

Testimony of Patrick J. Brennan, MD
Senate Resolution 20
Legislative Budget and Finance Committee
June 26, 2019

Good afternoon, Chairman Mensch, Vice Chairman Brewster and members of the committee. My name is Patrick J. Brennan. I am the Chief Medical Officer and Senior Vice President of the University of Pennsylvania Health System as well as a professor of medicine at the Perelman School of Medicine at the University of Pennsylvania. I would like to thank Chairman Mensch and the committee for allowing me to provide testimony regarding the impact of venue for medical professional liability actions on access to medical care in the Commonwealth of Pennsylvania.

On behalf of the University of Pennsylvania Health System and the School of Medicine, I am here to express our strong opposition to the changes to the venue rules applicable to medical liability actions being proposed by the Pennsylvania Supreme Court Civil Procedural Rules Committee.

The proposed rule changes will have a deleterious effect on health care providers in Pennsylvania and ultimately the patients they serve. By permitting venue in counties with no real connection to the underlying cause of action, the proposed changes will facilitate the forum-shopping that contributed to the medical liability crisis which the legislature and the governor's office sought to address via the Medical Care Availability and Reduction of Error Act (MCARE Act) in March, 2002 and to which the Supreme Court responded in 2003 with the adoption of the venue rule currently governing medical malpractice actions and the certificate of merit rule.

The crisis led to liability insurers leaving the market, limiting their insurance offerings and experiencing significant downgrades in their credit ratings. As a result, there was a dramatic decrease in the availability in medical liability insurance and significant increases in the costs associated with professional liability coverage. As reported by the Pennsylvania Medical Society, the state's major medical malpractice insurers increased their premium rates between 80 and 147 percent between 1997 and 2001. This led some providers to retire prematurely or leave the Commonwealth and, in some instances, threatened the financial viability of hospitals and health systems. At Penn, medical students were acutely aware of the crisis and many opted to pursue their residency training out-of-state or not remain in the Commonwealth once their training was completed. I regularly interact with medical students at Penn in small group settings. I can tell you from first hand exposure that students of that era were aware of the liability crisis as they entered medical education and factored it into their choices of specialty training and the location of their residencies, avoiding higher risk specialties and the Philadelphia market. All of these factors jeopardized the availability of comprehensive and high quality health care across the Commonwealth and led the legislature and the Supreme Court to act in 2002 and 2003. It is not in the public's interest to plunge the health care industry in Pennsylvania into crisis once again.

As recognized by the legislature in the MCARE Act, changes in the health care provider system had unduly expanded the reach and scope of the existing venue rules and negatively impacted the training of new physicians and health care services as a whole. Since 2003, health care in Pennsylvania has experienced further consolidation with hospitals and providers throughout the state increasingly merging with or being acquired by health systems in major metropolitan centers.

This has enhanced training opportunities for new physicians as well as access to specialty care for more citizens of the Commonwealth. Given this interim development, the impact of reverting to pre-2003 venue rules in medical malpractice actions would have an even more profound impact than it did prior to the 2003 rule change.

Our Health System is illustrative in that regard with several facilities and numerous health care providers providing patient care in the counties surrounding Philadelphia, and in central Pennsylvania through our merger with Lancaster General Health. If the new venue rule is adopted, simply by virtue of Lancaster General Health being part of a Philadelphia-based health system, cases that involve care exclusively provided in Lancaster County could be brought in Philadelphia County. The impact of requiring an entity such as Lancaster General Health to litigate medical liability claims in Philadelphia cannot be overstated. It not only will dramatically impact the cost of insurance due to Philadelphia County's associated higher risk profile but also will be disruptive to patient care if physicians and other providers are unavailable while participating in proceedings in a distant venue.

The justifications put forward by the Supreme Court Civil Procedural Rules Committee simply do not warrant the adoption of the proposed rule changes and the associated impact on the health care industry. The fact that there has been a reduction in medical malpractice claims filings statewide, and in Philadelphia in particular, which has led to stabilization of the medical liability insurance market, suggests that the current venue rule has had the effect intended by the legislature. The fact that it is working is a reason to keep the rule in place, not eliminate it.

The Supreme Court Civil Procedural Rules Committee also expressed concern about fairness in affording special treatment to a particular class of defendants. Special venue rules reflect the determination of policy makers that in some instances specific parties and certain types of litigation warrant different treatment. In this instance, the legislature determined that there was sufficient basis for concern about the impact of the then-existing venue rule on the health care market that it included a provision creating an Interbranch Commission on Venue in the MCARE Act. The Commission which was comprised of representation from all three branches of government was charged to study the venue issue and make recommendations to the legislature and the Supreme Court. After completing its study, in August, 2002, the Commission recommended the venue rule which is currently in existence. It was overwhelmingly approved by the legislature and subsequently adopted by the Supreme Court.

The Committee's further contention that the rule change is warranted as fewer victims of medical negligence are being compensated appears to be based on unspecified reports, not data. A review of the data available on the claims payments made by the state MCARE Fund does not support this assertion. Indeed, the MCARE Fund claim statistics indicate that both the average number of cases closed with payment and the average case value have been relatively constant. Moreover, this contention is at odds with the insurance industry's experience which has been trending toward increased severity. To the extent the Committee was referencing statistics suggesting a decrease in the number of jury verdicts in favor of claimants, it is important to note that those statistics also indicate a decrease in the overall number of cases being tried to verdict and do not reflect the increasing number of cases resolved via pre-litigation resolution, mediation and other forms of alternative dispute resolution including high/low arbitrations and high/low trial arrangements. At

a minimum, the asserted impact of the current venue rule on claimants warrants analysis of actual data – not anecdotal reports.

We would like to thank the members of this committee for undertaking a comprehensive, fact-based analysis of this issue. We are confident that the study will bear out the concerns we have articulated. The proposed rule change threatens the continued availability and affordability of professional liability insurance, the training and retention of new physicians, and full access to quality health care for the residents of Pennsylvania.

I thank the committee for allowing me to testify today and for evaluating this important issue. I am happy to answer any questions the committee members may have.