

CIVIL MOTION PRACTICE  
IN THE  
APPELLATE DIVISION

**I. Preliminary Remarks**

- A.** The preparation of motion papers and the presentation of orders to show cause are essential skills needed for practice in appellate courts.
1. Motions can be used to maintain or restore the status quo during the pendency of an appeal;
  2. They can short-circuit defective appeals by seeking immediate dismissal;
  3. They are sometimes needed to object to the form or content of an adversary's brief or record or to gain more time to perfect an appeal or submit a brief.
- B.** Practitioners can make more effective motions by knowing more about the process and by brushing up on the basics.

**II. Motion Basics**

- A.** Before moving you must invoke the jurisdiction of the Appellate Division by serving a notice of appeal or moving for leave to appeal.
1. The court will entertain a motion as soon as its jurisdiction is invoked. There is no need to wait for entry of an order.

If the court has no record of the case you must supply an additional copy of the notice of appeal, an initial information statement on a form approved by the court, and the order or judgment appealed from required by 22 NYCRR 1250.3(a). The court will then assign an Appellate Division Docket Number which must appear on all papers.

**B. The Moving Paper**

1. The Order to Show Cause (OTSC)
  - a) Used in any one of three situations:
    - (1) to shorten the return date;

(2) to grant temporary relief (TRO); or,

(3) to change the mode or manner of service which would otherwise be set by CPLR 2103(b).

b) The original is filed when the OTSC is signed.

c) The court will select the return date.

2. The Notice of Motion is used in all other situations.

a) You select the return date, which must be at 10:00 A.M. on any Monday (22 NYCRR 1250.4[a][1]).

b) The motion papers must be filed with the motion clerk one week before the return date (22 NYCRR 1250.4[a][2]).

3. The moving paper contains the prayer for relief. Think this out carefully beforehand.

a) Is the relief requested within the power of the court to grant?

b) Is it reasonable?

c) Beware of afterthoughts. Do not tack on additional relief requests in the wherefore clause of the supporting affidavit or affirmation.

### **C. The Supporting Papers**

1. The supporting affidavit or affirmation.

a) This is an area of weakness in motion practice.

b) Know your audience

(1) This isn't before the IAS Judge. The court is unfamiliar with your case. It does not maintain a case file.

(2) Motions are decided by the court, not the judge who signed the OTSC.

c) Be organized and concise

- (1) Keep it simple! First, give the reader an introduction; early on succinctly state the relief you are requesting and in a sentence or two explain why you are entitled to the relief requested.
  - (2) State the *relevant* facts of the underlying dispute between the parties, the object of the lawsuit, and the procedural events that led to the appeal.
  - (3) Describe the order or judgment appealed from and explain why you need the relief requested in your motion.
- d) Summarize at the end. Distill your argument into a few concluding sentences.

The computer can be a great help in preparing your motion papers. You can often reuse what you have already written for the court of original instance. But edit carefully to remove irrelevant matter and focus only on the information that the court needs to decide your motion.

## 2. The Memorandum of Law

- a) Underused.
- b) Very professional—it has more impact than including arguments of law in the supporting affidavit or affirmation.
- c) Relate the facts to the relevant law.

## 3. The Exhibits

- a) The following papers are required by 22 NYCRR 1250.4(a)(3); the motion clerk will likely reject your papers if you leave them out:
  - (1) The notice of appeal or other document first invoking the jurisdiction of the court, with proof of filing;
  - (2) The order or judgment appealed from; and,
  - (3) The decision, if any.

b) Other Exhibits

(1) The photocopier is the great enemy here. Only attach exhibits that are truly necessary to your argument.

(2) Remember the number of motions the court must decide. Do not submit a phone book.

**D. Opposition Papers (22 NYCRR 1250.4[a][5])**

1. Must be served and filed:
  - a) for motions prosecuted by notice of motion, by 4 P.M. on the business day preceding the return date
  - b) for motions prosecuted by OTSC, by 10:00 A.M. on the morning of the return date. The method of service must be calculated to place opposing papers in hands of movant by 10:00 A.M. on the morning of the return date. 22 NYCRR 1250.4[b][3].

**E. Cross Motions (22 NYCRR 1250.4[a][6])**

1. Returnable on the same day as the motion in chief;
2. Papers must be served personally, by overnight delivery service or by electronic means and filed at least three days before the return date (22 NYCRR 1250.4[a][6]), except where demand is made pursuant to CPLR 2214(b). In that event the motion must be on at least 16 days' notice and the notice must demand service of answering and cross-moving papers at least 7 days prior to the return date.

**F. Reply Papers**

1. For motions brought on by notice of motion, the right to reply is governed by CPLR 2214(b). If the requisite notice is given under that provision, a reply may be served on the business day preceding the return date. The reply must be filed with proof of service by 4:00 p.m. on the business day preceding the return date.
2. For motions brought on by order to show cause, reply submissions shall be permitted only by leave of the court (*see* 22 NYCRR 1250.4[b][4]).

**G. Requirements Applicable to All Papers**

1. An affidavit of service must be filed with the motion clerk on or before the return date.
2. Compliance with signing requirement of 22 NYCRR 130-1.1-a(a) is required (*see* 22 NYCRR 1250.1[d]).
3. Adjournments. A party can adjourn the return date one time for a period of either 7 or 14 days. To do so, the parties must file a stipulation with the Court no later than 10:00 a.m. on the return date (*see* 22 NYCRR 1250.4(a)(9))

**H. No Oral Argument - All motions are deemed submitted (22 NYCRR 1250.4[a][8]). Counsel need not attend.**

**I. The motion clerk may reject motions for failure to comply with the rules (22 NYCRR 1250.1[g]).**

### **III. The Major Motions**

#### **A. The motion to dismiss is used in the following circumstances:**

1. Where the appellant is not aggrieved.
2. Where the paper appealed from is not appealable, such as
  - a) a decision;
  - b) an order or judgment made on consent or on default; or
  - c) an order that decides a motion in limine.
3. Where an appeal is improperly taken as of right instead of by permission, such as ones from
  - a) an order made sua sponte; or
  - b) an order that decides a motion that is not made upon notice, like one made at a conference.
4. Where the appeal is not timely taken 1250.10(a).
5. Where changes in fact or law have rendered the appeal academic--also not raised by the court sua sponte.

#### **B. The motion to change or restore the status quo during the pendency of an appeal**

1. CPLR 5519(c)—the discretionary stay of enforcement of an order or judgment pending appeal therefrom.
  - a) The movant must know the difference between executed and executory provisions of a judgment or order.
  - b) A CPLR 5519 stay is only of enforcement of executory provisions. Those provisions that have been carried into execution cannot be stayed.
  - c) The statute and cases interpreting it provide a bright line test. If an act is commanded or forbidden by the order or judgment, it may be stayed.
2. CPLR 5518 - the preliminary injunction

- a) Appellate Division can grant a preliminary injunction or modify or limit one granted by the trial court.
- b) The injunction works on people or entities and directs them to do or refrain from doing an act during the pendency of the appeal.

3. Stay of proceedings in the action

- a) Such a stay has no statutory basis. CPLR 2201 applies only to trial courts. It arises from the inherent power of an appellate court to preserve the status quo and protect the court's jurisdiction by insuring that a future decision will not be rendered academic by the change of circumstances over time.

4. Suspension of the effect of the declaration of the rights of parties.

5. The TRO

- a) Reasonable notice by the movant to his or adversary of the intent to seek temporary relief is required (22 NYCRR 1250.4[b]][2]); 24 hours is sufficient in most cases.
- b) An affidavit or affirmation as to the fact that notice was given must be included with the moving papers.
- c) Ask for a TRO only if you need it. The Justices of the court only consider granting such relief if needed to maintain the status quo. Unnecessary requests inconvenience opposing counsel and waste the money of the parties.
- d) If you do seek a TRO, ask only for temporary relief that you absolutely need—don't overreach.
- e) Explain the need for temporary relief in a separate paragraph of your supporting papers. This adds emphasis and just writing that paragraph will prepare you for presenting the OTSC containing the request for temporary relief.

f) An OTSC containing a TRO must be presented personally by an attorney or by the party pro se if not represented by an attorney (22 NYCRR 1250.4[b][1]).

g) The TRO conference

(1) The clerk of the court or one of her deputies conference applications for an OTSC containing a TRO. They read the moving papers and meet with the attorneys before presenting the application orally to the duty Justice.

(2) Where an attorney who has been given notice of an application opposes a TRO but cannot come to court, he or she may ask to speak with the clerk or a deputy, and request that he or she be telephoned when the application is presented. The court will then call to get that attorney's side of the story.

**C. Applications for enlargements to perfect an appeal or to serve and file a brief**

1. The parties may stipulate to extend the time to perfect by up to 60 days. The stipulation must be filed with the court. The appellant may apply for a further enlargement by letter, on notice to all parties, to extend the time to perfect by up to an additional 30 days. Any further enlargement requests must be made by motion. (22 NYCRR 1250.9[b]).
2. The parties may stipulate to a 30-day extension of time to file an answering brief (i.e. a respondent's brief). The stipulation is not effective unless it is promptly filed with the court. The parties may not stipulate to more than two 30-day extensions. Additional extension requests must be made by motion (22 NYCRR 1250.9[g][1]).
3. The parties may stipulate to a 10-day extension of time to file a reply brief. The stipulation is not effective unless it is promptly filed with the court. The parties may not stipulate to more than two 10-day extensions. Additional extension requests must be made by motion (22 NYCRR 1250.9[g][1]).



4. Check the decisions posted on the court's website or call frequently to determine whether the enlargement has been granted. Do not let time granted to you run out!

**D. The motion to dispense with certification of the record or appendix (22 NYCRR1250.7[g])**

1. Usually made by pro se litigants who cannot afford to pay the clerk of the court of original instance to certify the record and who cannot certify themselves, and whose opponent won't stipulate
2. When faced with such a motion examine the proposed record or appendix carefully. If the proposed record complies with CPLR 5526 or the appendix complies with CPLR 5528[a][5]), consenting to relief from the certification requirement is appropriate. But proposed records or appendices submitted on such motions are often incomplete or contain inaccurate copies of the original papers filed in the office of the court of original instance. Check carefully!

**E. The court's own motions**

1. Motions to dismiss abandoned cases.
  - a) The Appellate Division departments track the progress of all appeals. Civil appeals not perfected within 6 months of the date of the notice of appeal are liable to be dismissed on the court's own motion pursuant to 22 NYCRR 1250.10(a). A dismissal calendar is published every few months in the *New York Law Journal*.
  - b) Dismissal has preclusive effect as to all issues which could have been raised on the appeal (*Bray v Cox*, 38 NY2d 350 [1976]). Such issues may not be raised on a subsequent appeal from a judgment in the action. The Court of Appeals reaffirmed the rule of *Bray v Cox* in *Rubeo v National Grange Mut. Ins. Company* (93 NY2d 750[1999]).

The moral is that no appeal to the Appellate Division should be abandoned lest it have future preclusive effect. Attorneys should withdraw appeals that they do not intend to perfect.

2. Motions to impose sanctions

- a) Failure to keep the court informed of the status of the case or progress of the appeal (22 NYCRR1250.2[c]);
- b) Frivolous conduct (22 NYCRR1250.1[h]);
- c) Failure to attend a settlement or mediation conference (22 NYCRR 1250.3[c][3]).

**IV. The Order Deciding the Motion**

- A. For the most part, the court does not give reasons for its motion decisions.
- B. Sometimes the court will describe a motion that has several prayers for relief and in the main ordering paragraph grant only one branch then say the motion is denied in all other respects.
- C. Costs on a motion are \$100 (CPLR 8202). The court rarely awards such costs except on motions for reargument that are denied.

**V. CPLR 5704 Relief**

- A. An application pursuant to CPLR 5704 is designed to review the determination of an application for temporary relief that was granted or denied by the trial court ex parte. However, 22 NYCRR 202.7(f) now requires notice to an adversary of an intention to request a TRO from a trial court. As a result, opposing counsel often appear before the trial court judge when an OTSC is presented. This means that many fewer TROs are issued ex parte and cannot be reviewed using CPLR 5704 (see discussion of alternative under F below).
- B. Relief *granted* ex parte can be modified or vacated by one Justice of the Appellate Division.
- C. Relief *denied* ex parte can only be granted by a panel (4 or 5 judges) of the Appellate Division.
- D. Such applications are handled informally, in the same manner as an application for an OTSC.
- E. The court will make an endorsement on the papers and send the parties back to the trial court.

- F. Where an application for an OTSC was not made ex parte, the Appellate Division will entertain a motion under CPLR 5701(c) seeking leave to appeal from the OTSC. That motion can itself be brought on using an OTSC and one of the court's Justices can grant a temporary stay against the TRO issued by the trial court. Such motions are usually never decided; they await the outcome of the motion in the trial court and are then academic.