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**FOR MORE INFORMATION ABOUT THE  
THIRD CIRCUIT BAR ASSOCIATION,  
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OR VISIT US AT:  
www.thirdcircuitbar.org  
APPLICATION FORMS FOR THE BAR  
ASSOCIATION CAN BE FOUND AT:  
www.ca3.uscourts.gov.**

# On Appeal

## **PROPOSED CHANGES TO THE LOCAL APPELLATE RULES**

By George Leone, Esq. & Peter Goldberger, Esq.

The Third Circuit has issued Proposed Amendments to the Circuit’s Local Appellate Rules. The Circuit’s proposals are available on the Circuit’s home page at <http://www.ca3.uscourts.gov/Public%20Notices/Notice%20Public%20Comments.pdf>. Once again, the Bar Association has taken an active role in this process, having submitted on August 5 extensive comments to the Proposed Amendments aimed at clarifying certain aspects of local appellate practice.

The Proposed Amendments are mainly directed to preparing the way for the full implementation of electronic filing in the Third Circuit. The Circuit currently has implemented the “Case Management” electronic notification of filings, and hopes soon to implement the “Electronic Case Filing” system in which filings in most cases will be made through PACER, the courts’ electronic docketing system (See From The Clerk—Electronic Filing Update, below).

The Circuit proposes the adoption of the Model Local Appellate Rules for Electronic Filing. The model rules would require that all attorneys admitted to practice in the Circuit register

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## **FROM THE CLERK—ELECTRONIC FILING UPDATE**

By Mary E. Dixon, Esq.

Earlier this year, the Third Circuit launched its own electronic filing system. This “Case Management/Electronic Case Files” (EM/ECF) system permits practitioners to access documents, including briefs, through the PACER internet service. During its initial phase, the Third Circuit’s EM/ECF system provided electronic notification to attorneys of any filings in their appeals. In addition to electronic notification of docket activity, practitioners have been able to view and download documents from the system, through PACER, since February, 2008. The Third Circuit hopes to have its EM/ECF system fully operational by the end of 2008, so that – in addition to electronic notification and viewing and downloading documents from PACER – attorneys will be able to file documents electronically. Until electronic filing is fully implemented, however, practitioners must continue to file their documents using the traditional methods prescribed by the Local Rules.

In the meantime, a test group, comprised of attorneys who routinely practice in the Third Circuit, will begin testing the electronic filing of documents this Fall. The Third Circuit also

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## FROM THE PRESIDENT'S DESK

By Nancy Winkelman, Esq.

Welcome to the latest edition of "On Appeal," the newsletter of the Third Circuit Bar Association. We extend a particular welcome to our new members, and hope all have had a restful and enjoyable summer.

Our 3CBA has been busy in these past several months. Under the leadership extraordinaire of our Rules Committee and its chairs, Peter Goldberger and George Leone, the 3CBA submitted extensive comments on the Third Circuit's proposed amendments to its Local Appellate Rules. (See the article on page 1 of this newsletter for a description of the substance of the 3CBA's comments.) We thank Peter and George (who took the laboring oar on this round of comments) for their diligent work on this project. Once our website is up and running (which we expect it shortly will be), we will post the entirety of the 3CBA comments there.

Our Membership Committee, under the guidance of Committee Chair Mary Gibbons Whipple, is in the process of embarking on a final initiative for Founding Firms and Founding Members. The 3CBA Board has decided to end this Founding Firm/Founding Member opportunity at the close of this year. Please help Mary by spreading the word about the 3CBA to your colleagues. At present, 3CBA membership forms can be found on the Third Circuit's website, [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov).

Our Program Committee, led by Bob Graci, has continued to do a tremendous job in bringing high quality programs on federal appellate practice throughout the Circuit. In April, the 3CBA hosted three sessions at the 2008 Third Circuit Judicial Conference, which took place in Cambridge, Maryland and was well-attended by members of the

Bench and Bar. The first program, *Do's and Don'ts of Effective Appellate Advocacy*, had as faculty members Judge Dolores K. Sloviter, Judge Thomas L. Ambro, Judge D. Michael Fisher, Patricia Millett (Akin Gump Strauss Haver & Feld LLP), and Virginia Seitz (Sidley Austin LLP). The third session, *In's and Out's of Appellate Motions Practice*, had as faculty Chief Judge Anthony J. Scirica, Judge D. Brooks Smith, and Margaret Wiegand, the Legal Coordinator in the Third Circuit's Clerk's Office. 3CBA President-Elect James C. Martin moderated the latter panel, and I moderated the former. Our thanks to all presenters, and to our Program Committee, which developed the content for the Motions Practice Panel. These two 3CBA CLE sessions at the Judicial Conference sandwiched a spectacular lunchtime presentation by Thomas C. Goldstein, co-chair (with Patricia Millett) of Akin Gump's Supreme Court Practice Group,

about how he built – from the ground floor – what is today one of the country's most active and flourishing Supreme Court practices. Tom's candor, humility, and humor inspired us all!

True to our goal of presenting quality programs in all parts of the Circuit, in May the 3CBA put on a CLE program in the Virgin Islands about the new Virgin Islands *certiorari* process, which was attended by over 75 Virgin Islands practitioners. We thank our faculty for that course: Chief Justice of the Supreme Court of the U.S. Virgin Islands, Rhys S. Hodge, Third Circuit Judge Marjorie Rendell, Adriane Dudley, and 3CBA Board Member Peter Goldberger. Hats off to 3CBA Board Member Andrew Simpson for his fine work in planning our foray into the Virgin Islands.

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plans on offering attorney training sessions on the use of the EM/ECF system in the near future. The dates of the upcoming attorney training sessions, along with training materials, will be posted on the Third Circuit's website (See <http://www.ca3.uscourts.gov>).

Finally, appellate practitioners should be aware of an exciting development in electronic filing that is occurring at the district court level. The latest version of the EM/ECF system includes a feature that allows attorneys to create an appendix electronically. When an attorney chooses this feature, s/he is prompted to select those documents to be included in the appendix, and the software then assembles the documents into one, consecutively-paginated PDF document. The New Jersey, Delaware, and Middle District of Pennsylvania courts all have implemented this most recent version of the EM/ECF system, which enables the electronic assembling of appendices. It is anticipated that other district courts will follow suit in the near future.

Practitioners are encouraged to check the Third Circuit's website for updates concerning its electronic filing program.

## THIRD CIRCUIT DECISION OF INTEREST

By Colin E. Wrabley, Esq. & David J. Bird, Esq.

### *Gutierrez v. Johnson & Johnson*, 523 F.3d 187 (3d Cir. April 24, 2008).

*Gutierrez* contains important holdings regarding the timeliness of petitions to appeal class certification orders under Fed. R. Civ. P. 23(f). Rule 23 authorizes the courts of appeals to permit an interlocutory appeal from a district court order granting or denying class certification if a party files a petition to appeal “within ten days” of the order. *Gutierrez* holds that while the ten-day time limit generally is “strict and mandatory,” it may be tolled by motions for reconsideration in the district court, but only where such motions are filed within Rule 23(f)’s ten-day period. Thus, any reconsideration motion filed more than ten days after the class certification order is “untimely” and will not toll or reset Rule 23(f)’s ten-day period. This is true, the Court held, even if the reconsideration motion is filed within the time period allowed by a local district court rule or within a time period agreed to by the parties and approved by the district court.

*Gutierrez*’s construction of Rule 23(f) can have fatal consequences for parties who may rely on the plain language of local rules governing the time for filing reconsideration and court-approved extensions of those local rules. In *Gutierrez*, plaintiffs, who lost a class certification motion, asked the district court to extend their time to file a motion for reconsideration. The plaintiffs’ request, which was filed within ten days of the entry of the class certification order, stated that the parties had agreed to the extension and “understood” that the request and reconsideration motion would not prejudice any party’s

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as users in the Circuit’s electronic filing system, and that almost all filings be filed and served using the electronic filing system. This system would function similarly to the electronic filing systems employed by the district courts. Unlike those systems, the Circuit’s proposal retains the filing of paper copies of briefs and appendices.

The Circuit’s Proposed Amendments also address the Crime Victim’s Rights Act, propose motions by represented parties, and the new requirement to redact certain personal identifiers from all documents filed in the Circuit. In addition, the Proposed Amendments also make minor and stylistic changes to numerous rules.

The Third Circuit Bar Association has submitted suggestions regarding the Proposed Amendments. The suggestions were the result of comments by numerous members and the hard work by the co-chairpersons of the Rules Committee, George Leone and Peter Goldberger. The Association’s primary suggestions were designed to further integrate the proposed model rule with the Circuit’s existing Local Appellate Rules to lessen any confusion or conflict. The Association suggested a relaxation in the number of paper copies which must be filed and served, and clarification of when electronic filing and service may and must be used. It also suggested not requiring the electronic filing of appendices pending further study of the concerns raised.

The Association also made suggestions concerning the Circuit’s other proposals, and about other Local Appellate Rules, to make appellate practice easier. The

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Also in May, the 3CBA joined with the New Jersey Bar Association’s Federal Practice and Procedure Section and Appellate Practice Committee, and with the Association of the Federal Bar of New Jersey to put on a program, *The Nuts and Bolts of Practice Before the Third Circuit*, at the New Jersey State Bar Association’s Annual Meeting in Atlantic City. We thank 3CBA Board Member Mary Gibbons Whipple for organizing and moderating this program and the faculty members for their participation: Judge Michael Chagares, former Third Circuit Judge John Gibbons, 3CBA Treasurer and former New Jersey District Court Judge Stephen Orlofsky, and Third Circuit Clerk Marcia Waldron. Look for programs this Fall in the Middle and Western Districts of Pennsylvania, as well as a replay in Philadelphia in November (with the Pennsylvania Bar Institute as sponsor) of the *Do’s and Don’ts of Effective Appellate Advocacy* course.

Last, but certainly not least, my special personal thanks to Chip Becker, Colin Wrabley and our new Newsletter co-chair Mary Dixon for their hard work in putting together this newsletter. We so appreciate their dedication.

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rights under Rule 23(f). Nevertheless, the Court ruled that the plaintiffs' request was insufficient to toll or reset Rule 23(f)'s ten-day time limit; and that their reconsideration motion was untimely because it was filed more than ten days after the class certification order. The Court also found that plaintiffs could not use the district court's approval of their request to save their untimely petition. As a result, the Court denied the Rule 23(f) petition and refused to consider the merits of the district court's class certification order.

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Association's suggestions can be obtained by contacting Peter (Peter.Goldberger@verizon.net) or George (George.Leone@usdoj.gov).

The Association greatly appreciates the opportunity afforded it by the Third Circuit to participate in this process. The comments from members were invaluable to the effort. We look forward to the Circuit's issuance of the amended Local Appellate Rules.

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