

Attorney Resource: Filing Direct Appeals of New York City Criminal Convictions and Assignment of Appellate Counsel

Everyone convicted of a crime in New York State, whether by trial or plea, has the right to appeal their conviction regardless of their immigration status. The first step to appealing a conviction is filing a Notice of Appeal within 30 days after sentencing. This FAQ addresses common questions that defense counsel may have about appeals and their non-citizen clients.

Appellate review of criminal convictions is critical for non-citizen clients. Appellate counsel will review the record to make sure no mistakes were made by the judge or any party. An appeal will also ensure that your client is able to benefit from any non-retroactive change in the law. Critically, immigration agencies cannot use your client's conviction to deport them unless the conviction is affirmed or the appeal is dismissed or withdrawn. Lastly, appellate counsel can help your client with tertiary matters related to their detention. **For these reasons, you should file a notice of appeal in every non-citizen case.**

Notice of Appeal FAQ

What is the time period in which a Notice of Appeal must be filed?

The Notice of Appeal must be filed within 30 days of the sentencing date, regardless of whether the conviction was by plea or by trial. (*See* CPL 460.10(1)-(3)). At the conclusion of the criminal case, defense counsel **must** inform their client of the right to file a Notice of Appeal and follow directions from their client on whether they would like the conviction to be appealed.

ATTORNEY NOTE

Under the rules of the Appellate Division, a defense attorney is required, upon conviction, to advise her/his client of the right to appeal. See 22 N.Y.C.R.R. §§ 606.5(b) (First Department), 671.3(a) (Second Department), 821.2(a) (Third Department), & 1015.7(a) (Fourth Department). Each Department has different requirements for the exact contents of the advisal, but the advisal cannot be written and must include a discussion of the benefits and risks of filing an appeal for the specific defendant. Because an appeal makes the conviction non-final, this should be a benefit that you discuss with your client. You cannot rely on the appeal waiver or the judge's colloquy to substitute for this mandatory legal advice.

Can a Notice of Appeal be filed if the defendant's appellate rights were waived as part of a plea agreement?

Yes. Even if the plea agreement included a waiver of appellate rights, some appellate rights cannot be waived (e.g. voluntariness of the plea, competency to stand trial, speedy trial, etc.). A Notice of Appeal can still be filed where an appeal waiver has been signed. *People v. Thomas*, 34 N.Y.3d 1019 (2019) (“[A]n appeal waiver entered as part of the plea-bargaining process does not serve as an absolute bar to the taking of a first-tier direct appeal.”)

Who files the Notice of Appeal?

The criminal defense attorney must file the Notice of Appeal if the defendant requests it. The attorney who files a Notice of Appeal is not assigned to represent the defendant on appeal. The filing of the Notice simply informs the Appellate Division that the defendant intends to appeal their conviction, and the attorney should either file the certification or help their client file a Motion for Poor Person's Relief.

ATTORNEY NOTE

If a defendant requests that their defense counsel file a Notice of Appeal, counsel's subsequent failure to file the notice constitutes per se ineffective assistance of counsel and violates the Due Process Clause. *People v. Syville*, 15 N.Y.3d 391, 397 (2010) (citing *Roe v Flores-Ortega*, 528 U.S. 470, 477 (2000)). Prejudice is also assumed. *Flores-Ortega* at 484, even if the defendant signed a valid appeal waiver. *Garza v. Idaho*, 139 S. Ct. 738, 749 (2019) (“[T]he presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether a defendant has signed an appeal waiver.”)

What information must be included in a Notice of Appeal?

The Notice of Appeal must include the defendant's name, the name of the convicting court, indictment number, and the date of the conviction. There is no requirement that the Notice of Appeal identify the appellate issues to be raised. See CPL § 460.10. If counsel has not been retained on the appeal, the notice should also contain a short statement that the notice is being served and filed on appellant's behalf.

Where is a Notice of Appeal filed?

Two copies of the Notice of Appeal must be filed with the Clerk of Court where the conviction was entered with proof of service that one copy was also filed with the District Attorney's office that prosecuted the case. Defense counsel should either serve the notice of appeal on the DA by certified mail and retain a copy of the certificate of service in the client's file, or hand-deliver a copy and have it time-stamped.

For more information on direct appeals, see IDP's [FAQ: Filing Direct Appeals of New York City Criminal Conviction and Getting Counsel Assigned, March 2021](#).

What happens after a Notice of Appeal is filed?

Once the Notice of Appeal is filed, appointed trial counsel should submit a certification form to the Appellate Division affirming client remains indigent pursuant to CPL § 380.55(2). If defendant did not have appointed counsel, defense counsel should assist the client to prepare a Motion for Poor Person's Relief. Only then will the appellate division assign counsel for the appeal. Without assigned appellate counsel, the defendant's appeal may be dismissed.

Appellate Attorney Assignment FAQ:
Certification of Continued Eligibility for Poor Person Relief
or Motion for Poor Person’s Relief

Unlike in criminal court, attorneys are not automatically assigned to represent indigent clients on appellate cases. In order to vindicate your client’s rights on appeal, you must take additional steps to ensure that they are appointed appellate counsel.

If you were appointed trial counsel, you can submit a simple certification to the Appellate Division that will result in client obtaining assigned appellate counsel.

If you were retained but your client is now indigent, you can assist your client with a Motion for Poor Person’s Relief, and if granted, the Appellate Division will assign appellate counsel.

What is Certification of Continued Eligibility for Poor Person Relief?

ATTORNEY NOTE

Since January 14, 2022, indigent clients no longer need to submit a motion for poor person relief if their assigned trial counsel submits an affirmation stating that client remains indigent to the Appellate Division. This process streamlines and simplifies the process of assigning counsel to indigent defendants, and defense counsel should make use of this process whenever possible. A sample is attached.

What is a Motion for Poor Person’s Relief?

In cases where trial counsel does not file a certification, a Motion for Poor Person’s Relief indicates to the Appellate Division that the client cannot afford appellate counsel and that they are asking for one to be assigned. If no Motion for Poor Person’s Relief is filled, no attorney will be assigned to the appeal.

Who files the Motion for Poor Person’s Relief?

Defense counsel should prepare and file the Motion for Poor Person’s Relief with their client’s input. Ideally, it should be filed after confirming with the Appellate Division that it received the appeal. You can email the clerk’s office to confirm. Counsel who files the Motion for Poor Person’s Relief is not assigned to the appeal.

What Information must be included in a Motion for Poor Person’s Relief?

The Motion for Poor Person’s Relief is a notarized affidavit signed by the client asking for the court to assign appellate counsel and cover the fees of the appeal (including the transcript fees). The affidavit must lay out more information about the client’s financial situation.

Where is a Poor Person Certification or Motion for Poor Person's Relief filed?

The Motion for Poor Person's Relief is filed with the Appellate Division where the appeal will be pending. Supreme Court cases from Bronx and New York County are filed at the First Appellate Division and Kings, Queens, and Richmond County Supreme Court cases are filed at the Second Appellate Division. Criminal court cases are filed with the relevant Appellate Term.

Best practices are to also keep a copy of what was filed for your own files and give your client as copy as well.

What happens after a Motion for Poor Person's Relief is filed?

The Appellate Division will review the Motion and, if granted, assign appellate counsel to work on the appeal.

For more information on Motions for Poor Person's Relief, see IDP's [FAQ: Filing a Late Notice of Appeal of New York City Criminal Conviction, November 2023](#).

Supreme Court of the State of New York
Appellate Division, _____ Judicial Department

The People of the State of New York,

Respondent,

against

Certification of Continued
Eligibility For Poor Person
Relief and Assignment of
Counsel on Appeal Pursuant
to CPL § 380.55(2)

Ind/SCI No. _____

Defendant-Appellant.

_____, an attorney duly admitted to practice law in the State of New York,
and not a party to the above-entitled action, affirms the following to be true under penalty of
perjury, or if made on information and belief, believes them to be true:

1. I was assigned to represent defendant in the above-referenced criminal action, pursuant to
Section 722 of the County Law, in Supreme Court, County of _____.
2. A notice of appeal was timely filed and served on the District Attorney from a
_____ (insert judgment/sentence/order) dated _____.
A copy of the notice of appeal is attached hereto.
3. Upon information and belief, defendant continues to be indigent and eligible for poor
person relief and assignment of counsel on appeal pursuant to CPL § 380.55(2).
4. Defendant has indicated an intention to pursue the appeal and requests that counsel be
assigned for that purpose.

5. A copy of this certification has been served upon the District Attorney and provided to defendant.

Wherefore, it is respectfully requested that the Court issue an order assigning counsel on appeal and grant such other relief the Court deems just and proper.

Dated: _____

Attorney's Signature

Printed Name

Address _____

Telephone No. _____

Email Address _____