Chapter 1

Pre-Suit Considerations

1-1 INTRODUCTION

Like most other types of litigation, a number of pre-suit considerations may affect the course and potential outcome of commercial litigation. These include pre-suit case investigation and evaluation; preservation of evidence; personal and subject matter jurisdiction; arbitrability of disputes; venue; consideration of potential defenses and counterclaims; common interest or joint defense agreements; and whether the action is against a licensed professional.

1-2 CASE INVESTIGATION CONSIDERATIONS

The attorney begins virtually all cases by gathering information initially from the client. The client interview should identify all individuals who may have knowledge of facts and circumstances surrounding the dispute, and all individuals associated with the client who may have custody of or access to documents and other evidence relevant to the dispute. The client interview and independent case investigation should also identify, as early as possible, all non-party individuals and entities that may possess knowledge, documentary evidence, or other evidence that may be relevant to the dispute.

1-2:1 Gathering and Reviewing Client Documents and Electronic Information

With the advancement modern technology and the pervasive use of electronic communications, the obligation of attorneys and parties to preserve electronic evidence has been increasing in scope. Not only does the early gathering and preservation of

evidence enhance the quality of representation, but the failure to preserve evidence, documentary or otherwise, may give rise to sanctions during the litigation against the client and/or the attorney, or may result in other adverse consequences for spoliation, up to and including the dismissal of claims or preclusion of defenses.

It is helpful to begin every case by creating a "cast of characters" that identifies individuals and entities who have a role or potential role in discovery or in the outcome of the dispute. The "cast of characters" should be updated throughout the litigation. Identifying individuals' employers, their titles and their contact information such as addresses, phone numbers and e-mail addresses will lead to other useful information and discoveries during the case.

The pre-suit investigation should explore and identify the potential repositories of discoverable information. These include, but are not limited to, the locations and custodians of hard copies of documents; the types of computer systems of the client, including how and where information is stored and backed up; the devices used by the business and by individuals who may become fact witnesses (personal computers, electronic tablets, laptops and cellular devices); the types of telephone and voice messaging systems; phone vendors and carriers whose records may need to be preserved; and individuals' cellular phone numbers and carriers whose records may need to be preserved.

Once the sources of potentially helpful and discoverable information have been identified, a "litigation hold" notice should be issued to appropriate recipients.[1] Depending on how large or complex a case is, and if there is a risk of deletion or spoliation of relevant data, it may be advisable to have selected hard drives or devices imaged to preserve data as of a specific point in time. However, imaging can be costly, and counsel and the client will have to engage in a cost-benefit analysis of whether and when to conduct the imaging. With respect to information in the custody of third parties, it may be appropriate to issue written notices to them requesting or directing that information be preserved

[1] *See* Section 1-3.

because litigation is contemplated. A sample third party document preservation letter is included in Appendix 1-2:1.

1-2:2 Considerations for Interviewing Witnesses

As counsel's understanding of the case develops, counsel must evaluate whether and how to contact witnesses who may have useful information regarding the case. Contacting and interviewing non-client witnesses raise ethical implications and future discovery implications. If a witness is willing to be interviewed, the attorney must also determine whether to obtain a signed statement from the witness and whether to record it electronically. If a recorded statement is later transcribed, the recording should be preserved so that the accuracy of the transcription may be verified, and no spoliation issue develops in discovery.

1-2:2.1 Ethical Considerations for Interviewing Witnesses

The first consideration for interviewing witnesses is whether the witness and/or his or her employer is/are represented by counsel. If the lawyer knows that a person is represented by counsel[2] in the matter which is the subject of the lawyer's representation, then the consent of the witness' lawyer is necessary before communicating with the witness, unless otherwise authorized by law or court order.[3] Sometimes the client will arrange for a third party, or even an employee of the prospective defendant, to contact the lawyer, or sometimes such a witness will voluntarily contact the lawyer. However, the prohibition against communicating with persons known to be represented applies even if the represented person initiates the communication with the lawyer.[4] The lawyer cannot communicate indirectly, through an intermediary, with

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2. The prohibition only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. Pa. Rule of Professional Conduct, Rule 4.2, comment (8). This means actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. *See* Pa. Rule of Professional Conduct 1.0(f). The lawyer cannot evade obtaining the consent by closing eyes to the obvious. Pa. Rule of Professional Conduct, Rule 4.2, comment (8).

3. Pa. Rule of Professional Conduct, Rule 4.2.

4. Pa. Rule of Professional Conduct, Rule 4.2, comment (3). A lawyer must immediately terminate the communication once the lawyer learns that the communication is prohibited under Rule 4.2. *Id.*

a represented person if the direct communication would be prohibited.[5]

In the case of a represented organization, a lawyer may not communicate with a constituent of the organization who supervises, or directs or regularly consults with the organization's lawyer concerning the matter, or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[6]

Consent of the organization's lawyer is not required for communication with a former constituent of a corporate party.[7] Therefore, a lawyer may communicate with a former employee of an entity that will or may be a party to the dispute or with a non-managerial employee.[8] A lawyer may also communicate with present non-managerial employees of an opposing party who have not made acts or omissions in connection with the matter in issue that may be imputed to the party for purposes of its liability and whose statements will not constitute admissions on the part of the

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5. Pa. Rule of Professional Conduct, Rule 4.2., comment (4).

6. Pa. Rule of Professional Conduct, Rule 4.2., comment (7).

7. Pa. Rule of Professional Conduct, Rule 4.2., comment (7).

8. *Pritts v. Wendy's of Greater Pittsburgh*, 37 Pa. D. & C.4th 158, 163-69 (Allegheny Co. 1998) (Counsel may communicate with former employees of opposing party and with present non-managerial employees of opposing party who have not made acts or omissions in connection with the matter in issue that may be imputed to the party for purposes of its liability and whose statements will not constitute admissions on the part of the corporation). Compare Pa. Rule of Professional Conduct 3.4(f). When communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Pa. Rule of Professional Conduct 4.4. *See also Wein v. Williamsport Hosp. & Med. Ctr.*, 45 Pa. D. & C.4th 537, 544 (Lycoming Co. 2000) (communication with former employees of hospital not prohibited); *Marinnie v. Nabisco Brands*, No. 92-6064, 1993 WL 267453, 1, 1993 U.S. Dist. LEXIS 9552, at *2 (E.D. Pa. July 12, 1993) ("although it has not received a uniform interpretation, Rule 4.2 does not appear to bar ex parte contacts with former employees"); *University Patents, Inc. v. Kligman*, 737 F. Supp. 325 (E.D. Pa. 1990) (under Rule 4.2 an attorney is not precluded from contacting former employees); and *Action Air Freight, Inc. v. Pilot Air Freight Corp.*, 769 F. Supp. 899, 904 (E.D. Pa. 1991), *appeal denied*, 961 F.2d 207 (3d Cir. 1992) (attorney may engage in ex parte contact with former employees, but counsel "must refrain from soliciting information protected by the attorney-client privilege"). *But see Stabilus v. Haynsworth, Baldwin, Johnson & Greaves*, No. 91-6184, 1992 WL 68563, 1992 U.S. Dist. LEXIS 4980 (E.D. Pa. Mar. 31, 1992) (counsel should not have conducted ex parte interview with corporate plaintiff's former financial vice-president who was privy to communications with counsel concerning labor negotiations that were at issue in the litigation, and counsel was required to produce copies of any statements to opposing counsel).

corporation.[9] If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication appears to be sufficient for compliance with the Pennsylvania Rules of Professional Conduct, and the permission of the constituent's counsel is not necessarily needed.[10]

When dealing with unrepresented persons, the lawyer cannot state or imply that he/she is disinterested,[11] and cannot give advice to an unrepresented person, other than to advise such person to secure counsel, if the lawyer knows or reasonably should know that the interests of the witness are, or have a reasonable possibility of conflicting with the interests of the lawyer's client.[12]

The ethical issue also presents itself when counsel for a corporation seeks to interview and/or represent current or former employees of the entity she represents. In a 2019 decision, *Newsuan v. Republic Services, Inc.*, the Pennsylvania Superior Court addressed the attorney-client and work product privileges where corporate counsel interviewed current and former corporate employees

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9. *Raub v. US Airways, Inc*., No. 16-1975, 2017 WL 5172603, at *4 (E.D. Pa. Nov. 8, 2017) (insufficient evidence that flight attendants had the authority to obligate airline; but counsel violated rule because flight attendants were "represented parties because they are persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability"); *Pritts v. Wendy's of Greater Pittsburgh*, 37 Pa. D. & C.4th 158, 163-69 (Allegheny Co. 1998) (Counsel may communicate with former employees of opposing party and with present non-managerial employees of opposing party who have not made acts or omissions in connection with the matter in issue that may be imputed to the party for purposes of its liability and whose statements will not constitute admissions on the part of the corporation).

Communicating with present non-managerial employees presents an interesting quandary if counsel does not know in advance of the communication whether the employee made acts or omissions that may be imputed to the party for purposes of liability, or whether the employee's statements would constitute admissions on the part of the entity. If an interview commences, and if it is determined during the interview that acts, omissions or statements may be imputed to the opposing party for purposes of liability, the interview should be terminated immediately. In light of the court ruling in *Pritts v. Wendy's of Greater Pittsburgh*, 37 Pa. D. & C.4th 158, 163-69 (Allegheny Co. 1998), it seems unlikely that the information obtained could be used against the opposing party, and the ethical implications for counsel are unclear where counsel lacked knowledge in advance of the interview whether any acts, omissions or statements of the employee were imputable to the opposing party. *See also Raub v. US Airways, Inc.*, No. 16-1975, 2017 WL 5172603, at *4 (E.D. Pa. Nov. 8, 2017) (counsel violated rule because flight attendants were "represented parties because they are persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability").

10. Pa. Rule of Professional Conduct, Rule 4.2, comment (7).

11. Pa. Rule of Professional Conduct, Rule 4.3(a).

12. Pa. Rule of Professional Conduct, Rule 4.3(b).

who witnessed the plaintiff's injury.[13] The trial court held that no privilege applied because corporate counsel violated Pennsylvania Rule of Professional Conduct 7.3 by improperly telephoning the witnesses and offering legal services to them; Rule 1.7 by failing to inform the witnesses that there were potential conflicts of interest and by failing to obtain their informed consent to waive such potential conflicts; and Rule 3.4 by foreclosing plaintiff's counsel from fair access to evidence by refusing to provide contact information for the potential fact witnesses.[14]

In a confusing result, the Superior Court adopted the trial court's ruling denying an attorney-client relationship between corporate counsel and the employees, individually, but reversed, finding that the privileges applied in so far as the corporation was concerned, and remanded to allow plaintiff's counsel to seek ex parte interviews of the fact witnesses to the extent they were not represented by counsel, and allowed plaintiff's counsel to seek further discovery of available facts through depositions and discovery of the witnesses.[15] The Court stated that "the attorney-client relationship that counsel and the employees believed they had formed with one another was . . . invalid for reasons of potential conflict of interest without informed consent," but nevertheless found that the employees' apparent agreement to keep their communications confidential satisfied the requirements of the corporate attorney-client privilege.[16] Thus, the Court agreed with the trial court's ruling

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13. *Newsuan v. Republic Servs. Inc*., 213 A.3d 279, 284 (Pa. Super. 2019).

14. *Newsuan v. Republic Servs. Inc*., 213 A.3d 279, 283-84 (Pa. Super. 2019).

15. *Newsuan v. Republic Servs. Inc*., 213 A.3d 279, 288-89 (Pa. Super. 2019).

16. *Newsuan v. Republic Servs. Inc*., 213 A.3d 279, 288 (Pa. Super. 2019). The Court stated in a footnote:

> . . . Problematic for [the corporation] is the significant risk that an employee fact witness may testify against [the corporation's] interest . . . It is foreseeable, for example, that a current or former employee testifies to some deficiency with respect to the formation or enforcement of safety rules or with some other aspect of managerial oversight which would bolster the claim of negligence against the corporate defendant. Confronted with such testimony, counsel must either develop the testimony to advance the client witness's interest at the expense of corporate client, or impeach the client witness for the benefit of the corporate client. In either instance, counsel's responsibility to one client will materially limit his representation of the other client.
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> Therefore, we agree with the trial court that only upon the employee's informed consent to retain counsel despite the risk of conflict, which consent is accomplished through the employee's completion of a waiver form clearly notifying him or her of the conflict, is a valid attorney-client relationship formed.

213 A.3d at 285 n.4

that counsel had violated Rule 1.7 by failing to obtain the informed consent of the employees to represent them in their individual capacities, but the Court did not specifically address the trial court's other rulings on the application of Rules of Professional Conduct 7.3 or 3.4. Given the Superior Court apparently agreed with the trail court's ruling on Rule 1.7 and did not specifically reverse the trial court's rulings on the application of Rules 7.3 or 3.4, counsel would be well advised to study the *Newsuan* opinion and to be mindful of the trial court's rulings when interviewing current and former corporate employee witnesses.

The Pennsylvania Supreme Court has also held that where an attorney represents multiple clients in the same matter, it is imperative that the multiple clients be advised whether their communications with counsel are privileged from each other or shared jointly.[17]

An attorney must be careful when representing a corporate client and interviewing current and former employees of the entity. Before interviewing such individuals, counsel is encouraged to give an "*Upjohn* warning" to the witness.[18] The purpose is to make sure the witness understands whom the lawyer represents and who will control the confidentiality of what is about to be discussed. If a lawyer fails to give an *Upjohn* warning, the lawyer risks civil liability and/or disciplinary action and could end up being unable to control the confidentiality of statements made during the interview. It is highly recommended that the interviewing attorney not only give an *Upjohn* warning, but memorialize that the warning was given to prevent a later allegation by persons interviewed that they believed the attorney was representing them individually.[19]

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17. *Office of Disciplinary Counsel v. Baldwin*, 225 A.3d 817, 833 (Pa. 2020).

18. The warning is named after *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981), where the Supreme Court held that the attorney-client privilege applies when the company's attorney communicates with the company's employees, despite the rule that communications with third parties constitute a waiver of the attorney-client privilege.

19. When giving an *Upjohn* warning, counsel should consider having the person interviewed sign a non-disclosure agreement to prevent disclosure of the content of the discussion, except to the interviewed person's counsel. Counsel should explain that the attorney is representing the company and not the employee; that the company asked the attorney for legal advice; that the interviewee has information that the attorney needs to provide effective legal advice to the company; that all communications the attorney and the employee are protected by the attorney-client privilege, however, the privilege belongs only to the company and not to the employee; and that the company has the discretion and choice to waive the privilege and disclose to a third party the communications between the

If an *Upjohn* warning is given, it increases the chances that the witness interview will be protected by the entity's attorney-client privilege. The interviewee should be told that the forthcoming conversation will be confidential, but that whether it remains confidential will be controlled by the company and not by the interviewee. In other words, if the company wants to disclose to third parties at a later date what the interviewee is about to say, it can do so.

1-2:2.2 Discovery Considerations When Interviewing Witnesses

Other considerations when interviewing or communicating with witnesses are the future discovery implications surrounding the interview or communications. In state court, the discoverability of pre-suit investigative materials is addressed in Rules of Civil Procedure 4003.1 through 4003.8. The extent to which pre-suit investigative materials are discoverable should be borne in mind when conducting the investigation. Such material may be discovered even though prepared in anticipation of litigation or trial by or for the party, or by or for the party's representative, including the party's attorney, consultant, surety, indemnitor, insurer or agent.[20] However, the discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.[21] Thus, an attorney's notes of an interview would not be discoverable.[22]

On the other hand, with respect to a non-attorney representative such as an investigator, the protected information includes only his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or

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employee and the attorney without the employee's prior notice or consent; and to preserve the company's attorney-client privilege, the employee must not share the contents of the interview with anyone, including other employees or anyone outside the company, except for the interviewed employee's attorney. Counsel may also wish to explain that other employees may be interviewed as part of the company's investigation so that the interviewee does not feel that he or she is the only person being interviewed.

20. Pa. R. Civ. P. 4003.3.

21. Pa. R. Civ. P. 4003.3.

22. *Estate of Paterno v. Nat'l Collegiate Athletic Ass'n (NCAA)*, 168 A.3d 187, 199 (Pa. Super. 2017) (attorney interview notes and summaries are protected in their entirety by work product doctrine; whereas, investigator notes protected only to the extent that those notes reflect "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics").

tactics.[23] Thus, much of the contents of an investigator's notes would be discoverable, whereas the contents of the attorney's notes, or notes of an attorney's employee, would not.[24] To comply with Rule 4003.3, the non-attorney investigator or representative's notes will frequently be redacted, leaving only the non-protected portions visible.

Statements given by witnesses are discoverable.[25] A "statement" is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.[26]

In federal court, there seems to be a split of authority on whether witness statements are protected by the work product privilege. At least one federal court in Pennsylvania has held that the production of statements of party witnesses obtained in anticipation of litigation or preparation for trial requires the party seeking the discovery to show a substantial need in the preparation of the seeking party's case and that the seeking party is unable without undue hardship to obtain a substantial equivalent of the materials by other means.[27] Under another

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23. Pa. R. Civ. P. 4003.3.

24. *Estate of Paterno v. Nat'l Collegiate Athletic Ass'n (NCAA)*, 168 A.3d 187, 199 (Pa. Super. 2017) (attorney interview notes and summaries are protected in their entirety by work product doctrine; whereas, investigator notes protected only to the extent that those notes reflect "mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics"); *Hall v. Golden Mile Ice Ctr. Inc.*, 11 Pa. D. & C.4th 642 (Allegheny Co. 1991) (under Rule 4003.3, a lawyers' notes or memoranda of an oral interview of a witness who signs no written statement are protected, but the same notes or memoranda made by an insurance investigator will not be protected); *Brant v. Turnamian*, 9 Pa. D. & C.4th 216 (York Co. 1991) (paralegal's notes of interviews, taken as agent of attorney, are protected from discovery); *Yohe v. Nationwide Mut. Life Ins. Co.*, 7 Pa. D. & C.4th 300 (York Co. 1990) (adjuster's notes were not prepared in anticipation of plaintiffs' allegations of bad faith and therefore not protected by Rule 4003.3); and *Little v. Allstate Ins. Co.*, 16 Pa. D. & C.3d 110 (Allegheny Co. 1980) (Rule 4003.3's protections apply only to the litigation of the claim for which the impressions, conclusions and opinions were made, and not to other claims).

25. Pa. R. Civ. P. 4003.4.

26. Pa. R. Civ. P. 4003.4(1) and (2).

27. *Bell v. Lackawanna Cty.*, 892 F. Supp. 2d 647 (M.D. Pa. 2012) (statements of a party are work product until filed with the court); *but see Doe v. Luzerne Cty.*, No. 3:04-1637, 2008 U.S. Dist. LEXIS 47796, 2008 WL 2518131 (M.D. Pa. June 19, 2008) (declaration of third party witness not regarded as work product). Other courts have varied in their holdings on whether statements constitute work product. *See Murphy v. Kmart Corp.*, 259 F.R.D. 421, 428 (D.S.D. 2009) (noting court division on issue of whether affidavit

view, a statement of a non-party witness is not protected by the work product privilege.[28]

1-2:2.3 Discovery Considerations for Pre-Suit Communications with Experts

Frequently, counsel will engage the assistance of an expert before filing suit to evaluate the merits of a claim or defense, to examine causation, or to preliminarily quantify damages. The question arises whether the attorney's communications with an expert are discoverable.

In *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*,[29] an evenly divided Pennsylvania Supreme Court left standing a Superior Court holding that written communications between counsel and an expert witness are not discoverable to the extent that such communications are protected by the work-product doctrine, unless the proponent of the discovery request shows pursuant to Pennsylvania Rule of Civil Procedure 4003.5(a)(2) specifically why the communication itself is relevant.[30] Any mental impressions or legal analyses posited by counsel and contained within correspondence with the expert constitute attorney work product and would not be discoverable.[31] The opinion supporting

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of witness drafted by attorney constitutes attorney work product). Some courts find that unexecuted, draft declarations merely denote what an attorney thinks a party or witness will state, and therefore constitute attorney work product. *See Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 201 F.R.D. 265, 269-70 (D. D.C. 2001). Some courts also consider signed declarations to be work product, and hence privileged, until the moment they are filed with the court. *See Intel Corp. v. VIA Technologies, Inc.*, 204 F.R.D. 450, 452 (N.D. Cal. 2001); *Tierno v. Rite Aid Corp.*, No. C 05-02520, 2008 U.S. Dist. LEXIS 112461, at *13, 2008 WL 2705089, at *4 (N.D. Cal. July 8, 2008) (quoting *Intel Corp.*, 204 F.R.D. 450, 452 (N.D. Cal. 2001)). Still others have held that any work product protection that an affidavit or declaration may have disappears once the affiant or declarant signs the document. *See Tuttle v. Tyco Elecs. Installation Servs., Inc.*, No. 2:06-cv-581, 2007 U.S. Dist. LEXIS 95527, at *4, 2007 WL 4561530, at *2 (S.D. Ohio Dec. 21, 2007) ("Affidavits are normally not protected by the work product doctrine for the very reason that an affidavit 'purports to be a statement of facts within the personal knowledge of the witness, and not an expression of the opinion of counsel.'" (citation omitted)); *see also Walker v. George Koch Sons, Inc.*, Civ. A. No. 2:07cv274, 2008 U.S. Dist. LEXIS 81919, at *17, 2008 WL 4371372, at *5 (S.D. Miss. Sept. 18, 2008).

[28] *Doe v. Luzerne Cty.*, No. 3:04-1637, 2008 U.S. Dist. LEXIS 47796, 2008 WL 2518131 (M.D. Pa. June 19, 2008) (declaration of third party witness not regarded as work product).

[29] *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A3d 680 (Pa. 2014).

[30] *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 32 A.3d 800, 813 (Pa. Super. 2011), *aff'd*, 91 A.3d 680 (Pa. 2014).

[31] *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 32 A.3d 800, 812 (Pa. Super. 2011), *aff'd*, 91 A.3d 680 (Pa. 2014). Allocatur was granted by the Supreme

affirmance of the Superior Court would create a bright-line rule denying discovery of communications between attorneys and expert witnesses.[32] A subsequent Superior Court case followed this bright-line approach.[33]

The absence of a majority opinion by the Supreme Court leaves intact the Superior Court ruling in *Barrick* that while such communications are privileged to the extent they constitute work product, it is still possible to discover communications between an expert and an attorney upon cause shown. However, showing cause requires demonstrating that the attorney's work product itself becomes relevant to the action.[34] Usually, it is not relevant to the action, but this will be case specific.

As for federal court, parties may not discover private communications and draft reports from expert witnesses.[35] Communications between counsel and a testifying expert are not discoverable, except to the extent that the communications relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert

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Court limited to the issue whether Pa. R. Civ. P. 4003.3 provides absolute protection to all communications between a party's counsel and their trial expert. *Barrick*, 52 A.3d 221 (Pa. 2012). This question has not been resolved by a majority of the Supreme Court. *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014). *But see Pavlak v. Dyer*, 59 Pa. D. & C.4th 353, 355-56 (Pike Co. 2003) (plaintiff's counsel must produce a copy of the letters sent to his expert, but he may redact his opinion work product from the letters before forwarding them to defense counsel, and to ensure that only attorney opinion work product has been edited out, plaintiff's attorney also ordered to provide the court with copies of the redacted correspondence and copies of the complete, unedited letters. If in camera inspection of the documents revealed that plaintiff's counsel had inappropriately redacted factual allegations or anything else that does not constitute attorney opinion work product, then court would forward copies of the unedited letters to defendant's attorney as an immediate sanction).

32. *Barrick v. Holy Spirit Hosp. of Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014).

33. *Koller Concrete, Inc. v. Tube City IMS, LLC*, 115 A.3d 312, 320 (Pa. Super. 2015) (three emails from counsel to testifying expert and one memo from employee of plaintiff to expert discussing defense expert report held to be privileged).

34. *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 32 A.3d 800, 813 (Pa. Super. 2011), *aff'd*, 91 A.3d 680 (Pa. 2014). *But see Pavlak v. Dyer*, 59 Pa. D. & C.4th 353, 355-56 (Pike Co. 2003) (plaintiff's counsel must produce a copy of the letters sent to his expert, but he may redact his opinion work product from the letters before forwarding them to defense counsel, and to ensure that only attorney opinion work product has been edited out, plaintiff's attorney also ordered to provide the court with copies of the redacted correspondence *and* copies of the complete, unedited letters. If in camera inspection of the documents revealed that plaintiff's counsel had inappropriately redacted factual allegations or anything else that does not constitute attorney opinion work product, then court would forward copies of the unedited letters to defendant's attorney as an immediate sanction).

35. Fed. R. Civ. P. 26(b)(4).

considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.[36]

Ordinarily, in federal court, a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.[37] A party may do so only as provided in Rule 35(b) relating to physical or mental examinations, on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.[38]

The basic point is that counsel should be mindful of whether and to what extent his or her communications with an expert will be subject to discovery at a later date.

1-2:2.4 Discovery Considerations for Pre-Suit Communications with Third Party, Non-Lawyer Consultants

Occasionally, clients will engage third party consultants, such as accountants, accident reconstruction experts, and media consultants to evaluate liability and/or to help manage external perceptions, communications, and reactions to events that present risks of liability to the client. Such scenarios present interesting questions about privilege and discoverability, which the Pennsylvania Supreme Court addressed in *BouSamra v. Excela Health*.[39] In *BouSamra*, the Court unanimously held that the attorney-client privilege was waived when a communication between the client and its attorney was forwarded by the client to an outside, non-attorney media consultant because the outside media consultant was outside the attorney-client relationship and was not assisting outside counsel in providing legal advice to the client.[40] The majority stated that an exception may exist when

36. Fed. R. Civ. P. 26(b)(4)C).
37. Fed. R. Civ. P. 16(b)(4)(D).
38. Fed. R. Civ. P. 16(b)(4)(D).
39. *BouSamra v. Excela Health*, 210 A.3d 967 (Pa. 2019).
40. *BouSamra v. Excela Health*, 210 A.3d 967, 984 (Pa. 2019).

the third party consultant is acting as an agent of a lawyer and is facilitating the lawyer's representation of the client.[41]

As for the work product privilege, communications between the client and the third party public relations firm *may* be protected, depending on the circumstances. Citing non-Pennsylvania cases, the majority initially noted that "unlike the attorney-client privilege, the protection flowing from the work product doctrine belongs to the attorney, not the client."[42] The majority noted that the work product privilege is not rooted in confidentiality in the same way as the attorney-client privilege is.[43] Rather, the purpose of the work product privilege is to "enabl[e] attorneys to prepare cases without fear that their work product will be used against their clients." [44] Thus, unlike the attorney-client privilege, disclosure to a third party does not necessarily constitute waiver of the work product privilege, unless the third party is an adversary.[45] The Court held that "the work product doctrine is waived when the work product is shared with an adversary, or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it."[46]

Because the record before the Supreme Court was insufficient to conclude whether a waiver of the work product privilege had in fact occurred, the case was remanded for further proceedings.[47] In a concurring opinion, three justices focused on the manner of disclosure as being particularly relevant on remand to whether a waiver occurred.[48] In a separate concurring opinion, one justice urged that when analyzing waiver of the work product privilege, a significant consideration is whether disclosure to a third party was "inconsistent with the maintenance of secrecy from the disclosing

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41. *BouSamra v. Excela Health*, 210 A.3d 967, 984-85 (Pa. 2019).

42. *BouSamra v. Excela Health*, 210 A.3d 967, 974 (Pa. 2019).

43. *BouSamra v. Excela Health*, 210 A.3d 967, 977 (Pa. 2019).

44. *BouSamra v. Excela Health*, 210 A.3d 967, 977 (Pa. 2019).

45. *BouSamra v. Excela Health*, 210 A.3d 967, 978 (Pa. 2019).

46. *BouSamra v. Excela Health*, 210 A.3d 967, 978 (Pa. 2019). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 91(4) (2000) ("Work-product immunity is waived if the client, the client's lawyer, or another authorized agent of the client . . . discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.").

47. *BouSamra v. Excela Health*, 210 A.3d 967, 986 (Pa. 2019).

48. *BouSamra v. Excela Health*, 210 A.3d 967, 986-90 (Pa. 2019).

party's adversary," and urged that courts "must examine 'whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential.'"[49]

Regarding the attorney-client privilege, the Court held that the attorney-client privilege had been waived. Six justices held that the outside media consultant was not an officer, executive or director of the client, and thus fell outside the ambit of the "client" in the relationship.[50] Regarding whether the media consultant was an "agent" of the lawyer or the client for purposes of the attorney-client relationship, the majority held that under the particular facts of the case, the media consultant was not "privy to confidential information as a necessary means of improving the comprehension between the lawyer and client which facilitated the lawyer's ability to provide legal advice," and the media consultant's presence was not "indispensable to the lawyer giving legal advice or facilitated the lawyer's ability to give legal advice to the client."[51] Under the particular facts of *BouSamra*, the majority held that neither the original e-mail from outside counsel to the client nor the forwarding e-mail from the client to the third party media consultant solicited any input, advice or opinion from the third party media consultant.[52] The majority allowed for the possibility that a communication shared with a third party would be privileged where the third party's presence "may be necessary for a lawyer to provide legal advice to a client" or "must be present to in order to explain foreign concepts or terms."[53]

Particularly when dealing with media and public relations consultants, with respect to work product protection, counsel should be mindful of whether such consultants need to know the attorney's strategy in order to advise on public relations, and whether the public relations impact bears on the attorney's strategy on contemplated steps in the litigation.[54] Additionally, with respect to attorney-client privilege protection, counsel should be mindful of whether communications with a third party consultant are part

49. *BouSamra v. Excela Health*, 210 A.3d 967, 991 (Pa. 2019).
50. *BouSamra v. Excela Health*, 210 A.3d 967, 986 (Pa. 2019).
51. *BouSamra v. Excela Health*, 210 A.3d 967, 985 (Pa. 2019).
52. *BouSamra v. Excela Health*, 210 A.3d 967, 985 (Pa. 2019).
53. *BouSamra v. Excela Health*, 210 A.3d 967, 986 (Pa. 2019).
54. *BouSamra v. Excela Health*, 210 A.3d 967, 991-92 (Pa. 2019).

of a necessary means of improving the comprehension between the lawyer and client which facilitated the lawyer's ability to provide legal advice, and whether the consultant's presence is indispensable to the lawyer giving legal advice or facilitated the lawyer's ability to give legal advice to the client.[55]

1-3 LITIGATION HOLD NOTICES

Spoliation of evidence has always presented risks of adverse consequences for parties charged with the responsibility of preserving it. However, the significance of electronic communications in the outcome of cases, and the pervasive use of electronic communications, particularly among commercial enterprises, have elevated the importance of the preservation of electronically stored information (ESI).

1-3:1 Federal Requirements for Litigation Holds

The federal courts in Pennsylvania have been generally more proactive in addressing preservation of ESI and spoliation issues, stemming primarily from decisions of the United States District Court for the Southern District of New York.[56] These holdings, or variations of them, found their way into federal district courts in Pennsylvania.[57] However, effective December 1, 2015, the potential

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55. *BouSamra v. Excela Health*, 210 A.3d 967, 985 (Pa. 2019).

56. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*) (determining allocation of costs of producing emails contained on backup tapes); *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*) (setting reporting obligations); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*) (determining allocation of costs for restoring backup tapes); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*) (granting sanctions for breaching duty to preserve evidence which arises when party reasonably anticipates litigation); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*) (determining attorney's duty to communicate discovery obligations to client, including assisting client in identifying sources of discoverable information and party's failure to preserve emails and willful deletion of relevant emails after being instructed not to do so by inside and outside counsel held sanctionable); *Mastercard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613 (VM)(MHD), 2004 WL 1393992 (S.D.N.Y. June 16, 2004) (adverse inference instruction against defendants granted for negligently failing to preserve four months' worth of emails that were automatically destroyed in the ordinary course of business); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (ordinary negligence in compliance with discovery obligations sufficient for imposition of discovery sanctions) (superseded by Fed. R. Civ. P. 37(e)(2); and *Metro. Opera Ass'n v. Local 100 Hotel Emp. and Rest. Int'l Union*, 212 F.R.D. 178 (S.D.N.Y. 2003) (plaintiff granted judgment on liability and awarded counsel fees as a result of discovery misconduct).

57. *See Flanders v. Dzugan*, No. 12-1481, 2015 U.S. Dist. LEXIS 111599 (W.D. Pa. Aug. 24, 2015) (spoliation sanction require more than a mere failure to institute a litigation

effects of failing to preserve ESI are now addressed in the 2015 amendments to Rule 37(e), which creates a uniform standard on the effects of failures to preserve ESI.[58]

In addition to case law and Rule 37(e), federal courts have amended their local rules to define and manage the parties' obligations relative to the identification and preservation of ESI.[59] These requirements include an affirmative duty to investigate the client's ESI to understand how such ESI is stored and how it has been or can be preserved, accessed, reviewed, and produced.[60] An affirmative duty also exists to identify a person or persons with knowledge about the client's ESI, with the ability to facilitate,

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hold); *Boeynaems v. La Fitness Int'l*, 285 F.R.D. 331 (E.D. Pa. 2012) (addressing shifting of costs of producing electronically stored information (ESI); *Dunn v. Mercedes Benz of Fort Washington, Inc.*, No. 10-1662, 2012 U.S. Dist. LEXIS 17089 (E.D. Pa. Feb. 9, 2012) (failure to preserve evidence did not rise to the level of fault so as to justify suppression of evidence against defendant or entry of judgment in favor of plaintiff); *Culler v. Shinseki*, No. 3:09-0305, 2011 U.S. Dist. LEXIS 96043 (M.D. Pa. Aug. 26, 2011) (although defendant failed to preserve certain e-mails, plaintiff failed to establish prejudice, and plaintiff's request for adverse inference and imposition of costs or fees denied); *Phillips v. Potter*, No. 7-815, 2009 U.S. Dist. LEXIS 40550 (W.D. Pa. May 14, 2009) (although defendant did not timely issue a litigation hold, no evidence that relevant documents were destroyed, and motion for sanctions denied); *Ogin v. Ahmed*, 563 F. Supp. 2d 539 (M.D. Pa. 2008) (adverse inference instruction granted where defendants failed to preserve three weeks' worth of driver logs); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 639 (E.D. Pa. 2007) (sanctions denied where there was no affirmative destruction of evidence and plaintiff suffered no prejudice where evidence was available through other sources).

58. Rule 37(e) now provides:

> (e) **Failure to Preserve Electronically Stored Information**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).

59. *See, e.g.*, Local Rule LCvR 26.2 of the United States District Court for the Western District of Pennsylvania and Local Rule LR26.1 of the United States District Court for the Middle District of Pennsylvania.

60. *See, e.g.*, Local Rule LCvR 26.2 of the United States District Court for the Western District of Pennsylvania and Local Rule LR26.1 of the United States District Court for the Middle District of Pennsylvania.

through counsel, the preservation and discovery of ESI.[61] In addition to the foregoing duties to preserve ESI, the parties must be prepared to discuss at the Rule 26(f) conference[62] any issues concerning the disclosure and/or discovery of ESI, including the form or forms in which it should be produced.[63]

In 2015, Rule 16 of the Federal Rules of Civil Procedure was amended, and it now addresses the preservation of ESI and clawback agreements for inadvertent production of privileged information. As amended, Rule 16 permits a provision in the scheduling order for preservation of electronically stored information,[64] and the incorporation of any agreements of the parties, including agreements under Evidence Rule 502, regarding the effects of disclosure of information covered by attorney-client privilege or work-product protection.[65]

As a result of the evolving case law and rule changes, at least in federal court, attorneys now have affirmative duties relative to the preservation and production of electronic evidence. They can no longer simply wait for a discovery request and react to it by relying on clients to identify and produce documents on their own.

The first step in discharging those obligations and protecting against the possible adverse consequences of spoliation, is to issue one or more "litigation hold" notices to the client, which the client should further disseminate to all relevant personnel, as soon as the possibility of litigation is known. The scope of recipients and the precise content of a litigation hold notice will depend on the facts and circumstances of each case. But generally speaking, the litigation hold notice should do some or all of the following: (1) be marked as "Confidential and Protected by the Attorney-Client

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61. *See, e.g.*, Local Rule LCvR 26.2 of the United States District Court for the Western District of Pennsylvania.

62. Fed. R. Civ. P. 26(f) requires the parties to confer about the nature and basis of their claims and defenses; the possibilities for promptly settling or resolving the case; and making arrangements for the disclosures required by Rule 26(a)(1). This duty to meet and confer includes a discussion of any issues about preserving discoverable information. Fed. R. Civ. P. 26(f)(2). *See also* Local Rule LCvR 26.2 of the United States District Court for the Western District of Pennsylvania and Local Rule LR26.1 of the United States District Court for the Middle District of Pennsylvania.

63. Fed. R. Civ. P. 26(f)(3). *See also* Local Rule LCvR 26.2 of the United States District Court for the Western District of Pennsylvania and Local Rule LR26.1 of the United States District Court for the Middle District of Pennsylvania.

64. Fed. R. Civ. P. 16(b)(3)(B)(iii).

65. Fed. R. Civ. P. 16(b)(3)(B)(iv).

and/or Work Product Privileges" to help preserve any privileged content;[66] (2) advise the client and the client's information technology (IT) department to halt all automatic and manual destruction or deletion that could destroy specified file types; (3) direct the preservation of future electronic communications relevant to the dispute; (4) direct the identification of all laptop and other computers assigned to specified key individuals; (5) where appropriate, direct the creation of "mirror image" copies of hard drives of specified computers; (6) direct the identification of other hardware on which relevant e-mail and documents may be stored which are not routinely backed up; (7) direct that relevant backup media be segregated and preserved so as to eliminate possibility of inadvertent destruction by cycled overwriting; (8) direct the preservation of relevant voice mails; (9) direct the preservation of relevant text messages contained on cell phones and other similar devices; (10) request written acknowledgment of receipt of the litigation hold notice; (11) request written certification of compliance with the litigation hold notice; and (12) be reissued periodically to notify new employees and to refresh the memories of existing employees of their preservation obligations.

Sample litigation hold notices are included in Appendix 1-3.

1-3:2 State Requirements for Litigation Holds

When it comes to electronic discovery, Pennsylvania state courts have been slow to follow the lead of their federal counterparts. The preservation and production of electronic evidence can result in significant burden and expense.[67] The amount in controversy

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66. There is debate whether litigation hold notices and communications are discoverable. One federal court in Pennsylvania has held that litigation hold materials can be discoverable, depending on attorney involvement in their content and dissemination. *Hohider v. UPS*, 257 F.R.D. 80, 84 (W.D. Pa. 2009). The *Hohider* opinion was not definitive. The final result was awaiting the recommendations of a special master appointed to examine the claim of privilege. *Hohider v. UPS*, 257 F.R.D. 80, 84 (W.D. Pa. 2009). The special master later recommended that some litigation hold material was not privileged, other litigation hold material was privileged, and still other material lost its privilege due to waiver. *See also* Special Master's Report and Recommendation No. 3: Second Disposition of the Parties' Assertions of Privilege or Protection [With Modified Redactions], United States District Court for the Western District of Pennsylvania, Docket No. 04-363, Document No. 426. The docket does not reflect an Order adopting the Report and Recommendation. The case later settled.

67. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*) (determining allocation of costs of producing e-mails contained on backup tapes).

in many state court cases would not justify the level of burden and expense associated with the preservation and production of electronic evidence. Given the burden and expense associated with identifying and preserving ESI, the scope of duty to do so and the consequences for not doing so are likely to vary widely from county to county and from judge to judge, until the Pennsylvania Supreme Court addresses the issue more specifically in the Pennsylvania Rules of Civil Procedure.[68]

Counsel would be wise to inquire into the custom and practice in the county of venue for the court's expectations relative to electronic discovery and the preservation of same. Given that the federal courts have been more proactive in defining the obligations of parties and counsel, the cautious approach to preservation would be to follow the practice and requirements of the federal district court in which the state county of venue lies.

Sample litigation hold notices are included in Appendix 1-3.

1-4 JURISDICTIONAL CONSIDERATIONS

Before filing suit, plaintiff's counsel must consider whether his or her court of choice will have jurisdiction over all of the defendants. Subject matter jurisdiction cannot be waived.[69] Accordingly, if the case is filed in a court lacking jurisdiction, the case can be dismissed at any stage if the court lacks subject matter jurisdiction, even if the parties themselves do not challenge jurisdiction.[70] Thus, filing suit in the wrong court could not only result in a significant

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[68] In *Papadoplos v. Schmidt, Ronca & Kramer, PC.*, 21 A.3d 1216 (Pa. Super. 2011), the Superior Court affirmed dismissal of plaintiffs' legal malpractice claim where plaintiffs willfully destroyed computer hard drives following a court order requiring their forensic examination. *Papodoplos* does not address counsel's pre-suit responsibilities to preserve electronically stored information. It is, however, precedent for the most extreme sanction for spoliation of ESI, namely dismissal of a claim or defense. In *Schroeder v. Commonwealth*, 710 A.2d 23, 27 (Pa. 1998), a products liability case, the Pennsylvania Supreme Court adopted the Third Circuit's standard in deciding the proper penalty for the spoliation of evidence in a products liability case, which examines (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. It remains to be seen whether the 2015 amendments to the Federal Rules of Civil Procedure will have any influence on state courts' analyses of spoliation issues. *See* Fed. R. Civ. P. 37(e).

[69] *In re Caterbone*, 640 F.3d 108, 111 (3d Cir. 2011); *Nilo, Inc. v. Pa. Liquor Control Bd.*, 861 A.2d 248, 252 (Pa. 2004).

[70] *In re Caterbone*, 640 F.3d 108, 111 (3d Cir. 2011); *Nilo, Inc. v. Pa. Liquor Control Bd.*, 861 A.2d 248, 252 (Pa. 2004).

waste of time and money; but if the statute of limitation will have expired at the time the case is dismissed, the plaintiff can lose the ability to sue altogether.

In addition to potential dismissal, other reasons will influence the decision on where to sue. If counsel has a choice from among multiple courts that would have jurisdiction, he or she will want to consider the potential impact that each forum would have on the case. These considerations include, but are not necessarily limited to, counsel's familiarity and relationship with the court and its judges; the proximity of the forum for the convenience of the parties, counsel and witnesses; the experience of the potential judges to whom the case may be assigned with handling the subject matter of the dispute; the speed or lack of speed of the docket; whether mandatory alternative dispute resolution (ADR) procedures exist and the expenses associated therewith; the relative likelihood of obtaining or opposing a potential summary judgment motion or other dispositive motion; the scope of the court's subpoena power over potential witnesses; and other considerations.

Even if the case is filed in state court, counsel must consider the possibility of removal to federal court where there is a basis for federal jurisdiction. Removal could fundamentally alter how the case is handled, including the convenience of the forum, the standards for summary judgment, and the expenses associated with the case.

1-4:1 Contractual Selection of Forum for Jurisdiction

If the contemplated litigation arises out of a contract, the first consideration for jurisdictional analysis is whether the contract has a provision on forum selection and whether it will be enforced. Personal jurisdiction may be waived, and a party may contractually consent to personal jurisdiction in a forum.[71] However, if the agreement would seriously impair a plaintiff's ability to pursue its cause of action, a Pennsylvania court may decline to honor a consent-to-jurisdiction clause calling for jurisdiction in another

[71] *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536-37 (Pa. Super. 1990); *AAMCO Transmissions, Inc. v. Romano*, No. 13-5747, 2014 WL 4105986, at *3 (E.D. Pa. Aug. 21, 2014).

forum.[72] Mere inconvenience or additional expense is not enough for a Pennsylvania court to refuse to honor a forum selection clause if the plaintiff received consideration for its agreement to litigate in another specified forum.[73] If the contractually agreed-upon forum is available to the plaintiff and if that forum can do substantial justice to the cause of action, then the plaintiff should be bound by the contractual consent-to-jurisdiction clause.[74]

1-4:2 Personal Jurisdiction

When prospective defendants are out-of-state, the forum court, whether state or federal, must have personal jurisdiction over all defendants. If a party lacks sufficient contact with the forum, then that party may not be subject to suit in the forum. Disputes over jurisdiction will typically delay the outcome of the case, add a layer of time and expense that would not otherwise exist, and create an appealable issue. Thus, even if counsel believes he or she would ultimately prevail in a contest over personal jurisdiction, choosing a questionable forum may not be worth the risk if another forum is available and personal jurisdiction would clearly lie there.

Absent an enforceable contractual consent-to-jurisdiction clause, whether personal jurisdiction exists over a party usually begins with applying Pennsylvania's "long arm" statute[75] and/or

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[72] *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536-37 (Pa. Super. 1990). *See also Morgan Trailer Mfg. Co. v. Hydraroll, Ltd.*, 459 A.2d 926, 931 (Pa. Super. 2000).

[73] *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536-37 (Pa. Super. 1990).

[74] *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536-37 (Pa. Super. 1990). *See also Cont'l Bank v. Brodsky*, 311 A.2d 676 (Pa. Super. 1973) (forum selection or consent to jurisdiction by prior consent may be enforced when the parties have dealt on an equal basis and there is nothing unfair about their agreement).

[75] 42 Pa.C.S. § 5322. The long arm statute identifies ten bases for exercising personal jurisdiction. 42 Pa.C.S. § 5322(a). In addition, 42 Pa.C.S. § 5301 provides that certain relationships are sufficient to confer general jurisdiction over persons. For individuals, these include presence or domicile within the Commonwealth at the time of service of process, and consent. 41 Pa.C.S. § 5301(a)(1). For corporations, partnerships and similar entities, these include formation under or qualification as a foreign entity under the laws of Pennsylvania and the carrying on of a continuous and, systematic part of their general business in Pennsylvania. 42 Pa.C.S. § 5301(a)(2) and (3). So far in the Third Circuit, registration to do business in Pennsylvania is sufficient for general jurisdiction, even after *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Hegna v. Smitty's Supply, Inc.*, CV 16-3613, 2017 WL 2563231, at *4 (E.D. Pa. June 13, 2017) (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (registration under § 5301(a)(2) "carries with it consent to be sued in Pennsylvania courts")). However, the Superior Court has held that registration to business alone was insufficient for general jurisdiction. *Seeley v. Caesars Entm't Corp.*, 206 A.3d 1129, 1134–35 (Pa. Super. 2019) (Although corporate parent was registered to do business in Pennsylvania, it lacked sufficient contacts in Pennsylvania where its principle place of

examining United States Supreme Court, Third Circuit and Pennsylvania appellate court precedent for the minimum contacts necessary to permit personal jurisdiction in the chosen forum under the requirements of the United States Constitution.[76]

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business was in Nevada, did not pay taxes to Pennsylvania, sole pecuniary benefit from Pennsylvania came from subsidiary).

[76.] In addition to the 10 enumerated bases for personal jurisdiction in 42 Pa.C.S. § 5322(a), Pennsylvania courts may exercise personal jurisdiction "to the fullest extent allowed under the Constitution of the United States and [personal jurisdiction] may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa.C.S. § 5322(b). This requires analysis of United States Supreme Court, Third Circuit and Pennsylvania state court authority for the minimum contacts that would be necessary to subject a party to personal jurisdiction in Pennsylvania. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2783 (2011); *Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102 (1987); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94 (3d Cir. 2009); *Kehm Oil Co. v. Texaco, Inc.*, 537 F.3d 290 (3d Cir. 2008); *Gambone v. Lite Rock Drywall*, 288 Fed. Appx. 9 (3d Cir. 2008); *Marten v. Godwin*, 499 F.3d 290 (3d Cir. Pa. 2007); *Kubik v. Letteri*, 614 A.2d 1110, 1113 (Pa. 1992); *City of Phila. v. Borough of Westville*, 93 A.3d 530, 533 (Pa. Commw. 2014); *General Motors Acceptance Corp. v. Keller*, 737 A.2d 279, 281 (Pa. Super. 1999). The United States Supreme Court addressed the distinction between specific jurisdiction and general jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). In that case, a corporate parent was not subject to personal jurisdiction in California under an agency theory based on the activities of its subsidiary. *See also Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Element Fin. Corp. v. ComQi, Inc.*, No. 14-2670, 2014 WL 4977398, at *2 (E.D. Pa. Oct. 7, 2014) *Colony Nat. Ins. Co. v. DeAngelo Bros., Inc.*, No. 3:13-CV-00401, 2014 WL 1315391, at *6 (M.D. Pa. March 28, 2014) and *Marcus Uppe, Inc. v. Global Computer Enters., Inc.*, No. 14-530, 2014 WL 6775282, at *1 (W.D. Pa. Dec. 2, 2014). *See also Allaham v. Naddaf*, 2015 U.S. App. LEXIS 21989 (3d Cir. Dec. 17, 2015) (existence of a website to operate and presence of advertisements on Internet not sufficient to establish general or specific jurisdiction) and *Isaacs v. Arizona Bd. of Regents*, 608 Fed. Appx. 70, 75 (3d Cir. 2015) (activities of hospital and physicians do not rise to level of contact needed to attain general or specific personal jurisdiction, or personal jurisdiction under effects test), *Bors v. Johnson & Johnson*, CV 16-2866, 2016 WL 5172816, at *5 (E.D. Pa. Sept. 20, 2016) (challenges to personal jurisdiction can be waived either by agreements in forum selection clauses or by registering to do business in the forum pursuant to a statute which specifically advises the registrant of its consent by registration). Pennsylvania state court cases also address the distinction between specific jurisdiction and general jurisdiction. *See Vaughan Estate of Vaughan v. Olympus Am., Inc*., 208 A.3d 66, 73 (Pa. Super. 2019), *reargument denied* (June 11, 2019) ("There are two theories of personal jurisdiction: general, or all-purpose jurisdiction, and specific, or case-linked jurisdiction; propriety of exercise of specific jurisdiction depends on affiliation between forum and underlying controversy); *Hammons v. Ethicon, Inc*., 190 A.3d 1248, 1263 (Pa. Super. 2018), *allocatur granted*, 206 A.3d 495 (Pa. 2019) (jurisdiction established over non-resident medical device manufacturer based on documented collaboration with resident companies and individuals to design, test, and manufacture pelvic mesh in Pennsylvania). *See also Seeley v. Caesars Entm't Corp*., 206 A.3d 1129, 1134–35 (Pa. Super. 2019) (no general jurisdiction over corporation where it does not have any subsidiaries that conduct business in Pennsylvania, does not conduct any of its own business in Pennsylvania, does not own or lease any property in Pennsylvania, is not registered to do business in Pennsylvania, and does not have plans and was not currently under contract for any type of Pennsylvania business).

1-4:3 Federal Subject Matter Jurisdiction

Jurisdiction in federal district courts derives from Article III of the United States Constitution.[77] Title 28 of the United States Code specifies various matters over which federal district courts have jurisdiction.[78] The most common bases for federal court jurisdiction in commercial cases are federal question;[79] diversity of citizenship;[80] admiralty, maritime and prize cases;[81] bankruptcy cases and proceedings;[82] interpleader;[83] commerce and antitrust regulations;[84] and patents, copyrights, and other types of intellectual property.[85]

1-4:4 Federal Diversity Jurisdiction

With respect to commercial disputes, diversity jurisdiction exists where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between: citizens of different states;[86] citizens of a state and citizens or subjects of a foreign state (however, district courts shall not have original jurisdiction of an action between citizens of a state and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same state);[87] or citizens of different states and in which citizens or subjects of a foreign state are additional

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77. The judicial power of federal courts extends to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." U.S. Constitution, art. III, § 2.

78. 28 U.S.C. § 1330, et seq.

79. 28 U.S.C. § 1331.

80. 28 U.S.C. § 1332. *See* Section 1-3:4 for discussion of diversity jurisdiction.

81. 28 U.S.C. § 1333.

82. 28 U.S.C. § 1334.

83. 28 U.S.C. § 1335.

84. 28 U.S.C. § 1337.

85. 28 U.S.C. § 1338.

86. 28 U.S.C. § 1332(a)(1).

87. 28 U.S.C. § 1332(a)(2).

parties.[88] For purposes of diversity jurisdiction, a natural person is deemed to be a citizen of the state where she is domiciled.[89] To be domiciled in a state, a person must reside there and intend to remain indefinitely.[90] A person may have only one domicile, and thus may be a citizen of only one state for diversity jurisdiction purposes.[91]

1-4:4.1 Determining Diversity for Corporations

A corporation is deemed to be a citizen of every state and foreign state by which it has been incorporated and of the state or foreign state where it has its principal place of business.[92] In a direct action against a liability insurer to which the insured is not joined as a party-defendant, the liability insurer shall be deemed to be a citizen of every state and foreign state of which the insured is a citizen;[93] every state and foreign state by which the insurer has been incorporated;[94] and the state or foreign state where the insurer has its principal place of business.[95]

1-4:4.2 Determining Diversity for Partnerships and Limited Liability Companies

Partnerships and other unincorporated associations, however, unlike corporations, are not considered "citizens" as that term is used in the diversity statute.[96] The citizenship of a partnership takes on the citizenship of each of its partners.[97] The complete diversity requirement demands that all partners be diverse from all

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88. 28 U.S.C. § 1332(a)(3). Diversity also exists where the parties are a plaintiff-foreign state, defined in 28 U.S.C. § 1603(a), and citizens of a different state or of different states. 28 U.S.C. § 1332(a)(4).

89. *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2008).

90. *Krasnov v. Dinan*, 465 F.2d 1298, 1300-01 (3d Cir. 1972).

91. *Marsh v. Norfolk S., Inc.*, No. 3:14-2331, 2014 WL 7014028, at *2 (M.D. Pa. Dec. 11, 2014).

92. 28 U.S.C. § 1332(c)(1); *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 188-89 (3d Cir. 2008); *Mennen Co. v. Atl. Mut. Ins. Co.*, 147 F.3d 287, 290 (3d Cir. 1998).

93. 28 U.S.C. § 1332(c)(1)(A).

94. 28 U.S.C. § 1332(c)(1)(B).

95. 28 U.S.C. § 1332(c)(1)(C).

96. *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2008) (where partner of partnership was a dual American-British citizen domiciled in a foreign state and was therefore not diverse from all opposing parties, court lacked diversity jurisdiction).

97. *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 419-20 (3d Cir. 2010); *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2008).

parties on the opposing side.[98] The citizenship of unincorporated associations is determined by the citizenship of their members.[99]

Partnerships which have American partners living abroad present an interesting scenario. To be a citizen of a state within the meaning of the diversity statute, a natural person must be both a citizen of the United States and be domiciled within the state.[100] An American citizen domiciled abroad, while being a citizen of the United States, is not domiciled in a particular state, and therefore such a person is "stateless" for purposes of diversity jurisdiction.[101] Therefore, American citizens living abroad cannot be sued or sue in federal court based on diversity jurisdiction because they are neither "citizens of a State"[102] nor "citizens or subjects of a foreign state."[103]

Similar to partnerships, the citizenship of a limited liability company (LLC) is determined by the citizenship of each of the LLC's members.[104] This can present a significant challenge to counsel for determining whether diversity jurisdiction exists. Typically the identity of an LLC's members is not disclosed on public records websites and other sources. In most instances, the identity of an LLC's members will only be available through discovery after the case is filed. For this reason, it may be wise to file a praecipe for writ of summons in state court immediately after the case is filed in federal court if there is a risk that the statute of limitation would run if the case is later dismissed for lack of subject matter jurisdiction. The state of formation of the LLC does not determine citizenship. Even where a defendant LLC's state of formation is the same as the plaintiff's citizenship,

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98. *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 183 (3d Cir. 2008).

99. *Lincoln Benefit Life Co. v. AEI Life, LLC,* 800 F.3d 99, 105 (3d Cir. 2015); *Erie Ins. Exch. v. Greenwich Ins. Co.,* 2016 WL 1404162, at *2 (E.D. Pa. 2016) (citizenship of reciprocal insurance exchange depends on citizenship of its members).

100. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1988).

101. *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 183-84 (3d Cir. 2008).

102. *See* 28 U.S.C. § 1332(a)(1).

103. *See* 28 U.S.C. § 1332(a)(2); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1988).

104. *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015); *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 418 (3d Cir. 2010) (managing member of Nevada LLC was a Pennsylvania resident, and therefore, destroyed complete diversity).

diversity exists if the citizenship of all members of the LLC differs from that of the plaintiff's.[105]

1-4:5 Supplemental Jurisdiction (Claims Which Alone Would Not Otherwise Qualify for Federal Jurisdiction)

Except for certain claims where diversity is the sole basis of federal jurisdiction, if any one of the claims asserted by the plaintiff qualifies for federal subject matter jurisdiction, then the federal court will also have jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.[106] Such supplemental jurisdiction includes claims that involve the joinder or intervention of additional parties."[107]

If jurisdiction is based solely on diversity, then supplemental jurisdiction does not exist over claims made pursuant to Rules 14 (Third Party Practice), 19 (Required Joinder of Parties), 20 (Permissive Joinder of Parties) or 24 (Intervention) when exercising supplemental jurisdiction over such claims would be inconsistent with the requirements for diversity jurisdiction.[108]

Even if supplemental jurisdiction exists, the court may nevertheless refuse to exercise jurisdiction if the claim raises a novel or complex issue of state law; the claim substantially predominates over the claims over which there is original jurisdiction; the court has dismissed all claims over which it has original jurisdiction; or other compelling reasons exist for declining jurisdiction.[109]

Based on the intricacies of the supplemental jurisdiction analysis, counsel must determine the risk that the court would have jurisdiction over some claims, but not others. If the risk is high, then one must evaluate the wisdom of having claims pending in two separate forums if there is a forum that would have jurisdiction over all of the claims.

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105. *Fiedler v. Shady Grove Reprod. Sci. Ctr., P.C.*, No. 1:13-CV-2737, 2014 WL 3535558, at *2 (M.D. Pa. July 16, 2014).

106. 28 U.S.C. § 1367(a).

107. 28 U.S.C. § 1367(a).

108. 28 U.S.C. § 1367(b).

109. 28 U.S.C. § 1367(c).

1-4:6 Removal to Federal Court by Defendant(s)

If a case is filed in state court, a defendant may remove the case to the federal district court for the district and division embracing the place where the action is pending.[110] If removal is based on diversity of citizenship, the case may not be removed if any of the defendants is a citizen of the state in which the action is brought.[111]

If a civil action includes a claim arising under federal law and a claim not within the original or supplemental jurisdiction of the district court or a claim not removable by statute, the entire action may be removed if the action would be removable without the inclusion the nonremovable claim.[112] Once such an action is removed, the district court is obligated to sever from the action all of the claims not within the original or supplemental jurisdiction of the district court or claims made nonremovable by statute, and must remand the severed claims to the state court from which the action was removed.[113]

1-4:6.1 Procedure and Timing for Removal

A defendant or defendants wanting to remove a case from state court must file in the district court a notice of removal containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served on the removing defendant(s) in the action.[114] The notice of removal must be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and

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110. 28 U.S.C. § 1441(a). When a civil action is removed solely under § 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action. 28 U.S.C. § 1446(b)(2)(A). Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal. 28 U.S.C. § 1446(b)(2)(B). If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal. 28 U.S.C. § 1446(b)(2)(C).

111. 28 U.S.C. § 1441(b)(2).

112. 28 U.S.C. § 1441(c)(1).

113. 28 U.S.C. § 1441(c)(2).

114. 28 U.S.C. § 1446(a).

is not required to be served on the defendant, whichever period is shorter.[115]

Promptly after the filing of the notice of removal, the removing defendant(s) must give written notice thereof to all adverse parties and must file a copy of the notice with the clerk of the state court, which shall effect the removal, and the state court shall proceed no further unless and until the case is remanded.[116]

1-4:6.2 Determining the Amount in Controversy for Purposes of Removal Based on Diversity Jurisdiction

If removal of a civil action is sought on the basis of diversity jurisdiction,[117] the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy.[118] However, if the initial pleading seeks non-monetary relief or does not specify a demand in excess of $75,000, the notice of removal may assert the amount in controversy, and removal will be proper if the district court finds by a preponderance of the evidence that the amount in controversy exceeds $75,000.[119]

If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed $75,000, then information in the state court record, or in responses to discovery, shall be treated as an "other paper," and the 30 day time for removal does not begin to run until the defendant has received the "other paper" from which it may be first ascertained that the amount in controversy exceeds $75,000.[120]

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115. 28 U.S.C. § 1441(c)(2). Except as provided in subsection 28 U.S.C. § 1446(c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. 28 U.S.C. § 1446(b)(3).

116. 28 U.S.C. § 1446(d).

117. 28 U.S.C. § 1332(a).

118. 28 U.S.C. § 1446(c)(2).

119. 28 U.S.C. § 1446(c)(2).

120. 28 U.S.C. § 1446(c)(3). A case may not be removed on the basis of diversity more than one year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action. 28 U.S.C. § 1446(c)(1). If the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under § 1446(c)(1), and the case may be removed even after one year has passed since commencement of the action. 28 U.S.C. § 1446(c)(3)(B).

1-5 ARBITRATION

If the dispute arises out of a contract, the parties' contract may contain an arbitration clause that requires the submission of some or all disputes to arbitration for resolution. If so, then counsel must consider the effect of the arbitration clause before filing suit. Arbitration clauses can materially affect the conduct of the litigation and its disposition.

Chapter 23 addresses compelling and resisting arbitration in more detail.

1-5:1 Typical Differences Between Arbitration and Court

A number of differences between arbitration and judicial resolution of disputes can affect their outcomes and how they are handled. Typical differences between arbitrations and judicial resolutions include the following: (1) arbitration results are frequently binding and non-appealable, whereas judicial decisions are appealable; (2) a jury trial is not available in arbitration, whereas the parties have a right to a jury trial in court; (3) discovery is generally limited in arbitration and subject to the discretion of the arbitrator,[121] whereas parties have discovery rights in court as provided by the rules of civil procedure; (4) scheduling can be more flexible in arbitration than in court; (5) depending on the procedures governing selection of the arbitrator(s), arbitrators are more likely to be experienced in or familiar with the subject matter of the dispute than judges or jurors; (6) the rules of evidence may not be as strictly enforced in arbitration as they are in court;[122]

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121. *See* Rule R-21(a), American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Disputes) (At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct the production of documents and other information and the identification of any witnesses to be called).

122. "Conformity to legal rules of evidence shall not be necessary." Rule R-31, American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Disputes). The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission. Rule R-32, American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Disputes). Such evidence would most likely not be admissible at trial in court. Pa. R. Evid. 801 through 805. As another example, on application of a party and for use as evidence the arbitrator(s), in the manner and upon the terms designated by them, may permit a deposition to be taken of a witness who cannot be served with a subpoena or who is unable to attend the hearing.

(7) subpoenas can be more cumbersome to enforce in arbitration than in court;[123] and (8) depending on the number of arbitrators and the complexity of the dispute, it can be more costly to arbitrate than to litigate in court. These and other considerations may impact a party's desire to submit to or oppose arbitration.

1-5:2 Contests Over Arbitrability

Commencing suit in court in the face of an arbitration clause will usually invite an application to stay the judicial proceeding and compel the arbitration. Conversely, proceeding to arbitrate where the scope of the arbitration clause is in question may invite an application to stay the arbitration so as to proceed in court. Either way, a contest over arbitrability will add expense and delay to the case. Counsel will have to weigh the risk of added expense and delay against the benefits of being in court or in arbitration, as the case may be.

The Federal Arbitration Act,[124] the Pennsylvania Uniform Arbitration Act[125] and the Pennsylvania Revised Statutory Arbitration Act[126] express a public policy in favor of arbitration where parties have agreed to submit their disputes to arbitration.[127]

1-6 VENUE

In addition to jurisdictional and arbitrability considerations, counsel must also decide in what venue the case should be filed. Many cases have multiple options for venue. Other cases have only one option for venue, depending on the facts and circumstances.

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42 Pa.C.S. § 7309(b); 42 Pa.C.S. §7321.18(b). The use of a deposition in this manner may not be permitted in court. Pa. R. Civ. P. 4020.

123. The arbitrator(s) may issue subpoenas in the form prescribed by general rules for the attendance of witnesses and for the production of books, records, documents and other evidence. 42 Pa.C.S. § 7309(a); 42 Pa.C.S. §7321.18 Subpoenas so issued shall be served and, upon application to the court by a party or by the arbitrators, shall be enforced in the manner provided or prescribed by law for the service and enforcement of subpoenas in a civil action. 42 Pa.C.S. § 7309(a); 42 Pa.C.S. §7321.18.

124. 9 U.S.C. § 1, et seq.

125. 42 Pa.C.S. § 7301, et seq.

126. 42 Pa.C.S. § 7321.1, et seq.

127. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Joseph v. Advest, Inc.*, 906 A.2d 1205, 1209 (Pa. Super. 2006).

See Chapter 23 for when and how these statutes apply; a discussion of which issues are determined by the court and which are determined by the arbitrator(s); the procedures and standards for compelling and resisting arbitration; staying or compelling arbitration or court proceedings, as the case may be; and other considerations relating to arbitration.

1-6:1 Determining Venue in State Court

Venue in state court is governed by Rule 1006,[128] and the determination of venue depends on whether the defendant is an individual or entity.

1-6:1.1 Venue As to Individuals

Except as otherwise provided in Rule 1006, an action against an individual may be brought only in a county in which the individual may be served, or in which the cause of action arose, or where a transaction or occurrence took place out of which the cause of action arose, or in any other county authorized by law, or in which the property or a part of the property which is the subject matter of the action is located, provided that equitable relief is sought with respect to the property.[129] If the plaintiff states more than one cause of action against the same defendant in the complaint pursuant to Rule 1020(a), the action may be brought in any county in which any one of the individual causes of action might have been brought.[130]

For venue against corporations and other business entities, Rule 1006 refers to other rules of civil procedure that are particular to each type of entity.[131] In actions against partnerships, Rule 2130 governs. In actions against unincorporated associations, Rule 2156 governs. In actions against corporations and similar entities, Rule 2179 governs.

1-6:1.2 Venue As to Partnerships

An action against a partnership may be brought in and only in a county where the partnership regularly conducts business, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose or in the county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the

128. Pa. R. Civ. P. 1006.
129. Pa. R. Civ. P. 1006(a).
130. Pa. R. Civ. P. 1006(f)(1).
131. Pa. R. Civ. P. 1006(b).

property.[132] For purposes of venue analysis, a partnership does not mean a limited liability company, unincorporated association, joint stock company or similar association.[133] If the plaintiff states more than one cause of action against the same defendant in the complaint pursuant to Rule 1020(a), the action may be brought in any county in which any one of the individual causes of action might have been brought.[134]

1-6:1.3 Venue As to Corporations and Similar Entities

Except for an action on a policy of insurance, a personal action against a corporation or similar entity,[135] including a limited liability company, may be brought in and only in: (1) the county where its registered office or principal place of business is located; (2) a county where it regularly conducts business; (3) the county where the cause of action arose; (4) a county where a transaction or occurrence took place out of which the cause of action arose, or (5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.[136] If the action is on a policy of insurance against an insurance company, association or exchange, either incorporated or organized in Pennsylvania or doing business in this Commonwealth, the action may be brought: (1) in a county designated in subdivision (a) of Rule 2179; or (2) in the county where the insured property is located; or (3) in the county where the plaintiff resides, in actions upon policies of life, accident, health, disability, and live stock insurance or fraternal benefit certificates.[137] If the plaintiff states more than one cause of action against the same defendant in the complaint pursuant to Rule 1020(a), the action may be brought

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132. Pa. R. Civ. P. 2130.

133. Pa. R. Civ. P. 2126.

134. Pa. R. Civ. P. 1006(f)(1).

135. "Corporation or similar entity" includes any public, quasi-public or private corporation, insurance association or exchange, joint stock company or association, limited liability company, professional association, business trust, or any other association which is regarded as an entity distinct from the members composing the association, but does not include the Commonwealth of Pennsylvania, a political subdivision as defined in Pennsylvania Rule of Civil Procedure 76, a partnership as defined in Rule 2126, or an unincorporated association as defined in Rule 2151. Pa. R. Civ. P. 2176.

136. Pa. R. Civ. P. 2179(a).

137. Pa. R. Civ. P. 2179(b).

in any county in which any one of the individual causes of action might have been brought.[138]

1-6:1.4 Venue As to Unincorporated Associations

An action against an association may be brought in and only in a county where the association regularly conducts business or any association activity, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose or in the county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.[139] If the plaintiff states more than one cause of action against the same defendant in the complaint pursuant to Rule 1020(a), the action may be brought in any county in which any one of the individual causes of action might have been brought.[140]

1-6:1.5 Actions Against Two or More Defendants to Enforce Joint or Several Liability

An action to enforce a joint and several liability against two or more defendants, except actions in which the Commonwealth of Pennsylvania is a party, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants under the general rules of subdivisions (a) or (b) of Rule 1006. If the plaintiff states more than one cause of action against the same defendant in the complaint pursuant to Rule 1020(a), the action may be brought in any county in which any one of the individual causes of action might have been brought.[141]

1-6:1.6 Requesting a Change in Venue

Counsel will want to consider whether venue selection is likely to be challenged. A challenge to venue will result in procedural delay of the case. Challenges to venue may be based on venue

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138. Pa. R. Civ. P. 1006(f)(1).
139. Pa. R. Civ. P. 2156(a).
140. Pa. R. Civ. P. 1006(f)(1).
141. Pa. R. Civ. P. 1006(f)(1).

being improper,[142] or even if venue is otherwise proper, for the convenience of parties and witnesses.[143]

1-6:1.6a Transfers of Venue for Convenience of Parties and Witnesses in State Court

In state court, when venue is otherwise technically proper, a party may request a change in venue for the convenience of the parties and witnesses. The procedure for doing so is by petition and answer.[144] Traditionally in Pennsylvania state court, the plaintiff's choice of forum is entitled to great deference, it should rarely be disturbed, and a defendant bears a high burden to prove that the convenience of parties and witnesses outweighed the plaintiff's choice of forum.[145] This burden requires the moving party to establish, through detailed information in the record, that the plaintiffs' choice of forum is oppressive or vexatious to the defendant.[146]

For a long time, the application of these stringent requirements made it extremely difficult for a defendant to change venue based on convenience of the parties and witnesses. However, in 2014 the Pennsylvania Supreme Court arguably loosened these previously stringent requirements.[147] The court appears to have invested the trial courts with more discretion to consider other factors that may outweigh the plaintiff's choice of forum, including balancing the arguments of the parties, considering the level of prior court involvement, and considering whether the forum was designed to harass the defendant.[148] The showing of oppression needed for a judge to exercise discretion in favor of granting a forum non conveniens motion is not as severe as had been suggested by a number of Superior Court decisions.[149] Mere inconvenience remains insufficient to transfer venue, but defendants do not have to show near-draconian consequences for honoring the plaintiff's

142. Pa. R. Civ. P. 1006(e); Fed. R. Civ. P. 12(b)(3).
143. Pa. R. Civ. P. 1006(d); 28 U.S.C. § 1404(a).
144. Pa. R. Civ. P. 1006(d).
145. *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997).
146. *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997).
147. *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014).
148. *Bratic v. Rubendall*, 99 A.3d 1, 7 (Pa. 2014).
149. *Bratic v. Rubendall*, 99 A.3d 1, 10 (Pa. 2014).

chosen forum.[150] If a petition to transfer is granted, the petitioning party must pay the costs associated with transferring the file to the transferee county, but those costs may be taxed as costs in the action to be paid by the non-prevailing party.[151]

1.6:1.6b Dismissal or Transfer Where Venue is Improper in State Court

When venue in state court is improper *ab initio*, a party may request dismissal and/or transfer to a proper forum.[152] A challenge on this basis must be made by preliminary objection, or it is waived.[153]

If venue is successfully challenged, the costs and fees for transfer and removal of the record to the proper forum will be taxed on the plaintiff.[154] If a preliminary objection to venue is sustained and there is a county of proper venue within the state, the action shall not be dismissed but shall be transferred to the appropriate court of that county.[155] Pennsylvania state courts lack the authority to transfer matters to courts of sister states, but when appropriate, should dismiss the action to permit re-filing in another state.[156]

1-6:2 Determining Venue in Federal Court

Venue for actions commenced initially in federal court[157] is governed by Section 1391 of Title 28[158] and, as in state court, depends on whether the defendant is an individual or an entity.

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150. *Bratic v. Rubendall*, 99 A.3d 1, 10 (Pa. 2014); *Powers v. Verizon Pennsylvania, LLC*, ___ A.3d ___, 2020 PA Super 58 (Pa. Super. Ct. Mar. 11, 2020).

151. Pa. R. Civ. P. 1006(d)(3).

152. Pa. R. Civ. P. 1006(e).

153. Pa. R. Civ. P. 1006(e).

154. Pa. R. Civ. P. 1006(e).

155. Pa. R. Civ. P. 1006(e).

156. *Robbins for Estate of Robbins v. Consol. Rail Corp.*, 212 A.3d 81, 87 n.5 (Pa. Super. 2019) (citing *Alford v. Phila. Coca-Cola Bottling Co., Inc.*, 531 A.2d 792 (Pa. Super. 1987)).

157. The United States Supreme Court has noted that § 1391 applies only to actions initially brought in federal court, not to actions that are initially filed in state court and later removed to federal court. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953). Venue for removal actions is governed by 28 U.S.C. § 1441(a), which requires that such actions be removed to "the district court of the United States for the district and division embracing the place where [the state court] action is pending." *Polizzi*, 345 U.S. 663, 666.

158. 28 U.S.C. § 1391.

1-6:2.1 Venue Generally

A federal civil action may be brought in: (1) a judicial district in which any defendant resides, if all defendants are residents of the state in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in Section 1391, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to the action.

Residency is determined based on the type of defendant. A natural person shall be deemed to reside in the judicial district in which that person is domiciled.[159] Whether or not incorporated, a defendant entity shall be deemed to reside in in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the action.[160] A defendant who resides outside the United States may be sued in any judicial district.[161]

A corporation shall be deemed to reside in any district within which the corporation's contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.[162]

1-6:2.2 Venue in Specific Kinds of Actions

In a case that is removed to federal court from state court, venue is governed by 28 U.S.C. § 1441(a), which requires that such actions be removed to the district court and division embracing the place where the state court action is pending.[163] A copyright case may be brought in the district in which the defendant or his agent resides or may be found.[164] A patent infringement case may

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159. 28 U.S.C. § 1391(c)(1).

160. 28 U.S.C. § 1391(c)(2).

161. 28 U.S.C. § 1391(c)(3).

162. 28 U.S.C. § 1391(d).

163. *Exec. Wings, Inc. v. Dolby*, 2015 U.S. Dist. LEXIS 123729 (W.D. Pa. Sept. 16, 2015); *Reassure Am. Life Ins. Co. v. Midwest Res., Ltd.*, 721 F. Supp. 2d 346, 351 (E.D. Pa. 2010) (citing *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665-66 (1953)); *see also Heft v. AAI Corp.*, 355 F. Supp. 2d 757, 772 (M.D. Pa. 2005) ("Once a defendant files a notice of removal, the propriety of venue is determined by reference to § 1441(a).").

164. 28 U.S.C. § 1400(a).

be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.[165] A shareholder derivative action may be prosecuted in any judicial district where the corporation might have sued the same defendants.[166] An action of interpleader or in the nature of interpleader under Section 1335 of Title 28[167] may be brought in the judicial district in which one or more of the claimants reside.[168]

1-6:2.3 Changing Venue in Federal Court

1-6:2.3a Transferring Venue for Convenience of Parties and Witnesses in Federal Court

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.[169] Transfer can be sought by motion, or the court may consider transfer *sua sponte*, provided that the court gives notice to the parties and an opportunity to object to the proposed transfer.[170]

Section 1404(a) does not condition transfer on the initial forum's being "wrong;" it permits transfer to any district where venue is also proper (i.e., "where [the case] might have been brought") or to any other district to which the parties have agreed by contract or stipulation.[171] Section 1404(a) is merely a codification of the doctrine of forum non conveniens for cases in which the transferee forum is within the federal court system; in such cases, Congress

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165. 28 U.S.C. § 1400(b).

166. 28 U.S.C. § 1401.

167. 28 U.S.C. § 1335.

168. 28 U.S.C. § 1397.

169. 28 U.S.C. § 1404(a). *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183 (3d Cir. 2008).

170. *W. PA Child Care, LLC v. Powell*, No. 14-968, 2014 WL 6090522, at *2 (W.D. Pa. Nov. 13, 2014) (citing 15 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, Federal Practice and Procedure § 3884 (4th ed. 2013)); *Swindell-Dressler Corp. v. Dumbauld*, 308 F.2d 267, 273-74 (3d Cir. 1962) (vacating district court's transfer order because no notice, hearing or opportunity to be heard as to transfer was afforded); and *Jackson v. Murphy*, No. 08-585, 2008 WL 2566530, at *1 n.2 (W.D. Pa. June 26, 2008)).

171. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 579 (2013).

has replaced the traditional remedy of outright dismissal with transfer.[172]

In a typical case not involving a forum-selection clause, when considering a motion to transfer under Section 1404(a), the court must evaluate both the convenience of the parties and various public-interest considerations.[173] Factors relating to the parties' private interests include relative ease of access to sources of proof; availability of compulsory process for attendance of witnesses; the cost of obtaining attendance of witnesses; the possibility of viewing premises that are the subject of the suit; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[174] Public-interest factors may include administrative difficulties related to court congestion; local interest in having localized controversies decided at home; and the interest in having the trial of a diversity case in a forum whose law applies.[175] The court must also give some weight to the plaintiffs' choice of forum.[176]

The presence of a valid forum-selection clause changes a Section 1404(a) analysis.[177] First, a plaintiff's choice of forum merits no weight when the plaintiff has agreed to a valid forum selection clause.[178] As the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted.[179] Second, arguments about the parties' private interests should not be considered; only public-interest factors.[180] Third, the original

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172. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 580 (2013).

173. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013).

174. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 583 n.6 (2013); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

175. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 583 n.6 (2013); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

176. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 583 n.6 (2013); *see also Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

177. *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018).

178. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581-83 (2013).

179. *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 62-66 (2013); *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018).

180. *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581-83 (2013); *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581-83 (2013);.

venue's choice-of-law rules will not carry over to the forum that was contractually selected.[181] That is, the court in the contractually selected venue should not apply the law of the transferor venue to which the parties had waived their right by virtue of the forum selection clause.[182] Thus, where a valid forum selection clause exists, except in unusual circumstances, "the interest of justice" is served by holding parties to their bargain.[183] However, a court need not transfer an action based on a forum-selection clause if the clause is invalid or if it does not cover the claims sought to be transferred.[184] Rather, a transfer presupposes the existence of an action that falls within the scope of a valid forum-selection clause.[185]

1-6:2.3b Dismissal or Transfer Where Venue is Improper in Federal Court

Procedurally, improper venue must be raised by motion under Rule 12[186] and must be made before pleading if a responsive pleading is allowed, otherwise the issue is waived.[187] The moving party bears the burden of showing that venue is improper.[188] If venue is found to be improper, the court may dismiss the case, or in the interest of justice transfer the case to any district or division in which it could have been brought.[189] Transfer instead of dismissal is generally appropriate to avoid penalizing plaintiffs by technicalities.[190]

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181. *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581-83 (2013); *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018).

182. *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581-83 (2013); *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018).

183. *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581-83 (2013).

184. *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 97 (3d Cir. 2018).

185. *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 97 (3d Cir. 2018).

186. Fed. R. Civ. P. 12(b)(3). However, challenges to venue have been made pursuant to Rules 12(b)(1), 12(b)(3) and 12(b)(6). There is disagreement over whether dismissal (where appropriate) should be made pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(3) or 12(b)(6). *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 298 n.6 (3d Cir. 2001) (citing *Lambert v. Kysar*, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993) (dismissal based on forum selection clause specifying state forum grounded on Federal Rule of Civil Procedure 12(b)(6), not 12(b)(3) and *Lipcon v. Underwriters at Lloyd's, London*, 148 F. 3d 1285, 1289 (11th Cir. 1998) (collecting cases adopting each rationale and where forum selection clauses specified non-federal forums)).

187. Fed. R. Civ. P. 12(b)(3).

188. *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982).

189. 28 U.S.C. § 1406(a).

190. *Bockman v. First Am. Mktg. Corp.*, 459 Fed. Appx. 157, 162 n.11 (3d Cir. 2012) (quoting *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962)).

1-6:3 Multi-County and Multi-District Litigation

Whether in state or federal court, multiple civil actions may end up being filed involving common questions of law or fact. In such cases, it is possible to coordinate and/or consolidate the actions for efficiency and/or convenience of the parties and witnesses. If counsel knows that multiple actions have been or will be filed by the same parties, the client may benefit considerably by having the matters coordinated or consolidated in the client's or counsel's preferred forum.

1-6:3.1 Multi-County Litigation in State Court

Actions pending in different counties and involving a common question of law or fact, or which arise from the same transaction or occurrence, may be coordinated.[191] A party seeking coordination may file a motion in the court in which the first-filed action is pending.[192] Any party may then file an answer to the motion and the court may hold a hearing.[193] The court in which the complaint was first filed may stay the proceedings in any action which is the subject of the motion.[194]

When ruling on a motion to coordinate actions, the primary consideration is to determine if the proposed coordination would provide a fair and efficient method of adjudicating the matters.[195] Under Rule 213.1, a court is required to consider six enumerated factors: (1) whether the common question of fact or law is predominating and significant to the litigation; (2) the convenience of the parties, witnesses and counsel; (3) whether coordination will result in unreasonable delay or expense to a party or otherwise prejudice a party in an action which would be subject to coordination; (4) the efficient utilization of judicial facilities and personnel and the just and efficient conduct of the actions; (5) the disadvantages of duplicative and inconsistent rulings, orders or judgments; and (6) the likelihood of settlement of the actions without further litigation should coordination be

191. Pa. R. Civ. P. 213.1.

192. Pa. R. Civ. P. 213.1(a).

193. Pa. R. Civ. P. 213.1(a).

194. Pa. R. Civ. P. 213.1(b).

195. *Pennsylvania Mfrs. Ass'n Ins. Co. v. Pa. State Univ.*, 63 A.3d 792, 795 (Pa. Super. 2013).

denied.[196] A court is also free to consider other matters.[197] One such factor is where suit was filed first. Other "non-enumerated" factors that a court may consider are forum selection clauses and a party's right to a jury trial.[198]

If the court orders coordination, the order must include the manner of giving notice of the order to all parties in all actions subject thereto and direct that specified parties pay the costs, if any, of coordination.[199] The order must also require that a certified copy of the order of coordination be sent to the courts in which the actions subject to the order are pending, at which point those courts must act appropriately to carry out the coordination order.[200]

1-6:3.2 Multi-District Litigation in Federal Court

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.[201] Multidistrict coordination or consolidation must be sought by motion filed with the judicial panel on multidistrict litigation.[202] If the judicial panel on multidistrict litigation determines that transfer would be for the convenience of parties and witnesses and would promote the just and efficient conduct of the actions, then transfer will be made to an appropriate district.[203] A judge or judges to whom the action is assigned will conduct the coordinated or consolidated pretrial proceedings, and at or before their conclusion, the judicial panel on multidistrict litigation shall remand the action to the district from which it was transferred, and may at any time separate any claim, cross-claim, counter-claim or third party claim and remand any of such claims before the entire action is remanded.[204]

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196. Pa. R. Civ. P. 231.1(c).
197. *Pa. Mfrs.' Ass'n Ins. Co. v. Pa. State Univ.*, 63 A.3d 792, 796 (Pa. Super. 2013).
198. *See* Pa. R. Civ. P. 213.1(c) (introductory paragraph).
199. Pa. R. Civ. P. 213.1(e).
200. Pa. R. Civ. P. 213.1(e).
201. 28 U.S.C. § 1407(a).
202. 28 U.S.C. § 1407(c) and (d).
203. 28 U.S.C. § 1407(a).
204. 28 U.S.C. § 1407(b).

If multiple actions qualify for multidistrict transfer or consolidation, a person or entity who is a party to multiple actions can enjoy tremendous cost savings and efficiencies by litigating on one district. Conversely, a person or entity who is a party to only one proceeding can experience a more costly and less efficient process than the party might otherwise have experienced if the case stood on its own.

1-6:4 Forum Selection Clauses

Parties may contractually select the venue for resolving their disputes. Forum selection clauses are generally enforceable.[205] Thus, if a contract exists between the parties, counsel should first assess whether the forum selection clause in the contract is enforceable. Parties sometimes attempt to avoid forum selection clauses by pleading non-contractual causes of action. However, pleading alternative non-contractual theories alone is not enough to avoid a forum selection clause if the claims asserted arise out of the contractual relation and implicate its terms.[206]

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[205] *Patriot Commercial Leasing Co., Inc. v. Kremer Rest. Enters., LLC*, 915 A.2d 647, 651 (Pa. Super. 2006) (forum selection clause in a commercial contract between business entities is presumptively valid and will be deemed unenforceable only when: 1) the clause itself was induced by fraud or overreaching; 2) the forum selected in the clause is so unfair or inconvenient that a party, for all practical purposes, will be deprived of an opportunity to be heard; or 3) the clause is found to violate public policy); *Cent. Contracting Co. v. C. E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965) (court in which venue is proper and which has jurisdiction should decline to proceed when the parties have freely agreed to another forum and where such agreement is not unreasonable at the time of litigation). An agreement is unreasonable only where its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue his cause of action. Id. If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by his agreement. *Cent. Contracting Co.*, 209 A.2d 810, 816. The party seeking to obviate the agreement has the burden of proving its unreasonableness. *See also O'Hara v. First Liberty Ins. Corp.*, 984 A.2d 938 (Pa. Super. 2009) (forum selection clause in insurance policy enforceable and not against public policy); *Instrumentation Assocs. v. Madsen Elecs. (Canada), Ltd.*, 859 F.2d 4, 9-10 (3d Cir. 1988) (under Pennsylvania law, forum selection clause enforceable in the absence of compelling, countervailing reason which would seriously impair plaintiff's ability to pursue his cause of action).

[206] *Autochoice Unlimited, Inc. v. Avangard Auto Fin., Inc.*, 9 A.3d 1207, 1212 (Pa. Super. 2010); *Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA*, 779 F.3d 214, 220 (3d Cir. 2015) (courts generally interpret language in a forum clause encompassing any claims "with respect to" an agreement broadly to mean "connected by reason of an established or discoverable relation); *ARK Builders Corp. v. Minersville Area Sch. Dist.*, No. 3:14-CV-01551, 2015 U.S. Dist. LEXIS 140486 (M.D. Pa. Oct. 15, 2015); *Harley v. Bank of N. Y. Mellon*, No. 1:15-CV-1384, 2015 U.S. Dist. LEXIS 152105 (M.D. Pa. Nov. 10, 2015) (plaintiff cannot circumvent valid forum selection clause by pleading a non-contractual theory of relief if plaintiff's claim arises out of contractual relation and implicates contract's terms); *see also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*,

In federal court, if the plaintiff files suit in a forum other than the forum specified in a forum selection clause, the case most likely will not be dismissed because a forum selection clause does not render venue "wrong" or "improper" under Section 1406(a) of Title 28 or Rule 12(b)(3).[207] Only federal statutory law governs whether venue is "wrong" or "improper."[208] Therefore, a forum selection clause is appropriately enforced by a motion to transfer venue pursuant to Section 1404(a) of Title 28.[209]

If a motion to transfer is made under Section 1404(a), then transfer to another federal forum is proper if the forum selection clause allows suit to be filed in another federal forum.[210] If the forum selection clause points to a non-federal forum, dismissal is possible under a federal forum non-conveniens analysis; however, this carries a heavy burden of opposing the plaintiff's chosen forum.[211] It is unclear whether dismissal under Rule 12(b)(6) is possible based on a forum selection clause.[212]

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709 F.2d 190 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983), *overruled on other grounds by Lauro Lines v. Chasser*, 109 S.Ct. 1976 (1989), and *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988) (applying forum selection clause to related tort claims as well as to contract claims of third party beneficiary); *Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982) (applying forum selection clause in distributorship agreement to anti-trust claim); and *Rini Wine Co., Inc. v. Guild Wineries & Distilleries*, 604 F. Supp. 1055 (N.D. Ohio 1985) (applying forum selection clause in franchise agreement to anti-trust claim). To circumvent a forum selection clause simply pleading non-contractual claims in cases involving the terms of a contract containing the parties' choice of forum runs counter to the law favoring forum selection clauses. *Crescent Int'l, Inc. v. Avatar Cmtys., Inc.*, 857 F.2d 943 (3d Cir. 1988) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341 (3d Cir. 1966); and *Cent. Contracting Co. v. C.E. Youngdahl & Co. Inc.*, 209 A.2d 810 (Pa. 1965)).

207. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 579 (2013).

208. *Atl. Marine Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 577 (2013).

209. 28 U.S.C. § 1404(a); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 579 (2013); *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 297-300 (3d Cir. 2001).

210. *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 298-99 (3d Cir. 2001).

211. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 583 n.8 (2013); *Geosonics, Inc. v. Aegean Assocs., Inc.*, No. 2:14-cv-908 2014, WL 7409529, at *3 (W.D. Pa. Dec. 31, 2014) (forum selection clause should be given controlling weight in all but the most exceptional cases); *York Grp., Inc. v. Pontone*, No. 10-1078, 2014 WL 3735157, at *7 n.5 (W.D. Pa. July 28, 2014) (court accordingly must deem private-interest factors to weigh entirely in favor of the preselected forum).

212. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 580 (2013).

1-7 ANALYSIS OF POTENTIAL COUNTERCLAIMS

Before filing suit, counsel will want to consider whether any of the prospective defendants is likely to assert one or more counterclaims. Sometimes this possibility can be overlooked, and the result can be far greater litigation expense to the client than originally anticipated, and may expose the client to liability to the defendant with a resulting judgment. If counsel is representing the client under a contingent fee agreement, then a counterclaim can affect the amount of recovery, and the fee agreement should specify whether and on what terms representation will include the defense of a counterclaim.

A counterclaim can be in the nature of set-off[213] or recoupment,[214] thereby potentially reducing the amount of the plaintiff's claim, or a counterclaim can exceed the value of the plaintiff's claim and result in an affirmative claim against the plaintiff by a defendant.[215]

If a counterclaim is anticipated, counsel should then consider potential third party claims that the plaintiff may have, once the counterclaim is filed, against other parties who might be liable to the defendant who is asserting the counterclaim.[216] The contemplated multiplicity of claims and parties may impact expense and delay, jurisdiction and venue, and other aspects of managing the litigation.

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213. A "setoff" seeks affirmative relief against the plaintiff, but must be based upon the same transaction underlying the plaintiff's cause of action. 6 Standard Pa. Practice 2d § 29:2; *Kaiser by Taylor v. Monitrend Inv. Mgmt., Inc.*, 672 A.2d 359 (Pa. Commw. 1996).

214. "Recoupment" is a legal or equitable right based on the plaintiff's breach of contract or other duty arising out of the same transaction out of which the plaintiff's claim arises. 6 Standard Pa. Practice 2d § 29:3; *Commonwealth. v. Berks Cty.*, 72 A.2d 129 (Pa. 1950); *Nw. Nat'l Bank v. Commonwealth*, 27 A.2d 20 (Pa. 1942); *Cohen v. Goldberg*, 720 A.2d 1028 (Pa. 1998); *Kaiser by Taylor v. Monitrend Inv. Mgmt., Inc.*, 672 A.2d 359 (Pa. Commw. Ct. 1996). Recoupment does not result in an affirmative judgment against the plaintiff. 6 Standard Pa. Practice 2d § 29:3; *Kaiser by Taylor v. Monitrend Inv. Mgmt., Inc.*, 672 A.2d 359 (Pa. Commw. Ct. 1996); whereas the defendant may recover any excess over the plaintiff's claim under a setoff. 6 Standard Pa. Practice 2d § 29:3.

215. Pa. R. Civ. P. 1031(b); Fed. R. Civ. P. 13(c). Counterclaim is broader than either recoupment or setoff and embraces both. 6 Standard Pa. Practice 2d § 29:1.

216. Any party may join as an additional defendant any person not a party to the action who may be solely liable on the underlying cause of action against the joining party or liable to or with the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based. Pa. R. Civ. P. 2252(a). Under Federal Rule of Civil Procedure 14(b), when a claim is asserted against a plaintiff, the plaintiff may bring in a third party if Rule 14 would allow a defendant to do so. Fed. R. Civ. P. 14(b).

1-8 COMMON INTEREST/JOINT DEFENSE AGREEMENTS

1-8:1 Background on Common Interest/Joint Defense Privilege

Pennsylvania courts recognize a common interest privilege that will protect from disclosure communications made by parties with a common interest to each other in furtherance of what is typically a joint defense to litigation.[217] Although historically referred to as the "joint defense" privilege, the privilege is not necessarily limited to the defense of claims.[218] Federal courts also recognize a common-interest privilege that permits attorneys representing different clients who have similar legal interests to share information without having to disclose it to others.[219] Although the doctrine originated in the context of criminal co-defendants,[220] it also applies in civil litigation, and even in purely transactional contexts.[221]

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217. *Karoly v. Mancuso*, 65 A.3d 301, 315 (Pa. 2013) (joint-client or common-interest privilege exists under the prevailing law of this Commonwealth); *see also In re Condemnation by City of Phila.*, 981 A.2d 391, 396-98 (Pa. Commw. 2009); *Commonwealth v. Schultz*, 133 A.3d 294, 314 (Pa. Super. 2016), *reargument denied* (Mar. 30, 2016) (when multiple defendants and their counsel engage in common defense, privilege is not waived by sharing confidential information among the parties for the benefit of joint defense); *Commonwealth v. Scarfo*, 611 A.2d 242, 266 (Pa. Super. 1992), *superseded by statute on other grounds as stated in Commonwealth v. Buck*, 709 A.2d 892, 895 (Pa. 1998) (where multiple defendants and their attorneys participate in a common group defense, the attorney-client privilege is not waived by the sharing of confidential communications to those additional defendants and attorneys for the benefit of the group, or "joint defense").

218. *In re Chevron Corp.*, No. 10-MC-28, 2010 WL 5173279 (E.D. Pa. Dec. 20, 2010) (distinction between "joint defense" privilege and "common interest" privilege has been abolished and courts in this Circuit now apply only the community-of-interest privilege), *rev'd on other grounds, sub nom. In re Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011); *see Teleglobe Commc'ns Corp. v. BCE, Inc.*, 493 F.3d 345, 364 (3d Cir. 2007) ("[T]he community-of-interest privilege has completely replaced the old joint-defense privilege for information sharing among clients with different attorneys. Thus, courts should no longer purport to apply the joint-defense privilege.") (citing Restatement (3d) of the Law Governing Lawyers § 76)).

219. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *Mine Safety Appliances Co. v. N. River Ins. Co.*, No. 2:09cv348, 2014 WL 1320150, at *21 (W.D. Pa. Mar. 31, 2014) (where the information is shared pursuant to this common interest it is not privileged as between those clients but does remain privileged as to all others).

220. *See, e.g.*, *Commonwealth v. Scarfo*, 611 A.2d 242 (Pa. Super. 1992), *appeal denied*, 631 A.2d 1006 (Pa. 1993).

221. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007).

To qualify for protection under the common-interest privilege, a communication must be shared with the attorney of the member of the "community of interest," and "all members of the community must share a common legal interest in the shared communication."[222] The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.[223] The substantially similar interest must be legal, and not business, commercial, factual, or strategic.[224] The requirement that the parties to the communication share at least substantially similar legal interests prevents abuse of the privilege and unnecessary information sharing.[225]

The common-interest privilege does not apply unless the conditions of privilege are otherwise satisfied.[226] In other words, the common-interest privilege is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third party.[227] The party asserting the privilege has the burden of establishing the elements of the underlying privilege, as well as those of the common-interest privilege.[228]

1-8:2 Common Interest/Joint Defense Agreement

Although a written agreement is not necessary to invoke the common interest privilege,[229] it certainly helps, and it is wise to

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222. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007).

223. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007).

224. *United States v. Trombetta*, 2015 U.S. Dist. LEXIS 154748 (W.D. Pa. Nov. 16, 2015) (citing *In re Teleglobe*, 493 F.3d 345, 365 (3d Cir. 2007) and *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011)).

225. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 365 (3d Cir. 2007).

226. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *In re Diet Drugs Prods. Liability Litig.*, MDL No. 1203, 2001 WL 34133955, at *5 (E.D. Pa. Apr. 19, 2001).

227. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011).

228. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *see also U.S. v. LeCroy*, 348 F. Supp. 2d 375, 382 (E.D. Pa. 2004).

229. *United States v. Trombetta*, 2015 U.S. Dist. LEXIS 154748 (W.D. Pa. Nov. 16, 2015) (written agreement is not required in order to establish a common interest endeavor) (citing *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 592 (3d Cir. 2007)). *See also, e.g.*, *United States v. LeCroy*, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004) (courts have found that an oral

enter into a formal, written agreement. When communicating with counsel for co-plaintiffs or co-defendants, counsel should be careful about what is discussed and what information is shared, until she confirms and orally agrees with the other counsel that a common interest exists and that the common interest privilege will cover the communications. Counsel should then follow up with, and execute, a written common interest agreement as soon as practicable, and the written agreement should memorialize the earlier, oral agreement, to protect all communications predating the execution of the written agreement.[230] Thereafter, all written communications and strategy documents that are shared should contain a header such as "CONFIDENTIAL – SUBJECT TO COMMON INTEREST/JOINT DEFENSE PRIVILEGE." A sample common interest/joint defense agreement is included in Appendix 1-8:2.

1-9 IS THE CLAIM AGAINST A LICENSED PROFESSIONAL?

1-9:1 Background on Certificates of Merit

In the commercial litigation context, claims may arise against licensed professionals,[231] in which case a certificate of merit may be required as a condition to pursuing the claim. In addition to the rules governing civil actions generally, Rules 1042.1 through 1042.12 govern actions in which a professional liability claim is asserted by or on behalf of a client of a licensed professional against the licensed professional and/or an entity responsible for a licensed professional who deviated from an acceptable professional standard.[232]

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joint defense agreement may be valid (citing *In re Grand Jury Subpoena*, 274 F.3d 563, 569 (1st Cir. 2001)); *Exec. Risk Indem., Inc. v. Cigna Corp.*, 81 Pa. D. & C.4th 410 (Phila. Co. 2006).

230. *See In re Grand Jury Subpoena*, 274 F.3d 563, 569 (1st Cir. 2001).

231. This book will not examine claims for personal injury against licensed professionals, such as against licensed medical professionals. However, claims against other licensed professionals, such as attorneys, architects and engineers, may arise in commercial cases.

232. Pa. R. Civ. P. 1042.1.

The certificate of merit requirements apply whether the case is filed in state court or Federal court because the requirement is a substantive rule of law that applies in professional liability actions.[233]

This book will not include coverage of licensed *medical* professionals. For commercial litigation purposes, a "licensed professional" means any person who is licensed in Pennsylvania or another state as an accountant, architect, engineer or land surveyor, or attorney at law.[234] The term also includes corporations engaged in providing professional services, such as architectural or engineering services, even though the entity itself may not be "licensed."[235]

Failure to comply with the certificate of merit requirement can result not only in judgment of nonpros as to the professional liability claims,[236] but can also result in sanctions.[237]

1-9:2 Pleading Requirements

A complaint asserting a professional liability claim must identify each defendant against whom the plaintiff is asserting such a claim.[238] To comply with the certificate of merit requirements, counsel will need to clarify in the complaint whether the basis for professional liability is a direct act or omission by the licensed professional, or whether the basis for liability is solely because the licensed professional is responsible for other licensed professionals' deviation from an acceptable professional standard.[239]

1-9:3 Certificate of Merit Requirement

If the action is based on an allegation that the licensed professional deviated from an acceptable professional standard, then counsel for the plaintiff must file a certificate of merit either at the time

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233. *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 265 (3d Cir. 2011); *Iwanejko v. Cohen & Grigsby, P.C.,* No. 06–4471, 249 Fed. Appx. 938, 943–44 (3d Cir. Oct. 11, 2007).

234. Pa. R. Civ. P. 1042.1(c).

235. *Dental Care Assocs., Inc. v. Keller Engineers, Inc.*, 954 A.2d 597, 603 (Pa. Super. 2008); see also *Varner v. Classic Communities Corp.*, 890 A.2d 1068 (Pa. Super. Ct. 2006) (professional liability claim against architectural firm required certificate of merit).

236. Pa. R. Civ. P. No. 1042.6 and 1042.7.

237. Pa. R. Civ. P. No. 1042.9(b).

238. Pa. R. Civ. P. 1042.2(a).

239. *See* Pa. R. Civ. P. 1042.3.

the complaint is filed, or within 60 days after filing the complaint.[240] It can sometimes be difficult to discern whether a claim is based on deviation from a professional standard, thereby requiring a certificate of merit, or whether it falls outside that category. Courts have held that the certificate requirement does not apply to claims of fraud or intentional misrepresentation.[241] As for negligence claims, what distinguishes professional negligence from ordinary negligence is the need for expert testimony to clarify complex issues for a jury of laypersons.[242] Although professional negligence claims may require expert testimony, it is not always necessary when the negligence is obvious or within a layperson's understanding.[243] For counsel who is asserting a claim against a licensed professional, when in doubt, it is advisable to at least attempt to secure a certificate of merit opinion and file a certificate of merit.

Where a certificate of merit is required, it must be signed by the attorney and must certify one of three matters: (1) that an "appropriate licensed professional"[244] has supplied a written statement that a reasonable probability exists that the care, skill or knowledge exercised or exhibited in the practice or work that is

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240. Pa. R. Civ. P. 1042.3(a).

241. *See Krauss v. Claar*, 879 A.2d 302, 306–07 (Pa. Super. 2005); *McElwee Grp., LLC v. Mun. Auth. of Borough of Elverson*, 476 F. Supp. 2d 472, 475 (E.D. Pa. 2007). *But see Borough of Zelienople v. Houlihan*, 03-10287, 2006 WL 2883375, at *2 (Pa. Com. Pl. May 12, 2006) (where plaintiff was the defendant-attorney's client, certificate of merit necessary even for misrepresentation, distringushing *Kraus v. Claar*, 879 A.2d 302, 306–07 (Pa. Super. 2005)).

242. *Merlini ex rel. Merlini v. Gallitzin Water Auth*., 980 A.2d 502, 506 (2009); *see also Dental Care Assocs., Inc. v. Keller Engineers*, 954 A.2d 597, 601 (Pa. Super. 2008) and *Zokaites Contracting Inc. v. Trant Corp*., 968 A.2d 1282, 1288 (Pa. Super. Ct. 2009), *appeal denied*, 985 A.2d 972 (2009) (where no certificate of merit was filed, allegations stricken relating to "negligently" performed or "improperly designed" work; averments did not relate to specific contractual duties regarding manner and quality of performance, but instead, implicated exercise of care and professional judgment, and proof would require expert testimony).

243. *Merlini ex rel. Merlini v. Gallitzin Water Auth*., 980 A.2d 502, 506 (2009); *Grossman v. Barke*, 868 A.2d 561, 567 (Pa. Super. 2005).

244. The "appropriate licensed professional" who supplies the necessary statement supporting a certificate of merit need not be the same person who will actually testify at trial. However, the "appropriate licensed professional" must be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or must have qualifications such that the trial court would find them sufficient to allow that expert to testify at trial. Note to Pa. R. Civ. P. 1042.3(a)(1). In at least one case, it has been held that the "appropriate licensed professional" could not be from the same law firm as the attorney signing the certificate of merit. *See Parkway Corp. v. Edelstein*, 861 A.2d 264, 267 (Pa. Super. 2004) (where experts relied upon have been personally involved in the litigation, their credibility as to "certification" is inherently suspect).

the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm; (2) that the claim of deviation from an acceptable professional standard is based solely on allegations that other licensed professionals for whom the defendant is responsible deviated from an acceptable professional standard; or (3) that expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.[245]

A separate certificate of merit must be filed as to each licensed professional against whom a claim is asserted, and if a complaint raises claims of both direct and vicarious liability against the same defendant under both subdivisions (a)(1) and (a)(2) of Rule 1042.3, then the attorney must file a separate certificate of merit as to each claim raised, or a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2) of the rule.[246]

If the claim is based solely on allegations that other licensed professionals for whom the defendant was responsible deviated from acceptable professional standards, then a certificate of merit must be filed as to the "other licensed professionals" for whom the defendant is responsible.[247] The statement does not have to identify the specific licensed professionals who deviated from an acceptable standard of care, and unlike claims based on direct liability, separate certificates of merit as to each licensed professional for whom a defendant is allegedly responsible are not required.[248]

A defendant filing a counterclaim for professional liability must also file a certificate of merit.[249] However, a defendant or an additional defendant who joins a licensed professional as an additional defendant or asserts a cross-claim against a licensed professional does not need to file a certificate of merit, unless the joinder or cross-claim is based on acts of negligence that are *unrelated* to the acts of negligence alleged against the joining or cross-claiming party.[250]

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245. Pa. R. Civ. P. 1042.3(a)(1) through (3).
246. Pa. R. Civ. P. 1042.3(b)(1) and (2).
247. Note to Pa. R. Civ. P. 1042.3(a)(2).
248. Note to Pa. R. Civ. P. 1042.3(a)(2).
249. Note to Pa. R. Civ. P. 1042.3(c)(1).
250. Note to Pa. R. Civ. P. 1042.3(c)(2).

1-9:4 Effect of Failure to File Certificate of Merit or Comply with Requirements

A defendant against whom a professional liability claim is asserted need not file a responsive pleading until twenty days after service of the certificate of merit on that defendant.[251] Except for production of documents and things or entry upon property for inspection and other purposes, a plaintiff who has asserted a professional liability claim may not, without leave of court, conduct any other form of discovery with respect to that claim before the the certificate of merit is filed.[252] A failure to comply with the certificate of merit requirements can result in a judgment of nonpros on the professional liability claims.[253] Counsel is encouraged to review carefully Rules 1042.6 and 1042.7 and the case law decided thereunder for the circumstances and procedures under which judgment of nonpros can be secured.

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251. Pa. R. Civ. P. No. 1042.4.
252. Pa. R. Civ. P. No. 1042.5.
253. Pa. R. Civ. P. 1042.6 and 1042.7.