independent Contractors?
- Remote Patient Monitoring Reimbursement: What Providers Need to Know
- Telemedicine Prescribing and Controlled Substances Laws
- Medicare’s New Virtual Care Codes: A Monumental Change and Validation of Asynchronous Telemedicine
- Telehealth and Consumer Subscription Models
- Telehealth Law Handbook: A Practical Guide to Virtual Care*
- Understanding Telehealth*
Build a Telemedicine Offering That Is...

- Meaningful
- Clinically Appropriate
- Legally Compliant
- Scalable
Questions?

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Thank you