

Chair Monnes Anderson and members of the Senate Health Committee:

SB 144 comes with great promise, but a bill of this magnitude is not ready for prime time. HIPAA security rules simply do not cover synchronous two-way interactive video conferencing.

Before technology races ahead, the Oregon legislature must pull back the curtain on telemedicine business practices so that patient care and privacy will not be compromised. The legislature must:

1. Review and revise legislation regarding the licensing process for telemedicine<sup>1</sup> and implemented by the Oregon Board of Medical Examiners.
2. Review and tighten federal HIPAA privacy and security loopholes, preferably with the help of professional organizations (such as [American Association of Family Physicians](#) and [American College of Physicians](#)) and big data experts (such as legal scholar [Frank Pasquale](#)<sup>2</sup> and Electronic Frontier Foundation attorney [Nate Cardozo](#)).

With big capital<sup>3</sup> investments, Dr. Phil helped hang the 21<sup>st</sup> Century video conferencing shingle for Doctor on Demand. Dr. Mehmet Oz<sup>4</sup> preaches telemedicine of another kind—one where a patient’s death can be broadcast without permission. These healthcare televangelists have a shared faith that HIPAA privacy rules won’t be a barrier to their business plan.

In less than 20 years, the amount of health care data collected and shared has grown exponentially. *theDataMap*<sup>TM</sup> in 1997<sup>5</sup>

## theDataMap

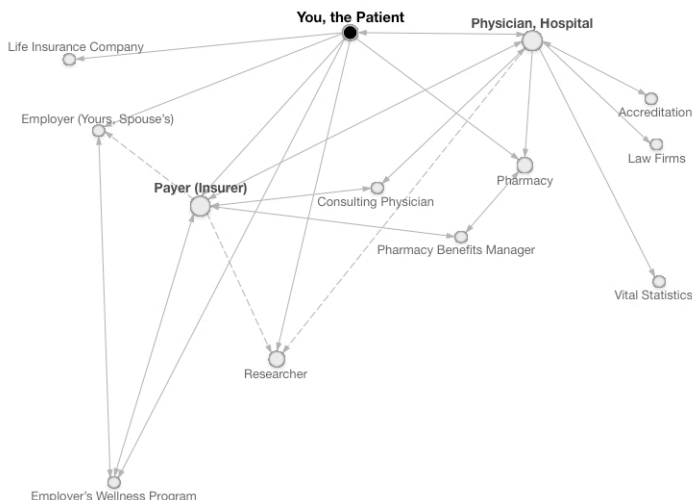
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<sup>1</sup> <http://www.oregon.gov/omb/Topics-of-Interest/Pages/Telemedicine.aspx>

<sup>2</sup> Review of *The Black Box Society: The Secret Algorithms That Control Money and Information*, Frank Pasquale, Harvard University Press, 2015. 319 pp. <http://www.sciencemag.org/content/347/6221/481.summary>

<sup>3</sup> [Andreessen Horowitz](#), [Google Ventures](#), [Lerer Ventures](#), [Shasta Ventures](#), [Venrock](#). Cofounders: CEO Adam Jackson; executive producer of The Doctors Jay McGraw and his dad, TV’s Dr. Phil McGraw. Former senator Tom Daschle serves on Board. [Athena Health’s Jonathan Bush](#) invests and advises. <http://www.doctorondemand.com/our-team/>

<sup>4</sup> *When a Patient’s Death is Broadcast Without Permission*, [Charles Ornstein](#) ProPublica, Jan. 2, 2015: “(T)he law (HIPAA) prohibits medical professionals from sharing information about a patient only after he has been examined or treated.” <https://www.propublica.org/article/when-a-patients-death-is-broadcast-without-permission>

<sup>5</sup> <http://thedatamap.org/about.html> *theDataMap*<sup>TM</sup> operates as a research project in the [Data Privacy Lab](#), a program in the Institute for Quantitative Social Science (IQSS) at [Harvard University](#). The project leader is [Professor Latanya Sweeney](#). Bob Gellman points out that health data does not respect a silo.



Confidentiality and Privacy Rules and security protections for the patient in connection with the telemedicine communication and related records.<sup>11</sup>

The Telehealth Alliance of Oregon<sup>12</sup> references white paper from the Center for Telehealth and e-Health law. An excerpt below:

By way of background, the HIPAA Security Rule (45 C.F.R. §§ 164.302 – 164.318) establishes standards to protect individuals' electronic personal health information (ePHI) that is created, received, used, or maintained by a covered entity (i.e., a hospital, physician's office, a skilled nursing facility, a health plan, etc.). The Security Rule requires that covered entities put in place the appropriate administrative, physical and technical safeguards to ensure the confidentiality and security of ePHI. In essence, the Security Rule governs how covered entities should safeguard the health information they have from unauthorized access.

The HIPAA Privacy Rule (see generally 45 C.F.R. §§ 164.500 – 164.534) establishes standards to protect individuals' medical records and other protected health information (PHI). The Rule requires covered entities to sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization. The Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records, and to request corrections. In other words, the Privacy Rule governs how covered entities may use and disclose health information in its possession.

As indicated, one major difference between the Security and Privacy Rules is that the Security Rule applies only to ePHI. As defined in the Security Rule, ePHI includes telephone voice response and fax back systems, but does not include paper-to-paper faxes, video conferencing, or messages left on voice mail — because the information being exchanged did not exist in electronic form prior to the transmission. If, however, a covered entity records a videoconferencing session and saves a copy, that saved version would be subject to the Security Rule.

Note, however, that because the Privacy Rule applies to all PHI (not just that which exists in electronic form), videoconferencing sessions involving the use of PHI and all related information and documentation would be subject to the requirements of the Privacy Rule.

In other words, the HIPAA security rule doesn't apply to teleconferencing; but a breach of privacy could be trouble for the unaware provider.

Doctor on Demand requires Google Chrome and a Google app<sup>13</sup>; and Doctor on Demand is part of the Google Ventures Life Science & Health portfolio.<sup>14</sup> Eric Schmidt, Executive Chairman of Google once said “Google policy is to get right up to the creepy line and not cross it.”<sup>15</sup>

WebMD interviewed Dr. Phil talking about Doctor on Demand at a recent digital health summit.<sup>16</sup>

~1:38 *We're very excited now because we've just added mental health services to that.*

~3:00 *You're able to go through; select a therapist; schedule an appointment; and see that person on an ongoing basis. And you can do it with the anonymity from your own home.*

Then at 4:52 it gets creepy. Dr. Phil encourages opening email exchanges of arguments with a significant other or uploading a photograph of what might be marijuana in a teenage son's sock drawer.

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<sup>11</sup> OAR 410-130-0610(3)(c)(A) Telemedicine [http://arcweb.sos.state.or.us/pages/rules/oars\\_400/oar\\_410/410\\_130.html](http://arcweb.sos.state.or.us/pages/rules/oars_400/oar_410/410_130.html)

<sup>12</sup> <http://www.ortelehealth.org/content/privacy-and-security-0>

<sup>13</sup> [https://patient.doctorondemand.com/patient/non\\_chrome/](https://patient.doctorondemand.com/patient/non_chrome/)

<sup>14</sup> <http://www.gv.com/portfolio/>

<sup>15</sup> <http://www.theguardian.com/technology/2013/aug/14/google-gmail-users-privacy-email-lawsuit>

<sup>16</sup> <http://digitalhealthsummit.com/live/> <http://digitalhealthsummit.com/2015-speakers/>  
<https://www.youtube.com/watch?v=1tf7NOwPrSA>

To learn more, I called up Doctor on Demand. There was no answer at the patient support line. I did get through when I called the Doctor Support line. I was told two doctors were immediately available for the "digital urgent care." \$40 for 15 min. UnitedHealth Care plans are covering Doctor on Demand visits.

- Christopher Pedersen<sup>17</sup> is not listed at the Doctor on Demand website. He received an Oregon license (MD 169060) for telemedicine on 12/23/14. He lives in Las Vegas.
- Dr. Kristin Dean is listed for pediatrics at Doctor on Demand<sup>18</sup> and lives and is licensed in California<sup>19</sup> (License Number: 118149), but **she has no license to practice in Oregon.**

Two-way interactive video conferencing is not the same thing as a face-to-face appointment. Urgent care sometimes requires follow-up. And sometimes urgent becomes emergent care. No physician unlicensed in Oregon should be able to regularly care for a patient residing in Oregon. Out-of-state practitioners should be connected to brick and mortar practices here.

In summary, legalizing video teleconferencing in Oregon would be reckless without meeting privacy and safety standards of face-to face healthcare.

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<sup>17</sup> <https://techmedweb.omb.state.or.us/Clients/ORMB/Public/VerificationDetails.aspx?EntityID=1476978>

<sup>18</sup> <http://www.doctorondemand.com/kristen-dean>

<sup>19</sup> <https://www.breeze.ca.gov/datamart/searchLicTypeByName.do?direct=true>