

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: November 12, 2020
 ATTENTION: Members, Medical Board of California
 SUBJECT: Update on Telehealth Regulations
 STAFF CONTACT: Aaron Bone, Chief of Legislation and Public Affairs

REQUESTED ACTION:

As requested by the Members of the Medical Board of California (Board), staff are providing this update on the current laws that regulate the practice of telehealth. Staff welcome Board member comments on this item, but no specific action is needed.

Background:

In California, and generally throughout the United States, state law considers medicine to be practiced in the state where the patient is located at the time care is rendered. Accordingly, state law generally requires a patient receiving care in the state of California to be treated by a physician licensed by the Board, even if that physician is providing care through a telehealth platform.

Business and Professions Code (BPC) section 2060 provides a limited exception to physicians who reside outside California and are licensed in their state or country of residence. Such an out-of-state physician may consult with a Board-licensed physician on patient care, but may not give orders or have ultimate authority over the care or primary diagnosis of the patient located in California.

In addition, BPC section 2290.5 establishes certain criteria and definitions related to providing telehealth. The key provisions of that section include:

- Definitions of the terms, “asynchronous store and forward,” “distant site,” “originating site,” “telehealth,” and “synchronous interaction”
- Requires obtaining certain verbal and written consent from patients
- States that failure to comply with the section is considered unprofessional conduct
- State that all laws pertaining to patient privacy, professional responsibility, unprofessional conduct, and standards of practice apply to telehealth interactions

Telehealth and the COVID-19 Pandemic

In response to the COVID-19 pandemic, the Governor of California and numerous other states used emergency authority to expand access to telehealth services. According to the Federation of State Medical Boards (FSMB), 42 states and three U.S. territories, modified one or more of their requirements pertaining to telehealth.

In California, the Governor authorized the Emergency Medical Services Authority to allow out-of-state physicians to practice in California in-person or through telehealth, without a Board license. The Governor suspended certain telehealth-related informed consent requirements and suspended certain privacy requirements (e.g. in cases of inadvertent, unauthorized access or disclosure of health information) in conjunction with the good faith provision of telehealth services.

In addition, the Governor and related state agencies issued numerous orders and guidance to public and private health insurers that allow or expand payment for services provided through telehealth or require providers to be reimbursed at the same rate regardless of the modality of delivery.

Federal Government Actions

The federal government waived or relaxed a number of requirements related to the provision of telehealth services, including:

- HIPAA Requirements – The U.S. Department of Health and Human Services is allowing providers to serve patients through common video chat applications like FaceTime, Skype, and Zoom.
- Medicare/Medicaid Services and Coverage – The Centers for Medicare and Medicaid Services (CMS) allows Medicare patients and providers to be at their respective home for telehealth interactions.

Further, CMS is exercising enforcement discretion pertaining to required in-home patient visits or otherwise allowing telehealth visits in place of in-person appointments for certain types of care/treatment settings, including: end state renal disease/home dialysis, nursing homes, behavioral health and education services provided by hospital-employed health providers, and opioid treatment programs.

Recent Telehealth Legislation

This year, the Governor signed into law [AB 3242 \(Irwin\)](#), which authorizes a telehealth-based mental health evaluation pertaining to the involuntary commitment and treatment of an individual. The Governor vetoed other telehealth bills approved by the Legislature, including:

- [AB 2360 \(Maienschein\)](#) – Requires health care service plans and health insurers, by July 1, 2021, to provide specified access to a telehealth consultation program for providers who provide mental health services to children and pregnant/postpartum persons.
- [AB 2164 \(Rivas\)](#) – Provides that a Federally Qualified Health Center or Rural Health Center "visit" includes an encounter between a patient and a health care provider using telehealth by synchronous interaction or asynchronous store-and-forward technology. These provisions continue until 180 days after the COVID-19 pandemic state of emergency is terminated.

- [AB 2877 \(Grayson\)](#) – Authorizes counties to perform specified In-Home Supportive Services needs reassessments using telehealth for eligible recipients.

In his veto messages, the Governor expressed support for using telehealth to increase access to care, but that the costs associated with those bills should be addressed through the budget process. Further, the Governor indicated that these policy changes should be assessed in the context of the respective state department's goals and processes. In particular, he stated that the Department of Health Care Services is currently evaluating its telehealth policy to determine what temporary flexibilities should be extended beyond the COVID-19 pandemic.

Certain other states enacted statutory changes that facilitated the use of telehealth services in their jurisdictions on either a temporary or permanent basis, including Maine, Minnesota, New Jersey, Oregon, and Vermont.

Considerations for Licensing Physicians Who Provide Telehealth Services

After the temporary COVID-19 pandemic related telehealth policy changes cease, there will continue to be numerous challenges to the growth of telehealth services in California and throughout the nation, including public and private health payments to providers, data privacy and security, and consumer broadband access. For state medical boards, physician licensing and enforcement considerations are the most relevant issues.

As previously indicated, state laws (including California) generally require physicians to hold a license in each state where they provide care. That requires a physician to abide by each state's licensure process, including paying licensure fees and complying with continuing medical education requirements for each jurisdiction, which may be burdensome for some.

The Board's ongoing efforts to decrease its application processing timeframes benefit both in-state and out-of-state physicians who desire to either establish a practice in California or take on California patients, respectively.

Although out-of-state physicians licensed by the Board are subject to its disciplinary authority, the Board may face additional challenges and costs to increase its enforcement activity with physicians located in other states or countries.

Resources:

Earlier this year, Board staff began attending monthly meetings of the Center for Connected Health Policy (CCHP), a non-profit organization dedicated to integrating telehealth technologies into the health care system. The [CCHP website](#) has a wealth of information on telehealth policy matters.

The FSMB maintains a [webpage](#) that tracks the state responses to COVID-19, including licensing waivers granted related to telehealth.