

Appellate Lawyer PREparation



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NEW YORK STATE APPELLATE DIVISION, FIRST DEPARTMENT CLERK'S REQUIREMENTS REGARDING AVAILABILITY FOR ORAL ARGUMENT

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We frequently receive questions from our clients regarding the procedures for notifying the Appellate Division, First Department, of any dates when they are unavailable to appear for oral argument. All letters notifying the Court of such requests must be filed by the date specified on the First Department's Term Calendar under the section labeled "Oral Argument, Time Requests and Adjournment Stipulations."

However, we have come across instances when an attorney provided too many unavailable dates to the Court. At what point will the Calendar Clerk view your availability as insufficient? The Clerk's rule is quite simple: the Court requires arguing attorneys to be available at least six of the Calendar days listed for that Term. Since Calendar days are usually on Tuesdays, Wednesdays and Thursdays, and each Term is about a month long, this typically translates into half the combined Tuesdays, Wednesdays and Thursdays within that Term.

The easiest way to ensure that you have effectively notified the Court of your availability is to have your letter reviewed by the Clerk's Office prior to filing. Otherwise, if there is insufficient availability, in most cases your letter will be rejected, or you will be notified by a staff member in the Clerk's Office to amend your request.

APPELLATE DIVISION, SECOND DEPARTMENT—DOCKET NUMBERS

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After receiving a Notice of Appeal, the Second Department of the Appellate Division will issue a docket number, without which the appeal cannot be perfected. (This is different from the First Department, which simply uses the lower Court's index number to identify all the documents when an appeal is perfected.)

In the Second Department, each Order or Judgment, together with its respective Notice(s) of Appeal, will carry a specific docket number. If the Appellant is appealing from multiple Orders and/or a Judgment in a single Record or Appendix, the Second Department will still assign each Order or Judgment (with its respective Notice of Appeal) a different docket number. For this reason, some Records on Appeal and Appendices have multiple docket numbers.

In the past, a docket number was issued promptly after the filing of the Notice of Appeal. If an Appellant was required to perfect an appeal before a docket number could be issued, the clerk of the Second Department would simply issue a docket number at the time of filing of the Record (or Appendix) and Brief. However, because of a large increase in appeals being filed at the Second Department,

it can now take several months for a docket number to be issued after the Notice of Appeal is filed. This can cause problems if an Appellant must perfect an appeal expeditiously.

At present, in order to obtain a docket number quickly, the Appellant must bring a copy of the stamped “filed” Notice of Appeal, the Order(s) and/or Judgment being appealed from and the RADI (Request for Appellate Division Intervention) form to the Second Department. The Court will issue a docket number the next day, and the Appellant will be able to label the Record or Appendix and Brief accordingly.

However, note that the Court considers this accelerated approach to be a method reserved for extreme circumstances. The clerks will make a note in their system that a docket number has been issued in this manner and expect to see the appeal served and filed within the next two or three days. Therefore, Appellants should use this method prudently and judiciously—only when sure of filing without delay—since it is unwise to run the risk of displeasing the Court.

ENLARGEMENTS OF TIME AT THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Enlargements of time to file Appendices and Briefs at the Second Circuit must be requested by Motion with a Supporting Affidavit demonstrating good cause. All Motions made to the Second Circuit must be accompanied by a T-1080 Form (Motion Information Statement). The Court prefers that these Motions be made at least two weeks in advance of the original due date for civil cases and at least one week in advance for criminal cases.

Since the filing deadlines are set up to 91 days in advance, the Court will generally grant one 30 day enlargement of time. However, it is reluctant to grant a second extension unless there are “extraordinary circumstances” such as a death or illness. The Court requires that a Motion to Enlarge be made as soon as practicable after said “extraordinary circumstances” arise.



HOW SOON AFTER THE DEADLINE TO PERFECT MY CIVIL APPEAL WILL AD1 OR AD2 DISMISS MY APPEAL AS ABANDONED?

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In the Appellate Division, one has nine months from the date on the Notice of Appeal to perfect a civil appeal in the First Department (§ 600.11) and six months to perfect a civil appeal in the Second Department (§ 670.8). If those deadlines pass without an application for an extension of time, the question arises as to whether AD1 or AD2 will dismiss the appeal at some point on the basis that it has been abandoned by the would-be Appellant.

According to AD1 Rule § 600.12, in May, the AD1 clerk makes a calendar of all civil appeals not perfected within the past nine months. This calendar is ultimately published in the New York Law Journal for five consecutive days and called by the clerk on the fifth day of publication. In the event that the Appellant or moving party fails to submit an Affidavit satisfactorily explaining the delay and containing information regarding the appeal (including, but not limited to, the nature of the Order being appealed, whether an enlargement was granted, the date the Notice of Appeal was served, etc.), an Order will be entered dismissing the appeal or cause.



In accordance with AD2 Rule § 670.8, the clerk “shall periodically prepare a calendar of all civil causes which . . . have not been perfected within . . . the time limitations [i.e., six months]. . . Such calendars shall be published in the New York Law Journal for five consecutive days. Upon the failure of the appellant to make an application to enlarge time to perfect within 10 days following the last day of publication, an order shall be entered dismissing the cause.”

DETERMINING DUE DATES FOR APPELLEE’S AND REPLY BRIEFS AT THE SECOND CIRCUIT

Paul LaMar

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In the Second Circuit Court of Appeals, the due date for an Appellee’s Brief depends on the date when the Appendix and Appellant’s Brief were electronically served and filed via ECF (electronic case files) upload.

The Appellee has 14 days from the Appellant’s Brief upload date to provide the Second Circuit with a scheduling notification for the Appellee’s Brief. That due date must fall within 91 days of the date that the Appellant’s Brief was electronically served and filed. For example, suppose the Appendix and Appellant’s Brief were electronically served and filed on March 1. The Appellee would have 14 days (until March 15) to notify the Second Circuit of the due date for its Appellee’s Brief, and that due date could not be later than 91 days after March 1 (that is, May 31).

The Reply Brief is due 14 days from the date that the Appellee’s Brief is uploaded to the Second Circuit ECF system. No scheduling notification is required for the Reply Brief.

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NEXT ISSUE HIGHLIGHTS

- Sending your Record on Appeal to an Appellate Printer: Achieving Efficiency via Client Web Portals
- The September Term in the Appellate Division, First Department
- The Appendix Method at the Appellate Division, Third and Fourth Departments

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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 cognizance, PrintingHouse Press' staff of appellate consultants, paralegals and production specialists is renowned for its acute familiarity with the appellate rules and internal operating procedure of all the State Courts, the thirteen Federal Circuit Courts and the United States Supreme Court.

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