DOCTORS

Rx

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SMILE!

The Doctor Will See You Now!

find out...

- What is telemedicine?
- Telemedicine and Maryland law
- The liability aspects of telemedicine

A LETTER FROM THE CHAIR OF THE BOARD

Dear Colleague:

Welcome to the first edition of our new format for *Doctors RX*! It's my sincere hope that you find this new layout easier and more enjoyable to read. Telemedicine has entered the health care arena, and Physicians are assessing whether to implement this new technology into their current practices. This latest edition of *Doctors RX* takes a look at the evolution of telemedicine in Maryland and provides insight into liability issues all Physicians should be aware of.

George Malouf

George S. Malouf, Jr., M.D.
Chair of the Board
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DOCTORS RX

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"Lets refocus the camera on your left shoulder."

This is not a professional photoshoot at an exotic locale. Rather, it is an exchange between a Physician at her office and a patient in her bed at home, participating in a remote medical examination conducted through an electronic medium. This is telemedicine, and it could be coming to a screen near you.[1] But don't be fooled. You will be held to the same medical standards, no matter how or where the interaction takes place.

WHAT IS TELEMEDICINE?

Maryland law defines telemedicine as "the use of interactive audio, video, or other telecommunications or electronic technology by a licensed health care provider to deliver a health care service within the scope of practice of the health care provider at a site other than a site at which the patient is located."[2] Originally intended to give rural communities access to specialized medical care, telemedicine has grown in scope due to health care reform and technological advancements.[3] Telemedicine is practiced over a range of subspecialties and can be used to monitor the care and management of chronic conditions, conduct general physical examinations, interpret labs and imaging, obtain specialty consultations, or for rehabilitative services. Because of its evolving status, this issue of *Doctors RX* will help health care providers become familiar with the scope, benefits, and challenges of telemedicine.

TELEMEDICINE IN MARYLAND

Senate Bill 776, signed into law on May 2, 2013, promoted further study of telemedicine in Maryland by creating the Telemedicine Task Force ("Task Force").[4] The Task Force was charged with identifying opportunities to use telehealth for the improvement of health status and the delivery of medical care in the State,[5] assessing factors related to telehealth,[6] and identifying strategies for telehealth deployment in rural areas to increase access and meet demand resulting from the implementation of the Patient Protection and Affordable Care Act ("ACA").[7]

Specific laws enacted for the purpose of facilitating access to, and utilization of telemedicine include:

- Senate Bill 781 (2012) – *Health Insurance – Coverage for Services Delivered through Telemedicine:* Requiring health insurers and managed care organizations to provide coverage for health care services appropriately utilizing telemedicine technology, and prohibiting denial of services provided through telehealth instead of in-person.[8]
- Senate Bill 798 (2013) – *Hospitals – Credentialing and Privileging Process– Telemedicine:* Authorizing a hospital to rely on certain credentialing and privileging decisions made by either a telehealth entity or a remote site hospital.[9]
- Senate Bill 496 (2013) – *Maryland*

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Eligibility

To be eligible for telehealth reimbursement, health care providers must be enrolled as Medicaid providers.

Medical Assistance Program – Telemedicine: Requiring reimbursement for certain telemedicine pilot programs.[10]

- Senate Bill 198 (2014) – *Maryland Medical Assistance Program – Telemedicine:* Expanding authorized reimbursement for telehealth services rendered in a certain manner and under certain circumstances.[11]

Despite these efforts, adoption of telemedicine in Maryland has been plagued with implementation problems and participation remains low. In fact, telemedicine was only utilized by approximately 9% of Physicians and fewer than 5% of hospital departments in 2013 and 2014, respectively. In the nine months following enactment of Senate Bill 781 in 2012, approximately 50 health care providers submitted 78 telehealth claims to payors.[12] In 2013, only 16 health care providers submitted 132 claims to state-regulated payors.[13]

Nevertheless, reimbursement among government payors is increasing, albeit marginally, with Medicare telehealth reimbursement covering 60 telehealth services in 2013 and 73 telehealth services in 2014.[14] Medicaid reimbursement is also expanding. Effective October 1, 2014, the Maryland Medical Assistance Program began reimbursing approved providers for telemedicine services rendered to participants throughout the State, regardless of geographic location.[15] To be eligible for telehealth reimbursement, health care providers **must** be enrolled as Medicaid

providers.[16] Additionally, before rendering any telemedicine services in Maryland, a Physician must be licensed in Maryland[17] and establish a Physician-Patient relationship via face-to-face or real-time audio video conferencing.[18] The American Medical Association similarly requires that a Physician-Patient relationship **must** be established before providing telemedicine services.[19]

The Maryland Department of Health and Mental Hygiene ("DHMH") is working with the legislature and health care provider groups to clarify regulations regarding Medicaid reimbursements for telemedicine services.[20] DHMH is also in the process of simplifying its provider addendum, which requires a telemedicine provider to conduct a needs assessment, provide a plan for program evaluation, and develop a quality monitoring system (among other things), in order for a provider to receive Medicaid reimbursement.

The current addendum contains 13 questions, nine of which are essay format and allow DHMH to critique the essay responses and request additional information. The addendum is a source of frustration for telemedicine providers, and as a result, DHMH is continuing to work towards a compromise which would allow them to obtain the necessary information from providers but not stymie providers from practicing telemedicine. These current steps show the continuing desire for telemedicine services in Maryland, but also evidence the lack of a clear path to establishing these services.

FACING THE CHALLENGES AND PREPARING FOR TELEMEDICINE PRACTICE

Challenges facing providers contemplating adoption of telemedicine include implementation of practice standards, professional licensure portability, payment, and coverage for services delivered.[21] Physicians considering telemedicine will benefit from consulting the American Telemedicine Association's ("ATA") state-by-state assessment that addresses precisely these issues by grading every state on an 'A' to 'F' scale.

Maryland, Virginia, and the District of Columbia received the ATA's highest possible composite scores. According to the ATA, these grades suggest "a supportive policy landscape that accommodates telemedicine adoption and usage."[22] While the District of Columbia and Virginia received an 'A' for telemedicine coverage and reimbursement standards, Maryland recently dropped to a 'B' because of certain restrictions that still exist for telemedicine coverage under state Medicaid plans. With regard to Physician practice standards and licensure, Maryland and Virginia received 'A's, while the District of Columbia received a 'B.'[23] In Maryland and Virginia – with the exception of prescribing – requirements for telemedicine are equivalent to requirements for in-person services.[24]

After assessing practical challenges facing telemedicine providers, it is important for health care providers considering implementation to set realistic expectations, conduct independent research, and estimate associated time, costs, and equipment needs.[25] Providers must formulate a plan for implementation and should consider the following:

- How will telemedicine be incorporated into an existing practice?
- How will telemedicine equipment and technology be integrated with the practice's other information technology?
- What clinical hours will be dedicated to telemedicine?
- Will the practice expand to include remote or satellite offices?

Although telemedicine varies in scope and complexity, a health care provider's basic needs include a webcam with HIPAA-compliant software allowing for secure video conferencing, and a secure portal connected to medical records.[26] And, most importantly, if interested in establishing a telemedicine practice, you must notify your insurance carrier to ensure there is coverage before embarking on this new endeavor.

LIABILITY ASPECTS OF TELEMEDICINE:

1. Informed Consent

Like any other type of testing and treatment, telemedicine services require a consent communication process. The dialogue between Physician and patient can help in designing a care plan that results in treatment adherence and good clinical outcomes. The following are strategies for managing telemedicine consent communications:

- Evaluate your existing consent policies, procedures and practices to make certain that the content includes telemedicine.
- Provide clear information about the telemedicine process and set clear expectations with patients about what can and cannot be accomplished through the use of telemedicine services.
- Inform patients of their rights when receiving telemedicine, including the right to stop or refuse treatment.
- Provide patients with the potential benefits, constraints, and risks (like privacy and security) of telemedicine.
- Inform patients of what will happen in the case of technology or equipment

Interested?

If you are interested in establishing a telemedicine practice, you must notify your insurance carrier to ensure there is coverage before embarking on this new endeavor.

Types of telemedical records media:

Telemedical records media may be; hard copy, video or audiotape, monitor strip, or electronic files. Some states specify acceptable media for health records.

failures during telemedicine sessions, and state a contingency plan.

- Document the informed consent communication process in the medical record.

2. Documentation

Telemedical records should be kept in the same manner as other health records. As with the traditional office visit, when documenting the telemedicine encounter, the Physician should note the date of and reason for the visit, along with the patient registration information, the relevant patient history, review of systems, consultative notes, and any other information used to make a decision about the patient's care. In addition, the patient record should include images or recordings of the patient as relevant to completely document the record. Further, the patient record should note its availability and location. The organization using the telemedical information to make a decision on the patient's treatment must comply with all standards, including the need for assessment, informed consent, documentation of event (regardless of the media), and authentication of record entries. Of note, backup systems for electronic records should be maintained and an emergency plan established in case of electronic system failure.

Retention of telemedical records should be in accordance with state laws or regulations and any reimbursement requirements.[27] Maintenance of telemedical records should ensure that the organization can quickly assemble all components of a patient's record, regardless of its location in the organization. In the absence of policies specifically addressing disclosure of telemedical information, disclosure should be allowed upon receipt of written authorization from the patient, the patient's legal representative, or in accordance with court order, subpoena, or statute. Informed consent for telemedical encounters should include the names of both the referring Physician and the consulting Physician, and it should inform the patient that his/her health information will be electronically transmitted. Telemedical records media may be hard copy, video or audiotape, monitor strip, or electronic files. Some states specify acceptable media for health records. Review your appropriate state laws and regulations for any specific requirements.[28] To avoid duplication of information and to determine custodianship, identify the responsible holder and owner of the legal telemedicine record.

3. Security, Privacy and Confidentiality

Providers of telemedicine are held to HIPAA privacy and confidentiality standards and must be sensitive to who has access to protected health information over a telemedicine network. Moreover, electronic communication and transmission of health information – often by way of live video streaming – increases the potential for computer hacker attacks and other methods of unauthorized disclosures. Providers should inform patients of associated risks and take all necessary measures to ensure that the use of telemedicine in a practice is HIPAA compliant.

Ultimately, because health care providers are often not experts in network security, data encryption, or firewalls, the safest solution may be to use the services of a HIPAA-compliant telemedicine partner or platform.

4. Standard of Care

Telemedicine raises new medical-legal implications and considerations. **However, providers who offer telemedicine services are held to the same standards as those practitioners who provide in-person care.** Currently, malpractice lawsuits involving specific telemedicine claims are limited; however, telemedicine may increase the potential for claims. Possible claims related to telemedicine include allegations of technological errors such as image distortion, or connectivity difficulties resulting in delay or misdiagnosis. Additionally, practitioners of telemedicine may be vulnerable to increased claims from the use and functionality of monitoring devices, timely interpretation of remote tests, allegations of improper remote rather than in-person examination, and privacy breaches. It also is possible that providers may be sued for failing to use the latest telemedicine technologies or capabilities. In short, telemedicine and associated technologies likely will increase the scope of liability issues.

THE FUTURE OF TELEMEDICINE

Telemedicine is likely to be a factor in accessing medical care in the future. The research firm Parks Associates predicts that by 2018 the number of patients utilizing telemedicine will increase from approximately 900,000 in 2013 to more than 22 million in 2018.[30] Andrew Sussman, M.D., Executive Vice President/Associate Chief Medical Officer of CVS Health similarly concluded, "[w]ith the increased demand for patient care anticipated in future years as a result of the expansion of coverage through the Affordable Care Act, the primary care Physician shortage, aging of the population and epidemic of chronic disease, telehealth gives us the opportunity to offer high quality care to an expanded group of patients in a variety of convenient and cost-effective locations."[31] Clearly, telemedicine will play a strategic role in the future of organizations like CVS.

Telemedicine's continuous legislative and clinical evolution is triggered not only by health care reform and advancing technologies, but also by demand for convenient medical services. As telemedicine advances, so do challenges related to implementation, documentation, reimbursement, licensure, malpractice litigation, data privacy and security, online prescribing, and credentialing. Interested health care providers should assess whether their clinical practice, institution, or patient population would benefit from adopting telemedicine and do their homework before taking that step.

For additional information and resources on telemedicine, visit our web site: mmlis.com/doctorsrx

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references

1 Although this article is intended to provide a general overview of telemedicine, health care providers must independently familiarize themselves with applicable state-specific laws and regulations.

2 Md. Code Ann., Insurance § 15-139(a)(1).

3 The Maryland Telemedicine Task Force has recommended transitioning from the term "telemedicine" to "telehealth" due to the latter's broader scope. The proposed definition of "telehealth" is "the delivery of health education and services using telecommunications and related technologies in coordination with a health care practitioner." See Maryland Telemedicine Task Force Final Report, October 2014, pp. 2-3. Available at: http://mhcc.maryland.gov/mhcc/pages/home/workgroups/documents/tlmd/tlmd_ttf_rpt_102014.pdf

4 See Senate Bill 776 (Chapter 319 of the Laws of Maryland of 2013). Available at: http://mgaleg.maryland.gov/2013RS/chapters_noln/Ch_319_sb0776E.pdf

5 Including an analysis of: underserved population areas; applications for cost-effective telehealth; innovative service models for diverse care settings to include chronic and acute care; and innovative payment models.

6 Including an analysis of: supportive uses of electronic health records and health information exchange; multimedia uses of products and services for patient engagement, education, and outcomes; health professional productivity, resources, and shortages; emerging technology and standards for security; and public and private grant funding. See Senate Bill 776. Available at: http://mgaleg.maryland.gov/2013RS/bills/sb/sb0776E.pdf

7 The Task Force issued its Final Report in October 2014. Available at: http://mhcc.maryland.gov/mhcc/pages/home/workgroups/documents/tlmd/tlmd_ttf_rpt_102014.pdf

8 See Senate Bill 781 (Chapter 579 of the Laws of Maryland of 2012). Available at: http://mgaleg.maryland.gov/2012rs/chapters_noln/Ch_579_sb0781T.pdf

9 See Senate Bill 798 (Chapter 324 of the Laws of Maryland of 2013). Available at: http://mgaleg.maryland.gov/2013RS/Chapters_noln/CH_324_sb0798t.pdf

10 See Senate Bill 496 (Chapter 280 of the Laws of Maryland of 2013). Available at: http://mgaleg.maryland.gov/2013RS/Chapters_noln/CH_280_sb0496e.pdf

11 See Senate Bill 198 (Chapter 141 of the Laws of Maryland of 2014). Available at: http://mgaleg.maryland.gov/2014RS/Chapters_noln/CH_141_sb0198t.pdf. See also MHCC, Advancing Telehealth in Maryland. Available at: http://mhcc.maryland.gov/mhcc/pages/hit/hit/documents/HIT_Telemedicine_Advancing_MD_Flyer_20140501.pdf. (referencing Md. Code Ann., Insurance §15-139 and the American Telemedicine Association, State Telemedicine Legislation Tracking, 2013).

12 See Final Report. Available at: http://mhcc.maryland.gov/mhcc/pages/home/workgroups/documents/tlmd/tlmd_ttf_rpt_102014.pdf

13 Id. Information reported from CareFirst BlueCross BlueShield, United Healthcare, and Cigna Health Care Mid-Atlantic Region. Aetna, Inc. did not provide information.

14 Maryland Telemedicine Task Force Final Report, October 2014, p. 1. Available at: http://mhcc.maryland.gov/mhcc/pages/home/workgroups/documents/tlmd/tlmd_ttf_rpt_102014.pdf

15 Maryland Department of Health and Mental Hygiene ("DHMH"). https://mmcp.dhmh.maryland.gov/sitepages/telemedicine%20provider%20information.aspx. As stated on the DHMH website, "Interested providers enrolled in the Medicaid Program must complete and submit a Telemedicine Provider Addendum." For additional information visit the 2014 Telemedicine Provider Manual, available at: https://mmcp.dhmh.maryland.gov/Documents/Maryland_Medicaid_Telemedicine_2014.pdf

16 Health care providers not enrolled as Medicaid Providers can visit: dhmh.maryland.gov/providerinfo

17 See COMAR 10.32.05 et seq. for regulations adopted by the Maryland Board of Physicians governing the practice of telemedicine. See COMAR 10.32.05.04 stating "If a Physician-Patient relationship does not include prior in-person, face-to-face interaction with a patient, the Physician shall incorporate real-time auditory communications or real-time visual and auditory communications to allow a free exchange of information between the patient and the Physician performing the patient evaluation." see also COMAR 10.32.05.03 (stating that except as specified in Maryland Health Occupations Article § 14-302 a Maryland medical license is required to practice telemedicine if the practitioner and/or the patient are located in the state.).

18 See COMAR 10.32.05.05C (defining face-to-face as within each other's sight and presence); see also COMAR 10.32.05.02B(2) and (7) (defining real-time to mean simultaneously or quickly enough to allow two or more individuals to conduct a conversation); see also COMAR 10.32.05B(6) (defining a Physician-Patient relationship as a relationship between a Physician and a patient in which there is an exchange of individual, patient-specific information.)

19 This Physician-Patient relationship must be established through a face-to-face examination, ether in-person or virtually through real-time audio/video technology.

20 Maryland Legislature. Senate. Finance Committee. Hearing on Senate Bill 242 – Maryland Medical Assistance Program – Telemedicine – Modifications. February 3, 2016. (436th session, Maryland General Assembly). DHMH Position Paper, Written Testimony.

21 Latoya Thomas & Gary Capistrant, State Telemedicine Gaps Analysis Physician Practice Standards and Licensure, American Telemedicine Association (May 2015) (hereinafter "Practice Standards"), available at: http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis--Physician-practice-standards-licensure.pdf?sfvrsn=14; see also Latoya Thomas & Gary Capistrant, State Telemedicine Gaps Analysis Coverage & Reimbursement (May 2015) (hereinafter "Reimbursement"), available at: http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis---coverage-and-reimbursement.pdf?sfvrsn=10.

22 http://www.americantelemed.org/news-landing/2014/09/08/states-graded-on-telemedicine-policy#.VpVry3x0zmI

23 See Practice Standards at p. 1.

24 See Practice Standards at pp. 32, 57.

25 Available at: http://www.americantelemed.org/resources/telemedicine-practice-guidelines/telemedicine-practice-guidelines#.VpaZTXx0zmI

26 Security and privacy concerns are addressed in further detail below.

27 The Maryland State Medical Society (MedChi), Medical Records Retention Guidelines. Available at: http://www.medchi.org/sites/default/files/Records%20Retention.pdf (accessed February 27, 2016).

28 Telemedical records are treated the same as all other medical records and protected health information with regard to retention and disposal requirements in Maryland. See Md. Code Ann., Insurance § 15-139, Health Care Services Delivered Through Telemedicine. See also Md. Code Ann., Health – General § 4-403, Destruction of Medical Records. See also COMAR 10.01.16., Retention and Disposal of Medical Records and Protected Health Information.

29 http://www.emrandhipaa.com/guest/2016/01/13/6-questions-to-consider-when-providing-virtual-visits-using-video-technology/

30 https://www.parksassociates.com/blog/article/how-telemedicine-transforms-care--reduces-costs

31 Available at: http://www.prnewswire.com/news-releases/cvs-health-to-partner-with-direct-to-consumer-telehealth-providers-to-increase-access-to-Physician-care-300133394.html

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CME TEST QUESTIONS

1. Before rendering any telemedicine services in Maryland, a Physician must be licensed in Maryland and establish a Physician-Patient relationship via face-to-face interaction only.

   A. True   B. False

2. The state of Maryland facilitates the use of telemedicine by all of the following EXCEPT:

   A. Requiring health insurers and managed care organizations to provide for health care services appropriately utilizing telemedicine technology
   B. Prohibiting the denial of services provided via telehealth instead of in-person
   C. Complicating the regulations regarding Medicaid reimbursements for telemedicine services
   D. Authorizing a hospital to rely on certain credentialing and privileging decisions made by either a telehealth entity or a remote site hospital

3. Under the Maryland Medical Assistance Program, to be eligible for telehealth reimbursement, a health care provider must meet which of the following conditions:

   A. Be enrolled as Medicaid provider
   B. Be licensed in Maryland
   C. Establish a Physician-Patient relationship via face-to-face or real-time audio video conferencing
   D. All of the above

4. All of the following are or were problems associated with telemedicine EXCEPT:

   A. An overwhelming number of Physicians have submitted claims for telemedicine services
   B. Maryland Medicaid initially restricted reimbursement to approved providers for services rendered to participants in remote geographic locations
   C. A limited number of telehealth services were reimbursable
   D. You should always wait 15 days

5. The Maryland Medical Assistance Program began reimbursing approved providers for telemedicine services rendered to participants throughout the State, regardless of geographic location.

   A. True   B. False

6. With regard to HIPAA privacy and security issues, which of the following statements are true:

   A. Providers of telemedicine are held to HIPAA privacy and confidentiality standards
   B. Providers must be sensitive to who has access to protected health information over a telemedicine network
   C. Providers should inform patients of associated risks and take all necessary measures to ensure that the use of telemedicine in a practice is HIPAA compliant
   D. All of the above

7. Providers who offer telemedicine services are held to the same standards as those practitioners who provide in-person care.

   A. True   B. False

8. Retention of telemedical records should be in accordance with state laws or regulations and any reimbursement requirements.

   A. True   B. False

9. Challenges facing providers contemplating adoption of telemedicine include implementation of which of the following:

   A. Practice standards
   B. Professional licensure portability
   C. Payment and coverage for services
   D. All of the above

10. All of the following strategies account for good telemedicine consent communications EXCEPT:

    A. Providing clear information about the telemedicine process and setting clear expectations with patients about what can and cannot be accomplished through the use of telemedicine services
    B. Not documenting the informed consent communication process in the medical record
    C. Providing patients with the potential benefits, constraints, and risks of telemedicine and informing patients of what will happen in the case of technology or equipment failures during telemedicine sessions
    D. All of the above

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Its mission and educational purpose is to identify current health care related risk management issues and provide Physicians with educational information that will enable them to reduce their malpractice liability risk.

Readers of the newsletter should be able to obtain the following educational objectives:

1) Gain information on topics of particular importance to them as Physicians,
2) Assess the newsletter's value to them as practicing Physicians, and
3) Assess how this information may influence their own practices.

CME Objectives for "SMILE! The Doctor Will See You Now!"

Educational Objectives: Upon completion of this enduring material, participants will be better able to:

1) Understand how telemedicine is defined and practiced in Maryland
2) Describe the challenges that Physicians face in implementing telemedicine into their practice
3) Understand the liability aspects of telemedicine

	Strongly Agree				Strongly Disagree
Part 1. Educational Value:	5	4	3	2	1
I learned something new that was important.	❑	❑	❑	❑	❑
I verified some important information.	❑	❑	❑	❑	❑
I plan to seek more information on this topic.	❑	❑	❑	❑	❑
This information is likely to have an impact on my practice.	❑	❑	❑	❑	❑

Part 2. Commitment to Change: What change(s) (if any) do you plan to make in your practice as a result of reading this newsletter?

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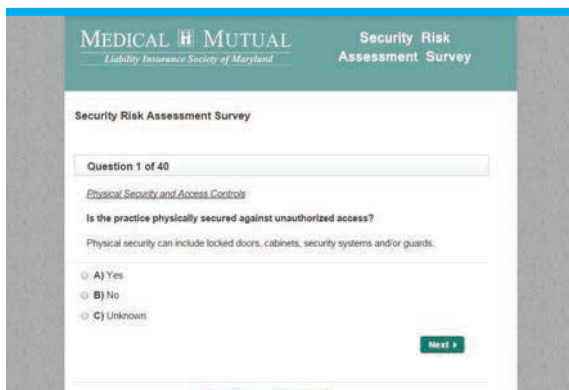
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