

CRIMINAL APPELLATE MOTION PRACTICE

I. CRIMINAL APPELLATE MOTION PROCEDURE

A. Requirements When Proceeding by Notice of Motion

(see 22 NYCRR 1250.4 [a], 1000.4 [a])

1. Sufficient Notice

a. Selecting a return date

Motions are returnable any Monday, regardless of whether Court is in session, upon sufficient notice. Personal service requires eight days notice, overnight delivery requires nine days notice, and service by regular mail requires 13 days notice.

b. Cross motions

Cross motions are returnable on the same date as the motion, and require three business days notice.

c. Filing deadline for responding papers

Responding papers regarding a motion must be filed by 4:00 p.m. of the Friday before the return date.

2. Proper Format

a. Necessary papers

- 1) notice of motion
- 2) supporting affidavit
- 3) affidavit of service of the motion
- 4) copy of the notice of appeal with proof of filing and proof or admission of service.

b. Oral argument is not permitted (22 NYCRR 1250.4 [a] [8]).

B. Requirements When Proceeding By Order to Show Cause
(see 22 NYCRR 1250.4 [b], 1000.4 [b])

1. Necessary papers

The required moving papers are the same as when proceeding by notice of motion, except that a proposed order to show cause takes the place of the notice of motion. No return date is specified in the order to show cause.

2. Scheduling

The order to show cause must be directed to a Justice of this Court with chambers in the Judicial District from which the appeal arises.

It is best to call the Clerk's Office when you are ready to submit your papers for the name and phone number of the appropriate Justice.

II. SUBSTANTIVE CRIMINAL APPELLATE MOTION PRACTICE

Examples of types of motions brought before the Appellate Division:

A. Extend Time to Take Appeal (CPL 460.30)

This type of motion is necessary when a notice of appeal was not properly filed.

1. Grounds for Relief (CPL 460.30 [1] [a], [b])

- a. Improper conduct, death or disability of counsel
- b. Improper conduct of a public servant
- c. Inability of defendant and counsel to communicate regarding whether an appeal should be taken.

2. Time Limitation (CPL 460.30 [1])

A motion for an extension of time to take an appeal must be made within one year and 30 days from the date of sentencing.

B. Stays (CPL 460.50)

A stay of execution of a judgment of conviction will allow an appellant to remain at liberty while his or her appeal is pending. The motion papers must demonstrate: (1) an intention to perfect the appeal within a reasonable time, and (2) that the appeal has merit.

If the appeal is not perfected within 120 days from the date that the order granting the stay was issued, the stay automatically expires (CPL 460.50 [4]).

C. Extensions

Typically, requests for extensions are made in the following situations:

1. Stays (CPL 460.50 [4])
2. Conditional Orders of Dismissal (22 NYCRR 1250.9 [b], 1000.9 [a])
3. Late Respondent's Briefs (22 NYCRR 1250.9 [g], 1000.9 [b]).

In each case, the motion for an extension should be made prior to the expiration of the previously imposed deadline. In order to succeed, a litigant must show:

- a. A reasonable excuse for the delay, and
- b. An intent to file and serve a brief within a reasonable time.

D. Vacate Dismissal (22 NYCRR 1250.10 [c])

If an appeal is dismissed for failure to timely perfect, a motion to vacate the dismissal may be made. The papers must demonstrate:

1. Good cause for the vacatur of the dismissal,
2. An intent to perfect the appeal within a reasonable time, and
3. Sufficient facts to demonstrate a meritorious appeal.

E. Summary Reversal

Summary reversal may be appropriate when a portion of the record is missing. Appellant must show that:

1. The transcript is unavailable, and
2. There are no alternative means to reconstruct the record.

F. Relief From Assignment

An assigned attorney may seek to be relieved from an assignment on three grounds:

1. Appellant Has Abandoned the Appeal
 - a. Repeated efforts made to elicit a response from appellant
 - b. Appealable issues exist
2. Appealable Issues Do Not Exist - *Crawford* motion (22 NYCRR 1250.11 [f] [2], 1000.11 [b])
3. The Appeal is Moot.

G. Leave to File an Oversized Brief (22 NYCRR 1250.9 [h])

H. Calendar Preference or Adjournment (22 NYCRR 1250.15 [a] [2], 1000.15 [a])

After an appeal has been perfected and a scheduling order issued, a party may move for a calendar preference or for an adjournment. The moving party must demonstrate that there are compelling circumstances justifying the relief requested.

I. Consolidation (22 NYCRR 1250.9 [f] [4])

The moving party must specify the appeals to be consolidated and the reasons justifying consolidation.

J. Strike

If inappropriate material is contained in a record or brief, a party may move to strike the material.

K. Reargument or Leave to Appeal to the Court of Appeals
(22 NYCRR 1250.16 [d])

1. Necessary Papers

- a. Notice of motion
- b. Supporting affidavit
- c. Affidavit of service of the motion
- d. Copy of the Court's order and memorandum, if any.

2. Time Limitation

The motion must be made within 30 days after service of the order of the Appellate Division with notice of entry.

L. Leave to Appeal From an Order Denying a CPL 440 Motion
(CPL 460.15; 22 NYCRR 1250.11 [b])

1. Necessary Papers

- a. Notice of motion
- b. Supporting affidavit
- c. Affidavit of service of the motion
- d. A copy of the order of the trial court sought to be reviewed, and a copy of the trial court's decision, if any, to the extent that it was issued separately from the order, or a statement that there was no separate decision
- e. A copy of all submissions filed with the trial court.

2. Time Limitation (CPL 460.10 [4] [a])

A motion for leave to appeal from an order denying a CPL 440 motion must be made within 30 days from the date that a copy of the order was served upon the defendant.

III. SUGGESTIONS FOR DRAFTING EFFECTIVE MOTION PAPERS

A. **Provide the Court with the Necessary Background Facts**, including:

1. the court of conviction
2. the date of conviction (sentencing date, not date of plea)
3. the name of the sentencing judge
4. the crime
5. the sentence received
6. the results of prior appellate motions.

B. **Be Organized and Thorough.** Present the information in the supporting affidavit in an organized, understandable fashion. Provide a thorough explanation of the legal and factual basis for the relief requested. Avoid generalizations or statements that merely repeat what was offered in a prior motion or application.