The Fourth Annual Appellate CLE: The Clerk's View

By Lori Sapir and Lauren Siber

The NYWBA's fourth annual Appellate CLE was held on April 28, 2010, immediately after the Annual Meeting of the Association. The Panel consisted of two representatives each from the First and Second Departments. Hon. David Spokony, the recently elected Clerk of the First Department, and Lauren Holmes, the Assistant Deputy Chief Court Attorney, discussed procedures in the First Department. As many know, Ms. Holmes is the face of the First Department for those seeking stays and other interim relief. Hon. James E. Pelzer, the Clerk of the Second Department for more than 11 years, and Associate Deputy Clerk Matthew Kiernan (Pelzer's designated successor upon his impending retirement), provided the Second Department's point of view. Myrna Felder moderated the discussion for the second year in a row.

The panel discussion focused on how the Departments handle CPLR § 5704 reviews as well as consequences of failing to timely withdraw pending appeals in each. Despite the rather dry subject matter, the discussion was lively, with wry comments like "the Second Department is second to none" tossed about.

CPLR § 5704 provides a vehicle for immediate appellate review of a lower court's ruling pertaining to *ex parte* relief applied for without notice. Recent changes in New York State Court Rules, which require that notice be given prior to seeking *ex parte* relief via Order to Show Cause, have called into question the applicability of § 5704 review. Indeed, Mr. Pelzer has proposed new language to address the effect of the new rules.

The First Department still allows for § 5704 review whether or not the adversary participated in the *ex parte* application in the lower court. It requires that the party seeking review contact its adversary prior to coming to court for a stay of the relief below.

In the Second Department, on the other hand, if the adversary participated in the application in the lower court, either by appearing in opposition or by submitting papers, it will not be considered *ex parte* relief "without notice" and § 5704 review is not available. Instead, the Second Department will permit a motion seeking leave to appeal the *ex parte* ruling, which will be granted or denied on grounds similar § 5704 relief. However, if the adversary did not participate in the lower court proceeding, the § 5704 procedures remains unchanged.

There is further difference in the First and Second Departments regarding the consequences of failing to perfect or withdraw a notice of appeal. The Second Department keeps track of all notices of appeal filed, while the First does not, which results in a difference in the way abandoned appeals are handled.

In the First Department, an appeal that is filed but not perfected sits until an adverse party makes a motion to dismiss. Essentially, unless the adversary moves to dismiss, it can be withdrawn at any time. However, in the Second Department, if an appeal is not perfected within the time frame provided (6 months), the Second Department will place the matter on a dismissal calendar and publish a decision dismissing the appeal as abandoned after the calendar is heard (which can sometimes take 6 or more months). In the Second Department, it is necessary to withdraw the appeal prior to the dismissal calendar being heard.

Once a party's appeal is dismissed as abandoned, the issues raised in the original appeal are forever disposed of. For example, if a party abandons an appeal of an order in a summary judgment motion, which later arises at trial, that party will be precluded from raising that same issue in any appeal from the trial or judgment. As such, the best course of action is to withdraw any appeal that will not be perfected.

Do not despair if you missed this year's CLE. Due to popular demand, the Clerks will be asked back for a follow-up on other topics next year.

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Lauren Holmes, Esq.*, Asst. Dep. Chief Court Atty, Appellate Div., First Dep't.; *Hon. David Spokony*, Clerk of the Appellate Div., First Dep't.; *Past President Myrna Felder, Esq.* (Moderator); *Hon. James E. Pelzer*, Clerk of the Appellate Div., Second Dep't.; and *Matthew Kiernan, Esq.*, Associate Deputy Clerk, Appellate Div., Second Dep't *(l to r)

Lauren Holmes, Hon. David Spokony and Myrna Felder (l to r)

Myrna Felder, Hon. James E. Pelzer and Matthew Kiernan, Esq. (l to r)