

BY MAIL

July 3, 2018

Hon. Rolando T. Acosta  
Presiding Justice  
Appellate Division, First Department

RE: Proposals for Reform of Appellate  
Procedures in the First and Second  
Departments

Hon. Alan D. Scheinkman  
Presiding Justice  
Appellate Division, Second Department

Hon. Martin Shulman  
Presiding Justice  
Appellate Term, First Department

Hon. Michael L. Pesce  
Presiding Justice  
Appellate Term, Second Department  
(2d, 11th, 13th Jud. Dist.)

Hon. Anthony F. Marano  
Presiding Justice  
Appellate Term, Second Department  
(9th, 10th Jud. Dist.)

Your Honors:

The New York County Lawyers Association Committee on Appellate Courts respectfully requests that the Appellate Divisions and Appellate Terms of the First and Second Departments consider three new rules which would improve the efficiency of the appellate process and facilitate the court's ability to resolve appeals:

- A. The appellate courts should ensure that in assigned-counsel cases, the judgment roll includes the *entire* trial-court file, not merely portions of the file selected by the Appeals Bureau;
- B. The appellate courts should permit parties to reproduce exhibits in the body of the brief or, at a minimum, attach exhibits to a brief; and
- C. The appellate courts should permit the parties in assigned-counsel cases to provide an electronic, paginated appendix.

Further, as discussed in section D below, we would welcome a dialogue with the appellate courts regarding improving access to exhibits entered into evidence at the trial/plea level for use on appeal.

## A.

### **Access to the Complete Court File**

Under current procedures, the appellate courts do not provide assigned counsel with a complete copy of every document filed in the lower court. Instead, in the First Department and in Richmond County of the Second Department, the Appeals Bureau parses the file to determine which papers should be made part of the judgment roll. For instance, under current First Department practice, assigned counsel does not receive a copy of pre-sentence memoranda or competency reports filed with the court.<sup>1</sup>

The appellate courts should provide the parties with a complete record containing every document in the court file. Ensuring complete access to the record would benefit the courts and the parties. Appeals Bureau staff would be relieved of the obligation of analyzing the court file to determine which papers should be provided, while the parties would have complete access to all potentially relevant materials.

## B.

### **Reproduction of Exhibits in Briefs**

The Committee recommends that the courts modify current court rules that bar parties from reproducing photographic exhibits in the body of the brief or appending them to the brief (*e.g.*, a lineup or a street map).<sup>2</sup> This minor amendment would facilitate appellate review, as it would prevent the courts and the parties from having to search the record for key exhibits while reviewing a brief.

The federal rules provide a good model for reform. Under Federal Rule of Appellate Procedure 32(a)(1)(C), “[p]hotographs, illustrations, and tables may be reproduced [in the brief] by any method that results in a good copy of the original.” We recommend that the appellate courts adopt this rule.<sup>3</sup> Of course, the rules applicable to the reproduction of exhibits in the record or appendix (*e.g.*, images must be accurately reproduced) would apply equally to reproduction of exhibits in (or attached to) the brief.

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<sup>1</sup> In the Second Department, the court does not provide the parties with the judgment roll. Instead, assigned counsel must copy the court file.

<sup>2</sup> See Appellate Division First Department Rule 600.10(d)(1)(iii) (“Unless authorized by the court, briefs to which are added or appended any matter, other than specifically authorized by this rule, shall not be accepted for filing.”); Appellate Division Second Department Rule 670.10.3(h)(2); Appellate Term First Department Rule 640.5(e). The Appellate Term Second Department’s rules are silent on this issue. See Rule 731.2

<sup>3</sup> The United States Supreme Court similarly allows demonstratives/exhibits to be included in the body of the brief. See *Petitioner’s Br., Foster v. Chatman*, 578 U.S. \_\_\_, 136 S.Ct. 1737 (2016) at 16.

### C.

#### **Submission of an Electronic Appendix in Assigned-Counsel Cases**

The Committee also recommends that the appellate courts allow parties in assigned-counsel cases to electronically submit an appendix.

In retained-counsel cases, the parties often file numerous copies of a paginated appendix. Assigned attorneys, on the other hand, proceed on the “original record.” Under this procedure, the court collects and retains a copy of the judgment roll and transcripts. In turn, assigned counsel refers to the testimony and file papers by date, witness name, nature of the document, etc. Upon receipt of the briefs, the parties and the court must search the file papers and transcript for the referenced material. And in cases where the transcripts/file papers are voluminous, this can be a particularly difficult enterprise.

Instead of this cumbersome procedure, the appellate courts should permit the appellant and respondent in assigned-counsel cases to electronically supply a paginated appendix which contains a complete copy of the transcript and file papers.<sup>4</sup> This system would be *identical* to the current system governing assigned-counsel appeals, except that the court would—in addition to the materials it already retains in assigned-counsel appeals—also receive an electronic, paginated appendix for easy reference. This reform will reduce confusion and save time for the parties and the courts.

### D.

#### **Access to Exhibits**

Finally, we would welcome the opportunity to discuss appellate counsel’s access to exhibits.

Unfortunately, assigned counsel in criminal and civil cases routinely struggle to access exhibits introduced during pretrial and trial proceedings. Although paper, photographic, and audio/video exhibits are often critical to an appeal, those exhibits are not part of the judgment roll that is provided to assigned counsel. Indeed, assigned counsel does not receive any exhibits as a matter of course. Instead, after receiving the transcripts and court file, assigned counsel must request exhibits from the parties that introduced the exhibit below. In turn, that party must access the trial file (either from storage or from trial counsel’s file) and locate every exhibit (often a difficult task, especially when counsel does not meticulously organize the

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<sup>4</sup> This paginated submission would only be electronic—assigned counsel would not also be required to supply written copies of a paginated appendix.

exhibits). The party must then reproduce the exhibits and provide a copy to assigned counsel. Often, exhibits consist of audio/video CDs, which can be difficult to reproduce. In the end, it can take anywhere from a month to six months for assigned counsel to access the exhibits, thus delaying the appeal.

We believe that this system can be improved and have several concrete proposals. We would welcome a dialogue with the appellate courts regarding possible reforms.

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The reforms discussed above would enhance the efficiency of the appellate process. Please let us know if we can arrange a meeting to discuss these reforms in person.<sup>5</sup>

Very truly yours,

Matthew Bova and Scott Danner  
*Co-Chairs, Committee on Appellate Courts*

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<sup>5</sup> The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas. The views expressed are those of the Appellate Courts Committee only and approved for dissemination by the President; these views have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.