

VERMONT MEDICAL SOCIETY

THIRD THURSDAY WEBINAR SERIES



Date: April 16, 2020

Title of Talk: COVID-19: HIPAA & Compliance Concerns

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CME credit must be claimed within 30 days of participating in the event.

Speakers:

Shireen Hart Esq., Anne Cramer Esq. & Alexa Clauss Esq.

Planning Committee Members:

Jessa Barnard, ESQ, Stephen Leffler, M.D.& Stephanie Winters

Purpose Statement/Goal of This Activity:

To discuss topical COVID-19 issues such as, HIPAA and telemedicine related concerns.

Learning Objectives:

To address concerns related to healthcare compliance in our new COVID-19 environment, namely HIPAA and telemedicine related concerns.

Disclosures:

Is there anything to Disclose? Yes No

Did this activity receive any commercial support? Yes No

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Thursday, April 16, 2020

VERMONT MEDICAL SOCIETY WEBINAR: COVID-19: HIPAA & Compliance Concerns

Presented By: Shireen Hart, Anne Cramer & Alexa Clauss

Agenda

- 1) HIPAA Compliance & Enforcement During Pandemic
- 2) Telehealth Expansion Under State of Emergency
- 3) Professional Liability Concerns/Scope of Emergency
Management Related Immunity
- 4) Families First Coronavirus Response Act – Family & Sick Leave



HIPAA Compliance & Enforcement During Pandemic

OCR Bulletins on HIPAA Privacy & Covid -19 outline permitted sharing of patient Information.

<https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>

Note: VT law tracks HIPAA for disclosures without consent:

- 18 VSA 1881
- 2019 Vt Supreme Ct ruling in Lawson v. Halpern -Reiss



HIPAA Compliance & Enforcement During Pandemic

Under HIPAA Privacy Rule, disclosures allowed for:

- treatment of patient
- public health activities (VDH/ CDC)
- notification to family, friends & others involved in care
 - w/ consent or opportunity to object
 - w/ professional judgement of best interests, if incapacitated
- prevention of serious & imminent threat to health & safety of person

Minimum necessary disclosures, unless for treatment



Limited HIPAA Waiver to Hospitals During COVID-19 Pandemic

[https:// www.hhs.gov/sites/default/files/hipaa -and-covid -19-limited -hipaa-waiver -bulletin -508.pdf](https://www.hhs.gov/sites/default/files/hipaa-and-covid-19-limited-hipaa-waiver-bulletin-508.pdf)

- 1135 Waiver announced March 13, 2020
- applies to Hospitals
- waives requirements to:
 - distribute Notice of Privacy Practices
 - obtain consent/ no objection for disclosures to family/ friends/ others involved
 - honor opt out of facility directory
 - comply w/ requests for restrictions/ confidential communications



OCR HIPAA Enforcement Discretion - Telehealth

During pandemic: No penalties for noncompliance if good faith provision of:

- Telehealth communications
- <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>
 - FAQs:
<https://www.hhs.gov/sites/default/files/telehealth-fqs-508.pdf>



OCR HIPAA Enforcement Discretion - Telehealth

- applies to services unrelated to COVID-19 treatment/prevention
- applies if non -availability of private setting
- allows lack of BAA w/ video communications vendor
- must still use non -public facing remote communication product!
(not Facebook Live, TikTok or Twitch)
- still must obtain consent from patient (oral, ok)



OCR HIPAA Enforcement Discretion - Telehealth

What if a breach?

- OCR will not pursue penalties if good faith provision of telehealth services
- Not a HIPAA-free zone/should document risk decisions
- What is “bad faith ” provision of telehealth?
 - Ex. Identity theft, use for marketing/ sale of PHI, unethical care, open chat rooms



Additional OCR HIPAA Enforcement Discretion Announcements

During pandemic: No penalties for noncompliance if good faith disclosure of COVID-19 exposure:

- To law enforcement and first responders

[https:// www.hhs.gov/sites/default/files/covid -19-hipaa-and-first-responders -508.pdf](https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf)

- For Public Health or Public Oversight purpose

[https:// www.hhs.gov/sites/default/files/notification -enforcement -discretion -hipaa.pdf](https://www.hhs.gov/sites/default/files/notification-enforcement-discretion-hipaa.pdf)

- At a COVID-19 testing site

[https:// www.hhs.gov/sites/default/files/notification -enforcement -discretion -community -based -testing -sites.pdf](https://www.hhs.gov/sites/default/files/notification-enforcement-discretion-community-based-testing-sites.pdf)



Telehealth - Why are we talking about it?

Address dramatic decrease in visits, (impacts patient access and financial outlook).

- Data on business impact to one sector of private practice:
<https://www.pcc.com/business-impact-of-covid-19/>

Avoid lost opportunities to help prepare for the future:

- Example, on 3/24/20, 11 health centers in Vermont were awarded a total of \$683,380 for preparedness and response supplemental funding, including for telehealth resources.

<https://bphc.hrsa.gov/emergency-response/coronavirus-covid19-FY2020-awards/vt>



Telehealth: Healthcare Service Delivery Using Telecommunications Technologies

- Telemedicine
- Store and forward
- Telemonitoring



Telemedicine*

- Health care delivered by a provider who is located at a “distant site ” to a patient at an “originating site. ”
- For purposes of evaluation, diagnosis, consultation, or treatment.
- Using telecommunications technology via two -way, real-time, audio and video interactive communication, through a secure connection that complies with HIPAA .



Store -and -forward (e.g., dermatology, ophthalmology)

Store-and-forward technologies collect images and data to be transmitted and interpreted later.



Telemonitoring (e.g., cardiology)

Remote patient -monitoring tools such as home blood pressure monitors, Bluetooth -enabled digital scales and other devices that can communicate biometric data for review.



Before COVID -19, was telemedicine a covered service under Vermont Medicaid?

Yes.

Reimbursable through Medicaid if medically necessary, clinically appropriate, and within provider's licensed scope of practice.

This has included the provision of mental health and substance use disorder treatment.



Medicaid COVID - 19 Changes



Informed Consent

Per VT Rule, one of the conditions for telehealth coverage requires informed consent, 18 V.S.A. § 9361(c)(1), with specific components that must be included.

H. 742, COVID 19 legislation, Sec. 26, Waiver of Certain Telehealth Requirements During the State of Emergency

During the COVID-19 emergency, if obtaining and documenting oral and/or written consent prior to the provision of telehealth services is impracticable, providers may obtain consent after the provision of the services.

Consent must include the 18 V.S.A. § 9361(c) requirements.



Licensure

Before COVID-19, only providers holding a Vermont license could provide telehealth services to patients in Vermont.

H. 742 amended this law to permit providers from other states and certain retirees to provide telehealth services to Vermonters.

Excellent resource about state licensure from VAHHS, including what VT providers would need to do to practice in NH, MA, and/or NY:

[http:// www.vtmd.org/sites/default/files/VT%20Licensure%20COVID%2019%203%2024%2020%20v3_0.pdf](http://www.vtmd.org/sites/default/files/VT%20Licensure%20COVID%2019%203%2024%2020%20v3_0.pdf)



Out-of-State Licensees during COVID -19 (per H.742) – for telehealth or on staff at licensed facility

Health care providers, including mental health care providers, who hold a license from another state, in good standing, may provide telehealth services to Vermonters without obtaining a Vermont license.

They are “deemed ” licensed, registered, or certified in Vermont.

There must not be any disciplinary action pending against the license.

For those who wish practice on the staff of a licensed facility, the Medical Board requires a form prior to being “deemed. ”



Health Care Professional Retired 3 -10 Years

(Also license holders in other states who plan to practice in Vermont and who will not limit their practice exclusively to telemedicine or practice on the staff of a licensed facility) - during COVID-19 (per H.742)

They must obtain a temporary license (OPR) or emergency license (Medical Board) to return to practice, through telehealth or other methods during the COVID -19 state of emergency.

There is no cost.

Valid for 90 days or through the end of the COVID -19 emergency, whichever period ends first.

May apply for another temporary/emergency license if state of emergency endures for more than 90 days.



Vermont Medicaid Payments for Telephonic Services During COVID -19

Telemedicine (2 -way, real-time, audio and video/visual) may not be possible.

Vermont Medicaid is providing reimbursement for medically necessary and clinically appropriate services delivered by communications technology, including telephone, from 3/13/2020 until end of emergency.



Telemedicine Rates During COVID -19

Rates for services delivered via telemedicine are the same as those provided face-to-face .



Private Health Insurance Companies

BC/BS of Vermont :

[https:// www.bcbsvt.com/health -and-wellness/coronavirus -update/telemedicine -and-telephone -office -visits-will -reduce -exposure](https://www.bcbsvt.com/health-and-wellness/coronavirus-update/telemedicine-and-telephone-office-visits-will-reduce-exposure)

MVP:

[https:// content.mvphealthcare.com/provider/fast -fax/2020 -26-COVID-19-Vermont -Updates -3-30-2020.pdf](https://content.mvphealthcare.com/provider/fast-fax/2020-26-COVID-19-Vermont-Updates-3-30-2020.pdf)

CIGNA:

[https:// static.cigna.com/assets/chcp/resourceLibrary/medicalResourcesList/medicalDoingBusinessWithCigna/medicalDbwcCOVID -19.html](https://static.cigna.com/assets/chcp/resourceLibrary/medicalResourcesList/medicalDoingBusinessWithCigna/medicalDbwcCOVID-19.html)



Medicare Telemedicine Visits

From March 6, 2020 through end of federal COVID -19 Public Health Emergency, Medicare will cover Medicare telehealth services in broader circumstances. In particular, patients outside of rural areas, and patients in their homes will be eligible for telehealth services.

These visits are considered the same as in -person visits and are paid at the same rate as regular, in -person visits.

Medicare coinsurance and deductible would generally apply, but OIG is allowing providers to reduce or waive cost -sharing for telehealth visits.

To the extent a prior established relationship is required, HHS will not audit for this.



Medicare Telemedicine Visits

4/14/20, CMS Administrator, Seema Verma, discussed CMS exploring whether any of the changes necessitated by COVID could become permanent.

Now that providers, patients, and Congress will be growing more familiar and comfortable with it, CMS may have more success in broadening its scope.



DEA

In response to the COVID -19 public health emergency, DEA adopted policies to allow DEA - registered practitioners to prescribe controlled substances without having to interact in -person with their patients.

These policies are effective beginning March 31, 2020, and will remain in effect for the duration of the public health emergency, unless DEA specifies an earlier date.

DECISIONTREE*:How to Prescribe Controlled Substances to Patients During COVID -19 PHE:
[https://www.deadiversion.usdoj.gov/GDP/\(DEA -DC-023\)\(DEA075\)Decision_Tree_\(Final\)120_2007.pdf](https://www.deadiversion.usdoj.gov/GDP/(DEA -DC-023)(DEA075)Decision_Tree_(Final)120_2007.pdf)

*This decision tree summarizes the policies for quick reference. Full details are on DEA's COVID -19 website:
<https://www.deadiversion.usdoj.gov/coronavirus.html>

DEA also relaxed requirement for prescribers of controlled substances to have a separate DEA registration for each state in which they prescribe or dispense controlled substances.



Virtual Visit Tips for Providers

Quick and easy ways to make your patient visit more engaging and effective presented by UVM Health Network

<https://static1.squarespace.com/static/564f3d4fe4b06abfbce08b63/t/5e86856851cbbf1de3a8f244/1585874282385/TipsForProvidersDoingVirtualVisits%282%29.pdf>

OTHER TELEHEALTH RESOURCES

Vermont Medical Society

<http://www.vtmd.org/covid-19-resource-page>

VPQHC Statewide Telehealth Resources & Workgroup,

<https://www.vpqhc.org/statewide-telehealth-work-group>

Excellent up-to-date resources on payer policies (Medicare, Medicaid, and Commercial), and implementation.

H.742:

<https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT091/ACT091%20As%20Enacted.pdf>



Professional Liability Concerns During Pandemic

Concern for risk exposure when adapting to rapidly changing circumstances :

- increased demand for services
- constrained resources
- modifying patient encounters to reduce infection risk
- illness of colleagues/staff

Should maintain documentation of circumstances.



Professional Liability Concerns – Vermont Law

- actions to be judged by circumstances:
 - unprofessional conduct, 26 VSA 1354(a)(22), gross failure to use/ exercise on a particular occasion, or simply the failure to use/ exercise on repeated occasions, that degree of care, skill, and proficiency that is commonly exercised by the ordinary skillful, careful, and prudent physician *engaged in similar practice under the same or similar conditions*, whether or not actual injury to a patient has occurred.
 - malpractice definition, 12 VSA 1908, proof of failure to have knowledge/ skill, or exercise degree of care, of a reasonably skillful, careful & prudent health care professional *engaged in similar practice under same/similar circumstances* w injury resulting



Professional Liability Concerns – Federal Law

CARES Act

- Provides immunity for health care provided by a volunteer in good faith & w/ i scope of volunteer's licensure.
- Exceptions include harm caused by willful misconduct or gross negligence.



Professional Liability Concerns —Governor Scott's Executive Order, 4/10/20

- Adopts rule interpreting Emergency Response Immunity under 20 VSA 20
 - Law protects persons involved in emergency management services or activity from liability for injury/ death
- Order includes health care providers/ health care volunteers if providing (authorized to provide) health care services in response to COVID 19 outbreak as part of emergency response service or response activities, including:
 - expedited postponement of non-essential adult elective surgery & medical/ surgical procedures
 - cancelling or denying elective surgery or procedures or routine care
 - redeployment/ cross training of staff to respond to COVID 19 outbreak
 - planning or enacting crisis standard-of-care measures
 - reduced record-keeping to the extent necessary to respond to COVID 19 outbreak
- Except if gross negligence/ willful misconduct.



The Families First Coronavirus Response Act

Effective Dates: the paid leave requirements are effective April 1 – December 31, 2020

Poster: All private employers with few than 500 employees must post the FFCRA poster in the workplace: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf (for employees who are working remotely, the poster needs to be emailed or direct mailed, or posted to the employer's internal website)

FFCRA & Health Care Provider Employers: “An Employer whose Employee is a health care provide or an emergency responder ma exclude such Employee from the EPSLA’s Paid Sick Leave requirements and/or the EFMLEA’s Expanded Family and Medical Leave requirements. 29 CFR 862.30(c).

HELPFUL EMPLOYMENT-RELATED LINKS

- 1) US Department of Labor/FFCRA:
[https:// www.dol.gov/agencies/whd/pandemic](https://www.dol.gov/agencies/whd/pandemic)
- 2) VT Department of Labor/Unemployment:
[https:// labor.vermont.gov/covid19](https://labor.vermont.gov/covid19)
- 3) Equal Employment Opportunity Commission & COVID-19:
[https:// www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
- 4) VT Attorney General's Office Workplace Guidance:
[https://ago.vermont.gov/covid -19-updates -and-information -from -the -attorney -general /](https://ago.vermont.gov/covid-19-updates-and-information-from-the-attorney-general/)

THANKS!

Any questions?

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