

# Chapter 1

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## 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; public disclosure of sensitive information; common interest or joint defense agreements; differences between state and federal practice; discovery considerations; 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; individuals’ cellular phone numbers and carriers whose records may need to be preserved; and online or social media accounts utilized by relevant individuals.

Once the sources of potentially helpful and discoverable information have been identified, a “litigation hold” notice should be issued to appropriate recipients.<sup>1</sup> 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

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<sup>1</sup>. See Section 1-3 for a discussion of litigation hold notices.

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<sup>2</sup> in the matter that 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.<sup>3</sup> 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.<sup>4</sup> The lawyer cannot communicate indirectly, through an intermediary, with

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<sup>2</sup> 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).

<sup>3</sup> Pa. Rule of Professional Conduct, Rule 4.2.

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

Consent of the organization's lawyer is not required for communication with a former constituent of a corporate party.<sup>7</sup> 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.<sup>8</sup> However, authority exists that prohibits the attorney from soliciting from former employees information protected by the attorney-client relationship.<sup>9</sup> A lawyer may also communicate with present non-managerial employees of an opposing party who have not made acts or omissions in connection

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<sup>5</sup> Pa. Rule of Professional Conduct, Rule 4.2, comment (4).

<sup>6</sup> Pa. Rule of Professional Conduct, Rule 4.2, comment (7).

<sup>7</sup> Pa. Rule of Professional Conduct, Rule 4.2, comment (7).

<sup>8</sup> *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).

<sup>9</sup> *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).

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.<sup>10</sup> 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.<sup>11</sup>

When dealing with unrepresented persons, the lawyer cannot state or imply that he/she is disinterested,<sup>12</sup> 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.<sup>13</sup>

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

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<sup>10</sup>. *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”).

<sup>11</sup>. Pa. Rule of Professional Conduct, Rule 4.2, comment (7).

<sup>12</sup>. Pa. Rule of Professional Conduct, Rule 4.3(a).

<sup>13</sup>. Pa. Rule of Professional Conduct, Rule 4.3(b).

the attorney-client and work product privileges where corporate counsel interviewed current and former corporate employees who witnessed the plaintiff's injury.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> Thus, the Court agreed with the trial court's ruling that counsel had violated Rule 1.7

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<sup>14</sup> *Newsuan v. Republic Servs. Inc.*, 213 A.3d 279, 284 (Pa. Super. 2019).

<sup>15</sup> *Newsuan v. Republic Servs. Inc.*, 213 A.3d 279, 283-84 (Pa. Super. 2019).

<sup>16</sup> *Newsuan v. Republic Servs. Inc.*, 213 A.3d 279, 288-89 (Pa. Super. 2019).

<sup>17</sup> *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.

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 trial 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.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup>

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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.

*Newsuan*, 213 A.3d at 285 n.4

<sup>18</sup>. *Office of Disciplinary Counsel v. Baldwin*, 225 A.3d 817, 833 (Pa. 2020).

<sup>19</sup>. The warning is named after *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981), where the United States 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.

<sup>20</sup>. 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

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.<sup>21</sup> 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.<sup>22</sup> Thus, an attorney's notes of an interview would not be discoverable.<sup>23</sup>

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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 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.

<sup>21</sup>. Pa. R. Civ. P. 4003.3.

<sup>22</sup>. Pa. R. Civ. P. 4003.3.

<sup>23</sup>. *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").



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 tactics.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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

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<sup>24</sup> Pa. R. Civ. P. 4003.3.

<sup>25</sup> *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).

<sup>26</sup> Pa. R. Civ. P. 4003.4.

<sup>27</sup> Pa. R. Civ. P. 4003.4(1) and (2).

equivalent of the materials by other means.<sup>28</sup> Under another view, a statement of a non-party witness is not protected by the work product privilege.<sup>29</sup>

### 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*,<sup>30</sup> 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)

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<sup>28</sup> *Bell v. Lackawanna Cnty.*, 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 Cnty.*, 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 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 Com.*, 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 Techs., 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.*, No. 2:07cv274, 2008 U.S. Dist. LEXIS 81919, at \*17, 2008 WL 4371372, at \*5 (S.D. Miss. Sept. 18, 2008).

<sup>29</sup> *Doe v. Luzerne Cnty.*, 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).

<sup>30</sup> *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014).

(2) specifically why the communication itself is relevant.<sup>31</sup> 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.<sup>32</sup> The opinion supporting affirmance of the Superior Court would create a bright-line rule denying discovery of communications between attorneys and expert witnesses.<sup>33</sup> The Superior Court has subsequently followed this bright-line approach.<sup>34</sup>

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.<sup>35</sup> Usually, it is not relevant to the action, but this will be case specific.

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<sup>31</sup> *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).

<sup>32</sup> *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 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 v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 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).

<sup>33</sup> *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014).

<sup>34</sup> *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).

<sup>35</sup> *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.).

As for federal court, parties may not discover private communications and draft reports from expert witnesses.<sup>36</sup> 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 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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup>

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. Excelsa Health*.<sup>40</sup> 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

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<sup>36</sup> Fed. R. Civ. P. 26(b)(4).

<sup>37</sup> Fed. R. Civ. P. 26(b)(4)C).

<sup>38</sup> Fed. R. Civ. P. 16(b)(4)(D).

<sup>39</sup> Fed. R. Civ. P. 16(b)(4)(D).

<sup>40</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967 (Pa. 2019).

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.<sup>41</sup> The majority stated that an exception may exist when the third party consultant is acting as an agent of a lawyer and is facilitating the lawyer's representation of the client.<sup>42</sup>

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.”<sup>43</sup> The majority noted that the work product privilege is not rooted in confidentiality in the same way as the attorney-client privilege is.<sup>44</sup> 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.”<sup>45</sup> 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.<sup>46</sup> 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.”<sup>47</sup>

Because the record before the Pennsylvania 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.<sup>48</sup> In a concurring opinion, three justices focused on the manner of disclosure as being particularly relevant on remand

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

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

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

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

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

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

47. *BouSamra v. Excelsa 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.”).

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

to whether a waiver occurred.<sup>49</sup> 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 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.’”<sup>50</sup>

Regarding the attorney-client privilege, the *BouSamra* 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.<sup>51</sup> 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 “privity 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.”<sup>52</sup> 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.<sup>53</sup> 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.”<sup>54</sup>

Since *BouSamra*, the Superior Court has held that the report of an accident investigation expert, pre-suit, was not protected by

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<sup>49.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 986-90 (Pa. 2019).

<sup>50.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 991 (Pa. 2019).

<sup>51.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 986 (Pa. 2019).

<sup>52.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 985 (Pa. 2019).

<sup>53.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 985 (Pa. 2019).

<sup>54.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 986 (Pa. 2019).

the work product privilege.<sup>55</sup> Where the expert was retained for a business purpose, to investigate the “root causes” of an accident and to enable the company to implement operational changes to prevent such accidents in the future, communications with the expert were not protected.<sup>56</sup> That litigation was foreseen, in itself, did not preclude discovery.<sup>57</sup> The Superior Court has also held that expert reports mandated by regulatory bodies were not privileged work product, but rather were documents created in the regular course of business.<sup>58</sup> Because the “primary purpose in creating [the] reports was not merely . . . anticipation of litigation,” they were discoverable.<sup>59</sup> The court further noted Rule 4003.3 does not automatically protect work product even if prepared in anticipation of litigation.<sup>60</sup>

One federal case applying *BouSamra* drew a distinction between a public relations consultant who was an active participant versus a passive consultant and held that with respect to some communications, the consultant was necessary for the rendering of legal advice, the communications at issue were protected, and the privilege was not waived.<sup>61</sup> On the other hand, privilege was waived as to communications with the same consultant that were “business related” with no legal advice being apparent.<sup>62</sup>

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

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<sup>55.</sup> *Virnelson v. Johnson Matthey Inc.*, 253 A.3d 707 (Pa. Super. 2021), *reargument denied* (Apr. 28, 2021).

<sup>56.</sup> *Virnelson v. Johnson Matthey Inc.*, 253 A.3d 707, 715 (Pa. Super. 2021), *reargument denied* (Apr. 28, 2021).

<sup>57.</sup> *Virnelson v. Johnson Matthey Inc.*, 253 A.3d 707, 715 (Pa. Super. 2021), *reargument denied* (Apr. 28, 2021).

<sup>58.</sup> *Cardinal Midstream II, LLC v. Energy Transfer LP*, 295 A.3d 284, 291 (Pa. Super. 2023).

<sup>59.</sup> *Cardinal Midstream II, LLC v. Energy Transfer LP*, 295 A.3d 284, 291 (Pa. Super. 2023).

<sup>60.</sup> *Cardinal Midstream II, LLC v. Energy Transfer LP*, 295 A.3d 284, 291 n. 6 (Pa. Super. 2023).

<sup>61.</sup> *Sandoz Inc. v. Lannett Co., Inc.*, No. 20-3538, 2021 WL 5139975, at \*4 (E.D. Pa. Nov. 4, 2021).

<sup>62.</sup> *Sandoz Inc. v. Lannett Co., Inc.*, No. 20-3538, 2021 WL 5139975, at \*4 (E.D. Pa. Nov. 4, 2021).

on contemplated steps in the litigation.<sup>63</sup> Additionally, with respect to attorney-client privilege protection, counsel should be mindful of whether communications with a third party consultant are part 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.<sup>64</sup>

### 1-3 LITIGATION HOLD NOTICES

Spoilation 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.<sup>65</sup> These holdings,

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<sup>63.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 991-92 (Pa. 2019).

<sup>64.</sup> *BouSamra v. Excelsa Health*, 210 A.3d 967, 985 (Pa. 2019).

<sup>65.</sup> 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 *Metropolitan Opera Ass'n v. Local 100 Hotel Emp. & 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).



or variations of them, found their way into federal district courts in Pennsylvania.<sup>66</sup> However, effective December 1, 2015, the potential effects of failing to preserve ESI were addressed in the 2015 amendments to Rule 37(e), which creates a uniform standard on the effects of failures to preserve ESI.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup> An affirmative duty also exists to identify a person or persons with

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<sup>66</sup> 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 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).

<sup>67</sup> 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).

<sup>68</sup> 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.

<sup>69</sup> 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.

knowledge about the client's ESI, with the ability to facilitate, through counsel, the preservation and discovery of ESI.<sup>70</sup> In addition to the foregoing duties to preserve ESI, the parties must be prepared to discuss at the Rule 26(f) conference<sup>71</sup> any issues concerning the disclosure and/or discovery of ESI, including the form or forms in which it should be produced.<sup>72</sup>

Federal Rule of Civil Procedure 16 addresses the preservation of ESI and clawback agreements for inadvertent production of privileged information. Rule 16 permits a provision in the scheduling order for preservation of electronically stored information,<sup>73</sup> 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.<sup>74</sup>

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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<sup>70</sup> See, e.g., Local Rule LCvR 26.2 of the United States District Court for the Western District of Pennsylvania.

<sup>71</sup> 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.

<sup>72</sup> 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.

<sup>73</sup> Fed. R. Civ. P. 16(b)(3)(B)(iii).

<sup>74</sup> Fed. R. Civ. P. 16(b)(3)(B)(iv).

and/or Work Product Privileges” to help preserve any privileged content;<sup>75</sup> (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.

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<sup>75</sup> 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.

The Eastern District of Pennsylvania has held that generally litigation hold notices are privileged; however, upon a showing of spoliation, production of a litigation hold letter can be compelled to show when a party should have known that evidence may be relevant to future litigation. *McDevitt v. Verizon Servs. Corp.*, No. 14-4125, 2016 U.S. Dist. LEXIS 34777, at \*2 (E.D. Pa. Feb. 22, 2016) (report and recommendation), *adopted by* No. 14-4125, 2016 U.S. Dist. LEXIS 34360 (E.D. Pa. Mar. 17, 2016).

The preservation and production of electronic evidence can result in significant burden and expense.<sup>76</sup> The amount in controversy 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.<sup>77</sup>

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.<sup>78</sup> 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,

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<sup>76.</sup> 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).

<sup>77.</sup> In *Papadopolos 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. *Papadopolos* 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).

<sup>78.</sup> 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).

even if the parties themselves do not challenge jurisdiction.<sup>79</sup> Thus, filing suit in the wrong court could not only result in a significant waste of time and money; but if the statute of limitations 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.<sup>80</sup> 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

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<sup>79</sup>. *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).

<sup>80</sup>. *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536-37 (Pa. Super. 1990); *AAMCO Transmissions, Inc. v. Romano*, 42 F. Supp. 3d 700, 706 (E.D. Pa. 2014).

forum.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup>

Having said the foregoing, before enforcing a contractual forum selection clause, the court must determine whether the parties freely entered into a contract containing the forum-selection clause at issue.<sup>84</sup> The forum selection clause must meet the normal requirements of contract law.<sup>85</sup> For example, if no consideration supported the alleged agreement containing the forum selection clause, the court may find that there must be an independent basis for personal jurisdiction.<sup>86</sup> In federal court, state law determines whether the claims and parties involved in the suit are subject to the clause.<sup>87</sup> District courts within the Third Circuit have held that a non-signatory to a contract can enforce and/or be bound by a forum-selection clause in a contract if the non-signatory is a third-party beneficiary of the contract or is closely related to the contractual relationship or dispute, such that it is foreseeable that the party will be bound by the forum-selection clause.<sup>88</sup> The scope of a forum selection clause is one of contract

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<sup>81</sup> *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).

<sup>82</sup> *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536-37 (Pa. Super. 1990).

<sup>83</sup> *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 536-37 (Pa. Super. 1990). *See also Continental 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).

<sup>84</sup> *Ansys, Inc. v. SF Motors, Inc.*, No. 2:20-CV-00352-MJH, 2021 WL 22453, at \*3 (W.D. Pa. Jan. 4, 2021).

<sup>85</sup> *Ansys, Inc. v. SF Motors, Inc.*, No. 2:20-CV-00352-MJH, 2021 WL 22453, at \*3 (W.D. Pa. Jan. 4, 2021).

<sup>86</sup> *Ansys, Inc. v. SF Motors, Inc.*, No. 2:20-CV-00352-MJH, 2021 WL 22453, at \*4 (W.D. Pa. Jan. 4, 2021) (alleged click-through software license agreement was not supported by consideration).

<sup>87</sup> *Ansys, Inc. v. SF Motors, Inc.*, No. 2:20-CV-00352-MJH, 2021 WL 22453, at \*3 (W.D. Pa. Jan. 4, 2021).

<sup>88</sup> *Powervar, Inc. v. Power Quality Scis., Inc.*, No. 20-5908, 2021 WL 2986417, at \*3 (E.D. Pa. July 15, 2021) (citing *AAMCO Transmissions, Inc. v. Romano*, 42 F. Supp. 3d 700, 708 (E.D. Pa. 2014); *Jordan v. SEI Corp.*, No. 96-1616, 1996 WL 296540, at \*6 (E.D. Pa. June 4, 1996); and *Synthes, Inc. v. Emerge Med., Inc.*, 887 F. Supp. 2d 598, 607 (E.D. Pa. 2012)).

interpretation.<sup>89</sup> Federal courts apply state law to determine the scope of a forum-selection clause.<sup>90</sup>

### 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 or other valid consent or waiver, whether personal jurisdiction exists over a party usually begins with applying Pennsylvania’s “long arm” statute<sup>91</sup> and/or 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.<sup>92</sup>

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<sup>89.</sup> *John Wyeth & Bro. Ltd. v. CIGNA Int’l Corp.*, 119 F.3d 1070, 1073 (3d Cir. 1997); *Hydak v. Dominion Energy Transmission, Inc.*, No. 2:21-CV-1066, 2022 WL 1423283, at \*4 (W.D. Pa. May 5, 2022).

<sup>90.</sup> *Hydak v. Dominion Energy Transmission, Inc.*, No. 2:21-CV-1066, 2022 WL 1423283, at \*4 (W.D. Pa. May 5, 2022) (citing *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 182 (3d Cir. 2017)).

<sup>91.</sup> 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 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). However, the Pennsylvania Supreme Court has held that Subsection (a)(2)(i) of Pennsylvania’s “long arm” statute is unconstitutional to the extent it seeks to confer general jurisdiction over a non-resident corporation that merely registers to do business in Pennsylvania. *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 569 (Pa. 2021), *vacated and remanded*, 600 U.S. 122, 143 S. Ct. 2028, 2045 (2023). See discussion of *Mallory* decision later in Section 1-4:2.

<sup>92.</sup> 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

A court must analyze jurisdictional contacts on a claim-by-claim basis.<sup>93</sup> Personal jurisdiction over a defendant depends on

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would be necessary to subject a party to personal jurisdiction in Pennsylvania. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 141 S. Ct. 1017, 1024 (2021); *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); *International Shoe Co. v. Wash.*, 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. 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*, 571 U.S. 117 (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 Kyko Glob., Inc. v. Bhongir*, 807 F. App'x 148, 152 (3d Cir. 2020) (applying "effects test" for intentional torts for specific jurisdiction); *Schnur v. Papa John's Int'l, Inc.*, No. 2:22-CV-1620-NR, 2023 U.S. Dist. LEXIS 150947, at \*3 (W.D. Pa. Aug. 28, 2023) (an out-of-state defendant that employs Session Replay Code on its website is not subject to the specific personal jurisdiction of the forum (collecting cases)); *Goldfarb v. Kalodimos*, No. 20-5667, 2021 WL 1945711, at \*7 (E.D. Pa. May 14, 2021) (five Tweets sufficient to support the court's exercise of specific personal jurisdiction over resident of Washington State in Pennsylvania); *LCV Capital Mgmt., LLC v. Nuova Argo Finanziaria S.p.A.*, No. 2:18-cv-01645, 2021 WL 716728, at \*12 (W.D. Pa. Feb. 24, 2021) (phone and email communications by Italian defendants were insufficient to confer personal jurisdiction); *Chant Eng'g Co. Inc. v. Cumberland Sales Co.*, No. 20-4559, 2021 WL 848062, at \*4 (E.D. Pa. Mar. 5, 2021) (membership in a trade association insufficient to establish personal jurisdiction); *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. Mar. 28, 2014) and *Marcus Uppe, Inc. v. Glob. Comput. 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); *O'Shaughnessy v. Palazzo*, 496 F. Supp. 3d 872, 880-81 (E.D. Pa. 2020) (personal jurisdiction of a non-forum coconspirator may be asserted where plaintiff demonstrates substantial acts in furtherance of the conspiracy occurred in Pennsylvania and non-forum coconspirator was aware or should have been aware of those acts); 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) Pennsylvania state court cases also address the distinction between specific jurisdiction and general jurisdiction. *See Vaughan Est. 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.*, 240 A.3d 537 (Pa. 2020) (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).

<sup>93</sup> *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 104 (3d Cir. 2004) (Scirica, Chief Judge, concurring in part and dissenting in part); *Beemac, Inc. v. Republic Steel*, No. 2:20-cv-1458, 2021 WL 2018681, at \*2 (W.D. Pa. May 20, 2021); *see also Hammons v. Ethicon, Inc.*,



the defendant having sufficient contacts with the forum State that maintaining suit is “‘reasonable, in the context of our federal system of government,’ and ‘does not offend traditional notions of fair play and substantial justice.’”<sup>94</sup> The United States Supreme Court has recognized two kinds of personal jurisdiction: “general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction.”<sup>95</sup>

Specific personal jurisdiction exists when the three elements are established: (1) a defendant purposefully directs its activities at the forum, (2) a plaintiff’s claims arise out of or relate to the defendant’s activities, and (3) the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice.<sup>96</sup> The Pennsylvania Supreme Court has held that the court should not “focus narrowly on the elements of plaintiff’s specific legal claims, which could unnecessarily restrict access to justice for plaintiffs,” but instead, “look more broadly to determine whether the case as a whole establishes ties between the defendant’s actions in the forum state and the litigation.”<sup>97</sup> The long-arm statute is not to be construed narrowly absent clear guidance from the United

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240 A.3d 537, 556 (Pa. 2020) (specific personal jurisdiction not as straightforward as general personal jurisdiction; requires consideration of factual nuances of jurisdictional connections in each case).

<sup>94</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 141 S. Ct. 1017, 1024 (2021); *Beemac, Inc. v. Republic Steel*, No. 2:20-cv-1458, 2021 WL 2018681, at \*3 (W.D. Pa. May 20, 2021); *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 556 (Pa. 2020).

<sup>95</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 141 S. Ct. 1017, 1024 (2021) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>96</sup> *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 129 (3d Cir. 2020); *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 556-57 (Pa. 2020) (citing Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice & Procedure Civil* § 1069 (4th ed. 2015 & Supp. 2020)). In contract cases, courts will inquire whether the defendant’s contacts with the forum were instrumental in either the formation of the contract or its breach. *Herbert v. Pouya*, No. 2:20-CV-1413-NR, 2021 WL 1737463, at \*3 (W.D. Pa. May 3, 2021). The court must examine “the totality of the circumstances, including the location and character of the contract negotiations, the terms of the contract, and the parties’ actual course of dealing.” *Remick v. Manfredy*, 238 F.3d 248, 256 (3d Cir. 2001). The court will consider whether the defendant solicited, negotiated, or executed the contract in the forum state, and whether the defendant knew or should have known that it was dealing with someone in the forum state. *Herbert*, 2021 WL 1737463, at \*3. Finally, although not required, visits or some physical presence in the forum will tip the scale in favor of finding specific personal jurisdiction. *Hardwick v. Consumer Guardian Specialists, LLC*, No. 2:20-CV-00060, 2022 WL 669212, at \*4 (W.D. Pa. Mar. 7, 2022) (establishment of a post office box in Pennsylvania for the purpose of furthering business operations in Pennsylvania and Maryland; in furtherance of contractual obligations to plaintiff; and “convenience and proximity to Maryland-based contractor(s)” was sufficient to confer specific jurisdiction).

<sup>97</sup> *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 560 (Pa. 2020).

States Supreme Court to apply a claim-by-claim jurisdictional analysis.<sup>98</sup>

General jurisdiction means that a defendant is “essentially at home” in the forum state and extends to “any and all claims” brought against a defendant.<sup>99</sup> For example, an individual is subject to general jurisdiction in the individual’s place of domicile, and the “equivalent” forums for an entity are its place of formation and principal place of business.<sup>100</sup> But merely “continuous and systematic” contacts in Pennsylvania would not justify general personal jurisdiction over a defendant.<sup>101</sup> While the possibility of exceptional circumstances might justify general personal jurisdiction over a corporation that is headquartered or incorporated outside Pennsylvania, general personal jurisdiction should normally be limited to where corporations are headquartered or incorporated.<sup>102</sup>

In *Mallory v. Norfolk Southern Railway Co.*,<sup>103</sup> the Pennsylvania Supreme Court held that a foreign corporation’s mere qualification to do business in Pennsylvania was insufficient to confer general personal jurisdiction over it. However, the United States Supreme Court vacated and remanded, finding that under the facts of that case, Norfolk Southern had consented to personal jurisdiction

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<sup>98.</sup> *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 560 (Pa. 2020). The Pennsylvania Supreme Court noted that two cases were pending before the U.S. Supreme Court at the time of *Hammons*’ disposition. *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 560 (Pa. 2020) (citing *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744 (Minn. 2019), cert. granted, \_\_\_ U.S. \_\_\_, 140 S. Ct. 916 (2020) and *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 395 Mont. 478, 443 P.3d 407 (Mont. 2019), cert. granted, \_\_\_ U.S. \_\_\_, 140 S. Ct. 917 (2020). Both *Bandemer* and *Ford Motor Co.* were subsequently decided. See *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 141 S. Ct. 1017 (2021). *Ford Motor Co.* does not appear to undermine the Pennsylvania Supreme Court’s reasoning in *Hammons*. See *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 362, 141 S. Ct. 1017, 1026 (2021) (“[O]ur most common formulation of the [standard for specific jurisdiction] demands that the suit ‘arise out of or relate to the defendant’s contacts with the forum.’”).

<sup>99.</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 141 S. Ct. 1017, 1024 (2021).

<sup>100.</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 141 S. Ct. 1017, 1024 (2021).

<sup>101.</sup> *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 556 (Pa. 2020) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014)).

<sup>102.</sup> *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 556 (Pa. 2020) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)). See Section 1-4:2 for a collection of cases discussing personal jurisdiction in more detail.

<sup>103.</sup> *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 569 (Pa. 2021), vacated and remanded, 600 U.S. 122, 143 S. Ct. 2028 (2023).

by registering to do business in Pennsylvania and triggering a statutory consent to personal jurisdiction.<sup>104</sup>

The plaintiff in *Mallory* brought suit in Pennsylvania under the Federal Employers' Liability Act. The plaintiff worked for Norfolk Southern in Ohio and Virginia and resided in Virginia at the time he filed suit. The United States Supreme Court held that the Pennsylvania Court did have personal jurisdiction over the railroad because the railroad had consented to personal jurisdiction by registering to do business in Pennsylvania under 15 Pa.C.S. § 411 and 42 Pa.C.S. § 5301(a)(2)(i), which provided that state courts could exercise general personal jurisdiction over registered foreign corporations.<sup>105</sup>

The *Mallory* decision came with multiple opinions, but it appears that a majority agreed on the following principles: (1) that Norfolk Southern had consented to suit in Pennsylvania; (2) that *Pennsylvania Fire*<sup>106</sup> controlled the outcome; (3) that *Pennsylvania Fire's* rule for consent-based jurisdiction had not been overruled; (4) that *International Shoe*<sup>107</sup> governs where a defendant has not consented to exercise of jurisdiction; (5) that exercising jurisdiction here was hardly unfair under the circumstances of the case; (6) that the federalism concerns in the Supreme Court's due process cases have applied only when a defendant has not consented to personal jurisdiction; and (7) that the Court should not overrule *Pennsylvania Fire*.<sup>108</sup> On remand, one issue that appears to be unresolved is the constitutionality of a state imposing a registration requirement and consent to personal jurisdiction as conditions to doing business in that state, which may violate the Commerce Clause of the United States Constitution.<sup>109</sup> The

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<sup>104.</sup> *Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 143 S. Ct. 2028 (2023).

<sup>105.</sup> In reaching its conclusion, the United States Supreme Court held that the Pennsylvania Supreme Court had erred in finding that intervening decisions had implicitly overruled *Pennsylvania Fire Insurance Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), which had held that suits premised on such grounds did not deny a defendant due process of law. *Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 143 S. Ct. 2028, 2030 (2023).

<sup>106.</sup> *Pennsylvania Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

<sup>107.</sup> *International Shoe Co. v. Wash.*, 326 U.S. 310 (1945).

<sup>108.</sup> *Mallory v. Norfolk S. Ry.*, 600 U.S. 122, n.11, 143 S. Ct. 2028, 2043 n.11 (2023).

<sup>109.</sup> *Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 143 S. Ct. 2028, 2047 (2023) (Alito, concurring).

reader is encouraged to review all of the majority, concurring and dissenting opinions for a helpful overview of the history of personal jurisdiction decisions and the direction in which the United States Supreme Court may be leaning in future challenges to statutorily imposed consent to personal jurisdiction.

### 1-4:3 Federal Subject Matter Jurisdiction

Jurisdiction in federal district courts derives from Article III of the United States Constitution.<sup>110</sup> Title 28 of the United States Code specifies various matters over which federal district courts have jurisdiction.<sup>111</sup> The most common bases for federal court jurisdiction in commercial cases are federal question;<sup>112</sup> diversity of citizenship;<sup>113</sup> admiralty, maritime and prize cases;<sup>114</sup> bankruptcy cases and proceedings;<sup>115</sup> interpleader;<sup>116</sup> commerce and antitrust regulations;<sup>117</sup> and patents, copyrights, and other types of intellectual property.<sup>118</sup>

### 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;<sup>119</sup> 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

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<sup>110.</sup> 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.

<sup>111.</sup> 28 U.S.C. §§ 1330, et seq.

<sup>112.</sup> 28 U.S.C. § 1331.

<sup>113.</sup> 28 U.S.C. § 1332. *See* Section 1-3:4 for discussion of diversity jurisdiction.

<sup>114.</sup> 28 U.S.C. § 1333.

<sup>115.</sup> 28 U.S.C. § 1334.

<sup>116.</sup> 28 U.S.C. § 1335.

<sup>117.</sup> 28 U.S.C. § 1337.

<sup>118.</sup> 28 U.S.C. § 1338.

<sup>119.</sup> 28 U.S.C. § 1332(a)(1).

residence in the United States and are domiciled in the same state);<sup>120</sup> or citizens of different states and in which citizens or subjects of a foreign state are additional parties.<sup>121</sup> Diversity is determined as of the time of filing the complaint.<sup>122</sup> For diversity purposes, if a removing defendant is merely a nominal party, the citizenship of such a defendant can be disregarded to determine jurisdiction.<sup>123</sup>

For purposes of diversity jurisdiction, a natural person is deemed to be a citizen of the state where she is domiciled.<sup>124</sup> To be domiciled in a state, a person must reside there and intend to remain indefinitely.<sup>125</sup> A person may have only one domicile, and thus may be a citizen of only one state for diversity jurisdiction purposes.<sup>126</sup> For foreign persons immigrating to the United States, citizenship for diversity jurisdiction requires an established permanency of residence.<sup>127</sup> This means “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws.”<sup>128</sup> It is insufficient to have applied for permanent residence status, to reside in a state and intend to remain indefinitely, or to be admitted to reside in the United States on a temporary basis.<sup>129</sup>

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<sup>120.</sup> 28 U.S.C. § 1332(a)(2).

<sup>121.</sup> 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).

<sup>122.</sup> *Newman-Green, Inc. v. Alfonso-Larrain*, 490 U.S. 826, 830 (1989); *Frett-Smith v. Vanterpool*, 511 F.3d 396, 399 n.4 (3d Cir. 2008); *Chestnut St. Consol., LLC v. Dawara*, No. 21-03046, 2021 WL 5279874, at \*2 (E.D. Pa. Nov. 12, 2021).

<sup>123.</sup> *Balazik v. Cnty. of Dauphin*, 44 F.3d 209, 213 n.4 (3d Cir. 1995) (citations omitted); *Shea v. Nationwide Prop. & Cas. Ins. Co.*, No. 3:22-CV-00494, 2023 U.S. Dist. LEXIS 61454, at \*11-12 (M.D. Pa. Mar. 1, 2023); see also *Johnson v. Smithkline Beecham Corp.*, 724 F.3d 337, 358 (3d Cir. 2013) (affirming the determination that defendant corporation’s citizenship was irrelevant to the removability of the action because it was a “nominal party that lacks a real interest in the litigation” (quotation omitted)).

<sup>124.</sup> *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 182 (3d Cir. 2008).

<sup>125.</sup> *Krasnov v. Dinan*, 465 F.2d 1298, 1300-01 (3d Cir. 1972); *Boldrini v. Luzerne Cnty.*, No. 3:21-CV-02005, 2022 WL 1518906, at \*3 (M.D. Pa. Feb. 24, 2022).

<sup>126.</sup> *Marsh v. Norfolk S., Inc.*, No. 3:14-2331, 2014 WL 7014028, at \*2 (M.D. Pa. Dec. 11, 2014).

<sup>127.</sup> *Dziodosz v. GOC Myszkowski SP.JAWNA*, No. 3:21-0251, 2021 WL 5868143, at \*4 (M.D. Pa. Dec. 10, 2021) (citing 28 U.S.C. § 1332(a)); *Gall v. Topcall Int’l, A.G.*, No. 04-CV-432, 2005 WL 664502, at \*4 (E.D. Pa. Mar. 21, 2005).

<sup>128.</sup> *Dziodosz v. GOC Myszkowski SP.JAWNA*, No. 3:21-0251, 2021 WL 5868143, at \*4 (M.D. Pa. Dec. 10, 2021) (citing *Foy v. Schantz, Shatzman & Aaronson, P.A.*, 108 F.3d 1347, 1349 (11th Cir. 1997) (citing 8 U.S.C. § 1101(a)(20)).

<sup>129.</sup> *Dziodosz v. GOC Myszkowski SP.JAWNA*, No. 3:21-0251, 2021 WL 5868143, at \*4 (M.D. Pa. Dec. 10, 2021) (citing *Westfield Ins. Co. v. Francois*, No. 3:10-CV-2260, 2010 WL 4668960, at \*2 (M.D. Pa. Nov. 5, 2010) (citing cases)).

#### 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.<sup>130</sup> 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;<sup>131</sup> every state and foreign state by which the insurer has been incorporated;<sup>132</sup> and the state or foreign state where the insurer has its principal place of business.<sup>133</sup>

A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene in an action must file a statement that (A) identifies any parent corporation and any publicly held corporation owning ten percent (10%) or more of its stock; or (B) states that there is no such corporation.<sup>134</sup> When jurisdiction is based on diversity, Federal Rule of Civil Procedure 7.1 requires parties and intervenors to file a disclosure statement naming and identifying the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor.<sup>135</sup> Every citizenship that is attributable to a party or intervenor must be disclosed.<sup>136</sup> The disclosure statement must be filed when the action is filed in or removed to federal court, and when any later event occurs that could affect the court's jurisdiction under 28 U.S.C. § 1332(a).<sup>137</sup>

#### 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

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<sup>130.</sup> 28 U.S.C. § 1332(c)(1); *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 188-89 (3d Cir. 2008).

<sup>131.</sup> 28 U.S.C. § 1332(c)(1)(A).

<sup>132.</sup> 28 U.S.C. § 1332(c)(1)(B).

<sup>133.</sup> 28 U.S.C. § 1332(c)(1)(C).

<sup>134.</sup> Fed. R. Civ. P. 7.1(a)(1).

<sup>135.</sup> Fed. R. Civ. P. 7.1(a)(2).

<sup>136.</sup> Fed. R. Civ. P. 7.1(a)(2), Committee Notes on Rules – 2022 Amendment.

<sup>137.</sup> Fed. R. Civ. P. 7.1(a)(2)(A) and (B).

used in the diversity statute.<sup>138</sup> The citizenship of a partnership takes on the citizenship of each of its partners.<sup>139</sup> The complete diversity requirement demands that all partners be diverse from all parties on the opposing side.<sup>140</sup> The citizenship of unincorporated associations is determined by the citizenship of their members.<sup>141</sup>

Partnerships which have American partners living abroad present an interesting scenario. 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.<sup>142</sup> 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”<sup>143</sup> nor “citizens or subjects of a foreign state.”<sup>144</sup>

Similar to partnerships, the citizenship of a limited liability company (“LLC”) is determined by the citizenship of each of the LLC’s members.<sup>145</sup> 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 limitations would run if the case is later dismissed for lack of subject matter jurisdiction. The state of formation of the LLC does

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<sup>138.</sup> *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).

<sup>139.</sup> *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).

<sup>140.</sup> *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 183 (3d Cir. 2008); *Boehm v. Sluder*, No. 2:21-CV-00529-MJH, 2021 WL 3406653, at \*3 (W.D. Pa. Aug. 4, 2021).

<sup>141.</sup> *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015); *Erie Ins. Exch. v. Greenwich Ins. Co.*, No. 16-00015, 2016 WL 1404162, at \*2 (E.D. Pa. Apr. 11, 2016) (citizenship of reciprocal insurance exchange depends on citizenship of its members).

<sup>142.</sup> *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 183-84 (3d Cir. 2008).

<sup>143.</sup> See 28 U.S.C. § 1332(a)(1).

<sup>144.</sup> See 28 U.S.C. § 1332(a)(2); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

<sup>145.</sup> *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).

not determine citizenship. Even where a defendant LLC's state of formation is the same as the plaintiff's citizenship, diversity exists if the citizenship of all members of the LLC differs from that of the plaintiff's.<sup>146</sup>

To assist the court and the parties to evaluate diversity jurisdiction, when jurisdiction is based on diversity, Federal Rule of Civil Procedure 7.1 requires parties and intervenors to file a disclosure statement naming and identifying the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor.<sup>147</sup> Every citizenship that is attributable to a party or intervenor must be disclosed.<sup>148</sup> Thus, if a partner of a partnership, or a member of a limited liability company, is itself a partner or limited liability company, then the identity and citizenship of each of the constituent partners or members must be disclosed all the way up and down the chain of ownership. But Rule 7.1 disclosures are not a panacea. The rule does not address questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.<sup>149</sup>

#### **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."<sup>150</sup> Such supplemental

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<sup>146.</sup> *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).

<sup>147.</sup> Fed. R. Civ. P. 7.1(a)(2).

<sup>148.</sup> Fed. R. Civ. P. 7.1(a)(2), Committee Notes on Rules – 2022 Amendment.

<sup>149.</sup> Fed. R. Civ. P. 7.1(a)(2), Committee Notes on Rules – 2022 Amendment.

<sup>150.</sup> 28 U.S.C. § 1367(a).



jurisdiction includes claims that involve the joinder or intervention of additional parties.”<sup>151</sup>

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.<sup>152</sup>

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.<sup>153</sup>

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.

#### **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.<sup>154</sup> If removal is based on diversity of citizenship, the case may not be removed if any of the defendants “properly joined and served” is a citizen of the state in which the action is brought.<sup>155</sup> The Third Circuit has held that

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<sup>151.</sup> 28 U.S.C. § 1367(a).

<sup>152.</sup> 28 U.S.C. § 1367(b).

<sup>153.</sup> 28 U.S.C. § 1367(c).

<sup>154.</sup> 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).

<sup>155.</sup> 28 U.S.C. § 1441(b)(2); *Kemp v. Hoffman*, No. 21-3447, 2022 WL 79627, at \*2 (E.D. Pa. Jan. 7, 2022).

a citizen of the state in which the action was brought *can* remove a diversity action if the defendant has not yet been served at the time of removal.<sup>156</sup>

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.<sup>157</sup> 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.<sup>158</sup>

#### 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.<sup>159</sup> 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 is not required to be served on the defendant, whichever period is shorter.<sup>160</sup>

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<sup>156.</sup> *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018) (pre-service removal by an in-state defendant allowed based on the statutory language of 28 U.S.C. § 1441(b), which provides that an action otherwise removable on the basis of diversity jurisdiction “may not be removed if any of the parties in interest properly joined **and served** as defendants is a citizen of the State in which the action is brought.” 28 U.S.C. § 1441(b) (emphasis added)); *Hatchigian v. Ford*, No. 22-1559, 2023 U.S. App. LEXIS 8306, at \*6 n.7 (3d Cir. Apr. 7, 2023); *Avenatti v. Fox News Network Ltd. Liab. Co.*, 41 F.4th 125, 128 n.1 (3d Cir. 2022). See Chapter 2, Section 2-3:1, explaining 2022 amendment to Pa. R. Civ. P. 400(b). The amendment to Rule 400(b) was intended to address inconsistent “snap” removal opportunities, such as those permitted in *Encompass* based upon delays in service of process depending on the county of filing.

<sup>157.</sup> 28 U.S.C. § 1441(c)(1).

<sup>158.</sup> 28 U.S.C. § 1441(c)(2).

<sup>159.</sup> 28 U.S.C. § 1446(a).

<sup>160.</sup> 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

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.<sup>161</sup>

#### **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,<sup>162</sup> the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy.<sup>163</sup> 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.<sup>164</sup>

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.<sup>165</sup>

The removal statutes are construed strictly against removal, and all doubts should be resolved in favor of remand upon motion for remand.<sup>166</sup>

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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).

<sup>161.</sup> 28 U.S.C. § 1446(d).

<sup>162.</sup> 28 U.S.C. § 1332(a).

<sup>163.</sup> 28 U.S.C. § 1446(c)(2).

<sup>164.</sup> 28 U.S.C. § 1446(c)(2).

<sup>165.</sup> 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).

<sup>166.</sup> *Boyer v. Snap-On Tools, Corp.*, 913 F.2d 108, 111 (3d Cir. 1990); *Signature Bldg. Sys. of Pa., LLC v. Motorist Mut. Ins. Co.*, No. 3:20-CV-2348, 2021 WL 1946758, at \*3 (M.D. Pa. May 14, 2021).

## 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,<sup>167</sup> 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;<sup>168</sup> (7) subpoenas can be more cumbersome to enforce in arbitration

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<sup>167</sup>. 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.)

<sup>168</sup>. "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. 42

than in court;<sup>169</sup> 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,<sup>170</sup> the Pennsylvania Uniform Arbitration Act<sup>171</sup> and the Pennsylvania Revised Statutory Arbitration Act<sup>172</sup> express a public policy in favor of arbitration where parties have agreed to submit their disputes to arbitration.<sup>173</sup>

## 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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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.

<sup>169</sup> 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.

<sup>170</sup> 9 U.S.C. §§ 1, et seq.

<sup>171</sup> 42 Pa.C.S. §§ 7301, et seq.

<sup>172</sup> 42 Pa.C.S. §§ 7321.1, et seq.

<sup>173</sup> *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,<sup>174</sup> and the determination of venue depends on whether the defendant is an individual or entity. The propriety of venue is determined as of the time the suit is initiated.<sup>175</sup> If venue is proper at that time, it remains proper thereafter for the duration of the case.<sup>176</sup>

Effective January 1, 2023, the Pennsylvania Supreme Court amended the rules governing venue, namely, Pennsylvania Rules of Civil Procedure 1006, 2130, 2156 and 2179.<sup>177</sup>

#### 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 where the individual may be served; the cause of action arose; a transaction or occurrence took place out of which the cause of action arose, or venue is authorized by law; 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.<sup>178</sup> 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.<sup>179</sup> The Pennsylvania Supreme Court deleted the provision formerly at Rule 1006(a.1), restricting venue for medical professional liability actions to the county in which the cause of action arose. Thus, medical malpractice claims are subject to the same venue rules applicable to other professional liability claims and tort claims in general.<sup>180</sup> Defendants in medical malpractice

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<sup>174</sup>. Pa. R. Civ. P. 1006.

<sup>175</sup>. *Hausmann v. Bernd*, 271 A.3d 486, 493 (Pa. Super. 2022) (citing *Zappala v. Brandolini Prop. Mgmt., Inc.*, 909 A.2d 1272, 1281 (Pa. 2006)).

<sup>176</sup>. *Hausmann v. Bernd*, 271 A.3d 486, 493 (Pa. Super. 2022) (citing *Zappala v. Brandolini Prop. Mgmt., Inc.*, 909 A.2d 1272, 1281 (Pa. 2006)).

<sup>177</sup>. In re: Order Amending Rules 1006, 2130, 2156 and 2179 of the Pennsylvania Rules of Civil Procedure, No. 736 Civil Procedural Rules Docket, available at <https://www.pacourts.us/assets/opinions/Supreme/out/Order%20-%20105253423195809573.pdf?cb=1> (last visited May 7, 2024).

<sup>178</sup>. Pa. R. Civ. P. 1006(a).

<sup>179</sup>. Pa. R. Civ. P. 1006(f)(1).

<sup>180</sup>. Civil Procedural Rules Committee Adoption Report - Amendment of Pa.R.Civ.P. 1006, 2130, 2156, and 2179, available at <https://www.pacourts.us/assets/opinions/Supreme/out/Report%20-%20105253423195809604.pdf?cb=1> (last visited May 7, 2024).

actions can seek a change in venue in the same ways as all other defendants do in other types of actions.<sup>181</sup>

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.<sup>182</sup> In actions against political subdivisions, Rule 2103 governs. 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 Political Subdivisions**

An action against a political subdivision may be brought only in the county in which the political subdivision is located.<sup>183</sup>

### **1-6:1.3 Venue As to Partnerships**

An action against a partnership may be brought in and only in a county where the partnership regularly conducts business; the cause of action arose; a transaction or occurrence took place out of which the cause of action arose; or 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.<sup>184</sup> For purposes of venue analysis, a partnership does not mean a limited liability company, unincorporated association, joint stock company or similar association.<sup>185</sup> 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.<sup>186</sup>

### **1-6:1.4 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,<sup>187</sup> including a limited

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<sup>181</sup>. Civil Procedural Rules Committee Adoption Report - Amendment of Pa.R.Civ.P. 1006, 2130, 2156, and 2179, *available at* <https://www.pacourts.us/assets/opinions/Supreme/out/Report%20-%20105253423195809604.pdf?cb=1> (last visited May 7, 2024).

<sup>182</sup>. Pa. R. Civ. P. 1006(b).

<sup>183</sup>. Pa. R. Civ. P. 2103(b).

<sup>184</sup>. Pa. R. Civ. P. 2130.

<sup>185</sup>. Pa. R. Civ. P. 2126.

<sup>186</sup>. Pa. R. Civ. P. 1006(f)(1).

<sup>187</sup>. “Corporation or similar entity” includes any public, quasi-public or private corporation, insurance association or exchange, joint stock company or association,

liability company, may be brought in and only in a county where: (1) its registered office or principal place of business is located; (2) it regularly conducts business;<sup>188</sup> (3) the cause of action arose; (4) a transaction or occurrence took place out of which the cause of action arose; or (5) 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.<sup>189</sup> 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 in a county: (1) designated in Subdivision (a) of Rule 2179; (2) where the insured property is located; or (3) where the plaintiff resides, in actions upon policies of life, accident, health, disability, and livestock insurance or fraternal benefit certificates.<sup>190</sup> 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.<sup>191</sup>

### 1-6:1.5 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; the cause of action arose; a transaction or occurrence took place out of which the cause of action arose; or the property or a part of the property, which is the subject matter of the action, is located provided that equitable relief is sought

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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.

<sup>188.</sup> *Hangey v. Husqvarna Prof'l Prods., Inc.*, 304 A.3d 1120 (Pa. 2023) (focusing only on percent of a defendant's total sales occurring in the forum county is not an accurate way of determining regularity of acts for purposes of establishing venue. A company can regularly conduct business, even if it is not producing a lot of money).

<sup>189.</sup> Pa. R. Civ. P. 2179(a).

<sup>190.</sup> Pa. R. Civ. P. 2179(b).

<sup>191.</sup> Pa. R. Civ. P. 1006(f)(1).



with respect to the property.<sup>192</sup> 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.<sup>193</sup>

### **1-6:1.6 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.<sup>194</sup> 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.<sup>195</sup>

### **1-6:1.7 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 being improper,<sup>196</sup> or even if venue is otherwise proper, for the convenience of parties and witnesses.<sup>197</sup>

### **1-6:1.7a 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 either dismissal pursuant to 42 Pa.C.S. § 5322(e) or a change in venue pursuant to Rule 1006(d), for the convenience of the parties and witnesses. Under 42 Pa.C.S. § 5322(e), if the court finds that “in the interest of substantial justice the matter should

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<sup>192</sup> Pa. R. Civ. P. 2156(a).

<sup>193</sup> Pa. R. Civ. P. 1006(f)(1).

<sup>194</sup> Pa. R. Civ. P. 1006(c).

<sup>195</sup> Pa. R. Civ. P. 1006(f)(1).

<sup>196</sup> Pa. R. Civ. P. 1006(e); Fed. R. Civ. P. 12(b)(3).

<sup>197</sup> Pa. R. Civ. P. 1006(d); 28 U.S.C. § 1404(a).

be heard in another forum,” the court “may stay or dismiss the matter in whole or in part on any conditions that may be just.”<sup>198</sup> However, dismissal under 42 Pa.C.S. § 5322(e) differs substantially from transfer under Rule 1006(d). Rule 1006(d)(1) enables the court to transfer an action to another county within Pennsylvania “for the convenience of parties and witnesses.”<sup>199</sup>

A transfer under Rule 1006(d) does not end the litigation. The plaintiff need not refile the action in the transferee county. Instead, the Prothonotary or clerk of courts of the transferor county simply forwards to the transferee county “copies of the docket entries, process, pleadings, depositions and other papers filed in the action.”<sup>200</sup> The action then continues as if the plaintiff had filed it initially in the transferee county. By contrast, a dismissal under 42 Pa.C.S. § 5322(e) ends the litigation. Unlike an intra-jurisdiction transfer of Rule 1006(d), 42 Pa.C.S. § 5322(e) applies when the court determines that another jurisdiction would offer a more convenient and appropriate forum for the action.<sup>201</sup> Pennsylvania courts lack authority to transfer cases to the courts of other states, so dismissal is the only permissible result under Section 5322(e).

Under Section 5322(e), the court looks beyond technical considerations of jurisdiction and venue to determine whether the plaintiff’s chosen forum would serve the interests of justice under the particular circumstances of that case.<sup>202</sup> The two most important factors when considering whether dismissal is warranted are (1) that the plaintiff’s choice of forum should not be disturbed, except for “weighty reasons,” and (2) there must be an alternate forum available or the action may not be dismissed.<sup>203</sup>

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

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<sup>198.</sup> 42 Pa.C.S.A. § 5322(e); *Rahn v. Consol. Rail Corp.*, 254 A.3d 738 (Pa. Super. 2021).

<sup>199.</sup> Pa. R. Civ. P. 1006(d).

<sup>200.</sup> Pa. R. Civ. P. 1006(d)(3).

<sup>201.</sup> *Alford v. Phila. Coca-Cola Bottling Co., Inc.*, 531 A.2d 792, 794 (Pa. Super. 1987).

<sup>202.</sup> *Alford v. Phila. Coca-Cola Bottling Co., Inc.*, 531 A.2d 792, 794 (Pa. Super. 1987).

<sup>203.</sup> *Rahn v. Consol. Rail Corp.*, 254 A.3d 738 (Pa. Super. 2021)

plaintiff's choice of forum.<sup>204</sup> 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.<sup>205</sup>

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, the Pennsylvania Supreme Court in 2014 arguably loosened these previously stringent requirements.<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup> Mere inconvenience remains insufficient to transfer venue, but defendants do not have to show near-draconian consequences for honoring the plaintiff's chosen forum.<sup>209</sup> 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.<sup>210</sup>

### 1.6:1.7b 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.<sup>211</sup> A challenge

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<sup>204</sup> *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997).

<sup>205</sup> *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997).

<sup>206</sup> *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014).

<sup>207</sup> *Bratic v. Rubendall*, 99 A.3d 1, 7 (Pa. 2014).

<sup>208</sup> *Bratic v. Rubendall*, 99 A.3d 1, 10 (Pa. 2014).

<sup>209</sup> *Bratic v. Rubendall*, 99 A.3d 1, 10 (Pa. 2014); *Powers v. Verizon Pa., LLC*, 230 A.3d 492 (Pa. Super. 2020).

<sup>210</sup> Pa. R. Civ. P. 1006(d)(3).

<sup>211</sup> Pa. R. Civ. P. 1006(e).

on this basis must be made by preliminary objection, or it is waived.<sup>212</sup>

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.<sup>213</sup> 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.<sup>214</sup> 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.<sup>215</sup>

## 1-6:2 Determining Venue in Federal Court

Venue for actions commenced initially in federal court<sup>216</sup> is governed by Section 1391 of Title 28<sup>217</sup> and, as in state court, depends on whether the defendant is an individual or an entity.

### 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

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<sup>212</sup> Pa. R. Civ. P. 1006(e).

<sup>213</sup> Pa. R. Civ. P. 1006(e).

<sup>214</sup> Pa. R. Civ. P. 1006(e).

<sup>215</sup> *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)).

<sup>216</sup> 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. at 666. Once removal occurs, the district court can consider a motion to transfer venue. *See Keystone Drill Servs., Inc. v. Davey Kent, Inc.*, No. 3:21-cv-30, 2022 WL 819280, at \*1 (W.D. Pa. Feb. 22, 2022) and *Hotel Oakland Assocs. v. Doyle Real Est. Advisors, LLC*, No. 21-0004, 2021 WL 2936025, at \*2 (E.D. Pa. July 13, 2021).

<sup>217</sup> 28 U.S.C. § 1391.

district in which any defendant is subject to the court's personal jurisdiction with respect to the action.<sup>218</sup>

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.<sup>219</sup> 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.<sup>220</sup> A defendant who resides outside the United States may be sued in any judicial district.<sup>221</sup>

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.<sup>222</sup>

### 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.<sup>223</sup> A copyright case may be brought in the district in which the defendant or his agent resides or may be found.<sup>224</sup> A patent infringement case may 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.<sup>225</sup> A shareholder derivative action may be prosecuted in any judicial district where

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<sup>218.</sup> 28 U.S.C. § 1391(b).

<sup>219.</sup> 28 U.S.C. § 1391(c)(1).

<sup>220.</sup> 28 U.S.C. § 1391(c)(2).

<sup>221.</sup> 28 U.S.C. § 1391(c)(3).

<sup>222.</sup> 28 U.S.C. § 1391(d).

<sup>223.</sup> *Executive Wings, Inc. v. Dolby*, 131 F. Supp. 3d 404 (W.D. Pa. 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)."). Once removal occurs, the district court can consider a motion to transfer venue. See *Keystone Drill Servs., Inc. v. Davey Kent, Inc.*, No. 3:21-cv-30, 2022 WL 819280, at \*1 (W.D. Pa. Feb. 22, 2022) and *Hotel Oakland Assocs. v. Doyle Real Est. Advisors, LLC*, No. 21-0004, 2021 WL 2936025, at \*2 (E.D. Pa. July 13, 2021).

<sup>224.</sup> 28 U.S.C. § 1400(a).

<sup>225.</sup> 28 U.S.C. § 1400(b).

the corporation might have sued the same defendants.<sup>226</sup> An action of interpleader or in the nature of interpleader under Section 1335 of Title 28<sup>227</sup> may be brought in the judicial district in which one or more of the claimants reside.<sup>228</sup>

### 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.<sup>229</sup> 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.<sup>230</sup>

Section 1404(a) does not condition transfer on the initial forum 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.<sup>231</sup> 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 has replaced the traditional remedy of outright dismissal with transfer.<sup>232</sup>

Normally, personal jurisdiction is determined in advance of the propriety of venue, but when sound prudential justification

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<sup>226</sup> 28 U.S.C. § 1401.

<sup>227</sup> 28 U.S.C. § 1335.

<sup>228</sup> 28 U.S.C. § 1397.

<sup>229</sup> 28 U.S.C. § 1404(a). *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183 (3d Cir. 2008).

<sup>230</sup> *Western 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)).

<sup>231</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 59 (2013).

<sup>232</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 60 (2013).

exists for doing so, “the court may reverse the normal order of considering personal jurisdiction and venue.”<sup>233</sup> Section 1404(a) authorizes the transfer of a civil action, even in the absence of personal jurisdiction over the defendant.<sup>234</sup>

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.<sup>235</sup> 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.<sup>236</sup> 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.<sup>237</sup> The court must also give some weight to the plaintiffs’ choice of forum.<sup>238</sup>

The presence of a valid forum-selection clause changes a Section 1404(a) analysis.<sup>239</sup> First, a plaintiff’s choice of forum merits no weight when the plaintiff has agreed to a valid forum selection clause.<sup>240</sup> 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.<sup>241</sup> Second, arguments about the parties’ private interests should not

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<sup>233</sup> *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Thar Process, Inc. v. Sound Wellness, LLC*, No. 20-945, 2021 WL 1110572, at \*2 (W.D. Pa. Mar. 23, 2021).

<sup>234</sup> *United States v. Berkowitz*, 328 F.2d 358, 361 (3d Cir. 1964); *Thar Process, Inc. v. Sound Wellness, LLC*, No. 20-945, 2021 WL 1110572, at \*2 (W.D. Pa. Mar. 23, 2021).

<sup>235</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 (2013).

<sup>236</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 n.6 (2013); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

<sup>237</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 n.6 (2013); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

<sup>238</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 n.6 (2013); see also *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

<sup>239</sup> *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018).

<sup>240</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62-66 (2013).

<sup>241</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. 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).

be considered; only public-interest factors.<sup>242</sup> Third, the original venue's choice-of-law rules will not carry over to the forum that was contractually selected.<sup>243</sup> 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.<sup>244</sup> Thus, where a valid forum selection clause exists, except in unusual circumstances, "the interest of justice" is served by holding parties to their bargain.<sup>245</sup> 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.<sup>246</sup> Rather, a transfer presupposes the existence of an action that falls within the scope of a valid forum-selection clause.<sup>247</sup>

A third-party defendant does not have standing to challenge venue if the venue of the original action is not challenged.<sup>248</sup> However, where the third-party action is subject to a forum selection clause, the third-party action may be transferred to another district.<sup>249</sup> If transfer is granted, the third-party action can either be severed from the original action and transferred on its own, or the entire action can be transferred based on the private and public factors applicable to a forum non-conveniens analysis.<sup>250</sup>

Even non-signatories can be bound by a forum selection clause.<sup>251</sup> Four issues determine whether a forum selection clause applies to a non-signatory: (1) whether the non-signatory is an intended third-party beneficiary or closely related to the agreement;

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<sup>242</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62-66 (2013).

<sup>243</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. 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).

<sup>244</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. 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).

<sup>245</sup> *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62-66 (2013).

<sup>246</sup> *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 97 (3d Cir. 2018).

<sup>247</sup> *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 97 (3d Cir. 2018).

<sup>248</sup> *Thar Process, Inc. v. Sound Wellness, LLC*, No. 20-945, 2021 WL 1110572, at \*4 (W.D. Pa. Mar. 23, 2021).

<sup>249</sup> *Thar Process, Inc. v. Sound Wellness, LLC*, No. 20-945, 2021 WL 1110572, at \*5 (W.D. Pa. Mar. 23, 2021).

<sup>250</sup> *Thar Process, Inc. v. Sound Wellness, LLC*, No. 20-945, 2021 WL 1110572, at \*5 (W.D. Pa. Mar. 23, 2021).

<sup>251</sup> *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 59 (3d Cir. 2018); *O'Shaughnessy v. Palazzo*, 496 F. Supp. 3d 872, 879 (E.D. Pa. 2020).



(2) whether enforcement of the clause was foreseeable to the non-signatory; (3) whether the dispute itself is covered within the scope of the forum selection clause; and (4) whether the *Atlantic Marine*<sup>252</sup> modification to a Section 1404(a) analysis applies when non-signatories are bound by a forum clause.<sup>253</sup>

### 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<sup>254</sup> and must be made before pleading if a responsive pleading is allowed, otherwise the issue is waived.<sup>255</sup> The moving party bears the burden of showing that venue is improper.<sup>256</sup> 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.<sup>257</sup> Transfer instead of dismissal is generally appropriate to avoid penalizing plaintiffs by technicalities.<sup>258</sup>

## 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

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<sup>252</sup>. *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49 (2013).

<sup>253</sup>. *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 59 (3d Cir. 2018); *O'Shaughnessy v. Palazzo*, 496 F. Supp. 3d 872, 879 (E.D. Pa. 2020).

<sup>254</sup>. 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)).

<sup>255</sup>. Fed. R. Civ. P. 12(b)(3).

<sup>256</sup>. *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982); *Kutsenkow v. Fuscardo*, No. 2:21-CV-00391-CCW, 2021 WL 5867039, at \*2 (W.D. Pa. Dec. 10, 2021); *Miller v. SAWA Transp. Inc.*, No. 21-2308, 2021 WL 4399665, at \*1 (E.D. Pa. Sept. 27, 2021).

<sup>257</sup>. 28 U.S.C. § 1406(a).

<sup>258</sup>. *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)); *Kutsenkow v. Fuscardo*, No. 2:21-CV-00391-CCW, 2021 WL 5867039, at \*3 (W.D. Pa. Dec. 10, 2021); *Freedman v. Fed. Elections Comm'n*, No. 1:22-CV-0298, 2022 WL 1571775, at \*5 (M.D. Pa. Apr. 18, 2022), report and recommendation adopted in part, No. 1:22-CV-0298, 2022 WL 1570472 (M.D. Pa. May 18, 2022); *PrimePay, LLC v. Prime Tr., LLC*, 559 F. Supp. 3d 394, 398 (E.D. Pa. 2021).

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.<sup>259</sup> A party seeking coordination may file a motion in the court in which the first-filed action is pending.<sup>260</sup> Any party may then file an answer to the motion and the court may hold a hearing.<sup>261</sup> The court in which the complaint was first filed may stay the proceedings in any action which is the subject of the motion.<sup>262</sup>

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.<sup>263</sup> 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 denied.<sup>264</sup>

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<sup>259</sup> Pa. R. Civ. P. 213.1.

<sup>260</sup> Pa. R. Civ. P. 213.1(a).

<sup>261</sup> Pa. R. Civ. P. 213.1(a).

<sup>262</sup> Pa. R. Civ. P. 213.1(b).

<sup>263</sup> *Pennsylvania Mfrs. Ass'n Ins. Co. v. Pa. State Univ.*, 63 A.3d 792, 795 (Pa. Super. 2013).

<sup>264</sup> Pa. R. Civ. P. 231.1(c).

A court is also free to consider other matters.<sup>265</sup> 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.<sup>266</sup>

Any party to a case that is a candidate for coordination with other cases has standing to move for coordination.<sup>267</sup>

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.<sup>268</sup> 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.<sup>269</sup>

An order coordinating actions in different counties is an interlocutory order appealable as of right.<sup>270</sup> Standing to move for coordination is not limited to parties outside the county of the first-filed case.<sup>271</sup> However, Rule 213.1 does not permit coordination of cases that have not yet been filed as of the time of the motion for coordination.<sup>272</sup> Nor does Rule 213.1 allow the court to impose class action procedures in its coordination order, or to appoint lead or representative counsel in coordinated cases.<sup>273</sup> To do so would violate the Rule’s notice provisions applicable to all parties subject

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<sup>265.</sup> *Barber v. Stanko*, 2021 Pa. Super. 96 (2021), *reargument denied* (July 23, 2021); *Pennsylvania Mfrs.’ Ass’n Ins. Co. v. Pa. State Univ.*, 63 A.3d 792, 796 (Pa. Super. 2013).

<sup>266.</sup> See Pa. R. Civ. P. 213.1(c) (introductory paragraph).

<sup>267.</sup> *HTR Rests., Inc. v. Erie Ins. Exch.*, 260 A.3d 978, 985 (Pa. Super. 2021), *aff’d*, 307 A.3d 49 (Pa. 2023) (coordination under Rule 213.1 can only be applied to actions that have been filed at the time coordination is sought).

<sup>268.</sup> Pa. R. Civ. P. 213.1(e).

<sup>269.</sup> Pa. R. Civ. P. 213.1(e).

<sup>270.</sup> *HTR Rests., Inc. v. Erie Ins. Exch.*, 260 A.3d 978, 984 (Pa. Super. 2021), *aff’d*, 307 A.3d 49 (Pa. 2023); *Wohlsen/Crow v. Pettinato Associated Contractors & En’grs, Inc.*, 666 A.2d 701, 703 (Pa. Super. 1995).

<sup>271.</sup> *HTR Rests., Inc. v. Erie Ins. Exch.*, 260 A.3d 978, 985 (Pa. Super. 2021), *aff’d*, 307 A.3d 49 (Pa. 2023) (coordination under Rule 213.1 can only be applied to actions that have been filed at the time coordination is sought).

<sup>272.</sup> *HTR Rests., Inc. v. Erie Ins. Exch.*, 260 A.3d 978, 985 (Pa. Super. 2021), *aff’d*, 307 A.3d 49 (Pa. 2023) (coordination under Rule 213.1 can only be applied to actions that have been filed at the time coordination is sought).

<sup>273.</sup> *HTR Rests., Inc. v. Erie Ins. Exch.*, 260 A.3d 978, 985 (Pa. Super. 2021), *aff’d*, 307 A.3d 49 (Pa. 2023) (coordination under Rule 213.1 can only be applied to actions that have been filed at the time coordination is sought).

to coordination and would deprive unnamed parties of opt-out rights they would otherwise have.<sup>274</sup>

### 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.<sup>275</sup> Multidistrict coordination or consolidation must be sought by motion filed with the judicial panel on multidistrict litigation.<sup>276</sup> 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.<sup>277</sup> 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.<sup>278</sup>

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.<sup>279</sup>

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<sup>274.</sup> *HTR Rests., Inc. v. Erie Ins. Exch.*, 260 A.3d 978, 985 (Pa. Super. 2021), *aff'd*, 307 A.3d 49 (Pa. 2023) (coordination under Rule 213.1 can only be applied to actions that have been filed at the time coordination is sought).

<sup>275.</sup> 28 U.S.C. § 1407(a).

<sup>276.</sup> 28 U.S.C. § 1407(c) and (d).

<sup>277.</sup> 28 U.S.C. § 1407(a).

<sup>278.</sup> 28 U.S.C. § 1407(b).

<sup>279.</sup> *Patriot Com. Leasing Co., Inc. v. Kremer Rest. Enters., LLC*, 915 A.2d 647, 651 (Pa. Super. 2006) (forum selection clause in a commercial contract between

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.<sup>280</sup>

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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); *Central Contracting Co. v. C. E. Youngdahl & Co., Inc.*, 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. *Central Contracting Co., Inc.*, 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).

<sup>280</sup>. *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.*, 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 antitrust 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 Cmty's, 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); *Central Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341 (3d Cir. 1966); and *Central Contracting Co. v. C.E. Youngdahl & Co., Inc.*, 209 A.2d 810 (Pa. 1965)).

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).<sup>281</sup> Only federal statutory law governs whether venue is “wrong” or “improper.”<sup>282</sup> Therefore, a forum selection clause is appropriately enforced by a motion to transfer venue pursuant to Section 1404(a) of Title 28.<sup>283</sup>

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.<sup>284</sup> 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.<sup>285</sup> It is unclear whether dismissal under Rule 12(b)(6) is possible based on a forum selection clause.<sup>286</sup>

## 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

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<sup>281</sup>. *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 59 (2013).

<sup>282</sup>. *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 56 (2013).

<sup>283</sup>. 28 U.S.C. § 1404(a); *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 59 (2013); *Salovaara v. Jackson Nat’l Life Ins. Co.*, 246 F.3d 289, 297-300 (3d Cir. 2001).

<sup>284</sup>. *Salovaara v. Jackson Nat’l Life Ins. Co.*, 246 F.3d 289, 298-99 (3d Cir. 2001).

<sup>285</sup>. *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 65 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).

<sup>286</sup>. *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 (2013).

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<sup>287</sup> or recoupment,<sup>288</sup> 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.<sup>289</sup>

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.<sup>290</sup> The contemplated multiplicity of claims and parties may impact expense and delay, jurisdiction and venue, and other aspects of managing the litigation.

## 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

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<sup>287</sup>. 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).

<sup>288</sup>. "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 Cnty.*, 72 A.2d 129 (Pa. 1950); *Northwestern 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. 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. 1996); whereas the defendant may recover any excess over the plaintiff's claim under a setoff. 6 Standard Pa. Practice 2d § 29:3.

<sup>289</sup>. 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.

<sup>290</sup>. 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).

a joint defense to litigation.<sup>291</sup> Although historically referred to as the “joint defense” privilege, the privilege is not necessarily limited to the defense of claims.<sup>292</sup> The Commonwealth Court has held that a party seeking to invoke the common interest doctrine must show (1) the parties’ agreement to same; (2) a common interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement; and (4) the continued confidentiality of the communications, i.e., the communications were not disclosed to other third parties such that the privileges were waived.<sup>293</sup> State courts in Pennsylvania have not addressed whether an express written agreement is required to establish the privilege.<sup>294</sup>

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.<sup>295</sup> Although the doctrine originated in the context of criminal co-defendants,<sup>296</sup> it also applies in civil litigation, and

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<sup>291</sup> *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”).

<sup>292</sup> *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 In re Teleglobe Commc’ns Corp.*, 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)).

<sup>293</sup> *PPUC v. Sunrise Energy, LLC*, 177 A.3d 438, 445 (Pa. Commw. 2018).

<sup>294</sup> *Sandoz Inc. v. Lannett Co., Inc.*, No. 20-3538, 2021 WL 5139975, at \*5 (E.D. Pa. Nov. 4, 2021).

<sup>295</sup> *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).

<sup>296</sup> *See, e.g., Commonwealth v. Scarfo*, 611 A.2d 242 (Pa. Super. 1992), *appeal denied*, 631 A.2d 1006 (Pa. 1993).



even in purely transactional contexts.<sup>297</sup> Federal courts applying the privilege appear to assume that no written agreement is necessary.<sup>298</sup>

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.”<sup>299</sup> 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.<sup>300</sup> The substantially similar interest must be legal, and not business, commercial, factual, or strategic.<sup>301</sup> The requirement that the parties to the communication share at least substantially similar legal interests prevents abuse of the privilege and unnecessary information sharing.<sup>302</sup>

The common-interest privilege does not apply unless the conditions of privilege are otherwise satisfied.<sup>303</sup> In other words, the common-interest privilege is not an independent privilege, but merely an exception to the general rule that no privilege attaches

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<sup>297.</sup> *Midwest Athletics & Sports All. LLC v. Ricoh USA, Inc.*, No. 2:19-cv-00514-JDW, 2020 WL 5554361, at \*2 (E.D. Pa. Sept. 16, 2020) (common interest doctrine protects parties with shared interest in actual or potential litigation against a common adversary from waiving right to assert privilege when they share privileged information; activities may be litigation or transactional matters, but privilege only applies when clients are represented by separate counsel); *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).

<sup>298.</sup> *See In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3d Cir. 2007) (absence of discussion of requirement for a written agreement); *Rosser Int'l, Inc. v. Walter P. Moore & Assocs., Inc.*, No. 2:11-CV-1028, 2013 WL 3989437, at \*19 (W.D. Pa. Aug. 2, 2013) (express written agreement not required to establish joint defense or common interest privileges under Pennsylvania law, but best practice is to memorialize agreement in writing); *United States v. Trombetta*, No. 13-227-01, 2015 WL 4406426, at \*20 (W.D. Pa. July 20, 2015) (written agreement not required to establish common interest).

<sup>299.</sup> *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).

<sup>300.</sup> *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).

<sup>301.</sup> *United States v. Trombetta*, No. 13-227-01, 2015 U.S. Dist. LEXIS 154748 (W.D. Pa. Nov. 16, 2015) (citing *In re Teleglobe Commc'ns Corp.*, 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)).

<sup>302.</sup> *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).

<sup>303.</sup> *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011); *In re Diet Drugs Prods. Liab. Litig.*, No. 1203, 2001 WL 34133955, at \*5 (E.D. Pa. Apr. 19, 2001).

to communications that are made in the presence of or disclosed to a third party.<sup>304</sup> 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.<sup>305</sup>

### 1-8:2 Common Interest/Joint Defense Agreement

Although a written agreement is not necessary to invoke the common interest privilege,<sup>306</sup> it certainly helps, and it is wise to 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.<sup>307</sup> 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 PUBLIC DISCLOSURE CONSIDERATIONS FOR COMMERCIALLY SENSITIVE MATERIAL OR TRADE SECRETS

The discovery process, court filings and court proceedings present opportunities for undesired disclosure of a client’s commercially

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<sup>304</sup>. *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118 (E.D. Pa. 2011).

<sup>305</sup>. *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).

<sup>306</sup>. *United States v. Trombetta*, No. 13-227-01, 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., U.S. v. LeCroy*, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004) (courts have found that an oral joint defense agreement may be valid (citing *In re Grand Jury Subpoena*, 274 F.3d 563, 569 (1st Cir. 2001)); *Executive Risk Indem., Inc. v. Cigna Corp.*, 81 Pa. D. & C.4th 410 (Phila. Co. 2006).

<sup>307</sup>. *See In re Grand Jury Subpoena*, 274 F.3d 563, 569 (1st Cir. 2001).

sensitive information or trade secrets. In such circumstances, counsel will want to consider the ability to protect against public disclosure of such information by a protective order or sealing order. On the other hand, opposing the protection or sealing of such information gives leverage to the party opposing secrecy. The standards differ for protecting information in discovery, sealing judicial records on the docket, and accessing civil trials.<sup>308</sup>

### **1-9:1 Protective Orders in Discovery**

Protecting commercially sensitive or trade secret information in discovery occurs through a protective order. Often the parties will reach an agreement on the terms of a protective order, and the court will grant it. If the agreement cannot be reached, the party can move the court for a protective order to prevent and/or restrict disclosure of and/or access to certain information.<sup>309</sup>

In federal court, the party seeking a protective order in discovery must demonstrate that “good cause” exists.<sup>310</sup> The court will consider seven factors when determining whether good cause exists and a protective order should be granted: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.<sup>311</sup>

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<sup>308.</sup> *In re Avandia Mktg., Sales Practs. & Prods. Liab. Litig.*, 924 F.3d 662, 670 (3d Cir. 2019) (explaining three distinct standards when considering challenges to the confidentiality of documents—confidentiality of discovery materials; access to court documents on file; and access to civil trials).

<sup>309.</sup> Pa. R. Civ. P. 4012(a)(9); Fed. R. Civ. P. 26(c)(1)(G) and (H).

<sup>310.</sup> *In re Avandia Mktg., Sales Practs. & Prods. Liab. Litig.*, 924 F.3d 662, 671 (3d Cir. 2019).

<sup>311.</sup> *In re Avandia Mktg., Sales Practs. & Prods. Liab. Litig.*, 924 F.3d 662, 671 (3d Cir. 2019) (citing *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

### 1-9:2 Orders Sealing Documents Filed of Record

If commercially sensitive information or trade secret information needs to be filed of record in support of or in opposition to motions, it will be necessary to get permission to file such information under seal. However, except in trade secret cases,<sup>312</sup> it can be difficult to seal judicial records.

In both state and federal court, the principle of openness of the courts is based in common law, the First Amendment to the United States Constitution, and the Pennsylvania Constitution<sup>313</sup> There is a rebuttable presumption of public access.<sup>314</sup> In Pennsylvania's state courts, all court proceedings are presumed to be open to the public.<sup>315</sup>

Under a First Amendment analysis, the party seeking to seal a record must show that denial of access serves an important governmental interest and there is no less restrictive way to serve that governmental interest.<sup>316</sup> In addition, the party must establish that the material is the kind of information that courts will protect and that there is good cause for the order to issue.<sup>317</sup> Good cause means that disclosure will result in a clearly defined and serious injury to the party seeking avoid disclosure.<sup>318</sup>

Under a common law analysis, overcoming the presumption in favor of access must show that the interest in secrecy outweighs

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<sup>312</sup>. “The court may not authorize or direct the disclosure of any information the owner asserts to be a trade secret unless the court allows the owner the opportunity to file a submission under seal that describes the interest of the owner in keeping the information confidential.” 18 U.S.C. § 1835(b). In addition, the court must enter orders and take other actions “necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules . . . Civil Procedure, the Federal Rules of Evidence, and all other applicable laws.” 18 U.S.C. § 1835(a).

<sup>313</sup>. *Commonwealth v. Fenstermaker*, 530 A.2d 414, 417 (Pa. 1987) (quoting *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 573 (1980)); *Storms v. O’Malley*, 779 A.2d 548, 568-69 (Pa. Super. 2001) (citing Pa. Const. Art. I, § 11 (“All courts shall be open.”)); *Hutchison v. Luddy*, 581 A.2d 578 (Pa. Super. 1990), *rev’d on other grounds*, 619 A.2d 276 (Pa. 1991).

<sup>314</sup>. *Storms v. O’Malley*, 779 A.2d 548, 568-69 (Pa. Super. 2001) (citing *Bank of Am. Nat’l Tr. & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986)); *In re Avandia Mktg., Sales Prac. & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019).

<sup>315</sup>. *Zdrok v. Zdrok*, 829 A.2d 697, 699 (Pa. Super. 2003).

<sup>316</sup>. *Storms v. O’Malley*, 779 A.2d 548, 569 (Pa. Super. 2001) (*Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984)).

<sup>317</sup>. *Storms v. O’Malley*, 779 A.2d 548, 569 (Pa. Super. 2001) (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)).

<sup>318</sup>. *In re Avandia Mktg., Sales Prac. & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994)); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984).

the presumption of access.<sup>319</sup> In deciding whether to seal a record, the court must engage in a balancing test, weighing the factors in favor of access and those factors weighing against it. Specificity is essential. Broad allegations of harm, without specific examples are insufficient to warrant sealing.<sup>320</sup> Under the common law, every person is entitled to access provided he or she has an interest therein for some useful purpose and not merely for curiosity.<sup>321</sup> The public can be excluded temporarily or permanently to protect private or public interests: trade secrets, privacy and reputations of innocent persons, mitigate risks to national security interests, and mitigate against the risk an unfair trial by adverse publicity.<sup>322</sup>

Trade secrets are not automatically protected from disclosure,<sup>323</sup> but courts in the Third Circuit often find that disclosure of trade secrets would cause a harm sufficient to warrant sealing.<sup>324</sup>

### **1-9:3 Access to Civil Trials**

The public and the press enjoy a First Amendment right of access to civil trials.<sup>325</sup> Limiting access to a judicial proceeding requires a much higher showing than that required for overcoming the common law right of access.<sup>326</sup> Restrictions on the right of public access to judicial proceedings are evaluated under a strict scrutiny standard.<sup>327</sup> The constitutional right of access is not absolute,

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<sup>319.</sup> *Storms v. O'Malley*, 779 A.2d 548, 569 (Pa. Super. 2001); *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (both citing *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986)).

<sup>320.</sup> *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019) (quoting *In re Candant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001)).

<sup>321.</sup> *Katz v. Katz*, 514 A.2d 1374, 1377 (Pa. Super. 1986).

<sup>322.</sup> *Katz v. Katz*, 514 A.2d 1374, 1377 (Pa. Super. 1986).

<sup>323.</sup> *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166-67 (3d Cir. 1993).

<sup>324.</sup> *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993); *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92-93 (3d Cir. 1992) (“[A]n intention to make imminent or continued use of a trade secret or to disclose it to a competitor will almost certainly show immediate irreparable harm.”); *Teva Pharms. USA, Inc. v. Sandoz Inc.*, No. 17-CV-00275, 2017 U.S. Dist. LEXIS 228373, 2017 WL 11512167, at \*2 (D.N.J. May 2, 2017).

<sup>325.</sup> *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019) (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984)).

<sup>326.</sup> *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019) (citing *In re Candant Corp.*, 260 F.3d 183, 198 n.13 (3d Cir. 2001)).

<sup>327.</sup> *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 104 (3d Cir. 2013).

but is subject to due process protection in the same way as other fundamental rights enjoy.<sup>328</sup>

Subject to constitutional principles, under Pennsylvania Rule of Civil Procedure 223, the court may make and enforce rules and orders “regulating or excluding the public or persons not interested in the proceedings whenever the court deems such regulation or exclusion to be in the interest of the public good, order or morals.”<sup>329</sup> Under Federal Rule of Civil Procedure 77, “every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.<sup>330</sup> Any other proceeding may be conducted by a judge in chambers, and anywhere inside the district, or even outside the district if all the affected parties consent.<sup>331</sup>

## 1-10 IS THE CLAIM AGAINST A LICENSED PROFESSIONAL?

### 1-10:1 Background on Certificates of Merit

In the commercial litigation context, claims may arise against licensed professionals,<sup>332</sup> 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.<sup>333</sup>

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.<sup>334</sup>

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<sup>328</sup>. *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 673 (3d Cir. 2019) (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984)).

<sup>329</sup>. Pa. R. Civ. P. 223(4).

<sup>330</sup>. Fed. R. Civ. P. 77(b).

<sup>331</sup>. Fed. R. Civ. P. 77(b).

<sup>332</sup>. 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.

<sup>333</sup>. Pa. R. Civ. P. 1042.1.

<sup>334</sup>. *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).

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.<sup>335</sup> 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.”<sup>336</sup>

Failure to comply with the certificate of merit requirement can result not only in judgment of nonpros as to the professional liability claims,<sup>337</sup> but can also result in sanctions.<sup>338</sup>

## 1-10:2 Venue Requirements

The Pennsylvania Supreme Court deleted the provision formerly at Rule 1006(a.1), restricting venue for medical professional liability actions to the county in which the cause of action arose. Thus, medical malpractice claims are subject to the same venue rules applicable to other professional liability claims and tort claims in general.<sup>339</sup> Defendants in medical malpractice actions can seek a change in venue in the same ways as all other defendants do in other types of actions.<sup>340</sup>

## 1-10:3 Pleading Requirements

A complaint asserting a professional liability claim must identify each defendant against whom the plaintiff is asserting such a claim.<sup>341</sup> To comply with the certificate of merit requirements, counsel will need to clarify in the complaint whether the basis

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<sup>335</sup> Pa. R. Civ. P. 1042.1(c).

<sup>336</sup> *Dental Care Assocs., Inc. v. Keller Eng'rs, Inc.*, 954 A.2d 597, 603 (Pa. Super. 2008), appeal denied, 968 A.2d 233 (Pa. 2009); see also *Varner v. Classic Cmty's. Corp.*, 890 A.2d 1068 (Pa. Super. 2006) (professional liability claim against architectural firm required certificate of merit).

<sup>337</sup> Pa. R. Civ. P. No. 1042.6 and 1042.7.

<sup>338</sup> Pa. R. Civ. P. No. 1042.9(b).

<sup>339</sup> Civil Procedural Rules Committee Adoption Report - Amendment of Pa.R.Civ.P. 1006, 2130, 2156, and 2179, available at <https://www.pacourts.us/assets/opinions/Supreme/out/Report%20-%20105253423195809604.pdf?cb=1> (last visited May 7, 2024).

<sup>340</sup> Civil Procedural Rules Committee Adoption Report - Amendment of Pa.R.Civ.P. 1006, 2130, 2156, and 2179, available at <https://www.pacourts.us/assets/opinions/Supreme/out/Report%20-%20105253423195809604.pdf?cb=1> (last visited May 7, 2024).

<sup>341</sup> Pa. R. Civ. P. 1042.2(a).

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.<sup>342</sup>

#### 1-10:4 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 the complaint is filed, or within 60 days after filing the complaint.<sup>343</sup> 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.<sup>344</sup> 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.<sup>345</sup> Although professional negligence claims may require expert testimony, it is not always necessary when the negligence is obvious or within a layperson's understanding.<sup>346</sup> 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

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<sup>342</sup>. See Pa. R. Civ. P. 1042.3.

<sup>343</sup>. Pa. R. Civ. P. 1042.3(a).

<sup>344</sup>. 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 Zelenople v. Houlihan*, No. 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, distinguishing *Krauss v. Claar*, 879 A.2d 302, 306-07 (Pa. Super. 2005)).

<sup>345</sup>. *Merlini ex rel. Merlini v. Gallitzin Water Auth.*, 980 A.2d 502, 506 (Pa. 2009); see also *Dental Care Assocs., Inc. v. Keller Eng'rs, Inc.*, 954 A.2d 597, 601 (Pa. Super. 2008), *appeal denied*, 968 A.2d 233 (Pa. 2009) and *Zokaites Contracting Inc. v. Trant Corp.*, 968 A.2d 1282, 1288 (Pa. Super.), *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).

<sup>346</sup>. *Merlini ex rel. Merlini v. Gallitzin Water Auth.*, 980 A.2d 502, 506 (Pa. 2009); *Grossman v. Barke*, 868 A.2d 561, 567 (Pa. Super. 2005).



“appropriate licensed professional”<sup>347</sup> 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 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.<sup>348</sup>

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.<sup>349</sup>

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.<sup>350</sup> 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.<sup>351</sup>

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<sup>347</sup>. 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).

<sup>348</sup>. Pa. R. Civ. P. 1042.3(a)(1) through (3).

<sup>349</sup>. Pa. R. Civ. P. 1042.3(b)(1) and (2).

<sup>350</sup>. Note to Pa. R. Civ. P. 1042.3(a)(2).

<sup>351</sup>. Note to Pa. R. Civ. P. 1042.3(a)(2).

A defendant filing a counterclaim for professional liability must also file a certificate of merit.<sup>352</sup> 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.<sup>353</sup>

### **1-10:5 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.<sup>354</sup> 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.<sup>355</sup> A failure to comply with the certificate of merit requirements can result in a judgment of nonpros on the professional liability claims.<sup>356</sup> 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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<sup>352</sup> Note to Pa. R. Civ. P. 1042.3(c)(1).

<sup>353</sup> Note to Pa. R. Civ. P. 1042.3(c)(2).

<sup>354</sup> Pa. R. Civ. P. No. 1042.4.

<sup>355</sup> Pa. R. Civ. P. No. 1042.5.

<sup>356</sup> Pa. R. Civ. P. 1042.6 and 1042.7.