



Submitted Statement of the

Medical Professional Liability Association

U.S. Senate

Committee on Health, Education, Labor and Pensions

June 17, 2020

“Telehealth: Lessons from the COVID-19 Pandemic”

The Medical Professional Liability (MPL) Association commends Chairman Alexander, Ranking Member Murray, and the distinguished members of the Committee on Health, Education, Labor and Pensions for holding this hearing on the future use of telemedicine. In recent months, the COVID-19 outbreak has resulted in the expanded use of telehealth services and it is becoming increasingly clear that the trend toward increased telehealth services is here to stay. With this new reality in mind, it is important that we contemplate the ramifications of expanded telehealth use beyond just increased access to care.

Interest of the Medical Professional Liability Association

The Medical Professional Liability Association is the insurance industry trade association that represents a full range of entities doing business in the medical professional liability (MPL) arena. These include domestic and international MPL insurance companies, risk retention groups, captives, trusts, and other entities. MPL Association members are enterprises owned and/or operated by physicians, hospitals, health systems, dentists and oral maxillofacial surgeons, podiatrists, chiropractors, and healthcare providers such as nurse practitioners, nurse midwives, CRNAs, and many others, as well as insurance carriers with a substantial commitment to the MPL line. Together, our members insure nearly 2 million healthcare professionals around the world including more than two-thirds of America’s private practicing physicians. MPL Association members also insure 2,500 hospitals and 9,000 medical facilities globally.

Our interest is to ensure that expanding telehealth use does not sacrifice the quality of care patients expect to receive nor place healthcare professionals at increased risk for non-meritorious medical liability claims. In addition, the rules associated with telehealth liability must be clearly defined for all participants in the healthcare system.

The Issue

Our nation’s healthcare system has experienced tremendous growth in telemedicine services during the COVID-19 outbreak as previous restrictions on its use were lifted in order to meet the demand for healthcare services brought on by the virus. This growth will not end as concerns about COVID-19 decline. Patients have grown to appreciate the ease and convenience of being able to interact with healthcare professionals without having to travel to a healthcare facility, wait significant periods of time for an appointment to start, or risk exposing themselves to those with other health issues. As such, they will demand that access to telehealth services be maintained, if not expanded, going forward.

Efforts to expand telehealth services have the potential to give patients across the country greater access to care while simultaneously reducing the burden and cost associated with receiving that care. This may result, however, in a new set of liability issues for healthcare professionals as the interstate provision of healthcare becomes more prevalent. Failure to address these issues now could have dire consequences for both patients and health professionals, and could severely diminish the effectiveness of efforts to expand telemedicine use.

From the financial perspective, the MPL Association's Data Sharing Project (DSP), the largest ongoing independent collaborative database of medical professional liability claims and lawsuits, reveals that while only a small number of telemedicine-related claims have been reported to date, a higher percentage of those claims result in payments compared to all other paid-to-closed claims. While the average indemnity payment was slightly lower for telemedicine claims than the average claim, the costs associated with defending a claim were more than 20% higher than for the average claim reported to the DSP. Clearly the expansion of telemedicine has the potential to open new avenues for liability claims, and thus force higher costs on both the liability and healthcare systems.

In light of recent regulatory changes which have allowed the temporary expansion of telemedicine in the United States, and ongoing efforts to make some of those changes permanent, we strongly recommend that Congress take the following actions to address telemedicine liability concerns:

- Determine who bears the liability burden if technology failures prevent the healthcare professional from making an accurate diagnosis or providing appropriate treatment.
- Establish federal liability laws that apply if a patient is treated by a healthcare professional in another state through telemedicine.

Communication Technology Failures

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 Congress 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 professional 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).

We believe that addressing these issues will provide proper incentive for all telehealth stakeholders to take responsibility for ensuring the best possible outcome from the utilization of those services.

Federal Liability Laws for Interstate Telehealth

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, in advance, exactly what liability laws applied to their interaction, and what their rights and responsibilities under the law are. 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.

It is important note that while we encourage the creation of federal liability standards for interstate telehealth services, the proper role of states in administering the practice of medicine should be preserved. The states' 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.

Conclusion

State laws are adequate when both the provider and patient are in the same state, but the situation becomes murkier when interstate treatment is provided. As Congress considers additional steps to expand the use of telemedicine, it is imperative that the issues above are fully considered. Without addressing the liability issues surrounding interstate telemedicine services, the threat of liability could serve to inhibit healthcare professionals from providing such services, thus limiting access to care at a time when the expansion of access is what is truly needed.

Federal telemedicine liability rules regarding interstate telemedicine services would benefit all stakeholders in the healthcare system by ensuring, in advance, that all participants are fully aware of the liability situation involved when the provision of care crosses state lines. This will

put the patient and healthcare professionals on equal footing, thereby establishing a balanced relationship from the initial provision of services. It also provides stability to the developers of telehealth technologies by making them aware of the standards which will be utilized when complex technologies are used in what can be additionally complex healthcare questions. By proactively taking steps to establish medical liability rules when interstate telemedicine services are provided, Congress can bring greater clarity to the realm of telemedicine, expand access to care, and help ensure a more stable medical professional liability market for healthcare professionals.

We thank the members of the Committee for their leadership roles in advancing the use of telemedicine and stand ready to provide any additional information which may be beneficial regarding associated liability issues.