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## Fraud, HIPAA and Telehealth

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## Fraud, HIPAA and Telehealth

*Technology is a wonderful thing, but it introduces all kinds of new considerations concerning the safe and legal conduct of the dental practice.*

Lance Plunkett, J.D., LL.M.

**T**he use of telehealth has skyrocketed during the novel coronavirus (COVID-19) pandemic, including interesting uses of the mechanism in dentistry (see January 2021 *NYSDA Journal*). But with the rise of telehealth has come some alarming problems with fraud—enough to trigger a Special Fraud Alert from the Office of the Inspector General (OIG) of the United States Department of Health and Human Services (HHS). This Special Fraud Alert lays out seven specific fraud issues for dentists to be wary of.

HHS OIG noted that its concerns were driven after observing inappropriate increases in spending for federal healthcare programs such as Medicaid and Medicare, harm to patients through the provision of unnecessary care, and interference with and compromise of healthcare professional judgment and patient care.

HHS OIG further noted that in many of these telehealth arrangements, companies pay healthcare providers in exchange for ordering or prescribing items or services: 1) for purported patients with whom the healthcare providers have limited, if any, interaction; and 2) without regard to healthcare necessity. Such payments

are sometimes described as payment per review, audit, consult or assessment of patient charts. Telehealth companies often tell healthcare providers that they do not need to contact the purported patient or that they only need to speak to the purported patient by telephone.

In addition, providers are not given an opportunity to review the purported patient's real patient records. Furthermore, the telehealth company may direct providers to order or prescribe a preselected item or service, regardless of necessity or clinical appropriateness. In many cases, the telehealth company sells the order or prescription generated by the healthcare provider to other individuals or entities that then fraudulently bill for the unnecessary items and services. The seven specific issues for dentists to be alert to appear below.

### **1. Patient Recruitment**

The patients for whom the dentist orders or prescribes items or services are identified or recruited by a teledentistry company using a telemarketing company call center, health fair, and/or through Internet, television or social media advertising for free or low out-of-pocket cost

items or services. In a related Web page, HHS OIG explains that federal healthcare program patients should be wary of being offered free or no-cost items or services because Medicaid, Medicare and other federal healthcare programs will never call you to offer free or no-cost items and services.

## 2. Insufficient Patient Information

The dentist has insufficient contact with or information from the patient, which increases the likelihood that items or services ordered or prescribed are not necessary and may actually be harmful to the patient. HHS OIG specifically mentioned telehealth companies that did not provide sufficient or genuine patient information and records to healthcare providers, including instances where telehealth companies required the provider to use audio-only technology regardless of patient preferences or the provider's professional judgment (more on audio-only teledentistry later in this article).

## 3. Compensation Based on Referrals

The teledentistry company compensates dentists based on the volume of items or services they order or prescribe, but which is misrepresented to the dentist as payment based on the number of patient records reviewed.

## 4. Federal Healthcare Program Patients Only

The teledentistry company only furnishes items and services to federal healthcare program beneficiaries, such as Medicaid or Medicare Advantage participants, and does not accept insurance from any other payor.

## 5. Carving Out Federal Healthcare Program Patients

The flip side of item #4 is where the teledentistry company claims to only furnish items and services to individuals who are not federal healthcare program beneficiaries, but the company actually bills federal healthcare programs. HHS OIG has long expressed concern about any arrangements that carve out federal healthcare program beneficiaries.

## 6. Limited Scope of Services

The teledentistry company only furnishes a single product or a single class of products, like specific prescription items, orthodontic aligners, sleep apnea devices or other similarly limited items, thereby restricting the dentist's options to a predetermined course of treatment. HHS OIG explained that this could result in care that is not necessary or is an interference with the dentist's professional judgment.

## 7. Lack of Follow-up

The teledentistry company does not expect dentists to follow up with patients for whom they order or prescribe services.

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Particularly troublesome are arrangements where the company does not provide dentists with sufficient information to follow up with patients, which may result in dental services that are worthless or not in line with the appropriate standard of dental care. HHS OIG provided the example of a telehealth company that does not require healthcare providers to discuss with patients results for any tests they have ordered.

On top of all this, questions have arisen as to how the Health Insurance Portability and Accountability Act of 1996 (HIPAA) applies to telehealth services, particularly those that are delivered via the aforementioned “audio-only” technology. Telehealth is generally defined as the use of electronic information and telecommunications technologies to support and promote long-distance clinical healthcare, patient and professional health-related education, and public health and health administration. Technologies include videoconferencing, the Internet, store-and-forward imaging, streaming media, and landline and wireless communications. Dentists can use remote communication technologies, including audio-only telehealth services, when such communications are conducted in a manner that is consistent with applicable requirements of the HIPAA Privacy, Security, and Breach Notification Rules. Note that there may be payment restrictions

on telehealth services from programs like Medicaid, Medicare or private insurance plans, but payment restrictions do not change HIPAA requirements (more on this later).

### Viral Response

In March 2020, in response to the novel coronavirus (COVID-19) public health emergency, the United States Office for Civil Rights (OCR), which enforces HIPAA, issued a “Telehealth Notification” to allow for the expansion of the use of remote healthcare services. The Telehealth Notification provided that OCR would exercise its enforcement discretion and would not impose penalties on healthcare providers for noncompliance with HIPAA requirements in connection with the good faith provision of telehealth using non-public-facing audio or video remote communication technologies during the COVID-19 public health emergency (now extended to Oct. 13, 2022).

Under this Telehealth Notification, healthcare providers could use any available non-public-facing remote communication technologies for telehealth, even where those technologies, and the manner in which they were used, would not fully comply with HIPAA requirements. The Telehealth Notification will remain in effect until the COVID-19 public health emergency ends.

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However, what if there was no public health emergency? How would HIPAA apply to telehealth services in that scenario? Would HIPAA preclude things like audio-only telehealth? The answer is “no.”

HIPAA does allow for using audio-only telehealth as a delivery mechanism. The HIPAA Privacy Rule requires that covered entities apply reasonable safeguards to guard the privacy of protected health information (PHI) from impermissible uses or disclosures, including when providing telehealth services. For example, OCR expects covered healthcare providers to offer telehealth services in private settings to the extent feasible. If telehealth services cannot be provided in a private setting, dentists still must implement reasonable safeguards, such as using lowered voices and not using speakerphone, to limit incidental uses or disclosures of PHI. In addition, if the individual is not known to the dentist, the dentist must verify the identity of the individual either orally or in writing (which may include using electronic methods). HIPAA does not mandate a specific way to verify identity.

What about the requirements of the HIPAA Security Rule when using remote communication technologies for audio-only telehealth services? The HIPAA Security Rule applies to electronic-protected health information (ePHI), which is PHI transmitted by, or maintained in, electronic media. The HIPAA Security Rule does not apply to audio-only telehealth services provided by a dentist who is using a standard telephone line, often described as a traditional landline, because the information transmitted is not electronic. Accordingly, dentists do not need to apply the Security Rule safeguards to telehealth services that they provide using such traditional landlines, regardless of the type of telephone technology the individual patient uses.

However, traditional landlines are rapidly being replaced with electronic communication technologies such as Voice over Internet Protocol (VoIP) and mobile technologies that use electronic media, such as the Internet, intranets and extranets, cellular and Wi-Fi. The HIPAA Security Rule applies when a covered entity uses such electronic communication technologies. Dentists using telephone systems that transmit ePHI need to apply the HIPAA Security Rule safeguards to those technologies. Note that an individual patient receiving telehealth services may use any telephone system he or she chooses and is not bound by the HIPAA Rule when doing so. In addition, a dentist is not responsible for the privacy or security of individual patients' health information once it has been received by the individual patient's phone or other device.

### Know your Technology

Some current electronic technologies that dentists use for remote communications that require compliance with the HIPAA Security Rule include:

- Communication applications (apps) on a smartphone or another computing device.

- VoIP technologies.
- Technologies that electronically record or transcribe a teledentistry session.

Messaging services that electronically store audio messages. Potential risks and vulnerabilities to the confidentiality, integrity and availability of ePHI when using such technologies need to be identified, assessed and addressed as part of a dental practice's risk analysis and risk management processes, as required by the HIPAA Security Rule. A dentist's risk analysis and risk management should include consideration of whether:

- There is a risk the transmission could be intercepted by an unauthorized third party.
- The remote communication technology (mobile device, app) supports encrypted transmissions.
- There is a risk ePHI created or stored as a result of a teledentistry session (session recordings or transcripts) could be accessed by an unauthorized third party, and whether encryption is available to secure recordings or transcripts of created or stored teledentistry sessions.
- Authentication is required to access the device or app where a teledentistry session's ePHI may be stored.
- The device or app automatically terminates the teledentistry session or locks after a period of inactivity.

As communication technologies (networks, devices, apps) continue to evolve at a rapid pace, a robust inventory and asset management process can help dental practices identify such technologies and the information systems that use them to help ensure an accurate and thorough risk analysis.

### Associate or Not?

Can you use audio-only teledentistry services without a business associate agreement with the audio-only service provider? Yes, but it depends on the service being provided. HIPAA requires a dentist to enter into a business associate agreement (BAA) with a telecommunication service provider (TSP) only when the vendor is truly acting as a business associate. A dentist using a telephone to communicate with patients is not required to enter into a BAA with a TSP that has only transient access to the PHI it transmits, because the vendor is acting merely as a conduit for the PHI.

If the TSP is not also creating, receiving or maintaining PHI on behalf of the dentist, and the TSP does not require access on a routine basis to the PHI it transmits in the call, no business associate relationship has been created. Therefore, a BAA is not needed in those circumstances. For example, a dentist may conduct an audio-only teledentistry session with a patient using a smartphone without a BAA between the dentist and the TSP, where the TSP does not create, receive or maintain any PHI from the teledentistry session and is only connecting the call.

However, a dentist must enter into a BAA with a vendor that is more than a mere conduit for PHI. For example, a dentist may



want to conduct audio-only teledentistry sessions with patients using a smartphone app offered by an electronic services provider that stores PHI via recordings or transcripts in the app developer's cloud infrastructure for the dentist's later use. In this case, the app would not be providing mere data transmission services and would instead also be creating, receiving and maintaining PHI. Because it is not merely a conduit for transmission of the PHI, the dentist would need to enter into a BAA with the app developer before the dentist can use the app with patients.

Similarly, a dentist would need a BAA with the developer of a smartphone app that the dentist uses to translate oral communications to another language to provide meaningful access to individuals with limited English proficiency because the app is creating and receiving PHI and, therefore, the developer is a business associate of the dentist.

### An Upward Trend

Does HIPAA allow dentists to use remote communication technologies to provide audio-only teledentistry if an individual patient's health insurance plan does not provide coverage or payment for those services? Yes. Dentists may offer audio-only teledentistry services using remote communication technologies

consistent with HIPAA requirements, regardless of whether any health insurance plan covers or pays for those services. Health insurance coverage and payment policies for healthcare services delivered via teledentistry are separate from questions about compliance with HIPAA. It simply means that the teledentistry option may be unattractive financially even though permitted by HIPAA.

HHS OIG and OCR enforcement with respect to telehealth services of all types is on the upswing and dentists need to be mindful of that trend. However, government agencies at both the state and federal levels are also playing catch-up in the telehealth area. There are many current telehealth operations in existence that implicate the seven key areas of concern identified by HHS OIG. Do not be one of those people who is caught up in the new enforcement era as government turns its attention to things they should have been watching long before the COVID-19 pandemic radically changed the healthcare delivery picture. //

*The material contained in this column is informational only and does not constitute legal advice. For specific questions, dentists should contact their own attorney.*

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