Third Circuit Civil Appeals: Initiating an Appeal

STEPHEN M. ORLOFSKY AND ADRIENNE C. ROGOVE, BLANK ROME LLP, WITH PRACTICAL LAW LITIGATION

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A Practice Note explaining the process for starting a civil appeal to the US Court of Appeals for the Third Circuit from a federal district court's order or judgment. This Note covers preliminary considerations, taking an appeal as of right, petitioning for permission to appeal, cost bonds, and stays pending appeal.

This Note explains how to appeal a civil order or judgment to the US Court of Appeals for the Third Circuit and covers:

- Preliminary issues attorneys should consider before an appeal.
- Taking an appeal as of right.
- Petitioning for permission to appeal.
- Posting a bond for costs.
- Seeking a stay pending appeal.

PRELIMINARY CONSIDERATIONS

Before an appeal begins, attorneys should:

- Review the applicable procedural rules (see Review the Applicable Procedural Rules).
- Obtain or renew admission to practice in the Third Circuit (see Third Circuit Bar Admission).
- Register for the Third Circuit's electronic filing system (see Registering for Third Circuit CM/ECF).
- Ensure that their client has a right to appeal (see Who May Appeal).

REVIEW THE APPLICABLE PROCEDURAL RULES

Attorneys always should review the relevant sections of the following rules before drafting, serving, or filing any document relating to an appeal in federal court:

- The Federal Rules of Appellate Procedure (FRAP).
- The appellate court's local rules.
- The appellate court's administrative, general, or standing orders, if any.
- The appellate court's case management/electronic case filing (CM/ECF) rules and instructions.

Although the FRAP provide the basic formatting, substantive, filing, and service requirements, the individual court's local rules and CM/ECF instructions may supplement the FRAP or impose different requirements.

The Third Circuit posts the FRAP, its local rules (which include its CM/ECF rules), and its standing orders on its website.

Attorneys also should review:

- The Federal Rules of Civil Procedure (FRCP) and the district court's local rules. Parties must file certain documents in the district court, such as the notice of appeal and any motion to extend the time to appeal (see Appeals as of Right). Those documents must comply with both the appellate and district court rules.
- The federal appellate jurisdiction statutes. These provisions govern which federal district court orders or judgments a party may appeal and to which federal appellate court (28 U.S.C. §§ 1251-1260 and 1291-1296).

The Third Circuit has jurisdiction over most appeals from the US District Courts for the following districts:

- District of Delaware.
- District of New Jersey.
- Eastern District of Pennsylvania.
- Middle District of Pennsylvania.
- Western District of Pennsylvania.
- District of the Virgin Islands.

(28 U.S.C. §§ 41, 87, 110, 118, and 1294; 48 U.S.C. § 1613a(c).)

Other federal appellate courts hear appeals from these district courts in patent cases and a few unusual types of cases, such as those heard by a three-judge district court and certain actions against the US (28 U.S.C. §§ 1253, 1295, and 2284).

THIRD CIRCUIT BAR ADMISSION

Each attorney appearing for a party or amicus curiae must be admitted to practice in the Third Circuit (3d Cir. L.A.R. 46.1(a)).

To qualify for admission, an attorney must be:

- Of good moral and professional character.
- A member in good standing of the bar of:
  - the highest court of a state;
  - the US Supreme Court;
  - another US circuit court; or
  - a US district court.

(FRAP 46(a).)

Attorneys working for a federal agency may appear before the Third Circuit without obtaining admission to practice (see 3d Cir. Attorney Admissions - Frequently Asked Questions). Otherwise, an attorney not already admitted in the Third Circuit must apply for admission when entering an appearance or filing a motion, brief, or other document with the court (3d Cir. L.A.R. 46.1(b)).

Attorneys may move for admission on a written or oral motion, but typically do so in writing (3d Cir. L.A.R. 46.1(d)).

To obtain admission to practice in the Third Circuit, an attorney must submit:

- A completed attorney admission application (which must be notarized if the attorney is moving on a written motion).
- The $221.00 attorney admission fee, payable by check or money order to Clerk, US Court of Appeal. The court does not accept credit card payments.
- An original certificate of good standing issued within the previous year demonstrating admission to a court described in FRAP 46(a)(1).
- A completed and signed Attorney's Registration Card, available with the admission application.

(3d Cir. Attorney Admissions Instructions.) Attorneys may submit a paper application to the Third Circuit Clerk's office.

The applicant must be sponsored by an attorney already admitted to practice before the Third Circuit. An attorney without a sponsor can ask that one of the Third Circuit Clerk's Office attorneys act as their sponsor. (3d Cir. Attorney Admissions Instructions.)

An attorney does not need to appear in court in connection with the application.

Attorneys must maintain "active" status to practice before the Third Circuit, by either:

- Entering an appearance within five years of their last appearance.
- Submitting a renewal form within five years of their last appearance.

(3d Cir. Attorney Disciplinary Enforcement R. 17; 3d Cir. Attorney Admission Renewal/Adjustment of Status Form.) Counsel may obtain the renewal form on the Court's website. Attorneys may submit the renewal form by email or in paper format to the Clerk's Office.

The Third Circuit generally does not allow attorneys to be admitted pro hac vice, except for attorneys appointed by the Court to represent a litigant *pro bono* (3d Cir. Attorney Admissions - Frequently Asked Questions).

REGISTERING FOR THIRD CIRCUIT CM/ECF

The Third Circuit requires all attorneys appearing before it to register for CM/ECF (3d Cir. L.A.R. 113.2(a)). Attorneys use CM/ECF to serve and file most appellate documents.

An attorney registers for Third Circuit CM/ECF by completing the online registration form at the federal Public Access to Court Electronic Records (PACER) Appellate Courts website.

An attorney must register for Third Circuit CM/ECF even if the attorney is already registered for PACER or another circuit's CM/ECF. Registration for another circuit's CM/ECF does not permit service and filing in the Third Circuit. An attorney with electronic filing status with another circuit should go to the "Manage My Appellate Filer Account" page and select the "register for additional courts" option. PACER registration enables a user to view documents on federal courts' CM/ECF websites, but it does not permit service and filing.

A CM/ECF user manual, list of frequently asked questions, and summary of electronic filing requirements are available on the Third Circuit's website.

WHO MAY APPEAL

A party may not appeal or seek permission to appeal unless it is "aggrieved" by a final judgment (*United States v. Erwin*, 765 F.3d 219, 232 (3d Cir. 2014)). Ordinarily, a party is aggrieved if the judgment entered in the district court adversely affects it (*United States v. Stoerr*, 695 F.3d 271, 275-76 (3d Cir. 2012)).

A party is not aggrieved if the district court grants the ultimate relief requested by the party but does so on grounds other than those urged by the party (*In re Diet Drugs (Phentermmine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 418 F.3d 372, 378 (3d Cir. 2005)). Accordingly, a party may not appeal merely because the district court makes adverse factual findings or employs an unfavorable legal analysis. For example, if a district court order criticizes the defendant but grants its motion to dismiss the complaint, the defendant is not aggrieved and therefore may not appeal.

Although non-parties generally do not have standing to appeal, they may appeal if

- They had a stake in the outcome of the proceedings that is discernible from the record.
- They participated in the proceedings before the district court.
- The equities favor the appeal.

(*IPSCO Steel (Ala.), Inc. v. Blaine Constr. Corp.*, 371 F.3d 150, 153 (3d Cir. 2004).)

Every aggrieved party that wants relief from the Third Circuit should appeal or request permission to appeal. Failure to appeal may result in a party not receiving relief, even if another aggrieved party prevails on its appeal from the same order or judgment.

APPEALS AS OF RIGHT

In federal court, an aggrieved party has a right to appeal final orders and judgments and certain types of interlocutory (meaning non-final) orders. When taking an appeal as of right, counsel should consider:

- Whether the aggrieved party has the right to appeal (see Orders or Judgments Appealable as of Right).
- When to party take the appeal (see Time to Appeal as of Right).
- How to take the appeal (see The Notice of Appeal).

ORDERS OR JUDGMENTS APPEALABLE AS OF RIGHT

An aggrieved party generally has the right to appeal if the district court enters a final order or judgment (28 U.S.C. § 1291). A "final decision" is generally one "that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Under the "merger rule," the district court's interlocutory orders "merge" with the final judgment in the case and may be reviewed on appeal from the final order to the extent that they affect the final judgment. (*Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 244-45 (3d Cir. 2013).) An order or judgment that resolves all claims for all parties generally is final even if there is an outstanding request for attorney's fees and costs (*Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs*, 134 S. Ct. 773, 782-83 (2014)).

However, a judgment that concludes the case for only some parties or claims is not a final judgment for purposes of appeal (see *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)).

Certification of Non-Final Orders for Appeal

A party may move the district court to certify a non-final order (such as a grant of partial summary judgment) as a final judgment in a case involving multiple claims or parties (FRCP 54(b)). If the district court finds that there is "no just reason for delay" and certifies the order as a final judgment, the aggrieved party may then appeal as of right without waiting for the end of the entire case (*Elliott v. Archdiocese of New York*, 682 F.3d 213, 219 (3d Cir. 2012)).

Statutory Limits on Right to Appeal

Even if the district court enters a final judgment, a party may not appeal as of right if federal law otherwise prohibits an appeal (for example, 28 U.S.C. § 1447(d) (disallowing appeals of orders remanding cases to state court except in certain enumerated circumstances) and see *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229-30 (2007) (holding that remands based on lack of subject matter jurisdiction or a defect in the removal procedure are not appealable)).

Appealable Interlocutory Orders

An aggrieved party also has the right to appeal an interlocutory order that:

- Grants, denies, dissolves, modifies, or refuses to dissolve or modify injunctions (28 U.S.C. § 1292(a)(1)).
- Appoints a receiver or refuses to wind up a receivership (28 U.S.C. § 1292(a)(2)).
- Determines the rights and liabilities of the parties to an admiralty case (28 U.S.C. § 1292(a)(3)).
- Falls within the collateral order doctrine.

TIME TO APPEAL AS OF RIGHT

A party generally must appeal as of right either:

- Within 30 days after entry of the order or judgment from which it is appealing (FRAP 4(a)(1)(A)).
- Within 60 days after entry of the order or judgment, if any of the following is a party to the case:
  - the US;
  - a federal agency; or
  - a federal officer or employee sued in connection with the officer's official duties.
  - (FRAP 4(a)(1)(B).)

If one party timely files a notice of appeal, the deadline for any other party to file a notice of appeal is the later of:

- 14 days after the filing of the first notice of appeal.
- The end of the applicable 30- or 60-day period described above.

(FRAP 4(a)(3).)

The time limits for taking an appeal are mandatory and jurisdictional (*Witasick v. Minn. Mut. Life Ins. Co.*, 803 F.3d 184, 187 (3d Cir. 2015); see also *Bowles v. Russell*, 551 U.S. 205, 214 (2007)). Failure to comply with these time limits results in dismissal of the appeal (see *Baker v. United States*, 670 F.3d 448, 454-56 (3d Cir. 2012)). In certain limited circumstances, however, would-be appellant may move for an extension of time to appeal (see Motions to Extend the Time to Appeal).

Calculating the Time to Appeal

A party generally must file a notice of appeal within 30 or 60 days from the entry of the order or judgment being appealed from (see Time to Appeal as of Right). Entry generally occurs when the district court clerk lists the order or judgment on the district court docket (FRAP 4(a)(7)(1)). However, if FRCP 58(a) requires a separate document, entry occurs when the judgment or order is entered on the docket and the earlier of when:

- The judgment or order is set out in a separate document.
- 150 days have passed since the judgment or order was entered on the docket.

The Third Circuit takes a strict view of the "separate document" requirement (see *Witasick*, 803 F.3d at 187-89).

In calculating the time to file a notice of appeal, attorneys should consult FRCP 6 and FRAP 4 (see FRAP 1(a)(2) (when a FRAP requires a filing in district court, procedure must comply with district court practice); FRAP 4 1998 advisory committee notes (noting that FRCP 1(a)(2) requires the court to use FRCP 6 to calculate time when a motion to extend time to file a notice of appeal is filed in the district court)). Under FRCP 6(a)(1), to calculate the due date for the notice of appeal:

- Exclude the day of the event that triggers the period.
- Count every day, including intermediate Saturdays, Sundays, and legal holidays.
- Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not Saturday, Sunday, or a legal holiday.

(FRCP 6(a)(1).)

Post-Judgment Motions May Extend the Time to Appeal

Certain types of district court motions automatically extend the time to appeal, if made within the time permitted by the FRCP. Those are motions under:

- FRCP 50(b) for judgment as a matter of law (see Practice Note, Motion for Judgment as a Matter of Law: Overview (Federal) (4-586-0945)).
- FRCP 52(b) to amend findings of fact after a bench trial or to make additional findings, regardless of whether granting the motion would alter the judgment.
- FRCP 54 for attorneys' fees, but only if the district court extends the time to appeal under FRCP 58 (see Costs and Attorneys' Fees Checklist (W-002-0409)).
- FRCP 59 to alter or amend the judgment (see Practice Note, Motion to Alter or Amend a Judgment Under FRCP 59(e) (3-609-0045)).
- FRCP 59 for a new trial (see Practice Note, Motion for a New Trial: Overview (Federal) (6-597-2485)).
- FRCP 60 for relief from a judgment or order if the motion is filed within 28 days after entry of the judgment (see Practice Note, Motion for Relief from Judgment Under FRCP 60(b) (W-000-4939)).

(FRAP 4(a)(4)(A).)

If a party timely makes one of the motions listed above within the time permitted by the FRCP and FRAP 4(a)(4)(A), the time for any party to file a notice of appeal runs from entry of the order deciding the motion, rather than from entry of the original order or judgment being appealed. If the parties make more than one of these motions within the time that the FRCP allows, the time to file a notice of appeal begins to run when the district court decides the last remaining motion. (FRAP 4(a)(4)(A).)

However, a motion made outside the time set by the FRCP and FRAP 4(a)(4)(A), even with the opposing party's consent or the district court's approval, does not toll the time to appeal (FRAP 4(a)(4)(A) (2016 advisory committee notes)).

Occasionally, a party may file a notice of appeal and then another party timely files one of the motions listed in FRAP 4(a)(4)(A) within the time permitted by the applicable FRCP. When this occurs, the notice of appeal becomes effective when the district court decides the second party's motion (FRAP 4(a)(4)(B)(i)). In other words, the appeal proceeds as if the appellant filed the notice of appeal after the district court decided the motion. There is no need for the appellant to file another notice of appeal from the prior order or judgment. To appeal from the district court's decision on the motion, however, the losing party must amend the existing notice of appeal or file a new one within 30 or 60 days (as applicable) of the disposition of the motion (FRAP 4(a)(4)(B)(ii)).

For example, if the district court enters final judgment for the defendant on March 1, the plaintiff files a notice of appeal from the judgment on March 2, the plaintiff moves the district court for a new trial on March 8, and the court denies the motion for a new trial on March 29, the appeal from the judgment becomes effective on March 29. In this hypothetical, however, the plaintiff has no grounds for appeal from the March 29 order unless it amends its existing notice of appeal or files a second one within 30 or 60 days of March 29.

Amended Notices of Appeal

Orders or judgments that affect prior orders or judgments may cause uncertainty about the need for a new or amended notice of appeal. Attorneys should be cautious and amend the existing notice of appeal to encompass later or amended orders or judgments. (FRAP 4(a)(4) (1993 advisory committee notes).) A new or amended notice of appeal is subject to the same time limits as any other notice of appeal except that the time is measured from entry of the order disposing of the post-judgment motion (FRAP 4(a)(4)(B)(ii)).

Motions to Extend the Time to Appeal

A party unable to appeal within the applicable time limit may under limited circumstances move for an extension of time to appeal (FRAP 4(a)(5)(A)).

A party must make a motion to extend the time to appeal in the district court, not the Third Circuit (FRAP 4(a)(5)(A)).

A party may move for an extension at any time up to 30 days after the expiration of the time otherwise available to appeal as of right (FRAP 4(a)(5)(A)(i)). Regardless of whether the party files the motion before or during the 30-day period, the would-be appellant must demonstrate "excusable neglect or good cause" for not timely appealing (FRAP 4(a)(5)(A)(ii); and see *In re Diet Drugs*, 401 F.3d at 153).

Excusable neglect is a strict standard that courts find only in extraordinary cases. Relevant factors include:

- The danger of prejudice to the non-moving party.
- The length of the delay.
- The reason for the delay.

(*Pioneer Investment Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993); and see *In re Diet Drugs*, 401 F.3d at 153-54.)

When moving for an extension of time, counsel should demonstrate that:

- Counsel acted quickly to remedy any mistake in failing to timely appeal.
- The delay would not prejudice the proceedings.

(See *In re Diet Drugs*, 401 F.3d at 152-54.)

Under the FRAP, attorneys may move to extend the time to appeal without serving the opposing party if the time to appeal as of right has not yet expired (FRAP 4(a)(5)(B)). However, attorneys must check the district court's local rules and the district judge's individual practice rules to determine whether they permit parties to make this kind of motion ex parte.

Attorneys may want to serve the opposing party even where service is optional. Federal courts generally are not fond of motions made without notice. Obtaining a more favorable reception from the court may well outweigh any harm from giving the opposing party a chance to respond to the motion.

After the time to appeal expires, attorneys must serve the motion on the opposing party or the district court cannot consider the motion (FRAP 4(a)(5)(B)).

The district court may extend the time to appeal up to the later of:

- 30 days after the time otherwise available to appeal.
- 14 days after entry of the order granting the motion.

(FRAP 4(a)(5)(C).) For example, if the district court enters judgment on March 1, the time to appeal as of right normally expires on March 31. The would-be appellant must move for an extension on or before April 30. The district court may then grant an extension to the later of April 30 (30 days after the time otherwise available) or 14 days after it grants the motion. Because the court may grant a shorter extension, attorneys should be prepared to promptly appeal after making the extension motion.

The 30-day limit for an extension of time to file a notice of appeal is a non-jurisdictional rule that the parties can waive or forfeit (see *Hamer v. Neighborhood Hous. Servs. of Chic.*, 138 S. Ct. 13 (2017)). Still, attorneys always should ensure that a court-ordered extension of time complies with the FRAP's time limits, as merely complying with a court-ordered extension may not ensure appellate review if the extension exceeds 30 days (or 14 days after entry of the order deciding the motion) (see *Hamer*, 138 S. Ct. at 22 (declining to address whether a party's failure to object to an overlong time extension, standing alone, can forfeit the FRAP's time limits)).

Motions to Reopen the Time to Appeal

A party that did not receive timely notice of the district court's judgment may, under certain circumstances, move to reopen the time to appeal. A party must move to reopen the time to appeal in the district court, not the Third Circuit (FRAP 4(a)(6)).

The district court may grant a motion to reopen only if:

- The movant did not receive notice of the district court's entry of the judgment or order at issue within 21 days of that entry.
- The motion to reopen the time to file an appeal is made within the earlier of:
  - 180 days after entry of the judgment or order; or
  - 14 days after the movant receives notice of the entry.
- Granting the motion does not prejudice any other party.

(FRAP 4(a)(6).) The rules governing motions to reopen the time to appeal are jurisdictional and the Third Circuit cannot alter their requirements (*Baker v. United States*, 670 F.3d 448, 454-56 (3d Cir. 2012)). Even if all of the rule's requirements are satisfied, the district court retains discretion to grant or withhold relief (*Bazuaye v. Chertoff*, 230 F. App'x 136, 137 (3d Cir. 2007)).

If the district court grants the motion, it may reopen the time to appeal for 14 days after entry of the order granting the motion (FRAP 4(a)(6)).

THE NOTICE OF APPEAL

A party begins an appeal as of right by filing a notice of appeal with the district court (FRAP 3(a)(1)).

Contents of the Notice of Appeal

The body of the notice of appeal must specify:

- The appellant or appellants.
- The judgment, order, or portion of a judgment or order from which the appellant is appealing.
- The court hearing the appeal (here, US Court of Appeals for the Third Circuit).

(FRAP 3(c)(1).) Because counsel must file the notice in the district court, the notice also must contain everything required by the FRCP and the district court's local rules, including:

- A proper caption (FRCP 10(a)). The caption should include:
  - the name of the district court (for example, US District Court for the District of New Jersey);
  - the district court's docket number;
  - the parties, identified by their district court designations (either "Plaintiff" or "Defendant"); and
  - the title "Notice of Appeal."
- The appellant's attorney's signature (FRCP 11(a)). The signature block should include the attorney's:
  - office address;
  - email address;
  - telephone number; and
  - any other information the local rules require.

The body of the notice of appeal should not:

- Contain any legal or factual argument.
- Name the appellees unless doing so is necessary to identify the judgment or order form which the appellant appeals. Naming only some of the appellees may prevent an appeal against the omitted parties.

For a sample notice of appeal and drafting tips, see Standard Document, Notice of Appeal (Federal) (8-519-3198).

Counsel should attach a copy of the order or judgment they are appealing to the notice of appeal. Counsel can do this by linking to the judgment or order when filing the notice on CM/ECF (see Filing and Serving the Notice of Appeal). Among other things, this clarifies which order or judgment the party is appealing.

Filing and Serving the Notice of Appeal

The appellant's counsel must file the notice of appeal in the district court from which the appeal is taken, not in the Third Circuit (FRAP 3(a)(1)). Before filing the notice of appeal, counsel should review the district court's local rules and CM/ECF rules to determine the proper filing procedure.

If the appellant mistakenly files the notice of appeal with the Third Circuit, the Third Circuit clerk must forward it to the district court. The district court deems the notice of appeal filed as of the date it was received by the Third Circuit (FRAP 4(d)).

All six district courts in the Third Circuit permit attorneys to file a notice of appeal using CM/ECF. Attorneys therefore should file the notice of appeal using the district court's CM/ECF system.

When filing by CM/ECF, attorneys can electronically link the notice of appeal to the judgment or order appealed from, rather than including a copy of the judgment or order in the PDF file. Once the filing is complete, CM/ECF automatically serves all other parties. An attorney should still file a certificate of service indicating that service is being made via CM/ECF (FRAP 25; 3d Cir. L.A.R. 113.4). For more

information on electronically filing a notice of appeal, see Practice Note, E-Filing in Federal District Court: Special Filing Issues: Notice of Appeal (6-521-5950).

If filing by CM/ECF is problematic, attorneys should determine whether paper filing is permissible by either:

- Consulting the district court's local rules and CM/ECF procedures.
- Contacting the district court's appeals clerk.

Where paper filing is available, the appellant's counsel delivers paper copies of the notice of appeal to the district court clerk (FRAP 3(a)(1)). The district court clerk must receive the notice of appeal by the applicable deadline. It is not enough for the appellant to place the notice of appeal in the mail before the deadline, unless the appellant is an inmate confined to an institution (FRAP 4(c) and 25(a)(2)(A).)

Attorneys must file enough copies of the notice of appeal for the district court to:

- Retain a copy for its own files.
- Provide a copy to the Third Circuit.
- Serve a copy on each of the other parties in the action.

(FRAP 3(a)(1) and (d).)

The appellant's counsel does not need to serve paper copies of the notice of appeal. The district court clerk serves the notice of appeal on the other parties. (FRAP 3(d).) Still, it is good practice for attorneys to send courtesy copies to the other parties.

After receiving the notice of appeal, the district court clerk forwards copies of the notice of appeal, the district court docket sheet, and any docket entries later than the notice of appeal to the Third Circuit clerk, whether the appellant uses paper or electronic filing (FRAP 3(d)).

Procedure When Multiple Parties Appeal

A single notice of appeal may list multiple parties as appellants, provided that their interests do not make it impracticable for them to litigate jointly. Parties appealing jointly proceed as a single appellant, instead of separately completing each step of the appellate process (FRAP 3(b)). For example, parties appealing jointly file a single brief and appendix instead of one brief and appendix per party (3d Cir. L.A.R. 3.2). Whether this is beneficial depends on the particulars of a given case.

Multiple parties entitled to appeal a single order or judgment alternatively may each file their own notice of appeal. In that event, each party separately completes each step of the appellate process, including paying the required filing fee (see Paying the Filing Fee). The Third Circuit may, however, join or consolidate the appeals (FRAP 3(b)).

Paying the Filing Fee

The appellant's counsel must pay a $505 filing fee when filing the notice of appeal (FRAP 3(e) and 3d Cir. Fee Schedule). Counsel should promptly pay the fee in the manner directed by the district court clerk. District courts typically accept payment by money order or certified check. Some district courts also accept cash, credit cards, law firm checks, or personal checks. If a party fails to pay the docketing fee within 14 days after filing of the notice of appeal, the Third Circuit clerk may dismiss the appeal (3d Cir. L.A.R. 3.5(a)). Multiple appellants filing a joint notice of appeal pay a single filing fee (3d Cir. L.A.R. 3.2). Multiple appellants filing individual notices of appeal each must each pay the filing fee. A cross-appellant also must pay the filing fee. (FRAP 3(e).)

APPEALS BY PERMISSION

Normally only final orders and judgments and certain specific interlocutory orders are appealable as of right (see Appeals as of Right). However, a party may obtain permission to appeal an otherwise non-appealable order by filing with the Third Circuit a petition for permission to appeal, sometimes referred to as a motion for leave to appeal. Counsel should consider:

- The types of district court orders or judgments a party may appeal with permission (see Orders Appealable by Permission).
- The time to petition for permission to appeal (see Time to Request Permission to Appeal).
- How to petition for permission to appeal (see Petitioning for Permission to Appeal).
- Responding to a petition (see Responding to the Petition for Permission to Appeal).
- The court's disposition of a petition (see Disposition of the Petition for Permission to Appeal).

ORDERS APPEALABLE BY PERMISSION

Federal law expressly gives parties the right to seek permission to immediately appeal certain interlocutory orders, including orders granting or denying:

- Class-action certification under FRCP 23 (FRCP 23(f) and see Practice Note, Appealing a Class Certification Decision Under FRCP 23(f) (W-001-1093) and Standard Document, Petition for Permission to Appeal a Class Certification Decision Under FRCP 23(f) (W-001-4370)).
- A motion to remand to state court a class action removed under the Class Action Fairness Act of 2005 (CAFA) (28 U.S.C. § 1453(c)(1) and see Practice Note, Class Actions: Appeals: Remand Orders (W-000-6908)).

If no statute or rule authorizes a particular interlocutory appeal, a party must seek permission to appeal under 28 U.S.C. § 1292(b), which allows a district court to certify an order for interlocutory appeal where both:

- The order involves a controlling question of law as to which there is substantial ground for difference of opinion.
- An immediate appeal from the order may materially advance the ultimate termination of the litigation.

A party seeking review under Section 1292(b) may preemptively ask the district court to certify an adverse decision for interlocutory appeal in its original motion papers. Alternatively, the district court may certify the order for interlocutory appeal sua sponte.

If the district court's order does not include a certification to seek permission to appeal under Section 1292(b), the aggrieved party may move the district court to amend its order to include the required language (FRAP 5(a)(3)).

Once the district court certifies an order for interlocutory appeal, the aggrieved party may petition the Third Circuit for permission to appeal within ten days after the order's entry. Federal appellate courts rarely grant permission to take interlocutory appeals.

TIME TO REQUEST PERMISSION TO APPEAL

A party must file its petition for permission to appeal within the time set by the statute or rule authorizing the appeal (FRAP 5(a)(2)). For example, a party must file a petition for permission to appeal from an order:

- Granting or denying class-action certification within 14 days after the order's entry (FRCP 23(f)).
- Granting or denying a CAFA remand motion within ten days after the order's entry (28 U.S.C. § 1453(c)(1)).
- Under Section 1292(b) within ten days after the order's entry (28 U.S.C. § 1292(b)).

If the applicable statute or rule does not establish a deadline, a party may file its petition within the time for filing a notice of appeal had the order been appealable as of right (FRAP 5(a)(2) and see Time to Appeal as of Right).

If a district court amends an order to add language necessary for a permissive appeal, the time to request permission to appeal runs from the date of the amendment rather than from the date of the original order (FRAP 5(a)(3)). For example, if a district court denies a defendant's motion to dismiss the complaint on April 1 and on April 15 amends the order to add language required for an appeal under Section 1292(b), the defendant has until April 25 to petition the Third Circuit for permission to appeal.

The Third Circuit cannot enlarge the time to petition for permission to appeal (FRAP 26(b)(1)). When calculating the time to request permission to appeal, attorneys should consult FRCP 6(a) (FRAP 1(a)(2) and see Calculating the Time to Appeal).

PETITIONING FOR PERMISSION TO APPEAL

A party requests the Third Circuit's permission to appeal by serving and filing a petition with the Third Circuit.

Drafting the Petition for Permission to Appeal

A petition for permission to appeal to the Third Circuit must contain:

- A corporate affiliate/financial interest disclosure statement, if the movant is a non-governmental corporate party (available on the court's website).
- The relevant facts and procedural history.
- The questions that would be presented in the interlocutory appeal.
- The relief sought (permission to take an interlocutory appeal).
- The argument for granting permission to appeal, including:
  - the statute or rule that authorizes this interlocutory appeal; and
  - the reason the Third Circuit should consider the question or questions presented now, rather than after a final judgment.
- A signature.
- A certificate of compliance with the type-volume limitation of FRAP 5(c).
- A copy of the order, decree, or judgment from which the petitioner seeks to appeal, together with any related opinion or memorandum.
- A copy of any separate order stating that the district court has granted permission to appeal or finding that the conditions for an interlocutory appeal are satisfied.
- Proof of service.

(FRAP 5(b)(1), (c), 26.1(a), 32(a), 32(c)(2), 32(d), 32(g)(1); 3d Cir. L.A.R. 26.1.1.) Some attorneys also include:

- A cover.
- A table of contents.
- A table of authorities.
- A preliminary statement.

If the petitioner's counsel uses a cover, it must be white. In the absence of a cover, the petitioner's counsel must include a case caption on the first page of the petition. (FRAP 32(c)(2)(A).) The caption should be the same as that used in the district court except that it should:

- Reference the Third Circuit instead of the district court.
- Refer to the party seeking to appeal as "Petitioner" and to the opposing party as "Respondent." The caption also may combine the parties' designations in the district and appellate courts (for example, "Plaintiff-Petitioner").
- Omit the docket number, because the Third Circuit will not yet have opened a file for the appeal. Counsel instead typically include a placeholder containing the last two digits of the year, followed by a blank for the clerk to provide the docket number on filing. For example, for a petition filed in 2018, the caption may include the number "18-_____."

Unless counsel obtains permission from the Court, the petition may not exceed:

- 5,200 words if the petitioner prepared it on a computer.
- 20 pages if the petitioner prepared it on a typewriter or by hand.

(FRAP 5(c).) The word or page limits do not include:

- The district court orders attached to the petition under FRAP 5(b)(1)(E).
- A cover page.
- The corporate affiliate/financial interest disclosure statement.
- Any table of contents.
- Any table of authorities.
- The signature block.
- The certificate of compliance with the type-volume limitation of FRAP 5(c).
- Proof of service.

(FRAP 5(c) and 32(f).) A party wishing to file an oversize petition must move the Third Circuit for permission (FRAP 5(c)).

Counsel must prepare the petition on 8.5" by 11" pages. Margins must be at least one inch on the left and right sides of the page, and at least three-quarters of an inch on the top and bottom of each page. Only page numbers may appear in the margins.

Attorneys must use:

- Double-spaced text, except for headings, footnotes, and quotations more than two lines long, which may be single-spaced. (FRAP 5(c), 32(a)(4), 32(c)(2).)
- Either a 14-point proportionally spaced font with serifs (for example, Times New Roman) or a monospaced font with no more than 10.5 characters per inch (for example, 12-point Courier) (FRAP 5(c), 32(a)(5), 32(c)(2)).
- Black type in a plain roman style, although italics and boldface may be used for emphasis.
- Italicized or underlined case names (FRAP 5(c), 32(a)(6), 32(c)(2)).

Unlike most other documents filed in the Third Circuit, counsel must serve and file paper copies of the petition (see Serving and Filing the Petition for Permission to Appeal). Paper copies of the petition must be:

- Printed single-sided.
- Bound along the left margin in a way that:
  - is secure;
  - does not obscure the text; and
  - permits the petition to lie reasonably flat when open. Counsel may use velo or spiral binding, but may not use backbones or spines. Any metal fasteners or staples must have smooth edges and be covered.

(FRAP 32(a)(1), (3), (4); 3d Cir. L.A.R. 32.1.)

For a sample petition for permission to appeal under FRCP 23(f), see Standard Document, Petition for Permission to Appeal a Class Certification Decision Under FRCP 23(f) (W-001-4370).

Serving and Filing the Petition for Permission to Appeal

A petition for permission to appeal under FRAP 5 is a case-initiating document and is therefore exempt from the electronic filing requirement. Counsel must instead file the petition in paper format with the Third Circuit Clerk, along with a certificate of service (FRAP 25(a), 25(d); 3d Cir. L.A.R. 113.1).

Counsel also must serve a copy of the petition on all parties. Acceptable methods of paper service on other parties include:

- Personal delivery.
- First-class mail.
- Third-party commercial carrier for delivery within three days.

(FRAP 25(c)(1).)

After receiving the petition, the Third Circuit clerk's office dockets the petition and sends a case opening letter to counsel to all parties. The petitioner's counsel must file an Appearance Form within 14 days after receiving the court's case opening letter.

A petitioner is not required to pay the $505 filing fee unless the court grants the petition.

RESPONDING TO THE PETITION FOR PERMISSION TO APPEAL

Within ten days after the petitioner serves the petition, any other party may file and serve an answer or cross-petition (FRAP 5(b)(2)). A party receiving service by US mail or commercial carrier may add three days to the time otherwise available to respond. Parties receiving a document by electronic service may not add three days to a response time calculated from the date of service (FRAP 26(c)).

A cross-petition should have the same contents as a petition. The rules do not specify an answer's contents other than a:

- A corporate affiliate/financial interest disclosure statement, if the answering party is a non-governmental corporate party (available on the Court's website).
- A certificate that the document complies with the type-volume limitation of FRAP 5(c).
- A signature.
- Proof of service.

(FRAP 5(c), 25(d), 26.1(a), 32(c)(2), 32(d), 32(g)(1); 3d Cir. L.A.R. 26.1.1.) The respondent's counsel may also want to include:

- A cover.
- A table of contents.
- A table of authorities.
- A preliminary statement.
- A statement of facts.
- An argument.

The respondent's counsel should explain in an answer why the court should decline to hear the interlocutory appeal. For example, the answer may explain why the statutes or rules do not actually permit the appeal or why the Third Circuit should wait until the end of the case to consider the question presented. An answer generally should not argue the merits of the possible interlocutory appeal unless the reason for the court to decline the appeal is that the US Supreme Court or the Third Circuit has already resolved the question presented.

Counsel should format the response in the same manner as a petition and comply with the same length limits (see Drafting the Petition for Permission to Appeal).

The Third Circuit may docket the petition before the response is due. If so, the respondent's counsel serves and files an answer or cross-petition by CM/ECF (3d Cir. L.A.R. 113.1). Attorneys should serve any party exempt from CM/ECF by paper means and provide proof of service (FRAP 25(c), 25(d)). If the respondent's counsel has not received a docketing notice from the Third Circuit by the day before the response deadline, they should contact the clerk's office to have the petition docketed or obtain alternate filing instructions.

The respondent's counsel also must file an Appearance Form on the same day it files the petition.

DISPOSITION OF THE PETITION FOR PERMISSION TO APPEAL

The Third Circuit normally considers a petition and any answer or cross-petition without oral argument (FRAP 5(b)(3)).

If the Third Circuit grants the petition, the petitioner (now the appellant) must pay the district court clerk the $505 appellate fee within 14 days after entry of the Third Circuit's order (FRAP 5(d)(1)(A) and 3d Cir. Fee Schedule). The petitioner must also file a cost bond within the same amount of time if required (FRAP 5(d)(1)(B) and see Posting a Bond for Costs). Attorneys should consult the district

court's local rules or the district court appellate clerk about how to pay the fee. The same is true for a cross-petition.

A successful petitioner does not need to file a notice of appeal. Any time periods that would be calculated from the notice of appeal in an appeal as of right are calculated instead from the order granting permission to appeal (FRAP 5(d)(2)).

POSTING A BOND FOR COSTS

Appellants generally need not post a bond for costs on appeal, but a district court may require it in a particular case (FRAP 7).

Although courts rarely require a cost bond, an appellee may move the district court for an order of this type. In deciding these motions, district courts may look at either FRAP 39(e) or the statute underlying the plaintiff's claim (see *In re Am. Inv'rs Life Ins. Co. Annuity Marketing & Sales Practices Litig.*, 695 F. Supp. 2d 157, 164 (E.D. Pa. 2010) (noting that there was no binding authority for the court to determine the "costs of appeal" and looking at both sources to determine that attorneys' fees are not to be included in a cost bond)). The costs covered by a bond under FRAP 7 are the costs of litigating the appeal, not those incurred in litigating in the district court.

If the court directs the posting of a cost bond, it may order any form and amount of security that it reasonably deems necessary to ensure the payment of costs on appeal (FRAP 7). An appellant generally may post a bond by cash or by using a surety. A surety usually must be on the US Treasury Department's Listing of Approved Sureties.

SEEKING A STAY PENDING APPEAL

Appealing a district court's judgment or order to the Third Circuit **does not** automatically stay the enforcement or execution of the judgment or order. To protect itself from an adverse order or judgment while appealing, an appellant instead ordinarily must request a stay by motion.

A party should first move for a stay pending appeal in the district court (FRAP 8(a)(1); FRCP 62(c)).

A party should move the Third Circuit for a stay only if the district court denies the stay or if unusual circumstances make a motion to the district court impracticable (FRAP 8(a)(2)(A)). A motion for a stay pending appeal in the Third Circuit must show either:

- That the movant sought a stay from the district court, that the district court denied the motion, and the district court's reasons for denying the motion.
- The reasons why moving first in the district court is impracticable.

(FRAP 8(a)(2)(A).)

A motion made to the Third Circuit also must include:

- Legal argument supporting the grant of a stay and the facts on which the appellant relies.
- Affidavits or other sworn statements supporting the facts subject to dispute.
- Relevant parts of the record, including any district court orders denying a stay.
- A copy of the district court's judgment, decision, or order and any accompanying opinion.

(FRAP 8(a)(2)(B); 3d Cir. L.A.R. 8.1.)

To obtain a stay, the appellant must show:

- A likelihood of success on the merits.
- That the appellant will suffer irreparable harm if the court denies a stay.
- That granting the stay will not substantially injure the non-moving party.
- That the public interest favors the court granting a stay.

(See *United States v. Cooper Health Sys.*, 958 F. Supp. 2d 564, 569 (D.N.J. 2013); *Am. Express Travel Related Servs. Co., Inc. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 622 (D.N.J. 2010).)

A Third Circuit panel typically considers a motion for a stay, but a party may direct a motion to a single judge in exceptional circumstances warranting expedited consideration (FRAP 8(a)(2)(D); 3d Cir. L.A.R. 8.2). The Third Circuit may condition relief on the posting of a bond or other security in the district court (FRAP 8(a)(2)(E)).

Alternatively, an appellant may post a *supersedeas* bond to stay a judgment or order pending appeal if the judgment or order does not direct an accounting in a patent infringement case or relate to an action for an injunction or receivership (FRCP 62(d)). An appellant must move the district court or Third Circuit to approve the *supersedeas* bond before the stay will be entered (FRAP 8(a)(1)(B), 8(a)(2)). If the appellant makes the motion before the Third Circuit, the appellant must satisfy the requirements under FRAP 8(a) and 3d Cir. L.A.R. 8.1 for a motion seeking a stay. The stay takes effect when the court approves the bond (FRCP 62(d)).

The rule does not specify the amount of the *supersedeas* bond, but a former rule required that the bond should "satisfy the judgment in full, plus interest, costs, and damages for delay" and courts have looked to this previous rule for guidance (see, for example, *United States v. Kurtz*, 528 F. Supp. 1113, 1114 (E.D. Pa. 1981)). However, the court may waive the *supersedeas* bond requirement if there are "extraordinary circumstances" and an alternative means of securing the judgment creditor's interest (see, for example, *Bank of Nova Scotia v. Pemberton*, 964 F. Supp. 189, 192 (D.V.I. 1997)).

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