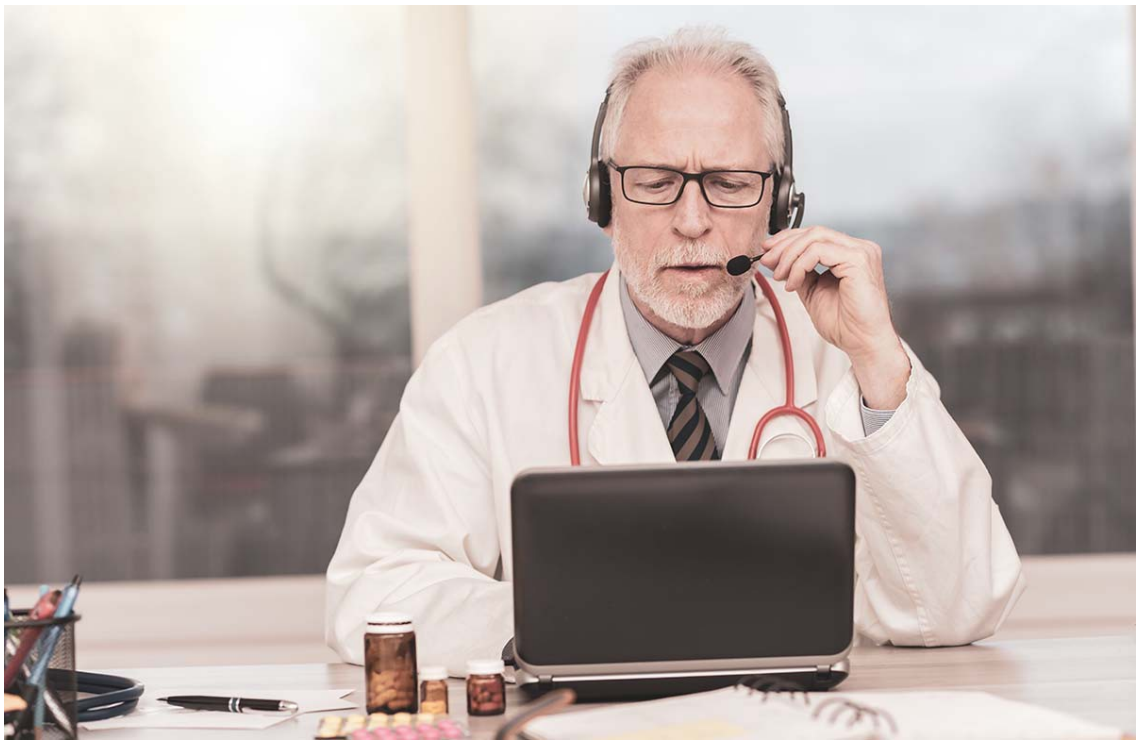
Key Considerations for Telemedicine



By Julie Loomis, RN, JD

1) Contact the Medical Board in every state where you plan to treat patients. Generally, states require full licensure to treat residents and may also have requirements for telemedicine encounters. During the COVID-19 pandemic, most states have relaxed licensing requirements as well as telemedicine regulations to encourage medical professionals to cross state lines to assist in the emergency. The Federation of State Medical Boards maintains a database of licensing requirements and waivers, but SVMIC recommends contacting the state board for applicable licensure and telemedicine regulations.

2) Review the Board regulations for the state where the patient is located. Medical boards in some states have published guidance for telemedicine. Different state laws and regulations may cover areas such as licensure, informed consent, confidentiality, prescribing, and payment applicable to telemedicine practice.

3) Contact SVMIC about coverage for telemedicine. Generally, telemedicine is covered

under your SVMIC policy when:

- You are practicing within the scope of your licensure;
- You are following the telemedicine guidelines, if any, of your state medical board;
- Providing care to an established patient; and
- Establishing a relationship with a new patient who resides within the state in which coverage has already been agreed upon by SVMIC.*

*To provide telemedicine to new patients outside your SVMIC coverage area, contact the Underwriting Department.
NOTE: If a claim arises, you will likely be sued in the state where the patient is located and would have to defend it there.

4) Know how a provider-patient relationship is established by telemedicine. Some states may have specific laws, regulations, or guidance addressing how a provider-patient relationship is created by way of telemedicine in the jurisdiction. Be aware of any special rules for treating minor patients via telemedicine. For example, in Tennessee, patients under the age of eighteen (18) must have a facilitator present to be treated via telemedicine. The facilitator also has additional responsibilities.

5) Be sure you are comfortable with the standard of care for the visit. In some states, the applicable standard of care is addressed by statute or regulation. In general, you should conduct a telehealth visit in a manner like an in-person office visit:

- Adequately assess the patient's complaints
- Conduct an adequate exam
- Develop a diagnosis
- Make recommendations
- Develop a follow-up plan
- Make appropriate referrals

6) The physician or other provider should have access to all appropriate patient records for the encounter or be able to obtain enough information from the patient to form a medical opinion.

7) Be aware that if the care rendered via telemedicine violates licensing rules and regulations, there may be an exclusion from malpractice coverage.

8) Contact the patient's healthcare insurance carrier to ensure they will pay for this visit. It is important to advise the patient up front that they may be personally responsible for payment, which may help limit any surprise billing, and help ensure they will pay later.

9) Address the practice of telemedicine with your own group/employer to ensure telemedicine is allowed. The group may already have policies and procedures that should be followed to avoid a defense issue if your care is later challenged.

10) It is important to remember that the telemedicine visit, like an in-person office visit, should be within the physician's or other provider's scope of practice (diagnosis, consultation, treatment, follow-up, and other aspects).

11) Both the provider and the patient must utilize adequately sophisticated technology to enable the remote provider to verify the patient's identity and location with an appropriate level of confidence.

12) The HHS Office of Civil Rights will "exercise enforcement discretion and waive penalties for HIPAA violations against health care providers that serve patients in good faith through everyday communications technologies, such as FaceTime or Skype, during the COVID-19 nationwide public health emergency."
Therefore, even without meeting the usual encryption requirements for healthcare communication, practices considering greater use of telehealth using readily available, non-specialized interfaces, like FaceTime and Skype, may do so.
Even with relaxed HIPAA technology enforcement during the COVID-19 pandemic, remember that provider-patient conversations are confidential. It is the provider's responsibility to discuss the question of confidentiality and identify who is in the room with the patient as well as the provider.

13) Obtain consent from the patient to treat them via telemedicine.

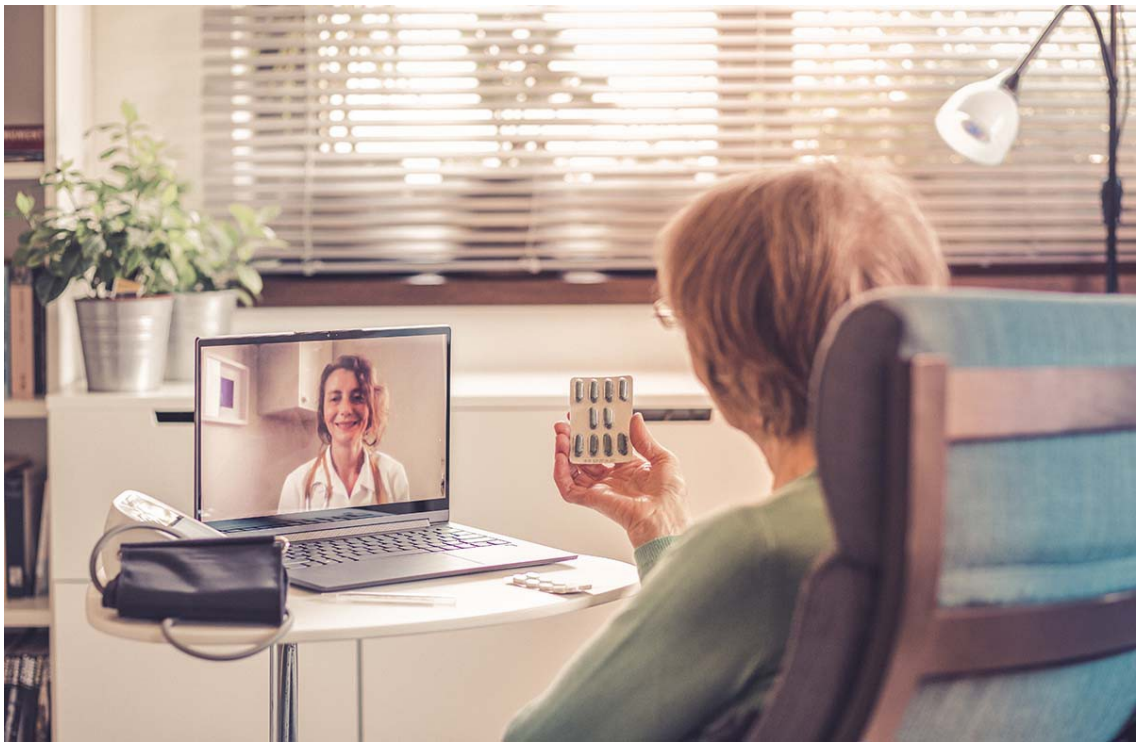
- This conversation may be documented as written or verbal, depending on state requirements. A simple consent form or verbal conversation should suffice.
- A macro may be developed to assist with the documentation.
- Electronic communication risks include, but are not limited to, possible disruption or virtual communication failures, unauthorized third-party access, difficulties in forwarding, intercepting, and possible distortion due to technical failures.
- Document any consent discussion.
- The provider should verify and authenticate the patient's identity.
- Some states require documentation of the virtual platform used by provider-patient.
- A telehealth informed consent form can be downloaded from the SVMIC website.

14) Document thoroughly. Pay attention to performing an appropriate examination, using clinical judgment, and developing a differential diagnosis. Your documentation should support the care provided and follow-up discussion with the patient. Some state boards require specific documentation. For example, in Tennessee, you must document that the encounter was conducted via telemedicine, and you must indicate the technology used.

15) Telemedicine is not appropriate for all conditions. Refer patients for in-person

treatment when indicated. Do not attempt to practice medicine via telemedicine if diagnostic testing or consultation with a specialist would be required at an in-person visit (unless you can accommodate those needs).

Utilizing Telemedicine in Your Practice During the Pandemic and Beyond



By Justin Joy, JD, CIPP

Telemedicine use has skyrocketed during the COVID-19 health crisis: Is it here to stay?

Prior to the COVID-19 pandemic, the vast majority of patients were unfamiliar with telemedicine,[1] and relatively few medical practices offered any form of virtual care. According to a J.D. Power report released in late 2019, only 10% of U.S. healthcare consumers had used telehealth services.[2] Fast forward to March 2020 and across the nation, telemedicine has become a lifeline connecting practices to their patients. As of

April 2020, the research company Forrester predicts there will be more than 1 billion U.S. virtual care visits in 2020.[3] The company went as far as to state it expected “time and resource constraints to create a supply crisis for virtual care during the pandemic.”

Many medical practices have embraced telemedicine to deliver high-quality care to their patients during a time when the dynamics of office visits have dramatically changed. Whether a medical practice is new to telemedicine, or a group has recently expanded its use of the technology, like other areas of healthcare, practices must be aware of and focus on numerous laws and regulations, liability risk, and patient expectations. As part of continuously improving their virtual care offerings, practices should develop telemedicine policies and procedures, which may include checklists, to help assure that all regulatory requirements are met at each visit for the applicable jurisdiction.[4] These regulatory requirements vary from state-to-state and address things such as telemedicine encounter documentation requirements, consents, patient and provider identification, and providing virtual care to minors.

Practices must also be aware of licensure and HIPAA privacy and security requirements. In recognizing the value of telemedicine as means to keep patients and providers connected safely at a distance, states across the country, as well as federal agencies, have made numerous—albeit temporary—changes to encourage the use of telemedicine. Changes in state licensing requirements and federal privacy and security standards have eased several administrative burdens on telemedicine deployment. The Federation of State Medical Boards has maintained an updated catalog of COVID-19 related state waivers and modifications for telehealth.[5] It is expected however that these interim emergency provisions will revert when no longer justified, and the normal requirements will apply once again. Practices should familiarize themselves with the applicable standing laws and regulations in anticipation of the cancellation of these modifications once the current health crisis subsides.

One of the more important aspects of a telemedicine visit, especially for a new office patient, or an existing patient who is new to telemedicine, is appropriately educating the patient about telemedicine before the visit begins. While there are some similarities to the traditional informed consent process for a medical procedure, where risks, benefits, and alternatives are discussed with the patient, obtaining a patient's informed consent for a telemedicine visit is just as much an exercise in expectation management as it is meeting a legal requirement.[6] Where technology permits, obtaining a patient's informed consent for telemedicine should be done in writing by way of an informed consent form, including capturing the patient's written acknowledgment on the document. After obtaining the patient's written consent, the provider or assistant should confirm whether the patient has any questions about the form that was electronically signed. It should be noted in the visit record that all questions were answered or that the patient did not have any questions. In instances where the communication technology used for the telemedicine visit does not have the capability of transmitting a written consent form or capturing the patient's written acknowledgment on the form, a verbal consent is acceptable, recognizing the verbal discussion, and documentation of that verbal discussion, is paramount.

In addition to covering some of the risks of telemedicine that are not present in the office setting, such as the possibility of being unable to adequately assess the patient's condition due to camera resolution or lighting limitations, disruption of the audio/visual telecommunication connection or other equipment failure resulting in abrupt discontinuation of the visit, patients need to understand that by participating in a virtual visit, there is no guarantee they will receive a prescription or other medical order. While some visits are more susceptible to these unrealistic expectations than others, patients need to appreciate at the outset that their provider will use his or her professional judgment to determine whether telemedicine is appropriate for the visit, and determine whether the technology is capable of allowing the provider to properly assess the patient to render a diagnosis and develop a plan of care. In some cases, such a determination cannot be made until the provider has begun the evaluation of the patient and reached a conclusion that the patient cannot be properly assessed remotely, necessitating an in-person visit or a referral elsewhere. If patient expectations are not adequately managed, this can lead to patient disappointment and frustration, either because the visit was not covered by insurance or for cost-sharing responsibility, particularly if patient payment for the service is expected. Much of this friction can be reduced by providing patients with adequate information that properly shapes their expectations for care and payments *before the visit begins*.

Changes by the Centers for Medicare and Medicaid Services (CMS) and many commercial payers have greatly expanded reimbursement for telemedicine services during the pandemic. As a result of these changes and emergency modification of state laws, in recent months, many patients have used telemedicine for the first time. As patients become increasingly accustomed to and comfortable with virtual visits, the desire by patients to remotely consult with their providers where appropriate is likely to grow in the future. If reimbursement remains generally available for telemedicine, patient demand will

likely result in higher telemedicine adoption and utilization rates in the private practice setting. For medical practices who have recently deployed or significantly expanded the use of telemedicine during the health crisis, now is the time to identify and continue to develop best practices in providing virtual care. Beyond the obvious in establishing and maintaining legal compliance with applicable state laws and regulations, practices should be persistently thoughtful about improving patient experience and efficiencies in delivering care by way of telemedicine. In doing so, practices are putting themselves in the best position to increase patient satisfaction, maximize revenue, and reduce liability risk.

Detailed information about telehealth, particularly during the COVID-19 crisis, is available on SVMIC's COVID-19 Resource Center.

[1]. The terms "telemedicine" and "telehealth" are often used interchangeably. In most contexts, both generally refer to the delivery of healthcare using communication technology. The focus of this article however is on the delivery of medical care for the purpose of rendering a diagnosis and treatment plan by remote means as recognized by state laws and/or regulations.

[2]. https://www.jdpower.com/business/press-releases/2019-us-telehealth-satisfaction-study

[3]. https://go.forrester.com/press-newsroom/us-virtual-care-visits-to-soar-to-more-than-1-billion

[4]. As a general rule, the laws and regulations in the state where the patient—not the provider—is located at the time of the telemedicine encounter apply.

[5]. https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf. As noted by the Center for Connected Health Policy, "Telehealth policy changes occurring within the COVID-19 environment have been rapidly developing on almost a daily basis." https://www.telehealthpolicy.us/

[6]. In addition to being good practice in every setting, in some states, there is an expressed requirement to obtain a patient's informed consent for a telemedicine visit.

SVMIC Actions and Resources to Assist with Coronavirus Impact

By Judy Musgrove

SVMIC has proactively developed several financial programs to help with the impact of the COVID-19 pandemic on practices. The company has also developed an extensive network of resources to help policyholders and staff respond in the most rapid and efficient manner to the changes necessitated by the current situation. As always, SVMIC's staff of risk, legal, and practice management experts are on hand to respond to your questions by email or phone – please contact us at ContactSVMIC@svmic.com or 800.342.2239 if we can be of assistance.

Temporary Part-time Discounts are available for policyholders who have experienced significant decline in patient volume due to the COVID-19 pandemic.

Flexible Payment Terms are being extended upon request when cash flow concerns due to the pandemic are causing a hardship for practices.

SVMIC's Board of Directors elected to **Suspend All Planned Rate Increases** for 2020 to attempt to alleviate any additional burden on policyholders during this difficult time.

We have **Waived Self-Study Education Fees** for the remainder of 2020.

SVMIC continues to offer **Consultations with Risk, Legal and Practice Management Experts** free of charge at any time to all policyholders.

Extensive Resources dedicated to COVID-19 and updated daily, including a website, a podcast, and timely webinars about returning to seeing patients.

- Your Coverage
- Re-opening/Re-starting Practice
- SVMIC's Response
- General Information
- Telemedicine
- HIPAA
- Government Programs & Financial Assistance
- Consent and Disclaimers
- Billing, Medicare, & Commercial Payers
- HR & Safety
- OSHA
- State DOIs

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