

**ARTICLE OF INTEREST: Pennsylvania's "Certificate of Merit:"
Does it have Merit?**

The Pennsylvania Rules of Civil Procedure¹ require that a "Certificate of Merit" be filed by plaintiffs within 60 days of the filing of a complaint against specified " licensed professionals". Pa. R.C.P. 1042.1 includes architects, engineers, and land surveyors² licensed in any state.

Design Professionals are plagued by frivolous lawsuits. The "shot gun" approach to suing every party that set foot on, or simply drove by, a construction site is an abuse that has picked the pockets of architects and engineers for decades. Although the sanctions provisions³ of the Certificate of Merit rule allow for the payment of counsel fees and costs if the design professional is subsequently dismissed from the suit, the discretionary wording of the rule does not guarantee sanctions. Rule 1042.7(b) provides:

"(b) A court may impose appropriate sanctions, including sanctions provided for in Rule 1023.4, if the court determines that an attorney violated Rule 1042.3(a)(1) and (2) by improperly certifying that an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge experienced or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a

¹ Pa. R.C.P. 1042.1-1042.8, adopted Jan. 27, 2003, imd. effective.

² Landscape architects are not included. The rule makes specific reference to the Architects Licensure Law, 63 P.S. § 34.1, et seq. and the Engineer, Land Surveyor and Geologist Registration Law, 63 P.S. § 148 et seq.

³ Pa. R.C.P. 1042.7.

cause in bringing about the harm." (Emphasis added).

It is likely, therefore, that the Certificate of Merit rule will not have any visible impact until an attorney is severely sanctioned because of a rule violation and that sanctioning is publicized. Until then, the rule will likely be flaunted by the plaintiff's bar.⁴ Upon dismissal from the suit, if requested, plaintiff's counsel must provide a copy of the written statement from the licensed professional upon which he based the Certificate of Merit.⁵ However, the rule provides that if claims are still pending against other licensed professionals, the written statement must be produced only after resolution of all claims against all licensed professionals. Since construction litigation typically drags on for years, patience and perseverance will be required to pursue sanctions.

The Certificate of Merit rule may, however, be useful as leverage. That is, the sanction potential is present. Defense counsel can offer to drop any Motion for Sanctions in exchange for immediate dismissal of the suit. In Pennsylvania, a discontinuance may not be entered as to less than all defendants "except upon the written consent of all parties or leave of court after notice to all parties."⁶ In order to avoid possible sanctions, plaintiff's counsel may be willing to petition the court or convince the other parties to agree to the dismissal.

The required Certificate of Merit can be satisfied by certifying to at least one of three specified possibilities. Rule 1042.3 (1) provides:

" an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm..."

⁴ It is also possible that the licensed professional, who issued the statement upon which the attorney relied, was mistaken. If so, the attorney would avoid sanctions. The rule is silent as to what recourse, if any, there may be against a licensed professional who issues a wrong statement.

⁵ Pa. R.C.P. 1042.7 (a).

⁶ Pa. R.C.P. 229 (b)(1)

The requirement of an opinion that the work did not meet the appropriate standard of care is straightforward. However, the requirement of an opinion on causation goes a step further and is an additional safeguard against frivolous lawsuits.

Rule 1042.3 (2) provides:

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

A note to this provision provides that the attorney must also file Certificates of Merit as to the licensed professionals primarily liable, even if they are not named defendants in the lawsuit.

Rule 1042.3 (3) provides:

3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

There are a few limited circumstances in which an expert witness is not required to prove a case of malpractice against an architect or an engineer. If a deviation from the standard of care is obvious, no opinion testimony is needed. An example would be a situation in which it is undisputed that a building does not meet code.

Rule 1042.5. provides that: " Except for the production of documents and things or the entry upon property for inspection and other purposes, a plaintiff who has asserted a professional liability claim may not, without leave of court, seek any discovery with respect to that claim prior to the filing of a certificate of merit."

In the past, design professionals could be subject to subpoena and deposition in pending litigation on the pretext that such non-party discovery would not necessarily lead to the joinder of the design professional in the litigation. In such cases, Design Professionals should now resist discovery beyond any that is specifically allowed by Rule 1042.5. In fact, this rule does not preclude a defendant from seeking a protective order against any discovery under Rule 4012 in response to a request for the production of documents and things. The response to a motion for a protective order would, potentially, expose an effort at pre-joinder discovery.

Pennsylvania's Certificate of Merit rules might make it more difficult for a Design Professional to obtain dismissal by affidavit of noninvolvement.⁷ The motion to dismiss, based upon an affidavit of noninvolvement, could be opposed by a plaintiff's statement that, to the contrary, he possesses a Certificate of Merit.

On balance, the Certificate of Merit rules are favorable to Design Professionals. Used aggressively, architects and engineers can be extricated from some cases in which they would otherwise languish as defendants.

CONTACT US:

About the author: Jonathan D. Herbst, Esquire is a partner in our Philadelphia office with a practice focusing on the defense of architects, engineers and other construction industry related professionals. A brief biographical sketch of Mr. Herbst may be found at our firm's web site located at www.margolisedelstein.com or you can contact him directly at jherbst@margolisedelstein.com.

MARGOLIS EDELSTEIN
The Curtis Center, 4th Floor
Independence Square West
Philadelphia, PA 19106-3304
215-922-1100
www.margolisedelstein.com

⁷ 42 Pa. C.S. § 7502; Pa. R.C.P. 1036.