

[Health Law Daily Wrap Up, STRATEGIC PERSPECTIVES: Telehealth has taken a giant step forward, but will the momentum continue?, \(May 20, 2020\)](#)

Health Law Daily Wrap Up

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By [Cathleen Calhoun, J.D.](#)

Experts think the future looks bright for telehealth.

In the midst of the COVID-19 pandemic, with its strain on hospitals and providers, stay-at-home orders, and social distancing, came the greater need for telehealth. New laws, new rules, and revised guidance have enabled telehealth to legally expand at a rapid rate during the crisis. This Strategic Perspective examines (1) the notable changes (so far) that have lengthened the reach of telehealth services and allowed them to be covered under Medicare, Medicaid, and other federal programs during the COVID-19 public health emergency, and (2) through interviews with multiple attorneys in the digital and telehealth space—[Jeremy Sherer](#), health care attorney for [Hooper, Lundy & Bookman, P.C.](#), [Jayme R. Matchinski](#), an officer and attorney for [Greensfelder, Hemker & Gale, P.C.](#), and [Rene Quashie](#), attorney and vice president of policy and regulatory affairs for digital health for [Consumer Technology Association](#)—explores issues related to the expansion of telehealth, and where telehealth and the law may go in the future.

CARES Act

The Coronavirus Preparedness and Response Supplemental Appropriations Act (CARES Act) ([P.L. 116-123](#)) amended HHS' emergency response powers under [Soc. Sec. Act §1135](#). Under the CARES Act, HHS can waive (and has been waiving) the originating site requirements that prevent a patient from receiving telehealth services at home and restrict the use of telephones under [42 C.F.R. §410.78\(a\)\(3\)](#). Beginning in March of 2020, Medicare has paid for telehealth services, including office, hospital, and other visits furnished by physicians and other practitioners to patients located anywhere in the country, including in a patient's place of residence (see [Health care policies slip through the CARES Act window](#), April 28, 2020).

New Interim Rules

CMS issued two interim rules in response to the COVID-19 crisis. The latest, an [interim rule](#), addresses telehealth coverage in detail during the COVID-19 pandemic. On an interim basis, CMS is (1) adding many services to the list of eligible Medicare telehealth services, (2) eliminating frequency limitations and other requirements associated with particular services furnished through telehealth, and (3) clarifying a number of payment rules that apply to other services that are furnished using telecommunications technologies with the goal of reducing exposure risks. Many normally face-to-face visits in hospice, home health, and inpatient rehabilitation can be fulfilled through telehealth (see [CMS eases rules to help providers effectively respond to COVID-19](#), May 8, 2020, and [CMS removes barriers, increases flexibility for providers during coronavirus pandemic](#), April 6, 2020).

Comments on the interim rules are being [accepted](#) through June 1, 2020, for the [first rule](#) issued in April, and through July 7, 2020, for the [second rule](#) issued in May.

CMS guidance and waivers

CMS has been regularly releasing [guidance](#) and [waivers](#) on telehealth and other issues related to COVID-19. Under the blanket waivers, CMS removed limitations on where Medicare patients are eligible for telehealth during the emergency. Specifically, patients outside of rural areas and patients in their homes are eligible for telehealth services (see [CMS issues blanket waivers for health care providers amid pandemic](#), April 10, 2020).

Services. CMS has published the [list](#) of services available for telehealth and continues to expand the list as weeks turn into months in the struggle with the COVID-19 crisis. For example, in April, CMS added "brief emotional/behavioral assessment" to the list of temporarily added telehealth services covered during the COVID-19 pandemic. CMS also created further [guidance documentation](#) on telehealth services that outlines certain telehealth services and codes and how to handle remote evaluations, virtual check-ins and e-visit information, telephone evaluations, remote patient monitoring, and removal of frequency limitations on Medicare telehealth, along with other Medicare telemedicine and remote patient care.

Waivers. CMS will [waive](#) the physician or non-physician practitioner licensing requirements, if certain conditions are met, including if the practitioner is furnishing services (whether in person or through telehealth) in a state where the emergency is occurring and the practitioner is contributing to the relief efforts. Other waivers are also available.

End-stage renal disease. Previously, for end-stage renal disease (ESRD) patients, CMS specified that the required clinical examination of the vascular access site must be furnished face-to-face "hands on" (without the use of an interactive telecommunications system) by a physician, clinical nurse specialist (CNS), nurse practitioner (NP), or physician assistant (PA), and, every three months, a face-to-face follow-up was needed. During the COVID-19 pandemic, under the new rule, CMS is permitting the required clinical examination and the follow-ups to be furnished as Medicare telehealth services (see [CMS releases updated guidance documents to prevent spread of COVID-19 in health care settings](#), April 9, 2020).

Opioid therapy. In a step further, CMS is [allowing](#) for audio-only telehealth services for those in counseling for opioid dependency, if patients do not have access to two-way audio/video communication.

Supervision. Many services are paid under the physician fee schedule (PFS) only when those services are under the direct supervision of a physician or nonphysician practitioner, and when the physician or nonphysician is actually in the office setting. During the entire COVID-19 emergency time period, CMS has revised the definition of "direct supervision" to allow practitioners to [provide](#) direct supervision using real-time interactive audio and video technology.

Toolkit. CMS has [announced](#) a COVID-19 telehealth [toolkit](#) that it hopes will advance states' use of telehealth in Medicaid and the Children's Health Insurance Program (CHIP).

Continued new and updated guidance documents are expected.

Expert commentary

We reached out to leading attorneys in the area of digital health for their thoughts on the rapid expansion of telehealth, and its future.

1. What are your thoughts on telehealth, and how it may continue to expand?

[Jeremy Sherer](#): "The current pandemic is catalyzing real change in the telehealth landscape, which is impacting stakeholders across the board. The pandemic's impact can be felt in how healthcare providers and their patients utilize telehealth, how commercial and public insurers cover and pay for telehealth services, and how federal and state officials regulate clinical services furnished via telehealth. Until recently, health systems and medical practices offering services via telehealth were seen as forward-thinking and progressive. Moving forward, there will be patients and payers who expect providers to offer telehealth, and telehealth technology will be another tool in the provider toolkit that is expected as part of the standard of care. It is going to be critical for federal and state regulators to be thoughtful in how they navigate this landscape moving forward."

[Jayme R. Matchinski](#): "Telehealth's growth has accelerated at an unprecedented rate due to the COVID-19 pandemic. Many health care providers have incorporated telehealth into their practice during this pandemic in order to continue treating their patients and to address any health care issues which have arisen...Telehealth will continue to expand at an accelerated rate. Physicians, physician practices, and health systems are being very innovative and forward thinking in how they are using

telehealth to treat their patients. Due to the pandemic, health care providers are increasing their use of technology to expand their ability to offer telehealth services to their patients."

[Rene Quashie](#): "For a long time, various surveys and studies have shown that once people try telehealth, they give the experience very high satisfaction marks. The questions have always been: How do we get more consumers/patients to try telehealth? And how do we get more providers to offer the service? The pandemic forced everyone's hand...as a result the healthcare delivery landscape will be changed...According to the Census Bureau, by 2030, 20 percent of all Americans will be retirement age—with all baby boomers older than 65...And when you factor in other trends, such as the projected decrease in the number of potential caregivers, the impact on healthcare delivery could be very substantial."

2. **What do you think the growth in telehealth will mean for the practice of law in this area? Or do you have any further thoughts that you would like to share?**

[Jeremy Sherer](#): "Increased utilization of telehealth means increased spending on services delivered via telehealth, and that sort of trend usually invites scrutiny enforcers in recent years, from HHS-OIG to state Medicaid Fraud Control Units to the Department of Justice. We saw increasing concerns about improper billing, and a suspicion among many regulators that fraudsters were using telehealth to perpetrate kickback schemes. It's unfortunate, because most actors in this space want to do the right thing, but of course the actions of a few can create problems for the rest. I think this trend will pick up considerably as the pandemic starts to subside, given the tremendous increase in telehealth utilization during the public health emergency. It's really important to implement robust compliance safeguards as soon as possible, though that obviously isn't the primary concern during a pandemic, and rightly so."

[Jayme R. Matchinski](#): "During this pandemic, most of the new projects I am working on involve telehealth, implementation of new models, and related documentation and reimbursement for the provision of telehealth. Telehealth and related issues regarding reimbursement, documentation, and protection of patient confidentiality will continue to be at the forefront of the provision of health care. Health care attorneys who assist health care providers with telehealth models, regulatory compliance, and reimbursement will have opportunities to continue to expand and advance this area of health care law. Health care providers and health care attorneys will need to focus on building a solid foundation for the provision of telehealth so that health care providers can sustain their practices and utilization of telehealth."

[Rene Quashie](#): "...Increasing use of telehealth provides a great opportunity for stakeholders to collect cost, outcomes, and other data. One consistent criticism of the telehealth sector has been the lack of comprehensive and insightful data. The recent surge offers a great opportunity to build that data set... One thing is becoming clearer during the pandemic—the increasing use of health technology (such as telehealth, remote patient monitoring, AI, mobile health, etc.) is critical to addressing the serious issues impacting the healthcare sector... I also think consumers will demand more access to virtual services in healthcare as they have in almost all other aspects of their life. Challenges remain such as broadband access, payer policies particularly on the Medicare fee-for-service side, clinician buy-in...but I think the future looks bright for telehealth and digital health generally."

Going Forward

Questions remain on whether all of the new rules and policies implemented during the COVID-19 pandemic will become permanent. Staying current on options for clients, and changes in the law, will remain critical. As changes continue, telehealth appears here to stay. Health care providers and practitioners, busy with important medical work, will need help in keeping up with the changes for proper compliance and reimbursement.

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