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New York Appellate Division, Second Department: Case Settled Between Briefing and Argument? Alert the Court!

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Section 670.2(g) of the Second Department rules requires that "parties or their counsel shall immediately notify the court" if a case is wholly or partially settled during the pendency of an appeal, under threat of sanctions or costs against the parties. On March 25, 2015, the Court emphatically reminded practitioners of this rule in the case of *Irish v. Town of Greenburg*, Docket No. 2013-01934, 2015 NY Slip Op. 02452.[1]

In this case, the briefing was completed in November of 2013, but the oral argument was placed on the calendar for February 3, 2015. In the intervening 14 months, the parties entered a stipulation whereby the appellant agreed to pay the judgment, plus preverdict and postverdict interest, within 30 days of the entry of judgment. The judgment was entered on October 9, 2014, and the stipulated amount was paid shortly thereafter.

On February 3, 2015, the date of the scheduled oral argument and several months after the satisfaction of the judgment, the appellant notified the Court by letter, with

1. *Irish v. Town of Greenburg*, Docket No. 2013-01934, 2015 NY Slip Op. 02452, available via this link: http://www.nycourts.gov/reporter/3dseries/2015/2015_02452.htm.

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a copy of the stipulation and judgment, that the amount had been paid and the appeal had been rendered academic.

In its decision on March 25, 2015, the Second Department dismissed the appeal as academic, as expected. The Court further issued an order to show cause as to why sanctions should not be imposed pursuant to § 670.2(g).

On May 26, 2015, the Second Department decided its order to show cause. *See Irish v. Town of Greenburg*, Docket No. 2013-01934, 2015 NY Slip Op. 74175(U).[2] Reminding the parties of the scope of § 670.2(g), the Court ordered the appellant to pay a sanction of $250 to the Lawyer's Fund for Client Protection of the State of New York and to furnish proof of payment of the sanction.

Let this case serve as an example to practitioners: if an appeal becomes academic or moot, be sure to withdraw the appeal in whatever manner the Court requires. In waiting until the day of argument, for which it can be assumed that the panel spent considerable time preparing, valuable judicial resources went to waste. The Court could have been alerted at an earlier date, in compliance with the requirement of "immediate" notification under § 670.2(g).

2. *Irish v. Town of Greenburg*, Docket No. 2013-01934, 2015 NY Slip Op. 74175(U), available via this link: http://www.nycourts.gov/reporter/motions/2015/2015_74175.htm.

When the Only Law Available on the Issue is an Unpublished Decision, What Are My Options?

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Imagine counsel representing litigants before a court. An attorney for one party takes a position on the issue. The court responds that, in a previously filed pleading, counsel had taken the opposite position on behalf of his or her client. The attorney responds, "No, Your Honor, that was an 'unpublished' filing. Not only am I not bound by it, in this jurisdiction, you are not even permitted to bring that 'unpublished' filing to my attention."

The court would likely hold the attorney in contempt or sanction him or her for frivolous conduct. Yet, courts do this to litigants and counsel almost all the time by filing an overwhelming majority of their opinions—including lengthy, important decisions—as unpublished decisions. These are not binding precedent and, in many jurisdictions, litigants and counsel are

prohibited from even revealing the existence of these prior decisions to the court.

In a recent *New York Times* article[1] discussing unpublished decisions, it was noted that 88% of federal appeals court decisions are unpublished. The article focused on a 40-page decision from the Fourth Circuit Court of Appeals concerning the important issue of unlawful increases of a prison sentence out of vindictiveness, which the Fourth Circuit issued as "unpublished." The U.S. Supreme Court denied review of the case, but Justice Clarence Thomas noted in his dissent that the decision not to publish the opinion was "disturbing" and violated the Fourth Circuit's own standards for publication. While multiple Supreme Court justices have expressed concern over the prevalence of unpublished decisions and their potential for abuse by courts desiring to decide cases in an improper manner, the Supreme Court has repeatedly declined to address the propriety of designating decisions as "unpublished."

Meanwhile, several courts have concluded that purported blanket prohibitions on citation to unpublished decisions are illegal and unconstitutional. *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir. 2000)

(holding that rule stating that unpublished decisions are not precedential and may not be cited is unconstitutional; the decisions are precedential); *Putnam v. Town of Saugus*, 365 F. Supp. 2d 151, 181, n. 17 (D. Mass. 2005) (agreeing with *Anastasoff* and holding that, while not precedential, unpublished First Circuit decisions could be cited and would be treated "with great care and respect" as persuasive authority); *Coggon v. Barnhart*, 354 F. Supp. 2d 40, 51, n. 4 (D. Mass. 2005) (same); *Cmty. Visual Communs., Inc. v. City of San Antonio*, 148 F. Supp. 2d 764, 773-775 (W.D. Tex. 2000) (agreeing with *Anastasoff* in part and lamenting that the inability to rely upon unpublished decisions makes the court's job more difficult). Indeed, Federal Rule of Appellate Procedure 32.1 was enacted to permit lawyers to cite federal unpublished decisions in federal courts if the decisions were issued after January 1, 2007. Judges, defending the practice, however, contend it is the only reasonable response to a crushing workload which precludes proper review of every decision to ensure it will not be misconstrued or misused and it is "safe as precedent." See, e.g., *Schmeir v. Supreme Court*, 78 Cal. App. 4th 703 (Cal. Ct. App. 2000).

As attorneys, we have all been faced with a situation where the most applicable or best case law is unfortunately

1. Article titled "*Courts Write Decisions That Elude Long View*" available via this link: http://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&_r=3.

buried in an "unpublished" decision. On some occasions, the only law available on the issue or the only factually similar case is an unpublished decision. When these circumstances arise, there are a handful of strategies to deal with them:

1. Check the Rule in Your Jurisdiction:

First, look at the rule for your jurisdiction. As stated above, some jurisdictions do not entirely prohibit citation to unpublished decisions and allow them to be cited as at least persuasive authority. There may be some additional requirement, such as providing a copy of the decision, but the unpublished decision may be cited.

2. Try a Request or Motion for Judicial Notice:

If your jurisdiction prohibits citation to unpublished decisions unless they are relevant for *res judicata* or collateral estoppel, then one approach is to request judicial notice of the unpublished decision as a court record, and then cite to the opinion as an exhibit to your judicial notice request. This permits the attorney to comply with the applicable rule by not citing the unpublished decisions directly while still bringing them to the court's attention. Judicial notice of court records is routinely accepted. *Rosenberg v. Renal Advantage, Inc.*, 2014 U.S. Dist. LEXIS 57538 (S.D. Cal. Apr. 24, 2014); see also *Baily v. Comm'r of Soc. Sec.*, 2014 U.S. Dist. LEXIS 152079 (S.D. Ohio 2014) (Courts take judicial notice of their own records). In many jurisdictions, judicial notice is mandatory, when requested, and the party seeking it supplies the court with the necessary information. An additional benefit is that, even if the request is denied, the court is made aware of the unpublished decisions which are relevant and may feel compelled to either decide your case in a similar fashion or at least explain why it did not do so in order to avoid criticism or the appearance of impropriety. The potential pitfalls of this strategy are that it may anger the court or be construed as an attempt to avoid compliance with court rules. However, it is supported by law and, in circumstances where your best, or only, applicable cases are unpublished, it may be your only real alternative.

3. Make an Argument for a Change in the Law:

Another alternative if your case is in a "no cite" jurisdiction is to make an argument for a change in the law and a determination that blanket prohibitions on citation to unpublished decisions are improper. There is ample authority, some of which is cited above, to support this contention, which should assuage any concerns about the argument being deemed frivolous or in bad faith. You may, however, want to research how many times such an argument has been made and whether it has been frequently rejected, as a court could potentially perceive the argument as frivolous because it has previously been rejected by your particular court or higher appellate courts in that jurisdiction.

Hopefully, these will help if you need to cite to unpublished decisions.

(This article was originally published on April 15, 2015 in *The Recorder,* California's leading legal news and analysis publication, under the following title "When the Best Case Goes Unpublished.")

Perfecting an appeal in the New York Appellate Division, First Department for the July 13th deadline? Up your game – get your appellate documents ready early!

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Newcomers to appellate practice in the New York State Appellate Division, First Department should be aware of this Court's term calendar and how the term calendar system impacts their appeals. In any given calendar year, the First Department has 10 terms for argument and submission, and there are specific deadlines by which documents must be filed in order to take part in a given term.

Terms: It matters when you file…

Although appellants may perfect an appeal[1] any day in which the Court is open, there are strategic reasons for choosing the last filing day for a term. Most significantly, by perfecting an appeal on the last filing day, the appellant gives the respondent the fewest number of days to file his responding brief. For instance, to perfect for the September 2015 Term,[2] an appellant must serve and file the necessary opening documents on or before July 13, 2015. No matter what date the appellant's documents are filed for that term, the respondent may file his brief up until August 12, 2015. Likewise, no matter what date the respondent files his brief, the appellant may file his reply brief as late as August 21, 2015. Filing early merely gives one's adversary extra time to prepare his or her own brief and does not accelerate proceedings in the First Department.

Up your game for the July 13th deadline

Given that the September Term is one of the busiest terms at the Appellate Division, First Department and the filing deadline has historically fallen immediately or shortly after the week of the July 4th holiday, we always advise our clients, even if they want to file on the last day of this term, to send their

documents to us around mid-June. It takes 2-3 business days to prepare a proof, and we can file as quickly as the client wants; or we can hold off on filing after we have prepared the documents, keep everything in our office and file on the date the client chooses. Why not clear your desk, give yourself peace of

1. To "perfect" an appeal means to file the note of issue, the appellant's opening brief and the record on appeal or appendix.

2. September Term appeals should have argument dates between September 8, 2015 and October 5, 2015.

mind, enjoy the holiday and avoid the last minute rush?

Appellants should also keep in mind that this Court requires service in accordance with the Mailbox Rule; service by mail must be effectuated five days before the last filing date for regular mail or one day before for overnight mail. Finally, the First Department requires that service and filing is done by paper and electronically. These considerations may add additional time to the preparation of appellate documents.

Oral Arguments

Requests for oral argument must be delivered to the Court no later than the day after the Court's deadline for respondents' briefs, per the term calendar. A single request must speak for all parties to an appeal and it must comply with rule §600.11(f).[3] Failure to timely request oral argument will result in the case being deemed submitted. In general, oral arguments are scheduled during the term for which the appeal was perfected, although the Court may *sua sponte* adjourn an appeal to maintain its calendar.[4] Calendars for oral argument are created by the Court following the submission of the respondents' briefs and oral argument request forms, but prior to the deadline for filing reply briefs.

Extensions of Time

The Appellate Division, First Department adheres fairly rigidly to its term calendar, and disfavors extensions of time. An appellant may request additional time to perfect his appeal *only* by motion. Parties may, however, stipulate to up to one week's additional time for filing of the respondent and/or reply briefs without impacting the term for which the appeal is set. Extensions of more than one week generally involve adjourning the appeal to a different term.

All in all, the Term Calendar provides a level of certainty in practice that few other courts can match. However, because few attorneys are familiar with the rigidity of such a system, practitioners should take care to fully understand the court's procedural rules or seek appropriate guidance.

If you have any confusion with the above guidelines or have any other appellate-related questions, please feel free to contact me directly.

3. A sample oral argument request form may be found on Counsel Press' website at www.counselpress.com.

4. This happens most frequently in the September Term, during which roughly 50% of cases, particularly civil cases, are adjourned to the October Term. Criminal and family court cases are generally calendared for argument before civil cases.

Electronic Filing in the New Jersey Appellate Division and Supreme Court: Live in 2015!

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New Jersey appellate courts are moving closer to electronic filing of all documents. The anticipated rollout for criminal and civil appeals for attorneys who already have a Judiciary collateral account is Late Spring 2015 and, for all others, Late 2015/Early 2016. All documents submitted in the Appellate Division will be filed through the "eData" (Electronic Docketing of Appeals and Tracking Application) portal. All documents submitted in the Supreme Court will be filed through the "Supreme Court eFiling" portal. Both systems will be accessible via the Judiciary's website: www.njcourts.com. Currently, registration is by invitation only. Upon full implementation of the systems, attorneys will be required to register as users through the Judiciary website in order to file under these applications. Registration for each system will be separate. Payment of all fees and deposits for cost in electronically-filed cases will also be made electronically.

The following is not meant to be a comprehensive summary of all of the new rules and requirements, but rather a broad overview of some of the changes that are anticipated.

E-filing requirements – file format, document formatting, filing deadlines

All scanned documents filed through both systems will be submitted in text-searchable portable document format (PDF). All documents submitted must include the filing attorney's name, his or her New Jersey attorney identification number and registered e-mail address. Documents submitted prior to 12:00 midnight, as defined by Judiciary data systems, will be deemed "received" as of that date.

An automatic electronic notification providing a link to the document will be generated by the electronic filing system when a document has been received for filing. This notification is deemed effective service on registered users. Service of documents by and on unrepresented litigants and attorneys who are not registered users will be made in accordance with existing Court Rules via mail or personal service.

Margins for all documents shall be one inch, except that the top margin shall be one and one-half inches to accommodate stamps applied by the trial courts, Appellate Division and/or Supreme Court. The duty to provide the Court with paper copies does not arise until the Clerk's Office has reviewed the submissions for compliance with the Rules of Court and has stamped the documents as "filed." The filer will then be notified to provide the Court with paper copies.

Paper copy requirements

In the Supreme Court, the

filer must provide the Clerk's Office with two (2) paper copies of a petition for certification, appendix, petitioner's Appellate Division brief and appendix. If certification is granted, the petitioner shall file five (5) additional paper copies of the "filed" stamped submissions. In the Appellate Division, the filer shall provide three (3) paper copies of the filed brief and appendix to the Court via mail or personal delivery. Sealed documents must be submitted to the Clerk's Office in paper copy, in separately sealed envelopes clearly and prominently marked "for the confidential use of the court."

In the Supreme Court, notices of petition for certification, notices of motion, briefs and appendices in support will only be filed electronically. If leave to appeal is granted, seven (7) paper copies of the "filed" stamped submissions must be filed with the Clerk's Office. Seven (7) paper copies of a notice of appeal or cross-appeal must be filed in addition to the electronic submission.

In the Appellate Division, a filer who submits a motion electronically through the eData system that exceeds a combined total of 75 pages, inclusive of notice of motion, supporting brief and appendix and exclusive of proof of service, will be required to submit simultaneously two (2) additional paper copies of the complete motion and any transcript to the Clerk's Office.

Processing of your e-filed documents

Electronically-filed notices of appeal and case information statements will be forwarded by the Clerk to the trial judge via e-mail or, if the appeal is taken from the decision or action of an administrative agency or officer, to the agency or officer by e-mail. Completion and submission of the transcript request form will be made electronically through the eData system which will notify the reporter and reporter supervisor. When the last volume and copy of the transcript have been delivered to the appellant, the transcript delivery certification and a complete set of CD-ROMs or DVDs, in addition to the paper copy, shall be forwarded to the Clerk.

Please contact me directly with any questions on filings in the New Jersey Appellate Division and Supreme Court.