

**APPEALS TO THE APPELLATE DIVISION,
FOURTH DEPARTMENT**

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Table of Contents

I.	<u>TAKING AN APPEAL.</u>	1
A.	Notice of Appeal.....	1
B.	Filing of Notice of Appeal.....	1
C.	Transmittal of Notice of Appeal.	1
D.	Time to Take Appeal.	1
II.	<u>PERFECTING AN APPEAL.</u>	1
A.	How to Perfect an Appeal.	1
	1. General Rule.	1
	2. Poor Person Appeal - Civil.....	1
	3. Poor Person Appeal - Criminal.	2
	4. Prior Orders.	2
	5. Date of Filing.	2
B.	Time Limits.....	2
	1. 60-Day Rule.....	2
	2. Nine-Month (Abandonment) Rule.	2
	3. Family Court Appeals.....	3
	4. Criminal Appeals.	3
	5. Briefs.	3
	6. Multiple Appeals.....	3
C.	Record on Appeal.	3
	1. Complete Record.....	3
	2. Contents of Record.	4
	3. Form of the Record.	5
	4. Companion Filings.....	6
	5. Incomplete or Untimely Filings.....	6
D.	Appendix Method in Civil Appeals.....	6

E.	Appendices in Criminal Appeals.	8
F.	Briefs.	8
G.	Exhibits.	10
III.	<u>TRANSFERRED AND ORIGINAL PROCEEDINGS</u>	11
A.	Proceedings Transferred to the Appellate Division.	11
B.	Original Proceedings.	11
IV.	<u>CALENDARING APPEALS AND PROCEEDINGS</u>	12
A.	Court Terms.	12
B.	Calendar.	12
	1. Scheduling Orders.	12
	2. Calendar Notice.	13
C.	Oral Argument.	13
	1. Check In.	13
	2. Argument Time.	13
	3. Rebuttal.	13
	4. Post-Argument Submissions.	14
	5. Day Calendar.	14
V.	<u>DECISIONS</u>	14
A.	Release Dates.	14
B.	Transmittal by Court.	14
C.	Availability of Decisions.	14
VI.	<u>WITHDRAWAL OR SETTLEMENT</u>	14
VII.	<u>SANCTIONS</u>	15

APPEALS TO THE APPELLATE DIVISION, **FOURTH DEPARTMENT**

I. TAKING AN APPEAL

- A.** Notice of Appeal. Taking an appeal consists of filing and serving the notice of appeal. The taking of an appeal is a prerequisite to appellate jurisdiction, and the procedures are statutory. The Court's rules, therefore, do not address the procedures for taking an appeal.
- B.** Filing of Notice of Appeal. Notices of appeal are not filed with the Appellate Division. They should be filed with the Clerk of the Court in which the action was commenced. The County Clerk is the Clerk of the County and Supreme Courts.
- C.** Transmittal of Notice of Appeal. In some instances, such as under the Family Court Act or the CPL, a notice of appeal will be forwarded to the Appellate Division. However, the taking of an appeal will not result in any action on the part of the Appellate Division; the burden of pursuing the appeal falls upon the parties.
- D.** Time to Take Appeal. The time to take an appeal, generally 30 days, begins to run upon service of the underlying order with notice of entry. The time to take an appeal operates as a statute of limitations and cannot be extended without statutory authorization.

II. PERFECTING AN APPEAL

A. HOW TO PERFECT AN APPEAL

- 1. General Rule. Unless otherwise provided by statute, rule or Court order, an appeal is perfected by filing the original stipulated or settled record and 10 copies thereof; 10 copies of a brief; all exhibits; proof of service of two copies of the record and brief; and payment of the filing fee of \$315 (22 NYCRR 1000.3 [b]). No filing fee is required in a criminal matter or in an appeal when the Court has granted poor person relief.

2. Poor Person Appeal - Civil. When poor person relief has been granted in a civil matter, an appeal is perfected by filing the original stipulated or settled record, 10 copies of a brief, exhibits and proof of service of one copy of the record and brief (22 NYCRR 1000.3 [c] [2]).
 - a. Exhibits in Family Court appeals. Confidential exhibits in Family Court appeals may be delivered directly to the Appellate Division, either at the request of the parties or the Court, as appropriate.
3. Poor Person Appeal - Criminal. When poor person relief has been granted in a criminal matter, an appeal is perfected by the filing of 10 copies of a brief, one copy of the criminal appendix, exhibits, the certified transcript of the trial or hearing, the presentencing investigation report and proof of service of one copy of the brief and appendix.
4. Prior Orders - Copies of any prior order affecting the appeal should be filed with the record.
5. Date of Filing. A filing is accomplished by the actual delivery of papers to the courthouse in Rochester.

B. TIME LIMITS

1. 60-Day Rule. 22 NYCRR 1000.2 (b) provides that an appeal must be perfected within 60 days after the notice of appeal is served on the respondent.
 - a. Sanction for failure to comply is not automatic dismissal of appeal; the appeal is subject to dismissal on motion for failure to timely perfect (*see* 22 NYCRR 1000.2 [b]; 1000.12 [a]; 1000.13 [e]).
 - b. 22 NYCRR 1000.13 (e) provides that, if the motion is not answered, the appeal is dismissed by default. If an answer is filed, a conditional order of dismissal is entered, which establishes a deadline (generally 30 to 60 days).
2. Nine-Month (Abandonment) Rule. 22 NYCRR 1000.12 (b) provides that a civil appeal must be perfected within nine months from the date of service of the notice of appeal or the appeal is deemed abandoned and dismissed. The rule is self-executing. Records are examined for

compliance and, if the record has been submitted more than nine months following service of the notice of appeal, the record is rejected and the party or attorney is advised that the appeal has been deemed abandoned and dismissed and that a motion may be made to vacate the dismissal (*see* 22 NYCRR 1000.13 [g]).

3. Family Court Appeals. 22 NYCRR 1000.2 (c) (1) provides that appeals from Family Court orders in which the Appellate Division has assigned counsel must be perfected within 60 days of receipt of the transcript pursuant to Family Court Act § 1121 (7).
4. Criminal Appeals. 22 NYCRR 1000.2 (c) (2) provides that criminal appeals in which the Appellate Division has assigned counsel must be perfected within 120 days following receipt of the transcript (*see also* 22 NYCRR 1021.1 [a] [3]).
5. Briefs. The time to file and serve responsive and reply briefs is measured from the time of service of the prior brief, not from receipt of a brief. Deadlines are extended five days if the service was by mail.
 - a. Respondent's briefs are due 30 days after service of the appellant's brief.
 - b. Reply briefs are due 10 days after service of the respondent's brief.
 - c. Surreply briefs are due 10 days after service of the reply brief. The contents of a surreply brief are limited to matters raised on a cross appeal, and, absent a cross appeal, a surreply brief is not permitted.
6. Multiple Appeals. In a matter involving multiple appeals, by the same or different parties, the deadlines for perfecting the appeals run separately. When a matter involves multiple appellants, the deadlines to file respondent's briefs run separately. When a matter involves multiple respondents, the deadlines for filing reply briefs run separately.

C. RECORD ON APPEAL (22 NYCRR 1000.4)

1. Complete Record. The first step in perfecting an appeal is to prepare the complete record. The complete record does not mean the original papers filed in the Clerk's Office, but instead means the volume(s) containing

copies of necessary papers, as stipulated to by the attorneys or settled by the court from which the appeal is taken (*see* 22 NYCRR 1000.4 [a]) and the original stipulation to the record or the original order settling the record or a certified copy thereof.

2. Contents of Record. 22 NYCRR 1000.4 (a) (2) outlines the contents of the complete record on appeal.

a. Whether the appeal is taken from an order or a judgment, the record should include a table of contents and a statement pursuant to CPLR 5531. Additionally, the record should include the following documents in the following order:

- i. the notice of appeal with proof of service and filing;
- ii. the order or judgment from which the appeal is taken;
- iii. the decision, if any;
- iv. the judgment roll, if any;
- v. the pleadings;
- vi. the corrected transcript, if any;
- vii. all necessary and relevant motion papers; and
- viii. all necessary and relevant exhibits, to the extent practicable.

b. If the appeal is taken from a judgment, the record should also include any reviewable order.

c. Memoranda of law and oral argument on motions constitute legal argument and generally are not included in the record on appeal. They may be included in the record on appeal in some circumstances, however, such as where preservation for review is at issue (*see e.g. Matter of Lloyd v Town of Greece Zoning Bd. of Appeals* [appeal No. 1], 292 AD2d 818, lv dismissed in part and denied in part 98 NY2d 691, rearg denied 98 NY2d 765).

- d. If a party is uncertain as to what papers should be included in the record on appeal, reference should be made to the order or judgment. The appealable document should recite all of the papers that should be included in the record. Accordingly, when preparing an order or judgment for signature, be certain that it accurately recites the papers that were before the court.
- e. If the parties are unable to agree regarding the contents of the record, it is the appellant's obligation to move before the trial court for an order settling the record. The order settling the record should state exactly what papers constitute the record on appeal.
- f. The best procedure to follow is to prepare a proposed record and a proposed stipulation and send it to opposing counsel for review. The record should be reproduced only after the stipulation is signed.
 - i. Do not wait until the "eleventh" hour to send a record to your opponent for stipulation.
 - ii. There is no obligation on a respondent to sign a stipulation to the record. An appellant should therefore allow sufficient time to move for an order of settlement.
- g. In a criminal matter, the Court is not bound by the parties' stipulation and may consider such material as it considers necessary and appropriate.

3. Form of the record.

- a. The record should be bound on the left side. Avoid metal fasteners with sharp points or edges (*see* 22 NYCRR 1000.4 [a] [3] [i]).
- b. Use white, opaque, unglazed paper, 8½ by 11 inches. Print must be at least 11-point size (*see* 22 NYCRR 1000.4 [a] [3] [ii]). Do not use the traveling transcript form or any other method that reproduces multiple transcript pages on a single 8½ by 11-inch page.
- c. The cover of the record shall be white and shall contain the following information:

- i. title;
 - ii. names and addresses of attorneys;
 - iii. index number, claim number or indictment number; and
 - iv. Appellate Division docket number, if one has been assigned (*see* 22 NYCRR 1000.4 [a] [3] [iii]).
 - d. Include a table of contents listing, and briefly describing, all papers in the complete record and listing all exhibits, indicating on which page of the record each exhibit was introduced and the page of the record where the exhibit is reproduced (*see* 22 NYCRR 1000.4 [a] [3] [iv]).
 - e. The record shall be consecutively paginated. The subject matter of each page of the record shall be stated at the top of the page (*see* CPLR 5526; 22 NYCRR 1000.4 [a] [3] [v]).
4. Companion Filings. In addition to the records and briefs, the parties may submit companion filings on interactive compact disk, read-only memory (CD-ROM) (*see* 22 NYCRR 1000.3 [h]).
 5. Incomplete or Untimely Filings. A record that is not completely or timely will be rejected by the Clerk, as will any filing that does not comply with the rules, is illegible, or is otherwise unsuitable (*see* NYCRR 1000.3 [a]; 1000.4 [h]).

D. APPENDIX METHOD IN CIVIL APPEALS CPLR 5528 [a] [5]; 22 NYCRR 1000.3 [d]; 1000.4 [d])

1. One alternative to reproducing the entire record is to employ the appendix method. However, caution is recommended when using this method.
2. A party proceeding by the appendix method must file one complete stipulated or settled record, plus 10 copies of the brief and appendix, and must serve one copy of the complete record and two copies of the brief and appendix on opposing counsel.

3. The appendix must include all papers necessary for the Court to decide the arguments raised. It must include all portions of the transcript upon which appellant relies and can reasonably expect that the respondent will rely (*see* CPLR 5528 [a] [5]; 22 NYCRR 1000.4 [d] [2]). Portions of transcript should not be misleading because of surrounding context. Briefs should contain references to the appendix and not to the original record. If it is necessary to refer to the original record, the appendix is incomplete.
4. The best example of an appropriate use of the appendix method is in a personal injury case in which liability but not damages, or damages but not liability, is in issue. The appendix would contain only those portions of the transcript relating to the arguments raised.
5. The appendix method may not be used in the following situations:
 - a. If the issue raised is whether the verdict is against the weight of the evidence. The Court must search the entire record to determine this issue.
 - b. To bring to the Court's attention papers that were not included in the stipulated record. Such an appendix is subject to a motion to strike by opposing counsel.
6. The parties may stipulate to a joint appendix (*see* 22 NYCRR 1000.4 [d] [2] [iv]).
7. There are several sanctions that may be imposed if an appendix is found to be inadequate:
 - a. The Clerk may, and often will, reject it.
 - b. The Court may simply dismiss the appeal.
 - c. A respondent may print a separate appendix and seek costs (*see* CPLR 5528 [e]).
 - d. The Court may order the appellant to print the entire record.

E. APPENDICES IN CRIMINAL APPEALS (22 NYCRR 1000.3 [c] [i]; 1000.4 [e] [1])

1. Appendices are required in criminal cases in which counsel has been assigned and should consist of the following documents in the following order:
 - a. a statement pursuant to CPLR 5531;
 - b. a copy of the notice of appeal with proof of service and filing;
 - c. a copy of the certificate of conviction and the judgment from which the appeal is taken;
 - d. a copy of the indictment, superior court information or other accusatory instrument;
 - e. all motion papers and affidavits;
 - f. exhibits (written and photographic) that are relevant and necessary to the determination of the appeal; and
 - g. the original stipulation to the record or the original order settling the record or a certified copy thereof.
2. Copies of prior orders affecting the appeal should be filed with the appendix (*see* 22 NYCRR 1000.3 [c] [1]; 1000.4 [e] [1]).

F. BRIEFS (22 NYCRR 1000.4 [f])

1. The brief should be bound on the left side (*see* 22 NYCRR 1000.4 [f] [1]).
2. The printing in the brief must be at least 11-point size, double-spaced with one-inch margins (*see* 22 NYCRR 1000.4 [f] [2]).
3. Footnotes are not permitted (*see* 22 NYCRR 1000.4 [f] [2], [6]).

4. Citation to New York decisions shall be to the Official Reports. If no official citation is available for a decision, the citation used should be to the most available source (*see* 22 NYCRR 1000.4 [f] [7]).
5. The page limits are 70 pages for principal briefs and 35 pages for reply or surreply briefs (*see* 22 NYCRR 1000.4 [f] [3]).
6. Pursuant to 22 NYCRR 1000.4 (f) (4), the cover of a brief shall include the following information:
 - a. the name, address and telephone number of the person submitting the brief;
 - b. the lower court docket number, index number, motion number, indictment number or information number;
 - c. the Appellate Division docket number, if one has been assigned; and
 - d. in the upper right-hand corner, the name of the person requesting oral argument or submitting the brief and the time requested.
7. Pursuant to 22 NYCRR 1000.4 (f) (5), the cover of the brief shall be:
 - a. blue for an appellant's or petitioner's brief;
 - b. red for a respondent's brief;
 - c. gray for a reply brief;
 - d. yellow for a surreply brief;
 - e. green for an amicus curiae brief; and
 - f. in an appeal involving a party granted poor person relief, either white or the previously designated color.
8. Pursuant to 22 NYCRR 1000.4 (f) (6), a brief shall include, in the following order:
 - a. a table of contents;

- b. a table of citations;
 - c. a concise statement of questions involved, followed by answers given by lower court;
 - d. a concise statement of the nature of the matter and the facts necessary and relevant to the questions involved, with supporting page references; and
 - e. argument of the issues, divided into points by appropriate headings, distinctively printed.
9. Material may be appended to a brief only if it is contained in the record or it consists of reprinted case law, statutes or regulations.
10. The briefs must be signed (*see* 22 NYCRR 1000.16 [b]).

G. EXHIBITS (22 NYCRR 1000.4 [g])

- 1. Parties may stipulate that particular exhibits are not relevant or necessary to the determination of the appeal. Otherwise, all original exhibits must be filed (*see* 22 NYCRR 1000.4 [g] [1]).
- 2. Exhibits should be printed in the record, to the extent practicable (*see* 22 NYCRR 1000.4 [g] [2]).
- 3. It is the appellant's responsibility to file all exhibits at the time records and briefs are filed or, if some or all exhibits are in the control of a third party, to file a five-day written demand for the exhibits (*see* 22 NYCRR 1000.4 [g] [3]).
- 4. In a criminal appeal, in lieu of filing original physical exhibits, the appellant may file an original stipulation identifying the exhibits and their location and providing that they are available upon request by the Court.
- 5. When confidential or sealed material is involved, it may be separately delivered to the Court.

III. TRANSFERRED AND ORIGINAL PROCEEDINGS

A. PROCEEDINGS TRANSFERRED TO THE APPELLATE DIVISION (22 NYCRR 1000.8)

1. Upon an order of Supreme Court transferring a matter to the Appellate Division, the County Clerk will transfer its file, including the order of transfer, petition, answer, motion papers and transcript, if any. It is not necessary for the petitioner to prepare a record on review (*see* 22 NYCRR 1000.8 [a]).
2. The Clerk's Office will issue a scheduling order fixing a filing date for briefs. The failure of petitioner to file and serve briefs will result in the dismissal of the proceeding (*see* 22 NYCRR 1000.8 [b]).
3. Oral argument is not permitted on matters transferred pursuant to CPLR article 78 (*see* 22 NYCRR 1000.11 [c] [2]).

B. ORIGINAL PROCEEDINGS (22 NYCRR 1000.9)

1. Most typically, these involve Article 78 proceedings in the nature of prohibition or mandamus against Supreme Court justices. These are not treated like motions, but rather, are treated like appeals, which means that briefs may be filed and the proceedings are placed on the calendar for argument and submission.
2. Although not a motion, an original proceeding must have a return date, for scheduling reasons. The return date is any Monday and must fall not less than 25 days after service of the notice of petition and petition (*see* 22 NYCRR 1000.9 [a]).
3. File the original notice of petition and petition, 10 copies thereof and the filing fee (*see* 22 NYCRR 1000.9 [b]).
4. Proof of service of two copies of the notice of petition and petition shall be filed not later than 15 days after the expiration of the applicable statute of limitations (*see* 22 NYCRR 1000.9 [b] [2]).
5. The Clerk will issue a scheduling order for the filing and service of briefs, if any (*see* 22 NYCRR 1000.9 [c]). Although no briefs are required, a

party is not entitled to oral argument unless a brief is filed (*see* 22 NYCRR 1000.11 [a]).

IV. CALENDARING APPEALS AND PROCEEDINGS

A. COURT TERMS.

The Court is in session nine terms per year. The June term is reserved for submitted appeals, motions, bar admissions and disciplinary proceedings. The August term consists of Election Law appeals only. The Court sits in panels of 4 or 5 to hear oral argument. The identity of the members of the panel for a particular day is not released until the morning of that day.

B. CALENDAR.

1. Scheduling Orders. Once an appellant has perfected an appeal or a proceeding has been commenced or transferred to the Appellate Division, the Clerk's Office will issue a scheduling order, directing that an appeal or proceeding be placed on a calendar for the next available term and fixing a date for the filing of respondent's briefs (*see* 22 NYCRR 1000.10 [a], [b]).
 - a. The date for respondent's briefs will be 30 days from the date of service of appellant's record and briefs (*see* 22 NYCRR 1000.2 [d]; 1000.10 [b]). The date in the scheduling order for a respondent's brief is confirmatory of the date compelled by service of an appellant's brief. Respondent may move for an extension of time to file a brief prior to the expiration of the deadline in the scheduling order (*see* 22 NYCRR 1000.10 [b]; 1000.13 [h]).
 - b. A party unavailable for oral argument on a specific date, or dates, during the term, should notify the Clerk in writing, within 15 days of the date that the scheduling order was mailed (*see* 22 NYCRR 1000.10 [c]). The Clerk will attempt to accommodate any scheduling requests.

- c. A motion to expedite an appeal or a proceeding may be made within 15 days of the date of mailing of the scheduling order. The motion must contain an affidavit setting forth compelling circumstances that require the appeal to be expedited (*see* 22 NYCRR 1000.10 [d]; 1000.13 [m]). A motion to expedite should not be made until the appeal is perfected or the proceeding has been filed with or transferred to the Appellate Division.
 - d. The Clerk prepares the calendars for each day of the Court term and notifies the parties or their attorneys of the date at least 20 days prior to the commencement of the term (*see* 22 NYCRR 1000.10 [e]).
2. Calendar Notice. Once the calendar is prepared, notices are mailed advising counsel of the scheduled date of argument. Once an appeal is placed on the calendar, adjournment is unlikely. Attorneys requesting alternate dates are usually advised either to submit the case or to ask another attorney to present the oral argument. Attorneys are advised to notify the Clerk's Office in writing prior to the respondents' filing deadline if they will be unavailable on a particular date.

C. ORAL ARGUMENT

- 1. Check In. Attorneys scheduled for oral argument must check in with the Clerk's Office prior to 10:00 a.m. on the day of oral argument. No more than one person shall be heard on behalf of any party. Argument is not permitted by a party who has not filed a brief, unless otherwise ordered by the Court (*see* 22 NYCRR 1000.11 [a]).
- 2. Argument Time. Requests for oral argument are made by indicating the amount of time requested on the cover of the brief. If no time is so indicated, the appeal will be deemed submitted (*see* 22 NYCRR 1000.11 [b]).
- 3. Rebuttal. The Court does not permit rebuttal argument (*see* 22 NYCRR 1000.11 [f]).

4. **Post-Argument Submissions.** Must be made within five business days of oral argument (*see* 22 NYCRR 1000.11 [g]). A form for such submissions is available on the Court's website (www.courts.state.ny.us/ad4).
5. **Day Calendar.** The Court's day calendar generally contains between 20 to 30 appeals. The Court convenes at 10:00 a.m. and immediately calls the first case. Thereafter, each case is argued or submitted in order until the calendar is concluded. If a case is called and the attorneys are not in the courtroom, the appeal is deemed submitted. The Court does not recess until the calendar is complete.

V. DECISIONS

- A. **Release Dates.** Generally, decision-orders are released two weeks after the conclusion of the term, at 3:00 p.m. (*see* 22 NYCRR 1000.17 [e]).
- B. **Transmittal by Court.** Decision-orders are prepared by the Clerk's Office and mailed to all parties to an appeal or proceeding (*see* 22 NYCRR 1000.17 [a]). The prevailing party must serve losing parties in order to commence the time within which to move for leave to appeal (*see* 22 NYCRR 1000.17 [b]). It is important to note that the mailing of orders by the Clerk's Office constitutes notification, not service.
- C. **Availability of Decisions.** The Court's decision list is available on the Court's website at www.courts.state.ny.us/ad4.

VI. WITHDRAWAL OR SETTLEMENT (22 NYCRR 1000.18)

- A. **Withdrawal.** To withdraw an appeal or proceeding, the parties must submit a written stipulation of discontinuance. An appeal or proceeding may be withdrawn and discontinued at any time prior to its determination. The Court shall be given prompt notice when the parties have resolved to withdraw a matter (*see* 22 NYCRR 1000.18 [b]).
- B. **Settlement.** When an appeal or proceeding, or any issue therein, has been resolved by settlement, the parties shall immediately notify the Court. A party who, without good cause shown, fails to notify immediately the Court of a

settlement may be subject to sanctions pursuant to 22 NYCRR 1000.16 (a) (*see* 22 NYCRR 1000.18 [c]).

- C. **Incapacity.** In the event that an appeal cannot be placed on the Court's calendar due to the death or bankruptcy of a party, the Court shall be notified immediately, under penalty of possible sanctions (*see* 22 NYCRR 1000.18 [c]).

VII. SANCTIONS (22 NYCRR 1000.16)

- A. Sanctions may be applied to attorneys or parties who fail to comply with a rule or order of this Court or who engage in frivolous conduct as defined in 22 NYCRR 130-1.1 (c).
- B. The imposition of sanctions may be made upon motion or upon the Court's own initiative, after a reasonable opportunity to be heard.
- C. The Court may impose sanctions upon a written decision setting forth the conduct and the reasons that sanctions are appropriate.

