Vermont Board of Medical Practice

Policy on the Appropriate Use of Telemedicine Technologies in the Practice of Medicine

Background and Introduction

This is an update to the Vermont Board of Medical Practice initial Policy on the Appropriate Use of Telemedicine Technologies in the Practice of Medicine, which was adopted by the Board on May 6, 2015. The Board's two goals when that first policy was adopted have not changed. They remain:

- Promoting safe, high-quality care for patients.
- Supporting licensees in their efforts to meet standards of care.

The Board is grateful to the many individuals who have put in much work with the Federation of State Medical Boards over the years creating the 2022 FSMB Model Policy on the Appropriate Use of Telemedicine Technologies in the Practice of Medicine, the 2014 FSMB Model Policy, and the original document on telemedicine issued in 2002. As with the earlier FSMB statements on telemedicine, the most recent Model Policy on telemedicine offers thoroughly-researched, clear, and useful guidance for medical boards, physicians, and health care professionals[1] licensed and regulated by state medical boards. For that reason, and because consistency among states is desirable with a subject such as telemedicine that inherently features interstate practice issues, we have tried to minimize the changes made to this latest FSMB Model Policy on telemedicine in adapting it to be a policy of this Board.

Section One. Preamble

The advancements and continued development of medical and communications technology have had a profound impact on the practice of medicine in the United States and offer opportunities for improving the delivery and accessibility of health care, particularly through telemedicine. Telemedicine continues to be best defined as the practice of medicine using electronic communication, information technology or other means of interaction between a licensee in one location and a patient in another location, with or without an intervening healthcare provider. This Board, like all state medical boards, in fulfilling the duty to protect the public must consider complex regulatory challenges and patient safety concerns in adapting regulations and standards historically intended for the in-person provision of medical care to new delivery models involving telemedicine technologies, including but not limited to: 1) determining when a physician-patient relationship is established; 2) assuring privacy of patient data; 3) guaranteeing

[1] The Board licenses members of a number of health care professions, including allopathic physicians (MDs). In many instances the term "physician" is used. That is not intended to exclude application of the guidelines described herein to those other professions, such as physician assistant.

proper evaluation and treatment of the patient consistent with the single standard of care that applies regardless of the circumstances of delivery ; and 4) limiting the inappropriate prescribing and dispensing of certain medications.

The Board recognizes the potential benefits of the use of telemedicine technologies to deliver medical care. When utilized appropriately, telemedicine technologies can enhance connection between patients and physicians, and reduce inequities in the delivery of care. Telemedicine technology can facilitate patient examinations and permit diagnosis, if acceptable under the standard of care. Telemedicine technologies also enable remote patient monitoring and permit physicians to obtain medical histories, give medical advice and counseling, and prescribe medication and other treatments.

This policy should not be construed to alter the scope of practice of any health care provider or to authorize the delivery of health care services in a setting, or in a manner, not otherwise authorized by law. This policy assumes a consistent standard of care and scope of practice notwithstanding the delivery tool or business method used to enable physician-to-patient communications. Telemedicine is one component of the practice of medicine. A physician using telemedicine technologies in the provision of medical services to a patient (whether existing or new) must take appropriate steps to establish the physician-patient relationship and conduct all appropriate evaluations and history taking of the patient consistent with established, evidence-based standards of care for the particular patient presentation. Vermont law must also be followed, as provided by 26 V.S.A. § 1354(a)33 and elsewhere as detailed later in this document. When the standard of care that is ordinarily applied to an in-person encounter cannot be met by virtual means, the use of telemedicine technologies is not appropriate.

The Board has developed these guidelines to educate licensees and the public as to the appropriate use of telemedicine technologies in the practice of medicine. The Board is committed to assuring patient access to the convenience and benefits afforded by telemedicine technologies, while promoting the responsible and safe practice of medicine by physicians.

It is the expectation of the Board that physicians who provide medical care, electronically or otherwise, maintain the highest degree of professionalism and should:

• Place the welfare of patients first;

• Maintain acceptable and appropriate standards of practice;

• Adhere to recognized ethical codes governing the medical profession;

• Properly supervise non-physician clinicians; and

• Protect patient confidentiality.

Attention to and compliance with nationally recognized health standards and codes of ethics will help physicians identify practice circumstances that present risk of unprofessional conduct. Physicians should be conscious of the fact that one effect of telemedicine has been to increase entrepreneurship related to delivery of consumer services that constitute medical practice, even though they are elective and usually not covered by health insurance. Attentiveness to ethical obligations will help physicians to make good choices where the structure of a telemedicine delivery system might pose a risk of unduly influencing a physician's medical decision making.

Section Two. Licensure

The State of Vermont and the Board follow the rule on medical licensure recognized across the United States. A physician must be licensed, or appropriately authorized, by the medical board of the state where the patient is located. The practice of medicine occurs where the patient is located at the time that telemedicine technologies are used. Physicians who diagnose, treat, or prescribe using online service sites are engaging in the practice medicine and must possess appropriate licensure in the jurisdiction where the patient receives care.

Vermont law was temporarily amended to create special exceptions to health care professional licensing requirements during the public health emergency associated with COVID-19. Some of those exceptions have expired. With regard to telemedicine practice, health care professionals not licensed or certified to practice in Vermont may provide health care services to patients located in Vermont using telehealth during the period from April 1, 2022 to June 30, 2023, if they obtain a temporary telehealth registration. To do so, they must apply through the Board's online system. There is no fee for the temporary telehealth registration during the period from April 1, 2022 to June 30, 2023. More information about qualification for temporary telehealth registration and the how to apply are on the Board's website at: https://www.healthvermont.gov/systems/medical-practice-board.

Vermont has enacted two new options for health care professionals who will be practicing with patients who are located in Vermont only through the use of telehealth technologies. The new options, effective on July 1, 2023, will be to obtain a telehealth registration or a telehealth license. The telehealth registration will be for health care professionals whose practice with Vermont patients will be very limited in both the number of patients and the length of time over which it will occur. A telehealth registration will be limited to a total of 10 unique patients, valid for only 120 consecutive days, and will not be renewable for three years after the date when issued. The second option, a telehealth license, will allow only telehealth practice and will be limited to a total of 20 unique patients during the term of the license. Telehealth licenses will be renewable. The fee for telehealth registration will be 50 percent of a full license and the

telehealth license will be 75 percent of the full-license fee. More information about the qualifications required and the process to obtain a telehealth registration or telehealth license will be available on the Board's website after administrative rules for the new credentials are published.

Section Three. Standard of Care

A practitioner who uses telemedicine must meet the same standard of care and professional ethics as a practitioner using a traditional in-person encounter with a patient. The failure to follow the appropriate standard of care or professional ethics while using telemedicine may subject the practitioner to discipline by the Board.

Scope of Practice

A practitioner who uses telemedicine should ensure that the services provided are consistent with the practitioner's scope of practice, including the practitioner's education, training, experience and ability. Physicians may supervise and delegate tasks via telemedicine technologies so long as doing so is consistent with applicable laws. Non-physician licensees may delegate tasks in a telemedicine setting to the same extent that they may do so when practicing in person so long as not prohibited by law, regulation, or workplace standards.

Establishment of a Physician-Patient Relationship

The health and well-being of patients depends upon a collaborative effort between the physician and patient.[2] The relationship between the physician and patient is complex and is based on the mutual understanding of the shared responsibility for the patient's health care. Although it may be difficult in some circumstances to precisely define the beginning of the physician-patient relationship, particularly when the physician and patient are in separate locations, it tends to begin when an individual with a health-related matter seeks care from a physician. The relationship is clearly established when the physician agrees to undertake diagnosis and treatment of the patient, and the patient agrees to be treated, whether or not there has been an in-person encounter between the physician (or other appropriately supervised health care practitioner) and patient. A physician-patient relationship may be established via either synchronous or asynchronous telemedicine technologies without any requirement of a prior in-person meeting, so long as the standard of care is met.

The physician-patient relationship is fundamental to the provision of acceptable medical care. It is the expectation that physicians recognize the obligations, responsibilities, and patient rights

[2] American Medical Association, Council on Ethical and Judicial Affairs, Fundamental Elements of the Patient-Physician Relationship (1990), available athttp://www.ama-assn.org/resources/doc/code-medical- ethics/1001a.pdf.

associated with establishing and maintaining a physician-patient relationship. A physician is discouraged from rendering medical advice and/or care using telemedicine technologies without (1) fully verifying and authenticating the location and, to the extent possible, identifying the requesting patient; (2) disclosing and validating the provider's identity, location, and applicable credential(s); and (3) obtaining appropriate consents from requesting patients after disclosures regarding the delivery models and treatment methods or limitations, including any special informed consents regarding the use of telemedicine technologies. An appropriate physician-patient relationship has not been established when the identity of the physician may be unknown to the patient. If available, a patient should be able to select an identified physician for telemedicine services, not be assigned to a physician at random, and have access to follow-up care.

Evaluation and Treatment of the Patient

A documented medical evaluation and collection of relevant clinical history commensurate with the presentation of the patient to establish diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended/provided must be obtained prior to providing treatment, including issuing prescriptions, electronically or otherwise. Gathering clinical history to make a diagnosis is often an iterative process and physicians need to have the opportunity and ability to ask iterative follow-up questions. If an evaluation requires additional ancillary diagnostic testing under the standard of care, the physician must complete such diagnostics, arrange for the patient to obtain the needed testing, or refer the patient to another provider. Additionally, as part of meeting the standard of care, physicians must use digital images, live video, or other modalities as needed to make a diagnosis if the standard of care in-person would have required physical examination. Treatment and consultation recommendations made in a virtual setting, including issuing a prescription via electronic means, will be held to the same standards of appropriate practice as those in in-person settings. Evaluation of a patient done solely by means of completion of an online questionnaire does not meet any acceptable standard care, including when the only service provided is issuance of a prescription.

The foregoing statements on establishment of the physician-patient relationship and minimum requirements for evaluation and treatment reflect nationally-applicable concepts for appropriate practice using telemedicine technologies that enable virtual encounters, and the Board endorses these concepts, which will guide its decision-making on these issues. Vermont law also speaks to these concepts. The law sets forth specific minimum requirements regarding the establishment of a physician-patient relationship and required minimum actions that the physician must undertake to render care in an acceptable manner. 26 V.S.A. § 1354(a)(33)(A) includes in the definition of unprofessional conduct the following:

> *(33)(A) providing, prescribing, dispensing, or furnishing medical services or prescription medication or prescription-only devices to a person in response to any communication transmitted or received by computer or other electronic means, when the licensee fails to take the following actions to establish and maintain a proper physician-patient relationship:*
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> *(i) a reasonable effort to verify that the person requesting medication is in fact the patient, and is in fact who the person claims to be;*
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> *(ii) establishment of documented diagnosis through the use of accepted medical practices; and*
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> *(iii) maintenance of a current medical record;*

Vermont law also specifies that in circumstances covered in 26 V.S.A. § 1354(a)(33), which is to say when practicing by telemedicine, an *electronic, on-line, or telephonic evaluation by questionnaire is inadequate for the initial evaluation of the patient.* 26 V.S.A. § 1354(a)(33)(B).

The minimum requirements for practice in the preceding paragraphs apply to telemedicine practice generally. Practice using telemedicine to issue patients prescriptions presents some challenges that physicians should consider when establishing systems of practice and protocols for issuing prescriptions. As suggested above, remote encounters can make it more difficult to reliably identify patients, communicate with patients, and reestablish contact between the physician and the patient (whether it is the physician or patient who seeks to reconnect). In other words, it can be more difficult to ensure that the need for the prescription is legitimate, that the information regarding facts supporting the prescription has been accurately communicated, and that when an error is made, it can be corrected. Thus, measures should be implemented to promote patient safety and mitigate any additional risks arising from the virtual circumstances. Use of e-prescribing systems that use technology to identify errors and formularies that exclude drugs that present greater risks are two examples.

Prescribing medications via telemedicine, as is the case during in-person care, is at the professional discretion of the physician. The indication, appropriateness, and safety considerations for each prescription issued during a telemedicine encounter must be evaluated by the physician in accordance with state and federal laws, as well as current standards of practice, and consequently carry the same professional accountability as prescriptions delivered during an encounter in person. However, where such measures are upheld, and the appropriate clinical consideration is carried out and documented, physicians may exercise their judgment and prescribe medications as part of telemedicine encounters.

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Informed Consent, Disclosure, and Functionality of Online Service Making Available Telemedicine Technologies

Evidence documenting appropriate patient informed consent for the use of telemedicine technologies must be obtained and maintained. Appropriate informed consent should, as a baseline, include the following:

- Identification of the patient and the patient's location;
- Identification of the physician, the physician's credentials, and the physician's state or territory of practice;
- Identification of the patient's primary care physician, if available;
- Types of transmissions permitted using telemedicine technologies (e.g., prescription refills, patient education, etc.);
- The patient's agreement that the physician determines, consistent with applicable laws, whether or not the condition being diagnosed and/or treated is appropriate for a telemedicine encounter;
- Details about the security measures taken for the telemedicine technologies in use, such as encryption of data, password protection of data files, and use of other reliable authentication techniques, along with potential risks to privacy notwithstanding the security measures;
- A warning to the patient of the risk of loss of information due to technical failure; and
- Requirement for express patient consent to forward patient-identifiable information to a third party, and limited to only if allowed under all applicable state and federal laws.

Physicians providing medical services using telemedicine technologies should clearly disclose:

- Specific services provided;
- Contact information for the physician;
- Licensure and qualifications of the physician(s) and associated healthcare providers;
- Fees for services and how payment is to be made;
- Financial interests, other than fees charged, in any information, products, or services provided by a physician;
- Appropriate uses and limitations of the site, including emergency health situations;
- Uses and response times for e-mails, electronic messages, and other communications transmitted via telemedicine technologies;
- To whom patient information may be disclosed and for what purposes;

- Rights of patients with respect to patient health information; and,
- Information collected and any passive tracking mechanisms utilized.

Physicians providing medical services using telemedicine technologies should provide patients a clear mechanism to:

- Access, supplement, and amend patient-provided personal health information;
- Provide feedback regarding the online platform and the quality of information and services; and,
- Register complaints, including information about filing a complaint with this Board.

Online services must have accurate and transparent information about the online platform owner/operator, location, and contact information, including a domain name that accurately reflects the identity of the responsible party.

Physicians may choose to make health-related and non-health-related goods or products available to patients to meet a legitimate patient need in instances where the goods are medically necessary for patients and not immediately or reliably available to patients by other means. Physicians who choose to make goods available to patients must be mindful of the inherent power differential that characterizes the physician-patient relationship and therefore the significant potential for exploitation of patients. The principle of non-exploitation of patients also applies to scenarios involving physician-owned pharmacies located in practice offices. In such instances, physicians should offer patients freedom of choice in filling any prescriptions and must therefore allow prescriptions to be filled elsewhere.[3]

Continuity of Care and Referral for Emergent Situations

Patients should be able to seek, with relative ease, follow-up care or information from the physician (or physician's designee) who conducts an encounter using telemedicine technologies. Physicians solely providing services using telemedicine technologies with no existing physician-patient relationship prior to the encounter must make documentation of the encounter using telemedicine technologies easily available to the patient and, subject to the patient's consent, any identified care provider of the patient immediately after the encounter. Physicians have the responsibility to refer patients for in-person follow-up care when a patient's medical issue requires an additional in-person physical exam, diagnostic procedure, ancillary lab, or radiologic

[3] FSMB. *Position Statement on Sale of Goods by Physicians and Physician Advertising.* April 2016, available at: https://www.fsmb.org/siteassets/advocacy/policies/position-statement-on-sale-of-goods-by-physicians-and- physician-advertising.pdf

test.

There may be situations in which a physician interacting with a patient using telemedicine technology discovers that the patient is inappropriate for care via telemedicine technologies or the patient experiences an emergent situation, complication, or side effects after an encounter using telemedicine technologies. Physicians who practice using telemedicine should have a standing plan in place for such situations. The physician has the responsibility to refer the patient to appropriate care (e.g. acute care, emergency room, or another provider) to ensure patient safety. It is insufficient for physicians to simply refer all patients to the emergency department; each situation should be evaluated on an individual basis and referred based on its severity and urgency.

Physicians have an obligation to support continuity of care for their patients. Terminating the medical care of a patient without adequate notice or without making other arrangements for the continued care of the patient may be considered patient abandonment and may result in discipline. The Board has a longstanding position regarding termination of the physician-patient relationship.[4] A physician may not delegate responsibility for a patient's care to another person if the physician knows, or has reason to know, that the person is not qualified to undertake responsibility for the patient's care.

Medical Records

Detailed requirements for documentation of informed consent for remote treatment using interactive audio and video, store & forward, and audio-only are set forth in Vermont law at 26 V.S.A. § 9361 and 9362. The law also sets forth certain exceptions to the requirement for informed consent. In addition to the informed consent documentation required by statute, the medical record should include copies of all patient-related electronic communications, including patient-physician communication, prescriptions, laboratory and test results, evaluations and consultations, records of past care, and instructions obtained or produced in connection with the utilization of telemedicine technologies. The patient record established during the use of telemedicine technologies must be accessible and documented for both the physician and the patient, consistent with all established laws and regulations governing patient healthcare records. Records should be in a format that is easily transferable to the patient. If requested by the patient, physicians must share the medical record with the patient's primary care physician and other relevant members of the patient's existing care team.

[4] https://www.healthvermont.gov/sites/default/files/documents/2016/12/BMP_Policies_Termination%20of%20Relationship.pdf

Privacy and Security of Patient Records & Exchange of Information

Physicians should meet or exceed applicable federal and state legal requirements of medical/health information privacy, including compliance with the Health Insurance Portability and Accountability Act (HIPAA) and state privacy, confidentiality, security, and medical retention rules. Physicians are referred to "Standards for Privacy of Individually Identifiable Health Information" and "Confidentiality of Substance Use Disorder Patient Records," issued by the Department of Health and Human Services (HHS).[5] Guidance documents are available on the HHS Office for Civil Rights Web site at: www.hhs.gov/ocr/hipaa.

Written policies and procedures should be maintained at the same standard as traditional in-person encounters for documentation, maintenance, and transmission of the records of the encounter using telemedicine technologies. Such policies and procedures should address (1) privacy, (2) healthcare personnel (in addition to the physician addressee) who will process messages, (3) hours of operation, (4) types of transactions that will be permitted electronically, (5) required patient information to be included in the communication, such as patient name, identification number, and type of transaction, (6) archival and retrieval, and (7) quality oversight mechanisms. Policies and procedures should be periodically evaluated for currency and be maintained in an accessible and readily available manner for review.

Sufficient privacy and security measures must be in place and documented to assure confidentiality and integrity of patient-identifiable information. Transmissions, including patient e-mail, prescriptions, and laboratory results must be secure within existing technology (i.e., password protected, encrypted electronic prescriptions, or other reliable authentication techniques). All patient-physician email, as well as other patient-related electronic communications, should be stored and filed in the patient's medical record, consistent with traditional record-keeping policies and procedures.

Section Four. Definitions

For the purpose of these guidelines, the following definitions apply:

"Telemedicine" means the practice of medicine using electronic communications, information technology or other means between a licensee in one location, and a patient in another location with or without an intervening healthcare provider. It typically involves the application of secure

[5] Standards for Privacy are found in 45 C.F.R. § 160 and 45 C.F.R. § 164. Special standards applicable to records of substance use disorder treatment are at 42 C.F.R. Part 2.

videoconferencing or store and forward[6] technology to provide or support healthcare delivery by replicating the interaction of a traditional, encounter in person between a provider and a patient.[7]

"Telemedicine Technologies" means technologies and devices enabling secure electronic communications and information exchange between a licensee in one location and a patient in another location with or without an intervening healthcare provider.

Approved by the Board of Medical Practice on March 1, 2023

ADDITIONAL REFERENCES

45 C.F.R. § 160, 164 (2000)

AMA. Council on Ethical and Judicial Affairs. Code of Medical Ethics.

AMA. Report of the Council on Medical Service. Addressing Equity in Telehealth. 7-CMS-21. (June 2021).

AMA. Report of the Council on Medical Service. Licensure and Telehealth. 8-CMS-21. (June 2021).

AOA. Policy Statement – Telemedicine. H601-A/17. (July 2017)

Center for Connected Health Policy. Impact of Audio-only Telephone in Delivering Health Services During COVID-19 and Prospects for Future Payment Policies & Medical Board Regulations. August 25, 2021.

Center for Connected Health Policy. State Telehealth Laws and Reimbursement Polices Report, Fall 2021. October 2021.

The Department of Health and Human Services, HIPAA Standards for Privacy of Individually Identifiable Health Information. August 14, 2002.

FSMB. Model Guidelines for the Appropriate Use of the Internet in Medical Practice. April 2002.

[6] "Store and forward" is defined in a Vermont law covering health insurance and telemedicine as: "an asynchronous transmission of medical information to be reviewed at a later date by a health care provider at a distant site who is trained in the relevant specialty and by which the health care provider at the distant site reviews the medical information without the patient present in real time." 8 V.S.A. § 4100k(g)(3).

[7] *See* Ctel.

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FSMB. Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine. April 2014.

Medicare Program: CY 2022 Payment Policies under the Physician Fee Schedule and Other Changes to Part B Payment Policies; Medicare Shared Savings Program Requirements; Provider Enrollment Regulation Updates; and Provider and Supplier Prepayment and Post-payment Medical Review Requirements., 86 FR 64996 (Nov. 19, 2021)(revising 42 C.F.R. § 403, 405, 410, 411, 414, 415, 423, and 425).