

Appellate Lawyer PREPparation

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CERTIFIED QUESTIONS FROM THE SECOND CIRCUIT TO THE NEW YORK STATE COURT OF APPEALS

JIM COONAN

Director of Appellate Services | PrintingHouse Press

*Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the [New York State] Court of Appeals exists, the court may certify the dispositive questions of law to the [New York State] Court of Appeals.
Rules of Ct of Appeals [22 NYCRR], § 500.27 (a)]*

There is confusion about the form a certified question from the Second Circuit Court of Appeals (2CA) to the New York State Court of Appeals (NYSCA) should take. Attorneys have been under the impression that they should take the Joint Appendix or Appendix that was filed in the Second Circuit and simply re-file it with a different caption for New York State's highest court.

This is incorrect. A certified question should mirror the form of an appeal being filed with the NYSCA that was previously heard at the Appellate Division level. Headings and page numbers should be on the top of each document and must match the entries in the table of contents. The cover should conform to all the requirements of the NYSCA, not the Second Circuit requirements. The accompanying briefs should also comply with the NYSCA rules.

The one benefit of filing a certified question with the NYSCA, as opposed to an appeal from a decision of the Appellate Division, is that there is no filing fee.

For more information regarding certified questions, please proceed to the NYSCA Rules.

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10 East 39th Street, 7th Floor, New York, NY 10016

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APPELLATE DIVISION, SECOND DEPARTMENT– DOCKET NUMBERS

CARMEN OTERO | Senior Appellate Consultant | PrintingHouse Press

After receiving a Notice of Appeal, the Appellate Division, Second Department 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.



THE REQUIREMENT OF SUBPOENAS IN THE NEW YORK STATE APPELLATE DIVISION

JOHN MCGORTY | Executive Vice President of Business Development | PrintingHouse Press

In the New York State Appellate Division, subpoenas are most commonly used when the Appellant elects to perfect an appeal using the “Appendix Method.” Essentially, an Appendix is an abbreviated version of a Record on Appeal. Therefore, when perfecting an appeal using the “Appendix Method,” it is the Appellant's responsibility to ensure the Appellate Division has a complete copy of the lower Court file. In order to effectuate such a transfer of the file, the Appellant must file a subpoena with the County Court which produced the Order they are appealing from. For instance, if the Appellant is perfecting an appeal in the Appellate Division, First Department from an Order originating in New York County, the subpoena must be filed in New York County. It is then the responsibility of the New York County Clerk's Office to transfer the complete Record to the First Department. When perfecting an appeal using the “Appendix Method” in either the First or Second Department, if the complete Record has not yet been transferred by the time the Appellant is ready to file the Appendix and Brief, the Clerk of the Appellate Division will request a copy of the filed subpoena.

There is a fee associated with filing a subpoena and the amounts and processes may vary from County to County. Most of the fees are fixed (and nominal) and must be paid with an attorney's check. However, Bronx County requires cash and the charges vary depending on the size of the Record that is being subpoenaed. On average, the fee will be between \$20 and \$30.

The process to perfect an appeal using the “Appendix Method” in the Appellate Division, Third and Fourth Departments is quite different. In addition to filing the Appendix, the Appellant is required to reproduce and serve/file one complete copy of the Record on Appeal. No subpoena is required.

ADJOURNMENT OF **ORAL ARGUMENTS** IN APPELLATE DIVISION, FIRST DEPARTMENT AFTER THEY HAVE BEEN CALENDARED

ERIC J. KUPERMAN, ESQ. | Executive Vice President of Sales | PrintingHouse Press

We plan and G-d laughs. It's an old adage that comes into play in appellate practice as well. With respect to calendaring of oral arguments in AD1, the Appellate Division has a system whereby an attorney can account for unavailable dates for upcoming oral argument. For instance, if you know of particular dates for which you are unavailable in a particular Term, you may write to the Appellate Division in advance of the Term calendar being released, including a list of up to six dates on which you are available to argue.

However, it is not so simple to adjourn a matter once already calendared by the Appellate Division, First Department. There are a few requirements that must be met, and even then, there is no guarantee that the adjournment will be granted. After all, the Appellate Division trumps lower court proceedings, so it is not enough, for instance, to say that you have a conflicting trial date. However, sudden illness or other extenuating circumstances (e.g., your child's wedding) may just be enough.

In such an instance, you are going to want to stipulate with opposing counsel to the adjournment. In addition to the Stipulation, however, you will need to complete an Attorney's Affirmation which explains the reason that the adjournment to another Term is needed. Finally, since this is akin to motion practice, a \$45 fee payable to the Appellate Division, First Department will have to be brought to the Court by the attorney seeking adjournment along with the Stipulation and the Affirmation, so the Appellate Division can So-Order the application (if it is so inclined).

All of this being said, if at all possible, try to account for conflicts in advance so you can avoid the hassle of endeavoring to adjourn a matter that has already been placed on the Court's calendar.



MOTIONS FOR PREFERENCE AT THE APPELLATE DIVISION, SECOND DEPARTMENT

ERIC J. KUPERMAN, ESQ. | Executive Vice President of Sales | PrintingHouse Press

As many are aware, the Appellate Division, Second Department (AD2) is one of the busiest appellate courts in the nation. The volume of appeals filed in AD2 on a daily basis is shockingly high. As a result, it should be surprising to no one that the lag between appeals being fully briefed and being calendared for oral argument is ever increasing. In fact, AD2 appeals now typically wait in excess of a year to be calendared for oral argument. And then, once argued, the parties must wait for a decision on the appeal.

Sometimes, the waiting game is no problem and just another hurdle in the litigation process. In other circumstances, however, attorneys may represent elderly clients and waiting over a year to have resolution of the appeal is difficult to tolerate. Accordingly, AD2 provides a remedy in those instances.

If an attorney has a client who is at an advanced age, the attorney may make a motion for a preference at AD2. This means that, if successful, the appeal will be calendared on an expedited basis. In order to successfully make such an application, the attorney must file a Notice of Motion and Affirmation in Support, demonstrating the need for such a preference. The movant should attach, at a minimum, the Notice of Appeal and Order being appealed with Notice of Entry as exhibits and include a \$45 filing fee payable to AD2.

Needless to say, the movant should file this application sooner rather than later, so as to get the ball rolling as quickly as possible. Absent prejudice and providing that the movant has demonstrated appropriate need, the application should be granted.

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NEXT ISSUE HIGHLIGHTS

- The Appendix Method at the Appellate Division, Third and Fourth Departments
- Requirement of serving with Notice of Entry even in electronically filed cases.
- The Submission Calendar at the Appellate Division, First and Second Departments

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' 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' 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.

