

CRIMINAL APPELLATE MOTION PRACTICE

I. CRIMINAL APPELLATE MOTION PROCEDURE

A. Requirements When Proceeding by Notice of Motion

1. Sufficient Notice

a. Selecting a return date (22 NYCRR 1000.13 [a] [1] & [2])

Motions are returnable any Monday, regardless of whether Court is in session, upon regular motion 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 (22 NYCRR 1000.13 [a] [3])

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

c. Filing deadline for responding papers (22 NYCRR1000.13 [a] [4] [i])

Responding papers regarding a motion must be filed by 5:00 p.m. the Friday before the return date.

2. Proper Format

a. Necessary papers (22 NYCRR 1000.13 [a] [5] [i])

- 1) notice of motion
- 2) supporting affidavit
- 3) affidavit of service of the motion
- 4) copies of all prior orders
- 5) a copy of the notice of appeal and proof or admission of service of the notice of appeal

b. Number of copies (22 NYCRR 1000.13 [a] [5] [iii])

A litigant is required to file an original and one copy of all documents, including attachments.

c. Oral argument not permitted (22 NYCRR 1000.13 [a] [6])

All motions are deemed submitted. The exception to this rule is a motion for a stay of execution of judgment of conviction made before an individual Judge (CPL 460.50).

B. Requirements When Proceeding By Order to Show Cause

1. Necessary Papers

When proceeding by order to show cause, the moving papers must contain an order to show cause as opposed to a notice of motion. No return date is specified in the order to show cause.

2. Scheduling (22 NYCRR 1000.13 [b])

It is best to call the Clerk's Office who will refer you to the appropriate Justice. The Justice will set the return date for the motion.

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; 22 NYCRR 1000.13 [c] [1])

A stay of execution of 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

2. That the Appeal Has Merit

If the appeal has not been perfected within 120 days from the date that the order granting the stay is 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]; 22 NYCRR 1000.13 [c] [2])
2. Conditional Orders of Dismissal (22 NYCRR 1000.13 [f])
3. Late Respondent's Brief (22 NYCRR 1000.13 [h])
4. Habeas Corpus Appeals

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

- a. A reasonable excuse for the delay
- b. An intent to perfect the appeal within a reasonable time

D. Vacate Dismissal

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

1. A reasonable excuse for the delay
2. An intent to perfect appeal within a reasonable time
3. Merit

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
2. There are no Alternative Means To Reconstruct

F. Relief From Assignment

An 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 1000.13 [q])
3. The Appeal is Moot

G. Excess Page Brief

A motion for permission to file an excess page brief is appropriate if the proposed brief exceeds the page limitations set forth by the Court.

H. Expedite Appeal

1. Compelling Circumstances (22 NYCRR 1000.13 [m])

The moving party must show that compelling circumstances necessitate that the appeal be heard in an expedited manner.

2. Time Limitation (22 NYCRR 1000.10 [d])

A motion to expedite an appeal must be made within fifteen days of the date of the scheduling order.

I. Consolidation

1. Specify the Appeals to be Consolidated (22 NYCRR 1000.4 [b] [2];
22 NYCRR 1000.13 [n])
2. Specify the Reasons Justifying Consolidation (22 NYCRR 1000.13 [n])

J. Strike

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

K. Reargument

1. Necessary Papers (22 NYCRR 1000.13 [p] [2])

- a. notice of motion
- b. supporting affidavit
- c. affidavit of service of motion
- d. copy of the order and memorandum, if any

2. Time Limitation (22 NYCRR 1000.13 [p] [1])

A motion for reargument must be made within 30 days of service of the order of the Appellate Division, with notice of entry.

L. Leave to Appeal to Court of Appeals

A motion to appeal to the Court of Appeals may be made either to the Appellate Division or to the Court of Appeals directly.

1. Necessary Papers (22 NYCRR 1000.13 [p] [2] & [p] [4])

The papers required for filing a motion for leave to appeal to the Court of Appeals are the same as those specified for a motion reargument.

2. Time Limitation (22 NYCRR 1000.13 [p] [1])

M. Leave to Appeal From an Order Denying CPL 440 Motion

1. Necessary Papers (CPL 460.15; 22 NYCRR 1000.13 [o])

- a. Notice of motion
- b. Supporting affidavit

- c. Affidavit of service of motion
- d. Copies of all papers submitted to the court below
- e. A copy of the lower court's order and memorandum, if any

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 denying the motion is served.

III. SUGGESTIONS FOR DRAFTING EFFECTIVE MOTION PAPERS

1. Provide the Court With the Necessary Facts:

- a. The court of conviction
- b. Name of the sentencing judge
- c. The crime
- d. The sentence received
- e. Results of prior appellate motions

2. Present the Information in the Supporting Affidavit in an Organized Fashion

3. Be Concise - do not offer extraneous facts, or explore tangents

4. Use a Persuasive Writing Style