

Analysis of Loss of Due Process for Physicians Who Participate in the Interstate Medical Licensure Compact

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2/19/18

Introduction: Physicians who get licenses in multiple states through the IMLC give up a significant measure of due process: under provisions of the Compact, if the participating physician's license is suspended or revoked in one member state, then the same sanction automatically goes into effect in all other member states, *without a hearing*. If a physician gets her out-of-state license outside the Compact, any sanctions in one state get reported to other states, but the physician retains her right to a hearing before sanctions can be levied in additional states.

My colleague Richard Levenstein, a nationally known health law attorney, licensed in Florida and Vermont, has reviewed this provision of S.253. Mr. Levenstein would strongly advise any physician he represented to get an out-of-state license through the ordinary, non-"expedited" application process rather than through the Compact. Avoiding the hassle of license application is not worth the risk of losing due process, in his opinion. Mr. Levenstein tells me that he would feel that he was not meeting his professional obligations to his client if he did not so advise.

This is the primary basis for my prediction that few physicians will join the IMLC to serve Vermonters. The question of how many physicians will want to use the Compact for licensing does not hinge on its value as a public policy initiative that might improve access to care; rather, the level of participation depends on how physicians perceive the degree of personal liability they will assume by joining the Compact.

Clinical Vignette: Consider the following clinical scenario: a Vermont-based gynecologist obtains her New Hampshire license through the Compact. A New Hampshire teenager travels to see this doctor in Vermont for treatment. If the Vermont doctor does not follow New Hampshire's law that requires parental notification, even though the care is provided lawfully in Vermont according to Vermont statutes, the New Hampshire medical board can investigate the doctor and suspend her New Hampshire license. Under Compact rules, her Vermont license is automatically suspended. Suddenly, without notice, her Vermont patients do not have a doctor. If the Vermont doctor got her New Hampshire license outside the Compact, neither she nor her patients are subject to this jeopardy, according to representations made by the Federation of State Medical Boards that participation is voluntary.

This is an example of a potential "false positive" finding of professional misconduct that is purely an artifact of the Compact language, for a physician who is practicing perfectly soberly, competently and ethically. In this scenario, patients pay the price.

Analysis:

Section 1420a of S.253 states: “The Compact also adopts the prevailing standard for licensure and affirms that the practice of medicine occurs where the patient is located at the time of the physician-patient encounter, and therefore, requires the physician to be under the jurisdiction of the state medical board where the patient is located.” If only this provision applied, an encounter between a patient and physician that takes place in Vermont is covered only by Vermont law and not New Hampshire’s.

The complexity of interpreting the Compact language is created by provision 1420 i(e): "Any member state may investigate actual or alleged violations of the statutes authorizing the practice of medicine in any other member state in which a physician holds a license to practice medicine." Under this provision, the New Hampshire medical board can come to Vermont to investigate, irrespective of where the patient was located at the time of the medical encounter. If we vary the clinical scenario and add that the New Hampshire teenager follows up with her Vermont physician via telemedicine, then the Vermont physician who treats without notifying parents (because followup could be construed as continuation of the face-to-face treatment) might again run afoul of the New Hampshire’s authority to investigate and sanction.

With the passage of S.50 last year, Vermont now allows telemedicine prescribing without the need for an in-person exam. If the Vermont-based doctor prescribed to the patient in New Hampshire via telemedicine, without ever meeting face-to-face, and fails to comply with all New Hampshire laws governing the practice of medicine, this could trigger the chain of events noted above.

The automatic disciplinary provisions differ slightly depending on whether or not the physician's "state of principal license" is taking an action. See below:

Section 1420j(b) states: “If a license granted to a physician by the member board in the state of principal license is revoked, surrendered or relinquished in lieu of discipline, or suspended, then all licenses issued to the physician by member boards shall automatically be placed, without further action necessary by any member board, on the same status. If the member board in the state of principal license subsequently reinstates the physician’s license, a license issued to the physician by any other member board shall remain encumbered until that respective member board takes action to reinstate the license in a manner consistent with the Medical Practice Act of that state.” Obviously, it is quite cumbersome, expensive, and time-consuming to remove a sanction on a license.

Section 1420j (d states): “If a license granted to a physician by a member board is revoked, surrendered or relinquished in lieu of discipline, or suspended, then any license or licenses issued to the physician by any other member board shall be suspended, automatically and immediately without further action necessary by the other member boards, for 90 days upon entry of the order by the disciplining board, to permit the member boards to investigate the basis for the action under the Medical Practice Act of that state. A member board may terminate the automatic suspension of the license it issued prior to the completion of the 90-day suspension period in a manner consistent with the

Medical Practice Act of that state.” As one can see, less flexibility is granted to other state boards when the "state of principal license" takes the action, and in either case, automatic suspension or revocation, without a hearing, goes into effect.

Note that the language of the above provisions does not distinguish between physicians licensed through the Compact or outside it. This part of the Compact language could be interpreted to mean that the provisions of the Compact apply to physicians who obtain multi-state licensure outside of the Compact. Thus, licensure through the Compact may not be "voluntary." Even if it is genuinely not the intent of the FSMB to extend the provisions of the Compact to *all* multi-state-licensed physicians in member states, the IMLC does not, as the FSMB frequently points out, control how state boards will interpret their responsibilities to protect the public safety. One is left to wonder why the authors of the statute did not include some rather obvious clarifying language. It is also not difficult to imagine member states modifying their own professional codes to conform with the Compact, to avoid confusion in enforcement, which would represent a migration of loss of due process to physicians who do not use the Compact.

The Compact language does not put any cap on fees that might be assessed to member states. Vermont might well consider, in light of only some 850 physicians nationwide who have joined so far, and in light of a significant legal deterrent to participation, how many out-of-state physicians will actually be gained for Vermonters at the risk of an open-ended financial commitment to the Compact, and at risk to the patients of any Vermont physicians who might use the Compact to get an out-of-state license.

The Compact has been quite controversial around the country. Ohio’s medical board and counsel for Missouri’s medical board rejected participation for the reasons outlined above, as well as many others. (Their opinions are attached.) Physicians who use the Compact will have to master the statutes in the other states where they are licensed to practice via telemedicine, and on top of that, they will have to consider how other states’ boards will interpret their responsibilities to enforce their own statutes, and how those boards will interpret the language of the Compact.