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By E-Mail

RE: Public Hearing on the Proposed Rule Change to Allow 'Venue Shopping' in Medical Malpractice Cases

Dear Esteemed Members of the Committee:

My name is Kevin Cottone and I am a partner in the Philadelphia office of White and Williams LLP, where I also serve as the Chair of the firm's Healthcare Practice Group. I am a 1994 graduate of The Penn State Dickinson School of Law and have devoted my entire career to representing health care systems, hospital institutions, senior and elder care communities and individual healthcare providers in professional liability matters.

Throughout my career, I have experienced firsthand the effects of the malpractice crisis that our Commonwealth experienced in the late 1990s and early 2000s characterized by the loss of truly gifted, young physicians who had to leave Pennsylvania to restart their careers because they could not afford the insurance necessary to practice medicine in our state. Between 1990 and 2001, many of Pennsylvania's largest medical professional liability insurance carriers failed, including PHICO, PIC of Pennsylvania and PIE Mutual. See Pew Research Foundation Study, at 7[1]. In 2001-2002, many other carriers, like the St. Paul Group of Companies, Princeton and MIIX, withdrew from the Pennsylvania medical liability insurance market altogether. See Pew Study at 8. A 2002 study by the American Hospital Association found that Pennsylvania had among the worst insurance availability problems in the nation. See Pew Study at 9. As a result, medical liability insurance premiums skyrocketed. According to a 2003 *Wall Street Journal* study, premiums for practitioners in the highest risk specialties increased by an average of 100% between 2000 and 2002 alone. See Pew Study at 14. During that time frame, average Pennsylvania premiums across all specialties went from 60% to 90% above the national average. See Pew Study at 15.

In response to the healthcare crisis, the Pennsylvania legislature and the Pennsylvania Supreme Court promulgated a series of tort reform measures designed to restore balance to the medical

[1] Randall R. Bovbjerg and Anna Bartow, *Understanding Pennsylvania's Medical Malpractice Crisis: Facts about Liability Insurance, the Legal System and Health Care in Pennsylvania*, THE PEW PROJECT ON MEDICAL LIABILITY IN PENNSYLVANIA (2003).

liability insurance market and ensure that citizens throughout the Commonwealth could continue to have access to high quality healthcare services. The Medical Care Availability and Reduction of Error ("MCARE") Act was the centerpiece of this effort. MCARE contained numerous provisions designed to eliminate frivolous lawsuits and rein in the astronomical costs associated with run-away settlement values and disproportionate jury awards. For its part, the Supreme Court enacted important rule changes to further these twin objectives: (1) the Certificate of Merit Rule, which requires a qualified physician to attest to the legitimacy of a potential claim before a plaintiff could bring suit and (2) the medical malpractice venue rule – which requires that suit could only be brought in the county where the care at issue was rendered. On December 22, 2018, more than 15 years after the implementation of these measures, the Civil Procedural Rules Committee of the Supreme Court ("Committee") proposed rescission of the venue rule in medical malpractice cases on the grounds that it "no longer appears warranted." See 48 Pa. Bulletin 7744.

According to the Committee, "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." Id. (citation omitted). "*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.*" Id. (emphasis added). The data regarding the number of filings is a matter of public record, but the basis for the statement that "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" is a mystery. There simply is no evidence of (1) the source of the report to the Committee; (2) the purported amount of decrease in claim payments; and most importantly, (3) that there are uncompensated victims of medical negligence.

This statement suggests the Committee believes that there are inherently unfair venues in Pennsylvania, which now requires the Supreme Court permit forum shopping to address these undefined, uncompensated victims of medical negligence. There is simply no objective evidentiary support for this bold claim.

The public is invited to submit written comments to the proposed rescission of the venue rule any time prior to February 22, 2019. See 48 Pa. Bulletin 7744. Public hearings are not required and are rarely conducted. The written comments the Committee receives are generally not made public; however, nothing precludes either the Committee from disclosing the substance of the comments in their Committee report or the commenters themselves from publicly disclosing their comments.

The Committee, generally, is tasked with reviewing each comment received and deliberating/debating the merits of the proposed rule change in light of the received comments. The Committee typically meets at least four times per year, though, they can meet more often and at any time the Chair sets a meeting agenda.

The next Committee meetings are currently scheduled for May and October 2019. After the Committee has deliberated on the comments, it may take the following actions (by majority

vote): (1) submit the proposal as published to the Supreme Court as a recommendation; (2) amend the proposal and send it to the Court as a recommendation; (3) amend the proposal and re-publish it for additional comments; or (4) discontinue the proposal. All recommendations to the Court are accompanied by an advisory report detailing the rationale, anticipated impact and necessity of the rule. The report further identifies and summarizes the public comments received as well as the Committees' response thereto. If the Committee recommendation is not unanimous, the advisory report will note and explain the basis for the dissent. The advisory report as well as all of the deliberations of the Committee are confidential.

After receiving the Committee's recommendation and advisory report, the Supreme Court engages in a non-public deliberative process. The Court may (by a majority vote): (1) adopt the recommendation as submitted; (2) adopt the recommendation as amended by the Court; (3) return the recommendation to the Committee with questions or directives; (4) or reject the recommendation. Typically, it takes an average of 18-24 months from the time of the initial publication of a proposed rule change to the time when the Court takes any action. In the case of a particularly complicated or controversial proposed rule change, the process may take longer.

The Committee's proposed repeal of the medical malpractice venue rule is misguided. The data on which the Committee relies does not support its conclusions. To the contrary, the reduction in filings demonstrates that the tort reform measures enacted more than 15 years ago by the legislature and the Supreme Court, especially the Certificate of Merit Rule, are working. Nothing in the data indicates that requiring plaintiffs to bring suit in the county in which the medical malpractice claim arose deprives alleged victims of access to the courts.

There is no dispute that case filings in Philadelphia decreased as a result of the medical malpractice venue rule and that filings in other counties – specifically Montgomery County, which is adjacent to Philadelphia County – increased. According to the Administrative Office of Pennsylvania Courts ("AOPC"), the average number of medical malpractice cases filed in Philadelphia County dropped from 1,204 between 2000 and 2002 to 406 in 2017 – a 66% *decrease*. In contrast, the average number of medical malpractice cases filed in Montgomery County increased from 22 between 2000 and 2002 to 107 in 2017 – a 386% *increase*.

The average number of medical malpractice cases filed statewide since the high of 2,904 in 2002 is 1,599. Annual filings have remained fairly consistent since 2009. **In other words, although the total number of filings has decreased since MCARE's implementation, it has remained relatively stable over the past decade.** A reduction in the number of suits, particularly frivolous suits, was the express purpose of many MCARE reforms.

The Committee cites no data to support the proposition that the reduction in filings has resulted in a proportionate decrease in compensation to victims of medical malpractice. The decrease in case filings – the only metric cited by the Committee – has no bearing on the proportionate amount of payouts made to victims of medical negligence. In fact and on the contrary, data available from the National Practitioner Data Bank with regard to claim payouts, when cross-referenced with the AOPC data on claim filings, indicates that claim payouts have also remained stable during the past decade. Moreover, given the number of tort reform measures implemented

as part of MCARE, it is impossible to conclude that the medical malpractice venue rule is solely responsible for any alleged decrease in medical malpractice jury verdicts or settlements. Rather, to the extent the number of payouts have decreased at all over the past 15 years, such decreases are likely due to many of the other reforms enacted as part of MCARE including: (1) the method by which damages are computed; (2) limitations on the imposition and amount of potential punitive damages; and (3) consideration of the impact on the defendant when considering an application for remitter.

The pre-MCARE data indicates that large urban counties, particularly Philadelphia, had a disproportionate number of medical malpractice cases filed and high verdict amounts. Of the medical malpractice cases plaintiffs won at trial between 1999 and 2001, more than half resulted in verdicts in excess of $1 million. In 2001, there were nearly as many $1 million+ verdicts in Philadelphia (87) as there were in the entire state of California (101). These statistics, coupled with the fact that many lawyers are based in Philadelphia, create a strong incentive to engineer ways to bring cases in Philadelphia. A return to an era where a disproportionate share of medical malpractice cases are brought in Philadelphia will: (1) increase insurance premiums; and (2) arbitrarily increase settlement amounts and jury awards. These were both key factors in the healthcare crisis which motivated tort reform in the first place. Returning to the pre-tort reform era will inure to the detriment of Pennsylvania's citizens in the form of higher costs and reduced access to physicians and facilities.

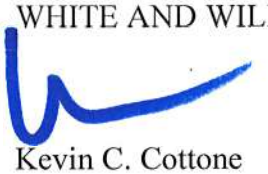
Under the traditional venue rule, a defendant can be sued in any county where: (1) any defendant can be served; (2) where the transaction or occurrence took place; or (3) in the county where any defendant "does business." The "doing business" prong of this test is particularly problematic today because of the complexities with the delivery of health care and large health care systems. In the era of ever-consolidating healthcare systems, physicians who practice in any part of the state could easily be dragged to Philadelphia or any other remote location because their institution is affiliated in some way with a larger institution that has some presence in one of the bigger cities. Instead of rendering patient care, these doctors will be defending suits hundreds of miles from their hospital, office or home.

Elimination of the venue rule in medical malpractice actions will have an adverse impact on healthcare providers. The elimination of the medical malpractice venue rule would encourage forum shopping, which contributed to the medical malpractice crisis that led to the sweeping tort reform measures in the first instance. Not only will this expose healthcare providers to the prospect of increased settlement amounts and excessive jury awards, as well as increased insurance premiums, it will impose greater burdens on healthcare providers who, instead of rendering patient care, will be forced to travel far from home to attend depositions and trial. The proposed elimination of the venue rule by the Civil Procedural Rules Committee will inure to the detriment of healthcare providers and, by extension, the thousands of patients across the Commonwealth whom they treat on a daily basis.

Thank you for the opportunity and privilege to submit this written comment and testimony.

Respectfully submitted,

WHITE AND WILLIAMS LLP



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