

ADVOCACY

TELEMEDICINE FRAUD: DON'T LET IT HAPPEN TO YOU

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Telemedicine has swept through Texas health care in the last several years, and the recent COVID-19 pandemic has only increased its momentum. Texas's telemedicine statute, which provides that Texas physicians may practice telemedicine in Texas without an initial face-to-face encounter to establish a physician/patient relationship, is now in full force. Hospitals, health care facilities, and physician groups in Texas seem to have made substantial investments in the infrastructure, equipment, and training. Arguably, telemedicine may now be necessary for competitive advantage given that patients now seem to expect it. And it's not just limited to Texas. The pull for Texas physicians to do telemedicine in other states appears strong. So how does a Texas physician determine what he/she can do in telemedicine versus what opportunities should be declined or avoided completely?

Where Can You Practice Telemedicine?

The Federation of State Medical Boards makes it clear that "[a] physician must be licensed, or under the jurisdiction, of the medical board of the state where the patient is located. The practice of medicine occurs where the patient is located at the time telemedicine technologies are used. Physicians who treat or prescribe through online services sites are practicing medicine and must possess appropriate licensure in all jurisdictions where patients receive care." In Texas, a physician licensed to practice medicine in Texas may practice telemedicine within Texas; that is, on patients located in Texas at the time of the telemedicine encounter. The Texas Medical Board (TMB) also allows out-of-state physicians to provide "episodic consultations" by telemedicine to patients located in Texas at the time of the telemedicine encounter if that physician registers with the TMB and pays the required fee for such license.

However, Texas physicians desiring to practice telemedicine on patients located in states outside of Texas at the time of the telemedicine encounter should assume that specific state-to-state licensure is required, unless specific legal advice to the contrary has been received. Keep in mind that the issue of where a patient normally resides appears to be irrelevant. What matters is "where the patient is located at the time telemedicine technologies are used." If a patient is in another state at the time of the

telemedicine encounter, a Texas physician must be licensed in that state and comply with the telemedicine laws of that state.

A physician can choose to obtain multiple licenses in various states in order to address this issue. But doing so can be cumbersome and expensive, as a physician must apply, receive, and maintain each such license as well as understand how to comply with the telemedicine laws of each particular state, which may be varied and/or in flux. That said, it is getting easier and more convenient for physicians to be licensed in multiple states, as many physicians may now streamline their own individual licensing in multiple states under the Interstate Medical Licensure Compact. Under the Compact, eligible physicians need only to complete one application to receive separate licenses from each state where they intend to practice. At this point in time, many states now participate in the Compact, including Texas (which is now accepting applications). However, even with an appropriate license in another state, a Texas physician still needs to understand what that particular state requires in order to practice telemedicine. This can be confusing, especially if a physician has licenses in multiple states. This can also make the physician more vulnerable to telemedicine fraud schemes.

Beware of Telemedicine Fraud

Envision the following scenario: You are a Texas physician with multiple out-of-state licenses. You receive an email or telephone inquiry from a third party (could even be a reputable locum tenens company or other entity) telling you that:

- As a physician, you could make some extra money doing telemedicine by working as an independent contractor for a "telemedicine" company
- If you have multiple state licenses, doing telemedicine would be perfect for you given that you could help a lot of patients in these different states
- An online portal would allow you easy access to do patient "consults"
- The "telemedicine" company would keep the medical records and do all the billing
- You would be credentialed and trained, and could work from the comfort of your own home or anywhere you have online access
- You wouldn't even have to see or talk to any patients

- You would get paid \$50 per consult (the amount could vary), and you could do hundreds of these or even more each week
- There are physicians all across the country helping patients by doing "telemedicine" in this way.

Intrigued, you look up the telemedicine company (or the locum tenens or other company offering the opportunity), which has a very professional-looking website. Various folks (including other physicians) who are involved assure you that the telemedicine company is completely legitimate and that doing "telemedicine" in this way is the wave of the future. You decide to find out more so you submit your CV and references, which are reviewed and confirmed. You are interviewed by phone or videoconference. You decide to accept and so you go through the credentialing and training process, which all seems legitimate. You are asked to sign contracts and placement orders, which appear to have been prepared by legal counsel for the "telemedicine" company. The paperwork you receive, including issuance of malpractice insurance for your work, appears in order. You are then told that your shifts have been scheduled, and that there are patient "consults" in the online portal that need to be completed within 24 to 48 hours. You follow the instructions you are given and complete your shifts. You then receive your paychecks for the "telemedicine" work that you have done timely and as promised. This may go on for months or even years. But then you get a notice from a provider, a hospital or health care entity, the TMB, or another third party (like the federal government) that you are now suspected to be involved in a fraudulent "telemedicine" scheme. How could this have happened?

Red Flags and Recent Telemedicine Schemes

The unfortunate reality is that fraudulent "telemedicine" companies are luring physicians into these types of schemes (which oftentimes seem very legitimate), to which even experienced and prudent physicians may fall prey. But if a physician knows what to look for, certain various red flags can be recognized, as follows:

- Independent contractor relationships, although employment and ownership opportunities may also pose risk
- Online portal that maintains all medical and billing records (without portal, physician has no access)

- All patient intake, interface, and billing functions are done for the physician (physician has no control over these functions)
- Physician does not see or talk to patients (so how can a patient/physician relationship be established?)
- Unfamiliar or new companies (usually out of state, sometimes all over the nation) that may be connected to locum tenens or other placement companies, even reputable ones
- Payment of \$25-100 per "consult" (or even more), and/or
- When credentialing, MD allows access to NPI number and e-signature, which can be placed on prescriptions without authorization.

The federal government has been monitoring the potential for fraud and abuse involving telemedicine for years now. In 2019, the U.S. Department of Justice (DOJ) issued indictments of physicians and others in what was named "Operation Brace Yourself," a telemarketing/telemedicine scheme in which Medicare beneficiaries were allegedly duped into signing up for unnecessary genetic tests, durable medical equipment (DME), and prescriptions, causing billions of dollars of alleged losses to the federal government. More recently, "Operation Happy Clickers" has resulted in similar types of DOJ indictments. In this alleged scheme, physicians were paid by "telemedicine" companies to review and sign orders as a "telemedicine" visit, and the orders were then sold to DME supply companies and laboratories. Even if a physician is not criminally indicted or called to be a witness due to involvement, a physician's participation in these types of schemes is usually detected by insurance providers, hospitals, or health care entities at which they practice. The involved physician will also likely be reported to the appropriate state medical board, which will no doubt be very problematic for a physician. The simple fact is that fraudsters want the NPI numbers and e-signatures of physicians — so make sure that you do not blindly trust these types of third parties and unwittingly become a tool for telemedicine fraud.

Avoiding Fraud and Doing Telemedicine Right in Texas

Telemedicine poses legal risk given its novelty and dependence on technology, which most physicians do not fully understand. To guard against fraud, Texas physicians must also know the specifics of Texas telemedicine laws as well as the telemedicine laws in any other states that they may be licensed in (if they intend to practice telemedicine there). Generally, avoiding liability for fraud and abuse related to telemedicine care in Texas is no different from in-person treatment. A physician practicing telemedicine must develop protocols related to fraud and abuse as required under Texas law. And as with in-person visits, during telemedicine visits, a Texas physician must obtain the patient's informed consent and provide a notice of privacy practices under HIPAA, as well as post the required TMB complaint notice.

Under the Texas telemedicine statute, a "telemedicine medical service" is defined as "a health care service delivered by a physi-

cian licensed in this state, or a health care professional acting under the delegation and supervision of a physician licensed in this state, and acting within the scope of the physician's or other health professional's license to a patient at a different physical location than the physician or health professional using telecommunications or information technology." Generally, there are four telemedicine modalities currently in use in Texas:

- interactive audio-video technology, including videoconferencing in real time between a physician and a patient; diagnosis and treatment options are offered to a patient
- store-and-forward technology, including transmission of digital clinical information (such as diagnostic images, medical histories, laboratory/pathology results, and prescriptive histories) from the patient's medical file to a physician at a different physical location, which can be asynchronous (i.e., not in real time)
- remote patient monitoring technology, including collecting medical data from remote patients to be used for diagnosis and treatment, and
- mobile health technology, including use of cell phones, mobile devices, wearable devices, and web applications to monitor and track health conditions.

The Texas telemedicine statute provides that "[a] health professional providing a health care service or procedure as a telemedicine medical service or a telehealth service is subject to the standard of care that would apply to the provision of the same health care service or procedure in an in-person setting." So if a physician cannot uphold the same level of care as an in-person visit, telemedicine services should not be used. This means that the physician must determine if it is appropriate to use telemedicine for every visit. In each case, physicians should consider the following non-exclusive factors:

- the type of treatment or diagnostic procedure
- the seriousness of the patient's condition
- the specific chronic conditions of the patient
- the specific physical and mental abilities of the patient
- the particular telemedicine modality used
- the quality, reception, and age of the telemedicine equipment
- the quality of the visual exam
- the possible need for a telepresenter to assist the patient
- the availability of the patient's diagnostic and medication history, and
- existing deficiencies in obtaining accurate clinical information for the patient.

Again, initial in-person visits are not mandatory, as the Texas telemedicine statute does not have an in-person consultation requirement to establish a physician-patient relationship. And while the Texas telemedicine statute allows for the various telemedicine modalities described above, not all modalities are subject to reimbursement, as some may not qualify for coverage under Medicare or private-pay benefit plans. Please also note that telemedicine is prohibited for abortion in Texas.

Conclusion

Given the recent COVID-19 pandemic, telemedicine appears to now be woven into the proverbial fabric of health care in Texas as well as across the nation. While telemedicine laws in various states are still developing, all physicians must guard against the various fraudulent schemes that unfortunately come with these new telemedicine technologies. For Texas physicians, this involves understanding where they can practice telemedicine (i.e., on patients who are located in Texas at the time of the telemedicine encounter). Texas physicians must also determine whether a telemedicine visit is appropriate for any given patient and should not use telemedicine as a shortcut to diagnosis or treatment that should be done in-person. Finally, Texas physicians should guard against signing orders presented by a third party, as the physician must still review the patient's information and determine that the specific patient needs a particular type of treatment or device when doing telemedicine. While many of these same guidelines apply outside of Texas, Texas physicians desiring to practice telemedicine in other states should assume that specific state-to-state licensure is required and obtain legal advice from counsel licensed in such state regarding applicable telemedicine laws. Finally, a physician must be very protective of his/her professional record and reputation at all times, which means getting legal help from experienced physicians' counsel before signing on to anything resembling possible "telemedicine" fraud. Your professional record, including your medical license, depends on it!

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References:

1. See Texas Occ. Code Chapter 111.
2. See www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf (emphasis in bold added).
3. See <https://www.imlcc.org>.
4. See Texas HB 1616, which now facilitates licensing under the Compact for Texas physicians.
5. Although physicians with multiple state licenses appear more vulnerable to these situations, please note that telemedicine fraud could certainly also happen to a physician who is licensed only in one state.
6. The use of the term "telemedicine" in this article denotes telemedicine technologies that are suspected to not comply with telemedicine requirements of applicable state law.
7. Again, Texas physicians desiring to practice telemedicine in other states should assume that specific state-to-state licensure is required and obtain legal advice from counsel licensed in such states regarding applicable telemedicine laws.
8. See Texas Occ. Code §111.001(4).
9. See Texas Occ. Code §111.007(a).
10. For additional considerations, see <https://www.texmed.org/TelemedicineLaw/>.
11. See Texas Occ. Code §111.055(c).