3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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IN THIS ISSUE

70TH JUDICIAL CONFERENCE OF THE THIRD CIRCUIT PROMISES OUTSTANDING LEARNING AND NETWORKING OPPORTUNITIES

Andrew J. Hughes, Blank Rome LLP

As part of the 3CBA's goal of raising the level of appellate advocacy in the Third Circuit, the 3CBA will be making significant contributions to the upcoming Judicial Conference, May 4-6, 2011, at the Loews Philadelphia Hotel. There is still time to register, and the 3CBA encourages all members to come and benefit from this unique experience.

The conference will be highlighted by a presentation from the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court. Distinguished judges, scholars and practitioners will present discussions and breakout sessions on topics related to ethics, bankruptcy, criminal law, appellate practice, and more. Of course, the conference will present invaluable opportunities to network with judges and fellow practitioners. And in addition, attendees can receive almost an entire year's worth of CLE credits—9.5 hours, including 2 hours of ethics. (See **here** for more information on CLE opportunities.)

On Wednesday, May 4, the 3CBA will kick off this year's Conference by sponsoring a pre-dinner reception in the Millennium Hall of the Loews Hotel. At the dinner, the Honorable Theodore A. McKee, Chief Judge of the Third Circuit, will introduce the new judges. Justice Alito will then address the Conference.

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RULES COMMITTEE FOCUSES EFFORTS ON 3D CIR. APPENDIX REQUIREMENTS, SEEKS INPUT OF 3CBA MEMBERS

by Peter Goldberger, Law Office of Peter Goldberger, Ardmore, PA
Robert A. Zauzmer, Office of the United States Attorney for the Eastern District of Pennsylvania

The Rules Committee has been one of the Third Circuit Bar Association's most active units. Since our founding, the committee has commented on the Association's behalf on each set of rules proposals from the practitioner's perspective. Our comments have resulted in many helpful changes in the Court's rules and procedures. As the Court presently has no rule-amendment proposals out for comment, the Committee is planning this year to take a more pro-active stance. We have settled on a single agenda item: to develop a proposal to make more practical and user-friendly the requirements for the compilation and filing of the appendix (both paper and electronic), and for citing the appendix in briefs.

In addition to the committee co-chairs, Board members Andy Simpson (D.V.I.), Kevin McNulty (D.N.J.), and Lisa Freeland (W.D.Pa.) will be participating in this effort. We will also need the input and assistance of other Association members—from all parts of the circuit and with all sorts of practices. In aid of this effort, the committee plans to circulate a questionnaire or survey to the membership soliciting their experiences, good and bad, with the appendix process, and any ideas members may have for improvement.

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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:
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VALUING OUR FRIENDS

A Re-examination of the Third Circuit's Open Policy Toward the Submission of Amicus Curiae Briefs in Light of the Government's Recent Advocacy in Other Circuits of a More Restrictive Standard

Jed Goldstein and Kevin McNulty, Gibbons P.C.

Nearly nine years ago, in *Neonatology Associates, P.A. v. Commissioner,* 293 F.3d 128 (3d Cir. 2002), Justice (then Judge) Samuel A. Alito, Jr. authored the Third Circuit's definitive opinion on the standards for deciding whether to grant leave to file an amicus curiae brief. In this thoughtful opinion, Justice Alito considered the historic role of amicus briefs, their usefulness to the Court, and other policy concerns. He rejected a narrow analysis that would require a prospective amicus to demonstrate that it is impartial; that it has no pecuniary interest in the case; and that the party supported by the amicus brief is unrepresented or inadequately represented. Instead, drawing support from the Federal Rules of Civil Procedure, public policy, judicial economy, and the trend in other circuits, Justice Alito declared that leave to file amicus briefs should be granted "unless it is obvious that the proposed briefs do not meet Rule 29's[1] criteria as broadly interpreted." *Id.* at 133.

Neonatology Associates remains good law, binding in this Circuit and widely respected elsewhere. *Neonatology* represents the modern view, one that prefers arguments on the merits to collateral litigation over whether a party qualifies as an amicus. Prospective amici well know, however, that adversaries continue to cite case law—much of it practically superseded but never overruled—requiring a level of neutrality and disinterestedness more associated with the clergy than with litigants. Parties opposing amicus filings, including in one notable recent case the United States government, continue to advocate for a narrow analysis that would block the submission of potentially helpful amicus briefs.

In *United States v. Rubashkin,* No. 10-2487 (8th Cir. Jan. 19, 2011), the Washington Legal Foundation, the American Civil Liberties Union of Iowa, and the National Association of Criminal Defense Lawyers, joined by federal judges, prosecutors, and leading law professors, moved for leave to submit amicus briefs in support of the defendant in a criminal appeal. The defendant had received a twenty-seven year sentence of imprisonment after being convicted of multiple financial crimes. The *Rubashkin* case was one of many prosecutions arising from a massive raid by Immigration and Customs agents that revealed nearly 400 undocumented workers. The prospective amicus submissions discussed, among other things, whether the district judge's assistance in coordinating the raid and prosecutions potentially compromised the judge's independence.

The government took the unusual step of filing a substantial objection. *See* Government's Resistance to Motions for Leave to File Amicus Curiae Briefs at 8 (hereinafter "Objection"). It advocated for the adoption of a restrictive standard unique to the Seventh Circuit, which would permit an amicus brief to be filed only "when (1) one party is inadequately represented, (2) 'the would-be amicus has a direct interest in another case' that may be impacted by the decision in the instant case, or (3) 'the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.'" *Id.* at 2 (quoting *Nat'l Org. for Women v. Scheidler,* 223 F.3d 615, 617 (7th Cir. 2000)).

The government's Objection garnered significant public attention, and recently the government withdrew it. The government's stated concern was that, whether or not the amicus briefs were accepted, there remained "the possibility the [proposed amicus] briefs may be considered by the Court without the benefit of any government response." *See* Withdrawal of Objections to Filing Amicus Curiae Briefs. The government seemed to be implying that the panel, even if it rejected the amicus submission, might be influenced by it (because Appellate Rule 29 requires proposed amicus briefs to be attached to motions for leave to file). This was an awkward argument to make to the panel judges, who would ordinarily be presumed to disregard material not properly before them.

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RULES COMMITTEE FOCUSES EFFORTS…—continued from page 1

The committee will also be researching the practices of the other circuits, which appear to be quite varied on the matter of appendix form and contents. In some circuits, no appendix at all is required when the record is fully available on PACER. In others, the paper appendix has been abolished, and the only filing is electronic. Still others employ an "excerpts of record" system, where the contents of the appendix are strictly limited, often to less than 100 pages total in addition to any lower court opinion. The committee will explore these and other options.

Any members who attend the upcoming Judicial Conference are invited to buttonhole Peter or Bob to share their thoughts, or to volunteer to participate in the appendix reform project. Those who do not attend may contact us by e-mail (peter.goldberger@verizon.net or bob.zauzmer@usdoj.gov). Other ideas and suggestions for improvements in the Third Circuit's rules and procedures are always welcome as well.

FROM THE PRESIDENT'S DESK

I am honored and privileged to assume the Presidency of the Bar Association of the Third Federal Circuit. I am pleased to follow in the footsteps of Jim Martin, Immediate Past President of our Association, as well as Nancy Winkelman, our first President. I thank Jim and Nancy for their outstanding service to our Association. We continue to move forward to achieve all of our objectives: To raise the standards of federal practice, to help develop the Rules of Practice, to promote events and educational programs to aid the Court in the administration of justice, and to facilitate bench-bar relations with the Third Circuit.

This year, the Third Circuit will convene its Judicial Conference on May 4-6, 2011 at the Loews Philadelphia Hotel, 1200 Market Street, Philadelphia, PA. For more information and to register for the Conference, please visit the Third Circuit's conference website **here**. The Conference will be highlighted by a visit and speech by the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court (formerly a Third Circuit judge). There will also be panel discussions on cutting edge legal issues, presented by distinguished panels of Federal Judges, scholars, and practitioners. Attendees may obtain up to 9.5 hours of CLE credit, with up to 2.0 hours of ethics credit.

In particular, I urge you to attend the reception which is being co-sponsored by our Association and the Court on Wednesday, May 4, 2011 at 6:30 p.m. The reception and the dinner which follows will provide an excellent opportunity to meet, greet, and confer with Judges, distinguished scholars, and colleagues from throughout the Third Circuit.

On Friday, May 6, 2011, from 10:15 a.m. to 11:15 a.m., two members of our Board of Governors, Peter Goldberger, Esq. and Nancy Winkelman, Esq., will be participating in a panel discussion of Appellate Waivers with Circuit Judges, D. Michael Fisher, Thomas M. Hardiman, and District Judge Gene E. K. Pratter of the Eastern District of Pennsylvania. Immediately following that panel discussion, at 11:30 a.m. on Friday, May 6, Donna M. Doblick, Esq., a member of our Board of Governors, and I, will be participating in a panel discussion on Interlocutory Appeals with Circuit Judges Julio M. Fuentes and D. Brooks Smith of the Third Circuit, and District Judge Stanley R. Chesler of the District of New Jersey. Throughout 2011, we hope to present additional interesting and practical CLE's throughout the entire Third Circuit.

Please do not neglect to respond to the recent Dues Notice you received. Dues are still a very affordable $40.00, and your membership is critical to the success of our mission. Please consider this your personal invitation to renew your membership, or to join us. For more information and a downloadable membership form, please visit our website **here**.

Our website, http://thirdcircuitbar.org, contains valuable information for practitioners as well as information about membership, programs, and committees. I urge you to become active in the various Programs and Committees of our Association. Naturally, if you have any questions, please feel free to contact me directly. I look forward to working with you and serving as your President.

Steve
Stephen M. Orlofsky

JUDICIAL CONFERENCE PROMISES LEARNING AND NETWORKING…—continued from page 1

The Conference will continue on Thursday, May 5 with panel discussions featuring federal judges and world-renowned scholars. First, the Honorable Lawrence F. Stengel (Eastern District of Pennsylvania) will moderate a panel on Forensic Evidence. Next, the Honorable Thomas M. Hardiman (Third Circuit) will moderate a panel on Ethical Considerations in the Digital Age.

After lunch, Professor Lawrence H. Summers of Harvard University's Kennedy School of Government, who formerly served as Director of the National Economic Council and Secretary of the Treasury, will address the Conference. His remarks will be followed by a panel discussion on the Economic Landscape, moderated by Professor David Skeel, of University of Pennsylvania School of Law.

On Friday, May 6, distinguished judges, scholars and practitioners will convene for additional panel discussions on an array of topics. In the morning, Professor Daniel Nagin of Carnegie Mellon University will moderate a panel on Imprisonment and Crime. The 3CBA will sponsor panel discussions on two hot-button topics in appellate advocacy. The first, on Appellate Waivers, will feature the Honorable D. Michael Fisher (Third Circuit), the Honorable Thomas M. Hardiman, and the Honorable Gene E.K. Pratter (Eastern District of Pennsylvania). The 3CBA's second panel discussion, on Interlocutory Appeals, will feature the Honorable D. Brooks Smith (Third Circuit), the Honorable Julio M. Fuentes (Third Circuit), and Stephen M. Orlofsky, Esq. of Blank Rome LLP, 3CBA President and formerly a United States District Judge for the District of New Jersey. Also on Friday, Chief Judge McKee will moderate a panel on Achieving the Goals of Sentencing and Professor Walter J. Taggart, of Villanova School of Law, will moderate a panel on Current Issues in Bankruptcy.

The cost of registration and meals for this year's Third Circuit Judicial Conference is $500 for those who register before April 20, 2011 and $600 for those who register later. Public interest attorneys and full-time students and faculty may register at a reduced rate. More information and online registration are available **here**. The 3CBA encourages members to come to what is sure to be an enriching, educational, and entertaining event.

BECOME ACTIVE WITH THE 3CBA—AND SPREAD THE WORD AMONG FELLOW PRACTITIONERS

Are you interested in the standards of practice before the Third Circuit—including the quality of your own practice? Are you affected by Third Circuit rules, and do you ever wish you could gain the ear of the Court and its administrators to provide input about those rules? Do you enjoy networking with other appellate practitioners, and do you need to earn CLE credits? Do you think it would be beneficial to your clients if the Third Circuit were a model of active, candid, and enjoyable bench/bar relations?

If you answered "yes" or "maybe" to any of these questions, the Third Circuit Bar Association is a wise investment of your time. You may already know that membership, at $40, is a bargain. But you might not realize that the time you invest with the Association will also yield ample returns.

The 3CBA's educational programs on federal appellate practice are offered all around the Circuit and address topics of interest to you. Recent programs have covered the "dos and don'ts" of federal appellate practice, Third Circuit motion practice, and how to avoid waiving arguments on appeal. Many CLEs include a networking or social component, too. Nothing concludes a stimulating panel discussion better than drinks and conversation with other attorneys and Third Circuit judges. And taking the next step—helping to organize or lead a CLE—allows you to form working relationship with some of the foremost practitioners in the Third Circuit as well as its judges. To get involved with the Program Committee, contact Bob Graci (rgraci@eckertseamans.com).

The 3CBA is your voice with the Court. We provide comments that the Court takes into account before revising local rules. If there is a nagging issue of procedure that you think could be handled better, get involved with the Rules Committee and help to change things for the better. See **here** for information on the Rules Committee's latest initiative to propose new local rules regarding filing and citing to the appendix—or contact Peter Goldberger (peter.goldberger@verizon.net) or Bob Zauzmer (bob.zauzmer@usdoj.gov).

You stay abreast of developments in the Third Circuit's case law. By going one step further and drafting a short article for this newsletter, you can deepen your own understanding of current issues and gain visibility in the Circuit. To get in touch with the Newsletter Committee, email Colin Wrabley (cwrabley@reedsmith.com) or Paige Forster (pforster@reedsmith.com).

You take care to initiate and maintain professional relationships with other attorneys who are active before the Third Circuit. You can leverage those connections by joining in with the Membership Committee as it seeks to increase involvement with the 3CBA—just contact Donna Doblick (ddoblick@reedsmith.com).

In an age of shrinking federal budgets, we cannot assume that our institutions will function smoothly without support from critical stakeholders. As Third Circuit practitioners, we are all critical stakeholders—and the 3CBA gathers our energy and amplifies our voices. Active involvement with the 3CBA benefits you and your clients. Get in touch with 3CBA committee chairs and increase your involvement in the organization. You'll see ample returns on your investment.

VALUING OUR FRIENDS—continued from page 2

Alternatively, the government may have decided on further reflection that, where prosecutorial and judicial conduct are called into question, the public interest is best served by a full airing of all arguments. Another relevant consideration may have been consistency; the government is, after all, a frequent and successful amicus filer. See Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism,* 42 Conn. L. Rev. 185, 211 (2009).

Despite the government's about-face in Rubashkin, the arguments it raised in its objection to the amicus briefs are far from frivolous. They are well worth considering, particularly in light of the rationales espoused by now-Justice Alito in *Neonatology*.

According to the government's Objection in *Rubashkin*, one benefit of adopting the Seventh Circuit's tightly-drawn standard would be enhanced judicial efficiency through the elimination of frivolous and duplicative arguments. Objection at 3 n.3. Justice Alito considered this argument, but doubted that adoption of a stricter standard for amicus briefs would accomplish this goal. The savings, he explained, are illusory: "[T]he time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted." *Neonatology*, 293 F.3d at 133. Indeed, rigorous threshold scrutiny of proposed amicus briefs would result in many amicus briefs being carefully evaluated twice: once when submitted, and again when the court analyzes the merits. In short, screening unhelpful briefs at the initial stage might be more trouble than it is worth. "[B]ecause private amicus briefs are not submitted in the vast majority of court of appeals cases, and because poor quality briefs are usually easy to spot," Justice Alito observed, "unhelpful amicus briefs surely do not claim more than a very small part of a court's time." *Id.*

The government, grappling with Justice Alito's position, suggested that the broad view adopted by the Third Circuit might have the unintended consequence of encouraging the submission of more non-meritorious amicus briefs. Objection at 3 n.3. Any potential amicus reading *Neonatology*, however, must recognize that a lenient standard for filing briefs does not imply any hospitality to substandard arguments; the very foundation of Justice Alito's reasoning is that judges are well equipped to recognize substandard arguments and give them the weight they deserve. Justice Alito's opinion is animated by the principle that judges should confront meritless arguments directly, rather than via imperfect proxy doctrines such as amicus standing. In short, *Neonatology* should create no perverse incentive, because frivolous briefs will ultimately fail to register any impact

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on the outcome of the case. Litigants who fail to appreciate this reality may be undeterrable in any event.

The government argued—plausibly, to any harried litigator—that an "open door" policy for amicus briefs could require a party to commit its resources to responding to arguments so lacking in merit that they were deliberately bypassed by the other party's lawyers. *Neonatology* once again undermines the unspoken premise of this argument: that arguments are forgone by the parties only because they lack force or relevance. Justice Alito suggested that, on the contrary, amicus briefs may elucidate matters that tend to be glossed over by adversaries whose agenda can be unduly narrow. Amici may provide "background or factual references that merit judicial notice[,] expertise not possessed by any party to the case[, analysis of] points deemed too far-reaching for emphasis by a party intent on winning a particular case," or analysis of the potential impact of the Court's holding on a particular group and industry. *Id.* (citing Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J. App. Prac. & Process 279 (1999)). If the arguments advanced by the amicus indeed lack merit, able counsel should be able to dispose of them without undue effort. It cannot be denied, of course, that some additional effort and expense is required. Once again, however, the question is whether a restrictive standard would truly avoid that effort, or merely deflect it to the preliminary skirmish over amicus status.

The government's final critique of the open policy toward amicus briefs is not that such briefs are meritless, but that they are redundant: free acceptance of amicus briefs "can require the expenditure of the opposing party's resources to re-address issues the primary litigant is capable of raising and has raised." Objection at 3 n.3. The government refers here to what is disparagingly called the "me too" brief. To be sure, an issue raised by one of the primary litigants does not require an amicus to raise it. And it cannot be denied that amicus briefs, no less than others, may be repetitive or unoriginal. Still, should an amicus brief truly duplicate the arguments in a party's brief, then the opposing party may elect not to respond, or may incorporate by reference its own merits brief. Neither course entails any significant expenditure of resources. On the other hand, to the extent amici have an interest or perspective distinct from those of the primary litigants, their arguments may merit a response, and the adversarial exchange may be beneficial to the court's decision-making.

Other important considerations support an open policy toward the participation of amici. If required to undertake the distasteful task of demonstrating the inadequacy of a party's counsel—one of the alternative requirements imposed by the Seventh Circuit's narrow rule—many potential amici could be deterred, irrespective of the merits of their arguments. Such a rule might deny the court the assistance of amici in cases where it is most required: where "[a] party's brief is less than ideal and an amicus submission would be valuable to the court." *Neonatology*, 293 F.3d at 132. The Third Circuit's open policy, moreover, better reflects the procedural reality that amicus submissions are ideally submitted early in the appeal. At that stage, the court may not yet have seen the merits briefs, and thus may lack the basis for an informed decision about whether the proffered amicus brief supplements the arguments of the parties. *See id.* at 133-34. Relatedly, a motion to participate as amicus may be submitted to a motions panel or judge other than those who will decide the merits. Those motions judges are placed in the awkward position of determining, "not whether the proposed amicus brief would be helpful to them, but whether it might be helpful to others who may view the case differently." *Id.* at 133. Under such circumstances, Justice Alito concluded:

> [I]t is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.

Id.

Finally, there is the fear that a restrictive policy could create the reality, or "at least … the perception[,] of viewpoint discrimination." *Id.* "Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable." *Id.* In addition, "[a] restrictive policy may also convey an unfortunate message about the openness of the court." *Id.* Such public misgivings, corrosive to the legitimacy of the justice system, are easier to prevent than to dispel.

The open standards for approving the submission of amicus briefs employed by this Circuit serve a noble and sensible purpose: to encourage the full airing of issues and arguments that may be of use to the Court. Many decisions in this Circuit have been shaped by such submissions and amicus briefs will no doubt continue to provide assistance. More restrictive standards, however attractive to overburdened counsel and judges, may in the long run deprive the Court of valuable insight from learned experts and interested parties, such as those who sought amicus status in *Rubashkin*. Opinions such as *Neonatology* persuasively put the case for more open access. Justice Alito's message, though not explicitly stated, is clear: Trust the court; rely on counsel; engage on the merits.

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1 Rule 29(b) of the Federal Rule of Appellate Procedure provides that motions for leave to file as amicus curiae "must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

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This newsletter is compiled by the 3CBA's publicity/newsletter committee; please address suggestions to the committee's chair, Colin Wrabley (cwrabley@reedsmith.com).