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CIVIL PROCEDURE

Shrouded in Mystery

Emergent applications in the Appellate Division

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In our combined three years as law clerks in the Appellate Division, no other topic among attorneys seemed as shrouded in mystery as filing an emergent appeal. This article demystifies the process and provides a step-by-step guide on how to file an emergent application with the Appellate Division.

Is It Emergent?

As the name indicates, only those situations involving an emergency will be accepted for emergent review. The standard for considering such applications is very high. In a Notice to the Bar dated July 1, 1999, the Honorable Sylvia B. Pressler, P.J.A.D., enumerated the standard as follows: If an emergent application is made during trial, the court will only entertain it "upon a preliminary showing of likelihood of success of the application and that immediate and irreparable harm will result if the application is not entertained. . . . Applications not made during trial will be entertained by the court on a showing

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that a definitive event will occur or specific action is required on a date prior to" the next available motion date. In other words, you must demonstrate that the issue presented is so emergent that your client cannot wait for the relief offered in a standard appeal. Many applications are denied because the harm is neither immediate nor irreparable, and the relief sought is more appropriately suited for an appeal in the normal course of litigation.

Oftentimes the application may be denied because the emergency was self-created. For example, if you waited over a week after the triggering order/decision to file an emergent application, it is likely that the application is not truly emergent. Otherwise, the immediacy of the harm would have required you to file the application immediately. Such a delay might also suggest that you were "judge-shopping," providing yet another basis to reject your application.

Additionally, the Appellate Division will only entertain your application if you have first applied for a stay with the trial court or agency issuing the adverse order. If the request for a stay is denied, the matter is ripe for appeal. Alternatively, a trial judge may grant a short stay for the purpose of allowing a party to seek emergent relief before the provisions of the order are carried out.

If a trial judge refuses to sign an order denying the stay, file a certification explaining the details of your application, its denial, and the judge's refusal. When there is no time to request a stay from the trial court or agency and irreparable harm is imminent, the appellate judge who will review your emergent application has the authority to temporarily stay the adverse decision pending review of the emergent appeal.

Remember, the mere filing of an emergent application does not guarantee that your motion will be considered on the merits. Think of it as a "screening" process used to determine whether the appeal should be decided on an expedited basis.

Where To File?

You cannot file an emergent application with the appellate judge of your choice. It must be filed with the appellate judge assigned to emergent duty for that week in the vicinage in which the court or agency issuing the adverse order is located. For example, an emergent appeal from a decision of the Superior Court, Essex County, should be filed with the judge assigned to emergent duty for the Essex vicinage at the time of filing. Similarly, an emergent appeal from an order of an agency located in Trenton should be filed with the judge assigned that week to emergent duty for the Mercer vicinage.

A schedule of the assignments can be found on the judiciary Web site

and in the legal newspapers. The clerk of the Appellate Division can also tell you which judge is entertaining emergent applications for your vicinage that week.

Any subsequent emergent applications in a case should be made to the same Appellate Division judge that entertained the first application, regardless of whether or not that judge is scheduled for emergent duty. This exception prevents "judicial shopping" and promotes judicial efficiency.

What To File?

An application for emergent relief must include two documents: the signed Order of the Superior Court or agency from which you are appealing and a completed Emergent Relief Fact Sheet.

The Fact Sheet can be obtained either from the judiciary Web site or by requesting one from the law clerk of the judge assigned to emergent duty that week. The Fact Sheet requires that you provide, among other things, general information about the case, the nature of the emergency and a description of the irreparable harm. Submitting the Fact Sheet does not constitute filing an appeal and there is no right to be heard orally.

How To File?

The law clerk of the judge on emergent duty is the point of contact regarding your emergent application. If you have not already contacted the clerk, now is a good time to call and inform him/her that you will be submitting an application. Thereafter, fax both the signed Order and the completed Fact Sheet to the judge's chambers. If you cannot fax the documents, ask the law clerk about other acceptable methods of delivery.

The judge may also request a transcript or the written findings of the trial court or agency. If so, ask the law

clerk how you should send these documents, as many chambers will not accept faxes over 10 pages in length. Alternatively, the judge may require you to prepare a certification describing the trial court or agency's reasoning. At this stage, there is still no right to be heard orally and there is no right to submit additional papers. The judge will consider your application and either accept the appeal as emergent or deny the application as not warranting immediate attention.

What If the Application Is Denied?

If your application is denied as non-emergent, you will receive a copy of the Fact Sheet stamped "Denied," with an endorsement to provide a basis for seeking further review with the Supreme Court. The emergent application process is now over. You may file a motion for leave to appeal (from an interlocutory judgment) or notice of appeal (from a final judgment), which will be heard in its ordinary course.

What If the Application Is Granted?

If your application is granted as emergent, the judge's law clerk will contact you and provide a briefing schedule. The law clerk may instruct you to advise your adversary that an emergent application was accepted and a briefing schedule ordered. The judge, at his/her discretion, may also hold oral arguments over the phone or in chambers. Due to the urgent nature of this process, the briefing and argument schedule is typically not longer than one week. Furthermore, if the judge on emergent duty certifies the matter as emergent, another judge from his/her part will be assigned to hear the motion.

If the emergent appeal is taken from a final order disposing all the issues or is certified as final by the trial court, you must file a Notice of Appeal. Conversely, if the appeal or motion is taken

from an interlocutory order, you must file a Notice of Motion for Leave to Appeal. Without these papers, the Appellate Division has no jurisdiction and cannot hear your application.

You should also submit a short brief in support of your motion along with any appendices (if necessary); a transcript (if available); certification of counsel; and the signed Order. Unless otherwise directed, submit an original and four copies of all the documents and provide a copy of the papers to the second judge that may hear the motion.

As with any motion, appropriate fees must be paid to the court. The filing fee for a Notice of Appeal is \$200. The filing fee for a Motion for Leave to Appeal is \$30, which if granted, would require an additional \$200 filing fee for the Notice of Appeal. Checks made payable to "The Clerk of the Superior Court" should be included with the documents submitted to the court or you can use your attorney account with the Superior Court.

Finally, the court will review the parties' submissions and render its decision. If the motion or appeal is before a two-judge panel, the court may enter an order disposing of the matter on appeal. If the motion or appeal is heard by a single judge, he/she may only issue temporary relief until the motion or appeal is heard by a full panel.

If at any time during the emergent application process you have a procedural question, contact the chambers of the judge scheduled for emergent duty or the Clerk of the Appellate Division. Always remember to consult the Court Rules before filing any motion or appeal.

Racing against a ticking clock can be stressful for you and your clients, but if you are prepared, the emergent application can be smooth and painless. ■