

Medication Abortion by Telehealth:

Legal Issues for Providers

ABOUT RAAP

Regulatory Assistance for Abortion Providers (RAAP) is a division of Resources for Abortion Delivery. RAAP provides pro bono legal assistance to eligible providers regarding compliance with abortion-related laws. RAAP partners with in-state attorneys as needed in order to provide legal advice in states where we are not licensed to practice law. To contact RAAP, please email us at RAAP@radprogram.org.

DISCLAIMER

This guide provides educational information only. It is not legal advice and is not intended to create an attorney-client relationship. Most laws and regulations related to telehealth for medication abortion care are state-specific. ***If you plan to launch this service in your state, you should consult an attorney.*** This guide was last updated on May 5, 2021.



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Introduction

Over the past year, the use of telehealth for medication abortion care (teleMAB) has increased dramatically and continues to grow as abortion providers think creatively about expanding abortion access. Recently, the U.S. Food and Drug Administration (FDA) lifted its in-clinic dispensing requirement for mifepristone for the duration of the COVID-19 pandemic, allowing even more options for teleMAB services, at least temporarily. However, providing teleMAB can still be a legal and regulatory minefield. It is important to be aware of the many areas of state law that may apply so that you can avoid trouble with state regulators.

This guide is for abortion providers (including clinicians, facility owners, and administrators) looking to launch or expand teleMAB services. The guide describes legal issues you should consider to ensure compliance with applicable state laws. The guide provides general information about issue areas such as abortion, telehealth, pharmacy and medication regulation, and scope of practice. It does not cover the legal requirements of any particular state. You should read this guide to understand what areas of state law might apply, and follow up with an attorney to discuss your specific plans.

This guide does not provide general information about the medication abortion process or teleMAB models. Information and resources about these topics can be found in the Appendix to this document. This guide also does not cover the federal requirements that are still in place for mifepristone. These requirements can be reviewed in the FDA's Risk Evaluation and Mitigation Strategies for mifepristone.

Terminology Used in This Guide

This guide uses the following terminology. The exact definitions of these terms may differ under state law.



Telehealth

The delivery of healthcare services and information through electronic rather than in-person interactions. Telehealth may be synchronous or asynchronous.

TeleMAB

An abbreviation for medication abortion care provided by telehealth.

Synchronous Visits

Real-time interactions between the provider and the patient via a telehealth video visit, or in some instances a phone call.

Asynchronous Visits (also called “store and forward”)

Electronic transmission of information between a patient and a provider that does not involve real-time interaction. A patient submitting an online intake form for the provider to review is an example of an asynchronous “visit.”

Originating Site

Where the patient is located.

Distant Site

Where the provider is located.

Medications by Mail

Delivery model where the medications are sent to the patient by mail from the provider or from a mail order pharmacy.

Medication Pick Up

Delivery model where the patient picks up the medication at a medical facility, either inside or in an area just outside of the facility such as a parking lot or a pickup window.

Provider Delivery

Delivery model where the provider personally delivers medications to the patient at a place other than the medical facility.

Facts to Consider

Although you might not yet know exactly what type of teleMAB service model you will use, it is helpful to think through some key questions at the start of your project. The answers to these questions will impact the areas of state law that apply. These laws may influence the service model you ultimately decide to use.

- 1 Where will the provider and patient be located?
- 2 In what state is the provider licensed and what type of license do they have?
- 3 What technology (video, phone, asynchronous) will be used for each step of the process, including informed consent and education, tests and exams, the MAB visit, and follow-up?
- 4 Will you provide medications directly to the patient (by mail, medication pick up, or provider delivery) or will you use a mail order pharmacy?
- 5 If you provide medications directly to the patient, which clinic staff will do so?
- 6 If you provide medications directly to the patient, which clinic staff will otherwise be involved in the teleMAB process, including accessing the medications, labeling them, and preparing them for mailing?
- 7 Will you offer teleMAB to minors?
- 8 Will you accept either public or private insurance?



State Legal Issues to Consider for All TeleMAB Models

When you launch a new teleMAB service, you should consider the following questions for any teleMAB model you use. If you plan to mail medications directly to patients or use medication pick-up or provider delivery, additional areas of law might apply. These areas are covered in the next section.

This section assumes that the patient and provider are in the same state. If the patient and provider are located in different states, enforcement authorities may take the position that the laws of both states apply. This can be a very complex area of law, particularly if teleMAB is prohibited in one of the states. We do not recommend providing teleMAB across state lines without consulting an attorney.

Does the state ban teleMAB?

Many states impose restrictions that make it impossible to provide teleMAB services. These restrictions come in different forms, such as:

- Making it illegal to provide teleMAB;
- Effectively banning teleMAB by requiring the provider and patient to be in the same room;
- Requiring the provider to be “face to face” with the patient, which may require an in-person visit.

Even in states with teleMAB restrictions, depending on your state’s laws you may still be able to use telehealth for patient informed consent and education or follow-up.

Does the state require the MAB provider to be a physician?

Several states have laws that prohibit anyone but physicians from “performing” medication abortions. In some states, this can mean that no person other than a physician can physically deliver mifepristone and/or misoprostol to patients. In other states, it might mean that clinic staff can provide the medications to the patient as long as the physician controls the process. What the law means in your state will depend on the law’s specific language and how courts and enforcement officials have interpreted it. It may also depend on other laws such as scope of practice and medication dispensing.

Does the state require facility licensing if you are only providing teleMAB?

Some states impose burdensome laws on abortion facilities and providers, called Targeted Regulation of Abortion Providers (“TRAP”) laws. TRAP laws commonly include facility licensing requirements, and a state may require that you provide teleMAB in a licensed facility. Additional requirements may apply based on the facility license, such as a requirement that the facility have an emergency transfer agreement with a nearby hospital or that you dispose of fetal tissue in a particular manner. While you may still be able to provide certain services via telehealth even if your state has TRAP laws, you may be unable to use certain service models if the laws require the provider or patient to be in a licensed facility.

Does the state require biased counseling or a waiting period before providing teleMAB?

Several states require that patients receive certain information prior to the abortion that is intended to discourage them from proceeding, and some specifically require biased counseling about medication abortion reversal. Biased counseling requirements are often paired with waiting periods.

States may require biased counseling to be done in person. This means that even if the MAB visit can be done via telehealth, the patient will be required to have at least one in-person visit.

Does the state require particular tests or exams prior to or following teleMAB?

Some states require that patients receive certain tests or exams prior to or following an abortion, which may make at least one in-person visit necessary.

Examples include:

- Mandatory ultrasounds;
- Lab work such as Rh testing or hematocrit measures;
- Physical exams;
- In-person follow-up visits.

If your state does not explicitly require that a test or a physical exam be done in person, you may be able to provide it using telehealth as long as it is medically appropriate to do so.

Does the state require parental notification or consent for minors?

Many states require that if the patient is a minor, the provider notify a parent or guardian before the abortion and/or obtain the parent's or guardian's consent. The notification or consent may need to be done in person and may be paired with a waiting period. Because of this, even if the MAB can be provided via telehealth, an in-person visit may be required, either with just the parent/guardian or with the parent/guardian and the patient.

Does the state require reporting of abortions by teleMAB?

Many states have reporting requirements for abortion, including MAB, and some states have specific requirements for teleMAB. While these won't impact your ability to provide teleMAB, it is important to be aware of any reporting requirements in your state.

What licensure requirements does the state apply to telehealth providers?

Most states require a provider conducting telehealth visits to be licensed in the state where the patient is located and comply with the laws in that state. States typically require full licensure, though some states offer or require special licenses for telehealth.

Does the state impose other telehealth restrictions?

Some states impose specific restrictions on telehealth. These typically fall into two categories: (1) requirements related to the practice of telehealth and (2) requirements related to telehealth technology.

Requirements related to the practice of telehealth may include:

- Requiring an established provider-patient relationship before telehealth services can be used, which may require an in-person visit depending on state law;
- Providing informed consent specifically for the use of telehealth;
- Recordkeeping requirements;
- Confirming the provider's identity with the patient;
- Having the ability to refer patients to in-person and/or emergency care; and
- Implementing specific policies and procedures for the use of telehealth.

Requirements related to telehealth technology may include:

- Specific definitions of synchronous and asynchronous technology;
- Limiting or entirely prohibiting the use of asynchronous technology; and
- Requiring the technology to meet certain standards for patient privacy.

Does the state impose specific requirements on teleMAB if you seek third-party reimbursement?


States often impose specific requirements if you seek reimbursement for teleMAB services either through Medicaid or private insurance. These requirements might include:

- Certain tests or exams prior to or after the abortion;
- Specifications for distant and originating sites;
- Prohibiting certain technology such as phone or asynchronous technology.

Although RAAP does not provide assistance on billing and insurance questions, we recognize that this is an important issue. The Additional Resources section of the Appendix includes websites with information about these topics.

Has the state modified its telehealth requirements due to the COVID-19 pandemic?

During the COVID-19 pandemic, nearly all states have taken action to temporarily remove barriers to healthcare by waiving or easing telehealth and provider licensure requirements. Some states are extending these changes or making them permanent, which could allow you to more easily launch teleMAB services.



Additional State Legal Issues to Consider when Providing Medications Directly to Patients

If you are providing patients with mifepristone, misoprostol, or any other medications directly by mailing or delivering medications to patients or having the patient pick up drugs from the facility, as opposed to using a mail order pharmacy, you will need to be sure you are complying with your state's pharmacy and medication laws. If you are considering providing abortion medications directly, you should think through the following questions.

Does the state require the facility or provider to obtain a pharmacy license or register with the Board of Pharmacy?

Some states require that any provider who dispenses medications directly to patients obtain a pharmacy license. More commonly, states do not require a pharmacy license, but do require the provider to register with the state Board of Pharmacy and become what is often called a “dispensing practitioner.” Specific rules often apply to dispensing practitioners, some of which may make certain teleMAB models difficult or impractical, such as requiring the provider to be on site when medications are dispensed.

What pharmacy and medication requirements apply to mifepristone, misoprostol, and other medications provided to patients?

States apply different laws and regulations to different types of medications. Mifepristone and misoprostol may be considered dangerous drugs, controlled substances, or something else entirely.

However they are categorized, you will need to confirm that you are complying with all requirements for that medication category. You will need to do the same for any other medications you provide to teleMAB patients, such as painkillers or anti-nausea medication.

Based on how a medication is categorized, different requirements may apply, such as:

- Who can possess, administer, dispense, and prescribe the medications (discussed in detail in the question below);
- How the medications must be stored, labeled, and packaged;
- Recordkeeping; and
- If you are mailing medications, how the medications are shipped and tracked and what information must be included in the package.

What roles does the state allow staff to play in the delivery of the medications?

Whether you can move forward with your preferred service model may depend on being able to have a variety of licensed and unlicensed staff assist in the process. Common tasks that states regulate include prescribing, dispensing, and administering the medication. The definitions for these terms often vary by state. How states define these terms will impact which clinic staff can take part in each step of the process, such as physically handing the pills to the patient or preparing the medications for mailing. The different tasks staff can undertake will primarily depend on two areas of law: (1) medication dispensing and (2) scope of practice.

Medication Dispensing

States define certain terms related to dispensing medications in ways that can impact which staff members can take part in the teleMAB process and what they can or cannot do. For example, some states may consider the act of handing a pill to the patient to be part of the dispensing process, others may consider it to be administering, and others may not consider it to be either dispensing or administering.

Definitions that may impact teleMAB typically include “prescribe,” “dispense,” and “administer.” Your state may also use other terms, such as “deliver,” “distribute,” and “possess,” in ways that could impact your service model. For example, some states only allow certain people to “possess” medications, which may limit who at your facility can physically handle the medications, including packaging or handing them to the patient.

States sometimes define these terms differently in different sections of the law, so it is important to know which definition applies to the medications you will provide your patients. For example, what is considered to be “dispensing” a dangerous drug may be different from what is considered to be “dispensing” a controlled substance in your state.

Scope of Practice

Scope of practice refers to the specific activities that a person is allowed to undertake based on the professional license they hold or the training they have received. In addition to understanding the dispensing laws, it is also important to confirm that at each point in the process you are using staff that are acting within their scope of practice under state law. For example, if your state considers handing pills to a patient to be “administering” medications, then medication administration must be within the staff member’s scope of practice.

Scope of practice requirements involve determining:

- If a person has independent authority to complete specific tasks;
- If the abortion provider can delegate certain tasks to staff; and
- Whether people without independent or delegation authority can perform administrative tasks.

Some scope of practice laws may also include in-person supervision requirements for certain clinical staff that could impact your teleMAB model.



As you launch teleMAB services, it is important to remember that several different areas of state law will apply, including requirements related to abortion, telehealth, and possibly pharmacy, medication dispensing, and scope of practice.

We hope this guide is a useful starting point for you, but remember, these laws are often complex, so we encourage you to consult with an attorney before beginning a new teleMAB service model.

*Thank you for all you do to provide
safe and accessible abortion care!*

APPENDIX

Medication Abortion Background

Medication abortion (MAB) is the use of pills to end a pregnancy. There are two common MAB methods:

① **Mifepristone/Misoprostol.**

The most common method of MAB in the United States is through a combination of two medications, mifepristone and misoprostol. Under this method, patients first take mifepristone and then take misoprostol, typically 24 to 48 hours later.

Self-managed abortion, without supervision by a health care provider, is another MAB method. While we recognize that many people choose to self-manage their abortions for a number of reasons, we do not include it as a method here because this guide focuses on teleMAB that involves a licensed clinician.

② **Misoprostol alone.** Another MAB method is the use of misoprostol alone. Under this method, patients typically take 3 or more doses of misoprostol several hours apart.

Under both methods, a follow-up is typically scheduled 7-14 days after the patient takes misoprostol to confirm the pregnancy was terminated.

The FDA has approved the mifepristone/misoprostol method for use up to 70 days since the patient's last menstrual period (LMP). However, many providers offer both methods beyond 70 days LMP under an evidence-based protocol.

TeleMAB Service & Delivery Models

Below is a chart of the most common service and delivery models for teleMAB. The specific details of each model may vary based on patient need, clinical protocols, and state law.*

	In-Facility Patient Services	Low-Touch	No Test
Description of model	Patient is at a facility; provider is at another location	Patient is at a facility for a portion of the process; provider may be at the same facility as the patient or at another location	Patient does not go into the facility for any part of the teleMAB process
Patient informed consent & education	Patient is at a facility; provider is at another location	Patient is at a facility if legally required, otherwise done using synchronous or asynchronous telehealth	Done using synchronous or asynchronous telehealth
Pregnancy confirmation & gestational age determination	Patient is at a facility; provider is at another location. Providers typically use screening questions, ultrasound, physical exam, and/or blood tests	Done using synchronous or asynchronous telehealth using at home pregnancy test, patient’s LMP, and/or screening questions	
Other tests & exams	Patient is at a facility; provider is at another location	Not done unless legally required or medically indicated. If required or indicated, done by telehealth if possible, otherwise in person	Not done unless legally required or medically indicated. If required or indicated, done by telehealth if possible. <i>If not possible, no longer a no test model. Becomes a low touch or in-facility patient visit.</i>
Provider chart review & patient screening to determine MAB eligibility	Done using synchronous or asynchronous telehealth		
Providing medication to patient	Patient and provider have a synchronous telehealth visit while the patient is at a facility; provider is at another location Mifepristone: Provided at the facility Misoprostol and other medications: Provided at the facility or the patient is given a prescription to pick up at a pharmacy	Either the patient and provider have a synchronous telehealth visit or MAB information is provided via asynchronous technology Mifepristone, misoprostol, and other medications: Provided via medication pick-up, mailed directly from the facility, delivered to the patient by provider, or shipped via mail order pharmacy (the patient may also pick up misoprostol and other medications from a pharmacy with valid prescription)	
Patient taking mifepristone and/or misoprostol	Patient takes mifepristone either at the facility or outside of it. Patient takes misoprostol outside of facility	Patient takes mifepristone either at the facility or outside of it. Patient takes misoprostol outside of facility	
Follow-up	Typically done at the facility, but may be by synchronous or asynchronous telehealth and at-home pregnancy test and screening questions	Done using synchronous or asynchronous telehealth and at-home pregnancy test and screening questions	

*The abortion community is currently exploring alternative terms for “low touch” and “no test” services. The terms we use in this guide were the most common terms in use at the time of drafting.

Additional Resources

Below are several resources to help you identify state laws and regulations relevant to teleMAB.

These resources are for educational information only and do not provide legal advice. This is not an exhaustive list, and not all of the resources included will be relevant to your plans. Be sure to confirm the information from each of these websites before relying on them since they may not be accurate or updated regularly.

Abortion Restrictions

- Guttmacher
 - [Chart](#) on MAB restrictions, including teleMAB
 - [Chart](#) on waiting periods/2-trip requirements
 - Guttmacher also has a variety of other charts related to abortion restrictions
- Policy Surveillance Program's Abortion Law Database
 - The [Medication Abortion Requirements](#) page includes specific questions about teleMAB

Telehealth Requirements

- Center for Connected Health Policy
 - [Main page](#) allows you to look up telehealth requirements by topic or state
 - [Map](#) of state bills and proposed regulations
 - [COVID-19 State-Related Actions](#)
 - [State Telehealth Laws and Reimbursement Policies Report](#)
- American Medical Association [50-state survey](#) (2018): Establishment of a patient-physician relationship via telehealth
- Federation of State Medical Boards table of [U.S. States and Territories Modifying Requirements for Telehealth in Response to COVID-19](#)

Scope of Practice Requirements

- National Conference of State Legislatures Scope of Practice Policy [50 State Scope of Practice Landscape](#)
- Kaiser Family Foundation [Nurse Practitioner Scope of Practice Laws](#) and [Physician Assistant Scope of Practice Laws](#)
- American Association of Medical Assistants [State Scope of Practice Laws](#)

Other Resources

- [Federation of State Medical Boards Model Telemedicine Policy](#)
- [Interstate Medical Licensure Compact](#)
- Health & Human Services Office for Civil Rights [HIPAA for Professionals](#), including providers [frequently asked questions](#)
 - Not specific to telehealth, but includes information and guidance for entities covered under HIPAA, such as healthcare providers, on how to meet their federal privacy and security obligations.
- National Association of Community Health Centers [Telehealth Implementation Quick Guide COVID-19 Resource Packet](#)
- National Health Law Program [Medicaid Coverage of Medication Abortion Delivered via Telehealth](#)
- American Medical Association [Telehealth Implementation Playbook](#)
- National Association of Board of Pharmacy [NABPLAW Online](#) (paid resource)