

What is a Special Appendix? Must I file one in the Second Circuit?

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Most of my clients are familiar with the Joint Appendix, the most common appellate document filed when an appeal is perfected at the U.S. Court of Appeals, Second Circuit (often abbreviated 2CA). Many, however, are not as familiar with the Special Appendix.

If a Joint Appendix or Appendix for 2CA contains more than 300 pages in addition to the orders, opinions and judgments being appealed, a Special Appendix must also be filed. The Special Appendix contains:

- A table of contents
- All of the case's orders, opinions and judgments being appealed
- The text (with appropriate citation) of any significant rule of law

All the above documents (except the Special Appendix's table of contents) can remain in the Joint Appendix or Appendix as well, but that is not required.

When a Special Appendix is required, it is always filed together with the Joint Appendix or Appendix and Brief. The two ways of filing a Special Appendix are:

- by adding it to the back of the Brief as an addendum and labeling the cover "Brief and Special Appendix," or
- by printing it as a separately bound book and labeling the cover "Special Appendix."

Just as with Joint Appendices and Appendices, PrintingHouse Press will be sure to create Special Appendices for our clients whenever necessary.

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What Lower Court Documents to Include in an Appellate Filing

Mark Virag | Senior Appellate Consultant | PrintingHouse Press

When filing an appeal in the New York State Appellate Division, Appellants may choose to file either a Record on Appeal or an Appendix.

Records on Appeal

Many of our clients assume that a Record on Appeal should include everything in the lower Court's file for that case, but this is incorrect. The Record should include only those documents that the lower Court considered when it rendered the particular Order or Judgment being appealed. Supreme Court Justices often issue a Memorandum cover page that lists all the documents that were considered.

Whether your Record on Appeal is derived from motion practice or a trial, the Notice(s) of Appeal and the Order or Judgment being appealed must always be included.

Appealing an Order or Judgment Resulting from Motion Practice. When the Order or Judgment being appealed is a result of motion practice, the Record on Appeal includes:

- the Notice of Appeal,
- the Order or Judgment being appealed,
- the Notice of Motion and supporting papers,
- the Affidavit or Affirmation in Opposition,
- the Reply Affidavit or Affirmation, and
- all respective exhibits to the above, including pleadings as exhibits to the various Affidavits and/or Affirmations.

Appealing a Verdict after Trial. In an appeal from a verdict after trial, the Record on Appeal consists of:

- the Notice of Appeal,
- the Judgment being appealed,
- the trial transcript,
- all exhibits admitted into evidence,
- the pleadings, and
- the Judgment Roll.

Please note that the trial transcript must be settled, which means that either the parties must stipulate to its correctness or it must be sent out with a 15-day Notice of Settlement. The other parties to the appeal have 15 days to respond with corrections, if any. Alternatively, once 15 days have passed, the Appellant must include an Affirmation of Compliance in the Record (stating that the transcript has been settled). In the rare instances when the parties cannot agree on the correctness of a transcript, the trial judge is called upon to settle the transcript.



Our clients frequently ask about including Memoranda of Law in the Record. Generally, this is frowned upon by the Appellate Division because a Record is a compilation of fact and Memoranda of Law are argument. However, a Memorandum of Law is included if it was the only document that one (or more) of the parties filed in support of its position.

Appendices

The New York State Appellate Division also allows Appellants the option of perfecting an appeal using the Appendix method. When utilizing the Appendix method, the Appellant may be selective about which documents to include and which documents to omit from the filing. In essence, an Appendix is a compilation of the documents that an Appellant plans to cite as well as those the Appellant can reasonably anticipate the Respondent needing to cite. If the Appellant does not make a good-faith effort to include the documents the Respondent will need, the Respondent may file a Motion to Strike the Appendix, and the resulting motion practice at the Appellate Division will cost the Respondent far more time and money than preparing a more complete Appendix in the first place.

Just keep in mind that Appellants must subpoena the entire file from the Court of original instance to the Appellate Division when using the Appendix method in the Appellate Division, First and Second Departments. When using the Appendix method in the Appellate Division, Third and Fourth Departments, Appellants must file a single copy of the Record on Appeal with the Appendix. For this reason, in the Third and Fourth Departments it is usually more practical and economical simply to submit a Record on Appeal (instead of an Appendix in addition to a Record on Appeal).

Deferred Appendices at the Second Circuit

Paul LaMar | *Executive Vice President of Appellate Services* | PrintingHouse Press

When filing an appeal in the United States Court of Appeals for the Second Circuit, most Appellants file an Appendix to accompany their Appellant's Brief. The Appendix includes the documents to be cited to by all the parties in their Briefs.

However, local rule 30(c) of the Second Circuit provides that parties may file a Deferred Appendix as provided in FRAP 30(c), if the parties stipulate, or if the Court's own Motion directs. This method eliminates the need to ascertain in advance which documents the parties will need to cite to. The Deferred Appendix is normally used in instances when the parties cannot decide which documents will be contained in the Appendix until they have written their Briefs. Some law firms also use this method as a cost-cutting measure because it limits the number of pages reproduced in the Appendix to those truly necessary for the arguments in the Briefs.

In instances when a Deferred Appendix is to be filed, the Appellant and Appellee file page-proof Briefs with citations directly to the Record documents listed on the lower Court's Docket Sheet. Once the page-proof Reply Brief is filed by the Appellant, the Deferred Appendix will need to be filed within seven days, containing all the documents cited to in all the page-proof Briefs. Fourteen days after the filing of the Deferred Appendix, the final-form Briefs are filed with citations to the Appendix, replacing the Record citations that were in the page-proof Briefs.

To sum up, when filing a Deferred Appendix, please keep in mind that two Briefs are required to be filed by each party: page-proof and final-form. The page-proof Brief contains citations to the Record, and the final-form Brief contains citations to the Appendix.

Formatting Requirements for Appellate Briefs in AD1 and AD2

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The New York State Appellate Division has requirements for how an Appellate Brief must be formatted and a few elements it must contain. Most of these rules are the same whether the Brief is filed in the First or Second Department (AD1 or AD2). However, a few requirements differ from one Court to the other. Here are some guidelines that our clients find helpful.

Formatting Rules Identical for AD1 and AD2:

- Table of Contents: Required.
- Typeface: Times New Roman (14 point text with 12 point footnotes) or Courier (12 point text with 10 point footnotes).
- Trim Size: 8.5 × 11.
- Spacing and Margins: Double-spaced with 1-inch margins.
- Italic or Underlining for Emphasis in Text: Acceptable if not excessive.
- Full Caps: Acceptable in headings and subheadings, but unacceptable in text unless those words were in full caps in documents filed in lower Court.
- Maximum Page and Word Count: For Appellant's and Respondent's Briefs, 70 pages/14,000 words. For Reply Briefs, 35 pages/7,000 words.
- Oversized Briefs: Both AD1 and AD2 require a copy of Brief prior to filing, with a letter application seeking Court's permission.

Formatting Rules That Differ between AD1 and AD2:

- Bullet Points in Text: Acceptable in AD2. Unacceptable in AD1, but dashes may be used as alternative.
- Table of Authorities: Required in AD1 but optional in AD2.
- Compliance Document: Both AD1 and AD2 require this as the final page of each Brief. The compliance document lists the processing system, typeface, point size and word count of the Brief. Neither AD1 nor AD2 requires a signature. However, in AD1 the compliance document is entitled "Printing Specifications Statement" and lists the information above pursuant to CPLR 600.10(d)(1)(v). In AD2 the document is entitled "Certificate of Compliance" and lists the same information pursuant to CPLR 670.10.3(f).

The bottom line is that whenever we work on an Appellate Brief, multiple departments at PrintingHouse Press double-check to make sure it meets the aforementioned requirements so that the Court will not reject it. We pride ourselves on protecting our clients and dealing with any potential issues prior to serving and filing a brief in Court.

Modifications to the Counsel of Record at the Appellate Division, Second Department

Eric J. Kuperman, Esq. | *Executive Vice President of Sales* | PrintingHouse Press

In the Appellate Division, Second Department, what is an Appellant's responsibility for notifying the Court when the Respondent's Counsel of Record has changed from the one indicated on the Appellant's filed Request for Appellate Division Intervention form?

I recently had a client who needed to perfect his appeal in the Appellate Division, Second Department (AD2). It turned out, however, that after he had filed his Notice of Appeal and Request for Appellate Division Intervention ("RADI"), the Respondent's counsel had withdrawn, and the Respondent had become a pro se litigant.

This was significant because AD2 requires that an Affidavit of Service accompany the filing to prove that the service has been properly effectuated on the appropriate party. In order to

ensure compliance, AD2 routinely compares the information on the Affidavit of Service to the information provided by the Appellant on the RADI. In this instance, since that information was inconsistent, AD2 required a letter to accompany the filing, indicating the change in representation of the party. In fact, without such a letter, AD2 would have rejected the filing.

For this reason, if you are perfecting an AD2 appeal on the date of its expiration, you'd better make sure that your adversary's counsel has not changed. If it now differs from what you listed on your RADI, it is incumbent upon you to prepare a letter on your letterhead advising AD2 of the change and, of course, of the reason you are serving another party rather than the party listed on the RADI.

NEXT ISSUE HIGHLIGHTS

- How Do I Determine My Deadline to File an Appendix and Brief in the Second Circuit?
- Certified Questions to the New York State Court of Appeals from the Second Circuit Court of Appeals
- Petition for Writ of Certiorari: Booklet Format; 8 1/2 by 11-Inch Paper Format or 6 1/8 x 9 1/4 format

About Us

Since its inception in 1970, PrintingHouse Press has worked diligently to become the East Coast's leading appellate services provider. Throughout the years, PrintingHouse Press has sustained a highly knowledgeable and experienced team of professionals whose mantra has always been to provide the legal community with unparalleled appellate printing and litigation support. With a shared dedication and broad knowledge base, PrintingHouse Press's staff of appellate consultants, paralegals and production specialists is renowned for its in-depth familiarity with the appellate rules and internal operating procedure of all the State Courts, the 13 Federal Circuit Courts and the United States Supreme Court.

We have developed numerous high-value solutions that go beyond the scope of the company's well-known appellate printing services. With the PrintingHouse Press Client Portal, the first in the industry, attorneys have 24/7 online access to all Records, Appendices and Briefs they have filed with the Court; possess the ability to track the date, time, location and position on the calendar for oral arguments; and receive instant notifications when their appeals are served and filed.

Over the past several years, PrintingHouse Press has devised several new ways to serve the appellate community. Our entire website was completely revamped and given a responsive interface that can be used just as easily on a mobile device as on a computer. PrintingHouse Press has also brought to its clients an informative video series called On the Record that aims to clarify any misconceptions regarding New York State and Federal appellate practice.

Technological advancements are not PrintingHouse Press's sole focus, though. We are making great strides to personally connect with our clients by sponsoring countless legal association events and presenting Continuing Legal Education courses on appellate procedure—both live courses and online webinars for our clients' convenience.

PrintingHouse Press is constantly striving to deliver innovative solutions that address the needs of our clients as well as the needs of the appellate industry at large.

