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Supreme Court of the State of New York Appellate Division Third and Fourth Departments: Key Differences in Record and Brief Preparation (Part I)

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There are thousands of courts across the United States and each one of them has their own set of rules and internal operating procedures. Although the appellate process is generally the same, it is important to be aware of the specific rules and procedures of the court you are appearing within. The focus of this article is on the New York State's Appellate Division Third and Fourth Departments, and specifically on the key differences in the preparation of records and briefs in these two courts.

Stipulation v. Certification

The most significant difference occurs in the process of finalizing the contents of a record on appeal. The Appellate Division Fourth Department requires that all parties stipulate to the completeness of the record on appeal and sign a written stipulation pursuant to CPLR § 5532. If the adversary on an appeal refuses to stipulate to the contents, then the only alternative is for the appellant to make a motion to the lower court judge to settle the record on appeal. When the order is received from the lower court judge, that order then will need to be certified by the county Clerk's office from which the appeal derived. When the appeal is perfected at the Fourth Department, the original signed stipulation, or the certified copy of the order settling the record must be

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included in the original record. Either way, it is not possible to file the record on appeal without agreement from your adversary, or a decision as to the contents from the lower court judge.

In the Appellate Division Third Department, the process can be less complicated since the Court will allow the appellant to certify the record, pursuant to CPLR § 2105. The appellant can simply certify that he has compared the originals to what is on file at the county Clerk's office and the record on appeal is complete. The original certification must be included in the original record on appeal.

If, however, there is a transcript where testimony has been taken, then the appellant will need to settle the transcript with the adversary and proof of that settlement will need to be included in the record on appeal. In that case, it may be preferential to simply have the adversary stipulate to the full record on appeal. Additionally, all original proceedings would require a stipulation to the contents of the record.

The convenience at the Appellate Division Third Department is that, if there is no transcript where there was testimony taken, the appellant can file the appeal without having to consult his adversary as to the contents of the record on appeal.

Transfer Proceedings

Another major difference between the Third Department and Fourth Department is when an appellant has a transfer proceeding that needs to be perfected. In the Appellate Division Fourth Department, the original papers are transferred directly from the lower court. The Fourth Department then issues an order setting a date by which the appellant must file 10 copies of his/her brief and proof of service of one copy on the adversary.

At the Third Department, the appellant must prepare a printed record on review. The record on review is similar to a record on appeal with the main difference being that instead of a notice of appeal, there is an Order of Transfer. There is no filing fee for a record on review at the Third Department. The appellant needs to file 10 copies of the record on review along with 10 copies of the appellant's brief, and serve one copy of the record and two copies of the brief on the adversary.

Consolidating Appeals

The process of consolidating appeals, which arise out of the same action, also differs in the Third and Fourth Departments. The Appellate Division Fourth Department requires a motion to be made to consolidate multiple appeals

when there is more than one order or judgment. The Court has been known to take a very strict interpretation of the rules requiring consolidation by motion. Additionally, if there are multiple appellants appealing from a single order or judgment, the Fourth Department requires a stipulation of consolidation to be signed by the parties. This stipulation is then either filed at the court, or included in the record on appeal. The consolidation requirements can be a stumbling block for an appellant if they are approaching their deadline and did not take care to follow the letter of the rules with enough time for the Court to grant a motion to consolidate.

The process is simpler at the Appellate Division Third Department in that if appeals arise out of the same action, they are automatically consolidated without the necessity of a motion, or stipulation. This saves the attorney both time and cost.

Read Part II on the Counsel Press Blog.... Learn how the deadlines for perfecting an appeal are determined in the Third and Fourth Departments; the differences in the motion process for extensions of time, as well as pre-argument statements and condensed transcripts; and go over the differences in the preparation of a brief. To read Part II, visit Counsel Press' Blog (The Appellate Law Journal section).

US Court of Appeals for the Second Circuit Scheduling Orders: "Automatic Dismissal" Language Actually Means What It Says

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May 13, 2013 – The Second Circuit denies a motion to reinstate an appeal after a dismissal for failure to file a brief in compliance with a scheduling order.

The Second Circuit cites a history of case backlog, along with desired adherence to the Court's rules, as its rationale for denying to reinstate an appeal after an automatic dismissal. In the Second Circuit, it had been the practice for counsel to routinely request and receive extensions of time to file their appellate briefs, and this "trend" led to the Court having a large docket of appeals not ready for argument and determination. In response, the Second Circuit changed two key practices: 1) motions for extensions would be decided by a judge, as opposed to the Clerk's Office; and 2) parties were permitted to select a filing date themselves within a 91-day period.

In this particular civil case, the appellant had a pending notice of appeal and filed a scheduling notification in mid-November 2012 selecting a

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filing date in mid-January 2013. Five days before the appellant's brief was due, the appellant filed a motion for an extension of time stating that his office was significantly affected by Hurricane Sandy. The Second Circuit granted the extension and set a new filing date, but the order included "automatic dismissal" language. First, it stated that the appeal would be dismissed on a certain date unless a brief was filed by that date; and, second, that a motion for reconsideration or other relief would not stay the effectiveness of the order.

Despite the "automatic dismissal" language in the order, three days before the extended deadline, counsel moved for another extension listing a myriad of reasons, such as other pressing matters, mediator responsibilities and out-of-state business travel. The Court denied as moot the appellant's second extension request in light of the previous order. On the same day, the appellant moved to reinstate the appeal by citing in part that he was prejudiced by the Court's delay of seven days in deciding the motion for a second extension. Counsel again cited other pressing matters as his rationale for his inability to file a brief on time.

The Court found that the appellant "demonstrated a persistent indifference" to the Court's local rules and scheduling orders and denied counsel's motion to reinstate. The Court noted that the appellant's reasons for his second extension did not rise to the extraordinary circumstances contemplated by LR 27.1(f)(1) – events such as serious personal illness or death in counsel's immediate family. Also, counsel did not file his extension requests in a timely fashion – five days before the filing deadline in the first instance and three days before the filing date in the second instance. The Court further noted that counsel's first extension request "relied on events that had occurred months before the brief's due date," referring to Hurricane Sandy, and even before counsel himself selected the filing deadline. Additionally, counsel did not leave a long enough time period to receive a decision on his motion before his respective due dates. As a result, the Court found that counsel demonstrated a lack of familiarity with the Court's rules, as well as the particular language in the scheduling order regarding dismissal. Additionally, the Court noted that the appellant failed to attach a proposed brief or address the merits of the appeal which is part of the analysis on reinstatement motions.

It is apparent that the Second Circuit is adamant about its rules, including those regarding extensions of time. And it goes without saying that it is imperative for counsel to carefully read orders granting extensions and take note of "automatic dismissal" language.

How to Avoid Calendaring Conflicts in the Supreme Court of the State of New York Appellate Division Second Department

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The Supreme Court of the State of New York, Appellate Division Second Department is generally quite flexible with practitioners appearing before it when it comes to briefing schedules, enlargement requests and even the scheduling of oral arguments. The Court takes its calendar very seriously though. Once an appeal is on the calendar to be heard, the Court's policy is to NOT remove it. The Court does not want to hear about events, plans or obligations that prevent you from attending your oral argument after it has been scheduled.

The Court is willing, however, to consider dates that you (and/or your adversary) are unavailable before scheduling the oral argument. All they require is a letter, preferably submitted at the time the last brief is filed, setting forth dates that the parties cannot attend oral argument. Since the Court sometimes takes several months to calendar an argument, attorneys have a continuing obligation to advise the Court of their unavailability as such dates arise.

So, if you have any vacation time planned, family commitments, religious holidays or professional obligations that cannot be changed and still have an appeal pending for which you are awaiting an oral argument date, write to the Court to advise of your unavailability. The letter may be sent by fax to the attention of the Court's Calendar Clerks at (646) 963-6460.

Similarly, communication with the Court is essential when a cause (defined as, among other things, an appeal or proceeding – see 22 NYCRR 670.2[a][1]) becomes unnecessary because the underlying action has wholly or partially settled, or any of the issues become wholly or partially academic. Furthermore, if the cause should not be calendared because of bankruptcy, death of a party, inability of counsel to appear, etc., the Court must be notified immediately. See 22 NYCRR 670.2[g]. If an attorney or party fails to promptly notify the Court, sanctions may be imposed at the Court's discretion. Notice may be sent to the Clerk of the Court by fax to (212) 419-8457 or by e-mail to ad2clerk@courts.state.ny.us.

The Court takes its calendar very seriously.... Once an appeal is on the calendar to be heard, the Court's policy is to NOT remove it.

So, whether it's advising the Court of your own unavailability or providing notice that the Court's attention to a matter is no longer needed, as with any relationship, communication is key. ▮

U.S. Supreme Court Rules: Revisions to Take Effect July 1, 2013

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The Court has adopted a revised version of the rules of the Court to take effect on July 1, 2013. Normally, the Court makes any proposed revisions available for public comment before making them effective. This time, however, the Court was of the opinion that the latest changes were of minor importance and of a housekeeping nature, and, thus, it did not seek public comment.

However, there are certain revisions that the Bar should be aware of, and we have highlighted the most important of those below. (All revisions may be reviewed at: www.supremecourt.gov/ctrules/2013revisedrules.pdf)

Rules 15 and 18 have an increase in the amount of days that the Clerk must wait before distribution to the Justices of a petition and brief in opposition. That period has been increased from 10 to 14 days so that distribution will now take place sometime between 14-21 days instead of 10-17 days. The exact timing of distribution depends upon various factors which change throughout the course of the year. In any event, this will give the petitioner more time to reply and have the reply brief included in the distribution package. As always, the petitioner can waive the distribution period.

Electronic transmission of all documents to all parties at the petition stage is now required under Rule 29.3 (with some exceptions). "All parties" obviously does not include the Court. Electronic transmission has been required at the merits stage for several years now for all parties, and the Court as well.

Rule 12.6 now provides that a party aligned with a petitioner(s), who supports the granting of the petition, has 30 (not 20) days to file a brief in support, and this time will not be extended. However, such respondent must notify all parties of its intention to file a brief in support within 20 days after the petition has been placed on the docket.

A new Rule 28.8 has been added. The rule sets forth the Court's current practice of only allowing members of the Supreme Court Bar to argue unless a motion to argue *pro hac vice* is made under Rule 6.

As to *amicus* briefs, Rules 37.2(a) and 3(a) have also been revised. 37.2(a) emphasizes that the 10-day notice provision pertains only to *amicus* briefs at the petition stage and 37.2(a) and 3(a) now require only one signatory to an *amicus* brief being filed jointly to obtain consent. This eliminates the need for additional consents when other *amici* join a brief.

Rule 39 has also been revised so that attorneys, who are appointed by a state court, need not file an affidavit of indigency.

Supreme Court of the State of New York Appellate Division First Department: Unraveling The Term Calendar

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Newcomers to appellate practice in the New York State Appellate Division First Department should be aware of this Court's term calendar and how the term calendar system impacts their appeal. In any given calendar year, the First Department has 10 terms for argument and submission, and there are specific deadlines by which documents must be filed in order to take part in a given term.

Terms: It matters when you file…

Although appellants may perfect an appeal[1] any day in which the Court is open, there are strategic reasons for choosing the last filing day for a term. Most significantly, by perfecting an appeal on the last filing day, the appellant gives the respondent the fewest number of days to file his responding brief. For instance, to perfect for the September 2013 Term[2], an appellant must file the necessary opening documents on or before July 8, 2013. No matter what date the appellant's documents are filed for that term, the respondent may file his brief up until August 7, 2013. Likewise, no matter what date the respondent files his brief, the appellant may file his reply brief as late as August 16, 2013. Filing early merely gives one's adversary extra time to prepare his or her own brief and does not accelerate proceedings in the Appellate Division First Department.

The term calendar also plays into other strategic considerations. For instance, if an appellant seeks to have an appeal decided by the end of a particular calendar year, the appeal should be perfected no later than the June Term. Generally, opening briefs and records on appeal are due by mid-March to be eligible for arguments in the June Term. Additionally, one must consider the Court's summer recess; there are no terms between the June and the September Terms. Thus, in 2013, any appeals perfected between March 19 and July 8 would be part of the September Term. Appellants should keep in mind that this Court requires

1. To "perfect" an appeal means to file the note of Issue, the appellant's opening brief and the record on appeal or appendix.

2. September Term appeals should have argument dates between September 3 and September 30, 2013.

service in accordance with the Mailbox Rule; service by mail must be effectuated five days before the last filing date for regular mail or one day before for overnight mail. Finally, the First Department requires that service and filing is done by paper and electronically. These considerations may add additional time to the preparation of appellate documents.

Oral Arguments

Requests for oral argument must be delivered to the Court no later than the day after the Court's deadline for respondents' briefs, per the term calendar. A single request must speak for all parties to an appeal, and must comply with rule § 600.11(f).[3] Failure to timely request oral argument will result in the case being deemed submitted. In general, oral arguments are scheduled during the term for which the appeal was perfected, although the Court may *sua sponte* adjourn an appeal to maintain its calendar.[4] Calendars for oral argument are created by the Court following the submission of the respondents' briefs and oral argument request forms, but prior to the deadline for filing reply briefs.

Extensions of Time

The First Department adheres fairly rigidly to its term calendar, and disfavors extensions of time. An appellant may request additional time to perfect his appeal *only* by motion. Parties may, however, stipulate to up to one week's additional time for filing of the respondent and/or reply briefs without impacting the term for which the appeal is set. Extensions of more than one week generally involve adjourning the appeal to a different term.

All in all, the First Department's Term Calendar provides a level of certainty in practice that few other courts can match. However, because few attorneys are familiar with the rigidity of such a system, practitioners should take care to fully understand the Court's procedural rules or seek appropriate guidance. ▮

3. A sample oral argument request form may be found on Counsel Press' website at www.counselpress.com.

4. This happens most frequently in the September Term, during which roughly 50% of cases, particularly civil cases, are adjourned to the October Term. Criminal and family court cases are generally calendared for argument before civil cases.