3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

On Appeal

December 2008
Volume II, Number 3

IN THIS ISSUE

REVISION OF RULES ON JUDICIAL CONDUCT

By The Honorable Dolores K. Sloviter

The United States Constitution provides that federal judges (both of the supreme and inferior Courts) "shall hold their Offices during good Behaviour," Art. III, sec. 2, which in usual parlance is understood to be for life. The only other provision of the Constitution relevant to the behavior of judges is that applicable to civil officers of the United States who "shall be removed from Office on Impeachment for, and Conviction of, Treason." Art. II, sec. 4.

There is a wide area of potential judicial conduct between the poles set by these two constitutional provisions but Congress did not directly act on the issue of misconduct of federal judges until 1980 with the passage of the Judicial Conduct and Disability Act, codified at 28 U.S.C. § 351. That Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct "prejudicial to the effective and expeditious administration of the business of the courts." The Act also covers complaints reflecting a judge's inability to perform his or her duties because of "mental or physical disability."

In order to safeguard judicial independence that would be threatened were complaints of judicial misconduct investigated by persons or bodies other than judges, the Act created a system that relies on internal judicial investigation. Each judicial complaint is to be reviewed by the Chief Judge of the

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THIRD CIRCUIT ISSUES AMENDED LOCAL APPELLATE RULES

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

The Third Circuit has issued the most extensive and far-reaching amendments to the Circuit's Local Appellate Rules in more than a dozen years. The Circuit's amended Local Appellate Rules are effective December 15, 2008, are available on the Circuit's home page by **clicking here**, and will be posted on the Third Circuit Bar Association's website. In moving to electronic filing, the amended rules make significant changes in the mechanics of appellate practice. Every Third Circuit practitioner will have to implement changes in office procedures to comply, and many will have to acquire more powerful PDF software. Trainings are being provided throughout the Circuit to facilitate the process of mastering the new procedures, and will continue to be offered on a monthly basis.

ELECTRONIC FILING AND SERVICE

The Rules are amended primarily to guide parties in utilizing the new "Electronic Case Filing" (ECF) system, which also becomes effective December 15, 2008, joining the "Case Management" (CM) electronic notification of filings implemented earlier this year. In this new CM/ECF system, parties will be required to file most documents in the Court of Appeals through ECF. The ECF system will replace the e-mail submissions currently used for briefs, emergency motions, and petitions for rehearing, and will largely replace the filing of documents in paper form. Thus, after December 15th, filing in the

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FOR MORE INFORMATION ABOUT THE THIRD CIRCUIT BAR ASSOCIATION, PLEASE CONTACT US AT:
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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.

FROM THE PRESIDENT'S DESK

By Nancy Winkelman, Esq.

Welcome, all, to the end of the year edition of the 3CBA newsletter. We hope that you find Judge Sloviter's article discussing the revisions to the Rules on Judicial Conduct interesting and informative. Please also pay special attention to the article about the new Third Circuit Local Rules written by George Leone and Peter Goldberger, the Co-Chairs of the 3CBA Rules Committee. This article contains important information about the Court's new ECF filing system, which will go into effect on December 15, 2008. We are most appreciative of George and Peter for their fine work as Chairs of the 3CBA Rules Committee.

I want to take this opportunity to thank you for your interest in, and support of, the Third Circuit Bar Association over the past year. We are delighted with the quality, and diversity, of the programs that we have presented this year, ranging from a CLE course in the Virgin Islands on the new *certiorari* practice to courses at the 2008 Third Circuit Judicial Conference on effective appellate advocacy and motions practice. We have also continued our collaboration with our local and regional counterparts, up to and including a December 10 program about practice outside the Third Circuit with the Philadelphia Bar Association's Appellate Courts Committee. We thank our President-Elect Jim Martin and Newsletter Co-Editor Chip Becker for their participation in that program. In 2009, we look forward to presenting programs at the Third Circuit Judicial Conference – another conference open to attorneys, to be held in May in Philadelphia, as well as in the two districts where we have not yet presented programs (the Western and Middle Districts of Pennsylvania); and to continuing our presence throughout the Circuit with quality programming.

Finally, two housekeeping notes. First, you each will shortly receive a Dues Renewal Notice. You may recall that in recognition of the fact that the 3CBA was just getting off the ground in 2007, we extended your memberships for an additional year, through the end of 2008. We now encourage you to return the 2009 dues renewal form at your earliest convenience so that we can continue to be a robust organization going forward. One word about the amount of the dues: after close consideration, the Board of Governors decided to increase the annual dues by a modest amount ($5.00-from $35.00 to $40.00). We made this decision carefully, balancing the need to continue to provide quality programs with the difficult economic times we all are facing.

Second, the close of 2008 also brings an end to each of the terms of the 3CBA Officers and Members of the Board of Governors. Our Bylaws permit any member to nominate a candidate from his/her district to serve on the Board. (The Board then selects the Governors from those nominations.) Please consider nominating someone; self-nominations also are welcome! Nominations are due on or before December 31.

Let me close by wishing each of you a happy, healthy, and peaceful holiday season and New Year.

THIRD CIRCUIT ISSUES AMENDED LOCAL APPELLATE RULES—continued from page 1

Circuit will resemble, but is not identical to, filing in the district and bankruptcy courts.

The principal change in the Rules is the Circuit's adoption of an amended version of the Model Local Appellate Rules for Electronic Filing as Miscellaneous Local Appellate Rule 113. This rule requires every attorney who intends to practice in the Circuit to register as a "Filing User" of the ECF system through the PACER Service Center (113.2). Registration through the PACER Service Center (and ECF training) can be done through the Circuit's home page by **clicking here**. The times and locations of training sessions are also posted there.

All briefs, motions, appendices, petitions for rehearing, entries of appearances, responses to petitions for certiorari to review the Virgin Islands Supreme Court, and other documents filed by a Filing User must be filed through the ECF system (25.1, 30.1, 31.1, 35.2, 40.1, 46.2, 112.8, 113.1). The only documents that can be filed solely in paper format are ex parte motions and case-originating documents in original proceedings, such as petitions for write of mandamus, petitions for review of an agency order, and petitions for certiorari to review the Virgin Islands Supreme Court (25.1, 112.2, 113.1, 113.4). The parties must file briefs and appendices electronically through the ECF system, but they must also that day mail (or send by commercial carrier promising delivery within 3 days) to the Circuit ten paper copies of briefs and four paper copies of the appendix (25.1, 31.1, 113.1).

Documents filed by ECF are timely filed if they are transmitted through the ECF system, and the system issues a "Notice of Docketing Activity" before midnight (113.3). Documents created by the filer and filed by ECF must be in PDF text format (31.1 (comment), 113.3). In other words, they should be converted to PDF from a word-processed document, rather than scanned. While scanning is not prohibited for other documents, text-based PDFs should be used whenever possible, to maximize their searchability and minimize the size of the computer file.

Employment of the Filing User's new Circuit CM/ECF log-in and password to file an electronically-filed document constitutes the Filing User's signature, but the document's signature page(s) must also display an electronic signature or the attorney's name preceded by an "s/" (46.4, 113.9).

Electronically-filed documents may, but are not required to, have hyperlinks to cases or to the record (28.3, 30.1, 113.13). If hyperlinks are used, a standard citation to the case reporter, the looseleaf service, or the paper appendix page must nevertheless also be included (28.3, 30.1, 113.13). If the cited document is available only on the internet, a complete internet address (URL) must accompany the hyperlink (113.13).

Filing Users must file the appendix electronically, as well as file the four paper copies (25.1). Appellants

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THIRD CIRCUIT ISSUES AMENDED LOCAL APPELLATE RULES—continued from page 2

must include in volume I of the appendix only the notice of appeal, the order(s) or judgment(s) pertinent to the appeal, the relevant opinion(s), and any order granting a certificate of appealability (32.2). Appellants may no longer include 25 additional pages in volume I. In an appeal challenging a criminal sentence, the appellant must file the Presentence Report and the Statement of Reasons for the Sentence electronically and also provide a copy of each in each of four sealed envelopes (30.3).

If a document that is electronically filed has an attachment or exhibit, the attachment or exhibit must be filed in electronic form (113.6). Unlike appendices, no paper copy is to be filed.

In light of the general ability of the public to access electronic documents through PACER, and to comply with the E-Government Act and the Judicial Conference Policy on Privacy, counsel or parties filing a document electronically or in paper form must exclude or partially redact certain personal identifiers – dates of birth, social security numbers, financial account numbers, home addresses, and names of minor children (113.12, 25.3). (Most PDF software offers a feature for making redactions.) If needed, such personal identifiers can be filed under seal in specified ways (113.12).

Sealed documents must be filed electronically and in paper form unless the Clerk gives permission to file in paper form only (113.7). Motions to seal documents, and the order granting motions to seal documents, may be filed electronically if permitted by law (113.7). Sealed documents are accessible only to the parties and the court (see 106.1). (If the Filing User designates a document as "sealed," then the document is automatically "locked.") Ex parte motions must be filed in paper form only (113.4).

In addition, the court or clerk may restrict to the parties and the court electronic access to entire case files or portions thereof, leaving the public to view the documents at the Clerk's Office (113.1). (However, the Third Circuit has recently announced that it will no longer ever keep secret the entire existence of a case and its docket.) All documents in immigration cases and social security cases, and appendices in criminal cases (other than the appellant's required volume I of the appendix described above), will be thus restricted.

The Circuit or the Clerk can require or waive electronic or paper filing in some circumstances, and pro se parties are not required to use electronic filing (25.1, 27.2, 35.2, 40.1, 113.1, 113.2, 113.8). Similarly, whenever special circumstances seem to render strict compliance with the new ECF rules impracticable or inappropriate in a particular case or with respect to a particular document, counsel may contact the Clerk's Office for guidance and the possible granting of an exception.

Service will be generally by ECF (25.1). Registration as a Filing User constitutes consent to service by ECF (31.1, 113.2). Whether an opposing attorney or party is a "Filing User" can be determined by checking the Circuit's docket sheet to see if the attorney or party has an e-mail address listed. If a brief, appendix or other document is served on a Filing User by ECF, service of a paper copy is not required (31.1).

Service of a paper document is required only if service is on a person who has not consented to electronic service, or if a document is filed solely in paper form (25.1, 113.4). In those circumstances, only one paper copy of a brief must be served, along with a paper copy of volume I (and any other volumes) of the appendix (31.1). Service of a paper document must be performed as required by Fed. R. App. P. 25(c) (113.4).

A certificate of service is still required to be attached to the filed and served document, whether filing or service is in electronic or paper form (25.1). If service is by ECF, the certificate should state that the person served is a Filing User and is served electronically by the Notice of Docketing Activity (113.4, 25.1). If service is in paper form, the certificate of service must state the method of service (25.1).

All communications from the Clerk's Office to a Filing User will be through the ECF system. The Court's orders and opinions will similarly be sent solely by ECF (113.10). Orders will contain an electronic signature (113.5).

OTHER NOTEWORTHY CHANGES

A district court now has 30 days after the docketing of the notice of appeal, rather than the present 15, in which to file a written opinion amplifying its ruling (3.1).

A party seeking disqualification of a judge for reasons other than participation in the case must file a motion (26.1.2). Motions for summary action or dismissal must be filed before appellant's brief is due, unless there has been a change in circumstances or law (27.4). Motions to expedite an appeal, expedited motions, bail motions, and motions to seal must be answered in time periods measured in "calendar days" (4.1, 9.1, 27.7, 106.1). A party represented by counsel is prohibited from filing pro se motions except in specified circumstances; such motions, like pro se briefs sent by a represented party, will not be filed by the Clerk but instead will be forwarded to the party's counsel with notice to the party (27.8, 31.3).

Petitions for mandamus under the Crime Victims' Rights Act must be preceded by phone notice to the Clerk and served and filed immediately on all "relevant" parties (21.1). The Clerk will notify the U.S. Attorney, who must file a response within 24 hours unless otherwise directed, and who may provide notice to other victims, who have 24 hours from case opening to file any additional petition (21.1). The rule does not address responses from defendants.

In briefs, the Statement of Related Cases must be located after the Statement of Issues (28.1), a point not previously clear. In diversity cases, a party must cite opposing authority from the "highest" court of the state (28.3), just as parties must cite controlling adverse precedent in other cases. The Statement of the Interest of Amicus Curiae does not count toward the amicus brief's word limit (29.1). Where an Anders brief has been filed, the Court may appoint current counsel or new counsel if it disapproves the Anders filing, either because it finds arguable merit to the appeal or if it finds that the Anders brief is inadequate (109.2).

A party seeking oral argument by video-conference must telephone the Clerk's Office and give notice to

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REVISION OF RULES ON JUDICIAL CONDUCT—continued from page 1

Circuit who, where appropriate, appoints a special committee of judges to investigate further. That committee is charged with reporting its findings to the circuit judicial council and recommending discipline, where warranted.

There was some criticism by certain members of congress about the way in which the Act was being implemented. Essentially, the complaints were that the system set up by the Act was inadequate because it allows judges to investigate themselves. In 2004, Chief Justice Rehnquist appointed a six-member Committee, chaired by Justice Stephen Breyer, to examine the Act's implementation and report its findings and any recommendations directly to the Chief Justice. The Committee consisted of five judges and the Chief Justice's administrative assistant. When Chief Justice Roberts took office, he requested that the Committee continue its work.

The Committee's Report was completed in September 2006 and contains a detailed discussion of the complaints disposed of from 2001-2005, the process by which the Act was administered by the judicial branch, an analysis of the actual terminations of complaints during that period, and the Committee's findings and assessment of the operation of the Act. The Report was published in 239 FRD 116 (2006).

The Breyer Committee found that during the five year period it investigated, litigants constituted 51% of the complainants and prisoners accounted for an additional 41%. Approximately 6% of the complainants were usually relatives of litigants or prisoners, or unrelated persons with an interest in a particular case (including nonprofit organizations). A minuscule percent of the complaints alleged disability.

During the period studied, chief circuit judges dismissed 52% of the complaints because they were directly related to the merits of a judicial decision, and 36% were dismissed as frivolous, as defined by the Act. 11% were dismissed because the complaint was not in conformity with the Act, and another 1% were dismissed because appropriate corrective action had already been taken.

The Committee reached two major conclusions. The first was that "the chief circuit judges and judicial councils have properly implemented the Act in respect to the vast majority of the complaints filed." These cases, representing the bulk of the complaints, were referred to as the "iceberg." The Committee necessarily used samples in its inquiry, and found that the relevant error rate, i.e., failing properly to process the complaints, was about 2% to 3%, a result that the Committee believed showed no serious flaw in the operation of the system.

The Committee applied a different method of assessment to a separate category of complaints, those it categorized as high visibility cases, described as "those that have received national or regional press coverage, including matters that have come to the attention of (or have been filed by) members of Congress." The Committee identified 17 such cases over the five year period studied. Rather than sampling, the Committee examined each of those cases individually and concluded that the handling of five such cases was problematic, an error rate of almost 30%. Significantly, the Committee concluded that was far too high because such cases receive publicity and are likely to contribute to the public's view of the judiciary.

The five high-visibility cases were labeled "problematic" primarily because the Committee believed that in each such case the chief circuit judge failed to undertake an adequate inquiry into the complaint before dismissing it. This did not signify that the complaint itself was meritorious, merely that the procedure contemplated by the Act had not been followed.

The Committee Report explained in detail why the handling of twelve of the 17 high-visibility cases was nonproblematic. For example, a complaint was filed against a circuit judge for membership on a board of a judicial education organization ("FREE"). The complaint alleged that FREE espouses a clear political stand on environmental issues and that FREE tries to advance its views by inviting judges to all-expense-paid seminars to influence their views of environmental cases. Another chief circuit judge, appointed through the intercircuit assignment procedures, conducted the inquiry and dismissed the complaint because he determined that the allegations lacked any factual foundation. The Committee concluded that the chief judge's factual conclusions were reasonable applications of the Act. The fact that some of FREE's publications could be read as suggesting that FREE does take positions on political and social issues does not constitute judicial misconduct under the Act.

The Committee's assessment of that situation contrasts with its assessment of one of the five situations that it termed "problematic." In that case, although there had been no complaint of judicial misconduct filed with the chief circuit judge, the director of the Administrative Office notified the chief circuit judge that a report from a subcommittee of the House Judiciary Committee alleged that a district judge had lied, or had been seriously misleading, in testimony to the Committee, had illegally departed downward from the sentencing guidelines in drug cases, and improperly closed a sentencing proceeding and sealed transcripts of other sentencing proceedings. The chief circuit judge gave several explanations why he had declined to identify a complaint: they were that the judge complained of did not testify as part of his official duties, the Court of Appeals had taken "sufficient corrective action" when it ruled the district judge had abused his discretion, and the chief circuit judge awaited action by the full Judiciary Committee to avoid a duplicative investigation.

The Breyer Committee assessed the chief circuit judge's action as "problematic." The Committee explained that conduct off the bench can be conduct prejudicial to the effective and expeditious administration of the business of the courts, the statutory standard established by the Act. The alleged corrective action, reversal by the court of appeals, was inconsistent with the applicable standard that defined corrective action as "voluntary action taken by the judge complained against." Finally, the Committee concluded that deferring to a congressional investigation of alleged judicial misconduct is "arguably in tension with the Act's fundamental policy that the judiciary should police itself." The Committee concluded that the better course "in this very public matter"

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would have been for the chief judge to identify a complaint, undertake whatever limited inquiry was necessary, and dismiss any elements that merited dismissal.

Following its analysis of the implementation of the Act, the Breyer Committee made twelve recommendations which can be classified in five different groups. It made recommendations (1) aimed primarily at enhancing chief judges' and council members' ability to apply the Act; (2) encouraging public and bar knowledge of the Act and its appropriate use; (3) providing accurate information for legislators, the press, the public, and the judicial branch about how the Act operates; (4) clarifying the authority of the Judicial Conference to review decisions of its Committee to Review Circuit Council Judicial Conduct and Disability Orders, and; (5) creating programs to make assistance available by phone for all judges of the circuit.

Promptly after the Committee issued its report, the Judicial Conference Committee to Review Circuit Council Judicial Conduct and Disability Orders undertook an examination of the rules for Judicial Conduct and Judicial Disability proceedings previously promulgated by the Judicial Conference. The Judicial Conference Committee concluded that there was a need for the Judicial Conference to exercise its power under the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. The Conference committee drafted a revised set of rules based largely on those included as an appendix in the Breyer Report. The committee then solicited public comment on the draft and thereafter submitted the revised rules to the Judicial Conference which adopted them on March 11, 2008.

The Rules, which are mandatory and supercede any conflicting judicial council rules, place primary responsibility for implementing the Act on the chief circuit judges who are required to identify a complaint based on information constituting reasonable grounds for inquiry even if no complaint has been filed. This does not in any way diminish the opportunity of members of the bar, the public, and other judges to communicate with the circuit chief with respect to a complaint of judicial misconduct that falls within the Act. It is important to note, however, that excluded from the Act are complaints directly related to the merits of a decision or procedural ruling. The chief circuit judge may also dismiss complaints that are frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations that are incapable of being established through investigation.

The only comments that have come to my attention since the new Rules were promulgated have been from some academics who object to keeping confidential information about complaints that have been dismissed. However, the Act itself provides that, with certain exceptions, all papers, documents, and records of proceedings related to investigations shall be confidential. 28 U.S.C. § 360(a). On the other hand, the Act provides that each written order to implement any action issued by a judicial council, the Judicial Conference, or the Conference Committee shall be made available to the public through the appropriate Clerk's Office. This was illustrated by the mid-September 2008 decision of the Judicial Council of the Fifth Circuit acting pursuant to the Judicial Conduct and Disability Act making public its reprimand of a district judge, its recommendation for impeachment, and the hundreds of pages of previously secret documents in the investigation. The press has reported that Congress would not take up the impeachment question until 2009.

The Third Circuit has already implemented another of the Breyer Committee's recommendations in that information about filing a complaint is on the homepage of the court's website under Rules and Procedures, subtitled Rules Governing Complaints of Judicial Misconduct and Disability, and includes a form that can be used by anyone seeking to file a complaint of judicial misconduct.

THIRD CIRCUIT ISSUES AMENDED LOCAL APPELLATE RULES —continued from page 3

opponents, and should make such a request when notified of the calendaring of the case, or as soon as the need for video-conferencing arises (34.1, 101.2).

As provided for some time in the Federal Rules, a request for rehearing en banc is to be called a "petition," not a "suggestion" (32.3, 35.4, 108.1). En banc courts may be held regardless of the number of judges disqualified (35.3).

In addition, the amendments also make minor and stylistic changes to numerous rules.

The Third Circuit Bar Association submitted suggestions regarding the proposed amendments. The suggestions were the result of comments by numerous members and 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 Circuit adopted many but not all of the Association's suggestions. A copy of the Association's suggestions will be available on the Association's website.

The Association greatly appreciates the opportunity afforded it by the Third Circuit to participate in this process. The Association particularly appreciates the cooperation and courtesy displayed by the Clerk and her staff. We look forward to working with the Clerk and the Court in putting the Circuit's amended Local Appellate Rules into practice.

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