STRATEGY FROM THE START
LITIGATION IN STATE vs. FEDERAL COURT

1. OVERVIEW

1. Introduction

1. Many employment claims present issues that can be litigated in either state or federal court, requiring counsel to analyze substantive and procedural reasons for electing one forum over another.

2. In the event that administrative remedies must be exhausted before filing suit, plaintiff's counsel must also determine whether the client is best served by filing a charge with a federal, state or local agency.[1] From the defense perspective, the issue will be whether a plaintiff who commences suit has failed to exhaust administrative remedies, subjecting the court claims to dismissal.

2. Strategic and Tactical Considerations in Evaluating Agency and Forum Choices

1. The decision as to where to pursue or defend an employment-related action involves numerous strategic and tactical considerations.

2. Pre-filing considerations include:

1. Comparative standards and remedies under federal and state law;

2. Comparative merits of federal, state or local agencies;

3. Right to a jury, jury pools and jury verdicts;

4. Removal and remand;

5. Evidentiary and procedural differences;

6. Implications of supplemental jurisdiction;

7. Dispositive motions;

8. Post-trial and appellate considerations

[1] Issues as to whether remedies under collective bargaining agreements must first be exhausted or whether arbitration or mediation may be required are beyond the scope of these materials. Nevertheless, counsel must also make an initial determination as to whether either are required before filing a charge with an agency or filing suit.

3. These materials review the above considerations, focusing on the perspective of practitioners in Pennsylvania. There are some references, however, to substantive issues arising under New Jersey and Delaware law.

1. Employment cases for purposes of these materials involve claims of unlawful discrimination, wrongful termination, breach of contract, state tort claims arising in the employment context, including causes of action for negligent supervision and hire, defamation, assault, and intentional infliction of emotional distress, wage payment claims, wage and benefits claims, and actions arising from restrictive covenants.

2. COMPARATIVE STANDARDS AND REMEDIES

1. Federal, State and Local Laws

Although not exhaustive, the Chart accompanying these materials identifies many of the key federal, state and local laws in the employment area.

2. Tort Claims

1. By their nature, tort claims in employment cases for private sector employees will arise under state law. Consequently, the choice between federal and state forums will only arise if there is a basis for federal jurisdiction and supplemental jurisdiction pursuant to 42 U.S.C. § 1331 and § 1367.

2. While not exhaustive, the following are the most typical tort claims raised in employment cases:

1. Civil conspiracy. No claim of civil conspiracy - allegation that the management employees conspired with each other or with the corporate employer to effect the discharge - because a corporation cannot conspire with its agent/employees nor can agents of a single entity conspire among themselves. *Rutherfoord v. Presbyterian-Univ. Hosp.,* 417 Pa. Super. 316, 333-34, 612 A.2d 500, 509 (1992). Further, if the employee's termination was lawful, there could be no conspiracy because conspiracy requires a wrongful act. *Rose v. Wissinger*, 294 Pa. Super. 265, 439 A.2d 1193 (1982); *Ranieri v. Depolo,* 65 Pa. Cmwlth. 183, 187, 441 A.2d 1373, 1376 (1982).

2. Fraudulent Misrepresentation. Statements made to an employee – particularly during the hiring phase, while insufficient to establish a claim for breach of contract, might give rise to a claim of misrepresentation. All the normal elements of fraud must be shown.

   - a misrepresentation of material fact;
   - the defendant knew the statement was false (or had reckless disregard for the truth);
   - the defendant intended the statement to induce the plaintiff to act (or refrain from acting);
   - the plaintiff justifiably relied on the misrepresentation; and
   - plaintiff was damaged by the misrepresentation.

   Gibbs v. Ernst, 538 Pa. 193, 647 A. 2d 882 (1994). Mere "puffing" of employment prospects, however, has been held not to be sufficient to state a cause of action for misrepresentation. *Claiton v. Frito-Lay, Inc.*, 2 Ind. Empl. Rights Cases 1678, 1987 WL 47837 (M.D. Pa. Nov. 11, 1987).

3. Negligent Misrepresentation: requires 1) a misrepresentation of material fact; 2) the employer must either know of the misrepresentation, make the misrepresentation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; 3) the employer must intend to induce action in reliance and 4) injury must result from justifiable reliance on the misrepresentation. *Burland v. ManorCare, Inc.*, 1999 WL 58580 (E.D. Pa. Jan. 26, 1999).

4. Breach of the Covenant of Good Faith and Fair Dealing: This cannot be an independent cause of action — "while there may be an express or implied covenant of good faith and fair dealing in an employment contract, a breach of such covenant is a breach of contract action, not an independent action." *Seiple v. Community Hosp. Of Lancaster,* 1998 WL 175593 (E.D.Pa. Apr. 14, 1998)

5. Tortious interference with contractual relations: A defendant's unprivileged acts intended to interfere with the plaintiff's employment relationship with a third party, which cause actual legal damage, are actionable. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F. 3d 393, 530 (3d Cir. 1998); *Michalson v. Exxon Research and Eng'g Co.*, 808 F. 2d 1004 (3d Cir. 1987); *Collincini v. Honeywell, Inc.* 411 Pa. Super. 166).

(1) The claim requires acts by an outsider to the employment relationship; thus it cannot be maintained if interference is perpetrated by the plaintiff's managers and supervisors. *Rutherfoord v. Presbyterian-Univ. Hosp.,* 417 Pa. Super. 316, 612 A.2d 500, 507-09 (1992).

(2) Truth is not a defense to claim of tortious interference with contractual relations. *Collincini v. Honeywell, Inc.* 411 Pa. Super. 166)(regarding letter from former employer listing contract renewals lost through allegedly improper conduct of plaintiff). Whether defendant's action was unprivileged depends on a number of factors, including societal interest in protecting the actor's freedom of action in the circumstances. Rstmt 2d Torts § 767.

6. Pennsylvania also recognizes claims for tortious interference with prospective business relations where the contractual relationship is not entered into or is delayed because of Defendant's tortious conduct. *Kelly-Springfield Tire Co. v. D'Ambro,* 408 Pa Super 301 (1991) is where the opportunity is sufficiently

7. No claim based on specific intent to harm particular employee. Wrongful discharge claim for specific intent to harm a particular employee is not viable in Pennsylvania. *Brosso v. Devices For Vascular Intervention, Inc.*, 879 F. Supp. 473 (E.D.Pa. 1995); *Yetter v. Ward Trucking Corp.*, 401 Pa. Super 467, 585 A.2d 1022, *allocatur denied,* 529 Pa. 623, 600 A.2d 539 (1991).

8. Intentional infliction of emotional distress. This claim is usually precluded by Workers' Compensation Act but may be available in limited instances. *See, e.g., Hoy v. Angelone,* 720 A.2d 745, 754-55 (Pa. 1998).

9. Negligent hire and supervision. "An employer may be liable in negligence if it knew or should have known that an employee was dangerous, careless or incompetent" and the employment might create a situation in which the employee's conduct would harm a third person. *Brezenski v. World Truck Transfer, Inc.,* 2000 Pa. Super. 175, 755 A.2d 36, 39 (Pa. Super. 2000); *Hutchinson v. Luddy*, 560 Pa. 51, 742 A.2d 1052 (Pa. 1999)(necessary to examine claim of negligent hiring and/or retention with an analysis of both common law and the *Restatement (Second) of Torts* § 317).

10. Defamation. Elements of a cause of action for defamation are set forth at 42 Pa.C.S.A. § 8343(a). *See also Raneri v. DePolo*, 65 Pa. Commw. 183, 186, 441 A.2d 1373, 1375 (Pa. Commw. 1982) ("publication to an *identified* third party is an essential element of actionable defamation"; demurrer sustained where alleged publication merely to "third persons"); *see also, Jaindl v. Green Acres Home Park*, 432 Pa. Super. 220, 229, 637 A.2d 1353, 1358 (Pa. Super. 1994), *aff'd*, 541 Pa. 163, 661 A.2d 1362 (1995)("complaint for defamation must, on its face, identify exactly to whom the allegedly defamatory statements were made").

11. Assault and battery. *See generally, Cucinotti v. Ortmann*, 399 Pa. 26, 27-28, 159 A.2d 216, 217-218 (Pa. 1960)(sustaining preliminary objections to complaint alleging civil assault on ground that plaintiff alleged no overt act other than oral threats and therefore stated no cause of action for assault; even threats of violence are legally insufficient to state a cause of action for assault in the absence of an overt act to indicate that a battery will ensue immediately).

3. A significant issue in such cases is the extent to which workers' compensation statutes will bar such claims.

3. Breach of Contract

1. Contract Theories

1. Express Contract (Oral or Written). All employment is contractual in nature - there is an agreement to pay for work - but the contract includes an "at will" term unless agreed otherwise. The clearest exception to the rule of employment at-will is where the employer and employee enter into a written contract that expresses an intent to overcome the at-will presumption.

(1) Such a contract must be clear and definite, and must contain either a definite term of employment, or a provision that the employee may not be terminated except for cause. *Ross v. Montour Railroad Co.*, 357 Pa. Super. 376, 381-82, 516 A.2d 29 (1986); appeal denied, 515 Pa. 609, 529 A.2d 1082 (1987).

(2) Promises such as "lifelong employment," and "employment so long as you perform satisfactorily," are too indefinite to create an express contract. *Marsh v. Boyle*, 356 Pa. Super. 1, 5, 530 A.2d 491 (1987) (promises of employment "for life" or "permanently" are not sufficient); *Murphy v. Publicker Indus.*, 357 Pa. Super. 409, 418, 516 A.2d 47 (1986); *Darlington v. General Elec.*, 350 Pa. Super 183, 195-96, 504 A.2d 306 (employment for "long range project" is too indefinite to over presumption of at-will employment).

2. Implied Contract. Absent an express contract for a specific term, employees often plead the existence of an implied contract based upon statements contained in employee handbooks and/or personnel policies of additional consideration. The employee bears a heavy burden of proof in these circumstances.

(1) Personnel policies: "[i]t must be shown that they [the employer] intended to offer it [the policy] as a binding contract. Nor can their intention be proved by bits and pieces of their policy given [to] individual employees at different times under varying circumstances." *Morosetti v. Louisiana Land and Exploration Co.*, 522 Pa. 492, 495, 564 A.2d 151, 152-3 (1989). *Id*. at 495, 564, A.2d at 152-53; but see, *Vincent v. Fuller Co.*, 400 Pa. Super. 108, 582 A.2d 1367 (1990), *rev'd on other grounds*, 532 Pa. 547, 616 A.2d 969 (1991) (rejecting reliance on a company policy as the basis for a claim of implied employment contract) and *Richardson v. Charles Cole Memorial*, 320 Pa. Super. 106, 466 A.2d 1084 (1983), (mere existence of a corporate policy not to terminate employees who performed satisfactorily was insufficient to create enforceable contractual rights); *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654 (3d Cir. 1990) (employer's policy of discharging employees only for cause insufficient to create an employment contract; undefined terms such as "just cause" not sufficiently concrete to establish an employment contract).

(2) Handbook: where there is a very clear statement in the employee handbook of an intent to alter the employment at-will relationship and legally bind the employer, the provisions of a handbook may be contractually enforceable. *Martin v. Capital Cities Media, Inc.*, 354 Pa. Super. 199,

215-222, 511 A.2d 830, 838-842 (1986), *appeal denied mem.*, 514 Pa. 643, 523 A.2d 1132 (1987); *Reilly v. Stroehmann Bros.*, 367 Pa. Super. 411, 416, 532 A.2d 1212, 1214 (1987).

(3) Additional Consideration. Contract implied for a "reasonable" period of time that cannot be terminated without cause due to additional consideration from the employee of either:

(1) substantial benefit to the employer other than the services which the employee was hired to perform *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 526 A.2d 1192 (1987), *allocatur denied*, 536 A.2d 1331 (plaintiff accepted wages lower than paid to union members for twenty-four years based on the employer's promise that he would have lifetime employment);

(2) *substantial* hardship to the employee. *News Printing Co., v. Roundy*, 409 Pa. Super. 64, 597 A.2d 662 (1991) (plaintiff quit his job, rejected another job offer, sold his home in Massachusetts and purchased a home in Pennsylvania only to be fired after three months on the job) *Cashdollar v. Mercy Hosp.*, 406 Pa. Super. 606, 595 A.2d 70 (1991) (plaintiff gave up secured employment, sold home, relocated pregnant wife and small child); *Scullion v. Erneco Industries Inc.*, 398 Pa. Super. 294, 580 A.2d. 1356 (1990), *allocatur denied*, 527 Pa. 625, 592 A.2d 45 (1991). But see, *Clay v. Advanced Computer Applications, Inc.* 370 Pa. Super. 497, 536 A.2d 1375 (1988), *rev'd on other grounds*, 522 Pa. 86, 559 A.2d 917 (1989) (purchasing a new home and foregoing other employment opportunities are common detriments of professional employment); *Shriver v. Cichelli*, 1992 U.S. Dist. LEXIS 19511,*18 (E.D.Pa. 1992) (relocation alone not enough); *Gorwara v. AFL Indus., Inc.*, 784 F. Supp. 239 (E.D.Pa. 1992) (overtime work not additional consideration)

2. Estoppel. The doctrine of estoppel is not available to overcome the employment at-will presumption. *Paul v. Lankenau Hosp.*, 524 Pa. 90, 569 A.2d 346 (1990).

3. Restrictive Covenants. An important subset of breach of contract actions are claims arising under restrictive covenants.

1. While Pennsylvania, New Jersey, and Delaware law generally recognize and will enforce reasonable restrictive covenants, a former employee's state of residence may be an important factor. Some states, most notably California, will not enforce such covenants, except to protect trade secrets.

(1) Pennsylvania courts have refused to enforce restrictive covenants against former employees residing and working in California, and have even disregarded the parties choice of law "because it would be contrary to a fundamental public policy of California, which has a materially greater interest than Pennsylvania in the determination of the issue of whether the defendants may be employed by a California-based company." *General Video Corporation v. Soule*, 2000 U.S. Dist. LEXIS 3826 (E.D.Pa. 2000).

4. Wrongful Discharge Theories

1. Public policy exception to the "at-will" rule: Exception to the at-will rule where termination violates a clear mandate of public policy which "goes to the heart of a citizen's rights, duties and responsibilities." *Booth v. McDonnell Douglas Truck Services, Inc.*, 585 A. 2d 24, 27 (Pa. Super 1991); *Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917, 918 (1989).

1. Judicially Created *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (recognizing claim but holding that disagreement concerning the safety of a new product was **not** sufficient to support cause of action for wrongful termination).

2. Narrowly construed: There must be a clear and specific policy that is pronounced either in a constitutionally or legislatively established prohibition, requirement or privilege. As a result, a wrongful discharge action is generally upheld only when the employee is terminated as a result of the employee's compliance with or refusal to violate the law. *Krajsa v. Keypunch, Inc.* 424 Pa. Super. 230, 622 A.2d 355 (1993) **"Where our courts**

recognized a violation of a clear mandate of public policy, the plaintiff demonstrated that a statute or constitution applied to his case and that the discharge resulted from his duty to act in accordance with that applicable law." 622 A.2d at 359 (emphasis added). The Superior Court held that "no clear mandate of public policy had been threatened or violated" where employee terminated after questioning safety of a new product.

"Our review of cases regarding this cause of action reveals that our courts have found a clear mandate of public policy threatened on only three occasions. *Field v. Philadelphia Electric Co.*, 338 Pa. Super. 400, 565 A.2d 1170 (1989) (violation of public policy where discharge was based on performance of duty to report nuclear safety violations under federal statute); *Hunter v. Port Authority*, 277 Pa. Super. 4, 419 A.2d 631 (1980) (violation of the Pennsylvania Constitution to deny public employment to a person on the basis of a prior conviction for which he has been pardoned); *Reuther v. Fowler & Williams, Inc.*, 225 Pa. Super. 28, 386 A.2d 119 (1978) (under Pennsylvania law, a person is statutorily required to serve when called for jury duty for the purpose of having citizens available for trial, and thus a discharge for fulfilling this statutory duty is against public policy).

3. Specific public policy bases for claim: employee's discharge for refusing to take polygraph test *Kroen v. Bedway Security Agency, Inc.*, 430 Pa. Super. 83, 633 A.2d 628 (1993)(citing Pa Polygraph Law, 18 PCS §7321).

4. ***Rejected*** as bases for claims: refusing to help cover losses incurred by plaintiff's incorrect reports to bank (*Reese v. Tom Hesser Chevrolet-BMW*, 413 Pa. Super. 168, 604 A.2d 1072 (1992)); disconnecting employer's video surveillance equipment *(Hineline v. Stroudsburg Elec. Supply Co.*, 348 Pa. Super. 537, 559 A.2d 566 (1989)), refusing to participate in insurance policy mailings which employee claimed violated state law where employee could not point to specific statute (*McGonagle v. Union Fidelity Corp.*, 383 Pa. Super. 223, 556 A.2d 878 (1989)); discharge based on a faulty drug screening test (*Hershberger v. Jersey Shore Steel Co.*, 394 Pa. Super. 363, 575 A.2d 944 (1990). And, NB: No separate common law action for wrongful discharge where specific statutory remedies, such as the discrimination statutes, are available. *See, e.g. Jacques v. Akzo Int'l. Salt, Inc.*, 422 Pa. Super. 419, 619 A.2d 748 (1993).

5. Applies only to At-Will Employees. Employees, such as union members, whose employment is not "at-will" are not protected by this wrongful discharge doctrine, which is an exception to the "at-will" rule. *Aughenbaugh v. North American Refractories Co.*, 426 Pa. 211 (1967).

2. Damages for wrongful discharge are the traditional tort recoveries of compensatory damages, and in some instances punitive damages. To recover punitive damages, the plaintiff must prove that the conduct of the employer was outrageous and that the imposition of punitive damages would deter the defendant and others in similar situations from committing the same acts. *Woodson v. AMF Leisureland Center, Inc.,* 842 F.2d 699 (3d Cir. 1988).

3. CLAIMS OF DISCRIMINATION

A. Overview

1. Employees who allege discrimination by their employer have remedies available to them under both state and federal law. Under both state and federal anti-discrimination laws, employees are required to exhaust their administrative remedies before filing a lawsuit.

2. Pennsylvania, New Jersey, and Delaware all have work-sharing agreements between the state agencies responsible for discrimination claims and the Equal Employment Opportunity Commission.

3. Employees should be encouraged to file charges in such a manner so that they may take advantage of remedies under both state and federal anti-discrimination laws. Generally, that means that the charging party must file with either the state agency or the EEOC before the state law-mandated deadline for filing such charges. At the time the charge of discrimination is filed with either the EEOC or the state agency, the charging party should request that the charge be dually filed with both the EEOC and the state agency.

    1. Pennsylvania: A charge must be filed within 180 days of the alleged discriminatory event.

    2. New Jersey: A charge must be filed within 180 days of the alleged discriminatory event.

    3. Delaware: A charge must be filed within 90 days of the alleged discriminatory event.

4. EEOC: A charge must be filed within 300 days of the alleged discriminatory event (in states with workshare agreements).

5. There may also be local agencies, such as the Philadelphia Commission on Human Relations, with jurisdiction. These may have different deadlines for filing charges of discrimination.

(1) Time is of the essence

(2) Confirm dual filing accomplished

4. Factors to consider in choosing EEOC, state or local agency for primary responsibility

1. Client's objective

2. Timeliness of investigation

3. Mediation/Settlement

4. Right to Sue

5. Remedies

6. Substantive claims

(1) Federal and state laws are not always parallel, most notably in the area of disability discrimination.

(2) State and local laws are often broader than federal law

(1) Sexual orientation

(2) Marital status

(3) Independent contractors

(4) People under 40 years of age

7. Procedural Considerations

(1) Pennsylvania (applies to employers w/4+ employees)

(1) A charge under the PHRA must be filed within 180 days of the discriminatory event.

(2) A PHRC investigator may set up a factfinding conference at which the employee and employer's representative are present.

(3) The administrative process is not complete until one year has passed or the PHRC completes its investigation, whichever comes first. Normally, the PHRC sends a letter telling the charging party that its investigation is complete. The charging party may file suit one year after filing the charge or after receiving the PHRC's letter but must file a complaint within two years of receiving the PHRC's letter.

(4) The PHRA protects certain independent contractors.

(5) The PHRA allows the charging party to sue individual discriminators as aiders and abettors.

(2) New Jersey

(1) The NJLAD provides claimants with two alternative procedures for seeking relief from alleged discrimination. An aggrieved party may seek relief from the Division of Civil Rights, or he or she may pursue a complaint in the Superior Court of the state of New Jersey. N.J.S.A. §10:5-13.

(2) Once a party has invoked the administrative procedure, however, that chosen remedy is exclusive while the administrative proceeding is pending. *Hermann v. Fairleigh Dickinson University*, 183 N.J. 500, 504, 444 A.2d 614 (App. Div.), *cert. denied*, 91 N.J. 573 (1983)(affirming dismissal of plaintiff's alleged discrimination action where plaintiff elected administrative remedy and finding of no probable cause issued); *see also* N.J.S.A. §10:5-27.

(3) Pursuant to N.J.S.A. §10:5-27, a final determination by the Division of Civil Rights "excludes any other

action, civil or criminal, based on the same grievance." *Hermann*, *supra,* 183 N.J. at 504. If a party is aggrieved by the final order of the director of the Division of Civil Rights, he or she "may take an appeal therefrom to the Superior Court, Appellate Division as an appeal from a State Administrative agency." N.J.S.A. §10:5-21. *See generally, Hermann*, *supra,* 183 N.J. at 504 and *Ferrara v. Tappan Company*, 722 F.Supp. 1204, 1206 (D.N.J. 1989)(plaintiff's discrimination claim precluded by finding of no probable cause entered by the New Jersey Division of Civil Rights).

(3) Delaware (applies to employers w/4+ employees)

(1) While a charging party may file a charge of discrimination with the Delaware Human Relations Commission, the charging party has no private right of action under Delaware law.

(2) The charging party must file with the state's Office of Labor Law Enforcement within 90 days of the alleged discriminatory event.

4. JURY ISSUES

1. Evaluating the Jury Pool

1. Assuming at least some jury claims, counsel must also evaluate the potential jury pool in the available forums

2. In cases where state law does not allow for a jury trial, filing federal and state law claims in federal court will assure jury trial on at least some issues.

2. Jury Verdicts

5. THE BENCH

1. Individual Assignment v. General Pool

2. Familiarity with the Applicable Law: In general, federal judges have more familiarity with the basics of anti-discrimination law, such as sexual harassment, etc., simply because a large percentage of federal cases deal with employment-related, anti-discrimination issues.

6. PROCEDURAL DIFFERENCES

1. Case Management

1. Federal Court: Case management is governed by FED. R. CIV. P. 16 and 26. *See* Appendix "A," Timeline and Appendix "B," Sample Initial Disclosures pursuant to FED. R. CIV. P. 26(a)(1).

2. State Court: In Pennsylvania, the courts generally do not apply the "hands on" management style seen in the federal courts. Often the parties are responsible for moving the case along (Philadelphia County is an exception), and, in some jurisdictions, a failure to take any action on a case for a long period of time, could result in dismissal of the case. In Pennsylvania, attorneys should pay close attention to the local rules in regard to the manner in which the Court manages cases.

2. Discovery

1. Written discovery: In federal court, parties are limited to 25 interrogatories, including subparts, unless the Court grants its permissions to exceed that amount. FED. R. CIV. P. 33(a). In state court, there is no limit on the number of interrogatories that one party may propound on another. PA. R. CIV. P. 4005. In both federal and state court, parties may propound unlimited document requests.[2]

2. Deposition limitations:

1. Federal Court: In federal court, unless authorized by the court or stipulated to by the parties, depositions are limited to one day, seven hours. FED. R. CIV. P. 30(d)(2). Any objections during a deposition must be "stated concisely and in a non-argumentative and non-suggestive manner." FED. R. CIV. P. 30(d)(1). Note rule for third-party depositions. FED. R. CIV. P. 45.

2. State Court: Pennsylvania Rules do not have limitations on depositions similar to those found in the Federal Rules.

3. Experts

[2] Both state and federal courts have limits on discovery taken in bad faith, with the intent to embarrass or harass, that is burdensome or overly expensive, that is privileged, and/or that is beyond the scope of discovery contained in the Rules of Civil Procedure.

EXPERTS
Federal Court v. Pennsylvania Courts

Federal Rules	State Rules
FED. R. CIV. P. 26(a)(2): Required Disclosure of Expert Testimony (at least 90 days before trial or on date order by Court) 1) the identity of any expert to be used under FED. R. EVID. 702, 703, or 705 2) an expert report, including the expert's opinion, the basis and reasons for the opinion, the expert's qualifications, including a list of publications during last 10 years, the compensation paid for the expert report and testimony, and a list of cases in which expert has testified as an expert at trial or in deposition during the last 4 years	**PA. R. CIV. P. 4003.5: Discovery of Expert Testimony**. **Trial Preparation Material** Discovery may be had of facts known and opinions held by an expert through: a)(1) interrogatories requiring information regarding a) identity of expert and subject matter of anticipated testimony and b) substance of facts and opinions to which expert will testify, either as report or answers to interrogatories. b) expert not so identified shall not be permitted to testify except in extenuating circumstances
FED. R. CIV. P. 26(b)(4): Trial Preparation: Experts 1) Allows party to depose opponent's expert after receiving expert report 2) Party may serve interrogatories on opponent to discovery facts known or opinions held by expert retained to testify at trial. 3) Except under unusual circumstances, party cannot get information about experts retained but who are not going to testify at trial 4) Party seeking discovery from expert has to pay for it	**PA. R. CIV. P. 4003.5: Discovery of Expert Testimony. Trial Preparation Material** 1) Allows a party to propound interrogatories upon a party regarding the identity of any expert expected to be called at trial and the facts and opinion to which the expert is expected to testify 2) Must obtain court permission to depose expert 3) Except under unusual circumstances, party cannot get information about experts retained but who are not going to testify at trial 4) Expert testimony at trial is limited to that which was disclosed in discovery or report
FED. R. EVID. 702: Testimony by Experts - *Daubert/Kumho* test - The Court must act as a gatekeeper to insure that expert testimony is both relevant and reliable, using factors articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This test is now applied to all offered expert testimony, regardless of whether	**PA. R. EVID. 702: Testimony by Experts** - the *Frye* test, based on the holding in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). The *Frye* test was applied by federal courts to expert testimony before the Supreme Court's 1993 *Daubert* decision. The *Frye* test bars novel scientific evidence until it has received "general

Federal Rules	State Rules
the expert is a scientist or not. *See Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999). Minority theories can be admitted under this standard if they meet the tests of reliability.	acceptance" in the relevant scientific community. *See Blum v. Merrell Dow Pharmaceuticals, Inc.*, 705 A.2d 1314 (Pa.Super. 1997), *aff'd* 764 A.2d 1 (Pa. 2000). In *Blum*, the plaintiffs offered scientific evidence similar to the scientific evidence offered in *Daubert* with the opposite result — in state court, the proffered expert evidence was inadmissible as not "generally accepted."
FED. R. CIV. P. 703: Bases of Opinion Testimony by Experts Facts or data perceived by or made known to expert at or before hearing. If of sort reasonably relied upon by expert in field, need not be admissible in evidence.	**PA. R. EVID. 703: Bases of Opinion by Experts** Facts or data perceived by or made known to expert at or before hearing. If of sort reasonably relied upon by expert in field, need not be admissible in evidence.
FED. R. CIV. P. 705: Disclosure of Facts or Data Underlying Expert Opinion. The expert does not have to first testify about the underlying facts or data supporting his or her opinion.	**PA. R. EVID. 705: Disclosure of Facts or Data Underlying Expert Opinion.** The expert does have to testify about the facts or data underlying his or her opinion.

3. Independent Medical Examinations

Federal Law - FED. R. CIV. P. 35	**State Law - PA. R. CIV. P. 4010**
Court may order a mental or physical examination when a physical or mental condition is in controversy. FED. R. CIV. P. 35(a).	Court may order a mental or physical examination when a physical or mental condition is in controversy. PA. R. CIV. P. 4010(a)(2).
The order is made only on good cause shown and upon notice to the examinee and all parties. The notice shall specify the time, place, manner, conditions and scope of the examination and the person who will make the examination. FED. R. CIV. P. 35(a).	The order is made only on good cause shown and upon notice to the examinee and all parties. The notice shall specify the time, place, manner, conditions and scope of the examination and the person who will make the examination. PA. R. CIV. P. 4010(a)(3).
	The examinee has the right to have counsel or another representative present at the examination. PA. R. CIV. P. 4010(a)(4)(i). (This rule does not apply to actions for custody, partial custody, and visitation of minor children).
	Upon reasonable notice, the examinee or the party producing the examinee may have a stenographic or audio recording made of the examination. PA. R. CIV. P. 4010(a)(5)(i). (This rule does not apply to actions for custody, partial custody, and visitation of minor children).
Parties and the examinee are entitled to copies of the examiner's report. If the examinee has a examination done by his or her own examiner regarding the same condition as was the basis for the Rule 35 examination, the other parties are entitled to that report. If the report is not produced, the examiner may be excluded from testifying at trial. FED. R. CIV. P. 35(b)(1).	Parties and the examinee are entitled to copies of the examiner's report. If the examinee has a examination done by his or her own examiner regarding the same condition as was the basis for the Rule 35 examination, the other parties are entitled to that report. If the report is not produced, the examiner may be excluded from testifying at trial. PA. R. CIV. P. 4010(b)(1).
By order a report of the examination, the examinee waives any privilege between the examinee and any person who has made or will make an examination regarding the same condition. FED. R. CIV. P. 35(b)(2).	By order a report of the examination, the examinee waives any privilege between the examinee and any person who has made or will make an examination regarding the same condition. PA. R. CIV. P. 4010(b)(2).
Rule 35 applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise and does not preclude discovery on an examiner in accordance	Rule 4010 applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise and does not preclude discovery on an examiner in accordance

Federal Law - FED. R. CIV. P. 35	State Law - PA. R. CIV. P. 4010
with the provision of other discovery rules. FED. R. CIV. P. 35(b)(3).	with the provision of other discovery rules. PA. R. CIV. P. 4010(b)(3).

4. When can a party compel an independent medical examination? The issue of proof of a plaintiff's emotional distress raises the related issue of compelled mental examinations. Under Fed. R. Civ. P. 35, an employer may compel a plaintiff's mental examination by proving that the plaintiff's mental condition is in controversy and that there is good cause for the examination. Fed. R. Civ. P. 35(a). A plaintiff does not put his/her mental condition in controversy, however, merely by claiming that he/she has suffered mental anguish, emotional distress, humiliation, or the like. At the other extreme, where the plaintiff intends to offer expert psychiatric or psychological evidence of emotional harm, the employer must be permitted to offer evidence to the contrary with the same imprimatur of expertise. In that case, the mental examination will be allowed.

   These principles have been applied to deny a motion to compel a plaintiff's psychological examination in a suit under state and federal law for hostile environment, discriminatory hiring and retaliation. The defendant argued that it was entitled to a psychological examination because plaintiff's claims for emotional distress placed her mental condition in controversy. Noting that most courts require a showing that the emotional distress claim is "more than simply a component of [the] statutory cause of action," Judge Kauffman stated that employment discrimination plaintiffs are generally compelled to undergo mental examination only when a case involves:

   - ♦ a separate tort cause of action for infliction of emotional distress;
   - ♦ an allegation of severe ongoing mental injury or psychiatric disorder;
   - ♦ plaintiff's offering an expert to support the emotional distress claim; or
   - ♦ plaintiff's concession that mental condition is in controversy.

   Where the plaintiff had alleged only that she felt anxious and had trouble sleeping, she had not put her mental condition in controversy for the purposes of Rule 35(a). *Hardy v. ESSROC Materials, Inc.*, 1998 WL 103306 (E.D.Pa. Feb. 18, 1998)(*see* cases cited therein).

5. Observers at Independent Medical Examinations: As noted above, the Pennsylvania rules allow the examinee to have an observer present. Rule 35 is silent on the issue of observers, and, upon petition, judges have ruled that observers are not permitted, *Shirsat v. Mutual Pharmaceutical Co.*, 169 F.R.D. 68 (E.D.Pa. 1996), and that they are. *Gensbauer v. The May Department Stores Co.*, 184 F.R.D. 552 (E.D.Pa. 1999).

7. REMOVAL AND REMAND ISSUES

1. Basis for Removal

1. 28 U.S.C. § 1441

1. Except as otherwise expressly provided by an Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant(s) to the district court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441(a).

(1) Nonremovable actions, including civil actions arising under the workmen's compensation laws of a State, may not be removed to a federal district court. 29 U.S.C. § 1445.

(2) The citizenship of defendants sued under fictitious names are disregarded for purposes of removal. 28 U.S.C. § 1441(a).

2. Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States ("federal question") shall be removable without regard to the citizenship or residence of the parties. 28 U.S. C. § 1441(b).

3. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. 28 U.S. C. § 1441(b).

4. Whenever a separate and independent claim or cause of action within federal question jurisdiction is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues or, in its discretion, may remand all matters in which State law predominates. 29 U.S.C. § 1441(c).

5. The district court to which the case is removed is not precluded form hearing and determining any claim because the State court from which the action is removed did not have jurisdiction over that claim. 28 U.S. C. § 1441(e).

2. Procedure for Removal

    1. Specified in 28 U.S.C. § 1446.

        1. Defendants must file in the federal district court a Notice of Removal.

            (1) Must contain a short and plain statement for removal, together with a copy of all process, pleadings, and orders served on defendant(s).

            (2) A certified copy of the Notice of Removal must generally be filed with the state court in which the action was originally filed.

                (1) Always check state rules for appropriate filings in state court.

3. Time is of the Essence

    1. The Notice of Removal must be filed within thirty (30) days after the receipt, "through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which action or proceeding is based, or within thirty (30) days after service of summons upon defendant if such initial pleading has been filed in court and is not required to be served on defendant, whichever period is shorter." 28 U.S.C. § 1446(b).

        1. If the defendant(s) in a removed action has not already answered, the answer, defenses or objections available under the Federal Rules of Civil Procedure must be filed **within twenty (20) days** after receipt through service or otherwise of a copy of the initial pleading, **or within twenty (20) days after service of summons upon such pleading**, then filed, **or within five (5) days after the filing of the petition of removal**, **whichever period is longest.** Fed.R.Civ.P. 81(c).

    2. A motion to remand on the basis of any defect other than lack of subject matter jurisdiction must be made within **30 days** after filing of the Notice of Removal.

    3. Post Removal Procedure

        1. 28 U.S.C. § 1448

2. Fed.R.Civ.P. 81(c)

8. POST-TRIAL AND APPELLATE CONSIDERATIONS

1. Timeliness

2. Issues Anticipated on Appeal