# *Pennsylvania Bar Institute (PBI)*
# *FUNDAMENTALS OF PERSONAL INJURY*

## *How to Litigate the PI Case/Preparing For Your Trial*
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## LITIGATING THE PI CASE

### Initial Filing

Pa. R. Civ. P. 1007 recognizes that an action may be commenced by filing a Praecipe for Writ of Summons or a Complaint. The action is commenced when one of the two has been *filed*, the appropriate fee *paid*, and the case *indexed and docketed*. 42 Pa. C.S.A. §5503(a) (dealing with limitations of action) provides that the action has been commenced for its purposes "when a document embodying the matter is filed in an office authorized to receive such document."

A. Praecipe for Writ of Summons

1. Requires no information beyond names and addresses of litigants. (For form, *see* Pa. R. Civ. P. 1351).

2. Tolls the statute of limitations (provided you do not inhibit service of the writ).

3. In counties where cases are reached for trial based on their docket seniority, early filing establishes a desirable position.

4. Permits use of discovery process to gain access to information to enable drafting of a sound complaint. Case law, however, reflects the courts' reluctance to allow pre-complaint discovery absent a showing that without the discovery a complaint could not be drafted. *See, e.g., Potts v. Consolidated Rail Corp.*, 147 P.L.J. 40 (Alleg. Co. 1998); *Warble v. Watkins*, 47 Pa.D. & C.3d 485 (Somerset Co. 1986); *Crown Marketing Equipment Co. v. Provident Nat'l Bank*, 3 Pa.D. & C.3d 364 (Phila. Co. 1977). Pa. R. Civ. P. 4007.1(c) requires that a plaintiff seeking pre-complaint discovery provide a brief statement of the nature of the cause of action and of matters to be inquired into during deposition. *See, e.g., Festa v. Sandy*, 7 Pa.D. & C.4th 97 (Lackawanna Co. 1990).

5. Gains jurisdiction (via service) over a party who is about to leave it.

Although the writ may be inscribed with a Notice to Plead within 20 days, in fact no response is required. In the absence of a response the plaintiff does not know if he has named the right party, named all the parties, nor are issues of jurisdiction, venue, agency, control, etc., focused. Plaintiff should not permit the statute to expire without careful consideration of these issues,

preferably with discovery or a responsive pleading to a complaint. Defendant may precipe for a rule upon plaintiff to file a complaint. If complaint is not filed within 20 days after service of rule, defendant may praecipe for a judgment of non pros. (Pa. R. Civ. P. 1037)

B. Complaint

1. Must contain

a. identity of the parties

b. basis of subject matter jurisdiction

c. basis of venue

d. the material facts on which the cause of action is based (no mere notice pleading)

e. averments of fraud or mistake with particularity; malice, intent, knowledge and other conditions of mind may be averred generally

f. the performance or occurrence of conditions precedent may be averred generally

g. time, place and special damages must be pleaded specifically

h. if the claim is based upon a writing, attach a copy, if accessible (Pa. R. Civ. P. 1019)

i. caption

Every pleading must contain a caption setting forth name of court, number of the action and name of the pleading. Caption of a complaint must set forth the form of the action and the names of all parties.

1) Medical liability actions - in an action where there is a claim for medical professional liability, the caption of all legal papers, or the cover sheet in a county that requires a cover sheet, shall contain the designation "Civil Action --Medical Professional Liability Action." Pa. R. Civ. P. 1042.16.

j. notice to defend (Pa. R. Civ. P. 1018.1(b)

Each court designates by local rule the office or organization which should be named in the notice as the agency providing lawyer referral or other legal services. Pa. R. Civ. P. 1018.1(c). A court may by local rule require the notice to be repeated in one or more designated languages other than English. Pa. R. Civ. P. 1018.1(d). If service is to be made by publication, Pa. R. Civ. P. 430(b)(1) permits an abbreviated form of notice to defend.

k. verification (Pa. R. Civ. P. 1024)

2. Requires responsive pleading and is, therefore, the most advantageous method of confirming the validity and accuracy of the facts to be averred, to determine what matters are in issue, and to gain admissions as far as possible.

**Professional Liability Actions**

A. Definition

1. A civil action in which a professional liability claim is asserted against a licensed professional. "Licensed professional" means any person who is licensed pursuant to an Act of Assembly as:
    a. a health care provider;
    b. an accountant;
    c. an architect;
    d. a chiropractor;
    e. a dentist;
    f. an engineer or land surveyor;
    g. a nurse;
    h. an optometrist;
    i. a pharmacist;
    j. a physical therapist;
    k. a psychologist;
    l. a veterinarian. Pa. R. Civ. P. 1042.1(b) (1) (i-xii) (2005); or
    m. an attorney at law. Pa. R. Civ. P. 1042.1(b) (2).

B. Complaint

1. The complaint must identify each defendant against whom the plaintiff is asserting a professional liability action. Pa. R. Civ. P. 1042.2(a).

2. A defendant may raise by preliminary objections the failure of the complaint to identify itself as a professional liability claim in compliance with subdivision (a) of this rule. Pa. R. Civ. P. 1042.2(b).

   a. Failure to raise this defect in pleading has been held to constitute a waiver of the certificate of merit requirement. See PMSLIC Defense Counsel Alert of 8/17/04. See *Herrmann v. Pristine Pines of Franklin County*, 64 Pa. D. & C.4th (Allegheny Co. 2003). But See *Kerry v. Butler Memorial Hospital,* (A.D. No. 03-1049, C.P. 04-20049, Butler County 2004) (Holding that the operative document is the complaint, which must be read in its entirety as to whether it is asserting a professional liability claim).

C. Certificate of Merit

1. Pa. R. Civ. P. 1042.3

   a. "In any action based upon an allegation that a licensed professional deviated from an accepted professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either:

      1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, 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, or

- A licensed professional is defined in Rule 1042.1 and includes entities defined as health care providers under 40 Pa. C.S.A. § 1303.503 (MCARE).

2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard.

- The original note to rule 1042.3(a)(2) read: "Certificates of merit must be filed as to the other licensed professionals whether or not they are named defendants in the action."

- 1042.3(a)(2) apparently caused some confusion among attorneys, who interpreted the rule to mean that a separate certificate of merit was required for each individual involved in the alleged misconduct.

- In 2005 the note to Rule 1042.3(a)(2)was amended by the Supreme Court of Pennsylvania to read "[a] certificate of merit, based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care." Amend. Note R. 1042.3(a)(2) (Pa. Sup. Ct. February 11, 2005).

3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim." Pa. R. Civ. P. 1042.3(a)(1-3).

b. A separate certificate of merit must be filed for each licensed professional against whom a claim is asserted. Pa. R. Civ. P. 1042.3(b).

c. A defendant who files a counterclaim asserting a claim for professional liability must file a certificate of merit. Pa. R. Civ. P. 1042.3(c)(1).
    1) Note: In situations in which a cross-claim is filed asserting a different theory from that of the plaintiff, a certificate of merit must be filed..

2. Responsive Pleading

a. a defendant against whom a professional liability claim is asserted shall file a responsive pleading within the time required by rule 1026 (within 20 days after service of preceding pleading) or within twenty days after service of the certificate of merit, whichever is later. Pa. R. Civ. P. 1042.4.

3. Failure to File Certification

a. The prothonotary, on praecipe of the defendant, shall enter a judgment non pros against the plaintiff for failure to file a certificate of merit within the required time. Pa. R. Civ. P. 1042.6.

    1) there must be no pending timely filed motion seeking an extension pursuant to 1042.3(d).

    2) prothonotary cannot enter non pros if certificate is filed prior to filing of praecipe. Pa. R. Civ. P. 1042.6(a) note. [i.e. "race to the courthouse"]

b. Enforcement by courts

    1) judgment non pros for failure to timely file the certificate of merit, or a petition for extension, within the required time has been strictly enforced by the courts. These judgments are not limited to medical malpractice actions.

    2) Once a non pros is entered and the statute of limitations has run, the only recourse is a petition to open the judgment. See Pa. R. Civ. P. 3051. Note: In the event non pros is entered and the

statute of limitations has **not** expired, it has been held that plaintiff is not barred from filing a second action. See Helfrick v. UPMC Shadyside Hospital, 65 Pa. D. & C.4th 420 (Allegheny Co. 2003).

## Exceptions to General Rule of Pleadings

A. Petition and Rule to Show Cause

Unless specifically authorized by statute or a Rule of Civil Procedure, a Petition and Rule will not constitute original process. Absent such authorization, the filing will be a nullity. Examples of special provisions include:

1. Petition and Rule by a creditor to institute

2. Petition by the Attorney General for contempt to enforce orders under the Clean Streams Law (35 P.S. §691.210).

B. Special Forms of Action

Under the Rules, certain special forms of action may not be begun by writ and must be begun in the manner specified.

1. Replevin: Pa. R. Civ. P. 1073 (commence by filing a complaint with the Prothonotary)

2. Mandamus: Pa. R. Civ. P. 1093 (file complaint with the Prothonotary)

3. Quo Warranto: Pa. R. Civ. P. 1113 (file complaint with the Prothonotary)

4. Mortgage Foreclosure: Pa. R. Civ. P. 1143 (file complaint with the Prothonotary)

5. Mechanics' Liens: Pa. R. Civ. P. 1653 (file complaint with the Prothonotary)

## Special Considerations

A. Actions Against Dead Person

An action commenced against a dead person is a nullity. *See Custren v. Curtis*, 392 Pa. Super. 394, 572 A.2d 1290 (1990).

1. A personal representative cannot be later substituted. *Ehrhardt v. Costello*, 437 Pa. 556, 264 A.2d 620 (1970). However, a new action can be filed against the decedent's personal representative. *See Valentin v. Cartegena*, 375 Pa. Super. 493, 544 A.2d 1028 (1988).

2. The action may not be brought against the "estate of". *Paragas of Tannersville, Inc. v. Case*, 46 Pa. D. & C.2d 240 (Monroe Co. 1969).

3. Death of the intended defendant does not toll the statute of limitations. The plaintiff must have letters of administration issued and suit filed timely. *Lovejoy v. Georgeff*, 224 Pa. Super. 206, 303 A.2d 501 (1973). However, an exception may exist where plaintiff did not learn of the death of the defendant until immediately before the running of the statute. *Stevenson v. Wildasin Estate*, 48 Pa. D. & C.2d 684 (York Co. 1969).

B. Identification of Defendant

In bringing action against a business entity other than an individual, care should be taken to determine the form of the business entity, whether partnership or corporation. Rules 2176 et seq. provide the manner and style of actions against corporations.

**Tolling of Statute of Limitations**

A. Filing Tolls the Statue of Limitations

It is filing, not subsequent docketing and issuance of service, which tolls the running of the statute of limitations, provided that the plaintiffs refrain from a course of conduct which serves to stall in its tracks the legal machinery that has been set in motion. For example, in *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976), delay on the part of the plaintiff in obtaining service was deemed to nullify the effect of the writ in tolling the statute of limitations. See further discussion infra.

B. Awareness of Local Practice

Attorneys must be aware of local practice. An attorney's ignorance of local service and filing requirements does not justify a failure to comply. *Feher v. Altman*, 357 Pa. Super. 50, 515 A.2d 317 (1986).

## Jury Trial Demand

In order to secure jury trial, demand must be filed and served not later than twenty days after the service of the last permissible pleading. The demand may be made either by endorsement on a pleading or by a separate writing. Pa. R. Civ. P. 1007.1(a). Demand for jury trial may not be withdrawn without consent of all parties. Pa. R. Civ. P. 1007.1(c)(1).

A. Appeal from compulsory arbitration

The appellant must endorse a demand for jury trial on its appeal, and, if no demand is made, the appellee must file and serve written demand within ten days after being served with notice of the appeal. Pa. R. Civ. P. 1007.1(b).

## JURISDICTION

Pennsylvania Long-Arm Statute, 42 Pa. C.S.A. §5301 et seq. (1981 & Supp. 1998)

The Long-Arm Statute confers personal jurisdiction over certain non-residents. The Long-Arm Statute is applied by state courts and federal courts sitting in Pennsylvania. *See, e.g., Erie Press Systems v. Shultz Steel Co.*, 548 F. Supp. 1215 (W.D. Pa. 1982). The courts have interpreted Pennsylvania's Long-Arm Statute as being coextensive with the outermost limits of the federal Constitution. *Pennzoil Prods. Co. v. Colelli Assocs., Inc.,* 149 F.3d 197, 200 (3d Cir. 1998); *Daimler Chrysler Corp. v. Askinazi,* 2000 U.S. Dist. Lexis 8740 (E.D. Pa. June 26, 2000).

## General Jurisdiction (§5301)

General jurisdiction exists when the non-resident is deemed "present" in the state by virtue of its voluntary action, such as maintaining continuous and substantial forum contacts, consenting to jurisdiction, being domiciled in the state, being incorporated in the state, being qualified in the state as a foreign corporation, or, in the case of unincorporated entities, being formed in the state.

A. Continuous and systematic business

1. Jurisdiction over nonresidents may be attained if the party carries on a continuous and systematic part of its business in Pennsylvania, even if the suit is totally unrelated to its business activities. §5301(a)(2)(ii), (3)(iii). *Bork v. Mills*, 458 Pa. 228, 329 A.2d 247 (1974). *See International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945); *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 72 S.Ct. 413 (1952).

2. In order to meet this test, a business entity must have "purposefully availed itself of the privilege of conducting activities within [Pennsylvania], thus invoking the benefits of its laws." *Bucks Co. Playhouse v. Bradshaw*, 577 F.Supp. 1203, 1207 (E.D.Pa. 1983)(quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Generally, test is met if non-resident defendant "makes a substantial number of direct sales in the forum, solicits business regularly and advertises in a way specifically targeted at the forum market." *Strick Corp. v. A.J.F. Warehouse Distributors, Inc.,* 532 F. Supp. 951, 956 (E.D.Pa. 1982).

3. "Although general jurisdiction must exist at the time the cause of action arises, the court's examination of forum contacts is not limited to those that coincided with the activities that gave rise to the lawsuit ... it is necessary to look at defendant's activities within the state over a period of time." *Modern Mailers, Inc. v. Johnson & Quin, Inc.,* 844 F. Supp. 1048, 1052 (E.D. Pa. 1994).

4. "... [W]hen a foreign corporation, which was subject to the general personal jurisdiction of Pennsylvania tribunals, subsequently ceases to do continuous and systematic business in Pennsylvania . . . Pennsylvania's jurisdiction over the foreign corporation is not defeated with respect to any act, transaction, or omission which occurred during the previous period." *Simmers v. American Cyanamid Corp*., 394 Pa. Super. 464, 475, 576 A.2d 376, 382 (1990), cert. denied, 502 U.S. 813 (1991); §5301(b).

5. Defendant's activities found continuous and substantial. *See, e.g., TJS Brokerage & Co.,* 940 F. Supp. 784 (E.D. Pa. 1996)(court had general personal jurisdiction over New Jersey-based freight forwarder due to its retention of salesmen and its transaction of business in the state); *Weintraub v. Walt Disney World*, 825 F. Supp. 717 (E.D. Pa. 1993) (defendant sent employees to Pennsylvania for business seminar, representatives of defendant visited Pennsylvania to promote college relations and professional staffing, engaged in publicity and advertising regularly, and marketed resort through Pennsylvania travel agents); *Gavigan v. Walt Disney World, Inc.,* 646 F. Supp. 786 (E.D. Pa. 1986) (defendant Delaware corporation had continuous and substantial business activities in Pennsylvania, by contacting officials in

and sending representatives to Philadelphia to promote tourism to corporation's Florida amusement park, engaging in Pennsylvania print and television advertising that was paid for by parent corporation, using an affiliated travel company to encourage Pennsylvania citizens to visit park, entering into joint ventures with at least two Pennsylvania venturers, and setting up an exhibit in a Pennsylvania store for advertising); *Omni Exploration, Inc. v. Graham Engineering Corp.,* 562 F. Supp. 449 (E.D. Pa. 1983) (defendant Graham performed ten drilling operations for plaintiff, made daily phone calls to plaintiff and sent confirming correspondence in connection with most recent operation); *Gulentz v. Fosdick*, 320 Pa. Super. 38, 466 A.2d 1049 (1983) (defendant's trucks drove 2.5 million miles in Pennsylvania and purchased over one-half million gallons of fuel on which substantial tax was paid. The fact that gross revenue generated by defendant in Pennsylvania represented 3.7% of defendant's total gross revenue of $750,000 did not deprive the court of jurisdiction).

6. Defendant's activities not continuous and substantial. *See, e.g., Hurley v. Cancun Playa Oasis International Hotels,* 1999 U.S. Dist. Lexis 13716 (E.D. Pa. Aug. 31, 1999)

**Transactional (Specific) Jurisdiction (§5322)**

Transactional jurisdiction is present over causes of action which arise from non-resident defendant's Pennsylvania activities.

A. Activities listed in Long-Arm Statute

1. Transacting business in Pennsylvania §5322(a)(l)

a. an act or series of acts in Pennsylvania aimed at benefiting the actor, §5322(a)(1)(i)(ii). *See McAndrew v. Burnett*, 374 F. Supp. 460, 462 (M.D. Pa. 1974).

b. shipping merchandise directly or indirectly into or through Pennsylvania §5322(a)(l)(iii). *See, e.g., Alpha Press Co., v. Stanley,* 566 F. Supp. 1140 (E.D. Pa. 1983)(cause of action must arise from shipping activity); *Image Ten, Inc. v. Walter Reade Org. Inc.,* 456 Pa. 485, 322 A.2d 109 (1974).

c. engaging in a business or profession in Pennsylvania. §5322(a)(1)(iv).

d. ownership, use or possession of real property in Pennsylvania. §5322(a)(1)(v).

2. Contracting to supply services or products in Pennsylvania. §5322(a)(2).

3. Causing harm or injury in Pennsylvania by an act or omission to act either within or outside Pennsylvania. §5322(a)(3)(4).

B. Constitutional Limitations to Transactional Jurisdiction - Minimum Contacts

Under *Kubik v. Letteri*, 532 Pa. 10, 614 A.2d 1110 (1992) (applying *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), for a state to assert transactional personal jurisdiction over a non-resident defendant, the non-resident defendant must meet the following requirements:

1. The nonresident must have sufficient minimum contacts with the forum state. Defendant's conduct and connection with the forum state must be such that he would reasonably anticipate being hailed into court there.

   a. Critical to this analysis is the determination that the defendant purposefully availed himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its law.

   b. This requirement insures that a defendant will not be brought into a jurisdiction solely because of random, fortuitous, or attenuated contacts, or the unilateral activity of another party or third person.

   c. An individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts in the other party's home forum. Instead, the court must consider the parties' prior negotiations, their contemplated future consequences, their actual course of dealing, and the terms of the contract in determining whether the defendant purposefully established minimum contacts within the forum.

2. The assertion of personal jurisdiction must comport with fair play and substantial justice.

a. A defendant bears the burden of persuasion on this matter, and must "show that the assertion of jurisdiction is unconstitutional." A "compelling case" must be presented that jurisdiction would not be reasonable. *Daimler Chrysler Corp. v. Askinazi,* 2000 U.S. Dist. Lexis 8740 (E.D. Pa. June 26, 2000).

b. The court must consider such factors as: the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.

c. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.

3. For application of Burger King test by Pennsylvania courts, *see Hall-Woolford Tank Co.*, 698 A.2d 80 (Pa. Super. Ct. 1997) (contract with out-of-state party alone cannot automatically establish sufficient minimum contact in the other party's home forum); *Colt Plumbing Co., Inc. v. Boisseau*, 435 Pa. Super. 380, 645 A.2d 1350 (1994) (employee had sufficient minimum contacts with Pennsylvania for court to exercise personal jurisdiction in employer's breach of contract action where, inter alia, the parties had business relationship for five years, employer's confidential information was available to employee, and employee used office in Pennsylvania); *McCall v. Formu-3 International, Inc.,* 437 Pa. Super. 575, 650 A.2d 903 (1994) (insufficient minimum contacts where manufacturer merely placed dietary food ingredient into stream of commerce, never sold the ingredient to any United States company, did not advertise the ingredient in the U.S., no agent solicited sales of the ingredient in Pennsylvania, and ingredient allegedly manufactured by defendant went through four different enterprises before injuring plaintiff); *Kachur v. Yugo America, Inc.,* 534 Pa. 316, 632 A.2d 1297 (1993) (in products liability action, exclusive purchasing agent of foreign car manufacturer did not have sufficient minimum contacts with Pennsylvania where agent was a separate corporate entity, conducted no business in Pennsylvania, had

no offices, agents or employees in Pennsylvania, nor did it advertise or solicit business in Pennsylvania); *Kubik v. Letteri*, 532 Pa. 10, 614 A.2d 1110 (1992) (sufficient minimum contacts existed where defendants entered into a contract to sell real estate in Pennsylvania, negotiations were held in Pennsylvania and the transaction was consummated in Pennsylvania).

**Special considerations for corporate defendants**

A. Activities of subsidiary as basis for jurisdiction over parent

Three tests/standards have been discussed by courts:

1. So long as the parent and subsidiary observe and respect the corporate form, the jurisdictional contacts of the subsidiary will not be imputed to the parent. *Canon Manufacturing Co. v. Cudahy Packing Co.,* 267 U.S. 333, 45 S.Ct. 250 (1925).

2. Contacts should be imputed when the parent corporation exercises total control over the affairs and activities of the subsidiary, and therefore can be said to be the subsidiary's alter ego. *See Gallagher v. Mazda Motor of America*, 781 F. Supp. 1079 (E.D. Pa. 1992).

3. Contacts should be imputed when the subsidiary was either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself. *Mirrow v. Club Med, Inc.,* 118 F.R.D. 418 (E.D.Pa. 1986).

B. Jurisdiction over non-resident officers and directors.

Contacts of corporations in Pennsylvania do not confer jurisdiction over non-resident officers or directors as individuals. *Forum Publications, Inc. v. P.T. Publishers, Inc.,* 700 F. Supp. 236 (E.D. Pa. 1988); *but cf., Maleski v. DP Realty Trust*, 653 A.2d 54 (1994) (recognizing exception to general rule when corporate officer or director personally becomes involved in corporation's tortious conduct). *See also Daimler Chrysler Corp. v. Askinazi,* 2000 U.S. Dist. Lexis 8740 (E.D. Pa. June 26, 2000).

C. Activities of predecessor

The forum-related contacts of a predecessor corporation may be attributed to its successor for jurisdictional purposes when the successor has assumed its predecessor's liabilities. *Simmers v. American Cyanamid Corp.*, 394 Pa. Super. 464, 576 A.2d 376 (1990), cert. denied, 112 S. Ct. 62 (1991).

**Procedural Considerations**

A. Who has burden of proof?

1. The mere allegation by defendant in preliminary objections that there is a lack of jurisdiction does not place a burden on the plaintiff to negate such allegations. *Alumbaugh v. Wallace Business Forms, Inc.,* 226 Pa. Super. 511, 313 A.2d 281 (1973). Defendant must support objections by presenting evidence. *King v. Proctor and Gamble Co.*, 452 Pa. Super. 334, 682 A.2d 313 (1996); *Holt Hauling and Warehousing Systems, Inc. v. Aronour Roofing Co.,* 309 Pa. Super. 158, 454 A.2d 1131 (1983).

2. The burden of proof shifts only to the plaintiff after the defendant has presented evidence in support of its preliminary objections challenging jurisdiction. *Gall v. Hammer*, 420 Pa. Super. 512, 617 A.2d 23 (1992).

3. Once a defense to jurisdiction has been sufficiently set forth by the defendant, the plaintiff must prove by a preponderance of the evidence that the defendant had sufficient minimum contacts with the forum for the court to exercise jurisdiction. *Weintraub v. Walt Disney World*, 825 F. Supp. 717 (E.D. Pa. 1993). Plaintiff may not rely on mere conclusory statements contained in the pleadings, but must present competent evidence. *Mann v. Tom James Co.*, 802 F. Supp. 1293 (E.D. Pa. 1992).

B. How is a factual dispute resolved?

1. When deciding a motion to dismiss for lack of personal jurisdiction, the court must consider the evidence in the light most favorable to the nonmoving party (the plaintiff). *See, e.g., King v. Proctor and Gamble*, *supra*.; *Kenneth H. Oaks, Ltd. v. Josephson*, 390 Pa. Super. 103, 568 A.2d 215 (1989).

2. But note dictum (unsupported by citation) that court "[f]or purposes of this appeal from the dismissal of [defendant's] objections, must assume [defendant's] factual averments are true." *United Farm Bureau Insurance Co. v. United States Fidelity and Guaranty Co.*, 501 Pa. 646, 650, 462 A.2d 1300, 1302 (1983).

3. The court may not reach a determination based upon its view of the controverted facts, but must resolve the dispute by receiving evidence from the parties. *Holt Hauling and Warehousing Systems, Inc. v. Aronour Roofing Co.*, 309 Pa. Super. 158, 454 A.2d 1131 (1983); *see also Gall v. Hammer*, 420 Pa. Super. 512, 617 A.2d 23 (1992).

4. The parties may gather facts through discovery (interrogatories, depositions, requests to produce, requests to admit), affidavits, and exhibits. *See Scoggins v. Scoggins*, 382 Pa. Super. 507, 555 A.2d 1314 (1989); *Holt Hauling and Warehousing*, *supra*; *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414 (E.D. Pa. 1979)

5. In federal court, a preliminary hearing can be requested on the issue of jurisdiction. Fed. R. Civ. P. 12(d).

C. Discovery considerations

1. Assume that court will grant limited time to collect data (for plaintiff, conduct investigation promptly, having interrogatories and other discovery prepared; for defendant, have corroborating information attached as exhibits to initial affidavits; for both, file motions seeking discovery without delay).

2. For defendant, be careful that initial assertions are accurate.

D. Appeal

1. For defendant to appeal from an adverse determination, lower court must certify that preliminary objections raise a substantial issue of jurisdiction or venue. Pa. R. App. P. 311(b)(2); see 42 Pa. C.S.A. §5105(c).

2. The standard of review of an appeal from an order granting a preliminary objection has been summarized as follows: "When preliminary objections, if sustained, would result in the

dismissal of an action, such objections should be sustained only in cases which are clear and free from doubt. Moreover, when deciding a motion to dismiss for lack of personal jurisdiction the court must consider the evidence in the light most favorable to the non-moving party." *Delaware Valley Underwriting Agency, Inc. v. Williams and Sapp, Inc.,* 359 Pa. Super. 368, 518 A.2d 1280 (1986) (citations omitted).

## SERVICE OF PROCESS: PENNSYLVANIA CASE LAW

### Process Generally

Process is the means of compelling the defendant to appear in court.

A. Jurisdiction of the person

1. May be obtained only through consent, waiver or proper service of process. *Slezynger v. Bischak*, 224 Pa. Super. 552, 307 A.2d 405 (1973).

2. The requirements of service of process must be strictly followed, because jurisdiction of the person depends upon proper service of process and thus improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of the action. *Sharp v. Valley Forge Medical Center and Heart Hospital, Inc*., 422 Pa. 124, 221 A.2d 185 (1966).

3. But see *Cross v. 50th Ward Community Ambulance Co*., 365 Pa. Super. 74, 81-82 and n.9, 528 A.2d 1369, 1372 and n.9 (1987) (discussing "nonfatal" defects in service).

## Time for Service/Reissuance and Reinstatement

A. Service within the Commonwealth must be accomplished within 30 days after the issuance of the writ or the filing of the complaint. Pa. R. Civ. P. 401(a). If not served, it must be reissued or reinstated. Pa. R. Civ. P. 401(b).

B. Service made without reissuance or reinstatement more than 30 days after issuance is ineffective. *See Robinson v. Trenton Dressed Poultry Co.,* 344 Pa. Super, 545, 496 A.2d 1240 (1985); Pa. R. Civ. P. 401(b).

C. Time is computed from the day after the issuance or filing, and includes the last day unless the last day is a Saturday, Sunday, or legal holiday (Pa. R. Civ. P. 106). (NOTE: Ordinarily, process or service may not be served or executed on a Sunday. 42 Pa. C.S. §5107).

D. Writ may be reissued or complaint reinstated at any time within the statute of limitations and any number of times. Pa. R. Civ. P. 401(b)2). *See, e.g., Fox v. Thompson*, 377 Pa. Super. 39, 546 A.2d 1146 (1988).

E. If an action is commenced by writ of summons and a complaint is thereafter filed, the plaintiff instead of reissuing the writ may treat the complaint as alternative original process and as the equivalent for all purposes of a reissued writ, reissued as of the date of the filing of the complaint. *Ritter v. Theodore Pendergrass Teddy Bear Productions, Inc.,* 356 Pa. Super. 422, 514 A.2d 930 (1986).

## Effect on Statute of Limitations

A. The filing of a writ (or complaint) extends the statute of limitations for the original period of limitation applicable to the action. *Shackleford v. Chester County Hospital*, 456 Pa. Super. 356, 690 A.2d 732 (1997).

B. Plaintiffs are required to make a good faith effort to notify a defendant of a commenced action; "good faith" is to be assessed on a case-by-case basis. *Shackleford v. Chester County Hospital, supra; Farinacci v. Beaver County Indus. Dev. Auth.*, 510 Pa. 589, 511 A.2d 757 (1986).

1. "It is not necessary (that) the plaintiff's conduct be such that it constitutes some bad faith act or overt attempt to delay

before the rule of Lamp will apply. Simple neglect and mistake to fulfill the responsibility to see that requirements for service are carried out may be sufficient to bring the rule in Lamp to bear. Thus, conduct that is unintentional that works to delay the defendant's notice of the action may constitute a lack of good faith on the part of the plaintiff." *Shackleford v. Chester County Hospital,* 456 Pa.Super. at 363-64, 690 A.2d at 736 (quoting *Rosenberg v. Nicholson*, 408 Pa. Super. 502, 509-10, 597 A.2d 145,148(1991)).

**Manner of Service/Acceptance of Service**

A. Rule 402(a)(2)(i) provides that original process may be served by handing a copy at the residence of the defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence.

   1. Failure of adult son to give parents papers did not prevent parents from receiving notice properly served upon them. *Hilton Credit Corp. v. Williamson*, 204 Pa. Super. 248, 203 A.2d 389 (1964).

   2. Person in charge of residence need not be permanent resident or member of household. *Drury v. Zingarelli*, 198 Pa. Super. 5, 180 A.2d 104 (1962).

   3. Service on a minor in the armed services is valid by serving father, action stayed until discharge. *Shipman v. Welsh*, 27 Pa. D. & C.2d 445 (1962); Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §521 (1981).

B. Rule 402(a)(2)(ii) provides that original process may be served by handing a copy at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides.

   1. One served may be clerk or manager. *Futer v. Futer*, 12 Pa. D. & C. 96 (1929); *Clark v. Yellow Cab Company of Philadelphia* 43 Pa. D. & C.2d 798 (1966).

   2. Transient wayfarer at inn overnight is not "in residence," so service of original process could not be made upon the innkeeper. *Kearson v. Love*, 41 Pa. D. & C.2d 241 (1966).

   3. Plaintiffs attempted service of a complaint in a medical malpractice action was defective where complaint was left with a nurse at the intensive care unit of the hospital in which the defendant physician was then a patient, since the nurse could not

be deemed to be a clerk or manager of a place of lodging. *Collins v. Park*, 423 Pa. Super. 601, 621 A.2d 996 (1993).

C. Rule 402(a)(2)(iii) provides that original process may be served by handing a copy at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.

1. This rule applies only where the defendant has some quality of managerial status – he must be more than an ordinary employee. *See Pincus v. Mutual Assurance Co.*, 457 Pa. 94, 321 A.2d 906 (1974); *Sharp v. Valley Forge Medical Center*, 422 Pa. 124, 221 A.2d 185 (1966); *Branch v. Foort*, 397 Pa. 99, 152 A.2d 703 (1959).

2. The "place" of business is strictly construed. *Sharp v. Valley Forge Medical Center*, 422 Pa. 124, 221 A.2d 185 (1966) (service on an intern at his place of employment was invalid where sheriff's return of service indicated copy had been left with "person for the time being in charge of the place of employment," which did not show service in conformance with civil procedure rule).

3. Service must be made at the defendant's place of business, and not at the agent's residence. *Simonson v. Martin*, 35 Pa. D. & C.2d 1 (1963).

4. Service upon individual corporate trustees by handing a copy to the manager of the main office of the corporate defendant was held valid even where the individuals conducted their affairs at another location. *Pincus v. Mutual Assurance Co.*, 457 Pa. 94, 321 A.2d 906 (1974).

5. *Williams v. Office of Public Defender*, 402 Pa. Super. 188, 586 A.2d 924 (1991) (service of complaint upon secretary of public defender's office adequate upon individual defenders who were regularly present and directly produced work product of office, though managerial status or proprietary interest not shown).

D. Under Rule 402(b) the defendant may accept service of the writ or complaint in lieu of service by the sheriff.

**Service in Particular Action**

A. Real Property Actions – Rule 410. This rule is a consolidation of the service provisions of Ejectment, Quiet Title, Mortgage Foreclosure, Equity, Mechanics Liens and Actions Required By Act No. 6 of 1974.

B. Domestic Relations Matters – Rule 1930.4. This rule governs service in an array of matters concerning domestic relations: divorce, annulment, custody, support, visitation and protection from abuse.

1. Service of original process may be made by the sheriff or any adult;
2. By handing it to the defendant; by delivering it to defendant's residence to an adult family member with whom he resides or to an adult in charge of the residence; by delivering it to defendant's place of business (to the person then in charge); or as directed by special order of court.
3. In PFA matters, mail process is also permitted (Rule 1930.4(c)).
4. Service outside the Commonwealth is permitted under any of the above provisions.

C. Mechanics' Lien Claim – Jurat of deputy sheriff not required, under 49 P.S. §1502(a)(2), where return of service timely filed, even though statute states "affidavit of service of notice ... shall be filed." *J.H. Hommer Lumber Co., Inc. v. Dively*, 401 Pa. Super. 72, 584 A.2d 985 (1990).

**Service Upon Particular Parties**

A. Minors – Rule 420

B. Incapacitated Persons – Rule 421

C. The Commonwealth and Political Subdivisions – Rule 422

1. Rule 422 provides that service of original process upon the Commonwealth shall be made at the office of the defendant and the Office of the Attorney General.
2. In addition, the Judicial Code requires that, within 6 months from the date any injury was sustained or any cause of action accrued, written notice shall be filed in the office of the government unit. If the action is against a Commonwealth agency for damages, then notice should also be filed in the Office of the Attorney General. The requirements of notice as to content and form are set forth in 42 Pa. C.S.A. §5522.

D. Partnerships and Unincorporated Associations – Rule 423

E. Corporations and Similar Entities – Rule 424

1. Rule 424 provides that service of original process upon a corporation or similar entity shall be made by handing a copy to any of the following persons provided the person served is not a plaintiff in the action:
   a. An executive officer, partner, or trustee of the corporation or similar entity.

(1) It is immaterial that service made on one of the above not at his place of business – may be made anywhere within the jurisdiction. *See, e.g., Levy v. Curtis Shoe Co., Inc.,* 73 Pa. D. & C. 8 (1950) (vice president served at hotel where he was staying – purpose of stay deemed immaterial); *Bowser v. Clay Equipment Corp.*, 90 Dauph. 33 (1968) (executive officer served at booth at state farm show)

b. The manager, clerk, or other person for the time being in charge of any regular place of business or activity of the corporation or similar entity.

(1) *Trzcinski v. Prudential,* 409 Pa. Super. 114, 597 A.2d 687 (1991): service upon receptionist at law firm that allegedly worked exclusively for insurer was not authorized by Rule 424, because she was not the "person for the time being in charge" and a law firm cannot be considered a "wholly-owned subsidiary" of any client.

(2) *North Pittsburgh Telephone Co. v. Klein,* 32 Pa. D. & C.3d 115 (1984): the "person for the time being in charge" cannot be a total stranger temporarily "in charge" of the premises, but must have an adequate relationship to the corporation.

(3) *Delaware Valley Surgical Supply Co., Inc. v. Geriatric and Medical Centers, Inc.*, 450 Pa. 239, 299 A.2d 237 (1973): service on parent corporation's chairman, who was also officer of subsidiaries, made at the headquarters of parent was good as to parent corporation but not as to subsidiaries.

(4) *Myers v. Mooney Aircraft, Inc.,* 429 Pa. 177, 240 A.2d 505 (1968): service was invalid as dealer of defendants' product in Pennsylvania was seen to be an independent contractor and not an agent of the defendant.

(5) *Graul Unemployment Compensation Case*, 159 Pa. Super. 549, 49 A.2d 281 (1946): service on manager of one of defendant's stores was sufficient.

c. An agent authorized by the corporation or similar entity in writing to receive service of process for it.

2. NOTE: substituted service pursuant to Rule 402(a)(2) upon a corporation or similar entity is not permitted by Rule 424.

**Service of Process Outside the Commonwealth**

A. Section 5323(a) of the Judicial Code (42 Pa. C.S. §5323) and Rule 404 govern the manner of service of process outside the Commonwealth

1. §5323(a) of the Code provides:

a. Manner of service – When the law of this Commonwealth authorizes service of process outside this Commonwealth, the service, when reasonably calculated to give actual notice, may be made:

(1) By personal delivery in the manner prescribed for service within this Commonwealth.

(2) In the manner provided or prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction.

(3) By any form of mail addressed to the person to be served and requesting a signed receipt.

(4) As directed by the foreign authority in response to a letter rogatory.

(5) As directed by a court.

2. Service of process made on Defendant – §5323 departs from the procedure of the prior long-arm statute by eliminating service upon the Secretary of the Commonwealth. Service of process is made directly upon the defendant.

3. Mail returned "refused" – Section 5323 does not provide for process which is sent by mail but is returned "refused." This matter is covered by Rule 403(1). *See National Exposition, Inc. v. DuBois*, 97 F.R.D. 400 (W.D. Pa. 1983): notation of postal authorities to the effect that registered mail addressed to a non-resident is "unclaimed" is not equivalent to a notation that the mail is "refused," and is insufficient to authorize service by ordinary mail pursuant to the provisions of the former service of process rule, Pa. R. Civ. P. 2079(c)(3).

4. Last-known address no longer sufficient – Neither the Code nor the rules contain provision of the repealed long-arm statute, 42 Pa. C.S. §8307, or of former Rule 2080 that mailing process to the defendant's last-known address is sufficient service even though the defendant cannot be found at that address. As service is now made directly upon the defendant under both the Rules and the Code, such service would raise a serious due process question. *See National Expositions, Inc. v. DuBois*, 97 F.R.D. 400 (W.D. Pa. 1983):

mere sending of registered mail addressed to non-residents' last known addresses, whether received by them or not, would not constitute effective service of process under former Rule 2079(c)(3) authorizing service by any form of mail addressed to person to be served and requiring signed receipt.

5. Personal delivery and signed receipt required – The strictness of the Code provision is evidenced by the requirement of "personal delivery" in §5323(a)(1) and the requirement of §5323(b) that the signed receipt required by §5323(a)(3) must be signed by the signed addressee. *But see Engler v. City of Philadelphia*, 34 D. & C.3d 30 (1984). Under the Uniform Interstate and International Procedure Act, 42 C.S. §5323(a)(3), service of process is proper outside of the Commonwealth by certified mail when addressed to the person to be served, even though the return receipt is signed by the spouse of the person to be served.

B. Section 5329(2) of the Judicial Code provides that the methods of service set forth in §5323(a) are alternative to other laws providing a method of service:

"Section 5329. Other provisions of law unaffected. Except as otherwise provided in this subchapter, this subchapter does not repeal or modify any law of this Commonwealth:

(2) Permitting a procedure for service or for obtaining testimony, documents, or other things for use in this Commonwealth or in a tribunal outside this Commonwealth other than the procedures prescribed in section 5323 (relating to service of process on persons outside this Commonwealth)...."

**Who Makes Service - Rule 400**

A. The Sheriff: In most actions the writ or the complaint (original process) must be served by the sheriff.

B. Competent Adults: In certain actions service may also be made by a competent adult who is not a party.

C. When the Sheriff is a Party: In that case process shall be served by the coroner or other officer authorized by law to perform the duties of coroner.

D. Deputized Service: If service is to be made by the sheriff in a county other the county in which the action was commenced, the sheriff of the

county where service may be made shall be deputized for that purpose by the sheriff of the county where the action was commenced.

E. Philadelphia County. Rule 400.1(a) provides that in an action commenced in the First Judicial District (comprised of Philadelphia County) original process may be served by the sheriff or a competent adult. Rule 400.1(b) states that in actions instituted in any other county, original process may be served by deputized service as provided in Rule 400(d) or by a competent adult.

**Return of Service – Rule 405**

A. The general rule regarding attacking the propriety of service is that in the absence of fraud, a return under oath which is regular, full and complete upon its face, and fully conforms to the statutory requirements, is conclusive, and may not be attacked by extrinsic evidence. *Vaughn v. Love*, 324 Pa. 276, 188 A. 299 (1936).

B. Sanctity of sheriff's return gradually being eroded by cases.

1. The conclusiveness of a return under oath, however, does not extend to facts stated in the return of which the sheriff cannot be expected to have personal knowledge. *Hollinger v. Hollinger*, 416 Pa. 473, 206 A.2d 1 (1965). *See also Rubin v. Nowak*, 367 Pa. Super. 629, 533 A.2d 451 (1987); *Quatrochi v. Gaiters*, 251 Pa. Super. 115, 380 A.2d 404 (1977).

2. A return indicating service at "place of employment" is invalid on its face since the rule requires service at one's "place of business." *Sharp v. Valley Forge Medical Center and Heart Hospital, Inc.*, 422 Pa. 124, 221 A.2d 185 (1966).

3. While defendant may attack the representations of facts not within the sheriffs personal knowledge, defendant will not avail by merely alleging he was not served without attempting to bring in extrinsic evidence to establish nonservice. *Hersch v. Clapper*, 232 Pa. Super. 550, 335 A.2d 738 (1975).

C. The absence of or a defect in a return of service does not necessarily divest a court of jurisdiction over a defendant who was properly served. *Cintas Corp. v. Lee's Cleaning Services, Inc., supra.*

**Privileges and Exemptions From Service**

A. Non-Resident

1. As a general rule, a non-resident may not be served with process while attending or going to or coming from a judicial proceeding as witness or attorney.

a. The Supreme Court in *Eberlin v. Pa. Railroad Co.*, 402 Pa. 520, 167 A.2d 155 (1961), held that where a non-resident commences an action within Pennsylvania, he will not receive immunity from service of process for a cause of action arising out of that same transaction. The privilege was said to be one of the court itself and not of the individual and would be extended only when judicial necessities were required. *See also Gekoski v. Starer*, 223 Pa. Super. 560, 302 A.2d 398 (1973); *Fahy v. LeBlanc,* 223 Pa. Super. 185, 229 A.2d 323 (1972); *Club v. Honegger Farms Co., Inc.,* 55 Pa. D. & C.2d 745 (1972).

b. The immunity given a non-resident is to last only for a period necessary to ensure the smooth operation of the courts. *Faby v. Abattoir*, 223 Pa. Super. 185, 299 A.2d 323 (1972); *Commonwealth ex ref. Dulles v. Dulles*, 181 Pa. Super. 498, 124 A.2d 128 (1956).

B. Armed Services

1. Members of the Armed Services are not exempt from service of process. However, a court is authorized to stay the action pending release from the service. *Anderson v. Jaszenski*, 81 Pa. D. & C. 428 (1952).

C. Legislators and Foreign Diplomats

1. Legislators are not amenable to service while attending public service.

2. Diplomats – to include ambassadors, attaches and secretaries of legations, but not consuls – are immune to process in the country in which they are accredited.

**Individual Defendants Who Conceal Their Whereabouts**

A. Rule 430 provides for service pursuant to special order of court.

1. The court is authorized to enter such an order upon affidavit stating:

a. "the nature and extent of the investigation which has been made to determine the whereabouts of the defendant," and

b. "the reasons why service cannot be made."

2. The extent and nature of the investigation required will vary depending upon the facts of each case. The Committee Note to Rule 430 gives an illustration of a good faith effort to locate the whereabouts of a defendant and lists the following sources of information:

a. inquiries of postal authorities, including inquiries pursuant to the Freedom of Information Act, 39 C.F.R. Part 265,

b. inquiries of relatives, neighbors, friends, and employers of the defendant, and

c. examinations of local telephone directories, voter registration records, local tax records, and motor vehicle records.

3. The Note also states that "a sheriff's return of 'not found' or the fact that a defendant has moved without leaving a new forwarding address is insufficient evidence of concealment," citing *Gonzales v. Polis*, 238 Pa. Super. 362, 357 A.2d 580 (1976).

4. *See also Cobb v. Gray*, 269 Pa. Super. 267, 409 A.2d 882 (1979); *Hill v. Southeastern Pa. Transp. Auth.*, 263 Pa. Super. 229, 397 A.2d 830 (1979); *Austin v. Goode,* 47 D. & C.2d 545 (1969).

## VENUE

### Rules Governing

A. Most questions of venue are governed by Rule 1006.

B. Many actions have their own venue rules.

1. Ejectment: Rule 1052.
2. Confession of judgment: Rule 2982.
3. Quiet title: Rule 1062.
4. Custody or visitation: Rule 1915.2.
5. Replevin: Rule 1072.
6. Mandamus: Rule 1092.
7. Partition: Rule 1552.
8. Quo warranto: Rule 1112.
9. Divorce or annulment: Rule 1920.2.
10. Mechanics' liens: Rule 1652.
11. Mortgage foreclosure: Rule 1142.
12. Support: Rule 1910.2.
13. Equity: Rule 1503.
14. Protection from Abuse: Rule 1901.1
15. Medical Professional Liability Claims: Rule 1006(a.1) [New Rule]

a. Pa. R. Civ. P. 1006(a.1)

1) "a medical prfessional liability action may be brought against a health care provider for a medical professional liability claim only In a county In which the cause of action arose."

2) in an action to enforce joint and several liability against two or more defendants, and the action contains one or more medical liability claims, the action shall be brought against all defendants in any county in which venue may be laid against any defendant under subdivision (a.1).

b. Stated Reasons:

1) Prevent venue shopping.

2) Certain counties, particularly the urban counties of Philadelphia and Allegheny, are considered more liberal in jury awards.

c. Effects of 1006(a.1):

1) In 2003, medical malpractice case filings declined by 52.1% in Philadelphia County from the 2000-2002 average. In 2004 med-mal case filings were down 53.6% from the 2000-2002 average. Pennsylvania Supreme Court, Pennsylvania Medical Malpractice Case Filings: 2000-2003, 2, <http://origin-www.courts.state.pa.us/index/medical malpractice/med%20mal%20filings%20statewide%20with%20adjustments%20for%20transfer%20cases%202004.pdf.>

2) In 2003, medical malpractice case filings were down by 31.3% from the 2000-2002 average in Allegheny County. In 2004, med-mal filings were down 25% from the 2000-2002 average. Id. at 1. IN 2006 the reduction of filings in Allegheny County was still down 24% and Phildelphia County was down 52.7% from the 2000-2002 period.

3) Note, there was a statewide reduction in med-mal filings of 37.8% in 2003, and 34% in 2004, from the 2000-2002 average, which may be due to other issues, such as certificate of merit rules. Id. at 2. In 2006, the statewide filings shows a decrease of 38% from the 2000-2002 period.

d. 1006(a.1) Cases:

1) Venue where M.D. gave orders over phone in one county and patient allegedly died secondary to negligence of care in hospital in another county?

- for venue purposes the cause of action arose in the county where the negligent act or omission occurred.
- telephone orders were carried out in county of hospital where patient was located.
- all care provided [or not provided] to decedent was occurred in Lehigh county [county of hospital]. *Bilotti-Kerrick v. St. Luke's Hospital*, 873 A.2d 728 (Pa. Super. 2005).

2) Venue where patient misprescribed a drug in one county, but suit filed in another county where patient ingested drug [where injury occurred].

- held cause of action arose in county of misprescription. *Peters v. Sidorov*, 855 A.2d 894 (Pa. Super. 2004).

C. Certain entities have special venue rules.

1. Partnership: Rule 2130.
2. Commonwealth or political subdivision: Rule 2103.
3. Unincorporated association: Rule 2156.
4. Corporation: Rule 2179.

a. A personal action against a corporation or similar entity may be brought in and only in

1) the county where its registered office or principle place of business is located;

2) a county where it regularly conducts business. For Instance, recently the Superior Court held In *Zampana-Barry v. Donaghue*, 921 A.2d 500 (Pa. Super. 2007) that a law firm whichh transacts 3 to 5 percent of Its business In Philadelphia was subject to venue in Philadelphia county;

3) the county where the cause of action arose;

4) a county where a transaction or occurrence took place out of which the cause of action arose, or

5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

b. Business contacts decisions:

1) Rule 2179(a)(2) requires the standard of "regularly conducts business."

- See Monaco v. Montgomery Cab Co., 417 Pa. 135, 208 A.2d 252 (1965); Canter v. American Honda Motor Corp., 426 Pa. 38, 231 A.2d 140 (1967).
- See also Purcell v. Bryn Mawr Hospital, 525 Pa. 237, 579 A.2d 1282 (1990) (rotation of medical personnel between two counties for educational purposes, mere purchase of hospital supplies, and phone book and newspaper advertisements insufficient to establish venue)
- See Kubik v. Route 252, Inc., 762 A.2d 1119 (Pa. Super. 2000) (appellee restaurant's website containing driving directions from Philadelphia to its establishment, an email newsletter and Internet sale of gift certificates to Philadelphia residents were not enough to constitute regularly conducting business in Philadelphia).

D. Venue, service, etc., are procedural and governed by the law in effect at the time of the suit, service, etc. *See, e.g., Sussman v. Yaffee*, 443 Pa. 12, 275 A.2d 364 (1971); *Kilian v. Allegheny Cty. Distributors*, 409 Pa. 344, 185 A.2d 517 (1962); *Senowiat v. Colonial Supply Co.*, 53 Pa. D. & C.2d 528 (1971).

E. In actions at law, venue and change of venue are governed by Rule 1006, which provides:

(a) Except as otherwise provided by subdivisions (b) and (c) of this Rule, an action against an individual may be brought in and only in a county in which he may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law. [NOTE: For a definition of "transaction" or "occurrence," see cases cited in I.G., *infra*.]

(b) Actions against the following defendants, except as otherwise provided in Subdivision (c), may be brought in and only in the counties designated by the following rules: political subdivisions, Rule 2103; partnerships, Rule 2130; unincorporated associations, Rule 2156; corporations and similar entities.

(c) An action to enforce a joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, 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).

(d) (1) For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought.

(2) Where, upon petition and hearing thereon, the court finds that a fair and impartial trial cannot be held in the county for reasons stated of record, the court may order that the action be transferred. The order changing venue shall be certified forthwith to the Supreme Court, which shall designate the county to which the case is to be transferred. [NOTE: For the refusal of the judge for interest or prejudice, see Canon 3C of the Code of Judicial Conduct.]

(3) It shall be the duty of the prothonotary of the court in which the action is pending to forward to the prothonotary of the county to which the action is transferred certified copies of the docket entries, process, pleadings, depositions and other papers filed in the action. The costs and fees of the petition for transfer and the removal of the record shall be paid by the petitioner in the first instance to be taxable as costs in the case.

(e) Improper venue shall be raised by preliminary objection and if not so raised, shall be waived. [*See, e.g., Gogets v. Gogets*, 267 Pa. Super. 458, 406 A.2d 1132 (1979).] 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. The costs and fees for transfer and removal of the record shall be paid by the plaintiff.

(f) 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."

F. Jurisdiction should not be confused with venue. All counties of the Commonwealth have jurisdiction to handle civil actions. Venue, however, is transitory and determined by the geographical location of the defendant at the time of service and not at the time of suit. *See Salay v. Braun*, 427 Pa. 480, 235 A.2d 368 (1967); *See also U.S. Cold Storage Corp. v. Phila.*, 431 Pa. 411, 246 A.2d 386 (1968).

G. For definition of "transaction" or "occurrence," see:

1. *Harvey v. Agnew*, 54 Pa. D. & C.2d 305 (1971): despite the residence and the property's location in other counties, the court overruled defendant's preliminary objections on the basis that the real estate transaction was consummated in Delaware County through the defendant's real estate agent location therein.

2. *Craig v. W. J. Thiele & Sons, Inc.,* 395 Pa. 129, 149 A.2d 35 (1959): although a contract is a "transaction" or "occurrence," the mere "ordering" or offer to purchase is not if the goods are to be delivered elsewhere. *See also Telstar Corp. v. Berman*, 281 Pa. Super. 443, 422 A.2d 551 (1980).

3. *Lucas Enterprises v. Paul C. Harman Co., Inc.*, 273 Pa. Super. 422, 417 A.2d 720 (1980): failure to make payment to plaintiff in the plaintiffs county of residence/place of business is a proper basis of venue there for breach of contract. *See also Oxford Container Co. v. CR Containers E-T-C Ltd.*, 23 Pa. D. & C.3d 613 (1982).

H. Joint Defendants

1. Where there are two or more defendants venue is proper in any county where venue may be laid against one. *U.S. Cold Storage Corp. v. Phila.*, 431 Pa. 411, 246 A.2d 386 (1968); Pa. R. Civ. P. 1006(c). *See also Gibbs v. Ernst*, 9 Pa. D. & C.4th 458 (Bucks Co. 1991) (involving a political subdivision as one of the defendants).

2. The court will not consider the motive or merits of plaintiffs claim. *See McCollum, Jr. v. Laubach*, 47 Pa. D. & C.2d 155 (1964), involving non-resident defendant and General Motors unsupported allegation of product defect in motor vehicle case sufficient to establish venue in any county in state. *See also Drab v. City of Phila.,* 47 Pa. D. & C.2d 149 (1969), involving a non-resident defendant and an employer with Workers' Compensation immunity.

3. Practice against additional defendants is governed by Rule 425. If venue is proper in the action by the plaintiff, the defendant may have deputized service or other service against non-resident defendants.

I. Transfer of Venue for Convenience of Parties and Witnesses – Forum Non Conveniens

42 Pa. C.S. §5322(e)--"When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just." This applies to cases in which transfer is to another state.

In these cases, the two most important factors for the court to consider are: (1) a plaintiff's choice of the place of suit will not be disturbed except for weighty reasons, and (2) no action will be dismissed unless an alternative forum is available to the plaintiff. *Humes v. Eckerd Corp.* 807 A.2d 290 (Pa. Super. Ct. 2002); *Poley v. Delaware Power and Light Co.*, 779 A.2d 544 (Pa. Super. Ct. 2001).

Pa. R. Civ. P. 1006(d)(1)--"For the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought." This governs intrastate transfers. A petition for transfer of venue under Rule 1006(d)(1) should not be granted unless the defendant meets its burden of demonstrating, with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant. *Cheeseman v. Lethal Exterminator, Inc.*, 549 Pa. 200, 701 A.2d 156 (1997). Trial courts may not consider their own "private and public interest" factors including court congestion in determining whether venue should be transferred under this Rule. Id.

J. Improper Venue

1. Objection to venue must be raised by preliminary objections. If not so raised, then the objections are waived. *See Panzano v. Lower Bucks Hospital*, 395 Pa. Super. 480, 577 A.2d 644 (1990); *City of Philadelphia v. Silverman*, 91 Pa. Commw. 451, 497 A.2d 689 (1985); Pa. R. Civ. P. 1006(e).
2. It has been held that an attack on "jurisdiction" which raises solely issues of venue is governed by Rule 1006(e). *Tyson v. Basehore*, 22 Cumb. L.J. 53 (1972), *aff'd*, 222 Pa. Super. 572, 295 A.2d 189 (1972).

3. If a preliminary objection to venue is sustained and there is a county of proper venue within the state, that action cannot be dismissed but must be transferred to the appropriate court of that county, at plaintiffs expense. Pa. R. Civ. P. 1006(e).
4. In *Nicolosi v. Fittin*, 434 Pa. 133, 252 A.2d 700 (1969), the Pennsylvania Supreme Court would not permit a transfer where improper service was attacked rather than venue. *But see Tyson v. Basehore*, 222 Pa. Super. 572, 295 A.2d 189 (1972).
5. Evidence may be necessary to provide the court with a basis to determine venue. *Hamre v. Resnick*, 337 Pa. Super. 119, 486 A.2d 510 (1984).

K. Considerations When Attorney Has a Choice of Venue
1. Convenience to self, parties, arts and other witnesses.
2. Metropolitan v. rural – type of client, size of claim.
3. Familiarity with attitudes and personalities of judges.

## PREPARING YOUR CASE FOR TRIAL

## INITIAL CONSIDERATIONS IN THE AUTOMOBILE ACCIDENT CASE

Screening the case is one of the most important parts of the case, but also one of the most under-appreciated. The initial screening is the first opportunity to meet, interview and observe the client; investigate all aspects of the case; review the medical records and injuries to see how they may relate to the accident; and consult with outside experts in order to objectively view the case and determine its merits. From a plaintiff's perspective, the initial screening is very important because if an injury is overlooked or not researched during the initial screening, then plaintiff's counsel may spend considerable time and resources pursuing a case that may not be as strong as once thought. Also, a good case may be rejected if the medical records or other aspects of the case are not screened properly.

From a practical standpoint, the initial screening of a case should begin with interviewing the client and probably any family members followed by gathering and thoroughly reviewing the medical records. The medical records are going to be the most important aspect of the investigation from a damages standpoint.

All motor vehicle accident cases require an interview with the client, obtaining as many medical records as possible, researching **both** the medical and legal aspects of the law as each relate to the case, and consulting with

experts. Also, the accident scene should be visited in every case and photographs taken of the accident scene and vehicle(s) as soon as possible.

The medical records review and a visit/phone conference with the client's treating physician is very important. Medicine and the law are different. The definition of certain terms and use of phrases are different in one practice as opposed to the other. For example, it is not necessary for a medical practitioner to testify in court with precise 100% certainty the "cause" of an injury, but only to testify that the injuries were "to reasonable degree of medical certainty" or an "increased risk of harm" caused by the accident. Further, one part of a medical record may be important in a legal case and not important for the physician to treat a patient. A physician may find a particular fact in a record relevant but the attorney/paralegal not. The goal of the physician is to treat, but the goal of the attorney/paralegal is to obtain compensation for the client. Therefore, the attorney/paralegal must be able to explain legal terms so physicians, insurance adjusters, and juries can understand the medicine as it relates to the law.

Defense attorneys like to say that the best defense witness is the Plaintiff's medical records. Therefore, it is necessary to be able to interchange legal and medical terminology in order to make sure that the there are no surprises. Cases are usually not won based on the medical records, but they can be lost by them.

# THE INITIAL INTERVIEW

An initial interview may take many forms. Usually it starts with the client providing basic information over the telephone. The initial phone call is very important because some negative and positive parts of the case may be discovered, including the injuries, damages, liability, and insurance coverage. All the notes from the conversation should be kept for use during the initial meeting/interview.

After the initial phone call, the client should meet with the attorney/paralegal at his or her office. However, it may be necessary to meet with the client at his or her home or hospital room. At the initial meeting, the client should bring as many of their medical records as possible as well as a copy of the police report, auto insurance policy, health insurance plans, and insurance declaration sheet. The medical records will help to explain symptoms, injuries, diagnoses and treatments, since the client may not know or remember the precise diagnoses or treatments which have been prescribed. The medical records may also include a prognosis.

There is a lot of information to obtain during the initial interview. Some areas to cover in a motor vehicle accident case are:

1. Whether the client/other driver was able to get out of the car on his or her own or whether he or she needed help;
2. Whether the client/other driver went to the hospital from the scene of the accident, and if so, how?;

3. Whether the client/other driver was admitted to the hospital or Emergency Room;
4. Length of time after the accident the client first saw a physician, other than at a hospital or ambulance personnel;
5. Whether the client has been restricted from working by a physician or whether the victim does not feel up to working because of injuries;
6. The position of the client in the car at the time of the accident;
7. Whether the client had his or her seatbelt on at the time of the accident;
8. Whether the client was expecting an accident;
9. Whether the client gave any statements to insurance adjusters, hospital personnel, governmental authorities or police;
10. Whether the client took any pictures of the motor vehicles, the accident scene, his or herself depicting injuries, etc.;
11. The mechanics of the accident;
12. The road, weather, and traffic conditions at the time of the accident;
13. Whether there are any witnesses who observed the injuries and damages;

14. Household activities the client has been precluded from performing;
15. Recreational activities the client has been precluded from performing;
16. Social activities the client has been precluded from performing;
17. Household activities the client has difficulty performing or can no longer perform;
18. Recreational activities the client has difficulty performing or can no longer perform;
19. Social activities the client has difficulty performing;
20. Whether the client has limited tort or full tort, and if so, does an exception apply?;
21. Whether the client reported injuries to the police officer at the scene of the accident, and were there any noted on the police report;
22. The age of the client;
23. The occupation of the client;
24. The education of the client; and
25. The family background of the client, including whether he or she is married, whether he or she has children, whether he or she has dependents living with him or her.

In addition to asking the client to bring medical records and review the above information, look at and observe the client at the time of the initial meeting. Observe whether the client is wearing a cast, brace, TENS Unit, cervical collar, or any other device that would be consistent with the injuries. Also, observe any scars as a result of the incident and take pictures, if necessary. Observe if the client is acting any differently than what is noted in the medical records or is consistent with the medical literature for this specific injury. For instance, an attorney and paralegal need to be wary of a client who claims that he or she is having difficulty sitting for more than a half hour and then at the initial interview sits for two hours without problem, or if the medical records state a similar event or occurrence.

Listen to the client. There are certain bits of information that the client may volunteer. There are certain traits of people that may or may not make them a good client or witness. Also, if possible, go to the client's home to observe their daily activities, and possibly videotape them doing their daily activities if they have difficulty performing any of their daily activities.

**Investigating the Case: Reviewing and obtaining documents, Statements, Insurance Verification:**

As noted, the process of obtaining and verifying the accuracy of the medical records and other documents usually starts after the interview. There are several ways to obtain the medical records. They include:

1. Ask the client to bring all of the records to the initial meeting;

2. Ask the client to obtain the records after the initial meeting and drop them off at your office or mail them to you;
3. Ask the client to sign authorization allowing you to obtain all of the client's records and then request the records directly from the physicians; and
4. If there is a case already in litigation, subpoena the records.

There are many different ways to verify and ensure the accuracy of medical records including:

1. Reviewing the original records at the office of the hospital, physician, insurance company, etc.;
2. Meet with or talk to the physician;
3. Some physicians do not like to meet with or talk to the legal profession, however, he or she may be willing to provide an answer to a specific question or concern in a letter;
4. The records may be subpoenaed and certified as accurate and correct; and
5. If there are references to specific events or statements in the records, the person who made the note may be interviewed. For instance, if a nurse writes down a particular event or statement, an investigator, paralegal, or attorney may try to talk to the nurse to see if he or she remembers the event or statement; and

6. Retain a nurse or physician to summarize the medical records.

Having a background into the customary and usual organization of a medical record is important to verify its accuracy. There are several pieces of information which help to verify the accuracy of a medical record. They include:

1. Knowing the information which should be in a medical or hospital record (i.e. admission note, discharge note, nurses notes, progress notes, surgery notes, anesthesia records, recovery room records, nursing notes, sponge counts, lab notes, imaging reports, abbreviations);
2. Knowing how the record is prepared;
3. Having a basic understanding of the symptoms, disease, diagnosis, and treatment;
4. Having a basic understanding of physician vocabulary;
5. Knowing how to read poor handwriting;
6. Knowing medical abbreviations; and
7. Knowing how records should be organized.

There are many ways and places to research medical and legal issues. The different ways to conduct this research are:

1. Medical research
    a. Attorney's office library;

b. Medical libraries. Locally, there are medical libraries at Hershey Medical Center, Harrisburg Hospital, Community General Osteopathic Hospital, and Polyclinic Medical Center. The library staff at all of these hospitals are very willing, able, and accommodating;

c. Local library. The local library can be helpful not only for conducting general research but, journal articles can be requested through an inter library loan (ILL);

d. Computer databases such as WESTLAW and LEXIS;

e. The Internet. There are several thousand websites that can help with research. For instance, MEDLINE (Pubmed) can help with locating medical journal articles and abstracts. There are entire medical journals on the Internet such as The New England Journal of Medicine. There are websites for Orthopedists, Chiropractors, Neurosurgeons, Neurologists, Internal Medicine Specialists, and almost every other specialty which may provide you with a general background into a specific area of medicine you are trying to research. Also, search engines can be useful which may lead to additional websites dealing with a particular subject.

f. Medical Dictionary. A medical dictionary may give you general terms that can form a basis for your research; and

g. Colleagues, friends, acquaintances. Particularly in personal injury law it is common for other attorneys to have had similar cases. It may be helpful to contact them or, if you are a member, conduct a search through the Trial Lawyers Associations (PAJ/AAJ), Jury Verdict Research.

2. Legal Research

a. Office Library;

b. State Law Library;

c. Law School Library;

d. Medical Library;

e. Local Library;

f. Computer Databases (WESTLAW/LEXIS);

g. The Internet;

h. Past Cases within the firm;

i. Seminars;

j. Colleagues; and

k. Legal Dictionary.

Sometimes a consultant will be helpful to obtain an understanding of a case. However, make sure there is a basic understanding of what needs to be learned and researched before speaking to the consultant. You are probably paying premium dollar to speak with a consultant. Therefore, it is important to get right to the point and not waste the consultant's time. The consultant knows the topic and is more than willing to help, however, if you waste the consultant's time the consultant may not help in the future. Some consultants to consider are:

1. Physician (preferably Board Certified);
2. Registered nurse;
3. Biomechanist;
4. Psychologist/Psychiatrist;
5. Hospital Administrator; and
6. Radiologist.

All of the above potential consultants may help you focus you on a certain aspect of the case that you may not have noticed. Therefore, if a problem arises in a case, you can fix or eliminate the problem before it becomes a crucial part of your case.

Another consultant to consider is using a focus group or a mock jury trial. One could compare a focus group to a typical jury, since the participants in the focus group are recruited in much the same manner as a jury. Focus groups help to see both sides of the case, not just the Plaintiff or Defendant. They can

also help with deciding whether or not to take a case. They help you notice what the potential jurors want to know most about the case. Therefore, you can focus more on a couple of important points, and you may discover that what you think is a very important part of the case, the focus group may disregard it, or find it to be not as important as you thought.

As noted previously, the initial screening of a case is probably the most important part of a case. This is your initial chance to look at the case from both sides before advocating your position. Without all of the initial records and proper initial work up, the defense needs to call only one witness, the medical record.

Also, you should contact all prospective witnesses and obtain statements. The insurance should also be verified for both your client and the other driver. If there is no insurance on the other driver then an uninsured motorist claim should be pursued.

## **Evaluating Liability Issues and Coverage:**

### I. Property Damage

Over the past years, the amount of property damage and pictures of the property damage have become very important in motor vehicle accident cases. The perception of jurors is that (even if it may or may not be incorrect) the amount of damage to a vehicle is an indication of the amount of injury to the person. Therefore, it is critical to obtain photographs of your client's property damage, but also the other person's property damage. It may also be

advisable to actually take off the bumper to show undercarriage damage that may not be shown on photographs. Also, the amount of property damage to a totaled vehicle may or may not be an indication of the actual damage because if a car is totaled the appraiser will generally not do an entire estimate.

II. Personal Injury Protection Benefits

Personal injury protection benefits or first party coverage is important in order to determine the amount of medical bills and/or wage loss which may be pleaded, proven and recovered at trial. In the Commonwealth of Pennsylvania, 75 Pa. C.S. §1720 and §1722 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) preclude the recovery of medical benefits which have been paid or payable by a third party source. The Declaration Sheet for the client and his/her health insurance book are very important in order to determine the amount of first party benefits which are available. However, it is very important to remember super-liens which pre-empt the preclusion provisions in the Pennsylvania Motor Vehicle Financial Responsibility Law from no subrogation, and thus, allow the bills and wage loss to be pleaded, proven and recovered.

III. Med Pay

Under the Pennsylvania Motor Vehicle Financial Responsibility Law, a medical care provider must accept as payment in full the Act VI reduced amount of the total charge of each medical bill related to injuries sustained in a motor vehicle accident. Below is a link to a website where the Act VI reduced

amounts for medical bills related to an automobile accident can be calculated. This website provides the Medicare Fee Schedule for each county in Pennsylvania. You must have a copy of the bill or at least the procedure code for each service.

The website is www.hgsa.com/professionals/reimbursement.shtml First, check to see what year the service was provided, then click on "Interactive Fee Schedule Calculator" under the appropriate year. Next, determine which county the service was performed in. If the service was performed in Bucks, Chester, Delaware, Montgomery or Philadelphia County, select Pennsylvania Charge Class 01. If the service was provided in any of the other counties, select Pennsylvania Charge Class 99. Next, enter the five-digit Procedure Code from the bill, and click Submit. The appropriate reduced amount payable will be 110% of the "PAR Amount".

## IV. Third Party Damages

Obviously, the amount of injury and damage to a person is important to consider. The third party's injuries are also important in addition to the property damage. Many times it is important to note that the other person responsible for the accident went to the ambulance or emergency room after the accident. It may also help to determine whether the other driver was ever injure din a low impact accident.

## V. Uninsured and Underinsured Drivers (UM/UIM)

Uninsured motorist (UM) coverage typically refers to coverage in

your client's insurance policy for a hit and run (unidentifiable) vehicle; when the insurance company for the person responsible is or becomes insolvent; when there is no coverage due to an exclusion; or the other driver is simply uninsured. Underinsured motorist (UIM) coverage, on the other hand, means that the client has already recovered monies from the third party, but the client has not been adequately compensated by the other person's insurance recovery, and thus, the amount of excess or difference in damages can be recovered.

There are several issues to remember when dealing with the various types of UM and UIM claims. With regards to both uninsured and underinsured motorist coverage, it is important to remember to protect any potential Statute of Limitations and with underinsured motorist claims, it is important to obtain a certified copy of the Declaration Sheet, offer of limits letter, and an affidavit of no other insurance from the other person's insurance company. Even though not required in Pennsylvania, it is important to try to obtain consent to settle and waiver of subrogation rights from the underinsured motorist carrier or there is a potential area of denial of coverage. Also, Pennsylvania is an excess state, and not a gap state with regards to underinsured motorist coverage which means that your client's recovery is the total of his or her damages minus what they already recovered, not the amount of the UIM coverage only.

When identifying areas of uninsured and underinsured motorist claims it is important to note the type of arbitration, IF it even applies, that the claim is going to be brought under. The general formats are Common Law, Uniform

Arbitration Act of 1927, the Uniform Arbitration Act of 1980, and AAA Arbitration. Pursuant to Pennsylvania law, if none is stated in the motor vehicle insurance policy, then the Uniform Arbitration Act of 1980 applies. It is also important to look at the scope of the arbitration provision in order to determine whether or not the issue being arbitrated is actually subject to arbitration or must be decided in court.

Other important uninsured and underinsured issues under the MVFRL are:

A. Whether or not uninsured and underinsured motorist coverage is available, or if it has been properly rejected;

B. Whether or not stacking has been offered and/or adequately rejected;

C. Whether or not a Section 1791 Important Notice was provided at the time of application for initial coverage;

D. Whether or not there has been a proper sign-down if applicable of uninsured or underinsured motorist coverage below the statutorily required liability limits equal to uninsured and underinsured motorist coverage;

E. Look for certain exclusions which may be valid or invalid under Pennsylvania law, including but not limited to the Governmental, territorial, named driver, non-permissive use, and household/family car exclusions. These are all important exclusions which are usually in every insurance policy and may be invalid as they apply to your case.

## **Product Liability Issues**

When damages are significant and/or the facts warrant, preserve

the vehicle in which your client was traveling in order to have an inspection conducted by an engineer. Also, depending upon the facts and circumstances, it may be necessary to actually preserve and have the other person's vehicle inspected for potential claims.

## Opening and Organizing the Case File

The opening and organizing of the file is vital. The file should be opened to include all relevant information on the client's case, including but not limited to personal, family, educational, criminal history, employment, medical treatment, insurance information, investigation, and all other relevant information. The case file can be organized many ways, but usually can be organized in a fashion with several folders behind one another to reflect correspondence, memoranda, attorney's notes, investigation, protected interests, insurance information, medical records, medical bills, pleading, discovery, authorizations signed by the client, and costs.

## Tactical Issues

a. Statute of Limitations

It is very important to note the Statute of Limitations on all motor vehicle accident cases immediately. Generally, in the Commonwealth of Pennsylvania, the statute of limitations is two years from the date of the accident, however, keep in mind that there are several exceptions and other requirements depending upon the type of claim. For instance, if a potential claim is against a governmental entity, then a six-month notice diary card must

be made in order to provide notice to the governmental and sovereign entity of a potential claim within six months of the accident. In addition, if the person injured is a minor, the Minor's Tolling Statute may apply for the minor. Furthermore, uninsured and underinsured motorist claims are generally brought under contract where the statute of Limitations is four years. However, the four years can be different for an uninsured motorist claim than an underinsured motorist claim. Generally, the uninsured motorist claim must be brought within four years from the date of the accident, and an underinsured motorist claim must be brought within four years from the time a person becomes underinsured. Even though uninsured and underinsured motorist claims are being brought, it may be necessary to file a separate Writ of Summons in order to protect the uninsured and underinsured motorist carrier's potential subrogation rights.

b. Conflicts of Interest and Multiple Representations

Generally, a case may arise where the attorney wants to represent the passenger(s) and driver in the same motor vehicle accident. Assuming the clients are made aware of the potential conflict of interest up front, then it is not improper to represent them upfront. However, if a lawsuit is filed and the other driver joins or adds the driver as an Additional Defendant, then a mandatory and un-waivable conflict of interest may arise.

## PRE-SUIT SETTLEMENT NEGOTIATIONS AND METHODS

### A. Preparing For the Demand/Settlement Request Package

The first important point to remember in order to effectively prepare a settlement demand is to approach the case from the start as if it is going to trial. It is usually a mistake to prepare a case assuming that it will eventually settle and one should anticipate the reverse.

Preparing a proper demand begins with developing the facts and investigation to support the liability and starting to understand the medical issues involved in the case. The last element of preparing the demand statement is the special damages/wage loss.

More and more, certain insurance companies are using computer programs to respond to demands. Therefore, a demand should be thorough and well documented. The liability must be fully investigated and witnesses (with statements if available) should be discussed. Also, it is important to establish in the demand whether the client had a pre-existing history of injury in the same or similar area of the body which was injured in the accident. If there is such a history, it is important to obtain any and all of the records for the pre-existing injury since they would be discoverable later and should be disclosed in negotiations.

Some suggestions for an effective demand are as follows:

1. Humanize your client. The insurance adjuster/defense attorney may not know your client and only see the

client/plaintiff as a faceless person to whom a file or claim has been assigned. When preparing a demand, do whatever you can to humanize your client so the adjuster stays attentive while reviewing the demand. On some occasions, a personal background section is included which outlines everything about your client including education, children, marital status, and possibly photographs. Another suggestion is to refer to your client on a first name basis throughout the demand.

2. Tell a story. The client's case should be presented in a way not to sound like other cases that the adjuster is reading. Not only tell what happened to your client, but why it happened. In the perfect world, the adjuster will complete reading the demand and think that the amount of your demand sounds reasonable or is at least negotiable, should be settled and well documented.

3. Address witnesses. Even if a witness is negative to your case, it is a good strategy to discuss them in the demand. If the clients' case has a negative witness, discuss in the demand the reasons why the witness may or may not be credible.

4. Organize medical records.

5. Include special reports, i.e. medical, accountants, engineers, etc.
6. Summarize special damages and do not bring claims that would not be brought as if you were at court.
7. Proofread.

It is important to remember that insurance companies are not afraid of being sued, particularly in small personal injury claims. However, the adjuster would prefer to close a file, but the adjuster will not do so simply by settling a small claim for more than it is worth. The adjuster has an obligation usually to justify any offers or settlements to at least one supervisor, and sometimes their salary or bonus may be tied to the case.

The demand letter may take many forms, but generally, should include the following:

1. A listing of all medical specials.
2. Calculation of any work loss with supporting documentation.
3. Listing of injuries and diagnoses related to the accident.
4. A chronological summary of how the collision has affected the client. It is in this section that elements such as pain, suffering, loss of life's pleasures, inconvenience, and other non-economic damages are discussed.

When preparing a motor vehicle demand in Pennsylvania, it is also important to include your client's insurance information and coverage. The

adjuster is going to need to see that your client had full tort as opposed to limited tort, and if there is a limited tort issue, then you should explain how limited tort does not apply. In addition, because of preclusions on pleading, proving and recovering certain benefits under the Pennsylvania Motor Vehicle Financial Responsibility Law, the adjuster is going to need to see what coverage is available in order to determine if any monies can be pleaded, proven and recovered.

**Alternative Dispute Resolution**

Even though a case has been filed in court, or even before suit is filed, there are many ways to resolve a claim amicably. The adjuster and company would like to try to save money on litigation costs, particularly if they know that the case should be settled, and for one reason or another, a third party is necessary. There are various alternative dispute options. The general formats are as follows:

1. Mediation. During mediation, it is important to make sure that both sides attend the mediation ready to settle. In fact, it is recommended that both sides at least make offers and demands prior to the mediation. Also, the client and insurance adjuster with authority to settle the case should be present. It should not be a situation where a mediator and the parties are present, but one side needs several days to consult with a different entity. However, there are certain cases which are not appropriate for mediation.

These cases include claims in which should be settled where the insurance company does not see liability, or where there is a serious limited tort issue. Also, from the insurance company's standpoint, if you believe the insurance company is not willing to compromise or offer of any more money to settle the case, or the plaintiff has not completed treatment and do not have all of the medical and special damages, then mediation is not suggested. Most other cases could be mediated in addition to any claims where the insurance company knows it is going to be responsible for liability and the only issue of value of damages. Claims with contributory negligence and co-defendants are good claims for mediation. Lastly, uninsured and underinsured motorist claims may be ripe for mediation, particularly if an experienced mediator who also acts as a neutral arbitrator on many occasions is the mediator.

2. Arbitration. Arbitration is generally recommended and successful when both sides know that the case should be settled, and for whatever reason cannot be settled without a third party reaching a decision. Some claims appropriate for arbitration are claims where one side is not willing to compromise, they want to argue their case to a neutral fact finder and have a decision rendered. In addition, claims where mediation cannot work. Other claims for arbitration could be where the client has unreasonable expectations, where

there are multiple parties, where there is a high or low verdict potential, but related high expenses, and particularly in coverage disputes or jurisdictions where it may take several months to have a case listed and placed on a trial list.

When considering arbitration through alternative dispute resolution, it is important to make agreements on whether or not the arbitration is binding or non-binding, whether the arbitration is subject to a high/low agreement, and any other parameters of the agreement. Furthermore, it is necessary to reach agreements as to what may or may not be disclosed to the arbitrator, and how the testimony will be presented, either live or by reports.

## AUTOMOBILE ACCIDENT CASES DURING TRIAL

### Defining Role in the Litigation Team

Your role in the litigation team starts by understanding that the attorney and paralegal are working as a "team". The paralegal is the most essential team member when it comes to trial preparation and keeping things organized during the trial.

The team should always remember that the trial attorney is ultimately responsible for the case and practicing law. Therefore, the paralegal must remember there are still limitations upon what he or she can do that include:

1. Not giving substantive legal advice to a client;
2. Not giving procedural legal advice to a client;

3. Not signing a pleading, discovery, or any other legal document;

4. Not representing a client in state or federal court or in any other legal proceeding including a deposition, unless statutorily or administratively allowed to do so; and

5. Not negotiating settlements on behalf of the attorney.

Without a team approach, the relationship between the paralegal and trial attorney will not be successful. The attorney and paralegal should have an on-going relationship. The paralegal is usually involved in the case from its beginning. The paralegal may have valuable suggestions and observations about the case that the attorney may not see.

Each team member should know each other's roles. If an attorney does something the paralegal can do or the paralegal does something the attorney can do, then there is a waste of time. Each role should be delineated at the start.

Some keys to working as a successful team are:

**Communication**

The key to knowing each person's role is through communication. It is important to have regular meetings between the attorney, secretary, and paralegal to update the status of each case. Regular meetings will help all those involved in the case focus on what has been done and what needs to be done in order to get the case ready for trial.

It is important for the team members to spend time learning each other's work habits, personal attributes, quirks, capabilities, preferences, etc. in order to

get to know one another. By knowing the other person, it will enhance communication and trust between one another and build a successful trial team.

**Get involved at the start:**

It is important that the paralegal be part of the case from the very beginning at the initial client interview. Get involved at the beginning to show the client you are working **with** the attorney. The client will see that you are part of the case and will probably feel more comfortable talking with you when the attorney is unavailable or if the client has a question you can answer in lieu of the attorney.

As part of the initial interview, the lawyer wants to always closely observe the client and ask questions. Clients usually feel that the attorney is really interested in the person and listening to their case if the attorney is not taking notes all of the time. Therefore, the paralegal can help the initial interview by taking the initial notes while the attorney is asking questions and developing a rapport with the client. The paralegal should always ask questions that the attorney may have forgotten or not developed. The paralegal may be able to follow up on additional physicians, witnesses, interviews, etc. and develop the initial client interview more thoroughly.

Following the initial client interview, the paralegal should be able to:

A. Open the file;

B. Write a follow up letter to the client, including information such as thanking the client for the meeting, confirming what the client and

attorney are going to do as a follow up to the initial interview, and requesting additional information;

C. Write letters to any insurance carriers notifying each company that the attorney is getting involved in the case;

D. Set up the files for subfiles such as medical records/bills, special damages, and summaries;

E. Organize charts for requesting medical records/bills; and

F. Diary dates to follow up with the client or anyone else.

**Be a resource of information (stay involved):**

After the initial interview and even once the case has been filed, the paralegal should be a valuable resource. As part of the pre-trial proceedings, the paralegal's role in the litigation team may be to:

A. Interview witnesses to see if they would be willing to give an investigator formal statements. As part of this process, the paralegal can learn the good and bad parts of the case and tell them to the attorney;

B. Go out to the scene of the accident with the attorney and take photographs;

C. Take photographs of the automobiles involved in the accident;

D. Help the attorney prepare a diagram of the accident scene;

E. Request the accident report;

F. Locate experts. As part of locating experts, there are many ways to find experts, including the internet, research similar cases that may have a list of experts used, and obtain articles, books, newspaper articles on the subject matter and contacting the authors of the materials.

G. Draft pleadings, including research on how and where to serve the defendant;

H. Draft discovery to the other side as well as draft discovery on behalf of the client. This includes promptly supplementing discovery responses when additional information is received. This also may include identifying incomplete discovery responses from the other party, or objections and preparing a memorandum to the attorney to possibly draft a letter to opposing counsel or a motion to compel;

I. Depositions including assembling documents that may be used as exhibits at the deposition, preparing outlines for each witness, research articles in books if you are deposing an expert, and preparing demonstrative materials if the deposition is being videotaped. The paralegal should try to attend as many depositions as possible, particularly if they are of the parties or experts. Once the transcript is received, the paralegal should organize the deposition exhibits, index them, and summarize the deposition transcript;

J. Use focus groups: The paralegal can work with a trial consultant to set up a focus group and/or possibly act as a moderator at the focus group, depending on what type of focus group you are trying. As part of the focus group, the paralegal should be able to prepare key demonstrative exhibits for presentation to the focus group to see how the evidence will play to a jury at trial; and

K. Jury research: The paralegal may do jury verdict research for each case.

**Stay organized:**

The most important part of the case is to make sure the file and case is organized. Photographs should be in specific folders or binders, each photograph should be labeled and, if possible, with the date and time each photograph was taken, who took it, and what it shows. Specific folders should be kept for each witness with a separate tab for each witness and all information about each witness including statements, depositions, and how they can be located. Expert witness binders for all experts including Curriculum Vitae, reports, notes, publications, etc. should be included.

# Trial Checklist

The paralegal is essential to prepare for trial. The attorney knows exactly how he/she wants to present the case, however, the paralegal is the one who needs to provide the tools and resources for the attorney to present the information. Some necessary items for trial are:

A. Prepare a trial notebook. The paralegal should be responsible for preparing the trial notebook, which should contain a separate tab for each witness who may be called, and for each witness who you expect the defense to call. Included with each tab should be all of the information needed to prepare the witness for his/her testimony or to prepare for cross-examination of the witness. Some of information that may be included within each witness tab are the witnesses trial subpoena, deposition, notes from interviews, formal statements, information about a witness in answers to interrogatories, prior testimony, books, articles on the witness, list of exhibits that will be introduced through each witness, and an outline of the testimony for each witness. Each witness should be contacted the day before he/she is expected to testify to ensure the witness knows what time to be present, and where. The witness should also be contacted about two weeks before trial so that the attorney can meet with the witness before the trial to review his/her testimony, if possible. If necessary, the paralegal or someone from the office should provide the witness with transportation and lodging. The paralegal should also have a phone number in order to notify the witness of changes in scheduling. If necessary, the paralegal should be prepared to stay with the witness until the time to testify.

   Also in the trial notebook should be tabs for the jury list, all pre-trial memorandum, motions for voir dire, points for charge, proposed verdict slips, motions in limine (if any), pleadings, discovery, opening and closing statements, etc.

B. As noted previously, witness folders should have all of the information on each witness as part of the folders.

C. Prepare exhibit folders and accessories;

D. Prepare points for charge;

E. Prepare voir dire;

F. Prepare jury list;

G. Prepare jury slip;

H. Prepare motions in limine;

I. Witness cards and letters;

J. Pleadings;

K. Discovery;

L. Props;

M. Videographer;

N. Projector screen;

O. Extension cord;

P. Deadlines and reminders; and

Q. Demonstrative evidence.

**Keeping the file organized at trial**

The file is used throughout the whole trial. During the day, exhibits may be set aside for certain witnesses or not used at all, and others are put into evidence. The file is usually totally separated and exhibits scattered by the end of each day. This goes the same for depositions and summaries. The paralegal needs to make sure that he/she puts the file back together after each day. If the file is not re-organized at the end of each day, and double-checked before each court day, exhibits, depositions, summaries, notes, pleadings, etc. may become lost. The attorney and paralegal should meet at the end of each day

to make sure that the paralegal knows what documents or information is being taken from the file overnight.

At the end of each day and prior to the start of Court each morning, the paralegal should be responsible for making sure that all materials are in their proper place. All file boxes, exhibits and any other documents necessary should be at the Courthouse and arranged prior to the start of Court each day.

During trial, the paralegal usually should have a box that contains any supplies which may be needed by the attorney during trial, including Post-It notes, index cards, legal pads, pens, markers of all colors, stapler/staples, paper clips, white-out, envelopes, rulers, extension cord, pointers, easels, etc.

At the end of each day and before the beginning of each day, the attorney and paralegal should look at the Courtroom and know what is going to happen during the next Court session. The attorney and paralegal should discuss what may be used including tripods, computers, television sets, and other equipment. Prior to the proceedings, the paralegal should check to make sure that all the equipment works. Jurors do not like to see unprepared attorneys.

During the trial, the exhibits should be organized and be readily available. A set of exhibits should be made for the attorney so that he/she can mark up as needed, and a second set of clean exhibits should be available to be entered into evidence. In some courts, it may be necessary to have a third or fourth set of exhibits available for the court and opposing counsel. This should be

discussed prior to trial, but also made sure that they are organized and available during trial. The paralegal should know how to obtain and retrieve an exhibit at an instance.

**Assisting at jury selection**

One of the most important parts of jury selection is for the paralegal to obtain a jury list and, if possible, questionnaires prior to trial. The paralegal should obtain a copy of the jury list and questionnaires as soon as possible. This will allow the attorney, paralegal, and office staff to review the jury list to make a determination, ahead of time, of what jurors may be subject to striking for cause, challenge, or a preemptory strike. Our firm tries to also circulate the jury list to other firms out of county to see if they are acquainted with any of the potential jurors or can tell us anything about them. Depending upon the county you are practicing in, if you are unfamiliar with the county, the paralegal and attorney may want to drive by different homes and developments in the county to see the socio-economic status, hobbies, bumper stickers, homes, vehicles, etc. of the majority of the potential jurors. In addition, depending on the county, a consideration concerning the majority party affiliation of potential jurors should be taken into consideration.

The attorney and paralegal should know how the trial judge will conduct jury selection. Some judges, particularly in federal court, do not allow the attorneys to ask any questions of the juror during jury selection. Most judges in state court provide some initial information and ask some questions, but then

allow for follow up questioning, although some counties are more limited than others. The attorney and the paralegal need to know this ahead of time so that they can decide what specific areas to ask about, if they are going to be limited, which would be helpful in jury selection. One particular concern for Plaintiffs is to try to find out a prospective juror's attitude towards the judicial system.

During jury selection itself, the paralegal needs to be observant and listen. The attorney is not going to be able to look at all of the jurors simultaneously, so the paralegal needs to watch for everything and look for nuisances and voice reflections in answer. Jury selection is not a science, and much of it is instinct and intuition so the paralegal needs to be able to communicate and express his/her feelings to the attorney during selection.

In addition to listening, the paralegal can watch what type of clothing each potential juror has worn. The paralegal can also observe potential jurors to see if some of the jurors appear to be friends.

The paralegal should be able to prepare a seating chart for the attorney so he/she can address the jurors by name during voir dire. In Dauphin County, particularly, from a Plaintiff's standpoint, there is not a lot of time to do this, so the paralegal should be cognizant of how the seating is done during jury selection well ahead of time. The paralegal should be writing down notes in the seating chart for each potential juror during jury selection.

Over time and through experience, the paralegal can essentially become a second trial consultant during jury selection.

## Presenting evidence

The paralegal can and should be an invaluable part of the team in the courtroom during trial. Some paralegals sit at counsel table while others do not and some jurisdictions may not allow this. However, whether the paralegal is at the counsel table or not, he/she is invaluable. The paralegal can anticipate as much the lawyer's needs as possible for each witness. This will allow testimony to run smoothly and without delay.

During trial, the paralegal should keep track of what exhibits have been identified, offered and admitted into evidence and most importantly to make sure that he attorney moves to have each exhibit admitted, and in fact, move to admit all exhibits at the end of their case even if all of them have already been admitted in order to make certain. The paralegal can also take notes which will help the trial lawyer during the case. The paralegal may pick up on something that needs to be corrected or brought out that was not brought out and bring it to the attorney's attention. However, over time, it is usually found that for the lawyer and paralegal to exchange notes during trial can be distracting to the jurors.

In order to help present the evidence properly, the paralegal should help:

A. Notify the witnesses an get them to the courtroom;

B. Pull out and separate exhibits as each witness is prepared to testify and if necessary, have all of the supporting "props" ready for use.

When determining demonstrative evidence, it is important to think about what types of exhibits will be persuasive in your case. Some of these demonstrative evidence items to think about are photographs, x-rays, motion pictures, charts, diagrams, maps, models, sketches, medical illustrations, etc. Remember that the exhibit needs to fit into the courtroom and be effectively utilized. If they cannot be utilized in the court, it is of no use. Of most importance, now your audience. Depending on your audience, be it a judge, jury, or opposing counsel, will effect what type of exhibits you will use.

C. Retain a video technician in order to show video-taped depositions;

D. If necessary, the paralegal may be required to read in certain portions of depositions at trial;

E. Keep track of all exhibits and reorganize the file;

F. Make sure that the exhibits are admitted; and

G. Help the attorney to observe events in the courtroom. Try to be positive and constructive in helping the attorney.

As shown, the paralegal and attorney can be an effective team. However, the team can only be successful if it is communicating, organized, and trust one another. A team that communicates, is organized, and trusts each other is going to be successful in any case.