Arnall Golden Gregory LLP

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The New World of Telehealth

GHA Compliance Officers Roundtable Retreat

September 6, 2018

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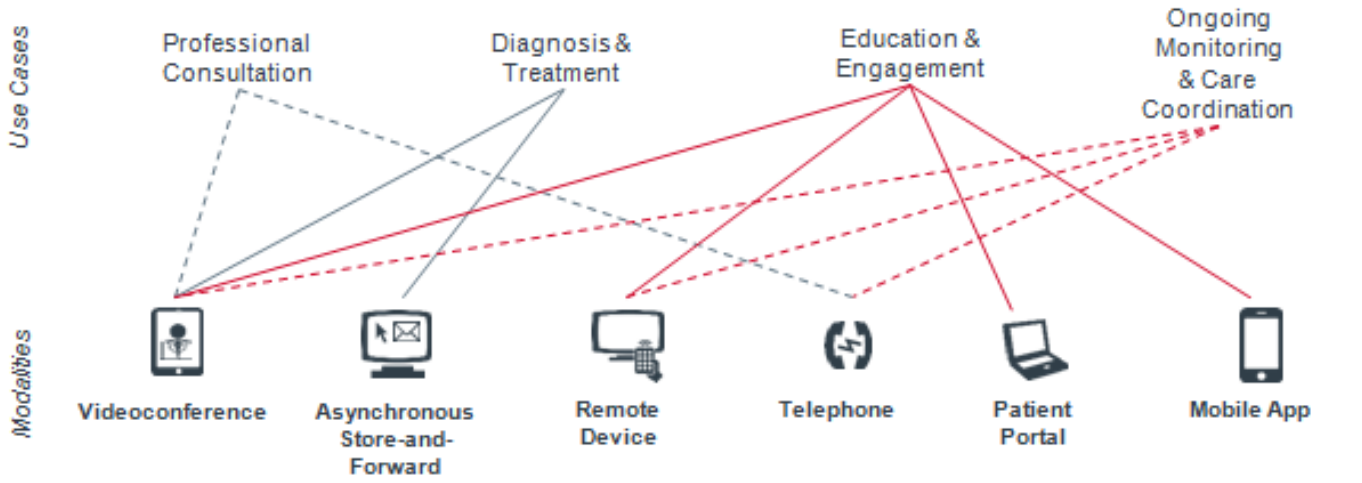
What Does Telehealth Look Like?

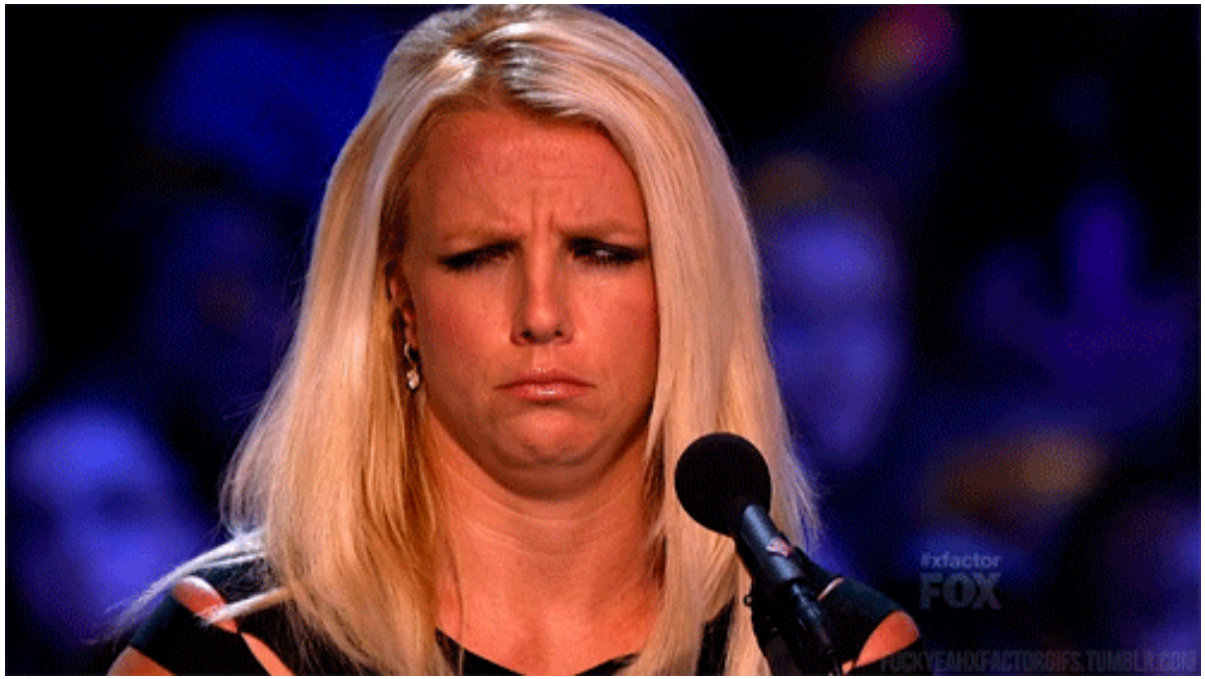
Use Cases May Be Achieved Across Multiple Modalities

Telehealth Use Cases, Relevant Modalities, and Investment Required



Source: Marketing and Planning Leadership Council interviews and analysis.

What Do You Look Like?



So What Do You Need To Know?

- Basic Billing Rules: Medicare and Georgia Medicaid
- Georgia Standard of Care Issues
- Conditions of Participation/The Joint Commission
- HIPAA
- Prescribing Drugs
- Risks to Keep on Your Radar

Medicare Rules: 42 USC 1395m(m)

- Statute defines “telehealth service” as professional consultations, office visits and office psychiatry services defined by CPT codes that CMS must update annually.
  - “Category One” Codes

- CMS has expanded upon that basic definition (“Category 2” Codes). CMS more broadly considers “telehealth services” to be services that practitioners normally furnish in-person, but for which CMS will make payment “when they are instead furnished using interactive, real-time telecommunication technology.”

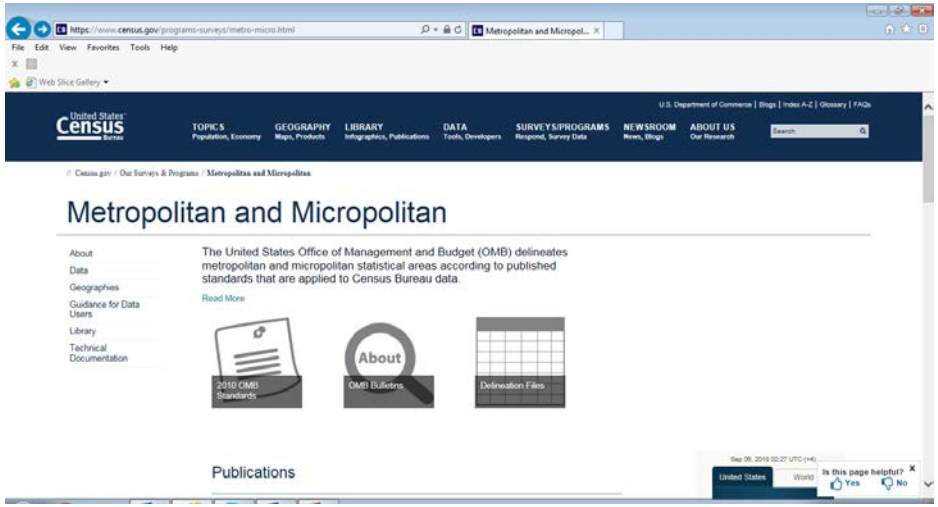
Medicare Rules: 42 USC 1395m(m)

- Statute establishes five conditions for Medicare coverage of telehealth services:
  - Patient is in a qualifying rural area
  - Patient is located in a qualifying originating site
  - Telehealth services are provided by a qualifying practitioner
  - The telehealth technology is appropriate
  - The service is on CMS's current CPT list

- There is your audit checklist!

Medicare Rules: Unpacking the 5 Elements

- Qualifying Rural Area (where the patient is):
  - HPSA (Health Professional Shortage Area); or
  - Not in a MSA (Metropolitan Statistical Area); or
  - The originating site is participating in a Medicare telemedicine demonstration project and has a waiver.



Medicare Rules: Unpacking the 5 Elements

- Qualifying Originating Site (where the patient is; site of service 02 instead of GT modifier as of 2018):
  - Physician Office
  - Critical Access Hospital
  - Rural Health Clinic
  - Federally-Qualified Health Center
  - Hospital
  - Provider-Based Renal Dialysis Center
  - Skilled Nursing Faciltiy
  - Community Mental Health Center
- What is not on that list? The patient's home. An ambulance. (But wait for Medicaid!)

Medicare Rules: Unpacking the 5 Elements

- Qualifying Distant Site Practitioner (No Location Limits):
  - Physician
  - Physician Assistant
  - Nurse Practitioner
  - Clinical Nurse Specialist
  - Certified Registered Nurse Anesthetist
  - Certified Nurse Midwife
  - Clinical Social Worker
  - Clinical Psychologist
  - Registered Dietitian or Registered Nutrition Professional

Medicare Rules: Unpacking the 5 Elements

- Qualifying Technology:
  - Interactive
  - Audio
  - Video
  - Real-Time, Two-Way Communication

- No Asynchronous, Store-and-Forward (but stay-tuned as CMS considers allowing in some contexts)

- Look for grant opportunities: the FCC is offering grants, and talk to the Georgia State Office of Rural Health

Medicare Rules: Unpacking the 5 Elements

- Qualifying CPT Code:
  - List published by CMS each year at https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes.html
  - Each year, CMS proposes new services and allows for exceptions to the 5 rules. On the horizon:
    - Expansion for stroke services (no rural area restriction, can have a mobile stroke unit as the originating site)
    - Expansion for home dialysis therapy (after one face-to-face, can do assessments from patient's home)
    - Proposed "Virtual Check-In" from established patient's home to be billed as an E/M (expect lots of phoneapps); CMS considering "store and forward" with proposed Remote Patient Monitoring (RPM)
    - Key: Keep the Code list current for audits

Medicare Rules: Unpacking the 5 Elements

CY 2018 Medicare Telehealth Services

Service	HCPCS/CPT Code
Telehealth consultations, emergency department or initial inpatient	HCPCS codes G0425–G0427
Follow-up inpatient telehealth consultations furnished to beneficiaries in hospitals or SNFs	HCPCS codes G0406–G0408
Office or other outpatient visits	CPT codes 99201–99215
Subsequent hospital care services, with the limitation of 1 telehealth visit every 3 days	CPT codes 99231–99233
Subsequent nursing facility care services, with the limitation of 1 telehealth visit every 30 days	CPT codes 99307–99310
Individual and group kidney disease education services	HCPCS codes G0420 and G0421
Individual and group diabetes self-management training services, with a minimum of 1 hour of in-person instruction to be furnished in the initial year training period to ensure effective injection training	HCPCS codes G0108 and G0109
Individual and group health and behavior assessment and intervention	CPT codes 96150–96154
Individual psychotherapy	CPT codes 90832–90834 and 90836–90838
Telehealth Pharmacologic Management	HCPCS code G0459
Psychiatric diagnostic interview examination	CPT codes 90791 and 90792
End-Stage Renal Disease (ESRD)-related services included in the monthly capitation payment	CPT codes 90951, 90952, 90954, 90955, 90957, 90958, 90960, and 90961
End-Stage Renal Disease (ESRD)-related services for home dialysis per full month, for patients younger than 2 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents	CPT code 90963
End-Stage Renal Disease (ESRD)-related services for home dialysis per full month, for patients 2-11 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents	CPT code 90964

Medicare Rules: Unpacking the 5 Elements

CY 2018 Medicare Telehealth Services (cont.)

Service	HCPCS/CPT Code
End-Stage Renal Disease (ESRD)-related services for home dialysis per full month, for patients 12-19 years of age to include monitoring for the adequacy of nutrition, assessment of growth and development, and counseling of parents	CPT code 90965
End-Stage Renal Disease (ESRD)-related services for home dialysis per full month, for patients 20 years of age and older	CPT code 90966
End-Stage Renal Disease (ESRD)-related services for dialysis less than a full month of service, per day; for patients younger than 2 years of age (effective for services furnished on and after January 1, 2017)	CPT code 90967
End-Stage Renal Disease (ESRD)-related services for dialysis less than a full month of service, per day; for patients 2-11 years of age (effective for services furnished on and after January 1, 2017)	CPT code 90968
End-Stage Renal Disease (ESRD)-related services for dialysis less than a full month of service, per day; for patients 12-19 years of age (effective for services furnished on and after January 1, 2017)	CPT code 90969
End-Stage Renal Disease (ESRD)-related services for dialysis less than a full month of service, per day; for patients 20 years of age and older (effective for services furnished on and after January 1, 2017)	CPT code 90970
Individual and group medical nutrition therapy	HCPCS code G0270 and CPT codes 97802–97804
Neurobehavioral status examination	CPT code 96116
Smoking cessation services	HCPCS codes G0436 and G0437 and CPT codes 99406 and 99407
Alcohol and/or substance (other than tobacco) abuse structured assessment and intervention services	HCPCS codes G0396 and G0397
Annual alcohol misuse screening, 15 minutes	HCPCS code G0442
Brief face-to-face behavioral counseling for alcohol misuse, 15 minutes	HCPCS code G0443

Medicare Rules: Unpacking the 5 Elements

CY 2018 Medicare Telehealth Services (cont.)

Service	HCPCS/CPT Code
Annual depression screening, 15 minutes	HCPCS code G0444
High-intensity behavioral counseling to prevent sexually transmitted infection; face-to-face, individual, includes: education, skills training and guidance on how to change sexual behavior; performed semi-annually, 30 minutes	HCPCS code G0445
Annual, face-to-face intensive behavioral therapy for cardiovascular disease, individual, 15 minutes	HCPCS code G0446
Face-to-face behavioral counseling for obesity, 15 minutes	HCPCS code G0447
Transitional care management services with moderate medical decision complexity (face-to-face visit within 14 days of discharge)	CPT code 99495
Transitional care management services with high medical decision complexity (face-to-face visit within 7 days of discharge)	CPT code 99496
Advance Care Planning, 30 minutes (effective for services furnished on and after January 1, 2017)	CPT code 99497
Advance Care Planning, additional 30 minutes (effective for services furnished on and after January 1, 2017)	CPT code 99498
Psychoanalysis	CPT code 90845
Family psychotherapy (without the patient present)	CPT code 90846
Family psychotherapy (conjoint psychotherapy) (with patient present)	CPT code 90847
Prolonged service in the office or other outpatient setting requiring direct patient contact beyond the usual service; first hour	CPT code 99354
Prolonged service in the office or other outpatient setting requiring direct patient contact beyond the usual service; each additional 30 minutes	CPT code 99355
Prolonged service in the inpatient or observation setting requiring unit/floor time beyond the usual service; first hour (list separately in addition to code for inpatient evaluation and management service)	CPT code 99356

Medicare Rules: Unpacking the 5 Elements

CY 2018 Medicare Telehealth Services (cont.)

Service	HCPCS/CPT Code
Prolonged service in the inpatient or observation setting requiring unit/floor time beyond the usual service; each additional 30 minutes (list separately in addition to code for prolonged service)	CPT code 99357
Annual Wellness Visit, includes a personalized prevention plan of service (PPPS) first visit	HCPCS code G0438
Annual Wellness Visit, includes a personalized prevention plan of service (PPPS) subsequent visit	HCPCS code G0439
Telehealth Consultation, Critical Care, initial, physicians typically spend 60 minutes communicating with the patient and providers via telehealth (effective for services furnished on and after January 1, 2017)	HCPCS code G0508
Telehealth Consultation, Critical Care, subsequent, physicians typically spend 50 minutes communicating with the patient and providers via telehealth (effective for services furnished on and after January 1, 2017)	HCPCS code G0509
Counseling visit to discuss need for lung cancer screening using low dose CT scan (LDCT) (service is for eligibility determination and shared decision making (effective for services furnished on and after January 1, 2018)	HCPCS code G0296
Interactive Complexity Psychiatry Services and Procedures (effective for services furnished on and after January 1, 2018)	CPT code 90785
Health Risk Assessment (effective for services furnished on and after January 1, 2018)	CPT codes 96160 and 96161
Comprehensive assessment of and care planning for patients requiring chronic care management (effective for services furnished on and after January 1, 2018)	HCPCS code G0506
Psychotherapy for crisis (effective for services furnished on and after January 1, 2018)	CPT codes 90839 and 90840

For ESRD-related services, a physician, NP, PA, or CNS must furnish at least one "hands on" visit (not telehealth) each month to examine the vascular access site.

Medicare Revenue

- Distant practitioner providing the service: payment parity. Receives an amount equal to the amount the practitioner would have received had the service been provided in person.

- Originating site: facility fee. This amount is set by CMS and increases with the Medicare Economic Index. Currently about $25.

Georgia Medicaid Rules

Telemedicine Guidance

GEORGIA DEPARTMENT OF COMMUNITY HEALTH

DIVISION OF MEDICAID

July 1, 2018

Georgia Medicaid Rules

- How Does Medicaid Differ From Medicare?
- No rural area requirement for originating site.
- Additional qualifying originating sites:
  - School-based clinics
  - County Board of Health offices
  - Ambulances
  - Pharmacies
- Additional distant site practitioner: Speech Pathologists
- Still uses GT modifier (Medicare dropped to modifier and is now site of service 02)

Georgia Medicaid Rules

- Additional Medicaid Rules:
  - Written consent for telehealth from the patient (specific consent form in provider manual); sign and put in medical record.
  - Medicaid requires that the telemedicine service be ordered by the “referring provider” who must be the patient’s PCP/attending.
  - Both the originating site and the distant practitioner must be enrolled Medicaid providers.

Georgia Medicaid Rules

- Additional Medicaid Rules:
  - CPT codes published with manual updates (at least once, sometimes twice per year).
  - Interesting: “The originating site’s system, at a minimum, must have the capability of allowing the distant site provider to visually examine the patient’s entire body including body orifices.”

Georgia Standard Of Care Issue

- The Georgia Composite Medical Board has issued regulations on the use of telehealth in practice.

- Board Rule 360-3-.07: “Practice Through Electronic or Other Such Means.” Includes basic requirements:

  - Patient history should be available to the distant practitioner.
  - Patient must be given distant practitioner’s contact information.
  - Distant practitioner must “make diligent efforts” to ensure the patient receives in-person follow up care.

Georgia Standard Of Care Issue

- The Board Rule adds a standard of care element:

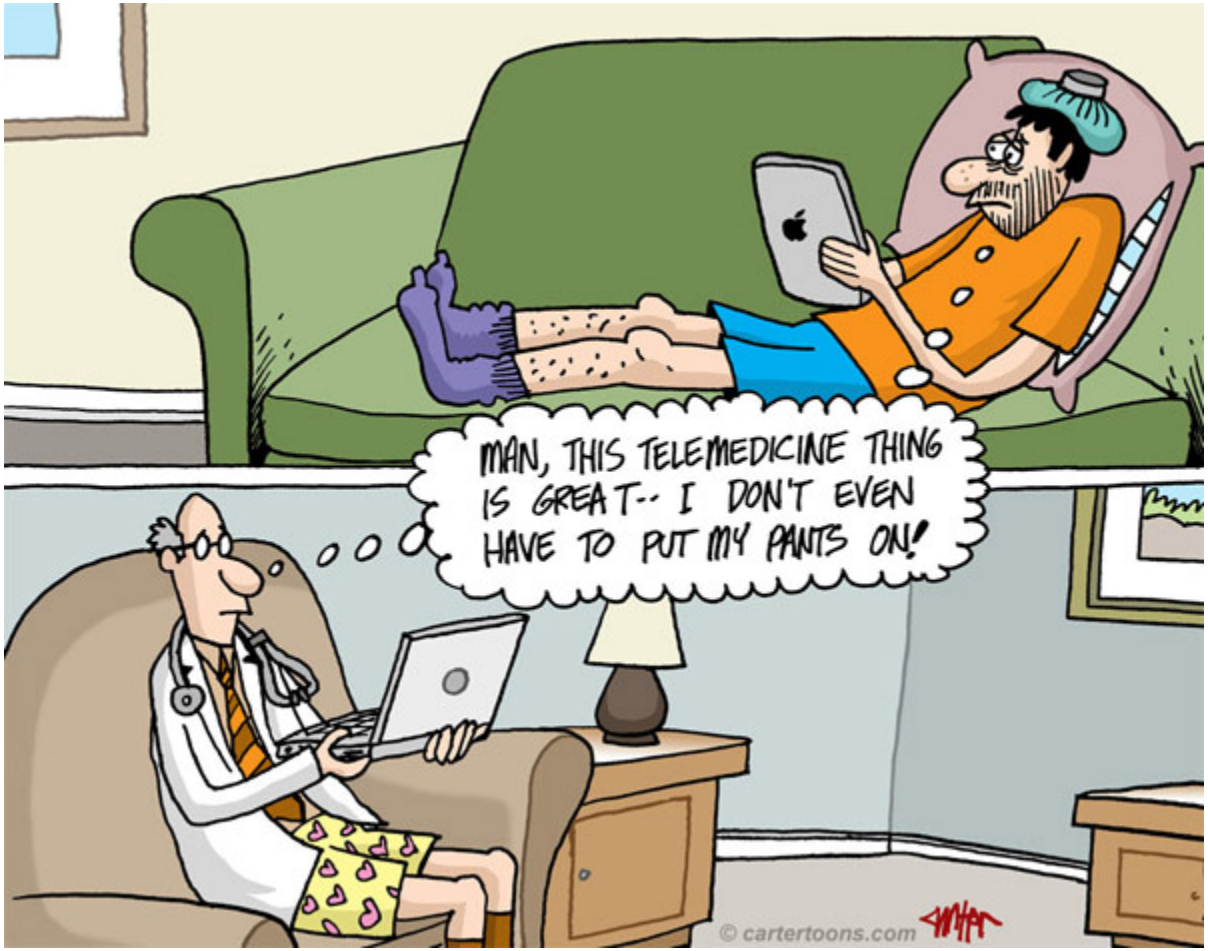
"Licensees practicing by electronic or other means will be held to the same standard of care as licensees employing more traditional in-person medical care. A failure to conform to the appropriate standard of care, whether that care is rendered in person or via electronic or other such means, may subject the licensee to disciplinary action by the Board."

  - How will this interplay with malpractice? Get Risk involved, particularly when you are the distant provider.

Georgia Standard Of Care Issue

- The Board was originally hesitant to support telehealth because of this issue, particularly speaking out against app-based, direct to patient (DTP) telehealth.
  - Board official once commented that the only telehealth service that could meet the standard of care is psychology/psychiatry.

- What to consider for medical staff compliance, particularly for employed docs?
  - Official declaration of the types of services medical staff members can provide/seek via telehealth (a separate concept from reimbursement)?


MAN, THIS TELEMEDICINE THING IS GREAT-- I DON'T EVEN HAVE TO PUT MY PANTS ON!
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Condition of Participation: 42 CFR 482.22

- Medicare conditions of participation require that every practitioner that treats a hospital's patients be a member of the medical staff.

- What about the distant site practitioner? She is treating your patients.

Condition of Participation: 42 CFR 482.22

- Allows for “Credentialing by Proxy”
  - The originating site hospital can rely upon the credentialing and privileging of the distant practitioner’s site.
  - Requires an agreement between the two parties.
  - Requires cooperative peer review process between the two parties.
  - If the distant site is not a hospital, the contract must have magic language stating that the distant site will furnish services in a way that permits the originating site hospital to comply with all applicable conditions of participation for the contracted services.

The Joint Commission Standard

- The Joint Commission addresses telemedicine through two of its Standards: LD.04.03.09 and MS.13.01.01.

- Same concepts as the condition of participation, with added requirement that the distant site must provide the originating site hospital with information on adverse outcomes related to sentinel events considered reviewable by TJC as well as information about complaints about the distant site practitioner.

COP / The Joint Commission Standard

- Audit considerations:
  - Contract review: do you have a contract for every telehealth arrangement?
    - Magic language when the distant site is not a hospital?
  - Are you engaging in cooperative peer review? Documenting?
  - Is credentialing by proxy enough? Consider it a floor/safety net, but maybe do more?

HIPAA Issues

- Things to consider:
  - Cannot rely on the technology vendors to achieve and ensure HIPAA compliance: conduct your own assessments and penetration testing.
  - Get BAAs with all telehealth technology vendors. Negotiate liability for breaches.
  - Do you trust the security of the distant practitioner? A hospital, perhaps. A physician office???
  - Will the patient record be jeopardized if the originating and distant are on different EHRs? 21st Century Cures legislation on interoperability still leaves questions for telehealth.

HIPAA Issues

HIPAA Issues

- More things to consider:
  - How to encrypt the transmissions of data?
  - How to ensure patient right of access to records of the encounter?
  - Anti-Virus? Vulnerability patching?
    - Talk to IT
  - Include breach and incident cooperation protocols in agreements between originating and distant sites
    - Remember agreements required under CoP / TJC
    - Most likely not a BAA, but need to consider similar concepts

Prescribing Drugs Through Telemedicine

- Georgia Composite Medical Board Rule 360-3-.02: "Unprofessional Conduct Defined"

- Prohibits a physician from prescribing controlled substances and/or dangerous drugs for a patient based solely on a consultation via electronic means. Exceptions: (1) coverage arrangements allow for a 72 hour supply; or (2) okay in documented emergency circumstances.
  - But remember the Board's Standard of Care rule. This Standard applied to the writing of scripts under these two exceptions.

Prescribing Drugs Through Telemedicine

- Georgia Composite Medical Board Rule 360-3-.02: “Unprofessional Conduct Defined”

- Punchline: generally, scripts must be written by a practitioner at the originating site who sees the patient face-to-face. Are you comfortable having the originating cite physician blindly endorse the script suggestion of the distant practitioner?

- The Board rule will be a potential road-block if CMS embraces virtual check-ins for E/M.

Prescribing Drugs Through Telemedicine

- Federal Ryan Haight Act
- Requires that any telemedicine encounter that results in a prescription for a controlled substance take place in the presence of a practitioner who is registered with the DEA.
  - Distant site practitioner can write the script under the federal law so long as the originating site has a DEA-registered practitioner present for the whole encounter.
- BUT: Georgia Board won't allow it. And even if Georgia Board adapts, it won't work for virtual check-ins. Watch for amendments to the Act.

SO NOW WHAT DO YOU DO?

Risks: What to Keep on Your Radar

- Telehealth is on OIG's radar; reimbursement is increasing by about 25% per year

- OIG Work Plan in October 2017: Focusing on claims paid to distant practitioners when there is not a corresponding originating site claim.
  - Some hospitals may not bill given the $25 reimbursement. If you are hosting the distant site practitioner, have your agreement require the originating site to bill.
  - Indemnification if they don't bill or if they are not a qualifying originating site after all?
  - Will you agree to these things if YOU are the originating site?

Risks: What to Keep on Your Radar

- OIG April 2018 Report: CMS paying practitioners for telehealth services that do not meet all 5 requirements.
  - OIG recommendation: CMS conduct post-payment review
  - OIG recommendation: MACs engage in provider education campaigns. BUT…

Risks: What to Keep on Your Radar

- Are your physicians using direct to patient (DTP) technology with Medicare/Medicaid patients? Moonlighting with patient care apps? Doing virtual appointments over cell phone and billing as traditional E/M visit?
  - Are they getting ABNs since the patient's home is not an originating site?
  - Are they submitting claims without site of service 02 (Medicare) or modifier GT (Medicaid)?

Risks: What to Keep on Your Radar

- Are you watching for Stark compliance?
  - The distant physician makes a Stark referral when he orders a related service to be performed at the originating site. Do you have a financial relationship with that physician that needs the protection of an exception?

Risks: What to Keep on Your Radar

- FMV in telehealth service agreements:
  - Flat rate per consultation or wRVU?
  - Hourly rate?
  - Coverage stipend? Alone or coupled with payment for services rendered?
- Watch for compensation stacking – is one distant practitioner taking tele-call for multiple hospitals at once? Are you paying one physician to cover all hospitals in your system?

Risks: What to Keep on Your Radar

- Are you watching for AKS compliance?
  - Is your hospital donating/loaning telehealth equipment to referring physicians, or is FMV rent charged?
  - Free telehealth consults to schools or County Health Depts (in hopes of getting follow up appointments billed to Medicaid?)?
- Is patient freedom of choice respected? Are patients funneled to the distant site provider for follow up care?

Risks: What to Keep on Your Radar

- OIG Advisory Opinion Library:
  - Ad. Op. No. 98-18
  - Ad. Op. No. 99-14
  - Ad. Op. No. 04-07
  - Ad. Op. No. 11-12
  - Ad. Op. No. 18-03

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