



# Appellate Lawyer PREPARation

SERVING THE NEEDS OF APPELLATE LAWYERS

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## APPELLATE DIVISION FIRST DEPARTMENT E-FILING EXPANSION: JANUARY 1, 2020

The First Department is expanding the categories of appeals that will be subject to e-filing.

### Beginning on January 1, 2020, e-filing will be mandatory in:

1. all case types e-filed (mandatory or consensual) in the Supreme Court, Bronx and New York Counties; and
2. Contested Matrimonial.

### This expansion of mandatory e-filing will be effective as follows:

- Matters in which notices of appeal are dated on or after January 1, 2020;
- Matters in which notices of appeal are dated prior to January 1, 2020 and where the appeal will be perfected on or after March 1, 2020. In these matters, compliance with the requirements of 22 NYCRR 1245.3(a) (Entry of Initial Information for Electronic Filing) will be measured from January 1, 2020.
- Appeals in the above case types which have already been perfected are exempt from the mandatory e-filing requirements.

**Mandatory e-filing requires ALL documents, as defined in 22 NYCRR 1245.1(d), to be e-filed.**



## DEFERRED APPENDICES AT THE SECOND CIRCUIT

*Paul LaMar | EVP Appellate Services | PHP*

When filing an appeal in the Second Circuit Court of Appeals, most Appellants file an Appendix accompanied by their Appellant's Brief. The Appendix will include the documents to be cited to by all the parties in their briefs.

However, local rule 30(c) of the Second Circuit provides that parties may file a Deferred Appendix as provided in FRAP 30(c). If the parties stipulate, or if the Court's own Motion directs, the parties may file a Deferred Appendix, eliminating the need to ascertain which documents the parties will need to cite to in advance. The Deferred Appendix is normally used in instances when the parties cannot decide which documents will comprise the Appendix until they have written their briefs. Some law firms also use this method as a cost-cutting measure, reducing the number of pages which need to be reproduced in the Appendix if they are not necessary for the arguments in their briefs.

In instances when a Deferred Appendix is to be filed, the Appellant and Appellee file "Page Proof" Briefs with citations directly to the Record documents listed on the Lower Court's Docket Sheet. Once the "Page Proof" Reply Brief is filed by the Appellant, the Deferred Appendix will need to be filed within seven days, comprised of the documents which were cited to in all the "Page Proof" Briefs. Fourteen days after the filing of the Deferred Appendix, the "Final Form" Briefs are filed with citations to the Appendix, replacing the Record citations that were in the "Page Proof" Briefs.

To sum up, when filing a Deferred Appendix, please keep in mind that two briefs are required to be filed by each party, "Page Proof" and "Final Form." The "Page Proof" Brief containing citations to the Record and the "Final Form" Brief containing citations to the Appendix.

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

*John McGorty | EVP Business Development | PHP*

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 matter is placed on the submission calendar, there is no further action/appearance 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 classified 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.

## APPELLATE DIVISION, FIRST DEPARTMENT: MULTIPLE APPELLANTS. WHY A BRIEFING SCHEDULE IS RECOMMENDED.

*Maria Andrades | Director of Operations | PHP*

Filing an appeal where multiple cross-appellants are involved can be complicated and at times challenging, especially when it's the first time you are involved in such an appeal. In the Appellate Division, First Department, appeals are placed into a specific calendared term. There is no possible way to have multiple cross-appellants file their briefs within the span of 30 days and a respondent be able to file their brief within the stated term. In order for all cross-appellants and respondents to file their briefs within the same term, a briefing schedule must be established, where the last reply brief is filed by the last day of the specified term. The parties should consult with each other to establish convenient dates and the term that everyone is comfortable with. The six month rule must be kept in mind when planning the briefing schedule, as the Appellate Division, First Department will not accept any filing once the notice of appeal has expired, regardless of any signed stipulations.

If you have an appeal where multiple appellants happen to be co-appellants there is no need for a briefing schedule. Co-appellants should file together for the same term. However, if one of the co-appellants is not ready for the term intended, a stipulation may be signed by all parties involved and filed with the court consenting to the next term, as long as all co-appellants file before their six month rule expires on their notice of appeal. A motion for an enlargement of time is also an option, but it will delay filing your appeal further, especially if your clients are eager to perfect.

## FAQ: APPELLATE DIVISION SECOND DEPARTMENT

**Q: Can more than one party appear on the cover as arguing an appeal in AD2?**

**A:** No, the court requires that only one person be listed on the cover as arguing an appeal. Of course, if for any reason that attorney cannot appear for argument, the attorney taking over for Oral Argument can simply show up the day of the scheduled argument, as long as they are from the same firm, and advise the court that they will argue in place of whomever was listed on the cover.

**Q: Can both my firm and Co-Counsel's Firm appear on the Record and Brief cover in AD2?**

**A:** No, Co-counsel Firms cannot appear on the covers. The Appellate Division Second Department requires that only ONE firm be designated as Attorney for the Appellant or Respondent. Both firms cannot appear unless one is designated Appellate Counsel to the other, at which time the court will require a Notice of Appearance to be filed with the appeal.

**Q: What are the practices for filing a Supplemental Record in AD2?**

**A:** A Supplemental Record may be filed upon a fully executed stipulation if the stipulation contains the following very specific language: WHEREAS, the contents of the Supplemental Record are properly part of the Record on Appeal as that term is defined in CPLR 5526 and section 1250.7(b) of the Practice Rules of the Appellate Division (22 NYCRR §1250.7[b]) but were inadvertently omitted from the Record on Appeal previously filed with the Court.

**Q: What must an attorney do in order to appear as Appellate Counsel on an Appeal at AD2?**

**A:** Appellate Counsel must file a fully executed Notice of Appearance which copies all counsel in the case. If, on the other hand, an attorney is substituting as new Counsel of Record, a Substitution of Counsel form, fully executed by outgoing and incoming counsel, as well as the client being represented, must be filed at AD2.

## NEXT ISSUE HIGHLIGHTS:

Avoid AD2 Oral Argument  
Date Scheduled on a Day You  
Are Unavailable

Incorporating Documents  
by Reference in the Lower  
Court

Appeal as of Right or  
Not - What to do

## MORE 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; receive instant notifications when their appeals are served and filed; and pay their invoices. 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.