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U.S. Court of Appeals for the Second Circuit – Appendices: When Joint Really Isn't Joint

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In one of the previous articles on appeals in the Second Circuit, we addressed the requirements for an appellant to prepare a joint appendix pursuant to FRAP 30 and Local Rule 30.1.[1] What happens, however, when an appellant fails to comply with the rules – either purposely or inadvertently?

Local Rule 30.1(g) was amended February 1, 2014. In pertinent part, the statute provides that an appellee may file a supplemental appendix if the appellant has not filed a joint appendix in compliance with the rules.[2] Over the past year, the clerks and case managers at the Second Circuit have determined its application.

If the appellant chooses not to confer with the appellee(s) regarding the contents of the joint appendix, their filing should be titled merely "appendix." Similarly, if the parties do confer but cannot reach an accord as to the contents, the document the appellant files should be called an appendix. In either of these situations, the appellee(s) can,

1. *See* "U.S. Court of Appeals for the Second Circuit Appendices: Responsibilities of the Appellant" in *The Appellate Law Journal*, Volume 2, Issue 6, 2014.

2. For the complete language of the statute, use this link: http://www.ca2.uscourts.gov/clerk/case_filing/rules/title7/local_rule_30_1.html.

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as of right, file a supplemental appendix under L.R. 30.1(g).

In the past, when an appellant labeled their filing a "joint appendix," the Court presumed the parties consulted to determine its substance. A dissatisfied appellee was, therefore, required to seek permission to file a supplemental or appellee's appendix prior to filing. This is no longer the case.

If the parties did not agree on the material in the joint appendix, an appellee is not required to file a motion, notwithstanding the "joint" characterization. This is true whether or not the parties discussed the matter. Instead, an appellee must provide a letter outlining the lack of consultation or failure of the parties to come to an agreement when they file their supplemental appendix.

On the other hand, if the parties consulted and concurred on the contents of the joint appendix prior to filing, but the appellee subsequently decided that additional documents are needed, a motion to supplement the appendix is required. The motion should be filed in advance of filing the supplemental appendix. Remember, however, that since all of the documents in the record will already be available to the Court, it may not be necessary to supplement the (joint) appendix with additional papers.

Appendices: joint, supplemental or otherwise should be limited only to the documents, or excerpts, that the parties truly believe the Court needs to see in order to address the issues on appeal. Credence ought to be given to the adage "less is more."

Monitoring the Appellate Trends: A Closer Look at the New York State Unified Court System Annual Reports

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Stability and evenness – these are ways, perhaps surprising to some, to describe recent trends in the state appellate courts of New York. Whether speaking of affirmance rates, total number of records filed, or motions handled, trends in those courts show little change. This article offers a statistical comparison of the years 2011 through 2013 – the latest available reports of the Chief Administrator of the Courts, with a brief look back to Reports of 2001 and 2005.[1]

1. These reports can be accessed at http://www.nycourts.gov/reports/annual/index.shtml.

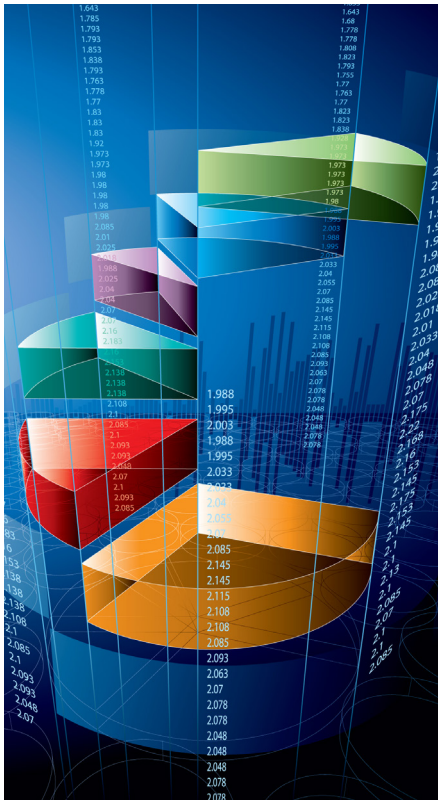
Starting from the busiest state appellate court – Appellate Division, Second Department

Take for example affirmance, reversal, and modification figures for civil cases in the busiest state appellate court, the Second Department, handling appeals from the counties of Queens, Kings,

Richmond, and several other down-state counties. Over the past three years, affirmances have not strayed beyond the range of 17 to 19 percent of dispositions, reversals have hovered between 7 and 8 percent, and modifications have held steady at 3 percent. It should be remarked that the balance of Second Department dispositions is composed largely of appeals withdrawn prior to argument, and even that percentage remains even, moving between 64 and 68 percent between 2011 and 2013. The number of overall civil dispositions also remained relatively flat over those years, with the Second Department handling 9,246 in 2011, 9,020 in 2012, and 8,681 in 2013.

Following with the Appellate Division, First Department

The First Department, handling appeals from the counties of New York and Bronx, also tends to tack to fixed ratios. Dispositions of civil cases over the period of 2011 to 2013 have been between 50 and 51 percent for affirmances, 15 and 16 percent for reversals, and 11 and 13 percent for modifications. Dismissals and other outcomes constitute the remaining balance. As with the Second Department, the overall amount of dispositions has held fast: 2,057 in 2011, 2,329 in 2012, and 2,261 in 2013.



Criminal appeals in the Appellate Division, First and Second Departments

Criminal appeals in the First and Second Departments show a similar trend of regularity. In the First Department, affirmances have been between 70 and 73 percent, while reversals and modifications, respectively, have been between 4 and 7 percent and 4 and 5 percent. In the Second Department, affirmances have ranged more substantially, from a high of 40 percent in 2011 to a low of 31 percent in 2012. Reversal percentages remained relatively even between 3 and 5 percent, and the plurality or majority of Second Department criminal cases are disposed of prior to argument, with that proportion ranging between 44 and 52 percent.

A Closer look at the New York Court of Appeals statistics

New York's highest court, the Court of Appeals, is also, at least in terms of statistical outcomes, a model of consistency. One might expect more randomly distributed statistical outcomes, given that the legal questions reaching this court are, by and large, exceedingly close. Yet, from 2011 to 2013, the range in civil cases has remained within 50 to 54 percent for affirmances, 27 to 30 percent for reversals, and 6 to 10 percent for modifications. Criminal appeals to the Court of Appeals show more variation, with affirmances being about 58 percent in 2011 and 2012 and 65 percent in 2013, and reversals and modifications combined being 38, 40, and 33 percent for 2011, 2012, and 2013, respectively.

General outcomes and trends across all state appellate courts

A look farther into the past bears out the theme of stability of outcomes in New York's state appellate courts. For example, in 2005, of a total 1,982 civil dispositions, the First Department affirmed 51 percent of the time, reversed in 16 percent of cases, and modified judgments 11 percent of the time. In 2001, for 2,129 civil dispositions, these figures were, respectively, 53, 15, and 11 percent. In 2005, the Second Department disposed of 9,086 civil appeals, with 20 percent affirmed, 9 percent reversed, and 4 percent modified. Again, the majority of civil appeals, 60%, were withdrawn. In 2001, outcomes in the Second Department were similar to recent years: of 8,402 dispositions, 21 percent resulted in affirmance, 10 percent were reversals, and 4 percent were modifications.

In addition to being notably stable in the percentages of certain outcomes, New York's state appellate courts may surprise observers with the sheer volume of their caseloads, the Second Department being by far the busiest. There, in 2013 alone, 11,180 motions were decided – more than 30 per day. That court also conducted 1,726 oral arguments, averaging about 7 each business day. Even at that galloping pace, the court is outstripped by the rate at which records are filed, an annual average of about 3,920 over the past three years. By comparison, the First Department handled an average of 5,240 motions per year, heard an average of 1,250 oral arguments, and received an average of 2,696 new records. Not surprisingly, the workload of the New York Court of Appeals was far less, with annual averages being 1383 for motions decided, 218 for oral arguments held, and 265 for new records filed.

What is shown by these records – all available at the website of the New York Unified Court System – is a remarkable, year-to-year consistency in New York's state appellate courts. They also reflect on the quality of the appeals filed and the skill of the judges sitting in the courts of original instance. Specifically, in the Second Department for the years 2011 to 2013, there were about 1.7 times as many decisions affirmed as there were decisions reversed or modified. That figure was approximately 1.8 in the First Department. Clearly, each appeal rises or falls on its own merits, but knowing the general outcomes and trends in the appellate courts is one more resource at the disposal of the advocate, enhancing his or her understanding of the courts that may control the outcome of their client's case.

For additional resources for your next appeal, please contact an Appellate Counsel at Counsel Press. We look forward to helping you achieve the best result possible for your client.

New York Supreme and County Courts: Mandatory Redaction Rules Take Effect March 1, 2015

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Practitioners in the New York Supreme and County Courts beware: mandatory redaction rules take effect on March 1. Based upon an administrative order, dated November 6, 2014, it will be required for counsel and unrepresented parties to omit or redact confidential personal information ("CPI") in filings made in most cases.[1]

These requirements are in place to both protect from identity theft, particularly as New York Courts increasingly move toward mandatory e-filing, and to reduce the burden later when cases are on appeal and subject to the Court of Appeals' mandatory redaction rules.

Pursuant to the new order, "CPI" is defined in Uniform Civil Rules of the Supreme and County Courts § 202.5(e) as:

i. the taxpayer identification number of an individual or an entity, including a social security number, employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

ii. the date of an individual's birth, except the year thereof;

iii. the full name of an individual known to be a minor, except the minor's initials;

iv. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number and/or an insurance account number, except the last four digits or letters thereof.

Papers excluded from this requirement include those filed in matrimonial actions, Surrogate's Court matters, mental hygiene law matters pursuant to article 81 and those otherwise designated by rule, law or Court order.

Where papers are filed without complying with the above, the Court may *sua sponte* or on motion order a party to remove the CPI and resubmit the papers, or may order the clerk to seal portions of the papers. Where a party has a good faith belief that the full information is necessary and material to the adjudication of a proceeding, he may seek leave to file a confidential affidavit or affirmation containing the full versions and cross-referencing the abbreviated forms in the papers. There is also a procedure in place for consumer credit actions wherein the defendant denies responsibility for an account for which only the last four digits have been displayed in the filings because of this rule.

These procedures have been in place for January and February 2015 on a voluntary basis. With the upcoming mandate for all parties to comply, it is imperative for practitioners to familiarize themselves with these requirements.

1. PDF of the order is available in the electronic version of this issue. Visit Counsel Press' Blog, the *Appellate Law Journal* section.

Second Circuit Procedure: How to Reinstate an Appeal Dismissed for Failure to Adhere to a Briefing Order

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In the last year, the US Court of Appeals for the Second Circuit amended its rules to include automatic dismissal language in every appellant's briefing order. We have closely addressed these amendments in our two previous articles on appeals in the Second Circuit. *See* "Second Circuit Procedure for Dismissing an Appeal or Sanctioning Counsel When the Court Sets a Brief Filing Date and a Brief is Not Timely Filed – Effective April 1, 2014." *See also* "US Court of Appeals for the Second Circuit Scheduling Orders: "Automatic Dismissal" Language Actually Means What It Says." Both articles are available at Counsel Press' Blog.

Counsel Press strongly recommends adhering to all briefing orders. However, for appellants, who have indeed failed to file their briefs and appendices by their ordered deadlines, the Second Circuit has given guidance on how to reinstate the appeal pursuant to Local Rule 27.1(i).

Timing

The motion to reinstate must be filed within 14 days of the order dismissing the appeal. Although the dismissal is guaranteed if you fail to file on time, a dismissal order must be added to the docket before the time to file this motion is triggered. This generally occurs on the business day following the actual due date, but it is important to count the 14 days from the actual order.

What to include

The motion to reinstate requires both the T-1080 form (the Court's general motion form) and an affirmation in support of the motion, explaining the reasons for the party's failure to adhere to the briefing order. These two documents should be filed as one event in ECF. Unless there are exhibits to this motion which cause it to exceed 50 pages, no hard copies of these documents are required to be filed in cases where all parties are ECF-registered.

Immediately after filing the motion, under a separate event, the final brief and *appendix*[1] must be filed. Paper copies of the brief and appendix must be filed according to the Court's usual practices and procedures.

If you have any confusion with these guidelines, please feel free to contact me directly.

1. Although Local Rule 27.1 does not mention the appendix, the Court expects the final version to be filed the same day as the motion and brief.

How to Take and Perfect an Appeal from a Decision of the Workers' Compensation Board

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

Workers' Compensation decisions are reviewed by the Appellate Division, Third Judicial Department. See Workers' Compensation Law Section 23. This article is an overview of the process and the steps in taking and perfecting a workers' compensation appeal. It is designed to assist those attorneys not familiar with the rules governing them. See also Section 800.18 of the rules of the Appellate Division, Third Judicial Department.

How to Take an Appeal:

If you wish to appeal from a decision of the Workers' Compensation Board, you must file and serve your notice of appeal within 30 days from the date of the Board's decision. The original notice of appeal should be filed with the Secretary of the Workers' Compensation Board, 328 State Street, Schenectady, New York 12305 with proof of service on all of the parties listed on the Board's decision and on the Attorney General, Eric T. Schneiderman. The Attorney General should be served at the following address: Department of Law, Labor Bureau, 120 Broadway, 26th Floor, New York, New York 10271. Filing a Pre-Calendar Statement is not required—see 800.24-a (a).

How to Perfect an Appeal:

It is your duty, as an appellant, to prepare a Statement of the Issues to be Presented for Review, along with a list of the documents relevant to those issues (proposed record list) and serve them on the Attorney General (who represents the Workers' Compensation Board) and each interested party. The time to do so is in accordance with Section 800.18(b)2.

Along with the Statement of the Issues and the proposed record list, you, as the appellant, must also serve a written request to stipulate to the contents of the record list within a 20-day time period. If a responding party does not serve objections or amendments within that 20-day period, the record list is deemed correct as to that party and appellant may prepare an affirmation to be included in the record certifying that that party failed to make objections or amendments within the 20-day period.

If within the 20 days, a respondent has objections or amendments to the record list, he/she must serve the objections or amendments to the record list on the appellant. An additional period of 20 days

is then given for the appellant and the objecting party to agree and stipulate in writing. If the parties are still unable to agree, the appellant will need to make a motion pursuant to 800.2(a) to the Board to settle the record list.

Unless a respondent makes a motion to dismiss, the time to perfect is nine months from the date of the notice of appeal. See Section 800.12.

The appellant files the single copy of the record on appeal (papers constituting the record list) with proof of service of one copy on the Attorney General and each other party, along with 10 copies of a brief/appendix with proof of service of two copies, or 10 copies of an appendix and 10 copies of a brief if bound separately from the brief, with proof of service of two copies on each party.

If all the papers are necessary to the appeal, then appellant may proceed on a full reproduced record and an appendix is not required. In this instance, 10 copies of the full record on appeal and 10 copies of the appellant's brief are filed with proof of service of one copy of the record on appeal and two copies of the brief on each party.

A filing fee of $315 is required. See Section 800.23(a).

Oral argument is not permitted. See Section 800.10(a)(1). If you wish to argue, you must submit a letter application to the Court pursuant to Section 800.10(b).

How to get it done correctly the first time, every time?

Please contact me directly with questions and assistance in preparing and filing an appeal from the decision of the Workers' Compensation Board, or, for that matter, with assistance in preparing and filing any appeal in the four departments of the New York State Appellate Division. Counsel Press provides the experience, quality and service in these Courts that you cannot find in any other appellate services provider in the nation. We are also the only appellate service provider to offer same-day filing and service for matters filing in the Appellate Division, Third Department and the New York State Court of Appeals without special conditions or charges.