

APPELLATE LAW

JOURNAL

U.S. Court of Appeals for the Second Circuit: Local Rules Amended Effective February 1, 2014

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Effective February 1, 2014, there are significant changes to many Second Circuit Local Rules. The amended rules include 25.1, 25.2, 27.1, 28.1, 30.1, 39.1, 40.2 and 42.2.

The new rules affect the following: submission of sealed, oversized and PDF documents (LR 25.1 and 25.2); motions to reinstate an appeal dismissed for failure to timely file a brief (LR 27.1); required information in the appellant's opening brief (LR 28.1); the number of paper copies of the appendix to submit and the submission of an appellee's supplemental appendix (LR 30.1); reproduction costs (LR 39.1); seeking panel reconsideration (LR 40.2) and stipulations or motions to voluntarily dismiss a criminal appeal (LR 42.2).

Of particular note to appellate practitioners, amended LR 28.1(b) lists several required components to the Statement of the Case section of the opening brief. Amended LR 30.1 now allows for an appellee to submit as of right a supplemental appendix with their brief where the appellant did not file a joint appendix in compliance with FRAP 30. Also under amended LR 30.1, counsel must now file six paper copies of an appendix in all cases where an appendix is submitted. Further, counsel are required to file and serve a text-searchable PDF of every appendix on CD or DVD under

The "Clerk's Law" or the Unwritten Rules You Should Know

Make no mistake, these guidelines are vital additions to your submission. (p. 3)

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amended LR 25.2.

Some of the amendments are fairly straight-forward and will be easy to implement in practice. With others, such as amended LR 30.1, allowing for the submission of an appellee's supplemental appendix as of right, practitioners may need to communicate with the Court to determine how to properly proceed.

In the past few weeks, we at Counsel Press have been closely monitoring the Second Circuit updates and communicating with the Court regarding the amended rules. Below is what we were able to clarify.

LR 30.1 – LR 30.1 was amended to allow an appellee to submit as of right a supplemental appendix with their brief where the appellant did not file a joint appendix in compliance with FRAP 30. The Court has informally clarified that when an appellant files their appendix as a “Joint Appendix,” the Court will assume that the parties have conferred and a motion to file a supplemental appendix will be required in all instances. If an appellee was not consulted

but the appellant, nevertheless, files a “Joint Appendix,” the appellee should call their case manager to discuss the next steps; a motion for leave to file a supplemental appendix may be necessary in these circumstances. In those instances where the appellant is *pro se*, an appellee may file their supplemental appendix as of right under amended LR 30.1.



LR 25.2 – To clarify the amendments to LR 25.2 requiring counsel to file and serve a text-searchable PDF of every appendix on CD or DVD, this rule only applies to

appeals filed prior to January 1, 2010 or with those beginning with docket numbers 09-xxxx or lower. Accordingly, for appeals with docket numbers of 10-xxxx or higher, there is no requirement to file and serve a CD or DVD containing a PDF of an appendix.

LR 25.1 – With respect to the amendment to LR 25.1 requiring counsel to submit a redacted version of documents filed under seal within seven days of filing, the Court prefers that the sealed and redacted versions are filed on the same day rather than waiting the permitted seven-day time period.

We at Counsel Press are always available to assist you with navigating the filing requirements of the Second Circuit, as well as other federal and state courts nationwide. We will continue to communicate with the Court to clarify the procedures surrounding the amended rules. Please feel free to contact us for more information.

To receive updates on rules via email, please sign up to our Appellate Practice Blog at Counsel Press' website. [■](#)

The “Clerk’s Law” or the Unwritten Rules You Should Know (Part I: New York State Appellate Division First Department and Appellate Division Second Department)

By: Mariana Braylovskiy | Senior Appellate Paralegal | Counsel Press | mbraylovskiy@counselpress.com

You've read the rules, and you've read them once more. You've followed them while preparing your brief and submitted it to your appellate services team for final processing. Unexpectedly, you are informed that changes are required to ensure that your brief is accepted for filing. You wonder, “How could this happen?” You're certain that you didn't overlook any details while reading the rules. The reason is that each court has a set of unwritten rules or “clerk's law.” These court-specific common practices can only be gleaned through experience, frequent communication with the clerks and through processing multiple filings in a particular court.

The role of Counsel Press' appellate paralegals is to advise and shield our clients from all potential pitfalls. In this article, I'll go over some of the unwritten rules of the Appellate

Division First and Second Departments. Some of these points may seem fundamental, but, make no mistake, these guidelines are vital additions to your submission.

First Department:

- *Bullet Points* – only four-to-five of these are permitted in all briefs submitted for filing.
- *Printing Specifications Statement* – no signature is required.
- *Filing Fee Check* – the court will not accept a check made payable to the “clerk” of the court. Only checks made payable to the “Appellate Division First Department” are accepted.
- *Request for Oral Argument Form* – counsel is required to file this form. Simply listing the name of the arguing attorney (for either side) on the brief cover is not sufficient. An original



signature is not required for filing.

- *Stipulation to file a Supplemental Record* – only one original signature is required.
- *Pre-Argument Statement* – this statement can be used in lieu of the CPLR § 5531 statement. Rule 600.10(b) (1)(ii) requires inclusion of the statement pursuant to CPLR § 5531 in the record, but parties may utilize the Pre-Argument Statement instead.

Second Department:

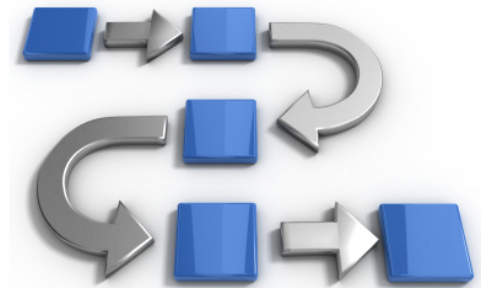
- *Docket Numbers* – every order under appeal is assigned a separate docket number.

- *Photographs in the Record/Appendix* – these must be reproduced in color or the Appellate Division will require a letter to explain how these documents were originally presented to the lower court.
- *Condensed Transcripts in the Record/Appendix* – these are not allowed, even if the transcript was presented in a condensed format in the lower court.
- *On cross-appeal – the Appellant-Respondent's Reply Brief* can be 14,000 words without need to

request permission to file an oversized brief.

- *Briefs filed in criminal matters* – no signature is required.
- *Appellate designations in the caption* – these have to match the appellate designations listed in RADI form or the court will require a letter explaining the discrepancies.

There are many other unwritten rules that counsel should be cognizant of. We will continue publishing the “unwritten rules” series and will be covering



other New York appellate courts, as well.

The biggest advantage of utilizing Counsel Press is peace of mind – there is no substitute for knowing that your filing will be completed correctly the first time, every time. ■

New York State Appellate Division Fourth Department: Multiple appellants or cross-appellants? How does this change the procedure? (Part II: Cross-Appellants-Respondents)

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The Appellate Division Fourth Department handles appeals with multiple appellants and cross-appellants in a different manner than any of the other three Departments of the New York State Appellate Division. In Part I of this article, we explained the procedure

for consolidating appeals, timing for perfecting an appeal, sharing the cost of the joint record and timing for an appellant's opening brief. In this part, we go over the color cover requirements at the Fourth Department and the alternative courses that an attorney can follow

in filing their briefs as a cross-appellant-respondent.

Understanding color cover requirements

The Fourth Department requires that all briefs filed at the court have the appropriate color cover for the particular type of brief that is being filed. These

requirements are covered in Rule 22 NYCRR 1000.4 (f) (5). From the first glance, the requirements may appear straight-forward; however, in practice, it can get very confusing when many parties are involved in an appeal. Especially confusing can be a situation when a party is a cross-appellant-respondent. In that case, the question arises whether the party should file a respondent's brief or an appellant's brief, or both; and what color should their brief(s) be.

Two options for filing brief(s) as a cross-appellant-respondent

The court allows the attorney to choose how they wish to proceed. A cross-appellant can choose to file a separate appellant's brief and then file a respondent's brief, responding to the lead appellant's case, as long as a cross-appellant is still timely in perfecting their appeal. This is not the most common route, but it is not unusual. The other alternative is for the cross-appellant-respondent to respond to the lead attorney's appellant's brief with a respondent's brief that also includes their appellant's argument. This process will involve less briefs

being filed with the court and is probably the more common choice.

Factors for choosing one option over another

Factors that might lead an attorney to choose one route over the other would include:

1. Timing – do they have enough time to still file an appellant's brief?
2. Strategy – do they want both appellant's and respondent's arguments in the same brief?
3. Cost – two briefs filed per-party versus three briefs filed.

We recently had that exact situation play out on an appeal and not only can it be confusing for the attorneys, but it can make it very complicated for the court. However, that is the system in the Fourth

Department and it provides the attorneys with many more choices on how to proceed than are provided in other departments. Of course, with choice comes complexity!

Counsel Press provides the experience, quality and service in the Third and Fourth Departments 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 and the U.S. Court of Appeals for the Second Circuit. 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.



Appeals in the New York State Appellate Division: How does a Motion for Reargument differ from a Motion for Leave to Appeal to the Court of Appeals?

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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

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.

Practitioners should be aware of timing issues with regards to filing each of these motions. In some courts, a Motion for Reargument may have a different time limit than a Motion for Leave to Appeal. ■

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.

“Hyperlinking” Your Appeal: Types of Hyperlinks and Techniques, A General Overview

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In the December issue of the Journal (available at Counsel Press' Blog, in the Appellate Law Journal section), we explored the potential dangers of “linkrot” and simple fixes for combating them when referencing and *linking* to the complex world of online materials. What we didn't discuss was how to *create* a hyperlink in the first place. In this article, we will consider different types of hyperlinks as well as some basic tools for creating them. This will serve as a general overview and good starting point for some simple definitions and techniques. We can jump into more advanced features later on.

There are many tools for creating hyperlinks and criteria for choosing among them, especially as they pertain to the world of appellate services. We will explore a few of the options presently available, whether you're linking from a PDF document, creating an internal link within a document or an external link to a website or supporting material.

Types of Links:

There are two basic types of links – internal and external. Internal links consist of references to documents *within* the current PDF file. These refer to a specific page or an attachment file. External hyperlinks consist of any *outside* source. These refer to any supporting document or website – basically, any material not found within the current PDF file.¹

Internal links

Specific page: any page referred to within the document itself; e.g., “*supra* at 10.” (Best tool for the job: third-party plug-in or Acrobat “Link” tool).

Attachments: any file “attached” to the current PDF

1. There are other advanced features not touched upon in this article, such as linking/working with destinations or embedding links directly into word files.

document. (Best tool for the job: Acrobat “Link” tool).

External links

Website: this is a link to any online material. (Best tool for the job: third-party plug-in or Acrobat “Link” tool).

External file: any document that is not part of the PDF file. This could refer to a population of exhibits, video deposition files, Excel spreadsheets, PowerPoint presentations, etc. These links require a path and command, e.g., open this particular file (in this particular folder) to this particular page. This is what a condensed link command might actually look like: (Witness Statement.pdf/LINK/JX-10/View External/FitPage/Dest.Page 1/NewWindow/Folder:Joint ExhibitsJX-10_2005_Report.pdf).



(Best tool for the job: third-party plug-in).

Although external links are the most common, they are not necessarily the most stable. Websites expire and file names change. The most important way to handle external links is to have the files well-organized and in final form at the beginning of the linking process.

Linking tools:

Acrobat “Link” tool: This is the built-in tool that Acrobat provides for creating hyperlinks. Although it is the most stable of the link tools, it is also one of the least user-friendly examples we have encountered. It will work for internal hyperlinks or if you have to do some minor linking. However, if you have thousands of hyperlinks on your plate, some third-party tools have proven to be better-suited.

Plug-ins: There are many third-party plug-ins for Acrobat products. A plug-in will increase the productivity of your software. Essentially, it's a small program that gets downloaded and added to your suite of Acrobat tools. Usually, a plug-in will appear at the top of the window as a new dropdown menu. A

simple web search should produce a plug-in solution for any of your specific needs. For example, Counsel Press utilizes a whole slew of Acrobat plug-ins for resizing documents, stamping, flattening, running batches, bookmarking, linking, numbering and redacting. These utilities, which keep us at the forefront of technology, have led us to build some successful in-house solutions for ultimate control, as well. In this way, the impeccable quality of our clients' documents is assured for each and every filing.

For more information regarding specific Acrobat plug-ins that best suit your needs, please visit the acrobat.pluginsworld.com or acrobatusers.com websites.

Here, at Counsel Press, we employ a wide range of software to create and manage the links in our clients' briefs and appendices with total regard for accuracy and consistent results. Constant monitoring of the latest developments in software and the frequent changes in the standards and requirements of the appellate courts make our workflow efficient, dependable and totally compliant. ■



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