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VIA ELECTRONIC MAIL
Karla M. Shultz, Counsel
Civil Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
civilrules@pacourts.us

Re: Proposed Venue Rule

Dear Ms. Shultz,

I am pleased to write concerning the proposed rule.

I was privileged to have served on the Rules Committee and honored to have been Chair. As a matter of background, I was involved in the discussions and drafting of Act 195 as well as Act 13 (Medical Care Availability and Reduction of Errors Act). I also served on the Pennsylvania Senate Select Committee on Medical Malpractice, as well as Governor Rendell's Task Force. I had been asked by Former Chief Justice Cappy to work with the Honorable Stanton Wettick and Gerald A. McHugh, Esquire (now Hon. Gerald McHugh of the Eastern District of Pennsylvania) to discuss and draft various reforms including certificates of merit and venue.

In full disclosure, I have been practicing in the Commonwealth for over 40 years. A significant portion of my practice has entailed defense of health care providers in professional lability cases.

I have set forth below a number of considerations with respect to the venue rules governing Pennsylvania medical malpractice actions. It should be noted that venue has no constitutional dimension, it is merely a matter of statutory grace. While it certainly implicates issues of fairness, the landscape for these issues has changed in Pennsylvania during the past two decades. The private insurance market is much different today than it was prior to the enactment of the current rule. The largest health systems have structured themselves differently, and have notably expanded their influence beyond the urban centers out into the more rural and suburban counties. Stakeholders in the system have achieved a certain balance based, in part, on a rule that proponents of the amendment have labeled "unfair." I understand their argument, but I do not think it holds water upon close examination.

MCARE – The Legal Landscape

The Medical Care Availability and Reduction of Errors ("MCARE") Act was enacted in 2002 due to a healthcare crisis that was occurring in Pennsylvania. While there are those who labeled it a "non-crisis" which was "manufactured," they are incorrect. It was a real crisis. I know since I lived through it. It was recognized as a crisis by the General Assembly, Governor Rendell's Task Force and the Court.

Prior to 2002, Pennsylvania citizens were facing decreased access to care. There was a diversion of resources within healthcare systems due to rising medical professional liability costs. Physicians were leaving the state due to the inability to obtain professional liability coverage. Residents were not pursuing their profession in some of our leading hospitals. Healthcare providers in some cases were practicing defensive medicine to protect themselves against possible lawsuits. Hospitals, physicians, and nurses were reluctant to report quality concerns or participate in collaborative efforts to improve patient care out of fear the information would be used during litigation.

Additionally, physicians in Pennsylvania were facing difficulty in obtaining medical liability coverage. Any coverage that could be obtained came with drastically increased premiums compared to the national average. Prior to 2002, only two of the top insurers for physicians remained in the state. There were numerous carrier liquidations. As of 2002, on a per capita basis, the aggregate medical professional liability premiums incurred in Pennsylvania were the highest in the nation. Pennsylvania claim payments were also some of the highest in the nation and were increasing at a rate faster than the rest of the country. In Pennsylvania, the number of million dollar plus settlements of medical malpractice lawsuits increased by fifty percent between 1999 and 2001, and the median verdict in Philadelphia County was twice the state median.

In response to this healthcare crisis, the Pennsylvania legislature enacted the MCARE Act. Courts faced issues with respect to the cases being funneled to plaintiff-friendly jurisdictions. Insurance coverage became unaffordable. Rule 1006 was designed to prevent a collapse of the health care system. The MCARE Act provided comprehensive reform in hopes of providing more fundamental fairness to medical malpractice litigation. Notably, the General Assembly recognized the changing landscape of healthcare systems' effect upon the existing venue rules. A joint task force on venue was formed, which favored the present venue rule. The Pennsylvania Supreme Court subsequently amended the applicable rules of civil procedure to impose a threshold certificate of merit requirement for each filing, and limited venue to the county in which the cause of action arose.

After more than fifteen years, the Civil Procedural Rules Committee of the Supreme Court has proposed rescission of the venue rule in medical malpractices cases. According to the proposal, "data compiled by the Supreme Court on case filings on medical professional liability actions indicates that there has been a significant reduction in those filings for the past 15

years…result[ing] in a decrease of the amount of claim payments [and] resulting in far fewer compensated victims of medical negligence." With all due respect, this proposal, however, is misguided.

What Do the Statistics Say?

The proponents for the amendment to Rule 1006 rely on incomplete data. On September 20, 2018, the Research & Statistics Department of the Judicial Administration Office of the Pennsylvania Courts published a Table tracing the number of Pennsylvania Medical Malpractice Filings since 2000 through 2017 ("Table 1").[1] The Explanatory Comment in support of the amendment asserts that Table 1 evidences a "significant" reduction in medical professional liability filings for the past 15 years. While the overall number of medical malpractice filings may have decreased since 2003, Table 1 utilizes a condensed comparison group which, in turn, portrays a pronounced decrease in the number of medical malpractice filings. Those seeking to amend Rule 1006 are quick to attribute this statistical decrease to the doctrine of venue and where a plaintiff may file suit. To the contrary, the concept of venue does not *bar* a plaintiff's ability to file a lawsuit, it is merely a guide on *where* a plaintiff may file his or her action.

The statistics relied upon in Table 1 do not tell the whole story of the situation prior to and following the enactment of Rule 1006. Specifically, Table 1 portrays 15 individual years of annual filings beginning in 2003, as compared to merely 3 years of average annual filings from 2000-2002. The three-year average for medical malpractice filings from 2000 through 2002 is hardly an accurate representation of the medical malpractice filings prior to 2003. Proponents of the amendment seek to have the Pennsylvania Legislature ignore the pre-2000 filing statistics in an effort to dramatize the number of medical malpractice cases filed since enacting Rule 1006.

In addition, the statistics relied upon by proponents of the amendment actually demonstrate a theme of distribution rather than decline. For example, medical malpractice filings in Philadelphia County decreased from 1,365 in 2002 to 577 in 2003. In neighboring Montgomery County, professional liability filings increased from 21 filings in 2002 to 102 filings in 2004. Similarly, in Bucks County, medical malpractice filings decreased from 44 in 2002 to 3 in 2003, then filings surged to 43 filings in 2004 and 62 filings in 2005. In Western Pennsylvania, although Butler County experienced a -84.0% change from its 2000-2002 average, the neighboring Lawrence County increased by +125.0% from its 2000-2002 average. Although the statistics portray a decrease in filings in some counties after 2003, other counties experienced a dramatic increase in the annual number of filings.

As we all know, statistics can be interpreted for a particular purpose and do not portray the total problem and are not a substitute for logic and common sense.

[1] Table 1: Pennsylvania Medical Malpractice Filings (September 20, 2018), *available at* http://www.pacourts.us/assets/files/setting-2929/file7458.pdf?cb= 656af3.

Finally, advocates seeking to rescind subdivision (a.1) cannot conclusively attribute the decrease to the enactment of Rule 1006(a.1). As discussed, the venue rule does not bar the plaintiff's ability to file a lawsuit. Proponents of the amendment ignore the enactment of Rule 1042.3, which required, for the first time, that a plaintiff file a certificate of merit along with the complaint. *See* Pa.R.C.P. 1042.3(a). The certificate of merit rule was enacted in January 2003, just prior to Rule 1006(a.1), to prohibit the filing of frivolous professional liability lawsuits. Rule 1042.3 acts as a clear bar to a plaintiff's ability to file suit. It is disingenuous to conclude that a decrease in medical malpractice filings is solely due to Rule 1006(a.1) without first distinguishing the number of cases that were not filed in response to Rule 1042.3, as well as other provisions in Act 13.

For these reasons, the statistical evidence in support of amending Rule 1006(a.1) is flawed by a restricted comparison group resulting in unreliable percentages. Moreover, the alleged decrease in medical malpractice filings since 2000 cannot be attributed to the enactment of Rule 1006(a.1) alone. Therefore, advocates seek to rescind Rule 1006(a.1) based on a hypothesis rather than fact.

Victim Compensation

Despite the position that compensation to victims has diminished since the enactment of the venue statute, publicly available information collected on LexisNexis reveals that the average reported jury award has likely increased slightly in medical malpractice cases in Pennsylvania from about $3M to $3.5M.

Furthermore, based on the information published by the Unified Judicial System of Pennsylvania, the percentage of large verdicts (>$5M) has also increased. Thus, when a jury finds it appropriate to compensate a plaintiff today, the trend has been to award higher amounts than before the MCARE venue rule was enacted. Therefore, it cannot be said that there has been a decrease in payments to medical malpractice plaintiffs.

Proponents of the Amendment look only at verdicts. This fails to recognize the reality that around 90% of cases settle. These settlements are usually confidential, but there are many settlements involving Philadelphia County cases that are high seven figures or eight figures.

To say that there are fewer compensated victims today than after the rules were implemented is taken out of context. As previously mentioned, while the overall number of medical malpractice cases has decreased since 2000-2003, this ignores the pre-2000 data, during which time medical malpractice filings were also significantly lower.

Moreover, the venue rule proponents again fail to recognize the effect of the implementation of the certificate of merit requirement. With Rule 1042.3, for the first time, plaintiffs were unable to file suit absent a threshold certification by a licensed professional to support the viability of their complaint. To attribute decrease in compensation to victims from the venue rule alone, while turning a blind eye to the certificate of merit requirement, simply fails to appreciate the simultaneous significant change in pleading requirements. The idea that a repeal of Rule 1006(a.1) will allow otherwise uncompensated victims to be compensated is pure sophistry. If a plaintiff's attorney is unwilling to file a case in Lancaster County, but willing to file the same case in Philadelphia County, then the problem is not the rule, but the attorney.

Finally, to suggest that plaintiffs cannot fairly be compensated in the jurisdiction where the claim arose implies that courts that currently hear medical malpractice cases are unable to provide an adequate judicial forum. This is to say that it is inherently unfair for a court to hear a case if the conduct at issue occurred in that venue. This suggests that the judicial system in that particular county is unable to adhere to the central protections afforded by the Pennsylvania Constitution and a myriad of court rules meant to protect the fundamental right to a fair trial. In fact, there have been many large eight figure verdicts in suburban Pennsylvania counties.

Medical malpractice plaintiffs were never stripped of a forum in which they may assert their claims. Indeed, they are permitted to bring the action in the county where the care at issue took place, which is quite likely the same venue in which they live, and where all essential evidence and witnesses may be found. Accordingly, plaintiffs have never lost any right or ability to fully recover in the event that liability is imposed by a jury of their peers. The present venue rule, therefore, makes the most sense for the convenience of plaintiff and the defendants.

Potential Effects of the Proposed Amendments

Patient Access to Quality Care

The proposed amendment has the potential to significantly impact both access and quality of care for patients. This should be the issue that this Committee spends the most time studying rather than the "statistics." If there is a primary goal of increasing patient access to quality care, then one must ask whether repealing Rule 1006(a.1) is consistent with that goal. I say it is not consistent. Repealing Rule 1006(a.1) will act as a disincentive for large, well organized, quality health care systems from investing resources in counties outside Philadelphia and Pittsburgh. It adds a layer of risk and will disrupt the balance of business decisions about whether to purchase and invest in rural facilities. Patients benefit when a large health system invests resources in rural counties. Patients have better access to care and the quality of care is increased. If this Committee is concerned about patient access to quality care, it must pause and consider the consequences of repealing the current venue statute.

Those who support repeal of Rule 1006(a.1) ask why should hospitals be treated differently than other defendants. The answer is quite simple. A hospital is not like a widget manufacturer. A hospital's job is to provide medical care. When a hospital decides to do business in a certain region, it makes a commitment to the health of the community there. This is fundamentally different then the decision made by a purely for-profit corporation that decides to sell products in a new territory. Accordingly, when some difficulty arises in the provision of these services, it does not necessarily make sense to allow the hospital system to be sued in all jurisdictions where it does business. Indeed, it makes more sense to limit jurisdiction to the place where the care took place. Hospitals have a unique obligation to the communities they serve, and each county court system is more than capable of handling the lawsuits that arise from the care rendered inside its borders.

Judicial Resources and Litigation Expense

Importantly, there has been no investigation into the effect this proposed change will have upon judicial resources. If the proposed amendments are enacted, the new rule will invite forum shopping, and it is undeniable that the majority of medical malpractice lawsuits will be filed in plaintiff-friendly venues. At this point, it is unclear if the courts in counties that will receive an influx in filings will have the resources to handle such a dramatic increase.

Typically, in Philadelphia for example, a professional liability matter will be given a trial date two years after the date of filing. There has been no investigation into the effect that this proposed rule change will have upon this current timeline. However, there will undoubtedly be a decrease in filings in different Pennsylvania counties, which currently do have the judicial resources necessary to hear medical malpractice cases in a timely manner.

Along with an increase in filings, there will be a significant increase in motion practice. There will be a rise in the filing of preliminary objections, discovery motions, and motions to transfer for *forum non conveniens*. These motions will require time and judicial resources to reach disposition, and will unnecessarily increase the cost of litigation for both plaintiffs and defendants.

One might suspect that the ability of a Plaintiff Lawyer to "steer more cases to plaintiff-friendly courts"[2] is the primary reason driving repeal of this rule. It pales in comparison to considerations regarding patient access to quality healthcare, and it shows a sharp conflict of interest between proponents of the amendment and the patients they may seek to represent. The incremental benefit of repeal that inures to a rural victim of medical negligence does not outweigh the disadvantage conferred on all rural patients who may no longer have access to quality care.

[2] Matthew Santoni, *Pa. Senate Wants Time to Study Looser Med Mal Venue Rules*, LAW360, Feb. 5, 2019, *available at* https://www.law360.com/personal-injury-medical-malpractice/articles/ 1126000/pa-senate-wants-time-to-study-looser-med-mal-venue-rules?nl_pk=a26eb4da-7aa3-41a2-9f4e-3ca97dd4895a&utm_source=newsletter&utm_medium=email&utm_campaign=personal-injury-medical-malpractice (last visited 2/7/19).

In sum, there should be no urgency to repeal a rule that in many ways, solved a crisis. The Committee's Explanatory Comment in support of repeal relies on conjecture, and unconvincing appeals to "fairness." The rules on venue and certificates of merit as well as reforms contained in the MCARE Act, were instituted in dealing with a real crisis. It makes no logical sense to repeal the venue rules. If a physician prescribes treatment to deal with a medical problem, would it make sense to stop treatment? The answer is obvious. Repeal of this rule will undoubtedly have wide-ranging impacts that have not been studied or considered by this Committee. At a minimum, the Committee should delay ruling on the proposed amendments so it can analyze whether a legitimate basis exists for repeal, as well as the probable consequences and impacts that would result from repeal.

This position is consistent with Pennsylvania Senate Resolution 20, which reasonably asks that the Legislative Budget and Finance Committee hold at least one public hearing, and be given until January 1, 2020 to provide the General Assembly with a report studying the impact of the current proposal. As set forth in Senate Resolution 20, this ten-month delay "will give the legal community, the medical community, the business community, and the public ample opportunity to weigh in with the statistics, trends, arguments, and philosophies."[3]

Thank you for your consideration.

Respectfully submitted,

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[3] Pa. S.R. 20, Regular Session 2019-2020 (2019), *available at* https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=28159.