I have no financial relationships with commercial interests to disclose

Nothing I say today is legal advice
OBJECTIVES

• Recognize and address potential legal hurdles in telepsychiatry, including licensure
• Understand the clinical hurdles in telehealth practice
• Appreciate the impact of the COVID public health emergency (PHE) and various regulatory waivers on telepsychiatry practice

AGENDA

• Before the public health emergency (PHE)
  • Preliminary determinations
  • Legal hurdles
  • Clinical hurdles
  • Prescribing controlled substances
  • Resources evidencing the standard of care
• During the PHE
  • Waivers
• After the PHE

BEFORE THE PHE
TAKE AWAY POINT #1

Treatment is rendered where the patient is physically located.

TAKE AWAY POINT #2

Utilizing telemedicine does not alter the standard of care to which the physician will be held – it is the same standard of care that would apply if the patient was in the physician’s office or facility.

TAKE AWAY POINT #3

Research/contact all applicable medical boards to determine if you can do what you want to do without violating applicable laws!

• Licensure requirements
• In-person physical examination required
• Prescribing
• Other requirements – CME, e-prescribing, PMP registration
• Telehealth regulations
TYPICAL TOPICS ADDRESSED IN TELEMEDICINE LAWS

- Informed consent
- Medical records
- Confidentiality and security
- Physician-patient relationship
- Follow-up care
- Verification of patient’s identity
- Other aspects

TELEMEDICINE

- Telephone treatment may or may not be considered telemedicine
  - Don’t be confused by state Medicaid laws:
    - Typically say state won’t reimburse for phone calls
      - Compliance with all state laws, including licensure laws, is still required

EVEN IF PHONE CONTACT IS NOT TELEMEDICINE...

- You still need to meet the standard of care
- If patient is in a different state, you may still need a license in the patient’s state
TO PRESCRIBE VIA TELERECedicine

- Ensure compliance with all state and federal laws, including:
  - State law – some states prohibit
  - Federal Controlled Substance Act
    - Including the Ryan Haight Act amendment
  - Federal DEA registration requirements
    - In each state you prescribe in
  - State equivalent of federal DEA registration, if applicable

FACE-TO-FACE EVALUATION

- Federal law (CSA as amended by the RHA)
- Some state boards say:
  - In-person exam is not required
  - Some boards say it depends
    - On the patient’s condition
TELEPSYCHIATRY & MEDICAL MARIJUANA

Some states prohibit using telemedicine to conduct the examination required to certify for medical marijuana

MEDICAL MALPRACTICE INSURANCE

- Not all carriers cover telemedicine
- Some carriers will only cover telemedicine if specific conditions are met
  - Ex: only cover if patient is in physician’s state
  - Ex: only consultation, not treatment
  - Ex: only cover in desirable jurisdictions
- Not all carriers will cover services rendered out of state
  - May not be set up to defend in patient’s state
- Some carriers may have premium surcharge for telemedicine
  - Ex: if patients are in a state without damage caps
- ASK:
  - Does carrier cover telemedicine?
  - Are there any restrictions?
  - Are there any requirements?
  - Is there a surcharge?
  - Is there coverage for suits brought out of state?
- Resource: Telehealth Resource Centers - Medical Malpractice and Liability

INTERNATIONAL TELEMEDICINE

- Physician is out of the country
  - Licensure
    - Needed in patient’s state
    - Confirm not needed from government of where physician is
  - Meeting the standard of care
    - Same as if patient was seen in person
    - Difficult for patient to reach physician?
    - Time difference?
    - Prescribing issues
  - Medical malpractice insurance
    - Can only address policy through PRMS:
      - Won’t cover suit brought in physician’s country
      - If sued in patient’s state in US:
        - Won’t deny coverage just because MD was outside of US
        - Will deny coverage for any standard reason:
          - Ex: Physician’s country found physician to be practicing without a license; policy doesn’t cover unlawful acts / unauthorized practice of medicine
INTERNATIONAL TELEMEDICINE

• Patient is out of the country
  • Licensure
    • Needed in physician’s state
    • Confirm not needed from government of where patient is
  • Meeting the standard of care
    • Same as if patient was seen in person
    • Difficult for patient to reach physician?
    • Time difference?
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• Medical malpractice insurance
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      • Will deny coverage for any standard reason:
        • (Ex: Patient’s country found physician to be practicing without a license; policy doesn’t cover unlawful acts / unauthorized practice of medicine)

TECHNOLOGY IS ONLY A TOOL

Technology is a tool that can partially restore the lost abilities to evaluate and treat patients at a distance, but by itself, technology cannot completely restore all abilities.

RISK MANAGEMENT ADVICE – WHEN CONSIDERING TELEPSYCHIATRY

• Define your telepsychiatry endeavor
  • What you want to do
  • What technology you want to use
• Determine all relevant laws and other standard of care factors
• Evaluate your ability to comply with legal requirements
  • E.g., Ensure all relevant medical boards allow you to do the exact telepsychiatry activities you want to do and with the technology you want to use
    • Licensure requirements
    • Physical examination requirements
    • Etc.
• Understand the importance of the location of the patient, both for legal and clinical reasons
RISK MANAGEMENT ADVICE – WHEN CONSIDERING TELEPSYCHIATRY

- Understand that the standard of care does not change with technology
- Evaluate the impact of your proposed telepsychiatry endeavor on your ability to meet the normal standard of care
  - In addition to meeting all care issues not unique to psychiatry, there are additional care issues related to telepsychiatry that must also be met
  - Understand that technology is a tool that can partially restore lost abilities to evaluate and treat patients at a distance, but technology itself cannot completely restore all lost abilities
- Formulate strategies to:
  - Comply with all applicable laws
  - Restore lost abilities where possible
  - Avoid situations where needed abilities cannot be restored
- Inform your Underwriter of your planned telepsychiatry activities

RISK MANAGEMENT ADVICE – WHEN DOING TELEPSYCHIATRY

- Consider what will be “lost” when treating individual patients re:
  - Communication
  - Ability to diagnose and treat
- Ensure the ability to treat individual patients within the standard of care
  - Carefully evaluate whether a particular form of telepsychiatry is appropriate for a given patient
    - At the beginning of treatment
    - AND at clinically significant events
    - AND periodically as treatment progresses
  - Determine whether and how the particular form and method of treatment will help the patient progress toward legitimate treatment goals
- Ensure patients have a basic understanding of the technology being used and appreciate its limitations

RISK MANAGEMENT ADVICE – WHEN DOING TELEPSYCHIATRY

- Prepare for possible emergencies by having patient addresses and local emergency services numbers available
- Utilize a consent form wherein the patient acknowledges
  - the possibility of a privacy / security breach
  - the possibility that medical conditions may not be able to be observed remotely
- Include in documentation of session
  - that session was conducted via telepsychiatry
  - why this method was chosen for this patient
  - why it continues to be an appropriate treatment option
- Continually re-evaluate physician and patient level of satisfaction
STATE REGULATORS

Waiver #1: License to Practice Medicine

- Not all states created waivers
- Nuanced
  - Temporary license
  - Only for treating COVID patients
  - Only in certain practice settings or under direction
- Track the waiver
  - Not tied to federal waivers
STATE REGULATORS

Waiver #2: State Controlled Substances Registration
• Not all states created waivers
• Track the waiver
  • Not tied to federal waivers
  • Once back in effect, will need to comply
    • May need to terminate treatment if cannot comply

FEDERAL REGULATORS

HHS – Office of Civil Rights
Waiver: Discretionary Enforcement when non-HIPAA Complaint Telepsychiatry Platforms are Used
• Needs to be non-public facing app
• Tied to the federal PHE declaration

FEDERAL REGULATORS

DEA
Waiver #1: In-person Visit Requirement Prior to Prescribing a Controlled Substance
• Many psychiatrists may be left with patients they cannot treat after PHE ends
• Tied to the federal PHE declaration
FEDERAL REGULATORS

DEA
Waiver #2: DEA Registration in the Patient’s State
Temporarily Not Required
• Tied to state licensure
• Tied to the federal PHE declaration

AFTER THE PHE

RE-OPENING YOUR OFFICE

Guidelines
• AMA
• MGMA (Medical Group Management Association)
• CMS
• CDC
• State guidelines for reopening
PATIENTS

Remained Local
- In-person
- Virtual
- Mix

PATIENTS

Out-of-State
- Plan to return to area?
- Track waivers
- If expired, what is needed to continue to treat?
  - If can treat, follow state guidelines and prescribing rules.
  - In-person visit, DEA registration in patient’s state
  - HIPAA-compliant platform
- If cannot treat, follow termination process.

QUESTIONS?