

**SUPREME COURT, CIVIL BRANCH
New York County
60 Centre Street, New York, N.Y. 10007**

**HELP CENTER
Room 116
646-386-3025**

How to Take an Appeal

Note: All persons involved in a lawsuit should consult an attorney. This office gives you information, forms and instructions on court procedures. As an office of this court, we cannot give legal advice or act as your advocate.

A person who is dissatisfied with an order or judgment of the court in his or her case, may, under certain circumstances, take an appeal to a higher court. This summary attempts to outline what is appealable, where an appeal is prosecuted, and how the appellate process is started. This summary does not, however, address how to prosecute the appeal in detail. **Anyone thinking about an appeal should consult an attorney.** Information about how an appeal is to be argued, how many copies of appellate briefs must be filed and similar matters may be obtained from the Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, telephone number 212-340-0400. The procedures of the Appellate Division are accessible at www.nycourts.gov/courts/ad1/index.shtml.

Electronic Filing

The New York State courts operate an electronic filing program, the New York State Courts Electronic Filing System (“NYSCEF”), through which documents are filed with the County Clerk and the court. Although e-filing is normally mandatory in Supreme Court, Civil Branch, New York County, an unrepresented party may opt out of e-filing by filing a certain form with the clerk. As this monograph concerns taking an appeal in a case pending in this court, it is assumed that the filer previously opted out of e-filing. Thus, this monograph addresses only the steps to be taken in a paper case.

What is an Appeal?

An appeal is a procedure by which a party in one court may seek to have a judgment or order overturned in a higher court. The party who proceeds with the appeal is called the **appellant**. All parties against whom the appellant seeks reversal (regardless of their posture in this court) are

referred to as “**respondents**” with respect to the appeal. The appeal is not a form of new trial. Basically, the same evidence that was before the trial court is placed before the appellate court and the parties to the appeal argue, on papers and at a brief oral argument, that the trial Justice, in reaching his or her decision on that evidence or the issue in question, did or did not commit an error that requires reversal. This evidence is called **the record on appeal (or the record)**.

The Appellate Court Structure

The appellate court that hears appeals from the Supreme Court, Civil Branch, New York County is, almost without exception, the Appellate Division, First Department. The next level in the appellate hierarchy is occupied by the Court of Appeals, Albany, New York, which is the State’s highest court. An appeal from the Supreme Court, Civil Branch, New York County should be prosecuted in the Appellate Division, First Department. Thereafter, it may be possible to pursue an appeal in the Court of Appeals, but the conditions for doing so are beyond the scope of this summary. The Court of Appeals will hear almost no appeals that do not first make their way through the appellate process in the Appellate Division.

What Rulings are Appealable?

The general rule is that the only thing that may be appealed from is a **judgment** or **order**. An order, roughly speaking, is a written determination of the court that resolves a request of a party for some relief prior to trial. This sort of request is called a **motion**.

A judgment is, generally speaking, a determination by the court that sets forth the results of an entire case or of a discrete claim for relief in a case. A judgment might, for instance, award plaintiff a sum of money or award judgment to defendant dismissing a case. Or a judgment may resolve only one or some of a number of claims made in a case. Generally speaking, a judgment is signed by a Justice or by the County Clerk in accordance with a written directive issued by the Justice or the verdict of a jury.

The mere signing of an order or judgment does not set running the time period during which an appeal must be instituted (see below for the deadline). Generally speaking, an appeal may only be taken from an order or judgment that has been **entered**. The deadline to take the first steps in an appeal depends upon the date that a copy of the judgment or order was served upon the parties to the case together with formal written notice that it has been entered (**notice of entry**). In this context, “entry” is the formal filing in the Office of the County Clerk and recording in the Clerk’s records of the order or judgment in question. The “entry” date is reflected by the date stamped by the Clerk on the original order or judgment. The stamp reads “Filed NY County Clerk [date of entry].”

In contrast with most orders, most judgments are not automatically “entered.” The prevailing party must appear before the Judgment Clerk of the County Clerk (Room 141B, in the basement) and request entry of the judgment. When the papers are in proper form, the Judgment Clerk will enter the judgment formally in the records of the County Clerk, at which point the judgment officially becomes binding and is appealable. Ordinarily, it is the responsibility of the prevailing party to prepare the form of judgment that is to be signed by the Justice and/or entered by the Clerk.

Only a party to a case who is “aggrieved” (i.e., has been harmed) by an order or judgment may pursue an appeal of it. Generally speaking, all judgments are appealable as a matter of right, even if they are not final. CPLR 5701(a)(2). An order is appealable if it arises out of a motion made on notice and if it

- (i) grants, refuses, continues or modifies a provisional remedy, such as an injunction;
- (ii) settles, grants, or refuses an application to resettle a transcript or statement on appeal;
- (iii) grants or refuses a new trial (with exceptions);
- (iv) involves some part of the merits;
- (v) affects a substantial right;
- (vi) in effect determines the action and prevents a judgment from which an appeal might be taken;
- (vii) in certain cases determines a statutory provision of the State to be unconstitutional; or¹
- (viii) grants a motion to reargue or determines a motion for leave to renew.

The Deadline for Taking an Appeal

An appeal as of right must be taken within 30 days after the party taking the appeal has been served with a copy of the judgment or order from which the appeal is to be taken, together with notice of its entry. Annexed hereto is a copy of a notice of entry.

Usually, the party who succeeded in this court is the one who serves the copy of the order or judgment with notice of entry. However, the losing party may do so if he or she wishes. In that case, the 30-day period commences from the time of this service.²

With only a few, very narrow exceptions, **this 30-day period may not be altered**. The parties cannot extend this time by their agreement, nor may the court grant a motion to extend the time.

¹ Some other matters are appealable as of right. See CPLR 5701(a)(3). Compare CPLR 5701(b). Some other matters are appealable only by permission. CPLR 5701(c). Permission to appeal can be granted only where the aggrieved party makes a motion requesting permission to appeal.

² The 30-day period applies to appeals as of right and those brought by permission. As to appeals that require permission, a notice of appeal is not served and filed at the outset; permission must be obtained first. To obtain this, a motion for permission must be made and the motion must be made within the 30-day period or else the opportunity to appeal will be lost. If the motion is made on time, the fact that it is not decided until after the 30-day period has expired does not affect the opportunity to appeal.

The failure of the appellant to take the appeal in timely fashion will deprive the Appellate Division of jurisdiction to hear the appeal. That court will and must dismiss the appeal. The appeal may not be pursued even if all other parties to the case wish that to happen. **In short, the unrepresented person is advised as strongly as words permit to pay close attention to the calendar when thinking about an appeal and to proceed quickly.**

How to Take an Appeal

An aggrieved party who wishes to take an appeal as of right must do so by serving and filing a document known as a **notice of appeal**. Annexed is a copy of a form of notice of appeal.

To carry out the required service step, a copy of the notice of appeal must be served upon every other party to the lawsuit. In this instance, service may be made by regular first class U.S. mail; by registered or certified U.S. mail, though either form of mailing is not required; by personal delivery to the attorneys for each of the parties; or by personal delivery to any other parties not represented by counsel. See also CPLR 2103. These papers must be served by someone who is over 18 years of age and is not a party to the case. The party appealing (the appellant) may not himself or herself serve the papers.

The appellant should also arrange for service in the same manner of a document known as **a pre-argument statement** (see CPLR 5531). This provides certain information about the case in which the appeal is being taken. The statement will be transmitted to the Appellate Division.

The person who has effectuated service must complete an affidavit of service which describes when service was made and upon whom service was made.

As stated, the appellant must also file the notice of appeal with the court. The filing is made with the County Clerk in Room 141 B at 60 Centre Street (the filing is not made with the Appellate Division). The appellant must file with the County Clerk two sets of documents, each in a legal (blue) back: (1) an original notice of appeal, to which must be annexed the original affidavit of service; and (2) a second original notice of appeal, the pre-argument statement; a copy of the order or judgment from which the appeal is being taken, and an affidavit of service.

At the time of filing, the appellant must pay a filing fee of \$65 to the County Clerk (payable by cash, Visa/Mastecard/American Express credit card, or money order payable to the New York County Clerk). In New York County, if you received a poor person order from the Supreme Court at the beginning of your case, you will not have to pay the \$65 fee for filing a notice of appeal. Otherwise, this fee, as well as the costs associated with **“perfecting” the appeal** in the Appellate Division (explained below), may be avoided only if the appellant obtains a **poor person order** from the Appellate Division, not from this court. It is not certain that the Appellate Division will grant a poor person order in any particular case. Some time is required to obtain such an order. Therefore, an appellant seeking a poor person order must do so quickly, to allow time to obtain the order and file the notice of appeal in a timely manner. As mentioned earlier, there is a rigid time

limit within which an appeal must be taken. Failure to take an appeal in a timely fashion will result in the dismissal of the appeal.

Cross-Appeals

A party who has not initiated an appeal may, upon receipt of a notice of appeal, wish to take an appeal too, that is, **cross-appeal**. Any party taking a cross-appeal must also be “aggrieved” in some way, i.e., he or she must have actually been harmed in some respect by what is contended to have been an error of the court. The cross-appealing party must also serve and file a notice of appeal (or make a motion for permission to appeal, if required) within 30 days after service of the order or judgment with notice of entry, or within 10 days after service upon him or her of the adverse party’s notice of appeal or motion for leave to appeal, whichever is longer.

Effect of the Appeal on the Order of Judgment

The taking of an appeal does not necessarily halt the effectiveness of the order or judgment from which the appeal is taken. If an appeal is taken by the State of New York or any of its governmental subdivisions, the order or judgment which is the subject of the appeal is automatically stayed, that is, put on “hold.” CPLR 5519(a). Other litigants will receive an automatic stay if they put up monies or other assets or post a bond sufficient to satisfy the judgment and commit to paying over in the event the appeal is unsuccessful.

In an appropriate case, if the appealing party makes a motion to stay effectiveness of the order or judgment during the appeal, this court (or the Appellate Division) may, in its discretion, issue an order granting the stay. See CPLR 5519(c)

“Perfecting” the Appeal

In addition to taking the appeal (initiating the appellate process) in the manner described above, the appealing party must pursue the appeal in a defined manner, which is known as “perfecting the appeal.”

If the appeal is taken from a judgment or order arising out of a trial or hearing at which sworn testimony was taken in open court, the appellant must “order” the transcript of those proceedings so that the Appellate Division can have before it and can review a record of what transpired in the trial court. Most decisions issued by the Supreme Court, Civil Branch, New York County are issued on the basis of motion papers only and therefore in such instances no transcript is required.

In cases where the order or judgment arose out of a trial or hearing at which oral evidence was taken in open court before a court stenographer, the appealing party must serve on the

stenographer a written request for the transcript and must deposit the fee for the transcript, which is calculated based upon the length of the transcript. The office of the Court Reporters is Room 420 at 60 Centre Street and the phone number is 646-386-3050. **This request must be served within the period allowed for the taking of the appeal, discussed above.**

The parties may agree that only a portion of the proceedings will be transcribed. This agreement should be in writing and should identify the portions of the transcript to be transcribed. The transcript is often very expensive and it may be in the interest of both sides to a case to limit expense by entering into an agreement of this sort.

Once the court reporter has transcribed the record of the proceedings in response to a request, he or she will deliver an original and one copy of the transcript to the appealing party. The appealing party should review it for errors. The appealing party should then serve a copy of the transcript on the other party, together with a list of suggested corrections, identified by page and line. The parties should consult one another and endeavor to agree as to what corrections should be made. If the parties cannot agree, the dispute will have to be resolved by the trial Justice, but it is strongly suggested that the parties should not impose this burden on the court. CPLR 5525.

If the parties can agree, they can prepare a written statement of the case, which may be used in place of a transcript. CPLR 5525(d).

The appealing party must also prepare and submit the “record on appeal.” The appellant should review Article 55 of the Civil Practice Law and Rules and the rules of the Appellate Division, First Department for additional information about the record, deadlines for briefs, and other things. The appellant may also contact the office of the Appellate Division, First Department, 212-340-0400, for additional information. See also

www.nycourts.gov/courts/1jd/supctmanh/litigation_functions.shtml

[Print in *black* ink in all areas in bold letters. Attach a copy of the order/judgment. Serve with a copy of this notice on all parties.]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x

Index Number

[fill in name(s)] Plaintiff(s)/Petitioner(s),

- against-

NOTICE OF ENTRY

[fill in name(s)] Defendant(s)/Respondent(s).

-----x

PLEASE TAKE NOTICE that the attached is a true copy of an order / judgment **[circle one]** in this matter that was entered in the office of the Clerk of the Supreme Court, New York County on the ___ day of _____, 20___. **[fill in the date]**

Dated: _____, 20__
[date signed]

Plaintiff / Defendant
[sign your name and circle one]

[print your name]

[your address and telephone number]

To: **[Name, address, and telephone number for each attorney for a party or the self-represented party in the case.]**

[Print in black ink in all areas in bold letters.]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x

Index Number

_____,
[fill in name(s)] Plaintiff(s)/Petitioner(s),
- against -

NOTICE OF APPEAL

_____,
[fill in name(s)] Defendant(s)/Respondent(s).

HON. _____

[name of assigned Justice]

PLEASE TAKE NOTICE that the plaintiff(s) / defendant(s) **[circle one]** hereby appeal(s) to the Appellate Division of the New York Supreme Court in and for the First Department from an order / judgment **[circle one]** entered in this case in the office of the Clerk of New York County on _____, 20__, **[fill in date of entry]**, which order / judgment **[circle one and describe the nature and effect of the order or judgment]** _____

and this appeal is taken from **[Specify below whether the appeal is taken from the entire order / judgment, or only a portion of the order / judgment. Check box that applies.]**

each and every part of that document as well as from the whole thereof; or

the portions of the document that **[if less than all of the order or judgment is being appealed from, identify the parts appealed from]** _____

Dated: _____, 20__
[date signed]

Yours, etc.,

Plaintiff / Defendant
[circle one and sign your name]

[print your name]

[print your address and telephone number]

[Print in ***black*** ink in all areas in bold letters.]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

-----x

Index Number

Plaintiff(s)/Petitioner(s),

[circle one - appellant or respondent]

- against -

CIVIL APPEAL
PRE ARGUMENT STATEMENT

Defendant(s)/Respondent(s).

[circle one - appellant or respondent]

-----x

1. **Title of action:** _____

2. There has been no change in the title of the action except as follows: **[if there has been a change, set forth the full names of the original parties]:** _____

3. **Individual name, law firm name, address, and telephone number of counsel for each appellant:**

4. **Individual name, law firm name, address, and telephone number of counsel for each respondent:**

5. Court and County from which appeal is taken: Supreme Court, New York County.

6. Appeal is from an order / judgment **[circle one]** entered on _____, 20__.
[date of entry in County Clerk's Office]

7. There is no related action or proceeding now pending in any court of this or any other jurisdiction except **[If there is any related court case, identify the related action or proceeding, the jurisdiction, and the status of the case.]** _____

8. The nature and object of the cause(s) of action or the special proceeding **[briefly identify what type of claims were asserted in the case (for example, breach of contract, personal injury, reversal of agency order) and what type of relief was sought (for example, money damages, injunction, specific performance)]**: _____

9. Result reached in the court or administrative body below: **[briefly describe the result of the order or judgment appealed from]** _____

10. Grounds for seeking reversal, annulment, or modification **[briefly state the grounds of your appeal]** _____

11. There is no additional appeal in this action except **[If there is an additional appeal pending in the same case, so state and specify the date of entry of the order or judgment there appealed from and state that a copy of the notice of appeal and the preargument statement in that other appeal are attached, and attach copies]**: _____

Dated: _____, 20____
[date signed]

Appellant [sign name]

[print name, address, and telephone number]

[Attach copies of the notice of appeal, the order / judgment appealed from (including any opinion of the court below) and the notice of appeal and preargument statement in any pending appeal in this case.]

Index Number

-----X

[fill in name(s)] Plaintiff(s)/Petitioner(s),

- against -

AFFIDAVIT OF SERVICE AFTER
COMMENCEMENT OF LITIGATION

[fill in name(s)] Defendant(s)/Respondent(s).
-----X

STATE OF NEW YORK
COUNTY OF _____ ss:

I, [name of person who served papers] _____,
being duly sworn, depose and say:

I am over 18 years of age and am not a party to this case.

I reside at [your address] _____

On [date of service] _____, 20__, at [time of day] ____ AM/PM, I served a true copy of the
following papers [identify papers served] _____,
_____ in the following manner. [check box that applies]:

Personal Service By personally delivering the papers to [identify person served] _____
_____ at [address] _____

The individual I served had the following characteristics [check one box in each category]

- | <u>Sex</u> | <u>Height</u> | <u>Weight</u> | <u>Age</u> |
|---------------------------------|--------------------------------------|---|--|
| <input type="checkbox"/> Male | <input type="checkbox"/> Under 5' | <input type="checkbox"/> Under 100 lbs. | <input type="checkbox"/> 21 - 34 years |
| <input type="checkbox"/> Female | <input type="checkbox"/> 5'0" - 5'3" | <input type="checkbox"/> 100 - 130 lbs. | <input type="checkbox"/> 35 - 50 years |
| | <input type="checkbox"/> 5'4" - 5'8" | <input type="checkbox"/> 131 - 160 lbs. | <input type="checkbox"/> 51 - 61 years |
| | <input type="checkbox"/> 5'9" - 6'0" | <input type="checkbox"/> 161 - 200 lbs. | <input type="checkbox"/> Over 61 years |
| | <input type="checkbox"/> Over 6' | <input type="checkbox"/> Over 200 lbs. | |

Color of skin [describe] _____ Hair color _____

Other identifying features, if any [describe]: _____

Mail By mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official
depository of the U.S. Postal Service within the State of New York, addressed to the last-known
address of the addressee(s) indicated below:

Overnight Delivery Service By depositing the same with an overnight delivery service in a wrapper properly addressed. Said
delivery was made prior to the latest time designated by the overnight delivery service for
overnight delivery. The delivery service used was [name of delivery service] _____

[Name(s) and address(es) of person(s) served by mail/overnight delivery]

Sworn to before me this
____ day of _____, 20__

[sign your name before a Notary]

Notary Public

[print your name]