

AMERICAN BAR ASSOCIATION

HEALTH LAW SECTION

REPORT TO THE HOUSE OF DELEGATES

1 RESOLVED, That the American Bar Association urges states and territories to provide for
2 mutual telemedicine licensure recognition, whereby a physician with a current, valid and
3 unencumbered license in any jurisdiction could file a single application which would permit the
4 physician to practice telemedicine in some or all other jurisdictions subject to continuing
5 compliance with those jurisdictions' licensure fees, discipline, and other applicable laws and
6 regulations, and adherence to professional standards of medical care.

7
8 FURTHER RESOLVED, That such legislation should specify a uniform definition of
9 telemedical practice, the requisite procedures for telemedical licensure, jurisdictional
10 requirements, and the continuing role of medical boards in physician licensure and discipline.

REPORT

Telemedicine represents an emerging set of technologies increasingly used to connect patients with providers around the country. Telemedicine has the potential for dramatically improving the delivery of health care services by significantly strengthening health care infrastructure in underserved areas, providing access to specialty services where little, if any, are available, enhancing continuity of care, lessening the growing problems caused by lack of availability of both primary and specialty medicine and decreasing costs. However, the potential for telemedicine to act as building block for health care delivery will not be realized if the legal restraints surrounding it, particularly licensure restrictions, are not removed.

Overview of the Issue

Definitions abound but, at its core, telemedicine can be defined as the delivery of medical services from a healthcare provider in one location to a patient in another. Applications that fall under this definition range from telephone advice to advanced interactive imaging, video consultations, robotic surgery, and virtual technology. There is no doubt that the potential benefits of telemedicine are myriad. However, so too are the legal issues that have arisen as legislators and regulators try to adapt old laws to new practices of medicine. Indeed, the most significant restraints on the full growth and development of telemedicine, in the United States and throughout the world are the legal barriers that remain – and are still being created. Among them, the most formidable barrier to the broad expansion of telemedicine services in the United States is the current need for multiple state licenses for physicians who practice across state lines.

While telemedicine has the potential to overcome barriers of distance and improve access to needed health care services, the current restrictive state licensure laws pose a significant obstacle to achieving this goal. Requiring a physician to obtain multiple licenses in order to practice telemedicine across state lines is duplicative, expensive and burdensome. It burdens physicians — particularly specialists — who wish to offer their services to patients on a multistate or national level. It burdens patients' rights to choose and avail themselves of the best possible medical care irrespective of where the provider is located. This burden falls disproportionately on patients who do not have the means to travel to distant providers. It burdens traditional physician communications and consults across state lines — indeed, it significantly burdens interstate commerce in medical care. Moreover, if the goals are to assure the qualifications of physicians practicing medicine in a particular state and to provide quality medical care at reasonable cost to that state's residents, multiple state licensure is unnecessary to achieve those goals. Rather, it is counterproductive.

“Telemedicine invites clinical applications that ignore the geographic borders on which our current licensure system is based In the most stark terms, the dilemma pits technological developments, which literally enable health care workers to offer their services across the nation, against the necessarily parochial role played by states in monitoring

the quality and the conduct of practitioners who provide care to their citizens.”¹

Moreover, at a time when every level of government and virtually every health care organization is evaluating methods to reduce health care expenses, the needless complexity of requiring multiple state licenses flies in the face of those efforts to reduce costs.

The Problem: Multiple State Licensure Requirements

All states require that a physician who provides medical care for a patient located in the state must hold a valid license in that state. Historically, most states have recognized at least a limited exception to the licensure requirement for out-of-state physicians providing in-state “consultations.” For example, some states were willing to interpret out-of-state telereview of slides and x-rays as a form of physician-to-physician consultation, and not require an in-state license for the out-of-state specialist. Today, most states are unlikely to read the consultation exception so broadly. In fact, the trend clearly is moving in the opposite direction.

For example, in 1997, the Illinois legislature amended the state’s Medical Practice Act to prohibit the practice of telemedicine without a license.² “Telemedicine” is defined to include “rendering written or oral opinions concerning diagnosis or treatment of a patient in Illinois by a person located outside the State of Illinois as a result of transmission of individual patient data by telephonic, electronic, or other means of communication within this state.”³ The Act provides exceptions for “periodic” consultations, second opinions, and medical care provided in follow-up to care originally provided in the provider’s state of license. It also provides that an out-of-state physician treating a patient in Illinois through the practice of telemedicine submits himself or herself to the jurisdiction of the courts of Illinois, and could face criminal penalties for the unlicensed practice of telemedicine. Thus, an out-of-state radiologist providing regular interpretations of films from patients located in Illinois must be fully licensed in Illinois or risk serious consequences.

Texas is another example. Texas had a rather liberal exemption for physicians who “entered” the state for consultative purposes. In 1999, however, Texas passed legislation expressly limiting the exemption to “episodic consultation,” and requiring a Texas medical license for any physician:

“who is physically located in another jurisdiction but who, through the use of any medium, including an electronic medium, performs an act that is a part of a patient care service initiated in [Texas], including the taking of an x-ray examination or the preparation of pathological material for

¹ Sulenic, “Crossing Borders: The Licensure of Interstate Telemedicine Practitioners,” 25 J. Legis. 1, 7 (1999).

² Public Act No. 90-99 (codified at Ill. Ann. Stat., Ch. 225, 60/49.5 (2004)).

³ Ill. Ann. Stat., Ch. 225, § 60/49.5(c).

examination, and that would affect the diagnosis or treatment of the patient”⁴

Violation of the Texas law is a Class A misdemeanor, punishable by a fine of up to \$4,000 and/or a jail sentence of up to one year. Conviction of a second offense is punishable as a third degree felony which may result in a fine of up to \$10,000 and imprisonment for two to ten years. Each day of violation constitutes a separate offense.

Statutes such as those enacted in Illinois and Texas threaten not only the future expansion of interstate, national and international telemedicine activities, they also imperil long-standing patterns of radiology and pathology consultations conducted by mail and other non-electronic means. And these states are not unique. To date, thirty-two states have adopted licensure regulations relating to the practice of telemedicine; seven other states are in the process of developing regulations,⁵ and a recent report from the Federation of State Medical Board notes that state activities in this area are ongoing.⁶

With narrowly-limited exceptions, most states require full in-state licensure for out-of-state telemedicine providers. Complicating the situation is the wide variation in the language of state medical practice acts and in the requirements of the regulations promulgated thereunder. Further, in several other states, the state medical board has interpreted its statute to require full licensure of out-of-state telemedicine physicians. For example, the General Counsel of the Massachusetts Board of Registration in Medicine has opined that, if a biopsy performed on a Massachusetts patient by a Massachusetts physician is received and diagnosed by an out-of-state physician, that out-of-state physician is practicing medicine without a license in Massachusetts.⁷

Physicians who practice telemedicine “without a license” risk criminal as well as civil penalties, state disciplinary proceedings, and denial of coverage under medical malpractice insurance policies which generally require licensure as a condition of coverage. Moreover, licensed physicians who send patient specimens or data out-of-state also may be sanctioned. For example, regulations of the Massachusetts Board of Registration in Medicine provide that a physician licensed in Massachusetts may be disciplined for “[k]nowingly permitting, aiding or abetting an unlicensed person to perform activities requiring a license.”⁸ Further, hospitals and managed care organizations whose physicians send biopsies or pap smears to large national reference laboratories for processing and interpretation by pathologists also may face charges of aiding and abetting the unlicensed practice of medicine.

⁴ Tex. Occ. Stat. § 151.056 (2004).

⁵ American Medical Association, “State Medical Licensure Requirements and Statistics,” p. 69 (2008).

⁶ Federation of State Medical Boards, “Legislative Services Report,” p. 49-50 (Oct. 2007).

⁷ Letter from Penelope Wells, Esq., General Counsel, Massachusetts Board of Registration in Medicine (September 18, 1985).

⁸ *Id.*

The Reality: Multiple State Licensure is Unnecessary

Concerns often are expressed that out-of-state physicians practicing telemedicine in “our state” may not be as qualified as in-state physicians. They argue that such telemedicine providers should be required to obtain a license to practice medicine in the state in which the patient resides and, thereby, be subject to that state’s licensing standards and “standard of care.” However, the expressed concerns are illusory and the suggested solution unnecessary.

State requirements for medical licensure are very close to uniform. All states use national standards such as graduation from a medical school accredited by the Liaison Committee for Medical Education (for U.S. graduates) and attainment of a passing score on the United States Medical Licensing Examination (the “USMLE”). (Before the establishment of the USMLE, states used other similar standards.) Further, while the number of years may vary somewhat from state to state, all states require some level of post-medical school training. This generally takes place in a residency program accredited – nationally -- by the Accreditation Council for Graduate Medical Education. Specialty credentialing also is national in scope — generally accomplished through certification by a specialty board member of the American Board of Medical Specialties. Finally, standards of practice — particularly in the medical specialties, which are likely to be the greatest arenas for telemedicine practice — are no longer local. All radiologists, pathologists, dermatologists, etc., are subject to national standards of care. The consistency and national scope of the above requirements should dwarf the significance of any state-by-state differences, and strongly argue against a requirement for multiple state licensure.

In sum, the substantial and ongoing administrative, financial and legal burdens that are imposed by requirements for multiple licenses for telemedicine practice outweigh any potential arguments in their favor. If the *true* goal is to allow each state’s residents to have access to the best medical care in the country, both within and outside of that state, all of the states must act to reduce barriers to interstate telemedical practice, not erect new ones.

Past Attempts at Solutions

During the mid to late 1990s, several proposals emerged to deal with the telemedicine licensure issue, including a model act developed by the Federation of State Medical Boards which would make a special telemedicine license available to licensed physicians who “regularly” practice medicine across state lines by electronic or other means.⁹ Although none of these proposals even came close to achieving the critical goal -- allowing a physician with a current, valid and unencumbered license in any state to provide telemedicine services to patients in any other state – they clearly acknowledged that state-by-state licensure requirements pose a serious impediment to the proliferation of telemedicine services.

Further, although no federal legislative action has been taken to date, several telemedicine bills addressing licensure have been proposed. For example, in 2004, John Edwards

⁹ Federation of State Medical Boards, “Act to Regulate the Practice of Medicine Across State Lines” (1995).

(D-NC) introduced Senate Bill 2325, the “Telehealth Improvement Act of 2004.”¹⁰ S.2325 would require, *inter alia*, that, “[w]ithin 1 year of the date of enactment . . . the Secretary [of HHS] shall convene a conference of State licensing boards, local telehealth projects, health care practitioners, and patient advocates to promote interstate licensure for telehealth projects.”

There even have been serious discussions relating to *national* or *federal* licensure. Although licensure of physicians has traditionally been the purview of the states, the federal government is beginning to show some interest where telemedicine is concerned. In 1996, the Health Resources and Services Administration (“HRSA”) solicited comments on “Legal Issues Related to Telemedicine.”¹¹ HRSA sought comments identifying, and suggestions for overcoming, legal barriers to the cost-effective use of telemedicine. In particular, the agency sought “suggestions for easing licensure barriers to physicians and other health care professionals providing telemedicine services across state lines.” HRSA encouraged respondents to explore the pros and cons of “a wide range of options,” including limited licensure, registration, reciprocity, and national licensure. In his presentation of the “Telemedicine Report to Congress” on January 31, 1997, U.S. Commerce Secretary Michael Kantor reported that one of the key issues that must be settled before telemedicine can proliferate is “the licensure of telemedicine professionals who work across state lines or who provide services on a multi-state basis.”¹²

Most recently, the State Alliance for E-Health, a special committee of the National Governors Association, recommended that the states act to create a physician licensure system that works across state lines “in a uniform manner” to permit open interaction between physicians and patients across state boundaries while preserving the traditional disciplinary authority of state medical boards.¹³ The recommendation also calls for a convention of the state medical boards to establish consensus on methods for achieving this goal. The Alliance’s recommendations are to be discussed at the upcoming Annual Meeting of the Federation of State Medical Boards in May, 2008.¹⁴ In light of these developments, and for all of the above reasons, the Section believes that the time is right to encourage state legislators to act on this important health issue.

*Recommendation: One Application, Mutual State Recognition,
Retained Authority of State Medical Boards*

The Section believes that the most straightforward method to reduce such barriers to telemedicine is to institute a system of mutual licensure recognition whereby a physician with a current, valid and unencumbered license in any state could file a single application which would permit the physician to practice telemedicine in some or all other states subject to

¹⁰ S.2325, 108th Cong. (2004).

¹¹ 61 Fed. Reg. 41640 (Aug. 9, 1996).

¹² Commerce Secretary Michael Kantor, Telemedicine Report to Congress, January 31, 1997 (available at <http://www.ntia.doc.gov/reports/telemed/letsec.htm>, last visited August 23, 2004).

¹³ Foxhill, “Inter-State Physician Licensure System to be Recommended,” Medscape Medical News (available at <http://doctor.medscape.com/viewarticle/570607>, last visited February 29, 2008).

¹⁴ FSMB BoardNet News (February 22, 2008).

continuing compliance with those states' licensure fees, discipline, and other applicable laws and regulations, and adherence to professional standards of medical care. The Section further believes that such legislation should specify a uniform definition of telemedical practice (*e.g.*, that the physician does not set up an office, appoint a place for meeting patients, or routinely receive calls *within* the state), the requisite procedures for telemedical licensure, [a requirement that the telemedicine provider must agree to the jurisdiction of the patient's home state for malpractice actions](#), and the continuing role of state medical boards in physician licensure and discipline.

Respectfully submitted,

Andrew J. Demetriou
Chair
Health Law Section
American Bar Association

August 2008

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Health Law Section

Submitted By: Andrew J. Demetriou, Chair

1. Summary of Recommendation(s).

The recommendation calls for state and territorial government's recognition of mutual state telemedicine licensure, subject to compliance with each jurisdiction's applicable fees, discipline and professional standards of each state's medical board. The recommendation also urges legislation that should specify a uniform definition of telemedicine practice, jurisdictional requirements, and procedures for licensure and discipline.

2. Approval by Submitting Entity.

Approved by Section Council May 6, 2008.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

02/96 Confidentiality of Health Information regarding electronic health records may be relevant with respect to patient records being transmitted electronically. This report and recommendation would not affect that policy. No other policies were identified.

5. What urgency exists which requires action at this meeting of the House?

A troubling trend has emerged where states are becoming more restrictive in allowing consultations across state lines (Illinois and Texas, for example). Bringing this issue to the House at this time is imperative to address these trends.

6. Status of Legislation. (If applicable.)

No federal legislation is pending, various states are considering legislation for telemedicine licensure.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

This report and recommendation has been referred to the Sections of Individual Rights and Responsibility, Science & Technology, Administrative Law and Business Law, the Young Lawyers Division, the Standing Committee on Medical Professional Liability and the Special Committee on Bioethics and the Law.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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Executive Summary

Summary of Recommendation

The recommendation calls for state and territorial government's recognition of mutual state telemedicine licensure, subject to compliance with each jurisdiction's applicable fees, discipline and professional standards of each state's medical board. The recommendation also urges legislation that should specify a uniform definition of telemedicine practice, jurisdictional requirements, and procedures for licensure and discipline.

Summary of issues which the recommendation addresses

The recommendation urges legislation to remove current barriers to telemedicine practice across state lines

Explanation of how the proposed policy position will address the issue

The recommended policy position will encourage states to provide mutual state recognition of physicians practicing telemedicine.

Summary of minority views or opposition which have been identified

No opposing views have been identified.