

# Legal Considerations

by Capella Healthcare



## WHAT'S COVERED

In this lesson, you will learn about legal considerations related to telehealth. Specifically, this lesson will cover:

1. State Health Laws and Policies
2. Telehealth Policy Barriers
3. Reimbursement
4. Connectivity and Net Neutrality
5. Credentialing and Privileging
6. Online Prescribing
7. Crossing State Lines and Licensure
8. Health Information and Portability Accountability Act (HIPAA)
9. Malpractice
10. Informed Consent



## HINT

This lesson will provide an overview of legal issues to be aware of regarding telehealth. The *Telehealth: Rules and Risk Management* course will cover this area in greater detail.

## 1. State Health Laws and Policies

Telehealth policy trends continue to vary from state to state, with no commonalities between states regarding how telehealth is defined, reimbursed, or regulated, according to the Center for Connected Health Policy. Either visit [State Health Laws and Reimbursement Policies](#) or view the pdf below for specific details.

## 2. Telehealth Policy Barriers

The widespread adoption of telehealth continues to lag despite improved technology and increasing amounts of evidence. Current policy barriers on both the federal and state levels contribute to the limited use of telehealth. Either visit [Telehealth Policy Barriers](#) or view the pdf below for specific details.

## 3. Reimbursement

Telehealth continues to grow, as more policies and services are being implemented on the federal and state level. However, reimbursement gaps continue. As previously mentioned, they hinder the expansion of telehealth services in healthcare. Medicare, Medicaid, and private payers all offer some degree of telehealth reimbursement, with their policies differing significantly in the type of services covered, and other restrictions and requirements. Overall, there is a lack of cohesiveness in policies both within and between public and private payers.

Many private insurance plans do reimburse for telehealth-delivered services; however, federal law does not require payers to provide these services. Currently, 43 states and DC have passed their own private payer laws mandating some sort of reimbursement, while others reimburse at the same rate as an in-person visit.

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## 4. Connectivity and Net Neutrality

Under net neutrality, internet service providers must provide equal service for everyone and everything; in other words, they would not slow down, block, or charge more for access to specific websites or content. This is a major point of discussion since telehealth services rely on a robust connection for telehealth services to work. There is debate that should net neutrality cease to exist, it could disrupt the use and growth of telehealth as it may prove too costly for providers and consumers to access. On the other hand, some have argued that telehealth could benefit greatly if it was given priority status.

The Federal Communications Commission (FCC) adopted principles of net neutrality, which were challenged by Verizon in 2014 and struck down. The FCC followed this by enacting net neutrality rules in 2015.

In November 2017, the FCC repealed the rules. However, several states passed net neutrality laws, some of which are currently being challenged in federal court. Stay tuned and watch for updates on [The Center for Connected Health Policy](#) website.

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## 5. Credentialing and Privileging

Prior to a practitioner being able to provide services in a hospital, they must have their qualifications verified – a process known as credentialing. Once a practitioner is credentialed, the hospital must also verify their competence in a specific area, which is a process known as privileging.

Telehealth providers, even though they are not physically at the hospital they are serving, must go through credentialing and privileging at the distant hospital. Credentialing and privileging can be time-consuming and expensive, often creating a barrier for smaller hospitals and healthcare facilities looking to increase their patients' access to specialty care through telehealth services. To address this issue, CMS Conditions of Participation allow the governing body of an organization whose patients are receiving telehealth services to rely on credentialing and privileging decisions made by a distant site hospital or telemedicine entity such as an ambulatory surgery center. This process is referred to as 'credentialing by proxy.'

Credentialing by proxy helps organizations save time and money, but requirements must be met by both the

originating site and the distant site. However, due diligence and oversight of telehealth services are still essential. The Center for Telehealth and e-Health Law advises that the governing body at the originating site is responsible for ensuring that the distant site is complying with CMS Conditions of Participation and other standards for contracted services.

States, accrediting bodies, certifying organizations, and third-party payers also may have credentialing and privileging standards related to telehealth. Healthcare organizations should be aware of the applicable requirements.

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## 6. Online Prescribing

Online prescribing or internet prescribing refers to a provider prescribing a drug to a patient based upon an interaction that has taken place online. An issue with online prescribing is that the patient-provider relationship may be solely established by an online encounter, rather than having a previously established relationship through an in-person encounter. Providers are required to have a patient-provider relationship before they can write a prescription. By having all interactions occur online, concerns were raised regarding whether the provider has enough information to make an informed decision regarding treatment. Questions include whether an adequate patient history and health status have been obtained and verification that the patient is accurately representing himself or herself.



### DID YOU KNOW

In some states, a patient-provider relationship based only on internet interactions is prohibited.

States maintain a large amount of control over internet prescribing. States may require an in-person physical examination prior to writing a prescription or they may opine that an online consultation is sufficient. State medical boards have information online regarding prescribing standards, laws, and regulations. [The Center for Connected Health Policy](#) provides information in a 50-state interactive map.

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## 7. Crossing State Lines and Licensure

The introduction of broadband access to connect to patients through telehealth services has enabled consultations from a distance. This has greatly improved access to care; however, providers in most cases are limited to practicing in the states they are licensed in.

In order to ease the burden of cross-state licensing, some professions have created interstate compacts to make it easier for professionals to practice across state lines. For a state to participate in a compact, they have to enact standard legislative language that creates the ground rules for the compact.

Additionally, healthcare providers who use telehealth must adhere to the requirements and restrictions of their applicable licensure. This requires consideration of the scope of practice specific to their license, as well as training and experience.

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## 8. Health Information and Portability

# Accountability Act (HIPAA)

Telehealth provision or use does not alter or change a covered entity's obligation to the Health Information and Portability Accountability Act (HIPAA), nor is there a special provision for telehealth services. Therefore, if an entity is providing telehealth that uses personal health information (PHI), the entity is obligated to meet the same HIPAA requirements as an in-person service. It is therefore necessary to ensure telehealth equipment, software, and network infrastructure meets HIPAA requirements.

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## 9. Malpractice

Medical malpractice is professional negligence by act or omission by a medical provider. Medical malpractice claims involving telehealth have been rare, and of those, most cases were settled out of court. As telehealth expands, it is likely malpractice claims will increase.

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## 10. Informed Consent

Medicare does not require that informed consent be obtained from a patient prior to a telehealth-delivered service; however, a majority of states either require informed consent for the Medicaid program or in their statute or rules regulating healthcare professionals. In telehealth, informed consent is used to describe what telehealth is, explain the expected benefits and possible risks associated with it to a patient, and describe security measures. It often requires the patient to sign an informed consent form and/or verbal acknowledgement that is documented in the patient's medical record.

Each state has varying informed consent requirements depending on a given profession. Some laws are written in a way that can be interpreted as a healthcare professional must obtain informed consent for each visit, while other laws only require informed consent for the first telehealth visit in a series for the same condition. Most entities see gaining informed consent as a best practice and subscribe to it.

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## Support

If you are struggling with a concept or terminology in the course, you may contact **TelehealthSupport@capella.edu** for assistance.

If you are having technical issues, please contact **learningcoach@sophia.org**.