



# Specialists will take care of the messy detail work

This cadre can guide attorneys through the procedural mine fields.

Lisa Solomon / Special to the National Law Journal • February 19, 2007

In 2006, appellants filed 66,618 records on appeal in the U.S. circuit courts of appeals. Federal Court Management Statistics for FY 2006 ([www.uscourts.gov/cgi-bin/cmsa2006.pl](http://www.uscourts.gov/cgi-bin/cmsa2006.pl)). In New York state courts alone, appellants filed 12,549 records on appeal in 2004 (the most recent year for which figures are available). New York Unified Court System, Office of Court Administration, Twenty-Sixth Annual Report of the Chief Administrator of the Courts for Calendar Year 2004, [www.courts.state.ny.us/reports/annual/pdfs/2004annualreport.pdf](http://www.courts.state.ny.us/reports/annual/pdfs/2004annualreport.pdf). In the year ending Sept. 30, 2004, appellants filed 7,008 appeals in the 2d U.S. Circuit Court of Appeals. U.S. Courts, Second Circuit Report 2004, [www.ca2.uscourts.gov](http://www.ca2.uscourts.gov). Some of these appeals were handled by seasoned appellate practitioners; others were handled by attorneys with no prior appellate experience. Regardless of one's background, however, every attorney working on an appeal can benefit from working with an appellate services provider (ASP).

Appellate services providers used to be called appellate printers. Before the advent of computers, one of the main tasks ASPs performed was typesetting appellate briefs. Now, any lawyer or legal secretary with basic word processing knowledge can easily format an appellate brief. For this reason, as reflected by the new moniker, ASPs have branched out. In addition to reproducing and binding records and briefs, ASPs help to prepare the record; serve and file; and monitor for decisions. Many ASPs are positioned at the forefront of legal technology, and can assist attorneys in preparing and submitting their appeals on CD-ROM.

Preparing the record can be a laborious and time-consuming process. Once the attorney provides the ASP with all of the documents that make up the record, the appellate paralegal working on the case will comb through the record to prepare a table of contents separately listing each document and the exhibits thereto. The record is consecutively paginated by using imaging technology. Appropriate headings are also applied in this way.

In place of offset presses, many ASPs now rely on high-speed, computerized copiers that cost many thousands of dollars: One ASP that prints U.S. Supreme Court briefs advertises that its blazingly fast copiers can produce 240 pages a minute!

Appellate practice is a minefield of procedural proscriptions—from the strictly enforced deadlines for filing notices of appeal to the rules governing entitlement to oral argument—that differ from court to court. Even something as basic as the time to perfect an appeal, and how that time is calculated, varies by court.

Although the discussion below focuses on New York courts, that state's jumble of detailed and disparate rules is far from unique: Most—if not all—appellate courts have similarly exhaustive rules that vary from district to district. For example, the Federal Rules of Appellate Procedure govern all of the U.S. circuit courts of appeals, but the rules themselves allow each circuit to establish its own local rules. See Fed. R. App. P. 47. Thus (to take just one example), although the federal rules exhaustively address the content of briefs in Fed. R. App. P. 28(a)-(j), every single circuit court has its own local rule modifying Rule 28. See 1st Cir. R. 28; 2d Cir. R. 28;

3d Cir. R. 28; 4th Cir. Local Rule 28; 5th Cir. R. 28; 6th Cir. R. 28; 7th Cir. R. 28; 8th Cir. R. 28A; 9th Cir. R. 28-1; 10th Cir. R. 28; 11th Cir. R. 28.1; D.C. Cir. R. 28; Fed. Cir. R. 28.

At the state level, an appellant in the New York Supreme Court Appellate Division, 1st Department, is given nine months to perfect an appeal, which is then submitted for a particular term of court (N.Y. Comp. Codes R. & Regs. tit. 22 § 600.11(a)(3) (2006)), while an appellant in the 2d Department has six months to perfect (N.Y. Comp. Codes R. & Regs. tit. 22 § 670.8(e)(1) (2006)), and appeals are placed on the calendar on a first-come, first-served basis (absent a scheduling order, of course). N.Y. Comp. Codes R. & Regs. tit. 22 § 670.8(a) (2006).

## Regulations cover every detail

Indeed, seemingly everything in the appellate process is regulated, from the color of brief covers, to the font and type size used in briefs, to the contents of the record. In New York, for example, the 1st Department is the only department that allows the use of condensed copies of transcripts (called "miniscripts" in a record or appendix (N.Y. Comp. Codes R. & Regs. tit. 22 § 600.10.2(d), 800.6(b), 1000.4(a)(3)(ii) (2006) (2d through 4th departments, respectively))). The 4th Department requires that each type of brief (appellant's, respondent's, reply, surreply and amicus curiae/intervenor) have a different color cover. N.Y. Comp. Codes R. & Regs. tit. 22 § 1000.4(f)(4) (2006). The 1st Department even regulates the kind of paper on which the brief and record are printed. See N.Y. Comp. Codes R. & Regs. tit. 22 § 600.10(e)

(2006) (requiring briefs and appendices to be printed on recycled paper). And, although it is relatively easy to format an appellate brief in any word processing program, proper formatting depends also on compliance with the plethora of rules governing the brief's appearance (including, for example, margin size and the type of binding) (N.Y. Comp. Codes R. & Regs. tit. 22 § 600.10(a)(2) & (a)(4), 670.10.1(c), 670.10.3(c), 800.8(a), 1000.4(f)(1) & (2) (2006) (1st through 4th Departments, respectively)), and content (including length, required sections and the use of footnotes). An attorney's ASP will make sure his or her briefs and record comply with these rules.

(For those keeping score, the 4th Department prohibits footnotes. N.Y. Comp. Codes R. & Regs. tit. 22 § 1000.4(f)(2) (2006). The 1st and 2d departments specify the maximum number of words a brief may contain and provide page limits for briefs that are not computer-generated (N.Y. Comp. Codes R. & Regs. tit. 22 §§ 600.10(d)(1)(i), 670.10.3(a)(3) (2006)), while the 3d and 4th departments still use the antiquated method of restricting the number of pages a brief may contain. N.Y. Comp. Codes R. & Regs. tit. 22 §§ 800.9(a), 1000.4(f)(3) (2006).)

The expertise of ASPs can even help attorneys save money for their clients. For example, attorneys who do not regularly handle appeals may be unaware that most types of appeals in New York's appellate divisions may be taken on either a full reproduced record or on an appendix. N.Y. C.P.L.R. 5528(a)(5); N.Y. Comp. Codes R. & Regs. tit. 22 § 600.5; 670.9; 800.4; 1000.4 (2006) (1st through 4th departments, respectively). Under the appendix method, only those parts of the record that are necessary to consider the questions involved are reproduced. Thus, using the appendix method can save substantial reproduction costs. A good ASP will advise the lawyers with whom it works whether the appendix method is appropriate for each case.

Small firms and solo practitioners in particular can benefit from working with appellate services providers. While larger firms often have in-house print shops and stables of paralegals, small firms and solos may have one or two low-end copiers and a single paralegal. The detail-oriented appellate paralegals who are the main point of contact between the ASPs and the attorneys they serve can save those attorneys hours of relatively ministerial work.

As evidenced by the growing prevalence of electronic filing in state and federal courts across the country, paperless courts are the wave of the future. In 2005, New York Chief Administrative Judge Jonathan Lippman predicted that "[t]en years from now, all papers will be filed electronically." John Caher, "Pay Hike Aside, Judiciary Won Most of the Agenda," N.Y.L.J., July 18, 2005, at 1. These sentiments were more recently echoed by a member of New York Chief Judge Judith Kaye's Commission to Examine Solo and Small Firm Practice, who opined that "electronic filing is coming, whether we like it or not." Raymond J. Dowd, "A Blueprint for Change," N.Y.L.J., June 26, 2006, at 2.

### Companion filings

In New York, the 4th Department and the New York Court of Appeals strongly encourage, but do not generally require, filing records, appendices and briefs on a companion CD-ROM, as long as all parties consent to such filing. N.Y. Comp. Codes R. & Regs. tit. 22 § 500.2, 1000.3(h) (2006) (Court of Appeals and 4th Department, respectively). The submission of a companion CD-ROM supplements, but does not replace, the filing of the requisite number of printed briefs and appendices. *Id.* However, the rules of both courts provide that the court may, by order on motion of any party or sua sponte, require the filing of a companion CD-ROM. *Id.* The 1st, 2d and 3d department rules do not yet address electronic filing.

The 2d Circuit requires that every brief filed by a party represented by counsel be submitted in portable document format (PDF), unless counsel certifies that submission of a brief in PDF format is not practical or would constitute hardship. 2d Cir. R. 32(a)(1)(A). The rule specifies that converting the document into PDF format by scanning the document does not comply with the rule. Rule 32(a)(1)(C). The PDF document must be transmitted to the court as an e-mail attachment. Rule 32(a)(1)(A).

### Focus on the merits

Of course, ASPs charge for their services. However, the work the ASP performs must be done anyway: Why not let an expert handle it? Working with an ASP allows attorneys to focus on brief writing rather than on minute and complex procedural issues that are not germane to the merits of the appeal itself. Moreover, when the court awards a prevailing party costs on appeal (which are statutorily limited to \$250), it may also award disbursements, which include the expense of reproducing the record. Therefore, some of the expenses attendant to working with an ASP may be recoverable in some cases.

To facilitate a relationship with an ASP and get the most out of the services it can provide, it is important that attorneys provide the ASP with any documents that are missing from the record in a timely fashion. Attorneys also should follow the time line provided by the ASP, who will help the attorneys to meet important deadlines. Procrastinators will be relieved to learn that an ASP generally can timely file and serve a brief that is e-mailed to it as late as noon on the date it is due (provided, of course, that it has already received an executed original signature page).

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