



MEDICAL PROFESSIONAL LIABILITY ASSOCIATION

April 1, 2019

The Hon. Mike Thompson, Co-chair
Congressional Telehealth Caucus
406 Cannon House Office Building
Washington, DC 20515

The Hon. Peter Welch, Co-chair
Congressional Telehealth Caucus
2187 Rayburn House Office Building
Washington, DC 20515

The Hon. David Schweikert, Co-chair
Congressional Telehealth Caucus
1526 Longworth House Office Building
Washington, DC 20515

The Hon. Bill Johnson, Co-chair
Congressional Telehealth Caucus
2336 Rayburn House Office Building
Washington, DC 20515

Via e-mail: Telehealth.RFI@mail.house.gov

Dear Congressmen Thompson, Welch, Schweikert and Johnson:

On behalf of the Medical Professional Liability (MPL) Association and the medical professional liability insurance community, I would like to thank the Congressional Telehealth Caucus for providing the opportunity to share our perspective on expanding the use of telemedicine services in the United States.

As you may be aware, the MPL Association is the insurance industry trade association that represents a full range of organizations providing MPL insurance coverage for the nation's physicians, nurses, hospitals, clinics and the wide array of medical clinicians and facilities. MPL Association members include insurance companies, risk retention groups, captives, trusts, and other entities owned and/or operated by their policy holders, as well as other insurance carriers with a substantial commitment to the MPL line. MPL Association members insure more than two-thirds of America's physicians in private practice, as well as dentists, nurses and nurse practitioners, and other healthcare providers, and they insure more than 2,000 hospitals nationwide.

We strongly support your efforts to expand the use of telehealth services as part of an effort to increase access to healthcare. As liability insurers, we also recognize that expanding access comes with the potential for expanded risk and confusion as to what that risk means for both healthcare professionals and their patients. State laws are adequate to address these issues when both the provider and patient are in the same state, but when the provision of care crosses state lines the situation becomes murkier. Failure to address such situations could inhibit the expansion of telemedicine services if patients and providers cannot be assured that liability issues may be clearly addressed when they arise.

In this regard, the MPL Association asks the Congressional Telehealth Caucus to consider the following issues when developing any telehealth legislation:

Determine who bears the liability burden if technology failures prevent the healthcare professional from making an accurate diagnosis or providing appropriate treatment for a patient in another state.

Telehealth services can encompass a vast array of communication technologies, including, but not limited to, audio, video and text communications. In addition, these services can utilize numerous platforms, including computers, tablets, cell phones, etc. With these ever-changing technologies comes not just great hope for improved communications, but also concerns about technology failures.

We believe liability arising from the provision of interstate healthcare services must be clarified in future legislation. While the exact language to be used requires additional consideration, we hope you will consider the following principles:

- Healthcare professionals should only bear the responsibility for ensuring the proper functioning of telehealth equipment that is under their control;
- Healthcare professionals should not be held responsible for failures of telehealth equipment resulting from errors in the design or manufacture of such equipment;
- Patients should assume responsibility for ensuring that communications they provide to a healthcare provider during a telehealth exchange are accurate, i.e. written messages are factually correct, and that the audio and video equipment used on the patient's behalf are sufficient to address the healthcare issue at hand.

By addressing these issues, we believe it will provide proper incentives for all stakeholders in the provision of telehealth services to take responsibility for ensuring the best possible outcome from the utilization of those services.

Develop federal medical liability laws that apply when a patient is treated by a healthcare professional in another state via telehealth services.

Accessing healthcare services across state lines brings into play different state liability laws. The use of telehealth services only expands that situation by potentially involving numerous jurisdictions. What happens, for instance, when a physician who practices in the District of Columbia and regularly treats a patient from Virginia, is contacted by the patient while the patient is on vacation in Florida and the physician is providing telehealth services from her home office in Maryland? While the circumstances may sound farfetched, they are not implausible and will only become more plausible as telehealth technologies advance.

Another factor to consider is how physician risk aversion may limit the expansion of telemedicine in some jurisdictions. While many have argued that the patient's locale should determine the rules, regulations and laws that regulate the patient-provider interaction, the liability ramifications of this argument could hinder greater use of telemedicine services. Will physicians in California, with some of the strongest liability protections in the nation, be willing to treat patients in rural Illinois or New Hampshire – states with little or no liability protections? The answer to that question could have a dramatic effect on the extent to which access to telehealth services can be expanded.

We believe that creating a federal liability standard for circumstances where the provision of telehealth services clearly involves interstate commerce would bring clarity to the physician-patient relationship for both individuals and would thus benefit both sides. This would allow both physician and patient to know, up front, exactly what liability laws applied to their interaction, and what their rights and responsibilities under the law were. In addition, by limiting such liability standards to circumstances

involving interstate commerce, Congress would maintain state sovereignty over tort issues within each state's borders, a view that has gained bipartisan support in recent years.

It is important note that while we encourage the creation of federal liability standards for interstate telehealth services, the proper role of the state in administering the practice of medicine should be preserved. The state role in licensing and disciplining providers of healthcare services has worked throughout our nation's history, and it would be unwise to alter it now, no matter how tempting that may be.

We appreciate this opportunity to provide information on the unaddressed issue of liability for telehealth services. We would be pleased to provide any additional information that you may find helpful or to respond to any questions you may have. You may contact our Vice President of Government Relations & Public Policy, Mike Stinson, at mstinson@MPLassociation.org or 301.947.9000. We look forward to working with you to expand the use of telehealth services and increase access to healthcare.

Thank you.

Sincerely,

A handwritten signature in blue ink that reads "B. K. Atchinson". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Brian K. Atchinson
President & CEO

Cc: The Hon. Brian Schatz
The Hon. Roger F. Wicker
The Hon. John Thune
The Hon. Benjamin L. Cardin
The Hon. Mark R. Warner
The Hon. Cindy Hyde-Smith