Why It's Time to Embrace Telehealth as the New Normal

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While the concept of telemedicine may not be completely foreign, the experience of this medical care currently exists at the boundaries of the general (and legal) community. Nevertheless, as technology grows and continues to shrink the distances between us, so too have we seen the growth of telemedicine, and to a broader extent, telehealth.

As we begin to adjust to the new normal of life with COVID-19, be it through social distancing, avoiding large crowds and "hunkering down" with family, one issue thrust to the forefront is telemedicine—a relatively new type of medical practice that may help treat symptomatic individuals while stemming the spread of the coronavirus.

The experience of going to the doctor's office, either for a routine checkup or for the treatment of a particular condition, is one shared by millions of Americans. And to many, while the concept of telemedicine may not be completely foreign, the experience of this medical care currently exists at the boundaries of the general (and legal) community. Nevertheless, as technology grows and continues to shrink the distances between us, so too have we seen the growth of telemedicine, and to a broader extent, telehealth. With these new expansions, we also see the charting of a new legal frontier, through which telehealth and telemedicine are likely to be operated, regulated, and ultimately, litigated, in the coming years.

A Primer on Basic Terminology and Application

In order to properly grasp the current (and future) legal issues surrounding the rapidly growing areas of telehealth and telemedicine, it is first necessary to understand the basic concepts that form the backdrop of this new landscape.

At the most basic level, the terms "telehealth" and "telemedicine" are typically differentiated according to the concept of patient care. While the specific definitions vary from state to state, telemedicine is generally considered a subset of telehealth. The latter consists of overall access to health information, which may, depending on the situation, involve the exchange of patient information, health-related education, data regarding public health and health care administration, and of course, the provision of clinical health care, all of which via some form of telecommunication medium. Telemedicine, on the other hand, is more specific, and deals primarily with the administration of individual patient care.

The methods of applying telehealth and telemedicine are inexorably tied to our technological and telecommunication

capacities. Current delivery systems include two-way video (via laptop or desktop computer), email, and even handheld devices such as smart phones and tablets. Regardless of the method, the basic tenets include a "distant site," which pertains to the location of the physician or other licensed practitioner delivering the service, and the "originating site," the site of the patient or other individual who receives those services.

Facilitating Access to Telemedicine

Given its ability to transcend county, state, and international borders, one of the legal "hurdles" facing telemedicine is the issue of medical licensure. Simply put, how can a physician at a distant site in Arizona, deliver telemedicine services to a patient at an originating site in West Virginia, Wisconsin or Maine? The answer, at least in part, can be found in an interstate agreement known as the Interstate Medical Licensure Compact, or IMLC.

At its core, one of the primary missions of the IMLC, and ultimately, telemedicine in general, is to "increase access to health care for patients in underserved or rural areas and allowing them to more easily connect with medical experts through the use of telemedicine technologies." To do this, the IMLC enables physicians to obtain licensure in multiple states, while obviating the need to submit separate applications to each individual state. At the same time, the IMLC provides protection to the public, by "enhancing states' ability to share investigative and disciplinary information."

The IMLC currently exists among twenty nine states, along with the District of Columbia and Guam. Once a physician becomes licensed in his or her home state (referred to in the IMLC as "principle location"), they can then apply for licensure in other participating states through "The Compact." As for Pennsylvania, the IMLC has already been passed and signed into law; however, implementation has been delayed due to logistics regarding information sharing.

Instructions regarding the application process, as well as the necessary criteria, are included within the IMLC's website. Current estimates project that approximately 80% of physicians in the United States meet the IMLC criteria, a factor that is likely to increase use of The Compact, and in turn, telemedicine services, in years to come.

Regulation of Telehealth

Federal and state statutes address the intersection of health care and technology. The Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic & Clinical Health Act (HITECH) provide specific protections for health data integrity, confidentiality and availability. The Patient Protection & Affordable Care Act (PPACA or the Affordable Care Act) provides oversight of the telehealth under the backdrop of the expansion of insurance coverage. The Medicare Access and CHIP Reauthorization Ac of 2015 (MACRA) incentivizes providers for efficient health care and improved outcomes, offering increased billing rates for specific services provided through telemedicine, and bonuses for implementing certain electronic billing and medical record programs.

Several states have already passed acts which specifically regulate the provision of health care through the use of technology, and within the next five years all U.S. states and territories are expected to have enacted formal telehealth legislation. Pennsylvania is

currently on its second attempt to pass a Telemedicine Act, with efforts spearheaded by state Sen. Elder A. Vogel Jr. of Beaver, Butler and Lawrence counties. The initial legislative attempt of Senate Bill 780 sought to define key components of telemedicine and set licensing requirements. Senate Bill 780 was removed from table on Sept. 26, 2018, reportedly because the bill required parity in payment for telemedicine services, meaning that the payers, generally health insurers, would reimburse telemedicine services at the same rate as in-person services.

Pennsylvania Senate Bill 857, Vogel's second attempt at passing a Pennsylvania Telemedicine Act, was referred to the Rules and Executive Nominations Committee (Pennsylvania Senate) on Nov. 21, 2019. Like its predecessor, Senate Bill 857 proposes definitions for telemedicine and telehealth, while providing temporary guidelines regarding patient evaluation and treatment services. The proposed legislation gives state departments two years to draft permanent rules and regulations.

The prior legislative stumbling block regarding parity has been addressed with language which provides temporary ground rules for telemedicine reimbursement, without the specific requirement that telemedicine services must be compensated at a rate commensurate with in-person services. While a kick-the-can approach may be a necessary first-step in enacting a telemedicine statute in Pennsylvania, the parity issue will ultimately require resolution. Payers, providers and patients currently shy away from telemedicine offerings, simply in efforts to avoid the significant confusion which exists about whether care via telemedicine services should be recognized as equal, separate-but-equal or inferior to in-person care.

What to Expect With Telehealth

Telehealth has been with us for longer than we may realize. Think back to 1895: if a physician diagnosed a fracture using the cutting-edge technology of an X-ray machine, then communicated those X-ray results to another physician via the slightly-older technology of a telephone, then those physicians were the "telemedicine pioneers" of their time. However, we are far from the days of Wilhelm Conrad Roentgen and Alexander Graham Bell.

Technology races forward, and how the law keeps pace is a decidedly open question. Courts throughout the United States have not been presented with many questions on telemedicine standards, nor about how the implementation of telemedicine may impact the provision of health care. Privacy issues have emerged, ranging from claims of improper acquisition and dissemination of protected health information in electronic format, to the alleged failure of a health care system employer to prevent a cyberattack on electronic systems containing employee protected health information.

As you read this article today, we are surrounded by uncertainty on several fronts, regarding the number of reported coronavirus cases, the availability of testing, shortages of basic medical supplies and the hunt for vaccines and treatment. We share concerns about taking loved ones for necessary medical treatment, for fear of COVID-19 exposure from another patient in a waiting room, a medical instrument, or even the medical provider who may unknowingly be carrying the virus. As we shelter in-place, we experience first-hand the benefits of a

telemedicine consult where our primary care physician has the ability to perform a physical assessment over a smartphone or computer, or remotely monitor heart rates and blood glucose levels. Our "new normal" will hopefully prompt our lawmakers to enact comprehensive telehealth legislation, and facilitate increased patient reliance on effective and safe telemedicine practices.

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