

HEALTH CARE LAW ADVISOR ALERT: TELEHEALTH IN WISCONSIN (PART 2 OF 2)

Medical Malpractice Risk and Telemedicine Policies

This article is the second of a two-part series on telehealth in Wisconsin. The first article of this series, available [here](#), highlighted basic standards for regulatory compliance in the design of internal telehealth policies. This second article addresses the practitioner's obligation to minimize patient harm (and thus practitioner liability) with attention to the medical standard of care when assessing when and how telehealth is appropriate for each patient.

A. Maintaining Medical Standard of Care in Telemedicine

Wisconsin medical providers must critically evaluate whether their use of a telemedicine platform would permit their evaluation and treatment of each patient in compliance with “the standard of minimally competent medical practice.”^[i] Standards of practice and conduct required for in-person visits, including standards relating to patient confidentiality and recordkeeping, must be observed in the telehealth context.^[ii]

In view of these standards articulated by the Wisconsin medical examining board, internal telemedicine policies and procedures must preserve the same degree of quality and safety achieved during in person appointments. Clinical leadership must assess whether quality of patient care can be maintained via telehealth, an evaluation which is dependent upon the provider's area of specialty, the patient's condition, and other factors. For example, the use of telemedicine is not suitable for conditions where physical examinations are necessary, because of extreme symptoms, forceful interventions, or in the case of medical procedures for which certain protocols need to be followed.^[iii]

Clinical guidelines specific to telemedicine can serve as important indicators as to whether your practice should incorporate telemedicine for specific patient encounters or diagnostic evaluations.^[iv] However, guideline compliance does not guarantee accurate diagnosis or safe and effective medical care meeting the standard of care. Local circumstances must be considered, and the practitioner is ultimately responsible for all decisions regarding the appropriateness of a specific course of action.^[v] Published guidelines for every clinical

scenario and application simply do not exist and so by necessity may need to be developed in-house.[vi] The policies of each medical practice should delineate between circumstances in which various telehealth platforms can, and cannot, preserve the quality of care for patients. Providing treatment recommendations, including issuing a prescription, based only on a static electronic questionnaire does not meet the standard of minimally competent medical practice.[vii]

Sometimes the proper standard of care is reflected in government reimbursement decisions. For example, the Wisconsin Department of Health Services' ("DHS") expansion of telehealth coverage will exclude comprehensive assessment and care planning for children with complexities, since this requires an in-person assessment. However, case management for children with complex medical needs will be covered. Certain, but not all, dental evaluations will be covered. Certain therapy services will be covered.[viii]

Where clinical leadership determines that telehealth is appropriate, workflow must be re-evaluated in the telehealth context to maintain the standard of care. For example, staff responsibilities may require adjustment for telehealth encounters to ensure that updates to the medical record, physician orders and the "after visit summary" are properly recorded in connection with each telehealth encounter. Providers may consider requiring immediate scheduling of patients who express symptoms that require in-person evaluation during a telemedicine visit to promote patient safety and minimize liability. Providers might also consider whether patient/family coaching regarding medication administration is properly handled in the telehealth context.

B. Telephone and Texting: Risk Mitigation

While the use of synchronous audio and video visits has exploded in the wake of the COVID-19 pandemic, physicians have provided routine medical advice by phone for decades, responding to patient calls reporting a change in condition and advising medication changes by phone communications. Surveys of patients since the COVID-19 pandemic indicates that texting is a preferred method of communication over phone calls.[ix] In addition to health care privacy and security issues (outside of the scope of this article), what are some of the legal considerations for such telephone and texting encounters?

First, practitioners must observe the criteria for government and private insurer reimbursement of telehealth, unless their practice is limited to self-pay. In the case of Medicaid reimbursement, the Wisconsin Medical Assistance Program generally covers consultations through "interactive telehealth" and certain asynchronous telehealth services and remote patient monitoring.[x] The Wisconsin Statutes delegate authority to DHS to determine whether to include telephone encounters within the definition of "telehealth." [xi] DHS is temporarily providing coverage for certain telephone visits during COVID-19 pandemic, and the agency may ultimately decide to continue coverage of certain telephone

communications as part of its permanent policy.[xii] Audio-only telephone communications must be delivered with the functional equivalency of a face-to-face encounter in order to be covered by Wisconsin Medicaid during the COVID-19 pandemic.[xiii]

If the patient will be located out-of-state, the provider must assess whether the applicable state's criteria for Medicaid telehealth reimbursement differs from the requirements imposed by Wisconsin Medicaid.[xiv] If federal Medicare will instead serve as payor, the Centers for Medicare and Medicaid Services ("CMS") will reimburse certain audio-only phone visits during the COVID-19 public health emergency. For reimbursement purposes, CMS distinguishes "telephone visits" from "services that "would normally occur in person." Telephone visits are "not paid as though the service occurred in person," and reimbursement may be bundled into a pre- or post-service if the phone encounter falls within the previous seven days of a prior visit or leads to a subsequent evaluation/management service.[xv]

Because audio-only telephone and texting encounters are inherently more limited with respect to patient evaluation capabilities, providers should exercise caution when using these modes of telehealth in circumstances that would usually *or could* warrant a physical evaluation of the patient based upon medical history or the symptoms described when scheduling an appointment. In addition to introducing risk of medical malpractice claims, providers risk non-compliance with criteria for reimbursement, such the standard of "functional equivalency to the face-to-face service" required by state Medicaid for reimbursement. The "functional equivalency standard" applicable to state government reimbursement is higher than the "the standard of minimally competent medical practice" generally applicable to the practice of telemedicine in the state.[xvi]

C. Updates to Telehealth Policies and Procedures

Irrespective of whether government reimbursement is in play, your medical practice policies and procedures should be updated to mitigate risk to patient care and safety in the telehealth context. Your internal policies and procedures should delineate between when telemedicine is (and is not) appropriate based upon a critical assessment of each of the several evaluative and diagnostic services provided by your practice. Staff, including schedulers and nurses, should be trained as to when scheduling a telemedicine appointment poses risk to your patients and your practice. Your policies should incorporate customized procedures designed to preserve the standard of care and the medical recordkeeping requirements imposed by the Wisconsin medical examining board for the practice of telemedicine. In addition, physicians practicing telemedicine should confirm that their medical malpractice insurance coverage applies outside of the traditional health care facility settings.

OCHDL's health care practice group will continue to monitor telehealth regulations and related guidance as the standard of care for telemedicine evolves. For more information on

this topic, contact Marguerite Hammes at 414-276-5000 or marguerite.hammes@wilaw.com.

[i] See WIS. ADMIN. CODE § MED 24.06.

[ii] See WIS. ADMIN. CODE § MED 24.05. (requiring the same standard of practice and conduct regardless of whether health care services are provided in person or by telemedicine). The standard of care that is required of all Wisconsin health care providers is defined as the degree of skill, care, and judgment which reasonable health care providers who practice the same specialty would exercise in the same or similar circumstances, having due regard for the state of medical science at the time. *Nowatske v. Osterloh*, 198 Wis.2d 419, 543 N.W.2d 25 (1996), *abrogated on other ground by Nommensen v. American Continental Ins. Co.*, 246 Wis.2nd 132, 629 N.W.2d 132 (2001); Wis. J.I. Civil No. 1023.

[iii] Secure Medical, Best Telemedicine Clinical Guidelines (April 13, 2018), available at <https://www.securemedical.com/telemedicine/best-telemedicine-clinical-guidelines/>

[iv] *E.g.*, American Telemedicine Association, Practice Guidelines Archives, available at https://www.americantelemed.org/resource_categories/practice-guidelines/ ; Pantanowitz, Liron et al. “American Telemedicine Association clinical guidelines for telepathology.” *Journal of pathology informatics* vol. 5,1 39. 21 Oct. 2014, doi:10.4103/2153-3539.143329; Krupinski, Elizabeth A, and Jordana Bernard. “Standards and Guidelines in Telemedicine and Telehealth.” *Healthcare (Basel, Switzerland)* vol. 2,1 74-93. 12 Feb. 2014, doi:10.3390/healthcare2010074.

[v] Elizabeth A. Krupinski and Jordana Bernard, Standards and Guidelines in Telemedicine and Telehealth, *Healthcare* 2014, 2, 74-93; doi: 10.3390/healthcare2010074, at 81.

[vi] See Standards and Guidelines in Telemedicine and Telehealth, *Healthcare*, *supra* note 5, at 81.

[vii] See WIS. ADMIN. CODE § MED 24.07 (2).

[viii] See Brook Anderson, Wisconsin DHS Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, available at <https://www.dhs.wisconsin.gov/telehealth/telehealth-expansion-all-provider.pdf> (revised July 30, 2020).

[ix] SR Heath, Patient Communication Preferences: the COVID-19 Impact, July 30, 2020, available at <https://mhealthintelligence.com/resources/white-papers/patient-communication-preferences-the-covid-19-impact>
eid=CXTEL000000554482&elqCampaignId=16139&utm_source=ded&utm_medium=email&utm_campaign=dedicated&elqTrackId=607a1670c3c349349ac195f03c60cba2&elq=362f09f490fe41169f2fc16dbcab5410&elqaid=16904&elqat=1&elqCampaignId=16139

[x] See WIS. STAT. § 49.46(2)(b)(21)-(22).

[xi] See WIS. STAT. § 49.45(61)(a)(4); §49.46(2)(b)(23).

[xii] See ForwardHealth Update 2020-12, “Temporary Changes to Telehealth Policy and Clarifications for Behavioral Health and Targeted Case Management Providers” (revised May 8, 2020), available at <https://www.forwardhealth.wi.gov/kw/pdf/2020-12.pdf>

[xiii] See *id.*

[xiv] See Center For Connected Health Policy, State Telehealth Laws and Reimbursement Policies (Fall 2020),

available at

<https://www.cchpca.org/sites/default/files/2020-10/CCHP%2050%20STATE%20REPORT%20FALL%202020%20FINAL.pdf>

[xv] See, e.g., Centers for Medicare and Medicaid Services, COVID-19 Frequently Asked Questions (FAQs) on Medicare Fee-For-Service (FFS) Billing (revised October 20, 2020), at 63-79, available at <https://www.cms.gov/files/document/03092020-covid-19-faqs-508.pdf>

[xvi] Compare Wisconsin ForwardHealth Telehealth Expansion and Related Resources for Providers, available at https://www.forwardhealth.wi.gov/WIPortal/content/html/news/telehealth_resources.html.spage, with WIS. ADMIN. CODE § MED 24.06.