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What Is a 'Fair' Venue for Medical Malpractice Litigation?

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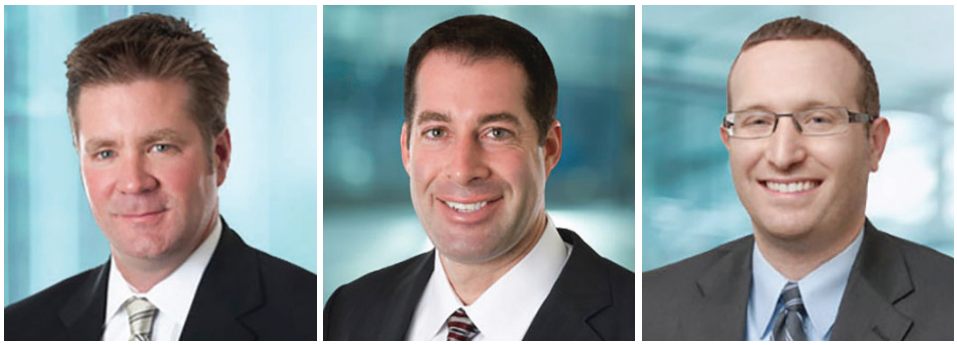
Special to the Legal



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The concept of venue is as old as the Anglo-American legal system itself. Unlike jurisdiction, venue is not a substantive right; rather, it is a procedural rule which, in this commonwealth, the Pennsylvania Supreme Court has exclusive authority to regulate. See *North-Central Pennsylvania Trial Lawyers Assoc. v. Weaver*, 827 A.2d 500 (Pa. Cmwlth. 2003). The current medical malpractice venue rule, Pa. R. Civ. P. 1006(a.1), which requires medical malpractice actions to be brought in the county where the medical care occurred, is reasonable, fair and—despite unsubstantiated claims to the contrary—has not impacted medical malpractice victims' ability to receive just compensation for their injuries. It should not be repealed.

The Repeal Proposal

In December 2018, the Pennsylvania Supreme Court's Civil Procedural Rules Committee proposed repealing the medical malpractice venue rule based on anecdotal reports that the rule "no longer appears warranted" and has "resulted in far fewer compensated victims of medical negligence." See 48 Pa. Bulletin 7744 (Dec. 22, 2018). Despite its sweeping conclusions, the committee's recommendation appeared supported by scant evidence. Accordingly, in February 2019, the Pennsylvania Senate passed a resolution directing the Legislative Budget and Finance Committee (LBFC), a joint committee of both houses of the Pennsylvania General Assembly, to conduct a study assessing the impact the medical malpractice venue rule has had since it was adopted in 2003 as well as the anticipated impact of the proposed repeal.

After nearly a year of work, the LBFC released its report in February 2020 and concluded that there was insufficient data to assess the impact of any change to the medical malpractice venue rule on medical care availability or access, compensation for victims of medical negligence or the cost and affordability of medical malpractice insurance. Accordingly, the LBFC drew no conclusions and made no recommendations as to whether the proposed rule change should be adopted by the Supreme Court. What the Supreme Court will do next is unclear, but it may

turn on both an understanding of what venue rules are (and are not) intended to do and what the LBFC has actually found will be the likely impact of repealing the medical malpractice venue rule (the consolidation of most medical malpractice litigation into three venues throughout the commonwealth).

There Are No Unfair Venues in Pennsylvania

The Civil Procedural Rules Committee has suggested that, as a result of the medical malpractice venue rule, victims of medical negligence have been under-compensated for the past two decades. However, the LBFC report does not support this conclusion.

No one data source provides comprehensive information regarding medical malpractice case outcomes. The source that is most routinely cited for information regarding the compensation paid to victims of medical negligence in Pennsylvania are reports by the National Practitioner Data Bank (NPDB) which records settlement and verdict information relative to named medical providers (and not settlement payments made on behalf of institutions). Even the under-representative NPDB data cited in the LBFC report demonstrates that, as of Dec. 31, 2018, Pennsylvania was second only to New York with regard to statewide medical malpractice payouts (on both a total and per capita basis). Simply put, the LBFC found no evidence that the medical malpractice venue rule has diminished recoveries by victims of medical negligence and has demonstrated that there are no "unfair" venues for medical malpractice plaintiffs in Pennsylvania.

Repealing the Venue Rule

The LBFC found that since the enactment of the venue rule, Pennsylvania's three largest counties—Allegheny, Lackawanna and Philadelphia—saw significant decreases in medical malpractice case filings (37.7%, 43.6% and 66.7%, respectively) while their neighboring counties saw concomitant increases in filings. For example, Washington County, near Allegheny, saw a 304.8% increase in filings; Luzerne County, near Lackawanna, saw a 44.1% increase in filings; and Bucks and Montgomery counties, adjacent to Philadelphia, experienced a 30.1% and 397% increase in filings, respectively. These changes are a result of cases being brought in counties where the medical care was actually provided, as opposed to venues plaintiffs lawyers believed would be more advantageous.

At minimum, repealing the venue rule is likely to increase filings in Allegheny, Lackawanna and Philadelphia counties, perhaps approximating pre-2003 levels. Moreover, as noted by the LBFC, given the consolidation in the healthcare market over the past 17 years, the percentage of Pennsylvania providers potentially subject to suit in one of the commonwealth's three largest counties will be significantly greater than in 2003. This result would be problematic for at least three reasons.

First, essentially consolidating much of the medical malpractice litigation into primarily three courts in the commonwealth threatens to increase the burden on our busiest courts which may already be over-extended. Litigating cases through a backlogged system will delay the administration of justice, not expedite it.

Second, any change in the venue rule will disrupt the medical professional liability insurance market. Professional liability underwriters, like all insurers, abhor uncertainty and are likely to, at least in the short-term, react unfavorably to a significant change in medical malpractice litigation. Indeed, the LBFC report predicts that "a change in the venue rule, coupled with the regionalization of hospital services, would likely create a less predictable market in the near term. If insurance companies have a more difficult time predicting their costs, rates may destabilize soon after as they adjust to the new rule." See LBFC Report at S-6, n.1

Finally, a change in the medical malpractice venue rule will likely require health care providers to defend suits far from the locations where they practice. Proponents of the venue rule change argue that it is unfair for medical providers to be subject to a different venue rule than other categories of defendants. However, medical providers are a unique class of individuals who, for reasons of convenience, the prompt administration of justice, and the well-being of all residents of the

commonwealth, should only be subject to suit in the county in which the medical care was rendered.

Today, the practice of medicine remains one of the few professions that is consistently practiced in a discrete location. Because the practice of medicine is inherently local, litigation for alleged malpractice should be as well. A physician serves his or her community best when he or she is at home treating patients, not hundreds of miles away attending deposition, trial or other court proceedings. In this era of consolidated health systems, a repeal of the medical malpractice venue rule significantly increases the likelihood that many providers in rural parts of the commonwealth, whose practices have been bought up by large health systems, will be dragged to Philadelphia or Pittsburgh to defend lawsuits when neither the plaintiff nor defendant has any personal connection to Philadelphia or Allegheny County. Although the LBFC found that this may not necessarily increase the plaintiff's chance of success or the amount of any award/settlement, it will require the defendant health care provider to abandon his or her practice, sometimes for significant periods of time, in order to travel hundreds of miles to participate in the litigation.

Forum Non Conveniens Is Not an Adequate Substitute

Many proponents of the venue rule repeal have argued that the doctrine of forum non conveniens, Pa. R. Civ. P. 1006(d)(1), is sufficient to address any meaningful concerns regarding the inconvenience associated with forcing a healthcare provider to defend a suit in a remote county. However, this argument ignores the reality that the burden to transfer venue under the doctrine of forum non conveniens is high. In order to prevail on a motion to transfer venue, the defendant must establish, in each case, that venue in the plaintiff's chosen forum is "vexatious and oppressive" to him or her. See *Cheeseman v. Lethal Exterminator*, 701 A.2d 156 (Pa. 1997). In the case of medical providers, the salient issue is more than the oppressiveness of a remote venue on them personally; it is also the deprivation of their patients from continued and uninterrupted access to their care. Moreover, motions to transfer venue will have to be separately litigated in each case. These motions are heavily fact-intensive and typically require their own dedicated period of discovery. This process will only increase the burden on the courts in which these actions are initially filed and further delay the prompt administration of justice.

The Current Medical Malpractice Venue Rule Should Remain

The current medical malpractice venue rule reasonably accounts for medical providers' unique position in society. It also preserves continuity of patient care and eases the burden on Pennsylvania's health care institutions. Moreover, the Legislature's study found no evidence to support the premise upon which the proposed rule change was based. Therefore, the venue rule should not be repealed.

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