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# Texas' Senate Bill 1107 and the future of US telemedicine

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On 27 May 2017, Texas Governor Greg Abbott signed into law Senate Bill 1107, which significantly increases opportunities for telemedicine services in the State. The new Bill removes the requirement previously in place in Texas for a face-to-face visit or an established physician-patient relationship to be in place before most providers could offer direct-to-consumer telehealth services. Alexis Gilroy, Todd Kelly and Courtney Carrell, of Jones Day, discuss the key features of Senate Bill 1107, and assess the future of telemedicine services in Texas and beyond.

## History of telemedicine in Texas

In 2010, as one of the first states to adopt specific telehealth regulations, the Texas Medical Board limited the practice of telemedicine by generally requiring an in-person visit before a physician could treat a patient using video conferencing technology, unless the patient was at an 'established medical site' with a 'patient site presenter' available to assist with the provision of care<sup>1</sup>. In 2015, the Texas Medical Board revised its rules to require an in-person physical exam before telephonic diagnosis or treatment, but allowing for telemedicine services to be provided directly to patients (including in their homes) if those services were limited to mental healthcare<sup>2</sup>. The Medical Board's strict rules for non-mental health services ultimately led one telemedicine provider, Teladoc, Inc., to file a lawsuit against the Texas Medical Board, alleging that the rules were intended to restrict physician competition and thus were a violation of antitrust laws<sup>3</sup>. With the passage of Senate Bill 1107, Teladoc has indicated in a press release that it will end its two year legal dispute with the Texas Medical Board.

To draft the new Bill, stakeholders began meeting a year before the start of the 2017 legislative session. Hospitals, physicians, Teladoc, Inc., and the Texas Medical Board, among others, came together with the goal of presenting one unified proposal to state legislators. The Texas eHealth

Alliance, a non-profit that connects health information technology stakeholders, provided critical leadership to prepare a bill that all parties could support and that would be approved by lawmakers.

## Key features of the new Bill

An essential feature of the new Bill is removing the requirement that a face-to-face visit take place in all cases before a non-mental health telemedicine service could be provided, notwithstanding whether or not the clinical circumstances called for an in-person encounter. The Bill also makes clear that a healthcare professional providing a telemedicine service is subject to the same standard of care that would apply if the service was provided in-person. Regulatory agencies are expressly prohibited from adopting rules that impose a higher standard of care.

Under the Bill, a valid practitioner-patient relationship is created through telemedicine if the practitioner: (i) has a preexisting relationship established with the patient; (ii) communicates with the patient (regardless of the method) pursuant to a call coverage agreement; or (iii) provides telemedicine through (a) synchronous video interactions, (b) asynchronous store and forward technology, or (c) any other form of audiovisual telecommunication technology enabling the provider to meet the standard of care. For relationships established solely through

one of the three telemedicine methods, the practitioner must have access to and use the same relevant clinical information that would be required to meet the in-person standard of care. Such a practitioner must also (i) provide the patient with guidance on follow-up care; and (ii) if the patient consents, provide the patient's primary care physician with relevant medical records within 72 hours after the telemedicine encounter.

Under the new Bill, Texas joins 18 other states that prohibit abortions via telemedicine, with the statute including a restriction that telemedicine providers may not prescribe abortion-inducing medications or any drug or device that terminates a pregnancy<sup>4</sup>. Such laws may be subject to future judicial challenges, with a similar restriction found unconstitutional by an Idaho Federal District Judge, leading to a settlement where the State agreed to repeal the ban<sup>5</sup>. Moreover, clinical researchers have been exploring the use of telemedicine for abortions, with a recent study published in *The BMJ* (formerly the *British Medical Journal*) finding that women who were less than 10 weeks pregnant and received abortion medications through telemedicine self-reported outcomes that compared favourably with in-clinic protocols<sup>6</sup>.

## Future of telemedicine in Texas and beyond

Now that the long awaited Bill is law,

continued

what does the future of telemedicine look like in Texas and beyond? First, we expect more direct-to-consumer services to become available in the State. One leader in the industry, American Well, had previously not operated in Texas because of the Texas Medical Board's position. With the new Bill, American Well has launched services in the State and others are expected to launch or expand their services. This expansion especially benefits rural consumers who will have a new option to receive routine care from home rather than traveling long distances to a clinic. Additional direct-to-consumer models are also being explored by employers and health plans looking to reduce expenditures on emergency room visits by encouraging employees and health plan members to use telemedicine options for low acuity care.

Second, we expect discussions to continue nationwide on prescription authority and insurance reimbursement. The new Texas Bill requires the State's relevant professional boards, including the Texas Medical Board and Texas State Board of Pharmacy, to coordinate in adopting rules relating to the validity of prescriptions generated through a telemedicine service. However, any such rules will be required to take into consideration the federal Ryan Haight Online Pharmacy Consumer Protection Act of 2008, 21 U.S.C. § 829. This Act amended the Controlled Substances Act to prevent 'rogue internet sites' from unlawfully dispensing controlled substances without a valid prescription. However, the Act's broad language captures telehealth services because it requires a provider to conduct at least one in-person visit with a patient before prescribing controlled substances.

The Ryan Haight Act includes exceptions for when telemedicine services are provided to a patient in a hospital or clinical setting, as part of the Indian Health Service, or during public health emergencies<sup>7</sup>. The only exception that is likely to apply to routine, direct-to-

consumer telemedicine services is an exception that permits practitioners to prescribe controlled substances if they have obtained a 'special registration' from the Drug Enforcement Agency ('DEA'). Unfortunately, the DEA has yet to promulgate rules detailing how this special registration will work. As recently as 2009, the DEA stated that prescribing a controlled substance without conducting an in-person medical evaluation remained a strong indication or 'red flag' of likely diversion<sup>8</sup>. With the current opioid epidemic, the DEA may be reluctant to change its position, but a path for legitimate providers to prescribe controlled substances through telemedicine is critical to maximise the benefits of this clinical care option, especially in the case of mental health services.

Notably, several states, including Ohio, Delaware, Florida, New Hampshire, and West Virginia, have created rules allowing controlled substances prescriptions by telemedicine providers, but these are of limited effect until the DEA acts.

US federal Government action is also needed to address telemedicine reimbursement, which will remain uncertain unless the Centers for Medicare & Medicaid Services ('CMS') reimburses direct-to-consumer telehealth visits for Medicare patients. Currently, Medicare greatly limits the circumstances under which it will reimburse telemedicine services. The fear among payers is that telemedicine will be one more service to pay for rather than a replacement for existing services. But as technology continues to improve, and private payers test the economics, the industry is hopeful that CMS will recognise the value of telemedicine and establish a more comprehensive reimbursement model.

Until then, state laws are addressing reimbursement in various ways. Most states cover telemedicine services under Medicaid. The majority of states, including Texas, also have 'coverage parity,' where

a private health plan may not exclude a telemedicine service from coverage solely because the service is not provided through an in-person consultation. Further, under Texas law, the patient's deductible or co-payment for a telemedicine service may not exceed the payment that would be due for the same service if provided in person. Texas law also tries to empower consumers by requiring health plans to post their telemedicine policies and payment practices on the plan's website. However, unlike some states, such as Colorado and Delaware<sup>9</sup>, the Texas Bill does not include 'payment parity,' so there is no requirement that the health plan pay the provider the same amount that the plan would pay if the service were provided through a face-to-face visit. Moreover, the Texas statute, similar to most state 'telehealth parity' statutes, does not include audio-only telephone consultations, text-only email messaging, or fax-based telemedicine services in these beneficial policies.

Even with the most favourable parity language, there is no absolute right to payment for telemedicine services because payer arrangements are based in contract. Statutory parity language simply gives the telemedicine provider leverage when negotiating with private payers. Telemedicine providers should be aware of the parity language in relevant state laws, but must also be prepared to negotiate with private insurance plans to contract for coverage.

### Conclusion

With the passage of Senate Bill 1107, the future of telemedicine looks bright. In addition to the precedent and support of an influential state, the population of Texas means that telemedicine providers have a large potential new patient base. Yet key questions remain regarding controlled substance prescriptions and reimbursement, and even Texas is not big enough to answer these questions alone. The US federal Government must weigh in and set policy in these areas to facilitate telemedicine's further growth.

1. 122 Tex. Admin. Code §§ 174.6, 174.7 (2010).

2. 22 Tex. Admin. Code §§ 174.6, 190.8 (2015).

3. Complaint, Teladoc, Inc. v. Tex. Med. Bd., No. 1:15-cv-343 (W.D. Tex. Apr. 29, 2015), ECF No. 1.

4. Guttmacher Inst., Medication Abortion: As of 1 July 2017, State Laws and Policies, <https://www.guttmacher.org/state-policy/explore/medication-abortion> (last visited 28 July 2017) (noting that 19 states, including Texas, 'require that the clinician providing a medication abortion be physically present during the procedure, thereby prohibiting the use

of telemedicine to prescribe medication for abortion remotely').

5. Planned Parenthood of the Great Northwest and the Hawaii Islands v. Wasden, 1:15-cv-557 (D. Idaho 2016).

6. Abigail R.A. Aiken et al., Self reported outcomes and adverse events after medical abortion through online telemedicine: population based study in the Republic of Ireland and Northern Ireland, 357 BMJ 2011 (2017).

7. 21 U.S.C. § 802(54) (defining the term 'practice of telemedicine').

8. 75 Fed. Reg. 15,595, 15,603 (2009).

9. See, e.g., Co. Rev. Stat. § 10-16-123 (2016); Del. Code Ann. Tit. 18 § 3370 (2016).