Senate Human Services Committee
Wednesday, March 3, 2021 2:30 PM
Sakakawea Room, State Capitol
HB 1151 - Opposition
Relating to telehealth and practice of dentistry

Re: Testimony in **opposition to HB 1151** for the Senate Human Services Committee

Chairman Lee and Members of the Senate Human Services Committee,

Good afternoon. My name is Michael Keim. I live in Fargo and currently serve on the North Dakota's Board of Dental Examiners. I wish to offer support for HB 1151 **with amendments.**

The North Dakota Board of Dental Examiners favors and supports telehealth regulations appropriate for applications within the practice of dentistry and is very interested in advancing telehealth to enhance access to care within the practice of dentistry. The truth is, the Dental Board's discussion about HB 1151 at their January meeting centered on a number of concerns about the bill – most specifically about some ambiguous wording that could handcuff the Board's disciplinary abilities as well as conflicts the bill has with existing laws and Administrative Rules. Although the Board opposes HB 1151 in its current form, I would like to offer a number of friendly amendments for your consideration. The amendments are included with the written testimony handed out. In collaboration with the Senate Human Services committee, I believe the additional clarity needed in several areas of the bill can be addressed such that the conflicts can be ironed out relatively easily. This would enhance the purpose of HB 1151, make it more specific to the practice of dentistry, and provide for better protection of the public.

For example, elements that can be found in similar statute related to medicine are not relevant to dentistry. Dentists do not use information forwarding devices like physicians do for heart, diabetes or other monitoring. Some open-ended phrasing of the bill that omits important elements of which dental team member can do, under what sort of supervision, can also be clarified to better assure patient safety. I hope the committee will consider allowing time to enable the Board, through its Executive Director and legal counsel from the Attorney General's office, to engage in discussions about these or other amendments to find mutually acceptable solutions to concerns I will outline

more specifically in a moment. These friendly amendments can assure optimal patient safety while engaging today's technology to the benefit of all North Dakota citizens.

Currently, HB 1151 contains a number of potential unintended consequences. Here are some of them.

1. **ND Regulations how dentistry may be practiced are presently, and should ideally be, found within Administrative rules, not statute as HB 1151 proposes.**
2. **Administrative Rules may be amended in a timely and appropriate manner through the process approved by the Legislative Council.**
3. **"Patient evaluation" is not "equivalent to a patient examination" as the bill implies.**
4. **All essential, necessary aspects of dental examinations cannot be performed through telehealth under all circumstances.**
5. **H.B. 1151 risks public safety through conflict with currently established existing statute and rule.**
6. **The *Principles of Ethics and Code of Professional Conduct* are presently identified within Administrative Rules. HB 1151 conflicts with long established Principles of Ethics and Conduct.**
7. **Ethical principles guide behavior and are not intended to regulate technology.**

Rules vs. Statute:

- The rapid pace of advancing technology brings frequent new elements for management of medical as well as dental care. The ability to gather input and guidance from knowledgeable sources in a timely fashion to safely modify Administrative Rules for improvement of dental is accomplished more nimbly by amending Administrative Rules of dentistry than through statutory changes. The Administrative Rules process enables input from multiple sources enabling an inclusive process for investigation and research prior to implementing change related to the practice of dentistry. This process maximizes protection of public safety.
- Regulations within Administrative Rules assure requirements for education and training for different levels of licensees are met authorizing duties for specific dental procedures.

Examination vs. Evaluation:

- Examples of evaluation include recording findings for blood pressure, temperature, height, weight, presence or absence of teeth, patient reported complaints or symptoms. An evaluation cannot be framed

as an examination. This bill conflicts with, negates and adds confusion to the Board's laws and rules regarding scopes of practice for dentists found in NDCC 43-28 (includes "examination") and dental hygienists or a dental assistant whose laws do not include the word "examination" but does include "assessment" and "evaluation."

- The NDBDE does not support the notion that a telehealth evaluation is equivalent to a live patient dental examination. The notion is false. Examination involves the understanding of conditions or circumstances that can influence the indications for, or inappropriateness of care (e.g. medications that contraindicate certain procedures). Commonly, hands-on examination by a dentist is also essential during examinations, (e.g., digital palpation and manipulation of tissues including teeth to determine mobility; digital palpation of muscles and/or auscultation of bone structure to diagnose the presence, or assure the absence of, temporomandibular dysfunction that could affect dental treatment; palpation of lymph nodes including their mobility, or lack thereof; probing of periodontal conditions to determine a diagnosis of health or disease; digital compression of soft tissues; visual assessment and metric evaluation of tooth mobility; thermal testing of teeth with interpretation to confirm vitality or diagnose irreversible pulpal abnormality or necrosis requiring endodontic treatment or extraction; perform percussion of teeth to discover and diagnose cracked teeth or recognized traumatic conditions; application of appropriate pressure to mandible during movement; etc. These procedures, their purpose, significance, importance, application and interpretation are not included in <u>all</u> educational programs for <u>all</u> levels of dental licensees - only for those who have gained D.D.S. or D.M.D. degrees from dental schools recognized by the Commission on Dental Accreditation (CODA). As a result, telehealth delivery of care is not universally applicable in all circumstances where a dentist is not physically present during direct examination of the patient.

- An examination is required to reach a diagnosis of disease or health; a diagnosis is required to establish a plan of treatment; a plan of treatment is necessary prior to initiating/providing treatment. An evaluation does not assure the ability to establish a diagnosis. HB 1151 wording conflicts with these requirements and could likely be considered below the standard of care, unethical and/or in violation of the Dental Practice Act.

Public safety is not protected.

Statements That Conflict with Public Safety:

Section 2, subsection 3(b)

- The statement that, "...subsequent followup care may be provided as deemed appropriate by the dentist or by a provider designated by the dentist to act temporarily in the dentist's absence." is problematic. There is no clear indication about who "*a provider*" should be, what level of education or training he/she must have, if such an individual is licensed to provide the care "*as deemed appropriate.*" This wording offers significant uncertainties and is open to individual interpretation – making enforcement of patient protection difficult under specific circumstances. Any provider "designated by the dentist" agreeing to specific care must have authority under Administrative Rules in Chapter 20 related to dentistry to administer care.

Public safety is not protected.

- The statement that: "In certain types of telehealth utilizing asynchronous store-and-forward technology or electronic monitoring, it is not medically necessary for an independent examination of the patient to be performed." This statement is also problematic. What "*certain types of telehealth*" are specifically, is left completely open for interpretation. The statement has no known basis in fact, is open to argument and/or litigation and conflicts with the established norm of an examination leading to diagnosis leading to a treatment plan leading to treatment. If passed in current form into statute, the bill would permit someone to decide for him/herself what "certain type of telehealth" they are providing (since it is not defined) and that "...it is not medically necessary for an independent examination." In addition, there is no definition for "independent examination." One might ask.... independent of what?

Public safety is not protected.

Section 2. 1. Line 10

- The existing Code of Ethics and Codes of Professional Conduct is already established and identified within existing Administrative Rules. Section 2. 1. either offers its own *interpretation* of the this code, or attempts to interject an alternative code of ethics for dentistry. The American Dental Association's *Principles of Ethics and Codes of Professional Conduct* document is universally accepted in regard to dental care in every state, but also is written into our Administrative Rules and therefore has the force of law. Adherence

to Principles of Ethics and Codes of Conduct focus on protection of patients through the Principle of Autonomy, (patient self-governance), Benevolence (do good), Nonmaleficence (do no harm), Justice (fairness) and Veracity (truthfulness). There is NO statement found within the ADA's document that affirms Section 2.1. of this bill to be true. Perhaps it is true in medicine. But, the statement is not true for dentistry.

- The ambiguous language in numerous parts of the bill as presented in Section 2; subsection 3, 3a, 3b, and 5 conflict with existing Administrative Rules for dentistry in Title 20.

Public safety is not protected.

Section 3, subsection 2:

- Regulations governing dentists and the North Dakota prescription drug monitoring program already exist in Title 20. Language regarding opioids also falls under the jurisdiction of the United States Drug Enforcement Agency. Currently, federal laws exist to direct practitioners in their prescribing of controlled substances during Covid-19. Is there a conflict?

In conclusion, the NDBDE **opposes HB 1151 in its present form.** However, I urge the Senate Human Services Committee's consideration of addition of the amendments offered here today. If aspects of these amendments are in question, I am confident the dental board would welcome and appreciate working together with the Committee to further tailor amendments to be acceptable to the Committee while also addressing the Board of Dental Examiners' concerns. As mentioned, the board recognizes the beneficial influence that telehealth offers to enhance delivery of care in both medicine and in dentistry and increase access to care. Electronic transfer of information is currently utilized in both professions already. How this technology can be appropriately and safely utilized and regulated in each environment is not identical. With added effort, it is my belief that this bill can satisfy the intent of the sponsors as well as the specific charge of the board of dentistry to assure appropriate, efficacious, and safe dental treatment with a focus of protecting the public. Please consider working with the NDBDE to optimize this bill to the benefit of citizens of North Dakota.

I would be happy to answer any questions.

Sixty-seventh
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1151

Introduced by

Representatives Devlin, Rohr, M. Ruby, Weisz

Senators Lee, K. Roers

A BILL for an Act to create and enact two new sections to chapter 43-28 of the North Dakota Century Code, relating to telehealth and the practice of dentistry; and to amend and reenact section 43-28-01 of the North Dakota Century Code, relating to the definition of telehealth.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 43-28-01 of the North Dakota Century Code is amended and reenacted as follows:

43-28-01. Definitions.

As used in this chapter and chapter 43-20, unless the context otherwise requires:

1. "Accredited dental school" means a dental school, college, or university accredited by the commission on dental accreditation of the American dental association or its successor.
2. "Advertising" means to invite the attention of or give notice to the public, by any means, medium, or manner whatsoever of any fact, information, or data pertaining to or being conducive of the practice of dentistry in this state.
3. "Board" means the state board of dental examiners.
4. "Certificate of registration" means a written statement of the board declaring that a licensed dentist has paid the biennial registration fee required by this chapter.
5. "Dentist" means an individual who has a license to practice in this state and who holds a valid biennial certificate of registration.
6. "License" means the right, authority, or permission granted by the board to practice dentistry in this state.
7. "Practice of dentistry" means examination, diagnosis, treatment, repair, administration of local or general anesthetics, prescriptions, or surgery of or for any disease, disorder, deficiency, deformity, discoloration, condition, lesion, injury, or pain of the human oral

cavity, teeth, gingivae, and soft tissues, and the diagnosis, surgical, and adjunctive treatment of the diseases, injuries, and defects of the upper and lower human jaw and associated structures.

8. "Telehealth" has the same meaning as in section 26.1-36-09.15.

SECTION 2. A new section to chapter 43-28 of the North Dakota Century Code is created and enacted as follows:

Standard of care and professional ethics - Telehealth.

A dentist is held to the same standard of care and ethical standards, whether practicing traditional in-person dentistry or telehealth. The following apply in the context of telehealth:

1. Professional ethical standards ~~require a dentist to practice only in areas in which the dentist has demonstrated competence, based on the dentist's training, ability, and experience.~~ adopted by the board by rule shall apply equally to a dentist practicing in a traditional dental setting or in a telehealth encounter. The telehealth provider shall practice in a manner consistent with their scope of practice and the standard of care for a dentist providing in-person dental care.

2. A dentist practicing telehealth shall establish a bona fide relationship with a patient before the diagnosis or treatment of the patient. A dentist practicing telehealth shall verify the identity of the patient seeking care and shall disclose and ensure the patient has the ability to verify, the identity and licensure status of a dentist providing dental services to the patient.

3. Before a dentist initially diagnoses or treats a patient for a specific illness, disease, or condition, the dentist shall perform an examination ~~or evaluation~~. A dentist may perform an examination ~~or evaluation~~ entirely through telehealth if the examination ~~or evaluation~~ is equivalent to an in-person examination.

   a. An examination utilizing secure videoconferencing or store-and-forward technology for appropriate diagnostic testing and use of peripherals that would be deemed necessary in an ~~like~~ in-person examination ~~or evaluation~~ meets this standard, as does an examination conducted with an appropriately licensed ~~intervening~~ dental health care provider, practicing within the scope of the provider's profession, providing necessary physical findings to the dentist. An examination or evaluation consisting only of a static online questionnaire or an audio conversation does not meet the standard of care.

   b. Once a dentist conducts an acceptable examination ~~or evaluation~~, whether

25 in-person or by telehealth, and establishes a patient-dentist relationship,

1 subsequent followup care may be provided as deemed appropriate by the

2 dentist, or by a licensed dental provider designated by the dentist to act temporarily in the dentist's absence. ~~In certain types of telehealth utilizing asynchronous store-and-forward technology or electronic monitoring, it is not medically necessary for an independent examination of the patient to be performed.~~

3 4. A dentist practicing telehealth is subject to all North Dakota laws governing the

4 adequacy of dental records and the provision of dental records to the patient and other

5 dental providers treating the patient as established by the board by rule.

6 5. A dentist may make appropriate referrals of patients not amenable to diagnosis or

7 complete treatment through a telehealth encounter, including a patient in need of

8 emergent care or complementary in-person care.

9 **SECTION 3.** A new section to chapter 43-28 of the North Dakota Century Code is created

10 and enacted as follows:

11 **Prescribing - Controlled substances.**

12 1. A dentist who has performed a telehealth examination or evaluation meeting the

13 requirements of this chapter may prescribe medications according to the dentist's

14 professional discretion and judgment, Opioids may be prescribed through telehealth only if prescribed to a patient in a hospital or long-term care facility. Opioids may not be prescribed through a telehealth encounter for any other purpose.

15 2. Pursuant to this chapter, a dentist who prescribes a controlled substance, as defined

16 by state law, shall comply with all state and federal laws regarding the prescribing of a

17 controlled substance, and shall participate in the North Dakota prescription drug

18 monitoring program.

denotes new language inserted

denotes language removed