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# An Overview of Telehealth and Controlled Substance Prescribing in Florida

*By Mary Thomas, Esq., FMA Assistant General Counsel | Updated May 12, 2022*

For a long time, telehealth has struggled to make the dramatic, futuristic, state-of-the-art technology breakthrough that its inception initially promised. When the technology did finally catch up, rules and regulations were slow to follow and even slower to update. As Florida is about to experience the most latitude for controlled substance prescribing via telehealth in state history, it is a good time to examine how we got here and what the legal landscape will look like as we move forward.

## Florida Law

In 2001, the Florida Board of Osteopathic Medicine cut the ribbon on the first promulgated rule of telehealth, rudimentary as it was, with the Board of Medicine following suit with an almost identical rule in 2003<sup>1</sup>. However, it's not until 2014 that we see rules more reflective of modern-day telehealth practice<sup>2</sup>. While there was still, at that point, a complete prohibition on prescribing

controlled substances via telehealth, important principles began to solidify. Notably for the purposes of this article, it is now clear that physician-patient relationships may be established via telehealth and that physicians are held to the same standard of care for a telehealth visit as an in-person visit. After a push from psychiatric advocacy groups, the Boards amended their respective rules in 2016 to allow for the first exception to the controlled substance ban when scheduled medications are prescribed for the treatment of a psychiatric disorder.

Zooming out from the topic of telehealth during this time, we can see that Florida was contending with a few other public health issues – statewide shortages of healthcare practitioners, increased traction of legalized medical cannabis/marijuana, and an opioid epidemic. The Boards were attuned to overprescribing practices and did not want to fuel another wave of opioid abuse by increasing the availability of controlled substances. When the Florida Legislature implemented the Florida Medical Marijuana Legalization Initiative in 2017, it made clear that physicians must conduct “a physical examination while physically present in the same room as the patient” before issuing a certification for medical marijuana<sup>3</sup>. This essentially eliminated the possibility of marijuana certifications via telehealth. The Boards were in the process of updating its telehealth rule to reflect this limitation but never got the chance to incorporate this final change.

Non-physician healthcare practitioners were hesitant to utilize telehealth because their professional boards did not have a rule similar to that of the Boards of Medicine and Osteopathic Medicine that expressly authorized and regulated the practice, largely because not all professions have the legislative authority to set practice standards by rule. This was always a tenuous excuse at best because there was no law prohibiting the use of telehealth for any other profession. Nonetheless, in 2019 the Legislature stepped in and created Section 456.47, Florida Statutes, which set the telehealth practice standard for several healthcare professions ranging from physicians to optometrists to massage therapists (which still sounds like a bit of a rip off to me). While Section 456.47 does authorize rulemaking, the Boards repealed the telehealth rules, leaving Section 456.47 the sole law of the virtual land.

While the telehealth statute adopted the general prohibition on prescribing controlled substances as previously seen in rule, it did expand the number of exceptions from one to four. Currently, and until July 1, 2022, a telehealth provider may not use telehealth to prescribe a Schedule II-V controlled substance unless the controlled substance is prescribed for the following: the treatment of a psychiatric disorder; inpatient treatment at a hospital; the treatment of a patient receiving hospice services; or the treatment of a resident of a nursing home facility.

Not long after Section 456.47 went into effect, the entire world came to a halt in the face of the

COVID-19 pandemic. In an effort to keep patients at home, Florida expanded the allowable use for telehealth in two circumstances: for the treatment of chronic nonmalignant pain when treating an existing patient and to renew a certificate for medical marijuana, once again only when treating an existing patient<sup>4</sup>. This change was very well-received but temporary — in effect only until Florida’s State of Emergency expired on June 26, 2021.

The benefits and overall popularity of increased access sparked a renewed push to statutorily expand controlled substance prescribing via telehealth, which finally brings us to the passage of Senate Bill 312. On April 6, 2022, Gov. Ron DeSantis signed SB 312 into law, allowing Schedule III, IV, and V controlled substances to be prescribed via telehealth. Schedule II controlled substances are still prohibited unless one of the four abovementioned exceptions apply and Schedule I controlled substances (medical marijuana certifications) via telehealth are still prohibited with no exceptions.

While there is more to be done in the telehealth arena (e.g., payment parity, expanded definition to include audio-only, etc.), overall, this is a great step forward in making healthcare more accessible to some of the most medically vulnerable patients. However, since someone invited a lawyer to this party, I offer a few words of caution before implementing your new telehealth policies when SB 312 goes into effect July 1, 2022. Do not forget one of the founding principles: The standard of care for a telehealth visit must be the same as an in-person visit. Just because you can virtually prescribe a controlled substance does not mean that you *should* in every circumstance. Such is the case in the news this week regarding Cerebral, a telehealth service primarily staffed by nurse practitioners, that is currently under investigation for alleged controlled substance violations by catering to patients seeking Adderall and Xanax<sup>5</sup>. Rely on your professional medical judgment for what is the best care for your patients and protect your hard-earned medical license.

## Federal Implications

It is also important to remember that while Section 456.47 may be the only Florida telehealth statute, federal law also has a role to play. Under the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, a controlled substance may not be prescribed “by means of the internet” without a valid prescription<sup>6</sup>. Here is the kicker – a “valid prescription” is defined as a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by a practitioner who has conducted at least one in-person medical evaluation of the patient<sup>7</sup>. While you may certainly establish a physician-patient relationship via telehealth, if you are going to prescribe a controlled substance, federal law requires at least one in-person examination.

There are seven exceptions to the in-person requirement. However, none reflect the type of practice models that most offices employ. Briefly, the exceptions include (1) treatment when the patient is in a DEA-registered hospital or clinic; (2) treatment when the patient is in the physical presence of a DEA-registered practitioner; (3) treatment that is conducted by a practitioner who is an employee or contractor of the Indian Health Service, or is working for an Indian tribe or tribal organization; (4) treatment during a declared public health emergency (remember this one!); (5) the practitioner has a special DEA registration to practice telemedicine (this program has not been implemented as of this article); (6) the practice of telemedicine is being conducted in a medical emergency situation by an employee or contractor of the Veterans Health Administration; or (7) other circumstances specified by regulation<sup>8</sup>.

As you can see, unless you are practicing telehealth in an institutional setting, these exceptions are not up to speed with modern-day telehealth practice. If this in-person requirement sounds foreign to you, it is likely because the requirement has been waived for over two years and will continue to be waived until the nationwide public health emergency declared by the Secretary of the U.S. Department of Health and Human Services ends, or at an earlier date as specified by the DEA<sup>9</sup>. While telehealth proponents are hoping for a permanent waiver of this requirement before the end of the declared public health emergency, telehealth prescribers must still be aware of its existence. It is unclear at this time whether new patients that were seen via telehealth during the pandemic would then need to see their telehealth providers in person once the waiver expires. The FMA will continue to track this issue and provide guidance as soon as it becomes available.

As if advancing technology wasn't hard enough – telehealth rules and regulations can be difficult to navigate. If FMA members have any telehealth questions or require additional resources, please do not hesitate to contact our Legal Department at (850) 224-6496 or [legal@flmedical.org](mailto:legal@flmedical.org).

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<sup>1</sup> Rules 64B15-14.008 and 64B8-9.014, Florida Administrative Code, respectively.

<sup>2</sup> Rules 64B8-9.0141 and 64B15-14.0081, Florida Administrative Code, did not use the term “telehealth” but rather “telemedicine” which was limited to the practice of medicine by Florida licensed physicians.

<sup>3</sup> Section 381.986(4)(a)1., Florida Statutes.

<sup>4</sup> Department of Health, State of Florida, **Emergency Order DOH No. 20-002 (Mar. 16, 2020)**

<sup>5</sup> Olsen, Emily. **“Cerebral under investigation by DOJ for possible controlled substance violations.”** MobiHealthNews, (May 9, 2022)

<sup>6</sup> 21 CFR 1306.09(a).

<sup>7</sup> 21 CFR 1300.04(l)(1)

<sup>8</sup> 21 CFR 1300.04(i)(1)-(7)

<sup>9</sup> **Determination that a Public Health Emergency Exists, Alex M. Azar II, Secretary of U.S. Department of Health and Human Services (January 31, 2020)**



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