Health Law Alert: Telemedicine Standards Approved by the Leading Organization of State Medical Boards

June 12, 2014

Experts predict that the global telemedicine devices market will exceed $1B this year and that it will grow at a five-year compounded annual rate of 56 percent. Several trends are driving the growth of this alternative care delivery model in the United States: a growing population and increased demand for medical services, a projected physician shortage, a rapid increase in older Americans, a lack of access to medical services in many parts of the country, an explosion in computer-based technology and electronic communications capabilities, and a consumer population that is increasingly at ease with technology.

To address the myriad concerns of state medical boards in regulating this fast-growing and fast-changing mode of care delivery, the Federation of State Medical Boards (FSMB), which represents all 70 state and territorial medical certification bodies, recently adopted a *Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine* (Model Policy). The Model Policy replaces the FSMB’s 2002 *Model Guidelines for the Appropriate Use of the Internet in Medical Practice* and sets forth a number of safety and quality guidelines for the practice of telemedicine. While state medical boards are not required to adopt the Model Policy, they are likely to use it to guide their approaches to the regulation of telemedicine.

The Minnesota Board of Medical Practice is no exception. While Minnesota laws and regulations are some of the more conducive to the practice of telemedicine in the country, the Board is closely studying the Model Policy. Further, legislative changes to Minnesota’s Medical Practices Act may not be far off following the Medical Practice Act Work Group’s 2013 report to the Minnesota legislature. The group’s report identified the “evolution of Telehealth and the impact of technology in the delivery of care” as an important issue to be addressed and noted the concern over whether Minnesota’s Medical Practice Act “sufficiently addresses issues and concerns related to the evolving field.”

Below is a brief discussion of some of the key provisions of the Model Policy.

Definition of Telemedicine

Just as the technology behind telemedicine has been ever-changing, so has the definition of “telemedicine.” The Model Policy defines it as “the practice of medicine using electronic communications, information technology or other means between a licensee in one location, and a patient in another location without an intervening healthcare provider.” The Model Policy provides that both secure videoconferencing and “store and forward” technology may be part of a telemedicine practice but that, generally, audio-only, email and instant messaging technologies are not telemedicine. The adoption of this definition was not without controversy, with a group of insurers, providers and patient advocates warning that the definition could restrict access to telemedicine for those patients who were strictly reliant on audio devices, email or text messages.

In comparison, Minnesota law defines “telemedicine” more broadly as the practice of medicine “when the physician is not in the physical presence of the patient” and does not restrict the technologies used in the practice of telemedicine.

Licensing

Most states require a provider to have a full, unrestricted licensed to practice medicine in the state where the patient is located, and the Model Policy supports this position where the provider is practicing telemedicine. We see little chance of state medical practice boards eliminating this requirement in the near future. Some may take the approach of Minnesota’s board by allowing providers wishing to deliver telemedicine care to patients in their states to obtain a limited telemedicine license, rather than require the provider to obtain a full, unrestricted license.

Establishing a Valid Provider-Patient Relationship

To establish a valid provider/patient relationship, many states require that the initial encounter between the provider and patient be in person. This is often the biggest hurdle for providers seeking to practice telemedicine. The Model Policy suggests that providers can establish a valid provider/patient relationship using telemedicine technologies – i.e., forego the in-person initial encounter – as long as the standard of care is met. In our experience, even those boards in states with stringent “in-person” requirements can be amenable to recognizing the establishment of a valid provider/patient relationship via a telemedicine encounter. We are likely to see state boards adopt the approach of the Model Policy and legislative changes consistent with that approach are likely not far behind.

Standard of Care

The Model Policy states that the same standards that have historically protected patients during in-person medical encounters must apply to medical care delivered electronically, including the issuance of prescriptions electronically. Such protections include a documented medical evaluation and the collection of relevant clinical history sufficient to establish diagnoses and identifying underlying conditions and/or contract-indications prior to providing treatment. Every state requires providers to meet a standard of care but not all recognize that it can be met using telemedicine technology. Importantly, and consistent with the laws of several states, the Model Policy suggests that “treatment, including issuing a prescription based solely on an online questionnaire, does not constitute an acceptable standard of care.” What constitutes an “online questionnaire” is not always clear though and it will be up to state boards to determine, often on a case-by-case basis, whether a provider’s telemedicine practice is “based solely on an online questionnaire.”

Disclosures and Functionality of Online Telemedicine Technologies

The Model Policy suggests a number of disclosures and functions that should part of an online telemedicine platform. These requirements include the disclosure of fees; financial interests, other than fees charged, in any information, products, or services provided; appropriate uses and limitations of the site, including emergency health situations; uses and response times for communications transmitted via the telemedicine technologies; and a clear mechanism for patients to access, supplement and amend PHI, provide feedback, and register complaints. It is likely that state medical boards will be inclined to incorporate these requirements into their own telemedicine regulations.

You can find the FSMB's Model Policy here.

If you have any questions about the Model Policy or telemedicine, please contact Jesse Berg at jesse.berg@gpmlaw.com / 612.632.3374.

Issues related to mobile health and telemedicine will be a featured topic at Gray Plant Mooty's 18th annual Health Law Seminar, to be held July 17th at the Depot in Minneapolis. For more information, click here.

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