Providing Responsible Health Care for Out-of-State Patients

For most physicians, a daily part of clinical practice is returning phone calls to their patients. Such calls are essential to the timely answering of patient questions, following up on test results, and—most of all—preserving ongoing care relationships. Unfortunately, physicians have increasingly been told by lawyers and compliance officers that calling patients located in another state is a legal gray area and introduces a risk of sanctions. States have accelerated this concern. The New Jersey Attorney General’s Office recently warned out-of-state physicians that, without a New Jersey medical license, “any practice by way of telemedicine, will constitute the unlicensed practice of your profession, and may subject you to administrative and criminal action” (email communication, March 31, 2023). These restrictions are impeding other communications as well. When Virginia ended its temporary pandemic regulations around physician licensure, Johns Hopkins had to inform more than 1000 patients they were no longer eligible to utilize telehealth appointments with its providers. Physicians given this advice are understandably frustrated because these restraints disrupt and reduce the quality of the care they provide. This is especially true for specialty physicians who serve a broad geographic area and physicians whose practice is near a state border.

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For example, many states lack any pediatric subspecialists and the majority of the population must travel more than 100 miles. In this Viewpoint, we explain why the legality of such a longstanding and fundamental part of clinical care has suddenly been called into question.

Is Calling a Patient “Practicing Medicine”?
The new restraints stem from longstanding state requirements that a physician must be licensed in the state in which the patient is located at the time of the encounter. The COVID-19 pandemic prompted both the federal and state governments to temporarily relax licensure requirements to facilitate care by out-of-state clinicians. Much of this temporary regulatory relief has already expired, and the end of the federal Public Health Emergency on May 11, 2023, phased out several more. This return to a prepandemic regulatory environment caused health systems and legal experts to reinstitute state licensure regulations.

Follow-up phone calls are a victim of this return to prepandemic practices. Many compliance officers now favor a strict interpretation of the governing statutes and conclude that physician follow-up calls constitute “practice of medicine” and therefore must be limited to patients in a state in which the physician is licensed. For example, the governing code in Texas defines practicing medicine as “diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method” and notes that any “person who is physically located in another jurisdiction but who, through the use of any medium, including an electronic medium, performs an act that is part of a patient care service initiated in this state...that would affect the diagnosis or treatment of the patient, is considered to be engaged in the practice of medicine.” Texas is not unique; similar definitions and rules exist in other states. Compliance officers have been interpreting “any system or method” and “any medium” to include phone calls, and some are extending these concerns to include emails in patient portals.

Strict Interpretation Leads to Illogical Scenarios
Limiting phone calls and electronic communication between physicians and patients interferes with the patient-physician relationship and forces a variety of unreasonable questions. If a patient sends a health portal message when physically located in one state, but is in another when the physician responds, which state “counts” for the physician in terms of licensure? Does requiring a patient to drive to the physician’s state of licensure for a phone call constitute better care? This is already the reality for many video telemedicine visits, whereby patients sit in cars or coffee shops on smartphones, searching for good WiFi and sharing tips about the best parking lots that are just across the state border. These constraints severely inconvenience patients, especially those with serious illness, physical disabilities, or lower income and limited resources; threaten patient privacy; encourage discontinuity of care; and might force private health care conversations to take place in ineffective and public settings.

The Broader Context
Besides creating problematic scenarios, this strict interpretation of state regulations to prohibit follow-up communications forces physicians to weigh the risk of violating licensing laws (both civil and criminal risk) rather than focusing on providing the best care possible to their patients. It also raises concerns of medical malpractice liability due to failure to act. Medical malpractice liability occurs when a provider fails to deliver the care that
would be expected of a reasonable practitioner under similar circumstances. The standard of care for physicians is to follow up with patients in a timely manner, regardless of their location. A physician might risk liability if a patient experiences harm because the physician refused to call the patient back, read a patient portal message, or examine remote patient monitoring data. Telling a patient that the physician cannot provide care and the patient must find a local clinician, or fly or drive to the physician’s state, is neither compassionate nor cost-effective care and may result in patients feeling abandoned. It also leaves medical decision-making up to a doctor who may not know the patient and has not provided prior care.

What to Do About It?
The laws governing telemedicine should not be interpreted to threaten patient access to follow-up appointments. We believe physicians should continue to act with their patients’ best interests in mind, but this requires immediate action by other members of the health care ecosystem to shield physicians and other health care professionals from harm. This is because providing good clinical care is in direct conflict with the overzealous new interpretation of decades-old licensure rules. In-house counsel, compliance officers, and the health law bar should work with regulators to mitigate any concerns over patient harm from unregulated practice of telemedicine.

A more comprehensive solution is reforming state regulations to provide clear protections for physicians who engage in interstate virtual follow-up care. The Federation of State Medical Boards, for example, has proposed exceptions for licensure requirements for telemedicine.6 We believe these exceptions should be expanded and simplified; states should create exceptions to licensure for any follow-up care after a relationship has been appropriately established through in-person or virtual means. Because the new interpretation of licensure rules undermines the quality of patient care, we believe that the state boards and the Federation of State Medical Boards have a duty to act quickly to return to the previous, more patient-centered approach of facilitating follow-up communication.

Congress could also solve this issue, and there are a number of models this reform could follow.7 In the Sports Medicine Licensure Clarity Act, Congress created reasonable exceptions for licensure when clinicians travel with a sports team to another state and provide care, even if they are not licensed in the state in which the sporting event occurs. Likewise, in the Mission Act, Congress created exceptions for care within the Veterans Administration. Similar legislation could establish an exception for any form of care when there is an established patient-clinician relationship. Alternatively, the delivery of medical care could be defined as being rendered where the physician is located, although that could potentially upend our existing system and impact state licensure authority. Although congressional action would mean the federal government supersedes, or preempts, existing state regulations, the advantage of either federal legislative approach is uniformity and clarity, rather than requiring physicians to navigate through 50 different approaches to the issue.

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REFERENCES