PBA NEWS

The Pennsylvania Supreme Court Continuing Legal Education Board has approved the PBA-crafted modification that expands the definition of live, in-person programming to include programming delivered via live webcast or other streaming technology during 2021. Effective Jan. 1 through Dec. 31, 2021, the CLE Board’s temporary policy recognizes live online programming by accredited distance learning providers (such as PBI) as live (non-capped) credit towards lawyers’ CLE requirement.

To read the 2020-21 policy in its entirety, go to https://www.pacle.org/assets/pdfs/CLE-Distance-Learning-2021.pdf.

COMMITTEE NEWS

Reminder: Next Executive Council Quarterly Meeting – Nov. 19, 2020 at 2 p.m.

All FPC Members are invited to participate in Executive Council meetings as nonvoting members (see Article IV Section 8), so please mark your calendar and join us.

To register, please use this link to sign-up. There is no cost to attend, but pre-registration is required in order to get the Zoom link.

If you have any items of concern, please email the committee chair, co-vice chairs or subcommittee chairs. Contact information can be found at the end of this newsletter.

The 2020 Federal Practice Institute

On Oct. 23, 2020, the FPC, in conjunction with Dickinson Law School and the PBI held a six-hour substantive Institute on Federal Practice. This was the second Institute, the first occurring in 2019. It was held remotely and had more than 80 attendees. The Honorable Michael Fisher, U.S. Court of Appeals for the Third Circuit, and Stephanie L. Hersperger, Esq., chaired the Institute and were panelists. Dean Danielle Conway, the Dean of Penn State Dickinson Law, spoke regarding “Challenges Facing Law Schools during Covid-19.”

The five moderators were Jeremy Mercer, Esq., Nancy Conrad, Esq., David Schwager, Esq., Melinda Ghilardi, Esq., and Stephanie Hersperger, Esq.

The Institute included five panels composed of experienced and distinguished practitioners, professors, and eight federal judges. The panelists included the following: Dickinson Professor Mohamed Badissy, District Judge Matthew Brann, Magistrate Judge Marty Carlson, Nancy Conrad, Esq., David Fine, Esq., Third Circuit Judge Michael Fisher,

The second FPI could not have been a success without the assistance of PBI, including Program Manager Emily Barnes and all of the great panelists!

Panelists Melinda Ghilardi, Magistrate Judge Marty Carlson, Phil Gelso, David Freed and Riley Ross address criminal issues that may arise during civil litigation.

Bankruptcy Judge Henry Van Eck, PBA President David Schwager, Immediate Past President Anne John and Jill Spott discuss the impact of bankruptcy on pending litigation.

David Fine, Judge Thomas Vanaskie, Judge Fisher, Marie Milie Jones, Stephanie Hersperger and Quin Sorenson shared a chuckle during the last panel of the day on Appellate Review.

Special speaker, Dean Conway, the Dean of Penn State Dickinson Law, addressed the many challenges and opportunities COVID-19 has presented to law schools.

Dean Conway and Judge Fisher discuss the challenges facing law schools since Covid-19 and Dean Conway’s vision for Dickinson.
FEDERAL PRACTICE NEWS

Links to Information on Courts’ Responses to COVID-19

Court of Appeals:
Notice Regarding Operations to Address the COVID-19 Pandemic

Eastern District:
Court Response, Guidelines, Notices and Standing Orders for COVID-19

Middle District:
Court Response, Orders, Guidelines for COVID-19

Western District:
Court Operations and Administrative Orders for COVID-19

STATUS OF JUDICIAL VACANCIES

U.S. Court of Appeals, Third Circuit
• There are no vacancies.

U.S. District Court, Eastern District of PA
• A nomination has yet to be made to fill the vacancy created when Judge Lawrence Stengel retired (Aug. 31, 2018).
• On June 26, 2020, public notice for appointment of New Magistrate Judge was posted. Applications were due by July 27, 2020.

U.S. District Court, Middle District of PA
• There are no vacancies.

U.S. District Court, Western District of PA
• The two remaining vacancies in the Western District have been filled. On July 27, 2020, William Scott Hardy was confirmed by the U.S. Senate. He has filled Judge Nora Barry Fischer’s seat. On Sept. 9, 2020, Assistant U.S. Attorney Christy Criswell Wiegand was confirmed by the U.S. Senate. She has filled Judge Peter Phipps’s seat.

UPCOMING EVENT
Nov. 19, 2020
PBA Committee/Section Day via Zoom

ABA Issues Ethics Guidance on Lawyers’ Duties When Clients Engage in Fraudulent or Criminal Behavior
By Thomas G. Wilkinson and Douglas B. Fox

What are the lawyer’s ethical responsibilities when the lawyer’s client appears to be engaging in a fraudulent scheme or criminal behavior and seeks the lawyer’s advice or assistance in furthering that conduct?

The American Bar Association’s Model Rule of Professional Conduct 1.2(d) (Model Rule) prohibits a lawyer from advising or assisting a client in conduct the lawyer “knows” is criminal or fraudulent. The text of the Model Rule states:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The rule sounds simple enough and plainly suggests that a lawyer must have actual knowledge of a client’s intended or ongoing criminal or fraudulent conduct before other professional duties may be triggered, such as the lawyer refusing to act on the client’s behalf or withdrawing from the representation. This reading is consistent with Model Rule 1.0(f), which states that to “know” something “denotes actual knowledge of the fact in question.” Rule 1.0(f) clarifies that a lawyer’s knowledge may be inferred from the circumstances.

On April 29, 2020, the ABA Standing Committee on Ethics and Professional Responsibility (Ethics Committee) issued Formal Opinion 491 (formal opinion) to provide additional guidance on this topic.1

1 The formal opinion expressly applies only to transactional matters and not to litigation. The opinion does not explain why the guidance was not intended to apply more broadly to litigation matters or what other analysis might apply in that context. However, by its terms, Model Rule 1.2(d) is not limited to transactional matters. Indeed, Comment [12] to Model Rule 1.2(d) specifically notes that the rule “does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.”
The Ethics Committee recognized that the Model Rule’s requirement of actual knowledge of a client’s intended or ongoing criminal or fraudulent conduct could be viewed as an invitation to a lawyer to turn a blind eye toward the client’s improper conduct. As the U.S. Supreme Court recently discussed, actual knowledge means “exactly what it says.” Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020) (construing an ERISA provision found at 29 U.S.C. §1113(2)). “[T]o have ‘actual knowledge’ of a piece of information, one must in fact be aware of it.” Id. at 776. At common law, the Supreme Court explained:

Legal dictionaries give “actual knowledge” the same meaning: “[r]eal knowledge as distinguished from presumed knowledge or knowledge imputed to one.” Ballentine’s Law Dictionary 24 (3d ed. 1969); accord, Black’s Law Dictionary 1043 (11th ed. 2019) (defining “actual knowledge” as “[d]irect and clear knowledge, as distinguished from constructive knowledge”). Id.

The court noted that, in contrast, “the law will sometimes impute knowledge — often called “constructive” knowledge — to a person who fails to learn something that a reasonably diligent person would have learned.” Id.

What, then, does the rule require of practitioners? May a lawyer ignore troublesome facts to avoid acquiring actual knowledge of a client’s intended criminal or fraudulent scheme?

The formal opinion explains that where a lawyer has actual knowledge of a client’s intended criminal or fraudulent conduct, the lawyer’s responsibility is clear under the Model Rules: the lawyer must not provide legal advice in furtherance of the improper conduct and may be required to withdraw from the representation. Where facts already known to the lawyer are so strong as to constitute actual knowledge of criminal or fraudulent activity, the lawyer must consult with the client regarding the limitations on the lawyer’s conduct. A lawyer “must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct[.]” ABA Informal Op. 1470 (1981).

Going further, the Ethics Committee explained that if the “facts before the lawyer indicate a high probability that a client seeks to use the lawyer’s services for criminal or fraudulent, activity,” then the lawyer is obligated to inquire further, to ensure that the representation will not aid the client in engaging in criminal or fraudulent conduct. Formal Op. at 4. The opinion thus equates “willful blindness” with “actual knowledge.” Id. at 6. A lawyer may not willfully ignore facts that trigger the obligation to make further inquiry. If further inquiry is necessary to make a determination about the client’s intended conduct, the lawyer may need to ask the client whether there is some misapprehension regarding the relevant facts. After further consultation, if there is no misunderstanding and the client persists, the lawyer must withdraw from representation pursuant to Rule 1.16. What constitutes suspicion sufficient to trigger further inquiry will depend on the circumstances. Id. at 5.

A determination that there is no need for further inquiry, on the other hand, will depend largely on the background facts, including the lawyer’s familiarity with the client or the jurisdiction where the legal work is to be performed.

The formal opinion also notes that Model Rules other than Rule 1.2(d) may trigger an obligation on the part of the lawyer to make further inquiry of his or her client. The rules concerning duties of competence, diligence, communication, honesty and withdrawal may also oblige the lawyer to inquire further of the client to understand the client’s objectives and intent. Additionally, other ethics guidance, such as ABA Formal Opinion 463, address a lawyer’s “gate-keeping” function and the potential need for further investigation. Formal Opinion 463 concerned the lawyer’s duties to protect the international finance system from criminal activity constituting money laundering and terrorist financing. One can imagine other circumstances where, either under a lawyer’s gate-keeping function under Formal Opinion 463 or the requirements of Formal Opinion 491, further factual inquiry of a client might be warranted. These could include circumstances where, for example, a lawyer becomes aware of facts suggesting that the client intends to make a fraud.
ulent insurance claim (a fraudulent COVID-19 insurance claim could be a current concern).³

Other examples cited in the Formal Opinion include circumstances where:

• A prospective client has significant business interests abroad and has received substantial payments from sources other than his employer. Those funds are held outside the U.S., but client wants to bring them to the U.S. through a transaction that minimizes tax liability. The client tells you a) that he is employed outside of the U.S., but does not say how, b) the money is in a foreign bank but the client will not identify the bank, c) client has not disclosed the payments to his employer or anyone else and has not included the amounts on his U.S. tax return.

• A prospective client says he is an agent for a minister or other government official from a “high-risk” jurisdiction and wants to buy a piece of property on behalf of an anonymous party. The client wants the property to be owned by undisclosed beneficial owners, and the source of the funds is vague or questionable.

The Ethics Committee also explained that a lawyer should not be subject to discipline where, under the circumstances, and under the facts available to the lawyer, the lawyer’s judgment was reasonable at the time. As long as the lawyer conducts a reasonable inquiry, where necessary pursuant to the Formal Opinion, the lawyer has performed his or her duty under the Model Rule 1.2(d), “even if some doubt remains.” Id. at 10. Of course, the corollary is that the lawyer may be required to decline the representation or withdraw where the Model Rule requires further inquiry and “the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction[.]” Id. at 13. Lawyers who receive indications that the client may be involved in planning or perpetrating a

fraud or criminal conduct using the lawyer’s services should conduct further inquiry and, where necessary, secure the advice of ethics counsel.

Although the formal opinion is expressly limited to transactional matters, the Model Rule applies to both transactional and litigation matters. Thus, civil litigators should consider how the guidance provided in the formal opinion could assist in ensuring compliance with the Model Rule and other Rules of Professional Conduct applicable to civil litigation. For example, Model Rule 3.3 (Candor Toward the Tribunal) provides:

A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Under Rule 3.3 a lawyer is prohibited from “knowingly” offering evidence that the lawyer “knows” to be false and may not represent a client in an adjudicative proceeding where the lawyer “knows” that the client intends to or is engaged or has engaged in criminal or fraudulent conduct relating to the proceeding. That is, the lawyer may not turn a blind eye toward the client’s conduct in adjudicative proceedings and may be required to make reasonable inquiries of the client where there is a high probability that the client intends to offer false testimony or otherwise use the proceedings to further criminal or fraudulent conduct.

Additionally, litigators, and especially white collar criminal defense litigators, must be sensitive to the possibility that their attorney’s fees derive from the client’s fraudulent or criminal activity. In federal criminal cases, for example, the Department of Justice may seek forfeiture of attorney’s

³ A recent disciplinary proceeding in New York provides a good example of the need for further inquiry when the facts demand it. In the Matter of Robert L. Rimberg, No. 2017-06111 (2d Dept. NY App. Div., June 3, 2020), the New York Grievance Committee issued an Opinion and Order suspending a lawyer from practice for three years after a client came to his office with $1 million in cash, told the lawyer that the money was “clean” and asked the lawyer to distribute the money to various accounts. The lawyer later testified that he “didn’t feel good about it” but proceeded to assist the client nonetheless. Later, the money was determined to have been “drug money.” The Grievance Committee quoted the judge who sentenced the lawyer for illegal activity that the lawyer “should have known that the money was from an illegal source” because “people usually don’t walk into an office with a million dollars in cash.” Id. at 3.
fees where there are reasonable grounds to believe that the lawyer had “actual knowledge” that the funds were subject to forfeiture at the time of transfer. The existence of “actual knowledge” is “determined on a case-by-case basis, taking into consideration all of the relevant evidence.” USAM § 9-120.109.4 The formal opinion drives home the importance of remaining vigilant to situations where clients may be engaging in fraudulent or criminal conduct, and the duty to avoid assisting in such conduct.

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CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions issued between April 1, 2020 and June 30, 2020 involving issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

Plastic Surgery Ctr., P.A. v. Aetna Life Ins. Co., 967 F.3d 218 (3d Cir. July 17, 2020) (ERISA preemption) - J.L. and D.W. – Each covered by an employer-provided healthcare plan insured by Aetna – required medical procedures that were not available in-network. Each were thus referred for treatment to the Plastic Surgery Center (PSC). As an out-of-network provider, the PSC, before agreeing to provide care, contacted Aetna to confirm that it would make payment. Under the alleged oral agreements that “[the PSC] and Aetna entered” in each case, the PSC would provide the procedures “[i]n exchange for,” respectively, payment of a “reasonable amount” (J.L.’s case) and at the “highest in[-] network level” (D.W.’s case) under their respective plans. After the PSC performed the necessary procedures, Aetna declined to pay the PSC anything for some services and paid less than it allegedly agreed to for others. The PSC sued, claiming breach of contract, unjust enrichment, and promissory estoppel. The district court granted Aetna's motion to dismiss in both cases, holding that section 514(a) of ERISA expressly preempted all claims. The Court of Appeals concluded that the PSC plausibly pleaded breach of contract and promissory estoppel claims that were not preempted. Neither of those causes of action required impermissible “reference to” ERISA plans, nor did they have a “connection with” ERISA plans. Conversely, the PSC’s unjust enrichment claims did entail an impermissible “reference to” the ERISA plans. The district court’s judgment was therefore reversed in part. (Opinion author: Judge C. Krause).

Blanco v. Attorney General, 967 F.3d 304 (July 24, 2020) (Immigration) - After participating in six political marches with an anti-corruption political party that opposed the current Honduran president, Blanco was abducted by the Honduran police and beaten, on and off, for 12 hours. He was let go but received threats over the next several months that he and his family would be killed if he did not leave Honduras. He fled to the U.S. and applied for asylum, withholding of removal and protection under the Convention Against Torture (CAT). The IJ denied all relief, and the BIA affirmed. The Court of Appeals concluded that the BIA and IJ misstated circuit precedent in three ways when determining whether Blanco’s beating and death threats rose to the level of persecution: (1) by requiring Blanco to show severe physical harm in order to establish past persecution; (2) by requiring the death threats to be imminent; and (3) by considering the beating and death threats separately. Applying the proper standard, it was clear from the record that Blanco had established past persecution. The IJ and BIA also did not follow the three-part inquiry established in Abdulai v. Ashcroft, 239 F.3d 542, 554 (3d Cir. 2001), before requiring Blanco to corroborate his CAT claim testimony. The court granted Blanco’s petition, vacated the BIA's decision and remanded for further proceedings. (Opinion author: Judge D.M. Fisher).

Williams v. City of York, 967 F.3d 252 (3d Cir. July 24, 2020) (Civil Rights- § 1983 [Qualified immunity]) – After she was found not guilty of disorderly conduct, Williams sued the City of York and three of its police officers under § 1983, claiming excessive force and false arrest. The
district court granted summary judgment to York on the false arrest claim and to Officer Monte on the § 1983 false arrest and state law false imprisonment claims. It denied the defendants’ summary judgment motions in all other respects, concluding that disputed issues of fact existed that precluded applying qualified immunity. The three officers appealed. After describing the two supervisory rules that apply whenever a district court denies a public official qualified immunity at summary judgment, the Court of Appeals concluded that the district court did not comply with those rules in conducting its qualified immunity analysis, leaving the appellate court to review the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed. The result of the court’s review was a determination that the district court erred in deciding that the officers were not entitled to qualified immunity on Williams’ excessive force claims. The court also concluded that the other two officers were entitled to qualified immunity on Williams’ false arrest claim. The district court’s order was therefore reversed. (Opinion author: Judge T. Hardiman).

*Pennsylvania v. Navient Corp.*, 967 F.3d 273 (3d Cir. July 27, 2020) (Preemption) – In October 2017, the Commonwealth filed a nine-count complaint against Navient alleging its actions in originating and servicing student loans constituted unfair, deceptive and abusive practices in violation of both the Consumer Financial Protection Act of 2010 and Pennsylvania’s Unfair Trade Practices and Consumer Protection Law. The Consumer Financial Protection Bureau (as well as other states) had filed similar lawsuits nine months earlier. Navient filed a motion to dismiss the complaint for failure to state a claim; the district court denied that motion in its entirety. The district court certified three questions of law for interlocutory appeal, and the Court of Appeals granted permission to appeal two of them: (1) whether the Commonwealth may bring a parallel enforcement action under the Consumer Protection Act after the Bureau filed suit; and (2) whether the Higher Education Act of 1965 preempted the Commonwealth’s loan-servicing claims under Pennsylvania’s consumer protection law. The Court of Appeals rejected Navient’s argument that the Consumer Protection Act precluded a concurrent lawsuit by Penn-sylvania, holding that clear statutory language of that act permitted concurrent state claims and that nothing in the statutory framework suggested otherwise. As to the second question, the court followed other circuit courts in holding that the Education Act expressly preempted only claims based on failures of disclosure, not claims based on affirmative misrepresentations. Because no other preemption principles barred the Commonwealth’s state-law claims, the district court’s ruling was affirmed. (Opinion author: Judge T. Ambro).

*Sherwin-Williams Co. v. Cty. of Delaware*, 968 F.3d 264 (3d Cir. July 31, 2020) (Federal court jurisdiction) – In 2018, Lehigh and Montgomery counties sued Sherwin-Williams (and others) in state court over its manufacture and sale of lead-based paint. Both counties hired the same law firm on a contingency. Seeking to prevent other counties from also suing it or from hiring outside contingent-fee counsel, Sherwin-Williams filed an action in federal court against Delaware county and members of its county council (among other counties and individuals), requesting declaratory and injunctive relief and raising three claims under § 1983. The district court concluded that Sherwin-Williams failed to plead an injury in fact or a ripe case or controversy, and it granted the county’s motion to dismiss on the ground that Sherwin-Williams lacked Article III standing. The Court of Appeals affirmed. Sherwin-Williams’ constitutional claims in two of its counts (alleging potential First Amendment and Due Process Clause violations) required substantial speculation as they rested on what it anticipated the county might allege in a hypothetical future lawsuit. Sherwin-Williams also failed to show that defending against any such lawsuit would be “inordinately expensive and impractical.” As to the last count (involving alleged due process violations associated with using outside counsel on a contingency fee basis), the court again concluded that the asserted injury, if any, was neither existing nor certainly impending (in part because the allegations were based on an expected arrangement rather than the actual agreement the county had with counsel). Finally, the court concluded that even if it could satisfy Article III’s injury-in-fact requirement, Sherwin-Williams’ claims would not be ripe for review. (Opinion author: Judge T. Hardiman).
Artesanias Hacienda Real S.A. de C.V. v. North Mill Capital LLC (In re: Wilton Armetale Inc.), 968 F.3d 273 (3d Cir. Aug. 4, 2020) (Bankruptcy [Standing vs. statutory authority to sue]) – Wilton’s previous owner transferred all of his shares in Wilton to an affiliate of Artesanias (a Wilton creditor) as a result of prior litigation. Artesanias then discovered that Wilton was insolvent and that the previous owner and North Mill Capital (another creditor) had plotted with Leisawitz Heller (a law firm) to plunder the company’s remaining assets. Artesanias sued North Mill and Leisawitz Heller, alleging that by “divert[ing]” Wilton’s remaining assets, they had “hinder[ed] ... Artesanias’ ability to enforce and collect obligations [owed to it] from Wilton.” Artesanias sought, inter alia, damages and an order setting aside the purportedly fraudulent asset transfers. Wilton shortly afterward filed for bankruptcy. The district court referred Artesanias’ case to the bankruptcy court. That court rejected Artesanias’ argument that a previously entered abandonment order (through which the bankruptcy court allowed the bankruptcy trustee to abandon all but a specified few of the estate’s legal claims) gave Artesanias standing to sue and concluded that only the trustee had such standing. The district court agreed and dismissed Artesanias’ action for lack of standing. The Court of Appeals first clarified the difference between a litigant’s “standing” to pursue causes of action that became the estate’s property and its constitutional standing to invoke the federal judicial power. Here, Artesanias had constitutional standing throughout Wilton’s bankruptcy and whether its claims were properly dismissed depended on whether it had the authority to sue once Wilton filed for bankruptcy. Because Artesanias’ claims relied on a general theory of recovery derivative of harm done to Wilton, those claims became property of the bankruptcy estate. The trustee, however, formally abandoned his statutory authority to pursue certain claims against North Mill and Leisawitz Heller, and that authority reverted to Artesanias. The court therefore vacated the district court’s order and remanded. (Opinion author: Judge S. Bibas).

Premier Comp Sols., LLC v. UPMC, 970 F.3d 316 (3d Cir. Aug. 12, 2020) (Civil Procedure [Rules 15 and 16]) – The district court in this antitrust case issued a case management order setting June 22, 2016, as the date by which the parties had to move to amend the pleadings or add new parties. Premier successfully sought an extension, and the new deadline was Nov. 13. After a March 2017 deposition of a UPMC employee, Premier moved to file a second amended complaint asserting a new antitrust count and adding a new defendant. Its brief asked the district court to apply Rule 15(a). UPMC opposed, arguing that Premier had relied on the wrong rule and had not made the requisite showing of diligence; Premier, in its reply, conceded that Rule 16(b)(4) applied and argued for the first time that it had been diligent. The district court denied Premier’s motion, and when moved to reconsider, declined, stating that it would not consider issues raised for the first time in a reply brief. After the district court granted summary judgment to UPMC, Premier appealed, challenging the district court’s denial of its motion to amend. The Court of Appeals clarified that (1) when a party moves to amend or add a party after the deadline in a district court’s scheduling order has passed, the “good cause” standard of Rule 16(b)(4) applies, and (2) a party must meet the good cause standard before a district court considers whether the party also meets Rule 15(a)’s standard. Under the court’s jurisprudence, good cause under Rule 16(b)(4) depends in part on a plaintiff’s diligence. The court concluded that the district court had not abused its discretion in denying Premier’s motion to amend and to add a party. (Opinion author: Judge T. Hardiman).

United States v. Heinrich, 971 F.3d 160 (3d Cir. Aug. 18, 2020) (Evidence) – Heinrich was charged with numerous counts of producing child pornography. He admitted to taking pictures and videos of young children and that they depicted sexually explicit conduct but claimed he lacked the required specific intent and proffered the testimony of an expert witness in support of that defense. The government moved to exclude the evidence as inadmissible under Fed. R. Evid. 401, 403, 702, or 704(b). After a hearing on the applicability of Rule 704(b), the district judge’s law clerk conducted a one-hour-and-15-minute unrecorded and untranscribed telephone conference during which the clerk advised counsel that the court intended to grant the government’s motion, that the basis for the exclusion was Rules 403 and 704(b), and that a written opinion would be forthcoming. Heinrich entered a conditional guilty plea, reserving the right to appeal the exclusion of the proposed expert evidence. No opinion or order on the government’s motions
was ever docketed. The Court of Appeals found itself “in the unenviable position – indeed, impossible position – of attempting to review a [law-clerk]-presented non-ruling that caused the Defendant to plead guilty rather than proceed to trial.” It had no district court reasoning, no evidence of the district court’s Rule 403 balancing and no clear indication of what evidence was excluded under Rule 403 and what evidence was excluded under Rule 704(b). The court, after explaining its reasons for declining to conduct a de novo Rule 403 or Rule 704(b) analysis as to the proffered expert evidence, vacated the judgment and remanded the case to the district court so it could make an explicit ruling on the government’s motion to exclude and provide an accompanying detailed memorandum opinion. (Opinion author: Chief Judge D.B. Smith).

Starnes v. Butler Cty. Court of Common Pleas, 971 F.3d 416 (3d Cir. Aug. 24, 2020) (Civil Rights - § 1983 [Qualified immunity]) – Starnes filed a five-count complaint against Doerr (president judge of the Butler County Court of Common Pleas), Holman (deputy court administrator) and the Butler County Court of Common Pleas, asserting, among other claims, that Judge Doerr (1) violated her First Amendment rights by forcing her to associate with him in an intimate fashion; and (2) violated her Fourteenth Amendment equal protection rights by discriminating against her on the basis of sex through quid pro quo sexual harassment and the denial of job entitlements after their sexual relationship ended. The complaint also alleged that Judge Doerr and Holman retaliated against her for exercising her First Amendment rights. Judge Doerr moved to dismiss for several reasons, including qualified immunity. The district court dismissed the due process claim with prejudice, dismissed the equal protection claim without prejudice and granted leave to amend that claim, and rejected Judge Doerr’s qualified immunity defense. Judge Doerr raised that defense again when he sought to dismiss the amended complaint. The district court denied his motion, and Judge Doerr appealed. After rejecting Starnes’ argument that it did not have jurisdiction over the appeal because Judge Doerr had failed to appeal from the first rejection of his qualified immunity defense, the Court of Appeals concluded that the district court did not err in denying qualified immunity on Starnes’ equal protection claim or on her First Amendment retaliation claim. The court reversed, however, the denial of qualified immunity as to the First Amendment freedom-of-association claim, concluding that Judge Doerr was entitled to qualified immunity on the claim, both as [mis]construed by the district court (that he interfered with Starnes’ intimate relationship with her then-boyfriend and current husband) and as construed as pleaded (that Judge Doerr violated her association rights by forcing her to associate with him). (Opinion author: Judge T. Hardiman).

Weimer v. County of Fayette, 972 F.3d 177 (3d Cir. Aug. 25, 2020) (Civil Rights - § 1983 [Absolute & Qualified Immunity] / Appellate court jurisdiction) – In 2006, a jury convicted Weimer of third-degree murder and conspiracy to commit murder; she was sentenced to 15 to 30 years in prison. In 2015, those convictions were vacated and Weimer was granted a new trial. Based on revelations regarding, inter alia, the evidence used to convict Weimer and information withheld from the defense, all charges were dropped with prejudice the next year. Weimer then filed a § 1983 suit against the Fayette County, former District Attorney Vernon and others, alleging that defendants violated her rights under the U.S. Constitution and Pennsylvania law. Among the allegations were that Vernon maliciously prosecuted Weimer in violation of her Fourth and Fourteenth Amendment rights, conspired with police to violate her civil rights and failed to intervene to prevent officers from violating her constitutional rights. Vernon moved to dismiss claims against her in both a first amended and second amended complaint, raising absolute and qualified immunity in each motion. This opinion resolves Vernon’s interlocutory appeal of the district court’s April 2019 and September 2018 orders denying parts of Vernon’s two motions. The Court of Appeals first concluded that it had jurisdiction to review the September 2018 order – despite Vernon not appealing from that order within 30 days of its issuance. Turning to the merits, the court “dissected” Vernon’s alleged actions to determine whether they were prosecutorial or investigative in nature and concluded that she was entitled to absolute immunity only with respect to her approval of the criminal complaint; other actions were not protected because they were investigative in nature. Moving to the question of whether Vernon was entitled to qualified immunity as
to her failure to intervene in the allegedly unconstitutional police investigation and for directing police to investigate the timing of a bite mark on the victim’s hand, the court concluded that given existing law at the time of the events at issue, Vernon would not have been on notice of constitutional violations. The court therefore affirmed in part and reversed in part. (Judge D.M. Fisher).

_Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J., 974 F.3d 237 (3d Cir. Sept. 1, 2020) (Constitution [Second Amendment] / Law-of-the-case doctrine) — Previously banning magazines capable of holding 15 rounds of ammunition, New Jersey enacted in 2018 a law making it illegal to possess a magazine capable of holding more than ten rounds. An association and two individuals filed suit under § 1983, alleging that the 2018 law violated the Second Amendment, the Fifth Amendment’s Takings Clause, and the Fourteenth Amendment’s Equal Protection Clause. A prior Court of Appeals opinion reviewed the district court’s denial of plaintiffs’ motion for a preliminary injunction, and in so doing, went beyond the question of likelihood of success and declared a holding on the merits: The 2018 law did not violate the Second Amendment, the Fifth Amendment’s Takings Clause or the Fourteenth Amendment’s Equal Protection Clause. Back before the district court, the parties filed cross-motions for summary judgment. Viewing the Third Circuit’s decision as binding, the district court granted the state’s motion. Plaintiffs appealed. The court noted that, even though procedural postures and standards of review differ, a panel reviewing a decision on a preliminary injunction motion can indeed bind a subsequent panel reviewing an appeal from an order on summary judgment. Because the court could not conclude that the prior decision was clearly wrong and manifestly unjust, it decided it was bound to respect the decision rendered by the prior panel. The district court’s judgment was therefore affirmed. (Opinion author: Judge K. Jordan; one judge dissenting).

_Hargrove v. Sleepy’s LLC, 974 F.3d 467 (3d Cir. Sept. 9, 2020) (Class action) — Drivers who made deliveries for mattress retailer Sleepy’s LLC brought a putative class action, alleging violations of New Jersey law stemming from their misclassification as independent contractors. They moved for certification of a proposed class of 193 drivers. The district court denied the motion without prejudice, concluding that plaintiffs had not demonstrated the ascertainability of the proposed class. Plaintiffs filed a renewed motion for class certification proposing a different class of only 111 drivers, addressing some of the issues the district court raised with the first proposed class. The district court denied that motion as well because (1) it did not satisfy the standard for a motion for reconsideration; and (2) the narrower class was still not ascertainable because the records kept by Sleepy’s regarding the identity of the drivers lacked critical information. The Court of Appeals first concluded that the district court erred by treating the renewed motion for class certification as a motion for reconsideration. As to the district court’s application of Rule 23 requirements, the court concluded that it misapplied ascertainability case law by essentially demanding that plaintiffs identify the class members at the certification stage. Because plaintiffs satisfied the existing standard, the court reversed the district court’s holding with respect to ascertainability. Noting the district court’s emphasis on the gaps in the records Sleepy’s kept and produced, the court clarified that where an employer’s lack of records makes it more difficult to ascertain members of an otherwise objectively verifiable class, the employees who make up that class will not be made to bear the cost of the employer’s faulty record keeping. The court extended _Tyson Foods, Inc. v. Bouaphakeo_, 136 S. Ct. 1036 (2016), and _Anderson v. Mt. Clemens Pottery Co., _ 328 U.S. 680 (1946), to the ascertainability determination at the class-certification stage and held that where an employer has failed to keep records it was required to keep by law, employees can prove ascertainability by producing “sufficient evidence” to define their proposed class as “a matter of just and reasonable inference.” (Opinion author: Judge T. Ambro; one judge dissenting).

_United States v. Williams_, 974 F.3d 320 (3d Cir. Sept. 10, 2020) (Criminal Law & Procedure / Sentencing) – In 2014, 21 individuals were charged on counts of racketeering conspiracy, drug-trafficking conspiracy and drug trafficking. Four were also variously charged with federal firearms offenses related to the alleged trafficking. Twelve proceeded to a joint trial held over an eight-week period in 2015; a jury found all 12 guilty on one or more counts. Ten of those 12 appealed, and those appeals were consol-
idated. This lengthy opinion addresses the 10 defendants’ numerous challenges to their convictions and sentences. Arguments included: (1) that the district court’s closure of the courtroom to the public during the two days of jury selection violated their Sixth Amendment right to a public trial and warranted reversal of their convictions and a new trial; (2) the district court’s in camera disposition of a Batson challenge both violated their constitutional right to personal presence at all critical phases of their criminal trial and was sufficiently prejudicial to warrant reversal of their convictions; and (3) that evidence was insufficient to support one or more of the verdicts against them – an argument that caused the Court of Appeals to clarify, among other things, the effect of its decision in United States v. Rowe, 919 F.3d 752 (3d Cir. 2019), upon its case law regarding the elements of a drug-trafficking conspiracy under 21 U.S.C. § 846. Defendants also raised several evidentiary challenges and challenges to their sentences. Although several errors were identified, the court ultimately affirmed the defendants’ judgments of conviction. It also affirmed the sentences of two defendants, but vacated in whole or in part the sentences of the remaining eight and remanded two of the cases for resentencing. (Opinion author: Judge D.M. Fisher; one judge dissenting).

EASTERN DISTRICT OF PA OPINIONS

State Farm Fire & Cas. Co. v. Worontzoff, 2020 U.S. Dist. LEXIS 140478, 2020 WL 4530704 (E.D. Pa. Aug. 6, 2020) (Intervention) — In this declaratory judgment action, State Farm sought to establish that it was not obligated to provide coverage for injuries allegedly caused by its insured, Nicholas Worontzoff III, when he assaulted Coleman Gladis. After learning of State Farm’s suit, Mr. Gladis sought permission to be heard in the action on the basis that the outcome here would affect his state court tort claim against Mr. Worontzoff. The district court, citing Liberty Mut. Ins. Co. v. Treesdale Inc., 419 F.3d 216, 221 (3d Cir. 2005), did not permit Mr. Gladis to intervene.

Complete Bus. Solutions Group, v. Sunrooms Am., 2020 U.S. Dist. LEXIS 130239, 2020 WL 4196195 (E.D. Pa. July 22, 2020) (Jurisdiction; Confessed judgment) — Complete Business Solutions Group Inc. (CBSG) obtained a confessed judgment against the defendants. Instead of filing a petition to strike or open the confessed judgment, the defendants timely removed the action based on diversity jurisdiction. CBSG then filed a motion to remand. The defendants subsequently filed a petition to strike or open the confessed judgment. Invoking the Rooker-Feldman doctrine, CBSG argued the district court did not have jurisdiction. The court agreed and held that, unless a state court confessed judgment has been stricken or opened, it is a final judgment.

Commonwealth of Pennsylvania v. DeJoy, 2020 WL 5763553 (E.D. Pa. September 28, 2020) (Election Law; Voting Law) — This was a suit brought by six states and the District of Columbia to enjoin the U.S. Postal Service’s specific changes in the lead up to the Nov. 3, 2020 election. At issue was whether the Postal Service violated the law and acted beyond its authority when it restricted extra and late trips by trucks and letter carriers and instituted overtime restrictions. After the court confirmed that it possessed jurisdiction, the court adopted the district court’s order in the Southern District of New York, which ruled on a similar issue. Furthermore, the district court in the Eastern District of PA enjoined the Postal Service from continued implementation of: 1) operational changes, which were announced in July 2020; 2) changes concerning late or extra mail truck trips and carrier start as well as stop times; and 3) work hours reduction targets, penalty overtime, pre-tour overtime, new manager approval requirements for work hours and overtime and other overtime requests and approvals that began on June 15, 2020.5

MIDDLE DISTRICT OF PA OPINIONS

United States v. Green, 2020 U.S. Dist. LEXIS 120982, 2020 WL 3883564 (M.D. Pa. July 19, 2020) (Speedy Trial Act and Sixth Amendment) – The defendant filed a motion to dismiss based on the Speedy Trial Act, 18 U.S.C. § 3161, as well as the Sixth Amendment right to speedy trial. The court granted the motion to dismiss the indictment insofar as it concluded that the Speedy Trial Act was violated so that the indictment must be dismissed without prejudice.

5 The Eastern District Court issued an order clarifying its Oct. 9, 2020.
The court explained that the Speedy Trial Act provides that in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, which ever date last occurs. Section 3161(h) sets forth what periods of time are excludable for calculating the time within which a trial must commence. The court found that the government’s motion to set the trial date did not toll the Speedy Trial clock. The court then analyzed whether the dismissal pursuant to the Speedy Trial Act should be with or without prejudice. The court considered the seriousness of the charges, the facts and circumstances that led to the dismissal and the impact of a re-prosecution on the administration of the Speedy Trial Act and on the administration of justice. After weighing these factors, the court concluded that the dismissal should be without prejudice. The court also denied defendant’s motion to dismiss based on the Sixth Amendment right to a speedy trial. In considering this motion, the court examined the factors set forth in Barker v. Wingo, 407 U.S. 514 (1972). Specifically, the court considered the length of the delay, the reason for the delay, the assertion of Speedy Trial rights, and the prejudice to the defendant. Based on these factors, the court denied defendant’s Sixth Amendment claims.

United States v. Armstrong, 2020 U.S. Dist. LEXIS 130165, 2020 WL 4226520 (M.D. Pa. July 23, 2020) (Compassionate Release and Reduction of Sentence) – The defendant filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) based upon his medical condition and his concern regarding the potential spread of the COVID-19 virus at FCI Schuylkill. The defendant also sought a reduction in his sentence based on the Sixth Amendment right to a speedy trial. In considering this motion, the court examined the factors set forth in Barker v. Wingo, 407 U.S. 514 (1972). Specifically, the court considered the length of the delay, the reason for the delay, the assertion of Speedy Trial rights, and the prejudice to the defendant. Based on these factors, the court denied defendant’s Sixth Amendment claims.

Guzzo v. Allen Distribution, 2020 U.S. Dist. LEXIS 145833, 2020 WL 4700673 (M.D. Pa. Aug. 13, 2020) (Motion for Partial Dismissal and Employment Discrimination) – The plaintiff sought employment as a forklift operator. As part of his application, he revealed a prior conviction for possession of child pornography. His application for employment was denied, and he filed a lawsuit against his potential employer alleging discrimination based on his age, disabilities and previous conviction. In granting the motion for partial dismissal, without prejudice, the court interpreted 18 Pa.C.S. § 9125, which governs the conditions under which employers can consider prior convictions of job applicants. Plaintiff argued that Section 9125 did not allow the defendant to reject his employment because the prior conviction was not relevant to the position for which he applied and he was not notified in writing about the basis for the rejection. The defendant argued that Section 9125 was inapplicable because it learned of the prior conviction through the job application and not through a background check. The court rejected defendant’s argument, finding that the statute applied regardless of how the employer learned of the prior conviction. However, the court further found that Section 9125 is only applicable when an employer receives information that is actually within the applicant’s criminal history file. Because plaintiff had not pleaded that his past conviction was part of his criminal history record information, the court granted the motion to dismiss, but gave plaintiff leave to file an amended complaint.

United States v. Miller, 2020 U.S. Dist. LEXIS 149420, 2020 WL 4812711 (M.D. Pa. Aug. 19, 2020) (Controlled Substances Act) – The defendant objected to being classified as a career offender under the United States Sentencing Guidelines. The issue before the court was whether the recent amendments to the Controlled Substances Act, 21 U.S.C. § 801, et seq., remove defendant’s prior state conviction for possession with intent to deliver marijuana. After noting it was an issue of first impression, the court determined that the definition of controlled substance in the career offender sentencing guideline, U.S.S.G. § 4B1.2, is a term of art and is limited exclusively to drugs listed under
the Controlled Substances Act. A Pennsylvania conviction for possession with intent to deliver marijuana does not qualify as a controlled substance offense and cannot serve as a predicate offense to trigger the career offender designation. The court found that defendant, at most, had one controlled-substance predicate and, therefore, could not be classified as a career offender. Thus, the court sustained defendant’s objection to the presentence report’s career-offender designation.

Thakker v. Doll, 2020 U.S. Dist. LEXIS 176024, 2020 WL 5737507 (M.D. Pa. Sept. 24, 2020) (Criteria for Class Certification/Federal Rule of Civil Procedure 23) — A number of ICE detainees sought release from ICE detention facilities across central Pennsylvania as a means to avoid potential COVID-19 infection. Pursuant to the same, the petitioners filed a motion for class certification and appointment of class counsel. In this opinion denying this motion, the court provided a thorough analysis of the criteria for class certification. Specifically, the court addressed the requirements of numerosity, commonality and typicality and adequacy. The court also addressed the practical challenges of satisfying these requirements in light of the pandemic. The court concluded that the petitioners’ claims varied too widely in their factual circumstances for a class action to be appropriate and that it would do them a disservice by considering them as a whole. As such, the court denied the petitioners’ motion for class certification and appointment of class counsel.

WESTERN DISTRICT OF PA OPINIONS

N. Hills Vill. LLC v. LNR Partners LLC, 2020 U.S. Dist. LEXIS 148103, 2020 WL 4745614 (W.D. Pa. Aug. 17, 2020) (Diversity Jurisdiction; Citizenship of a Trust) — Plaintiff, an LLC, whose sole member was a trust, alleged state breach of contract claims. The district court dismissed the complaint for lack of diversity jurisdiction. The analysis turned on the plaintiff’s citizenship, i.e., whether the plaintiff was a “traditional trust” or a “business trust.” For a traditional trust, citizenship is determined based on that of the trustee alone. For a business trust, citizenship is determined based on that of all its members. After setting forth various factors to consider (such as the “purposes of the trust”) and approaches of various courts addressing the issue, the district court found that plaintiff was a business trust because, among other things, the trust effectuated “financial returns to investors.” Because one trust member was an American citizen living abroad, and American citizens living abroad cannot be sued in federal court based on diversity jurisdiction, the court lacked jurisdiction to hear the case.

Rosfeld v. Univ. of Pittsburgh, 2020 U.S. Dist. LEXIS 142132, 2020 WL 4584356 (W.D. Pa. Aug. 10, 2020) (Due Process Rights in Employment Cases; Coerced Resignations) — Plaintiff, a University of Pittsburgh police officer, had been notified of an internal investigation pending against him and, about six weeks later, he was notified in writing that his employment would be terminated “effective today.” Plaintiff claimed that he was under “extreme duress,” which created a situation that “coerced” him into immediately requesting resignation in lieu of termination. The complaint alleged violations of his procedural due process rights because he was not provided with notice or an explanation of the charges against him at the time his employer presented the termination notice. The district court dismissed the complaint because plaintiff’s “unprompted decision” to resign had “relinquished his property interest in his continued employment.” The district court explained that employee resignations are presumed to be voluntary. That presumption can be overcome when an employer forces the resignation through coercion. The district court analyzed a five-factor test for voluntariness, finding that plaintiff did not plausibly allege coercion. The only action attributed to defendants was handing a termination notice to the plaintiff and failing to provide him with any alternative — that is “not enough to show that his resignation was involuntary.”

ate release based on “extraordinary circumstances” other than those explicitly enumerated in the commentary of the U.S. Sentencing Guidelines. The district court explained, however, that it “need not decide whether it is bound by the commentary” because the federal courts have universally agreed that extraordinary circumstances in the context of health issues must involve some type of “severe illness.” The district court further explained that the defendant did not have a terminal illness, nor did he have any medical condition that “substantially diminishes his ability to provide self-care in a correctional environment.” The mere existence of COVID-19, or the defendant’s susceptibility to COVID-19, was not extraordinary or compelling. Defendant’s arguments amounted to nothing more than “speculation” concerning possible future conditions and the potential for COVID-19 exposure that exists everywhere in the community.

*Kopko v. Range Res.-Appalachia LLC*, U.S. Dist. LEXIS 150886, 2020 WL 4877368 (W.D. Pa. Aug. 20, 2020) (Motions for Sanctions) — Defendant filed a motion for sanctions on grounds that plaintiff filed a complaint that was “clearly time-barred.” Defendant informed plaintiff that it would file a motion for sanctions if it did not withdraw the complaint within 21 days, but the correspondence to opposing counsel did not explicitly assert the statute of limitations as the basis for sanctions. Defendant informed plaintiff that it would file a motion for sanctions if it did not withdraw the complaint within 21 days, but the correspondence to opposing counsel did not explicitly assert the statute of limitations as the basis for sanctions. The district court denied the motion on grounds that defendant’s correspondence did not explicitly state that sanctions would be based on the complaint being time-barred. The correspondence did not adequately “describe the specific conduct that allegedly violates Rule 11,” as Rule 11 requires.

**Doe v. UPMC**, U.S. Dist. LEXIS 176222, 2020 WL 5742685 (W.D. Pa. Sept. 25, 2020) (interlocutory appeals) — Plaintiffs filed a motion to certify a ruling for interlocutory appeal, after the district court found that federal officer removal jurisdiction exists in a class action suit. The district court explained that, although interlocutory appeals are generally disfavored, the court, in its discretion, may grant certification if the issue (1) involves a controlling question of law; (2) offers substantial grounds for difference of opinion as to its correctness; and (3) if immediately appealed, materially advances the ultimate termination of the litigation. The court denied the motion, reasoning that an issue of first impression, by itself, is insufficient to establish the second element. Plaintiffs offered no conflicting precedent or other cases that were decided differently, and instead focused on what they deemed the absence of controlling law on a novel and complex issue. Although the facts may have been novel and complex, the applicable law was not so novel and complex as to warrant an immediate appeal.

*Kyko Glob Inc. v. Prithvi Info. Sols. Ltd.*, U.S. Dist. LEXIS 118043, 2020 WL 3654951 (W.D. Pa. July 6, 2020) (RICO; Personal Jurisdiction) — Defendants argued in a motion for reconsideration that The Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 et seq., does not permit international service of process and thus the court lacked personal jurisdiction. The district court acknowledged that there was no Supreme Court or Third Circuit case that addresses the issue of whether the RICO Act (specifically, 18 U.S.C. § 1965) allows international service of process. The district court further acknowledged a circuit split on the issue and chose to adopt the Eleventh Circuit’s approach. Rule 4(k) states that unless a statute prohibits international service, it is presumed to be proper. Because 18 U.S.C. § 1965 does not have any “prohibitive language,” the district court held that the Act could be used to establish personal jurisdiction over foreign defendants.

**Thank You**

The chair of the FPC Newsletter Subcommittee extends a sincere thank you to the following Federal Practice Committee members and others who contributed to this edition of the PBA Federal Practice Committee newsletter:

- **Hon. D. Michael Fisher**, U.S. Court of Appeals Third Circuit, Allegheny
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- **Melinda Ghilardi**, Munley Law PC, Lackawanna
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- **Thomas Wilkinson Jr.**, Cozen O’Connor, Philadelphia
- **Douglas B. Fox**, Cozen O’Connor, Philadelphia

A special thank you also goes to Susan Etter and Diane Banks of the Pennsylvania Bar Association.
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