



July 1, 2020

The Honorable Andy Beshear
Governor
Commonwealth of Kentucky
700 Capital Avenue
Frankfort, KY 40601

Dear Governor Beshear:

With a united voice, the Kentucky Hospital Association (KHA), Kentucky Medical Association (KMA), and the Kentucky Chamber of Commerce (Chamber) ask you to implement executive and legislative initiatives that encourage a stable and predictable liability environment for Kentucky's health care providers. As the Commonwealth gains ground in its battle with COVID-19, Kentucky's physicians, nurses, and hospitals want to assure that COVID-19-related litigation does not inhibit Kentucky's transition from emergency to recovery. The KHA and KMA join the Chamber's letter to you dated June 12, but felt it necessary to write separately given the unique way the COVID-19 pandemic affects Kentucky's health care providers.

Kentucky's health care heroes have met the unprecedented challenges of COVID-19 with uncommon compassion and valor. Responding to the moment and the Governor's leadership, Kentucky's physicians and nurses sacrificed themselves and their families to save the afflicted and protect the healthy. Hospitals became the front line of the pandemic, fighting a novel disease for which there is currently no cure. Though scientific advances in studying COVID-19 have been extraordinary, the properties of the virus are equally extraordinary and questions still outnumber answers. Despite Kentucky being nearly four months into the pandemic, providers are still treating a disease that the international scientific community does not fully understand. Kentucky's physicians, nurses and hospitals have been quick to adapt to the latest care innovations and data shows that their efforts are working.

Yet, clinical successes are tempered by anxiety of a future of litigating COVID-19-related claims. These fears are premised on legal uncertainty that already encumbers health care providers attempting to plan for recovery. It has been said that laws are developed for citizens to predict the standard of conduct expected of them in

society and for judges to apply those standards in resolving disputes.¹ However, Kentucky's existing laws did not fully anticipate the unprecedented circumstances created by the COVID-19 pandemic. Senate Bill 150 (2020), which you enacted on March 30, 2020, was helpful; however, there are still issues in question that could cause Kentucky's physicians, nurses and hospitals to be sued despite their efforts to follow ever-changing federal and state guidance. For example:

- What is the standard of medical care for treating a novel virus with unparalleled clinical properties?
- What are the legal implications of hard ethical dilemmas caused by the pandemic, such as the allocation of scarce resources?
- Will proximate cause always be a jury question given the ease with which the virus spreads even by asymptomatic persons?

The absence of answers to these questions underscores the vulnerability of Kentucky's health care providers to the uncertainties of litigation.

Unfortunately, if left to the Kentucky's courts to answer these questions, the answers will take years, subject providers to costly litigation, and create uncertainty in the interim that could have a lasting negative effect on health care and Kentucky's recovery. Moreover, courts are not expected to address difficult legal questions in a vacuum. The Executive and Legislative branches are empowered to establish standards of conduct through statute and regulations that define public policy.

The KHA, KMA, and the Chamber propose a discussion with you and your leaders to consider statutory and regulatory solutions designed to bring clarity and stability on the following topics:

- Whether providers who follow the Commonwealth's crisis standards of care and pandemic planning guidelines have an absolute defense to liability for COVID-19-related claims.
- Whether Kentucky's statutes and regulations can better define how professional and institutional duties change in the time of a declared emergency.
- Whether legal interventions can better empower and encourage courts to dismiss nuisance claims or allegations related to a declared emergency.
- Whether there are circumstances in which limited legal immunity may be appropriate for COVID-19-related claims or allegations. This topic is presented

¹ Holmes, O., "The Path of the Law." 10 Harvard Law Review 457 (1897).

solely for completeness in the discussion since many states have included immunity in their response to the COVID-19 emergency.²

Representatives of the KHA, KMA, and Chamber would be very grateful for an opportunity to meet with you and your leaders to frame the concerns held by Kentucky's health care providers and discuss solutions to encourage recovery.

One lesson we have learned from the pandemic is that reaching the other side of this disease requires us to work together. Our organizations appreciate the partnership we have had with your office throughout this emergency; and we look forward to the opportunity to continue that collaboration to ensure that COVID-19-related litigation is as fair and predictable as possible.

Sincerely,



Nancy Galvagni
President and CEO
Kentucky Hospital Association



Patrick Padgett
Executive Vice President
Kentucky Medical Association



Ashli Watts
President and CEO
Kentucky Chamber of Commerce

Cc: The Honorable Robert Stivers, II
The Honorable David Osborne
The Honorable Joni L. Jenkins
The Honorable Morgan McGarvey

² At least ten (10) states and the District of Columbia enacted some form of immunity or limited liability in response to the COVID-19 pandemic: Alaska, District of Columbia, Massachusetts, New Jersey, New York, North Carolina, Oklahoma, Utah, Wisconsin, and Wyoming.