The Hospital + Healthsystem Association of Pennsylvania

Leading for Better Health

Statement of The Hospital and Healthsystem Association of Pennsylvania

For the

Legislative Budget and Finance Committee
A Joint Committee of the Pennsylvania General Assembly

Presented 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, or HAP. HAP advocates for approximately 240 member organizations across the commonwealth, as well as for the patients and communities they serve.

HAP appreciates the opportunity to provide comments to the Legislative Budget and Finance Committee to assist in the preparation of a report evaluating the proposed changes to the Pennsylvania Supreme Court's Rules of Civil Procedure that would repeal medical professional liability venue reforms adopted during 2002.

Pennsylvania physicians and hospitals—and, most importantly, health care consumers—would be adversely affected by such a rule. By allowing venue selection in counties with little relation to the underlying cause of action, the trial bar could shop for verdict-friendly venues in which to file their suits. This would again lead to higher premiums for medical liability insurance, make Pennsylvania less attractive to physicians considering practicing in the state, increase medical costs, and adversely impact access to care for consumers. The proposal is not in the public interest.

During my testimony today, I will provide general background about this issue and explain why the Supreme Court should not implement the proposed rule change.

As a result of the passage of the Medical Care Availability and Reduction of Error (MCARE) Act, both the legislature and the Supreme Court adopted reforms that reduced the number of malpractice claims brought in Pennsylvania, especially in Philadelphia and Allegheny Counties. This was accomplished, to some degree, by limiting venue for medical liability actions to the county "in which the cause of action arose." Previously, expansive venue rules allowed medical liability plaintiffs to sue defendants almost anywhere they did business, even if the alleged malpractice occurred elsewhere.

Even with these reforms, however, Pennsylvania remains—based on 2017 data—the third highest-cost state for insurance premiums on a per capita basis.

The Civil Procedural Rules Committee of the Supreme Court now proposed late last year an amendment to the rules that limits venue in medical professional liability actions to the county in which the cause of action arose.

While HAP believes that patients injured during medical negligence should be compensated, HAP does not believe that a rule change is justified based on the explanation and limited data provided by the Civil Procedural Rules Committee around the proposed rule.

The proposal does not acknowledge the changes to the health care system between 2003 and 2019, which could amplify the negative impact of the rule change, nor the obvious financial consequences of such a change.

Changes to the health care delivery system that have taken place since the early 2000s include: hospital consolidations, workforce shortages, improvements to medical liability insurance availability, and escalating cost pressures.

- ***Mergers and consolidations:*** Since 2000, the number of hospitals affiliated with health systems has risen by 88 percent[1]. Because many hospitals that had been independent prior to the current venue policy are now affiliated with health systems, lawyers would have access to a much wider footprint of the state when shopping for plaintiff-friendly venues. For example, one Pennsylvania health system operates facilities within 18 counties.

- ***Worsening provider shortages:*** Based upon state-level projections of physician supply and demand performed by the U.S. Department of Health and Human Services' Health Resources and Services Administration, Pennsylvania will face a deficit of approximately 1,000 primary care physicians by 2025, or about 10 percent less than the estimated demand of more than 10,000 primary care physicians needed to serve Pennsylvania's population[2]. Rural areas are particularly vulnerable to losing providers given the disproportionate burden they face around statewide physician shortages.

- ***Medical liability insurance costs and availability:*** The impact of increased medical liability costs could cause closures of critical units, like obstetrics, which can inhibit adequate access to care. For example, between 1999 and 2000, median medical liability awards increased nearly 43 percent[3] and the average award for neurologically impaired infants

[1]Hospital Consolidation: Longitudinal Trends of Pennsylvania's Independent and System-Affiliated General Acute Care Licensed Hospitals." HAP's 2018 analysis of Pennsylvania Department of Health, Division of Health Informatics' Annual Hospital Survey data, 2000 through mid-Q4 2017.
[2]Based upon state-level projections of physician supply and demand performed by the U.S. Department of Health and Human Services' Health Resources and Services Administration

($1 million nationally during 2003) reached $100 million in Philadelphia[4]. Not surprisingly, between 1999 and 2005, Pennsylvania saw a 17 percent decrease in obstetrics units[5]; after the venue rules changed, the number of staffed obstetric beds began to increase, expanding access once more. The increasing burden of the cost of medical liability insurance diverts critical resources from being reinvested into infrastructure and innovation.

A recent report by Milliman, which was prepared to evaluate the impact of the proposed change to the venue rule, shows that:

- The current average statewide medical professional liability (MPL) costs and insurance rates for physicians in Pennsylvania will likely increase by 15 percent[6]
- Many individual counties will likely see increases in physician MPL costs and rates of 5 percent, while counties surrounding Philadelphia will likely see larger increases of 45 percent[7]
- High-risk physician specialties, such as Obstetrics/Gynecology and General Surgery, will likely experience additional cost and rate increases of 14 percent above and beyond the increases stated above

Notably, the report explained that these projected increases are likely understated, as the analysis did not account for several additional items that could increase MPL costs and rates, including the impact of health care provider consolidation, uncertainty in pricing, and an increased incentive to bring smaller borderline claims. Simply put, any physician, other licensed professional or health system that can be sued in Philadelphia or other high-cost jurisdictions will need to be insured as if they practiced all the time in Philadelphia.

- ***Fiscal insecurity of today's hospitals, especially in rural areas:*** An analysis of Pennsylvania Health Care Cost Containment Council financial data indicates that, during 2018, more than a third (39%) of Pennsylvania's hospitals reported negative operating margins; among the commonwealth's rural hospitals, more than half reported negative operating margins. Keep in mind that while many of our hospitals are doing well, providing excellent care and in possession of state-of-the-art health care infrastructure, Medicaid only

[3]Prepared statement of Shelby L. Wilbourn, MD, representing the American College of Obstetricians and Gynecologists, on "Patient Access Crisis: The Role of Medical Litigation," a joint hearing before the Committee on the Judiciary and the Committee on Health, Education, Labor, and Pensions (Senate Hearing 108-253) on "Examining the Status of Patient Access to Quality Health Care, Focusing on the Role of Medical Litigation and Malpractice Reform." 2/11/2003. Last accessed 1/24/2019.
[4]Ibid.
[5]HAP analysis of Pennsylvania Department of Health, Division of Health Informatics Annual Hospital Survey data, 1999 through 2005.
[6]Milliman Research Report, Review of Proposed Amendment of Pennsylvania Rules of Civil Procedure Nos. 1006, 2130, 2156, and 2179: Governing Venue in Medical Professional Liability Actions in Pennsylvania February 18, 2019, Thomas Ryan, Principal, FCAS, MAAA Carissa Lorie, Analyst
[7]Ibid.

reimburses approximately 80 cents on the dollar of hospital costs, and Medicare reimburses at slightly below cost. Hospitals still provide three-quarters of a billion dollars in uncompensated care to the state's uninsured and those who cannot pay high deductibles. To offset higher medical liability coverage costs, hospitals will need to divert money from a wide range of operating and infrastructure needs, which may have a chilling effect on health care innovations. The health care ecosystem in hospitals is complex, costly, and in many locations, fragile; a venue change driven by lawyers on behalf of complainants may up-end that ecosystem in ways that truly affect access to care.

We were recently made aware of some arguments that suggest that since hospitals more and more frequently employ physicians, there is no risk of physicians limiting practice or leaving the state, because all costs will be borne by hospitals. As I stated just a minute ago, many, many hospitals manage the costs they have today at a seemingly insurmountable burden with government payors reimbursing well below actual costs. Adding massive liability insurance cost increases, whether imposed by a separate carrier or through self-insurance, would only make that situation far more serious. Further, just as hospitals have increasingly joined or become health systems themselves, a number of physician practices have sought to grow and conduct business in multiple counties, which means the venue change proposed will impact their financial prospects separately and distinctly from a hospital.

Available data does not support the conclusion that the current venue rule should be rescinded. The reduction of court filings of medical malpractice actions demonstrates that the tort reform measures enacted by the legislature and the Supreme Court are working.

Specifically, during 2002, the percentage of medical liability cases filed in Philadelphia represented 44 percent of all filings throughout the commonwealth. Of those reaching jury verdicts in Philadelphia during the period of 1999–2001, 41 percent yielded plaintiffs financial awards—a rate that is more than double the national average of 20 percent—and half of such verdicts exceeded $1 million[8].

By 2003, after enacting venue rule reform, filings in Philadelphia fell substantially and, during 2017, Philadelphia's cases accounted for 28 percent of the 1,449 filings statewide[9].

Under the 2002 rule, however, patients can still bring medical liability suits, but such cases now must be tried in the jurisdiction where the alleged liability occurred. This 2002 reform did not deprive a claimant of the ability to access the courts to right a wrong. It only restricted where that case could be brought.

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[8]Bovbjerg RR and Bartow A. Understanding Pennsylvania's Medical Malpractice Crisis: Facts about Liability Insurance, the Legal System, and Health Care in Pennsylvania. Pew Charitable Trusts Project on Medical Liability in Pennsylvania. 2003. Last accessed: 1/25/2019.
[9]Pennsylvania Medical Malpractice Filings, 2000-2017. Unified Judicial System of Pennsylvania, Medical Malpractice Statistics website. Last updated 9/20/2018. Last accessed: 2/14/2019.

There is no evidence suggesting that individuals obtaining care in any Pennsylvania county lack access to courts in which to file malpractice claims, nor is there evidence that counties where malpractice actions are currently being litigated are not rendering fair results. Many counties experienced increased filings after the 2002 reforms went into effect. Further, tenuous or frivolous claims were themselves a target of the 2002 reforms—e.g. the Certificate of Merit requirement—and can explain the overall drop in filings. Additionally, our members tell us that over the past decade or more, common practice now is to settle larger numbers of claims pre-litigation.

Moreover, the Patient Safety Authority, created at the time of the reforms, publishes statistics which should be addressed here. Our members point out that reporting of outcomes to the Authority goes far beyond medical error, and the number of true medical error incidents are far exceeded by the current court filings, so any reference to the Authority's overall statistics as proof of uncompensated harm from professional negligence is highly misleading. There is no Recommendation that the court venue rule be changed.

Logic and Fairness Dictate that the Venue rules remain in medical liability matters.

There are logical and ethical arguments for the current rule. Where negligence is alleged to occur, where witnesses are located, where health care professionals and the patient may reside; this ought to be the place where a trial occurs. Further, our state faced a medical liability insurance crisis of epic proportions only 16 years ago. Reforms, including this one, enacted at that time, should not be repealed simply because the crisis has abated and the reforms were successful. Such a move flies in the face of logic.

Conversely, trying a case in a distant jurisdiction which has no obvious connection to the matter is illogical and unfair. For one, it encourages forum shopping, the practice of picking the friendliest jurisdiction to large recoveries. On this point, some may argue the doctrine of forum non conveniens, or inconvenient forum, will eliminate the threat or temptation of forum shopping. This is not true. All such disputes over convenience, if this bright line venue rule does not continue, will need to be argued, briefly and fully litigated before a case can go forward, driving up costs. Furthermore, anyone who has handled such a dispute knows it is a high burden for a movant to prove the forum is inconvenient. Perhaps a health system in Allegheny County, where the alleged act occurred, could not be brought into court in Philadelphia, but there are cases holding that even hundreds of miles are not an inconvenience, let alone 50 or 100 miles.

Finally, the proposal, if adopted, would represent a departure from the past practice of building consensus on rule changes that could have a significant public policy impact.

The Interbranch Commission on Venue, created under Act 13 of 2002, was comprised of appointments from the legislative, executive, and judicial branches of government. A majority of the members of the commission recommended that medical liability cases only be filed in the county in which the cause of action arises. The Pennsylvania Supreme Court adopted the commission's recommendation, as did the General Assembly through Act 127 of 2002. In short, the current venue policy was effectively built by three separate branches of government, while the current proposal to reverse that policy is a unilateral move that sets a dangerous precedent—one that may undermine future opportunities for interbranch collaboration.

For all of the reasons stated, HAP believes that the Supreme Court should not implement the proposed rule change. It also is worth noting that HAP has been joined by more than 20 health care provider and advocacy groups in opposing this change. A joint comment letter sent to the Supreme Court's Civil Procedural Rules Committee reflecting this opposition also is attached to the testimony, and incorporated by reference.

HAP appreciates the opportunity to provide comments to the Legislative Budget and Finance Committee, and we hope that the information we provided will assist you as you draft your report.

We are confident that your report will find that changes to the venue rule are not in the public interest, and would again lead to higher premiums for medical liability insurance, make Pennsylvania less attractive to physicians considering practicing in the state, increase medical costs, and adversely impact access to care for consumers.