# Civil Appeals in New York: Oral Argument, Disposition, and Motions for Reargument in the Fourth Department

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WITH PRACTICAL LAW LITIGATION

This Practice Note addresses oral argument, disposition, and reargument motions in appeals to the Appellate Division, Fourth Department, from civil judgments or orders of the New York State Supreme Court (the state's trial court of general jurisdiction). This Note also addresses recovery of costs and disbursements by the prevailing party.

After the parties have fully briefed an appeal, one or all of them may elect to present oral argument to the five justices of the Fourth Department deciding the appeal. Following oral argument, the Fourth Department issues an order in due course and, depending on the decision, the case is almost always either immediately remanded to the trial court or disposed of completely. The non-prevailing party may elect at this point to make a motion for reargument.

This Note addresses oral argument, disposition, recovery of costs, disbursements, and motions for reargument in the context of civil appeals to the Appellate Division, Fourth Department.

For information about motions for leave to appeal to the Court of Appeals, see Practice Note, Civil Appeals in New York: Taking an Appeal to the Court of Appeals (*http://us.practicallaw.com/w-000-3875*).

## ORAL ARGUMENT

Oral argument offers a chance for the parties, generally through counsel, to convey their respective positions in-person to the justices deciding their appeal. Whether to emphasize specific points made in a brief, address arguments brought up on reply, clarify potentially confusing issues, or simply passionately advocate the party's position, oral argument is a valuable opportunity that should not be minimized.

### AVAILABILITY OF ORAL ARGUMENT

Although the court has the discretion to decide oral argument is not warranted in a case, oral argument is, in practice, generally available to any party that requests it (N.Y. Ct. R. § 1000.11(c)(4)). However, oral argument is not permitted in:

- Motions (N.Y. Ct. R. § 1000.13(a)(6)).
- Appeals from a determination under the Sex Offender Registration Act (N.Y. Ct. R. § 1000.11(c)(2)).
- Article 78 proceedings transferred to the Fourth Department in which the sole issue is whether there is substantial evidence to support the challenged determination (N.Y. Ct. R. § 1000.11(c)(3)).

Finally, a party waives oral argument if it does not timely and properly request it or if a party otherwise entitled to argue fails to appear when the case is called (N.Y. Ct. R. § 1000.11(a), (d)).

### REQUESTING ORAL ARGUMENT

A party requests oral argument by indicating on the party's brief cover the amount of time requested for oral argument (N.Y. Ct. R. § 1000.11(b)). The brief must also indicate the person arguing the appeal (N.Y. Ct. R. § 1000.4(f)(4)). If someone other than the person designated on the brief ultimately argues the appeal, the party should notify the clerk in writing ahead of argument.

### ORAL ARGUMENT LENGTH

The court has discretion to determine the amount of time allowed for oral argument (N.Y. Ct. R. § 1000.11(b)). Arguments usually range from 5 to 20 minutes for each party, depending on the complexity of the appeal. No matter the length of argument, only one person may be heard on behalf of a party, absent leave of the court. The rule even applies where multiple parties submit a joint brief. (N.Y. Ct. R. § 1000.11(a).)

### ORAL ARGUMENT CALENDARS

The court hears oral argument during monthly terms, with each term generally consisting of approximately ten days. The court does not hold terms in July or August.

After the appellant has perfected the appeal (that is, file the opening brief, record, and, if applicable, appendix), the clerk issues a scheduling order. The order informs the parties of which court term the matter has been scheduled and sets a deadline for the service and filing of opposition and reply briefs. However, it does not set a particular date for argument. (N.Y. Ct. R. § 1000.10(a).)

The clerk issues the scheduling order at least several months in advance of the term for which an appeal is scheduled. The parties must advise the clerk in writing of any scheduling conflict during that term within 15 days of the mailing date of the scheduling order (N.Y. Ct. R. § 1000.10(c)).

The clerk mails a notice to appear for oral argument, which sets the specific date for argument, at least 20 days before the start of the scheduled term (but often long before then) (N.Y. Ct. R. § 1000.10(e)). The clerk also prepares daily calendars for each day of the term. The clerk posts the daily calendars on the Fourth Department's website and makes them publicly available several weeks before the start date of the term. These calendars:

- List the appeals scheduled for each day in the order the court will call them.
- Identify the time allotted to each party for argument (or note that the matter has been submitted on paper).
- Briefly describe the order serving as the basis for each appeal.

## PREPARING FOR ORAL ARGUMENT

Attorneys appearing for oral argument must be prepared to make convincing arguments on appeal based on sound legal precedent and the current state of the law. In this regard, it is essential that attorneys carefully review the legal arguments made and the cases cited in the parties' briefs, as well as identify any new on-point cases that may have been decided before oral argument. If these cases exist and are particularly persuasive or binding, attorneys should be cite to them during argument, which may serve as the basis for a post-argument submission under N.Y. Ct. R. § 1000.11(g).

However, the most effective oral arguments invariably are the ones that take the form of discussions with the justices. Helpfully and convincingly answering a justice's question may well confirm an assumption or change a justice's mind. Therefore, knowing the facts of the case in detail, understanding the relevant procedural history, and being conversant with the documents comprising the record, especially the key ones, is crucial.

It is helpful to prepare a written outline and "moot" an argument ahead of time, if for no other reason than to organize thoughts and ensure that oral argument does not extend beyond the time permitted. With that said, arguments cannot be scripted because things rarely go as planned. No matter the preparation or desired points of emphasis, attorneys need to be ready to scrap the script and engage directly with the justices hearing the appeal, answering their questions and addressing whatever concerns they voice.

## ARGUING THE APPEAL

The Fourth Department is located at 50 East Avenue in downtown Rochester. Appeals are scheduled to be heard beginning at 10:00 a.m. Because the clerk cannot estimate the specific time the court may hear a particular appeal, attorneys should arrive at the courthouse well ahead of time to allow for security checks and other potential delays. If attorneys are not present when their cases are called, the court deems their matters submitted without argument (N.Y. Ct. R. § 1000.11(d)).

On arrival at the courthouse (before 10:00 a.m. on the day of the scheduled argument), attorneys may inquire about the names of the justices hearing appeals. The court does not release a list of names until the morning of the argument. Attorneys arguing an appeal must sign in with the clerk on the second floor (N.Y. Ct. R. § 1000.11(a)) and then may fine-tune their preparation in the attorney workspace provided for the benefit of all counsel. The courtroom usually opens 15 to 20 minutes before the first case is called and generally fills up quickly.

Once inside the courtroom, attorneys need not sign in again. Rather, they should find a seat in the gallery and sit quietly until the court calls their case. It is important to silence all phones or other electronic devices and avoid engaging in any behavior that may be viewed as disruptive or otherwise disrespectful.

When the court calls their case, attorneys should approach the panel and sit at the designated table located immediately in front of the bench. The appellant's representative is the first to the podium.

Arguments should begin with the following brief introduction: "Good morning, Your Honors. May it please the court. My name is [NAME] on behalf of [PARTY]." Immediately following this brief introduction, it is important to jump into the main arguments on appeal. In almost all circumstances, a detailed factual recitation is unnecessary (and is likely to be frowned on) and a general overview of the relevant facts suffices. Especially with a limited amount of time, an attorney should focus on conveying the important legal points, not on painting a detailed factual background. To this end, in connection with making forceful legal arguments, referring the court to specific pages of the record in connection with crucial pieces of documentary evidence (or testimony) is often very helpful.

While arguing from a written outline is acceptable, it is important to remain engaged with the justices at all times. Accordingly, attorneys should avoid reading from a prepared statement. Not only is an argument of this type less effective, but it prevents the attorney from tailoring the attorney's argument to the justices' stated concerns. To the extent the justices ask questions (and they often do), attorneys should pay careful attention to answering the questions fully and making the remaining points with an eye on the questions already posed.

The presiding justice invariably informs the arguing attorney if the attorney's argument is approaching the end of the time allotted. Often, the justices indicate (subtly or not so much) that it is time for the attorney to sit down. An attorney should pay attention to these cues, which can be conveyed using statements, such as, "We have it, Counselor" or "We understand that argument." If the justices understand the points, there is no reason to belabor them.

The respondent's argument follows the appellant's and there is no opportunity for rebuttal (N.Y. Ct. R. § 1000.11(f)). Attorneys may leave the courtroom immediately following the conclusion of argument and should not gather inside the courtroom to discuss any matters.

### POST-ARGUMENT ISSUES

In practice, post-argument submissions are rare. With that said, the court allows for them, if the submitting party files ten copies, with proof of service of one copy on each other party within five business days of the argument date. (N.Y. Ct. R. § 1000.11(g).) However, parties should not file a post-argument submission to reiterate arguments already made in a brief submitted to the court. Post-argument submissions are best reserved for exceptional circumstances, such as where an attorney wishes to briefly explain a newly issued on-point decision mentioned for the first time during oral argument because the authority was not yet in existence when the briefs were filed.

## DISPOSITION OF AN APPEAL

During each calendar year, the Fourth Department determines approximately 2000 appeals and proceedings. With each appeal, the court has broad discretion to grant relief to any of the parties who have directly appealed to the court. After the court reaches a decision, the Office of the Clerk of the Court for the Fourth Department drafts and enters an order. (N.Y. Ct. R. § 1000.17; New York Civil Practice Law Rules (CPLR) 5524(a).)

### TYPES OF DISPOSITIONS

The court generally disposes of a case by either:

- Rendering a final determination.
- Remitting the case to another court for further proceedings, often with instructions for how to cure an incomplete record or avoid committing an error.

The court has rendered a final determination when it has disposed of all issues in the action. After the court reaches a final determination, a further appeal may be taken only from that order and not from any previous judgment entered. (CPLR 5611.)

The court may reverse, affirm, or modify, in whole or in part, any judgment, regarding any party (CPLR 5522(a)). If the court reverses or modifies a judgment, its order must state whether its determination is on the law, the facts, or both (CPLR 5712(c)). If the court affirms the lower court's decision, it can affirm "for reasons stated" or "on the opinion" of the lower court. When an appeal is taken from a jury trial, the court may set aside the jury verdict and order a new trial, but it cannot dismiss the case entirely unless it concludes, as a matter of law, that the evidence does not support the verdict.

Each order following an appeal should state whether one or more of the justices dissent (CPLR 5712(a)).

### NOTICE OF ENTRY

The Fourth Department sits for nine terms during the calendar year. Each term is approximately ten days in length. Orders are typically released two weeks after the conclusion of each term. The clerk posts the decision to the court's website at 3:00 p.m. on the day of issuance. (N.Y. Ct. R. § 1000.17(e).) After obtaining a copy of the disposition, each prevailing party must promptly serve a copy of the order with notice of entry on all other parties to the appeal (N.Y. Ct. R. § 1000.17(b)). This begins the other parties' time to move for reargument or for leave to appeal (see Motion for Reargument and Practice Note, Civil Appeals in New York: Taking an Appeal to the Court of Appeals (*http://us.practicallaw.com/w-000-3875*)).

### COSTS

The court renders a decision "with costs" or "without costs" (*Dooley v. Anton*, 205 N.Y.S.2d 700 (Sup. Ct. Erie Co. 1960), *aff'd*, 217 N.Y.S.2d 170 (4th Dep't 1961)). As courts do not necessarily award costs on appeal to the same party who was awarded costs in the action, these awards are treated separately. This is because, of course, the prevailing party on appeal may not be the same party who was successful at trial. The prevailing party on appeal is entitled to costs unless provided otherwise by court order or by statute (CPLR 8107.) The amount of costs awarded is governed by CPLR 8203.

### WHO MAY RECOVER COSTS

The court has broad discretion regarding who can recover costs (CPLR 8107). Therefore, even though the prevailing party is initially entitled to costs, the court may deny costs to the prevailing party or award less than the maximum amount permitted. It can withhold costs where questions of law are unsettled or where the successful party acted arbitrarily or unreasonably (see, for example, *Clark v. Trubitt*, 305 N.Y.S.2d 82 (4th Dep't 1969) (costs were awarded to the appellant even though the appeal was dismissed because the respondent failed to communicate vital information to the appellant)).

The court may award costs to the losing party if doing so is consistent with the purposes of the cost provision statutes (*Solomon v. County of Oswego*, 753 N.Y.S.2d 786 (4th Dep't 2003) (court granted costs to the losing party due to the length of time plaintiff's counsel delayed in filing the complaint)). The court may also deny costs to all parties where an appeal was dismissed because it was not pursued or because of a defect in the trial court of which both parties were unaware.

### WHAT COSTS ARE RECOVERABLE

Unless the court decides to award a lesser amount, the amount of costs awarded on appeal is $250 (CPLR 8203(a)). A party to whom costs are awarded is also entitled to recover disbursements for those expenses necessarily incurred and reasonable in amount. The appropriate categories of taxable disbursements, compiled in a non-exhaustive list in CPLR 8301, include the fees for witnesses, printing papers for a hearing, publication, entering and docketing the judgment, and anything else the court expressly deems allowable. (CPLR 8303.)

### PROCEDURE FOR RECOVERING COSTS AND DISBURSEMENTS

A party must submit to the county clerk the bills for the corresponding taxable disbursements along with affidavits to show that the costs were necessarily incurred and are reasonable in amount. The clerk examines the bills, calculates the total amount of disbursements to which a party is entitled, and inserts that amount in the judgment as costs, disbursements, and additional allowances. (CPLR 8401.) This is known as taxation of costs. The clerk's role is a ministerial, non-discretionary one. If the disbursement is properly substantiated, the clerk does not have the discretion to disallow reimbursement to the party.

A party may apply for taxation of costs with or without notice. In the former instance, a party who wishes to recover disbursements must give its adversary at least five days' notice (with additional time for service by mail or overnight delivery) by serving a notice, a copy of the itemized bill of costs, and a copy of any supporting affidavits. (CPLR 8402.)

If a party applies for taxation without notice, the clerk must immediately serve the notice of award of costs, a copy of the bill of costs, and any supporting papers on each party who is entitled to that notice. Within five days of service, any party who wishes to challenge the taxation may serve a notice of retaxation of costs. (CPLR 8403.)

A party aggrieved by the clerk's final determination may move the supreme court for review of "any item objected to before the clerk" (CPLR 8404). The supreme court may allow or disallow any cost or disbursement preserved for its review or orders the clerk to retax costs (CPLR 8404). A party aggrieved by the supreme court's order may be able to appeal that order to the Fourth Department (see CPLR 5701).

## MOTION FOR REARGUMENT

When a party files a motion to reargue, the Fourth Department hears that motion. The Court of Appeals does not decide motions to reargue to the Fourth Department.

A proper motion to reargue seeks to correct a point that the Fourth Department overlooked or misapprehended (N.Y. Ct. R. § 1000.13(p)(3)). It may be that a party wishes to correct the language of an opinion, the names of the parties, or other technical errors. (See, for example, *Roehm v. RLB Dev., LLC*, 864 N.Y.S.2d 376 (4th Dep't 2008) (court deleted and substituted language in the order and memorandum); *Mary P. v. Helfer*, 797 N.Y.S.2d 326 (4th Dep't 2005) (court changed the petitioner's surname); *Denio v. State of New York*, 786 N.Y.S.2d 758 (4th Dep't 2004) (court amended the order and memorandum to include an increased award of damages)).

It also is possible that a motion to reargue may result in a substantial modification or reversal of the court's prior decision (see, for example, *Gabriel v. Johnston's L.P. Gas Serv., Inc.*, 960 N.Y.S.2d 691 (4th Dep't 2013) (court granted reargument and substituted the ordering paragraph of its decision)).

### MOVING FOR REARGUMENT

A party may file a motion for reargument within 30 days of the service of the order with notice of entry. This period is extended by five days if the order is served by mail or one day if the order is served by overnight delivery (N.Y. Ct. R. § 1000.13(p)(1)). Unlike CPLR 2103(b)(2), the Fourth Department rules do not vary the amount of extra time depending on where the order was mailed from. There is no provision that expressly allows for any extension based on a showing of good cause.

#### Contents of the Motion

The motion for reargument must include a notice of motion, supporting affidavit, proof of service on all parties, a copy of the Fourth Department order, and, if available, the memorandum or opinion of the court (N.Y. Ct. R. § 1000.13(p)(2)). The motion requires a $45 filing fee, payable to the Appellate Division, Fourth Department (N.Y. Ct. R. § 1000.13(a)(5)).

The affidavit must include all the points the moving party alleges that the court overlooked or misapprehended, with an explanation of why the panel's decision was incorrect (N.Y. Ct. R. § 1000.13(p)(3)). The affidavit can also include controlling statutes, regulations, and decisions that were enacted or decided after the appeal was argued. However, the court does not consider any additional facts. It looks only to the record on which the appeal was decided.

A party may not repeat any points already addressed in the appellate brief, nor can it make new arguments in the motion to reargue.

#### Format of the Motion

The Fourth Department has specific formatting requirements for briefs, but there are no specific formatting requirements for motions (see Practice Note, Civil Appeals in New York: Making Motions in the Fourth Department: Formatting the Motion (*http://us.practicallaw.com/w-000-7374#a000009*)).

#### Serving and Filing the Motion

A party must file the motion for reargument within 30 days after service of a copy of the order with notice of its entry (N.Y. Ct. R. § 1000.13(p)(1)). To start the 30-day window, it is important that counsel for the prevailing party immediately serve notice of entry or risk allowing the opposing party an indefinite period to file a motion to reargue (see *People v. Voymas*, 2009 WL 2615773 (4th Dep't 2009) ("[a]bsent proof that the People served the order of this Court with notice of entry upon defendant, there is no basis upon which to conclude that the time to make a formal motion on notice seeking reargument relief has begun to run..."). A party may serve the motion using any of the traditional service methods, including hand delivery, US mail, or overnight delivery. The moving party must serve the notice of motion and supporting affidavits at least eight days before the return date. (N.Y. Ct. R. § 1000.13(a)(2).)

### OPPOSING A MOTION

A party may file papers in opposition to the motion to reargue. The opposition should only briefly address the moving party's claim that the court overlooked or misapprehended some vital point of law. It should also attempt to show that the court had all the relevant evidence and applicable law during its initial deliberation.

A party served with a reargument motion may serve opposition papers two days before the return date, unless the moving party served the motion at least 16 days in advance and demanded the opposition papers seven days before the return date (CPLR 2214(b)).

Parties must file all papers in support of or in opposition to the motion for reargument with the clerk by personal delivery by the Friday preceding the return date. If Friday is a legal holiday, parties should file the papers on the Thursday preceding the return date. The court accepts electronic submissions if the submitting party also sends original papers and a copy of the electronic submissions to the clerk. (N.Y. Ct. R. § 1000.13(a)(4).) No fee is required to oppose a motion.

### REPLYING IN SUPPORT OF A MOTION

If the movant served its motion to reargue at least 16 days in advance and demanded opposition papers seven days before the return date, it may serve reply papers at least one day before the return date (CPLR 2214(b)). Reply papers should not simply restate the arguments in the original motion. Rather, they should address the legal and factual issues laid out in the opposition papers.

### DISPOSITION OF A MOTION

The Fourth Department does not permit argument on a motion for reargument or any other motion.

While the court may grant a motion for reargument, this does not guarantee that it will also change the actual result of the determination for which the reargument was made (*DiMarco v. Bombard*, 887 N.Y.S.2d 922 (4th Dep't 2009)) (the court granted reargument, but still affirmed the decision).

There is no appeal granted from the denial of a motion for reargument.

## NO REHEARING EN BANC

The New York State Constitution prevents the appellate division from rehearing appeals en banc. Article VI, Section 4(b) states that no more than five justices can sit in any case. Therefore, if the panel of four or five justices that heard the appeal denies reargument, the losing party must either move for leave to appeal to the Court of Appeals or accept the result. For information about moving for leave to appeal, see Practice Note, Civil Appeals in New York: Taking an Appeal to the Court of Appeals (*http://us.practicallaw.com/w-000-3875*).



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