Slice of Healthcare Podcast Episode 301: Nathaniel Lacktman, Foley & Lardner LLP
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Jared Taylor (00:11)
Hey everyone. Thanks so much for joining me on the Slice of Healthcare podcast. I'm your host Jared Taylor. Joining me today is Nate Lacktman, the partner at the law firm Foley & Lardner and chair of its national telemedicine and digital health industry team. Nate is also a member of the Board of Directors of the American Telemedicine Association, and probably one of the closest guests that we've had since I'm in St. Petersburg and he's in Tampa, Florida. So Nate, welcome.

Nathaniel Lacktman (00:39)
Thanks for having me, Jared. Go, Tampa Bay!

Jared Taylor (00:42)
I love it. I moved down here from Boston, and then all the teams start winding down here. And I'm not saying it's related, but it was definitely well aligned.

But I'm excited to have you on, Nate. I've been a fan of yours for a while and your firm. And I'm excited to dive into some cool topics with you today. Just in case someone doesn't know who you are, could you give us the quick rundown on your background? And then tell us a little bit about Foley & Lardner?

Nathaniel Lacktman (01:08)
Sure, I'm a telemedicine and digital health lawyer. Foley has been around for almost 200 years with 1,100 lawyers across the country and some offices overseas. I've been practicing law a little over 18 years, the last 10 of which has been almost exclusively telemedicine and virtual care. So it's fair to say we probably have more lawyers who do this on our team than any law firm in the country; namely, representing telemedicine and digital health companies. I'm really proud of what we built, and what we've helped out clients build.

We work with a variety of providers, typically providers, tech-enabled service providers – whether they're hospitals or academic medical centers – tons of venture and private equity-backed startups or decentralized clinical trials, remote patient monitoring, remote therapeutic monitoring, and the like. We have a team of different subject matter experts located around the country and we work together collaboratively to help us solve our client's issues using a consultative model. So working with us is a bit more like working with a consulting firm asking, what are your goals and your strategies? And let's give you answers and solutions, rather than just give you a bunch of laws. Yes, we know the laws and we incorporate that into our advice, but working with us is a highly interactive experience of bringing the law where your goals are. I find it fulfilling.

Jared Taylor (02:27)
Yeah, it's definitely nice when your lawyers can actually give you actionable, consultative advice, not just regurgitate like you were mentioning the laws. That's a nice pairing.

One of the things I was really excited about in bringing you on, one of the questions I wanted to ask was around the current environment for venture capital and digital health. It's a topic I hear a lot about, I hear a variety of opinions on LinkedIn and across the board and just from people venting what they think is going to happen. But I feel like you are more qualified than most to be able to, you know, give us give us an honest opinion on, you know, what should we expect? What are you seeing?

Nathaniel Lacktman (03:15)
Sure, I'm happy to! I'll give you an honest opinion, but it's still just one person's opinion. I think that we've certainly moved from a stage of growth-only to sustainability. I don't believe a lot of venture firms are expecting founders to be profitable immediately, but they want to have a direct path to profitability. So we've seen that manifest in what's called downs RIFs [reductions in force], a fancier way of calling it layoffs. Companies do this to right size their P&L sheets, and [spend] less time and money invested in growth and acquisition plays. And we've seen that in lower advertising spending on DTC and social media platforms. It has a knock-on effect throughout the e-commerce industry.

That's what we've seen... and then you hear these anecdotal stories about how valuations are lower, and all the venture capitalists are in Europe on holiday 2022 and they're unavailable during the summer. And we saw a significant uptick in memes by the VCs themselves, including hiring out third parties to write their tweets and memes for them. All of that is fun and it's gossipy, but it's just noise.

If you are a startup founder, whatever stage, remember that venture deployment can be cyclical. And it may be in a recessionary period that LPs are less inclined to further invest or reinvest in funds. But funds typically have a 10 or 12 year lifespan and they have a deployment schedule, usually of 2-4 years of when they close that fund. Billions of dollars were raised in 2019, 2020, and 2021. The venture capital firms have raised all of this money from limited partners for the purpose of investing in telemedicine and digital health companies. They have fiduciary and contractual obligations to deploy that money, and they have every financial interest to do so as well. That means there is a bunch of dry powder still there that must go out before that 2-4 year cycle ends. You could extend that timeframe a little bit, but not too far. This is part of the thesis: they must invest in digital health companies at this date and time. I think founders of sustainable companies can take comfort in that.

A skeptic might say, it almost seems as if all the venture capital firms suddenly agreed to stop investing, if only because the valuations got so high. Ok, then. Wait for the boil to simmer down, and then the investment dollar will go further, VCs will get more bang for their buck in terms of amount of equity they get for how much they have to spend. But it’s not as if the VC funds will cease making capital calls and simply close up shop.

In a startup recessionary period, look at as if you're inflating a raft, and you [have] to take a breath once in a while, you really have to, in order for you to have the power for additional growth. So although venture seems like it moves really fast, and it has in these last few years, the lifecycle of a venture capital investment is ‘X” as an alternative product is actually quite long. Your money is highly illiquid, for what could be a decade.

And so the LPs have a different sense of time and horizon, the VC investors have a different sense of time and horizon, [and] the ones with the most sense of urgency are the founders themselves. So if they

can try to take a step back and have some perspective saying "this will be okay" there is actually money out there that has previously been raised and earmarked for a company like mine", I think they can take some real comfort in that. The startup might not get a billion dollar valuation, but maybe it shouldn't have gotten a billion dollar valuation. Let me do a raise that's not so much money, I'll choke on it, but instead is appropriate for what the needs of the company are right now.

Professional services of any nature, including medical health care, are exceedingly difficult to scale at speed, no matter how much technology-enabling power you to add. So it is just fine to have a very robust healthy growth pattern for a telemedicine company. And it does not have to meet the growth pattern you would have for selling in-app purchases on a gamified Candy Crush. They're just very different metrics. I think it's a bright future for digital health with plenty of fuel out there to fire further growth.

Jared Taylor (07:55)
Yeah, I think... no matter what someone thinks about the space, what it did to a certain degree was eliminated some of the companies that probably had no business. They weren't able to raise that next round of funding, but maybe they shouldn't have been able to raise the first round of funding. You know, when you look at some of these companies out there, there's only a handful... in every space, especially within health care, there's a lot of companies and each kind of individual segment. But there's only a handful of the companies that are truly moving forward, innovating and creating... these great platforms that help patients. So I'm really excited to see what continues to happen with this space as well. But thank you so much, by the way, for that breakdown. I love hearing that.

Nathaniel Lacktman (08:43)
Look, there's a fundamental supply/demand imbalance in America, between the patients who need care and the amount of clinicians available to deliver that care. If you want to discuss TAM or product market fit, healthcare seems obvious, right? The macro idea of most venture is 80-90% of all these companies will fail, but in the process of failing and trying to find that fit, they're going to help change the world for the better.

Some companies will be winners financially, [but] might not move the needle clinically. Whereas other first movers will be like, 'this company was the very first to do it.' Nobody knows about them, because although they pave the roads, they didn't collect the tolls on those roads. But that type of pattern of innovation has truly existed for centuries. If you look back into when England first cut little river channels through the countryside to fuel the factories, it was not the people who invested to create those river pathways who made all the money. It was the factories who were built subsequent upon them. So I do think that from a mission perspective... telemedicine digital founders, as well as the venture capitalists who support them, are doing the right thing.

Jared Taylor (10:00)
One of the other things, Nate, I wanted to dive into with you today was the topic of the public health emergency (PHE). So when this ends, I want to know, do you think it'll create a significant downturn, specifically in the telemedicine industry?

Nathaniel Lacktman (10:18)
I think we can't ignore the reality that if you turn off Medicare coverage of certain services that are used, it will inhibit people from using the services. Not everybody on Medicare is wealthy and can afford to pay out-of-pocket for care. So if you take these audio-only phone calls that are currently covered under the PHE waivers, and discontinue them, like CMS has proposed it will do, there will be a cohort of

people who just don't get care, because they don't have the bandwidth or they don't have smartphones. The doctors are not going to deliver it. The audio-only is an example that's not even something the doctor would be allowed to charge cash. Probably it would be covered, but not [a] separately billable, provider-liable service. So yeah, and the reimbursement when there's less gasoline, the cars just don't drive as far.

But I think on the whole the public health emergency and COVID did not create the telemedicine industry. What it did was accelerate the pace that this technology was already being adopted, and accelerated it really, really quickly. But it's been around for three years already. So we've been operating under the so-called "temporary waivers" for three years, which seems to me like a lifetime. And many of these have already been baked into the normal course of medical practice, like the relationships and the business models, those are not going to go away just because some rule waivers do.

I think the ones that we're paying the most amount of attention to outside of Medicare are licensing. Although most of the states have already eliminated their license waivers, I think we could see some more activity on state-by-state agreements for continuity of care exceptions for follow-up care being able to do that interstate without needing to be licensed, and then controlled substance prescribing via telemedicine with the DEA under the Ryan Haight Act.

That's one thing that, in particular, has taken way too long as 13 years ago the DEA should have put out this regulation. It was legally required to by Congress and President Trump's Administration. I think by 2019 they were supposed to publish the rule by federal congressional demands, and they did. So I'm expecting them to do so, [but] we don't know when. But... there is a subset of patients who are relying on a controlled substance prescribing for important medication assisted therapy, who will not be able to realize that if the telehealth cliff hits without the DEA having a solution in place.

That's probably the one that I think gives me the most personal concern. Because you've already seen in the news coverage about how there's shortages in Adderall [and] supply chain, globally. Increases in mental health awareness and increases and access to health care are a good thing, but medication assisted treatment is also very important for some patients. I don't believe it is clinically appropriate to ignore medication and simply tell someone with neurodivergence, or someone struggling with addiction, "Just try harder, focus on the positive, be more organized." I do think it's incumbent on the DEA make a change.

Jared Taylor (13:38)
Well, Nate, I want to have you on again, because you just provide such great explanations and snapshots of where we're at in the industry. But you know, it was an absolute pleasure having you on for the first time. I can't wait to have you on again. And I can't wait to connect [at] some of the upcoming events in person which, you know, it's always nice to meet people in person. But thank you again so much for being a guest.

Nathaniel Lacktman (14:03)
Oh, it's my pleasure. Thank you for having me. I'd love to do it again. Yeah, we'll see each other at HLTH in Las Vegas in November and hopefully at the ATA Edge Law and Policy Conference in DC the first week of December.

Jared Taylor (14:16)
Awesome. Well, thanks so much, Nate.