

COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA

In re: LOUISIANA HEALTH SERVICE & INDEMNITY COMPANY D/B/A BLUE CROSS AND BLUE SHIELD OF LOUISIANA PLAN OF REORGANIZATION REGARDING THE CONVERSION FROM A MUTUAL INSURANCE COMPANY TO A STOCK INSURANCE COMPANY

Blue Cross Blue Shield of Louisiana’s Proffer Regarding the Public Hearing

I. INTRODUCTION.

At the January 17, 2024 status conference, the Hearing Officer requested briefings regarding the scope of the hearing and the limitations on cross examination at the public hearing for the Plan of Reorganization Regarding the Conversion from a Mutual Insurance Company to a Stock Insurance Company scheduled for February 14th and 15th, 2024 (the “Public Hearing”). Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana (“BCBSLA”) submits this outline in response. In sum, policyholders and members of BCBSLA should not be permitted to cross examine witnesses. In addition, the presentation of evidence, testimony and documents should be limited to material and relevant evidence and testimony that contain the basic indicia of reliability and authenticity regarding the proposed reorganization and basic evidentiary privileges should be protected at the Public Hearing. Lastly, BCBSLA proposes an orderly sequencing to the presentation of witnesses in the interests of efficiency and fairness.

II. BACKGROUND.

The starting point should be Rule No. 1 and its provisions. Rule 1 states that formal rules of pleading and evidence need not be observed.¹ But that is not the end of the discussion. Rule 1

¹ In administrative hearings, although the usual rules of evidence do not apply, the findings of the agency must be supported by competent evidence. *Board of Ethics Matter of Monsour*, 16-1159 (La. App. 1 Cir. 6/21/17), 233 So.3d 625 (2017 WL 2692679).

places great discretion with the hearing officer regarding the introduction of evidence, hearsay and authentication of documents. With that in mind, BCBSLA proffers that certain limitations regarding the presentation of evidence and testimony should be followed regarding materiality, relevance, reliability and authenticity, and evidentiary privileges. For some of the privileges, BCBSLA provides cross references to the Louisiana Code of Evidence as a resource to the Hearing Officer. BCBSLA requests that the Hearing Officer impose the following guidelines (guard rails) for the Public Hearing.

III. POLICYHOLDERS SHOULD NOT BE PERMITTED TO CROSS EXAMINE WITNESSES.

The Hearing Officer has the authority under R. S. 22:236.4(C) to establish the rules for the hearing. BCBSLA submits that the Hearing Officer should use his authority provided under R.S. 22:236.4(C), to bar policyholders and members of BCBSLA from cross examining witnesses at the public hearing.

The purpose of the hearing is for BCBSLA to present its evidence and reasons why it should be permitted to convert from a mutual insurance company to a stock insurance company. To that extent, a two-day public hearing has been set. At the Public Hearing, BCBSLA will present evidence and testimony to support its request. The Louisiana Department of Insurance (the “Department”) is tasked with representing the interest of policyholders and members of BCBSLA. As such, the Department will present evidence, witnesses and testimony on these topics. The Department will also be able to cross examine the witnesses presented by BCBSLA. To allow the policyholders and members to likewise cross examine the witnesses would be unnecessarily duplicative and time consuming.

IV. MATERIALITY AND RELEVANCE.

The purpose of the upcoming public hearing is to provide the Hearing Officer and the Louisiana Commissioner of Insurance with additional information that BCBSLA considers necessary for the Commissioner to approve the reorganization of BCBSLA from a mutual insurance company to a stock insurance company. Conversion from a mutual insurance company to a stock insurance company is permitted under Louisiana law and the Commissioner of Insurance has the authority to approve the Plan of Reorganization. As such, testimony at the Public Hearing should be limited to that which is relevant to the Commissioner's determination whether to approve BCBSLA's conversion from a mutual insurance company to a stock insurance company.

Not only should the testimony that is presented and the evidence be relevant it should also be material. Evidence is material if the proposition tends to prove or disprove the matter at issue. McCormick on Evidence § 185 (3ed. 1984). At this Public Hearing, the material issue is approval of the reorganization.

V. RELIABILITY AND HEARSAY.

After having set the limits of materiality and relevance, consideration should be given to whether the testimony have some indicia of reliability. To that extent, documents created by individuals or counsel should not be admitted into evidence without testimony to establish their genuineness and factual basis.² The Public Hearing is not a time to engage in speculation. The general rule is that even though hearsay is admissible at an administrative hearing, it is not competent evidence to support an administrative finding upon judicial review. Rather, when considering whether to admit hearsay, the Hearing Officer must engage in a deeper analysis of

² “[W]e conclude that hearsay evidence, such as the officer's sworn statement, which is considered by the DPSC in an administrative hearing for review of the suspension of a driver's license pursuant to LSA-R.S. 32:661 may qualify as competent evidence to support its decision, provided that the evidence has some degree of reliability and trustworthiness and is of the type that reasonable persons would rely upon.” *Chaisson*, 97–1225 at pp. 12–13, 708 So.2d at 382; *Brouillette*, 589 So.2d at 533.

whether the information is reliable and is something that would normally be relied upon. Thus, while hearsay evidence may be presented and admitted, the party proposing the evidence should be required to provide some indicia of reliability.

VI. PRIVILEGES.

In addition, various evidentiary privileges should be maintained as stated in the Louisiana Code of Evidence. Specifically, the following privileges should be recognized and maintained because they are established as a matter of public policy.

The attorney client and work product privileges should be preserved. LCE art. 506. Discussion of any trade secrets held by the parties should be protected. LCE art. 513.

VII. LAY OPINION TESTIMONY.

While the rules of evidence are relaxed for administrative hearings, they are not so relaxed as to allow non-expert opinions into evidence.³ Consequently, should any lay witness or Intervenor attempt to present expert testimony, it should not be considered.

VIII. TIME MANAGEMENT.

The Public Hearing is set for two days. BCBSLA, as the party bearing the burden of proof, will present its evidence and testimony first. BCBSLA estimates that it will have six witnesses. BCBSLA suggests that it be allowed to present all of its evidence and direct testimony before cross examination.

In addition to the BCBSLA witnesses, Elevance Health, the Department, and the Intervenors intend to present testimony. We understand that the Department will present two expert witnesses. Similarly, BCBSLA understands that Elevance Health will present witnesses. And it remains unclear how many witnesses the remaining Intervenors will present.

³ *Lingo v. State, Department of Employment Security*, 364 So.2d 1367 (La. App. 3 Cir. 1978).

Given the number of potential witnesses it is suggested that cross examination of each witness be limited so as to avoid redundant or duplicative testimony. Further, it is suggested that the Hearing Officer not allow any Intervenor to recall a witness to testify on direct examination if they have already been called on direct by another party.

IX. PROPOSED SCHEDULE.

If the Hearing Officer permits the Policyholder Intervenors to cross-examine witnesses, BCBSLA proposes the following sequence in an effort to maximize efficiency and complete the hearing in a reasonable amount of time.

Direct examination:

A. BCBSLA Witnesses

1. BCBSLA proposes that it present its three identified lay witnesses (Dr. I. Steven Udvarhelyi, Darrell Langlois, and Tim Barfield) on direct examination with cross examination reserved for after the completion of all of the direct testimony.
2. BCBSLA has identified three expert witnesses: Vanessa Claiborne of Chaffe & Associates, Inc., Brian Collender of Deloitte Consulting, LLP, and a representative of Cain Brothers. BCBSLA will present each expert individually on direct after it has presented the three lay witnesses. Cross examination of the experts will be reserved for after the completion of all direct testimony of all presenting parties.

B. Elevance Health Witnesses

1. BCBSLA proposes that Elevance Health present its witnesses second. Cross examination will be reserved until after the completion of all of the direct testimony.

C. Louisiana Department of Insurance Witnesses

1. The Louisiana Department of Insurance has identified two direct witnesses. BCBSLA proposes that these witnesses be presented on direct examination third.

D. Cross Examination of BCBSLA, Elevance Health and Louisiana Department of Insurance Witnesses and Experts

1. Upon conclusion of the direct testimony of the BCBSLA witnesses, Elevance Health witnesses and Department witnesses, a panel consisting of the three BCBSLA lay fact witnesses will be provided for cross examination. Cross examination of the panel would proceed in the following order: Elevance Health; the Department; and the Policyholder Intervenor (assuming the Hearing Officer permits them to cross examine witnesses). A brief redirect by BCBSLA would follow, if necessary.
2. BCBSLA suggests that cross examination of its three experts occur one at a time following the cross examination of its lay fact witnesses. Cross examination will occur in the following order: Elevance Health; the Department; and the Policyholder Intervenor (assuming the Hearing Officer permits them to cross examine witnesses). A brief redirect by BCBSLA would follow, if necessary.
3. Following the cross examination of the BCBSLA witnesses, the Elevance Health fact witnesses would be presented as a panel for cross examination in the following order: BCBSLA; the Department; and the Policyholder Intervenor (assuming the Hearing Officer permits them to cross examine witnesses). A brief redirect by Elevance Health would follow, if necessary.
4. The witnesses for the Department would be cross examined individually in the following order: BCBSLA; Policyholder Intervenor; and Elevance Health.

E. Policyholder Intervenor

1. BCBSLA suggests that Policyholder Intervenor may proceed with direct examination of witnesses at this time.
2. BCBSLA suggests that cross examination of these witnesses occur once each has testified on direct in the following order: BCBSLA; the Department; and Elevance Health.

F. Public Comment

1. Given the nature and extent of the expected testimony, the Hearing Officer should consider imposing time limits on public comments and requiring those making oral public comment be in person. Public comments will be included in the record although they are not evidence.

X. CONCLUSION.

The evidence and testimony that is considered should be both relevant and material. The introduction of hearsay should be limited and any hearsay that is considered must be supported by

other indicia of reliability. Speculation should not be considered. The Hearing Officer should limit cross-examination.

Respectfully submitted this 30th day of January, 2024.

McGLINCHEY STAFFORD, PLLC

/s/ Juston M. O'Brien

Rodolfo J. Aguilar, Jr. (Bar Roll No. 1192)
Ronnie L. Johnson (Bar Roll No. 20238)
Juston M. O'Brien (Bar Roll No. 26447)
Brad M. Barback (Bar Roll No. 35642)
Zelma Murray Frederick (Bar Roll No. 31459)
301 Main Street, 14th Floor
Baton Rouge, LA 70801
Telephone: (225) 382-9000
Facsimile: (225) 343-3076
rudyaquilar@mcglinchey.com
rjohnson@mcglinchey.com
jobrien@mcglinchey.com
bbarback@mcglinchey.com
zfrederick@mcglinchey.com

*Attorneys for Louisiana Health Service &
Indemnity Company d/b/a Blue Cross and
Blue Shield of Louisiana*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2024, a copy of the above and foregoing has been sent via electronic mail to the following:

Counsel for the Louisiana Department of Insurance

James David Caldwell
Claire Lemoine
Louisiana Department of Insurance
1702 N. 3rd Street
Baton Rouge, LA 70802
david.caldwell@ldi.la.gov
claire.lemoine@ldi.la.gov

David S. Rubin
Josh McDiarmid
George Holmes
Butler Snow LLP
445 North Boulevard, Suite 300
Baton Rouge, LA 70802
david.rubin@butlersnow.com

josh.mcdiarmid@butlersnow.com
george.holmes@butlersnow.com

Counsel to Elevance Health, Inc. and ATH Holding Company, LLC

Andrew R. Lee
Jones Walker LLP
201 St. Charles Avenue
New Orleans, LA 70170
Telephone: (504) 582-8664
Fax: (504) 589-8664
alee@joneswalker.com

Eric P. Morvant
Jones Walker LLP
445 North Boulevard, Suite 800
Baton Rouge, LA 70802
emorvant@joneswalker.com

Robert B. House
Jones Walker, LLP
3100 North State Street, Suite 300
Jackson, MS 39216
rhouse@joneswalker.com

Jared R. Danilson
Emily Z. Campbell
Faegre, Drinker Biddle & Reath LLP
300 North Meridian Street, Suite 2500
Indianapolis, Indiana 46204
jared.danilson@faegredrinker.com
emily.campbell@faegredrinker.com

Counsel for Policy Holder Intervenor

John S. Bradford
4431 West Prien Lake Road
Lake Charles, LA 70605
Telephone: 337-802-3377
jsbradford@ssvcs.com

Henry W. Kinney
Kinney, Ellinghausen & DeShazo
1250 Poydras Street, Suite 2450
New Orleans, LA 70113
hkinney@kinneylaw.com

/s/ Juston M. O'Brien
Justin M. O'Brien