

## Texas Telemedicine 2015 Year in Review

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The regulations regarding telemedicine in Texas were a frequent topic of discussion in 2015. While the telemedicine rules currently in effect for Texas are the same as they were this time last year, over the course of the past year there were amendments to the rules, litigation to enjoin enactment of those amendments, and legislation related to the rules.

The use of telemedicine in Texas dates back to 1998, when Texas' Medicaid program started offering telemedicine services to those in medically underserved areas. Thereafter, the Texas Legislature took several steps to expand the types of services, providers, and locations eligible for reimbursement for telemedicine services.

In October 2010, the Texas Medical Board (“**TMB**”) amended several provisions of its telemedicine rules, including: revising the definition of “telemedicine” to require consultations using advanced telecommunications technology so that providers could see and hear the patient in real time; requiring that providers establish a proper physician-patient relationship via physical, face-to-face, examination of the patient; and prohibiting the prescription of controlled substances via telemedicine. These changes initiated the first disconnect between the TMB and companies providing medical services solely via telecommunications, particularly a Dallas-based telehealth company known as Teladoc that provides round-the-clock patient care through Internet real-time telephone and video consultations.

Starting in 2011, a series of warning letters, lawsuits, injunctions, and countersuits were exchanged between the TMB and Teladoc, and 2015 saw renewed legal battles between the parties. In January 2015, the TMB passed an emergency measure to prohibit the prescribing of drugs without an initial in-person visit, so Teladoc filed a federal antitrust suit and sought a preliminary injunction to prevent the new rule taking effect.

Just two months later, in March 2015, TMB proposed official amendments to the telemedicine rules, which were approved by the TMB in April 2015 and scheduled to take effect on June 3, 2015. The revised rules required “establishing a diagnosis through the use of acceptable medical practices, including documenting and performing patient history, mental status examination, and physical examination *that must be performed as part of a face-to-face or in-person evaluation....*” (22 Tex. Admin. Code 174.8(a), emphasis added).

While the revised rules included some changes which may help expand telemedicine services, such as exceptions for mental health services and for situations where the patient is currently at a health facility and is attended by another healthcare professional, many saw the face-to-face or in-person requirement as impeding the use of technology and hindering the expansion of telemedicine. TMB's position is that the revised rules aim to strike a balance between patient safety and the use of advanced technology. Teladoc feels that the changes restrict access to healthcare and prevent patients from having a more convenient and affordable option for their medical needs, so Teladoc once again filed suit.

On May 29, 2015, less than a week before the revised rules would take effect, the U.S. District Court in Austin granted Teladoc's request for an injunction against TMB's new rules. Most recently, on December 14, 2015, a federal judge rejected TMB's motion to dismiss Teladoc's antitrust suit. Most likely, there will be further motions and rulings in 2016, but there may not be full resolution until February 2017, when the case regarding the new rules is set for trial.

Texas is not the only state trying to find the correct balance between the practice of medicine and the use of technology. As Medicare, Medicaid and other payors continue to add aspects of telemedicine that qualify as reimbursable services, most states are taking some type of action related to telemedicine.

Several other states, including Arizona, Colorado, Connecticut, Florida, Kentucky, Maine, Montana, Nebraska, New Hampshire, New Mexico, Oklahoma and Tennessee, have enacted legislation to regulate a variety of telemedicine activities. These states, like Texas, tend to be viewed as having heightened requirements for telemedicine. Twelve states have joined the Interstate Medical Licensure Compact ("**IMLC**"), whose goal is to expedite licensing of physicians seeking to practice in multiple states and improve access to healthcare through the use of telemedicine technologies. Texas has not yet joined the IMLC, but it and seven other states have introduced legislation related to the IMLC.

Texas politicians have also taken action in this area. More than 10 telemedicine bills were filed during the 84th Texas Legislature, and, by the time the legislature adjourned in June 2015, only one bill, House Bill 1878, had passed. This legislation allows Medicaid reimbursement for school-based telemedicine if certain requirements are met.

Further, the Texas political leadership recognized the significance of the telemedicine topic related to access to care and issued "Interim Charges" to study the issue in 2016. The Interim Charge designation indicates the potential for the issue to become priority legislation during the next legislative session, which will reconvene in January 2017.

As 2016 begins, Texas will most likely continue to experience (and possibly cause) some static as it works to find the right connections between providers and patients via the use of telemedicine.