

Committee on Courts of Appellate Jurisdiction

REPORT

on

APPELLATE DIVISION RULES

Adopting the Report and Recommendations
of the Appellate Division Rules Subcommittee

February 18, 2014

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New York State Bar Association unless and until it is
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Committee on Courts of Appellate Jurisdiction

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* Justice Peradotto, while participating in the discussions leading to the Subcommittee's recommendations, did not participate in drafting this Report and has abstained from taking a position on the recommendations contained herein.

The Subcommittee is grateful for the many insights provided throughout this project by Susanna Molina Rojas, Clerk of the Appellate Division, First Department; Aprilanne Agostino, Clerk of the Appellate Division, Second Department; James Ranous, Deputy Clerk of the Appellate Division, Third Department; and Frances Cafarell, Clerk of the Appellate Division, Fourth Department.

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Committee on Courts of Appellate Jurisdiction

Report of the Subcommittee on Appellate Division Rules

In May 2012, the Subcommittee on Appellate Division Rules (“Subcommittee”) embarked on an ambitious project to examine the rules of practice of the four Departments of the Appellate Division and make recommendations about the extent to which they can be made uniform for the benefit of both the courts and practicing attorneys. The Subcommittee recognized from the outset that some of the rules of each Department reflect deeply imbedded procedures, culture, and history, but also believed a significant body of rules can be made uniform without adversely affecting the courts’ operations, benefiting practicing attorneys by minimizing traps for the unwary and minimizing the need for the courts to address corrective motions. The Subcommittee believes that unifying a substantial body of appellate practice rules will also facilitate state-wide electronic filing, which is likely to be implemented in the next 12 to 24 months.

Early in the process, the Subcommittee contacted the clerk’s office and/or presiding justice in each Department to request their cooperation in this endeavor. The Subcommittee believed that it was important to understand the rationale behind the rules in each Department and to gain a sense of how important those rules are to the courts’ operations. The Subcommittee made it clear the recommendations that evolve from this project would be wholly the Subcommittee’s recommendations, and if adopted, the Committee’s recommendations; they are not necessarily the preferences of the clerks and they would not be binding on the courts in any way. All agreed to participate in the endeavor recognizing that the dialogue would both be helpful to the clerks and further the Subcommittee’s goals.

The Subcommittee held 12 telephonic conferences spanning June 2012 to May 2013. At those conferences, the members of the Rules Subcommittee and the clerks of the four Departments of the Appellate Division or their designees combed through the rules, topic by topic, to determine and catalogue where those rules are consistent and where they differ. Where the rules differ substantially, the clerks explained the rationale for their rules so that the Subcommittee could make well-informed recommendations. Charts showing similarities and differences and summaries of the discussions are provided in the Appendix to this Report.

As a result of these extensive discussions, the Subcommittee makes the following recommendations in favor of uniformity.¹ It has grouped the rules into three categories:

First, there is a significant body of rules that are essentially harmonious and can be made uniform with little or no difficulty. In particular, the Subcommittee recommends complete uniformity for certain general requirements and terminology; rules governing the form and content of briefs, records, and appendices; rules governing oral argument; and rules governing redaction and sealing of confidential materials. Standardizing “form and content” rules would complement and facilitate state-wide electronic filing. Uniform rules governing these aspects of appellate practice should be adopted expeditiously.

Second, there are some rules that are not now harmonious but can be made uniform without undue adverse effects on the internal operations of the different Departments. Examples of these rules include those governing initial filings, general motion practice, emergency applications for interim relief, original and transferred proceedings, and motions for reargument or leave to appeal. The Subcommittee recommends that efforts be made to unify these rules as well, though these efforts may take more time to study and implement.

And third, there is a body of rules that will be difficult to harmonize without significant changes in the deeply engrained internal operations of one or more of the courts. For example, the First Department has its unique method for calendaring cases for argument; the Second Department tracks appeals from the initial filing of the jurisdictional document through decision or abandonment, and thus has a dismissal calendar; and the Fourth Department has no interest in resuming the practice of settlement conferences. And, of course, the First and Second Departments hear appeals from the Appellate Term. Uniform rules related to these unique operational practices, even if possible, will be difficult unless the courts are willing to change them.

Even where rules relating to a particular topic cannot be made entirely uniform, particular attention should be given to standardizing quickly certain aspects of rules that present traps for unwary appellate practitioners who may have little experience in one or more of the Departments. Examples of unexpected

¹ While the recommendations overall reflect a consensus of the Subcommittee, the individual recommendations do not necessarily reflect the views of each of its members.

nuanced differences that can affect the substantial rights of litigants and cause unnecessary motion practice for both attorneys and the courts include:

- The date from which perfection and abandonment deadlines for appeals are measured: The First Department requires the record to be filed within 30 days after “filing the notice of appeal”; the Third and Fourth Departments require the record and brief to be filed within 60 days after “service of the notice of appeal.” The First, Second, and Third Departments deem appeals abandoned if not perfected within 6 or 9 months of the “date of the notice of appeal,” while the Fourth Department deems appeals abandoned 9 months after “service of the notice of appeal.” All perfection and abandonment deadlines should be measured from the date of the notice of appeal.
- The date from which perfection and abandonment deadlines for transferred proceedings are measured: The First and Third Departments measure their perfection and abandonment deadlines from “entry” of the transfer order; the Second Department measures its 6 months rule from the “date of the transfer order;” and the Fourth Department issues a scheduling order, but under an unwritten rule, not until petitioner causes the original papers filed in supreme court to be filed in the Fourth Department. Perfection and abandonment deadlines for transferred proceedings should uniformly run from the date of the transfer order.
- Rules governing perfection of cross appeals and concurrent appeals: For cross appeals or concurrent appeals from the same judgment of order, the First and Second Departments require the parties to consult and file a joint record or appendix and that the cost of the joint record or appendix shall be borne equally by the parties. The Third Department implies that the appeal and cross appeal shall be perfected together and requires the plaintiff to file first and, at least initially, bear the cost of preparing the record and appendix. The Fourth Department does not even require that cross appeals be consolidated, although it permits consolidation upon motion or upon stipulation of the parties. Neither the Third nor Fourth Department rules mention concurrent appeals. A uniform rule requiring cross appeals and concurrent appeals from the same order or judgment be consolidated and perfected on one record or appendix, with the costs borne equally by the appealing parties, would encourage the parties to cooperate in

perfecting and ensure that all the issues arising from an order or judgment are simultaneously presented to one panel of justices.

- Time for the appellant to file a respondent's/reply brief when there are cross appeals: The Second Department reasonably requires the initial appellant to file a respondent's/reply brief within 30 days of receiving the cross-appellant/respondent's brief. But the First Department requires it to be filed within 9 days, and the Third and Fourth Departments require it to be filed within 10 days. These short time limits are unrealistic for a document that is both a respondent's brief and a reply brief. The appellant should have the full time generally allotted for respondent's brief, 30 days, (although this may necessitate adjournment to another term in the First Department).
- Time for filing reargument motions: The First Department requires motions to reargue be made within 30 days after the decision; the Second and Fourth Departments require motions to reargue be made within 30 days after service of the order with notice of entry; and the Third Department has no time limit. The First Department's rule can be particularly problematic because the date triggering time limits for reargument does not coincide with the date triggering time limits for motions for leave to appeal, although these motions are often made simultaneously. A standard rule requiring reargument motions to be filed within 30 days after service with notice of entry, as is required for motions for leave to appeal, appears warranted.

While the Subcommittee recognizes that it may not be possible to have completely uniform rules, it recommends uniformity to the extent feasible. Should each Department retain its own set of rules, with many of the rules standardized throughout all the Departments but others reflecting unique practices, the Subcommittee recommends that the Departments use parallel numbering systems so that the sequence of rules is the same in all the courts. This would enable practitioners unfamiliar with the rules of a certain Department to easily find the rule applicable in that court.

Rules Readily Amenable to Uniformity

Certain general rules, rules governing the form and content of records, appendices, briefs, and rules governing oral argument readily lend themselves to uniformity.

I. General Rules

A. Definitions

The Second Department has a number of general rules addressing definitions, general concerns, and the effect of holidays and weekends. Consideration should be given to having these general provisions for all Departments.

B. Number of Justices

In practice, appeals to the First, Third (at least until recently), and Fourth Departments are generally heard by five-justice panels. The Second Department routinely sits in four-justice panels. There is effective consistency on these rules about when four justices sit, although the Second Department adds a provision to its rules permitting the later addition of a fifth justice to the four-justice panel unless an objection is raised at the time of argument or submission. **The Subcommittee recommends a uniform rule similar to the Second Department's rule stating that an appeal argued or submitted to a four-justice panel is deemed submitted to any other justice unless an objection is noted at the time of argument or submission.**

C. Filing

The First, Third and Fourth Departments have an implicit rule that filing occurs when papers are received by clerk of the court. The Second Department has an express rule that “[a]ll records on appeal, briefs, appendices, motions, affirmations and other papers will be deemed filed in this court only as of the time they are actually received by the clerk and they shall be accompanied by proof of service.” For motions, upon request of the filing party, the Fourth Department allows for receipt by fax of one copy of motion papers with proof of service, followed by mailing. The Court of Appeals has a rule that papers must be addressed to Court’s address, and that papers may not be submitted by fax or email unless requested by clerk. **The Subcommittee recommends the adoption of uniform rules that expressly provide that documents will be deemed filed only when actually**

received by the clerk and shall be accompanied by proof of service, and that papers may not be submitted by fax or email unless approved by the clerk.

D. Filing Fees

Most of the Departments specify that filing fees are \$315 for a civil appeal or special proceeding and \$45 for a motion and must be paid in advance. The Second Department expressly requires payment at the time of filing the record on appeal or initiating a special proceeding, or upon filing a motion.

The First, Second and Fourth Departments require payment upon presentation of an emergency application/OTSC, though in the Second Department the fee can be waived or applied as payment of the fee for filing notice of petition if the OTSC is denied. The Third Department requires payment of fee only if the OTSC is signed.

The First Department lists no exemptions, whereas the Second, Third and Fourth Departments expressly list exemptions variously for poor person status and state and government agencies. Unique to the Third Department, for unemployment insurance appeals no filing fee is required.

Instead of enumerating instances where no filing fee is required, the Court of Appeals requires payment of the filing fee in that Court unless appellant demonstrates exemption from the fee requirements by statute or other authority.

The Subcommittee recommends a uniform rule that expressly identifies the amounts of filing fees, states when they must be paid, and provides for an exemption of fee requirements where the party demonstrates an exemption is authorized by statute or other authority.

E Docket Numbers

The First, Third and Fourth Departments have no rule regarding when and how docket numbers are assigned. The Second Department, with its tracking system, provides that the filing of a Request for Appellate Division Intervention results in the issuance of an Appellate Division docket number. In the other Departments, docket numbers are assigned when the first motion or other papers are filed with the appellate court. All the Departments require that docket numbers must be displayed opposite title on first page of all papers and correspondence. The First Department would also like to include on all papers the lower court index number or indictment number.

The Subcommittee recommends a uniform rule requiring identification on all documents of the Appellate Division's docket number where one has been assigned, and the court of original jurisdiction and its index number or indictment number. Obviously, the timing for assigning docket numbers will continue to differ between the Second Department and the other appellate courts which do not track appeals and transferred proceedings from their inception.

F. Proof of Service

All the Departments state that proof of service is required at time of filing. **The Subcommittee recommends that they should continue to do so.**

G. Discretion to Waive Noncompliance

It is explicit in the Second Department and implicit in all the other Departments that the court has discretion to waive non-compliance with its rules of practice. **The Subcommittee recommends that the Second Department's rule be made an explicit uniform rule.**

II. General Rules Governing All Papers

Three of the four Departments have rules governing the form of records, appendices, and briefs that mirror the requirements of CPLR 5526 and 5529; the Third Department merely references CPLR 5526 and 5529. Such documents “shall be reproduced by any method that produces a permanent, legible, black image on white paper”; on “white paper eleven inches along the bound edge by eight and one half inches”; and “numbered consecutively.” **The Subcommittee recommends a uniform rule expressly re-stating the requirements of CPLR 5526 and 5529 for all documents.**

CPLR 5529 (a)(1) also states, “Paper shall be of a quality approved by the chief administrator of the courts.” The Chief Administrator has adopted a rule setting the required paper standards, stating that appellate papers must be reproduced “on a good grade of at least 20-pound, white, opaque, unglazed paper” (22 NYCRR 112.1). The Court of Appeals, as well as the four Departments of the Appellate Division, state that documents shall be printed on “unglazed, opaque, good quality paper.” The First Department’s rule requiring the use of recycled paper is inconsistent with the requirement of CPLR 5529 that the quality of paper used for the reproduction of appellate documents be that specified by the chief administrator and should be eliminated. **The Subcommittee recommends a uniform rule quoting the Chief Administrator’s rule that documents shall be printed on “unglazed, opaque, good quality paper.”**

All of the Departments of the Appellate Division and the Court of Appeals require binding on left and have a rule prohibiting the use of sharp or protruding fasteners. The First Department’s rule also refers to taping and specifically prohibits spiral and Acco binding. **The Subcommittee recommends a uniform rule requiring binding on the left, except for motion papers, and prohibiting protruding fasteners or bindings.**

III. Rules Governing Form and Content of Records and Appendices

A. Form of Records and Appendices

The rules of the Second and the Fourth Departments contain provisions banning the reproduction of transcripts in condensed format, also known as “minuscrit.” The Second Department bans such condensed transcripts absolutely (22 NYCRR 670.10.2[d]) and the Fourth Department bans them except where they were submitted in identical form in the trial court (22 NYCRR 1000.4[a][3][ii]; [d][3]; [e][2]). The rules of the First and Third Departments are silent on the topic of condensed-format transcripts. **The Subcommittee recommends that rules banning condensed-format transcripts either be eliminated or that all Departments adopt the formulation of the ban employed by the Fourth Department permitting their use only where submitted in that form to the trial court.**

B. Contents of Records and Appendices

1. Records

The rules of the four Departments contain inconsistent provisions regarding the cover and the content of a record on appeal and the order in which that content is to be placed, and they use different words to describe the same documents, the First Department requiring, for example, an “index” of the contents of the record and the other three Departments requiring a “table of contents.” Three of the Departments effectively permit the record to be certified by an attorney pursuant to CPLR 2105, by the appropriate clerk pursuant to Judiciary Law § 255, or by stipulation of the parties. The Fourth Department requires that the parties stipulate to the completeness of the record or settle it by order of the court of original instance.

The Subcommittee recommends the adoption of a standardized model for the form and contents of records on appeal consisting of the following:

- **A cover on white paper, bearing the title of the matter, names, addresses, e-mail addresses, and phone numbers of counsel or parties, index or file number assigned by court of original instance, and appellate division docket number, if available;**
- **The statement required by CPLR 5531;**
- **A table of contents listing and briefly describing each paper in the record, with the part relating to a transcript of testimony to**

separately list each witness and the pages at which direct, cross, redirect, and re-cross begin, and the part relating to exhibits to indicate the nature and contents of each exhibit, where it is reproduced in record, and where admitted into evidence.

- The standard contents required by CPLR 5526, formatted and placed in the order specified therein;
- A statement regarding exhibits (see *infra*) and, where appropriate, a stipulation or order dispensing with the reproduction of the same;
- Certification of the record either by an attorney's certificate pursuant to CPLR 2105, the certificate of the proper clerk pursuant to Judiciary Law § 255, or the stipulation of the parties.

2. Appendices

The rules relating to the form and content of an appendix have inconsistencies similar to those relating to a full record. **The Subcommittee recommends the adoption of a standardized model for the form and content of appendices consisting of the following:**

- Where bound separately from a party's brief, a cover on white paper, bearing the title of the matter, names, addresses, e-mail addresses, and phone numbers of counsel or parties, number assigned by court of original instance and appellate division docket number;
- The statement required by CPLR 5531;
- A table of contents listing and briefly describing each paper in the appendix, with the part relating to a transcript of testimony to separately list each witness and the pages at which direct, cross, redirect, and re-cross begin, and the part relating to exhibits to indicate the nature and contents of each exhibit, where it is reproduced in record, and where admitted into evidence.
- The notice of appeal or order of transfer, the order, decree, or judgment appealed from, the decision or opinion of the court or agency of original instance, if any, and so much of the standard contents required by CPLR 5526, placed in the order specified therein, as are necessary to consider the issues raised on the appeal, including those parts that the appellant can reasonably expect will be relied upon by the respondent;

- **A statement regarding exhibits (see *infra*) and, where appropriate, a stipulation or order dispensing with the reproduction of the same;**
- **Certification of the record either by an attorney's certificate pursuant to CPLR 2105, the certificate of the proper clerk pursuant to Judiciary Law § 255, or the stipulation of the parties.**

CPLR 5528(c) authorizes an appellant's reply brief *and appendix*. The Subcommittee is informed that the practice in some courts is not to accept an appellant's reply appendix because it introduces additional parts of the record that the respondent did not understand would be relied on by the appellant when the respondent prepared his or her brief. **The Subcommittee recommends that a uniform policy be adopted by rule either permitting the filing of an appellant's reply appendix absolutely or by stipulation of the parties or permission of the court obtained by motion.**

The practice of the various Departments varies regarding supplying the court and adversaries with a copy of the full record on appeal in causes perfected using the appendix method. The First and Second Departments require the appellant to subpoena the original papers constituting the full record from the clerk of the court of original instance (22 NYCRR 600.5[a]; 670.9[b][1]). The Third and Fourth Departments require the preparation of the full record which must be stipulated as correct by the parties or settled before the court from which the appeal is taken (22 NYCRR 800.7[b]; 1000.4[d][1]; 1000.4[a][1]). The Third and Fourth Department require the appellant to file one copy of the complete record with the clerk of the Appellate Division and to serve one copy on each adversary (22 NYCRR 800.4[b]; 1000.3[d][1]). Alternatively the Third Department permits the appellant to serve one copy of the complete record on the respondent with his or her brief, in which case the respondent is required, in turn, to file that complete copy of the record with the clerk of the court upon the filing of the respondent's brief (22 NYCRR 800.4[b]). **The Subcommittee recommends that the different Departments consult concerning the advantages and disadvantages of these two variant methods of preparing, serving, and filing one complete copy of the full record on appeal when an appeal is perfected on the appendix method with a view to determining whether a uniform state-wide practice is warranted.**

3. Number of Copies

The rules of the various Departments require the service and filing of different numbers of copies of the record and/or appendix. **The Subcommittee**

recommends that a uniform rule be adopted requiring that where perfection is accomplished traditionally on paper, two copies be served on each adversary (one if the filer is a poor person) and the original and a standard number of copies be filed in the office of the clerk. In the case of e-filing, the Subcommittee recommends the filing of a paper original and a reduced number paper copies, and the service of one copy electronically and one in paper on each adversary.

4. Exhibits

The rules of the four Departments contain lengthy provisions regarding the inclusion of exhibits in records and appendices. All Departments require the inclusion of relevant exhibits but the rules differ as to how those that are bulky or dangerous and/or irrelevant to the issues are to be handled. **The Subcommittee recommends that the statement be filed concerning exhibits contained in a record and appendix, listing every exhibit admitted into evidence or marked for identification, indicating:**

- **if the exhibit is relevant and included in the record or appendix, the page number or numbers upon which it is to be found;**
- **if the exhibit is relevant but is bulky or of a dangerous nature, whether the exhibit has been filed with the clerk or is being held in readiness, and by whom, for filing upon call from the clerk's office; and,**
- **if the exhibit is irrelevant to the issues raised on appeal, that it has been omitted from the record on stipulation of the parties or order of the court.**

5. Cross Appeals and Concurrent Appeals

In the event of cross appeals or concurrent appeals from the same judgment of order, the rules of the First and Second Departments require the parties to consult and file a joint record or appendix containing the notices of appeal and cross appeal and further provide that the cost of the joint record or appendix shall be borne equally by the parties (22 NYCRR 600.11[d][1]; 670.8[c][1]). The rules of the Third Department provide that in the event of cross appeals the plaintiff shall be the appellant and shall file first (22 NYCRR 800.9[e]), thereby implying that the appeal and cross appeal shall be perfected together but imposing on the plaintiff the necessity of bearing the cost of preparation of the record or appendix. This rule recently led to the case of *Derr v Fleming* (108 AD3d 854 [3d Dept. 2013]) in

which the court held that cross appellants were not obliged to contribute to the cost of preparing a record in that court and that such costs were recoverable as disbursements awarded to the prevailing party on the appeal. The rules of the Fourth Department do not require that cross appeals be consolidated but permit consolidation upon motion or upon stipulation of the parties (22 NYCRR 1000.4[b]). **The Subcommittee recommends that the rules of all Departments require that cross appeals and concurrent appeals from the same order or judgment be consolidated and perfected on one record or appendix, thus insuring that all the issues arising from an order or judgment are simultaneously presented to only one panel of justices. Similarly, the Subcommittee recommends that the cost of preparing the joint record or appendix be borne equally by all parties appealing.**

The rules of the Second Department provide that appeals from separate orders or judgments made in the same action or proceeding may be consolidated without the need for court permission to do so, provided that each appeal is timely perfected (22 NYCRR 670.7[c][1]). However, appeals from orders and/or judgments made in separate actions or proceedings may not be consolidated but may be scheduled to be heard together on written request of a party (22 NYCRR 670.7[c][2]). The rules of the Fourth Department permit consolidation of appeals upon motion setting forth the appeals to be consolidated and the reasons justifying consolidation (22 NYCRR 1000.4[b][2]; 1000.13[n]). The rules of the First and Third Departments appear to be silent on the issue. **The Subcommittee recommends the approach to consolidation taken in the rules of the Second Department because it eliminates unnecessary motion practice, permits appeals arising from orders or judgments made in the same case to be heard at the same time before one panel of justices, and permits but does not require the court to calendar separately perfected appeals from orders or judgments made in different actions or proceedings, but raising similar issues, at the same time before the same panel.**

IV. Rules Governing Form and Contents of Briefs

A. Form of Briefs

All four Departments of the Appellate Division require briefs to be double-spaced with one-inch margins all around, excluding pagination (although there are some textual differences among the rules). **The Subcommittee recommends such a uniform rule requiring briefs to be double-spaced with one-inch margins all around, excluding pagination.**

The Departments have inconsistent rules regarding two-sided or one-sided printing of briefs. All Departments but the First Department prefer two-sided printing of briefs, as does the Court of Appeals. The First Department accepts only one-sided briefs, though it has no express rule. While acknowledging that some find it easier to read one-sided briefs and take notes, the Subcommittee recommends a uniform rule stating a preference for two-sided copying. **The Subcommittee recommends a rule that states a preference for two-sided printing of briefs.**

The Departments have inconsistent rules regarding typeface and font in computer-generated briefs. The First and Second Departments and Court of Appeals have rules requiring 14 point text and 12 point footnotes for proportional fonts, and 12 point text and 10 point footnotes for monospaced fonts. The Third Department has no rule and the Fourth Department requires at least 11 point font. The Second Department also requires serifed fonts, but because there is disagreement about whether serifed fonts are easier to read, the Subcommittee does not recommend that this rule be uniform in all Departments. **The Subcommittee recommends a uniform rule requiring 14 point text and 12 point footnotes for proportional fonts, and 12 point text and 10 point footnotes for monospaced fonts.**

With regard to length of briefs, the First and Second Departments have maximum word limits of 14,000 words for principal briefs and 7,000 words for reply and amicus briefs. The First Department, in the alternative, and the Fourth Department rules provide for similar lengths by allowing 70 pages for principal briefs and 35 pages for reply briefs. The Third Department allows 70 pages for appellant's brief but sets more stringent page limits of 35 pages for respondent's briefs and 15 pages for reply briefs. The Third Department's stricter rules are particularly onerous when there are cross appeals. The First and Second Departments' rules make sense for all Departments now that most briefs are computer-generated and because word limits minimize the opportunity to manipulate formatting to squeeze in more content. **The Subcommittee recommends a uniform rule setting limits of**

14,000 words for principal briefs and 7,000 words for reply and amicus briefs, not including tables, addenda, CPLR statements, and certification. The Subcommittee recommends that page limits be retained only for type-written and hand-written briefs.

With regard to citation form, most of the Departments have express rules that generally follow the direction provided by CPLR 5528(e) that citation to New York authorities is to the official reporter only, while citations to out-of-state authorities is to the National Reporter System and official reporters, or to the most available source. **The Subcommittee recommends a uniform rule restating CPLR 5528(e) regarding citation form.**

Three of the four Departments allow footnotes, while the Fourth Department has a no-footnote rule. **The Subcommittee recommends a uniform rule that allows footnotes while urging practitioners to avoid over-using them.**

The Fourth Department is also the only state court to require color-coded brief covers. The United States Supreme Court and the Second Circuit have long required color-coded covers and the judges who use them feel strongly that they are a great help. **The Subcommittee recommends a uniform rule adopting the Fourth Department's rule regarding color-coding of brief covers.**

Courts continue to receive typewritten briefs, particularly from pro se litigants. The Second Department and Court of Appeals specify that typewritten fonts shall be no more than ten and one half characters per inch, while the other Departments have no specific rule. **The Subcommittee recommends a uniform rule like the Second Department's rule specifying that typewritten fonts shall be no more than ten and one half characters per inch.**

In addition, most of the Departments accept handwritten briefs from pro se litigants and do not require permission. The Third Department has no rule but as a matter of practice requires permission to file a handwritten brief. All the courts reserve the right to reject illegible submissions, and a uniform rule in that regard is not controversial. Further discussion is needed on the requirement for obtaining permission.

B. Contents of Briefs

1. Brief Covers

The Departments of the Appellate Division have very similar rules and/or practices regarding brief covers, and like its counterparts the First Department has recently indicated that it is willing to permit parties to request oral argument time on the cover itself, instead of by letter. **The Subcommittee recommends adoption of a uniform rule along the lines of the Fourth Department rule, which expressly provides for the following:**

- **Title of the matter, including party status**
- **Name, address, e-mail address, and telephone number of person and/or firm submitting brief**
- **In a civil matter, the court of original instance and the index, claim, or motion number assigned in that court**
- **In a criminal matter, the court of original instance and the indictment or information number**
- **The appellate division docket number, if one has been assigned**
- **The name of the person requesting oral argument and time requested, or name of person submitting (upper right-hand corner)**
- **Only one counsel may be listed for argument**

2. The Brief Itself

The rules regarding contents of briefs offer a prime opportunity for consistency. The core rules for the First, Second and Fourth Departments merely restate the requirements of CPLR 5528, while the Third Department rules just reference the CPLR. **The Subcommittee recommends a uniform rule restating the requirements of CPLR 5528, with the following additional requirements:**

- **The contents shall be in a specified order.**
- **A CPLR 5531 statement shall be included.**
- **A table of authorities shall be included.**
- **A certificate of compliance (or functional equivalent), which will likely be required in any event if word counts are adopted as a way to limit size of briefs, shall be included.**
- **Limiting the sur-reply brief to issues raised on cross appeal, and prohibiting a sur-reply brief if there is no cross appeal.**

C. Addenda

This may be the most controversial subject under the topic of briefs. The First Department rejects any brief containing an addendum (other than the CPLR 5531 statement). But its rules do refer to “authorized addendum containing statutes, rules, regulations, etc.,” (22 NYCRR 600.10[d][1][i]), appearing to allow litigants to request permission to file such an addendum. The First Department also allows unpublished cases to be handed up with a letter on the day of argument. The Second Department allows addenda to briefs that contain these same types of authorities, but it specifically prohibits maps, photographs and other addenda even if judicially noticeable. The Third and Fourth Departments have no rules regarding addenda, but in practice accept addenda containing judicially noticeable materials, particularly where a request for judicial notice is made in a footnote or parenthetical in the brief. While the First and Second Department have been quite reluctant to open this door, the Third and Fourth Departments have not experienced much of a problem with this approach, other than an occasional motion to strike.

The Subcommittee recommends adoption of a uniform rule allowing addenda, without motion, to include statutes, rules and regulations, and judicial and administrative decisions.

D. Number of Copies

The rules governing the number of copies of most types of briefs to be filed and served vary slightly, but are easily amenable to consistency. The First and Second Departments have the 9 (filed) + 2 (served) rule, while the Third and Fourth have the 10 (filed) + 2(served) rule. With electronic filing, the First Department is moving to 8 (filed) + 2 (served) in most cases. **The Subcommittee recommends that a uniform rule requiring the filing of 9 copies and service of two copies and that the numbers be reduced when rules requiring electronic filing and service kick in.**

The most variation among the Departments occurs in rules reducing filing and service requirements in particular types of appeals to reduce costs for the litigants. The First Department specifies 8 + 1 for Family Court appeals. The Second Department specifies 9 + 1 in appeals prosecuted on the original record, i.e., Family Court cases, criminal appeals, indigent matters, election matters, and SDHR appeals. The Third Department also specifies 10 + 2 in transferred proceedings and proceedings under the Tax Law, Education Law, Labor Law, and Public Health Law. The Third Department rules allow the filing and service of

fewer copies of briefs in Family Court appeals, criminal cases, indigent matters, election cases, and SDHR appeals -- for the most part requiring 7 + 1. The Fourth Department generally requires 10 + 1 in these types of cases, but 9 + 1 in People's appeals. The Departments agree that only one copy need be served in these types of cases. **The Subcommittee recommends a consistent rule for these cases requiring 9 briefs to be filed and 1 to be served. The number of briefs required to be filed should be reduced when e-filing is implemented.**

V. Rules Governing Oral Argument

A. How Requested

Three of the four Departments of the Appellate Division require a statement on the upper right hand corner of brief cover with amount of time and attorney's name. Heretofore, the First Department has required a joint request by letter, due a day after respondent's brief. The First Department, during the process of working on its project, has indicated that it is willing to amend this rule to use the same method as the other three appellate courts. The Fourth Department has an additional express rule that no more than one person per side may argue where parties submit a joint brief. **The Subcommittee recommends a uniform rule requiring a statement on the upper right hand corner of the brief cover with the amount of time requested and the name of the attorney to argue, and allowing one oral advocate per joint brief unless otherwise permitted by the court.**

B. Time Limits

The First Department's rule allows 15 minutes per "side" for enumerated appeals; though additional time may be requested by letter to the clerk upon a showing of good cause. The Second Department's rule allows 30 minutes for trials, hearings, Appellate Term appeals and special proceedings; and 15 minutes for all other argued appeals. The Third Department's rule allows 30 minutes for appeals from judgments and transferred special proceedings, and 15 minutes for appeals from non-final orders. The Fourth Department leaves it to the court's discretion. **The Subcommittee recommends a uniform rule providing for a maximum of 15 minutes per advocate, one advocate per joint brief, unless otherwise permitted by the court in a particular case.**

C. Rebuttal

Rebuttal is permitted in the First Department if requested at calendar call; not permitted in the Second unless to raise an issue of factual error during respondent's argument; in the Third Department if requested at beginning of argument; and not at all in the Fourth Department. Rebuttal is permitted by request in both the Court of Appeals and in the Second Circuit. In the courts where rebuttal is allowed, time for rebuttal must be reserved from the total time granted for argument. **The Subcommittee recommends a uniform rule allowing rebuttal if requested at calendar call or at opening of argument to be reserved from total time granted for argument.**

D. No Argument in Certain Kinds of Cases

Each of the Departments of the Appellate Division lists various kinds of cases where no argument is allowed without permission of the court. These include appeals in State Division of Human Rights cases, grand jury appeals, appeals from orders concerning child or spousal support or maintenance, counsel fees, sentencing, article 78 proceedings where the sole issue is substantial evidence, Sex Offender Registry Act appeals and appeals raising calendar and practice issues. The Third Department also disallows argument in appeals from Workers' Compensation and Unemployment Insurance Board decisions. **The Subcommittee recommends a uniform listing of all these kinds of cases in which oral argument is not allowed except with the court's permission.**

E. Notification of Calendar Date for Argument/Submission

The First and Second Departments post notice of the calendar date for argument/submission on the courts' websites and in the New York Law Journal. The Third and Fourth Departments notify the parties by mail and on the courts' websites. This specific rule may be hard to unify given the number of appeals heard in the downstate cases. **The Subcommittee recommends a uniform rule providing notification on the court's website and by regular mail or e-mail where practicable.**

F. Post-Argument Submissions

The First and Second Departments allow no post-argument submissions without permission of the court. The Third Department has no rule. The Fourth Department allows them within 5 days of oral argument. **The Subcommittee recommends allowing post-argument submissions only with permission of the court.**

VI. Notice of Decisions

The First and Second Departments mail them to counsel if counsel requests with a self-addressed stamped envelope, and publishes them on the courts' websites and in the New York Law Journal. The Third and Fourth Departments have no rule but send them to all parties and publish them on the courts' websites.

The Subcommittee recommends a uniform rule providing for publication on the courts' websites, and allowing the courts to otherwise send decisions by mail or e-mail or publish them in the New York Law Journal as they wish. All four Departments' decisions should also appear on the day of release on the OCA's Official Reporter's "Most Recent Decisions" website.

VII. Confidential Materials: Sealing and Redaction

The Office of Court Administration is considering a state-wide rule regarding sealing and redaction of confidential materials. The Court of Appeals already has such a rule. With our impetus, the NYSBA has submitted comments asking for the adoption of one uniform state-wide rule.

The Subcommittee recommends that the result of the OCA rulemaking process be the basis for a uniform rule of the Appellate Division concerning sealing and redaction of confidential materials.

Rules Amenable to Uniformity, But With Some Difficulty

I. General Motion Practice Rules

The interplay of the CPLR and the various Departments' rules makes it particularly difficult to recommend uniform rules in connection with motion practice. But it is the view of the Subcommittee that the motion rules can and should be simplified, especially since there generally is no personal appearance or oral argument on appellate motions.

A. Content of Motion

Each of the Departments has a different list for the information that must be included in the notice of motion (such as nature of relief, names of attorneys, no personal appearance) and required attachments (such as supporting affidavit, copy of order below, proof of service). There was a consensus that a comprehensive itemization of the information in the notice and attachments would be helpful. **The Subcommittee recommends that there be a uniform rule listing all items set forth in the existing rules and anything required by the CPLR.**

B. Return Date for Motions Brought on by Notice of Motion

CPLR 2214 requires specifying "the time and place of the hearing on the motion." Each Department specifies a different day for the return date: any business day except July and August when Monday only, any Friday, any Monday, any Monday or next business day if Monday is a holiday. The clerks of three of the courts did not object strongly to allowing the attorney to choose any return date as in the First Department, but the Fourth Department did not want to abandon the Monday requirement because of the effect of the return date on the timing of cross motions. The First Department prefers its rule since the return date is the basis for assigning motions. The consensus was that if a single day were chosen, it should be Monday, or, alternatively, a Wednesday, to avoid the timing complications attendant to a Monday return date. (Presumably the "next business day" qualification if the specified day is a holiday is implicit in all rules.) If Monday were applicable to all courts, the First Department's internal policies could determine assignments without regard to the "official" return date. Indeed, the only significance of the return date is its effect on the filing of opposing papers, reply papers and cross motions. **The Subcommittee recommends that there be a uniform rule fixing Monday as the day of the return date, or alternatively fixing it on Wednesday**

to avoid timing complications for answering and reply papers when the return date is set for on the first business day after the weekend.

C. Return Time

Here, too, the courts differ: 10 a.m., 9:30 a.m., no time, 10 a.m. specifying a time was considered preferable since it established a fixed time for the distribution of the complete set of papers to the justices. All agreed that 10 a.m. was acceptable. **The Subcommittee recommends that there be a uniform rule fixing 10 a.m. as the time of the return date.**

D. When and How to Serve

Three Departments cite CPLR 2214; the Fourth Department specifies the requirements of CPLR 2103 with respect to the method of service. Nobody objected to citing the two relevant CPLR rules. **The Subcommittee recommends that there be a uniform rule citing CPLR 2214 and 2103.**

E. When to File

The rules are as different as possible: noon of the business day preceding the return date; at least one week before the return date; as soon as possible, by 5 p.m. on the Friday before the return date. Further, although none of the clerks opposed attorneys filing at the same time as service, each had a reason for giving the attorneys some flexibility. All clerks seemed to agree that opposing papers should be filed by 5 p.m. on the business day preceding the return date. It also appears that the clerk's office does nothing of significance with a motion (such as assigning it to a justice) until all papers are filed. **The Subcommittee recommends a uniform rule that motion papers should be filed as soon as possible but no later than 5 p.m. on the business day preceding the return date.**

F. How to File

Only two Departments have a rule related to "how": One asks lawyers to file in person or mail in an envelope marked "motion papers"; the other requires an original and one copy. Although these special rules satisfy particular preferences of the relevant Departments, **the Subcommittee recommends a uniform rule.**

G. Opposing and Reply Papers - Service and Filing

Two Departments have no express rule with respect to service of opposing or reply papers. The First Department refers to CPLR 2214, which covers service but is not comprehensive with respect to reply papers. The Second Department requires a method for serving opposing papers.

CPLR 2214 provides in general for service of the notice of motion at least 8 days before the return date and the service of answering papers at least 2 days before the return date. There is no provision for the service of reply papers or cross motions and no provision for the service of a response to a cross motion. If the notice of motion is served 16 days before the return date, it may contain a demand that answering papers and cross motions be served 7 days prior to the return date; in that case reply papers and responding papers to the cross motion must be served 1 day before the return date. The problem in relying only on CPLR 2214 with respect to service of all motion papers is that the CPLR does not cover service of reply papers except in the special case where demand is made and the motion is served 16 days in advance. Perhaps the CPLR assumes that if a movant wants to keep open the possibility of serving a reply, he should serve the motion very early and otherwise should be out of luck. As to filing, the First Department requires opposing papers be filed by 4 p.m. of the day prior to the return date. The Second Department requires all opposing papers to be filed by 9:30 a.m. of the return date. The Fourth Department requires filing by 5 p.m. of the business day prior to the return date.

Although there are no court rules concerning service of reply papers, two Departments have rules concerning filing of reply papers: in the First Department they must be filed by 4 p.m. on the day before the return date and in the Fourth Department by 5 p.m. on Friday before the return date (which is the same as the day before the return date since the Fourth Department has fixed Monday as the return date).

The question is whether all Departments should adopt rules to supplement the CPLR with respect to opposing and reply papers. **The Subcommittee recommends a uniform rule that reply papers be served by 5 p.m. on the business day before the return date.** This would provide guidance to attorneys and does not conflict with any Department's preferences. We recognize that this would result in the same time limit for reply papers whether or not served following the special demand, but the movant who made the special demand would have that much more time to prepare the reply. **The Subcommittee recommends**

a uniform rule that answering and reply papers be filed by 5 p.m. of the business day before the return date. This would mean that all motion papers must be filed by the same time.

H. Argument on Motions

All Departments have a rule specifying that there is no argument on motions, but the Third Department explicitly permits argument with permission of the court or justice. The First and Second Departments have internal policies allowing arguments with permission. No Department expressly provides a procedure for requesting permission. **The Subcommittee recommends a uniform rule that motions may not be orally argued except with permission of the court or a justice, such permission to be sought by letter addressed to the Clerk of the Court setting forth why the interests of justice require oral argument.**

I. Adjournments

Two Departments have no rules regarding the adjournment of motions. The First Department permits one adjournment with written consent of all parties; the Fourth Department permits one adjournment with written consent of the moving party or a court order. No court had a rule about the length of the adjournment permitted or when the consent to adjourn should be filed. **The Subcommittee recommends a uniform rule that one adjournment, for not more than 14 days, be permitted without the need for court permission as long as both parties consent in writing filed no later than 5 p.m. of the return date, and that any other adjournment be by court order.**

J. Cross Motions

1. Return date: In all Departments, cross motions are returnable the same day as the original motion.
2. Service of cross motion: In two Departments, the motion must be served 3 days before the return date (as is required by CPLR 2215); in the Fourth Department it must be served 4 days before the return date (contrary to the CPLR rule). The Third Department has no rule.
3. Filing of cross motion: The First and Third Departments have no rule re filing a cross motion; in the Second Department it must be filed 3 days

before the return date; in the Fourth Department, it must be filed no later than 5 p.m. on the Friday prior to the (Monday) return date.

4. Responses to cross motion: No Department has a rule with respect to service of responses to the cross motion except (1) the First Department refers to CPLR 2214(b), but that provision covers “responding affidavits” only where a special demand has been made, and (2) the Second Department provides that “all papers in opposition to any motion” must be served so as to be received by filed by 9:30 a.m. on the return date. Only the Second Department has a rule with respect to filing of responses - by 9:30 a.m. on the return date.

The Subcommittee recommends a uniform rule that cross motions must be returnable the same day as the original motion and filed by 5 p.m. on the business day before the return date. As to service of the cross motion, the Subcommittee recommends a uniform rule referring to CPLR 2214 and 2215. As to responding affidavits the Subcommittee recommends they be served and filed by 5 p.m. on the business day before the return date.

K. Withdrawal of Motions

Three Departments have no rule; the Fourth permits it at any time prior to the return date upon written request of the movant. The Departments with no rule permit withdrawal, and even after the return date, but the Fourth Department did not want to abandon its deadline. **The Subcommittee recommends a uniform rule permitting withdrawal either at any time prior to the decision or only before the return date.**

II. Emergency Applications for Interim Relief

A. Terminology

The First Department provides for emergency applications for an interim stay or other relief, but eliminated the order to show cause (OTSC) nomenclature years ago. The other Departments require use of a formal order to show cause. It is most often employed as a means to obtain interim relief while a court considers a full motion. **The Subcommittee recommends uniformity of terminology.**

B. Contents of Application

The Second Department's rule provides for generally standard contents of the OTSC: nature of motion or proceeding; specific relief sought, requested return date, and names, addresses and phone numbers of all attorneys. The other Departments would have no problem with this rule, but the suggestion was made that the return date should be left blank to be filled in by the justice entertaining the OTSC. **The Subcommittee recommends a uniform rule similar to the Second Department's current rule, but the application should include the addresses, e-mail addresses, and phone numbers of all attorneys and the return date should be left blank to be filled in by the justice.**

C. Notice to Parties

The First and Third Departments have very similar rules stating that the applicant for interim relief must inform the clerk or justice of the court at the time of submission whether the opposing party has been notified and whether such party opposes or consents to the interim relief. The Second and Fourth Departments have similar rules requiring a detailed affidavit or affirmation stating the manner of notification and opposing party's view, or an explanation for why notice has not been given or opposing counsel has not appeared. The First and Third Department clerks indicated that a rule like the Second and Fourth Department rules may be acceptable, though they may not strictly enforce it. **The Subcommittee recommends a rule requiring notice similar to the current rule in the Second and Fourth Departments.**

D. Responsive Papers

The First Department generally requires responding papers to be filed on the afternoon before the return date so the clerk can prepare a report; the Second and

Third Department in practice accept late papers filed on the morning of the return date. All the Departments have an interest in having responsive papers filed in time for a justice to review the papers and expeditiously decide the application for emergency relief on return date. **The Subcommittee recommends a rule requiring responding papers to be filed the afternoon before the return date, if possible, but in no case later than 10:00 a.m. on the return date unless otherwise permitted by the justice.**

E. Presentation of Order to Show Cause for Signature

The First and Second Departments have duty justices, although in the Second Department, the parties can go to any justice. In the Third Department, the parties can present the OTSC to any justice. Due to geography, the Fourth Department requires the OTSC to go to the rotating duty judge in the district. Any consistent rule would have to take into account the geographic character of each Department.

The First Department rule states that the time and manner of service of motion papers shall be directed by a justice and the relief is granted by a brief order attached to notice of motion and the justice's signature applies to the stay or provisional remedy only. The First Department needs this rule because it does not use the OTSC format. The Second and Fourth Departments have similar requirements that apply to the OTSC format. The Third Department has no specific rule. **The Subcommittee recommends a uniform rule setting forth the requirement that the justice set the time and manner of service of motion papers and that his or her signature applies only to the stay or provisional remedy.**

F. Interim Relief in Criminal Cases

The Fourth Department has an express rule that an application for a stay of a judgment in a criminal case may be made by notice of motion or by order to show cause. As in the Fourth Department by rule, applications for a stay in the other Departments can be by notice of motion or emergency application. In all Departments, applications for emergency relief in criminal cases can go to any justice and may be decided the same day or the next day. **The Subcommittee recommends a uniform rule stating that interim relief in criminal cases may be requested by notice of motion or order to show cause.**

G. Interim Relief in Family Court Cases

The Fourth Department has an express rule that an application for a stay of a judgment pursuant to Family Court Act § 1114 must be made by OTSC. The Fourth Department requires such applications to be made by OTSC because the statute states that it should be a single-justice application. In practice in the First Department stay applications under Family Court Act §1114 can be made by emergency application or by notice of motion, but regardless, they are decided by a single justice. In the Second and Third Departments, such stay applications may be made by notice of motion or by OTSC, but again are decided by a single justice. Again Departments use basically the same procedure, but different nomenclature. **The Subcommittee recommends a uniform rule allowing the application to be made by either method but providing that it shall be decided by a single justice.**

H. Motions for a Preference

The First and Second Departments have the same express rule that if a party is entitled to a preference by law, the party may serve and file a demand for a preference that shall set forth the provision of law relied upon. The Third and Fourth Departments have no express rule but appear agreeable to one. **The Subcommittee recommends a uniform rule like the First and Second Departments' rule.**

The First, Second and Fourth Departments have substantially similar rules regarding motions for a discretionary preference. The First and Second Departments' rules are identical: A preference under CPLR 5521 may be obtained upon good cause shown in an application made to the Court on notice to the other parties to the appeal. The Third Department has no rule. The Fourth Department's rule states that a motion to expedite an appeal or proceeding shall be supported by an affidavit setting forth with particularity the compelling circumstances justifying an expedited appeal or proceeding. **The Subcommittee recommends a uniform rule. Either the "for cause" formulation or the "compelling circumstances" formulation is acceptable, but any rule should track the statute, giving the courts "discretion" to grant or deny the preference.**

III. Motions for Reargument and/or Leave to Appeal

A. Rules governing motions to reargue

1. Deadlines

The four Departments have inconsistent rules on deadlines for reargument. The First Department requires such motions to be made within 30 days of the decision and order. However, in practice, if a joint motion for reargument and/or leave to appeal is made, and the application for leave to appeal is timely, but the one for reargument is not, the court provides a grace period as to the latter. The Second Department imposes the same deadline for reargument as for motions for leave, which by statute must be filed within 30 days from service of the order with notice of entry. However, the court allows for extensions based on good cause. The Third Department has no deadline for civil reargument motions. The Fourth Department imposes the same deadline for reargument as for leave applications and has no express provision for extensions based on good cause.

These inconsistencies, in deadlines for reargument and leave applications within three of the Departments' rules, and among all of the Departments' rules, create significant traps for the unwary and do not encourage judicial economy by aggrieved litigants seeking further review. The First Department practice could be reflected in its rule by providing the same deadline for reargument as for leave applications. The lack of a deadline in the Third Department opens up the possibility of very belated motions.

The Subcommittee recommends a uniform rule providing that motions for reargument, like motions for leave to appeal, must be made within 30 days of service of the decision and order with notice of entry. The courts should decide whether the rule will expressly provide for exceptions based on good cause.

2. Content

There is some consistency in three of the four Departments regarding the content of reargument motions. The First, Second, and Fourth Departments require that the papers include the decision and order appealed from and state points purportedly overlooked or misapprehended. In addition, the First and Second Departments require that the movant refer to relevant portions of the record and cite authorities relied upon. The Fourth Department instructs that the papers must include a notice

of motion, supporting affidavit, and proof of service, as with motions generally. The Third Department provides no guidance as to the content of the motion, providing only that the challenged decision must be attached.

The Subcommittee recommends a uniform rule that the papers must include the decision and order appealed from, state points purportedly overlooked or misapprehended, refer to relevant portions of the record, and cite authorities relied upon.

B. Rules governing motions for permission to appeal

1. Civil

There is some consistency among three Departments regarding the content of civil leave applications. The First, Second, and Fourth Departments require that such motions set forth questions of law to be reviewed by the Court of Appeals. The Third Department refers to “proposed questions.” The First Department also references CPLR 5513 (b) and 5516 and states that civil leave applications are to be submitted without oral argument. The Second Department states that, where appropriate, proposed questions of law decisive as to the correctness of the challenged decision should be set forth and the order must be attached. The Third Department states that the motion will be granted only upon approval of a majority of the justices assigned to the motion. The Fourth Department states that the supporting affidavit must state why the questions of law should be reviewed, that motions must be determined by the panel that determined the appeal, and that they must be returnable on specified dates.

The Subcommittee recommends a uniform rule providing that civil leave applications set forth questions of law to be reviewed by the Court of Appeals, and attach the Appellate Division order. The Subcommittee recommends that there be a uniform rule fixing Monday as the day of the return date, or alternatively fixing it on Wednesday, or alternatively, any day of the week. The Subcommittee recommends further that the rule expressly state, in accordance with CPLR 5516, motions be returnable no less than 8 and no more than 15 days after service.

2. Criminal

The four Departments have inconsistent rules regarding criminal leave applications, but some commonality in actual practice. The First Department has

no rule and in practice entertains letter-applications as motions, setting a return date and notifying the district attorney of the date. The Second Department states that CPL 460.20 motions must be made to any justice of the panel that decided the appeal and must attach a copy of the order. The First and Third Department rules do not set forth the requirement that only a justice from the deciding panel may entertain a leave application, but that is the actual practice. The Third Department states that such motion may be addressed to a named justice and must be made returnable as for other motions, unless otherwise directed by order to show cause, and it may not be argued unless the named justice or one to whom the motion was referred (by the Clerk) otherwise directs. The Fourth Department states that a supporting affidavit must set forth questions of law to be reviewed, be submitted to any member of the panel that determined the appeal, state that no other application has been made, and be made on 8 to 15 days' notice.

The Subcommittee recommends a uniform rule providing that CPL 460.20 letter motions be made to a justice that decided the appeal; attach a copy of the order; set forth questions of law to be reviewed; and state that no other application has been made.

IV. Proceedings Commenced in the Appellate Division

The First and Second Departments treat certain original proceedings essentially as motions. The First Department in practice, and in the Second and Third Departments by rule, require that certain types of original proceedings in the nature of certiorari to review proceed through briefing and argument much the same as appeals. In the Third Department, the parties must stipulate to the record in these types of original proceedings.

The Third and Fourth Departments use a hybrid procedure for all original proceedings. After the pleadings and supporting papers are filed, the court issues a briefing and calendaring schedule requiring perfection in accordance with the rules governing appeals. The Fourth Department uses order to show cause procedures to provide immediate relief or expedition.

The rules governing original proceedings seem more difficult than they need to be. The rules of the four Departments regarding special proceedings share common themes, but they vary in detail in many, many ways. **The Subcommittee recognizes that it may be difficult to reconcile these differences, but recommends a uniform straightforward rule. The rule should treat specified types of original proceedings like motions, with the exception that multiple copies of the papers must be filed. All other original proceedings should proceed in a manner similar to appeals and transferred proceedings.**

V. Transferred Proceedings

In the First Department, transferred proceedings are governed by the same rules as appeals, except that petitioner or appellant must file the record within 30 days of entry of the order of transfer, and briefs within 20 days thereafter, unless time is enlarged. In the Second and Third Departments, they are simply governed by the same rules as appeals. In the Fourth Department, transferred proceedings are prosecuted on original papers transferred from Supreme Court and the clerk issues a briefing and argument schedule; each party files 10 copies of brief, and serves 1 copy.

Unlike the rules regarding original proceedings, the Departments' rules regarding transferred proceedings are largely consistent -- they are treated very much the same as appeals in all four Departments. The only difference involves the calendaring procedure in the First Department and the rule in the Fourth Department that the proceeding is heard on the original papers. The Third Department in practice gets the original record from Supreme in pro se prisoner matters. **The Subcommittee recommends a uniform rule treating transferred proceedings the same as appeals. In addition, the Subcommittee urges adoption of the Fourth Department's rule using the papers filed below as the original record, but would allow the parties the choice to proceed on the appropriate number of copies of either the full record or appendix.**

VI. Criminal Appeals

A. Record or Appendix

The Departments differ concerning when an appeal must be prosecuted with an appendix or on a full record. The Second Department permits prosecution of all criminal appeals on the original record without motion; the First Department permits appeals on the original record by implication in a rule that refers to appeals “other than those in which permission to proceed on the original record is granted” (although there is no indication on what basis the court would grant such relief). The Third Department, mandates criminal appeals be prosecuted with an appendix and a single copy of the record (indictment, transcripts, motion papers, sentence); no transcripts are required with poor person relief. In the Fourth Department criminal appeals where poor person relief has been granted are effectively prosecuted upon a full record, but appellant has the option of filing the bound stenographic minutes prepared by the court reporter separately along with an “appendix” that contains all other documents that constitute the full record. Where an appendix is filed, the Second, Third and Fourth Departments specify that the appendix must include the indictment. Although the rules appear dissimilar with respect to what papers comprise the record, it appears that their differences really relate to what must be filed in addition to the appendix or what must be filed as part of the appendix that is criminal case-specific. It seems clear that the Third Department does not want to give up its single copy of record.

The Subcommittee recommends that where the appendix method is required or chosen by the appellant, the rules be the same as those for civil appeals, supplemented by the requirement that the indictment or information be included. The Subcommittee recommends that the First and Second Departments retain their special rules concerning original record appeals.

B. Contents of Brief

The First and Second Departments require specific information at the beginning of the brief: in the First Department - statement of judgment appealed from, sentence imposed and whether stay application has been made; in the Second Department – whether a stay application has been made, status of appeals, if any, of co-defendants, if any. In the interests of uniformity, and because all the courts would find this information useful and included in any decent brief in any event, all Departments should require all of the above. **The Subcommittee recommends a uniform rule requiring briefs in criminal appeals contain, at the beginning, a**

description of the decision and judgment appealed from, whether an application for a stay has been made and its status, and the status of any appeals by any co-defendants.

C. Time to Perfect/Enlargements/Dismissals

In the First Department, a criminal appeal must be perfected within 120 days of the deadline for filing a notice of appeal except that where poor person has been granted, the deadline appears inoperative. Instead the court publishes a dismissal calendar in May and October listing all causes not brought on for a hearing within 18 months of poor person relief. There is no similar monitoring when poor person relief has not been granted. Presumably the appeals can languish until the prosecutor chooses to move to dismiss.

In the Second Department, unperfected criminal appeals are deemed abandoned after nine months if there has been no appearance by an attorney. Since the Second Department starts keeping track of appeals once the notice of appeal has been filed, it could move *sua sponte* to dismiss such appeals, but there is no evidence that this is done as a matter of course.

In the Third Department, a criminal appeal must be perfected within 60 days of the last day to file a notice of appeal. Again there is no monitoring system.

In the Fourth Department, if no attorney has been assigned, an appeal must be perfected within 120 days of receipt of the transcript. In the Rules of the Indigent Criminal Appeals Management Program, perfection is required within 120 days of receipt of the transcript by assigned counsel. Where no counsel is assigned, appellants are subject to 60-day dismissal motions applicable to appeals generally.

It is impossible to reconcile these rules, and they are not completely satisfactory as stand-alone rules. **The Subcommittee recommends that consideration be given to gearing time limits for criminal appeals to those used for civil appeals.**

The First and Third Departments have rules referring to enlargement requests – both courts require that the request explain the reasons for the delay; the First Department additionally require information concerning whether the defendant has gotten a stay and has made bail; the Third Department additionally requires that the motion provide the procedural history. These requirements make sense and seem obvious. **The Subcommittee recommends a uniform rule prescribing the**

content of a motion to enlarge or use of the civil appeals rule for motions to enlarge.

D. Number of Briefs

The First and Second Departments require appellant to file and serve the same number as required for civil appeals (9 and 2; in the Second Department only 1 need be served in criminal cases). The Third Department requires fewer than for civil appeals (7 copies of brief, 7 of appendix, serve 1 of each). The Fourth Department requires filing the same number as for civil appeals (10) but serving fewer (1) if poor person relief has been granted. The Fourth Department indicated its requirements could be reduced, and likely would be reduced under an e-filing system. Respondents file the same number as in civil cases and serve 2 in all Departments. **The Subcommittee recommends a uniform rule requiring filing of 9 and service of 1. Respondent should file 9 and serve 2 (to permit appellant's attorney to send a copy to the client). The number of briefs required to be filed should be reduced when e-filing is implemented.**

E. Sentence Appeals

The First and Fourth Departments have no rule for appeals presenting sentence arguments only. The Second and Third Departments permit an appeal by motion if the only issue is the “legality, propriety or excessiveness” of the sentence. Both these courts provide for an “abbreviated” record. In the Second Department the motion should be accompanied by the transcripts of plea or trial and sentence and include a CPLR 5531 statement and a statement there are no other issues. The Third Department permits the “Record on Appeal from Sentence” to include the plea and sentence minutes and the notice of appeal. (The court assumes a sentence motion will never be filed after a trial.) The Second Department prohibits oral argument (but as a matter of policy, permission to appeal may be granted). The Third Department permits submission unless the court orders otherwise. The Fourth Department prohibits oral argument if the only issue in a criminal appeal is the legality or length of sentence. **The Subcommittee recommends no specific uniform rule.**

F. People's Appeals from Orders Reducing or Dismissing an Indictment or Directing the Filing of an Information

All Departments permit such appeals to be heard on an expedited basis if requested by either party.

The First Department permits appeal on the original record and an appendix if necessary. The other three Departments specify the appendix must contain a copy of the indictment and order below if there is an appendix. The Second Department apparently does not mean an appendix in the normal meaning; it requires the People's brief to include an "appendix" with the indictment and order and decision appealed from. The Third Department requires a brief and appendix with the indictment and order and decision appealed from, but also provides that the appeal be taken on "one original record," which includes the indictment, decision and order below and notice of appeal. The Fourth Department seems to require a regular appendix.

All Departments require the grand jury minutes to be filed separately.

The First, Second and Third Departments have no rules concerning service and filing. The Third Department requires filing of nine copies of the brief and appendix and service of one copy of the brief and appendix for both parties (different from the rule for other appeals).

These appeals are not taken very often, and the rules are largely consistent. Further, any differences between the Departments concerning the manner of perfecting such an appeal will not cause confusion since prosecutors will not cross Department lines. The only rule that would matter to the defendant-respondent is the one about expedited appeals, which is already uniform.

The Subcommittee does not recommend a uniform rule, except that the Subcommittee recommends that the rule concerning the number of copies of the brief to be served and filed be the same as with other appeals, and except that each Department should require that two copies of the brief and appendix be served on defendant's attorney (as is done where defendant is appellant).

G. Miscellaneous

The First Department permits the prosecutor to oppose an appeal (presumably by motion) solely on the grounds that the appellant waived his right to appeal and may later direct a brief be filed on the merits. No other Department has such a rule. Presumably this is for the benefit of the prosecutors in the First Department and the lack of a similar rule in the other Departments will not cause confusion. The Subcommittee does not recommend a uniform rule.

The Fourth Department is the only Department with a rule about applications for a stay of sentence. The rule is identical to the practice in the other Departments -- the initial application by notice of motion or OTSC and extensions sought by motion explaining the delay in perfecting the appeal. It seems unnecessary, but does not create confusion.

VII. Habeas Corpus Proceedings

The Appellate Division has both original jurisdiction and appellate jurisdiction in habeas corpus cases (see CPLR 7002[b]). They may entertain original applications for the writ or make them returnable in the supreme court. When returnable in the Appellate Division they are governed by the rules relating to original civil proceedings. When they come to the court on appeal from a judgment of the supreme court, they are treated like any other civil appeal

In general, the Departments require habeas corpus petitioners to comply with the generally applicable alternative methods for perfecting appeals unless poor person relief is granted, but, except for the First Department, have no express rule governing such proceedings. (The Fourth Department's rule governing poor person relief does refer to habeas corpus petitioners, but there is no separate rule.) While the Second Department provides by rule that appeals in specified types of cases can proceed on the original record, habeas corpus proceedings are not listed. The First Department's rules also provide that criminal habeas appeals may be brought on for expedited hearing and removed from the calendar after at least eighteen months from when *in forma pauperis* status had been granted. **Since the Departments appear to treat habeas corpus appeals generally in the same way, the Subcommittee recommends a uniform rule governing habeas corpus proceedings and appeals, if only to state that they are governed by rules generally applicable to civil proceedings or appeals.**

VIII. Election Law Appeals

Each Department has special rules in Election Law cases to reflect the expedited nature of such appeals. Each allows these matters to be heard on a stipulated original record and either expressly or in practice provide for expedited briefing and a preference for oral argument. **The Subcommittee recommends uniform rules for Election Law matters to provide for such expedited procedures.**

Rules Not Easily Reconcilable

In the third category are rules that reflect unique operational practices of different Departments of the Appellate Division and will require agreement for substantial changes to accomplish complete uniformity.

Specifically, the First Department has its unique calendaring system, where the litigants generally choose the term the appeal is to be argued and the dates for filing records and briefs are set accordingly. The other Departments no longer use that system, and instead control their own calendars, setting briefing schedules by rule, scheduling order or letter.

The Second Department is unique in that it tracks appeals from cradle to grave, from the filing of the notice of appeal until decision or dismissal. The other Departments do not assign docket numbers until a motion or other papers are filed or an appeal is perfected, and therefore do not have dismissal calendars. The Second Department's tracking system may become more practical and desirable in the other Departments when e-filing is phased in.

The Fourth Department has no pre-argument settlement program.

Should the individual Departments choose to retain these unique operational practices, complete uniformity is not possible, although uniformity may be possible among the other Departments.

I. Terms and Sessions of Court

All Departments set their own terms annually, and publish their sessions on their websites.

Historically, the First Department has established monthly terms and has allowed litigants to set the term when their appeal will be heard. More recently, the volume of cases has resulted in essentially continuous sitting, and the court often finds it necessary to adjust its docket. The Second Department has adopted an annual term, with nearly continuous sitting, and manages its own docket. The Third and Fourth Departments establish monthly terms sitting for two or more weeks each term, and control their dockets by calendaring arguments when appellants and/or respondents' briefs are filed.

The First Department rule sets sessions on Monday through Thursday at 2 p.m. and Friday at 10 a.m., plus special sessions as ordered by the court. The Second Department rule sets sessions on Monday through Friday at 10 a.m., plus special sessions as ordered by the court. The Third Department sets its sessions on Monday through Thursday at 1 p.m. and Friday at 9:30 a.m. The Fourth Department sets sessions on Monday through Friday at 10 a.m., unless otherwise ordered by the court.

The Subcommittee recommends that setting the terms and sessions of the court should be left to the discretion of each Department.

II. Initial Filings and Settlement Conferences

It will be difficult to have complete consistency for these rules regarding initial filings and settlement conferences. The Second Department tracks appeals from the time they are filed through final appellate division disposition, requires the filing of a RADI with copies of the notice of appeal at the time the notice of appeal is filed in the court below, and therefore has a dismissal calendar for appeals that are not perfected. The First Department, in e-filing cases, will receive an electronic copy of the notice of appeal from the court below, but it is not receptive to the Second Department's tracking approach to case management. Nor does the Third Department track appeals before the first motion is made or the appeal is perfected. The First and Third Departments require initial filings for the sole purpose of considering settlement potential. The Fourth Department requires no initial filings whatsoever and has no interest in resurrecting its former settlement program.

Exceptions to the mandate of filing the requisite initial form vary. The First Department excludes Family Court and criminal appeals, and pro-se appellants; the Second Department has no limitation, but will only schedule conferences on civil matters; the Third Department, in addition to excluding certain Family Court cases, also excludes Election Law cases, Articles 70 & 78 proceedings, and cases typical to the Third Department: Workers' Compensation, Unemployment Insurance, certain Corrections Law cases. It is unlikely that uniformity can be obtained regarding the exceptions to the requirement for an initial filing. **The Subcommittee recommends that Election Law matters be excluded uniformly from the requirement for an initial filing and settlement conference, given the truncated scheduling of appeals in that area.**

A. Form and Content of Initial Filings

The First, Second and Third Departments all require some form of initial submission (1st – Pre-Argument Statement; 2nd – RADI; 3rd – Pre-Calendar Statement), along with the notice of appeal that was filed in the court from which appeal is taken. The contents of the initial filings in these three Departments have overlapping functions and require similar information, with certain additional information required in each Department. No Department seems adverse to a uniform document including all of the information required by the other Departments. **The Subcommittee recommends a uniform document (by whatever title) containing the following information:**

- The title of the action, the index and RJI numbers in the Court below, and any change to the title since inception of the case.
- The purpose of the action.
- Identification of each party and his/her status in the Court below and on appeal.
- The name, address, telephone number and e-mail address of each attorney who appeared below and the name of each party for whom that attorney appeared.
- The Court and Judge issuing the document appealed from, the form of that document (Order, Judgment, Decree, etc.), and its date of issuance and entry.
- A description of the Order, Judgment or Decree appealed from, including the amount of any Judgment.
- The grounds for seeking reversal (which grounds shall be for reference only and not preclusive).
- Identification and status of any other related action, and of any appeal taken within the same action.
- The Notice of Appeal (or Order granting leave to appeal) and the document appealed from shall be annexed to the pre-argument/RADI/pre-calendar form.

B. Settlement Conferences

Settlement conferences are called by the Court; however, each of the three affected Departments provide, by rule or in practice, for a party to request a conference - - in the First Department after 20 days, in the Third Department after 30 days, and in the Second Department, there is no rule. **The Subcommittee recommends that a uniform rule permit a party to request a conference after 30 days.** The First Department's requirement that a "counter-pre-argument statement" be filed by respondent upon notice of a conference should be eliminated, since the Order, Judgment or Decree appealed from, supplemented, if need be, by comments at the conference, is usually sufficient.

All three Departments require a conference in person; the First and Second Departments provide that the parties "may" be required to attend, while the Third Department requires the parties' attendance unless excused, and those attending must have whatever authority is available to settle the matter. **The Subcommittee recommends a uniform rule that parties "may" be required to attend, that**

attendees have whatever authority is available to settle, and a further rule authorizing the parties, with the Special Master or Staff Counsel's authorization, to participate in the conference by telephone or video.

The Second and Third Departments provide that the conference can address settlement, limitation of issues, or other matters - - a rather broad description of authority. The First Department has no rule. **The Subcommittee recommends that the broadly stated rule apply uniformly to all three Departments.**

The successful resolution of a matter in the First Department results in a so-ordered stipulation, in the Second Department results in a Stipulation or Order. The Third Department has no specific rule. **The Subcommittee recommends a uniform adoption of the Second Department's approach, leaving flexibility in the hands of the parties and the courts.**

C. Sanctions

All three Departments provide for sanctions for failure without good cause to appear for a scheduled conference or for failure to comply with a resulting stipulation/order. In addition, the First Department provides for potential sanctions for failure to comply with the rules governing the filing of the pre-argument or counter-pre-argument statements, and for failure "to demonstrate good faith" during the conference. **The Subcommittee recommends elimination of those sanction provisions, which appear overly broad and may be applied inconsistently.**

D. Notifications of Settlements or Withdrawal of an Appeal

The Second and Fourth Departments require the parties to notify the Court in the event of full or partial settlement or upon the death or bankruptcy of a party; and both Departments expressly provide for sanctions for a failure to comply. **The Subcommittee recommends that such a rule become uniform throughout the Departments.** Considering how busy our appellate courts are, there is no reason for the courts to waste time and resources preparing for appeals that have become moot.

Withdrawal of appeals is subject to unwritten rules in most Departments; only the Fourth expressly requires a stipulation signed by all parties, and permits that to be filed at any time before the decision is rendered. The other Departments permit withdrawal by letter to the lower court (in the Second Department, to the appellate

court) before the appellant's brief (in the Second Department, before the respondent's brief) is filed. After that point, withdrawal can be made only by stipulation of the parties, and can be made even after oral argument (except in the Second Department, where no withdrawal may be allowed after oral argument).

The Subcommittee recommends a uniform rule permitting withdrawal of an appeal before filing of the appellant's brief by letter to the lower court and the Appellate Division; after filing of the appellant's brief and before oral argument, by stipulation signed by the parties; and after oral argument, by a request, accompanied by a stipulation signed by all parties, which will be "considered" by the court (the latter formulation being the rule in the Court of Appeals).

III. Deadlines and Abandonment

The four Departments take such different approaches, that it may be helpful to outline them Department-by-Department. The first discussion relates only to perfecting the appeal. The subsequent discussion relates to the time limits for respondents' and reply briefs.

A. Deadlines for Perfecting Appeals

First Department

Only the First Department has a series of steps prior to the filing of the brief, depending on whether the appeal is being perfected by the appendix, agreed statement or full record method and further on whether there is a transcript or not or whether it is a transferred record appeal. (Presumably the CPLR is enough for the other Departments.)

1. With transcript

If by the appendix method, appellant must subpoena the record on appeal within 30 days of settlement of the transcript (which, by explicit [and unique] 1st Dept. rule and CPLR 5525 requires the transcript to be settled by agreement [explicit or implicit] within 30 days of receipt and otherwise to be submitted to justice). (The filing of the appendix has no independent time limit. It is filed with the brief.)

If by full record method, the record must be filed within 30 days of settlement of transcript.

2. No transcript

If by the appendix or full record method, the record must be filed within 30 days of filing the notice of appeal.

3. If by agreed statement method, the statement must be filed within 30 days of approval by the court.

4. If the appeal is heard on a transferred record, the record must be filed within 30 days of entry of the order of transfer.

These time limits are honored in few cases. In theory respondent could file a motion to dismiss after 30 days, upon which the First Department might set a briefing schedule.

The First Department has no time limits for the perfection of the appeal but deals with this in its rules about dismissal. Otherwise the time for filing is determined by working backward from the chosen term during which the appeal is to be heard (57 days before the opening date of the term). If an appeal is not perfected within nine months of the date of the notice of appeal or transfer order, a civil appeal is deemed abandoned, and may not thereafter be filed without court order. In addition, if appellant “fails to prosecute” within the time prescribed, any other party may move to dismiss.

The First Department also has a dismissal calendar in May for civil appeals not brought on for a hearing within 9 months of filing the record on appeal. An appeal on the dismissal calendar is dismissed unless appellant explains the reason for the delay. This is not inconsistent with the “deemed abandoned” rule, presumably the affidavit explaining the delay results in a court order which is the equivalent of the order in the deemed abandoned appeal situation. The difference seems to be that if you wait for the dismissal calendar you only have to submit an affidavit; if you decide to take action because the nine months has passed, you have to file a motion. On the other hand, as a matter of practice the clerk advised that the First Department requires the appellant to file a motion to enlarge time prior to the nine-month deadline.

Second Department

The Second Department has no rules concerning steps that must be taken prior to filing the brief. The record, appendix or agreed statement must be filed within 6 months of the date of the notice of appeal, order granting leave to appeal or order of transfer, the same time period prescribed for perfecting the appeal by filing the brief. In other words, unlike the First Department, the Second Department does not have separate filing dates for the record and brief.

Because the Second Department requires the filing of a RADI when the notice of appeal is filed, and therefore can track all cases, it also may direct “active management” of the appeal and issue a scheduling order covering all stages.

The parties may obtain a 60-day enlargement of the perfection deadline by stipulation. Further enlargements must be obtained from the clerk or justice (by letter application with showing of reasonable grounds for delay).

A civil appeal is “deemed abandoned” if not perfected within 6 months unless time has been extended. But if an appeal is not perfected timely, a clerk or justice may grant a letter application for an enlargement (based on reasonable grounds for failure to perfect). The Second Department feels strongly that a 6-month limit is more likely to get an appeal perfected in 9 months.

A dismissal calendar is published for civil cases ordered perfected by a date certain but not perfected and all cases not perfected within the rules. Appellant must move to enlarge within 10 days of last publication of the calendar or the appeal is dismissed. There appears to be no set time for publishing such a calendar, but in practice it is done approximately every two months.

Third Department

The Third Department has no rules concerning steps that must be taken prior to filing the brief. The record, appendix or agreed statement must be filed within 60 days of service of the notice of appeal or order of transfer, the same time period prescribed for perfecting the appeal by filing the brief. Thus, unlike the First Department, but like the Second Department, the Third Department does not have separate filing dates for the record and brief. However, the Second and Third Departments differ with respect to the time period (6 months versus 60 days) and the trigger event (date versus service of the notice of appeal).

There are no rules permitting enlargement requests. The matter is handled by the rule that a civil appeal is deemed abandoned if not perfected within 9 months of the date of the notice of appeal (compare the 60-day trigger after service of the notice of appeal) but permitting time to be extended by court order. The Third Department clerk advised that the 60-day requirement is seen as a trigger for a motion to dismiss by respondents, which the rules authorize if appellant fails to comply with “any” rule. There is no separate rule resulting in dismissal of an appeal.

Fourth Department

The Fourth Department has no rules concerning steps that must be taken prior to filing the brief. The record, appendix or agreed statement must be filed within 60

days of service of the notice of appeal or order of transfer, the same time period prescribed for perfecting the appeal by filing the brief. Transferred proceedings are an exception; in those cases the court orders a briefing schedule. Thus, unlike the First Department but like the Second and Third Departments, the Fourth Department does not have separate filing dates for the record and brief. The Fourth Department is consistent with the Third Department and differs from the Second Department with respect to the time period and triggering event.

The Fourth Department has a rule that the record/appendix and brief must be filed together and will be rejected if filed separately. In no other court does this appear to happen, although with the exception of the First Department, the practice is that the record/appendix and brief are filed at the same time.

A civil appeal is deemed abandoned and dismissed if not perfected within 9 months of service of the notice of appeal but appellant may move for an extension prior to the due date showing reasonable excuse and intent to perfect in a reasonable time. Further, if the appeal is not perfected within 60 days, any party may move to dismiss and appellant must show a reasonable excuse and intent to perfect in a reasonable time, in which case the court will enter a conditional order of dismissal. As with the Third Department, the 60-day requirement is seen as a trigger for a motion to dismiss by respondent.

Subcommittee recommendation: It appears that a uniform 60-days rule and 9-months rule, each dating from the date of the notice of appeal or its service, is possible in the Third and Fourth Department where the rules are very similar. For example, the Third Department deems appeals not filed within 9 months to be “abandoned”; the Fourth Department deems them “abandoned and dismissed.” The 9-months rule dates from the date of the notice of appeal in the Third Department and from the service of the notice of appeal in the Fourth Department; in both courts the 60-days rule dates from the service of the notice of appeal. The Fourth Department enters a conditional order of dismissal if respondent moves to dismiss based on the 60 days; the Third Department does the same, though it has no express rule.

Uniformity, however, would not be possible for the First and Second Departments. The major difference is the six-month and nine-month rule. Each court seems wedded to its own time limits and is unlikely to change. Neither is it likely for the First Department to achieve uniformity with the Third and Fourth Departments in view of the First Department’s special rule for filing the record and dismissal calendar. It might be useful to probe more

deeply into whether the First Department enforces these perfection rules. If the First Departments rule were eliminated in favor of the CPLR requirements for settling transcripts, this discrepancy would be eliminated.

B. Deadlines for Respondents'/Reply Briefs

First Department

Because of its term system, the deadline for filing respondent's brief is not based on when the prior brief was filed, but on the opening date of the term. Appellant's brief must be filed at least 57 days prior to that date, respondent's brief at least 27 days prior to that date. Note that with the First Department's filing by e-mail system, respondent would get the brief by e-mail the same day it is filed. If appellant waits until the last possible day to file, then respondent gets 30 days; if an appellant files early, then the respondent gets extra time. In either case, the reply is filed 9 days after service of respondent's brief.

There is no specific rule concerning an extension of time to file respondent's brief. As a matter of practice, respondent can get one enlargement by a so-ordered stipulation (generally resulting in a change of term). Further enlargements require a motion. We were not told of the practice for an extension for the reply.

Second Department

The respondent's brief must be filed within 30 days of service of appellant's brief; the reply within 10 days of service of respondent's brief. If there is no scheduling order, the parties can stipulate once to a 30-day extension for respondent's brief and a 10-day extension for the reply.

Third Department

The rules specify respondent's brief must be filed within 45 days. In practice, and as a courtesy to counsel, the clerk's office issues a scheduling order for respondent's brief, generally 45 days. The reply is due within 10 days. The Third Department allows respondent to seek a 30-day extension and appellant to seek a 10 day extension for the reply by stipulation or telephone or letter request; otherwise, a motion is required.

Fourth Department

The rules specify that respondent's brief must be filed within 30 days. In practice, and as a courtesy to counsel, the clerk's office issues a scheduling order for respondent's brief, generally 30 days. The reply is due within 10 days.

Subcommittee recommendation: The First Department is out of step with the other Departments because of its term system. The other three Departments, however, could be made consistent. **The Subcommittee recommends that a 30-day extension for the filing of respondent's brief and a 10-day extension for the filing of the reply brief be allowed as of right upon request of the parties by letter. Perhaps the First Department could consider a rule that allows a one-term extension upon request by letter. Any other extensions must be obtained by approved stipulation or motion.**

C. Deadlines for Cross Appeals

All Departments require the cross-appellant to file its respondent's/opening brief within the respondent's time limit. That is 30 days in all Departments but the First, where the date is determined by the opening date of the term. These rules are consistent as they are going to get as long as the First Department operates with terms.

The situation is different with the appellant, who must file both a respondent's and reply brief. The First Department requires the filing of the responding and reply brief in 9 days. The Second Department fixes 30 days. The Third Department fixes 10 days. The Fourth Department fixes 10 days. The time limits in the First, Third and Fourth Departments are totally unrealistic for a document that is both a respondent's brief and a reply. **The Subcommittee recommends that appellant have the full time generally allotted for respondents' briefs (30 days), recognizing that this would necessitate adjournment to another term in the First Department.**

As to the cross-appellant's reply, the First Department permits 9 days, the other three Departments permit 10 days. **The Subcommittee recommends that all Departments permit 10 days for filing cross-appellant's reply brief.**

Uniform Sequence of Rules

Since it may not be possible or desirable to have completely uniform rules, the Subcommittee recommends uniformity to the extent feasible. Should each Department of the Appellate Division retain its own set of rules, with most of the rules being uniform but others different, the Subcommittee recommends that the Departments use parallel numbering systems so that the sequence of rules is the same in all the courts. This would enable practitioners unfamiliar with the rules of a certain Department to easily find the rule applicable in that court.

It may be worth considering whether to continue to number the rules of the First Department as 22 NYCRR part 600; to renumber the rules of the Second Department as 22 NYCRR part 700; to continue to number the rules of the Third Department as 22 NYCRR part 800; and to renumber the rules of the Fourth Department as 22 NYCRR part 900.

Alternatively, consideration should be given to using a system similar to that used in the Federal Rules of Appellate Practice, where standard rules are supplemented by local rules.

After examining the tables of contents for the practice rules for each Department, the Subcommittee proposes the following uniform sequence:

- 000.1 General Rules
 - Definitions
 - Number of Justices
 - Docket Numbers
 - Filing, Filing Fees, and Proof of Service
 - Rules Governing Quality, Size, and Binding of Papers
 - Discretion to Waive Noncompliance
- 000.2 Terms and Sessions of Court
- 000.3 Fees of the Clerk of the Court
- 000.4 Electronic Filing/CD ROM Filing
- 000.5 Initial Filings

- 000.6 Civil Appeals Settlement Program
- 000.7 Applications for Emergency Relief
- 000.8 General Motion Practice
 - Motions for Leave to Appeal to the Appellate Division
 - Motions for Poor Person Relief
 - Motions for Calendar Preference/Consolidation
 - Motions for Extensions/Adjournments
 - Motions for Pro Hanc Vice
 - Motions for Permission to File Amicus Brief
 - Motions to Dismiss or Withdraw Appeals
- 000.9 Times for Filing in the Normal Course
 - Time for Filing Record/Appendix
 - Time for Filing Appellant's Brief
 - Time for Filing Respondent's Brief
 - Time for Filing Reply Brief
 - Time for Filing When There Are Cross Appeals
 - Time for Filing When There Are Concurrent Appeals
 - Time for Filing Amicus Curiae Briefs
- 000.10 Alternative Methods for Prosecuting Appeals or Proceedings
 - Original Record Method
 - Full Record Method
 - Appendix Method
 - Stipulated Facts
- 000.11 Form and Contents of Records and Appendices
 - Form of Records and Appendices
 - Contents of Records
 - Contents of Appendices
 - Transcripts
 - Exhibits
 - Certification or Stipulation
- 000.12 Form and Contents of Briefs

Form of Briefs
Brief Covers
Appellant's Brief
Respondent's Brief
Reply Brief
Cross Appeals
Concurrent Appeals
Amicus Curiae
Addenda

- 000.13 Calendaring and Oral Argument
- 000.14 Decisions, Orders, and Costs
- 000.15 Motions for Reargument and Leave to Appeal to the Court of Appeals
- 000.16 Criminal Appeals
- 000.17 Appeals from Appellate Term
- 000.18 Original Proceedings
- 000.19 Transferred CPLR Article 78 Proceedings
- 000.20 Family Court Appeals
- 000.21 Election Appeals
- 000.22 Other Matters

SDHR
Workers Compensation
Unemployment Compensation
(See list from Second Department)

- 000.23 Confidential Materials – Sealing and Redaction
- 000.24 Electronic Recording of Oral Argument
- 000.25 Sanctions

APPENDIX

Report

of the

Appellate Division Rules Subcommittee

WORK PAPERS

Report of the Rules Appellate Division Rules Subcommittee

Appendix -- Work Papers

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GENERAL REQUIREMENTS

	AD1	AD2	AD3	AD4	Court of Appeals	Second Circuit
Paper Size	8 ½ x 11	8 ½ x 11	8 ½ x 11 (by ref. to CPLR 5526, 5529(a))	8 ½ x 11	8 ½ x 11	8 ½ x 11 (or pamphlet)
Paper Quality	Good grade, white opaque, unglazed: Recycled paper	Opaque, unglazed, white	Good quality, unglazed, white	Opaque, unglazed, white	Opaque, unglazed, white	Opaque, unglazed, white
Reproduction	Permanent legible black on white	Permanent legible black on white; Both sides encouraged	No carbon copies; Permanent legible, black on white (by ref. to CPLR 5529)	Black on white; Standard typographical printing or duplication	Permanent legible, black on white; Both sides encouraged	Black on light; Only one side
Pagination	Consecutive	Consecutive; Center bottom in margin	Consecutive (by ref. to CPLR 5529(b))		Consecutive; Center of bottom of page	May be in margin
Binding	Briefs, Records, App, on left; No sharp or protruding edges - taped; No Acco or spiral binding	Briefs, Records, App, on 11 inch side; No sharp or protruding edges	Briefs, Records, App, on left; No sharp or protruding edges	Briefs, Records, App, on left; No sharp or protruding edges	Briefs, Records, App, and Motions On left No plastic covers, No sharp or protruding edges	Secure; do not obscure text; Opens flat
Font	14 pt proportional, 12 pt fn serif, or 12 pt monospaced, 10 pt fn Max 15 or 14 pt point headings	14 pt proportional, 12 pt fn serif, or 12 pt monospaced, 10 1/2 char/inch 10 pt fn, serif		Larger than 11 point	14 pt proportional, 12 pt fn, or 12 pt monospaced, less than 10 1/2 char/inch, 10 pt fn	14 pt proportional, 12 pt fn, serif, or monospaced less than 10 1/2 char/inch
Typeface	No bold except headings	No bold or caps except headings				Plain roman style; ital. and bold for emphasis only

	AD1	AD2	AD3	AD4	Court of Appeals	Second Circuit
Margins	1 inch sides; 6 1/2 x 9 text	1 inch all sides		1 inch all sides	1 inch sides, top and bottom	1 inch all sides
Spacing	Double- spaced except footnotes, headings, quotes two lines long	Double- spaced except footnotes, headings, quotes two lines long		Double- spaced; No footnotes	Double- spaced except footnotes, headings, quotes two lines long	Double- spaced except footnotes, headings, quotes two lines long
Citation Form (See CPLR 5529(e))	NY official cites Other - official and NRS or most available source		NY official cites Other - official and NRS or most available source	NY official cites Other - NRS	NY official cites Attach if unpublished or unavailable	
Typewritten	Not less than elite size	Not less than elite; Not more than 12 char/inch; ribbon typescript to be signed and filed one of copies			Neat, not less than elite or more than 12 char/inch; double- spaced except fns, headings, point headings; consecutive numbering	
Handwritten		Permitted for pro se litigants; Cursive or hand printed in black ink; Clerk may reject if illegible			Permitted for pro se litigants; Cursive or hand printing in black ink; Clerk may reject if illegible	
Filing	Implicitly, upon receipt by clerk	Implicitly, upon receipt by clerk	Implicitly, upon receipt by clerk	Implicitly, upon receipt by clerk	Shall be addressed to Court, address, no fax or email unless requested by clerk	

	AD1	AD2	AD3	AD4	Court of Appeals	Second Circuit
Proof of Service	Required at time of filing	Required at time of filing	Required at time of filing	Required at time of filing	Affix to original, inside of back cover	
Signature		In ink on designated original		In ink on designated original	On designated original	

Requirements for all papers (Records, Appendices, Briefs):

CPLR §5526 (record) and. §5529 (brief and appendix) requirements: Most of the Appellate Divisions and the Court of Appeals use the language set forth in CPLR §5526 and. §5529(a) (or slight variation thereof) that documents “shall be reproduced by any method that produces a permanent, legible, black image on white paper”; on “white paper eleven inches along the bound edge by eight and one half inches”; and “numbered consecutively.” The Third Department merely references. §5526 and. §5529. The sense of the Subcommittee was that it appears reasonable to have an express consistent rule following the language of. §5526 and. §5529 for all documents.

CPLR §5529(a)(1) also states, “Paper shall be of a quality approved by the chief administrator of the courts.” No one on the Subcommittee was aware of chief-administrator-approved paper quality, but the Appellate Divisions and Court of Appeals all use the phrase “unglazed, opaque, good quality paper” or similar wording. The sense of the Subcommittee was that a consistent rule using the quoted phrase appears to be reasonable.

Binding: All of the Appellate Divisions and the Court of Appeals require binding on left and have a rule prohibiting the use of sharp or protruding fasteners. The First Department’s rule also refers to taping and specifically prohibits spiral and Acco binding. It was the sense of the Subcommittee that a consistent rule on binding requirements appears reasonable.

Double-Sided Copying: For Records and Appendices, all of the Appellate Divisions accept and even encourage two-sided copying but none have a specific rule on this. It was the sense of the subcommittee that a consistent rule requiring two-sided copying appears to be reasonable. Whether a similar consistent rule is appropriate for briefs is subject to further discussion.

Signatures: Only the Second and Fourth Departments and Court of Appeals expressly require signatures in ink to be affixed to documents designated originals. The sense of the Subcommittee was that a consistent rule appears to be reasonable.

Filing: The Second Department has a list of general provisions and definitions, including: “All records on appeal, briefs, appendices, motions, affirmations and other papers will be deemed filed in this court only as of the time they are actually received by the clerk and they shall be accompanied by proof of service..” The First and Fourth Departments expressly define filing only with respect to motions, while the Third Department’s rule is only implicit for all documents. It was the sense of the Subcommittee that the definition of filing should be consistent and express across the Appellate Divisions.

Other General Requirements: The Second Department also has a number of general rules addressing other definitions, service requirements, the effect of holidays, docket numbers, etc. Consideration should be given to having these additional provisions for all Appellate Divisions.

Requirements specifically applicable to briefs

The consensus was that these additional requirements should be included in a rule related solely to Form and Content of Briefs, not in the general provisions:

All Briefs: Line spacing and margins - There is effective unanimity for requiring double-spacing and one-inch margins all around, excluding pagination (although there are some textual differences among the courts). Some Appellate Divisions do not specify; First Department uses a different formulation. The sense of the Subcommittee was that consistency on these requirements appears reasonable.

Two-sided or One-sided: All Appellate Divisions but the First Department prefer two-sided copying of briefs, as does the Court of Appeals. The First Department accepts only one-sided briefs, though it has no express rule. While some think it may be easier to read one-sided copies and take notes, the consensus was that a consistent rule requiring two-sided copying might be reasonable. Two-sided copying would also be consistent with the First Department's rule requiring use of recycled paper, a rule that the other Appellate Divisions might also consider. Further discussion needed.

Footnotes: There was preliminary discussion about the Fourth Department's no footnote rule. Although the Fourth Department is clearly in the minority on this view, Justice Peridotto noted that the rule has its benefits. Further discussion is needed before a recommendation is made on this issue.

Citation Form: Most of the Appellate Divisions have express rules that generally follow the direction provided by CPLR §5528(e) that citation to New York authorities is to the official reporter only, while citations to out of state authorities is to the National Reporter System and official reporters, or to most available source. The sense of the Subcommittee was that a consistent rule on this is reasonable.

Computer-generated briefs -Typeface and Font: A great deal of discussion centered around typeface and font. There also appears to be consistency among the First and Second Departments and Court of Appeals for a rule that requires 14 point text and 12 point footnotes for proportional fonts, and 12 point text and 10 point footnotes for monospaced fonts, although the Third Department has No rule. and the Fourth Department requires at least an 11 point font. The sense of the Subcommittee was that a consistent rule like that of the First and Second Departments and Court of Appeals appears reasonable.

The Second Department also requires serified fonts, but it was noted that there is disagreement about whether serified fonts are easier to read. Whether there should be a consistent rule on serified fonts is open to discussion.

Typewritten and Handwritten Briefs: The Second Departments and Court of Appeals specify that typewritten fonts shall be no more than ten and one half characters per inch. The other Appellate Divisions have no specific rule on this. The sense of the Subcommittee was that a consistent rule for all Appellate Divisions along this line appears reasonable.

All the Appellate Divisions accept handwritten briefs from pro se litigants and do not require permission. The Third Department has No rule. but as a matter of practice requires permission to file a handwritten brief. All the courts reserve the right to reject illegible submissions, and a consistent rule in that regard is not controversial. Further discussion is needed on the requirement for obtaining permission.

JURISDICTION AND INITIAL FILINGS

	AD1	AD2	AD3	AD4
Number of Judges	Appeal argued to four judge bench deemed submitted to any other judge unless objection noted at time of argument. §600.1(c)	Appeals argued or submitted to four-judge panel deemed submitted to any other judge unless objection noted at time of argument or submission. §670.1(c)	Appeal argued to four judge bench deemed submitted to any other judge unless objection noted at time of argument. §800.1	Appeal argued to four judge bench deemed submitted to any other judge unless objection noted at time of argument. . §1000.11(e)
Disqualification	No rule.	No rule.	No rule.	No rule.
Discretion to Waive Noncompliance	No rule.	§670.23 §670.10(3)(a)	No rule.	No rule.

There is effective consistency on these rules. The Second Department adds an unobjectionable detail requiring objection to four judge panel at time of submission. All Departments agree that No rule. regarding disqualification is required. All also agree that discretion to waive non-compliance is implicit, but no problem making it explicit. In practice, appeals to the First, Third, and Fourth Departments are generally heard by five-judge panels.

	AD1	AD2	AD3	AD4
Notice of Appeal - Civil Cases	Notice of appeal, order granting leave to appeal, or order of transfer, together with preargument statement and copy of opinion or Order and Memorandum to be filed in duplicate in original court. §600.17(a),(c)	Notice of appeal or order granting permission to appeal filed in court of original instance plus two additional copies with RADI (on Form A), copy of judgment or order appealed from, copy of opinion below and Additional Appeal Information (on Form B), if applicable. §670.3(a) In transferred Article 78, file with AD two copies of transfer order with RADI and opinion in original court. §670.3(c) In appeals from Appellate Term, file copy of order granting leave in Appellate Term. §670.13(b)	Notice of appeal or order granting leave to appeal and copy of judgment, order, and/or decision must be filed with preargument statement. §800.24-a(a).	No rule.

Here is where the Second Department's unique approach to case management makes it difficult to have consistency. The Second Department tracks appeals from the time they are filed through final appellate division disposition and therefore requires the filing of a RADI with copies of the notice of appeal at the time the notice of appeal is filed in the court below. The Second Department therefore has a dismissal calendar

for appeals that are not perfected. If e-filed, the First Department will receive an electronic copy of the notice of appeal from court below, but it is not receptive to the Second Department's approach to case management. Nor does the Third Department track appeals before the first motion is made or the appeal is perfected. The First and Third Departments require initial filings for the sole purpose of considering settlement potential. The Fourth Department requires no initial filings whatsoever and has no interest in resurrecting a settlement program. So long as there is this basic difference in approach to case management and settlement procedures, consistency of rules concerning initial appellate filings is problematic.

	AD1	AD2	AD3	AD4
Notice of Appeal - Criminal Cases	No rule.	In criminal cases, notice of appeal from conviction is filed in duplicate in original court. §670.3(b)	No rule.	No rule.

There appears to be some room for consistency in these rules, assuming that the unwritten rule is the same in all four courts re filing notices of appeal in criminal cases.

	AD1	AD2	AD3	AD4
Pre-argument Statement - When Filed	Filed (except for Family Court cases) in duplicate, in civil cases, in original court in which notice of appeal is filed, order granting leave is entered, or order transferring CPLR Article 78 to Appellate Division is entered, with opinion below and notice of appeal or order granting leave. §600.17(a)	In civil cases, Request for Appellate Division Intervention (RADI) is attached to duplicate notices of appeal and filed in trial court. §670.3(a) In criminal cases, trial court clerk prepares RADI upon receipt of notice of appeal and sends to AD. §670.3(b)	All civil cases except Election Law, CPLR Articles 70 and 78, Unemployment Insurance Appeals Board and Workers Compensation Board appeals; appeals pursuant to 168-n(3) of the Correction Law; appeals from Family Court abuse, neglect, juvenile delinquency or PINS proceedings; file pre-calendar statement with notice of appeal or order granting leave. §800.24-a(a)	No rule. (Nothing beyond CPLR 5531)

The First and Third Departments require the filing of preargument statements for their settlement programs. The Second Department uses its RADIs to screen for inclusion in settlement program. The Fourth Department is wholly uninterested in having a settlement program or in having an initial filing before motions or perfection. First Department requires preargument statements in Article 78 proceedings, while Third Department does not.

	AD1	AD2	AD3	AD4
Pre-argument Statement - Contents/ Request for Intervention	Title; original parties and any changes; name, address, phone number of all counsel; court and county (or administrative body) from which appeal is taken; nature and object of case below; results below; grounds for seeking reversal; status of related action in any court of any jurisdiction; if other appeal pending attach notice of appeal and preargument statement and date of entry of order. §600.17(b)	RADI (Form A) requires title; case type; filing type; nature of suit; paper appealed from; court and judge appealed from; description of paper appealed from; amount at issue; issues to be raised on appeal; party information; attorney information. §670.24	Title; original parties and any changes; name, address, phone and fax of all counsel; court, judge and county appealed from; index number; RJI number; nature and object of action or proceeding; statement of grounds for reversal; related appeals; copy of order, opinion, notice of appeal or order granting leave. §800.24-a(b)-(c); use form in. §800.24-a(e)	No rule. (Nothing beyond CPLR 5531)

There appears to be an opportunity to make the content requirements of these initial filings consistent.

	AD1	AD2	AD3	AD4
Filing Fees	Filing record (except where poor person relief) \$315; no exemptions listed. §600.15(a)-(b)	Filing record on civil appeal, initiating special proceeding, \$315. §670.22(a)(1). motion fee \$45, except for motion for leave to appeal as poor person under CPLR 1101(a). §670.22(a)(2); certain parties exempt from all fees. §670.22(c)	Filing record on civil appeal \$315. Exemptions: state or state agency, government agency exempted by law; party authorized to appear as poor person; claimant on appeal from decision of Unemployment Insurance Board. §800.23(a)	Not required of person granted permission to appeal as poor person. §1000.14(d). Filing fee for appeal or original proceeding incorporates by reference CPLR 8022. §§1000.3(b), 1000.9(b). Filing fee required to be paid to perfect appeal. §1000.3(b). Motion filing fee is \$45, except for motions for poor person relief. §1000.13(a)(5)(v)

	AD1	AD2	AD3	AD4
Docket Numbers	No rule. Use lower court index, indictment or docket number on all papers.	Filing of Request for Appellate Division Intervention results in issuance of Appellate Division Docket Number, which must be displayed opposite title on first page of all papers and correspondence. §670.2(e)	No rule.	Rules refer to docket number, if any, but No rule. for assigning docket number. Docket number assigned when appeal perfected or first motion made.

These rules are basically consistent. We may want to have a uniform mechanism to bring to court's attention statutory provision for exemption from filing fee. CPLR 8022 is not the only relevant statutory provision. Note: Unemployment Insurance Board appeals are unique to Third Department.

**GENERAL MOTION PRACTICE
(EXCLUDING ORDERS TO SHOW CAUSE)**

	AD1	AD2	AD3	AD4
Content of Motion	Nature of relief, return date, names of all attorneys, n/appeal and order to be reviewed if before appeal heard, proof of service. §600.2(a)(3),(4)	Nature of relief, return date, names of all attorneys, n/appeal and order to be reviewed. §670.5(c)(d)	Notice that personal appearance not required. §800.2(a)	Supporting affidavits, proof of service, n/appeal or transfer order, order and decision being appealed, any prior AD order, docket no if assigned. §1000.13(a)(5),

There was consensus that a listing would be helpful and should include all items listed above.

	AD1	AD2	AD3	AD4
Return Date	9/1-6/30: Any business day July/Aug: Mon. only. §600.2(a)(1)	Any Friday. §670.5(a)	Any Monday. §800.2(a)	Any Mon or next business day if holiday. §1000.13(a)(1)

The First, Second and Third Departments agreed that allowing motion to be returnable on any day was acceptable. The Fourth did not want to abandon the Monday return date. (I note that CPLR 2214 requires specifying “the time and place of the hearing on the motion.”) The First Department prefers to keep its current system b/c the return date is the basis for assigning motions to panels. If a single return day, Mondays seem to accommodate cross motion timing concerns.

	AD1	AD2	AD3	AD4
Return Time	10 a.m. §600.2(a)(1)	9:30 a.m. §670.5(a)	none	10 a.m. §1000.13(a)(1)

All preferred to specify a time b/c it gives a time limit for litigants to file any last minute papers before distributing them to justices (though this could be accomplished by distributing them the next day), and agreed that 10 a.m. was acceptable.

	AD1	AD2	AD3	AD4
When to Serve	CPLR 2214(b). §600.2(a)(4)	CPLR 2214. §670.5(a)	CPLR 2214. §800.2(a)	8 days in person or electronic; 13 days by mail; 9 days overnight delivery. §1000.13(a)(2)

The detail in the Fourth Department rule is based on CPLR 2103. Nobody objected to the idea that specifying the two relevant CPLR rules or spelling out the requirements would be useful.

	AD1	AD2	AD3	AD4
When to File	By noon of business day preceding return date. §600.2(a)(4)	At least one week before return date. §670.5(b)	As soon as possible. §800.2(a)	By 5 Friday before return date or Thursday if Friday is holiday. §1000.1(a)(4)(i)

There was no consensus. Each Department agreed that it would be fine if attorneys filed at the same time they served, but each had a reason for wanting to give the attorney some flexibility in filing and there were differences as to how much flexibility. Perhaps a preference can be stated to have the motion papers filed at least one week before the return date, but in no case later than 12:00 p.m. on the business day preceding the return date. This may make some sense from a processing viewpoint b/c all agreed that opposing papers should be filed by 5 p.m. on the business day preceding the return date.

	AD1	AD2	AD3	AD4
How to File	Personal delivery or Mail (envelope marked “motion papers”). §600.2(a)(6)			Original and 1 copy. §1000.13(a)(5)(iii)

“How to file” is probably taken care of in the rule defining “filing.” The particular requirements of the First and Fourth Department meet the perceived needs of their clerk’s office and there seems no basis to recommend that all departments adopt either or both (except for consistency). The need for the extra copy may be alleviated by electronic filing system in the future.

	AD1	AD2	AD3	AD4
Opposing and Reply Papers - Service	CPLR 2214. §600.2(a)(5)	<i>Opposing papers</i> by method calculated to place movant in receipt on or before 9:30 a.m. of return date. §670.5(b)	No rule.	No rule.

It may be that this could be dealt with in the same way as the service of the originating papers. However, I note that CPLR 2214 does not cover the service of *reply* papers *unless* the notice of motion (if served 16 days before return date) demands that “answering affidavits and any notice of cross-motion” be filed at least 7 days before return date in which case reply or responding (presumably to the cross-motion) affidavits must be served at least 1 day before return date.

	AD1	AD2	AD3	AD4
Reply Papers - Filing	By 4 p.m. on day before return date; if by mail in an envelope marked “motion papers”. §600.2(a)(5),(6)	No rule.	No rule.	By 5 p.m. On Friday before return date or Thursday if Friday is legal holiday. §1000.13(a)(4)(i)

Those Departments who specify seem to want the opposing and reply papers filed by the same time, so this should probably be the common rule.

	AD1	AD2	AD3	AD4
Argument on Motions to Serve	No. §600.2(c),(d)(i)	No. §670.5(b)	Only with permission of court or justice. §800.2(a)	No. §1000.13(a)(6)

As a matter of practice, all Departments allow argument on motions only with permission of the court or a justice. The preference is probably not to spell this out.

	AD1	AD2	AD3	AD4
Adjournments	Once by written consent of all parties. §600.2(d)(2)	No rule.	No rule.	Only with written consent of moving party or court order. §1000.13(a)(1)

All Departments were amenable to permitting one adjournment by written consent of the parties. The First Department rule, under which the adjournment was automatic and did not require the imprimatur of a judge, was not preferred by the Fourth Department. There was limited discussion whether the written consent method of getting an adjournment, even if requiring court imprimatur, should be limited to one adjournment. Perhaps the “once by written consent” procedure might be acceptable to all courts if it were constrained by a time limit of say, 14 days.

	AD1	AD2	AD3	AD4
Cross Motions	Returnable same day as original motion served 3 days before return date No rule. re filing. §600.2(a)(2)	Returnable same day as original motion served 3 days before return date filed 3 days before return date. §670.5(a)	No rule.	Returnable same day as original motion served personally or overnight delivery service served 4 days before return date filed no later than 5 p.m. on Friday before return date. §1000.13(3),(4)(i)

CPLR 2215 provides for three days’ service. The Fourth Department rule accommodates the fact that it fixes all return days as Monday. This might also be dealt with, as other rules, by reference to the relevant CPLR provisions.

	AD1	AD2	AD3	AD4
Withdrawal of Motion	No rule.	No rule.	No rule.	At any time prior to return date upon written request of movant. §1000.18(a)

The First, Second and Third Departments apparently permit withdrawal of a motion even after the return date. The Fourth Department did not feel this was a good idea.

SPECIAL MOTIONS

	AD1	AD2	AD3	AD4
Pro Hac Vice	Lawyer from another jurisdiction admitted to participate in the “trial or argument of a particular cause” upon application to and in discretion of court. §602.2(a) (note: this is not in rules of practice but in Part 602: “Admission to Practice”)	Attorney or equivalent may move pursuant to. §520.11(a)(1) with respect to cause pending in AD upon affidavit stating: attorney in good standing, associated with NY lawyer who gets service; and attaching certificate of good standing. §670.6(e)	Verified petition stating: facts showing compliance with. §520.11(a)(2), nature of services to be performed, courts in which attorney to appear, time period. §805.3 (note: this is not in rules of Practice but in Part 805: Admission of Attorneys)	Attorney or equivalent may move pursuant to. §520.11(a)(1) with respect to a matter pending in AD upon affidavit stating: attorney in good standing, associated with NY lawyer who gets service; and attaching certificate of good standing. §1000.13(l)

The First Department will review the rules of the other Departments to see if they were useful. *Note:*. §520.11(a)(1) refers to an application to “any court of record” with respect to the right “to participate in any matter in which the attorney is employed” whereas. §520.11(a)(2) refers to the Appellate Division and does not contain the same qualification. That may explain why the Second and Fourth Department rules are in the rules of practice and the First and Third Department rules are in the Admission of Attorneys section.

	AD1	AD2	AD3	AD4
Mootness	No rule.	Notify AD if settled, moot, bankruptcy, etc. And case should not be calendared. §670.2(g)	No rule.	Notify AD when case settled, moot, bankruptcy, or death and case should not be calendared. §1000.18(c)

The Departments agreed that a rule specifying notification of the court under certain circumstances is appropriate and need not refer to the future calendaring of a case.

	AD1	AD2	AD3	AD4
Amicus Curiae Relief	No rule.	Leave obtained by motion on notice to all parties. §670.11(a)	No rule.	Leave obtained by motion. §1000.13(k)

The Department agreed that the rule as expressed by the Second Department is appropriate.

EMERGENCY APPLICATIONS/ORDERS TO SHOW CAUSE

	AD1	AD2	AD3	AD4
Emergency Application	When applying for an interim stay or other relief pending determination of a motion, there will be no direction to a party “to show cause” why an order should not be entered. §600.2 (a)(7)	No rule.	No rule.	No rule.

The First Department provides for emergency applications for an interim stay or other relief, but eliminated the order to show cause (OTSC) nomenclature years ago. The other Departments require use of a formal order to show cause, but really it is an application for interim relief while a court considers a full motion. It appears that conformity of language may be possible at no cost.

	AD1	AD2	AD3	AD4
Responding Papers	Answering papers on a motion must be <u>served</u> within the time directed by a justice of the court and <u>filed</u> by 4:00 p.m. in the afternoon of the business day preceding the day on which the application is returnable unless, for good cause shown, they are permitted to be filed at a later time. §600.2 (a) (5)	Papers in response to a motion or proceeding brought on by order to show cause must be <u>filed</u> by 9:30 a.m. of the return date and <u>served</u> by a method calculated to place the movant and other parties in receipt thereof on or before that time. §670.5 (b)	Papers in response to an order to show cause shall be <u>filed</u> at or before 9:00 a.m. of the return date. §800.2 (a)	Papers in response to a motion brought on by order to show cause shall be <u>served</u> and <u>filed</u> no later than noon of the return date. §1000.13 (b)

The First Department generally requires responding papers to be filed on the afternoon before the return date so the clerk can prepare a report; the Second Department in practice accepts papers any time on the return date. All the Appellate Divisions have an interest in having responsive papers to be filed in time for a judge to review papers and decide the application on return date.

	AD1	AD2	AD3	AD4
Nature of Motion	No rule.	The order to show cause must set forth the nature of the motion or proceeding, the specific relief sought, the return date and the names, addresses and telephone numbers of the attorneys and counsel for all parties in support of and in opposition to the motion or proceeding. §670.5 (d)	No rule.	No rule.

The Second Department’s rule provides for fairly standard contents of the application/OTSC, although the addresses and phone numbers of all attorneys are often not included and are not absolutely required. The other Appellate Divisions would have no problem with this rule.

	AD1	AD2	AD3	AD4
Notice to & Consent of Opposing Parties	When an application for an interim stay or other relief pending determination of the motion is sought, the party seeking such relief must inform the clerk at the time of submission whether the opposing party has been notified of the application and whether such party opposes or consents to the granting of the relief sought. §600.2 (a) (7)	When a temporary stay or other interim relief is sought by order to show cause, the party seeking such relief must give reasonable notice of the day, time when and location where the order to show cause is to be presented and the relief being requested. Where such notice is given, the order to show cause must be accompanied by an affidavit or affirmation stating the time, place, by whom given, the manner of the notification and, to the extent known, the position taken by the opposing party. If notice is not given, the affidavit or affirmation shall state whether the applicant has made an attempt to give notice and the reasons for the lack of success. If the applicant is unwilling to give notice, the affidavit or affirmation shall state the reasons for such unwillingness. §670.5 (e)	When the order to show cause makes provision for a temporary stay or other interim relief, the moving party must inform the justice or the clerk at the time of submission of the proposed order to show cause that the opposing party has been notified of the application and whether such person opposes or consents to the granting of the interim relief sought. §800.2 (d)	When the moving party seeks a temporary stay or other emergency relief that party must give reasonable notice to all other parties of the date and time when, and the location where, the order to show cause will be presented and all counsel may be present upon presentation of the order to show cause. When the presence of adverse counsel cannot be obtained, the papers in support of the order to show cause shall include an affidavit setting forth the manner in which reasonable notice has been given and an explanation for the failure to obtain the presence of adverse counsel. §1000.13 (b)

Concerning notice to and consent of opposing parties, the First and Third Departments have very similar rules and the Second and Fourth Departments have similar rules. The Second and Fourth Department rules require a detailed affidavit or affirmation stating manner of notification and opposing party's view, or an explanation for why notice has not been given or opposing counsel has not appeared. The First and Third Departments can live with a version of the Second and Fourth Department rules, though they would not force strictly.

	AD1	AD2	AD3	AD4
	The time and manner of service of motion papers shall be directed by a justice, the relief granted will be by brief order appended to the notice of motion and the justice's signature will apply to the stay or provisional remedy only. §600.2 (a) (7)	No rule.	No rule.	No rule.

The First Department needs this rule b/c it does not use the OTSC format. Otherwise, the required information is standard information included in the OTSC in other Departments.

	AD1	AD2	AD3	AD4
CPLR 5704	No rule.	CPLR 5704 applications require same notice procedures as orders to show cause. §670.5 (e)	No rule.	An application for relief pursuant to CPLR 5704 (a) shall be made using the procedures set forth in. §1000.13 (a) for an order to show cause. §1000.13 (b) (2)
Presentation	No rule.	An order to show cause seeking a temporary stay or other interim relief or a CPLR 5704 application must be personally presented for signature by the party's attorney or by the party if such party is proceeding pro se. §670.5 (e)	No rule.	No rule.

The First Department considers CPLR 5704 applications ex parte even if respondent argues in opposition. The Third Department prefers not to address CPLR 5704 applications in the courts' rules. The Second Department requires personal presentation unless otherwise permitted by the court. The Third and Fourth Departments permit presentation of the application by fax, given the geographic span of those Departments.

	AD1	AD2	AD3	AD4
Judge	No rule.	No rule.	No rule.	The order to show cause shall be directed to a justice of that Court with chambers in the judicial district from which the appeal arose. §1000.13 (b)

The First, Second and Third Departments have duty judges, although in the Second and Third Departments, the parties can go to any judge. Due to geography, the Fourth Department requires the OTSC to go to rotating duty judge in district. Any consistent rule would have to take into account geographic character of each Department.

	AD1	AD2	AD3	AD4
Criminal	No rule.	No rule.	No rule.	An application for a stay of a judgment in a criminal case may be made by motion or by order to show cause. §1000.13 (c)

Applications for emergency relief in criminal cases can go to any judge and may be decided the same day or the next day.

	AD1	AD2	AD3	AD4
Family Court	No rule.	No rule.	No rule.	Unless otherwise ordered by a justice of that Court, an application for a stay pursuant to Family Court Act. §1114 <u>shall</u> be made by order to show cause. §1000.9 (b) (1)

In the First Department stay applications under Family Court Act. §1114 can be made by application or by motion, but regardless, they are decided by a single judge. In the Second and Third Departments, such stay applications may be made by motion or by OTSC, but again are decided by a single judge. The Fourth Department requires such applications to be made by OTSC because the statute states that it should be a single judge application. Again, Departments use basically the same procedure, but different nomenclature. The Fourth Department uses the more precise language.

	AD1	AD2	AD3	AD4
CPLR 8022	No rule.	No rule.	No rule.	Where an original proceeding is commenced by order to show cause the filing fee required by CPLR 8022 shall be paid in advance. §1000.9 (b) (1)

The statute - CPLR 8022 - requires fee to be paid in advance. It is not necessary to re-state in the courts' rules, but may be helpful. The First, Second and Fourth Departments require payment upon presentation of the application/OTSC, though in the Second Department the fee can be waived or applied as payment of the fee for filing notice of petition if the OTSC is denied. Third Department requires payment of fee only if the OTSC is signed.

MOTIONS FOR A PREFERENCE

	AD1	AD2	AD3	AD4
	If entitled to a preference by law, a party may serve and file a demand for a preference which shall set forth the provision of law relied upon. §600.12 (a) (1)	If entitled to a preference by law, a party may serve and file a demand for a preference which shall set forth the provision of law relied upon. §670.7 (b) (1)	No rule.	No rule.

The First and Second Departments' rule is acceptable for all.

	AD1	AD2	AD3	AD4
	A preference under CPLR 5521 may be obtained upon good cause shown in an application made to the Court on notice to the other parties to the appeal. §600.12 (a) (2)	A preference under CPLR 5521 may be obtained upon good cause shown in an application made to the Court on notice to the other parties to the appeal. §670.7 (b) (2)	No rule.	A motion to expedite an appeal or proceeding shall be supported by an affidavit setting forth with particularity the compelling circumstances justifying an expedited appeal or proceeding. §1000.13 (m)

The First, Second and Fourth Departments' rules are substantially the same and are acceptable for all, although which standard - "good cause" or "compelling circumstances" - should track statutory requirement. Neither standard is specified in the statute, however.

SETTLEMENT FACILITATION & WITHDRAWAL OF APPEALS

The Fourth Department did not take part in our monthly conference call and advised that it has no intention of reconsidering its jettisoning of settlement facilitation efforts some years ago. The balance of this discussion is limited, for the most part, to the other three departments.

Settlement Facilitation Rules in the First, Second, and Third Departments

One outstanding distinction in respect to the pre-appeal form (Pre-Argument Statement in the First, RADI in the Second, Pre-Calendar Statement in the Third Department) is the use to which these documents are put. Unlike the other departments, which track cases only when an appeal is perfected or a motion or other proceeding is instituted at the Appellate Division, the Second Department uses its RADI form to track cases immediately upon receipt of those documents from the lower court, and it also uses them to screen cases for the settlement program. Because of its dual use, the RADI form requires certain information not required by other departments (while the other departments require certain info not required on the RADI). There are NO EXCEPTIONS to the requirement of a RADI in the Second Department, whereas certain appeals do not require a Pre-Argument Statement in the First Department (Family Court, Criminal and pro-se appeals, the latter an unwritten exception), or a Pre-Calendar Statement in the Third (Election Law, Articles 70 and 78, Unemployment Ins. Or Workers' Comp., Corrections Law. §168-n(3) and certain Family Court appeals).

Nevertheless, the form and contents of the document filed with the notice of appeal in these three departments provide, I think, the most likely and helpful possibility for uniformity. None of the Court Clerks participating appeared to voice objection to the notion of formulating a single document containing *all* of the information which *any* of the departments deems important, nor to the idea that the document received may contain more info than they individually require. If nothing else comes of our efforts but the formulation of a single document for use by appellants to the First, Second and Third Departments, we'll have earned our keep.

At present, the Court initiates pre-argument conferences in all three Departments, although, by rule or custom, a party may request a pre-argument conference (after 20 days in the First Department, 30 days in the Third Department). (The Second Department has no stated rule, but in fact will entertain requests for conferences from the parties.) The 1st and 2nd Depts. want to continue sua sponte scheduling of settlement conferences because their programs are so successful. A standardized rule might be helpful.

Both the Second and the Third Departments set forth the purpose of the conference: to settle the case, narrow the issues, or otherwise deal with the appeal. The First Department has no stated rule. Given the penalties available for non-compliance, it may behoove us to have a uniform standard apply in the First Department as well. The First and Second Department rules provide that the parties may be required to attend a pre-argument conference (usually, as a matter of practice, on the second or third meeting). The Third Department requires attendance by the party unless excused. Harmony seems unlikely here.

Both the Second and Third Department permit sanctions, in the absence of good cause shown, for failure to appear at a pre-argument conference and for failure to abide by a resulting stipulation or order. The First Department, in addition to those grounds, permits sanctions for failure to comply with rules governing filing a pre-argument statement (which includes filing a “counter-pre-argument statement” upon the calling of a conference - - a requirement about which many seasoned appellate practitioners know nothing), as well as for failure to “demonstrate good faith” during the conference. I’m leery of those two, especially the latter, though I can’t imagine the First Department giving them up.

The Second and Fourth Departments both have rules requiring notification to the Court in the event of full or partial settlement, or death or bankruptcy of a party, the Second Department expressly stating that failure to do so may result in sanctions. The First and Third Department clerks indicated that they would expect the parties to promptly advise the court, even without a stated rule. In fact, failure to do so would seem to be frivolous maintenance of an appeal. Nevertheless, one would think a uniform rule should be attainable. On the other hand, appellate counsel are not always immediately informed about settlement or death or bankruptcy of the client.

Withdrawals of Appeals

Most fractious among the departments in this area of appellate practice (other than the 4th Dept.’s non-involvement with settlement facilitation) are the approaches to withdrawal of appeals. The First and Third Departments although having no stated rule, permit withdrawal before perfection by letter to the lower court (except where a pre-argument conference was called; then a stipulation is required); by stipulation after the first filing with the appellate court; and withdrawal is apparently permitted by stipulation even after oral argument. In the Second Department, again with no stated rule, withdrawal is permitted before submission of a Respondent’s Brief by letter to the Appellate Division; withdrawal is by stipulation thereafter, but withdrawal is generally not permitted after oral argument. The Fourth Department rule is clear and written: withdrawal is permitted only by stipulation of the parties any time before a decision is rendered.

SETTLEMENT & WITHDRAWAL OF APPEALS

	AD1 Pre-Argument Statement	AD2 RADI	AD3 Pre-Calendar Statement	AD4	Court of Appeals	2d Circuit
Filed	In court below with Notice of Appeal or Order granting leave and opinion below. §§600.17(a)	In court below with Notice of Appeal (In criminal cases, prepared by Clerk). §670.3(a), (b)	In appellate court and in court below with Notice of Appeal or Order granting leave. §800.24-a	No rule.	No rule.	No Filing
Exceptions	Family court cases Criminal Cases	None (But conferences only on civil cases)	Election Law, Articles 70,78, Unemployment Ins., Workers' comp., Correction Law 168-n(3), Family Court - abuse, neglect, juvenile delinquency, or PINS	No rule.	No rule.	Pro Se, non-argument calendar, Writ Habeas Corpus, Mandamus, Prohibition. §33.1(a)
Contents beyond Title, purpose of action, party info, attorneys info, court below, description of order, judgment appealed, grounds for seeking reversal	Changes to parties, status of any related action, any other appeal pending in action (attach Notice of Appeal, Pre-Argument statement, date of entry of order). §600.17§b	Filing type (appeal, 5704, etc.), Judge appealed from, amount of Judgment. §670.24	Changes to parties, Judge appealed from, index #, RJJ #, related appeals. §800.24-a	No rule.	No rule.	No Filing
Conferences	Scheduled by Court, or party may request after 20 day. §600.17). within 10 days, respondent must file counter pre-argument statement. §600.17(g)	Scheduled by Court. §670.4(b)(1) (but in practice, party can call CAMP to spur conference)	Scheduled by Court; party may request after 30 days.	No rule.	No rule.	Called by staff counsel. §33.1(b), or by "parties". §33.1(d)

	AD1 Pre-Argument Statement	AD2 RADI	AD3 Pre-Calendar Statement	AD4	Court of Appeals	2d Circuit
How Held-Attendees	In person; parties may be required to attend. §600.17(e)	In person; parties may be required to attend. §670.4(b)(2)	In person; parties must attend unless excused. Attorney must have binding authority or bring someone with him/her who does. §800.24-b(a)	No rule.	No rule.	In person, or, with staff counsel OK, by telephone or video. Counsel without client, but with “as much authority as feasible”. §33.1(g)
Subject of Conference	No rule.	Settlement, limitation of issues, other matter. §670.4(b)(1)	Settlement, limitation of issues, other matters	No rule.	No rule.	Settlement, narrow issues, other matters. §33.1(c)
Result	Stipulation-court ordered. §600.17(i)	Stipulation or Order. §670.4(b)(2)	No rule. Court will issue order granting voluntary dismissal of appeal, but will not so-order settlement.	No rule.	No rule.	May result in order; all else is confidential. §33.1(e)
Sanctions	Failing to follow rules regarding filing Pre-Argument Statement or counter statement, fail to appear for or “demonstrate good faith” during conference, fail to comply with conference order or stipulation. §600.17(h)	Failure to appear for conference, failure to comply with conference stip. or order. §670.4(b)	Failure to appear or comply with post conference stipulation or order. §800.24(b)	No rule.	No rule.	Failure to “participate in good faith”

	AD1 Pre- Argument Statement	AD2 RADI	AD3 Pre-Calendar Statement	AD4	Court of Appeals	2d Circuit
Notification of Settlement	No rule.	Must notify of full or partial settlement, or death or bankruptcy or rehabilitation of party. Failure can result in sanctions. §670.2(g)	No rule.	Must notify if proceeding or any issue settled or moot, or of bankruptcy or death of a party. §1000.18(c)	No rule. (but see below)	No rule. (but see below)
Withdrawal of Appeals	No rule. Before any filings, by letter, then actual withdrawal in lower court. After filings, by stipulation or motion up until the time of decision.	No rule. Before any filing of briefs, by letter. After filing of appellant's brief, by letter or stipulation. After filing of respondent's brief, by stipulation or motion. After argument, by motion only.	No rule. Before any filings, parties may withdraw appeal in court of original instance. After filings, by letter to appellate division.	Only by stipulation signed by all parties any time before decision. §1000.18(b) May also be withdrawn by motion, but no unilateral withdrawal after papers are filed.	Before oral argument by stipulation of all parties. After oral argument by stipulation of all parties to be considered by the Court.	By stipulation, including how costs and fees are to be paid.; On motion of appellant upon agreed terms or as fixed by Court. Dismissal without prejudice to reinstatement only by "so-ordered" stipulation or motion.

FILING DEADLINES, EXTENSIONS & ABANDONMENT¹

	AD1	AD2	AD3	AD4
Filing Deadlines - Settlement of Transcript	Within 15 days of receipt of transcript, appt serves resp; response required within 15 days; if unresolved objections, submit to judge for settlement; if not, transcript deemed correct. §600.5(e)	No specific rule	No specific rule	No specific rule

The First Department restates most of CPLR 5525 (it does not repeat the requirement that the transcript must be ordered within the time to file a notice of appeal). There appeared to be consensus that there is no particular benefit to having a rule that says what the CPLR says and it might be just as useful to simply refer to the CPLR

	AD1	AD2	AD3	AD4
Filing Deadlines - Record/Appendix	If appendix method, record on appeal must be subpoenaed within 30 days of settlement of transcript. §600.5(a)(1) If agreed statement, statement must be filed within 30 days of approval by court. §600.5(b)(2) If full record, record must be filed within 30 days of settlement of transcript. §600.5(c) If no transcript, record must be filed within 30 days of filing of notice of appeal. §600.5(d) If transferred, record must be filed within 30 days after entry of order of transfer. §600.7(b) Appendix filed with brief (see filing deadlines brief). §600.11(b)(2)	Record/Appendix/Agreed Statement must be filed within 6 months of date of notice of appeal, order granting leave to appeal or order of transfer. §670.8(e)	Record/Appendix/Agreed Statement must be filed within 60 days of service of notice of appeal. §800.9(a) In transferred proceedings, record/appendix must be filed within 60 days of entry of transfer order. §800.19	Record/Appendix/Agreed Statement must be filed within 60 days of service of notice of appeal. §1000.2(b)

¹ Does not include Family Court or Criminal Appeals or original proceedings. Separate rules applicable to transferred proceedings will be noted.

1. Only the First Department imposes a time limit with respect to the filing of the record separate from the rules for the filing of the brief and appendix. The 30-day rule serves as a trigger for respondents to move to dismiss at an early point; such motions will be denied, but the court may then set a briefing schedule. As a practical matter, however, the 30-day rule is virtually never followed.

2. The six-month (Second Department) rule is subject to the right to seek an enlargement. The court felt that a six-month rule with the right to enlargement in the context of the court's tracking system was more likely than a nine-month rule to meet the ABA recommendation that all appeals be resolved within one year.

3. The 60-day rule (Third and Fourth Departments) is seen as a trigger for respondents to push appellant to perfect appeal. Unlike the way the Second Department views its six-month rule, the 60-day period is not considered the outside date for perfecting the appeal by the Third and Fourth Departments, which have a nine-month rule for abandonment.

4. The Second Department's six-month rule is triggered by the date of the notice of appeal; the Third and Fourth Departments' 60-day rule is triggered by service of the notice of appeal. The Second Department requires counsel to file three copies of the notice of appeal, one of which the clerk must transmit to the Second Department. §670.3(a), at which point a docket number is assigned and the case is tracked. Since the notice of appeal is not accompanied by the affidavit of service, the Second Department clerk cannot base its monitoring on the date of service. The Third and Fourth Departments assume that if respondent files a motion for failure to comply with the 60-day rule, respondent will include a copy of the notice of appeal and statement of service. The Third Department seems willing to entertain using date of notice of appeal or transfer order instead of service date as a trigger. The Fourth Department prefers to use service date as a trigger, even though the deemed dismissal nine months after service is automatic, not on motion, raising the question how the date of dismissal is determined where the court does not know the service date.

5. The Fourth Department has an unwritten rule that the record/appendix and appellant's brief must be filed together, and will be rejected if filed separately.

	AD1	AD2	AD3	AD4
Filing Deadlines - Appellant's Brief	Brief must be filed with note of issue at least 57 days prior to first day or term for which appeal noticed. §600.11(b) §600.11 applicable to action on submitted facts. §600.7 §600.11 applies to all enumerated appeal (listed in. §600.4 and including transferred proceedings)	Brief must be filed within 6 months of date of notice of appeal or date of the order transferring case. §670.8(e)	Brief must be filed within 60 days of service of notice of appeal. §800.9(a) In transferred proceedings, brief must be filed within 60 days of entry of transfer order. §800.19	Brief must be filed within 60 days of service of notice of appeal. §1000.2(b) In transferred proceedings, court will order briefing schedule. §1000.8(a)
Filing Deadlines - Respondent's Brief	Brief must be filed at least 27 days before first day of term for which appeal is noticed. §600.11(c)	Brief must be filed within 30 days of service of appellant's brief. §670.(8)(b)	Clerk issues scheduling memorandum generally providing 45 days to file brief. §800.9(b)	Clerk issues scheduling order generally requiring filing of brief within 30 days of service of appellant's brief. §1000.2(b)

The Third and Fourth Departments appear to look upon the scheduling memorandum/order as a courtesy to the litigants to make sure they know what the time limits are.

	AD1	AD2	AD3	AD4
Filing Deadlines - Reply Brief	Reply must be filed within 9 days after service of respondent's brief. §600.11(c)	Reply must be filed within 10 days after service of respondent's brief. §670.8(b)	Reply must be filed within 10 days after service of respondent's brief. §800.9(c)	Reply must be filed within 10 days after service of respondent's brief. §1000.2(e)

Susanna Rojas said she'd check to see if the 9 days could be 10 days. She thinks 9 days was chosen to fit in with the court's scheduling (certain things are done on Wednesdays and Fridays).

	AD1	AD2	AD3	AD4
Cross-Appeals and Concurrent Appeals	Parties shall consult and file joint record or appendix, cost to be borne equally; first filer of notice of appeal perfects, respondent/cross appellant to file brief by date scheduled for a respondent for specified term, reply/cross cross-respondent's brief to be filed within 9 days, reply to be filed within 9 days. §600.11(d)	Unless otherwise directed by court, parties shall consult and file joint record or appendix; first deadline measured from last date of notice of appeal; respondent/cross appellant's brief to be filed within 30 days, reply/cross-respondent's brief to be filed within 30 days, reply to be filed within 10 days. §670.8	Unless otherwise directed by court, plaintiff shall be appellant and file first; respondent/cross appellant's brief to be filed within 30 days, reply/cross-respondent's brief to be filed within 10 days, and reply to be filed within 10 days. §800.9(e)	Where there are multiple appellants from single order/judgment, appeals may be consolidated on motion or stipulation designating party responsible for filing record. §1000.4(b)(1) respondent/cross appellant's brief to be filed within 30 days, reply/cross respondent's brief within 10 days, and reply within 10 days. §1000.2

All agree that the 9- or 10-day limit to reply a reply/cross-respondent's brief is completely unreasonable.

	AD1	AD2	AD3	AD4
Deadlines Fixed by Courts		Court may direct "active management" of appeal and fix timing of all stages. §670.4(a)(1)(2) Scheduling order may be amended on good cause. §670.4(a)(3)		

The Second Department has the ability to track all cases from the filing of the notice of appeal. As stated, a copy of the notice of appeal is sent to the Second Department by the trial court clerk and the Second Department then assigns a number.

	AD1	AD2	AD3	AD4
Motions to Enlarge	No rule. (but see below)	If no scheduling order, parties may stipulate once to 60-day extension for appellant's brief, 30-day extension for respondent's brief, 10-day extension for reply brief (as long as ordered by clerk). §670.8(d)(1) Letter application (sent to clerk) may be granted by clerk or justice with showing of reasonable grounds for failure to perfect; motion for full bench review of order granted based on letter application. §670.8(d)(2)	No rule. (but see below. By implication parties may move to enlarge.)	If appeal subject to dismissal, appellant may move for extension prior to brief due date showing reasonable excuse and intent to perfect in reasonable time. §1000.13(f) Any party may move for extension of time to file brief showing reasonable excuse and intent to file in reasonable time. §1000.13(h)

1. First Department requires appellant to file a motion to enlarge time prior to the nine-month deadline. Once an appeal is perfected, respondent may get one enlargement by a so-ordered stipulation; almost always that will result in putting the appeal over to the next term.

2. In Third Department respondent can get 30-day extension, and appellant may get 10-day extension for reply, by stipulation or telephone or letter request, otherwise by motion.

3. In Fourth Department respondent can get extension by motion or approved stipulation. The Fourth Department has pilot program permitting respondent to seek an additional 30 days by telephone call to the clerk and requires formal motion practice for other enlargements.

	AD1	AD2	AD3	AD4
Dismissal/ Abandonment	Civil appeals deemed abandoned if not perfected within 9 months of date of notice of appeal, transfer order, or filing of notice of petition, and may not be perfected thereafter without court order. §600.11(a)(3) If appellant fails to prosecute within time prescribed, any other party may move to dismiss on 8 days' notice. §600.12(b)	Civil appeal deemed abandoned if not perfected within 6 months of date of notice of appeal, order of transfer, order granting leave unless time extended by so-ordered stipulation or other court order. §670.8(e)	Civil appeal deemed abandoned if not perfected within 9 months of date of notice of appeal, order of transfer, order granting leave unless time extended by court order. §800.12 If appellant fails to comply with any rule, opposing party may move to dismiss. §800.9(d)	Civil appeal deemed abandoned without motion or order if not perfected within 9 months of service of notice of appeal but party may move to vacate "such abandonment and dismissal." §1000.12(b) If appellant fails to perfect within 60 days of service of notice of appeal, any other party may move to dismiss; motion will be granted unless appellant provides reasonable excuse and intent to perfect within reasonable time, in which case court will issue conditional order of dismissal. §1000.12(a). §1000.13(e)

1. Each court has an outside drop-dead date for perfecting appeals, 9 months in all Departments except the Second, which allows 6 months. The Second Department was concerned that appellants were waiting until the last minute and then moving to enlarge; the six-month rule is more likely to get briefs in by 9 months. The other departments don't see (or care about) the appellant who waits until the ninth month, although they all provide an opportunity for respondent to move to dismiss earlier than the drop-dead date.

2. Here the Third Department switches from "service" of the notice of appeal to "date" of the notice of appeal; the Forth Department maintains the service concept.

3. All courts deem the appeal not filed in the required time to be abandoned. Unlike the other departments, the Forth Department deems the appeal to be also "dismissed."

4. The First, Second and Third Departments have provisions for extension by court order. The Forth Department speaks in terms of a motion to vacate the abandonment and dismissal.

	AD1	AD2	AD3	AD4
Dismissal Calendars	Calendar each May for civil appeals not brought for hearing within 9 months of filing of record or underlying papers. §600.12(c)(1) Appeal dismissed unless appellant submits affidavit explaining reason for delay. §600.12(c)(4)	Calendar published for civil cases ordered perfected by date certain but not perfected and all civil causes assigned Dkt. # and not perfected within rules, and appeals dismissed unless appellant moves to enlarge within 10 days of last publication. §670.8(h)	No rule.	No rule.

In the experience of one committee member, the Third and Fourth Departments allow appellant to move to vacate a default under the CPLR standard. The motion is often granted if made less than a month or two after the 9 months.

RECORDS, TRANSCRIPTS, AND APPENDICES

	AD1	AD2	AD3	AD4
Form of Papers	<i>Form and content of records, appendices, and briefs.</i> §600.10(a), (e) - Note: general provisions applying to format of briefs and records and appendices.	<i>Form and content of records, appendices, and briefs-generally.</i> §670.10.1 Note: general provisions applying to format of briefs and records and appendices.	<i>Record on appeal or review.</i> §800.5	Content and form of records, appendices and briefs; exhibits. §1000.4(a)(3); (b)(3); (c)(2); (d)(3); (e)(2).
	Bound on left. Metal fasteners to be covered with tape. Acco or spiral binding discouraged 8½” x 11” paper.	Briefs, records and appendices to comply with CPLR 5528 and 5529 and full records to comply with CPLR 5526. Reproduced by any method that produces permanent, legible, black image on white paper. Paper to be of quality approved by chief administrator and be 8½” x 11” in size.	Record on appeal or review to be on good quality, white, unglazed paper that complies with CPLR 5526 as to size and form.	Bound on left in manner that properly secures pages together. Metal fasteners or similar hard material that protrudes or presents a bulky surface or hard edge prohibited. §1000.4(a)(3)(i); (d)(3); (e)(2)
	Typeface requirements apply to records and appendices as well as briefs. Double spaced with 1” margins. Detailed description of captions and descriptive names for parties. Pages to be numbered consecutively with page numbers of appendix preceded by letter A and respondent’s appendix by letters RA.	Bound on left. Fasteners that protrude or present a hard or bulky edge prohibited. Records and appendices to be divided into volumes not exceeding 2” in thickness. Detailed description of designation of parties. Docket number to be displayed on cover opposite title. §670.10.1.	Carbon copies prohibited. Bulky records to be divided into volumes not to exceed 1½” in thickness. Bound on left with flat clasp or similar type fastener. §800.5	Reproduction to be by standard typographic printing or any other duplicating process that produces clear black image on white paper. Paper to be opaque, unglazed and white in color 8½” x 11” in size. Printing of no less than 11-point size. §1000.4(a)(3)(ii); (d)(3); (e)(2).

	AD1	AD2	AD3	AD4
	Descriptive headings to appear at top of page.	<i>Form and content of records and appendices.</i> §670.10.2(a); (d) Note: Applies to records and appendices only.		Transcript pages in any condensed form are not permitted unless such papers were submitted in identical form in trial court. §1000.4(a)(3)(ii); (d)(3); (e)(2).
	Quotations may be single spaced with ellipses indicated by asterisks. Citation of decisions to be from official reports. §600.10(a). Every brief and every appendix shall be reproduced on recycled paper. §600.10(e).	Records and appendices to contain accurate reproductions of the papers in court of original instance formatted in accordance with practice in that court. §670.10.2(a).		Where appeals consolidated, papers related to each appeal to be clearly identified in table of contents and physically separated and conspicuously identified by insertion of tab or colored divider. §1000.4(b)(3).
	Paper submitted on a motion to be preceded by description indicating on whose behalf it was read. Answers to questions not to begin a new paragraph.	Exception, condensed form of transcripts prohibited - no "manuscript." §670.10.2(d).		Cover to white and bear title of the matter, names addresses, and telephone numbers of counsel or parties, number assigned by court of original instance, appellate division docket number. §1000.4(a)(3)(iii); (d)(3); (e)(2)
				Pages to be consecutively paginated with descriptive captions at top of page. §1000.4(a)(3)(v); (d)(3); (e)(2).

Comments

CPLR 5529 provides that briefs and appendices shall be reproduced on paper of a quality approved by the Chief Administrator of the Courts. The Chief Administrator has adopted a rule setting the required paper standards, stating that appellate papers must be reproduced “on a good grade of at least 20-pound, white, opaque, unglazed paper” (22 NYCRR 112.1).

First Department rule requiring recycled paper, however motivated, is inconsistent with the Chief Administrator’s standard.

Second Department volumes limited to no greater than 2” in thickness.

Third Department volumes limited to no greater than 1½” in thickness.

1st Dept’s typeface requirements appear to apply to records and appendices as well as briefs. 2nd Dept’s rule prohibiting transcripts in condensed formats bans them irrespective of whether they were submitted in that form in the court of original instance.

All sets of rules should require, like Second Department rule. §670.10.2(a), that a record or appendix must contain accurate reproductions of papers as they were submitted to court of original instance, formatted in accord with practice in that court. Ban of condensed format transcripts should either be dropped in all courts or adopted in all courts in the formulation found in the Fourth Department rules. §1000.4(a)(3)(ii) allowing them if submitted in that fashion to court of original instance. Second Department should conform its rule banning manuscript accordingly.

All should adopt manuscript ban or adopt Fourth Department formulation of rule.

MODEL:

1. White cover (standardize form)
2. CPLR 5531 statement
3. Table of contents
4. Standard contents pursuant to CPLR 5526
5. Statement and stipulation or order regarding exhibits
6. Proper certification

Do not make Fourth Department’s requirement of a stipulation or order settling the record a requirement. Proper certification or stipulation sufficient.

First and Third Departments require original and 9 copies for total of 10.

Second Department requires 9 copies, one to be marked original for total of 9.

Fourth Department requires original and 10 copies for total of 11.

Standardize on 1 original and _____ copies.

Content of Full Record

	AD1	AD2	AD3	AD4
Content of Full Record	<i>Form and content of records, appendices, and briefs. §600.10(b) - Record, what to contain</i>	<i>Form and content of records and appendices. §670.10.2(b) - Reproduced full record</i>	<i>Record on appeal or review. §800.5</i>	<i>Content and form of records, appendices and briefs; exhibits. §1000.4(a)(2), (3)(iii), (iv)</i>
	Cover containing the title of the case, the names, addresses and phone numbers of the attorneys for the parties, and the index number in the court of original instance. §600.10(b)(3).	Cover containing title of action or proceeding, names, addresses, and phone numbers of attorneys, county clerk's index or file number and/or indictment number. §670.10.2(b)(1).	Soft cover containing title and names, addresses and telephone numbers of attorneys. §800.5(a)(1).	Cover on white paper containing title of matter identifying parties to the appeal and the action or proceeding, in a civil matter the index, claim, or motion number assigned in the court from which the appeal is taken, in a criminal matter the indictment or information number, and the appellate division number if one assigned. §1000.4(a)(3)(iii).
	CPLR 5531 statement. §600.10(b)(1)(ii).	CPLR 5531 statement. §670.10.2(b)(2).	Statement pursuant to CPLR 5531. §800.5(a)(3)	CPLR 5531 statement. §1000.4(a)(2).
	An index of the record's contents describing each paper separately.	Table of contents listing and briefly describing each paper in the record.	Table of contents listing and briefly describing each paper included in record, each witness and each exhibit.	Table of contents briefly describing the papers included in the record and a listing of all trial or hearing exhibits with a description of the nature of each exhibit, the page at which it was admitted into evidence and the page at which it is reproduced. §1000.4(a)(3)(iv)
	Part relating to exhibits to identify contents or nature and date, where reproduced in record, and where admitted in evidence.	Part relating to exhibits to indicate nature and contents of each exhibit, where it is reproduced in record, and where admitted in evidence. §670.10.2(b)(3).	Part relating to each exhibit to briefly describe each exhibit and indicate page where offered or admitted in evidence and whether exhibit omitted from record. §800.5(a)(2)	

	AD1	AD2	AD3	AD4
	Part relating to transcript to separately list each witness and pages where direct, cross, redirect, and recross begin. §600.10(b)(1)(i).	Part relating to transcript to separately list each witness and the pages at which direct, cross, redirect, and recross begin.	Part relating to transcript to separately state as to each witness the pages at which direct, cross, redirect and recross begin.	
	If appeal is from a judgment, the notice of appeal, the judgment roll, the corrected transcript of the proceedings or statement pursuant to CPLR 5525(d), any relevant exhibits admitted in court of original instance, any other reviewable order, and any opinions in the case. §600.10(b)(1)(iii).	Notice of appeal, order of transfer, judgment or order appealed from, judgment roll, corrected transcript or statement in lieu thereof, relevant exhibits, and any opinion or decision in the cause. §670.10.2(b)(4).	Notice of appeal, 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).	Subject matter of each page to be stated at top of page, except for matter other than testimony, subject matter to be stated at top of first page of paper with first and last pages thereof. Part pertaining to testimony to have name of witness, by whom called, and whether testimony is direct, cross, redirect, or recross stated at top of page. §1000.4(a)(3)(v).
	If the appeal is from an interlocutory judgment or any order, the notice of appeal, the judgment or order appealed from, the transcript if any, the papers or other papers on which the judgment or order was founded, and any opinions in the case. §600.10(b)(1)(iv).	An affirmation, stipulation, or order settling the transcript pursuant to CPLR 5525. §670.10.2(b)(5).	A stipulation or order settling the transcript pursuant to CPLR 5525(c). §800.5(a)(5).	
	A stipulation or order settling the transcript pursuant to CPLR 5525(c). §600.10(b)(1)(v).	A stipulation or order dispensing with reproduction of exhibits. §670.10.2(b)(6).	A stipulation dispensing with the reproduction of exhibits. §800.5(a)(6)	
	The opinion in the case or a statement that there was none. §600.10(b)(1)(vi).		Appropriate certification or stipulation of the record pursuant to. §§800.7. 800.5(a)(7).	

	AD1	AD2	AD3	AD4
	A stipulation, if any, dispensing with the printing or filing of exhibits. §600.10(b)(1)(vii).	Appropriate certification of record, namely, certificate of appellant's attorney pursuant to CPLR 2105, certificate of proper clerk, stipulation in lieu of certification pursuant to CPLR 5532. §670.10.2(b)(7).		Notice of appeal with proof of service and filing, order or judgment from which appeal taken, the decision of the court from which appeal taken, the judgment roll, the pleadings, the corrected transcript, all necessary and relevant motion papers, and to the extent practicable, all necessary and relevant exhibits. §1000.4(a)(2)
	A clerk's certificate or a stipulation waiving certification of the papers pursuant to CPLR 5532 or an attorney's certificate certifying the correctness of the papers pursuant to CPLR 2105. §600.10(b)(1)(viii)			Stipulation to the complete record or order settling record. §1000.4(a)(2).
	Where appeal by permission under CPLR 5701 from an order granting or denying motion for more definite statement of vague or ambiguous pleading or to strike matter from pleading, portion of pleading to which motion addressed to be italicized or underlined. §600.10(b)(2).			
Full Record - Service and Filing	File 8 hard copies and 1 electronic File certified original of record and 9 copies together with proof of service of two copies on adversaries within 30 days after settlement of transcript of proceedings, or where no transcript, within 30 days after filing of notice of appeal. §600.5(c), (d)	File 9 (original and 8) File 9 copies, one of which is to be marked "original," together with proof of service of 2 copies on each of the other parties. §670.9(a)	File 10 (original and 9) File original and 9 copies together with proof of service of 1 copy on each of the other parties. §800.4(a);. §800.9(a)(1)	File 11 (original and 10) File complete record with original stipulation of the parties or order settling the record and 10 copies of the record together with proof of service of 2 copies on each opposing party to the appeal. §1000.3(b).

Content of Appendix

	AD1	AD2	AD3	AD4
Content of Appendix	<i>Form and content of records, appendices, and briefs. §600.10(c)</i> Appendix, what to contain. Must contain those portions of the full record necessary to consider the questions involved (failure to comply may result in rejection of appendix or imposition of costs), including at least the following: Cover bearing the title of the case, the names, addresses and phone numbers of the attorneys for the parties, and the index number in the court of original instance. §600.10(c)(3). Index of contents conforming to the extent feasible to the form of index required for full record on appeal. §600.10(c)(4).	<i>Form and content of records and appendices. §670.10.2(c)</i> Appendix. Appendix must contain those portions of the record necessary to permit the court to fully consider issues to be raised by appellant and respondent, including, where applicable, at least the following: If bound separately from brief, a cover in the form required for a full record. §670.10.2(c)(2). CPLR 5531 statement. §670.10.2(c)(2). Table of contents. §670.10.2(c)(2). Notice of appeal or order of transfer. §670.10.2(c)(1)(i). Judgment, decree, or order appealed from. §670.10.2(c)(1)(ii).	<i>Form and content of brief and appendix. §800.8(b), (c)</i> May be bound in the brief or separately. Must contain such parts of record as necessary to consider questions involved, including, at least: Notice of appeal. §800.8(b)(1). Judgment, decree, or order appealed from. §800.8(b)(2). Decision and opinion of court or agency, and report of referee, if any. §800.8(b)(3). Pleadings, if their sufficiency, content or form is in issue or material; in a criminal case, the indictment. §800.8(b)(4).	<i>Content and form of records, appendices and briefs; exhibits. §1000.4(d) Appendices - CPLR Article 55</i> Appellant's appendix to contain those parts of the record necessary to consider the questions involved, including those portions on which respondent can reasonably be expected to rely. §1000.4(d)(2)(i). Respondent's appendix to contain only such additional parts of record necessary to consider questions involved. §1000.4(d)(2)(ii).

	AD1	AD2	AD3	AD4
	Notice of appeal, judgment, decree, or order appealed from, notice of motion, order to show cause, opinion (or statement that there was none), findings of fact and conclusions of law, report of referee or hearing examiner, charge to jury, verdict, and pleadings if their sufficiency, content or form at issue or material. §600.10(c)(2)(i).	Decision and opinion of court or agency and report of referee, if any. §670.10.2(c)(1)(iii) Pleadings, if their sufficiency, content or form is at issue or material; in a criminal case the indictment or superior court information. §670.10.2(c)(1)(iv). Material excerpts from testimony or from papers on a motion. Such excerpts must contain all the testimony or averments on which the appellant relies and on which respondent may reasonably be expected to rely. Excerpts must not be misleading because of incompleteness or lack of surrounding context. §670.10.2(c)(1)(v).	Relevant excerpts from transcripts of testimony or averments in motion papers upon which appellant relies or on which respondent may reasonably be expected to rely; in a criminal case, the sentencing minutes. §800.8(b)(5). Charge to the jury. §800.8(b)(6). Copies of critical exhibits, including photographs, to the extent practicable. §800.8(b)(7).	Appellant's reply appendix to contains only parts of record necessary to consider the issues that were not included in appellant's or respondent's appendix. §1000.4(d)(2)(iii). Joint appendix may be filed where parties stipulate as to contents. §1000.4(d)(2)(iv).
	Relevant excerpts from transcript of testimony or papers in connection with motion. Must contain all papers on which appellant will rely and which expected to rely. Excerpts must not be misleading because of incompleteness or lack of surrounding context. §600.10(c)(2)(ii). Copies of critical exhibits, including significant photographs, to the extent practicable.	Copies of critical exhibits, including photographs, to the extent practicable. §670.10.2(c)(1)(vi). Appropriate certification or stipulation. §670.10.2(c)(1)(vii).		

	AD1	AD2	AD3	AD4
	Copy of so ordered stipulation authorizing omission of exhibits with description of exhibits so omitted. §600.10(c)(2)(iii).			
Inadequate appendix			If appendix fails to comply with 880.8(b), adverse party may move to compel a party to file a further appendix. A respondent may also file an appendix to respondent's brief containing relevant portions of record omitted from appellant's brief [sic]. §800.8(c).	
Appendices - criminal appeals				In criminal appeal where poor person relief granted, the appellant's appendix shall contain: CPLR 5531 statement; notice of appeal with proof of service and filing; copy of certificate of conviction and judgment from which appeal taken; copy of indictment, superior court information, or other accusatory instrument; all motion papers, affidavits, and to extent practicable, written and photographic exhibits relevant and necessary to determination of appeal, and stipulation of parties or their attorneys to the complete record or the order settling the record; copies of all Appellate Division orders affecting the appeal. §1000.4(e)(1).

Comments

MODEL

1. Standard cover if bound separately
2. CPLR 5531 Statement
3. Table of contents
4. Standard contents
5. Statement re exhibits
6. Proper certification

Appellant's reply appendix should only be allowed with permission of court or on stipulation because it introduces additional parts of the record that respondent did not understand would be relied on by the appellant when the respondent prepared his or her brief.

Rules should provide guidance on what to include and omit from an appendix

Appendix Method – Supplying Full Record

	AD1	AD2	AD3	AD4
Appendix Method - Supplying Full Record	Appellant to subpoena original papers constituting record as set forth in CPLR 5526 from clerk of court of original instance within 30 days after settlement of transcript or statement in lieu of transcript. Two copies of CPLR 5531 statement to be delivered with subpoena. §600.5(a)(1).	Appellant to subpoena all the papers constituting the record on appeal from the clerk of the court from which the appeal is taken. §670.9(b)(1). Clerk to compile original papers and transmit them to Appellate Division together with certificate listing the papers constituting the record on appeal and stating whether all such papers are included in the papers transmitted. §670.9(b)(2).	Where appendix method used a single copy of the record must be stipulated as correct by parties or settled by judge before whom proceedings held in manner provided in CPLR 5525(c) except respondent has 20 days to make proposed amendments or objections. §800.7(b). Appellant to file the single copy of the record with the clerk of the Appellate Division with proof of service on each adverse party or proof of service on such adverse parties of a notice that a single copy of the record has been filed with the clerk.	The completeness of the complete record on appeal must be stipulated to by the parties or settled by the court from which the appeal is taken. §1000.4(a)(1). Form of complete record to comply with. §1000.4(a) which specifies binding and reproduction requirements as above. §1000.4(d)(1). Appellant must file and serve one copy of complete record with clerk of Appellate Division and each adverse party. §1000.3(d)(1).

	AD1	AD2	AD3	AD4
	Clerk to affix one copy of CPLR 5531 statement to papers and transmit them to Appellate Division together with additional copy of statement and certificate listing the papers constituting the record on appeal and stating whether all such papers are included in the papers transmitted. §600.5(a)(2). If transcript or statement in lieu thereof not included in papers subpoenaed, appellant to file ribbon copy of transcript or statement (presumably in the Appellate Division?) at time of filing appellant's brief.	If settled transcript or approved statement in lieu thereof or any relevant exhibit not in papers subpoenaed and filed, appellant shall cause transcript, statement, or exhibit to be filed with brief. §670.9(b)(3).	Alternatively appellant may serve the single copy of the record on respondent with appellant's brief, who then files single copy with clerk within 30 days. Special instructions for service and use of single copy where more than one respondent. §800.4(b).	
	Where feasible, parties encouraged to stipulate pursuant to CPLR 5525(b) that only a portion of the transcript need be filed. §600.5(a)(3). Appellant to serve or make available to respondent a conformed copy of transcript. §600.5(a)(4).			

Comments

Original typescript of transcript of proceedings, certified by reporter and corrected by stipulation, or by settlement under CPLR 5525, should be filed in office of clerk of court of original instance thereby making it a part of the permanent case file. Original or conformed copy should then be sent to Appellate Division by clerk.

In. §600.5(a)(3), First Department provides that “(w)here feasible, the parties shall stipulate, pursuant to CPLR 5525, subdivision (b), that only a portion of the transcript of proceedings need to be filed.” CPLR 5525(b) provides instead that “(t)he parties may stipulate that only a portion of the record be transcribed” (emphasis added). This refers to transcription of the stenographic minutes into English and not to filing of only a portion of the transcribed minutes. In practice respondents rarely agree to the transcription of only a part of the stenographic minutes. The reference to CPLR 5525(b) should be eliminated from the rule encouraging filing of only a portion of the transcribed minutes.

Appendix – Service and Filing

	AD1	AD2	AD3	AD4
Appendix - Service and Filing	File 8 hard copies and 1 electronic. Serve 1 hard and 1 electronic. File 9 copies with proof of service of 2 copies. One of the copies is to be filed and served by e-mail as text-searchable PDF. §600.11(b)(2)	File 9 copies, one of which is to be marked “original,” together with proof of service of 2 copies on each of the other parties. §670.9(b)(4).	File single copy of record and 10 copies of appendix and brief together with proof of service of 1 copy of record and 2 copies of brief and appendix on each respondent. §800.9(a)(2). Family Court appeals to be perfected on single copy of record and 7 copies of brief and appendix. §800.13 Criminal appeals - single copy of record and 7 copies of brief and appendix. §800.14(b).	File 1 complete record and 10 copies of appendix and serve 1 copy of complete record and 2 copies of appendix on each party. §1000.3(d)(1).

Comments: Third and Fourth Departments require the appellant to prepare and file single copy of the full record.

Is the procedure used in the Third and Fourth Departments really necessary? Use of original papers from the files of the court of original instance works fine in the First and Second Departments.

First Department requirement re filing appendix copy by e-mail unclear as to whether it is in addition to 9 required or in place of one of the 9. E-mail filing requirement does not appear to apply to full record method or agreed statement method. See. §600.5(c)

Agreed Statement in Lieu of Record Method

	AD1	AD2	AD3	AD4
Agreed Statement in Lieu of Record Method - Content	Reproduce agreed statement as joint appendix, preceded by CPLR 5531 statement, by printing or other method of reproduction authorized by CPLR 5529. §600.5(b)(1).	Reproduce agreed statement as joint appendix to which CPLR 5531 statement to be appended	Reproduce agreed statement as joint appendix preceded by CPLR 5531 statement in a manner authorized by CPLR 5529. §800.4(d).	Rule as to contents tracks language of CPLR 5527 and requires that joint statement be bound together with CPLR 5531 statement and the order approving the statement as a joint appendix in the form required of a printed record under. §1000.4(a)(3); (c).
Agreed Statement in Lieu of Record Method - Service and Filing	File original and 9 copies of statement with proof of service of 2 copies within 30 days after approval of statement by court from which appeal taken. §600.5(b)(2).	File 9 with proof of service on each of the other parties. §670.9(c).	File “the required number of copies” (presumably 10) with proof of service of 1 copy upon each adverse party within 30 days after approval of statement by court from which appeal taken. §800.4(d)	File and serve joint appendix and 10 copies thereof. §1000.3 (total of 11). Service of 2 copies implied from direction that in all other respects parties comply with requirements of. §1000.3(b); (d)(2)

Original Papers Method

	AD1	AD2	AD3	AD4
Original Papers Method - When Use Authorized	As of right: Family Court appeals,. §600.6; appeals under the Election Law,. §600.9, and transferred human rights proceedings under Executive Law. §298, §600.7(c). By permission: Appeals in criminal actions. §600.8(a)(1).	As of right: appeals from Appellate Term & Family Court, appeals under Election Law, Human Rights Law (Exec. Law. §298), Correction Law. §§168-d(3) and 168-n(3), where sole issue is compensation of judicial appointee, where original record authorized by statute, and in criminal causes. By permission: where authorized by order of the court. §670.9(d).	Not covered. Indigent parties may perfect appeal by the appendix method and single copy of record. §800.4(c). Appeals under Election Law may be prosecuted on a single copy of the record and seven copies of brief and appendix. §800.16.	Appeals under the Election Law may be prosecuted on one copy of original record stipulated as correct by all parties or settled by court from which appeal taken and 10 copies of brief with proof of service of 1 copy of brief on each opposing party to the appeal. §1000.5. Criminal appeals in which poor person relief granted by order of the court may be prosecuted on certified transcript, pre-sentence report, and 10 copies of brief and appendix containing stated documents, with proof of service of 1 copy. §1000.3(c)(1).
				Civil appeals where poor person relief granted or where appellant is Attorney for the Child may be prosecuted on 10 copies of appellant's brief, with proof of service on each opposing counsel to the appeal and one copy of the complete record on appeal, original stipulation or order settling record, with proof of one copy on each other party to the appeal. §1000.3(c)(2).

E-Filing

	AD1	AD2	AD3	AD4
E-Filing	One copy of each appendix shall be filed and served by e-mail and that copy shall satisfy the clerk's office specifications for filing a text-searchable portable document format file by e-mail. §600.11(b)(2) E-mail addresses established for filing. §600.11(b)(3). No provision for e-filing of record or agreed statement.			Submission of records, appendices and briefs on interactive CD-ROM as companions to required number of printed records, appendices or briefs is allowed and encouraged provided that all parties have stipulated to the filing of the companion CD-ROM. §1000.3(h)(1)(i). Court may, by order on motion of a party or sua sponte, require filing of companion CD-ROM. §1000.3(h)(1)(ii).
				CD-ROM shall be identical in content and format to printed record, appendix or brief, except may provide hyperlinks to cited authorities or any document or other material constituting part of record. §1000.3(h)(3). 10 disks or sets of disks copies to be filed with proof of service of one copy on each party to the appeal together with stipulation or order allowing or directing the filing. §1000.3(h)(4).

Comments

There was, to my recollection, an inconclusive discussion of the problems attendant on e-filing by e-mail because file sizes for records are often too large to meet mail file size requirements. As e-filing project advances in trial courts, records will be available directly from the clerk of the court of original instance.

Downside of records and briefs filed on CD-ROM is that they may contain hyperlinks, thus making them a significantly different document than the one filed in paper.

Exhibits

	AD1	AD2	AD3	AD4
Exhibits	Relevant exhibits to be included in record. §600.10(b)(1)(iii), (iv).	Relevant exhibits to be included in record. §670.10.2(b)(4)	Relevant exhibits to be included in record. §800.5(a)(4)	Complete record to contain all necessary and relevant exhibits. §1000.4(a)(2)
	Critical exhibits to be included in appendix. §600.10(c)(2)(iii).	Critical exhibits to be included in appendix. §670.10.2(c)(1)(vi)	Critical exhibits to be included in appendix. §800.8(b)(7)	
	Relevant exhibits may be omitted from record upon stipulation of the attorneys for the parties, approved by a justice of the court, which shall contain a list of the exhibits to be omitted and a brief description of each exhibit. Stipulation to be printed in record. §600.10(b)(1)(vii)(a)	Relevant exhibits may be omitted from record on stipulation which must contain a list of the exhibits omitted and a brief description of each. If opponent unreasonably refuses to stipulate, exhibits may be omitted on motion to the court. §670.10.2(b)(6)(i)	Exhibits that are material to the issues shall be made available to court. Irrelevant, bulky, dangerous, or irreplaceable exhibits need not be filed unless the clerk otherwise directs. Exhibits under control of respondent or third person to be filed pursuant to 5-day written demand or subpoena duces tecum. Appellant to file list of all relevant exhibits with brief. §800.5(b)	Exhibits not expressly mentioned in description of contents of appendix but impliedly covered by requirement that appendix contain those parts of the record on appeal necessary to consider the questions involved. §1000.4(d)(2)(i).
		Omitted exhibits to be filed with clerk at time appellant's brief filed. §670.10.2(b)(6)(i)		

	AD1	AD2	AD3	AD4
	Critical exhibits may be omitted from appendix on stipulation of attorneys for parties, approved by a justice, which shall contain a list of the exhibits to be omitted and a brief description of each exhibit. A copy of this stipulation should be included in the appendix. §600.10(c)(2)(iii). Relevant or critical exhibits omitted from record by so-ordered stipulation to be filed with clerk no later than Wednesday preceding first day of term for which appeal noticed. §600.10(b)(1)(vii) (a); (c)(2)(v)(a)	Irrelevant exhibits to be omitted from record on stipulation which must contain a brief description of the omitted exhibits and a statement that they will not be relied on or cited in the briefs of the parties. If opponent unreasonably refuses to stipulate, motion to omit such exhibits may be addressed to the court. §670.10.2(b)(6)(ii).		Absent court order or stipulation all exhibits are to be submitted to court. Parties or attorneys may stipulate that particular exhibits not relevant or necessary to determination of appeal. In that case, appellant shall file copy of stipulation listing exhibits not relevant or material. §1000.4(g)(1). To extent practicable, all relevant and necessary exhibits to be printed in record on appeal. §1000.4(g)(2).
	Bulky exhibits to be held in readiness and delivered to court on telephone notice. §600.10(b)(1)(vii)(a); (c)(2)(iv)(a).	Bulky or dangerous exhibits to be held in readiness and delivered to court on telephone notice. §670.10.2(b)(6)(i).		
	Irrelevant exhibits to be omitted from record on stipulation, which is not required to be approved by a justice, which must contain a brief description of the omitted exhibits and a statement that they will not be relied on or cited in the briefs of the parties. §600.10(b)(1)(vii) (b); (c)(2)(iv)(b)	No provisions regarding omission of exhibits from appendix. See. §670.10.2(c)(1)(vi)		Absent stipulation of parties all original exhibits to be submitted to court and filed by appellant upon perfecting the appeal. Exhibits under control of respondent or third person to be filed pursuant to 5-day written demand or subpoena duces tecum. §1000.4(g)(3)

	AD1	AD2	AD3	AD4
				In criminal appeals, in lieu of filing physical exhibits such as weapons or contraband, the appellant may file a stipulation identifying the particular exhibits and the party in custody and control of each, and providing that each shall be made available upon request of the clerk. §1000.4(g)(4).
	Parties to consult and file joint record or appendix containing cross notice of appeal. Cost of joint record or appendix to be borne equally among the parties. §600.11(d)(1).	Cross appellant defined as person whose interests are adverse to a party who previously appealed from same order or judgment. §670.2(a)(6) All parties appealing from the same judgment or order to consult and file a joint record or appendix which shall include all notices of appeal. §670.8(c)(1) Costs of the joint record or appendix and transcript, if any, shall be borne equally by the appealing parties.	In case of cross appeals, plaintiff shall be appellant and file first. §800.9(e)	Multiple appeals from the same order or judgment may be consolidated on motion or stipulation of parties or their attorneys. Such stipulation shall designate the party bearing the primary responsibility for filing the record. §1000.4(b)(1).

Comments

Very confusing!

Why not one list of exhibits showing:

1. Those exhibits included with page #;
2. Those not included bulky or dangerous but filed with clerk or available on call; and,
3. Those omitted as irrelevant & immaterial to the issues raised on the appeal?

Why is the Third Department's requirement that in the case of cross appeals the plaintiff shall be the appellant and file first necessary? Why care who goes first? The usual rule is that the party who files the first notice of appeal is the appellant-respondent and the other is the respondent-appellant.

Why does the Fourth Department's rule make the consolidation of cross appeals from the same order or judgment permissive rather than mandatory? Shouldn't cross appeals from the same paper always be consolidated so that different panels don't deal with different parts of the same appealable paper?

Second Department's requirement that all parties consult and file joint record or appendix prevents separate perfection of two or more appeals from the same paper and permits calendaring all such appeals before the same panel of Justices.

Concurrent Appeals

	AD1	AD2	AD3	AD4
Concurrent Appeals		Concurrent appeals defined as those taken separately from same order or judgment by parties whose interests are not adverse to one another. §670.2(a)(6).		
		Concurrent appellants also required to consult, file joint record or appendix and share costs. §670.8(c)(1).		
		Joint record or joint appendix and briefs of concurrent appellants shall be served and filed together. Time to do so is measured from the latest date on the several notices of appeal. §670.8(c)(2)		

Consolidation of Appeals

	AD1	AD2	AD3	AD4
Consolidation of Appeals		A party may consolidate appeals from civil orders and/or judgments arising out of the same action or proceeding provided that each appeal is timely perfected. §670.7(c)(1).		Appeals may be consolidated on motion setting forth the appeals to be consolidated and reasons justifying consolidation. §1000.4(b)(2); §1000.13(n)
		Appeals from orders and/or judgments made in separate actions or proceedings may not be consolidated but may be scheduled to be heard together on written request of a party. §670.7(c)(2).		

Comments

Why not allow permissive consolidation of appeals from orders or judgments arising out of the same action or proceeding as of right? Many benefits, no downside.

BRIEFS

	AD1	AD2	AD3	AD4
Content of Appellant's Brief	In the following order: Index or table of contents, including the titles of points urged in the brief and a table of cases (alphabetically arranged), statutes, and other authorities, indicating pages where cited. Concise statement of the questions involved, numbered separately, followed by the answer of the court from which the appeal is taken (2 pages max). Concise statement of the case and relevant facts. Appellant's argument, divided into points with headings. Statement required by CPLR 5531, as an addendum.	Comply with CPLR 5528 and 5529 Statement required by CPLR 5531. Table of contents, including titles of points urged in brief. Concise statement of the questions involved, numbered separately, followed by the answer of the court from which the appeal is taken. Concise statement of the nature of the action and relevant facts. Appellant's argument, divided into points with headings. If a civil cause is perfected on the original papers, include a copy of the order appealed from, the decision, and the notice of appeal, or a copy of any order transferring the proceeding to this court.	Comply with CPLR 5528 and 5529. §800.8(a); §800.21; §800.14(a); §800.10	In the following order: Table of contents. Table of citations. Concise statement of the questions involved, numbered separately, followed by the answer of the court from which the appeal is taken (2 pages max). Concise statement of the nature of the matter and relevant facts. Argument of the issues, divided into points with headings.
	If appeal involves an order of alimony or counsel fees, include the date of joinder of issue, if the issue was joined, and whether the case has been noticed for trial. §600.10(d)(2)	If appeal involves an order of pendente lite relief in a matrimonial action, state whether issue was joined and, if so, the date of joinder and whether case was noticed for trial.		Other Rules: Content of companion CD-ROM briefs shall be identical in content and format as printed brief, except that it may provide electronic hyperlinks to authorities or record. §1000.3(h)(3)

	AD1	AD2	AD3	AD4
				Amicus briefs may not duplicate arguments made by a party to the appeal. §1000.13(k), §1000.4(f)(6); CPLR 5528
		In criminal cases: (A) whether order per CPL 460.50 is outstanding, name of judge who issued it, and whether defendant is free on bail or ROR; (B) disposition and status of appeals of any co-defendants, Certificate of compliance. §670.10.1(a); §670.10.3(f); §670.10.3(g)(2)		
Content of Respondent's Brief	An index or table of contents, including the titles of points urged in the brief, and a table of cases (alphabetically arranged), statutes and other authorities, indicating pages where cited. A counterstatement of the questions involved or of the nature and facts of the case, if the respondent disagrees with the statement of the appellant.	Table of contents, including titles of points urged in brief. A counterstatement of the questions involved or of the nature and facts of the action or proceeding, if the respondent disagrees with the statement of the appellant. The argument for the respondent, which shall be divided into points by appropriate headings.	Same rules as appellant's brief In workers' compensation appeals, respondent's brief may contain an appendix with additional parts of the record necessary to consider questions involved, or the parties may agree upon a joint appendix. §800.18(a)	Same rules as appellant's brief. §1000.4(f)(6)
	The argument for the respondent, which shall be divided into points by appropriate headings. §600.10(d)(3)	Certificate of compliance. §670.10.3(g)(3); §670.10.3(f)		

	AD1	AD2	AD3	AD4
Content of Appellant's Reply	A table of contents and a table of cases (alphabetically arranged), statutes and other authorities, indicating the pages of the brief where cited The reply for the appellant, without repetition of the arguments contained in the main brief, which shall be divided into points by appropriate headings. §600.10(d)(4)	A table of contents The reply for the appellant of the points raised by the respondent, without repetition of the arguments contained in the main brief, which shall be divided into points by appropriate headings A certificate of compliance. §670.10.3(f); §670.10.3(g)(4)	Same rules as appellant's brief. §800.8(a)	Same rules as appellant's brief. §1000.4(f)(6)
Content of Sur-Reply Brief				Contents of sur-reply brief are limited to issues raised in cross-appeal; in absence of cross-appeal, sur-reply briefs are not permitted. §1000.2(f)

Summary of Rules, re: Contents of Briefs

The rules regarding contents of briefs offer a prime opportunity for consistency. The core rules for the First, Second and Fourth Departments merely re-state the requirements of CPLR 5528, while the Third Department rules just reference the CPLR. So we need only decide whether to re-state or reference. I vote in favor of re-statement, in light of the additional requirements that seem unobjectionable, including the requirement that the items be in specified order.

There are a few differences that require reconciliation.

Some of the Appellate Divisions have additional rules that are unobjectionable and likely to be acceptable to all Appellate Divisions:

- (1) The First and Fourth Departments specify that the contents shall be in the following order.
- (2) The First and Second Department require inclusion of the CPLR 5531 statement (the First Department as an addendum).
- (3) The First and Fourth Departments require table of authorities, and many judges from all Appellate Divisions have asked for this in all briefs.
- (4) The First and Second Departments specifically limit questions presented and answers to two pages.
- (5) The Second Department requires a certificate of compliance, which will likely be required in all Appellate Divisions if word counts are adopted as a way to limit size of briefs. The attorney's signature accomplishes the same thing.
- (6) The Fourth Department's rule re amicus brief is hortatory and likely unnecessary.
- (7) The Fourth Department calls respondent's brief on cross appeal a "sur-reply" brief, limits it to issues raised on cross appeal, and prohibits a sur-reply brief if there is no cross appeal. I am not sure we need this unique nomenclature, though a specific rule limiting replies to issues raised in respondent's or cross-respondent's briefs may be a good idea.

Some of the differences are quirkier, but still may allow for consistency:

- (1) The Second Department has additional requirements for statements or attachments in civil causes prosecuted on the original record, matrimonial actions involving an order of pendent lite relief, and criminal cases.
- (2) The Third Department provides for respondent's appendix in worker's comp cases.
- (3) The Fourth Department has a rule regarding hyperlinked CD-ROM filings.

Form of Briefs

	AD1	AD2	AD3	AD4
Length	Principal briefs shall not exceed 70 pages or 14,000 words.	Appellants' and respondents' briefs shall not exceed 14,000 words (computer-generated) or 70 pages (typewritten).	Petitioners - or appellants- briefs shall not exceed 50 printed or 70 typewritten pages Respondents - and amicus curiae -briefs shall not exceed 25 printed or 35 typewritten pages .	Briefs of an appellant, petitioner, respondent, or respondent- appellant shall not exceed 70 pages.
	Reply briefs shall not exceed 35 pages or 7,000 words.	Reply and amicus curiae briefs shall not exceed 7,000 words (computer-generated) or 35 pages. (typewritten)	Reply briefs shall not exceed 10 printed or 15 typewritten pages. §800.8(a)	Reply briefs of an appellant, petitioner or appellant-respondent, or sur-reply briefs of a respondent-appellant shall not exceed 35 pages. §1000.4(f)(3)
	Calculation of page length shall exclude table of contents, table of citations, and any addendum containing statutes, rules, or regulations. §600.10(d)(1)(i)	Page length includes point headings and footnotes, and excludes table of contents, table of citations, etc. §670.10.3(a), (b)		

Summary of Rules, re: Length of Briefs

The rules regarding length of briefs cry out for consistency.

The First, Second, and Fourth Department rules are largely consistent, with 70 pages for principal briefs and 35 pages for reply briefs. The First and Second Departments add alternative word limits, which make sense for all departments now that most briefs are computer-generated and because word limits minimize opportunity to manipulate formatting to squeeze in more content. The First and Second Department also sensibly exclude from length limits tables and addenda.

The Third Department's length limits on respondent's and reply briefs are way out of line with other Appellate Divisions and the Second Circuit, and unreasonably restrictive in many cases. The Third Department anachronistically references "type-written" pages, as well as "printed" pages (terms that have lent themselves to confusion among practitioners).

The Second and Third Departments sensibly limit amicus briefs to 35 pages (or 7,000 words).

As we discussed at an earlier meeting we may want to have add a consistent rule governing font size and margins.

Brief Covers

	AD1	AD2	AD3	AD4
Rules Related To Brief Covers	The name of counsel who is to argue the appeal must appear at the upper right hand corner of the cover of all briefs. Only one counsel shall be listed, except when otherwise ordered by the court. §600.11(d)(2)	The title of the action In the upper right hand section: Notation stating whether the case is to be argued or submitted. If it is to be argued, the time required for the argument and the name of the attorney to argue. In the lower right hand section: Name, address, and telephone number of the attorney filing the brief and the name of the party whom the attorney represents. §670.10.3(g)(1)	The name and address of counsel who will argue the appeal The estimated time of argument. §800.8(a)	Contents: Title to the matter. Name, address and telephone number of person submitting brief. In a civil matter, the index, claim, or motion number assigned in the court from which the appeal is taken. In a criminal matter, the indictment or information number. The appellate division docket number, if one has been assigned. The name of person requesting oral argument and time requested, or name of person submitting (upper right hand corner). §1000.4(f)(4)
Color:				Cover of appellant's brief shall be blue; cover of respondent's brief shall be red; cover of reply brief shall be gray; cover of sur-reply brief shall be yellow; cover of intervenor or amicus brief shall be green; cover of pro se supplemental and attorney for child brief shall be white. §1000.4(f)(5)

Rules related to brief covers also lend themselves to consistency. All Appellate Divisions, in rule or in practice, require information re the attorney filing the brief and name of attorney to argue. The Second, Third and Fourth Departments require estimated time of argument, and the First Department has agreed to allow requested time for argument to appear on brief. The Fourth Department sensibly requires Appellate Division docket numbers if assigned, and identifying docket/indictment/information numbers from court below. Like the Second Circuit and U.S. Supreme Court, the Fourth Department uses color-coded covers. Consistent rules requiring docket numbers and color-coded brief covers in all the Appellate Divisions should be discussed further.

Brief Captions

	AD1	AD2	AD3	AD4
Brief Captions	The parties to all appeals shall be designated in the record and briefs by adding the word “Appellant”, “Respondent”, etc., following the party’s name, e.g., “Plaintiff- Respondent”.	The parties to all appeals shall be designated by adding the word “Appellant,” “Respondent,” etc., following the party’s name, e.g., “Plaintiff Respondent”.	No rule.	No rule.
	Parties who have not appealed and against whom the appeal has not been taken shall be listed separately and designated as they were in the court below, e.g., “Plaintiff”.	Parties who have not appealed and against whom the appeal has not been taken shall be listed separately and designated as they were in the trial court, e.g., “Plaintiff,” “Defendant,” “Petitioner,” “Respondent.”		
	In appeals from the Surrogate’s Courts, or from judgments on trust accountings, the caption shall contain the title used in the court below, including the name of the decedent or grantor, followed by listing all parties to the appeal, properly designated.	In appeals from the Surrogate’s Court or from judgments on trust accountings, the caption shall contain the title used in the court below, including the name of the decedent or grantor, followed by a listing of all parties to the appeal.		
	In proceedings and actions originating in this court, the parties shall be designated “Petitioner” and “Respondent”, or “Plaintiff” and “Defendant”. §600.10(a)(5)	In proceedings and actions originating in this court, the parties shall be designated “Petitioner” and “Respondent” or “Plaintiff” and “Defendant”. §670.10.1(d)		

Again, the rules lend themselves to consistency. The First and Second Department rules are nearly identical. The Third and Fourth Department practice is consistent with these express rules.

Number of Copies

	AD1	AD2	AD3	AD4
	Appellant and respondent shall file nine copies of the brief with proof of service of two copies (under electronic system, 8+1). Appellant shall file the same number of copies of a reply brief as were filed of the main brief, with proof of service of the same number of copies as were served of the main brief.	Nine copies of brief with proof of service of two.	Appellant shall file 10 copies of appellant's brief with proof of service of two copies upon each respondent. Respondent shall file the same number of copies of its brief as appellant filed, with proof of service of two copies upon each appellant. Appellant may file a corresponding number of copies of a reply brief with proof of service of two copies upon each respondent. §800.9(a) (c)	Appellant, respondent, reply: 10 copies and proof of service of two copies on opposing party. §1000.3(b), (e) CD-ROM companion briefs: 10 disks with proof of service of one disk. §1000.3(h)(4)
Original Record		Appeal on original record: only one copy of brief need be served. §670.8(a), (b)		Original proceedings: 10 copies. §1000.9(c)
Family Court	Family Court appeals: eight copies of the brief with proof of service of one copy may be filed.		Appeals from Family Court: seven copies of brief. §800.13	
	One copy of the brief must be filed and served by email §600.11(b)(2)(c)		Special proceedings under Education, Labor, Public Health and Tax Law: 10 copies of petitioner's and respondent's briefs with proof of service of two upon adversary. §800.2(c) Appeals by indigent parties: seven copies of appellant's and respondent's briefs with proof of service of one copy upon adversary. §800.4(c)	Poor person/criminal appeals: 10 copies with proof of service of one copy on assigned counsel and the People. §1000.3(f) Transferred proceedings: 10 copies with proof of service of one copy on each respondent. §1000.8(b)

	AD1	AD2	AD3	AD4
			Appeals in criminal cases: seven copies of brief with proof of service of one copy upon appellant and respondent. §800.14(b) Expedited People's appeals per CPL 450.20: nine copies filed and one copy served on opposing counsel. §800.14(h)(3)(i) Election cases: seven copies of brief. §800.16 Workers' Compensation appeals: 10 copies of brief with proof of service of two upon the Attorney General and each respondent. §800.18(e) State Human Rights matters: seven copies of appellant's and respondent's briefs with proof of service of one copy upon each respondent. §800.20(a)	

Number of Copies

The core rules governing the number of copies of most types of briefs to be filed and served vary slightly, but should be amenable to consistency. The First and Second Departments have the 9 + 2 rule, while the Third and Fourth have the 10 + 2 rule. The Third Department also specifies 10 + 2 in transferred proceedings and proceedings under the Tax Law, Education Law, Labor Law, and Public Health Law. With electronic filing, the First Department is moving to 8 + 2 in most cases. All the Appellate Divisions may be able to reduce the number of copies to be filed and served when electronic filing kicks in.

The most variation among the Appellate Divisions occurs in rules reducing filing and service requirements in particular types of appeals to reduce costs for the litigants. The First Department specifies 8 + 1 for Family Court appeals. The Second Department specifies 9 + 1 in appeals prosecuted on the original record, i.e., Family Court cases, criminal appeals, indigent matters, election matters, and SDHR appeals. The Third Department rules also allow the filing and service of fewer copies of briefs in Family Court appeals, criminal cases, indigent matters, election cases, and SDHR appeals - for the most part requiring 7 + 1. The Fourth Department generally requires 10 + 1 in these types of cases, but 9 + 1 in People's appeals. The Appellate Divisions agree that only one copy need be served in these types of cases. It may make sense to have a consistent rule for numbers of copies filed in these kinds of cases, perhaps 8 + 1 or 7 + 1, if the courts' procedures can accommodate fewer copies.

The First Department in addition requires email service of briefs that are e-filed; that will be the norm when e-filing kicks in other Appellate Divisions.

Citations and Footnotes

	AD1	AD2	AD3	AD4
Citations	New York decisions must be cited from the official reports. All other decisions must be cited from the official reports, and also from the National Reporter System. Decisions not reported officially or in the National Reporter System shall be cited from the most available source. §600.10(a)(11)	Comply with CPLR 5528 and 5529.	No rule.	New York decisions shall be cited from the official reports. All other decisions shall be cited from the official reports, and also from the National Reporter System. Decisions not reported officially or in the National Reporter System shall be cited from the most available source. §1000.4(f)(7)
Footnotes	Footnotes may be single spaced. §600.10(a)(4)	No rule.	No rule.	A brief shall contain no footnotes. §1000.4(f)(2), (6)

This is another area that should be amenable to a consistent rule. The First and Fourth Departments restate the citation rule found at CPLR 5529; the Second Department references CPLR 5529; and the Third Department is silent. It probably makes sense to have the First and Fourth Department rule expressly apply across the board.

The First Department's rule re footnotes is observed in practice across the board. The Fourth Department's no-footnote rule is unique, and is disfavored by many practitioners.

Addenda

	AD1	AD2	AD3	AD4
	No rule.	Briefs may contain an addendum composed of decisions, statutes, ordinances, rules, regulations, local laws, or other similar matter, cited therein that were not published or not readily available. Unless otherwise authorized by the court, briefs may not contain maps, photographs, or other addenda. §670.10.3(h)	No rule.	No rule.

This may be the most controversial subject under the topic of briefs. The First Department rejects any brief containing an addendum (other than the CPLR 5531 statement). But its rules do refer to “authorized addendum containing statutes, rules, regulations, etc., Rule. §600.10(d)(1)(i), appearing to allow litigants to request permission to file such an addendum. In the First Department, unpublished cases may be handed up with a letter on the day of argument. The Second Department allows addenda to briefs that contain these types of authorities, but it specifically prohibits maps, photographs and other addenda even if judicially noticeable. The Third and Fourth Departments have No rules regarding addenda, but in practice accept addenda containing judicially noticeable materials, particularly where a request for judicial notice is made in a footnote or parenthetical in the brief. Justice Peradotto prefers not to require formal motion practice to obtain permission to attach judicially notice materials as addenda.

While the First and Second Department have been quite reluctant to open this door, the Third and Fourth Departments have not experienced much of a problem with this approach, other than an occasional motion to strike. These approaches will be difficult to reconcile.

ORAL ARGUMENT

	AD1	AD2	AD3	AD4	Court of Appeals
How Requested	Joint request by letter, due day after respondent's brief. §600.11(f)	Statement on upper right hand corner of brief cover with amount of time and attorney's name. §670.10.3(g)(1)	Statement on brief cover with time listed. §800.8-a)	Statement on brief cover with time listed. §1000.4(f)(4),. §1000.11(b) No more than one person per side where parties submit joint brief. §1000.11(a)	Statement on upper right hand corner of brief cover with time and name of counsel (500.13)
Time Limit (absent special permission)	15 minutes per "side" for enumerated appeals; additional time may be requested by letter to the clerk upon a showing of good cause. §600.11(f)(2)	30 minutes (Trials, hearings, App Term appeals, special proceedings); 15 minutes all other argued appeals. §670.20(a),(b)	30 minutes (Judgments, transferred special proceedings); 15 minutes (Non-final orders). §800.10(c)	Court's discretion. §1000.11(b)	30 minutes per party, unless Court orders otherwise (500.18)
Rebuttal (within time allotted)	If requested at Calendar Call	Generally None (unless new issue or factual error during respondent's argument)	If requested at start of argument	None. §1000.11(f)	If requested at start of argument (500.8)
Appeals where no argument is permitted (Court, except 1st, may direct no argument in others)	Appeals from non-enumerated orders. §600.11(f)(3), see. §600.4(b); State Division of Human Rights. §600.7(c); Grand jury. §600.16)	Child/spouse support, Maintenance; Counsel fees; Sentencing, SORA, Grand jury; Calendar & practice issues. §670.20)	WC; UI; Grand jury; Sentencing, Article 78 (Substantial evidence). §800.10,. §800.15)	Sentencing; SORA; Article 78 (Substantial evidence). §1000.11(c)	No rule.

	AD1	AD2	AD3	AD4	Court of Appeals
Notification of Argument date	No rule. Posted on court website, NYLJ.	No rule. Posted on court website, NYLJ.	Clerk notifies parties. §800.11	Clerk notifies parties. §1000.10(e)	Clerk notifies parties. §500.17
Post-Argument Submissions	None without permission of the Court. §600.11(f)(4)	None without leave. §670.20(i)	No rule.	Within 5 days of oral argument, 10 copies to Court, serve 1.	Other than “new developments” §500.6, disfavored - need permission of Clerk
Notification of Decisions	All parties filing papers pertaining to motion or special proceeding shall include SASE. §600.2(a)(8); court website; NYLJ.	Party to civil cause or retained attorney in criminal case gets copy of decision on motion or appeal by supplying clerk with SASE. §670.2(f); court website; NYLJ.	No rule.; Clerk sends decisions to all parties; court website	Clerk sends decisions to all parties. §1000.17(e); court website	Clerk calls parties on morning of decision and sends decisions to all parties; court website.

MOTIONS FOR REARGUMENT AND LEAVE TO APPEAL

	AD1	AD2	AD3	AD4
Reargument	Motions must be made within 30 days of decision and submitted without oral argument. Papers must include the First Department order; state points purportedly overlooked or misapprehended; refer to relevant portions of the record; and cite authorities relied upon. §600.14	Motions must generally be made within 30 days of service of the decision and order with notice of entry, but for good cause, the time may be extended. Papers must include the Second Department order; state points purportedly overlooked or misapprehended; refer to relevant portions of the record or briefs; and cite authorities relied upon. §670.6	A copy of the Third Department decision and any opinion must be attached. §800.2, §800.3	(1) The motion must be made within 30 days of service with notice of entry. Papers must include: notice of motion, supporting affidavit, proof of service, and Fourth Dept. order and memorandum or opinion. (2) A supporting affidavit must set forth points alleged to have been overlooked or misapprehended. §1000.13
Leave to Appeal - Civil	Motions must comply with CPLR 5513(b) and 5516 and be submitted without oral argument. Papers must include the First Department order and set forth questions of law to be reviewed by the Court of Appeals. §600.14	Motions must set forth questions of law to be reviewed by the Court of Appeals and, where appropriate, proposed questions of law decisive of the correctness of the Second Department's determination. A copy of the challenged order must be attached. §670.6	A motion for leave to appeal to the Court of Appeals pursuant to CPLR 5602 (a) will be granted only upon approval of a majority of the justices assigned to the motion. Papers must contain proposed questions. §800.2, §800.3	Same as for (1). above. A supporting affidavit must set forth questions of law to be reviewed and the reasons they should be reviewed. Motion must be determined by panel of justices that determined appeal. §1000.13

	AD1	AD2	AD3	AD4
Leave to Appeal - Criminal	No rule.	Motions pursuant to CPL 460.20 must be made to any justice of the panel that decided the appeal. A copy of the Second Department's order must be attached. §670.6	A CPL 460.20 motion may be addressed to a named justice. Unless otherwise directed by order to show cause, such application must be made returnable as provided in Rule. §800.2(a). The motion may not be argued unless the justice to whom it is made or referred otherwise directs. §800.2, §800.3	Same as civil, except that the motion may be submitted to any member of the panel that determined the appeal. The supporting affidavit must state that no other leave application has been made. Civil and criminal leave applications must be returnable on a Monday on eight to 15 days' notice (CPLR 5516). §1000.13

Reargument

There is variance as to deadlines for motions for reargument, and uniformity seems unlikely. The First Department has a unique rule requiring motions to be made within 30 days of decision. Susannah explained that the Court likes to get motions for reargument as soon as possible while the cases are still fresh to the panel that decided the appeal. This issue has arisen before, including in a report of the NYSBA Commercial and Federal Litigation Section. The Court is unlikely to be inclined to want to change the rule. In practice, there is a grace period where there is a joint application and the motion for leave is timely, but the motion for reargument is not. In such situation, Susannah has never seen a reargument application dismissed as untimely.

The Second and Fourth Departments apply the same deadline for reargument motions as for leave applications, i.e. 30 days from service with notice of entry. The Second Department, however, allows for extensions for good cause shown. Aprilanne said that the standard is liberally applied to cover things like an inability to timely make the motion for a variety of reasons and that it seemed unlikely that the Second Department would eliminate the unique good cause provision. There was a brief discussion about whether the Second Department good cause standard could be explicitly set forth in the First Department to reflect actual practice and in the Third Department, in place of the current open-ended approach for civil reargument applications.

Jim Ranous, who was unable to participate in the conference call, addressed questions in a separate discussion. As to the Third Department's approach of imposing no deadline for civil motions for reargument, he does not think it would be a problem to make the deadline the same for reargument is for leave applications, given that some Judges prefer imposing timelines. He noted: (1) where motions for reargument have been submitted after a lengthy delay, usually reargument is the only relief sought, that is, the party did not make a motion for leave, wait for a disposition, and then seek reargument; and (2) belated reargument motions can be useful and appropriate where, several months after the challenged decision, controlling law changes to favor the aggrieved party.

The Third Department rule is also unique in not setting forth required elements in a civil reargument motion, such as addressing points purportedly overlooked or misapprehended and citing to relevant portions of the record. Jim did not think the Court would have a problem adding such language, thus achieving harmony with the other Departments. He stated, however, as to citing the record, that the Court would want it to be clear that the movant was not supposed to resubmit the record on appeal, since the Court retains the brief and record or appendix for at least a year.

Civil Motions For Leave

Only the Fourth Department reveals that the panel that decided the appeal will decide the civil leave application. The other Departments, though, all follow that practice, except that if a panel member is not available, another judge is vouched in to decide the motion. The group discussed why any information about who decides the motion needs to be spelled out. There could perhaps be uniform silence on this topic in the rules. Jim did not think the Third Department would resist adding a statement that leave applications should set forth questions of law that should be reviewed. Thus, it appears that harmony is possible on this element.

Criminal Motions For Leave

Only the First Department has No rule. on criminal motions for leave. Susannah said perhaps the Court would be willing to simply state that CPLR 460.20 applies. While the Departments generally require formal motions, if the First Department receives a letter application, they convert it into a motion by logging it in as a motion, creating a motion file, and notifying the District Attorney of the return date.

The Second and Fourth Departments state that the motion must be made to a justice of the panel that decided the appeal. The First and Third Departments do not so state, but in fact that is the case. Jim Ranous noted that there is a decision that provides that a criminal leave application must be made to a justice from the panel that decided the appeal.

SPECIAL PROCEEDINGS AND PARTICULAR TYPES OF CASES

	AD1	AD2	AD3	AD4
Original Proceedings	Returnable at 10 a.m. on any day between August 1 and June 20; rules are same as for motions except each party files seven conformed copies in addition to original papers. No calendar is published or called. §600.2(b), (c) Certain types of original proceedings (NYC Tax cases, EDPL, Labor Law) as a matter of course are treated as appeals, but rules do not require it.	Article 78 proceedings are governed by same rules as motions, returnable on Fridays at 9:30 a.m., except notice as required by CPLR 7804(c). §670.5(a) Certain types of original proceedings (EDPL, RPTL, Public Service Law, Labor Law, and Public Officers Law), commenced pursuant to CPLR 304 and 306-b, are treated like appeals and must be perfected w/in three months of serving answer, but on original record. §670.18	Special proceedings (mandamus, prohibition, etc.) are returnable on any motion day at 1:30 p.m., notice as required by CPLR 7804(c) or 403; each party files original and six copies of papers; moving papers filed 24 hours after service. Court then issues schedule for briefing (if no memo of law was filed with pleadings) and calendaring. §800.2(b) Certain types of proceedings (Educ. Law, Labor Law, Public Health Law, and Tax Law) must be perfected according to same rules as appeals, w/in 60 days of service of respondent's answer, except that record must be stipulated. §800.2(c) Abandonment rules apply. §800.12	Returnable any Monday (or next day if legal holiday) at 10 a.m. at least 25 days after service; each party must file original and ten copies of papers. Court then issues schedule for briefing and calendaring. §1000.9

The First and Second Departments treat most original proceedings essentially as motions, particularly those in the nature of mandamus and prohibition. The First Department in practice, and in the Second and Third Departments by rule, certain types of original proceedings in the nature of mandamus for review proceed through briefing and argument much the same as appeals. In the Third Department, the parties must stipulate to record in these types of original proceedings.

The Third and Fourth Departments use a hybrid procedure for all original proceedings. After the pleadings and supporting papers are filed, the court issues a briefing and calendaring schedule requiring perfection in accordance with the rules governing appeals. The Fourth Department uses order to show cause procedures to provide immediate relief or expedition.

The rules governing original proceedings seem more difficult than they need to be. The rules of the four Appellate Divisions regarding special proceedings share common themes, but they vary in detail in many, many ways. It will be difficult to reconcile these differences, but a consistent, straightforward rule would be desirable.

	AD1	AD2	AD3	AD4
Transferred Proceedings	Governed by same rules as appeals except that petitioner or appellant must file record within 30 days of entry of order of transfer. §600.7(b), and briefs within 20 days thereafter, unless time enlarged. §600.11(a)(1)	Governed by same rules as appeals. §670.16	Governed by same rules as appeals. Petitioner must perfect according to same rules as appeals within 60 days after entry of transfer order. §800.19 Abandonment rules apply. §800.12	Prosecuted on original papers transferred from Supreme Court; clerk issues briefing and argument schedule; each party files 10 copies of brief, serves 1 on all others. §1000.8

Unlike the rules regarding original proceedings, the Appellate Divisions' rules regarding transferred proceedings are largely consistent - they are treated very much the same as appeals in all four Appellate Divisions. The only difference involves the calendaring procedure in the First Department and the rule in the Fourth Department that the proceeding is heard on the original papers. The Third Department in practice gets original record from Supreme in pro se prisoner matters.

Rules that Specifically Address Habeas Corpus

	AD1	AD2	AD3	AD4
Calendar Call Dismissals for Habeas Corpus Appeals	Preference; Dismissal of Appeal or Cause; Dismissal Calendar Calls. §600.12(c) If certain requirements are not met following a semi-annual calendar call, criminal habeas appeals may be removed from the calendar after at least eighteen months from when <i>in forma pauperis</i> status had been granted.	No Equivalent Rule	No Equivalent Rule	No Equivalent Rule
Method of Appeals	Habeas Corpus Appeals. §600.18 Alternative Method of Prosecuting Appeals. §600.5	Alternate Methods of Prosecuting Appeals. §670.9	Alternative Methods of Prosecuting Appeals. §800.4	Necessary Documents; Perfection of Appeals. §1000.3
	Habeas appeals may employ the alternative methods of §600.18 or any other method specified by the court. §600.5 Certain Appeals can be filed by “The Appendix Method,” with an “Agreed Statement in Lieu of Record,” or with an “Optional Full Record” . §600.5	An appellant may elect to prosecute an appeal with the “Reproduced Full Record,” by “The Appendix Method,” or by the “Agreed Statement in Lieu of Record Method.”	(b,c) Appeals in indigent cases may use “The Appendix Method.”	(c)(2) Filing and notice rules for civil appeals, including habeas, in which <i>in forma pauperis</i> status has been granted.

Fourth Department has established specific rules regarding Filing, notice, etc. for civil appeals, including habeas, for which *in forma pauperis* status has been granted. In indigent cases, Third Department allows appellants to use The Appendix Method, and these rules would seemingly apply to habeas if *in forma pauperis* status was granted. First Department allows habeas appeals to use The Appendix Method, Agreed Statement in Lieu of Record, or Optional Full Record. Second Department appears to allow all appellants to use any of these three methods, although their specific implementation is not identical to First Department or Third Department in relevant part.

Election Law Cases in the Appellate Divisions

	AD1	AD2	AD3	AD4
	Appeals in Election Cases. §600.9	Alternate Methods of Prosecuting Appeals. §670.9	Appeals in Election Cases. §800.16	Appeals Taken Pursuant to Election Law. §1000.5
	Election law appeals may employ any of the alternative methods of. §600.5 or on a record of the original papers, a typewritten transcript, if any (either stipulated as correct by both parties or settled by a trial judge pursuant to CPLR 5525 and 5532), etc. §600.9 The court or a justice thereof shall establish the terms and conditions for a hearing. §600.5 Certain Appeals can be filed by “The Appendix Method,” with an “Agreed Statement in Lieu of Record,” or with an “Optional Full Record.” Provides rules for the settlement of a transcript.	Appeals under Election Law may be prosecuted upon the original record, including a properly settled transcript of the trial or hearing, if any. §670.9(d)(1)(iii)	Appeals in Election may be prosecuted upon a single-copy of the record and seven copies of a brief and appendix pursuant to the Appendix Method. These appeals shall be given preference and the presiding justice shall establish the terms and conditions for argument. §800.16	(a) Election law appeals shall be prosecuted on one original record (either stipulated as correct by all parties or settled by the court from which the appeal is taken) and the original exhibits. (b) Elections Law Appeals shall be given a preference pursuant to Election Law. §16-116. The clerk should expeditiously calendar the appeal and issue a schedule for filing and service of the record and briefs. Ten copies of briefs shall be filed with the court and one with each opposing party. Election Law. §16-116 Proceedings shall have preference over all other causes. Special proceedings shall be heard upon a verified petition.

