

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

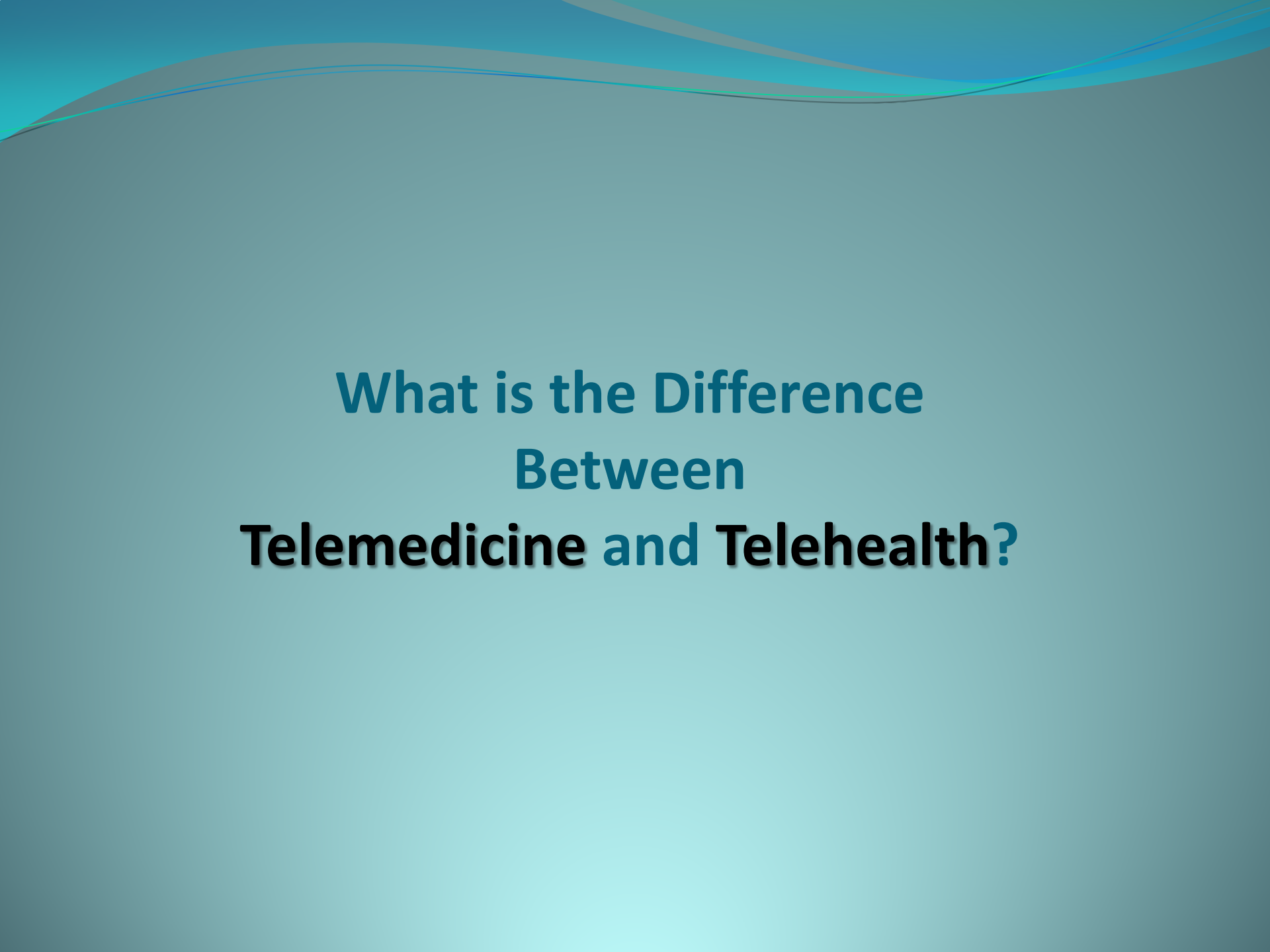
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# **What is the Difference Between Telemedicine and Telehealth?**

# 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.

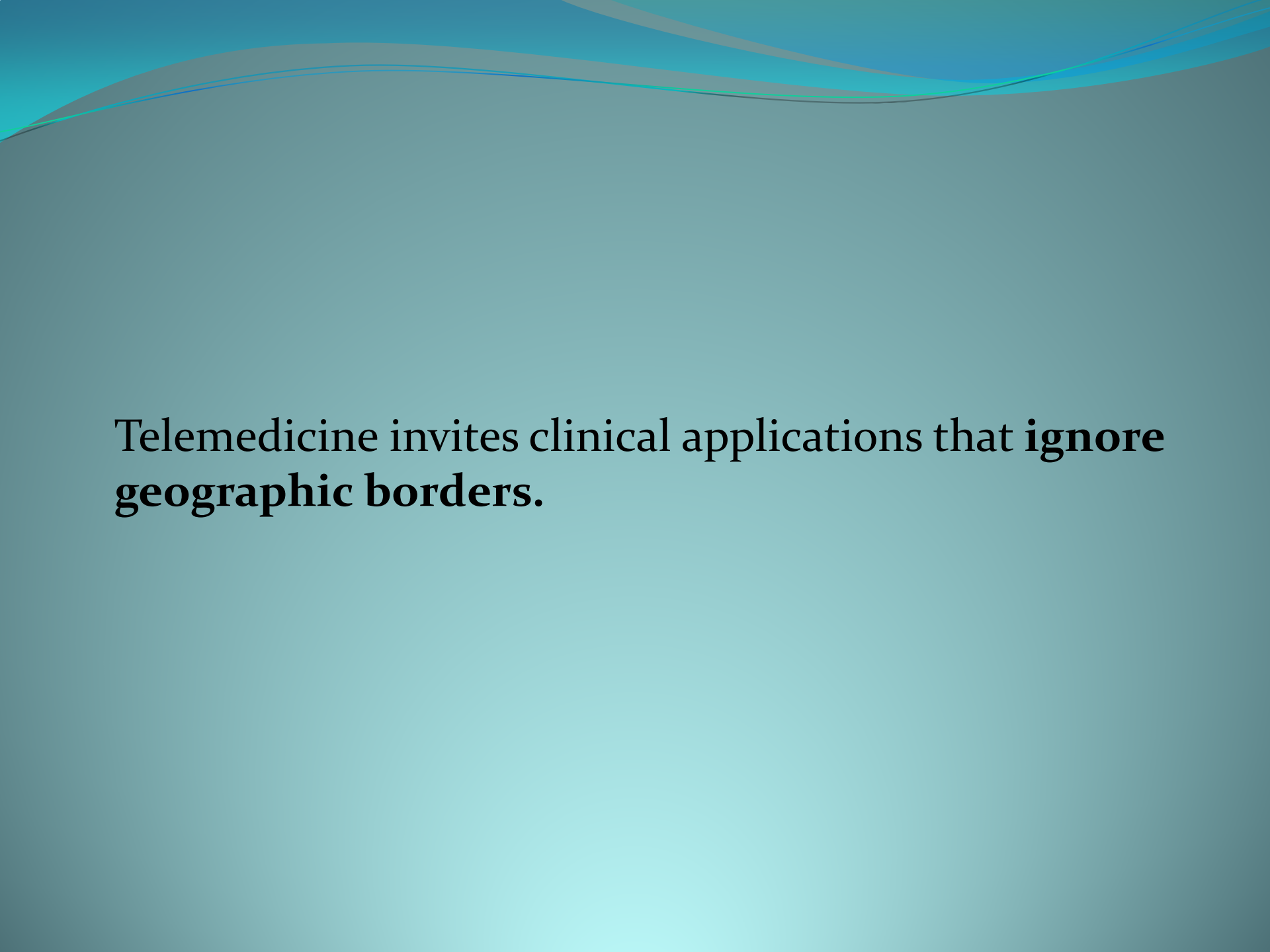


# Potential Legal Obstacles to Telemedicine:

- Licensure
- Jurisdiction (where a lawsuit can be maintained)
- Insurance Coverage

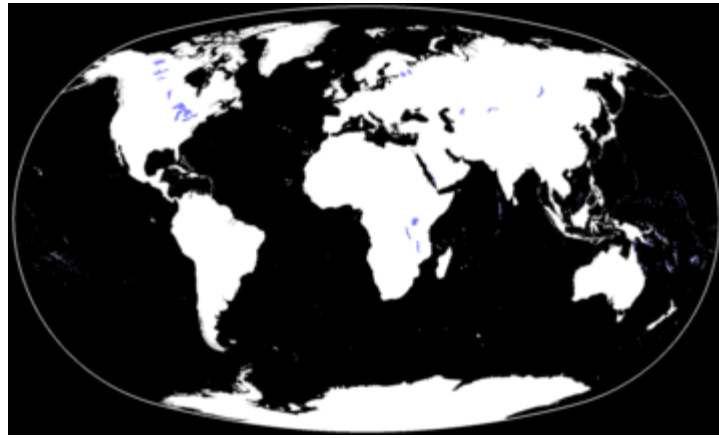


# **LICENSING PROBLEMS : CROSSING STATE LINES**



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.**



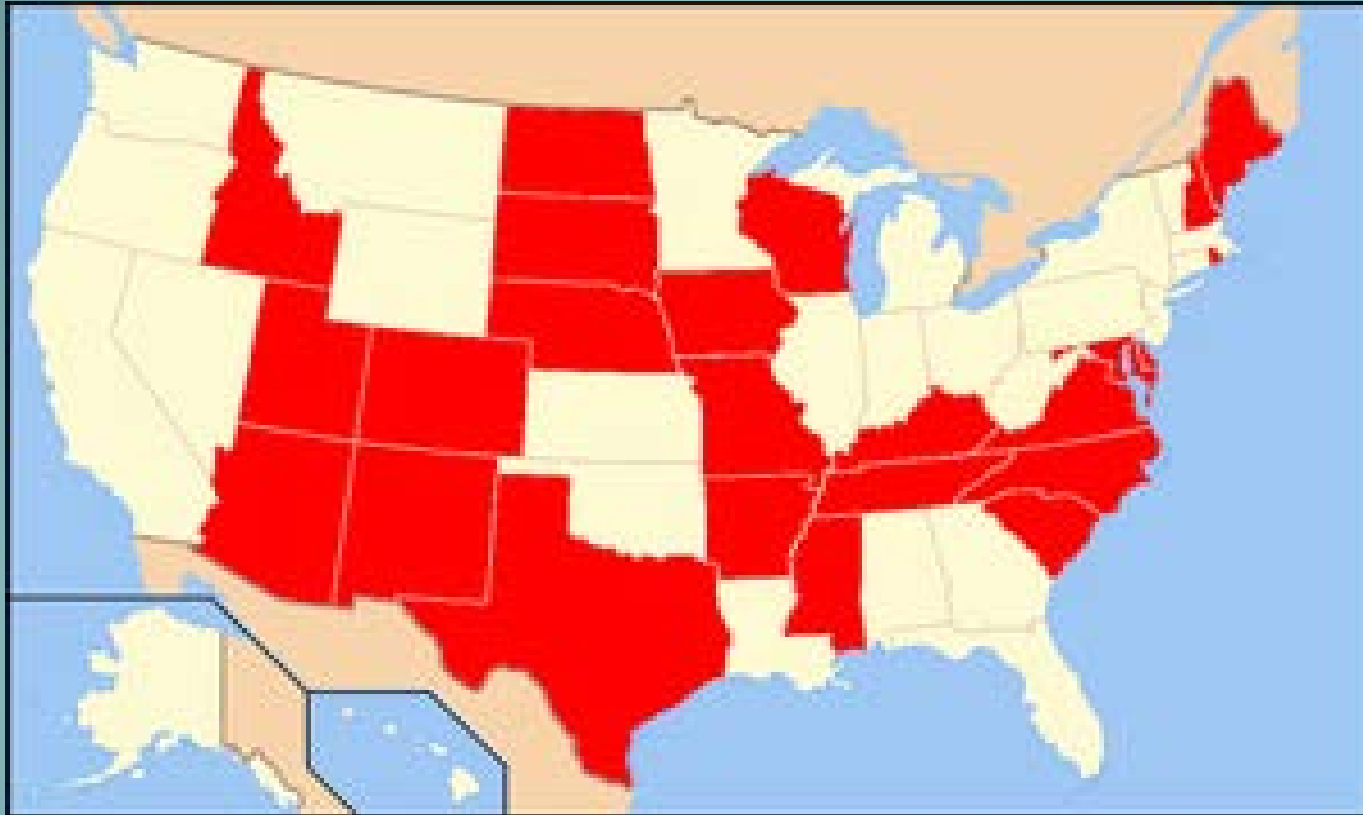
## Exception:

- Providing services in federal institutions.
- Examples:
  - Federal prisons
  - Federal hospitals (such as Balboa Naval Medical Center)

# **NURSING LICENSURE ACROSS STATE LINES:**

- In 2000, The National Council of State Boards of Nursing (NCSBN) 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.

\*Federation of State Medical Boards, “Act to Regulate the Practice of Medicine Across State Lines” (1995).

- 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]. . .**”  
.
- Tex. Occ. Stat. § 151.056 (2004).



## 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.**

## NO \$ CAP ON DAMAGES

- 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.

The background is a solid blue gradient, lighter at the bottom and darker at the top. A series of thin, wavy lines in various shades of blue and grey run horizontally across the top of the image, creating a layered, wave-like effect.

**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
- <http://archinte.jamanetwork.com/article.aspx?articleid=1149633>



## 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.



Key=

- 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.