

# CIVIL APPELLATE MOTION PRACTICE

## I. MOTION PAPERS (22 NYCRR 1000.13)

### A. Notice of Motion

1. Return Date - any Monday except a holiday (Rule 1000.13 [a] [1] [i]).
2. Sufficient Notice (Rule 1000.13 [a] [2]): 8 days, plus one for overnight mail, or plus 5 for regular mail.
3. Cross Motions (Rule 1000.13 [a] [3]): 4 days before return date.
4. Filing Papers (Rule 1000.13 [a] [4]): 5:00 p.m. by the preceding Friday. Fax is acceptable (585-530-3247) if papers are also sent by mail.
5. Proper Format (Rule 1000.13 [a] [5]):
  - a. Necessary papers, especially notices of appeal, order/judgment appealed from, and proof of service of motion.
  - b. Original and one copy.
6. Oral Argument not permitted (Rule 1000.13 [a] [6]).
7. \$45 Filing fee required (CPLR 8022[b]), except for poor person motions.
  - a. Payable to Appellate Division, Fourth Department
  - b. Attorney check, certified check, or money order (no personal check or cash).

### B. Orders To Show Cause (Rule 1000.13 [b]):

1. Schedule with Justice hearing motions in that Judicial District that week.
2. Likely to be made returnable before full Court on Monday when Court is sitting.
3. Notice to opponent ordinarily required.
4. If Justice signs order, then file original and copy (plus filing fee) in Clerk's Office; filing fee is not paid to individual Justice.

## II. SPECIFIC MOTIONS

- A. Dismissal For Failure to Perfect (Rule 1000.13 [e]): if motion opposed, extension up to 60 days ordinarily granted.
- B. Extension of Time to Perfect (Rule 1000.13 [f]): also 60 days is ordinarily maximum.
- C. Vacate Dismissal of Appeal (Rule 1000.13 [g]): same requirements as for extension, but must also demonstrate merit.
- D. Extension of time to file a Brief (Rule 1000.13[h]):30 days is ordinarily maximum.
- E. Briefs *Amicus Curiae* (Rule 1000.13 [k]): as soon as possible after appeal is perfected.
- F. Admission *Pro Hac Vice* (Rule 1000.13 [l]): need certificate of good standing and affidavit from New York attorney.
- G. Expedite Appeal (Rule 1000.13 [m]): premature until appeal perfected.
- H. Consolidation (Rules 1000.13 [n] and 1000.4 [b] [2]): can only consolidate appeals from orders in same action, and:
  - 1. Parties can stipulate to consolidation if appealing from same order;
  - 2. If appealing from different orders, must be same appellant.
- I. Reargument and Leave to Appeal to Court of Appeals (Rule 1000.13 [p]; CPLR 5513):
  - 1. Must move within 30 days of service of this Court's order with notice of entry, and (for leave motions) make motion returnable on Monday 8-15 days away.
  - 2. Need not attach notice of appeal and lower court order/ judgment, but must attach Appellate Division order.
- J. Other Motions
  - 1. Stays in Appeals Pursuant to Family Court Act § 1114 (Rule 1000.13 [d]) initially made by order to show cause.
  - 2. Other Stays:

- a. Can be by motion or order to show cause.
  - b. CPLR 5519 allows stays of "proceedings to enforce an order":
    - 1. Trial is not proceeding to enforce an order (*Matter of White v City of Jamestown*, 242 AD2d 979).
    - 2. Better alternative is to seek stay from trial judge per CPLR 2201 (*Rhodes v Mosher*, 115 AD2d 351).
  - c. Automatic stay for State and political subdivisions (CPLR 5519 [a]).
  - d. Bonds, Undertakings, etc. (CPLR 5519 and CPLR art. 25)
    - 1. Note that "automatic" stay may be available under CPLR 5519 (a) upon giving an undertaking.
    - 2. If so, then discretionary stay is not available under CPLR 5519 (c).
  - e. Injunctions (CPLR 5518): same standard as CPLR art. 63
3. Motions for Permission to Appeal:
- a. CPLR 5704 (a): appealing from ex parte order. No appeal lies, but order (or refusal to sign order) can be reviewed on motion.
  - b. CPLR 5703 (b): appealing from County Court order on appeal from justice court judgment/order. No appeal lies if justice court judgment/order was not final.
  - c. CPLR 5513 and CPLR 5701 (c): appealing from order that is not appealable as of right under CPLR 5701.
4. Extension to serve or file notice of appeal (CPLR 5520 [a]): must have done one before the Court can authorize the other. If not, defect is jurisdictional.
5. Poor Person (Rule 1000.14): must show indigency and merit (CPLR 1101[a]) and proof of service on County Attorney (CPLR 1101[c]).
6. Lesser Number of Records/Briefs (Rule 1000.15): if record voluminous, can save by filing on CD-ROM (Rule 1000.3[h]).

7. Strike Record/Brief (For noncompliance with Rules 1000.2 - 1000.4).
8. Other (Rule 1000.13 [r]).
9. Settling/supplementing record on appeal: motion must be made to court from which appeal was taken, not to Appellate Division (Rule 1000.4 [a][1][ii]).