

## *Emerging issues in Texas telemedicine regulation*

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Growing use of telemedicine is raising questions for the Texas Legislature about how best to address medical services provided at a distance. Telemedicine has been used in the United States since the 1970s and in Texas since the 1980s, traditionally to deliver care in niche specialties and to hard-to-reach populations, such as patients in rural areas or those in the military, in prison, or working on offshore oil rigs.

In its earliest form, telemedicine was used mainly at a relatively small number of sites with the equipment and transmission capabilities needed to connect patients with health care providers. In the 1990s and 2000s, hospitals and clinics expanded its use for consultations and for remotely monitoring patients' medical conditions. Now, faster internet connections, the prevalence of smartphones, and increased insurance coverage for telemedicine allow people to use it in more ways than ever before.

In response to these advances, the Texas Medical Board adopted rules in 2010 and 2015 governing physicians' use of telemedicine. In 2015 the board's authority in this area faced a legal challenge from the telemedicine industry. The same year, state legislation was proposed, but not enacted, to allow telemedicine companies to operate in Texas without following a board rule on establishing a telemedicine relationship between doctor and patient.

Today, with board rules in legal limbo, questions remain about how and where telemedicine may be used and the degree to which it should be regulated by the Texas Medical Board. This report focuses on this and other issues emerging in state regulation of telemedicine, including establishing the physician-patient relationship, prescribing medication online, practicing across state lines, and regulating insurance coverage.

*This report focuses  
on emerging issues and debate  
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telemedicine.*

### Overview

Telemedicine is the delivery of health care with advanced telecommunications technology to connect a doctor or other provider under a doctor's supervision with a patient in a distant location. What distinguishes telemedicine from the practice of medicine in other settings is the provider's use of advanced telecommunications technology in assessing, diagnosing, or treating

the patient (see *Telemedicine in statute*, below). According to the Texas Medical Board, telemedicine is a “modality” — a way of providing medical care — rather than a separate medical practice.

Another modality is telehealth service. The distinction between telemedicine medical service and telehealth service in Texas lies in whether the practitioner in charge of delivering the care is a physician (telemedicine) or another health professional not under a physician’s supervision (telehealth). Unless otherwise specified, this report focuses on telemedicine medical service.

In general, a traditional health care interaction in a doctor’s office, clinic, or similar setting is known in the telemedicine industry as an “in-person” visit. An interaction

in which the patient and provider communicate through real-time video by computer or smartphone is sometimes informally referred to in the telemedicine industry as a “face-to-face” visit. The patient’s location is known as the “patient site” and the location of the health care provider as the “distant site.” The term “face-to-face” may be defined differently by different actors or may be left undefined in rule or statute, as it is in the Medicare rules on telemedicine visits. Under Texas Medical Board rules, a “face-to-face” visit requires the patient to meet with the provider in person or at an established medical site. According to the Texas Medical Board, an “established medical site” is a patient site:

- at which there is a health care professional to present the patient to the physician at the distant site; and
- that has sufficient technology and medical equipment to allow for a physical evaluation and sufficient size to accommodate patient privacy.

Telemedicine also can be used to transmit a patient’s digital images for a radiological consultation or for at-home telemonitoring of a patient’s health. Telemonitoring is used for patients with chronic diseases, who use a wearable device to send data, such as blood pressure, to the physician at a distant site. With this information, the physician can help the patient avoid health emergencies and frequent in-person check-ups. Although electronic medical records involve digital transfer of patient information, their use typically is not considered “telemedicine” according to the federal Health Resources and Services Administration.

Maintaining confidentiality of medical information and obtaining the patient’s informed consent for a telemedicine service present challenges due to the physical distance between patient and provider. Texas law requires a patient’s medical information to be kept confidential when using telemedicine or telehealth.

**History.** Telemedicine has been used in some form in Texas for more than 30 years, but its use in the state’s health science centers and nonprofit health care facilities increased in 1999 after implementation of a series of telecommunications infrastructure grants authorized by the 76th Legislature that were designed to increase access to medical care in rural or underserved areas. Texas also has used telemedicine to provide health care in prisons since the early 1980s (see *Telemedicine and telehealth services in state prisons*, page 3).

### Telemedicine in statute

The following statutory definition of “telemedicine medical service” appears in a number of Texas codes, including Government Code, [ch. 531](#), which governs the Texas Health and Human Services Commission:

A health care service that is initiated by a physician or provided by a health professional acting under physician delegation and supervision, that is provided for purposes of patient assessment by a health professional, diagnosis or consultation by a physician, or treatment, or for the transfer of medical data, and that requires the use of advanced telecommunications technology, other than telephone or facsimile technology, including:

- compressed digital interactive video, audio, or data transmission;
- clinical data transmission using computer imaging by way of still-image capture and store and forward; and
- other technology that facilitates access to health care services or medical specialty expertise.

Government Code, sec. 531.001, contains a related definition for “telehealth service” to mean a health service provided by any health professional, other than the provider of telemedicine medical service, and that depends on advanced telecommunications technology as described above.

As use of telemedicine began to expand in the early 2000s, critical issues for lawmakers included the state's role in building a telecommunications infrastructure to support the technology, providing for insurance reimbursement for telemedicine services, establishing health care providers' roles and liabilities, and protecting confidentiality of patient medical information. Some of these issues, including patient confidentiality and gaps in telecommunications infrastructure, have since partially been addressed by advances in technology, including better data encryption and widespread access to high-speed internet and smartphones. (For more on the history of telemedicine in Texas, see [Telemedicine in Texas: Public Policy Concerns](#), HRO Focus Report Number 76-22, May 5, 2000.)

**Interim charges.** More recently, state leaders identified several issues, including rural access to telemedicine, to study in advance of the regular session of the 85th Legislature. The House Committee on Public Health published an interim [report](#) on the history of telemedicine, its use in rural areas, the adequacy of the state's technological infrastructure, and reimbursement practices for telemedicine, including through health insurance. The Senate Committee on Health and Human Services [reported](#) on barriers to implementation and access to telemedicine in rural areas, as well as the use of telemonitoring and telemedicine services to improve outcomes for those with complex medical needs and those confined in correctional facilities.

## Recent legal developments

Telemedicine medical services are provided in Texas under laws enacted by the Legislature and rules adopted by the Texas Medical Board, the state's physician licensing agency. Telehealth services, such as video-based mental health counseling, are regulated by the board that governs the health profession in question.

**State law and board rules.** Occupations Code, [sec. 111.004](#) authorizes the Texas Medical Board, in consultation with the Texas Commissioner of Insurance, to adopt rules for telemedicine medical services necessary to:

- ensure that patients using telemedicine receive appropriate, quality care;
- prevent abuse and fraud in telemedicine;
- ensure adequate supervision of non-physician health professionals who provide telemedicine;

- establish the maximum number of non-physician health professionals that a physician may supervise through telemedicine; and
- require a face-to-face consultation between a patient and a physician providing a telemedicine medical service within a certain number of days following an initial telemedicine medical service only if the physician has never seen the patient.

Under Occupations Code, [ch. 165](#), the Texas Medical Board may impose an administrative penalty of up to \$5,000 against a board-licensed physician for each violation of a rule or order.

In 2010, the medical board adopted rules designed to accommodate developing trends in health care delivery, including increased use of telemedicine. In 2015, it adopted new rules on where and how physicians could provide medical services, including through telemedicine. These rules require a physician to conduct an in-person physical exam or face-to-face exam enabled by telemedicine technology at an established medical site before diagnosing, treating, or prescribing through telemedicine.

## Telemedicine and telehealth services in state prisons

Texas has used telemedicine or telehealth services in correctional settings since the 1980s. Services provided to offenders currently range from primary care and pharmacy services to mental health, dialysis-nephrology, and HIV care. Texas Department of Criminal Justice (TDCJ) facilities are equipped with medical monitoring equipment that allows patient information to be presented to a health care provider at a distant site. The program uses electronic medical records to transfer patients' medical information from the correctional unit to the health care provider.

In 2016, the University of Texas Medical Branch Correctional Managed Care program used telemedicine to serve 119,000 offenders in 83 units throughout the TDCJ system. In fiscal 2015, the program reported 131,699 telemedicine or telehealth encounters, compared to about 10,000 such encounters performed at TDCJ in fiscal 1999. The Texas Tech University Health Sciences Center conducts more than 4,500 prison telemedicine consultations a year for 32,000 inmates in 23 units in the TDCJ system.

**Court challenge and temporary injunction.**

A Dallas-based telemedicine provider, Teladoc, Inc., filed suit in April 2015 in the U.S. District Court for the Western District of Texas against the Texas Medical Board to block [rule 190.8](#) requiring an in-person or face-to-face physical exam before diagnosing or treating a patient or prescribing medication, including during a telemedicine visit. Those challenging the medical board’s rules say they improperly restrict competition within Texas medicine, which harms the business prospects of telemedicine companies and reduces consumer access to affordable care. They say the medical board’s actions violate the Sherman Antitrust Act. Those who support the medical board’s rules say rule 190.8 is an extension of a longstanding provision requiring a physician to have examined a patient before giving a diagnosis or prescribing a medication. Board rules do not restrict competition, they say, and are consistent with the state’s authority to regulate occupations in the interest of protecting the public.

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In May 2015, the district court judge issued a temporary injunction blocking enforcement of the Texas Medical Board’s rule 190.8, and the case is stayed until April 2017. After the injunction, the Texas Medical Board appealed to the 5th U.S. Circuit Court of Appeals but withdrew its appeal in October 2016. The injunction issued by the district court is in effect while the case is pending, during which time the medical board’s rule cannot be enforced.

Before the recent lawsuit, *Teladoc, Inc. v. Texas Medical Board*, some Texas telemedicine software companies operated under medical board rules and continue to do so. Some Texas businesses meet the requirement for an in-person or face-to-face physical examination by allowing patients to schedule video-based telemedicine visits only with their existing physicians. A patient has an “existing physician” if the patient has had an in-person or established medical site visit with that physician. By contrast, other companies, including Dallas-based Teladoc, allow patients to see a new physician at any time through a phone- or video-based telemedicine visit.

**Locations for telemedicine.** The location of each party when the patient-provider relationship is established is key in telemedicine. Plaintiffs in the *Teladoc* lawsuit say

patients should be allowed to use telemedicine medical services anywhere and to see a new health care provider for the first time using a smartphone or computer. Before its widespread use among consumers, telemedicine interactions in Texas generally had conformed to the Texas Medical Board requirement, now enjoined, for a patient to have seen a provider in person or to have visited an “established medical site.”

**Established medical sites.** Under Texas Medical Board rules, if a patient sees a health care provider for the first time or presents with a new condition, the patient may use telemedicine only at an “established medical site.” The

site must have sufficient technology to allow a health professional, known as a “site presenter,” to perform a physical exam and present the patient to a health care provider at a distant site. It also must be large enough to ensure patient privacy. Established medical sites may include a school nurse’s office, an oil rig, a community center, a pharmacy, a prison, or

anywhere that meets the medical board’s privacy and technology requirements and has a health professional, such as a nurse, emergency medical technician, or pharmacist, on site.

**Other locations.** Texas Medical Board rules allow a patient to be treated by telemedicine at home or at a non-established medical site if a relationship already exists between the patient and the treating physician or if the patient’s established physician has made a referral. A patient may use telemedicine at home to seek follow-up care for a previously diagnosed condition, see a new provider with a referral from the established physician, or seek treatment for a new condition if the distant site provider already has performed an evaluation in person or at an established medical site. A physician using telemedicine to treat a new condition must advise the patient to see a physician at an established medical site or in person within 72 hours if symptoms do not resolve.

**Other health services.** Requirements for mental health services delivered by telemedicine or telehealth differ somewhat from those for other telemedicine medical services, especially on the need for an initial physical exam (see *Telemedicine mental health services*, page 5).

## Proposals and debate

Debate on telemedicine has centered on the extent to which the Texas Medical Board should have regulatory authority over telemedicine services. As use of telemedicine increases across the country, lawmakers also could grapple with other issues being considered in Texas and other states, including:

- how the physician-patient relationship should be established;
- whether an existing physician-patient relationship or physical examination is needed for online prescribing;
- whether to join an interstate compact for nursing or physician treatment; and
- whether telemedicine visits should be reimbursed at the same rate as other medical visits.

**Physician-patient relationship.** At the heart of the legal dispute between Teladoc and the Texas Medical Board is whether Texas law should allow the medical board to require a face-to-face consultation (in person or at an established medical site) to establish the physician-patient relationship for telemedicine or whether an initial consultation could occur solely online.

The Texas Medical Board requires a physical exam to establish the physician-patient relationship for non-mental health services. Unlike other states, such as Florida, Texas also specifies that a physical exam should

### Telemedicine mental health services

Texas Medical Board rules do not require a distant site provider to perform a physical exam before a patient receives telemedicine mental health services, except in a behavioral health emergency. Distant site providers must establish the physician-patient relationship when providing mental health services, either at the time of the initial face-to-face telemedicine visit (for example, using a secure video call) or with a traditional in-person visit, by obtaining a patient history, a mental status examination, and diagnostic and laboratory testing as needed. For a face-to-face visit, another health care provider is not required to be with the patient to present symptoms to the physician except in a behavioral health emergency.

be done at an established medical site or in person (by the patient's physician or the physician to which the patient was referred). Some states' medical boards do not have telemedicine-specific rules and instead apply existing rules on medical practice, including for physical exams, to telemedicine medical services.

[HB 3444](#) by Laubenberg, a bill introduced but not enacted by the 84th Legislature in 2015, would have removed medical board authority under Occupations Code, sec. 111.0004 to adopt rules requiring a face-to-face consultation for an initial telemedicine service. Instead, a physician would have been allowed to establish this relationship with an initial encounter through telecommunications technology under a written protocol adopted by the physician or the organization in which the physician practiced. The bill would have required a physician to use discretion in determining when a face-to-face exam was necessary and to ensure the physician provided services with the same standard of care as in a traditional setting. [SB 1177](#) by Eltife, an identical bill, died in the Senate Health and Human Services Committee. While neither bill received a hearing in 2015, the debate on the board's role in regulating telemedicine is active in the ongoing lawsuit, and similar proposals could emerge in 2017.

**Supporters of restricting board authority to require face-to-face evaluations** to establish physician-patient relationships say the rules limit access to medical care without necessarily improving quality. The rules exacerbate rising health care costs and a lack of access to primary care physicians, they say.

Texas is a vast state with a large rural population, supporters say, making it ideal for widespread use of telemedicine under a regulatory scheme that does not hinder its expansion. Advocates say expanded access to telemedicine would help rural residents more efficiently access care through telemedicine apps and websites. Current technology is sophisticated enough to allow an accurate diagnosis through a video call, they say, and rules requiring medical site visits are overly burdensome.

Supporters say board rules protect the traditional model without benefit to patient safety. Telemedicine often costs less than a traditional doctor's visit and could lower patient costs while providing new revenue for physicians. They say a technology-neutral definition of telemedicine in state law could allow patients and doctors to choose how to

communicate, increasing convenience without sacrificing safety. This balance could be achieved by requiring an in-person or medical site visit only when a physician determined it to be medically necessary.

**Opponents of restricting board authority to require face-to-face evaluations** to establish physician-patient relationships say this oversight provides the best balance of convenience and safety to ensure quality care for Texans.

They say rules requiring exams in person or at an established medical site before using telemedicine protect both physician and patient. Physicians cannot diagnose patients properly without a physical exam, opponents say, either in person or through a video call with a health professional using diagnostic technology at an established site. Absence of strong rules could erode accountability, they say, allowing physicians to diagnose or prescribe drugs to patients they have never seen in person or at an established medical site and who may not have the symptoms they claim. They say patients could be wrongly diagnosed and receive lower levels of care.

Current rules have allowed Texans to use telemedicine in rural areas and the state's medical centers, according to opponents. Many Texas-based companies have operated successfully under these rules for years, they say, which has not prevented development of pilot projects or access to telemedicine services by rural Texans.

**Online prescribing.** According to a 2013 report by the Robert J. Waters Center for Telehealth and e-Health Law, Texas was one of 44 states to prohibit prescribing a substance, controlled or otherwise, to a patient online or in person without an established physician-patient relationship or a physical exam. The report said Texas was one of 19 states specifically allowing physical exams to be done electronically and one of 26 that did not allow a medical questionnaire or a patient-supplied history to replace a physical exam.

The federal Ryan Haight Online Pharmacy Consumer Protection Act requires a patient to have had a medical evaluation either in person or by telemedicine according to applicable state and federal law before receiving a controlled-substance prescription online. In addition, under the act, the patient must be physically located in a hospital or clinic to receive such a prescription through telemedicine. E-prescribing, when a provider sends a prescription electronically to a pharmacy, is not considered

online prescribing, according to the Center for Connected Health Policy, a telehealth policy organization.

Those who support allowing online prescribing without a physical exam, by telemedicine or otherwise, say it would help in rural areas without access to nearby medical centers and that several states allow it. While a physical exam should be required in some cases, they say, patients with existing or easily diagnosed conditions can safely receive a non-controlled substance prescription by telemedicine without a new exam. Others say a physical exam is the best way to determine what a patient needs, with an exam by telemedicine and a telepresenter being the next best option. They say prescribing medication to a patient without a thorough physical examination could lead to harmful drug interactions or overuse of antibiotics.

**Licensing and compacts.** Licensing requirements determine who may practice telemedicine and where. Professional licensure portability — whether physicians in one state may practice in another state by telemedicine — is another issue facing policy makers. Physicians in Texas and 47 other states must have a medical license in

### Pilot project for rural services

In 2015, the 84th Legislature enacted [HB 479](#) by Bell, authorizing a pilot project for “next generation 9-1-1 telemedicine medical services.” It was implemented in February 2017, with services expected to begin in March. The project allows regional trauma resource centers to provide instruction through telemedicine to rural emergency medical services providers and health care providers at rural area trauma facilities.

Supporters of the program said it would increase access to high-level trauma and emergency care for Texans in rural areas who live hours away from a Level 1 trauma facility. The project focuses on counties with populations of 50,000 or less as well as larger counties with isolated or sparsely populated areas. The law requires the Texas Tech University Health Sciences Center to help establish the pilot project and requires the Commission on State Emergency Communications to provide technical assistance. Funding comes from money collected under a 9-1-1 surcharge appropriated to the commission.

the state in which the patient is located in order to practice telemedicine in that state, according to a 2013 report by the Federation of State Medical Boards. The same report found that medical boards in 14 states, including Texas, issue out-of-state licenses or certificates allowing out-of-state physicians to practice telemedicine across state lines. Although requirements vary, these licenses generally have fewer requirements and are easier to obtain than a full state medical practice license. Out-of-state telemedicine licenses issued by the Texas Medical Board do not allow license holders to physically practice medicine in Texas, which would require a regular Texas medical license. The out-of-state telemedicine license allows out-of-state physicians to consult with Texas physicians and provide follow-up care for patients for whom “the majority of patient care was rendered in another state,” as defined by the board.

Some observers in Texas favor joining an interstate compact that would allow out-of-state physicians to use telemedicine for Texas patients and Texas physicians to use it in participating states. The Interstate Medical Licensure Compact was established in 2015 with the goal of simplifying and expediting physician licensing across state lines. Texas has previously joined interstate compacts to expand where nurses may practice and for emergency medical services personnel licensure. Proponents of an interstate compact for telemedicine say it could increase access to low-cost, high-quality health care while protecting the public by allowing states to share disciplinary information about bad actors. Others question whether allowing physicians to practice across state lines without a medical license in each state would adequately protect the public. They say state telemedicine licenses already allow physicians to either consult with physicians in another state or treat patients through telemedicine.

**Health insurance coverage.** Many states, including Texas, have some requirement that telemedicine be covered by health insurance. According to the National Conference of State Legislatures (NCSL), in 2015, 32 states and the District of Columbia had laws on reimbursement for telemedicine by private insurance. Some, including Texas, require private payer reimbursement of telemedicine to be at the same rate or “equivalent to” in-person or face-to-face services. Others require payment “on the same basis” as in-person services, allowing private payers to consider different costs for telemedicine, such as facility and administrative fees. According to NCSL, 23 states and the District of Columbia

require private insurance to cover and reimburse telehealth at a rate comparable to that for in-person services.

Texas Insurance Code, ch. 1455, prohibits health benefit plans from denying coverage for a telemedicine or telehealth service solely because the service is not provided face-to-face. The Insurance Code also requires the deductible, copayment, or coinsurance for such services to be the same as or less than a comparable face-to-face service. Although costs for telemedicine and telehealth cannot be higher than an in-person visit, health insurance plans and employers may treat telemedicine visits differently, with lower copays for consumers and lower reimbursement rates for providers. Health insurers and employers also may contract with a separate network of providers solely for telemedicine services or may contract with a company such as Teladoc, Inc. to provide those services under its own provider network. The 85th

## Medicaid, CHIP, and ERS

**Medicaid and CHIP.** Texas is one of 49 states requiring Medicaid programs to have some coverage for telemedicine, according to NCSL. Texas law requires telemedicine services under Medicaid and the Children’s Health Insurance Program to be reimbursed at the same rate as Medicaid for a comparable in-person service. Two bills enacted by the 84th Legislature in 2015 affected telemedicine and telehealth reimbursement in Texas. [HB 1878](#) by Laubenberg requires the Texas Health and Human Services Commission (HHSC) to ensure that Medicaid reimbursement is provided for telemedicine delivered at schools, regardless of the primary care physician on record. [HB 3519](#) by Guerra authorizes HHSC to allow Medicaid reimbursement for home telemonitoring services until September 1, 2019. Telemonitoring allows patients to track vital signs at home and relay the information to a health care provider for assessment.

**ERS.** In 2015, NCSL reported that 24 states allowed some coverage for telehealth in state employee plans. In 2016, the Employees Retirement System of Texas (ERS) began allowing reimbursement for virtual health visits through the HealthSelect of Texas plan. HealthSelect of Texas does not require a patient to have a primary care provider or a referral for a virtual visit but does require use of internet-connected audio and video.

Legislature may consider proposals to change these practices, such as requiring that telemedicine services be reimbursed at the same rate and through the same mechanism as comparable in-person services, or requiring that telemedicine medical services be one of many benefits provided to patients under one provider network.

**Supporters of requiring telemedicine to be treated the same as other medical services for insurance purposes say** that reimbursement rates should be at least the same as those for comparable in-person services and that insurers and employers should not use separate provider networks for telemedicine. While telemedicine may help with access to care in sparsely populated areas, reimbursement rates for telemedicine are too low and often do not account for the time and administrative work involved. Rural medical practices are becoming less viable as some health plans do not include rural physicians in their provider network for telemedicine medical services, but instead contract with a telemedicine company located in a major city. Rural patients on these plans have access to telemedicine but usually can see a doctor only in a major Texas city through telemedicine, not their local doctor. Instead of contracting with a separate network of physicians for telemedicine services, health plans could offer telemedicine services as part of a capitated or managed care plan, with one provider network for all

services, including telemedicine medical services. Rural patients could see their local physician or a physician in a major area, and rural physicians would be reimbursed for providing telemedicine services.

While contracting with only one telemedicine company to provide telemedicine services might save patients or health plans money, it could contribute to fragmentation of care and prevent rural patients from establishing a medical home with one primary care doctor.

**Opponents of requiring telemedicine to be treated the same as other medical services for insurance purposes say** that allowing health insurers to set lower reimbursement rates for telemedicine services would allow more patients to use telemedicine at a lower cost while still giving them the option of seeing their local physician in person. Mandating that health insurers and employers contract with the same network of physicians for telemedicine medical services as for in-person services could increase costs for consumers and restrict access to care. Health plans' current contracts with telemedicine companies provide low-cost care in rural areas to patients who otherwise might not be able to see a physician due to a provider shortage in rural Texas.

— by *Lauren Ames*

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