

# DOCTORS

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## SMILE!

The Doctor Will See You Now!



### find out...

- What is telemedicine?
- Telemedicine and Virginia law
- The liability aspects of telemedicine

## A LETTER FROM THE CHAIR OF THE BOARD

Dear Colleague:

Welcome to the first edition of our new format for *Doctors RX*! It's my sincere hope that you find this new layout easier and more enjoyable to read. Telemedicine has entered the health care arena, and Physicians are assessing whether to implement this new technology into their current practices. This latest edition of *Doctors RX* takes a look at the evolution of telemedicine in Virginia and provides insight into liability issues all Physicians should be aware of.



George S. Malouf, Jr., M.D.  
Chair of the Board  
Professionals Advocate Insurance Company



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## DOCTORS RX

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**SMILE!**  
The Doctor Will See You Now!

*“Let’s refocus the camera on your left shoulder.”*

This is not a professional photoshoot at an exotic locale. Rather, it is an exchange between a Physician at her office and a patient in her bed at home, during a remote medical examination conducted through an electronic medium. This is telemedicine, and it could be coming to a screen near you. But don’t be fooled. You will be held to the same medical standards, no matter how or where the interaction takes place.

## WHAT IS TELEMEDICINE?

Virginia law defines telemedicine services as “the use of electronic technology or media, including interactive audio or video, for the purpose of diagnosing or treating a patient or consulting with other health care providers regarding a patient’s diagnosis or treatment. ‘Telemedicine services’ does not include an audio-only telephone, electronic mail message, facsimile transmission, or online questionnaire.”<sup>1</sup> Originally intended to give rural communities access to specialized medical care, telemedicine has grown in scope due to health care reform and technological advancements. Telemedicine is practiced over a range of subspecialties and can be used to monitor the care and management of chronic conditions, conduct general physical examinations, interpret labs and imaging, obtain specialty consultations, or for rehabilitative services. Because of its evolving status, this issue of *Doctors RX* will help health

care providers become familiar with the scope, benefits, and challenges of telemedicine.

## FACING THE CHALLENGES AND PREPARING FOR TELEMEDICINE PRACTICE

Challenges facing providers contemplating adoption of telemedicine include implementation of practice standards, professional licensure portability, payment, and coverage for services delivered.<sup>2</sup> Physicians considering telemedicine will benefit from consulting the American Telemedicine Association’s (“ATA”) state-by-state assessment that addresses precisely these issues by grading every state on an ‘A’ to ‘F’ scale.

Virginia, the District of Columbia, and Maryland received the ATA’s highest possible composite scores. According to the ATA, these grades suggest “a supportive policy landscape that accommodates telemedicine adoption and usage.”<sup>3</sup> While Virginia and the District of Columbia received an ‘A’ for telemedicine coverage and reimbursement standards, Maryland recently dropped to a ‘B’ because of certain restrictions that still exist for telemedicine coverage under state Medicaid plans. With regard to Physician practice standards and licensure, Virginia and Maryland received ‘A’s, while the District of Columbia received a ‘B.’<sup>4</sup> In Virginia and Maryland – with the exception of prescribing – requirements for telemedicine are equivalent to requirements for in-person services.<sup>5</sup>



**Wray Fitch**  
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## Liability

*If you are interested in establishing a telemedicine practice, you must notify your professional liability insurance carrier to ensure there is coverage before embarking on this new endeavor.*

After assessing practical challenges facing telemedicine providers, it is important for health care providers considering implementation to set realistic expectations, conduct independent research, and estimate associated time, costs, and equipment needs.<sup>6</sup> Providers must formulate a plan for implementation and should consider the following:

- How will telemedicine be incorporated into an existing practice?
- How will telemedicine equipment and technology be integrated with the practice's other information technology?
- What clinical hours will be dedicated to telemedicine?
- Will the practice expand to include remote or satellite offices?

Although telemedicine varies in scope and complexity, a health care provider's basic needs include a webcam with HIPAA-compliant software allowing for secure video conferencing, and a secure portal connected to medical records.<sup>7</sup> And, most importantly, if interested in establishing a telemedicine practice, you must notify your professional liability insurance carrier to ensure there is coverage before embarking on this new endeavor.

## TELEMEDICINE IN VIRGINIA

In 1996, the Virginia General Assembly passed House Joint Resolution No. 53, requesting the Council on Information Management, as part

of the Information Technology Infrastructure Initiative, to evaluate roadblocks to the implementation of telemedicine applications in rural Virginia and recommend legislative or regulatory action.<sup>8</sup> The Council on Information Management submitted its final report on December 13, 1996, finding, among other things, that the proliferation of telemedicine may depend less on technology and more on the willingness of insurance companies and the federal Health Care Financing Administration to reimburse health care providers for the cost of remote diagnostics and consultation.<sup>9</sup>

In 2010, over a decade after the report concluding that reimbursement was a major factor influencing telemedicine use in Virginia, the state legislature unanimously approved SB 675- Health Insurance; Mandated Coverage for Telemedicine Services,<sup>10</sup> requiring private health insurers, health care subscription plans and HMOs to cover for the cost of health care services provided through telemedicine technology. Under Virginia law, a Physician must be a licensed Physician in the Commonwealth of Virginia to provide telemedicine services. However, Virginia law allows the rendering of medical advice or information through telecommunications from a Physician licensed to practice medicine in an adjoining state.<sup>11</sup> Virginia law also allows for the practice of medicine by any legally qualified out-of-state or foreign practitioner who consults with a legally licensed practitioner in Virginia.<sup>12</sup> When a Physician licensed in Virginia provides telehealth services out-of-state,

the Virginia Board of Medicine recommends that the practitioner be licensed by, or under the jurisdiction of, the regulatory board of the state where the patient is located and the state where the practitioner is located.<sup>13</sup>

## VIRGINIA BOARD OF MEDICINE GUIDANCE DOCUMENT

Because telemedicine is evolving, and many issues have not yet been addressed under Virginia law, on February 19, 2016, the Virginia Board of Medicine issued Guidance Document 85-12 entitled “Telemedicine.” The Guidance Document, intended to provide guidance and instruction to providers of telemedicine in Virginia, underscores the requirement that a provider first establish a provider-patient relationship in accordance with Virginia Code § 54.1-3303(A) and conduct all appropriate evaluations and history of the patient consistent with traditional standards of care for the particular patient presentation.<sup>14</sup>

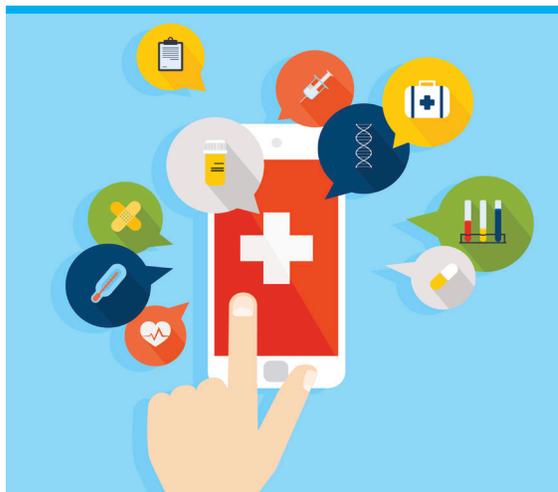
When a provider-patient relationship does not already exist, the Guidance Document recommends that the provider fully verify and authenticate the location, and if possible, confirm the identity of the requesting patient; disclose and validate the provider’s identity and credential(s); and obtain appropriate consent from patients after disclosures regarding the delivery models and treatment methods or limitations, including special informed consents regarding the use of telemedicine services.<sup>15</sup>

## PRESCRIBING

Virginia law allows Physicians to prescribe medicine digitally provided there is a “bona fide” Physician-Patient relationship.<sup>16</sup> SB 1227-Telemedicine Services; Provision of Health Care Services, enacted February 26, 2015, expanded access to care for minor illnesses by amending Virginia law to clarify that a prescriber licensed in Virginia may prescribe Schedule VI controlled substances via telemedicine, provided the prescriber conforms to the same standard of care expected of an in-person visit.<sup>17</sup>

A bona fide Physician-Patient relationship exists when the practitioner does the following: (1) obtains a medical or drug history; (2) informs the patient about the benefits and risks of the drug; (3) conducts a patient exam, either

physically or by the use of instrumentation and diagnostic equipment, through which images and medical records may be transmitted electronically; and (4) initiates additional interventions and follow-up care, if necessary, especially if a prescribed drug may have serious side effects.<sup>18</sup> The Virginia Medical Board further refines the Physician’s obligation to obtain and document the relevant clinical history prior to providing treatment, including the issuance of prescriptions. The Medical Board notes that an online questionnaire does not constitute an acceptable standard of care.<sup>19</sup>



## LIABILITY ASPECTS OF TELEMEDICINE

### 1. Informed Consent

As with any other type of testing and treatment, telemedicine services require a consent communication process. The dialogue between Physician and patient can help in designing a care plan that results in treatment adherence and good clinical outcomes. The following are strategies for managing telemedicine consent communications:

- Evaluate your existing consent policies, procedures and practices to make certain that the content includes telemedicine.
- Provide clear information about the telemedicine process and set clear expectations with patients about what can and cannot be accomplished through the use of telemedicine services.
- Inform patients of their rights when receiving telemedicine, including the right to stop or refuse treatment.
- Provide patients with the potential



## Prescribing

*Virginia law allows Physicians to prescribe medicine digitally provided there is a “bona fide” Physician-Patient relationship.*



## Types of telemedical records media:

*Telemedical records media may be hard copy, video or audiotape, monitor strip, or electronic files. Some states specify acceptable media for health records.*

benefits, constraints, and risks (like privacy and security) of telemedicine.

- Inform patients of what will happen in the case of technology or equipment failures during telemedicine sessions, and state a contingency plan.
- Document the informed consent communication process in the medical record.

### 2. Documentation

Telemedical records should be kept in the same manner as other health records. As with the traditional office visit, when documenting the telemedicine encounter, the Physician should note the date of and reason for the visit, along with the patient registration information, the relevant patient history, review of systems, consultative notes, and any other information used to make a decision about the patient's care. In addition, the patient record should include images or recordings of the patient as relevant to completely document the record. Further, the patient record should note its availability and location. The organization using the telemedical information to make a decision on the patient's treatment must comply with all standards, including the need for assessment, informed consent, documentation of event (regardless of the media), and authentication of record entries. Backup systems for electronic records must be maintained and an emergency plan established in case of electronic system failure.

Retention of telemedical records must be

in accordance with state laws or regulations and any reimbursement requirements.<sup>20</sup> Maintenance of telemedical records should ensure that the organization can quickly assemble all components of a patient's record, regardless of its location in the organization. In the absence of policies specifically addressing disclosure of telemedical information, disclosure should be allowed upon receipt of written authorization from the patient, the patient's legal representative, or in accordance with court order, subpoena, or statute. Informed consent for telemedical encounters should include the names of both the referring Physician and the consulting Physician, and it should inform the patient that his/her health information will be electronically transmitted. Telemedical records media may be hard copy, video or audiotape, monitor strip, or electronic files. Some states specify acceptable media for health records. Review your appropriate state laws and regulations for any specific requirements.<sup>21</sup> To avoid duplication of information and to determine custodianship, identify the responsible holder and owner of the legal telemedicine record.

### 3. Security, Privacy and Confidentiality

Providers of telemedicine are held to HIPAA privacy and confidentiality standards and must be sensitive to who has access to protected health information over a telemedicine network. Moreover, electronic communication and transmission of health information – often by way of live video streaming – increases the potential for computer hacker attacks and other methods of unauthorized disclosures.

Providers should inform patients of associated risks and take all necessary measures to ensure that the use of telemedicine in a practice is HIPAA compliant.

According to Sherry Benton, Ph.D., the creator and Chief Science Officer at TAO Connect, important privacy-related considerations specifically related to telemedicine video-conferencing include:

- That the video service provider will sign a business associate agreement as required by HIPAA.
- That the health care provider and patient both have a secure/encrypted internet connection.
- That the video service provider(s) encrypt data both “in motion” and “at rest” so as to be HIPAA compliant.
- That a patient’s health record will include the actual video recording.
- That the patient has been sufficiently educated about the technology being used to offer telemedicine services.<sup>22</sup>

Ultimately, because health care providers are often not experts in network security, data encryption, or firewalls, the safest solution may be to use the services of a HIPAA-compliant telemedicine partner or platform.

#### 4. Standard of Care

Telemedicine raises new medical-legal implications and considerations. **However, providers who offer telemedicine services are held to the same standards as those practitioners who provide in-person care.** Currently, malpractice lawsuits involving specific telemedicine claims are limited; however, telemedicine may increase the potential for claims. Possible claims related to telemedicine include allegations of technological errors such as image distortion, or connectivity difficulties resulting in delay or misdiagnosis. Additionally, practitioners of telemedicine may be vulnerable to increased claims from the use and functionality of monitoring devices, timely interpretation of remote tests, allegations of improper remote rather than in-person examination, and privacy breaches. It also is possible that providers may be sued for failing to use the latest telemedicine technologies or capabilities. In short, telemedicine and associated technologies

likely will increase the scope of liability issues.

## THE FUTURE OF TELEMEDICINE

Telemedicine is likely to be a factor in accessing medical care in the future. The research firm Parks Associates predicts that by 2018 the number of patients utilizing telemedicine will increase from approximately 900,000 in 2013 to more than 22 million in 2018.<sup>23</sup> Andrew Sussman, M.D., Executive Vice President/Associate Chief Medical Officer of CVS Health similarly concluded, “[w]ith the increased demand for patient care anticipated in future years as a result of the expansion of coverage through the Affordable Care Act, the primary care Physician shortage, aging of the population and epidemic of chronic disease, telehealth gives us the opportunity to offer high quality care to an expanded group of patients in a variety of convenient and cost-effective locations.”<sup>24</sup> Clearly, telemedicine will play a strategic role in the future of organizations like CVS.

Telemedicine’s continuous legislative and clinical evolution is triggered not only by health care reform and advancing technologies, but also by demand for convenient medical services. As telemedicine advances, so do challenges related to implementation, documentation, reimbursement, licensure, malpractice litigation, data privacy and security, online prescribing, and credentialing. Interested health care providers should assess whether their clinical practice, institution, or patient population would benefit from adopting telemedicine and do their homework before taking that step.



*For additional information and resources on telemedicine, visit our web site: [proad.com/doctorsrx](http://proad.com/doctorsrx)*



*“Telemedicine raises new medical-legal implications and considerations. However, providers who offer telemedicine services are held to the same standards as those practitioners who provide in-person care.”*

## references

- <sup>1</sup> VA Code Ann. § 38.2-3418.16 (2015)
- <sup>2</sup> Latoya Thomas & Gary Capistrant, State Telemedicine Gaps Analysis Physician Practice Standards and Licensure, American Telemedicine Association (May 2015) (hereinafter “Practice Standards”), available at: <http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis--physician-practice-standards-licensure.pdf?sfvrsn=14>; see also Latoya Thomas & Gary Capistrant, State Telemedicine Gaps Analysis Coverage & Reimbursement (May 2015) (hereinafter “Reimbursement”), available at: <http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis---coverage-and-reimbursement.pdf?sfvrsn=10>.
- <sup>3</sup> <http://www.americantelemed.org/news-landing/2014/09/08/states-graded-on-telemedicine-policy#.VpVry3x0zml>
- <sup>4</sup> See Practice Standards at p. 1.
- <sup>5</sup> See Practice Standards at pp. 32, 57.
- <sup>6</sup> Available at: <http://www.americantelemed.org/resources/telemedicine-practice-guidelines/telemedicine-practice-guidelines#.VpaZTXx0zml>
- <sup>7</sup> Security and privacy concerns are addressed in further detail below.
- <sup>8</sup> Virginia House Joint Resolution No. 53 (1996)
- <sup>9</sup> Council on Information Management. “Barriers to the Implementation of Telemedicine in Virginia.” VA House Document No. 31. 1997, at p. iii.
- <sup>10</sup> See Senate Bill 675 (Chapter 222, Acts of Assembly of Virginia) Approved April 7, 2010. Available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?101+ful+CHAP0222>; See also Virginia Code Ann. §38.2-3418.16 and §38.2-4319
- <sup>11</sup> Virginia Code Ann. § 54.1-2901
- <sup>12</sup> Id.
- <sup>13</sup> “Guidance Document 85-21” Virginia Board of Medicine, Feb. 2015
- <sup>14</sup> Id.
- <sup>15</sup> Id.
- <sup>16</sup> VA Code Ann. §§ 38.2-3418.16 and 54.1-3303
- <sup>17</sup> See Senate Bill 1227 (Chapter 32, Acts of Assembly of

Virginia) Approved Feb. 26, 2015, also available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+CHAP0032>; See also Id.

<sup>18</sup> Id.

<sup>19</sup> Guidance Document. Also note: Additional requirements apply for the prescription of Schedule V controlled substances via telemedicine.

<sup>20</sup> The Maryland State Medical Society (MedChi), Medical Records Retention Guidelines. Available at: <http://www.medchi.org/sites/default/files/Records%20Retention.pdf> (accessed February 27, 2016).

<sup>21</sup> Telemedical records are treated the same as all other medical records and protected health information with regard to retention and disposal requirements in Maryland. See Md. Code Ann., Insurance § 15-139, Health Care Services Delivered Through Telemedicine. See also Md. Code Ann., Health – General § 4-403, Destruction of Medical Records. See also COMAR 10.01.16., Retention and Disposal of Medical Records and Protected Health Information.

<sup>22</sup> <http://www.emrandhipaa.com/guest/2016/01/13/6-questions-to-consider-when-providing-virtual-visits-using-video-technology/>

<sup>23</sup> <https://www.parksassociates.com/blog/article/how-telemedicine-transforms-care--reduces-costs>

<sup>24</sup> Available at: <http://www.pnewswire.com/news-releases/cvs-health-to-partner-with-direct-to-consumer-telehealth-providers-to-increase-access-to-physician-care-300133394.html>



## CME TEST QUESTIONS

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- Under Virginia law, telemedicine services include an audio-only telephone, electronic mail message, facsimile transmission, or online questionnaire.  
A. True                      B. False
- Telemedicine is practiced over a range of subspecialties and can be used for which of the following:  
A. To monitor the care and management of chronic conditions  
B. To conduct general physical examinations  
C. Interpret labs and imaging  
D. All of the above
- Providers who offer telemedicine services are held to the same standards as those practitioners who provide in-person care.  
A. True                      B. False
- All of the following strategies account for good telemedicine consent communications EXCEPT:  
A. Providing clear information about the telemedicine process and setting clear expectations with patients about what can and cannot be accomplished through the use of telemedicine services  
B. Not documenting the informed consent communication process in the medical record  
C. Providing patients with the potential benefits, constraints, and risks of telemedicine and informing patients of what will happen in the case of technology or equipment failures during telemedicine sessions  
D. Informing patients of their rights when receiving telemedicine, including the right to stop or refuse treatment
- Telemedicine may be used to obtain specialty consultations.  
A. True                      B. False
- A health care provider who engages in telemedicine should ensure which of the following:  
A. A webcam with HIPAA-compliant software allowing for secure video conferencing  
B. A secure portal connected to medical records  
C. Professional liability insurance coverage  
D. All of the above
- Virginia law allows the rendering of medical advice or information through telecommunications from a Physician licensed to practice medicine in an adjoining state.  
A. True                      B. False
- With regard to HIPAA privacy and security issues, which of the following statements are true:  
A. Providers of telemedicine are held to HIPAA privacy and confidentiality standards and must be sensitive as to who has access to protected health information over a telemedicine network.  
B. Providers should inform patients of associated risks and take all necessary measures to ensure that the use of telemedicine in a practice is HIPAA compliant.  
C. Both A and B  
D. Neither A nor B
- For purposes of prescribing, the Virginia Medical Board notes that an online questionnaire constitutes an acceptable standard of care.  
A. True                      B. False
- A bona fide Physician-Patient relationship exists when the practitioner does which of the following:  
A. Obtains a medical or drug history  
B. Informs the patient about the benefits and risks of the drug and initiates additional interventions and follow-up care, if necessary, especially if a prescribed drug may have serious side effects  
C. Conducts a patient exam, either physically or by the use of instrumentation and diagnostic equipment, through which images and medical records may be transmitted electronically  
D. All of the above

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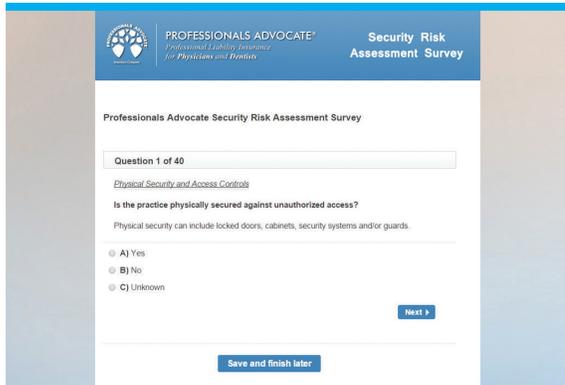
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