

TELEMEDICINE IN TEXAS
OPPORTUNITIES AND PRACTICE POINTERS FROM A LEGAL PERSPECTIVE

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TELEMEDICINE IN TEXAS

I. INTRODUCTION

Do you practice telemedicine or have plans to start? If so, this paper will give you a guide on basic requirements, opportunities, and pitfalls in Texas and beyond from a legal perspective. If not, you may wish to reconsider.

Texas telemedicine law is nascent, but burgeoning. As often is the case, the law will likely play catchup as the field develops. A variety of conditions now coalesce to push telemedicine into the forefront of Texas healthcare:

- **Technology.** Information technology is advancing in leaps and bounds. From high-speed wireless internet access to inexpensive smart phones and tablets, technological innovations continually give practitioners and patients the means to participate in telemedicine. Rapidly developing 5G infrastructure will facilitate high-fidelity, real-time video communication, even in remote areas where high-speed internet still is not available.
- **Demographics.** Several demographic factors will contribute to the rise of telemedicine. First, the U.S. as a whole is an aging nation.¹ As the public's health improves, the elderly will constitute a greater percentage of the public. Due to their often limited means of travel, telemedicine may present the best opportunities to provide services to the elderly. Second, Texas's population boom will almost certainly outstrip its means to administer healthcare, particularly for the elderly.² Third, younger generations who have grown up with smart phones and video chat may prefer the convenience of telemedicine to an in-person visit.
- **Public Policy & Geography.** Telemedicine can help close the geographic gap for patients in rural and remote areas with fewer healthcare providers. As hospitals and health care facilities across rural America close, access to healthcare has become a

nationwide polemic,³ which has captured the attention of both the media, the public, and the government.⁴ Texas is no exception. With 254 counties, 35 Texas counties have no physician, 80 counties have five or fewer physicians, and 185 Texas counties have no psychiatrist.⁵ Telemedicine can provide a vital role in solving this accessibility problem.

- **Legislative Support.** Due to the nature of our government, the law is often last to catch up with the trends affecting its constituents. In Texas, however, there is already a basic legal framework to regulate, support, and encourage the practice of telemedicine. That framework was first adopted by the Texas State Board of Medical Examiners in 2004 and codified into the Texas Administrative Code as a way to regulate medical services provided over the internet. Those regulations were first amended in 2010, then amended again in 2017, in coordination with new Occupations Code provisions intended to promote the practice of telemedicine.

This paper will present practitioners with a guide to the basic legal requirements for practicing telemedicine in Texas, identify opportunities and pitfalls, briefly touch on legal issues affecting interstate telemedicine, and highlight several issues where that may warrant practitioners' advocacy at the state legislature.

II. THE LAW IN TEXAS—THE CURRENT STATUS OF TELEMEDICINE

This section provides an overview of the current state telemedicine law in Texas, starting with the fundamental questions—who do telemedicine laws apply to, and what is telemedicine?

A. Who, What, and How?

First, you may be wondering: do telemedicine rules and opportunities apply to me? What services do they cover? And what means of conveying those services count as telemedicine?

The “who” is relatively easy to convey. Texas telemedicine laws apply to Texas-licensed physicians or

¹ The 2020 census should provide more accurate statistics, but the national aging trend has been deeply evident since 2014. [An Aging Nation: The Older Population in the United State](#); U.S. Census Bureau; May 2014.

² [Doctor Shortage in Texas Could Impact Patient Care for Seniors](#); Houston Public Media; May 12, 2018.

³ [It's 3 A.M. The Baby's Coming. But the Hospital Is 100 Miles Away](#); New York Times; July 17, 2018.

⁴ [CMS Advances Agenda to Re-think Rural Health and Unleash Medical Innovation](#); Centers for Medicare & Medicaid Services; April 23, 2019.

⁵ [Texas Rural Healthcare Is in Trouble](#); Dallas Morning News; December 31, 2018.

health professionals, meaning individuals who are licensed or certified in Texas to perform health care services.⁶

The “what” is a bit more nuanced. Texas telemedicine laws cover two categories of services: telemedicine medical services and telehealth services.

Telemedicine medical services refer to services delivered by a physician or physician-supervised health professional acting under the scope of their license (1) to a patient at a different physical location (2) by the use of telecommunications or information technology.⁷

Telehealth services has the exact same meaning, except it covers services by unsupervised health professionals. For the most part, the same restrictions apply to both telemedicine and telehealth services.⁸

The “how” is more difficult to define. What does “use of telecommunications or information technology” mean? This may lead to confusion, especially in light of inevitable technological advancements. For example, do services provided over the telephone count as telemedicine?

Certainly, the Occupations Code includes services by telephone via its reference to “telecommunications.”⁹ Other statutes, however, specifically exclude telephone services from telemedicine:

- Physicians who provide services by telephone are not required to provide patients with a written copy of the physician’s privacy practices.¹⁰
- Medicaid’s telemedicine reimbursement rules do not cover services provided by telephone.¹¹
- Texas insurers are not required to cover services provided by telephone.¹²

What other services count as telemedicine? The Medicaid definition of telemedicine provides some clarity. Its definition covers any services that require “the use of advanced telecommunications technology, other than telephone or facsimile technology, including

(A) compressed digital interactive video, audio, or data transmission; (B) clinical data transmission using computer imaging by way of still-image capture and store and forward; and (C) other technology that facilitates access to health care services or medical specialty expertise.”¹³

Practice Pointer → Until the Texas legislature or Texas Medical Board enacts a precise meaning, assume Texas telemedicine law covers a broad range of mediums—in other words, any medium used to provide services to a patient in a different location, by any means other than telephone or fax, regardless of the medium you use to administer those services. And to ensure you get reimbursed by a private insurer or Medicaid, be sure that your telemedicine services have some visual component.

B. Getting Started

There are only two fundamental requirements to start practicing telemedicine in Texas—(1) establishing a practitioner–patient relationship and (2) obtaining informed consent.

1. The practitioner–patient relationship

The first task on your checklist should be establishing a practitioner–patient relationship.¹⁴ You can use any of the following three methods to accomplish this:

- (1) have preexisting practitioner–patient relationship in place;
- (2) establish communication with the patient pursuant to a call coverage agreement under TMB rules; or
- (3) establish the relationship remotely by using (i) live video chat; (ii) secure transmission of imaging, video, or medical records; or (iii) any other form of audiovisual representation that allows the same standard of care as an in-person setting.¹⁵

Practice Pointer → Texas law absolutely requires establishing a practitioner–patient relationship before the physician issues a prescription. While not strictly

⁶ See Tex. Occ. Code § 111.001(1) (borrowing definition of “health professional” from insurance code); Tex. Ins. Code § 1455.001 (defining “health professional”).

⁷ Tex. Occ. Code § 111.001(4).

⁸ A notable distinction between telemedicine and telehealth arises in Medicaid reimbursement. This is discussed in section (F) below.

⁹ Tex. Occ. Code § 111.001(4).

¹⁰ Tex. Admin. Code § 174.4(1).

¹¹ Tex. Admin. Code §§ 354.1430(10, 11).

¹² Tex. Ins. Code § 1455.004(c).

¹³ *Id.*

¹⁴ Tex. Admin. Code § 174.6(a)(2).

¹⁵ Tex. Occ. Code §§ 111.005, 111.007.

necessary for other services, it is nonetheless recommended that you fulfill one of the above methods before practicing any telemedicine.

2. Informed consent

Second, obtain written informed consent from your patient or your patient's representative. The consent should cover the following specific topics:

- The patient's consent to the practice of telemedicine from a remote location.¹⁶
- Your privacy practices.¹⁷
- Standard language covering HIPAA's "Privacy Rule."¹⁸
- Specific language on how patients may file a complaint with the Texas Medical Board.¹⁹

These basic requirements—establishment of a relationship and informed consent—open the door to the practice of telemedicine.

Practice Pointer → at this time, the Texas Medical Disclosure Panel does not require any specific telemedicine language for your informed consent waiver.²⁰ We suggest adopting the language from Texas Occupations Code sections 111.001(3, 4) and 111.002 as closely as possible. These sections are included in the statute packet attached to this paper.

C. Rules of Practice

After you've obtained informed consent and established your practitioner-patient relationship, you are ready to start practicing telemedicine. There are a few rules to keep in mind, but most should already be intuitive.

- Practice the same standard of care that would apply to the same services or procedures in an in-person setting.²¹

- Ensure you maintain adequate medical records, the same way you would in an in-person setting.²²
- Take the same confidentiality precautions you would with any medical record. Telemedicine is subject to the same confidentiality requirements as any other physician-patient communication.²³
- Follow the same standards for issuing prescriptions that apply to an in-person setting.²⁴
 - There is one important exception to this rule: physicians cannot use telemedicine to issue prescriptions for scheduled drugs for the treatment of chronic pain.²⁵
- Adopt protocols to prevent fraud and abuse consistent with Health and Human Services standards.²⁶ Your protocol should address system security, the authentication of people and information, and the storage and transmission of information and medical records.²⁷

Practice Pointer → we recommend adopting written security standards for the electronic transmission and storage of patient data and communications. Consult with your system administrator when selecting the protocols appropriate for your practice.

D. Current Opportunities

Texas law has already created many opportunities for the health care provider. In fact, the legislature has directly authorized many uses for telemedicine.

- The Texas Medical Board is *prohibited* from imposing higher standards of care on telemedicine services, as compared to in-person services.²⁸
- Health insurers are *required* to cover telemedicine with a visual component.²⁹

¹⁶ Tex. Occ. Code § 111.002.

¹⁷ Tex. Admin. Code § 174.4(1).

¹⁸ Tex. Admin. Code § 174.4(2); 45 C.F.R. §§ 160, 164.

¹⁹ Tex. Admin. Code §§ 174.4(3); 178.3.

²⁰ Tex. Admin. Code §§ 601.1, *et seq.*

²¹ Tex. Admin. Code § 174.6(a)(1).

²² Tex. Admin. Code §§ 174.6(a)(3); 165.1.

²³ Tex. Occ. Code § 111.003.

²⁴ Tex. Admin. Code § 174.5(a); Tex. Occ. Code § 562.056; *see* Tex. Admin. Code § 217.24 (requirements of Texas Board of Nursing).

²⁵ Tex. Admin. Code § 174.5(e).

²⁶ Tex. Admin. Code § 174.3.

²⁷ Tex. Gov't. Code § 531.02161(c).

²⁸ Tex. Occ. Code § 111.007.

²⁹ Tex. Ins. Code § 1455.004(a); *but see id.* at §§ 1455.004(c) (plans are not required to cover telemedicine that consists

- Texas Medicaid reimburses many telemedicine services, subject to certain restrictions.³⁰
- Texas workers' compensation law allows practitioners to bill and be reimbursed for telemedicine, regardless of where the injured employee is located.³¹

E. Future Opportunities

There are many other proposed telemedicine laws pending in the Texas legislature. These laws continue the trend of encouraging the practice of telemedicine and include the following provisions:

- Creation of an “Action Plan to Expand Telemedicine” and increase its availability, including via mobile applications, to border regions, and to rural areas.³²
- Support and encouragement for telemedicine from Texas Health and Human Services Commission.³³
- Additional mandates that insurers cover telemedicine, including allowing practitioners the freedom to choose which platform they use to provide telemedicine.³⁴
- Teledentistry rules and opportunities.³⁵
- Support and encouragement for telemedicine in prenatal/neonatal and trauma services.³⁶

- Creation of an early childhood intervention services pilot program administered by telemedicine.³⁷
- Promotion of innovative technology, including telemedicine for a Medicaid STAR+PLUS pilot program for persons with intellectual or developmental disabilities.³⁸

Practice Pointer → If you receive a letter, notice, or other communication from the Texas Medical Board seeking to enforce a telemedicine rule or impose discipline, consult a lawyer—the TMB may be stepping outside its authority! The TMB is authorized to adopt new telemedicine rules.³⁹ However, the TMB’s rulemaking authority is not absolute, and can only be exercised “as necessary” to address certain topics.⁴⁰ Further, the TMB cannot make new rules or amend existing rules without taking certain procedural steps, such as a public notice period.⁴¹

F. Pitfalls

Telemedicine practitioners are required to comply with all applicable statutes and regulations. Any violations “may result in an investigation and discipline” through the procedures of the Medical Practice Act.⁴² That said, certain pitfalls jump out as particularly vexing:

- It bears repeating: do not issue scheduled drug prescriptions for the treatment of chronic pain.⁴³
- Texas has prohibited the use of telemedicine to prescribe abortifacient drugs or other drugs or devices that terminate a pregnancy.⁴⁴

only of audio-only calls or text-only email or fax), 1455.003 (certain specified plans are exempt from covering telemedicine).

³⁰ This topic is discussed in more detail below. *See* Tex. Admin. Code § 354.1432 (conditions for reimbursement).

³¹ Tex. Admin. Code § 133.30.

³² 86(R) H.B. 1782 (creates Tex. Gov’t Code § 531.021611).

³³ 86(R) H.B. 870 (amends Tex. Gov’t Code § 531.001).

³⁴ 86(R) H.B. 3345 (amends Tex. Ins. Code § 1455.001).

³⁵ 86(R) H.B. 1756; 86(R) S.B. 792 (amends Tex. Occ. Code § 111.001, *et seq.*).

³⁶ 86(R) H.B. 749 (creates Tex. Health and Safety Code § 241.1835); 86(R) H.B. 871 (amends Tex. Health & Safety Code § 773.1151).

³⁷ 86(R) H.B. 870 (creates Tex. Human Resources Code § 74.0002).

³⁸ 86(R) H.B. 4561 (amends Tex. Gov’t Code § 534.001, *et seq.*).

³⁹ Tex. Admin. Code § 174.1(a).

⁴⁰ *See* Tex. Occ. Code § 153.004 (rules must be “necessary” to appropriate care, prevent abuse and fraud, or related to the filing of claims and records).

⁴¹ *Teladoc, Inc. v. Texas Med. Bd.*, 453 S.W.3d 606, 623 (Tex. App.—Austin 2014, *pet. denied*).

⁴² Tex. Admin. Code § 174.7.

⁴³ Tex. Admin. Code § 174.5(e).

⁴⁴ Technically, these prohibited services negate the practitioner’s ability to establish a *practitioner–patient relationship*, which is a prerequisite for practicing telemedicine. Tex. Occ. Code § 111.005(c).

- Mental health services have their own set of telemedicine rules, which can impose more, less, or the same amount of restrictions as telemedicine for other services. For example, mental health practitioners are exempt from the standard requirements of informed consent, and it is easier for to establish a mental health practitioner–patient relationship.⁴⁵ Other rules, such as the standard of care and the restriction on prescription of drugs for chronic pain, are substantially the same as other practices.⁴⁶ However, mental health telemedicine practitioners must be properly licensed or certified to perform health care services, or be qualified in mental health professional–community services.⁴⁷
- You may work with new technology partners to implement your telemedicine practice. Be sure to execute a HIPAA-compliant Business Associate Agreement (“BAA”) with any technology partners that handle patient records or provide technology services for systems that store or process patient records. BAAs are required under both HIPAA and Texas law.⁴⁸ BAAs must, at a minimum, explicitly identify the partner as a Business Associate⁴⁹ and require the partner to implement appropriate safeguards to protect the privacy, integrity, availability, and confidentiality of patient records.

G. HHSC Medicaid Rules and Reimbursements

Perhaps unsurprisingly, the Texas Health and Human Services Commission (“HHSC”) issued some of the most detailed regulations concerning Texas Medicaid’s reimbursement of telemedicine.⁵⁰ While the entire scope of the regulations are too detailed to cover here, several significant reimbursement requirements are listed below.

- Reimbursement is restricted to the following services: consultations, office or other outpatient visits, psychiatric diagnostic interviews, pharmacologic management, psychotherapy, and data transmission.

- The patient must be at an established medical site, a state mental health facility, or a state supported living center.
- The patient’s PCP must be notified of the telemedicine services.
- *Telehealth services* (services by non-physician medical professionals who are not supervised by a physician) are subject to separate, more stringent requirements for reimbursement.
- Preventative health visits under Texas Health Steps are not reimbursable.

III. ACROSS THE BORDER—MULTISTATE REGULATIONS

Generally, it is far easier for a Texas physician to practice telemedicine within Texas than out-of-state practitioners. Out-of-state practitioners are subject to regulation of the TMB and must first abide by the same requirements as in-state telemedicine practitioners.⁵¹ In addition, out-of-state practitioners must meet the following *extra* requirements:

- must be licensed in medicine in another state;
- must not be subject to prior disciplinary actions or pending medical board investigations in any state;
- must pass the Texas Medical Jurisprudence Examination; and
- must receive approval, upon application, for an out-of-state telemedicine license from the TMB.⁵²

Not every practitioner is subject to the extra requirements set forth above. The following out-of-state practitioners may qualify for certain exceptions, which exempt them from the TMB’s regulations:⁵³

- out-of-state “medical specialists” who provide only episodic consultation services on request to a Texas-licensed physician of the same medical specialty;

⁴⁵ Tex. Occ. Code § 111.007; Tex. Admin. Code § 174.9(3).

⁴⁶ Tex. Admin. Code § 174.9(4, 6).

⁴⁷ Tex. Admin. Code § 174.9(1).

⁴⁸ 45 C.F.R. §§ 164.502(e), 164.504(e), 164.532(d, e); Tex. Admin. Code § 371.1659(7).

⁴⁹ 45 C.F.R. § 160.103.

⁵⁰ Tex. Admin. Code § 354.1232.

⁵¹ Tex. Admin. Code § 151.056(a).

⁵² Tex. Admin. Code § 172.12.

⁵³ Tex. Admin. Code § 151.056(b).

- physicians licensed in other jurisdictions who provide consultation services⁵⁴ to medical schools or certain other educational institutions; and
- (i) physicians in states bordering Texas, (ii) treating Texas patients, (iii) who are also the treating physicians of the patient, (iv) who order health or hospice services to be delivered by a Texas-licensed agency.

If you decide to take your practice outside of Texas, be aware that you must be in compliance with your host state's own laws. All 50 states have enacted cybersecurity obligations affecting the practice of telemedicine. Obligations vary by state, ranging from simple obligation to notify individuals of possible records breaches to extensive cybersecurity practice obligations. If you plan on practicing in California or Colorado, make careful note of their rapidly developing legislation:

- California—extensive privacy and security regulations go into effect Jan 1, 2020, which obligate most organizations to implement controls to ensure the privacy of consumer data.⁵⁵
- Colorado—requires all businesses to implement appropriate safeguards to protect sensitive personal information.⁵⁶

IV. LOOKING FORWARD—A NEW DIRECTION FOR TELEMEDICINE?

Medical practitioners are in the best position to assess the needs of their patients. Your recommendations will go a long way in shepherding in a robust telemedicine practice for the benefit of patients across Texas. Our current reality is that insurers and other corporate interests drive the legislative initiatives affecting the practice of medicine. Practitioners are then forced to adapt and react. You have the power, ability, and responsibility to change this paradigm, for the betterment of your patients, your colleagues, and the public at large.

⁵⁴ See Tex. Admin. Code § 172.2(g)(4) (defining “episodic consultation” as “consultation on an irregular or infrequent basis involving no more than 24 patients of a physician’s diagnostic or therapeutic practice per calendar year”).

⁵⁵ Cal. Civ. Code § 1798.100.

⁵⁶ Colo. Rev. State. § 6-1-713.5.

A. HHSC Medicaid Reimbursement Reform

The HHSC has enacted some of the most thorough regulations covering telemedicine. They are also some of the most troublesome. Several provisions discourage public access to healthcare and could seriously stand to be reformed.

First, HHSC requires the patient to be at a medical site, state mental health facility, or state-supported living center.⁵⁷ This misses the mark for the most underserved constituents—rural and elderly patients who have difficulty accessing medical facilities.

Second, HHSC excludes reimbursement for preventative health visits.⁵⁸ Any HHSC administrative concerns are likely outweighed by the greater concern to promote public health.

B. Defined Telemedicine Practices

Chapter 111 of the Texas Occupations Code and chapter 174 of the Texas Administrative Code are the backbone of Texas telemedicine regulations. Yet neither chapter adequately defines the practices that make up “telemedicine.” The easiest solution is likely adopting the more precise definition employed by the HHSC.⁵⁹

This definition, however, far from perfect. For example, a surgeon operating from a tablet’s video feed would qualify as practicing “telemedicine” under the HHSC definition, even if the surgeon was actually in the same room as the patient.

As medical technology continues to advance, it will be important to monitor exactly what could—and should—constitute telemedicine under Texas law.

C. Statutory Clarity and Consistency

Most of the telemedicine provisions in the Occupations Code and, particularly, the Administrative Code are not particularly easy to understand. They are often presented out of logical sequence, contain superfluous language, and litany of cross-references to other chapters or codes. A cosmetic overhaul would promote clarity and consistency, which reduce practitioners’ barrier to entry and assist their lawyers in providing effective counsel.

⁵⁷ Tex. Admin. Code § 354.1432(1)(C).

⁵⁸ Tex. Admin. Code § 354.1432(3)(A).

⁵⁹ Tex. Admin. Code §§ 354.1430(10, 11).

D. Lack of FAQ

The Texas Occupations Code requires that the Texas Medical Board develop and publish a user-friendly FAQ online.⁶⁰ As of the date of this paper’s publication, the TMB’s FAQ website is bereft of content.⁶¹ Instead, its readers are greeted with the following message: “Telemedicine FAQs being revised following enactment of SB 1107.” This is no excuse—that bill was signed into law in May 2017 and took effect back on January 1, 2018!

A functional FAQ would help doctors and patients understand and feel more comfortable with the practice of telemedicine.

V. CONCLUSION

Telemedicine presents exciting opportunities for doctors. It can help solve some of the biggest public health problems facing our state and nation. Texas law has carved out a place for telemedicine, reflecting its current and future importance to the practice of medicine. Still, there is work that needs to be done now, and there will surely be more work in the future. Medical practitioners are uniquely suited to help steer this ship into the bright future.

⁶⁰ Tex. Occ. Code § 111.006(b).

⁶¹ <http://tmb.state.tx.us/page/laws-gc-faqs-telemedicine>