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**IN THIS ISSUE**

- Third Circuit Clerk's Office, 3CBA Seek Feedback on Appendix Filing Procedures—Page 1
- 3CBA Presents Programs on Ethics, Certification of State Law Questions, and Supreme Court Reform—Page 1
- Third Circuit Historical Society Welcomes New Members—Page 2
- From the President's Desk—Page 2
- Supreme Court Reform Proposals Presented at Judicial Conference—Page 3
- 3CBA Introduces Website—page 4
- Case of Interest—page 4

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# On Appeal

## **THIRD CIRCUIT CLERK'S OFFICE, 3CBA SEEK FEEDBACK ON APPENDIX FILING PROCEDURES**

By Peter Goldberger & George Leone, Co-Chairs, Rules Committee

As we approach the anniversary of the Third Circuit's implementation in December 2008 of electronic filing ("ECF"), and the six-month anniversary of the Clerk's Order of March 2009 offering two different ways of filing the appendix, the Third Circuit Bar Association committee on rules is seeking input from members on their experiences filing appendices under the two options. The Clerk's Office likewise has expressed interest in hearing from our members about the filing of appendices. To this end, the Association soon will be sending its members a questionnaire seeking to elicit members' experiences and opinions about filing the appendix in electronic form, or in using the paper-only option provided under the standing order issued March 17, 2009.

Under the March Order, counsel choosing Option A are to file the volumes of appendix in electronic form (as well as four paper copies for the court). Under Option A, appendices need only be served via ECF, thus saving on printing costs for additional paper copies. Option A therefore is substantially identical to the procedures initially described in LAR 113.1(a)-(b) and LAR 113.4(a). While this option can be quite convenient for short appendices and those consisting almost entirely of copies of documents that counsel already possesses in PDF, compliance has proved difficult in cases with voluminous appendices and appendices consisting of documents not already in PDF form. The limited

(continued on page 3)

## **3CBA PRESENTS PROGRAMS ON ETHICS, CERTIFICATION OF STATE LAW QUESTIONS, AND SUPREME COURT REFORM**

By Robert A. Graci, Chair, Programs Committee

The Programs Committee of the 3CBA coordinated two overflow CLE presentations and a luncheon speaker in conjunction with the 2009 Third Circuit Judicial Conference held on the Philadelphia waterfront in May. Program Committee Chair Bob Graci worked with Third Circuit Judge D. Brooks Smith, assistant to the Circuit Executive Teresa Burnett, 3CBA President Jim Martin, former 3CBA President Nancy Winkelman, and 3CBA Board Member Peter Goldberger in organizing these offerings.

The first program, *Certification of Questions of Law to State Supreme Courts*, was moderated by Mr. Graci and featured Chief Justice Ronald D. Castille of the Commonwealth of Pennsylvania, Chief Justice Stuart Rabner of the State of New Jersey, Chief Justice Myron T. Steele of the State of Delaware, and Judge Smith as panelists. Each of the justices provided state-specific materials for the program and candidly discussed the certification process in their jurisdictions. The judicial panelists encouraged audience participation, which led to lively give-and-take between the justices and the attendees. Judge Smith helped to focus the discussion on the circuit's concerns when faced with unsettled questions of state law in federal cases. The session provided interesting and practical insights into how state and federal courts work collaboratively within the federal system.

(continued on page 2)

## FROM THE PRESIDENT'S DESK

The 3CBA's objectives are to raise the standards of federal appellate practice, help to 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. It has been exciting to see this work roll forward throughout the spring and summer.

In May, we offered two programs at the Third Circuit Bar Association Judicial Conference in Philadelphia. We presented standing-room-only panel discussions on "Certification of Questions of Law to State Supreme Courts" and "Ethics in Appellate Practice." I invite you to read more about them in [Bob Graci's article](#). And if you missed the Judicial Conference, check out the upcoming CLEs offered or co-sponsored by the 3CBA.

Also at the Judicial Conference, I had the great honor to present a plaque to Nancy Winkelman, our first President, thanking her for her energetic and visionary leadership during 3CBA's first years. The plaque was a fitting tribute to Nancy's hard work and guidance as the 3CBA got off the ground, and we owe her a continuing debt of gratitude.

Late this summer, board member Lisa Freeland rolled out the new 3CBA website at [thirdcircuitbar.org](http://thirdcircuitbar.org). The redesigned website is easy to navigate and provides helpful tools for Third Circuit practitioners. Please check out [Lisa's article](#) for details. We hope that all members, and others, will visit the website often and use its resources.

We continue to play an active role with the Circuit on implementation of rules governing appellate practice. Most recently, through George Leone and Peter Goldberger, we have commented on the practical implications of the rules relating to electronic filing and the handling of appendices. George, Peter and their committee members will continue to address practice-related issues in this critical area.

Our success as an organization depends on the support of our members. Pitch in with a [3CBA committee](#) (see sidebar on page 5 for a list of committees and chairs), attend one of our CLEs, and don't hesitate to contact me with any questions or comments.

James C. Martin  
President  
Third Circuit Bar Association

## THIRD CIRCUIT HISTORICAL SOCIETY WELCOMES NEW MEMBERS

The Historical Society for the United States Court of Appeals for the Third Circuit is dedicated to preserving and celebrating the Third Circuit's rich history. It preserves documents, records, and memorabilia of interest to scholars, historians and the general public. It also presents educational programs, curates educational exhibits, and records oral histories. Most recently, the Historical Society opened an exhibit in the United States Courthouse in Philadelphia that describes the extraordinary personal life and professional accomplishments of Judge Albert Maris, who sat on the federal bench from 1936 to 1989. The Society held a program in June to mark the exhibit's opening, which featured remarks by Judges Dolores Sloviter, Ruggero Aldisert, and Leonard Garth. The program was informative, inspirational, and well-received. For more information on the Historical society and the recent program about Judge Maris, please read the article by Charles L. Becker and Dr. Leanna Lee Whitman, soon to be posted on the [3CBA website](#).

Membership in the Third Circuit Historical Society is open to all individuals interested in advancing the Society's mission. If you are interested, please [email](#), or you can telephone Charles L. Becker, Kline & Specter, P.C., or Leanna Lee Whitman, Third Circuit Library, United States Courthouse, Philadelphia.

## 3CBA PRESENTS PROGRAMS ON ETHICS, CERTIFICATION OF STATE LAW QUESTIONS, AND SUPREME COURT REFORM—continued from page 1

The second program, *Ethics in Appellate Practice*, was moderated by Lawrence J. Fox, Esquire, of Drinker Biddle, LLP. The panel for this discussion was made up of Judge Julio M. Fuentes of the Third Circuit, David R. Fine, Esquire, of K&L Gates LLP, and Lisa B. Freeland, Esquire, Federal Public Defender for the Western District of Pennsylvania. Mr. Fox posed a series of hypotheticals to the panelists ranging from not-so-clear conflicts of interest, to ex parte meetings with opposing counsel, and appellate counsel's duties when

confronted with a post-argument change in the law. With his engaging style, Mr. Fox elicited audience participation that generated a good bit of debate between and among the panelists and the attendees.

The 2009 Appellate Luncheon speaker was Professor Paul D. Carrington of Duke University School of Law. He discussed recent proposed reforms for the U.S. Supreme Court relating to the tenure of the Justices and how the Court accepts cases for review that a group of 33 law

professors, former state supreme court justices and practitioners recently presented to the United States Attorney General and the Judiciary Committees of Congress. For an in-depth report on his proposals, see [Jim Martin's article](#).

If you missed the Judicial Conference, watch your email in-box and the 3CBA website at [thirdcircuitbar.org](http://thirdcircuitbar.org) for upcoming CLE opportunities presented or co-sponsored by the 3CBA.

## SUPREME COURT REFORM PROPOSALS PRESENTED AT JUDICIAL CONFERENCE

By James C. Martin, President

Professor Paul Carrington, of Duke University Law School, spoke at the Third Circuit Judicial Conference in May on a topic of abiding interest to Third Circuit practitioners: the structure and procedures of the U.S. Supreme Court. His comments provided a springboard for spirited discussion among Judicial Conference attendees.

Prof. Carrington began by providing a historical background of the operation of the modern (post-1920's) Court, including the development of the modern certiorari process by which it creates virtually all of its caseload. After tracing previous reform efforts, Prof. Carrington noted that such efforts usually do not gain momentum because they have no natural constituency.

Nevertheless, Prof. Carrington and his colleagues have authored a new series of reform proposals, which are supported by a cross section of the legal community. These reforms (which comprise a proposed Judiciary Reform Act of 2009) include:

- **Regular appointment of justices.** One Supreme Court justice would be appointed every two years. Since the Constitution prohibits judicial term limits or age limits, any justice who is senior to nine other justices would continue in office, but would become a Senior Justice. Senior Justices would sit to decide cases if there is a vacancy or recusal, and they would participate in the

certiorari process, but they would not decide the merits of cases accepted for review.

- **Procedure for reporting disability.** The proposed Judiciary Reform Act would make it the duty of a justice to retire when no longer able to “fully perform” his or her duties. In addition, it would be the duty of the Chief Justice to advise another justice to retire when necessary—and to notify the U.S. Judicial Conference to that effect. In the same way, the other justices would have a duty to advise the Chief Justice and report to the Judicial Conference.
- **Term limit for the Chief Justice.** Because of the extensive powers and responsibilities that over time have become part of the office of the Chief Justice, that office would be limited to a seven-year term.
- **Revamp the certiorari process.** Prof. Carrington’s provocative thinking in this area stems from what he calls the “excessive independence” of the Supreme Court in choosing its own work. According to Prof. Carrington’s analysis, the certiorari process has allowed the justices to greatly reduce their case load. Meanwhile, he says, the Court has done less of some of its “basic” judicial tasks: reconciling circuit court conflicts over the interpretation of federal statutes, and assuring strict adherence to procedural safeguards in criminal cases. Noting public discontent with the

role of the Court (which the Justices themselves have acknowledged), Prof. Carrington proposes the creation of a Certiorari Division of the Court. This division would sit four times a year and would consist of a rotating panel of five judges, randomly drawn from a pool of all Senior Justices, together with appeals court judges who have eight or more years’ tenure. The Certiorari Division would review cert petitions and, by a majority vote, would grant at least 80 and no more than 100 petitions per year. The nine active justices would be free to grant additional petitions, or to reverse the grant of a petition by a majority vote.

Where any of these reform proposals might go was the next topic addressed. While expressing some sentiment favoring several of the proposals, members of the audience were somewhat skeptical about their possible adoption. Prof. Carrington shares that skepticism, at least for the near term.

As he pointed out, the proposals are unlikely to garner much attention given the urgency of the broader financial and social agendas occupying Congress. There also are vested interests in the current appointment process and in the current operations of the Court. For their part, however, Prof. Carrington and his colleagues will continue to press forward, so there will be “more to come” on the proposals.

## THIRD CIRCUIT CLERK’S OFFICE, 3CBA SEEK FEEDBACK ON APPENDIX FILING PROCEDURES—continued from page 1

upload capacity of the court’s ECF system—15 megabytes total per submission (and no more than 3.5 megabytes per attachment)—has exacerbated the problem, often requiring users to break up appendix volumes into a number of smaller documents for electronic filing.

Counsel electing to file the appendix under Option B, on the other hand, may file the appendix solely in paper form, as was done prior to December 2008. In that circumstance, however, the brief must include not only references to the paper appendix (by volume and page), but also parallel references to the same items by district court docket entry number (to the extent those items are to be found

on the district court’s PACER docket), plus a brief description if not otherwise evident. Such double-citing is required not only of the party that chooses to file the appendix in paper form, but of all other parties as well when any one party cites the paper-only appendix. This process of double-citing the appendix can be both time- and space-consuming. In partial compensation for the extra information required, the court’s March 2009 Order added 75 words to the otherwise applicable type-volume limits for briefs (that is, the maximum word limit for principal and reply briefs becomes 14,075 and 7,075, respectively). The Clerk is particularly interested in hearing from counsel, through the Association, how well they have found compliance

with Option B to work, how much extra time is required to comply, and whether the rules might be modified in any way that would serve the needs both of the court and of users.

The Association, through its Rules Committee, would welcome members’ participation in the upcoming survey on appendices. The Committee will compile the survey responses and forward them to the Clerk, possibly with a recommendation on how the appendix filing system can be further improved. At the same time, the Rules Committee is always pleased to receive any other suggestions for improvements in the court’s rules and practices, including the operation of the ECF system.

## CASE OF INTEREST: *THOMAS V. HORN*, NOS. 05-9006 & 05-9008 (JULY 1, 2009)

Section 2254(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA) permits federal courts to grant petitions for habeas corpus only if the state court has adjudicated a claim on the merits in a manner that is “contrary to” or an “unreasonable application” of clearly established Supreme Court precedent. But if the state court decided the claim on procedural or other grounds, *de novo* review is warranted.

In *Thomas*, the Third Circuit clarified that a claim has not been “adjudicated on the merits” if a lower state court decided the claim on the merits, but a state appellate court reviewing the decision decided the claim on purely procedural grounds. The Court had earlier defined “adjudication on the merits” as (1) final resolution of the claim (2) based on its substance. In *Thomas*, the Court added another requirement: in order to qualify as an adjudication on the merits, the substantive state court adjudication must have preclusive effect.

Thomas was convicted and sentenced to death in the Pennsylvania Court of Common Pleas for first degree murder and other serious offenses. He sought review of three issues under the Pennsylvania Post-Conviction Criminal Relief Act (PCRA). The Court of Common Pleas adjudicated two of the claims on the merits and did not address the third. On review, the Pennsylvania Supreme Court dismissed all three of Thomas’s claims as procedurally waived because they were not raised in the PCRA petition.

The Third Circuit held that Thomas’s claims were not “adjudicated on the merits” in state court because, when the Pennsylvania Supreme Court decided the issues on procedural grounds, it “stripped” the PCRA court’s substantive determinations of their preclusive effect. The state courts’ final resolution of Thomas’s claims, therefore, was not an adjudication on the merits. The Court applied a *de novo* standard of review rather than the extremely deferential AEDPA standard. This determination did not affect the Court’s review of the state courts’ factual conclusions, which are presumed to be correct under § 2254(e)(1).

On the Commonwealth’s cross appeal, the Court clarified that it will not defer to a state court’s characterization of whether it has adjudicated a claim on the merits. The Pennsylvania Supreme Court, in its review of Thomas’s PCRA petition, stated that it had resolved the issues surrounding the presentation of mitigating evidence “in all [their] possible manifestations.” The Third Circuit disagreed, noting that the Supreme Court had reached only one issue related to mitigating evidence, which was not the issue Thomas had raised. The Court observed that what matters most is what a state court actually did, not what it said it did.

*Thomas*, therefore, provides very helpful clarification for practitioners on the various standards the Circuit will apply in habeas cases.

## 3CBA INTRODUCES WEBSITE

This summer, Lisa Freeland (secretary of the 3CBA Board of Governors) spearheaded the development and roll-out of our new website at <http://www.thirdcircuitbar.org>. The website offers access to **valuable resources**, including rules and forms, links to every court website and electronic filing system in the **Third Circuit**, and links to related associations, including **bar associations** throughout the Circuit. You can also peruse the concise, practitioner-focused information and updates in **previous newsletters** and learn about the **Third Circuit Historical Society**.

The new website provides all the information you need to know about the 3CBA, including how to **join**.

The website is a great pipeline if you’d like to get involved in 3CBA activities. You can read about, and get in touch with, the **Programs Committee**, the **Rules Committee**, and our president, **Jim Martin**.

Visit the website soon, and return often to get the tools, tips, and information you need.

**3CBA**  
THE THIRD CIRCUIT BAR ASSOCIATION

**Welcome to the Bar Association of the Third Federal Circuit**

Welcome to the Bar Association of the Third Federal Circuit (3CBA) web site, the Association for lawyers who practice before the United States Court of Appeals for the Third Federal Circuit. With more than 700 members, including 98 Founding Members and 18 Founding Firms, the 3CBA’s mission is to work with the Court to:

- Improve the standards of federal practice
- Develop improved rules of practice
- Promote events and educational programs to aid the Court in the administration of justice
- Facilitate Bench/Bar relations with the Third Circuit

We hope that you will explore this site and to learn about upcoming programs. We also hope that you will join the 3CBA and become an active member of our growing association. [Click here for information about how to join the 3CBA.](#)

Since our formation in 2007, the 3CBA has presented state of the art appellate programs in every corner of the Circuit – from Pennsylvania to the Virgin

**Navigation Menu:**

- Home
- Membership Information
- Membership Form
- Announcements
- Membership Committee
- Programs Committee
- Rules Committee
- Board of Governors
- President’s Notes
- Newsletters
- Contact Information
- Third Circuit Practice
- Court Links
- Related Associations
- Third Circuit Historical Society

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