



# Telemedicine: A Look at the Changing Legal Environment in 2018 and Beyond

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# Telemedicine is Growing Even Faster Than Anticipated

Foley's 2017 Telemedicine & Digital Health Survey:  
2014 vs 2017

**87%**

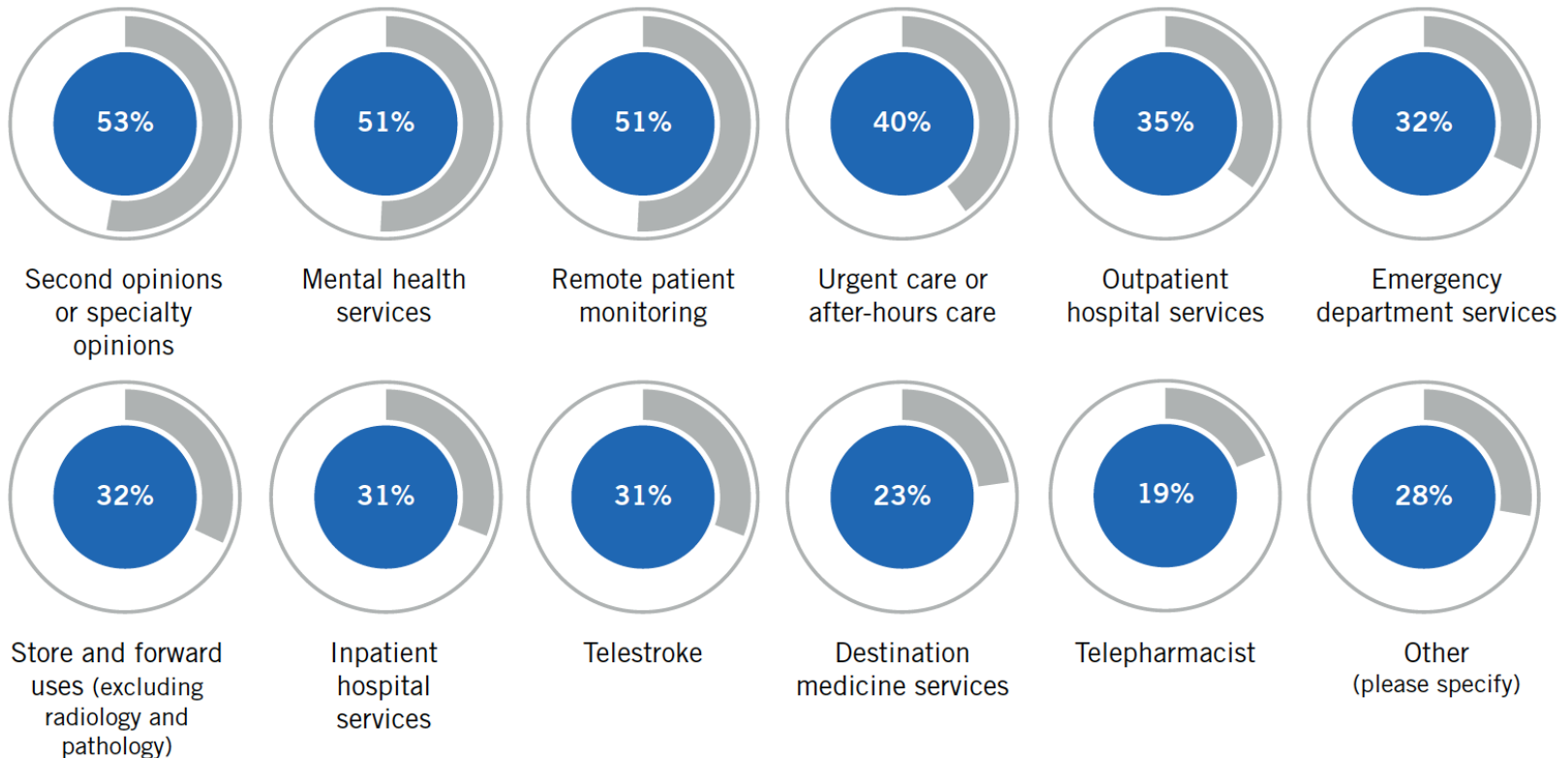
OF RESPONDENTS  
TO 2014 SURVEY  
**DID NOT EXPECT**  
THEIR PATIENTS  
TO BE USING  
TELEMEDICINE  
SERVICES.

**76%**

OF RESPONDENTS  
TO 2017 SURVEY  
**OFFER OR PLAN**  
TO OFFER  
TELEMEDICINE.

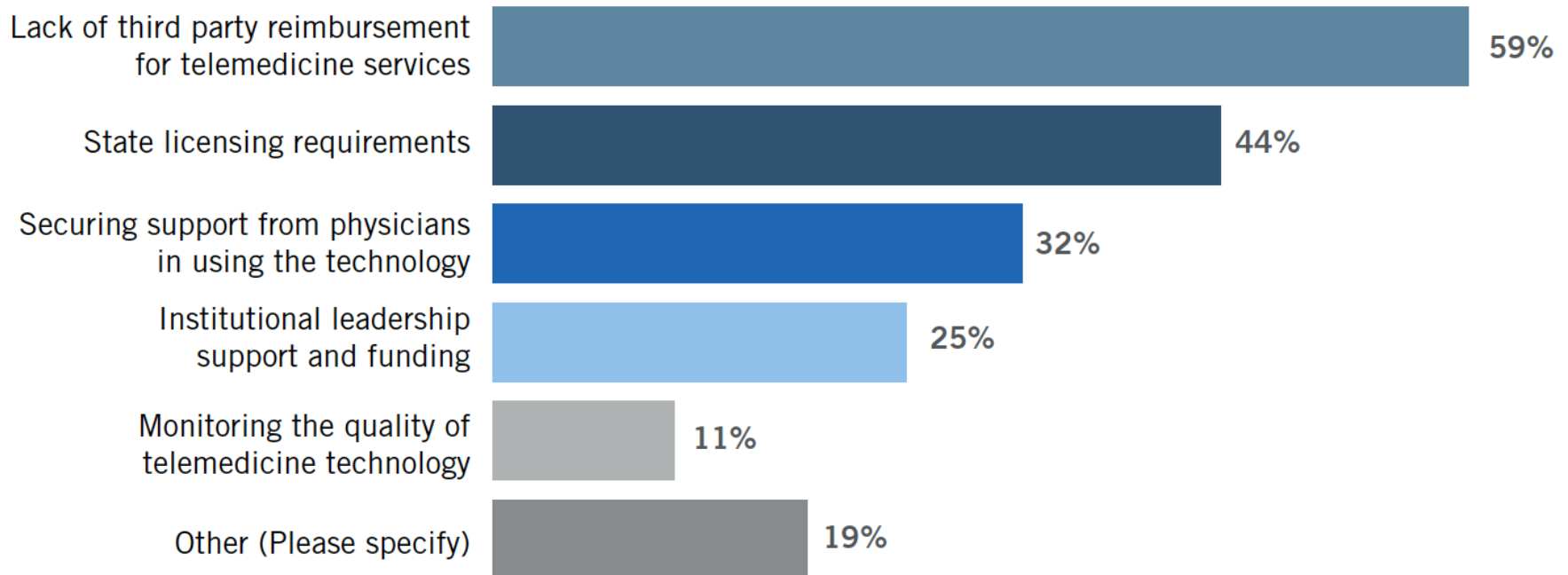
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# Current Perception of Opportunities in Telemedicine



Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)

# Current Perception of Obstacles in Telemedicine



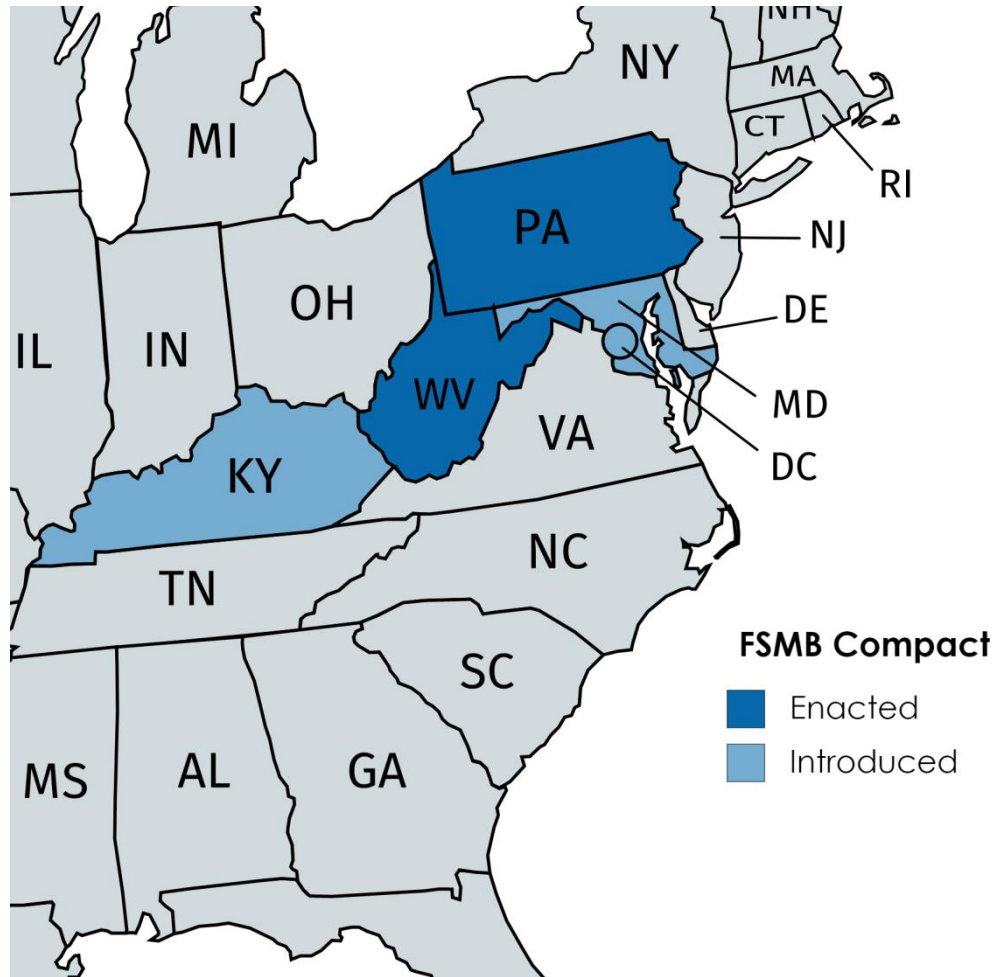
Source: Foley & Lardner 2017 Telemedicine & Digital Health Survey (Nov 2017)



A person's hands are shown holding a tablet computer. The screen of the tablet is visible, showing some blurred content. A semi-transparent blue rectangular overlay covers the middle portion of the image, containing the title text. The background is out of focus, showing what appears to be a person's face and some papers.

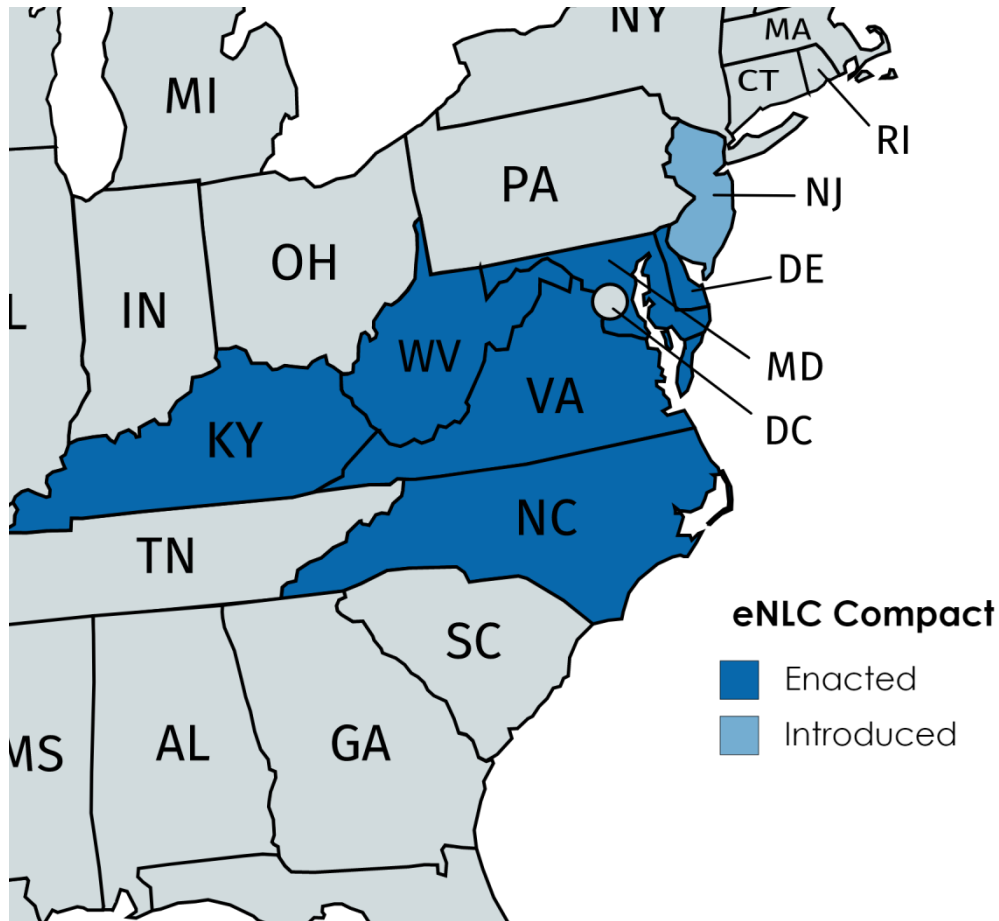
# Telemedicine and Licensure

# Growth of Interstate Licensing Compacts

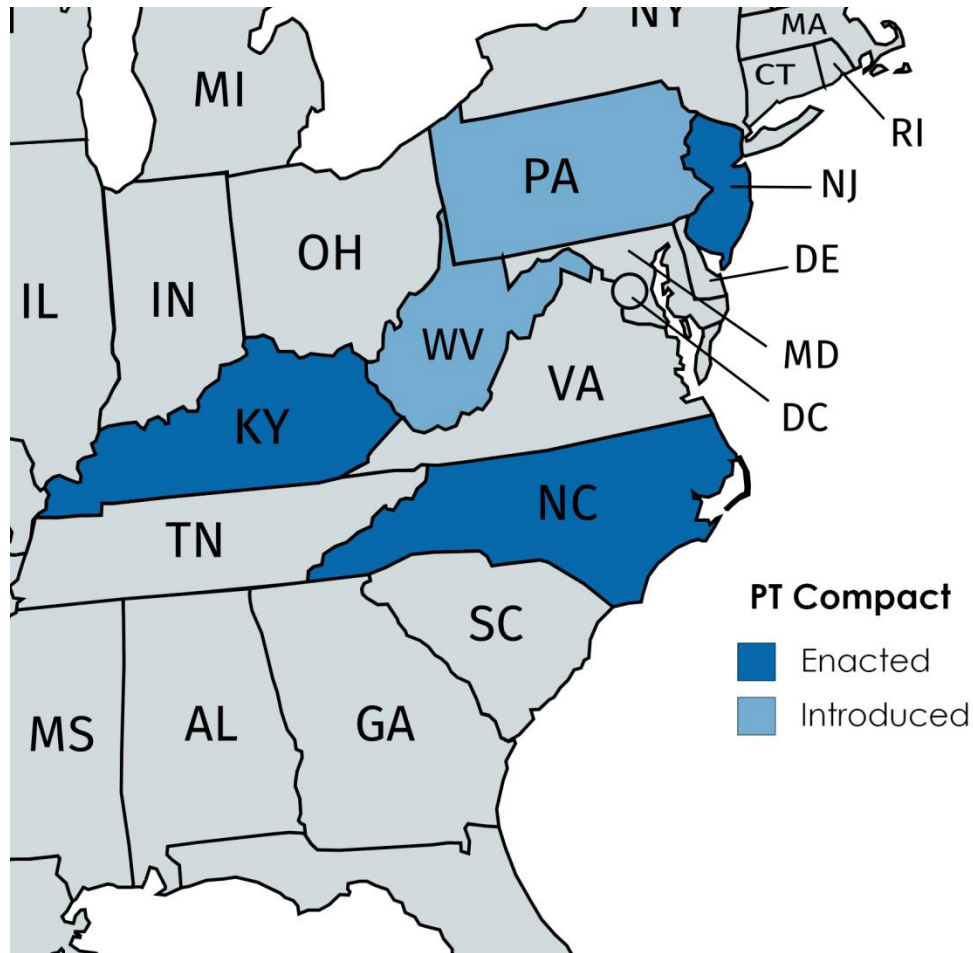


*Federation of*  
**STATE &  
MEDICAL  
BOARDS**

# Growth of Interstate Licensing Compacts

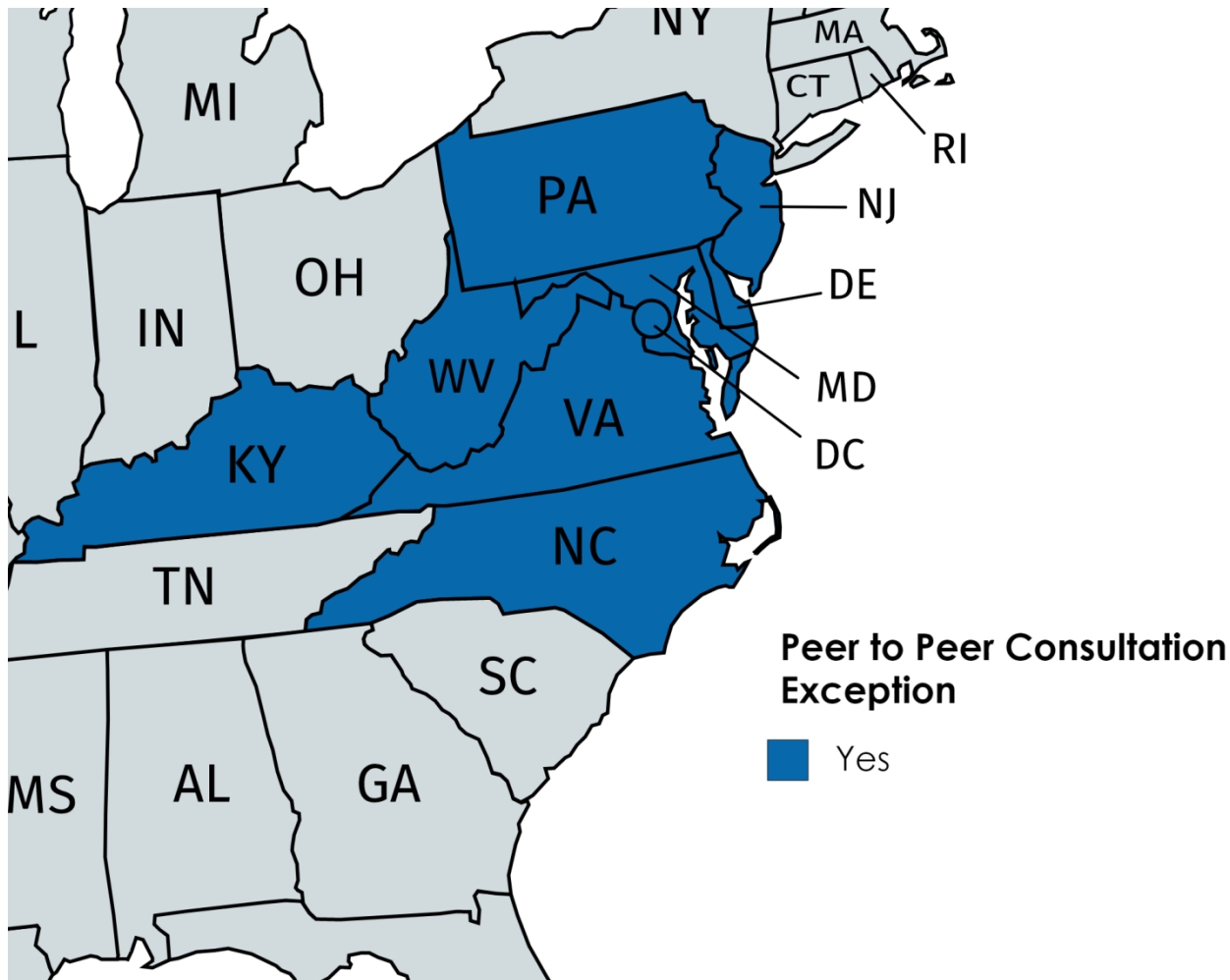


# Growth of Interstate Licensing Compacts





# Peer to Peer Consultation Exception



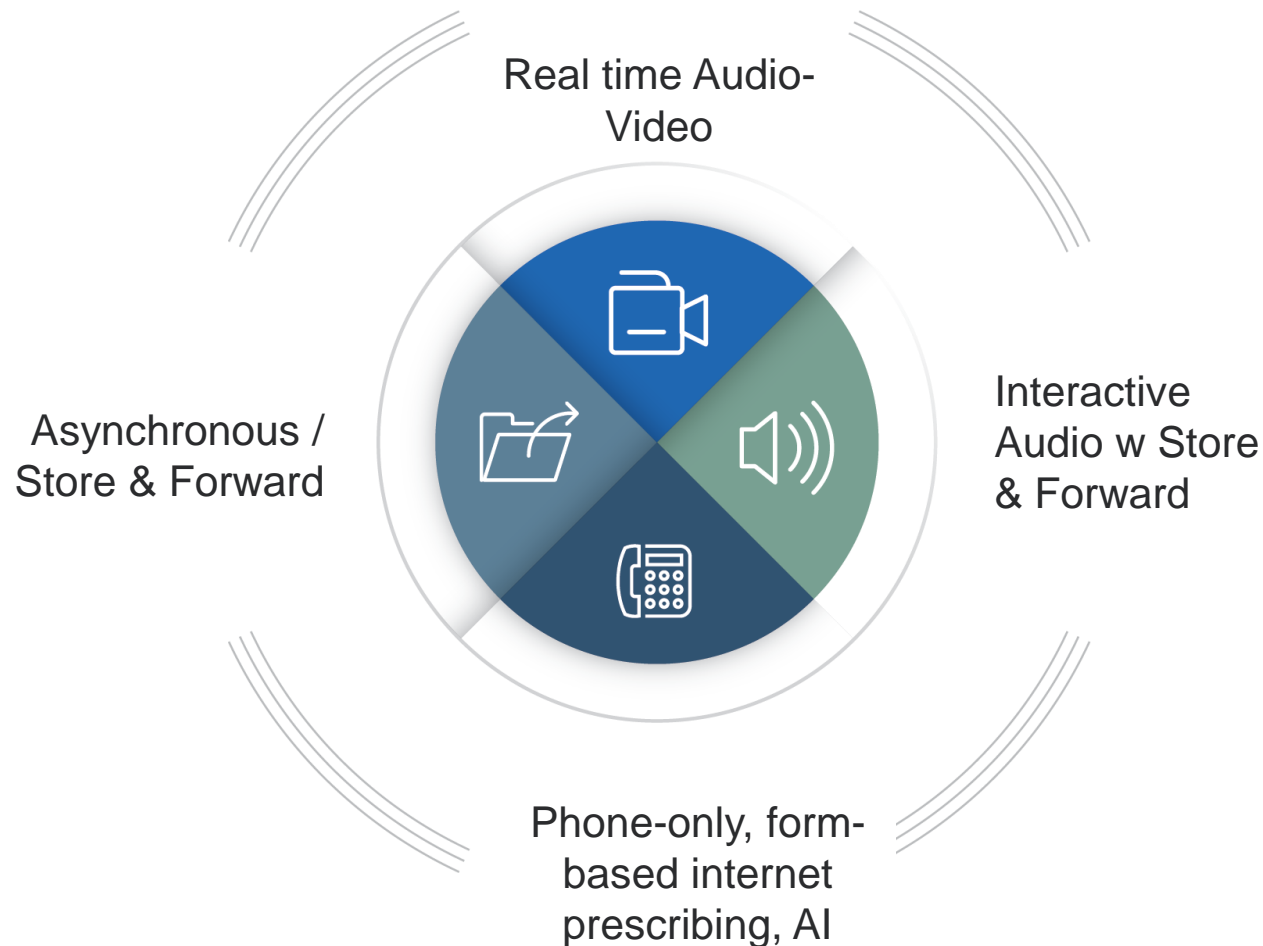
# Peer to Peer Consultation Exception

	Must be free	Express Frequency limitations	No established connections or contract/ arrangement	No primary diagnosis	No Pathology	No Radiology	Informal/ No Written Opinion	No in-state office or meeting place	Other Restrictions
DE		X							
DC									
KY		X		X	X				
MD									
NJ		X			X	X		X	X
NC		X				X			X
PA									
VA									
WV		X							

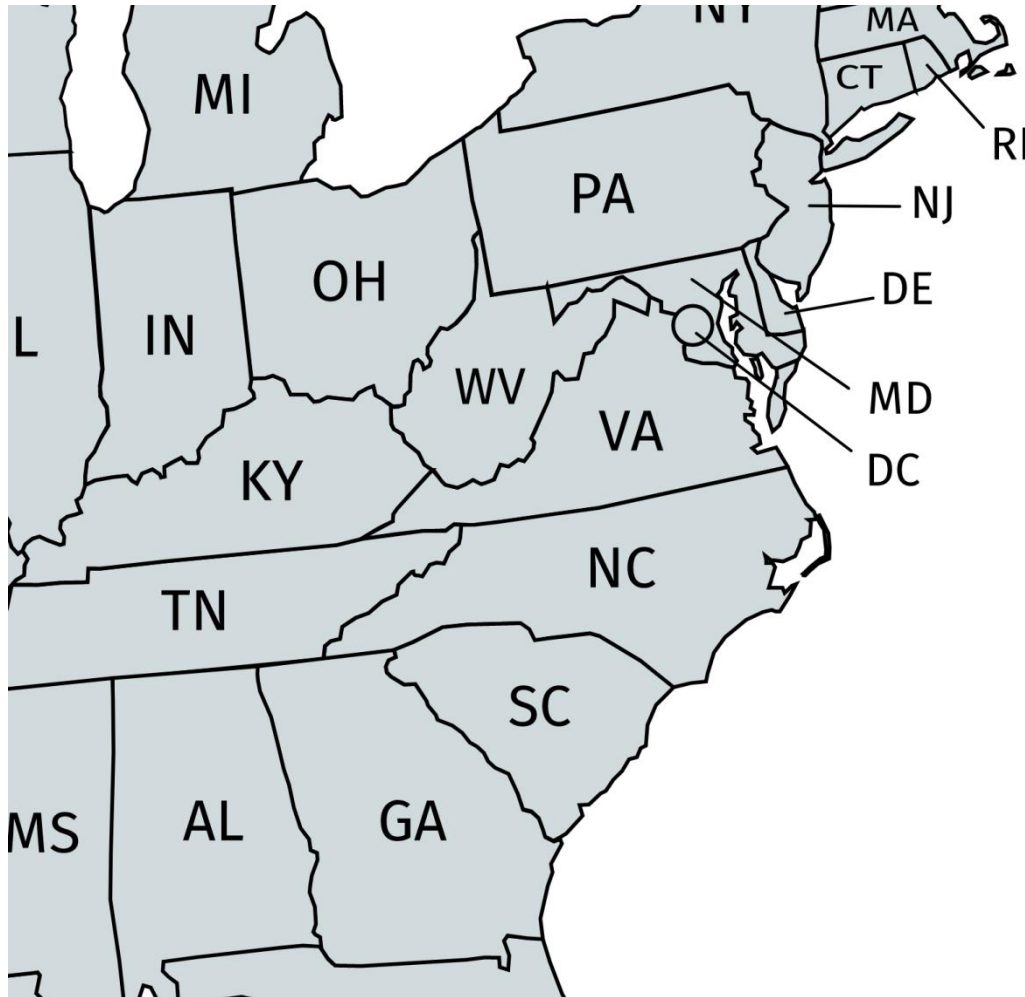


# Telemedicine and Practice Standards

# Telemedicine and Evolving Modalities

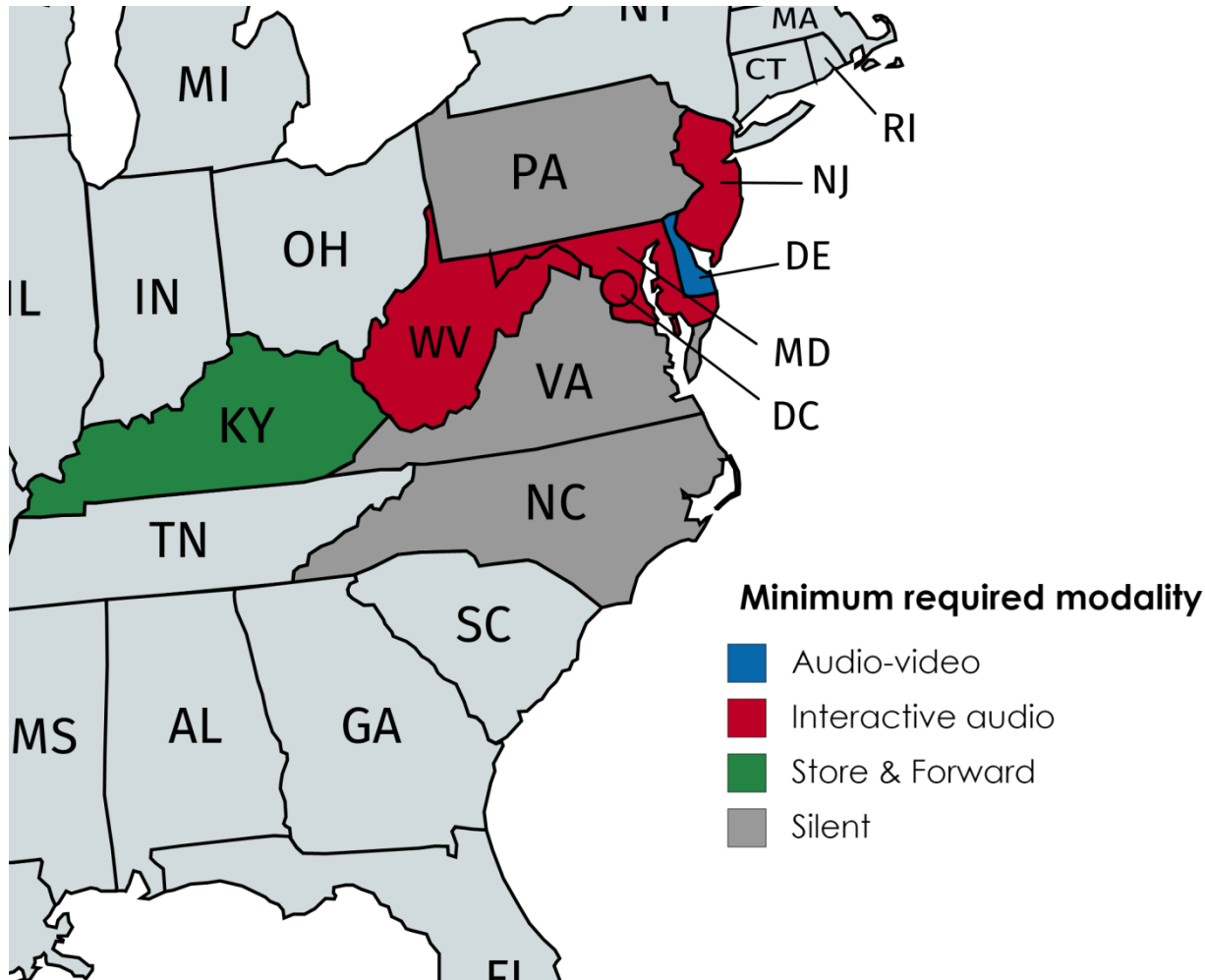


# Permitted Telemedicine Modalities

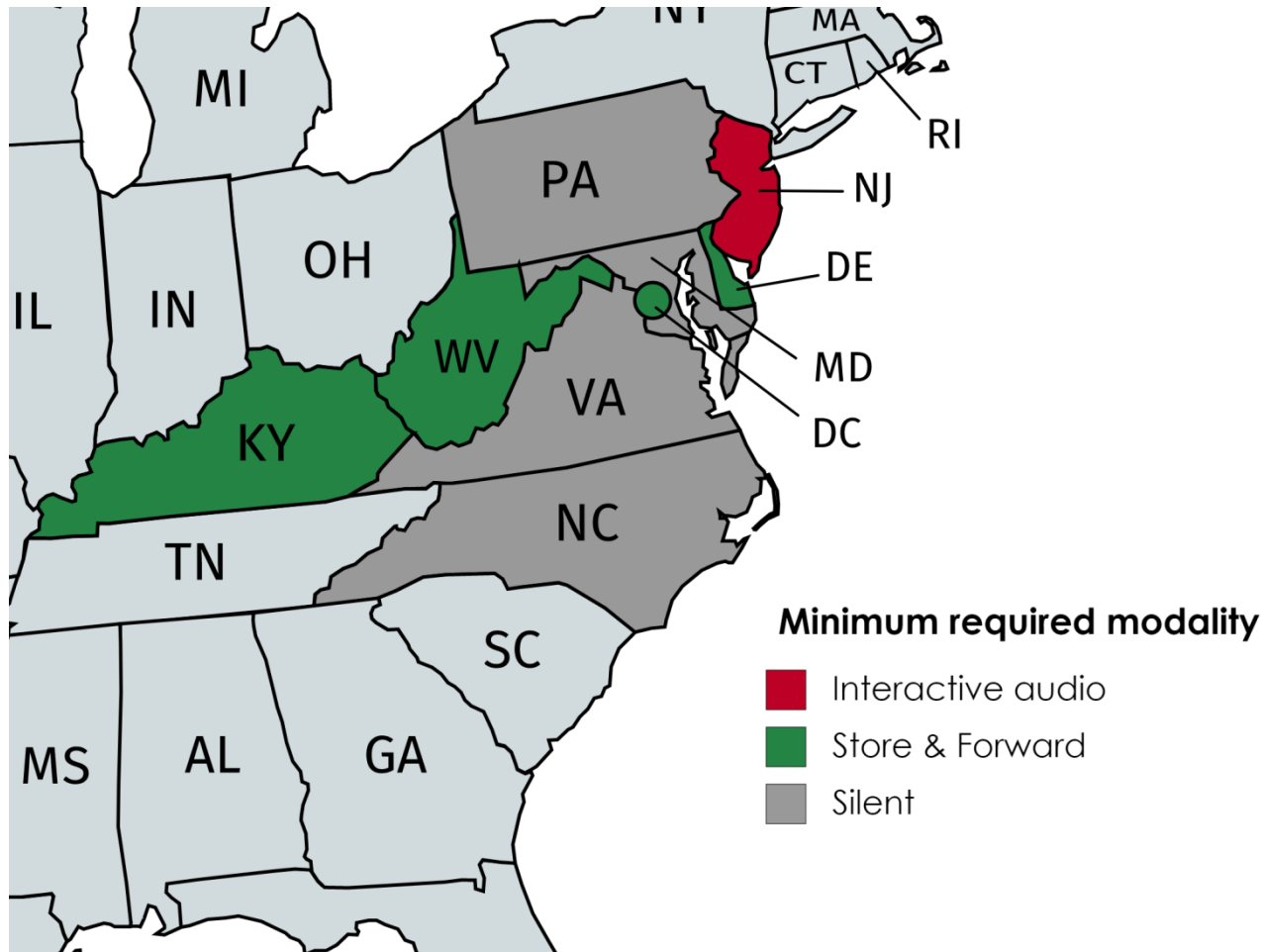




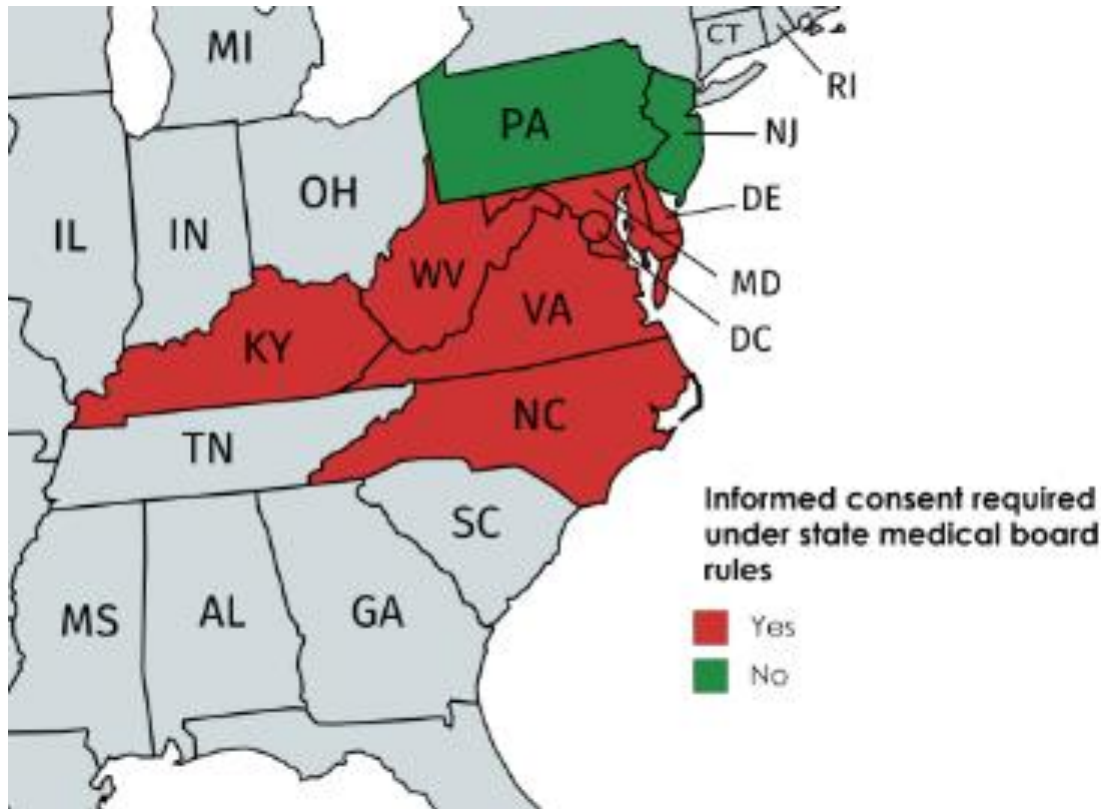
# Minimum Required Modality to Create Doctor-Patient Relationship



# Minimum Required Modality *After* Creating Doctor-Patient Relationship

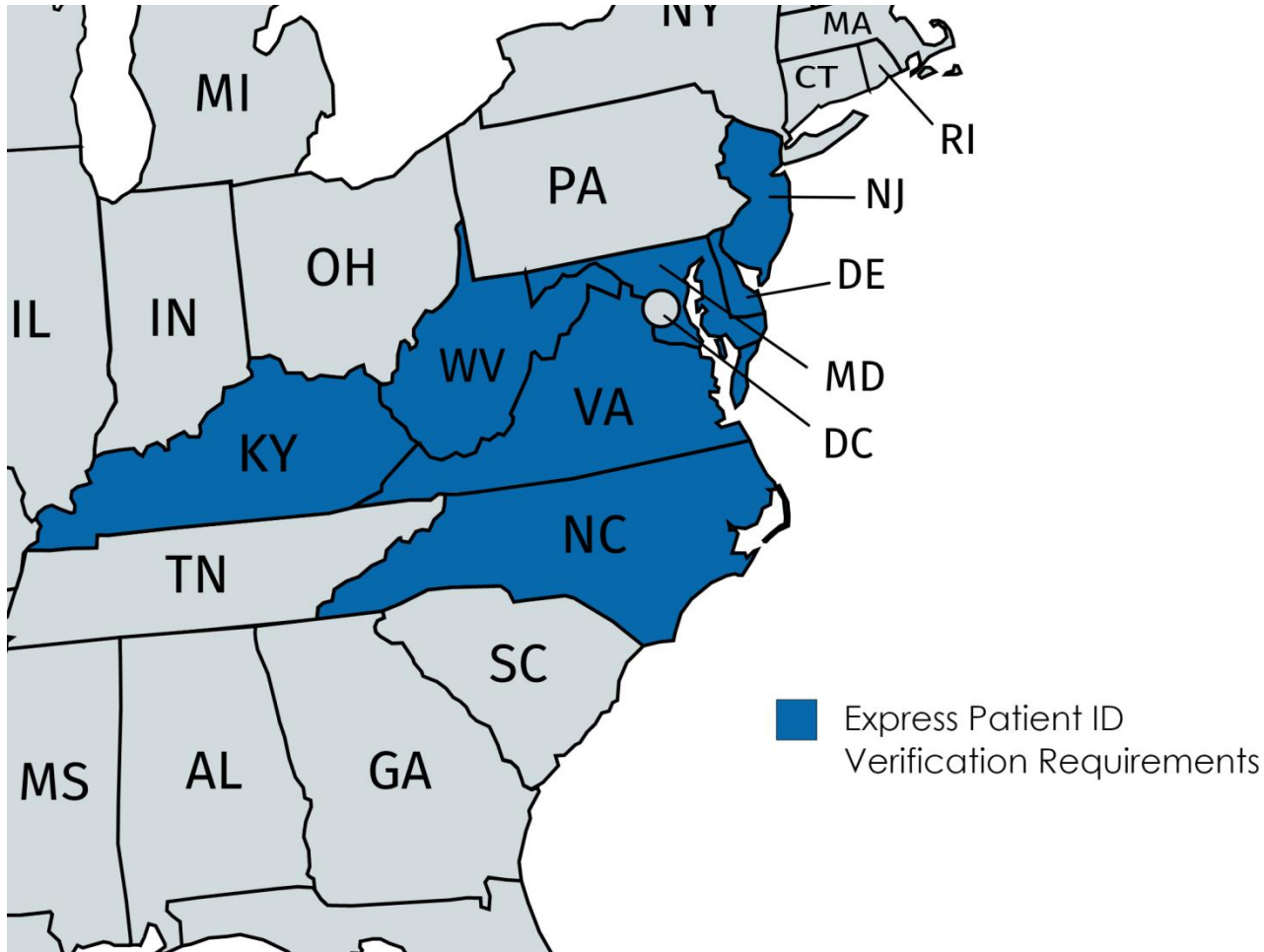


# Telemedicine Patient Informed Consent Requirements

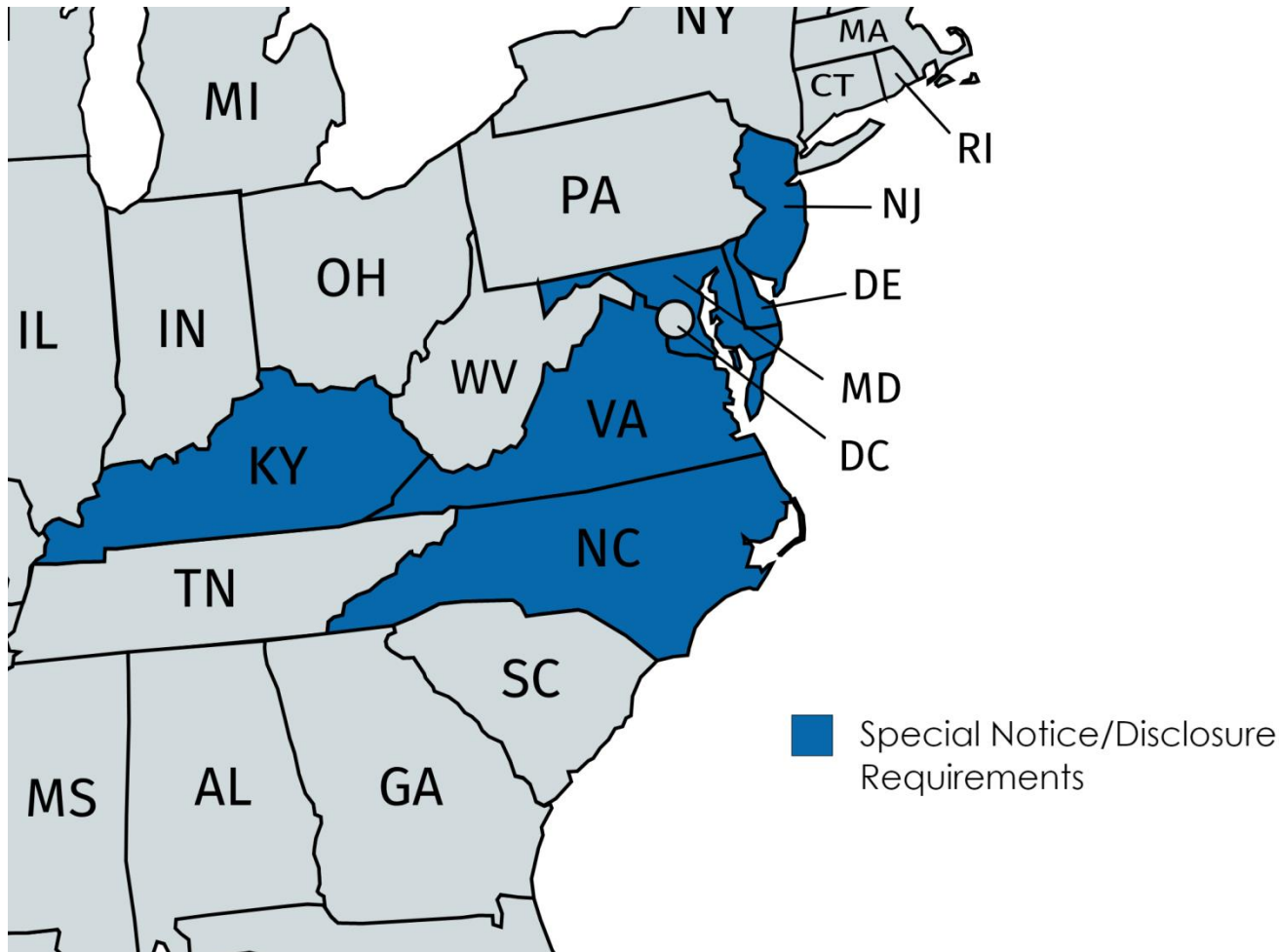


- Excludes Medicaid or payer rules; Medical board only

# Telemedicine Patient ID Verification Requirements



# Telemedicine Special Notice/Disclosure Requirements



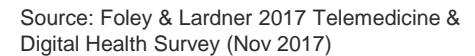


**Recording phone calls and discussions**

- 1-party consent law
- 2-party consent law

The map shows the following states and their recording laws:

- 2-party consent law (Red):** PA, DE, MD, DC.
- 1-party consent law (Blue):** NJ, WV, VA, NC, KY.
- Other states (Gray):** MI, OH, IN, IL, TN, SC, GA, AL, MS, FL, CT, MA, RI, NH, VT, ME.



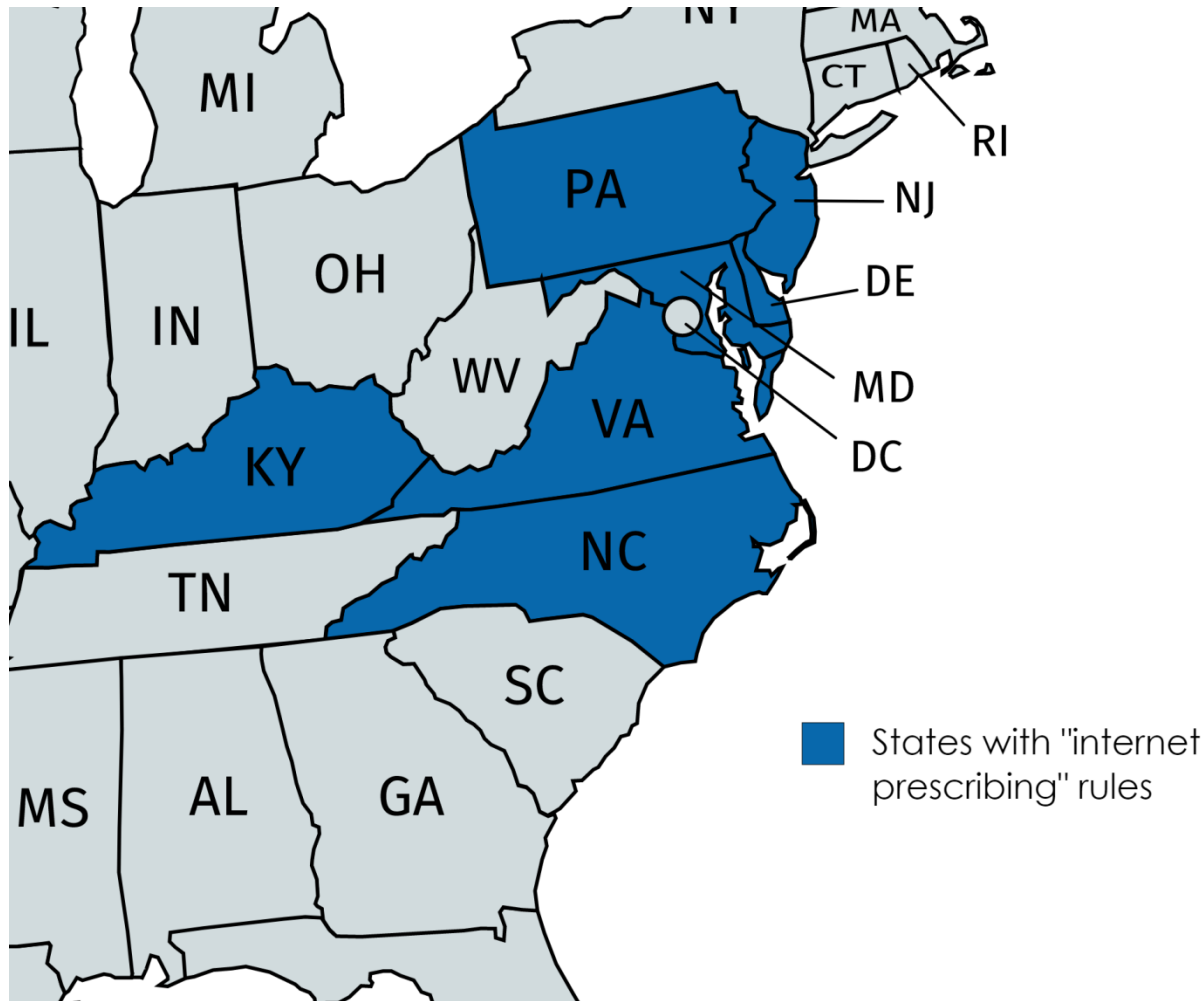
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# Telemedicine and Prescribing

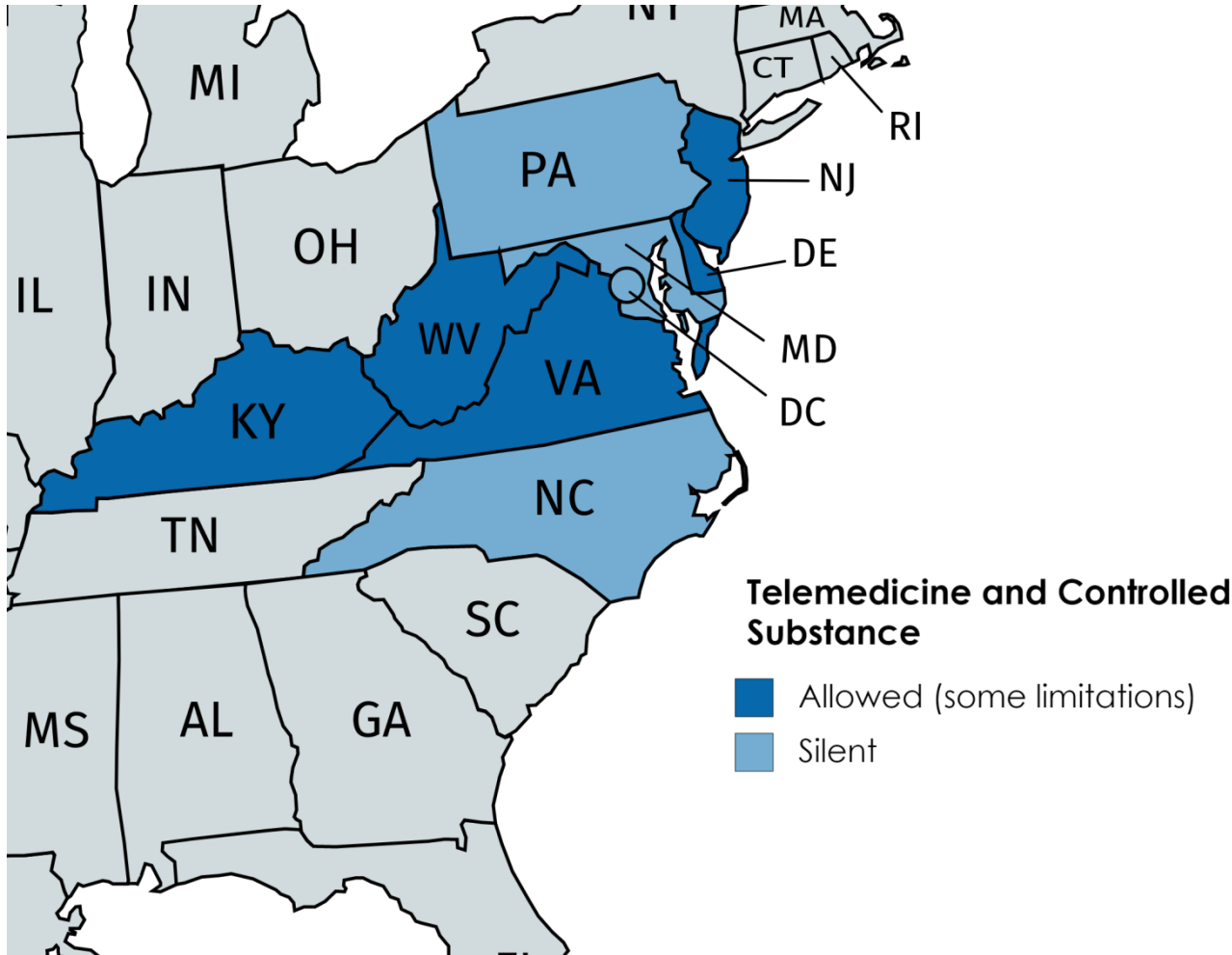
# Telemedicine and Prescribing

- Prescribe in connection with a provider-patient relationship
- What constitutes a valid provider-patient relationship?
- What constitutes a valid prescription?
  - Modality (state law)
  - Non-controlled substance? (state law)
  - Controlled substance? (state law)
  - Controlled substance? (federal law)
- *Not just professional board rules, but pharmacy board rules also*

# States With “Internet Prescribing” Rules



# Telemedicine Prescribing and Controlled Substances





# Analyzing Telemedicine Modalities and State Law

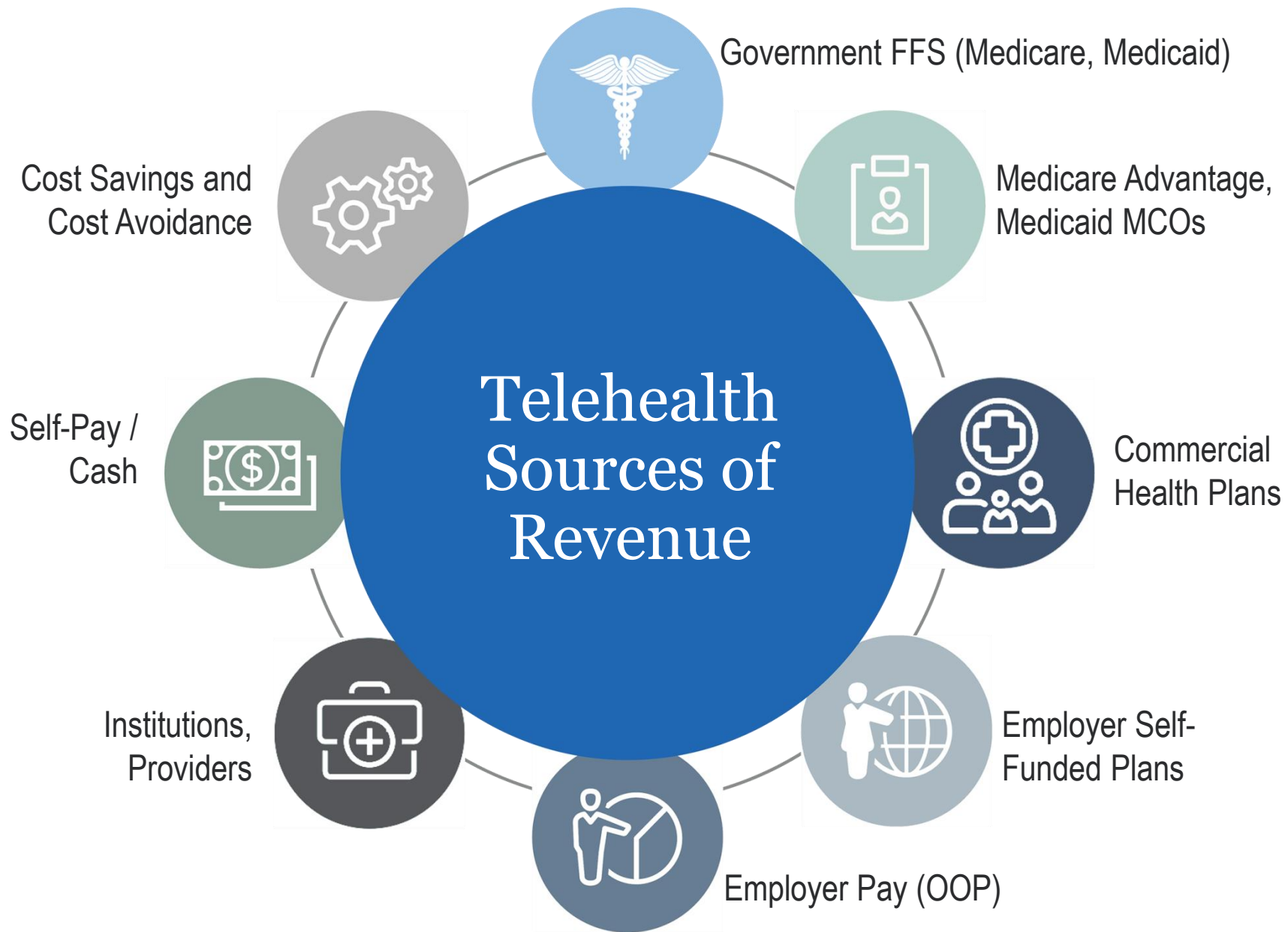
State	Modality used to establish valid doctor-patient relationship	Modality used after creating valid doctor-patient relationship	Modality used to prescribe non-controlled substances	Modality used to prescribe controlled substances	Internet prescribing rule prohibiting internet-based questionnaire?
Arizona	AV: <b>Yes</b> IA: <b>No</b> S&F: <b>No</b>	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>No</b>	AV: <b>Yes</b> IA: <b>No</b> S&F: <b>No</b>	AV: <b>Yes</b> IA: <b>No</b> S&F: <b>No</b>	<b>Yes</b>
Florida	AV: Silent IA: Silent S&F: Silent	AV: Silent IA: Silent S&F: Silent	AV: Silent IA: Silent S&F: Silent	AV: Silent IA: Silent S&F: Silent	<b>Yes</b>
Kentucky	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>Yes</b>	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>Yes</b>	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>Yes</b>	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>Yes</b>	<b>Yes</b>
New Jersey	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>No</b> (but may be used with AV and IA)	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>No</b> (but may be used with AV and IA)	AV: <b>Yes</b> IA: <b>Yes</b> S&F: <b>No*</b>	AV: <b>Yes</b> (but restrictions for Schedule II) IA: <b>Yes</b> (but restrictions for Schedule II) S&F: <b>Silent</b>	<b>Yes</b> (questionnaires only prohibited before a doctor-patient relationship is established)

# Telemedicine Practice Standards: Hot Policy Changes for 2018 and Beyond

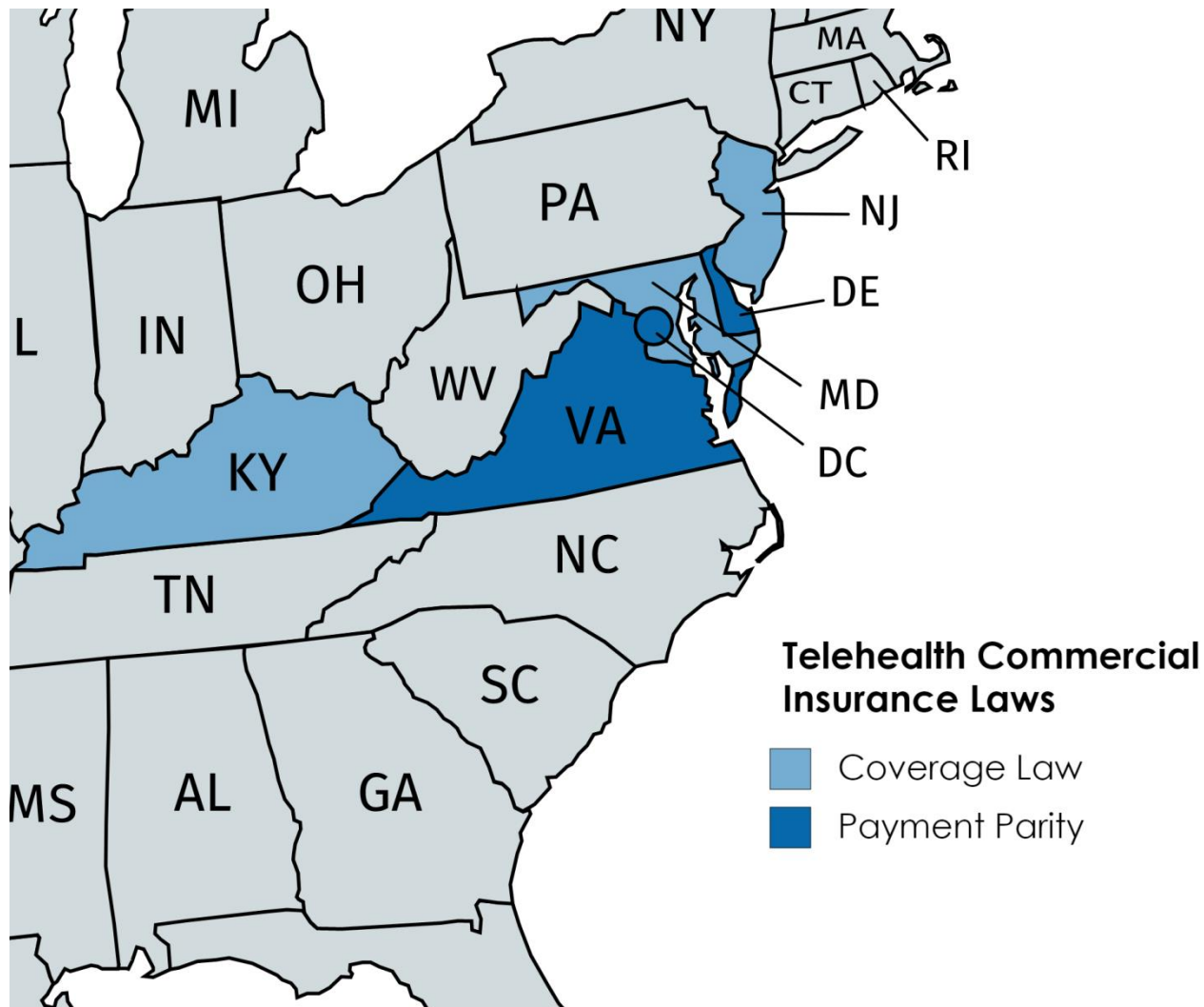
- Can create doctor-patient relationship via telemedicine
  - Texas SB 1107
- Telemedicine business registration
- Limitations on tele-optometry and tele-ophthalmology
- Non-physician telehealth rules and supervision



# Telehealth Payment and Reimbursement

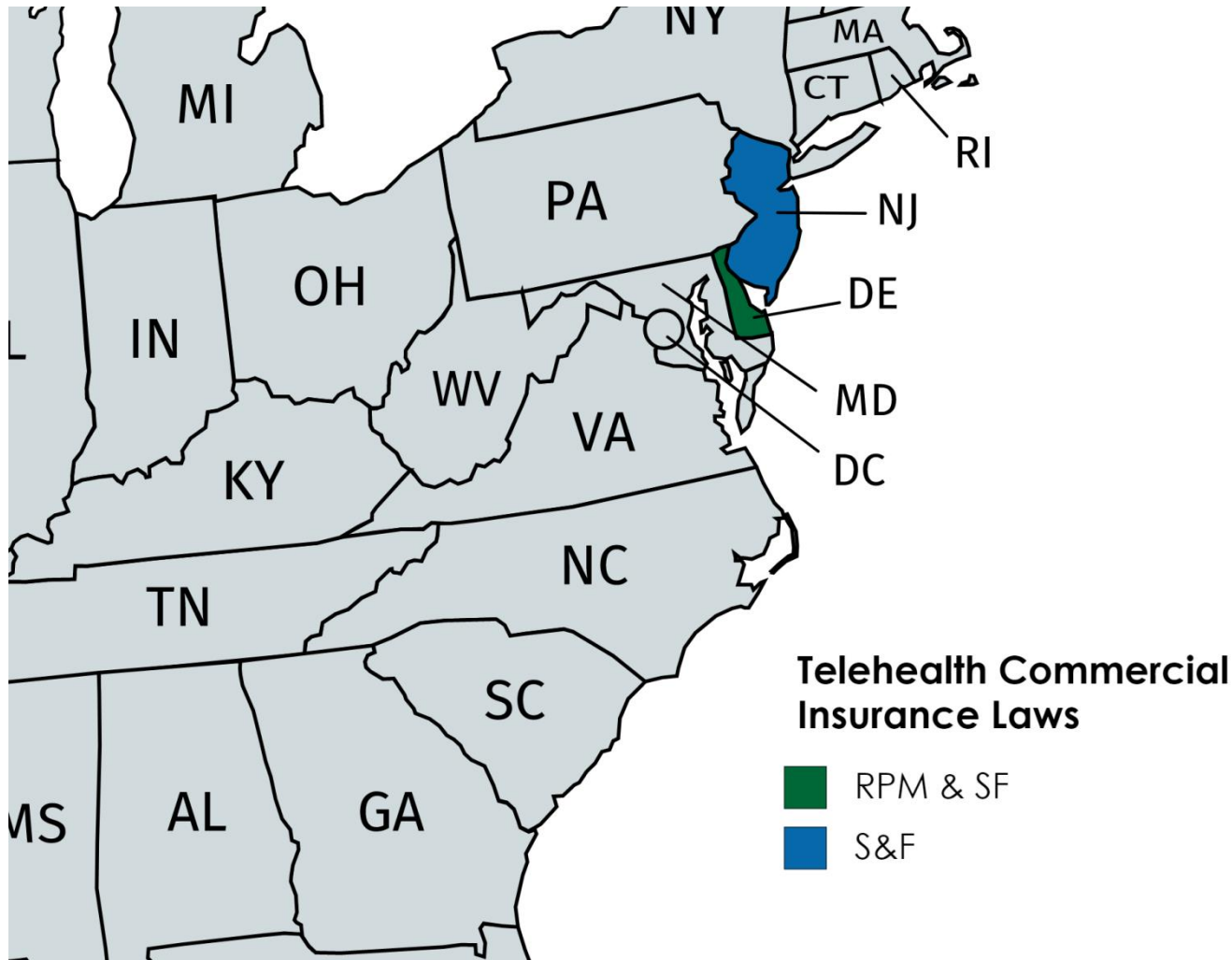


# Telehealth Commercial Insurance Laws

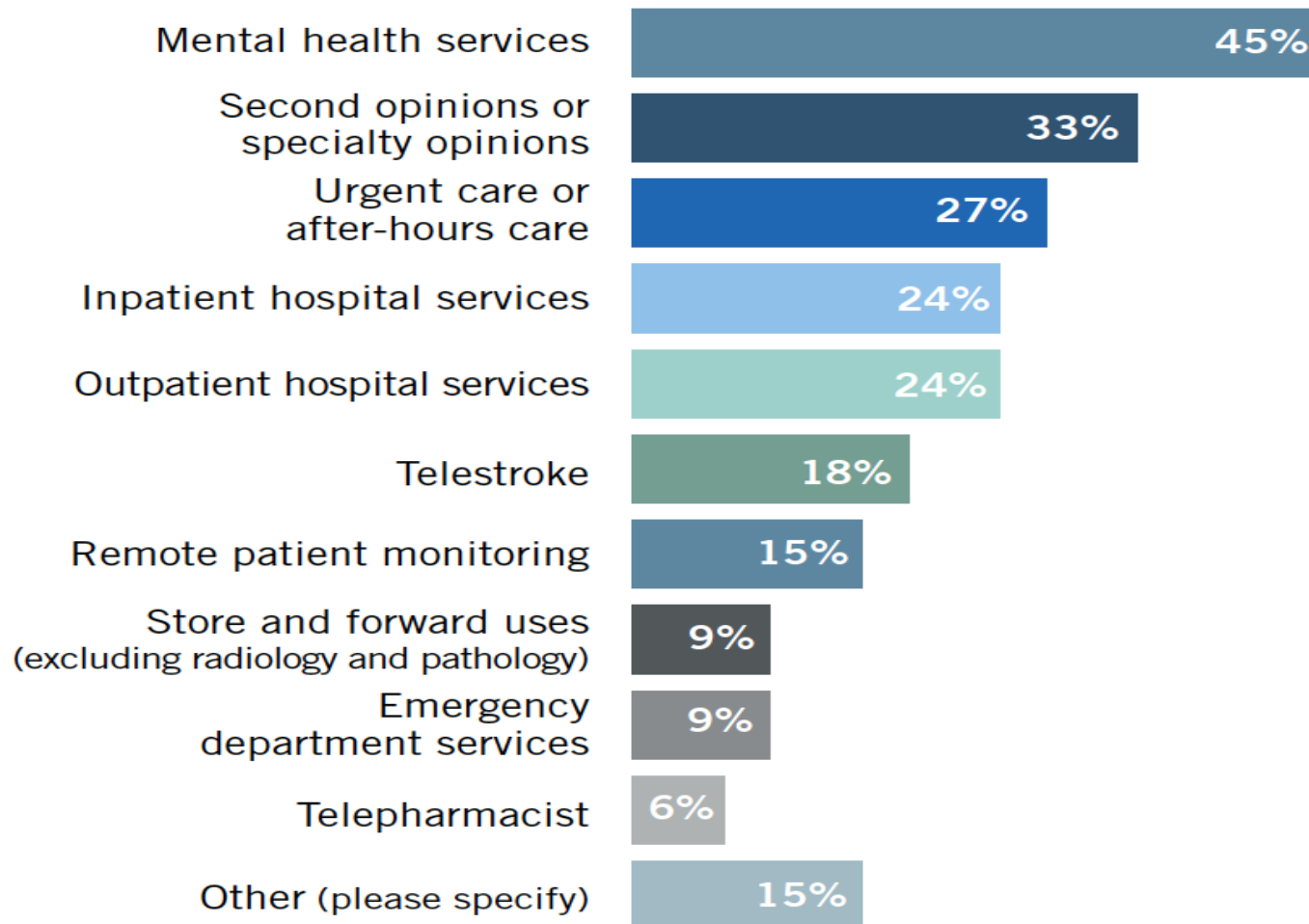




# Telehealth Commercial Insurance Laws



# Telehealth Commercial Insurance Coverage

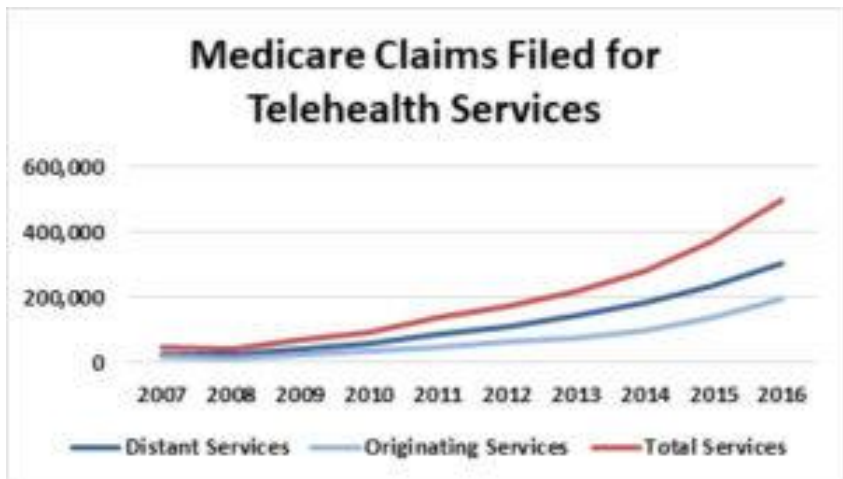
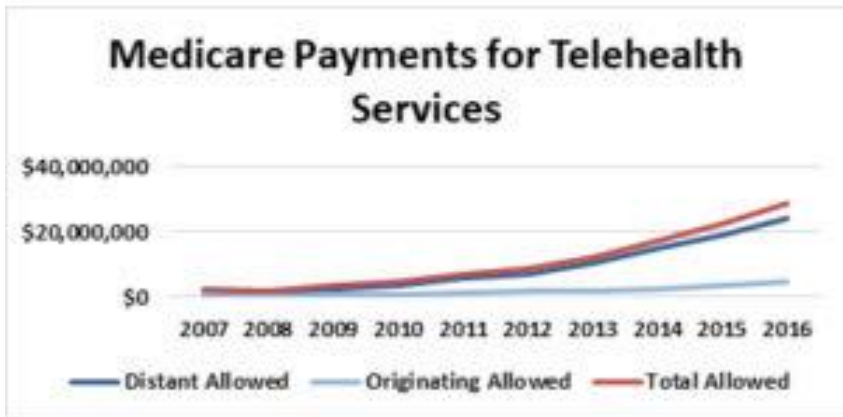


# Telehealth and Medicare

1. Patient in a qualifying rural area
2. Patient at one of eight qualifying facilities (“originating site”)
3. Service provided by one of ten eligible professionals (“distant site practitioner”)
4. Technology is real-time audio-video (interactive audio and video telecommunications system that permits real-time communication between the beneficiary and the distant site provider)
5. The service is among the list of CPT/HCPCS codes covered by Medicare

# Medicare Telehealth Payment Policy Changes for 2018

- POS 02, not GT
- Seven new codes for 2018:
  - G0296; CPT 90785; CPT 96160 and 96161; G0506 (Care Planning for Chronic Care Management); and CPT 90839 and 90840.
- New RPM payment (CPT 99091)
- Two new OIG projects to review telehealth billing compliance under Medicare and Medicaid



# Medicare Telehealth Payment Policy Changes for 2019 and Beyond

***Bipartisan Budget Act of 2018*** introduced some of “the most significant changes ever made to Medicare law to use telehealth,” per Senator Brian Schatz, a longtime sponsor and proponent of federal telehealth legislation.

1. Expands stroke telemedicine coverage beyond rural areas (2019)
2. Expands telehealth coverage to homes and independent renal dialysis facilities (2019)
3. Allows providers to give free at-home telehealth technology/equipment to dialysis patients if certain requirements are met (2019)
4. Allows Medicare Advantage plans to include delivery of telehealth services in a plan’s basic benefits (2020)
5. Eliminates rural restrictions and adds patient home as a qualifying originating site for certain Accountable Care Organizations (2020)

# Hot Issues in Medicare Telehealth Compliance

- ❑ *Reassignment to originating site*
- ❑ *Overseas providers*
- ❑ *Charging beneficiaries out of pocket for telehealth services*
- ❑ *Telehealth vs non-face-to-face services*
- ❑ *Incident to billing*
- ❑ *Global surgical period and post-op, follow-up care*
- ❑ *Telemedicine and EMTALA*
- ❑ *Conditions of Participation vs. Conditions for Payment*



# Legal & Regulatory Considerations Beyond In-Person Exams



# Legal & Regulatory Considerations

## **U.S. Federal**

- Anti-Kickback Statute
- Physician Self-Referral
- Civil Monetary Penalty Law
- Payer Rules (including Medicare, Medicaid)
- FTC, FDA, DEA

## **U.S. State**

- Patient Brokering Acts
- Fee-Splitting Laws
- Self-Referral Laws
- Corporate Practice of Medicine
- Insurance Laws
- Supervision of NPPs
- eCommerce Considerations

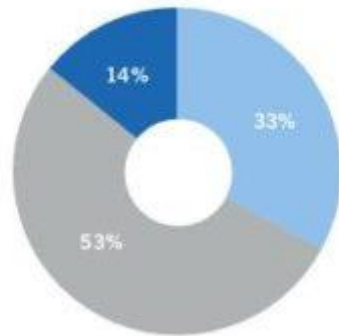
## **International**

- Foreign Corrupt Practices Act
- US Export Control Laws
- US Anti-Terrorism Laws
- US Anti-Boycott Laws
- International Corporate Laws and Tax
- Data protection; data ownership; data sharing
- Intellectual Property

# Telemedicine Credentialing by Proxy

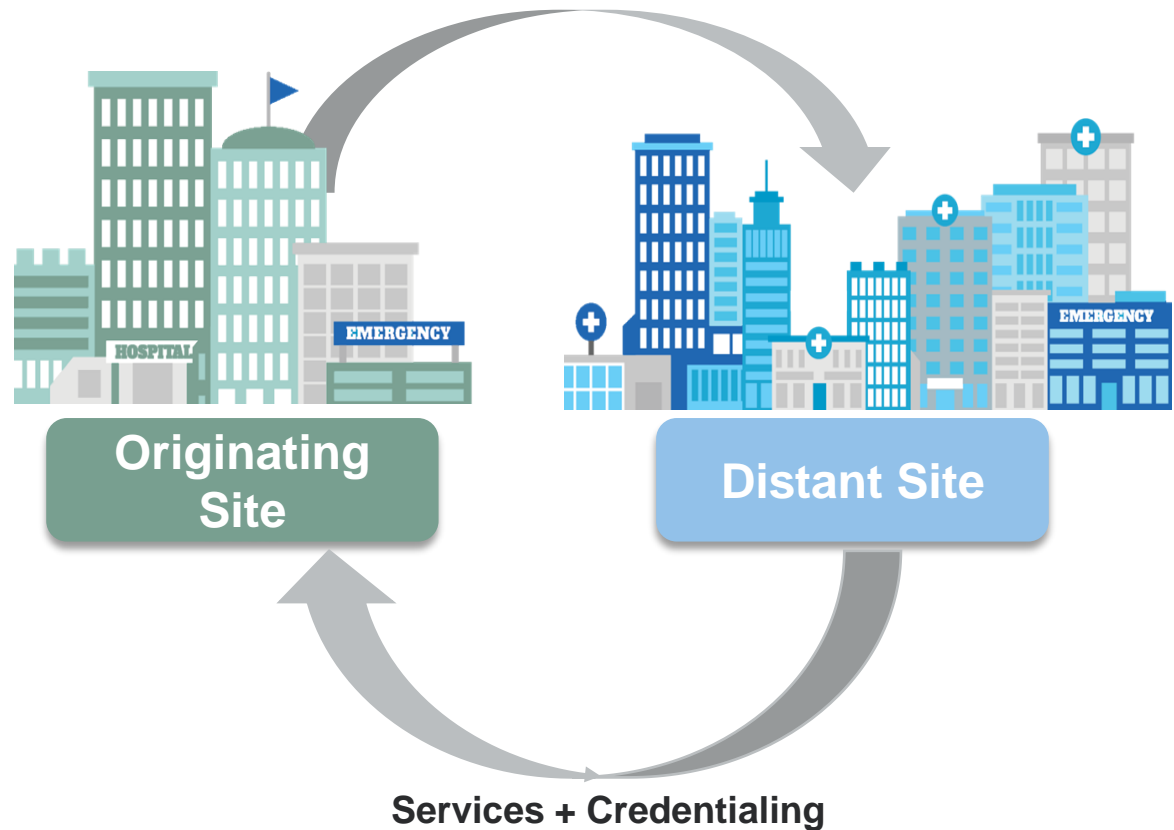
Data Reporting + Payment

19 DOES YOUR ORGANIZATION USE  
TELEMEDICINE CREDENTIALING BY  
PROXY FOR PHYSICIAN CREDENTIALING?



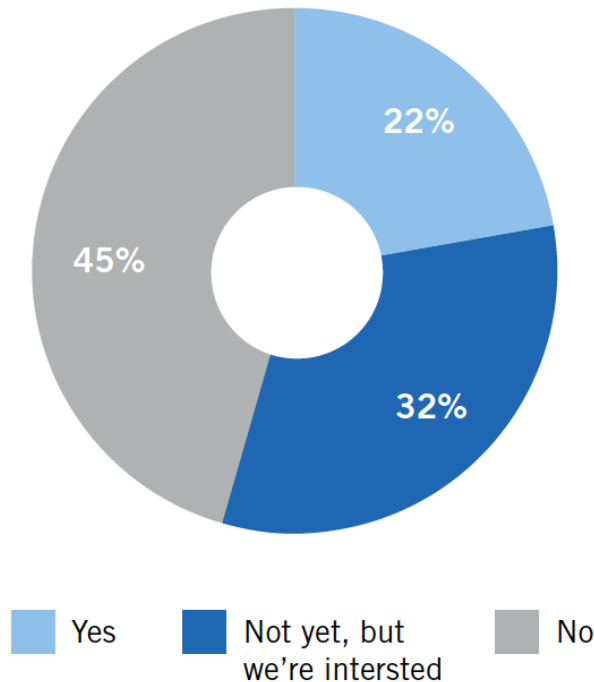
Yes No Don't know

Source: Foley & Lardner 2017 Telemedicine &  
Digital Health Survey (Nov 2017)

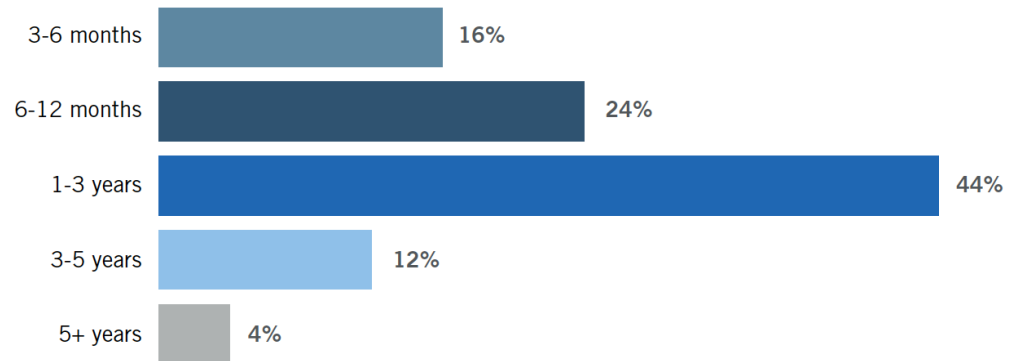


# International Telemedicine Arrangements

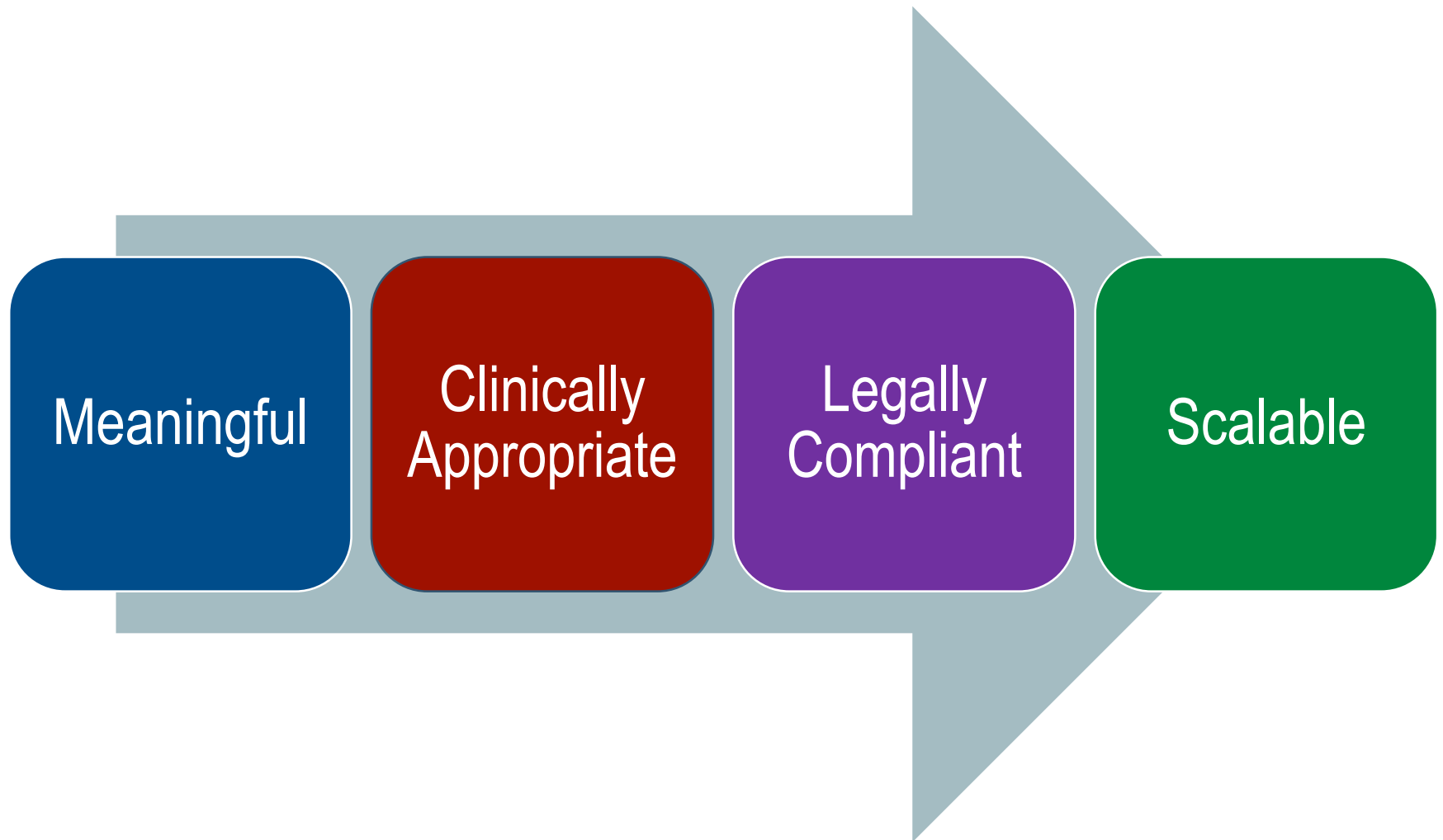
Does your organization offer telemedicine services internationally?



How soon do you expect international expansion?



# Build a Telemedicine Offering That Is...



# Speaker Contact



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# Thank you

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