

Do Telemedicine Laws Require a Minimum Number of In-Person Visits?

October 3, 2020

By Michael H. Cohen

In today's video, we discuss what are the minimum number of times per year and that a physician must see a patient, in-person, prior to treating the patient via telehealth?

By the end of today's video, you'll have a deeper understanding of telemedicine legal requirements regarding the physician-patient relationship. You'll also separate myth from fact when it comes to having the MD or DO see the patient physically, in-person, prior to further digital, online, or mobile health treatment.

I'm Michael H. Cohen, founding attorney of the Cohen Healthcare Law Group. Since 1999, our law firm has counseled hundreds of healthcare industry clients each year on healthcare and FDA legal issues.

Telemedicine is one of our core areas; we were early pioneers as telehealth, also known as digital health, e-health, and/or mobile health, began to catch on. We recognized that telemedicine was the future of medicine, as professional relationships move from physical to digital and virtual space.

Along the way, we heard many myths about telemedicine law. For example, *"you're okay so long as you have at least one visit in person a year with the patient."* That's a myth, nobody knows where it started, but somehow it feels self-soothing to say, "I'm legally ok as long as" dot-dot-dot is the case. And healthcare companies believe the myth because, like the song goes: *"I heard it from a friend who ... heard it from a friend who ... heard it from a friend."*

We lawyers call that quadruple hearsay. It doesn't matter that one of the friends in the chain was a lawyer.

Let's dispel the myth and get to the law.

When the technology began to evolve to allow effective video communication between doctors and patients, states at first were slow to catch up. Many state laws, and medical board regulations and policy statements, required a "face-to-face" visit between doctor and patient, the idea being that these faces had to be in the same room, physically, at the same time. In fact, the statutes, regulations, policy statements, medical board disciplinary cases, and judicial opinions, often said that, for example, telehealth treatment and prescription based on an online questionnaire were not standard of care, and, were prohibited by law.

Sometimes the rules were stricter for prescribing than diagnosis and treatment. Over time, a patchwork of laws formed across states.

Then, lawmakers and regulators opened up a more liberal pathway for telehealth.

In this new version, they did not require the physical exam and in-person encounter, but rather, allowed telemedicine, provided that the physician first “established” the physician-patient relationship.

The physician-patient relationship could be “established” in a variety of ways, including not only the in-person, “good faith” exam or clinical encounter, but also by an audio-visual encounter, augmented by an effort to ensure that the patient was really who they claimed to be. Among other things, the audio-visual connection had to be sufficiently reliable.

Once this physician-patient relationship was established, the physician then would be subject to certain professional obligations and liability.

This is pretty much the current trend. Remember, though, that the telehealth encounter still has to meet the standard of care, and that the technology used has to be sufficient to allow for accurate treatment and diagnosis in accordance with that standard of care.

Depending on the state, the community standard, and the type of condition involved, standard of care might or might not require a medical history and physical examination. Standards of care evolve over time. In dermatology, for example, video technologies can provide high levels of accuracy in diagnostic imaging. In other situations, medical boards might want the doctor to see the patient in person, and, could use standard of care as an enforcement hammer, depending on the situation, even if the statute is liberal.

This happened recently in one case involving a physician named Dr. Holmes, who was prescribing for ED, based on an Internet questionnaire.

To the extent the prescription involves a controlled substance, the federal Ryan Haight Act requires, with few exceptions, that the physician conduct an in-person evaluation of the patient before issuing the prescription.

At this point, many law firms have jumped into giving legal advice in the telemedicine space. Some even claim to have a “secret sauce” with extensive, and expensive, multi-state surveys of state law. We can address that more fully in a legal strategy session. Let’s just say that we still have our edge, with strategic advice tailored to the client.

Let’s face it: some lawyers are dream-killers: they just say “no” to everything. That way they’re a hundred percent safe, you’re pretty much assured of zero compliance battles, and, no one takes a risk. And some are “yes men” (and women): they’ll give all the assurances for a buck (or a hundred thousand, plus greenbacks). We prefer the goldilocks territory, somewhere in between. That’s where the subtle lies, the strategy lives.

Thanks for watching. Here’s to the success of your healthcare venture, we look forward to speaking with you soon.

Testimonials