

# Appellate Lawyer PREparation

SERVING THE NEEDS OF APPELLATE LAWYERS

## THE SUBMISSION CALENDAR AT THE APPELLATE DIVISION, FIRST AND SECOND DEPARTMENTS

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After perfecting an appeal or filing a Respondent's Brief on behalf of our clients, we track the associated calendar dates for the Appellate Division, First and Second Departments. Once an appeal is placed on the calendar, the date represents when either an oral argument or submission will take place.

If the appeal is placed on the calendar for oral argument, the parties involved will prepare their arguments for that date. Usually there is a 30-minute combined time limit for all parties (e.g., 15 minutes for Appellants, 15 minutes for Respondents).

If the matter is placed on the submission calendar, no further action or appearance by the attorneys is required. The submission date is provided so that the parties are aware of when the papers will be sent up to the panel for review. The panel will then make a final determination based on the briefs that were filed. Typically, the parties can expect to see a decision within eight weeks from the submission date.

There are instances when a party may request oral argument, but the Court still places the appeal on the submission calendar. In the Appellate Division, appeals are set forth as enumerated or "non-enumerated." If an appeal is non-enumerated, it is prohibited from oral argument and will be placed on the submission calendar. If your appeal is non-enumerated and you would like to argue the appeal in front of the panel, you may write a letter requesting permission from the Court. In the First Department, such letters should be filed no later than the day after Respondent's Briefs are due within a particular Term. In the Second Department, there is no set deadline for this type of request; however, the letter should typically be filed prior to the filing of the last Reply Brief. The parties would then avoid the risk of having the appeal placed on the submission calendar before the request has been made.

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# FILING AN APPENDIX AT THE NEW YORK STATE APPELLATE DIVISION

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There are several reasons that an attorney would prefer to file an Appendix as opposed to a full Record on Appeal. The predominant one is the desire to limit the costs of the appeal. In the Appellate Division, the Appellant has a choice of filing a Record on Appeal or an Appendix. An Appendix, to put it simply, is a “lighter” version of the full Record.

The Record on Appeal consists of all documents filed at the lower court level, which led to the Order/Judgment being appealed. A Record on Appeal would consist of all Motion papers for each party, the attached affirmations and exhibits and any replies that were filed. Also included is the Notice of Appeal and Order being appealed. A Record on Appeal arising from a trial verdict would consist of the trial transcript, pleadings and any exhibits admitted into evidence and of course the Notice of Appeal and Order/Judgment being appealed. Most attorneys prefer to utilize the full Record since it gives the Appellate Division Justices immediate access to the documents which were reviewed by the lower court Judge.

The Appendix method normally consists solely of the documents to which each party would be citing in their respective Briefs. The Appendix method can lead to the exclusion of hundreds of documents which each party may deem unnecessary since they are irrelevant to their arguments. The Appellant may feel that this is the best way to proceed when a cap on costs is involved.

When the Appendix method is used in the First or Second Department, it is required that the documents in the lower court be subpoenaed to the Appellate Division in order for the Court to have access to the full Record. This ensures that the Justices will be able to review documents that were omitted from the Appendix. The Court will not accept an Appendix for filing unless there is proof that the lower court documents have been subpoenaed. When the Appendix method is used in the Third and Fourth Department, the Appellant is required to provide one copy of the Record on Appeal and file it with the Appendix copies.

When the Appellant chooses the Appendix method, he must be careful when omitting documents. He must ensure that the Appendix includes the documents which will be cited to in his Brief and should also include the documents the Respondent(s) will need to cite to in its Brief. In most cases, based on the arguments involved, the Appellant can usually determine the documents required by the Respondent(s). When a good faith effort has been made by the Appellant, but some of the Respondent’s documents have still been omitted from the Appendix, a Respondent’s Appendix can be filed as of right. If a good faith effort was not made, then the Respondent can move to strike.

Most Appellants will look at the expense of both methods and determine which is more cost effective for their client.

# CHEERS!

Cheers to our clients who made this happen.  
Cheers to those nominated and the winners.  
Cheers to the work and the long nights.

Cheers to the **PrintingHouse Press** team,  
for taking the gold as **Best Appellate Printer** and  
**Best Appellate Services Provider**.



# THE APPENDIX METHOD AT THE APPELLATE DIVISION, THIRD AND FOURTH DEPARTMENTS

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In essence, an Appendix is an abbreviated Record on Appeal. When a trial goes on for weeks but only a portion of the transcript is pertinent to the appeal, an Appendix can be filed in order to eliminate the additional documents that could possibly dilute the Appellant's argument. Our clients will often choose to file an Appendix instead of the traditional Record on Appeal for this reason or simply because the Appendix method is usually more cost-effective.

When an Appellant files an Appendix with the Appellate Division, First or Second Department, these Courts require that the lower Court file be subpoenaed to the Appellate Division. Once the subpoena is so-ordered by the Appellate Division and filed with the county Court, it is the lower Court clerk's responsibility to transmit the documents to the Appellate Division.



However, when an Appellant perfects an appeal on the Appendix method in the Appellate Division, Third or Fourth Department, these Courts require that one copy of the Record on Appeal be served and filed in addition to the Appendix. This means that after compiling the Appendix documents, numbering the pages, creating headnotes and an Appendix table of contents, the Appellant must repeat these steps for a Record on Appeal, including even those documents which the Appellant elected to exclude from the Appendix. According to the rules of appellate practice for the Third and Fourth Departments, the Appellant is required to serve and file a single copy of the full Record on Appeal in addition to filing 10 copies (and serving 2) of the Appendix.

If you are filing an Appendix in either the Third or Fourth Department in order to save money, you might be cutting off your nose to spite your face. Unless the anticipated Record on Appeal would be exceedingly large, it usually is more efficient in AD3 and AD4 to simply compile a Record on Appeal instead of serving and filing both an Appendix and a Record.

## MEMORANDA OF LAW: TO INCLUDE OR NOT

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When compiling the documents that will constitute a Record on Appeal or Appendix, many appellate attorneys ask the same question regarding Memoranda of Law. Is it appropriate or acceptable to include them in the filing?

There is no rule at the New York State Appellate Division Departments that states a Record or Appendix will be rejected if Memos of Law are incorporated. The standard answer regarding whether they should be incorporated as part of the appeal is usually that the Memos of Law may be included only if they have independent relevance<sup>1</sup>. This means that either these lower court briefs contain admissions of fact or there is dispute as to whether or not a point was raised below.

If, however, a party only filed a Memorandum of Law instead of an Affirmation in Support or Opposition, then the Memo should always be included in the Record or Appendix regardless of whether it has independent relevance or not. In omitting such a Memo, a key portion of the case documents would be missing from the Record/Appendix and perhaps also the ensuing briefs, skewing the appellate judge's decision.

If a Memo of Law either has independent relevance or was filed in place of an affirmation and must be included in the Record on Appeal or Appendix, it is customary to then include all of the Memoranda of Law into the filing.

<sup>1</sup> However, if the Judge rendering the decision goes to the extent of pointing out the Memos of Law in his decree, I always advise my clients that they should automatically be included to accurately have a complete Record on Appeal.

# THE NOTICE OF ENTRY IN E-FILED CASES

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

A Notice of Appeal must be filed and served within 30 days of the date the Order or Judgment being appealed is served with Notice of Entry (CPLR § 5513(a)). Of course, if the Order with Notice of Entry is served via regular mail, the Appellant receives an additional five days to serve and file a Notice of Appeal (CPLR § 2103).

However, if a case is e-filed, does the mere fact that the Order or Judgment being appealed is uploaded onto the New York State Courts Electronic Filing System (“NYSCEF”) constitute “service with Notice of Entry” and start the clock with respect to when a Notice of Appeal must be filed? In short, the answer is no.

According to the New York County Clerk Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, “The County Clerk shall file decisions and orders, long form orders, and judgments electronically, which shall constitute entry thereof (Uniform Rule 202.5-b(h)1(1)), as will be reflected in a legend on the document. Upon e-filing, an email message will be transmitted immediately

to all filing users on the case. . . . Such notice does not <sup>1</sup> constitute service of notice of entry by any party.” The directive continues that such Notice of Entry shall be served in the manner set forth by Uniform Rule 202.5-b(h)(3).

Said section reiterates that the mere appearance of an Order on the NYSCEF site does not constitute service of the Order with Notice of its Entry. It continues that “a party shall serve notice of entry of an order or judgment on another party by serving a copy of the order or judgment and written notice of its entry. A party may serve such documents electronically by filing them with the NYSCEF site and thus causing transmission by the site of notification of receipt of the documents, which shall constitute service thereof by the filer.” In the alternative, the Rule permits a party to serve written notice of entry of an order or judgment in hard copy by any method set forth in CPLR 2103(b)(1) through (6).

<sup>1</sup> Emphasis in original.

## NEXT ISSUE HIGHLIGHTS

- Word Count Certification Requirement: How to Compute and What to Include
- Time to Perfect an Appeal in the Appellate Division First Department: 30 Days or Nine Months?
- Should Transcripts of Oral Arguments be Included in The Record on Appeal?

## 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.



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