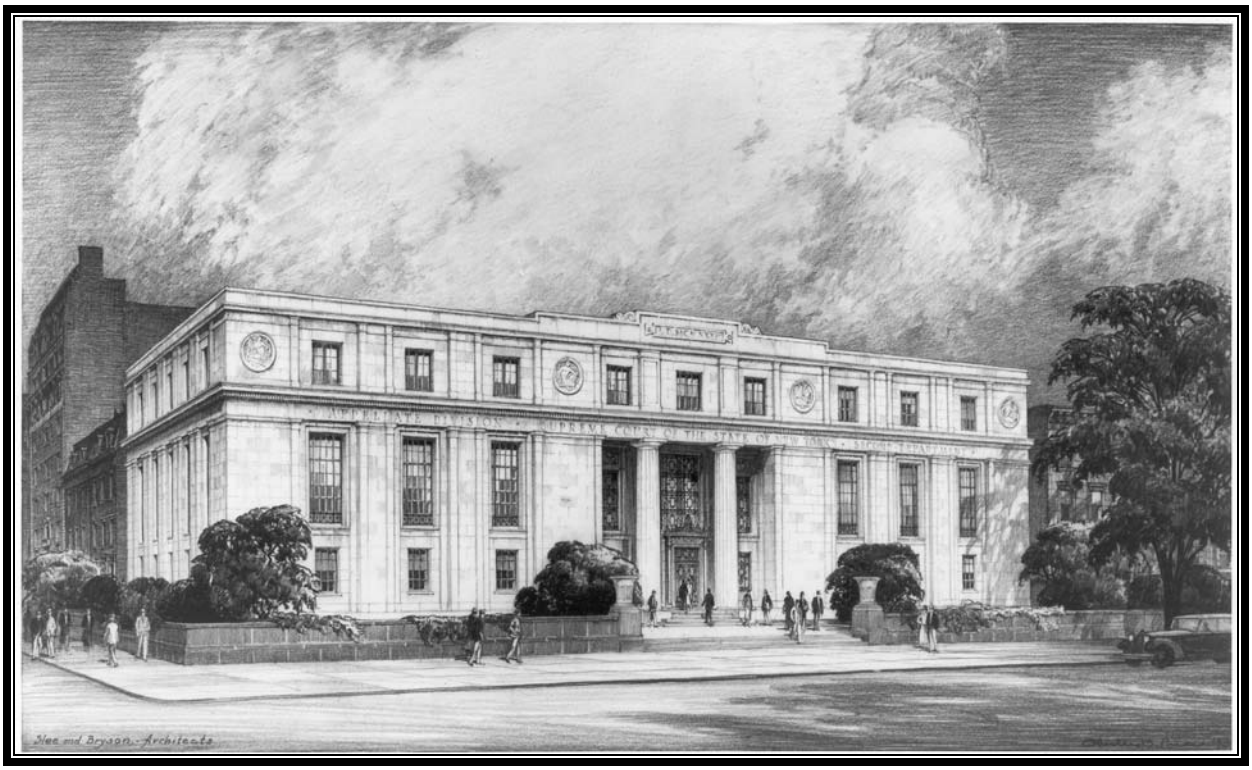
Supreme Court of the State of New York
Appellate Division: Second Judicial Department



Guide to Civil Practice

With Forms

Revised February 24, 2004

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1. Introduction.

This pamphlet is intended as a general guide to assist a person in prosecuting a civil matter in the Appellate Division, Second Department. It is not intended to cover all situations but, rather, to assist in the general steps needed to invoke the jurisdiction of this court, to perfect an appeal, and to submit a motion. For more information, the reader's attention is directed to the Civil Practice Law and Rules (CPLR) articles 55 and 57 and the Rules of this court.

§ 1.1 Jurisdiction; counties; courts.

The Appellate Division is an intermediate appellate court. There are four departments of the Appellate Division in New York State: the First Department is located in Manhattan, the Second Department in Brooklyn, the Third Department in Albany, and the Fourth Department in Rochester. The jurisdiction of the Second Department encompasses the counties of Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam.

The Second Department hears appeals in civil cases from orders, judgments, and decrees of the Court of Claims, the Supreme Court, the Family Court, and the Surrogate's Court and, if permission is granted, of the Appellate Terms of the Supreme Court. In addition, the court has original jurisdiction in a limited number of other matters (e.g., CPLR article 78 proceedings against a Supreme Court Justice or County Court Judge and CPLR 5704[a] applications).

2. Standing; Aggrievement.

There are certain limitations on a party's right to appeal. To take an appeal a party must have standing, meaning that the party is "aggrieved" by the determination made by the trial court (CPLR 5511). Basically, a party is "aggrieved" if an application that party made was denied or not fully granted, or if an application made by the party's adversary, which the party opposed, was fully or partially granted.

3. Appealability.

§ 3.1 Appealable paper.

An appeal may be taken only from an "appealable paper," that is, an order, judgment, or decree of a court, signed by a Judge, which formally grants or denies relief after a hearing or trial, or requested in a motion made on notice. A decision, whether transcribed in the minutes or in writing, is not appealable. Rulings made during a hearing or trial are not appealable. Often a Judge will issue a written memorandum which concludes "submit order" or "settle order on notice"; such a paper is merely a decision from which no appeal lies.

§ 3.2 Appeal as of right.

Not all orders are appealable as a matter of right; some may be appealed with permission of this court, others may not be appealed at all.

Generally, an appeal may be taken as of right from a final or interlocutory judgment and from an order which determines a motion made on notice and which adversely affects a substantial right of the appellant (CPLR 5701).

§ 3.3 Appeal by permission.

The most common orders which are not appealable as of right but which may be appealed with permission of this court include orders made in CPLR article 78 proceedings (CPLR 5701[b][1]), and nondispositional orders of the Family Court, other than those made in an abuse or neglect proceeding (Family Court Act § 1112[a]). Orders of the Appellate Term that determine an appeal from a judgment or order of a lower court are appealable by permission of the Appellate Term or, in case of refusal, by order of this court (CPLR 5703[a]); other orders of the Appellate Term are not appealable. Leave to appeal may be sought from this court by motion on notice to the other parties (a discussion on motion practice may be found in Part 8 of this pamphlet).

§ 3.4 Nonappealable orders.

No appeal at all lies from an order entered upon the default or consent of the appealing party, or from an order that denies reargument, or from an order which denies an adjournment of an ongoing proceeding.

4. Invoking the Appellate Jurisdiction of the Court.

§ 4.1 Notice of appeal.

If a party decides to appeal as of right from an order, judgment, or decree, he or she must file a notice of appeal in triplicate. The notice of appeal must be filed in the office of the clerk of the court which made the paper appealed from and an additional copy must be served on each adversary (CPLR 5515; Rules of the Appellate Division, Second Department § 670.3[a]; a sample notice of appeal is annexed to this pamphlet). On an appeal from a judgment or order of the Supreme Court, CPLR 8022(a) requires a party to pay a filing fee of $65 to the County Clerk upon the filing of a notice of appeal. A notice of appeal must be filed and served within 30 days after the appellant is served with a copy of the order, judgment, or decree, with notice of its entry, or, if the appellant has served a copy of that paper on his or her opponent with notice of its entry, within 30 days after such service (CPLR 5513[a]).

§ 4.2 Request for Appellate Division Intervention.

The appellant in a civil cause must file a Request for Appellate Division Intervention - Civil (Form A), known as a RADI (see Rules § 670.3[a]) with the notice of appeal. The RADI may be purchased at a store that sells legal forms (a copy of the RADI is annexed to this pamphlet). The notice of appeal must be filed in triplicate and annexed to two of the copies must be the RADI, a copy of the paper appealed from, and a copy of the decision leading to that paper, if any. If a party wishes to appeal from more than one paper, made in the same case, with the same notice of appeal, he or she must attach to each Form A an Additional Appeal Information form (Form B, a copy of which is annexed to this pamphlet).

Where a proceeding commenced in the Supreme Court is transferred to this court, the petitioner must file forthwith in this court two copies of the order of transfer, to each of which must be affixed a Request for Appellate Division Intervention - Civil (Form A) and any opinion or decision of the transferring court (Rules § 670.3[c]).

On the RADI, the title should be set forth as it appears on the summons, notice of petition or order to show cause commencing the civil cause. The names of all parties must be listed, together with their status in the trial court (e.g., plaintiff, petitioner, claimant, defendant, respondent, defendant third-party plaintiff, third-party defendant) and their status in the Appellate Division (e.g., appellant, respondent, appellant-respondent, respondent-appellant). If a party to the action has no status in the Appellate Division, the word "none" is to be entered in the space provided on the form. Where the Appellate Division is the court of original instance (e.g., the matter is a proceeding pursuant to CPLR article 78 against a Supreme Court Justice or County Court Judge commenced in this court pursuant to CPLR 506[b][1] or an application for a writ of habeas corpus) only the column entitled "Appellate Division Status" need be completed.

§ 4.3 Docket Number

An Appellate Division docket number will be assigned to each cause. The docket number must appear in the upper right hand corner, opposite the title, on all papers thereafter filed with the court. If the papers relate to multiple causes, they must bear the docket numbers of all those causes.

5. Perfecting an Appeal.

An appeal is perfected by the filing of a brief and a record. The record may be a full reproduced record, an appendix, an agreed statement of facts, or, when authorized, the original papers.

§ 5.1 Preparing to perfect — the record.

CPLR 5526 specifies the papers which constitute the record on appeal from a judgment or order, stating in relevant part:

> "The record on appeal from a final judgment shall consist of the notice of appeal, the judgment-roll, the corrected transcript of the proceedings * * * if a trial or hearing was held, any relevant exhibits, or copies of them, in the court of original instance, any other reviewable order, and any opinions in the case. The record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other exhibits upon which the judgment or order was founded and any opinions in the case."

Generally, the judgment, order, or decree will specify the papers upon which it was made. It is the appellant's responsibility to obtain accurate and complete copies of the papers comprising the record on file in the office of the clerk of the court that made the paper appealed from, and in the event that it was made after a trial or hearing, to obtain the transcript of the proceedings.

§ 5.2 Obtaining and settling the transcript.

In general, if the appeal is from a judgment, order, or decree that was made following a trial or hearing, the party taking the appeal will have to furnish the court and his or her adversary with a copy of the minutes. The minutes taken by the court reporter in stenographic form or recorded on tape must be transcribed into English. The rates of compensation of court reporters for transcribing stenographic minutes are set forth in § 108.2 of the Rules of the Chief Administrator of the courts (22 NYCRR § 108.2). For furnishing minutes in the regular course of the reporter's business, that is, within a reasonable time, the rate is set at $1.37½ per page. The rate of payment for expedited production of the transcript is subject to private agreement between the reporter and the appellant, with the rate suggested by the rule being $4.40 per page. In order to meet the time limits for perfecting an appeal set by the rules of the court, it is imperative that the transcript be ordered from the court reporter promptly after the filing of the notice of appeal.

After the transcript is received from the court reporter, it must either be stipulated as correct by the parties or settled pursuant to CPLR 5525 (Rules § 670.10.2[e]). The procedure for settlement of a transcript is set forth in CPLR 5525(c), which states:

> "(c) Settlement of transcript.
>
> "1. Within fifteen days after receiving the transcript from the court reporter or from any other source, the appellant shall make any proposed amendments and serve them and a copy of the transcript upon the respondent. Within fifteen days after such service the respondent shall make any proposed amendments or objections to the proposed amendments of the appellant and serve them upon the appellant. At any time thereafter and on at least four days' notice to the adverse party, the transcript and the proposed amendments and objections thereto shall be submitted for settlement to the judge or referee before whom the proceedings were had if the parties cannot agree on the amendments to the transcript. The original of the transcript shall be corrected by the appellant in accordance with the agreement of the parties or the direction of the court and its correctness shall be certified to thereon by the parties or the judge or referee before whom the proceedings were had. When he serves his brief upon the respondent the appellant shall also serve a conformed copy of the transcript or deposit it in the office of the clerk of the court of original instance who shall make it available to respondent.
>
> "2. If the appellant has timely proposed amendments and served them with a copy of the transcript on respondent, and no amendments or objections are proposed by the respondent within the time limited by paragraph 1, the transcript, certified as correct by the court reporter, together with appellant's proposed amendments, shall be deemed correct without the necessity of a stipulation by the parties certifying to its correctness or the settlement of the transcript by the judge or referee. The appellant shall affix to such transcript an affirmation, certifying to his

compliance with the time limitation, the service of the notice provided by paragraph 3 and the respondent's failure to propose amendments or objections within the time prescribed.

"3. Appellant shall serve on respondent together with a copy of the transcript and the proposed amendments, a notice of settlement containing a specific reference to subdivision (c) of this rule, and stating that if respondent fails to propose amendments or objections within the time limited by paragraph 1, the provisions of paragraph 2 shall apply."

§ 5.3 Time limitations.

The court has imposed time limits upon the perfection of a civil cause. Section 670.8(e) of the Rules provides:

"a civil appeal or proceeding shall be deemed abandoned unless perfected

'(1) within six months after the date of the notice of appeal, order granting leave to appeal, or order transferring the proceeding to this court, or,

'(2) within six months of the filing of the submission with the county clerk in an action on submitted facts pursuant to CPLR 3222,

"unless the time to perfect shall have been extended pursuant to subdivision (d) of this section. The clerk shall not accept any record or brief for filing after the expiration of such six-month period or such period as extended."

A party needing additional time to perfect a cause or serve and file a brief must obtain an enlargement of time to do so. Such an enlargement may be obtained by agreement with the other parties to the cause, embodied in a written stipulation so ordered by the clerk, or by an application in the form of a letter addressed to the clerk setting forth a reason why more time is needed (Rules § 670.8[d]).

§ 5.4 General requirements of records, appendices, briefs (see, Rules §§ 670.8, 670.9, 670.10.1).

An appeal may be prosecuted upon a full reproduced record (CPLR 5528[a][5]), an appendix (CPLR 5528[f][5]), an agreed statement of facts in lieu of record (CPLR 5527), or, where authorized by statute, the Rules of this court, or an order of this court, upon a record consisting of the original papers.

A party must file nine copies of a record, appendix, or agreed statement, and of the brief, one of which should be marked "original", with proof of service of two copies on each adversary (Rules § 670.9[a], [b][4], [c]). The document must be bound on the left side; the pages

must be 8 l/2 by 11 inches; no metal fasteners or similar hard material may protrude; volumes may not exceed two inches in thickness.

There must be a cover which, among other things, sets forth the title of the action with the parties' status in the trial court as well as in the Appellate Division (e.g., plaintiff-appellant; defendant-respondent). The cover of a record, appendix, or agreed statement should include the names, addresses, and telephone numbers of all attorneys and the parties they represent, and the index number of the matter in the trial court (a sample cover for a record is annexed to this pamphlet).

A record, appendix, agreed statement and brief must contain a statement pursuant to CPLR 553l, setting forth the information required by that statute (a sample statement pursuant to CPLR 5531 is annexed to this pamphlet).

The clerk may refuse to accept any document which does not comply with the Rules, is not legible or is otherwise unsuitable (Rules § 670.10.1[f]).

If appeals are taken from more than one paper in the same matter, they may be consolidated and prosecuted in one record and brief (Rules § 670.7[c]). Each appeal must be timely perfected in accordance with the Rules (§ 670.8[e]).

A record or appendix may not contain a transcript of testimony given at a trial, hearing, or deposition reproduced in a condensed format such that two or more pages in standard format appear on one page (Rules § 670.10.2[d]).

§ 5.5 Certification of the record or appendix.

The record or appendix must be certified as a true and complete copy of the original documents on file with the clerk of the court from which the appeal is taken. The certification may be made in one of the following three ways (Rules § 670.10.2[f]): (1) by the certificate of the appellant's attorney pursuant to CPLR 2105, (2) by the certificate of the clerk of the court from which the appeal is taken, or (3) by stipulation of counsel or the parties pursuant to CPLR 5532. A party proceeding *pro se* who cannot obtain a stipulation of his or her opponent as to the correctness of the record or appendix, and who cannot afford the cost of obtaining the certification of the appropriate clerk, may move to dispense with the certification requirement of the court's rules. Such a motion must be made before or simultaneously with the filing of the record or appendix.

§ 5.6 Concurrent and cross appeals.

When appeals are separately taken from the same judgment, order, or decree by parties whose interests are not adverse to one another, they are called concurrent appellants. If the interests of the appellants are adverse, they are called cross appellants (Rules § 670.2[a][6]).

Unless the court orders otherwise, concurrent and/or cross appellants are required to consult and file a joint record or appendix, which shall include the respective notices of appeal of the parties (Rules § 670.8[c][l]). The filing deadlines for concurrent and cross appeals can be found in section 670.8(c)(2) of the Rules.

§ 5.7 The record.

The full reproduced record is the most common way of perfecting a civil appeal. It must include a table of contents, a statement pursuant to CPLR 5531, a copy of the notice of appeal (or order of transfer, or order granting leave to appeal), a copy of the paper appealed from, the underlying decision, if any, and the papers submitted to the trial court (e.g., motion papers, trial testimony). Materials not submitted to the trial court are not part of the record.

The record and brief may not be bound together and filed as a single document.

§ 5.8 The appendix.

Like a record, an appendix must contain a table of contents, a statement pursuant to CPLR 5531, a copy of the notice of appeal (or order of transfer, or order granting leave to appeal), a copy of the paper appealed from, and the underlying decision, if any. However, unlike a record, a party need only submit so much of the papers (or testimony) that were before the trial court as the party deems necessary to determine the issues raised; the party must include papers (or testimony) benefitting the adversary as well as his or her own position (CPLR 5528[a][5]; Rules § 670.10.2[c]). A brief and appendix may be combined in one document (CPLR 5528[a][5]; Rules § 670.9[b][4]).

When an appendix is filed, the party must arrange with the clerk of the court from which the appeal was taken to send the entire original file to the Appellate Division. If a trial or hearing was held and all of the testimony is not included in the appendix, a complete set of the minutes must be submitted to this court.

§ 5.9 The agreed statement.

The statement, in proper form and properly bound, must be submitted as a joint appendix. It must also contain a table of contents, a statement pursuant to CPLR 5531, a copy of the notice of appeal (or order of transfer, or order granting leave to appeal), a copy of the paper appealed from, the underlying decision, if any, and a statement of the issues to be determined (CPLR 5527; Rules § 670.9[c]).

§ 5.10 The original record.

Certain matters may be prosecuted as a matter of right upon a record consisting of the original papers. These include appeals from Family Court orders (Family Court Act § 1116), appeals or transferred proceedings under the Human Rights Law (Executive Law § 298; Rules §§ 670.9[d]; 670.17), proceedings commenced in the Appellate Division pursuant to Eminent Domain Procedure Law § 207, Public Service Law §§ 128 and 170, and Labor Law § 220 (Rules § 670.18[d]), appeals arising under the Election Law, and appeals from the Appellate Term. In addition an appellant or petitioner may be granted leave to perfect using the original record method by order of this court upon motion (Rules § 670.9[d]).

§ 5.11 Briefs.

Briefs prepared on a computer shall be printed in either a 14-point serifed, proportionally spaced typeface (expect that footnotes may be printed in type of no less than 12 points), or a 12-point serifed, monospaced typeface containing no more than 10½ characters per

inch (except that footnotes may be printed in type of no less than 10 points). Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch. Computer-generated appellant's and respondent's briefs must not exceed 14,000 words, and reply and amicus curiae briefs must not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of pages containing the table of contents or table of citations. Typewritten appellants' and respondents' briefs must not exceed 70 pages, and reply briefs and amicus curiae briefs must not exceed 35 pages, exclusive of pages containing the table of contents or table of citations. If a party's brief exceeds these limitations, he or she must seek advance permission from the clerk of the Appellate Division by a letter annexed to a draft of the brief (Rules § 670.10.3[e]).

In the upper right hand corner of the cover of a brief, the party upon whose behalf it is filed must state the time requested for argument and who will argue, or the court will deem that brief submitted without oral argument (a sample cover for a brief is annexed to this pamphlet).

The appellant's brief must contain a statement pursuant to CPLR 5531; a table of contents, including the points urged in the brief; a concise statement of the facts of the case; a statement of the questions raised; the arguments divided by the points urged; and, if the appeal is being prosecuted on the original record, a copy of the paper appealed from, the underlying decision, if any, and a copy of the notice of appeal (Rules § 670.10.3[g][2]).

The respondent's brief must contain a table of contents, including the points urged in the brief; a counterstatement of the questions raised and of the facts; and argument arranged under the point headings urged (Rules § 670.10.3[g][3]). The respondent's brief is due 30 days after service of the appellant's brief (Rules § 670.8[b]).

The reply brief must contain a table of contents and reply to the respondent's arguments (Rules § 670.10.3[g][4]). A reply brief may be filed no later than 10 days after service of the respondent's brief (Rules § 670.8[b]).

A party must file nine copies of the brief and serve two on each adversary; if a party is proceeding on the original record pursuant to statute, rule or court order, he or she need only serve one copy on each adversary (Rules § 670.8[a], [b]).

Briefs must be signed in accordance with § 130-1.1-a(a) of the Rules of the Chief Administrator of the Courts (22 NYCRR § 130-1.1-a[a]; see, § 10.3 of this pamphlet). All briefs, except those that are handwritten, must also contain a certificate of compliance with § 670.10.3(f) of the rules of this court (Rules § 670.10.3[f]).

§ 5.12 Constitutionality of statute.

If the constitutionality of a State statute is involved, and the State is not a party, the party raising the issue must serve a copy of his or her brief on the State Attorney-General (Rules § 670.10.3[i]).

§ 5.13 Filing fee.

CPLR 8022(b) requires that a fee of $315 be paid upon the perfection of a civil appeal. The fee must be paid irrespective of the method by which an appeal is perfected, i.e., by

the full record, appendix, or original papers method, unless the party is exempt (e.g., has been granted poor person relief pursuant to CPLR 1102).

§ 5.14 Request for argument.

A party who wishes to argue a cause must make a request for time to do so. The request is made at the time the brief is filed in the form of a notation in the upper right hand corner of its cover stating that the cause is to be argued, the time actually required for argument, and the name of the attorney or party *pro se* who will argue (Rules § 670.10.3[g][1]; a sample cover of a brief is annexed to this pamphlet). Parties who do not wish to argue should mark their brief: "To be submitted."

Court rules permit argument of up to 30 minutes on appeals from judgments, orders or decrees made after a trial or hearing, appeals from orders of the Appellate Term and special proceedings transferred to or instituted in the Appellate Division to review administrative determinations made after a hearing (Rules § 670.20[a]). Up to 15 minutes of argument time is permitted for all other appeals in which argument is allowed (Rules § 670.20[b]).

Argument is not allowed as to certain issues. Section 670.20(c) of the Rules provides:

> "(c) Argument is not permitted on issues involving maintenance; spousal support; child support; counsel fees; the legality, propriety or excessiveness of sentences; grand jury reports; and calendar and practice matters including but not limited to preferences, bills of particulars, correction of pleadings, examinations before trial, physical examinations, discovery of records, interrogatories, change of venue, and transfers of actions to and from the Supreme Court. Applications for permission to argue such issues shall be made at the call of the calendar on the date the cause appears on the calendar. Notice of intention to make such an application shall be given to the court and the other parties at least seven days before the cause appears on the calendar."

A party who has not filed a brief may not orally argue (Rules § 670.20[e]). The court retains the right to deny oral argument of any cause (Rules § 670.20[d]).

6. Special Proceedings.

§ 6.1 Original CPLR article 78 proceedings.

The most common form of invoking the original jurisdiction of this court is a CPLR article 78 proceeding against a Supreme Court Justice or County Court Judge commenced in this court pursuant to CPLR 506(b)(1) (e.g., to prohibit the Justice or Judge from performing an act or to compel him or her to perform an act mandated by law). The proceeding may be commenced by notice of petition and petition or by order to show cause and petition. If the proceeding is commenced by notice of petition, the party must give the adversary 20 days notice (CPLR 7804[c]). Orders to show cause are explained in § 8.2 of this pamphlet.

§ 6.2 Transferred CPLR article 78 proceedings.

One of the issues that may be raised in a CPLR article 78 proceeding commenced in the Supreme Court is whether an administrative determination made after a hearing at which evidence is taken is supported by substantial evidence (CPLR 7803[4]). Where such an issue is raised, the proceeding must be transferred to this court for disposition (CPLR 7804[g]).

A CPLR article 78 proceeding transferred to this court must be perfected by a method specified by section 670.9 of the Rules, e.g., upon a full reproduced record, an appendix, an agreed statement or, if authorized by statute, rule, or order of this court, the original record (see, Rules § 670.l6).

§ 6.3 Writ of habeas corpus.

A Justice of this court may issue a writ of habeas corpus or order to show cause commencing a habeas corpus proceeding to challenge the legality of the detention of a person held within the jurisdiction of this Department (CPLR 7002[b][2]). Generally, this court will entertain original jurisdiction over, and hear argument on, only those habeas corpus proceedings challenging bail as being excessive. Ordinarily, the resolution of a habeas corpus proceeding raising issues other than the excessiveness of bail will involve disputed questions of fact and an application for a writ in such a case should be presented to the appropriate trial level court in the county in which the individual who is the subject of the writ is detained. If presented to a Justice of this court for signature, such a writ will usually be made returnable in the appropriate trial level court.

§ 6.4 Other special proceedings.

Various State statutes permit a limited number of other proceedings to be commenced in this court. Litigants should refer specifically to those provisions for more information and to section 670.l8 of the Rules (Eminent Domain Procedure Law § 207; Public Service Law §§ l28, 170; Labor Law § 220; Public Officers Law § 36).

§ 6.5 Filing fee.

CPLR 8022(b) requires that a fee of $315 be paid upon the filing of a notice of petition or order to show cause commencing a special proceeding in this court.

7. CPLR 5704.

CPLR 5704(a) gives this court authority to review ex parte orders of a Justice of the Supreme Court, a Judge of a Family Court or Court of Claims, or a Surrogate. If both parties appeared before or were heard by the Justice, Judge, or Surrogate, the order is not ex parte and CPLR 5704(a) review does not lie.

If the trial court granted relief ex parte (e.g., granted a temporary restraining order in an order to show cause), then one Justice of the Appellate Division may vacate or modify the order. A panel of Justices is needed to grant relief that the trial court declined to grant.

Section 670.5(e) of the Rules requires that the party seeking relief pursuant to CPLR 5704(a) give his or her adversary reasonable notice of the date, time and place that the

application will be made and of the relief being requested. The papers must include an affidavit describing the notice given and the position of the other party. If the party submitting the application is unwilling to give notice, he or she must state the reason for such unwillingness.

The Appellate Division will not review an ex parte order to show cause applied for at the Appellate Term of the Supreme Court.

8. Motion Practice.

If a party needs to seek relief from the court prior to or after the filing of records and briefs, the party must proceed by way of a motion, which may be brought on by a notice of motion or order to show cause. Oral argument is not permitted on motions. On the return date they are deemed submitted and counsel or parties *pro se* should not appear at the courthouse (Rules § 670.5[b]).

§ 8.1 Notice of motion.

If time is not of the essence and interim relief with a temporary restraining order (TRO) is not needed, the movant should proceed by notice of motion (a sample notice of motion is annexed to this pamphlet). Motions prosecuted by notice of motion may be made returnable at 9:30 A.M. on any Friday (Rules § 670.5[a]). The party making the motion is required to give his or her adversary at least eight days notice if the papers are delivered in person, and at least l3 days notice if they are served by mail. The moving papers should be filed with the court at least one week before the return date and opposition papers should be filed by 4:00 P.M. on the day before the return date (Rules § 670.5[b]).

The motion papers must contain a copy of the notice of appeal and the paper appealed from (Rules § 670.5[d]), an affidavit setting forth the background of the case and why the relief requested should be granted, any other exhibits or affidavits deemed necessary, and an affidavit stating that the papers were served upon the adversary.

A cross motion must be made returnable the same day as the original motion and must be served and filed three days prior thereto (Rules § 670.5[a]).

§ 8.2 Order to show cause.

If time is of the essence or a TRO is needed, the moving party should proceed by order to show cause (a sample order to show cause is annexed to this pamphlet). The order to show cause must be signed by a Justice of this court. The TRO should be set forth in a separate paragraph. The granting of a TRO lies within the discretion of the Justice who signs the order to show cause; it is not granted as a matter of course. The court will insert the return date of the application and it will usually be a shorter period than if the motion were made by notice of motion. The signing of an order to show cause is discretionary, and, if it is not signed, the movant may proceed by notice of motion.

The movant must include with the order to show cause a copy of the notice of appeal and paper appealed from, an affidavit setting forth the background of the case and why the relief requested should be granted, if a TRO is requested what immediate harm would result if it is not granted, and any other exhibits or affidavits deemed necessary. A party need not serve

the order to show cause and supporting papers upon his or her adversary before coming to this court to have it signed.

§ 8.3 Temporary restraining order.

As with an application pursuant to CPLR 5704 (see, Part 7 of this pamphlet), section 670.5(e) of the Rules requires that an applicant for a TRO give his or her adversary reasonable notice of the date, time, and place that the application for the order to show cause will be made, and the nature of the relief requested. The motion papers must include an affidavit describing the notice given and the position of the other party. If the movant is unwilling to give notice, he or she must set forth the reasons for such unwillingness. If an attorney or a party *pro se* is seeking a TRO, he or she must personally appear (Rules § 670.5[e]).

§ 8.4 Motions to reargue, resettle, amend.

Motions for reargument or to resettle or amend a decision and order of this court shall be made within 30 days after service of a copy of the decision and order with notice of its entry in the office of the clerk of this court. For good cause shown, the court may consider a motion submitted after that time (Rules § 670.6[a]).

§ 8.5 Rejection of motion papers.

Section 670.5(f) of the Rules authorizes the court to reject papers if they are not in proper form. Common reasons for such rejection are: (1) the failure to annex a copy of the notice of appeal or paper appealed from (Rules § 670.5[d][1], [2]); (2) the failure to annex a Request for Appellate Division Intervention (RADI), if an Appellate Division docket number has not yet been assigned; (3) the failure to sign or have notarized the supporting affidavit; and (4) the failure to include proof of service of the papers.

§ 8.6 Filing fee for motions.

CPLR 8022(b) provides that the fee for filing a motion or cross motion regarding a civil appeal or special proceeding is $45. However, no fee is payable for a motion which seeks poor person relief pursuant to CPLR 1101(a).

9. The Calendar.

§ 9.1 The general calendar.

When a matter is perfected it is placed on the court's general calendar to await the filing of answering and reply briefs, if any, before it can be placed on the day calendar for argument or submission to a panel of Justices. Unless a preference is granted, matters are generally heard in the order in which they are perfected (Rules § 670.7[a]).

§ 9.2 Preferences.

It will take several months after a matter is perfected before it will appear on a day calendar. A party who is entitled by law to a preference (to have the matter taken out of turn

and heard on a date certain) may serve and file a demand for that relief at the time the matter is perfected, setting forth the provision of law relied upon and good cause for the preference (Rules § 670.7[b][1]). In all other cases, if a party desires an early calendar date, he or she must move for a preference on papers showing good cause why the case should be preferred over other matters (Rules § 670.7[b][2]).

§ 9.3 The day calendar; notice.

The court schedules cases for a hearing before a particular panel of Justices by publishing its day calendars in the *New York Law Journal*. No other official notice is provided to litigants. Oral argument will not be rescheduled because of the failure of a litigant to obtain actual prior notice of the appearance of a cause on the day calendar.

A party wishing informal, prior notification of the date his or her case will appear on the day calendar may periodically telephone the court's calendar clerk at 718 722-6312. Alternatively, he or she may submit a properly addressed, stamped postcard to the calendar clerk. However, the court assumes no responsibility for the accuracy, timeliness, or receipt of such informal notice, and parties are reminded that the only official notice of the calendar date is the publication in the *New York Law Journal*.

The Courtroom

§ 9.4 The call of the day calendar and argument or submission.

Unless otherwise ordered, the court convenes at 10 o'clock in the morning in the courtroom in its courthouse located at 45 Monroe Place in Brooklyn, New York. Court sessions are held every Monday, Tuesday, Thursday, and Friday, excepting public holidays and during certain recess periods (Rules § 670.1[a]).

The first order of business is the call of the day calendar by the Justice Presiding. Parties who marked the cover of their brief with an argument request and who still wish to argue must answer the calendar call and state the amount of time required. Those who made an argument request on their brief but who no longer wish to argue, may submit simply by not appearing in court at the call of the calendar. The court will then mark their appeal submitted without argument. Thereafter the cases will be heard in the order that they appear on the day calendar.

10. Frivolous Conduct — Costs & Sanctions; the Signing Requirement.

Parties and attorneys who prosecute frivolous appeals or proceedings or engage in frivolous motion practice in this court are subject to the imposition of an award to their opponent of costs in the form of reimbursement of actual expenses reasonably incurred and reasonable attorneys fees, and to a sanction of up to $10,000 for each single instance of such conduct (22 NYCRR Part 130; § 670.2[h]).

Pursuant to § 130-1.1-a of the Rules of the Chief Administrator of the Courts, papers filed with this court in a civil cause must be signed. The signature constitutes a certification by the signer that the presentation of the paper or the contentions therein are not frivolous (22 NYCRR § 130-1.1-a; § 670.2[i]), as well as a representation of the accuracy of the certificate of compliance (Rules § 670.10.3[f]).

The signing requirement applies to civil appeals, habeas corpus proceedings, original and transferred CPLR article 78 proceedings, most Family Court proceedings (e.g., support, custody, visitation), and all other actions or proceedings commenced in this court in the first instance.

The requirement is not applicable to criminal cases, to Family Court cases arising under articles 3 (juvenile delinquency), 7 (PINS), 8 (family offenses), and 10 (abuse or neglect) of the Family Court Act, and to appeals in cases originating in a town or village court or a small claims part.

When a signature is required, any attorney with the firm can sign. Parties appearing *pro se* are also obligated to sign their papers. The signature must be an autograph in ink and must be on the original of the paper that is to be filed in the office of the clerk of this court. The signatory's name must be typed or printed below the signature.

§ 10.1 Signing — Requests for Appellate Division Intervention.

Because notices of appeal must be signed, the Request for Appellate Division Intervention (RADI) that must be annexed thereto pursuant to the rules of this court (22 NYCRR § 670.3[a]) need not be signed. However, those RADIs that are required to be filed in the office of the clerk of this court in connection with transferred proceedings and actions or proceedings commenced in this court (22 NYCRR § 670.3[c], [d], [e]) must be signed on a space provided for that purpose on a litigation back enclosing the RADI or on a separate form annexed thereto. (A sample form for this purpose is annexed to this pamphlet.)

§ 10.2 Signing — records & appendices.

Records and appendices on appeals and on proceedings transferred to this court need not be signed, the papers contained therein having been subject to the application of the signature rule in the court of original instance.

§ 10.3 Signing — briefs.

The "original" of the brief to be filed with the court must bear an ink autograph signature. All copies must be conformed to the original (*see,* 22 NYCRR § 670.2[i]).

In the event joint briefs are submitted, if separate firms appear for different parties, a signature is needed for each firm. If separate firms appear for the same party, one signature will suffice.

§ 10.4 Signing — motions in general.

There are four preferred methods of signing: (1) by signing the actual paper, such as an affidavit, (2) by signing a cover paper, such as a notice of motion, (3) by signing a space provided for that purpose on a litigation back that encloses the motion papers to be filed, or (4) by signing a separate form that lists the accompanying papers. A form for this purpose is available in the office of the clerk. Some of these methods are better adapted than others for use in different types of motion practice.

§ 10.5 Signing — motions prosecuted by notice of motion.

The preferred method for complying with the signing requirement on a motion prosecuted by notice of motion is a signature on the notice of motion itself. Alternatively, signing a litigation back or a separate form is appropriate. The notice of motion, litigation back, or separate form must recite the papers that accompany the notice of motion.

If the only affidavit or affirmation in support of the motion is that of the attorney or party *pro se*, the original signature on that paper is sufficient compliance with the rule and a separate signature is not required.

§ 10.6 Signing — motions prosecuted by order to show cause.

An order to show cause is not signed by the party or attorney on whose behalf it is submitted for signature. Accordingly, compliance with the signing requirement is necessary in one of the following ways: (1) if the only supporting paper is an affidavit or affirmation of an attorney or a party *pro se*, by signature on that paper, (2) by signature on a litigation back enclosing the motion papers, or (3) by signature on a separate form. If the second or third of these methods is used, the litigation back or form must recite the papers covered by the signature. If the only paper submitted in support of a motion prosecuted by order to show cause is the affidavit or affirmation of a party who is represented by counsel, or the affidavit or affirmation of a nonparty, compliance with the signing requirement by an attorney is required. The signature may be made either on a litigation back or on a separate form, each of which must recite the papers covered by the signature.

§ 10.7 Signing — opposition & reply papers.

If the only paper submitted in opposition to the motion or in reply to opposition papers is an affidavit or affirmation of an attorney or a party *pro se*, the signature on that paper will be sufficient. If, however, the only paper submitted in opposition or reply is the affidavit or affirmation of a party who is represented by counsel, or the affidavit or affirmation of a nonparty, or if more than one affidavit or affirmation is submitted, the signature of an attorney is necessary. That signature may be made either on a litigation back or on a separate form, each of which must recite the papers covered by the signature.

11. Miscellaneous.

§ 11.1 Poor person relief; relief from printing requirement.

If a party wishes to be exempt from payment of the $315 filing fee to perfect a civil appeal or special proceeding, the $45 filing fee for motions and cross motions, and/or the requirement that a civil appeal or proceeding be perfected using a printed record or appendix, he or she must move for poor person relief (CPLR 1101, 1102). The papers must be served on the Corporation Counsel if the appeal arises from a court in New York City or the County Attorney if not in the city (CPLR 1101[c]). If a party is unable to afford the expense of printing a record or appendix, but would not qualify for poor person relief, he or she may submit a motion for permission to prosecute the appeal on the original record.

§ 11.2 Filings.

All papers required to be filed at the court (e.g., records, briefs and motions) are deemed filed only as of the time they are actually received (Rules § 670.2[d]).

§ 11.3 Decisions.

If a party wishes to receive a copy of a judgment or order of this court determining a cause or motion, he or she must submit a self-addressed, stamped envelope which should include the docket number or numbers assigned by this court (Rules § 670.2[f]). Such an order or judgment is deemed entered on the date upon which it was issued (Rules § 670.21).

Bibliography

There are numerous publications dealing with appellate practice in New York. Attorneys and *pro se* litigants may wish to consult the following works for further information on specific topics of appellate practice relevant to their specific circumstances.

Davies, Mark, Marianne Stecich, and Risa I. Gold. *New York Civil Appellate Practice.* (St. Paul: West Publishing Co., 1996).

Griffith, Lonnie G. Jr., et al., eds. "Appeals in General," chap. 70 in vol. 10*, Carmody-Wait 2d: Cyclopedia of New York Practice with Forms* (Rochester: Lawyers Cooperative Publishing, 1990).

Karger, Arthur. *The Powers of the New York Court of Appeals*, 3rd ed. (Rochester: Lawyers Cooperative Publishing, 1997).

Naffky, Jeanne M., et al., eds. "Appeals to the Appellate Division," chap. 72 in vol. 11, *Carmody-Wait 2d: New York Practice with Forms* (Rochester: Lawyers Cooperative Publishing, 1996).

New York State Bar Association. *New York Appellate Practice.* (Albany: New York State Bar Association, 2003).

Newman, Thomas R., et al. *New York Appellate Practice,* rev. ed. (New York: Matthew Bender & Co., 1997).

Siegel, David D. *New York Practice*, 3rd ed. (St. Paul: West Group, 1999).

List of Forms

I. Notice of Appeal

II. Form A – Request For Appellate Division Intervention – Civil

III. Form B – Additional Appeal Information

IV. Form C – Additional Party and Attorney Information

V. Order to Show Cause

VI. Notice of Motion

VII. Affidavit

VIII. Affidavit of Service

IX. Signing Requirement Certification Pursuant to 22 NYCRR § 130-1.1-a(a)

X. Cover – Record on Appeal

XI. Cover – Appellant's Brief

XII. Statement Pursuant to CPLR 5531

XIII. Certification Pursuant to CPLR 2105

XIV. Certificate of Compliance Pursuant to 22 NYCRR § 670.10.3(f)

XV. Glossary of Terms for Formatting Computer-Generated Briefs