

APPEALS TO THE APPELLATE DIVISION

I. TAKING AN APPEAL

- A. Taking an appeal consists of filing and serving the notice of appeal. The taking of an appeal is a prerequisite to appellate jurisdiction, and the procedures are statutory. The Court's rules, therefore, do not address the procedures for taking an appeal.
- B. Notices of appeal are not filed with the Appellate Division. They should be filed with the Clerk of the Court in which the action was commenced. The County Clerk is the Clerk of the County and Supreme Courts.
- C. In some instances, such as under the Family Court Act or the CPL, a notice of appeal will be forwarded to the Appellate Division. However, the taking of an appeal will not result in any action on the part of the Appellate Division; the burden of pursuing the appeal falls upon the parties.
- D. The time to take an appeal, generally 30 days, begins to run upon service of the underlying order with notice of entry. The time to take an appeal operates as a statute of limitations and cannot be extended without statutory authorization.

II. PERFECTING AN APPEAL

A. HOW TO PERFECT AN APPEAL

- 1. Generally, unless otherwise provided by statute, rule or Court order, an appeal is perfected by filing the original record or appendix, five copies thereof, an original and five copies of a brief, all exhibits, and proof of service of the record and brief, and paying the filing fee of \$315 (22 NYCRR 1250.9 [a], 1250.17 [a] [1]). No filing fee is required in a criminal matter.

For guidance on perfecting an appeal in a matter in which poor person relief has been granted, see <http://www.nycourts.gov/courts/ad4/Clerk/AssignCoun/assign->

counsel.html.

2. Copies of prior orders of this Court affecting the appeal should be filed with the record.
3. Filing. A filing is accomplished by the actual delivery of papers to the courthouse in Rochester.

B. TIME LIMITS

1. Six-Month (Abandonment) Rule. 22 NYCRR 1250.9 (a) and 1250.10 (a) provide that, except where the Court has directed that an appeal be perfected by a particular time, a civil appeal must be perfected within six months from the date of the notice of appeal or the appeal is deemed abandoned and dismissed. The rule is self-executing. Records are examined for compliance and, if the record has been submitted more than six months following the date of the notice of appeal, the record is rejected and the party or attorney is advised that the appeal has been deemed abandoned and dismissed and that a motion may be made to vacate the dismissal pursuant to 22 NYCRR 1250.10 (c).

In general, the timing of criminal and Family Court appeals with assigned appellate counsel is governed by orders issued by the Court.

2. Briefs. The time to file and serve responsive and reply briefs is measured from the time of service of the prior brief, not from receipt of a brief. Deadlines are extended five days if the service was by mail.
 - a. Respondent's briefs are due 30 days after service of the appellant's brief.
 - b. Reply briefs are due 10 days after service of the respondent's brief.

C. RECORD ON APPEAL (22 NYCRR 1250.7)

1. The complete record on appeal. The first step in perfecting

an appeal is to prepare the complete record. The complete record does not mean the original papers filed in the Clerk's Office, but instead means the volume(s) containing copies of necessary papers, as certified by appellant's attorney or the proper clerk, stipulated to by the parties or settled by the court from which the appeal is taken (see 22 NYCRR 1250.7 [g]), along with the original certification, stipulation to the record, or order settling the record or a certified copy thereof (see 22 NYCRR 1250.7 [b] [7]).

2. 22 NYCRR 1250.7 (b) outlines the contents of the complete record on appeal.
 - a. Memoranda of law and oral argument on motions constitute legal argument and generally are not included in the record on appeal. They may be included in the record on appeal in some circumstances, however, such as where preservation for review is at issue (see *e.g. Matter of Lloyd v Town of Greece Zoning Bd. of Appeals* [appeal No. 1], 292 AD2d 818, *lv dismissed in part and denied in part* 98 NY2d 691, *rearg denied* 98 NY2d 765).
 - b. If a party is uncertain regarding what papers should be included in the record on appeal, reference should be made to the order or judgment. It should recite all of the papers that should be included in the record. Accordingly, when preparing an order or judgment for signature, be certain that it accurately recites the papers that were before the court.
 - c. In a criminal matter, the Court is not bound by the parties' stipulation and may consider such material as it considers necessary and appropriate (see 22 NYCRR 1000.7 [c]).
3. Form of the record.
 - a. Compliance with the CPLR. Briefs, appendices and reproduced full records shall comply with the requirements of CPLR 5528 and 5529, and reproduced full records shall, in addition, comply with the requirements of CPLR 5526.

- b. Method of Reproduction. Briefs, records and appendices shall be reproduced by any method that produces a permanent, legible, black image on white paper or its digital equivalent. Use of recycled paper and reproduction on both sides of the paper is encouraged for hard copy filings and submissions.
- c. Paper Quality, Size and Binding. Paper shall be of a quality approved by the chief administrator of the courts and shall be opaque, unglazed, white in color and measure 11 inches along the bound edge by 8½ inches. Records, appendices and briefs shall be bound on the left side in a manner that shall keep all the pages securely together; however, binding by use of any metal fastener or similar hard material that protrudes or presents a bulky surface or sharp edge is prohibited. Records and appendices shall be divided into volumes not to exceed two inches in thickness.
- d. The cover of the record shall be white and shall contain the following information:
 - i. title;
 - ii. names, addresses, telephone numbers and email addresses of attorneys;
 - iii. index number, claim number or indictment number; and
 - iv. Appellate Division docket number, if one has been assigned (see 22 NYCRR 1250.6 [e], 1250.7 [b] [1]).
- e. Include a table of contents listing and briefly describing all papers in the complete record and listing all exhibits, indicating on which page of the record each exhibit was introduced and the page of the record where the exhibit is reproduced (see 22 NYCRR 1250.7 [b] [3]).
- f. The record shall be consecutively paginated. The subject matter of each page of the record shall be stated at the top of the page (see CPLR 5526).

4. Incomplete or untimely filings will be rejected by the Clerk, as will any filing that does not comply with the rules, is illegible, or is otherwise unsuitable.
5. Digital copies of records and briefs required by 22 NYCRR 1250.9 (a), (c), and (d) shall be uploaded on the Court's website at <https://ad4.nycourts.gov/dcopy>.

D. APPENDIX METHOD IN CIVIL APPEALS – CPLR 5528 (a) (5); 22 NYCRR 1250.5 (c), 1250.7 (d)

1. One alternative to reproducing the entire record is to employ the appendix method. However, caution is recommended when using this method.
2. A party proceeding by the appendix method must file one digital copy of the complete record, plus an original and five copies of the brief and appendix, and must serve one hard copy of the brief and appendix upon each other party to the appeal (22 NYCRR 1250.9 [a] [2]).
3. The appendix shall include those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent including, where applicable, at least the notice of appeal or order of transfer; the judgment, decree or order appealed from; the decision and opinion of the court or agency, and report of a referee, if any; the pleadings, and in a criminal case, the indictment or superior court information; the material excerpts from transcripts of testimony or from documents in connection with a motion. Such excerpts shall include all the testimony or averments upon which the appellant relies and upon which it may be reasonably assumed the respondent will rely. Such excerpts shall not be misleading or unintelligible by reason of incompleteness or lack of surrounding context; copies of relevant exhibits, including photographs, to the extent practicable; if pertinent, a statement identifying bulky, oversized or dangerous exhibits relevant to the appeal, as well as identifying the party in custody and control of each exhibit; and the appropriate certification, stipulation or settlement order pursuant to subdivision (g) (22 NYCRR 1250.7 [d]).

Briefs should contain references to the appendix and not to the original record. If it is necessary to refer to the original record, the appendix is incomplete.

4. The best example of an appropriate use of the appendix method is in a personal injury case in which liability but not damages, or damages but not liability, is in issue. The appendix would contain only those portions of the transcript relating to the arguments raised.
5. The appendix method may not be used in the following situations:
 - a. If the issue raised is whether the verdict is against the weight of the evidence. The Court must search the entire record to determine this issue.
 - b. To bring to the Court's attention papers that were not included in the stipulated record. Such an appendix is subject to a motion to strike by opposing counsel.
6. There are several sanctions to be aware of if an appendix is found to be inadequate:
 - a. The Clerk may, and often will, reject it.
 - b. The Court may simply dismiss the appeal.
 - c. A respondent may print a separate appendix and seek costs (see CPLR 5528 [e]).
 - d. The Court may order the appellant to print the entire record.

E. APPENDICES IN CRIMINAL APPEALS (22 NYCRR 1000.7 [d])

1. Appendices are required in criminal cases in which poor person relief has been granted and should consist of the following documents in the following order:
 - a. a statement pursuant to CPLR 5531;

- b. a copy of the notice of appeal with proof of service and filing;
 - c. a copy of the certificate of conviction and the judgment from which the appeal is taken;
 - d. a copy of the indictment, superior court information or other accusatory instrument;
 - e. all motion papers and affidavits;
 - f. exhibits (written and photographic) that are relevant and necessary to the determination of the appeal; and
 - g. the original stipulation to the record or the original order settling the record or the certification of the record pursuant to 22 NYCRR 1250.7 (g).
2. Copies of prior orders of this Court affecting the appeal should be filed with the appendix (see 22 NYCRR 1000.7 [d]).

F. BRIEFS (22 NYCRR 1250.8, 1000.8)

1. The brief should be bound on the left side (see 22 NYCRR 1250.6 [c]).
2. The typeface of computer-generated briefs shall comply with the printing specifications in 22 NYCRR 1250.8 (f) (1).
3. Citation to New York decisions shall be to the Official Reports. If no official citation is available for a decision, the citation used should be to the most available source.
4. Computer-generated briefs shall not exceed 14,000 words for appellants' and respondents' briefs, and shall not exceed more than 7,000 words for reply and amicus curiae briefs (see 22 NYCRR 1250.8 [f] [2]).
5. Pursuant to 22 NYCRR 1250.8 (a), the cover of a brief shall include the following information:

- a. in the lower right-hand section, the name, address and telephone number of the person submitting the brief;
 - b. the title of the action;
 - c. the Appellate Division docket number, if one has been assigned; and
 - d. in the upper right-hand corner, the name of the person requesting oral argument or submitting the brief and the time requested.
6. Pursuant to 22 NYCRR 1000.8 (a), the cover of the brief shall be:
 - a. blue for an appellant's or petitioner's brief;
 - b. red for a respondent's brief;
 - c. gray for a reply brief;
 - d. yellow for a surreply brief;
 - e. green for an amicus curiae brief; and
 - f. white for a pro se supplemental brief or a brief submitted by an Attorney for the Child.
7. Pursuant to 22 NYCRR 1250.8, a brief shall include, in the following order:
 - a. a table of contents;
 - b. a table of cases;
 - c. a concise statement of questions involved, followed by answers given by lower court;
 - d. a concise statement of the nature of the matter and the facts necessary and relevant to the questions involved, with supporting page references;

- e. argument of the issues, divided into points by appropriate headings, distinctively printed; and
 - f. a statement certifying compliance with the printing requirements of 22 NYCRR Part 1250, on a form approved by the Court.
8. Material may be appended to a brief only if it is contained in the record or it consists of case law, statutes, ordinances, rules, regulations, or other similar matter cited therein that were not published or that are not otherwise readily available.

G. EXHIBITS

- 1. Parties may stipulate that particular exhibits are not relevant or necessary to the determination of the appeal or are being withheld because they are of a bulky or dangerous nature, and will be delivered to the Court on notice (see 22 NYCRR 1250.7 [c]).
- 2. Exhibits should be printed in the record, to the extent practicable (see 22 NYCRR 1250.7 [b] [4]).
- 3. In a criminal appeal, in lieu of filing original physical exhibits, the appellant may file an original stipulation identifying the exhibits and their location and providing that they are available upon request by the Court.
- 4. When confidential or sealed material is involved, it may be separately delivered to the Court.

III. TRANSFERRED AND ORIGINAL PROCEEDINGS

A. PROCEEDINGS TRANSFERRED TO THE APPELLATE DIVISION (22 NYCRR 1000.12)

- 1. Upon an order of Supreme Court transferring a matter to the Appellate Division, the County Clerk will transfer its file, including the order of transfer, petition, answer, motion papers and transcript, if any. It is not necessary for the petitioner to

prepare a record on review.

2. The Clerk's Office will issue a scheduling order fixing a filing date for briefs. The failure of petitioner to file and serve briefs will result in the dismissal of the proceeding (see 22 NYCRR 1000.12).
3. Oral argument is not permitted on matters transferred pursuant to CPLR article 78 in which the sole issue is whether there is substantial evidence to support the challenged determination (22 NYCRR 1000.15 [d] [2] [c]).

B. ORIGINAL PROCEEDINGS (22 NYCRR 1250.13)

1. Most typically, these involve Article 78 proceedings in the nature of prohibition or mandamus against Supreme Court justices. These are not treated like motions, but rather, are treated like appeals, which means that briefs may be filed and the proceedings are placed on the calendar for argument and submission.
2. Although not a motion, an original proceeding must have a return date, for scheduling reasons. The return date is any Monday and must fall not less than 20 days after service of the notice of petition and petition (see 22 NYCRR 1250.13 [a]).
3. File the original and a digital copy of the notice of petition and petition and the filing fee (see 22 NYCRR 1250.13 [b] [1]).
4. Proof of service of a hard copy of the notice of petition and petition shall be filed not later than 15 days after the expiration of the applicable statute of limitations (see 22 NYCRR 1250.13 [b] [2]).
5. The petitioner shall file an original, five hard copies, and one digital copy of its brief, with proof of service, within six months of the date of service of the answer or pursuant to a briefing schedule issued by the Court. The respondent shall file its brief within 30 days of service of petitioners brief (22 NYCRR 1250.13 [c] [2], [3]). Although no briefs are required, a party is not entitled to oral argument unless a brief is filed.

IV. CALENDARING APPEALS AND PROCEEDINGS

A. THE COURT

The Court is in session nine terms per year. The June term is reserved for submitted appeals, motions, bar admissions and disciplinary proceedings. The August term consists of Election Law appeals only. The Court sits in panels of 4 or 5 to hear oral argument. The identity of the members of the panel for a particular day is not released until the morning of that day.

B. THE CALENDAR

1. Scheduling Orders. Once an appellant has perfected an appeal or a proceeding has been commenced or transferred to the Appellate Division, the Clerk's Office will issue a scheduling order, directing that an appeal or proceeding be placed on a calendar for the next available term and fixing a date for the filing of respondent's briefs and reply briefs (see 22 NYCRR 1000.15 [b]).
 - a. The date for respondent's briefs will be 30 days from the date of service of appellant's record and briefs; the date in the scheduling order for a respondent's brief is confirmatory of the date compelled by service of an appellant's brief. Respondent may apply for an extension of time to file a brief prior to the expiration of the deadline in the scheduling order.
 - b. A party unavailable for oral argument on a specific date, or dates, during the term, should notify the Clerk in writing, within 15 days of the date that the scheduling order was mailed (see 22 NYCRR 1000.15 [b]). The Clerk will attempt to accommodate any scheduling requests.
 - c. A motion to expedite or adjourn an appeal or a proceeding must contain an affidavit setting forth compelling circumstances that require the appeal to be expedited (see 22 NYCRR 1000.15 [a]). A motion to expedite should not be made until the appeal is perfected or the proceeding has been filed with or

transferred to the Appellate Division.

- d. The Clerk prepares the calendars for each day of the Court term and notifies the parties or their attorneys of the date at least 20 days prior to the commencement of the term (see 22 NYCRR 1000.15 [c]).

C. ORAL ARGUMENT

1. Attorneys scheduled for oral argument must check in with the Clerk's Office prior to 10:00 a.m. on the day of oral argument. No more than one person shall be heard on behalf of any party. Argument is not permitted by a party who has not filed a brief, unless otherwise ordered by the Court (see 22 NYCRR 1000.15 [d] [1]).
2. Requests for oral argument are made by indicating the amount of time requested on the cover of the brief. If no time is so indicated, the appeal will be deemed submitted.
3. Rebuttal is not permitted (see 22 NYCRR 1000.15 [d] [3]).
4. Requests for leave to file post-argument submissions must be made within five business days of oral argument, and must be accompanied by a copy of the proposed submission (see 22 NYCRR 1000.15 [e]).
5. The Court's day calendar generally contains between 20 to 30 appeals. The Court convenes at 10:00 a.m. and immediately calls the first case. Thereafter, each case is argued or submitted in order until the calendar is concluded. If a case is called and the attorneys are not in the courtroom, the appeal is deemed submitted. The Court does not recess until the calendar is complete.

V. DECISIONS

A. RELEASE

Generally, decision-orders are released two weeks after the conclusion of the term, at 3:00 p.m. (see 22 NYCRR 1000.17 [e]).

B. DECISION-ORDERS

The prevailing party must serve a copy of the order with notice of entry upon all parties (22 NYCRR 1000.16 [a]).

C. AVAILABILITY

The Court's decision-orders are posted on the Court's website (22 NYCRR 1250.6 [a], 1000.6 [b]).

VI. SANCTIONS

- A. Sanctions may be applied to attorneys or parties who fail to comply with a rule or order of this Court or who engages in frivolous conduct as defined in 22 NYCRR 130-1.1 (c).
- B. The imposition of sanctions may be made upon motion or upon the Court's own initiative, after a reasonable opportunity to be heard.
- C. The Court may impose sanctions upon a written decision setting forth the conduct and the reasons that sanctions are appropriate.