

A New Telehealth Scheme and You

You are responsible for your own actions.

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Background

Anyone who is following various internet blogs and webzines is seeing a lot of posts concerning the maximizing of one's income from the medical professions. Podiatry is no exception. Some states will allow podiatrists to sell various medications from their office at a profit; many do not. There is a new wrinkle that has come to podiatry involving maximizing one's income. It purports to be totally legal, approved by a "gaggle of attorneys" who know what they are doing. The only problem is that this proposition is anything but legal. Various governmental authorities are investigating the players and shutting them down, one operation at a time. The punishment often involves prison time as well as very high fines. For the podiatrist, it can also involve loss of their professional license.

Many people thought it was just a matter of time until fraud wove its way into the telehealth market. First it started with phantom visits being billed for. Others began billing for administrative phone calls to patients as if they were being treated via telehealth. Another area that

was ripe for investigation was the lack of appropriate documentation of the telehealth visit. The next version of telehealth fraud was a take on the various companies providing help for the many males in need of "a little help" in enhancing their per-

formance with their significant other. The "patient" would call a physician, who was waiting by the phone. The physician would ask you a few questions, and wham, bang, your prescription was on its way in a plain wrapper so as not to embarrass you. If properly and ethically set up and run, this may be legal. What was not found legal was the scheme involving medication prescribed through telehealth for ADD. That medicine is a controlled substance involving many more rules. Frankly, busting an amphetamines scheme makes more

headlines than terminating an ED telehealth operation. At this stage, it is time to warn you that prior to getting involved with any "scheme", please consult your healthcare attorney. A competent legal expert will be able to

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see through most, if not all of these "ideas" to separate the legal from the illegal. At the very least, your attempt to keep it legal will be seen by the authorities as a good indication that you had no criminal intentions. It is also time to state very clearly that telemedicine, when honestly and ethically applied, can be a tremendous adjunct to your clinical practice, particularly in times of pandemic. It can also be a real lifesaver for the homebound patient. Telemedicine can also be used to greatly

Continued on page 60

Telehealth (from page 59)

increase your efficiency. You must document such visits, accurately and completely. The standards of documentation do not decrease just because you had no actual physical contact with your patient.

The Scheme

You receive a phone call, an office visit from a local representative of a pharmacy, typically, not from one of the big chains. You might be answering an advertisement that intrigued you. It was tucked away in the classifieds of your podiatric journals.

The representative appears very non-threatening. Frankly, they appear very reassuring that you are about to embark on an honest way of having an exceptional second source of legal income for relatively easy work from the comfort of your desk. The hairs on the back of your neck should be standing up by now. You have heard and read that you cannot take kickbacks. In such an assuring way, they assert that their attorneys, some nebulous army called “their legal team”, have studied this plan. They have assured her, the rep-

Here is problem number two: where are these patients coming from? Are they induced to be patients by money or something else of value? Until you can confidently answer that question, you should not proceed.

Next, you are encouraged to take a good history and ask questions. Often the questions to ask are scripted for you, “as a guide”. Often you are given templates to “assist” your

of prescriptions, you “urge” the patient to use a certain specialty pharmacy—often the only place that they can obtain the concoction prescribed by you. A patient should/must have the option of going to any pharmacy they want—not be pressured to use a particular pharmacy. This constitutes problem number five.

How are you, the podiatrist, paid in this arrangement? Besides billing

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documentation. You are usually given a list of preferred diagnoses to look for so that the advised prescriptions can be prescribed. Often, these diagnoses are very problematic. One such prescription involves a kind of topical that is used to treat an unusual skin cancer. Another involves a tropical disease that was rarely seen in that part of the country. You might state that a patient may have been infected while on vacation elsewhere. True, but how many patients from Nebraska visit Zaire during a pandemic?

for the telehealth visit, you get paid by the prescription or per patient, if there is a prescription dispensed that is on their list. Let us look back at the deal. You are emphatically not an employee of the “company.” You are an independent contractor using independent medical judgment. Can you justify your prescription for compounded topical cream “X” as being efficacious for the treatment for diagnosis “Y”? Maybe not. Yet, you are doing it anyway. This involves several more problems. Treating a patient under false pretenses is illegal. False documentation is illegal. Accepting money for an unnecessary treatment you know was performed just for reimbursement is illegal. Depending upon how you are being reimbursed, you may be over the legal line for violating the Anti-Kickback Act (AKA). Most states have their own version of an AKA. You have now lost count on how many problems there are with this situation.

Often, there is little if any follow-up with these patients. Often, it is never documented that any of these patients even needed to be seen via telehealth. That too is a problem, a big problem. If you are prescribing topicals with a diagnosis of a variety of skin cancer, did you take a skin biopsy? For pedal infections, was any culture and sensitivity taken prior to prescribing some very expensive, rarely used antibiotic? That is difficult to do during a telehealth visit.

Taking an extensive history and asking “the patient” a lot of ques-

Continued on page 62

Use of controlled substances raises increased scrutiny by the authorities as does overuse of medications that reimburse too well.

representative, that it is totally legal. You want to believe her. You can use the projected income. Here is where problem number one comes in to play. This so-called legal team, if it even exists, works for them, not you! That means that they are not worried about you. When and if there is a problem, guess who they will try to protect? One hint: it is not you.

Now that you have been assured that this wonderful opportunity is totally legal, you ask what is involved and how it works. You are given lists of patients to call. Where did they get these patients? You usually never find out until it is too late. You are expected to call the patients, so it can be done when it is convenient for you.

Additionally, the diagnosis is made without any cultures or blood tests, just the telehealth visit. Many of the prescriptions involve compounding of various ingredients. Some may include controlled substances. Many of the medications involve ingredients that are no more efficacious than a much cheaper ingredient. Some of them are not effective for the diagnosis. Coincidentally, they involve items that are very well reimbursed by prescription plans. These are obvious problems numbers three and four. Use of controlled substances raises increased scrutiny by the authorities as does overuse of medications that reimburse too well.

After that, you prescribe your list

Telehealth (from page 60)

tions may have the effect of making one feel better about getting involved in such a scheme. It should not. It does not take the authorities very long to see through these schemes. They often start with the so-called patients, who often are given incentives to get on these patient lists. They often get the expensive creams and pills, only to give them back to the pharmacy for a price. These “patients” have no use for them. When a federal agent comes knocking on their door with threats, they are often very happy to talk. Their talking will include the fact that they never had the diagnosis claimed and that the podiatrist on the other side of the telehealth visit did little or nothing to ascertain the diagnosis. The whole deal quickly unravels as everyone heads for the exits. You, the professional, with a professional degree, make the headlines.

Marketing and Telehealth

Sometimes, to attract patients, podiatrists might tend to over-promise what can be treated via telehealth. In a list of conditions treated by telehealth taken from a current advertisement, one group promises to treat open diabetic ulcerations, corns, calluses, ingrown toenails, allergic reactions, and lower extremity infections.

Most, if not all states, require advertising by podiatrists and other healthcare professionals to be accurate and not misleading. Misleading advertising is actionable against their professional license. It is important to review your marketing person’s advertising recommendations prior to them being published in a magazine, newspaper, radio, TV or online. You are responsible for the content.

Conclusion

You cannot delegate your legal responsibilities to pharmacies, drug representatives, marketing people,

or office staff. In the end, you are responsible for your own actions. You must investigate the offer to ascertain if it is a legitimate proposition. There was no shortcut to obtaining your professional education and license. Do not take the shortcut to losing it. **PM**



Dr. Kobak is Senior Counsel in Frier Levitt’s Healthcare Department in New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Healthcare Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.