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Karla M. Shultz, Counsel
Civil Procedure Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
P.O. Box 62635
Harrisburg, PA 17106

Re: Proposed Amendment of Pa.R.C.P. Nos. 1006, 2130, 2156 and 2179

Dear Ms. Shultz:

The Insurance Federation of Pennsylvania offers the following comments on the proposed amendment to these medical malpractice venue rules on behalf of our members and in conjunction with our national counterparts, NAMIC and the APCIA; our collective members include many of the Commonwealth's leading medical malpractice insurers.

The Doctors Company and Medical Mutual Insurance Company of North Carolina, two other prominent medical malpractice insurers, also join in this letter. So does the Pennsylvania Defense Institute, the leading statewide organization of the defense bar.

We recommend against adoption of the proposed amendment.

As noted in the Explanatory Comment to the proposal, the amendment rescinds the medical malpractice rules adopted by Supreme Court in 2002 that took effect

in 2003. We appreciate its intent is “to restore fairness to the procedure for determining venue regardless of the type of defendant.” We believe the current venue rules are fair; their rescission, certainly absent a more fulsome study by this Committee, would be anything but. We appreciate the Supreme Court’s decision to wait for the Legislative Budget and Finance Committee’s report as envisioned by Senate Resolution 20, and we are sharing our comments with the LB and FC.

1. The background behind the adoption of the current medical malpractice venue rules

Pennsylvania’s medical malpractice venue rules were adopted by the Supreme Court only after considerable study and debate. The Court made the ultimate decision, but the legislative and executive branches of government were heavily involved, as were all impacted parties.

- The General Assembly enacted, and the Governor signed, Act 13 of 2002. That set forth a series of reforms in Pennsylvania’s medical malpractice system, and prominent among them was that of venue. Many commentators have correctly focused on Section 514(b) of the act, 40 P.S. Section 1303.514, and its establishment of the Interbranch Commission on Venue, to demonstrate the comprehensive approach that led to the current venue rules.

We join those commentators in highlighting that approach: Chaired by Judge Stanton Wettick, the Commission’s members included not only all branches of government, but practicing lawyers from all sides, and it was open and thorough throughout, culminating in a report that gave a detailed analysis from all perspectives and recommended the venue rules now in place.

Section 514(a) of Act 13 also merits emphasis. It did something not often found in statutes: It determined that Pennsylvania’s health care system had “necessitated a revamping of the corporate structure for various medical facilities and hospitals across this Commonwealth,” and then determined that “this unduly expanded the reach and scope of existing venue rules.” It went on to find that “training of new physicians in many

geographic regions has also been severely restricted by the resultant expansion of venue applicability rules,” with resulting danger to “maintaining the high quality of health care that our citizens have come to expect.”

- The General Assembly reiterated this later in 2002 with its passage of Acts 127 and 215, both signed by the Governor. Those acts established Section 5101.1, 42 Pa.S.C. Section 5101.1, setting forth in subsection (b) the exact medical malpractice venue rule the Supreme Court adopted. That wasn't coincidental – it was a further demonstration of all three branches of government working together to address the venue issue.

These acts were even more emphatic than Act 13 in making the statutory determination that medical malpractice venue rules needed to be changed. Section 5101.1(a) cited Section 514(a) of Act 13 as well as public policy, and stated that “the General Assembly further declares the need to change the venue requirements for medical professional liability actions.”

Some proponents of the proposed amendment have said the venue problem has gone away, while others have questioned whether it ever existed. They don't offer documentation, though, instead citing a statewide decline in malpractice actions since then and noting other malpractice reforms have played a role in reducing the number of claims and awards. They ignore or deny these statutory determinations of the venue problem, as well as the deliberations that led to those determinations.

This Committee should reject that approach. First, it should acknowledge the statutory determinations of the medical malpractice venue problem that led to the current rules. If the Committee or others believe those determinations are no longer valid, their avenue is to pursue statutory change. We recognize the argument that venue rules fall solely within the Court's province. But here, the proposal is not only to have the Court rescind its venue rules. It is to ask the Court to disregard statutory findings of fact, that the previous venue rules were unduly expansive and harming all citizens in their expectation of quality care.

Granted, the medical malpractice problems of the late 1990s and early 2000s were not exclusively due to the venue rules in place at that time. There were other causes, just as there were other reforms. But to disregard the problem caused by those venue rules is to disregard not only the evidence and documentation that led to the current rules, but also the statutory determinations of that problem. The Committee (and by extension, the Court) can challenge and change procedural law. But it can't disregard those statutory findings.

The Committee should also respect the process that led to the current venue rules. All branches of government were included, and all perspectives were given the chance not only to comment but to question and be questioned. All aspects were reviewed, too – the impact on access to the courts as much as the impact on liability costs, and always with a consideration of the lawfulness of any proposals.

The best way to respect that approach is to adhere to it in evaluating the proposed rescission of these venue rules. The Court's instruction to wait for the LB and FC report helps. So would setting up a process replicating that of the Interbranch Commission.

2. The results of the current venue rules

The results of the overall reforms from 2002 are self-evident: Malpractice filings quickly came down and have since flattened for the past decade-plus, and the same is true for verdicts. Insurance rates have followed the same trend, and new competitors have entered the market. In addition, the number of providers in Pennsylvania, as determined by the Mcare Fund for purposes of its annual assessments, has grown considerably since 2004, after being flat in the years of the most uncertainty in the medical malpractice area.

Segregating out the impact of the 2002 venue rules on these changes is a challenge. The proposal's Explanatory Comment shows the difficulty: It cites the Supreme Court's data showing the statewide decline in the number of cases filed. But that exhibit references only the Certificate of Merit and changes in Pre-Trial Procedures as possible reasons for the statewide decline.

The Explanatory Comment left out the Court's data on cases filed in each county, which would be more relevant to the venue reforms: That data shows that while the number of filings from 2000-2002 to 2017 decreased statewide by 47%, the numbers among counties has varied considerably – although with the same relatively flat and stable numbers over the past decade-plus seen in other data.

- Notably, while Philadelphia County has seen a decrease of 66%, some neighboring and otherwise connected counties have seen significant increases – as with Montgomery County filings increasing by 386%.

We and a number of other parties retained Milliman, a nationally recognized actuarial consulting firm, to report on the impact of the current venue rules and their possible rescission, with the specific purpose of distinguishing the venue reform from the other reforms. A copy of the report is attached. It is instructive on the value of the venue reform and the cost of its rescission:

- It projects the statewide impact of rescinding the venue reform will be an increase in malpractice costs of as much as 15% for physicians;
- It projects local and county impacts will be an increase in malpractice costs that range from 5% to as much as 45% in counties surrounding Philadelphia; and
- It projects that high-risk specialties could see additional increases in malpractice costs of as much as 17%.

The Milliman report emphasizes these are conservative estimates. Of particular import, it notes that health care provider consolidation has only grown since then. A number of hospitals in counties with fewer claims and lower severity are now affiliated with Philadelphia hospitals, which will mean claims in those once-local hospitals may now be brought in Philadelphia.

We recognize the current venue rules should not be evaluated solely on savings in medical malpractice costs. These rules have taken effect, with well over a decade of consistent numbers, without complaints that they have denied plaintiffs

access to the judicial system or imposed undue burdens on them. The trial bar is an able advocate for its clients, and it has considerable resources. If these venue rules were depriving its clients of access to the courts, it would have argued this with aggregate data, or at least verifiable anecdotes, long before now.

Notably, we haven't heard – in the 16 years of these venue rules – that those with malpractice claims have been limited to filing those claims in counties where taking discovery, attending hearings or going to trial would be uniquely difficult or expensive in terms of travel or availability of legal representation. Those might be valid practical reasons for considering a reform of the venue rules. But after sixteen years, those anecdotes or evidence have never emerged.

3. Fairness in venue

The Explanatory Comment states that the proposed rescission of the medical malpractice venue rules “is intended to restore fairness to the procedure for determining venue regardless of the type of defendant.” That has an obvious appeal: Everyone agrees that venue rules should be fair for all litigants.

But it is misleadingly conclusive:

- Saying the current venue rules have been unfair to those alleging medical malpractice is not a charge to be made lightly. It demeans the work, inclusiveness, debate, dialogue and integrity of those involved in establishing these venue rules. Proponents of their rescission should adhere to those same hallmarks.

It also directly contradicts all three branches of government. Each found the venue rules in place before 2003 to be unduly expansive and in need of change – in a word, unfair; and each agreed on the current venue rules to address that unfairness. To contend that rescinding these rules will “restore fairness” ignores that. Laws are meant to be stable, not stationary. But changing them without the same thoroughness and findings that went into their adoption would be the real unfairness.

- Saying this rescission is needed because it will have the same venue rule “regardless of the type of defendant” rests on the unfounded principle that uniformity in venue rules is the preferred route. There is no statute or caselaw taking that position. To the contrary, Pennsylvania has many different venue rules, created by statute and the Supreme Court. In any event, if the goal is uniformity, why not extend the venue rules now applying to medical malpractice cases to all other actions? That may be a better standard of fairness, not a return to a venue rule that all three branches of government found to be unfair for medical malpractice cases.

The Committee should look beyond the flawed equation that “uniformity equals fairness” and instead focus on whether the current medical malpractice rules are denying any plaintiff with a malpractice claim access to the courts, as opposed to a particular court. As noted above, that can include whether the current venue rules are imposing undue hardships on plaintiffs preparing for discovery, meetings and trial.

But the Committee should also consider the dangers of venue shopping – subjecting defendants to being sued in counties where they have a negligible connection. That’s the needed balance here – ensuring plaintiffs ready access to judicial relief while not subjecting defendants to venue shopping.

We believe the current venue rules do that. We haven’t seen any documentation to the contrary, and certainly no documentation that returning to the 2002 venue rules would result in a better balance.

The Explanatory Comment notes the significant reduction in medical malpractice claims over the past 15 years, and therefore fewer claims being paid. True enough, and that is attributable to a myriad of reforms and other factors. The Comment then goes on to say this has resulted in “far fewer compensated victims of medical negligence.” If that means the current venue rules are precluding victims of malpractice from adequate compensation or fair hearings, that is as serious a charge as that of venue shopping was in 2002, and it demands the same scrutiny as applied then. Further, the Committee should consider other data showing that average jury awards have increased during this period, as has the percentage of verdicts over \$5 million.

We don't think the proponents of the venue rules' rescission have the facts to back this assertion of unfairness. But in any event, the Committee should reject it absent thorough and open review and meaningful substantiation.

4. The value of predictability and stability in the liability system

The venue rules of 2002 have established a more predictable and stable system in which to resolve claims, nothing more and nothing less. They haven't limited access to the courts or imposed new requirements for the filing of malpractice claims; they simply put restrictions on the statutorily-recognized problem of venue shopping.

Every citizen of the Commonwealth benefits from a predictable and stable liability system: Insurers enter the market, stay in the market, compete in the market and lower rates – and a predictable and stable market attracts the best of the insurance and risk industries and promotes solvency. That's proven true with the medical malpractice reforms of 2002, including the venue reforms being considered here. It can also be seen in other lines of coverage: The auto reforms of 1990 and the workers compensation reforms of 1993 and 1995 brought similar predictability and stability to those markets, and insurers have responded with long-standing availability and affordability of coverage.

We have, as an industry, an equally concerned reaction to an unpredictable and unstable liability system: Insurers tend to pull back, and rates go up as that instability encourages more claims and less predictability in settlements and verdicts.

Whatever else a legal system should be, it should be predictable and stable, with changes only after thorough study and findings. That is sound jurisprudence, and it should be a cornerstone in this Committee's deliberations.

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5. The need for an open review and study

We emphasized this at the outset, and it is an appropriate way to close: The Committee should take no action absent an open review and study. We endorse the Supreme Court's decision to hold off any consideration pending a review by the Legislative Budget and Finance Committee, and we recommend this Committee do the same.

It is equally important for the Committee to establish an open and inclusive process for reviewing this proposal after getting the LB and FC's report. The Committee has already gotten considerable comments from all perspectives, and we appreciate being part of that. We hope these comments and perspectives initiate not just a review but a genuine deliberative process, with hearings, discussions and questions.

We strongly believe the current medical malpractice venue rules are good ones, and that rescinding them will be harmful for the Commonwealth. We're happy to further discuss our reasoning and documentation for this, and to answer any questions. That's why we close with a final recommendation: We urge that you establish a process to allow this dialogue in your review of the proposal at hand, the comments it has generated and the studies concerning it.

Sincerely,

Samuel R. Marshall

C: Patricia Berger, Executive Director
Legislative Budget and Finance Committee