

# Appellate Lawyer PREPARation

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## HOW TO HANDLE DUPLICATIVE DOCUMENTS WHEN PERFECTING AN APPEAL AT THE APPELLATE DIVISION

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There are a couple of ways of handling duplicative documents when preparing a Record on Appeal or an Appendix for the New York State Appellate Division, First through Fourth Departments. The decision is normally left up to the attorney perfecting the appeal and/or the attorney's client.

If cost is an issue, most attorneys prefer not to have duplicative documents reproduced throughout the entire Record or Appendix. Depending on how many documents are duplicated, their length and how often they reappear, repeating them each time can significantly increase both the length of the Record or Appendix and the cost of printing it.

The practical way around this is to replace the repeated document with a single inserted page, explaining where the duplicative document already appears. For example, suppose the "Affirmation of Richard Jones, dated May 1, 2015" initially appears in the Record/Appendix from pages 50 to 75, then is included twice later, reappearing from pages 225 to 250 and 500 to 525. Each repetition can be replaced by a single page denoting:

*Affirmation of Richard Jones, dated May 1, 2015  
(Reproduced Herein at pages 50 to 75)*

In this example, you would eliminate nearly 50 pages from the Record or Appendix. In fact, since the Court requires a minimum of ten copies of the Record or Appendix for service and filing, you would eventually eliminate around 500 pages. As you can see, in this instance, the printing cost would be greatly reduced.

On the other hand, when cost is not an issue, the duplicative documents can be reproduced in their entirety throughout the Record or Appendix. Several PrintingHouse Press clients feel that the inclusion of these documents throughout the Record or Appendix adds convenience to the review process.

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# NEW YORK STATE APPELLATE DIVISION, FIRST AND SECOND DEPARTMENTS: HOW AND WHEN MUST I SERVE MY ADVERSARY?

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I frequently receive inquiries from my clients with respect to how to serve their adversaries when they are perfecting an appeal or opposing one that their adversary has already perfected. I will limit this posting to the Appellate Division, First Department (hereinafter AD1) and Appellate Division, Second Department (hereinafter AD2) because those are the courts about which I receive the most frequent inquiries.

In AD1, the brief must be in your adversary's hand/office on the date that it is filed. That means that if one's last day to perfect is February 18, 2014, or if one simply wants to meet that deadline to comply with the AD1 May 2014 Term deadline, not only must the Court receive the Record and Brief on that date but your adversary must receive it in hand as well. This is easily accomplished if the service party is local. However, if the filer is within NYC and the adversary is in Rochester, for instance, it behooves the filer to serve Rochester overnight (the day prior) so that both the service party and the Court will receive the documents simultaneously.<sup>1</sup> This, of course, requires the filer to complete his brief one day early to allow for shipping. The alternative is to personally deliver the brief (at whatever expense) to the adversary's office the date it is due. In this case, it would mean a car service, messenger, etc. to Rochester, NY, which, even if feasible, would dramatically increase the expense.

One caveat to the foregoing is with respect to the Appellant's Reply Brief. Since this is the last filing and the Respondent receives no opportunity to put in a brief after the Reply Brief is filed, there is no need for personal service of the Reply Brief. At this stage of the briefing schedule, the Appellant may serve his/her Reply Brief via regular mail.<sup>2</sup>

In AD2, it's more straightforward. Though service may, indeed, be done personally, service via regular mail is perfectly acceptable. Moreover, using the same date as the above-noted example (though there are no Terms in AD2), as long as the service is mailed on the date it is due, the filer has complied with the Court's requirements. It is for this reason that AD2 gives the adversary an additional five (5) days to respond to the filing if served via regular mail. The service party would get an additional one (1) day if served via overnight mail.

**1** The truth is that in this example, once the service is overnighted, the filer may file the same day he overnights the Appellant Brief/Record to the adversary as long as the deadline is the date of receipt and not the date the package is shipped.

**2** Of course, if the initial filing is a Joint Record/Appendix and the Respondent, therefore, is entitled to the last word (i.e. Reply Brief, on his cross-appeal) then the Appellant's Reply would have to be served personally and the Respondent's Reply Brief could be served via regular mail.



## HOW TO OBTAIN EXTENSIONS OF TIME AT THE NEW YORK STATE COURT OF APPEALS

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Extensions are more easily obtained in the New York State Court of Appeals than in the four departments of the Appellate Division. The Clerk of the Court is authorized to grant, for good cause shown, a reasonable extension of time for filing papers on an appeal. A request for an extension may be made by a telephone call to the Clerk's Office. Before calling the Clerk's Office, the party seeking an extension must contact all of the other parties involved in the appeal, notify them of the request and obtain their position as to whether they consent to (or oppose) an extension. The party requesting an extension shall advise the Clerk of the Court of the position of each party with regard to the request. A party who is granted an extension shall file a confirmation letter, with proof of service of one copy on each other party. In some instances the Court will notify all of the parties regarding their determination of the request directly. In this case, you do not have to serve each party with a copy of the confirmation letter.

# REQUESTING ORAL ARGUMENT IN THE NEW YORK STATE APPELLATE DIVISION

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The method for requesting oral argument varies in the appellate courts across New York State. Some courts require the time to be proposed on the brief covers while others require submitting a specific request form to the clerk. Regardless of the method used, however, there is always a limit as to how much time each party may request.

In the Appellate Division, First Department (hereafter AD1), an Oral Argument Request form must be submitted on behalf of all parties involved in the appeal in order to obtain argument time. Indicating on the cover that you will be arguing the case is insufficient. Your appeal will be scheduled for submission if the form is not filed in a timely manner. Pursuant to 600.11(f) of the rules of the First Department, the parties should confer and agree on the amount of time that will be requested for all parties; bearing in mind that a combined total of no more than 30 minutes is allowed for all the parties. If more than 30 minutes is necessary to give each party the opportunity to argue its point, a letter of explanation must be submitted to AD1. The Appellant usually files the Oral Argument Request form, but there is no rule prohibiting the Respondent from doing so.



In the Appellate Division, Second, Third and Fourth Departments, the responsibility for requesting argument time falls on each individual party filing a brief with the Court. The brief cover must contain the amount of time being requested. As with AD1, no more than a total of 30 minutes is allowed for argument time. The only exception is in the Third Department when the appeal is taken: (a) from a judgment; (b) in an action on submitted facts; or (c) in a special proceeding transferred or instituted in the Third Department. In these instances, each party is permitted 30 minutes of argument time. The Court of Appeals of the State of New York also allows 30 minutes per side for arguing.

In all New York State appellate courts, no more than one attorney is heard for each brief filed unless the Court grants permission (upon application prior to the argument date) allowing more than one attorney to argue. Moreover, if no time is requested, even if the cover reflects to be argued by, no time will be granted and the appeal will be decided exclusively on the filed documents.

## WORD COUNT CERTIFICATION REQUIREMENT: HOW TO COMPUTE AND WHAT TO INCLUDE

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The Appellate Division, First and Second Departments require that a word count certification be included at the end of every brief filed. Along with the word count of the brief, these certification pages include the type of font used, the size of the aforementioned font and the line spacing, which should always be double.

In both the First Department (Printing Specifications Statement pursuant to 22 NYCRR § 600.10(d)(1)(v)) and the Second Department (Certificate of Compliance pursuant to 22 NYCRR § 670.10.3(f)), Appellant and Respondent Briefs are limited to 14,000 words and 70 pages and the Reply Brief is limited to 7,000 words and 35 pages.

Neither the Tables of Contents/Authorities nor the signature block at the end of the brief need be included in the word count. It is, however, imperative that the footnotes be included when calculating the word count. One should therefore ensure that the word processing program being utilized has accounted for footnotes to avoid the last minute pressure of having to deal with an oversized brief the day it is due.



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## NEXT ISSUE HIGHLIGHTS

- How much time do I have to perfect an Appeal in the Appellate Division, First Department?
- Memoranda of Law: To Include or Not
- Second Circuit Nuance regarding rejected filings

## ABOUT PHP

Since its inception in 1970, **PHP** has worked diligently to become the East Coast's leading appellate services provider. Throughout the years, **PHP** 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, **PHP** 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 **PHP** 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.

**PHP** 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 **PHP** 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.

**PHP** 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.

