Recently I received a glossy mailing from Highmark BC/BS advertising the company’s alliance with Teladoc, a large national telemedicine provider that was in the news earlier this year because of its ongoing case against the Texas Medical Board. Although the case stirs some negative feelings, I have to admit that the ad was very attractive, and its promise of access to care “24/7/365” was somewhat alluring.

The WVSMA has an interest in the topic of telemedicine and recently convened a Telemedicine Committee to work on legislation to update current law in the 2016 session. It is a complicated issue. On the one hand, telemedicine is a beneficial technology. It is already commonly used by some in-state physicians, and it provides convenience and improves access to care, especially for patients in rural areas. On the other hand, convenience and improved access should not come at the cost of diminished quality of care, so it is important to ensure that necessary safeguards are in place.

**Current Telemedicine Law**

West Virginia’s Medical Practice Act stipulates that a state license is required for the practice of medicine. Since the physical location of the patient determines the applicable state law, a telemedicine provider who provides care (diagnosis or treatment) to a patient in West Virginia must have a WV license, regardless of where the provider is located. The Act states, in part, “A person engaged in the practice of telemedicine is considered to be engaged in the practice of medicine within this state and is subject to the licensure requirements of this article. The practice of telemedicine means the use of electronic information and communication technologies to provide health care when distance separates participants” (WV Code Sec. 30-3-13(a)).

**Telemecine Bill From 2015 Session**

During the 2015 legislative session, a bill was proposed to update telemedicine law in the state. SB 334, which passed the Senate but did not make it out of committee in the House before the end of session, would have rewritten pertinent sections of the Medical Practice Act. It would have amended licensing requirements to include some new exceptions for specific people and in specific situations (for example, for medical students or visiting faculty, and in emergencies or at sporting events). The proposed bill also added an expanded definition of telemedicine, and required that telemedicine could not be utilized unless a patient-physician relationship already existed or was established via real-time videoconferencing (with an exception for specialties such as radiology and pathology which use “store and forward” technology). Interestingly, an amended version of SB 334 also included a new section on “telehealth,” and it referred exclusively to advanced practice registered nurses (APRNs), which is unusual since the bill addressed Chapter 30, Article 3, the Medical Practice Act, rather than Article 7, which is the Registered Professional Nurses section of the code. The amended bill defined “telehealth” as “the practice of advanced practice nursing using tools such as electronic communication, information technology or other means of interaction between a licensed health care professional in one location and a patient in another location, with or without an intervening health care provider.” This is very different from the more common definition of telehealth, which is broader and not specific to any particular group of providers. The U.S. DHHS Office of the National Coordinator for Health Information Technology explains, “While telemedicine refers specifically to remote clinical services, telehealth can refer to remote non-clinical services, such as provider training, administrative meetings, and continuing medical education, in addition to clinical services” (see healthit.gov). The bill did not pass, but the original version of the bill, without the strange telehealth amendment, provides a good model for next year.
Legislative | NEWS

Telemedicine proposal for 2016

For the 2016 session, the WVSMA proposes drafting new legislation to amend the Medical Practice Act by adding a new telemedicine section that would maintain current state licensure requirements for telemedicine providers; stipulate that new patient-physician relationships must be established through either in-person exam or live video and audio consultation; and require reimbursement parity for services provided by telemedicine or traditional means.

Federal Legislation

At the federal level, an effort is underway to remove state licensure requirements for telemedicine providers. The TELE-MED Act (H.R. 3081/S. 1778), would allow a physician licensed in one state to provide telehealth services to Medicare patients in any other states in addition to the physician’s home state. One of the major groups behind this effort is the American Telemedicine Association (ATA; a Washington-DC based advocacy organization whose members include Teladoc and other provider groups, as well as major corporations such as Verizon, Sprint Business, Anthem, Panasonic, IBM, and many others). This effort to remove so-called “barriers to health care” is also supported by the U.S. Chamber of Commerce, the National Manufacturers Association, and many other groups. Several other bills, including H.R. 2948, H.R 2799/H.R. 1465, and H.R. 2066 would remove current restrictions on Medicare coverage of telehealth services. The AMA opposes the TELE-MED Act because its position is that physicians practicing telemedicine should be licensed in the state where the patient receives services.

Teladoc v. Texas Medical Board

This case, which is ongoing, began in June 2011 when the Texas Medical Board (TMB) sent a letter to Teladoc warning that its doctors could have their licenses revoked if they failed to properly establish a patient-physician relationship by having a face-to-face visit prior to providing care via telemedicine. Teladoc sued, claiming that TMB was trying to enforce an “unpublished rule.” The district court disagreed and ruled in favor of TMB. Teladoc appealed, and in December 2014 a Federal Appeals court overturned the lower court’s ruling. TMB responded by adopting an emergency rule on January 16, 2015, stating that “a face-to-face visit or in-person evaluation is required before a practitioner can issue a prescription for drugs.” Teladoc fought the rule and the appeals court again sided with Teladoc and issued a preliminary injunction to allow...
Teledoc providers who were licensed in the state of Texas to prescribe non-narcotic controlled medications based on phone consultation with patients. TMB then went through the process of formally adopting a new rule to require a physical exam prior to the establishment of a telemedicine relationship, and real-time video thereafter. The rule was supposed to have taken effect in early June, but the federal court issued another injunction to prevent the rule from being enacted until the lawsuit is concluded, on the grounds that the rule violated anti-trust laws (http://www.texmed.org/Template.aspx?id=33123).

Actions by state agencies are generally immune from antitrust laws. That means they can make rules with anticompetitive effects, so long as they clearly articulate the policy and actively supervise it. At least that was true until the Supreme Court's ruling last February in NC Board of Dental Examiners v. FTC. In that case, The North Carolina Dental board sought to prohibit teeth-whitening services by non-dentists and promulgated a new rule that only licensed dentists could provide the service in the state. The FTC sued and the case made its way to the U.S. Supreme Court. The Court held that when a controlling number of members on a state board are active participants in the occupation the board regulates, the board can invoke state action immunity only if it is subject to active supervision by the state. This opened the door for the Teladoc case in Texas, but the case would fare differently here in West Virginia since the rules by professional boards here are subject to legislative approval and are thus actively supervised by the state.

**Independent Research**

For the sake of research for this article, I decided to call Teladoc and set up a phone consult. It was not easy. The website had a security issue so I could not register online. I spent well over an hour on the phone registering with Teladoc, then Highmark (which, by the way, is not available for such purposes 24/7/365), then Teladoc again. I learned from the Highmark representative that the company plans to sever its relationship with Teladoc at the end of the year and replace it with two other national telemedicine providers, Amwell and Doctor on Demand. I also learned that Teladoc representatives sometimes give misinformation: the one who registered me informed me with absolute conviction that the physician who called me would be located in West Virginia. "Both the physician and the pharmacy must be physically located in the state where the patient is," she said, as if reciting a rule. Actually, the company only requires physicians to be licensed in the state. I checked with the Board of Medicine, and the physician who called me is, in fact, licensed in West Virginia (as well as 13 other states), although he told me he currently lives in northeastern Ohio. Aside from the registration, the process was pretty efficient. The physician called within a few minutes. I listed a few vague symptoms, and he quickly came up with a pretty serious diagnosis (which did not actually match the symptoms). To his credit, though, he gave very reasonable advice. He recommended that I schedule a visit with my local primary care doctor.

**Proposed Amendment to WVSMA Bylaws**

The WVSMA proposes that its Bylaws shall be amended by inserting a new section, as follows:

Chapter 1. Membership, Sec. 7.1 Physicians Assistants Members shall be those persons who are licensed and employed as Physicians Assistants in West Virginia and who are sponsored by an active physician member of the WVSMA. Physicians Assistants members are not eligible to hold office but may have elected or appointed committee membership, at the discretion of the acting WVSMA President.

This announcement is made in accordance with WVSMA bylaws. The Amendment will be proposed at the first session of the WVSMA Midwinter Meeting in January 2016, and delegates will vote on it during the second session. If at least two-thirds of delegates present at the session vote affirmatively, this amendment will be approved.