

Blog Post

Prescribing in Florida During the Pandemic: What is Allowed, What are the Gaps, and How Do We Fill Them?

April 16, 2020

By Martin R. Dix

The catchphrase of the day is “social distancing” and it is the primary means of flattening the COVID-19 pandemic (the pandemic) curve by keeping contagious and healthy people apart. However, there is another kind of distancing that may play a role in fighting the Pandemic – “health care distancing.” Health care distancing is a mechanism to keep the sick patients, who are sick, but not so sick that they need hands on care, out of the health care system so they don’t infect other patients and, at least equally important, the treating health care providers. The Florida Surgeon General ordered health care distancing in his Declaration of Public Health Emergency as follows:

Section 3. In order to protect public health, I find it is necessary to advise any individuals who believe they may have been exposed to COVID-19 to contact their local county health department prior to travelling to any physician’s office, emergency department, hospital, or urgent care center, to ensure proper protective measures are taken to prevent further risk of spread to others.

That both providers and patients respect this Order is especially important since, at this time, there is no recognized cure and there is only so much that the health care providers can do other than treat the

Related People

Martin R. Dix

Related Work

Healthcare
Hospitals and Health
Systems
Pharmacy, Drugs, and
Medical Devices

Related Offices

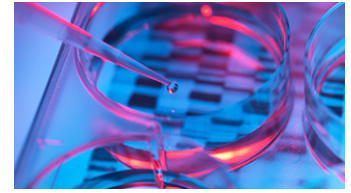
Tallahassee

Health Law Rx

Akerman Perspectives
on the Latest
Developments in
Healthcare Law

[Visit this Akerman blog](#)

Coronavirus Resource Center



symptoms. So, how can a provider provide care if the health care provider is to be distanced from the very patients to be treated?

The Governor's [Executive Order 20-52](#) has helped with health care distancing by allowing the dispensing of an emergency 30-day supply to patients whose non-Schedule II maintenance drug prescriptions expire during the period covered by the Order. Unfortunately, the law allowing this emergency supply only permits one filling of the prescription, so the patient will still need a new prescription as the pandemic continues. Florida law also allows early prescription refills when an emergency has been declared, but at some point the prescription will need to be re-authorized by the prescriber.

Florida allows prescribers to prescribe drugs via telemedicine. However, with only certain limited exceptions, they cannot prescribe controlled substances through this method (allowed for psychiatric disorders, hospital inpatients, hospice and nursing home patients Section 456.47(2)(c), F.S.). Prescribers that have designated themselves as a controlled substance prescribing practitioner pursuant to Section 456.44, Florida Statutes, may issue a renewal prescription for a controlled substance listed as Schedule II (note: Schedule II prescriptions cannot be refilled under federal law so it is unclear what a "renewal prescription" is), Schedule III, or Schedule IV under Chapter 893, Florida Statutes, only for an existing patient for the purpose of treating chronic nonmalignant pain without the need to conduct a physical examination of the patient (see [Florida Department of Health \("DOH"\) Emergency Order 20-002](#)). DEA, likewise, has developed a [chart on its website](#) to explain that prescribers can prescribe Schedule II, III, and IV controlled substances to patients they have already examined via telemedicine.

So, where does this leave prescribers? The Florida DOH allows the prescribing of:

- Any drug except, in most instances, controlled substances, through telemedicine
- A renewal of a prescription for controlled substances for patients diagnosed with chronic non-malignant pain via telemedicine without a face to face examination

DEA allows the prescribing of:

- Prescriptions for controlled substances via telemedicine, telephone, e-mail, etc., if the prescriber has previously examined the patient
- Prescriptions for controlled substances via telemedicine, if the prescriber has **not** previously examined the patient

DEA (surprisingly) gives much more allowance to the prescriber's professional judgment in prescribing controlled substances than does Florida and allows prescribing in situations where Florida does not. One obvious gap is that DEA's grant of authority to use telemedicine for prescribing controlled substances is much broader than Florida allows by emergency order. Florida prescribers, however, will have to follow Florida's narrower rule. Florida should consider bringing its policy on controlled substance prescribing in line with that of the federal agency responsible for controlled substances.

Another less obvious gap is that while telemedicine is a wonderful panacea for the young techno-savvy population that has adequate technology to participate, it does not work for everyone. The elderly did not grow up with this ever-changing technology and it may be a mystery to some of our vulnerable older population who lack the know-how and equipment to participate in a telemedicine appointment with their provider. Normally, such patient's friends or family could help them operate this technology, but that is a poor solution when employing social distancing. There are also members of the population who may know how to

use the equipment, but don't have the funds to purchase it and would have to violate social distancing mandates to use someone else's equipment. Both of these groups may also be transportation challenged

Most elderly people can still operate a phone. Why not let the prescribers use their years of judgment and experience to evaluate their patients over the telephone instead of via telemedicine? It is not an ideal solution, but it helps get medicine to patients in need without violating health care or social distancing. The allowance would be temporary and the downside risks are relatively small. Better that these patients get their needed medicines via a telephone assessment than we force the most vulnerable population into their medical provider's office because that is the only way for them to obtain their medicines. Physicians are still obligated to exercise professional medical judgment and prescriptions can only be issued for a legitimate medical purpose.

There is no clear general prohibition on the use of telephone assessments. Other than the state statutes addressing telemedicine, chronic non-malignant pain, and pain management and federal laws governing internet prescribing, neither Florida nor federal law expressly requires a physical examination prior to prescribing a prescription drug. All prescriptions are generally required to be issued in good faith and in the course of professional practice. However, it is possible that conducting a physical examination prior to prescribing is deemed a standard of practice. Accordingly, the Department of Health should issue guidance eliminating the need for an in-person physical examination prior to prescribing during the pandemic and allowing phones to be used for telemedicine purposes.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and

administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.