



By Rachel Damrauer, MPA

# *Practicing* **DEFENSIVE MEDICINE** *to* **AVOID LAWSUITS**

According to the American Medical Association's (AMA) *Medical Liability Reform NOW! The Facts You Need to Know to Address the Broken Medical Liability System*, "The broken medical liability system remains one of the most vexing issues for physicians today. It places a wedge between physicians and their patients. It forces physicians to practice defensive medicine."

Defensive medicine — the practice of physicians and other health care providers ordering medical tests, procedures, or consultations to protect themselves from medical liability lawsuits — increases the cost of health care but does not improve patient outcomes.

*So, why do some physicians practice defensive medicine? Simply put, it is the fear of frivolous lawsuits.*

## **Proposed Changes to the State's Venue Rule = An Increase in Defensive Medicine**

As of the writing of this article, the Pennsylvania Supreme Court's Civil Procedural Rules Committee is proposing changes to the state's venue rule that would expand the venue for medical liability lawsuits.\* This could have many negative impacts on both patients and physicians, one of which is that it could cause physicians to practice more defensive medicine.

More than 2,500 physicians, patients, and other stakeholders submitted comments to the Civil Procedural Rules Committee through PAMED's online form, opposing the proposed changes and discussing some of the negative effects of such a change. One common theme was the proposed changes could cause an increase in physicians practicing defensive medicine.

Here are some of the comments PAMED received from Pennsylvania physicians:

***“Being at risk for excessive liability is a great way to drive all physicians to practice defensive medicine, which involves excessive testing and raises cost without any evidence of improved patient outcomes.”***

***“This will hurt patients and clinicians by driving up costs, not only that relate to litigation but also overall costs of health care by forcing clinicians to practice even more defensive medicine.”***

***“Unjustified lawsuits create a huge burden to providing care. This creates undue anxiety and creates focus on ‘defensive medicine,’ where a doctor just wants to avoid a lawsuit.”***

***“These types of laws force us to over-diagnose and over-treat medical conditions only to cover ourselves in the court rather than make medical decisions based on clinical judgment.”***

\*The Supreme Court agreed to delay its decision on proposed venue rule changes until the PA Legislative Budget and Finance Committee studies the issue and releases a report on its possible impact. The report is expected to be issued in January 2020.



# *The Number of* **PHYSICIANS SUED** *vs.* **SUIT OUTCOMES**

A 2016 AMA survey found that:

*Almost half of physicians age 55 and older had been sued at some point during their careers.*

*Nearly 30 percent had been sued two or more times.*

*Among surgeons and OB-GYNs age 55 and older, more than 75 percent had been sued. More than half under the age of 55 had been sued.*

So, you might ask, “Does this mean physicians aren’t practicing good medicine?” To the contrary — data from the Physician Insurers Association of America (PIAA) cited in the AMA’s medical liability report showed that 68 percent of claims that closed in 2015 were dropped, dismissed, or withdrawn.



## PERSONAL STORIES FROM PENNSYLVANIA PHYSICIANS

In the slew of comments opposing the Supreme Court's proposed venue changes, several physicians shared their personal stories of the devastating financial and emotional toll a lawsuit can have on a physician, even if the physician wins the suit or the suit is dropped. These are their stories.

**“I have been practicing in Pennsylvania for more than 20 years. I can speak to this issue as a physician who has been sued (by an unfounded claim). It has changed my life, caused a tremendous amount of stress, caused me to order more tests and discharge more patients from my care, and will forever give me an increased malpractice insurance rate. In my case, my patient had an untoward outcome after a procedure performed by someone else. I intervened, and she thanked me for helping save her life, then sued me two years later. After another two long years of depositions and case preparation (causing much stress and loss of productivity and days off work), the suit was dropped by her personal injury lawyer as it was unfounded. NOTHING happened to her or her unethical attorney, but MY professional life and liability rate is changed forever.”**

**“I have been in practice for 35 years. I have been through five frivolous lawsuits, all in Philadelphia County. I had three suits dropped and won the other two. I wasted my time and health on these suits. I unnecessarily lost my malpractice insurance and had to scramble for new insurance. My time in City Hall will be forever ingrained in my memory as the absolute worst experience in my career.”**

**“I was sued 20 years ago by a patient who alleged that she had had an adverse reaction to a medication started by another physician. It was alleged that I had failed to identify this complication in a timely fashion. My attorney advised me that I had done nothing wrong and that my care and documentation were appropriate. He advised that the case against me had no merit based on the facts of the case. However, he also informed me that, being that the case would be tried in Philadelphia, a decision would likely be made based on the emotional impact of the plaintiff's alleged injuries rather than the medical facts. He advised me that Philadelphia juries tend to be more sympathetic to plaintiffs and that I stood a significant enough chance of losing this case despite the facts such that I should think about settling. Based on his advice, I ended up settling the case, mostly due to the venue aspect, even though I knew in my heart of hearts that I had done nothing wrong. The idea of giving in out of fear rather than fighting an injustice has haunted me all these years. Twenty years later, I still live with the consequences and emotional trauma of that decision. I actually required counseling at the time to help me deal with it.”**

## PAMED Is Advocating for You

PAMED continues to advocate on behalf of Pennsylvania physicians and patients on issues like medical liability reform as it did during the medical liability crisis of the early 2000s. Stay up to date on the venue issue at [www.pamedsoc.org/venueissue](http://www.pamedsoc.org/venueissue). Stay up to date on our advocacy priorities at [www.pamedsoc.org/advocacy](http://www.pamedsoc.org/advocacy). ●

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# DEFENSIVE MEDICINE

## *Costs Billions*

Source: American Medical Association, *Medical Liability Reform NOW! The Facts You Need to Know to Address the Broken Medical Liability System*, 2019 Edition

Because few research papers have examined the cost of defensive medicine in the privately insured population, it is difficult to precisely estimate the total cost of defensive medicine. Regardless of the approach used, estimations are in the billions.

Experts rely on the following two approaches:

### APPROACH ONE

**5 to 9 percent** estimate among Medicare beneficiaries with heart disease applied to health spending at large (Kessler and McClellan).



Applied to health spending in 2017 (**\$3,492.1 billion**) the Kessler and McClellan method would suggest a range of **\$175-\$314 billion per year**.

### APPROACH TWO

A more narrowly focused and conservative approach based on Kessler and McClellan's research.



The approach puts the 2008 cost of defensive medicine at **\$45.6 billion**. A more recent estimation using this approach is not available.