CONTINUING LEGAL EDUCATION

FALL 2015

OCTOBER 22, 2015

PERFECTING APPEALS IN THE APPELLATE DIVISION

ERIC J. KUPERMAN, ESQ. AND JOHN MCGORTY

SPONSORED BY:
APPELLATE DIVISION, FIRST DEPARTMENT
AND
THE ASSIGNED COUNSEL PLAN FOR THE FIRST DEPARTMENT

The Appellate Process at the New York State Appellate Division

Perfecting Civil Appeals in the New York State Appellate Division, First, Second, Third and Fourth Departments

Presented by: *Eric J. Kuperman, Esq. and John McGorty*

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Learning Objectives

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I. Understand How and When to File a Notice of Appeal

II. Know What to Include in the Record on Appeal

III. Grasp What to Include in the Appellate Brief

IV. Present Oral Argument

Timing for Filing Notice of Appeal – CPLR § 5513(a)

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I. Service with Notice of Entry
   a. 30 days from date the Order is served with Notice of Entry by hand
   b. 35 days from date the Order is served with Notice of Entry by mail

II. Jurisdictional requirement

III. Timing for Filing Notice of Cross-Appeal – CPLR § 5513(c)

The Greater of:

a. 10 days from date of primary Notice of Appeal
b. 30 days from Order with Notice of Entry

Filing Notice of Appeal

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AD1

a. Pre-Argument Statement
b. Notice of Appeal
c. Order appealing from w/ Notice of Entry
d. Original Affidavit of Service
e. $65 check payable to County Clerk

AD2

a. RADI form
b. Notice of Appeal
c. Order appealing from w/ Notice of Entry
d. Original Affidavit of Service
e. $65 check payable to County Clerk

New York State Counties (AD1 & AD2)

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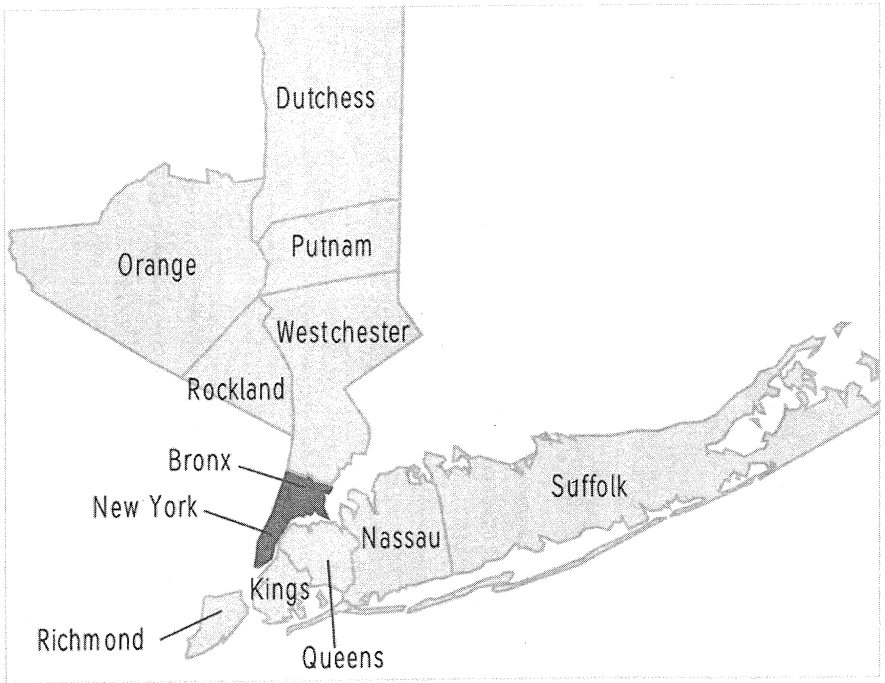
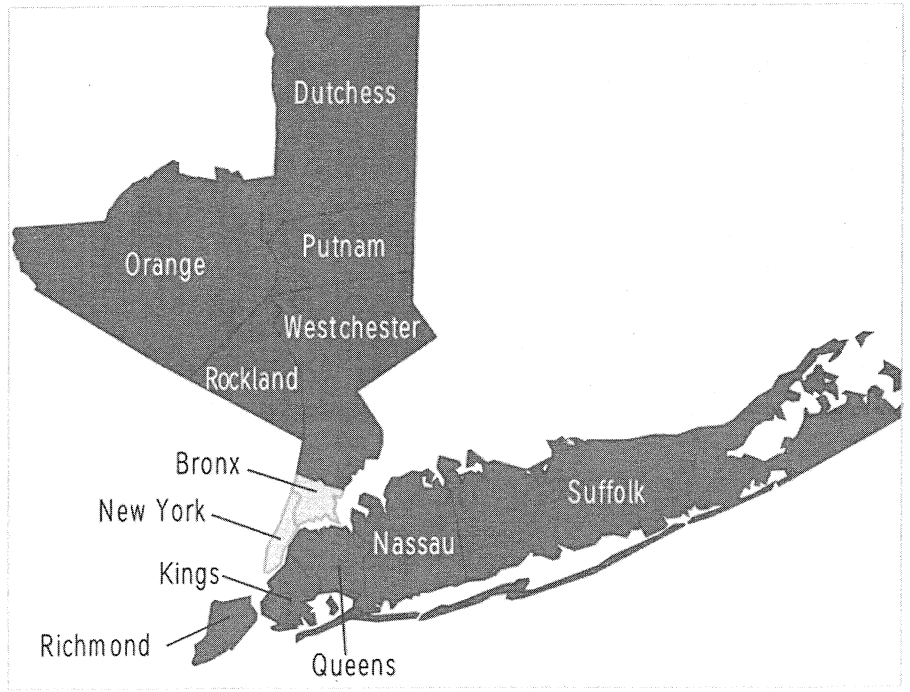


First Department

Second Department



Pre-Argument Statement

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Supreme Court of the State of New York
COUNTY OF _____

----------X

Appellant,

— against —

Pre-Argument Statement

Respondent.

----------X

1. Title of the action.
2. Full names of original parties and any change in the parties.
3. Names, addresses and telephone numbers of attorneys for the Appellant and Respondent.
4. State whether appeal is from an order or a final judgment, the date, the court, and county from which appeal is taken.
5. State whether there is any additional appeal pending in the same action, the date of entry of the order or judgment, and attach a copy of the notice of appeal and the pre-argument statement.
6. State whether there is any related action or proceeding now pending in any court of this or any other jurisdiction, and if so, the status of any such case.
7. State the nature and object of the cause of action or special proceeding.
8. State as briefly as possible the result reached in the court below.
9. State as briefly as possible the grounds for seeking reversal, annulment or modification.

RADI Form

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Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☐ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☐ Appeal
- ☐ Original Proceeding
- ☐ Transferred Proceeding
- ☐ CPLR 5704 Review

Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.

A. Administrative Review

- ☐ 1 Freedom of Information Law
- ☐ 2 Human Rights
- ☐ 3 Licenses
- ☐ 4 Public Employment
- ☐ 5 Social Services
- ☐ 6 Other

B. Business & Other Relationships

- ☐ 1 Partnership/Joint Venture
- ☐ 2 Business
- ☐ 3 Religious
- ☐ 4 Not-for-Profit
- ☐ 5 Other

C. Contracts

- ☐ 1 Brokerage
- ☐ 2 Commercial Paper
- ☐ 3 Construction
- ☐ 4 Employment
- ☐ 5 Insurance
- ☐ 6 Real Property
- ☐ 7 Sales
- ☐ 8 Secured
- ☐ 9 Other

D. Domestic Relations

- ☐ 1 Adoption
- ☐ 2 Attorney's Fees
- ☐ 3 Children - Support
- ☐ 4 Children - Custody/Visitation
- ☐ 5 Children - Terminate Parental Rights
- ☐ 6 Children - Abuse/Neglect
- ☐ 7 Children - JD/PINS
- ☐ 8 Equitable Distribution
- ☐ 9 Exclusive Occupancy of Residence
- ☐ 10 Expert's Fees
- ☐ 11 Maintenance/Alimony
- ☐ 12 Marital Status
- ☐ 13 Paternity
- ☐ 14 Spousal Support
- ☐ 15 Other

E. Miscellaneous

- ☐ 1 Constructive Trust
- ☐ 2 Debtor & Creditor
- ☐ 3 Declaratory Judgment
- ☐ 4 Election Law
- ☐ 5 Notice of Claim
- ☐ 6 Other

F. Prisoners

- ☐ 1 Discipline
- ☐ 2 Jail Time Calculation
- ☐ 3 Parole
- ☐ 4 Other

G. Real Property

- ☐ 1 Condemnation
- ☐ 2 Determine Title
- ☐ 3 Easements
- ☐ 4 Environmental
- ☐ 5 Liens
- ☐ 6 Mortgages
- ☐ 7 Partition
- ☐ 8 Rent
- ☐ 9 Taxation
- ☐ 10 Zoning
- ☐ 11 Other

H. Statutory

- ☐ 1 City of Mount Vernon Charter § § 120, 127-f, or 129
- ☐ 2 Eminent Domain Procedure Law § 207
- ☐ 3 General Municipal Law

I. Torts

- ☐ 1 Assault, Battery, False Imprisonment
- ☐ 2 Conversion
- ☐ 3 Defamation
- ☐ 4 Fraud
- ☐ 5 Intentional Infliction of Emotional Distress
- ☐ 6 Interference with Contract
- ☐ 7 Malicious Prosecution/ Abuse of Process
- ☐ 8 Malpractice
- ☐ 9 Negligence
- ☐ 10 Nuisance
- ☐ 11 Products Liability
- ☐ 12 Strict Liability
- ☐ 13 Trespass and/or Waste
- ☐ 14 Other

J. Wills & Estates

- ☐ 1 Accounting
- ☐ 2 Discovery
- ☐ 3 Probate/Administration
- ☐ 4 Trusts
- ☐ 5 Other

Appeal

Paper Appealed From (check one only):

- ☐ Amended Decree
- ☐ Amended Judgment
- ☐ Amended Order
- ☐ Decision
- ☐ Decree
- ☐ Determination
- ☐ Finding
- ☐ Interlocutory Decree
- ☐ Interlocutory Judgment
- ☐ Judgment
- ☐ Order
- ☐ Order & Judgment
- ☐ Partial Decree
- ☐ Resettled Decree
- ☐ Resettled Judgment
- ☐ Resettled Order
- ☐ Ruling
- ☐ Other (specify):

Court:	County:
Dated:	Entered:
Judge (name in full):	Index No.:
Stage: ☐ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☐ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ☐ Yes ☐ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ☐ Yes ☐ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

RADI Form

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Issues Continued:

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			

Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Use Form C for Additional Party and/or Attorney Information

Filing Notice of Appeal

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AD3

a. Pre-Calendar Statement
b. Notice of Appeal
c. Order appealing from w/ Notice of Entry
d. Original Affidavit of Service
e. $65 check payable to County Clerk

AD4

a. Notice of Appeal
b. Order appealing from w/ Notice of Entry
c. Original Affidavit of Service
d. $65 check payable to County Clerk

New York State Counties (AD3 & AD4)

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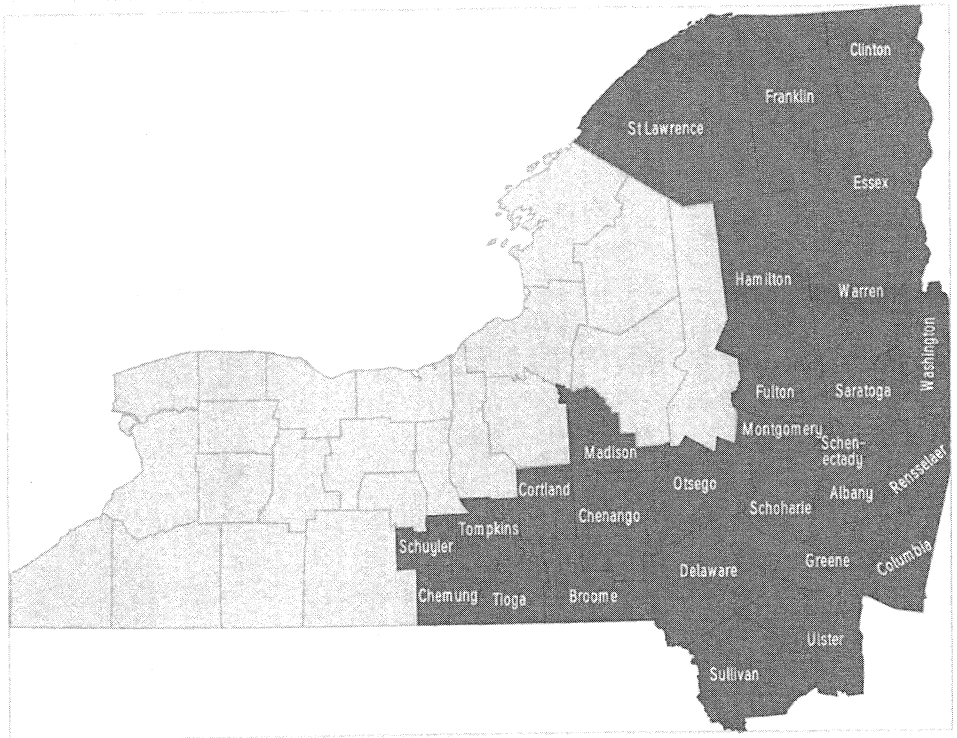
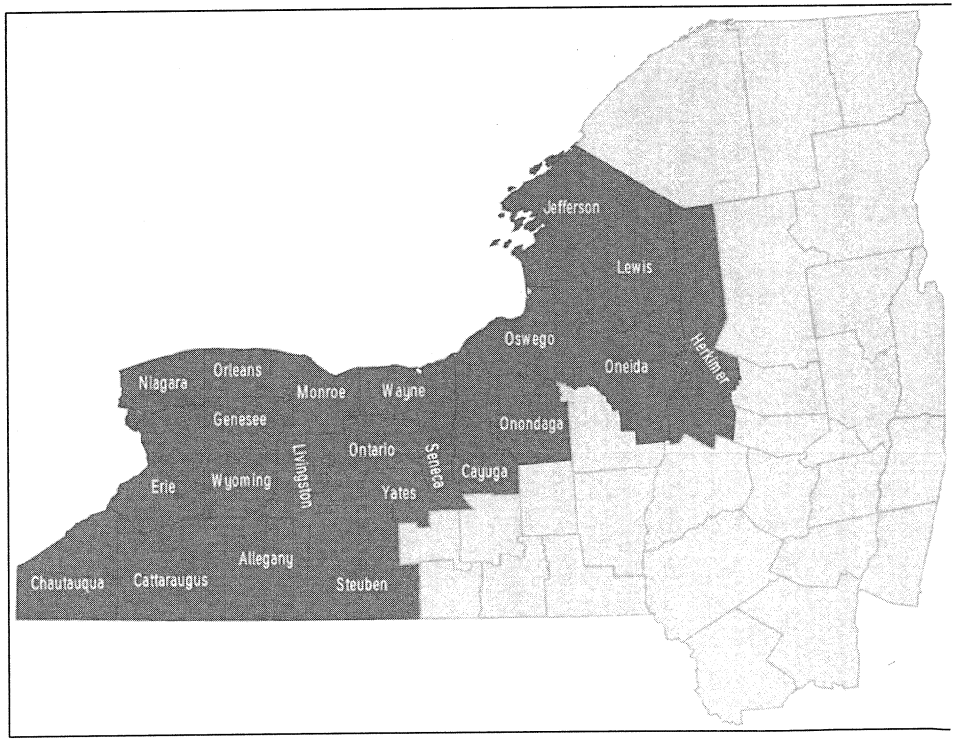


Third Department

Fourth Department



Pre-Calendar Statement

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PRE-CALENDAR STATEMENT
State of New York
Supreme Court - Appellate Division
Third Judicial Department

Case Title: Set forth the full case title.

County Index No.
RJI No.
Date of Commencement

Parties Involved: Set forth the full names of the original parties and any change in parties.

Party Name (eg. John Doe)	Original Status (eg. Defendant)	Appellate Status (eg. Appellant)

Counsel for Appellant(s):Set forth the name, address, telephone number and facsimile telephone number of counsel for appellant(s).

Counsel for Respondent(s) and Counsel for Other Parties: Set forth the name, address, telephone number and facsimile telephone number of counsel for respondent(s) and for each other party.

Court, Judge and County: Identify the court, judge or justice, and the county from which the appeal is taken.

Nature and Object of Action or Proceeding: Concisely set forth the nature and object of the underlying action or proceeding.

Appellate Issue(s): Set forth a clear and concise statement of the issue(s) to be raised on the appeal, the grounds for reversal or modification to be advanced and the
specific relief sought on the appeal.

Other Related Matters: Indicate if there is another related action or proceeding, identifying and briefly describing same.

Submitted by:

Signature

Print Name:
Attorney for:
Date:

Time to Perfect Appeal

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I. Appellate Division, First Department

a. Term Calendar

- Filing dates falling within 9 months of date on Notice of Appeal (§600.11 (a)(3))
- Request for Argument Forms; stipulations to adjourn

▲ The Calendar is called at 2:00 p.m. except on Fridays when it is called at 10:00 a.m.

Term	Opening Day of Term	Last Day to File: Records, Appendices, Appellant's Briefs with Note of Issue	Respondent's Briefs	Appellant's Reply Briefs	Request for Oral Arguments and Stipulations for Adjournment
January	January 6	November 10	December 10	December 19	December 11
February	February 3	December 8	January 7	January 16	January 8
March	March 3	January 5	February 4	February 13	February 5
April	March 31	February 2	March 4	March 13	March 5
May	April 21	February 23	March 25	April 3	March 26
June	May 19	March 23	April 22	May 1	April 23
September	September 8	July 13	August 12	August 21	August 13
October	October 6	August 10	September 9	September 18	September 10
November	November 4	September 8	October 7	October 16	October 8
December	December 1	October 5	November 4	November 13	November 5

2015 Calendar

Time to Perfect Appeal

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I. Appellate Division, First Department *(cont'd)*

b. 30-day rule (§600.5(d))
- Not followed
- Respondent moves for relief
  - Conditional grant of the relief
  - Ordered on for specific term

c. Multiple appellants
- "First in time" perfects first
- Must consult otherwise
- Co-Appellants: must perfect for the same Term (though not necessarily on the same day)

II. Appellate Division, Second Department

a. 6 months from date on Notice of Appeal (§670.8(e) (1))

b. Multiple appellants–race to perfect
- Co-Appellants: must perfect on the same day

Time to Perfect Appeal

III. Appellate Division, Third Department

a. 9 months from date on Notice of Appeal (§800.12)

b. 60-day rule (§800.9(a))

- Not followed
- Respondent moves for relief
  - Conditional grant of the relief
  - Ordered to file by specific date

c. Multiple appellants–race to perfect

- Co-Appellants: must consolidate appeal and perfect on the same day

IV. Appellate Division, Fourth Department

a. 9 months from date on Notice of Appeal (§1000.2(b))

b. 60-day rule (§1000.2(b))

- Not followed
- Respondent moves for relief
  - Conditional grant of the relief
  - Ordered to file by specific date

c. Multiple appellants–race to perfect

- Co-Appellants: must consolidate appeal and perfect on the same day

Time to Perfect Appeal

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V. Appellate Division, Second, Third and Fourth Departments

	Hand Delivery	Overnight Delivery	Regular Mail Delivery
Respondent Brief	30 Days from date served	31 Days from date served	35 Days from date served
Reply Brief	10 Days from date served	11 Days from date served	15 Days from date served

Record on Appeal

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I. What to Include

a. Trial
   - Pleadings
   - Transcripts and exhibits admitted into evidence (transcripts must be settled)
   - Notice(s) of Appeal
   - Order or Judgment being appealed
   - Post-Trial Motions

b. Motion
   - Motion papers for and against
   - All attached affirmations and exhibits
   - Replies
   - Notice(s) of Appeal
   - Order or Judgment being appealed

c. Memoranda of Law

d. Pre-Argument Statement (AD1) / 5531 Statement (AD2, AD3 & AD4)

e. 2105 Certification (AD1, AD2 & AD3) / 5532 Stipulation (AD4)

5531 Statement

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FOURTH DEPARTMENT

SO AND SO AND X & Y,

_____-_____,

against

SO AND SO AND X & Y,

_____-_____.

_____

1. The index number of the case in the Court below is _____.
2. The full names of the original parties are set forth above. There have been no changes to the parties.
3. The action was commenced in the Supreme Court, _____ County.
4. This action was commenced on or about _____, _____, by the filing of a _____. Issue was joined by service of a _____ on or about _____, _____.
5. The nature and object of the action: _____.
6. The appeal is from the _____, dated _____, _____.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.

or

This appeal is being perfected on the Appendix method.

2105 Certification

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CERTIFICATION PURSUANT TO CPLR § 2105

I, _____, of the firm _____, attorneys for _____, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the _____ have been personally compared by me with the originals, and have been found to be true and complete copies of said originals, and the whole thereof, all of which are now on file in the office of the Clerk of the _____ Court, County of _____.

Dated: _____ ___, ___

LAW FIRM

By: _____

_____, Esq.

Attorneys for _____

5532 Stipulation

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STIPULATION AS TO CORRECTNESS OF RECORD PURSUANT TO CPLR 5532

New York Supreme Court

APPELLATE DIVISION — FOURTH DEPARTMENT

SO AND SO AND X & Y,

_____-_____.

against

SO AND SO AND X & Y,

_____-_____.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys for the respective parties, pursuant to **CPLR 5532,** that the forgoing constitutes the entire Record on Appeal in this matter:

1. Statement Pursuant to CPLR 5531.
2. Notice of Appeal, dated _____.
3. Order, dated _____.
4. Notice of Motion, Affirmation, with Exhibits A through HH.
5.
6.

Signed: _____ Signed: _____

Dated: _____ Dated: _____

Appendix

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I. What to Include
   a. What appellant plans to cite to
   b. What appellant can reasonably anticipate respondent will cite to
   c. Must make good faith effort

II. Subpoena Lower Court File (AD1 & AD2)

III. File one copy of Record (AD3 & AD4)

Record on Appeal/Appendix

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I. Color Documents

a. AD1, AD3 & AD4

- May use black and white

b. AD2

- If in color in the lower court, must be in color in Record/Appendix unless unavailable

II. Illegible Documents

a. AD1

- May be retyped
- Include behind illegible document clearly marked as retyped

b. AD2, AD3 & AD4

- May not be retyped; document must be included exactly as it appeared in the lower court

Record on Appeal/Appendix

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III. How to handle documents outside the scope of the Record/Appendix

a. Motion to enlarge scope of Record/Appendix
   - Must be necessary to determination
   - Rarely granted

b. Discuss in Brief
   - Footnote with explanation (not allowed in AD4)
   - Bring copies to oral argument

Motion to Strike

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I. If appellant omitted too many documents in Record on Appeal or Appendix

II. If Record on Appeal or Appendix is incomplete
   a. If just a few pages missing, "tip-in" method
   b. Supplemental Record
      - Stipulation or Motion
   c. Respondent Appendix

Brief – Appellate Division, 1st, 2nd, 3rd, and 4th Departments

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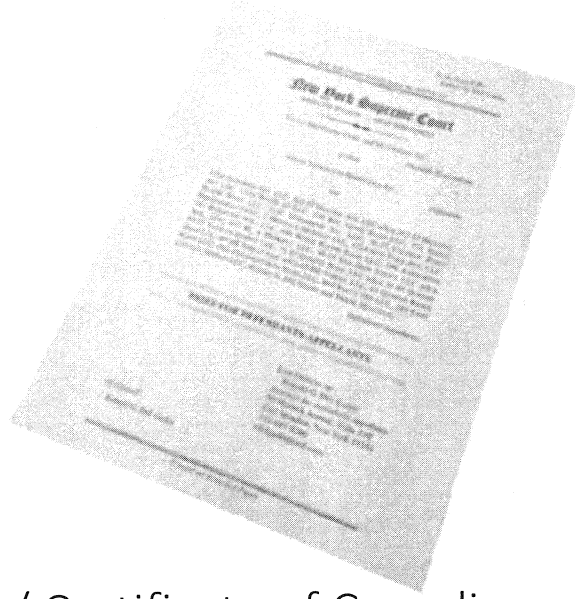

I. What to Include

a. Table of Contents
b. Table of Authorities (only AD1)
c. Preliminary Statement
d. Questions Presented
e. Statement of Facts
f. Argument
g. Conclusion
h. Printing Specifications Statement (AD1) / Certificate of Compliance (AD2)
i. No page certification required for AD3 and AD4

II. Appellant, Cross-Appellant and Co-Appellant Briefs

a. Pre-Argument Statement – Appellate Division, 1st Department
b. 5531 Statement – Appellate Division, 2nd Department
c. No 5531 Statement required – Appellate Division, 3rd and 4th Departments

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III. Formatting

a. Mono-spaced v. Proportionally Spaced font, examples of which are:
   - 14pt Times Roman or 12pt Courier New

b. Footnotes no smaller than 12pt Times Roman or 10pt Courier New
   - No footnotes allowed in AD4

c. Double spaced

d. 1 inch margins all around

e. No **bold** or FULLY CAPITALIZED words except in point headings

f. Underline and *Italics* acceptable if used sparingly

g. Covers must be color coded in AD4
   - Appellant Brief – **Blue** Cover
   - Respondent Brief – **Red** Cover
   - Reply Brief – **Gray** Cover

IV. Length and Certification Requirements

a. AD1

- Appellant/Respondent Brief
  - 14,000 words
  - Must not exceed 70 pages
  - Printing Specifications Statement

- Reply Brief
  - 7,000 words
  - Must not exceed 35 pages
  - Printing Specifications Statement

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 600.10(d)(1)(v)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 1,698.

V. Length and Certification Requirements

a. AD2

- Appellant/Respondent Brief
  - 14,000 words
  - Must not exceed 70 pages
  - Certificate of Compliance
- Reply Brief
  - 7,000 words
  - Must not exceed 35 pages
  - Certificate of Compliance

Brief – Appellate Division, Second Department

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Completed Example – 14-Point Proportionally Spaced Typeface

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 12,345.

Completed Example - 12-Point Monospaced Typeface

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A monospaced typeface was used, as follows:

Name of typeface: Courier
Point size: 12
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 12,345.

VI. Length and Certification Requirements

a. AD3

- Appellant Brief
  - Must not exceed 70 pages
  - No Certification Required
- Respondent Brief
  - Must not exceed 35 pages
  - No Certification Required
- Reply Brief
  - Must not exceed 15 pages
  - No Certification Required