

Telemedicine: State Legislation Update

On May 27, 2017, Texas Governor Greg Abbott signed Senate Bill 1107, which sets forth guidelines for telemedicine and telehealth service delivery within the State of Texas.¹ Upon the governor's signature, Texas became the last state to grant physicians the ability to establish a *physician-patient relationship via telemedicine platforms*.² Specifically, the legislation details three conditions for establishing a physician-patient relationship via telemedicine medical services:

- (1) The physician must have *"a preexisting practitioner-patient relationship with the patient"*;
- (2) The physician must *"communicate[], regardless of the method of communication, with the patient pursuant to a call coverage agreement in accordance with Texas Medical Board Rules"*; and,
- (3) The physician must provide telemedicine services through either *"synchronous audiovisual interaction"* or *"asynchronous store and forward technology...in conjunction with synchronous audio interaction."*³

In addition to these guidelines, the new legislation gives the Texas Medical Board jurisdiction over the law, including the right to:

- (1) *"Ensure that patients using telemedicine medical services receive appropriate, quality care"*;
- (2) *"Prevent abuse and fraud in the use of telemedicine medical services, including rules relating to the filing of claims and records required to be maintained in connection with telemedicine medical services"*;
- (3) *"Ensure adequate supervision of health professionals who are not physicians and who provide telemedicine medical services"*; and,
- (4) *"Establish the maximum number of health professionals who are not physicians that a physician may supervise through a telemedicine medical service."*⁴

Other notable mandates from the legislation include:

- (1) A health professional providing a telemedicine medical service is *"subject to the standard of*

*care that would apply to the provision of the same health care service or procedure in an in-person setting."*⁵

- (2) Payors cannot reject the reimbursement of telemedicine services on the basis that the service *"is not provided through an in-person consultation."* However, audio-only or visual-only platforms are not protected under this rule.⁶
- (3) Providers cannot *"prescribe[] an abortifacient or any other drug or device that terminates a pregnancy"* if a physician-patient relationship is to be established via telemedicine medical services.⁷
- (4) At this time, a physician-patient relationship via telemedicine medical services cannot be established for mental health services.⁸

This legislation is anticipated to end a two-year antitrust lawsuit between Dallas-based telehealth vendor Teladoc and the Texas Medical Board.⁹ Teladoc filed suit against the Texas Medical Board arguing that the state's original laws requiring in-person meetings between physicians and patients *"dramatically restrict[s] telehealth services in Texas"* and is anti-competitive under section 1 of the Sherman Act.¹⁰ With the new legislation repealing this in-person requirement, the *direct-to-consumer* telehealth market is expected to increase in Texas.¹¹ Teladoc and some of its competitors, such as American Well, MDLive, and Doctor on Demand, have already announced plans to expand their business enterprises within the state in response.¹²

Texas is not the only state experiencing a shift in its telemedicine landscape. In 2016, 44 states introduced over 150 pieces of legislation addressing a wide array of telemedicine-related issues.¹³ Specifically, states have passed laws relating to telemedicine reimbursement and standards of care for telemedicine service delivery.¹⁴ For example, Vermont recently passed legislation requiring insurers to cover telemedicine consultations that occur outside of healthcare organizations, such as the home or workplace, effective October 1, 2017.¹⁵ Additionally, New Jersey is considering passing a law that would subject health practitioners providing telemedicine consultations to the same standards of care and rules as those practitioners providing an in-person consultation.¹⁶ As Texas and other states experience increases in telemedicine utilization, lawmakers will likely continue

to introduce and revise laws centered on regulating its standard of care and reimbursement policies.

In addition to state initiatives, attempts have been made on the federal level to promote telemedicine use. For example, the *21st Century Cures Act*, signed into law in 2015, gives the *Centers for Medicare and Medicaid Services* (CMS) the authority to identify telemedicine's potential through demonstration projects.¹⁷ The *Expanding Capacity for Health Outcomes Act* (ECHO) mandates that the *Department of Health and Human Services* (HHS) researches and reports on the usefulness of telemedicine in rural and underserved areas.¹⁸ However, despite the progress that has been made to promulgate laws related to telemedicine across the U.S., there remains a patchwork of laws, which vary from state to state. This trend is especially pronounced in regards to parity laws (i.e., laws that require private payors to reimburse for telemedicine services at rates comparable to in-person services),¹⁹ in which only 33 states and the District of Columbia have passed to some degree.²⁰ Further, Medicaid coverage of telemedicine services also differs, with 48 state Medicaid programs providing coverage, but to varying degrees.²¹ The ideologically divisive views on healthcare reform in the U.S. have resulted in the majority of telemedicine reform measures occurring at a state, rather than at a federal, level.²²

With telemedicine market proliferation comes the opportunity for the development of health services in areas that lack access to health providers.²³ Specifically in Texas, numerous lawmakers, companies, and legal professionals have argued that *"Texas' continued requirement of the initial face-to-face encounter has stunted the growth of telemedicine in a state that is well positioned to benefit from telemedicine's ability to connect patients in underserved or rural areas without immediately access to the right healthcare providers that the patient needs the most."*²⁴ With Texas ranking 46th in the U.S. in the number of primary care physicians per capita, millions of residents will now have convenient access to medical care via telemedicine services.²⁵ The increase in telemedicine usage does not only have positive implications for Texas, but for other states as well. Over 6,000 *Health Professional Shortage Areas* (HPSAs) have been identified across the U.S., affecting 60 million people.²⁶ It is estimated that over 8,000 primary care physicians would be needed to alleviate these shortages.²⁷ Increasing access to, and encouraging the use of, telemedicine services through legislation may be one of the viable solutions to addressing this critical shortage.

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- 3 "Telemedicine and Telehealth Services" T.X. S.B. 1107 § 111.005 (2017).
- 4 *Ibid.*
- 5 *Ibid.*
- 6 *Ibid.*
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- 10 "Teladoc, Inc., et al. v. Texas Medical Board, et al." Case No. 16-50017 (September 9, 2016), Brief for the United States and the Federal Trade Commission As Amici Curiae Supporting Plaintiffs-Appellees, p. 4.
- 11 "Texas Legislators Vote to Enact New Telemedicine Regulations" By Eric Wicklund, mHealth Intelligence (May 12, 2017), <https://mhealthintelligence.com/news/texas-legislators-vote-to-enact-new-telemedicine-regulations> (Accessed 6/2/17); "With New Texas Law, Telemedicine Passes an Important Milestone" By Eric Wicklund, mHealth Intelligence (May 31, 2017), <http://mhealthintelligence.com/news/with-new-texas-law-telemedicine-passes-an-important-milestone> (Accessed 6/2/17).
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Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Master in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institution of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Certified Valuation Analyst (CVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, and is the author of several books, the latest of which include: *“The Adviser’s Guide to Healthcare – 2nd Edition”* [2015 – AICPA]; *“Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services”* [2014 – John Wiley & Sons]; *“Accountable Care Organizations: Value Metrics and Capital Formation”* [2013 – Taylor & Francis, a division of CRC Press]; and, *“The U.S. Healthcare Certificate of Need Sourcebook”* [2005 – Beard Books].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious *“Shannon Pratt Award in Business Valuation”* conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS). In 2016, Mr. Cimasi was named a *“Pioneer of the Profession”* as part of the recognition of the *National Association of Certified Valuators and Analysts (NACVA)* *“Industry Titans”* awards, which distinguishes those whom have had the greatest impact on the valuation profession.



Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of *“The Adviser’s Guide to Healthcare – 2nd Edition”* [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant’s Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies; Business Appraisal Practice*; and, *NACVA QuickRead*. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



John R. Chwarzinski, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis. Mr. Chwarzinski is the co-author of peer-reviewed and industry articles published in *Business Valuation Review* and *NACVA QuickRead*, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo.

Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.



Jessica L. Bailey-Wheaton, Esq., is Vice President and General Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey-Wheaton is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the *Journal of Health Law & Policy*.



Daniel J. Chen, MSF, is a Senior Financial Analyst at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he develops fair market value and commercial reasonableness opinions related to healthcare enterprises, assets, and services. In addition he prepares, reviews and analyzes forecasted and pro forma financial statements to determine the most probable future net economic benefit related to healthcare enterprises, assets, and services and applies utilization demand and reimbursement trends to project professional medical revenue streams and ancillary services and technical component (ASTC) revenue streams. Mr. Chen has a M.S. in Finance from Washington University St. Louis.