ISSUES IN
TELEMEDICINE

Andrew M. Knoll, M.D., J.D.
Cohen Compagni Beckman Appler & Knoll, PLLC
Syracuse, New York
aknoll@ccblaw.com
315-477-6241

©andrewknoll2017
Disclaimer

• This presentation is for educational purposes only and does not constitute legal advice or counsel nor does it create an attorney-client relationship.

• This is an area of the law that, in my opinion, is evolving and largely uncharted waters. Much of what is presented today is my interpretation of the law based on the limited guidance available.
What is Telemedicine?

• “Telemedicine’ means the use of synchronous, two-way electronic audio visual communications to deliver clinical health care services, which shall include the assessment, diagnosis, and treatment of a patient, while such patient is at the originating site and a telehealth provider is at a distant site.”

• One form of “telehealth,” which also encompasses also “store and forward technology” and “remote patient monitoring”
Additional Terminology

• Originating site – location of the patient (“spoke”)
• Distant site – location of the practitioner (“hub”)
• Store and forward technology – Asynchronous encounter where the data is obtained at the originating site and forwarded to the remote site, where the practitioner reviews the information without the patient being present
Organizers

• Health Systems (e.g., Guthrie Now)
• Physician Offices (especially urgent cares)
• Third Party Payors
  • Partnering with existing vendors
  • Captive PCs
• Direct to Consumer (DTC) companies
Common Scenarios

• Direct synchronous patient encounter
  • Telepsychiatry
• Specialist consultation
• Visual diagnosis (typically store and forward)
  • Medical imaging
  • Dermatology
  • Pathology
  • Fundoscopic photographs
Early History of Telemedicine

• 1960s – Remote patient monitoring originated with NASA and the early days of manned flight
• 1964 – first interactive video link for telepsychiatry established in Nebraska
• Late 60s/early 70s – federal government funded telemedicine R&D for rural areas
• 1990, Maritime Health Services in Seattle established video teleconferencing between onboard medical officers and stateside Eps (MedNet)
• Mid 1990s - teleradiography
Telehealth Parity Laws

- Private payors/MCOs – NY Ins. Law §§ 3217-h & 4306-g
- Entitled “Telehealth delivery of services”
  - A payor **shall not exclude** from coverage a service that is otherwise covered because the service is delivered via telehealth.
  - A payor may subject the coverage to **co-payments, co-insurance or deductibles** provided they are at least as favorable to the insured as the same service when not delivered via telehealth.
  - A payor may subject the coverage of these services to **reasonable UR and QA requirements** consistent with those established for the same service when not delivered via telehealth.
• Medicare and Medicaid will also pay, but have additional restrictions
• Medicaid – Article 29-G of the Public Health Law
  • Originating site limited to certain facilities and doctors’ offices (i.e., not from the patient’s home)
• Medicare – 42 CFR §§ 410.78, 414.65
  • Also has limits on originating sites (e.g., HPSA)
Regulatory Issues

• Licensure
  • The rule is that medicine is being practiced in the State in which the patient is located

• Standard of Care (SOC)
  • Is there a different SOC for telemedicine?
  • Should there be a different SOC?

• CPOM/fee splitting – DTC market

• HIPAA Privacy/Security
Regulatory Issues – SOC

• In my opinion, the rule is that the SOC is no different than for a face-to-face encounter
  • 2000/2009 NY BPMC Statements on Telemedicine
    • “All the current standards of care regarding the practice of medicine apply. The fact that an electronic medium is utilized does not change the standards of care.”
  • 2014 FSMB Model Policy for Telemedicine
    • “will be held to the same standards of appropriate practice as those in traditional (encounter in person) settings”

• Could this change?
  • American Telemedicine Association Practice Guidelines

• The big problem: the physical examination
Regulatory Issues – Physical Examination

• Some states have express statutes or regulations requiring a PE
  • FL: express requirement for a PE
  • TX: express requirement of an initial in-person visit
• NY has no express provision requiring a PE before Rx, but BPMC’s and BOM’s apparent position is a PE is required if it would be done during a face-to-face encounter
  • To my knowledge, this has never been tested in NY
  • The precautionary tale of internet prescribing
• Kiosks and gadgets
Regulatory Issues – Physical Examination

• What if litigated?
  • On call physicians call in prescriptions all the time based on a phone call; including a covering physician who has never seen the patient

• Is it arbitrary and capricious to prohibit a web based physician but not a brick-and-mortar based physician to call in a script without a physical exam?
  • General rule of deference to administrative agencies potentially open to attack under NC Bd. Dental Exam. v. FTC (2015)
  • Teladoc Inc., et al. v. Texas Medical Boad, et al.
Regulatory Issues – CPOM/fee splitting

• NY rules are strict prohibiting business entities from hiring physicians, practicing medicine or sharing in fees

• MSO/PC Model
  • Commonly done with brick and mortar operations
  • What are national direct-to-consumer companies doing?
Billing & Coding Issues

- Beyond the scope of this presentation
Security & Privacy Issues

• The systems will need to be HIPAA and HITECH compliant, particularly the HIPAA Security Rule
  • Administrative, technical, physical safeguards
• Practically must defer to information technologists and consultants, but ultimately, it is the Covered Entity that is responsible (no different than the EMR)
Security & Privacy, cont.

• Insecure communications
  • Skype & FaceTime
    • Need secured platforms
  • Open Wi-Fi
  • In my opinion, patients can waive, but not HCPs

• Recording the encounter
  • Also a potential SOC issue (NY law says “record”)
  • In my opinion, acceptable if assessment and plan included in the encounter
Medical Malpractice

- Are you covered?
  - Confirm with your carrier
  - Is jurisdiction limited?
- Personal jurisdiction
- Conflict of laws
  - Statute of limitations
  - Economic caps
  - Substantive and procedural law
- Standard of care
Direct to Consumer Websites

- National companies: e.g., Teladoc, American Well, MDLive
  - Some are telehealth, not telemedicine
  - Startups and other venture capital driven companies
- CPOM/fee splitting concerns
- SOC concerns
DTC, cont.

- Resneck et al., *Choice, Transparency, Coordination and Quality Among Direct-to-Consumer Telemedicine Websites and Apps Treating Skin Disease*, JAMA Dermatol. (online 5/15/16)
  - Simulated patients with structured cases/photos
  - Generally correct when readily obvious from the picture
  - Regularly failed to ask simple relevant questions
  - Major diagnoses were repeatedly missed
Questions?

Andrew Knoll, M.D., J.D.
Cohen Compagni Beckman Appler & Knoll, PLLC
477-6241
aknoll@ccblaw.com