

# Legal Brief

*Providing General Legal Guidance and Regulatory Compliance Information  
to SDSMA Members*

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## Telehealth

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of July 1, 2021; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

### Summary

*Any health care professional who treats a patient in South Dakota shall be fully licensed to practice in the state or employed by a licensed health care facility, an accredited prevention or treatment facility, a community support provider, a nonprofit mental health center, or a licensed child welfare agency under SDCL 36-32-12.*

*Any health care professional who utilizes telehealth shall ensure that a proper provider-patient relationship is established.*

### Discussion

#### Definition

Telehealth is the use of secure electronic information, imaging, and communication technologies by a health care professional to deliver health care services to a patient, including interactive audio-video, interactive audio with store and forward, store-and-forward technology, and remote patient monitoring. Telehealth does not include the delivery of health care services through the procedures relating to emergency commitment of dangerously ill persons.

#### General

Any health care professional treating a patient in the state through telehealth shall be:

- (1) Fully licensed to practice in the state or employed by a licensed health care facility, an accredited prevention or treatment facility, a community support provider, a nonprofit mental health center, or a licensed child welfare agency under § 36-32-76; and
- (2) Subject to any rule adopted by the applicable South Dakota licensing body.

Any health care professional who utilizes telehealth shall ensure that a proper health provider-patient relationship is established, which requires the following:

- (1) Verifying and authenticating the location and, to the extent reasonable, identifying the requesting patient;
- (2) Disclosing and validating the health care professional's identity and applicable credentials, as appropriate;
- (3) Obtaining appropriate consent for treatment from a requesting patient after disclosure regarding the delivery models and treatment methods or limitations;
- (4) Establishing a diagnosis through the use of acceptable medical practices, including patient history, mental status examination, physical examination, and appropriate diagnostic and laboratory testing;
- (5) Discussing with the patient the diagnosis and its evidentiary basis and the risks and benefits of various treatment options;
- (6) Ensuring appropriate follow-up care for the patient;
- (7) Providing a visit summary or consult note to the patient; and
- (8) Utilizing technology sufficient to evaluate or diagnose and appropriately treat a patient for the condition as presented in accordance with the applicable standard of care.

The foregoing requirements do not apply to on-call or cross coverage situations, or to consultation with another health care professional who has an ongoing health care provider relationship with the patient and agrees to supervise the patient's care and emergency treatment.

Treatment and consultation recommendations made through telehealth via a health care professional shall be appropriately provided and within the health care professional's scope of practice, training, and experience. If a face-to-face encounter would otherwise be required in the provision of the same service not delivered via telehealth, a health care professional using telehealth to provide medical care shall provide an appropriate face-to-face examination using real-time audio and visual technology prior to diagnosis and treatment of the patient.

Without a proper provider-patient relationship, a health care professional using telehealth may not prescribe a controlled drug or substance, as defined by § 34-20B-3, solely in response to an internet questionnaire or consult, including any encounter via telephone.

Health care professionals using telehealth must follow all applicable state or federal statutes or rules for informed consent.

A health care professional or the originating site treating a patient through telehealth shall:

- (1) Maintain a complete record of the patient's care;
- (2) Disclose the record to the patient consistent with state and federal laws; and
- (3) Follow applicable state and federal statutes and regulations for medical record retention and confidentiality.

### Conclusion

*Any health care professional treating a patient in the state of South Dakota through telehealth shall be fully licensed to practice in the state or employed by a licensed health care facility, an accredited prevention or treatment facility, a community support provider, a non-profit health center, or a licensed child welfare agency.*

*A proper provider-patient relationship must be established for any healthcare profession who utilizes telehealth.*

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Sources:

SDCL 34-52-1 to -8.