

Appellate Lawyer **PREP**aration

SERVING THE NEEDS OF APPELLATE LAWYERS

ISSUE 1 | VOL 7 | SPRING 2019

IN THIS ISSUE:

- PROPER MOTION PRACTICE
TECHNIQUES FOR THE NEW YORK
APPELLATE DIVISION AND THE NYS CA
- TAKING A NOTICE OF APPEAL IN THE
SECOND CIRCUIT
- MOTIONS FOR LEAVE TO APPEAL TO THE
COURT OF APPEALS OF THE STATE OF NY
- NEW YORK STATE APPELLATE DIVISION,
SECOND DEPARTMENT -
APPELLATE COUNSEL STATUS



Tel: 212.719.0990 | www.phpny.com
10 East 39th Street, 7th Floor, New York, NY 10016

PROPER MOTION PRACTICE TECHNIQUES FOR THE NEW YORK APPELLATE DIVISION & THE NYS CA

Jim Coonan | Director of Appellate Services | **PHP**

The single greatest difference between the Appellate Division and the Court of Appeals motion practice is that Appellate Division motions are submitted on a serve one/file one basis under a legal back or directly through the NYSCEF system if the case is eligible for NYSCEF filing, whereas Court of Appeals motions are submitted in brief form, serving two and filing seven. Service requirements are calculated in the same manner, with eight days' notice required if service is by hand and 13 days required if service is by mail. Overnight service adds one day to the by-hand service requirement.

All motions in AD1 and AD2 are returnable on any Monday. All Court of Appeals motions must be made returnable for a Monday, and said return date should be as close to 14 days from the date of service as practicable. All motions regarding Appellate Division orders must be served within 30 days (plus five if served by mail) of the date on the face of the notice of entry served with the motion's subject order.



TAKING A NOTICE OF APPEAL IN THE SECOND CIRCUIT

Paul LaMar | EVP Appellate Services | PHP

The first step when filing a notice of appeal for an appeal which will be perfected at the Second Circuit is to file with the district clerk. An appeal permitted by law as of right from a district court to the Court of Appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice of appeal to enable the clerk to comply with Rule 3(d).

An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

When two or more parties are entitled to appeal from a district court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Court of Appeals.

The notice of appeal must specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”.

Also designate the judgment, order or part thereof being appealed from and name the court to which the appeal is taken. The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party’s counsel of record -- excluding the appellant’s -- or, if a party is proceeding pro se, to the party’s last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries -- and any later docket entries -- to the clerk of the Court of Appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

If a party to a civil action in the district court files a notice of appeal electronically in accordance with the Federal Rules of Civil Procedure and the district court's local rules, the district clerk may satisfy the service requirements of FRAP 3(d) as to a counseled party to the appeal by effecting service electronically.

Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the Court of Appeals.

MOTIONS FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Eric J. Kuperman, Esq. | EVP of Sales | PHP

Motions for Leave to Appeal to the Court of Appeals of the State of New York (hereinafter, the "NYSCA") are one of the few instances in the law (if not the only one) where an attorney has two bites at the apple. To wit, the losing attorney at the Appellate Division may file/serve a Motion to Reargue, or in the alternative, for Leave to Appeal to the NYSCA, together with a \$45 filing fee, and make that motion returnable in the Appellate Division. If the Appellate Division grants leave, then a copy of the Order granting leave to appeal, together with a Preliminary Appeal Statement, is forwarded to the NYSCA. Thereafter, the NYSCA will issue a briefing schedule and the appeal will ultimately be perfected at the NYSCA.

If, however, the Appellate Division denies the motion, the movant may make the same motion, seeking the same relief, returnable in the NYSCA. This motion must be made returnable on any Monday and is accompanied by a \$45 filing fee as well as one complete copy of the Record/Appendix along with all Briefs which were filed in the Appellate Division. If the NYSCA grants leave to appeal, the Appellant would again file the Preliminary Appeal Statement with the Court and then await a briefing schedule for purposes of perfecting the appeal.

In either case, once the appeal is to be perfected in the NYSCA, the Record on Appeal which is to be served and filed is remarkably similar to that which was filed in the Appellate Division. Specifically, the Record would simply add the Appellate Division Order being appealed, the Order granting leave to appeal, a Statement pursuant to CPLR § 5531 and a Statement pursuant to CPLR § 2105 certifying the accuracy of the Record on Appeal. The requisite number of Records and Briefs are then filed (and served) together with a \$315 filing fee payable to the NYSCA and the electronic filing is completed via CourtPass.





NEW YORK STATE APPELLATE DIVISION, SECOND DEPARTMENT- APPELLATE COUNSEL STATUS

Maria Andrades | Director of Operations | **PHP**

In the Appellate Division, the Second Department wants to be notified if counsel of record has retained appellate counsel. Where a notice of appearance is not supplied to the Second Department, appellate counsel will not be able to act in any capacity on behalf of the law firm that has retained them.

The notice of appearance may be filed as soon as appellate counsel has been retained or it may be filed at the time of filing a notice of appeal or any other document at the Appellate Division.

NEXT ISSUE HIGHLIGHTS:

- PREPARING DOCUMENTS THAT WILL BE UNDER SEAL
- ARE CO-/CROSS-APPELLANTS REQUIRED TO SHARE IN THE COSTS OF A JT. RECORD IN AD3 AND AD4?
- HOW TO AVOID HAVING AN AD2 ORAL ARGUMENT DATE SCHEDULED ON A DAY YOU ARE UNAVAILABLE

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'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 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'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.

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.



Tel: 212.719.0990 | www.phpny.com
10 East 39th Street, 7th Floor, New York, NY 10016