COMMON PROFESSIONAL LIABILITY EXPOSURES AND RISK MANAGEMENT

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I have no relevant financial relationships with commercial interests.

Nothing I say today is legal advice.

OBJECTIVES

At the conclusion of this program, you will be able to:

- Understand the significance of documenting the reasoning behind clinical decision-making
- Recognize documentation risk areas inherent in EHR systems.
- Describe approaches for obtaining informed consent.
- Recognize non-adherent patients and implement strategies for improving adherence to treatment recommendations.
- Understand liability exposure and implement strategies for minimizing risks associated with supervision of clinical and non-clinical staff.
- Recognize and address potential legal hurdles in telemedicine.

DOCUMENTATION

DOCUMENTATION

1. Record serves 3 essential purposes
   - Clinical
     - Continuity of care
   - Legal
     - Defense in suit or administrative action
     - Compliance with state laws
     - Adherence to policies
   - Reimbursement/Billing
     - Substantiates services rendered
     - Shows adherence to insurer’s guidelines

DOCUMENTATION

2. A good record:
   - Substantiates judgment
   - Demonstrates knowledge and skill
   - Contemporaneous assessment of patient needs
   - Significant events
   - Revisions to treatment plan
   - Explanation of decisions
   - Informed consent

DOCUMENTATION

3. Good enough records vs. altered
   - Attorney can work with scant record but not altered record
   - "Corrections/additions to an existing record can be made, provided that each change is clearly identified as such, dated and initialed by the licensee." N.J.A.C. 13:35-6.5
4. What you didn't do and why
   - Particularly true if deviating from protocol or standard course of treatment
5. Choice of words
   - Assume patient will see record

DOCUMENTATION

6. Documenting discreetly
   - Assume someone other than patient will see record
     - Parent of minor child
     - Opposite side in divorce proceeding
   - Is information clinically relevant?
   - How much detail is necessary?
     - “Marital issues” vs. “affair with specific person”

EHR DOCUMENTATION

EHR DOCUMENTATION

1. Garbage in – garbage out
2. Concerns about safety
   - ECRI
   - Joint Commission
3. Lack of narrative
4. Issues with template use
   - Inaccuracies
   - CMS 3rd-party payers
   - Informed consent, etc.

EHR DOCUMENTATION

5. Autopopulation
   - Previous visit
   - Previous patient
   - Entered by clinician or system?

6. Copy paste
   - Scrutiny by CMS
   - Perpetuation erroneous info
   - Who authored?

EHR DOCUMENTATION

7. Appropriate billing
   - System may generate documents for highest code
   - Code must reflect medical necessity

8. Too much information
   - Can’t find relevant data
   - Time consuming
   - Print out and check accuracy

EHR DOCUMENTATION

9. Metadata
   - Data about data
   - Discoverable

10. Clinical decision support tools
    - Large number
    - Inaccurate/irrelevant
    - Metadata

INFORMED CONSENT

INFORMED CONSENT

1. Informed consent is rooted in the ethical imperative that competent adults (and in some instances minors) have the right to accept or reject medical treatment based upon their own personal goals and beliefs.
   - Absent special circumstances the right to accept or refuse treatment belongs solely to the patient
   - To be effective consent must be *informed*
   - Burden rests on the provider

INFORMED CONSENT

2. Informed consent is an ongoing PROCESS; it is not a piece of paper.
   - Signed form alone is insufficient
     - Doesn't prove consent given was INFORMED

INFORMED CONSENT

3. The informed consent process has several important functions:
   - It supports a fair and reasonable explanation of proposed treatment.
   - It helps to ensure that the patient has reasonable expectations regarding outcomes.
   - It avoids allegations of battery, fraud, negligence, and duress against the provider.

INFORMED CONSENT

4. A patient may maintain an action for lack of informed consent without otherwise proving negligence
   - Duty of inform
     - Known risks
   - Breach of duty
     - Reasonable patient standard
   - Damages
   - Proximate cause
     - If I had only known of risk I wouldn't have accepted treatment

INFORMED CONSENT

5. Begin the process by determining who may give consent
   - Competent adults
     - Capacity is presumed
   - Incompetent/incapacitated adults
     - Guardian
       - Obtain guardianship papers
     - POA/Advance directive
       - Ensure refers to medical condition
       - Powers have been triggered
   - Minors
     - Parent or guardian
       - If divorced obtain custody agreement
     - Minor?

INFORMED CONSENT

6. The informed consent discussion should include:
   - Diagnosis or working diagnosis
   - Nature of proposed treatment
   - Risks and benefits
   - Alternatives
   - Their risks and benefits
   - Risks and benefits of no treatment

INFORMED CONSENT

7. It is not possible to include every possible risk
   - Focus on material risks
     - Occur frequently
     - Severe when they occur the infrequent
     - Risks specific to patient due to underlying condition
   - "Golden rule"
   - Remember to include driving risks while taking meds

The Importance of Including Driving Prohibitions in Informed Consent Discussions

Published on May 20, 2016

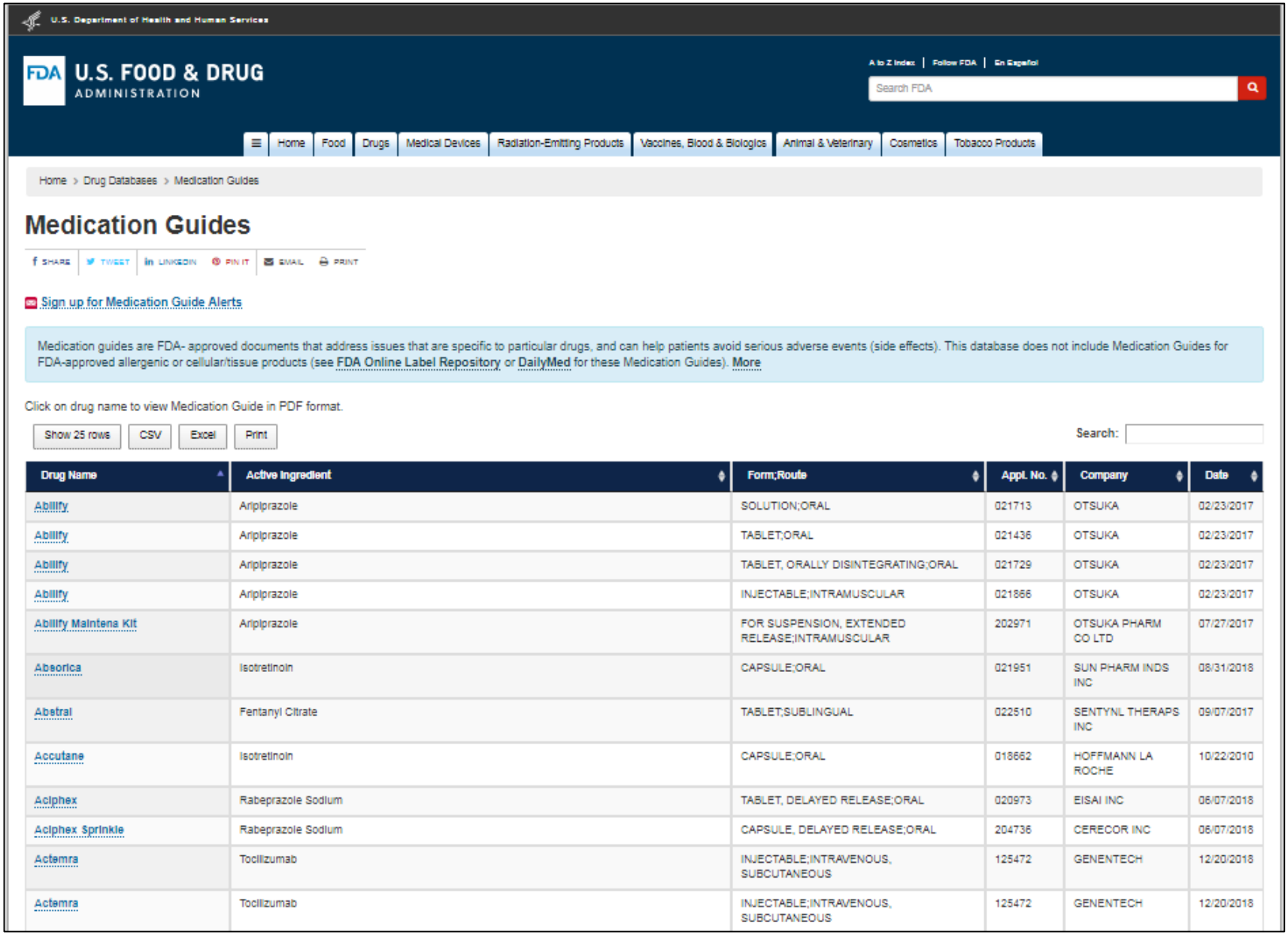
Donna Vanderpool, MBA, JD
VP, Risk Management at PRMS, Specialists in Professional Liability Insurance Programs

INFORMED CONSENT

8. To facilitate compliance, and protect patient safety educate the patient on issues such as:
   - Restrictions (driving, diet, activity, etc.) associated with the medication
   - Monitoring, such as blood work, that is needed
   - Purpose, dose, and frequency of the medication
   - How to identify side effects, and what to do if patient experiences
   - Ensuring patient's other physicians are aware of new prescriptions

INFORMED CONSENT

9. Take steps to ensure comprehension
   - Does patient understand info presented?
   - Receipt of info ≠ comprehension
   - Consider tone and inflection
   - Pace of delivery
   - What questions do you have?
   - Consider use of FDA medication guides



www.accessdata.fda.gov/scripts/cder/daf/index.cfm?event=medguide.page

INFORMED CONSENT

10. Don’t forget to document the discussion
    - More than risks discussed, patient consented
    - Personalize note
        - Who was there
        - What questions were asked
        - What risks particular to patient were discussed
    - Include resources provided
        - FDA med guide
    - Continue to assess efficacy and document patient’s ongoing consent

NON-ADHERENT PATIENTS

NON-ADHERENT PATIENTS

1. Juries look to physicians
   - Greater knowledge = greater burden
   - What actions did you take?

2. They may surprise you
   - Expect it when you least expect it

3. Non-adherence leads to inadequate, incomplete, and dangerous treatment
   - Longer treatment → increased costs → decreased adherence

NON-ADHERENT PATIENTS

4. Demonstrated by:
   - Missed appointments
   - Prescription misuse
     - Check PMP
     - Check PMP Interconnect
   - Inappropriate behaviors
   - Or not be apparent at all

5. Determining why
   - Intentional?
   - Unable?
   - Barrier?

NON-ADHERENT PATIENTS

6. Health literacy
   - Read, understand, act on info
   - Aging populations multiple chronic conditions, meds
7. Anosognosia
   - Bipolar (40%), schizophrenia (50 %)
8. Medication issues
   - Weight gain, sexual dysfunction, acne
   - Takes too long
   - Benefits not felt or seen
   - Improvement seen as cure

NON-ADHERENT PATIENTS

9. Documentation
   - Incidents of non-adherence
   - Conversations re recommendations
   - Written materials

10. Termination
    - Can’t treat if patient won’t let you

SOCIAL MEDIA

SOCIAL MEDIA

1. The way patients seek out healthcare information and physicians is changing. Many psychiatrists have realized that in order to be found they need an online presence.
   - Practice websites
   - Blogs
   - Facebook pages
   - Twitter
   - Pinterest
   - Zocdoc

SOCIAL MEDIA

2. Social media use carries various risks
   - Boundary violations
   - Disclosure of PHI
   - Inadvertent creation of treatment relationship
   - Unlicensed practice of medicine
   - Unprofessional conduct
   - Vicarious liability
   - Discoverability

SOCIAL MEDIA

3. State licensing boards can and have disciplined physicians for inappropriate online behavior
   - Inappropriate communication with patients online
   - Use of internet for unprofessional behavior
   - Online misrepresentation of credentials
   - Online violations of patient confidentiality
   - Online derogatory remarks regarding a patient
   - Online depiction of intoxication

SOCIAL MEDIA

4. Google yourself in all derivations of your name
   - May be seen by
     - Patients
     - Current/prospective employers
     - Colleagues
     - Licensing boards
     - Opposing side in litigation
   - Clean up posts/pages

SOCIAL MEDIA

5. Social media doesn't change duty to maintain boundaries with patients
   - Never interact on personal social media sites
   - Separate personal and practice sites
   - Do not accept friend requests from patients
   - Use strict privacy controls on personal accounts
     - Consider pseudonym, no personal photo
     - No outside access to posts
     - No outside access to photos
     - No outside access to friend list
     - Ask family to do the same

SOCIAL MEDIA

6. Use caution with practice websites and other platforms
   - Inadvertent establishment of treatment relationship
   - Non-compliance w/ HIPAA/advertising laws
   - Intellectual property violations
     - Written and images
   - Privacy breaches
   - Include disclaimer
   - Don’t allow non-established patients to contact you
   - Forms ≠ treatment relationship

SOCIAL MEDIA

7. Use caution with online referral services
   - May attract drug seekers
   - May attract limited purpose patients
   - Know what service is doing with info, e.g., follow-up letters
   - May use unethical practices re reviews
   - Add statement to profile
     - First visit is eval only
     - I check the PMP
     - I don't prescribe for pain
     - I don't prescribe controlled substances on first visit
     - I don't do disability evals
     - Etc.

SOCIAL MEDIA

8. Be aware of your liability for misuse by employees
   - Inside and outside workplace
   - Include with HIPAA training
   - Have staff sign confidentiality policy

SOCIAL MEDIA

Employee, wondering why an acquaintance was at the clinic, improperly accessed and read the patient's medical file learning that she had a sexually transmitted disease and a new sex partner other than her husband. The employee shared this information with another employee, who then disclosed it to others, and eventually the information reached the patient's estranged husband. During this time, someone created a MySpace webpage posting the information on the Internet. The patient sued the clinic and the individuals allegedly involved in the disclosure.

Yath v. Fairview Clinics, 767 NW2d34 (Minn. App. 2009)

An employee of a gynecologist decided to vent her frustrations on her online blog, ridiculing the patients giving birth and using expletives. Although the employee did not use patient names or any other identifying information in her post, two of the patients recognized themselves in the blog due to the detailed nature of the post and filed HIPAA complaints against the doctor and the practice.

Online Comments lead to privacy complaint. http://www.phiprivacy.net/?p=806

SOCIAL MEDIA

9. It's okay to Google patients, but…
   - Define your purpose
   - Determine what information you need
   - Consider obtaining patient's permission
   - Determine whether patient should be present
   - What if you find…?
   - Ensure the source is reliable
   - Do you include it in the record?
   - Are you increasing liability exposure?

ONLINE REVIEWS

ONLINE REVIEWS

1. If you are an MD or a DO you have a profile
2. Usually only disgruntled patients
   - Prescriptions
   - Billing
3. Can reach out to patient
4. Limited ability to respond online
5. Contact site
   - False information
   - Violates their policy

ONLINE REVIEWS

6. May clarify general misstatements
   - “I can neither confirm nor deny person is patient”
7. Do not astroturf
8. Do not use patient contracts
9. Use caution with patient testimonials
   - Ethical issues
   - True consent?
   - Must be representative
10. Consider LinkedIn

LIABILITY FOR ACTS OF OTHERS

LIABILITY FOR ACTS OF OTHERS

1. In addition to own acts and omissions
   - Staff
   - NPPs
   - Office mates
   - Patients
2. Theories of negligence
   - Vicarious liability/respondeat superior
   - Negligent supervision
   - Negligent hiring/retention
   - Informed consent

LIABILITY FOR ACTS OF OTHERS

3. Thorough vetting
   - Credentials
   - Past employers
   - Licenses
   - Criminal history
   - Malpractice history
   - Credit check
   - Not a patient or relative

LIABILITY FOR ACTS OF OTHERS

4. Typical allegations
   - Failure to timely release record
   - Improper release of information
   - Inappropriate access to PMP data

5. Mitigate exposure
   - Policies and procedures
   - Training
   - Documentation
   - Confidentiality agreement

LIABILITY FOR ACTS OF OTHERS

6. Social media
   - During and after hours
   - Include in confidentiality agreement

7. Office sharing
   - Assumption of employment, control, supervision
   - Perception = reality

LIABILITY FOR ACTS OF OTHERS

8. Avoid appearance of affiliation
   - Contracts suggesting connection
   - Shared signs
   - Shared letterhead
   - Shared phone numbers
   - Shared websites
   - Consider posting sign
   - Patient acknowledgement

LIABILITY FOR ACTS OF OTHERS

9. Negligent referral
   - Know your referrals
   - Give multiple options
   - Give patient choice to find own

10. Patient's negligence
    - Patient under influence of medication
    - Patient not told of possible effects
    - May be liable to injured 3rd party
    - Informed consent should include driving risk

SUPERVISION OF NURSE PRACTITIONERS

SUPERVISION OF NURSE PRACTITIONERS

1. Requirements vary but liability does not
   - Almost always included in suit
   - Regardless of whether saw patient

2. Psychiatrist's negligence
   - Vicarious liability/respondeat superior
   - Negligent hiring/retention
   - Lack of informed consent

SUPERVISION OF NURSE PRACTITIONERS

4. Don’t supervise/collaborate with unknown NP
   - Meet in person
   - Comfortable with expertise
   - Compatible treatment philosophy

5. Formal collaboration agreement
   - State may have sample
   - Read and keep copy
   - Understand provisions

SUPERVISION OF NURSE PRACTITIONERS

6. Closer supervision of new or unfamiliar NP
   - Initially will require more time
7. Temperament
   - Who will supervise
   - Time and temperament
   - Access and approachability

SUPERVISION OF NURSE PRACTITIONERS

8. Verify credentials
   - Education
   - Licensing status
   - Board complaints
   - Certification
   - CE hours
   - Employment history
   - Malpractice history/insurance
   - Credit check
   - Criminal background check

SUPERVISION OF NURSE PRACTITIONERS

9. Create job description & practice protocols
   - Before starting employment
   - Types of patients
   - When MD consulted
   - Frequency of chart review
   - Prescriptive authority

10. Patient understanding
    - When appointment made
    - Option of seeing MD

TELEPSYCHIATRY

TAKE AWAY POINT #1

Treatment is rendered where the **patient** is physically located.

TAKE AWAY POINT #2

Utilizing telemedicine does not alter the standard of care to which the physician will be held – it is the same standard of care that would apply if the patient was in the physician's office or facility.

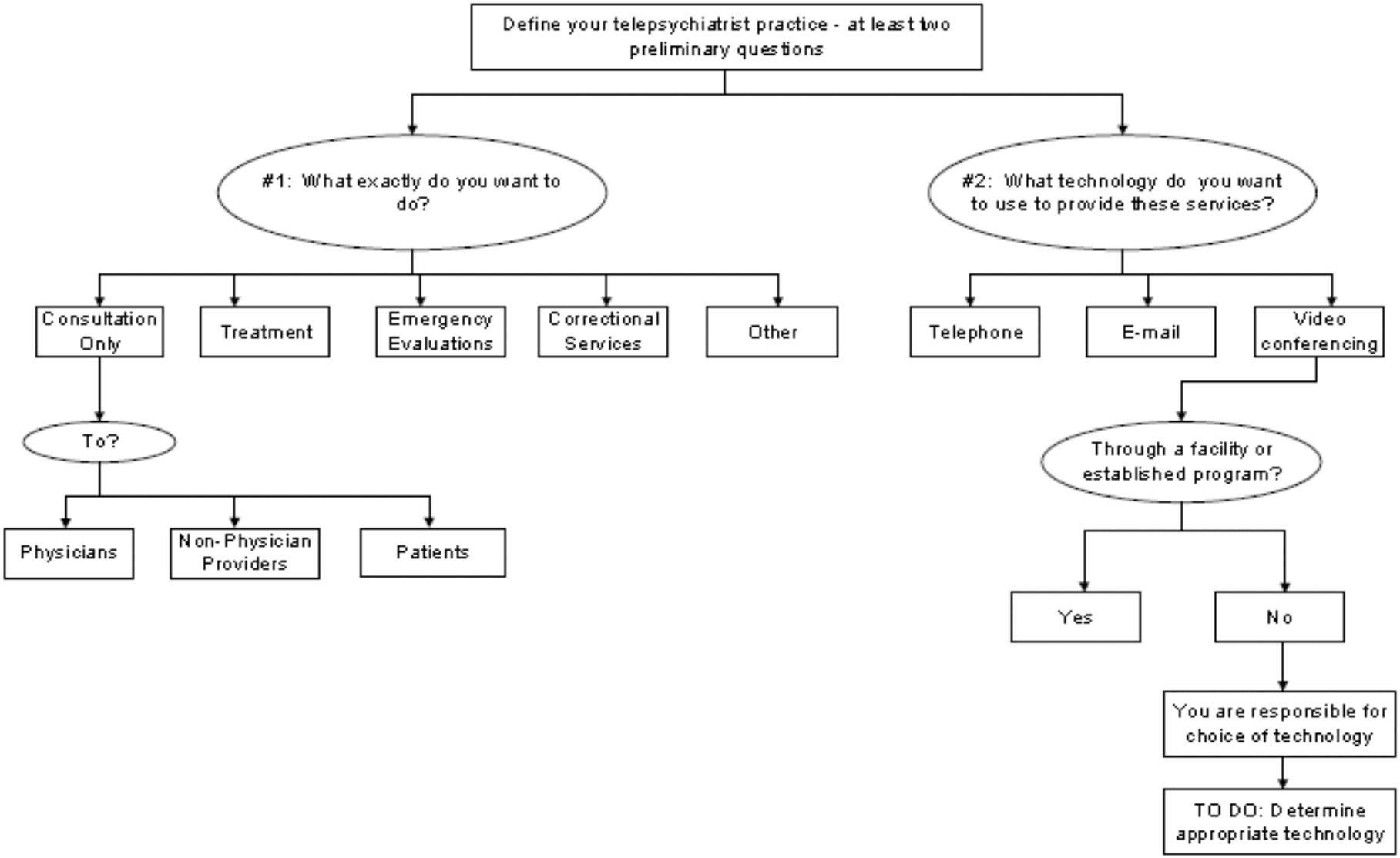
TAKE AWAY POINT #3

Research/contact all applicable medical boards to determine if you can do what you want to do without violating applicable laws!

- Licensure requirements
- In-person physical examination required
- Prescribing
- Other requirements – CME, e-prescribing, renewal
- Telehealth regulations

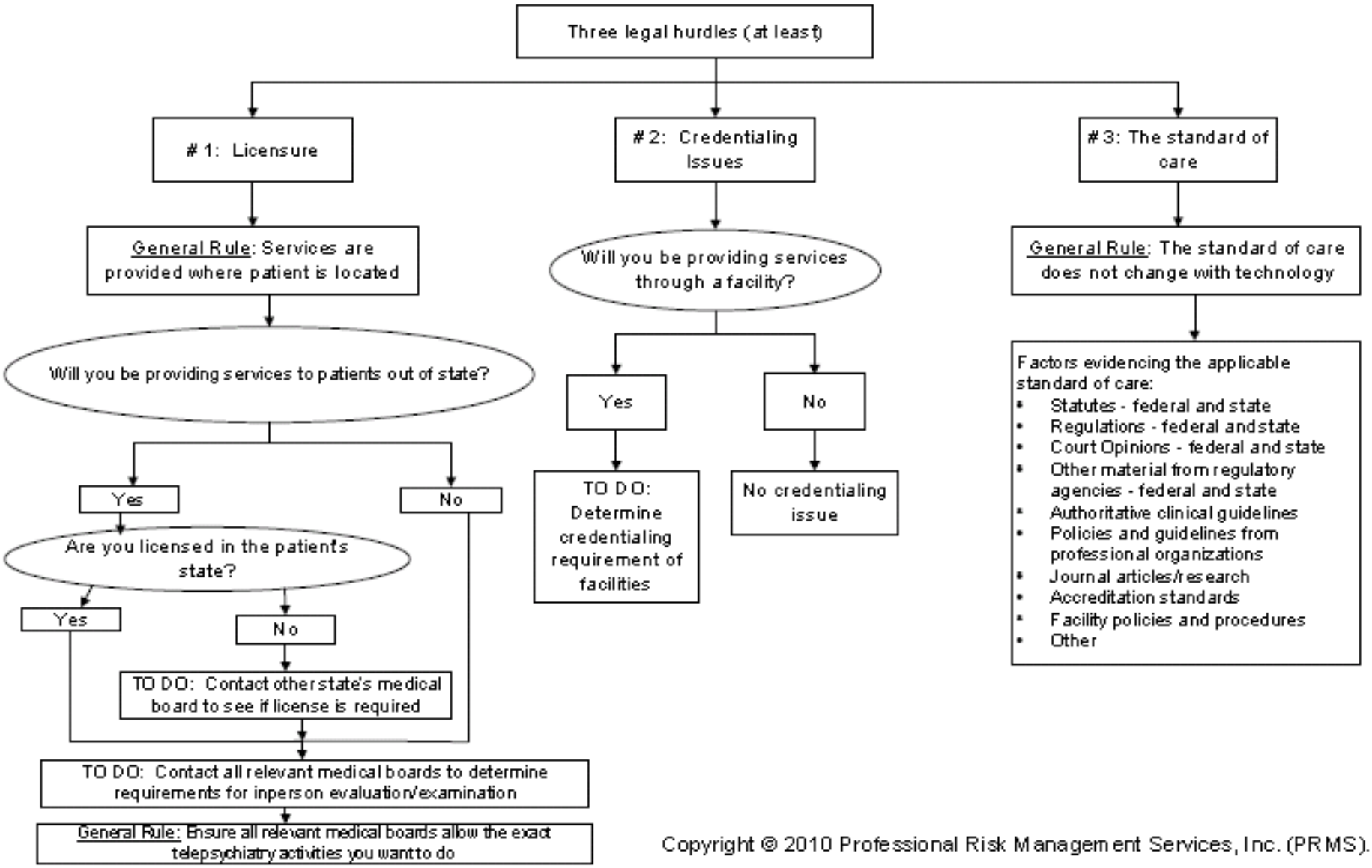
TELEPSYCHIATRY

PRELIMINARY DETERMINATIONS



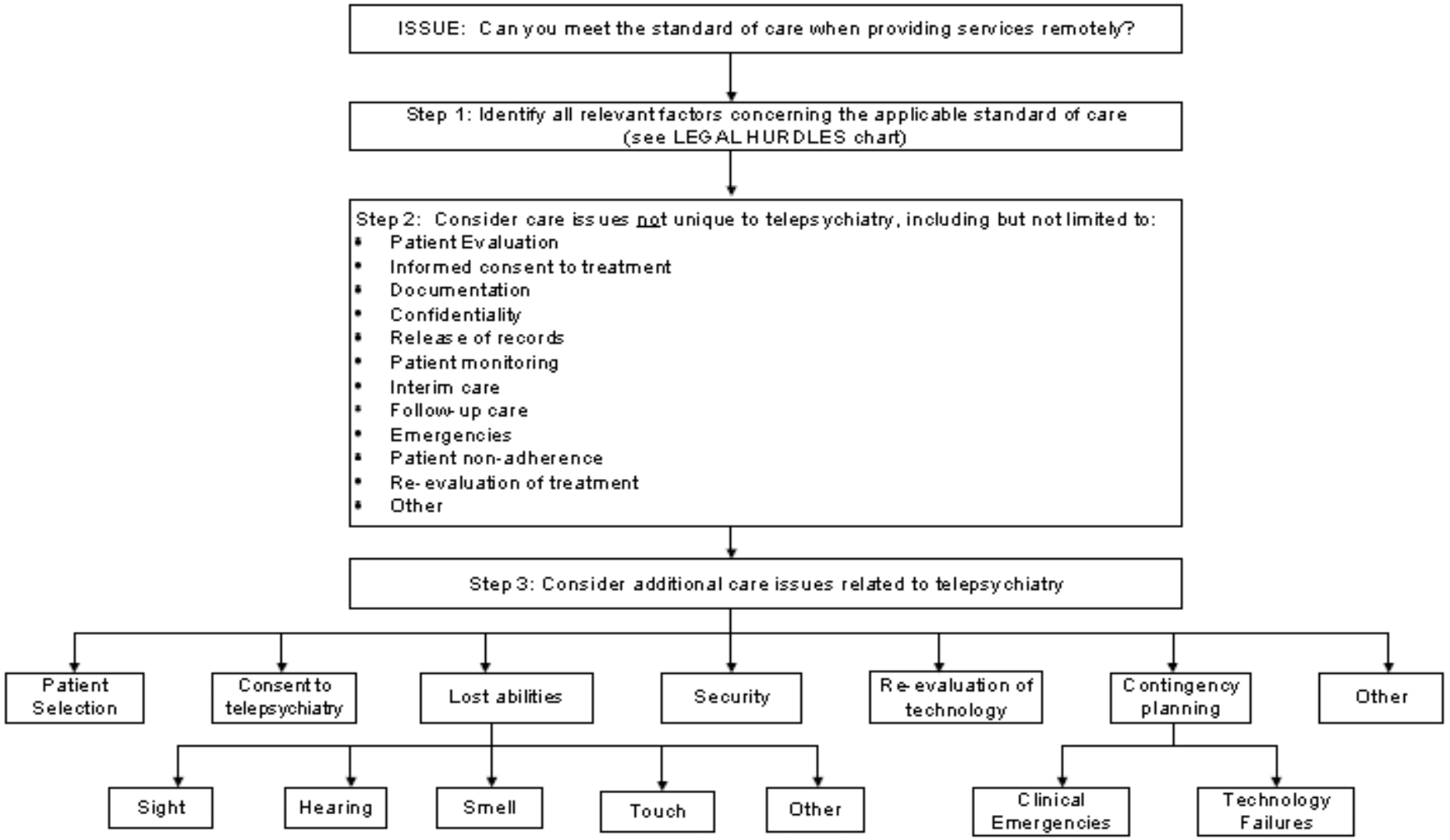
TELEPSYCHIATRY

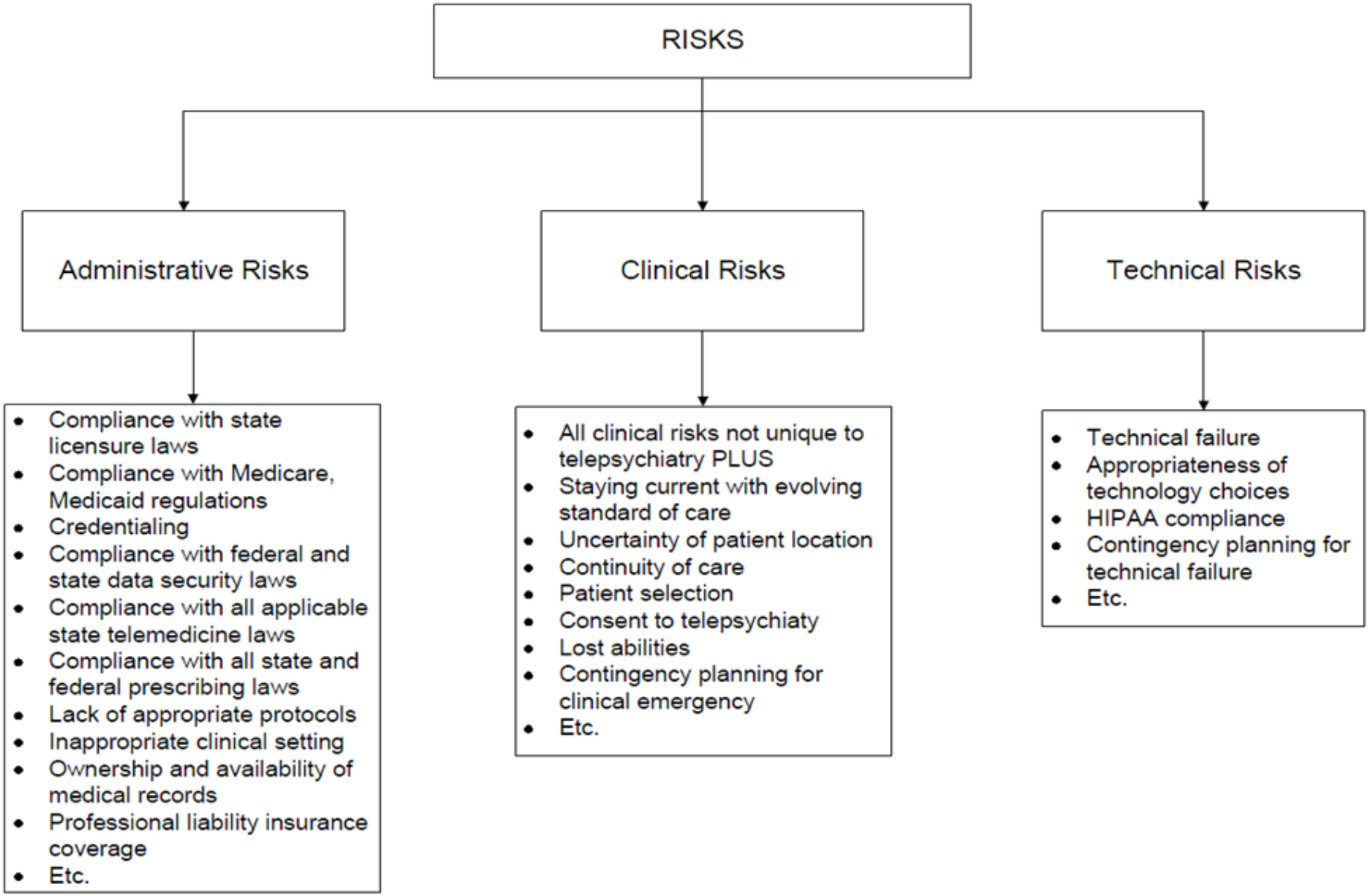
LEGAL HURDLES

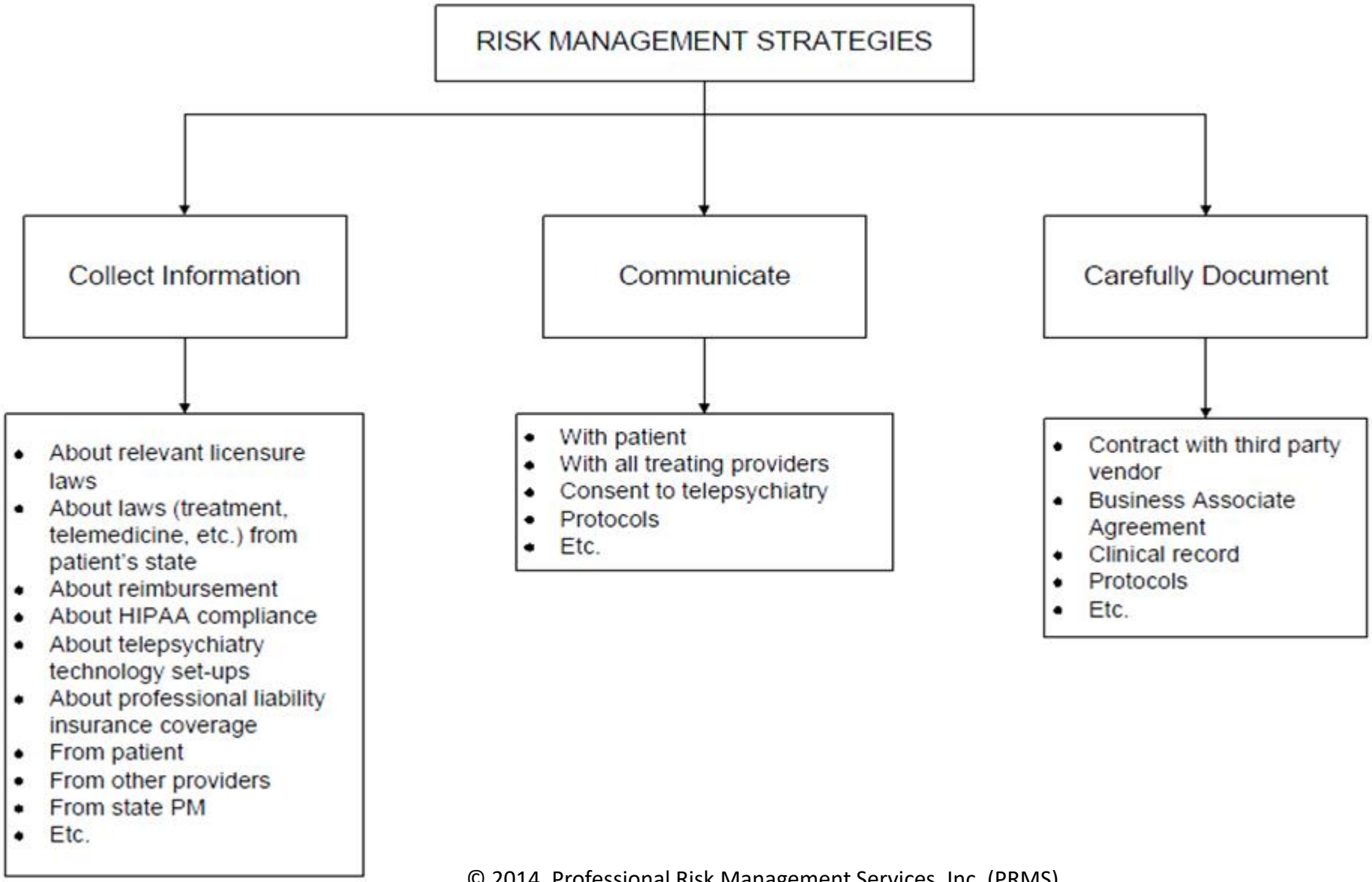


TELEPSYCHIATRY

CLINICAL HURDLES





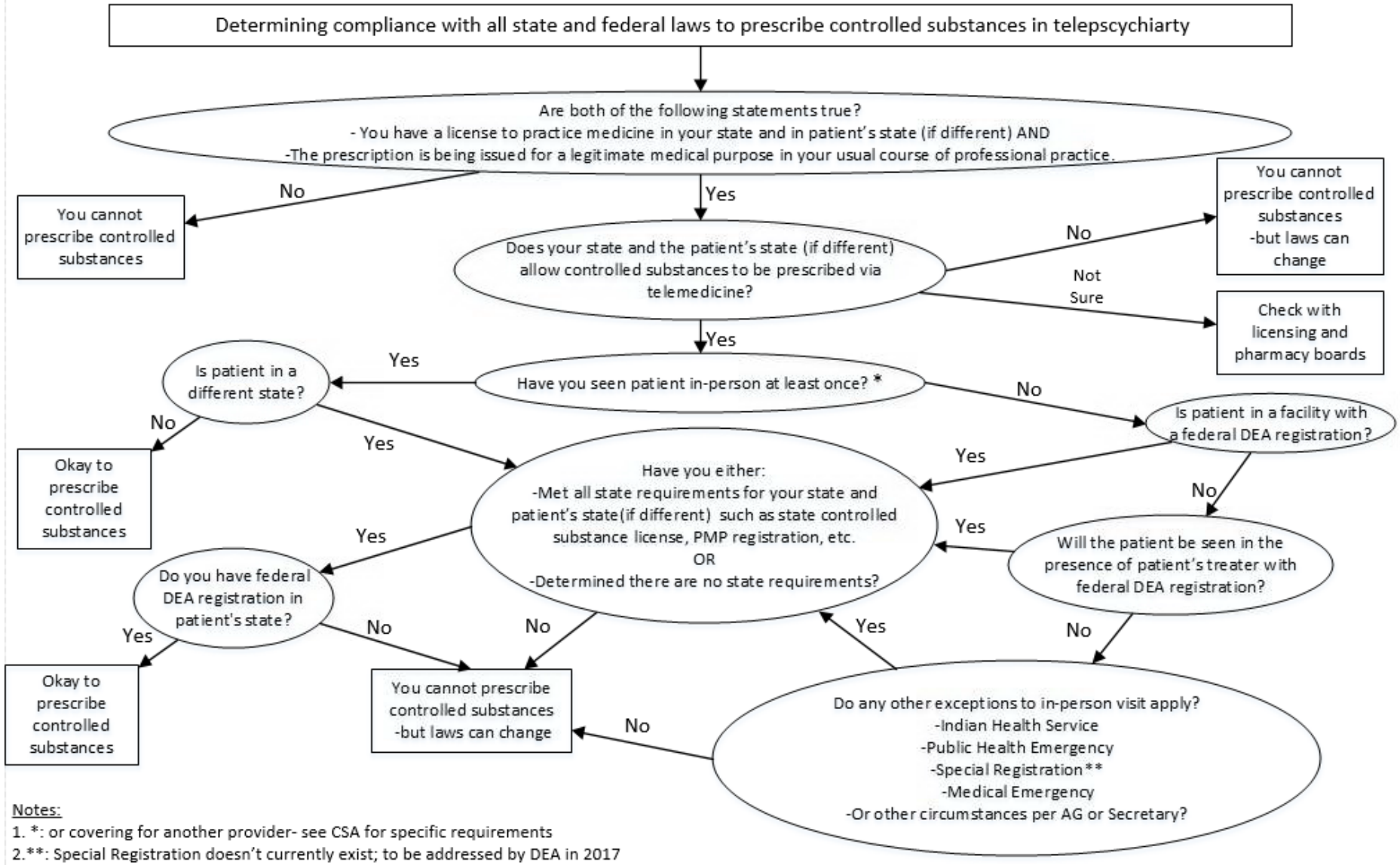


TO PRESCRIBE VIA TELEMEDICINE

- Ensure compliance with all state and federal laws, including:
  - State law – some states prohibit
  - Federal Controlled Substance Act
    - Including the Ryan Haight Act amendment
  - Federal DEA registration requirements
    - In each state you prescribe in
  - State equivalent of federal DEA registration, if applicable

TELEPSYCHIATRY-
FACE-TO-FACE EVALUATION

- Federal law (CSA as amended by the RHA)
- Some boards say in-person exam is not required
- Some boards say it depends
  - On the patient's condition



Notes:

1. *: or covering for another provider- see CSA for specific requirements
2. **: Special Registration doesn't currently exist; to be addressed by DEA in 2017
3. This is a risk management resource- it is not legal advice.
4. There can always be exceptions to these rules, especially if practicing within VA or IHS.
5. You should check with licensing boards in your state, and patient state's (if different) for specific requirements and prohibitions.

MEDICAL MALPRACTICE INSURANCE

- Not all carriers cover telemedicine
- Some carriers will only cover telemedicine if specific conditions are met
  - Ex: only cover if patient is in physician's state
  - Ex: only consultation, not treatment
  - Ex: only cover in desirable jurisdictions
- Not all carriers will cover services rendered out of state
  - May not be set up to defend in patient's state
- Some carriers may have premium surcharge for telemedicine
  - Ex: if patients are in a state without damage caps
- ASK:
  - Does carrier cover telemedicine?
  - Are there any restrictions?
  - Are there any requirements?
  - Is there a surcharge?
  - Is there coverage for suits brought out of state?
- Resource: Telehealth Resource Centers - *Medical Malpractice and Liability*

TECHNOLOGY IS ONLY A TOOL

Technology is a tool that can partially restore the lost abilities to evaluate and treat patients at a distance, but by itself, *technology cannot completely restore all abilities.*

RISK MANAGEMENT ADVICE - WHEN CONSIDERING TELEPSYCHIATRY

- Define your telepsychiatry endeavor
  - What you want to do
  - What technology you want to use
- Determine all relevant laws and other standard of care factors
- Evaluate your ability to comply with legal requirements
  - E.g., Ensure all relevant medical boards allow you to do the exact telepsychiatry activities you want to do and with the technology you want to use
    - Licensure requirements
    - Physical examination requirements
    - Etc.
- Understand the importance of the location of the patient, both for legal and clinical reasons

RISK MANAGEMENT ADVICE – WHEN CONSIDERING TELEPSYCHIATRY

- Understand that the standard of care does not change with technology
- Evaluate the impact of your proposed telepsychiatry endeavor on your ability to meet the normal standard of care
  - In addition to meeting all care issues not unique to psychiatry, there are additional care issues related to telepsychiatry that must also be met
  - Understand that technology is a tool that can partially restore lost abilities to evaluate and treat patients at a distance, but technology itself cannot completely restore all lost abilities
  - Formulate strategies to:
    - Comply with all applicable laws
    - Restore lost abilities where possible
    - Avoid situations where needed abilities cannot be restored
- Inform your Underwriter of your planned telepsychiatry activities

RISK MANAGEMENT ADVICE - WHEN DOING TELEPSYCHIATRY

- Consider what will be “lost” when treating individual patients re:
  - Communication
  - Ability to diagnose and treat
- Ensure the ability to treat individual patients within the standard of care
  - Carefully evaluate whether a particular form of telepsychiatry is appropriate for a given patient
    - At the beginning of treatment
    - AND at clinically significant events
    - AND periodically as treatment progresses
  - Determine whether and how the particular form and method of treatment will help the patient progress toward legitimate treatment goals
- Ensure patients have a basic understanding of the technology being used and appreciate its limitations

RISK MANAGEMENT ADVICE - WHEN DOING TELEPSYCHIATRY

- Prepare for possible emergencies by having patient addresses and local emergency services numbers available
- Utilize a consent form wherein the patient acknowledges
  - the possibility of a privacy / security breach
  - the possibility that medical conditions may not be able to be observed remotely
- Include in documentation of session
  - that session was conducted via telepsychiatry
  - why this method was chosen for this patient
  - why it continues to be an appropriate treatment option
- Continually re-evaluate physician and patient level of satisfaction

QUESTIONS?