

TELEMEDICINE RULE PROPOSED BY WISCONSIN MEDICAL EXAMINING BOARD IN FINAL STAGES OF REVIEW

The Wisconsin Medical Examining Board ("MEB"), on January 27, 2017, filed with the Wisconsin Legislature a **proposed administrative rule** governing the practice of medicine using telemedicine ("Med 24"). Upon the completion of the legislative review and approval process and final publication by the MEB, Med 24 will delineate standards that apply to a physician providing patient care, treatment or services "through the use of medical information exchanged from one site to another via electronic communications." Importantly, Med 24 states a physician who uses telemedicine in the diagnosis and treatment of a patient located in Wisconsin must be licensed in Wisconsin.

According to the Federation of State Medical Boards ("FSMB"), 48 states require that physicians engaging in telemedicine be licensed in the state in which the patient is located, 15 state boards issue a special license to practice medicine across state lines and 4 state boards require physicians to register if they wish to practice across state lines. FSMB indicates that Wisconsin currently is a state with no "unique laws regulating practice of telemedicine."¹ Upon the promulgation of Med 24, the Wisconsin MEB will address what some people have viewed as a gap in Wisconsin's regulatory scheme.

Analysis

Telemedicine Defined. Med 24 defines telemedicine as "the practice of medicine when patient care, treatment, or services are provided through the use of medical information exchanged from one site to another via electronic communication." The definition, however, excludes "the provision of health care services through an audio-only telephone, email messages, text messages, facsimile transmission, mail or parcel service, or any combination thereof." The rule also states that Med 24 does not prohibit things such as consultations between physicians and the review of digital images, pathology specimens and other medical data related to the care of patients in Wisconsin; patient care in consultation with another physician who has an established physician-patient relationship with the patient; patient care in on-call or cross-coverage situations when the physician has access to patient records; and treating a patient with an emergency medical condition. Med 24 also does not prohibit Wisconsin licensed physician assistants ("PAs") from using telemedicine to provide patient care, treatment and services within the PA's scope of practice under Med 8.07, which is under the supervision of a Wisconsin licensed physician.

These provisions explicitly exclude from the rule or do not prohibit many of a physician's electronic communications, such as a physician's telephone conversation or email exchange with a patient, consultation between physicians or patient care in on-call or cross-coverage situations. But, even though a physician's telephone conversation with a patient, consultation with another physician or patient care situation might be excluded from or might not be prohibited by Med 24, if the communication, consultation or patient care situation otherwise constitutes the practice of medicine in Wisconsin, the physician would need to meet the relevant licensing requirements and standards of practice and conduct established by the MEB.²

Wisconsin Licensure Requirements. In practice, Med 24 clarifies that if a patient is located in Wisconsin, a physician who provides patient care, treatment or services to that patient via telemedicine must be licensed in Wisconsin even if the physician is not located in Wisconsin.³

Standard of Care. While it defines telemedicine broadly, Med 24, in general, recognizes that the same standards of practice and conduct apply to a physician whether the physician provides patient care, treatment and services in person or through telemedicine. The rule includes two additional standards that are specific to telemedicine.

- *Equipment and Technology.* Med 24 establishes that a physician who provides health care services by telemedicine is responsible for the quality and safe use of equipment and technology that is integral to patient diagnosis and treatment. The equipment and technology must provide information that will enable the physician to meet or exceed the standard of minimally competent medical practice.
- *Internet Diagnosis and Treatment.* If a physician uses a website to communicate to a patient in Wisconsin, Med 24 specifies that the physician may provide treatment recommendations only if certain requirements are met, including that a documented patient evaluation, comprised of a medical history and, to the extent required to meet the standard of minimally competent medical practice, an

examination and diagnostic tests have been performed. Med 24, consistent with requiring physicians to meet the same standards of practice whether care is provided in person or through telemedicine, also requires that if a physician uses a website to communicate to a patient, the physician must be licensed by the MEB; the physician's name and contact information must be made available to the patient; the patient must have provided informed consent as required under s. 448.30, Stats. and Med 18; and a patient health care record is prepared as required under Med 21. Med 24 explicitly states that providing treatment recommendations, like issuing a prescription order, based only on a static electronic questionnaire does not meet the standard of minimally competent medical practice.

Practical Takeaways

The legislative review and subsequent final approval and publication of Med 24 by the MEB likely will take several months. During this period, organizations with patients located in Wisconsin who rely on physicians who are not located in Wisconsin should review the rule to determine whether any of the out-of-state physicians who are not licensed in Wisconsin will need to obtain a Wisconsin license. Wisconsin-licensed physicians who practice through telemedicine should review their practices and procedures to make sure they meet, in addition to the MEB's current standards of practice and conduct, the Med 24 standards related to telemedicine equipment and technology and, if a physician uses a website to communicate to a patient, the requirements related to internet diagnosis and treatment.

If you would like further guidance, please contact:

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¹ https://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/GRPOL_Telemedicine_Licensure.pdf. ² The MEB's authorizing statute states that they do not prohibit or require a license for "actual consultation or demonstration by licensed physicians [...] of other states or countries with licensed physicians" in Wisconsin. See s. 448.03(2)(d), Wis. Stats. On the other hand, a physician who is in Wisconsin providing patient care in on-call and cross-call situations in which the physician has access to patient records or is treating a patient with an emergency medical condition in Wisconsin likely would be subject to the MEB licensure requirements and standards of practice and conduct. ³ But, again, the rule excludes certain communication such as audio-only telephone, email messages and text messages. This exclusion, paired with Med 10.03(k), could help the care of a patient who visits Wisconsin or resides in a state other than Wisconsin for part of the year. Med 10.03(k) recognizes that a Wisconsin physician can provide outpatient patient services ordered by an out-of-state physician if the out-of-state physician saw the patient in the state in which the out of state physician is licensed and remains responsible for the patient.

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