September 2013 | Volume 1 | Issue 2

APPELLATE LAW JOURNAL

Perfecting Civil Appeals in the New York State Appellate Division: Which of the Three Available Methods is Perfect for Your Case?

By: Vincent J. Wiscovitch, Esq. | Appellate Counsel | Counsel Press | vwiscovitch@counselpress.com

Although the CPLR is pretty easy to understand regarding how to "take an appeal" (*see* CPLR § 5515, requiring a notice of appeal to be served on the adverse party and properly filed), the rules on how to "perfect" an appeal are not quite so clear. In fact, the CPLR does not even use the phrase "perfecting an appeal." It is a term of art that refers to the steps an appellant must take in order to have an appeal addressed by the court. The various steps may include: (i) settling the transcript – if required,[1] (ii) preparing, serving and filing the record on appeal, (iii) preparing, serving and filing an appellant's brief, (iv) placing the appeal on the court's calendar, and (v) arguing the appeal (optional).

This article will focus on the second step, involving the record on appeal. Many practitioners are not aware that there are three methods available to choose from. In the course of nearly every business day, clients ask us to advise them on the best method of perfecting their appeal. I will introduce each of the three methods in order of the

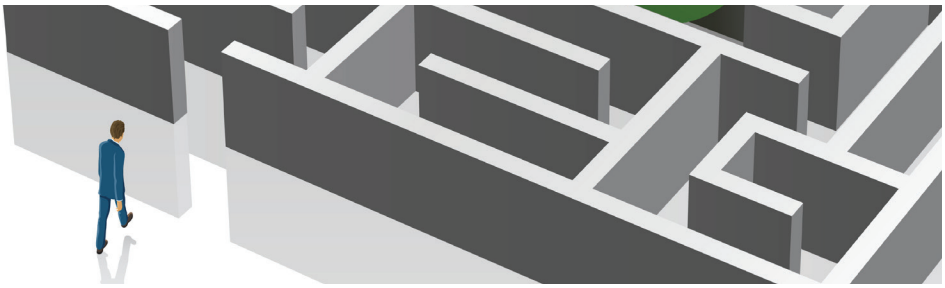
1. The rules on whether transcripts must be included in the record are addressed in a separate article titled "Appeals to the New York State Appellate Division: Settling the Transcript Does Not Have to Be an Unsettling Experience" – also in this issue.

The Appellate Law Journal *focuses exclusively on rules, practices and procedures of federal and state appellate courts nationwide. Edited by the appellate experts at Counsel Press,* ***The Appellate Law Journal*** *is designed to provide a forum for creative thought about the procedural aspects of appellate practice and to disclose best practices, strategies and practical tips.*

COUNSEL PRESS

frequency in which they are used and provide some tips on when to use each one.

A few caveats are in order first. With any appeal, no matter which method you use, you must include the notice of appeal, the order or judgment being appealed, a statement pursuant to CPLR § 2105 (except in the Fourth Department where they prefer a stipulation pursuant to CPLR 5532) and a statement pursuant to CPLR 5531 (except in the First Department where you are allowed to use the pre-argument statement that was filed along with the notice of appeal). The rules on whether transcripts must be included in the record are addressed in a separate article.[2] Finally, memoranda of law are not to be included in the record unless there is independent relevance for referring to them, *e.g.*, the judge states in his/her order that "plaintiff failed to argue *such and such*," when, indeed, plaintiff has that argument in the memorandum of law. Similarly, if a party's only response or opposition is in the form of a memorandum, then it should be included. The general rule of practice is if you include one memorandum, then all memoranda should be included.



Now, here are the three ways you can perfect your appeal:

The Full Record Method

This method provides the appellate court with *everything* the lower court has reviewed. When you are appealing from an order or interlocutory judgment, this will include the motion papers that the order/judgment is based upon with all of the exhibits presented to the court. If you are appealing after a final judgment, you must also include the judgment-roll, relevant exhibits from the hearing or trial if one was held (or copies of those retained by the court), and any reviewable orders and opinions issued in the case. *See* CPLR 5526. The way in which the record is coordinated, detailed, numbered and printed is also specified in Rule 5526.

Most often, appellants will use this method when the record is not going to be very large. For example, if a motion to dismiss *in lieu* of an answer is granted, there will likely be very few documents involved. Appellants also use this approach when they feel the appellate court needs to see all of the documents presented to the lower court. For example, after a summary judgment motion is denied or granted.

The Appendix Method

Think of this approach as providing the court with excerpts from the full record. The appellant may choose the documents, or portions thereof, that they believe the court needs to review in order to address the issues on appeal. This is not a license to cherry-pick the documents that only support the appellant's position, however. The appellant has a responsibility to also provide the court with the documents, or portions thereof, that he/she in good faith reasonably believes the respondent will

2. *See* footnote 1.

want to rely upon, as well.

In the First and Second Departments, the full record must be subpoenaed from the lower court so that the clerk can send up the record to the Appellate Division. In the Third and Fourth Departments, the appellant must prepare and serve one copy of the full record on the respondent(s) who then must review it and stipulate to its correctness. If the parties cannot agree, court intervention is required to settle the record. The parties then prepare appendices to their own briefs including only those documents from the record that they want the court to review in support of their arguments.

This method is used most often when many documents, or a large volume of paper, are contained in the record; for example, an appeal after a lengthy trial. The appendix method is also particularly helpful when the issues on appeal are discrete. For example, where summary judgment is granted in part and denied in part.

Depending on how large the full record is, using the appendix method can save a substantial amount of money due to the lesser quantity of paper that gets reproduced. However, in instances where a great deal of attorney time is required to review and parse through the record documents in order to deduce an appendix, the cost savings might not be so remarkable. Therefore, a balance must be reached between the resources needed to prepare the appendix and potential cost savings. The time spent excerpting files and documents rather than drafting a brief may not be the best allocation.

Agreed Statement Method

CPLR 5527 permits the parties to prepare a statement specifying the questions presented for the appeal, how the issues arose and how the lower court determined them. The agreement must include a statement of "facts averred and proved or sought to be proved as are necessary to a decision of the questions." The parties can include portions of the transcript of the proceedings and "other relevant matter" in their statement. The statement gets presented to the lower court, from where the appeal arose, within 20 days after the notice of appeal was filed. The court will review it and determine whether any corrections or additions are needed to fully present the questions for appeal. The final agreed statement gets printed as a joint appendix.

THREE WAYS YOU CAN PERFECT YOUR APPEAL:

1. **The Full Record Method**
2. **The Appendix Method**
3. **Agreed Statement Method**

This approach is hardly ever used. In fact, when I contacted a clerk for the Appellate Division First Department to inquire about its frequency of usage, he advised me that, in his 20 years with the court, he has *never* received an appeal under this method. Our experience is consistent in that we haven't been requested to assist a client perfecting an appeal under CPLR 5527. But, under the precept of full disclosure, I wanted you to be aware of its existence.

So, which method of perfecting your appeal will be perfect for you? If you need help deciding or deciphering, get in touch with Counsel Press; we will be happy to assist you.

Appeals to the New York State Appellate Division: Settling the Transcript Does Not Have to Be an Unsettling Experience

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

Before including a transcript in a record on appeal (or appendix) and asking the Appellate Division to rely upon it, practitioners must first determine whether the transcript needs to be settled, and, if so, take the necessary steps to do so. Section 5525 of the CPLR governs transcripts and the settlement thereof.[1]

When does a transcript need to be settled?

Not every transcript needs to be settled to be included in a record on appeal. Only transcripts of "proceedings," *i.e.*, those that contain sworn witness testimony and/or are the recitation of the court's order (without the order being reduced to writing), need to be settled. Thus, hearing transcripts that involve only attorney argument and colloquy with the judge or hearing officer need not be settled. Additionally, transcripts which were annexed to other documents as exhibits in the trial court do not need to be settled before they become part of the record on appeal.

The 15-day notice

Once a transcript has been ordered and received from a stenographer or court reporter, the appellant is required to serve a copy of the transcript, together with any proposed changes, on the respondent.[2] Accompanying the copy of the transcript should be what is termed "the 15-day notice." Such a notice advises the respondent that he or she has 15 days to make and serve proposed amendments or objections to the transcript, or the transcript will be deemed settled.

The stipulation

Usually, when serving the transcript and 15-day notice, it is best to include a cover letter and proposed stipulation to settle the transcript. Essentially, the stipulation agrees that, subject to whatever amendments have been proposed and agreed to by the parties, the transcript may be deemed correct and settled.

The affirmation

If the respondent's attorney does not respond to the 15-day notice or does not propose any amendments during the 15-day period, the appellant's counsel may execute an Affirmation of Compliance to settle the transcript. This affirmation explains that the attorney complied with the requirement of a 15-day notice pursuant to CPLR § 5525 and no proposed amendments have been provided by the respondent's counsel during the appropriate time. Upon

1. Transcripts must be settled for appeals in the First, Second and Third Departments of the Appellate Division. The Fourth Department does not require settlement of the transcript. Instead, a stipulation as to the authenticity of the entire record is required in that court.

2. CPLR § 5525 requires the appellant to perform this step within 15 days of receiving the transcript. However, for practical purposes, this provision is not routinely enforced, as long as the remaining steps are fully complied with.

execution of this affirmation, the transcript is deemed settled.

Be sure to note that *only* a stipulation *or* an Affirmation of Compliance is required to settle a transcript, but not both.

If the parties still can't agree…

Section 5525 of the CPLR provides a procedure for settlement of the transcript in cases where the appellant's attorney and respondent's attorney cannot agree to the proposed amendments after service of a 15-day notice. In such cases, the appellant shall, with at least four days' notice to the adverse party, submit the transcript, proposed amendments and objections to the judge or referee before whom the proceedings were held, and the judge or referee shall settle the transcript.

Keep in mind…

Settling transcripts takes time and some courts will not accept a record on appeal which includes an unsettled transcript. When planning to perfect an appeal, make sure you serve the 15-day notice at least 15 days sooner than you intend to perfect your appeal. If a transcript is not timely settled, it may be necessary to make a motion to enlarge a party's time to perfect the appeal.

Additionally, if any amendments to the transcript are agreed to during the settlement process, be sure to make the physical changes to the transcript prior to including it in your record on appeal.

Samples of a 15-day notice, stipulation and affirmation are available in the online version of this article. To view, visit Counsel Press' Blog (The Appellate Law Journal section).

Civil Appeals to the US Court of Appeals for the Second Circuit – You've filed a Notice of Appeal, now what?

By: Marie Bonitatibus, Esq. | Appellate Counsel | Counsel Press | mbonitatibus@counselpress.com

You've filed your notice of appeal and paid the applicable fee, but now what? Surprisingly, to the New York State court practitioner, when one files a notice of appeal, that is just the first in a series of filings before perfecting an appeal in the Second Circuit.

As the filing attorney, you will receive a Pacer alert once the notice of appeal is docketed and assigned a Second Circuit docket number. The first step you should take is to review the Second Circuit docket sheet for accuracy in the case information, your name and firm information. After your initial review of the docket sheet, the next important step is to determine the deadlines for filing the next series of forms; most run in 14-day intervals.

Within 14 days after filing the notice of appeal, a Civil Pre-Argument Statement (Form C) and a Civil Appeal Transcript Information Form (Form D) must be filed by the appellant. The practitioner is responsible for ensuring that no later than 14 days after filing the notice of appeal, the appellant must either order the transcript of proceedings or indicate on Form D that no transcript is necessary.

The Acknowledgement and Notice of Appearance form must be filed by all parties within 14 days of receiving the court's docketing notice. If an attorney other than the originally designated lead counsel of record wishes to appear in a case, that attorney must file a Notice of Appearance of Substitute, Additional or *Amicus* Counsel. Timely submission of the Acknowledgement and Notice of Appearance form constitutes compliance with the FRAP 12(b) Representation Statement requirement.

Pursuant to Local Rule 31.2, except for those cases assigned to the court's expedited calendar, the appellant must notify the court of the date by which the appeal will be

perfected within 14 days of the "ready date," which is the date the appellant either receives the completed transcript or files Form D indicating that no transcript is necessary. The attorney must select a perfection date within 91 days of said ready date. This requirement is most easily accomplished by filing a letter addressed to the court simply stating that the appellant has selected X date to perfect their appeal; said letter is called a scheduling notification. The court will so-order the appellant's letter unless the date chosen is unacceptable, for example, if it is outside the 91-day limit or falls on a weekend or holiday. It is important for counsel to realize that they are actually choosing their perfection date. This is significant as the court strongly discourages requests for extensions of time, in part because counsel are allowed to select their filing

It is important for counsel to realize that they are actually choosing their perfection date. This is significant as the court discourages requests for extensions of time...

dates and should choose said date carefully in full knowledge of their schedule and other obligations. Absent extraordinary circumstances, failure to file a scheduling notification within 14 days of the ready date will result in the court setting a briefing deadline of 40 days from the ready date.

After filing a notice of appeal, counsel must be cognizant of the need for subsequent filings before perfecting an appeal; the Acknowledgment and Notice of Appearance form and Forms C and D as well as a scheduling notification must be filed according to the Second Circuit's applicable rules. The Second Circuit's website contains sample forms and the clerk's office is available to answer questions regarding any of the above procedures. Lastly, the documents listed above must be text-searchable PDFs when uploaded to the CM/ECF system.

Supreme Court of the State of New York Appellate Division Fourth Department: Multiple appellants or cross-appellants? How does this change the procedure? (Part I)

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

Of all the various rules that come into play at the Appellate Division Fourth Department, more questions arise in the area of multiple appellants and cross-appellants than in any other provision of the rules. The 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. There are different ways for attorneys to proceed which only make it more complicated. Factor in colored covers for each type of brief and the confusion can be quite significant.

Consolidating appeals

When multiple parties file notices of appeal, the Court will allow appellants to combine their notices of appeal in one record and consolidate the appeals. Pursuant to Rule 1000.4 (b), "When two or more parties take an appeal from a single order or judgment, the appeals may be consolidated on motion pursuant to 22 NYCRR 1000.13 or on stipulation of the parties or their attorneys." Simply including multiple notices of appeal in the record on appeal and then having all parties stipulate to the record on appeal does not satisfy the Court's requirements. There either needs to be a motion made to consolidate or a stipulation agreeing that the appeals are consolidated. This stipulation can be separate from a stipulation certifying the record on appeal (pursuant to CPLR § 5532) or it can be combined with the statement, in which case the consolidated language will be incorporated into the stipulation. A stipulation consolidating appeals must be signed by the parties to the appeals or their attorneys. There must be language designating the party bearing primary responsibility for filing the record. This stipulation is either bound into the record or submitted separately to the Court and should contain original signatures.

Timing for perfecting an appeal

In many cases, but not always, the party who filed their notice of appeal first, takes the lead in preparing the appeal. However, any party can choose to take that lead. One potential pitfall for attorneys, who do not take the lead, yet agree to consolidate the appeals, is that they are at the mercy of the "lead" appellant in determining the timing of when the appeal will be

Read Part II on the Counsel Press Blog.... Learn about 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. To read Part II, visit Counsel Press' Blog (The Appellate Law Journal section).

perfected. It is up to the lead appellant to file the record on appeal and barring an order from the Court, the lead appellant has nine months to perfect the appeal calculated from the date of service of the notice of appeal. For this reason, it is not unusual for multiple appellants to make separate appeals so as to remain in control of the timing of the process.

Sharing the cost of the joint record

In the Appellate Division First and Second Departments, it is required that the costs for the record on appeal be split among the parties who are jointly appealing a matter. There is no such provision at the Appellate Division Fourth Department (or for that matter at the Third Department), and it is strictly up to the attorneys to plan for how the costs of the appeal will be shared, if at all. This area can lead to acrimony among different appealing parties and is best resolved before the appeal is perfected.

Timing for an appellant's opening brief

When the lead appellant decides to perfect the appeal, unless there is an order from the Appellate Division requiring perfection at a certain date, there is no obligation for the various appellants to file their briefs at the same time. When the lead appellant files the record on appeal along with their brief, the appeal is considered perfected and the Court prefers if the other appellant(s) plan on filing their briefs at roughly the same time. Usually, this ends up being the case; however, there is no obligation to require such timing. In fact, each appellant has up until nine months from the date of service of their individual notice of appeal to perfect their appeal. This means that if the lead appellant perfects the appeal quickly, say within 60 days, another appellant, who consolidated, theoretically, could wait until their nine months is close to expiring to file their brief. Practically speaking, there are limitations. When the lead appellant perfects, the case is calendared and presumably all parties will strive to file their briefs in time for oral argument. I have certainly seen lags of months between the timing of when various appellant briefs in the same matter are filed. Certainly, this is not how the Court prefers that consolidated appeals be handled, and you risk raising the ire of the Court. ▮