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The Second Circuit Changes It's Tune - "No More Mr. Nice Guy"

By Merril Biscone

Anyone who has had the privilege of appearing before the United States Court of Appeals for the Second Circuit may have taken note of the seemingly relaxed and lenient nature that embodied this Court. However, along with the start of the new year, the Court of Appeals seemed to have reformed. On January 1, 2010, the Rules of the Second Circuit underwent significant modifications. The new Rules reflect a trend away from a kinder, gentler Court that tolerated seemingly minor transgressions, to one that is considerably more stringent and rigid. Indeed, even a request that seeks minimal relief must be premised upon a showing of "extreme hardship" or "extraordinary circumstances". It is incumbent upon all practitioners, from those who will appear in this Court just a single time, to those who regularly practice there, to fully familiarize themselves with these salient transformations.

Change is evident from the inception of a practitioner's encounter with the Court. Within 14 days of filing the Notice of Appeal, Local Rule §12.1 requires specific forms to be filed with the Court, together with a docketing fee.

Failure to comply with any portion of this Rule, which is seemingly ministerial, may result in the dismissal of the appeal.

Perhaps the most expansive changes can be found within Local Rule §31.2, which governs the scheduling of the briefs. Under the new Rules, the parties themselves, not the Court, set the deadlines for the filing of the briefs. Specifically, the parties submit scheduling requests to the Court. Once the dates are set, the Court "so orders" the requested deadline as the firm filing dates for the parties. A word to the wise would be to consider these dates to be "set in stone".

Gone are the days of automatic extensions. This Rule provides that a party's scheduling request may only request a deviation from the times set forth above, if the case involves a "voluminous record" or if "extreme hardship" would result. The Rules give no indication of how large a record must be to constitute "voluminous" and no examples of what type of "extreme hardship" must be established. Extreme care should be taken to faithfully comply with the Court's mandates in these uncharted waters.

Additional change is found in the section of the Local Rules that govern motion practice in the Court. Under the new Rules, motions that seek to extend time beyond stated deadlines, will not be granted "absent an extraordinary circumstance". Here, the Court gives an example of such extraordinary circumstance as "serious personal illness or death in counsel's immediate family". It is not clear whether

this is the only excuse the Court will accept, but it appears that all deadlines should surely be treated as absolute. Further, once an argument date is set, applications to postpone will be granted only upon "extraordinary circumstances" and not, as previous practice, upon stipulation of the parties.

It should come as no surprise in this computer era that the Second Circuit has joined the electronic age as well. Effective January 20, 2010, the Court adopted Local Rule §25.1, which converted the Court to a new case management system and electronic document filing. Attorneys already registered in another appellate court or district court must still register electronically in the Second Circuit. Also, every document (in a case where a party is represented by counsel), must be served and filed electronically, unless it can be shown that this would be an "extreme hardship". The Court has retained the requirement for manual filing of briefs and appendices. Pro se litigants are "encouraged" but not required to serve and file electronically.

Various other amendments were made, but are of less significance. As always, anyone who plans to appear before the Second Circuit is strongly encouraged to become familiar with its Rules, both old and new. Strict compliance appears to be the best approach in order to avoid the precarious position of challenging the Court to define exactly when divergence from the Rules will be tolerated and to avoid potential pitfalls. And remember - - - gone are the days when any reasonable relief was yours, just for the asking.

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