

Updates on COVID-19's Impact on Commercial Appeals

New York Court of Appeals Expands Digital Filings, While the Appellate Division Lifts Moratorium on Filing Deadlines and Hears Skype Argument

By Jeff Kinkle, Kade N. Olsen and Stephen P. Younger

The progress of taking commercial appeals in New York has been impacted significantly by the onset of the COVID-19 pandemic. Deadlines for perfecting appeals were suspended and oral arguments were canceled. Although Skype conferences were being held in the trial level courts, such as the Commercial Division, arguments were not being scheduled on typical appeals. Recently, as Chief Judge Janet DiFiore has overseen a gradual re-opening of significant portions of the New York courts, there have been material developments in appellate practice which affect commercial litigators. These developments reflect a sense that appeals are starting to move forward again, albeit with the naturally attendant backlogs that the COVID-19 crisis has engendered.

The State's highest court, the New York Court of Appeals, has not heard oral argument since March 17, 2020. Those March arguments were heard in a socially distanced fashion. For its April-May 2020 session, the Court announced that it will consider appeals based on the briefing and record, without oral argument.[1] Oral argument for the June session will be heard in-person,

following appropriate safety protocols, although the courtroom will be closed to the general public.[2] Oral argument will be webcast live as usual.

The Court of Appeals recently amended its Rules of Practice to require submissions to be made in digital format for motions and responses to jurisdictional inquiries under Rule 500.10.[3] Along with such digital submissions, parties will still be required to file and serve printed papers in accordance with the Court's Rules of Practice. These digital submissions will be made via a Companion Filing Upload Portal, which will function similarly to Court-PASS.

The Court's Rules of Practice have also been amended to reduce the number of printed copies that must be filed. Parties will be required to file only one printed copy—down from six—for: a) civil motions seeking leave to appeal, b) reargument motions, and c) papers filed in opposition to those motions. Additionally, the appeals documents needed from the Appellate Division—as required by Rules 500.22(c), 500.26(b)(3)(iv), and 500.26(b)(4)—will only need to be filed in digital format. Motions submitted with proof of indigency will still only require one set of papers.

These new Court of Appeals rules are effective May 27, 2020.[4]



A man wearing a mask walks past a closed Manhattan Supreme Court at 60 Centre St.

Photo: Ryland West/ALM

Responses to Rule 500.10 jurisdictional inquiries requested on or after that date, and any motions returnable on or after June 1, 2020, must comply with these new rules. Parties may request that the digital submission requirements be waived based on a showing of undue hardship.

The Court has stressed that submitting papers digitally does not satisfy the service or filing requirements of the CPLR or the Court's Rules of Practice, and that practitioners must still meet the applicable CPLR time limits.[5] Parties are responsible for meeting the controlling due dates by filing the required number of paper documents with the Clerk's Office. It should be noted that motions, opposition papers to those motions, and responses to Rule 500.10 jurisdictional inquiries are only deemed "filed" when the Clerk's Office receives the hard paper copy.

In other appellate developments, the Appellate Division (New York's intermediate appellate court) has begun to rescind some of the orders that were made in response to the COVID-19 pandemic.

The Appellate Division, First Department, which sits in Manhattan, hears a substantial number of appeals from the Commercial Division. On May 6, 2020, the Court heard its first ever virtual oral argument over Skype. It will continue to hold virtual oral arguments until further notice. The Court has released some guidance for parties who are scheduled for these Skype arguments.[6]

Further, on May 8, 2020, the First Department rescinded its March 17, 2020 order—adopted in the wake of the early onset of Coronavirus in New York—that had temporarily suspended perfection, filing, and other deadlines for prosecuting appeals. The Court also ordered that the filing deadlines for this year's remaining court terms (*i.e.*, September through December 2020) be reinstated.[7] As a result, the new deadline for filing responding and reply papers that have not yet been filed on motions that were returnable during the period March 16 through May 4, 2020 is now May 22, 2020. Parties must also comply with any other filing deadlines ordered by the Court or set by the Clerk of the Court. The requirement that hard copies of briefs, records, appendices, and motions be filed with the Appellate Division is still suspended until further notice.

The First Department later clarified that any deadline after May 8, 2020 must be perfected on the due date, regardless if by the six-month rule or by order of the court. These deadlines are not subject to the blanket September deadline mentioned in the Court's May 8 order. Requests for time extensions can be filed through NYSCEF or emailed to the court on non-NYSCEF matters on or before the due date.

On May 6, 2020, the Second Department rescinded its March 17, 2020 order suspending appeals deadlines

and ordered that all motions—except those in which filing deadlines had been set by order or directive of the Clerk of the Court—which were returnable between March 16 and May 5, 2020 are to be adjourned as follows:

1. Motions which were returnable between March 16 and March 31, 2020, were adjourned to, and were returnable on, May 18, 2020;
2. Motions which were returnable between April 1 and April 15, 2020, are adjourned to, and are now returnable on, June 1, 2020;
3. Motions which were returnable between April 2020 and May 6, 2020, are adjourned to, and are now returnable on, June 15, 2020.[8]

Any opposition or reply papers in relation to these filings are to be served in accordance with Section 1250.1(c) of the Rules of Practice of the Appellate Division (22 NYCRR §1250.1[c]) and via email. These papers will be deemed filed when a digital copy with proof of service is uploaded through the Second Department's digital portal. Hard copy paper filings may still be made, but as of now are not required.

In addition, the Second Department ordered that, until further notice, it is continuing to suspend filing and other deadlines established in: a) the Practice Rules of the Appellate Division (22 NYCRR part 1250), b) the Rules of Practice of the Second Department (22 NYCRR part 670), c) the Electronic Filing Rules of the Appellate Division (22 NYCRR part 1245), and d) a prior order or directive of the Clerk of the Court, relating to non-actively-managed civil matters that have not already been addressed.[9]

The Third Department similarly has lifted suspensions of deadlines for prosecuting appeals in that Court.[10] The Court has been hearing virtual appeals for its May term.

Finally, the Fourth Department has also rescinded its suspension order and has moved to virtual court operations.[11]

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As Gov. Andrew M. Cuomo begins a regionally based approach to re-opening the State's economy, and Chief Judge DiFiore follows suit in a phased re-opening of court operations, commercial cases are again expected to proceed through the appeals process. Nonetheless, there are naturally bound to be backlogs once more normal operations resume, given the inability to progress cases through normal appellate routes during the COVID-19 crisis.

Endnotes:

[1] Notice to the Bar, 2020 April-May and June Sessions, New York Court of Appeals (April 23, 2020).

[2] Notice to the Bar, Returning to In-Person Operations and June 2020 Session, New York Court of Appeals (May 22, 2020).

[3] Notice to the Bar, 2020 April-May and June Sessions, New York Court of Appeals (April 23, 2020).

[4] *Id.*

[5] *Id.*

[6] AD1 2.0 – First Department Expands Operations as a Virtual Court (App. Div. 1st Dept. Aug. 21, 2020).

[7] Order In the Matter of the Rescission of Temporary Suspension Order (App. Div. 1st Dept. May 8, 2020).

[8] ADM 2020-0506 (App. Div. 2d Dept. May 6, 2020).

[9] *Id.*

[10] Order Lifting Suspension of Deadlines Pertaining to Filing of Answering and Responding Briefs (App. Div. 3rd Dept. May 6, 2020).

[11] Order Lifting Suspension of Deadlines (App. Div. 4th Dept. April 17, 2020).

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