Telehealth & Multi-State Physician Licensure:

DON’T GET CAUGHT IN THE TANGLED WEB OF INCONSISTENT AND TROUBLESOME STATE PHYSICIAN LICENSURE LAWS

“The only thing consistent about Telehealth is that it’s inconsistent”
- Author Unknown

Physician Licensure – Telehealth’s Biggest Obstacle

- Lack of state consistency in regulating the practice of medicine and licensure presents a significant barrier to any multi-state telehealth program.
- Inconsistent state licensure laws
- Inconsistent state practice of medicine regulations and rules
- Licensure must occur at the site of the patient
- One physician could be responsible for staying compliant with up to 50 different state practices of medicine
- Multi-state licensure process is long and expensive

Biggest Misconception Providers and Physicians Have About Licensure

- The belief that the main licensure obstacle is obtaining the license when in fact it is staying compliant with each state’s medical practice act & practice standards.

Where to Find State Licensure Laws & Regulations

- Medical Practice Act and State Administrative Rules
- State Board of Medicine website’s often list the state’s medical practice act and rules – Osteopathic Boards often have separate websites and information
- Separate telehealth/telemedicine legislation might not be located within the medical practice act
- State Medical Licensure Requirements and Statistics – published by AMA
- AMA Website - links to all SMB/State Licensing Departments
- FSMB – Uniform Application

Understand Telehealth/Telemedicine Definitions

- Basic definition:
  - the use of technology;
  - to undertake an activity;
  - constituting the practice of medicine;

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• when the healthcare practitioner and patient are not in the same physical location.¹

• However, the definition of telehealth/telemedicine varies based on the location of the patient and the governmental agencies that have authority to regulate in that jurisdiction.

**Jurisdictions share common themes of regulation**

• Medical Boards²
  
  o Resource for interpretations of state statutes and regulations that apply to physician practice and licensure.
  
  o SMB general counsel can be internal or external in the form of counsel for the State’s Attorney General’s Office.
  
  o General counsel helpful in talking through the appropriate structure of new and innovative joint ventures and physician licensure in that jurisdiction
  
  o SMB or Osteopathic Board websites usually provide links to applicable state statutes and regulations.³

• Practice Standards, conduct, and behavior
  
  ▪ Standards of conduct are imposed on physicians by:
    
    • Medical Staff
    
    • Board Certification
    
    • Medicare
    
    • Association Memberships, etc.
    
    • The state where licensure is sought

**Watch for Differences in Licensure Related to Telehealth or Telemedicine:**

• Most states require a physician to be licensed in the state when treating a patient in that state (regardless of whether the physician is in or out of the state).

• There may be additional practice requirements imposed by states on the physicians/practice of medicine that reaches into the state through telehealth.⁴

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² See generally Directory of State Medical and Osteopathic Boards, Federation of State Medical Boards, FSMB.ORG, http://www.fsmb.org/about-fsmb/directory-hub (last visited Mar. 31, 2016) (In addition to the typical medical board of each licensing jurisdiction, there are at least 14 state boards of osteopathic medicine).


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• There may be additional licensing or practice requirements related to physician supervision of other healthcare practitioners.\(^5\)
• There may be differences in educating the patient about physician qualifications & credentials.
• There may be differences in how the patient must be educated about patient choice and/or continuity of care.
• There are differences in definitions for “Practice of Medicine.”
• What constitutes “practice of medicine”? Review State Medical Practice Act, Osteopathic Practice Act, telehealth/telemedicine statutes, and administrative licensing rules.
• Physician practice scope is usually narrowed by the physician’s training and experience.\(^6\)

**Other Points to Analyze Related to State Licensure:**

- **Corporate Practice of Medicine/Fee-Splitting Statutes**
  - Vary by state
  - Fee-splitting statutes prohibit physicians from sharing “pro fees” in exchange for referral of patients.\(^7\) Fee-splitting language is sometimes found in state medical practice acts. AMA Code of Medical Ethics also addresses this practice.\(^8\)
  - “Corporate Practice of Medicine” – the theory that corporations are unfit vehicles for the practice of medicine; corporations cannot be licensed to practice medicine and should not influence or interfere with physician decisions when treating patients.\(^9\)
  - Approximately 30 states have some form of CPOM
  - States who actively enforce CPOM: NY, CA, NC, TX
- **Certificate of Need (CON)**
  - **CON** programs are aimed at restraining health care facility costs and allowing coordinated planning of new services and construction. Laws authorizing such programs are one mechanism by which state governments seek to reduce overall health and medical costs.

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5. *Id.*

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Most states have CON or a variation of CON (except: CA, UT, ID, WY, CO, NM, ND, SD, KS, TX, IN, PA). (i.e. West Virginia – can’t start a new clinical service – may be able to apply for an exemption).


Types of Licensing Models & Theories

- **Active models:**
  - Consulting Exceptions – allowed by most states when a state licensed physician requests a patient consultation from and out-of-state licensed physician. Varies by state. Most states prohibit the out-of-state physicians from treating patients directly.
  - Reciprocity – exists when authorities of different states negotiate and enter agreements to recognize licenses issued by other states without a further review of individual credentials.
  - Mutual Recognition/Interstate Compact – is an agreement between states to enact physician licensure legislation and enter into a contract for the limited purpose of addressing the issue of physician licensure portability. Allows physician practice across state lines while SMBs and state medical practice acts maintain authority to regulate physicians in that state.
  - Preemption – occurs when federal laws displace, or preempt, state laws, due to the Supremacy Clause of the Constitution\(^{10}\) (i.e. FDA – Medical Devices & Veterans Health Affairs).

- **Non-active models that may have future applicability**
  - National Licensure – A physician license would be granted based on a comprehensive standard of practice.\(^{11}\) Most likely involve input from state’s and controlled by a majority vote.
  - Federal Licensure – federal regulation that grants licensure and enforcement at the federal level. Possibly allows state input but completely controlled and regulated by the federal government.

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\(^{10}\) U.S. CONST. art. VI., § 2.


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Outside Influence on State Telehealth Evolution

- Federation of State Medical Boards (FSMB)
  - Represents 70 State Medical Boards & Osteopathic Boards
  - Establishes model policies commonly adopted by individual states and incorporated into individual state medical practice acts including the Model Pain Policy and Appropriate Use of Telemedicine.
  - Member State Medical Boards protect the public through the regulation of medical practice including:
    - Licensure: Assure competencies and set expectations; Evaluate education, training, and examination
    - Discipline: Standards of competence and conduct; revocation and restrictions
  - Created the Multi-State Compact Model Policy

- American Medical Association
  - Code of Medical Ethics
  - Definition of “Practice of Medicine”
  - Definition of “physician patient relationship”
  - Analysis of video, audio, and telephonic communications with patients
  - Honoring patient choice
  - Improving continuity of care

Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine - Report of the State Medical Boards’ Appropriate Regulation of Telemedicine (SMART) Workgroup

- A guidance document for SMBs
- Model Policy Guidelines:
  - Patient-Physician relationship established upon agreement for diagnosis and treatment
  - Can be established via telemedicine if the standard of care is met (this was a major shift from the previous believe that the relationship must be established face-to-face
  - Physician Discouraged from care without:
    - Verifying patient’s identification and location
    - disclosing credentials and identity
    - Obtaining consent form the patient
  - Licensure:
    - Physician under the jurisdiction of the SMB in the state where the patient is located
    - Allows practice of medicine in the state where the patient is located where the telemedicine technologies are used
  - Evaluation and Treatment:
    - Physician must collect relevant clinical history
- Treatment held to same standard as face-to-face
  - Prescribing:
    - Held to the same standards as other treatments
    - Sole use of online questionnaire is not acceptable
  - Informed Consent:
    - Identification of physician and technologies (and other healthcare professionals)
    - Types of transmissions permitted
    - Patient agreement to the discretion of the physician to determine whether or not the condition is appropriate for a telemedicine encounter
  - Continuity of Care:
    - Patient access to follow-up care or information from the provider of telemedicine services
  - Referral for emergency services:
    - Written protocol appropriate to services rendered

**Telehealth Physician Practice Standards**
- These are standards unique to telemedicine and do not cover all practices standards
- The practice of medicine using telehealth may require different practice standards.
  - When a physician is providing care through telemedicine she must follow all practice standards for that state not just the telemedicine specific practice standards.
- Medical Boards have a lot of power in their respective state – they control minimum standards of the profession. Make sure to spend the appropriate amount of time determining what the state medical board wants because making mistakes could cause serious problems for the telehealth program and for the physician’s license.
  - It is likely the SMB will share information with other states; making a serious mistake in one state may effect the physicians license in many other states and may need to be reported to the National Practitioner Data Bank (NPDB).
- These may all effect a physician’s ability to obtain or keep a state medical license.
  - Has or can a treating relationship be established?
  - Is a prior in-person examination required?
  - Is a facilitator required?
  - Does the patient have to be located at a clinical site? Home?
  - Are peripherals required (medical diagnosis tools – blood pressure machine, thermometer)?
  - Informed Consent?
  - Patient Choice for referrals/continuity of care?
Treating Relationship sufficient to prescribe?
Controlled Substance? DEA?

- Pharmacy Boards don’t always agree with Medical Boards – make sure to check the controlled substances act for each state. Confirm with the Drug Enforcement Administration (DEA) for prescribing restrictions.
- The DEA also has standards regarding telehealth prescribing of controlled substances. Ryan Haight Act:
  - A physician practicing telemedicine may prescribe controlled substances without an in-person evaluation if:
    - (1) The patient is treated by, and physically located in a hospital or clinic which has a valid DEA registration; and
    - (2) the telemedicine practitioner is treating the patient in the usual course of professional practice, in accordance with state law, and with a valid DEA registration.\(^\text{12}\)
  - New Jersey, NJ Admin. Code Title 13, 13:35 – 7.1A: “… a practitioner shall not dispense drugs or issue prescriptions to an individual, pursuant to the requirements of this subchapter, without first having conducted and examination which shall be appropriately documented in the patient record. As part of the patient examination the practitioner shall: 1. Perform an appropriate history and physician examination; …”

- Certain types of care (i.e. behavioral health) sometimes have separate standards and requirements or allowances for telehealth.

State Policy Overview
- Licensure: 50 SMBs specifically state that physician engaging in telemedicine be licensed in the state where the patient is located
- Standard of Care: 29 SMBs require the same standard of care be applied to telemedicine encounters as face-to-face.
- Physician Patient Relationship – 5 states require in-person exam prior to telemedicine encounter and 2 require in-person follow-up.
- Informed Consent: 12 states have informed consent requirements
- Other telemedicine SMB requirements:
  - May prohibit prescribing controlled substances
  - May specify “audio/video only”
  - State Pharmacy Boards may not agree with SMB Standard of Care and may set forth separate standard of care related to prescribing

\(^{12}\) 21 USC 802(54)(A).

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Interstate Compact Overview

- Participation voluntary for both physician and SMBs
- Creates another pathway for licensure, but does not otherwise change a state’s existing Medical Practice Act
- Regulatory authority remains with the participating SMBs
- Practice of medicine occurs where the patient is located
- Physician qualifications to participate in Interstate Compact:
  - Successfully passed the USMLE or COMLEX-USA
  - Successful completion of GME program
  - Specialty certification or a time-unlimited certificate
  - No discipline on any state medical license
  - No discipline related to controlled substances
  - Not under investigation by any agency
  - Fingerprint Background Check
- How does physician enter the interstate compact?
  - Identify principal/resident state that participates in the Interstate Compact and obtain a full and unrestricted license through that state
- Principal State?
  - Physician’s primary residence
  - State where 25% of medical practice occurs
  - Location of physician’s employer
  - State designated for federal income taxes
Where are we now?

- The Interstate Medical Licensure Compact is in the process of establishing its administrative process for expedited licensure. Expedited licensing is not yet available but will be soon.14
- “The Interstate Medical Licensure Compact Commission will meet March 31 and April 1, 2016, in St. Paul, Minn.”15
- As of January 1, 2016, twelve states have enacted the Compact legislation: Alabama, West Virginia, South Dakota, Utah, Wyoming, Idaho, Illinois, Iowa, Minnesota, Montana, Nevada, and Wisconsin.16

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13 Interstate Medical Licensure Compact, LICENSEPORTABILITY.ORG (last visited Mar. 31, 2016).
14 Id.
15 Id.
16 Id.

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• By surpassing the minimum threshold of seven state enactments, the Compact is now officially established.¹⁷
• This year, the Commission will determine the processes, rules and technical infrastructure necessary to facilitate the expedited licensing option available to qualified physicians in Compact member states.¹⁸
• LicensePortability.org has interactive map that shows each state’s enactment and introduction dates as well as the legislative bill language.

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¹⁷ Id.  
¹⁸ Id.

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