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Crossroads: How the Intersection of Technology, Medicine, and the Law, Impact the Administration of Healthcare in Florida and Puerto Rico

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Crossroads: How the Intersection of Technology, Medicine, and the Law, Impact the Administration of Healthcare in Florida and Puerto Rico

Casaundra Johnson*

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I. INTRODUCTION: TECHNOLOGY IN HEALTHCARE

Traditionally, seeking medical care has been conceptualized as making a visit to an office, clinic, or hospital, where one receives diagnosis and treatment from nurses, assistants, and a doctor. However, the practice of medicine has evolved from its standard form. Today, doctors are now capable of providing medical expertise to patients around the world through the use of varied electronic means.¹ While rudimentary in form, the use of telecommunications to practice medicine has its roots in the early 1960's. Over the years, technology has become more refined and its costs have decreased, subsequently increasing its potential and feasibility in the practice of modern medicine. Recent technological advances have altered the landscape of providing and receiving medical treatment.

The use of technology to disseminate medical expertise to far ranging patients has taken on many forms. In some jurisdictions in the United States, patients can obtain prescriptions for medications through internet-based remote prescribing services and order prescriptions online or over the phone.² Anyone with Internet access can search the Internet for medical terms, symp-

1. Nancy Lugn, *Medical Licensure and Telemedicine: Necessity or Barrier?*, 25 SUFFOLK TRANSNAT'L L. REV. 165, 166 (2001).

2. Some states, such as California, Florida, Kentucky, North Dakota, Ohio, and Texas, specifically regulate remote prescription dissemination and dispensing activities. See Cal. Health & Safety Code § 1261.6; Cal. Bus. & Prof. Code § 4119.1; Fla. Admin. Code § 64B8-9.014; Ky. Rev. Stat. § 315.310; N.D. Admin. Code §§ 61-02-08-01 to 61.02-08-09; Ohio Admin. Code § 4731-11-09(A); Tex. Occ. Code §§ 562.109 to 562.110; Tex. Admin. Code § 174.4. While many of these states require that telemedicine activities be exercised in accordance to professional standards of care, Florida, Texas, and Alaska have codified the presumption that remote prescription activities breach a doctor's the standard of care, or that a physician who engages in remote prescription activities is engaging in unprofessional conduct by prescribing medications based solely on a medical questionnaire filled out by the patient. See Fla.

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toms, common diagnoses, and treatments. With the help of smart phones, people can use the WebMD application, or its website counterpart, to identify the common medical conditions associated with their symptoms.³ In the age of technology, the options for accessing and receiving medical information, diagnosis, and treatment are boundless.

Three terms, each with their own distinct definitions and applications, have developed to describe the use of telecommunications within the practice of medicine: “telehealth,” “cybermedicine,” and “telemedicine.”⁴ Telehealth is the broad term applied to the use of electronic information and telecommunications for long-distance health care, health education, public health, and health administration.⁵ Telehealth tends to focus on the preventative, promotive, and curative aspects of medicine.⁶ Cybermedicine involves the distribution of health information through an Internet site without a previous or ongoing doctor-patient relationship.⁷ Cybermedicine describes much of the information found in the results of Internet searches. Telemedicine, however, “is the term applied to the electronic connection between a provider of healthcare information and a seeker of that information.”⁸ The term telemedicine is applied more narrowly than both telehealth and cybermedicine, as it focuses on the curative aspects of medicine and seeks to use technology to foster a long-distance medical relationship for a specific patient’s needs. In other words, telemedicine uses technology to provide information to remote persons involved in a patient’s care.⁹

Telemedicine is generally utilized in three broad categories. The first telemedicine practice involves one doctor sending images to another doctor, through one-way communication, and then the doctors discuss the image via telephone.¹⁰ The second use of telemedicine involves a video teleconferencing, which enables the doctor and the patient to see and hear each other as if they were

Admin. Code § 64B8-9.014, 22; Tex. Admin. Code § 174.4(b); 12 Alaska Admin. Code § 40.967(27) – (28).

3. See generally Web MD, <http://www.webmd.com/> (last visited Jan. 15, 2015).

4. Shannon S. Venable, *A Call to Action: Georgia Must Adopt New Standard of Care, Licensure, Reimbursement*, 54 EMORY L.J., 1183, 1184 (2005).

5. *Id.*

6. *Id.*

7. *Id.*

8. Lugn, *supra* note 1, at 167.

9. Venable, *supra* note 4, at 1184.

10. Regina A. Bailey, *The Legal, Financial, and Ethical Implications of Online Medical Consultations*, 16 J. Tech. L. & Pol’y 53, 60 (2011).

face-to-face.¹¹ The third telemedicine use involves complex two-way audio and video systems that transmit information from electronic stethoscopes, ostoscopes, endoscopes, microscopes, electrocardiograms, echocardiograms, and sonograms.¹² This third telemedicine system uses of video cameras for dermatology exams, and simultaneous transmission of x-rays and laboratory results.¹³

From the beginning, supporters of telemedicine have envisioned using modern technology to serve communities that lack access to proper medical care and proper treatment.¹⁴ Proponents claim that telemedicine is more cost effective and time efficient than traditional approaches to medical diagnosis and treatment¹⁵ In addition, telemedicine offers practitioners the opportunity to provide care for otherwise uninsured or underinsured patients and enables physicians to offer more specialized care to patients with complicated medical impairments.¹⁶

While telemedicine is an exciting breakthrough and does have the potential to serve masses of previously underserved communities, a range of legal considerations serve as barriers for doctors seeking to harness the full potential telemedicine has to offer.¹⁷ The legal obstacles imposed by Florida lawmakers have discouraged the practical use of telemedicine to serve diverse communities across Florida. Many residents in these communities are immigrants whose care comes with a variety of language, cultural, or ethnical needs that must be taken into consideration when providing medical treatment.

This comment will focus on current and potential uses of telemedicine, the narrow use of technology in the healthcare domain, and how Florida and Puerto Rican laws address the use of telemedicine. This comment has four purposes. First, it will examine the availability of telemedicine under Florida and Puerto Rican law. Second, this comment will analyze whether Florida and Puerto Rican physicians can utilize telemedicine to provide medical care to patients who have special medical needs or lack proper access to health care. Third, this comment will explore recent proposals to existing Florida laws and discuss how these changes would have impacted immigrant healthcare consumers.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 61.

15. *Id.* at 60.

16. Bailey, *supra* note 10, at 60.

17. Lugn, *supra* note 1, at 166.

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Lastly, this paper will call for Florida and Puerto Rican legislatures to adopt changes to telemedicine laws in order to provide better medical care.

Part II of this comment will provide a brief background and history of telehealth and, more specifically, telemedicine. This section will also describe select state implementation of telemedicine networks and discuss two of the common legal obstacles that have arisen in the implementation of telemedicine: (1) determining what constitutes a physical examination; and (2) navigating insurance reimbursement for telemedicine services. Part III will discuss the current use of telemedicine in Florida and Puerto Rico and analyze relevant portions of administrative codes and statutes regulating the use of telemedicine. In addition, Part II will also discuss recently proposed Florida bills addressing telemedicine and how these bills could have potentially impact Florida patients. Part IV will address the need for an expansive telemedicine network in Florida in light of the Hispanic demographics of the state and rural communities in need of health care providers. Part V serves as the comment's conclusion.

II. BACKGROUND: THE HISTORY OF TELEMEDICINE AND OVERVIEW OF STATE IMPLEMENTATION

Telemedicine utilizes modern technology, telecommunications, and medical information to provide healthcare to patients in distant regions—a feat made possible through telephone, emails, facsimile, video conferencing, electronic medical record transfers, robotic surgery, etc.¹⁸ Today, most telemedicine programs provide consultations via video conferences, or “store-and-forward” technology.¹⁹ “Store-and-forward” technology is commonly used for teleradiology.²⁰ However, the program has been utilized for psychiatry, cardiology, ophthalmology, and orthopedic teleconsultations as well.²¹

A. *How It All Began – A Brief Overview of How Telemedicine Got Its Roots*

The transfer of medical information to remote locations began

18. *Id.* at 167–168.

19. Talley L. Kaleko, *A Bold Step: What Florida Should Do Concerning the Health of Its Rural Communities, Licensure, and Telemedicine*, 27 FLA. ST. U. L. REV. 767, 767 (2000).

20. *Id.*

21. *Id.* at 767–768.

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with rather simple forms in the early 1900s. In 1905, Willem Einthoven sent electrocardiogram and phonocardiogram data from the Academic Hospital of Leyden to his laboratory via telephone.²² By the 1920s, it was standard practice to transmit medical information via radios.²³ Nebraska implemented a two-way television educational service in the mid-1950s in response to the difficulties of providing face-to-face psychiatry services to patients across the state.²⁴

Even though telemedicine found its humble beginnings in the first half of the 1900's, it didn't begin taking firm root until the early 1960's when the National Aeronautics and Space Administration ("NASA") began monitoring physiological measurements of astronauts in space.²⁵ By 1973, NASA developed the Space Technology Applied to Rural Papago Health Care (STARPAHC) program, which utilized microwave topology to provide consultations between remote clinics.²⁶ This technology was used to transmit information between mobile facilities in Sells, Arizona, and the stationary consulting hub in Phoenix, Arizona.²⁷ Though successful in aiding remote medical care, the exorbitant costs derailed the program by 1977.²⁸

Telemedicine has commonly involved the use of video-conferencing and other private network electronic means to disseminate medical information to patients or other physicians at a geographical distance.²⁹ With the development of technology and the increased access to the Internet outside of the United States of America, telemedicine has evolved and, today, extends across the globe to locations where physician licensing sometimes presents less of an issue.³⁰

In 1988, much of Soviet Armenia's medical infrastructure was destroyed in a massive earthquake.³¹ In response, NASA

22. RONALD C. MERRELL, HISTORICAL NOTES ON TELEMEDICINE, TELEMEDICINE FOR TRAUMA, EMERGENCIES, AND DISASTER MANAGEMENT 2 (2010).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. MERRELL, *supra* note 22.

29. Kerry A. Kearney and Celia M. Santander, *Telemedicine: Evolving into Cyberspace*, 13 HEALTH LAW, 28 (April 2001).

30. *Id.*

31. CHARLES R. DOARN, EVOLUTION OF TELEMEDICINE IN THE SPACE PROGRAM AND EARTH APPLICATIONS, TELEMEDICINE FOR TRAUMA, EMERGENCIES, AND DISASTER MANAGEMENT 13 (2010).

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partnered with the Armenian government to establish a telecommunications connection, called the Spacebridge, to link medical centers in the United States, Yerevan, Armenia, and Moscow.³² Though it took several months to negotiate and implement, NASA was able to use a satellite-based system to link three United States hospitals with Yerevan.³³ With this connection, disaster-zone physicians presented 240 medical cases via satellite and United States physicians were able to provide diagnoses in about sixty cases.³⁴ The Spacebridge was later used to tend to children injured in a train explosion in Ufa, Russia the same year.³⁵

NASA conducted the first international conference on telemedicine in 1991, setting the stage for telemedicine both domestically and abroad.³⁶ Speakers from many different professional backgrounds presented papers and gave presentations throughout the conference, each addressing the overall goal of the convention: to “convene an international, multidisciplinary gathering of experts to discuss the emerging field of telemedicine and assess its future directions; principally the application of the space technology to disaster response and management, but also to clinical medicine, remote health care, and other needs.”³⁷ As a result, the conference sparked the drafting of legislation by the U.S. Congress and policy development by the United Nations.³⁸ Three years later, another telemedicine conference was held, prompting more attention and literature on telemedicine.³⁹

*B. What Telemedicine Looks Like Now: Modern
Telemedicine Practices and a Brief Overview of
Select State Implementation*

Now, in a more developed state, the use of modern technology allows patients and doctors to obtain primary and secondary medical opinions⁴⁰ and exchange information for diagnosis, treatment,

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; *International Telemedicine/Disaster Medicine Conference: Papers and Presentations*, NP-207 (1991) available at http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19940007315_1994007315.pdf.

37. *International Telemedicine/Disaster Medicine Conference: Papers and Presentations*, NP-207 (1991) available at http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19940007315_1994007315.pdf.

38. DOARN, *supra* note 31, at 13.

39. *Id.*

40. Lugn, *supra* note 1, at 168.

and prevention of disease and injuries.⁴¹ To function to the fullest extent, telemedicine requires an array of hardware, software, telecommunication networks, and modern technology.⁴² In addition, telemedicine further requires a set of standard operating procedures, willing healthcare providers, and a need for medical information in areas geographically remote from the information source.⁴³

The use of telemedicine within the United States, however, comes with more seemingly insurmountable barriers. In the United States, physician licensure is regulated on a state-by-state basis.⁴⁴ Authority is vested in State legislators to regulate the use, prohibition, and availability of telemedicine as a legitimate means of providing medical care to patients.⁴⁵ Many states have imposed statutory or regulatory guidelines to address the use of telemedicine within their borders.⁴⁶ Some of these states have readily accepted the use of telemedicine while others either forbid its use or take a more conservative approach.⁴⁷

Texas, for example, has attempted to demonstrate a serious commitment to telemedicine through legislation aimed at removing some of the common barriers that arise in the implementation of telemedicine.⁴⁸ "S.B. 789 requires the Texas Health and Human Services Commission to begin: (1) overseeing Medicaid reimbursement for telemedicine services providers; (2) implementing various telemedicine pilot programs; and (3) setting minimum standards for operating system software and hardware used by health care facilities engaged in telemedicine."⁴⁹ In addition, the University of Texas, Medical Branch, has developed a telemedicine center where physicians conduct approximately 3,300 video telemedicine consultations per month.⁵⁰ While most of these patients are Texas Department of Criminal Justice inmates, the program is also used to treat patients on cruise ships and off-

41. Venable, *supra* note 4, at 1184.

42. Lugn, *supra* note 1, at 167-68.

43. *Id.*

44. *See* U.S. Const. Amend. X.

45. *See* U.S. Const. Amend. X; Paul Spradley, *Telemedicine: The Law Is the Limit*, 14 *Tul. J. Tech. & Intell. Prop.* 307, 317 (2011).

46. *See infra* text accompanying notes 48 to 59.

47. *See infra* text accompanying notes 48 to 59.

48. Gilbert Eric DeLeon, *Telemedicine in Texas: Solving the Problems of Licensure, Privacy, and Reimbursement*, 34 *ST. MARY'S L.J.*, 651, 653 (2003).

49. *Id.*

50. Bailey, *supra* note 10, at 60.

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shore drilling rigs.⁵¹

This commitment to telemedicine comes with minimum requirements for establishing a physician-patient relationship for physicians who choose to utilize telemedicine in their practice. Texas expressly requires physicians to verify a patient's identity, obtain an appropriate patient history and physical, and assure the availability of the physician for any potential follow-up care or treatment.⁵² In addition, Texas goes a step further to regulate a physician's supervision of non-physician practitioners who help use telemedicine procedures and limit the maximum number of non-physician practitioners a physician may supervise during each encounter.⁵³ Georgia, however, refuses to embrace the use of telemedicine, despite calls for modifications to existing polices.⁵⁴

While Alaska discourages the use of remote prescription activities, Alaska's Tribal Health System has implemented a program, the Alaska Federal Health Care Access Network, which remotely connects over 200 clinics around the state to provide consultations and care.⁵⁵ This program was started, in large part, due to the unique challenges Alaskan patients have in accessing healthcare.⁵⁶ Interestingly, this program has been implemented by tribal organizations and was initially funded by multiple Federal agencies, including the Indian Health Service, the Department of Health and Human Services, the Department of Defense, and the Department of Veteran Affairs.⁵⁷ Since 2004, however, the Indian Health Service has been the primary funding source of the program.⁵⁸ Regardless of funding, the program has seen great success in providing healthcare to over one hundred thousand patients around the state.⁵⁹ Alaska serves as an example of how telemedicine can be effectively utilized to reach rural patients and maximize healthcare statewide.

51. *Id.*

52. Tex. Admin. Code § 174.4(a).

53. Tex. Occ. Code § 111.004(3), (4).

54. Venable, *supra* note 4, at 1154.

55. AHRQ INNOVATIONS EXCHANGE, <http://www.innovations.ahrq.gov/content.aspx?id=3932> (last visited Feb. 15, 2014).

56. *See id.*

57. *See id.*

58. *Id.*

59. RURAL TELEMEDICINE AND TELEHEALTH: THE ALASKAN EXPERIENCE, INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH, <http://www.comsoc.org/files/About%20Comsoc/DLT/DSP/EMEA/Hudson-DSP-EMEA2011-Presentation.pdf>; AFHCAN TELEHEALTH SOLUTIONS, [www. Afhcan.org](http://www.Afhcan.org) (last visited Feb. 15, 2014).

C. Legal, Ethical, and Financial Obstacles States Commonly Encounter When Attempting to Implement Telemedicine Practices

Telemedicine offers a wide range of benefits, justifying the trend towards implementing more technology in traditional medical practices. As with any new system, however, there are a number of obstacles standing in the way of wide-ranging implementation. Many of the potential problems arise only in the context of distinct telemedicine practices, while other challenges are broader and more readily absolved through cooperation by the legislature.

In telemedicine practices via the Internet, where a physician treats a new patient without the ability to conduct a physical examination, there is always a chance that critical issues will be missed and diagnoses will be incorrect. Even though video conferencing allows the patient to be visually inspected, thereby improving the physician's ability spot critical issues absent in email communications, the physician still lacks the ability to physically touch and palpate the patient in order to identify signs and symptoms that may be necessary for a diagnosis.⁶⁰ While this form of telemedicine would be wholly inappropriate for some medical conditions, video conferencing would be acceptable for medical conditions where physical touch is not necessary for proper diagnosis and treatment. Nonetheless, a traditional physical exam still offers advantages that telemedicine is not yet able to offer. These concerns have the potential not only to leave physicians vulnerable to legal liability but also to create grave consequences for a misdiagnosed or under-treated patient.

In addition to concerns surrounding proper diagnosis and treatment, telemedicine may provide a greater opportunity for consumers to engage in fraudulent or abusive practices.⁶¹ In one-way internet communication, consumers may be able to circumvent identification procedures, allowing people to pose as someone else in order to receive medical care.⁶² In addition, online consultations may allow patients to be less than truthful concerning medical conditions, current medications, and current symptoms.⁶³ However, the potential for fraud is also present in traditional medical treatment scenarios. While it is not likely that these con-

60. Bailey, *supra* note 10, at 57.

61. *Id.*

62. *Id.*

63. *Id.*

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cerns can be completely eradicated in the telemedicine context, strict identification measures and the use of systems to identify reporting inconsistencies can be implemented to reduce the likelihood of fraud.

Furthermore, physician licensing is often a focal point of discussions concerning telemedicine because physicians are licensed based on state-by-state requirements. Each state has laws prohibiting the unlicensed practice of medicine within its jurisdiction. Therefore, without uniform licensing across the nation, the full potential of telemedicine is thwarted by state law.

D. Lack of a Traditional Physical Examination

Typically, a physical examination by a licensed practitioner is required for diagnosis and treatment of a patient. A physical examination traditionally includes “a general survey, vital signs, examination of the skin, palpation of the neck, auscultation of the heart and lungs, auscultation and palpitation of the abdomen, palpation of the pulses in all four extremities, testing reflexes, mental status exam, and rectal and genital exams.”⁶⁴ These examinations are centered on observations gathered through the physician’s senses, including touch, sight, sound, and smell.⁶⁵

Telemedicine involves the use of technology to provide health-care to patients in distant regions.⁶⁶ As such, during telemedicine events, the physician and the patient are not in the same room, and the physician is unable to engage in a traditional physical examination.⁶⁷ Where palpation is important for diagnosis, the physician must rely on the findings of other health-care workers.⁶⁸ Though a physician is limited in conducting an examination during a telemedicine event, advances in technology may decrease limitations in the future.⁶⁹

E. Insurance Reimbursement for Medical Providers

Reimbursement for telemedicine services varies amongst private insurers, Medicaid, and Medicare. Medicare, the federal

64. *Id.* at 84 (citing Lynns Bickley & Peter G. Szilagvi, *Bates Guide to Physical Examination and History Taking*, 10–13 (Lippincot Williams & Wilkins, 8th ed. 2003)).

65. *Id.*

66. *See supra* text accompanying notes 8 to 9.

67. N. M. Hjelm, *Benefits and Drawbacks of Telemedicine*, 11 J. OF TELEMEDICINE AND TELE CARE 67 (2005).

68. *Id.*

69. *Id.*

health insurance for individuals sixty-five or older that qualify for Social Security benefits, began providing payment for “teleconsultations” in geographical areas that are identified as “rural health professional shortage areas” in 1999.⁷⁰ Reimbursements applied to initial, follow-up, or confirmatory teleconsultations in hospitals, outpatient facilities, and medical offices⁷¹ and required the physician to engage in higher levels of direct patient interaction that mimic a traditional face-to-face appointment.⁷²

Medicare Part B provides for reimbursements for telemedicine services.⁷³ However, Medicare Part B will only pay for interactive communications involving two-way, real-time communication between the patient and the physician.⁷⁴ Reimbursement, therefore, is not provided for telephone conversations, facsimile communication, or electronic mail communications.⁷⁵ Medicare will not reimburse providers for reviewing and interpreting prior examinations, dermatology photographs, or store-and-forward technology use.⁷⁶ In addition, Medicare also refuses reimbursement for online medical consultations,⁷⁷ in large part because the communication is conducted via e-mail. Furthermore, in order to be reimbursed by Medicare, the physician must be licensed by the state where the physician is practicing.⁷⁸ Though the patient’s examination is under the control of the physician at a remote location,⁷⁹ a telepresenter is not required unless the physician determines that it is medically necessary.⁸⁰

Unlike Medicare’s rigid reimbursement standards under Medicare, Medicaid has greater flexibility in providing reimburse-

70. *Id.* at 86–87; U.S. Department of Health and Human Resources and Services Administration, *What are the reimbursement issues for telehealth?*, available at <http://www.hrsa.gov/healthit/toolbox/ruralhealthittoolbox/telehealth/whatarethereimbursement.html>.

71. *Id.*

72. *Id.*

73. *Id.* at 87.

74. *Id.* at 86–87; U.S. Department of Health and Human Resources and Services Administration, *What are the reimbursement issues for telehealth?*, HRSA, <http://www.hrsa.gov/healthit/toolbox/ruralhealthittoolbox/telehealth/whatarethereimbursement.html>.

75. *Id.* at 86–87.

76. The exception to this rule is that Medicare will provide for store-and-forward technology, under limited circumstances, in Alaska and Hawaii. 42 C.F.R. § 410.78(d); *see also* 42 C.F.R. § 410.78(a)(1).

77. Bailey, *supra* note 10, at 86–87.

78. 42 C.F.R. § 410.78(b)(1).

79. 42 C.F.R. § 410.78(b)(5).

80. 42 C.F.R. § 410.78(c).

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ment for telemedicine services.⁸¹ Though the federal government gives some money to states to run Medicaid programs, the state is given the power to establish its own eligibility standards and determine what services are rendered under the program, the amount of services it will provide, how long an individual is eligible for the services, and the scope of the services.⁸² States are also given the latitude to determine how much an individual will pay for services and determine how the program is administered.⁸³ Regardless of the freedom bestowed upon the state, federal funds are conditioned on compliance with select mandates.⁸⁴

Because states are given the opportunity to determine what medical service is provided through Medicaid, states can circumvent the traditional face-to-face requirements for reimbursement. As a result, most states have chosen to provide reimbursement for telemedicine services.⁸⁵ Many of the states providing for telemedicine reimbursement provide payment for a wide range of telemedicine services; however, just like Medicare, online consultations do not qualify for reimbursement.⁸⁶

While Medicare and Medicaid provide a substantial portion of healthcare benefits to Americans, many patients have private insurance. In efforts to promote telemedicine, some states require insurers to reimburse physicians for telemedicine services.⁸⁷ However, many state mandates are not clear about whether these reimbursement requirements apply to online consultations as well.⁸⁸ In the absence of state mandates, insurers have the option to provide payment for telemedicine. In some states, insurance companies such as Blue Cross, Blue Shield, and MVP Health Care have begun providing reimbursement for online consultations.⁸⁹ When insurers do not provide reimbursement for online medical consultations, patients with flexible spending accounts or health savings accounts can submit receipts in attempts to obtain reimbursement.⁹⁰

81. Bailey, *supra* note 10, at 86-87; Medicaid is a state program that provides medical assistance to low income individuals as well as disabled individuals who do not yet qualify for Medicare.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Bailey, *supra* note 10, at 88.

88. *Id.* at 86-87.

89. *Id.*

90. *Id.*

III. THE EVOLUTION OF FLORIDA'S APPROACH TO
TELEMEDICINE: WHERE IT BEGAN, WHERE IT IS,
AND WHERE IT IS GOING

A. *The Beginning of the Telemedicine Movement in
Florida*

Until 1999, Florida physician licensing statutes did not address telemedicine specifically.⁹¹ In 1999 and 2000, several telemedicine-focused bills were proposed during the Legislative Session.⁹² The 1999 House Bill 2125 passed and effectively created a telehealth task force in Florida.⁹³ The intent of the bill was to “protect the health and safety of all patients in this state receiving services by means of such technology and to ensure the accountability of the health care professions with respect to unsafe and incompetent practitioners using such technology to provide health care services to patients of this state.”⁹⁴ The task forces were given the authority to recommend how to regulate telemedicine, analyze licensing laws, and determine what effect telemedicine would have on rural health care in Florida.⁹⁵ Another bill proposed in 1999, House Bill 1703, died in committee.⁹⁶ This bill sought to require any physician who exerted primary care to obtain a license in Florida.⁹⁷ According to the bill, a physician would have primary authority over a patient, and would therefore be required to obtain a Florida license, if the physician engaged in ongoing, regular, and official interpretations of radiographic images to any health care practitioner in Florida.⁹⁸ Nevertheless, over time, Florida began addressing telemedicine head on in its administrative codes, providing some guidance while leaving many holes and questions for physicians and insurers.

B. *Current Laws and Regulations Addressing
Telemedicine Use in Florida*

In Florida, lawmakers have imposed restrictions that seem-

91. Kaleko, *supra* note 19, at 772.

92. *Id.*

93. *Id.*; see Fla. HB 2125, § 175 (1999) available at <http://laws.flrules.org/1999/397>.

94. Fla. HB 2125, § 175(1) (1999); see also Kaleko, *supra* note 19, at 772; Fla. HB 2125, § 175 (1999).

95. Fla. HB 2125, § 175(3)(c) and (e).

96. See Fla. HB 1703 (1999).

97. See *id.*

98. See *id.*

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ingly discourage the use of telecommunications for the dissemination of medical diagnosis in treatment.⁹⁹ As outlined in Florida Administrative Code, 64B8-9.0141(6), Standards for Telemedicine Practice, the use of telemedicine is prohibited unless three distinct requirements are met:

(6) Physicians and physician assistants shall not provide treatment recommendations, including issuing a prescription, via electronic or other means, unless the following elements have been met: (a) A documented patient evaluation, including history and physical examination to establish the diagnosis for which any legend drug is prescribed. (b) Discussion between the physician or the physician assistant and the patient regarding treatment options and the risks and benefits of treatment. (c) Maintenance of contemporaneous medical records meeting the requirements of Rule 64B8-9.003, F.A.C.¹⁰⁰

This regulation prohibits medical professionals from providing treatment recommendations without first conducting a physical evaluation. A physical evaluation has traditionally been interpreted as an examination consisting of a face-to-face interaction.¹⁰¹ Because the Code expressly requires a physical examination, it implies that a physician is precluded from using telemedicine services unless the physician has conducted a prior in-person physical examination. Thus, the Code does not authorize physicians to engage in telemedicine with patients with whom they have no prior relationship. Furthermore, the Code implies the formation of a physician-patient relationship through the theory of reliance.

Traditionally, a physician-patient relationship can be established through express contract, an implied contract, reliance, or payment. Physician-patient relationships can be created through an implied contract when a patient requests services, and an agreement for services is made.¹⁰² The relationship can also be created through reliance when “(1) the physician affirmatively advises the patient regarding a particular course of treatment; (2) it is foreseeable that the prospective patient would rely on the advice; (3) and the prospective patient in fact relies upon the advice.”¹⁰³ Regardless of disclaimers detailing otherwise, a physician-patient relationship is created when a physician accepts pay-

99. See *infra* text accompanying notes 100 to 122.

100. Fla. Admin. Code. R. 64B8-9.0141(6) (2014).

101. See *supra* text accompanying notes 61 to 62.

102. Bailey, *supra* note 10, at 98.

103. *Id.*

ment in advance of services, bills a patient for services rendered, or is reimbursed for services provided.¹⁰⁴ Thus, by demanding a physical evaluation and a thorough discussion of treatment as prerequisites for the use of telemedicine, the Code ensures that a physician-patient relationship is established.

Under Fla. Admin. Code R. 64B15-14.0081, restrictions are also imposed for physicians practicing osteopathic medicine.¹⁰⁵ In addition to ensuring that a physician-patient relationship is established in accordance to traditional standards of care for diagnosis and treatment, Fla. Admin. Code R. 64B15-14.0081(5) prohibits Doctors of Osteopathy from prescribing medications based solely on an electronic questionnaire.¹⁰⁶ The regulation explicitly creates a presumption that prescriptions written in this manner breach a standard of care and serve as a ground for disciplinary action.¹⁰⁷ Thus, under this regulation, online consultations resulting in prescription medication would not be permitted.

Though the regulations, on their face, do not allow a Florida physician to treat a patient remotely, there are two exceptions that do allow some involvement in telemedicine, as provided under Florida Administrative Code 64B15-140081.¹⁰⁸ The first exception allows physicians to prescribe medications in cases of an emergency.¹⁰⁹ The second exception allows physicians to prescribe medications in “on-call or cross-coverage situations in which the physician has access to patient records.”¹¹⁰ It also allows physicians to provide consultations, but only in cases where there is “another physician who has an ongoing relationship with the patient, and who has agreed to supervise the patient’s treatment, including the use of any prescribed medications.”¹¹¹ The term “consultation,” as used in Section 458.303(1)(b), F.S., encompasses the actions of a physician lawfully licensed in another state, territory, or foreign country.¹¹² A lawfully licensed physician is permitted to examine the patient, take a history and physical, review laboratory tests and x-rays, and make recommendations to a physician duly licensed in this state with regard to diagnosis and treatment

104. *Id.*

105. Fla. Admin. Code Ann. R. 64B15-14.0081 (2014).

106. Fla. Admin. Code Ann. R. 64B15-14.0081(5) (2014).

107. *Id.*

108. Fla. Admin. Code Ann. R. 64B15-14.0081(9)(a-d) (2014).

109. Fla. Admin. Code Ann. R. 64B15-14.0081(9)(b-c) (2014).

110. Fla. Admin. Code Ann. R. 64B15-14.0081(9)(d) (2014).

111. *Id.*

112. Fla. Admin. Code Ann. R. 64B8-2.001(6) (2013).

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of the patient.¹¹³ However, the term “consultation” does not include such physician’s performance of any medical procedure on or the rendering of treatment to the patient.”¹¹⁴

Florida’s statutes explicitly allow for some inter-state telemedicine practices. Section 458.3255 of Florida Statutes states that “[o]nly a physician licensed in this state or otherwise authorized to practice medicine in this state may order, from a person located outside this state, electronic-communications diagnostic-imaging or treatment services for a person located in this state.”¹¹⁵ This statute allows physicians to engage in “store-and-forward” telemedicine services in the limited context of diagnostic imaging, but it also restricts physicians by limiting services to only persons located in the state.¹¹⁶

In sum, Florida’s regulations allow Florida licensed physicians and doctors of osteopathy to engage in consultations remotely, using traditional telecommunication means. However, these consultations require that a physician, not a nurse, nurse’s assistant, nurse practitioner, or other medical professional, provide direct care to the patient. This greatly limits telemedicine’s potential by curtailing the ways in which physicians can render remote care for the many patients in need.

Florida’s administrative code addresses telemedicine in contexts outside of just licensed physicians. The Code discourages the use of telemedicine in nutritional assessment contexts as well. Florida Administrative Code, 64B8-44.007(21) provides:

(21) The licensee’s initial nutritional assessment of a patient must be done in a face-to-face setting, and may not be done by telephone, fax, or internet, except through use of a two point or multiple point video-conferencing system to provide each participant with a video camera, microphone and speakers which allow video and audio communication between all participants as if they were virtually seated in the same room. Communication between the patient and the licensee subsequent to the initial nutritional assessment may be accomplished either face-to-face or by other means, in the reasonable clinical judgment of the licensee. Federal programs that are federally funded are exempt from this subsection, so long as the administration of the program follows the dictates of the federal statutes and

113. *Id.*

114. *Id.*

115. Fla. Stat. Ann. § 458.3255 (2013).

116. *Id.*

rules applicable to the program.¹¹⁷

Unlike the regulatory provisions for physicians, this provision, aimed at professionals licensed to provide nutritional assessments, explicitly requires face-to-face interactions.¹¹⁸ However, these face-to-face interactions may be conducted via videoconferences, as long as the interaction is carried out in accordance to the prescribed guidelines.¹¹⁹ When set against the backdrop of the physician regulations, the requirements for utilizing telemedicine in the nutritional assessment context are more lax. The more liberal use of telemedicine for nutritional assessments may be due to the nature of the interaction with the patient.

Pharmacists are also addressed in laws concerning the use of telemedicine. Section 465.016, Florida Statutes provides grounds for denial of a license or disciplinary action for any “pharmacist who knows, or has reason to believe that the purported prescription is not based upon a valid practitioner-patient relationship.”¹²⁰ This sanction imposes a restriction for filling prescriptions from doctors who may not be creating valid practitioner-patient relationships.¹²¹ The concern is that some telemedicine services may not create a traditional valid physician-patient relationship. If so, a pharmacist may be sanctioned for filling a prescription that was provided through the telemedicine service, provided the pharmacist knows, or has reason to know of the improper physician-patient relationship.¹²² However, enforcing this statute may be problematic because it requires a pharmacist to have knowledge of a relationship he or she may not be privy to.

C. *Telemedicine Practices Currently Used in Florida*

Though Florida regulations, on their face, discourage the use of telemedicine without an existing physician-patient relationship, some hospitals in Florida have found ways to utilize technology in providing remote health care.¹²³ Florida authorizes the use

117. Fla. Admin. Code Ann. R. 64B8-44.007(21) (2010).

118. *Id.*

119. *Id.*

120. Fla. Stat. § 465.016.

121. *Id.*

122. *Id.*

123. See MIAMI CHILDREN'S HOSPITAL, GLOBAL HEALTH, <http://www.mch.com/patients-and-families/global-health.aspx>; *Telemedicine Brings Congenital Heart Institute's Unique Cardiac MRI Expertise Daily to Patients in Orlando, Miami Children's Hospital* (June 2, 2010), MIAMI CHILDREN'S HOSPITAL, <http://www.mch.com/>

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of telemedicine in rural areas for children with special needs,¹²⁴ allowing for some successful private telemedicine programs to exist, so long as the program is in compliance with state statutes and regulations.¹²⁵ For example, Miami Children's Hospital implemented its "Global Health" program, which offers "virtual and telemedicine consulting with referring physicians to ensure continuity and care."¹²⁶ The program is available to patients both domestically and abroad.¹²⁷ In a 2010 press release, Miami Children's Hospital highlighted its telemedicine efforts that have provided extensive remote care to patients at Arnold Palmer Hospital for Children, located in Orlando, Florida.¹²⁸ Before the use of telemedicine between these hospitals, one cardiac specialist traveled to Orlando's Arnold Palmer Hospital for Children, once a month, to see patients with congenital heart problems.¹²⁹ Now, the patients are able to receive specialized care at any time,¹³⁰ a practice made permissible due to the special needs of the patients.

Tenet Healthcare Corporation is another healthcare provider that engages in telemedicine practices. Tenet Healthcare Corporation, a healthcare services company "whose subsidiaries and affiliates own and operate 49 acute care hospitals, 84 free-standing outpatient ambulatory surgery centers and diagnostic centers in 11 states across the U.S.,"¹³¹ has implemented a telemedicine network to better provide patient care.¹³² Tenet Healthcare Corporation describes its telemedicine program as one that "connects Tenet Florida hospital's physicians to medical teams at sites

press/EN/266/TELEMEDICINE-BRINGS-CONGENITAL-HEART-INSTITUTE-S-UNIQUE-CARDIAC-MRI-EXPERTISE-DAILY-TO-PATIENTS-IN-O.aspx.

124. *State Medical Board: Paving the Way for Telemedicine in Florida?*, *Florida Partnership for Telehealth*, (Oct. 11, 2013), <http://www.fltelehealth.org/florida/2013/10/11/state-medical-board-paving-the-way-for-telemedicine-in-florida/>.

125. *Id.*

126. MIAMI CHILDREN'S HOSPITAL, GLOBAL HEALTH, <http://www.mch.com/patients-and-families/global-health.aspx>.

127. *Id.*

128. *Telemedicine Brings Congenital Heart Institute's Unique Cardiac MRI Expertise Daily to Patients in Orlando, Miami Children's Hospital* (June 2, 2010), MIAMI CHILDREN'S HOSPITAL, <http://www.mch.com/press/EN/266/TELEMEDICINE-BRINGS-CONGENITAL-HEART-INSTITUTE-S-UNIQUE-CARDIAC-MRI-EXPERTISE-DAILY-TO-PATIENTS-IN-O.aspx>.

129. *Id.*

130. *Id.*

131. TENET HEALTHCARE, TENET FLORIDA, <http://www.tenetflorida.com/en-us/aboutus/pages/default.aspx> (last visited Feb. 15, 2014). Eleven of Tenet Healthcare Corporation's hospitals are located within Florida.

132. *Telemedicine*, TENET FLORIDA, <http://www.tenetflorida.com/en-US/forphysicians/Pages/Telemedicine.aspx> (last visited Feb. 15, 2014).

across the globe. Whether it is to provide medical consultations, second opinions or offer continuing educational opportunities, telemedicine assists physicians to help them provide the best possible care for their patients.”¹³³ Tenet’s telemedicine program fits squarely in the authorized telemedicine practices under Florida Administrative Code Section 64B8-9.014 and Florida Statute, Section 458.3255, because the corporation’s network provides services that are consultative in nature, with the primary care provider fully engaged in the entire process.

These hospitals have found ways to utilize telemedicine in spite of the restrictions imposed by Florida law, in large part due to the programs being confined to second opinions, consultations, and other services that imply that an established primary care provider is closely involved in the care rendered through telemedicine events.¹³⁴ Thus, these telemedicine programs, on their face, are not used in circumstances where the treating physician lacks a prior relationship with the patient. Furthermore, these programs do not incorporate online consultations or extensive telemedicine procedures.

While telemedicine programs have proven to be valuable and effective for both providers and patients, the systems could be bolstered by fewer restrictions. Though Florida health care providers engage in limited telemedicine practices domestically, the legislative battle is not over.

D. Proposed Reform to Florida Telemedicine Practices in 2013

In 2013, two bills were placed before Florida legislatures, calling for lawmakers to repeal existing laws that restrict the use of telemedicine.¹³⁵ HB 167 and SB 70 (the “Bills”) were identical and encouraged lawmakers to revise Florida’s telemedicine laws to provide statewide expansion.¹³⁶ The Bills described telemedicine services as “those services that use electronic technology to overcome a geographic distance between patients and healthcare providers for the purpose of intervention, clinical management, or assessing, monitoring, or educating patients. . . .”¹³⁷ Examples of such services included synchronous video conferencing, remote

133. *Id.*

134. *See supra* text accompanying notes 123 to 133.

135. Fla. HB 167 (2013); Fla. SB 70 (2013).

136. *Id.*

137. *Id.*

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patient monitoring, transmission of asynchronous health images, or other electronic health transmissions, used for diagnosis, consultation, treatment, transfer of medical data, or exchange of medical information.¹³⁸ These transmissions could be conducted via audio, video, or data communications.¹³⁹ However, the Bill explicitly excluded audio-only telephone calls, e-mail messages, or facsimile transmissions from permissible telemedicine services.¹⁴⁰

The Bills died in committee, however, had they passed, telemedicine consultations would have remained permissible.¹⁴¹ The Bills also attempted to go a step beyond consultations by explicitly demanding that health care practitioners be trained, educated, and knowledgeable about telemedicine procedures and the technologies they are using.¹⁴² Failure to obtain or maintain sufficient training, education, or knowledge was a ground for disciplinary action by the applicable board.¹⁴³ In an effort to promote reimbursement from health insurers, the Bills, had they passed, would have prohibited private health insurers from conditioning reimbursement on a face-to-face contact as long as the telemedicine services had been appropriately provided and met generally accepted health care practices and standards prevailing in the applicable professional community at the time that the service was rendered.¹⁴⁴

The intent of the Bill was to eliminate barriers to accessing health care, such as geographic, weather, transportation, and lack of availability of a specialist.¹⁴⁵ The Bills also sought “to embrace efforts that will encourage health insurers and health care providers to support the use of telemedicine and that will also encourage all state agencies to evaluate and amend their policies and rules to remove any regulatory barriers prohibiting the use of telemedicine.”¹⁴⁶ The Bills further called for revisions to Medicaid reimbursement by requiring Medicaid services provided through fee-for-service or a managed care delivery system to consider telemedicine services creditable services.¹⁴⁷

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Fla. HB 167 (2013).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

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The Bills also demanded that in-person consultations and telemedicine consultations be considered equivalent services in terms of insurance coverage and reimbursement.¹⁴⁸ However, insurers would have been permitted to impose deductibles or copayments for telemedicine services so long as the deductible did not exceed the payment required for in-person consultations.¹⁴⁹

The Bills also addressed the Department of Health by authorizing it, along with appropriate boards, to exercise regulatory or rulemaking functions to promulgate rules as necessary to implement and enforce adherence to laws relating to telemedicine services.¹⁵⁰ The Department of Health was required to “lead and conduct an interagency study, which also includes the Department of Children and Families and the Agency for Health Care Administration, on options for implementing telemedicine services and coverage, including multipayer coverage and reimbursement, for stroke diagnosis, high-risk pregnancies, premature births, mental health services, and emergency services.”¹⁵¹

Though both of the Bills died in committee, they would have had the power to remove many of the barriers physicians wishing to engage in telemedicine face. The push for greater latitude in utilizing telemedicine has support from the Florida Board of Medicine and the Florida Board of Osteopathic Medicine.¹⁵² A Joint Telemedicine Subcommittee was recently created and is comprised of nine members of the Florida Boards of Medicine and Osteopathic Medicine.¹⁵³ The subcommittee met in September 2013 to discuss both the advantages and limitations of telemedicine, and the expansion of the same, in Florida.¹⁵⁴ The subcommittee discussed Rules 64B8-9.014 and 64B15.14.008 of the Florida Administrative Code and one subcommittee member explained that the Rules were originally set in place to prohibit Internet prescribing without face-to-face examinations.¹⁵⁵ Many

148. *Id.*

149. Fla. HB 167 (2013).

150. *Id.*

151. *Id.*

152. Florida Partnership for Telehealth, *State Medical Board: Paving the Way for Telemedicine in Florida?*, (Oct. 11, 2013), <http://www.fltelehealth.org/florida/2013/10/11/state-medical-board-paving-the-way-for-telemedicine-in-florida/>.

153. Florida Partnership for Telehealth, *supra* note 124.

154. Meeting Report, Joint Meeting of the Florida Boards of Medicine & Osteopathic Medicine, (Sept. 9, 2013), [hereinafter *Meeting Report*], http://ww10.doh.state.fl.us/pub/medicine/Agenda_Info/Public_Information/Public_Minutes/September2013/09092013_TeleMed_Minutes.pdf.

155. *Id.*

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advocates of telemedicine spoke about their concerns with the current Rules.¹⁵⁶ Common concerns were that the term “physical” in Rule 64B8-9.014 implies a face-to-face physical and that there are some instances in which a traditional face-to-face examination is not required, such as monitoring a patient after a traditional examination has been conducted.¹⁵⁷

One physician from Corizon Health, who has a contract to treat patients at the Department of Corrections, expressed the desire to use outside physicians to render care to patients in the facility, felt that doing so would require an expansion of telemedicine.¹⁵⁸ Other speakers focused on concerns with training surrogates in the room with a patient using teleconferencing, while others spoke on the effect of licensing barriers and raised HIPPA concerns.¹⁵⁹ Nonetheless, the overall commentary indicated that expansion of telemedicine services in Florida has overwhelming support and that initial concerns can be readily handled through careful and deliberate regulations and rules.¹⁶⁰ If the Subcommittee and other supporters continue to effectively lobby for the expansion of telemedicine and increase support for similar bills in the future, health care may change significantly for health care consumers in Florida.

E. Puerto Rican Laws Addressing the Use of Telemedicine Within Its Borders

Puerto Rico, too, has taken a stance on the use of telemedicine within its borders. Chapter 115 of the Laws of Puerto Rico Annotated, entitled the Telemedicine Regulating Act, was passed in 2000, and adopts a broad definition of telemedicine. Telemedicine is defined as:

[A]ny test, diagnosis, treatment, operation or prescription for any physical and/or mental illness, ailment, pain, lesion, deformity or condition performed on a patient by a physician who practices surgery or an osteologist who practices as such through advanced technologic telecommunication means in order to exchange information and provide the health services mentioned above in distant geographical areas.¹⁶¹

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Meeting Report, supra* note 154.

161. 20 L.P.R.A. § 6001(b) (2000).

Like Florida's administrative codes, Chapter 115 places a significant focus on the licensing requirements of physicians and osteologists using telecommunication to provide medical care in the Commonwealth. Pursuant to 20 L.P.R.A. § 6002, any physician who practices surgery or osteology must obtain a license from the Board of Medical Examiners to practice medicine in Puerto Rico. Physicians, surgeons, and osteologists outside of the Commonwealth must obtain a duly issued license from the Board of Medical Examiners in order to draft or publish advertisements claiming they are legally qualified to practice telemedicine in Puerto Rico.¹⁶² However, the licensing requirement does not apply to outside physicians and osteologists who are consulted by duly-licensed doctors within the Commonwealth, so long as the consulted physician or osteologist is licensed in the jurisdiction in which they practice, and any institution that provides a facility for the consultation is officially certified in the jurisdiction where the facility is located.¹⁶³

Though it imposes strict licensing requirements for the use of telemedicine, Puerto Rico does provide three caveats under the law. First, outside physicians are permitted to practice telemedicine in Puerto Rico, without a license, in instances of medical emergencies.¹⁶⁴ However, the medical emergency exclusion is limited to one instance per patient and must not exceed ten patients per year.¹⁶⁵ Second, outside physicians who practice surgery or osteology may engage in the irregular practice of telemedicine so long as they do not receive any compensation or remuneration of any kind.¹⁶⁶ Third, physicians who practice surgery, or osteologists, within Puerto Rico are permitted to occasionally consult with colleagues outside of the Commonwealth when there is not a direct physician-patient relationship.¹⁶⁷

Even if all licensing and consultation requirements are met, physicians are not permitted to use telemedicine unless the patient has given both oral and written informed consent.¹⁶⁸ Specifically, physicians must inform the patient that he or she has the option of withholding or withdrawing consent at any time and that withdrawing and withholding consent does not impair the

162. 20 L.P.R.A. § 6003 (2003).

163. *Id.*

164. 20 L.P.R.A. § 6007 (2000).

165. *Id.*

166. *Id.*

167. *Id.*

168. 20 L.P.R.A. § 6006 (1998).

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patient's right to receive other medical care.¹⁶⁹ Patients must also be advised of any potential risks, consequences, and benefits that may be imposed by the use of telemedicine, all safeguards taken to ensure patient confidentiality, and the "rights of the patient to the transmitted information and to obtain a copy thereof by paying a reasonable amount."¹⁷⁰

Failure to adhere to Puerto Rico's telemedicine laws is deemed the illegal practice of medicine and is subject to penalty.¹⁷¹ In addition, the Board of Medical Examiners has the authority to impose a fine up to fifteen thousand dollars for violations.¹⁷² The penalty guidelines provide an opportunity to ensure patient safety by providing firm sanctions against physicians who engage in improper telemedicine practices.¹⁷³

While both Florida and Puerto Rico focus to great extent on licensing, each have highlighted additional areas that serve as a cause for concern for their respective legislatures. Puerto Rico has placed additional consultation restrictions by delineating a specific number of instances in which an outside physician may provide consultations before the licensing requirement is triggered. Florida, however, has chosen to place additional emphasis on the examination requirements by imposing a "physical examination" mandate on physicians and a "face-to-face" mandate on nutrition specialists. The differences in regional focuses not only highlight the myriad of concerns that arise in the use of telemedicine, but also shed light on additional obstacles to a free-flowing model of medical diagnosis and treatment across borders.

IV. EXPANDED TELEMEDICINE SERVICES IN FLORIDA WOULD POSITIVELY IMPACT IMMIGRANTS AND RESIDENTS WHO LIVE IN RURAL COMMUNITIES

A. *How Telemedicine Can Better Serve Immigrants in Florida in Light of Ethnic and Linguistic Diversity*

As a nation, the United States is increasingly becoming more diverse. According to 2013 statistics provided by the United States Census Bureau, Black or African Americans comprise 13.2 percent of the American population, and Hispanic or Latinos

169. *Id.*

170. *Id.*

171. 20 L.P.R.A. § 6008 (1998).

172. *Id.*

173. *Id.*

represent 17.1 percent.¹⁷⁴ Nationwide, only 12.9 percent of United States residents indicated that they were foreign born and 20.7 percent of people over the age five years old speak a language other than English at home.¹⁷⁵ Florida, however, is more diverse than the national population as a whole. In 2013, Black or African Americans represented 16.7 percent of the Florida's population, and Hispanics or Latinos represent 23.6 percent.¹⁷⁶ In addition, 19.4 percent of Florida residents are foreign born and 27.4 percent of Floridians speak a language other than English at home.¹⁷⁷ Florida is home to a significant number of immigrants from countries sharing the Western Hemisphere, perhaps due to the proximity to Haiti, Cuba, Puerto Rico, and the Dominican Republic.

The immigrant population in Florida increased 37.0 percent from 2000 to 2010, with the immigrant share of the population increasing from 16.7 percent to 19.4 percent.¹⁷⁸ While Florida has seen a steady influx of immigrants since before the 1980's, approximately 35.3 percent of Florida's foreign-born residents entered Florida after 2000.¹⁷⁹ The United States Census Bureau estimates from 2006 to 2010 indicate that 74.5 percent of immigrants living in Florida were born in Latin America.¹⁸⁰ While Florida saw a 17.6 percent increase in its general population between 2000 and 2010, Florida's Latino population increased 57.4 percent during the same time frame.¹⁸¹

Florida is among the top five states with the largest Hispanic or Latino populations. The 2010 Census ranked the top-five states for detailed Hispanic or Latino origin groups. The census revealed that Florida had the highest Cuban population, the second-highest Puerto Rican population, the second-highest Guatemalan population, and the third-highest Dominican population.¹⁸² In addition, Florida had the second-highest population of "other Hispanics."¹⁸³

174. United States Census Bureau, *State and County Facts*, available at <http://quickfacts.census.gov/qfd/states/12000.html>.

175. *Id.*

176. *Id.*

177. *Id.*

178. United States Hispanic Leadership Institute (USHLI), *Almanac of Latino Politics 2012*, <http://almanac.ushli.org/states/florida/>.

179. *Id.*

180. *Id.*

181. *Id.*

182. Sharon Ennis, et al., *The Hispanic Population, 2010 Census Briefs*, U.S. Census Bureau (2011) <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

183. *Id.*

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Because of the high concentration of Latin Americans and the steady increase of immigrants, communities in Florida are often comprised of people speaking many languages other than English. According to the 2000 census for languages spoken at home, at least 16.5 percent of Floridians speak Spanish at home. Another 1.4 percent of Florida residents speak French Creole, and another .9 percent speak French.¹⁸⁴ Communication, and consequently language, is a key factor in providing health care, and with such diversity in languages spoken in Florida, there is a demand for healthcare providers who speak a language other than English.

i. Language Barriers and Cultural Norms Significantly Impact Medical Treatment

Providing healthcare to patients is not uniform. In order to render the most effective care, cultural contexts must be taken into consideration.¹⁸⁵ Culture can play a significant role in diagnosis, as many conditions are more prevalent in certain ethnic groups.¹⁸⁶ In addition to diagnosis, culture also plays a significant role in treatment¹⁸⁷ and access to healthcare.¹⁸⁸ Cultural variations can skew adherence to medication and treatment as well as influence what treatment options are acceptable to a patient, the effectiveness of the physician-patient relationship, and how an illness affects a patient.¹⁸⁹ In many contexts, Hispanic immigrants often have lower rates of treatment and lower quality of treatment, a problem that is particularly significant in the area of mental health.¹⁹⁰ To further exacerbate the most basic access problems, Hispanics living in rural areas face additional burdens such as the inability to travel long distances, lack of public transportation, and a lack of bilingual or bicultural mental health care providers.¹⁹¹ Because of Florida's extensive diversity, there are wide

184. Florida Languages, City Data, <http://www.city-data.com/states/Florida-Languages.html> (last visited Feb. 15, 2014).

185. Pauline W. Chen, *Bridging the Culture Gap*, THE NEW YORK TIMES, (July 16, 2009), <http://www.nytimes.com/2009/07/16/health/16chen.html>.

186. *Id.* (discussing family with Hepatitis B passed from mother and increased rate of liver cancer).

187. *Id.*

188. Joyce Javier et al., *The Relationship of Immigrant Status With Access, Utilization, and Health Status for Children With Asthma*, 7.6 AMBULATORY PEDIATRICS 421, 421 (2007).

189. *See* Chen, *supra* note 185.

190. Megan Dwight-Johnson et al., *Telephone-Based Cognitive – Behavioral Therapy for Latino Patients Living in Rural Areas: A Randomized Pilot Study*, 62.8 PSYCHIATRIC SERVICES 936, 936 (2011).

191. *Id.*

ranges of cultural differences that have the potential to influence medical diagnosis and treatment for patients across the state. Thus, there is a great need for healthcare providers to be aware of culture and be prepared to formulate specialized diagnosis and treatment plans that take culture into consideration.

Recent studies have shown that telemedicine is an effective method of bridging linguistic and cultural gaps for many Hispanic immigrants seeking healthcare in the United States.¹⁹² While telemedicine may be more useful in some situations, and less helpful in others, a recent study indicates that telemedicine is extremely beneficial for providing mental health care to Hispanic immigrants. Latinos who experience geographical, economical, linguistic, and cultural constraints need practitioners who understand these obstacles and are sensitive to their needs.¹⁹³ Latinos tend to prefer psychotherapy for treatment of depression, and “[c]ulturally tailored cognitive-behavioral therapy has been shown effective for treating depression among low-income Latinos; however, many have difficulty adhering to psychotherapy because of multiple competing demands.”¹⁹⁴ Access to psychotherapy is often limited for Hispanic immigrants because psychotherapy is rarely available in primary care, and many Latinos do not have specialty mental health care options.¹⁹⁵ The quality of depression treatment is higher when the treatment is provided by a provider who is linguistically and culturally similar to the patient.¹⁹⁶ Research further indicates that Hispanic patients, especially more recent immigrants, are often less likely than non-Hispanic patients to be “medically literate, comfortable with the use of new technology, and proficient in English; less open to the need for psychiatric services, the use of new prescription drugs, and receipt of professional help for emotional problems; and less familiar with the availability of services.”¹⁹⁷

Telemedicine, however, can address many of these concerns by linking Hispanic immigrants in Florida to care providers across the state who are linguistically and culturally similar to the

192. *Id.*; see also Marina Reznik, *Use of Interactive Videoconferencing to Deliver Asthma Education to Immigrants*, 10 J. OF TELEMEDICINE AND TELE CARE 118 (2004).

193. Francisco A. Moreno et al., *Use of Standard Webcam and Internet Equipment for Telepsychiatry Treatment of Depression Among Underserved Hispanics*, 63.12 PSYCHIATRIC SERVICES 1213, 1213 (2012).

194. Dwight-Johnson et al., *supra* note 190, at 936.

195. *Id.*

196. Moreno et al., *supra* note 193, at 1213.

197. *Id.*

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patient, and the use of telepsychiatry services has proven to be just as effective for treating depression as traditional means.¹⁹⁸

[U]se of measurement- and algorithm-based treatment for depression by psychiatrists via Webcam can lead to improvements in depression severity, functional ability, and quality of life that are at least equivalent and possibly superior to improvements achieved with treatment as usually delivered by primary care providers. Use of common household information technology may help facilitate access to linguistically and culturally congruent psychiatric specialty care among underserved Hispanic patients.¹⁹⁹

Telepsychiatry may be so successful in treating depression for Hispanics because it allows practitioners to serve the cultural and linguistic needs of patients while still being able to foster a relationship with the patient through video-conferencing sessions. Furthermore, the use of telemedicine in the practice of psychiatry is gaining ground, and with new networks being established, more long-term and in-depth studies can be conducted, with special attention being paid to fostering more specialized care for Hispanic patients.

ii. Telemedicine Offers Improved Access to Healthcare for Rural Florida Residents

Hispanic immigrants in Florida face more than just linguistic and cultural obstacles when attempting to access healthcare: immigrants also face significant financial impediments. Roughly twenty-one percent of Florida immigrants and their U.S.-born children under the age of eighteen live in poverty.²⁰⁰ Low-income individuals face many barriers when attempting to access healthcare. Three major obstacles for low-income individuals are: (1) lack of insurance; (2) poor access to services; and (3) unaffordable costs.²⁰¹ With many of Florida's immigrants living below the poverty line, these barriers to healthcare are a constant battle.

198. *Id.*

199. *Id.* Similar results were found in a study using a telephone based distance therapy, and the results indicated that the telephone-based telemedicine was effective in rendering care. See Dwight-Johnson et al., *supra* note 190, at 941.

200. Center for Immigration Studies, *New Study Examines Florida's Immigrants* (2012), available at <http://cis.org/sites/cis.org/files/2012%20Profile%20Florida.pdf> (last visit Feb. 15, 2014).

201. Jennifer E. DeVoe et al., *Insurance Plus Access Does Not Equal Health Care: Typology of Barriers to Health Care Access for Low-Income Families*, 5 ANN. FAM. MED. 511, available at <http://www.medscape.com/viewarticle/567154>.

Advocates claim telemedicine has the potential to “dramatically expand access to quality health care, eroding the barriers of distance, time, money and language that prevent people in medically underserved rural and urban areas from receiving state-of-the-art diagnosis and treatment.”²⁰² If true, increased and expanded use of telemedicine in Florida would have potential to erode many of these barriers that immigrants and their families face when attempting to access health care in Florida. By implementing more telemedicine networks, immigrant patients may have the ability to access healthcare providers who speak the same language and understand their cultural needs. Furthermore, increased use of telemedicine would enable physicians to provide care to more individuals in a greater geographical area, while decreasing travel costs for patients with limited means.

The recent Bills before Florida’s House of Representatives and its Senate aimed to increase insurance coverage for telemedicine services.²⁰³ By mandating that health insurance providers in Florida cover telemedicine procedures that do not involve a face-to-face interaction between the physician and patient, immigrants with insurance will have a better opportunity to seek care for their health needs. Studies have revealed that Hispanic immigrants respond positively overall to telemedicine and the benefits it offers to patients.²⁰⁴ Thus, expanding the use of telemedicine, as was proposed, would not only increase the effectiveness of healthcare to Florida residents but would also have a significant impact on the quality and access to healthcare throughout the state.

Puerto Rican immigrants in Florida would also be better served if provided the opportunity to receive telemedicine services from practitioners in Puerto Rico. Reforms to the licensing requirements for Puerto Rican physicians practicing telemedicine to immigrant patients living in Florida would allow a more fluid flow of medical treatment across the borders. In the same respect, a less restrictive licensing requirement under Puerto Rican law would allow Puerto Rican physicians to work closely with Florida physicians to provide specialized treatment to patients in need. The current licensing requirements under both sets of laws effec-

202. Kaleko, *supra* note 19, at 768 (citing Linda C. Fentiman, *The Legal Questions From Telemedicine, Five Major Issues Emerge*, N.Y. L.J., Aug. 3, 1998, at 7).

203. *See supra* text accompanying notes 135 to 151.

204. George Sheba, *How Do Low-Income Urban African American and Latinos Feel About Telemedicine? A Diffusion of Innovative Analysis*, INT’L J. OF TELEMEDICINE AND APPLICATIONS (2012).

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tively create barriers to generating greater access to medical treatment and restrict the flow of information that may be crucial to patient care. Both Florida and Puerto Rico's residents could benefit from a licensing regime that allows reciprocal access to physicians.

V. CONCLUSION

For decades, health care providers have been able to use technology to provide a range of health care services to patients in remote locations. While it started in rudimentary form, the range of healthcare practices that fall within the definition of telemedicine is expanding. Some states have embraced telemedicine and have consequently created an extensive network that provides increased access to healthcare for its residents and is more cost and time efficient than previous health care practices. Florida, however, is slowly warming up to telemedicine, evidenced by the gradual acceptance of remote medical services. While Florida currently imposes restrictions on telemedicine practices, essentially limiting it to consultative services and imaging review, changes to current law, as recently proposed in the House of Representative and Senate, would have the ability to change the landscape of health care in Florida.

Florida legislatures should pass laws similar to the recently proposed bills that called for mandatory insurance reimbursement for telemedicine procedures and overall reform in telemedicine laws in effect in Florida. Florida is a diverse state comprised of many ethnic groups who speak a variety of languages and adhere to a number of cultural norms that require special consideration when rendering health care. Telemedicine has the potential to better serve these residents, which, in turn, will improve and optimize the care provided to patients. With so many rural communities suffering from a lack of access to healthcare, the expansion of telemedicine is the most direct and immediate way to increase access and begin eliminating the health care problems eroding these communities. Likewise, Puerto Rico should embrace the opportunity to reexamine licensing requirements to allow for more consultations per physician and seek opportunities to enhance medical care within its borders.

Telemedicine is not a fad with a shaky foundation and minimal benefits—it is a facet of health care that increases access to treatment, erodes common barriers to effective care, decreases associated costs, and provides a more effective and desirable

health care experience. While issues such as a licensing, training, cost of equipment, privacy, and liability are valid concerns, they are not insurmountable barriers to implementing a system that has the potential to bring health care consumers a more beneficial experience. With effective training, careful consideration of patient needs, and a deliberate implementation, Florida's health-care system can be changed for the better. As evidenced by the Telemedicine Joint Subcommittee, many health care providers support the use of telemedicine in Florida and many practitioners who are currently engaged in limited telemedicine practices are eager to expand their services. Thus, Florida legislatures pass new legislation and allow the Department of Health to engage in a complete restructuring of telemedicine practices in Florida.