Telehealth/Telemedicine: The Promise and the Perils Under U.S. Law

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What is the Difference Between Telemedicine and Telehealth?
Telehealth =

• Delivery of health services and information using telecommunication technologies.

• Telehealth includes both clinical and nonclinical services for diagnosis, education or treatment.
Examples of Telehealth:

- Email communications,
- Electronic medical records,
- Store and forward technology

- This term is often used interchangeably with eHealth and/or cybermedicine.
Nurses in all settings who use telecommunications and health technologies, such as, audio, video, or data in their practice are providing telehealth nursing.
Telemedicine =

- One form of telehealth.

- Telemedicine is limited to the treatment of patients at a distance with the *provider not physically present with the patient*.

- This term is typically used only in the narrow context of clinical services and treatment.
Telephone triage, remote monitoring and home care are the fastest growing applications involving nursing telemedicine.
Why is a lawyer talking to you about these subjects?

- While telehealth is rapidly changing the face of medicine, the law is slow to act, creating potential traps for the unwary.
Potential Legal Obstacles to Telemedicine:

- Licensure
- Jurisdiction (where a lawsuit can be maintained)
- Insurance Coverage
LICENSING PROBLEMS: CROSSING STATE LINES
Telemedicine invites clinical applications that ignore geographic borders.
When telemedicine involves practicing across borders, issues with potentially serious consequences are presented.
There is **no U.S. national licensure system** for telemedicine.

There are **inconsistencies and lack of coordination** between U.S. states.
As a result, telemedicine regulations vary state-by-state.

State laws *vary widely* creating *a trap* for the unwary provider who provides medical services across state lines.
Every state agrees that the law where the patient is located at time of service applies.

With narrowly-limited exceptions, most states require full in-state licensure for out-of-state telemedicine providers.
Exception:

- Providing services in federal institutions.
  - Examples:
    - Federal prisons
    - Federal hospitals (such as Balboa Naval Medical Center)
In 2000, The National Council of State Boards of Nursing (NCBSN) launched an initiative to expand the mobility of nurses to practice across state lines.

The Nurse Licensure Compact (NLC) allows nurses to have one multistate license, with the ability to practice in both their home state and other member states.
As of December 2011, there are twenty-four states participating in the Compact.

The Compact is pending in 6 other states (not including California).
Caveat:

- Even with an interstate license, there may be problems if you are working under the direction of a doctor providing services to a patient in a different state where the patient is located and the doctor is not licensed in that state.

- THERE IS NO MULTI-STATE COMPACT FOR DOCTORS. GENERALLY, THEY MUST BE FULLY LICENSED IN EACH STATE.
PAST ATTEMPTS AT NATIONAL LICENSURE FOR PHYSICIANS FAILED.

The Federation of State Medical Boards developed a model act * which would make a special telemedicine license available to licensed physicians who “regularly” practice medicine across state lines.

This model act never passed.

The American Medical Association also rejected a proposal for interstate licensure.

Instead, it adopted the policy that licensure requirements should be developed by individual states and their medical boards.
Out of State Consultation Exemptions

Most states allow physicians to consult on out of state patients under limited circumstances IF:

1. They are acting in concert with a physician duly licensed to practice medicine in the same state as where the patient is present and

2. The state licensed physician retains ultimate authority over the patient’s care.

So... curbside consults directly with a patient’s own in-state doctor are okay.
Caveat re Consult Exception:

Historically, out-of-state telereview of slides and x-rays was seen as a form of permissible physician-to-physician consultation.

Today, many states are unlikely to read the consultation exception so broadly.

In fact, the trend clearly is moving in the opposite direction.
POTENTIAL PENALTIES
Licensing Penalties

Telehealth providers may have to defend against charges in other state’s Medical Board licensure proceedings for the unlicensed practice of medicine.
Example of Licensing Penalties: Massachusetts

Regulations of the Massachusetts Board of Registration in Medicine provide that a Massachusetts physician may be disciplined for “[k]nowingly permitting, aiding or abetting an unlicensed person to perform activities requiring a license.”

Hospitals and HMOs whose providers send biopsies to large national laboratories for interpretation by pathologists may face charges of aiding and abetting the unlicensed practice of medicine.
Criminal Penalties
Example of Criminal Penalties: Texas

- Texas limits out of state physicians to “episodic consultations,” and requires a Texas medical license for any physician:

  “who is physically located in another jurisdiction but who, through the use of ... an electronic medium, performs an act that is a part of a patient care service... that... affects the diagnosis or treatment of the patient [in Texas]. . . .”

Violation of this Texas law...

- Class A misdemeanor, punishable by a fine of up to $4,000 and/or a jail sentence of up to one year.

- Conviction of a second offense punishable as a third degree felony which may result in a fine of up to $10,000 and imprisonment for two to ten years.

- Each day of violation constitutes a separate offense.
Hageseth v. Superior Court involves *criminal prosecution* for an out of state provider.

Defendant Colorado physician wrote a Prozac prescription for California resident he never physically examined. Patient simply completed on-line questionnaire and obtained prescription from defendant. He then committed suicide. Prozac was found in his bloodstream.

The Court of Appeal held *California courts have jurisdiction over non-resident physician* who never physically entered state. Court reasoned it made “*no difference that the charged conduct took place in cyberspace rather than in real space.*”
Penalties:
Defend Lawsuit in Patient’s State
“JURISDICTION” AND TELEMEDICINE

- You may be sued in the state where the patient is located.

- This means the health care provider may be forced to defend a lawsuit in the state where the patient is located even if the provider never stepped foot in that state.
The state law where the patient is physically located applies.

Caps on damages are only afforded state licensed professionals.

No cap on damages is afforded a provider who performs telemedicine outside of state laws, even if the patient’s state has cap on damages.
Malpractice Insurance May Not Apply

- Malpractice insurance may not apply for out of state telemedicine practice.

- Such insurance is tied to having a valid license to practice medicine in the state.
It’s not all bad....
There are some states that have more favorable telemedicine laws....at least on the books.
Nevada

- On the books, Nevada has a “special use permit” allowing out of state physicians to practice telemedicine.

- However, Nevada issues very few such special use permits to out of state physicians.

While on the surface Nevada’s laws look more favorable than many, Nevada prohibits the prescription of any prescription drugs for a patient **unless the practitioner has physically examined the patient within the past 6 months.**
What is a health care provider to do?
PRACTICE TELEMEDICINE EXCLUSIVELY WITHIN A STATE...

OR

UNDER THE DIRECTION OF A PROVIDER LICENSED IN PATIENT’S STATE

(or exclusively practice in compact nursing states)
Telemedicine in California
AB 415: The Telehealth Advancement Act of 2011

This is a state law and only applies to services rendered, communications within the state of California.
AB 415 Allows Services to be Provided on E-mail or Phone *in-state*

- Caveat: HIPAA still applies
- California constitutional right to privacy still applies
AB 415 Eliminates Some Prior Restrictions

• Eliminates prior restriction requiring provider to document barrier to in-person visit in order to receive Medi-Cal reimbursement for telemedicine.

• Eliminates requirement of written consent. Verbal consent sufficient.
AB 415 Expands types of Allied Health Practitioners Who Can Provide Telehealth Services to include*:

- Pharmacists
- Nurse Practitioners
- Physician Assistants
- Registered Nurses
- Physical Therapists
- Occupational Therapists
- Licensed Vocational Nurses
- Psychologists
- Osteopaths
- And more....

*Note: this does **not** apply to Medicare which is still more restrictive on who is an eligible Telehealth provider
New CMS Rule Relaxing Credentialing and Privileging Requirements for Telehealth

- **Background**: All who provide services in a hospital must be privileged and credentialed by the professional staff.

- This rule complicated the ability to provide telehealth services into a remote hospital.

- New Rules **permits patient site to rely on credentialing at site where health care practitioner’s site**
  (“credentialing by proxy”)
Limits to Credentialing/Privileging by Proxy

- Limited to both the patient and the provider in the state of California.

- There must be a written agreement between the provider site and the patient site ensuring the medical staff’s credentialing and privilege processes at the providers’ site “meets or exceeds” CMS standards.
AB 415 - Removes many barriers to in-state telehealth

- Removes limits on physical locations where telehealth may be provided
  - Prior law restricted telehealth to doctors offices and licensed facilities.
  - New law opens the door to coverage of in-home monitoring devices and in-home medical appointments

- Note: locations for telehealth still subject to restrictions and policies in contracts by payers
Caveat: Potential Peril of In-home Telemedicine

- A US study of elderly patients with a high risk of hospitalization showed a significant increase in the mortality rate over 12 months: Telemonitoring group at 14.7%, compared with 3.9% for the usual care group.

Future
As the healthcare environment continues to evolve due to changes in reimbursement, legal issues, and shrinking healthcare resources, the expanding role of telehealth nurses will likely expand.

Leadership and collaboration among nurses are needed to outline the uses of telehealth technologies to provide nursing care in an interdisciplinary manner to patients, regardless of staffing, time, or geographic boundaries.
How to Protect Yourself....

- Avoid advice in emails or other social media communications *unless you know where the patient is physically located.*

- Establish and follow consistent policies, procedures and consent forms with the advice and consent of legal counsel.

- Have unified global management sites for all web portals and email systems.
• Distinguish provider to provider communications (consultant only limited liability) versus provider communications to **patient**.

• Distinguish services provided **across state lines**.

• **Riskiest case is provider providing services to patient across state lines.**
The most conservative view would be to practice Telemedicine only in the State of California or obtain a license in the state where you intend to treat patients via telemedicine.

- **If crossing state lines via telemedicine treatment, be sure to know what is required by that state’s laws.**

- In most instances, having a relationship with a physician on-site in the state where the patient is located with a physician who assumes ultimate authority for the patient and in-person physical examinations is preferable.