

APPELLATE LAW

Appeals in the New York State Appellate Division: Adverse Decision? What Now?

By: Jacquelyn Mouquin, Esq. | Appellate Counsel | Counsel Press | jmouquin@counselpress.com

After you have invested so much time, energy and money appealing to (or defending an appeal in) the Appellate Division, little can be worse than receiving a decision that is adverse to your client. However, one should not despair entirely; you still have options. You may seek further relief from the Appellate Division or move directly to the Court of Appeals to seek leave to appeal in that court.¹

Seeking Relief in the Appellate Division

After an adverse decision, a party may make a Motion for Reargument. In the First Department, service of the decision with notice of entry is not required to start the clock; instead, such a motion must be made within 30 days of the decision on the appeal. In the Second, Third and Fourth Departments, a Motion for Reargument must be made within 30 days of service with notice of entry of the Appellate Division's decision on the appeal.²

Like any motion in the Appellate Divisions, a Motion for Reargument must include a notice of motion, an affirmation

1. In very limited cases, you may also have an appeal as of right to the Court of Appeals. See CPLR § 5601 for further detail.

2. One day is added if the notice of entry is served by overnight delivery. Five days are added if the notice of entry is served by mail.

New York Appellate Division Third and Fourth Departments Rules

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Who is responsible for filing the record or appendix, and who bears the cost? And what is the time limit to perfect the appeal? (p. 6)

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Division, a Motion for Leave to Appeal to the Court of Appeals must be made within 30 days after service of the Appellate Division's order denying leave to appeal with notice of entry.

(A sample timeline is available in the electronic version of this article. To view, please visit Counsel Press' Blog – The Appellate Law Journal section.)

When filing a Motion for Leave to Appeal in the Court of Appeals, in addition to the standard filing fee, notice of motion and affirmation/declaration in support (including the above-described procedural and jurisdictional history), parties must include one copy of each brief filed in the Appellate Division, one copy of the Appellate Division's record on appeal or appendix, the Appellate Division's order and a corporate disclosure statement (where appropriate).

Motion for Reargument versus Motion for Leave to Appeal to the Court of Appeals

Although both a Motion for Reargument and a Motion for Leave to Appeal to the Court of Appeals seek further review of an appeal, the two types of motions request a different

court to make that review. With a Motion for Reargument, the party is seeking the appeal to remain in the Appellate Division, while, with the Motion for Leave to Appeal, the party is requesting that a new court address the issues.

Neither a Motion for Reargument nor a Motion for Leave to Appeal should simply rehash your appellate brief or affirmation. Further, neither motion should introduce new points or arguments regarding your appeal. Instead, the purpose is to explain to the court the reasons why further consideration of the appeal is warranted.

In a Motion for Reargument, a party should explain to the Appellate Division the reasons that the panel was incorrect in its decision. Thus, the motion should highlight what the court *overlooked* or *misapprehended* when making its decision. References should be made to the specific parts of the record on appeal or appendix that highlight these errors.

A Motion for Leave to Appeal may include the same considerations. However, this motion should also explain why

the questions presented merit review by the highest court in New York. The Court of Appeals Rules of Practice § 500.22(b)(4) identifies the following issues as ones that might merit review:

- issues that are novel or of public importance.
- issues that present a conflict with prior decisions of the Court.
- issues that involve a conflict among departments of the Appellate Division.

The Court of Appeals does not generally review issues of fact. Thus, in a Motion for Leave to Appeal, a party must highlight the questions of law that it believes the court should review.

There's still hope...

In conclusion, an adverse decision in the Appellate Division may not be the end of the line for your appeal. In appropriate cases, either the Appellate Division or the Court of Appeals, or both, will provide further review and relief. However, to take advantage of this, a timely Motion to Reargue and/or Motion for Leave to Appeal to the Court of Appeals must be filed. ■

New York State Appellate Division Third and Fourth Departments: Key Differences in Record and Brief Preparation (Part II)

By: Robert Brucato, Esq. | Senior Appellate Counsel | Counsel Press | rbrucato@counselpress.com

Proceedings in appellate courts are very different from those in trial courts, and each one of the appellate courts has their own set of rules and internal operating procedures. If you do not follow the rules carefully, you may lose the chance to have your appeal considered. In Part I of this article, we discussed some of the differences in the preparation of records and briefs in New York State's Appellate Division Third and Fourth Departments including "stipulation vs. certification", transfer proceedings and consolidating appeals. Other key differences, which attorneys practicing in these two courts should be aware of, are covered below.

(To read Part I, go to Counsel Press' Blog, The Appellate Law Journal section - Issue 1.)

Deadline for Perfecting an Appeal

The Appellate Division Fourth Department allows an appeal to be dismissed by motion after 60 days. As long as the

Appellant responds to such a motion, the Court will only issue a conditional dismissal requiring that the appeal be perfected by a certain date. If no motion has been made, the appeal is considered dismissed after nine months from the date of service of the notice of appeal without the necessity of a motion.

In the Appellate Division Third Department, the same motion procedure can occur where a motion to dismiss can be made after 60 days have passed. Again, as long as the attorney responds to that motion, the appeal will not be dismissed outright and, instead, a conditional dismissal will occur where the appeal must be perfected by a certain date. However, for practical purposes, it is very rare to see such a motion to dismiss made at the Third Department. It is a different situation at the Fourth Department where these motions are seen on a regular basis. At the Third Department, if a motion to dismiss has not been made, the appellant



has nine months to perfect the appeal. However, the nine months count not from the date of service of the notice of appeal or the date of filing, but from the date that the attorney dates their notice of appeal. This can make the difference of a few very critical days when determining an absolute deadline.

Extensions of Time

While the motion process for an extension is similar in both courts, one key difference at the Appellate Division Third Department is that the Court will sometimes grant extensions of time for the respondent and reply briefs without the necessity of making a written motion. A simple phone call will often result in an extension

of at least a few days. This is not in the rules, but is simply a matter of practice. The Fourth Department, however, always requires that a written motion be made for an extension of time.

Pre-Argument Statements

While not a part of the record on appeal, the Appellate Division Third Department does require the filing of a pre-calendar statement at the time that the notice of appeal is filed. The Fourth Department does not have such a requirement.

Condensed Transcripts

Traditionally, the Third and Fourth Departments both did not accept condensed transcripts in a record on appeal. As of last fall, however, the Fourth Department will accept condensed transcripts if they were submitted at the court below in that format. The Third Department continues not to accept condensed transcripts.

Brief Preparation

The Appellate Division Fourth Department allows up to 70 pages for both the appellant and the respondent briefs. The Third Department allows 70 pages for the appellant brief, yet only 35 pages for the

respondent brief. The Fourth Department allows 35 pages for a reply brief and the Third Department limits the reply brief to 15 pages.

Additionally, the Fourth Department only requires that the brief text be at least 11 points, with no particular font required. The Third Department does not specify a particular font or point size, but they prefer 14-point print. The Fourth Department requires a table of authorities which is not required at the Third Department, but it is strongly recommended. While there are particular colored cover requirements for briefs at the Fourth Department, covers at the Third Department are all white.

Final Thought

The instances cited herein are just some of the major

differences between the Appellate Division Third and Fourth Departments, and there are other instances that do occur. Counsel Press provides the experience, quality and service in these courts that you cannot find in any other appellate services provider in the nation. Robert Brucato is an admitted attorney in the Fourth Department, and he has been working in the appellate field for over 21 years, primarily in the Third and Fourth Departments. LaFon Howard, manager of Counsel Press' printing facility in Rochester, NY, has been in the appellate field for over 30 years. That's over 50 years of knowledge and experience right here in Western New York.

Counsel Press is always available to discuss any question that you may have regarding the appellate rules at these and other courts. ■



Civil Appeals to the New York State Appellate Division Third Department: Procedural Aspects of Cross-Appeals

By: Linda Champlin | Senior Appellate Consultant |
Counsel Press | lchamplin@counselpress.com

Cross-appeals in the Appellate Division Third Department are handled in a different manner than in any of the other three Departments of the New York State Appellate Division. To compare, see Section 800.9(e) of the rules of the Third Department with Section 600.11(d) (1) of the Appellate Division First Department, Section 670.8 (c) (1) of the rules of the Appellate Division Second Department and Section 1000.4 (b) (1) of the rules of the Appellate Division Fourth Department.

Who is responsible for filing the record or appendix?

Section 800.9 (e) of the Third Department rules states that, “unless otherwise directed by order of the court made pursuant to a motion on notice, the plaintiff shall be the appellant and shall file and serve the record and brief, or brief and appendix, first.” Simply put, this means that, unless the plaintiff makes a motion asking to be relieved

of this obligation, they are required to file and serve the record or appendix and opening brief first. Please note, however, that any party may take the lead, especially if they are the more aggrieved party.

What is the time limit to perfect the appeal and serve and file answering and reply briefs?

Section 800.9 (a) of the rules of the Appellate Division Third Department state that an appealing party must perfect (serve and file the record and opening brief) “within 60 days from service of the notice of appeal,” and failure to do so can invite a motion by your adversary to dismiss the appeal. However, unless a motion has been made to dismiss, the outside time you have to perfect is “nine months from the date of the notice of appeal.” (See Section 800.12).

The answering brief (and appendix if the appeal was perfected by the appendix method) needs to be “filed



and served within 30 days after service of the first brief” and needs to address “the points of argument on the cross-appeal.” A reply brief is required to be “filed and served within 10 days from service of the answering brief.” The reply brief to the cross-appeal needs to be filed and served 10 days after service of the first reply brief. See Section 800.9 (e).

Who bears the cost of preparing the record or appendix?

In the Third Department, cross-appellants are not obligated to contribute to the cost of preparing the record or appendix. That does not mean there can't be dialogue between the parties about sharing costs. Just keep in mind that if you are the defendant and you choose to take on the filing and serving of the record or appendix and your brief first, the plaintiff does not have to help with the cost of preparing that record or appendix. ■

“Web Links to Nowhere” in SCOTUS Decisions: How to Ensure that Cited Material Remains Available for Years to Come

By: Ray Harmon | Support Services Manager | Counsel Press | rharmon@counselpress.com

According to a recent article in *The New York Times*¹, half of the hyperlinks in Supreme Court opinions no longer link to the information originally cited. Even at this level, creating a link directly to a website can be risky business. Websites expire or change owners, while web pages are relocated or archived. The question arises, how do you take control of slippery online material when citing to a web source directly?

In an ideal world, it would be easiest to copy a web path directly into your link command, but what happens five years from now? What happens in ten years when that website is no longer valid or even in existence? It's important to understand that you have no control over that pinpoint material. Therefore, you are at the website's mercy and the one at risk when referencing online material.

1. The article titled “In Supreme Court Opinions, Web Links to Nowhere”, written by Adam Liptak, published September 23, 2013.

Counsel Press' eBrief team has extensive experience and deep expertise in hyperlink technology. We have assisted thousands of attorneys with enhancing their briefs, from basic hyperlinking to conversion of video and audio exhibits. Over the years, we have developed a number of techniques for combating website link rot, and we wanted to share a few of these in this article.

The easiest and most reliable way to prevent link rot is to do a simple conversion: create an image file of the website you are viewing. By converting a web page to a PDF, you

...creating a link directly to a website can be risky business... how do you take control of slippery online material when citing to a web source directly?

have locked that web page material down as an image, permanently. You can then link directly to that image file. Whether you choose to link externally, internally, or as an attachment file, it is up to you and a subject best left for another article.

Video files are especially tricky. *The New York Times* article notes one hyperlink in an



opinion about violent video games by Justice Samuel A. Alito, Jr. The hyperlink takes users to an error page that reads: "Aren't you glad you didn't cite to this Web page?" So, how do you avoid the video link rot in your legal document?

It's always best to try to utilize the exhibit material that you have available directly to you, e.g., deposition, surveillance, animations, etc. If you have to use an online video, I would ask for permission to use it directly from the source. Once you have the video files in place, you will need to check the size. If the size is large, the best solution is converting video files into a standard file format, e.g., mpeg, mp4, etc. This will ensure that all operating systems are able to (dis)play the video file. If the file size is more manageable, *embedding* video files directly into PDF can be another nice option. For example, at Counsel Press, we have uploaded many appellate filings into the PACER/ECF database that contain video material embedded directly into the brief and/or record.

When linking to citation material online, like statutes and case law in LexisNexis and Westlaw, you also have the capacity to create links that search for the relevant material rather than simply directing the command to that web page. In other words, the link will find the specified document rather than look for a web page directly.

Sometimes, the answer can be a combination of things. What about two links? One link might lead directly to the web page and the other to an *image* of the web page. However you decide to proceed, if you do have to reference something directly online, make sure that it's from a reputable source. Avoid URL shorteners as they are prone to rot. One last thing: check your links often!

There is no easy answer for linking directly to web sources, but, with a few techniques, you can ensure that your cited material will remain available and relevant for years to come. ■



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