

# APPELLATE LAW JOURNAL

## New York State Appellate Division, First Department: Unraveling The Term Calendar

By: Jacquelyn Mouquin, Esq. | Appellate Counsel |  
Counsel Press | [jmouquin@counselpress.com](mailto:jmouquin@counselpress.com)



Newcomers to appellate practice in the New York State Appellate Division, First Department should be aware of this Court's term calendar and how the term calendar system impacts their appeal. In any given calendar year, the First Department has 10 terms for argument and submission, and there are specific deadlines by which documents must be filed in order to take part in a given term.

### Terms: It matters when you file...

Although appellants may perfect an appeal<sup>1</sup> any day in which the Court is open, there are strategic reasons for choosing the last filing day for a term. Most significantly, by perfecting an appeal on the last filing day, the appellant gives the respondent the fewest number of days to file his responding brief. For instance, to perfect for the September 2014 Term<sup>2</sup>, an appellant must file the necessary opening documents on or before July 7, 2014. No matter what date the appellant's documents are filed for that term, the respondent may file his brief up until August 6, 2014. Likewise, no matter what date the respondent files his brief,

1. To "perfect" an appeal means to file the note of issue, the appellant's opening brief and the record on appeal or appendix.

2. September Term appeals should have argument dates between September 2, 2014 and September 29, 2014.

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the appellant may file his reply brief as late as August 15, 2014. Filing early merely gives one's adversary extra time to prepare his or her own brief and does not accelerate proceedings in the First Department.



The term calendar also plays into other strategic considerations. For instance, if an appellant seeks to have an appeal decided by the end of a particular calendar year, the appeal should be perfected no later than the June Term. Generally, opening briefs and records on appeal are due by mid-March to be eligible for arguments in the June Term. Additionally, one must consider the Court's summer recess; there are no terms between the June and the September Terms. Thus, in 2014, any appeals perfected between March 18 and July 7 would be part of the September Term.

Appellants should keep in mind that this Court requires service in accordance with the

Mailbox Rule; service by mail must be effectuated five days before the last filing date for regular mail or one day before for overnight mail. Finally, the First Department requires that service and filing is done by paper and electronically. These considerations may add additional time to the preparation of appellate documents.

### Oral Arguments

Requests for oral argument must be delivered to the Court no later than the day after the Court's deadline for respondents' briefs, per the term calendar. A single request must speak for all parties to an appeal and must comply with rule § 600.11(f)<sup>3</sup>. Failure to timely request oral argument will result in the case being deemed submitted. In general, oral arguments are scheduled during the term for which the appeal was perfected, although the Court may *sua sponte* adjourn an appeal to maintain its calendar<sup>4</sup>. Calendars for oral

3. A sample oral argument request form may be found on Counsel Press' website at [www.counselpress.com](http://www.counselpress.com).

4. This happens most frequently in the September Term, during which roughly 50% of cases, particularly civil cases, are adjourned to the October

argument are created by the Court following the submission of the respondents' briefs and oral argument request forms, but prior to the deadline for filing reply briefs.

### Extensions of Time

The Appellate Division, First Department adheres fairly rigidly to its term calendar, and disfavors extensions of time. An appellant may request additional time to perfect his appeal *only* by motion. Parties may, however, stipulate to up to one week's additional time for filing of the respondent and/or reply briefs without impacting the term for which the appeal is set. Extensions of more than one week generally involve adjourning the appeal to a different term.

All in all, the First Department's Term Calendar provides a level of certainty in practice that few other courts can match. However, because few attorneys are familiar with the rigidity of such a system, practitioners should take care to fully understand the court's procedural rules or seek appropriate guidance. ■

Term. Criminal and family court cases are generally calendared for argument before civil cases.

# How to Take an Appeal from a Decision of the Unemployment Insurance Appeal Board



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

The Appellate Division, Third Department is the only court in New York State that reviews decisions of the Unemployment Insurance Appeal Board. (See Labor Law § 624.) Since the rules governing unemployment insurance appeals are unique (see § 800.17) and they are not printed in the Rules of the Appellate Division, Third Department, I receive a lot of questions pertaining to this area of appellate practice. In this article, I will go over the process of taking and perfecting unemployment insurance appeals in the Third Department. If you have any questions, please do not hesitate to contact me directly.

## How to Take an Appeal

If you are adversely affected by the Unemployment Appeal Board's decision and wish to appeal, your very first step is to send written notice to the Appeal Board, not the Appellate Division, Third

Department, of your intent to appeal. This written notice must be postmarked within 30 days of the date the Board's decision was mailed to you.

The Appellate Division, Third Department reviews the Board's decision using the original record. The original record includes all the papers considered by the Board and the hearing transcript, if any.

The Commissioner of Labor is represented by the Attorney General's office. It is the responsibility of the Attorney

General to send the original record to the Third Department. If you need a copy of the record, you may send a written request to: Attorney General, Labor Bureau, Employment Security Section, 120 Broadway, 26th Floor, New York, NY 10271.

## How to Perfect an Appeal

Within 9 months from the date of the letter to the Unemployment Insurance Appeal Board (**not** from receipt of your letter) indicating you are appealing the Board's decision, you must file and serve your opening brief or brief and appendix.



At a minimum, you must attach to your brief the copy of the decision of the Unemployment Insurance Appeals Board that you are appealing *and* the copy of the notice you sent to the Board indicating your intent to appeal to the Appellate Division, Third Department.

If you would like to cite to other documents contained in the original record, you may prepare an appendix. This appendix can be attached to your brief or it can be a

separately bound document.

You must file the original and 6 copies of your brief in the Appellate Division, with proof of service of one copy on the Attorney General and one copy on any party that appeared before the Appeal Board, e.g., the claimant or the employer. No filing fee is required.

After your brief is accepted for filing, the Attorney General is responsible for filing the

original record and the brief of the Commissioner of Labor and serving you with one copy of the brief. You may then file a reply brief, if you wish.

Oral argument is not permitted except by permission of the Court. A written application to request oral argument must be made within 10 days after you have filed your brief and the application must be granted by the Court in order to argue before the Court. ■

## The “Clerk’s Law” or the Unwritten Rules You Should Know (Part II: New York State Appellate Division, Fourth Department)



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



*LaFon Howard*  
*Appellate Services Manager*  
*Counsel Press*  
*lhoward@counselpress.com*

Proceedings in appellate courts are very different from those in trial courts, and each one of the appellate courts has their own set of rules and internal operating procedures. If you do not follow the rules carefully, you may lose the chance to have your appeal considered. In addition to what is stated in

rule books, each court has a set of unwritten rules or “clerk’s law.” Sometimes, these are requirements and sometimes, just court preferences. These court-specific practices can only be gleaned through extensive experience, frequent interactions with the clerks and through processing multiple filings in a particular court.

The role of Counsel Press’ appellate counsel and appellate paralegals is to advise and shield our clients from all potential pitfalls. Part I of this article covered the procedures of the Appellate Division, First Department and Appellate Division, Second Department. In this article, we will go over some of the



unwritten rules of the Appellate Division, Fourth Department. Some of these points may seem fundamental, but, make no mistake, these guidelines are vital additions to your submission.

**\*Order Settling Record:** While the rules state that either an original stipulation certifying the record on appeal or an original order settling the record be included in the record on appeal, in essence, the original order is kept on file at the county of original jurisdiction. For this reason, when filing your record on appeal, the Court will accept a certified copy of the order. This will satisfy the rule requirement.

**\*Appendix Method in Civil Appeals – Inadequate Appendix:** If a party is proceeding via the appendix method, the rules dictate the appropriate process to be followed. They do not, however, mention that the Court can determine the appendix is inadequate. In the event that your appendix is determined to be inadequate, the clerk may do one of the following: they may reject the appendix and can even dismiss the appeal, they may also permit

the Respondent to prepare a Respondent's Appendix and seek costs or the Court can even order the Appellant to print the balance of the entire record.

**\*Contents of the Record on Appeal:** While the Court designates the contents of the record on appeal (see 1000.4(2)), they will deem what the parties stipulate to as being the complete record. For example, if memoranda are included in a stipulated record, the Court will accept the record as perfected. This also applies when there is an order settling the record. Any documents outlined in the order can be included.

**\*Brief – Addenda:** The Court encourages parties to attach unpublished decisions to their brief. They may also attach any document or photograph, provided that it is in the record on appeal. It is acceptable, as

well, for color photographs to be included in the body of a brief.

**\*Appropriate Color Cover for Respondent-Cross-Appellant Briefs:** While the rules state that an Appellant's Brief should be blue and a Respondent's Brief should be red, the rules do not dictate the correct color for the cover of a Respondent-Cross-Appellant Brief. The appropriate color for such a brief is red.

There are many other unwritten rules that counsel should be cognizant of. We will continue publishing the "unwritten rules" series and will be covering other New York appellate courts, as well.

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



## Filing Your Appeal with Counsel Press: How we get it done correctly the first time, every time? (Part I – Cultivating the Appellate Experts)

By: Maria Piperis | Vice President of Operations | Counsel Press | [mpiperis@counselpress.com](mailto:mpiperis@counselpress.com)



The preparation of a recent, enormous, 516 volume appeal has led me to field some questions about how we manage these large projects. That caused me to consider Counsel Press' internal procedures and our methods towards the management and effective oversight of our work. How are we able to deliver, accurately, even on these incredibly large projects?

We do this in three ways. First, we constantly develop our expert staff. Second, we deploy world-class technology to support our expert team at every turn. Finally, we utilize cutting edge machinery within our production facilities nationwide. In this article, I will discuss our most valuable asset – the cultivation of our expert team.

At Counsel Press, we work with over 8000 attorneys annually, all across the country. In order to meet their needs, we cultivate the knowledge of our team intensely. We

coordinate and implement company-wide professional development goals to support and achieve the highest quality experience possible at every stage for our clientele. Those goals demand heavy cross-training of our team.



Training, staff development and cross-training also gives us the option to shift projects from one Counsel Press location to another. Our specialists can be marshalled for client matters in which they are most effective and knowledgeable, regardless of where they are physically located.

To strike the right balance, we weigh the company benefits and the employee benefits, respectively. To be sure, there is value in cross-training to the company, manager and

employee alike. Cross-training an employee gives them the opportunity to learn a new skill, which then leads to greater rewards. With their new skills, our team becomes more valuable to our organization and clients alike. The added knowledge enriches our team, stimulates them and bolsters our clients' experience when working with us.

In the aggregate, all of these factors contribute to the award-winning support and service our team is able to provide our clientele. At Counsel Press, we work tirelessly to ensure that every individual aspect of our clients' experiences with us is memorable, while offering meaningful expertise which makes a lasting impression.

In the following two installments, I will write about how Counsel Press deploys world-class technology to support our expert team and the value of our specialty appellate support departments. ■

# U.S. Court of Appeals for the Second Circuit: Clarifying Recent Changes to Rules & Procedures



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

Effective February 1, 2014, there are significant changes to many Second Circuit Local Rules. The amended rules include 25.1, 25.2, 27.1, 28.1, 30.1, 39.1, 40.2 and 42.2. We covered the amendments in detail in Volume 2, Issue 1 of the *Appellate Law Journal* (available at Counsel Press' website).

Some of the amendments are fairly straight-forward; with others, practitioners may need to communicate with the Court to determine how to properly proceed. In the past few months, we at Counsel Press have been closely monitoring the Second Circuit updates and communicating with the Court regarding the amended rules. The following covers what we were able to clarify.

**LR 30.1** – LR 30.1 was amended to allow an appellee to submit as of right a supplemental appendix with their brief where the appellant did

not file a joint appendix in compliance with FRAP 30. The Court has informally clarified that when an appellant files their appendix as a "Joint Appendix," the Court will assume that the parties have conferred and a motion to file a supplemental appendix will be required in all instances. If an appellee was not consulted but the appellant, nevertheless, files a "Joint Appendix," the appellee should call their case manager to discuss the next steps; a motion for leave to file a supplemental appendix may be necessary in these circumstances. In those instances where the appellant is *pro se*, an appellee may file their supplemental appendix as of right under amended LR 30.1.

**LR 25.2** – To clarify the amendments to LR 25.2 requiring counsel to file and serve a text-searchable PDF of every appendix on CD or DVD, this rule only applies to appeals filed prior to January 1, 2010 or with those beginning

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

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

## **New 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, there is a change in how the Second Circuit will handle appeals that are not timely filed in accordance with a brief scheduling order. Here is the synopsis provided by the Court:

"In counseled agency and civil appeals, when the Court orders a petitioner or appellant's briefing deadline pursuant to a scheduling notification submitted under Local Rule 31.2(a)(1)(A), the order will specify that the appeal is dismissed effective the due date if the brief is not filed by that date. A motion to extend the time to file the brief or to seek other relief will not toll the previously ordered filing date. See LR 27.1(f)(1); cf. RLI Insurance Co. v. JDJ Marine, Inc., 716 F.3d 41, 43-45 (2d Cir. 2013)."

"In counseled agency and civil appeals, when the Court orders a respondent or an appellee's briefing deadline pursuant to a scheduling notification submitted under Local Rule 31.2(a)(1)(B), the order will specify that the appeal will proceed to a merits panel for determination forthwith if the brief is not filed by the due date. Appellee will be required to file a motion for permission to file a brief and appear at oral argument. A motion to extend the time to file the brief or to seek other relief will not toll the previously ordered filing date. See LR 27.1(f)(1); cf. RLI Insurance Co.,

716 F.3d, at 43-45."

"In counseled criminal appeals, when the Court orders a briefing deadline pursuant to a scheduling notification, the order will specify that if the brief is not timely filed, counsel may be subject to an order to show cause why a financial sanction should not be imposed under Local Rule 27.1(h) for the default."

You may find more information on the Court's website: <http://www.ca2.uscourts.gov>.

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

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



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