3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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U.S. SUPREME COURT'S *MOHAWK* DECISION OVERRULES THIRD CIRCUIT'S *FORD* DECISION, ENDING COLLATERAL ORDER DOCTRINE APPEALS OF DISCOVERY ORDERS IMPLICATING ATTORNEY-CLIENT PRIVILEGE

By David J. Bird and Paige H. Forster
Reed Smith LLP

Litigants may not immediately appeal federal court orders requiring them to disclose information that they believe to be protected by the attorney-client privilege, the U.S. Supreme Court ruled on December 8, 2009. The Court's unanimous decision in *Mohawk Industries Inc. v. Carpenter* overrules *In re Ford Motor Co.,* 110 F.3d 954 (3d Cir. 1997) (Becker, J.), under which Third Circuit practitioners had been able to immediately appeal attorney-client privilege rulings under the collateral order doctrine. The Supreme Court's *Mohawk* decision also overrules precedent from the Ninth and D.C. Circuits and generally follows the rule of no immediate appeals established in the First, Second, Seventh, Tenth, Eleventh, and Federal Circuits.

The Supreme Court's ruling stems from an appeal filed by a defendant in an unlawful termination suit seeking immediate review of a trial court order requiring the defendant to disclose information about a meeting between the plaintiff and the defendant's lawyer prior to the plaintiff's termination. The Eleventh Circuit held that the order did not qualify for immediate appeal under the collateral order doctrine.

In her first opinion for the Court, Justice Sonia Sotomayor agreed with the Eleventh Circuit's judgment. Justice Sotomayor acknowledged that orders requiring disclosure of such information concern important legal issues impacting the attorney-client relationship, but emphasized that the collateral order doctrine provides no more than a narrow exception to the general rule that an appeal should be allowed only after a final judgment has been entered.

According to the *Mohawk* opinion, immediate appeals are not necessary to ensure effective review of such orders. *Mohawk* eliminates an option for challenging the disclosure of privileged communications that many Third Circuit litigants and attorneys believed was useful and that had resulted in only a "trickle" of appeals in the circuits that allowed the practice. When discussion at oral argument turned to the possibility that allowing immediate appeals would result in a flood of cases for the federal appellate courts, Justice Alito remarked, "I was on the Third Circuit for eight years under this regime. And it didn't seem to me that the sky was falling."

(continued on page 3)

SAVE THE DATE! FEB. 16 RECEPTION FOR THIRD CIRCUIT BENCH AND BAR

The Bar Association of the Third Federal Circuit is sponsoring a reception for all 3CBA members and the Judges of the Third Circuit on Tuesday evening, February 16th at 5:00 p.m. The reception will be held in the Third Circuit Library at the James A. Byrne Courthouse at 601 Market Street in Philadelphia. 3CBA members are encouraged to attend and take advantage of this unique opportunity to meet the judges and your colleagues over refreshments in a social setting.

Please consider attending, and send your RSVP by February 11 to NHeimall@thirdcircuitbar.org.

FROM THE PRESIDENT'S DESK

As 2010 begins, I am pleased to report that the 3CBA is moving forward on all of our objectives: to raise the standards of federal appellate practice, help develop rules of practice, promote events and educational programs to aid the Court in the administration of justice, and facilitate bench/bar relations with the Third Circuit.

To further our goal of raising the standards of federal appellate practice, the 3CBA recently cosponsored a unique CLE on mediation in federal and state appellate courts in Pennsylvania. Judge Sloviter, Judge Fisher, and Joe Torregrossa, director of the Third Circuit mediation program, were all involved. So were 3CBA members Nancy Winkelman, Chip Becker, and Kim Watterson. The program provided a unique mix of perspectives: state and federal, judge and mediator, and plaintiffs' and defense counsel. Read more on page 3, and look for additional interesting and practical CLEs from the 3CBA in 2010.

On the practice front, the 3CBA, through its Rules Committee chairs Peter Goldberger and George Leone, has recently been involved in developing local rules to complement the December 2009 revisions to the Federal Rules of Appellate Procedure. Peter and George's pragmatic, practitioner-focused input has represented us well, and has been welcomed by the Third Circuit Clerk's Office as that office seeks to implement clear and workable rules. Read more about the Rules Committee's efforts below.

On bench/bar relations, I encourage all 3CBA members to attend our reception with the Third Circuit judges on Tuesday, February 16th at 5:00 p.m. in the Third Circuit Library at the United States Courthouse in Philadelphia. This will be a unique opportunity to meet the judges and your colleagues in a social setting. For more details, see page 1.

Finally, you recently received a dues reminder via email. If it got lost in the shuffle of your in box, please take a moment to fill out the renewal form and mail it in along with your check. The Board of Governors has decided to keep the dues at the low rate of $40 for 2010. The 3CBA is presenting helpful educational programs, providing practitioners' input on rules changes, and facilitating Third Circuit bench/bar relations. Please help to keep these efforts going strong by renewing your membership for 2010.

As always, I welcome your questions or comments; feel free to contact me.

James C. Martin
President, Third Circuit Bar Association

3CBA OFFERS FEEDBACK ON PROPOSED CHANGES TO LOCAL APPELLATE RULES

By Peter Goldberger (Ardmore, PA) and George Leone (Camden, NJ), Co-Chairs, 3CBA Committee on Rules of Procedure

The time periods of the Third Circuit's Local Appellate Rules (LAR) are being reexamined due to a change in the federal rules. Effective December 1, 2009, the Federal Rules of Appellate Procedure, along with the federal rules of civil, criminal, and bankruptcy procedure, were amended to simplify the system for counting time periods. For more on the changes to the appellate rules, see "Some Important Changes To The Federal Rules Effective December 1, 2009," page 4. Before the amendment, when the rules specified a period of fewer than 11 days (unless expressly stated as "calendar days"), intermediate Saturdays, Sundays, and legal holidays were excluded. Fed. R. App. P. 26(a)(3) (2005). Among other changes, the amended rules give all time periods in "calendar days," and weekends and holidays are not excluded. Fed. R. App. P. 26(a)(1)(B) (2009).

The change in the federal time-counting rules affects the LAR because the new time-counting rules "apply in computing any time period ... in any local rule or court order ...." Fed. R. App. P. 26(a). The LAR, as last amended in 2008, contain about two dozen references to time periods of less than 11 days. Under new Rule 26(a), those time periods would no longer exclude weekends and holidays. Direct application of the new federal time-counting rules to the existing LAR would, therefore, effectively shorten numerous time periods.

To ensure that the new rules do not cause unintended or perverse results when applied to the LAR, the Third Circuit in early December submitted proposed amendments for public comment. A few weeks later, the 3CBA Rules Committee reviewed those proposals and suggested additional amendments after consultation with the Board.

The Third Circuit's proposal was to amend about a dozen LAR time periods of fewer than 11 days – mostly 10-day periods that would be changed to 14 days. The intent of the proposed amendments was to leave the real amounts of time essentially unchanged. The Association found these proposed amendments uncontroversial and correct.

The Court's proposal omitted another dozen sections in the LAR that also provide time periods of fewer than 11 days. The 3CBA's comments listed these rules and suggested they be similarly amended. In several instances, the LAR have for some time allowed more days for action than the corresponding federal rule – most of these being 10-day periods for filing responses or replies to motions and notices (generally amounting to two calendar weeks), where the federal rule suggested 8 days (generally amounting to 10 calendar days). If the LAR were left unchanged, as under the Third Circuit's proposal, these time periods would be shortened. While that would conform these time periods to the shorter, federal standard, it would deprive practitioners of the extended periods the Third Circuit has long provided.

The 3CBA commented that practitioners would prefer for existing time allowances not to be effectively shortened. We pointed out that the existing time periods did not appear to be causing undue delay in the disposition of motions, and that in unusual cases the Third Circuit can always shorten a time period or act without awaiting a response or reply.

The Association also proposed that eight LAR references to "calendar days" be amended by deleting the word "calendar." This would avoid confusion, we suggested, as all days in the rules are now calendar days.

As of this writing, the Third Circuit is considering the 3CBA's proposal and other public comments. The LAR will be formally amended when that review is complete.

U.S. SUPREME COURT'S MOHAWK DECISION…—continued from page 1

Indeed, several justices made comments at oral argument that seemed to indicate support for—and even echo the language of—the Third Circuit's decision in *Ford*. In *Ford*, the Court concluded that a district court order requiring the disclosure of arguably privileged documents was reviewable under the collateral order doctrine because it "finally resolved an important issue separate from the merits that would be effectively unreviewable after final judgment."

The *Ford* opinion focused on the "important" and "effectively unreviewable" prongs of the *Cohen* test. The Court reasoned that the attorney-client privilege was sufficiently important, when weighed against the efficiency interests of the final judgment rule, because the privilege is "one of the pillars that supports" our system of justice. *Id.* at 962. The Court emphasized the role of the privilege in promoting "full and frank communication" between attorney and client and reasoned that clients would be less than frank with their attorneys—to the detriment of our adversarial system—if they knew that the information they disclosed was merely protected from use at trial. As for effective unreviewability, the *Ford* Court colorfully observed that even if a case is retried without the privileged material, "the cat is already out of the bag … there is no way to unscramble the egg…; the baby has been thrown out with the bath water."

The Supreme Court's *Mohawk* opinion concludes that these concerns do not outweigh the importance of avoiding piecemeal litigation. Acknowledging that "a fraction of orders adverse to the attorney-client privilege may … harm individual litigants in ways that are only imperfectly reparable," the Court nonetheless concluded that "the limited benefits of applying the blunt, categorical instrument of § 1291 collateral order appeal to privilege-related disclosure orders simply cannot justify the likely institutional costs," which include "delay" in resolving district court litigation and a "needless burden" on the federal appeals courts.

The Supreme Court also disagreed with the *Ford* Court's conclusion that the attorney-client privilege would not be protected without immediate reviewability of discovery orders pertaining to arguably privileged documents. The Court reasoned that "deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel." The Court then concluded that the behavior of litigants is much more likely to be influenced by the "breadth" of the privilege and the "narrowness of its exceptions," rather than "the small risk that the law [of privilege] will be misapplied."

In the Supreme Court's estimation, a number of "established" avenues for appeal suffice to protect the rights of parties and preserve the vitality of the attorney-client privilege:

- A losing party can appeal disclosure orders at the end of litigation, like any other erroneous evidentiary ruling, and request vacatur of any adverse judgment and remand for a new trial excluding privileged material and its fruits.
- A party may ask the district court to certify an interlocutory appeal and petition the court of appeals to accept such an appeal under 28 U.S.C. § 1292(b).
- A party can petition an appellate court for a writ of mandamus.
- A party can defy a disclosure and incur sanctions, including rulings that prohibit the disobedient party from supporting or opposing claims or defenses on the merits or contempt rulings that can be appealed directly.

Although the Supreme Court views post-judgment appeals, discretionary interlocutory appeals, mandamus, and defiance-and-sanction as adequate mechanisms to protect the rights of parties and preserve the vitality of the attorney-client privilege, each option involves considerable risk and expense and/or high legal standards for relief.

Finally, the Supreme Court noted that Congress has enacted legislation authorizing the Court to adopt rules defining when a district court ruling is "final" for purposes of an immediate appeal and authorizing interlocutory appeals under other circumstances. Because Congress has designated rulemaking as the "preferred means" for determining when an immediate appeal may be taken, the Court reasoned the collateral order doctrine must remain "narrow and selective." Justice Thomas joined in this part of the Court's opinion and filed a separate concurrence arguing that such questions should be addressed solely through the rulemaking process.

3CBA COSPONSORS APPELLATE MEDIATION PROGRAM

In December 2009, the Third Circuit Bar Association partnered with the Pennsylvania Bar Association, the Philadelphia Bar Association, and the Pennsylvania Bar Institute to present a CLE on "Appellate Mediation in Pennsylvania." This CLE was unique among typical 3CBA offerings because it encompassed both federal and state court mediation.

The organizers and panelists provided a variety of perspectives. Judge Marjorie O. Rendell (Third Circuit), Judge Rochelle S. Friedman (PA Commonwealth Court), and Judge Richard Klein (PA Superior Court) sat on the panel. Directors of mediation programs also participated: Joseph A. Torregrossa (Third Circuit mediation program), P. Douglas Sisk (PA Superior Court mediation program), and Richard Procida (PA Commonwealth Court mediation program). 3CBA member Nancy Winkelman helped plan the program, and members John Hare and Charles (Chip) Becker were on the panel. Adding to this mix of viewpoints were the attendees, who represented a cross section of the plaintiff's and defense bar.

The presentation covered the nuts and bolts of Third Circuit and Pennsylvania state court mediation programs: how cases are selected, who the mediators are, and mediation procedure. In addition, panelists and practitioners shared useful insights about mediation strategy and the considerations that influence plaintiff's and defense counsel's approach to the process. The program, which took place in Philadelphia and was simulcast to other Pennsylvania locations, represented a valuable opportunity for the 3CBA to reach out to, and learn from, state court practitioners. If you would like to learn about state and federal mediation programs in Pennsylvania, the course book is available for purchase through the Pennsylvania Bar Institute.

SOME IMPORTANT CHANGES TO THE FEDERAL RULES EFFECTIVE DECEMBER 1, 2009

by Donna M. Doblick
Reed Smith LLP

The recent revisions to the Federal Rules of Criminal, Civil, Bankruptcy, and Appellate Procedure are numerous (a total of 91 changes!), but most of the revisions were made to implement a new time-computation system. For any time period or deadline, all days are counted, eliminating the old "Rule of Eleven," and most time periods are now multiples of seven days (i.e., 14 days, 21 days, etc.). Appellate practitioners should take note that FRAP 26, which governs the computation of time, has changed significantly. The chart below highlights some of the significant changes in the Rules of Appellate Procedure.

FEDERAL RULES OF APPELLATE PROCEDURE: CHANGES IN TIME COMPUTATION			
Rule	**Topic**	**Then**	**Now**
FRAP 26(a)(1), 26(c)	General rules for computing time – applicable to all time periods in FRAP, local rules, and court orders	You would exclude intermediate Saturdays, Sundays, and legal holidays when the period was less than 11 days (unless stated in calendar days). If the period ended on a Saturday, Sunday, or holiday, the 3 days for mailing would be added starting the next day.	(1) Always count every day, including Saturdays, Sundays, and holidays. (2) If the last day falls on a Saturday, Sunday, or holiday, the period runs to the next business day. Then add 3 days if served by mail. FRAP 26(c) Example: Under the old rules, if a period in which to respond to a motion ended on a Saturday, and you were served by mail, your response would be due Tuesday (Saturday +3). Now, your response is due Thursday (Monday +3).
FRAP 26(a)(2)	Rules for computing time when the period is stated in hours	N/A	Begin counting immediately on the occurrence of the event that triggers the period; count every hour (including hours on Saturdays, Sundays, and legal holidays); if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or holiday.
FRAP 26(a)(3)	Rules for computing time when the period ends at a time when the clerk's office is inaccessible for filing	N/A	Time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or (if the time period is expressed in hours and the clerk's office is inaccessible during the "last hour"), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.
FRAP 26(a)(4)	Rules for computing time: definition of the "last day."	N/A	Unless varied by a statute, local rule, or court order, the last day for electronic filing in the district court ends at midnight in the court's time zone; the last day for electronic filing in the court of appeals ends at midnight in the time zone of the circuit clerk's principal office; when filing by other means (e.g., paper copy), the "last day" ends when the clerk's office is scheduled to close.
FRAP 26(c)	Additional time after service to take an act within a specified time (unless the paper is delivered on the date of service stated in the proof of service).	Add 3 calendar days.	Add 3 days and add them after the period would otherwise expire under FRAP 26(a).
10 DAYS under the old rules, now 14 DAYS			
FRAP 4(a)(5)(C)	Days by which the court can extend the deadline for filing a notice of appeal in a civil case, upon a showing of excusable neglect or good cause: 30 days after the prescribed time or 14 days (formerly 10 days) after the date of the order granting the motion, whichever is later. In criminal cases, under the otherwise parallel FRAP 4(b)(4), no alternative 14-day period is provided.		
FRAP 4(b)	Time to file defendant's notice of appeal in a criminal case		
FRAP 5(d)(1)	Days for paying the district court all required fees for an appeal by permission, after permission to appeal is granted, and for posting a cost bond if required		
FRAP 6(b)(2)(B)(i)	Days, after filing the notice of appeal in a bankruptcy appeal, for filing and serving a statement of the issues on appeal and a designation of the record		
FRAP 10(b)	Days, after filing the notice of appeal, for the appellant to order the district court transcript or file a statement that no transcript will be ordered; days for appellee to designate additional parts of the record (accomplished, in CA3, by filing of Transcript Purchase Order)		
FRAP 10(c)	Days for the appellee to object to an appellant's statement of the evidence based upon recollection (where no transcript was prepared)		
FRAP 12(b)	Days after filing the notice of appeal for the appellant to file a statement of parties represented on appeal (accomplished, in CA3, by filing of Entry of Appearance)		
FRAP 30(b)(1)	Days, after record is filed, for appellant to designate materials for inclusion in the appendix; days after appellant's designation for appellee to counter-designate		

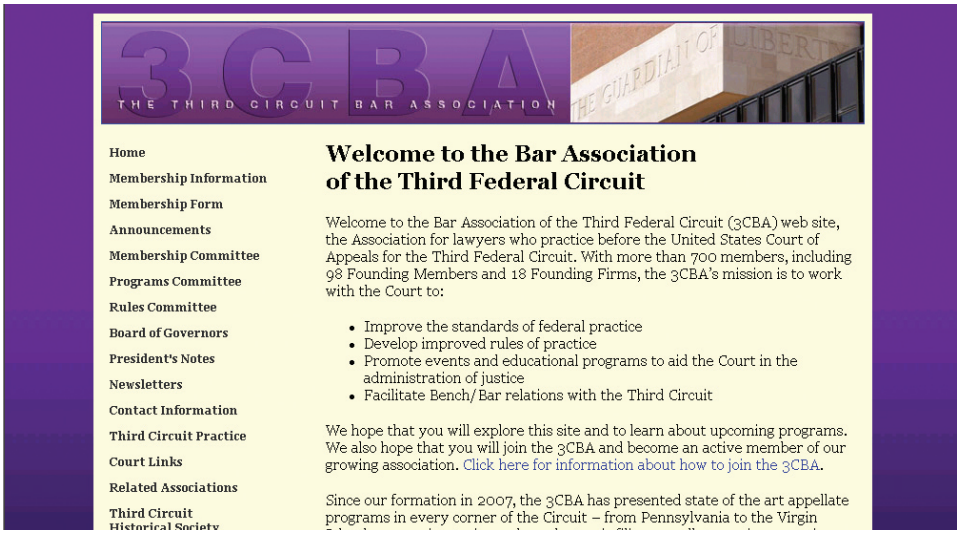
continued on page 5

SOME IMPORTANT CHANGES TO THE FEDERAL RULES EFFECTIVE DECEMBER 1, 2009—continued from page 4

FEDERAL RULES OF APPELLATE PROCEDURE: CHANGES IN TIME COMPUTATION	
10 DAYS under the old rules, now 14 DAYS (continued)	
FRAP 39(d)(2)	Days to object to a bill of costs
10 DAYS under the old rules, now 28 DAYS	
FRAP 4(a)(4)(A)(vi)	Days after entry of judgment within which a FRCP 60 motion be filed in order to toll the time for filing a notice of appeal
7 DAYS under the old rules, now 14 DAYS	
FRAP 4(a)(6)	Days within which to file a motion asking the district court to reopen the time for filing a notice of appeal in a civil case (on grounds that the movant did not receive notice of the entry of the judgment): 180 days after entry of the judgment/order or within 14 days of receiving notice (formerly 7 days), whichever is earlier. There is no corresponding rule for criminal appeals; the criminal appeal period can sometimes be extended, but it cannot be "reopened."
7 DAYS under the old rules, now 10 DAYS	
FRAP 5(b)(2)	Days to file an answer to a petition for permission to appeal or a cross-petition for permission to appeal
FRAP 19	Days to file an alternative proposed judgment enforcing an agency order
8 AND 5 DAYS under the old rules, now 10 AND 7 DAYS	
FRAP 27(a)(3)(A)	Days to file a response to a motion (10 days, formerly 8 days) or a reply to a response (7 days, formerly 5 days)
20 DAYS under the old rules, now 21 DAYS	
FRAP 15(b)(2)	Days to answer an application to enforce an agency order
3 DAYS under the old rules, now 7 DAYS	
FRAP 28.1(f)(4)	Days before oral argument by which reply briefs must be filed where there is a cross appeal
FRAP 31(a)(1)	Days before oral argument by which reply briefs must be filed where there is no cross appeal

3CBA WEBSITE PROVIDES RESOURCES FOR THIRD CIRCUIT PRACTITIONERS

Need links to Third Circuit rules and forms? How about links to every court website and electronic filing system in the Third Circuit? Or concise, relevant updates on law and procedure from past 3CBA newsletters? These resources and more are available at the redesigned 3CBA website, www.thirdcircuitbar.org. Visit often to find practical tips and tools.



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