



**COMMITTEE ON CRIMINAL
JUSTICE OPERATIONS**

SARAH J. BERGER
CHAIR
sarahberger315@gmail.com

**COMMITTEE ON
CRIMINAL ADVOCACY**

BRIAN A. JACOBS
CHAIR
bjacobs@maglaw.com

**COMMITTEE ON
CRIMINAL COURTS**

TERRI S. ROSENBLATT
CHAIR
terrirosenblatt@gmail.com

March 5, 2020

Chief Administrative Judge Lawrence K. Marks
Office of Court Administration
25 Beaver Street
New York, New York 10004

Presiding Justice Rolando T. Acosta
New York State Supreme Court
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Presiding Justice Alan D. Scheinkman
New York State Supreme Court
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Re: Delays Associated with Compiling the Record on Appeal in Criminal Cases

Dear Judges Marks, Acosta, and Scheinkman:

We are writing to you as members of the New York City Bar Association's Criminal Justice Operations Committee, Criminal Advocacy Committee, and Criminal Courts Committee. Over the past few months, through interviews with District Attorney's offices and Appellate Defenders, we have identified impediments that cause delay in compiling the record on appeal for criminal appeals, which ultimately delay their resolution. Thinking about the ways in which the appellate process can be made more efficient is consistent with the goals of OCA's "Excellence Initiative," which, just three years after its implementation, has improved disposition rates and reduced backlog in the trial courts. We are optimistic about the potential for similar improvements at the appellate level.

In general, appellate providers noted that simply compiling the documents and transcripts necessary to complete the record on appeal can take anywhere from two months to two years,

which is the primary reason why resolving a criminal appeal is a lengthy endeavor.¹ Below, we identify some common problems appellate attorneys face in compiling the record on appeal and offer some procedural solutions to address these concerns.

I. COURT FILES

a. Attorneys Often Do Not Receive All Parts Of The Court File They Need To Handle The Appeal.

In the counties covered by the First Department, the Appeals Bureau of each Supreme Court provides the Appellate Division with only those documents from the court file that they believe are relevant to handling the appeal. In other words, an employee of the Appeals Bureau includes only those documents that he/she personally believes an appellate attorney needs for the case. However, their judgment may not reflect the judgment of assigned counsel. For example, in previous years, appellate offices did not receive copies of jury notes as part of the court file. But in order to determine whether an O’Rama error exists, an attorney would need the notes to see if the court read them verbatim into the record.² Similarly, appellate defender offices are not provided with copies of their clients’ “rap sheets” because at least one of the Appeals Bureaus views them as confidential. Appellate defenders in the Second Department do not have the same problem, as those offices are given access to copy the court file themselves.

b. Because Of Incomplete Recordkeeping, Attorneys Have Difficulty Determining What Documents Are Missing From The Court File.

Another difficulty is determining which documents are missing from the court file. Unless the event — for example, a hearing; a pro se submission; an oral application for new counsel, release from custody on speedy trial grounds, or to waive the assistance of counsel and proceed pro se; or the resolution of a discovery dispute, which seem likely to proliferate as the new criminal justice reforms take effect — is noted on the clerk’s worksheet or is otherwise referenced in the transcripts provided, attorneys cannot know what is missing. This problem stems primarily from the worksheet, which the court clerk fills out for every case. There is no space on that form for the clerk to indicate that certain motions — for example, Sandoval motions — happened on a date before jury selection began, thus leaving attorneys unaware of certain events except in circumstances where they fortuitously happen to be mentioned in other parts of the record on appeal. Similarly, since appellate offices are not notified that sealed documents exist, such as Article 730 examination reports, they cannot know to request them or ask that they be unsealed. And in at least one county (Richmond), the county clerk refuses to provide Article 730 reports at all.

¹ Those who provided information for this report include Bureau Chief Leonard Joblove, Brooklyn District Attorney Appeals Bureau; Bureau Chief Johnette Trail, Queens District Attorney Appeals Bureau; Attorney-in-Charge Paul Skip Laisure, Appellate Advocates; Managing Attorney David Klem, Center for Appellate Litigation; and Attorney-in-Charge Christina Swarns, Office of the Appellate Defender. We are grateful for their assistance and we have incorporated their responses into this report.

² People v. O’Rama, 78 N.Y.2d 270 (1991) requires courts to follow a specific procedure when there is a note from the jury during a trial. A court must, in part, read the jury note into the record word-for-word, and failure to do so constitutes reversible error on appeal.

This particular issue may be of greater concern to First Department practitioners, since some Second Department attorneys reported that they routinely make a complete copy of the Supreme Court file and do not rely on a record assembled by the court clerk.

II. TRANSCRIPTS

a. Attorneys Often Wait For Months To Receive Transcripts Due To Delays By The Appeals Bureau, Court Reporters, And The Appellate Division.

The first step in the process of creating and delivering a transcript to appellate attorneys requires the Appeals Bureau to issue an order to the court reporter to transcribe the relevant record. In the past, these orders were issued within weeks of the assignment. However, in recent years, it has taken the New York County Appeals Bureau upwards of four to five months after appellate counsel is assigned simply to issue such an order. The speed at which orders are issued seems to have fluctuated based, in part, on personnel shifts within the office.

Next, court reporters must transcribe their notes from the requested proceedings. However, while the Supreme Court Appeals Bureaus order court reporters to provide transcripts of the requested proceedings within 90 days, the court reporters frequently do not adhere to these orders. If the reporter does not produce a transcript within 90 days, it appears that the Appeals Bureau in the First Department often does not follow up (the Appeals Bureau in the Second Department generally does, but without any better results). It then falls on assigned counsel to determine why they have not received the record in a timely manner, and then follow up with the court reporter until it is done. Multiple appellate offices identified court reporters as the most critical point of transcript delay, as court reporters almost never file the transcripts within 90 days. As a result, delays are extensive at this stage in the process.

Another source of delay arises even after the Appeals Bureau receives the transcripts. The Appellate Division logs in and scans the transcripts (and court files) before providing them to assigned counsel. Appellate offices have observed substantial scanning delays of up to six months in the Appellate Division.

b. Attorneys Often Do Not Initially Receive All Of The Transcripts They Need To Handle The Appeal.

This problem is similar to that described in the “Court File” section. Because the clerk’s worksheet does not have a space to indicate that certain motions occurred on a date prior to jury selection, the Appeals Bureau may not know that it has to request certain minutes. Moreover, the Appeals Bureau only requests transcripts that it believes are relevant. Thus, attorneys almost never receive transcripts of arraignments, adjournments, or what the Appeals Bureau considers “non-substantive” events. This creates a situation where necessary minutes are often missing from the package that appellate attorneys receive from the court.

c. When Attorneys Identify Additional Transcripts They Need To Handle The Appeal, The Process Of Then Obtaining Those Minutes Is Lengthy And/Or Costly.

If, once an attorney receives all of the transcripts ordered by the Appellate Division, she determines that she needs to order additional transcripts to handle the appeal, she will first attempt to order those minutes through the Appellate Division. However, the Appellate Division must then request that the Appeals Bureau order a transcript from the court reporter, and that process can take six months or more.

Sometimes, the Appellate Division balks at ordering the additional minutes (for example, all the adjourn dates in order to evaluate a speedy trial claim). In those cases, the appellate provider must make a formal motion to the court to request them. That process, which includes time for the DA's response and the court's consideration and decision, may take an additional several months.

Because of how long it takes to get additional minutes through the court, appellate providers often end up spending office funds to pay-order transcripts directly from the court reporter, a process which usually ensures that transcripts are provided within a reasonable amount of time. However, this means that appellate offices frequently spend money to pay-order minutes that should have been provided to them without cost as assigned counsel.

III. EXHIBITS

a. Exhibits Are Not Provided In A Timely Manner To Attorneys

Once exhibits are introduced into evidence, they become part of the record on appeal. However, rather than storing them in a centralized location, such as the court, the court returns them to the respective parties who introduced them, leading to a piecemeal storage system whereby exhibits are frequently lost or require a time- and labor-intensive process to locate.

Appellate defender offices typically request the People's exhibits in every case, which means that any delay in receiving exhibits leads to a delay in the resolution of the appeal. In order to obtain the People's exhibits, assigned counsel submits a formal request to the exhibits paralegal in the appropriate DA's office, including the exhibit list showing the admission of the requested exhibit. These paralegals are tasked with locating and supplying the exhibits to assigned counsel. However, the DA's office lacks personnel to handle the volume of these exhibit requests. Additionally, the DA's offices archive some of their trial materials off-site, and those materials are controlled by the NYC Department of Records and Information Services, from which they must be retrieved, causing additional delay. Thus, it can take anywhere from two months to more than six months for defense counsel to receive the People's exhibits. Moreover, in a substantial percentage of cases, the DA's office is unable to locate the exhibits at all, leading to defense counsel filing a brief without the relevant exhibits.

Obtaining defense exhibits requires the cooperation of trial counsel. If trial counsel is not cooperative, or if they have not engaged in orderly record-keeping, the assigned appellate attorney may never receive the defense exhibits.

b. Proposed Procedural Solutions

We propose the following solutions to address common delays in compiling the transcript on appeal.

- The Appeals Bureau should provide a copy of the entire court file to the Appellate Division, eliminating the need for attorneys to attempt to figure out whether any important document is missing from the court file and then retrieve that document.
- Trial courts could revise the clerk’s worksheet, providing a space on the form to document proceedings that occur prior to jury selection, thus creating a more complete record of events that the Appeals Bureau will rely on when determining what transcripts need to be ordered.
- The 90-day time requirement for court reporters to file transcripts should be strictly enforced by the court. To that end, OCA might consider developing a system to monitor whether court reporters are generally meeting the 90-day deadline, and if they are not, then considering what can be done to address this issue.
- Filing transcripts could be done in a digital format, which would minimize the delays inherent in passing transcripts from the court reporter to the Appeals Bureau to the Appellate Division and then, finally, to the assigned attorneys.
- We suggest that the court institute a procedure, at the time of trial, for creating digital copies of all exhibits from both parties and then storing those digital copies with the court, in order to ensure that exhibits are preserved in a centralized location and are easily accessible to appellate attorneys down the line.

Finally, we would welcome a meeting with Judge Marks, Justice Acosta, Justice Scheinkman, and representatives from the New York City district attorneys and appellate provider offices, for an opportunity to discuss the issues identified in this letter and identify concrete solutions to ensure the timely resolution of criminal appeals. We feel that the time is especially ripe for change given the pilot e-filing program being implemented in New York Superior Criminal Court.

Thank you for your consideration.

Respectfully,

Criminal Justice Operations Committee
Sarah J. Berger, Chair
Christina Wong
Benjamin Wiener
Eric Washer

Criminal Courts Committee
Terri S. Rosenblatt, Chair

Criminal Advocacy Committee
Brian A. Jacobs, Chair

cc:

John W. McConnell, Esq.
Office of Court Administration, Counsel's Office
25 Beaver Street, 11th Floor
New York, New York 10004

Paul McDonnell, Esq.
Office of Court Administration, Counsel's Office
25 Beaver Street, 11th Floor
New York, New York 10004