

# Health Law Policy Heading Into 2022 At The ABA Health Law Summit

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The [ABA Washington Health Law Summit](#) is the premier legal conference focusing on health law policy and, as a result, offers insight into current and future major policy issues. But, as always at this conference, there are the issues selected by the conference chairs and formally on the agenda – and then there are issues experienced practitioners can identify by reading between the lines. Both are addressed below.

## COVID-19, Telemedicine, And Privacy

It should be no surprise that these three issues dominated the agenda. While other topics were certainly addressed, opioids most prominently, even presentations that did not appear to include these topics, such as the panel on antitrust and mergers, touched upon at least one and usually all of these topics.

Foremost among these topics is the current public health emergency. The pandemic's effects upon healthcare was, and is, pervasive, revolutionary, and evolutionary. It has impacted everything from A ([antitrust](#)) to Z ([Z codes](#)). Without doubt, the most powerful and talked about presentation this year was the [Taya Briley from the Washington State Hospital Association](#) and [Sheniece Smith from North Bay Healthcare](#) discussion on crisis standards of care during the pandemic. Their discussion of the unimaginably difficult, trying, and exhausting decisions having to be made during the worst periods of the pandemic—which is far from over—provided fresh illumination upon the heroic work being done by so many people in healthcare and the challenges that we faced, and continue to face.

Part of COVID-19's impact is a dramatic acceleration of the already rapid growth in telemedicine, and this was reflected in several presentations. Some presenters saw telemedicine as a way to address some of the biggest problems facing healthcare today: [lack of access to care, an aging physician population, and the mental health crisis in the United States](#). Most presenters expressed concern that, once the pandemic is under control, states will revert back to stricter standards for telemedicine use. Prior to the pandemic, payors reimbursed for some telemedicine only in remote areas of the country, and only for certain services provided by particular types of providers. Where the public health emergency necessitated a more flexible approach to telemedicine, many fear that

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reversion to the old way will leave many people without the care that, ironically, they were finally able to access during the pandemic. While the growth of telemedicine has been dramatic, many challenges remain including wide differences among states, lack of broadband access, and privacy concerns. Nonetheless, the pandemic demonstrated that telemedicine can provide value to patients, providers, and payors.

Another telemedicine challenge is privacy, the third major issue covered at the Summit. Surveys discussed by [René Quashie from the Consumer Technology Association](#) showed that after cost, the biggest barrier to people trying telemedicine and other consumer health technologies was privacy concerns. While HIPAA generally works for medical privacy and providers are quite familiar with it, some states have enacted additional laws such as California's Confidentiality of Medical Information Act. While there is likely no federal legislation on this issue in the near future, the European Union's General Data Protection Regulation could serve as a model for a broader privacy law.

## **Polarization, Stagnation (Of Sorts), And Litigation**

While COVID-19, telemedicine, and privacy dominated the official agenda, the issue of polarization in healthcare policy also came through as a strong theme across presentations. As even casual observers are aware, American political parties and the electorate are increasingly polarized, unable to agree, and often unincentivized to try to agree. As a result, Congress continues a steady decline in legislation.

The polarization that has dominated the political landscape over the last several years, along with an increasing divide between industry and government, are greatly affecting healthcare on the ground. COVID-19 vaccinations, for example, are proving to be a controversial issue for healthcare workers, adding to the already difficult job that hospitals and their staff have in handling the pandemic.

Presidents and federal agencies have thus attempted to act through Executive Orders and agency rulemaking (both formal and informal). These methods are, by their very nature, more limited. And they are almost immediately challenged in the courts. The current Administration's actions relating to vaccine or testing requirements [through OSHA](#), CMS, and [Executive Orders](#), for example, are tied up in the courts.

This polarization and litigation ultimately result in stagnation. While we realize that while using the term "stagnation" may be odd given the rather turbulent and very active last 24 months, it is an accurate description of Congressional action relating to healthcare. This polarization results in little to no significant Congressional action on healthcare; and thus Federal agencies try to fill the void, but their actions are often challenged in the courts. States also have become active, especially in relation to COVID-19. But their efforts are also [the subject of litigation](#). Moreover, their actions are sometimes in direct conflict with federal actions—such as [states that have mandated that there be no vaccine mandates](#)—and with other states. This has resulted in a fragmented approach which discourages healthcare businesses from innovating, expanding, and developing.

## **Three Other Miscellaneous Issues: Opioids, Abortion, and Private Equity**

There were three other issues too important not to mention. Foremost is that opioid addiction and abuse continue to devastate communities and families across the country, and the pandemic has only exacerbated the problem. Faced with the stress of isolation, lost employment, and loss of friends and family to COVID-19, substance abuse in all forms has increased over the past two years. [Gary Cantrell, the Deputy Inspector General for Investigations at HHS OIG](#), explained that

HHS has been working to identify and stop health professionals who over-prescribe opioids, and has seen significant success in Appalachia over the past several years.

Second, some states have taken steps to limit access to abortions during the pandemic. Most notably are the [Texas](#) and [Mississippi](#) state laws currently before the Supreme Court. Additionally, they have been passing laws that, while nominally focused on abortion, could affect telemedicine more generally. Until the pandemic, the FDA only allowed [mifepristone](#) (RU 486) to be dispensed by a certified prescriber in certain healthcare settings and prohibited prescriptions without an in-person doctor visit. But the [FDA waived these requirements](#) during the pandemic. It is expected to issue the results of a study this month regarding the safety of remote dispensing. If, as expected, it is safe, then the requirements will likely be permanently waived. Many states, however, already have in place or are in the process of passing trigger laws that will prohibit this. However, if such laws are not narrowly drawn, they could limit telemedicine more generally as a result.

Finally, while it largely flew under the radar at the conference, the increased investment in healthcare over the last several years has also had a substantial role in the growth of the healthcare economy. An important part of this has been investment from private equity firms. To date, there have been a very small handful of False Claims Act cases in which a private equity firm [has been involved](#). During a Q&A session Lisa Re from HHS OIG indicated that ownership and “ownership structure” can incentivize company billing and other practices. Furthermore, it is possible that HHS OIG may issue guidance relating to private equity.

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