Telemedicine: Prescribing and the Internet

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ABSTRACT

The author provides an overview of state laws as they relate to prescribing within the field of telemedicine. This report analyzes the various requirements necessitated by state medical boards before a physician is permitted to prescribe medication to a patient. The conclusions established within this paper have been verified by each state medical board.

Telehealth Overview

Advancements in medicine and technology have transformed the way health care is delivered to patients. However, laws governing these interactions have not evolved at the same pace, leaving many legal and regulatory questions unanswered in the area of Internet prescribing and telemedicine. To best analyze this issue, we must examine the laws that govern physicians prescriptive authority.

These laws are found at the state level because Article X of the Constitution grants medical boards the authority to regulate the health, safety, and welfare of their citizens. Although the federal government has the authority to establish specific, professional requirements for doctors under the purview of the Supremacy Clause, there is a strong legal presumption against federal preemption of state prescribing laws. As a result, prescribing regulations vary state-by-state.

However, even though these laws are governed at the state level and vary state-by-state, there are consistent legal issues within the law that determine a state’s position on prescribing over the Internet. These two legal issues include the physical examination requirement and the pre-existing physician-patient relationship requirement.
**Pre-existing Physician-Patient Relationship**

Many states require that a patient have a pre-existing relationship with their doctor before the physician is able to prescribe medication to a patient through telemedicine. In most states, if the patient does not have a pre-existing physician-patient relationship with the physician, the physician providing the telemedicine treatment is required to examine the patient in-person. For the most part, this law only applies to those states that do not allow for the examination to take place electronically.

**Physical Examination**

In order to prescribe medication to a patient, a physician is required to conduct a medical examination of that patient. This is a standard of care that is accepted by the medical community. Traditionally, before the onset of telemedicine, examinations took place in-person where the practitioner physically examined the patient face-to-face. As medicine and technology advanced, physicians were presented with new tools, such as telemedicine, that would allow a practitioner to conduct that examination electronically.

However, state laws governing these interactions were unclear as to whether a physician was legally permitted to examine the patient over the Internet, through telemedicine, and then prescribe medication to that patient.

The confusion is rooted in the fact that the laws governing these telemedicine interactions were written decades before telemedicine was even conceptualized. In efforts to bring clarity to this situation, a small group of state legislators and state medical boards began analyzing whether telemedicine examinations met the medical standard or care requirement. That is, will the examination result in a proper evaluation, diagnosis and treatment plan for that patient?

Still, to this day, very few states have specific language addressing the issue of telemedicine and Internet prescribing. For those states that do not have specific telemedicine and Internet prescribing laws, states refer physicians to their state’s statute or board policies that generally speak to a physician’s right to prescribe.

Presently, there are 41 states and 1 territory (Puerto Rico) that require a physician to conduct an in-person or face-to-face physical exam of the patient before the physician is
permitted to prescribe medication using telemedicine. This means patients living in remote and rural areas may be required to travel hundreds of miles to receive a physical exam in order to be eligible for treatment by telemedicine in the future. Many argue that this physical examination requirement defeats the purpose of telemedicine – a tool that is supposed to virtually bridge the gap between patient and provider.

**Electronic Examination**

However, there are a handful of states that specifically allow telehealth practitioners to conduct medical examinations using telemedicine technologies. These states require that the practitioner keep with the standard of care when conducting the electronic examination.

According to those state medical boards that allow for electronic examinations, practitioners should not prescribe medication to a patient unless they believe the electronic examination meets the standard of care within the medical community.

For example, if a physician believes that the patient’s medical condition warrants an in-person examination, the practitioner is required to physically exam that patient before prescribing medication or administering treatment.

**Medical Questionnaires**

While some states allow for an electronic examination, almost all states do not allow for that examination to take place through the use of a medical questionnaire. State medical boards adhere to the belief that the administration of a on-line medical questionnaire as the sole basis for prescribing does not keep with the accepted standard of care.

In recent years, state medical boards have seen a rapid rise in illegitimate telemedicine operations by both new and established companies. Generally, these telemedicine business models do not offer a means to physically exam the patient. Rather the model solely relies on the patient to provide the physician with their own patient data and medical history, through the utilization of an on-line form. To date, there are 28 states that explicitly prohibit the use of an on-line medical questionnaire as the sole means for gathering patient data for means of prescribing medication.
Establish Appropriate Follow-up Care

In addition to ensuring that a physician conducts a proper medical exam, 13 states require a physician to establish appropriate follow-up care with the patient after prescribing medication – four of those states allow for an examination to take place electronically.

Conclusion

Generally, states are conservative in what they view to be an appropriate physical examination requirement. However, many state legislators and medical boards assert that they are not trying to impede the advancement of telemedicine but rather ensure that patients receive access to quality health care services.

According to Dr. Jean Sumner, Georgia State Medical Board, “Access to no care at all is better than access to poor care. We are at the very start of telemedicine and we have the opportunity to shape this industry and make it great.”

DISCLAIMER

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