VIEWPOINT

State Medical Boards and Interstate Telemedicine in the Courtroom

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Despite the convenience and value of telehealth, many states have rolled back COVID-19 pandemic–era flexibilities and reimposed strict licensure requirements for telemedicine. Thus, as it was prepandemic, so it is again that a physician, duly licensed in their home state, is prohibited from consulting or following up with an out-of-state patient via video or phone unless they are also licensed in the patient's state. Penalties for doing so without that license can amount to tens of thousands of dollars in fines and potential imprisonment.

State medical boards are the custodians of state licensure rules and have been responsible for the reimposition of licensure restrictions. Despite growing pressure to respond to patient preferences and widespread evidence of the benefits of interstate telemedicine,[1] state boards have been resistant to allowing interstate telehealth for even rudimentary services. However, 2 recently filed federal lawsuits reveal that key constituencies have lost patience with the boards and are asking courts to intervene to remove these unnecessary frictions. These legal actions represent a foundational challenge to state licensure regimes, and medical boards should pay close attention.

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One suit was filed jointly in December 2023 by 2 New Jersey residents with rare cranial tumors and their physicians against the New Jersey Board of Medical Examiners.[2] A similar suit was initiated in May 2024 against the Medical Board of California.[3] Both suits claim that the medical boards' prohibitions on telehealth consultations or follow-ups with out-of-state licensed physicians violate the US Constitution.

The lawsuits focus attention on 1 of the more baffling features of the US health care system. Physician licensure is administered by individual state boards even though standards of care and the requirements of medical credentialing are uniform across the nation. As the Mississippi Supreme Court once famously phrased it, "regarding the basic matter of the learning, skill, and competence a physician may bring to bear in the treatment of a patient, state lines are largely irrelevant. Bones break and heal in Washington the same as in Florida, in Minnesota the same as in Texas."[4] Boards nonetheless subject out-of-state physicians to costly and cumbersome licensure requirements before they are permitted to treat in-state patients, even for follow-up telehealth.

Other nations are more reasonable, and so a Massachusetts physician would encounter fewer restrictions providing telemedicine to a patient in England than to a resident of New Jersey or California. Moreover, state medical boards have become more restrictive of cross-state medical communication over time. Such restrictions hardly occurred to the pioneers of American medicine. Among the *Letters of Benjamin Rush, Volume I: 1761-1792* is a note written from Dr Rush's home in Philadelphia to Walter Stone of Maryland offering prescriptions on how to "keep your bowels open" and to address stomach ailments "mixed with and aggravated by worms."[5] In contrast, physicians are now routinely subject to legal opinions and warnings that discourage such interstate communication.

The lawsuits have been filed precisely because state boards have been defiant, and the plaintiffs believe they can avail upon the common sense of federal judges. The physicians bringing the suits, Drs Shannon MacDonald and Sean McBride, represent a vanguard of young clinicians who are eager to utilize new technologies to extend access to patients. They also reflect those who exhibit a healthy impatience with current medical board leadership, and their legal actions illustrate that majoritarian bodies like medical boards cannot ignore iconoclasts in the profession.

The lawsuits rest on 2 principal arguments. First, telemedical consultations and follow-ups are constitutionally protected speech because televisits are, at their core, conveyances of information. As such, the plaintiffs contend that restrictions on interstate telehealth communication disfavor certain content and certain speakers, thereby violating the First Amendment.

Second, the lawsuits claim that the additional licensure requirements unduly burden constitutional guarantees to interstate commerce. For nearly 2 centuries, the Supreme Court has interpreted the Constitution to prohibit states from erecting protectionist measures and impeding the development of a national market for goods and services. The plaintiffs argue that the New Jersey and California licensure requirements discriminate against physicians in neighboring states in favor of local physicians, thus preventing patients from benefiting from a national market of providers. Requiring physicians already licensed in 1 state to obtain a second license amounts to a tariff and barrier on cross-state medical consultations.

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On their face, the lawsuits address a narrow restraint and aim only to challenge the hardest-to-justify interstate telehealth restrictions. However, that masks the real threat these lawsuits pose to the authority of state medical boards. A victory for the plaintiffs would mean that medical board decisions would hereafter be subject to new, exacting legal scrutiny administered by judges and lawyers with remedies that could sweep more broadly than the targeted legislative fixes. Medical boards might have to justify a large swath of their rulings against a skeptical judiciary that has increasingly used the First Amendment to strike down economic regulation.

A similar series of lessons occurred in 2015, when the North Carolina Board of Dental Examiners discarded better judgment and channeled its regulatory authority to restrict inexpensive teeth whitening providers. The action caught the attention of the Federal Trade Commission, and the Board's actions were ultimately found to violate the Sherman Act.[6] Since then, medical and dental boards have been increasingly subject to inquiries by courts and agencies enforcing the Antitrust Laws.

Some might argue that the US health sector would benefit from subjecting state medical boards to scrutiny from legal experts looking to rein in unconstitutional and anticompetitive excess. However, a medical profession already under attack from skeptics of their expertise and from corporate entities seeking to limit their autonomy can ill afford to succumb to new sources of outside control.[7]

A wiser approach for state medical boards would be to accede to common sense. Instead of requiring every out-of-state physician who communicates with in-state residents to acquire an in-state license, medical boards should pursue reforms that streamline access to care. One pathway is to allow all licensed physicians, regardless of their home state, to provide certain categories of telehealth, such as follow-up care or specialized consultations.[8] Alternatively, states could set up simple registration systems, like Florida and Arizona, which allow out-of-state physicians to provide certain telehealth services after completing a rudimentary certification. Importantly, out-of-state physicians would still be subject to the scope-of-practice laws of the state in which the patient resides, just as out-of-state drivers are subject to state-specific speed limits.

Of course, Congress could intervene as well, either by laying out national rules for physician licensure or even by abolishing state licensure regimes altogether. Perhaps these lawsuits will attract the attention of other federal actors, many of whom have already expressed an appetite for licensure reform. The likely reality is that if state medical boards do not ensure that licensure rules conform with both patient needs and modern science, other political actors will intervene.

ARTICLE INFORMATION

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REFERENCES

1. Ellimoottil C. Takeaways from 2 key studies on interstate telehealth use among Medicare fee-for-service beneficiaries. *JAMA Health Forum*. 2022;3(9):e223020. doi:10.1001/jamahealthforum.2022.3020

2. *MacDonald et al v Sabando*, Case 3:23-cv-23044 (DNJ 2023).

3. *McBride v Hawkins*, Case 2:24-at-00619 (ED Cal 2024).

4. *Hall v Hilbun*, 466 So 2d 856 (Miss 1985).

5. Butterfield LH, ed. *Letters of Benjamin Rush*. Vol I. Princeton University Press; 1951:1761-1792.

6. *North Carolina Board of Dental Examiners v FTC*, 574 US 494 (2015).

7. Richman BD, Schulman KA. Restoring physician authority in an era of hospital dominance. *JAMA*. 2022;328(24):2400-2401. doi:10.1001/jama.2022.23610

8. Shachar C, Wilson K, Mehrotra A. Increasing telehealth access through licensure exceptions. *JAMA*. 2024;331(1):19-20. doi:10.1001/jama.2023.24960