PENNSYLVANIA ASSOCIATION FOR JUSTICE

212 North Third Street, Suite 101 • Harrisburg, PA 17101
Phone 717.232.6478 • Fax 717.232.6487
pajustice.org

Senators Mensch & Brewster
Chairmen – Legislative Budget and Finance Committee
Room 400A, Finance Building
613 North Street
Harrisburg, PA 17105

Re: Written Testimony, Senate Resolution 20 Hearing

This written testimony is being provided on behalf of the Pennsylvania Association for Justice ("PAJ"), a non-profit organization comprised of 2,000 members of the trial bar of the Commonwealth of Pennsylvania. For over 50 years, PAJ has promoted the rights of Pennsylvanians by advocating for the unfettered right to trial by jury, full and just compensation for victims of negligence, and the maintenance of a free and independent judiciary.

PAJ supports the Civil Procedural Rules Committee's proposed amendments to the Rules of Civil Procedure relating to venue as they remedy an inequity that should not have been placed upon victims of medical malpractice in this Commonwealth in the first place.[1] No rule should give one group of individuals or corporations special treatment and a preferred status. The preferred status given to malpractice defendants through the existing special venue rule must immediately be re-evaluated in light of data showing that the number of malpractice cases being filed has declined by 50 percent, while at the same time the number of medical errors has risen to a point where it is now the third leading cause of death in the United States.[2]

As the Explanatory Comment from the Rules Committee accurately notes, "[t]he current rule provides special treatment of a particular class of defendants, which no longer appears warranted." This special treatment discussed by the Committee undermines fundamental notions of fairness and justice. The purpose of the Rules of Civil Procedure should be to ensure that all litigants – whether plaintiff or defendant; patient or doctor; individual citizen or billion-dollar corporation – have the same access to and rights before the courts of this Commonwealth. To date, health care providers and related entities enjoy a venue rule more limited than any other non-governmental entity in our Commonwealth. This special treatment not only contravenes notions of fairness and equality, but lacks justification.

As members of this Committee are aware, circa 2000, there were significant lobbying efforts made by various special interest groups to enact wide-ranging "tort reform" measures to combat an alleged medical malpractice insurance "crisis." Without regard to the validity of the "crisis," various legislative and judicial reforms were enacted, including passage of the Medical Care and Reduction of Errors Act (hereinafter "MCARE Act").[3] Other enactments included the reduction in the amount of coverage

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[1] *See*, amendments to Pa.R.C.P. Nos. 1006, 2130, 2156, and 2179.
[2] Discussed further, *infra*.
[3] 40 P.S. § 1303.101—§ 1303.910

required by physicians from 1.2 million to 1 million dollars; the elimination of the collateral source rule; abrogation of joint liability; reduction to present worth for future earnings losses; and periodic payments of future medical and personal care expenses that are extinguished upon death of the malpractice victim. Proponents of "tort reform" (hospitals and insurers) achieved their goals - these changes, by design, significantly reduced the financial exposure of malpractice defendants and decreased access to the courts.

Additionally, in 2003, the Rules of Civil Procedure were modified quite extensively to (1) place limitations on the plaintiff's choice of venue by requiring that medical malpractice cases be filed in the county where the alleged malpractice arose, and (2) require medical malpractice cases be filed with a Certificate of Merit from a physician stating that there is a reasonable probability that a medical malpractice defendant deviated from the accepted standard of medical care, which caused the plaintiff harm.[4]

While the Certificate of Merit requirement is applicable to all professional negligence claims – including those against accountants, architects, engineers, and attorneys – the current preferential venue rule only applies to health care professionals. There was not then, nor is there today, data that exists to connect the number of medical malpractice cases with venue restrictions. Because the current venue rule being reviewed through SR 20 was enacted as one small part of greater medical malpractice reforms, it is impossible, despite what will be said by those who wish to perpetuate the unfair rule, to point to the impact of venue limitations in isolation.

We know this for certain – claims used to manufacture the "crisis" that led to all of these changes were unsupported, if not nefariously fabricated. Doctors were not leaving Pennsylvania in droves "because they could not afford their malpractice insurance any longer." Data shows that doctors were not leaving, but in fact they were gaining in numbers. "Despite claims that Pennsylvania is losing doctors to other states as a result of high liability insurance premiums, official statistics from the American Medical Association and from the Federation of State Licensing Boards show an actual per capita increase in treating physicians." It should also be noted that supporters conveniently leave out the fact that all but one state contiguous to Pennsylvania has the same venue rule as the one currently being proposed by the Rules Committee.[5] And insurance rates were increasing because of market forces, not lawsuits.[6]

In addition to preventing the exodus of doctors (which was not true) and stabilizing insurance rates caused by malpractice lawsuits (also not true), "tort reform" was also supposed to make Pennsylvanians safer.[7] Unfortunately, that has not happened either. The citizens of Pennsylvania, like the balance of

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[4] *See*, Pa.R.C.P. Nos. 1006, 2130, 2156, and 2179 for "Venue Rule." *See*, Pa. R.C.P. No. 1042.3. for "Certificate of Merit."

[5] Delaware, New York, New Jersey, Ohio, and West Virginia all provide venue for malpractice actions in the county where the Defendant resides or conducts business. The only state contiguous to Pennsylvania that prohibits venue where the Defendant conducts business is Maryland. Note: In W.V. actions against nursing homes may only be filed where the Nursing Home in question is located.

[6] Steve Esack, *Politics, money and fears in Pennsylvania medical malpractice fight*, The Morning Call (Feb. 10, 2019), http://www.mcall.com/news/pennsylvania/mc-nws-medical-malpractice-court-change-fight-20190204-story.html. "For years, insurance companies set malpractice rates artificially low to gain customers. That practice caused three major malpractice insurance companies to go belly up in the 1990s and early 2000s. then, following a 2001 stock market swoon, insurers raised rates to offset investment losses."

[7] The MCARE Act provides that "[e]very effort must be made to reduce and eliminate medical errors by identifying problems and implementing solutions that promote patient safety. *See,* 40 P.S. § 1303.102(5).

this country, face an epidemic. As the internationally renowned team of researchers at Johns Hopkins University School of Medicine recently concluded, preventable medical error is the third leading cause of death in the United States.[8] In Pennsylvania, the Patient Safety Authority statistics reveal that health care facilities, which do not include physician offices, reported 7,881 "serious events" in 2017.[9] These statistics demonstrate that our Commonwealth faces a much greater threat from preventable medical error than malpractice lawsuits.

Lawsuits effectuate positive outcomes by identifying problems and promoting patient safety. As a result of this "tort reform", we are doing less about this problem than we ever have. The most recent data from the Supreme Court shows an almost 50 percent decrease in medical malpractice filings since 2000-2002.[10] In fact, 2017 saw the fewest medical malpractice filings (1,449) in more than fifteen years despite the nearly 8,000 "serious events" reported to the Patient Safety Authority. According to the United States Centers for Disease Control and Prevention, approximately 84 percent of adults and 92 percent of children have contact with a health care professional each year.[11] Despite how often Pennsylvanians come into contact with health care providers, and how often "serious events" (at least the ones that are actually reported) occur, only one person in 8,833 files a medical malpractice lawsuit.[12] This information shows that, sadly, we have far too much medical malpractice, and far too little justice for those who are injured or killed. When this Committee considers these facts in addition to the lack of any data confirming the impact of the special health care venue rule, it is clear that no legitimate reason exists to maintain this special privilege.

As stated by the Civil Procedural Rules Committee, the venue restriction rule and other rules are resulting in "far fewer compensated victims of medical negligence."[13] Additionally, despite the requirement that all filed cases must be supported with a certificate of merit, thereby indicating that there is a meritorious claim, medical malpractice verdicts in Pennsylvania overwhelmingly favor defendants.[14] This trend is especially concerning in light of a national study published in the New England Journal of Medicine concluding that "[a]lthough the number of claims without merit that resulted in compensation was fairly small, the converse form of inaccuracy – claims associated with error and injury that did not result in compensation – was substantially more common. One in six claims involved errors and received no payment."[15]

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[8] Martin A. Makary and Daniel Michael, *Medical error - the third leading cause of death in the US*, 353 BMJ 2139 (2016).

[9] A "serious event" is an adverse event resulting in patient harm. An "adverse event" is an event that results in unintended harm to the patient by an act of commission or omission rather than by the underlying disease or condition of the patient. Patient Safety Authority, Annual Report, 2017 (www.patientsafetyauthority.org).

[10] Pennsylvania Medical Malpractice Filings Statewide 2000-2003 Avg. to 2017, available at http://www.pacourts.us/assets/files/setting-2929/file-7458.pdf?cb=656af3.

[11] Centers for Disease Control and Prevention, Summary Health Statistics: National health Interview Survey, 2018, available at https://ftp.cdc.gov/pub/Health_Statistics/NCHS/NHIS/SHS/2016_SHS_Table_A-18.pdf

[12] 12.8 million Pennsylvanians divided by 1,449 malpractice filings equals 8,833.

[13] *See*, Pa. Civil Procedural Rules Committee, *Notice of Proposed Rule Making (Proposed Amendment of Pa.R.C.P. Nos. 1006, 2130, 2156, and 2179)*, Exploratory Comment.

[14] See Medical Malpractice Jury Verdicts: January 2016 to December 2016, The Unified Judicial System of Pennsylvania, prepared August 30, 2017, available at http://www.pacourts.us/assets/files/setting-771/file-6329.pdf?cb=8929e6 (finding that nearly 80% of verdicts were in favor of the defense in 2017). Even in Philadelphia nearly 62% of the cases tried were defense verdicts and not one verdict in 2017 was over $5,000,000.

[15] See David M. Studdert, et al., Claims, errors, and compensation payments in medical malpractice litigation, N. Engl. J. Med. 2006; 354, 2024-33 (May 2006)

The cumulative effect of the nearly dozen "tort reform" measures that were adopted seventeen years ago is that 50 percent fewer Pennsylvanians have been able to access justice. This decrease in access to our courts is not cause for celebration, especially when juxtaposed against the terrifying fact that medical errors are occurring at an alarmingly high and steadily increasing rate.

The Pa. Supreme Court's 2003 enactment of the special venue rule for medical malpractice defendants as well as several other procedural and substantive law changes at that time have reduced the number of lawsuits in the commonwealth. It may not be possible to measure and know exactly how much any one change has contributed to this outcome. However, what can be measured and is known is that profits motivate those who wish to perpetuate the special venue rule. The rules of civil procedure are not designed to benefit any one party in such a fashion. It is axiomatic that the rules are designed to promote equality and fairness of process; the rules should be agnostic as to outcome.

Supporters of the special venue rule have resorted to their usual fear-mongering sound bites – "doctors will flee," "insurance premiums will increase," and "hospitals will close." Each of those claims, as stated above, have been proven untrue, thus the "favoritism rule" for doctors and hospitals is no longer needed. Moreover, hospitals like UPMC, UPenn, and Geisinger are more profitable than ever – even if they purport to be non-profit entities. Not to mention that patient safety (which is the most important issue) has not improved and, in fact, has gotten worse since the enactment of "special treatment" to doctor and hospitals. All of these facts warrant elimination of the special status venue rule for hospitals.

Furthermore, the healthcare delivery model has changed markedly since the early 2000s. Conglomerate hospitals and the health insurers are taking control of all the health care and health insurance in every county in Pennsylvania, not just the county where they are headquartered. They are dictating staffing, safety rules, coverage issues, etc. to the local community hospitals they own. As such, they should be able to be sued in the places where these decisions are made, not the county where the victim of malpractice was injured or dies. By abrogating the special venue rule, equality and fairness will be restored to the civil justice system, allowing conglomerate hospitals and insurers to be held accountable for unnecessarily injuring or killing so many Pennsylvanians.

Sadly, the only change being discussed is the special venue rule and not the numerous other procedural and substantive changes that were implemented in the early 2000s. All those other "tort reform" initiatives, similar to venue, have since proven to be nothing more than profit schemes that have systematically contributed to the erosion of patient safety.

The Rules Committee stated, "the special treatment [afforded to malpractice defendants] no longer appears to be warranted." In reality, it was never warranted in the first place, because there was never any actual statistical support for the change, and it most certainly is not warranted now given the rise in medical errors in an age where the healthcare delivery system has now placed patient safety in the rearview mirror.