On Friday, April 10, the Texas Medical Board voted to limit severely the ability of physicians in the state to provide two fundamental components of primary medical care via telemedicine – telemedical diagnoses and telephonic or video drug prescriptions. The vote represents the latest legal maneuver concerning a patient care modality that many observers believe is integral to today’s healthcare realities of cost-containment and twenty-four/seven primary care outside of an emergency department.

At the center of the controversy is Dallas-based Teladoc, a private company that aims to provide round-the-clock patient care via real-time telephone and video consults arranged via the internet. Teladoc’s physicians have conducted consults with millions of patients nationwide, and the company’s services are marketed to employers, health plans, associations and organizations, and Medicaid beneficiaries.

In 2011, the Texas Medical Board, which licenses and regulates physicians within the state, issued a warning to Teladoc regarding its physicians’ prescribing controlled substances via telemedicine. The company turned to the Texas courts for relief from the Board’s position. After several years of legal maneuvering, Teladoc ultimately secured a judicial determination that the Board’s restriction against telemedical prescriptions could not be defended on technical grounds of Texas state law.

In response, at its meeting in January of this year, the Texas Medical Board enacted an emergency rule that modifies Section 190.8 of Title 22, Part 9, of the Texas Administrative Code. In particular, the emergency rule prohibits the “prescription of any dangerous drug or controlled substance without first establishing a defined physician-patient relationship” (emphasis added). The emergency rule goes on to require that, at a minimum, a “defined physician-patient relationship” must include, among other things, “establishing a diagnosis through the use of acceptable medical practices” and “a physical examination that must be performed by either a face-to-face visit or in-person evaluation” (in-person evaluations do not apply to mental health services). Moreover, according to the emergency rule, “[a]n online questionnaire or questions and answers exchanged through email, electronic text, or chat or telephonic evaluation of or consultation with a patient are inadequate to establish a defined physician-patient relationship.”

At its meeting on Friday, April 10, the Board voted to uphold its emergency rule which will go into effect on June 3. Teladoc may likely continue to challenge the Board’s position in the Texas courts; therefore, it is unclear just how long the Board’s ban on telemedical diagnoses and drug prescriptions will stand. In addition, the Texas House is expected to begin considering three telemedicine bills this week, so the Board’s newly-enacted rule may be challenged by legislative action. The three bills are:

• H.B. 3444 by Rep. Laubenberg - This bill would further define telemedicine services and provider standards.

• H.B. 2250 by Rep. Coleman - This bill would amend the telehealth parity law - the law that requires health insurers to cover services delivered remotely via telemedicine at the same rate as the same service delivered in person.

• H.B. 2172 by Representative Smithee - If passed, this law could essentially eliminate a physician’s common law right to health insurance reimbursement for a telemedicine service, in many
circumstances, even if the telemedicine service was otherwise provided in full compliance with Texas law. On a national scale, this law, if passed, would set a relatively new precedent in the U.S.

Until the next episode in this continuing telemedical saga is played out, healthcare providers who integrate remote telephonic or video-based medical diagnoses or drug prescriptions into their continuum of care would be well served by reviewing the Texas Medical Board’s most recent action and the history of legal complaints and judicial actions that preceded it.