Disasters and the Licensure and Reimbursement of Displaced Physicians

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In the wake of Hurricanes Katrina and Rita, physicians, nurses and other health care providers have been displaced along with hundreds of thousands of other refugees. No one knows how long it will take before residents of the areas affected by the storm are permitted to return. In the case of New Orleans, among other areas, inhabitants will likely need to wait for months, rather than for mere weeks, before they can go back home – and when they return, they may find both their physical practices and many of their patients to be gone.¹

Undoubtedly, some will choose to resettle in other locations. However, many, if not most, intend to return to their former homes. For those licensed in other jurisdictions who have taken refuge in Texas, what, if any, options are available to them to practice their professions here while they wait for evacuation orders to be lifted in their home states?*

Most, if not all, conventional health care practitioners need a license to practice their professions in Texas.² Licensure is traditionally addressed by each state; the federal government does not presently license physicians or other health care providers.³ Obtaining state licensure is normally a lengthy process, usually involving completion of multiple forms, taking and grading examinations, and verifying information, among other activities.

Both the Texas Disaster Act and the Emergency Management Assistance Compact (EMAC), as codified in the Texas Health and Safety Code, permit individuals with foreign licenses to render aid involving the individuals’ skills in the event of a declared disaster.⁴ Included within the scope of these provisions are all health care professionals

¹ Analogously, see, e.g., Peter Applebom & Johnathan D. Glater, Storm and Crisis: The Lawyers; Storm Leaves Legal System a Shambles, N.Y. TIMES, Sept. 9, 2005, at A1 (discussing the impact of Hurricane Katrina on law practices and the court system).
² At the time of this Article’s posting, Louisiana and Texas are both struggling to deal with the immediate aftermath of Hurricane Rita. This Article thus deals largely with actions taken in early to mid-September in the wake of Hurricane Katrina. Presumably such actions will be extended to those affected by Hurricane Rita.
³ See, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (“We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.”); Florida Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (same).
as designated under Texas law, unless otherwise limited by the Texas governor.\textsuperscript{5} The Disaster Act further provides that “[t]he governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.”\textsuperscript{6}

Such rules, however, are generally intended to allow for the provision of services in a disaster taking place within the state in question. While its indirect effects have been significant, and ultimately led to the declaration of a disaster in the state, Katrina did not directly impact Texas.\textsuperscript{7} Additionally, some of the laws pertaining directly to the provision of emergency care on the part of physicians with licenses from other jurisdictions suggest that such physicians may not charge for their services – a proviso that would do little to assist health care professionals stranded, potentially for months, in Texas.\textsuperscript{8}

Recognizing this deficiency, the Texas Medical Board is permitting physicians licensed in Louisiana to apply for Visiting Physicians Temporary Licenses (VPTLs), which are valid for 45 days from date of issuance.\textsuperscript{9} VPTLs may also be issued to physicians volunteering medical assistance for hurricane evacuees in Texas.\textsuperscript{10} In order to obtain a VPTL, an applicant must be licensed or have applied to be licensed to practice medicine in some state.\textsuperscript{11} Additionally, the applicant must have a “sponsoring physician” who is licensed to practice medicine in Texas.\textsuperscript{12} Unlike certain other instances in which a physician supervises work, the Board does not consider the sponsoring physician to be

\textsuperscript{5} Health care professionals covered by the Act would include physicians, registered nurses, licensed vocational nurses, midwives, physician assistants, chiropractors, podiatrists, surgical assistants, acupuncturists, dentists, dental hygienists, optometrists, opticians, speech-language pathologists, audiologists, physical therapists, occupational therapists, massage therapists, psychologists, licensed professional counselors, social workers, marriage and family counselors, pharmacists, medical radiological technologists, respiratory therapists, orthotists and prosthetists, and embalmers. See generally \textsc{Tex. Occ. Code}, Title 3 (Health Professions).

\textsuperscript{6} \textsc{Tex. Gov't Code} § 418.016 (West 2002).


\textsuperscript{8} For example, the Texas Occupations Code exempts, in relevant part, the following individuals from physician licensure requirements:

1) A person who furnishes medical assistance in an emergency or disaster if no charge is made for the medical assistance; and

2) A legally qualified physician of another state who is in this state for consultation with a physician licensed in this state but who does not (a) maintain an office in this state; or (b) appoint a place in this state for seeing, examining, or treating a patient.

\textsuperscript{9} The rule also applies to physicians licensed in Mississippi or Alabama; however, as the majority of displaced physicians in Texas have come from Louisiana, only Louisiana was mentioned on the website. Telephone conference with Janet Howe, Texas Medical Board, on Sept. 12, 2005.


\textsuperscript{12} Id.

\textsuperscript{13} Id.
delegating duties to the visiting physician and hence does not intend the sponsoring physician to be liable for the visiting physician’s acts.\textsuperscript{14} By mid-September, 154 applications for a VPTL had been processed, 88 for physicians from Louisiana, and the rest from elsewhere, with the majority (22) from California.\textsuperscript{15} 

The temporary licensure provision leaves an interesting potential regulatory vacuum. Under the provisions, it is conceivable that physicians who are not yet licensed in any state to practice medicine, or who even are not physicians at all, could be given temporary licenses to practice in Texas. Because of the weak but extant supervision requirement, it is unlikely that anyone would take advantage of the present chaos to claim fictitiously, for example, that they graduated from Tulane Medical School and completed their residency there, when in fact they do not possess such credentials. However, it is not beyond the realm of possibility.

As mentioned above, the Texas Medical Board expressly is not placing the same supervisory requirements on sponsoring physicians with regard to VPTL holders as it does on Texas physicians who supervise physicians’ assistants (PAs), for example. PAs must be supervised by a physician in order to perform medical acts,\textsuperscript{16} and the supervising physician must be licensed in Texas.\textsuperscript{17} The supervising physician must “continuous[ly]” supervise a physician assistant; however, the physician need not be physically present at all times, but must at least be available by telephone or other form of telecommunication.\textsuperscript{18} The law considers physicians who supervise PAs to have delegated tasks to the PAs; hence, a physician may be liable for the acts or omissions of her PA.\textsuperscript{19} Physicians who undertake to sponsor a Louisiana or other out-of-state physician applying for a temporary license under the provision announced in the wake of Hurricane Katrina, on the other hand, arguably have no such liability as they are not considered to have delegated any tasks to the foreign physician.\textsuperscript{20}

\textsuperscript{14}\textit{Id.}  
\textsuperscript{15}Personal correspondence from Amanda Bloodgood, Assistant to the Director of Customer Affairs, Texas Medical Board, dated Sept. 14, 2005.  
\textsuperscript{16}See TEX. OCC. CODE § 204.204 (West 2003).  
\textsuperscript{17}22 TEX. ADMIN. CODE § 185.15(a)(1) (West 2003).  
\textsuperscript{18}22 TEX. ADMIN. CODE § 185.14(a) (West 2003).  
\textsuperscript{19}See TEX. OCC. CODE § 204.207(a) (West 2005) (noting that “Each supervising physician retains legal responsibility for a physician assistant’s patient care activities, including the provision of care and treatment to a patient in a health care facility”); but see TEX. OCC. CODE § 157.060 (West 2005) (stating that, “[u]nless the physician has reason to believe the physician assistant or advanced practice nurse lacked the competency to perform the act, a physician is not liable for an act of a physician assistant or advanced practice nurse solely because the physician signed a standing medical order, a standing delegation order, or another order or protocol authorizing the physician assistant or advanced practice nurse to administer, provide, carry out, or sign a prescription drug order”).  
\textsuperscript{20}Since last checked in mid-September, the Texas Medical Association altered the conditions of sponsorship to provide that the sponsoring physician is responsible for any prescription written by the visiting physician. See TMA, Emergency Licenses and Permits, supra note 11 Thus, liability may accrue with respect to issues related to prescriptions.
Liability, therefore, must be borne primarily by the visiting physician.\textsuperscript{21} Physicians licensed in Louisiana will not likely be covered by their regular Louisiana carrier for any alleged malpractice in Texas.\textsuperscript{22} Louisiana Medical Mutual Insurance Company (LAMMICO), a major carrier in Louisiana, directs physicians displaced by Katrina to contact it directly for assistance with out-of-state coverage.\textsuperscript{23} Texas Medical Liability Trust (TMLT), a major Texas carrier, is offering occurrence policies to physicians with temporary licenses who have been displaced in the hurricane.\textsuperscript{24} While the policies are written for a full year, TMLT will refund the balance for any policy not continued for a full year by a physician returning to his/her home following Katrina.\textsuperscript{25} There is no law, however, requiring a physician practicing in Texas to have malpractice coverage, so if a physician chose to go bare, he or she could do so.

Reimbursement for medical services provided to individuals with private health coverage is subject to the terms imposed by the insurer and thus will likely differ in each case regarding coverage for services provided in the wake of the hurricane by out-of-network or other providers. With respect to reimbursement for enrollees in public health plans, Michael O. Leavitt, the Secretary of the Department of Health and Human Services, issued a Section 1135 Waiver providing in relevant part that health care providers may be reimbursed for providing care to Medicare, Medicaid and SCHIP patients, even if they are unable to meet “certain conditions of participation, certification requirements, program participation or similar requirement, or pre-approval requirements” due to the exigencies posed by Hurricane Katrina, and absent fraud or abuse.\textsuperscript{26} Additionally, physicians who are not licensed in the state(s) in which they provide hurricane-related services will be eligible for reimbursement, as long as they hold a valid license to practice medicine in another state.\textsuperscript{27} Secretary Leavitt issued a similar Section 1135 Waiver on September 23, 2005, following Hurricane Rita.\textsuperscript{28}

The foregoing outlines some of the reactions to the disasters in the Gulf on the part of those responsible for licensing physicians, providing medical malpractice coverage, and paying for services provided to those with public health insurance. They are commonsensical and compassionate responses, particularly with respect to affected physicians and evacuees needing expeditious medical care. But one must nevertheless wonder what protections the foregoing gives to patients who may be treated by those taking advantage of the temporary licensing provisions or who are otherwise providing aid in the wake of the hurricane. One could respond that these provisions were

\textsuperscript{21} While Texas does provide immunity with respect to negligent acts committed in providing free care in the event of an emergency, it does not provide similar immunity with respect to paid care. See Tex. Civ. Prac. & Rem. Code §74.151 (West 2004).
\textsuperscript{22} Telephone conference with Kathryn Heymann, Texas Medical Liability Trust, on Sept. 13, 2005.
\textsuperscript{24} Telephone conference with Kathryn Heymann, supra note 22.
\textsuperscript{25} Id.
\textsuperscript{27} Id.
implemented largely to ensure that health care could in fact be delivered to those who need it most – refugees from the hurricane – and that most or all physicians utilizing the temporary licensure and other provisions are upstanding and honorable providers.

Such a response is entirely reasonable, and likely correct. But it also arguably calls into question the tightness of the grip that the 50 states have held on control over physician licensure and other matters in the event of a declared disaster. In the event of a disaster, it would seem apparent that a governor would promptly and officially declare the disaster and take any further steps necessary to meet his or her duties to provide for the state’s residents in the event of a catastrophe, activate various provisions such as those affecting licensure under EMAC, facilitate requests for assistance and funding, and other matters. Governor Rick Perry, for example, issued a disaster declaration for Texas on September 1, 2005, in the wake of Hurricane Katrina. He issued another such declaration on September 20, 2005, in anticipation of Hurricane Rita.

As noted above, EMAC provides that individuals licensed to practice a necessary skill in another state shall be deemed to be licensed to perform that skill in the receiving state. A further requirement under EMAC, however, is that the receiving state must request such assistance. Both of Governor Perry’s disaster proclamations directed that “that all necessary measures, both public and private as authorized under Section 418.015 of the code, be implemented to meet [the] disaster,” and that “all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the incident.” As such, the governor’s proclamations, in conjunction with Texas’ codification of EMAC, automatically permitted health care providers licensed in other states to provide care for hurricane evacuees if necessary.

Louisiana also has also adopted EMAC. Additionally, however, it appears to have adopted another compact, the Interstate Civil Defense and Disaster Compact (ICDDC). Texas, among a minority of the 50 states, is not a signatory to this compact. As adopted in Louisiana, the compact provides in relevant part that

[w]henever any person holds a license, certificate, or other permit issued by any state evidencing the meeting of qualifications for professional, mechanical, or other skills, such person may render aid involving such skill in any party state to meet an emergency or disaster and such state shall give due recognition to such

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29 See TEX. GOV’T CODE § 418.014 (West 2004).
32 See, e.g., TEX. GOV’T CODE § 418.171.
34 See TEX. GOV’T CODE § 418.171. As noted earlier, waivers for physicians merely seeking to practice in Texas until they can return to their homes, on the other hand, are not automatic under a Texas disaster declaration.
license, certificate, or other permit as if issued in the state in which aid is rendered.  

This would permit individuals licensed to perform a skill in a state that is party to the ICDDC to act in another party state in which a disaster had occurred. However, Louisiana, in its codification of the compact, altered and added a number of terms, as well as changed the name of the compact itself to the “Interstate Emergency Preparedness and Disaster Compact.” No other state appears to be a signatory to an “Interstate Emergency Preparedness and Disaster Compact.”

This apparently led to some confusion regarding the ability of individuals such as physicians licensed in other states to render aid in Louisiana in response to Hurricane Katrina. Governor Blanco’s disaster declaration of August 26, 2005, did not include any request for assistance by licensees from other states with particular skills. It also did not provide for all necessary measures, whether public or private, to be taken to respond to the disaster or for relief from rules and regulations that might inhibit response to the disaster. Thus, under EMAC, at least, licensure requirements for volunteers licensed in other states were not automatically suspended. The confusion was not resolved until Governor Blanco expressly suspended licensure requirements for health care workers on September 2, 2005.

One must query why issues involving licensure, liability and other matters with respect to physicians, among other health care providers, are so convoluted and differ so much from state to state in the event of a disaster, even with the existence of EMAC. All states should consider jointly revising their codifications of EMAC to ensure that volunteer health care providers licensed in other jurisdictions are automatically deemed to be locally licensed in the event of a disaster declared within their borders by the governor. Additionally, states should consider enacting reciprocity agreements with neighboring states regarding licensure of health care providers, among others, who are displaced for long periods by a disaster. Katrina and Rita are surely not the last disasters this nation will ever suffer. We should act promptly to be better prepared for the next time.

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35 LA. REV. STAT. § 29:733, Art. 4 (West 2005)
36 Interestingly, the terms of the ICDDC do not appear expressly to provide how the existence of a disaster is to be recognized.
37 See id.
39 See id.