

Advocate's View: Navigating new e-filing rules in the Appellate Division

By: Jeremy M. Sher | January 21, 2021 | 0



As attorneys gain familiarity with the Appellate Division's new rules, they should be aware of certain key e-filing provisions to ensure the clerk will accept their papers and they will not miss their opponents' filings. This article addresses common e-filing issues in appeals from lower court orders and judgments.

The first consideration for appellate practitioners is to understand there are several sets of rules: the statewide Electronic Filing Rules of the Appellate Division (the "E-Filing Rules," 22 NYCRR § 1245.1 et seq.), the statewide Practice Rules of the Appellate Division (22 NYCRR § 1250.1 et seq.), and the Local Rules for each of the four Departments of the Appellate Division (the Fourth Department's Local Rules are found at 22 NYCRR § 1000.1 et seq.). It is essential to review the E-Filing Rules, statewide Practice Rules, and applicable Local Rules before pursuing an appeal or filing documents in the Appellate Division.

An important early step for an appellant is determining whether e-filing requirements apply. The E-Filing Rules excuse unrepresented parties and attorneys claiming specific exemptions from mandatory e-filing, but otherwise allow the departments to decide which types of cases must be e-filed. Since July 1, 2020, the Fourth Department has imposed mandatory e-filing in all civil and criminal matters.

As I have written before, one of the most critical deadlines in New York practice is the 30-day time period to "take an appeal" by, in most cases, filing a notice of appeal in the trial court. The E-Filing Rules add more steps.

Within 14 days of filing the notice of appeal, the appellant in an e-filed appeal must open a new appellate case in NYSCEF. This is done through the "Record Initial Case Info" option in the Appellate Court menu. The appellant must also e-file in the Appellate Division case, as a single PDF, a copy of the notice of appeal with proof of service and the order or judgment appealed from.

This requirement to e-file the notice of appeal and related documents is not limited to the appellant. Any other party appealing or cross-appealing must also e-file their notice of appeal (or cross-appeal) with proof of service and the paper appealed from.

In the Fourth Department, the Appellate Division Clerk will not accept papers filed by any appellant or cross-appellant who has not satisfied this requirement. In my experience, the Fourth Department imposes this rule consistently, even after the parties perfect the appeal and the court issues a scheduling order identifying the appellants and cross-appellants. If the court rejects your filing because you have not e-filed your notice of appeal and related documents, you may be able to resolve the issue by e-filing the notice of appeal papers and informing the court you have done so.

Once NYSCEF opens an e-filed appellate case, the filer has seven days to serve a Notification of Case Number and Other Information form (available on the NYSCEF website) on all other parties in hard copy, using a traditional method of service, and e-file proof of service. The Notification of Case Number is a critical document that informs



the other parties of the e-filed appellate case. NYSCEF will only send an email alert that it opened the case to the initial appellant.

For the first 20 days after the appellant serves the Notification of Case Number, parties must serve documents in the appeal in hard copy and e-file affidavits of service along with the documents served. Failure to e-file proof of service can lead to the Appellate Division rejecting a document filed early in the appeal, such as a motion to consolidate. After the 20-day period ends, e-filing a document also counts as service and it is generally unnecessary to e-file proof of service (unless a party is unrepresented or exempt from e-filing, and thus must be served with a hard copy).

If you receive a Notification of Case Number, you should promptly log into the Appellate Court section of NYSCEF, select "Enter Contact Information for Respondent and Other Parties," and enter your information whether you are an appellant or respondent. (The E-Filing Rules give you 20 days to do this, but you should not put it off.) Submitting your contact information ensures NYSCEF includes you as a party to the appeal and emails you notifications of filings. If you are also an appellant, you should e-file your notice of appeal or cross-appeal as described above.

The consequences of ignoring a Notification of Case Number can be serious. A party who does not register in the NYSCEF case will not receive email alerts of any filings made more than 20 days after service of the Notification. Such filings will likely include the record and brief filed upon perfecting the appeal, as well as the court's scheduling order. Thus, the unregistered party might be unaware that the appellant perfected its appeal. I have heard an anecdote about a respondent who, after overlooking the Notification of Case Number, first became aware of an appeal when the Appellate Division announced that the appellant had won.

The Fourth Department appropriately expects attorneys to review and understand the new Appellate Division rules and time limits, and holds attorneys to their requirements. All attorneys handling appeals should be familiar with the appellate E-Filing Rules that govern the initial case opening and filings.

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