

## Resolving Telemedicine Disputes Through Mediation; As Telemedicine Booms, Mediation May Be The Right Prescription For Disputes

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Let's begin with two truths:

First, we are digital. In nearly every aspect of our lives, we rely on electronic communications. We have come to expect instant answers in practically every professional, consumer and social interaction. The pandemic has dramatically accelerated this digitalization in every part of our daily existence. What was an evolution in digital trends that might have taken decades to develop has—in the span of a single year—permanently changed how we live, work and learn.

Second, we want better (and quicker) access to reliable health care. Several factors are driving this. The world is getting older. A growing elderly population is increasing society's demands on medical care. The Affordable Care Act makes basic health care available to most of us. With greater access comes greater

demand. In addition, COVID-19 has sent our health care system into a tailspin. The pandemic dramatically intensified our appetite and need for immediate access to more intensive medical testing and care, which put further strain on an already challenged system.

At the intersection of these truths is telemedicine. Broadly defined, telemedicine is the electronic transmittal of medical information via secure modalities to improve patient health. It is used for primary care, chronic condition management, medication management, specialty care, mental health services and other critical care (including intensive care) that can be rendered via secure video and/or audio connections. (Telehealth is related but distinct and is slightly broader than telemedicine. Telehealth is clinical and non-clinical services conducted electronically. Here we will focus on telemedicine as



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the digital means of providing health care over physical or geographic distance.)

Telemedicine has been around for years, but its use has exploded over the past year. AARP reports, for example, telemedicine claims to private insurers grew by 5,680% in 2020. And private spending nationally on telemedicine services increased from \$60 million in March and April 2019 to \$4 billion in those same two months in 2020.

Some forecasters have opined that long-term reliance on

telemedicine may not stay at the stratospheric levels we have experienced during the pandemic. But there is little doubt that it has become an integral component of our health care system.

Health care organizations and service providers, including hospitals, physician practice groups, urgent care facilities, EMTs and pharmacies, all use telemedicine. Patients receive diagnoses, care and monitoring through telemedicine. It delivers and uses medical information in various ways. These include (i) store and forward (asynchronous), when patients, providers, specialists, et al., electronically share and/or store medical information, to later utilize when convenient or necessary; (ii) remote patient monitoring (telemonitoring); and (iii) real-time encounters (synchronous), which center on direct communications between patient and provider (or provider and provider) via specialized and secure applications.

Many of the players in telemedicine and the relationships among them are similar to ones in familiar brick and mortar health care. These include collaboration, consultation and referral among medical providers, such as hospitals, physicians, specialist groups

and other health care professionals. They also include federal health agencies and regulators, as well as their state counterparts. Private insurers (e.g., health plans) and payor entities with whom plans have medical service, care management and risk and cost-sharing agreements are taking on greater roles in how telemedicine is used—who gives it, who gets it and who pays for it. The same is true for providers of IT systems, platforms, and applications, which are integral to telemedicine.

Telemedicine also has allowed new participants to enter the health care field. These include telemedicine providers; for example, virtual medical offices or urgent care centers where patients can have discrete interactions with medical professionals for limited (and often isolated) services.

As the players and use of telemedicine proliferate, so will legal disputes. These are very similar to the ones we encounter in traditional health care, including disputes over the necessity and authorization of care, contractual terms, the scope and value of services, insurance, billing and reimbursement, and security and privacy. But telemedicine adds

notable complexities to these issues.

First, as expected, technology takes on greater prevalence and importance in digital health care. Providers of IT software, hardware and connectivity services are essential players in telemedicine. Clarity about who has what obligations to provide, maintain and ensure access to infrastructure and connectivity for telecommunications is imperative. Ensuring patient privacy and security, including compliance with HIPAA and the HITECH Act, takes on heightened importance and scrutiny in telemedicine. Set up, maintenance and management of IT systems will give rise to operational and legal issues. Inevitably, there will be an increase in the number and magnitude of disputes regarding cybersecurity breaches and their damages.

Moreover, although federal and state officials acted quickly in the pandemic to permit increased use of digital tools to accommodate emergent medical needs, the regulatory landscape of telemedicine is uncertain. Conventional wisdom says that we can expect more regulatory changes if and when we begin to contain COVID-19.

Telemedicine stakeholders must structure their relationships to create flexibility to deal with the uncertainties of an evolving regulatory regimen.

As noted above, as reliance on telemedicine increases, disputes will increase as well. A critical difference spawned by the acceleration of digital trends, including digital health, is the need for fast and efficient solutions to resolve conflicts in the evolving areas of telemedicine. Legal disputes will center on the basis and means for providers to render services to patients, provider interactions and relationships as they provide such services, and authorization and payment for such services. As telemedicine facilitates access to medical and insurance information, there will be greater opportunity (and temptation) for misuse of electronic access to patient identities and physician networks, which will implicate trade secret and contract interference issues. Parties will look to traditional ways of pursuing and deciding these disputes, such as informal negotiations, lawsuits, arbitrations and dispute resolution processes, including mediation.

Mediation is the optimal way by which parties can and should try to resolve telemedicine disputes. It provides a quick, efficient and cost-effective process to resolve disputes that, if left to languish in the courts, could delay accessibility to health care and even impede essential care.

Mediation also helps to preserve—and perhaps even improve—relationships between and among stakeholders in the telemedicine field, where reliable partnerships could serve to enhance good patient care, especially in areas (geographic, cultural, socioeconomic) where the need for such care exists and/or is growing. As a process, mediation encourages its participants to control their dispute resolution efforts and own the outcome. Again, this promotes healthy relationships among the players and helps to define workable parameters and develop reliable rules in this expanding field.

Finally, mediation gives parties the best means to deal with evolving federal and state regulations governing telemedicine. Mediation offers stakeholders a forum and process to collaborate

and tailor their relationships to account for and accommodate the uncertain and likely changing regulatory landscape. To facilitate this, parties can incorporate appropriate conditions and flexibility into their contractual arrangements.

Telemedicine is an expedient tool to address our expanding health care needs. It deserves, if not demands, a nimble yet urgent process to resolve its legal disputes. Mediation can accomplish this and will help telemedicine to continue to grow into a reliable means of health care.

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