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Medical Professional Liability Lawsuit Venue—New Post-COVID Considerations, The Legal Intelligencer, March 28, 2022

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In 2018, the Supreme Court of Pennsylvania Civil Procedural Rules Committee (rules committee) proposed elimination of Rule 1006(a.1) (venue rule), which requires that a medical professional liability action be brought in "a county in which the cause of action arose."

Since the change was first proposed, the COVID-19 pandemic accelerated the trends that led to implementing the Venue Rule nearly 20 years ago. As the health care economy adjusts to a post-COVID-19 environment, the case for the venue rule proposed revision is even less compelling than it was when it was first suggested.

When the rules committee proposed to eliminate the venue rule in December 2018, it characterized the venue rule as "special treatment to a particular class of defendants" that "no longer appears warranted." The rules committee explained that when the venue rule was first implemented, there was a significant decrease in medical malpractice filings and a reduction in payouts. The rules committee proposed that eliminating the venue rule would "restore fairness" to venue procedure. To reach its objective, the rules committee proposed removing subsection (a.1) entirely and any reference to medical professional liability. Under the proposed revision, venue in a medical professional liability lawsuit would be proper where: "the individual may be served; the cause of action arose; a transaction or occurrence took place out of which the cause of action arose; [or] venue is authorized by law." In effect, medical professional liability defendants would be subject to the same venue rules as any other civil defendant.

The venue rule emerged from the Medical Care Availability and Reduction of Error Act (MCARE) of 2002. MCARE responded to a crisis, which saw healthcare providers and professional liability insurers leaving the commonwealth. MCARE overhauled Pennsylvania's medical professional liability insurance system and implemented changes to the rules governing medical professional liability actions. These included new rules on medical expert witness testimony, joint and several liability, ostensible agency and damages, and a certificate of merit requirement.

Section 514 of MCARE addressed venue and observed 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." Philadelphia and Allegheny counties were considered venues where plaintiffs were more likely to obtain favorable verdicts and higher damages awards. As the Pennsylvania Superior Court pointedly explained in Olshan v. Tenet Health System City Avenue, 849 A.2d 1214 (Pa. Super. Ct. 2004):

The General Assembly has stated that it has recognized that health care in the commonwealth was becoming controlled by larger entities such as Tenet Health Systems, the University of Pennsylvania, Thomas Jefferson University, Einstein Hospital, the University of Pittsburgh Medical Center, and West Penn Allegheny Health System. As a result of this, any health care provider affiliated with any of these larger corporate entities became fair game to be sued in Philadelphia or Pittsburgh, where the vast majority of corporate entities have their main location or conduct a large amount of business.

MCARE created an Interbranch Commission on Venue, which recommended that medical malpractice cases should be brought in the county where the care was provided. In 2002, the General Assembly enacted 42 Pa. Cons. Stat. Ann. Section 5101.1, and the Supreme Court concurrently implemented the venue rule. The General Assembly's enactment of Section 5101.1 was determined to be unconstitutional by the Commonwealth Court because it infringed on the Supreme Court's exclusive power to create procedural rules. See North Central Trial Lawyers v. Weaver, 827 A.2d 550 (Pa. Commw. Ct. 2003), as amended (June 25, 2003).

The venue rule went into effect with the other extensive MCARE reforms, and its precise effect cannot be known. Still, medical professional liability case filings in Philadelphia and Allegheny counties fell dramatically after the venue rule was implemented. The General Assembly determined that medical malpractice filings in Philadelphia County fell by 67.7% between 2000-02 and 2015-17. Allegheny County saw a 37.7% decrease in the same period. Total medical professional liability lawsuits fell by 44.9% throughout the commonwealth. In conjunction with the other MCARE reforms, the Venue Rule is credited with resolving the health care crisis of the

early 2000s.

Shortly after the rules committee proposed elimination of the venue rule, the General Assembly responded with Senate Resolution 2019-20, "directing the 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." The resolution acknowledged that the healthcare crisis of the early 2000s was abated, but that it was important to evaluate what effect repeal of the venue rule might have. Perhaps in an implicit acknowledgement that legislative action on the Venue Rule was found unconstitutional in Weaver, S.R. 2019-20 only "requested" the Supreme Court to delay action on the venue rule change.

The Budget and Finance Committee issued its report in February 2020, just as the first wave of the COVID-19 pandemic reached Pennsylvania. The report studied the period of 1996 to 2018 and attempted to track the venue rule's effect on the availability of healthcare, the number of medical professional liability lawsuits filed, the total amount of medical professional liability payments made, and the availability and cost of medical professional liability insurance. In general, the report was unable to determine the effect the venue rule had on each area, and it could not predict the effect of its proposed repeal. Of note was the report's observation that the number of counties with healthcare providers linked to Philadelphia, Allegheny and Lackawanna counties increased between 2002 and 2018.

In the two years since the Budget and Finance Committee issued its report, the Supreme Court did not implement the proposed venue rule repeal. The events of the last two years invite a new look at the rationale for the proposed change.

As the General Assembly foresaw in 2002, institutions such as Philadelphia-based University of Pennsylvania and Pittsburgh-based Allegheny Health Network continued their growth. For example, by the eve of the pandemic, University of Pennsylvania acquired major hospitals in Chester and Lancaster counties. Allegheny Health Network was acquired by Highmark, Inc. and continued its expansion into western Pennsylvania counties. The COVID-19 pandemic placed significant financial stress on rural healthcare systems, which will necessarily increase the pace of consolidation. At the same time, Pennsylvania's urban venues remain attractive for plaintiffs. As the original rationale for the venue rule was health network consolidation, the rules committee statement that the venue rule "no longer appears warranted" is unfounded. If anything, the trend of consolidation was accelerated by the pandemic.

The COVID-19 pandemic accelerated widespread use of telemedicine, and the practice will likely remain a fixture of health care after the pandemic. This trend will further increase the geographic reach of the commonwealth's urban-based health networks. Under the venue rule proposed revision, venue in a medical professional liability case would no longer be limited to "the county in which the cause of action arose," but would expand to venues where "a transaction or occurrence took place out of which the cause of action arose." The current venue rule is interpreted by Pennsylvania courts as limiting venue to the county where the healthcare services are "furnished." Under this interpretation, advice relayed by telephone is considered "furnished" in the place where the patient receives the information. See, e.g., Cohen v. Furin, 946 A.2d 125 (Pa. Super. Ct. 2008). Under the proposed venue rule revision, existing caselaw would be subject to reevaluation, and a telemedicine consultation could lay venue in the county where the medical professional is present at the time of the consultation.

Aside from changes brought by the pandemic, the recent Superior Court decision in Dockery v. Thomas Jefferson University Hospitals, 253 A.3d 716 (Pa. Super. Ct. 2021), reargument denied (Apr. 26, 2021) calls into question the rules committee suggestion that eliminating the venue rule would "restore fairness." In Dockery, the Superior Court considered whether the venue rule violated state and federal Equal Protection Clauses under the U.S. Supreme Court's rational basis test. Dockery found that the plaintiff did not explain why the Supreme Court's creation of the venue rule was illogical and, by extension, unconstitutional. While a more direct equal protection clause challenge by the plaintiff in Dockery may have yielded a different outcome, the decision tends to undermine the premise that the Venue Rule should be revised to "restore fairness."

The extraordinary events of the last two years indicate that the venue rule rationale is as strong as it has ever been, and the premise that the venue rule is unfair is questionable. As Pennsylvania emerges from the COVID-19 pandemic, the Supreme Court should take a fresh look at the rules committee's proposal to eliminate the venue rule to account for these realities.

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