

RISK MANAGEMENT AND TELEPSYCHIATRY



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I have no financial relationships with
commercial interests to disclose

Nothing I say today is legal advice

OBJECTIVES

- Recognize and address potential legal hurdles in telepsychiatry, including licensure
- Understand the clinical hurdles in telehealth practice
- Appreciate the impact of the COVID public health emergency (PHE) and various regulatory waivers on telepsychiatry practice

AGENDA

- Before the public health emergency (PHE)
 - Preliminary determinations
 - Legal hurdles
 - Clinical hurdles
 - Prescribing controlled substances
 - Resources evidencing the standard of care
- During the PHE
 - Waivers
- After the PHE

BEFORE THE PHE

TAKE AWAY POINT #1

Treatment is rendered where the **patient** is physically located.

TAKE AWAY POINT #2

Utilizing telemedicine does not alter the standard of care to which the physician will be held – it is the same standard of care that would apply if the patient was in the physician’s office or facility.

TAKE AWAY POINT #3

Research/contact all applicable medical boards to determine if you can do what you want to do without violating applicable laws!

- Licensure requirements
- In-person physical examination required
- Prescribing
- Other requirements – CME, e-prescribing, PMP registration
- Telehealth regulations

TYPICAL TOPICS ADDRESSED IN TELEMEDICINE LAWS

- Informed consent
- Medical records
- Confidentiality and security
- Physician-patient relationship
- Follow-up care
- Verification of patient's identity
- Other aspects

TELEMEDICINE

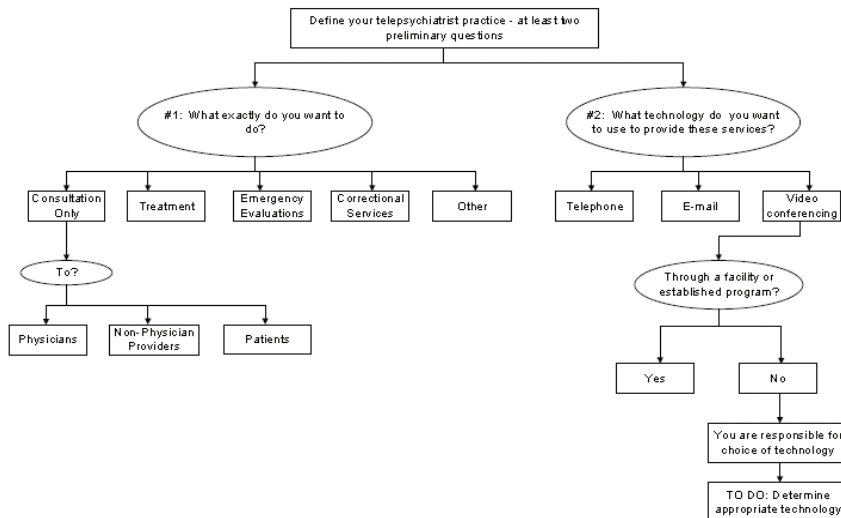
- Telephone treatment may or may not be considered telemedicine
 - Don't be confused by state Medicaid laws:
 - Typically say state won't reimburse for phone calls
 - Compliance with all state laws, including licensure laws, is still required

EVEN IF PHONE CONTACT IS NOT TELEMEDICINE...

- You still need to meet the standard of care
- If patient is in a different state, you may still need a license in the patient's state

TELEPSYCHIATRY

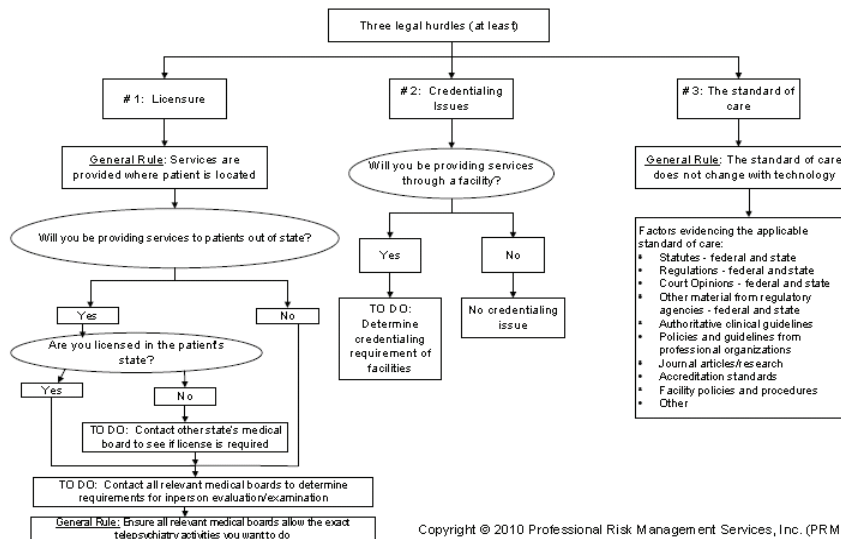
PRELIMINARY DETERMINATIONS



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TELEPSYCHIATRY

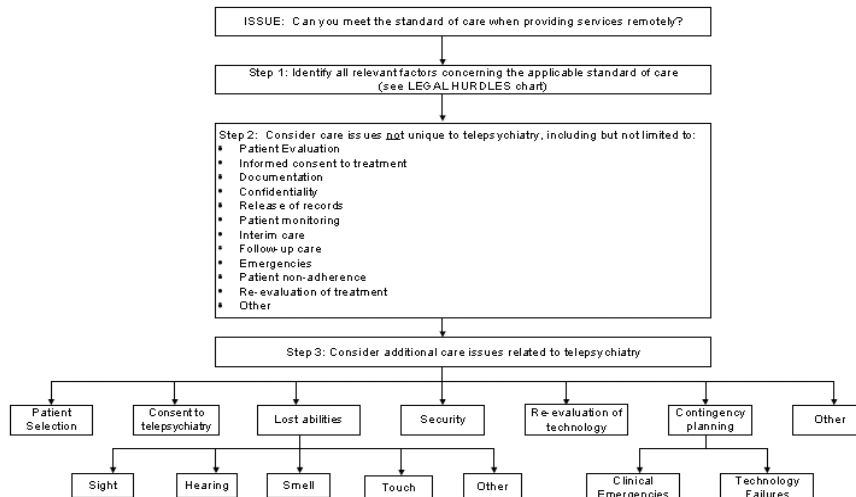
LEGAL HURDLES



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TELEPSYCHIATRY

CLINICAL HURDLES



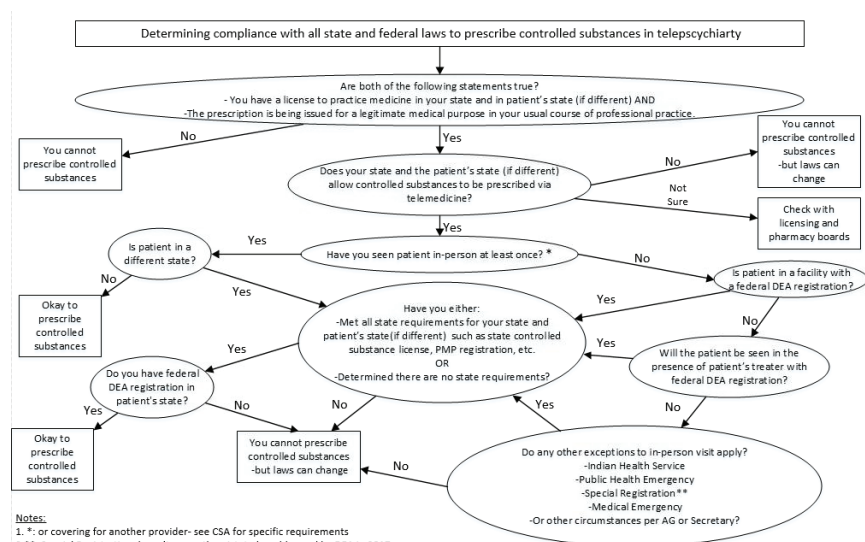
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TO PRESCRIBE VIA TELEMEDICINE

- Ensure compliance with all state and federal laws, including:
 - State law – some states prohibit
 - Federal Controlled Substance Act
 - Including the Ryan Haight Act amendment
 - Federal DEA registration requirements
 - In each state you prescribe in
 - State equivalent of federal DEA registration, if applicable

FACE-TO-FACE EVALUATION

- Federal law (CSA as amended by the RHA)
- Some state boards say:
 - In-person exam is not required
 - Some boards say it depends
 - On the patient’s condition



Notes:
 1. *: or covering for another provider- see CSA for specific requirements
 2. **: Special Registration doesn't currently exist; to be addressed by DEA in 2017
 3. This is a risk management resource- It is not legal advice.
 4. There can always be exceptions to these rules, especially if practicing within VA or IHS.
 5. You should check with licensing boards in your state, and patient state's (if different) for specific requirements and prohibitions.

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TELEPSYCHIATRY & MEDICAL MARIJUANA

Some states prohibit using telemedicine to conduct the examination required to certify for medical marijuana

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MEDICAL MALPRACTICE INSURANCE

- Not all carriers cover telemedicine
- Some carriers will only cover telemedicine if specific conditions are met
 - Ex: only cover if patient is in physician's state
 - Ex: only consultation, not treatment
 - Ex: only cover in desirable jurisdictions
- Not all carriers will cover services rendered out of state
 - May not be set up to defend in patient's state
- Some carriers may have premium surcharge for telemedicine
 - Ex: if patients are in a state without damage caps
- ASK:
 - Does carrier cover telemedicine?
 - Are there any restrictions?
 - Are there any requirements?
 - Is there a surcharge?
 - Is there coverage for suits brought out of state?
- Resource: Telehealth Resource Centers - *Medical Malpractice and Liability*

INTERNATIONAL TELEMEDICINE

- Physician is out of the country
 - Licensure
 - Needed in patient's state
 - Confirm not needed from government of where physician is
 - Meeting the standard of care
 - Same as if patient was seen in person
 - Difficult for patient to reach physician?
 - Time difference?
 - Prescribing issues
 - Medical malpractice insurance
 - Can only address policy through PRMS:
 - Won't cover suit brought in physician's country
 - If sued in patient's state in US:
 - Won't deny coverage just because MD was outside of US
 - Will deny coverage for any standard reason:
 - Ex: Physician's country found physician to be practicing without a license; policy doesn't cover unlawful acts / unauthorized practice of medicine

INTERNATIONAL TELEMEDICINE

- Patient is out of the country
 - Licensure
 - Needed in physician's state
 - Confirm not needed from government of where patient is
 - Meeting the standard of care
 - Same as if patient was seen in person
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 - (Ex: Patient's country found physician to be practicing without a license; policy doesn't cover unlawful acts / unauthorized practice of medicine)

TECHNOLOGY IS ONLY A TOOL

Technology is a tool that can partially restore the lost abilities to evaluate and treat patients at a distance, but by itself, *technology cannot completely restore all abilities.*

RISK MANAGEMENT ADVICE – WHEN CONSIDERING TELEPSYCHIATRY

- Define your telepsychiatry endeavor
 - What you want to do
 - What technology you want to use
- Determine all relevant laws and other standard of care factors
- Evaluate your ability to comply with legal requirements
 - E.g., Ensure all relevant medical boards allow you to do the exact telepsychiatry activities you want to do and with the technology you want to use
 - Licensure requirements
 - Physical examination requirements
 - Etc.
- Understand the importance of the location of the patient, both for legal and clinical reasons

RISK MANAGEMENT ADVICE – WHEN CONSIDERING TELEPSYCHIATRY

- Understand that the standard of care does not change with technology
- Evaluate the impact of your proposed telepsychiatry endeavor on your ability to meet the normal standard of care
 - In addition to meeting all care issues not unique to psychiatry, there are additional care issues related to telepsychiatry that must also be met
 - Understand that technology is a tool that can partially restore lost abilities to evaluate and treat patients at a distance, but technology itself cannot completely restore all lost abilities
 - Formulate strategies to:
 - Comply with all applicable laws
 - Restore lost abilities where possible
 - Avoid situations where needed abilities cannot be restored
- Inform your Underwriter of your planned telepsychiatry activities

RISK MANAGEMENT ADVICE – WHEN DOING TELEPSYCHIATRY

- Consider what will be “lost” when treating individual patients re:
 - Communication
 - Ability to diagnose and treat
- Ensure the ability to treat individual patients within the standard of care
 - Carefully evaluate whether a particular form of telepsychiatry is appropriate for a given patient
 - At the beginning of treatment
 - AND at clinically significant events
 - AND periodically as treatment progresses
 - Determine whether and how the particular form and method of treatment will help the patient progress toward legitimate treatment goals
- Ensure patients have a basic understanding of the technology being used and appreciate its limitations

RISK MANAGEMENT ADVICE – WHEN DOING TELEPSYCHIATRY

- Prepare for possible emergencies by having patient addresses and local emergency services numbers available
- Utilize a consent form wherein the patient acknowledges
 - the possibility of a privacy / security breach
 - the possibility that medical conditions may not be able to be observed remotely
- Include in documentation of session
 - that session was conducted via telepsychiatry
 - why this method was chosen for this patient
 - why it continues to be an appropriate treatment option
- Continually re-evaluate physician and patient level of satisfaction

DURING THE PHE

Coronavirus FAQs

NEW/UPDATED FAQs	▼
ADDICTION TREATMENT	▼
COMPUTER SECURITY/PHISHING	▼
ETHICS	▼
HIPAA AND 42 CFR PART 2	▼
OFFICE ISSUES	▼
PATIENT CARE ISSUES	▼
PRESCRIBING CONTROLLED SUBSTANCES	▼
REMOTE TREATMENT - TELEPHONE	▼
RESOURCES	▼
TELEPSYCHIATRY - ADMINISTRATIVE ISSUES	▼
TELEPSYCHIATRY - CLINICAL ISSUES	▼
YOUR UNAVAILABILITY	▼
OLDER FAQs	▼

Quick Links:

- ✔ Preliminary Analysis Chart to determine if state licensure is relevant (Added 1/14/21)
- ✔ Preparing For What's Next - To Do List
- ✔ State Guidelines For Re-Opening a Medical Office (Updated 3/30/21)
- ✔ State Licensure Waiver Information
- ✔ Telepsychiatry and COVID-19: What We Do and Do Not Know On-Demand Tutorial
- ✔ Telepsychiatry Checklist (Updated 9/2/20)
- ✔ Telepsychiatry: Keeping Up With Your Regulators' Waivers (Added 2/19/21)

www.prms.com/faq

STATE REGULATORS

Waiver #1: License to Practice Medicine

- Not all states created waivers
- Nuanced
 - Temporary license
 - Only for treating COVID patients
 - Only in certain practice settings or under direction
- Track the waiver
 - Not tied to federal waivers

STATE REGULATORS

Waiver #2: State Controlled Substances Registration

- Not all states created waivers
- Track the waiver
 - Not tied to federal waivers
 - Once back in effect, will need to comply
 - May need to terminate treatment if cannot comply

FEDERAL REGULATORS

HHS – Office of Civil Rights

Waiver: Discretionary Enforcement when non-HIPAA
Complaint Telepsychiatry Platforms are Used

- Needs to be non-public facing app
- Tied to the federal PHE declaration

FEDERAL REGULATORS

DEA

Waiver #1: In-person Visit Requirement Prior to
Prescribing a Controlled Substance

- Many psychiatrists may be left with patients they cannot treat after PHE ends
- Tied to the federal PHE declaration

FEDERAL REGULATORS

DEA

Waiver #2: DEA Registration in the Patient's State
Temporarily Not Required

- Tied to state licensure
- Tied to the federal PHE declaration



AFTER THE PHE



RE-OPENING YOUR OFFICE

Guidelines

- AMA
- MGMA (Medical Group Management Association)
- CMS
- CDC
- State guidelines for reopening



PATIENTS

Remained Local

- In-person
- Virtual
- Mix

PATIENTS

Out-of-State

- Plan to return to area?
- Track waivers
- If expired, what is needed to continue to treat?
 - If can treat, follow state guidelines and prescribing rules.
 - In-person visit, DEA registration in patient's state
 - HIPAA-compliant platform
- If cannot treat, follow termination process.



QUESTIONS?