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February 20, 2019

Karla M. Shultz, Counsel
Civil Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635

Re: Proposed Amendment to Pennsylvania Rule of Civil Procedure No. 1006

Dear Ms. Shultz:

We are writing in response to the Civil Procedure Rules Committee's invitation for comments, suggestions, and objections to the Proposed Amendment to Pennsylvania Rule of Civil Procedure 1006. This statement is being submitted by Post & Schell. P.C. a corporate defense law firm headquartered in Philadelphia, PA with offices in Allentown, Harrisburg, Lancaster, and Pittsburgh, PA. For more than 50 years, Post & Schell has represented for-profit and not-for profit hospitals, multi-hospital systems, integrated delivery systems, academic/teaching medical centers, and the directors, officers, and practitioners of health care providers in Pennsylvania state and federal courts. For the following reasons, we strongly urge the Committee and the Supreme Court of Pennsylvania to leave Rule 1006 unchanged and in its current form.

By 2002, the Commonwealth of Pennsylvania faced a health care crisis – one that impacted patients and medical providers alike. One main component of this problem was the diminishing availability of medical malpractice insurance coverage. From 1990 through 1998, Pennsylvania saw three major medical malpractice carriers fail (PIC of Pennsylvania, PIE of Ohio, and AHSPIC).[1] One of the nation's largest carriers, St. Paul Group of Companies, announced in

[1] RANDALL R. BOVBJERG & ANNA BARTOW, PEW CHARITABLE TRUST, UNDERSTANDING PENNSYLVANIA'S MEDICAL MALPRACTICE CRISIS: FACTS ABOUT LIABILITY INSURANCE, THE LEGAL SYSTEM, AND HEALTH CARE IN

December 2001 that it was withdrawing nationally from the malpractice market.[2] By February 2002, PHICO Insurance Company, a leading medical malpractice carrier in the state, was insolvent and ordered into liquidation.[3] Princeton Insurance Company and MIIX Insurance Company, two high volume companies, stopped renewing policies for insured Pennsylvania physicians the same year.[4] Meanwhile, hospitals reported limited availability of insurance coverage, especially high-end excess coverage.[5] As the availability of insurance coverage diminished, a second related threat to Pennsylvania health care emerged. Medical providers now faced policy premiums that jumped from around the national average during 1996 through 1998 to the ninth highest in the nation in 2000.[6]

The Medical Care Availability and Reduction of Error (Mcare) Act was passed by the General Assembly and signed into law by Governor Mark Schweiker on March 20, 2002. The Act was a response to the state's growing health care crisis, as evidenced by the policy declarations set forth at the outset of the Act:

> The General Assembly finds and declares as follows:
>
> (1) It is the purpose of this act to ensure that medical care is available in this Commonwealth through a comprehensive and high-quality health care system.
>
> (2) Access to a full spectrum of hospital services and to highly trained physicians in all specialties must be available across this Commonwealth.
>
> (3) To maintain this system, medical professional liability insurance has to be obtainable at an affordable and reasonable cost in every geographic region of this Commonwealth.
>
> (4) A person who has sustained injury or death as a result of medical negligence by a health care provider must be afforded a prompt determination and fair compensation.
>
> (5) Every effort must be made to reduce and eliminate medical errors by identifying problems and implementing solutions that promote patient safety.

PENNSYLVANIA (2003) at 7, *available at* https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/medical_liability/vfmedicalmalpractice0603pdf.pdf. *A copy of this report is enclosed with this letter as Exhibit "A".*

[2] Id. at 8.
[3] Id. at 7.
[4] Id. at 8.
[5] Id. at 9.
[6] Id. at 11-12.

> (6) Recognition and furtherance of all of these elements is essential to the public health, safety and welfare of all the citizens of Pennsylvania.[7]

The General Assembly also made an additional policy declaration in the Mcare Act specifically regarding litigation venue rules: "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."[8] The Mcare Act created the "Interbranch Commission on Venue", comprised of representatives from all three branches, charged with analyzing the issue of venue as it related specifically to medical professional liability actions and was a precursor to the amendment of the venue rules in 2003.[9] A majority of the Commission recommended in its August 8, 2012 report that "venue be limited in medical professional liability actions to the county where the cause of action arose or occurrence took place out of which a cause of arose".[10]

On October 17, 2002, Act No. 2002-127, P.L. 880 (Act 127) was enacted and, *inter alia*, required medical professional liability actions to be brought in the county in which the cause of action arose.[11] By way of an Order dated January 27, 2013, the Supreme Court of Pennsylvania similarly revised Pennsylvania Rule of Civil Procedure 1006.

Clearly, the Pennsylvania Supreme Court has the ultimate authority in promulgating procedural rules for the courts. The historical backdrop of Pennsylvania Rule of Civil Procedure 1006(a.1), however, demonstrates that the Supreme Court did not haphazardly reach a decision to enact a venue rule specific to medical professional liability actions. The state was facing an ongoing crisis. Rule 1006(a.1) essentially amounts to a public policy response following a measured and deliberate analysis involving all three branches of the government.

Unfortunately, the same cannot be said about the Civil Procedural Rules Committee's proposed rescission of Rule 1006(a.1). Here, the Committee is suddenly proposing a momentous change that will have "real world" negative consequences for Pennsylvania citizens when there is no demonstrated need for such action. Perhaps most alarming, considering the reasons why Rule 1006(a.1) was enacted in the first place, is the casual manner in which the Committee suggests

[7] 40 P.S. § 1303.102.

[8] Id. § 1303.514(a).

[9] Id. § 1303.514(b).

[10] REPORT OF THE PENNSYLVANIA INTERBRANCH COMMISSION ON VENUE (August 8, 2012), at 14. *A copy of the Report (without Appendix materials) is attached as Exhibit "B"*.

[11] The Commonwealth Court subsequently held on June 18, 2003 that these venue provisions of Act 127 exceeded the constitutional authority of the legislature. See North-Central Pa. Trial Lawyers Ass'n v. Weaver, 827 A.2d 550 (Pa. Commw. 2013).

that the current rule "no longer appears warranted"[12] (emphasis added) without any publicly available analysis to support this sweeping conclusion. The Committee further states that the proposed amendment is "intended to restore fairness to the procedure for determining venue regardless of the type of defendant"[13] (emphasis added) – suggesting without any substantiation that it is somehow unfair that a professional liability action must be heard in the county in which the cause of action arose. Moreover, the Committee asserts that Rule 1006(a.1) has resulted in a reduction in the number of medical professional liability actions and a resultant decrease in the amount of claim payments.[14] Again, the Committee's reasoning fails to demonstrate whether this drop in actions and claim payments are actually a result of Rule 1006(a.1), and, if so, whether Rule 1006(a.1) is actually decreasing unwarranted and meritless claims.

Apparently, the Pennsylvania Senate agrees. On February 8, 2019, the Senate passed a resolution by a vote of 31-18 that recounts the efforts made to remedy the health care crisis, including the role of Rule 1006(a.1), and directs its Legislative Budget and Finance Committee to conduct "a study of the impact of venue for medical professional liability actions on access to medical care and maintenance of health care systems in this Commonwealth" and assess "the effects of the 2003 changes governing venue in medical professional liability actions".[15]

It seems self-evident that this amendment, if enacted, will be a return to the old "forum shopping" days when big city courts like the Philadelphia courts, in particular, were clogged with medical malpractice from the outlying counties. Forum shopping is already prevalent in today's non-medical professional liability actions, and there is no reason to believe that this change would not result in bringing many county-centric cases back into the major metropolitan court systems such as the Philadelphia court system. This would not be good for litigants or the judiciary. It would be deleterious and unfair to hospitals and health providers across the Commonwealth if each one is forced to litigate issues of professional negligence in courthouses with which they have only some remote connection. It would be doubly unfair for healthcare providers that have no connection at all to a jurisdiction such as Philadelphia, but who happen to be co-defendants in a case in which service on another defendant could be effectuated there.

This proposed amendment works against the legislative, executive, and judiciary efforts fifteen years ago to successfully resolve a health care crisis. Worse, the Committee actually cites the success of Rule 1006(a.1) in reforming medical professional liability actions as the reason for the proposed revision. Given the absence of any substantiated and compelling need, and the stability presently seen in Pennsylvania health care, we strongly recommend that Pennsylvania Rule of Civil Procedure 1006(a.1) remain in its current form.

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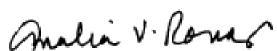
[12] Id.
[13] PA Bulletin, Doc. No. 18-1964 ("Explanatory Comment").
[14] Id.
[15] S. Res. 20, 203rd Leg., Reg. Sess. (Pa. 2019). *A copy of this resolution is attached as Exhibit "C".*

Respectfully submitted,

POST & SCHELL, P.C.

Donald N. Camhi



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