Texas Telemedicine Update: Texas Dispute with Teladoc Leads to Revisions to Telemedicine Clinical and Reimbursement Standards

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Some clarity is finally emerging on telemedicine clinical and reimbursement standards in Texas after a handful of important developments in the last several months.

Background: Texas Standoff

The first significant development involves an ongoing dispute between the Texas Medical Board (TMB) and Dallas-based telemedicine company Teladoc that dates back to 2011. The dispute involved the TMB's position that physicians may not provide services in Texas using telecommunications without first having an in-person consultation with a patient. Teladoc viewed this stance as anti-competitive, because it prevented practitioners from providing services using Teladoc's telecommunication devices to treat patients using a synchronous audio-visual interaction. Teladoc argued that because the TMB is made up of practicing physicians with whom telemedicine companies like Teladoc compete, its restriction of telemedicine services in Texas violated the Sherman Act. After first filing suit in state court in 2015, the matter was removed to federal court and attracted the attention of several federal agencies in September 2016, with both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) advocating in support of Teladoc. This battle and the industry attention surrounding it ultimately led the Texas legislature to take matters into their own hands this year.

Legislative Action

In passing Senate Bill 1107 (SB 1107) in May 2017, the Texas legislature introduced significant changes to the Texas telemedicine landscape. SB 1107 instructed the TMB to revise its in-person consultation requirement to allow providers to treat patients without first having a face-to-face visit. SB 1107 only requires health care professionals to "establish a practitioner-patient relationship." SB 1107 did not specify how such a relationship is formed, instead directing the TMB to update the state's telemedicine practice standards.

In addition to effectively resolving the somewhat narrowly-defined issue underpinning the *Teladoc* litigation, SB 1107 also introduced a range of other reforms that are reflected in the revised Texas regulations, including (i) removing a "telepresenter" requirement that required a healthcare professional to be present when a patient initiates a video consultation with a practitioner, (ii) introducing new definitions of "telehealth services" and "telemedicine medical services," and (iii) issuing new rules for remote prescribing. The revised regulations, which were introduced in September in draft form, went into effect November 26th. These new rules are further described below.

Highlights of the Revised Telemedicine Regulations for Provid

Defining "Telehealth Service" and "Telemedicine Medical Service"

SB 1107 introduced definitions for "telehealth service" and "telemedicine medical service." SB 1107 defines "telehealth services" as health services delivered by Texas-licensed health professionals acting within the scope of their licensure or certification to a patient at a different location than the health professional providing treatment using telecommunications or information technology. "Telehealth services" explicitly exclude "telemedicine medical services." The statute defines telemedicine medical services as health care services delivered by Texas-licensed physicians, or health professionals acting

under the delegation and supervision of a Texas-licensed physician, in each case acting within the scope of the physician's professional licensure to a patient located at a different location than the treating physician or health. 22 TAC § 174.2, "Definitions." By creating separate terms for services delivered by, or under the supervision of, physicians, and those delivered by non-physicians, the regulations demonstrate the legislature's intent to allow a wide range of providers to serve patients via telemedicine.

Establishing a Physician-Patient Relationship – Acceptable Modalities

Texas physicians can now establish physician-patient relationships – a necessary step before any treatment can be provided – without an in-person exam, using the following approved modalities: synchronous audio-visual, interactive communication; asynchronous store-and-forward technology, including asynchronous store-and-forward technology that is used together with audio interaction between the doctor and the patient, provided that the clinician uses clinical information from relevant images or the patient's medical records; or other forms of audiovisual telecommunication technology that satisfy the standard of care that the regulations proscribe. 22 TAC § 174.6, "Minimum Standards for the Provision of Telemedicine Medical Services."

Standard of Care

Physicians providing services via telemedicine are now held to the same standards of care as those providing services face-to-face. The parity in standards is further underscored in Texas' new telemedicine standard of care regulations, which explicitly prohibit an agency "with regulatory authority over a health professional" from adopting rules that would impose a higher standard of care on practitioners providing services via telemedicine. Importantly, however, the TMB rules require physicians treating patients via telehealth to provide those patients with instructions on follow-up care. Tex. Occ. Code §§ 111.005 – 111.008. Despite the follow-up care requirement, telehealth advocates have been relieved to see that providers using telemedicine will be on an even playing field with those providing services through traditional in-person encounters. Of course, limitations on patient evaluation inherent to treating patients via telemedicine do not excuse errors, and it is important for providers to remain thoughtful in the kind of services they offer through telemedicine and in the methods by which they authenticate patients.

Remote Prescribing

The TMB rules set forth that prescriptions issued via telemedicine are held to the same standards as those issued through a face-to-face consultation. There are, however, important limitations, including that prescriptions for controlled medications for the treatment of chronic pain cannot be prescribed via telemedicine, unless otherwise permitted by state or federal law. Controlled medications for the treatment of acute pain, however, may be prescribed via telemedicine. 22 TAC § 174.4. SB 1107 also prohibits practitioners from prescribing "any abortifacient or any other drug or device that terminates a pregnancy" via telemedicine. Tex. Occ. Code § 111.005(c), "Practitioner-Patient Relationship for Telemedicine Medical Services."

Reimbursement Highlights from SB 1107 and Texas Medicaid's December 1st Bulletin

Telemedicine Parity for Commercial Payers – Coverage but not Payment.

In addition to the TMB rules discussed above, SB 1107 introduced changes that will impact the reimbursement of telemedicine services in Texas' commercial market. Texas prohibits payers from declining to reimburse a claim for a covered benefit because the relevant service is provided through a telemedicine encounter and not a face-to-face consultation. It also allows payers to require a deductible, copayment or coinsurance for services provided via telemedicine, but prohibits them from requiring a higher copayment or coinsurance than would be required for the same service if it were provided pursuant to a face-to-face consultation. SB 1107 also requires payers to adopt telemedicine payment policies and display them clearly on their websites. Tex. Ins. Code § 1455.004, "Coverage for Telemedicine Medical Services and Telehealth Services."

Texas law does not require payers to reimburse the same amount for identical services that are provided via telemedicine and pursuant to a face-to-face encounter. In other words, although the state provides for telemedicine parity for coverage, it

has yet to do so with regard to payment. There are also limits regarding what modalities Texas payers are required to cover. SB 1107 and Texas insurance regulations do not require payers to cover services provided by only synchronous or asynchronous audio interaction, including audio-only telephone consultations, text-only email messages, or facsimile transmissions. Tex. Ins. Code § 1455.004, "Coverage for Telemedicine Medical Services and Telehealth Services." Because Texas law does not require services delivered via these more limited remote modalities like text messages and phone calls to be covered, payers in Texas may not reimburse claims provided through these modalities.

Texas Medicaid Reimbursement.

Before the TMB revised its rules, reimbursement under Texas Medicaid for telemedicine services was limited, because the TMB's rules prohibited physicians from establishing physician-patient relationships via telemedicine. Now that those standards have changed, Texas Medicaid appears poised to expand its reimbursement of services provided via telemedicine. On December 1, 2017, Texas' Medicaid contractor, the Texas Medicaid & Health Partnership (TMHP) published a bulletin confirming that its reimbursement policies regarding telemedicine would change in 2018. The bulletin discussed the impact of SB 1107 on Texas Medicaid in 2018. The bulletin indicates that Texas Medicaid is targeting implementation in late summer 2018. It then recites the new accepted modalities outlined above for providing care via telemedicine in Texas, and confirms that, "[o]nce policy benefit changes have been implemented sometime next year, these delivery modalities will be acceptable for use when delivering telemedicine or telehealth services to Medicaid fee-for-service clients."

Key Takeaways

Updated Texas Telemedicine Standards. As a result of the changes highlighted above, Texas telemedicine standards are now closer to those in other states throughout the country. Texas law now permits providers to treat patients and prescribe medication from remote locations using approved telemedicine modalities, and holds providers treating patients via telemedicine to an in-person standard of care.

The *Teladoc* Litigation is Resolved. The revisions to the Texas Medical Board's telemedicine regulations resolved the underlying disagreement between the Board and Teladoc by enabling physicians in Texas to treat patients via telemedicine without first having a face-to-face consultation. As a result, Teladoc withdrew its federal antitrust suit against the TMB on November 29, 2017.

Telemedicine Parity for Coverage, not Payment. Texas law prohibits payers from rejecting claims for services provided via telemedicine that would be reimbursed if provided through other means, but allows them to pay different amounts for such services.

Texas Medicaid Reimbursement. Texas Medicaid is preparing to expand its reimbursement of telemedicine services.

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Hooper, Lundy & Bookman's attorneys will continue monitoring state and federal telemedicine developments that impact healthcare providers and suppliers, including healthcare technology issues, Medicare, Medicaid and commercial reimbursement, hospital and health system operations, fraud and abuse and enforcement, and compliance.

For further information, please contact: Jeremy Sherer in Boston at 617.532.2705, Hope Levy-Biehl in Los Angeles at 310.551.8140, Jennifer Hansen in San Diego at 619.744.7310, Stephen Phillips or Paul Smith in San Francisco at 415.875.8500, or Robert Roth in Washington, D.C. at 202.580.7701.

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