

Focus

Health Law/Employee Benefits & Executive Compensation

Is Your Physician Practicing Telemedicine Without a License?

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Telemedicine raises novel legal questions, including a critical one: where does the practice of telemedicine occur? The answer remains the same as with traditional medical practice—the **physical location of the patient at the time of clinical care**. Thus, a Texas physician may see and treat patients in person in their Texas clinic or office, at a Texas hospital, or at Texas surgery center, all without issue. However, telemedicine technology now allows for a new scenario—a physician may, from time to time, clinically treat a patient who is at the time located outside the state of Texas. This raises a serious issue—might this physician be inadvertently practicing medicine in another state without a license?

The Federation of State Medical Boards has clearly spoken on this

issue, stating that a “physician must be licensed, or appropriately authorized by, the medical board in the state where the patient is located. The practice of medicine occurs where the patient is located at the time the telemedicine technologies are used.” This will likely surprise physicians, who might not even think to raise this issue. Many physicians might also point to the fact that patients routinely make telephone calls or otherwise communicate with physicians regarding their care (by email, patient portal, etc.) when not physically present in a physician’s office. Responding to such inquiries even when the patient is out of the state is routine. But the telemedicine appointment itself is a clinical visit, which is the key distinction that causes the concern.

Given this, what can a physician do to prevent the inadvertent unlicensed

practice of medicine in this situation? Knowing the current telemedicine laws in each state in which a patient might be located is a good first step. Some websites independently confirm the specific telemedicine laws that currently are in effect. *See, for example* www.bakerlaw.com/us-telehealth-law-map/. After reviewing applicable laws, a physician may then determine whether full medical licensure in each relevant state is prudent.

Also, various states may offer physicians the ability to obtain specific authorization that falls short of full medical licensure. For example, the Texas Medical Board (TMB) offers to physicians outside of Texas the convenient solution of paying a fee to do “episodic consultations” for patients located in Texas. Other states may offer Texas physicians this type of limited license for patients in their states. However, this approach may lead to an unwieldy patchwork of medical licenses/authorizations in other states—hardly an ideal solution.

Perhaps a more practical solution involves obtaining licenses in multiple states through the Interstate Medical License Compact (IMLC), which is a unified process for physician licensing in multiple states. Texas joined the IMLC in 2022 and now a total of 37 states participate. Eligible physicians need only complete one application and receive separate licenses from each state where they intend to practice. But if a physician has anything less than spotless licensing, criminal, and DEA records and is also not “subject to investigation,” they may not be eligible. Moreover, not all states participate at this point in time.

gusted that the various state medical boards should rethink medical licensing, especially as it relates to telemedicine. This opinion highlights two recently filed lawsuits claiming that various state “medical boards’ prohibitions on telehealth consultations or follow-ups with out-of-state licensed physicians violate the U.S. Constitution.” The legal theories in these lawsuits include arguments that such prohibitions violate protected free speech (as they are “at their core, conveyances of information”) as well as guarantees to interstate commerce (as they “erect[] protectionist measures and impede[] the development of a national market for goods and services”). *Id.* *See also McDonald et al v. Sabando*, Case 3:23-cv-23044 (D.N.J. 2023) and *McBride v. Hawkins*, Case 2:24-cv-01394 (E.D. Cal. 2024). This opinion concludes “[i]nstead of requiring every out-of-state physician who communicates with in-state residents to require an in-state license, medical boards should pursue reforms that streamline access to care, [such as allowing] all licensed physicians, regardless of their home state, to provide certain categories of telehealth, such as follow-up care or specialized consultations.”

Portability of medical licensure still has a long way to go and the various practical solutions mentioned above remain less than ideal. However, the first step is raising awareness of this issue so that physicians can properly license as necessary and avoid being accused of the unauthorized practice of medicine, which has serious legal and professional consequences for both the physician and their practice.

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