

# ARKANSAS REGISTER

## Proposed Rule Cover Sheet



Secretary of State  
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Name of Department \_\_\_\_\_

Agency or Division Name \_\_\_\_\_

Other Subdivision or Department, If Applicable \_\_\_\_\_

Previous Agency Name, If Applicable \_\_\_\_\_

Contact Person \_\_\_\_\_

Contact E-mail \_\_\_\_\_

Contact Phone \_\_\_\_\_

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Name of Rule \_\_\_\_\_

Newspaper Name \_\_\_\_\_

Date of Publishing \_\_\_\_\_

Final Date for Public Comment \_\_\_\_\_

Location and Time of Public Meeting \_\_\_\_\_

TOC not required

105.190

Telemedicine

8-1-181-1-  
22

Telemedicine is defined as the use of electronic information and communication technology to deliver healthcare services including without limitation, the assessment, diagnosis, consultation, treatment, education, care management, and self-management of a patient/client. Telemedicine includes store-and-forward technology and remote patient/client monitoring.

Store-and-forward technology is the transmission of a patient/client's medical information from a healthcare provider at an originating site to a healthcare provider at a distant site. An originating site includes the home of a client. Remote patient/client monitoring means the use of electronic information and communication technology to collect personal health information and medical data from a patient/client at an originating site that is transmitted to a healthcare provider at a distant site for use in the treatment and management of medical conditions that require frequent monitoring.

Arkansas Medicaid shall provide payment to a licensed or certified healthcare professional or a licensed or certified entity for services provided through telemedicine if the service provided through telemedicine is comparable to the same service provided in person. Payment will include a reasonable facility fee to the originating site operated by a licensed or certified healthcare professional or licensed or certified healthcare entity if the professional or entity is authorized to bill Arkansas Medicaid directly for healthcare services. There is no facility fee for the distant site. The professional or entity at the distant site must be an enrolled Arkansas Medicaid Provider. Any other originating sites are not eligible to bill a facility fee.

Coverage and reimbursement for services provided through telemedicine will be on the same basis as for services provided in person. While a distant site facility fee is not authorized under the Telemedicine Act, if reimbursement includes payment to an originating site (as outlined in the above paragraph), the combined amount of reimbursement to the originating and distant sites may not be less than the total amount allowed for healthcare services provided in person.

### Professional Relationship

The distant site healthcare provider will not utilize telemedicine services with a patient/client unless a professional relationship exists between the provider and the patient/client. A professional relationship exists when, at a minimum:

1. The healthcare provider has previously conducted an in-person examination of the patient/client and is available to provide appropriate follow-up care;
2. The healthcare provider personally knows the patient/client and the patient/client's health status through an ongoing relationship and is available to provide follow-up care;
3. The treatment is provided by a healthcare provider in consultation with, or upon referral by, another healthcare provider who has an ongoing professional relationship with the patient/client and who has agreed to supervise the patient/client's treatment including follow-up care;
4. An on-call or cross-coverage arrangement exists with the patient/client's regular treating healthcare provider or another healthcare provider who has established a professional relationship with the patient/client; or
5. A relationship exists in other circumstances as defined by the Arkansas State Medical Board (ASMB) or a licensing or certification board for other healthcare providers under the jurisdiction of the appropriate board if the rules are no less restrictive than the rules of the ASMB.
  - a. A professional relationship is established if the provider performs a face to face examination using real time audio and visual telemedicine technology that

provides information at least equal to such information as would have been obtained by an in-person examination. (See ASMB Regulation 2.8); ~~or~~

- b. If the establishment of a professional relationship is permitted via telemedicine under the guidelines outlined in ASMB regulations, telemedicine may be used to establish the professional relationship only for situations in which the standard of care does not require an in-person encounter and only under the safeguards established by the healthcare professional's licensing board (See ASMB Regulation 38 for these safeguards including the standards of care); ~~or~~

6. The healthcare professional who is licensed in Arkansas has access to a client's personal health record maintained by a healthcare professional and uses any technology deemed appropriate by the healthcare professional, including the telephone, with a client located in Arkansas to diagnose, treat, and if clinically appropriate, prescribe a noncontrolled drug to the client.

A health record is created with the use of telemedicine, consists of relevant clinical information required to treat a client, and is reviewed by the healthcare professional who meets the same standard of care for a telemedicine visit as an in-person visit.

A professional relationship does not include a relationship between a healthcare provider and a patient/client established only by the following:

1. An internet questionnaire;
2. An email message;
3. A patient/client-generated medical history;
- ~~4. Audio only communication, including without limitation interactive audio;~~
- ~~45. Text messaging;~~
- ~~56. A facsimile machine (Fax) and EFax; or~~
- ~~67. Any combination of the above; or~~
- ~~78. Any future technology that does not meet the criteria outlined in this section.~~

The existence of a professional relationship is not required when:

1. An emergency situation exists; or
2. The transaction involves providing information of a generic nature not meant to be specific to an individual patient/client.

Once a professional relationship is established, the healthcare provider may provide healthcare services through telemedicine, including interactive audio, if the healthcare services are within the scope of practice for which the healthcare provider is licensed or certified and in accordance with the safeguards established by the healthcare professionals licensing board. ~~The use of interactive audio is not reimbursable under Arkansas Medicaid.~~

### **Telemedicine with a Minor Client**

Regardless of whether the individual-provider is compensated for healthcare services, if a healthcare provider seeks to provide telemedicine services to a minor in a school setting and the minor client is enrolled in Arkansas Medicaid, the healthcare provider shall:

1. Be the designated Primary Care Provider (PCP) for the minor client;
2. Have a cross-coverage arrangement with the designated PCP of the minor client; or
3. Have a referral from the designated PCP of the minor client.

If the minor client does not have a designated PCP, this section does not apply. Only the parent or legal guardian of the minor client may designate a PCP for a minor client.

## Telemedicine Standard of Care

Healthcare services provided by telemedicine, including without limitation a prescription through telemedicine, shall be held to the same standard of care as healthcare services provided in person. A healthcare provider providing telemedicine services within Arkansas shall follow applicable state and federal laws, rules and regulations regarding:

1. Informed consent;
2. Privacy of individually identifiable health information;
3. Medical record keeping and confidentiality, and
4. Fraud and abuse.

A healthcare provider treating ~~patient~~client in Arkansas through telemedicine shall be fully licensed or certified to practice in Arkansas and is subject to the rules of the appropriate state licensing or certification board. This requirement does not apply to the acts of a healthcare provider located in another jurisdiction who provides only episodic consultation services.

## Telemedicine Exclusions

Telemedicine does not include the use of:

1. Audio-only communication unless the audio-only communication is in real-time, is interactive, and substantially meets the requirements for a health care service that would otherwise be covered by the health benefit plan:
  - a. Documentation of the engagement between patient and provider via audio-only communication shall be placed in the medical record addressing the problem, content of the conversation, medical decision-making, and plan of care after the contact;
  - b. Medical documentation is subject to the same audit and review process required by payers and governmental agencies when requesting documentation of other care delivery such as in-office or face-to-face visits;
2. A facsimile machine;
3. Text messaging; or
4. Email.

## FINANCIAL IMPACT STATEMENT

**PLEASE ANSWER ALL QUESTIONS COMPLETELY**

**DEPARTMENT** Department of Human Services

**DIVISION** Division of Medical Services

**PERSON COMPLETING THIS STATEMENT** Jason Callan

**TELEPHONE** 501-320-6540 **FAX** 501-682-8155 **EMAIL:** Jason.Callan@dhs.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

**SHORT TITLE OF THIS RULE** Section I 1-21 – Telemedicine

1. Does this proposed, amended, or repealed rule have a financial impact? Yes ☐ No ☒
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes ☒ No ☐
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes ☒ No ☐

If an agency is proposing a more costly rule, please state the following:

(a) How the additional benefits of the more costly rule justify its additional cost;

\_\_\_\_\_

(b) The reason for adoption of the more costly rule;

\_\_\_\_\_

(c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;

\_\_\_\_\_

(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

\_\_\_\_\_

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

(a) What is the cost to implement the federal rule or regulation?

**Current Fiscal Year**

General Revenue	<u>\$0</u>
Federal Funds	<u>\$0</u>
Cash Funds	<u></u>
Special Revenue	<u></u>

**Next Fiscal Year**

General Revenue	<u>\$0</u>
Federal Funds	<u>\$0</u>
Cash Funds	<u></u>
Special Revenue	<u></u>

Other (Identify) \_\_\_\_\_  
 \_\_\_\_\_  
 Total \$0 \_\_\_\_\_

Other (Identify) \_\_\_\_\_  
 \_\_\_\_\_  
 Total \$0 \_\_\_\_\_

(b) What is the additional cost of the state rule?

**Current Fiscal Year**

General Revenue \$0 \_\_\_\_\_  
 Federal Funds \$0 \_\_\_\_\_  
 Cash Funds \_\_\_\_\_  
 Special Revenue \_\_\_\_\_  
 Other (Identify) \_\_\_\_\_  
 Total \$ 0 \_\_\_\_\_

**Next Fiscal Year**

General Revenue \$0 \_\_\_\_\_  
 Federal Funds \$0 \_\_\_\_\_  
 Cash Funds \_\_\_\_\_  
 Special Revenue \_\_\_\_\_  
 Other (Identify) \_\_\_\_\_  
 Total \$ 0 \_\_\_\_\_

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

**Current Fiscal Year**

\$ \_\_\_\_\_

**Next Fiscal Year**

\$ \_\_\_\_\_

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

**Current Fiscal Year**

\$ 0 \_\_\_\_\_

**Next Fiscal Year**

\$ 0 \_\_\_\_\_

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes ☐ No ☒

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
  - (a) justifies the agency's need for the proposed rule; and
  - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;

- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
  - (a) the rule is achieving the statutory objectives;
  - (b) the benefits of the rule continue to justify its costs; and
  - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

## Statement of Necessity and Rule Summary

### Section I 1-21 -Telemedicine

**Why is this change necessary? Please provide the circumstances that necessitate the change.**

The 93<sup>rd</sup> General Assembly enacted Act 767 and Act 829. Act 767 amends the Telemedicine Act to allow the originating site to include the home of the client. Act 829 amends the Telemedicine Act to allow provider reimbursement for telemedicine provided via telephone. The Division of Medical Services is revising Section I of the General Provider Manual to reflect the changes in these two (2) acts.

**What is the change? Please provide a summary of the change.**

**Section I- General**

**Section 105.190 (Telemedicine)**

- Replaced the word “patient” with “client” throughout the section.
- Added, “An originating site includes the home of a client.”
- Added, “Any other originating sites are not eligible to bill a facility fee.”
- In number three (#3) on the first page, added the word “...professional...”
- Added, “6. The healthcare professional who is licensed in Arkansas has access to a client’s personal health record maintained by a healthcare professional and uses any technology deemed appropriate by the healthcare professional, including the telephone, with a client located in Arkansas to diagnose, treat, and if clinically appropriate, prescribe a noncontrolled drug to the client.”
- Added, “A health record is created with the use of telemedicine, consists of relevant clinical information required to treat a client, and is reviewed by the healthcare professional who meets the same standard of care for a telemedicine visit as an in-person visit.”
- Deleted, “4. Audio only communication, including without limitation interactive audio;”
- Deleted, “The use of interactive audio is not reimbursable under Arkansas Medicaid.”
- In the ‘Telemedicine with a Minor’ section, the word “client” follows the word “minor” throughout the section.
  - Replaced “individual” with “provider.”
- Added, “Telemedicine Exclusions” section.

“Telemedicine does not include the use of:

  1. Audio-only communication unless the audio-only communication is in real-time, is interactive, and substantially meets the requirements for a health care service that would otherwise be covered by the health benefit plan:
    - a. Documentation of the engagement between patient and provider via audio-only communication shall be placed in the medical record addressing the problem, content of the conversation, medical decision-making, and plan of care after the contact.
    - b. Medical documentation is subject to the same audit and review process required by payers and governmental agencies when requesting documentation of other care delivery such as in-office or face-to-face visits.
  2. A facsimile machine;
  3. Text messaging; or
  4. Email.”



**Please attach additional documents if necessary**

## NOTICE OF RULE MAKING

The Director of the Division of Medical Services of the Department of Human Services announces for a public comment period of thirty (30) calendar days a notice of rulemaking for the following proposed rule under one or more of the following chapters, subchapters, or sections of the Arkansas Code: §§ 25-10-129, 20-76-201, and 20-77-107.

### **Effective January 1, 2022:**

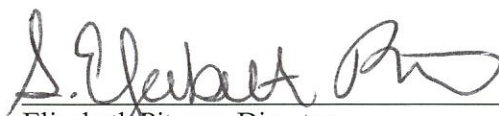
The Director of the Division of Medical Services (DMS) amends Section I f the General Provider Manual to incorporate Acts 767 and 829 of the 93<sup>rd</sup> General Assembly. DMS adds that an originating site includes the home of a client. DMS clarifies that only originating sites operated by a licensed or certified healthcare professional or entity are eligible to bill a facility fee. DMS also adds criteria to establish a professional relationship for health care providers licensed in Arkansas who have access to the personal health record maintained by a health care professional and uses technology deemed appropriate to diagnose and treat. Telemedicine Exclusions are added. The exclusion to telemedicine includes audio only communication (unless the communication is in real-time, is interactive, and substantially meets the requirements for a health care service that would otherwise be covered by the health benefit plan); fax machines; text messaging; or email.

The proposed rule is available for review at the Department of Human Services (DHS) Office of Rules Promulgation, 2nd floor Donaghey Plaza South Building, 7th and Main Streets, P. O. Box 1437, Slot S295, Little Rock, Arkansas 72203-1437. You may also access and download the proposed rule at <https://humanservices.arkansas.gov/do-business-with-dhs/proposed-rules/>. Public comments must be submitted in writing at the above address or at the following email address: [ORP@dhs.arkansas.gov](mailto:ORP@dhs.arkansas.gov). All public comments must be received by DHS no later than November 8, 2021. Please note that public comments submitted in response to this notice are considered public documents. A public comment, including the commenter's name and any personal information contained within the public comment, will be made publicly available and may be seen by various people.

A public hearing by remote access only through a Zoom webinar will be held on October 19, 2021, at 11:30 a.m. and public comments may be submitted at the hearing. Individuals can access this public hearing at <https://us02web.zoom.us/j/86967967222>. The webinar ID is **869 6796 7222**. If you would like the electronic link, "one-tap" mobile information, listening only dial-in phone numbers, or international phone numbers, please contact ORP at [ORP@dhs.arkansas.gov](mailto:ORP@dhs.arkansas.gov).

If you need this material in a different format, such as large print, contact the Office of Rules Promulgation at 501-396-6428.

The Arkansas Department of Human Services is in compliance with Titles VI and VII of the Civil Rights Act and is operated, managed and delivers services without regard to religion, disability, political affiliation, veteran status, age, race, color or national origin. 4502035775

  
Elizabeth Pitman, Director  
Division of Medical Services