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CMS Removes Major Obstacle to Telemedicine Practice (But Others Remain)

CLIENT ADVISORY

Telemedical practice technology has rapidly expanded in recent years, offering opportunities for treatment and cure that cross geographic and jurisdictional boundaries. Unfortunately, regulation of telehealth activities has been slow to keep pace with technological growth. Many providers face trans-jurisdictional licensing and accreditation issues that have yet to be resolved by any overarching regulatory scheme, and medical potential remains stymied in the legal quagmire.

On May 26, 2010, however, the Centers for Medicare and Medicaid Services ("CMS") took an important step toward facilitating telemedical practice -- it published a rule aimed at eliminating a long-standing conflict between accreditation standards issued by The Joint Commission and Medicare Conditions of Participation (CoPs) for Hospitals and Critical Access Hospitals (CAHs) (See Medicare and Medicaid Programs: Proposed Changes Affecting Hospital and Critical Access Hospital (CAH) Conditions of Participation (CoPs): Credentialing and Privileging of Telemedicine Physicians and Practitioners (the "Rule"), available here: <http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=5172772+0+2+0&WAISaction=retrieve>.) The Rule, to be codified with changes in language to 42 CFR §482.12(a)(2), §482.22(a)(2), and 485.616(b), authorizes the governing body of the hospital whose

patients are receiving the telemedicine service to "grant privileges based on its medical staff recommendations, which would rely on information provided by the distant-site hospital," as a means of more efficiently privileging the distant-site physicians who provide the services. Reliance on distant-site privileging will relieve providers of the burdensome requirements of the current CoPs, which demand that the medical staff undertake an individual appraisal of each candidate before making a recommendation to the facility's governing body. (Of course, facilities that wish to retain their more extensive systems of credentialing and privileging under the current CoPs may do so.)

But the change is not without accountability cost. In order to utilize the less-burdensome privileging option, the facilities accepting telemedical services must assure that the following four criteria are satisfied:

- (1) That the distant-site hospital providing the telemedicine services is a Medicare-participating hospital;
- (2) That the individual distant-site physician or practitioner is privileged at the distant site hospital providing telemedicine services, and that this distant-site hospital provides a current list of the physician's or practitioner's privileges;



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- (3) That the individual distant-site physician or practitioner holds a license issued or recognized by the State in which the hospital, whose patients are receiving the telemedicine services, is located; and
- (4) With respect to a distant-site physician or practitioner granted privileges by the hospital, the hospital has evidence of an internal review of the distant-site physician's or practitioner's performance of these privileges and sends the distant-site hospital this information for use in its periodic appraisal of the individual distant-site physician or practitioner.

The Rule also proposes that this periodic appraisal include, at a minimum, "all adverse events that may result from telemedicine services provided by the distant-site physician or practitioner to the hospital's patients and all complaints the hospital has received about the distant-site physician or practitioner.") Furthermore, the Rule proposes language to "stipulate that in cases where distant-site physicians and practitioners are requesting privileges to furnish telemedicine services through an agreement between hospitals, the criteria for determining those privileges and the procedure for applying the criteria would be subject to the proposed requirements at § 482.12(a)(8) and § 482.22(a)(3)."

The Rule will eliminate the current discrepancy between the CoPs and The Joint Commission Standards, which have long-allowed deemed facilities to accept the sort of "privileging by proxy" the Rule now purports to authorize. CMS's change-of heart was prompted, according to the Rule, by the realization that "our present requirement is a duplicative and burdensome process for

physicians, practitioners, and the hospitals involved in this process, particularly small hospitals, which often lack adequate resources to fully carry out the traditional credentialing and privileging process for all of the physicians and practitioners that may be available to provide telemedicine services." In the Background to the Rule, CMS also acknowledges that "small hospitals often do not have in-house medical staff with the clinical expertise to adequately evaluate and privilege the wide range of specialty physicians that larger hospitals can provide through telemedicine services."

While the Rule affords an important step forward for telemedicine practice, providers must be aware of the significant legal obstacles that still remain. For example:

- Most states require a treating physician to be licensed in the state of practice (typically deemed to be the state where the patient is located). These laws create barriers for physicians wishing to practice "virtually" across state lines.
- Medicare, Medicaid, and private insurers restrict reimbursement for certain services provided telemedically.
- Interstate telemedicine arrangements implicate conflicting standards of medical practice, liability, contract, tort, and criminal law.
- Federal Fraud, Abuse, Stark, and Anti-Kickback concerns may arise through telemedical practice, because telemedicine providers can only refer services to other providers with the technological capability to accept them.

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If you would like more information on the Rule, or on the legal implications of setting up or participating in a telemedicine practice, please contact Kim Daniel (kdaniel@hdjn.com), Mary Malone (mmalone@hdjn.com), Emily Towey (etowey@hdjn.com), or Elizabeth Trende (etrende@hdjn.com), at 804-967-9604, or visit our website at www.hdjn.com.

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