



# MondayMonday

## Come Into The Light, Or Else

November 9, 2015

Hofstra University opens this week with a convocation dedicated to the study of Frank Sinatra. The week ends with a concert by his son, Frank Sinatra, Jr., whose musical talents, in some ways, are greater than that of his father's. Frank Sinatra, Jr. is many things, but he is not his father.

Many years ago, at the elder Sinatra's last New York concert at Radio City, we spent a backstage intermission sipping Diet Cokes with Frank, Jr. He was nice, he was real and, as we would come to find out, he was a loving son. Call us prejudiced, but the latter quality is primary in our books.

At the end of the intermission (Don Rickles had opened), we were shown back to our seats by the Radio City ushers. On the way out (another story for another day), we met Frank's famous father. He was, well, Sinatra, and played that role perfectly. When the concert began again, it was Frank Sinatra's stage alone.

As good as Sinatra was (and he was), age relentlessly finds us all. Terribly vain, Sinatra would not wear glasses on stage. Since this was pre-65" LED TVs in the bathroom, the lyrics of Sinatra's songs were displayed for him instead on 27" studio monitors at the foot of the Radio City stage. The problem? In order for the lyrics to be big enough for Sinatra to see without glasses, a line could only contain a part of a sentence. Well, like any singer, Sinatra sings in phrases, not parts of sentences. Consequently, at



times he would lose his place in the lyric.

Enter his son, who was fronting a stellar orchestra which could have made anyone sound good. Frank, Jr. lovingly and with the practiced aplomb of a master, moved the music around the man, keeping his spirits up and making him look good. It appeared that Sinatra, the son, a superb singer in his own right, had other qualities too, perhaps some that his own father had never had the time to learn.

We thank *MondayMonday* reader Andrew Bokar for bringing to our attention this Second Circuit case, *Franklin v. McHugh*, Docket No. 14-4066, 2015 WL 6602023 (2d Cir., Oct. 30, 2015). Plaintiff, a retired colonel, alleged that his military records needed correction, that he was entitled to a retroactive promotion and back pay. While the Eastern District court dismissed his complaint for jurisdictional reasons, that's not what this case is doing in *MondayMonday* this week.

After the judgment dismissing his case was docketed, as a military officer, plaintiff had 60 days in which to file a notice of appeal under Rule 4(a) (1)(B) of the Federal Rules of Appellate Procedure. On October 27, 2014, Plaintiff's counsel did just that via the district court's CM/ECF electronic filing system. He uploaded the notice of appeal and related documents and paid the fee online ([www.pay.gov](http://www.pay.gov)) as well,

the latter emailing him a receipt for payment. But the CM/ECF system did not register the filing of the notice of appeal on the district court's docket sheet (operated by CM/ECF itself) on that day or any other. When plaintiff's counsel learned of the state of affairs, he contacted the EDNY's Clerk's Office which told him to simply refile the notice and repay the fee all over again, assured that the original receipt of payment would confirm the earlier filing date. The government now moves to dismiss the appeal as untimely taken.

Granting the motion to dismiss, the 2d Circuit explains that unless the notice of appeal is timely filed, it has no jurisdiction at all. Both EDNY and SDNY require electronic filing and a notice so filed is deemed properly filed. However, though EDNY's rule could be more explicit, until the filer sees a "Notice of Electronic Filing" on the screen confirming that it has been done (it's the last screen in the process,) there has been no electronic filing completed. Though plaintiff's counsel may have tried to electronically file, he did not, for he never saw that last screen. Consequently, the notice was not filed and "the Court is not at liberty to treat it as having been filed then." The subsequent late filing was just that: Late. The court reminds that counsel are charged with obtaining the skills necessary to litigate in the 21st Century.

Though appearing draconian, the Court does note the rather unique ability of a federal district court to actually *extend* the time to file a notice of appeal under Rule 4(a), if sought within 30 days of the last day it has to be filed. But you do have to ask, which plaintiff's counsel never did.

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