



Telehealth Legal and Policy Issues in 2018 and Beyond

Kentucky Telehealth Summit

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 @Lacktman

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Telemedicine is Growing Even Faster Than Anticipated

Foley's 2017 Telemedicine & Digital Health Survey:
2014 vs 2017

87%

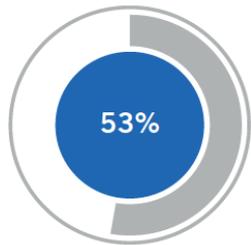
OF RESPONDENTS
TO 2014 SURVEY
DID NOT EXPECT
THEIR PATIENTS
TO BE USING
TELEMEDICINE
SERVICES.

76%

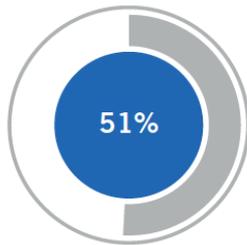
OF RESPONDENTS
TO 2017 SURVEY
OFFER OR PLAN
TO OFFER
TELEMEDICINE.

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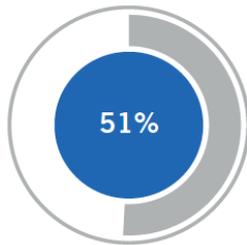
Current Perception of Opportunities in Telemedicine



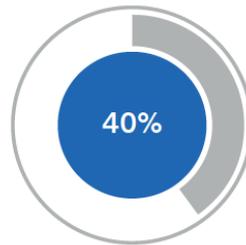
Second opinions or specialty opinions



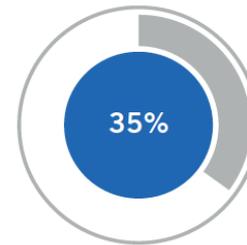
Mental health services



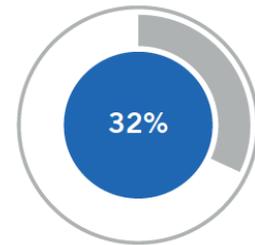
Remote patient monitoring



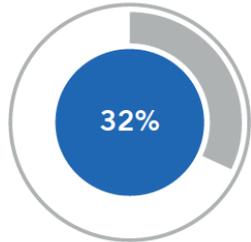
Urgent care or after-hours care



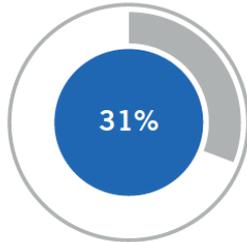
Outpatient hospital services



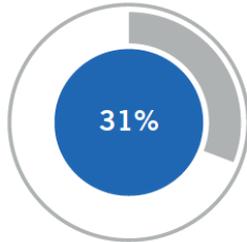
Emergency department services



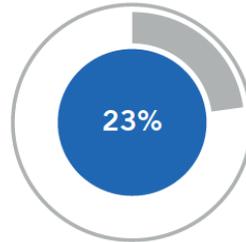
Store and forward uses (excluding radiology and pathology)



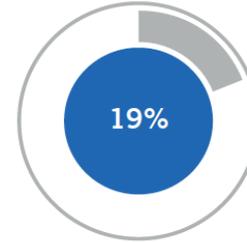
Inpatient hospital services



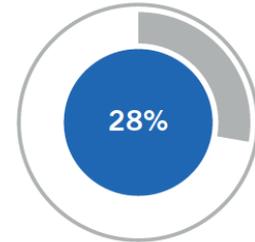
Telestroke



Destination medicine services



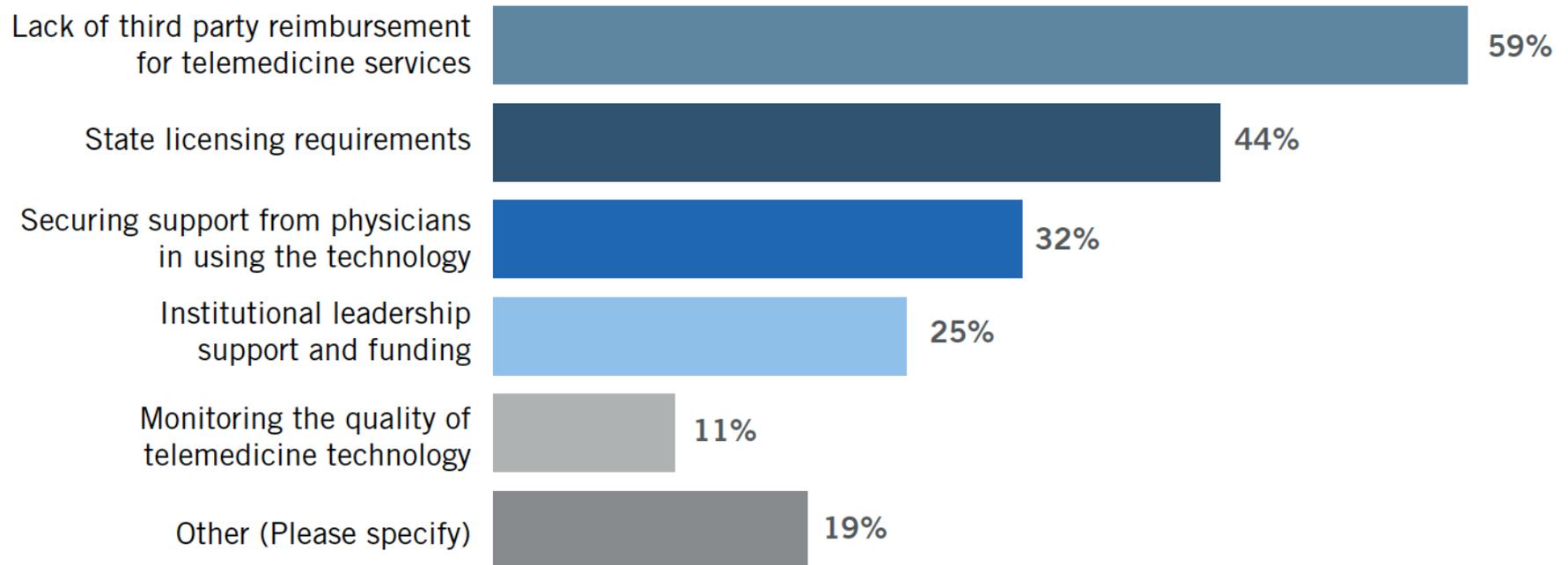
Telepharmacist



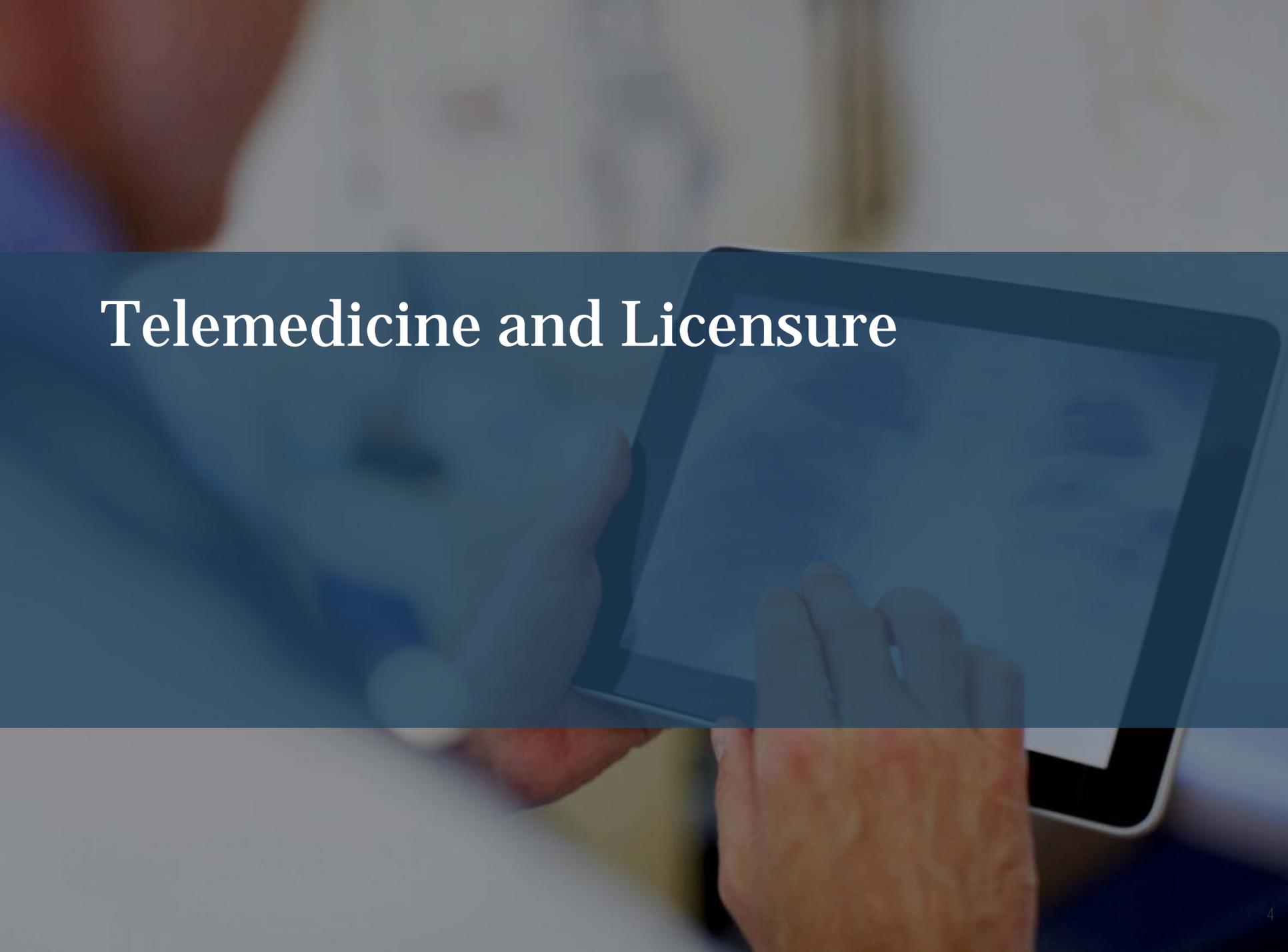
Other (please specify)

Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)

Current Perception of Obstacles in Telemedicine



Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)



Telemedicine and Licensure

Telemedicine and Licensing

- Physician offering care via telemedicine is subject to licensure rules of the state in which the patient is physically located at the time of the consult.
- State law expressly or implicitly requires licensure if the patient is located in the state at the time of the consult.
- Special rules for VA (May 11, 2018).
- Special rules for military and qualified military contractors when patient is located on base.

Notable Exceptions for Telemedicine



Consultation

Allows unlicensed physician to practice medicine in peer to peer consultation with a physician licensed in the state

Bordering State

Allows practice of medicine by out-of-state physicians who are licensed in a bordering state.

Special License or Registration

Abbreviated license or registration for telemedicine-only care

Follow-up Care

Allows physician to provide follow-up care to his/her patient (e.g., post-operation)

Kentucky Consultation Exception

- Kentucky licensure not required for a doctor located and licensed in another state who is in actual consultation with a Kentucky-licensed doctor.
 - An exception to licensure exists for “persons who, being nonresidents of Kentucky and lawfully licensed to practice medicine or osteopathy in their states of actual residence, infrequently engage in the practice of medicine or osteopathy within Kentucky, when called to see or attend particular patients in consultation and association with a [Kentucky-licensed] physician.” Ky. Rev. Stat. Ann. § 311.560(2)(b)(1).
 - A 2009 Board Opinion stated physician issuing the final report rendering a pathology diagnosis for a Kentucky patient must be licensed to practice medicine in Kentucky.
 - A 2007 Board Opinion stated a physician pathologist must be licensed in Kentucky if they diagnose a patient’s condition based upon a specimen that was taken from a patient in Kentucky.

	Must be free	Express Frequency limitations	No established connections or contract/ arrangement	No primary diagnosis	No Pathology	No Radiology	Informal/ No Written Opinion	No in-state office or meeting place	Other Restrictions
KY		X		X	X				



Telemedicine and Practice Standards

Telemedicine Practice Standards

- Modality Restrictions
- **Patient Consent**
- **Disclosures**
- Choice of provider
- **Verify patient identity**
- Peripherals
- **Medical Records**
- Originating site
- Special registration
- In-state affiliation

Telemedicine Practice Standards: Hot Policy Changes for 2018 and Beyond

- Can create doctor-patient relationship via telemedicine
 - Texas SB 1107
- Telemedicine business registration
- Limitations on tele-optometry and tele-ophthalmology
- Non-physician telehealth rules and supervision
- Asynchronous telemedicine
- Non-face-to-face services

Telemedicine and Prescribing

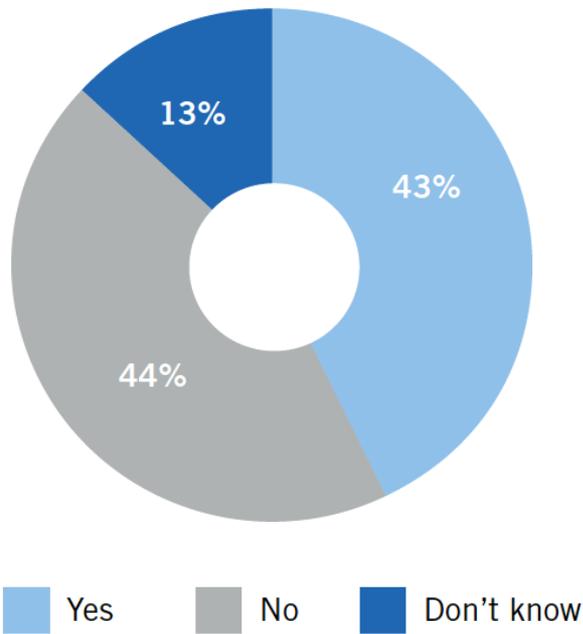
- Prescribe in connection with a provider-patient relationship
- What constitutes a valid provider-patient relationship?
- What constitutes a valid prescription?
 - Modality (state law)
 - Non-controlled substance? (state law)
 - Controlled substance? (state law)
 - Controlled substance? (federal law)
- *Not just professional board rules, but pharmacy board rules also*

Hot Issues in Controlled
Substances

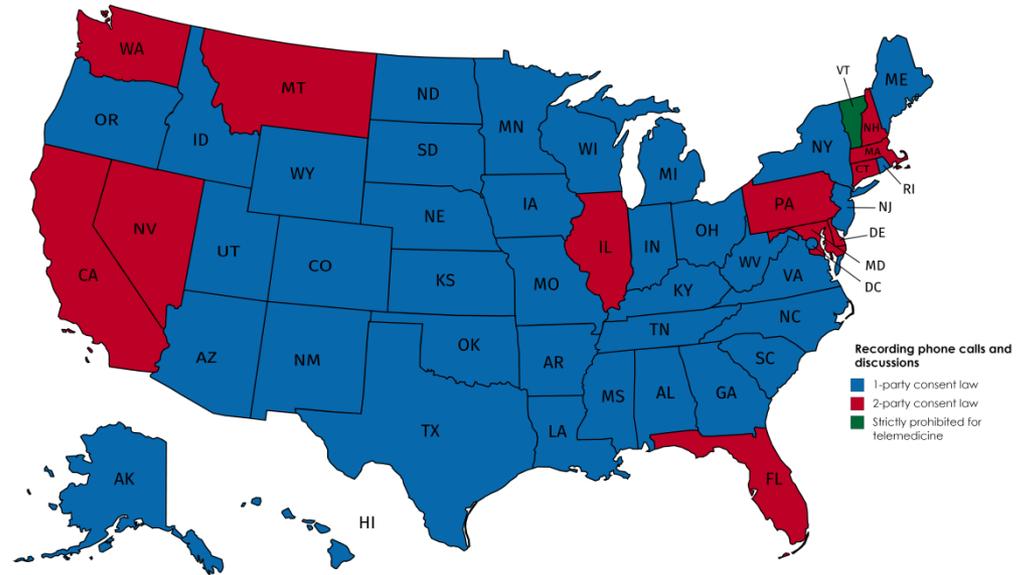
Analyzing Telemedicine Modalities and State Law

State	Modality used to establish valid doctor-patient relationship	Modality used after creating valid doctor-patient relationship	Modality used to prescribe non-controlled substances	Modality used to prescribe controlled substances	Internet prescribing rule prohibiting internet-based questionnaire?
Arizona	AV: Yes IA: No S&F: No	AV: Yes IA: Yes S&F: No	AV: Yes IA: No S&F: No	AV: Yes IA: No S&F: No	Yes
Florida	AV: Silent IA: Silent S&F: Silent	AV: Silent IA: Silent S&F: Silent	AV: Silent IA: Silent S&F: Silent	AV: Silent IA: Silent S&F: Silent	Yes
Kentucky	AV: Yes IA: Yes S&F: Yes	AV: Yes IA: Yes S&F: Yes	AV: Yes IA: Yes S&F: Yes	AV: Yes IA: Yes S&F: Yes	Yes
New Jersey	AV: Yes IA: Yes S&F: No (but may be used with AV and IA)	AV: Yes IA: Yes S&F: No (but may be used with AV and IA)	AV: Yes IA: Yes S&F: No*	AV: Yes (but restrictions for Schedule II) IA: Yes (but restrictions for Schedule II) S&F: Silent	Yes (questionnaires only prohibited before a doctor-patient relationship is established)

Recording Telemedicine Consults

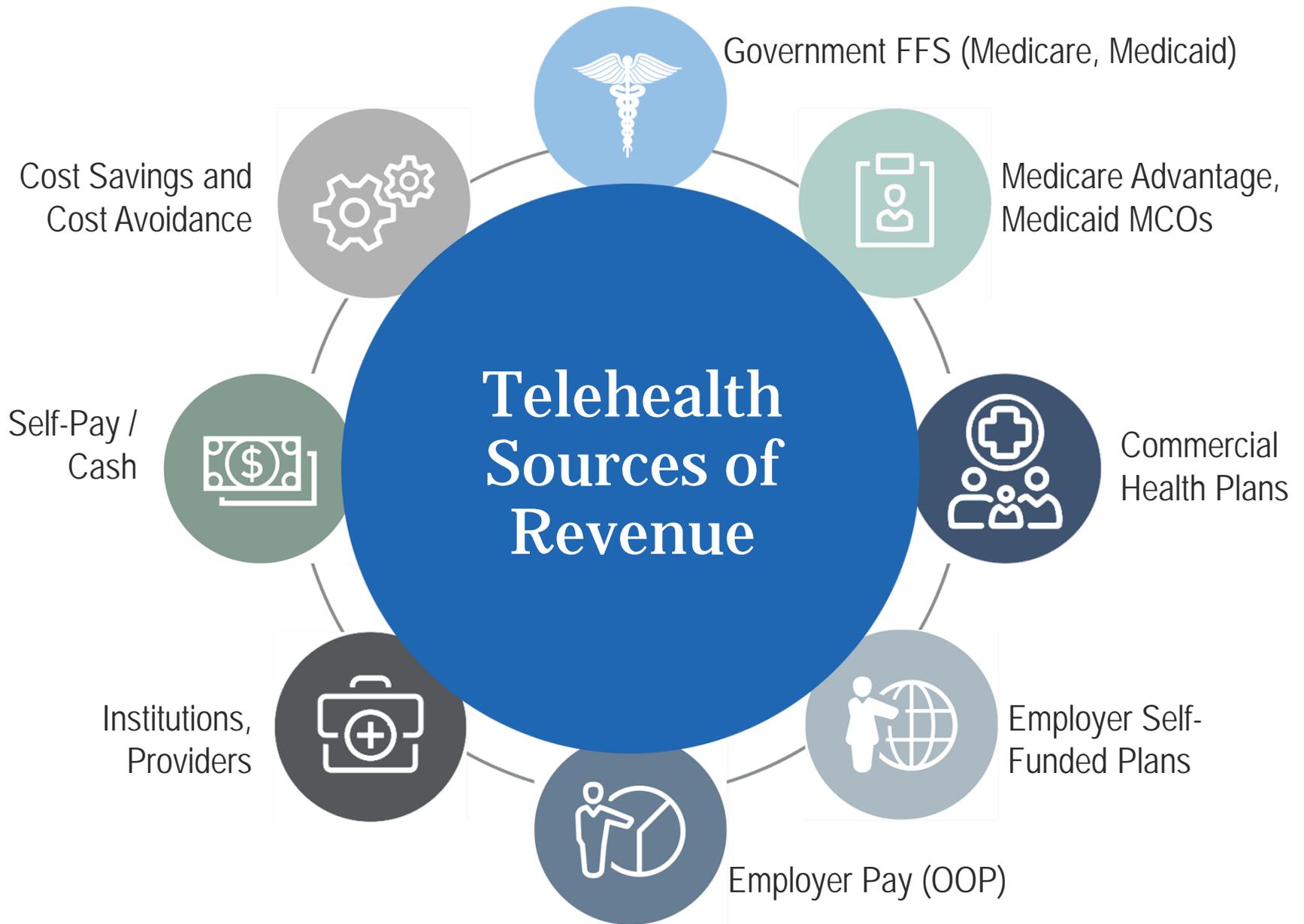


Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)





Telehealth Payment and Reimbursement

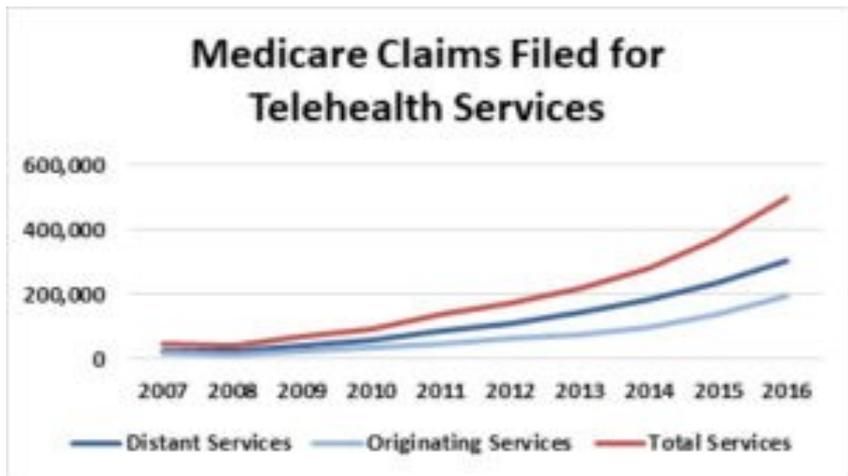
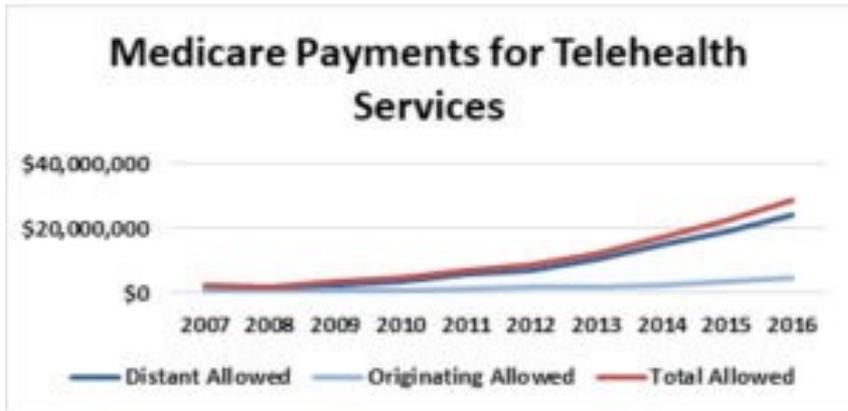


Telehealth and Medicare

1. Patient in a qualifying rural area
2. Patient at one of eight qualifying facilities (“originating site”)
3. Service provided by one of ten eligible professionals (“distant site practitioner”)
4. Technology is real-time audio-video (interactive audio and video telecommunications system that permits real-time communication between the beneficiary and the distant site provider)
5. The service is among the list of CPT/HCPCS codes covered by Medicare

Medicare Telehealth Payment Policy Changes for 2018

- POS 02, not GT
- Seven new codes for 2018:
 - G0296; CPT 90785; CPT 96160 and 96161; G0506 (Care Planning for Chronic Care Management); and CPT 90839 and 90840.
- New RPM payment (CPT 99091)
- Two new OIG projects to review telehealth billing compliance under Medicare and Medicaid



Medicare Telehealth Payment Policy Changes for 2019 and Beyond

Bipartisan Budget Act of 2018 introduced some of “the most significant changes ever made to Medicare law to use telehealth,” per Senator Brian Schatz, a longtime sponsor and proponent of federal telehealth legislation.

1. Expands stroke telemedicine coverage beyond rural areas (2019)
2. Expands telehealth coverage to homes and independent renal dialysis facilities (2019)
3. Allows providers to give free at-home telehealth technology/equipment to dialysis patients if certain requirements are met (2019)
4. Allows Medicare Advantage plans to include delivery of telehealth services in a plan’s basic benefits (2020)
5. Eliminates rural restrictions and adds patient home as a qualifying originating site for certain Accountable Care Organizations (2020)

Hot Issues in Medicare Telehealth Compliance

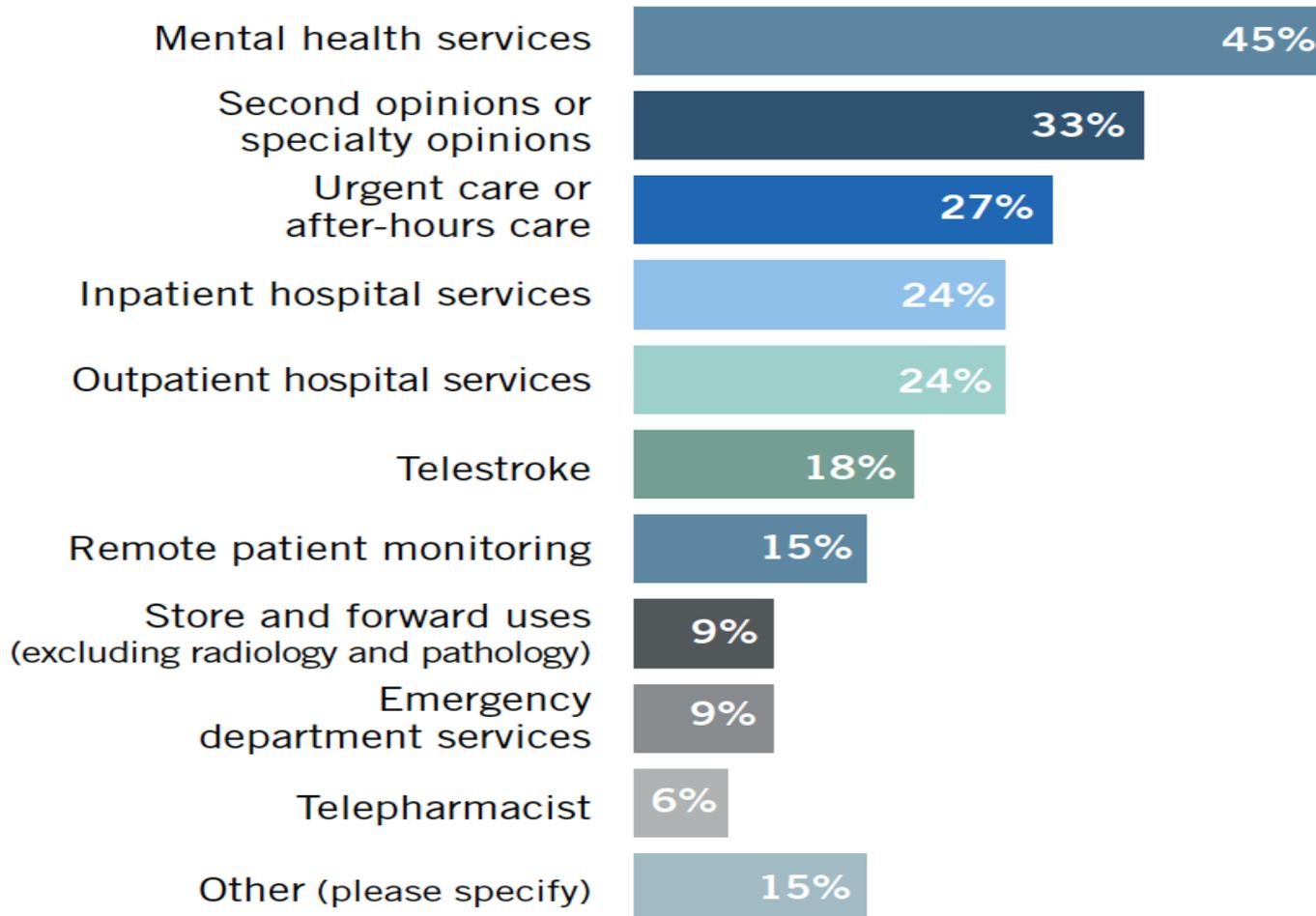
- Qualifying rural area*
- Qualifying originating site*
- Eligible modality*
- Overseas providers*
- Distant site billing for orig. site facility fee*
- Reassignment to originating site*
- Charging beneficiaries out of pocket for telehealth services*
- Telehealth vs non-face-to-face services*
- Telehealth admitting physician*
- Incident to billing*
- Global surgical period and post-op, follow-up care*
- G code and consultations*
- Telemedicine and EMTALA*
- Conditions of Participation vs. Conditions for Payment*

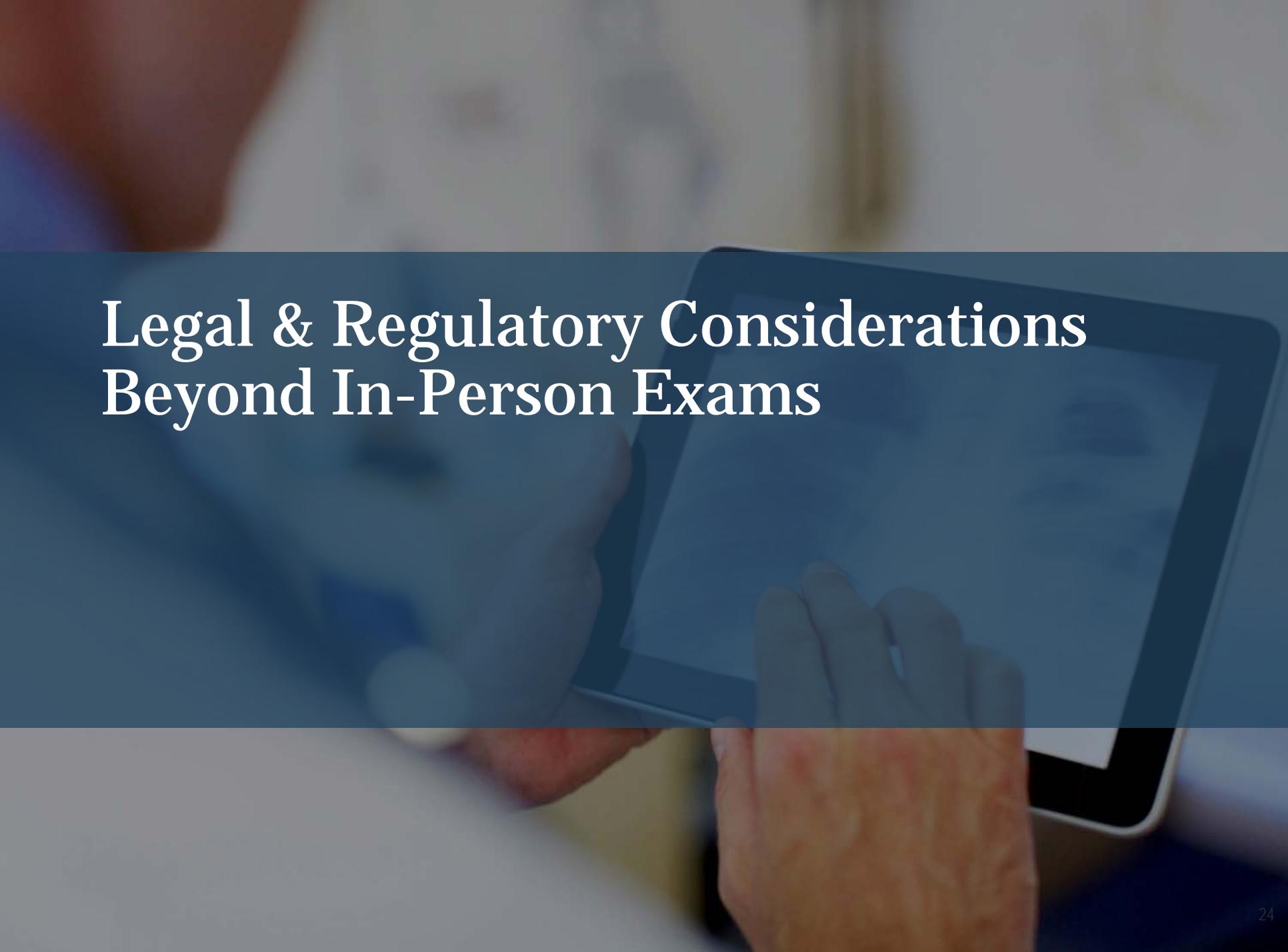
Medicaid Telehealth Payment Policy Changes for 2018

- 48 state Medicaid programs offer some type of coverage for telehealth services (most commonly interactive live video).
- 15 state Medicaid programs offer coverage of asynchronous (store-and-forward) telehealth services.
- 21 state Medicaid programs offer coverage of remote patient monitoring technologies.
- 42 state Medicaid programs offer coverage without geographic restrictions (e.g., rural or urban).
- 23 state Medicaid programs set forth a list of specific sites that can serve as an originating site.

Source: Center for Connected Health Policy *State Telehealth Laws and Reimbursement Policies* (Fall 2017).

Telehealth Health Plan Contracting



A person's hands are shown holding a tablet computer. The tablet screen is visible, though the content is not clearly legible. A semi-transparent blue overlay covers the middle portion of the image, containing the title text in white. The background is a blurred indoor setting.

Legal & Regulatory Considerations Beyond In-Person Exams

Legal & Regulatory Considerations

U.S. Federal

- Anti-Kickback Statute
- Physician Self-Referral
- Civil Monetary Penalty Law
- Payer Rules (including Medicare, Medicaid)
- FTC, FDA, DEA

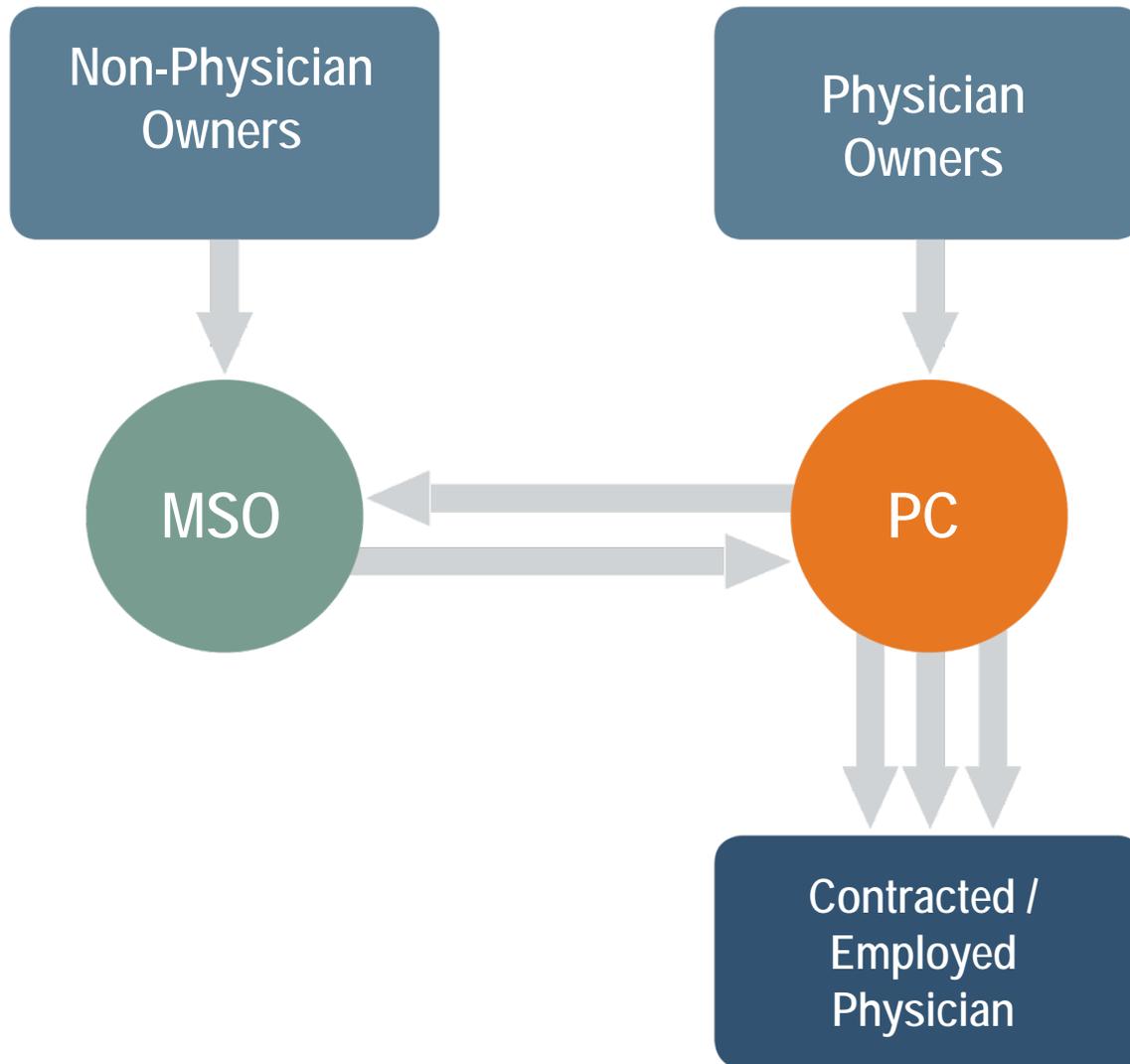
U.S. State

- Patient Brokering Acts
- Fee-Splitting Laws
- Self-Referral Laws
- Corporate Practice of Medicine
- Insurance Laws
- Supervision of NPPs
- eCommerce Considerations

International

- Foreign Corrupt Practices Act
- US Export Control Laws
- US Anti-Terrorism Laws
- US Anti-Boycott Laws
- International Corporate Laws and Tax
- Data protection; data ownership; data sharing
- Intellectual Property

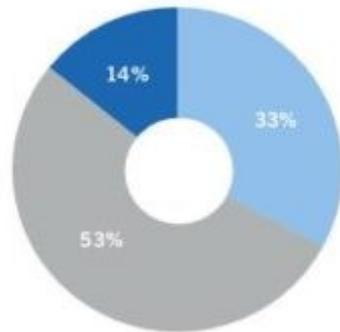
Investments in Multi-State Telemedicine



Telemedicine Credentialing by Proxy

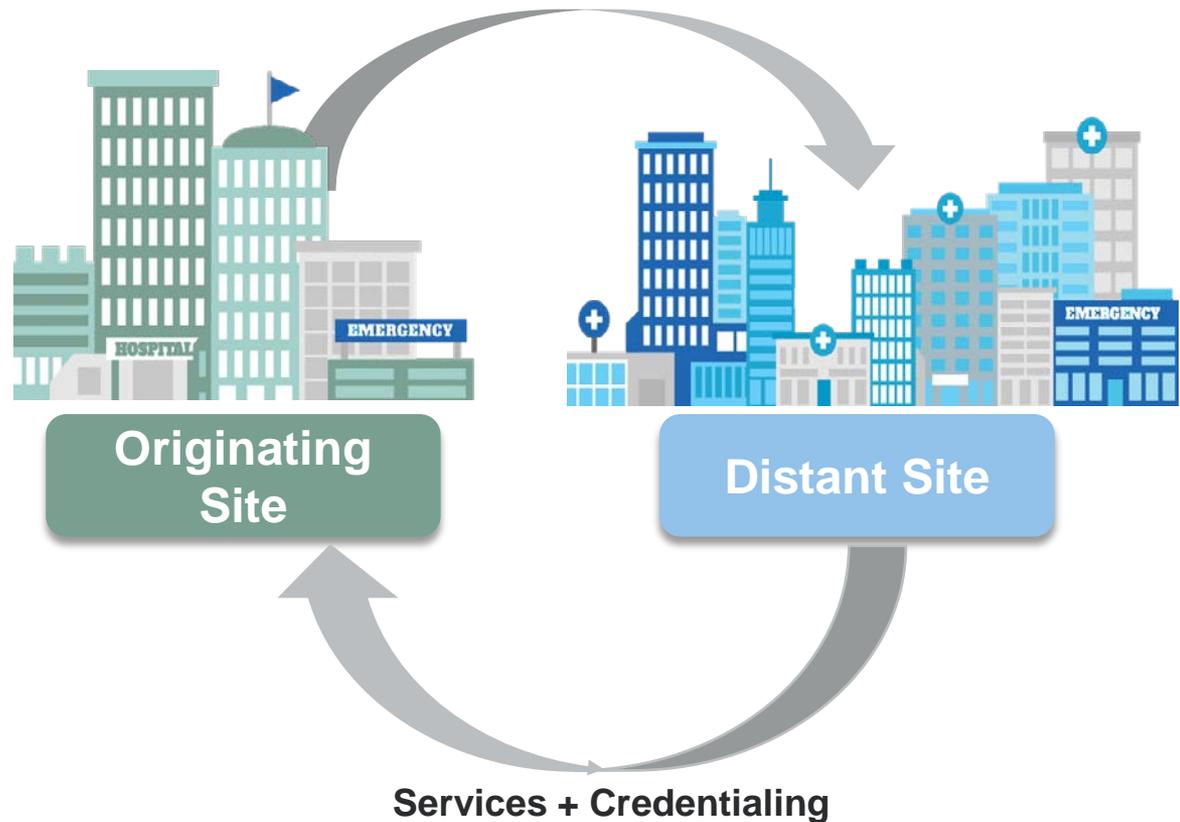
Data Reporting + Payment

19 DOES YOUR ORGANIZATION USE TELEMEDICINE CREDENTIALING BY PROXY FOR PHYSICIAN CREDENTIALING?

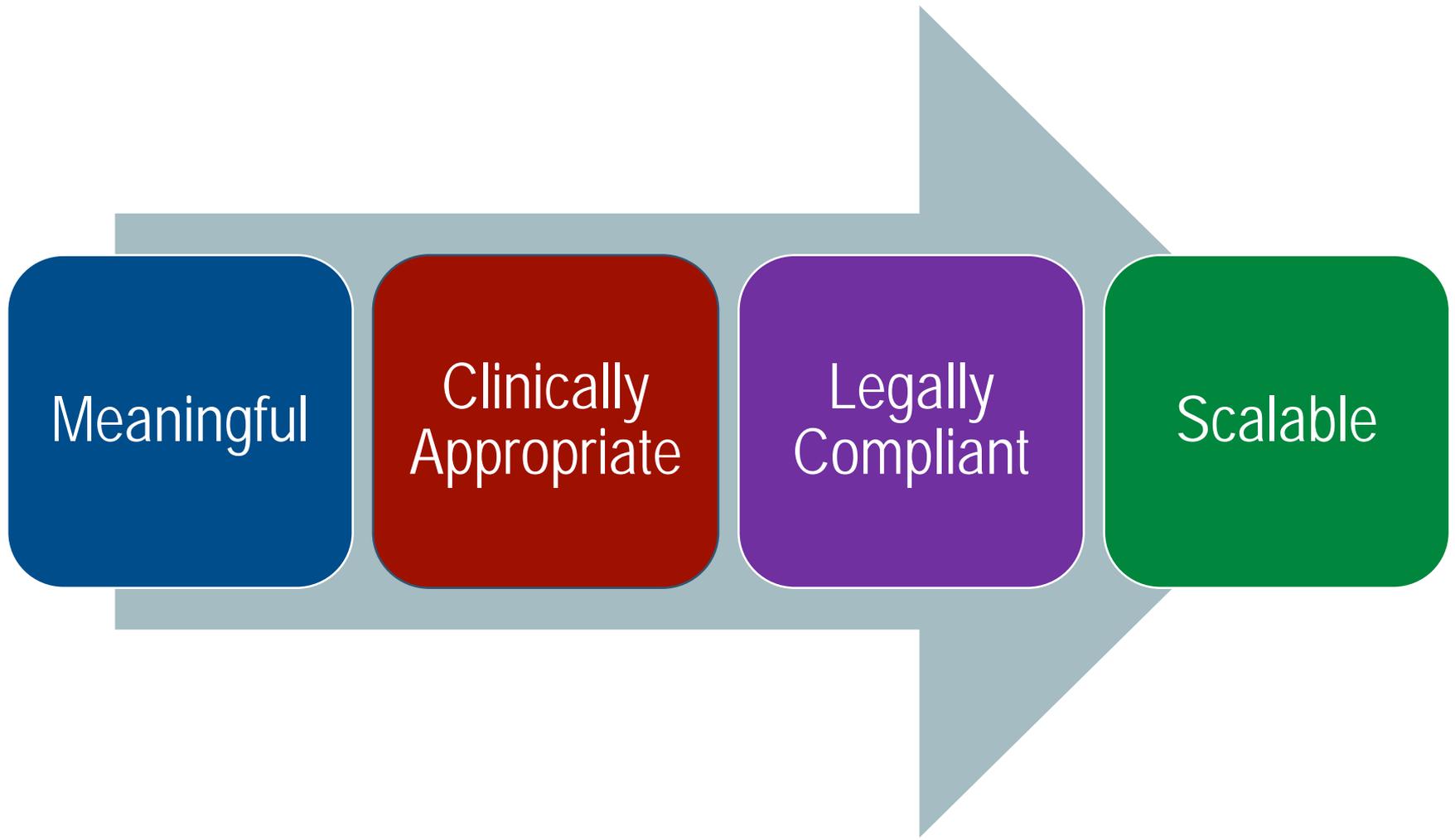


Yes No Don't know

Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)



Build a Telemedicine Offering That Is...



Speaker Contact



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Thank you

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