HEALTH LAW ALERT

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Employing Effective Telemedicine in the COVID-19 era

The COVID-19 virus poses a daunting challenge to clinicians that struggle with medicine's traditional requirement for a live face-to-face encounter. While New York passed a law in 2016 permitting the delivery of telehealthcare services to Medicaid patients, it requires a two-way live audio-visual connection. However, over the last week there has been a sea change in emergency regulation, both state and federal, designed to encourage physicians and the rules are presently relaxed. While we await a clear declaration by the New York State Health Commissioner, it does appear that telemedicine is permissible, when necessary, during this crisis. Here is a quick survey of the legal landscape which continues to change rapidly:

1. The federal anti-kickback statute generally prohibits the wholesale waiver of coinsurance, co-pays or deductibles for Medicaid and Medicare patients. However, in the face of the COVID-19 crisis, the U.S. Department of Health and Human Services, Office of Inspector General announced that Medicare beneficiaries may obtain telehealth services instead of going to a physician's office. Physicians who so treat their patients are not required to charge a co-pay or coinsurance payments.

2. The Secretary for Health and Human Services has also declared a public health emergency during which DEA registered practitioners may issue prescriptions for controlled substances to patients for whom they have not conducted an in person medical evaluation provided: (i) prescriptions are issued for legitimate medical purposes by practitioner acting in the usual course of his or her professional practice, (ii) the telemedicine communication is conducted using an audio-visual real time face to face interactive communication system and (iii) the practitioner is acting in accordance with all other applicable state and federal law.

3. The New York State Department of Financial Services adopted a new emergency regulation under the Insurance Law requiring New York State insurance companies to waive cost sharing, including deductibles, copayments and coinsurance for in-network telehealth visits.

4. This week and for 90 days, Aetna will cover acute evaluation and management services rendered via telephone. However, for non-acute issues, an audio-visual connection is required in order to assure payment by this carrier.

5. As of March 13, Medicaid agreed to reimburse clinicians for telephone evaluation and management service for established patients when, because of this emergency, face-to-face visits that are not possible.

6. Last night, Physicians Reciprocal Insurers (PRI), informed its policyholders that so long as they are practicing within the scope and specialty listed on the declarations page of their malpractice insurance policies (and the patient is located within the physician's state of licensure), they will be covered for malpractice claims arising from medical services delivered using telemedicine.

Practical Guidance

1. Do not abandon your patients. In the face of this emergency, clinician must be creative and do their very best to treat patients safely with available resources and technology.

2. An in person face-to-face encounter may jeopardize the patient or the clinician, particularly if one is at high risk of infection (or of infecting others). If a face-to-face live encounter is clinically necessary to diagnose or treat, refer the patient to urgent care or the closest hospital.

3. If a live face-to-face encounter is not necessary, consider Skype, Zoom or some other live audio-visual connection. Zoom is reportedly HIPAA compliant but some due diligence regarding the security of the connection may be necessary. Parenthetically, the service you choose should be ready, willing and able to enter into a legitimate HIPPA Business Associates Agreement. If secure video is unavailable consider using what you have rather than abandoning patients.

4. If video is unavailable, as it is for many seniors and indigents, telephone contact may have to suffice to avoid abandonment. All reasons for deferring an in person visit should be documented along with the mode of communication employed.

5. Be careful with patients seeking pain management with controlled substances, particularly new patients, those from outside your geographic area, those seeking early renewals or other tell-tale signs of abuse and diversion. Continue to check I-Stop.

6. Check with a responsible practice management consultant about CPT codes and modifiers before billing for tele-health services.

Our firm is up and running.
If you have any questions, please contact
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