

Civil Appeals in New York: Taking an Appeal to the Fourth Department

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This Practice Note explains the process for starting an appeal to the Appellate Division, Fourth Department from an order or judgment in a civil action or proceeding in the New York State Supreme Court (New York's trial court of general jurisdiction). This Note covers preliminary procedural matters, taking an appeal as of right, and moving for leave to appeal.

PRELIMINARY MATTERS

REVIEWING THE APPLICABLE PROCEDURAL RULES

Before drafting, serving, or filing any documents in the Fourth Department, attorneys should review the relevant sections of:

- Article VI of the New York Constitution, which defines the powers and jurisdiction of the courts (N.Y. Const. art. VI, §§ 1-37).
- Article 4 of the New York Judiciary Law, which governs the appellate divisions (N.Y. Jud. Law §§ 70-109).
- The Civil Practice Law and Rules (CPLR).
- The Fourth Department's local rules (N.Y. Ct. R. §§ 1000.1-1022.11a).

Parties should confirm that they are appealing to the correct appellate division. The Fourth Department hears appeals from the supreme courts venued in:

- Allegany County.
- Cattaraugus County.
- Cayuga County.
- Chautauqua County.
- Erie County.
- Genesee County.
- Herkimer County.
- Jefferson County.
- Lewis County.
- Livingston County.
- Monroe County.

- Niagara County.
- Oneida County.
- Onondaga County.
- Ontario County.
- Orleans County.
- Oswego County.
- Seneca County.
- Steuben County.
- Wayne County.
- Wyoming County.
- Yates County.

(N.Y. Const. art. VI, §§ 4, 6; CPLR 5701; N.Y. Jud. Law §§ 70, 140.)

Attorneys should appeal orders transferring a case from one county to another in the appellate division where the motion to transfer was decided (CPLR 511(d)). For example, attorneys should appeal a motion granted in Herkimer County to transfer jurisdiction from Herkimer County to Hamilton County in the Fourth Department, not the Third.

Attorneys preparing to take an appeal also should review the laws and rules governing practice in the supreme court because some documents, like the notice of appeal, are not filed in the appellate division (CPLR 5515(1)). These documents must conform to the requirements of the CPLR and:

- The Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR §§ 202.1-202.70), including, where applicable:
 - the rules governing use of the New York State Courts Electronic Filing System (NYSCEF) in the supreme court (22 NYCRR §§ 202.5-b to 202.5-bb); and
 - the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70). The specific rules of practice for the commercial division are set out in 22 NYCRR § 202.70(g) (Commercial Division Rules).
- Any local rules of the supreme court (for example, General Rules for Non-Jury Trials in Onondaga County Supreme Court).
- Any local rules or guidelines for NYSCEF (for example, Onondaga County Protocol for Case Filings New York State Electronic Filing (NYSCEF)).



- Any individual practice rules for the justice assigned to the case (for example, the Rules of the Justices of the Supreme Court 8th Judicial District for Civil and Matrimonial Cases).
- Any case-specific orders (for example, a consolidation order that modifies the caption requirements).

Failure to comply with all applicable rules may result in papers being rejected for filing (N.Y. Ct. R. § 1000.3(a)).

OBTAINING ANY NECESSARY ADMISSIONS OR REGISTRATIONS

Attorneys appearing in the case for the first time must be admitted to practice in New York. An admitted attorney or a *pro se* party must sign every document served on another party or submitted to a court (22 NYCRR § 130-1.1a(a); N.Y. Ct. R. § 1000.16(b)).

Unlike in federal court, however, attorneys do not need separate admission to practice in the appellate courts. Admission to practice in New York permits an attorney to appear in any New York court (N.Y. Jud. Law § 90(1)).

Attorneys not admitted to practice in New York may move for admission *pro hac vice* (see Standard Documents, Affirmation of New York Attorney in Support of *Pro Hac Vice* Motion in New York State Court (<http://us.practicallaw.com/4-554-3325>) and Affidavit of Out-of-State Attorney to Support a *Pro Hac Vice* Motion for Admission in New York State Court (<http://us.practicallaw.com/5-554-9586>)). In the Fourth Department, the papers supporting the motion must include:

- An affidavit from the attorney stating that the attorney is:
 - a member in good standing in all the jurisdictions in which the attorney is admitted; and
 - associated with a New York bar member in good standing acting as the attorney of record.
- A certificate of good standing from the bar of the state where the attorney maintains the attorney's principal office.

(N.Y. Ct. R. § 1000.13(l).)

Attorneys appearing in the case for the first time may need to register for NYSCEF to take an appeal. The Fourth Department does not use NYSCEF, but attorneys may need to electronically file the notice of appeal or motion for permission to appeal with the county clerk. Attorneys can register for NYSCEF on the NYS courts e-filing homepage.

TIME TO TAKE AN APPEAL

Normally, an appellant must take the appeal, whether as of right or by permission, within 30 days after either the appellant or the respondent (New York courts do not use the term "appellee" (CPLR 5511)) serves notice of entry of the judgment or order appealed from (CPLR 5513(a), (b) and see Standard Document, Notice of Entry (NY) (<http://us.practicallaw.com/5-544-6946>)).

A party moving for leave to appeal where the supreme court has already denied permission must make the motion within 30 days from service of notice of entry of the order denying its first leave motion (CPLR 5513(b)).

If one party timely serves a notice of appeal or motion for leave to appeal, the deadline for any other party to take an appeal is the later of:

- Ten days after the service of the first notice of appeal or motion for leave to appeal.
- The end of the 30-day period described above.

(CPLR 5513(c).)

The time limits for taking an appeal are jurisdictional. Failure to comply with them results in the dismissal of the appeal (see *AXA Equitable Life Ins. Co. v. Kalina*, 956 N.Y.S.2d 743, 745 (4th Dep't 2012)).

CALCULATING THE TIME TO APPEAL

When calculating the time to appeal, attorneys should:

- Exclude the day the notice of entry was served.
- Count intermediate Saturdays, Sundays, and legal holidays.
- Extend the deadline to the next succeeding business day if it falls on a Saturday, Sunday, or legal holiday.

(N.Y. Gen. Constr. Law §§ 20, 24, 25-a.)

If the date of service and the date of receipt are different (for example, where a party serves notice of entry by US mail or overnight delivery), attorneys must calculate the time from the date of service (for example, the date of mailing). The date of receipt is immaterial. (CPLR 2103(b)(2), (6); N.Y. Gen. Constr. Law § 20.) However, attorneys should add to the otherwise applicable time to appeal:

- One business day if the notice of entry was served by overnight delivery.
- Five business days if the notice of entry was served by US mail from within New York State.
- Six days if notice of entry was served by US mail from outside New York State but within the US.

(CPLR 2103(b)(2), (6) and 5513(d); N.Y. Ct. R. § 1000.13.)

Attorneys should add these extra days regardless of which party served the notice of entry (CPLR 5513(d)).

For example, if the appellant serves notice of entry of a supreme court judgment by placing it in the US mail in New York State on August 1, that party has until September 5 (35 days from the date of service) to take an appeal. If September 5 is a Saturday, Sunday, or public holiday (for example, Labor Day), the time to appeal expires at the end of the next business day.

EXTENDING THE TIME TO APPEAL

Attorneys can extend the time to appeal under very limited circumstances (CPLR 5514(c)).

A timely appeal inadvertently taken by the wrong method normally extends the time to appeal. If the appellant appeals as of right when it should have appealed by permission or vice versa, then unless the court orders otherwise, the appellant must appeal by the correct method 30 days from service of notice of entry of the court order either:

- Dismissing the appeal incorrectly taken as of right.
- Denying the unnecessary motion for leave to appeal.

(CPLR 5514(a), 5520(b); *Park E. Corp. v. Whalen*, 381 N.Y.S.2d 819 (1976); Practice Commentary C5514:1 to McKinney's CPLR 5514.)

An appellant also receives extra time if, before the end of the normal 30-day period, its attorney suffers any of the following:

- Death.
- Disability.
- Suspension.
- Disbarment.

(CPLR 5514(b).)

The time to appeal is 60 days from the death, suspension, disbarment, or onset of disability (CPLR 5514(b)).

Finally, an appellant receives extra time if, before the end of the normal 30-day period, an event occurs that allows or requires substitution of a party. If that happens, all parties have until 15 days after the substitution is made to take an appeal. (CPLR 1022, 5514(c).)

PROCEDURE FOR APPEALING AS OF RIGHT

An aggrieved party takes an appeal as of right by serving and filing a notice of appeal in the supreme court.

For information about what types of judgments or orders a party may appeal as of right, see Practice Note, Civil Appeals in New York: Initial Considerations for Appellate Division Appeals: Papers Appealable as of Right (<http://us.practicallaw.com/0-535-6702#a308115>).

CONTENTS OF THE NOTICE OF APPEAL

A notice of appeal to the Fourth Department must contain:

- A caption (see Caption).
- Basic information about the appeal (see Text).
- A signature block (see Signature Block).
- A copy of the paper appealed from and any supporting decision or opinion (see Paper Appealed From).
- Proof of service (see Proof of Service).

(CPLR 2101, 5515; 22 NYCRR §§ 130-1.1a, 202.5(a).)

For a sample notice of appeal with drafting tips and explanations, see Standard Document, Notice of Appeal (NY Appellate Division) (<http://us.practicallaw.com/2-533-1206>).

Caption

Each paper served or filed in an action or proceeding in the supreme court must begin with a caption containing:

- The court name (Supreme Court of the State of New York).
- The county of venue (for example, County of Cattaraugus).
- The case title.
- The nature of the paper (here, Notice of Appeal).
- The name of any assigned justice and the index number, both located to the right of the case title.

(CPLR 2101(c); 22 NYCRR § 202.5(a).)

Attorneys should also consult any applicable local rules, division rules, assigned justice's rules, e-filing rules or guidelines, and case-specific orders for additional material that may be required in a particular case.

Text

Every notice of appeal must identify:

- The appellant or appellants.
- The paper or papers from which the appeal is taken.
- The court hearing the appeal (here, the Appellate Division, Fourth Department).

(CPLR 5515(1).)

If the appellant is appealing from only part of a judgment or order, the notice of appeal should identify the particular part (CPLR 5515(1)).

The text of the notice of appeal should not contain material beyond the items described above. It should not, for example, contain any legal or factual argument. Nor should it name the respondent or respondents unless doing so is necessary to identify the judgment or order appealed from. Including additional material can only restrict the scope of the appeal, not expand it.

For more information about the text of a notice of appeal and sample language, see Standard Document, Notice of Appeal (New York Appellate Division): Drafting Note: Text for an Appeal from an Entire Paper (<http://us.practicallaw.com/2-533-1206#a237018>).

Signature Block

The appellant's counsel should date and sign the notice of appeal on the day counsel intends to serve and file it. In the Fourth Department, the deadline to perfect the appeal (that is to file the appellant's brief, record, and, if applicable, appendix) or have it deemed abandoned runs from the date of service of the notice of appeal (N.Y. Ct. R. § 1000.02(b)).

The notice of appeal must be signed by the appellant's counsel or a self-represented appellant (22 NYCRR § 130-1.1a(a)). If the appellant's counsel serves and files in paper format, the attorney should sign it manually. If the appellant's counsel serves and files using NYSCEF, absent a local rule to the contrary, the attorney should sign the document by any of the following methods:

- Physically signing a paper copy of it and scanning it into electronic format.
- Electronically attaching to it a digital image of the signer's signature.
- Electronically serving and filing the document under the signer's NYSCEF user ID and password.
- Complying with any other electronic signature standard or requirement established by the Chief Administrator of the Courts.

(22 NYCRR § 202.5-b(e).)

Using only "/s/" therefore does not suffice as a signature.

By signing a notice of appeal, an attorney or party certifies that to the best of the signer's knowledge, information, and belief, the appeal is not frivolous (22 NYCRR § 130-1.1a(b)).

In addition to the attorney's signature, whether physical or electronic, the signature block must contain the signer's:

- Typed or clearly printed name, just below the signature line.
- Address.

- Telephone number.

(CPLR 2101(d); 22 NYCRR § 130-1.1a(a).)

An attorney generally should also identify the attorney's law office and client in the signature block.

By including a fax number in the signature block, an attorney consents to service by fax (CPLR 2103(b)(5)).

List of Recipients

Although not required, attorneys may list the attorneys or *pro se* parties on whom they are serving a notice. Attorneys may also add the court clerk with whom they file the notice, although this is less common (see *Serving and Filing the Notice of Appeal*).

Paper Appealed From

The appellant must serve and file each judgment or order appealed from and any accompanying opinion or decision with the notice of appeal.

Proof of Service

The appellant must file the proof of service on all parties with the notice of appeal (CPLR 2103(e), 5515(1); 22 NYCRR § 202.5(a)).

FORMATTING THE NOTICE OF APPEAL

The notice of appeal must comply with the general formatting requirements for supreme court documents and with any applicable local rules, division rules, justice's rules, and case specific orders. Electronically filed documents must also comply with the NYSCEF rules and guidelines.

General Requirements

Attorneys must prepare the notice of appeal on 8.5 inch by 11 inch paper. Each page must have margins of at least one inch on each side (CPLR 2101(a); 22 NYCRR § 202.5(a); Commercial Division Rule 6 (22 NYCRR § 202.70(g))).

The attorney must print the text in black ink with font that is at least 10-point size (CPLR 2101(a)). However, the commercial division requires the use of at least a 12-point font size for body text with footnotes in at least a 10-point font (Commercial Division Rules 6 (NYCRR § 202.70(g))). Even where 10-point font is permissible, attorneys should use 12-point font for legibility.

The text must be double-spaced except for block quotations, the signature block, and any list of the notice's recipients (22 NYCRR § 202.5(a); Commercial Division Rule 6(22 NYCRR § 202.70(g))).

The usual custom is to fasten notices at the top. Attorneys using this method should print the notice of appeal on one side of the paper. However, an attorney may print the notice of appeal double-sided if the attorney fastens the notice on the left side. (22 NYCRR § 202.5(a).)

New York attorneys also commonly use litigation backs, known as blue backs, although the rules do not require it (22 NYCRR § 202.5(a)). For a sample litigation back, see *Standard Document, Litigation Back (NY)* (<http://us.practicallaw.com/9-553-4125>).

Attorneys should use tabs to separate the notice of appeal, the paper appealed from, and any accompanying decision from one another.

For additional information about formatting, see Practice Note, *General Formatting Rules in New York State Supreme Court* (<http://us.practicallaw.com/5-573-4485>).

E-Filing Requirements

Attorneys using the NYSCEF must comply with the applicable formatting requirements (CPLR 2101(g); 22 NYCRR § 202.5-b(d)(1)). For information about using NYSCEF, see Practice Note, *Electronic Filing in New York State Supreme Court* (<http://us.practicallaw.com/8-541-7805>).

SERVING AND FILING THE NOTICE OF APPEAL

The appellant's attorney must serve and file the notice of appeal within the applicable time limit (see *Time to Take an Appeal*).

If the appellant's attorney makes a mistake in serving or filing the notice of appeal, but not both, the court may extend the time for completing that act if the appellant's counsel correctly and timely completed the other act (CPLR 5520(a)). For example, where the appellant's counsel improperly served the notice of appeal but timely filed with the county clerk, the appellate division had discretion to extend the time to serve (*M Entm't, Inc. v. Leydier*, 891 N.Y.S.2d 6, 7 (2009)).

Service

An appellant in the New York courts must serve the notice of appeal on all of the other parties itself, unless the court orders otherwise (CPLR 2103(e), 5515(1)). This differs from federal practice, in which the district court clerk serves the notice of appeal (Federal Rule of Appellate Procedure 3(d)).

The appellant can serve the notice of appeal using any of the ordinary service methods, such as US mail, overnight delivery, personal delivery, or NYSCEF. When using mail or overnight delivery, attorneys need only deliver the notice to the postal service or delivery service within the time limit. The date the other parties receive the notice may be outside that limit. Service by personal delivery, however, requires that the other parties receive the notice within the time limit (CPLR 2103(b), (f) and see Practice Commentary C5515:1 to McKinney's CPLR 5515).

Filing

After serving the notice of appeal, the appellant must file it with the county clerk in the county where the supreme court case is venued, not the Fourth Department (CPLR 105(e), 5515(1)).

If filing by paper, attorneys should check the county clerk's website or call the clerk's office to determine the appropriate address, room, and, if applicable, window for filing the document.

Attorneys generally may file paper documents by hand delivery, US mail, or overnight delivery. The county clerk, unlike a party, must receive the notice of appeal within the applicable time limit. It is not enough to give the notice to the postal service or overnight delivery service before the filing deadline. Counsel should file by hand delivery whenever feasible to minimize the risk of missing the deadline or other errors. (Practice Commentary C:2102 to McKinney's CPLR 2102).

If e-filing, attorneys should use the NYSCEF, following the applicable rules and procedures. For information about using NYSCEF, see Practice Note, *Electronic Filing in New York State Supreme Court* (<http://us.practicallaw.com/8-541-7805>).

Fees

The filing fee for a notice of appeal is \$65 (CPLR 8022(a)).

The notice of appeal is not deemed filed until the appellant pays the fee. The attorney may e-file and pay online using a credit card, in which event the clerk deems the appeal filed at the conclusion of e-filing (NYSCEF System User Manual for Supreme Court and Court of Claims at 12). It is possible to e-file and then pay in person, although this procedure may delay the effective filing date if there is a delay in paying.

Attorneys choosing to pay in person should check with the clerk's office for acceptable payment methods.

Parties exempt from paying the filing fee, such as state agencies, must submit an exemption letter in place of payment.

PROCEDURE FOR APPEALING BY PERMISSION

If a judgment or order is not appealable as of right, an aggrieved party may move for permission to appeal it.

For information about what types of judgments or orders a party may appeal by permission, see Practice Note, Civil Appeals in New York: Initial Considerations for Appellate Division Appeals: Papers Appealable by Permission (<http://us.practicallaw.com/0-535-6702#a858285>).

This Note focuses on a motion for leave to appeal to the appellate division. For general information about motion practice in the supreme court, see Practice Notes:

- Motion Practice in New York State Supreme Court: Initial Considerations for Making a Motion on Notice (<http://us.practicallaw.com/4-548-8965>).
- Motion Practice in New York State Supreme Court: Documents and Requirements for a Motion on Notice (<http://us.practicallaw.com/8-552-2745>).
- Motion Practice in New York State Supreme Court: Serving and Filing a Motion on Notice (<http://us.practicallaw.com/5-550-5894>).

CHOOSING WHERE TO FILE THE MOTION FOR LEAVE TO APPEAL

An aggrieved party may move for leave to appeal from any order that is not appealable as of right in either the supreme court or the appellate division. If the supreme court denies a leave motion, the party may then move in the appellate division. But a party cannot move the supreme court after moving for leave in the appellate division (CPLR 5701(c)).

While moving first in the supreme court gives an aggrieved party two chances to obtain leave, doing so may also take more time. Because appeals by permission are usually interlocutory and generally do not automatically stay proceedings in the supreme court (CPLR 5519), more time may not be in the aggrieved party's interest. The litigation normally proceeds while the supreme court considers the motion for leave to appeal.

Attorneys should therefore consider the likelihood of the supreme court granting leave to appeal its own order. This is a case-specific question that may depend on matters like whether there is a novel legal issue, how far along the case is, or whether an appeal would

materially advance litigation. If the likelihood is small, as it may often be, attorneys may want to save time, money, and effort by making the motion in the appellate division in the first instance.

CONTENTS OF THE MOTION FOR LEAVE TO APPEAL

A motion for leave to appeal must contain:

- A notice of motion (see Notice of Motion).
- Supporting papers, such as an affidavit or affirmation and a memorandum of law (see Supporting Papers).
- Proof of service, in the copy filed with the court (see Proof of Service).

Notice of Motion

Unless the moving party proceeds by order to show cause (see Orders to Show Cause), a motion must begin with a notice of motion containing:

- A caption containing:
 - the court name (for example, Supreme Court of the State of New York);
 - the venue, including the county for motions in the supreme court (for example, County of Niagara or Appellate Division, Fourth Department);
 - the case title;
 - the nature of the paper (here, Notice of Motion for Leave to Appeal); and
 - the name of any assigned justice and the index number, both located to the right of the case title.
- The date, time, and place at which the motion is returnable (that is, when and where the motion is to be formally submitted to the court).
- A list of the papers being submitted in support of the motion.
- The relief sought (here, leave to appeal).
- The legal basis for relief (commonly the statute or rule authorizing the motion and relief).
- A signature block containing the signer's name, address, and telephone number.
- The names, addresses, and telephone numbers of all counsel in the action.

(CPLR 2101, 2214; 22 NYCRR §§ 130-1.1a, 202.5(a); N.Y. Ct. R. § 1000.13(a)(5).)

Unless the court orders otherwise, the return date for a motion for leave to appeal must be between 8 and 15 days after service of motion (CPLR 5516; N.Y. Ct. R. § 1000.13(a)(1)(i)). Consequently, the movant has no right to serve and file reply papers in support of the motion (CPLR 2214(b) (movant must give 16 days' notice to have the right to reply)).

Attorneys should check the local rules or consult the clerk's office for guidance on when and where to make the motion returnable. For example, the Fourth Department requires motions to be made returnable at 10 a.m. on Monday (or on the next business day if Monday is a holiday) (N.Y. Ct. R. § 1000.13(a)(1)). In Onondaga County Supreme Court, counsel may choose a return date from the assigned justice's motion term schedule (Onondaga County Protocol for Case Filings New York State Electronic Filing (NYSCEF)).

In the supreme court, the notice of motion may contain a request for oral argument of the motion, unless the local rules, division rules, justice's rules, or case-specific orders provide for another method (22 NYCRR § 202.8(d) and see Commercial Division Rule 22 (22 NYCRR § 202.7(g)) (permitting oral argument request in cover letter)). The Fourth Department does not hear oral arguments on motions (N.Y. Ct. R. § 1000.13(a)(6)).

For a sample notice of motion for the supreme court, see Standard Document, Motion Practice in New York State Supreme Court: Notice of Motion (<http://us.practicallaw.com/7-553-5526>).

Supporting Papers

The moving party must serve and file with the notice of motion papers showing why the moving party is entitled to the relief requested.

In the supreme court, the supporting papers must consist of:

- Affidavits or affirmations containing relevant facts.
- A memorandum of law containing legal argument.

(22 NYCRR § 202.8(c).)

Although the Fourth Department's rules do not specify the form of motion papers, attorneys should use the same type of supporting papers as in the supreme court.

The papers supporting the motion should focus on why the court should permit the appeal, rather than on the merits of the appeal. The goal of the motion is not to win the appeal but to get permission to take the appeal. If attorneys show their position has merit but do not explain why the court should permit the appeal now, the court may deny the motion and make the moving party raise the issue in a later appeal as of right. Attorneys should therefore emphasize why a later appeal cannot provide full relief even if it successful.

Affidavits or affirmations often contain exhibits, which attorneys should separate using tabs (for example, Commercial Division Rule 16(a) (22 NYCRR § 202.70(g))). In the Fourth Department, any transcripts attached as exhibits must be full-size, unless the condensed form was permitted in the court below (N.Y. Ct. R. § 1000.4(a)(3)(ii)).

In the Fourth Department, the motion papers must also include a copy of:

- The notice of appeal or order of transfer with proof or admission of service.
- The order or judgment being appealed, along with the court's decision.
- Any prior order of the Fourth Department.

(N.Y. Ct. R. § 1000.13(a)(5)(i).)

When moving in the Fourth Department, attorneys should state whether the moving party has previously requested the same relief in the supreme court. If so, the moving party should identify to whom it made the motion and any reasons that justice gave for not granting the motion. If the supreme court denied a motion for leave to appeal in writing, attorneys should include the supreme court's order as an exhibit to their supporting papers.

Proof of Service

The filed copy of the motion must contain an affidavit or affirmation of service on the other parties, or an acknowledgment of service of those served (CPLR 2103(e); 22 NYCRR § 202.5(a); N.Y. Ct. R. § 1000.13(a)(5)(i)).

FORMATTING THE MOTION FOR LEAVE TO APPEAL

Motions made in the supreme court should conform to the generally applicable formatting requirements, including any local rules, justice's rules, and case-specific orders (see Practice Notes, Motion Practice in New York State Supreme Court: Documents and Requirements for a Motion on Notice: Formatting Requirements (<http://us.practicallaw.com/8-552-2745#a311499>) and General Formatting Rules in New York State Supreme Court (<http://us.practicallaw.com/5-573-4485>)).

The Fourth Department's local rules do not contain formatting requirements for motions. However, attorneys should comply with the formatting requirements for appellate briefs to the extent applicable, including using:

- 8.5 by 11 inch paper with one-inch margins on all sides.
- White, opaque, unglazed paper.
- Black type.
- 11-point font or larger.
- Double-spaced text, except for footnotes, headings, block quotations, signature blocks, and lists of counsel.
- No footnotes.
- Consecutive pages numbers.

(CPLR 5529; N.Y. Ct. R. § 1000.4(f).)

Attorneys should also consider using single-sided pages to improve legibility.

The Fourth Department does not have page limits for motion papers.

While appellate briefs must be bound on the left side (N.Y. Ct. R. § 1000.4(a)(3)), attorneys normally bind motion papers at the top. Attorneys commonly use blue backs, but they are optional (see Standard Document, Litigation Back (NY) (<http://us.practicallaw.com/9-553-4125>)).

Although the rules do not dictate how attorneys should bind motion papers, good practice dictates separately binding each individual paper being filed with the motion.

SERVING AND FILING THE MOTION FOR LEAVE TO APPEAL

A party must serve its motion within the time permitted to appeal, which is usually 30 days from service of notice of entry of the paper appealed from (CPLR 2211, 5513 and see Time to Take an Appeal).

Before making the motion, attorneys should check whether there are any meet-and-confer or pre-motion conference requirements. For example, the commercial division requires advance notice of most motions (Commercial Division Rule 24 (22 NYCRR § 202.70(g))).

Attorneys may serve the motion using any of the ordinary service methods, like US mail, overnight delivery, or personal delivery. In the supreme court, attorneys may also use NYSCEF. When using mail or overnight delivery, attorneys need only deliver the notice to the Postal Service or delivery service within the time limit. The date the

other parties receive the notice may be outside that limit. Service by personal delivery, however, requires that the other parties receive the notice within the time limit (CPLR 2103(b), (f) and 2211 and see Practice Note, Motion Practice in New York State Supreme Court: Serving and Filing a Motion on Notice: Serving the Motion (<http://us.practicallaw.com/5-550-5894#a890242>)).

When filing the motion, whether in the supreme court or the appellate division, attorneys must pay a \$45 fee (CPLR 8020(a), 8022(b); N.Y. Ct. R. § 1000.13(a)(5)). For information about how to pay the fee in the supreme court, see Fees. In the Fourth Department, counsel may pay the fee by cash, check, or money order. Attorneys may make checks or money orders payable to Clerk of the Court or Appellate Division, Fourth Department.

For information about filing motions in the supreme court, see Practice Note, Motion Practice in New York State Supreme Court: Serving and Filing a Motion on Notice: Filing the Motion (<http://us.practicallaw.com/5-550-5894#a234374>).

In the Fourth Department, the moving party must file the original motion papers and one copy no later than 5 p.m. on the Friday before the return date or 5 p.m. on the Thursday before if that Friday is a holiday (N.Y. Ct. R. § 1000.13(a)(4), (5)). The clerk's office must physically receive the papers by that date to accomplish filing by that date (N.Y. Ct. R. § 1000.13(a)(4)(ii)).

ORDERS TO SHOW CAUSE

A party that needs urgent relief may move by order to show cause (CPLR 2214(d); N.Y. Ct. R. § 1000.13(b)). This procedure allows for faster briefing of the motion, the granting of interim relief (like a stay of proceedings), and possibly a faster disposition of the motion. However, the parties may not move by order to show cause when there is no genuine urgency (see, for example, Commercial Division Rule 19 (22 NYCRR § 202.70(g))).

A motion for leave to appeal on its own rarely, if ever, merits an order to show cause. A party need only make the motion before the applicable deadline, not have it decided (see Time to Take an Appeal). Usually only if the party seeks some additional relief, such as a stay, does an order to show cause become appropriate for this type of motion.

The Order

An order to show cause directing the non-moving party to respond to the motion, usually on an expedited schedule, replaces the notice of motion for an urgent motion. It may also direct the parties to serve motion papers by a particular method (for example, hand delivery). An order to show cause may also contain interim relief pending disposition of the motion.

Although an order to show cause states that the non-moving party must show cause why the court should not grant the motion, the burden of proof remains with the moving party.

The moving party drafts the order to show cause and presents it to the court, together with supporting papers. The court may sign the order, modify it and then sign it, or refuse to sign it. If the court refuses to sign the order, the moving party can then move by notice of motion. If the court signs the order, the moving party must serve it on the moving party. The non-moving party must then respond as directed.

Procedure in the Supreme Court

The procedures for submitting an order to show cause to the supreme court vary from county to county and may vary between courts within a county. Attorneys should check the local rules, division rules, justice's rules, and NYSCEF rules and guidelines governing their particular case. For information about moving by order to show cause in supreme court, see Practice Note, Motion Practice in New York State Supreme: Ex Parte Applications and Orders to Show Cause (<http://us.practicallaw.com/3-558-2845>).

Procedure in the Appellate Division

In the Fourth Department, an attorney generally needs to give reasonable notice to other counsel that the attorney is going to present an order to show cause to the court at a particular location, day, and time (N.Y. Ct. R. § 1000.13(b)(1)). Attorneys commonly give notice by telephone.

All attorneys may be present at the presentation of the order to show cause (N.Y. Ct. R. § 1000.13(b)(1)). If the moving party cannot obtain an adverse party's presence, the moving party must include in the papers to support the order to show cause:

- An affidavit setting out the manner in which notice has been given.
- An explanation for the failure to obtain the presence of the adverse counsel.

(N.Y. Ct. R. § 1000.13(b)(1).)

The adverse party must file all papers in opposition to the motion by noon of the return date, unless otherwise ordered by a justice of the court (N.Y. Ct. R. § 1000.13(b)(1)).

RESPONDING TO THE MOTION FOR LEAVE TO APPEAL

A party served with a motion for leave to appeal made on notice may serve responsive papers at least two days before the motion's return date, unless otherwise ordered by the court (CPLR 2214(b), 5516).

In the supreme court, responsive papers must consist of:

- Affidavits or affirmations containing only the relevant facts.
- A memorandum of law.

(22 NYCRR § 202.8(b).)

Although the Fourth Department's rules do not specify the form of motion papers, attorneys should use the same type of supporting papers as in the supreme court.

In the supreme court, the responding party may request oral argument on the first page of its motion papers or as otherwise permitted by the applicable division rules, local rules, or justice's rules (22 NYCRR § 202.8(d) and see Commercial Division Rule 22 (22 NYCRR § 202.70(g)) (permitting oral argument request in cover letter)). The Fourth Department does not hear oral argument on motions (N.Y. Ct. R. § 1000.13(a)(6)).

Attorneys may attach relevant exhibits to their affidavits or affirmations. When attaching exhibits, attorneys should separate them with tabs (see Commercial Division Rule 16(a) (22 NYCRR § 202.70(g))). In the Fourth Department, transcripts should be full-size, unless condensed transcripts were submitted in an identical format to the trial court (N.Y. Ct. R. § 1000.4(a)(3)(ii)).

The responding party should focus on why the court should not permit the appeal in the responding papers. It should not focus on the merits of the appeal unless there is clear precedent within the Fourth Department or the Court of Appeals that has firmly resolved the question presented. The merits of the appeal are not at issue at this stage of the proceeding and arguing the merits of the appeal only alerts the moving party to the arguments that the respondent will present in the response brief.

The response papers should comply with the same formatting requirements as the moving papers (see *Formatting the Motion for Leave to Appeal*).

Cross-Motions

In addition to opposing the motion, a responding party may request relief by cross-motion (CPLR 2215). For example, the responding party may cross-move for permission to appeal a different part of the same order or judgment.

Parties should make a cross-motion returnable on the same day as the original motion (N.Y. Ct. R. § 1000.13(a)(3)). Cross-motions are normally decided together with the original motion by the same justice or panel of justices. In contrast, a party making a separate responsive motion rather than cross-moving often cannot obtain the same return date because of the notice requirements of CPLR 2214.

A cross-motion is subject to the same content and formatting requirements as a motion, except that the cross-motion papers contain both the response to the motion and support for the cross-motion.

For information about cross-motions in the supreme court, see Practice Note, *Motion Practice in New York State Supreme Court: Serving and Filing a Motion on Notice: Serving a Cross-Motion* (<http://us.practicallaw.com/5-550-5894#a217615>).

For information about making a cross-motion in the Fourth Department, see Practice Note, *Civil Appeals in New York: Making Motions in the Fourth Department: Cross-Motions* (<http://us.practicallaw.com/w-000-7374#a000017>).

Service and Filing

Unless the court orders otherwise, attorneys may serve cross-motions personally or by overnight delivery at least four days before the return date (N.Y. Ct. R. § 1000.13(a)(3)). In the supreme court, attorneys may also file and serve by using NYSCEF. The adverse party must serve all papers in opposition to an order to show cause 12 p.m. on the return date (N.Y. Ct. R. § 1000.13(b)(1)).

A party that only opposes a motion does not pay a fee. A party filing a cross-motion must pay a \$45 fee (CPLR 8020(a), 8022(b)). For information on how to pay fees in the supreme court, see *Fees*.

In the supreme court, the responding party normally must file the responding papers or cross-motion on or before the return date (22 NYCRR § 202.8(d)). However, the local rules or individual justice's rules may require earlier filing. For information about serving response papers and cross-motions in the supreme court, see Practice Note, *Motion Practice in the New York State Supreme Court: Serving and Filing a Motion on Notice: Serving the Motion and Serving a Cross-Motion* (<http://us.practicallaw.com/5-550-5894>).

In the Fourth Department, the clerk's office must receive original motion papers no later than 5 p.m. on the business day preceding the return date (N.Y. Ct. R. § 1000.13(a)(4)). Filing by fax is acceptable if the party also mails the original papers by that date (N.Y. Ct. R. 1000.13(a)(5)). A party responding to an order to show cause must file the original papers by 12 p.m. on the return date (N.Y. Ct. R. § 1000.13(b)(1)).

DISPOSITION OF THE MOTION

In the supreme court, oral argument practice varies widely. Attorneys should consult the applicable local rules, division rules, justice's rules, case-specific orders, and NYSCEF rules and guidelines to determine whether oral argument is available and, if so, how and when to request it.

The Fourth Department does not hear oral argument on motions (N.Y. Ct. R. § 1000.13(a)(6)).

The party prevailing on the motion should serve a notice of entry on all the other parties in the action (N.Y. Ct. R. § 1000.17(b); see Standard Document, Notice of Entry (NY) (<http://us.practicallaw.com/5-544-6946>)).

If either court grants the motion to appeal, the appellant's counsel must serve and file with the county clerk:

- The order granting leave to appeal.
- The judgment of order appealed from and any accompanying decision.
- Proof of service.

After the appellant's counsel files the order granting the motion for leave to appeal and any additional papers, the appeal proceeds in the same manner as an appeal taken as of right. There is no need to file a separate notice of appeal.

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