

Supreme Court of the State of New York
Appellate Division: Second Judicial Department



RULES OF PRACTICE

22 NYCRR Part 670

Effective September 18, 2018

Rules of Practice

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**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

Part 670. Rules of Practice

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670.1 General Provisions and Definitions

(a) Practice Rules of the Appellate Division

This Part serves as a supplement to, and should be read in conjunction with, the Practice Rules of the Appellate Division (22 NYCRR Part 1250) and the Electronic Filing Rules of the Appellate Division (22 NYCRR Part 1245). Where there is a conflict between this Part and Parts 1250 and 1245, this Part controls when practicing within the Second Judicial Department.

(b) Sessions of the Court

Unless otherwise ordered, the court will convene at 10 o'clock in the forenoon on Monday, Tuesday, Thursday, and Friday. Special sessions of the court may be held at such times and for such purposes as the court from time to time may direct.

(c) Appearance of Counsel

(1) Counsel who has filed a notice of appeal on behalf of a party shall be regarded as counsel of record for that party in this court, except where

(A) the notice of appeal contains a statement indicating that counsel has not been retained for purposes of appeal, or

(B) counsel who filed the notice of appeal was assigned in the court of original instance, and that assignment has not been extended to the appeal by statute, order or rule.

(2) In any cause or matter in which counsel files a document in this court on behalf of a party who is not otherwise represented by counsel of record in this court, filing counsel shall be regarded as counsel of record for that party in this court.

(3) Unless the Court directs otherwise, there shall be only one counsel of record for a party in connection with any cause or matter pending in this Court.

(4) Counsel of record may be changed by:

(A) The filing of a consent to change attorney or substitution of counsel in this Court which is on notice to all parties, executed by both counsel of record and incoming counsel, if there is one, and signed and acknowledged by the affected party; or

(B) By successfully moving this Court for permission to withdraw as counsel.

(5) Upon the filing of a notice of appearance on notice to all parties in a cause or matter, counsel shall be regarded as counsel of record for a party who is not otherwise represented in this court in connection with the cause or matter.

(6) Counsel who is retained by counsel of record to serve as appellate counsel may inform the court as to that status by filing a writing indicating same on notice to all parties. All records, appendices and briefs filed by appellate counsel must bear the name, address, telephone number

and e-mail address of counsel of record, along with that of appellate counsel, and must indicate appellate counsel's status as such.

670.2 Settlement or Withdrawal of Motion, Appeal or Proceeding; Notice of Change in Circumstances

(a) Withdrawal of an appeal which has been placed on the court's calendar

(1) A stipulation withdrawing an appeal or proceeding which has been placed on the Court's calendar must be filed with the court prior to the calendar date. Absent such a stipulation, an appellant may, prior to the calendar date, move for permission to withdraw such an appeal or proceeding.

(2) An appeal which has been placed on the court's calendar cannot subsequently be withdrawn based upon a settlement which occurred prior to the calendar date, except upon a showing of good cause.

(3) An application for permission to withdraw an appeal subsequent to the calendar date must be supported by (i) a stipulation withdrawing the appeal, (ii) documentation which establishes when the event upon which the withdrawal is based occurred, and (iii) where appropriate, an explanation regarding why there was a delay in notifying the court of that event. Such applications shall be granted only in limited circumstances and upon a showing of good cause.

(b) Notice of Change of Circumstances. For the purposes of section 1250.2(c) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.2[c]), settlement includes, but is not limited to, any oral or written agreement or understanding which may, once memorialized, render a determination of the cause unnecessary.

670.3 Initial Filings; Active Management of Causes; Settlement or Mediation Program

(a) Initial Filings

(1) In all civil matters, counsel for the appellant or the petitioner shall file the original plus one copy, and serve one copy, of the papers referred to in section 1250.3(a) of the Practice Rules of the Appellate Division (22 NYCRR §1250.3[a]).

(2) Where an appeal is taken in a criminal matter, the clerk of the court of original instance shall execute an initial information statement on a form approved by the court and shall transmit it together with a copy of the notice of appeal and the order of sentence and commitment, if any, to the clerk of this court.

(3) An initial informational statement relating to attorney matters shall be filed in connection with attorney disciplinary proceedings instituted in this court and applications made to this court pursuant to sections 690.17 and 690.19 of the rules of this court.

(4) In all other actions or proceedings instituted in this court, and applications pursuant to CPLR 5704, an initial informational statement shall be filed.

(b) Active Management.

(1) All appeals from orders of the Family Court, and any other proceedings in which the welfare, custody or parental access of children is at issue, shall be actively managed.

(2) In all actively managed matters, the clerk shall issue a scheduling order or orders directing the parties to take specified action to expedite the prosecution thereof, including but not limited to the ordering of the transcript of the proceedings and the filing of proof of payment therefor, the making of motions, the perfection of the cause, and the filing of briefs. Notwithstanding any of the time limitations set forth in this part or Part 1250 (22 NYCRR 1250), a scheduling order shall set forth the date or dates on or before which such specified action shall be taken.

(3) If any party shall establish good cause why there cannot be compliance with the provisions of a scheduling order, the clerk may amend the same consistent with the objective of insuring expedited prosecution of the cause. An application to amend a scheduling order shall be made by letter, addressed to the clerk, with a copy to the other parties to the cause. The determination of the clerk in amending or declining to amend a scheduling order shall be reviewable by motion to the court on notice pursuant to section 1250.4 of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4).

(4) Upon the default of any party in complying with the provisions of a scheduling order, the clerk shall issue an order to show cause, on notice, why the cause should not be dismissed or such other sanction be imposed as the court may deem appropriate.

(c) Pre-Perfection Civil Appeals Management Program

(1) The court, in those cases in which it deems it appropriate, shall issue a notice directing the attorneys for the parties and/or the parties themselves, as well as any other individual whose attendance the court may require, to attend a pre-perfection conference before a Justice of this court or such other person as it may designate, to consider the possibility of settlement, the limitation of the issues, and any other matters which the designated Justice or other person determines may aid in the disposition of the appeal or proceeding.

(2) Requests for adjournments shall be addressed to the Pre-Perfection Civil Appeals Management Program Administrator. Such requests shall be determined by the Administrator or Special Referee designated to conduct the conference, whose determination shall be final. Absent unusual circumstances, no adjournment shall be granted unless requested at least three business days prior to the scheduled date.

(3) Pre-perfection conferences shall be deemed appearances before this court. Any attorney or party who, without good cause shown, fails to appear for a regularly scheduled pre-perfection conference, or who fails to comply with the terms of a stipulation or order entered following a pre-argument conference, shall be subject to the imposition of such costs and/or sanctions as the court may direct. Pre-perfection conferences shall constitute actual engagements before this court for the purposes of Part 125 of the Rules of the Chief Administrator of the Courts (22 NYCRR Part 125).

(d) Mandatory Civil Appeals Mediation Program

(1) Establishment, Purpose and Scope of Program

The Appellate Division, Second Department hereby establishes a Mandatory Civil Appeal Mediation Program (the Program). Appeals from orders of the Family Court are excluded from this requirement, provided, however, that counsel and the parties to perfected Family Court appeals involving the custody of, or access to, children may jointly request, by letter application to the Clerk of the Court, that the particular appeal be designated for mediation.

(2) Mandatory Mediation; Notice of Reference

(i) The Clerk of the Court shall cause civil appeals which have been perfected to be designated for mandatory mediation.

(ii) Upon such designation, the Clerk of the Court, shall cause to be issued a Notice of Reference, which shall direct the parties to the appeal and their counsel, as well as any other individual whose attendance the court may require, to attend an initial, ninety-minute session, without charge, before a designated Special Master identified in that Notice. The Notice of Reference shall set forth the date, time, and place of the initial mediation session. Counsel and parties who are natural persons are required to attend the mediation in person. In the event that a party is not a natural person but a legal entity, such as a corporation or limited liability company, such entity is required to have present at the mediation a representative of the entity who has the authority to make binding decisions on behalf of the entity.

(iii) Parties and counsel who wish to continue mediation beyond the initial ninety-minute session may continue that session or schedule additional sessions as agreed upon with the Special Master. Special Masters shall be entitled to receive such compensation from the parties for such continued or additional sessions as may be agreed upon in writing, provided that the initial session shall remain free-of-charge. At the conclusion of the mediation the Special Master shall not serve in any other capacity relative to the litigation that was the subject of the mediation without the consent of the parties.

(iv) Requests for adjournments shall be addressed by e-mail to the Special Master, with copies sent simultaneously to all counsel or unrepresented parties. Such requests shall be determined by the Special Master, whose determination shall be final. Absent unusual circumstances, no adjournment shall be granted unless requested at least three business days prior to the scheduled date. In no event may the initial mediation be adjourned more than three (3) times or for a total of more than 30 days.

(v) Mediation sessions shall be deemed appearances before this court. Failure to appear or to appear on time may result in the imposition of sanctions pursuant to Part 130 of the Rules of the Chief Administer of the Courts (22 NYCRR Part 130). The initial mediation session shall constitute an actual engagement before this court for the purposes of Part 125 of the Rules of the Chief Administrator of the Courts (22 NYCRR Part 125).

(vi) At least five (5) business days prior to the initial session, counsel to the parties, or a self-represented party, shall provide the Special Master with copies of the order or judgment appealed from, the decision of the trial court, the briefs or memoranda submitted by the parties to the trial court, the briefs, if any, filed with this court, and any other information necessary for the effective negotiation and resolution of the issues involved. The Special Master may request a conference call with both counsel regarding any preliminary matters.

(vii) Within five (5) business days after the conclusion of the mediation sessions, the Special Master shall send a Report (“Report of the Special Master”) to the Clerk of the Court and to counsel for the parties stating the date of the initial session and whether each party and counsel appeared at the initial session, the dates of any subsequent scheduled sessions, whether the parties reached partial, complete, or no agreement on the issues, and whether a stipulation of withdrawal of the appeal has been executed. The Special Master shall not disclose any other information discussed during the Mediation to the court, and the use of any such information is subject to CPLR § 4547

(3) The Role of the Court

The Program is conducted under court auspices and pursuant to these rules. The pendency of mediation will not affect, or delay, the progress of the appeal on the court’s calendar. Unless an agreement is reached in mediation and the appeal is wholly or partially withdrawn, the appeal will proceed in accordance with the regular processes of the Court and will be heard and determined.

(4) The Roster of Special Masters

The Clerk of the Court shall maintain a list of approved Special Masters. It shall consist of individuals who the Presiding Justice of this court has concluded possess the requisite training and experience as well as the appropriate temperament, character, and discretion. Approved Special Masters may be add to and removed from the Roster of Special Masters at the discretion of the Presiding Justice.

(5) Immunity

Special Masters serving in this Program shall be immune from suit as a result of any conduct or omission during the performance of duties in that capacity to the extent permissible by law.

670.4 Motions

(a) Motions Which Include Requests for Interim Relief

(1) Notice. To the extent practicable, the notice required by section 1250.4(b)(2) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4[b][2]) shall be accompanied by a copy of the papers the party seeking relief intends to present to the court for filing. The affidavit or affirmation of notice required by section 1250.4(b)(2) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4[b][2]) shall state the manner in which the proposed filing was served. If notice has not been given, and/or a copy of the papers the party seeking relief intends to present to the court for filing has not been served, the affidavit or affirmation shall state whether the applicant has made an attempt to give notice and/or make such service and the reasons for the lack of success. If the applicant is unwilling to give notice and/or to make the required service, the affidavit or affirmation shall state the reasons for such unwillingness.

(2) Oral argument. Where the notice required by subdivision (1) has been given, the party seeking relief and/or the party opposing the relief sought may request the opportunity to present argument to the justice to whom the application will be presented, which request shall be determined in the discretion of that justice.

(b) Permission to Appeal to the Appellate Division in a Civil Matter. A motion for permission to appeal to the Appellate Division pursuant to CPLR 5701(c) and Family Court Act § 1112 shall be addressed to the court.

(c) Leave to File Amicus Curiae Brief. A motion for leave to file an amicus brief shall be made in accordance with section 1250.4(f) of the Practice Rules of the Appellate Division (22 NYCRR §1250.4[f]), and shall include one copy of the proposed brief.

Section 670.5 [Reserved]

Section 670.6 [Reserved]

Section 670.7 [Reserved]

Section 670.8 [Reserved]

670.9 Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Digital Copies of Records, Appendices and Briefs. The digital copies of the records, appendices and briefs required to be filed with the Court pursuant to §§ 1250.9[a], [c] and [d] of the Rules of Practice of the Appellate Division (22 NYCRR §§ 1250.9[a], [c], [d]) shall comply with the technical requirements and guidelines for electronically filed documents (22 NYCRR Part 1245, Appendix A), and shall be filed by uploading through portal. Please consult the court's website for details.

(b) Extensions of time to perfect an appeal or to file and serve a brief. Motions to extend the time to perfect an appeal or to file and serve a brief shall be granted only in limited circumstances and upon a showing of good cause.

Section 670.10 [Reserved]

670.11 Additional Rules Relating to Criminal Appeals

(a) Transcript of Proceedings. Where an appeal in a criminal matter is prosecuted on the original record or by the appendix method, the appellant shall serve a copy of the transcript of the proceedings upon the respondent together with the brief and appendix, and cause a copy to be filed with the court.

(b) Appeal from Sentence. Where the only issue to be raised on appeal concerns the legality, propriety, or excessiveness of sentence, the appeal may be prosecuted by submitting a concise statement setting forth the reasons urged in support of the reversal or modification of sentence. Such statement shall contain the information required by CPLR 553l and by section 1250.8(b)(3) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.8[b][3]) and shall contain a statement by counsel for the appellant that no other issues are asserted.

(l) Such appeals may be brought on as though they were motions made in accordance with the provisions of section 1250.4 of the Practice Rules of the Appellate Division (22 NYCRR § 1250.4) and shall be placed upon a special calendar for appeals submitted in accordance with this

subdivision. The respondent shall serve and file papers in opposition within 14 days after service of the motion papers.

(2) The appellant shall submit the transcript of the sentence proceeding and of the underlying plea or trial. The parties shall file an original and one digital copy of their respective papers, including the necessary transcripts.

Section 670.12 [Reserved]

Section 670.13 [Reserved]

Section 670.14 [Reserved]

670.15 Calendar Preference; Calendar Notice; Oral Argument; Post-Argument Submissions

(a) Oral Argument. A maximum of 15 minutes shall be allowed for argument to each attorney who has filed a brief, except as set forth in subdivision (b).

(b) Argument Proscribed. Argument is not permitted on issues involving maintenance; spousal support; child support; counsel fees; the legality, propriety or excessiveness of sentences; determinations made pursuant to the sex offender registration act; grand jury reports; and calendar and practice matters including but not limited to preferences, bills of particulars, correction of pleadings, examinations before trial, physical examinations, discovery of records, interrogatories, change of venue, and transfers of actions to and from the Supreme Court.

(c) Who May Argue. Not more than one attorney shall be heard for each brief filed unless, upon application made in writing at least seven days before the matter appears on the court's calendar, the court shall have granted permission to allow more than one attorney to argue.

(d) Adjournment of Oral Argument. After filing a brief and until a matter has been placed on the court's calendar, counsel shall advise the court, in writing and on a continuing basis, of commitments that will interfere with counsel's ability to appear on a particular date. Requests for leave to adjourn oral argument of an appeal or proceeding which appears on the court's calendar are strongly disfavored. Such requests may be granted only where unusual_circumstances are present, as explained in a writing in which counsel indicates why he or she cannot appear for oral argument, why no other attorney can appear in his or her place, and why oral argument is necessary. Requests for leave to adjourn oral argument of an appeal or proceeding are within the discretion of the court.

(e) Submission. A party who originally elected to argue may notify the clerk of the intention to submit the cause without argument and need not appear at the call of the calendar.

(f) Rebuttal. Rebuttal argument shall not be permitted, except with leave of the court given at the time of argument.

(g) Citations to Recent Authority. After a cause has been placed on the calendar and prior to argument or submission of that cause, any party who previously submitted a brief may inform the

court by letter, a copy of which is contemporaneously provided to the other parties to the appeal, of the citation to any decisions, statutes, ordinances, rules, regulations, or other similar matter not previously cited in that party's brief which arose subsequent to the filing thereof, without additional argument. Except for good cause shown, the court will not accept precedent at the call of the calendar where a copy thereof has not previously been given to the other parties.

Section 670.16 [Reserved]

670.17 Fees of the Clerk of the Court

(a) Fees. In addition to the fees provided for in section 1250.17 of the Practice Rules of the Appellate Division (22 NYCRR § 1250.17), pursuant to Judiciary Law § 265 the clerk of the court is directed to charge and is entitled to receive in advance the following fees on behalf of the State:

- (1) For making a photocopy or providing a digital copy of an order, decision, opinion, or other filed paper or record, \$1 for the first page and 50 cents for each additional page.
- (2) For comparing the copy of a prepared order, decision, opinion, or other paper or record with the original on file, \$1 for the first page and 50 cents for each additional page, with a minimum fee of \$2.
- (3) For certifying the copy of an order, decision, record, or other paper on file or for affixing the seal of the court, \$1; and for authenticating the same, an additional \$5.
- (4) For certifying in any form that a search of any records in his custody has been made and giving the result of such search, \$1.
- (5) For an engraved parchment diploma attesting to admission as an attorney and counselor at law, \$25.
- (6) For a printed certificate attesting to admission or to good standing as an attorney and counselor at law, \$10.