



# On Appeal

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## FROM THE CLERK – ELECTRONIC FILING IS HERE!

In a recent notice to the bar, Clerk of the Third Circuit, Ms. Marcia Waldron, announced that the Circuit had taken the first step in implementing the CM/ECF (“Case Management/Electronic Case Files”) system of filing and document management. Those who practice in bankruptcy and federal district courts are well aware that the CM/ECF system allows parties to view docket documents, including orders, pleadings and briefs, via the PACER internet-based system.

The first step of the implementation in the Third Circuit involves activating the automatic notification system – indeed, already, all documents filed in pending appeals on or after February 4, 2008, will be automatically emailed to counsel of record. The Circuit will no longer send paper notices of court orders, opinions, or letters. It is therefore essential that counsel of record ensure that the Circuit has their current and correct email address. The Circuit will roll out the rest of the CM/ECF system later in 2008, likely sometime in the summer. Once that happens, counsel will be able to file all documents electronically. In the meantime, Ms. Waldron stresses that counsel continue to serve paper versions of their filings on all parties unless counsel have agreed to e-mail service. Ms. Waldron has informed us that CM/ECF training sessions for attorneys will be offered in the near future, and she encourages counsel to take advantage of these sessions.

## 3CBA COMMENTS, THIRD CIRCUIT ADOPTS RULE FOR VIRGIN ISLANDS CERT PETITIONS

By George S. Leone and Peter Goldberger, Co-Chairs, 3CBA Rules Committee<sup>1</sup>

The Third Circuit Bar Association's comments may have helped shape the Third Circuit's newly issued local rule addressing the Circuit's relationship with the recently-formed Supreme Court of the Virgin Islands (“SCOVI”). SCOVI was established on October 29, 2004, and opened for business on January 29, 2007. Replacing the former appellate division of the U.S. District Court, SCOVI now hears appeals from the Virgin Islands Superior Court, itself the successor to the former U.S. Virgin Islands Territorial Court.

For the first 15 years after the establishment of SCOVI, the Third Circuit has jurisdiction under 48 U.S.C. § 1613 to review by writ of certiorari “all final decisions” of the “highest court of the Virgin Islands from which a decision could be had.” (The Court of Appeals retains its direct appellate jurisdiction over cases

<sup>1</sup> Peter Goldberger, a founding member of the 3CBA Board of Governors, is a criminal defense lawyer based in Ardmore, Pennsylvania, who has a nationwide federal appellate practice. George S. Leone, a long-time prosecutor in Pennsylvania and New Jersey, is currently the Chief of Appeals for the United States Attorney's Office for the District of New Jersey. He is also a member of the 3CBA Board of Governors. The views expressed in this article do not necessarily represent the views of the Department of Justice or the United States.

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## 3CBA Comments, Third Circuit Adopts Rule For Virgin Islands Cert Petitions—continued from page 1

decided in the District Court of the Virgin Islands, the USVI's federal trial court.) The Third Circuit's new Local Appellate Rule Misc. 112, effective December 1, 2007, creates procedures for seeking or opposing a writ of certiorari for Third Circuit review of a SCOV decision, and suggests the criteria by which the Circuit will exercise its discretion in granting or denying the writ. In response to an invitation for public comment, the Association submitted a detailed, 11-page memorandum concerning the Court's draft Rule 112 in late June of 2007. From a review of the Circuit's final Rule 112, it appears that the Association's comments may have had a positive impact.

In the legislation authorizing this increase in local judicial autonomy, Congress provided that relations between the federal courts, including the Third Circuit, and the new Virgin Islands courts, shall be governed by the same laws as the relationship between the federal courts and the courts of the several states. 48 U.S.C. § 1613. On this basis, the Association questioned the portion of the Third Circuit's draft rule stating that the Circuit could use its certiorari jurisdiction to exercise supervisory powers over the SCOV. The Circuit's Rule 112.1(2) removes the words "supervisory powers," substituting "powers of review."

The Association urged the Third Circuit to increase the time for filing a certiorari petition from 30 to 60 days because of the delays of mailing and the need to consult with clients before seeking further review. The Association suggested that little delay would result if the maximum allowable extension of time was reduced from 60 to 30 days. Rules 112.2(a) and 112.4(a) state that petitions may be filed within 60 days of the filing of the final decision of SCOV, with a maximum extension of time of 30 days.

The Association questioned the draft rule's requirement that extension requests be filed at least 10 days in advance of the due date, and that untimely requests would not be granted except in "extraordinary circumstances." Rule 112.4(a) provides that extension requests should be filed at least 5 days in advance, and that untimely requests "ordinarily" will not be granted. Rule 112.1(a) also incorporates the Association's suggestion that an untimely petition for certiorari could be considered if accompanied by an extension request.

The Association further noted that the draft rule did not define "filing" for petitions for certiorari. Rule 112.1(a) defines "filing" of the petition as receipt by the Third Circuit Clerk in Philadelphia, or documented deposit in a prison mail system by incarcerated persons. The Association's request to allow the filing of counseled petitions by postmark or deposit with a commercial carrier was not accepted.

Additionally, the Association also noted that the draft rule's provision apparently allowing untimely petitions for rehearing, even if denied by SCOV, to extend the time for certiorari, could be unfair to respondents. The Circuit's Rule 112.1(d) removed that provision.

The Association suggested the desirability of being able to bind the appendix with the petition for certiorari. The Circuit's Rule 112.7(b) allows an appendix of up to 75 pages to be bound with the petition as a single document. The petition itself is subject to a 5,600-word limit, which, using the required 14-point proportional typeface, means that petitions are typically restricted to about 15 pages in length.

The Association advocated: allowing respondents to file a brief supporting the

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## FROM THE PRESIDENT'S DESK

By Nancy Winkelman, Esq.

Welcome to the second edition of “On Appeal,” the newsletter of the Bar Association of the Third Federal Circuit. We published an introductory edition last summer, and now expect to be in full swing, with quarterly editions. We will bring you feature articles about important Third Circuit matters (see the article, “3CBA Comments, Third Circuit Adopts Rule For Virgin Islands Cert Petitions” in this edition); news from the Third Circuit Clerk’s Office (this installment brings you important information about the new electronic filing system in the Court of Appeals); information about the 3CBA’s activities and upcoming programs, and so forth. We hope that you find our newsletter useful and information. We encourage you to direct any comments or suggestions to our newsletter editors, Colin Wrabley, [cwrrabley@reedsmith.com](mailto:cwrrabley@reedsmith.com), and Chip Becker, [cbecker@klinespecter.com](mailto:cbecker@klinespecter.com).

Our 3CBA has been busy and productive in these last months. We now stand proud at over 600 members, including 95 Founding Members and 17 Founding Firm Members. We thank our founding firms and members, and recognize them individually on pages 2 and 3 of this newsletter.

The 3CBA held its opening reception in Philadelphia on November 26, 2007. The reception was attended by over 100 3CBA members, as well as by numerous district and appellate court judges. At the reception, we honored the newest members of the Court of Appeals, Judge Michael Chagares, Judge Thomas Hardiman, and Judge Kent Jordan. The reception proved to be valuable not only as a way to introduce the 3CBA, but also as a way to recognize new members of the Court. We hope to make this an annual event.

Our Rules Committee, under the outstanding leadership of Peter Goldberger and George Leone, submitted extensive comments about a proposed new Third Circuit Local Appellate Rule involving a *certiorari* process from the newly-created Virgin Islands Supreme Court to the Court of Appeals. As discussed in the article on page 1, the Court has now adopted its new rule; the rule reflects and incorporates a number of the points raised by the 3CBA in its comments.

We also have sponsored a number of programs on various aspects of appellate advocacy in the past months, in both Philadelphia and in Wilmington. These programs have included a course on Effective Oral Advocacy, presented by appellate specialist extraordinaire David Frederick, in Wilmington, and a session presented by former Third Circuit Judge John Gibbons on the Guantanamo Bay litigation, in which Judge Gibbons and his firm have played an active role. We have additional programs planned for the upcoming months in New Jersey, the Virgin Islands, Philadelphia, and at the Third Circuit Judicial Conference. (See upcoming events, on page 4 for details about our upcoming programs.) Our program chair, Bob Graci, is always looking for new program ideas, so do not hesitate to contact him with any thoughts you might have.

We are particularly excited about our role at the upcoming Third Circuit Judicial Conference, as this will be the first Judicial Conference in which our 3CBA will have the opportunity to participate. The Judicial Conference will take place from April 28-30 at the Hyatt Regency in Cambridge, Maryland. Mark your calendars, and watch the Third Circuit’s website for registration information. The 3CBA will be

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## RECENT 3CBA EVENTS

The 3CBA has been busy sponsoring and coordinating a number of recent programs, including:

- *Review of 2006-2007 U.S. Supreme Court Term*, Co-Sponsorship with the Philadelphia Bar Association's Appellate Courts Committee, May 2007.
- *Federal Grand Jury Practice*, Co-Sponsorship with the Federal Practice Committee of the Pennsylvania Bar Association, June 2007.
- *Effective Appellate Advocacy*, David Frederick, Wilmington, Delaware, September 25, 2007.
- *3CBA's Opening Reception*, Philadelphia, Pennsylvania, November 26, 2007.
- *Guantanamo Bay Litigation*, Judge Gibbons, Co-Sponsorship with the Philadelphia Bar Association's Appellate Courts Committee, Philadelphia, Pennsylvania, February 13, 2008.

## UPCOMING 3CBA EVENTS

As always, there are several upcoming events in which the Bar Association is involved:

- *Unique Perspectives of the Judge Turned Advocate*, Timothy Lewis and Robert Graci, Co-Sponsorship with the Philadelphia Bar Association's Appellate Courts Committee, Philadelphia, Pennsylvania, March 19, 2008.
- 2008 Third Circuit Judicial Conference, April 28-30, Cambridge, Maryland
  - 3CBA Welcoming Reception, April 28.
  - Extended CLE program, April 30, including the following sessions:
    - *Do's and Don'ts of Effective Appellate Advocacy*, Judge Dolores K. Sloviter, Judge Thomas L. Ambro, and Judge D. Michael Fisher; Patricia A. Millett, Akin Gump Strauss Hauer & Feld LLP; Virginia A. Seitz, Sidley Austin LLP; Nancy Winkelman, Schnader Harrison Segal & Lewis LLP, Moderator;
    - *Building an Appellate Practice: Litigating Before the Supreme Court and Navigating the Court's Changing Composition*, Thomas C. Goldstein, Akin Gump Strauss Hauer & Feld LLP, Luncheon Speaker;
    - *In's and Out's of Appellate Motions Practice*, Chief Judge Anthony J. Scirica; Judge D. Brooks Smith; Margaret Wiegand, Legal Coordinator, Third Circuit Clerk's Office; James C. Martin, Reed Smith LLP, Moderator.
- CLE Program on New Local Rule Governing Review of Virgin Islands Supreme Court Decisions, Virgin Islands, May 5, 2008.
- *The Nuts and Bolts of Practice Before the Third Circuit*, Co-Sponsorship with New Jersey Bar Association Federal Practice and Procedure Section and Appellate Practice Committee, and the Association of the Federal Bar of New Jersey, May 22, 2008.

## THIRD CIRCUIT DECISION OF INTEREST

### ***DL Resources, Inc. v. FirstEnergy Solutions Corp.*, 506 F.3d 209 (3d Cir. Oct. 16, 2007).**

*DL Resources* makes some important observations about notices of appeal. It first deals with premature notices of appeal – notices of appeal filed before the entry of an appealable order or judgment. The Court explained that under Federal Rule of Appellate Procedure 4(a)(2), as construed by the Supreme Court in *FirstTier Mortg. Co. v. Investors Morg. Ins. Co.*, 498 U.S. 269 (1991), such a notice of appeal is effective at least where the order appealed from would be appealable if immediately followed by the entry of judgment. The Court also noted that under *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983), even premature notices of appeal that do not satisfy Rule 4(a)(2) and *FirstTier* can still be effective so long as no prejudice results to the appellee – such notices “ripen” upon the later entry of a final judgment. The Court did observe, however, that many other circuits had “either declined to adopt or repudiated the sort of ripening analysis” adopted in *Cape May Greene*. The ongoing circuit split here is something to keep an eye on.

*DL Resources* also examined recent Supreme Court decisions addressing whether various time requirements for filing in the federal rules are jurisdictional or just “claim-processing” rules. The distinction matters: jurisdictional limitations can be addressed *sua sponte* by the Court and cannot be waived or forfeited. The Court pointed out that while the time to file a notice of appeal under Rule 4 is still a jurisdictional requirement under Circuit precedent, and the Supreme Court recently held that one particular provision of Rule 4 is jurisdictional, see *Bowles v. Russell*, 127 S. Ct. 2360 (2007), cases like *Eberhart v.*

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## 3CBA Comments, Third Circuit Adopts Rule—continued from page 2

grant of certiorari (even if opposing relief on the merits); requiring any non-petitioning party who fully supports the petition to submit a statement saying so within 20 days rather than the 30 allowed for a brief in opposition; allowing the Clerk to order a response to a Petition; and providing that the Court ordinarily should not grant a petition for certiorari unless a response has been filed or requested. Rules 112.8(a)-(c) so state.

The Association's comments may also have affected: how parties are denominated, Rule 112.5, 112.6(a)(6); the need to show in the petition's Jurisdictional Statement that the order below is final, Rule 112.6(a)(3); the need to explain the importance of the questions for review, Rule 112.6(a)(7); the ability of the respondent to decline to respond, to question the suitability of the case for certiorari, and to file a supplemental appendix, Rule 112.7(d), 112.8(a); the rules on cross-petitioners, Rule 112.3, Rule 112.7(c); and the limitation of merits review to the question on which certiorari was granted, Rule 112.10(a).

The Third Circuit also changed Rule 112 to make conflicts with other appellate courts a factor in granting certiorari, and to require a statement of the Virgin Islands courts' jurisdiction over the underlying case. Left to be determined is whether the Circuit will defer to SCOV's views on questions of territorial law as it would to the views of a state supreme court on points of state law.

The Association appreciated the opportunity the Third Circuit provided to comment on the proposed rules. The Association hopes that its comments assisted the Circuit, and that the Circuit's changes to its final rule will help the courts and practitioners deal with this new procedure. The Association intends to use this experience to improve its ability to comment on proposed and existing rules in other areas, utilizing its expanded committee structure in any future endeavor along these lines.

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## Third Circuit Decision of Interest—continued from page 4

*United States*, 546 U.S. 12 (2005) and *Kontrick v. Ryan*, 540 U.S. 443 (2004) suggest that the time to file a notice of appeal, at least in some circumstances, is a "claim processing" requirement.

At least one message is loud and clear in *DL Resources* – continue to be especially vigilant in preparing and filing your notice of appeal.

## COULD YOUR UPCOMING THIRD CIRCUIT ARGUMENT BENEFIT FROM A MOOT COURT?

One of the stated objectives of the Bar Association is to enhance the proficiency of practice before the Third Circuit. Cary Flitter of Lundy, Flitter Beldecos & Berger has proposed a unique and mutually beneficial opportunity for Association members that would do just that – a moot court system that would help prepare members for upcoming arguments before the Court. Participants would agree to sit on "panels" and judge mock arguments. In exchange, participants who sit as judges could call on other participants in the system to judge their mock arguments. What better way to marshal the energies and diverse talents of our membership and channel that into achieving one of the Association's core goals. If you are interested in participating, please contact Cary Flitter directly at (610) 822-0782 or [cflitter@lfb.com](mailto:cflitter@lfb.com).

## From the President's Desk—continued from page 3

presenting three Continuing Legal Education programs on various aspects of appellate practice in an extended session April 30. (See page 4 for details.) In addition, we will also be hosting an opening reception on April 28. We look forward to seeing you there.

Finally, I want to take a moment to recognize and thank our outstanding inaugural Officers and Board of Governors and Program Chairs, who are listed on page 6. Everything that the 3CBA has accomplished in the past year, this first year of our existence, has been due to the energy of our officers, board members, and program chairs. Let me also note that we have two additions to the Board for 2008. George Leone (the Chief of Appeals of the U.S Attorney's Office in New Jersey) will be taking Cynthia Jacob's seat, and Loren Myers (Deputy Attorney General of the Delaware Department of Justice) will be taking John Parkins's seat. We thank our outgoing Board members for their contributions, and welcome our new members.

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