

Telepsychiatry during COVID-19: Understanding the rules

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In addition to affecting our personal lives, coronavirus disease 2019 (COVID-19) has altered the way we practice psychiatry. Telepsychiatry—the delivery of mental health services via remote communication—is being used to replace face-to-face outpatient encounters. Several rules and regulations governing the provision of care and prescribing have been temporarily modified or suspended to allow clinicians to more easily use telepsychiatry to care for their patients. Although these requirements are continually changing, here I review some of the telepsychiatry rules and regulations clinicians need to understand to minimize their risk for liability.

Changes in light of COVID-19

In March 2020, the Centers for Medicare & Medicaid Services (CMS) released guidance that allows Medicare beneficiaries to receive various services at home through telehealth without having to travel to a doctor's office or hospital.¹ Many commercial insurers also are allowing patients to receive telehealth services in their home. The US Department of Health & Human Services Office for Civil Rights, which enforces the Health Insurance Portability and Accountability Act (HIPAA), reported in March 2020 that it will not impose penalties for not complying with HIPAA requirements on clinicians who provide good-faith telepsychiatry during the COVID-19 crisis.²

Clinicians who want to use audio or video remote communication to provide any type of telehealth services (not just those related to COVID-19) should use “non-public facing” products.² Non-public facing products (eg, Skype, WhatsApp video call, Zoom)

allow only the intended parties to participate in the communication.³ Usually, these products employ end-to-end encryption, which allows only those engaging in communication to see and hear what is transmitted.³ To limit access and verify the participants, these products also support individual user accounts, login names, and passwords.³ In addition, these products usually allow participants and/or “the host” to exert some degree of control over particular features, such as choosing to record the communication, mute, or turn off the video or audio signal.³ When using these products, clinicians should enable all available encryption and privacy modes.²

“Public-facing” products (eg, Facebook Live, TikTok, Twitch) should not be used to provide telepsychiatry services because they are designed to be open to the public or allow for wide or indiscriminate access to the communication.^{2,3} Clinicians who desire additional privacy protections (and a more permanent solution) should choose a HIPAA-compliant telehealth vendor (eg, Doxy.me, VSee, Zoom for Healthcare) and obtain a Business Associate Agreement with the vendor to ensure data protection and security.^{2,4}



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Regardless of the product, obtain informed consent from your patients that authorizes the use of remote communication.⁴ Inform your patients of any potential privacy or security breaches, the need for interactions to be conducted in a location that provides privacy, and whether the specific technology used is HIPAA-compliant.⁴ Document that your patients understand these issues before using remote communication.⁴

How licensing requirements have changed

As of March 31, 2020, the CMS temporarily waived the requirement that out-of-state clinicians be licensed in the state where they are providing services to Medicare beneficiaries.⁵ The CMS waived this requirement for clinicians who meet the following 4 conditions^{5,6}:

- must be enrolled in Medicare
- must possess a valid license to practice in the state that relates to his/her Medicare enrollment
- are furnishing services—whether in person or via telepsychiatry—in a state where the emergency is occurring to contribute to relief efforts in his/her professional capacity
- are not excluded from practicing in any state that is part of the nationally declared emergency area.

Note that individual state licensure requirements continue to apply unless waived by the state.⁶ Therefore, in order for clinicians to see Medicare patients via remote communication under the 4 conditions described above, the state also would have to waive its licensure requirements for the type of practice for which the clinicians are licensed in their own state.⁶ Regarding commercial payers, in general, clinicians providing telepsychiatry services need a license to practice in the state where the patient is located at the time services are provided.⁶ During the COVID-19 pandemic, many governors issued executive orders waiving licensure requirements, and many have accelerated granting temporary

licenses to out-of-state clinicians who wish to provide telepsychiatry services to the residents of their state.⁴

Prescribing via telepsychiatry

Effective March 31, 2020 and lasting for the duration of COVID-19 emergency declaration, the Drug Enforcement Agency (DEA) suspended the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, which requires clinicians to conduct initial, *in-person* examinations of patients before they can prescribe controlled substances electronically.^{6,7} The DEA suspension allows clinicians to prescribe controlled substances after conducting an initial evaluation via remote communication. In addition, the DEA waived the requirement that a clinician needs to hold a DEA license in the state where the patient is located to be able to prescribe a controlled substance electronically.^{4,6} However, you still must comply with all other state laws and regulations for prescribing controlled substances.⁴

Staying informed

Although several telepsychiatry rules and regulations have been modified or suspended during the COVID-19 pandemic, the standard of care for services rendered via telepsychiatry remains the same as services provided via face-to-face encounters, including patient evaluation and assessment, treatment plans, medication, and documentation.⁴ Clinicians can keep up-to-date on how practicing telepsychiatry may evolve during these times by using the following resources from the American Psychiatric Association:

- Telepsychiatry Toolkit: www.psychiatry.org/psychiatrists/practice/telepsychiatry
- Practice Guidance for COVID-19: www.psychiatry.org/psychiatrists/covid-19-coronavirus/practice-guidance-for-covid-19.

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Regardless of which telepsychiatry product you use, enable all available encryption and privacy modes

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