Legislative Budget and Finance Committee
A Study of the Impact of Venue for Medical Professional Liability Actions

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Mr. Chairman and Members of the Committee, I am here today to present the results of our study of the impact of venue on medical professional liability actions.

Senate Resolution 2019-20 (SR20) directed LBFC to determine the impact of venue, which regulates the geographic location where the merits of a legal dispute can be fairly and conveniently adjudicated, for medical professional liability actions on access to medical care; determine the effects of the 2003 changes governing venue in medical professional liability actions on the availability of physicians, hospital services, and medical professional liability insurance in Pennsylvania; determine the effects of the 2003 changes on the prompt determination of, and fair compensation for, injuries and death resulting from medical negligence by health care providers; and to determine the effects of the proposed amendment to Pa.R.C.P No. 1006, which would revert to the prior court rule on venue, on these concerns. The Medical Care Availability and Reduction of Error Act, known as MCARE, included other changes, for example, the amount of insurance medical practitioners were required to purchase decreased from $1.2 million to $1 million; the collateral source rule; and the certificate of merit.

It is important to note that we were not asked to, and therefore did not, provide recommendations.

As directed in SR20, we held public hearings on June 25 and 26, 2019 and accepted testimony from affected parties including representatives of the health care industry, insurance industry, and legal community. We met with representatives for attorneys, medical providers, insurers, patients, and medical colleges. It is important to note that much of the information provided was anecdotal in nature, and while important, could not serve as the basis for our analysis.

Methodology

In order to determine the impact of venue on access to health care, we reviewed numerous studies including a 2003 study completed by the United States Government Accountability Office regarding medical malpractice insurance rates and their impact on access to health care. This particular study included Pennsylvania in its scope.

To measure the 2003 changes on the availability of doctors in the Commonwealth, we reviewed Pennsylvania Department of Health data on the number of active medical staff with clinical privileges at hospitals, and the number of full-time medical interns and residents on hospital payrolls. We performed a simple linear regression analysis between the number of active medical staff in the medical specialties of obstetrics and gynecology (OB/GYN), general surgery, and internal medicine along with rates for those specialties published by the *Medical Liability Monitor*, which

conducts an annual rate survey of major writers of medical malpractice insurance. We also reviewed several studies published in peer reviewed journals regarding medical malpractice tort reforms in other states and nationally as well as perceived physician shortages in Pennsylvania.

To measure the 2003 changes on the availability of hospital services, we obtained information from the Pennsylvania Department of Health (PDH) *Annual Hospital Questionnaire* for each year we reviewed. In addition to this data from the questionnaire, we reviewed PDH hospital reports that include data on all general acute care hospitals, specialty hospitals, beds set up and staffed, and the availability of hospital services. Likewise, we performed a simple linear regression analysis between the number of OB/GYN beds in each county compared to medical malpractice insurance rates for the specialty.

To determine the effects of the 2003 changes on the prompt determination of, and fair compensation for, injuries and death resulting from medical negligence, we obtained publically available information from the Administrative Office of the Pennsylvania Courts on medical malpractice filings and jury awards from calendar year 2000 through 2017. We used this data to quantify the average number of medical malpractice filings statewide and by county, determine the percent of change in filings, identify the number of jury awards statewide and by county, and calculate the plaintiff and defense rate of success. We also reviewed all available verdict slips for every case determined by a jury in an effort to assess the prompt determination of medical malpractice claims. In addition, we reviewed Philadelphia Court of Common Pleas' annual reports in an effort to gain insight into that county's medical malpractice case inventory.

We obtained claims paid data from MCARE and reviewed their annual reports from 1998 to 2018. We did this in an attempt to analyze the trends in payments by specific region and type of health care provider.

Because the research indicated the vast majority of medical malpractice claims are settled out of court, we reviewed 22 years of data from the National Practitioner Data Bank for all physicians in Pennsylvania and nationwide. The data was used to determine the value and number of payments made on behalf of all practitioners and physicians in Pennsylvania and compare that to national trends.

We reviewed a series of studies conducted by the Pew Charitable Trust to help us understand the pre- and post-reform changes in Pennsylvania. In an attempt to define the term "fair compensation," we reviewed studies conducted by the Institute of Medicine, the United States Department of Health and Human Services and other peer reviewed research.

We obtained summarized statutory information from the National Conference of State Legislatures to understand the medical malpractice laws and regulations for the five states with the highest medical malpractice payouts.

To determine the effect of changing the venue rule back to its pre-2003 version, we applied what we learned to the current health care marketplace. We also reviewed the number of MD and DO

graduates, first year residency quotas, and the match rate of open residency positions. We researched where Pennsylvania physicians received their graduate medical education (GME) and compared that to the practice locations of physicians who completed their GME in Pennsylvania.

To determine the potential effect of the proposed venue rule change on the availability of hospital services, we used information from the Hospital and Healthsystem Association of Pennsylvania, United States Agency for Healthcare Research and Quality, American Hospital Association, and Pennsylvania Department of Health.

To determine the effects of the proposed rule change on the availability, cost, and affordability of medical professional liability insurance in Pennsylvania, we used information we obtained from the *Medical Liability Monitor* and the Pennsylvania Insurance Department's *Annual Statistical Report*. The data was used to calculate the change in cost of medical professional liability insurance from 1996 to 2018 for all counties in Pennsylvania; determine the number of insurers offering coverage in Pennsylvania and their market share; and determine the amount of direct premiums.

At this point it is important to note, that statistically speaking, it is largely not possible to isolate one variable if multiple changes are occurring (in this case, the changes provided for in the MCARE Act) at the same time. In order to do so, one would have to assume that all changes, save the one we would wish to isolate, must be held equal. This is an assumption that we are unwilling to make.

The various changes in the MCARE Act are very likely to affect each county differently. For example, the venue change, theoretically, had no impact on Philadelphia. Plaintiffs were not rushing to get their claims heard outside of Philadelphia. Yet medical malpractice insurance premiums dropped significantly more in Philadelphia after the 2003 MCARE changes. Therefore, it is reasonable to conclude that the remaining changes to the law – certificate of merit, for example – had a greater impact in Philadelphia than in other counties.

Another example is the collateral source rule. That rule would likely affect counties differently depending on the number of residents who have health insurance and the income level of the residents. A county with fewer residents with health insurance and higher rates of poverty may have a higher reduction in medical malpractice claims because those claims are not as economically viable. Thus, the collateral source rule may have a larger impact on Philadelphia than Montgomery County, for example.

To assume that all of the MCARE changes affect all of the counties equally, save the change in the venue rule, is not prudent.

Venue in Medical Professional Liability Actions and Availability of Physicians

We were asked to determine the impact of the 2003 changes governing venue in medical professional liability actions on the availability of doctors in Pennsylvania. We reviewed available data from 1996 through 2018.

Based on that review, we found there is a lack of comprehensive, detailed data on the number of physicians practicing in Pennsylvania – particularly by specialty. However, with the data that is available, we found a strong correlation between medical malpractice insurance rates and the number of active medical staff with clinical privileges in certain counties. For example, the data shows a strong correlation between medical malpractice rates from two insurance providers and active medical staff with clinical privileges in the OB/GYN specialty in Philadelphia, Blair, Fulton, Lawrence, and Westmoreland Counties. Therefore, as rates increased the number of physicians decreased. However, the data did not indicate any overwhelming statewide trends.

The available data indicates that medical malpractice insurance rates may have an effect on a physician's decision on where to practice, however, it also indicates there are many other factors that influence those decisions. Research shows that physicians are making the same employment cost-benefit analysis as most American workers. Physician decisions on where to practice that are outside of the MCARE changes, include both social and economic factors, such as compensation, location, work-life balance, job satisfaction, and access to continuing education.

The data also indicates there were no measurable effects of venue on the availability of physicians across the Commonwealth from the 2003 MCARE changes. That said, the health care landscape in Pennsylvania and the nation has changed significantly in the intervening 17 years.

Overall, the availability of physicians has increased during the period we reviewed. However, there are some year-to-year decreases. For example, the number of physicians decreased by two percent in FY 1999-00. Our data analysis of the year-to-year variations statewide do not yield a conclusion that these decreases were associated with any one variable. Additionally, the number of full-time medical interns and residents on payroll at hospitals appeared unaffected by the 2003 tort reforms.

We were also asked to determine the impact of the proposed venue rule change on the availability of physicians going forward. As I previously noted, there are many variables at work stemming from the MCARE Act. Without isolating the impact of the venue rule, there is no way for the data to forecast the impact of the proposed venue rule change on the availability of physicians.

That said, insurers like predictability and stability. A change in the venue rule will make the medical malpractice insurance market less predictable – as any change would make the market less predictable. A less predictable insurance market could have a destabilizing effect on rates in the near term.

Even so, the available data did not indicate measurable changes to the availability of Pennsylvania physicians in all specialties after the 2003 MCARE Act. Therefore, we would not expect to see a significant decline in the number of Pennsylvania physicians practicing medicine in the Commonwealth if the venue rule changes again.

Further, it is important to remember that outside influences on the availability of physicians have changed dramatically since 2003. This includes the effects of the 2010 Affordable Care Act, the

increase the number of health care systems, national medical malpractice trends, and changes in technology.

Venue in Medical Professional Liability Actions and Availability of Hospital Services

We were also asked to determine the effects of the 2003 changes governing venue on the availability of hospital services across Pennsylvania in addition to the effects of the proposed rule change going forward. Here too, we reviewed data from 1996 to 2018.

Based on our review of the available data, we found the number of general acute care hospitals was declining before and continued after the 2003 change to venue. The data also does not indicate that a change to the venue rule would change this trend.

While general acute care hospitals have been decreasing, the total number of specialty hospitals have steadily increased since FY 1999-00. Further, the total number of hospitals within a health care system has increased in Pennsylvania and nationwide. For example, in 2002, there were 79 general acute care hospitals within a health care system. That number increased to 133 by 2018.

Finally, we found that the available data does not lend itself to a conclusion on the effects of venue on the number of hospitals and services in the Commonwealth.

To illustrate the point, the data shows a decline in general acute care hospitals from 201 in FY 1996-97 to 154 in 2018. The trend does not appear to be affected by the 2003 MCARE Act changes. Additionally, the data shows that Pennsylvania is similar to the nation as a whole. In 1996 there were 5,134 "community hospitals" in the United States. By 2016 there were 4,840.

However, because not all hospitals are the same size, we reviewed data on the number of hospital beds. Here too Pennsylvania is in line with a nationwide trend. In FY 1996-97, the number of hospital beds set up and staffed in Pennsylvania was 37,746. By 2018, that number had fallen to 31,463. Likewise, the number of hospital beds in the United States decreased from 862,352 in 1996 to 780,272 in 2016.

We did find a strong correlation between two insurance provider's medical malpractice rates for OB/GYNs and the number of OB/GYN hospital beds in eight counties – Blair, Chester, Jefferson, Lehigh, Montour, Northumberland, Philadelphia, and Schuylkill. However, in three of those counties, the data shows a positive correlations. That means as medical malpractice insurance rates increased, so did the number of hospital beds. As we know, however, correlation does not necessarily mean causation.

We were also asked to analyze the availability of hospital services over the period. This is a difficult task in that services may be available within a particular health care district, but not in every hospital within that district. This makes it challenging to group hospital services based on any one variable to measure availability within every hospital within the Commonwealth. We reviewed hospital services based on our analysis of counties which have had an increase or decrease in general acute care hospitals from FY 1996-97 through 2018.

We identified 25 counties that had a change in the number of general acute care hospitals. We then analyzed the data on 49 selected services in general acute care hospitals in those counties. From FY 1996-97 to FY 2003-04, in the counties we identified has having changes to the number of general acute care hospitals, 43 hospitals increased services, 25 decreased services, and 21 did not change the number of services provided. For the period FY 2003-04 to 2018, 43 hospitals increased services, 31 decreased services, and 15 did not change the number of services provided. Hospital services, as noted previously varies by health district and facility, so the mere fluctuation cannot be explained based on the total number of available selected services. Therefore, we could not conclude that tort reform had an effect on the number of hospital services within those 25 Counties.

Determination and Compensation for Injuries and Death Resulting From Medical Negligence by Health Care Providers

SR20 also directed LBFC to determine the effects of the 2003 changes regarding venue on the prompt determination of and compensation for injuries resulting from medical negligence. We reviewed data on the cost of professional medical liability actions, pre- and post-tort reform changes, MCARE fund payouts, and national medical liability payments.

We found the available data does not support a conclusion on the effect the change of venue would have on the prompt determination and fair compensation of injuries. Medical malpractice filings decreased by 45 percent from the period 2000-02 of our review. We also found from 2000 to 2017, of all jury verdicts resulting in no award, 23 percent were in Philadelphia County, 13 percent were in Allegheny County, 3 percent in Lackawanna County, and 63 percent were in the remainder of the state.

Additionally, the data show the total CAT Fund/MCARE claims paid from 1996 to 2018 decreased by 22 percent. Prior to 2003, total paid claims increased by 29 percent. After 2003 payments decreased by 44 percent.

According to data obtained from the National Practitioner Data Bank, the value of malpractice payments made on behalf of Pennsylvania physicians increased by 12 percent from 1996 to 2018, but the number of payments decreased by 45 percent. Prior to the 2003 changes, the value of medical malpractice payments increased by 22 percent while the total number of payments decreased by 10 percent. After the 2003 changes, the value of medical malpractice payments decreased by 14 percent, and the total number of payments decreased by 40 percent.

Due to the limited data on medical malpractice case duration, and inconsistencies in reporting between counties, we were unable to determine if medical malpractice cases were promptly concluded or if duration improved over the scope of this study.

We are, however, able to highlight limited data from the National Practitioner Data Bank. This data includes jury verdicts and out-of-court settlements. From 2003 to 2012, the average time between incident and payment in Pennsylvania was 5.6 years. In other high payout states the time was 5.8 years (New York), 4.1 years (Florida), 3.2 years (California), and 5.9 years (New Jersey).

We were also tasked with determining the effects of the proposed venue rule change. While the number of medical malpractice filings and the number of jury awards have decreased since 2003, the available data does not support a conclusion on the effect venue may have had on filings and awards. The decrease in MCARE Fund claims paid shows a similar trend as the number of filings and jury awards; but according to MCARE, it could be due to a delay in claims or other statutory changes that were enacted during tort reform. Further, the most comprehensive source with available data on medical malpractice payments made on behalf of a medical practitioner is the National Practitioner Data Bank. Their data shows that Pennsylvania is part of a national trend post 2003, where the value of payments made on behalf of physicians (MDs and DOs) and number (count) of payments has decreased.

Availability, Cost, and Affordability of Medical Professional Liability Insurance

Finally we were asked to determine the effects of venue on the availability, cost, and affordability of medical malpractice insurance. LBFC staff reviewed information from the *Medical Liability Monitor*, the Pennsylvania Insurance Department's *Annual Statistical Report*, the Pennsylvania Joint Underwriting Association's *Underwriting Manuals*, and the MCARE Fund *Assessment Manuals* in order to determine the effects of the 2003 venue change on the availability, cost, and affordability of medical professional liability insurance.

We found the available data does not support a conclusion that changes in the availability, cost, and affordability of medical professional liability insurance are the result of changes in Pennsylvania law. In fact, the medical malpractice insurance changes may be the result of national trends.

The data also shows that the availability of medical professional liability insurance has increased since 2002. Specifically, the number of insurance companies writing more than $1,000 in direct premiums increased from 89 in 2002 to 144 in 2017. The number of insurance companies writing more than $1 million in direct premiums increased from 39 in 2002 to 70 in 2017. Finally, the market share of the 10 largest medical malpractice insurance companies decreased from 71.6 percent in 2002 to 49.4 percent in 2017 – indicating a more competitive insurance market with more choices for doctors and hospitals.

The data we reviewed from the *Medical Liability Monitor* shows the cost of medical malpractice insurance increased from 1996 through 2007 before declining. However, as I stated earlier, this appears to be in line with a national trend. The total direct premiums charged by medical malpractice insurance companies fluctuated over time from a low of $499 million in 2002, peaking at $768 million in 2006, and declining to $646 million in 2017.

Since 2007, the cost of medical malpractice insurance has decreased and is therefore more affordable than it was previously. However, this change also appears to be part of a national trend.

As noted, the cost of medical malpractice insurance increased in Pennsylvania as well as the nation as a whole from 1997 to its peak around 2007 – depending on the state. In Pennsylvania, medical malpractice insurance rates for internal medicine increased, on average by county, roughly 348 percent from 1996 to 2018. The increase was 450 percent in eleven counties over

the same period. The increase for general surgeons over the period were less than those for internal medicine. The average general surgeon increase by county for the period was 251 percent. OB/GYNs saw an increase of 312 percent over the same period.

From 1996 to 2007, rates increased dramatically. OB/GYNs experienced the largest increase of the three specialties we reviewed – 462 percent. Beginning in 2007, medical malpractice insurance rates began to decline across the specialty types we reviewed. The average decline by county for general surgeons was the largest at 29 percent.

The MCARE Act made significant changes to the law regulating medical professional liability insurance in 2003. However, rates continued to rise as shown by the smaller decline in rates over the full period of 2003 to 2018 than from 2007 to 2018. Rates for doctors practicing internal medicine increased by 9 percent from 2003 to 2018.

We were asked to determine the effect of the venue rule change on the affordability of medical malpractice insurance. Affordability is a difficult term to define. What one person finds to be an acceptable and affordable price for a good or service may not be considered acceptable and affordable to another. We chose two methods to address this issue. First, the data can show us whether the price for medical professional liability insurance increased or decreased over time. In that way we can determine whether the insurance was more affordable or less affordable than it was.

The second is to compare county and specialty rates to a particular benchmark. Because Philadelphia, Allegheny, and Lackawanna Counties are of particular concern to policymakers, we use those counties as our benchmarks by which to compare the rates of other counties in our analysis.

The change in affordability of medical malpractice insurance varied depending on the county and the practice specialty. For example, general surgeons in Montgomery County saw the smallest increase in medical professional liability insurance rates from 1996 to 2018 at 99 percent. On the other hand, doctors practicing internal medicine in eleven counties experienced an overall rate increase of 464 percent over the same period.

The years 1996 to 2007 saw significant increases in medical malpractice insurance rates. The most dramatic was for internal medicine in ten counties where rates increased 626 percent over the period. The smallest increase in rates took place in Mercer and Westmorland Counties for general surgeons at 248 percent.

Post 2007, rates began to decline. However, as in previous periods, the rate of decline was not shared equally across Pennsylvania's counties or medical specialties. Bucks, Chester, and Montgomery County general surgeons realized the largest decrease in rates at 50 percent. While Crawford, Erie, Lawrence, and Mercer County doctors practicing internal medicine only saw declines of 4 percent over the period.

As I noted earlier, the time period from 2003, the year significant changes to Pennsylvania's laws regarding medical malpractice insurance were made, through 2018 also show a disparate

impact among counties and physician specialties. For example, general surgeons in Bucks, Chester, and Montgomery Counties saw their rates decline by 37 percent during the period, while doctors practicing internal medicine in Crawford, Erie, Lawrence, and Mercer Counties saw their rates increase by 20 percent over the same period.

We also compared *Medical Liability Monitor* data from eight other states. The data clearly shows the trend across the country is that rates increased fairly dramatically until 2005, 2006, or 2007 depending on the state, and then began to decline.

The second method by which we analyzed the affordability of medical malpractice insurance was to compare rates to a benchmark. One concern of policymakers is that as medicine has become regionalized, doctors and hospitals will be drawn into the Philadelphia, Allegheny, or Lackawanna County court systems if a health care system has a footprint in those and other counties. For example, in 1996 health care systems in Philadelphia had a presence in Centre, Clarion, Delaware, Franklin, Lehigh, and Montgomery Counties.

To determine the change in affordability of medical malpractice insurance and how closely tied the counties are to Philadelphia, Allegheny, or Lackawanna Counties, we calculated the OB/GYN premium for the counties with health care systems tied to one of the three counties I just mentioned. For example, in 1996, the Centre County medical malpractice premium for an OB/GYN was $12,431. The premium for an OB/GYN in Philadelphia was $25,416. Therefore, the Centre County premium in 1996 was 49 percent of the Philadelphia rate.

The results show that for Centre, Clarion, Franklin, and Lehigh Counties, rates became less affordable and more closely tied compared to Philadelphia. Montgomery County experienced a small decoupling of rates, while Delaware County realized no change. The reason for the phenomenon is that the Philadelphia rate decreased faster than rates in other counties.

For counties that have health care systems tied to Allegheny County, the results are similar. For Beaver, Blair, Centre, Cumberland, Erie, and York Counties, OB/GYN rates either became more closely aligned to Allegheny County rates or exceeded them.

Finally, health care systems in Lackawanna County were only present in one additional county in 1996 – Luzerne County. Again, OB/GYN rates in Luzerne County increased as a percentage of the Lackawanna County OB/GYN medical malpractice rate.

The MCARE Act requires the JUA to offer medical professional liability insurance to health care providers who cannot conveniently obtain medical professional liability insurance through ordinary methods. Therefore, regardless of whether the proposed venue rule change comes to fruition, medical professional liability insurance in Pennsylvania will continue to be offered by the JUA.

We then turn to the question as to whether other insurance companies will continue to participate in the Pennsylvania market if the venue rule changes. As a practical matter, the trend in the number of insurance companies offering more than $1 million in total coverage began prior to the effects of the MCARE Act being realized. Additionally, as noted earlier, isolating the effects

caused by the change in the venue rule from the other changes made in the MCARE Act is problematic given the number of changes made at the same time.

The cost of medical liability insurance is part of a trend that is also clearly established in other states. While it is possible that the changes in the MCARE Act had an effect on the cost of insurance, given the many changes in the law, regulations, and court rules that occurred at the same time, the only way to isolate the effects of venue would be to assume that all of the other changes affected different regions and medical specialties in the same way. This is not an assumption we are comfortable making.

Finally, affordability is rather difficult to define. But we do note that the benefits in the reduction in rates were not realized equally across the state. Only three counties, Bucks, Delaware, and Montgomery, saw their rates improve as a percentage of the rate in Philadelphia. Put another way, these are the only three counties where rates decoupled from Philadelphia.

Conversely, Dauphin County, for example, had premium rates for OB/GYNs that were 49 percent of the Philadelphia rate in 1996. By 2018, Dauphin County rates were 90 percent of the Philadelphia rate – indicating they are now more closely aligned with that county.

In closing, I would like to thank the analysts on this project, Stevi Sprenkle and Shanika Mitchell-St. Jean. Over the course of this study they reviewed thousands of pages of documents and thousands more data points. I would also like to acknowledge the excellent cooperation we received from the staff of the Pennsylvania Department of Health, Pennsylvania Insurance Department and the Pennsylvania Professional Liability Joint Underwriting Association. Finally, we also appreciate the input we received from numerous stakeholder groups and associations with which we met during the course of this study. In particular, we would like to thank those individuals who participated in the hearings held on June 25 and 26, 2019.

With that, I'm happy to address any questions Members of the Committee may have.