



April 2009  
Volume II, Number 1

**IN THIS ISSUE**

- From the President's Desk—Page 1
- Third Circuit Judicial Conference, With Addresses By Two Justices of the Supreme Court, Promises Outstanding Learning Opportunities—Page 1
- Third Circuit's Electronic Filing System Implemented, Altered, and Functioning—Page 2
- Decision of Interest—Page 3
- Membership Renewal—Page 4
- New Edition of Third Circuit Appellate Practice Manual Coming Soon!—page 1

**FOR MORE INFORMATION ABOUT THE  
THIRD CIRCUIT BAR ASSOCIATION,  
PLEASE CONTACT US AT:  
[3cba@thirdcircuitbar.org](mailto:3cba@thirdcircuitbar.org)  
OR VISIT US AT:  
[www.thirdcircuitbar.org](http://www.thirdcircuitbar.org)  
APPLICATION FORMS FOR THE BAR  
ASSOCIATION CAN BE FOUND AT:  
[www.ca3.uscourts.gov](http://www.ca3.uscourts.gov)**

# On Appeal

## FROM THE PRESIDENT'S DESK

James C. Martin

I am very pleased and more than a little humbled to take over the leadership of the Third Circuit Bar Association. It is important to choose one's predecessors carefully, and I couldn't have done better than to follow in the footsteps of Nancy Winkelman, who as our first president did an outstanding job of creating a solid foundation for the 3CBA. Nancy's wisdom and guidance were invaluable as we took our first steps. We are indeed fortunate that she will be continuing on the Board of Governors as the Immediate Past President.

My priorities for the coming year are to maintain a close and solid working relationship with the members of the Court and its staff, as well as providing high quality CLE opportunities for the Association's membership. By focusing on these two areas, we will be able to implement the 3CBA's objectives: raising the standards of appellate practice, helping to develop rules of practice, promoting events and educational programs to aid the Court in the administration of justice, and facilitating bench/bar relations.

The upcoming Third Circuit Judicial Conference, May 4-6, is an excellent opportunity to do all these things. If the addresses by Chief Justice John Roberts and Justice David Souter aren't enough to bring you to Philadelphia, consider the 3CBA's offerings at the conference: a reception for all conference attendees and two panel presentations. The first panel, on the certification of state law questions to

(continued on page 3)

## THIRD CIRCUIT JUDICIAL CONFERENCE, WITH ADDRESSES BY TWO JUSTICES OF THE SUPREME COURT, PROMISES OUTSTANDING LEARNING OPPORTUNITIES

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, 2009 at the Hyatt Regency Philadelphia at Penn's Landing. There is still time to register, and all 3CBA members are encouraged to come and enjoy this one-of-a-kind learning and networking experience. Presentations from two sitting U.S. Supreme Court justices, plus distinguished panels and unique networking opportunities, will highlight the event.

On Monday, May 4, the 3CBA is sponsoring a reception before the black-tie dinner that kicks off the public portion of the Judicial Conference. The reception will be an excellent way to reconnect with colleagues before enjoying dinner and the remarks of Chief Justice John Roberts.

The conference continues Tuesday, May 5, with a panel on executive power featuring four former solicitors general and a lunch address by Justice David Souter. Other panel topics on Tuesday include legal education and privacy and national security.

3CBA involvement kicks into high gear on Wednesday, May 6, when it sponsors two panel presentations. The morning panel, which will discuss the certification of legal questions to state supreme courts, includes the chief justices of the supreme courts of Delaware, New Jersey, and Pennsylvania, as well

(continued on page 2)

## THIRD CIRCUIT'S ELECTRONIC FILING SYSTEM IMPLEMENTED, ALTERED, AND FUNCTIONING

By George S. Leone, Esq.

The Third Circuit has implemented its Electronic Case Filing (ECF) system. After five months, attorneys are using the ECF system with increasing ease. The Circuit addressed one thorny issue by issuing an order offering parties the choice to file appendices solely in paper form.

The Third Circuit first implemented ECF on December 15, 2008, to complement its earlier electronic Case Management (CM) system. The Circuit simultaneously amended the Local Appellate Rules largely to guide parties in using ECF. We summarized these amended Rules in our article in the December 2008 edition of *On Appeal*. The Rules themselves are available on the Circuit's home page by [clicking here](#).

Under the amended Rules, the Circuit requires almost all documents to be filed by ECF through PACER. This replaced the prior paper-only and e-mail filing. Briefs must be filed by ECF with ten paper copies for the Circuit.

Initially, appendices similarly had to be filed by ECF with four paper copies for the Circuit. But filing appendices by ECF sometimes posed a problem because of the size of the electronic appendix. Preparing an electronic appendix by scanning paper documents uses up many more computer bytes than converting a word-processed document to PDF. The Clerk's Office increased the limit for each attachment to an ECF transaction to 3.5 megabytes. That 3.5 MB limit, however, can be reached by approximately 30 scanned pages depending on the documents and scanner settings

used. As a result, an attorney filing a scanned electronic appendix would often have to divide it into separate electronic attachments of about 30 pages each. If the total volume of the electronic attachments exceeded the 15 MB limit for each ECF transaction, the attorney would have use more than one ECF transaction to file the electronic appendix. The time and effort involved was a concern to attorneys and the Clerk.

As a result, on March 17, 2009, the Clerk gave parties options on how to file the appendix, in an order available by [clicking here](#). The Clerk's Order gives parties the option whether to file the Appendix electronically and in paper as the amended Rules contemplated, or in paper only. Under Option A, a party may choose to file an appendix by ECF with a limit of 3.5 MB per attachment and 15 MB per ECF filing transaction. A party doing so needs only to provide four paper copies to the Circuit, and can serve the appendix on any other ECF filer solely by ECF. The party's brief may cite solely to the appendix page.

Under Option B, a party may choose to file the four paper copies of the Appendix without also filing the appendix electronically. If the party chooses this option, he must serve one paper copy of all the volumes of the Appendix (including volume I) on the other parties, even if they are ECF filers. If a party files only a paper appendix, any party's brief citing that appendix must cite to the appendix page and must include a parallel cite to the document's District Court docket number and page if the document is electronically available on the District Court docket.

For example, if the appellant includes the District Court opinion only in a paper appendix, any party citing to that opinion in the paper appendix must cite to the page in the appendix and to the District Court Docket Entry (DDE #) and page, e.g., App. 27; DDE # 57 at 5. This parallel cite will allow judges or law clerks working online to retrieve the document electronically from the District Court PACER cite. A party may include a hyperlink to the District Court document, but the Rules require a citation as well in case the hyperlink doesn't work. A party that elects Option B, and who thus must add the parallel cites, is afforded 75 additional words in the type-volume allowance for the document to accommodate the extra information.

The Circuit currently intends to allow parties to use either appendix-filing option indefinitely, and has no preference between the two. To aid in using Option A for ECF filing, the Clerk advises that many District Courts have a version of CM/ECF that allows a party to create an appendix directly from the District Court docket. On the screen that asks whether to run a docket report, there is a box to check to "Create Appendix." This tool allows a party to check off the desired documents, designate their order, and push a button. The software then compiles all documents into one PDF document and consecutively paginates them. The party can then save and file the PDF document after adding a cover page and table of contents. If the PDF document exceeds 3.5 MB, the party will still need to divide it into separate electronic attachments using the PDF software.

(continued on page 4)

## THIRD CIRCUIT JUDICIAL CONFERENCE, WITH ADDRESSES BY TWO JUSTICES OF THE SUPREME COURT, PROMISES OUTSTANDING LEARNING OPPORTUNITIES—continued from page 1

as Judge D. Brooks Smith of the Third Circuit. The afternoon panel, which will focus on ethics in appellate practice, features distinguished appellate practitioners Lawrence J. Fox (Drinker Biddle), Lisa Freeland (Federal Public Defender for the Western District of Pennsylvania) and David Fine (K&L Gates) with Judge Julio Fuentes of the Third Circuit.

Also on Thursday, Professor Paul Carrington of Duke University School of Law will give a luncheon address outlining proposed modifications in the make-up and decision-making process of the U.S.

Supreme Court. Professor Carrington is one of a group of bipartisan scholars who have proposed reforms in this area, and his ideas have provoked new thinking on this topic.

This year's Third Circuit Judicial Conference will be a practical, enriching, and enjoyable learning event. For more information and to register, [click here](#). Registration for the Judicial Conference is \$810 (covers up to 12 hours of CLE as well as all meals and breaks, including Monday and Tuesday evening reception/dinner events). A reduced rate

is available for public interest attorneys and full-time faculty and students. Because of particular interest in Wednesday's bankruptcy events (up to 6.5 CLE credits), a special one-day registration rate is available. In addition, individuals may register separately for the Monday black tie reception and dinner (\$225) and the Tuesday reception, dinner, and exhibit at the Philadelphia Museum of Art (\$150). For all special registration arrangements, please contact Gail Comas in the Office of the Circuit Executive, 267-299-4213, before April 17.

## DECISION OF INTEREST

### *Kaufman v. Allstate N.J. Ins. Co., No. 08-4911 (March 26, 2009)*

The federal Class Action Fairness Act (CAFA) confers jurisdiction on federal courts over certain class actions in which any defendant and any class member are citizens of different states. In *Kaufman*, the Third Circuit recently became the first court of appeals to consider two important issues related to CAFA's "local controversy" exception to this grant of federal jurisdiction: the application of the "principal injuries" provision, and whether the "significant basis" provision requires all plaintiffs to assert claims against the local defendant.

CAFA's "local controversy" exception directs district courts to "decline to exercise jurisdiction" over a putative class action where two thirds of the plaintiffs and at least one defendant are citizens of the state where the action was filed, and in addition: (1) the local defendant's "alleged conduct forms a significant basis for the claims" and (2) the "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in [that] State."

*Kaufman* involved state-law claims by nine plaintiff-insureds against six automobile insurance companies that originated in New Jersey state court. Plaintiffs voluntarily dismissed three of the insurer-defendants – of the remaining three insurer-defendants, only one was a citizen of New Jersey. After the insurers removed the case, the district court granted the plaintiffs' motion to remand based on CAFA's local controversy exception.

On appeal, the Circuit agreed with the district court that the principal injuries provision of the local controversy exception had been satisfied, but it remanded for further consideration of the significant basis provision. The Circuit first concluded that the district court had erred by considering all six original defendants in its "significant basis" analysis, rather than only the three defendants remaining in the action. The Circuit noted that CAFA expressly provides that "class member citizenship may be determined even after the time of filing" and that district courts should take into account only defendants

presently in the action when considering the local controversy exception.

The Circuit then rejected the insurers' contention that the "significant basis" provision required that all plaintiffs must assert claims against the local defendant in order to support a remand under the "local controversy" exception, concluding that "[i]f the local defendant's alleged conduct is a significant part of the alleged conduct of all the Defendants, then the significant basis provision is satisfied."

Finally, the Circuit held that the "principal injuries" requirement is satisfied when either principal injuries resulting from the alleged conduct were incurred in the state or when principal injuries resulting from any related conduct were incurred in the state.

*Kaufman* is the first appellate clarification of the "significant basis" and "principal injuries" provisions of CAFA's local controversy exception to federal jurisdiction and provides helpful guideposts for future litigation under CAFA.

## FROM THE PRESIDENT'S DESK—continued from page 1

state courts, will feature the chief justices of the Supreme Courts of Delaware, New Jersey and Pennsylvania, along with Judge D. Brooks Smith of the Third Circuit. The second panel, on the ethics of appellate advocacy, will consist of seasoned criminal and civil appellate practitioners and Judge Julio M. Fuentes of the Third Circuit. A luncheon address by Professor Paul Carrington of Duke University will be of particular interest to 3CBA members: Professor Carrington will outline his recent proposals for modifying the make-up and decisionmaking process of the U.S. Supreme Court. Additional sessions and networking events promise an unparalleled social and educational event. Read more about it elsewhere in this newsletter (Third Circuit Judicial Conference, with Addresses by Two Justices of the Supreme Court, Promises Outstanding Learning Opportunities, p. \_\_\_), and be sure to register by [clicking here](#).

I am grateful to the members of the Board of Governors who will continue to serve in the coming

year. I would also like to thank our outgoing board members Paul Fishman and Loren Myers for their valuable contributions and service to the Association. In addition, I would like to introduce three new board members. Edna Ball Axelrod served for seven years as Chief of Appeals in the United States Attorney's Office for the District of New Jersey. Since then, her private practice has concentrated upon federal appeals and federal criminal defense. Charles (Chip) Becker manages the appellate and legal issues practice at Kline & Specter, P.C., in Philadelphia. He currently serves on the Pennsylvania Supreme Court's Appellate Courts Procedural Rules Committee and is a member of the American Law Institute. Edna and Chip both occupy at-large seats on the Board of Governors. Filling the seat for the Western District of Pennsylvania is Witold (Vic) Walczak, Legal Director of the ACLU of Pennsylvania. Vic specializes in free-speech and religious-liberty cases, and he has received many honors for his work. I look forward

to the contributions that Edna, Chip and Vic will make as new members of the board.

You can contribute to the 3CBA, too, by getting involved with one of our committees. Peter Goldberger and George Leone head up the Rules Committee, which provides input to the Court on proposed revisions of local rules. Bob Graci chairs the Program Committee, planning CLE events throughout the year. Colin Wrabley edits the newsletter that is distributed quarterly to all of our members. Any of these committee chairs would welcome your involvement in shaping the activities of the 3CBA.

For those of you who have renewed your membership in the Association, thank you. For those of you who are considering it, please do so. Our success as an organization depends on the support of our members. If you have questions or comments, don't hesitate to contact me. With your help, I look forward to another productive and rewarding year.

## THIRD CIRCUIT'S ELECTRONIC FILING SYSTEM IMPLEMENTED, ALTERED, AND FUNCTIONING—continued from page 2

Other than the appendix-filing issue, implementation of ECF has proceeded apace and attorneys have become increasingly acclimated to the new system. The Clerk's Office provided training on ECF throughout Pennsylvania, New Jersey, Delaware, and the Virgin Islands. On April 6, 2009, members of the Clerk's Office joined the 3CBA's President-Elect Stephen M. Orlofsky in a joint seminar with the New Jersey Institute for Continuing Legal Education in New Brunswick. The Clerk's Office continues to provide in-person training on the second Wednesday of each month in Philadelphia. Online training, attorney registration, the CM/ECF User Manual, and the answers to frequently-asked questions are available on the Circuit's CM/ECF website by [clicking here](#). The Circuit also operates an ECF help desk, which can be telephoned between 9 a.m. and 4 p.m. at 267-299-4970 or reached by [e-mail](#).

One issue addressed in both the local and national frequently-asked questions concerns the hardware and software needed to use ECF. The system requires updated versions of some software (e.g., Java), and is being adapted to work with more recent versions of other software (e.g., Adobe 9.0). Temporarily, however, users of Adobe 9 must learn to downgrade their documents to Adobe 8 compatibility before filing. More information is available on the Third Circuit CM/ECF website.

Other frequently-asked questions concern attorney registration. An attorney seeking to file documents or have documents filed in his name must register to obtain an ECF login and password from the Third Circuit, which differs from the PACER login and passwords for District Courts (but may be the same as used for other Circuits). An attorney can also register secondary e-mail addresses so that ECF notices will also go to a staff assistant, to a central e-mail site for the firm, etc. An attorney's ECF login and password serve as her signature, so they should be used to file documents in her name. The attorney's name preceded by "s/" must appear on the signature line for briefs, motions, and similar filings. A staff member may use his own name preceded by "s/" to sign certificates of service. An attorney should register and/or file her entry of appearance at least several days before seeking to file other documents to allow PACER and the Clerk's Office to process the registration and/or entry.

Problems occasionally arise in filing documents. Parties are encouraged to review the bottom of the initial ECF filing screen to ensure their documents are filed only under the correct docket numbers. The Circuit's CM/ECF User's Manual contains a list of the "events" (categories of submissions) under which documents can be filed, and the Clerk has added new events as experience warrants. The Circuit's amended Rules and CM/ECF website also contain instructions concerning filing and viewing sealed and restricted documents. Parties are encouraged to call the Clerk's Office if they desire assistance filing sealed documents. (Certain document types, such as Pre-Sentence Investigation Reports and Statements of Reasons in criminal sentencing appeals, are automatically filed under seal without special action by the Filing User.)

Another area where attorneys should gain familiarity is redaction. Under Fed. R. App. P. 25(a)(5) and Local Appellate Rule 113.12, a party filing or attaching a document, whether in paper or electronic format, generally must redact Social Security and taxpayer ID numbers, financial account numbers, dates of birth, names of minor children, and home addresses in criminal cases. The Judicial Conference's Privacy Policy is available on the Circuit's website by [clicking here](#). The filing attorney has the responsibility to comply with these rules to avoid problems with public disclosure of this sensitive, private information. Software programs may be available to help.

To ease ECF filing, the Circuit has made many of its forms available in writable PDF format. The forms are available on the Circuit's website by [clicking here](#). Once the form is filled in, but before ECF filing, the form should be "published" to PDF using software such as Adobe Writer to "lock" the text of the document, or printed to paper and scanned.

The Circuit's new ECF system, unsurprisingly, has met with a few initial challenges, but it has eliminated delays in filings reaching the Circuit, has given instant notice of filings to ECF users, and has reduced some costs of paper filing, service, and mailing. Allowing enough time to carefully use ECF is key. The Clerk's Office remains available to help, and the 3CBA will continue to work with the Clerk to ease the difficulties and increase the benefits of the CM/ECF system.

Peter Goldberger, co-chair of the 3CBA's Rules Committee along with George Leone, contributed to this article.

## MEMBERSHIP RENEWAL

The 3CBA is asking all members who have not renewed their membership to do so now. Your participation ensures that we can continue to distribute our newsletter and provide high-quality CLE programs of interest to Third Circuit practitioners. Membership is \$40.00 (\$25.00 for students; free for judges, clerks, staff, and attorneys admitted fifty years or longer).

You can print a membership/renewal form by following the link on the front page of the [Third Circuit website](#). Under the heading "New from the Third Circuit!" look for "Third Circuit Bar Association." You can also mail a check, along with your name and contact information, to:

Bar Association of the Third Federal Circuit  
P.O. Box 4041  
Brick, NJ 08723

Thank you for supporting the 3CBA and its goals of offering helpful practice aids and educational opportunities to its members.

## NEW EDITION OF THIRD CIRCUIT APPELLATE PRACTICE MANUAL COMING SOON!

PBI Press has announced that this fall it will publish the second edition of the *Third Circuit Appellate Practice Manual*, an indispensable resource for practitioners in the Third Circuit. The *Manual* covers all aspects of Third Circuit practice in chapters authored by leading appellate counsel. The second edition of the *Manual* will be accompanied by a searchable, companion CD-ROM and will include updated chapters as well as a new chapter on preserving issues for appeal and waiver.

3CBA leaders and members were integral in launching the first edition of the *Manual* and have continued their contributing roles in preparing the second edition. The 3CBA's first president, Nancy Winkelman, and its current president, James C. Martin, are the editors of the *Manual*, and many of the contributing authors are 3CBA members. The 3CBA is proud to continue its work with PBI Press on this essential appellate resource.

For more information on how to get your hands on the updated [, click here](#) and watch future issues of *On Appeal*.

## FOUNDING MEMBERS

Arlin M. Adams  
Hon. William G. Bassler  
Judge Harold Berger  
Andrew T. Berry  
Gabriel L.I. Bevilacqua  
Theresa M. Blanco  
Anthony J. Bolognese  
Carl D. Buchholz  
Robert L. Byer  
Candace Cain  
Mark R. Cedrone  
Jacob C. Cohn  
Pamela Lynn Colon  
Ian Comisky  
Stephen A. Cozen  
Charles W. Craven  
Thomas R. Curtin  
Jane L. Dalton  
Alan J. Davis  
Mark Diamond  
John T. Dorsey  
Alan B. Epstein  
David B. Fawcett  
Henry L. Feuerzeig  
Arlene Fickler  
Ann T. Field  
Paul J. Fishman  
Michael Foreman  
Lisa B. Freeland  
Steven L. Friedman  
Dennis F. Gleason  
Alan S. Gold  
Sidney L. Gold  
Peter Goldberger  
Jonathan L. Goldstein  
Herve Gouraige  
Robert Graci  
David A. Gradwohl  
Harold Green  
Ruth Greenlee

William T. Hangle  
James R. Hankle  
John G. Harkins, Jr.  
Judith E. Harris  
Lawrence T. Hoyle, Jr.  
Daniel B. Huyett  
Carmine A. Iannaccone  
Cynthia M. Jacob  
John P. Karoly, Jr.  
John G. Knorr II  
George S. Kounoupis  
Ronald A. Krauss  
Ann C. Lebowitz  
George S. Leone  
Arnold Levin  
Timothy K. Lewis  
James B. Lieber  
Jeffrey M. Lindy  
Michael P. Malakoff  
Edward F. Mannino  
Kevin H. Marino  
James C. Martin  
W. Thomas McGough, Jr.  
William B. McGuire  
Bruce P. Merenstein  
H. Laddie Montague, Jr.  
Dianne M. Nast  
Sandra Schultz Newman  
Karl E. Osterhout  
Robert L. Pratter  
Brian M. Puricelli  
Abraham C. Reich  
Raymond J. Rigat  
William W. Robertson  
Joseph F. Roda  
Lawrence M. Rolnick  
Stuart H. Savett  
James A. Scarpone  
Howard D. Scher  
Jeffrey M. Schlerf  
Deena Jo Schneider  
Collins J. Seitz, Jr.

Marcia G. Shein  
Theodore Simon  
Andrew C. Simpson  
Carl A. Solano  
Aslan T. Soobzokov  
Antoinette R. Stone  
Thomas D. Sutton  
Peter W. Till  
Paul H. Titus  
Michael J. Torchia  
John D. Tortorella  
Joe H. Tucker, Jr.  
H. Woodruff Turner  
Stacey F. Vernallis  
Robert A. Vort  
Ralph G. Wellington  
Barry M. Willoughby  
Nancy Winkelman

## FOUNDING FIRMS

Arseneault Whipple Farmer  
Fassett & Azzarrello  
Bifferato & Gentilotti  
Blank Rome LLP  
Connolly Bove Lodge Hutz  
Cozen O'Connor  
Duane Morris LLP  
Eckert Seamans Cherin Mellott  
Gibbons, PC  
Hangle Aronchick Segal & Pudlin  
Hoyle Fickler Herschel & Mathes  
Marino & Tortorella  
Marshall Dennehey Warner  
Coleman & Goggin  
Reed Smith  
Robertson Frelich Bruno & Cohen  
Roda Nast  
Schnader Harrison Segal & Lewis  
Spector Gadon & Rosen  
Harkins Cunningham LLP

## COMMITTEE CHAIRS

**Membership/Dues:** Mary Gibbons Whipple

**Rules:** Peter Goldberger and George Leone

**Programs:** Robert Graci

**Publicity/Newsletter:** Colin Wrabley, Mary Dixon and Paige Forster

**Website:** Lisa Freeland and Andrew Simpson

## OFFICERS

**President:** James C. Martin  
Pittsburgh, PA

**President-Elect:** Stephen M. Orlofsky  
Princeton, NJ

**Secretary:** Lisa Freeland  
Pittsburgh, PA

**Treasurer:** George Leone  
Newark, NJ

**Immediate Past President:**  
Nancy Winkelman  
Philadelphia, PA

## DIRECTORS

**Edna Ball Axelrod**  
South Orange, NJ

**Charles (Chip) Becker**  
Philadelphia, PA

**Charles Craven**  
Philadelphia, PA

**Peter Goldberger**  
Ardmore, PA

**Robert Graci**  
Harrisburg, PA

**John Knorr**  
Harrisburg, PA

**C.J. Seitz**  
Wilmington, DE

**Andrew Simpson**  
St. Croix, U.S. Virgin Islands

**Witold (Vic) Walczak**  
Pittsburgh, PA

**Mary Gibbons Whipple**  
Morristown, NJ

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