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Expert Analysis

Statewide Appellate Practice Rules Are Cause for Celebration

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Appellate practitioners statewide have circled September 17, 2018 on their calendars, marking the effective date for the sweeping changes ushered in by the newly enacted "Practice Rules of the Appellate Division" (22 NYCRR Part 1250) (further references to rules codified in 22 NYCRR will use the familiar shorthand "Rule"). Part 1250 was enacted by the four Judicial Departments by joint order on December 12, 2017, revised by another on June 29, 2018. It unifies practice among the departments to an extent likely unprecedented. It addresses electronic filing, perfection requirements, informational statements, deadlines, extension requests, motions and a myriad of other areas for which a comprehensive discussion is beyond the scope of this article. Presented here are reasons to cheer this major reform while noting aspects of the new rules that may give appellate litigators who long for true uniformity cause to restrain their enthusiasm.

Here's a pop quiz to provide some context for the celebratory portion of this article: You have just been served in hand with a week old order with notice of entry. Under current rules, how many days do you have in which to move for reargument? If you answered, "30 days; only the service date matters," citing CPLR 2221(d)(3), you are correct, assuming the order is from any trial level Supreme Court.

Suppose, however, it's an order upon an appellate decision of one of the four Supreme Court, Appellate Division courts, to which CPLR 2221(d)(3), by its express terms, does not apply. "No difference," declare Second Department denizens at 45 Monroe Place, Brooklyn. "It's still 30 days from service with notice of entry under our Rule §670.6(a)." Then, from the First Department's seat across the East River and just three miles uptown at 27 Madison Ave., comes the retort: "Here, you snooze, you lose. It's 30 days from the date of the decision, not from service! See our Rule §600.14(a)." Current Fourth Department rules for reargument motion time accord with the Second's, *i.e.*, 30 days after

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service with notice of entry (Rule §1000.13(p)(1)), whereas, in the Third Department, while reargument motions are contemplated (Rule §800.2(a)), no particular time limit is prescribed. Thus, on this admittedly arcane point, existing Appellate Division rules run the gamut from requiring quicker action than a similar motion in the trial court, to having no express time limit. (Under new Part 1250, appellate reargument aficionados will have 30 days after service of the order with notice of entry to so move (Rule §1250.16(d)(1)).)

The foregoing is not intended as an esoteric primer on Appellate Division reargument practice under soon to be extinct rules, but to present but one striking example of the "traps for the unwary" that have been lying in wait for practitioners who may find themselves handling an appeal outside the department in which they practice routinely. Such traps may have posed comparatively few concerns for, say, a litigator in western New York with no appellate appearances further east than Rochester. Downstate practitioners, however, have been obliged to master often radically different rules of two or more departments lest they make mistaken assumptions about how and when things are to be done in another courthouse perhaps a few subway stops from one with rules with which they are thoroughly familiar.

Like the diverse fauna Darwin observed on each of the Galapagos Islands, distinctive rules of practice evolved in the jurisdictionally separate departments. While reform of the Balkanized practices of New York's trial courts began in 1986 with the "Uniform Rules for The New York State Trial Courts" (Part 202), furthered by additions such as uniform rules for the Commercial Division (Rule §202.70), the idiosyncratic rules of the mid-level appellate courts long appeared untouchable.

The four departments were created by the New York State Constitution of 1894, and the divergent evolution of their practices took hold well before the CPLR arrived in 1963. CPLR Articles 55 ("Appeals Generally") and 57 ("Appeals to the Appellate Division") gestured towards an homogenous Appellate Division practice. However, Article 55 contemplated regional variations, some material, of what otherwise would have represented statewide rules. CPLR 5530(c) allowed each Appellate Division to set time limits different from those otherwise prescribed for perfecting appeals. CPLR 5530(a) would have required perfection a scant 20 days after settlement of a transcript, with but 15 days allowed for respondents' briefs.

While the departments' relaxation of CPLR 5530(a)'s time limit was a boon to appellants, the variety of timing requirements they adopted when exercising that authority presented divergent rules, both as to when the perfection period begins to run and as to when that period ends. Thus, under the long-prevailing rules still in effect until September 16, 2018, in order to avoid potential dismissal, and absent extension, an appellant in the Third or Fourth Department must perfect within 60 days of service of the notice of appeal (Rules §§800.9(a) and 1000.2(b), respectively). By contrast, in the Second, the appeal must be perfected within six months from the date of the notice of appeal (*not* from the date of its service or filing) (Rule §670.8(e)(1)). In the First, discounting a generally ignored 30 day requirement, a generous nine month perfection period is allowed, running from the date of the notice of appeal (Rule §600.11(a)(3)).

New Part 1250, specifically Rule §1250.9(a), ends the confusion by making existing Second Department practice respecting perfection time the rule for all four Departments; unless otherwise directed by the court, perfection will be required within six months of the date of the notice of appeal. Caution: absent extensions, appeals taken by notices of appeal

bearing dates earlier than March 18, 2018 will require perfection by September 14, 2018 (the Friday before new Part 1250's effective date). First Department appellants will have no "grandfathered" right to take the balance of their nine months after September 17, 2018 to perfect pending appeals.

Departments' Freedom to Set Rules Curtailed

The departments' freedom to craft their own rules of practice has at last been curtailed by the departments themselves. Curtailed, yes. Eliminated? Not quite.

Some veteran litigators may recall being disappointed upon realizing that the trial court "Uniform Rules" effective in 1986 would not be the only ones needed in order to practice in all Supreme and county courthouses, and that a thicket of local court and Individual Assignment Part rules would take root and flourish. Similarly, today's litigators who have read only headlines announcing new statewide rules for appellate practice will need to recalibrate their expectations if they anticipate full uniformity. Each department has already enacted its own set of rules, effective simultaneously with new Part 1250, declaring expressly that they supplement and should be read in conjunction with Part 1250 and the "Electronic Filing Rules of the Appellate Division" (Part 1245), and that they control within that department in the event of a conflict with those statewide rules.

Thus, the First Department's new Part 600 that will rescind and replace existing Part 600 preserves that department's unique practice of calendaring appeals for a "term of the court" (new Rule §600.15). The preservation of the term system continues historical distinctions between the First and Second departments respecting what must be done and when to have an appeal calendared for argument. The Second Department's new Rules of Practice Part 670 will rescind and replace current its Part 670, the Third's Part 850 will supersede its Part 800, and the Fourth's new Part 1000 replaces existing Part 1000.

The effect of the individual departments' rules upon Part 1250 may be more akin to tailoring an off-the-rack suit than recreating the "bespoke" sets of rules that remain in effect until mid-September, but the alterations are significant nonetheless. In fact, the metaphor is imperfect because Part 1250's rules are not fully uniform for all departments even before supplementation by the individual sets of rules. Thus, a First or Second Department appellant's brief will need to include a CPLR 5531 statement (Rule §1250.8(b)(7)), and, most typically, a copy of the order or judgment appealed from, the decision, if any, and a copy of the notice of appeal (Rule §1250.8(b)(8)). Other differences among the departments will be found in Rule §1250.9 ("Time, Number and Manner of Filing of Records, Appendices and Brief"), in certain rules pertaining to criminal appeals (see, *e.g.*, Rules §§1250.11(f)(2) and (g)), and in rules concerning briefing certain original special proceedings (Rule §1250.13(c)). In the First and Third departments only, rebuttal time may be reserved prior to oral arguments (Rule §1250.15(c)).

In sum, while differences among the departments' practices will be narrowed greatly by new Part 1250, attention must be paid to the significant number of special rules that will apply uniquely within the department where an appeal is pending. Unless and until statewide practice is made truly uniform, both new Part 1250 and the applicable department's own rules will need to be scrutinized to ensure compliance.