



Health Care Law Today

Health Care Law Today Podcast Episode 10: Telehealth in the Time of COVID-19

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In this episode, Foley Of Counsel [Kyle Faget](#) sits down with [Jennifer Crawford](#) (General Counsel at [Medici](#)) to discuss how COVID-19 has impacted the telehealth industry.

Kyle Faget

Thanks so much, Judy. Hi, my name is Kyle Faget, I am Of Counsel at Foley & Lardner. I'm a member of the Health Care and Life Sciences practice groups, and I am a core member of our telemedicine practice, which is booming at the moment, which is pretty exciting. Today I am joined by Jennifer Crawford who is General Counsel at Medici, and I will let Jennifer explain what Medici is and what Medici does, but I'm excited to have Jennifer today because she is literally on the legal front lines of managing COVID-19 via telemedicine, which is really what we're going to talk about today and what can be done with telemedicine that was prompted by COVID-19, so I will pause there and let Jennifer introduce herself.

Jennifer Crawford

Thanks for having me today, I really appreciate it, Kyle. I'm Jennifer Crawford, the General Counsel at Medici, which is a virtual care company that connects providers to their patients via audio, video, and text. I've been at Medici since January 2019, and before that I practiced at some large law firms in New York City and Charlotte. I practiced in-house in the health care industry for several years as well, and so we have been seeing a lot of things at Medici in the virtual care space. It's been a crazy ride, especially in the last couple of months for sure.

Kyle Faget

I bet. What are some of the biggest changes you've seen to telemedicine since the beginning of maybe starting with the beginning of the declaration of the public health emergency?

Jennifer Crawford

There's been several changes it's even hard to keep up with them all, but really what we're seeing is many barriers that we've struggled with for years have really been broken down in a matter of weeks. The first that we've been looking at is licensure waivers. States usually require doctors to have a state license to practice medicine within that state, which presents a challenge in telemedicine. When you're at a brick and mortar practice, it doesn't matter because your patients are just driving to see you and usually that happens in the same state, but with telemedicine, doctors can treat patients with a farther reach. There are many states waving these licensure requirements during the pandemic, which helps doctors using our platform to have a further reach to help more people. So that's one thing that we're really seeing, and it's a good thing to see. We definitely are looking forward to seeing how that impacts patient care going forward.

Kyle Faget

That makes a ton of sense. I have people even reaching out to me currently asking questions, and I think it's not—and maybe it's counterintuitive, I don't know, it's hard for me to stay from my vantage point since I've been practicing this for a while—but it's perhaps not totally intuitive that you need to be licensed where the patient resides, or is at the point of care. So you're right, that has been a huge barrier and the shift has been tremendous. Anyway, not to interrupt, but I just thought I'd interject that piece. So what else?

Jennifer Crawford

The second thing maybe is Health and Human Services (HHS) has relaxed HIPAA rules saying they won't pose penalties for noncompliance with HIPAA as long as the provider is engaging in the good faith provision of telehealth during the pandemic. This has been interesting for us for many reasons. First, it's just fueled a huge spike in interest to use our platforms. We've also had one or two questions from providers if they could just use Zoom or Skype instead, which was pretty interesting, and our answer to that has been not to forget the good faith provision of that HHS directive. So using Zoom maybe without a BAA puts more of a target on that providers back instead of finding a HIPAA compliant platform. And I think patients also expect HIPAA compliance, and it's also not a long-term solution. We think telemedicine is here to stay, so why introduce your patients to something that you probably can't use in the future? So use a platform that's built for this.

Medici also offers malpractice insurance for our consults, whereas another platform could leave their provider open to the reasonable possibility of malpractice lawsuits, so we provide some extra protection there.

Kyle Faget

I completely appreciate that during a public health emergency to the extent that HHS is concerned about getting care to patients in a way that doesn't expose clinicians unnecessarily, preserves PPE [personal protective equipment] for times when it's absolutely needed to say, "Okay, during this public health emergency, go ahead and use FaceTime. Go ahead and use whatever technology is available to reach the patient." But having said that, I 100% agree with you that when you are a patient interacting with a health care provider, you absolutely expect confidentiality and HIPAA compliance. So to the extent that providers already have a HIPAA compliant platform with which to conduct telemedicine, it makes a ton of sense to continue utilizing that platform. And for those providers who in a pinch are utilizing FaceTime or interacting with telemedicine, utilizing the tool for the very first time, I totally agree with you. As soon as the quote unquote pandemic is over and the public health emergency ceases, I imagine it will be time for all providers to shift to a HIPAA compliant platform such as Medici.

Jennifer Crawford

Yeah, it'll be interesting to see what happens in the future.

Kyle Faget

So licensure waiver. Absolutely. I think that's a huge thing. And the discretion that being exercised in terms of HIPAA enforcement. Is there anything else that has in your mind's eye has been an enormous shift, or really groundbreaking?

Jennifer Crawford

Yeah, I think the third thing could be the prescription of controlled substances. It's something that we're looking at really closely now. Normally, the DEA does not allow providers to prescribe controlled substances via telemedicine, but there is an exception to this for a public health emergency. The DEA has put out some guidance about this during the pandemic, basically, allowing it subject to certain conditions.

You still have to have a legitimate medical purpose and be in the usual course of the provider's practice—it needs to be audio, video, real time to an interactive communication—and of course the provider still needs to act in accordance with federal and state law. So even though this federal law has an exception, they still have to watch out for state laws and also policies for, maybe, e e-prescribe systems that don't allow for the prescription of controlled substances. So there are a couple of roadblocks there still, but this has been a huge shift, especially with the opioid crisis. I guess the pandemic outweighs the opioid crisis right now, but I do think that we're looking at this carefully, and watching it to see how our providers can use this exception for the good of their patients.

Kyle Faget

I do think there has been, from our client's perspective, a huge shift. In advance of the public health emergency, the barrier to use of telemedicine, was that the DEA required a clinician to have an in-person visit with a patient in advance of utilizing telemedicine to prescribe controlled substances, [which is not congruent with the practice of telemedicine]. Then layer on top of that individual states have their own rules and regulations associated with the prescribing of controlled substances, sometimes quite specific to the use of telemedicine.

So for example, there are states out there that take issue with utilizing telemedicine for the prescription of controlled substances. So your 100% accurate that while DEA has removed this barrier, practitioners are well advised to look to their state statutes and regulations before prescribing controlled substances without an in-person visit to ensure that the state doesn't have some kind of requirement in place. And, or, it is possible that during the public health emergency that there's been an executive order in the state to remove such barriers, but it is important to know what those are.

Jennifer Crawford

It is a great barrier. I mean, it's a good barrier for now to break down, but there are some roadblocks still.

Kyle Faget

From my perspective, some of the things that have been this huge shift—and maybe it intersects with Medici, maybe it doesn't—but I suppose to the extent that providers have access to reimbursement in a way that they didn't before, I can imagine that this could make a difference for Medici. But, with the relaxation and Medicare reimbursement, Medicare changed the approach to telemedicine during the public health emergency, so that, before there were prescribed originating sites and distance sites where the patient could be located and the provider as well, there's really a strict set of rules about that. And Medicare has relaxed that at this juncture—and again in large part to address not wanting to put health care providers in harm's way—potentially as of March 6th, Medicare is now paying for telehealth services that are furnished to patients even at home, which was not the way it was in advance of the public health emergency. And it's at the same rate as the regular in-person visits.

So this is a huge shift, and that's something that has been talked about for a long time to be honest. There's been a lot of pressure on Medicare in advance of the public health emergency to open up telemedicine, so that telemedicine wouldn't just be available to people in rural locations, which of course, one can understand why telemedicine would be a very useful tool in rural areas. Being able to reach patient populations that don't have providers maybe right down the street, but there's a lot of utility for telemedicine in urban areas as well. It maybe took this pandemic to get that shift put in place. But we're seeing now a big shift there and, alongside that, some states that already have in place what's a

considered payment parity, where commercial insurance and their Medicaid programs for example, have to pay telemedicine. The next step of that, having to pay telemedicine visits at the same rate as in-office visits, and this shift has really forced the hand of some states that were slow to adopt this payment parity model.

For example, in Massachusetts there wasn't payment parity up until the public health emergency, and now for at least for the purposes of the public health emergency, commercial insurers have to pay for telemedicine visits in a way that they didn't have to before. We're seeing this all explode, and even modalities have changed where there was a huge push against using telephones and I sit on these calls now—with the CMS hosts these calls—and there's a lot of call for use of telephones because the gold standard is this audio visual real time communication that Medici offers through its platform. There's a portion of the population that—and most notably the elderly population—that may not have an iPhone available, or a Google phone, and the only way you can get care to them maybe is via the regular telephone.

But regardless of all of that, since we're now seeing better reimbursement, more reimbursement, have you seen a dramatic shift at Medici? Have you seen providers all of a sudden flocking to the platform saying, "Hey, all of a sudden we have these mechanisms for reimbursement available." Now where we once didn't see maybe there was utility in telemedicine, but if you can't get paid for it it's hard to argue somebody should do it.

Jennifer Crawford

We have providers that want to use telemedicine with their patients, but they're afraid that they're not going to get reimbursed for that. So now this is breaking down more barriers that they have more clarity around if they get reimbursed for a telemedicine visit instead of just as an in person visit. Because if they're not sure about it and the patient's not sure about it, the default is just come into the office. But now there's more clarity around this, I think the shift to telemedicine is going to pick up the pace, or pick up speed. So it'll be interesting as these laws really come into effect, and the payments really start flowing to the physicians, and the patients are seeing that this is getting reimbursed, I think telemedicine is really going to take off.

Kyle Faget

And have you seen an uptick in subscriptions to Medici's platform since the public health emergency was declared?

Jennifer Crawford

Absolutely. This has made our business explode. I think it's really changed the thinking of the general public, and providers with regard to using telemedicine. Patients don't want to go into the office and be exposed. Providers don't want to be exposed to all those people, and in our governing bodies, our governments don't want people to go to the doctors, they

want them to stay home. So we have a solution for this now instead of people being on the fence saying, "I'll try this later. I'll go to the doctor this time. Maybe I'll try virtual care later." They want to try the virtual consult first, and save the in-person visit for a last resort. This has really caused us to see a huge increase in demand, which we're trying to help as many people as we can and be the solution here.

Kyle Faget

This has just been such a dramatic sea shift in just, as you suggested at the very beginning in a matter of weeks, all these barriers, all the things that we've been talking about for so long in telemedicine circles as "Here's why we can't get by, and here's this barrier." The licensure, the reimbursement, everything just went crumbling down all at once, which I guess leads to what I think is the next natural question. When all is said and done, do you see telemedicine, and all of these changes, staying in place, and if not, what do you think is going to stay and what do you think we'll sort of go back to business as usual?

Jennifer Crawford

I think this is the fun part to think about because we don't know. I do think we'll continue to see increased volume of virtual consults. I think this gets people through that initial hesitation to try telemedicine. I do think that telemedicine is here to stay. Even before the pandemic, I think it was projected that it was going to be a \$130 billion industry by 2025 up from \$38.3 billion last year, and that was before this even hit. So I think telemedicine is here to stay, I think that this drives people to try it, but the things that we talked about, like for example, I think the HIPAA regs, those will change steps slightly to be more friendly to virtual care. And I think that as lawmakers make regulations regarding HIPAA, they'll be thinking about virtual care more, but I don't see HIPAA totally going away. Do you agree?

Kyle Faget

I agree with that. It's just too important for people to know that, as you suggested, there's an expectation of privacy and when you're interacting with a healthcare provider. I think that there might be some shifts to it, I can't think exactly about what those shifts might be. But I do anticipate that the barriers will go back up with in terms of HIPAA for sure. And that's a good thing, we want our privacy protected.

Jennifer Crawford

I think at this point patients expect that, and to just do away with that totally it would not be really good for anyone. I also think with the restrictions on controlled substances, I think that will come back when this is over. I think that is too important of an issue in the United States that will keep the way it is right now. I do think state licensure requirements, they'd be something that will change following this, like they have the Interstate Medical Licensure Compact. I could see that being the lead to have, basically, more doctors be able to practice in multiple states. I could definitely see that that would be something that would be here to stay as well.

Kyle Faget

I hope that you're right on that front because when I get phone calls from young entrepreneurs, young physicians—well, frankly any age range— and new to telemedicine practitioners, one of the first things that we have to address is the licensure issue. "Okay. Where are you licensed? And if you want to provide care from Massachusetts to Texas, or Massachusetts to Florida, for example, then you really need to be licensed to practice medicine in those states." And it can take providers over a year to get licensed. It's crazy.

Jennifer Crawford

Yes, it really does. It takes forever.

Kyle Faget

There are some states that have just thrown up the white flag and said, "Listen, if you're licensed and in good standing in your state, please come and practice we need the help." Some states are taking this approach to that you have to provide documentation that you are licensed, and in good standing in another state before you are able to provide care within the state of interest for example. There's not uniformity right now. Every state's taking their own approach to licensure waiver.

I think it would be great—and in fact we as our practice group the other day, we did the query out to everybody, "What do you think is going to change and what will stay in place following the public health emergency?" And it was a much larger question, not just with telemedicine, but this issue of licensure—I think a lot of people believe as you do, that the easing of restrictions will stay in place after the public health emergency. And I feel like a total naysayer about this because I think, and maybe it's just that I'm jaded from having practiced in health care for quite a while, but I see states, and state medical boards wanting to have control in a way that, I don't know.

I really, I hope it's true that the easing of restrictions stays in place. But I have to say I'm not, I'm not incredibly optimistic about it. I think that states can be pretty protectionist, and we see some of that law too in the various licensure. You can't just go to Florida, you still have to pass the Florida bar, and so I can see states still taking that approach. "Hey, we don't want providers just beaming in via phone, and via FaceTime, and treating patients in our state willy-nilly." And again, that might just be that I'm a jaded soul on this front, but I don't know. It'll be interesting to see.

Jennifer Crawford

Yeah. It could also be how long this actually lasts. If this is going to be over—and again, nobody really knows how long we're all going to be on lockdown—is this for two years, is this for six months? I think that's going to also depend on where we end up as well.

Kyle Faget

That's a really, really good point. I think the longer that this goes on, the less likely it is that the state medical boards can go back to business as usual. There'll just be so much inertia. You mentioned the opioid crisis and balancing that out with utilizing telemedicine for the prescribing of controlled substances, and again, I 100% agree with you that the opioid crisis has its own inertia, and DEA is always struggling to get its arms around how to balance access to care with trying to control for the opioid crisis, but the big barrier for telemedicine really is about having to have this initial in-person visit, and that's really the big thing that has been lifted here.

And the enforcement I get leading up to the public health emergency of that provision within telemedicine has not been particularly robust. That's one place that I really do hope that DEA continues with that position, not requiring the in-person visit because that in-person visit requirement before being allowed to compliantly prescribe controlled substances has been just a colossal barrier to use of telemedicine and to what end exactly. You can do ID verification via telemedicine. You can have real time audio visual, so exactly what purpose that particular prohibition is serving at this point I'm not 100% sure of. My hope is that that that particular provision, that loosening, stays in place, but I hear you on the other side of this that I think anything that relates to the opioid crisis that even feels as though we're loosening up the reins, that there's going to be a lot of question marks about that.

Jennifer Crawford

Definitely. Only time will tell.

Kyle Faget

Like I said at the very beginning, it's great to have you today because you're really at the front lines, and seeing all of this unfold in real time with a business, which is a perspective that must just be absolutely amazing. I hope that when we come out the other side of this, you'll take some time to kind of write up some of your experiences because I'd be very interested in hearing about that.

Jennifer Crawford

Definitely, it has been a wild ride for sure. It has been crazy, and really, honestly, we just want to help as many people as we can. If that means extra hours or whatever, I think we're all willing to put that time in. Anything that we can do to help with the pandemic, everyone is trying to do what they can, and if this is what we can do, and serve more patients and deal with that spike and try—our customer service line is going crazy. There's so many questions from providers and from patients, and we're trying to get to all that—so if we can do that, and you do your part by staying in, we do our part by trying to make sure that everybody is satisfied with the product, keeping up to date on all of these laws, and helping our providers, then that's what we'll do and we're happy to do that.

Kyle Faget

Well, I can't thank you enough for taking some time to be with us today. And maybe if you wouldn't mind taking a minute reminding our listeners, who you are and what you do and how people can get in touch with you to access Medici services.

Jennifer Crawford

Thanks Kyle. So we are Medici technologies, LLC, or Medici. We're a virtual care company that connects providers to their patients via audio, video, and text. We have software platforms to be able to connect, and in case it's helpful for your listeners, if they'd like to know more, please go to medici.md, or you can find us in the App Store. And we can give you a call, we can walk you through our services, and help you in any way we can to help you with your practice.

Kyle Faget:

Well, we can't thank you enough. I thank you, and whether or not people can see all the work that you're doing, I know from my perspective that it's almost every day that the legal landscape is shifting, particularly with respect to telemedicine. So thank you for being in the trenches, and for everything that you're doing. And thank you so much for taking some time to talk with us today.

Jennifer Crawford

Yeah, thanks for having me.

Kyle Faget

And with that, I'll turn it back over to Judy.