New York County Lawyers Association

Matthew Bova & Edward E, Smith
Co-Chairs, Appellate Courts Committee

January 25, 2021

MEMORANDUM

TO: Mr. Jeffrey Carucci
Statewide Coordinator for Electronic Filing
Office of Court Administration
25 Beaver Street
New York, New York 10004
efilingcomments@nycourts.gov
Via E-Mail

FROM: Appellate Courts Committee, New York County Lawyers Association

RE: Comments on Electronic Filing

This memorandum, submitted by the Appellate Courts Committee of the New York County Lawyers Association, offers comments for inclusion in the Office of Court Administration's ("OCA's") annual report to the Legislature, the Governor, and the Chief Judge evaluating our State's electronic filing system, including the New York State Electronic Filing System ("NYSCEF"). We appreciate the opportunity to offer input.[1]

In December 2017, all four departments of the Appellate Division adopted uniform rules on electronic filing (the "Rules"). *See* 22 NYCRR § 1245 et. seq. And in 2020, the Appellate Divisions First and Second Departments went "all digital," no longer requiring paper filing of any documents. Instead, in the First Department, papers are

[1] These comments have been approved by NYCLA's Appellate Courts Committee and approved for submission by NYCLA's President. They have not been reviewed by NYCLA's Executive Committee and do not necessarily represent the views of its Board.

filed on NYSCEF and in the Second Department papers are filed on either NYSCEF or a portal.

The Appellate Courts Committee of the New York County Lawyers Association applauds the Unified Court System's efforts to expand electronic filing. Electronic filing drastically enhances the efficiency of the court system and prevents the wasteful process of travelling to a courthouse to file paper. Still, the current e-filing system can be improved. These comments propose several simple e-filing reforms that could drastically improve the efficiency of our appellate system.

In proposing these reforms, we do not operate on a blank slate. Many of the reforms proposed below have already been previously proposed, in one form or another, in bar-association letters and reports.[2] Now is the time to adopt them.

A. Compilation of the Record on Appeal

The current system for providing the record to assigned counsel is inefficient, costly, and delays cases by years. Digital reform can fix this problem.

In First Department cases where counsel is assigned (a vast majority of criminal cases and a significant number of civil cases in that Department), the record that the court provides to assigned counsel is often incomplete, thus forcing assigned counsel to spend considerable resources compiling a complete record.[3] Relevant transcripts are often not provided. Papers filed with the trial court are often absent from the record, meaning that counsel must dig through the paper court file to assemble a complete record. And hearing and trial exhibits are, as a matter of established practice, *never* part of the provided record and are instead only provided upon a request to the party who introduced them, which often takes months to fulfill. Even worse, these exhibit requests are fulfilled at the taxpayer's expense as the prosecution

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[2] *See* Exhibit A, which attaches the following materials: NYCLA Statement, *Electronic Filing and Service During the Current Pandemic* (March 25, 2020); New York City Bar Association, Criminal Justice Operations Committee, Criminal Advocacy Committee, and Criminal Courts Committee, Letter to O.C.A. and Presiding Justices of the First and Second Departments, *Delays Associated with Compiling the Record on Appeal in Criminal Cases* (March 5, 2020); NYCLA, Appellate Courts Committee, Letter to the Presiding Justices of the Appellate Courts, *Proposals for Reform of Appellate Procedures in the First and Second Departments* (July 3, 2018); NYCLA, Appellate Courts Committee, Letter to the Clerk of the Court of Appeals, *Electronic Service of Applications for Leave to Appeal in Criminal and Civil Appeals* (July 13, 2018).

[3] The situation is even worse in the Second Department. There, the record is not provided at all; instead, assigned counsel must compile the record from scratch on his/her own.

and other state agencies must spend resources scouring old files for exhibits that were admitted years earlier.

Once the record is complete, it still takes years after judgment is imposed for the court system to provide it. It often takes at least a year for counsel to be assigned post-judgment. At that point, the court orders the provision of the transcripts/record to assigned counsel, a process that routinely takes another year. So, for instance, appellate counsel may not receive a viable record on appeal from a May 2014 judgment until May 2016 or even later. This delay hurts individuals seeking appellate relief. And it hurts the government's interests because, if a judgment is reversed, new proceedings must take place many years after the initial proceeding, thus injecting the risk of absent witnesses, stale memories, and outright loss of evidence.

To improve this inefficient system, OCA should enact a rule requiring the following simple changes:

- the OCA CRIMS record sheet, which lists all of the court appearances in criminal cases, must be filed on NYSCEF so appellate counsel can have easy access to information that will allow for a determination of the record's completeness;

- transcripts should be uploaded onto NYSCEF so the parties can have easy access to them;

- all materials filed in the trial court and/or contained in the court file must be filed on NYSCEF, including jury notes, *in limine* motions, and substantive email correspondence with the trial court (such as requests to charge, with are often done through email); and

- a copy of each exhibit must be made part of the record and placed on the NYSCEF file.

These reforms will do a lot of good. They should be adopted.

B. The Court of Appeals Should Go All Virtual

Although the Appellate Divisions have gone virtual during the Pandemic, the Court of Appeals has unfortunately not done so. Briefs and records, often collectively consisting of a thousands of pages, must still be filed in paper copy, as must motions for leave to appeal. Fortunately, the Court has recently (effective January 2021) created a new e-filing portal which allows for parties to file electronic copies of motions for leave to appeal in criminal and civil cases. But while the Court has abandoned the cumbersome requirement that copies of the Appellate Division

briefing must be filed in paper, it still requires paper copies of the motion papers and letters.

The Court of Appeals should nullify any paper-filing requirements as doing so will enhance efficiency and save the taxpayer millions of dollars over a decade on the costs associated with printing/shipping of millions of pages of paper (when papers are filed and served by assigned or government counsel). In turn, the Court of Appeals should join the NYSCEF filing system so papers can be filed there.

At a minimum, the Court of Appeals should amend all of its rules to render a paper timely filed if the digital copy is uploaded by or on a deadline. The Court's current rules pin the filing date to the date the paper copy is received by the Court in Albany. This rather arbitrary rule puts the parties at the mercy of the mail. Justice should not be pinned to factors outside the party's control. Nor should attorneys have to endure anxiety and time tracking packages, contacting postal services to determine the status of packages, and contacting the court to confirm that a paper has been received. Instead, as in virtually every other court system of which we are aware, a paper should be deemed filed when it is electronically submitted.

C. The Second Department's Technical Citation Requirements

E-filing works wonders for busy attorneys. But the imposition of hypertechnical and time-consuming e-filing rules wastes precious time. The Second Department's cumbersome citation rules for e-filed cases is wasteful and should be modified.

In the Second Department, filings must comply with a set of "Technical Guidelines." Among them are requirements that authorities cited within filings must be "Bookmarked" or "Hyperlinked." Under the Technical Guidelines, litigants who opt for bookmarking must: (1) compile all of the authorities cited into pdf files, (2) merge those files into one compendium, (3) annex that compendium to the filing, and (4) manually bookmark each cited authority. Those who opt for hyperlinking must, for each citation in the filing, manually create a hyperlink to the website where the source is located. For an average-length appellate brief, we have found that both methods require between two and a half to three hours to complete.

This requirement comes at a tremendous cost for appellate practitioners and produces little benefit. For one, appellate counsel must purchase expensive pdf-writing software. Worse, counsel must spend valuable time complying with the intricacies of the Technical Guidelines rather than tending to clients' needs. Indigent clients represented by institutional providers suffer the most. Purchasing the required software licenses creates budgetary headaches for providers. Additionally, since many institutional providers have limited support staffs, formatting responsibilities fall onto attorneys who must divert time and energy away from legal work and client communication in order to bookmark and hyperlink their filings.

In sum, there should not be any technical citation requirements. Instead, a table of authorities suffices.

D. Improving Access to Transcripts

Ready access to electronic copies of transcripts is essential to good lawyering and the fair administration of trial-level and appellate justice. Nevertheless, in assigned-counsel cases, transcripts are still routinely delivered in paper copy to the courts and the parties. This is senseless and wasteful. Transcripts should be provided in electronic copy because doing so is cheaper and far more efficient than printing out hundreds (and at times thousands) of pages and transporting those pages to the recipients. And once the court system receives a transcript for an appeal, it should immediately upload that transcript onto the NYSCEF system so it will be available to all parties. This change will speed up the appellate process by many months.

Further, the court system should ensure that there are no price distinctions between PDF and paper copies of transcripts. PDF copies should never cost more than paper.

E. Rejected E-Filings

Courts routinely reject e-filings that do not comply with formatting and e-filing requirements. The manner in which they do so is often unhelpful. Often, the courts provide neither an explanation of where in the filing the defects appear nor a person to contact regarding their rectification. This can lead to practitioners spending valuable time trying to obtain guidance on how to fix (often minor formatting) errors. OCA should require courts to provide contact information for the person(s) who deem filings defective and eliminate the waste of time and resources current conventions produce.

Respectfully Submitted,

Appellate Courts Committee,
New York County Lawyers Association

EXHIBIT A

New York County Lawyers Association

STATEMENT OF THE NEW YORK COUNTY LAWYERS ASSOCIATION

Electronic Filing and Service During the Current Pandemic

In response to the current pandemic, some, but not all, New York courts have relaxed the rules governing the filing and service of legal papers by permitting electronic filing and service. And as of March 22, 2020, the Administrative Order of the Chief Administrative Judge of the Courts prohibits filings except in certain enumerated matters and those matters deemed "essential."[1]

To ensure the safety of the thousands of individuals involved in the filing, service, and review of legal documents, we recommend that New York appellate and trial courts, in both civil and criminal cases, quickly enact a rule that requires electronic service/filing of all legal documents and prohibits paper service/filing. *See* C.P.L.R. § 2103(b)(7) (authorizing the chief administrator to create rules governing e-service). This proposed rule would not require the establishment of any new e-filing systems but would instead merely require courts and litigants to make e-mail addresses available for electronic filing. This rule will facilitate filings in those cases where filing is currently permitted under the March 22nd Order and will continue to facilitate filings once that order is lifted some time in the future.

An exception to this proposed electronic-filing rule should be made for (1) incarcerated individuals and (2) *pro se* litigants who, due to financial, technological, or other hardship, cannot file documents electronically. This rule would be temporary in light of current circumstances and should remain in effect until subsequent rule modification.

This rule should not require consent of the parties and should simply require that courts and litigants make all reasonable efforts to provide an avenue for electronic service and filing. In virtually all pending cases, these avenues are already in place as parties already have access to court and party e-mail addresses. And if e-mail addresses are not currently available to accommodate this simple method, arrangements can easily be made to facilitate electronic filing and service. We are confident that attorneys and courts can, with ease, quickly adapt to this simple change.

We further recommend that the court system continue to make efforts to permit oral argument *via* video or telephone conference during this difficult period.[2]

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[1] https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf

[2] 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. A version of this statement was approved by the Committee on Appellate Courts on March 22, 2020. The Executive Committee approved this statement as a Statement of the New York County Lawyers Association at its regular meeting on March 25, 2020.

COMMITTEE ON CRIMINAL JUSTICE OPERATIONS

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March 5, 2020

Chief Administrative Judge Lawrence K. Marks
Office of Court Administration
25 Beaver Street
New York, New York 10004

Presiding Justice Rolando T. Acosta
New York State Supreme Court
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Presiding Justice Alan D. Scheinkman
New York State Supreme Court
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Re: Delays Associated with Compiling the Record on Appeal in Criminal Cases

Dear Judges Marks, Acosta, and Scheinkman:

We are writing to you as members of the New York City Bar Association's Criminal Justice Operations Committee, Criminal Advocacy Committee, and Criminal Courts Committee. Over the past few months, through interviews with District Attorney's offices and Appellate Defenders, we have identified impediments that cause delay in compiling the record on appeal for criminal appeals, which ultimately delay their resolution. Thinking about the ways in which the appellate process can be made more efficient is consistent with the goals of OCA's "Excellence Initiative," which, just three years after its implementation, has improved disposition rates and reduced backlog in the trial courts. We are optimistic about the potential for similar improvements at the appellate level.

In general, appellate providers noted that simply compiling the documents and transcripts necessary to complete the record on appeal can take anywhere from two months to two years,

which is the primary reason why resolving a criminal appeal is a lengthy endeavor.[1] Below, we identify some common problems appellate attorneys face in compiling the record on appeal and offer some procedural solutions to address these concerns.

I. COURT FILES

a. Attorneys Often Do Not Receive All Parts Of The Court File They Need To Handle The Appeal.

In the counties covered by the First Department, the Appeals Bureau of each Supreme Court provides the Appellate Division with only those documents from the court file that they believe are relevant to handling the appeal. In other words, an employee of the Appeals Bureau includes only those documents that he/she personally believes an appellate attorney needs for the case. However, their judgment may not reflect the judgment of assigned counsel. For example, in previous years, appellate offices did not receive copies of jury notes as part of the court file. But in order to determine whether an O'Rama error exists, an attorney would need the notes to see if the court read them verbatim into the record.[2] Similarly, appellate defender offices are not provided with copies of their clients' "rap sheets" because at least one of the Appeals Bureaus views them as confidential. Appellate defenders in the Second Department do not have the same problem, as those offices are given access to copy the court file themselves.

b. Because Of Incomplete Recordkeeping, Attorneys Have Difficulty Determining What Documents Are Missing From The Court File.

Another difficulty is determining which documents are missing from the court file. Unless the event — for example, a hearing; a pro se submission; an oral application for new counsel, release from custody on speedy trial grounds, or to waive the assistance of counsel and proceed pro se; or the resolution of a discovery dispute, which seem likely to proliferate as the new criminal justice reforms take effect — is noted on the clerk's worksheet or is otherwise referenced in the transcripts provided, attorneys cannot know what is missing. This problem stems primarily from the worksheet, which the court clerk fills out for every case. There is no space on that form for the clerk to indicate that certain motions — for example, Sandoval motions — happened on a date before jury selection began, thus leaving attorneys unaware of certain events except in circumstances where they fortuitously happen to be mentioned in other parts of the record on appeal. Similarly, since appellate offices are not notified that sealed documents exist, such as Article 730 examination reports, they cannot know to request them or ask that they be unsealed. And in at least one county (Richmond), the county clerk refuses to provide Article 730 reports at all.

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[1] Those who provided information for this report include Bureau Chief Leonard Joblove, Brooklyn District Attorney Appeals Bureau; Bureau Chief Johnette Trail, Queens District Attorney Appeals Bureau; Attorney-in-Charge Paul Skip Laisure, Appellate Advocates; Managing Attorney David Klem, Center for Appellate Litigation; and Attorney-in-Charge Christina Swarns, Office of the Appellate Defender. We are grateful for their assistance and we have incorporated their responses into this report.

[2] People v. O'Rama, 78 N.Y.2d 270 (1991) requires courts to follow a specific procedure when there is a note from the jury during a trial. A court must, in part, read the jury note into the record word-for-word, and failure to do so constitutes reversible error on appeal.

This particular issue may be of greater concern to First Department practitioners, since some Second Department attorneys reported that they routinely make a complete copy of the Supreme Court file and do not rely on a record assembled by the court clerk.

II. TRANSCRIPTS

a. Attorneys Often Wait For Months To Receive Transcripts Due To Delays By The Appeals Bureau, Court Reporters, And The Appellate Division.

The first step in the process of creating and delivering a transcript to appellate attorneys requires the Appeals Bureau to issue an order to the court reporter to transcribe the relevant record. In the past, these orders were issued within weeks of the assignment. However, in recent years, it has taken the New York County Appeals Bureau upwards of four to five months after appellate counsel is assigned simply to issue such an order. The speed at which orders are issued seems to have fluctuated based, in part, on personnel shifts within the office.

Next, court reporters must transcribe their notes from the requested proceedings. However, while the Supreme Court Appeals Bureaus order court reporters to provide transcripts of the requested proceedings within 90 days, the court reporters frequently do not adhere to these orders. If the reporter does not produce a transcript within 90 days, it appears that the Appeals Bureau in the First Department often does not follow up (the Appeals Bureau in the Second Department generally does, but without any better results). It then falls on assigned counsel to determine why they have not received the record in a timely manner, and then follow up with the court reporter until it is done. Multiple appellate offices identified court reporters as the most critical point of transcript delay, as court reporters almost never file the transcripts within 90 days. As a result, delays are extensive at this stage in the process.

Another source of delay arises even after the Appeals Bureau receives the transcripts. The Appellate Division logs in and scans the transcripts (and court files) before providing them to assigned counsel. Appellate offices have observed substantial scanning delays of up to six months in the Appellate Division.

b. Attorneys Often Do Not Initially Receive All Of The Transcripts They Need To Handle The Appeal.

This problem is similar to that described in the "Court File" section. Because the clerk's worksheet does not have a space to indicate that certain motions occurred on a date prior to jury selection, the Appeals Bureau may not know that it has to request certain minutes. Moreover, the Appeals Bureau only requests transcripts that it believes are relevant. Thus, attorneys almost never receive transcripts of arraignments, adjournments, or what the Appeals Bureau considers "non-substantive" events. This creates a situation where necessary minutes are often missing from the package that appellate attorneys receive from the court.

c. When Attorneys Identify Additional Transcripts They Need To Handle The Appeal, The Process Of Then Obtaining Those Minutes Is Lengthy And/Or Costly.

If, once an attorney receives all of the transcripts ordered by the Appellate Division, she determines that she needs to order additional transcripts to handle the appeal, she will first attempt to order those minutes through the Appellate Division. However, the Appellate Division must then request that the Appeals Bureau order a transcript from the court reporter, and that process can take six months or more.

Sometimes, the Appellate Division balks at ordering the additional minutes (for example, all the adjourn dates in order to evaluate a speedy trial claim). In those cases, the appellate provider must make a formal motion to the court to request them. That process, which includes time for the DA's response and the court's consideration and decision, may take an additional several months.

Because of how long it takes to get additional minutes through the court, appellate providers often end up spending office funds to pay-order transcripts directly from the court reporter, a process which usually ensures that transcripts are provided within a reasonable amount of time. However, this means that appellate offices frequently spend money to pay-order minutes that should have been provided to them without cost as assigned counsel.

III. EXHIBITS

a. Exhibits Are Not Provided In A Timely Manner To Attorneys

Once exhibits are introduced into evidence, they become part of the record on appeal. However, rather than storing them in a centralized location, such as the court, the court returns them to the respective parties who introduced them, leading to a piecemeal storage system whereby exhibits are frequently lost or require a time- and labor-intensive process to locate.

Appellate defender offices typically request the People's exhibits in every case, which means that any delay in receiving exhibits leads to a delay in the resolution of the appeal. In order to obtain the People's exhibits, assigned counsel submits a formal request to the exhibits paralegal in the appropriate DA's office, including the exhibit list showing the admission of the requested exhibit. These paralegals are tasked with locating and supplying the exhibits to assigned counsel. However, the DA's office lacks personnel to handle the volume of these exhibit requests. Additionally, the DA's offices archive some of their trial materials off-site, and those materials are controlled by the NYC Department of Records and Information Services, from which they must be retrieved, causing additional delay. Thus, it can take anywhere from two months to more than six months for defense counsel to receive the People's exhibits. Moreover, in a substantial percentage of cases, the DA's office is unable to locate the exhibits at all, leading to defense counsel filing a brief without the relevant exhibits.

Obtaining defense exhibits requires the cooperation of trial counsel. If trial counsel is not cooperative, or if they have not engaged in orderly record-keeping, the assigned appellate attorney may never receive the defense exhibits.

b. Proposed Procedural Solutions

We propose the following solutions to address common delays in compiling the transcript on appeal.

- The Appeals Bureau should provide a copy of the entire court file to the Appellate Division, eliminating the need for attorneys to attempt to figure out whether any important document is missing from the court file and then retrieve that document.

- Trial courts could revise the clerk's worksheet, providing a space on the form to document proceedings that occur prior to jury selection, thus creating a more complete record of events that the Appeals Bureau will rely on when determining what transcripts need to be ordered.

- The 90-day time requirement for court reporters to file transcripts should be strictly enforced by the court. To that end, OCA might consider developing a system to monitor whether court reporters are generally meeting the 90-day deadline, and if they are not, then considering what can be done to address this issue.

- Filing transcripts could be done in a digital format, which would minimize the delays inherent in passing transcripts from the court reporter to the Appeals Bureau to the Appellate Division and then, finally, to the assigned attorneys.

- We suggest that the court institute a procedure, at the time of trial, for creating digital copies of all exhibits from both parties and then storing those digital copies with the court, in order to ensure that exhibits are preserved in a centralized location and are easily accessible to appellate attorneys down the line.

Finally, we would welcome a meeting with Judge Marks, Justice Acosta, Justice Scheinkman, and representatives from the New York City district attorneys and appellate provider offices, for an opportunity to discuss the issues identified in this letter and identify concrete solutions to ensure the timely resolution of criminal appeals. We feel that the time is especially ripe for change given the pilot e-filing program being implemented in New York Superior Criminal Court.

Thank you for your consideration**.**

Respectfully,

Criminal Justice Operations Committee
Sarah J. Berger, Chair
Christina Wong
Benjamin Wiener
Eric Washer

Criminal Courts Committee
Terri S. Rosenblatt, Chair

Criminal Advocacy Committee
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Matthew Bova & Scott Danner
Co-Chairs, Appellate Courts Committee

New York County Lawyers Association

July 13, 2018

RE: Electronic Service of Applications for Leave to Appeal in Criminal and Civil Appeals

Honorable John P. Asiello
Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Your Honor:

The New York County Lawyer's Association *Appellate Courts Committee* analyzes the state and federal appellate court system with an eye towards reform. We write with a proposal for reform of the rules governing the service of materials submitted in support of leave applications: the Court of Appeals should permit electronic service in lieu of mail service.

As Chief Judge DiFiore recently explained, "The benefits of going all-digital are obvious and significant. It streamlines the commencement of cases, resulting in substantial cost savings for all litigants."[1] Replacing the current system with an e-service system would significantly enhance the efficiency of the leave-application process, promote environmental responsibility, and save money.

From 2012 through 2016 alone, the Court of Appeals disposed of more than 10,000 criminal-leave applications and nearly 5,000 civil motions for leave to appeal. In the typical application, numerous documents must be filed. In a criminal case, Appellant must file an opening letter (attaching the Appellate Division briefs and decisions) and

[1] Chief Judge Janet DiFiore, *Going Paperless: The New York City Family Court*, 90(3) The New York State Bar Association Journal 10-12 (March/April 2018).

often files a substantive follow-up letter (once a Judge is assigned to the application). In turn, the Respondent files a letter in opposition.

In civil cases, the party seeking permission to appeal must file even more materials:

- an original and six copies of consolidated motion papers including, among other things, a notice of motion, statement of case history, a jurisdictional showing, statement of the questions presented, a showing of leaveworthiness, and a copy of the order/judgment sought to be appealed;
- a copy of the record or appendix in the court below;
- copies of each party's briefs below.

The opposing party may then file six copies of papers in opposition, setting forth reasons for dismissal or denial of the application.

The end result is that each year, hundreds of thousands of pages are copied/printed, mailed, filed, and stored. It is also likely that at least $100,000 per year is spent on the mailing and printing of documents—a tab that is often picked up by the taxpayer, as most leave applications are filed and opposed by tax-payer funded agencies/firms.

An e-service system would facilitate the work of the Court and the parties. Parties could electronically file the papers on an internal court database[2] or the parties could simply email the papers to designated email addresses.[3] For instance, the Court could designate an email address for opening criminal leave applications and for each Judge, and also designate a centralized email address for civil leave applications. Each email address could, upon receipt, send confirmation to the parties that the papers have been received and filed.

Given the significant benefits of an e-filing system, and its likely attractiveness to litigants, the Court should amend its rules to make e-service an option for litigants seeking permission to appeal.

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[2] The database need not be publically available.

[3] The Appellate Division, First Department, for instance, designates an email address for the receipt of electronic copies of briefs. First Department Rules of Procedure § 600.11(b)-(c).

We welcome the opportunity to discuss this proposal with you further. [4]

Very truly yours,

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

[4] 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.

Matthew Bova & Scott Danner
Co-Chairs, Appellate Courts Committee

New York County Lawyers Association

BY MAIL

July 3, 2018

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

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

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.[1]

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).[2] 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.[3] 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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[1] In the Second Department, the court does not provide the parties with the judgment roll. Instead, assigned counsel must copy the court file.

[2] *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

[3] 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.[4] 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

[4] 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.

* * *

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.[5]

Very truly yours,

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

[5] 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.