Telemedicine and Beyond: The Current Status of the Law and Its Future

by Cecylia K. Hahn

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Doctors often wonder whether it would be possible to remotely assess, diagnose and treat patients through the use of telemedicine technologies. This might be beneficial for many reasons. For example, healthcare may be available to a broader group of patients. It will allow patients greater choice in the types of specialists they would like to consult. For those patients that cannot travel, it will also give them access to medicine they would not otherwise have.

Telemedicine is a developing area of the law without many well-established precedential cases readily available. Moreover, because of the localized nature of the regulation of the practice of medicine, state laws must be analyzed by anyone considering practice in another state to properly determine the risks associated with cross-border treatment of patients. There are, however, several general principles that appear to hold true, from which conclusions may be extrapolated.

Preliminarily, **a physician must be licensed in the state in which the patient is located** (because the treatment of that patient would constitute the practice of medicine). In addition, the physician typically must perform a **physical examination of the patient before prescribing and/or dispensing any medications**. Another consideration is the prescription of medication. Some states have stringent restrictions on internet prescribing and strict requirements regarding histories and physical examinations prior to the prescribing or dispensing of prescription drugs.

Governing Law. This cross-border practice of medicine creates the additional complication requiring a legal determination as to *which* state's laws or whether *both* states' laws would govern a doctor's activity. Logically, it is safe to assume that, at a minimum, the laws of the state in which the patient resides would govern the activity because the patient's state of residence has a legitimate and long respected public policy interest in protecting its residents. It is less clear, however, whether the law of the state in which the doctor is located would also govern.

Telemedicine Model. The American Telemedicine Association ("ATA") identifies itself as the principal organization bringing together telemedicine practitioners, healthcare institutions, vendors and others involved in this field. In accordance with its mission, the ATA has attempted to identify requirements and guidelines for the implementation and promotion of telemedicine. The ATA specifically identifies state-by-state medical licensure requirements and practice restrictions, such as the requirement of a physical examination.[1] These are the two greatest long-standing barriers to the implementation and growth of telemedicine.

Included in the ATA's suggested core standards for telemedicine is the requirement that doctors be fully licensed not only in their respective state, but also in the state *where the patient is located*. Doctors are warned to also follow all laws and regulations in *both* his/her home state and the state where the patient is located. This admonition is, in part, grounded in the historical approach of holding doctors to the standard of care practiced by members of the same practice specialties in the local geographic location. This puts significant time and expense burdens on a doctor to obtain and maintain a license in every state where his/her patients are located.

On April 26, 2014, the Federation of State Medical Boards adopted a "Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine" (the "Model Policy").[2] Though state medical boards are not required to adopt the Model Policy, boards may use it as a guide. The Model Policy recognizes that telemedicine technologies facilitate communications with doctors and their patients or other health care providers, including prescribing medication, obtaining laboratory results, monitoring chronic conditions, providing health care information, and clarifying medical advice. Emphasized is the balance between enabling access to care and ensuring patient safety. Importantly, the Model Policy supports a consistent standard of care and scope of practice notwithstanding the delivery tool or business method in enabling doctor-to-patient communications. Treatment, including prescribing medication, based solely on the review of an online questionnaire does not constitute an acceptable standard of care. Doctors that choose to use telemedicine tech-

nologies are encouraged to take appropriate steps to establish a patient-physician relationship and conduct all appropriate evaluations and patient history consistent with traditional standards of care for a particular presentation.

The Model Policy provides that videoconferencing and "store and forward" technology may be a part of telemedicine practice but provides that, generally, audio-only, email, and instant messaging technologies are not telemedicine. The doctor providing services must be licensed by, or under the jurisdiction of, the medical board where the patient is located. The practice of medicine occurs where the patient is located at the time telemedicine technologies are used. The doctor must obtain informed consent for telemedicine consultation which should be filed with the patient's medical record. An emergency protocol is required in the event the patient needs to be referred to an acute care facility or emergency room. Further, there are a number of disclosures that must be made by providers using the online telemedicine platform – including fees, contact and license information of the doctor and a method for patients to give feedback and to access and amend their patient records. The domain name must accurately reflect the online provider's identity. The Model Policy further cautions doctors should not benefit financially from linking to other websites from online platforms (*i.e.,* "pay per click" arrangements).

As an example, the New York Department of Health has issued a statement that follows much of the guidance set forth in the Model Policy, including as it relates to standard of practice, patient location, development of physician-patient relationship and medical records. However, the practice of telemedicine is more broadly characterized as follows:

- The geographic separation between two or more participants and/or entities engaged in health care,
- The use of telecommunication and related technology to gather, store and disseminate health-related information, and
- The use of electronic interactive technologies to assess, diagnose and/or treat medical conditions.

It should be noted that New York does not have a statute or regulation that expressly prohibits the prescription of medication without a prior physical exam, as do other states.

California and Florida have specifically enacted telemedicine laws. The California Business and Professional Code requires a full medical license to practice medicine. California does not have specific language within its state statute, nor its administrative regulations, granting doctors a "special/limited" license to enter the state remotely to practice telemedicine. Further, the administration of medication over the internet without a prior physical medical examination is prohibited. The Code states that:

> No person or entity shall dispense or furnish, or cause to be dispensed or furnished, dangerous drugs or dangerous devices, as defined in Section 4022, on the Internet for delivery to any person in this state without a prescription issued pursuant to a good faith prior examination of a human . . . for whom the prescription is meant. . . . Cal. Bus. & Prof. Code § 4067(a).

Additionally, the California Business and Professional Code § 2242(a) generally prohibits as "unprofessional conduct" the "[p]rescribing, dispensing, or furnishing dangerous drugs . . . without a good faith prior examination and medical indication thereof."

Similarly, the Florida Board of Medicine has promulgated a telemedicine regulation that states:

> Prescribing medications based solely on an electronic medical questionnaire constitutes the failure to practice medicine with that level of care, skill, and treatment which is recognized by reasonably prudent physicians as being acceptable under similar conditions and circumstances. . . . Florida Admin. Code § 64B8-9.014(1).

Florida's regulations, however, do provide an exception that might be utilized as a basis for long-distance care. It states that the above regulation:

> [S]hall not be construed to prohibit patient care in consultation with another physician who has an ongoing relationship with the patient, and who has agreed to supervise the patient's treatment, including the use of any prescribed medications, nor on-call or cross-coverage situations in which the physician has access to patient records. Florida Admin. Code § 64B8-9.014(4).

This exception to the Florida regulation may provide a basis to act in consultation by an out-of-state doctor with a local physician, but will not permit a doctor directly to treat patients across the border in Florida from another state. Additionally, Florida has extensive pharmacy laws that prohibit pharmacists and pharmacies from dispensing medications where it is known there is not a proper physician-patient relationship. Florida Statute § 465, et seq.

Accordingly, California and Florida are two of the many examples where doctors are restricted from conducting telemedicine and from treating patients on a long-distance basis where there is not a proper prior history and physical examination of the patient.

New Jersey does not have any specific regulations or statutes that address telemedicine specifically. The general rule in New Jersey, as in most of the other states, is that physicians engaging in telemedicine with New Jersey patients must be licensed in New Jersey. N.J.S.A. § 45:9-6. There are two small

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exceptions to the general rule, found in N.J.S.A. § 45:9-21(b)-(c). Of relevance is subsection (c) which **allows a physician or surgeon of another state of the United States that is duly authorized under the laws of that state to practice medicine or surgery there, is not required to obtain a license in New Jersey if the practitioner does not open an office or place for the practice of his profession in this State**. Despite this exception, N.J.A.C. §§ 13:35-7.1A and -7.5 indirectly impact upon telemedicine as these regulations require physical examinations of patients prior to dispensing or prescribing drugs to them. Accordingly, this would place a limitation on the ability of a physician to practice via telemedicine at least as it relates to treatment of patients through drug therapy within New Jersey. In addition, with regard to interpretation of any diagnostic testing, the provisions of N.J.A.C. § 13:35-2.76(s) permit a New Jersey physician to transmit records or data for interpretation by a consultant who is not a New Jersey licensee provided that written consent to such interpretation service is obtained in advance from the patient and any third-party payor. By its terms, "this subsection is intended to be available for special occasional or emergent consultations only." Providing such diagnostic interpretative services during the course of a year on 10 or more occasions "is deemed to be rendering medical services in this State and requires licensure by the Board." While this regulation is directed at diagnostic testing, the New Jersey licensing board might take a similar stance on actual treatment encounters.

Further, based on an analysis similar to the court's in Allstate Ins. Co. v. Northfield Medical Center, P.C., 2001 WL 34779104, *37 (N.J. Super. Ct. Law Div., April 27, 2001), it is possible that both the medical board and third party payors may take a strict view of a foreign doctor's activities in New Jersey. Recognizing N.J.S.A. § 45:9-21(c)'s exception to the prerequisite of licensure in New Jersey, the court nonetheless stated in dicta that even if an out-of-state doctor does not have an in-state office, he or she may still need to be licensed in New Jersey "before engaging in ***regular*** practice . . . because it is the state government which retains the authority to protect the public by disciplining an incompetent, negligent, impaired or dishonest practitioner." (Emphasis added). The court emphasized throughout the opinion that if one practices medicine regularly in NJ, even though they may be licensed in a different state and not have an office here, the exception would not apply to them because New Jersey has an interest in protecting its citizens and the Board of Medical Examiners still has a right to regulate the doctor. Hence, there is a risk that consulting and treating patients regularly in New Jersey may prompt the requirement to obtain licensure here despite the exception found in the statute.

The General Consensus. The trend suggests two critical requirements in many states for telemedicine. First, the doctor generally must be licensed in the state in which the patient resides, regardless of where the doctor is located. Second, the doctor must conduct an appropriate and sufficient history and physical examination of the patient as a precondition to prescribing or dispensing drugs to the patient. In many ways, these two common requirements place a tremendous barrier on the practice of telemedicine across state borders.

Thus, while telemedicine may be progressing, there are still significant barriers and limitations that would make use of this technology challenging. In particular, to fully and independently conduct the of medicine, an out-of-state doctor would still need to obtain licenses in, or be subject to the jurisdiction of, the state where his/her patients reside, comply with and know the physician licensing laws in each of those states, pay the licensing fees in each state (if applicable), subject himself/herself to regulatory oversight and disciplinary enforcement in each of those states, be subject to the continuing medical education credit requirements of those states, and potentially subject himself/herself to medical malpractice liability in those states (also requiring malpractice insurance coverage for each such state). Further, the basic in-person patient examination requirement of some states to dispense drugs is not avoidable. Accordingly, telemedicine as a model for direct physician-patient communications has significant hurdles. As state legislatures get more comfortable with the concept of telemedicine, protections of transmission of patients' information are further developed, and benefits of telemedicine are more closely appreciated, the future may be a friendlier environment for practitioners of telemedicine. For now, all need to be cautious of the risks involved.

About the Author

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Endnotes

[1]http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis---coverage-and-reimbursement.pdf

[2]The Model Policy does not apply to the use of telemedicine when solely providing consulting services to another physician who maintains the physician-patient relationship with the patient who is the subject of the consultation. http://fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf.