

KEYS TO EFFECTIVE MOTIONS PRACTICE IN THE CIVIL CASE

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I. OVERVIEW OF PRETRIAL MOTIONS

A. *Purpose of Pretrial Motions*

Pretrial motions may serve a variety of goals. For example, an attorney may use a pretrial motion to:

1. Educate the court;
2. Streamline the case and limit issues for trial;
3. Eliminate/limit controversial scientific evidence and testimony;
4. Obtain advance rulings on evidentiary and substantive legal issues; and
5. Avoid surprise.

B. *When to File Pretrial Motions*

Before filing a pretrial motion, an attorney must ask himself or herself a series of questions. These include:

1. Is the motion timely? Is it too early or late?
2. Is the motion legally sound?
3. Will the motion help or hurt the client's overall objectives?
4. Is there some way to achieve the client's immediate goals other than by filing a motion?
5. Will the motion alert the other side to something of significance that is better left for a surprise at trial?
6. Will filing the motion expose the client to some counter-attack?
7. What are the chances of winning the motion?

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8. What are the consequences of losing the motion?
9. What is the likelihood that the court will write an opinion and what impact will this have if the motion is lost?

C. *Vexatious Motions*

1. There is no Pennsylvania rule of procedure which expressly allows a court to sanction parties or attorneys who file motions (other than discovery motions) in bad faith or for improper purposes. The authority to impose sanctions is generally deemed to be part of the inherent power of the court.
2. 42 Pa.C.S. §2503 discusses the right of a party to collect counsel fees in various situations, including those cases where the party's opponent has engaged in "dilatatory, obdurate or vexatious conduct" or has acted arbitrarily, vexatiously, or in bad faith.
3. Pa.R.C.P. 4019 allows a court to impose sanctions in the form of costs and fees for various discovery abuses.
4. Federal practice. Pretrial motions filed in federal court are subject to Fed. R. Civ. P. 11. Under Fed. R. Civ. P. 11(c), a court may sanction an attorney, the law firm, or the relevant client for filing a motion in bad faith or for some improper purposes.
5. Similarly, 28 U.S.C. §1927 states that an attorney who "unreasonably and vexatiously" multiplies the proceedings in any case may be personally liable for the costs, expenses, and fees incurred as a result of such conduct.

II. PRELIMINARY OBJECTIONS

A. *Scope of Rule*

Pa.R.C.P. 1028(a) allows any party to preliminarily object to any pleading on various express grounds:

1. Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;

2. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
3. Insufficient specificity in a pleading;
4. Legal insufficiency of a pleading (demurrer);
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; and
6. Pendency of a prior action or agreement for alternative dispute resolution.

B. *Use of Preliminary Objections*

A preliminary objection under Pa.R.C.P. 1028 is used to challenge the sufficiency of a pleading on its face. “In reviewing preliminary objections, only facts that are well-pleaded, material and relevant [should] be considered as true, together with such reasonable inferences that may be drawn from those facts, and preliminary objections [should] be sustained only if they are clear and free from doubt.” *Santiago v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, 418 Pa. Super. 178, 613 A.2d 1235, 1238 (1992); *Mellon Bank, N.A. v. Fabinyi*, 437 Pa. Super. 559, 567-568, 650 A.2d 895, 899 (1994). Preliminary objections should be sustained where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover. *Santiago*, 418 Pa. Super. at 184-185, 613 A.2d at 1238; *see also Milliner v. Enck*, 1998 Pa. Super Lexis 408, 709 A.2d 417, 418 (1998).

It is important to note that while functioning like a federal dismissal motion under Fed.R.Civ.P. 12, a preliminary objection is *not* a “motion.” It is a pleading. *See* Pa.R.C.P. 1017(a). As such, it must be verified and also may itself be preliminarily objected to.

C. *Federal Practice*

Fed.R.C.P. 12 allows for a similar type of challenge to the facial deficiency of a pleading. Under Rule 12(b)(6), a claim may be dismissed for failure to state a cause of action. *See Gould Elec., Inc. v. U.S.*, 220 F.3d 169, 178 (3d Cir. 2000); *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990). The Court must accept the facts presented in the pleadings as true and in a light most favorable to a plaintiff, where the pleading fails as a matter of law to state a cause of action, the pleading must be dismissed. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Gould Elec.*, 220 F.3d at 178. In the same way, where no set of facts could be adduced to support a claim for relief, the grant of a motion to dismiss is appropriate. *See id.*

Rule 12 also provides other enumerated grounds that must be raised at the time a motion to dismiss is filed or they are waived. *See* Fed.R.C.P. 12 (h) (challenges to *personal* jurisdiction, improper venue, insufficiency of process, or insufficiency of service must be raised in the motion to dismiss if one is filed, or in the responsive pleading, otherwise they are waived).

III. PRELIMINARY INJUNCTIONS

A. *Scope of Rule*

Pa.R.C.P. 1531 authorizes the issuance of a preliminary or special injunction after written notice and a hearing unless it appears to the court that immediate and irreparable harm will be sustained before notice can be given or a hearing can be held.

When determining whether to issue a preliminary or special injunction without a hearing or notice, the court may act on the averments in the pleadings or petition and may also consider affidavits of parties or third persons or any other proof as required by the court.

1. A bond must be posted by the movant. *See* Pa.R.C.P.1531 (b).
2. An injunction issued without notice will be dissolved after five days unless a hearing is held. *See* Pa.R.C.P. 1531 (d).
3. Any party may move at any time to dissolve an injunction. *See* Pa.R.C.P. 1531 (c).

B. *Use of Motion*

A court will grant a preliminary injunction with notice or without notice where there: 1) exists a threat of immediate and irreparable harm that cannot be remedied by damages; 2) greater injury will result by refusing the injunction than by granting it; 3) the injunction will restore the parties to their status as existing prior to the alleged wrongful conduct; and 4) the alleged wrong is manifest and the injunction is reasonably suited to abate it. *See WPNT, Inc. v. Secret Communication, Inc. t/d/b/a WDVE FM*, 443 Pa. Super. 269, 271, 661 A.2d 409, 410 (1995) (applying Pa. R. Civ. Proc. 1531); *Soja v. Factoryville Sportsmen's Club*, 416 Pa. Super. 29, 34, 522 A.2d 1129, 1131 (1987); *Berger v. West Jefferson Hill School Dist.*, 669 A.2d 1084, 1086 n.1 (Pa. Commw. Ct. 1995).

A Court may also grant a preliminary injunction under Pennsylvania law *without notice and a hearing* when “there exists a need for unusual haste so that a clear right may be protected from immediate and irreparable injury.” *WPNT, Inc.*, 661 A.2d at 411. “In that event, the [C]ourt must

make a finding that relief is necessary and must be awarded before the defendant can be notified.” *Id.*; see also *Hart v. O’Malley*, 676 A.2d 222, 223 n.1 (1996).

Note that the term “temporary restraining order” or TRO is not used in state practice. State court’s often use “special injunction” instead of TRO.

C. *Federal Practice*

Federal injunction practice is similar to state practice. A preliminary injunction will be granted if a movant satisfies four factors: 1) the likelihood of success on the merits; 2) the probability of irreparable harm if the injunction is not granted; 3) that granting injunctive relief will not result in greater hardship to the defendant; and 4) the issuance of an injunction is consistent with public interest. See *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994); *Bieros v. Nicola*, 857 F. Supp. 445, 446 (E.D. Pa. 1994).

This same standard also is applicable to temporary restraining orders or *ex parte* injunctions. *Bieros*, 857 F. Supp. at 446.

IV. **MOTIONS FOR NON PROS / JUDGMENT UPON DEFAULT OF ADMISSION**

A. *Scope of Rule*

Pa.R.C.P. 1037 provides a vehicle for a party to demand that a complaint be filed if an action, commenced by writ of summons, remains unprosecuted.

B. *Use of Motion*

A *defendant* may file a praecipe with the prothonotary. The prothonotary shall then enter a rule upon the plaintiff to file a complaint. If the complaint is not filed within twenty days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros. See Pa.R.C.P.1037 (a).

Upon praecipe of a *plaintiff*, the prothonotary shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend or for any relief admitted to be due by the defendant’s pleading. See Pa.R.Civ.P. 1037 (b) (emphasis added).

1. Damages will be assessed by the prothonotary if plaintiff is entitled to a sum certain, or damages will be assessed at a trial limited to damages. See Pa.R.Civ.P. 1037 (b)(1).

C. *Standards*

The standard used to determine whether a motion for non pros should be granted has been revisited recently by the Pennsylvania Supreme Court. In 1968, the Pennsylvania Supreme Court decided *James Bros. Co. v. Union Banking and Trust Co.*, 247 A.2d 587, 589 (Pa. 1968), which set forth a three part test for deciding non pros motions: 1) a want of due diligence in failing to proceed with reasonable promptitude; 2) no compelling reason for the delay; and 3) the delay has caused some prejudice to the adverse party. Then in 1992, the Court in *Penn Piping, Inc. v. Insurance Co. of N. Am.*, 529 Pa. 1006, 603 A.2d 1006 (Pa. 1992) held that prejudice would be presumed if there is a delay of more than two years in substantive docket activity.

This “presumed prejudice” standard, however, was abandoned in 1998 by the Pennsylvania Supreme Court’s decision in *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998). The *Jacobs* court essentially returned to the three-part test in *James Bros.* which requires that actual prejudice be demonstrated by the complaining party.

On the same day that *Jacobs* was decided, the Pennsylvania Supreme Court also decided *Marino v. Hackman*, 551 Pa. 369, 710 A.2d 1108 (1998) and concluded that an evaluation of *non-docket* activity should be included in the analysis of whether there was a compelling reason for the delay sufficient to avoid the entry of a non pros judgment.

V. MOTIONS FOR JUDGMENT ON THE PLEADINGS

A. *Scope of Rule*

Pa.R.C.P. 1034(a) allows any party to move for judgment on the pleadings at any time after the relevant pleadings are closed, provided that the motion is filed early enough that it does not unreasonably delay the trial. A motion under Pa.R.C.P. 1034 may be directed to one or more specific legal issues or may seek judgment on the entire case.

B. *Use of Motion*

A motion under Pa.R.Civ.P. 1034 asserts that, on the face of the pleadings alone, the moving party must prevail as a matter of law. *Pennsylvania Ass’n of Life Underwriters v. Foster*, 147 Pa. Cmwlth. 591, 597, 608 A.2d 1099, 1101-02 (1992). In considering such a motion, the court must view the pleadings in the light most favorable to the party against whom it is directed. The burden of proving the absence of any factual issue is on the movant. *Township of Bensalem v. Moore*, 152 Pa. Cmwlth. 540, 542-43, 620 A.2d 76, 77 (1993). No materials, other than the pleadings

themselves, may be considered in ruling on the motion. *Giddings v. Tartler*, 130 Pa. Cmwlth. 175, 178, 567 A.2d 766, 767 (1989).

C. *Relation to Demurrer*

A motion for judgment on the pleadings is conceptually analogous to a demurrer, raised by preliminary objection to the complaint. In fact, Pa.R.C.P. 1032(a) specifically states that the defense of failure to state a claim upon which relief can be granted may be raised by preliminary objection (demurrer) and/or by motion for judgment on the pleadings.

D. *Federal Practice*

Fed. R. Civ. P. 12(c) allows for motions on the pleadings in federal court in much the same manner as the Pennsylvania Rules. One important difference, however, is that Fed. R. Civ. P. 12(c) allows a court to consider matters outside the pleadings themselves and to treat the motion as one for summary judgment under Fed. R. Civ. P. 56. *Cf. Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1206, n.18 (3d Cir. 1992); *Alexander v. Department of Public Welfare*, 137 Pa. Cmwlth. 342, 345, 586 A.2d 475, 476, *appeal denied*, 527 Pa. 651, 593 A.2d 423 (1991).

VI. DISCOVERY MOTIONS

A. *Timing/Procedural Aspects*

Certain districts, like Pittsburgh, for example, have a particular time and day reserved for discovery motions in *all* cases not on a published trial list. Discovery motions must be presented after ten days notice and are generally not filed until after disposition. Three extra copies of the cover sheet of the motion and one extra copy of the proposed court order are required at the time of presentation.

B. *Federal Practice*

Discovery motions are more formally presented in federal court. In some jurisdictions, including the Western District of Pennsylvania, a local rule (7.1), instructs the Clerk of Court to not accept a discovery motion unless counsel certifies that they have conferred and consulted with respect to each matter set forth in the motion, and that they are unable to resolve the discovery differences.

VII. MOTIONS FOR SUMMARY JUDGMENT

A. *Scope of Rule*

Pa.R.C.P. 1035.2 allows a party to move for summary judgment any time after the close of the relevant pleadings, provided that the motion does not unreasonably delay trial. *See Austin J. Richards, Inc. v. McClafferty*, 371 Pa. Super. 269, 276, n.1, 538 A.2d 11, 14 n.1 (1988) (Trial court's denial of motion for judgment on the pleadings did not prevent it from later granting motion for summary judgment), *appeal denied*, 520 Pa. 570, 549 A.2d 131 (1988). Unlike a motion under Pa.R.C.P. 1034, a motion for summary judgment may rest on facts outside the pleadings, including depositions, answers to interrogatories, admissions on file, and supporting affidavits. *West Penn Power Co. v. Piatt*, 405 Pa. Super. 467, 471, 592 A.2d 1306, 1307 (1991), *appeal denied*, 530 Pa. 646, 607 A.2d 255 (1992).

B. *Use of Motion*

A motion for summary judgment may be granted:

- (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
- (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury, a motion for summary judgment may be granted.

Pa.R.C.P. 1035.2; *see also Township of Bensalem v. Moore*, 152 Pa. Cmwlth. 540, 542-43, 620 A.2d 76, 76-77 (1993).

Moreover, "The adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion," which identifies parts of the record indicating a genuine issue of material fact, or "evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." Pa.R.C.P. 1035.3(a).

C. *Partial Versus Total Summary Judgment*

A party may move for summary judgment as to any or all claims set forth in the complaint. A court may grant summary judgment as to liability, even though there remains a genuine issue as to damages. *See Dept. of Env'tl. Resources v. Bryner*, 149 Pa. Cmwlth. 59, 63, 613 A.2d 43, 45 (1992).

D. *The Nanty-Glo Rule*

The Nanty-Glo rule, provides that summary judgment may not be granted where the moving party relies exclusively upon oral testimony, through affidavits or depositions, to establish that there is no genuine issue of material fact. *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 162 A.2d 523 (1932). No matter how clear such proof may appear, courts in Pennsylvania will not decide the credibility of the witness(es), a duty reserved for a jury.

E. *Federal Practice*

Fed. R. Civ. P. 56 governs motions for summary judgment in the federal courts. Like the state rule, Fed. R. Civ. P. 56(c) provides that summary judgment may be granted when the pleadings and other evidence “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53 (1986); *Jones v. United Parcel Serv.*, 214 F.3d 402, 407 (3d Cir. 2000). A party opposing a motion for summary judgment may not rest on denials contained in its pleadings, but rather must set forth specific and admissible factual evidence showing that there is genuine issue for trial. Fed. R. Civ. P. 56(a); *Firemen’s Ins. Co. v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2510 (1986). In deciding a motion for summary judgment, a court must analyze the facts in the light most favorable to the non-movant. *Schafer v. Bd. of Public Educ.*, 903 F.2d 243, 247 (3d Cir. 1990).

VIII. MOTIONS IN LIMINE

A. *Purpose*

A motion *in limine* is made before trial and is a request for an advance ruling on a matter relating to how the trial will be conducted. *See McMillen v. 84 Lumber, Inc.*, 538 Pa. 567, 569, 649 A.2d 932, 933 (1994).

B. *Nature*

1. *General scope and purpose.*

Most often, motions *in limine* are used to preclude a party, its counsel or witnesses from communicating to the jury inadmissible or irrelevant information that is so prejudicial that its effect cannot be fixed by a curative instruction. Motions *in limine* may also be used to obtain a ruling that evidence *is* admissible.

2. *Other uses.*

Technically, there are no limits on a party's use of motions *in limine* other than those imposed by the imagination of the party's attorney. For example, a party may file a motion *in limine* to exclude an expert on the grounds that he or she is unqualified to testify. A motion *in limine* also may be used to obtain a ruling on a choice of law issue.

C. *Governing Authority*

The Pennsylvania Rules of Civil Procedure are silent on motions *in limine*. Motions *in limine* are, however, a common part of Pennsylvania practice, recognized through case law. *See, e.g., Hatfield v. Continental Imports*, 530 Pa. 551, 555, 610 A.2d 446, 448 (1992) (showing use of motion *in limine* by party seeking "permission" to introduce certain evidence); *Walker v. GMC*, 526 Pa. 444, 445, 587 A.2d 308, 308-09 (1991) (considering motion *in limine* used to exclude certain evidence). In addition, the newly adopted Pennsylvania Rules of Evidence discuss motions *in limine*. *See* Pa.R.E. 103. Among other things, the rule makes clear that raising an evidentiary issue on a motion *in limine* is sufficient to preserve the issue for appeal, without the need to re-object to the evidence when offered at trial.

D. *Necessity of Motions in Limine*

Unless specified by local rule or a particular judge's pretrial order, a party is not required to raise any issue by motion *in limine*. In theory, any issue subject to a motion *in limine* may be held until trial. The benefit of filing a motion is that it may help streamline the issues before the court and shorten the length of the trial. Moreover, while a motion *in limine* may not be necessary to address some concern or question regarding admissibility of evidence or testimony, it usually presents the only opportunity to obtain a ruling on such an issue before the opposing party delivers his or her opening statement.

E. *Federal Practice*

The guidelines concerning motions *in limine* discussed above also apply in federal court.

IX. MOTIONS TO CONSOLIDATE, SEVER AND BIFURCATE

A. *Motions to Consolidate -- Pa.R.C.P. 213(a)*

1. *Scope of rule.*

Consolidation under Pa.R.C.P. 213(a) is allowed when two or more actions are pending in the same county *and* the actions (1) involve a common question of law or fact, *or* (2) arise from the same transaction or occurrence.

2. *Authority of court.*

A court has discretionary authority to consolidate under Pa.R.C.P. 213(a) and may do so on its own motion or on the motion of any party.

3. *Purpose of rule.*

Pa.R.C.P. 213(a) is designed to “avoid unnecessary cost or delay.” Factors for consideration include:

- a. the risk of inconsistent verdicts;
- b. the risk of prejudice;
- c. the risk that a plaintiff will recover twice for the same injury; and
- d. the potential savings in time, effort and resources for the court and the parties.

4. *Impact of rule.*

The rule allows a court to schedule two or more actions for a joint hearing or trial of any matter in issue, consolidate the cases into a single action, or issue any of the orders to further the purpose of the rule.

B. *Motions to Sever: Pa.R.C.P. 213(b)*

1. *Severance of Claims and Issues*

- a. Scope of rule. Pa.R.C.P. 213(b) allows for separate trials of any or all claims or issues in a single case.
- b. Authority of court. As with consolidation, a court has discretionary authority to order severance, and may do so on its own motion or on motion of any party. Pa.R.C.P. 213(b).

2. *Severance of Actions*

- a. Authority of court. It has been held that a court has inherent authority to sever one action into two or more separate actions. *See* Goodrich- Amram 2d §§ 213(b):1 - 213(b):7 (1999); *Kaiser v. Meinzer*, 272 Pa. Super. 207, 216, 414 A.2d 1080, 1085 (1979), *appeal dismissed*, 498 Pa. 1136, 445 A.2d 104 (1982). Pa.R.C.P. 213(b) has also been cited as the source of this authority. *See* Goodrich- Amram 2d §§ 213(b):1 - 213(b):7; *Meyer v. Heilman*, 503 Pa. 472, 479, 469 A.2d 1037, 1041 (1983) (dictum).

C. *Motions to Bifurcate -- Pa.R.C.P. 213(b)*

1. *Purpose and impact of rule.*

Bifurcation under Pa.R.C.P. 213(b) allows a party to try to verdict all issues relating to liability before that party is required to try issues relating to damages. Goodrich- Amram 2d §§ 213(b):2 (concerning the regulation of the order of proof).

2. *Authority of court.*

As with consolidation and severance, a court has discretionary authority to order bifurcation, and may do so on its own motion or on motion of any party. Pa.R.C.P. 213(b).

D. *Federal Practice*

1. Fed. R. Civ. P. 42(a) gives courts authority to order consolidation of cases involving a common question of law or fact.
2. Fed. R. Civ. P. 42(b) allows a court to order a separate trial of any or all claims of issuers when separation would promote efficiency.
3. Fed. R. Civ. P. 21 deals with misjoinder and nonjoinder of parties, and provides that “[a]ny claim against a party may be severed and proceeded with separately.”

E. *Related Motions*

When thinking about filing a motion to consolidate, sever and /or bifurcate, an attorney may also want to reconsider whether any additional parties should be joined to the lawsuit. Depending upon the timing of a

motion to join additional parties, leave of court may be required. *See* Pa.R.C.P. 2253 (joinder of additional defendant more than sixty days after service of the initial pleading not permitted, except with leave of court); Fed. R. Civ. P. 14(a) (requiring leave to file third party complaint later than ten days after service of the original answer).

X. MOTIONS TO SUBSTITUTE PARTIES

A. Substitution of Successor

Pa.R.C.P. 2352 allows a “successor” to voluntarily become a party to a pending action. Pa.R.C.P. 2351 defines a “successor” as “anyone who by operation of law, election or appointment has succeeded to the interest or office of a party to an action.” If the successor fails to voluntarily become a party, Pa.R.C.P. 2352(b) allows an adverse party to file a motion to show cause why the successor should not be substituted. Once joined, a successor has all the rights and liabilities of a party to the action. *See* Pa.R.C.P. 2354; *see* Goodrich-Amram 2d §§ 2351; 2352(b):4.

B. Transfer of Interest in Pending Action

Pa.R.C.P. 2004 provides that if a plaintiff commences an action in his or her own name, and then transfers all or part of his or her interest, the action may be continued by the original plaintiff, by the transferee in interest, or by both.

C. Substitution of Guardians

1. Pa.R.C.P. 2033 deals with the substitution of a guardian for minor.
2. Pa.R.C.P. 2062 deals with the substitution of a guardian ad litem for an incompetent party.

D. Federal Practice

Fed. R. Civ. P. 25 deals with the need to substitute parties as a result of death, incompetency, transfer of interest, or change in public officer.

E. Motions to Dismiss for Late Joinder

1. Pa.R.C.P. 2252 allows any defendant to join an additional defendant when the proposed party is partly liable on the plaintiff’s cause of action.
2. A party seeking to join an additional defendant must do so within 60 days of service of the initial pleading or any

amendment thereof, unless expressly “allowed by the court upon cause shown.” Pa.R.C.P. 2253.

3. A proper challenge to the joinder is made by preliminary objection to the joinder complaint under Pa.R.C.P. 1028(a). *Olson v. Grutza*, 428 Pa. Super. 378, 384 631 A.2d 191, 194 (1993). Pennsylvania courts have set standards for considering motions to dismiss for late joinder. *See White v. American Honda Research*, 403 Pa. Super. 584, 589 A.2d 764 (1991). In *White*, the court required a party seeking to join an additional defendant beyond the 60 day time period to “establish some reasonable justification for the delay.” *Id.* at 587, 589 A.2d at 766 (citations omitted).

F. *Federal Practice*

1. Fed. R. Civ. P. 14(a) addresses the analogous concept of third-party practice. It allows that any defendant may, as a third party plaintiff, join an additional defendant under circumstances similar to those set forth above.
2. Initial action as a third-party plaintiff more than ten days after service of the original answer requires leave of court. Fed. R. Civ. P. 14(a).
3. A federal court enjoys considerable discretion in determining whether to grant leave of court to amend pleadings and join parties. *See Abbott v. Latshaw*, 164 F.3d 141, 149 (3d Cir. 1998) (stating that an appeals court only reviews a district court’s decision on leave to amend under an abuse of discretion standard); *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994) (engaging in abuse of discretion review for leave to amend pleadings).

XI. MOTIONS TO STAY PROCEEDINGS

A. *Pennsylvania Rule*

Pa.R.C.P. 4013 allows a party to file a motion to stay any and all proceedings pending the resolution of a motion for a protective order. There are no automatic stays.

B. *Federal Practice*

Under federal practice, the filing of a motion for a protective order will not stay proceedings unless a stay order is granted.

XII. MOTIONS TO DISQUALIFY AND RECUSE

A. *Pennsylvania Practice*

The time just prior to trial is often when parties think about filing motions to disqualify counsel and/or recuse a judge. There are obvious risks to both motions which should be considered carefully. Although a reviewing court allows for broad discretion in matters of recusal, the appearance of prejudice gives rise to an appropriate basis for recusal. *See In re McFall*, 533 Pa. 24, 36-37, 617 A.2d 707, 714 (1992).

B. *Federal Practice.*

The Third Circuit has recently shown a willingness to disqualify district judges in certain high-profile cases. *See In re School Asbestos Litigation*, 977 F.2d 764, 785 (3d Cir. 1992).

XIII. CONTINUANCES

A. *General Rules on Continuances*

1. *Continuances under Pa.R.C.P. 216.*

Pa.R.C.P. 216 provides for continuances on the following grounds:

- a. agreement of all parties or their attorneys, if approved by the court;
- b. illness of counsel of record, of a material witness or of a party;
- c. inability to subpoena or to take testimony of any material witness as stated by affidavit;
- d. such special grounds as may be allowed in the discretion of the court;
- e. the scheduling of counsel to appear at the disciplinary hearing of a judge or attorney.

2. *Judicial Interpretation.*

In Commonwealth ex rel. Rivers v. Myers, 414 Pa. 439, 444, 200 A.2d 303, 306, *cert. denied*, 379 U.S. 866 (1964), the Supreme Court held that the trial court has discretion to deny a continuance “unless the case falls within one of the special exceptions listed” Later cases, however, show

the trial courts do exercise some discretion even in cases involving the special exceptions. *See* Goodrich- Amram 2d §§ 216(A):7-9.

B. *Costs of Continuance*

Pa.R.C.P. 217 provides a procedure for imposing costs on a party seeking a continuance after the preliminary call of the trial list.

C. *Formal Requirements*

A continuance based on facts of record may be made by motion. A continuance based on facts outside the record should be in the form of a verified petition, or should include a supporting affidavit. Also, remember to check Pa.R.C.P. 216, which expressly requires supporting documentation for continuances based on certain circumstances. *See* Goodrich- Amram 2d §§ 216(A):1-6.

1. *Agreement of the parties.*

If the parties agree to a continuance, the agreement must be in writing. It may, however, be enough for one party to write to the court, informing it of the agreement. Goodrich- Amram 2d § 216(A):1.

2. *Illness.*

A continuance based on illness may require a physician's certification. It is important to remember, however, that the illness of an attorney may not be sufficient grounds for a continuance if the attorney is a member of a firm. Goodrich- Amram 2d § 216(A):5; 7 Stand. Pa. Practice 2d § 38:8 (1982). Similarly, a continuance for illness of a witness may not be granted if the witness is not "material," or if the factors do not show a serious threat to the witness's health. Goodrich- Amram 2d § 216(A):5.

3. *Special grounds.*

The special grounds on which a party may obtain a continuance include, but are not limited to:

- a. absence, death or substitution of counsel;
- b. absence of a party -- *e.g.* for military service;
- c. death of a party;

- d. substitution of a party;
- e. good faith unpreparedness;
- f. surprise; and
- g. amendment of pleadings.

The formal requirements imposed on a party seeking a continuance on special grounds will depend largely upon the circumstances of the case, as well as on the local rules and practices of the court. For a more thorough discussion of continuances sought on special grounds see Goodrich- Amram 2d §§ 216(A):7-9; 7 Stand. Pa. Practice 2d, §§ 38:18-36; Pa.R.C.P. 216(e).

D. *Following Substitution of a Successor*

Pa.R.C.P. 2354 states that after a successor becomes a party to an action, the court may grant “such continuances and extensions as may be necessary to afford the successor a reasonable opportunity to appear and prosecute or defend the action.” Goodrich- Amram 2d § 2354:3.

E. *Federal Practice*

Fed. R. Civ. P. 16 deals with scheduling and case management. Procedures for obtaining continuances may also vary depending upon local rules and the individual judge to whom a case is assigned.

XIV. SPECIAL LISTING FOR TRIAL

A. *Preferences on Trial List*

1. Pa.R.C.P. 214 sets out certain categories of cases which are subject to preference on the trial list. These include the following:
 - a. cases in which the Commonwealth is the real party in interest;
 - b. cases against defaulting officers of the Commonwealth, its political subdivisions, or its sureties;
 - c. actions of *quo warranto* or mandamus involving public officers;
 - d. cases in which a new trial was granted, a judgment of nonsuit removed (except for nonsuits due to

failure to appear), or a *venire facias de novo* awarded;

- e. suits to recover wages for manual labor;
- f. suits arising under the laws of the Commonwealth to determine the competency of a person alleged to be weak-minded, insane or a habitual drunkard; and
- g. such other cases as the court may designate.

2. *Obtaining special preference.*

Pa.R.C.P. 215 requires a party to notify the officer in charge of the trial list of the right to preference. It further allows a party to apply to set aside the preference at least ten days before the case is called for trial.

B. *Local Rules Govern*

Except as set out in Pa.R.C.P. 214 and 215, the manner in which cases are listed for trial generally is governed by the local rules of each court.

C. *Federal Practice*

Fed. R. Civ. P. 40 requires the district courts to promulgate rules for placing cases on the trial calendar.