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

Dear Members of the Civil Procedural Rules Committee:

The Pennsylvania Coalition for Civil Justice Reform (PCCJR) submits this comment letter in opposition to the Proposed Amendment of Pa.R.C.P. Nos. 1006, 2130, 2156 and 2179.

PCCJR is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional and trade associations, health care providers, nonprofit entities, taxpayers and other perspectives. The coalition is dedicated to bringing fairness to our courts by elevating awareness of civil justice issues and advocating for legal reform in the legislature.

The PCCJR urges this committee to reject the proposed rule change which would roll back medical malpractice venue reform implemented in early 2003. Adoption of the proposed rule change would risk repeating the history of the medical malpractice crisis that led to the current rule’s adoption. It is important that this committee understand what transpired in the period of the late 1990s through the early 2000s. Neither should the committee allow itself to be mislead by the unsubstantiated facts and reasons being advanced in support of this change.

Adopting the proposed venue rule would result in significantly higher premiums for medical malpractice insurance coverage. A recent study by Milliman points to medical liability premium increases of 15% state-wide and increases of up to 45% in the counties surrounding Philadelphia, should the former broad venue rule be reinstated for medical malpractice cases. In addition, certain specialties could experience additional cost and rate increases of 14%.

This letter addresses all of these points below.

1. History Must Not Repeat Itself

A. Causes and Impact of the Last Malpractice Crisis
The late 1990s and early 2000s were a very trying time for medicine in the Commonwealth of Pennsylvania. Medical malpractice premiums soared. Jury awards in Philadelphia were extraordinarily high. The increase in liability premiums coincided with an increase in indemnity payments by medical liability insurers. High jury awards, with Philadelphia leading the way, and the resulting increase in medical liability insurance premiums, were the recipe for a medical malpractice crisis that gripped Pennsylvania. The practice of medicine was under siege and patients suffered as services became scarce.

A report commissioned by the Pew Charitable Trusts in 2003 titled “Understanding Pennsylvania’s Medical Malpractice Crisis” provides crucial insight into the problems facing health care and patients during the early 2000s. According to the Pew Report (hereinafter “the report”), malpractice premiums for Pennsylvania physicians started to rise in the late 1990s at a sharp rate putting Pennsylvania well above the national average of premium costs for physicians. The report concluded that the largest component fueling rising insurance rates was the cost of investigating, defending, and paying legal claims.

The report further found that Pennsylvania ranked well above the national average in the rate of paid claims and in average payment amounts. Pennsylvania’s total malpractice payouts adjusted for population were twice the national average. Malpractice costs per resident in Pennsylvania were roughly four times higher than in California, a state that enacted significant medical malpractice reform.

Philadelphia courts presented a particular problem, according to the report. “Philadelphia plaintiffs were more than twice as likely to win jury trials as the national average, and over half of the awards were for $1 million or more. Philadelphia juries awarded sums of this magnitude 87 times (between 1999 and 2001). The number of million-dollar awards plus settlements in all of California during this period was only slightly larger.” As a result, plaintiffs’ attorneys would file malpractice cases in Philadelphia even though the alleged medical error took place far from the city and had no real or substantive connection to the city.

The impact on patient access to healthcare was severe. The New York Times, in an article dated August 25, 2002, reported that Mercy Hospital in Philadelphia closed its maternity ward. Jefferson Health closed the maternity ward at its Methodist Hospital in Philadelphia. Brandywine Hospital in Chester County closed its Trauma Center, while Paoli Hospital closed its paramedic unit. All these closures, according to The Times, were the direct result of the medical malpractice crisis.

The CAT Fund (predecessor to today’s MCARE Fund) reported an 11 percent decrease in physicians in active clinical practice between 1997 and 2000. 44 Delaware County doctors stopped practicing medicine due to the crippling costs of liability insurance. All 12 orthopedic surgeons at Frankford Hospital’s three southeastern Pennsylvania facilities stopped practicing when liability rates doubled in 2001, according to the Philadelphia Inquirer. PA Department of Health data reveals a 17 percent loss of obstetrics units between 1999 through 2005.

B. The Solution

Enter the Pennsylvania General Assembly. As a result of a couple years of study, hearings, debate, and advocacy, the General Assembly passed Act 13 of 2002 (MCARE Act). While the act contained several very important public policy changes designed to address the medical liability crisis, perhaps none was
more important in alleviating pressure on hospitals and physicians than implementing new venue rules for medical malpractice.

The process by which the venue rule was enacted was unique and deserves your attention and consideration. Act 13 established the Interbranch Commission on Venue. The Supreme Court, Governor, and legislature appointed individuals to serve on this commission for the sole purpose of making a recommendation on whether to change the rules of venue for medical malpractice and, if so, to recommend the appropriate standard. The deliberations of the commission were guided by this statement of policy from Act 13:

(a) Declaration of policy.--The General Assembly further recognizes that recent changes in the health care delivery system have necessitated a revamping of the corporate structure for various medical facilities and hospitals across this Commonwealth. This has unduly expanded the reach and scope of existing venue rules. Training of new physicians in many geographic regions has also been severely restricted by the resultant expansion of venue applicability rules. These physicians and health care institutions are essential to maintaining the high quality of health care that our citizens have come to expect.

This policy still stands in law today and is even more relevant than it was in 2002 when Act 13 passed unanimously in the Senate and with only one dissenting vote in the House. Health care consolidation was in its infancy in the early 2000s. As referenced in the Declaration of policy, the expansion of city-based health systems allowed attorneys to file cases in Philadelphia and other high verdict jurisdictions for causes of action that arose elsewhere in the state. The reach and scope of the venue rules in effect in 2002 were expanded in ways not contemplated when they were written.

Health care consolidation has increased exponentially since that time. Pittsburgh based UPMC now owns facilities in central Pennsylvania. The University of Pennsylvania Health System now owns Lancaster General and Chester County Hospitals, both of which were independent community hospitals when Act 13 passed. To revert to the pre-2003 venue rule as is being advocated by some, would flood the city of Philadelphia and other high verdict jurisdictions with medical malpractice cases all in the name of higher contingency fees for the plaintiffs’ attorney!

The Commission issued its report in late 2002 with a majority recommendation that medical malpractice cases should be filed only in the county in which the cause of action arose. The Supreme Court enacted the current Civil Procedure Rule 1006 to reflect the recommendation of the commission. The current venue rule is clear and easy to follow. As such it has brought predictability and stability to medical malpractice cases and to the liability insurance market. It has worked!

How do we know it has worked? The data collected by the Supreme Court reveals that between 2000 and 2002, 1204 medical malpractice cases were filed in Philadelphia on average each year. After the 2003 rule change requiring filing where the cause of action arose, the number of medical malpractice cases filed in Philadelphia dropped to 577. That result is exactly what the current Rule 1006 intended and played a large role in alleviating the medical malpractice crisis of the early 2000s.

The PCCJR urges this committee to not turn its back on a rule that was created out of a rare cooperative effort of all three branches of state government and successfully addressed a health care crisis.

2. The Arguments to Revert to the Pre-2003 Rule Do Not Withstand Scrutiny
A. Special Treatment of Different Classes of Litigants

The only "official" rationale given for changing the current venue rule is found in the Explanatory Comment to the proposed rule:

EXPLANATORY COMMENT

The Civil Procedural Rules Committee is proposing amendment of 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. The current rule provides special treatment of a particular class of defendants, which no longer appears warranted. Data compiled by the Supreme Court on case filings on medical professional liability actions (http://www.pacourts.us/news-and-statistics/research-and-statistics/) indicates that there has been a significant reduction in those filings for the past 15 years. Additionally, it has been reported to the Committee that this reduction has resulted in a decrease of the amount of claim payments resulting in far fewer compensated victims of medical negligence.

The proposed rescission of subdivision (a.1) is intended to restore fairness to the procedure for determining venue regardless of the type of defendant. The proposal would apply to medical professional liability actions filed after the effective date of the amended rule. Conforming and stylistic amendments have also been made to Rules 2130, 2156, and 2179.

No evidence is presented as to why the current venue rule no longer appears warranted. All we are left with is a conclusory sentence with no supporting documentation. However, if the committee is truly concerned with alleged "special treatment" and wishes to see one venue rule apply to all classes of litigants, the proposed solution is not the only approach, but it is the wrong approach. Instead the committee should consider extending the current medical malpractice venue rules to cover all types of civil cases. This would end venue shopping for all cases and would be an easy rule to follow in its simplicity. The PCCJR strongly urges the committee to drop consideration of the proposed venue rule as published and turn its attention to enacting a rule that treats all litigants fairly by having civil lawsuits filed only where the cause of action arises.

B. A Significant Reduction in Filings

While the PCCJR does not dispute that medical malpractice, filings are down from the years prior to 2003, the reason cannot be the current venue rule. Venue prevents no one from filing their case and having access to the courts. Venue only allocates where cases are filed within the state of Pennsylvania. PCCJR submits that there are other reasons for the state-wide decrease in filings, including other reforms enacted in Act 13 of 2002.

The decrease in filings in Philadelphia and some other high verdict jurisdictions can be partially attributed to the venue reform of 2003. There are some counties that have seen increases in medical malpractice filings since that time, such as Montgomery County, which likely reflects cases that might have been filed in Philadelphia under the pre-2003 broad venue rules.
C. Far Fewer Compensated Victims of Medical Negligence

This is another unsubstantiated statement from the Explanatory Comment presented as fact. It is possible that claim payments are being down because of fewer cases being filed in Philadelphia and other high verdict counties. That is an intended result of Act 13 and the venue reform enacted by the Supreme Court. It was venue shopping, resulting in higher payouts, that helped fuel the malpractice crisis and led to the passage of Act 13 and subsequent venue reform. Claim payments have also been reduced by other reforms such as reducing awards to present value and limiting punitive damages to 200 percent of compensatory damages under Act 13.

But what is particularly puzzling is the assertion that “there are far fewer compensated victims of medical negligence.” Is the committee relying on data and statistics that are not available to the public to arrive at this conclusion? Of course, the public has no way of knowing this since the committee has not made its records and information available for copying and inspection. One can only conclude that the committee has actual evidence of uncompensated victims it is not making available to the public, or the very statement itself is a mere talking point from the plaintiffs’ bar that has never liked the current venue rule and has been working feverishly behind the scenes to revoke it. If the committee has actual evidence and data, it should be made public and the comment period extended so commenters can study, understand, and properly comment.

3. Trial Bar Talking Points

In addition to the reasons set forth in the explanatory comment, the plaintiffs’ lawyers of the commonwealth have promoted several talking points in support of the proposed rule change that are easily refuted.

A. Victims Cannot Find Justice in Counties

Under this line of reasoning, medical malpractice victims can only find justice in Philadelphia and presumably other urban jurisdictions in the state. This argument is an affront to every county court in the Commonwealth and its jurors who diligently serve, evaluate evidence, and seriously deliberate.

The main reason given for the supposed inability to find justice in smaller counties is that hospitals are often a large employer in the county. Perspective jurors are therefore reluctant to find against a provider of employment and opportunity as they might have relatives employed at the facility.

It is true that hospitals and health systems are often major employers in rural counties. However, nowhere are hospitals and health care employers more dominant than in the city of Philadelphia. Statistics from the Pennsylvania Department of Labor and Industry reveal that in 2018 the largest segment of employers in Philadelphia was “General medical and surgical hospitals.” “Offices of physicians” and “Other hospitals” were also in the top 10! In fact, of the top 25 employers in Philadelphia, according to Labor and Industry, 11 are hospitals. Allegheny County has similar employment statistics.

It is highly unlikely that any county in the state has as high a concentration of health care jobs as Philadelphia and Allegheny Counties. Yet plaintiffs’ attorneys seem to have no difficulty finding fair and impartial jurors in Philadelphia and Pittsburgh.
And let’s not forget that biased jurors can be, and are, weeded out through voir dire.

**B. Misuse of Patient Safety Authority Data**

Certain advocates of returning to the broad venue rule of pre-2003 point to annual statistics reported by the Patient Safety Authority as proof that many victims of medical negligence are not successful in getting their cases filed and heard in court. How this relates to venue is unclear. However, this is a blatant and shameful misrepresentation of the data collected by the Patient Safety Authority!

Advocates of changing the rule have pointed to several figures from the 2017 annual report of the Patient Safety Authority. At times they have cited the total number of reported events, 302,514, and the total of 7,881 “serious events” as indicative of an epidemic of medical negligence sweeping the state. These advocates know better yet persist in misleading the public.

The definition of “serious event” as found in the 2017 annual report states in part: “An adverse event resulting in patient harm.” “Adverse Event” is defined as:

“The Authority considers this term to be broader than “medical error,” because some adverse events may result from clinical care without necessarily involving an error.

Although PA-PSRS includes reports of events that result from errors, the Authority’s focus is on the broader scope of actual and potential adverse events, not only those that result from errors.” (emphasis added)

When one reviews the harm levels assigned to certain events, it is clear that only a small percentage of the events chronicled in the report rise to the level of harm from which a medical negligence suit might be justified. Only harm scores of G, H, and, I include permanent harm and death. These categories represent only 0.16% of all reports filed in 2017, or roughly 435 reports of harm. While not suggesting that these figures are acceptable, they are more realistic than the wildly inflated figures some are floating in the media. The Civil Procedural Rules Committee should consult with the Patient Safety Authority to obtain a proper understanding of the meaning of the statistics in its annual report before relying on such distortions and misrepresentations.

**4. Premiums for Professional Liability Insurance Will Increase Dramatically if the Proposed Rule is Adopted**

Submitted with this comment letter is an actuarial report from Milliman that examines the financial impact of reverting to the pre-2003 broad venue rule. Milliman’s findings are dramatic and should give this committee great pause.

From the report:

- **Statewide Impact:** The current average statewide MPL costs and insurance rates for physicians in Pennsylvania could increase by 15%;

- **Local/County Impact:** Many individual counties could see increases in physician MPL costs and rates of 5%, while counties surrounding Philadelphia could see larger increases of 45%;
• Physician Specialty Impact: High-risk physician specialties, such as Obstetrics/Gynecology (OB/Gyn) and General Surgery, could experience additional cost and rate increases of 14%.

Milliman also states that these estimates are likely low as they do not account for other factors that could increase costs resulting from a venue rule change, such as the impact of health care provider consolidation in recent years.

The Milliman report demonstrates that a return to the broad venue rules, and the venue shopping that will result, will have a dramatic impact on medical liability premiums, the financial viability of health care providers, and patient access to health care.

For all the reasons stated above, The Pennsylvania Coalition for Civil Justice Reform firmly believes the current venue rules for medical malpractice cases have worked and should not be changed. We urge your rejection of the proposed changes to Rule Nos. 1006, 2130, 2156 and 2179.

Sincerely,

[Signature]

Curt Schroeder
Executive Director
Pennsylvania Coalition for Civil Justice Reform

Enclosures:

Milliman Research Report, 2019

Understanding Pennsylvania’s Medical Malpractice Crisis,
Randall R. Bovbjerg and Anna Bartow, Pew Charitable Trusts, 2003