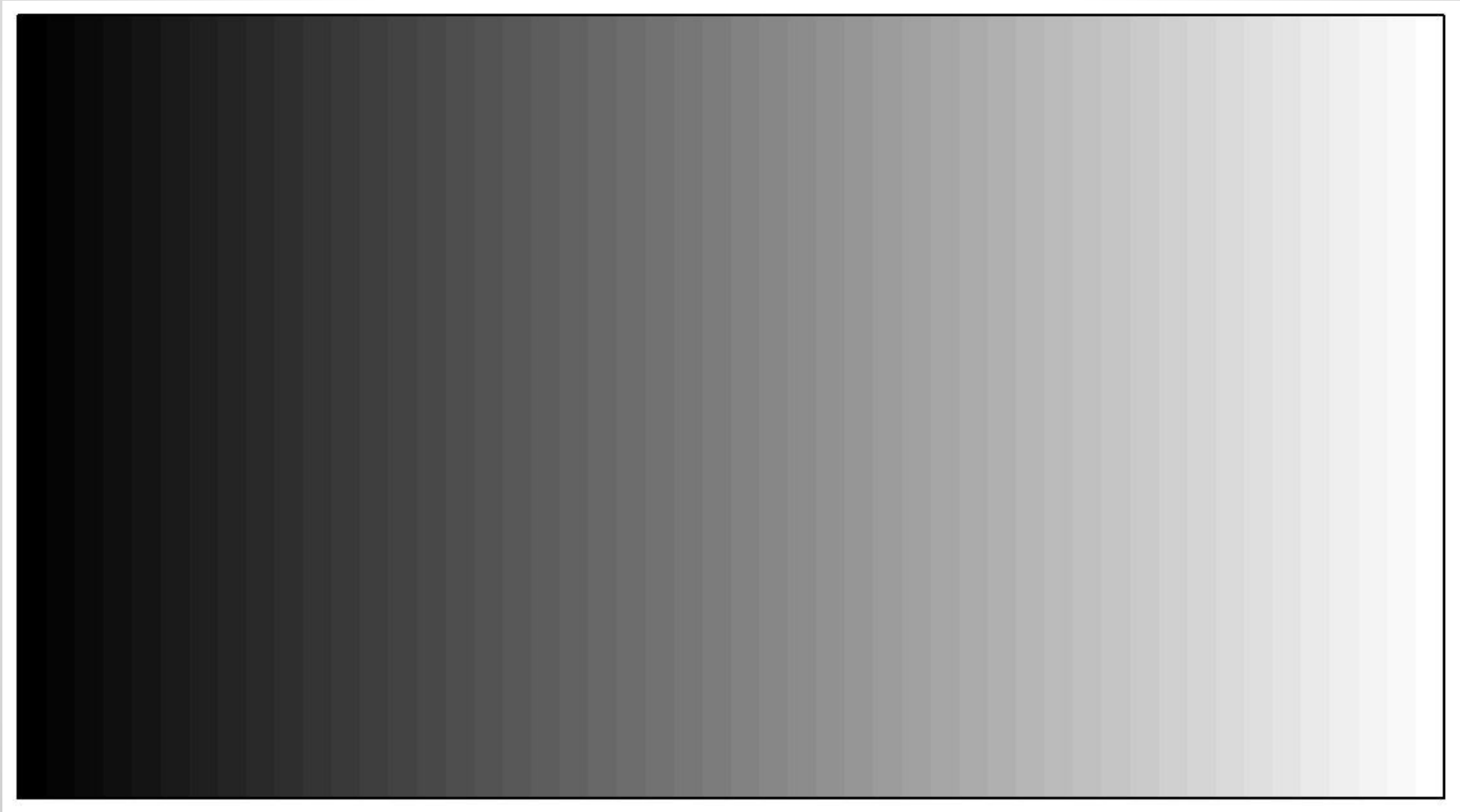


Telemedicine: The Wild West



“50 Shades of Gray”



Telemedicine Legal Risk Areas



My Top Telemedicine Risk Areas



1. Scope of Practice

2. Billing and Coding Compliance

3. Marketing and Referral Arrangements

4. Patient Notices & Acknowledgements

Risk #1: Scope of Practice



**So
what
are the
issues?**

Which service lines are appropriate for telemedicine?

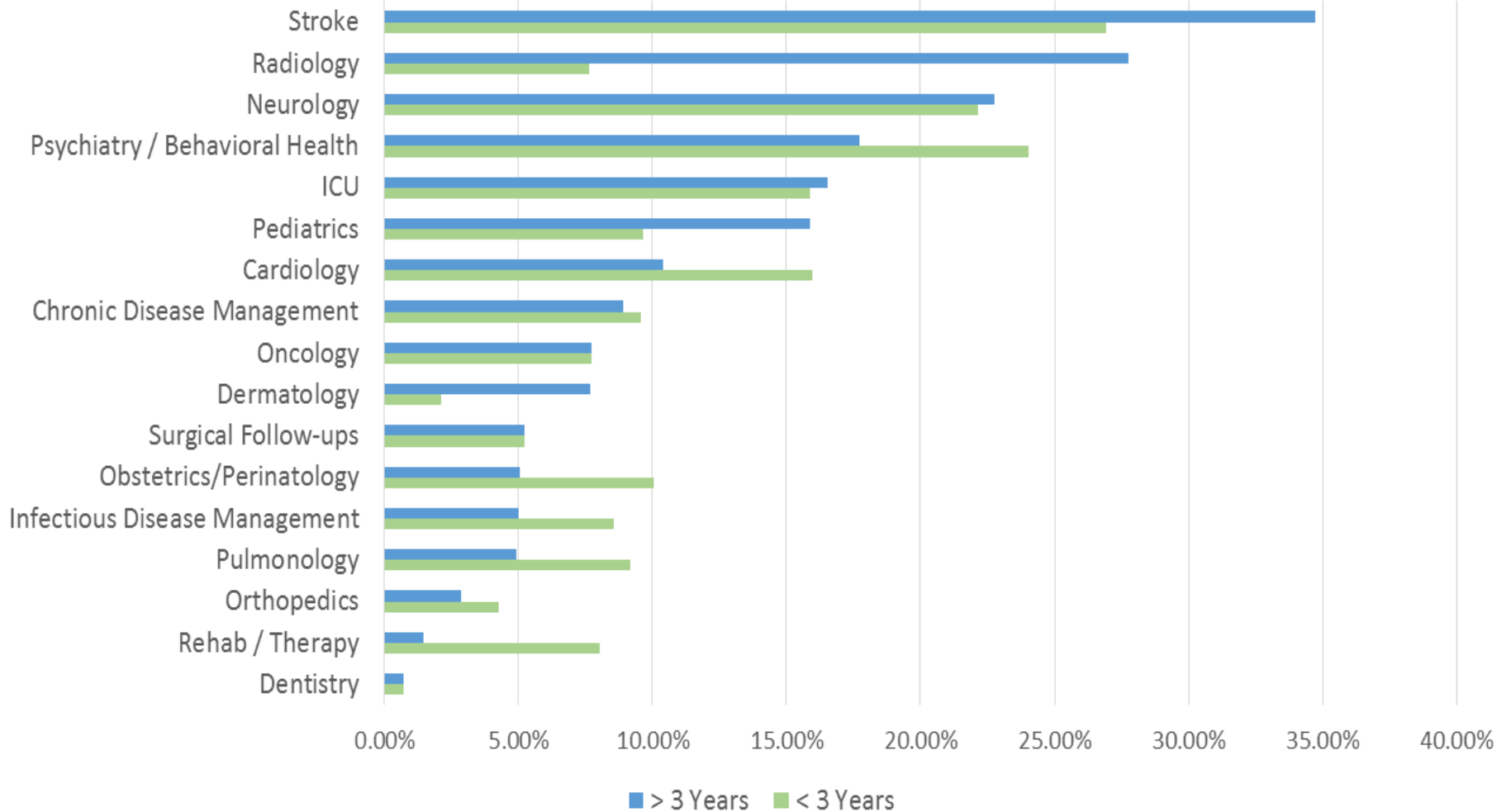
Which are not?

What is the standard of care?

Telemedicine Service Lines



Maturity by Service Lines



Other Emerging Telemedicine Service Lines



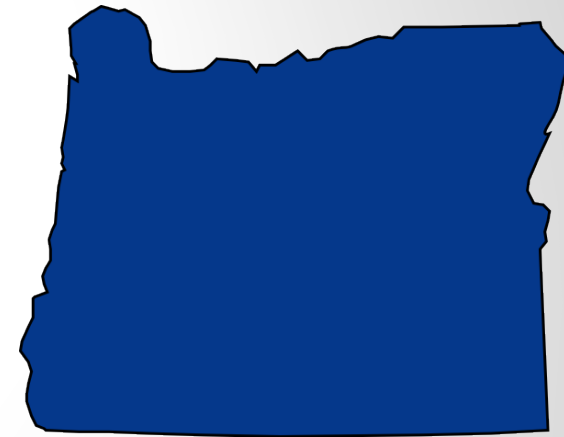
- TeleHospitalists
- Nocturnists
- Chronic Pain Management
- Involuntary Commitments
- Clinical Trial Monitoring
- Direct to Consumer Medicine
- Direct Access Genetic Testing with virtual Genetic Counseling

Medical Practice Acts on “Unprofessional Conduct”



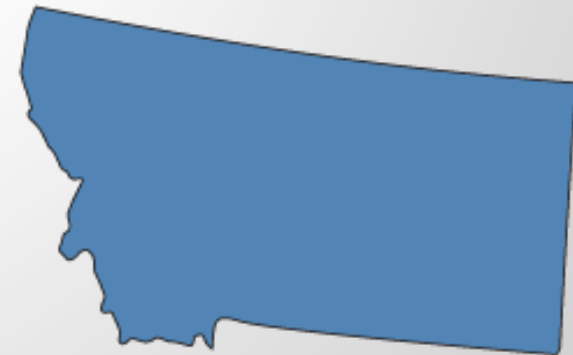
- **Oregon**

- “Willful performance of any surgical or medical treatment which is **contrary to acceptable medical standards**”



- **Montana**

- “Conduct that does not meet the **generally accepted standards of practice.**”



State Telemedicine Policies



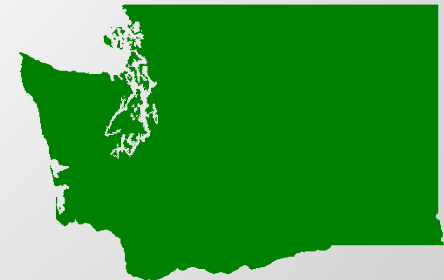
- **Idaho Board of Medicine**

- **Certain conditions are appropriate** for telemedicine technologies, while **others are not**.
- Providers must have a **written emergency plan** and provide that plan to patients.



- **Washington Medical Quality Assurance Commission**

- If...circumstances **require in-person contact**, the telemedicine practitioner should advise the patient to be seen by a practitioner in person.
- **The practitioner is responsible for knowing the limitations** of the care they can provide.
- Telemedicine practitioners should recognize situations that are **beyond their expertise**, their ability, or the limits of available technology to adequately evaluate or manage, and refer such patients for appropriate care.





- **Condition of Participation: Governing Body**
 - All patients admitted to inpatient or observation status must “**be under the care of a [physician]** with respect to any medical or psychiatric problem that is present on admission or develops during hospitalization that is outside the scope of practice of the admitting practitioner.”

- **Interpretive Guideline**
 - Surveyors will verify that “an assigned doctor of medicine or osteopathy is **responsible for and is monitoring the care** of each [patient] with respect to all medical or psychiatric problems during the hospitalization.”

Telemedicine Standard of Care



Risk #2: Telehealth Billing and Coding Compliance



**So
what
are the
issues?**

CPT code selection

Consistent coding practices between payors

Consistent coding within your practice of system

Free services

Example: Physician Consultations



Office Consult

(99201-215-GT)

- New or Established Patient
- Medicare covered (for rural patients)

Online E&M (98969)

- Non-Physician
- Established Patient
- Non-covered by Medicare

Online E&M (99444)

- Physician
- Established Patient
- Non-covered by Medicare

Miscellaneous E&M (99499)

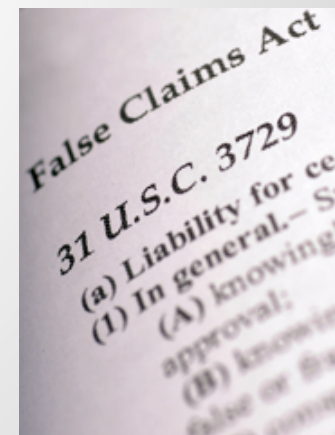
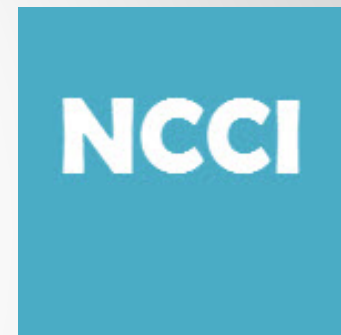
- Unlisted evaluation and management service

Different Codes / Same Service?



- **National Correct Coding Initiative**
 - “Only the **single CPT code most accurately describing the procedure** performed or service rendered should be reported.”

- **False Claims Acts**
 - Federal
 - *U.S. ex rel. Putnam v. Eastern Idaho Regional Medical Center*
 - Hospital submits claims for reimbursement to Medicare or Medicaid based on **false, misleading, or incorrect CPT codes**
 - State False Claims Acts
 - Commercial Payor, Medicaid, Worker’s Comp, etc.



Different Rates / Same Code?



Problems caused by inconsistent charge structures:

- (1) Medicare’s “**Substantially in Excess**” Rule
 - Medicare may exclude “[a]ny individual or entity that . . . has submitted or bills or requests for payment . . . for items or services furnished substantially in excess of such individual’s or entity’s usual charges”
- (2) Payor’s arguments under **State False Claims Acts**
 - You represented your charge to be X
 - Your claims to others are for Y, which is lower
 - Therefore, your claim for payment of X is false
- (3) **Consumer Protection Act** penalties or False Claims Act liability attaches to increasing charges more than costs
 - (3) *United States Of America, et al. v. Huron Consulting Group, Inc., et al.*

Provide Telemedicine for Free?



- **Beneficiary Inducement Laws**

- Prohibits health care providers from offering **gifts or other inducements** to Medicare or Medicaid patients
- “Gifts or other inducements” means “transfers of items or services for free or for **other than fair market value**”
- Does the gift to the beneficiary have the **effect of inducing the beneficiary** to choose the provider
- Violations may result in **penalties** including:
 - Criminal fines up to \$25K
 - Imprisonment for up to 5 years
 - Exclusion from federal programs
 - Civil money penalties of 3X damages plus \$50K per violation

Risk #3: Marketing and Referral Issues



**So
what
are the
issues?**

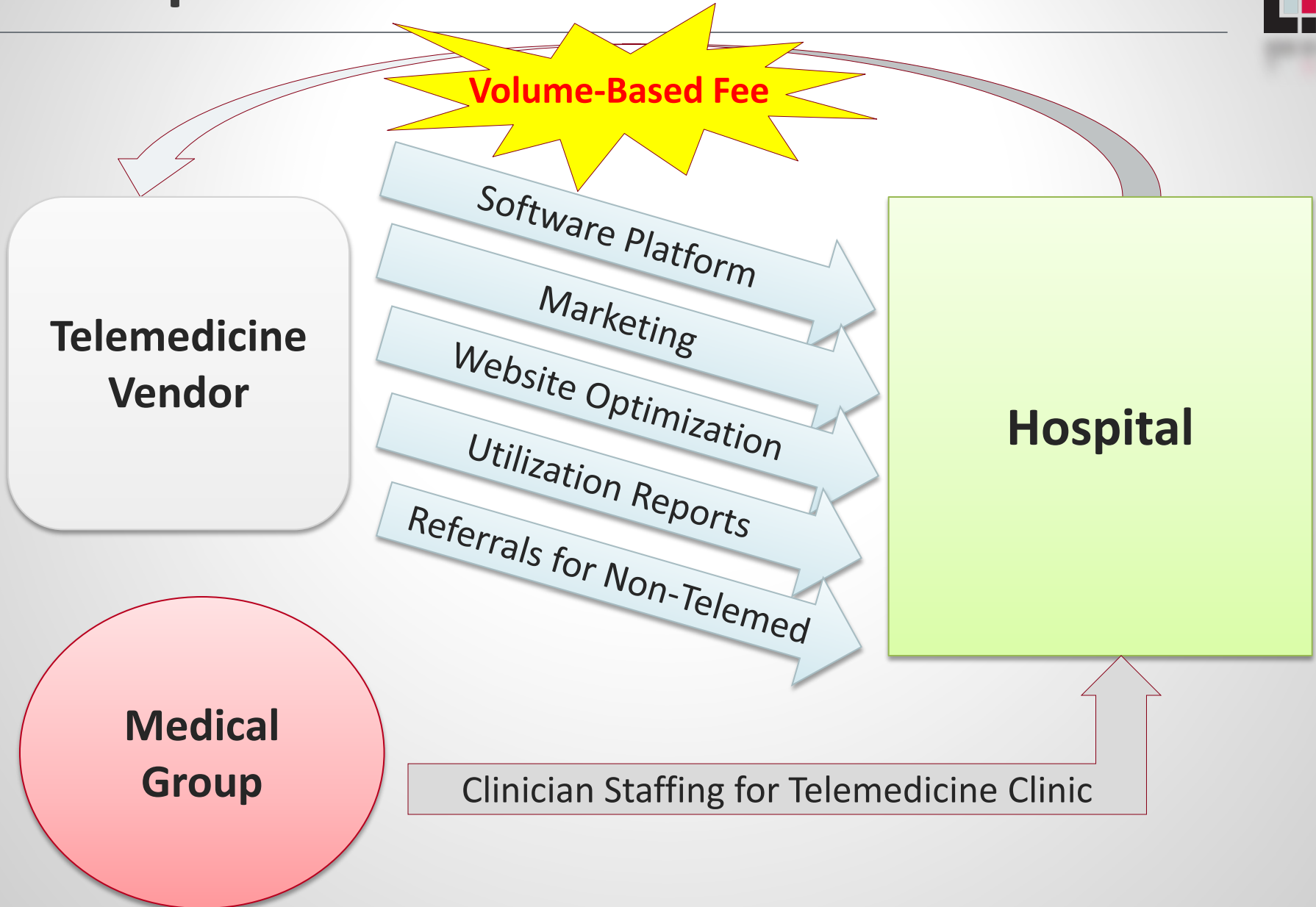
Telemedicine is viewed as a patient acquisition tool

Start-up mentality

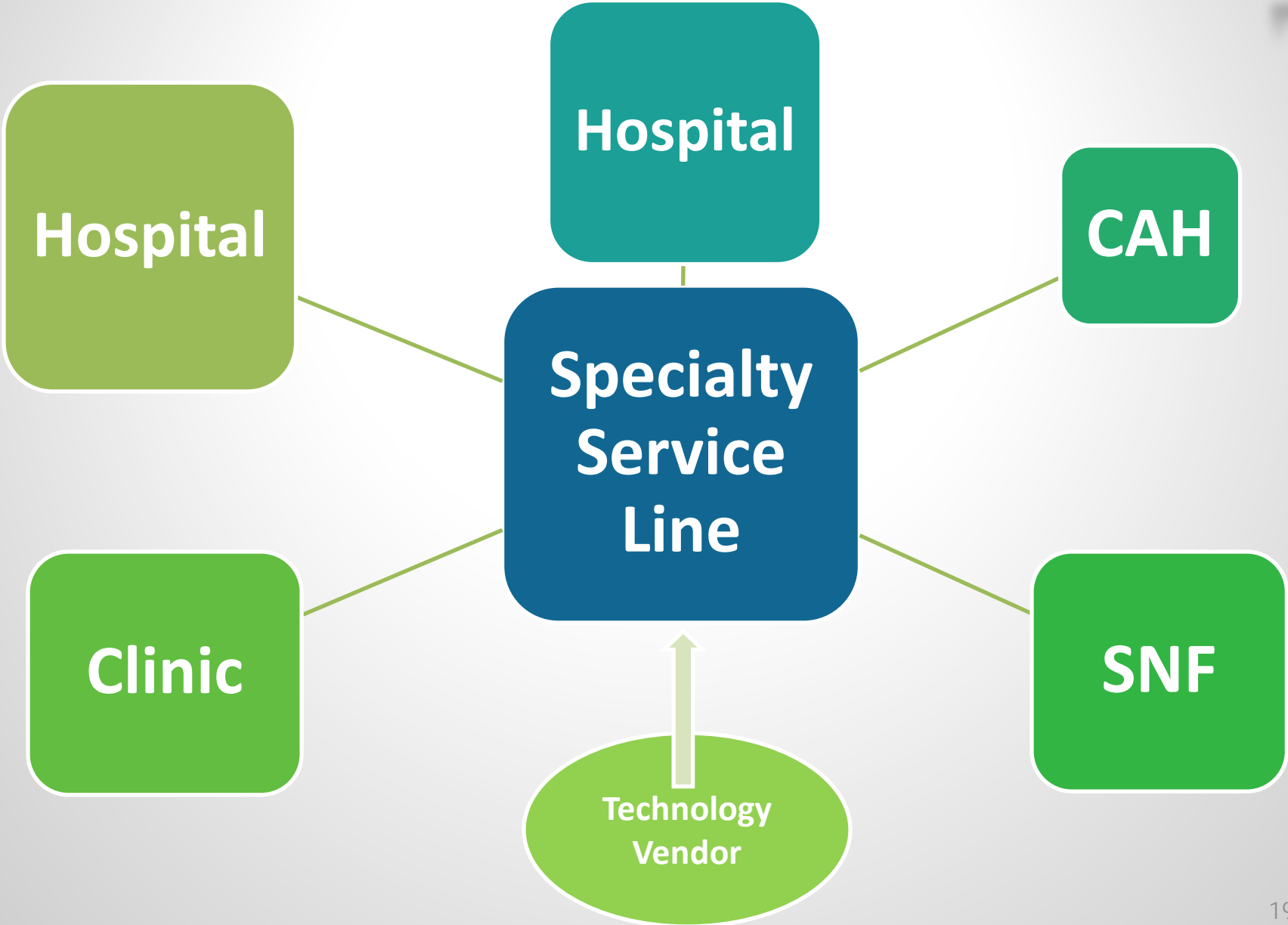
Low compliance awareness or sensitivity

Lack of enforcement precedents

Example One: D2C Telemedicine



Example 2: Hub & Spoke Telemedicine



Fraud and Abuse Issues



Anti-Kickback Risk?

- Are federal program patients involved?
- If no, does state kickback law apply to all patient referrals?
- Is “one purpose” of the arrangement to generate referrals?

Stark Law Risk?

- Does medical group refer DHS to hospital?
- Is there a financial relationship between hospital and group?
- Does it fit within an exception?

Fee-Splitting Risk?

- Does medical group split fee with Telemedicine Vendor?

Patient Brokering Statutes?

- Does Telemedicine Vendor earn a fee for each hospital referral?

Risk #4: Patient Notices & Acknowledgements



**So
what
are the
issues?**

Website Terms of Use

HIPAA Notice of Privacy Practices

Consent to Telemedicine Treatment

Patient Authorization to Use or
Disclose PHI

Electronic Notice of Privacy Practices



- Covered Entities must:
 - Furnish NOPP to new patients
 - Make good faith effort to acknowledge receipt
- May furnish NOPP via email
 - (Unless patient requests hard copy instead)
- Acknowledgement of NOPP sent via email:
 - Via checkbox is okay if:
 - “the individual is **clearly informed**...of what they are acknowledging and the acknowledgment is **not also used as a waiver or permission for something else....**”
 - Or by electronic return receipt:
 - “For notice delivered electrically, **an electronic return receipt or other return transmission** from the individual is considered a valid written acknowledgment of the notice.”

Consent to Telemedicine Treatment



- **California:** The initiating health care provider must:
 - Prior to use, verbally inform the patient that telehealth may be used
 - Obtain verbal consent from the patient
 - Document consent in patient's medical record.
 - Failure to comply constitutes unprofessional conduct

Consent to Telemedicine 2.0



- **Oklahoma:** All the following information must be given:
 - The individual retains the option to withhold or withdraw consent at any time without affecting the right to future care or treatment or risking the loss or withdrawal of any program benefits to which the individual would otherwise be entitled;
 - The potential risks, consequences, and benefits of telemedicine;
 - All existing confidentiality protections apply;
 - Patient access to all medical information transmitted during a telemedicine interaction is guaranteed, and that copies of this information are available at stated costs, which shall not exceed the direct cost of providing the copies; and
 - Dissemination to researchers or other entities or persons external to the patient-practitioner relationship of any patient-identifiable images or other patient-identifiable information from the telemedicine interaction shall not occur without the written consent of the patient.

Beware of Combining Notices



- **Federal Trade Commission: Settlement with Payments MD (Dec. 2014)**
 - Consumers on website could authorize health plans to disclose their medical records, and for three other purposes, by clicking one box.
 - Complaint said PaymentsMD had “**inadequately informed consumers** that [they] would be seeking such information” and had been “**deceiving consumers** about the way they collect and use information.”
 - Order states that PaymentsMD must “**obtain consumers’ affirmative express consent**” before sharing their health information.

Before Launch of Each Telemedicine Service Line, “You may ask yourself...”



- Who is the provider?
- What is the service?
- Which CPT codes?
- Which payors?
- Which regulators?
- Who markets?
- Which legal entities?
- Where do patients flow?
- Where does the money flow?
- Where does data flow?





- Over 500 lawyers
- Full-service transactional, litigation and regulatory practices
- Strong industry teams, particularly in communications, media, technology, health care, energy, financial services, hospitality and life sciences

