The Hospital + Healthsystem Association of Pennsylvania

*Leading for Better Health*

Statement of
**The Hospital and Healthsystem Association of Pennsylvania**

for the
**Majority Policy Committee**
**Pennsylvania House of Representatives**

submitted by
**Andy Carter, President and Chief Executive Officer**

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The Hospital and Healthsystem Association of Pennsylvania (HAP) advocates for 235 member hospitals as well as for the patients and communities they serve. We appreciate the opportunity to share our perspective as you evaluate the Pennsylvania Supreme Court's recent order to amend the Rules of Civil Procedure relating to venue of medical professional liability actions.

As you know, during 2002, all three branches of Pennsylvania government worked together to develop and implement a framework that requires medical liability suits to be considered in the county in which the alleged harm occurred. For two decades, this framework has ensured a fair legal process and compensation for injured patients, while ensuring that health care remains accessible to all Pennsylvanians.

The court's order rejects that framework and reverts back to allowing personal injury lawyers to file such suits in counties that have histories of higher payouts—a practice known as "venue shopping."

**A return to venue shopping will reduce the availability of quality health care for patients—particularly obstetrics and specialty care, exacerbate the health care workforce crisis, and threaten already strained hospital finances.**

We urge you to work in a bipartisan way and with your judicial and executive branch colleagues to address this issue. HAP appreciates the court's intent to review the impact of the rule change during 2025 but, by then, lasting damage will have been done. Repairing Pennsylvania's health care system may take decades. Reversing potential damage to patients may be impossible.

The premises are simple:

1. When venue shopping was allowed in Pennsylvania, the result was a crisis that hurt Pennsylvanians' access to health care.

2. Venue reform worked.

3. There is no evidence that venue reform was unfair to plaintiffs and ample evidence to suggest that returning to the pre-2003 framework could be even more devastating today than it was 20 years ago.

To be clear, HAP believes that patients deserve respect, a fair hearing to litigate liability claims, and compensation for injuries caused by negligence. The framework in place for 20 years has enabled that to happen while averting the damage that venue shopping inflicts on the commonwealth's entire health care system.

**When venue shopping was allowed in Pennsylvania, the result was a crisis that hurt Pennsylvanians' access to health care**

It was difficult for the commonwealth to attract and keep practitioners, hospitals were forced to cut services, health care providers could not afford skyrocketing premiums, and insurers left the market. Venue shopping had a profound effect on liability trials and certain specialties, such as obstetrics and gynecology. From 1999 to 2000, for example—just one year—the median medical liability award shot up by nearly 43 percent.[i]

This was largely due to cases from throughout the commonwealth being tried in Philadelphia:

- From 1999–2001, Philadelphia had 87 medical liability cases of $1 million or more, only slightly fewer than the entire state of California during those same years.
- During 2002, medical liability jury verdicts in Philadelphia were more than twice the national average; nearly a quarter were for $1 million or more.[ii]
- During 2001, Philadelphia had 117 medical liability trials, more than any other county in the nation, even higher than New York, which had 72 trials.[iii]

Further, a 2002 study by the U.S. Department and Health and Human Services[iv] noted:

- More than 40 doctors at the height of their careers in Delaware County left the state or stopped practicing medicine during 2001 because of high malpractice insurance costs.
- During January 2001, 65 percent of West Chester physicians polled said they were seriously considering moving their practice to another state. Many specialists (such as neurosurgeons) had already moved to less hostile legal environments in surrounding states.
- At one Bucks County hospital, all 12 active orthopedic surgeons decided to lay down their scalpels after their malpractice rates nearly doubled to $106,000 each for 2001.

The commonwealth's challenges retaining and attracting health care providers—particularly in high-risk specialties—resulted in hospitals cutting services. From 1999 to 2020, for example, the number of obstetric units in Pennsylvania hospitals fell 40 percent.

**Venue reform worked.**

Recognizing the crisis, all branches of state government worked together to end venue shopping during 2002. The *Interbranch Commission on Venue* (Act 13 of 2002) included legislative, executive, and judicial branch appointments, the majority of whom recommended that medical liability cases be filed in the county in which the cause of action arose. The Supreme Court adopted the commission's recommendation, and the General Assembly passed and the Governor signed Act 127 of 2002.

Only 24 percent of medical liability cases statewide were filed in Philadelphia during 2020, a 71 percent decrease from 2002.

A 2020 report by the General Assembly's Legislative Budget and Finance Committee also noted that, after venue reform, competition in the insurance market increased, more carriers wrote policies, and health systems developed robust self-insurance programs. Conversely, the Joint Underwriting Association, the insurer of last resort in Pennsylvania, decreased their premiums and experienced lower total payout.

It is important to note that *there is no evidence that verdicts have been unfair since policymakers eliminated venue shopping in Pennsylvania.* In fact, from when venue shopping ended during 2003 through the first half of 2022, Pennsylvania's statewide average medical malpractice payment reported to the National Practitioner Data Bank was $468,311—still nearly 16 percent *higher than the national average* during that same time[v].

**There is no evidence that venue reform was unfair to plaintiffs and ample evidence to suggest that returning to the pre-2003 framework could be even more devastating today than it was 20 years ago.**

*The data is clear*.

For many issues, policymakers must wade through a variety of viewpoints that present an array of conclusions. On this subject, however, there is consistent and well-documented consensus. Please consider highlights from studies conducted by a number of interested parties:

- A 2019 report[vi] commissioned by stakeholders found that:
  - A return to venue shopping could raise the average liability costs in Pennsylvania by 15 percent, with some areas as high as 45 percent.
  - Some high-risk physician specialty rates—OB, GYN, and general surgeons, for example—could climb 17 percent beyond that.

  - It is likely that the above projections are low, as they did not account for industry consolidation, increased incentive for smaller claims, potential increases to Mcare assessments, and other factors.
  - While venue reform stabilized the medical professional liability market in Pennsylvania, the commonwealth's rates were still among the highest in the nation.

- While not drawing conclusions, a 2020 report by the Legislative Budget and Finance Committee noted:
  - Insurance rates stabilized and filings fell after policymakers eliminated venue shopping in Pennsylvania.
  - There was a correlation between medical liability rates and the number of active medical staff with clinical privileges in certain counties and specialties.
  - Widespread consolidation and growing partnerships among health care providers substantially increase the possibility of shopping litigation to high-verdict venues.

    (Since 2000, the number of hospitals affiliated with health systems, for example, has grown by 146 percent. Health systems spanning multiple counties is a fact of hospital care today in our state, and far more hospitals serving Pennsylvanians across every community in our state have connections to Philadelphia, Allegheny, or Lackawanna counties than they did prior to 2002.)

- A June 2022 actuarial study[vii] commissioned by the Pennsylvania Senate Judiciary Committee forecasted that returning to venue shopping will:
  - Cause alarming premium increases in many parts of the state that could result in another medical liability crisis.
  - Result in extreme increases for some counties. In Lancaster County, for example, premiums could surge by 72 percent for hospitals and 82 percent for physicians.

*The health care workforce crisis is real.*

These reports make a compelling and alarming case against reverting to venue shopping. Even so, they do not tell the whole story.

No report thus far explicitly takes into full account the perilously low numbers of health care professionals across the commonwealth. Staffing shortages are already limiting the number of available inpatient beds and slowing hospitals' ability to discharge patients to skilled and other levels of nursing care. A recent survey of Pennsylvania hospitals found average vacancy rates of 45 percent for nursing support staff, 32 percent for clinical nurse specialists, and 27 percent for direct-care registered nurses.

Current estimates suggest that, by 2025, Pennsylvania will need at least 1,000 more primary care physicians to care for its aging population. A 2021 report by the Association of American Medical Colleges predicted a nationwide physician shortage of anywhere from 37,800 to 124,000 by 2034[viii].

It is clear that Pennsylvania must compete with other states to attract and retain high-quality health care professionals. Every single provider is essential and we cannot diminish their availability to treat patients because they are practicing defensive medicine, participating in far-away litigation, or leaving the state.

*Pennsylvania health care is at risk.*

Hospitals already face an uncertain financial future as they continue to navigate staffing shortages, a behavioral health care crisis, and the COVID-19 pandemic.

According to data reported by the Pennsylvania Health Care Cost Containment Council:

- Even with federal pandemic aid included, 30 percent of Pennsylvania's general acute care hospitals posted negative operating margins for fiscal year 2021 and another 15 percent posted operating margins of less than 4 percent, which is unsustainable in the long term.

- Increased staffing costs attributable to the pandemic soared to $202.3 million for the first quarter of 2022, 25 percent higher than a year prior.
- Pennsylvania hospitals have incurred more than $7.6 billion in additional costs and revenue losses attributable to the COVID-19 pandemic through the first quarter of 2022.

A return of venue shopping will further threaten the sustainability of Pennsylvania hospitals—and the care they provide—by increasing liability costs and resulting in even higher staffing expenses, as it becomes more difficult to attract providers to Pennsylvania.

**Collaboration is needed to protect Pennsylvanians' health care.**

The decision by the Supreme Court to abandon the existing venue framework is a departure from the past practice of building consensus on rule changes that have significant public policy influence.

One reason that venue reform was successful in Pennsylvania is that all three branches of government worked together in good faith and invested their expertise to implement meaningful solutions.

There have been many positive policy advancements for patients in Pennsylvania since venue shopping was eliminated: creating the Patient Safety Authority, passing an apology law, and expanding disclosure and informed consent requirements, to name a few.

Given those policy developments and significant changes in the health care landscape over the course of the decade—and the acute impact of the pandemic—interbranch discussion and collaboration is more important than ever. In acting independently and within processes appropriate to the judiciary, it is unclear if and how policy considerations were evaluated.

For example, what are the intersections between venue and telemedicine? Is it sustainable for rural providers to pay big-city liability rates? Does reinstatement of venue shopping provide a strong economic disincentive, causing smaller providers to resist joint ventures or supplementing their community's care offerings by partnering with other high-quality providers,

who may happen to be in urban areas? Does the commonwealth need a different licensure framework to be able provide care in areas that lose specialty care?

Thank you for your time and consideration today. Thanks, too, for considering this crucial issue to all Pennsylvanians. Again, we urge you to work with your colleagues across the aisle and across all branches of government to find a meaningful way forward before January 1, 2023.

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i 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 03/01/2022.
ii 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. Accessed: 03/01/2022.
iii Courtstatistics.org. Medical Malpractice on Appeal. December 2009. Accessed: 03/01/2022.
iv U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs By Fixing Our Medical Liability System, July 24, 2002 https://wehavins.com/wp-content/uploads/2016/03/HHS-medmal-report-July-2002.pdf
v HAP analysis of U.S. Department of Health and Human Services, National Practicioner Data Bank's medical malpractice payment report data, 2003 through 2022.
vi 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, Milliman, February 2019
vii Actuarial Review of the Proposed Amendment to the Medical Professional Liability Venue Rule, Oliver Wyman Actuarial Consulting, Inc., June 2022
viii https://www.aamc.org/news-insights/press-releases/aamc-report-reinforces-mounting-physician-shortage