



The Hospital + Healthsystem
Association of Pennsylvania

Leading for Better Health

February 21, 2019

Karla M. Shultz, Counsel
Civil Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635

RE: Proposed Amendments to Rules of Civil Procedure Governing Venue in Medical Professional Liability Actions

Dear Ms. Shultz:

I am writing on behalf of The Hospital and Healthsystem Association of Pennsylvania (HAP), which represents approximately 240 member institutions, to provide input about proposed changes to the Rules of Civil Procedure that would serve to 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 in counties with little relation to the underlying cause of action, claimants 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.

This letter will provide general background about this issue, offer several observations relating to the proposed rule change, and provide specific recommendations relating to next steps. HAP has extensive data to further elucidate the points below and looks forward to opportunities to provide more detailed information.

Background: As a result of the passage of the Medical Care Availability and Reduction of Error (MCARE) Act, Act 13 of 2002, 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 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.

The MCARE Act established an Interbranch Commission on Venue, which studied how venue issues were driving unreasonable medical liability insurance rates and issued a report to the General Assembly. Based upon the report of this commission, on October 17, 2002,



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the legislature enacted Act 127 of 2002, which provided that medical liability cases shall be filed only in the county where the “cause of action arose.” Later, in early 2003, the Supreme Court, by per curiam order, promulgated amendments to the Rules of Civil Procedure (Rule 1006) adopting the language of Act 127.

These reform efforts are widely seen as the most important step around Pennsylvania’s efforts to address the medical liability insurance crisis, substantially reducing medical malpractice filings statewide. Other reforms, such as requiring plaintiffs to obtain a certificate of merit to pursue a professional liability claim, likely had an impact.

Even with these reforms, Pennsylvania remained the third highest-cost state for insurance premiums on a per capita basis during 2017.

Proposed Rule Change: The Civil Procedural Rules Committee now is proposing an amendment to Rule 1006 to rescind subdivision (a.1), which limits venue in medical professional liability actions to the county in which the cause of action arose. Conforming and stylistic amendments also are being proposed to Rules 2130, 2156, and 2179.

The Rules Committee appears to argue that the Supreme Court made a special exception when it prohibited venue shopping during 2003 because there was a crisis, but that the system has since stabilized and the exception is no longer warranted. HAP believes this assumption is faulty and shortsighted because, among other things, it ignores fundamental changes to Pennsylvania’s health care market during the interim 16 years, such as hospital system consolidation, provider shortages, and an uncertain liability insurance environment.

Observations: 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 data provided by the Civil Procedural Rules Committee around the proposed rule.

- 1) The data on which the committee relies 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. A decrease of filings also reflects increases around alternative resolution strategies, like arbitration and mediation.

During 2000–2002, the percentage of medical liability cases filed in Philadelphia (1,204) represented 44 percent of all filings throughout the commonwealth (2,733).¹ Of those reaching jury verdicts in Philadelphia during the period of 1999–2001, 41 percent yielded plaintiffs financial awards² (a rate that is more than double the national

¹ [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.

² [Medical Malpractice Jury Verdicts: January 2002-July 2003](#). Unified Judicial System of Pennsylvania, [Medical Malpractice Statistics website](#). Last updated: 3/22/06. Last accessed: 2/14/2019.



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average of 20 percent³), and half of such verdicts exceeded \$1 million.⁴ By 2003, after enacting venue rule reform, filings in Philadelphia fell to 577 and, during 2017, Philadelphia's cases accounted for only 28 percent of the 1,449 filings statewide (a 66 percent drop in Philadelphia filings from 2002 to 2017).⁵

Under the 2002 rule, patients can still bring medical liability suits, but such cases now must be tried in the jurisdiction where the alleged liability occurred.

- 2) The committee has not provided any data demonstrating that the current rule deprives alleged victims of access to the courts**—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.
- 3) The data provided by the committee is incomplete because it does not include claims in which litigation was not filed**—The Supreme Court data tracks only those medical professional liability claims that were filed in court and tried to verdict. The data does not include those claims where litigation was not filed or those claims which were resolved outside of court. These claims must be taken into account before assuming that the alleged “special treatment” of medical liability claim is no longer warranted.
- 4) Patient safety and transparency reforms have impacted quality of care and number of claims**—As part of the medical liability and patient safety reform efforts during the early 2000s, the state created the Patient Safety Authority. Hospitals now are required to report serious events and incidents to the Authority to advance strategies that make the health care system safer; hospitals are subjected to substantial financial penalties for failure to report such incidents. This enhanced awareness has made health care providers much more focused around quality improvement efforts to eliminate patient harm, which may well have reduced potential malpractice claims. Relatedly, as mounting research suggests that hospitals issuing formal apologies reduces malpractice filings,⁶ Pennsylvania joined 30 other states to adopt a 2013 “apology law” enabling physicians to apologize to patients after a poor medical outcome without fear that it will be used against them in court.

³ 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.

⁴ HAP's analysis of the Unified Judicial System's medical malpractice 2000-2003 jury verdict data indicates that 50% of 83 of Philadelphia's 166 plaintiff-awarding verdicts exceeded \$1 million.

⁵ [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.

⁶ Robbenolt, JK. “[Apologies and medical error](#).” *Clinical Orthopaedics and Related Research*. Vol. 467, 2 (2008): 376-82.



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5) 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—

The committee does not acknowledge changes to the health care delivery system that have taken place since the early 2000s, such as 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.⁷ Because many hospitals that had been independent prior to the current venue policy are now affiliated with health systems, they 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. 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 and the average award for neurologically impaired infants (\$1 million nationally during 2003) reached \$100 million in Philadelphia.⁸ Not surprisingly, between 1999 and 2005, Pennsylvania saw a 17 percent decrease in obstetrics units; after the venue rules changed, the number of staffed obstetric beds began to increase, expanding access once more.⁹ The increasing burden of the cost of medical liability insurance diverts critical resources from being reinvested into infrastructure and innovation.

⁷ "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.

⁸ 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.

⁹ HAP analysis of Pennsylvania Department of Health, Division of Health Informatics Annual Hospital Survey data, 1999 through 2017.



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The attached 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
- 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
- High-risk physician specialties, such as Obstetrics/Gynecology (OB/Gyn) 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.

- ***Fiscal insecurity of today's rural hospitals:*** An analysis of Pennsylvania Health Care Cost Containment Council financial data indicates that, during 2017, more than a third (35%) of Pennsylvania's hospitals reported negative operating margins; among the commonwealth's rural hospitals, more than half (55%) reported negative operating margins.¹⁰ Even as Pennsylvania's rural hospitals are working to implement telemedicine, expanded venue-shopping opportunities for plaintiffs under the proposed venue rules would discourage the adoption of this technology. Relatedly, to offset higher medical liability coverage costs, hospitals will need to divert money from a wide range of infrastructure needs, which may have a chilling effect on health care innovations.

6) 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.

¹⁰ Based on HAP's analysis of "Financial, Utilization, and Payer Data by Facility, FY 2017 Volumes I, II, and III." Pennsylvania Health Care Cost Containment Council.



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Recommendation: For all of the reasons mentioned above, the Supreme Court should not implement the proposed rule change.

At a minimum, any potential changes to the venue rules should only be made after careful evaluation and study of the potential impact of the rule changes, and a determination by all three branches of government that the change would promote the public interest. Issues that should be carefully examined include:

- Plaintiffs' access to courts for medical liability actions
- The potential impact of the repeal of the rule for high-risk specialties around medical liability insurance costs and the availability of care
- The potential impact of the repeal upon the voluntary market and the Joint Underwriting Association around terms of both rates and availability
- The ability of courts in Allegheny and Philadelphia Counties to handle the potential increase in litigation
- The impact of the rule change around medical liability insurance rates, the cost, and availability and quality of health care

We appreciate the recent decision of the Supreme Court to delay a decision on this matter pending the completion of a study by the Joint State Government Commission (JSGC). We look forward to providing additional information to assist in the JSGC's evaluation of this issue.

Thank you for the opportunity to comment. If you have any questions or comments relating to this letter or HAP's position about the proposed rule change, please feel free to contact [me](#) directly at (717) 561-5314 or [Jeff Bechtel](#), senior vice president, health economics and policy, at (717) 561-5325.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andy Carter', is written over a light blue horizontal line.

Andy Carter

President and Chief Executive Officer