3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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THIRD CIRCUIT AFFIRMS DISTRICT COURT'S *IN CAMERA* INTERVIEW OF ATTORNEY

In Re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014)

Richard G. Freeman, Philadelphia, PA

In what it called a "close case" with challenging facts, the Third Circuit—in *In re Grand Jury Subpoena* —further defined the contours of the "crime-fraud exception" to the attorney-client privilege, especially as it applies to spoken rather than written communications.

In re Grand Jury Subpoena involved a corporation that sought to do business with a bank in the United Kingdom. The corporation's president (the "client") approached an attorney who, in exchange for being available for inquiries, occupied a rent-free office in the corporation's building. The client explained that he planned to pay a banker to ensure that a project progressed swiftly. Would these payments violate the Federal Corrupt Practices Act (FCPA)? The attorney looked up the FCPA and asked the client whether the bank was a government entity and whether the banker was a government official. The attorney then advised the client against making the payment. The client insisted that his proposed payment did not violate the FCPA, and the two parties had no further contact. The corporation later made payments totaling more than $3.5 million to the banker's sister, who was not employed by the bank.

After the banker and his sister came under scrutiny in the United Kingdom, the FBI began to investigate the client, and a grand jury was convened. The government subpoenaed the attorney to testify about

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THE THIRD CIRCUIT'S EXACTING APPROACH TO THE SEPARATE DOCUMENT REQUIREMENT

Cumberland Mutual Fire Ins. Co. v. Express Prods., Inc., 529 F. App'x 245 (3d Cir. 2013)

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The filing of a timely notice of appeal is an important first step in the appellate process. According to Federal Rule of Appellate Procedure ("FRAP") 4(a), a notice of appeal in a civil case must be filed "within 30 days after entry of the judgment or order appealed from." Compliance with FRAP 4(a) is mandatory for the appellate court to have jurisdiction over a case.[1] It is thus vital for litigants to recognize when an appealable "judgment or order" has been entered. The method for doing so is provided by the federal rules—specifically Federal Rule of Civil Procedure ("FRCP") 58(c) and FRAP 4(a)(7). Under these rules, subject to certain exceptions, an appealable judgment or order is officially entered when it is entered in the civil docket *and* (a) it is set out in a separate document *or* (b) 150 days have run from the entry in the civil docket. This so-called "separate document" requirement appears simple: All it seems to require is that an appealable judgment or order be set out in document that is separate and distinct from an opinion or memorandum. Yet, there has been difficulty with

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TRIBUTE TO THE HONORABLE JOSEPH F. WEIS, JR.[1]

Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit

I am honored to provide a remembrance of our departed friend and colleague, Judge Joseph F. Weis, Jr., who died on March 19, 2014. I do so to call to mind an extraordinary colleague who contributed so much to our judicial and legal disciplines.

Many of you did not know him. Those that did know him, even those who served with him on this Court, may not have been familiar with all of his achievements. And there are others who may not have known the joy of having him as a friend and in the case of more recent members of our Court, of having known him as a colleague.

I will not go into detail about the many activities and accomplishments of Judge Weis, as they have been recognized in the very many tributes paid to him, including that of the University of Pittsburgh Law Review. His contributions to the military, to our great nation and to the Judicial Branch were registered at length in his recent obituary. Significant among them, of course, was his Chairmanship of the Long Range Planning Committee and his outstanding contributions to the Judicial Conference of the United States where he served as Chairman of its most impressive committees. His activities on those and countless other committees led to Joe receiving the 1993 Eleventh Devitt Award—the Nobel prize of the judiciary.

His receipt of the Devitt Award in 1993 was the fifth Devitt Award that had been awarded to our Court. Judge Albert Maris had been the first recipient, Judge Weis was the second, followed by Judge Seitz, Judge Becker, and then Judge Scirica. Take note that the work that led to this Award was accomplished while Joe was still sitting as a full time judge on Third Circuit panels.

Having recalled some of Judge Weis's notable contributions to the Third Branch, I wanted to reflect upon the Judge Weis I have known for 45 years and his character. No picture would be complete or accurate without mention of Judge Joseph F. Weis, Jr., the individual—his warmth, humor, compassion and collegiality; his family ethics, his roles as father and grandfather, his integrity, and his religious values. They were all part and parcel of Judge Weis. He was devoted to his church, and despite all of his Court obligations, found time to teach at The University of Pittsburgh School of Law.

Judge Weis and I had joined the Federal Courts as District Court Judges at about the same time in 1970. Thereafter, we joined the Court of Appeals together in 1973. When we came aboard, we arrived in a land of legal giants: Judges Hastie, Biggs, Maris, Forman, Kalodner, Adams, Gibbons, Aldisert, Rosen, Van Dusen, Hunter, Staley and, of course, Judge Seitz. Chief Judge Seitz was the first to call our Court a family and we have been a family ever since. Joe added to the distinctiveness of our Court family and the quality of our judicial work.

Joe never sought credit or recognition for the work that he did or for his many accomplishments. I for one can attest to that aspect of his character throughout the 45 years of our federal service. But there are many others who have spoken about his judicial work on various occasions.

Judge Aldisert, our colleague and former Chief Judge of the Third Circuit, and one of the three Senior oldest judges on our Court (the other two being Judge Weis and myself, at 93), has always referred to Judge Weis as someone who "out-niced others for years as a lawyer, Federal District Judge, and United States Circuit Judge. He characterized Judge Weis as "genuinely human with his characteristic impish grin and easy laugh." Former U.S. Solicitor General, Ken Starr, captured Joe's character as "Therein lies his magic... a far-seeking judicial reformer who at the same time is marvelously self-effacing and gracious. He listens with care and respect."

The late Dean Sell of the University of Pittsburgh School of Law said: "Never have I heard a lawyer criticize Joe as a judge, even when the decision was not what the lawyer had desired …." We and the profession are much the better because he walked and worked in our midst. The Chancellor of that University, Mark Nordenberg, said: "If anything, what is remarkable about the man extends beyond the quality and quantity of his professional achievements. It includes the way he approaches life and, particularly, the way he deals with other people. He enjoys the highest professional respect and the deepest personal affection."

I might add one further note to Judge Weis's character. When he received the Devitt Award, he donated the monetary portion of that award to Universities and a Historical Society rather than retaining it for his family or his own purposes.

The Judge Weis I knew was a caring family person and a most caring jurist. He shared with our former Chief Judge Becker a judicial philosophy that, among other things, embraced "mercy" when the case called for it. Joe called me a number of times to ask about that "odd" case which Judge Becker had cited called, "In Re Rachmones". Of course, there was no such case. It was in a manner of speaking, "take another look at the case before us and inject a touch of mercy in the opinion we are drafting." Joe was not a mechanic in the judging process. He was not mechanistic. There was humanity that he brought to his judgment and opinions, and all within the principles of stare decisis. Joe brought to his sense of professionalism the heart and soul of an individual who recognized not only judicial doctrine, but human and Godly factors.

It is little wonder then, that those with whom he came in contact cherished him and valued so highly his judgments. Nor is it surprising, therefore, that I am both privileged and proud to announce a most significant event. In order to honor Judge Weis the family man of the Weis family and the Court family, a jurist with faith in and love for our great country, and an individual who spent his entire life in the service of others, the Council of the Third Circuit has unanimously endorsed an action to name the United States Federal Courthouse in Pittsburgh after Judge Weis. We fervently hope that Congress authorizes this action and that there will be in Pittsburgh—for years to come—the Judge Joseph F. Weis, Jr. Courthouse.

We trust that Congress will acknowledge Judge Weis's labors on behalf of our Nation and the Third Branch, and we will be able to replace Judge Weis's name—which now only graces the Library of the Courthouse—with a new name: that of The Judge Joseph F. Weis, Jr. Courthouse.

Joe was my dearest friend—and I will miss him more than I can tell you.

[1]This article is adapted from remarks written by Judge Garth and delivered by Chief Judge McKee at the 71st Judicial Conference of the Third Circuit in Hershey, PA on May 8, 2014.

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the content of his conversations with the client. Both the client and the corporation—whom the Third Circuit dubbed "the intervenors"—moved to quash the subpoena. The district court, however, relying on the guidelines set forth in *United States v. Zolin*, 491 U.S. 554, 572 (1989), held an *in camera* hearing for the purpose of determining whether the attorney-client privilege yielded to the "crime-fraud" exception. The district court allowed the intervenors and the government to submit questions for the court to ask of the witness, but neither the government nor the intervenors saw or heard what the attorney told the court. (The intervenors requested and were denied a transcript of the *in camera* hearing.)

Based upon its review of an *ex parte* affidavit submitted by the government and the attorney's *in camera* testimony, the district court found the crime-fraud exception applicable to the attorney's testimony, and granted the government's motion to enforce the subpoena. The intervenors appealed, challenging the district court's decision to conduct an *in camera* examination and the court's ultimate finding that the crime-fraud exception applied.

On appeal, the Third Circuit acknowledged the applicable law: "To circumvent the attorney-client privilege under the crime-fraud exception, the party seeking to overcome the privilege must make a *prima facie* showing that (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud." The Court recognized also that "[b]ecause it is often difficult or impossible to prove that the exception applies without delving into the communications themselves, the Supreme Court [in *Zolin*] has held that courts may use *in camera* review to establish the applicability of the exception."

Because *Zolin* dealt specifically with *in camera* review of documents, the Third Circuit defined its task as "whether we should adopt the *Zolin* standard where unmemorialized oral communications are at issue." And despite the intervenors' claim that unwritten verbal communications are unreliable and subject to the frailties of human memory, the Court held that the *Zolin* standard applied, and that the district court's *in camera* review was faultless—it did not violate due process. The Court's rationale focused on law enforcement needs: "If we were to apply a heightened standard to oral communications, would-be criminals could use the differing standards to avoid the proper application of the crime-fraud exception. A client could seek to take advantage of the higher showing necessary to delve into oral communications by instructing the attorney not to record the communications in any way. We do not want to incentivize circumventing the proper application of the crime-fraud exception." The Court further cited the fact that the attorney was "under oath" and questioned by a judge in response to the intervenors' claim that the verbal method was infirm. The threat of "abuse" of the privilege outweighed any concern over the weaknesses inherent in the questioning method.

What made the case "close" for the Court was the question of whether there was sufficient evidence for the crime-fraud exception to apply, given the brief nature of the exchange between the attorney and the client. The Court recognized that for the crime-fraud exception to apply, the client must be "committing or intending to commit a crime or fraud" at the time he or she consults the attorney. In this case the client approached the attorney with the information that he intended to make the payment. Had he articulated a "what if?" scenario he would not have signaled the intent to commit a crime and thus dissipated the privilege. The Court also held that because the attorney provided information about the types of conduct that violate the law, the district court did not abuse its discretion in determining that there was a reasonable basis to conclude that the attorney's advice was used to fashion conduct in furtherance of the crime.

PRESIDENT-ELECT'S NOTE

Peter Goldberger, Ardmore, PA

The Bar Association of the Third Circuit was pleased to play several active roles in support of the Judicial Conference held in Hershey, Pennsylvania, in early May. At the Court's invitation, we formed a working group of Board members to assist the Circuit Executive in the early stages of planning the agenda. At the Court's request, we also agreed to sponsor the Thursday evening reception that preceded the Conference's major dinner event. And we had the pleasure of organizing and presenting two major educational sessions on Friday morning. Because our President, Lisa Freeland of Pittsburgh, unexpectedly found herself unable to attend, I stood in for her as President-Elect as spokesperson for the Association.

At the Thursday evening reception, the Third Circuit Bar Association honored the three Circuit Judges who have assumed senior status since the last Judicial Conference. Our Founding President, Nancy Winkelman, spoke movingly about the career and contributions of Judge Dolores K. Sloviter, a pioneer in legal education before becoming the first woman to be a member of the Court, and then the first woman to serve as its Chief Judge. 3CBA Secretary Chip Becker delivered the remarks concerning former Chief Judge Anthony J. Scirica, beloved not only in our Circuit but also for his national leadership on Judicial Conference committees. Finally, Paul Fishman, a founding member of our Board and now the U.S. Attorney for the District of New Jersey, spoke with his characteristic wit about Judge Maryann T. Barry. The Association announced that we are making a $1000 contribution to the American Judicature Society in honor of these respected jurists.

During the Conference, the Association debuted and distributed a revised edition of our Third Circuit Practice Guide. More than a hundred printed copies were snapped up by Conference attenders. We are in the process of distributing the revised edition to all current members. The updates were edited by Donna Doblick, of Reed Smith in Pittsburgh, and myself, with helpful input from the Clerk, Marcia Waldron.

The Association's CLE programs were on the topics of Ethical Issues in Appellate Practice and Managing High-Profile Cases. An overflow crowd enjoyed the energetic and interactive, problem-oriented

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THE THIRD CIRCUIT'S EXACTING APPROACH TO THE SEPARATE DOCUMENT REQUIREMENT

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applying the rule in practice, leading to confusion over the time for filing an appeal and risk of filing an appeal too late.

The "separate document" requirement stems from a 1964 amendment to FRCP 58. According to the amendment's advisory committee notes, the requirement was intended to eliminate uncertainty pertaining to the 30-day starting point for filing a notice of appeal. In order to carry out this purpose, the Third Circuit has applied the separate document requirement in a "mechanical" fashion. The Court has explained that a judgment satisfies the separate document requirement if it (1) is self-contained and separate from any memorandum or opinion; (2) notes the relief granted; and (3) substantially omits the district court's reasons for disposing of the parties' claims. Under this framework, the Court has found the requirement not to be satisfied where a judgment was set within a four-page memorandum opinion,[2] where an order was contained within a six-page document that expounded on the background of the case,[3] and where a judgment appeared three-quarters of the way down the next to last page of a 15-page document titled "Opinion and Order."[4]

The Third Circuit illustrated its exacting approach to the separate document requirement recently in *Cumberland Mutual Fire Insurance Co. v. Express Products, Inc.*[5] There, a district court stated within an order granting summary judgment that a "supporting memorandum is forthcoming." Twenty-one days later, the district court issued the supporting memorandum and stated at the end of the memorandum that "[a]n appropriate Order follows." The appellant filed a notice of appeal more than 30 days after the court issued its initial order but less than 30 days after the court issued its memorandum. The Court of Appeals held that, despite the confusion created by the district court's memorandum, the initial order was appealable and satisfied the separate document requirement, and the appellant's notice of appeal was untimely because it came more than 30 days after the district court issued the appealable order.

Cumberland Mutual provides an important lesson for would-be appellants who have doubts as to whether the district court has complied with the separate document requirement and whether the 30-day clock has started to run. In such a situation, appellants need to take some action to ensure they file a timely appeal. Specifically, pursuant to FRCP 58(d), a party may ask the district court to set out its judgment in a separate document. Alternatively, as the Court of Appeals intimated in *Cumberland Mutual*, a party may file a notice of appeal from an order even when there is some ambiguity about whether it meets the separate document requirement. Filing a notice of appeal too late is a fatal mistake requiring dismissal of the appeal. But filing a notice of appeal too early or in the absence of a separate document is not a problem—a premature notice of appeal ordinarily ripens upon the entry of a subsequent final judgment or order.[6]

The *Cumberland Mutual* decision also is instructive for appellees. An appellee can obtain the dismissal of an appeal by immediately challenging the appellate court's jurisdiction when an appellant files a notice of appeal more than 30 days after the issuance of an order that appears to satisfy the separate document requirement. Familiarity with the federal rules and the Court of Appeals' case law on the separate document requirement can thus help all Third Circuit litigants to take appropriate action during the early stages of the appellate process.

[1]Bowles v. Russell, 551 U.S. 205, 209 (2007).
[2]Gregson & Assocs. Architects v. Govt. of the V.I., 675 F.2d 589 (3d Cir. 1982).
[3]In re Cendant Corp. Sec. Litig., 454 F.3d 235 (3d Cir. 2006).
[4]LeBoon v. Lancaster Jewish Cmty. Center Ass'n, 503 F.3d 217 (3d Cir. 2007).
[5]529 F. App'x 245 (3d Cir. 2013).
[6]DL Res., Inc. v. FirstEnergy Solutions Corp., 506 F.3d 209, 215 (3d Cir. 2007); Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 585 (3d Cir. 1999).

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ethics presentation designed and moderated by Harry Bryans, of Aon Risk Services, with panelist contributions from Judge Joseph Greenaway, Jr., attorney Barbara Rosenberg, and Professor Laurel Terry. Similarly, ACLU-PA legal director Vic Walczak moderated a high-spirited discussion of dealing with the media and courtroom issues in cases that generate an unusual level of public interest. The panelists were Judge D. Brooks Smith, Chief Judge Wilma Lewis (D.V.I.), Chief Justice Leo Strine (Supreme Court of Delaware), and attorneys Larry Lustberg (Gibbons Firm, Newark) and Marsha Levick (Juvenile Law Center, Philadelphia).

Those who attended seemed to agree that this year's Conference was particularly stimulating and provocative, including several panels touching on issues of subconscious racism and related problems in the judicial system. We applaud the Court, especially Chief Judge McKee. The value of these Conferences for bench and bar alike cannot be doubted, and the Association is committed to contributing in every way it can to their continued success.

PUBLIC NOTICE - U.S. BANKRUPTCY JUDGESHIP VACANCY - DISTRICT OF NEW JERSEY

Chief Judge Theodore A. McKee of the United States Court of Appeals for the Third Circuit announces the application process for a bankruptcy judgeship in the District of New Jersey, seated in Newark. Applications must be submitted electronically by June 26, 2014. Visit www.ca3.uscourts.gov for more information and to apply, or call the Circuit Executive's Office at 215-597-0718.

PUBLIC NOTICE - U.S. BANKRUPTCY JUDGESHIP VACANCY - DISTRICT OF DELAWARE

Chief Judge Theodore A. McKee of the United States Court of Appeals for the Third Circuit announces the application process for a bankruptcy judgeship in the District of Delaware, seated in Wilmington. Applications must be submitted electronically by noon on Wednesday, July 9, 2014. Visit www.ca3.uscourts.gov for more information and to apply, or call the Circuit Executive's Office at 215-597-0718.

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