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Telehealth Laws:

What Your Organization Needs to Know

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My Background

- Graduated from the University of Denver Sturm College of Law in 2010
- Worked for the Colorado Department of Health Care Policy and Financing (Colorado Medicaid) for 3 ½ years
- Started at the law firm of Caplan and Earnest as a Health Care Attorney in June 2014
- Started “Health Law Rundown” podcast in 2017

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Definitions

- Many different definitions available by various entities and agencies:
  - Telehealth
  - Telemedicine
  - Telepsychiatry
  - Mobile Health (mHealth)

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Some of the Benefits of Telehealth

- Increases access to care (especially with transportation issues)
- Improves quality of care
- Boosts Patient Satisfaction
- Reduces costs of care/increase revenue

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Brief History of Telehealth

- Civil War
- Invention of telephone
- Radiology advancements
- Invention of the television
- Space & Military
- Computers & cell phones

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The Growth of Telehealth

- As history has shown us, as technology grows so has the use of telehealth. This will continue!
- Commercial payers, Medicaid, and Medicare expand coverage every year.
- Significant investments and increased spending across the board.
- Diverse set of laws

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Medicare Requirements

- Location, location, location!
  - The “Originating site” or location of the patient must be at a qualified facility (see below) and located in a Health Professional Shortage Area (HPSA) or located in a county that is not included in a Metropolitan Statistical Area.
  - Originating sites include: physician and practitioner offices, hospitals including critical access hospitals, rural health clinics, FQHCs, SNFs, CMHCs, and sites participating in HHS approved demonstration projects.

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Medicare Requirements Continued

- Technology:
  - Must use interactive audio-and-video telecommunications permitting real-time communication between the provider at the distant site and the patient at the "Originating site." Asynchronous "store and forward" services are only permitted in Federal telemedicine demonstration programs in Alaska and Hawaii.
  - Telephone, fax, and email do not fall under the definition of interactive telecommunications system.

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Medicare Requirements Continued

- Provider Type:
  - Only specific practitioners located at the distant site or location of the treating practitioner may be reimbursed. Originating site receives facility fee.
  - Includes physicians, PAs, NPs, Nurse-midwives, clinical social workers, clinical nurse specialists, clinical psychologists, certified registered nurse anesthetist, and registered dietitians.
  - These practitioners must also meet state licensing, credentialing, and other requirements of both the distant site and originating site.

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Medicare Requirements Continued

- Services Covered:
  - About 100 CPT & HCPCS Codes on Medicare's website (slow but steady growth – CMS added 2 prolonged preventive services codes in 2019).
  - Current services include but are not limited to: office or other outpatient visits; professional consultations; transitional care management; smoking cessation services; alcohol and other substance use disorder services; follow-up inpatient telehealth consultations furnished to beneficiaries in hospitals or SNFs; annual depression screening; and individual psychotherapy.
  - For 2019, CMS declined to add codes related to chronic care remote physiologic monitoring and initial hospital care services.

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Colorado Medical Board (CMB) & Other Colorado Professional Boards

- Previously, the CMB 40-09 Policy required a Provider-Patient relationship through an in-person physical examination before engaging in telemedicine.
- On August 20, 2015 the CMB adopted new policies, which included guidelines for providers utilizing telehealth technologies in the delivery of patient care (40-27), the practitioner-patient relationship (40-3), and for prescribing for unknown patients (40-9).
- Other Boards: Tele-PT and Telenursing

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CMB Continued

- Policy 40-27
  - Provider-Patient relationship may be established using telehealth technologies now.
    - Likely needs to be established through a live, two-way, synchronous interaction.
  - Informed consent for telehealth must be obtained.
  - An emergency plan should be provided to the patient when the care provided using telehealth indicates that a referral to an acute care facility or ED for treatment is necessary for the safety of the patient.
  - Additional requirements….

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Prescribing Controlled Substances

- Difficult to meet Federal Requirements for prescribing controlled substances including:
  - Ryan Haight Act – 21 U.S.C. § 829(e)
    - Requires an in-person medical evaluation before a practitioner may prescribe a controlled substance
  - DEA Regulations for Prescribing Controlled Substances
    - 21 U.S.C. § 802(54) – 7 exceptions to in-person physical examination
  - "Special Registration for Telemedicine Act of 2018"

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Colorado Medicaid

- All Medicaid clients can receive services through the use of telemedicine, whether they live in rural or urban areas.
- However, Medicaid also states that telemedicine is best used for clients who live in rural areas and are far away from a provider (as well as members facing transportation difficulties). Telemedicine is not to take the place of seeing a provider in person when medically necessary.
- Telemedicine (telehealth) services are rendered “live” in real-time via audio-video communications equipment. Telemedicine (telehealth) does not include telephone or fax machines.
- Medicaid’s Telemedicine Billing Manual provides information on covered services, billing, reimbursement, and confidentiality requirements.
- Waiver of initial face-to-face requirement and required disclosures!

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Colorado Legislation

House Bill 15-1029 (Applies to Insurance Plans):

- removed the previous 150,000 population restriction and prevented health benefit plans from requiring in-person care when telehealth is appropriate regardless of where the provider or individual is located;
- providers and patients are still afforded discretion and are not required to utilize telehealth;
- providers do not have to prove that a barrier exists for in-person care in order to perform telehealth under a health benefit plan;

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House Bill 15-1029 Continued

- health benefit plans cannot discriminate and differentiate payment to participating providers for services provided via telemedicine in comparison to services provided in-person;
- covered benefits may not be denied because the service is provided through telehealth rather than in-person;
- health benefit plans containing deductibles, copayments, or coinsurance amounts for services provided via telehealth must not exceed the amounts for the same services provided through in-person care; and
- health benefit plans must not have different annual dollar maximums, policy-year, calendar-year, lifetime, or other durational benefit limits or maximums on telemedicine services that do not also apply to the same in-person care services.

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Other Issues To Consider

- HIPAA
- Reimbursement issues and increased risk
- Implementation/maintenance and technology costs
- The Anti-Kickback Statute, the Stark Law, and other fraud and abuse laws?

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Other Issues to Consider

- Practitioner issues including documentation, licensure, credentialing, or meeting specific organization requirements/bylaws.
- Telehealth on the OIG's Radar!
  - October 2017 – OIG added Medicare payments for telehealth services to its workplan.
  - November 2017 – OIG added Medicaid telehealth services to its workplan.

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Questions?

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