RULES

Appellate Division Adopts Statewide Practice Rules – EFF. SEPT. 17, 2018
BY HON. T. RANDALL ENG
In the *New York Law Journal*, former Second Department Presiding Justice Eng provided a helpful overview of the new Statewide Practice Rules of the Appellate Division, aka "Uniform Rules," which are effective Sept. 17, 2018. The Rules apply to appeals pending on that date, unless a showing of substantial prejudice, manifest injustice or impracticability is made. Highlighted provisions include **Rule 1250.1 (e)**, identifying confidential documents; **Rule 1250.4 (d)**, discussing poor person relief; **Rule 1250.7 (c)**, providing greater flexibility as to the reproduction of exhibits; and **Rule 1250.10**, addressing the dismissal of appeals and vacatur of dismissals. True uniformity remains elusive. For one thing, the Statewide Rules contain several differences among the Departments. For another thing, in many instances, the Rules say, "unless the court shall direct otherwise" or "the court may require," thus alerting the practitioner to the need to consult the new local practice rules issued by each Department.
https://www.law.com/newyorklawjournal/2018/07/30/appellate-division-adapts-statewide-practice-rules

OTHER NOTES AS TO THE NEW APPELLATE DIVISION RULES:

- Under **Rule 1250.4 (d) (4)** regarding poor person applications, where bail was posted during the trial proceedings and the defendant is in custody, he must explain why the funds used to post such bail are not available to retain appellate counsel. That Statewide Rule does not provide that the defendant must report the income of a spouse. In three of the four Departments, applications for poor person relief and assignment of counsel currently require information about a spouse's income. Such forms are expected to be updated to reflect the new Statewide Rules.

- Briefs printed in a serifed, proportionally spaced typeface, such as Times New Roman, must use 14-point type; and there is a 14,000-word limit for the principal briefs and a 7,000-word limit for reply briefs (**Rule 1250.8 [f]).**

- Six months from the date of the notice of appeal is now the period to perfect appeals, but the rule does not apply to assigned counsel cases (**Rule 1250.9 [a], [b]**).

- **Rule 1250.9 (a)** further provides for a reduced number of records, briefs, and appendixes to be filed.

- **Rule 1250.11** contains detailed provisions relating to criminal appeals. Subdivision (g) provides for supplemental pro se briefs as of right in the Third and Fourth Departments where counsel did not file an *Anders* brief.

- Post-argument submissions are discouraged and may be made only with leave of the court (**Rule 1250.15 [d]**). Perhaps the Second and Fourth Departments will be more apt to grant leave, given that those courts have adhered to their prohibition against rebuttal during oral argument (**Rule 1250.15 [c] [5]).**

- Institutional providers in the First and Second Departments report that they have been working with those courts regarding how the new Statewide Rules and local rules will impact mandated representation appeals.

- The Third Department has explained: "Although there are a few significant changes to the rules affecting civil appeals (*see* **Rule 1250.10 [a]**), as well as changes to the manner in which assigned criminal and Family Court appeals are perfected, the assignment order will continue to guide assigned counsel with respect to the manner and timing of perfecting appeals, as well as the applicable rules under which assigned appeals will be prosecuted and perfected. As we have always done, we encourage practitioners to call with questions or concerns. Our staff will continue to provide guidance and support as we all transition to the new rules. We anticipate that it will be a learning process for all involved, and we are committed to making the transition as seamless as possible. One note with respect to the new requirement that a digital copy of the brief/appendix and record be filed on appeals perfected by the appendix method (*see* **Rule 1250.9 [a] [2]**): The Third Department will be creating a link on its home page of the website that will enable counsel to upload PDF copies of documents. Although E-Filing is not yet applicable to Family Court or criminal appeals, please note that the digital copy of the record is required to comply with the technical requirements as set forth in Attachment A of the E-Filing Rules of the Appellate Division."
  http://www.nycourts.gov/ad3/e-file/E-file_rules.pdf
- A message on the Fourth Department's website states in part: "Our goal is to work with attorneys and litigants to ensure that the transition to the new Practice Rules does not unfairly jeopardize the substantive rights of anyone who makes a good faith effort to abide by the new rules, particularly with respect to the perfection of appeals pending on September 17, 2018." In criminal and Family Court assigned appeals, the assignment orders will set the due date, and the old rules permitting letter extension requests will continue to apply. But due dates will not be included in SORA and habeas assignment orders, and thus motions will continue to be required to extend the time to perfect. Certification of the record is now permitted in the Fourth Department (**Rule 1250.7 [g]**), which may be helpful in Family Court cases involving pro se litigants.

- To see the Statewide Practice Rules, a joint order regarding appeals affected, and the local rules of all four Departments, click on the link here and scroll down the page.
  https://www.ils.ny.gov/content/appellate-and-post-conviction-representation

DECISIONS

CPL 470.15 – AGGRIEVEMENT REQUIRED

In two decisions rendered on September 6, the Second Department denied CPL 440.20 motions, based on the aggrievement requirement of CPL 470.15, which states: "Upon an appeal to an intermediate appellate court…such appellate court may consider and determine any question of law or issue of fact…which may have **adversely affected the appellant** [emphasis added]." In ***People v Francis***, the defendant stated that he was erroneously sentenced as a first felony offender, but he was, in fact, a second felony offender. He sought resentencing so that he could move to withdraw his plea on the basis that the new, lawful sentence would be contrary to his original plea agreement. In ***People v McNeil***, the defendant claimed that he had been unlawfully sentenced as a second felony offender, instead of as a second violent felony offender. He sought to upset sequentiality for purposes of multiple felony offender status. In both cases, the Second Department held that, because the defendants were not adversely affected, and indeed benefitted from lesser sentences, their claims had to be rejected without consideration of the merits. In many cited cases, CPL 470.15 (1) has led to the denial of direct appeals from sentences that were shorter than the proper ones. The Second Department now held that such statute equally barred appeals from orders denying CPL 440.20 motions collaterally attacking such sentencing errors.

ARTICLES

Second Department is Changing Way It Operates – TO REDUCE BACKLOG

BY HON. ALAN D. SCHEINKMAN

In the *New York Law Journal*, current Second Department Presiding Justice Scheinkman discussed efforts to reduce the court's significant backlog of perfected civil appeals. With the advent of the Statewide Practice Rules, the Second Department has decided to rein in the number and length of extensions, as well as the volume of extension motions. The Statewide Rules provide for automatic or semi-automatic extensions, but further extensions will no longer be available for the mere asking. A new local rule provides that such motions "shall be granted only in limited circumstances and upon a showing of good cause." *See* new Second Dept Rule 670.9. The "press of business" will not be enough, but matters such as unexpected health issues or unforeseeable events may be enough. Any extension granted will be for no longer than necessary to address the situation at hand.

https://www.law.com/newyorklawjournal/2018/09/04/2nd-department-is-changing-the-way-it-operates-to-reduce-backlogs

Dissents, Disappointments, and Open Questions – NEW YORK COURT WATCHER

BY VINCENT M. BONVENTRE

In a September 6 post on his New York Court Watcher blog, Albany Law School Professor Bonventre offered observations about the prolific use of unsigned memoranda decisions by the New York Court of Appeals over the past year. In a case decided on June 14, *People v Thibodeau*, the court denied relief despite substantial record support for a claim of actual

innocence, and the court rendered an unsigned decision despite the 4-3 vote and a powerful, 30-page dissent. One explanation sometimes given for unsigned writings is that they are used where the issues are well-settled, readily resolved or otherwise insignificant. The blog author opined that such reason is not convincing when unsigned opinions are used where the court is deeply divided, and the salient issue is important and intensely debated. Prof. Bonventre concluded: "Cases that reach the Court of Appeals are sufficiently significant and close that their resolution deserves the fullest justification and explanation. These unsigned memoranda opinions rarely provide that."
http://www.newyorkcourtwatcher.com

Computerized Tests in Custody Cases, 9/6/18 – ***NYLJ***
BY TIMOTHY M. TIPPINS
The use of computer-based test interpretations (CBTIs) in forensic settings is improper, the author opines. Interpretive reports by commercials services are often relied upon, even though the narratives are only hypotheses meant to be considered in the context of all assessment data. Further, in child custody cases, report conclusions sometimes include large portions of verbatim text from such interpretive reports. The algorithms underlying CBTIs are closely guarded proprietary secrets unknown to the forensic evaluator. Yet an expert may properly rely on material not in evidence only where: (1) it is a kind accepted in the profession; and (2) it is accompanied by evidence establishing its reliability. *See Wagman v Bradshaw*, 292 AD2d 84. In custody cases, competent representation may include attacking the absence of independent proof of the reliability of CBTIs. *See People v Wilson* (2018 WL 3762700). The attorney making a challenge should demand the source code, and when it is not provided, should move to strike the report, the author asserts. *See People v Fields*, 160 AD3d 1116.
https://www.law.com/newyorklawjournal/2018/09/05/computerized-test-interpretations-in-custody-litigation

MEMORANDUM
Pernicious Impact of Recordings of Interrogations – POLICE OPINIONS
BY BRIAN SHIFFRIN
The author observes that, fortunately, New York now requires the recording of interrogations by police at a detention facility in many felony cases (*see* Penal Law 60.45 [3] [a]), but that, unfortunately, the recordings' admission into evidence can hurt the defense. To extract incriminating statements, police can lie, including falsely claiming that they have evidence of the suspect's guilt, so long as the deception is not so unfair as to deny due process. During interrogations, police can also opine that the defendant is guilty and that his/her account is untrue. According to the author, there are no reported New York decisions as to the admissibility of police opinions in recorded interrogations. Other states have held that such statements—which are precluded when an officer testifies—should not come in through the "back door" and that, where such opinions are admitted, limiting instructions are required.
https://www.ils.ny.gov/files/Appellate/Resources/Memo%20on%20Recordings%20of%20Interrogations.pdf

Looking Below the Surface
CURRENT EDITION, *APPELLATE ISSUES*, ABA COUNCIL OF APPELLATE LAWYERS
BY MICHAEL SCODRO
The author, a U.S. Supreme Court practitioner, discusses how technology has made it easier for appellate advocates to obtain a trove of helpful materials underlying appellate decisions and how such materials may be used to color the meaning of precedent. For example, faced with ambiguous precedent, counsel may use record documents, appellate briefs or oral argument transcripts to present a clearer picture of relevant facts and arguments underlying the decision. After offering examples of such advocacy, the author cautions: be prepared for a rebuke from opposing counsel, who may say that the court should eschew a look beyond the four corners of the precedent.
https://www.americanbar.org/content/dam/aba/publications/appellate_issues/2017fall_ai.authcheckdam.pdf

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