

FAQs About How California and New York Regulate Telemedicine

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Each state has its own set of telemedicine laws and medical society requirements. The rules, definitions, and penalties for non-compliance vary from state to state. The laws are being constantly amended or updated. Medical societies and boards are continually making changes to their telemedicine standards. California and New York are two states that are forcefully addressing the do's and don'ts of telemedicine practice.

In this post, we answer some common questions about the status of the law regarding telemedicine. Note that this is a general description that may not necessarily reflect the latest developments, as telemedicine, mobile health, and digital health law is constantly changing. For the latest legal and regulatory telemedicine developments, and to understand how telemedicine law might apply to your healthcare business or practice, consult an experienced telemedicine lawyer.

What is the History of Telemedicine Law in California?

California's initial telemedicine law was the Telemedicine Act of 1996. This law required, among other duties and obligations, that patients sign a written consent form before telemedicine services could be provided.

The next law was the Telehealth Advancement Act of 2011 (AB 415). This law provided that:

- Store-and-forward technologies should be reimbursable when provided by a health care provider.
- Mandated that private payers (insurance companies) reimburse health providers for telemedicine services.
- Removed the requirement that the telemedicine appointment take place in a licensed healthcare facility. Many patients are more comfortable and find it more convenient to communicate with a doctor from their home.
- Telemedicine interactions do require that the patient's information be kept confidential and that his/her rights be protected
- Health care service plans and health insurance companies including Medi-Cal should adopt payment policies (that also meet the Business and Professional Code) so that doctors, hospitals, and other authorized telehealth providers can be properly compensated for telemedicine services.

Assembly Bill 1733 of 2013 provided \$200 million for telemedicine education programs and new high-tech approaches. The bill provided that private healthcare plans could not mandate that there be an initial face-to-face visit before telemedicine could be used. The bill also provided that private healthcare plans couldn't limit reimbursement if patient-site visits weren't used.

Assembly Bill 809 of 2015 provided that written patient consents for telemedicine were not required. Verbal and written consents, properly documented, are sufficient to provide telehealth services. It also deleted the rule that the health care provider be at the originating site when the consent to provide telemedicine services is obtained.

What Standard of Care Must Physicians Follow When Providing Telehealth Services in California?

The Medical Board of California states that:

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The standard of care for telemedicine is the same as for in-person visits.

- *Physicians can provide telehealth services from out of state – provided they have a current valid California medical license*

- *Telemedicine typically includes videoconferencing or store-and-forward technology. It's not talking on the telephone or sending emails and faxes back and forth.*

How Does California define “telehealth?”

Section 2290.5 of the California Business and Professions Code defines “telehealth” as:

“... the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient's health care while the patient is at the originating site and the health care provider is at a distant site. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers.”

How is the doctor-patient relationship established?

While some states require an initial in-person visit, California does not. In California, the initial consultation between doctor and patient can be through telemedicine.

Additionally, non-controlled substances can be prescribed through telemedicine. To prescribe “dangerous drugs or devices,” an initial in-person office visit is required.

California Code, Business and Professions Code – BPC § 2242 specifically provides that: “(a) Prescribing, dispensing, or furnishing dangerous drugs as defined in Section 4022 without an appropriate prior examination and a medical indication, constitutes unprofessional conduct.”

Your quote: ***“In-person examinations not only enhance the opportunity to confirm if a patient needs the identified medication or to rule out other medical conditions, but ensures the patient is advised of alternative treatment options and is aware of potential side effects. For some patients, certain drugs are contraindicated and serious injury, including death, can follow.”***

On its webpage describing telemedicine, the California Medical Board (CMB) appears to default to the standard of care as the test as to whether telemedicine is permissible; however, on its webpage concerning Internet prescribing, CMB states that the law prohibits prescribing, without an “appropriate prior examination,” notwithstanding that standard of care may be satisfied or that it might be considered within the range of acceptable professional practice by peers not to have an in person exam (for example, in some tele-dermatology). On this page, CMB cites California Business & Professions Code, Section 2242.

Notably, as of October 11, 2019, the California legislature amended and liberalized Section 2242 via AB 1264, to provide that an appropriate prior examination does not require a synchronous interaction between the patient and the licensee and can be achieved through the use of telehealth, as specified, provided that the licensee complies with the appropriate standard of care. Thus, 2242 now provides:

“Prescribing, dispensing, or furnishing dangerous drugs as defined in Section 4022 without an appropriate prior examination and a medical indication, constitutes unprofessional conduct. An appropriate prior examination does not require a

synchronous interaction between the patient and the licensee and can be achieved through the use of telehealth, including, but not limited to, a self-screening tool or a questionnaire, provided that the licensee complies with the appropriate standard of care.”

Cal. Bus. And Professions Code § 2242.

Yet even so, there are also standard of care concerns, as noted in a 2019 disciplinary action by the Medical Board of California entitled, *In re Richard J. Holmes, M.D.*

ESTABLISHING THE PHYSICIAN-PATIENT RELATIONSHIP: TELEMEDICINE LAW OFTEN REQUIRES IT, BUT WHAT DOES THIS MEAN?

Establishing the physician-patient relationship is often a requirement of state telemedicine law, but what does it mean that the physician has in fact “established” the physician-patient relationship?

Which California health care providers can offer telemedicine services?

Anyone licensed under Division 2 of the state’s Healing Arts statute are able to provide telemedicine care to patients. This includes, but not limited to, physicians, nurses, dentists, chiropractors, speech pathologists, registered dietitians, occupational therapists and licensed midwives.

How do hospitals, physicians, and other telemedicine get paid/reimbursed in California?

Payment in California generally follows the following principles:

- **Medicaid (Medi-Cal).** Medi-Cal only reimbursees for synchronous videoconferencing. It doesn’t reimburse for store-and forward, remote patient monitoring, and for telephone care. There are no limits on the patient site or on the patient’s location.
- **Medicare.** Doctors and other medical practitioners should review Medicare reimbursement with an experienced telemedicine lawyer. Generally, the patient site and geographical location are not factors. There are specific requirements though that need to be reviewed. Medicare does encourage telemedicine for people with multiple chronic conditions.
- **Private payors.** Generally, private insurers should pay for videoconferencing. They are not required to pay for other telemedicine methods such as store-and-forward or remote patient monitoring.

What services does Medi-Cal Cover?

The California Department of Health Care Services states that the following telemedicine services should be covered by Medi-Cal:

- Selected Evaluation and Management (E&M) services for patient visit and consultation.
- Selected psychiatric diagnostic interview examination and selected psychiatric therapeutic services.
- Store-and-forward tele-dermatology.
- Store-and-forward tele-ophthalmology.
- Teledentistry.
- Transmission costs (up to 90 minutes per patient, per day).
- Originating site facility fee.
- Interpretation and report of X-rays and electrocardiograms performed after telehealth transmission.

Are there unlicensed practice of medicine and corporate practice of medicine issues in California?

Doctors and health care providers do need to understand who is using their telemedicine technology. Policies should be in place so that only providers authorized by California's telemedicine laws can provide telehealth services. If an unauthorized or unlicensed person provides telemedicine service, the medical practice may violate several laws and professional requirements including:

- Violating the telemedicine laws for that state
- Be seen as "aiding and abetting unlicensed medical practice"
- Be engaged in the corporate practice of medicine

Telehealth includes telemedicine, digital health, and mobile health. Desktops, laptops, cellphones, smartphones, iPads, tablets, and any type of mobile device should be monitored so that only authorized personnel can speak to or help patients.

3 WAYS HEALTHCARE & TELEMEDICINE COMPANIES CAN TRIGGER UNLICENSED AND CORPORATE PRACTICE OF MEDICINE LEGAL TRIPWIRES

Healthcare startups, including telemedicine and mobile health startups, can unwittingly trigger unlicensed and corporate practice of medicine legal tripwires.

How does the use of a questionnaire affect the issue of the unlawful practice of medicine?

One of the very early legal rules you will see around telemedicine in many states is the general statement that sending a questionnaire over the Internet and using that to make a medical recommendation, is unlawful. While the law is being made more liberal, medical providers should review with experienced telemedicine lawyers whether the submission of a questionnaire through electronic means may be seen as an unlicensed diagnosis.

Does California provide telehealth parity?

Parity is essentially paying doctors for telemedicine services that are essentially the same as in-person services. A telemedicine parity law requiring private payers reimburse providers for telemedicine services does exist in California.

Does New York provide telehealth parity?

New York has provided telehealth parity since 2014. Telehealth parity covers Medicaid, state employee health plans, and private payors. It doesn't require coverage for store and forward telemedicine nor for remote patient telemedicine monitoring.

What is New York Medicaid's Telemedicine Policy?

eVisit, a major telemedicine provider in New York, states that Medicaid in New York does cover live videoconferencing, store-and-forward technology, and remote monitoring of patients through telemedicine. Medicaid does limit which health care providers can offer telehealth. Approved providers include:

- Asthma Educators
- Clinical Social Workers
- Dentists
- Diabetes Educators
- Genetic Counselors

- Home care services agency
- Hospice
- Hospital
- Midwife
- Nurse practitioner
- Optometrist
- Or any other provider as determined by the Commissioner
- Physician
- Physician assistant
- Physician specialists, including psychiatrists
- Podiatrist
- Psychiatric Nurse Practitioners
- Psychologists
- Registered professional nurse
- Speech language pathologist or audiologist

“Medicaid managed care plans can choose whether to cover telehealth.”

Again, please note that the laws concerning telemedicine are constantly in flux and that even as we read these laws and regulations or visit secondary sources describing them, you should only look for legal advice for your situation from an experienced telemedicine lawyer in the course of an attorney-client relationship.

Covered services

Under New York’s parity law, private health plans cannot exclude coverage for any telemedicine service that would be covered if delivered in-person. New York Medicaid reimburses for medically necessary services over live video. It also reimburses for specialty care such as dermatology and ophthalmology for store-and-forward telehealth.

What restrictions to prescribing medications apply in New York?

Legal limits on prescribing medication through telemedicine are constantly changing. Consult with your telemedicine lawyer. Remember that medical doctors must comply with other laws such as DEA requirements.

What are the informed consent requirements in New York?

The only type of approved telemedicine services which requires informed patient consent is telepsychiatry.

What are the eligible originating sites in New York for telemedicine services?

In New York, patients can originate their telemedicine care in the following sites:

- Their home
- A doctor’s office

- A hospital or hospice care
- A mental health facility such as a psychiatric center
- An adult care facility
- A child day care facility
- A school

What is the Interstate Medical Licensure Compact?

The interstate medical licensure compact is a way for qualified licensed physicians to practice medicine and thus to offer telemedicine services in multiple states. The tradeoff for allowing physicians to obtain licenses in multiple states is that the states can also “share investigative and disciplinary information.”

“The IMLC is an agreement between 24 states and 1 territory and the 31 Medical and Osteopathic Boards in those states and territory. Under this agreement licensed physicians can qualify to practice medicine across state lines within the Compact if they meet the agreed upon eligibility requirements. Approximately 80% of physicians meet the criteria for licensure through the IMLC.”

Questions to review with your telemedicine attorney

The National Telecommunications and Information Administration – suggests doctors review the following telemedicine issues for the states where the doctor is licensed with their telemedicine attorney:

- Which healthcare providers can provide telemedicine services?
- What state legal and medical requirements apply?
- Can telemedicine services be offered across state lines?
- Where must the patient be when the telehealth services are offered?
- Where must the physician be when the telehealth services are offered?
- Must a physician be physically present when another health provider is working with the distant patient?
- Must the physician see the patient in the office first before telemedicine can be used?
- Can prescriptions be offered using telehealth?
- How and when can the health provider be reimbursed for the telemedicine services.

Doctors, hospitals, and others health professionals should ask what laws and rules apply for the state where the physician offers the telemedicine advice. Doctors who fail to follow state telemedicine laws may lose their license and may not qualify for medical payments.

To learn more about how telemedicine works and what the rules are in your state, a conversation with an experienced telehealth lawyer is a must. To learn your rights and obligations when using telehealth services, call [Cohen Healthcare Law Group PC](#) at 310-844-3173 or complete our [online contact form](#) to make an appointment.

[Contact our healthcare law](#) and [FDA attorneys](#) for legal advice relevant to your healthcare venture.