

**TELEMEDICINE: A CONFLICT OF LAWS  
PROBLEM WAITING TO HAPPEN—HOW  
WILL INTERSTATE AND INTERNATIONAL  
CLAIMS BE DECIDED?**

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## I. INTRODUCTION

Telemedicine is a quickly developing means of health care delivery across the United States as well as around the world.<sup>1</sup> This technical marvel allows patients from the most remote locations in the world to be treated by specialty physicians located in more urban areas by means of real-time encounters that vary little from face-to-face visits.<sup>2</sup> While the potential benefits of telemedicine are doubtless, there is a great deal of doubt regarding how courts, both internationally and within the United States, will handle the legal issues that are sure to arise from these telemedicine consultations.<sup>3</sup>

Most likely, we will—if we have not already—all come face-to-face with health care services being delivered from a distance, that is, telemedicine.<sup>4</sup> Physicians at the University of Texas Medical Branch<sup>5</sup> have found that, in many instances, telemedicine can be a more efficient delivery system than traditional care for all the parties involved.<sup>6</sup> For instance, telemedicine can increase employer satisfaction by allowing employees to remain in the workplace for treatment, thus increasing productivity.<sup>7</sup> Surprisingly, these physicians have

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1. See U.S. DEPT. OF HEALTH AND HUMAN SERVICES, OFFICE FOR THE ADVANCEMENT OF TELEHEALTH, 2001 TELEMEDICINE REPORT TO CONGRESS 21–26 (2001), available at <http://telehealth.hrsa.gov/pubs/report2001/2001REPO.pdf> [hereinafter 2001 TELEMEDICINE REPORT] (reporting general information on the state of telemedicine in the United States to Congress).

2. *Id.* at 1.

3. See generally *id.* at 4, 21–26.

4. John D. Stobo, M.D., *Telemedicine: the Future of Health Care*, Vol. 4 No. 2, ENERGY HOUSTON, 2002, at 92.

5. The University of Texas Medical Branch had conducted more than 45,000 telemedicine consultations as of 2002 and continues to conduct more than 1000 per month. *Id.* at 93.

6. *Id.* at 94. Parties to a telemedicine consultation potentially include the patient, the treating physician, the health care provider that is present with the patient, the patient's health care insurer, and the patient's employer. *Id.*

7. *Id.* at 94–95.

also found that patient satisfaction remains high by supplementing local care with these additional services.<sup>8</sup>

In order to get an appreciation for the potential effects of telemedicine, it is beneficial to look at a real life example. In June 2003, a thirty-five year old meteorologist at the National Science Foundation's Amundsen-Scott research station in Antarctica began experiencing chest pain.<sup>9</sup> The station's primary care physician suspected that the patient had suffered a myocardial infarction, or heart attack, but without the help of a cardiologist the primary care physician could not be certain about the diagnosis or its possible severity.<sup>10</sup> The primary care physician, therefore, arranged a telemedicine visit with Masood Ahmad, M.D., a professor of cardiology at the University of Texas Medical Branch in Galveston, Texas.<sup>11</sup> Specialized equipment allowed Dr. Ahmad to see and to talk with both the primary care physician and the patient, as well as to analyze ultrasound pictures of the patient's heart on a real-time basis despite being more than halfway across the globe.<sup>12</sup> Dr. Ahmad piloted the primary care physician through the entire procedure by guiding his movements and adjusting the equipment in order to get different views of the heart.<sup>13</sup> Through telemedicine, the requisite specialty physician was able to diagnose and treat the patient as well as oversee his rehabilitation.<sup>14</sup> While this may not sound critical to many, in this case it was a life or death issue. This consult took place in the dead of the Antarctic winter in an environment consisting of temperatures as low as one hundred degrees below zero.<sup>15</sup> Without this technology, the patient would have to be air-lifted out, thereby risking the lives of the patient and the would-be rescuers, not to mention the

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8. *Id.* at 94.

9. Carrie Ann Taylor, *Telemedicine on Ice*, UTMB MAGAZINE, Summer 2004, at 14, available at [http://www.utmb.edu/utmbmagazine/archive/04\\_Summer/features/tele\\_on\\_ice.htm](http://www.utmb.edu/utmbmagazine/archive/04_Summer/features/tele_on_ice.htm).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 15.

14. *Id.* at 15-16.

15. *Id.* at 14.

hundreds of thousands of dollars in potential costs.<sup>16</sup> While all telemedicine consults may not involve life or death situations or such extreme conditions, they all involve a heightened level of potential cost control, increased access to care, and decreased travel burdens, such as cost, time, and stress.<sup>17</sup>

The above example helps illustrate the amazing potential for health care delivery worldwide through telemedicine. However, in order to protect this potential, it is important for telemedicine providers, patients, and policymakers to begin addressing the potential legal ramifications that may extend to this form of health care.<sup>18</sup>

In order to further illustrate the potential ramifications involved with telemedicine let us go back to the Antarctica example. Let us assume that the treatment was not a success. Would the patient be able to bring a medical malpractice claim against the specialty physician, primary care physician, or employer? What if the problem stemmed from a malfunction in the equipment, could he bring a products liability claim?

These are all interesting questions, but ones that usually can easily be analyzed and answered by looking to the controlling law involved in each case. This leads us to the real problem: which law applies in a telemedicine consultation across either state or foreign borders, and furthermore, who would have jurisdiction over such claims? In the Antarctica example, this may seem like a pretty simple solution since Antarctica does not have its own laws and because a most significant contacts analysis would likely result in application of Texas law.<sup>19</sup>

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16. *Id.* at 14–15.

17. U.S. DEPT. OF COMMERCE, OFFICE OF TECHNOLOGY POLICY, INNOVATION, DEMAND, AND INVESTMENT IN TELEHEALTH 1 (Feb. 2004) [hereinafter INNOVATION] (government reporting on the state of innovation, demand, and investment in U.S. telehealth).

18. 2001 TELEMEDICINE REPORT, *supra* note 1, 4, 21–26.

19. “If one of the competing laws is archaic and isolated in the context of the laws of the federal union, it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal.” *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 726 (Cal. 1978).

However, these questions get much more difficult with some very slight changes to the hypothetical. For example, what if the patient was instead a meteorologist in northern Alaska? Would the Texas physician be subject to the laws of Alaska in regards to a medical malpractice claim? Would the Alaskan primary care physician be subject to Texas law? With regard to state regulatory claims—does the Texas physician have to be licensed to practice medicine in Alaska?

The international nature of many telemedicine matters further complicates many telemedicine consultations. Since there are no international treaties or global agreements that deal with telemedicine,<sup>20</sup> these same choice of law and jurisdictional questions would also have to be addressed on an international basis. Therefore, depending on the country in which the patient is located, telemedicine providers may be opening themselves up to insurmountable liability problems.<sup>21</sup>

Despite the looming problems for telemedicine participants, a great deal of information is not available to answer these questions.<sup>22</sup> In 1999, a Department of Health and Human Services science panel reported that “[t]he extent and nature of liability associated with IHC [Interactive Health Communication] applications are unclear.”<sup>23</sup> The report explains the lack of clarity is especially true for “more sophisticated applications” such as telemedicine and that future legal actions and case law will have to provide some clarity on these issues.<sup>24</sup> As of February 2004, no court—in or outside of the United States—has faced the potential problems of telemedicine

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20. John D. Blum, *The Role of Law in Global E-Health: A Tool for Development and Equity in a Digitally Divided World*, 46 ST. LOUIS U. L.J. 85 (2002).

21. INNOVATION, *supra* note 17, at 88.

22. *Id.*

23. U.S. DEPT OF HEALTH AND HUMAN SERVICES, SCIENCE PANEL ON INTERACTIVE COMMUNICATION AND HEALTH, WIRED FOR HEALTH AND WELL-BEING; THE EMERGENCE OF INTERACTIVE HEALTH COMMUNICATION 1 (1999) [hereinafter WIRED FOR HEALTH]. Telemedicine and Telehealth clearly fall within the definition of Interactive Health Communication, which is defined by Health and Human Services as “the interaction of an individual—consumer, patient, caregiver, or professional—with or through an electronic device or communication technology to access or transmit health information, or to receive or provide guidance and support on a health-related issue.” *See id.* at 8.

24. *Id.* at 88.

consults between unrelated entities.<sup>25</sup> Basically, the liability issues involved in mixing health care with telecommunications has yet to be addressed.<sup>26</sup> Because the court system has not dealt with these issues, it is necessary to take a more proactive stance to help providers predict the potential legal ramifications within the telemedicine industry.

Part I of this Comment will define “telemedicine” and “telehealth” and discuss the potential effects these services may have on various health care delivery systems. This Part will also discuss some of the potential legal claims that may affect telemedicine and its delivery.

Part II discusses procedural issues that will need to be addressed when a legal claim involving telemedicine is brought before a foreign or domestic court. This Part will investigate the application of personal jurisdiction in similar claims as well as the different methods that could be used in deciding an impending conflict of laws problem.

Finally, Part III will attempt to analyze these potential claims to help postulate the potential ramifications of conducting telemedicine across various borders. This Part will investigate potential actions using current procedural methods employed by the various court systems for both regulatory and civil cases.

## II. GENERAL OVERVIEW OF TELEMEDICINE AND TELEHEALTH

### A. *What is Telemedicine?*

Telemedicine has been defined as “the use of electronic communication and information technologies to provide or support clinical care at a distance.”<sup>27</sup> This is distinguished from the broader concept of telehealth, which refers more generally to “the use of telecommunications and information technologies to

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25. Sharon R. Klein and William L. Manning, *Telemedicine and the Law*, HEALTH CARE INFORMATION MANAGEMENT, Summer 1995, at 35, reprinted in The Health Law Resource, <http://www.netreach.net/~wmanning/telmedar.htm>.

26. See INNOVATION, *supra* note 17, at 88.

27. 2001 TELEMEDICINE REPORT, *supra* note 1, at 1 (quoting 1997 TELEMEDICINE REPORT TO CONGRESS, U.S. DEPARTMENT OF COMMERCE 1).

provide health care services at a distance, to include diagnosis, treatment, public health, consumer health information, and health professions education.”<sup>28</sup> Therefore, the area of telemedicine that provides or supports *clinical* health care<sup>29</sup> is a piece of the more expansive field of telehealth, which covers all health care related issues.<sup>30</sup> This Comment will concentrate on telemedicine, in particular the use of information technologies in the delivery of health care between a physician and a patient.<sup>31</sup>

Telemedicine can be defined a number of ways, but it “is [really] nothing more than the transport[ation] of [health] information from one site to another.”<sup>32</sup> In fact, telemedicine is not really its own technology but is “rather a technique for delivering care remotely.”<sup>33</sup> For the first time, primary care providers will not be tied to their own region’s health care limitations.<sup>34</sup>

Telemedicine can occur through a number of different means, ranging from a simple phone conversation, to video conferencing, to conducting highly technical medical procedures.<sup>35</sup> For example, surgeons in New York City completed the world’s first transatlantic surgery.<sup>36</sup> On September 20, 2001, the surgeons were able to successfully remove a patient’s gall bladder by utilizing a remote control robot located in Strasburg,

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28. INNOVATION, *supra* note 17, at 9 (quoting OFFICE FOR THE ADVANCEMENT OF TELEMEDICINE, 2001 REPORT TO CONGRESS ON TELEMEDICINE (2002), <http://telehealth.hrsa.gov/pubs/report2001/intro.htm#overview>).

29. 2001 TELEMEDICINE REPORT, *supra* note 1, at 1.

30. *See id.* at 9–10.

31. For purposes of this Comment, the treating or telemedicine provider will be the one providing consultation services from a remote location, while the host provider will be in the same location as the patient providing services and rendering treatment through the telemedicine equipment. *See, e.g.*, Taylor, *supra* note 9, at 13–14.

32. Dr. Jay Sanders, *The Revolution in Health Care Delivery*, 73 N.D. L. REV. 19 (1997).

33. INNOVATION, *supra* note 17, at 9.

34. Sanders, *supra* note 32, at 24. For example, this technology gives a primary care provider the ability to get real-time consultations and advice from specialists that he would not normally be able to access. *Id.*

35. *Id.* at 19–20.

36. Leah B. Mendelsohn, Comment, *A Piece of the Puzzle: Telemedicine as an Incentive to Facilitate the Improvement of Healthcare in Developing Countries?*, 18 EMORY INT’L L. REV. 151, 164 (2004).

France.<sup>37</sup>

Despite the great range of telemedical services currently available, the typical telemedicine service consists of treating and diagnosing a patient by means of telehealth technology<sup>38</sup> and a high-speed internet connection.<sup>39</sup> This delivery method allows a physician to treat a remote patient the same as he would if it were a face-to-face visit.<sup>40</sup> For example, when the patient's local provider places a specially designed stethoscope over the patient's heart, the treating physician is able to instantly check for any abnormalities in the patient's heart rhythm.<sup>41</sup>

*B. What Effects Could Telemedicine Have on Health Care Delivery?*

In a 2001 letter to President Bush, the Secretary of Health and Human Services, Tommy Thompson, described telemedicine as a method of using technology to help disadvantaged Americans gain access to needed medical care.<sup>42</sup> It is a way to "bridge the gap between the health care 'haves' and 'have nots'" by providing services to rural hospitals, clinics, and schools as well as to urban prisons and homes.<sup>43</sup> The advantages of telemedicine include improved health care access, improved continuity of care, decreased health care costs, enhanced patient

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37. *Id.*

38. INNOVATION, *supra* note 17, at 23–24. "Telehealth technology would include those devices and software that enable healthcare providers and educators to diagnose, consult with, monitor, treat and educate patients and consumers remotely." *Id.* at 22. This technology includes remote monitoring equipment, diagnostic tools (such as otoscopes and stethoscopes), videoconferencing, and digital imaging equipment *Id.* at 23–24.

39. *See generally id.* (noting the necessity for telecommunications capable of handling videoconferencing, remote data monitoring and file transfer).

40. *See id.* at 22, 25.

41. *See generally* INNOVATION, *supra* note 17, at 22–24 (describing the various equipment used in telehealth procedures). This equipment is connected to a computer and an internet connection that allows the treating physician to monitor the results remotely on a real-time basis. *Id.*

42. 2001 Telemedicine Report, *supra* note 1, at iii.

43. *Id.*

education, and improved medical education.<sup>44</sup>

The number of telemedicine programs in the United States increased by 1,500% from 1993 through 1998, and the actual number of telemedicine consults increased more than 3,200% over this same time period.<sup>45</sup> The annual market for telehealth technologies in 2004 has been estimated to be around \$380 million with a growth rate of approximately fifteen to twenty percent.<sup>46</sup> Furthermore, the Federal Trade Commission estimated that more than thirty million Americans sought health information over the Internet in 2001.<sup>47</sup>

The increase in utilization of telemedicine services has not been limited to the United States.<sup>48</sup> Telemedicine applications have exploded internationally as well.<sup>49</sup> For instance, all of France's neurosurgeons are linked together so they can read MRIs and CAT scans on patients throughout the country.<sup>50</sup> Norway, also, has an extensive telemedicine network, which has saved its government substantial amounts of money.<sup>51</sup>

Despite the utilization of telemedicine around the world, telehealth has not reached its full market potential.<sup>52</sup> In fact, some commentators have labeled the export of U.S. medical expertise worldwide as "one of the most untapped multi-million dollar resources" in America.<sup>53</sup> This expertise would be especially beneficial in many developing countries where access to primary care physicians is very limited and access to many specialty

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44. *The Minnesota Medical Association Report on Telemedicine—Executive Summary*, MINN. MED. ASS'N. (1996), available at <http://www.mnmed.org/llp/pdf/TeleExecSummary.pdf>.

45. Kristine Goodwin, *Payment, Licensure are Barriers to Telemedicine*, 21 ST. HEALTH NOTES 330 (2000), reprinted in National Conference of State Legislatures, <http://www.ncsl.org/programs/health/barriers.htm>.

46. INNOVATION, *supra* note 17, at 58.

47. 2001 TELEMEDICINE REPORT, *supra* note 1, at 1.

48. See Sanders, *supra* note 32, at 24; Mendelsohn, *supra* note 36, at 168.

49. Sanders, *supra* note 32, at 28.

50. *Id.* at 24.

51. *Id.* at 28–29. This network has particularly been used in the delivery of care to the country's more rural areas. *Id.*

52. See INNOVATION, *supra* note 17, at 67.

53. Sanders, *supra* note 32, at 30. See INNOVATION, *supra* note 17, at 67.

physicians is almost nonexistent.<sup>54</sup> Telemedicine gives many countries an alternative approach for treating their citizens.<sup>55</sup> For example, a patient could travel from the Middle East to Europe or the United States to see a dermatologist at a cost of over thirty-thousand dollars or that same dermatologist could see the patient at a local clinic through telemedicine for a fraction of the cost.<sup>56</sup> For these reasons, many developing and rural countries are seeking telemedicine as a cost-effective means of improving medical care for their citizens.<sup>57</sup>

### C. *What Legal Claims Will Affect Telemedicine and Its Delivery?*

As with most major commercial endeavors, countless claims could be brought against parties participating in telemedicine, ranging from malpractice to fraud.<sup>58</sup> This is especially true due to the very technical and detailed nature of both the equipment utilized as well as the information transmitted.<sup>59</sup> However, for the sake of time, this Comment will concentrate on three major areas of concern: (1) Physician licensure and governance, (2) Medical Malpractice, and (3) U.S. federal statutory claims.

Physician licensure and governance<sup>60</sup> has been a major area of concern since the development of telemedical services, and it is the area that has had the most discussion within federal and state governments.<sup>61</sup> This issue basically boils down to how

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54. INNOVATION, *supra* note 17, at 67. See Mendelsohn, *supra* note 36, at 209–10.

55. See Sanders, *supra* note 32, at 30. Traditionally, citizens of many of these countries were forced to travel to Europe or the United States in order to have access to many specialists that simply were not available in their own country. *Id.*

56. *Id.*

57. *Id.*; see Mendelsohn, *supra* note 36, at 192–94.

58. See generally Klein & Manning, *supra* note 25.

59. See *id.*

60. “[S]tates have . . . the authority to regulate activities affecting the health, safety and welfare of their citizens,” thus they may define the “process and procedures for granting a health professional license, renewing a license, and regulating medical practice within the state.” Joanne Kumekawa, *Issue: Licensure Update*, TELEHEALTH UPDATE, available at <http://telehealth.hrsa.gov/pubs/licens.htm> (last visited Jan. 29, 2006). State licensure laws have a strong legal presumption against federal preemption even though they do have some authority under government programs to establish specific professional requirements. *Id.*

61. *Telemedicine Licensure Report*, DEP’T OF HEALTH & HUM. SERVICES, OFF. FOR THE ADVANCEMENT OF TELEHEALTH, CENTER FOR TELEMEDICINE 1–3 (2003) [hereinafter

much control a government can impose on a physician or other medical practitioner not physically located within its borders. Traditionally, in order to practice medicine in a state, a physician must be licensed in that state.<sup>62</sup> However, in regards to telemedicine, it is unclear whether the practice of medicine occurs where the patient is located, where the physician is located, or both.<sup>63</sup> Currently thirty-three states have enacted laws or regulations regarding licensure for the practice of telemedicine.<sup>64</sup> However, a great deal of confusion surrounds applicable licensure and governance laws in the other seventeen states, as well as internationally where only one country has legally addressed telemedicine.<sup>65</sup>

The most obvious area of legal concern is civil litigation, such as medical malpractice and informed consent laws, which can vary from jurisdiction to jurisdiction.<sup>66</sup> Malpractice is generally described as a “breach of the duty owed by someone rendering professional services to a person who has contracted for such services.”<sup>67</sup> U.S. case law has already established that a patient-physician relationship<sup>68</sup> is established when a “physician offers diagnostic or treatment advice to [a] patient [over] the

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*Licensure Report*]; INNOVATION, *supra* note 17, at 84–88.

62. *Licensure Report*, *supra* note 61, at 1–2, 6.

63. *See id.*; Klein & Manning, *supra* note 25.

64. *Licensure Report*, *supra* note 61, at 7. In states that have not specifically addressed telemedicine licensure issues, interested parties will be forced to apply traditional licensure rules to telemedicine providers. *Id.*

65. Mendelsohn, *supra* note 36, at 181. Malaysia is the only country in the world to have developed a broad law regulating the use of telemedicine, including licensure, within its borders. *Id.*

66. *See* Klein & Manning, *supra* note 25.

67. Phyllis Forester Granade, *Medical Malpractice Issues Related to the Use of Telemedicine—An Analysis of the Ways in Which Telecommunications Affects the Principles of Medical Malpractice*, 73 N.D. L. Rev. 65 (1997). Traditionally in U.S. courts, medical malpractice occurs when the plaintiff establishes: “(1) a duty by the physician to act according to certain standards; (2) a breach of the applicable standard of care; (3) an injury to the patient; and (4) a causal connection between the breach of care and the patient’s injury.” *Id.* at 65–66 (citing *Ortiz v. Shaw*, 905 S.W. 2d 609, 610 (Tex. App.—Houston [14th Dist.] 1995, writ. den’d).

68. A patient-physician relationship gives rise to a duty to “act according to certain standards.” *Id.*

telephone.”<sup>69</sup> Logically, this means that a physician providing consultation services through telemedicine will most likely have formed a treatment relationship with that patient.<sup>70</sup>

The ominous malpractice problem for providers and courts alike will be deciding on the proper standard of care that should be applied against a treating physician. Since a physician’s applicable standard of care is established by pertinent case law binding on a particular jurisdiction,<sup>71</sup> there is a good chance that the standard of care could change dramatically depending on which state or country’s law is applied.<sup>72</sup>

The final area of legal concern (for purposes of this Comment) surrounds several U.S. federal statutes regulating health care services and their application to telemedicine services. On an interstate basis, many of these issues present a false conflict<sup>73</sup> since they apply equally to each state.<sup>74</sup> However, there are still a number of very interesting questions arising from these federal statutes. For example, does the Civil False Claims Act<sup>75</sup> or the Health Insurance Portability and Accountability Act (HIPAA) privacy<sup>76</sup> provision apply to

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69. *Id.* at 69 (citing *Bienz v. Cent. Suffolk Hosp.*, 557 N.Y.S.2d 139, 139–40 (N.Y. App. Div. 1990)).

70. *Id.* at 68 (citing *Ortiz v. Shaw*, 905 S.W. 609, 610 (Tex. App. 1995)).

71. The two generally accepted standards of care used in the United States for determining physician negligence are (1) the community standard in which a physician must use the same degree of care exercised by other doctors in the same or similar community and (2) the national standard in which physicians across the nation are held to the same standard as other physicians in the same specialty. *Id.* at 74–75.

72. *See generally* *Granade*, *supra* note 67.

73. A false conflict occurs in a multi-jurisdiction case when only one of the jurisdictions involved is interested in applying its law. SYMEON C. SYMEONIDES, ET AL., *CONFLICT OF LAW: AMERICAN, COMPARATIVE, INTERNATIONAL* 127 (2d ed. 1998).

74. *See* *Stewart Org., Inc. v. Rioch Corp.*, 487 U.S. 22 (1988). Since the law sought to be applied is a federal statute, it will be applied evenly across the United States as long as that statute controls the issue before the court and the statute is a valid exercise of Congressional power; therefore, it is not a true conflict since no more than one jurisdiction can be interested in having its law applied. *Id.*

75. The Civil False Claims Act gives the federal government as well as any person a cause of action against any person who submits false claims to the government. 31 U.S.C. § 3729 (2001).

76. The Health Insurance Portability and Accountability Act (HIPAA) privacy regulations, in general, impose an obligation to maintain the confidentiality of individually identifiable health information on health plans, health care clearinghouses,

international physicians treating U.S. patients through telemedicine? Are Emergency Medical Treatment and Active Labor Act (EMTALA)<sup>77</sup> requirements imposed if the treating physician's telemedicine consult is being conducted in her hospital's emergency department? These issues will probably be answered through statutory interpretation with special attention paid to relevant constitutional limitations on congressional power.<sup>78</sup>

### III. PROCEDURAL ISSUES: PERSONAL JURISDICTION, CHOICE OF LAW, AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS

After considering some possible legal claims that could be brought against a telemedicine provider, it is important to consider in which courts these claims could be brought and, more importantly, what law would govern the claim. Before conducting a more in-depth analysis on what steps a court may take in deciding these issues, this Comment will first look at some basic procedural principles a court would have to address. It is crucial health care providers understand these principles so they may fully grasp the scope of their potential liability before entering into a telemedicine agreement or relationship.

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and health care providers that transmit health information electronically. 45 C.F.R. § 164.502 (2004).

77. All hospitals with a Medicare provider agreement must "treat all human beings who enter their emergency departments in accordance with the Emergency Medical Treatment and Active Labor Act (EMTALA)." *Burditt v. U.S. Dept. of Health and Human Services*, 934 F.2d 1362, 1366 (5th Cir. 1991). EMTALA creates a duty for the hospital to (1) screen a patient for an emergency condition and/or active labor upon her arrival at the hospital and (2) the hospital must stabilize or, under certain specified circumstances, transfer the patient if she has an emergency condition. 42 U.S.C. § 1395dd (2001).

78. When courts are faced with enforcing a federal statute, they will exercise statutory interpretation to determine if "a statute covers the point in dispute," and then will inquire whether it is a "valid exercise of Congress' authority." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26, 29 (1988).

### A. *Personal Jurisdiction*

Jurisdiction consists of three kinds of power: the power to prescribe, the power to adjudicate, and the power to enforce.<sup>79</sup> Within the United States, it is well settled that in order for a court to have personal jurisdiction over an interstate or international claim, the exercise of personal jurisdiction must (1) be allowed under the state's long-arm statute<sup>80</sup> and (2) not offend the Constitution's Due Process clause.<sup>81</sup>

Interstate telemedicine services would most likely satisfy these due process requirements.<sup>82</sup> In particular, most telemedicine-services litigation would be brought into court under "specific" jurisdiction principles, which allows a state to exercise jurisdiction over a defendant in matters arising specifically from a contact with the forum state.<sup>83</sup>

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79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

80. State long-arm statutes vary from state to state, but long-arm statutes typically allow state jurisdiction to extend to all claims that do not offend the Fourteenth Amendment's Due Process clause. *See* *Guardian Royal Exchange Assurance, LTD. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (1991); Cal. Code Civ. Proc. § 410.10 (1973); *Hall v. Helicopteros Nacionales De Colombia, S.A.*, 638 S.W.2d 870, 872-73 (Tex. 1982), *rev'd*, 455 U.S. 408 (1984) (holding that Columbian corporation's contracts with Texas were insufficient to satisfy requirements of Due Process Clause of the Fourteenth Amendment).

81. Over the years, the courts have formulated several tests to determine whether the exercise of jurisdiction is permitted under the Due Process Clause. The two cornerstones of personal jurisdiction appear to be (1) whether the defendant has minimum contacts with the forum state, as illustrated by "purposeful availment" of the privileges and protections of the laws of that state, and (2) the exercise of personal jurisdiction is reasonable and would not offend "traditional notions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-79 (1985); *Hanson v. Denckla*, 357 U.S. 235, 251-53 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-98 (1980).

82. Interstate telemedicine satisfies the due process requirements because (1) the telemedicine provider purposefully avails itself of commerce in that state, constituting minimum contacts with the patient's state, and (2) the exercise of this jurisdiction would not offend "traditional notions of fair play and substantial justice" because the provider could have predicted being haled into court in that state. *See Burger King*, 471 U.S. at 471-80; *Hanson*, 357 U.S. at 251-53; *World-Wide Volkswagen*, 444 U.S. at 291-98.

83. Specific jurisdiction refers to a situation in which the claim arises out of or is related to the contacts with the forum jurisdiction, thus satisfying the "traditional notions of fair play and substantial justice" requirement. *See Int'l Shoe Co. v.*

Internationally, for a court to exercise jurisdiction over a civil dispute, “there must be a nexus between [the claim,] the persons or property involved . . . [,] and the forum.”<sup>84</sup> A court may “assume *in personam* jurisdiction [over a defendant through actual or implied] consent.”<sup>85</sup> Actual consent can be given by incorporating or registering to do business in a forum, and through forum selection and choice of law provisions.<sup>86</sup> Somewhat mirroring the U.S. due process requirements, consent to jurisdiction in common law countries<sup>87</sup> “can be implied from the person (1) having the [same] nationality [as] the forum, (2) being domiciled in the forum, (3) having general contacts with the forum, or (4) having specific contacts with the forum.”<sup>88</sup> Therefore, it appears that a foreign court could very easily exercise proper jurisdiction over a telemedicine case involving one of its citizens.<sup>89</sup>

This assumption is further supported by recent international case law involving Internet-related claims.<sup>90</sup> Due to the international nature of the Internet, some of the more recent Internet cases provide very good insight into how foreign and domestic courts may treat potential telemedicine claims. The leading internet case in the United States, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, involved a dispute over the ownership of an Internet domain name.<sup>91</sup> In this case,

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Washington, 326 U.S. 310, 316 (1945). In most cases, telemedicine consultations would satisfy specific jurisdiction requirements because the claim would arise directly out of the contacts, for example, the actual consultation with the forum jurisdiction.

84. Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 546 (2002).

85. *Id.*

86. *Id.* Forum selection and choice of law provisions will be analyzed in the next subpart of the Comment.

87. Implied consent criteria differ slightly between common law and civil law countries, but these differences are currently being rectified. *See id.* at 547.

88. *Id.*

89. Consent to jurisdiction could be established by a foreign court by the general and specific contacts between the patient, the telemedicine provider, the telemedicine host, and the foreign country itself through the telemedicine treatment of its citizens. *See generally id.* at 548–49.

90. August, *supra* note 84, at 549–51.

91. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1120 (W.D. Pa. 1997). In *Zippo*, the Court of the Western District of Pennsylvania applied the “specific

the court concluded that the proper exercise of personal jurisdiction “is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”<sup>92</sup> An application of the *Zippo* court’s reasoning could lead a court to reasonably conclude that personal jurisdiction in cases of telemedicine is proper due to the complex and directed nature of the activity as well as the possible life and death qualities of the services involved.<sup>93</sup> Thus, it would be fairly easy for a court to exercise jurisdiction over a telemedicine-related claim involving one of its citizens.

The exercise of personal jurisdiction in *Zippo* has received international support in several notable Internet cases.<sup>94</sup> For example, both French and British courts have assumed jurisdiction over content provided by American service providers or from American servers but viewed in the forum jurisdiction.<sup>95</sup>

### B. Choice of Law

Once a court has determined they have jurisdiction over the relevant parties to the litigation, they must then decide which law they will apply in the case before them.<sup>96</sup> Most, if not all, courts around the world have established principles that they utilize in making these choice of law decisions.<sup>97</sup>

This Comment will first briefly distinguish the differences between procedural and substantive laws and how they affect a court’s choice of law decision. Then it will investigate the predominant guiding principles used in American courts today to determine the appropriate substantive law for a case. Finally, it will briefly touch upon the parties’ potential ability to make a

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contacts” test set out in *International Shoe* to determine whether jurisdiction was appropriate. *Id.* at 1122–23; see also August, *supra* note 84, at 549–50.

92. *Zippo*, 952 F. Supp. at 1124.

93. See *id.* at 1126–27.

94. See Tribunal de grand instance [T.G.I.] [ordinary court of original jurisdiction] Nov. 20, 2000, No. RG 00/005308 (Fr); R. v. Graham Waddon, (2000) (Crim. App.) (U.K.); 2000 WL 491456.

95. *Id.*

96. *Id.*

97. See generally SYMEONIDES ET AL., *supra* note 73, at 1–13 (discussing the history of choice of law decisions and contributions from different courts around the world).

choice of law determination themselves through contract.

### 1. *Procedure versus Substance*

A critical step of any choice of law analysis is to make the distinction between substantive and procedural law since matters of procedure are almost universally governed by the law of the forum state,<sup>98</sup> unlike substantive matters that may be governed by foreign law.<sup>99</sup> “The chief question [for the court] is where to ‘draw the line’ between substance and procedure.”<sup>100</sup> The First Restatement of Conflict of Laws has articulated a number of subjects as procedural,<sup>101</sup> such as the statute of limitations,<sup>102</sup> recovery limitations,<sup>103</sup> and who may or must be parties to a claim.<sup>104</sup> Despite this purportedly exhaustive list, contention still exists over what really should be classified as procedural.<sup>105</sup> For example, some courts have abandoned the traditional approach of classifying statutes of limitations as procedural and have instead subjected these issues to the same choice of law analysis as other substantive issues in the case.<sup>106</sup>

### 2. *Approaches to the Choice of Law Problem*

The traditional *lex loci delicti* rule was used almost universally throughout the United States to determine any potential choice of law problems until the early 1960s.<sup>107</sup> “Under this principle, [a] . . . court will determine the substantive rights of an injured party according to the law of the state where the

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98. “Forum state” is defined as “the state in which a suit is filed.” BLACK’S LAW DICTIONARY 666 (7th ed. 1999).

99. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934) [hereinafter RESTATEMENT (FIRST)].

100. SYMEONIDES ET AL., *supra* note 73, at 56.

101. *See* RESTATEMENT (FIRST), *supra* note 99, §§ 586–620.

102. *Id.* §§ 603–05.

103. *Id.* § 606.

104. *Id.* § 588.

105. *See* Grant v. McAuliffe, 264 P.2d 944, 948 (Cal. 1953); Kilberg v. N.E. Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961).

106. *See* Heavner v. Uniroyal, Inc., 305 A.2d 412, 415–18 (N.J. 1973).

107. *Id.* at 140–41. The American Law Institute formally stated this principle in 1934. *See* RESTATEMENT (FIRST), *supra* note 99, § 378.

injury occurred.”<sup>108</sup> The First Restatement of Conflict of Laws states that “[t]he place of a wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”<sup>109</sup> The First Restatement of Conflict of Laws goes on to state in § 378 that “the law of the place of [the] wrong determines whether a person has sustained a legal injury.”<sup>110</sup> Of special importance for telemedicine cases, a note under § 377 provides that, in cases of bodily harm, the place of the tort is where the harmful force takes effect upon the body.<sup>111</sup> Overall, the *lex loci delicti* rule provides courts with a principle that is both easy to apply and neutral in its application.<sup>112</sup> Finally, to give a small glimpse of the international perspective of the *lex loci* rule, the Supreme Court of Canada held that the application of the law of the place of the wrong is consistent with the parties’ expectations.<sup>113</sup>

The most common choice of law methodology used by American courts today<sup>114</sup> began as the “center of gravity” test<sup>115</sup> and has evolved into the “most significant contacts test.”<sup>116</sup> This test was adopted by the Second Restatement of Conflict of Laws which states that “[t]he rights and liabilities of the parties with

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108. *Fitts v. Minnesota Min. & Mfg. Co.*, 581 So.2d 819, 820 (Ala. 1991). Currently, ten states continue to use the traditional *lex loci delicti* rule to determine conflict of law issues for tort claims, and eleven use it for contract claims. SYMEONIDES ET AL., *supra* note 73, at 301–02.

109. RESTATEMENT (FIRST), *supra* note 99, § 377.

110. *Id.* § 378.

111. *Id.* § 377.

112. SYMEONIDES ET AL., *supra* note 73, at 23. Its application is neutral since it does not, on its face, favor either plaintiffs or defendants. *Id.*

113. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, 305 (the *lex loci* rule is consistent with the parties’ expectations because “ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly.”); *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, 1025.

114. Twenty-five states currently employ a form of the most significant relationship test in tort claims and twenty-nine in contract claims. SYMEONIDES ET AL., *supra* note 73, at 301.

115. *Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954). Under the “center of gravity” or “grouping of contacts” theory, the court would give emphasis to the “law of the place ‘which has the most significant contacts with the matter in dispute.’” *Id.* (quoting *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 305 (N.Y. 1953)).

116. *See Haag v. Barnes*, 175 N.E.2d 441, 443 (N.Y. 1961).

respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in [§] 6.”<sup>117</sup>

This guiding choice of law principle “encourage[s] a searching case-by-case contextual inquiry into the significance of the interests that the law[s] of competing jurisdictions may assert in particular controversies.”<sup>118</sup> This principle was an important advancement to the conflict of law field in that it gave courts the ability to apply more than one jurisdiction’s law.<sup>119</sup> Under the *lex loci* doctrine, only one jurisdiction’s law—the place of the injury—would be applied to all issues involved in a particular claim.<sup>120</sup> However, under more modern approaches, a court may conduct an issue-by-issue analysis and apply a different jurisdiction’s law to separate issues within the claim depending on the court’s determination of the relationships (or interests) involved.<sup>121</sup>

The third methodology is the governmental interest,<sup>122</sup> or “comparative impairment” analysis, which has been adopted by three states.<sup>123</sup> Under this approach, a court should determine whether the relationship of a jurisdiction is “such as to bring the

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117. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) [hereinafter RESTATEMENT (SECOND)] (emphasis added). The § 6 factors referenced in § 145 include:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

*Id.* § 6(2).

118. *O'Connor v. O'Connor*, 519 A.2d 13, 26 (Conn. 1986).

119. See Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973).

120. See *O'Connor*, 519 A.2d at 15.

121. See Reese, *supra* note 119. This phenomenon is called *Dépeçage*. *Id.*

122. SYMEONIDES ET AL., *supra* note 73, at 126. This methodology is derived from the works of Brainerd Currie. *Id.* at 125.

123. *Id.*, at 126. The most notable jurisdiction using the interest analysis test is California. *Id.* at 290–91.

case within the scope of the state's governmental concern."<sup>124</sup> The court must first decide whether an actual conflict exists between the jurisdictions involved in the claim.<sup>125</sup> This test differs from other choice of law methods because it first looks to the laws of each jurisdiction rather than simply the facts and relationships involved in the specific claim.<sup>126</sup>

A jurisdiction is deemed to have an "interest" when the "application of its law to the particular case would promote the policies or purposes underlying that law."<sup>127</sup> If only one of the involved jurisdictions would be interested in applying its law, then a false conflict exists, and the law of the interested jurisdiction should prevail.<sup>128</sup> If none of the jurisdictions are interested, then a "no interest" or unprovided-for case exists and the law of the forum should apply.<sup>129</sup> Finally, if more than one state would be interested in having its own law applied, then a true conflict exists.<sup>130</sup> When a true conflict exists, the claim should be resolved by applying the law of the jurisdiction that would have its interests more impaired if its law was not applied.<sup>131</sup>

While the previous three methodologies are currently being used by a majority of U.S. states, it is important to note that there are other methods currently in place throughout the country and the world. One such method is the *lex fori* method utilized by three states in the tort context.<sup>132</sup> Under this approach, the law of the forum will generally prevail "unless

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124. SYMEONIDES ET AL., *supra* note 73, at 126 (quoting Brainerd Currie, *Selected Essays on the Conflict of Laws* 189 (1965)).

125. *See In Re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425, 1431 (D. Ill. 1990).

126. *See id.*

127. SYMEONIDES ET AL., *supra* note 73, at 127. In making this determination, "emphasis is placed on the appropriate scope of the conflicting state policies rather than on the 'quality' of those policies." *Bernhard v. Harrah's Club*, 546 P.2d 719, 724 (Cal. 1976), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2006).

128. *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268, 1270-71 (D.C. 1987).

129. *Erwin v. Thomas*, 506 P.2d 494, 497 (Or. 1973).

130. *Bernhard*, 546 P.2d 722.

131. *Id.* at 723; *In Re Air Crash at Sioux City, Iowa*, 734 F. Supp. at 1431.

132. SYMEONIDES ET AL., *supra* note 73, at 301.

another state has an overwhelming interest.”<sup>133</sup> Another method currently being used in five states is the “better-law” approach,<sup>134</sup> which is a result-oriented approach that provides a flexible set of “choice-influencing considerations” that will help the court determine the appropriate law to apply.<sup>135</sup> Finally, six states use a method that combines aspects from the other modern methods.<sup>136</sup>

In summary, American and International courts may use a number of established conflict of laws methodologies to determine which jurisdiction’s law is the appropriate one to be applied in a given case.<sup>137</sup> Furthermore, even within the same methodology, a court has a great deal of leeway to exercise its own discretion in determining which law will be applied to a specific issue.<sup>138</sup> These two characteristics of the conflict of laws arena, unfortunately, produce a great deal of uncertainty for litigants trying to determine whose law will govern a particular claim or issue. For this reason, it is crucial to investigate ways individuals can help minimize this uncertainty through their own actions before a claim ever arises.

### C. Choice of Law Contract Provisions

One of the oldest and most universally accepted choice of law principles around the world is the that of party autonomy.<sup>139</sup> “[N]amely, . . . parties to a [multi-jurisdiction] contract may, within certain limits, choose the law that would govern their contract.”<sup>140</sup> However, this principle is not as simple as it may seem. For example, the drafters of the First Restatement of

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133. Motenko v. MGM Dist., Inc., 921 P.2d 933, 935 (Nev. 1996).

134. SYMEONIDES ET AL., *supra* note 73, at 164.

135. Robert A. Leflar, *Choice Influencing Considerations in Conflict Law*, 41 N.Y.U. L. REV. 267, 282 (1966). The list of choice-influencing considerations include: “(a) Predictability of results; (b) Maintenance of interstate and international order; (c) Simplification of the judicial task; (d) Advancement of the Forum’s Governmental Interests; and (e) Application of the better rule of law.” *Id.*

136. SYMEONIDES ET AL., *supra* note 73, at 299–303.

137. *See id.*

138. *See id.*

139. SYMEONIDES ET AL., *supra* note 73, at 338.

140. *Id.*

Conflict of Laws decided to limit party autonomy, seeing it as a license for private legislation.<sup>141</sup> This about-face to tradition was abandoned, however, when the principle of party autonomy was formally sanctioned by the Second Restatement in § 187(1), which states “[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”<sup>142</sup> While this section of the Restatement may suggest that all choice of law problems could be settled through the use of a choice of law contract provision, a court would need to analyze a number of factors before enforcing such a contract provision, such as the validity, limitation, and scope of the contract itself.<sup>143</sup>

The first issue that must be determined before a court enforces a choice of law contract provision is the overall validity of the choice of law clause itself.<sup>144</sup> A choice of law provision, just like any other contract provision, must be validated under ordinary contract law principles before a court will enforce it.<sup>145</sup> This step, however, raises a preliminary choice of law question regarding whose law will govern the initial contract interpretation.<sup>146</sup> This preliminary choice of law question is answered in one of three ways: (1) the law of the forum;<sup>147</sup> (2) the chosen law;<sup>148</sup> or (3) the law that would have been applicable absent a contractual choice of law provision.<sup>149</sup>

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141. *Id.*

142. RESTATEMENT (SECOND), *supra* note 117, § 187.

143. SYMEONIDES ET AL., *supra* note 73, at 344.

144. *Id.*

145. *Id.* The contract law principles a court will use to validate the choice of law provision include the capacity to contract, “meeting of the minds”, duress, and error. *Id.*

146. *Id.*

147. *See* RESTATEMENT (SECOND), *supra* note 117, § 187. The law of the forum was adopted by the Second Restatement for issues of misrepresentation, duress, undue influence, or mistake. *Id.*

148. *Id.* § 189. The chosen law was adopted by Switzerland and by the Second Restatement for all other issues of formation and validity of the contract provision. SYMEONIDES ET AL., *supra* note 73, at 344 (citing Bundesgesetz uber das Internationale Privatrecht, art. 116(2) (Switzerland 1987)).

149. The law that would have been applicable absent a contractual choice of law provision has been adopted by the EEC Convention on Contractual Obligations (Rome Convention), Germany, and Louisiana. Convention on the Law Applicable to Contractual

Once a choice of law provision has been judged valid under a chosen jurisdiction's contract law, the court must determine the scope of the choice of law provision and resolve whether the current claim falls within this determined scope.<sup>150</sup> One of the most common questions regarding choice of law provisions is "whether the clause encompasses non-contractual" or quasi-contractual issues, such as tort claims, "arising from the same contractual relationship."<sup>151</sup> This question is usually answered by looking to the contractual intent of the parties as well as to their contractual power.<sup>152</sup> The critical inquiry in this analysis is whether the parties have the power to select the law that will govern issues that are not purely contractual.<sup>153</sup> Civil and common law systems have demonstrated an emerging split in this area, with most civil law systems ruling that parties do not have this power<sup>154</sup> while most common law courts allow parties to *expressly* choose the law that will govern "tort-like" issues as well as purely contractual ones.<sup>155</sup>

Finally, before a court enforces a contractual choice of law provision, it must determine whether the parties' freedom to choose the applicable law should be limited in that particular instance.<sup>156</sup> All legal systems recognize the need for some limitations to the principle of party autonomy, but the approach they use to determine where the limits should be placed varies a

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Obligations art. 4 ¶ 1, *opened for signature* June 19, 1980, *reprinted in* RICHARD PLENDER, *THE EUROPEAN CONTRACTS CONVENTION: THE ROME CONVENTION ON THE CHOICE OF LAW FOR CONTRACTS* (Sweet & Maxwell 2001) [hereinafter Rome Convention]; *Schuldrecht (Law of Contract)* 1986, BGBI.I at 1142, art 27 ¶ 4 (F.R.G.); LA CIV. CODE ANN. arts. 3537-40 (1994).

150. *See* *Nedlloyd Lines B.V. v. Superior court*, 834 P.2d 1148 (Cal. 1992).

151. SYMEONIDES ET AL., *supra* note 73, at 358.

152. *See Nedlloyd Lines B.V.*, 834 P.2d 1148.

153. *See id.*

154. SYMEONIDES ET AL., *supra* note 73, at 359. For example, the European Union's Rome II Regulation allows agreements concerning the governing law of future torts only if they are entered into after the dispute arose. Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to NonContractual Obligations "Rome II," at 22, COM(2003) 427 Final (July 22, 2005).

155. SYMEONIDES ET AL., *supra* note 73, at 359.

156. *See* *DeSantis v. Wackenhunt Corp.*, 793 S.W.2d 670 (Tex. 1990); SYMEONIDES ET AL., *supra* note 73, at 345.

great deal from jurisdiction to jurisdiction.<sup>157</sup> Despite this variance, the Restatement's approach is a good illustration of the type of analysis most jurisdictions will follow to determine whether the choice of law provision should be enforced in a given situation.<sup>158</sup>

Under this approach, the court must first determine "(1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law."<sup>159</sup> "If neither of these tests is met, . . . the court [does] not [have to] enforce the parties' choice of law."<sup>160</sup> If one or more of the tests is met, "the court must [then] determine whether the chosen law is contrary to a fundamental policy" of the jurisdiction whose law would have been applied without the choice of law provision.<sup>161</sup> If a fundamental conflict exists and that jurisdiction has a "materially greater interest than the chosen [jurisdiction] in the determination of the particular issue," the court may disregard the parties' choice of law.<sup>162</sup> However, if no such conflict exists, then the court may enforce the provision and apply the chosen law.<sup>163</sup> Finally, it is important to note that many systems expressly prohibit or restrict party autonomy in certain contractual situations.<sup>164</sup>

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157. See SYMEONIDES ET AL., *supra* note 73, at 345.

158. Section 187(2) of the Second Restatement states:

[t]he law of the state chosen by the parties to govern . . . will be applied, . . . unless either: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state . . . and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.

RESTATEMENT (SECOND), *supra* note 117, § 187(2).

159. *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1152 (Cal. 1992).

160. *Id.*

161. *Id.* (emphasis omitted).

162. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187(2)(b)).

163. *Id.* at 1152.

164. Courts will usually restrict party autonomy where one contracting party has an unequal bargaining position. SYMEONIDES ET AL., *supra* note 73, at 357. For example, under the Rome Convention, a choice of law provision will not be enforced if it were to result in "depriving the consumer of protection afforded to him" by the laws of the

In order to help improve the probability that a choice of law provision will be enforced, a forum selection clause can also be added to the contract.<sup>165</sup> However, many jurisdictions prohibit the use of venue provisions for public policy reasons.<sup>166</sup> If a jurisdiction does accept forum selection clauses, a court could transfer venue by means of the forum selection clause to another jurisdiction which may be more likely to enforce the choice of law provision.<sup>167</sup>

To summarize, a contractual choice of law provision in most cases allows the contract parties to choose a specific law that will govern the contract as well as many non-contractual claims related to the contract.<sup>168</sup> However, depending on a court's own conflict of laws principles, a choice of law provision can be disregarded for a number of reasons.<sup>169</sup> Therefore, while a choice of law provision helps predict what law will be applied in future litigation, it is not conclusive, and a court may choose to apply its own law or that of another jurisdiction.<sup>170</sup>

#### *D. Recognition and Enforcement of Judgments*

The final issue to be addressed is whether a holding by one jurisdiction will be recognized and enforced by another jurisdiction.<sup>171</sup> After all, it is well and good for a foreign judgment to be filed, but what good will that judgment be for a victim if the defendant's resident jurisdiction<sup>172</sup> will not

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country in which he resides. See Rome Convention, *supra* note 149, art. 5, ¶ 2.

165. See generally *DeSantis v. Wackenhunt Corp.*, 793 S.W.2d 670 (Tex. 1990). A forum selection clause is defined as "[a] contractual provision in which the parties establish the place (such as country, state, or type of court) for specified litigation between them." BLACK'S LAW DICTIONARY 665 (7th ed. 1999).

166. See *Barnette v. United Research Co.*, 823 S.W.2d 368 (Tex. App.—Dallas 1991, writ den'd) (discussing Texas' opposition to the inclusion of venue provisions in contracts governed by Texas law).

167. See *id.*

168. See *DeSantis*, 793 S.W.2d 670; see also *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1152 (Cal. 1992).

169. See *SYMEONIDES ET AL.*, *supra* note 73, at 344.

170. See *id.*

171. See *id.*

172. The defendant's resident jurisdiction is the location of defendant's personal residence or place of business or both. Residence is defined as "the place where one

recognize and enforce that judgment?

This part of the analysis is fairly simple in the case of interstate judgments due to the Constitution's Full Faith and Credit Clause<sup>173</sup> and the Full Faith and Credit Statute.<sup>174</sup> The doctrine governing the recognition and enforcement of interstate judgments was first laid out by Chief Justice Marshall in 1818 when he stated that "the judgment of a state court should have the same credit, validity and effect, in every court of the United States, which it had in the state where it was pronounced."<sup>175</sup> This doctrine was later codified in the Full Faith and Credit Statute, which provides that the "Acts, records and judicial proceedings . . . [of any state] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] state . . . from which they are taken."<sup>176</sup> This, in effect, permits a state to determine the "extraterritorial effect of its judgments" indirectly by "prescribing the effect of its judgments within the [s]tate."<sup>177</sup> Therefore, if a final judgment was reached in one state and that state had both personal and subject matter jurisdiction, then that judgment "qualifies for recognition throughout the land."<sup>178</sup>

This final piece of the conflict of laws puzzle becomes far more complicated when entering into the realm of foreign judgments being enforced within the United States. Neither the Constitution's Full Faith and Credit Clause nor the Full Faith and Credit Statute are applicable in the enforcement of foreign judgments.<sup>179</sup> Therefore, recognition of these judgments is a matter of state discretion.<sup>180</sup> It has been stated that "[n]o

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actually lives" or "the place where a[n] . . . enterprise does business or is registered to do business." BLACK'S LAW DICTIONARY 1310 (7th ed. 1999).

173. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

174. 28 U.S.C. § 1738 (2004).

175. *Hampton v. McConnel*, 16 U.S. 234 (1818).

176. 28 U.S.C. § 1738 (2004).

177. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

178. *Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

179. SYMEONIDES ET AL., *supra* note 73, at 811.

180. *Id.* at 811.

sovereign is bound . . . to execute within his dominions a judgment rendered by the tribunals of another [jurisdiction].”<sup>181</sup> For example, some foreign jurisdictions have refused to recognize foreign judgments absent a treaty on point.<sup>182</sup>

Most decisions regarding the extent that the law of one nation shall be recognized in another nation centers on notions of “comity.”<sup>183</sup> Principles of comity hold that a foreign court’s judgment is usually held to be conclusive if:

- (1) the foreign judgment was rendered by a court of competent jurisdiction, which had jurisdiction over the cause and the parties, (2) the judgment is supported by due allegations and proof, (3) the relevant parties had an opportunity to be heard, (4) the foreign court follows procedural rules, and (5) the foreign proceedings are stated in a clear and formal record.<sup>184</sup>

However, comity is not a matter of “absolute obligation” but is instead a matter of discretion for the jurisdiction in which judgment recognition is sought.<sup>185</sup> The current American approach has been described as a “halfway house” of “neither pretending that the initial litigation never occurred, nor giving [it] an automatic conclusive effect.”<sup>186</sup> This allows American courts to “deny effect to foreign country judgments when the rendering court has acted . . . in ways intolerable by our country’s . . . ideal of fundamental fairness.”<sup>187</sup> This approach gives many persons operating in an international manner some solace that they will be at least partially protected from having

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181. *Hilton v. Guyot*, 159 U.S. 113, 165 (1895).

182. See *SYMEONIDES ET AL.*, *supra* note 73, at 816 (noting that Sweden and the Netherlands do not recognize foreign judgments in the absence of a treaty).

183. *Hilton*, 159 U.S. 113 (explaining that comity refers to the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, and for other persons who are under the protections of its laws”).

184. *International Transactions v. Embotelladora Agral Regiomontana, SA De CV*, 347 F.3d 589, 594 (2003) *citing Hilton*, 159 U.S. 113.

185. *Hilton*, 159 U.S. 113, 163–64.

186. *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 905–06 (N.D. Tex. 1980).

187. *Id.* at 906.

an “intolerable” judgment enforced against them.<sup>188</sup>

Another principle to take notice of when analyzing whether a foreign judgment will be recognized by a domestic jurisdiction is the idea of reciprocity.<sup>189</sup> An American court that requires reciprocity will not enforce a foreign judgment unless that foreign court would recognize an American judgment in a reverse situation.<sup>190</sup> Most courts in the United States<sup>191</sup> as well as the Second Restatement of Conflict of Laws<sup>192</sup> and the Third Restatement of Foreign Relations of the United States<sup>193</sup> have rejected or disapproved of the requirement of reciprocity.<sup>194</sup> However, some jurisdictions still require reciprocity in order to recognize a foreign judgment.<sup>195</sup>

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188. *See id.*

189. *See Hilton*, 159 U.S. at 210.

190. *See id.*

191. *See, e.g., Chabert v. Bacquie*, 694 So. 2d 805, 814 (Fla. Dist. Ct. App. 1997) (“[A] lack of reciprocity is merely one of several grounds on which a trial judge may, but is not required to, refuse recognition [of a foreign judgment] . . . .”); *Nicol v. Tanner*, 256 N.W.2d 796, 801 (Minn. 1976) (“[R]eciprocity is not a prerequisite to enforcement of a foreign judgment in Minnesota.”); *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121, 124 (N.Y. 1926) (concluding that comity “rests[] not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment”).

192. *See* RESTATEMENT (SECOND), *supra* note 117, § 98 (“A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States . . . .”).

193. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. d (1987).

194. *SYMEONIDES ET AL.*, *supra* note 73, at 819.

195. *See, e.g., TEX. CIV. PRAC. & REM. CODE ANN.* § 36.005(b)(7) (Vernon 1997). According to the Texas Civil Practices and Remedies Code:

(b) A foreign country judgment need not be recognized if:

...

(7) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of “foreign country judgment.”

*Id.* This split among jurisdictions is further illustrated by looking at the adoption of the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), which aspired to bring uniformity to state judgment recognition rules as well as to “increase the likelihood that American judgments will be recognized in foreign countries.” *SYMEONIDES ET AL.*, *supra* note 73, at 820–21 (quoting Unif. Foreign Money-Judgments Recognition Act Pref. Note, 13 U.L.A. 261–62(2000)). The UFMJRA, which specifically abandons the reciprocity requirement, has been adopted by thirty-one jurisdictions. *Id.* at 821. However, seven of the adopting jurisdictions (Florida, Georgia, Idaho, Massachusetts, North Carolina, Ohio, and Texas) have added the reciprocity requirement to the Act either as a

#### IV. WHICH LAW WILL APPLY IN A TELEMEDICINE-RELATED CLAIM?

After an in-depth look into telemedicine and the prevailing procedural principles employed by various court systems, it is possible to postulate a choice of law analysis that a court may undertake when a telemedicine case is brought before it. Since there is no case law on point with these issues, it is crucial to the continued development of this industry to hypothesize on this issue so that healthcare providers can better predict their potential liability when entering into a telemedicine agreement. In order to properly perform this analysis, this Comment will investigate three hypothetical legal situations: (1) a medical malpractice claim brought against a physician, (2) a physician licensure claim where a telemedicine provider is not licensed in the jurisdiction in which the patient is located, and (3) a federal statutory claim brought against a physician. In this analysis, this Comment will look at both interstate and international scenarios and apply the prevailing conflict of laws principles. Finally, this Comment will look at the potential ramifications a contractual choice of law clause would have on these various scenarios.

First of all, it is important to note that no U.S. court will blindly enforce a judgment—foreign or domestic—against one of its citizens if that judgment does not meet either due process requirements<sup>196</sup> or the court's comity requirements.<sup>197</sup> For this reason, this Comment will only look to provide an analysis that meets these qualifications.

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mandatory ground for recognition or as a discretionary method. *Id.*

196. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982) (“[P]roceedings [must] satisfy the minimum procedural requirements of the Fourteenth Amendment’s Due Process Clause in order to qualify for . . . full faith and credit.”); *see Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (explaining that a court rendering a judgment must have “adjudicatory authority over the subject matter and persons governed by the judgment” in order for it to qualify for recognition).

197. *See Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895). In the absence of a federal statute or treaty, recognition of foreign-country judgments is a matter of comity. *See id.* at 163–64.

### A. *Medical Malpractice Claim*

*Hypothetical:* A Texas radiologist specializing in mammography oversees the mammogram of a patient and then reads the patient's images through the use of telemedicine. The radiologist misses a small malignant lump on the mammogram, and the patient later brings a malpractice suit against the physician. The patient is located in a rural area of (a) Alaska or (b) Mexico. At trial, the plaintiff patient wants the court to apply the substantive law of her resident forum while the defendant physician would like Texas substantive law to apply.

To correctly analyze this claim, a court must first determine whether it has competent jurisdiction over the cause of action and the parties.<sup>198</sup> In this hypothetical, both the physician's resident courts<sup>199</sup> and the patient's resident courts<sup>200</sup> would have subject matter jurisdiction.<sup>201</sup> Also, since most state long-arm statutes allow state jurisdiction to extend to the length and breadth of the Constitution's Due Process Clause, any court that will satisfy this Clause will have proper personal jurisdiction.<sup>202</sup> Therefore, either the physician's or patient's resident forum would satisfy the due process requirements for proper personal jurisdiction.

Once the court has decided it has competent jurisdiction over the parties and the claim, it must decide whose law will

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198. *See supra* notes 79–80 and accompanying text.

199. The physician's resident court in this hypothetical would be the Texas state courts and the federal district courts located in Texas because she is a resident of Texas. *See supra* note 172.

200. The patient's resident court in this hypothetical would be either the (a) Alaskan state and federal courts or (b) a court in the Mexican system because she is a resident of either (a) Alaska or (b) Mexico. *See supra* note 198.

201. "Subject-matter jurisdiction is the court's power to act with respect to the generic type of dispute before the court . . ." DAVID CRUMP, WILLIAM V. DORSANEO, III & REX R. PERSCHBACHER, *CASES AND MATERIALS ON CIVIL PROCEDURE* 149 (4th ed. 2001). The relevant state courts—Texas, Alaska, and Mexico—would have subject-matter jurisdiction since the claim arises under state malpractice law. *See id.* The federal courts would also have original diversity jurisdiction since the action involves citizens of different states and the amount in controversy will be more than \$75,000. 28 U.S.C. § 1332 (2005).

202. *See supra* notes 80–89 and accompanying text.

govern the claim.<sup>203</sup> First, the forum court will make a distinction between procedural and substantive matters.<sup>204</sup> This distinction is of great concern to telemedicine providers because any issue the court classifies as procedural will almost universally be governed by the forum jurisdiction's laws.<sup>205</sup> Absent a valid choice of law provision, a telemedicine provider should be ready to follow all rules of another jurisdiction that could be classified as procedural.<sup>206</sup>

After making the procedure versus substantive distinction, the court will then follow its established choice of law principles to determine whose substantive law will be followed.<sup>207</sup> This Comment will now look one-by-one at the potential choice of law analyses that a court might make.

A court using the traditional *lex loci delicti* rule will apply the substantive law of the jurisdiction in which the injury occurred.<sup>208</sup> However, unlike in an automobile accident or other tort claim, this is not a straight-forward decision. The patient will most likely argue that her injury occurred at the place where she was located at the time her breast cancer was misdiagnosed, and therefore, her resident jurisdiction's substantive law should be applied. However, the physician can argue that if a misdiagnosis did in fact occur it would have occurred in Texas, and it is this misdiagnosis that would have caused the harm to the patient. Therefore, Texas substantive law should apply to the case. The patient's best support comes from the First Restatement of Conflict of Laws which explains the *lex loci delicti* rule.<sup>209</sup> In describing where "the place of wrong" is located, the First Restatement uses language such as "where the last event necessary to make an actor liable . . . takes place" or where the injury "takes effect upon the body."<sup>210</sup> Using

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203. See *supra* note 96 and accompanying text.

204. See *supra* notes 98–100 and accompanying text.

205. See *supra* note 98 and accompanying text.

206. Some rules that could be classified as procedural include statute of limitations and recovery limitations. See *supra* notes 102–03 and accompanying text.

207. See *supra* notes 96–97 and accompanying text.

208. See *supra* notes 107–13 and accompanying text.

209. See RESTATEMENT (FIRST), *supra* note 99, § 377.

210. *Id.* § 377 & n.1.

the First Restatement as a guide, a court following the *lex loci* rule would most likely hold that the injury occurred in the patient's resident jurisdiction and apply that jurisdiction's substantive law to the claim.<sup>211</sup>

A court that utilizes the "most significant relationship" test for determining choice of law issues will undoubtedly have a more difficult time determining whose substantive law will apply than those using the *lex loci* rule. Under this test, the forum court will apply the "local law of the [jurisdiction] which, with respect to that issue, has the most significant relationship to the occurrence and the parties."<sup>212</sup>

Using this principle, the patient will base her argument on "the relevant policies of the forum,"<sup>213</sup> "the protection of justified expectations,"<sup>214</sup> "certainty, predictability and uniformity of result,"<sup>215</sup> and the overall "ease in the determination and application of the law to be applied."<sup>216</sup> She will argue that the forum's medical malpractice laws are in place to help protect the jurisdiction's citizens from negligent and wrongful behavior by physicians and other healthcare providers. Furthermore, she would have expected to be protected by her local laws when she was receiving medical treatment, despite the fact that the supervising physician was not physically located in the same jurisdiction. Finally, using the forum's local law will provide predictability and ease of determination because the forum is already familiar with its own laws.

On the other hand, the physician may use a public policy argument for determining that Texas has the most significant relationship, and its substantive law should be applied. First, Texas has an interest in protecting its physicians from unwarranted or frivolous medical malpractice claims as well as

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211. *See id.* The court would make this determination based on how the injury "takes effect" upon the patient's body in the patient's resident jurisdiction. *Id.*

212. RESTATEMENT (SECOND), *supra* note 117, § 145(1) (emphasis added). Under the Second Restatement's version of this test, the court's decision is to be made in reference to the principles laid out in § 6 of the Second Restatement. *Id.*

213. *Id.* § 6(2)(b).

214. *Id.* § 6(2)(d).

215. *Id.* § 6(2)(f).

216. *Id.* § 6(2)(g).

an interest in regulating and promoting new industries such as the telemedicine industry.<sup>217</sup> Second, all parties and states involved have a need for the proliferation of telemedicine in underserved rural areas, and the best entity to ensure that this occurs properly is the jurisdiction in direct control over the supply of these services, which is Texas in this case.<sup>218</sup> Finally, the physician can argue that while he did make himself available to the patient in question, it was in fact the patient that sought out treatment from a physician located in a different jurisdiction. Consequently, this situation should be treated just as if the patient had traveled to Texas and was seen by the physician in a normal office setting.

Despite strong arguments for Texas having the most significant relationship to the matter, most courts will likely decide to use the forum's own substantive law, especially when the factors are so evenly split.<sup>219</sup> This inclination to use the forum law is usually due to ease of use, familiarity, and the court's overall predisposition to protect its own citizens.<sup>220</sup>

The next principle a court might use to determine the proper substantive law is the "interest" or "comparative impairment" approach.<sup>221</sup> This approach usually involves a more in-depth analysis than the most significant relationship test; however, in this case the two analyses appear to be very similar. Under this approach, the court must determine which jurisdictions have an interest in having their law applied.<sup>222</sup> Because the application of both jurisdictions' malpractice laws would promote the policies underlying these laws, both jurisdictions are interested, and a "true conflict" exists.<sup>223</sup> Both the physician and patient would

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217. *See id.* § 6(2)(c).

218. *See id.* § 6(2)(a), (c).

219. "The local law of th[e] state [in which the court sits] will . . . be applied unless some other state has a *greater* interest in the determination of this issue." RESTATEMENT (SECOND), *supra* note 117, § 178, cmt. b .

220. *See* Bryant v. Silverman, 703 P.2d 1190, 1192 (Ariz. 1985); RESTATEMENT (SECOND), *supra* note 117, § 6 (f)-(g).

221. *See supra* note 122 and accompanying text.

222. *See supra* notes 123-26 and accompanying text.

223. *See* Bernhard v. Harrah's Club, 546 P.2d 719, 722 (Cal. 1976), *superseded by statute*, CAL. CIV. CODE § 1714 (West 2006); *In re Air Crash at Sioux City, Iowa*, 734 F. Supp. 1425, 1432 (D. Ill. 1990) (Noting that the laws in question must differ from each

most likely make very similar arguments to those that they made under the most significant relationship test in regards to reasons why the court should choose its preferred law. After these arguments, the court will then apply the law of the jurisdiction whose interests would be more impaired if its law was not applied.<sup>224</sup> This may actually provide the physician with her best chance of having the court apply Texas law since Texas has two interests involved: (1) protecting its physicians and (2) protecting its emerging telemedicine industry. Meanwhile, the forum's main interest is in protecting the patient.

Overall, under each choice of law principle, the hypothetical physician can make some very strong arguments supporting the application of Texas law to the claim brought against her. However, most courts will usually end up applying their own local law in an effort to protect their local citizen and to provide the easiest mode of determination.<sup>225</sup> Finally, if a court has followed the steps above and a judgment has been rendered upon the physician, almost all U.S. jurisdictions will enforce that judgment.<sup>226</sup> The only exception would be if the judgment did not meet a state's reciprocity requirement.<sup>227</sup>

### B. *Physician Licensure Claim*

*Hypothetical:* A dermatologist specializing in rare skin diseases is only licensed to practice medicine in the state of Texas. This dermatologist is asked to consult on a patient with an unknown skin rash through his hospital's telemedicine unit. The patient is located in (a) Utah, (b) Alaska, (c) Washington, or (d) Saudi Arabia.

When it comes to licensure issues, there is not a great deal of analysis that can be done to determine whose law should apply. Medical licensure is a matter of state control to be determined by that state's legislature or medical board.<sup>228</sup> Since

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other in some way for a true conflict to exist).

224. See *supra* note 131 and accompanying text.

225. See *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973); RESTATEMENT (SECOND), *supra* note 117, § 6(f)–(g).

226. See *supra* notes 171–94 and accompanying text.

227. See *supra* notes 189–94 and accompanying text.

228. See *Licensure Report*, *supra* note 61.

“most state medical boards have taken the position that the practice of medicine occurs in the state where the patient is located[,]” they have every legal right to enforce some level of control over physicians practicing medicine within their state.<sup>229</sup> For this reason, the only legal advice for telemedicine providers is that they must know in which jurisdiction their patient is located.<sup>230</sup> The easiest way to accomplish this is to contact the state’s medical board or a foreign country’s equivalent before performing any telemedicine consultation to determine whether they must have some form of license to perform the requested telemedicine services.<sup>231</sup> For example, in the hypothetical given, the dermatologist would need a full Utah medical license to treat the Utah patient, but she would not need another license to treat the Washington patient. It is unclear what kind of license she would need to treat the Alaskan and Saudi patient.

### C. *Federal Statutory Claim*

*Hypothetical:* A German infectious disease specialist is treating an American patient with herpes through telemedicine and observes remarkable results. To promote this great accomplishment, he e-mails recorded treatment procedures and other information from the patient’s medical record to a German news show that often broadcasts stories on new medical treatments. The show airs the footage on German television. The patient is informed of the show and brings a civil claim against the physician under the Health Insurance Portability and Accountability Act’s (HIPAA) privacy regulations.

To determine whether a U.S. citizen may bring a claim under a federal statute against a foreign citizen, a court will look to a statute’s construction to determine its proper application.<sup>232</sup> Congress has the authority to enforce its laws beyond the territorial boundaries of the United States, but the

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229. *Id.* at 3.

230. *See id.*

231. *See id.*

232. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. NO. 102-166, 105 Stat 1071.

plaintiff must show that Congress did in fact intend to have this extraterritorial effect.<sup>233</sup> In order to determine “whether the contacts and interests of the United States are sufficient to support the exercise of extraterritorial jurisdiction,” a U.S. court will consider the citizenship of the defendant, the effect on U.S. commerce, and the existence of a conflict with foreign law.<sup>234</sup> The patient, in this case, will argue that the congressional intent of the HIPAA privacy rule was to maintain the privacy of American patients, and therefore, the statute should be applied to the German physician.

If the nationalities were reversed so that an American physician was treating a German patient, the analysis would be similar. The court would still look to statutory construction and the congressional intent behind the statute.<sup>235</sup> However, in this case, the patient will argue that enforcement of the HIPAA privacy rule would not involve extraterritorial effect at all since all of the conduct leading to the privacy rule violation occurred within the United States. The patient will then argue that the congressional intent of the HIPAA privacy rule was to ensure that U.S. physicians respected their patients’ privacy, and therefore, the statute should be applied to the American physician.

#### V. CONTRACTUAL CHOICE OF LAW/FORUM PROVISION

These hypothetical situations illustrate the liability and overall uncertainty telemedicine providers are potentially exposed to when they begin performing telemedical consultations. It is imperative that these providers attempt to limit their liability or at least help predict potential legal effects of telemedicine before entering the field. The best means of accomplishing this goal is through the use of law and forum selection clauses in their telemedicine contracts.<sup>236</sup> While these

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233. *Id.* at 248.

234. *American Rice v. Arkansas Rice Growers Coop. Ass’n*, 701 F.2d 408, 414 (5<sup>th</sup> Cir. 1983).

235. *See supra* note 236 and accompanying text.

236. *See supra* notes 142, 151–52, 156 and accompanying text. These clauses should be included in all contracts associated with the telemedicine host provider, the telemedicine host government, and with the patient themselves.

selection clauses should help reduce the uncertainty of which law will be applied in various telemedicine-related tort and contract claims, it will not eradicate all of the uncertainty in these areas.<sup>237</sup> As discussed previously, some jurisdictions choose not to follow law and forum selection clauses at all,<sup>238</sup> while others choose to follow them only in specific situations.<sup>239</sup> Still others will choose not to follow these clauses if their application would be contrary to a fundamental policy of the jurisdiction.<sup>240</sup> Telemedicine providers should not only be aware of this fact, but they should also have a contingency plan in place in case a foreign court decides not to follow the contractual selection clauses.<sup>241</sup>

Finally, telemedicine providers should be careful about which laws they choose to govern telemedicine contracts. For example, in order to reduce potential liability, a telemedicine provider may not want to pick his or her local law to govern a particular telemedicine contract. She should perform a thorough investigation of possible laws and use the one in the law selection clause that will be the most beneficial to her needs. To reach her desired goals, the provider should consider all relevant factors, including legal fees, travel, and inconvenience. However, she should remain cognizant that many jurisdictions will not apply a law selection clause if the chosen law has no substantial relationship to the parties or the transaction.<sup>242</sup> Therefore, a telemedicine provider should always make sure her chosen law does have a substantial relationship to the parties or the transaction or both.<sup>243</sup>

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237. See *supra* notes 139–70 and accompanying text.

238. See *supra* notes 140–41 and accompanying text.

239. See *supra* note 164 and accompanying text.

240. See *supra* notes 159–63 and accompanying text.

241. This contingency plan should include items addressing insurance issues and the procurement of foreign counsel. See generally Lauren R. Frank, Note, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957 (2000).

242. See *supra* notes 159–61 and accompanying text.

243. See *supra* notes 159–61 and accompanying text.

If done properly, a law selection clause can help remove some uncertainty for healthcare providers when entering into a telemedicine arrangement with another party. These clauses can help (1) predict where court proceedings will take place, (2) predict what legal standards the provider must operate under and be held to, and (3) provide healthcare providers with a rough idea of their own potential liability in the case a claim is brought against them.

## VI. CONCLUSION

The bottom line on these issues is a telemedicine provider must be prepared to (1) be haled into any court in any jurisdiction in which she is conducting or has conducted telemedicine care for a patient and (2) be held to that jurisdiction's legal standards of care.<sup>244</sup> While the provider can help minimize the uncertainty of what legal standards she will be held to by the use of choice of law provisions in her telemedicine contracts, she has no guarantee that a court will follow the law specified in one of these provisions.<sup>245</sup> Furthermore, there are at least two situations in which a choice of law provision will not be adequate in protecting a telemedicine provider from a jurisdiction's specified legal requirements.<sup>246</sup> First, a telemedicine provider should be cognizant of the fact that the state—foreign or domestic—in which she is treating patients through telemedicine has the authority to control her activity in that state through state licensure and other regulatory requirements.<sup>247</sup> Second, she must pay close attention to any relevant federal or foreign statutes regulating health care treatment.<sup>248</sup> Depending on the statute's construction and the legislative body's sovereign authority, she may also be held to the state's standards as well.<sup>249</sup> In summary, despite telemedicine's amazing opportunity

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244. See generally *supra* notes 196–230 and accompanying text.

245. See *supra* notes 242–49 and accompanying text.

246. See *supra* notes 231–41 and accompanying text.

247. See *supra* notes 231–35 and accompanying text.

248. See *supra* notes 236–41 and accompanying text.

249. See *supra* notes 236–41 and accompanying text.

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to increase worldwide access to quality health care and to improve the cost effectiveness of this care for developing and rural areas of the world,<sup>250</sup> telemedicine providers have the unenviable task of trying to manage their potential risk of liability in every area of the world reached by their telemedicine services.<sup>251</sup> Until these issues are answered by a court or until legislative bodies in and outside of the United States provide some guidance on how these issues will be handled by the courts, telemedicine providers will remain in the dark about their potential liability.<sup>252</sup>

*J. Kelly Barnes\**

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250. *See supra* notes 42–57 and accompanying text.

251. *See WIRED FOR HEALTH, supra* note 23, at 88.

252. *See id.*

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