

## CONGRESS CALLS FOR COMMENTS ON FEDERAL LEGISLATIVE CHANGES NECESSARY TO ENCOURAGE THE USE OF TELEHEALTH TECHNOLOGY

On May 1, 2014, the House Energy and Commerce Subcommittee on Health **announced** it is seeking input and feedback on federal legislation that would encourage the deployment and adoption of **telehealth technology**. The announcement was made in conjunction with a hearing, "Telehealth to Digital Medicine: How 21<sup>st</sup> Century Technology Can Benefit Patients," led by Subcommittee Chairman Joe Pitts (R-PA) and Ranking Member Frank Pallone (D-NJ). A transcript of the hearing can be found **here**. The deadline for submissions is **June 16, 2014**.

### CALL TO ACTION

Hall Render is working with interested providers to educate members of Congress on the operational challenges associated with the deployment of telehealth technology and to provide practical solutions that support the sustainable integration of this technology into the delivery of care.

### SUMMARY OF LEGAL AND REGULATORY CHALLENGES TO THE DEPLOYMENT AND USE OF TELEHEALTH TECHNOLOGY

The primary challenges to the deployment of telehealth technology continue to be state licensing requirements, hospital credentialing of physicians, provider reimbursement and the allocation of legal risk for services provided through a telehealth delivery method.

*Physician Licensing and Credentialing.* One of the most frequently cited barriers to the widespread use of telehealth technology continues to be **state licensing restrictions** that require a physician to be licensed in the state where the patient is receiving telemedicine services ("originating site") in addition to being licensed in the state from which the physician is providing such services ("distant site"). These requirements have evolved independently of each other, and there is no state consistency in physician licensing. The result is a multiple-application process that is arduous and time consuming.

The physician **credentialing** requirements of hospitals are also a barrier to the deployment of telehealth technology. Like state licensing laws, credentialing requirements can vary significantly from hospital to hospital, and the approval process is burdensome, expensive and untimely. Moreover, physicians providing care via telemedicine to patients in a large health system are typically required to go through the credentialing process at each hospital within the system. Consequently, there is no incentive for physicians to provide telemedicine services on a regional or national basis, and patients are left without access to specialists who could provide a higher level of care. While the opportunities for the implementation of "reliance credentialing" under the Medicare Conditions of Participation potentially reduce some of the barriers, the infrastructure to implement reliance credentialing is absent in most hospital/system organizations. Given the potential costs of developing the infrastructure, the remaining uncertainties (e.g., state common law negligent credentialing risks) and the inconsistent reimbursement discussed further below, further reductions in the credentialing burden are needed.

*Reimbursement.* Another barrier to the adoption of telehealth technology is the lack of provider reimbursement for telemedicine services. Currently, Medicare only provides reimbursement for a limited number of telemedicine services. Furthermore, it requires that those services be delivered to a beneficiary in an eligible facility located in a non-metropolitan area, where even the recent expansion to cover telehealth services originating in the newly interpreted urban Health Professional Shortage Areas still leaves many beneficiaries without coverage. These requirements ignore the needs of Medicare patients at most inner-city safety net hospitals and other urban areas where specialty shortages exist, who would benefit greatly from the specialized care that can be offered via telehealth technology.

Some states have adopted regulations that require their Medicaid program and private insurance companies to provide reimbursement for telemedicine services. However, those regulations can differ significantly from state to state. These inconsistencies and the overall lack of reimbursement lead to a refusal on the part of providers to adopt telehealth technology. The result is a largely underserved patient population that is denied access to remote specialists and treatments that would improve their quality of care.

*Risk.* The use of telehealth technology also creates a number of legal liability issues. The physician-patient relationship, the medical standard of care, negligent credentialing claims, insurance coverage uncertainties and control of treatment decisions all come into play when care is provided via telehealth technology. For instance, the boundaries of a physician-patient relationship are generally well defined when a

physician provides care to a patient in-person. However, the formation and dissolution of this relationship becomes much less clear when the patient and physician are in different locations, possibly different states, especially in circumstances where the two never meet "in person" and without technology mediation. This lack of a clearly established relationship could limit a patient's ability to bring a medical malpractice action or prevent a patient from invoking the protections afforded by the physician-patient privilege.

Since there is no established national standard of care for treatment provided via telehealth technology, provider liability differs from state to state. Control over treatment decisions when multiple physicians are providing care from multiple distant sites is also vague compared to a traditional medical encounter where one physician provides care to the patient in a face-to-face setting. All of these issues can make determining or predicting liability difficult in the event the patient files a medical malpractice action.

Additionally, medical malpractice insurance policies may only cover in-person encounters that take place in the state where the physician is licensed to practice medicine. As a result, physicians who provide telemedicine services to patients outside of the state where they are licensed could be exposing themselves to uninsured medical malpractice claims.

## **PRACTICAL TAKEAWAYS/CONCLUSION**

The barriers to widespread use of telehealth technology are substantial. There is no national license that allows physicians to provide telemedicine services across state lines, and the hospital credentialing process is onerous and time consuming. Physicians that choose to provide treatment via telehealth technology across state lines do so without a clearly defined standard of care and with the risk of being subject to a medical malpractice claim that is not covered by their insurance company.

In light of these and other hurdles, members of Congress want to hear from providers who are interested in expanding the use of telehealth technology. If you would like to respond to the House Energy and Commerce Subcommittee on Health's request for comment on legislative or regulatory changes that would encourage the deployment and adoption of telehealth technology, please contact one of the following Hall Render attorneys before June 13, 2014:

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