



Minnesota Hospital Association

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Mr. Chris Schmitter
Chief of Staff
Office of Governor Tim Walz and Lt. Governor Peggy Flannagan
130 State Capitol
75 Rev Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

RE: Executive Order: Liability Protections for Providers Acting to Protect the Public Health During COVID-19 Peacetime Emergency

Dear Chris,

I write to follow up on our May 27 meeting with the CEOs and General Counsels of three Minnesota health systems. At that time, we discussed the critical need to protect Minnesota's health care providers from liability during the Governor's declared Peacetime Emergency in response to this public health crisis. In anticipation of another meeting that you have indicated you will be scheduling, the Minnesota Hospital Association proposes the following language for an **Executive Order: Liability Protections for Providers Acting to Protect the Public Health During COVID-19 Peacetime Emergency**:

All health care providers, as defined by Minn. Stat. § 145.682 and all emergency medical services personnel, as defined by Minn. Stat. § 144E.001, et seq., shall be immune from administrative sanctions and any civil action described in Minn. Stat. § 145.682 for any injury, death or any other damages alleged to have been sustained as a result of an act or omission in the course of performing their duties, including but not limited to providing, allocating, withdrawing, or delaying health care services, arising out of the response to the COVID-19 outbreak and during the period of the Peacetime Emergency, unless it is established that such injury, death, or other damage was caused by willful or wanton actions of the health care provider or emergency medical services personnel.

This proposal only protects providers from professional liability civil lawsuits or licensing sanctions for their good faith actions to further the health of Minnesotans during the COVID-19 Peacetime Emergency. This proposal does not protect providers for "willful or wanton actions" that harm patients. This exception mirrors and aligns with the Crisis Standards of Care language found in Minn. Stat. §12.61, Subd. 2(b).

An executive order enacting liability protection for providers is an appropriate, needed response for the following reasons:

(1) Enacts fundamental fairness for health care providers and emergency responders. Your request for data on the number of providers who have or may refuse to provide care in the absence of an Executive Order limiting liability does not reflect our purpose in seeking the Executive Order. Instead, we submit the Governor should take this action to acknowledge and protect the overwhelming majority of providers who are rendering care in the unprecedented circumstances of the Peacetime Emergency. Thousands of providers across the state have made judgment calls in an uncertain pandemic environment for months. Their collective and individual responses to patient and public needs during this pandemic are nothing short of heroic. They have provided care in disciplines and settings, including virtual, that are outside their normal practice to meet urgent and sub-specialty staffing needs, with different and fewer resources than normal. Furthermore, in compliance with the Governor's orders, providers have delayed important treatments, procedures, diagnostic and preventive services, for both COVID-19 positive and non-COVID patients alike, that under normal circumstances would have been provided to these patients weeks or months earlier. Consequently, providers are unfairly exposed to claims that they did not meet the standard of care for those patients. These practice and care model changes and redeployments are not mere logistics, but instead present rapidly evolving and undefined standards of care across disciplines and provider types, all precipitated by a need to serve the community needs and assure its health. I have attached as an appendix an updated summary of the responses MHA received in response to our initial survey.

(2) Recognizes a necessary shift of focus from individual needs to community benefit and health. Providers have adjusted the scales to weigh in favor of assuring adequate resources are available to the most lives across the entire Minnesota community, rather than focusing on how best to meet individual patient needs, introducing disruption, novelty and risk into their professional practice to do so, and all at risk to their own health and well-being. These heroes have stepped up selflessly in unprecedented and uncertain circumstances and deserve to be protected.

(3) Acknowledges the uncertainty and risk associated with rapid and novel changes to clinical practice and standards, with limited and evolving data. In pre-COVID times, patients and providers generally knew what to expect and were able to provide care based on nationally accepted and reliable scientific evidence and practices, *i.e.*, the standard of care. During the COVID-19 pandemic, however, providers are asked and even required to set aside normal standards and practices, and are treating patients in novel circumstances, without established guidance or care protocols and with data and scientific understanding that evolves daily and remains ambiguous in the face of life and death decisions in a context of resource scarcity. In treating COVID-19 there is no established "standard of care" by which providers can align their practice, and thus exposure to claims months and years later when it will be nearly impossible to determine the information available and understood on the day a treatment decision was made, is at its essence, unfair.

(4) Reduces moral distress, moral injury and defensive practices that impair providers emotionally and clinically in times of uncertainty and fear. Providers face enormous stress in these challenging circumstances. Providers are asked to serve in triage roles where they may be required to withhold or withdraw scarce resources in order to provide the greatest good to the community. They are treating critically ill patients without the presence of family members and substitute decision makers. They are communicating with distressed families who cannot be at their loved one's bedside. They are constantly worried about bringing the infection home to their own families. Yet, heroically, they return to work each day reaffirming their servant duties with a deep and unwavering commitment to their oaths and their communities, even in the face of enormous risk and uncertainty. Concerns have been raised that an Executive Order protecting providers and emergency responders would deprive individual patients and families of their right to a day in court. This proposed action limits a remedy that would otherwise be available to an individual in normal times. But these are not normal times. As the Governor's declaration

of the Peacetime Emergency and numerous other executive orders shows – providers are functioning in an unprecedented situation. In the setting of a pandemic with a new virus, the threat of a professional liability claim in the face of good faith care can only be inappropriately punitive, not instructive nor a deterrent. Furthermore, balancing a patient’s right to redress with other competing public interests is a public health imperative and is accomplished in many ways. Some states set damages caps, some have expert review requirements, others have expert panels, and all have immunities for various circumstances.

(5) Prevents Minnesota providers from being targets of malpractice litigation. Without the protection of an Executive Order, Minnesota will be both a regional and a national outlier, thereby exposing our providers to the unique threat of malpractice lawsuits from attorneys all over the country who are precluded from bringing suit in their own jurisdictions because other states have acted to protect their health care workers from this unfair risk. For some nonprofit hospitals, such litigation might mean the difference between survival and collapse. Such a secondary consequence is preventable, and its avoidance ensures nonprofit health care remains a vital and accessible asset throughout Minnesota.

We all have great pride in the selflessness, professionalism, and community-spirit of our Minnesota health care workers as they carry us through this journey. Given everything they have sacrificed to fulfill their commitment to patients and the community, it is only fair and just to protect them in this endeavor.

Sincerely,

A handwritten signature in black ink that reads "R. Koranne." The signature is written in a cursive, slightly slanted style.

Rahul Koranne, M.D., MBA, FACP
President & CEO

Appendix: Selected comments from survey

Providers and staff working in areas outside normal scope of work

- Providers have voiced concerns about liability when working in an area of the health care system they do not typically work in. This concern about liability can lead to provider refusal to work in the areas of greatest need during a pandemic surge resulting in significant gaps in workforce needs. In addition, without adequate clinical staff to support the areas of the health care system most impacted by a surge of COVID-19, the staff who do work in those areas will not get adequate reprieve resulting in fatigue that increases risk for work related injuries and puts patients at risk for medical errors.

Large rural hospital

- Our family medicine providers are back in the hospital after years of primarily outpatient work. Our hospitalists are working in the ICU where previously we had a dedicated ICU team. Our primary care providers are covering acute respiratory clinics and more urgent care work than previously performed. Our team-based care models are expanding their supervision and collaborative work with nursing staff and APPs.

Central Minnesota health system

- Many of our physicians and other providers are very willing to work in a different environment with appropriate supervision and just in time training but have expressed significant concerns regarding liability risk. We don't think having or not having liability protection will affect our ability to care for our patients during the COVID-19 pandemic -- we are professionals and will do what we need to do to care for our patients and the community. However, the lawsuits, trials, and financial loses that happen, no matter who wins in court, will severely impact our ability to care for our patients and communities after the pandemic. All health systems are financially on life support and are stressed emotionally in preparing for the COVID-19 surge. The emotional and financial toll from lawsuits afterwards will likely be 'the straw that breaks the camel's back.'

Northern Minnesota health system

- Physicians and advanced practice providers who have not provided hospital services in many years, some never, are providing these services. Nursing staff who have not worked in areas for years are now using those skills again. Treatments for COVID-19 are rapidly changing and there is, thus far, no true standard of care; yet, we as providers are always held to the standard of care. This clearly puts providers and nursing staff at risk of whatever the court decides is standard for an event that may arise during this time.

Southern Minnesota health system

- If our staff were asked to respond to community needs for providers outside of our system, it is likely there would be reluctance to step outside of an individual's specialty/scope of practice to provide support absent liability protections.

Small urban hospital

- We have a plan to have a neonatologist work within a pyramid staffing structure for ICU ventilated COVID patients who is an affiliate provider and not an employee. Her liability coverage is carried through her private group, but she is willing to step up and help our system but would be taking care of adults. I don't know if her liability coverage applies to adults. She is just one example as we have others with similar situations.

Large metropolitan hospital

- Staff and providers responding in whatever capacity is required to care for the needs of COVID patients should not have to worry about their professional liability as they treat patients in need. Protection against such liability is imperative and would be much appreciated.

Small central Minnesota hospital

- Given the challenges in capacity associated with COVID-19 as well as the disproportionate allocation of COVID patients among health systems at baseline, anything that exposes providers to liability concerns associated with a once in a century pandemic will only serve to increase the disproportionate burden on these health systems.

Large metro health system

- Small organizations must work with each other to support those who come to us for care. With the COVID pandemic, needs could change quickly, and we will need help. It hurts to think that both our facility and the person assisting could be subject to lawsuits because we tried to do the best we could.

Small northern Minnesota hospital

- Systems, hospitals and providers have done, and continue to do, a tremendous job, in most cases to the detriment of their very survival as a business. To add on the cost, time and negative press of a lawsuit stemming from a reasonable action to support a patient's health, to carry out reasonable services as a deemed essential service, or due to the newness of the duties during an unprecedented pandemic would be extremely difficult if not impossible to overcome.

Small hospital in southeastern Minnesota

- **Being a small, rural CAH, we have surgical nurses helping out in the Care Center and Assisted Living. We have Lab Staff cleaning during down times due to the lower census in the hospital and clinic. We have physicians and nurse practitioners working outside performing respiratory assessments, as to not bring COVID-19 in the building if possible. Many more examples of clinical providers working in areas and conditions that are not historically normal. Assessing liability in this period of a novel pandemic would put even more undue financial and staffing strain on a system that is already trying to cope with so many unknowns and changes.**

Small southwestern hospital

- **Clinic RNs and LPNs and family practice APPs do not have extensive acute care experience, for example, order entry process for medications could increase medication errors, understanding of IV protocols, just in time training for some equipment, picc and central line management. Cross training has been provided in a limited manner, but experience for many is nil. Fear**

there will be hesitation of staff to participate if they are working in areas they do not normally work in and lack experience in.

Small central Minnesota hospital

- **Taking care of patients with novel staffing arrangements**

Large metro health system

New illness without established treatment protocols

- Since COVID-19 is a new illness without treatments supported by multiple prospective clinical trials, all treatments are essentially experimental. It is likely that as more is learned we will find that some treatments were more harmful than beneficial, others simply ineffective, and some proven to be the new standard of care. It is important that medical caregivers acting in good faith are protected from liability if treatments are later found to be harmful or ineffective and the new standard of care was not known at the time the care was given.

Small hospital in southeastern Minnesota

- Liability protections are necessary for all involved in providing service during the pandemic. There are too many unknown variables that can have far reaching ripple effects to the business, employees and the community that we are here to serve.

Small northern Minnesota hospital

- COVID order sets are changing weekly as more data is collected and more outcomes known. Physicians are worried about the number of emergency use authorizations and what protections they will have if downstream negative impacts are discovered. When you or your loved one are running out of options, how conservative do you want them to be?

Small northwestern Minnesota hospital

- Put yourself in the shoes of health care workers making difficult decisions in these times when the COVID-19 virus and its effects and treatments are extremely labile, evolving, unknown and pose risks to all of us in health care who need to be available without fear of potential liability from patients and their loved ones when the best will be done with what is available, which is a limited resource, regardless of how well we can try to plan in advance. People when suffering will not understand that and will look to find blame for that suffering especially when the effects of this virus can be devastating.

Small hospital in Northeastern Minnesota

- All our providers are rapidly changing their practice protocols and responding to changing guidelines with very early research-based protocols. The guidelines and protocols are changing very quickly, and this increases the risk of liability concerns.

Central Minnesota health system

- Greater liability protection is certainly needed for health care professionals due to the demanding, everchanging and unpredictable COVID-19 pandemic in Minnesota.
Small southern Minnesota hospital
- Due to lack of definitive, curative treatment available at this time patients or their families could think all that could be done was not.
Small northeastern Minnesota hospital
- The lack of comprehension of the risks to COVID and exposure despite discussion due to constantly changing course of this virus could be construed as our lack of communication or neglect to explain, especially if new information, which is constantly fluid occurs.
Small northeastern Minnesota hospital
- Due to the false negatives from COVID-19 testing, patients may state if they contract despite our testing prior to and screening of staff that they obtained from health care site.
Small northeastern Minnesota hospital
- Our exposure to this concern is more limited and focused than that of larger facilities. But the decision making around who gets treatment and who doesn't, if we should get to that point, would be morally difficult for everyone involved. It would be helpful if it wasn't also legally perilous.
Small northeastern Minnesota hospital
- Providers are working long and arduous hours. Make no mistake, this is a wartime activity with the enemy the COVID-19 virus. Mistakes will be made. We are adapting to a new normal of donning and doffing PPE in new ways. We as providers and nursing staff are still human. As long as processes are in place to help hardwire the changes, there should be no undue or excessive fiscal, criminal or civil punishment should a provider or nurse inadvertently acquire and then transmit the virus to another patient through a mistake in PPE procedure or use of a procedure later found to be ineffective.
Southern Minnesota health system
- **Given the novelty of COVID-19 there is no established standard of care. Every day, new information is surfacing about the impact of the disease and how it can best be treated. An intervention that is seen as appropriate one week, may be discredited the following week. In treating this previously unseen infectious disease, providers are risking their own health, working outside their normal scope of activity, often with limited supplies and equipment. These unprecedented circumstances create significant risk for providers whose decisions may be challenged years later - after this crisis has ended, with the benefit of hindsight, and without the ability to specifically understand the knowledge and supplies available on the day that a provider made a particular patient care decision.**
Large metro health system

- **We, as well as many other systems throughout the country, are creating protocols for this disease where there are no standards and no studies to document what best or even common practice might be. For example: we are developing protocols for reducing blood clots in the hospital and at home after discharge that have some risk but are not extensively studied yet.**
Large metro health system

Issues with providing care in different ways

- Due to the pandemic we have used virtual methods to provide care for patients that were unknowingly not physically in Minnesota at the time of their virtual visit – patients who live out of state and typically travel to Minnesota for care or patients who live in Minnesota but were visiting friends out of state at the time of their virtual visit. We may have unknowingly provided care in a state where a practitioner is not licensed, and our malpractice provider is saying this may not be covered if there were a suit filed.
Small southeastern Minnesota hospital
- Health care workers have extraordinarily stepped up to the plate and have been flexible in designing alternative workflows to help reduce the risk of infection to non-COVID patients and employees. Should we not do the same for them?
Small southern Minnesota hospital
- Providers and hospitals have changed their patient workflows, have committed or are using additional resources to care for patients, and have increased their personal and professional risk because of COVID. Minnesota should provide a reasonable risk reduction effort for their commitment to caring for Minnesotans.
Small southern Minnesota hospital
- **I am seeing patients in their vehicle as part of our respiratory clinic. This includes a limited exam of the lungs and heart. Because of being outdoors with the wind, vehicle noise and other normal outdoor noises, I am concerned of the possibility of missing an important clinical finding in this environment.**
Small southwestern Minnesota hospital

Shortages of staff, PPE and other resources

- All reasonable efforts were made to provide guidance on PPE usage across different levels of interaction with patients. Those efforts include following CDC, OSHA, MDH and other authorities. Instances exist where staff/providers do not agree that that was enough and disagreed with the guidance of the authorities. If an adverse action or event occurs during the pandemic with so many moving parts and changing guidance, an organization could have legal action taken against them though all reasonable efforts were made to protect staff and patients.
Small southeastern Minnesota hospital

- If we were in a situation of allocating scarce lifesaving resources, we would want liability protection, if we were following some prescribed protocols and ethical guidelines. In the absence of that protection, it makes it difficult for us to hang on to COVID-19 patients if resources were to tighten.

Small northeastern Minnesota hospital

- At this point I have concern for our chief medical officer's and community family physician's involvement in decisions regarding employee health if COVID impacts our community. Will we see lawsuits from employees regarding policies and procedures involving employee health and PPE?

Small southwestern Minnesota hospital

- Due to lack of potential resources and need to use resources based on prior ethical committee and triage of these scarce resources, patients or their families could think that choices/decisions based on the best medical knowledge we have at the time of treatment was not sufficient and unfair treatment choices were made.

Small northeastern Minnesota hospital

- Our biggest potential exposure would be needing to have multiple patients in some form of respiratory distress using ventilators or other respiratory support equipment. We do not have a dedicated respiratory therapist to assist in monitoring patients of this type and our medical staff does not routinely utilize ventilators on the patients we typically serve.

Small southwestern Minnesota hospital

- Facilities may be hesitant to accept COVID patients for subacute care due to liability. Use of anesthesia machine for patient requiring ventilation due to not having a ventilator. An anesthesia machine would be better than nothing. The environment is rapidly changing, and staff are growing weary of the changes and having a hard time adjusting to the new information.

Small southwestern Minnesota hospital

- **PPE was never meant to be reused which we are now doing for conservation. I am concerned about the liability of the organization and myself personally as CMO if one of our staff would become ill.**

Small southwestern Minnesota hospital

- We have had to make several adjustments to staffing patterns in order to meet and maintain the screening and infection prevention requirements that COVID has brought on the need for. This has added to what we already know to be true -- our bench isn't very deep. If even one employee tests positive for this virus -- we will be hit fast and hard which will result in adding work to an already stressed workforce and further limiting services until back can be safely brought in. The financial implications for the hospital as well as individual employees will hit just as hard. Bottom line-people need money to live.

Small northeastern Minnesota hospital

- **Taking care of patients with less than ideal PPE**
Large metro health system

Delays in care due to shutdowns

- **Delaying surgeries and interventions due to COVID**
Large metro health system
- **Delayed diagnosis due to cancelled clinic visits and procedures. Providing video visits and phone visits when no other type of visit is possible. Video and phone can be a great option in many instances. But in the COVID crisis, for some patients, there has been no option for in-person care, even when it would be preferable.**
Large metro health system
- **Delays in preventative care – mammographies, colonoscopies – due to PPE conservation, prohibition on non-essential services and patient reluctance to leave their homes.**
Large metro health system
- **Interruptions in normal care processes and hand-offs between providers due to patients and providers being remote from one another**
Large metro health system
- **Interruption in chronic care services – treatments, monitoring**
Large metro health system
- **With the executive decision (order) to reduce elective surgery every surgeon was forced to determine whether their patients could safely wait for surgery or not. This put them all at enhance risk for legal claims.**
Large metro health system

Patients missing out on family support and advocacy

- **This is already concerning because of the nature of residents being confined to their rooms 24/7, not able to have contact with loved ones thus mental health becomes a problem, and staff are needing to do more with less.**
Small southwestern Minnesota hospital
- **Caring for hospitalized patients when their family members are unable to provide support and advocacy**
Large metro health system

Other comments

- I think a balance can be found in achieving liability protection and maintaining Minnesota's high standard of care.
Small southern Minnesota hospital
- **We have 1 emergency room provider that could potentially be called to help with the national guard if they are called up. Our liability could potentially be in trying to get our Emergency Room covered for his scheduled shifts. We do have locum companies that we could work with to help in an emergent situation if needed.**
Small southwestern hospital
- **Transferring patients to smaller hospitals at peak in order to keep beds open**
Large metro health system