The Hospital + Healthsystem Association of Pennsylvania

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Statement of The Hospital and Healthsystem Association of Pennsylvania

For the

Senate Judiciary Committee

Submitted by
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My name is Warren Kampf and I am the Senior Vice President for Advocacy and External Affairs for The Hospital and Healthsystem Association of Pennsylvania. I submit these comments on behalf of our membership organization regarding the Legislative Budget and Finance Committee's (LBFC) report related to the venue rule for medical liability cases.

Overall: The LBFC report does not dispel the hospital community's justifiable concern that the proposed return to venue shopping will wreak havoc on access to care in Pennsylvania. The last thing you would want to do is make a substantial policy change when there is widespread doubt about its potential impacts. If anything, the LBFC report serves to prove that doubt.

Hospitals and their medical professionals know that the venue change proposal is about money. If the change occurs, claims and costs will go up. No one can seriously dispute that.

Making physicians and other practitioners—who already are in scarce supply—travel significant distance for trial and then be away from their patients for long periods of time will harm access. The COVID pandemic has pushed practitioners to near the edge of their capacity to work; stress, fear and many other constraints have piled on an already difficult set of professions which are critical to the well-being of our entire society. Rising costs, extended travel, and other challenges from the proposed venue change will only serve to reduce the supply of these medical professionals, and the places where good medical care will be available.

The report recognizes that substantial consolidation and partnership among hospitals and health systems across the state during the last two decades mean many more hospitals would be brought into Philadelphia and other high-verdict venues than before.

- Health systems spanning multiple counties is a fact of hospital care today in our state, and far more hospitals have a connection to Philadelphia, Allegheny, or Lackawanna

counties than they did prior to 2002. More physicians and health systems will be subject to suit in those counties if the rule changes (p. 45). This must be a consideration before deciding to change the rule, according to the LBFC

- The report states that data cannot predict what change will occur to availability, the number of beds, or hospitals if there is a rule change (p. 52)

- Access to care depends upon the ability to afford care. It will be affected by a venue rule change, because—in part—where one can be sued significantly impacts costs

- Traveling far for long periods of time to an unfriendly venue also harms access to care

- Mass Tort and other cases from all over the world come to Philadelphia for filing. There is a reason for that. It is a jurisdiction plaintiff's counsel choice for high-verdict and settlement value. Allowing the adjudication of most of our medical professional cases in such a venue, which is what a rule change would necessarily do, is simply unwise

Medical Professionals and the Venue Rule

- The LBFC admitted it does not have reliable data to prove what impact insurance rates will have on physicians' decisions about where to practice (pp. 45–46)

- The LBFC admitted it does not have reliable data to predict what the effects are of tort reforms on availability of obstetric (OB) and gynecology (GYN) care

- The LBFC states that overall the available data related to physicians practicing in Pennsylvania is inadequate to draw conclusions. The report underscores this: "We again caution the use of our physician data has limitations as previously outlined" (p. 29)

- The LBFC graphs demonstrate a clear reversal of the downward trend of active medical staff in OB/GYN and General Surgery in Pennsylvania after the reforms (pp. 34, 39). The number of OB/GYN physicians statewide fell prior to 2002 reforms, and then climbed again (p. 34)

- The LBFC fails to mention the significant toll a venue rule change will have on medical professionals. These are human beings, often highly specialized. They sit as the accused in court, and this takes a toll. Requiring distant travel to enter that crucible only makes matters worse, and makes it even harder to serve their patients back at home. There are not endless supplies of medical professionals waiting to substitute when a provider is required to be present at a distant trial

- Venue for medical professional liability is an inherently local matter. This is not a mass-produced widget used in every city and town across the country. It is a team of professionals in a local community doing their best to provide care. The venue rule

today respects this reality. The LBFC report does not address this element of the proposal

While the report fails to arrive at any broad conclusions, it creates a reasonable doubt for anyone considering whether to change the venue rule of 2002

- The LBFC report confirms that, after the Medical Care Availability and Reduction of Error (MCARE) Act, and the venue rule change, insurance rates stopped climbing and stabilized—although rates remained high—and filings fell. The report ultimately concludes, however, that Pennsylvania has insufficient data to estimate the effects of any proposed change to the venue rule. While this is a very conservative conclusion to draw from the facts, it means there is reasonable doubt about what a change to one of the pillars of the MCARE reform might do to Pennsylvania's health care delivery system

- Due to multiple variables in play, the report says LBFC **could not determine what effect** the proposed change would have on the prompt determination or fairness of claims and payouts for injuries (S-6). This is tantamount to saying the LBFC could not find that access to justice or fair compensation have been harmed under the current rule

- The LBFC report also clearly states, "with such diverse variables and lack of data, we will not conclude whether venue for medical professional liability actions impacts access to medical care" (p. 20). Essentially, LBFC has said it cannot predict whether changing this rule again will have consequences for the citizens of Pennsylvania

- The hospitals of Pennsylvania know that returning to venue shopping will have very significant consequences for access to care. Since 2002, hospital consolidation into multi-county operations has rapidly increased. Subjecting hospitals and their medical professionals to lawsuits in the state's highest payout and exposure venues will certainly deter access. The court will take an enormous risk were it to revert to the old rule. Even the LBFC says this must be a consideration

- Think of the small city hospital somewhere in Pennsylvania. What if it has a joint venture with another hospital operating in Philadelphia? What if it will close unless it partners with a large system with Philadelphia or Pittsburgh operations? Costs of insurance or self-insurance—which will be at high-payout venue rates—are at least double in Philadelphia as compared to some of these small cities and rural counties. That is absolutely a deterrent to providing the best access to care, especially in struggling areas. Patients in those underserved areas will be deprived of high-quality care, or be forced to travel huge distances for such care. The LBFC report does not address this except in the most cursory way

- Health care is by definition local. Physicians, nurses, and other hospital staff are members of the very communities they serve. Forcing them to travel great distances to high-verdict venues—which takes them away from the care they deliver and the patients

who need them—will harm access to health care. This issue is more important than ever, but it is not examined by the report

- Venue also will affect other health systems' decisions about whether to begin serving our large urban areas, where needs also exist. A change in venue will give pause to such expansion, not just because of the cost of care in those areas, but also because the decision to operate there will affect stability in all the other hospitals in the system. This was not examined by the LBFC

The report does not include key facts and research that could provide additional clarity

- The LBFC does not include the 2019 Milliman, Inc. report that explored the potential impacts of the proposal. Milliman is a professional actuarial firm; the LBFC is not. The Milliman report found:
  - The average medical professional liability costs in Pennsylvania are likely to increase by 15 percent in the event of a change of the venue rule
  - Specifically, some areas could see increases of 45 percent. High-risk physician specialties—OB, GYN, and general surgeons—could experience a rate increase of 14 percent above and beyond these other increases listed

- The LBFC clearly documents that, consistent with the intent of the 2002 policy change, filings went down in Philadelphia and up in the ring counties of Philadelphia (e.g., Chester, Bucks, Montgomery). Insurance rates in the ring counties went down faster than other places, demonstrating that venue change impacted rates. The LBFC drew no overt conclusions from this powerful data about rates and venue (p. 34)

- The report does not take into account the influx of filings that will likely occur in the several high-verdict venues. These courts are not set up at this stage to handle such an increase

- The LBFC report does not couple the very different hospital landscape today compared to before 2002 with how insurance rates are presented to health systems. Underwriting or reserves will need to be based now on high-verdict venues; whereas, before 2002, this was not at all likely

The report did not prove the plaintiff bar's key assertion that patients are not getting access to justice for legitimate claims

- To justify a change of the venue rule in the Supreme Court Civil Rules Committee, the plaintiff's bar asserted that people are being denied access to the courts. The LBFC's examination of data found nothing to suggest that legitimate claims are not being heard

- The plaintiff's bar asserted that patients no longer receive fair compensation if their claims are found to be valid. The LBFC examined available data and offers no data or conclusion to support this initial plaintiff's bar assertion. Indeed, many large payouts have been awarded in courts outside Philadelphia since 2002

The report includes some important insurance rate information, but leaves some other variables and data out

- The report provides data showing that the availability of the all-important specialty of OB/GYN is closely tied to insurance rates. Where rates rose during the analysis period in certain venues, the number of such physicians declined (pp. 34, 62)

- Importantly, the report also demonstrates that, in the ring counties of Philadelphia, insurance rates fell faster after the venue reform (pp. 130–131). **This is evidence that the 2002 venue change was successful.** Logically, rates would fall faster where ring county physicians were not tied to Philadelphia courtroom exposure

- Based on the available data, LBFC determined "there was a correlation between medical malpractice rates and the number of active medical staff with clinical privileges in certain counties and specialties." (p. 23)

- The report does not emphasize that clearly venue matters to cost, and has an economic impact on access to care; otherwise, insurance rates would be the same in every venue, and they are not

- The report documents that, along with the reforms, the insurance market became far more competitive, more carriers wrote policies, health systems had developed robust self-insurance programs and, conversely, the Joint Underwriting Association, the insurer of last resort in Pennsylvania, saw a decrease in premiums and payouts

- The report does not acknowledge in any significant way that much of the data it uses is weak. Payouts from MCARE do not present the entire picture of what has been paid over time. Amounts of approximately $1 million and below $500,000 are not kept there. Many cases are settled pre-litigation. Further, The National Practitioner Data Bank does not report claims or amounts paid by health systems of hospitals, only practitioners

- The report does not emphasize that many health systems in Pennsylvania now have their own self-insurance for large parts of the risk. This is very valuable to hospital budgeting in a stable, affordable climate, but exposure to enormous risk in just a few venues will significantly jeopardize this, and could cause enormous upheaval

- Obtaining excess insurance, or even resources from the bond markets, will perhaps be impossible in counties well outside of the high-verdict jurisdictions in particular, or such protection only will be achieved at enormous cost. This was not examined by the LBFC

- There was an extraordinary rise in rates—approximately 200 percent during a very short portion of 2002—and MCARE reforms stopped that unsustainable trend

- The report states that claims, payouts, and insurance rates are dropping as part of a national trend. This conclusion is questionable. Many cases are settled and do not make it into the data LBFC used. MCARE payouts do not capture the entire picture, since payouts below $500,000 and above $1 million are not recorded. The National Practitioner Data Bank does not capture payouts by institutions, only practitioners

- The LBFC states that instability would occur in the insurance market if a change happened (See "Report Highlights" document)

- National trends are influenced by many factors, including the averaging in of states where a costly litigation climate simply does not exist. On the other hand, Pennsylvania is one of the top-five payout states, and it and other states that enacted tort reform could very well have influenced the national trends

Trends

- While the report references national trends with respect to claims, payouts and insurance rates, venue is an inherently local matter, county by county. The LBFC itself documents differences on impact county by county. Reference to national trends, therefore, is misleading, and the trends referenced may not be consistent with county-by-county trends, or even state trends, once properly dissected[1]

- The report documents that recoveries are far higher—and chances of plaintiff success are far greater—in Philadelphia County (p. 85). Fair compensation for injury, however, is not necessarily equivalent to the place where the greatest chances of recovery—and higher recovery—exist. This is a flawed premise of the plaintiff's bar's request

- Tort reform occurred in many states during the first decade of the 2000s. This has influenced national trends

[1] New York enacted no tort reforms and it could be a large driver of national trends upward in all categories. That said, Pennsylvania and Florida also were significant drivers of upward trend lines and then both enacted reforms during the early 2000s. Is it possible that these reforms, along with efforts to reduce medical error, explain the trend lines? Further, it could be coincidence alone that the average of all states, for which we do not have data in this report, happens to appear similar to the Pennsylvania trend line referenced. Further, keep in mind much of the data relied on for payouts and settled claims is incomplete, and rates are still very high in Pennsylvania, though stable.

- States neighboring Pennsylvania should be examined to better understand whether and how reform occurred. What we see seems to demonstrate that where reform occurs, trend lines show similarities

- Litigation costs, aside from settlement and judgments, have increased. The report does not address this current cost. Those costs are real to health care providers and will necessarily be higher in high-payout venues