



# PENNSYLVANIA BAR ASSOCIATION FEDERAL PRACTICE COMMITTEE



Cases, News & Updates

Fourth Quarter 2016

## COMMITTEE NEWS

### **The PBA Board Of Governors Approves the FPC's Recommendations Regarding Proposed Changes To Federal Rules**

On Jan. 25, 2017, the PBA Board of Governors unanimously approved the Federal Practice Committee's recommendations with respect to proposed changes to the Federal Rules of Appellate Procedure, Civil Procedure, Criminal Procedure and Federal Bankruptcy Rules. This action brings to a successful conclusion a significant undertaking on the part of numerous FPC members.

That undertaking began when the Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules published in August 2016 proposed amendments to their respective rules and forms and requested that the proposals be circulated to the bench, bar and public for comment. With a Feb. 15, 2017 deadline for comments, Marc Zucker, chair of the FPC's Local Rules Subcommittee, quickly recruited volunteers to review the proposed rule changes and develop recommendations for review by the full committee and for eventual submission to the PBA Board of Governors. Steven Baicker-McKee, (Hon.) Robert L. Byer, Kristy Castagna, Andrea C. Farney,

Harold M. Goldner, Melissa Giddy, Stephanie Hersperger, Anne N. John, Jennifer Menichini, Jeremy A. Mercer, Peggy M. Morcom, Margaret A. O'Malley, Brian J. Pulito, Barbara Ransom, Brett G. Sweitzer, Henry W. Van Eck and Thomas G. Wilkinson Jr. reviewed the voluminous material and drafted recommendations and supporting analysis. The recommendations and analyses were then circulated to all PBA Federal Practice Committee members for review and an opportunity to comment.

On Jan. 6, 2017, the Federal Practice Executive Council, as well as any FPC members who wished to participate, discussed the subcommittee recommendations. After limited modifications, the Executive Council approved those recommendations, which were then circulated, as required by PBA bylaws, to interested PBA sections and committees (the Appellate Advocacy Committee, Business Law Section, Criminal Justice Section and Civil Litigation Section) so that they also had an opportunity to comment prior to the modified recommendations being submitted to the PBA Board of Governors for its consideration and action.

The Honorable D. Michael Fisher, chair of the Federal Practice Committee, presented the committee's final recommendations to the Board of Governors. Kathleen Wilkinson, the FPC's liaison to the PBA Board of



Also at the PBA's Mid-Year Meetings in St. Kitts, FPC Chair Hon. D. Michael Fisher and FPC Co-Vice Chairs Nancy Conrad and Melinda Ghilardi joined the Chief Judges of Pennsylvania's federal courts (Hon. D. Brooks Smith – U.S. Court of Appeals for the Third Circuit; Hon. Petrese B. Tucker, U.S. District Court for the Eastern District; Hon. Christopher Conner, U.S. District Court for the Middle District; Hon. Joy Flowers Conti, U.S. District Court for the Western District) in discussing the impact on Federal Practice of the 2015-16 Term of the U.S. Supreme and previewing the top cases for the 2016-2017 Term.



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Governors, also spoke in support of the recommendations and helped move the proposals before the Board. The Board determined to act in lieu of the House of Delegates due to the exigent circumstances (the next House of Delegates meeting is scheduled for May, well after the comment period deadline).

Now that the Board of Governors has approved the recommendations, they can be submitted on behalf of the PBA to the Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules. As Marc Zucker described, “This was a significant undertaking in which all participants should take pride.”

### Upcoming PBA Events

**March 10-11, 2017**

PBA Labor & Employment Law Section Retreat  
Hotel Hershey in Hershey, PA

**March 23, 2017**

PBA Committee & Section Day  
Red Lion Hotel Harrisburg East in Harrisburg, PA

**March 24-26, 2017**

PBA Civil Litigation Section Retreat  
Nemacolin Woodlands Resort in Farmington, PA

### Reminder: Next Committee Meeting - Feb. 20, 2017

The Executive Council will hold its next quarterly meeting on Feb. 20, 2017 at 4:30 p.m. As a general practice, all committee members are invited to participate in Executive Council meetings as non-voting members (see Article IV Section 8). This helps keep all committee members engaged and ensures a pool of interested members for future

committee leadership. Please mark your calendar and join us if you can. The call-in information will be provided via the PBA Federal Practice Listserv. If you have any items of concern, please email the committee chair, co-vice chairs or subcommittee chairs. Their contact information is provided on page 3.

### Correction

In the last newsletter, the “Notice to Counsel” regarding recent changes to Federal Rules of Appellate Procedure omitted the appendix that provided a summary of the changes to document word limits. The complete “Notice to Counsel” is appended to this newsletter.

## SUBCOMMITTEES

### Reports from the Chairs

#### Local Rules Subcommittee

See “The PBA Board Of Governors Approves the FPC’s Recommendations Regarding Proposed Changes to Federal Rules” on page 1.

#### Newsletter Subcommittee

The Newsletter Subcommittee obtained approval from the FPC Executive Council to use a LinkedIn “unlisted” group to provide FPC members with an opportunity to engage in dialogue over Open Forum questions and other matters. Work on establishing that group is ongoing.

Susan Schwochau

#### Nominations Subcommittee

Activities of the Nominations Subcommittee will resume next quarter, when committee reappointments will be addressed.

Brett Sweitzer



## PBA FEDERAL PRACTICE COMMITTEE

### Welcome New FPC Members!

The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome our newest members:

- Adam Garner – Philadelphia County, The Garner Firm Ltd.
- Stephanie Gordon – Allegheny County
- Jody Lopez-Jacobs – Philadelphia County, U.S. District Court Eastern District of PA
- Narisa Sasitorn – Montgomery County, Montgomery County Solicitors Office

We are delighted that you have joined this vibrant and active committee! We hope that you will enjoy the benefits of FPC membership, which include automatic receipt of quarterly e-newsletters. Please consider participating in any of the FPC's subcommittees – see page 3 for subcommittee contact information. You can reach out to executive council members with any ideas on how the FPC can best pursue its mission to promote communication and cooperation among members of the federal judiciary and lawyers who practice in federal courts and enhance the knowledge and professional capabilities of lawyers who practice law in the U.S. District Courts in Pennsylvania.

### Contact Information

The chairs of the FPC's six subcommittees welcome new members, and they invite and encourage all FPC members to join one or more of them. If you are interested in serving on any of the six subcommittees, please contact:

#### Educational Programs Subcommittee

Kathleen Wilkinson, Philadelphia  
Wilson Elser Moskowitz Edelman & Dicker LLP  
[kathleen.wilkinson@wilsonelser.com](mailto:kathleen.wilkinson@wilsonelser.com)

#### Legislative Subcommittee

Professor Arthur Hellman, Pittsburgh  
University of Pittsburgh School of Law  
[hellman@pitt.edu](mailto:hellman@pitt.edu)

#### Local Rules Subcommittee

Marc Zucker, Philadelphia  
Weir & Partners LLP  
[mzucker@weirpartners.com](mailto:mzucker@weirpartners.com)

#### Newsletter Subcommittee

Susan Schwochau, Pittsburgh  
[s.schwochau@comcast.net](mailto:s.schwochau@comcast.net)

#### Nominations Subcommittee

Brett G. Sweitzer, Philadelphia  
Defender Association of Philadelphia  
[brett\\_sweitzer@fd.org](mailto:brett_sweitzer@fd.org)

#### Outreach and Diversity Subcommittee

Jennifer Menichini, Lackawanna  
Greco Law Associates PC  
[jmenichini@callGLA.com](mailto:jmenichini@callGLA.com)

## FEDERAL PRACTICE NEWS

### Rules Changes

#### The Eastern District

The District Court for the Eastern District on Jan. 17, 2017 approved two amendments to the court's local rules. To conform to recent changes to Federal Rule of Civil Procedure 6(d), Local Rule 5.1.2 was amended to delete section 8(e) (allowing three days to be added if service was by electronic means) and to renumber the following sections. In addition, the following change was made to Local Rule 48.1:

Whenever it appears likely that the trial will be unusually protracted, or whenever the court in its discretion determined that the interests of justice so require, the jury may be enlarged to include as many as twelve (12) members; and any number of alternates may be used, as the court may determine, but not more than twelve (12) persons shall participate in the deliberations of the jury, nor may any verdict be rendered by a jury consisting of more than twelve (12) persons, or fewer than six (6) persons.

Although both amendments were deemed immediately effective, those wishing to comment on the amended rules

may do so by submitting those comments to Kate Barkman, Clerk of Court, U.S. Courthouse, 601 Market St. Room 2609, Philadelphia, PA, 19106, by the close of business Feb.17, 2017.

## The Western District

As you may recall, in March 2016, the District Court for the Western District announced a series of proposed changes to its local rules. With some modifications, those proposed amendments went into effect on Nov. 1, 2016. Changes were made to a total of 21 provisions within the court's civil rules and to seven provisions within the court's criminal rules. Because the court's website does not appear to post a redline showing all of the final amendments, an attachment to this newsletter presents them for your convenience.

The District Court for the Western District also made a change to its CM/ECF policies and procedures, effective Dec. 1, 2016. The change removed reference to the three extra days allowed under former Fed. R. Civ. P 6(d) and Fed. R. Crim. P. 45(c) and thus brought the CM/ECF policies and procedures into conformance with recent changes to the federal rules.

## Status of Judicial Vacancies

### U.S. Court of Appeals, Third Circuit

- There are two vacancies: one created when Judge Marjorie Rendell assumed senior status (2015) and one created when Judge Fuentes assumed senior status (2016). Recent reports show no nominees.

### U.S. District Court, Western District of PA

- There are four vacancies: one created with the passing of Judge Gary Lancaster (2013), one created when Judge Sean McLaughlin resigned (2013), one created when Judge Terrence McVerry assumed senior status (2013), and one created when Judge Kim Gibson assumed senior status (2016). Recent reports show no nominees.

### U.S. District Court, Eastern District of PA

- There are two vacancies: one created when Judge Mary McLaughlin assumed senior status (2013) and one created when Judge Luis Restrepo was elevated (2016). Recent reports show no nominees.

## CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions filed between October and December 2016 involving issues of potential interest to FPC members

## THIRD CIRCUIT PRECEDENTIAL OPINIONS

*United States ex rel. Customs Fraud Investigations LLC v. Victaulic Co.*, 839 F.3d 242 (3d Cir. 2016) (Statutes [False Claims Act] / Civil Procedure [Rule 15]) – Customs Fraud Investigations (CFI) brought suit under the False Claims Act's reverse false claims provision, alleging that Victaulic engaged in fraudulent acts to avoid paying marking duties on its imported unmarked or improperly marked pipe fittings. Holding that it failed to cross the *Twombly/Iqbal* threshold from possible to plausible, the district court dismissed CFI's complaint with prejudice and, citing undue delay and futility, also denied CFI's subsequent motions for leave to amend and for relief from judgment. The Court of Appeals vacated both of the latter orders, concluding that district court erred in deciding that (1) because CFI should have been on notice that it was considering dismissing the complaint, CFI's motion for leave to amend was untimely; (2) the proposed first amended complaint (FAC) was futile because failure to pay marking duties could not, as a matter of law, give rise to a reverse false claims action; and (3) CFI's FAC failed to meet the pleading requirements of Rule 9(b). In the majority's view, CFI's proposed complaint contained "just enough" allegations of hard facts that would survive a Rule 12(b)(6) motion when combined with other allegations and an expert's declaration.

*Schuchardt v. President of the U.S.*, 839 F.3d 336 (3d Cir. 2016) (Civil Procedure / Standing) – Attorney Schuchardt launched a constitutional challenge to an electronic surveillance program operated by the NSA under Section 702 of the Foreign Intelligence Surveillance Act, alleging that the government was violating the Fourth Amendment by capturing and storing the email communications of all or substantially all American citizens, including his own, through a program called "PRISM." Treating the Government's Rule 12(b)(1) motion as a facial challenge, the district court concluded that Schuchardt failed to plead facts from which one might reasonably infer that his own

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communications had been seized by the federal government, *i.e.*, that he had standing. In an opinion that underscores the effect of the procedural posture of the case on appeal, the Court of Appeals concluded that (1) the allegations in Schuchardt’s complaint, in addition to the news articles and other disclosures concerning PRISM, were sufficiently “particularized” to demonstrate that he suffered a discrete injury and (2) the facts were pleaded with enough detail to render them plausible, “well-pleaded” allegations entitled to a presumption of truth. As a result, the Court vacated the district court’s order of dismissal.

***South Jersey Sanitation Co. Inc. v. Applied Underwriters Captive Risk Assurance Co.***, 840 F.3d 138 (3d Cir. 2016) (Arbitration) – The district court denied Applied Underwriters’ motion to compel arbitration, ruling that the arbitration provision in the parties’ contract was unenforceable under applicable Nebraska law and the McCarran Ferguson Act. Reviewing that denial, the Court of Appeals, applying *Rent-A-Ctr., West., Inc. v. Jackson*, 561 U.S. 63 (2010), concluded that South Jersey’s fraud-based challenge focused on the contract in general rather than on the arbitration provision alone, and thus its claim of fraud should be left for the arbitrator’s consideration. As to the effect of Nebraska law — which also implicated the contract as a whole — the Court noted that the nature of the contract was in dispute (investment vehicle versus insurance contract) and concluded that the precise nature of the contract was for the arbitrator to determine, as was whether Nebraska law applied to it.

***Marshall v. Commissioner, Pennsylvania Dep’t of Corrections***, 840 F.3d 92 (3d Cir. 2016) (Habeas Corpus / Appellate Court Jurisdiction) – Marshall moved to remove counsel and proceed *pro se*; he filed a notice of appeal before the district court ruled on that motion. The Court of Appeals dismissed the premature appeal because neither Rule 4(a)(2) nor the doctrine based on *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983), applied where a notice of appeal was filed before the district court announced its decision. The Court provided its rationale for not extending the *Cape May Greene* doctrine to permit a litigant to file a preemptive notice of appeal before the district court makes or announces any decision and

then proceed with the appeal if the decision later proves unfavorable.

***U.S. v. Elonis***, 841 F.3d 589 (3d Cir. 2016) (Criminal Law & Procedure) – The Court of Appeals initially affirmed Elonis’ conviction for violating 18 U.S.C. § 875(c) (prohibiting transmitting in interstate commerce a communication containing a threat to injure the person of another); the U.S. Supreme Court reversed. It explained that the objective standard under which the jury was instructed was insufficient and that the jury should have been instructed that it could convict Elonis if it found he “transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication w[ould] be viewed as a threat.” On remand, the Court of Appeals assessed whether the instructional error the Supreme Court identified was harmless. Finding that the record contained overwhelming evidence demonstrating beyond a reasonable doubt that Elonis knew the threatening nature of his communications, the Court concluded that he would have been convicted absent the error.

***Halle v. West Penn Allegheny Health Sys.***, 842 F.3d 215 (3d Cir. 2016) (Labor-FLSA [Collective Action] / Appellate Jurisdiction) – Halle filed suit under the FLSA, claiming that he and similarly-situated employees were not properly compensated for work performed during meal breaks. Based on determinations in two previously-filed similar actions, the district court dismissed Halle’s collective action allegations with prejudice on issue preclusion grounds and dismissed the claims of opt-in plaintiffs without prejudice to re-filing individual actions. Halle later accepted a Rule 68 offer of judgment, and judgment was entered against West Penn. Three opt-in plaintiffs then filed an appeal seeking review of the district court’s dismissal of the collective action allegations from Halle’s complaint. The Court of Appeals dismissed the appeal for lack of jurisdiction, concluding that the three opt-in plaintiffs were no longer “parties” to the case after they were dismissed without prejudice from Halle’s proceeding and that they could not pursue an appeal from the judgment in Halle’s individual case — a judgment that in no way bound them or aggrieved them. The Court echoed the point made in *Camesi v. University of Pittsburgh Med. Ctr.*, 729 F.3d 239 (3d Cir. 2013): To obtain appellate

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review of an order decertifying a collective action, the plaintiff must either proceed to a final judgment on the merits of his or her individual claims or seek the district court's permission to pursue an immediate appeal.

***Papp v. Fore-Kast Sales Co., Inc.***, 842 F.3d 805 (3d Cir. 2016) (Statutes [Federal Officer Removal] / Federal Court Jurisdiction) – Papp filed in state court a products liability / failure to warn action alleging that his late wife was made ill by exposure to asbestos from a Boeing aircraft. Boeing removed under the federal officer removal statute and Papp sought remand. The district court granted Papp's motion. Applying the test for federal officer removal announced in *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457 (3d Cir. 2015), the Court of Appeals reversed, finding that Boeing met all four of the test's requirements. The Court declined to consider Papp's alternate, untimeliness assertion made in a single footnote sentence because Papp merely referred to arguments made elsewhere rather than presenting sufficient argument on the issue.

***U.S. v. Robinson***, 844 F.3d 137 (3d Cir. 2016) (Criminal Law & Procedure) – Robinson was convicted of one count, under 18 U.S.C. § 924(c), of brandishing a firearm during the commission of a crime of violence and two counts of Hobbs Act robbery. On appeal, he argued that, under the categorical approach and looking only to the minimum conduct criminalized by the statute in determining whether it is a crime of violence, a Hobbs Act robbery is not a crime of violence as required for a conviction under § 924(c). The Court of Appeals, on review for plain error, rejected the parties' contention that the categorical approach applied. The Court concluded that when two offenses — here robbery and brandishing a gun — have been tried together and the same jury has reached a guilty verdict on both offenses, the Hobbs Act robbery qualifies as a crime of violence under the “elements clause” of 18 U.S.C. § 924(c) (3)(A). The Court also held that the district court did not err in denying Robinson's motion to suppress a photo array identification or in failing to conduct a *Faretta* hearing in response to Robinson's request to proceed *pro se*. It therefore affirmed Robinson's conviction. The Court agreed with the government, however, that the issue of whether Robinson

qualified as a career offender under U.S.S.G. § 4B1.1 should be remanded to district court.

***Moeck v. Pleasant Valley School Dist.***, 844 F.3d 387 (3d Cir. 2016) (Civil Procedure [Rule 11 Sanctions]) – The School District, despite winning on summary judgment, sought review of the district court's denial of two Rule 11 motions, which the Court of Appeals described as including examples of alleged false statements that were “focused on small details that have little bearing on the essence of Plaintiffs' claims.” The Court held that the district court did not abuse its discretion in (1) declining to treat the School District's motions as unopposed under the court's local rules, given that the plaintiffs had responded with a motion to stay the filing and consideration of the Rule 11 motions until the fact questions they raised could be decided in the then-pending summary judgment motions; and (2) denying the Rule 11 motions, which the district court concluded were meritless, and in essence, a waste of judicial resources.

***Maliandi v. Montclair State Univ.***, \_\_ F.3d \_\_, 2016 WL 7438626 (3d Cir., Dec. 27, 2016) (Labor & Employment [FMLA] / Eleventh Amendment Immunity) – In this interlocutory appeal from the denial of Montclair State University's Rule 12(b)(1) motion, the Court of Appeals resolved a split among district judges in the circuit as to whether the University is an arm of the State of New Jersey and therefore entitled to Eleventh Amendment immunity. Applying the three-factor test described in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989) (*en banc*), the Court concluded that while the funding factor counseled against immunity, the status under state law and autonomy factors – while close – tilted in favor of extending immunity from suit. Because two of the three co-equal factors supported the University's claim for immunity, the Court held it was an arm of the State protected by the Eleventh Amendment.

### **EASTERN DISTRICT OF PA OPINIONS**

***School Dist. of Phila. v. Kirsch***, 2016 U.S. Dist. LEXIS 139417 (E.D. Pa. Oct. 6, 2016) (Rule 62 & IDEA's “stay-put” provision) – After granting in part and denying in part the parties' cross motions on the administrative

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record, Judge T. O'Neill Jr. applied the IDEA's "stay-put" provision and ordered the School District to reimburse parents for their childrens' private-school tuition until all of their claims were resolved. Both parties filed appeals. The School District moved under Rule 62(d) for a stay of the court's \$227,788.68 judgment, asserting that as a "political subdivision," it was entitled to a stay without a bond under Rule 62(f). Judge O'Neill denied the School District's motion, concluding that because the IDEA's "stay-put" provision serves as an automatic preliminary injunction, the School District's motion was governed by Rules 62(a)(1) and 62(c). The court explained that the stay-put provision reflects a congressional policy choice that children with disabilities are best served by maintaining their educational status quo and that this extends through the appellate process.

***U.S. v. Fattah***, 2016 U.S. Dist. LEXIS 145833 (E.D. Pa. Oct. 20, 2016) (Criminal Law & Procedure) – Five defendants, including former Congressman Fattah, were found guilty of numerous crimes after a lengthy jury trial related to their involvement in five criminal schemes. (Fattah was found guilty on all 22 counts in which he was named.) They all sought judgments of acquittal under Rule 29 or new trials under Rule 33. Judge H. Bartle III's opinion is notable, not only for its detailed description of the criminal activities of an elected official and his supporters, but also for the court's application of the Supreme Court's recent clarifications on the meaning of "official acts" in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Ultimately, the court found that the government had failed to establish isolated elements of five of the 28 charged crimes and granted in part the motions for judgment of acquittal of three defendants. The motions for new trial were denied.

***U.S. v. Moore***, 2016 U.S. Dist. LEXIS 149199 (E.D. Pa. Oct. 27, 2016) (Criminal Law & Procedure) – Two defendants were charged in a five-count indictment with crimes arising out of two armed bank robberies. After the defendants initially pleaded guilty, the court permitted them to withdraw their pleas after the packaged nature of their plea agreement came to light and both defendants substituted counsel. In this opinion, Judge L. Davis explained his decision to deny four pretrial motions: a

motion to dismiss the indictment (based largely on the packaged plea agreement); a motion to dismiss counts three and five of the indictment (urging that armed bank robbery is not a crime of violence under 18 U.S.C. §924(c)(3)); a motion to sever the defendants; and a motion to suppress cell site location information. Although decided before the Third Circuit's decision in *U.S. v. Robinson* (844 F.3d 137 – see above) and although Judge Davis applied the categorical approach, his ruling that armed bank robbery is a crime of violence appears consistent with *Robinson*.

***U.S. v. Sanchez***, 2016 U.S. Dist. LEXIS 148890 (E.D. Pa. Oct. 27, 2016) (Effect on trial of defense counsel prior suspension) – Before Sanchez's trial began, the Pennsylvania Supreme Court suspended Sanchez's counsel, in part because his representation of a number of clients had been grossly deficient. That suspension became effective the first day of Sanchez's trial. In addition, the EDPA, prior to trial, had entered an order for the attorney to show cause why the imposition of identical discipline would be unwarranted. After trial and after learning of these facts, Judge H. Bartle III granted Sanchez's motion for a new trial under Rule 33, concluding that, whether or not his representation rose to the level of ineffective assistance of counsel, Sanchez's counsel's representation of Sanchez undermined the fairness and integrity not only of the trial but also of the federal judicial system.

***Monfared v. St. Luke's Univ. Health Network***, 2016 U.S. Dist. LEXIS 152435 (E.D. Pa. Nov. 2, 2016) (Arbitration cost-splitting) – At issue in this employment discrimination case was whether the 50/50 cost-splitting provision in the arbitration clause in Monfared's employment contract was enforceable. Judge J. Leeson ordered the parties to proceed to arbitration, concluding that Monfared had not met her burden of showing that her share of estimated arbitration costs would be prohibitively expensive for her. A key fact was that Monfared's gross salary in her new job (obtained nine weeks after being terminated by defendant) was \$135,000, while her stated debts and expenses – which expressly did not include "groceries, gas, clothing, and the like" – left a difference of \$76,270, which the court considered a substantial sum. In view of her high salary, Monfared did not provide sufficient detail as to how this

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money was taken up by taxes or other expenses, and the court could not find in her favor.

***Davis v. Northampton Cty. Dep't of Corr.***, 2016 U.S. Dist. LEXIS 162379 (E.D. Pa. Nov. 22, 2016) (Extension of time to appeal) – *Pro se*, formerly incarcerated plaintiff sought an extension of time to file a notice of appeal from the district court's grant of summary judgment to defendants. Judge J. Schmehl denied the motion, finding that Davis failed to show either good cause or excusable neglect for his untimely appeal and extension of time request: Nothing suggested that he did not receive notice of the court's judgment, and all four factors that must be considered in determining whether Davis' neglect was excusable went in favor of denying his request.

***Landau v. Viridian Energy PA LLC***, 2016 U.S. Dist. LEXIS 164879 (E.D. Pa. Nov. 30, 2016) (Economic Loss Doctrine and the UTPCPL) – Landau filed a putative class action asserting Viridian, an energy services company, lured him from his local utility company by making deceptive promises of low, stable electricity rates and breached the terms of its contract by charging him and others exorbitant prices for electricity. Viridian moved to dismiss Landau's claims and to strike Landau's class allegations, arguing, among other things, that the economic loss doctrine barred Landau's UTPCPL claim. Although the Third Circuit in *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002), had held, based on its prediction of how the Pennsylvania Supreme Court would rule, that the economic loss doctrine barred statutory fraud claims, including those arising under the UTPCPL, two subsequent Superior Court opinions were to the contrary. In a detailed opinion, Judge G. McHugh explained why he sided with the district courts that have held that *Werwinski* no longer is controlling authority and have followed Superior Court decisions, rather than with those courts that have held that *Werwinski* remains binding. Viridian's motion to dismiss was ultimately granted as to Landau's claims for breach of the covenant of good faith and fair dealing, unjust enrichment and for his claim for injunctive relief, but was denied as to all other claims. Its motion to strike class allegations was also denied.

***Stein v. Cortés***, 2016 U.S. Dist. LEXIS 171187 (E.D. Pa. Dec. 12, 2016) [Jill Stein's recount effort] – Judge P.

Diamond's summary of his opinion: "Unsuccessful Green Party Candidate Jill Stein and Pennsylvania voter Randall Reitz allege that because Pennsylvania's voting machines might have been 'hacked' during last month's election, I must order the commonwealth to conduct a recount of the votes cast for president. There are at least six separate grounds requiring me to deny plaintiffs' motion [for a preliminary injunction]. Most importantly, there is no credible evidence that any 'hack' occurred, and compelling evidence that Pennsylvania's voting system was not in any way compromised. Moreover, plaintiffs' lack of standing, the likely absence of federal jurisdiction, and plaintiffs' unexplained, highly prejudicial delay in seeking a recount are all fatal to their claims for immediate relief. Further, plaintiffs have not met any of the requirements for the issuance of a mandatory emergency injunction. Finally, granting the relief plaintiffs seek would make it impossible for the commonwealth to certify its presidential electors by Dec. 13 (as required by federal law), thus inexcusably disenfranchising some six million Pennsylvania voters. For all these reasons, I am compelled to refuse Plaintiffs' request for injunctive relief."

***Lamb v. Montgomery Twp.***, 2016 U.S. Dist. LEXIS 177927 (E.D. Pa. Dec. 23, 2016) (Rule 37 sanctions) – After she was terminated for the theft of her supervisor's iPhone, Lamb filed suit alleging claims of hostile work environment, sex discrimination and retaliation for protected activity. Lamb attached to her response, in opposition to the defendants' motion for summary judgment, a declaration that offered expert opinions regarding the sufficiency and appropriateness of the police investigation into the iPhone theft; defendants moved to strike that declaration. Judge W. Beetlestone granted the motion to strike with respect to any expert testimony it contained (but denied it as to fact-based testimony), concluding that Rule 37 sanctions were appropriate given Lamb (1) had classified the declarant as an expert witness and used that classification to avoid having defendants depose the declarant as a fact witness; (2) failed to produce an expert report by the court-ordered deadline for such reports, thereby avoiding having defendants depose the declarant as an expert witness; and (3) simply attached the report (in the form of the declaration) to her summary

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judgment response months after the deadline had passed. The court ultimately granted the defendants' summary judgment motion.

### **MIDDLE DISTRICT OF PA OPINIONS**

***Qazizadeh v. Pinnacle Health Sys.***, \_\_ F. Supp. 3d \_\_, 2016 WL 578352 (M.D. Pa. Oct. 4, 2016) (Reconsideration of interlocutory orders under Rule 54(b)) – Physician alleged, *inter alia*, that in suspending him without pay and terminating him without severance payments, Pinnacle Health breached the parties' employment agreement and violated Pennsylvania's Wage Payment and Collection Law. After the district court granted in part and denied in part Oazizadeh's motion for partial summary judgment on those claims, both parties sought reconsideration. Determining that a Rule 54(b) "consonant with justice" standard applied to its interlocutory order (versus the standard applicable to Rule 59 motions), Judge W. Caldwell granted Oazizadeh's motion and denied Pinnacle Health's motion. Pinnacle Health had put forth arguments that could have been raised previously, and in any event, they were arguments that the court concluded were unavailing. On the other hand, the court agreed with Oazizadeh's assertion that the court had made an error of fact that, when corrected, meant that summary judgment should have been granted in Oazizadeh's favor. The court therefore vacated its previous order and granted Oazizadeh's summary judgment motion in full.

***Keyes v. Lynch***, \_\_ F. Supp. 3d \_\_, 2016 WL 5799111 (M.D. Pa. Oct. 4, 2016) (Law of the case / Exceptions to issue preclusion) – Keyes and Yox, who had each been involuntarily committed for brief periods in 2006 (two weeks and one week), challenged on Second Amendment as-applied grounds their inability to possess guns as private individuals. Both carried guns in the course of their employment. Keyes' Second Amendment claims were dismissed because he had previously raised the claims in state court. Yox prevailed on his Second Amendment claims, largely because Judge J. Jones III concluded, contrary to the state court addressing Keyes' claims, that *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011) rather than *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)

applied. After summary judgment, Keyes and Yox moved for reconsideration under Rule 59 of the court's prior dismissal of Keyes' Second Amendment claims. Because the motion was not timely under Rule 59, Judge Jones regarded it as a Rule 60(b)(6) motion. In an opinion that sets forth in substantial detail both law-of-the-case and issue-preclusion principles, the court concluded that (1) given the extraordinary circumstances that the case presented, the law-of-the-case doctrine did not preclude the court from revisiting the prior dismissal order; and (2) the court's ruling with respect to Yox's claims was a significant change in the legal atmosphere that justified a departure from the general rules of issue preclusion. As the court described: "One Plaintiff has been afforded full constitutional relief, while the other, materially identical Plaintiff has been barred from asserting his constitutional rights. We would be hard pressed to think of a better example of an inequitable administration of the laws, and it is a circumstance that cries out to be rectified." The court vacated its prior order of dismissal with respect to one of Keyes' claims.

***Tiongco v. Southwestern Energy Production Co.***, \_\_ F. Supp. 3d \_\_, 2016 WL 6039130 (M.D. Pa. Oct. 14, 2016) (Private Nuisance) – Tiongco asserted, among other things, that SEPCO's drilling and gas exploration activities, which created "excessive noise, light, and vibrations" that interfered with the use and enjoyment of her private property, constituted a private nuisance. Judge A.R. Caputo denied SEPCO's motion seeking summary judgment on Tiongco's private nuisance claim, holding that (1) whether the noise, light, and/or vibration levels of which Tiongco complained exceeded the limits prescribed by county ordinance is not determinative of whether the same activities constitute a significant invasion giving rise to a private nuisance; (2) the plaintiff produced sufficient evidence as to whether SEPCO was the legal cause of the private nuisance to survive summary judgment (the court noting that SEPCO provided no evidence that it was not the legal cause); and (3) there was sufficient evidence in the record to allow a reasonable juror to conclude that SEPCO, although not acting with the purpose to invade, knew or was substantially certain that its conduct was in fact significantly interfering with Tiongco's use and enjoyment of her property.

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*United States v. Tyler*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 6728683 (M.D. Pa. Nov. 15, 2016) (Criminal Law & Procedure / Constitution) – Tyler was convicted in 2000 of obstructing justice (1) by tampering with a witness by murder and (2) by tampering with a witness by intimidation and threats. Due to intervening Supreme Court decisions, Tyler was ultimately ordered retried on charges that he obstructed justice by murder or by intimidation and threats in order to prevent the (deceased) victim’s communication to a law enforcement officer of information relating to the possible commission of a possible federal offense. Tyler sought to dismiss the indictment. Judge W. Caldwell denied Tyler’s motions, rejecting Tyler’s assertions that (1) the government’s case relied entirely on the testimony of a narcotics detective regarding statements made to him by the victim, and the use of this inadmissible hearsay would violate the Sixth Amendment’s confrontation clause; (2) the Fifth Amendment’s Double Jeopardy Clause barred retrial because he was already subjected to trial in Pennsylvania state court for criminal homicide and lesser charges and because his federal convictions had been vacated (albeit for errors in law), he cannot be tried on what amounts to a different theory; (3) the Fifth Amendment’s due process clause barred retrial because of the prosecutor’s prior “outrageous” conduct.

*United States v. Mitchell*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 6656771 (M.D. Pa. Nov. 10, 2016) (Habeas Corpus) – Mitchell, serving a mandatory minimum sentence of 15 years’ imprisonment as a result of the ACCA, moved for vacatur of her sentence in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015) (invalidating the ACCA’s residual clause as unconstitutionally vague). Although she conceded that one of her prior convictions was for a “serious drug offense,” Mitchell urged that her three prior convictions for arson under Pennsylvania law could only fall under the now-invalidated residual clause (*i.e.*, they were beyond the reach of both the enumerated offenses clause and the force clause). Chief Judge C. Conner concluded that (1) because Mitchell’s petition came within one year of *Welch v. United States*, 136 S.Ct. 1257 (2016) (holding *Johnson* is retroactively applicable to cases on collateral review), her petition was timely; (2) Mitchell’s claim was not

procedurally defaulted — although she did not raise her claim on direct review, she showed cause, as well as resulting prejudice should the default be given preclusive effect; and (3) because under the modified categorical approach, two of Mitchell’s three Pennsylvania arson convictions did not match the elements of generic arson, those convictions could only be supported by the invalidated residual clause. Thus, she did not have three predicate felonies under the ACCA, and the court granted Mitchell’s §2255 motion.

*United States v. Thompson*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 7045741 (M.D. Pa. Nov. 2, 2016) (Criminal Joinder under Rule 8(d)) - Thompson was charged with conspiring, along with 18 other co-defendants, to distribute drugs by way of an extensive network that tracked the I-80 corridor in the greater Williamsport area. He moved to sever, arguing that he was improperly joined under Fed. R. Crim. P. 8(b) because multiple sub-conspiracies existed, rather than a single overarching one and because he was not personally involved in all acts undertaken by other members of the alleged conspiracy. Rejecting these arguments, Judge M. Brann denied Thompson’s motion, concluding (1) on the basis of allegations in the indictment, Thompson was one of 18 subjects who worked together to distribute heroin and other substances that were obtained from common sources, sold to common customers, distributed out of common operational sites and discussed on common mobile telephone lines; and (2) Thompson failed to meet his burden of identifying clear and substantial prejudice sufficient to outweigh the strong preference for joint trials of co-conspirators.

### **WESTERN DISTRICT OF PA OPINIONS**

*Team Angry Filmworks, Inc. v. Geer*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 6039068 (W.D. Pa. Oct. 14, 2016) (Justiciable controversies under Article III and the Declaratory Judgment Act) – Film-production company sought a declaration that Philip Francis Nowlan’s 1928 science-fiction novella *Armageddon-2419 A.D.* and character “Buck Rogers” entered the public domain. Defendant Trust moved (for the third time) to dismiss the action under Rule 12(b) (1) for failure to present a justiciable controversy under the DJA and Article III, or in the alternative, moved to

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join necessary parties under Rules 12(b)(7) and 19. After rejecting the production company's argument that under *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S.Ct. 843 (2014), the burden of proving jurisdiction lies with the Trust, Chief Judge J. Conti, treating the Trust's Rule 12(b)(1) motion as a facial challenge, again granted that motion. The court concluded that although the company made the requisite showing of reality, it had not established the immediacy of the dispute. The company was given 60 days to file an amended complaint. The Trust's motion to join necessary parties was denied as moot.

***Guthrie v. Guthrie***, \_\_ F. Supp. 3d \_\_, 2016 WL 6241870 (W.D. Pa. Oct. 25, 2016) (Qualified Immunity) – Plaintiff sued police officer for unlawful seizure and excessive force as a result of events occurring when the officer responded to the plaintiff's 9-1-1 call made when her husband suffered, as it was later determined, a grand mal seizure. The officer moved for summary judgment, arguing that although the restraint and handcuffing of the husband was a seizure, it was not unlawful under the community caretaking doctrine. Alternatively, the officer urged he was entitled to qualified immunity on both claims. Judge M. Kearney (EDPA) declined to address whether the community caretaking doctrine provides an exception to the Fourth Amendment prohibition on warrantless seizures inside the home and instead granted the officer's motion with respect to the unlawful seizure claim on qualified immunity grounds, concluding that the Supreme Court had not defined the scope of a citizen's right to be free from seizure when an officer is assisting the citizen suffering a grand mal seizure and potentially reaching for the officer's gun. The court found that genuine issues of material fact precluded qualified immunity on the excessive force claim.

***U.S. v. Johnson***, \_\_ F. Supp. 3d \_\_, 2016 WL 6433176 (W.D. Pa. Oct. 31, 2016) (Government's pre-trial obligations re: information) – Johnson filed numerous motions seeking a wide variety of information from the government before trial. Treating Johnson's Motion for Early Release of Jencks Act Material as seeking all disclosures available under Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), and

the Jencks Act, Judge D. Cercone explained the confines of each and what a defendant is and is not entitled to in terms of pre-trial disclosures. The motion was denied to the extent that it sought the disclosure of statements, information and things beyond (1) that which the government made or had agreed to make available and (2) the dictates that flow from Rule 16 and *Brady*. The court also denied Johnson's motion for a bill of particulars. His request for an order requiring all government agents to preserve their rough notes and writings was granted to the extent that material falls within the purview of *Brady* and/or the Jencks Act. The court also encouraged the government to disclose all *Brady* impeachment material without further delay, in any event no later than 10 business days prior to trial, and directed the government to provide the general notice required under Rule 404(b) no later than 10 business days prior to trial.

***DCK North Am., LLC v. Burns & Roe Services Corp.***, \_\_ F. Supp. 3d \_\_, 2016 WL 6441574 (W.D. Pa. Oct. 31, 2016) (Arbitrability in light of an ambiguous arbitration clause) – DCK filed breach of contract claims against Burns & Roe, with which it engaged in joint construction projects; Burns & Roe moved to dismiss or stay pending arbitration. The arbitration clause in the parties' joint venture agreement provided certain disputes would be settled by arbitration and that others — those arising after completion of performance of the "Construction Contract" — would be settled in court. The problem: There was no definition for "construction contract" and no language defining what the parties intended to use to define when performance of that contract was completed. Judge M. Hornak concluded that (1) in reviewing the motion, a motion to dismiss standard (as opposed to a summary judgment standard) was appropriate; (2) DCK's claim was more akin to questions of arbitrability that courts presumptively decide; (3) even though the parties referred to the AAA Rules in their arbitration clause, under the circumstances this did not allow for the conclusion that the parties clearly and unmistakably provided for an arbitrator, rather than a court, to decide the question of arbitrability; and (4) the presumption in favor of arbitration applied. The court granted the motion, ordered the parties to arbitration and stayed the case pending arbitration.

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***U.S. EEOC v. Scott Med. Health Ctr., P.C.***, \_\_ F. Supp. 3d \_\_, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016) (Discrimination based on sexual orientation under Title VII) – The EEOC brought this action on behalf of a gay male who was allegedly constructively discharged by Scott Medical Center due to an allegedly sexually hostile work environment. The Center moved for dismissal under Rule 12(b)(1), arguing that the court lacked jurisdiction because the EEOC failed to comply with Title VII’s procedural requirements, and under Rule 12(b)(6), urging that Title VII does not protect against discrimination based on sexual orientation. Judge C. Bissoon denied the motion in its entirety. The court rejected the Center’s argument that Title VII imposes the same procedural requirements on the EEOC suing in its own name as it imposes on private plaintiffs, and it found that the EEOC fully complied with the procedures and standards applicable to it. Judge Bissoon also held that Title VII’s “because of sex” provision prohibits discrimination on the basis of sexual orientation, and thus that the EEOC’s complaint properly stated a claim for relief. The court discussed why *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), controlled the analysis, and why it did not view the Third Circuit’s decision in *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), as dispositive.

***Wall v. Corona Capital, LLC***, \_\_ F. Supp. 3d \_\_, 2016 WL 6901333 (W.D. Pa. Nov. 22, 2016) (Personal jurisdiction and venue) – Corona Capital, a Delaware limited liability company with its principal place of business in Florida, purchased structured annuity payments at a discount from plaintiffs who settled personal injury claims. The Walls purchased, under an agreement with Altium Group (a Delaware limited liability company doing business in New Jersey), structured annuity payments that were sold to Altium by Corona Capital. The Walls never received payments, the underlying settlement payments having been found to have been sold to Corona Capital by a Floridian without authority to sell. The Walls sued; Corona Capital asserted that the court had no jurisdiction over it and Altium wanted the case transferred to New Jersey under the agreement’s forum selection clause. Judge M. Kearney (EDPA) granted Corona Capital’s motion, concluding that

it did not have minimum contacts with Pennsylvania. After finding that venue in Pennsylvania was proper, the court determined that the agreement’s forum selection clause was permissive, and that private interest factors and public interest factors weighed against transferring the case to New Jersey. The court therefore denied Altium’s motion.

***Corr v. Springdale Borough***, \_\_ F. Supp. 3d \_\_, 2016 WL 6901327 (W.D. Pa. Nov. 22, 2016) (Civil Rights – Public employee) – Former Springdale part-time police officer filed claims against the borough, the chief of police, the mayor, and others, asserting that he was deprived of his property interest in his job as a Springdale Borough police officer without being given a *Loudermill* hearing, and that his First and Fourth Amendment rights were violated when he was prevented from speaking at a borough council meeting and escorted out. Defendants sought summary judgment on all claims. Judge M. Hornak granted summary judgment in defendants’ favor on Corr’s due process claim, finding, as a matter of law, that Corr voluntarily resigned from his position and that he dropped his grievance rather than following the available procedure through to its conclusion. After determining that the council meetings were a limited public forum, the court concluded that the disputed facts, such as the motive for cutting off Corr’s speech, prevented summary judgment for two defendants on Corr’s First Amendment claims. The court granted the defendants’ motion on Corr’s Fourth Amendment claims because no jury could find that he was seized, and he admitted he was not searched.

### From Around the Web

GOOD NEWS! The Department of Homeland Security has granted Pennsylvania yet another extension – until June 5, 2017 – to bring itself into compliance with the REAL ID Act. Bottom line: You can still use your PA driver’s license to get access to federal buildings.

<https://www.governor.pa.gov/governor-wolf-bipartisan-leaders-announce-pennsylvania-real-id-extension/>

## PBA FEDERAL PRACTICE COMMITTEE

If you know of articles, sources, sites, blogs or other locations of material you think other FPC members would find interesting, insightful, useful or just plain humorous, please forward the location information to Susan Schwochau at [s.schwochau@comcast.net](mailto:s.schwochau@comcast.net).

### OPEN FORUM

No submissions received.

The “Open Forum” section of the FPC newsletter is open to all FPC members for raising questions of federal practice, rules and other matters that are likely to be of interest or importance to other members. Submissions for possible inclusion in the Open Forum section can be sent to [s.schwochau@comcast.net](mailto:s.schwochau@comcast.net).

### Thank You

The chair of the FPC Newsletter Subcommittee extends a sincere thank you to the following Federal Practice Committee members for their contributions to this edition of the PBA Federal Practice Committee newsletter:

- Kevin H. Conrad, White and Williams LLP, Center Valley
- Nancy Conrad, White and Williams LLP, Center Valley
- Hon. D. Michael Fisher, U.S. Court of Appeals Third Circuit, Pittsburgh
- Philip Gelso, Law Offices of Philip Gelso, Kingston
- Melinda Ghilardi, Federal Public Defenders Office, Scranton
- Adam Martin, Chambersburg
- Jeremy A. Mercer, BlankRome, Pittsburgh
- Brett G. Sweitzer, Defender Association of Philadelphia, Philadelphia
- Marc Zucker, Weir & Partners LLP, Philadelphia

A special thank you goes to Susan Etter, Esq., Pennsylvania Bar Association, who continuously provides invaluable assistance.

### Federal Practice Committee Leadership

PBA President Sara A. Austin has appointed the following people to lead the PBA Federal Practice Committee:



**Chair: Hon. D. Michael Fisher**  
U.S. Court of Appeals  
Third Circuit, Pittsburgh



**Co-Vice Chair: Melinda Ghilardi**  
Federal Public Defenders Office,  
Scranton



**Co-Vice Chair: Nancy Conrad**  
White and Williams LLP,  
Center Valley

### RESOURCES

#### **Pennsylvania Bar Association**

Become a member of the PBA Federal Practice Committee - [Join now](#)

#### **Federal Judicial Center**

**U.S. District Court, Middle District of Pennsylvania**

**U.S. District Court, Eastern District of Pennsylvania**

**U.S. District Court, Western District Pennsylvania**



## PBA FEDERAL PRACTICE COMMITTEE

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### 1 NOTICE TO COUNSEL

Amendments to the Federal Rules of Appellate Procedure effective December 1, 2016 lower the word limits for briefs. These amendments also convert page limits into word limits for other documents such as motions, petitions for rehearing, petitions for mandamus. A chart showing the new word limits prepared by the Standing Committee is attached below.

Briefs filed after December 1, 2016 must conform to the new word limits. If an extension of time to file appellant's brief is granted and the due date is beyond December 1, the new word limits apply. However, if the first brief in the case was filed before December 1, 2016, appellee/respondent's brief and subsequent briefs may use the pre-December 1 word limits. This exception applies only to briefs; motions, Rule 28(j) letters and petitions for rehearing must conform to the new word limits.

The comment to the amendment to Rule 32 states, "In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate." The Court has reviewed the standing order of January 9, 2012 which discourages motions to exceed the word limits. The Court has determined that insofar as the order provides for granting a motion for excess words in extraordinary circumstances such complex multi-party cases or when "the subject matter clearly requires expansion of the word limits" the order is in harmony with the comment to Rule 32 and will remain in force.

The full report and text of the Amendments are posted on the Court's website. Counsel should read and become familiar with the changes to the Rules. Counsel's attention is particularly directed to Rule 4(a)(4) which clarifies that a motion listed in the Rule that is made after the time allowed by the Civil Rules will not toll the time for appeal and Rule 26(c) which "is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served." Committee Note to Rule 26(c).

Marcia Waldron  
Clerk of Court



PBA FEDERAL PRACTICE COMMITTEE

FEDERAL RULES OF APPELLATE PROCEDURE 35

**Appendix:  
Length Limits Stated in the  
Federal Rules of Appellate Procedure**

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.
- For the limits in Rules 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

|                             | <b>Rule</b> | <b>Document type</b>  | <b>Word limit</b> | <b>Page limit</b> | <b>Line limit</b> |
|-----------------------------|-------------|---|-------------------|-------------------|-------------------|
| <b>Permission to appeal</b> | 5(c)        | <ul style="list-style-type: none"> <li>• Petition for permission to appeal</li> <li>• Answer in opposition</li> <li>• Cross-petition</li> </ul> | 5,200             | 20                | Not applicable    |



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36 FEDERAL RULES OF APPELLATE PROCEDURE

|  | <b>Rule</b> | <b>Document type</b>   | <b>Word limit</b> | <b>Page limit</b> | <b>Line limit</b> |
|--|-------------|--|-------------------|-------------------|-------------------|
| <b>Extraordinary writs</b>                     | 21(d)       | <ul style="list-style-type: none"> <li>• Petition for writ of mandamus or prohibition or other extraordinary writ</li> <li>• Answer</li> </ul> | 7,800             | 30                | Not applicable    |
| <b>Motions</b>                                 | 27(d)(2)    | <ul style="list-style-type: none"> <li>• Motion</li> <li>• Response to a motion</li> </ul>   | 5,200             | 20                | Not applicable    |
|  | 27(d)(2)    | <ul style="list-style-type: none"> <li>• Reply to a response to a motion</li> </ul>  | 2,600             | 10                | Not applicable    |
| <b>Parties' briefs (where no cross-appeal)</b> | 32(a)(7)    | <ul style="list-style-type: none"> <li>• Principal brief</li> </ul>  | 13,000            | 30                | 1,300             |
|  | 32(a)(7)    | <ul style="list-style-type: none"> <li>• Reply brief</li> </ul>  | 6,500             | 15                | 650               |
| <b>Parties' briefs (where cross-appeal)</b>    | 28.1(e)     | <ul style="list-style-type: none"> <li>• Appellant's principal brief</li> <li>• Appellant's response and reply brief</li> </ul>                | 13,000            | 30                | 1,300             |
|  | 28.1(e)     | <ul style="list-style-type: none"> <li>• Appellee's principal and response brief</li> </ul>  | 15,300            | 35                | 1,500             |
|  | 28.1(e)     | <ul style="list-style-type: none"> <li>• Appellee's reply brief</li> </ul>   | 6,500             | 15                | 650               |
|  |             |  |                   |                   |                   |
| <b>Party's supplemental letter</b>             | 28(j)       | <ul style="list-style-type: none"> <li>• Letter citing supplemental authorities</li> </ul>   | 350               | Not applicable    | Not applicable    |



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FEDERAL RULES OF APPELLATE PROCEDURE 37

|                                      | <b>Rule</b>      | <b>Document type</b>   | <b>Word limit</b>  | <b>Page limit</b>  | <b>Line limit</b>  |
|--------------------------------------|------------------|--|--|--|--|
| <b>Amicus briefs</b>                 | 29(a)(5)         | <ul style="list-style-type: none"> <li>Amicus brief during initial consideration of case on merits</li> </ul>  | One-half the length set by the Appellate Rules for a party's principal brief | One-half the length set by the Appellate Rules for a party's principal brief | One-half the length set by the Appellate Rules for a party's principal brief |
|                                      | 29(b)(4)         | <ul style="list-style-type: none"> <li>Amicus brief during consideration of whether to grant rehearing</li> </ul>                                    | 2,600  | Not applicable   | Not applicable   |
| <b>Rehearing and en banc filings</b> | 35(b)(2) & 40(b) | <ul style="list-style-type: none"> <li>Petition for hearing en banc</li> <li>Petition for panel rehearing; petition for rehearing en banc</li> </ul> | 3,900  | 15   | Not applicable   |



## PBA FEDERAL PRACTICE COMMITTEE

# CHANGES TO THE WESTERN DISTRICT'S LOCAL RULES EFFECTIVE NOV. 1, 2016

(Deletions; Additions)

### AMENDED CIVIL RULES

#### 5.1 GENERAL FORMAT OF PAPERS PRESENTED FOR FILING

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**L. Hyperlinks.** The use of hyperlinks is permitted but is not required. Because a hyperlink contained in a filing is no more than a convenient mechanism for accessing material cited in the document, a hyperlink reference is extraneous to any filed document and does not make the hyperlinked document part of the court's record.

**1 Electronically filed documents may contain:**

- (a) Hyperlinks to either Westlaw or Lexis/Nexis for cited legal authority, but hyperlinks to a cited authority may not replace standard citation format. Standard citations must be included in the text of the filed document;
- (b) Hyperlinks to other documents previously filed within the CM/ECF in the Western District of Pennsylvania or from any other federal court; and
- (c) Hyperlinks to other portions of the same document.

**2 Electronically filed documents may not contain in text or footnotes:**

- (a) Hyperlinks to sealed or restricted documents;
- (b) Hyperlinks to websites not listed in (a); or
- (c) Hyperlinks to audio or video files.

Hyperlinking must comply with the hyperlinking protocol in the Court's Electronic Case Filing Policies and Procedures. Non-conforming documents may be ordered stricken by the Court.

#### 5.2 DOCUMENTS TO BE FILED WITH THE CLERK OF COURT

...

**H. Leave of Court Required To File Under Seal.** A party wishing to file any document under seal must obtain prior leave of Court for each document that is requested to be filed under seal. A party must file a motion seeking leave to file such documents under seal. Only after obtaining an order of Court granting such a motion will a party be permitted to file a document under seal.

#### **Comment (2016)**

LCvR 5.2.H implements the Court's standing Order dated January 27, 2005 (2:05-mc-00045-DWA) *In re Confidentiality and Protective Orders in Civil Matters*, which ordered that effective July 1, 2005, any provision in a Confidentiality Order or Protective Order filed on or after June 30, 2005 that permits the parties to designate documents as confidential documents to be filed with the Court under seal is null and void and that on or after July 1, 2005, parties wishing to file documents under seal must obtain prior leave of Court for each ECF document that is requested to be filed under seal.

#### LCvR 16.1 PRETRIAL PROCEDURES

##### **A. Scheduling and Pretrial Conferences -- Generally.**

...

- 2. As soon as practicable but not later than thirty (30) days after the appearance of a defendant, the Court shall enter an order, which may be revised as set forth in LCvR 16.1.A.3 below, setting forth the date and time of an initial scheduling conference and the dates by which the parties shall confer and file the written report required by Fed. R. Civ. P. 26(f), which shall be in the form set forth at "Appendix LCvR 16.1.A" to these Rules and shall be referred to as the Rule 26(f) Report. **Unless the Court finds good cause for delay, the initial scheduling conference shall take place within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.** The Court may defer the initial



## PBA FEDERAL PRACTICE COMMITTEE

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scheduling conference if a motion that would dispose of all of the claims within the Court's original jurisdiction is pending.

...

### B. Scheduling Orders and Case Management.

**1. Initial Scheduling Order.** ~~At~~ Unless the Court finds good cause for delay, the Court shall issue the initial scheduling order as soon as practicable but no later than at or immediately after the initial scheduling conference ~~or as soon thereafter as practicable, the Court.~~ Such conference shall ~~enter an~~ take place within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared. The initial scheduling order ~~that sets~~ shall set forth dates for the following:

- a. the topics identified in Fed. R. Civ. P. 16(b)(3)(A);
- b. completion of fact discovery;
- c. a post-discovery status conference to be held within thirty (30) days after the completion of fact discovery; and
- d. designation, if appropriate, of the case for arbitration, mediation, early neutral evaluation, or appointment of a special master or other special procedure;

...

### C. Pretrial Statements and Final Pretrial Conference.

**1.** By the date specified in the Court's scheduling order, which generally will be no sooner than 30 days after the close of discovery (including expert discovery), counsel for the plaintiff or an unrepresented plaintiff shall file and serve a pretrial statement. The pretrial statement shall include:

- a. a brief narrative statement of the material facts that will be offered at trial;
- b. a statement of all damages claimed, including the amount and the method of calculation of all economic damages;
- c. the name, address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, and identifying each witness as a liability and/or damage witness;
- d. the designation of those witnesses whose testimony is expected to be presented by means of a deposition and the designation of the portion of each deposition transcript (by page and line number) to be presented ~~if already deposed~~ (and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony);

- ...
- 6.** Unless otherwise ordered by the Court, the following shall be done at the final pretrial conference:
- a. counsel and any unrepresented party shall indicate on the record whether the exhibits of any other party are agreed to or objected to, and the reason for any objection;
  - b. motions prepared pursuant to LCvR 16.1.C.5.c shall be presented, accompanied by or containing supporting legal authority;
  - c. counsel and any unrepresented party shall be prepared to disclose and discuss the evidence to be presented at trial, including (a) any anticipated use of trial technology in the presentation of evidence or in the opening statement or closing argument, and (b) any anticipated presentation of expert testimony and any challenges thereto;
  - d. counsel and any unrepresented parties shall advise the Court of any depositions ~~for use at trial of experts or unavailable witnesses~~ that they anticipate will or may be taken after the final pretrial conference and ~~the reason for~~ the timing of the depositions. ~~Subject to the provisions of Fed. R. Civ. P. 26 and 37 regarding the identification and disclosure of witnesses, absent good cause shown by an objecting party, the deposition shall be permitted on such terms as ordered by the Court.~~ In the event that such ~~deposition is for use at trial and the~~ deposition will be taken other than by stenographic means, the party taking the deposition shall have the deposition transcribed and the transcript shall be made available for the Court to make rulings on any objections raised during the course of the deposition. Prior to use in the trial, the party offering the testimony shall edit any video recording to reflect the Court's ruling on objections;

...

### D. Procedures Following Disclosure Of Information That May Be Privileged.

**1.** Unless a party requests otherwise, the following language will be included in the Scheduling Order to aid in the implementation of Fed. R. Evid. 502:

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- a. The producing party shall promptly notify all receiving parties of the inadvertent production of any ~~privileged~~ *material protected by the attorney-client privilege and/or that constitutes* trial preparation material *as set forth in Fed. R. Civ. P. 26(b)(3)*. Any receiving party who has reasonable cause to believe that it has received ~~privileged~~ *material protected by the attorney-client privilege and/or that constitutes* trial preparation material shall promptly notify the producing party.
  - b. Upon receiving notice of inadvertent production, any receiving party shall immediately retrieve all copies of the inadvertently disclosed material and sequester such material pending a resolution of the producing party's claim either by the Court or by agreement of the parties.
  - c. If the parties cannot agree as to the *resolution of a claim of privilege or a claim of protection as trial preparation material*, the producing party ~~shall~~ *may* move the Court for a resolution within 30 days of the notice set forth in subparagraph (a). Nothing herein shall be construed to prevent a receiving party from moving the Court for a resolution, but such motion must be made within the 30-day period.
2. As provided in Fed. R. Evid. 502(d), the Court may enter an Order stating that the production of material protected by the attorney-client privilege and/or that constitutes trial preparation material, regardless of inadvertence, does not result in a waiver of the privilege or protection attaching to said material for purposes of the proceeding pending before the Court or in any other federal or state proceeding. A model Order is located at "Appendix LCvR 16.1.D."

### Comment (2016)

Regarding LCvR 16.1.C.1 and LCvR 16.1.C.6, courts that have dealt with the issue have split on whether depositions of witnesses for use at trial may be taken after the passing of the discovery deadline. Compare *RLS Assocs., LLC v. United Bank of Kuwait PLC*, 2005 U.S. Dist. LEXIS 3815, 66 Fed. R. Evid. Serv. (CBC) 924 (S.D.N.Y. Mar. 9, 2005) and *Estenfelder v. Gates Corp.*, 199 F.R.D. 351 (D. Colo. 2001) with *Crawford v. United States*, No. 11-cv-666-JED-PJC, 2013 WL 249360 at 4 (N.D. Okla. Jan 23, 2013) and *Integra Lifesciences I, Ltd. v. Merck KgaA*, 190 F.R.D. 556, 1999 U.S. Dist. LEXIS 21170 (S.D. Cal. 1999). As a general matter, (1) a party should not have to depose its own witnesses during discovery, (2) should not have to spend the money to take for-trial depositions until it became likely that a trial would actually occur, and (3) litigants are entitled to present their relevant and admissible evidence at trial. Accordingly, the Local Rule addresses the issue in the context of the pre-trial conference by requiring the parties and the Court to set a time, after the filing of the pre-trial statements and before trial within which depositions for use at trial may be taken. In addition, assuming the witness was properly disclosed under Fed. R. Civ. P. 26, the Local Rule places the burden on a party opposing the taking of a deposition for use at trial to show good cause why any such deposition should not be permitted.

### LCvR 23 CLASS ACTIONS AND COLLECTIVE ACTIONS

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**C. Matters to be Addressed at Initial Scheduling Conference (hereafter "Pretrial Conference").** In addition to the requirements of Fed. R. Civ. P. 16, with respect to any case in which class claims are alleged, the parties should be prepared to address the following topics at the Pretrial Conference:

1. the timing of the filing of a motion for class certification;
2. the appointment of interim class counsel;
3. the scope of any discovery, **including any discovery of Electronically Stored Information consistent with the provisions of LCvR 26.2**, necessary for resolution of any class certification motion;

...

**E. Joint Report of the Parties.** At least seven (7) days prior to the Pretrial Conference, the parties shall submit a "Joint Report of the Parties and Proposed Scheduling and Discovery Order -- Class Action" setting forth their respective positions on the timing and scope of class certification discovery, the filing of a motion for class certification, and the appointment of class counsel. A form "Joint Report of the Parties and Proposed Scheduling and Discovery Order -- Class Action" is available. See "**Appendix LCvR 23.E.**" This is in lieu of the Fed. R. Civ. P. 26(f) Report. To the extent appropriate given the facts of the case, the parties are encouraged to stipulate to any facts regarding the approximate size and definition of the class, the qualifications of proposed class counsel, and any other matters relevant to the findings to be made by the Court under Fed. R. Civ. P. 23.

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### LCvR 26.2 DISCOVERY OF ELECTRONICALLY STORED INFORMATION

**A. Duty to Investigate.** Prior to a Fed. R. Civ. P. 26(f) conference, counsel shall:

1. Investigate the client's Electronically Stored Information ("ESI"), such as email, electronic documents, and metadata, and including computer-based and other digital systems, in order to understand how such ESI is stored; how it has been or can be preserved, accessed, retrieved, and produced; and any other issues to be discussed at the Fed. R. Civ. P. 26(f) conference, ~~including the issues in LCvR 26.2.C.~~
2. Identify a person or persons with knowledge about the client's ESI, with the ability to facilitate, through counsel, preservation and discovery of ESI.

**B. Designation of Resource Person.** In order to facilitate communication and cooperation between the parties and the Court, each party shall, if deemed necessary by agreement ~~under LCvR 26.2.C.7~~ or by the Court, designate a single resource person through whom all issues relating to the preservation and production of ESI should be addressed.

**C. Preparation for Meet and Confer.** Prior to the Fed. R. Civ. P. 26(f) conference, the parties should refer to both the Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information set forth in "Appendix LCvR 26.2.C-CHECKLIST" to these Rules, and the Guidelines for the Discovery of Electronically Stored Information set forth in "Appendix LCvR 26.2.C-GUIDELINES" to these Rules.

**D. Duty to Meet and Confer.** At the Fed. R. Civ. P. 26(f) conference, and upon a later request for discovery of ESI, counsel shall meet and confer, and attempt to agree, on the discovery of ESI, ~~including:~~

1. ~~The steps the parties have taken to preserve ESI;~~
2. ~~The scope of ESI discovery and an ESI search protocol, including methods to filter the data, such as application of search terms or date ranges;~~
3. ~~Procedures to deal with inadvertent production of privileged information under LCvR 16.1.D;~~
4. ~~Accessibility of ESI, including but not limited to the accessibility of back-up, deleted, archival, or historic legacy data;~~
5. ~~The media, format and procedures for preserving and producing ESI, including the media, format, and procedures for the Fed. R. Civ. P. 26(a)(1) initial disclosures;~~
6. ~~Allocation of costs of preservation, production, and restoration (if possible and/or necessary) of any ESI;~~
7. ~~The need for a designated resource person, as discussed in Section B above; and~~
8. ~~Any other issues related to ESI.~~

**E. Case Management Conference.** Prior to the case management conference, the parties shall complete and file a copy of the form Rule 26(f) Report of the Parties set forth in "Appendix LCvR 16.1.A" to these Rules or the form Rule 26(f) Report (Class Actions) set forth in "Appendix LCvR 23.E" to these Rules, as applicable. At the direction of the Court, the parties may be required to submit a draft of the Stipulated Order re: Discovery of Electronically Stored Information for Standard Litigation set forth in "Appendix LCvR 26.2.E-MODEL ORDER" to these Rules. The parties may also choose to file an order under Rule 502(d) such as the model Order set forth in "Appendix LCvR 16.1.D" to these Rules.

#### Comment (revised 2016 June 2008)

~~1. LCvR 26.2.A.1 imposes a duty for counsel to discuss ESI with their client. It does not, in any way, alter a party's and counsel's obligations under law to preserve evidence, including ESI, when litigation is reasonably anticipated. Nothing in this section precludes a party from moving the Court for an appropriate preservation order.~~

~~2. Regarding LCvR 26.2.A.2, the person may be an individual party, a party's employee, a third party, or a party's attorney.~~

1. Regarding LCvR 26.2.B, the resource person must have sufficient familiarity with the party's ESI to meaningfully discuss technical issues and provide reliable information relative to the preservation and production of ESI. The resource person is permitted to, and, in fact, encouraged to, involve persons with technical expertise in these discussions, including the client, client's employee, or a third party. The resource person may be an individual party, a party's employee, a third party, or a party's attorney, and may be the same person referenced in LCvR 26.2.A.2.

2. Regarding LCvR 26.2.D, the parties have an ongoing obligation to supplement their disclosures. See Fed. R. Civ. P. 26.1.



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3. Detailed information regarding the Court's Electronic Discovery Mediation and Special Master, along with other ESI resources, can be found on the Court's website at <http://www.pawd.uscourts.gov/ed-information>.

### LCvR 40 ASSIGNMENT OF ACTIONS

[NOTE: Changes to LCvR 40.B increased the number of subcategories for Controlled Substance and Fraud/Property offenses. Only the final rule is presented here.]

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**B. Criminal Action Categories.** All criminal cases in this district shall be divided into the following categories:

- 1a. Narcotics and Other Controlled Substances, 1 to 2 Defendants
- 1b. Narcotics and Other Controlled Substances, 3 to 9 Defendants
- 1c. Narcotics and Other Controlled Substances, 10 or more Defendants
- 2a. Fraud and Property Offenses, 1 to 2 Defendants
- 2b. Fraud and Property Offenses, 3 to 9 Defendants
- 2c. Fraud and Property Offenses, 10 or more Defendants
3. Crimes of Violence
4. Sex Offenses
5. Firearms and Explosives
6. Immigration
7. All others

For purposes of determining the appropriate category, the number of defendants in related indictments which are returned during the same grand jury session shall be combined.

See also LCrR 57.A.

...

**E. Assignment of Related Actions.**

1. If the fact of relatedness is indicated on the appropriate form at time of filing, the Clerk of Court shall assign the case to the same Judge to whom the lower numbered related case is assigned, **who may reject the assignment if the Judge determines that the cases are not related or the assignment does not otherwise promote the convenience of the parties or witnesses or the just and efficient conduct of the action.**
2. If the fact of relatedness **does-is not become known-until** indicated on the appropriate form at time of filing, after **the a** case is assigned, the **assigned** Judge **receiving the later case** may transfer the **matter later-filed case** to the Judge **to whom** who is assigned the **earlier** lower-numbered related case **was assigned**, (i) *sua sponte*, (ii) upon motion of a party, and/or (iii) upon suggestion of any other Judge in this Court, if the Judge assigned the later-filed case(s) determines that the cases are related or the transfer would promote the convenience of the parties or witnesses or the just and efficient conduct of the action.

### LCvR 47 VOIR DIRE OF JURORS

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**C. Required Questions to Each Juror.** The following questions, **where-to the extent the trial judge deems** appropriate, shall, *inter alia*, be put to each juror individually:

1. How old are you?
2. Where do you live? How long have you lived there?
3. What is your educational background?
4. What is your present occupation? (If retired, what was your occupation?)
5. Who is your employer? (If retired, who was your employer?)
6. Are you married? If so, what is your spouse's occupation and who is your spouse's employer? (If your spouse is retired, what was his or her occupation and who was his or her employer?)
7. Do you have any (**adult**) children? If so, how old are they? For whom do they work, and what do they do?
8. Do you own your own home?
9. Do you drive a car?
10. Have you ever been a party to a lawsuit?



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11. Any other question, which in the judgment of the trial Judge or the Judge in charge of miscellaneous matters after application being made, shall be deemed proper.

### LCvR 54 COSTS

#### B. Taxation of Costs.

2. While there is no strict deadline for filing a bill of costs with the Court, a bill of costs must be filed within a reasonable period of time, which should be no later than 45 days after a final judgment is entered by the District Court. **However, if an appeal has been filed, counsel may defer filing a bill of costs until 30 days after the mandate has been filed in the District Court, or after an appeal has been withdrawn.**

### LCvR 83.2 ADMISSION TO PRACTICE AND APPEARANCE OF ATTORNEYS AND STUDENTS

#### A. Admission to Practice -- Generally.

3. **Procedure For Admission.** No person shall be admitted to practice in this Court as an attorney, except on oral motion of a member of the bar of this Court, who shall submit a Certification in the form set forth at "Appendix LCvR/LCrR 83.2.A Certification". He or she shall, if required, offer satisfactory evidence of his or her moral and professional character **and, and shall provide the same information set forth in subsection B, below. He or she** shall take the following oath or affirmation, ~~to wit:~~

"I DO SOLEMNLY SWEAR (OR AFFIRM) THAT I WILL CONDUCT MYSELF AS AN ATTORNEY AND COUNSELOR OF THIS COURT, UPRIGHTLY AND ACCORDING TO LAW; AND THAT I WILL SUPPORT THE CONSTITUTION OF THE UNITED STATES. SO HELP ME GOD."

If admitted, the applicant shall, under the direction of the Clerk of Court, sign the roll of attorneys and pay such fee as shall have been prescribed by the Judicial Conference and by the Court.

**B. Pro Hac Vice Admissions.** All motions for admission *pro hac vice* must be accompanied by the filing fee. A motion for admission *pro hac vice* must be made by the attorney seeking to be admitted and must be accompanied by an affidavit from the attorney seeking to be admitted *pro hac vice* (the "affiant"). The affidavit must include the affiant's name, law firm affiliation (if any), business address, and bar identification number. The affiant must attest in the affidavit that the affiant is a registered user of ECF in the United States District Court for the Western District of Pennsylvania, that the affiant has read, knows, and understands the Local Rules of Court for the United States District Court for the Western District of Pennsylvania, and that the affiant is a member in good standing of the bar of any state or of any United States District Court. The affidavit must list the bars of any state or of any United States court of which the affiant is a member in good standing. The affiant must attach to the affidavit one current certificate of good standing from the bar or the court in which the affiant primarily practices. The affidavit also must list and explain any previous disciplinary proceedings concerning the affiant's practice of law that resulted in a non-confidential negative finding or sanction by the disciplinary authority of the bar of any state or any United States court. The Court will not rule on a motion for admission *pro hac vice* that does not include an affidavit containing the ~~above~~ **forementioned** information and attestations required by this rule. The forms of the motion for admission *pro hac vice* and accompanying affidavit are set forth in "**Appendix LCvR/LCrR 83.2.B-MOTION,**" and "**Appendix LCvR/LCrR 83.2.B-AFFIDAVIT.**"

## AMENDED CRIMINAL RULES

### LCrR 5 INITIAL APPEARANCE BEFORE MAGISTRATE JUDGE

**A. Opportunity to Consult With Counsel.** A defendant shall be given an opportunity to consult with counsel at his or her Initial Appearance and before an initial interview with Pretrial Service Officers. The Federal Public Defender,



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or an attorney from the CJA Panel if the Federal Public Defender has a conflict, as directed by the Court, will provide advice of rights to defendants before their interview with Pretrial Services. **Notwithstanding the foregoing, the Court may establish a separate protocol or procedure for situations involving the substantially contemporaneous arrests of ten or more individuals.**

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### LCrR 12 PRETRIAL MOTIONS

- A. Timing.** Motions **that must be made before trial** under Fed. R. Crim. P. 12, ~~and those made under Rule 41, and a motion for a bill of particulars under Fed. R. Crim. P. 7~~ shall be made within fourteen days after arraignment, unless the court extends the time at arraignment, or upon written application made within the said fourteen day period. The court, in its discretion, may, however, for good cause shown, permit a motion to be made and heard at a later date.

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### LCrR 16 DISCOVERY AND INSPECTION

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**F. Status Conference.** The Court shall hold a status conference with counsel approximately 30 days after Arraignment, on a date certain to be set by the Court. Counsel must be prepared to discuss case scheduling matters, **including the timing of disclosures required by law or by rule of Court**, as well as the progress of discovery to date. The attendance of the defendant shall be at the discretion of the Court.

### LCrR 32 PROCEDURE FOR GUIDELINE SENTENCING

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**F. Revocation of Probation and Supervised Release.** In every case where revocation of probation or supervised release is sought, the United States Probation Office shall prepare and disclose to the defendant's attorney and the attorney for the government a Violation Work Sheet outlining the terms and class of the original conviction, the grading of each alleged violation and the advisory guideline range of sanctions for the alleged violation, if applicable.

**G. Nondisclosure of Probation Office's Sentencing Recommendation.** The specific sentencing recommendation of the United States Probation Office, which is submitted to the Court, shall not be disclosed to the parties or their counsel.

### LCrR 57 ASSIGNMENT OF CASES

[NOTE: Changes to LCrR 57.A increased the number of subcategories for Controlled Substance and Fraud/Property offenses. Only the final rule is presented here.]

...

**A. Criminal Action Categories.** All criminal cases in this district shall be divided into the following categories:

- 1a. Narcotics and Other Controlled Substances, 1 to 2 Defendants
- 1b. Narcotics and Other Controlled Substances, 3 to 9 Defendants
- 1c. Narcotics and Other Controlled Substances, 10 or more Defendants
- 2a. Fraud and Property Offenses, 1 to 2 Defendants
- 2b. Fraud and Property Offenses, 3 to 9 Defendants
- 2c. Fraud and Property Offenses, 10 or more Defendants
3. Crimes of Violence
4. Sex Offenses
5. Firearms and Explosives
6. Immigration
7. All others

*See also* LCvR 40.B.

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### **LCrR 83.2 PRO HAC VICE ADMISSIONS**

Pro Hac Vice Admissions. A motion for admission *pro hac vice* must be made by the attorney seeking to be admitted and must be accompanied by an affidavit from the attorney seeking to be admitted *pro hac vice* (the “affiant”). The affidavit must include the affiant’s name, law firm affiliation (if any), business address, and bar identification number. The affiant must attest in the affidavit that the affiant is a registered user of ECF in the United States District Court for the Western District of Pennsylvania, that the affiant has read, knows, and understands the Local Rules of Court for the United States District Court for the Western District of Pennsylvania, and that the affiant is a member in good standing of the bar of any state or of any United States District Court. The affidavit must list the bars of any state or of any United States court of which the affiant is a member in good standing. The affiant must attach to the affidavit one current certificate of good standing from the bar or the court in which the affiant primarily practices. The affidavit also must list and explain any previous disciplinary proceedings concerning the affiant’s practice of law that resulted in a non-confidential negative finding or sanction by the disciplinary authority of the bar of any state or any United States court. The Court will not rule on a motion for admission *pro hac vice* that does not include an affidavit containing the information and attestations required by this rule. The forms of the motion for admission *pro hac vice* and accompanying affidavit are set forth in “Appendix LCvR/LCrR 83.2.B-MOTION,” and “Appendix LCvR/LCrR 83.2,B-AFFIDAVIT.”