

# THE PERRY LAW FIRM, L.L.C.

update

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## Institution Update

### *Ex-Parte Communication with Former Employee of Corporate Defendant*

Our firm has noticed that in more and more cases, plaintiffs' attorneys have been contacting and interviewing former employees of our corporate defendant/clients. Many corporations and defense counsel incorrectly assume that the attorney-client privilege bars this type of communication. Although few cases have addressed the issue in Pennsylvania, the practice is not prohibited. As a result, corporate defendants, including professional corporations, should be aware that plaintiffs' counsel can and will interview former employees to elicit information regarding a pending lawsuit.

Pennsylvania Rule of Professional Conduct 4.2 - Communication With Person Represented, provides, in pertinent part, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

In *Pritts v. Wendy's of Greater Pittsburgh, Inc.*, 37 D. & C. 4th 158 (CP Allegheny Cty. 1998) Judge Wettick, a highly respected authority on Pennsylvania civil procedure, held that Rule 4.2 does not prohibit ex-parte communications with former employees.

In *Pritts*, plaintiffs' counsel requested Wendy's to provide the name, last known address, and telephone number of former employees who worked at the facility, so that he could interview them. In denying the defendant's request for a protective order, Wettick noted that a party's right to interview witnesses is a valuable right and that Wendy's request that defense counsel be present whenever plaintiffs' counsel contacts Wendy's present or former employees would make it less like a true interview and more like a formal deposition.

Wettick noted that Pa. R.C.P. 4003.6 is the only provision of the Pennsylvania Rules of Civil Procedure governing depositions and discovery that prevents an attorney from obtaining information through an interview (precluding an ex-parte contact by a defense attorney with a treating physician). Wettick reasoned that a former employee has no existing relationship with a corporate party and is therefore not a "party." Therefore, the language of 4.2 does not cover communications with former employees who have not retained counsel.

Judge Wettick found that his ruling was

consistent with formal opinion 91-359 issued by the American Bar Association Committee on Ethics and Professional Responsibility, as well as formal opinion 90-142 of the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility. With respect to former employees, the Committee concluded that Disciplinary Rules 4.2 and 4.3 allow an attorney to communicate with an organization's unrepresented former employees under the following circumstances: (1) the attorney is prohibited from eliciting or using information that may be protected by the attorney-client privilege; (2) the attorney must immediately disclose his or her capacity to the former employee; (3) if the person contacted requests personal counsel or the company's counsel to be present for their interview, the request must be honored; (4) the attorney should advise former employees that they have the right to refuse to be interviewed or, if they wish, to be interviewed with the company's counsel present; (5) the lawyer may not contact a former employee of the opposing party that the lawyer knows to be represented by separate counsel without the consent of that counsel.

Judge Wettick reasoned that the first three caveats were not at issue because plaintiffs' counsel acknowledged that all three of those conditions should and would be met. As to the remaining two requirements (4 and 5 above), the plaintiffs in *Pritts* stated they would follow ABA formal opinion 91-359 which does not require the attorney to advise former employees that they have the right to refuse to be interviewed or, if they wish, to be interviewed with the company's counsel present. In refusing to enforce the final two requirements, Wettick reasoned that an attorney violates Rule 4.3 if the attorney causes an unrepresented person to believe that he or she has an obligation to submit to an interview, or if the attorney disregards the request of an unrepresented person that the interview be terminated. However, 4.3 does not impose a "Miranda" requirement that unrepresented former employees be advised that they have the right to refuse to be interviewed, or to be interviewed only with the company's attorney present. Furthermore, since 4.2 does not extend to former employees, this rule cannot be the source of any "Miranda" requirement. Consequently, there is no source for this "Miranda" requirement in the Rules of Professional Conduct.

With respect to present employees, the key issue is whether they are managerial employees. The rule essentially states that, a lawyer representing a client may conduct ex-parte communications about the matter of the representation with present non-managerial employees of an opposing party who have not made acts or omissions in connection with the matter at issue that may be imputed to the party for purposes of its liability, and whose statements will not constitute admissions on the part of the corporation. Judge Wettick noted that there are no bright lines for determining who is and who is not a present "managerial" employee, for distinguishing between present managerial employees who are actors and present managerial employees who are simply observers.

Judge Wettick's reasoning was followed in *Wein v. Williamsport Hospital and Medical Center*, 45 Pa. D. & C. 4th 537 (Lycoming Cty. 2000). In that case, Judge Kieser granted plaintiffs' counsel's motion to compel discovery responses seeking the names, addresses and telephone numbers of former employees.

There are no absolute safeguards against a disgruntled former employee discussing matters with a plaintiff's lawyer in a pending case. There are several measures that a corporation can take to mitigate these concerns. First, conduct exit interviews with employees on a regular basis and encourage employees to contact the corporation if they are ever contacted by a lawyer in connection with a pending matter. Nothing prohibits a corporation from informing former employees that they have a right to refuse to be interviewed and that they certainly can ask for counsel if they choose. Note, however, the corporation should not tell the former employee (or present employee who is about to become a former employee) that they cannot or should not speak with a lawyer in a pending litigation. Finally, there is nothing to prohibit corporations and their counsel from doing their own "legwork." Corporations and their counsel should identify early on whether any former employees are important witnesses to a case and interview them promptly.

Mark T. Perry, Esquire

fall/winter 2005

### *Primary Insurance Limits to Remain for Now*

On July 8, 2005, the Pennsylvania Insurance Commissioner issued a press release on the ability of the current medical malpractice marketplace to offer an additional \$250,000 of coverage for health care providers in Pennsylvania. Based on the market analysis, Commissioner Diane Koken has concluded that there is not sufficient capacity to shift a greater proportion of medical malpractice coverage to the private market from the state MCARE Fund.

Health care providers in Pennsylvania are required to carry \$1 million in coverage. Currently, the first 50 percent (\$500,000) comes from a private insurance company and the remaining 50 percent (\$500,000) comes from

the MCARE Fund. Current law mandates that the limits be increased unless the Insurance Commissioner concludes that there is not adequate additional capacity.

Based upon an actuarial study conducted by PriceWaterhouse Coopers, LLP it has been found that since the passage of Act 13 there have been improvements in the medical malpractice marketplace from a capacity standpoint – meaning there is more coverage available in the private market, Koken said. “However, the market conditions, as found in the study, do not show sufficient additional capacity to support a ‘step-up’ in basic insurance limits at this point.”

“While the data illustrates movement in a positive direction, I have concerns that need to

be allayed before I could responsibly allow the primary marketplace to increase the primary malpractice insurance limit to \$750,000 from \$500,000.” Koken added.

Until market conditions improve, the current levels of \$500,000 private insurance coverage and \$500,000 MCARE insurance coverage will remain in place.

Commissioner Koken’s July 8, 2005 press release and Report, “Findings in Medical Malpractice Insurance Capacity Study” can be found on the Pennsylvania Insurance Department website.

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*Paul J. Wylam, Esquire  
Cindy A. Sheridan, Esquire*

## Immigration Law Update

### *Recent Changes to Immigration Law Make it Easier for Providers to Hire Foreign Trained Nurses and Physical Therapists*

President Bush signed into law H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005. This Act includes provisions that directly relate to immigration. Specifically, the Act places unused employment-based visa numbers from fiscal years 2001-2004 back into use for future fiscal years when

there is a demand that exceeds the available visa numbers. By placing unused employment-based visa numbers back into use, employers will have the ability to sponsor additional foreign nationals, where visa numbers may not have been previously available, for positions in which U.S. citizens and legal permanent residents are unavailable. This program is applicable to

foreign nationals including nurses and physical therapists. In light of the general shortage of allied health care providers throughout the United States, this Act provides an opportunity for healthcare providers struggling with the healthcare shortage.

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*Salvatore Savatteri, Jr., Esquire, MHA*

## Employment Law Update

### *Disparate Impact Claims Now Allowed Under Age Discrimination in Employment Act (ADEA)*

Earlier this year, the United States Supreme Court ruled that plaintiffs asserting age discrimination claims under the Age Discrimination in Employment Act (ADEA) do not have to prove that their employer deliberately discriminated against them, just that the employer’s policies disproportionately harmed them. *Smith v. City of Jackson, Mississippi, et al.*, 125 S. Ct. 1536 (2005).

In *Smith*, the City of Jackson adopted a pay plan granting raises to all city employees. The articulated intent of the plan was to “attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race, and/or disability.” The plan was also motivated, at least in part, by the City’s desire to bring the starting salaries of police officers up to the regional average. Those who had less than five years tenure received proportionately greater raises when compared to their former pay than those with more seniority. While some officers over the age of 40 had less than five years of service, most older officers had more. The plaintiffs were officers over 40 who received

less of an increase than younger workers.

In *Smith*, the older officers who filed suit under ADEA, claimed that the City deliberately discriminated against them because of their age (the “disparate-treatment” claim) and that they were “adversely affected” by the plan because of their age (the “disparate-impact” claim). Judge Stevens, writing for the court, noted that despite the age of ADEA, this was a question the court had not yet addressed.

The importance of the *Smith* case is that employees can now bring disparate impact claims in age cases under the ADEA. Disparate impact claims involve situations where workers in a protected class are adversely affected by certain policies of their employers, even where the employer’s employment practices are neutral in their treatment of different groups of workers. Previously, although disparate impact claims were permitted under Title VII of the 1964 Civil Rights Act, which bans discrimination based on sex, religion, race, and national origin, such claims were not available under the ADEA.

In *Smith*, the Supreme Court rejected the petitioners’ claim, noting that the employees did little more than point out the pay plan at issue

was relatively less generous to older workers than to younger workers. They failed to identify any specific tasks, requirement or practice within the pay plan that had an adverse impact on older workers. The court noted that it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. In sum, the court found that the City’s decision to grant a larger raise to lower echelon employees for the purposes of bringing salaries in line with that of surrounding police forces was a decision based on a “reasonable factor other than age” that responded to the City’s legitimate goal of retaining police.

Although the Plaintiffs’ claims failed in *Smith*, the case changes the landscape of age discrimination claims brought under the ADEA and allows disparate impact claims.

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*Frank J. Brier, Esquire  
Amy A. Shwed, Esquire*

### *How Courts Have Interpreted the Certificate of Merit Rule*

The Certificate of Merit requirement in professional negligence cases was one of the most significant changes brought about by Act 13. Rule 1042.3 of the Pennsylvania Rules of Civil Procedure now requires plaintiffs to submit a Certificate of Merit within 60 days of filing a complaint.

The Certificate of Merit requirement applies not only to each and every healthcare provider named in a lawsuit, but also to any professional liability claim including those against accountants, architects, and lawyers. Sanctions are available against the plaintiff if the court determines that an attorney violates this Rule either by falsely claiming that the case is such that an expert is not needed, or by improperly certifying that an appropriate licensed professional has supplied the required written statement.

#### **Get it Right the First Time**

The sixty day period for filing a certificate of merit in medical malpractice action begins to run on the date the original complaint was filed, not on the date the complaint was reinstated after plaintiff failed to effect service. *Hoover v. Davilla*, 862 A.2d 591 (Pa. Super. 2004). Similarly, in *O'Hara v. Randal, et al.*, 879 A.2d 240 (Pa. Super. 2005) the Superior Court held that the sixty-day period did not start anew when the patient amended the original complaint.

#### **What the Defendant Must Do**

If a Plaintiff does not file a required certificate of merit the defendant must file a praecipe for entry of judgment of *non pros*. The praecipe for entry of judgment of *non pros* must be filed with the prothonotary on the record. *Warner v. University of Pennsylvania Health System*, 874 A.2d 644 (Pa. Super. 2005). It must be noted that there is no relief if a praecipe for entry of judgment of *non pros* is filed after the certificate of merit is filed. *Helfrich v. UPMC Shadyside Hospital* 64 Pa.D. & C. 4th 129 (CP Allegheny Cty. 2003).

#### **However, Be Careful in Federal Court**

The procedure for obtaining a dismissal differs in state and federal court. Rule 1042.3 has been deemed a "substantive" provision

of law, and, as a result, the certificate of merit requirement applies to diversity cases in federal court. However, the mechanism for obtaining a judgment has been deemed "procedural," and, therefore, one must follow the federal rules [Federal Rule of Civil Procedure 7(b) and 41(b)] to obtain the actual dismissal. In Pennsylvania, Rule 1042.6 provides that upon a praecipe of the defendant the prothonotary shall enter judgment of *non pros* against the plaintiff for failure to file a certificate of merit or move for an extension of time to do so, within the sixty-day timeframe. In other words, no intervention from a judge is required. By contrast, Federal Rule 41(b) provides that a defendant may move for dismissal of an action or a claim for failure of the plaintiff to prosecute or comply with the procedural rules of any order. Federal Rule 7(b) provides that an application to the court for an order shall be by written motion, stating the particular area of the grounds and relief being sought. In *Abdulhay v. Bethlehem Medical Arts, et al.*, (E.D. Pa. 2005) the court granted plaintiffs' motion to strike the praecipe for entry of judgment of *non pros* which the defendants filed without application for order of the court. As a result, be careful to follow the federal rules for entry of judgment pursuant to Rule 7(b) and 41(b) when seeking a dismissal pursuant to the certificate of merit rule. Of course, an interesting question for a federal court case will be whether or not the plaintiffs will be allowed to file a motion to extend the time for filing a certificate of merit once they receive the defendants' motion to enter judgment based upon the failure to file the sixty-day rule requirement.

#### **Corporations are Included**

The courts have rejected plaintiffs' arguments that a certificate of merit is unnecessary in an action brought against a corporate entity, such as a hospital. Judge Terrence Nealon, Court of Common Pleas, Lackawanna County, held that a corporate liability claim against a hospital must be supported by an independent certificate of merit. *White v. Behlke*, 2004 WL 3259082. In *Dobos v. Pennsberg Manor*, PICS Case No. 05-1110 (Pa. Comm. July 7, 2005), the Commonwealth Court held that a plaintiff was required to file a certificate of merit in an action against an extended care nursing facility.

#### **Have a Heart...**

Pennsylvania courts have been tough on plaintiffs who have failed to comply with the rule. In *Hoover, supra.*, the Superior Court endorsed Judge Wettick's view expressed in *Helfrich, supra.*, that it is nearly impossible for a plaintiff to establish a reasonable explanation for failing to file a certificate of merit within 60 days since the rule governing the practice provides a framework for extending the deadline.

However, courts have allowed plaintiffs to set aside the judgment in extraordinary circumstances. Pennsylvania Rule of Civil Procedure 3051(b) establishes the necessary elements to open a judgment. These include: petition is timely filed; there is a reasonable explanation or legitimate excuse for the inactivity or delay; and, there is a meritorious cause of action. In *Harris v. Neuburger*, 877 A2d 1275 (Pa. Super. 2005) the court held that an order granting petition to open judgment of *non pros* in a medical malpractice action that was entered due to failure by the administrator of patient's estate to file certificate of merit within 60 days of filing complaint was not abuse of discretion. The administrator substantially complied with the rule by providing affidavit certifying existence of medical expert reports that the administrator had complied with the rule, and the motion to reopen was within one week of judgments of *non pros*.

In *Almes v. Buarket*, 881 A.2d 861 (Pa. Super. 2005), a divided Superior Court panel held that the plaintiffs were due relief from a *non pros* judgment where the one-week delay in the filing of the certificate was due to a death in their attorney's family.

Of course, even if an entry of judgment of *non pros* is entered against a plaintiff, and statute of limitations has not expired, then Plaintiff can still bring a new action prior to expiration of statute of limitations. *Helfrich v. UPMC Shadyside Hospital* 64 Pa.D. & C. 4th 129 (CP Allegheny Cty. 2003).

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*John R. Hill, Esquire*  
*Joseph M. Kelly, Esquire*

### *Participation in MCARE is Optional for Healthcare Providers Practicing Less than 50% in Pennsylvania*

Health care providers practicing less than 50% in Pennsylvania must secure basic insurance coverage limits as required by and consistent with Act 13 of 2002. Current coverage limits are \$1 million per occurrence or claim/\$3 million per annual aggregate. Health care providers who practice less than

50% may choose to participate in MCARE. If a health care provider practicing less than 50% chooses not to participate in MCARE, they must secure basic insurance coverage limits of \$1 million per occurrence or claim/\$3 million per annual aggregate. For those health care providers practicing 50% or

more, MCARE participation is mandatory.

Source: MCARE Bureau of Policy Administration (7/1/05)

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*William J. Aquilino, Esquire*

# Question

*If you bring an action in a jurisdiction that does not automatically establish case management deadlines upon commencement of the action, is there a method under the Pennsylvania Rules of Civil Procedure to establish such deadlines?*

# Answer

**yes.** *Any party may file a motion requesting the Court to issue a Scheduling Order one year from the date the answer was filed. Thereafter, within thirty (30) days the Court must issue a Scheduling Order or case management conference. The Scheduling Order shall include schedules for the completion of discovery and the production of expert reports.*

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*Caroline M. Miller, Esquire*

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