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THIRD CIRCUIT RESOLVES IMPORTANT PROCEDURAL ISSUES IN AFFIRMING HABEAS RELIEF

Han Tak Lee v. Superintendent Houtzdale SCI et al., No. 14-3876, --- F.3d --- (3d Cir. Aug. 19, 2015)

David R. Fine
K&L Gates LLP, Harrisburg

Ji Yun Lee lived a short and troubled life, and the ramifications of her death in 1989 continue to this day. Her father, Han Tak Lee, was convicted of murdering her, but he persuaded a magistrate judge and a district judge that he was entitled to *habeas* relief. The Third Circuit, in *Han Tak Lee v. Superintendent Houtzdale SCI et al.*, affirmed that decision and, in the course of its opinion, addressed three important procedural points.

Some background is necessary to understand the context in which the procedural issues arose.

Ji Yun suffered from mental illness and suicidal ideation. She and her family lived in New York, where she exhibited erratic behavior. At the suggestion of his pastor, Ji Yun's father took her to a religious retreat in Monroe County, Pennsylvania. Within hours of their arrival, Ji Yun had jumped into a body of water and later became so agitated that others had to restrain her. That night, there was a fire in the Lees' cabin. Ji Yun died but her father escaped.

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THIRD CIRCUIT ADDRESSES THE SEPARATE DOCUMENT REQUIREMENT WITH RESPECT TO ELECTRONIC TEXT-ONLY DOCKET ENTRIES

Witasick et al. v. Minn. Mut. Life Ins. Co. et al., No. 14-1150, --- F.3d --- (3d Cir. Oct. 1, 2015)

Anderson T. Bailey and Thomas S. Jones
Jones Day, Pittsburgh

In a recent decision, *Witasick v. Minnesota Mutual Life Insurance Co.*, the Third Circuit addressed when electronic docket entries satisfy the requirement of a "separate document" for a proper judgment under the civil rules. But does its opinion clarify or muddle critical questions about how to calculate post-judgment deadlines?

Federal Rule of Civil Procedure 58(a) requires that, with some exceptions, "[e]very judgment … must be set out in a separate document." Judicial opinions—even ones that clearly order relief, such as the grant of dismissal on the pleadings or summary judgment—do not satisfy this "other document" requirement. *In re Cendant Corp. Sec. Litig.*, 454 F.3d 235, 241 (3d Cir. 2006). Rather, to qualify as a "judgment" under Rule 58(a), a document must typically meet three criteria: (1) it must be self-contained; (2) it must indicate the relief granted; and (3) it must omit or substantially omit the

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Prosecutors alleged that Han Tak Lee set the fire to kill his daughter. At trial, they relied on fire-scene analysis and gas-chromatography evidence. Mr. Lee's defense was that Ji Yun set the fire. The jury accepted the Commonwealth's version and found Mr. Lee guilty. A judge sentenced him to life in prison without the possibility of parole.

On direct appeal, the Pennsylvania Superior Court remanded for a hearing on Mr. Lee's ineffective-assistance-of-counsel claims. Evidence adduced at that hearing demonstrated that developments in the field of fire science called into question the reliability of the arson investigation that formed the basis for the prosecution. Notwithstanding that evidence, the trial court denied Mr. Lee's claims, the Superior Court affirmed, and the Pennsylvania Supreme Court denied review. Invoking both state and federal law, Mr. Lee sought post-conviction relief from the state courts, but he was unsuccessful.

Mr. Lee then sought federal *habeas* relief. The district court first denied relief, but the Third Circuit in 2012 reversed and remanded the case for an evidentiary hearing. *Lee v. Glunt*, 667 F.3d 397. That decision set an important precedent concerning when the due process clause requires re-examination of old convictions based on new developments in forensic science.

On remand, Magistrate Judge Martin C. Carlson presided over the hearing and concluded that Mr. Lee had proven that scientific evidence the Commonwealth offered at trial was unreliable. Finding that the Commonwealth's remaining evidence was insufficient to sustain the guilty verdict under the terms of the Third Circuit's mandate, the magistrate judge recommended that the district judge grant *habeas* relief, which he did.

On August 19, 2015, the Third Circuit affirmed. *Lee v. Superintendent*, 798 F.3d 159.

The merits of the case are of course important, but there are three procedural points also worthy of note.

Mr. Lee took issue with both the timing and the means by which the Commonwealth filed its notice of appeal. The federal rules authorize district courts to implement electronic filing and to make that process mandatory subject to limited exceptions. The Middle District's local rules require that all documents submitted by counsel, including notices of appeal, be electronically filed. Because of perceived logistical issues, the Monroe County district attorney filed his notice by mail, which the district court clerk's office received on the thirtieth day after the order granting *habeas* relief. The clerk actually filed the notice the following day. The rules make clear that a notice of appeal counts as timely based on its receipt by the clerk, even if the formality of filing occurs later. Mr. Lee argued to the Third Circuit that the notice was untimely because under the mandatory electronic filing regime, it was never properly "filed" at all. He pointed out that leave to file on paper had not been sought or granted within the 30-day limit, nor during any extension of time to file allowed by the district court.

The Third Circuit rejected the argument and held that the notice was timely because the clerk received it within the required 30 days. The court of appeals chose to follow the Ninth Circuit in holding that a notice of appeal that violates a local rule on electronic filing is nonetheless sufficient to confer appellate jurisdiction. The court reasoned that electronic versus paper filing is a matter of "form," for which a filing may not be rejected.

The second procedural issue relates to whether the federal courts were required to give deference to the state courts' legal and factual decisions. Section 2254 of the Judicial Code, the federal *habeas* provision applicable to state inmates, generally requires federal courts to give deference to state courts' legal and factual determinations if they are at least "reasonable." When Mr. Lee's case was first before the court of appeals in 2012, the Third Circuit concluded that it need not give such deference because the state courts had failed to address or analyze Mr. Lee's federal due process claim. A year later, the U.S. Supreme Court decided in a different case that, even if a state court has not expressly addressed a federal claim, a federal *habeas* court should still be deferential because it should generally presume that the state court adjudicated the federal claim on the merits even if it did not say it had. In its 2015 decision in *Lee*, the court of appeals declined to reconsider the prior panel's non-deferential review of the state court decisions because, even though there had been an intervening change in the law, "the Commonwealth has not asked us to revisit the issue here." Accordingly, the court applied the usual doctrine of "law of the case." The court of appeals offered no insight into how it might have handled the intervening precedent had the Commonwealth raised it.

The third procedural issue relates to the standard by which the district judge and the court of appeals reviewed the magistrate judge's report and recommendation. Ordinarily, when a party timely objects to the magistrate judge's report on an issue that only the district judge has authority finally to decide, review is *de novo*. However, if the aggrieved party files no objections or files insufficient objections, the district judge and the court of appeals look only to see if there was "plain error." Of course, plain-error review is significantly more deferential to the decision being reviewed, with the court reversing only if there was an error that was "plain" (in the sense of being clear and obvious) that affected a substantial right, and that seriously affects the fairness, integrity or public reputation of judicial proceedings. In this case, the Commonwealth had filed cursory objections, and the district judge had ruled that they were insufficient to avoid plain-error review. In its briefing in the Third Circuit, the Commonwealth did not dispute the district court's application of plain-error review or that this more onerous standard carried forward to the appeal. As a result, the court of appeals also applied that more-deferential standard. At the same time, the Third Circuit opinion gives no indication that it might have reached any different result had its standard of review been different.

The Commonwealth has indicated to the district court that it intends to file a petition for a writ of *certiorari*, which would be due within 90 days of August 19, that is, by November 17, 2015.

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reasoning behind that relief. *Id.* The point of these criteria is to clearly establish when the time for filing a notice of appeal or post-trial motions begins to run. *Id.* at 243. The date the judgment is set out in a separate document starts the clock for appeal; if there is no separate document, then judgment is deemed entered 150 days after the relevant entry on the docket. *See* Fed. R. Civ. P. 58(c)(2).

Witasick posed the question of whether an electronic text-only entry satisfies this separate-document requirement. The factual background can be stated summarily: as part of an earlier settlement, Plaintiff/Appellant Kevin Witasik, Sr., released all past and future claims against the Defendant/Appellee insurance companies. Witasik subsequently brought suit in the District of New Jersey, and the court dismissed his claims pursuant to the release. Six months later, Witasick filed a notice of appeal. The insurers argued that the Third Circuit lacked jurisdiction over the appeal because Witasick's notice was not timely.

The procedural nuances of the case thus commanded greater attention on appeal than the merits. The District Court had ordered dismissal on March 25, 2013, issuing a ten-page reasoned opinion. In a section of the opinion headed "Conclusion," the Court wrote: "IT IS ORDERED this 25th day of March, 2013 that Defendants' motion to dismiss the Complaint … is hereby GRANTED." The district court judge did not issue any separate order, but that same day, a text-only entry was made on the CM/ECF docket stating in full: "***Civil Case Terminated. (drw) (Entered: 03/25/2013)." Witasick did not file his notice of appeal until September 23, 2013.

In a precedential opinion written by Judge Nygaard and joined by Judges Fuentes and Greenaway, Jr., the Third Circuit nevertheless found Witasick's appeal timely and held that neither the March 25 opinion nor the contemporaneous docket entry satisfied Rule 58's separate-document requirement. Because the opinion ordered dismissal in its conclusion section, that order was not self-contained and included the trial court's reasoning. As for the docket entry, the phrase "Civil Case Terminated" was "a mere clerical notation" that did not specify the nature of the relief granted. A case can be terminated for a variety of reasons; simply noting termination thus cannot satisfy the second requirement of *In re Cendant*. Accordingly, judgment did not enter until August 22, 2013—150 days after the March 25 order of dismissal under Federal Rule of Civil Procedure 58(c)(2)(B)—and the deadline for appeal was thirty days thereafter, or September 23, 2013. The Court of Appeals thus had jurisdiction and affirmed the dismissal of Witasick's claims on the merits.

But the Third Circuit went beyond the case to expound on when electronic docket entries can satisfy Rule 58's separate-document requirement. Delineating a taxonomy that differentiated between text orders, utility events, and minute entries, the court held that "[t]ext orders usually have no difficulty satisfying the separate document requirement of Rule 58(a)" since they are typically self-contained and specify the relief granted without including any reasoning. Utility events and minute entries, on the other hand, memorialize "mundane matters like the addition of an attorney" and "the time spent in a case management conference." Moreover, utility events and minute entries "are not orders of the district court nor are they signed by a judge."

The opinion immediately raises two questions for anyone practicing in the Third Circuit.

First, does this mean that litigants might incur uncertainty for someone else's oversight? Where relief is denied as it was in *Witasick*, it is the duty of the clerk to enter judgment without direction from the court. Fed. R. Civ. P. 58(b)(1)(C). The Administrative Office of U.S. Courts has distributed Form AO 450 specifically for this purpose, but it is commonly overlooked. Even the drafters commented when amending Rule 58 in 2002 that the "simple separate document requirement has been ignored in many cases," but they made "[n]o attempt … to sort through the confusion that some courts have found in addressing the elements of a separate document." In *Witasick*, the district court admitted that it had not entered a separate document entered as Rule 58 required, and the appellant (who was clearly familiar with the rules) came uncomfortably close to forfeiting his appellate rights while waiting for that event to occur.

Second, does the Third Circuit's decision provide a workable solution? ECF practices and procedures can vary widely across districts or between individual chambers, and every practitioner has likely faced docket entries that do not fit neatly into one of the three categories that the Third Circuit described. Other courts have taken more rigid approaches to similar questions. In the Second Circuit, a memorandum decision followed by a clerk's docket entry noting the relief does not satisfy Rule 58 absent a separate filing specifically titled Judgment. *See Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993). Judge Posner, writing as motions judge, has assailed the practice of permitting docket entries to satisfy Rule 58. *Brown v. Fifth Third Bank*, 730 F.3d 698, 700-01 (7th Cir. 2013). *See also Barber v. Shinseki*, 660 F.3d 877, 879 (5th Cir. 2011) (observing that "the district court has an obligation to issue an order as a separate, freestanding document, and not just as a docket entry").

The Third Circuit's alternative—fine distinctions between text orders and minute entries—arguably frustrates Rule 58's purpose of ensuring clear notice of appellate deadlines. The reasoning in *Witasick* also risks blurring those fine distinctions. Minute entries may not be orders of court or signed by the judge, but neither is a clerk-entered judgment. The separate-document test of *In re Cendant* has also never required a judge's signature. In addition, the entry of judgment—like minute entries—has itself been described as a "ministerial act." *Taylor Brands, LLC v. GB II Corp.*, 627 F.3d 874, 879 (Fed. Cir. 2010).

But, it is ultimately because of the practical realities that the opinion in *Witasick* makes good sense. Uncertainty can abound on both sides under the separate-document requirement of Rule 58: One party may believe an order is final without appeal while the other awaits the entry of the final order lest an appeal be denied as premature. At the same time, while the losing party should not have to speculate about when judgment is entered, requiring—where the rules do not—the use of a specific form or special magic words elevates form over substance and risks unfairly quintupling appellate deadlines to the prevailing party's disadvantage. Finally, a one-size-fits-all approach to docket entries is also not plausible in a world with the variety (and conveniences) that ECF affords. *Witasick* navigates this world by adopting a strict approach to applying the three requirements

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THIRD CIRCUIT CLARIFIES TEST FOR STAY PENDING APPEAL

In re: Revel AC, Inc., No. 15-1253, --- F.3d --- (3d Cir. Sept. 30, 2015)

Devin M. Misour
Farrell & Reisinger, LLC, Pittsburgh

Like all equitable relief, a stay pending appeal is an "extraordinary remedy" that plays a critical role for litigants seeking to protect important legal rights. Such relief can mean the difference between affording a litigant a full and fair opportunity to assert those rights and losing them altogether, with no opportunity for recourse. Because of this, it is crucial that courts and litigants have clear rules for determining when a stay is appropriate.

Recently, in *In re: Revel AC, Inc.*, a divided Third Circuit panel sought to provide such clarity to the four factors for granting a stay pending appeal set forth in *Republic of Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653 (3d Cir. 1991). The four *Westinghouse* factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 658 (internal quotation marks omitted).

In *Revel*, Judges Ambro and Krause adopted a "sliding scale" approach that gives greater weight to some factors over others, and allows a litigant to obtain a stay even if one (or possibly more) of the factors are not met. Judge Shwartz dissented, arguing that the majority's approach signaled a break from established Circuit precedent requiring that litigants meet all four prongs of the conjunctive *Westinghouse* test to obtain a stay.

Revel involved the recent closing of the Revel Resort and Casino in Atlantic City, New Jersey. At the outset of that project, Appellee-Debtor Revel had entered into a lease with Appellant IDEA Boardwalk, LLC. The lease, which required IDEA to invest $16 million in the project, allowed IDEA to operate two nightclubs and a beach club on the property. Revel entered bankruptcy for a second time in June 2014 and sought permission from the Bankruptcy Court to sell its assets free and clear of all liens and interests—including the lease to IDEA.

IDEA objected to the sale, arguing that the Bankruptcy Code, 11 U.S.C. § 365(h), allows a lessee to retain its rights under the terms of the lease for the remainder of the lease term. IDEA also claimed that Revel could not sell the lease free and clear because the validity of IDEA's lease was not in *bona fide* dispute, as required by § 363(f)(4) of the Code. Despite these objections, Revel proceeded with efforts to sell its assets.

At the hearing on the proposed sale, the Bankruptcy Court held that Revel presented sufficient evidence of a *bona fide* dispute over the validity of IDEA's lease, even though Revel never submitted a copy of the lease to the court or offered any record evidence of the dispute. The Bankruptcy Court accordingly approved the sale, likening Revel and IDEA to partners rather than landlord and tenant, and allowing Revel to sell its assets free and clear of the lease to IDEA.

In an effort to salvage its interest, IDEA moved to stay the Bankruptcy Court's order. After the motion was denied, IDEA sought an emergency stay in the District Court, which applied the *Westinghouse* four-prong test and concluded that: (1) IDEA failed to demonstrate a likelihood of success on its claim that the lease was valid; (2) IDEA showed no irreparable harm because, at best, it would take possession of a space in an empty and commercially unproductive building; (3) a stay would substantially harm Revel because the potential buyer was likely to abandon the deal if the closing were delayed; and (4) the public interest in facilitating bankruptcy proceedings and preserving approximately 4,000 jobs at Revel favored allowing the sale to proceed. Thus, the stay was denied and IDEA appealed.

The Third Circuit's primary focus on appeal was how to analyze and balance the four *Westinghouse* factors. The Court gave greater weight to the likelihood of success and irreparable harm factors, noting that they are critical—indeed, necessary—to obtaining a stay. It added, however, that a strong showing of a likelihood of success "is arguably the more important piece of the stay analysis," and to satisfy that factor, a litigant's chance of winning must rise to the level of a reasonable probability.

With respect to irreparable harm, the Court emphasized that the harm to the movant must be more likely than not to occur absent a stay. That harm is then balanced with the potential harm to the party opposing the stay. The Court considered these factors together, combining them in what it called the "balancing of the equities." The fourth factor—public interest—is considered to the extent that a stay decision may have consequences beyond the two parties.

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THIRD CIRCUIT ADDRESSES THE SEPARATE DOCUMENT REQUIREMENT WITH RESPECT TO ELECTRONIC TEXT-ONLY DOCKET ENTRIES

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of *In re Cendant*. That approach provides both the flexibility necessary to accommodate local and case-specific practices, and the concrete criteria by which litigants can understand their own obligations.

Practitioners should take note of additional procedures that help mitigate the risk of untimely appeals. Rule 58(d) allows any uncertain party to "request that judgment be set out in a separate document." District courts can also extend the time to appeal for good cause under Federal Rule of Appellate Procedure 4(a)(5). And, if doubt about technical compliance persists, the separate-document requirement can essentially be waived altogether by treating judgment as properly entered; after all, a premature notice of appeal filed before judgment is ultimately deemed filed on the day judgment is entered under Federal Rule of Appellate Procedure 4(a)(2). With these safety valves supplementing the Third Circuit's recent guidance, questions of timeliness like the one in *Witasick* should be few and far between for conscientious litigants and their counsel.

THIRD CIRCUIT CLARIFIES TEST FOR STAY PENDING APPEAL

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The Court utilized the "sliding scale" approach from *Constructors Association of Western Pennsylvania v. Kreps*, 573 F.2d 811 (3d Cir. 1978), to balance all four factors and determine the appropriate outcome. Under that approach, the relative importance of the likelihood of success factor is dictated by the court's interpretation of the equities and the public interest. The more those factors weigh in favor of a stay, the less strong the movant's underlying case need be, and vice versa. This approach is only used, however, if the first two *Westinghouse* factors (likelihood of success and irreparable injury to the movant) are met. If one or the other is not met, then no further analysis is necessary and the stay should be denied. Under the sliding scale approach, a sufficiently strong likelihood of success can be enough to warrant a stay even if the balance of the harms and the public interest do not weigh in favor of such an outcome.

Applying this test to the facts at hand, the Court determined that the balance of harms tilted in favor of IDEA because the sale of Revel's assets would leave IDEA with no way to continue operating and an economic loss that would likely put it out of business. On the other hand, the potential harm to Revel was speculative at best due to the lack of evidence. In the Court's view, the public interest slightly favored Revel due to the potential for lost jobs if the stay were granted.

The crux of the matter, therefore, was whether IDEA made a strong showing of a likelihood of success on the merits. In holding that IDEA's success was "all but assured," the Court noted that both the District and Bankruptcy Courts erred in finding that there was a *bona fide* dispute over the validity of the lease. Instead, it found that IDEA's actions were consistent with the existence of a valid lease, and that the lease did not create a partnership or joint venture between the parties. In the final analysis, the court concluded that even though only three *Westinghouse* elements were met, the merits of IDEA's claim and its showing of irreparable harm were sufficient to win the day.

Judge Shwartz dissented, arguing that Circuit precedent requires a movant to satisfy all four factors of the *Westinghouse* test before obtaining a stay—something the majority conceded IDEA did not do. Judge Shwartz feared that this relaxed standard would allow litigants to obtain stays pending appeal and potentially preliminary injunctive relief based solely on a strong showing on the merits.

The *Revel* decision is likely to have a far-reaching effect on equitable relief in the Third Circuit. In the process of clarifying the balancing of the four *Westinghouse* factors, the Court clearly indicated which factors it considered most worthy of consideration. Whether in doing so the Court watered down the standard for obtaining extraordinary relief remains to be seen, but in the meantime, counsel would be well advised to focus their arguments accordingly.

2015 RULES OF ATTORNEY DISCIPLINE / NEW TOOLS FORTHCOMING

Amendments to the Rules of Attorney Disciplinary Enforcement were approved by the Court on July 1, 2015. The Rules establish an inactive status for attorneys who have not entered an appearance in a case or have not updated their contact information in the past five years. The Clerk's Office is developing procedures for implementing this new program, which may take several months. A form for updating contact information and a report that attorneys and the public can use to check on an attorney's status will be developed and posted on the Court's website. Attorneys will be notified by email when these tools are available. Attorneys NEED NOT take any action to maintain active status until notified by the Clerk's Office.

PRESIDENT'S NOTE

Peter Goldberger
President, Third Circuit Bar Association

The Third Circuit Bar Association is once again pleased and proud to offer our members an issue of the newsletter full of useful information to enhance your practice.

In our last issue, my President's Note predicted that our Association's input into the process of revising the Court's Rule of Disciplinary Procedure would prove beneficial. The new rules published this Spring, effective on July 1, 2015, bear this out. You can learn about some of their most important features in this issue.

Additionally, I am very pleased to be able to announce a new and exciting initiative by our Association in partnership with the Court of Appeals, the "Chambers Chat." The idea grew out of a conversation between 3CBA President-elect Chip Becker and our newest Circuit Judge Cheryl Ann Krause about how to enhance communication between the appellate bench and bar. Members of our Association will hopefully have the opportunity every few months to meet in small groups in an intimate, off-the-record atmosphere with one or more interested members of the Court for uninhibited discussions about issues of mutual concern. The first such gathering will be held this month. About a dozen Philadelphia-based members, including Chip and myself, will meet with Judge Krause in her chambers, at her invitation. We hope similar meetings will follow with other judges around the Circuit. Please feel free to let me know if you'd like to be invited to a session in your area. While I cannot promise that all requests to participate can be honored, the Board of Governors will do all we can to ensure broad participation by interested members of the Association. Only active members are eligible to participate, so be sure to return your renewal form and pay your extremely modest dues when the reminder is circulated in the next month or so!

This issue contains three articles on recent Circuit decisions that address important procedural lessons. Two of these concern the impact of electronic filing on the rules of procedure: Anderson Bailey and Thomas Jones help us unravel the complexities of what counts as "judgment" set forth in a "separate document" as required to trigger the time to appeal in a civil case.

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PITTSBURGH'S UNITED STATES COURTHOUSE TO BE RENAMED IN HONOR OF JUDGE JOSEPH F. WEIS JR.

On May 29, 2015, President Barack Obama signed P.L. 114-20, which designates the United States Courthouse in Pittsburgh as the Joseph F. Weis Jr. United States Courthouse. Judge Weis sat on the United States Court of Appeals for the Third Circuit from 1973 until his death in March 2014. There will be a courthouse dedication ceremony followed by a reception. The event is open to the public.

November 20, 2015 at 11:00 a.m.
Ceremonial Courtroom
Joseph F. Weis Jr. United States Courthouse
700 Grant Street
Pittsburgh, Pennsylvania

Judge Leonard Garth wrote an article about Judge Weis's life and career that was published in On Appeal, the Third Circuit Bar Association Newsletter, in June 2014. The article is available here.

PRESIDENT'S NOTE

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David Fine discusses another aspect of timely filing of a notice of appeal in the electronic age, addressing how a paper filing can count as a sufficient notice even when the local rules mandate that all filing must be through the CM/ECF system.

Both cases, at bottom, show how the Third Circuit takes a practical approach and values protection of the right to appeal over strict or technical readings of the rules. Finally, Devin Misour deftly analyzes the Court's recent decision explicating its standards for granting a stay pending appeal. All those who practice in our Circuit will want to take account of these recent developments.

Thank you for your continued support of our Association as we continue to move forward in service to your needs and to those of the Court of Appeals. And my special thanks to Colin Wrabley, Paige Forster, and Patrick Yingling for putting together another fine newsletter.

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