

HOW TO COMMENCE A SPECIAL PROCEEDING

[NOTE: Persons without counsel are advised to consult with an attorney. Court staff MAY NOT give legal advice, prepare your papers or act as your attorney.]

A special proceeding can only be used where it is specifically authorized by a statute. There are a number of these, but generally, they relate to challenging the action or determination of a governmental officer or agency. See, Civil Practice Law and Rules (CPLR for short) Article 78. Landlord-tenant relations can also be determined in a special proceeding in some instances, otherwise, special proceedings usually cannot be brought against private parties.

If you are unsure whether or not your matter is considered a special proceeding, it is suggested that you consult with an attorney to assure that your facts support your claim. If it clearly doesn't support your claim, your claim could be dismissed with a sanction as frivolous. By signing a paper, such as a Petition, that party certifies that to the best of his/her knowledge, information and belief, the presentation of the paper or the information contained therein is not frivolous. See, Rules of the Chief Administrative Judge, Section 130-1.1a Signing of Papers.

The person bringing the case is called the Petitioner while the party opposing the Petition is called the Respondent. The Petitioner should be sure that he or she brings the special proceeding in the proper county. There are a number of rules about what is a proper venue for a case that generally relates to the residence of the various parties and where the underlying subject matter of the lawsuit arose (Article 5 of the CPLR). Generally, the Petitioner must commence a special proceeding against a public body or officer in any county within the judicial district where the Respondent made the determination complained of or refused to perform the duty allegedly violated, where the underlying proceedings were brought, where the material events took place, or where the principal office of the Respondent is located. The Sixth Judicial District covers 10 counties: Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins.

To commence a special proceeding you need to file the following with the County Clerk's Office: (i) Notice of Petition or Order to Show Cause; (ii) Verified Petition; (iii) Application for Index Number form; and (iv) Request for Judicial Intervention (RJI) form. The fee to obtain an Index Number is \$210 and the fee for an RJI is \$95. Please check with your local County Clerk's Office to see what forms of payment (cash, check, money order, credit, etc.) are accepted. If Petitioner obtains a poor person order, these fees may be waived. Only a "poor person" as defined by law may be exempted from the obligation to pay these fees.

A Notice of Petition is directed to the Respondent and advises where and when the Petition is to be submitted to a Supreme Court Justice and identifies all papers upon which the special proceeding is based. An Order to Show Cause also serves to give notice to all parties, but the form of the document is different. Unlike a Notice of Petition, it is presented to a Justice and signed by him or her before it is served on the other parties in the case.

Please note that if you choose to commence the special proceeding by filing an Order to Show Cause instead of by Notice of Petition, the court is under no obligation to sign the Order to Show Cause or grant temporary relief, and may instead tell you to make your application by Notice of Petition.

THE PETITION

In order to commence this kind of lawsuit, a person must prepare a document called a Petition, which is a statement of the person's charges or the grievance of which the person complains. A Petition (*and any other document served in this court*) should be typed or legibly printed in English, in black ink, on 8½ x 11 inch paper, using one side of the paper only. Papers should be stapled or otherwise bound securely (CPLR §2101).

The Petition should have the name of the court and county, the caption of the case (*a sort of box at the top containing the names of all parties*) and the Index Number (*an identifying number explained below*) on the right side. The Petition should begin with a brief identification of the Petitioner. This should be followed by an identification of the Respondent. The Respondent named should be those persons claimed to have made the determination or decision at issue.

The Petition should set forth a brief, factual description of the determination or events upon which the claim is based in chronological order, including the dates of key events. Each allegation set forth should be in separate, numbered paragraphs with each paragraph containing only one material (*i.e., relevant and meaningful*) allegation. Be certain to set out factual assertions in a clear and coherent fashion.

Where a special proceeding challenges the decision of a government agency in regard to some claimed right of the Petitioner, the Petition should specifically state, in detail, why the Petitioner contends that the agency action was wrong and must be annulled. The court may overturn agency action only if the determination or action made or taken was (i) in contravention of law; (ii) arbitrary, capricious or an abuse of discretion; or (iii) if a hearing held at the agency level was not supported by substantial evidence in the record.

Although the Petitioner is familiar with the facts, he or she should keep in mind that the court will be unaware of them except insofar as they are presented to the court in the Petition. Accuracy is important and errors may be damaging to the Petitioner's cause. Legible copies of any pertinent documentary evidence should be included as exhibits, with index tabs annexed to each such exhibit. If the proceeding concerns a claim that a government agency acted incorrectly or illegibly, a copy of the agency's final determination which is the subject of the proceeding and any intermediate rulings must be included.

Generally speaking, a Petitioner may only obtain relief in this court in the form of a review and, if successful, reversal of the final agency action. In the case of a parking ticket, for example, the Petitioner will likely be unsuccessful if he or she failed to pursue the entire appeal process. The Petitioner should clearly describe each step he/she took in the administrative process, each decision made by the agency along the way, and what was the final action by the agency. There are time

limitations of varying lengths within which such lawsuits must be brought. In the case of an Article 78 proceeding, the limitation generally is four months from the final agency action.¹ The Petition must make clear when the final agency action took place. The Petition should conclude with a demand for some form of relief. Frequently, the Petitioner will seek reversal of the agency's action (*i.e., setting aside and vacating the parking ticket*).

The Petition must be verified. When you are verifying a document, you are swearing under penalty of perjury that the facts contained in the Petition are all true. The verification part of the Petition must be signed by the Petitioner before a notary public, who will acknowledge, stamp and sign the verification.

PROCEEDING BY ORDER TO SHOW CAUSE

When moving by Order to Show Cause, Petitioner should prepare the Petition as explained above and an Order to Show Cause. Check with the Supreme Court Clerk's Office where you will be filing the papers to see how many copies of each document you will need to file and serve, making sure to keep a copy for your records.

At this point, you have filed your papers with the County Clerk's Office and paid the appropriate fees, but filing with the Court has not yet occurred. The Petitioner should go to the Supreme Court Clerk's Office and file the original Petition and Order to Show Cause, together with proof of filing with the County Clerk, proof of purchase of the Index Number and a completed RJI form together with proof of payment of the RJI fee. If emergency relief is requested, Petitioner must also submit an emergency affidavit which briefly explains the nature of the relief requested and why immediate or emergency relief is needed. If immediate emergency relief is not required, the papers are simply left with the Supreme Court Clerk's Office.

The Supreme Court Clerk's Office will then review the papers to make sure they are in proper form. After they are reviewed, they will either be marked to be returned for correction or sent to the assigned Justice for signature. You can check the status of your Order to Show Cause by calling the Supreme Court Clerk's Office, making sure to wait at least 48 hours after submission before calling. If the papers need corrections, you should return to the Supreme Court Clerk's Office to pick them up and correct them as needed for resubmission. If the papers are correct as to form, they will be forwarded to the assigned Justice's Chambers for signature. If the Justice finds them satisfactory, he or she will sign them, fill in the return date and specify when and how the papers are to be served.

When the Order to Show Cause has been signed, the Petitioner must "conform a copy," that is, reproduce on a copy of the papers with each and every marking made thereon by the Justice. This copy must then be photocopied and served upon the attorneys for all parties to the case in the manner and within the deadline set by the Justice. For information on service, see [How to Serve Papers](#)

¹ Certain substantive statutes mandate different time limitations. A review of the pertinent statute (*law*) should be made prior to commencement of such a proceeding.

When Commencing an Action or Proceeding.

After service is made, the Petitioner must see to it that an Affidavit of Service is prepared and signed by the person making service. The original signed affidavit must be presented to the court on the return date. The case will be called in the assigned Justice's courtroom. The Petitioner must be present at that time especially if the court granted a stay (TRO) until the hearing date of the motion and the Petitioner wants to continue it until the petition is decided. Petitioners must ask for this when the Order to Show Cause is called before the court at calendar call. If Respondent doesn't submit opposing papers and doesn't appear on the return date, the court may take action on the Order to Show Cause provided that it is satisfied from the affidavit of service that the Respondent was properly served with the Order to Show Cause and supporting papers.

The Respondent may submit papers in opposition to the Petition, usually in the form of an answer together with opposing affidavits and exhibits. Ordinarily this will be done within the time specified by the Justice when the Order to Show Cause is signed. Opposition papers must also be properly served on the Petitioner as well as all other parties to the case.

PROCEEDING BY NOTICE OF PETITION

The proceeding can be brought before the court without need for a Justice to sign an Order to Show Cause at the beginning. Instead, the Petitioner may proceed directly by Notice of Petition, as follows. Petitioner should prepare the Notice of Petition and Verified Petition and complete an Application for Index Number and RJI forms. Since the initiating papers will not first be presented to a Justice, the Petitioner must select a return date and identify the place where the matter is to be heard, which is the courtroom of the assigned Justice.

The return date can be any weekday at 9:30 a.m., but the return date must be selected keeping in mind that the Respondent must be given adequate time to prepare opposing or answering papers. Therefore, the return date selected must be at least 8 days after service of the initiating papers has been made on all Respondents.²

As explained earlier, the Petitioner should file one copy of the Notice of Petition, Verified Petition and Application for Index Number with the County Clerk, paying the fee for the Index Number at that time. Next, the Petitioner should serve a copy of the Notice of Petition, Verified Petition and RJI form upon all Respondents. Then the Petitioner must file two duplicate original Affidavits of Service, one with the County Clerk's Office and one with the Supreme Court Clerk. At the time of filing an original Affidavit of Service with the County Clerk's Office, the Petitioner will also have to pay the \$95 RJI fee.

² In an Article 78 proceeding, 20 days advance notice must be provided. Also, if a Notice of Petition that was served at least 12 days prior to the return date expressly demands that the answer be served days prior to the return date, the Respondents must serve his/her/its answer at least 7 days prior thereto. In that event, the Petitioner will have a right to serve affidavits and a memorandum of law in response to the answer (called a reply) at least one day prior to the return date.

Finally, the Petitioner should file the original of all papers and the original RJI with the Supreme Court Clerk's Office at least five (5) business days prior to the return date so that the Petition may be recorded in the court's computer system. The Supreme Court Clerk will randomly assign the matter to a Justice and will place it on the calendar for the return date selected by the Petitioner.

In the first instance, the place at which the motion will be returnable is the Assigned Justice's Courtroom. Oral (*spoken*) argument may take place there but usually oral argument takes place only when, where and if the assigned Justice directs. This is so for all petitions brought in our court by Notice of Petition. The parties are free upon agreement to adjourn Petitions (within limits) so as to accommodate their schedules. Answering and reply papers are to be served upon all other parties to the case within the deadlines applicable. The original answering and reply papers, with proof attached that the papers were served on all parties, must be delivered to the courtroom at the call of the calendar on the return date.

A word of caution on return dates. Sometimes the assigned Justice and/or the Supreme Court Clerk's Office will direct or require a change in the return date. Accordingly, a few days after you submit your Notice of Petition you must check with the Supreme Court Clerk's Office to see if this has happened. You can do this by calling the Supreme Court Clerk's Office, making sure to have the Index Number ready.

Once the petition is marked submitted, it is either sent to the Justice assigned to the case for decision or scheduled for oral argument in front of that Justice. This depends upon the procedures adopted by the Justice in question. To check the status of your Petition, call the Supreme Court Clerk's Office, making sure to have your Index Number ready.