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RULE ADOPTIONS

Reporter

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Agency

LAW AND PUBLIC SAFETY > DIVISION OF CONSUMER AFFAIRS > STATE BOARD OF VETERINARY MEDICAL EXAMINERS

Administrative Code Citation

Adopted New Rules: N.J.A.C. 13:44-4A

Text

Telemedicine

Proposed: June 17, 2019, at 51 N.J.R. 939(a).

Adopted: January 29, 2020, by the State Board of Veterinary Medical Examiners, Mark W. Logan, VMD, President.

Filed: February 18, 2021, as R.2021 d.020, **without change.**

Authority: N.J.S.A. 45:16-3 and P.L. 2017, c. 117.

Effective Date: March 15, 2021.

Expiration Date: October 2, 2024.

Summary of Public Comments and Agency Responses:

The official comment period ended August 16, 2019. The Board received comments from the following individuals:

1. Andrew Lenton, Bayville Veterinary Hospital
2. Brianna McDowell, Bayville Veterinary Hospital
3. Glenn McDowell, Bayville Veterinary Hospital
4. Matthew Edson, DVM, President, New Jersey Veterinary Medical Association
5. Richard Alampi, Alampi & Associates Management Corporation
6. Claudia Duck Tucker, Vice President Government Affairs, Teladoc
7. Janet D. Donlin, DVM, CAE, Executive Vice President and Chief Executive Officer, AVMA

1. COMMENT: Two commenters point out that an October 5, 2017 letter from the Office of Legislative Services (OLS) stated that it did not appear that P.L. 2017, c. 117 authorizes veterinarians to engage in telehealth or telemedicine.

RESPONSE: The Board of Veterinary Medical Examiners (Board) has reviewed the letter referred to by the commenters and does not agree with OLS's conclusion that P.L. 2017, c. 117 does not apply to veterinarians. The letter states that, while N.J.S.A. 45:1-28, 34, and 58 recognize that veterinarians are health care professionals, P.L. 2017, c. 117, which is codified as N.J.S.A. 45:1-61 et seq., does not apply because veterinarians are not health care providers. The term "health care provider" is defined at P.L. 2017, c. 117 as "an individual who provides a health care service to a patient, and includes, but is not limited to, a licensed physician, nurse, nurse practitioner, psychologist, psychiatrist, psychoanalyst, clinical social worker, physician assistant, professional counselor, respiratory therapist, speech pathologist, audiologist, optometrist, or any other health care professional acting within the scope of a valid license or certification issued pursuant to Title 45 of the Revised Statutes." The letter states that the definition of "health care service" at N.J.S.A. 26:2H-2 governs who is or is not a health care provider. This statute, which regulates the accreditation of health care facilities, defines a "health care service" as "the preadmission, outpatient, inpatient, and post discharge care provided in or by a health care facility, and such other items or services as are necessary for such care, which are provided by or under the supervision of a physician for the purpose of health maintenance organizations, diagnosis, or treatment of human disease, pain, injury, disability, deformity, or physical condition, including, but not limited to, nursing service, home care nursing, and other paramedical service, ambulance service, service provided by an intern, resident in training or physician whose compensation is

provided through agreement with a health care facility, laboratory service, medical social service, drugs, biologicals, supplies, appliances, equipment, bed and board, but excluding services provided by a physician in his private practice, except as provided in sections 7 and 12 of P.L. 1971, c. 136 (C.26:2H-7 and 26:2H-12), or by practitioners of healing solely by prayer, and services provided by first aid, rescue, and ambulance squads as defined in the "New Jersey Highway Traffic Safety Act of 1987," P.L. 1987, c. 284 (C.27:5F-18 et seq.)." The letter states that, as a "health care service" is defined as addressing "human disease, pain, injury, disability, deformity, or physical condition" veterinarians cannot provide health care services as they do not provide services to humans.

The letter does not address the fact that the definition of "health care services" is limited to "care provided in or by a health care facility." Pursuant to the position taken by OLS in the letter, the only time P.L. 2017, c. 117 would apply is when a practitioner is providing services to a patient in a health care facility. It would be inappropriate to assume that telemedicine and telehealth can only be provided when a patient and a provider are in a health care facility, as there would be no need to use telecommunications to provide such services. It would also be inappropriate to argue that veterinarians are health care professionals as [page=428] recognized by N.J.S.A. 45:1-28, 34, and 58, but that they do not provide health care and, thus, are not health care providers.

As the letter referenced by the commenters articulates a position that does not appear to fully consider the implications of categorizing a veterinarian as a non-health care provider, the Board does not accept its contention that P.L. 2017, c. 117 does not apply to veterinarians. Veterinarians are health care providers who provide health care services to animals and they are subject to the provisions of P.L. 2017, c. 117.

2. COMMENT: A commenter contends that Senator Joseph Vitale and Governor Chris Christie's office both indicated prior to P.L. 2017, c. 117 being enacted that the bill did not cover veterinary practice. The commenter recognizes that veterinarians are identified as "health care providers" in some statutes, but points out that they are not considered health care providers, in statutes on Medicare, Medicaid, or health care insurance. The commenter requests that the Board not adopt the proposed new rules.

RESPONSE: As discussed in the Response to Comment 1, P.L. 2017, c. 117 applies to veterinarians as they provide health care services. While veterinarians may not be included in Medicare, Medicaid, or health care insurance statutes, that does not change the fact that

veterinarians are health care providers, as they are recognized as health care professionals by N.J.S.A. 45:1-28, 34, and 58, who provide health care services to animal patients. As they are health care providers, they are subject to P.L. 2017, c. 117.

3. COMMENT: A commenter contends that P.L. 2017, c. 117 was not intended to cover veterinary services and that the Board should not adopt the proposed new regulations. The commenter contends that provisions at P.L. 2017, c. 117 that address identification of patients do not apply to animals and, therefore, N.J.A.C. 13:44-4A.4, which addresses the establishment of a licensee-client-patient relationship for telemedicine and telehealth purposes, is not authorized by the law. The commenter contends that P.L. 2017, c. 117 does not apply to clients, the people who seek veterinary services for animal patients, and that N.J.A.C. 13:44-4A.5, which addresses providing services through telemedicine or telehealth, is also not authorized by the law.

RESPONSE: As discussed in the Response to Comment 1, P.L. 2017, c. 117 applies to veterinarians as they are health care providers who provide health care services. The Board drafted N.J.A.C. 13:44-4A.4 and 4A.5 to effectuate the provisions of P.L. 2017, c. 117, while recognizing the unique nature of veterinary practice with regard to relationships with patients.

4. COMMENT: Several of the commenters opposed the proposed new rules that permit licensed veterinarians to provide services through telemedicine and telehealth. The commenters contend that veterinary medicine cannot be practiced effectively or safely without a physical examination. The commenters contend that animal owners will often provide inaccurate information that can only be clarified through a physical examination. The commenters also contend that a licensee-client-patient relationship cannot be established over the phone or online. Prescriptions cannot be safely provided through telemedicine either. The commenters do not believe that veterinarians will be able to determine when the standard of care for services provided through telemedicine or telehealth are consistent with those provided in-person. The commenters are concerned that the proposed new rules will result in small, independent veterinary practices being pushed out of business.

RESPONSE: As discussed in the Response to Comment 1, P.L. 2017, c. 117 applies to veterinarians as they are health care providers and, therefore, the law prohibits the Board from requiring an in-person visit as a condition of providing services using telemedicine or telehealth. With regard to the commenters' concerns about the necessity of physical examinations in veterinary practice, the Board notes that, under the law, licensees must determine whether they can provide

services through telemedicine or telehealth consistent with the standard of care applicable when those services are provided in-person. If a veterinarian believes that he or she can provide services consistent with those provided in-person without a physical examination of a patient, P.L. 2017, c. 117 authorizes the veterinarian to provide these services through telemedicine or telehealth. If a veterinarian believes that he or she cannot do so, the veterinarian may not provide telemedicine or telehealth services. The Board believes that veterinarians will be able to make determinations as to the appropriateness of providing services through telemedicine or telehealth based upon their education and experience. The Board is not aware of any reason why P.L. 2017, c. 117 would lead to veterinary practices being closed.

5. COMMENT: A commenter recognizes the potential for telemedicine to improve access to care, but points out that telemedicine for veterinary care is relatively new and contends that there are no outcome data or published assessments regarding such care. The commenter is concerned that there is not enough professional guidance as to when it is appropriate to establish a veterinarian-client-patient relationship through electronic means.

RESPONSE: The Board believes that there is professional guidance as to the use of telemedicine and telehealth to provide health care services, including State and Federal laws, rules, and regulations and information from professional associations, such as the American Veterinary Medical Association. In conjunction with a licensee's education and experience, such guidance will help to inform professional decisions as to whether it is appropriate to provide services through telemedicine or telehealth.

6. COMMENT: A commenter points to the American Veterinary Medical Association's policy on telemedicine and its 2019 version of the Model Veterinary Practice Act as documents that provide guidance for the use of telemedicine to provide veterinary care.

RESPONSE: As discussed in the Response to Comment 5, the Board agrees that information provided by the American Veterinary Medical Association can provide guidance as to the appropriateness of using telemedicine and telehealth to provide health care services.

7. COMMENT: A commenter contends that the proposed new rules refer to physicians and podiatrists, not veterinarians, and that this indicates that P.L. 2017, c. 117 does not apply to veterinarians.

RESPONSE: The Board recognizes that there was a typographical error in the Regulatory Flexibility Statement where the term "physicians and podiatrists" was used as opposed to the term "veterinarians." The Board

trusts that this typographical error did not unduly confuse licensees as it is clear that the rulemaking and the proposed new rules apply to veterinarians.

8. COMMENT: A commenter points out that the proposed new rules would permit veterinarians to create veterinarian-client-patient relationships through electronic means. The commenter contends that Federal law prohibits creating such relationships through electronic means when a veterinarian issues a Veterinary Feed Directive, engages in extra-label drug use, or prepares and uses autogenous biologics. The commenter contends that the proposed new rules fall short of Federal law and could create confusion for licensed veterinarians.

RESPONSE: The fact that Federal laws prohibit telemedicine and telehealth in certain aspects of practice impacts whether health care services can be provided through telemedicine and telehealth consistent with the standard of care when such services are provided in-person. The Board anticipates that licensees will consider all applicable Federal and State laws when deciding whether to initiate or continue each telemedicine or telehealth encounter. The Board believes that the Federal laws identified by the commenter will help guide licensees in their determinations as to the appropriateness of providing health care services through telemedicine or telehealth, reducing licensee confusion.

9. COMMENT: Two commenters are concerned that requirements for veterinarian-client-patient relationships when veterinary services are provided through telemedicine or telehealth will not be met. The commenters posit that paraprofessionals will be able to make recommendations or prescriptions that would be approved by a licensed veterinarian who has not properly overseen the paraprofessional. The commenters are particularly concerned with N.J.A.C. 13:44-4A.4(c)1, which would allow for consultation without a licensee-client-patient relationship.

RESPONSE: Paraprofessionals should never provide unsupervised veterinary services as the commenter posits, whether through telemedicine and telehealth or in-person. Any instances of such behavior should be reported to the Board for possible disciplinary action. N.J.A.C. 13:44-4A.4(c)1 does permit licensees to provide informal consultations with another healthcare provider without a proper licensee-client-patient relationship. This provision of the rule is established pursuant to N.J.S.A. 45:1-63.

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A Federal standards analysis is not required because there are no Federal laws or standards applicable to the adopted new rules.

Full text of the adopted new rules follows:

SUBCHAPTER 4A. TELEMEDICINE

13:44-4A.1 Purpose and scope

(a) The purpose of this subchapter is to implement the provisions of P.L. 2017, c. 117 (N.J.S.A. 45:1-61 et seq.), which authorizes healthcare providers to engage in telemedicine and telehealth.

(b) This subchapter shall apply to all persons who are licensed by the Board as veterinarians.

(c) Pursuant to N.J.S.A. 45:1-62, a veterinarian must hold a license issued by the Board if he or she:

1. Is located in New Jersey and provides health care services to any patient located in or out of New Jersey by means of telemedicine or telehealth; or

2. Is located outside of New Jersey and provides health care services to any patient located in New Jersey by means of telemedicine or telehealth.

(d) Pursuant to N.J.S.A. 45:16-8.1, a veterinarian located in another state who consults on a case with a licensee in New Jersey through the use of information and communications technologies will not be required to obtain licensure in New Jersey in order to provide such consultation.

13:44-4A.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Asynchronous store-and-forward" means the acquisition and transmission of images, diagnostics, data, and medical information either to or from an originating site or to or from the licensee at a distant site, which allows for the patient to be evaluated without being physically present.

"Board" means the Board of Veterinary Medical Examiners.

"Client" means a patient's owner, owner's agent, or other person responsible for the patient.

"Cross-coverage service" means a licensee who engages in a remote medical evaluation of a patient, without in-person contact, at the request of another licensee who has established a proper licensee-client-patient relationship with the patient.

"Distant site" means a site at which a licensee is located while providing health care services by means of telemedicine or telehealth.

"Licensee" means an individual licensed by the Board as a veterinarian.

"On-call" means a licensee is available, where necessary, to physically attend to the urgent and follow-up needs of a patient for whom the licensee has temporarily assumed responsibility, as designated by the patient's primary care licensee or other health care provider of record.

"Originating site" means a site at which a patient is located at the time that health care services are provided to the patient by means of telemedicine or telehealth.

"Patient" means the animal or group of animals receiving veterinary services from a licensee.

"Telehealth" means the use of information and communications technologies, including telephones, remote patient monitoring devices, or other electronic means, to support clinical health care, provider consultation, patient and professional health-related education, public health, health administration, and other services in accordance with the provisions of P.L. 2017, c. 117 (N.J.S.A. 45:1-61 et seq.).

"Telemedicine" means the delivery of a health care service using electronic communications, information technology, or other electronic or technological means to bridge the gap between a health care licensee who is located at a distant site and a patient who is located at an originating site, either with or without the assistance of an intervening licensee, and in accordance with the provisions of P.L. 2017, c. 117 (N.J.S.A. 45:1-61 et seq.). "Telemedicine" does not include the use, in isolation, of audio-only telephone conversation, electronic mail, instant messaging, phone text, or facsimile transmission.

13:44-4A.3 Standard of care

(a) Prior to providing services through telemedicine or telehealth, a licensee shall determine whether providing those services through telemedicine or telehealth would be consistent with the standard of care applicable for those services when provided in-person.

(b) If a licensee determines, either before or during the provision of services, that services cannot be provided through telemedicine or telehealth in a manner that is consistent with in-person standards of care, the licensee shall not provide services through telemedicine or telehealth.

(c) A licensee who determines that services cannot be provided through telemedicine or telehealth pursuant to (b) above shall advise the client to obtain services in-person for the patient.

(d) A licensee who provides a diagnosis, treatment, or consultation recommendation, including discussions regarding the risk and benefits of a patient's treatment options, through telemedicine or telehealth shall be held to the same standard of care or practice standards as are applicable to in-person settings.

13:44-4A.4 Licensee-client-patient relationship

(a) Prior to providing services through telemedicine or telehealth, a licensee shall establish a licensee-client-patient relationship by:

1. Identifying the patient and the client with, at a minimum, the client's name, date of birth, phone number, and address. A licensee may also use a client's assigned identification number, Social Security number, photo, health insurance policy number, or other identifier associated directly with the client; and

2. Disclosing and validating the licensee's identity, license, title, and, if applicable, specialty and board certifications.

(b) Prior to an initial contact with a patient for the purpose of providing services to the patient using telemedicine or telehealth, a licensee shall:

1. Review the patient's history and any available records;

2. Determine whether he or she will be able to provide the same standard of care using telemedicine or telehealth as would be provided if the services were provided in-person. The licensee shall make this determination prior to each unique patient encounter; and

3. Provide the client the opportunity to sign a consent form that authorizes the licensee to release records of the encounter to the patient's primary care provider or other health care provider identified by the client.

(c) Notwithstanding (a) and (b) above, service may be provided through telemedicine or telehealth without a proper licensee-client-patient relationship if:

1. The provision of services is for informal consultations with another healthcare provider performed by a licensee outside the context of a contractual relationship, or on an irregular or infrequent basis, without the expectation or exchange of direct or indirect compensation;

2. The provision of services is during episodic consultations by a medical specialist located in another jurisdiction who provides consultation services, upon request, to a licensee in this State;

3. A licensee furnishes medical assistance in response to an emergency or disaster, provided that there is no charge for the medical assistance; or

4. A substitute licensee, who is acting on behalf of an absent licensee in the same specialty, provides health care services on an on-call or cross-coverage basis, provided that the absent licensee has designated the substitute licensee as an on-call licensee or cross-coverage service provider.

13:44-4A.5 Provision of services through telemedicine or telehealth

(a) As long as a licensee has satisfied the requirements of N.J.A.C. 13:44-4A.4, a licensee may provide health care services to a patient through the use of telemedicine and may engage in telehealth to support and facilitate the provision of health care services to patients.

(b) Prior to providing services through telemedicine or telehealth, a licensee shall determine the patient's originating site and record this information in the patient's record.

(c) A licensee providing healthcare services through telemedicine shall use interactive, real-time, two-way communication technologies, which shall include, except as provided in (e) below, a video component that allows a licensee to see a patient and client and the patient and client to see the licensee during the provision of services.

[page=430] (d) A licensee providing services through telemedicine or telehealth may use asynchronous store-and-forward technology to allow for the electronic transmission of:

1. Images;
2. Diagnostics;
3. Data; and
4. Medical information.

(e) If, after accessing and reviewing the patient's records, a licensee determines that he or she is able to meet the standard of care for such services if they were being provided in-person without using the video component described in (c) above, the licensee may use interactive, real-time, two-way audio in combination with asynchronous store-and-forward technology, without a video component.

(f) During the provision of services through telemedicine or telehealth, and after the provision of services, a licensee, or another designated licensee, shall provide his or her name, professional credentials, and contact information to the client. Such contact information shall enable the client to contact the licensee for at least 72 hours following the provision of services, or for a longer period if warranted by the patient's circumstances and accepted standards of care.

(g) Prior to providing services through telemedicine or telehealth, a licensee shall review any patient history or records provided by a client as follows:

1. For an initial encounter with a patient, history and records shall be reviewed prior to the provision of services through telemedicine or telehealth; and

2. For any subsequent interactions with a patient, history and records shall be reviewed either prior to the provision of services through telemedicine or telehealth or contemporaneously with the encounter with the patient.

(h) After the provision of services through telemedicine or telehealth, a licensee shall provide the client, upon request, with the patient's records created due to the services provided.

(i) A licensee shall provide, upon a client's written request, the patient's information to the patient's primary care provider.

(j) A licensee engaging in telemedicine or telehealth shall refer a patient for follow-up care when necessary.

13:44-4A.6 Prescriptions

(a) A licensee providing services through telemedicine or telehealth may issue a prescription to a patient, as long as the issuance of such a prescription is consistent with the standard of care or practice standards applicable to the in-person setting.

(b) A licensee shall not issue a prescription based solely on responses provided in an online questionnaire, unless the licensee has

established a proper licensee-client-patient relationship pursuant to N.J.A.C. 13:44-4A.4.

(c) Notwithstanding (a) above, a licensee shall not issue a prescription for a Schedule II controlled dangerous substance unless the licensee has had an initial in-person examination of the patient and a subsequent in-person visit with the patient at least every three months for the duration of the time the patient is prescribed the Schedule II controlled dangerous substance.

13:44-4A.7 Records

A licensee who provides services through telemedicine or telehealth shall maintain a record of the care provided to a patient. Such records shall comply with the requirements of N.J.A.C. 13:44-4A.9, and all other applicable State and Federal statutes, rules, and regulations for recordkeeping, confidentiality, and disclosure of a patient's record.

13:44-4A.8 Prevention of fraud and abuse

(a) In order to establish that a licensee has made a good faith effort to prevent fraud and abuse when providing services through telemedicine or telehealth, a licensee must establish written protocols that address:

1. Authentication and authorization of users;
2. Authentication of the patient and client during the initial intake pursuant to N.J.A.C. 13:44-4A.4(a)1;
3. Authentication of the origin of information;
4. The prevention of unauthorized access to the system or information;
5. System security, including the integrity of information that is collected, program integrity, and system integrity;
6. Maintenance of documentation about system and information usage;
7. Information storage, maintenance, and transmission; and
8. Synchronization and verification of patient profile data.

13:44-4A.9 Privacy and notice to patients

(a) Licensees who provide services through telemedicine or telehealth, or their authorized representatives, shall, prior to providing services, give clients notice regarding telemedicine and telehealth, including the risks and benefits of being treated through telemedicine or telehealth and how to receive follow-up care or

assistance in the event of an adverse reaction to the treatment or in the event of an inability to communicate as a result of a technological or equipment failure. A licensee shall obtain a signed and dated statement indicating that the client received this notice.

(b) When telemedicine or telehealth is unable to provide all pertinent clinical information that a licensee exercising ordinary skill and care would deem reasonably necessary to provide care to a patient, the licensee shall inform the client of this prior to the conclusion of the provision of care through telemedicine or telehealth and shall advise the client regarding the need for the patient to obtain an additional in-person medical evaluation reasonably able to meet the patient's needs.

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