

## **Nov. 22, 2022, MMAB Follow Up RE: Questions related to Telemedicine, Certifying Practitioners Responsibilities, and Department of Health Oversight**

Board members inquired into the use of telemedicine by physicians registered to certify patients for medical marijuana use (“certifying practitioners”), certifying practitioner responsibilities, and the oversight of the Department of Health (“DOH”). Based on the discussion, the DOH is providing information on the following three areas:

- 1) Responsibilities of certifying practitioners
- 2) Telemedicine
- 3) DOH oversight

### **Responsibilities of Certifying Practitioners.**

Under the [Medical Marijuana Act](#) (“Act”) and Temporary Regulations (“Regulations”), physicians with an active Pennsylvania medical license, in accordance with the Medical Practice Act of 1985 (63 P.S. §§ 422.1 – 422.51a) or the Osteopathic Medical Practice Act (63 P.S. §§ 271.1 – 271.18), are eligible to apply to be certifying practitioners. 35 P.S. §§ 10231.401 – 405 and 28 Pa. Code Ch. 1181.

In addition to maintaining an active medical license with the Department of State (“DOS”) and remaining compliant with all associated licensure laws, certifying practitioners must comply with the Act and the [Physicians and Practitioners Temporary Regulations](#). Importantly, Section [§ 1181.27](#) provides the certifying practitioner’s obligations when issuing patient certifications, which includes the following pertinent statements, among others, that a certifying practitioner attests to be true as part of the issuance of each patient’s certification:

- (1) The consultation was conducted in a manner appropriate to make a medical determination to the patient’s serious medical condition(s).
- (2) A diagnosis of a serious medical condition was made and that the patient will receive a therapeutic or palliative medical benefit from medical marijuana.
- (3) A medical record was established, and that the certifying practitioner will maintain the medical record while the patient is under their continuing care.

Certifying practitioners are also required to complete a 4-hour training course provided by one of the Department of Health approved training entities. 28 Pa. Code § 1181.32. For awareness, these training courses must include, at a minimum, the following:

- (1) The provisions of the Act and Regulations relevant to the responsibilities of a certifying practitioner.
- (2) General information about medical marijuana under Federal and State law.
- (3) The latest scientific research on the endocannabinoid system and medical marijuana, including the risks and benefits of medical marijuana.
- (4) Recommendations for medical marijuana as it relates to the continuing care of a patient in the following areas:
  - (i) Pain management, including opioid use in conjunction with medical marijuana.

- (ii) Risk management, including drug interactions, side effects and potential addiction from medical marijuana use.
  - (iii) Palliative care.
  - (iv) The misuse of opioids and medical marijuana.
  - (v) Recommendations for use of medical marijuana and obtaining informed consent from a patient.
  - (vi) Any other area determined by the Department.
- (5) Use of the Prescription Drug Monitoring Program.
- (6) Best practices for recommending the form and dosage of medical marijuana products based on the patient’s serious medical condition and the certifying practitioner’s medical specialty and training.

The DOH expects certifying practitioners registered in the medical marijuana program to comply with the Act and Regulations while also practicing within the acceptable and prevailing standard of care as required by their Pennsylvania professional licensure.

### **Telemedicine.**

During the COVID-19 pandemic, the statutory and regulatory requirement for “in person” consultations was waived. Thereafter, [Act 44 of 2021](#) removed the requirement that a practitioner’s treatment of a patient, referred to as “continuing care,” include an *in-person* consultation with that patient. The Act now states that continuing care means “treating a patient, in the course of which a practitioner has completed a full assessment of the patient’s medical history and current medical condition, including a consultation with a patient.” According to the [DOS Telemedicine FAQs](#) available on the DOS website, telemedicine is a way to provide physical and behavioral health services virtually, such as through video conferencing or over the phone. The FAQs also address whether licensed professionals are permitted to practice telemedicine in Pennsylvania. For your convenience, the most relevant questions and answers (DOS Nos. 1, 2 and 12) have been copied and provided below.

Notably, given that there is no statute in Pennsylvania that explicitly authorizes the use of, or disallows the use of, telemedicine, action cannot be taken against a licensed physician simply for using this practice, alone. *See* DOS No. 12 below. Further, the licensed physician would need to be in violation of another regulation that they are unable to comply with as a result of using telemedicine.

The Act and the Regulations do not prohibit certifying practitioners from using telemedicine. If a certifying practitioner is complying with all necessary laws and professional licensure requirements, a certifying practitioner is the most qualified to determine whether the certifying practitioner can effectively consult and diagnosis patients using telemedicine and to determine how to best treat the individual patients. Again, the DOH expects that all certifying practitioners will uphold their obligations to practice within the acceptable and prevailing standard of care to conduct medical consultations as required by their Pennsylvania professional licensure.

## **DOS Telemedicine FAQ**

### **DOS No. 1. What is telemedicine?**

Telemedicine is a way to provide physical and behavioral health services virtually, such as through video conferencing or over the phone. In Pennsylvania, Medical Assistance (MA) enrolled providers have been allowed to provide physical health and behavioral health services since 2007 and 2011, respectively, but the option was not widely used until many providers had to deliver services via telemedicine during the COVID-19 pandemic. Similarly, commercial health insurance plans may have had individual policies allowing for reimbursement for services provided via telemedicine but there is no statute in Pennsylvania that explicitly authorizes the use or disallowance of telemedicine in Pennsylvania or that sets reimbursement rates for services delivered by telemedicine.

### **DOS No. 2. Does the Department of State allow licensed professionals to practice telemedicine in Pennsylvania?**

With regard to licensed healthcare practitioners and the use of telemedicine, there is currently no statute in Pennsylvania that explicitly authorizes its use, nor one that explicitly prohibits it. This was true even before the pandemic. The purpose of the telemedicine waiver issued by the Department of State at the beginning of the COVID-19 disaster declaration was to address significant confusion and make it clear that licensees under the Department's Bureau of Professional and Occupational Affairs (BPOA) health-licensing boards can provide services within their existing scopes of practice via the use of telemedicine when appropriate, provided it is done according to accepted standards of care.

While engaging in telemedicine is allowable from a professional licensing standpoint, it is important to note that there may be additional issues to consider – such as, for example, insurance coverage, payment and reimbursement, and the intersection of telemedicine services with existing facility licensing requirements that must be met by hospitals or other licensed health care facilities.

These additional considerations are not within the purview of the Department of State. Rather, such issues fall within the purview of other state and federal agencies, such as the Pennsylvania Department of Human Services (DHS), the Pennsylvania Insurance Department, the Pennsylvania Department of Drug and Alcohol Prevention (DDAP), and the Pennsylvania Department of Health (DOH).

Act 30 of 2022 extended certain COVID-19 waivers — including the BPOA telemedicine waiver — until October 31, 2022, unless terminated sooner by the agencies that issued them. The Department of State has no plans to expire its telemedicine waiver prior to October 31, 2022. **When the telemedicine waiver does expire, it will not affect licensees' continued use of telemedicine from a professional licensing standpoint. It will continue to be allowable in the same way it was allowable prior to the pandemic.** (Emphasis added).

Act 30 of 2022 also extended suspended regulations for DHS, DOH, DDAP, and DOS, including extending the suspended regulations tied to the federal Public Health Emergency (PHE) until the PHE or federal authorization of the flexibility allowed under the PHE ends. A full list of suspended regulations across agencies can be found [here](#).

**DOS No. 12. Will the state licensing boards take action against a Pennsylvania-licensed professional for practicing using telemedicine after October 31, 2022?**

A licensee can be disciplined for a violation of a provision in a practice act or regulations of the Board. Health care practitioners must also practice within the acceptable and prevailing standard of care. Because the practice acts and regulations do not currently address the provision of health-related services by telehealth/telemedicine, there could be no violation for simply using telehealth/telemedicine after October 31, 2022, and in general there is nothing that would prohibit licensees from using telehealth/telemedicine so long as doing so complies with the standards of acceptable and prevailing medical practice. This was true even prior to the pandemic. It is possible, however, that violations of certain regulations could occur in some circumstances where telemedicine is used. For example, there are regulations that specifically call for a physical examination to be conducted. If a Pennsylvania-licensed practitioner instead “examines” the patient via telemedicine, there could be a violation of the regulation. The violation would not be for the practitioner’s use of telemedicine, but rather the practitioner’s failure to conduct the required physical examination.

**DOH Oversight.**

While the DOH does not have the authority to inspect licensed health care practitioners or their offices, the DOH investigates all complaints received, including those that indicate a certifying practitioner is in violation of the Act and Regulations. That said, when a complainant alleges a certifying practitioner violated the Act and Regulations, due process is still required. As a result, it is crucial for the DOH to have cooperation from the complainant, particularly if the certifying doctor’s standard of care is at issue, to pursue litigation against the certifying practitioner and have a successful outcome. The DOH also collaborates with the DOS when certifying practitioners are alleged to violate the Act or Regulations. Chapter 1181 of the Regulations, linked above under the “Responsibilities of Certifying Practitioners”, discusses circumstances for denial, revocation or suspension of certifying practitioner’s registration.

Regarding the inquiry into how the DOH ensures a certifying practitioner reviews a patient’s medical records, the Act and Regulations address the review and assessment of a patient’s medical records in the definition of “continuing care” and “patient consultation” as well as enumerate the responsibility with respect to records for issuing a patient certification. 35 P.S. § 10231.103, 28 Pa. Code §§ 1181.21 and 1181.27(a)(2). The DOH expects all certifying practitioners to remain compliant with the Act and Regulations and to practice ethically and responsibly under their Pennsylvania medical license. The DOH encourages anyone that believes a certifying practitioner is not complying with the Act and Regulations or standards of acceptable and prevailing medical practice to file a complaint.