

**PERFECTING THE APPEAL – PART I**  
**THE RECORD ON APPEAL AND APPENDICES**

**by**

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An appeal may be prosecuted upon a full reproduced record (CPLR 5526); an appendix method (CPLR 5528(a)(5)); or an agreed statement in lieu of record (CPLR 5527). For the majority of appeals, particularly those arising from motion practice, a full reproduced record containing all of the items considered by the Court below can be used. Alternatively, where the appeal only involves a narrow issue, and substantial portions of the motion papers are irrelevant to the appeal, the appellant may choose to proceed via the Appendix method. Even when perfecting an appeal under this method, the appellant is still required to prepare and file a single copy of the record on appeal. Finally, although very rarely utilized, the CPLR authorizes an appeal to be prosecuted upon an agreed statement in lieu of a record in which the parties jointly prepare a statement setting forth the facts necessary to determine the issue(s) on appeal.

**RECORD ON APPEAL**

**Contents Of The Record On Appeal**

The appellant is responsible for compiling the Record on Appeal. Oftentimes, the judgment, order or decree being appealed will specify the papers upon which it was made. It is then the appellant's responsibility to obtain accurate copies of these papers and compile them in the Record on Appeal.

The contents of the Record on Appeal are prescribed by the CPLR and the Rules of the various Appellate Divisions. For example, CPLR 5526 generally requires that:

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.

In addition to these general requirements regarding the content of the Record on Appeal, the

CPLR also requires that the subject matter of each page of the record be included at the top of the page. (*See* CPLR 5526). If the particular page consists of testimony from an underlying proceeding, the statute requires that the page include a header setting forth the name of the witness and whether the testimony is part of direct, cross, redirect or re-cross examination. (*Id.*)

The Appellate Division rules supplement these general requirements. For example, the Appellate Division - Third Department<sup>1</sup> requires that the Record on Appeal contain:

- A soft cover containing the title and names, addresses and telephone numbers of attorneys (§ 800.5(a)(1));
- A table of contents which shall list and briefly describe each paper included in the record, each witness's testimony and each exhibit (§ 800.5(a)(2));
- A statement pursuant to CPLR 5531 (§ 800.5(a)(3));
- The notice of appeal or order of transfer, judgment or order appealed from, judgment roll, corrected transcript or statement in lieu thereof, any affidavits and relevant exhibits or copies of them, and any opinion or decision in the case (§ 800.5 (a)(4));
- A stipulation or order settling the transcript pursuant to CPLR 5525(c) (§ 800.5(a)(5));
- A stipulation dispensing with reproducing any exhibits (§ 800.5(a)(6));
- The appropriate certification or stipulation as required by section 800.7 of the Court's rules (§ 800.5(a)(7)).

In addition to setting forth the required content to be included in the Record on Appeal, the Third Department's rules also specify the size and quality of paper to be used, the size of the record volumes (not to exceed 1 ½ inches thick), and the type of binding to be utilized. (§ 800.5(a)).

While the CPLR and Appellate Division rules dictate the materials which are required to be included in the Record on Appeal, caselaw demonstrates that certain materials are not to be included in the Record on Appeal. More specifically, the appellate court will typically refuse to consider materials which were not presented to or considered by the court below (matters *dehors* the Record). *See, e.g., Cives Corp. v. Hunt Constr. Group, Inc.*, 91 A.D.3d 1178, 1179 n.2 (3<sup>rd</sup> Dept. 2012) (refusing to consider papers which were not part of record on appeal); *Smith v. Bombard*, 294 A.D.2d 673, 675 n.2 (3<sup>rd</sup> Dept. 2002) (refusing to consider information which is *dehors* the record); *Lattuca v. Natale-Lattuca*, 293 A.D.2d 805, 805 n.2 (3<sup>rd</sup> Dept. 2002) (same); *Cipitelli v. County of Schenectady*, 284 A.D.2d 823, 825 n.2 (3<sup>rd</sup> Dept.) (noting that the Court previously granted motion striking those documents which were *dehors* the record), *app.*

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<sup>1</sup> The Rules of Practice for the Appellate Division of Third Department can be found at 22 N.Y.C.R.R. Part 800. These Rules will be referenced herein by their particular section number.

*denied*, 97 N.Y.2d 606 (2001). Despite this general proscription, “an incontrovertible official document, even though it is dehors the record, may be considered on appeal for the purpose of sustaining a judgment.” Interrante v. Rozzi, 26 A.D.3d 704, 705 (3<sup>rd</sup> Dept. 2006).

One document which poses particular problems when compiling the Record on Appeal is a memorandum of law which was submitted to and considered by the court below. Generally, since a memorandum of law contains “unsworn allegations of fact [that] are without probative value,” it is not to be included in the Record on Appeal. *See* Byrd v. Roneker, 90 A.D.3d 1648, 1649 (4<sup>th</sup> Dept. 2011). An exception to this general rule exists when the inclusion of the memorandum of law is necessary to determine whether a particular issue has been properly preserved for review. *Id.*; *See also* Town of Claverack v. Brew, 277 A.D.2d 807, 808 n.1 (3<sup>rd</sup> Dept. 2000).

### **Settlement of Transcripts**

As indicated above, if the Record on Appeal contains transcripts from proceedings in the Court below, the Record must also contain a stipulation or order settling the transcripts. (*See* § 800.5(a)(5)). The procedure for settling the transcript is contained in CPLR 5525 (c), which requires that the appellant, within 15 days of receiving the transcript, serve the transcript upon the opposing parties with any proposed corrections and amendments, as well as a notice that the transcripts will be deemed accepted if there is no response within 15 days.

If the parties agree to the accuracy or proposed corrections / amendments, the parties can execute a stipulation reflecting their agreement. Alternatively, if the opposing party does not object to the proposed corrections / amendments within 15 days, the transcript with the proposed changes will be deemed correct. In such an instance, the appellant shall include in the Record on Appeal an affirmation certifying compliance with the statutory procedure and the absence of any objections. Finally, if the parties are unable to agree on the proposed changes, either party may submit the transcript and the proposed corrections / amendments to the judge who oversaw the proceedings for certification of their accuracy.

### **Certification of the Record on Appeal**

As indicated above, the Third Department’s rules require that the Record on Appeal contain an appropriate certification or stipulation. (*See* § 800.5(a)(7)). More specifically, § 800.7(a) of the Third Department’s rules requires that the record be certified by either:

- (1) A certificate of appellant’s or petitioner’s attorney pursuant to CPLR 2105;
- (2) A certificate of the proper clerk; or
- (3) A stipulation in lieu of certification pursuant to CPLR 5532.

# **APPENDIX**

## **Contents Of An Appendix**

Where an appeal involves only a narrow issue, and large portions of the Record on Appeal are not relevant to the determination of that particular issue, the appellant may choose to pursue the appeal via the Appendix method. In such case, the Appendix should contain only those portions of the Record on Appeal which are necessary to consider the questions / issues raised in the appeal. *See* CPLR 5528(a)(5).

Although, like the Record on Appeal, the CPLR contains general requirements for an Appendix (*see* CPLR 5528(a)(5) and 5529), the specific contents required to be included in the Appendix are set forth in the Appellate Division's rules. For example, the Appellate Division - Third Department requires that the Appendix contain:

- Notice of appeal (§ 800.8(b)(1));
- Judgment, decree or order appealed from (§ 800.8(b)(2));
- Decision and opinion of the court or agency, and report of a referee, if any (§ 800.8(b)(3));
- Pleadings, if their sufficiency, content or form is in issue or material (§ 800.8(b)(4));
- Relevant excerpts from transcripts or testimony or averments in motion papers upon which appellant relies or has reason to believe respondent will rely (§ 800.8(b)(5));
- Charge to the jury (if applicable) (§ 800.8(b)(6)); and
- Copies of critical exhibits, including photographs<sup>2</sup>, to the extent practicable (§ 800.8(b)(7)).

Both the CPLR and the Appellate Division rules contemplate that the Appendix should contain materials that the appellant reasonably assumes will be relied upon by the respondent. (*See* CPLR 5528(a)(5); § 800.8(b)(5)). In fact, in the event that a party fails to comply with this requirement, the Third Department's rules authorize a party to move to compel the filing of a further appendix. (*See* § 800.8(c)). Alternatively, both the CPLR and the Appellate Division rules permit the respondent to submit their own appendix along with their respondent's brief. (*See* CPLR 5528(b); § 800.8(c)).

Even if the appellant chooses to proceed with their appeal via the Appendix method, they

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<sup>2</sup> If the motion papers or exhibits in the proceedings below contained color photographs, the photographs included in the Record / Appendix should be identical color photographs.

must still file a single copy of the Record on Appeal. (*See* § 800.7(b)). This single copy must comply with the content and certification requirements addressed above. (*See Id.*).

## **FILING REQUIREMENTS**

The Appellate Division's rules also dictate the necessary filing requirements. For example, in the Appellate Division of the Third Department, the appellant must file an original and nine copies of the Record on Appeal when proceeding via the reproduced full record method. (*See* § 800.4(a)). In addition, the appellant must also serve one copy of the Record on Appeal upon each adverse party. (*Id.*).

Conversely, when proceeding via the Appendix method, appellant need only file a single copy of the Record on Appeal and serve one copy upon each adverse party. (*See* § 800.4(b)). Alternatively, in lieu of serving a copy of the Record on Appeal upon each adverse party, appellant may elect to serve notice upon each adverse party that the single copy Record on Appeal has been filed in the Appellate Division Clerk's Office. (*Id.*). Yet another option authorizes appellant to serve the Single Copy of the Record directly upon the respondent, who is then required to file the single copy of the Record on Appeal in the Appellate Division Clerk's Office within 30 days of service. (*Id.*). In either of these instances, appellant must file ten copies of their Appendix, along with their brief, and serve two copies upon each respondent. (*See* § 800.9(a)).