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U.S. Court of Appeals for the Second Circuit Appendices: Responsibilities of the Appellant

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There are a myriad of appendix responsibilities within the Federal Rules of Appellate Procedure ("FRAP") and the Second Circuit Local Rules, many which are time-sensitive, and the appellant is responsible for rule compliance. FRAP 30 sets forth the requirements for appendices to briefs and the appellant is responsible for filing an appendix that comports with both FRAP and the Second Circuit Local Rules. A Second Circuit appendix must contain, at a minimum, the District Court docket sheet and the relevant pleadings, charge, findings or opinion, as well as the Notice of Appeal and subject Order, Decision or Judgment. The appendix may also contain any other parts of the record to which the parties wish to draw the Court's attention.

"Joint" appendix and joint efforts across-the-board

For most appeals, it is anticipated that the appellant will file a "joint" appendix. The appellant is expected to consult with the appellee regarding its contents.[1] This is most easily

1. Local Rule 30.1(g) was amended February 1, 2014 to allow an appellee to submit, as of right, an appellee's supplemental appendix where the appellant did not file a joint appendix in compliance with FRAP 30.

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accomplished by sending a "designation letter" to the appellee for their review. Said letter should contain a list of the items the appellant intends to include in the joint appendix and gives the appellee a set timeframe in which to respond with additional designations; FRAP 30(b)(1) allows for a 14-day time period. In most instances, the appellant must include those documents designated by the appellee. If the appellant believes that the appellee is designating documents in an unreasonable or vexatious manner and feels that said documents are not necessary for the joint appendix, they must notify the appellee and may request payment for the cost of including said material. The Court disfavors motion practice concerning the parties' positions with respect to the contents of the joint appendix.

Joint or not, the appendix is limited to record material

An important factor to keep in mind is that the appendix, whether joint or not, is limited to record material, *i.e.*, material that was docketed in the District Court below and appears on the docket sheet for the case in question. The parties should neither designate nor include

non-record material in the appendix. If a document was improperly excluded from the District Court docket, the party or parties should seek to cure such a defect before including the subject document in the appendix. Similarly, material docketed in a related case cannot be included in the appendix unless the cases have been consolidated.

No longer joint when it gets to the cost

The appellant is responsible for the cost of preparing and filing the appendix pursuant to FRAP 30(b)(2) unless the parties agree otherwise, or, as described above, the appellant believes that the appellee is designating unnecessary documents in an unreasonable or vexatious manner. The cost of preparing and filing the appendix is a taxable cost. Counsel should note that, pursuant to FRAP 30(b)(2) and Local Rule 30.1(f), the court may "impose sanctions against an attorney who unreasonably and vexatiously increases litigation costs by including unnecessary material in the appendix."

Filing under seal

Occasionally, parties need to file their appendix under seal. If so, the appellant should contact the case manager to ascertain whether a motion for leave to file under seal is required. If the District Court issued a Protective or Sealing Order, or the like, which specifically addresses the document(s) in question, the Second Circuit will likely allow the party to file under seal as of right. If the District Court did not issue a Protective or Sealing Order or if said Order is not specific with respect to the document(s) in question, the Second Circuit will likely require a motion for leave to file under seal. Pursuant to Local Rule 25.1(j)(2) [as amended February 1, 2014], within seven days of filing sealed documents, a party must electronically file a redacted version of said sealed document(s).

Filing a deferred appendix

If the parties stipulate or the Court on motion directs, the parties may file a deferred appendix pursuant to FRAP 30(c)

and Local Rule 30.1(c) instead of filing the appendix with the opening briefs. When the parties use a deferred appendix in the Second Circuit, they submit two sets of briefs: proof briefs that are devoid of appendix citations and final form briefs which have been updated to cite to the paginated deferred appendix. Proof briefs are filed according to the briefing schedule or the applicable rules. The deferred appendix is due 21 days after the last appellee's brief is served and the final form briefs are due 14 days thereafter. Although not used frequently in the Second Circuit, a deferred appendix can be a good option where the parties are unsure of the precise issues that will be raised on appeal or where the District Court record is voluminous. After proof briefing is completed, only those pages cited by the parties are compiled and paginated sequentially to form the deferred appendix. This may ultimately result in a smaller, more focused appendix for filing.

Filing a special appendix

A somewhat unique filing in the Second Circuit is the special appendix. The appellant is required to prepare and file a special appendix if the joint appendix is larger than 300 pages. Pursuant to Local Rule 32.1(c), the special appendix must contain the Orders, Opinions and Judgments being appealed and the text of any significant rule of law. The special appendix may be added as an addendum to the appellant's opening brief or it may be a separately bound volume so titled.

Counsel should endeavor to comply with both FRAP and Local Rules when preparing an appendix in the Second Circuit.

New York State Courts Electronic Filing: How a Recent Administrative Order Affects Appellate Filings

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Several years ago, the New York State Unified Court System established the NYS Courts Electronic Filing "NYSCEF" program to permit the filing of legal papers by electronic means with the county clerk and the courts in certain types of cases in designated venues, as well as electronic service of papers in those cases. Recently, an Administrative Order of the Chief Administrative Judge of the Courts was issued expanding the types of cases in various courts that are required to be filed electronically, as well as those which may voluntarily be filed electronically. *See* AO/64/14. (Link is available in the electronic version of this article. To view, visit Counsel Press' Blog.) Certain kinds of cases in the New York Supreme Court in Bronx, Erie, Essex, Kings, Nassau, New York, Onondaga, Queens, Rockland, Suffolk and Westchester counties fall in the mandatory e-filing category. Various Surrogate's Court proceedings in Cayuga, Chautauqua, Erie, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates counties also require e-filing. The list of counties, courts and

types of cases that allow for consensual/voluntary e-filing is too voluminous to list in this brief article. Practitioners should be sure to review the Administrative Order to see if your case falls within either category.

So, what does all this e-filing in the lower courts mean for the appellate practitioner?

Simply put, if your lower court case was e-filed, any Notice of Appeal from an order or judgment in such a case must be filed online through the NYSCEF system.[1] Documents that must accompany the Notice of Appeal must also be e-filed. For example, a Request for Appellate Division Intervention (RADI) form, as required by the Appellate Division, Second Department or a Pre-Argument Statement, as required by the Appellate Division, First Department, as well as a copy of the order/judgment appealed from. These documents must be uploaded as a single text-searchable PDF file. Furthermore, the $65 filing fee must be paid online. Hard copies do not have to be filed with the county clerk's office in most counties (parties should verify the individual court's rules).

Service of these documents, however, may or may not be effectuated electronically, depending upon which court you are appealing from. For example, in New York County, once a Notice of Appeal and related documents are e-filed, the other participating parties to the case will be served via NYSCEF. On the other hand, e-filed cases coming out of Kings County require service of hard copies. Proof of the hard copy service upon all necessary parties must be filed electronically.

The lesson here is that e-filing is here to stay, and the rules are constantly evolving. If your case is e-filed, you must research how to go about initiating an appeal.

1. *Pro se* parties or attorneys, who have opted out of the NYSCEF system, need not e-file their Notice of Appeal.

New York Appellate Practice: *Pro Hac Vice* Admission in the Appellate Division, First and Second Departments

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Not infrequently, parties appearing in the Appellate Divisions are represented by counsel who are not admitted to the New York Bar. However, attorneys may not appear on the brief or in the "to be argued" section of the cover if they are not admitted to practice in the Court, either by virtue of New York State Bar admission or by *pro hac vice* status. This article provides a guideline for how counsel may be admitted to practice *pro hac vice* in the Appellate Division, First Department and Appellate Division, Second Department.

Appellate Division, First Department

An application to appear *pro hac vice* before the First Department is generally a fairly

simple process which can be completed by the local counsel associated with the non-New York attorney. The local counsel should provide a letter to the Clerk of the Court, Susanna M. Rojas, with copies to all parties, stating:

1. The name and index number of the case for which the attorney is seeking *pro hac vice* status;
2. That the attorney is in good standing in the jurisdictions in which he/she is admitted and listing each jurisdiction in which the attorney is admitted; and
3. That no disciplinary proceedings have been instituted or are in progress against the attorney.

In short, the local counsel is acting as a sponsor for the proposed *pro hac vice* attorney. Certificates of good standing are not required; local counsel's word suffices.

It is important to remember that a *pro hac vice* application is only good for one appeal. Even if granted, if the non-New York attorney wants to appear in the Appellate Division, First Department for another matter or subsequent appeal in the same matter, a new letter must be submitted.

After submission, the Court will process the application and issue a letter order granting admission *pro hac vice*. That letter will provide case-specific instructions on how to correct covers, if applicable, and/or to sign briefs using the *pro hac vice* counsel's credentials. The First Department tends to process the most time-sensitive applications first, but it is best to give the Court as much notice as possible regarding the representation of a party by out-of-state counsel.

Appellate Division, Second Department

The process for *pro hac vice* admission in the Second Department is more complicated. In the Second Department, a motion seeking leave for an attorney to appear *pro hac vice* must be filed, even if the Second Department has previously granted the attorney *pro hac vice* status on another appeal. The motion must be supported by a New York attorney, but may be made by the out-of-state attorney or New York attorney. Included with the motion must be an affirmation indicating that New York local counsel will accept all service in

the case and that the proposed *pro hac vice* attorney is in good standing in all jurisdictions in which he/she is admitted. Certificates of good standing are also required. All motions require a $45 filing fee, payable to "Appellate Division, Second Department."

Motions for leave to appear *pro hac vice* are addressed as expeditiously as possible by the Court, but if the application is made very close to the calendared date of argument, the application should be made by an Order to Show Cause.

The Second Department does not require cover page corrections to be made once *pro hac vice* status is granted, but it is generally advisable to inform the Court and all parties by letter if the newly admitted *pro hac vice* attorney intends to argue the matter.

Filing Your Appeal with Counsel Press: How we get it done correctly the first time, every time? (Part II – Implementing World-Class Technology)

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Recently, I wrote an article about the development of Counsel Press' expert team and our outlook towards achieving the highest standards in quality and service for our clientele. (To view this article, please visit Counsel Press' Blog.) Another key component to our success is the use of world-class technology.

Counsel Press has developed a proprietary software platform that is custom-designed to address the specifics of the appellate process, and it fully integrates every aspect of our business, including all client workflow. Every relevant detail about any matter being handled by our team is visible within this system to all members of the team on the project. Also, all Counsel Press staff are able to work on any file regardless of which of our 12 locations our team member is physically located. This permits us to fully maximize our team's efficiency and meet tough deadlines. This system is the key platform for our team, permitting access to all documents, cases, court rules, PACER, e-mails, client instructions and more, at any time. No third-party system can offer what we have implemented.

Counsel Press' clientele are also provided with access to our secure CP Client Portal. All documents and information associated with a matter are available for viewing, updating or downloading 24 hours a day. Moreover, your whole team can use the client portal to exchange and review documents. You have control over who can view the documents on a case-by-case basis. There is no need to set up a customized Dropbox or other file-sharing system; we have already built all of the functionality into our system and continue to enhance it.

All Counsel Press' data is replicated to at least three different storage sites across the country. In this way, our clients' files are securely stored and constantly accessible. When disaster strikes, Counsel Press can still perform for its clients without missing a beat.

Every Counsel Press customer benefits from all of the above. Counsel Press' utmost objective is to guide our clients as they navigate the appellate courts while ensuring that all projects progress, no matter the circumstance.

In the last installment of this three-part series, I will discuss how Counsel Press offers our clients world-class service through three specialty divisions: our United States Supreme Court department, CP Legal Research Group and CP eBrief division.

Town of Greece and *Hobby Lobby* – Religion in America Under the Robert's Court

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In *Town of Greece v. Galloway*, which was decided about two months ago, the Supreme Court held in a 5-4 decision that a town board's practice of beginning its public sessions with a Christian prayer did not violate the Establishment clause of the Constitution. The Court reversed the Court of Appeals' decision and, in light of this decision, one is hard-pressed to think of an Establishment claim that would now prevail at the Court. (Decisions barring school prayers, clergy-led prayer at a public high school, student-led prayer at football games, etc., may be in jeopardy unless the Court views prayers in a school setting in a different light.)

Fast-forward to June 27 and we have the *Burwell v. Hobby Lobby* case decided by the same five Justices. This opinion held that owners of a closely held, for-profit, corporation may exercise their religious beliefs by refusing to provide contraception coverage for employees, as required by the Affordable Care Act. The suit in *Hobby Lobby* was brought under the Religious Freedom Restoration Act passed by Congress to overrule a Supreme Court decision in which Congress felt the Court had overstepped its bounds relating to a particular Free Exercise exemption. Justice Samuel J. Alito, Jr., writing for the majority, held that Congress intended to expand and provide broader protection for religious liberty and not merely to restore the balance that had existed before.

Justice Alito, writing for the 5-4 majority, and Justice Anthony Kennedy concurring, reasoned, in part, that the employees would still be covered for all forms of contraception through a process created by the Obama administration to accommodate religious nonprofit organizations. That process allows religious nonprofits to obtain an exemption by signing a short form certifying its religious objections and sending a copy to its third-party insurance administrator, which then is obligated to provide the coverage separately to employees without charge.

A few days later, however, those same Justices signed a temporary order that appears to backtrack from the assurances given by Justices Alito and Kennedy. The Court's new action temporarily (the Court could reverse its order) frees Wheaton College, a Christian college in Illinois, from having to go through the exemption process. Wheaton filed a lawsuit arguing that the mere signing of the form would burden its religious exercise rights by making it complicit in providing certain forms of contraception which it objects to.

The Court's order in the Wheaton matter stated that no form or notification to insurance providers was needed — all Wheaton had to do is tell the government in writing "that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraception services."

The difference between the opt-out procedure relied upon in the *Hobby Lobby* case and the notice allowed by the Court's subsequent order in the Wheaton matter may not seem like much, but it could have a substantial effect in hampering contraception coverage.

Now, in the wake of *Hobby Lobby*, President Obama is under increased pressure from religious groups demanding that they be excluded from an expected executive order barring discrimination against gays and lesbians by companies with government contracts.

There is no telling how far this will go, but clearly *Town of Greece v. Galloway* and *Hobby Lobby* appear to be just the opening salvos. For a more in-depth analysis of the *Town of Greece* and *Hobby Lobby* decisions, please see an article in *The New York Times* written by Linda Greenhouse on July 9, 2014: "Reading Hobby Lobby in Context." (Link availble in the electronic version of this article. To view, visit Counsel Press' Blog.)

Should you have any questions regarding the U.S. Supreme Court rules, please do not hesitate to contact Roy Liebman directly. Mr. Liebman is the Director of Counsel Press' U.S. Supreme Court Department; he specializes exclusively in U.S. Supreme Court practice and has an in-depth knowledge of what is happening at the Court, at all times.