Utah Telehealth Study - Phase 2 Report

Prepared by Pilot Healthcare Strategies for the Utah Division of Occupational and Professional Licensing

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Executive summary and overview

This phase of the Utah Telehealth Study features a compilation and analysis of state law governing the administration of telehealth services by health care professionals including summary charts of relevant state law. Given the broad breadth of practitioners covered and governing law reviewed, two crosswalk charts were created. One chart covers state law and regulation governing delivery of patient services via telehealth. Telehealth can entail practice across state lines by out of state practitioners and laws and rules governing telehealth by licensed health care practitioners frequently touch on the subject. Illinois law, for example, recognizes that technological advances and the practice of medicine are occurring with increasing frequency across state lines.[1] Given the link between telehealth and health care professional practice across state boundaries, a second chart contains a compilation of law and regulation governing interstate practice by health care practitioners with a focus on telehealth.

[1] 225 ILCS 60/49.5(a)

Methodology

State statutes and regulations compiled by The National Telehealth Research Policy Center were reviewed on a state-by-state basis, extensively supplemented by a state-by-state search utilizing Lexis/Nexis with the search phrase “telemedicine or telehealth.” The scope of this review encompasses statutes and regulations pertaining to telehealth services by licensed healing arts practitioners. It generally excludes telehealth-related authorities pertaining to health care facilities, state medical assistance programs, state telehealth initiatives, and public and private health insurance.

Extensive variation was found among the states relative to regulation of telehealth as well as interstate practice by providers licensed in other states. Some states have relatively extensive bodies of law. Five states (New Hampshire, New Mexico, Nebraska, Oklahoma and California) have enacted omnibus telemedicine or telehealth acts, while other states have been minimally active in this area. Several states have not enacted any statutes or promulgated regulations pertaining to the delivery of services via telehealth by licensed health care practitioners. Nearly all states regulate telehealth practice by physicians and osteopathic physicians, although small number do not (such as Ohio and South Dakota) where telehealth laws solely govern other licensed healing arts. Many states specifically regulate telehealth practiced by licensees including nurses, physician assistants, mental health providers, audiologists and speech pathologists, physical therapists, optometrists and dentists.

States vary in how they define telehealth (some use the term “telemedicine”). Several (Alaska, Arizona, Louisiana, Oklahoma) define it as a practice of health care delivery when provider and patient are not physically co-located using information and communications technology. California has adopted a relatively broad definition, defining telehealth as “the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient's health care.” One state (Montana) defines telehealth as practiced exclusively by out of state practitioners for patients within the state, while others limit its use to in-state licensed practitioners.

Nearly half of all states define telehealth in the context of a live interaction between patient and provider. Two states (South Dakota, Vermont) limit the definition of telehealth to the monitoring of patients in their homes. One state (Maryland) regulates telehealth provided by physicians by establishing rules that specifically apply to physicians using websites for the delivery of telehealth. Most states exclude telephone, facsimile and electronic mail communications from the definition of telehealth other than to augment telehealth care.

(Texas permits use of electronic mail between physicians and patients in an established relationship if written policies for its use are adopted and other conditions are met.) In addition, some states exclude consultations among health care professionals from the definition of telehealth as provided to patients by providers.

While most states with telehealth laws include a form of telehealth known as “store and forward” (use of information and communications technology to transmit data, images, sounds or video from one care site to another for evaluation) in the definition of telehealth, some exclude it. California includes both synchronous patient-provider interactions and asynchronous store and forward transfers in its definition of telehealth.

Several states (Colorado, Florida, Hawaii, and North Carolina) incorporate a parity standard into their laws and regulations governing telehealth, explicitly stating standards of practice and professional misconduct apply equally to care provided patients via telehealth and in settings where patient and provider are co-located. Colorado statute specifically includes telemedicine within the definition of practice of medicine. One state (Wisconsin) requires telehealth to be “functionally equivalent to face to face contact.”

Only one state, West Virginia, has law specific to the practice of pharmacy in the context of telehealth. The law defines the practice of “telepharmacy" as the provision of pharmacist care by properly licensed pharmacists located within the United States through the use of telecommunications or other technologies. A face-to-face physical examination adequate to establish the medical complaint must be performed by the prescribing practitioner.

Patient safety aspects of state regulation of telehealth services by licensed health care professionals

A handful of states have put in place relatively extensive care standards regulating the use of telehealth by licensed health care professionals including Florida, Kentucky, Louisiana, Maryland and Texas. These as well as other states have adopted threshold requirements providers must meet in order to establish a telehealth provider-patient relationship before care is provided including:

- Informed consent to receiving care by telehealth
- Verification of patient’s identity
- Written patient notification of provider’s privacy practices

- An initial patient examination
- Disclosure to patient of risks, consequences and benefits of telehealth, right to withdraw consent, how to receive follow-up care or assistance in the event of an adverse reaction to treatment or if there is a telemedicine equipment failure
- Notice of how to file a complaint against the provider
- Access to pertinent portions of the patient's medical record and;
- Support staff trained to conduct telehealth patient visit, implement physician orders, identify where medical records generated by the visit are to be transmitted for future access, and provide or arrange back up, follow up, and emergency care to the patient.

For patients seen at other than an established medical site, Texas requires physicians to conduct initial patient visits at the same location with the patient except when the patient has received an in-person evaluation by another physician who has referred the patient and the referral is documented in the medical record. Texas also requires a co-located physician-patient visit be conducted at least annually in the context of providing care via telehealth.

Maryland law recognizes the establishment of a physician-patient relationship without an initial, in-person, face-to-face interaction, provided physicians 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.”

Louisiana delineates the elements that define establishment of a physician-patient telehealth relationship including evaluation (review of any relevant history, laboratory or diagnostic studies, diagnoses, or other information deemed pertinent by the physician); diagnosis of the patient's disorder, illness, disease or condition and the reason for which treatment is being sought or provided; treatment plan and a plan for follow-up care provided to the patient in writing and documented in the patient's record.

In most states, there are ongoing provider requirements to ensure patient safety that govern the delivery of care via telehealth including:

- Protocols to prevent fraud and abuse through the use of telehealth medical services
- Adequate security measures to ensure that all patient communications, recordings and records remain confidential
- Procedures to prevent access to data by unauthorized persons through password protection, encryption, or other means
- Policies on how quickly patients can expect a response from the physician to questions or other requests included in transmissions and;

- Maintenance of a complete record of the patient's care.

Texas limits the use of telehealth by physicians in instances where a patient encounter is unable to provide all pertinent clinical information that a health care provider exercising ordinary skill and care would deem reasonably necessary for the practice of medicine at an acceptable level of safety and quality. In such instances, physicians must advise patients prior to the conclusion of the telehealth encounter of the need for additional in-person evaluation.

Economic factors/access to care

The primary economic aspect of state regulation of telehealth lies in its recognition of telehealth as a means of providing increased access to care, particularly when economic factors contribute to medically underserved areas where health care is not as accessible as in other geographic areas. This policy rationale was expressed in a December 4, 2012 report to the Maryland House by the Maryland Department of Health and Mental Hygiene:

> *When patients have limited access to health care providers, they are less likely to receive timely diagnosis, treatment, and monitoring of their health conditions. While face-to-face consultations with the patient are preferred whenever possible, there are instances where this is not possible due to a shortage of providers in the area. In these instances, telemedicine, which is the use of electronic communication equipment for the delivery of medical services, has been found to be an effective tool in increasing patient access, improving quality of care, and promoting better communication and coordination among providers.*[2]

While the context of the letter refers to legislation outside the scope of this review pertaining to a state Medicaid program, the economic policy rationale is generally transferrable to all forms of telehealth. This policy rationale, however, can be found in telehealth legislation within the scope of this review. Nebraska's Telehealth Act contains these legislative findings:

(1) Access to health care facilities and health care practitioners is critically important to the citizens of Nebraska;

[2] Letter from Maryland Department of Health and Mental Hygiene to Maryland Senate Finance Committee and House Health & Government Operations Committee *RE SB 781/HB 1149 (Chapters 579/580 of the Acts of 2012) – Report on Telemedicine Policies and Fiscal Impact of Maryland Medical Assistance Coverage of Telemedicine*, December 4, 2012.

(2) Access to a continuum of health care services is restricted in some medically underserved areas of Nebraska, and many health care practitioners in such areas are isolated from mentors, colleagues, and information resources necessary to support them personally and professionally;

(3) The use of telecommunications technology to deliver health care services can reduce health care costs, improve health care quality, improve access to health care, and enhance the economic health of communities in medically underserved areas of Nebraska; and

(4) The full potential of delivering health care services through telehealth cannot be realized without the assurance of payment for such services and the resolution of existing legal and policy barriers to such payment.[3]

New Mexico's Telehealth Act contains similar findings:

A. The legislature finds that:

(1) lack of primary care, specialty providers and transportation continue to be significant barriers to access to health services in medically underserved rural areas;

(2) there are parts of this state where it is difficult to attract and retain health professionals, as well as to support local health facilities in providing a continuum of health care;

(3) many health care providers in medically underserved areas are isolated from mentors and colleagues and from the information resources necessary to support them personally and professionally;

(4) using information technology to deliver medical services and information from one location to another is part of a multifaceted approach to address the problems of provider distribution and the development of health systems in medically underserved areas by improving communication capabilities and providing convenient access to up-to-date information, consultations and other forms of support;

(5) the use of telecommunications to deliver health services has the potential to reduce costs, improve quality, change the conditions of practice and improve access to health care in rural, medically underserved areas; and

[3] R.R.S. Neb. § 71-8502

(6) telehealth will assist in maintaining or improving the physical and economic health of medically underserved communities by keeping the source of general health, behavioral health and oral health care in the local area, strengthening the health infrastructure and preserving health-care-related jobs.
B. The purpose of the New Mexico Telehealth Act [24-25-1 NMSA 1978] is to provide a framework for health care providers to follow in providing telehealth services to New Mexico citizens in a manner that provides efficient and effective access to quality health services. Telehealth services include consultations, direct patient care and education for health care professionals, support personnel, students, families, patients and other consumers of health care services.[4]

Telehealth and practice across state lines

This review of state law regulating delivery of services by licensed healing arts professionals via telehealth found most states prohibit practitioners licensed in other states from delivering services via telehealth to patients residing within their jurisdictions. In about half the states, the law is silent on delivery of telehealth services by health care professionals licensed in other states.

Several states except from physician licensure requirements consultations between physicians, typically within the context of "store and forward" telehealth, where patient diagnostic information such as imagery is transmitted to an out of state physician for review and medical opinion. Oregon law allows telehealth monitoring by physicians licensed in other states in a single circumstance: to monitor surgical patients. Under this provision, Oregon health care facilities must grant privileges to these physicians and request the state medical board grant them active telemonitoring status.

Apparently in recognition of telehealth practice by physicians, nine states issue specialized telehealth licenses or certificates that permit a practitioner licensed in another state to practice within their jurisdictions under certain conditions. States authorizing special telehealth licensure for physicians licensed in other states include:

- Alabama
- Louisiana
- Montana
- New Mexico

[4] N.M. Stat. Ann. § 24-25-2

- Nevada
- Ohio
- Oklahoma
- Tennessee
- Texas

Minnesota allows physicians licensed in other states to practice telemedicine on patients located in Minnesota if they register with the medical board and refrain from opening an office in the state or meeting with or receiving calls from patients while both provider and patient are in Minnesota.

Hawaii allows physicians licensed in other states to practice telehealth on Hawaii residents if they have a pre-existing provider-patient relationship. However, Hawaii law prohibits the use of telehealth to establish a physician-patient relationship with a resident of Hawaii without a license to practice medicine in Hawaii.

Some states allow out of state physicians to practice within their jurisdictions if they hold licensure in adjoining states or by reciprocal licensing with other states. States allowing practice under specified conditions by physicians licensed in bordering states include Texas, Pennsylvania, Maryland and Washington. Only three states (Alabama, North Dakota and South Dakota) have reciprocal licensure laws. To the extent these states sanction the practice of telehealth within their own borders, these laws effectively permit the limited interstate practice of telehealth within their jurisdictions.