

HANDBOOK OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT
PROCEDURE



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Louisiana Court of Appeal
Third Circuit

Preface

This handbook contains some information about taking an appeal and applying for supervisory relief in the Louisiana Court of Appeal, Third Circuit. It is not an official reference source. It may not be cited as authority. It will not answer every question about procedure in this court. It is intended as a starting point to help attorneys who are not familiar with appellate procedure, and to help litigants who are representing themselves. The material in this handbook should be supplemented by your own study of Louisiana law, the Uniform Rules of the Louisiana Courts of Appeal, and the Internal Rules of the Third Circuit. The Uniform Rules and Internal Rules can be found on the Third Circuit's website.

Rules change. This handbook is based on the rules in effect on January 1, 2004.

ACKNOWLEDGMENTS

One of the first things I saw a need for when I became Chief Judge of the Third Circuit earlier this year was a handbook to help young lawyers and persons representing themselves take an appeal to this Court or seek from us the exercise of our supervisory jurisdiction. I asked my dear friend and former colleague, Retired Judge Henry L. Yelverton, to do the job. There was no doubt in my mind he could do it. With ten years of district attorney experience, and 32 years on the Louisiana bench as a trial and appellate judge, he knows civil and criminal trial and appellate procedure as only a person with 42 years of hands-on experience can know a subject.

Judge Yelverton gave his draft manuscript to other experts in the Third Circuit for their perusal. These experts were the Clerk of this court, Kenneth deBlanc, who is also a lawyer and who has spent his entire professional life, 44 years, in the service of the Third Circuit; Kelly McNeely, a 23 year attorney-employee who is Chief Deputy Clerk of Court and also the Civil Staff Director; Annette Roach, an assistant district attorney for nine years before becoming our Criminal Staff Director 14 years ago; and Roberta Burnett, the only one of the group who is not a lawyer but who began acquiring her vast knowledge of how courts operate 32 years ago and is now a Chief Deputy and Supervisor. This handbook is the result of their efforts.

I acknowledge, with much gratitude, their work, and I have thanked them personally for the job they have done. The handbook is everything I hoped it would be.

Ulysses Gene Thibodeaux
Chief Judge, Louisiana Court of Appeal
Third Circuit

Lake Charles, Louisiana
June 2004

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CHAPTER ONE

Overview of the Third Circuit

1.1 INTRODUCTION

This chapter gives general information about the Court of Appeal, Third Circuit, what it is, and what it does. We will often refer to this court as “Third Circuit.”

1.2 WHAT THE THIRD CIRCUIT IS

A court of appeal is the intermediate appellate court in Louisiana’s three-tiered court system. By intermediate is meant that, in authority, it sits in the middle. It is on a level between trial courts, where trials take place, and the Supreme Court of Louisiana, which is the highest judicial authority in the state. Appellate means it is a court which handles appeals. It does not hear witnesses, and it does not accept new evidence. In addition to handling appeals from the trial courts, a court of appeal has some supervision over trial courts located within its territory.

It is called the “Third” Circuit because it is one of five numbered intermediate appellate courts in Louisiana. It is a “circuit” court because it can sit, or hold court, anywhere within its territorial limits. Sometimes a circuit court is thought of as a traveling court.

Each intermediate appellate court in Louisiana has its own territory. The Third Circuit is the largest. Its territory consists of 21 parishes in southwest and central Louisiana. The parishes are Acadia, Allen, Avoyelles, Beauregard, Calcasieu, Cameron, Catahoula, Concordia, Evangeline, Grant, Iberia, Jefferson Davis, Lafayette, LaSalle, Natchitoches, Rapides, Sabine, St. Landry, St. Martin, Vernon, and Vermilion. Geographically, its northernmost parish is Natchitoches; the Mississippi and Achafalaya Rivers meander its eastern border; the Gulf of Mexico is its southern boundary; and the Sabine River (and Texas) is its western boundary. Its population is over one million.

There are 12 judges, including a Chief Judge, sitting on the Third Circuit. They are each elected from a voting district in the Third Circuit's territory. These judges serve 10 year terms.

The Third Circuit's courthouse, called its domicile, is in Lake Charles. That is where the appeal records, supervisory writ records, and other official paperwork are kept. Most of its court sessions are held there, but as a circuit court it sometimes travels to other cities and towns within its territory and borrows local courtrooms to hear cases.

The Third Circuit takes pride in its reputation as a "user-friendly" court. This reputation exists because its Clerk and staff traditionally are willing to answer questions and otherwise help all litigants and lawyers as much as they can.

It is a strictly enforced rule that no party is ever permitted to make contact directly with the Chief Judge or any individual judge of this Court regarding any case. The office of the Clerk of Court is available to answer any specific procedural questions you may have about how to file your papers with the Court.

The Third Circuit's web address is www.la3circuit.org. The mailing address of the Court of Appeal, Third Circuit, is 1000 Main Street, Lake Charles, LA 70615, or P.O. Box 16577, Lake Charles, Louisiana 70616, and its Telephone Number is (337) 433-9403. When contacting the Third Circuit keep in mind that the Court's employees are not permitted to give legal advice or make specific recommendations to you on how you should pursue your claims on appeal or by writ application.

1.3 WHAT THE THIRD CIRCUIT DOES

The Third Circuit has appellate and supervisory jurisdiction over the lower courts (trial courts) in its territory. The lower courts, or trial courts, presently in the Third Circuit are district courts, city courts and workers' compensation courts.

Here are brief, very general definitions for a few terms. An *appeal* is the exercise of the right of a party to have a judgment of a trial court modified or reversed by an appellate court. *Appellate* refers to appeal, and *jurisdiction* refers to the power or authority of a court to hear and decide appeals. Thus, the Third Circuit has the *appellate jurisdiction* to decide appeals.

Generally, appeals may be taken only from final judgments. A *final judgment* is one which determines the merits of a case in whole or in part. Judgments are said to be *interlocutory* when they do not determine the merits of a case but only preliminary matters in the course of the case. The Third Circuit can exercise its *supervisory jurisdiction* to review interlocutory judgments or rulings. The Court's appellate jurisdiction is invoked by taking an appeal; its supervisory jurisdiction is invoked by making a writ application.

An individual judge of a court of appeal alone can take no action. Third Circuit judges do all of their work in panels. Nearly always a panel consists of three judges. Most of the time they all agree on their decisions, or rulings. In case of disagreement, the majority rules. When a judge disagrees with the majority, the judge expresses the disagreement by dissenting. If the judge agrees basically with the ruling but there is something about the ruling that the judge does not quite agree with, the judge may express his or her vote as a concurrence. All of the Third Circuit's appeal decisions are in writing, and the decision nearly always shows the name of the judge who wrote the opinion which gives the reasons for the decision.

There are times when the law requires that at least five judges hear a case. This happens only in civil matters, and only when a judgment of a district court is to be modified or reversed by a three-judge panel and one judge dissents. In such an event, the case has to be reargued before a panel of at least five judges, and a majority of them must concur to render judgment.

Occasionally the court sits *en banc*, meaning all 12 judges will sit on a case. This happens only when the law or special circumstances require it.

Appeals are randomly assigned to individual judges in a manner so that the workload is evenly divided. Regularly changing three-judge panels are also randomly selected for a year in advance. The names of the panel members for each panel appear on the docket which is published generally 30 days before oral argument. Each appeal is given to the assigned judge to be decided by his or her panel. After the case is decided the assigned judge is responsible for writing the opinion giving the reasons for the decision. At intervals of about six weeks throughout the year, the Third Circuit hands down and makes public its decisions and opinions rendered during that interval. Every written opinion is sent to the parties, and this is the way the parties learn what happened to each appeal.

The court's supervisory work is also done by panels of three. However, writ applications are not assigned to a particular judge or panel. Instead, four panels of three judges each sit in turn for half-month periods, and the panel takes up all writ applications that become ready for consideration while that panel is sitting.

The rest of this handbook is divided into three parts. PART I, consisting of Chapters 2 through 8, deals with the Third Circuit's appellate jurisdiction. PART II, consisting of Chapters 9 through 11, deals with the court's supervisory jurisdiction. PART III, consisting of Chapter 12, mentions other matters.

PART I APPELLATE JURISDICTION

CHAPTER TWO Appealability and Time Limits

2.1 INTRODUCTION

This chapter discusses some rules about what can be appealed and the time limits for appeals.

2.2 WHAT CAN BE APPEALED

Civil Cases

In civil cases all final judgments of district courts, city courts, and workers' compensation courts in the Third Circuit can be appealed to the Third Circuit, with one exception. That exception is where a law or ordinance has been declared unconstitutional. A judgment that does that is appealable directly to the Louisiana Supreme Court.

Most of the time final judgments in a case dispose of all issues, claims and parties in that case. A judgment that does not do that is a partial judgment. A partial judgment may nevertheless be final even though it does not grant the successful party or parties all of the relief prayed for, or even though it does not adjudicate all of the issues in the case. If a partial judgment (1) dismisses the suit as to less than all of the parties; (2) grants a motion for judgment on the pleadings; (3) grants a motion for summary judgment other than one that disposes of a particular issue, theory of recovery, cause of action, or defense; (4) adjudicates one of separately tried principal or incidental demands; (5) separately adjudicates liability; or (6) imposes sanctions, it probably can be appealed as a final judgment. Any other partial judgment is not final, and cannot be appealed, unless the trial court designates it as a final judgment after an express determination that there is no just reason for delay.

An interlocutory ruling is also appealable but only if the ruling causes irreparable injury. Irreparable injury exists in the context of an interlocutory judgment only where the error cannot be corrected on appeal following a determination of the merits. Appeals from interlocutory rulings, or judgments, are rare. Generally a party seeking Third Circuit relief from such a ruling will invoke the supervisory jurisdiction of the Court by way of a writ application.

Criminal Cases

In criminal cases a defendant may appeal to the court of appeal from a final judgment in a case triable by jury. The final judgment in such a case is the judgment imposing sentence. The single exception to this right of appeal to the court of appeal is a judgment in a capital case where a sentence of death has been actually imposed; in that case the appeal is to the Supreme Court.

Review of a misdemeanor conviction is through a writ application. See ch. 9.3

2.3 TIME LIMITS FOR AN APPEAL

Civil Cases

Appeals may be taken only within certain delays, or time limits, depending on the type of case. If the appeal is not taken timely, the right to appeal is forever lost.

In most district court cases there are two kinds of appeal, suspensive and devolutive. A suspensive appeal suspends the effect or execution of an appealable order or judgment. For example, a suspensive appeal can be taken from a judgment which awards money damages for personal injuries, meaning that the defendant, or judgment-debtor, does not have to pay the judgment pending the appeal. However, the appellant who takes a suspensive appeal has to furnish security in order to suspend the effect or execution of the judgment. A suspensive appeal must be taken within 30 days of (1) the expiration of the delay for applying for a new trial or judgment notwithstanding the verdict, or (2) the date of mailing of the notice of the court's refusal to grant a timely application for a new trial or judgment notwithstanding the verdict.

The other kind of appeal is called a devolutive appeal. It does not suspend the effect or execution of the judgment. It allows a delay of 60 days from the time for applying for a new trial or mailing of a notice of refusal to grant a new trial.

Some cases are subject to other delays for appealing. For example, an order or judgment relating to a preliminary injunction must be appealed within 15 days, and the trial judge has discretion whether to allow the appeal to be suspensive. In a possessory action the appeal delay is 30 days whether it is suspensive or devolutive. A judgment from an annulment, divorce, custody, visitation, or support action can only be appealed devolutively, and the delay is only within 30 days. A judgment of eviction must be appealed within 24 hours, and to make the appeal suspensive there are requirements in addition to the giving of security. In juvenile cases appeals shall be taken within 15 days. Judgments appointing or removing a tutor are subject to a 30 day limit and cannot be suspended. Actions objecting to the calling of a special election, objecting to candidacy, or contesting an election need to be appealed within twenty-four hours after rendition of judgment. These examples, which are not exclusive, demonstrate the importance of always checking the law to determine the delay for appealing to which a particular case is subject.

An appeal from a judgment rendered by a city court may be taken only within 10 days from the date of the judgment or, when notice is required, from the service of notice of judgment.

Criminal Cases

The time for appeal in a criminal case is no later than (1) 30 days after the rendition of the judgment or ruling from which the appeal is taken, or (2) if a motion to reconsider sentence has been timely filed, 30 days after denial of that motion.

If these delays elapse without an appeal having been taken, an out-of-time appeal may be available through an application for post-conviction relief filed in the district court.

CHAPTER THREE Mechanics of Appealing

3.1 INTRODUCTION

This chapter tells about who can appeal and the method of appealing, i.e., what the appellant, who is the party taking the appeal, has to do to get his or her case before the Third Circuit. It also tells about the rights of an appellee, who is the party against whom the appeal is taken, to answer the appeal or take an appeal on his or her own.

3.2 WHO CAN APPEAL

Civil Cases

In civil cases any party to an appealable judgment of a trial court has the right to ask the appellate court to revise, modify, set aside, or reverse the judgment. This right does not exist if the party confesses judgment or acquiesces in the judgment. The right to appeal also extends to a person who is not a party to a judgment but who could have intervened in the trial court.

Criminal Cases

In criminal cases the state cannot appeal from a judgment of acquittal, but it can appeal from many other judgments or rulings adverse to it. A defendant may appeal to the Third Circuit from a judgment imposing sentence in a case triable by a jury, except where the death penalty has been imposed in which case the appeal is directly to the Supreme Court.

3.3 TAKING AN APPEAL

The first thing that the appellant has to do is get an order of appeal from the trial court which rendered the judgment. This is done by filing a motion with the trial court, either orally in open court or in writing, within the time delays generally discussed above, asking for an appeal. Once the trial court grants an order of appeal, and sets a date when the appeal is returnable to the court of appeal, the clerk of the trial court which rendered the judgment will prepare the record of the case. The record will include the legal papers filed, the transcript of testimony to the extent that it is applicable to the appeal, and the documents and exhibits filed in evidence at the trial.

The appellant in a civil case may designate the portions of the record he or she desires to constitute the record on appeal. This designation, if desired, must be done in writing before the preparation of the record begins. If no designation is made the clerk of the trial court will include a transcript of all the proceedings as well as all of the documents filed.

The designation rule is different in a criminal case. In a criminal case a designation of the record must be made: the party making the motion for appeal shall, at the time the motion is made, request the transcript of that portion of the proceedings necessary, in light of the assignment of errors to be urged.

When it is compiled, this record of the case becomes the appeal record. The appellant should examine the record to make sure it has everything in it relevant to the appeal. However, nothing can be added that was not before the trial court.

The clerk of the trial court will send the appeal record to the Third Circuit. After the record is filed, or “lodged” in the Third Circuit, the Third Circuit will mail the appellant a Notice of Lodging. That notice will give the appellant directions about briefs and how to request the opportunity to present oral arguments.

The cost of the preparation of the record on appeal is the obligation of the appellant. The clerk of the trial court will mail an estimate of the cost to the appellant and the appellee, giving 20 days from date of mailing for payment. In a civil case the penalty for nonpayment is dismissal of the appeal. In a criminal case nonpayment of costs may result in dismissal but the court has other options.

3.4 ANSWERING THE APPEAL

In civil cases if the appellee wants the judgment modified or reversed, or demands damages against the appellant, the appellee can answer the appeal. To do that, he or she must file a written answer stating the relief demanded, not later than 15 days after the return day or the lodging of the record, whichever is later. If the appellee answers the appeal and the appeal is subsequently dismissed, the dismissal of the appeal has the effect of dismissing the answer as well.

Alternatively, instead of filing an answer to the appeal, the appellee may seek modification or reversal of a judgment by taking a separate appeal of his or her own, within the applicable time limits.

CHAPTER FOUR

Appellate Review Scope and Standards

4.1 INTRODUCTION

This chapter will discuss the limits of appellate review of both civil and criminal cases. It will briefly describe the scope of review, the standard of review, and a few other legal restraints on how far the Third Circuit can go in modifying or reversing a judgment. This information is given so you can better present your briefs and oral arguments.

4.2 SCOPE OF REVIEW

Civil Cases

Appellate jurisdiction of a court of appeal extends to law and facts. The Third Circuit is required to examine the appeal record in its entirety. If a question of law is involved on appeal the Third Circuit has to determine if there is a reversible error of law. If questions of fact are involved the appellate court is required to determine if a jury or trial court's findings of fact are clearly wrong or manifestly erroneous.

Criminal Cases

In criminal cases the Third Circuit's appellate jurisdiction extends only to questions of law. Its review is limited to assigned errors, or errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

4.3 STANDARD OF REVIEW

Civil Cases

In a case tried by a judge, the judge is the "finder-of-fact." In a case tried by a jury, the jury is the "finder-of-fact." When factual issues are assigned as error on appeal, the appellate court is required to give deference to findings of fact in the trial court. A reason for this is because the appellate court does not have the advantage enjoyed by the trial court of observing the trial as it takes place, and of evaluating at first hand the believability of the litigants and their witnesses.

Thus, in reviewing the facts the Third Circuit is not allowed to simply substitute its judgment about the facts for that of the trial court. The standard of its review requires the Third Circuit to affirm the findings of fact of the trial court unless it finds from the record that (1) a reasonable factual basis does not exist for the trial court's finding, and (2) the trial court's finding is "clearly wrong," or, as lawyers and judges sometimes say it in bigger words, "manifestly erroneous."

The Third Circuit's review is also limited when the decision of the trial court involves the exercise of the trial court's discretion. The deference that must be given to a trial court's decision in matters of child custody is a particular example. In a child custody matter the appellate court is not allowed to change the decision unless it is an "abuse of discretion." Another example of a trial court's discretion is the determination of the amount of general damages in personal injury cases. Because the

amount of general damages for personal injuries is hard to measure precisely, an appellate court will rarely disturb an award of general damages.

There are many other rulings that are accorded deference because they are discretionary rulings. Rulings admitting or denying evidence, the awards of attorney's fees, whether or not to grant a continuance, and the qualifications of jurors are just a few.

Criminal Cases

Although the Third Circuit's appellate jurisdiction extends only to questions of law, it is necessary for the court to review the evidence if an appellant raises the issue of the legal sufficiency of the evidence for a conviction. When the issue of sufficiency of evidence is raised on appeal in a criminal case, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

4.4 CONSEQUENCES OF TRIAL COURT ERROR

Civil Cases

Not every error made by a trial judge or jury can result in a reversal or modification of the judgment. Some errors are inconsequential; that is to say, they are not significant enough to change the outcome of the case. In the law we refer to errors that have consequences as prejudicial errors. If there are no prejudicial errors the judgment will be affirmed.

If the Third Circuit finds that a prejudicial error has occurred, two things can happen. It can either remand the matter for further proceedings, or it can decide the case *de novo*. Decisions *de novo* are favored in such circumstances. An appellate court in Louisiana seldom remands a case. If the record is complete, i.e., if the case has been fully tried, the Third Circuit will decide it based on the record. This kind of decision is called *de novo* because the court decides it anew, without regard to the standard of review otherwise regulating its appellate function. To explain further, if a prejudicial legal error is discovered by the Third Circuit, the court will simply decide the case applying the correct law. If the Third Circuit finds that the factual finding of

the trial court is manifestly erroneous (or, more simply, clearly wrong), it will change the judgment to accord with its own finding of what the facts really are.

The consequences when the Third Circuit finds an abuse of discretion will depend on the nature of the ruling. For example, if the discretion found abused is an award of general damages below or over the range believed to be a reasonable range by the appellate court, the Third Circuit is empowered to raise the award to the lowest point within the range found to be reasonable, or lower it to the highest point within the range, and render a judgment accordingly.

Criminal Cases

There are no *de novo* decisions made in criminal appeals. If an unduly prejudicial error of law (including improper admission of evidence) is made during the trial, the conviction and sentence are reversed and the case is remanded for a new trial. If there is something legally wrong with the sentence, or if the sentencing judge abused his sentencing discretion, the case will be remanded for resentencing. If the evidence is found legally insufficient for a conviction, the Third Circuit is empowered to order an acquittal.

CHAPTER FIVE

Briefs

5.1 INTRODUCTION

This chapter will deal with briefs. It will explain what they are, who files them, when they are filed, their formal requirements, and a few observations about their content.

5.2 WHAT A BRIEF IS

A brief is a written document filed in a lawsuit by a party, directed to the court, explaining that party's position in the suit and giving factual and legal reasons why that party's position should be approved by the court.

5.3 WHO FILES BRIEFS

The appellant, i.e., the person taking the appeal, must file a brief in order to tell the court of appeal what he or she thinks is wrong with the decision of the court below. The appellee usually files a brief to tell the court why he or she thinks the trial court's decision was correct and why it should be affirmed. The appellant is allowed but not required to file a short reply brief in response to the appellee's brief.

5.4 WHEN BRIEFS ARE DUE

The brief of the appellant must be filed not later than 25 calendar days after the appeal record is filed in the Third Circuit. The brief of the appellee must be filed not later than 45 calendar days after the filing of the appeal record. The reply brief, if any, of the appellant shall be filed not later than 10 calendar days after the appellee's brief is filed.

The court can shorten the time for briefing. It will do so in cases that need to be handled expeditiously, like some cases involving minors. When the briefing schedule is shortened, the Third Circuit will let the parties know when the briefs must be filed.

If more than one party appeals, for purposes of determining the briefing schedule the court normally treats the second and subsequent appellants as though they were appellees.

5.5 FORMAL REQUIREMENTS

Briefs must be prepared in accordance with the requirements of the Uniform Rules of the Courts of Appeal. A compliance checklist for briefing can be found on the Third Circuit's website: www.la3circuit.org. Strict compliance is essential.

One of the formal requirements is the size type, which must be Roman or Times New Roman 14 point or larger computer font, normal spacing, with a margin of at least one inch at the top and bottom of each page.

There are page limitation. Original briefs on 8 ½" X 14" paper shall not exceed 28 pages; reply briefs on such paper shall not exceed 13 pages. Original briefs on 8 ½" X 11" paper shall not exceed 38 pages; reply briefs on such paper shall not exceed 18 pages. These limitations do not include pages containing the cover, jurisdictional statement, assignments of error, and issues presented for review.

Briefs shall state on the cover or on the title page the following:

- (a) the title of the Third Circuit;
- (b) the Third Circuit docket number;
- (c) the Third Circuit title of the case;
- (d) the name or title of the court and the parish from which the case came;
- (e) the name of the judge who rendered the judgment or ruling complained of;
- (f) a statement as to whether the case comes before the court on appeal or in response to a writ;
- (g) a statement identifying the party on whose behalf the brief is filed and the party's status before the court;
- (h) whether it is the appellant's original brief, the appellee's brief, or the appellant's reply;
- (i) the name of counsel, with address and telephone number, by whom the brief is filed, and a designation of the parties represented, and a designation of "appeal counsel;" and
- (j) the designation of whether the case is a civil, criminal, juvenile, or special proceeding (state particular type of proceeding).

5.6 APPELLANT'S BRIEF – CONTENT

It shall set forth the jurisdiction of the court, a concise statement of the case, the action of the trial court, a specification or assignment of errors, the issues presented for review, an argument confined to the issues, giving accurate citations of the pages of the record and authorities relied upon, and a short conclusion stating the precise relief sought.

All specifications or assignments of errors must be briefed. If any are not, the court may consider them to have been abandoned.

References to legal authorities must be accurately identified. All references to Louisiana cases shall conform to Part G, §8, of the Louisiana Supreme Court General Administrative Rules. These rules can be found on the Supreme Court's website: www.lasc.org.

A copy of the judgment, order, or ruling complained of, and a copy of the trial judge's reasons for judgment, shall be attached to the brief. If the trial judge gave no reasons for judgment, that fact shall be noted in the brief. The failure to attach a copy of the reasons for judgment is a common omission. Judges don't like that.

5.7 APPELLEE'S BRIEF – CONTENT

It need not contain a recitation of the jurisdiction, the facts, or the issues, unless the appellee disagrees with the appellant's statement of those things. Otherwise this brief should conform to the requirements of the appellant's brief.

5.8 REPLY BRIEF – CONTENT

If the appellant files a reply brief, it must be confined strictly to a rebuttal of points raised in the appellee's brief.

5.9 GENERAL CONSIDERATIONS – ALL BRIEFS

An original and four copies must be filed with the Third Circuit. Copies shall be delivered or mailed to all other parties or counsel of record.

Take care in writing your brief. Be concise. Use plain English and make it readable. Read and re-read to make sure spelling, grammar and citations are correct.

Be courteous. Never personally attack an opponent, opposing counsel, or a judge. Name-calling and invective are never appropriate. An improper brief can be stricken or returned, and its author or authors can be punished for contempt of court.

Do not argue a point if that point would not change the outcome. Remember, too, that arguing weak points tends to diminish your strong points. Do not argue about anything that is not in the record.

CHAPTER SIX

Oral Argument

6.1 INTRODUCTION

This chapter explains oral argument before the Third Circuit, how the privilege of arguing orally is requested, and some pointers about how to argue your case.

6.2 WHAT ORAL ARGUMENT IS

Oral argument is the privilege of standing before the panel of Third Circuit judges who will decide your appeal and telling them why they should decide in your favor. It includes the responsibility to answer any questions they may ask about your case.

6.3 WHO CAN PRESENT ORAL ARGUMENTS

Any party may present an oral argument who requests it and has been given permission by the court. The request must be made in writing either by motion or by letter, and the request must be made within 14 days after the filing of the appeal record in the court. Such requests will generally be granted. When permission is given to one party, permission automatically extends to all other parties.

Filing of a late brief operates as a forfeiture of the writer's right to argue orally.

6.4 GENERAL CONSIDERATIONS – ORAL ARGUMENT

Arguments are limited in time to 20 minutes per side. The appellant goes first, and must divide his or her time between the main argument and the rebuttal argument.

If there are two or more parties on a side, they have to split up the 20 minutes among themselves. In rare situations, such as a case affecting the public interest, the Third Circuit will entertain a motion for additional time.

Start by identifying yourself and telling the court what party you represent. Speak plainly, using simple language, and do not read from your brief. Remember that the judges already know about your case so do not waste time with preliminaries. Get right into your argument. Make your best argument first. If a judge asks you questions, answer each question directly and candidly, explaining the answer to the extent necessary.

Be courteous. Do not personally attack your opponent, opposing counsel, or the jury or judge who decided the case. Do not argue about anything that is not in the record.

While your opponent is arguing his or her case and you are seated at counsel's table, do not use facial expressions or other body language in reaction to opposing counsel's argument. The judges will consider this sort of conduct highly unbecoming and unprofessional.

CHAPTER SEVEN

Motions

7.1 INTRODUCTION

This chapter explains motions.

7.2 WHAT A MOTION IS

A motion is a written request to the Third Circuit for a special ruling during the appeal. There are any number of special rulings a party might request. To name a few, a party, through his or her attorney, might request permission to make an oral argument, or to supplement the record, or to withdraw as counsel, or to enroll as counsel, or to get an extension of time to file a brief, or even to dismiss a motion previously filed. In short, a party may request a special ruling from the Third Circuit for just about any relief the court is empowered to give.

7.3 HOW AND WHEN A MOTION IS FILED

A motion may be made by any party. It is addressed to the court, and it must clearly explain what special ruling the party filing the motion wants and why. A copy of the motion must be mailed to each other party. The motion must be filed in time to get the relief requested.

For example, if extra time is needed to file a brief, the moving party (the person filing the motion) must explain why extra time is needed and how much time is needed. The moving party must file the motion before the brief is due well enough in advance of the regular briefing time for the court to decide whether to allow the extra time or not. If such a motion is not filed in time, the right to file it is lost.

CHAPTER EIGHT

Decision, Rehearing, and Finality of Judgments

8.1 INTRODUCTION

This chapter discusses the Third Circuit's decision, or judgment; how a party may ask the court to rehear the matter so as to reconsider the decision; and when the decision, or judgment becomes final.

8.2 THE DECISION

After the Third Circuit considers the briefs and oral arguments, if any, on the appeal, the final step is its decision. The decision is always in writing and it contains the judgment of the Third Circuit. Except in those rare instances when the court gives summary disposition to a case, the decision always carefully explains the court's reasons for deciding the appeal the way it did.

Notice of the Third Circuit's judgment is delivered personally or mailed to all counsel of record, and to all parties not represented by counsel.

8.3 REHEARING

Although rehearings are seldom granted, the Third Circuit will entertain an application for a rehearing if filed within 14 days of its judgment. In civil cases the 14 days counts from mailing of the notice of the court of appeal judgment. In criminal cases the 14 days counts from the date the judgment was rendered.

8.4 FINALITY OF JUDGMENT

A discussion of the Louisiana Supreme Court's jurisdiction is beyond the scope of this handbook. However, in order to explain the rules about the finality of a court of appeal judgment, it is necessary to point out that the Louisiana Supreme Court has unlimited supervisory jurisdiction over all lower courts including the Third Circuit. If the Supreme Court exercises its supervisory jurisdiction and considers the Third Circuit's judgment, the fate of the Third Circuit's judgment will await the Supreme Court's decision.

Civil Cases

If no application for rehearing before the Third Circuit is filed, and no application for a writ of certiorari to the Louisiana Supreme Court is filed, a judgment of the Third Circuit becomes final 30 days after the mailing of the notice of judgment.

A party may apply to the Supreme Court for a writ of certiorari within 30 days of the mailing of the notice of judgment and opinion of the Third Circuit, or within 30 days of the notice of denial by the Third Circuit of a timely application for rehearing by any party, or within 10 days of the mailing by the clerk of the notice of another party's timely filed application for a writ of certiorari.

If an application for certiorari to the Supreme Court is filed and denied, the judgment of the Third Circuit becomes final upon that denial.

Criminal Cases

A judgment of the Third Circuit becomes final 14 days from the date it was rendered. If an application for rehearing is timely filed, the judgment becomes final when the application is denied.

If an application for a writ of review is timely filed with the Supreme Court, the judgment of the Third Circuit becomes final when the Supreme Court denies the writ.

PART II SUPERVISORY JURISDICTION

CHAPTER NINE Supervisory Review and Time Limits

9.1 INTRODUCTION

This chapter discusses supervisory jurisdiction in general, the circumstances under which the Third Circuit will exercise its supervisory authority, and the time limits for applications for writs.

9.2 WHAT SUPERVISORY JURISDICTION IS

The Third Circuit has supervisory jurisdiction over cases that arise within its territory. Up until now this Handbook has dealt mostly with the court's appellate jurisdiction, or the power of the court to hear and decide appeals. Appeal, it was explained, is the exercise of a right possessed by a party in a lawsuit. The appellate court is required by law to consider and decide an appeal. But appeals may generally

be taken only from final judgments, so an appeal is not always available as a matter of right every time a trial court makes a judgment or ruling. In the course of a trial there can be a lot of rulings or judgments that decide only preliminary or interlocutory matters relating to the case. There is generally no appeal from these interlocutory rulings or judgments.

There are times, however, when a party needs relief from a higher court from an erroneous interlocutory, non-appealable judgment or ruling made by the lower court. The Third Circuit may give that relief because it has supervisory jurisdiction, i.e., the power to step in if requested and assert its authority. Unlike the right to an appeal, a party does not have a right to get this intervention, but it can ask for the Third Circuit's intervention by requesting the Third Circuit to issue what we call a supervisory writ. We call this request an "application for writs."

A writ is simply a written order issued by the court. Because the court has discretion in the exercise of its supervisory jurisdiction, it may or may not issue a writ in response to an application for writs. If the application for writs and its supporting papers show without doubt that the applicant is not entitled to supervisory relief, the court will deny the application and explain why. On the other hand, if the application shows clearly that the applicant is entitled to relief, the court will grant a writ without delay (peremptorily). Sometimes, when a question raised by the application is too hard to answer quickly, the court will issue a writ solely for the purpose of calling the case up for a more studied consideration, and later, after further study, the court will either grant or deny the requested relief.

9.3 CIRCUMSTANCES FOR SUPERVISORY INTERVENTION

Writs are always issued to prohibit a trial court from exceeding its jurisdiction or to compel a trial court to perform a mandatory duty. There are several other circumstances when the Third Circuit will choose to exercise its discretionary supervisory jurisdiction and issue a writ or writs.

One circumstance is where not taking the case will result in irreparable injury to the party applying for writs. "Irreparable injury" means if help is not given immediately it will not do any good. If an appeal provides an adequate remedy there will be no irreparable injury, and the Third Circuit will normally require the party to wait until final judgment and take an appeal to seek the relief he or she wants.

In other circumstances even if the alleged error in the trial court can be corrected on appeal, it may be considered best to go ahead and grant a supervisory writ. This happens when (1) there is no dispute of fact to be resolved, (2) the trial court decision appears to be incorrect, and (3) a reversal by the Third Circuit will terminate the litigation. Trial judge rulings in civil cases reviewable for these reasons include the overruling of an exception or the denial of a motion for summary judgment.

In criminal cases, when a defendant does not have a right of appeal from a final judgment, he or she has the right of review by the court of appeal by applying for a writ of review, thus invoking the supervisory jurisdiction of the Third Circuit. This right applies to most misdemeanor convictions in District Courts, all revocation of probation rulings, and the denial of post conviction relief applications. It also applies to misdemeanor convictions in City Courts but only if the defendant was charged under state law.

9.4 TIME LIMITS FOR APPLICATIONS FOR WRITS

A party wishing to file an application for writs must notify the trial judge and the other parties, and have the trial court fix a reasonable time (called the “return date”) within which to file the application with the Third Circuit. The return date shall not exceed 30 days from the date the ruling at issue was rendered. The ruling is not necessarily a written judgment; it may be an oral ruling. The 30-day period begins from the day of that ruling. The trial court may extend the time upon filing of a timely motion for extension of the return date.

CHAPTER TEN

Applying for Writs

10.1 INTRODUCTION

This chapter talks about the method of applying for writs, i.e., how a party goes about asking the Third Circuit to exercise its supervisory jurisdiction. The reader will notice that this Handbook goes into greater detail on writ application preparation than

it does in discussing the preparation of the record for an appeal. This is because the preparation of the record for appeal is the responsibility of the clerk of the trial court, while putting together the right papers supporting an application for writs is the responsibility of the person who is applying for writs.

10.2 WHAT THE APPLICATION INCLUDES

The original writ application shall be signed by the party filing it verifying the allegations of the application and certifying that a copy has been delivered or mailed to the trial judge and to all opposing counsel. The affidavit shall list all parties and all counsel indicating the parties each represents. The original and duplicate writ application shall have the pages of the application and attached documents and exhibits consecutively numbered and shall contain these items:

- (a) an index of all items contained in the writ application;
- (b) a concise statement of the grounds upon which the jurisdiction of the court is invoked;
- (c) a statement of the facts concerning the case;
- (d) the issues and questions of law presented for determination by the court;
- (e) assignments or specifications of errors and a memorandum in support of the application;
- (f) a copy of the judgment or ruling complained of (if it is in writing);
- (g) a copy of the judge's reasons for ruling (if it is in writing);
- (h) a copy of each pleading on which the judgment, order or ruling is based, and a copy of the pertinent court minutes (if available);
- (I) a copy of the notice of intent to seek writs and the order setting the return date and any extensions; and
- (k) if the applicant seeks expedited relief or a stay order, a separate page entitled "REQUEST FOR EXPEDITED CONSIDERATION" and indexed as such shall be included. (A Request for Expedited Consideration is sometimes called an "emergency writ," which is acted on almost immediately if the circumstances indeed warrant expedited consideration.)

In a criminal case the application shall also include a complete record of all evidence upon which the judgment is based (such as the transcript of the hearing or the trial at issue in the writ application), or an affidavit setting forth that the defendant

intelligently waives the right to cause all or any portion of the record to accompany the application.

CHAPTER ELEVEN

Decision and Rehearing

11.1 INTRODUCTION

This chapter tells about the decision, the right to ask for a rehearing in writ proceedings, and the Supreme Court's supervisory jurisdiction.

11.2 DECISION

The court will take appropriate action and notify all parties of its disposition of the application for writs. The notice will be by mail unless the circumstances require prompt notice, in which case the clerk's office of the Third Circuit may also notify all affected persons by telephone or other electronic means.

11.3 REHEARING

From a writ denial, there is no right to a rehearing. If the writ application is granted, a party may seek a rehearing from the Third Circuit.

11.3 SUPREME COURT SUPERVISORY JURISDICTION

Although, as stated earlier, a discussion of the Louisiana Supreme Court's jurisdiction is beyond the scope of this handbook, we remind the reader that the Supreme Court has unlimited supervisory jurisdiction over all lower courts including the Third Circuit. This means that the Supreme Court has supervisory jurisdiction over the Third Circuit's exercise of its own supervisory jurisdiction.

**PART III
OTHER MATTERS**

**CHAPTER TWELVE
Costs, a Caveat, and the Supreme Court's Address**

12.1 INTRODUCTION

This chapter tells about costs, warns against taking frivolous appeals, and gives the Supreme Court's address.

12.2 COSTS

A party who has been declared to occupy "pauper" status may take a devolutive appeal or apply for supervisory writs without paying costs or giving security. All others must pay costs to the Third Circuit in accordance with a schedule of costs. That schedule changes from time to time. A current schedule can be found on the Third Circuit's Web address: www.la3circuit.org.

12.3 FRIVOLOUS APPEAL

Although appeals are favored in Louisiana, an appellate court is empowered to award damages against a party who takes a frivolous appeal. An appeal is unquestionably frivolous when it is taken solely for the purpose of delay or when counsel is not sincere in the position he or she advocates.

12.4 SUPREME COURT'S ADDRESS

Clerk of Court Office
400 Royal Street, Suite 4200
New Orleans, LA 70130-8102

Telephone: 504-310-2300

Web address: www.lasc.org

SOURCES

CONSTITUTION

_____ Constitution of State of Louisiana of 1974
Article I, §19
Article V, §§ 8(B) and 10

LEGISLATION

Codes

Louisiana Code of Civil Procedure

Article 2081 *et seq.*

Article 3612

Article 3662(3)

Article 3942 *et seq.*

Article 4555

Article 4735

Article 5001 *et seq.*

Louisiana Children's Code

Article 330 *et seq.*

Louisiana Code of Criminal Procedure

Article 911 *et seq.*

Article 930.6

Louisiana Revised Statutes

Title 13, §4431 *et seq.*

Title 18, §1409

Title 23, §1310.5(B)

COURT RULES

Uniform Rules of Louisiana Courts of Appeal

Internal Rules of the Court of Appeal, Third Circuit