



June 3, 2010

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Via fax: (512) 305-7051

**RE: Proposed Changes to the Texas Medical Board Rules, reflected in 35 TexReg 3390 April 30, 2010, Texas Register**

Members, Board of Medical Examiners:

On April 5, 2010 I submitted comments regarding your proposed rules that impact the practice of telemedicine.

As previously mentioned, TCCRI is involved in health care policy through our Health and Human Services Task Force and we have an interest in the way Texas can deliver improved services. Texas has the highest rate of uninsured in the country and access to care in many parts of the state is a serious challenge.

In the months since I first wrote the Board, I have had time to reconsider the proposed rules. As a consequence, I have very serious reservations about how the provisions of §174.7 could limit telemedicine practice in all areas, including – and most importantly – the rural areas.

First, how many complaints has TMB received in regards to physicians practicing telemedicine, or cases of patient harm related to telemedicine? How does this compare to the number of complaint that that have resulted from error when under the direct physical supervision of a doctor in either an office setting or hospital? If it is the Board's belief that the current rules need tightening because of violations, has it issued cease and desist letters to telemedicine operators?

Second, the definitions of “established medical site” and “patient site presenter”, when read in the context of § 174.6 and § 174.7, appear to have the unintended consequence of restricting, rather than enabling, telemedicine. Specifically, § 174.7 (a) (1) requires a “face-to-face visit before providing telemedicine care.”

A qualified physician practicing telemedicine may indeed be able to provide precise medical care without a face-to-face visit. Is there evidence to the contrary? If the concern is that a patient might be misdiagnosed via telemedicine, is the Board contending that a face-to-face visit completely eliminates the possibility of an error occurring? The vast numbers of preventable medical errors that occur under the direct physical supervision of a doctor even in a hospital setting demonstrate that such a contention is false:

Experts estimate that a staggering 98,000 people die from preventable medical errors each year. More Americans die each month of preventable medical injuries than died in the terrorist attacks of Sept. 11, 2001.

In addition, a federal Centers for Disease Control and Prevention study concluded that 99,000 patients a year succumb to hospital-acquired infections. Almost all of those deaths, experts say, also are preventable.

These numbers are not absolutes. There is no definitive study — which is part of the problem — but all of the available research indicates that the death toll from preventable medical injuries approaches 200,000 per year in the United States.

- “*Within Health Care Hides Massive, Avoidable Death Toll,*” *Houston Chronicle*, August 10, 2009.

Does the Board dispute these findings as reported in the *Houston Chronicle*? If it does not, why then is additional regulation necessary to deal with problems that may arise through telemedicine? The proposed rule appears to presume that face-to-face visits are superior.

Third, creating an in-person 72 hour requirement for a face-to-face visit with a physician in rural Texas would place an additional burden on rural communities that are currently faced with a shortage of primary care physicians. Utilizing telemedicine is a market response to the fact that many rural citizens in this state have limited access to primary health care.

The 72-hour rule is an arbitrary time frame that has no medical standing and could potentially put physicians in harms way and regulate patient behaviors in an unwarranted fashion. My concerns are based on the plain wording of the proposed rule §174.7 (c) which states: “all patients must be seen by a physician for an in-person evaluation at least once a year”. This language raises serious concerns about the 72-hour rule.

This is costly for employers, individuals and the state by requiring an annual visit that may be unwarranted. Furthermore, §174.7 (c) raises many questions:

- If a patient doesn't see a doctor for a year, does that result in a disciplinary action against the telemedicine provider who meets all of the others parts of this rule? If so, the telemedicine provider is punished for what the patient did not do. What is the burden on the patient and/or the PCP?

- Does this mean a patient must see a doctor once a year in perpetuity?
- Would this allow a patient to see any licensed physician in order to be in compliance?
- In the proposed rule, does the word “physician” mean a Primary Care Physician (PCP)?
- Must the in-person evaluation be with the doctor that authorized the telemedicine service?

There are other concerns and questions arising from the wording of §174.7 (c) specifically and §174.7 generally.

While it is the agency’s job to police those who misbehave, the authority to police bad actors in the physician community already exists. For instance, if a physician is milling patients, a patient tries to “pill shop”, or engage in other harmful activities through telemedicine, the agency can utilize its existing regulations to ensure bad players are pushed out of the telemedicine arena. Furthermore, telemedicine does not by itself increase the incentives for actors to misbehave.

Rural communities in Texas face different challenges than our large urban communities who have ready access to health care. As a general policy matter, TCCRI is supportive of telemedicine; in 2007 we supported Senate Bill 24 (80R), which allowed Medicaid reimbursements to be used for telemedicine consultations. Perhaps a good compromise would be to waive the 72 hour requirement in rural areas and create a system that works for each market, whether urban or rural.

Thank you for the opportunity to comment.

Sincerely,



John Colyandro

*Executive Director, Texas Conservative Coalition Research Institute*