Areas for Further Investigation Regarding the Interstate Medical Licensure Compact: Opposition to HB 2502 in Arizona

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This memo was drafted to reply to supporters of the bill, HB 2502, authorizing the State of Arizona to join the Interstate Medical Licensure Compact promoted and developed by the Federation of State Medical Boards (FSMB). The memo is applicable to any other state seeking membership in the Compact.

Concerns about Compact participation are insignificant, claim proponents of handing control of aspects of Arizona licensure, and indeed Arizona law, over to an Interstate Medical Licensure Commission via the Interstate Medical Licensure Compact.[1,2] We encourage everyone to read the Compact[3] in full, line by line, and judge for himself.

A reading of the Compact raises questions that deserve additional investigation and consideration in juxtaposition to statements made by supporters of the Compact.

Overriding Existing State Law

It is alleged that Compact participation poses no danger of overriding existing Arizona law. However, the Compact states that rules made by the Interstate Commission have "the force and effect of statutory law in a member state." The Compact also states: "All laws in a member state in conflict with the Compact are superseded to the extent of the conflict." Additionally, it states: "All lawful actions of the Interstate Commission, including all rules and bylaws promulgated by the commission, are binding upon the member states." No fewer than six times in the 24-page Compact, the Interstate Commission is "authorized to develop rules" that would apply to each participating state.[3]

It is not yet clear how the Compact and rules made by the Interstate Commission governing the Compact will affect existing state law, or what protections exist against the Commission inappropriately expanding the scope of its rule-making. The Compact does not provide a method for the state to reject rules made by the Commission without the consent of a sufficient number of other states' Commission appointees.

Other states' concerns in this regard resulted in non-participation. For example, the State Medical Board of Ohio is not pursuing Compact participation and notes concerns about "loss of self-determination, financial issues, legal issues, and the administrative burden associated with additional bureaucracy and lack of operational clarity."[4]

Similarly, the Delaware Board of Medical Licensure and Discipline declined seeking Compact participation, stating that "some states will likely need to forgo some state specific requirements to participate in the interstate compact" and "that there are many questionable items at this point."[5]

Additionally, the Association of State and Provincial Psychology Boards, in an FAQ about a proposed psychologist licensure compact, notes:

> To the extent that a compact is used as a governing tool, they require…that participating states cede some portion of their sovereignty. The matter of state sovereignty can be particularly problematic when interstate compacts create ongoing administrative bodies that possess substantial governing power. Such compacts are truly a creation of the twentieth century as an outgrowth of creating the modern administrative state.[6]

Julie D'Angelo Fellmeth, J.D., administrative director and supervising attorney of the University of San Diego's Center for Public Interest Law, opposes California's approval of the FSMB's compact. "The fact that its provisions will 'supersede' state law and that it superimposes, over all state medical boards, a huge interstate commission that has not yet been created is problematic," Ms. Fellmeth testified to the California Medical Board.[7] She further opined that, "some of the language of the compact is unclear, confusing, and internally inconsistent."[8]

"The compact says that the laws shall not overwrite existing state authority to regulate the practice of medicine," yet, "this seems to be contradicted by another compact provision that all laws in a member state in conflict with the compact are superseded to the extent of the conflict," noted Marian Hollingsworth on behalf of the Consumers Union Safe Patient Project.[8]

Testimony before the Michigan State Medical Society also expressed concerns about ceding control to the Interstate Commission, including on issues related to limiting portability, reciprocity, and expedited licensure.[9]

Due Process Rights of Physicians

Compact proponents say that participation will not affect the due process rights of Arizona physicians. However, the following provisions in the Compact raise concerns about the weakening of physicians' due process rights:

- Any disciplinary action taken by any member board against a physician licensed through the compact shall be deemed unprofessional conduct which may be subject to discipline by other member boards;
- 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 disciplinary action is taken against a physician by a member board not in the state of principal license, any other member board may consider the action conclusive as to matter of law and fact decided;

- 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 issued to the physician by any other member board shall be suspended, automatically and immediately...;
- Member boards shall share complaint or disciplinary information about a physician upon request of another member board;
- Member boards may report any nonpublic complaint, disciplinary, or investigatory information not required by Subsection (c) to the Interstate Commission;
- A subpoena issued by a member state shall be enforceable in other member states;
- 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.

The Missouri Medical Board raised concerns about the due process implications of the Compact for Missouri physicians.[10] It notes that provisions of the compact "require action on the part of the state without due process." These concerns need to be addressed by the Arizona Medical Board and the Arizona Medical Association.

Even more concerning, the Compact language appears vague regarding whether some of the above due-process changes apply only to physicians participating in the Compact, or whether they might apply to all physicians in a state that signs on. If these provisions are intended to apply only to physicians licensed via the Compact, why isn't the Compact more clearly worded in this regard?

Others who have raised due-process concerns related to the compact include Hark and Hark, Pennsylvania professional license defense attorneys, who write that the Compact exposes "medical practitioners to unilateral concurrent disciplinary process of member states without the ability to respond, investigate, or even defend oneself in a court of law. Member state's unilateral actions will automatically trickle back to the physician's primary licensure state, causing potentially automatic disciplinary action there."[11]

The Missouri Association of Osteopathic Physicians and Surgeons opposed the Compact due to "potential loss of due process" and "unknown impacts on the state, licensees and patients, and the fact that in its current form there is little benefit to the patients and physicians…."[12]

"Other areas that could raise questions are the joint investigations and discipline sections, states the Center for Connected Health Policy, noting that a physician may have no recourse in disciplinary actions as the finding in one state is "conclusive as to the matter of law and fact decided."[13]

Arizona Patients' Need for Out-of-State Physicians Who Are Hindered by the Existing Arizona Licensing Pathway

Proponents have not disclosed how this purported need has been identified. We do not know who these physicians are who wish to treat Arizona patients but have not been able to obtain a license, or whether they have communicated with Arizona legislators or the Arizona Medical Board. Arizona-based solutions should be explored before signing the state onto a compact governed by a process largely unaccountable to the citizens of the state of Arizona and its physicians and patients. Instead of adding a new bureaucracy, Arizona could examine its existing licensure structure and propose changes to accommodate the needs of out-of-state physicians.

The New Mexico Medical Board, for instance, determined that "[w]e do not need this [the Compact] as we already have an expedited licensure process."[14] The California Medical Association suggests that "[i]f there is a problem with California's existing licensing process, the CMA believes that perhaps that is an issue that the Board should take up for all licensees, rather than just a subset that chooses to participate in the compact."[8]

Proponents have apparently not explored the effects of the Compact on current Arizona physicians and patients. Will the Compact give additional competitive advantages to multi-state health systems over local independent physicians? Will this facilitate multi-state health systems pushing patients to see "in-network" out-of-state physicians via telemedicine in lieu of a face-to-face visit with an independent local physician? And what are the patient safety implications of shifting face-to-face physician encounters to telemedicine?

Of note is that organizations registering their support of the Compact with the Arizona Legislature are a "Who's Who" of the medical-industrial complex and the organizations they control.[15] They include: the Health System Alliance of Arizona (an alliance of the state's four largest health systems), the Arizona Hospital and Healthcare Association, the Arizona Medical Board, the Arizona Association of Health Plans, Dignity Health, Banner Health, Mayo Clinic Arizona, Honor Health, and the AZ Alliance for Community Health Centers. Even the president of FSMB, the organization devising the Compact, Humayun Chaudhry, D.O., admits in the *New England Journal of Medicine* that the Interstate Medical Licensure Compact "will benefit health systems that want to deploy their physician employees in multiple...sites around the country."[16]

Maintenance of Certification (MOC)

It is claimed that Maintenance of Certification (MOC) is not a requirement for Compact participation. However, the legislature and organizations representing Arizona physicians should take a close look at questions surrounding the implications of the board certification requirements in the Compact.

The Compact defines a physician as one who "holds specialty certification or a time-unlimited specialty certificate recognized by the American Board of Medical Specialties or the American Osteopathic Association's Bureau of Osteopathic Specialists."

Except for the declining number of physicians with a lifetime certificate, MOC is required to maintain specialty board certification and thus required to be licensed through the Compact. FSMB goes to great lengths to explain that "[t]he Compact makes absolutely no reference to Maintenance of Certification (MOC)." However its own definition of "physician" requires MOC for most physicians participating in the Compact.

The Interstate Commission, in a letter to the American Osteopathic Association, notes that "a physician must demonstrate ***current certification*** to be eligible for licensure via the Compact" [emphasis added].[17] Current certification requires MOC or OCC for most physicians.

A comparison of early versions of the Compact to the final version suggest that the FSMB intended MOC to be required in the final version (grandfathered physicians exempted).[18]

The definition of "physician" in the Compact draft circulated by FSMB in December 2013 was: "Currently holds, or has previously obtained specialty certification recognized by the American Board of Medical Specialties or the American Osteopathic Association's Bureau of Osteopathic Specialists." In May 2014, the draft Compact wording defined "physician" as one who "holds specialty certification recognized by the American Board of Medical Specialties or the American Osteopathic Association's Bureau of Osteopathic Specialists." The final Compact wording is that a "physician" is one who "holds specialty certification or a time-unlimited specialty certificate recognized by the American Board of Medical Specialties or the American Osteopathic Association's Bureau of Osteopathic Specialists."

It is noteworthy that a physician seeking Compact participation must meet nine criteria outlined in the agreement's definition of "physician." In contrast, the definition of "psychologist" in the proposed psychologist licensure compact (Arizona House Bill 2503) is simply: "'Psychologist' means an individual who is licensed for the independent practice of psychology."

Conflicts of Interest

The legislature should demand full disclosure of financial conflicts of interest of the FSMB or other organizations involved in drafting or supporting the Compact.[19] It should consider whether the FSMB's role as a founding member of the American Board of Medical Specialties (ABMS) or its status as an "associate member" of the ABMS influenced the decision to include ABMS certification as a requirement for Compact participation.[20] It should also determine how much revenue the FSMB anticipates receiving from the required use in the Compact of FSMB products such as examinations and credentialing verification.

Conclusion

There are myriad issues that deserve further investigation before Arizona joins the Interstate Medical Licensure Compact. We hope the legislature and other organizations representing Arizona's physicians and patients will take the time to seek answers and clarification.

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