

## POLICY NOTE

# Making COVID-19 health care reforms permanent in Washington state

By Roger Stark, MD, FACS

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### Key Findings

1. The COVID-19 health care crisis has forced Washington state elected officials to change the health care delivery system to accommodate a patient surge.
2. These changes make sense in the short term and likewise make sense to be made permanent. They all work to increase timely access to health care for patients, not just during a crisis.
3. Because of the crisis, state officials suspended the Certificate of Need law (CON) for long term care facilities. Without any CON, the state also set up non-hospital facilities, such as Century Link Field, to handle any overflow from traditional hospitals. With 50 years of real-world experience, the evidence is now clear that CON laws do not reduce health care costs, however, they do reduce patient access to care.
4. State officials declared that providers of telemedicine visits would be reimbursed by insurance companies at the same rate as in-office visits. To improve access to health care, state officials should streamline the licensing process for out-of-state providers, and should not place barriers to patient-doctor interactions using telemedicine.

### Introduction

The COVID-19 health care crisis has forced Washington state elected officials to implement positive reforms in the health care delivery system to accommodate a patient surge. These changes are meant to be temporary, however if they are necessary and effective on a short-term basis they should be made permanent so they can benefit patients in the future.

The goal of these reforms is to increase patient access to health care while utilizing limited medical resources in the most efficient manner. These policy changes make sense in the short term and likewise it makes sense to carry them forward.

### Repeal Certificate of Need laws

Medical Certificate of Need (CON) laws have existed since the mid-1960s. They are a classic example of government intervention and central planning of the health care delivery system. Their stated purpose is to hold down costs and at the same time provide more charity care. They operate by requiring doctors, hospitals and clinics to receive government permission before providing more health care services in a given region. Thirty six states, including Washington, impose CON laws.<sup>1</sup>

The CON process is controlled by the Washington State Department of Health. Here are the specifics from its website:<sup>2</sup>

“The Certificate of Need program is a regulatory process that requires certain healthcare providers to get state approval before building certain types of facilities or offering new or expanded services.

The Certificate of Need process is intended to help ensure that facilities and new services proposed by healthcare providers are needed for quality patient care within a particular region or community.”

1 “Why Washington’s restrictive Certificate of Need medical services law should be repealed,” by Roger Stark, MD, Policy Note, Washington Policy Center, February 2016, at <https://www.washingtonpolicy.org/publications/detail/why-washingtons-restrictive-certificate-of-need-medical-services-law-should-be-repealed>.

2 “Certificate of Need,” Washington State Department of Health at <http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/CertificateofNeed/DecisionsandEvaluations> accessed on January 20, 2016.

5. The Inslee Administration released an executive order that allowed volunteers who were not fully licensed to provide emergency services during the crisis and to be protected from malpractice litigation. Relaxing barriers to practice medicine in Washington state would be an effective method to improve the looming doctor shortage.
6. Because of the COVID-19 crisis, state officials have unilaterally made changes to the health insurance industry. Whether these are reasonable mandates from government or not, the important point is that in a crisis, health insurance reforms can be made expeditiously.
7. Governor Inslee denied a request from the Washington State Hospital Association, Medical Association, and Nurses Association to extend the Emergency Volunteer Protection Act to all Washington practitioners. Tort reform would improve the affordability and quality of health care for all Washington state residents.
8. The COVID-19 crisis has forced elected officials to make rapid decisions in what they believe to be the safest course of action for citizens. Rather than take these positive reforms away, they should be made permanent in law.

Basically, a CON review is required for any new medical facility or any addition of treatment capacity of an existing hospital or clinic. For example, a new hospital or the addition of licensed beds at an existing hospital requires CON approval. A CON is also required if an existing facility wants to add a specialized treatment service such as heart surgery or organ transplantation.

On March 30, 2020 state officials suspended the CON for long term care facilities. This is only one of many individual CON laws that remain in Washington state.<sup>3</sup> Without any CON requirements, the state also set up non-hospital facilities, such as Century Link Field Event Center, to handle any overflow from traditional hospitals.

With 50 years of real-world experience, the evidence is now clear that neither federal nor state-level CON laws reduce health care costs. They do, however, reduce patient access to care.

Congress repealed the federal CON law years ago, finding it to be a failure. States without CON laws provide high-quality care to patients at no greater average costs than other states. Defenders of the remaining states with CON laws seem to place a desire to maintain government control over the health care system above the need of patients to have ready access to care.

As more patients use high-deductible health insurance plans and thereby use more of their own money, they should have more choices and better access to health care. Expanded access, increased price competition and greater medical choice would serve the public interest by allowing new health care services to be provided in communities where they are needed most.

Washington's CON law has not achieved its original purpose, but it does serve to protect favored interests from normal market competition at the expense of health care consumers. For these reasons, the bureaucratically restrictive and long-outdated CON law in Washington state should be repealed. CON laws were not necessary during the COVID-19 crisis and should be repealed on a permanent basis.

## Allow more telemedicine

People living in certain geographic areas in the United States lack access to primary and specialty health care. These are mostly people living in rural areas where patients have no timely access to doctors, nurses, or other medical professionals. Nearly 59 million Americans nationally and 1.2 million Washingtonians live in areas with a shortage of access to local primary care.<sup>4</sup>

3 "Laws and Orders: Coronavirus," State Policy Network, at <https://docs.google.com/spreadsheets/d/1ZCFXeXj9AmuesRzc7IYFG2yEzmY1DXiHr5sCloyiq90/edit#gid=1500850991>.

4 "The benefits of telemedicine in Washington state," by Roger Stark, MD, Policy Note, Washington Policy Center, December 2017, at <https://www.washingtonpolicy.org/publications/detail/the-benefits-of-telemedicine-in-washington-state>.

Telemedicine, defined as “the remote diagnosis and treatment of patients by means of telecommunication technology,” is gaining popularity and offers a practical solution for lack of health care services in rural areas. Telemedicine allows patients to remain in their own town, or even their own home, and receive direct care from a distant provider.

The terms telemedicine and telehealth are used interchangeably. Both terms refer to the use of communication technology to connect doctors and patients over distance.

The Washington Legislature passed a series of bills from 2015 to 2017 that define who can use telemedicine, where the patient must physically be to receive the consultation, and what the reimbursement is for the provider. The Legislature also established a “Collaborative” where participating institutions could share information and results of the effectiveness of telemedicine practices.

Problems with telemedicine include the licensure of doctors who provide services across state lines and reimbursement parity with in-office visits. In May 2017, Washington state officials signed on to the Interstate Medical Licensure Compact which allows for state licensure applications to be expedited for out-of-state doctors. However, the state where the patient resides retains oversight of the doctor-patient relationship.

On March 25, 2020, state officials declared that providers of telemedicine visits would be reimbursed by insurance companies at the same rate as in-office visits.<sup>5</sup>

Access to providers is the most important part of our health care system. Receiving timely care is critical to society having a healthy population. It gives patients choices in the type of care they obtain and it gives providers more options in how to treat sick individuals. Telemedicine has the ability to increase access to affordable and convenient health care for millions of patients, especially those living in rural areas.

Telemedicine can also reduce the cost of providing health care. A visit electronically is much cheaper than a trip to the emergency room. Diagnosing minor health problems using telemedicine is much safer and less expensive than waiting for the patient’s clinical condition to become severe.

To improve access to health care, state officials should streamline the licensing process for out-of-state providers, and should not place barriers to patient-doctor interactions using telemedicine. These measures have been successful during this COVID-19 crisis and should be made permanent. Physicians have the responsibility to determine what type of patients can be helped with telemedicine and how many facilities should offer the service. For that reason state regulators should not attempt to pre-judge who can and cannot use telemedicine services.

Extending the use of telemedicine is a practical solution to ever-increasing health care costs and to limited health care access for millions of Americans in rural areas. Government officials should offer guidelines and protect patient rights, but they should otherwise let people in the voluntary free market decide the most efficient use of this expanding technology.

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<sup>5</sup> “Laws and Orders: Coronavirus,” State Policy Network, at <https://docs.google.com/spreadsheets/d/1ZCFXeXj9AmuesRzc7IYFG2yEzmY1DXiHr5sCloyiq90/edit#gid=1500850991>.

## Expand provider licensing and scope-of-practice

Individual state licensing laws have been one of the main barriers to an adequate physician and nurse supply. Each state has its own set of tests and regulations even though doctor and nurse training is essentially uniform throughout the country. By allowing out of state providers to practice in Washington state, access to health care would increase for thousands of patients.

The Inslee Administration issued an executive order on February 29, 2020 that allows volunteers who are not fully licensed to provide emergency services during the COVID-19 crisis and to be protected from malpractice litigation.<sup>6</sup>

The United States in general and Washington state in particular are facing a severe doctor shortage in the next 10 to 15 years. Not only is the population growing, but the baby boomer generation is aging and will require more medical services in the near future.

Relaxing barriers to practice medicine in Washington state would be an effective method to improve the looming doctor shortage. Telemedicine is a perfect example of utilizing out of state providers to increase access to health care for Washingtonians.

Another group of potential providers are those individuals who graduated from foreign medical and nursing schools. Careful credentialing and monitoring would insure that foreign graduates practiced quality medicine, while easing the impending provider shortage.

Scope-of-practice laws place unnecessary barriers to health care access for patients. A medical crisis can require an all-hands-on-deck mentality because of necessity. If practitioners who are trained, but not specifically licensed, are needed during a crisis, they can undoubtedly be utilized for routine care.

Groups of providers protect their specific practice domains through the use of politics. The Legislature should relax scope-of-practice laws and let patients determine who is best qualified to treat their medical needs. This has worked during the crisis and should be continued in the future.

## Enact health insurance reform

Insurance is defined as “a practice or arrangement by which a company or government agency provides a guarantee of compensation for specified loss, damage, illness, or death in return for payment of a premium.”

However, people often view health insurance differently than other types of insurance. When a person says he has “great health insurance,” what he actually means is that his insurance covers nearly everything related to receiving health care, with essentially no out-of-pocket expense. Covered services can include dental treatment, eye wear, and routine visits to the doctor. This is analogous to a person having auto “insurance” that pays for routine maintenance services, including gas, oil, and brakes.<sup>7</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> “Is health insurance different than other types of insurance?,” by Roger Stark, MD, Policy Note, Washington Policy Center, January 2018, at <https://www.washingtonpolicy.org/publications/detail/is-health-insurance-different-than-other-types-of-insurance>.

There is no disagreement with the idea that people need health insurance, even though simply having insurance does not guarantee timely access to health care. Many countries with universal health insurance also have rationing and long wait times to see providers that would be unacceptable to most Americans.

Because of the COVID-19 crisis, Washington state officials have unilaterally forced changes on the health insurance industry. They have mandated that insurance companies waive co-pays, deductibles, and co-insurance payments for virus testing. They have banned surprise bills for virus treatments in facilities that are out-of-network for patients. They have forced insurance companies to pay for telemedicine services.<sup>8</sup>

Whether these are reasonable mandates from government or not, the important point is that in a crisis health insurance reforms can be made expeditiously. Likewise, after analyzing the reforms that were implemented during the COVID-19 emergency, good reforms should be made permanent.

The challenge is how to reform the health insurance industry effectively. The free market has proven to be the most efficient, the most practical, and the fairest economic model because it allows people to choose the goods and services that are best for them.

Solutions to the current health care crisis in America should revolve around reforms that introduce more free market ideas in all the various types of health insurance, both private and government-run. These solutions should include health insurance regulatory reform, the elimination of most benefit mandates, and price transparency.

## **Enact tort reform**

Unlike other western countries, the United States has a very active legal system, and hospitals, doctors and other health care providers must constantly manage the impending threat of costly medical lawsuits. In many states, health care lawsuit reform, that is, reasonable limits placed on the cost of a medical lawsuit, has helped hold costs down and provided a stable physician pool, while still allowing injured patients to have their day in court.<sup>9</sup>

On April 24, 2020 Governor Inslee denied a request from the Washington State Hospital Association, Medical Association, and Nurses Association to extend the Emergency Volunteer Protection Act to all Washington practitioners.<sup>10</sup> His reasoning was that the majority of the COVID-19 crisis had passed and tort reform was not necessary.

From the experience in other states, a meaningful legal cap on non-economic damages is the most effective element of successful lawsuit reform legislation. To a lesser extent, a statute of limitations on lawsuits and pre-trial screening are often effective in reducing the cost of specific medical malpractice lawsuits.

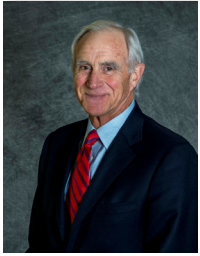
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8 “Health insurance and coronavirus (COVID-19) frequently asked questions,” Office of the Insurance Commissioner, Washington State, at <https://www.insurance.wa.gov/health-insurance-and-coronavirus-covid-19-frequently-asked-questions>.

9 “The cost of medical malpractice lawsuits in Washington state – Lessons from Texas reform,” by Roger Stark, MD, Policy Note, Washington Policy Center, April 2016, at <https://www.washingtonpolicy.org/library/doclib/Stark-Update-on-the-cost-of-medical-malpractice-lawsuits-in-Washington-State-Lessons-from-Texas-reform.pdf>.

10 Email from the Washington Liability Reform Coalition April 24, 2020.





**Dr. Roger Stark** is the health care policy analyst at Washington Policy Center and a retired physician. He is the author of three books.

Over a 12-month period in 2013 and 2014, Dr. Stark testified before three different Congressional committees in Washington DC regarding the Affordable Care Act. Dr. Stark graduated from the University of Nebraska's College of Medicine and he completed his general surgery residency in Seattle and his cardiothoracic residency at the University of Utah. After practicing in Tacoma he moved to Bellevue and was one of the co-founders of the open heart surgery program at Overlake Hospital.

He retired from private practice in 2001 and became actively involved in the hospital's Foundation, serving as Board Chair and Executive Director.

He currently serves on the Board of the Washington Liability Reform Coalition.

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The barriers to enacting non-economic caps are provisions in some state constitutions, the active political opposition of powerful state trial lawyer associations, and the states-rights question of whether the states or the federal government should pass such legislation. To control the rise in medical lawsuit costs, Washington state would need to amend its constitution. This would require a supermajority of legislative votes in both houses, a strong coalition of supporters, and a simple majority support of voters.

In Washington state, lawmakers can most effectively reduce the cost of health care lawsuits, slow the rise in overall health care costs and increase patient access to high-quality affordable care by adopting reasonable limits on the non-economic costs of malpractice awards.

In addition, meaningful caps on non-economic damages would encourage more doctors to stay in practice in Washington, would promote greater expertise in key medical specialties like delivering healthy babies and treating severe neurological injuries, and would make the state a more attractive place for University of Washington Medical School graduates and doctors from other states to open their practices. This reform would improve the affordability and quality of health care for all Washington state residents.

## Conclusion

The COVID-19 crisis has had a dramatic impact on both the medical and economic areas of everyone's life. It has forced elected officials to make rapid decisions in what they believe to be the safest course of action for citizens.

Although the decisions were made quickly, they were made with the best of intentions and were thought to be the best for patients. Rather than allow these positive actions and reforms to expire, they should be made permanent in law. They all work to increase timely access to health care for patients at any time, not just during a crisis. This is the main goal of any health care reform. The governor and other state officials should not take these positive reforms away once the crisis is over.