Uniform Law Commission Drafting Committee on Telehealth
Background Memo for February 19, 2021 Meeting

February 12, 2021

In the Drafting Committee on Telehealth meeting scheduled for February 19, 2021, the Committee will begin to examine potential elements of a uniform law related to telehealth. We will begin by focusing on the following questions:

- How should the uniform law define "telehealth"?
- To what extent should the uniform law address standards of practice?
- Under what circumstances should the uniform law permit out-of-state providers to deliver telehealth services to patients inside the state?

This memo describes legislative trends, offers recommendations, and identifies issues to be resolved in each of these areas. In the meeting, we will gather feedback on the recommendations, discuss the issues that have been identified, and solicit suggestions about any other issues that need to be addressed in drafting a uniform law on telehealth.

Question 1: How should the uniform law define telehealth?

Recent statutes and bills use the term "telehealth" rather than the narrower "telemedicine." Recent definitions often use broad terms such as "telecommunications technology" and reference both synchronous and asynchronous technologies.

Statutes vary in the extent to which they describe or list particular technologies, such as remote patient monitoring. Statutes also vary in their exclusions. E-mail messages and fax transmissions are commonly excluded from definitions of telehealth, but most statutes do not directly address other forms of asynchronous communication, such as secure messaging through patient portals.

Historically, many statutes excluded audio-only telephone communications from the scope of telehealth. As a result of the pandemic and heightened use of telephonic communications, however, a number of pending bills seek to remove these exclusions altogether or establish more limited exclusions that permit audio-only communications when audio-video communications are inaccessible.

Recommendations

- In establishing standards for the delivery of telehealth services, the uniform law should use the term "telehealth" and refer to both synchronous and asynchronous telecommunication technologies.

Questions

- Should the statute specifically reference audio-only technologies? If so, should they be allowed, conditionally allowed, or prohibited?
- Should the statute list types of technology encompassed within the definition of telehealth, such as remote patient monitoring technologies?
- Should the statute exclude specific types of technology from the definition of telehealth, such as email, fax, or patient portal-based messaging?

Question 2: To what extent should the uniform law address standards of practice?

Telehealth bills and statutes often include practice standard-related provisions. Historically, some states limited the ability to establish a practitioner-patient relationship via telehealth. Currently, however, all states allow the creation of a physician-patient relationship via telehealth, and statutes often have specific language indicating this and/or describing permitted modalities for establishing a relationship. Statutes generally align telehealth practice standards with in-person standards. Some statutes have established special rules with respect to prescribing; some rules focus specifically on controlled substances. A recently enacted Maryland statute requires health occupations boards to allow the creation of a practitioner-patient relationship through telehealth and prohibits boards from establishing a separate standard of care.

State telehealth laws may have specific provisions with respect to informed consent, recordkeeping, and compliance with privacy standards, but it's often not clear how far these obligations extend beyond existing requirements for the delivery of in-person services. Some states require a separate consent for the use of telehealth technologies.

Recommendations

- In describing the obligations of telehealth providers, the law should use the term "practitioner," without further specification of the nature of the practitioner's license.
- The law should state that a practitioner-patient relationship may be established by telehealth through any modality the practitioner deems appropriate to meet the standard of care.
- The law should make clear that there is no distinct standard of practice for health services delivered via telehealth.

Questions

- Should the law expressly preclude boards from establishing distinct standards of practice for services delivered via telehealth? Should the law preclude boards from adopting standards that identify circumstances in which services must be delivered in person?
- Should the law require documentation of consent to use telehealth, as opposed to in-person delivery of care?
- Should the law differentiate between technologies that are appropriate for established patients versus new patients?
- Should the law have specific provisions related to other traditional aspects of health care delivery, such as informed consent, recordkeeping, or privacy/confidentiality?
- Should the law have a specific provision related to drug prescribing? Should prescribing of certain drugs be prohibited? If so, should there be exceptions, such as prescribing in the context of previously established relationships, or prescribing in the aftermath of a synchronous patient visit?

Question 3: Under what circumstances should the uniform law permit out-of-state providers to deliver telehealth services to patients inside the state?

Health care providers are generally expected to be licensed in the state in which the patient is located when receiving services. During the Covid-19 pandemic, however, some states have tried to expand access to care through multiple mechanisms, including granting emergency licenses and permitting distant physicians to continue to treat patients with whom they had previously established

relationships. The exceptions for continuing relationships allowed physicians to continue treating college students returning to their family homes and others who moved across state lines for Covid-related reasons, as well as allowing out-of-state specialists to follow up with their patients.

Interest in cross-state delivery of telehealth services predated the pandemic and seems likely to expand in its aftermath. Florida established a registration system for out-of-state providers in 2019. A recent Maryland bill proposes a registration system. Similar to many of the executive orders issued during the pandemic, a pending Arizona bill would permit out-of-state providers without disciplinary records to provide telehealth services without registration. Common elements of bills and statutes allowing providers to deliver care across state lines include a requirement that the practitioner hold a license elsewhere and have a clean disciplinary record; notify the applicable state licensing board of subsequent disciplinary actions; adhere to liability coverage requirements; and adhere to scope of practice rules. Registration laws typically subject providers to sanction by regulatory boards and contain provisions related to jurisdiction and venue for litigation. Florida's law requires the appointment of an agent. Registration laws typically preclude the delivery of in-person services within the state. They also typically impose a registration fee.

Laws allowing providers licensed in other states to deliver services vary in their scope. Vermont's H. 104, introduced in 2021, applies only to providers of clinical mental health services who already have an established relationship with a patient. Minnesota has a registration system applicable only to physicians. Oregon's recent telehealth bill SB 423 applies to physicians, physician assistants, psychologists and nurse practitioners, but only those who are "in California, Idaho or Washington, or another jurisdiction as determined by the appropriate health professional regulatory board by rule." By contrast, Florida's registration statute applies to many different professionals, including physicians, mental health counselors, optometrists, dietitians, chiropractors, athletic trainers, clinical social workers, advance practice registered nurses, behavior analysts, and acupuncturists, among others, without regard to geographic location.

Recommendations

- The law should create a registration system.
- The law should
    - Require a clean disciplinary record and notification to the applicable board of disciplinary actions.
    - Require adherence to state laws and regulations with respect to liability coverage and scope of practice.
    - Contain provisions that ensure that the physician can be disciplined by the applicable state board and will be subject to suit within the state.
- The law should state that a registered provider is not authorized to provide in-person services within the state.

Questions

- Should the law permit out-of-state practitioners to provide telehealth services to patients with whom they have already established a relationship, without requiring licensure or registration?
- Should the law establish a single central registration system, or should it provide for the creation of registration systems operated separately by each of its professional boards?
- Should the law's registration system apply to all practitioners, or should it identify specific types of health care professionals? If the law identifies specific types of professionals, which should it include?