

## Telemedicine in Michigan: What Physicians Need to Know

*By Patrick J. Haddad, JD, Kerr, Russell and Weber, PLC, MSMS Legal Counsel*

**Telemedicine continues to evolve as an innovative means of providing patients with enhanced access to quality medical care through the use of technology in medically appropriate circumstances, as an alternative to conventional in-person encounters. Although there is no universal definition, “telemedicine” is often used to describe the furnishing of clinical health care services to patients from distant sites through the use of electronic information and telecommunications technologies. Another term, “telehealth,” is commonly used to refer to a wider range of clinical and non-clinical health services furnished by technology.**

### Regulatory Landscape in Michigan

The Michigan Insurance Code was amended in 2012 to facilitate insurance coverage for telemedicine services. The Insurance Code prohibits health insurers and HMOs from requiring face-to-face contact between a health care professional and a patient for services appropriately provided through telemedicine, as determined by the insurer or HMO. Telemedicine services must be provided by a health care professional who is licensed, registered, or otherwise lawfully authorized to engage in his or her health care profession in the state where the patient is located. Telemedicine services are subject to all terms and conditions

of the policy, certificate, or contract covering the patient including, but not limited to, required copayments, coinsurances, deductibles, and other approved amounts. MCL § 500.3476(1).

“Telemedicine,” as defined in the Insurance Code, means “the use of an electronic media to link patients with health care professionals in different locations.” To qualify as telemedicine for purposes of the Insurance Code, the health care professional must be able to examine the patient “via a real-time, interactive audio or video, or both, telecommunications system” and the patient “must be able to interact with the off-site health care professional at the time the services are provided.” MCL § 500.3476(2).

Importantly, in order for telemedicine services to be covered by an insurer, HMO, or self-funded plan, the services must comply with all requirements specified by the payer, which may choose to cover telemedicine services only in limited circumstances. Physicians will need to check each payer’s coverage and reimbursement criteria, including the CPT codes and modifiers which the payer will accept, whether the payer requires prior authorization, whether physicians are prohibited from billing

(CONTINUED)

*This publication is furnished for informational purposes only. It does not communicate legal advice by the Michigan State Medical Society or Kerr, Russell and Weber, PLC. Receipt of this publication does not establish an attorney/client relationship. © 2017 Michigan State Medical Society and Kerr, Russell and Weber, PLC.*

patients for telemedicine services if not covered by the payer, and whether the payer has established additional standards that must be satisfied as a condition of payment.

Michigan Public Act 359 of 2016, and Michigan Public Act 22 of 2017, each effective March 29, 2017, regulate specified aspects of “telehealth” for purposes of health professional licensing under Michigan’s Public Health Code. By statute, Michigan now defines “telehealth” as the use of electronic information and telecommunication technologies to support or promote long-distance clinical health care, patient and professional health-related education, public health, or health administration. Additionally, “telehealth” may include, but is not limited to, “telemedicine” as defined in Michigan’s Insurance Code.

A health professional may not provide a “telehealth service” (i.e., a health care service provided through telehealth) without directly or indirectly obtaining consent for treatment, except that this requirement does not apply to a health professional who is providing a telehealth service to an inmate under the jurisdiction of the Department of Corrections and housed at a correctional facility.

A health professional who is providing a telehealth service to a patient may prescribe the patient a drug if the following conditions are met:

- (1) the health professional is a “prescriber” who is acting within the scope of his or her practice in prescribing the drug;
- (2) if the health professional is prescribing a drug that is a controlled substance, the health professional meets the requirements of the Public Health Code applicable to a health professional for prescribing a controlled substance;
- (3) if the health professional considers it medically necessary, the health professional provides the patient with a referral for other health care services that are geographically accessible to the patient, including, but not limited to, emergency services; and
- (4) after providing a telehealth service, the health professional, or a health professional who is acting under the delegation of the delegating health professional, makes himself or herself available to provide follow-up health care services to the patient or refer the patient to another health professional for follow-up health care services.

A disciplinary subcommittee may place restrictions or conditions on a health professional’s ability to provide a telehealth service if the disciplinary subcommittee finds that the health professional has violated the legislation’s patient consent or prescribing requirements.

## Medicare and Medicaid Telemedicine Standards

### Medicare

Medicare Part B will reimburse for qualifying telemedicine services only in limited circumstances. Telemedicine services must be furnished by a licensed physician or other practitioner (i.e., the distant site practitioner) to an eligible beneficiary via an interactive audio and video telecommunications system that permits real-time, face-to-face interactive communication between the physician and the patient. Medicare beneficiaries are eligible for telemedicine services only if they are presented from an originating site located in a rural health professional shortage area located either outside of a Metropolitan Statistical Area or in a rural census tract, or in a county outside of a Metropolitan Statistical Area. Eligible originating sites include the offices of physicians or practitioners; hospitals; critical access hospitals; rural health clinics; federally qualified health centers; hospital-based or CAH-based Renal Dialysis Centers (including satellites); skilled nursing facilities; and community mental health centers. However, independent renal dialysis facilities are not eligible originating sites. Telemedicine services must be furnished by a qualified practitioner at a qualifying originating site (e.g., physician offices, hospitals, skilled nursing facilities). 42 C.F.R. § 410.78.

The Centers for Medicare & Medicaid Services annually revises Medicare’s standards for reimbursement for telemedicine services. When submitting claims to Medicare for telemedicine services, physicians and other practitioners will need to use the appropriate CPT or HCPCS code for the professional service along with the telemedicine modifier GT, “via interactive audio and video telecommunications systems.” Medicare’s list of covered telemedicine services is available on the CMS website.

### Michigan Medicaid Program

The Michigan Medicaid Program imposes similar limitations on telemedicine as Medicare, with some differences. While Michigan Medicaid’s list of eligible originating sites is similar

*This publication is furnished for informational purposes only. It does not communicate legal advice by the Michigan State Medical Society or Kerr, Russell and Weber, PLC. Receipt of this publication does not establish an attorney/client relationship. © 2017 Michigan State Medical Society and Kerr, Russell and Weber, PLC.*

to Medicare's, Michigan Medicaid does not require an originating site to be located either outside of a Metropolitan Statistical Area or in a rural census tract, or in a county outside of a Metropolitan Statistical Area. Claims to Medicaid for telemedicine services also use the telemedicine modifier GT. Procedure code and modifier information is contained in the MDHHS Telemedicine Services Database available on the MDHHS website. Distant site providers (i.e., physicians or other licensed practitioners) must be enrolled in Michigan Medicaid.

There are no prior authorization requirements when providing telemedicine services for Medicaid fee-for-service beneficiaries. However, authorization requirements for beneficiaries enrolled in health plans contracted to the Michigan Medicaid Program may vary. Physicians and other practitioners must check with individual Medicaid health plans for any authorization, coverage, or other requirements.

## Telemedicine Recommend Practices

Listed below are recommended practices and issues which Michigan physicians should be aware of when furnishing telemedicine services. Practices and issues are not presented in any order of priority.

### Use Telemedicine in Medically Appropriate Circumstances

Telemedicine should be used only in medically appropriate circumstances. To mitigate professional liability and licensing risk exposures, physicians should not use telemedicine when the prevailing medical standard of practice calls for an in-person encounter. In the event of medical emergencies, patients should be directed to hospital emergency rooms or to dial 911.

### Licensing Compliance

A physician or other health care professional must be licensed, registered or otherwise authorized by law to engage in his or her health care profession in the state where the patient is located.

### Prescribing Medications—Michigan Law

- Generally, Physicians must exercise professional judgment and discretion before deciding whether to prescribe medications on the basis of a telemedicine encounter. There must be an existing and valid physician/patient relation-

ship. Michigan is one of a handful of states that do not, by statute or regulation, mandate an in-person examination before a physician may prescribe medications. Nevertheless, a physician may have an exposure to a professional liability claim, as well as a licensing action, if the standard of medical practice would require an in-person examination before prescribing medication. In contrast to prescriptions issued pursuant to a bona fide telemedicine encounter, the Michigan Board of Pharmacy, the National Association of Boards of Pharmacy, and the Federation of State Medical Boards all consider prescriptions issued pursuant only to an internet questionnaire to be invalid, because there is no existing physician-patient relationship when the physician and patient have not interacted except on the basis of an online questionnaire.

- **Controlled Substances.** Notwithstanding Michigan's Public Health Code Requirement, physicians must exercise caution before prescribing controlled substances during a telemedicine encounter, in light of intentionally restrictive U.S. Drug Enforcement Administration compliance obligations and law enforcement risks designed to combat unlawful diversion and internet mills. Under federal law, a prescription for a controlled substance cannot be lawfully prescribed on the basis of a telemedicine encounter unless the prescribing physician has conducted at least one (1) in-person medical evaluation of the patient, subject to limited exceptions that will not be available to most physicians and other prescribers. An "in-person medical evaluation" means a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals. Even if the minimum one (1) in-person encounter requirement is satisfied, the prescription must be issued for a legitimate medical purpose in the usual course of the prescriber's professional practice, which are longstanding legal requirements applicable to all prescriptions for controlled substances.

(CONTINUED)

*This publication is furnished for informational purposes only. It does not communicate legal advice by the Michigan State Medical Society or Kerr, Russell and Weber, PLC. Receipt of this publication does not establish an attorney/client relationship. © 2017 Michigan State Medical Society and Kerr, Russell and Weber, PLC.*

Federal law provides that nothing is construed to imply or suggest that one (1) in-person medical evaluation demonstrates compliance with these standards; i.e., all of the facts and circumstances surrounding the issuance of the prescription must be evaluated. Prescribers who fail to comply with the in-person medical evaluation requirement, and any pharmacy that knowingly or intentionally fills such a prescription, violated the Controlled Substances Act. Moreover, if a physician prescribes a controlled substance in violation of Michigan's legislation, a disciplinary subcommittee may place restrictions or conditions on the physician's ability to provide telemedicine services.

## **Prescribing Medications - American Medical Association**

AMA policy guidelines provide that a patient-physician relationship generally must be established before medication can be prescribed through a telemedicine encounter. The physician must:

- (i) obtain a reliable medical history and perform a physical examination of the patient, adequate to establish the diagnosis for which the drug is being prescribed and to identify underlying conditions and/or contraindications to the treatment recommended/provided;
- (ii) have sufficient dialogue with the patient on treatment options, risks and benefits;
- (iii) as appropriate, follow up with the patient to assess the therapeutic outcome; and
- (iv) maintain a contemporaneous medical record, including the prescription information.

If telemedicine technology is used to establish a physician-patient relationship, a video component is needed to facilitate a face-to-face encounter which is necessary to prescribe medications; ordinary telephone calls and email communications are insufficient. Exceptions to the above requirements can arise in on-call or cross-coverage situations, emergency medical treatment, in other circumstances recognized as meeting or improving the standard of care, or when medication is prescribed in

consultation with another physician who has an ongoing professional relationship with the patient and who has agreed to supervise the patient's treatment, including use of any prescribed medications.

## **Professional Liability Insurance Coverage**

Physicians should review their professional liability policies to confirm coverage for telemedicine services or whether exclusions may apply. Physicians should specifically determine whether or not services furnished to patients located outside of Michigan are covered. The insurer or insurance agent should be contacted as needed and to determine whether the insurer has any recommended risk management practices.

## **Informed Consent**

As in any conventional encounter, informed consent must be obtained with respect to a telemedicine encounter. Effective March 29, 2017, physicians are required under Michigan law to obtain a patient's consent for treatment in order to furnish telehealth services. Physicians are responsible to ensure that patients are aware of the potential benefits and risks associated with receiving services via telemedicine, and that the patient consents to receiving treatment via telehealth. Evidence of the patient's informed consent should be maintained in the patient's medical record, as is the case for a conventional in-person encounter.

## **Maintain Medical Records for Telemedicine Services**

Michigan licensed physicians are obligated to maintain medical records for telemedicine services as they would for any conventional, face-to-face encounter. There is no exception from professional liability or licensing risks for failure to do so.

## **Comply with Third Party Payer Billing Requirements**

Before furnishing and billing payers for telemedicine services, physicians need to understand and to comply with each payer's requirements. In general, each payer has the right to establish its own terms and conditions.

(CONTINUED)

*This publication is furnished for informational purposes only. It does not communicate legal advice by the Michigan State Medical Society or Kerr, Russell and Weber, PLC. Receipt of this publication does not establish an attorney/client relationship. © 2017 Michigan State Medical Society and Kerr, Russell and Weber, PLC.*

## Mitigate Post Payment Audit Risks.

As in any encounter, it is critical for physicians to accurately document in the clinical record all clinical and other information required substantiate the claim as coded and billed. Physicians furnishing services by telemedicine are exposed to post payment audit risks as they are for services furnished during conventional encounters.

## Use HIPAA Compliant Technology which is Reliable.

Physicians are responsible to comply with HIPAA's privacy and security rules when furnishing telemedicine services. Physicians should verify whether their telecommunications vendors use HIPAA compliant technology. In addition, the technology must be reliable. If the telecommunications equipment is defective or otherwise fails during a patient encounter, the patient or physician may receive inaccurate information, which could result in injury to the patient. Physicians should seek to negotiate vendor responsibility within their contracts to encourage a high level of technology performance. In addition, physicians should determine whether they have liability insurance coverage in such circumstances.

## Frequently Asked Questions

- Q.** Can a Michigan licensed physician furnish telemedicine to an existing patient who is attending college out of state? What about existing "snowbird" patients who are wintering out of state?
- A.** Physicians need to consider licensing, insurance coverage/reimbursement, and professional liability issues before furnishing services to existing patients who are out of state.

According to a recent survey by the Federation of State Medical Boards, all states require that physicians engaging in telemedicine either must be licensed in the state in which the patient is located or must acquire from such state a special purpose license, telemedicine license or certificate, or license to practice medicine across state lines to allow for the practice of telemedicine. Sunshine states requiring out-of-state physicians to be fully

licensed include Arizona, California, and Florida. Physicians who are licensed in Michigan, but not in the state where the patient is located, risk violating that other state's licensing laws by furnishing services via telemedicine. If such a violation is proven, the physician will also be at risk for disciplinary action for violating Michigan's licensing laws. It is unclear whether state medical boards may construe certain acts, such as renewing prescriptions for existing patients when located outside of Michigan, as requiring the physician to be licensed in that other jurisdiction. Because telemedicine licensing standards continue to evolve, physicians should periodically determine whether there have been any changes in the licensing laws of relevant jurisdictions.

Michigan's Public Health Code does not explicitly address whether a Michigan licensed physician would violate Michigan's licensing standards by furnishing telemedicine services to patients located out of state with whom the physician has an established physician/patient relationship. In such circumstances, Michigan physicians should continue to follow the requirements of the Michigan Public Health Code in such circumstances unless administrative rules to the contrary are issued. As noted in the preceding paragraph, a physician's compliance with Michigan's licensing standards will not excuse a physician's failure to comply with licensing requirements established by the state in which the patient is located.

Although Michigan's Insurance Code prohibits insurers in Michigan from requiring face-to-face contact between a physician and patient for services appropriately provided through telemedicine, the Code provides that telemedicine services must be provided by a physician who is licensed, registered, or otherwise lawfully authorized to engage in his or her health care profession in the state where the patient is located. If the physician is not lawfully authorized to practice in the state where the patient is located (i.e., which is not necessarily the same as being affirmatively prohibited from doing so), the insurer will not be required to pay the physician for the service and may have the right to recoup any payment made for such services.

(CONTINUED)

*This publication is furnished for informational purposes only. It does not communicate legal advice by the Michigan State Medical Society or Kerr, Russell and Weber, PLC. Receipt of this publication does not establish an attorney/client relationship. © 2017 Michigan State Medical Society and Kerr, Russell and Weber, PLC.*

From a professional liability standpoint, physicians should ensure that any service furnished via telemedicine is appropriately furnished by such means and conforms to the applicable standard of professional practice. Physicians should consult their professional liability insurers or agents on whether or not they will be covered for services furnished by telemedicine to patients who are located in states other than Michigan.

- Q.** Can a Michigan licensed physician use telemedicine to care for patients in Michigan while the physician is out of state?
- A.** It is advisable for Michigan-licensed physicians, before furnishing telemedicine services to patients located in Michigan from a state in which they are not licensed, to confirm whether or not the other state may require them to be licensed, or whether an exemption from licensure may be available. State licensing laws typically provide

limited exceptions from licensure for out-of-state licensed physicians who engage in activities for which the state would otherwise require them to be licensed. However, these exceptions are typically narrow, normally apply to patients located in the same state as the physician, and may not extend to telemedicine services furnished over state lines. For example, Michigan's Public Health Code has limited exceptions for out-of-state licensed physicians who render medical care in a time of disaster or at the scene of an emergency, or who, in an exceptional circumstance, are called in for consultation or treatment by a health professional in Michigan, or who practice while attending meetings or conducting lectures or demonstrations under the auspices of professional associations or training institutions in Michigan and do not maintain an office or designate a place to meet patients or receive calls in Michigan.

