IDAHO COMPLIANCE ISSUES

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(1-21)

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COMPLIANCE WEBINAR SERIES

Date	Webinar
12/10/20	Provider Relief Fund
12/17/20	New Stark and Anti-Kickback Rules
1/7/21	Telehealth
1/14/21	Vaccinations
1/19/21	**Idaho Compliance Issues**
1/21/21	Fraud and Abuse Laws
1/26/21	Nevada Compliance Issues
1/28/21	Information Blocking Rule

https://www.hollandhart.com/events

Upcoming

- HIPAA
- 42 CFR part 2
- Cybersecurity and Data Privacy
- FDA and Medical Device
- Antitrust
- Employment Laws
- Interpreters, Translators and Auxiliary Aids
- Creating and Terminating Patient Relations
- EMTALA
- Others

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AGENDA

- Idaho Fraud and Abuse Laws
- Idaho Patient Act
- Idaho Consent and Withdrawal
- Idaho Telehealth Laws
- Prescriber Obligation to Review Opioid History
- Idaho COVID Immunity

➢ *We will move fast and cover high points.*

Questions?

- Use chat feature, or
- E-mail me at: kcstanger@hollandhart.com

WRITTEN MATERIALS

- Stanger, *Idaho Fraud and Abuse Statutes: Requirements, Penalties and Repayments*
- Stanger, *Fraud and Abuse in Private Payor Situations*
- Carlson, *The Idaho Patient Act and its Impact on Medical Debt Collections*
- Stanger, *Consent Forms v. Informed Consent*
- Stanger, *Consent for Treatment of Minors in Idaho*
- Stanger, *Mental Holds in Idaho*
- Stanger, *Telehealth in Idaho and Elsewhere*
- Stanger, *New Idaho Laws Affecting Healthcare Providers – Effective July 1*
- Myers, *Idaho Legislature Grants Limited Immunity to Businesses Responding to Coronavirus*

If you didn't receive them, contact ldsquyres@hollandhart.com or they are available at https://www.hhhealthlawblog.com/

IDAHO FRAUD AND ABUSE LAWS

FRAUD AND ABUSE LAWS

Federal

- False Claims Act
- Anti-Kickback Statute
- Ethics in Patient Referrals Act ("Stark")
- Civil Monetary Penalties Law
- Eliminating Kickbacks in Recovery Act

(Tune in Thursday…)

Idaho

- Idaho False Claims Act
- Idaho Medicaid Provider Agreement
- Idaho Anti-Kickback Statute
- Idaho Stark Implications
- Idaho Fee-Splitting Statute

IDAHO FALSE CLAIMS ACT

Cannot knowingly:

- Submit claim that is incorrect.
- Make false statement in any document to state.
- Submit a claim for medically unnecessary item or service.
- Fail repeatedly or substantially to comply with DHW rules.
- Breach provider agreement.
- Fail to repay amounts improperly received.
- Be managing employee in an entity that engaged in fraud or abusive conduct.

(IC 56-209h(6))

Penalties

- Exclusion from state health programs, e.g., Medicaid.
- Civil penalty of up to $1000 per violation.
- Referral to Medicaid fraud unit.

(IC 56-209h)

IDAHO MEDICAID PROVIDER AGREEMENT

Current Medicaid provider agreement requires providers to comply with broad range of requirements, including:

- Compliance with federal and state statutes, regs and rules.
- Provide accurate information in applications.
- Be properly licensed, certified and registered, and properly supervise others.
- Document services and maintain records for 5 years.
- Certify that items or services claimed were:
  - Actually provided;
  - Medically necessary; and
  - Provided per applicable professional standards and DHW rules.
- Repay amounts improperly received.
- Do not balance bill services payable by Medicaid.

(Medicaid Provider Agreement (06/11))

- Failure to comply with provider agreement may mean civil penalties.

(IC 56-209h))

IDAHO ANTI-KICKBACK STATUTE

Healthcare providers cannot:

- Pay another person, and other person may not accept payment, for a referral.
- Provide services knowing the claimant was referred in exchange for payment.
- Engage in a regular practice of waiving, rebating, giving or paying claimant's deductible for health insurance.

(IC 41-348)

Penalties

- $5,000 fine by Dept of Insurance

➢ Violation of Medicaid provider agreement?

➢ Applies to private payers as well as government programs

IDAHO STARK IMPLICATIONS

Ethics in Patient Referrals Act ("Stark")

- If physician (or family member) has a financial relationship with an entity, the physician may not refer "designated health services" to the entity unless the transaction is structured to fit within a regulatory safe harbor.

(42 USC 1395nn; 42 CFR 411.353)

- Idaho does not have a state Stark law

But…

- Idaho Medicaid regulations allow DHW to "deny payment for any and all claims it determines are for items or services … provided as a result of a prohibited physician referral under [Stark,] 42 CFR Part 411, Subpart J."

(IDAPA 16.05.07.200.01)

IDAHO FEE-SPLITTING STATUTE

Physician and PAs my not:

- Divide fees or gifts or agree to split or divide fees or gifts received for professional services with any person, institution or corporation, in exchange for a referral.
- Give or receive rebates.

(IC 54-1814(8)-(9))

Penalties

- Adverse licensure action.
- Void contract.

➢ Violation of Medicaid provider agreement?

IDAHO INSURANCE FRAUD

"Any person who, with the intent to defraud or deceive an insurer … presents or causes to be presented … any statement … in support of … a claim for payment or other benefit, knowing that such statement contains false, incomplete, or misleading information …

(IC 41-293)

Penalties

- Violation = felony
  - 15 years in prison
  - $15,000 fine
  - Restitution to insurer
- Each violation may be considered a separate offense.

(IC 41-293)

IDAHO PATIENT ACT

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IDAHO PATIENT ACT

- If fail to provide required notices to patient, may not take "extraordinary collection action" against patient:
  - Send bill to collection agency before 60 days after Final Statement;
  - Report to consumer reporting agency; or
  - Bring lawsuit, place lien, or garnish patients' assets.

(IC 48-301 et seq.)

- May still—
  - Send bills and demands for payment yourself.
  - Send bill to collection agency 60 days after Final Statement is sent.
  - Discharge patient from your practice.
  - Other self-help.
  - Pursue collection but—
    - Cannot recover costs, expenses and fees, and
    - Subject to penalties of $1000 to $3000 or damages.

TO INITIATE "EXTRAORDINARY COLLECTION ACTION" W/OUT PENALTY

- w/in 45/90 days after services or discharge, submit charges to patient or payers identified by patient.
- w/in 60/150 days after services or discharge, submit "consolidated summary of services" to patient.
  - Exception: single billing entity that provides final statement and info re billing entity.
- Submit "final statement" to patient.
  - Note this is not what most would consider a "final statement"
- Wait at least 60* days after final statement is received to send bill to third-party to collect or charge interest, fees or ancillary charges.
  - Presumed "received" 3 days after first class mail.
  - Patient may agree to email or other means.
- Wait at least 90* days after final statement and resolution of reviews, disputes and payer appeals .

(IC 48-301 et seq.)

* Deadlines refer to date "received" by patient. Adjust by 3 days if mail by first class mail.

45 CHARGES

- To pursue extraordinary collection action, submit charges to either patient or third-party payer identified by patient within 45 days of providing good services to patient or discharge from facility.

(IC 48-304(1))

- May take additional 45 days (90 days total) to submit charges, but cannot recover costs, expenses, and fees, including attorney fees.

(IC 48-306)

60 CONSOLIDATED SUMMARY OF SERVICES

- To pursue extraordinary collection action, submit consolidated summary of services so that patient receives it within 60 days of services or discharge.
  - *"This is Not a Bill. This is a Summary of Medical Services You Received. Retain This Summary for Your Records. Please Contact Your Insurance Company and the Health Care Providers Listed on this Summary to Determine the Final Amount You May Be Obligated to Pay."*
  - Patient's name, phone, and contact info
  - Facility's name, phone, and contact info
  - Date and duration of patient's visit to facility
  - General description of items provided to patient, including name, address, phone of each billing entity whose providers rendered items to patient.

(IC 48-303(1))

- May take additional 90 days (150 days total) to submit consolidated summary of services, but cannot recover costs, expenses, and fees, including attorney fees.

(IC 48-306)

CONSOLIDATED SUMMARY OF SERVICES

- Not required to send consolidated summary of services if:
  - The patient will receive a final statement from a single billing entity for all goods and services provided to patient at that health care facility;
  - The patient was clearly informed in writing of the name, phone number, and address of the billing entity; and
  - The health care facility otherwise complies with all other provisions of section IC 48-304, i.e.,
    - Submitted charges w/in 45/90 days.
    - Sent final statement.
    - Waited to charge interest or pursue action.

(IC 48-309)

FINAL STATEMENT

- Bill to patient.
- Include:
  - Patient's name, phone, and contact info.
  - Facility's name, phone and contact info.
  - List of goods and services provided, including initial charges and dates provided.
  - "A full itemized list of good sand services provided to the patient is available on patient's request".
  - Name of third-party payers to which charges submitted and patient's group and membership numbers.
  - Detailed description of adjustments and payments received.
  - Final amount patient is liable to pay.

(IC 48-303(4))

- "Final statement" is likely the first bill to patient.

LIMITS ON FEES

- Cannot recover costs, expenses, or fees for extraordinary collection action unless complied with process in IC 48-304.
  - May still collect principal but may be subject to penalties.
- Limits on fees:
  - Uncontested judgment against patient: principal owed + up to lesser of $350 or 100% of principal + pre- and post-judgment interest
  - Contested judgment against patient: principal owed + up to lesser of $700 or 100% of principal + pre- and post-judgment interest.
  - Post-judgment motions and writs: up to $75/$25 per successful motion or writ + Service fees.
  - May apply for more if fees grossly disproportionate
  - If patient prevails: recovers all costs, expenses and fees and has no liability.

(IC 48-305)

ENFORCEMENT AND PENALTIES

- If bring extraordinary collection action without complying with IC 48-304 or -306:
  - Patient has no liability for collection costs, expenses and fees.
  - Provider is liable to patient for greater of:
    - $1,000, or
    - Damages suffered by patient due to violation.
  - If provider willfully or knowingly violated the statue, court may award greater of:
    - $3,000, or
    - 3x damages suffered by patient due to violation.

    Patient is entitled costs + reasonable attorneys fees.

(IC 48-311)

SUGGESTIONS

- Get the law changed.
  - Increases costs associated with care.
  - Diminishes financial viability of pursuing judicial collection actions, thereby reducing ability to recover bad debt.
  - Collection agencies may be less willing to take cases.
- Document compliance with dates, including dates charges submitted, consolidated summary and final statement sent or given to patient, etc.
  - Provider has burden of proof.
  - Must plead compliance when file court action.

CONSENT, WITHDRAWAL AND ADVANCE DIRECTIVES

LACK OF INFORMED CONSENT

- Patient lacks capacity
  - Physically
  - Mentally
  - By statute
- Ignore patient's wishes
- Provide treatment that exceeds consent
- Fail to provide relevant info to make decision informed
- Patient does not understand

Result

- Tort of lack of informed consent
- Malpractice
- Battery
- False imprisonment

➢ *Informed consent is a defense to torts*

- Adverse licensure action
- No reimbursement

CONSENT: CAPACITY

- "Any person who comprehends the need for, the nature of and the significant risks ordinarily inherent in, any contemplated … health care, treatment or procedure is competent to consent thereto on his or her own behalf."
- "Any health care provider may provide such health care and services in reliance upon such a consent if the consenting person appears to the health care provider securing the consent to possess such requisite comprehension at the time of giving consent."

(IC 39-4503, emphasis added)

CONSENT: SURROGATES

- Consent for the furnishing of health care to [1] any person who is not then capable of giving such consent or [2] who is a minor may be given or refused by the following, provided that the surrogate decision maker shall have sufficient comprehension as required to consent to his or her own health care:
  - Court appointed guardian.
  - Person named in living will and durable power of attorney.
  - Spouse.
  - Adult child.
  - Parent.
  - Delegation of parental authority per IC 15-5-104.
  - Relative.
  - Any other competent person representing himself or herself to be responsible for health care.

(IC 39-4504(1))

MINORS: EMANCIPATION

- Minor is probably emancipated and able to consent to their own healthcare if:
  - Married or has been married (*see* IC 18-604(3))
  - In armed forces (*see* IC 18-604(3))
  - Living on own and self-sufficient (*see* IC 66-402(6))
  - Court declares them emancipated (*see* IC 16-2403(1))
- Must still satisfy the basic test, i.e., be able to "comprehend the need for, the nature of and the significant risks ordinarily inherent in, any contemplated … health care…"

  (IC 39-4503)

MINORS: EMANCIPATION

- Pregnancy is probably not an emancipating event.
  - "Capacity to become pregnant and capacity for mature judgment concerning the wisdom of bearing a child or having an abortion are not necessarily related."

  (IC 18-602)
  - "To protect minors from their own immaturity", abortions for "pregnant unemancipated minors" generally require:
    - Parental/guardian consent, or
    - Judicial finding that minor is mature and capable of giving informed consent.

  (IC 18-602, 18-609A)
- *If pregnancy were an emancipating event, you would not need parental consent for abortion.*

MINORS: STATUTES ALLOW MINOR CONSENT

- Emergency medical exam and stabilizing treatment in hospital. (HHS Interpretive Guidelines to 42 CFR 489.24)
- Examinations, prescriptions devices, and info regarding contraceptives if practitioner determines that minor has sufficient intelligence and maturity to understand the nature and significance of treatment. (IC 18-603)
- Family planning services funded by Title X of the Public Health Services Act. (42 USC X300(a))

MINORS: STATUTES ALLOW MINOR CONSENT

- Drug treatment or rehab. (IC 37-3102)
  - If minor is age 16 or older, cannot notify parents without minor's consent.
- Age 14: testing or treatment for reportable infectious or communicable disease. (IC 39-3801)
- Age 14: hospitalization for observation, evaluation and treatment for mental condition. (IC 66-318(a)(2))
  - Treating facility must notify parents
- Age 17: unpaid blood donations. (IC 39-3701)
- Others?

MATURE MINOR DOCTRINE

- In other states, minors with sufficient maturity may consent to their own care.
- Idaho statutes are ambiguous.
  - IC 39-4503 states "any person" of sufficient comprehension may consent to or refuse their own care. *See also* IC 18-603 and 18-609A; Idaho AG Op. (2/16/10).
  - IC 39-4504 identifies those who may consent for minors.
- Individual probably has fundamental right to make decisions about themselves and their offspring, especially in matters of reproductive rights. *See, e.g., Carey v. Population Services Int'l* (S.Ct. 1977)
- But we don't have any Idaho cases regarding this right now…

CONSENT: EMERGENCY

- "If the person [1] presents a medical emergency or there is a substantial likelihood of his or her life or health being seriously endangered by withholding or delay in the rendering of … health care to such person and the person [2] has not communicated and is unable to communicate his or her treatment wishes, the attending health care provider may, in his or her discretion, authorize and/or provide such health care, as he or she deems appropriate, and all persons, agencies and institutions thereafter furnishing the same, including such health care provider, may proceed as if informed, valid consent therefor had been otherwise duly given."

(IC 39-4504(1); *see also* IC 56-1015)

STATUTES ALLOWING TREATMENT W/OUT CONSENT

- Mental holds at hospital (IC 66-326)
  - The person is gravely disabled due to mental illness or
  - the person's continued liberty poses an imminent danger to that person or others, as evidenced by a threat of substantial physical harm.
- Shelter care at hospital for minors (IC 16-2411)
  - an emergency condition exists, and
  - child is suffering from a serious emotional disturbance as a result of which he is likely to cause harm to himself or others or is manifestly unable to preserve his health or safety, and
  - immediate detention and treatment is necessary to prevent harm to the child or others.

STATUTES ALLOWING TREATMENT W/OUT CONSENT

- Treatment of infant by "safe haven". (IC 39-8203)
- Certain tests and treatments for newborns, including germicide and PKU tests. (IC 39-903, -909, -912)
  - Parents may refuse based on religion.
- Limited testing or treatment ordered by law enforcement, such as blood test for DUI or testing of prisoners for communicable diseases. (IC 18-8003, -8002; 39-604)

FORM OF CONSENT

- "It is not essential to the validity of any consent … that the consent be in writing or any other specific form of expression."

(IC 39-4507)

- Under Idaho law, consent may be:
  - Implied
  - Oral
  - Written

The more significant the treatment, the greater the need to document informed consent.

- Other laws or payor standards may require documented consent, e.g.,
  - COPs 42 CFR 482.13(b), 482.24(c)(2)(v), 42 CFR 482.51(b)(2); 485
  - Joint Commission RC.02.01.01

FORM OF CONSENT

- "When the giving of such consent is recited or documented in writing and expressly authorizes the care …, and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent, in the absence of convincing proof that it was secured maliciously or by fraud, is presumed to be valid for the furnishing of such care…, and the advice and disclosures of the attending [practitioner], as well as the level of informed awareness of the giver of such consent, shall be presumed to be sufficient."

(IC 39-4507)

INFORMED CONSENT

- "Consent, or refusal to consent, for the furnishing of health care … shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting [1] the need for, [2] the nature of, and [3] the significant risks ordinarily attendant upon such a person receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision."

(IC 39-4506)

INFORMED CONSENT

- "Any such consent shall be deemed valid and so informed if the health care provider … has made such disclosures and given such advice respecting pertinent facts and considerations as would ordinarily be made and given under the same or similar circumstances, by a like health care provider of good standing practicing in the same community. As used in this section, the term "in the same community" refers to that geographic area ordinarily served by the licensed general hospital at or nearest to which such consent is given.

(IC 39-4506)

- *"What info would other practitioners in community give?"*

FORM OF CONSENT: CONSENT FORM

- Name and signature of patient or legal representative.
- Name of the provider.
- Name of treatment or procedures.
- Name of all practitioners performing the procedure and individual significant tasks if more than one practitioner.
- Risks and benefits.
- Alternative procedures and treatments and their risks .
- Date and time consent is obtained.
- Statement confirming procedure was explained to patient.
- Signature of person witnessing the consent.
- Name and signature of person who explained the procedure to the patient or guardian.

(*See* CMS SOM to 42 CFR 482.24(c)(2)(v))

INFORMED CONSENT

Informed Consent = Communication	Consent Form = Documentation
• Practitioner communicates info relevant to treatment • Patient understands the material facts, e.g., benefits, risks, and likely consequence of the proposed treatment and alternatives. • Patient makes informed decision to consent or refuse treatment.	• Supplements oral or other info given by the practitioner. • Documents that the communication process took place, e.g., that practitioner communicated relevant info, patient understood info, and patient made voluntary, informed decision.

INFORMED CONSENT

- Ensure that patient understands.
  - Evaluate whether patient is in a condition to be able to process relevant info.
  - Speak at the patient's level of understanding.
  - Beware language barriers.
    - Discrimination statutes may require interpreters, translators, or communication aids.
  - Supplement oral communications with written or visual material and documentation.
  - Give the patient an opportunity to ask questions and receive answers.

RESPONSIBILITY FOR OBTAINING CONSENT

- "Obtaining sufficient consent for health care is the duty of the attending health care provider upon whose order or at whose direction the contemplated health care … is rendered."

(IC 39-4508)

- Practitioner is the person with the knowledge, training and licensure necessary to diagnose condition and have effective communication.
- Practitioner is the person who will be liable for failure to obtain informed consent.

REFUSAL OF TREATMENT: PATIENT SELF-DETERMINATION

- Idaho "recognizes the established common law and the fundamental right of [competent] persons to control the decisions relating to the rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn...."

(IC 39-4509)

- Right to consent = right to refuse care or withdraw consent.

(See IC 39-4502(7), "'Consent to care' includes refusal to consent to care and/or withdrawal of care.")

REFUSAL OF TREATMENT: SURROGATES

- Consent for health care "may be given or refused" by the authorized surrogate.

(IC 39-4504(1))

- "Health care … shall be withdrawn and denied in accordance with a valid directive" from:
  - a competent patient,
  - a patient's health care directive, or
  - by a patient's surrogate decision maker.

  Exception: developmentally disabled person.

(IC 39-4514(3))

REFUSAL OF TREATMENT: SURROGATES

- Child neglect = "without proper … medical or other care … necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them."

(IC 16-1602(25))

- Vulnerable adult neglect = "failure of a caretaker to provide … medical care reasonably necessary to sustain the life and health of a vulnerable adult…"

(IC 39-5302(8))

- Providers must report suspected neglect.

(IC 16-1605; 39-5303)

- Court may order treatment.

ADVANCE DIRECTIVES

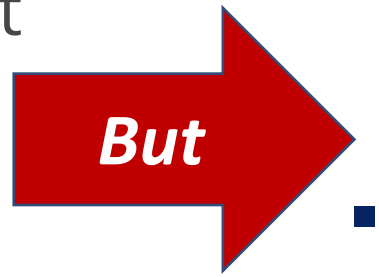
- Competent adult patients "have the fundamental right to control the decisions relating to their rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn."

(IC 39-4509)

- Competent adult may express their directives through:
  - Direct instructions by competent patient.
    - Be sure to document same.
  - Advance directives executed in case the patient becomes incompetent or unable to communicate. (*See* IC 39-4510)

ADVANCE DIRECTIVES

- Living Will
- Durable Power of Attorney
- Physician's Order for Scope of Treatment ("POST")
- Do Not Resuscitate ("DNR")
- Mental Health Care Directives
- Others?



- "It is not essential to the validity of any consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures that the consent be in writing or any other specific form of expression." (IC 39-4507).
- Any authentic expression of a person's wishes with respect to health care should be honored." (IC 39-4509(3)).
- Be sure to document…

REVOCATION OF ADVANCE DIRECTIVE

- Maker may revoke at anytime by:
  - Intentionally canceling, defacing, obliterating, burning, tearing, or otherwise destroying the document by maker or in maker's presence and at maker's direction.
  - Written revocation signed by maker.
  - Oral revocation by maker.

  ** What about other manifestation?*
- Maker is responsible for notifying provider.
- Provider not liable for failing to act on revocation unless provider has actual knowledge of revocation.

(IC 39-4511A)

SUSPENSION OF ADVANCE DIRECTIVE

- Advance directive is NOT automatically suspended during surgery.
- Maker may suspend an advance directive at anytime by:
  - Written, signed suspension by maker expressing intent to suspend.
  - Oral expression by maker expressing intent to suspend.

  ** What about other manifestation?*
- Upon meeting the termination terms of the suspension as defined by the maker, the living will, DPOA, POST or other advance directive will resume.

(IC 39-4511B)

SIMON'S LAW

- Hospital or health facility may not institute a DNR or withhold artificial life-sustaining procedures for unemancipated minor unless make reasonable effort to notify the parent(s) or legal guardian(s).
- Must give the parents 48 hours to request transfer from facility before instituting order.
- If transfer requested, must continue to provide care for at least 15 days while transfer accomplished.

(IC 39-4516)

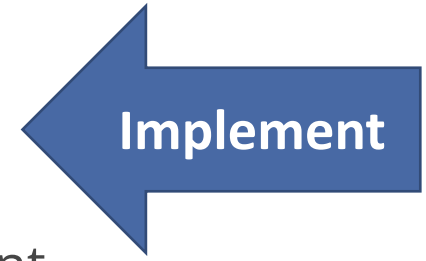
TELEHEALTH

IDAHO TELEHEALTH LAWS

Idaho Telehealth Access Act

- Scope of practice
- Provider-patient relationship
- Evaluation and management
- Prescriptions
- Informed consent
- Continuity of care
- Referrals
- Medical records

(IC 54-5701 et seq.)



Licensing Board Regulations

- Medicine (IDAPA 24.33.03.201 et seq)
- Dentistry (IDAPA 24.31.01.055)
- Psychologists (IDAPA 24.12.01601)

Others?

- Nursing
- Podiatry
- Chiropractors
- Counselors
- Therapists
- Social Workers

LICENSURE

- "A provider offering telehealth services must at all times act within the scope of the provider's license and according to all applicable laws and rules, including, but not limited to, this chapter and the community standard of care."

(IC 54-5704)

- Check licensing regulations

Does this require an Idaho license?

LICENSURE

General

- "Any physician, physician assistant, respiratory therapist, polysomnographer, dietitian, athletic trainer, or naturopath… who provides any telehealth services to patients located in Idaho must hold an active Idaho license issued by the Idaho State Board of Medicine"

(IDAPA 24.33.03.202)

COVID

- "Physicians and PAs with a license in good standing in another state will not need an Idaho license to provide telehealth to patients located in Idaho during the response to COVID-19."
- Must still comply with fed law and HHS guidance re COVID to prescribe controlled substances.
- Must still comply with:
  - Idaho Telehealth Access Act
  - Licensing rules unless suspended

(https://bom.idaho.gov/BOMPortal/BOM/Procedures/FAQ%20COVID-19.pdf)

LICENSURE

General

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(IDAPA 24.33.03.202)

Post-COVID?

- Gov. Little issued executive order that would permanently suspend regulations that were suspended during COVID unless agency took affirmative action. (https://gov.idaho.gov/wp-content/uploads/sites/74/2020/06/eo-2020-13.pdf)
- Proposed rule would delete the Idaho license requirement? (https://adminrules.idaho.gov/bulletin/2020/09.pdf#page=71)

➢ *This does not apply to those who provide telehealth out of Idaho.*

STANDARD OF CARE

- Must comply with community standard of care applicable to in-person services.

(IC 54-5704, 54-5705, 54-5706; IDAPA 24.33.03.204)

- The provider is personally responsible to familiarize him/herself with the applicable Idaho community standard of care.
- If a patient's presenting symptoms and conditions require a physical examination, lab work or imaging studies in order to make a diagnosis, the provider shall not provide diagnosis or treatment through telehealth services unless or until such information is obtained.

(IDAPA 24.33.03.204)

PROVIDER-PATIENT RELATIONSHIP

- If telehealth provider does not have an established provider-patient relationship with the patient, provider shall take appropriate steps to establish a provider-patient relationship by use of two-way audio or audio-visual interaction.
- Exceptions:
  - Provider is taking call on behalf of another provider in the same community who has a provider-patient relationship; or
  - Emergency, i.e., imminent threat of a life-threatening condition or severe bodily harm.

(IC 54-5705; *see also* IC 54-1733 for prescriptions)

PROVIDER-PATIENT RELATIONSHIP

During first contact with patient, physicians and PA must:

- Verify the location and identity of the patient;
- Disclose the provider's identity, their current location and telephone number and Idaho license number;
- Obtain appropriate consents from the patient after disclosures regarding the delivery models and treatment methods or limitations, including a special informed consent regarding the use of telehealth technologies;
- Allow the patient an opportunity to select their provider rather than being assigned a provider at random to the extent possible.

(IDAPA 23.33.03.203)

EVALUATION AND TREATMENT

- Prior to providing treatment, including a prescription drug order, provider shall obtain and document a patient's relevant clinical history and current symptoms to establish the diagnosis and identify underlying conditions and contraindications to the treatment recommended.
- Treatment based solely on an online questionnaire does not constitute an acceptable standard of care.

(IC 54-5706; *see also* IC 54-1733)

PRESCRIPTIONS

General

- Provider with an established provider-patient relationship may issue prescription drug orders using telehealth services within the scope of the provider's license and according to any applicable laws, rules and regulations.
- Controlled substances must be prescribed in compliance with 21 U.S.C. section 802(54)(A).

(IC 54-5707)

COVID

- Per DEA, practitioners may issue prescriptions for schedule II-V controlled substances without in-person medical evaluation if:
  - For legit medical purpose by a practitioner acting in the usual course of his/her practice;
  - Telehealth communication is conducted using audio-visual, real-time, two-way interactive communication system; and
  - Practitioner is acting in accordance with applicable Federal and State laws.

(https://www.deadiversion.usdoj.gov/coronavirus.html)

INFORMED CONSENT

- Informed consent for the use of telehealth technologies must be obtained and maintained at regular intervals consistent with the community standard of care.

(IC 54-5708; IDAPA 24.33.03.205)

- Appropriate informed consent should, at a minimum, include the following terms:
  - Identify patient, provider and provider's credentials;
  - Patient's agreement that provider will determine whether or not the condition being diagnosed and/or treated is appropriate for telehealth services;
  - Info on security measures re telehealth technologies, e.g., encrypting data, password protections, authentication techniques, and potential risks to privacy and notwithstanding such measures;
  - Warn that info may be lost due to technical failures.

(IDAPA 24.33.03.205)

CONTINUED CARE

- A provider of telehealth services shall be available for follow-up care or to provide information to patients who make use of such services.

(IC 54-5709)

- A provider shall be familiar with and have access to available medical resources, including emergency resources near the patient's location, in order to make appropriate patient referrals when medically indicated.

(IC 54-5710)

MEDICAL RECORDS

- Telehealth providers must maintain medical records for each telehealth patient in compliance with applicable laws and regs, including HIPAA.
- Such records shall be accessible to other providers, if the patient has given permission, and to the patient in accordance with applicable laws, rules, and regulations.

(IC 54-5711)

- Medical records include:
  - Patient-related electronic communications
  - Prescriptions
  - Labs and tests
  - Evaluations and consults
  - Relevant history
  - Instructions obtained or produced in connection with the utilization of telehealth technologies
  - Informed consents

(IDAPA 24.33.03.206)

ENFORCEMENT AND PENALTIES

- Adverse licensure actions. (IC 54-5712)
  - But what about providers who are not licensed by the state board?
- Negligence per se
  - Based on violation of statute
- Malpractice
- Lack of informed consent
- Practicing without a license
- Other?

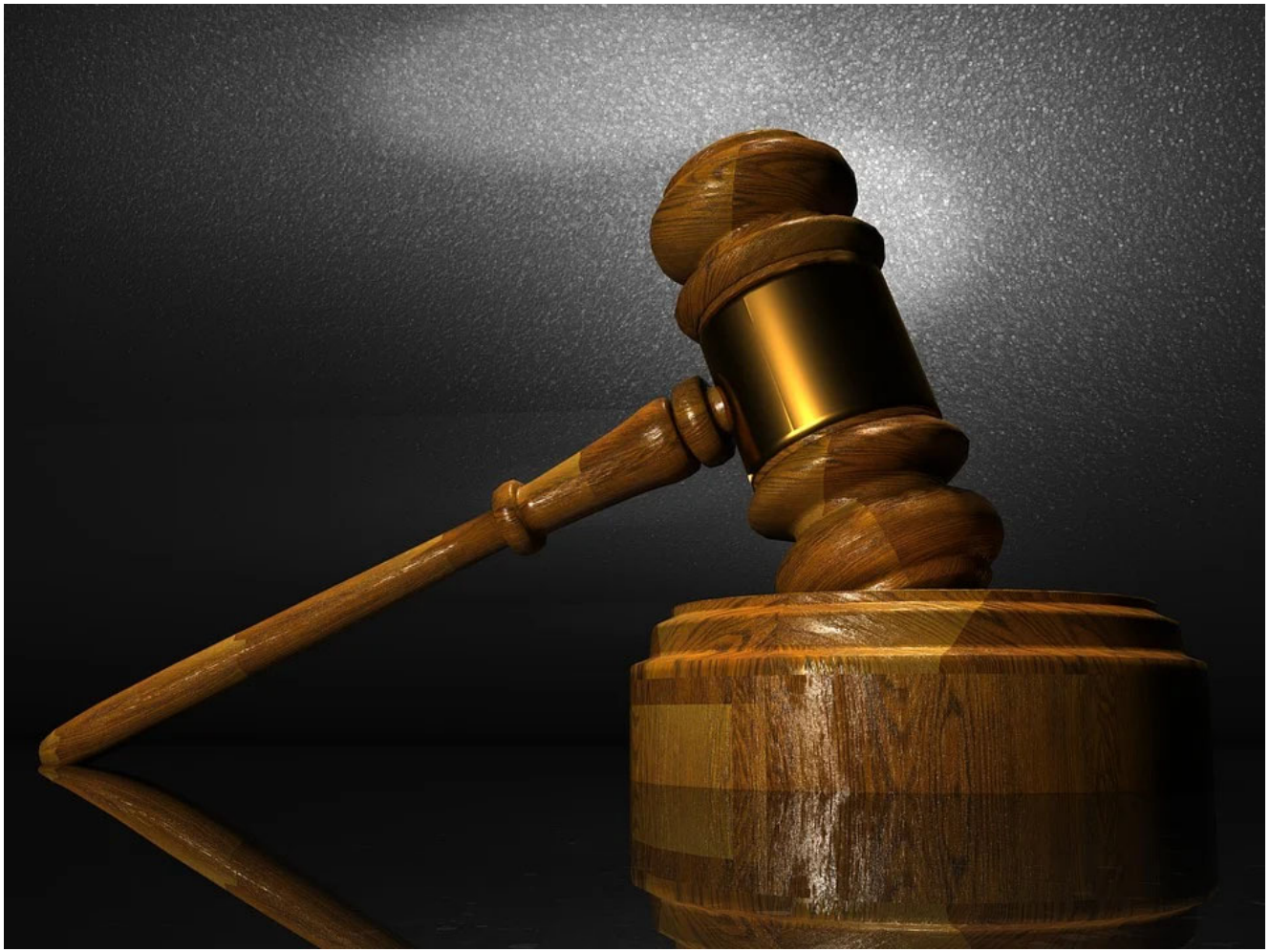
CHECKING DRUG HISTORY

CHECKING DRUG HISTORY

- Applies to persons required to register for prescription drug monitoring program.
- Prior to issuing prescription for outpatient use for an opioid analgesic or benzodiazepine listed in schedule II, III, or IV, the prescriber or the prescriber's delegate shall review the patient's prescription drug history for the preceding twelve (12) months from the prescription drug monitoring program and evaluate the data for indicators of prescription drug diversion or misuse.
- Review not required:
  - For patients receiving treatment in an inpatient setting; at the scene of an emergency or in an ambulance; in hospice care; or in a skilled nursing home care facility.
  - For a prescription in a quantity to last no more than three (3) days.

(IC 37-2722; see https://bom.idaho.gov/BOMPortal/BOM/Procedures/PDMP-FAQ.pdf)

COVID IMMUNITY



COVID IMMUNITY

Federal

- Public Readiness Emergency Preparedness Act ("PREP Act"),
  - Manufacture, distribution, prescription, administration and use of COVID countermeasures.
- Coronavirus Aid, Relief and Economic Security Act ("CARES Act")
  - Volunteer healthcare professionals providing COVID diagnosis, prevention or treatment.
- Volunteer Protection Act
  - Volunteers for nonprofits or government agencies

State

- Coronavirus Limited Immunity Act, IC 6-3403

CORONAVIRUS LIMITED IMMUNITY ACT

- An entity is immune from civil liability for damages or an injury resulting from exposure of an individual to coronavirus.
- Limitations
  - Does not apply to public health districts, federal or state of Idaho agencies (except colleges).
  - Does not apply to acts or omissions that constitute an intentional tort or willful or reckless misconduct, i.e., conduct in which a person makes a conscious decision to act in manner that person knows or should know creates an unreasonable risk of harm to another and involves a high probability that such harm will actually result.
  - Does not modify workers compensation laws.
  - Expires July 21, 2021.

(IC 6-3402 and 6-3403)

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QUESTIONS?

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