The Do’s and Don’ts of Federal Practice: Avoiding Mistakes that Lead to Waiver

The PBA Federal Practice Committee provided a successful CLE program at the Beaver County Bar Association on June 17, 2014. The program covered a number of tips for attorneys who appear in federal courts. The program qualified for 2 substantive CLE credits.


“We thought it was important to personally present a program with practical and useful tips. It’s a good example of one of the many benefits of PBA membership. Often lawyers in smaller counties can’t afford time out of the office to travel and attend an all-day CLE program,” said Hon. D. Michael Fisher, Chair of the PBA Federal Practice Committee. Judge Fisher developed the program and recruited area lawyers and judges to serve on the panel. The faculty addressed areas where it is easy to make a mistake in trial that can be fatal on appeal. Participants also learned how appellate practice errors can limit their ability to effectively represent clients’ interests in the Court of Appeals.

SAVE THE DATES

August 26, 2014 • The Supreme Court of the U.S.: A Term in Review (2013-14) and a Look Forward (Fall 2014) This program will be held at the PBI facility in Pittsburgh, Pennsylvania. Details will be sent through the PBA Federal Practice listserv.

November 20, 2014 • PBA Committee & Section Day
Holiday Inn East, Harrisburg, PA
Summaries of the most interesting federal practice precedential opinions issued by the United States Court of Appeals for the Third Circuit and the Middle District of PA from April through June, 2014.

**Third Circuit Precedential Opinions**
**April – June 2014**

**U.S. v. Velazquez**, 749 F.3d 161 (3d. Cir. 2014) (Criminal Law/Speedy Trial) – Conviction of drug-related crimes reversed and indictment dismissed with prejudice where a superseding indictment was filed in November 2005 and trial was scheduled for July 2012; court found error in determination that government was “reasonably diligent” between November 2005 and 2011, concluding that the record showed that the government was “strikingly inattentive” for a period of five years.

**Lesende v. Borrero**, 752 F.3d 324 (3d. Cir. 2014) (Civil Rights - §1983) – district court’s judgment (1) vacating second jury’s $4,000,000 verdict, (2) vacating the earlier-entered order granting City’s motion for remittitur from the first jury’s $2,700,000 verdict, and (3) reinstating the first jury’s verdict in its entirety was itself vacated with instructions to reinstate the second jury’s verdict and resolve the City’s related motion for remittitur on its merits. The Court, based on the invited-error doctrine, was disinclined to give either party the relief it sought on appeal.

**Bryan v. Children and Youth Servs. Of Erie County**, 752 F.3d 316 (3d. Cir. 2014) (Jurisdiction/ Civil Rights - §1983) – In ongoing litigation, district courts have the jurisdiction to decide whether the parties have settled the action or have satisfied the judgment.

**In re: Makowka**, 754 F.3d 143 (3d. Cir. 2014) (Bankruptcy) – Where the highest court of the state has not addressed the matter at hand, a district court may discount decisions of an intermediate state court decision that it finds flawed; Court of Appeals determined that PA Supreme Court would be more likely to rule consistently with Commonwealth Court decision rather than with Superior Court decision and would hold that an action in debt does not constitute a proper method to enforce a statutory lien under Pennsylvania’s Uniform Planned Community Act.

**U.S. v. Stanley**, 753 F.3d 114 (3d. Cir. 2014) (Criminal Law / Fourth Amendment) – Use of the MoocherHunter to identify location of computer connecting to a neighbor’s unprotected wireless router was not a search within the meaning of the Fourth Amendment

**Gonzalez v. Waterfront Comm’n of NY Harbor**, 2014 WL 2724127 (June 17, 2014) (Employment / Abstention) – Applying Sprint Communications, Inc. v. Jacobs, 134 S. Ct. 584 (2013), the Court affirmed the district court’s dismissal, under the Younger abstention doctrine, of an action seeking to enjoin state disciplinary proceedings against plaintiff on the ground that those proceedings violated Title VII, the ADA, and the First Amendment.

**Thank you**
A sincere thank you to the following Federal Practice Committee members for their work and contributions to this edition of the PBA Federal Practice Committee Newsletter:

- **Hon. D. Michael Fisher**, U.S. Court of Appeals Third Circuit, Pittsburgh
- **Philip Gelso**, Law Offices of Philip Gelso, Kingston
- **Susan Schwochau**, Duane Morris, LLP, Pittsburgh
- **Tom Wilkinson**, Cozen O’Connor, Philadelphia

**Background:** Former borough police officer brought action against borough and borough council members, alleging violations of the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act (PHRA), as well as his due process and First Amendment rights under § 1983. Defendants moved to dismiss for failure to state claim.

**Holdings:** The District Court, Malachy E. Mannion, J., held that: [1] borough violated officer’s due process rights when it failed to hold hearing prior to suspending him without pay; [2] three-month lapse between officer’s protected activity and his suspension did not create inference of causation that would support First Amendment retaliation claim; [3] officer sufficiently stated causation element of retaliation claim; [4] members were entitled to qualified immunity from due process claim; [5] members were not entitled to qualified immunity from retaliation claim; but [6] officer failed to state claim under ADA and PHRA. Motion granted in part and denied in part.

United States v. Taylor, --- F.Supp.2d ---- 2014 WL 2041861 (MDPA 5/16/14)

**Background:** Defendant, who was charged with being a felon in possession of a firearm, moved to suppress incriminating statements he made to law enforcement.

**Holdings:** The District Court, A. Richard Caputo, J., held that: [1] defendant was not subject to custodial interrogation under Miranda when he made statements to detectives prior to surgery, but [2] detectives’ later interview of defendant at his home while he was recuperating was custodial.

Whitewood v. Wolf, --- F.Supp.2d ---- 2014 WL 2058105 (MDPA 5/20/14)

**Background:** Plaintiffs, including eleven lesbian and gay couples, one widow, and two teenage children of one of aforesaid couples, brought § 1983 action against Commonwealth of Pennsylvania, challenging two provisions of state’s Domestic Relations Code that limited marriage to opposite-sex couples and prohibited recognition of same-sex marriages legally entered into in other jurisdictions. Parties moved and cross-moved for summary judgment.

**Holdings:** The District Court, John E. Jones III, J., held that: [1] Supreme Court’s summary dismissal in Baker v. Nelson was no longer controlling precedent; [2] plaintiffs sufficiently established that they suffered actionable harms due to challenged provisions; [3] plaintiffs had fundamental right to marry, which was infringed by same-sex marriage ban; [4] non-recognition provision violated plaintiffs’ fundamental liberty interest in legal recognition of their marriages; [5] on equal protection challenge, intermediate scrutiny was warranted; and [6] challenged provisions did not survive intermediate scrutiny. Plaintiff’s motion granted.
Nittany Outdoor Advertising, LLC v. College Township, --- F.Supp.2d ---- 2014 WL 2094335 (MDPA 5/20/14)

**Background:** Applicants for billboard permits brought action against township, alleging that sign ordinance under which township denied their applications for billboards bearing religious messages violated the First Amendment. Applicants moved for partial summary judgment and for permanent injunctive relief.

**Holdings:** The District Court, Matthew W. Brann, J., held that: [1] applicants lacked standing to pursue claim that ordinance’s banning off-premises signs was a content-based prohibition on speech; [2] ordinance’s differential treatment of on-premises and off-premises signs was not a content-based distinction that favored noncommercial over commercial speech; [3] applicants had standing to bring facial challenge to township’s sign ordinance; [4] applicants had Article III standing to bring facial challenge to township’s sign ordinance; [5] the ordinance was a prior restraint on speech in violation of the First Amendment; and [6] invalid provisions could not be severed from the ordinance. Motions granted in part and denied in part.


**Background:** Defendant, who trained and raced horses, moved to dismiss indictment charging him with attempting to commit wire fraud and violating the Travel Act by using the simulcast of horse races to promote gambling involving the rigging of horse races.


Stuart v. Urden Law Offices, PC, --- F.Supp.2d ---- 2014 WL 2604926 (MDPA 6/9/14)

**Background:** Mortgagor brought action against law firm that represented mortgagee, alleging that law firm violated Fair Debt Collection Practices Act by sending letter to mortgagor detailing alleged debt that mortgagor owed mortgagee. Law firm moved to dismiss.

**Holdings:** The District Court, Matthew W. Brann, J., held that: [1] letter was not initial communication that would trigger requirements of FDCPA; [2] law firm was not bound by provision of Pennsylvania’s Loan Interest and Protection Act concerning attorney fees payable; and [3] least sophisticated debtor would not have been misled by letter. Motion granted.

NCAA v. Corbett, --- F.Supp.2d ---- 2014 WL 2619288 (MDPA 6/12/14)

**Background:** Before the Court were Defendants Governor Thomas Corbett and Chairman of the Pennsylvania Commission on Crime and Delinquency Mark R. Zimmer, Treasurer Rob McCord, and Auditor General Eugene DePasquale’s motions to dismiss or stay Plaintiff National Collegiate Athletic Association’s complaint.

**Holdings:** The District Court, A. Richard Kane, J., denied Defendants’ motions to dismiss on the basis of abstention, and will decline to stay the matter.

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**Do you have ideas for a CLE program in your area?**

Let the Chair know if you would like us to host a local CLE program in your area, either independently or jointly with your local bar. We are prepared to present our “Tips and Traps” program and are exploring other program topics. The committee is interested in providing educational programs wherever interest exists.
Update on the Proposed Amendments to the Federal Rules of Civil Procedure

In November, 2013 the PBA House of Delegates approved the PBA Federal Practice Committee’s recommendations for comments to the Federal Court Committee on Rules of Practice and Procedure. In December a letter was sent conveying those comments.

According to the federal courts webpage, the process for promulgating an amendment to a rule or form involves several levels of consideration and approval, the first of which is consideration and approval by the appropriate advisory committee and then the Committee on Rules of Practice and Procedure. Following approval by the Committee on Rules of Practice and Procedure, proposed amendments must be considered and approved by the Judicial Conference, the Supreme Court, and then Congress.

On May 29-30, 2014, the Committee on Rules of Practice and Procedure met in Washington, DC. Amendments to Civil Rules 1, 6, 16, 26, 30, 31, 33, 34, 37, and 55, and proposed abrogation of Rule 84 and the Appendix of Forms were approved by the Rules Committees and are now pending Judicial Conference Review.

A copy of the full report is available at:

Judicial Vacancies

U.S. District Court, Eastern District of Pennsylvania
The following four individuals were nominated on June 16, 2014 for the EDPA. They had their Senate Judiciary Hearings on July 24 and are awaiting confirmation.

Wendy Beetlestone, Mark A. Kearney, Joseph F. Leeson, Jr., and Gerald J. Pappert.

U.S. District Court, Western District of Pennsylvania
There are three vacancies.

United States Court of Appeals for the Third Circuit
The U.S. Senate unanimously confirmed Cheryl Krause for a seat on the U.S. Court of Appeals for the Third Circuit.

One other vacancy still exists.

Federal Practice Committee Leadership

PBA President Frank O’Connor has appointed the following people to lead the Federal Practice Committee:

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

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

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