

**CIVIL AND CRIMINAL APPEALS IN THE APPELLATE  
TERM, SECOND DEPARTMENT**

by

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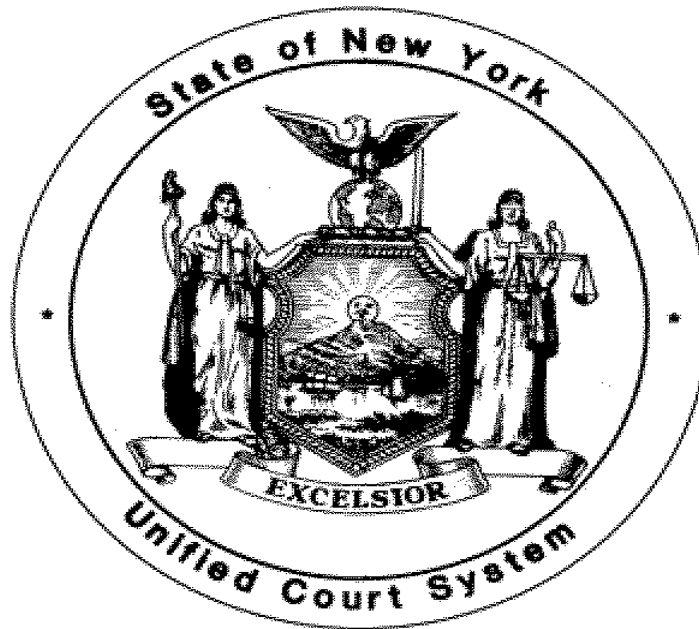
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# NEW YORK STATE BAR ASSOCIATION

Committee on Courts of Appellate Jurisdiction

Presents



## NEW YORK APPELLATE PRACTICE

(CIVIL AND CRIMINAL APPEALS IN THE  
APPELLATE TERM, SECOND DEPARTMENT)

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Melville, New York

*Presented by:*

**PAUL KENNY, ESQ.**

**CHIEF CLERK**

**APPELLATE TERM, SECOND DEPARTMENT**

## **JURISDICTION; COUNTIES; COURTS**

The Appellate Terms in the Second Department are comprised of two separate courts, authorized by Art. 6, § 8 of the New York State Constitution and established by the Appellate Division. One court serves the 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts (Kings, Queens and Richmond Counties), and the other the 9<sup>th</sup> and 10<sup>th</sup> Judicial Districts (Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess Counties). Each of the two Appellate Term benches consists of five Supreme Court justices serving pursuant to the appointment of the Chief Administrative Judge of the State of New York with the approval of the Presiding Justice of the Appellate Division, Second Department. The courts share a common non-judicial staff pursuant to 22 NYCRR §730.1(e).

The Appellate Terms hear appeals from the Civil and Criminal Courts in Kings, Queens and Richmond Counties in New York City, from the City Courts and Justice Courts in the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts, and from the District Courts in Nassau and Suffolk Counties. The Appellate Term for the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts also hears civil appeals from the County Courts in those districts (with the exception of SORA cases). Additionally, the Appellate Terms hear and determine motions, orders to show cause, and applications interposed pursuant to CPLR 5704 (b), most of which are emergency in nature and require immediate disposition. While serving the ten counties comprising the Second Judicial Department, which covers urban, suburban and rural environments, the courts serve a diverse population of more than 10 million people and are presented with a wide spectrum of legal issues.

# CIVIL APPEALS

## I. INVOKING THE JURISDICTION OF THE COURT

The jurisdiction of an appellate court is invoked when a notice of appeal is timely and appropriately filed.

### (A) WHEN TO FILE THE NOTICE OF APPEAL

The notice of appeal must be filed and served upon the adverse party within 30 days (plus five days if served by mail, one day if served by overnight delivery) after service by a party upon the appellant of a copy of the judgment or order appealed from with written notice of its entry (CPLR 5513 [a]; 5515 [1]). If the appellant has served a copy of the judgment or order with notice of its entry, the notice of appeal must be filed and served within 30 days (plus five days if served by mail, one day if served by overnight delivery) of that service (CPLR 5513 [a]). In small claim and commercial claim cases commenced in the New York City Civil Court, or in the District, City and Justice courts outside of NYC, the 30-day period within which to take an appeal begins to run when (1) the court serves the order upon the appellant, (2) a party serves the order upon the appellant, or (3) the appellant serves the order on the party, whichever occurs first (Uniform City Court Act § 1703[a]; Uniform Justice Court Act § 1703[a]; Uniform District Court Act § 1703[a]; NYC Civil Court Act § 1703[a]).

Unlike criminal cases, in civil appeals the 30-day rule is absolute. The statute does not permit the court to grant extensions of time. However, if an appellant either timely serves or timely files the notice of appeal, but does not do the other act in a timely manner, the court may grant appellant an opportunity to correct that omission (see, CPLR 5520[a]).

### (B) WHERE TO FILE THE NOTICE OF APPEAL

The notice of appeal must be filed **in the office where the judgment or order of the court of original instance is entered** (CPLR 5515 [1]). In contrast to criminal cases, the notice of appeal is not immediately sent to the Appellate Term upon its filing. In fact, the Appellate Term does not receive notice that an appeal has been taken until: (1) one of the parties to the appeal makes a motion in the Appellate Term, or (2) the record on appeal is sent to the Appellate Term by the clerk of the lower court. Thus, in a civil appeal, until one of these two instances occur, the Appellate Term will not be aware of the specifics of your appeal, or even that a notice of appeal has been filed.

### (C) WHAT TO FILE

The notice of appeal must be filed, along with proof of service upon the adverse party. There is a fee for the filing of a notice of appeal in a civil matter. The fee is paid to the clerk of the lower court. This is in contrast to the criminal notice of appeal, for which no fee is charged.

### (D) WHAT IS APPEALABLE

The right to appeal is, by and large, statutory. There are several statutes that you can consult, chief among them section 1702 of the NYC Civil Court Act; Uniform City Court Act; Uniform Justice Court Act; or the Uniform District Court Act. Specifically, section 1702 (a) of the respective Court Acts enumerate what judgments and orders are appealable as of right. Section 1702 (c) of the Acts set forth those orders which may be appealed by permission of the court.

It must be stressed that a **decision after trial is not appealable** (even if it recites that it “constitutes the decision and order of the court”). Before a party can appeal after a trial, a judgment must be entered pursuant to CPLR 5016. The judgment must be signed by the clerk, and must bear the date of entry. To be appealable as of right, an order must determine a motion made on notice (*see* § 1702 of the NYC Civil Court Act; Uniform City Court Act; Uniform Justice Court Act; or the Uniform District Court Act). A motion is considered to be made on notice when an order to show cause or notice of motion is served (CPLR 2211). An order must comply with the CPLR definition of an order (*see* CPLR 2219), in that it must be in writing, and “shall be signed with the judge’s signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, **recite the papers used on the motion**, and give the determination of or direction in such detail as the judge deems proper.”

## II. STAYING THE EFFECT OF THE ORDER OR JUDGMENT APPEALED FROM

As is the case with criminal appeals, the fact that the notice of appeal has been filed in a civil appeal generally does not automatically stay compliance with the order or judgment appealed from. The exceptions to this rule may be found in CPLR 5519 [a], and generally involve situations where the appellant is a municipality or where the judgment appealed from directs the payment of a sum of money and that judgment has been bonded ( in L & T cases, a stay without court order is accomplished where an undertaking in a sum fixed by the lower court

is paid by appellant as per CPLR 5519 [a] [6]). Also, the Appellate Term or the court from which the appeal is taken may grant a discretionary stay upon a showing of a potentially meritorious appeal (CPLR 5519 [c]). If the appellant obtains a stay pending appeal to the Appellate Term, and then is wholly or partially unsuccessful on that appeal, the stay remains in effect for five days after service upon the appellant of a copy of the Appellate Term order with notice of entry. If the appellant makes a motion for leave to appeal (see VIII, *infra*) within that five-day period, the stay remains in effect (1) if the motion is granted, until five days after the appeal is determined, or (2) if the motion is denied, until five days after the movant is served with the order denying leave to appeal with notice of its entry (CPLR 5519 [e]).

### **III. THE RECORD ON APPEAL**

In contrast to most appellate courts, for appeals to the Appellate Term, the Record on Appeal is compiled by the clerk of the lower court and then forwarded to the Appellate Term (22 NYCRR §§ 731.1 [a]) or 732.1 [a]). The appellant is not required to file a printed record (22 NYCRR §§ 731.1 [c] or 732.1 [c]).

The record on appeal in a civil case includes:

1. A clerk's return, signed by the clerk of the court from which the appeal is taken
2. A notice of appeal
3. A copy of the judgment or order appealed from, along with the judge's decision and all intermediate orders brought up for review if the appeal is from a judgment
4. The transcripts, if any, and settlement thereof (see following section)
5. Exhibits, if any
6. All of the pleadings
7. If the appeal is from an order which decides a motion, all of the papers considered by the court in deciding that motion.

If any of the above items are missing or incomplete, the Appellate Term clerk's office will reject the file and return it to the trial court.

#### IV. SETTLING THE TRANSCRIPT

As set forth in the previous section, where a trial or hearing has been held *on the record*, a complete trial court record on appeal includes a “settled” transcript of the proceedings. The procedure for settling the transcript in a civil appeal is outlined in section 1704 of the Uniform City Court Act; Uniform Justice Court Act; Uniform District Court Act; and the NYC Civil Court Act. I do not wish to bore you with the details of those sections, but I would like to highlight that the Clerk’s Office at the Appellate Term looks to see that **both parties were given an opportunity to review the transcript and submit objections** and that **the judge signed the clerk’s return indicating whether or not he/she accepted the objections**.

#### V. PERFECTING A CIVIL APPEAL

##### (A) WHEN TO PERFECT THE APPEAL

When a record on appeal is received by the Appellate Term, it is checked for completeness and the appeal is given a case number and placed on the court’s general calendar. The appellant then has 90 days within which to perfect the appeal. A written notice is sent by the court to the appellant notifying him of this deadline, and also notifying him that if the deadline is not complied with the appeal will go on a specified dismissal calendar and will be dismissed for lack of prosecution (see, 22 NYCRR §§ 731.8 [a] & [c] or 732.8 [a] and [c]). Note: the Appellate Term has held on numerous occasions that the written notice is a mere courtesy and non-receipt of the notice will not, in and of itself, excuse a default.

##### (B) HOW TO PERFECT THE APPEAL

An appellant perfects an appeal, that is, causes the appeal to be placed on the appeals calendar to be assigned to an appointed term, by filing the original plus five copies of the appellant’s brief, with proof of service of one copy upon the parties to the appeal, within the 90-day deadline (22 NYCRR §§ 731.4 [c] or 732.4 [c]).



## **(C) WHAT HAPPENS IF THE APPEAL IS NOT TIMELY PERFECTED**

If the appellant is unable to timely perfect the appeal, he or she may enter into one stipulation with his or her adversary for additional time, or make a written application to the clerk of the court for such relief.

### **1. STIPULATIONS**

The Appellate Term permits the parties to enlarge their time to perfect an appeal or file a brief by stipulation. The stipulation must be signed by all of the parties to the appeal, and must be forwarded to the court so that it may be “So Ordered” by the clerk before the date upon which the brief would otherwise be due for filing. Note that the clerk, in his/her discretion, may decline to “So Order” a stipulation, usually because he/she considers the time requested to be unreasonable. In that case, the party’s other option is to make a motion. Note further that the parties may stipulate to enlarge the time to perfect the appeal for up to 60 days, to file an answering brief for up to 30 days and to file a reply brief for up to 10 days, and that no more than one such stipulation is permitted (22 NYCRR §§ 731.8 [d] [1] or 732.8 [d] [1]).

### **2. APPLICATIONS FOR ENLARGEMENT OF TIME**

In addition to permitting parties to stipulate once to enlarge as set forth above, where a party establishes reasonable grounds why the time limits cannot be complied with, he or she may request in writing to the clerk of the court, with a copy to the other parties to the appeal, additional time to file his or her brief (22 NYCRR §§ 731.8 [d] [2] or 732.8 [d] [2]). Note that this procedure is *not* available, and a formal motion is required, if the court has previously ordered that the appeal be perfected by a date certain.

### **3. THE DISMISSAL CALENDAR**

An appeal that has not been timely perfected is subject to dismissal by the court. Procedurally, the appeal is placed on a dismissal calendar, which is published in the *New York Law Journal*. Additionally, the parties receive written notification from the court. If no enlargement is sought, the appeal is dismissed by the court.

## VI. THE BRIEFING SCHEDULE

Once the appeal is perfected, the respondent has until 21 days after service of the appellant's brief within which to file a respondent's brief (an original with proof of service plus five copies), and the appellant then has 7 days from service of the respondent's brief within which to file a reply brief (an original with proof of service plus five copies) (22 NYCRR §§ 731.4 [c] or 732.4 [c]). Add five days to the deadline if service is made by mail, one day if served via overnight delivery (22 NYCRR § 730.3 [a]). Just like the appellant's brief, the time within which to file a respondent's brief and a reply brief may be enlarged by stipulation (up to 30 days for respondent's brief, up to 10 days for a reply brief) or by written application (22 NYCRR §§ 731.8 [d] [2] or 732.8 [d] [2]). If the parties are stipulating to enlarge the time to file a respondent's brief, that stipulation must contain a provision for the filing of the reply brief as well.

## VII. PROCESSING A PERFECTED APPEAL

The appeal will usually be placed on the Appellate Term's *Ready Day Calendar* for oral argument within several months of the perfection of the appeal, and the parties are notified of the date by the court in writing and by publication in the *New York Law Journal* two weeks prior to the argument date. Appearance at oral argument is optional. **If a party does not file a brief or fails to request oral argument on the cover page of the brief, he or she will not be permitted to argue** (22 NYCRR §§ 731.2 [a] [2] or 732.2 [a] [2]; 22 NYCRR §§ 731.6 [b] or 732.6 [b]). The appeal is heard before a panel of three justices, and a decision is usually rendered within 60 days of the date of oral argument. The parties are mailed a courtesy copy of the decision by the court.

## VIII. THE UNSUCCESSFUL LITIGANT

The party who is unsuccessful in the Appellate Term may seek further appellate review by making a motion to reargue and/or for permission to appeal to the Appellate Division. The motion to reargue, resettle or amend must be made *within 30 days after the cause shall have been decided, except that for good cause shown, the court may consider any such motion when made at a later date* (22 NYCRR §§ 731.11 [a] or 732.11 [a]). A motion for leave to appeal to the Appellate Division is made, in the first instance, in the Appellate Term (see, CPLR 5703 [a]). The rules regarding the making of a motion for leave to appeal in a civil action may be found at 22 NYCRR §§ 731.11 or 732.11. If the motion made to the Appellate Term is denied, the unsuccessful party may then, and only then, make a motion for the same relief directly to the Appellate Division (see, CPLR 5703 [a]).

# CRIMINAL APPEALS

## I. INVOKING THE JURISDICTION OF THE COURT

Where an appeal is from a local criminal court in which the proceedings were recorded stenographically, the jurisdiction of an appellate court is invoked when duplicate copies of a notice of appeal are timely and appropriately filed and served upon the adverse party. Where the appeal is from a local criminal court in which the proceedings were not recorded mechanically or by a court stenographer, the defendant may invoke the court's jurisdiction by either filing a notice of appeal *or* filing an affidavit of errors (CPL § 460.10 [3] [a]).

### (A) WHEN TO FILE THE NOTICE OF APPEAL

The notice of appeal must be filed within 30 days of the imposition of sentence (CPL § 460.10 [1] [a]). Therefore, a defendant who has been found guilty, whether by plea or by verdict after trial, **must await the imposition of sentence** before he can file a notice of appeal. An appeal taken before sentence is imposed will be dismissed.

If the sentence imposed is a fine, the defendant may file a notice of appeal **even if the fine has not been paid**, just as if the sentence imposed is one of incarceration, the defendant does not have to wait until he has served his sentence before he can file a notice of appeal.

Please note, however, that the fact that the notice of appeal has been filed **does not stay the defendant's obligation to pay the fine**, just as it does not stay his obligation to serve his jail sentence.

In criminal cases only, the defendant may seek relief from the 30-day rule by making a motion **to the Appellate Term** seeking **leave to file a late notice of appeal** (CPL § 460.30 [1]). The motion must be made within a year and 30 days of the imposition of sentence, or else the court does not have jurisdiction to grant it, and the defendant must establish that the failure to timely file the notice of appeal resulted from “(a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated . . . , concerning whether an appeal should be taken” within the initial 30-day period.

## **(B) WHERE TO FILE THE NOTICE OF APPEAL**

In general, the notice of appeal cannot be filed in the Appellate Term Clerk's Office. Instead, the notice of appeal must be filed **with the clerk of the criminal court in which sentence is imposed** (CPL § 460.10 [1] [a]). However, if the court in which the defendant was convicted does not employ a clerk, one copy of the notice of appeal must be filed with the judge of the court and a duplicate copy must be filed with the appellate court by the appellant.

Where the notice of appeal is filed in the local criminal court, a copy of the notice of appeal is forwarded to the Appellate Term by the clerk of the local court immediately upon its filing (CPL 460.10 [1] [e]). This is in contrast to civil appeals, where the clerk prepares the record on appeal, which includes the notice of appeal, and then forwards the record to the appellate court.

## **(C) WHAT TO FILE**

The notice of appeal must be filed in duplicate, along with proof of service upon the adverse party, which, in the case of a criminal appeal, would be the local prosecutorial authority. There is **no fee** for the filing of a notice of appeal on a criminal matter. The imposition of court fees is statutory, and no statute authorizes the charging of a fee to file a notice of appeal in a criminal case, unlike a civil case.<sup>1</sup>

## **(D) WHAT IS APPEALABLE**

The right to appeal in a criminal matter is, by and large, statutory.

### **1. BY THE DEFENDANT**

In the criminal realm, unlike civil, the general rule (to which there are exceptions found in the Criminal Procedure Law) is that the defendant must await the judgment of conviction in order to appeal, and cannot appeal from intermediate orders issued during the course of the criminal proceeding.

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<sup>1</sup> Note that appeals from a finding of liability for red light violations has been held by the Appellate Term to be "wholly civil in nature" (*People v Nager*, 34 Misc 3d 135[A][App Term 9<sup>th</sup> & 10<sup>th</sup> Jud Dists, 2011]), and as such the appeals are subject to the procedures (including a fee for the notice of appeal) applicable to civil appeals.

## **2. BY THE PEOPLE**

Like the defendant, the right of the prosecution to appeal is limited by statute and by the constitution. Thus, for example, the People cannot appeal from a judgment of conviction where the defendant was convicted of some, but not all, of the charges against him. Similarly, the People cannot appeal from a verdict by which the defendant was acquitted. However, the People may appeal from an order dismissing an accusatory instrument, and from an order which sets aside a jury verdict and dismisses the accusatory instrument. For a complete list of authorized People's appeals, please see Criminal Procedure Law §450.20. The procedures to be followed for taking and perfecting a People's appeal are essentially the same as those that apply to an appeal by the defendant.

## II. STAYING THE JUDGMENT OF CONVICTION

As previously mentioned, the filing of a notice of appeal does not automatically stay execution of the judgment of conviction. Therefore, if the defendant was sentenced to jail time, he is not released upon the filing of a notice of appeal. Similarly, if a fine or restitution was imposed as part of the sentence, collection of the fine or restitution is **not automatically stayed** merely because the defendant has taken an appeal.

However, the defendant may move for a **stay or suspension** of the execution of the judgment of conviction pending appeal. Such a motion is made pursuant to Criminal Procedure Law § 460.50. When the appeal is from a judgment issued by a criminal court located within New York City, such a motion must be made to a justice of the supreme court of the judicial district embracing the county in which the judgment was entered (CPL § 460.50 [2] [c]). The motion is *not* made to the Appellate Term. In contrast, if the appeal is from a judgment issued by a criminal court located outside of New York City, the Criminal Procedure Law vests the Appellate Term with the authority to determine the judges who may issue a stay order (see, CPL 460.50 [2] [d]), and the Appellate Term rule provides that **a justice of the Appellate Term or “a justice of the Supreme Court of the judicial district embracing the county in which the judgment was entered”** may issue such a stay (22 NYCRR § 732.12).<sup>2</sup>

On application of the defendant the justice has the authority to

- stay or suspend the execution of the judgment pending the determination of the appeal, with or without condition, OR
- release the defendant on his own recognizance or fix bail.

Where the defendant is imprisoned, the custodian generally will not release him without a certified copy of the order which stays execution of the sentence.

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<sup>2</sup> As a practical matter, motions for a stay of a sentence of incarceration will be referred to a justice of the supreme court in the county in which the judgment was entered.

### III. PURSUING THE APPEAL

Once the appellant has invoked the jurisdiction of the court, it is incumbent upon him to pursue his appeal. How this is accomplished depends on a number of factor:

- (A) The appellant **successfully moves for poor person relief**, and the Appellate Term issues an order directing that the minutes be produced

This court's order granting poor person relief typically directs the stenographer or certified transcriber to "promptly make, certify and file two typewritten transcripts of the minutes of all proceedings, including those minutes of the voir dire of prospective jurors in cases tried before a jury, with the clerk of the trial court." The order further directs the clerk of the trial court "to furnish, without charge, one copy" to the attorney who is assigned by that order to represent the defendant on appeal, and "to file the second copy of the transcript with the record, which shall then be filed with this court." Please bear in mind that this only applies where the court is a court of record.

- (B) The appellant **purchases the official court transcript:**

In general, if the appeal is from a judgment, order, or decree that was made following a trial or hearing, the party taking the appeal will have to furnish the court and his or her adversary with a copy of the minutes. The minutes taken by the court reporter in stenographic form or recorded on tape must be transcribed into English. The rates of compensation of court reporters for transcribing stenographic minutes are set forth in § 108.2 of the Rules of the Chief Administrator of the courts (22 NYCRR § 108.2).

- (C) The appellant files an **affidavit of errors**.

The filing of an affidavit of errors is only available where no official minutes were taken (see, CPL 460.10 [3]). The affidavit of errors must be filed within 30 days of filing the notice of appeal and must be served upon the adverse party (CPL 460.10 [3]). ***Note that since section 30.1 of the Rules of the Chief Judge requires that all town and village court proceedings be mechanically recorded effective June 16, 2008, resorting to the affidavit of errors as a method of appeal may be significantly curtailed.***<sup>3</sup>

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<sup>3</sup> The Appellate Term recently held that the "process of recording court proceedings electronically is the functional equivalent of a 'record[ing] by a court stenographer.'" (*People v Finklea*, 2013 NY Slip Op. 23304, 2013 WL 5021027 [App Term, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists, 2013]).

#### IV. PREPARING THE RECORD ON APPEAL

Once the minutes are transcribed or the affidavit of errors is filed, **the clerk of the lower court** must prepare the record on appeal and forward it to the Appellate Term.

**(A) If no official minutes** were taken

As previously stated, if no official minutes or digital recording were taken of the proceedings, the appellant must file an **affidavit of errors**. This is an affidavit filed by the appellant or his attorney setting forth errors in the proceedings which are the subjects of the appeal (CPL 460.10 [3]). The affidavit of errors must be filed within 30 days of the filing of the notice of appeal. It is sometimes filed with the notice of appeal or, as previously indicated, may be filed in place of the notice of appeal. The affidavit of errors must be served on the respondent.

Within 10 days of the filing of the affidavit of errors, the judge must reply to the affidavit of errors. This may be done in a number of different ways. Some judges answer the affidavit point by point, some write a letter stating that the court's decision stands as their answer. If the judge wishes a transcript of his personal notes or minutes or a transcript of a tape recording to stand as his answer to the affidavit of errors he must state so in writing. The judge's answer, which is called the court's return (see, CPL 460.10[3][d]) must be sent to both parties. By statute, the court's return "must set forth or summarize evidence, facts or occurrences in or adduced at the proceedings, resulting in the judgment, sentence or order, which constitute the factual foundation for the contentions alleged in the affidavit of errors" (CPL 460.10 [3] [d]). If the court's return is not timely filed, or if it is inadequate, the Appellate Term, upon motion of the appellant, must order the court to file an appropriate return within a specified time. Once the court's answer, or return, is filed, the clerk shall sign the clerk's return on appeal form and the entire record is sent to the Appellate Term. The clerk's return on appeal consists of a statement, signed by the clerk, in which the clerk certifies "that there are hereto attached originals of the Notice of Appeal and of all papers required to be returned pursuant to the Criminal Procedure Law and the Rules of the Appellate Term."

**(B) If official minutes** were taken

If minutes were taken by an official court reporter the appellant must purchase the transcript of the trial or guilty plea and sentence, or successfully move for poor person relief.



The original transcript is given to the court and must be settled by the judge. Settlement of the transcript can be done in different ways. The judge can call the parties in for a hearing to settle the transcript, ask the parties to file a stipulation settling the transcript or mail out letters asking the parties to submit any proposed changes.

Once the judge is satisfied that the transcripts are complete and accurate he or she shall sign the clerk's return form and indicate that the official minutes are settled.

The clerk then signs the clerk's return on appeal form and the entire record is sent to the Appellate Term.

## V. COMPILING THE RECORD ON APPEAL

A complete record contains the following (see, 22 NYCRR §§ 731.1 [b] or 732.1 [b]):

1. **The clerk's return on appeal form** signed by the clerk (and signed by the judge if official minutes were taken)
2. The **notice of appeal**
3. Where **official minutes** were taken, the **trial (or guilty plea) and sentence transcripts and settlement** thereof.

Where **no official minutes** were taken, the **affidavit of errors and judge's answer** thereto.

4. **All original papers** including the information, any motion and opposition papers, court orders, etc.
5. A **certificate of disposition** stating the date of the plea or verdict and the charge of which the defendant was convicted, as well as the sentence date and the sentence imposed on each count.

## **VI. PERFECTING A CRIMINAL APPEAL**

### **(A) WHEN TO PERFECT THE APPEAL**

In contrast to civil appeals, a criminal appeal must be perfected within 90 days of the date the notice of appeal is filed (see, 22 NYCRR §§ 731.8 [b] or 732.8 [b]), or shall be subject to dismissal.

### **(B) HOW TO PERFECT THE APPEAL**

An appellant perfects an appeal, that is, causes the appeal to be placed on the appeal calendar to be assigned to an appointed term, by filing the original with proof of service upon the parties to the appeal, plus five copies of the appellant's brief, within the 90-day deadline (22 NYCRR §§ 731.4 [c] or 732.4 [c]).

### **(C) WHAT HAPPENS IF THE APPEAL IS NOT TIMELY PERFECTED**

If the appellant is unable to timely perfect the appeal, he may enter into a stipulation with his adversary for additional time, or move the court for that relief. Please note, however, that if you were assigned by the Appellate Term to represent the defendant on appeal, you do not have a date by which to perfect your appeal. That is, you are charged with the obligation of perfecting the appeal expeditiously and in accordance with the court's rules and directives. Therefore, if you submit a "So Ordered" stipulation enlarging your time to perfect the appeal to the court, it will be rejected as unnecessary. A similar fate will befall an application for an enlargement of time. However, you will periodically receive a letter from the clerk of the court inquiring as to the status of your prosecution of the appeal. Those letters must be responded to promptly and honestly.

#### **1. STIPULATIONS**

As is the case with civil appeals, the Appellate Term permits the parties to a criminal appeal to enlarge their time to perfect an appeal or file a brief **once** by stipulation. The stipulation must be signed by all of the parties to the appeal, and must be forwarded to the court so that it may be "So Ordered" by the Clerk before the date upon which the brief would otherwise be due for filing. In addition, in a criminal case the stipulation must contain a statement signed by counsel setting forth the sentence imposed, whether the defendant has been granted a stay of execution of sentence, and whether an enlargement of time had been

previously granted (22 NYCRR §§ 731.9 [a] or 732.9 [a]). Please note that the clerk, in his/her discretion, may decline to “So Order” a stipulation, usually because he/she considers the time requested to be unreasonable. In that case, the appellant’s other option is to make a motion.

## **2. WRITTEN APPLICATIONS FOR ENLARGEMENT OF TIME**

Please see enlargement of civil appeals above - the requirements for enlargement requests in criminal appeals are essentially the same. Also note that on the criminal side the motion papers must contain the same information as is required for a stipulation (see, 22 NYCRR §§ 731.9 [a] or 732.9 [a]). Note that a formal motion is required if the court has previously ordered that the appeal be perfected by a date certain *or* a continuation of a stay is necessary.

## **3. THE DISMISSAL CALENDAR**

Appeals in which counsel has been assigned to represent the defendant are no longer placed on the court’s dismissal calendar. However, all other criminal appeals will be subject to dismissal for failure to timely perfect. An appeal that has not been timely perfected shall be dismissed by the court. Procedurally, the appeal is placed on a dismissal calendar, which is published in the *New York Law Journal*. Additionally, the parties receive written notification by mail five days prior to the first publication of the calendar (22 NYCRR §§ 731.8 [c] or 732.8 [c]).

## **VII. THE BRIEFING SCHEDULE**

As is the case with a civil appeal, once the appeal is perfected, the respondent has 21 days from the date appellant serves his or her brief within which to file a respondent’s brief (an original with proof of service plus five copies), and the appellant then has 7 days from service of the respondent’s brief within which to file a reply brief (an original with proof of service plus five copies) (22 NYCRR §§ 731.4 [c] or 732.4 [c]). Add five days to either deadline if service is made by mail, one day if served via overnight delivery (22 NYCRR § 730.3 [a]). As is the case with the appellant’s brief, the time within which to file a respondent’s brief and a reply brief may be enlarged by stipulation or by written application (22 NYCRR §§ 731.8 [c] or 732.8 [c]). If you are stipulating to enlarge the time to file a respondent’s brief, that stipulation must contain provision for the filing of the reply brief as well.

## VIII. PROCESSING THE PERFECTED APPEAL

The appeal will usually be placed on the Appellate Term's Ready Day Calendar for oral argument within several months of the perfection of the appeal, and the parties are notified in writing by the court of the date and by publication in the *New York Law Journal*. Appearance at oral argument is optional. **If a party does not file a brief or fails to request oral argument, he or she will not be permitted to argue** (22 NYCRR §§ 731.2 [a] [2] or 732.2 [a] [2]; 22 NYCRR §§ 731.6 [b] or 732.6 [b]). The appeal is heard before a panel of three justices, and a decision is usually rendered within 60 days of the date of oral argument. The parties are mailed a courtesy copy of the decision by the court.

## IX. THE UNSUCCESSFUL LITIGANT

The party to a criminal appeal who is unsuccessful in the Appellate Term may make a motion to reargue. The motion to reargue, resettle or amend must be made *within 30 days after the cause shall have been decided, except that for good cause shown, the court may consider any such motion when made at a later date* (22 NYCRR §§ 731.11 [a] or 732.11 [a]). Appeals in a criminal action go from the Appellate Term directly to the Court of Appeals, and, except in limited circumstances (see, CPL 450.90 [2]), only if a certificate granting leave to appeal has been issued by a judge of the Court of Appeals (CPL 450.90 [1], 460.20 [2] [b]).

## **X. CALENDARING: ARGUMENT AND SUBMISSION CALENDARS**

A confidential report is prepared by an Appellate Term court attorney for each appeal. Each such report contains a comprehensive summary of the facts and an analysis of the issues presented by the appeal. Once the confidential report on an appeal is completed, the appeal is placed on the court's appeal calendar. Appeals in which oral argument is permitted are heard, in the Appellate Term for the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts at 141 Livingston Street, 15<sup>th</sup> Floor, Brooklyn. Twice each year the court hears arguments in the courthouse in Jamaica, Queens and once each year in Staten Island. For appeals to the Appellate Term for the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts, argument is heard at the Supreme courthouses in Mineola, White Plains and Central Islip on a rotating basis. On occasion, arguments will be heard in New City, Goshen or Poughkeepsie.

The court holds a submission calendar on numerous dates throughout the year for appeals in which argument was not requested or the court has determined not to hear requested argument (22 NYCRR §§ 731.6 [d] or 732.6 [d]).

The clerk's office prepares a formal calendar, generally two weeks before the calendar date, sends it to the *New York Law Journal* for publication, and mails a notice to the parties to each appeal.

In advance of the calendar date, each Justice assigned to a ready-day calendar receives copies of the briefs of all of the parties for each appeal scheduled for that date, as well as the confidential report prepared for each case. The Justice and his or her chambers staff does additional research as necessary. The Justices exchange their views with the other members of the panel and the Chief Court Attorney and make suggested revisions.

## **XI. CALENDAR DAY**

On those days when the court sits to hear oral argument, the clerk's call of the calendar is at 9:15 AM (in the Appellate Term for the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts) and at 9:30 AM (in the Appellate Term for the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts). The Justices take the bench shortly after the clerk's call, whereupon those matters on which argument was requested and the party requesting argument has appeared, are called in calendar order. A party (or attorney) who has not submitted a brief or who has submitted a brief without a request for argument will not be permitted to argue. Rebuttal is generally not permitted.

Following oral argument, the panel retires to the court's consultation room, to consider each appeal individually. The Justices discuss each case, vote on an appropriate resolution, and their determination is recorded by a deputy clerk. Those cases that are disposed of by unanimous vote in favor of a draft decision are sent back to the Law Department for a final review and eventual release.

If the voting was not completed at the initial consultation, the Chief Court Attorney or his deputy circulates majority, concurring and dissenting opinions drafted thereafter by members of the panel, and records the votes as they are received.

## **XII. DECISION RELEASE AND REMITTITUR**

Following internal review, the Presiding Justice approves the release of the final lists of decisions to the public. The decisions are then distributed to among others, the *New York Law Journal* and the State Reporter.

After the appeal is decided, the original record is returned to the clerk of the court from which the appeal was taken, along with a copy of the decision.

## MOTION PRACTICE.

If a party needs to seek relief from the court prior to or after the receipt of records and filing of briefs, the party must proceed by way of a motion, which may be brought on by a notice of motion or order to show cause.

*Oral argument is not permitted on motions. On the return date they are deemed submitted and counsel or self-represented parties should not appear at the courthouse (22 NYCRR § 731.7 or 732.7).*

### **(A) NOTICE OF MOTION.**

If time is not of the essence and interim relief with a stay is not needed, the movant should proceed by notice of motion. Motions prosecuted by notice of motion may be made returnable at 10:00 A.M. on any day in which the court is open (22 NYCRR § 731.7 or 732.7). The party making the motion is required to give his or her adversary at least eight days notice if the papers are delivered in person, and at least 13 days notice if they are served by mail.

The motion papers must contain a copy of the notice of appeal and the judgment or order appealed from, an affidavit setting forth the background of the case and why the relief requested should be granted, any other exhibits or affidavits deemed necessary, and an affidavit stating that the papers were served upon all adversaries. The service must be made, and the affidavit of service completed, by a person over the age of 18 who is not a party to the action. A cross motion should be made returnable the same day as the original motion and must be served and filed three days prior thereto, unless the original motion has made a CPLR 2214(d) demand, whereby the cross motion must be filed at least 7 days prior to the return date. Note: All affidavits must be properly sworn to before a notary public.

### **(B) ORDER TO SHOW CAUSE.**

If time is of the essence or a stay is needed, the moving party (the movant) should proceed by order to show cause. The proposed stay should be set forth in a separate paragraph. The granting of a stay lies within the discretion of the justice who signs the order to show cause; it is not granted as a matter of course. The court will insert the return date of the application and it will usually be a shorter period than if the motion were made by notice of motion. The signing of an order to show cause is discretionary, and, if it is not signed, the movant may proceed by notice of motion.

The movant must include with the order to show cause a copy of the notice of appeal and judgment or order appealed from, an affidavit sworn to before a notary public setting forth the background of the case and why the relief requested should be granted, if a stay is requested what immediate harm would result if it is not granted, and any other exhibits or affidavits deemed necessary. A party need not serve the order to show cause and supporting papers upon his or her adversary before seeking to have it signed by a justice of the court. The court will set the time and method of service and the **papers must be served in accordance with the court's instructions or risk being dismissed.**

### *Appellate Term Coordinator Program*

In an effort to provide court users with a more efficient and consistent procedure for processing applications to the Appellate Term for emergency relief, the Presiding Justice of the Appellate Division, Second Department developed, and the staff of the Appellate Term has implemented, the *Appellate Term Coordinator Program*. Under this program, most court users, many of whom are self-represented, no longer have to travel to the Appellate Term Clerk's Office in Brooklyn (in the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts) or find an available Justice to entertain their application (in the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts). Rather, in all Second Department counties but Kings County, those seeking to file an order to show cause or an application pursuant to CPLR 5704 (b) submit the application to an Appellate Term Coordinator in the Supreme Court of the county in which the action or proceeding arose. The coordinators, Supreme Court clerks trained by Appellate Term staff, provide a preliminary review of the submission, then transmits it via digital sender to the Appellate Term Clerk's Office. The clerk's office in turn presents the application for review by a reserve justice and returns the justice's decision to the coordinator for dissemination to the moving party. This has led to significant convenience to court users as well as speedier and more consistent processing and disposition of applications. The location of the Appellate Term Coordinator in each county is attached.

### **(C) CPLR 5704 (b).**

An application pursuant to CPLR 5704 (b) permits the Appellate Term or a Justice thereof to vacate or modify an ex parte order of a court, or judge thereof, from which an appeal to the Appellate Term would lie, and permits the Appellate Term to grant an ex parte order which was refused by such a court or judge. Most commonly, in the case of a CPLR 5704 (b) application, the Appellate Term Justice will be presented with an order to show cause which seeks temporary relief, and which a lower court judge has declined to sign. This declination generally must appear on the face of the order to show cause presented to the Appellate Term



in order for the court to have jurisdiction to review the application. The application will be for the Appellate Term Justice to review the order to show cause, which, if granted, will then be returnable before the lower court which declined to sign it. Even though an Appellate Term Justice may allow the party an opportunity to return to the trial court, they may, at their discretion, decline to allow all of the temporary relief sought (for example a request for a stay) that the party is seeking by crossing out or modifying some of the language contained in the order to show cause. The party should be aware that they are merely being given an opportunity to return to the lower court to appear before a Judge and the adverse party, and that the signature of an Appellate Term Justice is not a guarantee that they will obtain the relief they are seeking on the return date.

When a party (or attorney) is unhappy with a trial court Judge's denial of an order to show cause, they should be directed to the Appellate Term Coordinator of the county in which the application is made or in the case of Kings County, to the Appellate Term Clerk's Office located in Brooklyn, New York.

NOTE: Pursuant to CPLR 2221, an application to vacate a stay signed by a Judge of the trial court must be presented to said Judge prior to appellate review. If that relief is denied, then the application may be presented to the Appellate Term pursuant to CPLR 5704 (b).

It is imperative that when the litigant leaves the trial court to seek review of this denial that they have in their possession the following documents:

- a) The Order to Show Cause denied or refused by the trial court;
- b) The Affidavit in Support;
- c) Copies of any previous Stipulations, Orders or Judgments;
- d) The computer generated History of Proceedings Sheet or copy of file jacket if no History Sheet is available;
- e) A copy of the Petition and Notice of Petition;
- f) Notice of Eviction / 72 Hour Notice - if one has been served;
- g) Any additional information that was presented to the trial court with the Order to Show Cause (receipts, rent statements, exhibits).

The Appellate Term justice will generally be unable to review this application in the absence of any of the above described information.

NOTE: Documentation that has not been seen by the trial court Judge cannot be reviewed by the Appellate Term Justice.

**Contacting the Appellate Term**  
347-401-9580 (general number for the public)

Paul Kenny	Chief Clerk	(347) 401-9592
Marianne Cutrona Ritz	Deputy Chief Clerk	(347) 401-9589
Jennifer Chan	Deputy Chief Clerk	(347) 401-9591
John Sartoretti	Clerk's Office	(347) 401-9585
Vincent Martusciello	Clerk's Office	(347) 401-9586
Xiomara Lebron-Diaz	Motion Support	(347) 401-9583
Julio Mejia	Clerk's Office	(347) 401-9588
Adrienne Hairston	Clerk's Office	(347) 401-9587
David Ryan	Clerk's Office	(347) 401-9577
Jacqueline Robinson	Clerk's Office	(347) 401-9542
Kristy Britz	Clerk's Office	(347) 401-9584

# **APPELLATE TERM COORDINATOR**

## **CONTACT LIST**

### **9<sup>th</sup> Judicial District:**

*Westchester County-* James Garfein, Esq.  
Westchester County Courthouse  
111 Dr. Martin Luther King Jr. Boulevard  
Office of the Administrative Judge  
11<sup>th</sup> floor, Chambers  
White Plains, New York 10601  
Phone: (914) 824-5100

*Rockland County-* John F. Hussey, Chief Clerk  
Rockland County Supreme Court  
1 South Main Street, Suite 200  
New City, New York 10956  
Phone: (845) 483-8301

*Dutchess County-* Michael Thompson, Esq., Chief Clerk  
Dutchess County Supreme Court  
10 Market Street  
Poughkeepsie, New York 12601-3203  
Phone: (845) 431-1720

*Putnam County-* Karen O'Connor, Chief Clerk  
Putnam County Supreme Court  
County Office Building  
40 Gleneida Avenue  
Carmel, New York 10512  
Phone: (845) 208-7810

*Orange County-* Lynn McKelvey, Chief Clerk  
Orange County Supreme Court  
Orange County Government Center  
285 Main Street  
Goshen, New York 10924  
Phone: (845) 476-3429

**10<sup>th</sup> Judicial District:**

*Nassau County-*

Mary Gallagher  
Paul Paoli  
Nassau County Supreme Court Building  
100 Supreme Court Drive  
Court Information Center (2<sup>nd</sup> Floor)  
Mineola, New York 11501  
Phone: (516) 493-3200  
(516) 493-3201; 3202

*Suffolk County-*

Riverhead:

Thomas Clavin  
Suffolk County Supreme Court  
1 Court Street  
Riverhead, New York 11901  
Phone: (631) 852-2400  
Fax: (631) 852-3867

Riverhead:

Christopher Tucker  
Arthur Cromarty Court Complex  
220 Center Drive, 1<sup>st</sup> Floor  
Riverhead, New York 11901  
Phone: (631) 852-2420  
(631) 852-2494

**2<sup>nd</sup> Judicial District:**

*Kings County*

Appellate Term Clerk's Office  
141 Livingston Street, 15<sup>th</sup> Floor  
Brooklyn, New York 11201  
(347) 401-9580

**11<sup>th</sup> Judicial District:**

*Queens County-*

Debra Bosch  
Jean Cawley  
Office of Self Represented (Room 100)  
Queens County Supreme Court  
88-11 Sutphin Boulevard  
Jamaica, New York 11435  
Phone: (718) 298-1024

**13<sup>th</sup> Judicial District:**

*Richmond County-*

Mary Shine  
Resource Center  
Richmond County Civil Court  
927 Castleton Avenue  
Staten Island, New York 10310  
Phone: (718) 675-8443  
(718) 675-8455

Deborah Tortorice [backup]  
General Clerk's Office (basement)  
Phone: (718) 675-8458 or 8459

